No.

IN THE SUPREME COURT
OF THE UNITED STATES

♦

MALIK WOODS,
Petitioner,
VS.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

♦

Appendixes

- **Appendix A**: Woods v. Armel, C.A. No. 19-3303, U.S.M.J. Hey's Report and Recommendation, (October 27, 2021).
- **Appendix B:** Woods v. Capozza, C.A. No. 19-3303, U.S.D.J. for the Eastern District of PA, (December 6, 2022).
- **Appendix C**: Woods v. District Attorney of Philadelphia, Et Al., C.A. No. 22-3442, [Kraus, Porter, Montgomery-Reeves], (April 13, 2023).
- **Appendix: D**: Woods v. District Attorney of Philadelphia, Et Al. C.A. No. 22-3442 [Denial of Reconsideration], (May 12, 2023).

Appendix C:

Woods v. District Attorney of Philadelphia, Et Al.,
C.A. No. 22-3442, [Kraus, Porter, Montgomery-Reeves], (April 13, 2023).

Appendix B:

Woods v. Capozza, C.A. No. 19-3303, U.S.D.J. for the Eastern District of PA, (December 6, 2022).

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

MALIK WOODS, **Petitioner** **v.** **MARK CAPOZZA, THE DISTRICT ATTORNEY OF THE COUNTY OF PHILA AND THE ATTORNEY GENERAL OF THE STATE OF PA,** **Defendant.**	**CIVIL ACTION** **NO. 19-3303**

ORDER

AND NOW, this 6TH day of DECEMBER, 202, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, and upon consideration of the Petitioner's Objections thereto (ECF 44), Respondent's Brief in Response to Petitioner's Objections (ECF 49) and Petitioner's Reply to Respondent's Response to Petitioner's Objections (ECF 50) **IT IS ORDERED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED**.
2. The petition for a writ of habeas corpus is **DENIED**.
3. The motion for appointment of counsel is **DENIED**.
4. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

/S/WENDY BEETLESTONE, J.

WENDY BEETLESTONE, J.

Appendix A

Woods v. Armel, C.A. No. 19-3303, U.S.M.J. Hey's Report and Recommendation, (October 27, 2021).

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

MALIK WOODS	:	CIVIL ACTION
v.	:	
ERIC ARMEL, et. al.[1]	:	NO. 19-3303

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. October 27, 2021

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Malik Woods ("Petitioner"), challenging his 2014 convictions for second-degree murder and related crimes. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010 (Phila. C.C.P.). For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

On February 25, 2014, a jury empaneled before the Honorable Steven R. Geroff of the Philadelphia Court of Common Pleas convicted Petitioner of second-degree murder, robbery, solicitation to commit murder, criminal conspiracy, carrying a firearm without a license, carrying a firearm on the street or public property in Philadelphia, possessing an

[1]Rule 2(a) of the Rules Governing Section 2254 Cases requires Petitioner to name the officer with current custody as the respondent. At the time Petitioner filed his petition, the superintendent of the State Correctional Institution ("SCI") Fayette was Mark Capozza. Because the current superintendent of SCI-Fayette is Eric Armel, he has been substituted as the proper respondent.

instrument of crime ("PIC"), and retaliation against a witness. N.T. 02/25/14 at 150-52.

Judge Geroff briefly summarized the facts as follows:

> At trial it was established that on December 12, 2009, William Duval II, was shot to death by [Petitioner] and Joseph Kelsey inside a house on the 5500 block of Willow Street, Philadelphia. The incident was the outcome of a marijuana sale in which the victim allegedly "shorted" Kelsey. After the shooting, Kelsey took approximately $100 from the victim's pockets.

Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Opinion, at 2 (Phila. C.C.P. Dec. 27, 2017) ("PCRA Ct. Op.").[2] On the same day the jury returned its verdict, Judge Geroff sentenced Petitioner to an aggregate term of life plus five -to- ten years' imprisonment. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Sentencing Order (Phila. C.C.P. Feb. 25, 2014); Trial Ct. Op. at 1.[3]

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[2]The trial evidence will be discussed in greater detail later in this Report. Petitioner was tried jointly with Joseph Kelsey, who was also convicted of second-degree murder and related offenses. N.T. 02/25/14 at 144-46. Petitioner's charges related to the killing of Mr. Duval were charged in CP 51-CR-0004555-2010, while the charges of solicitation to commit murder and retaliation against a witness were charged in CP 51-CR-0006164-2010, and arose from evidence that Petitioner sought to have a fellow inmate kill one of the prosecution witnesses. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Opinion, at 3 (Phila. C.C.P. Nov. 7, 2014) ("Trial Ct. Op."); N.T. 2/20/14 at 8-9; 2/24/14 at 64-66.

[3]Specifically, Judge Geroff sentenced Petitioner to life imprisonment without parole for the second-degree murder conviction, a consecutive sentence of five -to- ten years for the conviction of solicitation to commit murder, concurrent sentences of five -to- ten years each on the convictions for robbery and criminal conspiracy, and a concurrent sentence of two and one-half -to- five years on the conviction for carrying a firearm without a license. Trial Ct. Op. at 1. No further penalty was imposed on Petitioner's remaining convictions. Id.

Petitioner filed a timely direct appeal challenging the sufficiency of the evidence, asserting error in the trial court's decision to allow the Commonwealth to present the testimony of Jerry Haley concerning a note he allegedly received from Petitioner, and arguing that his sentence for robbery violated double jeopardy. Commonwealth v. Woods, 734 EAL 2014, Memorandum, at 2 (Pa. Super. June 16, 2015) ("Super. Ct.-Direct"). Judge Geroff filed a Rule 1925(a) opinion, Trial Ct. Op, and the Superior Court affirmed in part and vacated in part, affirming as to Petitioner's first two claims on the basis of the trial court's opinion, and vacating his sentence for robbery because it merged with his mandatory life sentence for second-degree murder. Super. Ct.-Direct at 6. Petitioner filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on November 24, 2015. Commonwealth v. Woods, 397 EAL 2015, Order (Pa. Nov. 24, 2015).

On March 23, 2016, Petitioner filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-9551. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Petition for Post-Conviction Relief (Phila. C.C.P. Mar. 23, 2016) ("PCRA Pet."). Court appointed counsel filed an amended PCRA petition, arguing that trial counsel was ineffective for failing to challenge the admission of Mr. Kelsey's redacted police statement on Confrontation Clause grounds, and for failing to seek a separate trial from Mr. Kelsey. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Amended Petition

Seeking Collateral Relief (Phila. C.C.P. Feb. 10, 2017) ("Amended PCRA").[4] The PCRA court issued a notice of intent to dismiss the petition, see Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Notice Pursuant to Pennsylvania Rule of Criminal Procedure 907 (Phila. C.C.P. Sep. 13, 2017), to which Petitioner filed a pro se response. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Response to Notice of Intention to Dismiss (Phila. C.C.P. Sep. 27, 2017). On November 21, 2017, Judge Geroff dismissed the PCRA petition without a hearing for lack of merit. Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Order (Phila. C.C.P. Nov. 21, 2017).

Petitioner appealed, asserting that trial counsel was ineffective for (1) failing to file and litigate a motion to exclude Mr. Kelsey's police statement and for failing to object to its admission, and (2) for failing to request a severance. PCRA Ct. Op. at 2; Commonwealth v. Woods, No. 3826 EDA 2017, 2018 WL 4499704 (Pa. Super. Sep. 20, 2018) ("Super. Ct.-PCRA"). Judge Geroff issued an opinion recommending affirmance, see PCRA Ct. Op., and the Superior Court affirmed the denial of PCRA relief. Super. Ct.-PCRA. On March 12, 2019, the Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Woods, 480 EAL 2018, 204 A.3d 360 (table) (Pa. Mar. 12, 2019).

[4]The Amended PCRA is not contained in the state court record received by this court and was provided by Respondents upon request.

On July 29, 2019, Petitioner filed the present pro se habeas petition,[5] Doc. 1, raising the following twelve claims:

1. Ineffective assistance of counsel ("IAC") for failing to object to admission of Mr. Kelsey's police statement;

2. IAC for failing to file a motion to sever his trial from that of Mr. Kelsey;

3. IAC for failing to seek a jury instruction regarding witness Jerry Haley's immunity agreement;

4. IAC for failing to impeach Mr. Haley on his alleged mental condition;

5. IAC for failing to inform Petitioner of a plea offer;

6. IAC for failing to seek a jury instruction that there is no intent to commit robbery when the perpetrator seeks the return of his own goods;

7. IAC for failing to seek a manslaughter instruction;

8. IAC for failing to object to Robin Gore's testimony about Petitioner's and Mr. Kelsey's weapons;

9. IAC for failing to move to suppress Petitioner's police statement;

10. Sufficiency of the evidence;

11. Trial court's admission of Mr. Haley's note violated due process; and

[5]Petitioner signed his petition on July 24, 2019, see Doc. 1 at 36, and it was docketed in this court on July 29, 2019. Id. at 1. Because the petition is timely based on the filing date, see infra at 7 n.9, I need not make any finding as to when he provided it to prison authorities pursuant to the mailbox rule. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998) (pro se petition is deemed filed when given to prison authorities for mailing) (citing Houston v. Lack, 487 U.S. 266 (1988)).

12. IAC for failing to impeach Mr. Gore with his prior inconsistent statements.

Id. ¶ 12 (GROUNDS ONE-TWELVE).[6] Plaintiff filed a memorandum of law in support of his petition. Doc. 10. The District Attorney filed a response arguing that Petitioner's claims are meritless, procedurally defaulted and/or non-cognizable, Doc. 28, and Petitioner filed a reply. Doc. 35.[7] Petitioner has also filed a motion for appointment of counsel. Doc. 32.[8]

The Honorable Jan E. DuBois referred the matter to me for a Report and Recommendation, see Doc. 2, and the case was subsequently transferred to the Honorable C. Darnell Jones, III. Doc. 34. The matter is now ripe for disposition.

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[6]All citations to the parties' filings will be to the court's ECF pagination, except for Notes of Testimony which will be cited by date and transcript page number. This court received only one volume of Notes of Testimony as part of the state court records (Volume 1, February 20, 2014), however Respondents attached the entire trial transcript, except voir dire, to their response. Doc. 28-2.

[7]The court notes that Petitioner's memorandum of law (Doc. 10) addresses only certain of his claims, some of which do not numerically coincide with the grounds asserted in the petition (Doc. 1), and that Petitioner's first claim is the only one addressed in his reply brief (Doc. 35). When I address the claims I will indicate in quotation marks the issue number Petitioner used in his memorandum.

[8]I previously denied without prejudice Petitioner's motion for appointment of counsel, indicating that I would address the motion in this Report. See Doc. 38.

II. LEGAL STANDARDS[9]

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, a petitioner must comply with the exhaustion requirement of section 2254(b), by giving "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). In addition, federal constitutional claims must be fairly presented to the state courts, meaning that the petitioner must present the same factual and legal basis for the claim to the state court to put the state court "on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999).

A petitioner's failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert v. Blackwell, 134 F.3d 506, 518-19 (3d Cir. 1997). Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. See Werts v.

[9]The petition is timely. Petitioner's conviction became final on February 22, 2016, ninety days after the Supreme Court of Pennsylvania denied Petitioner allowance of appeal on November 24, 2015. See Kapral v. United States, 166 F.3d 565, 570 (3d Cir. 1999) (conviction becomes final when time for seeking next level of appeal expires if appeal is not taken); Morris v. Horn, 187 F.3d 333, 337 n.1 (3d Cir. 1999) (conviction becomes final after ninety days when time for seeking certiorari expires). Petitioner filed his PCRA petition on March 23, 2016, after thirty days had elapsed. The PCRA remained pending until March 12, 2019, when the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Stokes v. Dist. Att'y of Philadelphia, 247 F.3d 539 (3d Cir. 2001) (habeas limitations period is not tolled for the ninety days during which a prisoner may file a petition for a writ of certiorari in the United States Supreme Court from the denial of state post-conviction relief). Accordingly, the federal habeas clock resumed running on that date and Petitioner had 345 days in which to file a timely petition. Thus, his petition filed less than five months later, on July 29, 2019, is timely.

Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). In addition, if the state court does not address the merits of a claim because the petitioner failed to comply with the state's procedural rules in presenting the claim, it is also procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The court may address a procedurally defaulted claim only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192 (citing McCandless, 172 F.3d at 261; Coleman, 501 U.S. at 731). To meet the "cause" requirement to excuse a procedural default, a Petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). To establish prejudice, a petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Bey v. Super't Greene SCI, 856 F.3d 230, 242 (3d Cir. 2017).

In order for a petitioner to satisfy the fundamental miscarriage of justice exception to the rule of procedural default, the Supreme Court requires a petitioner to show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Carrier, 477 U.S. at 496). This requires petitioner to supplement his claim with "a colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991) (citing Kuhlmann v. Wilson,

477 U.S. 436, 454 (1986)). In other words, a petitioner must present new, reliable evidence of factual innocence. Schlup, 513 U.S. at 324.

Additionally, with respect to certain claims of ineffectiveness of trial counsel, a petitioner can rely on post-conviction counsel's ineffectiveness to establish cause to overcome a default. Martinez v. Ryan, 566 U.S. 1, 14 (2012). In Martinez, the Supreme Court carved out a narrow exception to the rule that ineffective assistance of PCRA counsel does not provide cause to excuse a procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 9. The Court explained that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." Id. at 10-11. Thus, the Martinez exception applies only to claims of ineffective assistance of trial counsel where the errors or absence of post-conviction counsel caused a default of these claims at the initial-review post-conviction proceeding. Id. at 14; see also Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) ("Martinez made very clear that its exception to the general rule . . . applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeal."). In addition, a petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit." Martinez, 566 U.S. at 14.[10]

[10]Whether a claim has "some merit" is judged by the standard to obtain a certificate of appealability ("COA"). Martinez, 566 U.S. at 14 (citing Miller-El v.

B. Merits Review

Under the federal habeas statute, review is limited in nature and may only be granted if (1) the state court's adjudication of the claim "resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, rebuttable only by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state

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Cockerell, 537 U.S. 322, 327 (2003) ("A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.")).

court's application of clearly established federal law was objectively unreasonable." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

C. IAC

Most of Petitioner's claims raise IAC and are governed by the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Id. at 687. In other words, "a defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 689. This assessment requires the court to consider counsel's conduct at the time, under all the circumstances, without the "the distorting effects of hindsight." Id. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins, 528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed").

III. DISCUSSION

Petitioner raises twelve claims. He acknowledges that many of his claims are not exhausted and are defaulted, and he asserts Martinez to overcome the default. Before considering each of his claims, I will provide a more detailed summary of the trial court proceedings and evidence presented at trial.

A. Summary of Evidence

The basic scenario presented at trial was than on the evening of December 12, 2009, three friends -- William Duval, Robin Gore, and Lamont Lester -- got together in the basement of Gore's house in Philadelphia. Soon after, Petitioner's co-defendant, Joseph Kelsey, arrived outside Gore's house, and Duval sold him some marijuana. Kelsey weighed the marijuana when he got home and concluded that Duval had "shorted" him. Kelsey and Petitioner arrived at Gore's home approximately fifteen to twenty minutes later. They met Duval in the driveway and then went into Gore's house and into the basement, where Kelsey and Petitioner pointed handguns at Duval. A scuffle ensued during which Duval was shot in the neck and collapsed, and died at the scene. This evidence was largely undisputed. What was disputed was whether Kelsey and Petitioner were acting together and which of them fired his weapon.

The investigation began immediately. When police officers arrived and found Duval dead in the basement, Gore told them that masked men had shot Duval. Later that night, however, Gore gave detectives a written statement in which he identified Kelsey and Petitioner as the perpetrators. N.T. 2/21/14 at 76 (Gore). Arrest warrants were issued, and Petitioner turned himself in to the police a few days later. N.T. 02/24/14 at

44-45 (Sergeant Kenneth Flaville). While being transported to the Homicide Division, Petitioner admitted that he was present for Duval's murder but that it did not mean he saw anything. Id. at 46. Police arrested Kelsey approximately one month later. Kelsey gave a statement to the police in which he admitted to confronting Duval about the marijuana sale, but that Petitioner had fired the fatal shot. Id. 45-47 (Sergeant Flaville), 71-85 (Detective Thorsten Lucke).

At a preliminary hearing held on April 13, 2010, Gore identified Kelsey and Petitioner as the perpetrators. N.T. 4/13/10 at 7-8, 21-24; see also N.T. 2/21/14 at 78 (Gore trial testimony). Two days later, Petitioner, who was incarcerated pending trial, recognized fellow inmate Jerry Haley from the neighborhood, and told Haley that he "shot the guy in the neck but didn't really mean to." N.T. 2/21/14 at 14-15 (Haley). According to Haley, when Petitioner learned that Haley expected to be released the following day on bail, Petitioner gave him a note for a contract to kill Gore. Id. at 16-17. The note contained Gore's name and address. Id. at 17. The next day Haley reported the note to his prison counselor, who contacted police. Id. at 18. On April 16, 2010, Detective Lucke interviewed Haley and took possession of the note, resulting in the additional charges against Petitioner. See id. at 22; N.T. 2/24/14 at 65-66 (Lucke).

As previously noted, Petitioner and Kelsey proceeded to a joint trial before Judge Geroff. The prosecution presented the testimony of Gore and Lester, who witnessed Duval's murder, and Haley, whom Petitioner had solicited to kill Gore to prevent him from testifying. Lester testified that he and Gore were in the basement of Gore's house that evening watching television and drinking and Duval (the victim) joined them. N.T.

2/20/14 at 81-82. Duvall got a phone call and went outside, and then returned followed by Kelsey and another man who kicked in the basement door and flashed guns. Kelsey and Duval argued over marijuana and then began "tussling," and Kelsey raised his arm, put his gun about four feet away from Duval's face and it "went off," after which Duval fell to the ground. Id. at 85-87. Lester recalled hearing only one gunshot. Id. at 87. Kelsey pointed his gun at Gore and said, "You better not say anything," and then both armed men ran away. Id.

In a written statement to detectives, Lester identified Gore and Kelsey from a photo array, and did not identify Petitioner when shown another photo array containing a picture of Petitioner. Id. at 92-93, 98-99. At trial, Lester identified Kelsey by pointing him out as "[t]he guy," and would not use Kelsey's name. See, e.g., id. at 84, 87. Lester did not identify Petitioner. In his statement to the detectives, Lester said that as soon as the two men with guns came into the basement, one of them struck Duval on the side of the head with a gun. Id. at 105. However, at trial Lester said that he did not previously say that he saw the victim being struck in the head with a gun. Id. at 96.

Gore testified that he had known the victim, Duval, almost his entire life. N.T. 2/21/14 at 51. Gore explained that he and Kelsey were friends and that although he did not know Petitioner, he had seen Petitioner on prior occasions when he would accompany Kelsey to Gore's house. Id. at 52-53. Gore testified that he had no doubt that Kelsey and Petitioner were the perpetrators. Id. at 78. He explained that there were three lights on in the basement, as well as light from a television, and that he witnessed the shooting from five feet away. Id. at 62-63.

Gore testified that he had just arrived home from work and was in his basement with Duval and Lester. Gore's ex-girlfriend and her two children were also in the residence, but they were upstairs. N.T. 2/21/14 at 54. Kelsey had called Gore to ask if Duval was present, and Gore then came to the house to buy marijuana from Duval. Id. at 57. Kelsey arrived and met Duval in the driveway to make the purchase, left, and then called Gore again asking to see Duval. Id. at 57-58. During the call, Kelsey stated that he wanted to make another transaction and had been "shorted" with the last purchase. Id. at 83-84. Gore told Kelsey that Duval was still at his house, and Kelsey returned about fifteen to twenty minutes after leaving. Id. at 58.

Gore testified that when Kelsey returned, Gore and Duval went outside and then re-entered the house with Kelsey through the driveway door. N.T. 2/21/14 at 59. Gore stated that at that time, he recalled seeing only Kelsey. Id. When Duval began taking off his jacket in the house, Kelsey pulled out a gun and aimed it at Duval. Gore testified that there was a ten-second pause and then Duval began spinning his jacket to defend himself and keep the gun out of his face, but that it fired and Duval fell to the ground. Id. at 60, 95.[11] Gore stated that after hearing the first shot and seeing Duval fall to the ground, a second shot came from a louder and more powerful gun and saw fire come from a revolver, which is when he noticed Petitioner. Id. at 60, 64, 90. Gore believed the second shot came from a revolver because it was more powerful. Id. at 63-64. Gore identified Kelsey's gun as an automatic because it did not have a tumbler. Id. at 65. He

[11]At the preliminary hearing, Gore had testified that the gun was pointing at Duval's throat when the shot was fired. N.T. 04/13/10 at 33; see also N.T. 3/21/14 at 102 (Gore cross).

believed that Petitioner had the revolver that fired the second shot, although he also said that Petitioner's gun did not have a tumbler. Id. at 63-65.

Gore further testified that after both shots had been fired, Kelsey pointed his gun at Gore's face and told him not to say anything about what had just happened. N.T. 2/21/14 at 61, 95. Kelsey then went through Duval's jacket, although Gore could not recall whether Kelsey checked one or both pockets. Id. at 107. Kelsey and Petitioner left through the driveway, Lester left the basement via the stairs, and Gore called the police who arrived within three to five minutes. Id. at 66. Gore admitted that he initially told the police that masked men had shot Duval, explaining that he loved his friend Duval and feared for his own life. Id. at 67-68. According to Gore, he changed his mind and recanted his story about the masked men because he wanted to tell the truth. Id. at 76. Detective Lucke also testified that when Gore was interviewed the evening of the shooting, he first reported that the perpetrators were wearing masks, but later in the same interview identified Kelsey and Petitioner. N.T. 2/24/14 at 52. He also testified that Gore initially appeared upset and scared. Id. at 53.

As noted, Haley testified that he knew Petitioner from the neighborhood and recognized him when they shared the same block of prison housing in 2010. N.T. 2/21/14 at 14-15. Haley identified Petitioner during trial as the man who admitted to him that "he shot the guy in the neck," id. at 14, 16, and he identified the note Petitioner gave him in prison, which he characterized as a contract to kill witness Gore. Id. at 16-17. Haley testified that when he reported these events to Detective Lucke, the detective did not promise him anything or threaten him, and Haley also stated that when he agreed to

testify he did not believe the prosecutor would be able to help him with his own case. Id. at 39. Detective Lucke similarly testified to his interview of Haley and that he did not make any promises to Haley regarding his open criminal matter or make any threats to get him to come forward, nor did he have any involvement with Haley's open matter. N.T. 2/24/14 at 67. Haley stated that he revealed the note because he was being a good Christian and wanted his conscience cleared. N.T. 2/21/14 at 38, 40. He acknowledged that his testimony regarding what Petitioner told him in prison about the shooting -- that Petitioner had shot the victim in the neck -- differed from his statement to police that the other man with Petitioner shot the victim in the neck and then Petitioner fired his gun. Id. at 45.[12]

The prosecution also presented evidence from Sam Gulino, M.D., the chief medical examiner for the City of Philadelphia. N.T. 02/20/14 at 65-79. Dr. Gulino testified that he performed an autopsy on Duval and concluded that he sustained two gunshot wounds -- one to the front aspect of his neck, which was fatal, and a second to his right wrist. Id. at 67, 73. The doctor also found scrapes on the right side of Duval's forehead and on his chest, right forearm and left leg, and that the scrapes must have occurred within twenty-four hours before his death because they showed no signs of healing or scabbing. Id. at 67. The doctor explained that there was nothing about the appearance of the wounds that would allow him to determine Duval's body position when he was shot. Id. at 77. Dr. Gulino opined that because no soot or stippling was

[12]After asserting his right against self-incrimination, Haley was granted immunity against prosecution and testified to having committed numerous murders as a former member of the "Junior Black Mafia." N.T. 2/21/14 at 24-25, 30-31.

observed on Duval's wounds or clothing, the range of fire was at least two -to- three feet from the victim. Id. at 70-71, 78-79.

The prosecution also presented forensic and ballistics evidence establishing that two bullets were recovered from the victim's body and that they had been fired from the same weapon, which was most likely a revolver. N.T. 2/24/14 at 24-26 (Officer Raymond Andrejczak). The police did not recover any spent cartridges from the scene, which was also consistent with the shots having been fired from a revolver rather than a semiautomatic weapon. N.T. 2/20/14 at 113 (Detective James Crone).

Kelsey, Petitioner's codefendant, did not testify at trial. However, without objection from Petitioner's counsel, Detective Lucke read a redacted version of Kelsey's police statement into the record, with all references to Petitioner replaced by "the other guy" or "another guy." N.T. 2/24/14 at 77-83.[13] Prior to allowing the statement to be read into the record, Judge Geroff cautioned the jury:

> I do want to caution you that – Detective Lucke is about to read from the contents of C-1 – and I just want to caution you that you are not to use any of the testimony of Detective Lucke with regard to C-1 in any way against [Petitioner]. This is a statement of Defendant Kelsey. I just want to caution you about that.

N.T. 2/24/14 at 70. After Detective Lucke read the statement into the record, Judge Geroff again cautioned the jury:

> Ladies and Gentlemen, I just want to again caution you that the contents of C-1 . . . are to be considered only with respect

[13]Relevant portions of Kelsey's redacted statement are set forth in section III.B, beginning infra at 21.

> to Mr. Kelsey and in no way are they to be considered against [Petitioner]. Thank you so much.

Id. at 96.

In his jury instructions, Judge Geroff revisited Kelsey's statement a third time:

> I want to reiterate the important rule which restricts you in using the evidence offered to show that . . . Kelsey made a statement concerning the crimes charged against him. A statement made before trial may be considered as evidence only against the defendant who made the statement. . . . . You may consider the statement as evidence against defendant Kelsey if you believe that he made it voluntarily. You must not consider the statement as evidence against . . . [Petitioner]. You must not use the statement in any way against . . . [Petitioner].

N.T. 2/25/14 at 103.

With this summary of the trial proceedings in mind, I will first address Petitioner's exhausted claims followed by the defaulted claims.

B. Ground One: IAC for Failing to Object to Co-Defendant's Statement

In Ground One, Petitioner argues that counsel was ineffective for failing to object to admission of his co-defendant Kelsey's redacted statement, on the grounds that it violated his rights under the Confrontation Clause. Doc. 1 ¶ 12 (GROUND ONE) & at 12; Doc. 10 at 15-41 ("Issue One"); Doc. 35 at 3-25. Respondents counter that the claim is meritless. Doc. 28 at 23-47.

Because the habeas review standard requires that the state court's decision be contrary to or involve an unreasonable application of clearly established federal law, I begin by reviewing the caselaw in the area of the admission of codefendants' statements. Such statements can implicate the Confrontation Clause, which guarantees a defendant's

right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. This right includes the ability to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400, 404, 406-07 (1965).

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause was violated by the admission of a non-testifying codefendant's statement implicating the petitioner by name in the crime, despite an instruction that the jury not consider the statement against the defendant. In 1987, the Court began defining the contours of Bruton, deciding that a codefendant's confession which had been redacted to eliminate all reference to the existence of the defendant did not violate the Confrontation Clause. Richardson v. Marsh, 481 U.S. 200 (1987). In Richardson, the Court left open the question of other types of redaction, stating "[w]e express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Id. at 211 n.5. The Court partially answered this question in 1998 in Gray v. Maryland, 523 U.S. 185 (1998), concluding that a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the work 'deleted,' or a similar symbol," violates the Confrontation Clause. Id. at 192.

The Third Circuit has consistently held, in a series of federal habeas corpus cases, that Bruton, Richardson, and Gray define the current state of the law with respect to non-testifying codefendants' statements. Washington v. Sec'y Pa. Dept. of Corrs., 801 F.3d 160, 165-66 (3d Cir. 2015); Eley v. Erickson, 712 F.3d 837, 856-57 (3d Cir. 2013); Vazquez v. Wilson, 550 F.3d 270, 279 (3d Cir. 2008).

> Taken together, the current state of the law is that there is a Confrontation Clause violation when a non-testifying codefendant's confession is introduced that names another codefendant, Bruton, 391 U.S. at 126, or that refers directly to the existence of the codefendant in a manner that is directly accusatory. Gray, 523 U.S. at 193-94. That is because such statements present "a substantial risk that the jury, despite instructions to the contrary, [will] look[ ] to the incriminating extrajudicial statements in determining [the defendant's] guilt." Bruton, 391 U.S. at 126. But there is no violation if the confession is properly redacted to omit any reference at all to the codefendant, making it more likely that the jury will be able to follow the court's instruction to disregard this evidence in rendering its verdict. Richardson, 491 U.S. at 208.

Washington, 801 F.3d at 166.

Detective Lucke read a redacted version of Kelsey's statement to the jury, stating in relevant part as follows (with each mention of "the other guy" or "the other person" underlined for reference):

> "Question: Mr. Kelsey, were you present inside of 5530 Willows Avenue on December 12, 2009, when William Duval was shot?
>
> "Answer: Yes."
>
> "Question: How did you know the victim, William Duval?
>
> "Answer: From selling weed. He sold weed.
>
> "Question: How long had you known William Duval?
>
> "Answer: About 15 years.
>
> "Question: What did you know William by?
>
> "Answer: "Dollar." I also called him "Bill."
>
> "Question: Please tell us in your own words what happened inside of 5530 Willows Avenue on December 12, 2009, when William Duval was shot as well as the events leading up to the incident.
>
> "Answer: I bought some weed off Dollar. I went home and measured it and saw that he shorted me a few grams. I called back to the spot. I talked to Rob. I asked him if he and also if Dollar had a scale. He said no and he said

that Dollar isn't there. I call back a couple minutes later, not long. I called Rob again. That's the only number I had. He said that Dollar was there. I never talked to Dollar. We went back around to Rob's.

. . . .

"Question: When you first bought from the victim, were you by yourself?

"Answer: No. I was with another guy.[14]

"Question: Who else was in the basement at that time?

"Answer: Dollar, Rob, and the other guy.

"Question: How much marijuana did you buy from Dollar?

"Answer: I bought an ounce.

. . . .

"Question: How long after first buying the marijuana did you return to Rob's house on Willows Avenue?

"Answer: About 20 minutes.

"Question: Was the other guy with you when you returned?

"Answer: Yes.

"Question: Go ahead. Tell us what happened when you returned to Willows Avenue.

"Answer: We were coming down the alley and Dollar was outside the house in the alley. We went back in the house. Everybody, me, the other guy and Dollar went back in the house. We went into the basement. Dollar was on his phone talking. When he hung up, I was telling him that what I had gotten from him was short. He said not to worry about it. 'I got you next time.' I said, "Fuck that. I want mine." Dollar was sitting in a chair. I was standing next to him. When I said, "Fuck that, I want mine," he stood up and took his jacket off. He came out of his jacket. That's when I stepped back and pulled out my gun. That's when he stepped towards me and we started tussling.

. . . .

"We were tussling like that for a few seconds. That's when I heard a gunshot and I saw Will stumble a little bit and then fall backwards. When he went down, I saw the blood coming out of his neck. That's when I turned around and I

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[14]It is not clear whether "another guy" was a redaction. The state court record provided to this court did not include a copy of Kelsey's statement.

saw the other guy standing there with a gun raised in his hand."

. . . .

"I bent down and took my money out of Dollar's pocket and then I left. The other guy was already out of the door.

. . . .

"Question: When you began struggling with Dollar, where was the other guy?

"Answer: Behind me.

"Question: When you heard the gunshots, where did it come from?

"Answer: Behind me where the other guy was.

"Question: How many gunshots did you hear?

"Answer: One.

"Question: What kind of gun did you see in the other guy's hand?

"Answer: A revolver."

. . . .

"Question: Do you know what caliber that was?

"Answer: No, I didn't know."

"Question: What kind of gun did you have?

"Answer: A nine (millimeter).

"Question: Did you fire your gun during this incident?

"Answer: No.

"Question: What did you do with your gun after the incident?

"Answer: Threw it away. I put into a trash can at 54th and Willows.

"Question: Who else besides you, Dollar, and the other guy was present in the basement during this incident?

"Answer: Rob and another person. I don't know his name.

"Question: Where were Rob and the other person during this incident?

"Answer: Dollar was sitting in front of me and the other guy was behind me and Rob and some other guy were over to my left. I really wasn't paying them no mind.

"Question: Where did you go?

"Answer: All over.

. . . .

"Question: Which way did the other guy go?

"Answer: He went towards 56th Street. I don't know where he went from there. I haven't seen him since.

N.T. 02/24/14 at 77-83 (emphasis added).

When Petitioner presented his Bruton claim on PCRA, arguing that the reference to him as "the other person" violated his rights, the Superior Court rejected the claim on the merits:

> As [Petitioner] concedes, our Supreme Court and this Court have approved references to "the other guy" in place of a co-defendant's name in a confession. . . . Nonetheless, [Petitioner] relies on . . . recent federal cases, to argue that Kelsey's statement was inadmissible because it contextually implicated him in Duval's murder. In other words, he contends that the redactions, combined with other evidence, left the unmistakable impression that he was "the other guy" referenced in Kelsey's statement. This argument fails because, unlike the . . . Third Circuit, our Supreme Court has distinguished the use of "the other guy" in confessions from the use of a blank space that the Supreme Court of the United States considered in [Gray]. . . .
>
> After *Gray*, our Supreme Court held that even when other evidence at trial, considered together with a redacted co-defendant's confession, clearly implicates a defendant, the circumstances are insufficient to warrant suppression under *Bruton*. *Commonwealth v. Rainey*, 928 A.2d 215, 227-28 (Pa. 2007). . . . This Court has followed our Supreme Court's precedent and held that "there is no *Bruton* violation when the accused is linked to the crime with other properly admitted evidence other than the redacted confession; it is a permissible instance of contextual implication." *Commonwealth v. James*, 66 A.3d 771, 777 (Pa. Super. 2013). . . .
>
> When determining if contextual implication violates a defendant's rights, we must consider "the potential prejudice to the defendant versus the probative value of the evidence, the possibility of minimizing the prejudice, and the benefits to the criminal justice system of conducting joint trials." *Rainey*, 928 A.2d at 228. [T]here is little risk of prejudicing [Petitioner] by admitting Kelsey's statements and the benefits

> of a joint trial were significant. Hence, pursuant to our Supreme Court's current decisional law, [Petitioner's] underlying ***Bruton*** claim lacks arguable merit and he is not entitled to relief on his first claim of [IAC].

Pa. Super.-PCRA, 2018 WL 4499704, at *2-3 (citation to appellate brief omitted).

In applying federal habeas review, the Third Circuit has rejected the blanket rule adopted by the Pennsylvania Supreme Court on the ground that it constitutes an unreasonable application of the fact-based inquiry required by the Supreme Court's Bruton line of cases.[15]

> Courts and attorneys cherish bright-line rules as such rules simplify their tasks and lay out clear paths for them to follow. Furthermore, it certainly is true that ordinarily the use of a term like "the other guy" will satisfy Bruton. Nevertheless, it is an unreasonable application "of clearly established Federal law under the decisions of the Supreme Court of the United States" to hold that their use always will be sufficient for that purpose.

Vazquez, 550 F.3d at 281-82; see also Washington, 801 F.3d at 166 (application of a blanket rule "is not a reasonable view of the law"); Williams v. Folino, 625 F. App'x 150, 156 (3d Cir. 2015) (not precedential) ("The Commonwealth's argument that clearly established federal law permitted introduction of a redacted confession that replaced the defendant's name with a generic term so long as a limiting instruction was given

[15]Respondents argue that the Superior Court avoided applying a blanket rule in this case and took "a more holistic view of the statement." Doc. 28 at 39. However, the Superior Court explicitly noted the different approaches taken by the Pennsylvania Supreme Court and the Third Circuit when considering the admissibility of a redacted co-defendant's statement, and restated with approval state court precedent holding that there is no Bruton violation when the defendant is linked to the crime with evidence other than the redacted confession. Pa. Super.-PCRA, 2018 WL 4499704, at *2. Such language essentially amounts to the blanket rule rejected by the Third Circuit in its analysis of Supreme Court precedent.

understates all that must be considered under established Supreme Court precedent."). Rather the Circuit Court has interpreted Bruton, Richardson, and Gray to require the court to determine if the redacted statement "permit[s] jurors to infer, without reference to any other evidence, that the statement refers to the defendant." Williams, 625 F. App'x at 156 (citing Gray, 523 U.S. at 196).

In making this determination, the Third Circuit has noted that "the number of persons involved is significant." Vazquez, 550 F.3d at 282. In Vazquez, the court discussed the difference between the admission of a redacted statement referring to "the other guy" in a case involving three people, citing United States v. Richards, 241 F.3d 335 (3d Cir. 2001), and one involving fifteen people, citing Priester v. Vaughn, 382 F.3d 394 (3d Cir. 2004). The court explained, "because Richards involved only three people, . . . the redactions ["my friend" and "inside man"] were 'tantamount to an explicit reference to the co-defendant.'" Vazquez, 550 F.3d at 282 (quoting Richards, 241 F.3d at 401). However, in Priester, "at least fifteen persons were involved, so that the use of 'the other guy' or 'another guy' did not point to any person." Id. (citing Priester, 382 F.3d at 399-400).

In Vazquez, the evidence showed that three individuals were involved in a shooting, and in his statement read at trial, Vazquez's co-defendant denied being the shooter. 550 F.3d at 273. The court concluded:

> The fact that there were only two possible shooters under [the co-defendant's] statement should have made clear to the trial court that . . . [the jury] was almost certain to conclude that the individual [the co-defendant] described in his redacted statement as "my boy" or "the other guy" as the

> shooter was Vazquez because [the third co-conspirator] was not on trial and the Commonwealth argued that Vazquez fired the fatal shot.

Id. at 281. Likewise, in Williams, a case involving two co-defendants accused of murder, the Third Circuit found that the redaction in the co-defendant's statement to identify Williams as "his boy" was tantamount to using Williams' name. "[T]he jury knew that there were only two people involved in the shooting and only two people were on trial for the crime to which [the co-defendant] confessed, and the Commonwealth argued that Williams was the shooter." 625 F. App'x at 156.

In assessing the existence of a Bruton violation, Petitioner's case is most similar to Williams. The Commonwealth's theory was that Petitioner and Kelsey conspired to rob Duval after a drug sale and that Duval was killed in the events that followed. The Commonwealth presented witnesses (Gore and Lester) who saw two men arrive at the scene and draw handguns, with one of the witnesses (Gore) identifying them as Kelsey and Petitioner. Both defendants admitted they were present -- Kelsey in his police statement and Petitioner when he turned himself in to police and when he spoke with a fellow inmate and admitted the shooting. The Commonwealth also presented evidence that Duval was shot twice and killed during a tussle between himself and Kelsey, after which Kelsey went through Duval's jacket and he and Petitioner fled the scene. N.T. 2/25/14 at 58-73. Kelsey and Petitioner were the only two people on trial, and Kelsey gave a statement to the police indicating that he went to the residence with another person, engaged in a tussle with Duval who was shot, and identifying "the other person" as the shooter. Under these circumstances, using "the other person" was tantamount to

identifying Petitioner by name. Under the Third Circuit precedent of Washington, Eley, and Vazquez, the Superior Court's decision was an objectively unreasonable application of Bruton and its progeny.

Bruton violations are subject to a harmless error analysis. See, e.g., Washington, 801 F.3d at 170. Therefore, before granting habeas relief, the court must determine if the error had a "substantial and injurious" effect on the fairness of the trial. Fry v. Pliler, 551 U.S. 112, 121 (2007) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,'" i.e., "where the matter is so evenly balanced that [the judge] feels himself in 'virtual equipoise' as to the harmlessness of the error," "the error is not harmless." O'Neal v. McAninch, 513 U.S. 432, 435-36 (1995).[16] "In other words, 'the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.'" Williams, 625 F. App'x at 157 (quoting O'Neal, at 435).

Here, the evidence was more than sufficient to support Petitioner's convictions, independent of Kelsey's statement. As previously noted, the Commonwealth presented two eyewitnesses, one of whom (Gore) directly implicated both Kelsey and Petitioner in Duval's murder and robbery. Gore testified that he and Kelsey were friends, that he had seen Petitioner with Kelsey on prior occasions, and that he had no doubt that Kelsey and

[16]Because the Superior Court did not reach the issue of harmless error, there is no state court decision to which to defer on this issue. See Davis v. Ayala, 576 U.S. 257, 269 (2015) (requiring the federal court to defer to harmless error determination made in state court).

Petitioner were the perpetrators. N.T. 2/21/14 at 51, 52-53, 78. In addition to his familiarity with both men, Gore explained that the basement was well-lit with lights and a television, and that he witnessed the shooting from five feet away. Id. at 62-63. Other trial evidence placed Petitioner at the scene. For example, Petitioner told police that he was present for the murder but did not see anything, and he later told a friend and fellow inmate (Haley) that he had shot a man in the neck (where Duval was shot), and then gave Haley a note asking him to kill Gore, which events took place just a few days after Gore testified against Petitioner at his preliminary hearing. No other individuals were implicated in the Duval killing.

Viewed in the context of this evidence, I conclude that the Bruton error did not have a substantial and injurious effect on Petitioner's trial. Although the evidence does not align perfectly with the evidence in any of the recently decided Bruton cases from the Third Circuit, it more closely resembles cases where the error was found harmless.

First, evidence of Petitioner's guilt was as strong as the evidence in cases that allowed the conviction to stand despite the Bruton error. In Bond v. Beard, the court described the Commonwealth's evidence as "extensive," including the testimony from an eyewitness who had an unobstructed view of the shooter during the robbery and who was "absolutely certain" that Bond was the shooter, a statement by another witness identifying Bond as the shooter but who recanted the statement at trial, and a confession by Bond. 539 F.3d 256, 262, 276 (3d Cir. 2008). Although the court found a Bruton

violation,[17] the court found that the other evidence left no basis for "grave doubt" about the harmlessness of the error. Id. at 276. Likewise, in Williams, the court found that the Bruton violation was harmless in light of significant evidence including an eyewitness identification by a man who testified that the shooter turned and faced him and that he recognized Williams. 625 F. App'x at 152, 157. The witness testified that Williams, wearing a hooded sweatshirt, shot the victim and fled to a pickup truck, and there was corroborating testimony from several other witnesses regarding the man in the hooded sweatshirt and the pickup truck, and testimony that a similarly dressed man had threatened the mother of the victim's child earlier the same evening. Id. at 151-53, 157-58. Additionally, there was evidence that Williams confessed to the shooting on two occasions while incarcerated. Id. at 153-54, 158.

Here, as previously noted, Gore testified that he was familiar with and identified both Petitioner and Kelsey, having witnessed the shooting and robbery from a short distance, in a well-lit room, with corroborating testimony from Lester. Additionally, Petitioner told police that he was present and he told fellow inmate Haley that he had shot "the guy" in the neck.

Conducting a "fact-intensive" inquiry and considering the "quantity and credibility of other incriminating evidence," Williams, 625 F. App'x at 157, I conclude that the evidence here is analogous to that in Bond and Williams, and distinguishable from that in

[17]The Bruton error in Bond was more significant than the error here. Both Bond and his co-defendant gave a statement implicating himself and the other, and the statements were both redacted to use neutral references in place of the other's name. However, as to Bond, the prosecutor used the term "the killer" rather "the other guy" and stated that the co-defendant identified Bond by name. 539 F.3d at 275.

Vazquez and Washington. The eyewitness testimony presented by Gore and corroborated by Lester was compelling, Petitioner placed himself at the scene of the crime, and Petitioner subsequently attempted to have Gore killed to prevent him from testifying at trial. Also, the trial court instructed the jury on three occasions that it could not consider Kelsey's statement against Petitioner. Finally, although the evidence did not establish with certainty whether Kelsey or Petitioner fired the fatal shot, the identity of the shooter is immaterial because Petitioner was convicted of second-degree rather than first-degree murder under Pennsylvania's felony-murder rule. See 18 Pa. C.S.A. § 2502(b), (d) (second-degree murder defined as a criminal homicide committed while defendant is engaged as principal or accomplice in commission of, or flight from, a robbery).

Thus, I find that a Bruton violation occurred but that it was harmless. Because Petitioner would not be entitled to relief on the underlying Confrontation Clause claim, I conclude that trial counsel cannot be held ineffective for failing to raise this claim. See McAleese v. Mazurkiewicz, 1 F.3d 159, 169 (3d Cir. 1993) (counsel not ineffective for failing to pursue meritless claim).[18]

C. Ground Two: IAC for Failing to Sever Trial

In a related claim, Petitioner argues that counsel was ineffective for failing to file a motion to sever his trial from that of his co-defendant, Kelsey. Doc. 1 ¶ 12 (GROUND

[18]Petitioner argues that a COA should issue on the question whether a Bruton violation resulted in prejudice. Doc. 38 at 18-19. Because the prejudice discussion here falls within Third Circuit caselaw, I do not recommend issuance of a COA.

TWO) & at 14-15; Doc. 10 at 42-58 ("Issue Two"). Respondents counter that the claim is meritless. Doc. 28 at 48-49.

Respondents note that the Superior Court rejected this claim on PCRA appeal, holding that severance was not warranted under Pennsylvania Rule of Criminal Procedure 583. Doc. 28 at 48. To the extent Respondents imply that the issue was raised entirely as a matter of state law, I disagree. In his PCRA petition, Petitioner averred that severance was the only way he could receive "a fair trial," citing federal law, see PCRA Pet. at Ground (b)(iv), and he invoked Bruton, saying Kelsey's statement could not have been introduced against him if they had been tried separately. Id. at Ground (b)(vii), (ix). Although the Amended PCRA petition did not explicitly refer to due process or fundamental fairness, and did not cite federal law, it also referred to Petitioner's Bruton claim. Amended PCRA at 28 (referring to "Claim 1"). In his habeas petition, Petitioner similarly argues that severance was required to receive a fair trial. Doc. 10 at 50 (citing Zifiro v. United States, 506 U.S. 534, 539 (1993) (trial court should grant severance under Fed. R. Crim. P. 14 where "there is a serious risk that a joint trial would . . . prevent the jury from making a reliable judgment")).

Therefore, I read Petitioner's severance claim as an argument that the admission of certain evidence at the joint trial resulted in a denial of due process. Such evidentiary claims are "best left to the province of the trial judge," Yohn v. Love, 76 F.3d 508, 525 (3d Cir. 1996), and "are not considered to be of constitutional proportion, cognizable in federal habeas proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." Bisaccia v. Att'y Gen. of State of N.J., 623 F.2d 307, 312 (3d Cir.

1980). To constitute a denial of fundamental fairness, "the evidence erroneously admitted at trial must be material in the sense of a crucial, critical, highly significant factor." Jameson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983).

In reviewing this claim on PCRA appeal, the Superior Court stated:

> Severance of defendants is governed by Pennsylvania Rule of Criminal Procedure 583, which provides that, "The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa. R. Crim. P. 583. When considering a motion to sever, a trial court should consider the following factors:
>
> > (1) whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) whether evidence not admissible against all the defendants probably will be considered against a defendant notwithstanding admonitory instructions; and (3) whether there are antagonistic defenses.
>
> ***Commonwealth v. Brookins***, 10 A.3d 1251, 1256 (Pa. Super. 2010) . . . .
>
> It is well-settled that "joint trials are preferred where conspiracy is charged." ***Commonwealth v. Cole***, 167 A.3d 49, 57 (Pa. Super. 2017) . . . . Moreover, the "potential prejudice to a defendant from the use of a non-testifying co-conspirators' statements must be balanced against the demands of judicial economy and desire for verdict consistency." ***Commonwealth v. Oliver***, 635 A.2d 1042, 1044 (Pa. Super. 1993).
>
> In this case, there were only two defendant and the complexity of the evidence as to the two defendants was low. Hence, the jury could easily distinguish the evidence and apply the law intelligently as to both [Petitioner] and Kelsey. Thus, the first factor weighed against severance.

> As to the second factor, [Petitioner] faced minimum prejudice from the admission of Kelsey's statement. [Petitioner], in his statement to police, admitted that he was present during the murder. The evidence that [Petitioner] was armed at the time of Duval's murder and the evidence regarding the robbery of Duval would also have been admissible if [Petitioner's] trial were severed from Kelsey's trial. Hence, the only portion of Kelsey's statement that was not cumulative was that portion alleging that [Petitioner] shot Duval. The person that shot Duval, however, was immaterial to [Petitioner's] second-degree murder conviction. If [Petitioner] conspired with Kelsey or participated in the robbery as either a principal or accomplice, and Duval was murdered during that robbery, [Petitioner] was guilty of second-degree murder. All of the evidence related to [Petitioner's] participation in the robbery would have been admissible in a separate trial for [Petitioner] and the evidence that [Petitioner] was present at the time of the murder would also have been admissible at a separate trial.
>
> . . . .
>
> As to the third factor, [Petitioner's] and Kelsey's defenses were not so antagonistic as to cause prejudice. [Petitioner] argues that Kelsey shot Duval while Kelsey argued that [Petitioner] shot Duval. There was no other portion of Kelsey's defense that was antagonistic to [Petitioner's] defense. Our Supreme Court has held that defendants pointing fingers at each other is insufficient antagonistic defenses to warrant separate trials. ***See Commonwealth v. King***, 721 A.2d 763, 771 (Pa. 1998) [citation omitted].

Pa. Super.-PCRA, 2018 WL 4499704, at *3-4. Because the underlying claim lacked arguable merit, the Superior Court concluded that counsel was not ineffective for failing to file a severance motion. Id. at *4.[19]

[19]To the extent the state courts decided Petitioner's severance claim solely under state law, the decision is not reviewable. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Under principles of due process, the determination of the state courts is neither contrary to, nor an unreasonable application of, Supreme Court precedent because the joint trial did not deprive Petitioner of fundamental fairness. Co-defendants pointing fingers at each other is insufficient to warrant separate trials as a matter of due process. See United States v. Voigt, 89 F.3d 1050, 1095 (3d Cir. 1996) ("courts have consistently held that finger-pointing and blame-shifting among coconspirators do not support a finding of mutually antagonistic defenses"); see also Zafiro, 506 U.S. at 538, 540 ("[m]utually antagonistic defenses are not prejudicial *per se*" and "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"). Moreover, Petitioner cannot show prejudice because all of the evidence related to his presence at the time of the murder, being armed at the time, his involvement in the robbery, and his interaction with Haley, including his request for Haley to murder Gore, would have been admitted against him in a separate trial. While Kelsey's statement would not have been admitted in a separate trial, given the totality of the other evidence, it cannot be said that admission of his statement rendered Petitioner's trial fundamentally unfair.

For the aforementioned reasons, I conclude that Petitioner is not entitled to relief on his severance claim.

D. Ground Ten: Sufficiency of the Evidence

In Ground Ten, Petitioner argues that the evidence was insufficient to support each of his convictions. Doc. 1 ¶ 12 (GROUND TEN) & at 28.[20] Respondents counter that the claim is meritless. Doc. 28 at 62-66.

Principles of due process dictate that a person can be convicted of a crime only if, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see also In re Winship, 397 U.S. 358, 364 (1970); Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983). Accordingly, in reviewing challenges to the sufficiency of the evidence, a court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Sullivan, 723 F.2d at 1083-84 (quoting Jackson, 443 U.S. at 319) (emphasis in original). Pennsylvania courts follow the same rule. See Commonwealth v. Trill, 543 A.2d 1106, 1112 (Pa. Super. 1988) (verdict will be upheld if, "viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt") (quoting Commonwealth v. Griscavage, 517 A.2d 1256, 1257 (Pa. 1986)).

[20]Petitioner did not address this claim in his 68-page memorandum of law (Doc. 10) or his 25-page reply brief (Doc. 35).

In reviewing Petitioner's sufficiency claim on direct appeal, the Superior Court affirmed the denial of relief on the basis of the trial court's opinion. Super. Ct.-Direct at 3-5. In that opinion, Judge Geroff reviewed the evidence as to each of Petitioner's convictions in detail in rejecting the sufficiency claim. As to the counts related to the killing of Duval charged in CP 51-CR-0004555-2010, Judge Geroff stated:

> [Petitioner] challenges his convictions for conspiracy, robbery, and second-degree murder on the grounds that the evidence was insufficient to convict him of any of those crimes. To be convicted of a conspiracy, a person must have agreed with one or more persons to commit a crime; he must have intended to commit the crime; and one or more of them must have committed an overt act in furtherance of the conspiracy. 18 Pa. C.S.A. § 903. A person is guilty of robbery if, in the course of committing a theft, he inflicts serious bodily injury upon another. 18 Pa. C.S.A. § 3701. [Petitioner] was convicted of second-degree murder. A criminal homicide constitutes murder of the second-degree when it is committed while [the] defendant was engaged as a principal or an accomplice in the perpetration of a felony. 18 Pa. C.S.A. § 2502.
>
> With regard to the murder, conspiracy, and robbery convictions, the evidence is sufficient to sustain the convictions. The evidence, taken in the light most favorable to the Commonwealth, and with all reasonable inferences therefrom, is sufficient for the jury to have concluded that each and every element of the crimes charged was established beyond reasonable doubt.
>
> The evidence shows that there was a dispute between Kelsey and the victim over marijuana; that [Petitioner] was with Kelsey in the basement when the murder occurred; that he entered the basement at about the same time Kelsey did; that both he and Kelsey were armed; and that at least one of them fired at the victim. The evidence also shows that after the victim had been shot, Kelsey, [Petitioner's] co-conspirator, went into the victim's pockets. Also, Kelsey and [Petitioner] both left 5530 Willows Avenue at approximately the same time. In addition, the evidence showed that

[Petitioner] gave Haley a note for a contract to kill a witness, Robin Gore.

There is sufficient evidence that Kelsey and [Petitioner] entered into and carried out a conspiracy to rob the victim. According to Gore's testimony, there had been a marijuana purchase in the basement of 5530 Willows Avenue earlier in the evening. [N.T. 02/20/2014] at 57. Before Kelsey came over and shot the victim, Kelsey told Gore that something was short with the transaction Kelsey had made earlier in the evening with the decedent. *Id.* at 83-84. Lamont Lester gave similar testimony; Lester testified that Kelsey, before pointing his gun at the victim and shooting him, told the victim, "I thought you had it." (N.T. 02/20/2014, p. 85, 103). [Petitioner] admitted to Sergeant Flaville that he was present for the homicide. (N.T. 02/24/2014, p. 46). . . . Gore testified that [Petitioner] was not only in the basement with Kelsey, but was armed when the murder happened; Gore also testified that [Petitioner] fired his gun at the victim almost immediately after Kelsey fired his. (N.T. 02/21/2014, p. 60). Moreover, Gore testified that Kelsey went into the pockets of his victim after the victim had been shot. *Id.* at 61, 92. A conspiracy to rob a victim may reasonably be inferred from the fact that after Kelsey went into the victim's pockets, both defendants left at about the same time. *Id.* at 66, (N.T. 02/20/2014, p. 87). Based on the facts presented at trial, there was sufficient evidence for the jury to convict [Petitioner] of conspiring with Kelsey to rob the victim.

There is sufficient evidence to convict [Petitioner] of robbery. . . . As already stated, the evidence shows [Petitioner] entered into a conspiracy with Kelsey to rob the victim. In the course of committing the theft, [Petitioner] inflicted injury on the victim; . . . Gore testified that [Petitioner] fired a gun at the victim after the victim had already been shot. (N.T. 02/21/2014, p. 60). Gore testified that Kelsey then went into the victim's pockets probably with the intention to take marijuana. *Id.* at 61, 92, 107.

There is sufficient evidence to convict [Petitioner] of second-degree murder. . . . The evidence shows that either [Petitioner] or Kelsey committed a criminal homicide by delivering the fatal shot to the victim's body. Dr. Gulino testified that the manner of death was homicide and that there were two bullets in the victim's body. (N.T. 2/20/2014, p. 74,

67). Dr. Gulino also testified that the cause of death was the gunshot wound to the neck. *Id.* at 73. Even if Kelsey was the one who fired the fatal shot to the neck, [Petitioner] was his accomplice in the conspiracy to rob the victim. [Petitioner], therefore, is criminally liable for the second-degree murder of the victim even if [Petitioner] did not actually fire the fatal shot. . . . Based on the testimony of the witnesses, there was sufficient evidence for the jury to infer that Kelsey fired the fatal shot to the neck. The evidence shows that Kelsey was the one who directly committed the criminal homicide, and that [Petitioner] was his accomplice. There is, therefore, sufficient evidence to convict [Petitioner] of second-degree murder.

. . . .

[Petitioner] also argues that there was insufficient evidence to convict him of carrying a firearm without a license, carrying a firearm on the public streets, and [PIC].

To find the defendant guilty of carrying a firearm without a license, three elements must be proved beyond reasonable doubt. 18 Pa. C.S.A. § 6106: First, that the defendant carried a firearm concealed on or about his person; second, that the defendant was not in his home or place of business; and third, that the defendant did not have a valid and lawfully issued license for carrying the firearm. *Id.* First, there was sufficient evidence [Petitioner] carried a firearm concealed on or about his person. . . . [Petitioner] was in the basement with a gun, and he clearly had not been invited. It would have been reasonable, therefore, for the jury to infer that [Petitioner] traveled to 5530 Willows Avenue with his firearm concealed on or about his person. Second, [Petitioner] was not in his home or place of business. Third, the evidence showed that [Petitioner] did not have a valid and lawfully issued license for carrying his firearm. (N.T. 02/24/2014, p. 95). . . .

To find a defendant guilty of [PIC], three elements must be proved beyond reasonable doubt. 18 Pa. C.S.A. § 907: First, that the defendant possessed an item; second, that the item was an instrument of crime; and third, that the defendant possessed the item with the intent to employ it criminally. *Id.* According to Gore, [Petitioner] fired a gun at the victim after the victim had already been shot. (N.T. 02/21/2014, p. 60). [Petitioner] possessed an item, a gun, which was an instrument of crime, and which he clearly

> intended to employ criminally. There was, therefore, sufficient evidence that [Petitioner] possessed an instrument of crime.
>
> To find the defendant guilty of carrying a firearm on the public streets, each of the following elements must be proved beyond reasonable doubt. 18 Pa. C.S.A. § 6108: First, that the defendant carried a firearm on the public streets of Philadelphia, and second, that the defendant did not have a valid and lawfully issued license to carry the firearm. *Id.* The evidence was clearly sufficient to establish both elements beyond reasonable doubt.

Trial Ct. Op. at 16-19, 21-22. As to the charges of solicitation to commit murder and retaliation against a witness charged in CP 51-CR-0006164-2010, Judge Geroff stated:

> A person is guilty of retaliation against a witness if he harms another by any unlawful act or engages in a course of conduct or repeatedly commits acts which threaten another in retaliation for anything lawfully done in the capacity of witness. 18 Pa. C.S.A. § 4953. The evidence was sufficient to convict [Petitioner] for retaliation against a witness, because the note Haley was given by [Petitioner] was for a contract to kill Robin Gore, a witness who had lawfully testified as a witness against [Petitioner] at the preliminary hearing.
>
> According to Haley, [Petitioner] gave Haley the note and explained to him the situation that had happened. (N.T. 02/21/2014, p. 16). Haley testified that the note [Petitioner] provided him was for a contract to kill Robin Gore, and that the note had contained Gore's address. *Id.* at 17. When shown the note in court, Haley immediately identified it. *Id.* at 19. Haley identified [Petitioner] in court and testified that he had known [Petitioner] for years. *Id.* at 14, 15. Haley testified that he had been part of the Black Mafia, a criminal organization with a brutal reputation in Philadelphia. *Id.* at 23. The jury could have reasonable inferred that [Petitioner] was likely to have known of Haley's reputation as part of the organization; the jury could have also reasonably inferred that he approached Haley because he thought Haley would have the experience and the willingness to assist him in killing a witness whom he [[Petitioner]] had seen just days earlier at the preliminary hearing. (N.T. 4/13/201[0], p. 6.)

> Haley testified that he went to his counselor with the note just a day after receiving it from [Petitioner]. (N.T. 2/21/2014, p. 20). In addition, Detective Lucke testified that he heard from Haley's counselor about the note on April 16, 2010, just three days after the preliminary hearing. (N.T. 2/24/2014, p. 64). The timing, therefore, would have provided the jury with a reasonable inference that within days of [Petitioner] seeing Gore at the preliminary hearing, [Petitioner] decided to try and persuade Haley to kill Gore to prevent him . . . from testifying at trial.
>
> Moreover, there is no reason Haley would have known the name or address of the witness until he was approached by [Petitioner], who told him about Gore and gave him a note containing Gore's address. Detective Lucke stated at trial that he made no threats or promises to Haley. *Id.* at 66-67. Detective Lucke also stated at trial that he had no prior knowledge of Haley's connection to the case. *Id.* At trial, Haley corroborated Lucke's testimony about the note by indicating that no one had threatened or promised him anything in return for his statement. (N.T. 2/21/2014, p. 23).
>
> Haley's testimony, along with the other evidence presented at trial, provided sufficient evidence to convict [Petitioner] of solicitation to commit murder. A person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission. 18 Pa. C.S.A. § 902. [Petitioner] solicited Haley to commit murder when he asked Haley to murder witness Robin Gore by giving Haley the note in question. The evidence presented was sufficient to convict [Petitioner] of solicitation to commit murder.

Trial Ct. Op. at 19-21.

The decision of the state courts is neither contrary to, nor an unreasonable application of, the Supreme Court's Jackson decision. 443 U.S. at 319. Judge Geroff accurately set forth the elements of each offense under state law and identified in detail how the evidence adduced at trial (consistent with the summary set forth above) was

sufficient to satisfy the elements of each offense beyond a reasonable doubt, and the Superior Court adopted Judge Geroff's analysis of this claim in its entirety.

Although Petitioner does not expand on this claim in his petition or briefing, arguments related to the sufficiency of the evidence may be gleaned from his statements addressing prejudice generally and harmless error in the context of his Bruton claim. In doing so, much of Petitioner's argument amounts to a request to re-weigh evidence and reassess the credibility of witnesses, which a federal habeas court cannot do. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court"). For example, Petitioner argues that Gore was not a credible witness because he initially told police officers that the two assailants wore masks, Doc. 10 at 31, 38, and that Haley was not a credible witness because he was an admitted murderer, convicted felon, and member of the Black Mafia who testified under an immunity from prosecution agreement. Id. at 38, 63-64. In his trial court opinion on direct appeal, Judge Geroff explained why it was "expectable" that Gore would not be completely forthcoming about what had happened when he first spoke to police, Trial Ct. Op. at 21, and the judge explained how the jury could make reasonable inferences from Haley's testimony. Id. at 19-21. Because this court is bound by the trial court's credibility determinations, trial evidence from Gore and Haley is properly considered in the context of a sufficiency claim.

There being no error in the trial court's analysis, and upon viewing the evidence in the light most favorable to the prosecution, it is clear that "any rational trier of fact could

have found the essential elements" of each of the crimes beyond a reasonable doubt. Jackson, 443 U.S. at 319. Therefore, I find that Petitioner is not entitled to relief on his sufficiency claim.

E. Defaulted Claims

Petitioner's remaining claims, most of which allege IAC, are defaulted because he did not raise them in the state courts and he is now precluded from doing so. Petitioner relies on Martinez v. Ryan, 566 U.S. 1 (2012), to overcome the default of his IAC claims. As previously explained, in Martinez the Supreme Court carved out a narrow exception to the rule that ineffective assistance of PCRA counsel does not provide cause to excuse a procedural default, holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Id. at 9. With respect to each defaulted IAC claim, I will dispense with the multi-step Martinez analysis and find that each underlying claim of ineffective assistance of trial counsel is meritless. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

1. Ground Three: IAC for Failing to Seek Jury Instruction Regarding Haley's Immunity Agreement

Petitioner argues that counsel was ineffective for failing to seek a cautionary jury instruction regarding witness Jerry Haley's immunity agreement. Doc. 1 ¶ 12 (GROUND THREE) & at 19; Doc. 10 at 58-63 ("Issue Three"). In his supporting memorandum of law, Petitioner raises a different ineffectiveness claim related to a jury

instruction, specifically that counsel was ineffective for failing to request an instruction on accomplice testimony regarding Haley. Doc. 10 at 58. Respondents counter that both versions of the claim are defaulted. Doc. 28 at 49-51.

Because both claims lack merit, I will reject them on that ground. First, as to a cautionary instruction regarding witness Haley's immunity agreement, Petitioner's claim is flawed because Judge Geroff issued the very instruction Petitioner claims his trial counsel failed to obtain. After granting the Commonwealth's request for immunity, Judge Geroff instructed the jury that Haley "is now immune from prosecution if he should testify in a manner that might incriminate himself." N.T. 2/21/14 at 30. In his final instructions, Judge Geroff instructed the jury that Haley had

> testified under grant of immunity from prosecution that during that time frame he participated in at least 10 murders. He testified that he has served 30 years in prison for crimes committed on the street and for offenses while he was in prison. He was released from prison in 2005 and was not arrested again until March of 2010 when he was charged with attempted murder and an aggravated assault. He spent two years in custody awaiting trial and was found not guilty by a judge sitting without a jury. He testified that no threats or promisers were made to him in exchange for his statement to Detective Lucke. Detective Lucke also testified that he made no promises to Mr. Haley. Nonetheless, you should consider whether Mr. Haley expected or was hoping for a deal or for leniency if he was convicted of the attempted murder or aggravated assault.
>
> . . . .
>
> You should take into account all of the above circumstances, his extensive history of criminal behavior, his convictions for *crimen falsi*, his possible expectation of favorable treatment under grant of immunity in deciding the credibility and weight of anything he has said in his testimony in deciding whether or not to believe all, part, of none of the testimony given by Mr. Haley at this trial.

N.T. 2/25/14 at 87-88. Trial counsel cannot be found deficient for having failed to request a cautionary instruction that was, in fact, given.

Second, Petitioner's later-added claim of IAC for failing to seek a cautionary instruction on accomplice testimony by Haley also lacks merit.[21] According to Petitioner, Haley became an accomplice when, after Petitioner requested that Haley murder Gore and handed him a note with Gore's address, Haley "stated that he was going to follow through and carry out the job, but then decided to tell his prison counselor about the contract." Doc. 10 at 59. Under Pennsylvania law, an accomplice is an individual who "knowingly and voluntarily cooperates with or aids another in the commission of a crime." Commonwealth v. Carey, 439 A.2d 151, 158 (Pa. Super. 1981). Here, contrary to Petitioner's assertion, there is no evidence that Haley knowingly and voluntarily cooperated with Petitioner's plan to murder Gore. Haley testified that he told Petitioner that he would "think about it," and the next day turned the note over to his prison counselor, who in turn contacted the District Attorney's office. N.T. 2/21/14 at 17-18. When pressed on his intention on cross-examination, Haley testified that he thought about Petitioner's proposal "[a] little," but that "I had a chance to change my mind, and I did." Id. at 37-38. As such, there is no basis upon which the jury could infer that Haley was an accomplice, and trial counsel cannot be found deficient for having failed to request a baseless instruction.

[21]The memorandum containing this claim was filed on October 3, 2019, and therefore the claim is timely. See supra at 7 n.9.

2. Ground Four: IAC for Failing to Impeach Witness Haley

Petitioner argues that counsel was ineffective for failing to impeach witness Haley on his alleged mental condition, and that the Commonwealth withheld evidence of Haley's alleged mental issue in violation of Brady v. Maryland, 373 U.S. 83 (1963). Doc. 1 ¶ 12 (GROUND FOUR) & at 21; Doc. 10 at 63-64 ("Issue Four"). Respondents counter that the claim is defaulted, as neither aspect of the claim was raised in the state courts. Doc. 28 at 52-54.

To the extent Petitioner asserts a Brady claim, such a claim is unexhausted and procedurally defaulted, and not subject to Martinez. Moreover, although Petitioner's IAC claim conceivably could be excused by Martinez, the claim cannot be considered "substantial" because it is vague and unsupported.

Petitioner does not offer any factual development for this claim, such as facts to suggest Haley had any sort of mental problem or how counsel should have impeached Haley based on any such alleged mental condition. See Mayle v. Felix, 545 U.S. 644, 655 (2005) (habeas petition must "specify all the grounds for relief available" and "start the facts supporting each ground") (quoting Habeas Corpus Rule 2(c), 28 U.S.C. § 2254); Palmer v. Hendricks, 592 F.3d 386, 395 (3d Cir. 2010) (in habeas context, "[b]ald assertions and conclusory allegations do not afford sufficient ground for an evidentiary hearing"); United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) ("[V]ague and conclusory allegations contained in a [habeas] petition may be disposed of without further investigation by the District Court."). Accordingly, the default of this claim cannot be excused by Martinez.

3. Ground Five: IAC for Failing to Inform Petitioner of a Plea Offer

Petitioner argues that counsel was ineffective for failing to inform him of a plea offer from the Commonwealth. Doc. 1 ¶ 12 (GROUND FIVE) & at 23; Doc. 10 at 64-66; Doc. 10 at 64-66 ("Issue Five"). Respondents counter that the claim is defaulted, and that it contains insufficient factual support to justify relief. Doc. 28 at 54-55. I conclude that Petitioner is not entitled to relief on the underlying ineffectiveness claim.

As an initial matter, Respondents criticize Petitioner for failing to attach a docketing statement that he contends provides support for his argument that the Commonwealth extended a plea offer to Petitioner's counsel on November 10, 2010. Doc. 28 at 54. This criticism is inaccurate insofar as Petitioner clearly refers to the state court docket sheets in CP 51-CR-0006164-2010 and CP 51-CR-0004555-2010, both of which contain an entry dated November 10, 2010, that states "Defense request to consider Commonwealth offer." Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Docket Sheets (Phila. C.C.P. entries dated 11/10/10) ("Docket Sheets"). Petitioner identified these docket entries as Exhibit A to his PCRA petition, and again in his response to the PCRA court's Notice of Intent to Dismiss his PCRA petition. PCRA Pet. Exh. A; Commonwealth v. Woods, CP 51-CR-0006164-2010, CP 51-CR-0004555-2010, Response to Notice of Intention to Dismiss, ¶¶ 19-20 (Phila. C.C.P. Sep. 27, 2017). As a result, Petitioner's failure to attach the Docket Sheets does not, by itself, deprive his IAC claim of factual support.

Nevertheless, Respondents are correct insofar as Petitioner otherwise fails to provide factual support for this ineffectiveness claim. First, the November 10, 2010 entries referencing a "Commonwealth offer" are far from self-explanatory. They follow multiple entries in which the defense requested "further investigation." Docket Sheets (entries dated 6/22/10, 6/28/10, 7/29/10, 9/29/10, 10/20/10). Indeed, the November 10, 2010 entries themselves are also captioned "Defense Request for Further Investigation." Id. (entries dated 11/10/10). Thus, it is not obvious from the face of the docket whether "request to consider Commonwealth offer" concerned an offer related to that investigation, a request for time to contemplate whether to invite a plea offer from the Commonwealth, or, as Petitioner suggests, time to consider a plea offer already made. The terms "plea" or "deal" do not appear on the Docket Sheets or anywhere else in the record, including the trial notes of testimony or in any attached correspondence from a prosecutor, the court, or defense counsel. Although Petitioner contends that an offer existed and that it was for a "lesser" sentence than what he received, Doc. 10 at 64, he provides no information to support the existence or terms of the offer other than the November 10, 2010 docket entries. Absent any such evidence to support his claim, Petitioner cannot establish that trial counsel was ineffective. See Burt v. Titlow, 571 U.S. 12, 23 (2013) ("[T]he absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'") (quoting Strickland, 466 U.S. at 689).

Further, I note that Petitioner adamantly professed his innocence during trial and appeal, and continues to do so now, and therefore there is no suggestion in the record that

Petitioner would have considered a plea deal that would have required him to admit guilt to at least some of the charges, as well as the Commonwealth's version of the facts.

For these reasons, I find that Petitioner is not entitled to relief on this IAC claim.

4. Ground Six: IAC for Failing to Seek Jury Instruction Regarding Lack of Intent to Commit Robbery

Petitioner argues that counsel was ineffective for failing to seek a jury instruction that there is no intent to commit robbery when the perpetrator seeks the return of his own goods. Doc. 1 ¶ 12 (GROUND SIX) & at 24. Petitioner does not elaborate on this claim, but in context appears to argue that because Duval did not provide Kelsey with the full amount of marijuana he purchased, Kelsey and Petitioner appeared at Gore's house to "recover goods that . . . belong[ed] to [Kelsey]." Id. at 24. Respondents counter that the claim is defaulted. Doc. 28 at 55-56.

Petitioner did not present this claim to the state court and therefore relies on Martinez to overcome default. Rather than proceeding through each step of the Martinez analysis, I conclude that Petitioner is not entitled to relief because the underlying ineffectiveness claim is meritless.

Under Pennsylvania law, a person cannot lawfully commit murder to regain property over which the person claims ownership. See Commonwealth v. Mays, 675 A.2d 724, 730 (Pa. Super. 1996) ("While it is true that felonious intent is one of the important elements of the crime of robbery, . . . if a defendant is owed money by a victim, and commits murder of the victim when attempting to regain the money, the defendant will be guilty of robbery . . . ;" defendant was not entitled to a special

instruction on felonious intent) (citations omitted). Because counsel cannot be ineffective for seeking an unwarranted jury instruction, Petitioner's claim is meritless.

5. Ground Seven: IAC for Failing to Seek a Manslaughter Instruction

Petitioner argues that counsel was ineffective for failing to seek a manslaughter instruction. Doc. 1 ¶ 12 (GROUND SEVEN) & at 25. Respondents counter that the claim is defaulted. Doc. 28 at 57-58.

As with Petitioner's other defaulted IAC claims, I conclude that the underlying ineffectiveness claim is meritless. It is axiomatic that a defendant is not entitled to a jury instruction unless there is an evidentiary basis for one. See Vujosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988) (jury instruction not required unless the proposed instruction is supported by evidence); Commonwealth v. Carter, 466 A.2d 1328, 1332-33 (Pa. 1983) (trial court may charge on voluntary manslaughter only where evidence exists to support verdict). Under Pennsylvania law, a manslaughter instruction is not warranted where, as here, the defendants were engaged in an armed robbery at the time of the shooting. Commonwealth v. White, 415 A.2d 399, 402 (Pa. 1980) (jury instruction on involuntary manslaughter not warranted where "appellant and [codefendant] were engaged in an armed robbery at the time of the shooting," which at minimum constitutes murder of second degree "whether the revolver was discharged by appellant or [codefendant], intentionally or accidentally"); Commonwealth v. Bennett, 2017 WL 376016, at *9 (Pa. Super. Jan. 26, 2017) (defendant not entitled to voluntary manslaughter instruction where victim was shot during struggle with defendant because

"the defense ignores that there was a struggle only because defendant was committing a gunpoint robbery of the victim when the shooting occurred").

Here, the evidence adduced at trial regarding Petitioner's participation in the armed robbery of Duval at the time of his killing did not support a manslaughter instruction. Therefore, trial counsel cannot be found ineffective for failing to seek an unwarranted jury instruction.

6. Ground Eight: IAC for Failing to Object to Testimony Regarding Weapons

Petitioner argues that counsel was ineffective for failing to object to Gore's testimony about the weapons wielded by Petitioner and Kelsey because such testimony was beyond the scope of a lay witness and required expert testimony. Doc. 1 ¶ 12 (GROUND EIGHT) & at 26; Doc. 10 at 67-68 ("Issue Seven"). Respondents counter that the claim is defaulted and meritless. Doc. 28 at 59-60.

The underlying ineffectiveness claim is meritless. Contrary to Petitioner's claim, trial counsel did object when Gore identified Petitioner's weapon as a revolver. N.T. 2/21/16 at 63. Judge Geroff sustained the objection and instructed the prosecutor to rephrase the question. Id. The prosecutor then laid a foundation for Gore's understanding of the differences between a revolver and a semiautomatic, and Gore testified as to why he believed one gun was a revolver and the other an automatic based on what he observed at close range. N.T. 2/21/14 at 63-65. As such, there was no basis for counsel to continue to object to Gore's testimony regarding the weapons involved.

Moreover, for the reasons discussed more fully in consideration of Petitioner's sufficiency claim, he cannot demonstrate that any failure by counsel in this regard caused him prejudice at trial. Therefore, Petitioner is not entitled to relief on this ineffectiveness claim.

7. Ground Nine: IAC for Failing to Move to Suppress Petitioner's Police Statement

Petitioner argues that counsel was ineffective for failing to move to suppress Petitioner's police statement, which occurred before he was read his Miranda rights. Doc. 1 ¶ 12 (GROUND NINE) & at 27; Doc. 10 at 66-67 ("Issue Six"). Respondents counter that the claim is defaulted and meritless. Doc. 28 at 60-62.

As with Petitioner's other defaulted IAC claims, I will dispense with each step of the Martinez analysis because the underlying ineffectiveness claim is meritless. The well-recognized rule is that prior to any custodial interrogation, the police must advise a suspect of procedural safeguards established in Miranda v. Arizona, 384 U.S. 436, 475 (1966), to protect individuals against self-incrimination. However, Miranda does not bar the admission of volunteered statements, even if given in response to a follow-up question. See, e.g., United States v. Nikparvar-Fard, 782 Fed. App'x 160, 162 (3d Cir. 2019) ("Miranda concerns are not implicated in follow-up questions to volunteered statements.") (quoting United States v. Rommy, 506 F.3d 108, 133 (2d Cir. 2007)); United States v. Granero, Crim No. 91-578-1, 1992 WL 59151, at *6 (E.D. Pa. Mar. 19, 1992) ("It is axiomatic that volunteered statements of any kind are not barred by the Fifth Amendment.") (citing Miranda, 384 U.S. at 478).

Here, Petitioner was not being interrogated in the back seat of a police cruiser when he volunteered that he was present for Duval's murder. As Sergeant Flaville testified,

> [w]hile transporting [Petitioner] to the Homicide Division, he was inside of our vehicle and he asked how long he was going to be at Homicide. Detective Kerwin and I told him it all depends on what he has to say and what he knows. His response was that [Detective] Lucke wants to talk to him about a homicide. He said that he was present for the homicide, but it does not mean that he saw anything. And that was it.

N.T. 2/24/14 at 46. Because this volunteered statement did not violate Miranda, counsel cannot be deemed deficient for failing to move to seek its suppression.

Moreover, for the reasons previously set forth, Petitioner cannot demonstrate that he was prejudiced by counsel's failure to suppress the police statement. In the statement, Petitioner stated only that he was present in the basement when Duval was shot, but that he did not see anything. At trial, the Commonwealth presented testimony from Gore and Lester that two men arrived and drew guns, eyewitness Gore directly identified Petitioner as one of the two men. The Commonwealth also presented the testimony of Haley regarding statements Petitioner made to him about the Duval killing and his attempt to have Gore killed to prevent his testimony. Under the circumstances, therefore, Petitioner cannot establish prejudice. This ineffectiveness claim is meritless.

8. Ground Eleven: Due Process Violation

Petitioner argues that the trial court's decision to admit witness Haley's note into evidence violated Petitioner's due process rights. Doc. 1 ¶ 12 (GROUND ELEVEN) &

at 29. Respondents counter that the claim is defaulted and non-cognizable. Doc. 28 at 66-67.

On direct appeal, Petitioner raised this claim only as a matter of state evidentiary law, and the state courts decided it exclusively on that basis. See Trial Ct. Op. at 23-24 (finding Petitioner's note to Haley was authentic, prosecution presented evidence that note was what it claimed it to be, Haley confirmed the note shown at trial was same note Petitioner gave him, and timing was consistent with inference that Petitioner tried to hire Haley to kill Gore); Super. Ct.-Direct at 5-6 (adopting Trial Ct. Op.). State court determinations of state law evidentiary issues are not reviewable, see Estelle, 502 U.S. at 67-68, and simply adding the words "due process" does not convert a state-law claim into a constitutional claim. Cotton v. Wenerowicz, Civ. Action No. 12-3103, 2014 WL 1396477, at *9 (E.D. Pa. Apr. 10, 2014) (citing Rivera v. Illinois, 556 U.S. 148, 158 (2009)).

Questions involving the admission of evidence may rise to a due process violation when the probative value of such evidence, though relevant, is greatly outweighed by prejudice to the accused, thus giving rise to issues of fundamental fairness. Bisaccia, 623 F.2d at 313. "[O]nly if the inflammatory nature of [the evidence] so plainly exceeds its evidentiary worth, will we find that a constitutional error has been made." Lesko v. Owens, 881 F.2d 44, 52 (3d Cir. 1989). Petitioner fails to articulate how the inflammatory nature of the note required its exclusion. The note was highly relevant, and it was not so shocking or upsetting that the trial judge would likely have excluded it.

For the aforementioned reasons, I conclude that this due process claim is defaulted and in any event meritless.

9. Ground Twelve: IAC for Failing to Impeach Gore with His Prior Inconsistent Statements

Lastly, Petitioner argues counsel was ineffective for failing to impeach Gore with his prior inconsistent statements. Doc. 1 ¶ 12 (GROUND TWELVE) & at 30. Respondents counter that the claim is vague and insufficiently pled, and in any event meritless. Doc. 28 at 67-68.

Petitioner did not present this claim to the state court and therefore relies on Martinez to overcome default. Respondents take issue with Petitioner's failure to factually develop this claim by, for example, identifying what the prior inconsistent statements were or how defense counsel should have cross-examined Gore, and argue that Petitioner therefore fails to present a substantial ineffectiveness claim under Martinez. Doc. 28 at 68. I find the prior inconsistent statements to be readily determinable and will instead reject the underlying ineffectiveness claim on the merits.

As previously explained, Detective Lucke testified that Gore appeared visibly shaken, scared and nervous about what transpired in his basement. N.T. 2/24/14 at 53. Gore testified that after Duval had been shot, Kelsey pointed his gun at Gore's face and told him not to say anything about what had just happened. N.T. 2/21/14 at 61, 95. Gore admitted that he initially told the police that masked men had shot Duval, explaining that he loved his friend Kelsey and feared for his own life, but that he changed his mind and recanted his story about the masked men because he wanted to tell the truth. Id. at 67-68,

76. Judge Geroff found Gore's explanation for the differing stories to be "persuasive," explaining in his opinion on direct appeal, "Gore was visibly shaken by what had happened, and he was afraid for his own life. It was, therefore, expectable that initially Gore was not completely forthcoming about what had actually happened." Trial Ct. Op. at 21. Gore had already admitted to the inconsistency, and any attempt by counsel to further impeach Gore with his prior inconsistent statements would have allowed Gore to reiterate to the jury that he had just witnessed Kelsey and Petitioner shoot his friend and then had a gun pointed as his head along with a warning not to talk. Therefore, counsel cannot be found deficient in failing to pursue that line of questioning.

Moreover, for the reasons previously explained, Petitioner cannot show that counsel's failure in this regard caused him prejudice. Therefore, Petitioner is not entitled to relief.

IV. MOTION FOR APPOINTMENT OF COUNSEL

Finally, Petitioner's motion for appointment of counsel (Doc. 32), which I previously denied without prejudice (Doc. 38), should be denied. There is no constitutional right to habeas counsel, see Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), and no statutory right to habeas counsel in a non-capital case. Cf. 18 U.S.C. § 3599(a)(2) (providing for appointment of counsel in federal post-conviction proceedings seeking to vacate a death sentence). The court has discretion to appoint counsel "when the interests of justice so require." Id. § 3006A(a)(2). In making this determination the court should consider the complexity of the factual and legal issues in the case and the petitioner's ability to investigate facts and present his claims. Reese, 946

F.2d at 264. Counsel need not be appointed when the issues are "'straightforward and capable of resolution on the record' . . . or the petitioner 'had a good understanding of the issues and the ability to present forcefully and coherently his conclusions.'" Id. (quoting Ferguson v. Jones, 905 F.2d 211, 214 (8th Cir. 1990); LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987)); see also Ballard v. Duckworth, 656 F. Supp. 693, 675 (N.D. Ind. 1986) (factors to consider include the legal and factual merits of the claims, the degree of complexity of the issues, and the petitioner's apparent physical and intellectual abilities to prosecute the action) (citing, inter alia, Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981)).

Here, Petitioner asserted twelve claims in his petition, attached lengthy supporting argument to the petition, and thereafter filed additional briefing and evidence. Docs. 1 & 35. Petitioner has clearly laid out his claims and his arguments. For example, Petitioner seeks counsel to argue prejudice in the context of his Bruton claim, Doc. 35 at 18, while laying out a cogent and forceful argument as to why the Bruton violation in his case should not be found harmless. Additionally, Plaintiff has not raised any issue as to his physical or mental ability to address his claims, nor can one be discerned from the record or submissions to this court. Therefore, I find that appointment of counsel is not warranted.

V. CONCLUSION

Petitioner's habeas petition is timely and raises twelve grounds for relief. Petitioner's first two IAC claims (Grounds One & Two) and his sufficiency claim (Ground Ten) are exhausted and meritless, and his remaining claims are both defaulted

and meritless. Additionally, appointment of counsel is not warranted.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 27th day of October, 2021, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED, and his motion for appointment of counsel be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ ELIZABETH T. HEY

ELIZABETH T. HEY, U.S.M.J.

Appendix: D:

Woods v. District Attorney of Philadelphia, Et Al.
C.A. No. 22-3442 [Denial of Reconsideration],
(May 12, 2023).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3442

MALIK WOODS,
Appellant

v.

DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa No. 2-19-cv-03303)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant Malik Woods 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/ Cheryl Ann Krause
Circuit Judge

Dated: May 12, 2023
Tmm/cc: Malik Woods
Katherine E. Ernst, Esq.
Ronald Eisenberg, Esq.