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February 22, 2023

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RE: Daniel Vincent v. Superintendent Smithfield SCI, et al
Case Number: 22-3258
District Court Case Number: 2-19-cv-02399

ENTRY OF JUDGMENT

Today, **February 22, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

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

BLD-094

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-3258**

DANIEL VINCENT, Appellant

VS.

SUPERINTENDENT SMITHFIELD SCI, ET AL.

(E.D. Pa. Civ. No. 2:19-cv-02399)

Present: KRAUSE, PORTER, and AMBRO, 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. See 28 U.S.C. § 2253(c). For substantially the same reasons given by the District Court, jurists of reason would agree, without debate, that Vincent's claims are procedurally defaulted or meritless. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Strickland v. Washington, 466 U.S. 668, 687 (1984); Martinez v. Ryan, 566 U.S. 1 (2012). Further, even if jurists of reason could debate whether the PCRA court's refusal to consider claims raised in an amended PCRA petition represents an adequate and independent state law ground barring federal review, jurists of reason would agree without debate that Vincent has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

By the Court,

/S Cheryl Ann Krause
Circuit Judge

A True Copy:

Patricia A. Dodszuweit

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

APPENDIX "A"

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

DANIEL VINCENT	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN RIVELLO,[1] et al.	:	NO. 19-2399

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. January 21, 2022

This pro se petition for writ of habeas corpus is now ripe after the case was stayed to allow Vincent the opportunity to exhaust his state court remedies. For the reasons that follow, I recommend that the petition be denied.

I. PROCEDURAL HISTORY[2]

On September 15, 2011, after a trial before the Honorable James P. Bradley of the Court of Common Pleas of Delaware County, a jury convicted Vincent of attempted murder, aggravated assault, robbery, burglary, and criminal conspiracy. N.T. 9/15/11 at

[1]Vincent is incarcerated at the State Correctional Institution at Huntingdon, Pennsylvania ("SCI-Huntingdon"), and he properly named Jamey Luther, who was the superintendent of SCI-Huntingdon, as the respondent in this case. Since that filing, John Rivello has replaced Ms. Luther as the superintendent of SCI-Huntingdon. See https://www.cor.pa.gov/Facilities/StatePrisons/Pages/Huntingdon.aspx#.V4jsmHV971M. Therefore, I have replaced Ms. Luther with Mr. Rivello as the respondent in the case. See Rule 2(a) of the Rules Governing Section 2254 Cases (requiring the state officer with current custody to be named as the respondent).

[2]I recount much of the procedural history from the prior Report I prepared, recommending that Vincent's petition be stayed to allow him to complete his then-pending state court appeal to exhaust his state court remedies, see Doc 14, and will supplement the current procedural history with the outcome of that state court appeal.

37-39. The charges arose from the November 30, 2009 shooting of Alex Adebisi, after two men forcibly entered his apartment in Darby, Pennsylvania. Commonwealth v. Vincent, CP-23-0006201-2010, Opinion, at 2-3 (Del. C.C.P. Apr. 27, 2012) (Resp. Exh. T).[3] On December 15, 2011, Judge Bradley sentenced Vincent to an aggregate term of imprisonment of 15 -to- 30 years followed by 5 years' probation. N.T. 12/15/11 at 26-27.[4]

Vincent filed a timely direct appeal claiming that the trial court abused its discretion when it denied Vincent's motions for severance and dismissal because the photo array used to identify Vincent was dated after the arrest warrant. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Statement of Matters Complained of on Appeal (Del. C.C.P. Feb. 2, 2012) (Resp. Exh. S); Commonwealth v. Vincent, 333 EDA 2012, Brief for Appellant (Aug. 17, 2012) (Resp. Exh. U). The Superior Court affirmed Judge Bradley's rejection of the dismissal motion based upon the testimony of the officer who swore out the complaint, and found that Vincent waived the severance issue by failing to address it in his brief. Commonwealth v. Vincent, No. 333 EDA 2012, Memorandum

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[3]Vincent was tried together with co-defendant Anthony Shaw, who was also found guilty. N.T. 9/15/11 at 34-37. Attached to the District Attorney's response is a 7-volume Appendix of documents from the state court record. I will include reference to the District Attorney's exhibits when first identifying a document contained in the Appendix.

[4]Judge Bradley sentenced Vincent to 10 -to- 20 years' imprisonment and 5 years' probation for attempted murder; a consecutive term of imprisonment of 5 -to- 10 years for robbery; and concurrent terms of 48 -to-96 months for conspiracy to commit robbery, 1 -to- 5 years for conspiracy to commit burglary, and 2 -to- 4 years for burglary. N.T. 12/15/11 at 26-27; see also Commonwealth v. Vincent, CP-23-CR-0006201-2010, Criminal Docket ("CP Docket") (Disposition Sentencing/Penalties).

(Pa. Super. Oct. 22, 2012), 62 A.3d 462 (Pa. Super. Oct. 22, 2012) (table) (Resp. Exh. V). Vincent did not seek review in the Pennsylvania Supreme Court.

On November 20, 2013, Vincent, through counsel, filed a petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-51, presenting claims of ineffective assistance of counsel ("IAC"):

1. Counsel failed to request a Kloiber[5] charge and failed to object to the court's failure to include such a charge on identification, and
2. Counsel failed to object to the court's instructions on "demeanor evidence."

Commonwealth v. Vincent, CP-23-CR-0006201-2010, Post Conviction Relief Act Petition (Del. C.C.P. Nov. 20, 2013) (Resp. Exh. X) ("Nov. 2013 PCRA Pet."). Judge Bradley issued a Notice of Intent to Dismiss. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Notice of Intent to Dismiss Without a Hearing (Del. C.C.P. Apr. 9, 2014) (Resp. Exh. Y). Having received no response to the Notice, Judge Bradley dismissed the PCRA petition. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. May 16, 2014) (Resp. Exh. Z). After counsel filed a notice of appeal, Vincent sought to remove counsel and to file a pro se amended PCRA petition. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion to Remove Counsel/Request for Leave to File Pro Se Amended Post Conviction Relief Petition (Del. C.C.P. May 22, 2014) (Resp. Exh. BB). After holding a hearing, see N.T. 6/12/14 (attached as Exh. A to Resp. Exh.

[5]See Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954) (holding that jury should be warned to receive eyewitness identification with caution where circumstances show that accuracy of identification was doubtful).

EE), Judge Bradley appointed new counsel to represent Vincent and directed counsel to file a Statement of Errors Complained of on Appeal from the May 15, 2014 dismissal of the PCRA petition. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. June 12, 2014) (Resp. Exh. DD).[6]

In the Concise Statement of Errors Complained of on Appeal, newly appointed counsel presented the following IAC claims and a claim of PCRA Court error:

1. Counsel failed to request a Kloiber charge and failed to object to the court's failure to include a Kloiber charge in the jury instructions;
2. Counsel failed to object to the court's charge on "demeanor evidence;"
3. PCRA counsel was ineffective for failing to present the following ineffectiveness claims:
   a. trial counsel failed to object to an improper instruction on attempted murder;
   b. trial counsel failed to object to an improper amendment of the robbery charge,
   c. trial counsel failed to investigate, interview, or call various medical personnel who treated the victim,
   d. trial counsel failed to seek expert testimony on human perception and memory related to the issue of identification,
   e. trial counsel failed to adequately cross-examine the key Commonwealth witness regarding clouded misperceptions and inconsistencies in the identification of the perpetrator; and
4. The PCRA Court erred in dismissing the PCRA petition when Mr. Vincent presented timely objections to the Notice of Intent to Dismiss.

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[6]Newly appointed counsel sought to have the case remanded to the PCRA court, see Commonwealth v. Vincent, CP-23-CR-0006201-2010, Petition for Remand (Del. C.C.P. July 30, 2014) (Resp. Exh. EE), which the Superior Court denied. Commonwealth v. Vincent, No. 1556 EDA 2014, Order (Pa. Super. Aug. 25, 2014) (Resp. Exh. FF).

Commonwealth v. Vincent, CP-23-CR-0006201-2010, Concise Statement of Errors Complained of on Appeal (Del. C.C.P. Sept. 25, 2014) (Resp. Exh. HH). Judge Bradley recommended affirmance as to the first two listed claims but recommended remanding the case to allow Vincent the opportunity to present properly layered claims of ineffective assistance of PCRA counsel. Commonwealth v. Vincent, CP-23-0006201-2010, Opinion (Del. C.C.P. Oct. 2, 2014) (Resp. Exh. II) ("PCRA Op. 1"). The Superior Court discontinued the appeal and remanded the case to the PCRA court. Commonwealth v. Vincent, No. 1556 EDA 2014, Order (Pa. Super. March 31, 2015) (Resp. Exh. KK).

On remand, Judge Bradley allowed Vincent to file an Amended PCRA Petition, Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. Feb. 11, 2016) (Resp. Exh. MM),[7] in which Vincent claimed his PCRA counsel was ineffective for failing to allege trial counsel's ineffectiveness for failing to:

1. object to the improper amendment of the robbery charge,
2. interview and call three alibi witnesses,
3. interview and call Kathy Totaro, a delivery driver, as a fact witness,
4. cross-examine Tanisha Garraway with her prior police statement,
5. object to an improper charge on attempted murder,
6. cross-examine Lieutenant Gibney about other suspects,
7. challenge the false robbery charge in the affidavit, and
8. challenge the cumulative effect of trial counsel's errors.

[7]After the remand, Vincent sought and was granted permission to proceed pro se. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion to Proceed Pro Se (Del. C.C.P. March 30, 2016) (Resp. Exh. OO); N.T. 5/25/16 at 14. At times, however, Vincent was represented by counsel. See N.T. 5/3/17 and 11/9/17 (represented by counsel at evidentiary hearing).

Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion for Leave to Amend Post Conviction Relief Act Petition (Del. C.C.P. March 14, 2016) ("March 2016 PCRA Pet.") (Resp. Exh. NN).

In a subsequent amendment, Vincent repeated many of the same claims and added more:

1. Trial counsel was ineffective for failing to object to the court's instructions omitting a Kloiber charge, and
2. PCRA counsel was ineffective for failing to present several claims of ineffective assistance of trial counsel alleging trial counsel was ineffective for interfering with Vincent's right to testify by giving erroneous advice vitiating a knowing waiver of the right to testify.

Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion for Leave to Amend Post Conviction Relief Act Petition (Del. C.C.P. Aug. 15, 2016) (Resp. Exh. PP) ("Aug. 2016 PCRA Pet.").[8]

Judge Bradley held an evidentiary hearing with respect to two of Vincent's claims -- IAC for advising Vincent not to testify at trial and failing to present three alibi witnesses. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. Jan. 13, 2017) (Resp. Exh. UU); N.T. 5/3/17 at 7; N.T. 11/9/17 at 6-10, 33-42. On March

[8]Judge Bradley granted Vincent leave to file the amendment. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. Aug. 23, 2016) (Resp. Exh. QQ). Vincent filed additional amendments to his PCRA petition for which he was not granted leave, presenting both claims that were included in the filings above and additional claims. See Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion for Leave to Supplement Amended Post-Conviction Relief Act Petition (Del. C.C.P. Sept. 12, 2016) (Resp. Exh. RR) ("Sept. 2016 Motion to Supplement"); Commonwealth v. Vincent, CP-23-CR-0006201-2010, Motion for Leave to Supplement Amended Post-Conviction Relief Act Petition (Del. C.C.P. Oct. 11, 2016) (Resp. Exh. SS) ("Oct. 2016 Motion to Supplement").

13, 2018, Judge Bradley denied the amended PCRA petition. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. March 13, 2018) (Resp. Exh. WW).

On appeal, Vincent's newly-appointed counsel argued that trial counsel was ineffective for improperly advising Vincent regarding the admissibility of his prior offenses with respect to the decision to testify and failing to call alibi witnesses. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Rule 1925(b) Statement (Del. C.C.P. May 11, 2018) (Resp. Exh. BBB).[9] Acting pro se, Vincent presented fifteen claims, couched in terms of PCRA court error for the following:

1. Failing to allow Vincent to develop the record by presenting evidence to support his claim of ineffectiveness of trial counsel for failing to investigate, interview, and call alibi witnesses,
2. Dismissing the IAC claim for failure to request a Kloiber charge and for failing to object to the court's failure to include a Kloiber charge,
3. Dismissing the IAC claim for failure to object to the Court's charge on "demeanor evidence,"[10]
4. Denying the IAC claim for inducing Vincent to waive his right to testify through erroneous advice,
5. Denying the IAC claim for failure to investigate, interview, and call willing alibi witnesses,
6. Denying the IAC claim for failure to object to the court's jury instruction which introduced a new theory regarding attempted murder,
7. Denying the IAC claim for failure to object to the Court's improper amendment of the robbery charge,

[9]After counsel's filing, Judge Bradley permitted Vincent to proceed pro se. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. June 25, 2018) (Resp. Exh. CCC).

[10]In his appellate brief, Vincent withdrew the claim regarding demeanor evidence. Commonwealth v. Vincent, No. 1135 EDA 2018, Brief for Appellant at 39 (Pa. Super. June 18, 2019) (Resp. Exh. GGG).

8. Denying the IAC claim for failure to challenge the false statement and robbery charge in the affidavit of probable cause,
9. Denying the IAC claim for failure to interview delivery driver Kathy Totaro and failure to call her as a witness at trial,
10. Denying the IAC claim for failure to cross-examine witness Tanisha Garraway with her prior statement,
11. Denying the IAC claim for failure to cross-examine Lieutenant Gibney regarding other suspects,
12. Denying the IAC claim for failure to object to the court's charge which omitted any discussion of identification and for failure to request a cautionary Kloiber instruction as mandated by 4.07B Identification Testimony – Accuracy in Doubt, as warranted whenever a line-up is denied,
13. Denying the claim of PCRA counsel's ineffectiveness for failure to raise direct appeal counsel's ineffectiveness for failing to raise claims which were properly preserved pre-trial,
14. Denying the IAC claim for failure to alert the court to antagonistic defenses in his motion for severance, and
15. Denying the IAC claim of PCRA counsel's ineffectiveness for failing to raise the cumulative effect of trial counsel's ineffectiveness, which severely prejudiced Vincent and denied him a fair trial.

Commonwealth v. Vincent, CP-23-CR-0006201-2010, Concise Statement of Errors Complained of on Appeal (Del. C.C.P. Oct. 17, 2018) (Resp. Exh. EEE) ("PCRA Concise Statement of Errors"); Commonwealth v. Vincent, No. 1135 EDA 2018, Brief for Appellant (Pa. Super. June 18, 2019) (Resp. Exh. GGG) ("PCRA Appellate Brief").

Judge Bradley recommended affirmance on appeal. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Opinion (Del. C.C.P. Nov. 7, 2018) (Resp. Exh. FFF) ("PCRA Op. 2"). On December 4, 2019, the Superior Court affirmed the denial of PCRA relief, relying on Judge Bradley's opinion, finding claims 12, 13, and 14 waived, and rejecting the remainder of the claims on the merits. Commonwealth v. Vincent, No. 1135 EDA

2018, 2019 WL 6523162, Memorandum (Pa. Super. Dec. 4, 2019) (Resp. Exh. III) ("Pa. Super. Op. – PCRA"). The Superior Court denied Vincent's request for reargument en banc. Commonwealth v. Vincent, No. 1135 EDA 2018, Order (Pa. Super. Feb. 5, 2020) (Resp. Exh. KKK). Vincent did not seek review in the Pennsylvania Supreme Court.

While his PCRA appeal was pending in the Superior Court, Vincent filed this petition for habeas corpus, presenting claims of IAC for:

1. failing to request a Kloiber charge or object to any mention of identification during the court's jury instructions,
2. failing to investigate and present available alibi witnesses that were willing to testify,
3. interfering with Vincent's right to testify by giving him erroneous advice regarding the admissibility of his criminal background,
4. failing to interview or present Kathy Totaro as a witness for the defense,
5. failing to cross-examine Tanisha Garraway with a prior statement,
6. failing to cross-examine Lieutenant Gibney with evidence that there were other suspects that were being investigated for the crime,
7. failing to alert the trial court that he and his co-defendant had antagonistic defenses,
8. failing to object to the trial court's improper charge which introduced a new theory of attempted murder,
9. failing to object to the trial court's improper amendment of the robbery charge,
10. failing to challenge the false robbery charge included in the affidavit of probable cause,
11. failing to properly present claims on direct appeal that were preserved pretrial, and
12. failing to call witnesses Tiara Tucker and Rovia Dousuah.

Doc. 1 ¶ 12 and at 24-26 (Attachment A). The District Attorney originally responded that the petition should be dismissed because Vincent was pursuing his claims in the state court at the time he filed his petition. Doc. 10. On November 27, 2019, the Honorable

Nitza I. Quiñones Alejandro, to whom the case is assigned, adopted my recommendation that the case be stayed pending the conclusion of Vincent's then-pending state court appeal. Docs. 14 & 16. Judge Quinones reactivated the case and referred the matter back to me once Vincent notified this court that he completed his state court appeal. Docs. 18-19. In response to the reactivated petition, the District Attorney argues that the petition should be denied because Vincent's claims are procedurally defaulted or meritless. Doc. 27. Vincent filed a reply, Doc. 30, and the District Attorney filed a surreply. Doc. 34.

II. LEGAL STANDARDS[11]

A. Exhaustion and Procedural Default

Before the federal court can consider the merits of a habeas claim, a petitioner must comply with the exhaustion requirement of section 2254(b), which requires a petitioner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Exhaustion requires the petitioner to present to the state courts the same factual and legal theory supporting the claim. Landano v. Rafferty, 897 F.2d 661, 669 (3d Cir. 1990). It also requires the petitioner to preserve each claim at the state appellate level. See Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004) (exhaustion satisfied only if claim fairly presented at each level of the

[11]As noted in my earlier Report, Vincent's habeas petition was timely filed. Doc. 14 at 5-6. He tolled the running of the habeas limitations period by filing a PCRA petition one day before the one-year period expired, and he filed his habeas petition before the PCRA proceedings concluded.

state court system) (citing O'Sullivan, 526 U.S. at 844-45). The habeas petitioner has the burden of proving exhaustion. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

A petitioner's failure to exhaust his state remedies may be excused in limited circumstances on the ground that exhaustion would be futile. Lambert, 134 F.3d at 518-19. Where such futility arises from a procedural bar to relief in state court, the claim is subject to the rule of procedural default. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). In addition, if the state court did not address the merits of a claim because the petitioner failed to comply with the state's procedural rules in presenting the claim, it is also procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

If a claim is defaulted, the federal court may address it only if the petitioner establishes cause for the default and prejudice resulting therefrom, or that a failure to consider the claim will result in a fundamental miscarriage of justice. Werts, 228 F.3d at 192. To meet the "cause" requirement to excuse a procedural default, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Id. at 192-93 (quoting and citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). Additionally, a petitioner can rely on post-conviction counsel's ineffectiveness to establish cause to overcome the default of a substantial claim of ineffective assistance of trial counsel. Martinez v. Ryan, 566 U.S. 1, 14 (2012). To establish prejudice, a petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Bey v. Sup't Greene SCI, 856 F.3d 230, 242 (3d Cir. 2017).

For a petitioner to satisfy the fundamental miscarriage of justice exception to the rule of procedural default, the Supreme Court requires that the petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Carrier, 477 U.S. at 496). This requires that the petitioner supplement his claim with "a colorable showing of factual innocence." McCleskey v. Zant, 499 U.S. 467, 495 (1991) (citing Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)). In other words, a petitioner must present new, reliable evidence of factual innocence. Schlup, 513 U.S. at 324.

B. Merits Review

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

The Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts."

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

C. IAC

All of Vincent's claims allege ineffective assistance of counsel. Such claims are governed by Strickland v. Washington, 466 U.S. 668 (1984), in which the Supreme Court set forth a two-pronged test for the consideration of IAC claims. First, the petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Id. at 687. Second, the petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair and reliable trial. Id. In determining prejudice, the question is whether there is a reasonable probability that the result of the proceeding would have been different. Id. at 694; see also Smith v. Robbins,

528 U.S. 259, 284 (2000) (prejudice prong turns on "whether there is a reasonable probability that, absent the errors, the petitioner would have prevailed"). Counsel will not be considered ineffective for failing to pursue a meritless argument. Real v. Shannon, 600 F.3d 302, 309 (3d Cir. 2010); McAleese v. Mazurkiewicz, 1 F.3d 159, 169 (3d Cir. 1993).

II. DISCUSSION

A. Factual Background

Consideration of Vincent's claims will require a discussion of the trial evidence. I begin by reproducing Judge Bradley's detailed synopsis of the evidence set forth in the state court opinions, and I will discuss specific evidence and testimony further as necessary to address the claims.

> The incident that gave rise to [Vincent's] conviction took place in Darby Borough, Delaware County, Pennsylvania on November 30, 2009. The victim, Alex Adebisi lived in an apartment in Darby Borough. See N.T. 9/13/11 pp. 28-30. At about 7:00 p.m.[,] Mr. Adebisi was entertaining guests in his apartment. Earlier in the day Mr. Adebisi saw [Vincent] and his co-defendant Anthony Shaw, outside of his apartment building rolling "weed." Id. at 75, 80-81. Mr. Adebisi had also seen these two men previously that day in his friend "Max's" apartment. Id. at 74. He asked the men to leave. He described the two as black males, one taller and dark-skinned and the other, shorter with lighter skin. Id. at 81-82. During the course of the conversation [Vincent] asked Mr. Adebisi where he was from. [Vincent] and Mr. Adebisi discussed the fact that both had lived in Flatbush in New York City. Id. at 82 [ ]. The conversation ended and Mr. Adebisi joined several friends in his apartment.
>
> Next, a short time later, [Vincent] and Shaw knocked on Mr. Adebisi's door and asked him for change for a $100.00 bill. Id. at 84. Mr. Adebisi gave the men five twenty-dollar bills in exchange for the $100.00 bill. Id. [ ].

He suggested in the course of the conversation that he hoped the $100.00 bill was not counterfeit. Id. Mr. Adebisi closed the door and the men left.

Shortly thereafter there was another knock at the door. Mr. Adebisi opened the door expecting to find a person delivering Chinese food that he had ordered for his guests. Id. at 87. [Vincent] and Shaw were at the door. A hall security light illuminated the area when [Vincent] forced his way in. Id. at 89-90. [Vincent] punched Mr. Adebisi in the face and asked "where the money was?" Id. at 93. [Vincent] told Shaw to shoot Mr. Adebisi and Shaw shot him in the left thigh. Id. at 89, 93, 100. Mr. Adebisi struggled with Shaw over the gun. [Vincent] ordered Shaw to "kill the nigger" and Shaw shot Mr. Adebisi in the chest. Id. at 90-101, 109, 113. Mr. Adebisi fell to the ground and [Vincent] got on top of him, and put his hands on the victim's throat, "strangling" him. Id. at 99.

Mr. Adebisi yelled for the police and [Vincent] and Shaw ran. Id. at 99. Mr. Adebisi's guests had taken refuge in the bathroom during the incident and one of them called 911. Id. at 115. Mr. Adebisi crawled in to the living room where he waited, in fear of his life until police officers and paramedics arrived. Id. at 124. Mr. Adebisi testified that he was "blacking out." Id. at 125. He was in pain and had a fear of dying that he could not describe. Id. at 127.

Mr. Adebisi was transported the University of Pennsylvania Hospital. Id. at 126-128. Officer Charles Schuler of the Darby Borough Police Department traveled with him in the ambulance. N.T. 9/14/11 p. 121. During transport[,] Officer Schuler attempted to interview Mr. Adebisi because there was a concern that Mr. Adebisi would die as a result of the injuries that he sustained. Mr. Adebisi appeared to be in a great deal of pain and the EMT's were tending to his wounds and administering oxygen. Id. at 122, 130, 137. Officer Schuler reported that Mr. Adebisi said that he was shot by two men that he had never seen before. One was a small, dark-skinned black man wearing a gray hoodie and Mr. Adebisi could not remember anything about the second man. Id. at 125-26. During the course of this interview[,] Officer Schuler was repeatedly interrupted by medics and at other times Mr. Adebisi was unable to respond. Id. at 142, 144. At the hospital[,] Mr. Adebisi was immediately taken to a trauma bay and he was not questioned

> any further. Officer Schuler was told that Mr. Adebisi couldn't answer any more questions. Id. at 136, 140. Mr. Adebisi was in a coma for two days following emergency surgery. N.T. 9/13/11 p. 130[,] 227. At trial[,] Mr. Adebisi testified that he did not recall speaking to Officer Schuler during his transport and that he had no recollection of ever saying that he had never seen the two men before. Id. at 227, 232.
>
> On December 2, 2009[,] Lieutenant Richard Gibney of the Darby Borough Police Department visited Mr. Adebisi while he was in the Intensive Care Unit. N.T. 9/14/11 p. 18. Mr. Adebisi was shown a photo array and he quickly picked a photo of Anthony Shaw from the array and identified him as the shooter. Id. at 18, 21-29. The next day[,] Lt. Gibney returned to the hospital with a second photo array that included [Vincent's] photo. Id. at 30-31. Mr. Adebisi picked out [Vincent's] photo and identified him as the man who had held him down and who ordered Shaw to shoot him. Id. at 31. Mr. Adebisi described the incident and recalled that [Vincent], the taller man[,] ordered Shaw to shoot him and that Shaw complied. Id. at 24. Further, [Vincent] then held Mr. Adebisi on the floor waiting for him to die. Id. at 24-25.

PCRA Op. 1 at 1-4 (reproduced in PCRA Op. 2 at 1-4 and Pa. Super. Op. – PCRA, 2019 WL 6523162, at *1-2).

I begin by addressing claims that Vincent has defaulted, and will then turn to his exhausted claims. As noted, all of Vincent's claims allege IAC.

B. Procedurally Defaulted Claims

1. Failing to Inform the Court of Antagonistic Defenses in Seeking Severance (Claim 7) and Failing to Present on Appeal Claims Preserved Pretrial (Claim 11)

The first time Vincent presented a claim that his trial counsel was ineffective for failing to alert the court to antagonistic defenses to support the motion for severance or a claim that direct appellate counsel was ineffective for failing to present claims preserved

pretrial, was in his October 11, 2016 amended PCRA petition, which he had not obtained permission to file. See Oct. 2016 Motion to Supplement. Judge Bradley found these claims waived, noting that, after being permitted to proceed pro se, Vincent was ordered to file an amended PCRA petition on or before June 27, 2016. PCRA Op. 2 at 34. After being granted an extension of time, Vincent filed his petition on August 15, 2016. Then, "[w]ithout leave of court, Petitioner filed supplemental amended petitions on September 12, 2016 and October 11, 2016." Id. at 35. "Because . . . Petitioner had no right to unilaterally amend a pending petition, the additional claims for relief that are set forth in the unauthorized supplemental amendments are waived." Id. The Superior Court likewise found the claims waived. "We agree with the PCRA court that Appellant waived these claims because he failed to obtain 'leave to amend' his petition." Pa. Super. Op. – PCRA, 2019 WL 6523162, at *5 n.4.[12]

[12]In order to support a finding of procedural default, the state court decision must be based on state law that is independent of the federal question and adequate to support the decision. Coleman, 501 U.S. at 750. Clearly the waiver finding is independent of the constitutional claim. To be adequate to support the default, the procedural rule must be "consistently or regularly applied." Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997) (quoting Johnson v. Mississippi, 486 U.S. 578, 588-89 (1988)). Pennsylvania courts regularly enforce a waiver rule in this circumstance. "[I]t is well-settled that claims raised outside of a court-authorized PCRA petition are subject to waiver." Commonwealth v. Mason, 130 A.3d 601, 627 (Pa. 2015) (citing Commonwealth v. Reid, 99 A.3d 470, 484 (Pa. 2014) (noting that Pennsylvania Supreme Court "has condemned the unauthorized filing of supplements and amendments to PCRA petitions, and held that claims raised in such supplements are subject to waiver")); see also Commonwealth v. Elliott, 80 A.3d 415, 430 (Pa. 2013) (same); Commownealth v. Roney, 79 A.3d 595, 615-16 (Pa. 2013) (same); Commonwealth v. Porter, 35 A.3d 4, 12 (Pa. 2012) (same). Thus, the state courts' waiver finding supports a procedural default in this court.

Because the state court did not address the merits of these claims based on Vincent's failure to comply with the state's procedural rules, the claims are procedurally defaulted. Coleman, 501 U.S. at 750. Vincent does not acknowledge the default, let alone offer any reason for his failure to include these claims in his properly filed pro se amendments to his PCRA petition. Nor has he supplemented the claims with any new, reliable evidence of factual innocence. Thus, these claims remain defaulted.

2. Failing to Call Witnesses Tiara Tucker and Rovia Dousuah (Claim 12)

In his final enumerated claim, Vincent argues that his trial counsel was ineffective for failing to call two eyewitnesses to the crime, Tiara Tucker and Rovia Dousuah. Vincent never presented this claim to the state courts and concedes that the claim is procedurally defaulted. Doc. 1 ¶ 12, Attachment A, GROUND TWELVE. He relies on Martinez to argue that the ineffectiveness of his PCRA counsel should excuse the default. Id. The District Attorney responds that Vincent had the opportunity to present the claim when he was representing himself in the PCRA court, and therefore cannot avail himself of Martinez because it was not counsel's ineffectiveness but his own choice not to present the claim. Doc. 27 at 58-60.

Although the ineffectiveness of PCRA counsel does not provide a basis for an independent constitutional claim in habeas corpus, see 28 U.S.C. § 2254(i), such ineffectiveness can, in very circumscribed circumstances, provide cause to excuse a procedural default. In Martinez, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's

procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. The Court cautioned that the ineffectiveness of initial-review collateral counsel must have resulted in no court ever reviewing the underlying ineffective assistance of trial counsel claim in order for Martinez to apply. Id. at 10-11; see also Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) ("Martinez made very clear that its exception to the general rule . . . applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeal.").

Vincent's reliance on Martinez is misplaced. Although the claim alleging ineffectiveness for failing to call these two witnesses was not included in Vincent's original counseled PCRA petition, Judge Bradley allowed Vincent to file an amended PCRA petition when the case was remanded. Commonwealth v. Vincent, CP-23-CR-0006201-2010, Order (Del. C.C.P. Feb. 11, 2016); Order (Del. C.C.P. Aug. 23, 2016). At that point, Vincent had been granted leave to proceed pro se. Vincent neglected to include this claim in his March 14, 2016 pro se amendment or his August 15, 2016 pro se amendment despite Vincent's inclusion of numerous allegations of the ineffective assistance of PCRA counsel for failing to present issues of trial counsel ineffectiveness. Thus, it was Vincent himself who defaulted the claim, not PCRA counsel.[13]

There is language in Martinez that suggests that its rule applies where a petitioner elects to proceed pro se in his initial review collateral proceedings.

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[13]Vincent also did not raise this IAC claim in his two pro se amendments that Judge Bradley did not accept. See Sept. 2016 Motion to Supplement; Oct. 2016 Motion to Supplement.

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.

566 U.S. at 14. The judges of our district court and our sister districts have rejected such an interpretation of this language in Martinez, ruling instead that it refers only to the complete denial of counsel at the post-conviction level, not when the petitioner is afforded counsel but chooses to proceed pro se.

> [T]his "absence of an attorney" language does not refer to situations where an individual has initial-review collateral counsel and then voluntarily terminates that counsel in order to represent himself. Rather, it refers to situations "where the state courts did not appoint counsel in the initial-review collateral proceeding," thereby forcing an individual to undertake his own post-conviction representation.

Marsalis v. Wetzel, Civ. No. 16-3098, 2020 WL 6262326, at *1 n.1 (E.D. Pa. Oct. 23, 2020); see also Haggie v. Coleman, Civ. No. 13-320, 2014 WL 5795602, at *8 (W.D. Pa. Oct. 6, 2014) (where PCRA counsel was permitted to withdraw and petitioner did not object to proceeding pro se and had the opportunity to present his claims, "[a]ny failure to properly raise and brief his PCRA claims is attributable solely to Petitioner, since he was proceeding pro se") (Report and Recommendation adopted 2014 WL 5795651 (Nov. 6, 2014)); Kollock v. Glunt, Civ. No. 13-656, 2014 WL 4080757, at *25 (E.D. Pa. Aug. 18, 2014) ("[Petitioner cannot] allege ineffectiveness of PCRA counsel as cause, because he elected to act pro se. Petitioner filed an amended PCRA petition, with supplementation,

after the PCRA court granted appointed counsel's motion to withdraw, and Petitioner filed a pro se PCRA appeal. Therefore, the Supreme Court's . . . decision [in Martinez] . . . does not apply."); Bender v. Wynder, Civ. No. 05-998, 2013 WL 3776746, at *4 (W.D. Pa. July 15, 2013) ("Petitioner elected to represent himself during his PCRA proceedings despite the PCRA court appointing him counsel. Thus, . . . Petitioner's default was caused by Petitioner's own ineffectiveness to which Martinez cannot reasonably be said to apply.").

The language used in Martinez supports the courts' interpretation that "the absence of an attorney" refers to the failure to appoint counsel rather than the decision to proceed pro se.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceedings, where the claim should have been raised, was ineffective under the standards of Strickland . . . .

566 U.S. at 14. Neither circumstance is presented here.

Moreover, the court's interpretation is also consistent with the Supreme Court's limitation that the ineffectiveness of initial-review collateral counsel can only provide cause if such ineffectiveness would deprive a petitioner of the ability to ever present the underlying ineffectiveness claim to any court. Martinez, 566 U.S. at 10-11. In the circumstances presented in Vincent's case, he was permitted to present claims of the

ineffectiveness of PCRA counsel when the case was remanded to Judge Bradley. Thus, Vincent had the opportunity to present this claim, but failed to do so.[14]

C. Exhausted Claims – Merits Determination

Vincent properly presented the remainder of his claims to the state courts and those claims are exhausted for purposes of habeas review. Except as noted, when referring to the state courts' opinions, I will refer to Judge Bradley's opinion because the Superior Court adopted Judge Bradley's opinion as its own. Pa. Super. Op. – PCRA, 2019 WL 6523162, at *5.

1. Failing to Request a Kloiber Charge/Object to Identification (Claim One)

Vincent claims that his trial counsel was ineffective for failing to request a Kloiber charge (jury should receive doubtful identification evidence with caution) or object to any mention of identification in the jury charge. Doc. 1 ¶ 12, Attachment A, GROUND ONE. The District Attorney responds that the state courts' adjudication of the claim did not result in an unreasonable application of federal law nor an unreasonable determination of the facts. Doc. 27-1 at 10-19.

[14]The Pennsylvania Supreme Court recently addressed "the procedure for enforcing the right to effective counsel in a . . . PCRA . . . proceeding," endorsing "a review paradigm allowing a petitioner to raise claims of PCRA counsel's ineffectiveness at the first opportunity when represented by new counsel, even if on appeal." Commonwealth v. Bradley, 261 A.3d 381, 383, 401 (Pa. 2021). In essence, Vincent was able to present challenges to the effective assistance of his PCRA counsel when the case was remanded by the Superior Court.

Vincent properly presented this claim in his PCRA proceeding. See Nov. 2013 PCRA Pet.; Aug. 2016 PCRA Pet.; PCRA Concise Statement of Errors; PCRA Appellate Brief. Judge Bradley found no basis to support a Kloiber charge.

> Where a "witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identification have been weakened by qualification or by failure to identify defendant on one or more occasions," the jury will be instructed that the witness's testimony must be received with caution. Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954). . . .
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> . . . .
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> Petitioner here did not allege, and in fact conceded that Mr. Adebisi's identification was not rendered suspect by a lack of opportunity or an inability to observe his assailants. Through his trial testimony the Commonwealth established that Mr. Adebisi recognized both [Vincent] and Shaw from two interactions earlier in the day. His assailants forced their way into his apartment and he recognized them immediately. He quickly identified both [Vincent] and Shaw when he came out of his coma days after the shooting. At trial his in-court identification was unequivocal on both direct and cros-examination. See N.T. 9/13/11 pp. 135, 156. Under these circumstances, the statements Mr. Adebisi gave during his ambulance ride where he was unable to give a description of [Vincent] provided trial counsel an opportunity to challenge his credibility but it was not a "mis-identification" warranting a Kloiber instruction.

PCRA Op. 2 at 15, 17 (quoting PCRA Op. 1 at 8, 10).

Judge Bradley's opinion is a reasonable determination of the facts. First, Mr. Adebisi testified that, when he and some friends had returned from shopping earlier that same day, he saw his assailants and another man in his friend Max's (Adetokumbo Maximus Adeore) apartment. N.T. 9/13/11 at 71, 74. When neither Mr. Adebisi nor a friend, Bishop (Bobatuna Oke), recognized the men, they contacted Max, and got

everyone out and locked Max's apartment. Id. at 74-75, 303-04. After leaving Max's apartment, Mr. Adebisi testified that he saw two of the men hanging by the gate outside his apartment nearby. Id. at 77. Mr. Adebisi and his friends then entered Mr. Adebisi's apartment and ordered Chinese food. Id. at 79. Later, one of the men, the shorter, light-skinned man (Shaw), knocked on Mr. Adebisi's door and asked for change for $100 bill. Id. at 79-80, 83. Mr. Adebisi walked outside, where both of the men were, and had a conversation with the taller, dark-skinned man (Vincent), who was rolling up marijuana, about where they were from. Id. at 81, 82. Mr. Adebisi gave them $20 bills for the $100 bill and joked that he hoped it was not fake, and returned to his apartment. Id. at 84. The same two men later knocked on the apartment door, and Mr. Adebisi, expecting the food delivery, opened the door, and was attacked by the two men. Id. at 87, 89-90.

Although Mr. Adebisi gave a vague description of the shooter to Officer Schuler and was unable to offer any description of the other when he was in the ambulance after being shot twice, N.T. 9/14/11 at 125, just days after the shooting, when Lieutenant Gibney showed him two photo arrays, Mr. Adebisi identified Vincent and Shaw as his assailants. Id. at 24, 31. Shaw was the shorter of the two who shot the victim, and Vincent the taller, darker-skinned assailant, who punched Mr. Adebisi and told Shaw to shoot the victim and then attempted to choke him, saying, "die, die." N.T. 9/13/11 at 95-99. He also identified both in court. Id. at 96-96, 135, 156.

Thus, Mr. Adebisi had the opportunity to observe his assailants, not only at the time of the incident, but earlier in the day, and positively identified them just days after the incident, and again at trial. Judge Bradley's conclusion that the facts of the case did

not warrant a Kloiber instruction was a reasonable determination of the facts. Because such an instruction was not warranted, counsel cannot be considered ineffective for failing to request such an instruction. See Real, 600 F.3d at 309 (counsel not ineffective for failing to pursue a meritless argument); McAleese, 1 F.3d at 169 (same).

2. Failing to Call Alibi Witnesses (Claim Two)

Vincent next argues that his trial counsel was ineffective for failing to investigate and call Shirley Pierre, Ruth Washington, and Sabrina St. Ford as alibi witnesses. Doc. 1 ¶ 12, Attachment A, GROUND TWO.[15] The District Attorney responds that the state court reasonably rejected this claim in light of the evidence presented at the PCRA hearings. Doc. 27-1 at 19-23.

Vincent presented this claim in his March 2016 amendment to his PCRA petition, March 2016 PCRA Pet. at 12-17, and called witnesses at the PCRA hearings held on May 3 and November 9, 2017. Vincent's trial counsel testified, explaining that he thought the identification evidence in the case was weak. N.T. 5/3/17 at 18-19. He also explained his rationale for not calling these witnesses.

> When I spoke to those alibi witnesses they couldn't get the times straight, the days straight, they couldn't get anything straight, and I came to the conclusion very quickly that they were going to get slaughtered if they took the stand, that they were making up stories to cover Mr. Vincent, so this was all part of it. I didn't want him to expose himself to something that was going to wind up convicting him, alright.

[15]In Judge Bradley's opinion, he refers to Shirley Pierre as Shirley Pierce. See PCRA Op. 2 at 25-27. Her name appears as Shirley Pierre in the transcript of the November 9, 2017 proceedings when she testified. N.T. 11/9/17 at 33. Therefore, I will refer to her as Shirley Pierre.

Id. at 26-27; see also id. at 29 ("They were all over the map as to where Mr. Vincent had been, how long they were with him . . . and I thought that they were going to be destroyed on the witness stand."), 45-46 ("I told [Vincent] that the witnesses were not in line with the times that they were together with him . . . . I was concerned that the District Attorney was going to literally tear them apart."). In short, trial counsel testified that "quite frankly, after speaking with those women I didn't believe a word they told me." Id. at 39-40.

With respect to the potential alibi witnesses themselves, at the May 3, 2017 hearing, Vincent explained to the court that he told the witnesses not to appear because he thought the hearing was going to be continued, N.T. 5/3/17 at 5-6, and neither Ms. Washington nor Ms. St. Ford appeared at either listing. Shirley Pierre, Vincent's girlfriend and mother of his child, testified that she spent November 30, 2009, with Vincent shopping on South Street in Philadelphia, and that they were at the bar where his brother worked in West Philadelphia at the time of the incident. N.T. 11/9/17 at 35-37. She testified that she was never contacted by trial counsel or his investigator, id. at 38, contradicting trial counsel's testimony. N.T. 5/3/17 at 38, 44. She also acknowledged that she had a 2004 federal conviction for making false statements in connection with the purchase of a firearm. N.T. 11/9/17 at 37-40.

In his opinion, Judge Bradley rejected this claim for several reasons. First, the court noted that during a colloquy at trial, Vincent confirmed that he agreed with the decision not to call the alibi witnesses based on the content of their testimony and what counsel anticipated would occur on cross-examination. PCRA Op. 2 at 24 (citing N.T.

9/14/11 at 99-100). He also found trial counsel's testimony at the PCRA hearing as to the reasons he believed the testimony of the potential alibi witnesses would not be helpful to be credible. PCRA Op. 2 at 26-27. In addition, the court rejected Vincent's claim as to Ruth Washington and Sabrina St. Ford, because Vincent failed to present evidence to substantiate their proposed alibi testimony.

> [Vincent] had the opportunity to prove his claims at the evidentiary hearing. His claim, as it regards named alibi witnesses Ruth Washington, and Sabrina [St.] Ford requires no discussion because [Vincent] failed to produce these witnesses and his allegations remained unproven by any competent evidence.

Id. at 25. Finally, as to Ms. Pierre, Judge Bradley found her testimony to be "vague at times and nonsensical at other times." Id. at 27.[16] Judge Bradley concluded that "[a]ll of the credible evidence led the Court to conclude that this claim is meritless." Id.

Judge Bradley's decision is consistent with Strickland and a reasonable determination of the facts. After interviewing the proposed alibi witnesses, counsel made a strategic choice not to call them because he did not find them credible and expected they would cause more harm than good in light of what counsel considered weak identification testimony. "Because advocacy is an art and not a science, and because the adversary

[16] I note a discrepancy in Ms. Pierre's testimony. During questioning, PCRA counsel stated, "I want to bring you back to the night of the shooting," and what happened that day. N.T. 11/9/17 at 35. Ms. Pierre proceeded to describe the events of the day, including browsing the shops on South Street and later going to Vincent's brother's bar. Id. at 36-37. She then testified as to the next morning, "That Monday I left him – I went to class that morning. I left him in the bed, so I had to be at class about like 9:00, so I left him in bed. I don't know what time he got up." Id. at 37. The problem is that the crime took place on Monday, November 30, 2009.

system requires deference to counsel's informed decisions, strategic choices must be respected . . . if they are based on professional judgment." Strickland, 466 U.S. at 681. Moreover, Vincent failed to produce two of the witnesses and the third witness's testimony was found not to be credible by the PCRA court. Thus, Vincent cannot establish prejudice. Vincent is not entitled to relief on this claim.

3. Erroneous Advice Regarding Testifying (Claim Three)

Vincent claims that his trial counsel interfered with his right to testify by giving him erroneous advice regarding the admissibility of his prior crimes for impeachment purposes. Doc. 1 ¶ 12, Attachment A, GROUND THREE. Vincent first presented this claim in the amendment to his PCRA petition filed on August 15, 2016, presenting it as a layered claim of IAC. Aug. 2016 PCRA Pet. at 9-12. Judge Bradley rejected the claim based on the colloquy conducted during trial when Vincent confirmed that he made the decision not to testify and finding trial counsel's testimony credible as to his strategic reasons for advising Vincent not to testify. PCRA Op. 2 at 19-23. The District Attorney relies on the PCRA record and Judge Bradley's opinion in arguing that the claim lacks merit. Doc. 27-1 at 23-31.

Before reviewing the colloquy conducted at trial, I will review the testimony from the PCRA hearing as it provides some context for Plaintiff's claim. Vincent testified that trial counsel told him that "because of your extensive criminal history we wouldn't put you on the stand." N.T. 5/3/17 at 66-67; see also N.T. 11/9/17 at 11. Vincent testified that they only discussed his criminal history once, the first time he spoke to trial counsel. N.T. 11/9/17 at 11. He also testified that his trial counsel never explained to him that he

would be subject to cross-examination if he took the stand and did not explain that his conviction for unauthorized use (receiving stolen property – a car) could be used to impeach him. N.T. 11/9/17 at 10.

Trial counsel testified that, in reviewing a negotiated plea offer, he reviewed Plaintiff's prior criminal convictions to determine his criminal history score and explain why his sentence would be somewhat higher than his codefendant. N.T. 5/3/17 at 20-21. Included in this discussion were misdemeanor and juvenile convictions, and counsel wrote a letter dated July 7, 2011, to Vincent, listing all of his convictions and explaining this criminal history for purposes of calculating his sentencing exposure. Id. at 19-21, 69. This letter did not reference the convictions for purposes of whether they could be used for impeachment should Vincent testify at trial. Id. at 19-20. Contrary to Vincent's testimony, counsel stated that he advised Vincent that there was a conviction for receiving stolen property that may be admissible as impeachment evidence if he took the stand. Id. at 22-23. Counsel did not recall whether he told Vincent that the other convictions could be used for impeachment. Id. at 23.

At trial, at Judge Bradley's direction, trial counsel colloquied Vincent regarding the decision not to testify, N.T. 9/14/11 at 96-101, during which Vincent confirmed that he made the decision not to testify and was not forced to do so. Id. at 98. The colloquy did not reference impeachment based on prior convictions.

In his decision, Judge Bradley rejected Vincent's claim, finding that trial counsel did not give Vincent erroneous advice.

> Before trial, [trial counsel] brought a negotiated plea offer to [Vincent] and explained that in light of his extensive criminal history [Vincent] would be exposed to a much stiffer sentence if he was found guilty after a trial. [N.T. 5/3/17] at 21-23. Counsel suppled [Vincent] and his family with his Prior Record Score and his history of criminal convictions to explain the advantages of entering a negotiated plea and to demonstrate the risk associated with going to trial. He did not, as [Vincent] contends, tell [Vincent] that his entire criminal record could be used to impeach him at trial. Id. at 21-23.
>
> Rather, before trial [trial counsel] discussed the possibility that if [Vincent] testified his 2003 conviction for unauthorized use of a motor vehicle, a *crimen falsi*, could be put before the jury to impeach his credibility. Id. at 23, 51. [Trial counsel] testified credibly that additional factors influenced his advice. [Vincent's] testimony would have been that he was not present when Mr. Adebisi was shot and he was going to use an alibi as a defense. Id. at 28-30. [Trial counsel's] primary concern was that if [Vincent] testified as expected, the jury would also expect to hear from corroborating witnesses. [Trial counsel] concluded that he would be unable to call any of the alibi witnesses that [Vincent] identified because they couldn't provide reliable testimony: "When I spoke to those witnesses they couldn't get the times straight, the days straight, they couldn't get anything straight, and I came to the conclusion very quickly that they were going to get slaughtered if they took the stand, that they were making up stories to cover Mr. Vincent, so this was all part of it." Id. at 27-31. [Trial counsel] considered Mr. Adebisi's identification problematic for the Commonwealth because it was made . . . several days after the shooting when Mr. Adebisi was in the hospital. Id. at 19, 34. The defense strategy was "to make the Commonwealth live up to their burden." Id. at 50. The suspect testimony of unreliable witnesses and the possibility that [Vincent] would inadvertently provide testimony that could help the Commonwealth's case were not worth the risk in [trial counsel's] view. See id. at 50, 52.

PCRA Op. 2 at 22-23.

Judge Bradley's decision is consistent with Strickland and a reasonable determination of the facts. In order to succeed on his claim, Vincent has to establish that counsel gave him erroneous advice regarding the admissibility of his prior convictions for impeachment purposes. He has failed to do so. Although trial counsel reviewed all of Plaintiff's prior convictions with him, he did so in the context of reviewing the plea offer and comparing that to his sentence should he be convicted after trial. Counsel advised Vincent that one of those convictions could be used against him if he testified. Moreover, counsel explained his other reasons for recommending that Vincent not take the stand, including the fact that there was no credible corroborating alibi witness, Vincent risked bolstering the Commonwealth's case if he did take the stand, and counsel considered the identification evidence in the case weak. Thus, counsel had sound strategic reasons to support his advice. Finally, during the colloquy, Vincent confirmed that he made the decision not to testify. N.T. 9/14/11 at 98. Vincent is not entitled to relief on this claim.

4. Failure to Interview/Call Kathy Totaro (Claim Four)

Vincent claims that his counsel was ineffective for failing to interview and present Kathy Totaro as a witness at trial. Doc. 1 ¶ 12, Attachment A, GROUND FOUR. Vincent contends that Ms. Totaro, the driver who delivered the Chinese food he and his friends ordered, gave a statement to police indicating that as she approached Mr. Adebisi's residence, "she witnessed 3-4 males between 16-18 running from the victim's

house after the shooting." Id.[17] Judge Bradley rejected the claim finding that Vincent failed to establish that Ms. Totaro was available and would have testified at trial, or that the absence of her testimony prejudiced the defense. PCRA 2 Op. at 31-32. The District Attorney argues that Judge Bradley's denial of the claim was consistent with firmly established federal law and did not result in an unreasonable determination of the facts. Doc. 27-1 at 31-34.

Judge Bradley's determination of the claim was consistent with Strickland and a reasonable determination of the facts. Vincent has proffered no evidence that Ms. Totaro was available and willing to testify at trial. Considering that Mr. Adebisi identified Vincent, who was 27 years old at the time of trial, N.T. 9/14/11 at 96, both from a photo array at the hospital just days after the shooting, and then in court during trial, Vincent has failed to establish that "there is a reasonable probability" that the result of the proceeding would have been different in light of Ms. Totaro's purported testimony that she saw several teenaged males run from the house after the shooting. See Strickland, 466 U.S. at 694. Vincent is not entitled to relief on this claim.

5. Failure to Cross Examine Tanisha Garraway (Claim Five)

Vincent next argues that his trial counsel was ineffective for failing to cross-examine Tanisha Garraway with a prior statement she gave to police. Doc. 1 ¶ 12,

[17]When Vincent presented this claim in his March 14, 2016 amendment to his PCRA petition, he also argued that Ms. Totaro's statement included evidence that the victim was "into illegal activity," because she was always given one hundred dollar bills when she delivered to Mr. Abedisi's residence. March 2016 PCRA Pet. at 18-19. Although he mentions this in his traverse, Vincent did not include this factual basis in the claim presented in his habeas petition.

Attachment A, GROUND FIVE. The District Attorney responds that the Superior Court properly rejected the claim. Doc. 27-1 at 34-36.

Ms. Garraway was a friend of Mr. Adebisi's who was visiting from New York at the time of the attack. N.T. 9/13/11 at 323, 326. At trial, she testified that she saw Mr. Adebisi and "a big black man fighting" id. at 336, and then saw Mr. Adebisi get shot. Id. at 340. Vincent claims his counsel was ineffective for failing to cross-examine Ms. Garraway with a prior statement in which she described the man as "a 6'0 tall; 200 pound African man yelling in an African language." Doc. 1 ¶ 12, Attachment A, GROUND FIVE.

As previously noted, when the Superior Court considered Vincent's PCRA appeal, it adopted Judge Bradley's opinion as its own. However, there was a caveat regarding the consideration of the IAC claim for failure to cross examine Ms. Garraway. In his decision, Judge Bradley rejected the claim on two grounds. First, the judge found that trial counsel had a strategic reason for not cross-examining Ms. Garraway. "[F]rom a practical standpoint, had trial counsel cross-examined Ms. Garraway regarding whether the assailant was yelling an African, or any foreign language, Mr. Adebisi's testimony, that Petitioner identified himself to him as Haitian when they spoke earlier could have been corroborated and strengthened Mr. Adebisi's identification testimony." PCRA Op. 2 at 33. Second, Judge Bradley found that, contrary to Vincent's argument that Ms. Garraway's prior statement would have discredited Mr. Adebisi's identification, Ms. Garraway's earlier statement could only be used to impeach her own description of the assailant, not Mr. Adebisi's description. Id. at 32-33. The Superior Court adopted Judge

Bradley's determination that trial counsel had a reasonable basis for his decision not to cross-examine Ms. Garraway, but did not adopt the reasoning regarding the claim's potential merit. Pa. Super. Op. – PCRA, 2019 WL 6523162, at *5 n.4.

The Superior Court's determination is consistent with Strickland and a reasonable determination of the facts. At the PCRA evidentiary hearing held on May 3, 2017, trial counsel testified that he did not want any evidence to corroborate Mr. Adebisi's testimony that he had spoken earlier with his attacker, who had identified himself to Mr. Adebisi as Haitian. N.T. 5/3/17 at 18. Cross-examining Ms. Garraway about her prior statement in which she said the attacker was yelling in an African language could have provided the corroboration that counsel was trying to avoid. Thus, the Superior Court's determination that counsel had a reasonable basis for deciding not to cross-examine Ms. Garraway is a reasonable determination of the facts, and counsel's "strategic choice[] must be respected." Strickland, 466 U.S. at 681.

6. Failure to Cross-Examine Lieutenant Gibney (Claim Six)

Vincent next argues that his trial counsel was ineffective for failing to cross-examine Lieutenant Gibney with evidence that there were other suspects under investigation for the crime. Doc. 1 ¶ 12, Attachment A, GROUND SIX. The District Attorney responds that Judge Bradley reasonably rejected this claim because Vincent has failed to establish that the failure to pursue such a line of cross-examination prejudiced the defense. Doc. 27-1 at 36-39.

On PCRA review, Vincent argued that evidence that other suspects were investigated would have "embellished Officer Schuler's testimony concerning Mr.

Adebisi's incoherentness" and challenged Mr. Adebisi's identification of Vincent.[18] March 2016 PCRA Pet. at 27. Vincent attached several investigation summaries which indicated that the police were investigating or looking for other suspects. Id. Exhibit D.. Judge Bradley rejected the claim.

> While the extent to which law enforcement investigated and developed other suspects can be fodder for cross-examination, the Court can find no merit in the claim. The various police reports that Petitioner has attached to his petition . . . provide no support for this convoluted and speculative claim.

PCRA Op. 2 at 33.

Judge Bradley's determination is consistent with Strickland and a reasonable determination of the facts. Vincent has not established that the failure to pursue this line of cross-examination prejudiced the defense. During his testimony, Mr. Adebisi explained his prior interactions with the men who attacked him, identified Vincent's photo and that of his co-defendant Shaw while in the hospital recovering from his gunshot wounds, and identified Vincent and Shaw in court. N.T. 9/13/11 at 74-84, 95-96, 139-41, 144-47; see also N.T. 9/14/11 at 18, 21-31 (Lt. Gibney). Although there may have been a viable line of cross-examination regarding the investigation and other suspects, Vincent has failed to establish that there is a reasonable probability that cross-

[18]Officer Schuler rode in the ambulance with Mr. Adebisi and questioned him on the way to the hospital. N.T. 9/14/11 at 121-22. Officer Schuler testified that Mr. Adebisi said he was shot by two men he had never seen before, one of whom was small, dark-skinned, and wearing a gray hoodie. Id. at 125-26. According to Officer Schuler, Mr. Adebisi could not remember anything about the other man. Id. at 126.

examination regarding such investigation into other suspects would have resulted in his acquittal.

7. Failure to Object to a Charge Introducing a New Theory of Attempted Murder (Claim Eight)

Vincent argues that his trial counsel was ineffective for failing to object to the court's jury charge that he could be found guilty of attempted murder based on evidence that he tried to strangle Mr. Adebisi, when the prosecution's attempted murder theory was that he instructed Shaw to shoot Mr. Adebisi. Doc. 1 ¶ 12, Attachment A, GROUND EIGHT. The District Attorney responds that Judge Bradley's rejection of the claim was not contrary to nor an unreasonable application of firmly established federal law, nor was it an unreasonable determination of the facts. Doc. 27-1 at 49-52.

When charging the jury on attempted murder, the trial court said:

> The defendants in this case have been charged with Attempted Murder. To find either Defendant guilty of this offense you must find the following three elements . . . . First, that the Defendants [did] a certain act. In this particular case, Mr. Shaw is charged with shooting the alleged victim. Mr. Vincent is charged with attempting to strangle the alleged victim.

N.T. 9/15/11 at 15. When Judge Bradley considered this claim on PCRA review, he rejected it.

> This claim is patently frivolous. Mr. Adebisi testified that Anthony Shaw shot him at [Vincent's] direction and that after he fell to the ground [Vincent] had his hands on Mr. Adebisi's throat, attempting to strangle him. At the same time [Vincent] said, "die, die, die." N.T. 9/13/11 pp. 97-101. This portion of the jury instruction merely reflected the

> testimony that was heard at trial. It is proper for the trial court to explain to the jury the contentions of the parties, particularly when it is done in a manner that clearly shows he is not expressing his own views. See Commonwealth v. Rough, 275 Pa. Super. 50, 418 A.2d 605 (Pa. Super. 1980); Commonwealth v. Leonhard, 485 A.2d 444 ([Pa. Super.] 1984).
>
> The contention that this instruction, "uninvitingly interfered with the defense strategy," when in fact the defense strategy was to challenge Mr. Adebisi's identification is far-fetched at best. [Vincent] knew from the outset that he and Shaw were charged with an attempted murder that was committed in the course of a robbery. The Court's charge was in conformity with the evidence and the presumption of trial counsel's competency is not overcome by trial counsel's failure to make the dubious objection that [Vincent] suggests.

PCRA Op. 2 at 28-29.

Under Pennsylvania law, in determining the propriety of a jury instruction, the court must determine "whether such charge was warranted by the evidence in the case." Commonwealth v. Baker, 963 A.2d 495, 506 (Pa. Super. 2008) (quoting Commonwealth v. Boyle, 733 A.2d 633, 639 (Pa. Super. 1999)). Here, Mr. Adebisi's testimony describing Vincent's actions supported a strangulation theory of attempted murder.

> [Mr. Adebisi]: . . . . That's when [after being shot in the chest], I fell to the ground. And the other man, the dark-skinned man came on top of me and strangled me. He had his hands in my throat -- on my throat. And then I kept saying, I said, the cops is coming. The cops. I didn't know what else to say, you know.
> [Prosecutor]: Okay.
> [Mr. Adebisi]: And he said to me, die, die. And, you know -- the first -- the little dude ran out first. Then the other man followed suit.

N.T. 9/13/11 at 99. Considering this testimony, there was no basis for defense counsel to object to the charge and counsel will not be found ineffective for failing to pursue a

meritless argument. Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998). Judge Bradley's determination of this claim is consistent with Strickland and a reasonable determination of the facts.

8. Failure to Object to the Court's Improper Amendment of the Robbery Charge (Claim Nine)

Vincent contends that his counsel was ineffective for failing to object to the jury instructions because "the trial court instructed the jury that they could find [Vincent] guilty on subsections of robbery that [Vincent] had not prepared to defend against nor [was] charge[d] with in the indictment." Doc. 1 ¶ 12, Attachment A, GROUND NINE. The District Attorney responds that the PCRA court reasonably rejected this claim because Vincent was convicted of and sentenced on the charge of robbery, specifically 18 Pa. C.S. § 3701(a)(1)(i), which was included in the criminal information and for which he was held for court at the preliminary hearing. Doc. 27-1 at 52-53.

It appears that the discrepancy lies between the affidavit of probable cause, which alleged robbery under section 3701(a)(1), subsections (i) and (v), see Commonwealth v. Vincent, 20091130M2696, Police Criminal Complaint, Affidavit of Probable Cause, at 5 (Dec. 3, 2009) (Resp. Exh. B) ("Probable Cause Affidavit"), and the Criminal Information, which as will be discussed, charged Vincent with robbery under five subsections of section 3701(a)(1).[19]

---

[19]The relevant portion of the robbery statute states:

(a) Offense defined. --

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

Judge Bradley found the claim "patently frivolous," noting that "[t]he Criminal Information, No. 6201D of 2010, filed on November 4, 2010 charges each subsection of robbery, 18 Pa.C.S.A. §3701(a)(i-v), setting forth in detail each of the foregoing subsections." PCRA Op. 2 at 29.

Judge Bradley correctly noted that the Criminal Information charged Vincent with subsections i through v:

> The District Attorney of Delaware County by this Information charges that on (or about) November 30, 2009, in said County, [Vincent] did in the course of committing a theft:
> 1. Inflict serious bodily injury upon ALEX ABEDIS[I]; and/or
> 2. Threaten, or intentionally put ALEX ADEBIS[I] in fear of immediate serious bodily injury; and/or
> 3. Commit or threaten immediately to commit a felony of the first or second degree upon ALEX ADEBIS[I]; and/or
> 4. Inflict bodily injury upon, or did threaten with or intentionally put ALEX ADEBIS[I] in fear of immediate bodily injury; and/or
> 5. Physically take or remove property from the person of ALE[X] ADEBIS[I] by force, however slight.

> (ii) threatens another with or intentionally puts him in fear of immediate bodily injury;
> (iii) commits or threatens immediately to commit any felony of the first or second degree;
> (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; [or]
> (v) physically takes or removes property from the person of another by force however slight
> . . . .

18 Pa. C.S.A. § 3701(a)(1)(i)-(v).

Commonwealth v. Vincent, No. 6201D of 2010, Criminal Information (Del. C.C.P. Nov. 4, 2010) (Resp. Exh. D). Thus, contrary to Vincent's allegation, he had been charged pursuant to these five subsections in the original Criminal Information. In defining robbery for the jury, the trial court addressed the subsections. N.T. 9/15/11 at 18-19.[20] The Verdict Sheet mirrored these subsections and the jury found Vincent Guilty of each of the subsections regarding robbery, Commonwealth v. Vincent, CP-23-CR-0006201-2010, Verdict (Del. C.C.P. Sept. 15, 2011) (Resp. Exh. H), and he was given a sentence of 5 -to- 10 years on the robbery charge. N.T. 12/15/11 at 26.

Thus, to the extent Vincent complains about an improper amendment of the Criminal Information, the Criminal Information on robbery was not amended. To the extent the Criminal Information charged Vincent with violations of section 3701(a)(1)(ii)-(iv), which were not included in the Affidavit of Probable Cause, Vincent cannot establish that the failure to object caused him any prejudice as the jury specifically found Vincent guilty of robbery under section 3701(a)(1)(i), requiring that Vincent, in the course of committing a theft, inflicted serious bodily injury upon the victim. That charge was included in the affidavit of probable cause, the Criminal Information, the court's instruction, and the verdict sheet, and Vincent received only one sentence for robbery. Thus, Vincent is not entitled to relief on this claim.

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[20]In the jury instructions, the court did not specifically address subsection five, defining robbery as "physically tak[ing] or remov[ing] property from the person of another by force however slight." 18 Pa. C.S.A. § 3701(a)(1)(v). However, this failure is harmless as the jury found Vincent guilty under each subsection and he received only one sentence for robbery.

9. Failure to Challenge the False Robbery Charge in the Affidavit of Probable Cause (Claim Ten)

Finally, Vincent argues that his trial counsel was ineffective for failing to "challenge the false robbery charge included in the affidavit of probable cause." Doc. 1 ¶ 12, Attachment A, GROUND TEN. According to Vincent, Mr. Adebisi "testified that he had money on him when he entered the hospital after the shooting, and that the money was not missing until eight days later when he [was] discharged from the hospital." Id. The District Attorney responds that Judge Bradley's disposition of the claim is consistent with federal law and a reasonable determination of the facts. Doc. 27-1 at 53-55.

Judge Bradley rejected this claim on PCRA review:

> This is another patently frivolous claim. [Vincent] alleges that the affidavit of probable cause contains false statements that led to a "false accusation" of robbery. [Vincent] seems to base this claim on the fact that there was a discrepancy in Mr. Adebisi's testimony concerning when he realized that $1,000 dollars had been removed from his pocket, *i.e.*, whether he realized that he had been robbed of this money before or after the affidavit of probable cause was sworn. How this discrepancy can be transformed into a claim of material misrepresentation or fraud is unfathomable given the facts of this case. Lt. Gibney interviewed Mr. Adebisi while he was still in the Intensive Care Unit, on December 2, 2009. Mr. Adebisi reported that he was accosted and robbed by two intruders and one was armed.
>
> This fanciful claim has no basis in law or fact.

PCRA Op. 2 at 30.

In the Affidavit of Probable Cause, Lieutenant Gibney stated that when he spoke to Mr. Adebisi in the Intensive Care Unit, Mr. Adebisi told him that his assailants went into his pockets and took $1,000 in cash and $2,000 in money orders. Probable Cause

Affidavit at 7. The discrepancy noted by Judge Bradley arose at the preliminary hearing, when Mr. Adebisi was questioned about any missing belongings and testified that he did not realize the money (and presumably money orders) was missing until he got out of the hospital.

> [Prosecutor]: Was anything removed from your home and belongings?
> [Mr. Adebisi]: Not at that time, but I have some money in my pocket. And after that, the whole scenario, I cannot, you know, it's you know.
> [Prosecutor]: Okay. Did anyone remove that money from your pocket?
> [Mr. Adebisi]: I cannot just remember because the money was in there -- when I got to the hospital, or after, you know, I can't pickup these things no more. It's been like a year.
> [Prosecutor]: Okay. Do you know if you had that money on you when you went to the door?
> [Mr. Adebisi]: No. I don't think so because my clothes was ripped off.
> [Prosecutor]: No, no. When you first answered your door?
> [Mr. Adebisi]: Oh, yeah. I did. I had the money on me then.
> [Prosecutor]: How much money?
> [Mr. Adebisi]: I had $2,000 in money order, and I had a thousand dollars in cash.
> [Prosecutor]: Where was it?
> [Mr. Adebisi]: Both was in my back pocket, back pocket right there.

N.T. 10/6/10 at 11-12. On cross-examination, Mr. Adebesi was asked if Vincent took the money. Mr. Adebisi responded, "I'm saying it could have been taken by them. But I'm not saying they did not take it, but I'm not saying positively they did take it." Id. at 14. When asked when he realized the money was missing, Mr. Adebisi said, "When I got out of the hospital." Id. at 15.

At the preliminary hearing, Vincent's counsel sought dismissal of several of the charges, including robbery, because Mr. Adebisi could not positively say that Vincent and his co-defendant Shaw took the money. N.T. 10/6/10 at 48. The Honorable Leonard V. Tenaglia, who conducted the preliminary hearing, rejected the argument.

> Addressing the Robbery and Theft charges first, as to all of those type of charges. The testimony was one of the first things that's said come to the door, was we want your money? Where's the money. And then there was a shooting. The witness, Mr. Adebisi, testified that he -- after he was shot and struck, he was stunned. But he also testified nobody else in the apartment came near him afterwards. Now he testified he had the $3,000 in his back pocket right before he answered the door, and it was missing. Yes, it can certainly be argued that the money disappeared later at the hospital, but it's [sic] also can be assumed, especially for the purposes of this hearing, for the prima facie case, especially since the -- if the victim's testimony is accepted, which it has to be fore [sic] the purposes of this hearing, that they came there to get money, and then after they shot the Defendant [sic] the money was missing. That, I think, establishes a prima facie case as to all those charges.

Id. at 54-55. Although counsel did not argue that the affidavit of probable cause was not consistent with Mr. Adebisi's testimony regarding when he discovered the money was missing, Vincent has failed to establish that such an argument would have resulted in dismissal of the robbery charge. Mr. Adebisi had already testified that he did not remember details of the incident. Id. at 11. I also note that at trial counsel for Vincent's co-defendant questioned Lieutenant Gibney about the discrepancy between the police report of the statement he took from Mr. Adebisi in the Intensive Care Unit (indicating his assailants went through his pockets and took the money) and Mr. Adebisi's trial testimony that he did not recall anyone taking the money. N.T. 9/14/11 at 40-41. Despite

alerting the jury to this discrepancy, they convicted Vincent of robbery. Judge Bradley's determination of this claim is consistent with Strickland and did not result in an unreasonable determination of the facts.

D. Motion for Appointment of Counsel

Vincent requested the court to appoint counsel to represent him in pursuing his habeas petition. Doc. 24. There is no constitutional or statutory right to counsel to pursue a habeas petition. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991). The court does have discretion to appoint counsel "when the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). In making this determination, the court should consider the complexity of the factual and legal issues in the case and petitioner's ability to investigate facts and present his claims. Reese, 946 F.2d at 264. Counsel need not be appointed when the issues are "'straightforward and capable of resolution on the record' . . . or the petitioner 'had a good understanding of the issues and the ability to present forcefully and coherently his conclusions.'" Id. (quoting Ferguson v. Jones, 905 F.2d 211, 214 (8th Cir. 1990); LaMere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987)).

Here, Vincent presented his claims coherently in this court and in pursuing his PCRA appeal in the state court, and was well-versed in the governing caselaw. In light of Vincent's briefing and the state court record, I find no need to appoint counsel and recommend that his request for counsel be denied.

III. CONCLUSION

Two of Vincent's claims -- Claims 7 and 11 -- are procedurally defaulted because he did not follow the state proscribed procedures for presenting them to the state court,

resulting in waiver of the claims in the state court. A third claim – Claim 12 -- is procedurally defaulted because he never presented the claim to the state courts and Vincent's reliance on Martinez is misplaced because the court gave Vincent the opportunity to present claims of ineffective assistance of PCRA counsel and he failed to present this claim. The remainder of his claims, although properly exhausted, are meritless as the state courts' determination of the claims was consistent with Strickland and did not result in an unreasonable determination of the facts.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 21st day of January, 2022, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Elizabeth T. Hey

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

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

DANIEL VINCENT	:	CIVIL ACTION
v.	:	
JOHN RIVELLO, et al.	:	No. 19-2399

ORDER

AND NOW, this day of , 2022, upon careful and independent consideration of the petition for writ of habeas corpus, the response, reply/traverse, sur-reply, and after review of the Report and Recommendation of United States Magistrate Judge Elizabeth T. Hey, IT IS ORDERED that:

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

BY THE COURT:

NITZA I. QUIÑONES ALEJANDRO, J.

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

1/21/2022

RE: VINCENT v. LUTHER et al

CA No. 19-2399

NOTICE

Enclosed please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hey 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 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/Stephen Gill
Stephen Gill, Deputy Clerk

civ623.frm (11/07)

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

DANIEL VINCENT *Petitioner, pro se*	:	**CIVIL ACTION**
	:	**NO. 19-2399**
v.	:	
JAMEY LUTHER, *et al.* *Respondents*	:	

ORDER

AND NOW, this 26th day of October 2022, upon consideration of the *pro se* petition for a writ of *habeas corpus* filed by Petitioner Daniel Vincent ("Petitioner") pursuant to 28 U.S.C. § 2254 (the "Petition"), [ECF 1]; the state court record; the *Report and Recommendation* issued on January 21, 2022, by the Honorable Elizabeth T. Hey, United States Magistrate Judge (the "Magistrate Judge"), [ECF 40], recommending that the Petition be denied; and Petitioner's objections to the *Report and Recommendation*, [ECF 47, 48]; and after conducting a *de novo* review of the objections, it is hereby **ORDERED** that:

1. The *Report and Recommendation* (the "R&R") is **APPROVED** and **ADOPTED**;

2. The objections to the R&R are without merit and are **OVERRULED**;[1]

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[1] On September 15, 2011, after a trial before the Honorable James P. Bradley of the Court of Common Pleas of Delaware County, a jury convicted Petitioner and a codefendant of attempted murder, aggravated assault, robbery, burglary, and criminal conspiracy. Subsequently, Petitioner was sentenced to an aggregate term of fifteen (15) to thirty (30) years in prison, followed by five (5) years of probation. As outlined in the R&R, Petitioner filed multiple appeals and post conviction relief act petitions ("PCRA") with the state courts.

In his *habeas corpus* petition, Petitioner asserts twelve (12) claims for ineffective assistance of counsel, premised on various alleged failures of his trial counsel. The matter was stayed to allow Petitioner an opportunity to exhaust his state court remedies. Once Petitioner advised the Court that he had completed his state court appeal, the case was reactived. Thereafter, the Magistrate Judge issued a thorough, well-reasoned, 45-page R&R in which she recommended that all of Petitioner's claims be dismissed as procedurally defaulted and/or without merit. [ECF 40]. Petitioner has now filed objections to the R&R. [ECF 47, 48].

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and

4. No probable cause exists to issue a certificate of appealability.[2]

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

When a party files timely objections to an R&R, 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)); *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.

In his objections, Petitioner disagrees with the Magistrate Judge's analysis and essentially repeats the same arguments presented to the state courts and in his *habeas* petition with respect to the various alleged failures of his trial counsel. Each of these arguments was considered and correctly rejected by the Magistrate Judge. This Court agrees with the Magistrate Judge's analysis and conclusions, and finds that: (a) Claims 7, 11, and 12 were not fairly presented to the state courts for review and are, thus, procedurally defaulted; and (b) the state courts' rejection of Claims 1 through 6 and 8 through 10 was neither "contrary to" nor "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," nor was the rejection "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). Accordingly, Petitioner's objections are overruled, and the R&R is adopted and approved in its entirety.

[2] A district court may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth in the R&R, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court's assessment "debatable or wrong." *Slack*, 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3258

DANIEL VINCENT,
Appellant

v.

SUPERINTENDENT SMITHFIELD SCI; DISTRICT ATTORNEY DELAWARE COUNTY; ATTORNEY GENERAL PENNSYLVANIA

(2:19-cv-02399)

SUR PETITION FOR REHEARING

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

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

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

APPENDIX "C"

judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: March 24, 2023
Tmm/cc: Daniel Vincent
William R. Toal, III, Esq.
Ronald Eisenberg, Esq.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**CP-23-CR-6201-2010**
	:	
vs.	:	**1135 EDA 2018**
	:	
DANIEL VINCENT	:	
	:	

William Toal, III, Esquire, on behalf of the Commonwealth
Daniel Vincent, pro se

OPINION

Bradley, J. **FILED:** 11/7/18

Petitioner, Daniel Vincent, appeals from the March 13, 2018 Order dismissing his Post Conviction Relief Act (PCRA) petition after an evidentiary hearing.

The facts that gave rise to the Petitioner's conviction and the proceedings before the trial court were set forth in the Opinion filed on October 2, 2014 in conjunction with a prior appeal:

> After a jury trial Petitioner was found guilty of attempted murder, aggravated assault, robbery, burglary, and criminal conspiracy. The incident that gave rise to Petitioner's conviction took place in Darby Borough, Delaware County, Pennsylvania on November 30, 2009. The victim, Alex Adebisi lived in an apartment in Darby Borough. See N.T. 9/13/11 pp. 28-30. At about 7:00 p.m. Mr. Adebisi was entertaining guests in his apartment. Earlier in the day Mr. Adebisi saw Petitioner and his co-defendant Anthony Shaw, outside of his apartment building rolling "weed. "

APPENDIX "D"

Id. at 75, 80-81. Mr. Adebisi had also seen these two men previously that day in his friend "Max's" apartment. Id. at 74. He asked the men to leave. He described the two as black males, one taller and dark-skinned and the other, shorter with lighter skin. Id. at 81-82. During the course of the conversation Petitioner asked Mr. Adebisi where he was from. Petitioner and Mr. Adebisi discussed the fact that both had lived in Flatbush in New York City. Id. at 82-82. The conversation ended and Mr. Adebisi joined several friends in his apartment.

Next, a short time later, Petitioner and Shaw knocked on Mr. Adebisi's door and asked him for change for a $100.00 bill. Id. at 84. Mr. Adebisi gave the men five twenty-dollar bills in exchange for the $100.00 bill. Id. at 84. He suggested in the course of the conversation that he hoped the $100.00 bill was not counterfeit. Id. Mr. Adebisi closed the door and the men left.

Shortly thereafter there was another knock at the door. Mr. Adebisi opened the door expecting to find a person delivering Chinese food that he had ordered for his guests. Id. at 87. Petitioner and Shaw were at the door. A hall security light illuminated the area when Petitioner forced his way in. Id. at 89-90. Petitioner punched Mr. Adebisi in the face and asked "where the money was?" Id. at 93. Petitioner told Shaw to shoot Mr. Adebisi and Shaw shot him in the left thigh. Id. at 89, 93, 100. Mr. Adebisi struggled with Shaw over the gun. Petitioner ordered Shaw to "kill the nigger" and Shaw shot Mr. Adebisi in the chest. Id. at 90-101, 109, 113. Mr. Adebisi fell to the ground and Petitioner got on top of him, and put his hands on the victim's throat, "strangling" him. Id. at 99.

Mr. Adebisi yelled for the police and Petitioner and Shaw ran. Id. at 99. Mr. Adebisi's guests had taken refuge in the bathroom during the incident and one of them called 911. Id. at 115. Mr. Adebisi crawled in to the living room where he waited, in fear of his life until police officers and paramedics arrived. Id. at 124. Mr. Adebisi testified that he was "blacking

out." Id. at 125. He was in pain and had a fear of dying that he could not describe. Id. at 127.

Mr. Adebisi was transported to the University of Pennsylvania Hospital. Id. at 126-128. Officer Charles Schuler of the Darby Borough Police Department traveled with him in the ambulance. N.T. 9/14/11 p. 121. During transport Officer Schuler attempted to interview Mr. Adebisi because there was a concern that Mr. Adebisi would die as a result of the injuries that he sustained. Mr. Adebisi appeared to be in a great deal of pain and the EMT's were tending to his wounds and administering oxygen. Id. at 122, 130, 137. Officer Schuler reported that Mr. Adebisi said that he was shot by two men that he had never seen before. One was a small, dark-skinned black man wearing a gray hoodie and Mr. Adebisi could not remember anything about the second man. Id. at 125-26. During the course of this interview Officer Schuler was repeatedly interrupted by medics and at other times Mr. Adebisi was unable to respond. Id. at 142, 144. At the hospital Mr. Adebisi was immediately taken to a trauma bay and he was not questioned any further. Officer Schuler was told that Mr. Adebisi couldn't answer any more questions. Id. at 136, 140. Mr. Adebisi was in a coma for two days following emergency surgery. N.T. 9/13/11 p. 130, 227. At trial Mr. Adebisi testified that he did not recall speaking to Officer Schuler during his transport and that he had no recollection of ever saying that he had never seen the two men before. Id. at 227, 232.

On December 2, 2009 Lieutenant Richard Gibney of the Darby Borough Police Department visited Mr. Adebisi while he was in the Intensive Care Unit. N.T. 9/14/11 p. 18. Mr. Adebisi was shown a photo array and he quickly picked a photo of Anthony Shaw from the array and identified him as the shooter. Id. at 18, 21-29. The next day Lt. Gibney returned to the hospital with a second photo array that included Petitioner's photo. Id. at 30-31. Mr. Adebisi picked out Petitioner's photo and identified him as the man who had held him down and who ordered Shaw to shoot him. Id. at

31. Mr. Adebisi described the incident and recalled that Petitioner, the taller man ordered Shaw to shoot him and that Shaw complied. Id. at 24. Further, Petitioner then held Mr. Adebisi on the floor waiting for him to die. Id. at 24-25.

On September 15, 2011 the jury returned the guilty verdicts. On December 15, 2011 an aggregate sentence of fifteen to thirty years of incarceration to be followed by five years of probation was imposed. The Superior Court affirmed judgment of sentence on October 22, 2012.

Commonwealth v. Vincent, (filed 10/2/14).

On November 20, 2013 Norris E. Gelman, Esquire filed a "Post Conviction Relief Act" Petition on Petitioner's behalf. The Commonwealth's response was filed on March 10, 2014 and on April 9, 2014 the Court entered an Order advising the parties of its intent to dismiss the petition without an evidentiary hearing. On May 15, 2014 the petition was dismissed.

Sometime thereafter, the Court received a "Motion to Remove Counsel Request for Leave to File pro-se Amended Post Conviction Relief Act Petition," via first class mail. In this motion Petitioner complained of Mr. Gelman's failure to respond to the April 9th Notice of Intent to Dismiss. The Court forwarded this correspondence to Mr. Gelman and Mr. Gelman filed a Notice of Appeal on May 22, 2014 from the Order dismissing the PCRA petition. On May 30, 2014 Mr. Gelman was ordered to file a Concise Statement of Errors Complained of on Appeal on Petitioner's behalf.

On June 2, 2014 the Court scheduled a hearing for June 12, 2014 to address Petitioner's request to remove Mr. Gelman and to proceed *pro se*. The hearing was

conducted via Two-Way Simultaneous Audio-Visual Communication. Mr. Gelman did not appear at the time scheduled for the hearing and the Court determined that Petitioner did not in fact wish to waive his right to counsel but instead wanted a new lawyer. On the same day the Court went on to appoint new counsel, Henry DiBenedetto Forrest, Esquire to represent petitioner on appeal.

Mr. DiBenedetto Forrest petitioned the Court for an extension of time in which to file a Concise Statement of Errors on Appeal. This request was granted on July 9, 2014 and Petitioner was ordered to file a Rule 1925(b) statement within thirty days. On July 30, 2014 Mr. DiBenedetto Forrest filed a petition for remand in the Superior Court. The petition alleged that in the counselled PCRA petition Mr. Gelman failed to include all of Petitioner's post-conviction claims and that on May 11, 2014, before the petition was dismissed Petitioner made a request to proceed *pro se* and for leave to file an amended PCRA petition pursuant to the "prisoner mailbox rule.[1] On August 12, 2014 upon new counsel's request the Court stayed the Order entered on July 9, 2014 pending the Superior Court's consideration of Petitioner's petition for remand.

The petition for remand was denied in the Superior Court by Order filed on August 25, 2014. On August 27, 2014 the PCRA Court ordered Petitioner to file a Concise Statement of Errors Complained of on Appeal. Petitioner's Concise Statement of Errors Complained of on Appeal was filed on September 25, 2014.

In the "Concise Statement of Errors Complained of on Appeal Pursuant to Pa. Rule of Appellate Procedure 1925(B)" filed on September 25, 2014 the Petitioner

[1] See generally Commonwealth v. Ousley, 21 A.3d 1238 (Pa. Super. 2011). In a return receipt attached to the petition as Exhibit "D" it appears that this petition was delivered to the Delaware County Courthouse Complex on May 14, 2014.

complained of errors committed by the PCRA Court in dismissing the petition and also claimed that Mr. Gelman failed to provide effective assistance of counsel throughout the PCRA proceedings. Regarding the allegations of court error, Petitioner claimed that the PCRA Court erred when it dismissed without a hearing his claims that trial counsel provided ineffective assistance because he failed to request a *Kloiber* charge and failed to object to the Court's instructions to the jury at the close of trial. Regarding his claim of ineffective assistance of PCRA counsel Mr. Gelman, Petitioner claimed that Mr. Gelman failed to include several meritorious claims in his PCRA petition including the following: trial counsel failed to object to the Court's attempted murder instruction, trial counsel failed to object to the Commonwealth's motion to amend an Information at the time of trial, trial counsel failed to investigate, interview or call at trial unidentified medical personnel who treated the victim, trial counsel failed to seek expert testimony relating to human perception and memory as it relates to eye witness identification, trial counsel failed to effectively cross-examine the "key Commonwealth witness regarding his "clouded misperceptions and Inconsistencies within the identification of the perpetrator," and that the PCRA Court erred in dismissing the PCRA petition without considering Petitioner's timely *pro se* request to raise the foregoing issues.

The PCRA Court's Rule 1925(b) Opinion was filed on October 2, 2014. In that Opinion the issues raised by Mr. Gelman in the original PCRA petition were addressed. Because issues relating to the claim that Mr. Gelman provided ineffective assistance in PCRA proceedings were never litigated the PCRA Court suggested that a remand to address the PCRA ineffectiveness claims would be appropriate in this case. Thereafter a

"Joint Petition To Permit Discontinuance Pursuant To PA.R.A.P. 1973 And To Remand To The PCRA Court," was filed by Mr. DiBenedetto. On March 31, 2015 an Order remanding the case to the PCRA court for further proceedings and relinquishing jurisdiction was entered in the Superior Court.

PCRA proceedings resumed with Mr. DiBenedetto representing the Petitioner. On August 20, 2015 Petitioner was Ordered to file a response to the Notice of Intent to Dismiss that was entered on April 10, 2014. After several requests for an extension of time were granted, on February 5, 2016 Mr. DiBenedetto Forrest filed a response to the Notice on February 5, 2016. In his response Mr. DiBenedetto renewed the issues that were raised by former counsel Mr. Gelman and raised several additional issues that Mr. Gelman did not raise, thus raising a claim of Mr. Gelman's ineffectiveness. Mr. DiBenedetto Forrest asked for leave to file an amended PCRA petition and that request was granted. See Trial Court Order, February 11, 2016.

Although Mr. Forrest represented Petitioner, on March 14, 2016 Petitioner filed a *pro se* petition for leave to amend his PCRA petition. This motion was followed by a motion to proceed *pro se* that was filed on March 30, 2016. In response to the March 30th motion a *Grazier* hearing was scheduled. The *Grazier* hearing took place on May 25, 2016. At the hearing Petitioner expressed his dissatisfaction with Attorney Forrest's failure to follow Petitioner's direction regarding all of the issues that Petitioner wanted to be included in an amended PCRA petition. See generally N.T. 5/25/16. Attorney

Forrest confirmed that a difference of opinion on matters of strategy existed between he and Petitioner[2].

On June 8, 2016 an Order accepting Petitioner's waiver of his right to counsel was entered. Petitioner was ordered to file an amended petition on or before June 27, 2016.

On August 15, 2016 after a request for an extension of time was granted, Petitioner filed a *pro se* amended PCRA petition. The Commonwealth was directed to file a reply. Without leave of Court Petitioner filed a supplemental amended petitions on September 12, 2016 and on October 11, 2016. The Commonwealth's response was filed on December 16, 2016. Petitioner filed a response on January 16, 2017.

An evidentiary hearing limited to two issues raised by Petitioner was scheduled: 1) whether PCRA counsel (Mr. Gelman) provided ineffective assistance for failing to raise trial counsel's ineffective assistance in advising Petitioner whether to testify at trial and 2) whether PCRA counsel provided ineffective assistance for failing to raise trial counsel's failure to investigate and present named alibi witnesses. The hearing was scheduled for February 28, 2017. The hearing was continued several times at the Petitioner's request. Finally, on May 3, 2017 a hearing took place.

At the May 3, 2017 Robert Datner, Esquire appeared on behalf of the Petitioner.[3] Mr. Datner advised the Court that he was unable to proceed on the "alibi" issue because

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[2] Attorney Forrest stated:
"Your Honor without compromising the attorney/client relationship from counsel's end, I would suggest that as a matter of strategy counsel has an opinion as to the merit of that counsel has a duty before the tribunal to submit non -frivolous issues before the Court. And by submitting frivolous issues before the Court that it would be unethical from this attorney's standpoint to pursue the same. I'll leave it at that." N.T. 5/25/16 p. 12.

Petitioner's witnesses had failed to appear. On further inquiry, Petitioner (Daniel Vincent) confirmed that he independently told the witnesses not to appear because the hearing was going to be continued. N.T. 5/3/17 p. 6. The hearing proceeded with the witnesses that were available although Petitioner stated the he "was uncomfortable with this hearing right now." Id. at 10. The Court heard the testimony of trial counsel, John List, Esquire and the direct testimony of Petitioner. The hearing was scheduled to resume the next day but the Petitioner was not prepared to proceed and a new date was set.

Attorney Scott Kramer, Esquire entered his appearance on August 4, 2017. A hearing was scheduled for September 11, 2017 and after several requested continuances the evidentiary hearing resumed on November 9, 2017. The Petitioner was subject to cross examination and the Petitioner was given the opportunity to call the alibi witnesses that he alleged had been identified and available at the time of trial. See N.T. 11/9/17. The testimony was closed and Mr. Kramer was granted leave to submit a memorandum of law in support of Petitioner's claim for relief.

After considering the claims alleged, all of the testimony and the memoranda submitted by the parties, on March 13, 2018 the PCRA petition was denied. Mr. Kramer filed a motion to withdraw his appearance on March 23, 2018. The petition alleged in vague terms that differences between the Petitioner and Mr. Kramer compelled him to withdraw. On March 29, 2018 Petitioner filed a motion to "remove" Mr. Kramer. It was alleged *inter alia*, that Mr. Kramer was not representing the Petitioner's interests. After

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[3] Although Mr. Datner was privately retained he sought IFP status for Petitioner to enable him to obtain notes of testimony. Petitioner was allowed to obtain notes with costs borne by the County of Delaware.

a hearing, on April 4, 2018 the Court granted Mr. Kramer's request to withdraw. At the hearing, upon the Court's questioning, Petitioner stated that he did not wish to waive his right to counsel but wanted new counsel. The Court appointed Scott D. Galloway, Esquire. Mr. Galloway filed a timely Notice of Appeal on April 10, 2018 and a Concise Statement of Errors Complained of on Appeal on May 11, 2018. However, on May 7, 2018 Petitioner once again petitioned for the removal of counsel.

A hearing was convened on June 21, 2018. At the conclusion of the hearing Defendant was granted leave to proceed *pro se* and on June 25, 2018 an Order documenting the waiver of the right to counsel as knowingly, voluntarily and intelligently entered was filed.

On May 11, 2018 an Order directing Petitioner to file a Concise Statement of Errors Complained of on Appeal was entered. Petitioner requested several extensions of time in which to comply. On October 12, 2018 Petitioner's Rule 1925(b) Statement was filed. Claims of error are identified in fifteen paragraphs. Theses claims will be addressed *seriatim*.

Post Conviction Relief Act

> "To be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his or her conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S. § 9543(a)(2). These circumstances include a violation of the Pennsylvania or United States Constitution and ineffective assistance of counsel which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i), (ii). Furthermore, a petitioner must establish that the claims of error raised in

> the PCRA petition have not been previously litigated or waived and that "the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S. § 9543(a)(3) and (4); Washington, supra at 593. An issue has been waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post[-]conviction proceeding." 42 Pa.C.S. § 9544(b). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2)."

Commonwealth v. Paddy, 15 A.3d 431, 442 (Pa. 2011). Where a petitioner raises the ineffective assistance of counsel as the basis for relief he "must overcome the presumption that counsel is effective by establishing that "1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's ineffectiveness." Id. at 442 *citing* Commonwealth v. Dennis, 597 Pa. 159, 950 A.2d 945, 954 (2008); Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975–76 (1987). Petitioner must "initially demonstrate that the issue underlying claim of ineffectiveness has arguable merit" to support his claim. See Commonwealth v. Granberry, 644 A.2d 204 (Pa. Super. 1994). It is well-settled that failure to establish any one of the three prongs that are necessary to establish the ineffective assistance of counsel will defeat the entire claim. See e.g. Commonwealth v. Moore, 860 A.2d 88, 94 (Pa. 2004) *citing* Commonwealth v.

Basemore, 744 A.2d 717, 738 n. 23 (Pa. 2000). See also Commonwealth v. Robinson, 82 A.3d 998, 1005 (Pa. 2013).

In Commonwealth v. Rivers, 786 A.2d 923, 929 (Pa. 2001) the Court explained "PCRA claims are not merely direct appeal claims that are made at a later stage of the proceedings, cloaked in a boilerplate assertion of counsel's ineffectiveness. In essence, they are extraordinary assertions that the system broke down." As a "general and practical matter, the fact that a claim is litigated through the lens of counsel ineffectiveness, rather than as a preserved claim of trial court error, makes it more difficult for the defendant to prevail." Commonwealth v. Gribble, supra. The harmless error analysis that is applicable where trial error is claimed on direct appeal is not applied. "Harmless error" analysis places the burden of proving that an alleged error did not contribute to the verdict beyond a reasonable doubt on the Commonwealth. Id. at 472. ("[w]henever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless."). In PCRA proceedings the burden of proof is with petitioner. Commonwealth v. Gribble, supra. Counsel is presumed effective and not every error by counsel will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. Id. The petitioner must prove actual prejudice: that is that counsel's conduct had an actual adverse effect on the outcome of the proceedings. Id. Stated differently, that "there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." Id.

"There is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." Commonwealth v. Jones 942 A.2d 903, 906 (Pa.Super.2008) *citing* Commonwealth v. Barbosa, 819 A.2d 81 (Pa.Super. 2003). Where the court can determine, after examining the record, that the arguable merit of the claim has not been proven the petition can be dismissed without a hearing. Id. See Pa.R.Crim.P. 907. See also Commonwealth v. Payne, 794 A.2d 902, 906 (Pa. Super. 2002) ("right to an evidentiary hearing on a post-conviction petition is not absolute. A PCRA court may decline to hold a hearing if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence;" "controlling factor in determining whether a petition may be dismissed without a hearing is the status of the substantive assertions in the petition." Id. *quoting* Commonwealth v. Weddington, 522 A.2d 1050, 1052 (Pa. 1987). A hearing on all issues raised in a PCRA is not required where all do not raise genuine issues of material fact. Where only some claims raise issues of fact, a hearing may be ordered on those issues alone. Pa.R.Crim.P. 907(3).

Did the PCRA Court fail to allow the Petitioner "to develop the record by presenting evidence to support his claim of ineffectiveness of trial counsel for failing to investigate, interview and call alibi witnesses?

This claim is refuted by the record. Petitioner was granted an evidentiary hearing on this issue. As noted, *supra*, a hearing was scheduled for February 28, 2017. It was continued several times at the Petitioner's request. Finally, on May 3, 2017 a hearing

took place. Robert Datner, Esquire, appeared on behalf of the Petitioner. Mr. Datner advised the Court that he was unable to proceed on the "alibi" issue because Petitioner's witnesses had failed to appear. On further inquiry, Petitioner personally confirmed that he independently told the witnesses not to appear because the hearing was going to be continued. N.T. 5/3/17 p. 6. The hearing proceeded with the witnesses that were available although Petitioner stated the he "was uncomfortable with this hearing right now." Id. at 10. The Court heard the testimony of trial counsel, John List, Esquire and the direct testimony of Petitioner. The hearing was scheduled to resume the next day but the Petitioner was not prepared to proceed and a new date was set.

A second hearing was convened after Attorney Scott Kramer, Esquire entered his appearance. The hearing was originally scheduled for September 11, 2017 and after several requested continuances the evidentiary hearing resumed on November 9, 2017. The Petitioner was subject to cross examination and the Petitioner was given the opportunity to call the alibi witnesses that he allegedly identified to trial counsel before trial and were available at the time of trial. See N.T. 11/9/17. While three witnesses were identified in his PCRA petition only Shirley Pierre, Petitioner's girlfriend, was called to testify. See id. at 34, 39. The testimony was closed and PCRA counsel Kramer was granted leave to submit a memorandum of law in support of Petitioner's claim for relief.

Petitioner and the plethora of attorneys that have represented him over time were granted the Court's indulgence in this matter time and time again. This claim is frivolous.

Did the Court err in dismissing the claim that trial counsel provided ineffective assistance for failing to request a *Kloiber* charge and for failing to object to the Court's failure to include a *Kloiber* charge in jury instructions?

The Opinion filed by this Court on October 2, 2014 in Petitioner's prior appeal (1556 EDA 2014), fully addressed this claim:

> The claim that trial counsel provided ineffective assistance "by virtue of trial counsel's failure to object to the Court's charge which did not include a cautionary *Kloiber* instruction and for counsel's failure to request a cautionary instruction[4]" was set forth in the PCRA petition and was dismissed without a hearing after proper notice. Where a "witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identification have been weakened by qualification or by failure to identify defendant on one or more occasions," the jury will be instructed that the witness's testimony must be received with caution. Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954). In Commonwealth v. Ali, 10 A.3d 282 (Pa. 2010) the Court considered the arguable merit of a claim of ineffective assistance of counsel that was based on trial counsel's failure to request a *Kloiber* instruction and subsequent counsel's failure to raise this claim on appeal:
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> > Under *Kloiber*, "a charge that a witness'[s] identification should be viewed with caution is required where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past." Commonwealth v. Gibson, 547 Pa. 71, 688 A.2d 1152, 1163 (1997) (*citing Kloiber*). Where an eyewitness has had "protracted and unobstructed views" of the defendant and consistently identified the defendant "throughout the investigation and at trial," there is no need for a *Kloiber* instruction. Commonwealth v. Dennis, 552 Pa. 331, 715 A.2d

[4] See "Concise Statement of Errors Complained of on Appeal Pursuant to Pa.Rule of Appellate Procedure 1925(B)."

> 404, 411 (1998). When the witness already knows the defendant, this prior familiarity creates an independent basis for the witness's in-court identification of the defendant and weakens ineffectiveness claims based on counsel failure to seek a *Kloiber* instruction. See Commonwealth v. Fisher, 572 Pa. 105, 813 A.2d 761, 770–71 (2002) (Opinion Announcing Judgment of the Court) (witness's in-court identification valid based on witness having known defendant for eleven years); Commonwealth v. [Freddie] Johnson, 433 Pa. 34, 248 A.2d 840, 841–42 (1969) (witness had known defendant for three years prior to robbery and murder; no trial court error in not issuing Kloiber instruction); see also Commonwealth v. [Clarence] Johnson, 419 Pa.Super. 625, 615 A.2d 1322, 1335–36 (1992) (witness knew defendant and "had seen him on several occasions" prior to murder; defendant not entitled to *Kloiber* instruction because witness's in-court identification was supported by independent basis).

10 A.3d at 303. In *Ali*, the defendant was found guilty of murder and related offenses. The victim's daughter was four-year's old when she witnessed the murder and was six year's old when she testified at trial. The Pennsylvania Supreme Court concluded that Ali's claim that trial counsel was ineffective due to his failure to request a *Kloiber* instruction had no arguable merit because none of the circumstances that warrant a *Kloiber* charge were present. The child had an unobstructed view of the defendant as he attacked her mother, she was also attacked by the defendant, she knew him from prior interactions and she did not equivocate in her identifications at trial or in prior proceedings. The Court explained that any perceived weaknesses in the witness's testimony "attributable to her tender years, the circumstances of the horrific experience, the subject matter, and her ability to recall details were matters of credibility for the jury as factfinder to decide; but those issues did not undermine [her] actual physical ability to identify appellant at the time and place of the murder, so

delivered an accurate jury instruction regarding the credibility of witnesses and directed the jury to consider "[t]he accuracy of [a witness's] memory and recollection, his or her ability and opportunity to acquire knowledge of or to observe the matters concerning which he or she testifies, the consistency or inconsistency of his testimony, as well as the reasonableness or unreasonableness of all of the evidence in the case." N.T. 9/15/11 p. 8, 10. This instruction was both appropriate and adequate given the facts of this case.

This claim has remained unchanged and the foregoing analysis continues to apply.

Did the Court err in dismissing the claim that trial counsel provided ineffective assistance for failing to object to the Court's charge on "demeanor evidence?"

Similarly, this claim was previously addressed in the Court's 2014 opinion:

Likewise, the claim that trial counsel provided ineffective assistance by failing to object when the Court instructed the jury that it making its credibility determinations it could consider the "demeanor" of the witnesses has no merit. The allegedly objectionable portion of the Court's instruction follows:

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4. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution [name of witness] 's testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony.

5. You should consider all evidence relevant to the question of who committed the crime, including the testimony of [name of victim or witness], [any evidence of facts and circumstances from which identity, or non-identity, of the criminal may be inferred] [give other circumstances]. You cannot find the defendant guilty unless you are satisfied beyond reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.

Commonwealth v. Sanders, 42 A.3d 325, 332 n. 4 (Pa.Super. 2012).

> The matter of the credibility of a witness, that is, whether his or her testimony is believable and accurate in whole or in part is solely a matter for your determination. I'm going to mention some of the factors which might bear on that determination, whether the witness has any interest in the outcome of the case or has any friendship or animosity toward any of the persons involved in the case, the behavior of the witness on the witness stand and his or her own demeanor, his or her manner of testifying and whether he or she shows any bias or prejudice which might color their testimony.

N.T. 9/15/11 p. 10.

There is no relevant basis in law to support this claim. The Suggested Standard Jury Instruction, 4.17, Credibility Of Witnesses, General, includes the following as a factor to consider in determining whether to accept the testimony of a particular witness: "Did the witness testify in a convincing manner? [How did [he] [she] look, act, and speak while testifying? Was [his] [her] testimony uncertain, confused, self-contradictory, or evasive?]" The "demeanor" of witnesses is thus recommended as a permissible consideration in assessing the credibility of a witness. Further, an instruction on credibility, including the witness's demeanor as a factor for the jury's consideration, has been cited with approval by our Supreme Court. See e.g. Commonwealth v. Harris, 852 A.2d 1168(Pa. 2004). Demeanor is a factor that may be considered in determining credibility notwithstanding Petitioner's vague and unsupported due process claim. The instruction, read in it's entirely accurately conveyed the applicable law and accurately explained the relevant factors jury should consider in determining credibility.

Did the PCRA court err by denying the claim that trial counsel was ineffective for inducing Petitioner to waive his right to testify through erroneous advice?

At the PCRA hearings on May 3, 2017 and November 9, 2017 the Petitioner testified on his own behalf and offered the testimony of Attorney John J. List, Esquire who served as trial counsel.

To support a claim that trial counsel was ineffective for failing to present a petitioner as a witness, a petitioner bears the burden of proving that: "(1) counsel interfered with his client's freedom to testify, or (2) counsel provided specific advice so unreasonable that it otherwise vitiates a knowing and intelligent decision by the client not to testify. Commonwealth v. Preston, 613 A.2d 603, 605 (Pa. Super. 1992). Counsel is not ineffective where counsel's advice to the defendant was reasonable. For example, where a defendant could be impeached with a prior record of convictions for crimen *falsi* offenses it may not be unreasonable for counsel to advise his client not to testify. See e.g. Commonwealth v. Daniels, 999 A.2d 590, 596 (Pa. Super. 2010) *quoting* Commonwealth v. Whitney, 708 A.2d 471, 476 (Pa. 1998) (citations omitted).

Ultimately, whether to testify or not is a decision that lies with the defendant in a criminal trial. It is the defendant who has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Commonwealth v. Brown, 18 A.3d 1147, 1158 (Pa. Super. 2011) *citing* Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring). Concerning these decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action. Id.

Defendant's decision not to testify was addressed in an extensive colloquy that was conducted by both trial counsel and by the Court at the close of the Commonwealth's case. See N.T. 9/14/11 pp. 96-101. In response to the Court's inquiries Defendant confirmed that he discussed possible defenses with counsel and he was comfortable with his decision not to testify. He affirmed that he was aware that he could change his decision at any time and that he had no additional questions for either trial counsel or for the Court. Id. See also N.T. 11/9/17 pp. 15-16. At the PCRA hearing Petitioner testified that Mr. List did not discuss the possibility that were he to testify he could be impeached only with prior convictions that were *crimen falsi* in nature. He testified that they discussed his extensive criminal history only once in connection with a negotiated plea offer. See 11/9/17 pp. 10-14. He claims that as a result he believed that his entire criminal history would be put before the jury if he chose to testify and that his decision was based on this misunderstanding. See N.T. 11/9/17 pp. 13-14 13.

In PCRA proceedings the Court sits as the factfinder and makes the necessary credibility determinations. See generally Commonwealth v. Spotz, 84 A.3d 294, 319 (Pa. 2014); Commonwealth v. Johnson, 966 A.2d 523, 539 (Pa. 2009); Commonwealth v. Basemore, 744 A.2d 717, 737 (Pa. 2000). In light of the record and after considering the testimony of trial counsel the Court determined that Petitioner's testimony was wholly lacking in credibility. Petitioner affirmed at the time of trial that after consultation with counsel he chose not to testimony and this decision was based on counsel's

professionally competent advice. His current testimony to the contrary does not alter this conclusion.

John J. List[6], a criminal trial attorney with forty years of experience representing defendants in criminal cases represented the Petitioner throughout the trial proceedings. N.T. 5/3/17 p. 11-12, 43. Before trial Mr. List brought a negotiated plea offer to the Petitioner and explained that in light of his extensive criminal history Petitioner would be exposed to a much stiffer sentence if he was found guilty after a trial. Id. at 21-23. Counsel supplied Petitioner and his family with his Prior Record Score and his history of criminal convictions to explain the advantages of entering a negotiated plea and to demonstrate the risk associated with going to trial. He did not, as Petitioner contends, tell the Petitioner that his entire criminal record could be used to impeach him at trial. Id. at 21-23.

Rather, before trial Mr. List discussed the possibility that if Petitioner testified his 2003 conviction for unauthorized use of a motor vehicle, a *crimen falsi*, could be put before the jury to impeach his credibility. Id. at 23, 51. Mr. List testified credibly that additional factors influenced his advice. Petitioner's testimony would have been that he was not present when Mr. Adebisi was shot and he was going to use an alibi as a defense. Id. at 28-30. Mr. List's primary concern was that if Petitioner testified as expected, the jury would also expect to hear from corroborating witnesses. Mr. List concluded that he would be unable to call any of the alibi witnesses that Petitioner identified because they couldn't provide reliable testimony: "When I spoke to those

[6] Mr. List passed away in April of 2018.

witnesses they couldn't get the times straight, the days straight, they couldn't get anything straight, and I came to the conclusion very quickly that they were going to get slaughtered if they took the stand, that they were making up stories to cover Mr. Vincent, so this was all part of it." Id. at 27-31. Mr. List considered Mr. Adebisi' s identification problematic for the Commonwealth because it was made days several days after the shooting when Mr. Adebisi was in the hospital. Id. at 19, 34. The defense strategy was "to make the Commonwealth live up to their burden." Id. at 50. The suspect testimony of unreliable witnesses and the possibility that the Petitioner would inadvertently provide testimony that could help the Commonwealth's case were not worth the risk in Mr. List's view. See id. at 50, 52.

Mr. List testified credibly that he advised the Petitioner that he considered the identification testimony in this case weak, that he informed him that his prior *crimen falsi* conviction could be used to impeach him and that his alibi witnesses were unreliable. Id. at 45. In light of the foregoing he advised Petitioner not to testify. Mr. List described Petitioner as a "bright" individual with a "mind of his own" and confirmed that ultimately, after consultation with him Petitioner made his own decision. See N.T. 5/3/17 pp. 18-19, 26.

In light of the foregoing the Court concluded that Petitioner's allegation lacked credibility and that trial counsel's advice was reasonable given the circumstances.

Did the PCRA court err by denying the claim that trial counsel was ineffective for failing to investigate, interview or call willing alibi witnesses?

This claim too is refuted by the record and by the testimony offered at the PCRA hearing. In the same colloquy during which Petitioner's Fifth Amendment rights were addressed, Petitioner confirmed that after consultation with counsel he would not be calling alibi witnesses;

> Mr. List: And one other thing I want to cover her(sic), we have some people that have come forward to testify as potential alibi witness(sic). Have we talked about that?
> Mr. Vincent: Absolutely.
> Mr. List: Okay. And those three individuals that are willing to testify as alibi witnesses, have we talked about not only what their anticipated testimony would be, but what I anticipate would be the cross examination of those witnesses by the district attorney?
> Mr. Vincent: Yes. We had spoken.
> Mr. List: Based upon the discussions we've had, is it your feeling right now, and as Judge Bradley may tell you, you might be able to change this, not to call those witnesses to the stand?
> Mr. Vincent: Yes, at this present time.
> Mr. List: And what is your decision?
> Mr. Vincent: My decision is not to call these witnesses.
> The Court: Sir, do you have any questions you want to ask either your attorney or the Court at this time?
> Mr. Vincent: No, Your honor.

N.T. 9/14/11 pp. 99-100.

In Petitioner's PCRA petition three alibi witnesses that were allegedly available and willing to testify at trial were identified: Ruth Washington (Petitioner's sister),

Shirley Pierre (Petitioner's girlfriend) and Sabrina St. Ford (an employee at Vision's Bar in Philadelphia).

An alibi defense "places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." Commonwealth v. Dennis, 17 A.3d 297, 302 (Pa. 2011) *quoting* Commonwealth v. Roxberry, 602 A.2d 826, 827 (Pa. 1992). In connection with his claim that Mr. List provided ineffective assistance for failing to investigate and call alibi witnesses Petitioner bears the burden of proving the following by a preponderance of the evidence: (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial. Id. at 302. As in all claims of ineffective assistance a petitioner bears the burden of satisfying all prongs of the *Strickland* standard and the PCRA court is charged with determining the credibility of witnesses that testify in support of the claim. Id.

Petitioner had the opportunity to prove his claims at the evidentiary hearing. His claim, as it regards named alibi witnesses Ruth Washington, and Sabrina Ford requires no discussion because Petitioner failed to produce theses witnesses and his allegations remained unproven by any competent evidence. See Dennis, *supra*.

Shirley Pierce, Petitioner's girlfriend and the mother of a child fathered by Petitioner testified on November 9, 2017. Id. at 34, 40. She testified that she was with the Defendant from morning until night on November 30, 2009. See N.T. 11/9/17 pp.

35-37. They began the day on South Street, met the Petitioner's sister Ruth Washington at the Petitioner's brother's bar in West Philadelphia, took Ms. Washington to return a rental car and returned to the bar at about 6:30 p.m. when the Petitioner worked for his brother at the bar until they returned to Ms. Pierce's home in Northeast Philadelphia. Id. at 36. Ms. Pierce testified that she was available and willing to testify at trial. Id. at 37. She acknowledged a 2004 federal conviction for making false statements in connection with the purchase of a firearm[7]. Id. at 38-40. She testified that she was never contacted by Mr. List or by an investigator. She testified that Defendant asked her to testify but she never contacted or spoke to Mr. List. Id. at 40.

Ms. Pierce testified that although she attended the trial she had no memory of the Petitioner confirming his decision to forego alibi witnesses on the record. Id. at 41. She also stated that she did not speak to the Petitioner about the crime at the time it occurred. She didn't know anything about it until "the hearing." Id. at 41. Her testimony was vague and unconvincing.

Mr. List testified that the Petitioner gave him the names of positional alibi witnesses including his sister Ruth. He spoke with potential witnesses and they were "all over the map." N.T. 5/3/17 p. 29. The alibi that Petitioner and the alibi witnesses supplied was that he was at a "party" with friends and family members. Id. at 31. Mr. List had no recollection of the description of the day of November 30, 2009 that Ms. Pierre supplied in her testimony. Id. at 35. He specifically recalled speaking with Ruth Washington who told him that they were at a family party and with Petitioner's brother.

[7] Ms. Pierre admitted that she was convicted of conspiracy to commit a "false statement during the purchase of a firearm in federal court, a *crimen falsi*. Id. at 38-40

Petitioner's brother was unwilling to testify. Id. at 35, 37. Ruth Washington did not provide him with helpful times that matched up with the time of the offense. Id. at 37. He spoke to Ruth, Sabrina and Shirley and no one provided helpful information. See id. at 37-40. Mr. List testified: "I don't have any recollection of anything being told to me about an Enterprise rental car, about two trips back and forth to the bar. I don't have any recollection about Mr. Vincent tending bar and, quite frankly, after speaking with those women I didn't believe a word they told me. Id. at 40.

The testimony of Mr. List was credible; the testimony of Ms. Pierre and Petitioner was not. Even after six years passed and hearings were scheduled, continued and re-scheduled, the Petitioner failed to offer any corroborating testimony from witnesses who were allegedly with him and Ms. Pierce during the relevant time. Specifically, Ms. Peirce testified that from 6:30 p.m. onward she was at Petitioner's brother's bar with his brother and his sister in West Philadelphia. Neither family member testified at the PCRA hearing. Mr. List had no recollection of having ever being told, by any potential alibi witness that Petitioner took his sister to return a rental car earlier in the day and was in his brother's bar when the shooting occurred, Finally, Ms. Pierce testified that she attended the trial but never spoke with Mr. List or questioned why she was not being called as a witness. Her testimony was vague at times and nonsensical at other times. At the time of trial Petitioner was colloquied and offered the opportunity to object to Mr. List's failure to call Ms. Pierce to the stand. He did not. All of the credible evidence led the Court to conclude that this claim is meritless.

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to object to the Court's jury instruction which introduced a "new theory?

In the third claim set forth in the PCRA petition, it is alleged that trial counsel should be found ineffective for failing to object to the PPCRA Court's jury instruction wherein the Court stated: "First, we're going to discuss Attempted Murder. The Defendants in this case have been charged with Attempted Murder. To find either Defendant guilty of this offense you must find that the Defendant's (did) a certain act. In this particular case, Mr. Shaw is charged with shooting the alleged victim. Mr. Vincent is charged with attempting to strangle the alleged victim." N.T. 9/15/11 p. 15. The Court continues on to discuss the remaining elements of attempted murder, Namely specific intent to kill and the "substantial step" necessary to an finding of attempt. Id. at 15-16.

This claim is patently frivolous. Mr. Adebisi testified that Anthony Shaw shot him at Petitioner's direction and that after he fell to the ground Petitioner had his hands on Mr. Adebisi' s throat, attempting to strangle him. At the same time Petitioner said, "die, die, die." N.T. 9/13/11 pp. 97-101. This portion of the jury instruction merely reflected the testimony that was heard at trial. It is proper for the trial court to explain to the jury the contentions of the parties, particularly when it is done in a manner that clearly shows he is not expressing his own views. See Commonwealth v. Rough, 275 Pa.Super. 50, 418 A.2d 605 (Pa. Super. 1980); Commonwealth v. Leonhard, 485 A.2d 444 (1984).

The contention that this instruction, "uninvitingly interfered with the defense strategy," when in fact the defense strategy was to challenge Mr. Adebisi' s identification is far-fetched at best. Petitioner knew from the outset that he and Shaw were charged with an attempted murder that was committed in the course of a robbery. The Court's charge was in conformity with the evidence and the presumption of trial counsel's competence is not overcome by trial counsel's failure to make the dubious objection that Petitioner suggests. Cf, Commonwealth v. DeMarco, 809 A.2d 256 (Pa. 2002) (Evidence supporting a jury instruction may be adduced by a defendant as part of his case, or may be found in the Commonwealth's own case-in-chief, or be elicited through cross-examination).

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to object to the Court's "improper amendment" of the robbery charge?

This claim is patently frivolous. The Criminal Information, No. 6201D of 2010, filed on November 4, 2010 charges each subsection of robbery, 18 Pa.C.S.A. §3701(a)(i-v), setting forth in detail each of the foregoing subsections. The verdict slip mirrored the Information. Defendant was sentenced to five to ten years of incarceration for one count of robbery, a first degree felony. Assuming *arguendo* that the Information charging robbery was in fact amended, an amendment may be allowed even after the closing arguments but before the court's charge and relief is warranted only where the amendment prejudices a defendant. See Commonwealth v. Page, 965

A.2d 1212, 1224 (Pa. Super. 2009). See also Commonwealth v. Roser, 914 A.2d 447, 454 (Pa.Super. 2006), *appeal denied* 927 A.2d 624 (Pa. 2007) ("Factors to be considered when determining whether Appellant was prejudiced by the Commonwealth's amendment include whether the amendment changes the factual scenario; whether new facts, previously unknown to appellant, were added; whether the description of the charges changed; whether the amendment necessitated a change in defense strategy; and whether the timing of the request for the amendment allowed for ample notice and preparation by appellant.")

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to "challenge the false statement and robbery charge in the affidavit of probable cause?"

This is another patently frivolous claim. Petitioner alleges that the affidavit of probable cause contains false statements that led to a "false accusation" of robbery. Petitioner seems to base this claim on the fact that there was a discrepancy in Mr. Adebisi' s testimony concerning when he realized that $1,000 dollars had been removed from his pocket, *i.e.*, whether he realized that he had been robbed of this money before or after the affidavit of probable cause was sworn. How this discrepancy can be transformed into a claim of material misrepresentation or fraud is unfathomable given the facts of this case. Lt. Gibney interviewed Mr. Adebisi while he was still in the Intensive Care Unit, on December 2, 2009. Mr. Adebisi reported that he was accosted and robbed by two intruders and one was armed.

This fanciful claim has no basis in law or fact.

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to interview delivery driver Kathy Totaro and failure to call her as a witness at trial?

Petitioner alleges that delivery driver Kathy Totaro could have provided evidence that was "key" to his defense, that is, that Mr. Adebisi always paid her with $100 bills. It is alleged that this evidence would have been relevant because it suggests that Mr. Adibesi was a drug dealer and impugns his credibility. This allegation is completely meritless. Whether Mr. Adibisi was a drug dealer or not has no bearing on the facts of this case or on Petitioner's defense, i.e., misidentification.

Additionally, this ineffective assistance claim fails procedurally and substantively:

> 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 (1999).

Commonwealth v. Reid, 99 A.3d 427, 438 (Pa. 2014). Petitioner failed to provide the required witness certification and failed to prove any of the substantive elements that are necessary to this claim.

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to cross-examine witness Tanisha Garraway with a prior statement?

Ms. Garraway was from New York and was visiting Mr. Adebisi when he was robbed and shot. See N.T.9/13/11pp. 326-27. Ms. Garraway did not identify Petitioner or Mr. Shaw at trial. She testified that she was in the apartment when there was a knock at the door and "somebody" barged in. She then saw Mr. Adebisi and "a big black man" fighting. Id. at 336, 337, 340-41. Petitioner claims that trial counsel was ineffective for failing to cross-examine Ms. Garroway with a prior statement in which she described the man as a dark-skinned male, six feet tall and about 200 pounds who was yelling in an "African language." He contends that Ms. Garraway's earlier description would have dis-credited Mr. Adebisi' s identification.

This claim has no merit. Ms. Garraway's alleged inconsistent statement could serve to impeach only her description of the assailant, not Mr. Adebisi' s. See generally Pa.R.E. 613, Witness's Prior Inconsistent Statement to Impeach; Witness's Prior Consistent Statement to Rehabilitate.

At trial Ms. Garraway described the man who wrestled with Mr. Adebisi as a "big black male." Mr. Adebisi described Petitioner as a "tall, dark-skinned" male. See id. at 81. He also recounted a conversation that took place earlier in the day where Petitioner asked him where he was from and where Mr. Adebisi said he was African: from Nigeria.

Petitioner replied that he was from New York and that he was Haitian. Id. at 81-90. As previously stated, Ms. Garraway was unable to identify Petitioner and her description of the assailant did differ somewhat from Mr. Adebisi's. Thus, any discrepancy was already before the jury. Further, from a practical standpoint, had trial counsel cross-examined Ms. Garraway regarding whether the assailant was yelling in an African, or any foreign language, Mr. Adebisi' s testimony, that Petitioner identified himself to him as Haitian when they spoke earlier could have been corroborated and strengthened Mr. Adebisi' s identification testimony.

This claim is speculative. It has no arguable merit and trail counsel was not ineffective for failing to act in the way Petitioner suggests.

Did the PCRA Court err in denying Petitioner's claim of ineffective assistance based on trial counsel's failure to cross-examine Lieutenant Gibney regarding "other suspects."

Petitioner claims that had trial counsel demonstrated, through cross-examination of Lieutenant Gibney, that "other suspects" were investigated in connection with this robbery "Officer Schuler's testimony concerning Mr. Adebisi' s initial inability to identify a shooter would have been "embellished." This, he contends would have "attacked" Mr. Adebisi' s identification.

While the extent to which law enforcement investigated and developed other suspects can be fodder for cross-examination, the Court can find no merit in this claim. The various police reports that Petitioner has attached to his petition, see Exhibit D, provide no support for this convoluted and speculative claim. See generally, Commonwealth v. Sepulveda, 55 A.3d 1108, 1133 (Pa. 2012) (counsel cannot be

deemed ineffective for failing to raise speculative claim); Commonwealth v. Charleston, 94 A.3d 1012, 1026 (Pa. Super. 2014) (Unsupported speculation does not establish "prejudice" that is essential to an ineffectiveness claim).

The claims included in Petitioner's "Motion for Leave to Supplement Amended Post-Conviction Relief Act Petition," filed on September 14, 2016 and "Motion for Leave to Supplement Amended Post-Conviction Relief Act Petition," filed on October 11, 2016 have bee waived.

Pennsylvania Rule of Criminal Procedure 905 allows the court to "grant leave to amend or withdraw a petition for post-conviction collateral relief at any time." "Amendment shall be freely allowed to achieve substantial justice" but amendments are not "self-authorizing" such that a petitioner may simply "amend" a pending petition with a supplemental pleading. See Commonwealth v. Porter, 35 A.3d 4, 12 (Pa. 2012). "Rather, the Rule explicitly states that amendment is permitted only by direction or leave of the PCRA court." 35 A.3d at 12.

The filing of unauthorized supplemental petitions and amendments to PCRA petitions have been condemned and are subject to waiver. See Commonwealth v. Mason, 130 A.3d 601, 607 (Pa. 2015); Commonwealth v. Reid, 99 A.3d 470, 484 (Pa. 2014) *citing* Commonwealth v. Elliott, 80 A.3d 415, 430 (Pa. 2013); Commonwealth v. Roney, 79 A.3d 595, 615–16 (2013); Commonwealth v. Porter, supra.

As stated above, on June 8, 2016 an Order accepting Petitioner's waiver of his right to counsel was entered. Petitioner was ordered to file an amended petition on or before June 27, 2016. On August 15, 2016 after a request for an extension of time was

granted, Petitioner filed a *pro se* amended PCRA petition. The Commonwealth was directed to file a reply. Without leave of court Petitioner filed supplemental amended petitions on September 12, 2016 and October 11, 2016. The Commonwealth's response was filed on December 16, 2016.

Petitioner was not granted leave to file additional amendments and/or supplements to the amended PCRA petition that was filed on August 15, 2016. Although these supplements were entitled "motions for leave," they were in fact attempts to add new claims. "Misdesignation does not preclude a court from deducing the proper nature of a pleading." Commonwealth v. Porter, 35 A.3d at 12 *citing* Commonwealth v. Abdul–Salaam, 996 A.2d 482 (Pa. 2010) ("involving deceptive labeling of PCRA pleading").

Because, as in *Porter, supra*, Petitioner had no right to unilaterally amend a pending petition, the additional claims for relief that are set forth in the unauthorized supplemental amendments are waived. It follows therefore, that the claims raised in paragraphs 12 and 14 of the Statement of Errors Complained of on Appeal are similarly waived on appeal.

The claims that are raised in paragraphs 13 and 15 of the Statement of Errors Complained of on Appeal have no arguable merit. Recognizing that a claim of ineffective assistance is discrete and separate from an underlying claim of trial court error, nevertheless an underlying issue of arguable merit must be raised. Petitioner has failed to plead or prove even identify an instance where direct appeal counsel provided ineffective assistance.

Finally, in paragraph number 15 Petitioner claims that the PCRA Court erred because it did not find PCRA counsel ineffective for failing to raise the "Cumulative Effects of trial counsel's ineffectiveness." Again, this boilerplate claim of error must be dismissed. As all of the forgoing demonstrates, Petitioner's claims of trial counsel's and PCRA counsel's ineffective assistance had no arguable merit. It is also true that "prejudice" was not demonstrated but his claims were not rejected on grounds of "prejudice." It is well-settled that no number of failed ineffectiveness claims may collectively warrant relief if they fail to do so individually. Commonwealth v. Busanet, 54 A.3d 35, 75 (Pa. 2012) ("where ineffectiveness claims are rejected for lack of arguable merit, there is no basis for an accumulation claim.") *citing* Commonwealth v. Johnson, 966 A.2d 523, 532 (Pa. 2009); Commonwealth v. Sattazahn, 952 A.2d 640, 671 (Pa. 2008).

BY THE COURT:

James P. Bradley, J.