APPENDIX A

Decision of the United States Court of Appeals

Decision of the District Court

Report and Recommendation of the U.S. Magistrate Judge

Timely denial the petition for rehearing

Certificate of Appealability Granted

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2688

GUSTAVO XAVIER,
Appellant

v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY SUSQUEHANNA COUNTY

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:12-cv-01603)
District Judge: Jennifer P. Wilson

Submitted Under Third Circuit L.A.R. 34.1(a):
November 18, 2022

Before: HARDIMAN, PORTER, and FISHER,
Circuit Judges.

(Filed: December 2, 2022)

OPINION*

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* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

PORTER, *Circuit Judge*

Gustavo Xavier seeks habeas corpus review of his state conviction for third-degree murder under a negotiated plea agreement, for which he received a sentence of 20 to 40 years. He seeks relief under 28 U.S.C. § 2254 based on a claim of ineffective assistance of trial counsel. The District Court concluded that he failed to adduce sufficient evidence showing that his trial counsel's performance fell below an objective standard of reasonableness. For the reasons that follow, we will affirm the District Court.

I

Xavier argues that his trial counsel failed to properly investigate evidence that would undermine the malice element of his homicide charge. Absent malice, he argues, he could have been tried and convicted of voluntary manslaughter, resulting in a lesser sentence. Therefore, he concludes, his counsel's assistance was ineffective, and his resulting guilty plea could not have been knowing, voluntary, and intelligent.

The homicide at issue was that of Lisa Parlanti, Xavier's then-girlfriend. Xavier struck her multiple times with a blunt object, wrapped her head in a plastic bag, and placed her body in a closet. For that, he was charged with criminal homicide and aggravated assault. In a negotiated plea agreement, Xavier entered a guilty plea to one count of Murder of the Third Degree. In exchange, the Commonwealth agreed not to seek a charge of Murder of the First Degree. The court accepted the plea.

Over a decade of post-conviction procedure has ensued. Xavier soon challenged his conviction through a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"). The Court of Common Pleas denied PCRA relief on September 27, 2011. He then appealed to the Superior Court of Pennsylvania, which affirmed the denial of PCRA relief on May 23, 2012. On August 10, 2012, he filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania, which was subsequently transferred to the Middle District of Pennsylvania.

The District Court dismissed the petition with prejudice, declining to issue a certificate of appealability ("COA"). Xavier appealed, and this Court issued a COA as to two issues: "(1) whether the District Court erred in concluding that Xavier is procedurally barred from pursuing his claim that counsel was ineffective for failing to advise him that he might only be convicted of manslaughter if he opted for trial; and (2) whether counsel was ineffective for failing to challenge inculpatory statements given to investigators while Xavier was heavily medicated in the ICU." App. 5. We affirmed the District Court's denial of Xavier's claim with regard to inculpatory statements but vacated as to the Sixth Amendment claim. *Xaiver v. Superintendent Albion SCI*, 689 F.App'x 686 (3d Cir. 2017) (non-precedential). The case was remanded on the effective-assistance-of-counsel question. *Id.*

On remand, the District Court held an evidentiary hearing, taking testimony from witnesses including Xavier and his trial counsel, Linda LaBarbera. LaBarbera testified to

having discussed manslaughter with Xavier several times before he pleaded guilty and advising him that a strategy of seeking a voluntary manslaughter conviction was unlikely to succeed at trial. Xavier testified that he did not believe that they had ever discussed manslaughter prior to the entry of his plea. Judge Saporito found LaBarbera's testimony to be fully credible but Xavier's to be "only partially credible" based on his demeanor and the inconsistencies between his testimony and other evidence in the record. *Xavier v. Harlow*, 2021 WL 3520649, at *4 (M.D. Pa. May 14, 2021). Judge Saporito found Xavier's testimony to be "equivocal, at best," whereas he found LaBarbera's to be explicit that they had discussed manslaughter "on multiple occasions"—an assertion supported by her contemporaneous notes of their meetings. *Id.* at *12. The District Court found LaBarbera's advice to be reasonable under the circumstances and found no evidence of coercion, misleading statements, or undue compulsion on her part. Xavier timely appealed.

II

Petitions for writs of habeas corpus raise federal questions, giving the District Court jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1) over Xavier's appeal from the District Court's order denying his habeas petition. In reviewing the denial of a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254, we "exercise plenary review over the district court's legal conclusions and apply a clearly erroneous standard to its factual findings." *Cradle v. United States ex rel. Miner*, 290 F.3d 536, 538 (3d Cir. 2002).

III

Federal law concerning effective assistance of counsel establishes a two-prong test. *See Strickland v. Washington*, 466 U.S. 668 (1984). First, did counsel's representation fall below an objective standard of reasonableness? *Id.* at 687-88. Second, did counsel's deficient performance prejudice the defendant in making his defense? *Id.* at 687. Because we hold that LaBarbera's representation of Xavier did not fall below an objective standard of reasonableness, we do not reach the question of prejudice.

Defense counsel in a criminal case "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. She is obligated to make a "reasoned judgment as to the amount of investigation the particular circumstances of a given case require." *Blystone v. Horn*, 664 F.3d 397, 423 (3d Cir. 2011) (citation omitted). But she is not required to pursue "an investigation that would be fruitless, much less one that would be harmful to the defense." *Harrington v. Richter*, 562 U.S. 86, 108 (2011). The decision not to investigate "must be directly assessed for reasonableness in all the circumstances" but with "a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Xavier has failed to demonstrate that LaBarbera's counsel fell below an objective standard of reasonableness. When she advised Xavier concerning his plea, she had seen the crime scene photos and could appreciate the extreme violence of the crime. She reviewed documents detailing the eighteen-to-twenty-two injuries to Parlanti's head. She

knew that Xavier had taped a plastic bag over Parlanti's head before stuffing her in a closet. She could reasonably judge the likely effect that information would cause if heard by a jury. She knew that it is difficult to persuade a jury that a homicide perpetrator involuntarily "snapped" in a way that would undermine a finding of malice. And she knew that Xavier had testified that he was "not drunk and did not use drugs" on the night of the homicide, which would make it more likely for him to be convicted of Murder of the First Degree rather than of the Third.[1]

Xavier's arguments to the contrary are unavailing. Much of the testimony that he notes could have been taken in 2009 is ambivalent as to the question of malice. *See* Appellant Br. at 19-20. Witness statements indicate a mutually abusive relationship between Xavier and the victim as well as drug use by Xavier. *See id.* Mutual abuse does not clearly negate malice, and, again, drug use might reduce a charge of Murder of the First to Murder of the Third, but not to Voluntary Manslaughter. *See Commonwealth v. Milburn*, 413 A.2d 388, 388 (Pa. 1980). Other statements, such as that about an officer's Spanish-language proficiency or that Xavier was thought by several people to have been inebriated on the day of the murder, are irrelevant and waived. *See* Appellant Br. at 19. Xavier puts too much weight on these testimonies, claiming that they show "a reasonable

[1] Xavier makes much of witness statements as to his intoxication at various times. His intent in doing so is not always clear. *See* Appellant Br. at 19. Under Pennsylvania law, intoxication cannot reduce a charge of murder to voluntary manslaughter. *Commonwealth v. Milburn*, 413 A.2d 388, 388 (Pa. 1980) ("[M]urder of the third degree does not require specific intent, and voluntary intoxication neither precludes conviction of that offense nor reduces it to voluntary manslaughter."). And if he means to cast doubt over portions of his statements to police, such evidentiary questions are waived by his guilty plea.

probability that, but for trial counsel's deficient performance . . . Xavier would have gone to trial and would be serving a shorter sentence for manslaughter." Appellant Br. at 21. They do no such thing.

Xavier also faults counsel for not further pursuing ambiguities as to the murder weapon. The Commonwealth's theory was that Parlanti was killed with a sink post; Xavier contends that he used a tire jack. He argues that counsel's failure to resolve ambiguities as to the murder weapon is evidence of her deficiencies and proves that she did not take the investigation seriously. Appellant Br. at 20 n.23; Reply Br. at 2.

There are two flaws in that argument. First, Xavier's choice of weapon is not dispositive of malice. One could use a tire jack in a crime of malice or in the heat of passion just as one could a sink post. If Xavier has an argument for why the choice of weapon clearly weighs in favor of a heat-of-passion crime, he has not articulated it here. Second, if there was ambiguity as to the murder weapon, Xavier is partly to blame: in his oral guilty plea colloquy, he affirmatively indicated that he hit the victim "on a number of occasions with a metal post which had been used to prop up a sink." App. 107. Because a defendant pleading guilty is bound by the statements that he makes under oath in open court, he cannot subsequently change his story. *Commonwealth v. Yeomans*, 24 A.3d 1044, 1047 (Pa. Super. Ct. 2011). Nor was his counsel ineffective for declining to investigate theories that would contradict those statements made under oath.

We cannot deny that there may be other facts that could have been discovered and other testimony that could have been taken. But "reasonable" investigation is not

maximal investigation. *Strickland*, 466 U.S. at 691. An attorney is not required to pursue every morsel of information that might bear upon her client's case. *See Harrington*, 562 U.S. at 108. Here, the facts that were already available to LaBarbera offered significant evidence from which a jury would likely conclude that Xavier acted with malice. Under the "heavy measure of deference" that we afford to criminal defense counsel in these situations, we cannot say that a defense attorney presented with the evidence that LaBarbera had is unreasonable in declining to investigate further. *Strickland*, 466 U.S. at 691.[2] Therefore, we cannot say that she was ineffective in advising him to plead rather than to roll the dice.

IV

Under *Strickland*, Xavier has failed to show that his counsel's declination to further investigate evidence going to malice was unreasonable. 466 U.S. at 691. The District Court therefore did not err when it denied Xavier's habeas petition. We will affirm the denial.

[2] Pursuant to 2254(d), our review of an ineffective-assistance-of-counsel claim adjudicated on the merits in state court is reviewed under a doubly deferential standard.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GUSTAVO XAVIER, Petitioner, v. MICHAEL HARLOW, Superintendent, Respondent.	CIVIL ACTION NO. 3:12-CV-01603 (WILSON, J.) (SAPORITO, M.J.)

REPORT AND RECOMMENDATION

This proceeding was initiated by a petition for a writ of habeas corpus submitted pursuant to 28 U.S.C. § 2254, signed and dated by the petitioner, Gustavo Xavier, on August 6, 2012. (Doc. 1.) At the time of filing, Xavier was incarcerated at SCI Albion, which is located in Erie County, Pennsylvania. The petition was originally filed in the United States District Court for the Western District of Pennsylvania, but it challenges a conviction and sentence imposed by a Susquehanna County trial court. Thus, it was transferred to this Court on August 14, 2012. (Doc. 2; Doc. 3.) *See generally* 28 U.S.C. § 118(b) (listing counties included within the Middle District of Pennsylvania).

The original *pro se* petition included multiple claims for habeas relief. We previously considered them and recommended that all claims be denied and dismissed with prejudice. *Xavier v. Harlow*, Civil Action No. 3:12-CV-01603, 2015 WL 9685500 (M.D. Pa. May 22, 2015), Doc. 18. On January 7, 2016, the presiding district judge at that time, the late Hon. A. Richard Caputo, adopted our recommendation and dismissed the petition in its entirety. *Xavier v. Harlow*, Civil Action No. 3:12-CV-1603, 2016 WL 97696 (M.D. Pa. Jan. 7, 2016) (memorandum opinion), Doc. 25; *see also Xavier v. Harlow*, Civil Action No. 3:12-CV-1603, 2016 WL 75002 (M.D. Pa. Jan. 7, 2016) (order), Doc. 26. The petitioner appealed. On appeal, the Third Circuit affirmed the dismissal of all but one of the petitioner's claims, vacating and remanding the dismissal order with respect to a single claim, which we had dismissed as procedurally defaulted. *Xavier v. Harlow*, 689 Fed. App'x 686 (3d Cir. 2017), Doc. 31.

On remand, the matter was referred to the undersigned United States magistrate judge to conduct an evidentiary hearing and consider the merits of the petitioner's remaining claim for habeas relief. (Doc. 32.) We have conducted that hearing and, based on the testimony and evidence presented at that hearing, we present our proposed findings of

fact, conclusions of law, and recommendations for disposition. (*See* Doc. 79; Doc. 80; Doc. 83; Doc. 88.) In sum, we recommend that the petitioner's remaining habeas claim be denied as meritless, and the petition be dismissed with prejudice.

I. STATEMENT OF THE CASE

A. Procedural History

On May 1, 2009, Xavier pleaded guilty and was convicted in the Court of Common Pleas of Susquehanna County of third-degree murder. *Commonwealth v. Xavier*, Docket No. CP-58-CR-0000365-2008 (Susquehanna Cty. (Pa.) C.C.P.).[1] Under the terms of his otherwise unconditional plea agreement,[2] the original criminal homicide and aggravated assault charges against him were subsequently nolle prossed by the Commonwealth. *Id.* On May 21, 2009, Xavier was sentenced to

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[1] In addition to the petition, a federal habeas court may take judicial notice of state court records, as well as its own records. *Montanez v. Walsh*, No. 3:CV-13-2687, 2014 WL 47729, at *4 n.1 (M.D. Pa. Jan. 7, 2014); *see also Reynolds v. Ellingsworth*, 843 F.2d 712, 714 n.1 (3d Cir. 1988). Accordingly, in considering this petition, we have taken judicial notice of the publicly available dockets of criminal and collateral post-conviction proceedings in the Court of Common Pleas of Susquehanna County, the Superior Court of Pennsylvania, and the Supreme Court of Pennsylvania, available online at https://ujsportal.pacourts.us/CaseSearch, as well as this Court's own records.

[2] (Hr'g Ex. 107; *see also* Doc. 10-1, at 26–27.)

serve a term of twenty to forty years in prison. *Id.* Xavier did not file a direct appeal to the Superior Court of Pennsylvania.

Xavier filed a *pro se* PCRA petition in the Court of Common Pleas on November 24, 2009, and a *pro se* amended or supplemental PCRA petition on November 17, 2010.[3] The Court of Common Pleas denied PCRA relief on September 27, 2011. *Id.* The denial of Xavier's PCRA petition was affirmed on appeal by the Superior Court of Pennsylvania on May 23, 2012. *Commonwealth v. Xavier*, Docket No. 1762 MDA 2011 (Pa. Super. Ct.). Xavier did not file a petition for allocatur in the Supreme Court of Pennsylvania.

B. Habeas Claim Presented

The petitioner's *pro se* petition asserted several different claims for relief under 28 U.S.C. § 2254. As noted above, the dismissal of all but one of the petitioner's habeas claims has been affirmed on appeal. On remand, the petitioner's one remaining claim for consideration on the

[3] Although the state court docket sheet indicates filing dates of November 30, 2009, and November 19, 2010, for Xavier's original and amended PCRA petitions, the petitions themselves indicate that Xavier mailed them on November 24, 2009, and November 17, 2010, respectively. *See Commonwealth v. Little*, 716 A.2d 1287, 1289 (Pa. Super. Ct. 1998) ("[T]he prisoner mailbox rule is applicable to petitions filed pursuant to the PCRA . . . .").

merits is that his conviction was based on a guilty plea that was not knowing, voluntary, and intelligent because his trial counsel was ineffective for failing to advise him that the charge of criminal homicide included an alternative lesser offense of voluntary manslaughter.

II. DISCUSSION

Xavier's surviving claim for habeas relief alleges that his conviction was based on a guilty plea that was not knowing, voluntary, and intelligent due to ineffective assistance of counsel. Xavier entered his guilty plea on May 1, 2009. On May 19, 2009, he filed a motion to withdraw his guilty plea. On May 21, 2009, Xavier withdrew his motion to withdraw the guilty plea. He was sentenced later that same day.

In his remaining claim, Xavier contends that, in initially deciding to plead guilty and later deciding to withdraw his motion to withdraw his guilty plea, he relied on the advice of trial counsel, which was constitutionally ineffective. Xavier alleges that his trial counsel induced him to plead guilty to third-degree murder and, later, to withdraw his motion to withdraw that guilty plea by failing to advise him that the charge of criminal homicide included an alternative lesser offense of manslaughter. Xavier claims that, if he had been so advised, he would

not have agreed to plead guilty to third-degree murder under terms requiring him to serve a minimum sentence of twenty years in prison.

A. Applicable Legal Standard

Because the state courts did not adjudicate the merits of Xavier's surviving habeas claim, we review this last remaining claim de novo. *See Workman v. Superintendent Albion SCI*, 915 F.3d 928, 943 (3d Cir. 2019) ("Once procedural default is excused, 'our review of a petitioner's claim is de novo because the state court did not consider the claim on the merits.'"). *See generally Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring) (noting that, in de novo review, a court "must exercise its independent judgment when deciding both questions of constitutional law and mixed constitutional questions (*i.e.*, application of constitutional law to fact)").

To establish an ineffective assistance of counsel claim, a habeas petitioner must show that: (1) trial counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* test is conjunctive, and a habeas petition must establish *both* the deficient performance prong and the prejudice prong. *See id.* at 687; *Rainey v. Varner*, 603 F.3d

189, 197 (3d Cir. 2010).

Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. *Id.* at 687–89. This requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S. 86, 104 (2001) (quoting *Strickland*, 466 U.S. at 687). As the *Strickland* Court explained,

> the proper standard for attorney performance is that of reasonably effective assistance. . . . [A] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.
>
> More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Strickland, 466 U.S. at 687–88 (citations omitted). Indeed, a federal habeas court is "required not simply to give the attorney the benefit of

the doubt, but to affirmatively entertain the range of possible reasons petitioner's counsel may have had for proceeding as he did." *Branch v. Sweeney*, 758 F.3d 226, 235 (3d Cir. 2014) (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011)) (alterations omitted).

To establish prejudice in the context of a guilty plea, a petitioner must "show [that] the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (requiring a petitioner to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). A petitioner makes this showing by establishing not only that he would not have pleaded guilty and instead would have proceeded to trial if he had been properly advised, but also that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced the defendant by causing him to plead guilty rather than go

> to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. . . . [T]hese predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."

Hill, 474 U.S. at 59–60 (quoting *Strickland*, 466 U.S. at 695). Thus, under the specific circumstances presented here, Xavier must adduce evidence to demonstrate that, had he gone to trial, it was reasonably likely that he would have been convicted on the lesser-included offense of voluntary manslaughter, and neither first- nor third-degree murder. *See Hill*, 474 U.S. at 59; *see also Williams v. Adams*, No. CVF04503 DLB HC, 2006 WL 657129, at *10 (E.D. Cal. Mar. 14, 2006).

B. Testimony Received into Evidence

1. ***Testimony of Gustavo Xavier***

The petitioner opened by presenting his own testimony, elicited by habeas counsel. Xavier testified that he is a native of Uruguay but had resided in the United States since 1999. He testified that Spanish is his

primary language, but he speaks "some English." He testified at this habeas evidentiary hearing with the assistance of an interpreter.

Xavier testified regarding his interactions with trial counsel in the months between his arrest in September 2008 and his conviction and sentencing in May 2009. Xavier testified that he had been represented by two separate attorneys from the county public defender's office—Jamie Dench and Linda LaBarbera—with whom he met a total of four or five times while facing criminal charges.

On direct examination, Xavier was asked whether he and his trial counsel had discussed voluntary manslaughter, but his initial answer was nonresponsive:

> Q. . . . Did you and Ms. LaBarbera discuss voluntary manslaughter?
>
> A. No, I don't think she—she never investigated my case.

(Hr'g Tr. 10 (June 16, 2020), Doc. 80.) His habeas counsel then repeated the same question, obtaining a somewhat equivocal admission—that Xavier did not recall discussing voluntary manslaughter with his trial counsel:

> Q. Okay. My first question is did you and Ms. LaBarbera discuss to your knowledge voluntary

manslaughter?

A. No.

Q. You're saying no, you don't recall, or you didn't discuss?

A. I don't think so.

(*Id.* at 11.)

Habeas counsel then turned to the issue of potential prejudice, asking Xavier if he would have done anything differently if trial counsel had discussed voluntary manslaughter with him, to which Xavier responded: "I would have gone to trial."[4] (*Id.*)

Based on the demeanor of the witness and the inconsistency of his testimony with the record as a whole, we find Xavier's testimony to be only partially credible.

2. ***Testimony of Linda LaBarbera***

The petitioner presented the testimony of attorney Linda LaBarbera, a full-time public defender who represented him as trial counsel for most of his criminal proceedings. Habeas counsel generally walked LaBarbera through her representation of Xavier chronologically.

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[4] Habeas counsel also elicited testimony regarding Xavier's belief that trial counsel had failed to discuss voluntary manslaughter with him because she had failed to adequately investigate his case. (*Id.* at 11–12.)

LaBarbera testified that she was one of two attorneys with the county public defender's office at the time of Xavier's criminal case, and her office had been designated to represent Xavier based on his indigent status. Initially, Xavier was represented by attorney Jamie Dench, a part-time public defender, but after Dench left the public defender's office, LaBarbera alone served as Xavier's defense counsel.

LaBarbera testified that it was her office's general practice to make notes of each attorney-client visit or contact. (*Id.* at 21.) She testified that, personally, she typically typed her notes within a few days after the visit or contact. (*Id.* at 21–22.) LaBarbera identified and authenticated Exhibit 102, a copy of the file containing attorney notes for Xavier's criminal case, which had been recorded by both herself and Dench. (*Id.* at 22–23.)

LaBarbera identified a set of handwritten notes concerning a September 4, 2008, client visit as notes made by Dench. (*Id.* at 23.) She identified typewritten and handwritten notes concerning a September 10, 2008, discussion with Xavier's landlord as her own notes. (*Id.* at 23–26.) She identified typewritten notes concerning a September 16, 2008, client visit as her own notes; she testified that, based on Xavier's account

of the incident given at that meeting, she commented in her notes that the details of his account did not necessarily support self-defense. (*Id.* at 26–28.)

LaBarbera identified a long, handwritten letter in the file from Xavier, addressed to "my lawyer," and she confirmed that she took no steps to investigate much of the information provided by Xavier in that letter. (*Id.* at 28–42.) She identified handwritten notes concerning a December 26, 2008, client visit as notes made by Dench. (*Id.* at 42–43.) She identified two separate letters in the file from Dench and addressed to a private investigator, dated February 6 and 13, 2009, seeking to retain the investigator to assist in Xavier's case. (*Id.* at 47–48.)

LaBarbera identified typewritten notes concerning an April 2, 2009, client visit as her own notes. (*Id.* at 48–50.) She testified that Xavier asked about the possibility of a temporary insanity defense, and they discussed it. (*Id.* at 50.) She testified that he asked her whether the incident might constitute "depraved heart." (*Id.*) In her notes, LaBarbera indicated that she was unsure what he meant by this, but they discussed whether the circumstances of the incident might constitute a killing in the "heat of passion," which would support a voluntary manslaughter

conviction as an alternative to the murder charges he faced. (*Id.*) Based on crime scene photos, the ethnic makeup of the probable jury pool, and the details of the incident as relayed by Xavier himself, LaBarbera testified that she advised him that she did not think he could get a voluntary manslaughter conviction instead of first- or third-degree murder. (*Id.* at 51–52.) She testified that the factors she considered and discussed with Xavier included the tumultuous and abusive relationship between Xavier and Parlanti,[5] the presence of drugs in the victim's system, and the crime scene photos, which she believed showed that he "beat the hell out of her" and were sufficiently graphic to outweigh other factors. (*Id.* at 53–55.)

LaBarbera identified an undated fragment of typewritten notes concerning a discussion with Xavier as her own notes. (*Id.* at 56.) She testified that her notes indicated that Xavier did not deny that he hit the victim, but he believed that he endured so much abuse from her that he should not be held responsible. (*Id.*) She testified that her opinion,

[5] To be clear, as described to his trial counsel by Xavier, the physical abuse was largely one-sided, with Xavier often on the receiving end of Parlanti's abuse. The evidence he contends trial counsel neglected to investigate mostly concerned that physical abuse, as well as Parlanti's criminal history and history of drug abuse.

recorded in her notes, was that this was a "[m]itigating circumstance[] . . . maybe, but not a defense." (*Id.* at 57.)

LaBarbera identified typewritten notes concerning an April 29, 2009, client visit as her own notes. (*Id.* at 58.) She testified that, at that meeting, Xavier seemed hesitant to enter a guilty plea, and they discussed his case's strengths and weaknesses. (*Id.*) Although Xavier had admitted to killing Parlanti, he thought he should get less than a twenty-year sentence because of the abuse he had endured from Parlanti. (*Id.* at 58–59.) Based on the discovery produced by prosecutors and on Xavier's own account of the incident, LaBarbera advised Xavier that he could go to trial, but she thought he would be convicted of first-degree murder, which carries a mandatory sentence of life in prison. (*Id.* at 59–60.)

LaBarbera was presented with a physical exhibit—a metal sink post recovered from the scene that investigators had identified as the instrument with which Xavier struck Parlanti. (*Id.* at 62–65.) LaBarbera confirmed on examination what she wrote in her April 29, 2009, notes: Xavier had killed Parlanti with a tire jack, which she had initially used to hit him with first, *not* the sink post. (*Id.*)

LaBarbera testified that Xavier brought written questions with him

to that April 29, 2009, meeting. (*Id.* at 65.) One of these questions was whether having one of his hair follicles tested would help him get manslaughter instead of murder. (*Id.*) LaBarbera testified that she discussed manslaughter with him and told him she did not believe testing a hair follicle would get him there because intoxication could only reduce first-degree murder to third-degree murder.[6] (*Id.*) She testified that she explained to him that it is the element of malice that distinguishes murder and manslaughter.[7] (*Id.*)

LaBarbera identified and authenticated Exhibit 106, a copy of Xavier's guilty plea colloquy, which he signed that same day—April 29, 2009. (*Id.* at 67–68.)

LaBarbera identified and authenticated Exhibit 107, a copy of

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[6] Presumably by establishing reasonable doubt with respect to whether Xavier had a specific intent to kill, the element of proof distinguishing first- and third-degree murder.

[7] Although habeas counsel did not elicit further testimony on this particular point, LaBarbera's notes include further details of the legal advice she gave to Xavier that day: "The malice element changes murder to manslaughter. Malice is shown by the brutality of the incident. Couple that with the bag over the head and the stuffing into a closet and I think the jury would find malice. If he had hit her only once and not put her in a closet, I believe he would have a better chance with a jury. He takes a risk of getting a Murder one conviction. If a jury finds murder 3, he could get less as a sentence but 20–40 is consistent with what happens in Susquehanna County." (Ex. 102, at 34.)

Xavier's plea agreement, and Exhibit 108, a transcript of Xavier's plea hearing on May 1, 2009. (*Id.* at 72–73.)

LaBarbera identified typewritten notes concerning a May 14, 2009, client visit as her own notes. (*Id.* at 75–76.) She testified that Xavier remained unhappy about the sentence to which he had agreed. (*Id.* at 76.) Xavier maintained that he did not intend to kill Parlanti, but "snapped" and "went crazy for a bit." (*Id.*) LaBarbera testified that, as she wrote in her notes, Xavier asked her: "Why isn't this voluntary manslaughter?" (*Id.*) She testified that, as she documented in her notes, they discussed malice again.[8] (*Id.*) Ultimately, LaBarbera provided Xavier with two options for proceeding: (1) withdraw the guilty plea and go to trial; or (2) be sentenced on the plea deal to which he had agreed. (*Id.*) After this discussion with LaBarbera, Xavier opted to proceed with sentencing on the plea agreement, but LaBarbera told him she would check back with him after he had more time to think about it. (*Id.* at 76–77.)

LaBarbera identified a short, handwritten note in the file from

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[8] Once again, LaBarbera's notes provide further details of their discussion. She wrote: "Believe that the beating the vic endured—beating of the vic repeatedly to vital part of her body—law assumes malice. If pictures get in[,] jury can find malice. DA believes and will argue this is 1st degree murder." (Hr'g Ex. 102, at 35.)

Xavier, dated May 18, 2009, in which he had informed her that he had changed his mind and intended to withdraw his guilty plea. (*Id.* at 77.) She testified that, prompted by this note, she met with Xavier at the jail on May 19, 2009, and she identified typewritten notes concerning that client visit as her own notes. (*Id.* at 77.) At this meeting, Xavier told her that "he believe[d] that he's only guilty of voluntary manslaughter." (*Id.*) LaBarbera testified that they then discussed the case and the theory of his defense—essentially, that "he had to protect himself" and is "guilty but not of murder."[9] (*Id.*) She testified that, as she wrote in her notes at

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[9] In her notes, LaBarbera provided further details:

> Discussed the elements of [voluntary manslaughter] with [Xavier]. He also believes that he can only get 20 years for murder three. Showed him the max is 40. He is all about heat of passion.
>
> Theory of the case is that she abused the prescription. He had to protect himself. He is a good guy. He killed her and went crazy. He is guilty [but] not of Murder.
>
> Discussed the problems and the element of malice. He is certain he will do better than 20 years and is not concerned if he gets life. He totally understands the fact that the DA is seeking first degree murder and believes that it is first degree.
>
> Lets go.
>
> Prepare for trial. . . .

(Hr'g Ex. 102, at 37.)

the time, she was ready to prepare for trial. (*Id.* at 77–78.)

LaBarbera identified and authenticated Exhibit 109, a copy of a motion to withdraw Xavier's guilty plea, which she filed that same day—May 19, 2009. (*Id.* at 79.)

LaBarbera identified typewritten notes concerning a May 20, 2009, client visit as her own notes. (*Id.*) She testified that the trial judge had set a hearing on Xavier's motion to withdraw his guilty plea for May 21, 2009. (*Id.*) She testified that they discussed what to expect at the hearing the next day, as well as Xavier's feeling that 20 years was too long of a sentence.[10] (*Id.* at 79–80.) She testified that, ultimately, however, Xavier

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[10] Although habeas counsel did not elicit further testimony on this particular point, LaBarbera's notes indicate that they discussed voluntary manslaughter once again:

> Want to insure that [Xavier] understands the element of malice. I have explained it several times. Brought the pictures. Want to insure that [Xavier] understands the evidence against him. That he has seen the photos in case they are used at trial. [Xavier] did not want to view the photos. Talked about malice.
>
> . . . .
>
> . . . He understands that he may get a life sentence if he takes the case to trial. He also may get convicted of a lesser charge. Decision is totally his.
>
> [Xavier] reconsidered his decision to withdraw the plea.

(continued on next page)

changed his mind once again, and the plea withdrawal hearing was converted into a sentencing hearing. (*Id.* at 80–81.)

LaBarbera identified and authenticated Exhibit 110, a transcript of Xavier's sentencing hearing on May 21, 2009. (*Id.* at 80–81.) She identified and authenticated a hand-drawn picture by Xavier himself of the tire jack with which he killed Lisa Parlanti. (*Id.* at 81–82.) LaBarbera also testified about discovery materials produced in Xavier's criminal case, including statements made to investigators by Xavier and various witnesses, and about her failure to investigate or, with respect to Xavier's statements, move for their suppression before allowing Xavier to plead guilty. (*Id.* at 83–96.)

On cross-examination, LaBarbera testified that the underlying criminal case was never a "whodunit," but rather the only determination to be made was the appropriate degree of guilt to be assigned to Xavier, who had admitted to killing Lisa Parlanti. (*Id.* at 98.) She testified, unequivocally, that she had discussed manslaughter with Xavier on multiple occasions, and it appeared to her that he understood it. (*Id.* at

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He wants to be sentenced.

(Hr'g Ex. 102, at 38.)

99.) In particular, she testified that Xavier "asked appropriate questions," including "questions that used legal terms," he wrote her long letters, and she believed he understood English well enough to understand the conversations they had in the course of his defense. (*Id.*)

LaBarbera testified on cross-examination that, based on the number of separate injuries noted in the autopsy report, she had estimated that Xavier struck Parlanti approximately twenty times with the tire jack. (*Id.* at 99–100.) She testified that, based on this and the fact that several of the hits were to her head and resulted in her death, the location and number of blows were sufficient to establish malice, which they would need to effectively rebut to show a jury that Xavier was guilty of manslaughter rather than third-degree murder. (*Id.* at 100.)

On re-direct, however, LaBarbera conceded that ten of those injuries listed in the autopsy report were described as mere abrasions, and seven were lacerations, albeit some with underling skull fractures.[11] (*Id.* at 109–11.) She further confirmed that she and Xavier had discussed

[11] We note that the autopsy report itself appears to list eighteen separate injuries, including eleven abrasions, four lacerations with underlying skull fractures, one laceration with four traumatically missing teeth, and two other lacerations with no additional qualifiers. (Hr'g Ex. 111, at 97–98.)

his belief that he should not be found guilty of murder because he struck Parlanti in the heat of passion and in the context of a history of abuse from Parlanti, but she had told him she did not think that this would be a successful strategy. (*Id.* at 115.) LaBarbera acknowledged that she did not conduct any investigation beyond her review of the discovery file and her conversations with her client, but she testified that she would have done so if he had decided to proceed to trial. (*Id.* at 115–16.)

Based on the demeanor of the witness and the consistency of her testimony with the record as a whole, we find LaBarbera's testimony to be fully credible. In particular, we note that her testimony is corroborated by, and entirely consistent with, the contemporaneously recorded attorney notes she maintained with respect to communications between herself and her client, the petitioner.

3. ***Testimony of Corporal McAndrew***

The petitioner presented the testimony of Corporal McAndrew, a Pennsylvania state trooper assigned to serve as primary evidence custodian a Pennsylvania State Police station located in Susquehanna County. He authenticated physical evidence—the metal sink post and pills recovered from the crime scene—presented in court by the

petitioner. In lieu of the items themselves, photographs of the items were admitted into evidence. Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find McAndrew's testimony to be fully credible.

4. ***Testimony of John David Walker***

The petitioner presented the testimony of John David Walker, one of the investigating police officers, who testified regarding the circumstances of Xavier's arrest. He testified that he did not exchange words of any sort with Xavier other than directing him to sit in a chair, and later directing him to return to his chair when he attempted to get out of it. Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find Walker's testimony to be fully credible.

5. ***Testimony of Craig Purdum***

The petitioner presented the testimony of Craig Purdum, a retired Pennsylvania state trooper who, as one of the investigating police officers, spoke with Xavier while he was hospitalized immediately after his arrest. Purdum testified regarding his investigation into Parlanti's death, including an interview with Xavier at the hospital. Based on the

demeanor of the witness and the consistency of his testimony with the record as a whole, we find Purdum's testimony to be fully credible.

6. ***Testimony of Jamie Dench***

The petitioner presented the testimony of attorney Jamie Dench, a criminal defense attorney and former part-time Susquehanna County public defender who represented Xavier as trial counsel in the early stages of his criminal proceedings. Dench testified regarding his general practices as a part-time public defender in Susquehanna County. He testified that he generally kept notes of client communications and visits in a file for each client.

Dench identified and authenticated Exhibit 103, an excerpt from a jail visitors log, which indicated that he had visited Xavier on September 4, 2008. (Hr'g Tr. 144 (June 16, 2020), Doc. 80.) He identified handwritten notes concerning a September 4, 2008, client visit as his own notes. (*Id.* at 145–46.) He identified handwritten notes concerning a December 26, 2008, client visit as his own notes. (*Id.* at 147–48.) He identified two separate letters in the file addressed to a private investigator, dated February 6 and 13, 2009, seeking to retain the investigator to assist in Xavier's case, as letters he authored. (*Id.* at 148.) He identified two

motions for a continuance that he filed in Xavier's criminal case in December 2008 and February 2009. (*Id.* at 148–51.) He testified that he filed these motions because prosecutors had not provided him with discovery until shortly before the second motion. (*Id.* at 151.)

On cross-examination, Dench testified that his representation of the petitioner ended in March 2009, when he left the Susquehanna County public defender's office. (*Id.* at 157–58.)

Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find Dench's testimony to be fully credible.

7. ***Testimony of Tonya Hance***

The petitioner presented the testimony of Tonya Hance, a bartender at a bar frequented by Xavier before his arrest. She testified that she had known Xavier for "a couple of years" at the time as a customer at the bar. She testified about his generally calm and friendly demeanor when at the bar. She testified that, while she didn't know Parlanti, she had seen her come into the bar with Xavier at times.

Hance testified that, on the Wednesday before Parlanti's death, she saw Xavier and Parlanti at the bar, bickering. She testified that Xavier

came into the bar for happy hour on Thursday, but he appeared "shaky" and had a big diagonal bruise across his face. Xavier told her that he and Parlanti had been in a fight and Parlanti had hit him.

Hance testified that she was interviewed by law enforcement in 2008, but she was not interviewed by Xavier's trial counsel.

Based on the demeanor of the witness and the consistency of her testimony with the record as a whole, we find Hance's testimony to be fully credible.

8. ***Testimony of Kevin Nagy***

The petitioner presented the testimony of Kevin Nagy, Xavier's employer. Nagy testified that, prior to his arrest, Xavier had worked for Nagy as a full-time seasonal employee for about four years, stacking stone for Nagy's stone business. He testified that Xavier was a reliable and hard worker.

Nagy testified that, in the days and weeks prior to Xavier's arrest, he had shown up at work several times with injuries, such as a gash on his face or a black eye. When Nagy asked him what had happened, Xavier told him that he and his girlfriend had gotten into a scuffle. Nagy testified that Xavier had said that his girlfriend was "a little bit crazy or a wacko."

Nagy testified that he was interviewed by law enforcement in 2008, but he was not interviewed by Xavier's trial counsel.

Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find Nagy's testimony to be fully credible.

9. ***Testimony of Anthony Bonilla***

The petitioner presented the testimony of Anthony Bonilla, one of the investigating police officers, who testified that he did not recall interviewing Xavier in September 2008, but he did not dispute that he was present for such an interview. Bonilla testified that, while he sometimes interacted with Spanish-speaking suspects or victims on an informal basis, he had only a basic level of proficiency in the Spanish language. Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find Bonilla's testimony to be fully credible.

10. ***Testimony of Lynn Reese Powell***

The petitioner presented the deposition testimony of Lynn Reese

Powell,[12] Xavier's landlord prior to his arrest. Powell testified that Xavier had been his tenant for about a year prior to Xavier's arrest. He testified that Xavier was an excellent tenant, and he had never observed Xavier to be violent. He testified that he had met Parlanti while at Xavier's apartment, and he had the impression she was "bipolar" or subject to "great mood swings."

Powell testified that he had visited Xavier in jail several times after his arrest. During those visits, Xavier told him that he and Parlanti had been "out on the town" the evening of her death, before returning the Xavier's apartment. She asked Xavier to take her to back to Scranton, but he refused because it was too late at night.

Powell testified that Xavier had said that he walked into the apartment first and, just after getting inside, Parlanti had "cracked" him in the back of the head with some object.[13] Xavier told him that they got

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[12] Powell was unavailable to travel to testify in court due to his age and health condition, but the parties agreed to conduct a *de bene esse* deposition at a state courthouse near to where the witness resided. The evidentiary record was held open for submission of the deposition transcript, which was filed on April 22, 2021. (Doc. 88.)

[13] Powell testified that his tenants had kept various tools on the front porch that they used in the stone business, and he believed Parlanti might have picked up one of those and used it to strike Xavier on the back of the head, but Xavier had not told him what the object was.

in a struggle, and he took the object away from Parlanti and hit her with it. Powell testified that Xavier told him that "I just hit her one time to many."

Powell testified that he did not recall going to the public defender's office or being interviewed by them.

Based on the consistency of the deponent's testimony with the record as a whole, we find Powell's testimony to be fully credible.

11. ***Testimony of John Oliver***

The respondent presented the testimony of John Oliver, a detective with the Susquehanna County district attorney's office who had previously been a Pennsylvania state trooper. At the time of Lisa Parlanti's death, Oliver was still with the state police and was one of the investigating police officers.

Oliver testified that, immediately following Xavier's arrest, he and Purdum were sent to the hospital to interview Xavier. At the time, they were told that Xavier spoke Spanish, so someone at the Dunmore state police headquarters had arranged for a Spanish-speaking officer, Dunmore officer Bonilla, to meet them there to help with the interview.

Oliver testified that he, Purdum, and Bonilla entered Xavier's

hospital room expecting to conduct an interview in Spanish, with Bonilla translating, but they were surprised to find that Xavier spoke English "very well." Oliver testified that, during the interview, Bonilla did help clarify certain words, but Bonilla's overall participation in the interview was "very minimal."

On cross-examination, Oliver testified in further detail regarding the circumstances of the interview of Xavier at the hospital.

Based on the demeanor of the witness and the consistency of his testimony with the record as a whole, we find Oliver's testimony to be fully credible.

C. Exhibits Received into Evidence

1. Exhibit 101: A copy of the Pennsylvania State Police file documenting their investigation into the death of Lisa Ann Parlanti.

2. Exhibit 102: A copy of trial counsel's file containing attorney-client correspondence, attorney notes summarizing discussions with the petitioner and with potential defense witnesses, and correspondence with a private investigator.

3. Exhibit 103: A copy of excerpts from a jail visitors log, documenting visits to the petitioner by trial counsel and others.

4. Exhibit 104: A copy of a December 16, 2008, motion by the petitioner to continue his criminal trial.

5. Exhibit 105: A copy of a February 12, 2009, motion by the petitioner to continue his criminal trial.

6. Exhibit 106: A copy of the petitioner's executed guilty plea colloquy, dated April 29, 2009.

7. Exhibit 107: A copy of the petitioner's executed plea agreement, dated May 1, 2009.

8. Exhibit 108: A copy of the transcript of the petitioner's May 1, 2009, guilty plea hearing.

9. Exhibit 109: Multiple documents—(a) a copy of the petitioner's May 19, 2009, motion to withdraw his guilty plea; (b) a copy of an order entered by the state trial court that same day for the district attorney to show cause why the motion should not be granted; and (c) a copy of an order entered by the state trial court on May 21, 2009, granting trial counsel's oral motion to withdraw the petitioner's motion to withdraw his guilty plea.

10. Exhibit 110: A copy of the transcript of the petitioner's May 21, 2009, sentencing hearing.

11. Exhibits 111 and 112: A copy of the discovery file produced to trial counsel by prosecutors, divided into two exhibits.

12. Exhibit 113: A copy of a page of nurse's progress notes obtained from medical records from the petitioner's post-arrest hospitalization.

13. Exhibit 114: A photograph of a metal sink post recovered by police investigators from the crime scene—the original item itself was presented for inspection in court.

14. Exhibit 115: A photograph of pills recovered by police investigators from the crime scene.

D. Analysis

The petitioner's lone remaining claim for habeas relief is that his conviction was based on a guilty plea that was not knowing, voluntary, and intelligent because his trial counsel was ineffective for failing to advise him that the charge of criminal homicide included an alternative lesser offense of voluntary manslaughter. As noted above, to prevail, the petitioner must demonstrate both deficient performance by trial counsel and prejudice as a result. *See Strickland*, 466 U.S. at 687. Here, the petitioner has failed to adduce sufficient evidence to demonstrate that his

trial counsel's performance was deficient.[14]

The fundamental factual premise of the petitioner's habeas claim is that his trial counsel failed to advise him that the lesser offense of voluntary manslaughter was an available alternative to the first- and third-degree murder charges he faced. The testimonial and documentary evidence adduced at his hearing, however, belies this premise.

The petitioner's own testimony regarding this fact issue was equivocal, at best. When asked by habeas counsel if he had discussed voluntary manslaughter with his defense attorney, Linda LaBarbera, Xavier first responded "no," but then, when asked by habeas counsel to clarify whether he was "saying no, you don't recall, or you didn't discuss," he responded, "I don't think so." (Hr'g Tr. 11 (June 16, 2020), Doc. 80.)

By contrast, it was LaBarbera's unequivocal testimony that she had discussed voluntary manslaughter with Xavier on multiple occasions, and she had repeatedly advised Xavier that, in her professional opinion, he was unlikely to secure a voluntary manslaughter conviction instead of

[14] As a result, we need not reach the issue of prejudice. We note that much of the evidence presented by the petitioner at his evidentiary hearing was concerned with the prejudice prong and not relevant to the performance prong.

first- or third-degree murder. (*See id.* at 50–52, 65, 76, 77, 99, 115.) This testimony is well-supported by her contemporaneously recorded attorney notes. (*See* Hr'g Ex. 102, at 30, 33–34, 35, 37, 38.)

Moreover, we find LaBarbera's advice to Xavier—that his proposed strategy of pursuing a conviction on the lesser-included offense of voluntary manslaughter, instead of first- or third-degree murder, was unlikely to succeed—was sound and reasonable advice under the circumstances presented. *See generally Branch*, 758 F.3d at 235 (noting that we are "required not simply to give the attorney the benefit of the doubt, but to affirmatively entertain the range of possible reasons petitioner's counsel may have had for proceeding as he did").

Xavier was charged with criminal homicide, in violation of 18 Pa. Cons. Stat. Ann. § 2501(a). The statutory offense of criminal homicide is divided into three classifications—murder, voluntary manslaughter, and involuntary manslaughter, *see id.* § 2501(b)—with murder further subdivided into first-, second-, and third-degree murder, *see id.* § 2502. Under the facts involved, Xavier faced a potential conviction for first-degree murder, which carried a mandatory sentence of life in prison, *see id.* § 1102(a)(1), the lesser-included offense of third-degree murder, which

carried a sentence of up to forty years in prison, *see id.* § 1102(d), or the lesser-included offense of voluntary manslaughter, which carried a sentence of up to twenty years in prison, *see id.* §§ 1103(1), 2503(c).[15] Xavier did not dispute that he had killed Parlanti, leaving only the question of the particular offense for which he would be convicted and sentenced. The district attorney had indicated to LaBarbera that he would seek a first-degree murder conviction at trial. In conversations with her client, LaBarbera advised Xavier that, in light of the facts of his case, he was unlikely to secure a voluntary manslaughter conviction at a trial because, among other factors, the evidence to support a jury's finding of malice was strong. Although he waffled, Xavier ultimately agreed to plead guilty to third-degree murder, avoiding trial and a possible life sentence.

As LaBarbera alluded to in her testimony, under Pennsylvania law, "malice is the distinguishing factor between murder and manslaughter." *Commonwealth v. Scales*, 648 A.2d 1205, 1206 (Pa. Super. Ct. 1994); *see also Yarnal v. Brierley*, 324 F. Supp. 311, 314 (W.D. Pa. 1971) ("Murder

[15] The facts of his case did not implicate either second-degree murder or involuntary manslaughter. *See generally* 18 Pa. Cons. Stat. Ann. §§ 2502(b), 2504.

is the killing of a human being with malice aforethought, and it is the presence of this element which distinguishes murder from manslaughter."); *Commonwealth v. Yuknavich*, 295 A.2d 290, 292 (Pa. 1972) ("[T]he distinguishing criterion of murder is malice aforethought."); *Commonwealth v. King*, 990 A.2d 1172, 1177 (Pa. Super. Ct. 2010) ("Malice is an essential element of murder, including murder of the third degree.").

As LaBarbera recognized in both her testimony and her attorney notes, "[o]ne means of showing malice is proving that a defendant used a dangerous weapon on a vital part of another's body." *Commonwealth v. Clark*, 411 A.2d 800, 802 (Pa. Super. Ct. 1979). Xavier did not dispute that he struck Parlanti multiple times on and around her head with a heavy blunt object—a tire jack, according to his trial counsel—causing her death. The autopsy report identified four separate lacerations on Parlanti's face and scalp with underlying skull fractures, one laceration on her face with four traumatically missing teeth, and two additional lacerations on her face. This evidence alone was sufficient to easily demonstrate malice. *See Commonwealth v. Anderson*, No. 3459 EDA 2012, 2013 WL 11250364, at *3 (Pa. Super. Ct. Nov. 26, 2013) (finding

that evidence of a second blow to the head with a hammer, after the victim was already incapacitated, was sufficient by itself to support a finding of malice); *Commonwealth v. Marks*, 704 A.2d 1095, 1100 (Pa. Super. Ct. 1997) (finding defendant's use of a sledgehammer to repeatedly strike victim's head, producing twelve lacerations, "easily demonstrates malice"). In her testimony and her attorney notes, LaBarbera also referenced the graphic nature of the crime scene photographs as a factor in her assessment that a jury would likely find malice. She also commented in her attorney notes on the fact that Xavier had placed a bag over his victim's head, secured with duct tape around her neck, and stuffed her body into a closet, suggesting that these facts would also persuade a jury to find malice. We find trial counsel's assessment to be reasonable.[16]

Indeed, the same evidence of malice likewise might have supported

[16] We note that some of the evidence has also suggested that Xavier might have been intoxicated at the time, though he has denied it at times. Even if he had been intoxicated, we note that evidence of voluntary intoxication may reduce a homicide from first-degree murder to third-degree murder, negating the element of specific intent to kill, but it cannot negate malice, and thus it cannot reduce third-degree murder to manslaughter. *See Commonwealth v. Ruff*, 405 A.2d 9289, 929–30 (Pa. Super. Ct. 1979).

a jury finding of specific intent to kill, resulting in a conviction of first-degree murder and a mandatory life-term prison sentence. *See Commonwealth v. Drumheller*, 808 A.2d 893, 908 (Pa. 2002) ("The use of a deadly weapon on a vital part of the victim's body may constitute circumstantial evidence of a specific intent to kill."). This too supports our finding with respect to the reasonableness of LaBarbera's assessment of the case and her advice to Xavier that a voluntary manslaughter conviction was unlikely.

We also note that, based on the various witnesses' testimony and trial counsel's attorney notes, there is no evidence that LaBarbera coerced, misled, or otherwise unduly compelled Xavier to accept the negotiated plea agreement in which he agreed to plead guilty to third-degree murder, with a sentence of twenty to forty years in prison, in exchange for dismissal of first-degree murder and all other charges. As LaBarbera testified, and her notes corroborated, she shared with Xavier her professional opinion that a voluntary manslaughter conviction was unlikely in view of the crime scene photos, autopsy findings, and other evidence of malice, and left the decision to Xavier whether he would plead guilty to third-degree murder or proceed to trial, where he faced the very

real possibility of a life sentence for first-degree murder.

Under the circumstances presented in the underlying criminal case, and in view of the evidence adduced by the parties in these habeas proceedings, we find the petitioner has failed to adduce sufficient evidence to demonstrate that his trial counsel's performance was deficient.

Accordingly, we recommend that the Court adopt the following proposed findings of fact, conclusions of law, and recommendations for disposition.

III. RECOMMENDATION

For the foregoing reasons, we recommend that the following proposed findings of fact, conclusions of law, and recommendations for disposition be adopted pursuant to Rule 8(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

A. Proposed Findings of Fact

1. The petitioner, Gustavo Xavier, is a state prisoner, incarcerated at the time of filing at SCI Albion, a state correctional institution located in Erie County, Pennsylvania.

2. On May 1, 2009, Xavier pleaded guilty and was convicted in the Court of Common Pleas of Susquehanna County of third-degree murder for the death of his paramour, Lisa Parlanti.[17]

3. On May 21, 2009, Xavier was sentenced to serve a term of twenty to forty years in prison.

4. Xavier did not file a direct appeal from his judgment of conviction and sentence.

5. Xavier filed a *pro se* petition for post-conviction collateral relief (the "PCRA petition") in the Court of Common Pleas of Susquehanna County on November 24, 2009.

6. Xavier's PCRA petition was denied by the PCRA court on September 27, 2011.

7. The denial of Xavier's PCRA petition was affirmed on appeal by the Superior Court of Pennsylvania on May 23, 2012.[18]

8. Xavier did not file a petition for allocatur in the Supreme Court of Pennsylvania.

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[17] *Commonwealth v. Xavier*, Docket NO. CP-58-CR-0000365-2008 (Susquehanna Cty. (Pa.) C.C.P.).

[18] *Commonwealth v. Xavier*, Docket No. 1762 MDA 2011 (Pa. Super. Ct.).

9. Xavier filed the instant *pro se* federal habeas petition, asserting multiple claims for habeas relief under 28 U.S.C. § 2254, on August 6, 2012.

10. On December 17, 2012, counsel was appointed to represent Xavier in these federal habeas proceedings.

11. On January 7, 2016, Xavier's federal habeas petition was denied and dismissed in its entirety by this Court. Some claims were denied on procedural grounds, others were denied on the merits, subject to the deferential standard articulated in 28 U.S.C. § 2254(d).

12. Xavier timely appealed the January 2016 order dismissing his petition.

13. On May 3, 2017, in an unpublished opinion, the United States Court of Appeals for the Third Circuit affirmed the dismissal order in part and vacated it in part.[19]

14. The Third Circuit vacated this Court's dismissal order "insofar as it concluded that Xavier is procedurally barred from arguing a Sixth Amendment violation based on counsel's purported failure to

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[19] *Xavier v. Superintendent Albion SCI*, 689 Fed. App'x 686 (3d Cir. 2017).

advise him of the possibility of a manslaughter charge," and remanded that particular claim to this Court for consideration on the merits.[20]

15. The Third Circuit affirmed this Court's dismissal order with respect to all other claims for habeas relief.

16. An evidentiary hearing was held in this matter on June 16 and 17, 2020, before the undersigned United States magistrate judge, at which the testimony of several witnesses was presented, and several documentary exhibits were admitted into evidence.

17. The record was held open for the submission of the transcript of the *de bene esse* deposition of one of the petitioner's witnesses, who was unavailable to testify at the evidentiary hearing due to his advanced age and his health. That deposition was taken on July 15, 2020, and the transcript of that deposition was filed on April 22, 2021.

18. In his single remaining habeas claim, Xavier contends that that he was denied the effective assistance of counsel, in violation of his Sixth Amendment rights, because his trial counsel failed to advise him that the charge of criminal homicide included an alternative lesser offense of voluntary manslaughter.

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[20] *Xavier*, 689 Fed. App'x at 690.

19. At the evidentiary hearing, Xavier testified on his own behalf.

20. When asked on direct examination if he and his trial counsel, Linda LaBarbera, had discussed voluntary manslaughter, he responded "no" and then, "I don't think so."

21. At the evidentiary hearing, the petitioner presented the testimony of his trial counsel, Linda LaBarbera.

22. LaBarbera testified that she had discussed voluntary manslaughter with Xavier on multiple occasions, and she had repeatedly advised Xavier that, in her professional opinion, he was unlikely to secure a voluntary manslaughter conviction instead of first- or third-degree murder due to the strong evidence of malice present in his case, as well as other factors.

23. LaBarbera also identified and authenticated her contemporaneously recorded attorney notes, which corroborated the aforementioned testimony and provided additional details regarding several discussions between herself and Xavier with respect to voluntary manslaughter, the element of malice that distinguishes murder and manslaughter offenses, and the facts and evidence in Xavier's criminal case that appeared likely to support a jury finding of malice.

24. The petitioner presented the testimony of several other witnesses, whose testimony does not bear on the issue of whether trial counsel discussed voluntary manslaughter with Xavier.

25. The petitioner presented a transcript of the deposition of Lynn Reese Powell, whose testimony does not bear on the issue of whether trial counsel discussed voluntary manslaughter with Xavier.

26. The respondent presented the testimony of a witness, John Oliver, whose testimony does not bear on the issue of whether trial counsel discussed voluntary manslaughter with Xavier.

27. Based on the demeanor of the witness and considering the record as a whole, the testimony of Gustavo Xavier is only partially credible.

28. Based on the demeanor of the witness and considering the record as a whole, the testimony of Linda LaBarbera is fully credible.

29. Based on the demeanor of the witnesses and considering the record as a whole, the testimony of the other witnesses—Corporal McAndrew, John David Walker, Craig Purdum, Jamie Dench, Tonya

Hance, Kevin Nagy, Anthony Bonilla, Lynn Reese Powell,[21] and John Oliver—is fully credible, but does not bear on the issue of whether trial counsel discussed voluntary manslaughter with Xavier.

30. Trial counsel did, in fact, advise Xavier that the charge of criminal homicide included an alternative lesser offense of voluntary manslaughter. Trial counsel and Xavier discussed the offense of voluntary manslaughter and the element of malice extensively and on multiple occasions. But she advised him that, based on the facts and evidence of his case at that time, he was unlikely to be convicted by a jury of voluntary manslaughter instead of first- or third-degree murder.

B. Proposed Conclusions of Law

31. To establish an ineffective assistance of counsel claim, a habeas petitioner must show that trial counsel's performance was deficient, which requires the petitioner to show that trial counsel's performance was objectively unreasonable. *See Strickland*, 466 U.S at 687–88.

32. Trial counsel adequately advised Xavier that the offense of

[21] Powell's testimony was presented by deposition transcript, so our assessment of his credibility is based solely on its consistency with the record as a whole.

criminal homicide with which he was charged included the lesser offense of voluntary manslaughter, as well as the offenses of first- and third-degree murder.

33. Based on the facts of the underlying criminal case and the evidence adduced in these habeas proceedings, trial counsel reasonably advised Xavier that he was unlikely to secure a voluntary manslaughter conviction instead of first- or third-degree murder, either at trial before a jury or through further plea negotiations.

34. The petitioner has failed to adduce sufficient evidence to show that trial counsel's representation fell below an objective standard of reasonableness.

C. Recommended Disposition

35. The petitioner has failed to show that he was denied the effective assistance of counsel. Therefore, we recommend that the petitioner's single remaining habeas claim be denied on the merits and the petition be dismissed with prejudice.

36. We further recommend that the Court decline to issue a certificate of appealability, as the petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2); *see also Buck v. Davis*, 137 S. Ct. 759, 773–75 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated: May 14, 2021

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GUSTAVO XAVIER, Petitioner, v. MICHAEL HARLOW, Superintendent, Respondent.	CIVIL ACTION NO. 3:12-CV-01603 (WILSON, J.) (SAPORITO, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated May 14, 2021. Any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified

> proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Dated: May 14, 2021

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

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

GUSTAVO XAVIER, *Petitioner*	:	Civil No. 3:12-CV-01603
v.	:	(Judge Wilson) (Magistrate Judge Saporito)
MICHAEL HARLOW, *Respondent*	:	(Electronically Filed)

PETITIONER'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

AND NOW, comes the Petitioner, Gustavo Xavier, by his attorney, Lori J. Ulrich, Esquire, of the Federal Public Defender's Office, and files the following objections to the Magistrate Judge's Report and Recommendation, ("Report," filed May 14, 2021, *see* Doc. 89)(hereinafter cited as "Rep't").

1. Petitioner objects generally to the conclusion in the Report that "[t]he petitioner has failed to show that he was denied the effective assistance of counsel." (Rep't at 46).

2. More specifically, Petitioner objects to the conclusion that "[b]ased on the facts of the underlying case and the evidence adduced in these habeas proceedings, trial counsel reasonably advised Xavier that he was unlikely to secure a voluntary manslaughter conviction instead of first- or third-degree murder, either at trial before a jury or through further plea negotiations." (Rep't at 46).

3. Petitioner objects to the conclusion that "[t]he petitioner has failed to adduce sufficient evidence to show that trial counsel's representation fell below an objective standard of reasonableness." (Rep't at 46).

4. Petitioner objects to the conclusion that [t]rial counsel adequately advised Xavier that the offense of criminal homicide with which he was charged included the lesser offense of voluntary manslaughter, as well as the offenses of first- and third-degree murder. (Rep't at 45-46).

5. Petitioner objects to the finding that he had to adduce evidence to demonstrate that, had he gone to trial, it was reasonably likely that he would have been convicted on the lesser-included offense of voluntary manslaughter, and neither first- nor third-degree murder. (Rep't at 9).

6. Petitioner objects to the conclusion that Xavier's testimony was only partially credible. (Rep't at 11).

7. Petitioner objects to the conclusion that trial counsel's testimony was fully credible. (Rep't at 22).

8. Petitioner objects to the conclusion that "there is no evidence that Ms. LaBarbera coerced, misled, or otherwise unduly compelled Xavier to accept the negotiated plea agreement in which he agreed to plead guilty to third-degree murder, with a sentence of twenty to forty years in prison, in exchange for dismissal of first-degree murder and all other charges." (Rep't at 38).

9. As set forth more fully in the accompanying brief, Ms. LaBarbera could not have rendered effective assistance of counsel when she could not have "adequately" or "reasonably" discussed voluntary manslaughter when Ms. LaBarbera failed to conduct any investigation into Xavier's claims that he had been abused by the victim, that she assaulted him first, and that he snapped.

WHEREFORE, the Petitioner, Gustavo Xavier, submits the foregoing as his objections to the Magistrate Judge's Report and Recommendation.

Respectfully submitted,

Date: June 23, 2021

/s/ Lori J. Ulrich
LORI J. ULRICH, ESQ.
Asst. Federal Public Defender
Attorney ID# PA55626
100 Chestnut Street, Third Floor
Harrisburg, PA 17101
Tel. No. 717-782-2237
Fax No. 717-782-3881
lori_ulrich@fd.org
Attorney for Gustavo Xavier

CERTIFICATE OF SERVICE

I, Lori J. Ulrich, Esquire, of the Federal Public Defender's Office, do hereby certify that I served a copy of the foregoing **Objections to the Magistrate Judge's Report and Recommendation**, by Electronic Case Filing, and/or by placing a copy in the United Sates mail, first class in Harrisburg, Pennsylvania, addressed to the following:

Mark H. Darmofal, Esquire
Susquehanna County District Attorney's Office
181 Maple Street
PO Box 218
Montrose, PA 18801
mdarmofal@susqco.com
da@susqco.com

Gustavo Xavier
JB-5610
SCI Albion
10745 Route 18
Albion, PA 16457-0002

Date: June 23, 2021

/s/ Lori J. Ulrich
LORI J. ULRICH, ESQ.
Asst. Federal Public Defender
Attorney ID# PA55626
100 Chestnut Street, Third Floor
Harrisburg, PA 17101
Tel. No. 717-782-2237
Fax No. 717-782-3881
lori_ulrich@fd.org
Attorney for Gustavo Xavier

CERTIFICATE OF SERVICE

I, Ronald A. Krauss, Esq., Assistant Federal Public Defender, certify that I caused to be served on this date a copy of the foregoing document via Electronic Case Filing, and/or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, and/or by hand delivery, addressed to the following:

MARK H. DARMOFAL, ESQ.
Susquehanna County District Attorney's Office
P. O. Box 218
Montrose, PA 18801
mdarmofal@susqco.com
Attorney for Respondents/Appellees

Mr. GUSTAVO XAVIER,
Petitioner/Appellant

/s/ Ronald A. Krauss
RONALD A. KRAUSS, ESQ.
First. Asst. Federal Public Defender

Date: November 24, 2021

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

GUSTAVO XAVIER,	:	Civil No. 1:12-CV-01603
Petitioner,	:	
v.	:	Judge Jennifer P. Wilson
MICHAEL HARLOW, *et al.*,	:	
Respondents.	:	Magistrate Judge Joseph F. Saporito, Jr.

ORDER

AND NOW, on this 10th day of August, 2021, for the reasons stated in the accompanying memorandum, **IT IS ORDERED AS FOLLOWS:**

1. The report and recommendation, proposed findings of fact, and proposed conclusions of law issued by United States Magistrate Judge Joseph F. Saporito, Jr. (Doc. 89) are **ADOPTED IN THEIR ENTIRETY**.
2. Petitioner's objections (Doc. 92) are **OVERRULED**.
3. The petition for writ of habeas corpus (Doc. 1) is **DENIED WITH PREJUDICE**.
4. A certificate of appealability will not issue.
5. The Clerk of Court is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

found neither. Having overruled the objections, the court will adopt Judge Saporito's report and recommendation in its entirety and deny Xavier's petition with prejudice. A certificate of appealability will not issue because no reasonable jurist would find the court's decision debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

CONCLUSION

For the foregoing reasons, Judge Saporito's report and recommendation, proposed findings of fact, and proposed conclusions of law are adopted in their entirety, Xavier's objections are overruled, and Xavier's petition for writ of habeas corpus is denied with prejudice. An appropriate order follows.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: August 10, 2021

ALD-235 April 28, 2016

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **16-1289**

GUSTAVO XAVIER, Appellant

VS.

SUPERINTENDENT ALBION SCI, ET AL.

(M. D. Pa. Civ. No. 3-12-cv-01603)

Present: AMBRO, SHWARTZ, and NYGAARD, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

MMW/AJG/pdb

ORDER

Xavier's application for a certificate of appealability is granted as to the following issues: (1) whether the District Court erred in concluding that Xavier is procedurally barred from pursuing his claim that counsel was ineffective for failing to advise him that he might only be convicted of manslaughter if he opted for trial; and (2) whether counsel was ineffective for failing to challenge inculpatory statements given to investigators while Xavier was heavily medicated in the ICU. Reasonable jurists could debate whether the District Court should have resolved these claims differently. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant's application is otherwise denied.

By the Court,

s/Patty Shwartz
Circuit Judge

ALD-073

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2688**

GUSTAVO XAVIER, Appellant

VS.

SUPERINTENDENT ALBION SCI, ET AL.

(M.D. Pa. Civ. No. 3-12-cv-01603)

Present: JORDAN, RESTREPO and SCIRICA, Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Xavier's request for a certificate of appealability is granted because jurists of reason could debate the merit of his claim that ineffective assistance of counsel resulted in the entry of an involuntary and unintelligent guilty plea. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see also 28 U.S.C. § 2253(c); Hill v. Lockhart, 474 U.S. 52, 58–59 (1985) (holding that a habeas petitioner can show ineffective assistance of counsel at the plea bargain stage if counsel's representation fell below an objective standard of reasonableness and "there is a reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial"); Strickland v. Washington, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); United States v. Bui, 795 F.3d 363, 367 (3d Cir. 2015) ("When addressing a guilty plea, counsel is required to give a defendant enough

information to make a reasonably informed decision whether to accept a plea offer.") (internal quotation marks and citation omitted). A briefing schedule shall issue.

By the Court,

s/ L.Felipe Restrepo
Circuit Judge

Dated: February 22, 2022
JK/cc: All Counsel of Record

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GUSTAVO XAVIER,

Petitioner,

v.

MICHAEL HARLOW,
Superintendent,

Respondent.

CIVIL ACTION NO. 3:12-CV-01603

(CAPUTO, J.)
(SAPORITO, M.J.)

ORDER

AND NOW, this 20th day of March, 2020, pursuant to General Order 20-1, IT IS HEREBY ORDERED THAT the evidentiary hearing currently scheduled in the above-captioned action for April 6, 2020, is **CONTINUED TO June 16, 2020, at 10:00 a.m. in Courtroom 1, Max Rosenn United States Courthouse, 197 S. Main Street, Wilkes-Barre, Pennsylvania.**

Dated: March 20, 2020

Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

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

GUSTAVO XAVIER,	:	Civil No. 1:12-CV-01603
Petitioner,	:	
v.	:	Judge Jennifer P. Wilson
MICHAEL HARLOW, *et al.*,	:	
Respondents.	:	Magistrate Judge Joseph F. Saporito, Jr.

ORDER

AND NOW, on this 10th day of August, 2021, for the reasons stated in the accompanying memorandum, **IT IS ORDERED AS FOLLOWS:**

1. The report and recommendation, proposed findings of fact, and proposed conclusions of law issued by United States Magistrate Judge Joseph F. Saporito, Jr. (Doc. 89) are **ADOPTED IN THEIR ENTIRETY.**
2. Petitioner's objections (Doc. 92) are **OVERRULED.**
3. The petition for writ of habeas corpus (Doc. 1) is **DENIED WITH PREJUDICE.**
4. A certificate of appealability will not issue.
5. The Clerk of Court is directed to close this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-2688

GUSTAVO XAVIER,
Appellant
v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL PENNSYLVANIA; DISTRICT ATTORNEY SUSQUEHANNA COUNTY

(D.C. No. 3:12-cv-01603)

ORDER

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and *FISHER Circuit Judges

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

*Judge Fisher's vote is limited to panel rehearing.

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/ David J. Porter
Circuit Judge

Dated: March 17, 2023
JK/cc: Gustavo Xavier
All Counsel of Record

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