UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1999

DANA JOVAN JOHNSON,

Appellant

v.

DISTRICT ATTORNEY ALLEGHENY COUNTY, ET AL.

(W.D. Pa. Civ. No. 2:20-cv-00981)

SUR PETITION FOR REHEARING

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

The foregoing petition for panel rehearing and for rehearing en banc is denied. See 3d Cir. I.O.P. 8.3, 9.2, & 9.3. As noted in the order denying Appellant's application for a certificate of appealability, jurists of reason would not debate the District Court's decision to deny his habeas petition. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Specifically, reasonable jurists would not debate that Appellant's ineffective assistance of counsel and due process claims are either procedurally defaulted or meritless. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

More specifically, reasonable jurists would not debate that Appellant's claims regarding trial preparation, cross-examination, his opportunity to testify, witness

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*Judge Ambro's vote is limited to panel rehearing only.

credibility, his identification, and involuntary manslaughter jury instructions are all procedurally defaulted. *Coleman*, 501 U.S. at 735 n.1. *Martinez v. Ryan*, 566 U.S. 1 (2012), cannot excuse the default because Appellant has failed to demonstrate that the claims are substantial. 566 U.S. at 14. In addition, jurists of reason would agree that Appellant's claim regarding the conflict of interest is without merit, since Appellant has failed to demonstrate that the past representation had any impact on the defense strategy in a completely unrelated proceeding. See *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988). And reasonable jurists would not debate that Appellant's claims regarding counsel's use of unauthorized defenses, counsel's failure to call Latrese Winstead, and the Commonwealth's theory of the crime are without merit, since Appellant has failed to show that counsel's performance was deficient. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge 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.").

Additionally, even if jurists of reason could debate that Appellant's claims regarding Donald Macon's trial testimony, the expert witness, and jury instructions were procedurally defaulted, jurists of reason would not debate that those claims do not "state a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. First, Johnson challenges only Macon's credibility, not the underlying admissibility of Macon's testimony. Johnson has provided no reason why that testimony would have been inadmissible. Second, Johnson cannot demonstrate any prejudice relating to trial counsel's failure to call an expert witness to testify about the impossibility of a close-range shooting because, contrary to Johnson's assertions, there was no evidence presented that the victim was shot at close range. Third, because Johnson's request for (1) a prompt complaint jury instruction and (2) a *Kloiber* instruction are inapplicable to Johnson's case, reasonable jurists could not find trial counsel ineffective for failing to request these instructions. *See Com. v. Snoke,* 580 A.2d 295, 298 (1990); *Com. v. Paolello*, 665 A.2d 439, 455 (1995).

By the Court,

s/Thomas L. Ambro
Circuit Judge

Date: March 21, 2023

kr/cc: Dana Jovan Johnson
Rusheen R. Pettit, Esq.
Ronald Eisenberg, Esq.

BLD-004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-1999**

DANA JOVAN JOHNSON, Appellant

v.

DISTRICT ATTORNEY ALLEGHENY COUNTY, ET AL.

(W.D. Pa. Civ. No. 2:20-cv-00981)

Present: AMBRO, KRAUSE, and PORTER, Circuit Judges

Submitted is Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny his habeas petition. Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Specifically, reasonable jurists would not debate that Appellant's ineffective assistance of counsel and due process claims are either procedurally defaulted or meritless. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991); Strickland v. Washington, 466 U.S. 668, 687 (1984).

In particular, jurists of reason would not debate that Appellant's claims regarding Donald Macon's trial testimony, the expert witness, and jury instructions are procedurally defaulted and cannot be excused pursuant to Martinez v. Ryan, 566 U.S. 1 (2012). Martinez is inapplicable to these claims because it "applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeals," and these claims were abandoned on PCRA appeal. Norris v. Brooks, 794 F.3d 401, 404–05 (3d Cir. 2015) (citing Martinez, 566 U.S. at 16). In addition, reasonable jurists

would not debate that Appellant's claims regarding trial preparation, cross-examination, his opportunity to testify, witness credibility, his identification, and involuntary manslaughter jury instructions are all procedurally defaulted. Coleman, 501 U.S. at 735 n.1. Martinez cannot excuse the default because Appellant has failed to demonstrate that the claims are substantial. 566 U.S. at 14. Additionally, jurists of reason would agree that Appellant's claim regarding the conflict of interest is without merit, since Appellant has failed to demonstrate that the past representation had any impact on the defense strategy in a completely unrelated proceeding. See United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988). Finally, reasonable jurists would not debate that Appellant's claims regarding counsel's use of unauthorized defenses, counsel's failure to call Latrese Winstead, and the Commonwealth's theory of the crime are without merit, since Appellant has failed to show that counsel's performance was deficient. See Strickland, 466 U.S. at 689 ("[A] court must indulge 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.").

By the Court,

s/THOMAS L. AMBRO
Circuit Judge

Dated: October 28, 2022
Sb/cc: Dana Jovan Johnson
Rusheen R. Pettit, Esq.

A True Copy:

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

Appendix 2B

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

DANA JAVON JOHNSON, Petitioner, v. THOMAS MCGINLEY, *District Attorney of Allegheny County*, WARDEN, SCI COAL TOWNSHIP, and ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	)	Civil Action No. 20-981 District Judge Arthur J. Schwab Magistrate Judge Lisa Pupo Lenihan

ORDER OF COURT

On June 30, 2020, Petitioner Dana Javon Johnson's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Petition for Writ of Habeas Corpus") was lodged. (Doc. 1). This matter was referred to United States Magistrate Judge Lisa Pupo Lenihan ("Magistrate Judge Lenihan") for proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636, and Local Civil Rule 72.

On August 7, 2020, once Petitioner paid his $5.00 filing fee, the Petition for Writ of Habeas Corpus was filed. (Doc. 2).

On March 8, 2022, Magistrate Judge Lenihan filed a Report and Recommendation, recommending that the Petition for Writ of Habeas Corpus be denied, and that a certificate of appealability be denied. (Doc. 23).

Petitioner was notified that pursuant to 28 U.S.C. § 636(b)(1) he had fourteen days to file written objections to the Report and Recommendation. (*Id.*). Petitioner requested, and was

subsequently granted an extension of time in which to file objections. (Doc. 25). On April 19, 2022, Petitioner timely filed Objections to the Report and Recommendation. (Doc. 26).

After *de novo* review of the Record in this matter, Magistrate Judge Lenihan's Report and Recommendation, and Petitioner's Objections thereto, said Objections which the Court finds are meritless, it is hereby ORDERED that the Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 2) is DENIED.

It is further hereby ORDERED that no certificate of appealability is issued.

It is further hereby ORDERED that Magistrate Judge Lenihan's Report and Recommendation (Doc. 23) is adopted as the Opinion of the Court.

The Clerk of Court is to mark this matter CLOSED.

SO ORDERED, this 27th day of April, 2022.

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: U.S. Magistrate Judge Lisa Pupo Lenihan

Dana Javon Johnson
LE-7859
SCI Phoenix
1200 Mokychic Drive
Collegeville, PA 19426

All ECF Registered Counsel of Record

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

DANA JAVON JOHNSON, Petitioner, v. THOMAS MCGINLEY, *District Attorney of Allegheny County*, WARDEN, SCI COAL TOWNSHIP, and ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	)	Civil Action No. 20 – 981 District Judge Arthur J. Schwab Magistrate Judge Lisa Pupo Lenihan

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Petitioner Dana Javon Johnson has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 2. For the following reasons, it is respectfully recommended that Petitioner's petition for writ of habeas corpus be denied. It is further recommended that a certificate of appealability be denied.

II. REPORT

A. Background

In the Court of Common Pleas of Allegheny County, Pennsylvania, Petitioner was convicted at a jury trial of murder of the first degree. The trial court summarized the evidence as follows:

> The evidence presented at trial established that in the early morning hours of December 31, 2011, the victim, Donald Russell and many others were at a house party at 313 Sterling Street in the Arlington section of the City of Pittsburgh. [Petitioner] was seen at the party with Kavon Worlds and Montel Williams. At some point, a neighbor was awakened by shouting outside and heard discussion of a gun. Thereafter, [Petitioner] was then seen again inside the party wearing an AK-47 type rifle on a strap underneath an army fatigue jacket. There was a commotion during the party and Donald Macon observed [Petitioner] pointing his rifle at the victim, Donald Russell and reaching into his pockets. Macon fled and seconds later, shots were fired. When Macon returned, the victim had been shot several times and was eventually pronounced dead. An autopsy revealed that [Russell] had been shot 11 times, with two (2) shots being fatal or potentially fatal and nine (9) of those wounds being superficial or not otherwise fatal. Although some of the superficial wounds were consistent with being fired by a .9 mm [sic] handgun, the size and trajectory length of the fatal wounds were consistent with a 7.62 x .39 mm [sic] bullet fired from an automatic [sic] rifle.

Commonwealth v. Johnson, 125 A.3d 446 (Pa. Super. 2015) (unpublished memorandum at 2-3) (quoting Trial Court Opinion, 07/15/14, at 11) (footnotes omitted).

Petitioner was sentenced to life imprisonment on September 17, 2013. On direct appeal, the Pennsylvania Superior Court affirmed his judgment of sentence. Commonwealth v. Johnson, 125 A.3d 446 (Pa. Super. 2015) (unpublished memorandum). The Pennsylvania Supreme Court denied his petition for allowance of appeal. Commonwealth v. Johnson, 129 A.3d 1241 (Pa. 2015).

Petitioner filed a petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46, which was amended by counsel, and ultimately dismissed without a hearing. The Pennsylvania Superior Court affirmed the dismissal. Commonwealth v. Johnson, 221 A.3d 1275 (Pa. Super. 2019); ECF No. 12-11. The Pennsylvania Supreme Court denied allowance of appeal from the order of the Superior Court. Commonwealth v. Johnson, 225 A.3d 1102 (Pa. 2020).

Petitioner timely commenced this habeas litigation by lodging a petition on June 30, 2020. ECF No. 1. He subsequently paid the filing fee, and the instant petition was filed on August 7,

2020. ECF No. 2. On December 14, 2020, Respondents, through the Office of the District Attorney of Allegheny County, filed a response to the petition. ECF No. 12. On December 14, 2021, Petitioner filed a traverse. ECF No. 22. The petition is ripe for consideration.

B. Analysis

In his petition, Petitioner raises thirteen grounds for relief.

1. Ground One: Ineffective assistance of trial counsel for allowing Donald Macon's testimony to be admitted

In this claim, Petitioner asserts that his trial counsel should have acted to exclude Donald Macon's testimony, which he describes as "false and perjurious." ECF No. 2 at 5. In support of this claim, Petitioner explains:

> Donald Macon only came forward due to being involved in a car accident and possibly facing jail time. Macon allegedly had information on a homicide. Macon did not call police when the crime happened and Macon further had motives to lie and implicate Petitioner in the instant crime. Macon nonetheless gave two (2) separate accounts of what allegedly took place when the instant crime occurred and further invoked his Fifth Amendment Right when being cross-examined at [the] preliminary hearing.

Id.

Petitioner asserts that he raised this claim in his PCRA petition, but his PCRA counsel did not raise it in the PCRA appeal, against Petitioner's wishes. Id. Because Petitioner did not present this claim to the Pennsylvania Superior Court in his PCRA appeal, it has not been exhausted.

This Court has explained:

> As a general matter, a federal district court may not consider the merits of a habeas petition unless the petitioner has "exhausted the remedies available" in state court. *See* 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). A petitioner satisfies the exhaustion requirement "only if [the petitioner] can show that [he or she] fairly presented the federal claim at each level of the established state-court system for review." Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004). The purpose of the exhaustion requirement is to "give the state courts a full and fair opportunity to resolve federal constitutional

> claims before those claims are presented to the federal courts ... by invoking one complete round of the State's established appellate review process." O'Sullivan, 526 U.S. at 845.
>
> To "fairly present" a claim for exhaustion purposes, the petitioner must advance the claim's "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." Bennett v. Superintendent Graterford SCI, 886 F.3d 268, 280 (3d Cir. 2018) (quoting McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999)). A petitioner may exhaust a federal claim either by raising it on direct appeal or presenting it in post-conviction PCRA proceedings. O'Sullivan, 526 U.S. at 845. Either way, the petitioner must present his federal constitutional claims "to each level of the state courts empowered to hear those claims." Id. at 847 ("requiring state prisoners [in order to fully exhaust their claims] to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State"). "Once a petitioner's federal claims have been fairly presented to the state's highest court, the exhaustion requirement is satisfied." Stoss v. Estock, 2019 WL 2160464, at *3 (M.D. Pa. May 17, 2019) (citing Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989)).

Dean v. Tice, 2020 WL 2933325, at *4-5 (W.D. Pa. June 2, 2020).

When a petitioner has failed to fairly present his claim to the state courts, but state procedural rules, such as the time limitations in the PCRA, *see* 42 Pa.C.S.A. § 9545(b), now bar him from doing so, the exhaustion requirement is excused; however, the claims are considered to be procedurally defaulted. See, e.g., Lines v. Larkins, 208 F.3d 153, 162-66 (3d Cir. 2000). A petitioner can overcome procedural default by demonstrating "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Because Petitioner is, at a minimum, time-barred from pursuing this claim in a second PCRA petition, it is procedurally defaulted. In an apparent effort to overcome his procedural default, Petitioner asserts that his PCRA counsel acted "[a]gainst Petitioner's adamant wishes" in failing to exhaust this claim. Respondents interpret this assertion as an invocation of the ineffective

assistance of PCRA counsel and Martinez v. Ryan, 566 U.S. 1 (2012). ECF No. 12 at 16. Petitioner cites to Martinez in his traverse. ECF No. 22 at 1.

Generally, because there is no federal constitutional right to counsel in a PCRA proceeding, a petitioner cannot rely on PCRA counsel's ineffectiveness to establish the "cause" necessary to overcome the procedural default of a federal habeas claim. Davila v. Davis, 137 S. Ct. 2058, 2062 (2017). In Martinez, however, the Supreme Court announced a narrow, but significant, exception to this rule. In relevant part, it held that in states like Pennsylvania, where the law requires that claims of ineffective assistance of trial counsel be raised for the first time in a collateral proceeding, a petitioner may overcome the default of a claim of trial counsel's ineffectiveness if the petitioner demonstrates: (1) the defaulted claim of trial counsel's ineffectiveness is "substantial" and (2) PCRA counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 (1984) for (3) failing to raise that claim in the "initial review collateral proceeding." Martinez, 566 U.S. at 17.

The Supreme Court in Martinez defined "initial-review collateral proceeding" as a collateral proceeding that provides the first occasion to raise a claim of trial counsel's ineffective assistance. Id. at 9. In Pennsylvania, that is the proceeding before the PCRA court. The Supreme Court's decision in Martinez was influenced by the fact that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." Id. at 10. The Supreme Court held that because this concern is not present in "*appeals* from initial-review collateral proceedings," a petitioner may not use attorney error in a collateral appeal as cause to excuse a procedural default. Id. at 16 (emphasis added); Norris v. Brooks, 794 F.3d 401, 404-05 (3d Cir. 2015) (explaining that Martinez "applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeals").

Because this claim was litigated before the PCRA court, *i.e.*, in the relevant "initial-review collateral proceeding," the exception announced in Martinez is inapplicable. PCRA counsel's failure to pursue it on appeal cannot establish "cause" to avoid default of the claim. Martinez, 566 U.S. at 16; Norris, 794 F.3d at 404-05.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

2. Ground Two: Ineffective assistance of trial counsel for failing to challenge Public Defender's conflict of interest

In this claim, Petitioner asserts that his trial counsel should not have "allowed Petitioner's trial to commence" on the basis that a conflict of interest existed because Petitioner was represented by the Allegheny County Public Defender's Office as was Commonwealth witness Donald Macon, in separate criminal proceedings. ECF No. 2 at 7. This claim was exhausted in state court during the litigation of Petitioner's PCRA petition.

There, the Superior Court addressed the claim as follows:

> Johnson's issues concern trial counsel's effectiveness. We presume counsel was effective, and it is Johnson's burden to prove otherwise. ***See Commonwealth v. Fears***, 86 A.3d 795, 804 (Pa. 2014). To prevail on an ineffectiveness claim, Johnson must establish:
>
> > (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) [appellant] suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.
>
> ***Commonwealth v. Lesko***, 15 A.3d 345, 373 (Pa. 2011). Johnson must prove each element; merely alleging each element is not sufficient. ***See Commonwealth v. Mason***, 130 A.3d 601, 618 (Pa. 2015). A reasonable basis does not require that counsel chose the most logical course of action, but that the decision had some reasonable basis. ***Commonwealth v. Bardo***, 105 A.3d 678, 684 (Pa. 2014). "To demonstrate prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's actions or inactions, the result of the proceeding would have been different." ***Mason***, 130 A.3d at 618 (citing ***Strickland v. Washington***, 466

> U.S. 668, 684 (1984)). Counsel has broad discretion in choosing tactics and strategy. ***See Commonwealth v. Thomas***, 744 A.2d 713, 717 (Pa. 2000).
>
> Johnson first argues he was prejudiced by trial counsel's conflict of interest. The PCRA court found Johnson failed to show there was actual conflict, or prejudice from the alleged conflict. An appellant cannot prevail on a conflict of interest claim without a showing of actual prejudice. ***Commonwealth v. Collins***, 957 A.2d 237, 251 (Pa. 2008). However, we presume prejudice if counsel was burdened with an "actual"—rather than "potential"—conflict of interest. ***Id.*** To show an actual conflict of interest, Johnson must establish: 1) counsel "actively represented conflicting interests;" and 2) those conflicting interests "adversely affected his lawyer's performance." ***Commonwealth v. Hawkins***, 787 A.2d 292, 297 (Pa. 2001) (quoting ***Commonwealth v. Buehl***, 508 A.2d 1167, 1175 (Pa. 1986)).
>
> Here, Johnson has failed to show trial counsel actively represented conflicting interests. While, the Allegheny Public Defender's Office had previously represented witness Donald Macon in a DUI case, Johnson's counsel did not participate in Macon's representation. Because there was no active representation of conflicting interests, trial counsel did not have an actual conflict of interest. ***See Hawkins***, 787 A.2d at 297.

ECF No. 12-11 at 2-4.

Because the state court reviewed this claim and rejected it on its merits, the following standard is applicable. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, April 24, 1996, if a state court rejects a claimed federal violation on the merits, to obtain habeas relief a petitioner must show that the ruling:

> (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). *See also* Williams v. Taylor, 529 U.S. 362, 405-06 (2000); Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir. 2004); Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009).

An unreasonable application of federal law focuses on whether the state court unreasonably applied relevant Supreme Court holdings. White v. Woodall, 572 U.S. 415, 419-20 (2014). A petitioner must show an error so egregious "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 102-03 (2011). An unreasonable determination of the facts is one where the petitioner proves by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1), that the conclusion drawn from the evidence by the state court is so improbable that it "blinks reality." Miller-El v. Dretke, 545 U.S. 231, 266 (2005). As long as reasonable minds might disagree about the correctness of a factual determination, a federal habeas court must defer to the state court's determination. Rice v. Collins, 546 U.S. 333, 341-42 (2006).

Petitioner offers no challenge at all to the Superior Court's ruling. He neither asserts that the Superior Court made an unreasonable determination of the relevant facts, nor does he argue that the state court unreasonably applied relevant United States Supreme Court holdings. In short, Petitioner fails to show why this Court should not defer to the ruling of the Superior Court. Thus, he has failed to meet his burden and is not entitled to habeas relief on this claim. It should be dismissed.

3. Ground Three: Ineffective assistance of trial counsel for presenting an unauthorized defense

In this claim, Petitioner asserts that his trial counsel was ineffective for presenting an unauthorized defense, *i.e.*, admitting that Petitioner possessed a gun at the party where the shooting took place. ECF No. 2 at 8. This claim was exhausted in state court during the litigation of Petitioner's PCRA petition. There, the Superior Court addressed the claim as follows:

> The Commonwealth correctly points out that this argument is spurious. The cases relied on by Johnson found counsel ineffective when counsel conceded guilt without permission, argued defendant was guilty of lesser offenses, or raised an insanity defense when defendant proclaimed actual innocence. See Appellant's Brief, at 11.2. None of those situations occurred here. Johnson's counsel never argued Johnson was guilty of any crime. Counsel tried to convince the jury that Johnson was outside when the murder occurred. To do this, she relied on testimony from witnesses who both saw Johnson with a weapon and witnessed him leave the party before the murder occurred. N.T. Trial, 9/13/13, at 792-96. While counsel conceded some unfavorable facts, she did so to leave intact the credibility of witnesses on which she relied. Such strategic decisions are well within counsel's discretion. Counsel did not argue an unauthorized defense.

ECF No. 12-11 at 5.

As with Ground Two, in this claim Petitioner makes no challenge at all to the Superior Court's ruling. He neither asserts that the Superior Court made an unreasonable determination of the relevant facts, nor does he argue that the state court unreasonably applied relevant United States Supreme Court holdings. Thus, Petitioner again fails to show why this Court should not defer to the ruling of the Superior Court. He has failed to meet his burden and is not entitled to habeas relief on this claim. It should be dismissed.

4. Ground Four: Ineffective assistance of trial counsel for failing to present witness Latrese Winstead at trial

In this claim, Petitioner asserts that his trial counsel was ineffective for failing to investigate and present testimony from Latrese Winstead, who would have testified that Petitioner did not possess a weapon during the incident in question. ECF No. 2 at 10. This claim was exhausted in state court during the litigation of Petitioner's PCRA petition. The Superior Court addressed the claim as follows:

> Johnson's final argument is that his trial attorney was ineffective for failing to call Latrese Winstead as a witness. We have previously held:
>
> > There are two requirements for relief on an ineffectiveness claim for a failure to present witness testimony. The first requirement is procedural. The PCRA

> requires that, to be entitled to an evidentiary hearing, a petitioner must include in his PCRA petition "a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony." 42 Pa.C.S.A. § 9545(d)(1); Pa.R.Crim.P. 902(A)(15). The second requirement is substantive. Specifically, when raising a claim for the failure to call a potential witness, to obtain relief, a petitioner must establish that: (1) the witness existed; (2) the witness was available; (3) counsel was informed or should have known of the existence of the witness; (4) the witness was prepared to cooperate and would have testified on defendant's behalf; and (5) the absence of such testimony prejudiced him and denied him a fair trial. ***Commonwealth v. Carson***, 559 Pa. 460, 741 A.2d 686, 707 (Pa. 1999).
>
> ***Commonwealth v. Reid***, 99 A.3d 427, 438 (Pa. 2014). To show prejudice, petitioner must show he was denied a fair trial because of the absence of the testimony of the proposed witness. ***Id.*** To be entitled to a hearing, a petitioner must offer to prove that the result of the trial would have been different had the witness been called. ***See Commonwealth v. Priovolos***, 715 A.2d 420, 422 (Pa. 1998).
>
> Johnson included a signed statement by Winstead in which she states that she was with Johnson in the kitchen at the time of the murder and that Johnson did not have a weapon. In the statement, Winstead claims she was available and told trial counsel she was willing to testify. Johnson has substantially complied with the procedural requirements, however, Johnson has failed to show he was prejudiced. ***See id.***
>
> Trial counsel tried to convince the jury that Johnson was not in the building when the murder occurred. Winstead's testimony would have placed him in the room directly adjacent to where the murder occurred. This strategy choice is within counsel's discretion. ***See Thomas***, 744 A.2d at 717. Johnson has failed to show he was prejudiced when trial counsel did not call Winstead as a witness.

ECF No. 12-11 at 5-7.

Petitioner again neither asserts that the Superior Court made an unreasonable determination of the relevant facts, nor does he argue that the state court unreasonably applied relevant United States Supreme Court holdings. Thus, Petitioner again fails to show why this Court should not defer to the ruling of the Superior Court. He has failed to meet his burden and is not entitled to habeas relief on this claim. It should be dismissed.

5. Ground Five: Ineffective assistance of trial counsel for failing to present an expert witness

In this claim, Petitioner asserts that trial counsel was ineffective for failing to investigate and call an expert witness to testify that it is physically impossible that the victim was shot at close range as implied by Donald Macon's testimony. ECF No. 2 at 16. He elaborates that Donald Macon testified that he saw Petitioner's rifle come "up through the victim's shirt," but "there was no gunpowder residue or burn marks found on the victim's clothing or body, rend[er]ing it impossible for [the] victim to have been shot at close range up to 3 feet." ECF No. 22 at 3.

As Petitioner concedes, this claim was not exhausted because, although it was raised in his PCRA petition, it was not raised in the appeal from the dismissal of the petition. ECF No. 2 at 16. Because Petitioner is, at a minimum, time-barred from pursuing this claim in a second PCRA petition, it is procedurally defaulted. In an effort to overcome his procedural default, Petitioner asserts that his PCRA counsel acted "[a]gainst Petitioner's adamant wishes" in failing to exhaust this claim, id., and baldly cites to Martinez in his traverse. ECF No. 22 at 3.

As in Ground One, however, because this claim was litigated before the PCRA court, *i.e.*, in the relevant "initial-review collateral proceeding," the exception announced in Martinez is inapplicable. PCRA counsel's failure to pursue it on appeal cannot establish "cause" to avoid default of the claim. Martinez, 566 U.S. at 16; Norris, 794 F.3d at 404-05.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

6. Ground Six: Ineffective assistance of trial counsel for failing to request certain jury instructions

In this claim, Petitioner asserts that trial counsel was ineffective for failing request proper jury instructions concerning Donald Macon's testimony in light of Macon's "motive and bias

against Petitioner to lie and implicate Petitioner to receive favorable treatment from the Commonwealth." ECF No. 2 at 17.

As Petitioner concedes, this claim was not exhausted because, although it was raised in his PCRA petition, it was not raised in the appeal from the dismissal of the petition. Id. Because Petitioner is, at a minimum, time-barred from pursuing this claim in a second PCRA petition, it is procedurally defaulted. In an effort to overcome his procedural default, Petitioner again cites to Martinez in his traverse. ECF No. 22 at 4-5.

As in Grounds One and Five, however, because this claim was litigated before the PCRA court, *i.e.*, in the relevant "initial-review collateral proceeding," the exception announced in Martinez is inapplicable. PCRA counsel's failure to pursue it on appeal cannot establish "cause" to avoid default of the claim. Martinez, 566 U.S. at 16; Norris, 794 F.3d at 404-05.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

7. Ground Seven: Ineffective assistance of trial counsel for failing to prepare for trial properly

In this claim, Petitioner asserts that his trial counsel failed to prepare for trial properly. ECF No. 2 at 18. Petitioner alleges that counsel met with Petitioner only one time prior to trial and that counsel "did not conduct any necessary basic research on the facts of the case from Petitioner." Id. Petitioner alleges that this issue was raised in his PCRA petition, id., but it was not. *See* ECF No. 12-7 (Amended PCRA petition). The claim was not exhausted and is procedurally defaulted. Petitioner again baldly cites to Martinez in his traverse in an effort to excuse the procedural default (which he believes stems from PCRA counsel's failure to raise this issue on appeal). ECF No. 22 at 5.

As set forth above, in order to avoid the default of an ineffective-assistance-of-trial-counsel claim, a petitioner must establish: (1) the ineffective-assistance-of-trial-counsel claim is "substantial;" and (2) PCRA counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). Martinez, 566 U.S. at 14; Workman v. Superintendent Albion SCI, 915 F.3d 928, 937-941 (3d Cir. 2019).

> The Court of Appeals has explained that an ineffective-assistance-of-trial-counsel claim is "substantial" if it has "some merit." Workman, 915 F.3d at 938. The evaluation of whether a claim has "some merit" is the same one that a federal court undertakes when it considers whether to grant a certificate of appealability. Id. Thus, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); Workman, 915 F.3d at 938 (a petitioner "must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should be resolved in a different manner of that the issues presented were adequate to deserve encouragement to proceed further.'"), quoting Martinez, 566 U.S. at 14, which cited Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Hensley v. Cappoza, 2019 WL 5457396, at *6 (W.D. Pa. Oct. 24, 2019). Importantly, as this Court has stated, "Martinez v. Ryan does not allow habeas petitioners who fail to make a claim until the federal habeas stage to obtain an evidentiary hearing and a *de novo* evaluation of the claim on the mere assertion that PCRA counsel was ineffective." Boggs v. Rozum, 2017 WL 1184062, at *9 (W.D. Pa. Jan. 5, 2017).

Here, Petitioner presents no relevant factual support for his claim, and, thus, he has failed to establish that the claim of trial counsel's ineffectiveness is substantial. Further, his bald assertion of PCRA counsel's ineffectiveness falls well short of establishing the requirements of Strickland, *i.e.*, a showing that counsel's performance was deficient, without strategic or reasonable basis, and the deficiency prejudiced the defendant.

In short, this claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

8. Ground Eight: Ineffective assistance of trial counsel for failing to adequately cross examine Commonwealth witnesses

In Ground Eight, Petitioner asserts that trial counsel was ineffective for failing to conduct adequate cross examination of Commonwealth witnesses Donald Macon, Youlanda Polite, and Melissa Polite,[1] concerning their biases against Petitioner. ECF No. 2 at 19.

Petitioner alleges that this issue was raised in his PCRA petition, ECF No. 22 at 5, but it was not. *See* ECF No. 12-7 (Amended PCRA petition). The claim was not exhausted and is procedurally defaulted. Petitioner again baldly cites to Martinez in his traverse in an effort to excuse the procedural default (which he believes stems from PCRA counsel's failure to raise this issue on appeal). ECF No. 22 at 5.

Petitioner's mere assertion of PCRA counsel's ineffectiveness falls well short of establishing the requirements of Strickland, *i.e.*, a showing that counsel's performance was deficient, without strategic or reasonable basis, and the deficiency prejudiced the defendant.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

9. Ground Nine: Ineffective assistance of trial counsel for adopting the Commonwealth's theory of the crime

In this claim, Petitioner asserts that trial counsel was ineffective for adopting the Commonwealth's theory of the crime, *i.e.*, for telling the jury that Petitioner brought a gun to the party on the night of the crime. ECF No. 2 at 20. This claim is duplicative of Ground Three.

[1] In his traverse, Petitioner also refers to a fourth witness, Elmando Hutchinson. ECF No. 22 at 6.

10. Ground Ten: Ineffective assistance of trial counsel for denying Petitioner the opportunity to testify

In this claim, Petitioner asserts that trial counsel was ineffective for denying him the right to testify in his own defense. Id. at 21. In his traverse, Petitioner implies that trial counsel "threaten[ed]" and "intimidate[d]" him not to take the stand. ECF No. 22 at 6.[2] Petitioner alleges that this issue was raised in his PCRA petition, ECF No. 22 at 6, but it was not. *See* ECF No. 12-7 (Amended PCRA petition). The claim was not exhausted and is procedurally defaulted. Petitioner again baldly cites to Martinez in his traverse in an effort to excuse the procedural default (which he believes stems from PCRA counsel's failure to raise this issue on appeal). ECF No. 22 at 6.

Petitioner's mere assertion of PCRA counsel's ineffectiveness falls well short of establishing the requirements of Strickland, *i.e.*, a showing that counsel's performance was deficient, without strategic or reasonable basis, and the deficiency prejudiced the defendant.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

11. Ground Eleven: Ineffective assistance of trial counsel for failing to challenge credibility of Commonwealth witnesses with *crimen falsi*

In this claim, Petitioner asserts that trial counsel was ineffective for failing to challenge the credibility of certain Commonwealth witnesses on the basis of their prior convictions of crimes involving dishonesty. ECF No. 2 at 22. In his traverse, Petitioner clarifies that the witnesses to which he refers are Youlanda Polite, Melissa Polite, Earnest and Sayieeda Taylor and Donald

[2] Of note, Respondents cite to the trial court's colloquy of Petitioner concerning his decision not to testify, including his statement that the decision was made of his "own free will." ECF No. 12 at 32.

Macon. ECF No. 22 at 7. He does not identify the *crimen falsi* of which each of these witnesses was convicted.

As before, Petitioner alleges that this issue was raised in his PCRA petition, ECF No. 22 at 7, but it was not. *See* ECF No. 12-7 (Amended PCRA petition). The claim was not exhausted and is procedurally defaulted. Petitioner again baldly cites to Martinez in his traverse in an effort to excuse the procedural default (which he believes stems from PCRA counsel's failure to raise this issue on appeal). ECF No. 22 at 7.

Petitioner's mere assertion of PCRA counsel's ineffectiveness falls well short of establishing the requirements of Strickland, *i.e.*, a showing that counsel's performance was deficient, without strategic or reasonable basis, and the deficiency prejudiced the defendant.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

12. Ground Twelve: Ineffective assistance of trial counsel for failing to move to suppress all identifications of Petitioner by Commonwealth witnesses

In Ground Twelve, Petitioner asserts that trial counsel was ineffective for failing to file a pre-trial motion to suppress the identifications of Petitioner made by all of the Commonwealth's trial witnesses. ECF No. 2 at 23. In his traverse, he specifies various bases upon which he believes the witnesses' identifications were assailable. ECF No. 22 at 7-8.

Petitioner alleges that this issue was raised in his PCRA petition, ECF No. 22 at 6, but it was not. *See* ECF No. 12-7 (Amended PCRA petition). The claim was not exhausted and is procedurally defaulted. Petitioner again baldly cites to Martinez in his traverse in an effort to excuse the procedural default (which he believes stems from PCRA counsel's failure to raise this issue on appeal). ECF No. 22 at 6.

Petitioner's mere assertion of PCRA counsel's ineffectiveness falls well short of establishing the requirements of Strickland, *i.e.*, a showing that counsel's performance was deficient, without strategic or reasonable basis, and the deficiency prejudiced the defendant.

This claim is procedurally defaulted, and Petitioner presents no basis upon which this Court can excuse his procedural default.

13. Ground Thirteen: Ineffective assistance of trial counsel for requesting a jury instruction of involuntary manslaughter

Finally, Petitioner asserts that trial counsel was ineffective for requesting a jury instruction for involuntary manslaughter. ECF No. 2 at 24. He explains, "[a]n involuntary manslaughter jury instruction tells the jury that Petitioner possessed a gun and discharged it recklessly." Id. As Petitioner concedes, this claim was not presented to any state court. Id. It is unexhausted and procedurally defaulted. Petitioner again claims the applicability of Martinez, alleging that PCRA counsel was ineffective for failure to present this claim. Id.; ECF No. 22 at 8-9.

No involuntary manslaughter instruction was given to the jury. *See, e.g.*, ECF No. 12-5 at 5-7 (wherein the Superior Court addressed Petitioner's claim on direct appeal that the trial court erred in failing to give the instruction). Thus, at a minimum, Petitioner's underlying claim lacks any merit. Trial counsel could not be ineffective for requesting a jury instruction where that instruction was never given to the jury. The harm Petitioner claims occurred, that the requested instruction sent the wrong message to the jury, simply did not occur. The jury did not hear the instruction.

Accordingly, Petitioner has failed to meet the requirements of Martinez and therefore has failed to show that his procedural default of this claim should be excused.

C. Certificate of Appealability

A court should issue a certificate of appealability where a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner has not made the requisite showing in this case. Accordingly, a certificate of appealability should be denied.

D. Conclusion

For the foregoing reasons, it is respectfully recommended that Petitioner's petition for writ of habeas corpus, ECF No. 2, be denied. It is further recommended that a certificate of appealability be denied.

In accordance with the Federal Magistrate Judge's Act, 28 U.S.C. §636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: March 8, 2022.

Lisa Pupo Lenihan
United States Magistrate Judge

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(Via CM/ECF electronic mail)