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PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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PHILADELPHIA, PA 19106-1790
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January 9, 2023

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Gregory Smith
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Albion, PA 16475

RE: Gregory Smith v. Superintendent Albion SCI, et al
Case Number: 22-2673
District Court Case Number: 2-18-cv-01661

ENTRY OF JUDGMENT

Today, **January 09, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Laurie
Case Manager
267-299-4936

cc: Brandy S. Lonchena

DLD-059

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-2673**

GREGORY SMITH, Appellant

VS.

SUPERINTENDENT ALBION SCI, et al.

(W.D. Pa. 2-18-cv-01661)

Present: JORDAN, SHWARTZ, 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

The foregoing request for a certificate of appealability is denied because Smith has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). For essentially the reasons provided by the Magistrate Judge and adopted by the District Court, jurists of reason would agree, without debate, that Smith's claims are procedurally defaulted, meritless, or both. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Coleman v. Thompson, 501 U.S. 722, 750 (1991).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: January 9, 2023
Lmr/cc: Gregory Smith
Rusheen R. Pettit, Esq.
Ronald Eisenberg, Esq.

A True Copy:

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

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

GREGORY SMITH, Plaintiff, vs. SUPERINTENDENT CLARK, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, PENNSYLVANIA, AATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Defendants.	2:18-CV-01661-RJC

ORDER

AND NOW, this 22nd day of August 2022, after Petitioner, Gregory Smith, filed a Petition for Writ of Habeas Corpus (ECF No. 8), and after a Report and Recommendation was filed by Chief Magistrate Judge Cynthia Reed Eddy recommending the dismissal of the petition because none of Petitioner's asserted claims were cognizable (ECF No. 31), and having received no objections, the Court hereby ADOPTS Chief Magistrate Judge Eddy's Report and Recommendation (ECF No. 31) as its Opinion.

IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus (ECF No. 8) is DISMISSED WITH PREJUDICE;

IT IS FURTHER ORDERED that a certificate of appealability is DENIED because reasonable jurists could not conclude that a basis for appeal exists.[1] Petitioner has failed to allege

[1] A certificate of appealability may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). The Court agrees with Chief Magistrate Judge Eddy that there is no probable cause to issue such a certificate in this action.

the denial of a constitutional right that would entitle him to habeas relief, let alone demonstrate a substantial showing of the denial of that right;

IT IS FURTHER ORDERED THAT the Clerk of Court shall mark this case as CLOSED; and

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Appellate Procedure 4(a)(1), if Petitioner desires to appeal from this Order, he must do so within thirty (30) days by filing a notice of appeal as provided in Federal Rule of Appellate Procedure 3.

BY THE COURT:

/s/ Robert J. Colville
ROBERT J. COLVILLE
United States District Judge

Cc: GREGORY SMITH
LJ-6923
SCI Albion
10745 Route 18
Albion, PA 16475-0002
(via U.S. First Class Mail)

Rusheen R. Pettit Office of the District Attorney
(via ECF electronic notification)

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

GREGORY SMITH, Petitioner, v. SUPERINTENDENT CLARK, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	)	Civil Action No. 2: 18-cv-1661 United States District Judge Robert J. Colville Chief United States Magistrate Judge Cynthia Reed Eddy

REPORT AND RECOMMENDATION[1]

I. RECOMMENDATION

Petitioner, Gregory Smith ("Smith"), is a state prisoner in the custody of the Pennsylvania Department of Corrections and currently confined at the State Correctional Institution at Albion, in Albion, Pennsylvania. He has filed the instant Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging the judgment of sentence imposed on him in the Court of Common Pleas of Allegheny County, Pennsylvania, on January 15, 2014, in criminal case CP-02-CR-0015978-2012. (ECF No. 8). For the reasons below, it is recommended that the Petition be denied and a certificate of appealability as to each claim be denied.

II. REPORT

A. Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 2254, the federal habeas statute applicable to prisoners in custody pursuant to a state court judgment. It permits a federal court to grant a state

[1] This matter has been referred to the undersigned United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

prisoner the writ of habeas corpus "on the ground that he or she is in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). It is Smith's burden to prove that he is entitled to the writ. 28 U.S.C. § 2254(a); *see, e.g.*, *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 848-49 (3d Cir. 2017). There are other prerequisites that he must satisfy before he can receive habeas relief on his claims. For example, the burden imposed on him by the standard of review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (which is discussed below). But, ultimately, Smith cannot receive federal habeas relief unless he establishes that he is in custody in violation of his federal constitutional rights. 28 U.S.C. § 2254(a); *see, e.g.*, *Vickers,* 858 F.3d at 849.

B. Relevant and Procedural Background[2]

In January 2013, Smith was charged by Criminal Information with one count of criminal homicide for the shooting death of Jacquae Pascal in the Hill District section of Pittsburgh, Pennsylvania, on July 6, 2012. On September 30, 2013, Smith appeared before the Honorable Anthony M. Mariani and proceeded to a jury trial. He was represented by Attorney Carrie L. Allman, Assistant Public Defender. The Commonwealth was represented by Attorney Christopher Avetta, Assistant District Attorney. On October 3, 2013, with the jury deadlocked, Judge Mariani declared a mistrial.

Smith was retried before a jury on January 13, 2014. At the conclusion of the two-day trial, the jury found Smith guilty of First-Degree Murder. Smith was sentenced that same day to

---

[2] Respondents electronically filed as exhibits to their Answer (ECF No. 16) relevant parts of the state court record. For ease of reference, the Court uses the page numbers from the CM/ECF header. Respondents have also submitted a hard copy of the original file from the Court of Common Pleas for Smith's criminal case, including the transcripts from the Suppression Hearing held on April 29, 2013 (T13-0973) and the Trial held on January 13-15, 2014 (T14-0399).

a mandatory term of life imprisonment without parole. Attorney Allman continued to represent Smith during his second trial and on direct appeal.

The Pennsylvania Superior Court, in affirming the judgment of sentence, recounted the factual background and evidence that led to Smith's arrest and conviction as follows:

> The evidence adduced at trial was based heavily on the testimony of James Upshaw. Mr. Upshaw testified that . . . he was a friend of the victim, Jacquae Pascal. Mr. Upshaw testified that, on July 6, 2012, he had made plans to meet Mr. Pascal at the Team Mozzi barbershop in the Hill District area of the City of Pittsburgh to get haircuts together. Mr. Upshaw explained that July 6th was Mr. Pascal's birthday and they were going to hang out for a period of time on that day. Mr. Upshaw testified that [he] brought his four year-old son along to get a haircut. Mr. Upshaw, his son and Mr. Pascal met at the barbershop to get haircuts. When Mr. Upshaw arrived at the barbershop, there were others in the barbershop waiting to get a haircut. Most of the customers were discussing basketball. [Smith] was in the barber's chair. Mr. Upshaw testified that he had known [Smith] for a number of years.
>
> Mr. Upshaw testified that [Smith] got his haircut and left the barbershop. Mr. Upshaw was under the impression that [Smith] left to go to his girlfriend's house. [Smith] shortly returned and remained outside the barbershop. While Mr. Upshaw and his son were waiting their turn for a haircut, Mr. Upshaw's son advised Mr. Upshaw that he was thir[s]ty and asked if he could get some water due to the hot temperatures inside the barbershop. Mr. Upshaw agreed to purchase a bottle of water for his son. Mr. Pascal indicated he would go with Mr. Upshaw and his son to get something to drink. The three of them left the barbershop and crossed the street on their way to "Juan's", a local convenience store. As they crossed the street, Mr. Upshaw saw [Smith] come up behind the victim and shoot him multiple times with a chrome revolver. Mr. Upshaw testified he screamed at [Smith] and asked him "why would you do this, what is wrong with you?"
>
> Immediately after the shooting, Mr. Upshaw saw [Smith] run into [his] girlfriend's residence. At that point, Mr. Uphsaw left the scene with his son and went to his mother's house. He called . . . Mr. Pascal's girlfriend and told her what happened. He did not, however, inform the police what happened at that time. Because [Smith] was not in custody, Mr. Upshaw feared for his safety and kept what he knew to himself. For some time, he did not contact the police about what occurred. He later agreed to provide details of the shooting but only after his family was placed into the witness protection program.
>
> City of Pittsburgh Officer Matthew O'Brien responded to the scene. The shooting occurred near the intersection of Center Avenue and Kirkpatrick at . . . approximately 2:00 p.m. Upon arriving at the scene, he canvassed the area

attempting to locate any witnesses to the shooting. Despite the presence of many people at the scene, nobody was willing to discuss the shooting with him. There were no bullet casings found at the scene. The absence of casings was consistent with use of a revolver to commit the shooting.

Homicide detectives were dispatched to the scene. Through the course of their investigation, they were informed that a person known on the street as "Pretty" may have been responsible for the shooting. It was learned that [Smith]'s nickname was "Pretty". Detectives then sent out word within the police department that they were looking for [Smith].

Later in the evening, on the night of the shooting, Pittsburgh Police Officers pulled over a vehicle in the South Side section of the City of Pittsburgh that was involved in a hit and run. [Smith] was inside the vehicle when the responding officers stopped the vehicle. When the officers identified [Smith], they contacted homicide detectives to advise that they had [Smith] in custody.

Homicide detective Thomas Leheny interviewed [Smith] on the night of the shooting. Detective Leheny informed [Smith] that he did not have to speak with the detectives. Detective Leheny did advise [Smith] that he was not under arrest. [Smith] agreed to speak with Detective Leheny. [Smith] told Detective Leheny that prior to the shooting he was with a girl in the West End of Pittsburgh at the time of the shooting. [Smith], however, could not provide a name or phone number for the girl nor could he provide an address for the girl.

[Smith] then told Detective Leheny that he was driving through the Hill District talking on his cell phone when the murder occurred. Detective Leheny had not advised [Smith] where the murder occurred. [Smith] verbally consented to a gunshot residue test of his clothing. Detectives obtained [Smith]'s t-shirt for processing. Testing confirmed that gunshot residue was present on the front of the t-shirt. After this was done, Detective Leheny continued to speak with [Smith]. At this point, [Smith] put his head down and told Detective Leheny that he "wasn't right in the head" and he was prone to sudden bursts of anger since he was a kid. [Smith] told Detective Leheny that he didn't want to talk anymore and asked if he was free to leave. [Smith] then left the police station.

An arrest warrant was issued for [Smith] on August 30, 2012. [Smith] could not be located. Officer Matthew McCarthy testified that he was on patrol on November 7, 2013 when he conducted a traffic stop of a vehicle driven by Johnny Rutherford for speeding. Once the vehicle was pulled over, the front seat passenger, [Smith]'s brother, quickly exited the vehicle. [Smith], who was the back seat passenger, attempted to get out of the vehicle by climbing over the front passenger seat. Officers quickly secured the vehicle. Upon being asked for identification, [Smith] gave a false name and date of birth. He provided an age that was not possible based on the date of birth he provided. Because of his false

> answers, he was placed into custody. [Smith] was subsequently identified and arrested for the homicide of Mr. Pascal.
>
> Amber Traylor testified that she was driving in the area. As she was driving on Kirkpatrick Street, she heard loud noises. She observed the shooting in her rearview mirror. She saw three people standing outside the barbershop and she saw another person shooting at a person lying on the street. She was not able to provide detailed descriptions of any of the persons she observed at the scene of the shooting.
>
> The medical examiner testified in this case that the cause of Mr. Pascal's death was multiple gunshot wounds to his trunk and extremities. The manner of death was homicide. Mr. Pascal suffered six total gunshot wounds. Three of the gunshot wounds were to his back. The first wound entered the middle of his back and pierced his pulmonary vein and the heart. Mr. Pascal sustained other gunshot wounds to his buttocks, his right shoulder, his right upper arm and to the back of his hand.

Commonwealth v. Smith, No. 451 WDA 2014, 131 A.3d 101 (Pa. Super. Ct. Aug. 21, 2015) (table), *appeal denied*, 128 A.3d 220 (Pa. Dec. 16, 2015) (table) (quoting Trial Court Opinion, 7/19/2014, at 1-5) (ECF No. 16-5, pp. 1-5). The Pennsylvania Superior Court affirmed the judgment of sentence and the Supreme Court of Pennsylvania denied Smith's petition for allowance of appeal ("PAA"). *Commonwealth v. Smith*, No. 383 WAL 2015 (Pa. 2015). (*Id.*, p. 27). Smith did not seek further review in the Supreme Court of the United States.

In June, 2016, Smith filed a timely *pro se* petition for post-conviction collateral relief under Pennsylvania's Post-Conviction Relief Act ("PCRA"). (ECF No. 16-7). In it, he raised four issues: one ineffective assistance of counsel claim for failing to investigate and present mental health evidence; two trial court error claims, and one due process claim under *Batson v. Kentucky.* Attorney Scott Coffey was appointed to represent Smith during the PCRA proceedings. On September 28, 2016, Attorney Coffey filed a no-merit letter pursuant to *Commonwealth v. Turner*, 544 A.2d 213 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (ECF No. 16-8). The trial court, now the PCRA court, granted Attorney Coffey's request to withdraw and issued a notice of intent to dismiss the PCRA petition. On October 25, 2016, the PCRA court

denied Smith's PCRA petition. (ECF No. 16-10). The Superior Court affirmed the denial of the PCRA petition, and the Supreme Court of Pennsylvania denied Smith's PAA. *Commonwealth v. Smith,* No. 1767 WDA 2016, 181 A.3d 416 (Pa. Super. Ct. Nov. 15, 2017) (table), *appeal denied,* 188 A.3d 393 (Pa. filed June 27, 2018). (ECF No. 16-12, at pp. 1-9). Smith sought no further review.

On December 10, 2018, approximately 19 months after Smith's judgment became final, he filed a *pro se* second PCRA Petition raising only the issue that his trial counsel was ineffective for "failing to adequately investigate Smith's documented mental health issues and to procure a psychiatric examination that would have supported a diminished capacity defense that Smith lacked the mens rea necessary to commit murder in the first degree." Second PCRA Petition. (ECF 16-14). On March 5, 2019, the PCRA court denied the second PCRA petition as untimely. Smith filed an appeal and on January 6, 2020, the Superior Court of Pennsylvania affirmed the dismissal of the second PCRA petition as time-barred. (*Id.* at 16-18, at pp. 1-6). Neither the PCRA court nor the Superior Court adjudicated the claim on its merits. Smith sought no further review.

Four days after filing his second PCRA Petition, Smith filed the instant federal habeas petition raising three grounds for relief. (ECF No. 8). At Smith's request, the case was stayed and held in abeyance pending the resolution of his second PCRA Petition in state court. On February 13, 2020, Smith requested that the stay be lifted. His request was granted and the Court directed the U.S. Marshal to serve the petition on Respondents. (ECF No. 9). Respondents filed an Answer (ECF No. 16), to which Smith filed a Traverse. (ECF No. 20). The undersigned has reviewed the filings of the parties, as well as the original state court record, including the transcripts from Smith's suppression hearing and trial, the appellate brief filed by Attorney Allman for Smith on direct appeal (ECF No. 16-4), the *pro se* appellate brief filed by Smith appealing the decision to

dismiss his first PCRA petition (ECF No. 16-11), the *pro se* appellate brief filed by Smith appealing the decision to dismiss his second PCRA petition (ECF No. 16-17), and the Memorandums of the Superior Court of Pennsylvania filed November 15, 2017 (ECF No. 16-12), and January 6, 2020 (ECF No. 16-18). The matter is fully briefed and ripe for disposition.

C. The Standard for Habeas Relief Under 28 U.S.C. § 2254

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). Federal courts reviewing habeas corpus petitions "must be vigilant and independent . . . a commitment that entails substantial judicial resources." *Id.* This case is governed by the federal habeas statute applicable to state prisoners, 28 U.S.C. § 2254, as amended by the AEDPA, "which imposes significant procedural and substantive limitations on the scope" of the Court's review. *Wilkerson v. Superintendent Fayette SCI*, 871 F.3d 221, 227 (3d Cir. 2017).

A finding of fact made by a state court, including credibility determinations, always has been afforded considerable deference in a federal habeas proceeding. *Vickers*, 858 F.3d at 850 (even in pre-AEDPA cases, " 'federal habeas courts [had] no license to redetermine credibility of witnesses who demeanor ha[d] been observed by the state trial court, but not by them' ") (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)). AEDPA continued that deference and mandates that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

AEDPA also put into place a new standard of review, which is codified at 28 U.S.C. § 2254(d). It applies to any federal habeas claim "that was adjudicated on the merits" by the state

courts[3] and it prohibits a federal habeas court from granting relief unless the petitioner established that the Superior Court's "adjudication of the claim":

> was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Becker v. Sec'y Pennsylvania Dep't of Corr., 28 F.4th 459, 460 (3d Cir. 2022) (quoting 28 U.S.C. § 2254(d)). For the purposes of § 2254(d), a claim has been "adjudicated on the merits in State court proceedings" when the state court made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground. *See, e.g., Richter*, 562 U.S. at 98-100; *Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2014).

If the Superior Court did not adjudicate a federal habeas claim on the merits, this Court must determine whether the absence of an adjudication is because petitioner did not raise the claim to the Superior Court and, as a result, it is now procedurally defaulted. If the claim is procedurally defaulted, this Court should deny it for that reason. If the claim is not defaulted, or if petitioner established grounds to excuse his default, the standard of review at § 2254(d) does not apply and this Court reviews the claim *de novo*. *See, e.g., Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

Section 2254(d)(1) applies to questions of law and mixed questions of law and fact. In applying it, this Court's first task is to determine what law falls within the scope of the "clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). "The clearly established law" is " 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.' " *Dennis v. Sec'y,*

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[3] When applying § 2254(d), the federal habeas court considers the "last reasoned decision" of the state courts. *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (quoting *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008)); *Brown v. Sup't Greene SCI*, 834 F.3d 506, 512 (3d Cir. 2016).

Pennsylvania Dep't of Corr., 834 F.3d 263, 280 (2016) (en banc) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (3d Cir. 2003)).

Once the "clearly established Federal law, as determined by the Supreme Court of the United States," is identified, this Court must determine whether the state court's adjudication of the claim at issue was "contrary to" that law. *Williams,* 529 U.S. at 404-05 (explaining that the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1) have independent meaning). A state-court adjudication is contrary to clearly established Federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," *id.* at 405, or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 406.

A "run-of-the-mill" state-court adjudication applying the correct legal rule from Supreme Court decisions to the facts of a particular case will not be "contrary to" Supreme Court precedent. *Id.* at 406. For that reason, the issue in most federal habeas cases is whether the adjudication by the state court survives review under the "unreasonable application" clause of § 2254(d)(1).

"A state court decision is an 'unreasonable application of federal law' if the state court 'identifies the correct governing legal principle,' but 'unreasonably applies that principle to the facts of the prisoner's case.' " *Dennis,* 834 F.3d at 281 (quoting *Williams*, 529 U.S. at 413). To satisfy his burden under this provision of AEDPA's standard of review, a petitioner must do more than convince this Court that the state court's decision was incorrect. *Id.* He must show that it "'was objectively unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409) (emphasis added by *Dennis*). This means that a petitioner must show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond

any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. As the Supreme Court noted:

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer, supra*, at 75, 123 S. Ct. 1166. If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Id. at 102.

The standard of review set forth at § 2254(d)(2) applies when a petitioner "challenges the factual basis for" the state court's "decision rejecting a claim[.]"[4] *Burt v. Titlow*, 571 U.S. 12, 18 (2013). "[A] state court decision is based on an 'unreasonable determination of the facts' if the state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding,' which requires review of whether there was sufficient evidence to support the state court's factual findings." *Dennis,* 834 F.3d at 281 (quoting § 2254(d)(2) and citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). "'[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.' " *Titlow*, 571 U.S. at 18 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)); *see also Becker,* 28 F.4th at 464 (stating that "close calls - decisions upon which reasonable minds

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[4] Sections 2254(d)(2) and (e)(1) "express the same fundamental principle of deference to state court findings[,]" and federal habeas courts "have tended to lump the two provisions together as generally indicative of the deference AEDPA requires of state court factual determinations." *Lambert*, 387 F.3d at 235. Our Court of Appeals has instructed that§ 2254(d)(2), when it applies, provides the "overarching standard" that a petitioner must overcome to receive habeas relief, while 2254(e)(1) applies to "specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision." *Id.*

might disagree – are essentially insulated from federal court reversal AEDPA, which requires federal judges to defer to the reasonable state trial court findings . . .).

When a habeas petitioner claims ineffective assistance of counsel, "review is 'doubly deferential,' because counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment'." *Woods v. Etherton*, 578 U.S. 113, 116 (2016) (quoting *Titlow*, 571 U.S. at 22).

Various standards must be met before the Court can review the merits of Smith's habeas petition.

1. Timeliness

First, the Court must determine whether the habeas petition was timely filed. *Romansky v. Superintendent Green SCI*, 933 F.3d 293, 298 (3d Cir. 2019). Under AEDPA, a state prisoner must file his federal habeas claims within one year of the date his judgment of sentence became final. 28 U.S.C. § 2244(d)(1)(A). Smith's judgment of sentence became final on March 15, 2015, when the time to ask the Supreme Court of the United States to review his direct appeal expired. *See* U.S. Ct. Rule 13. Here Respondents acknowledge that the habeas petition was timely filed. (ECF No. 16, p. 12).

2. Has the Petition Presented Cognizable Habeas Claims?

Habeas relief may be afforded to a state prisoner only when his or her custody violates federal law. 28 U.S.C. § 2254(a); *Wilson v. Corcoran,* 562 U.S. 1, 6 (2010). Smith has presented three claims in this federal habeas petition, all of which are cognizable.

3. Procedural Benchmarks - Exhaustion and Procedural Default

a. Exhaustion of State Court Remedies

Among AEDPA's procedural prerequisites is a requirement that the petitioner "has exhausted the remedies available in the courts of the State" before seeking relief in federal court. 28 U.S.C. § 2254(b). The "exhaustion doctrine" requires that a state prisoner raise his federal constitutional claims in state court through the proper procedures before he litigates them in a federal habeas petition. *See, e.g.*, *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). It is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts[.]" *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The United States Court of Appeals for the Third Circuit has explained:

> A claim is exhausted if it was "fairly presented" to the state courts. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. at 848; *Cristin v. Brennan,* 281 F.3d 404, 410 (3d Cir. 2002); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). A petitioner has fairly presented his claim if he presented the same factual and legal basis for the claim to the state courts. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). A petitioner can "fairly present" his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999).

Nara v. Frank, 48 F.3d 187, 197-98 (3d Cir. 2007).

Moreover, a petitioner must have "invoke[d] one complete round of the State's established appellate review process[,]" in order to satisfy the exhaustion requirement. *O'Sullivan,* 526 U.S. at 845. In Pennsylvania, this requirement means that a petitioner in a non-capital case must have

first presented every federal constitutional claim raised in his federal habeas petition to the Superior Court either on direct or PCRA appeal. *See, e.g., Lambert,* 387 F.3d at 233-34.[5]

b. Procedural Default

If a claim has not been fairly presented "to the state courts but state law clearly forecloses review, exhaustion is excused, but the doctrine of procedural default may come into play." *Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002) (citations omitted). As the Supreme Court of the United States recently explained:

> State prisoners . . . often fail to raise their federal claims in compliance with state procedures, or even raise those claims in state court at all. If a state court would dismiss these claims for their procedural failures, such claims are technically exhausted because, in the habeas context, "state-court remedies are . . . 'exhausted' when they are no longer available, regardless of the reason for their unavailability." *Woodford v. Ngo*, 548 U.S. 81, 92-93, 126 S. Ct. 2378, 165 L. Ed.2d 368 (2006). But to allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule. *See Coleman*, 501 U.S. at 732. Thus, federal habeas courts must apply "an important 'corollary' to the exhaustion requirement": the doctrine of procedural default. *Davila v. Davis*, 582 —— U.S. ——, 137 S. Ct. 2058, 2064 [2017]. Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts "consistent with [the State's] own procedural rules." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed.2d 518 (2000).
>
> Together, exhaustion and procedural default promote federal-state comity. Exhaustion affords States "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam), and procedural default protects against "the significant harm to the States that results from the failure of federal courts to respect" state procedural rules, *Coleman,* 501 U.S. at 750. Ultimately, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without [giving] an opportunity to the state courts to correct a constitutional

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[5] On May 9, 2000, the Supreme Court of Pennsylvania issued Order No. 218 declaring that federal habeas petitioners no longer have to appeal to the state supreme court to satisfy the exhaustion requirement. *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases,* No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam). The Court of Appeals for the Third Circuit has recognized the validity of this Order. *See Lambert v. Blackwell,* 387 F.3d 210, 233-34 (3d Cir. 2004).

> violation," *Darr v. Burford*, 339 U.S. 200, 204 (1950), and to do so consistent with their own procedures, *see Edwards*, 529 U.S. at 452-453.

Shinn v. Ramirez, -- U.S. ---, 142 S.Ct. 1718, 1732 (May 23, 2022).

Federal courts may not consider the merits of a procedurally defaulted claim unless the petitioner can demonstrate "cause" to excuse the default and "actual prejudice resulting from the alleged constitutional violation." *Preston v. Superintendent Graterford SCI,* 902 F.3d 365, 375 (3d Cir. 2018) (quoting *Davila v. Davis*, -- U.S. ---, 137 S. Ct. 2058, 2065 (2017) (quoting *Wainwright v. Skyes*, 433 U.S. 72 (1977)), *cert. denied*, -- U.S. ---, 139 S. Ct. 1613 (2019)).[6] The burden lies with a petitioner to demonstrate circumstances that would excuse a procedural default. *See Sweger v. Chesney*, 294 F.3d 506, 520 (3d Cir. 2002); *see also Coleman*, 501 U.S. at 750.

If the petitioner has established grounds to excuse the default, the standard of review of §2254(d) does not apply and the federal court reviews the claim "de novo because the state court did not consider the claim on the merits." *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017) (citation omitted). In any event, in all cases and whether or not the § 2254(d) standard of review applies, the state court's factual determinations are presumed to be correct under § 2254(e)(1) unless the petitioner rebuts that presumption by clear and convincing evidence. *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010); *Nara v. Frank*, 488 F.3d 187, 201 (3d Cir. 2007) ("the § 2254(e)(1) presumption of correctness applies regardless of whether there has been

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[6] A petitioner, alternatively, can overcome a procedural default by demonstrating that the court's failure to review the defaulted claim will result in a "miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 748 (1991); *McCandless v. Vaughn*, 172 F.3d 225, 260 (3d Cir. 1999). "However, this exception is limited to a 'severely confined category [] [of] cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner]'." *Preston v. Superintendent Graterford SCI,* 902 F.3d 365, 375 n.11 (3d Cir. 2018) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (internal alteration in original) (quoting *Schlup v. Delo*, 514 U.S. 298, 329 (1995)).

an 'adjudication on the merits' for purposes of § 2254(d).") (citing *Appel v. Horn,* 250 F.3d 203, 210 (3d Cir. 2001)).

D. Discussion

The petition asserts that Smith is entitled to relief under 28 U.S.C. § 2254 for the following three reasons:

> GROUND ONE: The Superior Court's decision is unreasonable and/or contrary to the holding of *Miranda*.
>
> GROUND TWO: Smith's Fifth Amendment right against self-incrimination was violated.
>
> GROUND THREE: Trial counsel provided ineffective assistance by failing to pursue a diminished capacity defense.

Petition (ECF No. 8, quoted verbatim). Smith's claims will be addressed seriatim.

1. Was the state court adjudication contrary to or an unreasonable application of *Miranda v. Arizona*, 384 U.S. 436 (1966)

Smith raised this claim on direct appeal and it was adjudicated on the merits. As such, it is deemed exhausted for purposes of federal habeas review, and this Court's decision is governed by AEDPA's standard of review: whether the Superior Court's adjudication of this claim was contrary to, or involved an unreasonable application of clearly established federal law.[7] *See* 28 U.S.C. § 2254(d)(1).

Smith contends that he was denied his rights under the Fourth Amendment when his pre-trial motion to suppress physical evidence and statements was denied. Smith argues, as he did on direct appeal, that he was subjected to a custodial interrogation without first being provided with *Miranda* warnings. Respondents argue that, under the AEDPA standard, Smith has not met his

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[7] The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. Const. Amend. IV.

burden to demonstrate that the state court adjudication was clearly contrary to or an unreasonable application of *Miranda* or its progeny.

The Superior Court began its analysis by explaining that in reviewing a decision on a pre-trial motion to suppress evidence, it was limited to determining whether the factual findings of the suppression court are supported by the record and whether the legal conclusions drawn from those facts are correct. Superior Court Memorandum, 8/21/2015, at p. 8 (quoting *Commonwealth v. Borovichka*, 18 A.3d 1242, 1248-49 (Pa. Super Ct. 2011)) (ECF No. 16-5 at p. 8). Next, the Superior Court provided a thorough explanation of when the warnings articulated by *Miranda* become mandatory. *Id.* at pp. 9-10. And then, after quoting at length the findings of the trial court, the Superior Court concluded by "agree[ing] with the determination of the trial court that Smith's July 7, 2012, interview did not constitute custodial interrogation."

In determining whether Smith was subjected to a custodial interrogation, the Superior Court looked to the standards set forth in *Miranda v. Arizona*. The undersigned finds that the Superior Court applied clearly established Federal law and its adjudication of the claim was not "contrary" to that law. 28 U.S.C. § 2254(d)(1). Next, the Court must determine whether the adjudication survives review under the "unreasonable application" clause of § 2254(d)(1).[8]

After conducting an evidentiary hearing at which Smith testified, the trial court made several credibility determinations. For example, although Smith testified that he did not remember the police talking to him, other than being told "somebody wanted to speak to me and took me to headquarters." N.T. at 94, the trial court found Sergeant Matakovich's testimony credible that he advised Smith that he was not obligated to meet with the detectives, that there was no arrest warrant, that Smith was not under arrest, and Smith agreed to be transported to the police station

[8] Thus, this Court's review centers on the Superior Court's decision of August 21, 2015.

in a police cruiser. The trial court also determined that Detective Leheny's testimony was credible that at no time during the police interview was Smith placed in restraints, even though Smith testified that he was shackled during the entire interview.

The Superior Court found that the record fully supported the trial court's finding that "Smith was not coerced, but voluntarily consented to speak with the investigating detective as well as allow him to take the hand swabs and test his t-shirt." Superior Court Memo., at p. 13. In its Memorandum, the Superior Court quoted at length the trial court's findings:

> On the evening of July 7, 2012, [Smith] was a passenger in a vehicle that was stopped by law enforcement after the vehicle had been involved in a hit and run. After the officer stopped the vehicle, [Smith] was removed from the vehicle and temporarily detained. He was patted down for officer safety. Once [Smith]'s identity was known, officers advised [Smith] that homicide detectives were interested in speaking with him. [Smith] indicated that he would speak with the homicide detectives. Sergeant Stephen Matakovich, who was the ranking officer on the scene, advised [Smith] that he was not obligated to meet with the detectives, that there was no arrest warrant and that he was not under arrest. [Smith] agreed to be transported to the police station in a police cruiser. Pursuant to standard police protocol, [Smith] was handcuffed during transport.
>
> [Smith] arrived at the police station where he was met by Detective Leheny. When [Smith] arrived at the station, he was handcuffed. Detective Leheny removed the handcuffs as [Smith] entered into an interview room. Detective Leheny immediately advised [Smith] that he was not under arrest. [Smith] kept asking about his cell phone and Detective Leheny advised that he had it and would give it back to [Smith]. Detective Leheny asked if he could look at the cell phone to see if he could pull up some phone numbers that might help [Smith] remember who he spoke to or where he was during the day. [Smith] gave him permission to check the cell phone.
>
> Detective Leheny advised [Smith] that he wanted to discuss a homicide that occurred that day. He did not pressure [Smith] to speak with him. [Smith] began voluntarily speaking with Detective Leheny. [Smith] advised Detective Leheny that he was at his girlfriend's house all day in the West End of Pittsburgh. When asked for her name, address or phone number, [Smith] could not provide any of the requested information. [Smith] then asked Detective Leheny what would happen if [Smith] had been in the area of the murder and just happened to drive by it.

> During the interview, [Smith] also gave Detective Leheny verbal permission to perform a gunshot residue test on his hands and he also provided his t-shirt to Detective Leheny to perform a gunshot residue test on it.
>
> Just prior to the end of the interview, [Smith] informed Detective Leheny that he had anger issues, that sometimes his mind is not in the right place and that he is sometimes prone to outbursts of anger. [Smith] advised that he did not want to speak anymore to Detective Leheny. At that point, Detective Leheny terminated the interview and advised [Smith] he was free to leave. Detective Leheny offered [Smith] a ride home. [Smith] declined and left the police station.
>
> The facts of this case demonstrate that [Smith] was not in custody at the time he made statements to Detective Leheny. The record further reflects that [Smith]'s statements were voluntary. In addition, [Smith] voluntarily provided his t-shirt to Detective Leheny for testing and voluntarily consented to the swab of his hands for gunshot residue testing. During the interview, [Smith] was not handcuffed. He was advised that he was free to leave at any time and he was advised that he did not have to speak with Detective Leheny. He was not pressured into the interview. Throughout the interview, [Smith] was cooperative, and despite being free to leave, did not express a desire to leave the room for 30 to 40 minutes. When [Smith] expressed a desire to stop the interview and leave the police station, Detective Leheny stopped the interview and permitted [Smith] to leave. This Court does not believe that [Smith] was subjected to a custodian interrogation and it believes that [he] voluntarily consented to the hand swabs and to providing his t-shirt for testing. According, [this] claim is without merit.

Superior Court Memo., at pp. 10-12 (quoting Trial Court Opinion, 7/19/2014, at pp. 8-10) (ECF No. 16-5, at pp. 10-12). The Superior Court agreed with the trial court that the interview did not constitute a custodial interrogation:

> we agree with the determination of the trial court that Smith's July 7, 2012, interview did not constitute custodial interrogation. Under the totality of these circumstances, Smith did not reasonably believe that his freedom of action or movement was restricted. . . . The fact that police were investigating a report that Smith may have been present at the shooting does not automatically trigger "custody," and require ***Miranda*** warnings.

Id. at p. 12 (citing *Commonwealth v. Baker*, 963 A.2d 495, 502 (Pa. Super. Ct. 2008), *appeal denied*, 992 A.2d 885 (Pa. 2010).

As stated above, a finding of fact made by a state court, including credibility determinations, is afforded considerable deference in a federal habeas proceeding. *Vickers*, 858

F.3d at 850. Additionally, pursuant to § 2254(e)(1), a determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that the factual finding was erroneous. *Id.*; *Ruiz v. Superintendent Huntingdon SCI*, 672 F. App'x 207, 211 (3d Cir. 2016) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (a state court finding of witness credibility is a factual finding presumed to be correct under § 2254(e)(1)), *cert. denied sub nom. Ruiz v. Tice*, 137 S.Ct. 1122 (2017). Applying this deferential standard of review, the undersigned finds Smith has not shown by any evidence, much less clear and convincing evidence, that the factual findings, including credibility determinations, of the state courts were erroneous.

Moreover, to prevail on a claim that the state court has adjudicated on the merits, Smith must demonstrate that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. 86, 103 (2011). *See also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold"). Smith has not met that high threshold.

Viewing the Superior Court's disposition of this claim through the deferential lens of AEDPA, the undersigned has no hesitancy in concluding that Smith has failed to carry his burden to persuade this Court that the Superior Court's disposition was unreasonable, yet alone incorrect. The state court record more than amply supports the Superior Court's conclusion that the interview on July 7, 2012, was a non-custodial interrogation and, as such, *Miranda* warnings were not required; that Smith was not coerced, but voluntarily consented to speak with Detective Leheny, the investigating detective; and that Smith allowed Detective Leheny to take the hand swabs and

test his t-shirt. For these reasons, it is recommended that Smith's first ground for habeas relief be denied as the Superior Court's adjudication of it withstands review under § 2254(d)(1).

2. Was Smith's Fifth Amendment right against self-incrimination violated

Smith's second ground for habeas relief is that his Fifth Amendment right against self-incrimination was violated when Detective Leheny was permitted to testify regarding Smith's decision to end the interview on July 7, 2012. Smith raised this claim on direct appeal, and it was adjudicated on the merits. As such, the claim is deemed exhausted for purposes of federal habeas review, and this Court's decision is governed by AEDPA's standard of review: whether the Superior Court's adjudication of this claim was contrary to, or involved an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). Respondents argue that, under the AEDPA standard, Smith has not met his burden to demonstrate that the state court adjudication was clearly contrary to or an unreasonable application of Federal law or violated the U.S. Constitution.

Smith challenges the following testimony of Detective Leheny elicited by the Commonwealth on direct examination:

> [Detective Leheny]: As I previously explained, while the night felony detective was doing that test and collecting the shirt, I went back outside. When that was completed I went back inside and I continued to talk to Mr. Smith.
>
> At that point, Mr. Smith put his head down, said that he wasn't right in the head, that he was prone to sudden bursts of anger since he was young; and at the conclusion of that statement told me that he didn't want to talk anymore, and [asked] if he was free to leave. I said, in fact, you are.

N.T., 1/13/2014-1/15/2014, pp. 143-44. The trial transcript reflects that defense counsel made a preemptory objection to this testimony, which the trial court overruled. *Id.* at p.140.[9] In its 1925(a) opinion, the trial court explained its ruling, as follows:

> Detective Leheny's testimony did not create any perception that [Smith]'s statements about ending the interview constituted an admission of guilt. Instead, the statement simply provided a context as to how the interview ended. The statement made by [Smith] demonstrated that he was not in custody as he was permitted to leave the police station as soon as he indicated his desire to do so. Nothing about the statement offended the Fifth Amendment.

Trial Court Opinion, 7/19/2014, at p. 11 (ECF No. 16-3 at 11).

In denying the claim on its merits, the Superior Court began its analysis by reiterating the Fifth Amendment's protection against self-incrimination:

> We find it of no moment whether the silence occurred before or after the arrest or before or after ***Miranda*** warnings were administered. The Fifth Amendment was enacted to protect against self-incrimination, whether they are in custody or not, charged with a crime, or merely being questioned during the investigation of a crime. We clarify that our finding does not impose a *prima facie* bar against any mention of a defendant's silence; rather, we guard against the exploitation of appellant's right to remain silent by the prosecution. We conclude that the government may not use such silence as substantive evidence of guilt when a defendant chooses not to testify, and such use should not be limited to "persons in

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[9] While counsel were at side bar to discuss the admissibility of an exhibit to be used during Detective Leheny's direct testimony, the following exchange took place:

> MS. ALLMAN: While we're here, one peremptory matter, because we're getting close to it, I believe that Detective Leheny is going to testify "and then he didn't want to say anything else." I am going to object to that being permitted. I think that's commenting on his right to remain silent.
>
> . . .
>
> MR. AVETTA: Why? That's what concludes the conversation.
>
> . . .
>
> THE COURT: Well, if it is that way, your objection is overruled because it is responsive to the officer's question, the officer's questioning is based on the defendant's saying he will talk. The jury is going to want to know why he stopped asking questions.

N.T., 1/13/2014-1/15/2014, pp. 140-141.

> custody or charged with a crime"; rather, it may also not be used against a defendant who remained silent during the investigation of a crime.

Superior Court Memo., 8/21/2015 at p. 16 (quoting *Commonwealth v. Molina*, 33 A.3d 51, 63 (Pa. Super. Ct. 2011), *aff'd*, 104 A.3d 430 (Pa. 2014). The undersigned finds that the Superior Court did not apply a rule of law that contradicts established Supreme Court precedent and its decision was not contrary to clearly established Supreme Court precedent. Accordingly, the issue that remains is whether the adjudication by the Superior Court survives review under the "unreasonable application" clause of § 2254(d)(1).

The Superior Court found that the record supports the conclusion that the Commonwealth did not offer evidence, via Detective Leheny's testimony, of Smith's pre-arrest silence as substantive evidence of his guilt. Rather, "the Commonwealth elicited the testimony for the narrow purpose of explaining 'the way that the conversation ended'." Superior Court Memo., at p. 19. In making this finding, the Superior Court concluded that "Smith's constitutional rights were not violated, and the trial court did not abuse its discretion in admitting the testimony at issue." *Id.* at p. 20.

As with Smith's first ground for relief, the Court must view the Superior Court's disposition of this claim through the deferential lens of AEDPA. The undersigned concludes that Smith has failed to carry his burden to persuade this Court that the Superior Court's adjudication was unreasonable. The record supports the Superior Court's conclusion that the testimony was not offered as evidence of Smith's guilt, but rather was offered to explain why the interview ended. The reference to Smith's silence was brief in context and did not occur in a context likely to suggest to the jury that Smith's silence was the equivalent of a tacit admission of guilt. For these reasons, it is recommended that Smith's second ground for habeas relief be denied because the Superior Court's adjudication of it withstands review under § 2254(d)(1).

3. Was trial counsel ineffective for failing to investigate and/or pursue a diminished capacity defense[10]

Ineffective assistance of counsel claims are grounded in rights guaranteed under the Sixth Amendment and are governed *Strickland v. Washington*, 466 U.S. 668 (1994). Under *Strickland,* counsel is presumed effective, and to prevail on an ineffectiveness claim, a petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Given this presumption, the petitioner must demonstrate that (1) his attorney's representation fell well below an objective standard of reasonableness; and (2) there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688-96.

In Smith's third and final ground for relief, he claims that his trial counsel rendered ineffective assistance by failing to investigate and/or pursue a diminished capacity defense and argues that he might have been convicted of a lesser homicide offense had counsel presented a

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[10] In his Traverse, Smith raises for the first time what appears to be a stand-alone claim that PCRA counsel was ineffective. *See* Traverse at 2 ("PCRA counsel Scott Coffey, Esquire, was ineffective for filing a no merit letter, instead of attempting to adequately develop and litigate the diminished capacity defense . . . ."). Such a claim fails for two reasons. First, "[a] habeas petitioner cannot raise new claims in a reply (formerly known as a traverse) or in other filings made after the respondent has filed the answer." *Burns v. Attorney General of the State of Pennsylvania*, No. 14-300, 2016 WL 128212, *8 (W.D. Pa. Jan. 12, 1986); *see also* Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts ("The petition must: (1) specify all the grounds for relief available to the petitioner; . . . ." Second, Smith did not have a constitutional right to counsel during his PCRA proceeding, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), and for that reason, he cannot receive habeas relief on a claim that his PCRA counsel was ineffective. *See* 28 U.S.C. § 2254(j) ("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); *Coleman v. Thompson*, 501 U.S. 722, 752-53 (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.").

diminished capacity defense. Traverse, at p. 5. Respondents contend that Smith procedurally defaulted this claim when he did not pursue it in the first complete round of PCRA litigation in the state court. They add that his attempt to present it in his second PCRA petition, which the state courts rejected as untimely, does not alter the posture of this claim on habeas review, inasmuch as the state court's rejection of the claim when presented was independent of the merit of the constitutional claim and based upon a state statute of limitations rule that was adequate to support the judgment.[11] The undersigned agrees that procedural default bars review.

The record reflects that Smith raised the claim in his first PCRA petition, but he abandoned the issue. In his response to the notice of dismissal, he did not raise the issue and he did not raise the issue in his first PCRA appeal.[12] Smith then presented the claim to the state courts in his

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[11] In the alternative, Respondents argue that the claim should be denied as it is without merit.

[12] In his response to the notice of dismissal, Smith asserted an alleged defect in the information, an alleged sentencing error, and an allegation that trial counsel was ineffective for failing to make a *Batson* objection. On PCRA appeal, Smith raised the following eight issues, which are set forth verbatim:

> 1. Was Appellant's bill of information-indictment, facially defective pursuant to Pa. Rule of Criminal Procedure 560(B)(5)?
>
> 2. Did the trial court err in proceeding to trial upon a defective information?
>
> 3. Did the trial court pronounce judgment and sentence upon Appellant on a specific crimes code violation not contained in the bill of information?
>
> 4. Did the trial court order the bill of information offense originally charged to be amended, after the imposition of sentence?
>
> 5. Did the trial court deviate from sentencing procedures set out in the sentencing code at 42 Pa.C.S. sub. sec. 9711?
>
> 6. Whether or not the state or defense didn't object to proceeding with immediate sentencing, what authority did the court have from deviating from sentencing procedure set out for first degree murder at 42 Pa.C.S. sub. sec. 9711, and if this was not a death qualified case, what authority is stated in said procedure at 42

second PCRA petition, but did not do so in a timely-filed PCRA petition. A federal court ordinarily may not review a claim on the merits if the state court's denial of relief is based on a state procedural rule that rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

A state procedural ground for denying a PCRA claim in Pennsylvania includes the PCRA's timeliness requirement, 42 Pa. C.S. § 9545(b), which requires that a petitioner file his PCRA petition within one-year of his conviction becoming final.[13] This statutory law is "independent" of federal law, and since at the time Smith filed his second PCRA petition Pennsylvania courts consistently and regularly denied review of claims when not filed within the time proscribed by § 9545(b), it was also "adequate." *See Commonwealth v. Murray*, 753 A.2d 201, 203 (Pa. 2000) (time requirement for filing PCRA petition is mandatory and jurisdictional in nature), *abrogated on other grounds by Commonwealth v. Brown*, 943 A.2d 264 (Pa. 2008).

> Pa.C.S. sub. sec. 9711, that permits automatic imposition of sentence of life without parole?
>
> 7. Sentencing procedures for conviction of first degree murder, under statutory law, at 42 Pa.C.S. sub. sec. 9711, are only for death qualified and pursued cases, what other statute authorizes mandatory life without parole for a conviction of first degree murder, 18 P.C.S. sub. sec. 1102(a)(i), and if no other statute exists, how was defendant's jury instructed on first degree murder when it was not a death penalty case, and no statutory penalty exists for the court to access for imposition of any sentence thereafter, under statutory law?
>
> 8. PCRA counsel did not meet individual *Finley* requisites to show no pattern of exclusion of prospective jurors county-wide, as alleged, but merely spoke with trial counsel whom believed a Batson claim didn't occur and took her on her word, and showed no individual investigation steps per *Finley*?

Smith's Appellant Brief at iii-iv.

[13] This Court "must defer" to the holdings of the state courts on whether a PCRA petition is untimely. *See Merritt v. Blaine*, 326 F.3d 157, 165-66 (3d Cir. 2003).

Smith can overcome this procedural default if he can demonstrate cause and prejudice or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. However, Smith has failed to plead, let alone demonstrate, cause and prejudice or a fundamental miscarriage of justice to overcome the default. He asserts that his mental health issues were documented in 2003, 2012, and 2015. Yet, he offers no explanation of why he abandoned the issue in his first PCRA proceedings and appeal. Further, he has failed to prove that refusing to review this claim results in a fundamental miscarriage of justice.

Moreover, even if the claim were to be reviewed *de novo*, Smith is unable to show how trial counsel was ineffective for failing to raise a diminished capacity defense. "If a defendant does not admit that he killed the victim, but rather advances an innocence defense, then evidence on diminished capacity is inadmissible." *Commonwealth v. Hutchinson*, 25 A.3d 277, 312 (Pa. 2011).

Smith's trial counsel's strategy was that the Commonwealth had no evidence to prove Smith was involved in the homicide. Smith has not shown that counsel was ineffective for pursuing this strategy. *See Strickland*, 466 U.S. at 689 (courts indulge strong presumption that counsel's conduct is sound trial strategy). In her opening statement, Attorney Allman told the jury:

> You are going to hear from a lot of witnesses, but think about the testimony that they can tell you, and can they answer the critical question: Who shot and killed Jaquae (sic) Pascal? What happened to Mr. Pascal on July 6, 2012?
>
> That's the question that you are here to answer. And I submit to you at the end of these several days you are not going to be able to answer that question beyond a reasonable doubt.

N.T., 1/13-15//2014, pp. 24-25. And in her closing argument, Attorney Allman repeated that theme, arguing that, although the jury had heard from many witnesses,

> many of those witnesses would be what I called bucket fillers, which is my phrase. And essentially what I mean by that is they are people who had some tangential connection to this case, but they couldn't answer the ultimate question before you: Who shot and killed Jaquae (sic) Pascal on July 6, 2012?

Id. at p. 341. Attorney Allman also addressed some of the testimony that was presented at trial:

> a. James Upshaw waited six weeks before giving a statement to the police after the shooting and testified at trial that Smith was wearing a black shirt when he came up from behind the victim and shot him multiple times in the back. N.T. 1/13-15/14 at p. 214;
>
> b. Eunice McGill testified that she did not see Smith at all during the incident and that Smith would have had to run past her house to get to his house. *Id.* at p. 124;
>
> c. Amber Traylor testified that the shooter was wearing a white t-shirt and not a black shirt as testified to by James Upshaw. *Id.* at pp. 258, 261;
>
> d. Gunshot residue expert Daniel Wolfe testified that GSR test conducted on Smith's hands were inconclusive. Id. at p. 290.

Moreover, and importantly "[t]he extremely limited defense of diminished capacity, which encompasses voluntary intoxication and mental defect, is only available to defendants who admit criminal culpability but contest the degree of culpability based upon an inability to formulate the specific intent to kill." *Commonwealth v. Weiss,* 81 A.3d 767, 796 (Pa. 2013) (citations omitted); *Commonwealth v. King*, 57 A.3d 607, 622 (Pa. 2012) (noting that "under this Court's prevailing precedent, [ ] a [defense of diminished capacity] to first-degree murder is only available to defendants who admit that they killed the victim, but contest the degree of guilty based on an inability, at the time of the offense, to formulate a specific intent to kill due to a mental defect or voluntary intoxication."); *Commonwealth v. Hutchinson*, 25 A.3d at 312 (finding that a diminished capacity defense was not available to defendant because he "did not concede any liability in the killing of the victim) Rather [defendant] relied on an innocence defense, presenting an alibi

witness, attempting to undermine the credibility of the child witnesses, and attempting to inculpate the victim's husband in her murder.").

The record is clear that at no point did Smith ever accept or concede liability in the killing of the victim. His defense theory was that the Commonwealth could not prove that Smith was involved in the homicide. On this record, the undersigned has no hesitancy in finding that trial counsel cannot be deemed ineffective for failing to pursue a diminished capacity defense when Smith steadfastly insisted that he did not commit the homicide. For all these reasons, the undersigned recommends that Smith's third ground for habeas relief be denied.

E. The Request For An Evidentiary Hearing (ECF 20)

Smith has requested an evidentiary hearing on his defaulted ineffective assistance of counsel claim. Traverse, at p. 6. This request is guided by 28 U.S.C. § 2254(e)(2). "Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it." *Shinn,* 142 S.Ct. at 1728. But the standard under AEDPA to expand the state-court record is stringent. *Id.* "If a prisoner has 'failed to develop the factual basis of a claim in State court proceedings,' a federal court 'shall not hold an evidentiary hearing on the claim' unless the prisoner satisfies one of two narrow exceptions[.]" *Id.* (quoting 28 U.S.C. § 2254(e)(2)). More specifically, the prisoner must show that "the claim relies on" either: "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or . . . a factual predicate that could not have been previously discovered through the exercise of due diligence[.]" 28 U.S.C. § 2254(e)(2)(A). In addition to showing one of the above, to be entitled to an evidentiary hearing, the prisoner must "demonstrate[ ] that the new evidence will establish his innocence 'by clear and convincing evidence[.]' " *Shinn,* 142 S. Ct. at 1728 (quoting 28 U.S.C. § 2254(e)(2)(B)). "In all

but these extraordinary cases, AEDPA 'bars evidentiary hearings in federal habeas proceedings initiated by state prisoners.' " *Id.* (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013)).

Smith does not dispute that he failed to develop the factual basis of the claim in state court. Nor does he argue that he can meet the stringent requirements of § 2254(e)(2)(A), such that he is entitled to an evidentiary hearing under that provision. In fact, he does not address § 2254(e)(2) at all. In sum, Smith has not shown that he meets the requirements necessary under § 2254(e)(2) to entitle him to an evidentiary hearing in this Court to develop the facts to support his defaulted ineffective assistance of trial counsel claim.

III. CERTIFICATE OF APPEALABILITY

AEDPA codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). It also provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of

the constitutional claims debatable or wrong." *Id.* Applying those standards here, the undersigned concludes that jurists of reason would not find it debatable whether each of Smith's claims should be denied. For these reasons, it is recommended that a certificate of appealability not be issued on any of Smith's claims.

IV. CONCLUSION

For all of the above reasons, it is respectfully recommended that the instant habeas petition for writ of habeas corpus be denied. It is also recommended that a certificate of appealability not be issued as there is no basis upon which to grant one on any of the claims raised.

Any party is permitted to file written specific Objections to this Report and Recommendation to the assigned United States District Judge. In accordance with 28 U.S.C. § 636(b), Fed.R.Civ.P. 6(d) and 72(b)(2), and LCvR 72.D.2, Smith, because he is a non-electronically registered party, may file written objections to this Report and Recommendation by **August 8, 2022** and Respondents, because they are electronically registered parties, may file written objections by **August 5, 2022**. The parties are advised that failure to file timely and specific objections within this timeframe "will waive the right to appeal." *Brightwell v. Lehman*, 637 F.3d 187, 193 n. 7 (3d Cir. 2011) (quoting *Siers v. Morrash*, 700 F.2d 113, 116 (3d Cir. 1983). *See also EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (describing standard of appellate review when no timely and specific objections are filed as limited to review for plain error).

DATED: July 21, 2022

BY THE COURT:

s/ Cynthia Reed Eddy
Cynthia Reed Eddy
Chief United States Magistrate Judge

cc: GREGORY SMITH
LJ-6923
SCI Albion
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Albion, PA 16475-0002
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Rusheen R. Pettit
Office of the District Attorney
(via ECF electronic notification)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-2673**

GREGORY SMITH, Appellant

VS.

SUPERINTENDENT ALBION SCI, et al.

(W.D. Pa. No.: 2-18-cv-01661)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, AMBRO*, JORDAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and SCIRICA**, 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 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/ Kent A. Jordan
Circuit Judge

DATE: February 14, 2023
Lmr/cc: Gregory Smith
Rusheen R. Pettit, Esq.

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*At the time the petition for rehearing was submitted to the en banc panel, Judge Ambro was an active judge of the Court. 3rd Cir. I.O.P. 9.5.2.
** Judge Scirica's vote is limited to panel rehearing only.