Appendix "A"

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1737

SPENCER WALLACE,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
THE ATTORNEY GENERAL PENNSYLVANIA;
THE DISTRICT ATTORNEY PHILADELPHIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-18-cv-03509)
District Judge: Honorable Nitza I. Quiñones Alejandro

Submitted under Third Circuit L.A.R. 34.1(a)
March 21, 2023

BEFORE: JORDAN, GREENAWAY, JR., and McKEE, *Circuit Judges.*

(Filed: June 2, 2023)

OPINION*

GREENAWAY, JR., *Circuit Judge.*

Appellant Spencer Wallace appeals from the District Court's denial of his habeas

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

petition. For the following reasons, we will affirm the denial.

I. Background

Spencer Wallace was tried by a jury in the Court of Common Pleas of Philadelphia County for the murder of Harry Ballard. He was charged with the following offenses: Murder of the First Degree, violations of Pennsylvania's Uniform Firearms Act (VUFA charges), and Possession of an Instrument of Crime (PIC charge). The jury convicted Wallace, and he was sentenced to a mandatory term of life in prison without parole on the murder offense with a consecutive term of 2 to 7 years for the VUFA charges and 1 to 5 years on the PIC offense, all to run consecutively. In reaching a guilty verdict, the jury rejected Wallace's defense that he did not possess the firearm used to shoot Ballard.

Wallace's principal argument on appeal centers around the trial court's jury instructions. The trial court instructed the jury prior to the guilty verdict. As the court was instructing the jury on the murder count, the court explained that there were three elements that the prosecution had to prove to be successful: (1) the death of the victim, (2) that the defendant killed the victim, and (3) that the defendant killed the victim with the specific intent to kill and with malice. The court explicitly noted that the first element was not disputed because "there's no question" that the victim was dead. A307. On the murder offense, the court continued onwards to explain

> [w]hen deciding whether or not *the defendant* had the specific intent to kill, you should consider all the evidence regarding his words and conduct and the attending circumstances that might show his state of mind.

A307 (emphasis added). The jury was instructed the following on the PIC offense:

> In order to find the defendant guilty of this offense, you have to find, first of all, that the defendant possessed a firearm. To possess an item, the defendant must have the power to control it and the intent to control it. Secondly, that the firearm was an instrument of a crime. An instrument of a crime is anything that is used for criminal purposes and possessed by a defendant at the time of the alleged offense under circumstances that are not manifestly appropriate for any lawful uses it might have . . . . [T]he second element, that the firearm was an instrument of a crime, has been proven by the facts of this case that are not contradicted; *and that the defendant possessed the firearm with the intent to attempt or commit a crime with it—in this case the crime of murder. So what you have to decide is whether or not the defendant possessed a firearm.*

A308 (emphasis added). At multiple points, the trial court retold the jurors that they were the sole judges of the facts and that they had to weigh the evidence presented and making any logical inferences. Neither defense counsel nor the prosecutor made objections to the court's charge to the jury.

Wallace used both state and federal processes to challenge his conviction. After unsuccessfully appealing his verdict and sentence, Wallace requested relief under Pennsylvania's post-conviction relief process. The Superior Court of Pennsylvania affirmed the denial of post-conviction relief without an evidentiary hearing. *Commonwealth v. Wallace*, No. 913-EDA-2016, 2017 WL 6181826, *8 (Pa. Super. Ct. Dec. 8, 2017). Wallace petitioned for allowance of appeal, which the Pennsylvania Supreme Court denied. *Commonwealth v. Wallace*, 187 A.3d 913 (Pa. 2018). Wallace also filed a 28 U.S.C. § 2254 habeas petition raising multiple claims, only two of which are relevant here: (1) trial counsel was ineffective for not objecting to the trial court's jury instructions because the court directed a verdict against Wallace on both the VUFA and PIC charges and (2) trial counsel was ineffective for not objecting to the trial court

allegedly inserting its own opinion that Wallace possessed a firearm with intent to commit murder.[1] Wallace's habeas petition was referred to a magistrate judge. The magistrate judge issued a report and recommendation, advising that the petition be dismissed in full. The magistrate judge concluded that both ineffective assistance of counsel claims were procedurally defaulted because the Superior Court of Pennsylvania based its decision on an independent and adequate state law ground that barred review of the claim. The magistrate judge also concluded that Wallace failed to exhaust his claim under federal law because he did not "'fairly present' his due process argument in state court." A111.

After reviewing the magistrate judge's Report and Recommendation, the District Court denied Wallace's habeas petition. However, the court disagreed with the magistrate judge that these two claims were procedurally defaulted. The District Court concluded that Wallace had adequate citations to federal case law to put the Superior Court of Pennsylvania on notice that Wallace was raising a federal due process claim. Proceeding to the merits, the District Court proceeded to the merits of the claim and held that the Superior Court of Pennsylvania correctly applied federal law in analyzing the jury instruction issue as pertaining to the VUFA and PIC charges, and that Wallace could not show prejudice.

[1] The District Court granted a certificate of appealability on both claims.

II. Discussion[2]

Wallace urges us to conclude that his trial counsel was ineffective for failing to object to the trial court's jury instructions, which he argues constituted a directed verdict that violated his right to due process. We decline to do so; we agree with the District Court's denial of his habeas petition on the merits.

a. Legal Standards

An individual alleging ineffective assistance of counsel must prove two elements: (1) counsel's performance was deficient, determined by ascertaining whether counsel's representation fell below an objective standard of reasonableness and (2) deficient performance prejudiced the defendant, which requires that the outcome of trial would have been different except for counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Antiterrorism and Effective Death Penalty Act (AEDPA) changed the standard for federal courts reviewing state-court judgments through 28 U.S.C. § 2254 habeas petitions. A federal court can only grant a habeas petition if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States" or

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[2] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254(a). The District Court granted a certificate of appealability. We have jurisdiction pursuant to 28 U.S.C. §§ 2253(c)(1)(A) and 1291. We agree that § 2254(d) does not bar relief and exercise plenary review over a district court's dismissal of a habeas petition where the court did not hold an evidentiary hearing. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 280 (3d Cir. 2016) (en banc).

(2) "resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *See also Williams v. Taylor*, 529 U.S. 362, 375–390 (2000).

This standard is exacting—the first requirement is only met when there is "no possibility for fairminded disagreement" and a party can demonstrate that "Supreme Court precedent *requires* a contrary outcome." *Spanier v. Dir. Dauphin Cty. Prob. Servs.*, 981 F.3d 213, 228 (3d Cir. 2020) (cleaned up). The second requirement is met when a state court's decision is based on an unreasonable determination of the facts and the state court's factual findings are "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

The Due Process Clause of the Fourteenth Amendment protects defendants from jury instructions that may inadvertently decrease the burden of proof on the Government because it requires that each element of an offense be proven beyond a reasonable doubt. *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 392 (3d Cir. 2020) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). A conviction violates a defendant's due process right if there is "ambiguity, inconsistency, or deficiency" in the jury instruction "such that it creates a reasonable likelihood the jury misapplied the law and relieved the government of its burden . . . ." *Id.* (cleaned up). In evaluating such a due process claim, the court must independently review how a reasonable jury would have interpreted the instructions. *Id.*; *Francis v. Franklin*, 471 U.S. 307, 316 (1985). The court must focus on the challenged language but consider it in the context of the whole charge to determine whether there is a reasonable likelihood that the jury applied the instructions in a manner

that violated due process rights. *Tyson*, 976 F.3d at 392.

b. Analysis

Viewing the jury instructions as a whole makes clear that the trial judge was not issuing a directed verdict. If the disputed language is looked at in isolation, one may conclude that the trial court was pronouncing Wallace to be the perpetrator during the charge, which would not pass constitutional muster. But reviewing the rest of the charge shows that the trial court repeatedly instructed that it was the jury's duty, and not the court's, to determine whether Wallace was the perpetrator.

There is no reasonable likelihood that the jury was misled in convicting Wallace. Wallace's due process rights under the Fourteenth Amendment were not violated by the trial court's jury instructions as a whole on either the VUFA charge or the PICU charge.[3] The specific language of the jury instructions that Wallace points to is the excerpt from the trial court's PIC instruction that "the second element, that the firearm was an instrument of the crime, has been proven by the facts of this case that are not contradicted; *and that the defendant possessed the firearm with the intent to attempt or commit a crime with it—in this case the crime of murder*." A308 (emphasis added). According to Wallace, that instruction implied that he possessed the gun and therefore had the intent to commit murder. We agree with the District Court's observation that this

[3] The District Court evaluated these claims together because the analysis requires identical legal principles and discussion of the facts. We adopt the same approach here for the same reason.

instruction, taken in isolation, would relieve the prosecution of its burden of having to prove mens rea.

But our analysis does not stop there. Before accidentally stating that "the defendant possessed the firearm with the intent to attempt or commit a crime with it," A308, the trial court properly instructed the jury on the mens rea element for first degree murder. This directive correctly explained the "state of mind," A307, requirement for first degree murder, and shows that, although the trial court may have made an error, the error was unlikely to have altered the juror's understanding of the mens rea burden of proof, *United States v. Pennue*, 770 F.3d 985, 990 (1st Cir. 2014) (error in jury instruction improbable to impact government burden of proof where erroneous instruction was surrounded by other correct instructions). The trial court, before and after the mistaken instruction, described the different mental states and how they were defined for the jurors to reach a verdict. The trial court went on to explain that the main contested element was possession of the firearm and that that was what the jury needed to decide. Interspersed throughout the jury instructions was the trial court's repeated directive that the jury was the sole arbiter of the facts and that the jury had to make logical inferences and credibility determinations about the evidence presented. This shows that despite the trial court's slip of the tongue in referring to the perpetrator as "the defendant," the inadvertent error did not decrease the Government's burden of proof at trial.

The trial court's emphasis, in the context of the PIC instruction, on possession of a firearm, as opposed to mens rea, is logical given Wallace's defense at trial. Wallace did not emphasize whether Ballard was killed by a firearm or whether someone used a firearm with the intent to commit a crime. The trial court's instructions were an attempt to focus the jury on the most contested element of the trial—who possessed the firearm. Neither party objected to the jury instructions before the case was submitted to the jury, indicating that counsel did not recognize an error. *See United States v. Flores*, 454 F.3d 149, 158 (3d Cir. 2006) ("[C]ounsel's failure to object leaves us with the impression that the misstatement in the oral charge was hardly noticeable.").

Considering the jury instructions as a whole, it is evident that the trial court's use of the word "defendant," instead of generic perpetrator, did not absolve the prosecution of meeting its burden to prove that Wallace possessed the firearm, killed Ballard, and did so with the specific intent to kill. The jurors were forcefully directed to disregard any factual errors made by the trial court, showing that the jury could make factual determinations for itself. We must assume that "the judge or jury acted according to law," *Strickland*, 466 U.S. at 694, and that the jurors followed the entirety of the instructions they received to evaluate each element of each offense, *United States v. Bryant*, 655 F.3d 232, 252 (3d Cir. 2011).

The Superior Court's analysis on jury instructions was not contrary to federal law and did not result in a decision based on an unreasonable application of the facts. This case is distinguishable from cases finding due process violations based on faulty jury

instructions. *See, e.g., Bey v. Superintendent Green SCI*, 856 F.3d 230, 241–42 (3d Cir. 2017) (jury instructions resulted in prejudice because they misstated instruction expressly directing jury *not to* weigh most critical testimony to establishing defendant's guilt); *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 287–88 (3d Cir. 2018) (jury instructions relieved government of having to prove mental state because directives by the court did not contain specific-intent-to-kill instructions for accomplices); *Tyson*, 976 F.3d at 392–94 (jury instructions violated due process because they completely omitted the requisite mental state of an accomplice in first-degree murder).[4]

Instead, these facts are in line with our precedent in *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462 (3d Cir. 2017). The trial court in *Mathias* made inconsistent statements about when an accomplice could be liable for first-degree murder, stating that jurors could find shared intent or that an accomplice's intent could be inferred by a principal's intent to kill. *Id.* at 467–68. The due process claim could not succeed on appeal because parts of the instructions "properly articulated the specific intent requirement." *Id.* at 479.

[4] Wallace's discussion of the Court's ruling in *Sandstrom v. Montana*, 442 U.S. 510 (1979) provides no support for his position. The Supreme Court held that jury instructions that allowed a jury to create a mandatory presumption or permissive inference where the burden to prove intent shifted to the defendant violated due process. *Sandstrom*, 442 U.S. at 515–16. We find that the trial court's instruction here did not amount to a directed verdict or create a presumption or inference that resulted in improper burden-shifting by the court. As described, the instructions as a whole maintain the proper burden on the prosecution, especially as relevant to the mental state required for conviction.

The inconsistencies in Wallace's jury instructions are even less concerning than in *Mathias*.[5] Taken as a whole, the jury instructions here incorporated the correct mens rea. The trial judge repeatedly stated the actual contested issue at trial and cabined her jury instructions by demanding the jury make its own factual findings. The instructions were correct—even with the trial court's verbal scrivener's error—with respect to the elements of the crimes and the prosecution's burden at trial.

This case is unlike *Querica v. United States*, 289 U.S. 466 (1933), where the Supreme Court determined that the trial court's statement "I think that every single word that man said, except when he agreed with the Government's testimony, was a lie" prejudiced the defendant. *Id.* at 468, 472. In reaching this conclusion, the Court reasoned that "the judge is not a mere moderator" such that the jury will give great weight to a judge's statements. *Id.* at 469. Although a judge may comment on evidence at trial, he or she must "make[] it clear to the jury that all matters of facts are submitted to their determination." *Id.* Here, the trial judge followed this rule by telling the jurors multiple times that they were the ultimate arbiters of the facts. The statement by the judge in this case was less damaging than the one in *Querica*; the court did not comment on any direct pieces of evidence and did not take a stance on any testimony. The

[5] The *Mathias* panel noted two lines of reasoning established by the Supreme Court of the United States that we include here for comprehensiveness. The first line of reasoning consisted of a discussion from *Francis v. Franklin*, 471 U.S. 307 (1985). 876 F.3d at 477–78. The second line of reasoning is from the Supreme Court's decision in *Middleton v. McNeil*, 541 U.S. 433 (2004) (per curiam). *Id.* at 478. We decline to resolve or comment on any alleged tension between these two cases, as documented in *Mathias*, because it is unnecessary to our decision.

accidental use of the word "defendant" instead of "perpetrator" in a jury instruction does not rise to the level of a judge categorizing an accused's action as a marker of guilt.

Because there was no due process violation in the instructions, Wallace's trial counsel did not perform deficiently when he did not object to the instructions. Consequently, Wallace's ineffective-assistance-of-counsel claim fails.

III. Conclusion

For the foregoing reasons, we will affirm the District Court's denial of the habeas petition.

Appendix "B"

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

SPENCER WALLACE *Petitioner*	:	**CIVIL ACTION**
	:	**NO. 18-3509**
v.	:	
MARK GARMAN, *et al.* *Respondents*	:	

NITZA I. QUIÑONES ALEJANDRO, J. MARCH 23, 2022

MEMORANDUM OPINION

INTRODUCTION

Petitioner Spencer Wallace ("Petitioner" or "Wallace"), a Pennsylvania state prisoner initially proceeding *pro se*,[1] filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, in which he asserted numerous claims of ineffective assistance of counsel and denial of due process. [ECF 1]. In accordance with 28 U.S.C. § 636(b) and Local Rule of Civil Procedure 72.1.IV(c), the petition was referred to United States Magistrate Judge Richard A. Lloret for a *Report and Recommendation* ("R&R"). [ECF 2]. The Magistrate Judge issued an R&R, which recommended that the petition for a writ of *habeas corpus* be denied. [ECF 22]. Thereafter, Petitioner filed counseled objections to the R&R. [ECF 29]. This matter is, therefore, ripe for a *de novo* review and a determination of the merits of objections to the R&R.

After a thorough and independent review of the state court record and court filings, and for the reasons stated herein, Petitioner's objections are sustained, *in part*, and overruled, *in part*; the R&R is approved and adopted, *in part*; and the petition for a writ of *habeas corpus* is denied.

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[1] Counsel entered an appearance for Petitioner following the issuance of the underlying Report and Recommendation and filed objections to the R&R.

BACKGROUND

On June 18, 2010, Petitioner was found guilty by a jury of first-degree murder, violations of the Uniform Firearms Act ("VUFA"), and possession of an instrument of crime ("PIC") in connection with the death of Harry Ballard ("Ballard"). The facts underlying Petitioner's conviction were summarized by the Superior Court of Pennsylvania and quoted in the R&R, as follows:

> On July 10, 2008, [Appellant] was trying to track down . . . Ballard, who owed him $50. He walked a few blocks down from the Queen Lane Apartments to where he believed that Ballard's mother lived. When he got there[,] he yelled out that he was looking for Ballard's mother. Stella Lorick, Ballard's aunt, was told by another person that someone was looking for Ballard's mother, so she came out of her house and spoke to [Appellant]. [Appellant] told her that he wanted the money Ballard owed him. Ms. Lorick told him that if he had an issue with Ballard, he needed to take it up with Ballard and leave "them" alone. [Appellant] then informed Ms. Lorick that if he did not get his money, he would "bring back drama."
>
> Two days later, on July 12, 2008[,] at about 8:00–8:30pm [*sic*], [Appellant] and a few other men were hanging out behind the Queen Lane Apartments next to a play ground [*sic*] where a few residents were enjoying the summer evening with their children. Braheim Ballard ("Braheim"), Harry Ballard's brother, drove up, got out of his car and confronted [Appellant] about [Appellant's] confrontation a few days earlier with Ballard's aunt, Stella Lorick. Braheim yelled at [Appellant] about disrespecting his mother and proceeded to slap [Appellant] in the face. [Appellant] did not retaliate and the fight was broken up by a Philadelphia Housing Authority Officer who was patrolling the area at that moment. Braheim then got back in his car and drove off. The residents who were on the playground with their children witnessed the scene. Afterwards, they overheard [Appellant] tell his friend Robert Shaheem "Sha" Pinkney to go get his gun in the blue city bag. [Appellant's] friends attempted to talk him out of handling the situation this way, but he insisted. Upon receiving the blue city bag containing his gun, he stuck the gun in his waist band [*sic*] and walked around to the front of the Queen Lane Apartments and waited in front of a dry cleaner.

> A few minutes later, Ballard walked up to [Appellant] and attempted to make peace for what happened earlier between [Appellant] and Braheim. [Appellant] swung his fist at Ballard, missed[,] and the two were separated by [Appellant's] friends. [Appellant] then walked up to Ballard in the middle of the intersection of Queen Lane and Pulaski Street and shot Ballard once. Ballard dropped to his knees and then to the ground and began pleading for his life. [Appellant] then proceeded to turn Ballard over and shoot him four more times, three shots entering Ballard's chest. He then fled the scene. Ballard was pronounced dead later that night at a hospital.

Commonwealth v. Wallace, 2017 WL 6181826, at *1–2 (Pa. Super. Ct. Dec. 8, 2017) (alterations in original).

Following his conviction, Petitioner was sentenced to life imprisonment on the murder charge, two to seven years on the VUFA charge, and one to five years on the PIC charge, with the sentences to run consecutively. Petitioner timely filed a direct appeal, challenging comments the prosecutor had made during closing arguments. The Superior Court of Pennsylvania rejected this challenge and affirmed Petitioner's sentence.

Petitioner timely filed a *pro se* petition for post-conviction relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq.* Following the appointment of counsel and, later, subsequent retention of private counsel, Petitioner filed a second amended PCRA petition, identifying his five claims as follows:

> I. Trial counsel was ineffective for failing to object to the Court's charge on VUFA and PIC which directed a verdict against his client;
> II. Trial counsel was ineffective for not objecting to the Court's giving the jury its personal opinion of the evidence as to the Defendant's possession of the firearm with intent to commit murder;
> III. Trial counsel was ineffective because he failed to object to the Court's charge that highlighted uncontradicted facts because it encouraged the jury to give far more credence to testimony that is uncontradicted based on that fact alone and also focused the

jury's attention on the fact that the Defendant did not testify so as to contradict those facts; and

IV. Trial counsel was ineffective for failing to object to the Court's instructions which defined reasonable doubt in a manner where the jury was given the choice of eliminating reasonable doubts to which the Petitioner was entitled under the due process clause of the federal constitution.

V. Trial counsel was ineffective for failing to object to the charge of the court which equated malice with specific intent to kill and by so doing omitted an element of the crime of first degree murder.

(Sec. Am. PCRA Petition, at pp. 3, 8, 9, 13, and 17). The PCRA court dismissed the petition in a single-page Order that concluded that the "Petition is without merit."

Petitioner appealed the PCRA Court's denial of his PCRA, identifying five issues/claims for appeal in his Superior Court brief as follows:[2]

I. Was trial counsel ineffective for failing to object to the Court's charge on VUFA and PIC which directed a verdict against his client;

II. Was trial counsel ineffective for not objecting to the Court giving the jury its personal opinion of the evidence as to the Defendant's possession of the firearm with intent to commit murder;

III. Was trial counsel ineffective because he failed to object to the Court's charge that highlighted uncontradicted facts because it encouraged the jury to give far more credence to testimony that is uncontradicted based on that fact alone and also focused the jury's attention on the Defendant's failure to testify so as to contradict those facts;

IV. Was trial counsel ineffective for failing to object to the charge of the Court which equated malice with specific intent to kill and by so doing omitted an element of the crime of first degree murder; and

V. Was trial counsel ineffective for failing to move for a mistrial after he objected to the testimony from the deceased's mother that her son was a "Straight A Honor Student."

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[2] Notably, the PCRA court did not file a Rule 1925(a) opinion.

(Pet. Sup. Ct. Br. at 6). On December 8, 2017, the Superior Court rejected Petitioner's appeal and affirmed the lower court's order of dismissal. *Wallace*, 2017 WL 6181826, at *3–8. Petitioner's appeal to the Supreme Court of Pennsylvania was denied on June 25, 2018.

On August 17, 2018, Petitioner timely filed his *habeas* petition in this case, asserting his five claims as follows:

> I. Trial counsel was ineffective for not objecting to the Court's directing a verdict on VUFA and PIC which also directed a verdict against Petitioner as to his intent to murder, depriving him of his right to a jury trial and denying him due process of law;
> II. Trial counsel was ineffective for not objecting to the Court's giving the jury her personal opinion of the evidence as to Petitioner's possession of the firearm and intent to commit murder;
> III. Trial counsel was ineffective for not objecting to the Court's concluding charge which highlighted uncontradicted facts because it encouraged the jury to give far more credence to testimony that was uncontradicted based on that fact alone and also focused on Petitioner's failure to testify and contract such facts;
> IV. Trial counsel ineffectively failed to move for a mistrial after he objected to the testimony from the deceased's mother that her son was a "Straight A" honor student;
> V. Trial counsel was ineffective for failing to object to the Court's charge that equated malice with specific intent to kill, thereby omitting an element of first degree murder.

(Habeas Pet., ECF 1, at pp. 3-4). In the R&R, the Magistrate Judge addressed each of these claims, finding that the claims were procedurally defaulted and/or without merit. Petitioner filed counseled objections to the R&R, in which he challenges the Magistrate Judge's conclusions and recommendations as to *only* Claims I, II, and V.

LEGAL STANDARD

Where objections to an R&R are filed, a court must conduct a *de novo* review of the contested portions of the R&R, *see Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989)

(citing 28 U.S.C. § 636(b)(1)(C)), provided the objections are both timely and specific, *Goney v. Clark*, 749 F.2d 5, 6–7 (3d Cir. 1984). In conducting its *de novo* review, the court may accept, reject, or modify, in whole or in part, the factual findings or legal conclusions of the magistrate judge. 28 U.S.C. § 636(b)(1). Although the review is *de novo*, the statute permits the court to rely on the recommendations of the magistrate judge to the extent it deems proper. *United States v. Raddatz*, 447 U.S. 667, 675–76 (1980); *Goney*, 749 F.2d at 7.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the standards for reviewing state court judgments raised in federal *habeas corpus* petitions filed under 28 U.S.C. § 2254. *Werts v. Vaughn*, 228 F.3d 178, 195 (3d Cir. 2000). Post-AEDPA, federal courts must give increased deference to the factual findings and legal determinations of the state courts. *Id.* at 196. In accordance with § 2254(d), a federal court may only grant a *habeas corpus* petition if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In order to seek federal *habeas* relief, however, a petitioner must first exhaust the remedies available in state court. *See* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State . . . ."). To meet this exhaustion requirement, a petitioner must "fairly present his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). For a claim to be exhausted, "'[b]oth the legal theory

and facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.'" *Tome v. Stickman*, 167 F. App'x 320, 322–23 (3d Cir. 2006) (quoting *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992)). The petitioner must "fairly present" the federal claim to the state courts before seeking federal *habeas* relief by invoking "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233–34 (3d Cir. 2004).[3] The *habeas* petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Waymart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a state court has refused or would refuse to review a claim based on a state procedural rule that is independent of the federal question and adequate to support the judgment, the federal court may deny that claim as procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729, 731–32 (1991); *Lark v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 596, 611 (3d Cir. 2011); *Johnson v. Pinchak*, 392 F.3d 551, 556 (3d Cir. 2004). The federal court may consider the merits of a procedurally defaulted claim only if "the petitioner establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default." *Holloway v. Horn*, 355 F.3d 707, 715 n.3 (3d Cir. 2004) (quoting *Coleman*, 501 U.S. at 750).

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[3] In Pennsylvania, petitioners are not required to present their claims to the state's highest court on discretionary review (*i.e.*, the Supreme Court of Pennsylvania) in order to satisfy the exhaustion requirement. *Lambert*, 387 F.3d at 233–34. Thus, for exhaustion purposes, the Superior Court is the highest court to which Petitioner was required to seek review.

DISCUSSION

Petitioner objects to the Magistrate Judge's conclusions and recommendations with respect to Claims I, II, and V. This Court will address each of the claims and concomitant objections.

Claims I and II for Ineffective Assistance of Counsel

Petitioner first objects to the Magistrate Judge's conclusion that Claims I and II were unexhausted and, thus, procedurally defaulted. As set forth above, Petitioner asserts in Claims I and II that his trial counsel was ineffective for failing to object to the trial court's jury instructions and commentaries on the VUFA and PIC charges that Petitioner contends effectively directed a verdict against him on these charges and on the first-degree murder charge. The portion of the jury instruction at issue (as set forth in Petitioner's briefing and the Superior Court opinion) provided, as follows:

> Finally, I would like to define for you the crime of possessing an instrument of a crime [PIC].
>
> In order to find the defendant guilty of this offense, you have to find, first of all, that the defendant possessed a firearm. To possess an item, the defendant must have the power to control it and the intent to control it.
>
> Secondly, that the firearm was an instrument of crime. An instrument of a crime is anything that is used for criminal purposes and possessed by a defendant at the time of the alleged offense under circumstances that are not manifestly appropriate for any lawful uses it might have.
>
> And in this case[,] the facts show that a firearm was used to commit a murder, so the first two elements—the second element, that the firearm was an instrument of a crime, has been proven by the facts of this case that are not contradicted; and that the defendant possessed the firearm with the intent to attempt or commit a crime with it—in this case[,] the crime of murder.
>
> So what you have to decide is whether or not the defendant possessed a firearm.

See Wallace, 2017 WL 6181826, at *3–4.

Exhaustion of Claim I—Waiver Issue

The Magistrate Judge concluded that Claim I, which is premised on Petitioner's challenge to the above instruction, was unexhausted and procedurally defaulted. In reaching this conclusion, the Magistrate Judge relied on footnote seven in the Superior Court's decision. (*See* R&R, ECF 22, at p. 13). This footnote, which immediately followed the Superior Court's merits analysis of Petitioner's "first and second issues together,"[4] provided:

> Appellant does not develop his argument concerning why trial counsel was ineffective for failing to object to the trial court's VUFA charge. Accordingly, we deem this issue waived. *See Commonwealth v. Phillips*, 141 A.3d 512, 522 (Pa. Super. 2016) ("[A]rguments which are not appropriately developed are waived. Thus, issues raised in a Brief's Statement of Questions Involved but not developed in the Brief's argument section will be deemed waived.") (citations omitted). Nevertheless, even if not waived, we would determine that the trial court, again, appropriately clarified the issues for the jury by narrowing its focus to resolving the contested matter of whether Appellant had a firearm.

Commonwealth v. Wallace, 2017 WL 6181826, at *4 n.7 (Pa. Super. Ct. Dec. 8, 2017). Relying on this footnote, the Magistrate Judge concluded that Claim I, ***in its entirety***, had been deemed "waived" by the Superior Court and, thus, procedurally defaulted for purposes of *habeas* review. (R&R, ECF 22, at p. 13). As noted by the Magistrate Judge, it is well-settled that when a state court rejects a claim on an independent and adequate state law ground, such as waiver, the state court decision is not subject to federal court review. *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 389 n.4 (3d Cir. 2020); *Leake v. Dillman*, 594 F. App'x 756, 759 (3d Cir. 2014).

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[4] It is clear from the Superior Court's opinion that the Superior Court's reference to the "first and second issues" corresponds to the same first and second issues raised in Petitioner's underlying *habeas* petition. *See Wallace*, 2017 WL 6181826, at *2.

Though acknowledging that Claim I, as it relates to the VUFA instruction, was deemed "waived" by the Superior Court—and, thus, not reviewable here—Petitioner correctly argues that the Magistrate Judge erroneously extended this waiver to the portion of Claim I directed at the PIC instruction. In its opinion, the Superior Court clearly addressed the merits of Claim I with respect to the PIC instruction. *See Wallace*, 2017 WL 6181826, at *3–4. Further, the cited footnote is expressly limited to the portion of Claim I directed at the "VUFA charge." *Id.* at *5 n.7. Nowhere in its opinion did the Superior Court state, or in any way suggest, that the instructional error contained within the PIC charge was waived by Petitioner. To the contrary, the Superior Court spent fourteen paragraphs discussing the propriety of the PIC instruction and the trial judge's comments therein. *See Wallace*, 2017 WL 6181826 at *3–6. Accordingly, though this Court agrees with the Magistrate Judge that Petitioner's claim with respect to the VUFA instruction is procedurally defaulted, this Court disagrees with respect to the portion of Claim I directed to the PIC instruction. Thus, this claim was not procedurally defaulted on account of waiver.[5]

Exhaustion of Claims I and II—Fairly Presented Issue

Petitioner next objects to the Magistrate Judge's finding that Claims I and II were unexhausted and procedurally defaulted on account of Petitioner's failure to "fairly present" them to the state court. Specifically, in the R&R, the Magistrate Judge concluded that Petitioner had failed to "fairly present" his current due process challenges to the jury instructions in state court. (R&R, ECF 22, at p. 13). Respectfully, this Court disagrees with the Magistrate Judge's conclusion.

[5] Notably, in their response to the *habeas* petition, Respondents argued only that these claims, as they related to the VUFA charge, were procedurally defaulted and acknowledged that the claims as to the PIC charge were not defaulted. (*See* Resp. Br., ECF 10, at pp. 8–9).

To exhaust state court remedies, a state prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review procedures." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A claim has been exhausted when it has been "fairly presented" to the state court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). This means that the federal *habeas* claim "must be the substantial equivalent of that presented to the state courts." *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). The United States Court of Appeals for the Third Circuit, (the "Third Circuit") has interpreted "fairly presented" to mean that a petitioner must have presented both the factual and legal substance of the claims in the state court's highest tribunal. *Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012). A petitioner must do so "in a manner that puts them on notice that a federal claim is being asserted." *Bronshtein v. Horn*, 404 F.3d 700, 725 (3d Cir. 2005). The allegations and supporting evidence must offer the state courts "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard*, 404 U.S. at 276–77). To satisfy this requirement, "the petitioner need not have cited 'book and verse' of the federal constitution." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

Because Pennsylvania law prevents a defendant from raising an ineffective assistance of counsel claim on direct appeal, *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), a defendant exhausts an ineffective assistance of counsel claim by raising it in the first petition for collateral relief under the PCRA. *See Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236–37 (3d Cir. 2017). Here, Petitioner did not raise any challenges to the jury instructions during his direct appeal. Therefore, he was procedurally required to assert any such challenges through the lens of an ineffective assistance of counsel claim on post-conviction review. *See Tyson v.*

Superintendent Houtzdale SCI, 976 F.3d 382, 390 (3d Cir. 2020). Petitioner did so in his PCRA proceedings by asserting that his trial counsel was ineffective for failing to object to the trial judge's jury instructions on the PIC charge, which effectively directed a verdict against him. Having raised the same ineffective assistance of counsel claims in his PCRA proceedings that he asserts here, Petitioner has exhausted these claims. *See Tyson*, 976 F.3d at 390 (rejecting argument that petitioner failed to exhaust challenges to jury instructions where he asserted the claims for the first time as ineffective assistance of counsel claims during the PCRA proceedings).

Moreover, numerous courts have held that a claim is exhausted "if the State's highest court expressly addresses the claim, whether or not it was fairly presented." *Casey v. Moore*, 386 F.3d 896, 916 n.18 (9th Cir. 2004) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)); *see also, e.g.*, *Walton v. Caspari*, 916 F.2d 1352, 1356 (8th Cir. 1990) ("A habeas [p]etitioner need not actually have raised a claim in a state petition in order to satisfy the exhaustion [requirement], if a state court with the authority to make a final adjudication actually undertook to decide the claim on its merits in the petitioner's case."); *Castille*, 489 U.S. at 351 (holding that a claim has been exhausted "where the State has actually passed upon the claim"); *Orr v. Orr*, 440 U.S. 268, 274–75 (1979) (citing "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided"); *Moore v. DiGuglielmo*, 489 F. App'x. 618, 623 (3d Cir. 2012) (citing, *inter alia*, *Walton v. Caspari*, 916 F.2d 1352, 1356 (8th Cir. 1990) ("A habeas [p]etitioner need not actually have raised a claim in a state petition in order to satisfy the exhaustion [requirement], if a state court with the authority to make a final adjudication actually undertook to decide the claim on its merits in petitioner's case.")). Here, it is clear that the Superior Court addressed the merits of Petitioner's ineffective assistance claims contained within Claims I and II. As such, these claims were exhausted.

It is also clear from Petitioner's filings with the PCRA courts that Claims I and II raised the same federal and constitutional issues that he is raising in his *habeas* petition. As discussed above, Claims I and II were couched, as they were required to be, as claims for ineffective assistance of counsel—claims recognized by all state courts as raising federal and constitutional issues. Indeed, in analyzing these ineffective assistance of counsel claims, the Superior Court applied the state law equivalent of the federal standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Wallace*, 2017 WL 6181826, at *3 (quoting standard for ineffective assistance of counsel claim set forth in *Commonwealth v. Robinson*, 877 A.2d 433, 439 (Pa. 2005), that is the equivalent of that in *Strickland*). Having been presented and reviewed under the same legal standard as required in this Court, Petitioner's ineffective assistance of counsel claims at Claims I and II have been exhausted.

It is also clear from Petitioner's PCRA filings that his arguments underlying Claims I and II were premised, at least in part, on federal and constitutional underpinnings. In support of these claims, which specifically asserted that the trial court—through its jury instructions—had wrongfully directed a verdict against him, Petitioner cited to several United States Supreme Court decisions for the proposition that "federal courts have long condemned directed verdicts." (Sup. Ct. Br. at p.10). For example, Petitioner cited to *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), in which the Court held that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction." *Id.* at 572–73. He also cited *Carpenters v. United States*, 330 U.S 395, 408 (1947), and *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993), both of which expressly held that a trial judge may not direct a verdict against a criminal defendant, no matter how overwhelming the evidence. Petitioner's specific reliance on these federal cases

was sufficient to put the state courts on notice that he was raising federal and/or constitutional claims. Accordingly, this Court finds that Claims I and II were exhausted.

Merits of Claims I and II for Ineffective Assistance of Counsel

Having found that Claims I and II were exhausted and, thus, not procedurally defaulted, this Court next turns to the merits of these claims. As did the Superior Court, this Court will address these claims together, as Petitioner makes the same arguments for each. In these claims, Petitioner asserts that his trial counsel was ineffective for failing to object to the trial judge's instruction and comments to the jury regarding the PIC charge, which Petitioner contends amounted to a directed verdict against him. On *habeas* review, this Court must review the state court's decision with respect to these claims under the deferential standard of AEDPA.

As noted, AEDPA amended the standards for reviewing state court judgments raised in federal *habeas corpus* petitions filed under 28 U.S.C. § 2254, increasing the deference federal courts must give to the factual findings and legal determinations of the state courts. *Werts*, 228 F.3d at 196. In accordance with § 2254(d), a *habeas corpus* petition may only be granted if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To establish that the state court decision was "contrary to" federal law, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). Similarly, the federal court may only find the state court decision

to be an "unreasonable application" of federal law if the decision, "evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Id.* at 890. Further, factual determinations made by the state court are "presumed to be correct." 28 U.S.C. § 2254(e)(1). The *habeas* petitioner, however, may rebut this presumption with "clear and convincing evidence" of the state court's error. *Id.* Consequently, a *habeas* petitioner "must clear a high hurdle before a federal court will set aside any of the state court's factual findings." *Mastracchio v. Vose*, 274 F.3d 590, 597–98 (1st Cir. 2001). As the Supreme Court has observed, this standard is "difficult to meet and highly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

Claims I and II are each premised upon the alleged ineffective assistance of Petitioner's trial counsel for failing to object to a portion of the jury instructions. The "clearly established federal law" applicable to ineffective assistance of counsel claims on *habeas* review is the familiar two-pronged inquiry articulated by the Supreme Court in *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 363 (2000). To sustain a claim for ineffective assistance of counsel, a petitioner must show that counsel's performance was objectively deficient and that this deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish that counsel was deficient, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In evaluating counsel's performance, the reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted).

The Court has defined prejudice as a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*; *see also Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992). To meet this second prong, the petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* It follows that counsel cannot be ineffective for failing to pursue meritless claims or objections. *See United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999); *Boston v. Mooney*, 2015 WL 6674530, at *12 (E.D. Pa. Jan. 9, 2015).

Where the state court has denied an ineffectiveness claim on its merits, as is the case here, a *habeas* petitioner must show the state court's decision was "objectively unreasonable." *Renico v. Lett*, 559 U.S. 766, 773 (2010); *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (stating that review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). "[I]t is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002).

Petitioner advances no argument, in either his objections or *habeas* petition, that the Superior Court decision affirming the denial of PCRA relief is contrary to extant United States Supreme Court precedent, or that the test applied by the state court is inconsistent with the federal test established in *Strickland*. In its ruling affirming the dismissal of Petitioner's PCRA petition, the Superior Court correctly considered and applied the governing test in Pennsylvania for

ineffective assistance of counsel claims announced in *Commonwealth v. Pierce,* 527 A.2d 973 (Pa. 1987) ("the *Pierce* test").[6] The Third Circuit has determined that the *Pierce* test conforms to established federal law and is "not contrary to the *Strickland* test." *Henderson v. DiGugliemo*, 138 F. App'x 463, 468 (3d Cir. 2005); *Werts*, 228 F.3d at 203 (recognizing that the *Pierce* test as materially identical to the *Strickland* test). Hence, the Superior Court's decision is not "contrary to" the test established in *Strickland.*

The dispositive question with respect to these ineffective assistance of counsel claims, therefore, is whether the Superior Court's decision reflects an unreasonable application of the *Strickland* test. To carry his burden, Petitioner must demonstrate that the state court's decision, "evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under [*Strickland*]." *Werts*, 228 F.3d at 197.

In determining whether Petitioner's trial counsel was ineffective for failing to object to the jury instructions at issue, the Superior Court assessed the jury charge "as a whole" and concluded that there was no reasonable likelihood that the jury applied the instruction inappropriately. *Wallace*, 2017 WL 6181826, at *5–6. Because there was no reasonable likelihood that the jury misapplied the instruction, the Superior Court concluded that trial counsel was not ineffective for not objecting to the instruction. *Id.* In the R&R, the Magistrate Judge thoroughly addressed the Superior Court's decision as to the merits of Claims I and II and concluded that it was not an unreasonable application of federal law as determined by the Supreme Court. (R&R, ECF 22, at pp. 23–24). For the reasons that follow, this Court agrees with and adopts the R&R with respect to this conclusion.

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[6] In its opinion, the Superior Court quoted the Supreme Court of Pennsylvania's decision in *Commonwealth v. Robinson*, 877 A.2d 433 (Pa. 2005), for the requirements of an ineffective assistance claim, *Wallace*, 2017 WL 6181826, at *3. In *Robinson*, the Supreme Court of Pennsylvania relied on its previous decision in *Pierce*. 877 A.3d at 439.

When a *habeas* petitioner claims the jury instructions violated due process, as Petitioner does here, the federal courts "have an independent duty to ascertain how a reasonable jury would have interpreted the instructions as issue." *Smith v. Horn*, 120 F.3d 400, 413 (3d Cir. 1997). The Third Circuit outlined the applicable process and standard as follows:

> Our analysis of jury instructions claimed to impair a constitutional right "must focus initially on the specific language challenged." *Francis v. Franklin*, 471 U.S. 307, 315, 105 S. Ct. 1965, 1971, 85 L.Ed.2d 344 (1985); *see also Rock v. Zimmerman*, 959 F.2d 1237, 1246 (3d Cir. 1992) (en banc). The allegedly constitutionally infirm language must be considered in the context of the charge as a whole. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 482, 116 L.Ed.2d 385 (1991); *Flamer v. Delaware*, 68 F.3d 736, 752 (3d Cir. 1995); *Kontakis v. Beyer*, 19 F.3d 110, 115–16 (3d Cir. 1994). The proper inquiry is "'whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72, 112 S. Ct. at 482 (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L.Ed.2d 316 (1990)) (emphasis added); *see also Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 1243, 127 L.Ed.2d 583 (1994); *Flamer*, 68 F.3d at 752.

Smith v. Horn, 120 F.3d 400, 411 (3d Cir. 1997); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) (holding that a jury instruction should not be "judged in artificial isolation, but must be viewed in the context of the overall charge"). Notably, the Superior Court followed this framework by evaluating the jury instruction "as a whole" and concluding that there was no reasonable likelihood that the jury misapplied the instruction.

Turning to the challenged portion of the instruction, this Court agrees with Petitioner that this portion of the instruction, when viewed ***in isolation***, essentially advised the jury that the uncontradicted facts proved that "the defendant [Petitioner] possessed the firearm with the intent to commit a crime with it—in this case the crime of murder." In doing so, this portion of the instruction, in isolation, relieved the Commonwealth of its burden of proving every element of the

alleged crimes beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). Specifically, this portion of the instruction, in isolation, relieved the Commonwealth of its burden to prove that Petitioner possessed the firearm (which Petitioner contested at trial) and had the intent to commit murder, elements the Commonwealth was required to prove beyond a reasonable doubt. It bears repeating: this portion of the instruction—on its face, ***in isolation***, and by its express terms—advised the jury that Petitioner possessed a firearm with the intent to commit murder.

However, this Court's review of the instruction at issue does not end there. As correctly recognized by the Superior Court, the Magistrate Judge, and Petitioner in his briefing, the challenged language must be reviewed in the context of the jury instruction "as a whole." *Francis*, 471 U.S. at 315. In its decision, the Superior Court did just that. *See Wallace*, 2017 WL 6181826, at *5–7. The Superior Court set forth at length the portions of the jury instruction that explained: (1) the jury's role as the "sole judges of the facts;" (2) that the jury should not rely on the judge's "supposition;" (3) that the jury was "not bound by [the judge's] recollection;" and (4) that the jury was not limited to consideration of the "evidence that [the judge] or the attorneys brought to your attention . . . ." *Id.* at *5. The Superior Court also noted that immediately following the challenged portion of the instruction, the trial judge instructed: "So what you have to decide is whether or not [Petitioner] possessed a firearm." *Id.* at *4. In addition, the Superior Court set forth the entirety of the trial judge's jury instruction with regard to first-degree murder and the specific intent to kill. *Id.* at *7. The relevant portion of the instruction provided:

> First-degree murder is a murder in which the perpetrator has the specific intent to kill. In order to prove [Appellant] guilty of first-degree murder, the Commonwealth has to prove three elements: One, that the victim is dead. And there's no question about that.
>
> Two, that [Appellant] killed the victim.

> And, three, that [Appellant] killed the victim with the specific intent to kill and with malice.

Id. at *7. This portion of the instruction, specifically, clearly, and correctly, placed the burden on the Commonwealth to prove that the Petitioner killed the victim with the specific intent to kill. Taking the jury instructions "as a whole," the Superior Court concluded that the trial court's instructions "'clearly, adequately, and accurately' presented the law to the jury for its deliberations." *Id.* at *7 (citations omitted).

While this Court finds that a reasonable jurist could disagree with the Superior Court's decision, that is not the applicable standard on *habeas* review.[7] Rather, this Court must determine whether no reasonable jurist could agree with the Superior Court's decision. In light of this Court's review of the jury instruction as a whole—particularly those portions that correctly outlined the jury's role and the Commonwealth's burden with respect to each element of the charged crimes, and, in particular, first-degree murder—this Court finds that the Superior Court's decision with respect to the jury instructions was not an unreasonable application of federal law. Accordingly, Petitioner's objections to the Magistrate Judge's recommendation as to the merits of Claims I and II are overruled.

In addition, though not addressed by the Superior Court, this Court finds that Petitioner has not met, nor can he meet, the prejudice prong of *Strickland*. To demonstrate prejudice under the *Strickland* analysis, Petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

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[7] As clarified by the Third Circuit, "whether we 'conclude[] in [our] independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly' is irrelevant, as AEDPA sets a higher bar." *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 476 (3d Cir. 2017).

Strickland, 466 U.S. at 694. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. In the context of an unobjected-to and faulty jury instruction, the Third Circuit has instructed that a court must "look to the record to determine whether the instruction interfered with the jury's assessment of the evidence to the extent that, but for the incorrect statements of law, there is a substantial likelihood that a different verdict would have been reached." *Tyson*, 976 F.3d at 397. In assessing prejudice, the court must also consider the strength of the evidence presented against the defendant at trial. *See United States v. Calhoun*, 600 F. App'x 842, 844 (3d Cir. 2015) (citing *Albrecht v. Horn*, 485 F.3d 103, 128–29 (3d Cir. 2007)).

As set forth above, though the challenged portion of the jury instruction, in isolation, inappropriately appeared to relieve the Commonwealth of its burden to prove each of the elements of the charged crimes, the remainder of the instruction correctly placed that burden on the Commonwealth. When viewed as a whole, this Court cannot conclude that the "instruction interfered with the jury's assessment of the evidence to the extent that . . . there is a substantial likelihood that a different verdict would have been reached." *Tyson*, 976 F.3d at 397. This conclusion is supported by the Third Circuit's similar conclusion in *Mathias*, 876 F.3d 462 (3d Cir. 2017). There, the petitioner challenged a jury instruction that "made inconsistent statements regarding accomplice liability, with some portions properly instructing jurors to find shared intent and others incorrectly implying the principal's intent to kill was grounds for convicting the accomplice." *Tyson*, 976 F.3d 382, 398 (3d Cir. 2020) (describing the challenged jury instruction in *Mathias*). The *Mathias* Court concluded that the Superior Court's decision that the petitioner

suffered no prejudice in light of the "accurate portions of the trial court's first-degree murder instruction" was not an unreasonable conclusion under *Strickland*. *Mathias*, 876 F.3d at 479.

As in *Mathias*, the particular jury instruction at issue here (as described above) was "less than precise" and included inconsistent statements with respect to the Commonwealth's burden to prove each of the elements of the charged crimes. *Id.* at 478–79. The majority of the instruction with respect to the jury's role, the requisite elements of the charged crimes, and the Commonwealth's burden, however, was clear, accurate, and correct. Under these circumstances, this Court cannot conclude that "there is a substantial likelihood that a different verdict would have been reached." *Tyson*, 976 F.3d at 397.[8]

In addition, in this case, the evidence of Petitioner's guilt on all of the charges was overwhelming. Four eyewitnesses identified Petitioner as the individual who repeatedly shot the victim. While Petitioner attempted to challenge the credibility of these four eyewitnesses by pointing to minor, internal inconsistencies, those purported inconsistencies do not call into question these four eyewitnesses' consistent testimony that Petitioner was the shooter. In light of this overwhelming evidence, Petitioner has not shown a reasonable probability that the outcome would have been different, as is required under *Strickland*. Accordingly, the objections as to Claims I and II are overruled, and said claims are denied.

Claim V for Ineffective Assistance of Counsel

Petitioner also objects to the Magistrate Judge's recommendation with respect to Claim V. In Claim V, Petitioner asserts that his trial counsel was ineffective for failing to object to the trial court's jury instruction that purportedly merged the elements of specific intent to kill and malice,

[8] While this case is very similar to *Mathias*, it is very much different from *Tyson*, 976 F.3d 382 (3d Cir. 2020). The jury instruction in *Tyson* was "consistently incorrect" and "no portion of the instruction articulated the correct *mens rea*." *Id.* at 398. In contrast, the instruction here included portions that were correct with respect to the elements of the crimes and the Government's burden.

thereby relieving the Government of its burden to prove all of the requisite elements of the charged crimes. In the R&R, the Magistrate Judge found this claim non-cognizable on *habeas* and, otherwise, without merit. Petitioner objects to both of these findings.

In finding this claim non-cognizable, the Magistrate Judge interpreted the claim as a challenge on state law grounds only. Such state law claims are not cognizable on *habeas*. *Estelle*, 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law."). Reading both Petitioner's PCRA filings and *habeas* petition liberally, however, it appears that Petitioner has, in fact, asserted a cognizable federal challenge to the jury instruction at issue. In both his state court and *habeas* briefs, Petitioner supported his challenge to this aspect of the jury instruction with citations to and quotations from various federal cases. This federal case law addressed due process requirements in the context of jury instructions. Accordingly, this Court finds that Petitioner has asserted a cognizable *habeas* claim in Claim V.

Notwithstanding, this Court agrees with the Superior Court and the Magistrate Judge that this claim lacks merit. As clarified in his objections, Petitioner essentially argues that his trial counsel was ineffective for failing to object to the instruction on malice because the instruction equated malice with specific intent to kill without including the following qualification/exception provided in the Pennsylvania Standard Jury Instructions:

> A person has the specific intent to kill if he or she has a fully formed intent to kill and is conscious of his or her own intention. As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice **provided that it is also without circumstances indicating it was done in the heat of passion on sudden provocation.**

(Pet. Obj., ECF 29, at pp. 54–55). Here, trial counsel did not present a defense based on the homicide occurring "in the heat of passion." Rather, trial counsel's defense strategy was based solely on his challenge to the credibility of the evidence showing that Petitioner was the shooter,

i.e., the four eyewitnesses to the murder. Under these circumstances, which are nowhere addressed by Petitioner in any of his filings, trial counsel cannot be deemed to have been ineffective for failing to object to the absence of the inclusion of a "heat of passion" exception to the malice instruction. In addition, in light of the overwhelming evidence of guilt cited above, Petitioner has not shown a reasonable probability that the outcome would have been different, as is required under *Strickland*. Accordingly, the objections as to Claim V are overruled and Claim V is denied.

CONCLUSION

For the reasons stated herein, Petitioner's objections to the Report and Recommendation are sustained, *in part,* and denied, *in part*, and the petition for a writ of *habeas corpus* is denied. However, because reasonable jurists could debate this Court's disposition of Petitioner's Claims I and II, a certificate of appealability is granted. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An Order consistent with this Memorandum Opinion follows.

NITZA I. QUIÑONES ALEJANDRO, U.S.D.C. J.

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

SPENCER WALLACE	:	CIVIL ACTION
v.	:	
MARK GARMAN, et al	:	NO. 18-cv-03509-NIQA

REPORT AND RECOMMENDATION

RICHARD A. LLORET
U.S. MAGISTRATE JUDGE

October 2, 2020

INTRODUCTION

Petitioner Spencer Wallace ("Mr. Wallace" or "Petitioner") shot and killed Harry Ballard on July 12, 2008 over a $50 debt. *Commonwealth v. Wallace*, No. 913 EDA 2016, 2017 WL 6181826, at *1–2 (Pa. Super. 2017). A jury convicted Mr. Wallace of murder in the first-degree and related offenses, and he was sentenced to life imprisonment. *Id.* He is currently serving his sentence in a Pennsylvania prison. Mr. Wallace has petitioned this court for a writ of habeas corpus. Doc. No. 1[1] ("Pet." or "Petition"). The Petition has been referred to me for a report and recommendation pursuant to 28 U.S.C. § 2254 ("A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636."). Doc. No. 2.

Many of Mr. Wallace's claims are procedurally barred, and the rest do not merit relief. I recommend that Mr. Wallace's Petition be dismissed. *See* 28 U.S.C. § 2254(d)(1).

[1] All references to the electronically docketed record will be cited as "Doc. No. ____, at ____."

FACTS AND PROCEDURAL HISTORY

The Superior Court opinion on appeal, following dismissal of Mr. Wallace's petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546, adopted the trial court's description of the facts of the case:

> [Mr. Wallace] was tried from June 14, 2010 to June 18, 2010, before this [c]ourt and a jury on bill of information CP–51–CR–0004469–2009 and found guilty of murder in the first degree, [18 P.S. § 2502(a),] ... violation[s] of the Uniform Firearms Act [("VUFA")], [18 P.S. §§ 6106(a)(1), 6108,] and possession of an instrument of crime [("PIC")], [18 P.S. § 907(a),] in connection with the shooting death of Harry Ballard ("Ballard").
>
> On June 18, 2010, [Mr. Wallace] was sentenced to life imprisonment on Count 1, charging murder in the first degree; two to seven years['] imprisonment on Count 2, charging [VUFA], Section 6106, to be served consecutive to the sentence imposed on Count 1; and, one to five years['] imprisonment on Count 4, charging [PIC], to be served consecutive to the sentence imposed on Count 2; no further penalty was imposed on Count 3, [VUFA, Section 6108].
>
> * * *
>
> On July 10, 2008, [Mr. Wallace] was trying to track down ... Ballard, who owed him $50. He walked a few blocks down from the Queen Lane Apartments to where he believed that Ballard's mother lived. When he got there[,] he yelled out that he was looking for Ballard's mother. Stella Lorick, Ballard's aunt, was told by another person that someone was looking for Ballard's mother, so she came out of her house and spoke to [Mr. Wallace]. [Mr. Wallace] told her that he wanted the money Ballard owed him. Ms. Lorick told him that if he had an issue with Ballard, he needed to take it up with Ballard and leave "them" alone. [Mr. Wallace] then informed Ms. Lorick that if he did not get his money, he would "bring back drama."
>
> Two days later, on July 12, 2008[,] at about 8:00–8:30pm [*sic*], [Mr. Wallace] and a few other men were

> hanging out behind the Queen Lane Apartments next to a play ground [*sic*] where a few residents were enjoying the summer evening with their children. Braheim Ballard ("Braheim"), Harry Ballard's brother, drove up, got out of his car and confronted [Mr. Wallace] about [Mr. Wallace's] confrontation a few days earlier with Ballard's aunt, Stella Lorick. Braheim yelled at [Mr. Wallace] about disrespecting his mother and proceeded to slap [Mr. Wallace] in the face. [Mr. Wallace] did not retaliate and the fight was broken up by a Philadelphia Housing Authority Officer who was patrolling the area at that moment. Braheim then got back in his car and drove off. The residents who were on the playground with their children witnessed the scene. Afterwards, they overheard [Mr. Wallace] tell his friend Robert Shaheem "Sha" Pinkney to go get his gun in the blue city bag. [Mr. Wallace's] friends attempted to talk him out of handling the situation this way, but he insisted. Upon receiving the blue city bag containing his gun, he stuck the gun in his waist band [*sic*] and walked around to the front of the Queen Lane Apartments and waited in front of a dry cleaner.
>
> A few minutes later, Ballard walked up to [Mr. Wallace] and attempted to make peace for what happened earlier between [Mr. Wallace] and Braheim. [Mr. Wallace] swung his fist at Ballard, missed[,] and the two were separated by [Mr. Wallace's] friends. [Mr. Wallace] then walked up to Ballard in the middle of the intersection of Queen Lane and Pulaski Street and shot Ballard once. Ballard dropped to his knees and then to the ground and began pleading for his life. [Mr. Wallace] then proceeded to turn Ballard over and shoot him four more times, three shots entering Ballard's chest. He then fled the scene. Ballard was pronounced dead later that night at a hospital.
>
> Trial Court's Rule 1925(a) Opinion ("TCO"), 10/21/2010, at 1–3 (headings omitted).

Wallace, 2017 WL 6181826, at *1–2 (brackets in original) ("Mr. Wallace," referred to in brackets, is referred to as "Appellant" in the Superior Court opinion).

Mr. Wallace was tried before a Philadelphia Court of Common Pleas jury, who on June 18, 2010, found him guilty of the first-degree murder of Harry Ballard, carrying a firearm without a license, carrying a firearm on a public street, and possessing an instrument of crime. N.T. 6/18/10, at 150. The trial court sentenced Petitioner to a mandatory term of life imprisonment for the murder, followed by a term of two-to-seven years for carrying a firearm without a license and another one-to-five years for possessing an instrument of crime. The trial court imposed no additional penalty for his remaining conviction, carrying a firearm on a public street. N.T. 6/18/10, at 161–62.

Mr. Wallace filed an appeal of his conviction in which he challenged comments the prosecutor had made in closing argument. *Wallace*, 2017 WL 6181826, at *2. The Pennsylvania Superior Court rejected this challenge in April of 2011, and affirmed the judgment of sentence. *Id.* Mr. Wallace did not seek review by the Pennsylvania Supreme Court. *Id.*

Mr. Wallace filed a pro se PCRA petition on March 16, 2012. *Id.* Counsel was appointed, and in his second amended PCRA petition ("SAPP") served August 11, 2015, Mr. Wallace asserted five claims, some of which have been reiterated in his federal Petition. Mr. Wallace asserted that trial counsel was ineffective because he failed to object 1) to jury instructions on the VUFA and PIC charges (SAPP at 3), 2) to the court's statement of its opinion that the evidence showed the firearm was used with the intent to commit murder (SAPP at 8), 3) to the court highlighting "uncontradicted" facts (SAPP at 9), 4) to the court's reasonable doubt instruction (SAPP at 13), and 5) to the court's instruction equating malice and specific intent to kill (SAPP at 17).

On February 24, 2016, the PCRA court dismissed the petition. *Wallace*, 2017 WL 6181826, at *2. Mr. Wallace appealed, and on December 8, 2017, the Pennsylvania

Superior Court rejected his appeal and affirmed the lower court's order of dismissal. *Id.* at *3–8. The Pennsylvania Supreme Court denied further review on June 25, 2018. *Commonwealth v. Wallace*, 187 A.3d 913 (Pa. 2018) (table).

On August 17, 2018, Mr. Wallace filed his habeas Petition in this case, alleging five claims of trial counsel ineffectiveness. Mr. Wallace claims that his trial counsel was ineffective because counsel failed to:

> (1) object to the trial court's instructions on possessing an instrument of crime and violations of the Uniform Firearms Act (Pet. at 5);
> (2) object to the trial court's statement of opinion that the evidence showed that a firearm was used with the intent to commit murder (Pet. at 8);
> (3) object to the trial court's instructions that highlighted "uncontradicted" facts (Pet. at 10);
> (4) object to the trial court's charge equating malice with a specific intent to kill (Pet. at 11); and
> (5) move for a mistrial after the victim's (Harry Ballard's) mother testified that her son had been a straight-A, honor student (Pet. at 18).

In his memorandum, Mr. Wallace reverses the order of his fourth and fifth issues. Pet. Mem. at 20, 22. I will deal with his issues in the order in which Mr. Wallace deals with them in his memorandum.

STANDARD OF REVIEW

A. Exhaustion requirements.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, a prerequisite to the issuance of a writ of habeas corpus on behalf of a person in state custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). A claim is exhausted when it is "fairly

presented" to the state courts. *Nara v. Frank*, 488 F.3d 187, 197 (3d Cir. 2007) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999)). To be fairly presented, the petitioner must present the same legal and factual basis for the claim in the state courts. *Id.* at 197–98. The petitioner must give the state court "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. If the petitioner still has the right to raise the "question presented" under any available state court procedure, the claim is not considered exhausted for federal habeas review. *Lambert*, 134 F.3d at 513; 28 U.S.C. § 2254(c).

B. Procedural default.

If a petitioner fairly presents a claim to the state courts, but it was denied on a state-law ground that is "independent of the federal question and adequate to support the judgment," the claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A claim is also procedurally defaulted if the petitioner failed to present it in state court and would now be barred from doing so under state procedural rules. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

C. Merits review.

Where the federal court reviews a claim that has been adjudicated on the merits by the state court, 28 U.S.C. § 2254(d) permits the federal court to grant a petition for habeas relief only if: (1) the state court's adjudication of the claim "resulted in a decision

that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or; (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); *see Parker v. Matthews*, 567 U.S. 37, 42–45 (2012) (reiterating that the standard under 2254(d)(1) is highly deferential to state court decisions, and overturning a Sixth Circuit decision granting habeas relief because the state court's decision denying relief was not objectively unreasonable).

Clearly established federal law refers to the holdings, or "governing legal principles," set forth by Supreme Court decisions, rather than mere dicta. *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Specifically, the law must be in existence at the time of the petitioner's conviction. *Williams*, 529 U.S. at 380–81.The state court's factual findings are presumed to be correct, and the petitioner can only rebut this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lewis v. Horn*, 581 F.3d 92, 109 (3d Cir. 2009).

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*, 529 U.S. at 364–65. 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 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 v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) (citing *Williams*, 529 U.S. at 411); *see also Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (stating that the state court's decision must be "objectively unreasonable, not merely wrong; even clear error will not suffice" (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015))).

When determining whether the state court decision in question was based on an unreasonable determination of the facts, § 2254(d)(2) requires "substantial deference" to the state trial court's factual findings. *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (holding that state court factual findings may not be characterized as unreasonable "merely because [the reviewing court] would have reached a different conclusion in the first instance" (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010))).

D. Ineffective assistance of counsel.

Where a petitioner alleges a claim for ineffective assistance of counsel, the Supreme Court's analysis in *Strickland v. Washington*, 466 U.S. 668 (1984) is the governing standard. To prevail on any of his ineffective assistance claims, the petitioner must establish that "counsel's performance was deficient," meaning the errors were "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Ineffectiveness may be shown by evidence of "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal

principles" on the part of counsel. *Gov't of Virgin Islands v. Weatherwax*, 20 F.3d 572, 579 (3d Cir. 1994) (quoting ABA STANDARD FOR CRIMINAL JUSTICE § 4–5.2 (2d ed. 1980 & Supp. 1986)).

The petitioner must also demonstrate that he was prejudiced by the deficient performance to the point of being deprived of a fair trial. *Strickland*, 466 U.S. at 687. To establish this, the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability means "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Absent establishing these two prongs (deficient counsel and prejudice), "it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

Judicial scrutiny of counsel's performance "must be highly deferential." *Burger v. Kemp*, 483 U.S. 776, 789 (1987) (quoting *Strickland*, 466 U.S. at 689). Further, when a petitioner seeks federal habeas review of a state conviction due to ineffective assistance of counsel, a "'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt" must be applied. *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). Therefore, in the federal habeas context, the "pivotal" question to answer is whether the state court applied *Strickland* reasonably. *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

DISCUSSION

A. Mr. Wallace's first two claims: the VUFA and PIC instructions.

Mr. Wallace's first two claims allege that his attorney erred by not objecting to the trial court's instructions concerning charges of possessing an instrument of crime

("PIC") and violation of the Uniform Firearms Act ("VUFA"). Pet. Mem. at 4 (Claim 1); *id.* at 12 (Claim 2).

In Claim 1 Mr. Wallace argues that the trial court's instructional language improperly directed a jury verdict. Pet. Mem. at 4–6. He goes on to argue that counsel had no strategic basis for failing to object, that the instructions were prejudicial, and that the Superior Court did not reasonably apply Supreme Court precedent when it upheld the trial court's instructions. *Id.* at 6–11. In Claim 2 Mr. Wallace argues that the same instructional language improperly expressed the judge's opinion of the facts. Pet. Mem. at 12–15.

These claims are factually and legally intertwined, and Mr. Wallace's arguments are repetitive and duplicative. Whether the trial judge's communications to the jury are called instructions, as in the first claim, or an expression of opinion, as in the second claim, the analysis does not change. The question under either characterization is whether the trial judge's communication to the jury was constitutionally defective. Both claims reduce to a claim that the instructions violated Mr. Wallace's due process rights, under the Fourteenth Amendment, and that his attorney's failure to object to the instructions amounted to ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendment.

Mr. Wallace's first claim is that

> Trial counsel was ineffective for failing to object to the trial court's jury instruction on VUFA and PIC which directed a verdict against the petitioner, deprived him of the presumption of innocence, shifted the burden of proof to the petitioner and unconstitutionally lowered the prosecution[']s burden of proof on all the crimes charged.

Pet. Mem. at 3 (internal capitalization omitted). Mr. Wallace argues that:

> the trial court absolutely directed a verdict on the elements of intent and identity when it told the jury that it ***"has been proven by the facts of the case that" "the defendant possessed the firearm with the intent*** **to" *"commit murder."*** There is simply no other way to interpret the court's instruction. Accordingly, on PCRA appeal in this matter, the Superior Court acknowledged that the trial court directed a verdict but held that such a direct verdict was permissible pursuant to its decision in *Commonwealth v. Anderson,* 600 A.2d 577 (Pa. Super. 1991).

Pet. Mem. at 4 (emphasis in original) (citing to *Wallace,* 2017 WL 6181826, at *4).

Mr. Wallace's second claim is that:

> Trial counsel was ineffective for failing to object to the trial court's jury instruction which gave the jury her personal opinion of the evidence and relieved the prosecution of its burden of proof and shifted the burden to the petitioner by conveying to the jury the petitioner possessed a firearm with the intent to commit murder with it.

Pet. Mem. at 12. Both claims are defaulted and meritless. I will set forth the instructional language at issue, then deal with Mr. Wallace's legal arguments.

The trial court instructed the jury that:

> [i]n order to prove the crime of carrying a firearm without a license, the Commonwealth has to prove that the defendant carried a firearm; that he was not at his home or fixed place of business at the time; and that he did not have a valid and lawfully issued license for carrying the firearm.
>
> Now, in this case there has been an agreement, a stipulation, that the defendant did not have a lawful license to carry a firearm.
>
> Also – excuse me, and that gun that was used here definitely qualifies as a firearm. So the question for you is whether or not the defendant had a firearm.

I will now define the crime of carrying a firearm on public streets or public property.

To find the defendant guilty of this crime, you have to find that the defendant had a firearm on public streets or public property.

To find the defendant guilty of this crime, you have to find that the defendant had a firearm on public streets or public property and that he did not have a license to carry the firearm.

Finally, I would like to define for you the crime of possessing an instrument of a crime.

In order to find the defendant guilty of this offense, you have to find, first of all, that the defendant possessed a firearm. To possess an item, the defendant must have the power to control it and the intent to control it.

Secondly, that the firearm was an instrument of a crime. An instrument of a crime is anything that is used for criminal purposes and possessed by a defendant at the time of the alleged offense under circumstances that are not manifestly appropriate for any lawful uses it might have.

And in this case the facts show that a firearm was used to commit a murder, so the first two elements—the second element, that the firearm was an instrument of a crime, has been proven by the facts of this case that are not contradicted; and that the defendant possessed the firearm with the intent to attempt or commit a crime with it – in this case the crime of murder.

So what you have to decide is whether or not the defendant possessed a firearm.

N.T. 6/18/10, at 141–43.

1. Non-exhaustion and procedural default of Claim 1.

On appeal of the denial of Mr. Wallace's PCRA petition, the Pennsylvania Superior Court analyzed Mr. Wallace's first two claims together, and held that a claim that trial counsel was ineffective for failing to object to the court's instructions on VUFA and PIC was waived because Mr. Wallace failed to "develop" the claim, as required under Pennsylvania law. *Wallace*, 2017 WL 6181826, at *4 n.7 (citing *Commonwealth v. Phillips*, 141 A.3d 512, 522 (Pa. Super. 2016)). The requirement that appellate claims be developed in the argument section of a brief is an independent and adequate state law ground that bars review of the claim in state court. It also means that Petitioner's claim is procedurally defaulted in federal court. *Leake v. Dillman*, 594 F. App'x 756, 759 (3d Cir. 2014) (not precedential). Because federal courts do not sit in habeas to correct issues of state law, the issue of whether the claim was waived, under state law, is not reviewable in federal court. *Id.* The Pennsylvania Superior Court noted that even if the claim had not been waived, the court would have found it to be meritless. *Wallace*, 2017 WL 6181826, at *4 n.7.

Mr. Wallace also failed to exhaust the issue under federal law, because he did not "fairly present" his due process argument in state court. *See Baldwin v. Reese,* 541 U.S. 27, 32 (2004) (an argument that requires a state court to go beyond a petition or brief to discern it is not fairly presented, and therefore unexhausted).

In *Baldwin* the petitioner mentioned in his state supreme court brief that his trial counsel violated several provisions of the Federal Constitution, but he "did not say that his separate *appellate* "ineffective assistance" claim violated *federal* law." 541 U.S. at 30 (emphasis in original). The Ninth Circuit held that a reading of lower court opinions in Mr. Baldwin's case would have made clear to the state supreme court that his argument

was based on the Constitution. *Id.* The Supreme Court held that the petitioner did not fairly present the issue of appellate ineffective assistance under federal law. *Id.*

Mr. Wallace did substantially less than the petitioner in *Baldwin* to explain the federal constitutional basis of his claim. Mr. Wallace never mentioned the words "due process" in the first claim in his SAPP. SAPP at 3–4. He did not mention the Federal Constitution. He did not explain or argue that the Due Process Clause of the Fourteenth Amendment prohibits a state court from directing a verdict.

Instead, Mr. Wallace briefed the issue as a matter of state law. SAPP at 3. He mentioned in passing that "federal courts have long condemned directed verdicts[,]"[2] and cited, without discussion, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977), *Carpenters v. United States*, 330 U.S. 395, 408 (1947), and *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983). This was decidedly not a separate argument that there was a federal constitutional problem with the court's language.

Neither *Martin Linen* nor *Carpenters* purported to establish a due process standard concerning directed verdicts. In *Martin Linen*, the Supreme Court considered the double jeopardy effect of a district court's decision to acquit a defendant under Fed. R. Crim Pro. 29. 430 U.S. at 572. *Carpenters* concerned an erroneous instruction on the acts and intent the government needed to prove to hold labor unions and their members liable for antitrust violations under the Sherman Act. 330 U.S. at 400 n.2, 408–10. The Court insisted that a jury must be properly instructed on the limits of liability. *Id.* at 408. Neither *Martin Linen* nor *Carpenters* explained that due process forbids a directed

[2] I will refer to this phrase as the "condemned" phrase, for brevity's sake.

verdict in favor of the government, or that this due process standard is binding on state courts via the Fourteenth Amendment.

Johnson, a Fifth Circuit case from 1983, held that in a federal prosecution a jury, not a judge, must decide whether the document at issue in the trial was a "security" within the meaning of the federal statute under which the defendant was charged. 718 F.2d at 1319. The court of appeals explained that this rule was founded on the due process rule stated by the Supreme Court in *In re Winship*. *Id.* at 1321 n.8. Footnote 8 in *Johnson* cited, but did not quote from, *In re Winship*, 397 U.S. 358, 364 (1970). The PCRA court in Mr. Wallace's case was no doubt familiar with the holding in *In re Winship*: "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. Yet the facts in *Johnson* materially differed from those in Mr. Wallace's case. In *Johnson* the trial judge took an element of the crime away from the jury's consideration altogether. *Id.* at 1319. The trial judge in Mr. Wallace's case did not take the issue away from the jury, but commented on the strength of the evidence on one of the elements. Since *Johnson* was factually distinguishable, 30 years old, out of jurisdiction, non-binding on the state court, and buried third-in-line in a string-cite, the signal it emitted about Mr. Wallace's due process argument was vanishingly faint. The casual mention of *Johnson* certainly did not amount to a fair presentation of Mr. Wallace's current due process argument.

Sullivan v. Louisiana, 508 U.S. 275, 277 (1993), also cited by Mr. Wallace in his second amended PCRA petition (SAPP, at 4), dealt with a faulty reasonable doubt instruction which deprived a defendant of a proper jury verdict on his charge, just as a directed verdict would have deprived a defendant of a jury verdict. *Id. Sullivan* provides

no help on what level of commentary on the evidence amounts to removing the issue from the jury's consideration, which is the issue in Mr. Wallace's case.

The citation of these cases did not "fairly present" to the state court the due process defect that Mr. Wallace now argues, at least in the ordinary meaning of the words "fairly" and "present." "Present" means to make present: to make overt, not hidden. To "fairly" present means to give the reviewing court a reasonable opportunity, albeit not a perfect one, to understand the nature of the argument being presented. In this instance Mr. Wallace's cryptic citation of a handful of federal cases did not make the due process argument overtly. Neither did the federal cases he cited give the state judge a reasonable opportunity to understand the due process argument that Mr. Wallace now raises in his habeas Petition.

The federal cited cases cited by the petitioner were nothing like those cited in *Bridges v. Beard*, 941 F. Supp. 2d 584, 632 (E.D. Pa. 2013) (Brody, J.), in which the federal precedents mentioned by the petitioner dealt with instructional error identical to that confronted in *Bridges*, and clearly explained the error's constitutional infirmities. *See also Anderson v. Harless*, 459 U.S. 4, 7 (1982) (noting that a cited case that asserted a broad constitutional right to instructions that properly explained state law did not fairly present "the more particular analysis developed in cases such as *Sandstrom*").

If a petitioner has failed to overtly raise a constitutional argument in his state court pleadings, and must rely on cases string-cited in his state court pleadings to argue that he "fairly presented" his constitutional argument, the string-cited cases must clearly raise and discuss the precise constitutional argument he is advancing in habeas. Otherwise, there is nothing "fair" about his so-called "presentation." I note that Mr. Wallace was represented by counsel as of the filing of the SAPP, and throughout the

balance of his PCRA proceeding in state court. This is not a *pro se* petitioner's pleading, which I must review charitably.

The Third Circuit has explained that the following may be acceptable methods of communicating the existence of a federal claim to a state court:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Evans v. Court of Common Pleas, Del. Cty., Pa., 959 F.2d 1227, 1232 (3d Cir. 1992) (quoting *Daye v. Attorney General of New York*, 696 F.2d 186, 1194 (2d Cir. 1982) (en banc)). The federal cases cited by Mr. Wallace in the SAPP do not meet *Evans'* four communicative possibilities. *Id. Martin Linden* and *Carpenters*, the first two cases cited by Mr. Wallace, do not employ "constitutional analysis," *Evans'* first communicative option. *Id. Johnson* and *Sullivan*[3] are not "pertinent federal cases employing constitutional analysis" in "like fact settings." *Id.* The state cases cited by Mr. Wallace, SAPP at 3, do not explicate Mr. Wallace's constitutional argument. *Id.* Mr. Wallace's claim, in his state pleadings, is not phrased in "terms so particular as to call to mind a specific right protected by the Constitution," nor is Mr. Wallace's pattern of facts "well within the mainstream of constitutional litigation." *Id.* The fact that Mr. Wallace was not able to find a federal due process case with similar facts makes these last points clear.

In sum, Mr. Wallace "failed to apprise the state court of his claim that the . . . ruling of which he complained was not only a violation of state law, but denied him the

[3] I explain below that even if the cryptic citation of *Sullivan* in the SAPP sufficed to fairly present the due process argument Mr. Wallace makes in his habeas petition, *Sullivan* does not establish a due process violation in this case.

due process of law guaranteed by the Fourteenth Amendment." *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005) (quoting *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam)). The state court would have had to look well beyond Mr. Wallace's petition or brief to find his due process argument, if he intended one at all. *Id.* (citing *Baldwin*, 541 U.S. at 32). Mr. Wallace did not "fairly present" his due process argument, and therefore failed to exhaust it. The time has long passed for raising the argument in state court, and so the claim is also procedurally defaulted. *McCandless*, 172 F.3d at 261.

As I discuss in section 3, below, Mr. Wallace's claims are meritless, even if not procedurally defaulted.

2. Non-exhaustion and procedural default of Claim 2.

In his SAPP, Mr. Wallace argued his second claim under state law. SAPP at 8–9. He did not mention due process or any other federal constitutional theory. Without elaboration, he cited to *Martin Linen*, 430 U.S. at 572–73, and *Carpenters*, 330 U.S. at 408. Neither case purports to establish a due process standard binding on state courts. Mr. Wallace's second claim was not fairly presented to the state courts. It was therefore not properly exhausted, and is now procedurally barred.

To the extent that Mr. Wallace fairly presented any constitutional argument at all to the state courts in support of his second claim, it was that the instruction amounted to a directed verdict – the same argument he made in his first claim. SAPP at 8–9. As I explain in the next section, that argument is meritless.

3. Mr. Wallace's first two claims also fail on the merits.

The Superior Court said that:

> the facts adduced at trial indisputably indicated that Ballard had been shot five times, with three of those shots entering his chest. ***See*** TCO at 3. At trial—probably because of these very facts—

> Appellant did not challenge whether the shooter used the firearm with the intent to commit a crime, namely murder. Instead, Appellant argued at trial that the evidence did not prove that he was the **person** that possessed the firearm used to commit the murder. In other words, he claimed that **he** did not shoot Ballard. Therefore, the trial court acted appropriately in clarifying the issues for the jury, by directing them to focus on determining whether Appellant possessed the firearm used to kill Ballard, rather than on the uncontested issue of whether the shooter used the firearm with the intent to commit a crime. . . As such, we conclude that these claims have no arguable merit, and Appellant's trial counsel was not ineffective on these grounds.

Wallace, 2017 WL 6181826, at *4 (emphasis in original).

Mr. Wallace's primary argument is that the trial court's instruction is defective under *Sullivan*, 508 U.S. at 277. Pet. Mem. at 11 ("the U.S. Supreme Court specifically held that a judge may not direct a verdict for the state no matter what the evidence is."). He is mistaken. *Sullivan* dealt with a reasonable doubt instruction that concededly violated the Supreme Court's previous holding in *Cage v. Louisiana,* 498 U.S. 39 (1990) (per curiam). 508 U.S. at 277.[4] Analogic support for the holding in *Sullivan* was that a jury—not a judge—must render a verdict beyond a reasonable doubt. *Id.* (citing *Sparf v. United States*, 156 U.S. 51, 105–06 (1895)). Thus, the faulty reasonable doubt instruction in *Sullivan* deprived a defendant of a proper jury verdict on his charge, just as a directed verdict deprived a defendant of a jury verdict in *Sparf*. *Id.* The Court's holding in *Sullivan* was that a faulty reasonable doubt instruction was "structural" error that defied harmless error analysis. *Id.*

[4] The instruction's language told the jury that a reasonable doubt "must be such a doubt as would give rise to a *grave uncertainty,* . . . one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. . . A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt.*" *State v. Sullivan*, 596 So.2d 177, 185 n.3 (La. 1992) (emphasis in original); *see Sullivan*, 508 U.S. at 277.

Sullivan did nothing to explain what constituted a directed verdict, because *Sullivan* did not concern a directed verdict. Mr. Wallace merely asserts, but does not demonstrate, that the district court's instruction in his case amounted to a directed verdict that offends due process. He supplies no case law that analyzes the issue. The Commonwealth argues that Mr. Wallace does not develop this portion of the claim in his federal Petition, and so relief is foreclosed. Com. Resp. at 8–9 (citing *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991) ("vague and conclusory allegations" are insufficient to justify relief)). I agree. *Sullivan* does not control, under its own logic, because Mr. Wallace's case does not concern a faulty reasonable doubt instruction that altogether vitiates proper jury consideration of the facts. Mr. Wallace's Petition and memorandum do not facilitate meaningful review of the issue.

Mr. Wallace's claim does not survive a merits review, either. In this case the trial judge pointed out to the jury the obvious fact that a gun was used to commit a murder, about which the jury could have no rational dispute. Given the manner of the murder, there also was no rational dispute that whoever fired rounds into Mr. Ballard's back while he lay on the ground possessed the gun with the intention to commit a crime with it. The trial judge's comment dealt with one element of the PIC charge: that the firearm must be an instrument of crime. The point of the comment was to focus the jury's attention on the issue genuinely in dispute: whether *Mr. Wallace* possessed the firearm. As to this element of the charge, possession, the instruction was sound; likewise, nor is there an argument that the general instructions on reasonable doubt were defective.

Rose v. Clark, 478 U.S. 570 (1986) and *Neder v. United States*, 527 U.S. 1 (1999), though not discussed by Mr. Wallace, are more to the point than the cases he cites. *Rose* explains that a problem with an instruction on one element of a charge is fundamentally

different from a faulty reasonable doubt instruction, the problem in *Sullivan*. 478 U.S. at 577–80. Unlike a problematic instruction on one element of a charge, a faulty reasonable doubt instruction, like a directed verdict, undercuts the jury's consideration of *every* essential element. *Id.* at 580–81; *see also Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) ("omission or misstatement of an element of the offense" is not structural error and is subject to harmless error review). *Neder* reiterated the distinction made in *Rose*. The Court held that, unlike the faulty reasonable doubt instruction at issue in *Sullivan*, the removal of one element from the jury's consideration was not a structural error and was subject to harmless error review. *Neder*, 527 U.S. at 12.

The instruction in Mr. Wallace's case on the first element of PIC—that the gun was used as an instrument of crime—was not a model of precision, but the Constitution does not require a model of precision. The standard is "'whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way' that violates the Constitution[,]" when "considered in the context of the charge as a whole." *Smith v. Horn*, 120 F.3d 400, 411 (3d Cir. 1997) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). I do not conduct a fine-tuned review of the Superior Court's application of the constitutional standard; instead, I review whether the state court's application of federal law, as determined by the Supreme Court, was unreasonable. 28 U.S.C. § 2254(d)(1). If the Superior Court's application of federal law was not unreasonable, it survives habeas review.

The Third Circuit has explained that "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); *see also Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (the state court's decision must be "objectively unreasonable, not merely wrong; even clear error will not suffice" (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam))). "In other words, a litigant must 'show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Woods*, 575 U.S. at 316 (internal quotation marks omitted)). This is a difficult standard to meet. *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

The standard is yet more difficult to meet, in this case, because the applicable due process standard described in *Estelle* (*see Smith*, 120 F.3d at 411) is general, not specific. Mr. Wallace has not cited to a Supreme Court case treating the same facts, or even closely analogous facts. The more general the constitutional rule, the more leeway the state court has in reaching an outcome in a specific case. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Bearing these standards in mind, I find that the Superior Court did not unreasonably apply federal law as determined by the Supreme Court.

A trial judge may "assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia v. United States*, 289 U.S. 466, 469 (1933). The instruction in this case is virtually indistinguishable from the instruction approved in *United States v. Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975) (citing, *inter alia, Quercia*, 289 U.S. at 469). In *Natale*, the judge 1) charged each element of the offense and 2) said he did not think there was any

dispute as to the first two elements. *Id.* at 1167. The Second Circuit held that the trial judge was permitted to "comment upon the evidence if he does so fairly and makes clear to the jury that all matters of fact are submitted for their determination." *Id.* (citations omitted). The judge's comment "fell far short of an actual direction to the jury that these essential facts had been proven beyond a reasonable doubt." *Id.* The trial judge had given a standard instruction that the jurors were the sole judges of fact and not bound by the judge's opinion, and his opinion that there was no dispute over the first two elements was "not in any sense unfair," because the defense did not, in fact, dispute these elements. *Id.; see United States v. Dixon*, 469 F.2d 940, 942 n.4 (D.C. Cir. 1972) ("Where, as here, the comment is sustained by uncontradicted evidence, and the judge explicitly charged that all matters of fact were to be determined by the jury, no harm to appellants could result." (citing *Quercia*, 289 U.S. at 469)).

In this case the Superior Court evaluated the challenged instruction and determined there was no reasonable likelihood that the jury applied the instruction inappropriately. It did so by evaluating the challenged instruction in the context of the jury charge as a whole, as it must under the Constitution. *See Estelle,* 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380).

The jury was correctly instructed on reasonable doubt (N.T. 6/18/10, at 124–25), correctly instructed that they had the duty to find each element of each offense beyond a reasonable doubt (*id.* at 124), and correctly instructed that the jury, not the judge, were the "sole judges of the facts." *Id.* at 121. In the context of the jury instructions, taken as a whole, Mr. Wallace has not shown the Superior Court's determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *LeBlanc*, 137 S. Ct. at 1728

(internal quotations and citation omitted). Thus, the Superior Court's decision was not an unreasonable application of federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

What is more, if the instruction violated due process, the error would be harmless. *Hedgpeth*, 555 U.S. at 61 ("omission or misstatement of an element of the offense" is subject to harmless error review)); *Neder*, 527 U.S. at 10–11 (removing one element from the jury's consideration was subject to harmless error review). The harmless error standard in a habeas case is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Hassine v. Zimmerman*, 160 F.3d 941, 946 (3d Cir. 1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

As the Court explained in *Rose*, "[i]n many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." 478 U.S. at 580–81 (emphasis in original). So here. *Someone* shot and killed Harry Ballard using a gun. The only genuine issue was *who* shot him. No rational juror "could find that the defendant committed the relevant criminal act but did not *intend* to" use the gun as an instrument of crime. *Id.* If the Superior Court's determination was error, it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* Mr. Wallace has not shown prejudice.

An additional layer of complexity attaches here, where the instruction is challenged through a claim of ineffective assistance of counsel. Constitutionally effective counsel is not required to object to every trial error, like an automaton. In this case a lack of objection accorded with sound defense strategy by counsel. The element of

possession – who shot the firearm that killed the victim - was at least plausibly contestable, under the evidence, because it depended upon the recollection and credibility of witnesses who were subject to vigorous cross-examination. The issue of whether a gun was used as an instrument of crime (the murder of Harry Ballard) was not something a rational juror would debate. To object and insist the jury waste time debating whether the gun was used as an instrument of crime would be to lose all credibility with the jury on the more plausible argument that defendant was not the one who shot Harry Ballard. Harping on an absurd theory of defense, even if the law permits one to harp, is a time-tested way to convince a jury that one's client has no convincing arguments.

"There are countless ways to provide effective assistance of counsel in any given case." *Strickland*, 466 U.S. at 689. The wide variety of legitimate defense strategies is one reason why *Strickland* gives such deference to counsel's decisions, *id.*, and why double deference is due to a state court's application of *Strickland*. *Burt*, 571 U.S. at 15. Because trial council's decision not to object to the VUFA and PIC instructions is objectively well within the bounds of reasonable defense strategy, Mr. Wallace has not overcome the "strong presumption" that counsel's representation was effective. *Strickland*, 466 U.S. at 689. Therefore, the Superior Court's decision in this case is not an unreasonable application of *Strickland*.

Finally, even if counsel's failure to object was deficient, Mr. Wallace's ineffectiveness of counsel claim fails under *Strickland's* second prong, because there is no reasonable likelihood the jury verdict would have been different had an objection been made and granted. *Strickland* 466 U.S. at 696; *see Shelton v. Mapes*, 821 F.3d 941, 950 (8th Cir. 2016) (failure to object to an instructional error is harmless, under

Strickland, where the instruction concerns a relatively undisputed part of the evidence and it was not reasonably likely the jury's decision would have been different without the error). In view of the strength of the evidence that a gun was used in a crime—murder—and that whoever used the gun intended to commit a crime—again, murder—Mr. Wallace "cannot show that the [allegedly faulty] instruction deprived him of 'a fair trial, a trial whose result is reliable.'" *Buehl v. Vaughn*, 166 F.3d 163, 171–72 (3d Cir. 1999) (quoting *Strickland,* 466 U.S. at 687).

The Superior Court's decision was not an unreasonable application of clearly established federal law, as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

4. *Mr. Wallace's miscellaneous arguments, as to his first and second claims, are unexhausted and procedurally defaulted.*

Mr. Wallace makes several undeveloped arguments that are different from his main arguments in Claims 1 and 2. These claims were not fairly presented to the state courts and are therefore unexhausted and procedurally defaulted.

a. *Burden of proof and burden shifting.*

Mr. Wallace argues that the court's instruction improperly relieved the prosecution of its burden of proof and improperly shifted the prosecution's burden of proof. Pet. Mem. at 5–6. Petitioner claims the instruction violated *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979),[5] and that language elsewhere in the jury charge

[5] In *Sandstrom* the Court held that a conclusive evidentiary presumption removed the government's burden of proof on an essential element, which was a denial of due process, while a presumption that shifted the burden of persuasion to the defendant also denied due process. 442 U.S. at 521 (conclusive presumption), and 524 (shifting burden of persuasion). *Sandstrom* was an application of the holding in *Winship*, which required as a matter of due process that the government prove every essential element of a criminal charge beyond a reasonable doubt. *Id.* at 520 (quoting *In re Winship*, 397 U.S.at 364).

merely contradicted, but did not remedy, the infirm instruction. Pet. Mem. at 5 (citing *Francis v. Franklin*, 471 U.S. 307, 315 (1985)). He also argues that the instruction put him under an "obligation to contradict" the prosecution's allegations. *Id* at 6 (citing *Brooks v. Kemp,* 809 F.2d 700 (11th Cir. 1987)).

Mr. Wallace did not make these arguments in support of his first two claims to the PCRA court. *See* SAPP at 3–9. Neither *Sandstrom*, nor *Francis*, nor *Brooks* are cited. SAPP at 3–9. The arguments are therefore unexhausted because they were not fairly presented to the Commonwealth's courts. *See Baldwin*, 541 U.S. at 30, 32; *Duncan,* 513 U.S. at 366. They are also procedurally defaulted because the time for making PCRA claims has long passed. *See Coleman*, 501 U.S. at 729; *McCandless*, 172 F.3d at 261.

These claims are also meritless. *Quercia*, 289 U.S. at 469, *Natale*, 526 F.2d at 1167, and *Dixon*, 469 F.2d at 942, convince me that the instruction was not an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

b. *Removing an element of the murder charges from the jury.*

Mr. Wallace alleges that "[e]very time the judge explained the elements of each offense to the jury she told the jury that something was proven before the jury went to deliberate. The record reflects that every offense the petitioner was charged with the judge told the jury at least one element of each offense was proven. (N.T., 6-18-2018 [sic], pg. 137-140)." Pet. Mem. at 6. These claims about other faulty instructions were not fairly presented as part of his first two claims in the SAPP. There, Mr. Wallace complained only about one instruction for VUFA and PIC. SAPP at 3, 9–10. That instruction has been discussed, above. His undeveloped claims about other instructions

were not fairly presented to the state court and are therefore unexhausted and procedurally defaulted.

In addition to being defaulted, these claims are without merit. Pages 137–140 of the transcript of June 18, 2010, cited by Mr. Wallace in his memorandum, deal with murder instructions. For each iteration of murder—first degree and second degree—the judge explained that one element was that the victim was dead. Each time the judge mentioned this element, she commented "there's no question about that," *i.e.*, that the victim is dead. N.T. 6/18/10, at 137/22, 139/25–140/1. That happened to be true. Mr. Wallace never argued otherwise. For reasons I have explained above, there was no error in making the comment. *See supra,* at 21–23. The instruction did not take the elements of the crime away from the jury, and certainly posed no prejudice to Mr. Wallace.

c. *Various due process claims.*

Mr. Wallace makes the hyperbolic claim that "[t]his ruling by the Superior Court virtually [sic] contradicts every right that a criminal defendant is entitled to which [sic] has been established by the U.S. Supreme Court." Pet. Mem. at 9. In rapid succession Mr. Wallace claims that the court's comments violate the defendant's right not to testify, established in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)[6] (Pet. Mem. at 9); his right to have a jury – not a judge – determine each essential element of the crime charged, under *United States v. Gaudin,* 515 U.S. 506 (1995)[7] and *Duncan v. Louisiana,* 391 U.S. 145

[6] Due process forbids a state from compelling self-incriminating testimony by imprisonment for contempt. *Malloy*, 378 U.S. at 3 (1964).

[7] Due process requires that every element of a criminal charge must be determined by a jury. *Gaudin*, 515 U.S. at 522–23.

(1968)[8]; and the defendant's presumption of innocence and the requirement that the government prove every element of a criminal charge beyond a reasonable doubt. Pet. Mem. at 10 (citing *In re Winship*, 397 U.S. 358 and *Sandstrom*, 442 U.S. 510).

Mr. Wallace raised none of these theories in Claims I and II of his second amended PCRA petition. SAPP at 3–9. They are therefore unexhausted because they were not fairly presented to the Commonwealth's courts. *See Baldwin*, 541 U.S. at 30, 32; *Duncan*, 513 U.S. at 366. They are also procedurally defaulted because the time for making PCRA claims has long passed. *See Coleman*, 501 U.S. at 729; *McCandless*, 172 F.3d at 261.

If I were to ignore this default, the arguments are so insufficiently developed in Mr. Wallace's memorandum that I may reject them without more. *See Palmer v. Hendricks*, 592 F.3d 386, 395 (3d Cir. 2010) ("a habeas petitioner's nonspecific or conclusory allegations of ineffective assistance of counsel do not compel district courts to convene evidentiary hearings in order to delve into the unelaborated factual basis of a habeas petition."); *Zettlemoyer*, 923 F.2d at 298 ("vague and conclusory allegations" are insufficient to warrant habeas relief).

If I were to reach the merits, Mr. Wallace's abstract expressionist[9] citation of a series of Supreme Court cases arising in widely varying factual circumstances does nothing to convince me that the Superior Court's decision in this case was an unreasonable application of Supreme Court precedent. *Quercia*, 289 U.S. at 469,

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[8] Due process requires that a criminal charge carrying a maximum sentence of two-years imprisonment and a $5,000 fine be tried to a jury. *Duncan*, 391 U.S. at 149–50.

[9] I am reminded of Jackson Pollock's famous "drip paintings" as I read the spatter of citations at pages 9 and 10 of Petitioner's Memorandum. *See* JACKSON POLLOCK: BIOGRAPHY, PAINTING, AND QUOTES, https://www.jackson-pollock.org (last visited Sept. 29, 2020).

Natale, 526 F.2d at 1167, and *Dixon*, 469 F.2d at 942, convince me that the instruction was not an unreasonable application of clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). *Hassine*, 160 F.3d at 946, and *Rose*, 478 U.S. at 580–81, convince me that if the judge's commentary was error, it was harmless.

B. Mr. Wallace's third claim is meritless.

Mr. Wallace's third claim is that:

> Trial counsel was ineffective for failing to object to the trial court's jury instruction that highlighted allegedly uncontradicted facts because it confused the jury as to the level of doubt required for acquittal and focused the jury's attention on those facts and the petitioner's failure to testify.

Pet. Mem. at 16. Mr. Wallace explains the basis of his claim:

> In *Griffin v. California*, 380 U.S. 609 (1995) [t]he Supreme Court held, "The Fifth Amendment...forbids either comments by the prosecution on the accussed [sic] silence or instruction by the court that such silence is evidence of guilt." In the instant case, the trial court's instruction went beyond highlighting the petitioner's silence but served to confuse the jury about the degree of doubt required for an acquittal and shifted the burden to the petitioner to contradict the facts.

Id. Mr. Wallace appears to argue that the instruction adversely commented on Mr. Wallace's exercise of his right not to testify, the consequence of which was to lower the burden of proof and shift the burden of proof to the defendant. The logic of this argument is not self-evident, but I will deal with each component.

In his second amended PCRA petition, Mr. Wallace claimed that counsel was ineffective for failure to object to the charge, alleging that the charge

> highlighted uncontradicted facts because it encouraged the jury to give far more credence to testimony that is uncontradicted based on that fact alone and also focused the

> jury's attention on the fact that the defendant did not testify so as to contradict those facts.

SAPP at 9. Mr. Wallace asserted that the court's language "encouraged the jury to decide other issues of fact based on the fact that the evidence was not contradicted, and that is a due process violation." *Id.* at 10. Mr. Wallace did not support this assertion with any case citation or other argument. He went on to cite to *Griffin* and argue that the instruction focused the jury on the defendant's failure to testify, because Mr. Wallace was in a position to contradict the evidence. *Id.*

If Mr. Wallace's claims 1) that the court's language confused the jury about reasonable doubt, thereby lowering the government's burden of proof, and 2) that the court's language shifted the burden of proof, are independent of his claim that the court's language violated *Griffin*, these independent claims were not "fairly presented" in the SAPP and are therefore unexhausted. *See Baldwin*, 541 U.S. at 30, 32; *Duncan*, 513 U.S. at 366. The two claims, if independent from Mr. Wallace's *Griffin* claim, are also procedurally defaulted because the time for making PCRA claims has passed. *See Coleman*, 501 U.S. at 729; *McCandless*, 172 F.3d at 261. However, I do not read these two claims as independent of Mr. Wallace's *Griffin* claim, because Mr. Wallace seems to treat them all of a piece, and courts analyzing a *Griffin* claim have used the concepts of lowering the burden of proof and shifting the burden of proof as adjuncts to their analysis of a claim that the court or prosecutor indirectly commented on a defendant's failure to testify. *See, e.g., United States v. Brown*, 254 F.3d 454, 463 (3d Cir. 2001).

Mr. Wallace did fairly present his claim that the instruction improperly focused the jury's attention on Mr. Wallace's failure to testify under *Griffin*. *See Wallace*, 2017

61818126, at *5 (analyzing the claim). Mr. Wallace's *Griffin* claim, though fairly presented, is meritless. The trial court's instruction was not a direct comment on the defendant's failure to testify. Nor was there anything about the circumstances of the trial evidence that would single out the defendant as the only person who could contradict the evidence that the victim was dead.

A court's, or prosecutor's, remark improperly comments on a defendant's failure to testify when "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982) (citing *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971)). Remarks about the absence of facts in the record "need not be taken as comment on defendant's failure to testify." *Id.* (citing *Braxton v. Estelle*, 641 F.2d 392, 397 (5th Cir. 1981)). A statement about a police witness, that "there has been no challenge to his testimony, it's uncontested[]" was not manifestly intended as a comment on the defendant's failure to testify, nor would a jury naturally take it as a comment on the defendant's failure to testify. *Brown*, 254 F.3d at 463 (3d Cir. 2001). Neither did the comment shift the burden of proof. *Id.*

A federal court of appeals decision, such as *Brown*, is not a determinative resolution of the question whether a state court's decision was an unreasonable application of clearly established federal law, as determined by the Supreme Court. *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017). Nevertheless, *Brown* is persuasive evidence that "fairminded jurists" could disagree with Mr. Wallace's position, and agree with the Superior Court's decision, under existing Supreme Court precedent. *See id.* (fairminded jurists might disagree with the Ninth Circuit's interpretation of Supreme Court

precedent, and agree with the state court's interpretation, making the state court's decision not "unreasonable" under 28 U.S.C. § 2254(d)(1)).

The Superior Court reasoned that the trial court's instructions fairly and adequately informed the jury that they were not to draw any adverse inference from the defendant's failure to testify:

> Now, it is entirely up to a defendant in every criminal trial to decide whether or not to testify. The defendant, as I told you, has an absolute right founded on both the Constitution of the United States and the Constitution of Pennsylvania to remain silent. ***You must not draw any inference of guilt or any other inference adverse to [Appellant] from the fact that in this case he chose not to testify.***

Wallace, 2017 6181826, at *5 (quoting N.T. 6/18/10, at 121–23, 134 (emphasis in original). The Superior Court also reasoned that other instructions affirmed the jury's duty to make all factual determinations, and emphasized the jury's freedom to disregard uncontradicted evidence it found incredible:

> Looking at the jury instructions as a whole, the trial court imparted that the jury ***solely*** makes factual determinations, it should consider ***all*** of the evidence that it believed to be material to the issues involved, and that jury members should "not regard as true any evidence that [they found] to be incredible even if it is uncontradicted." ***Id.*** at 121, 122, 123. Furthermore, the trial court advised the jury that it "must not draw any inference of guilt or any other inference adverse to [Appellant] from the fact that in this case he chose not to testify." ***Id.*** at 134.

Wallace, 2017 WL 6181826, at *6 (emphasis in the original).

In Mr. Wallace's case, the judge's comments were not manifestly intended as a comment on Mr. Wallace's failure to testify, nor would a jury naturally take them as such a comment. Consequently, they did not shift or lower the burden of proof. *See Brown,* 254 F.3d at 463. I find that the Superior Court's decision rejecting Mr. Wallace's

contention that the trial judge's instructions improperly commented on defendant's failure to testify was not an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). I recommend that Mr. Wallace's third claim be dismissed.

C. Mr. Wallace's fourth claim is non-cognizable and meritless.

Mr. Wallace's fourth claim is that his trial attorney was ineffective for "failing to move for a mistrial or cautionary instruction after he objected to the testimony from the deceased's mother that her son was a straight-A honor student." Pet. Mem. at 20. In his memorandum, Mr. Wallace does not argue any federal constitutional violation. Rather, he argues that he was entitled to a mistrial or cautionary instruction as a matter of state law, and that his counsel was ineffective, under *Strickland*, for failing to move for a mistrial or cautionary instruction. *Id.* at 20–21.

The Superior Court held that, under state law, Mr. Wallace was not entitled to relief:

> Here, while in the midst of discussing Ballard's decades-long drug problem, Ballard's mother testified that her son had been a straight-A honor student in high school, roughly ***twenty years*** before the murder occurred. We cannot fathom that this lone statement prevented the jury from weighing and rendering a true verdict.

Wallace, 2017 6181826, at *8 (emphasis in original).

Habeas is not an avenue for correcting an erroneous application of state law by a state court. *See Estelle,* 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (internal quotation and citation omitted). *Estelle's* doctrine bars not only a claim that Mr. Wallace was entitled to a mistrial, under state law, but also a claim that counsel was ineffective for failing to move

for a mistrial, because the Pennsylvania court ruled that he was not entitled to a mistrial or other relief as a matter of state law. *See Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004) (state court's approval of a jury instruction, as a matter of state law, barred a *Strickland* claim that counsel was ineffective for failing to object to the instruction). Mr. Wallace's claim of ineffective assistance is not cognizable,
under *Estelle* and *Priester*.

Even if his claim were somehow cognizable, Mr. Wallace has not made out a violation of a constitutional right in his habeas Petition. He points to no Supreme Court precedent establishing that a defendant has a constitutional right to a mistrial when a witness makes a stray favorable comment about the victim. My independent research has found none. In federal courts, whether a mistrial should be granted is ordinarily left to the sound discretion of a trial judge, who must determine whether there is a manifest necessity for declaring a mistrial, or the ends of public justice would otherwise be defeated by failing to grant a mistrial. *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (citations and quotations omitted); *see Blueford v. Arkansas*, 566 U.S. 599, 609 (2012) (mistrial may be granted without implicating double jeopardy where there is a showing of manifest necessity). Mr. Wallace has not alleged or demonstrated that the Superior Court's disposition of this claim was an unreasonable application of federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

I recommend that Mr. Wallace's fourth claim be dismissed because it is non-cognizable and meritless.

D. Mr. Wallace's fifth claim is non-cognizable and meritless.

Mr. Wallace alleges in his fifth claim that

> Trial counsel was ineffective for failing to object to the trial court's jury instruction which merged the elements of specific intent to kill and malice which unconstitutionally lowered the prosecution's burden of proof and shifted the burden of proof to the defendant to disprove malice.

Pet. Mem. at 22. Mr. Wallace alleged that the instruction was error, under Pennsylvania law. SAPP at 17–23. The Superior Court held that, under state law, the instruction adequately conveyed the essential elements of the crime of first-degree murder. *Wallace*, 2017 WL 6181826, at *7. In his habeas petition, Mr. Wallace again contends that the instruction was erroneous under Pennsylvania law. Pet. Mem. at 22–24.

Whether or not the Superior Court is correct about Pennsylvania law, the decision is not reviewable by me. Habeas is not an avenue for correcting an erroneous application of state law by a state court. *See Estelle*, 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law.") (internal quotation and citation omitted). *Estelle's* doctrine bars not only a claim that the trial court's instruction on malice and specific intent was erroneous, under state law, but also a claim that counsel was ineffective for failing to object to the instruction, because the Pennsylvania court ruled that the instruction was not error. *See Priester*, 382 F.3d at 402 (state court's approval of a jury instruction, as a matter of state law, barred a *Strickland* claim that counsel was ineffective for failing to object to the instruction). The Petitioner's claim of ineffective assistance is not cognizable, under *Estelle* and *Priester*, to the extent that he is arguing an instructional error under state law.

In his memorandum, Mr. Wallace cites one case that elaborates a federal due process standard. That case is *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007) (cited at Pet. Mem. 24), and it does not help him. In *Polk* the Ninth Circuit found that an

instruction that the Nevada Supreme Court held was erroneous under state law also violated due process. *Id.* at 906–07. The Ninth Circuit subsequently rejected *Polk's* rationale, based on further developments in Nevada law, but upheld *Polk's* holding on other grounds. *See Babb v. Lozowsky*, 719 F.3d 1019, 1029 (9th Cir. 2013). The reasoning and holding in *Babb* were then undermined by a Supreme Court decision, and the Ninth Circuit recognized *Babb's* abrogation in *Moore v. Helling*, 763 F.3d 1011, 1018–19 (9th Cir. 2014).

Rather than chronicle the sad and tortured history of the demise of the constitutional theory in *Polk*, it suffices to say that Mr. Wallace's argument is not aided by *Polk*, by *Babb*, or by *Moore*. Even if Mr. Wallace's argument were supported by these cases, they would not control the decision here, because the cases do not amount to "clearly established Federal law, as determined by the Supreme Court of the United States," the law by which I must measure the reasonableness of a state court's decision under 28 U.S.C. § 2254(d)(1). Because Mr. Wallace's fifth claim is non-cognizable and meritless, I recommend that it be dismissed.

RECOMMENDATION

Based upon the discussion above, I respectfully recommend that Mr. Wallace's Petition be dismissed with prejudice.

I further recommend that no certificate of appealability issue because "the applicant has [not] made a substantial showing of the denial of a constitutional right," under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262–

63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012).

The parties may object to this report and recommendation under 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1 within fourteen (14) days after being served with this report and recommendation. An objecting party shall file and serve written objections that specifically identify the portions of the report or recommendations to which objection is made and shall provide an explanation of the basis for the objections. Failure to file timely objections is likely to constitute waiver of any appellate rights. See *Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007). A party wishing to respond to objections shall file a response within fourteen (14) days of the date the objections are served.

BY THE COURT:

s/Richard A. Lloret
RICHARD A. LLORET
U.S. Magistrate Judge

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

SPENCER WALLACE, Petitioner, v. MARK GARMAN, et al., Respondents.	:	CIVIL ACTION No. 18-cv-03509-NIQA

JUDGMENT

In accordance with the Court's separate Order, filed contemporaneously with this Judgment on this _____ day of _____, 2020,

JUDGMENT IS ENTERED

DENYING and **DISMISSING WITH PREJUDICE** Petitioner's Petition for Writ of Habeas Corpus.

BY THE COURT:

_____
HON. NITZA I. QUIÑONES ALEJANDRO
U.S. DISTRICT JUDGE

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

SPENCER WALLACE, Petitioner, v. MARK GARMAN, et al., Respondents.	:	CIVIL ACTION No. 18-cv-03509-NIQA

ORDER

AND NOW, this _____ day of _____, 2020, upon careful and independent consideration of Spencer Wallace's petition for writ of habeas corpus (Doc. No. 1), the Respondents' response in opposition (Doc. No. 10), Mr. Wallace's memorandum of law in support of his petition (Doc. No. 11), and the Report and Recommendation of U.S. Magistrate Judge Richard A. Lloret (Doc. No. ____), it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Richard A. Lloret is **APPROVED** and **ADOPTED**;
2. Mr. Wallace's Petition for Writ of Habeas Corpus is **DENIED** and **DISMISSED** with prejudice by separate Judgment, filed contemporaneously with this Order. *See* Federal Rule of Civil Procedure 58(a); Rules Governing Section 2254 Cases in the United States District Courts, Rule 12;
3. No certificate of appealability shall issue under 28 U.S.C. § 2253(c)(1)(A) because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the

constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262-63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012); and

4. The Clerk of Courts shall mark this file closed.

BY THE COURT:

_____

HON. NITZA I. QUIÑONES ALEJANDRO
U.S. DISTRICT JUDGE

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

10/1/2020

RE: WALLACE v. GARMAN, ET AL
CA No. 18-CV-3509

NOTICE

Enclosed please find a copy of the Report and Recommendation filed by United States Magistrate Judge Lloret on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties' written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By: s/JamesDeitz
James Deitz, Deputy Clerk

cc: **S. Wallace, p.p. #JP 5441**
COUNSEL

civ623.frm (11/07)