CLD-103

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **22-3359**

YA-SIN EL-AMIN SHAKIR, Appellant

VS.

SUPERINTENDENT FAYETTE SCI, ET AL.

(W.D. Pa. Civ. No. 2:19-cv-01652)

Present: GREENAWAY, JR., MATEY, and FREEMAN, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Shakir's request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would agree, without debate, that Shakir's claims are procedurally defaulted, not cognizable on habeas review, or meritless, for substantially the same reasons provided in the Magistrate Judge's Report and Recommendation, which the District Court adopted. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 30, 2023
PDB/cc: Ya-Sin El Amin Shakir
All Counsel of Record

A True Copy:

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

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May 30, 2023

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RE: Ya-Sin El-Amin Shakir v. Superintendent Fayette SCI, et al
Case Number: 22-3359
District Court Case Number: 2-19-cv-01652

ENTRY OF JUDGMENT

Today, **May 30, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

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

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

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

Attachments:

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

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

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

For the Court,

s/ Patricia S. Dodszuweit
Clerk

s/ pdb Case Manager

cc:
Brandy S. Lonchena

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

YA-SIN EL-AMIN SHAKIR,	)	
	)	
Petitioner,	)	Civil Action No. 2:19-cv-1652
	)	
v.	)	Judge Marilyn J. Horan
	)	Magistrate Judge Patricia L. Dodge
MARK CAPOZZA, *et al.*,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Pending before the Court is the Petition for a Writ of Habeas Corpus (ECF 5) filed by state prisoner Ya-Sin El-Amin Shakir ("Petitioner"), who is proceeding *pro se*, under 28 U.S.C. § 2254. It is respectfully recommended that the Court deny each of Petitioner's claims and deny a certificate of appealability.

II. REPORT[1]

A. Relevant Background

In 2012, at the end of a trial held in the Court of Common Pleas of Beaver County ("trial court"), a jury convicted Petitioner of one count of attempted murder, four counts of aggravated assault and related crimes. Attorney Mitchell Shahen represented Petitioner at his trial and subsequent direct appeal in the state appellate courts.

The charges against Petitioner stemmed from an incident that occurred around 1:40 a.m. on July 14, 2011, when Petitioner, Jiwan Bailey and Razaun King approached Brian Elmore and

[1] Respondents attached as exhibits to their Answer (ECF 17) the relevant state-court filings and decisions as well as the transcripts from Petitioner's pretrial, trial and sentencing proceedings (ECF 19).

Lucien Roberts on a street in Aliquippa, Pennsylvania, intending to rob them. Petitioner brandished his handgun during the incident and when he did so, Roberts, who was licensed to carry a firearm, pulled out his handgun. Both Petitioner and Roberts fired their respective weapons. Roberts shot King during the incident and he died from his injuries.[2] Petitioner was charged with, among other crimes, attempting to kill Elmore, who was also shot during the incident but survived his injuries.

The trial court summarized the background of this case as follows:

> A review of the record discloses the following facts were established at trial: In the early evening hours of July 13, 2011, Tomara Scott, her friend Robin Reddix, and three males—Jiwan Bailey, Razaun King, and [Petitioner]—engaged in a conversation outside of Scott's residence on Chaske Street in Penn Hills, Allegheny County [in which they discussed committing a robbery]. A plan was developed for the robbery of a bar in Aliquippa, Beaver County. Scott ... suggested that the establishment known as "The Outkast Bar" would be an easy target. Later in the evening, Scott, accompanied by Reddix, Bailey, King and [Petitioner], drove her automobile from Penn Hills to Aliquippa. During the trip, the five occupants further discussed the planned robbery. Upon entering Aliquippa, Scott parked her vehicle outside the OutKast Bar, and Scott and Reddix entered the bar to have a couple [of] drinks in order to determine the feasibility of implementing their plan. While the women were in the bar, the three men walked around the neighborhood and later returned to the vehicle to await the females. Near to closing time, Scott and Reddix exited the bar and reconvened with the three men in the car where they spoke of whether to proceed with the robbery of the bartender. The women observed that the owner of the bar had been present and possessed a weapon. Upon further discussion, the plot to rob the bartender was abandoned, causing Bailey to become agitated at having come to Aliquippa for naught. They all entered Scott's vehicle intending to return to Penn Hills.
>
> While driving from the area of the bar at approximately 1:40 A.M. on July 14, 2011, the occupants of the automobile observed two men, Lucien Roberts and Brian Elmore, Jr.—walking up Fifth Avenue hill. Scott proceeded to the bottom of the hill, stopped the vehicle, turned to Bailey and said, "Jiwan, there you go." Bailey exited the vehicle and [Petitioner] followed. King remained inside the vehicle to complete a text message and exited a short time later. Bailey, King, and [Petitioner] approached Roberts and Elmore. King observed [Petitioner] retrieve a silver handgun from his waist. [Petitioner] told Roberts and Elmore to "take it off" or "throw it off" (meaning "give me whatever you got"). Elmore responded, "beat it, get out of here." Roberts initially observed [Petitioner] point his gun at Elmore.

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[2] Roberts was detained by the police for about fourteen hours following the incident. It was determined that he acted in self-defense and he was not charged with any crime. (Trial Tr., 9/7/12, ECF 19-4 at pp. 54-55, 62, 71.)

In response, Roberts retrieved his .45 caliber semi-automatic pistol from his waist as Bailey directed his weapon at Roberts. Nearly simultaneously, shots were fired by both [Petitioner] and Roberts. King ran and hid behind a telephone pole and did not observe the shooting, although he heard gun fire and saw flashing from the firing of the weapons. Roberts, who possessed a license to carry a firearm and whose weapon was properly registered to him as the owner, fired three or four rounds before he was tackled by Bailey, who attempted to take the pistol from Roberts. In the struggle that ensued between Roberts and Bailey, Roberts fired approximately five more shots, three of which struck Bailey. Elmore, who had been drinking that night and was somewhat intoxicated, fled across the street behind a nearby garage; however, he was struck by a total of six bullets—two in the right leg, one in the right thigh, one in the left buttocks and two in the left hand. Elmore indicated that he was hit with the first shot as he stepped off the curb into the street. He was subsequently transported to UPMC Presbyterian Hospital for treatment. Elmore remained in the hospital for two or three days during which he underwent surgery on his left hand, including the insertion of a rod. As of the date of trial, he was unable to completely bend a finger on his left hand. None of the bullets were surgically removed from Elmore's body. Although not struck by any gun fire, Roberts found two bullet holes in the basketball shorts he was wearing. Upon extricating himself from Bailey's grasp, Roberts returned to his feet, fled to the top of the hill and called the police. Roberts testified that the entire incident lasted approximately six minutes.

[Petitioner] returned to Scott's waiting vehicle. King, being unfamiliar with the area, left the scene and came upon two individuals from whom he borrowed a cellular phone which he utilized to call his own cellular telephone in Scott's vehicle. Reddix answered the call. Scott, along with [Petitioner] and Reddix, proceeded to King's location, at which time he entered the car. King inquired as to Bailey's absence and condition. [Petitioner] replied that he thought Bailey had tackled Roberts and ran from the scene. While in the vehicle, King again observed the silver firearm in the left hip area of [Petitioner]. King testified that none of the other occupants of the vehicle possessed a firearm. Roberts described [Petitioner's] weapon as being a revolver. Scott drove her vehicle to her residence in Penn Hills with Reddix, King, and [Petitioner] as occupants. Later that morning the participants learned of Bailey's death.

Detective Sergeant Steven Roberts of the Aliquippa Police Department testified that a total of four spent .45 caliber casings were located at the scene and fragments from other bullets of an unknown caliber were located in the roadway. He explained that Lucien Roberts' .45 caliber pistol was a semi-automatic weapon which ejected spent casings. No casings of any other caliber were found at the scene. Detective Sergeant Roberts explained that since the silver handgun in the possession of [Petitioner] was a revolver, which does not automatically eject its spent casings, he did not expect to find any spent casings from the revolver. Detective Sergeant Roberts further indicated that upon a check with the Pennsylvania State Police, a certification was received that [Petitioner] did not possess a license to carry a firearm nor was he eligible to do so due to his age of 19

> years. The three bullets in the body of Bailey were determined to be .45 caliber ammunition.
>
> Officer Brandon Yourke of the Wilkinsburg Police Department testified that he arrested [Petitioner] on an unrelated outstanding warrant on July 21, 2011, eight days after the shooting, and upon searching [Petitioner] found six live .38 caliber bullets in his left front trouser pocket.
>
> The Commonwealth called William Best as a ballistics expert.... Mr. Best was requested to and did take measurements of a bullet depicted on an x-ray of Elmore's body using a digital micrometer, and excluded the bullet in Elmore's body as being a .45 caliber bullet based on its size. He further indicated that he could not exclude the bullet as being either a .38 caliber or a .32 caliber bullet. Mr. Best indicated that he had never taken measurements of an x-ray image previously but was aware that the procedure had, in fact, been utilized. He also related that he had not received any training in radiology.

Commonwealth v. Shakir, No. 517 WDA 2013, 2013 WL 11248248, at *2 (Pa. Super. Ct. Dec. 17, 2013) (quoting the Trial Court's 3/6/13 Op. at 2-6 (ECF 17-3 at pp. 3-9) (bracketed text added by the Superior Court.)

At the conclusion of the trial, the jury convicted Petitioner of attempted murder of Elmore, 18 Pa.C.S. § 901(a); four counts of aggravated assault, 18 Pa.C.S. § 2702(a); firearms not to be carried without a license, 18 Pa.C.S. § 6106(a)(1); and recklessly endangering another person, 18 Pa.C.S. § 2705. At that time the trial court sentenced him to an aggregate sentence of 15 to 30 years imprisonment. *Shakir*, 2013 WL 11248248, at *3.

Petitioner, through counsel, filed post-sentence motions which the trial court denied. (Trial Court's 3/6/13 Op., ECF 17-3 at pp. 2-42.) Petitioner then filed a counseled direct appeal with the Superior Court of Pennsylvania in which he raised seven grounds for relief, two of which are relevant to this federal habeas proceeding. (Pet's Appellate Br., ECF 17-4 at pp. 11-66.) In relevant part, Petitioner asserted that: (1) the trial court abused the discretion afforded to it under Rule 702 of the Pennsylvania Rules of Evidence[3] when it permitted Best to testify as an expert for the

[3] Rule 702 of the Pennsylvania Rules of Evidence governs the testimony of expert witnesses. At the time of Petitioner's 2012 trial, Rule 702 (which was amended in 2013) stated: "If scientific,
Continued on next page...

Commonwealth and opine as to the caliber of bullets lodged in Elmore's body based on a measurement of the length and width of an x-ray image (*id.* at pp. 37-41); and (2) the Commonwealth introduced insufficient evidence to sustain his conviction of attempted murder because it failed to prove beyond a reasonable doubt that he acted with the specific intent to kill (*id.* at pp. 47-60).[4] The Superior Court rejected these claims on the merits and affirmed Petitioner's judgment of sentence. *Shakir*, 2013 WL 11248248, at *4-5, 10-11. The Supreme Court of Pennsylvania denied his petition for allowance of appeal.

Over the course of the next several years, Petitioner litigated in state court sentencing-phase claims that are not relevant to this federal habeas case. The trial court eventually resentenced him to an aggregate term of 13 ½ to 27 years' incarceration. After that litigation concluded Petitioner filed the instant Petition for a Writ of Habeas Corpus (ECF 5) with this Court in which he raises these two claims:

Claim 1: The trial court's decision to permit Best's expert testimony violated Federal Rule of Evidence 702 and Petitioner's rights under the Due Process Clause of the Fourteenth Amendment because Best was allowed to opine on matters outside of his expertise. (*Id.* at p. 6; ECF 5-1 at pp. 11-18); and,

Claim 2: The Commonwealth introduced insufficient evidence to sustain Petitioner's conviction of attempted murder because it failed to

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technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." At the time of Petitioner's trial Pennsylvania law applied the "general acceptance" test for the admissibility of scientific, technical, or other specialized knowledge testimony. *See Commonwealth v. Hopkins*, 231 A.3d 855, 869 (Pa. Super. Ct. 2020); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003). It rejected the federal test derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That remains true under the current version of the state's Rule 702.

[4] Petitioner also argued on direct appeal that the Commonwealth introduced insufficient evidence to support his aggravated assault and firearms convictions. He did not raise those claims in this federal habeas case. (*See* ECF 5 at p. 5; ECF 5-1 at pp. 19-23.)

> prove beyond a reasonable doubt that he acted with a specific intent to kill. (*Id.* at p.5; ECF 5-1 at pp. 19-23.)

Respondents have filed the Answer (ECF 17) and the relevant state court records (ECF 17 and 19) and Petitioner has filed his Reply (ECF 24).

III. Discussion

A. Jurisdiction

The Court has jurisdiction under 28 U.S.C. § 2254, the federal habeas statute applicable to prisoners in custody pursuant to a state-court judgment. It permits a federal court to grant a state prisoner a writ of habeas corpus "on the ground that he or she is in custody in violation of the Constitution...of the United States." 28 U.S.C. § 2254(a). Errors of state law are not cognizable. *Id.*; *see, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Indeed, the Court is bound by the state courts' determinations of state law. *See, e.g.*, *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004).

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

B. Exhaustion and Procedural Default

The "exhaustion doctrine" requires that a state prisoner raise his federal habeas claims in state court through the proper procedures before he litigates them in a federal habeas petition.

28 U.S.C. § 2254(b), (c); *see, e.g.*, *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). It is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts[.]" *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

The United States Court of Appeals for the Third Circuit has explained:

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

Nara v. Frank, 488 F.3d 187, 197-98 (3d Cir. 2007).

"It is not sufficient that all the facts necessary to support the federal claim were before the state courts." *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001). "If state courts are to be given the opportunity to correct alleged violations of its prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66.

Additionally, a petitioner must have "invoke[d] one complete round of the State's established appellate review process[,]" to satisfy the exhaustion requirement. *O'Sullivan*, 526 U.S. at 845. In Pennsylvania, this requirement means that a petitioner in a non-capital case such as this one must have first presented every federal constitutional claim raised in his federal habeas

petition to *the Superior Court either on direct or PCRA appeal. See, e.g., Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

The doctrine of procedural default, like the doctrine of exhaustion, is "grounded in concerns of comity and federalism," *Coleman*, 501 U.S. at 730. To summarize, it provides that a Pennsylvania state prisoner in a non-capital case defaults a federal habeas claim if he: (a) failed to present it to the Superior Court and he cannot do so now because the state courts would decline to address the claims on the merits because state procedural rules (such as, for example, the one-year statute of limitations that applies to collateral proceedings) bar such consideration; or (b) failed to comply with a state procedural rule when he presented the claim to the state court, and for that reason the Superior Court declined to address the federal claim on the merits. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 851-56 (1999) (Stevens, J. dissenting) (describing the history of the procedural default doctrine); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Lines v. Larkins*, 208 F.3d 153, 162-69 (3d Cir. 2000).

As the Supreme Court recently explained:

> State prisoners . . . often fail to raise their federal claims in compliance with state procedures, or even raise those claims in state court at all. If a state court would dismiss these claims for their procedural failures, such claims are technically exhausted because, in the habeas context, "state-court remedies are. . . 'exhausted' when they are no longer available, regardless of the reason for their unavailability." *Woodford v. Ngo*, 548 U.S. 81, 92-93, 126 S. Ct. 2378, 165 L. Ed.2d 368 (2006). But to allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule. *See Coleman*, 501 U.S. at 732, 111 S. Ct. 2546. Thus, federal habeas courts must apply "an important 'corollary' to the exhaustion requirement": the doctrine of procedural default. *Davila [v. Davis]*, 582 U.S., at — , 137 S. Ct. [2058], 2064 [2017]. Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts "consistent with [the State's] own procedural rules." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed.2d 518 (2000).
>
> Together, exhaustion and procedural default promote federal-state comity. Exhaustion affords States "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth v. Serrano*, 454 U.S. 1, 3, 102

> S. Ct. 18, 70 L. Ed.2d 1 (1981) (per curiam), and procedural default protects against "the significant harm to the States that results from the failure of federal courts to respect" state procedural rules, *Coleman*, 501 U.S. at 750, 111 S. Ct. 2546. Ultimately, "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without [giving] an opportunity to the state courts to correct a constitutional violation," *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 94 L .Ed. 761 (1950), and to do so consistent with their own procedures, *see Edwards*, 529 U.S. at 452-453, 120 S. Ct. 1587.

Shinn v. Ramirez, 142 S. Ct. 1718, 1732 (2022).

When a claim is procedurally defaulted a petitioner can overcome the default if he shows "cause for the default and actual prejudice as a result of the alleged violation of federal law[.]" *Coleman*, 501 U.S. at 750. "'Cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him[.]" *Id.* at 753 (emphasis in original). A petitioner may also avoid the default of a claim by showing that the federal habeas court's failure to consider it will result in a fundamental miscarriage of justice. *See, e.g., Lines*, 208 F.3d at 160. This type of "gateway" actual innocence claim requires newly presented evidence of "actual innocence" that is "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error[.]" *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see also McQuiggin v. Perkins*, 569 U.S. 383 (2013).

C. Standard of Review

In 1996, Congress made significant amendments to the federal habeas statutes with the enactment of the AEDPA. Among other things, AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)). It reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems,

not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotations and citation omitted).

One of the things that AEDPA put into place was a new standard of review, which is codified at 28 U.S.C. § 2254(d). It applies to any federal habeas claim "that was adjudicated on the merits" by the Superior Court[5] and, in relevant part, it prohibits a federal habeas court from granting relief unless the petitioner established that the Superior Court's "adjudication of the claim":

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1).[6] For the purposes of § 2254(d), a claim has been "adjudicated on the merits in State court proceedings" when the state court (here, the Superior Court) made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground. *See, e.g.*, *Richter*, 562 U.S. at 98-100; *Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2014).

In applying § 2254(d)(1), this Court's first task is to ascertain what law falls within the scope of the "clearly established Federal law, as determined by the Supreme Court of the United

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

[6] Section 2254(d)(1) applies to questions of law and mixed questions of law and fact. As explained below, Petitioner presented only one cognizable claim (Claim 2) to the Superior Court to the Superior Court. That claim (Claim 2) presents a mixed question of law and fact and therefore § 2254(d)(1) applies to this Court's review. Another provision of AEDPA's standard of review, codified at § 2254(d)(2), provides that a petitioner must show that the state court's adjudication of a claim "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." This provision applies when a petitioner "challenges the factual basis for" the state court's "decision rejecting a claim[.]" *Burt v. Titlow*, 571 U.S. 12, 18 (2013). Section § 2254(d)(2) is not applicable to this case because the Superior Court's decision to deny Claim 2 was not premised on a finding of fact. Rather, the Superior Court applied the historical facts (the evidence introduced at Petitioner's trial) to the law when it denied Claim 2.

States[,]" 28 U.S.C. § 2254(d)(1). It is "'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 280 (2016) (en banc) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

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

A "run-of-the-mill" state-court adjudication applying the correct legal rule from Supreme Court decisions to the facts of a particular case will not be "contrary to" Supreme Court precedent. *Williams*, 529 U.S. at 406. Thus, the issue in most federal habeas cases is whether the adjudication by the state court survives review under § 2254(d)(1)'s "unreasonable application" clause.

"A state court decision is an 'unreasonable application of federal law' if the state court 'identifies the correct governing legal principle,' but 'unreasonably applies that principle to the facts of the prisoner's case.'" *Dennis*, 834 F.3d at 281 (quoting *Williams*, 529 U.S. at 413). To satisfy his burden under this provision of AEDPA's standard of review, Petitioner must do more than convince this Court that the Superior Court's decision was incorrect. *Id.* He must show that it

"'was *objectively* unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409) (emphasis added by Court of Appeals). This means that Petitioner must prove that the Superior Court's decision "*was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*" *Richter*, 562 U.S. at 103 (emphasis added). As the Supreme Court noted:

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

Id. at 102.

If, when evaluating a claim, the Court determines that the petitioner has satisfied AEDPA's standard of review, the Court must then "proceed to review the merits of the claim *de novo* to evaluate if a constitutional violation occurred." *Vickers*, 858 F.3d at 849 (citing *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)).[7] That is because "a federal court can only grant the Great Writ if it is 'firmly convinced that a federal constitutional right has been violated[.]'" *Id.* (citing *Williams*, 529 U.S. at 389, and *Horn v. Banks*, 536 U.S. 266, 272 (2001) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review...none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]")).

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[7] These steps "sometimes merge in cases in which the federal habeas court determines that the state court engaged in an 'unreasonable application' of clearly established Supreme Court precedent because it will be apparent from the explication of why the state court unreasonably applied that precedent that, under any reasonable application, a constitutional violation did occur." *Vickers*, 858 F.3d at 849 n.8.

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

D. Petitioner's Claims

Claim 1

In Claim 1, Petitioner contends that the trial court erred when it permitted Best to testify as an expert witness because Best had no expertise in reviewing x-ray images. Petitioner claims that the admission of Best's expert testimony violated his due process rights. He also asserts a violation of Rule 702 of the *Federal* Rules of Evidence, but that rule had no applicability to his trial, which was governed by the Pennsylvania Rules of Evidence.

As explained above, when Petitioner challenged the admission of Best's testimony in his direct appeal to the Superior Court, he argued only that the trial court abused the discretion afforded to it under Rule 702 of the Pennsylvania Rules of Evidence. He did not also assert that the admission of Best's testimony violated his due process rights. (Pet's Appellate Br., ECF 17-4 at pp. 37-41.)

In denying Petitioner's state-law claim, the Superior Court held as follows:

> "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion. The standard for qualification of an expert witness is a liberal one. The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. A witness does not need formal education on the subject matter of the testimony, and may be qualified to render an expert opinion based on training and experience." *Commonwealth v. Serge*, 837 A.2d 1255, 1259 (Pa. Super. 2003); Pa.R.E. 702.

> Here, [Petitioner] objects to the testimony of Mr. William Best as the Commonwealth's ballistics expert. [Petitioner] claims that Mr. Best had no training or experience in radiology, and had never identified bullet caliber based on examination of x-rays. [Petitioner] argues therefore that Mr. Best was not qualified to testify as to the caliber of the bullets embedded in Mr. Elmore's body based on an x-ray analysis. The trial court however, disagreed, explaining that "Mr. Best was not interpreting the x-ray, but simply taking measurements of an object displayed on the x-ray, which was within his field of expertise." Trial Court Opinion, 3/6/13, at 22. We find no abuse of discretion in the trial court's determination that Mr. Best was qualified to testify as a ballistics expert. *See generally*, N.T., 9/10/12, at 455-467.
>
> At trial, Mr. Best's testimony was limited to opining on the caliber of the bullets in Mr. Elmore's body, based on a measurement of the length and width of the x-ray image. *Id.* Mr. Best testified that he received an education in forensic science and training in firearm and tool mark examination. *Id.* He additionally testified that he had previously qualified as a ballistics expert, and that he had taken "thousands of measurements" on bullets and employed the same methodology in measuring the x-ray image of the bullet. We conclude, here, that Mr. Best had a reasonable pretension to specialized knowledge in ballistics, and was properly qualified as an expert in that field.
>
> "[O]nce an expert is qualified to testify, the weight to be given his testimony is a matter for the jury." *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002). [Petitioner] was given the opportunity to, and did in fact conduct a rigorous cross-examination of Mr. Best regarding the limitations of measuring a bullet from an x-ray image, to discredit his methodology and conclusions. N.T, 9/10/12, at 479-486. Moreover, [Petitioner] was given the opportunity to present his own expert to refute Mr. Best's testimony. [Petitioner] opted not to do so. *See* Trial Court Opinion, 3/6/13, at 20; *In re D.Y.*, 34 A.3d 177, 183 (Pa. Super. 2011) ("Once expert testimony has been admitted, the rules of evidence then place the full burden of exploration of facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination[;] [i]t is thus the burden of opposing counsel to explore and expose any weaknesses in the underpinnings of the expert's opinion.") (citations omitted); *Commonwealth v. Petroll*, 696 A.2d 817, 835 (Pa. Super. 1997) (incorrect calculations in an expert's analysis did not disqualify him from providing expert testimony as it did not implicate his qualification to testify as an expert but rather went to the weight to be accorded his testimony, a matter to be determined by the jury). Given the foregoing, we conclude that the trial court did not abuse its discretion in admitting Mr. Best as a ballistics expert.

Shakir, 2013 WL 11248248, at *4-5.

This Court has no authority to review the Superior Court's decision because it was adjudicating a state law claim that is not cognizable under § 2254(a). *Estelle*, 502 U.S. at 67-68; *see also Priester*, 382 F.3d at 402 ("Federal courts reviewing habeas claims cannot 'reexamine

state court determinations on state-law questions.'") (quoting *Estelle*, 502 U.S at 67-68). Although Petitioner now asserts that the trial court's decision violated his due process rights, he cannot repackage a state law claim into a federal due process claim simply by stating that he was denied a fair trial based upon a ruling of state law. *See, e.g.*, *Johnson v. Rosemeyer*, 117 F.3d 104, 109-10 (3d Cir. 1997).

Additionally, because Petitioner did not argue to the Superior Court that the admission of Best's testimony violated his due process rights, that federal constitutional claim is procedurally defaulted.[8] *See, e.g.*, *Duncan*, 513 U.S. at 366 ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."); *Niemeyer v. Cameron*, No. 1:10-cv-09, 2012 WL 760830, at *8 (W.D. Pa. Jan. 23, 2012), report and recommendation adopted, 2012 WL 760835 (W.D. Pa. Mar. 7, 2012) (when petitioner litigated on direct appeal claims of trial court errors, he did not argue that those errors violated his rights under the Due Process Clause and therefore those constitutional claims were procedurally defaulted); *Bedolla Camacho v. Garman*, No. 19-cv-3454, 2020 WL 8968103, at *8 (E.D. Pa. May 29, 2020), report and recommendation adopted, 2021 WL 1105047 (E.D. Pa. Mar. 23, 2021) (same); *Curry*

[8] Respondents do not argue that Petitioner's due process claim is procedurally defaulted. However, it clearly is because Petitioner did not raise it to the Superior Court. This Court has "the authority to raise the issue of procedural default sua sponte[,]" *Evans v. Secretary Pennsylvania Dept. of Corr.*, 645 F.3d 650, 656 n.12 (3d Cir.2011), as long as Petitioner is given fair notice and an opportunity to respond and is not prejudiced. *Sweger v. Chesney*, 294 F.3d 506, 520 n.3 (3d Cir. 2002) (courts may consider sua sponte whether procedural default bars claim); *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001) (same); *Smith v. Horn*, 120 F.3d 400, 408 (3d Cir.1997) (same); *see also Day v. McDonough*, 547 U.S. 198, 205-10 (2006) (habeas court may raise statute of limitations sua sponte); *United States v. Bendolph*, 409 F.3d 155, 161-70 (3d Cir.2005) (en banc) (same). This Report and Recommendation provides Petitioner with the required notice.

v. Brittain, No. 17-cv-4842, 2018 WL 5569418, at *2 (E.D. Pa. June 26, 2018), report and recommendation adopted, No. 17-cv-04842, 2018 WL 5454290 (E.D. Pa. Oct. 29, 2018) (same).

In any event, because Petitioner's due process claim has no merit, the Court could also review it de novo and deny it on that basis. *See Lambrex v. Singletary*, 520 U.S. 518, 525 (1997) (the court may avoid the more complex issue of procedural default and evaluate the claim on the merits if it is more efficient to do so). To prevail on a due process claim, Petitioner must establish that the admission of Best's testimony was so prejudicial that it denied him a fair trial. *See Lesko v. Owens*, 881 F.2d 44, 51-52 (3d Cir. 1989) (where probative value of evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence may violate fundamental fairness and due process). Petitioner has not satisfied his burden. Defense counsel thoroughly cross-examined Best in an attempt to discredit his opinion and the Commonwealth introduced other independent evidence of his guilt on all charges. The admission of Best's testimony in no way rendered his trial fundamentally unfair. *Curry*, No. 17-cv-4842, 2018 WL 5569418, at *3 (concluding petitioner's Fourteenth Amendment claim failed on the merits because he failed to show how the introduction of the challenged evidence so infused his trial with unfairness as to deny due process of law). Thus, even if Petitioner had not procedurally defaulted a due process claim, or he could avoid the default, he still would not be entitled to relief on that claim.

In conclusion, Claim 1 in actuality is a claim of state law error and, as such, is not cognizable. To the extent Petitioner asserts an error under Rule 702 of the Federal Rules of Evidence, that claim must be denied because that Rule did not apply to his trial. As for Petitioner's due process claim, he procedurally defaulted it because he did not raise it to the Superior Court. It

also has no merit because the admission of Best's testimony did not render Petitioner's trial fundamentally unfair. For each of these reasons, the Court should deny Claim 1.

Claim 2

In Claim 2, Petitioner contends that the Commonwealth introduced insufficient evidence to support the jury's verdict that he committed the crime of attempted murder because it failed to establish beyond a reasonable doubt that he acted with a specific intent to kill, which is an element of that crime. (ECF 5 at p. 5; ECF 5-1 at pp. 19-23.) A claim that there was insufficient evidence to support the jury's verdict implicates a petitioner's due process rights and thus is cognizable in a federal habeas case. *See, e.g.*, *Travillion v. Sup't Rockview SCI*, 982 F.3d 896, 902 (3d Cir. 2020) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

The Superior Court denied Claim 2 on the merits as follows:

> "A conviction for attempted murder requires the Commonwealth to prove beyond a reasonable doubt that the defendant had the specific intent to kill and took a substantial step towards that goal. 18 Pa .C.S. §§ 901, 2502." *Commonwealth v. Blakeney*, 946 A.2d 645, 652 (Pa. 2008). "We have held that a specific intent to kill can be inferred from the circumstances surrounding an unlawful killing. Moreover, specific intent to kill may be inferred from the fact that the accused used a deadly weapon to inflict injury to a vital part of the victim's body." *Commonwealth v. Robertson*, 874 A.2d 1200, 1207 (Pa. Super. 2005).
>
> - - -
>
> ... [Petitioner] claims that he only discharged his gun as part of an attempt to rob the victims, not to kill them or cause serious bodily injury, thus negating the element of specific intent for attempted murder. Additionally, [Petitioner] argues that the Commonwealth's forensic expert [Best] examined only one of the bullets in Elmore's body, which he could not conclusively identify as a .38 caliber bullet, and that the Commonwealth presented no medical testimony that Elmore was shot in a vital area of his body, to sustain his conviction for attempted murder....
>
> The Commonwealth presented testimony that [Petitioner] approached the victims from behind, and while attempting a robbery, [Petitioner] pointed his gun at Mr. Elmore and Mr. Roberts and fired. N.T., 9/7/12, at 80-82. Mr. Elmore sustained six bullet wounds to his left hand, right calf, buttocks, and thigh. *Id.* at 166. The Commonwealth's ballistics expert testified that at least one of the bullets in Mr. Elmore's body was either a .32 or .38 caliber, and was not fired from Lucien Roberts' .45 caliber pistol. N.T., 9/10/12, at 472-473. Under the circumstances of this case, the jury could properly infer [Petitioner's] specific intent to kill ... to

> sustain [Petitioner's] conviction[ ] for attempted murder ... [.] *See Manley*, 985 A.2d at 272 (Pa. Super. 2009) (where appellant attacked the victim, shooting multiple shots, five of which hit the victim and the victim was struck in the groin, thigh, shoulder and twice in the hand, although none of the bullets hit the victim in a vital organ, the jury could properly infer the specific intent to kill from these circumstances); *Commonwealth v. Jackson*, 955 A.2d 441 (Pa. Super. 2008) (where a detective chased a defendant who was armed with a gun and shooting at a third person, and defendant turned, looked at the detective, and raised his arm toward the detective, the fact finder could have reasonably found that defendant took a substantial step toward intentionally killing the detective, even though defendant did not fire the gun); *Commonwealth v. Wyche*, 467 A.2d 636 (Pa. Super. 1983) (where the appellant aggressively attacked the victim, shooting four shots, three of which hit their target, although the fatal bullet entered the victim through the buttock, the jury could properly infer the specific intent to kill from these circumstances).

Shakir, 2013 WL 11248248, at *10-11.

The "clearly established Federal law," 28 U.S.C. § 2254(d)(1), by which to analyze the Superior Court's adjudication of this claim is set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, the Supreme Court explained that "[t]he Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt" of each element of the offense. 443 U.S. at 309. "This reasonable doubt standard of proof requires the finding of fact 'to reach a subjective state of *near certitude* of the guilt of the accused." *Travillion*, 982 F.3d at 902 (3d Cir. 2020) (quoting *Jackson*, 443 U.S. at 315) (emphasis supplied by Court of Appeals).

"Under *Jackson*, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson*, 443 U.S. at 319) (emphasis supplied by the Supreme Court). "*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam) (quoting *Jackson*, 443 U.S. at 319).

When it denied this claim, the Superior Court applied the Pennsylvania equivalent of the *Jackson* standard. *Shakir*, 2013 WL 11248248, at *10-11; *see also Evans v. Court of Common Pleas, Delaware Cnty.*, 959 F.2d 1227, 1233 (3d Cir. 1992) (the test for insufficiency of the evidence is the same under both Pennsylvania and federal law). Because it applied the correct legal standard, its adjudication satisfies review under the "contrary to" clause of § 2254(d)(1). *Williams*, 529 U.S. at 406.

The next inquiry for this Court, then, is whether the Superior Court's decision was an "unreasonable application of" *Jackson* under § 2254(d)(1). The Supreme Court has stressed to federal habeas courts conducting this analysis that:

> [w]e have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the…verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, __ (2011) (*per curiam*) (slip op., at 1). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. __, __ (2010) (slip op., at 5)).

Coleman, 566 U.S. at 651.

As explained above, to show that the Superior Court's adjudication of Claim 2 was "objectively unreasonable," Petitioner must do more than convince this Court that the Superior Court's decision was incorrect. *Dennis*, 834 F.3d at 281. He must prove that the Superior Court's decision "*was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.*" *Richter*, 562 U.S. at 103 (emphasis added). Petitioner has not met that difficult burden here. Thus, he has not

shown that the Superior Court's decision to deny his challenge to the sufficiency of the evidence was an "unreasonable application of" *Jackson.*

Finally, to the extent that Petitioner's actual challenge is that the jury's verdict *was against the weight of the evidence*, such a claim is purely one of state law that is distinct from a federal due process claim, and, as such, it is not cognizable in federal habeas corpus. *Tibbs v. Florida*, 457 U.S. 31, 37-45 (1982) (weight of evidence claims raise questions of credibility; it is different from a claim that the evidence was insufficient to support the conviction); *McKinnon v. Sup't, Great Meadow Corr. Facility*, 422 F. App'x 69, 75 (2d Cir. 2011) ("the argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus[.]"); *see, e.g.*, *Anger v. Wenerowicz*, No. 2:11-cv-1421, 2012 WL 5208554, *2 (W.D. Pa. Sept. 10, 2012) (a claim that the verdict was against the weight of the evidence "is simply not a cognizable claim in federal habeas proceedings as it raises solely a state law claim."), report and recommendation adopted by 2012 WL 5208654 (W.D. Pa. Oct. 22, 2012); *Davis v. Lavan*, No. 2:04-cv-456, 2004 WL 2166283, *9 (E.D. Pa. Sept. 23, 2004) (same).

In conclusion, the Court should deny Claim 2 because the Superior Court's adjudication of it withstands review under § 2254(d)(1). To the extent that Petitioner's actual challenge is that the jury's verdict was against the weight of the evidence, the Court should deny that claim because it is a state law claim that is not cognizable under § 2254.

E. Certificate of Appealability

AEDPA codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from...the final order in a habeas corpus proceeding in which the detention complained

of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). It also provides that "[a] certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Applying those standards here, jurists of reason would not find it debatable whether Petitioner's claims should be denied for the reasons given herein. Accordingly, the Court should not issue a certificate of appealability on any of Petitioner's grounds for relief.

IV. CONCLUSION

Based on the foregoing, it is respectfully recommended that the Court deny each claim raised in the Petition (ECF 5) and deny a certificate of appealability as to each claim. Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017); *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Dated: July 7, 2022

/s/ Patricia L. Dodge
PATRICIA L. DODGE
United States Magistrate Judge

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

YA-SIN EL-AMIN SHAKIR,	)	
	)	
Petitioner,	)	
v.	)	**Civil Action No. 19-1652**
	)	
MARK CAPOZZA and BEAVER COUNTY DISTRICT ATTORNEY,	)	
	)	
	)	
Respondents.	)	

MEMORANDUM OPINION and ORDER

Ya-Sin El-Amin Shakir (Petitioner) has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his state court judgment of sentence following his conviction for attempted murder, four counts of aggravated assault, firearms not to be carried without a license, and recklessly endangering another person. ECF No. 4. The case was referred to Magistrate Judge Patricia L. Dodge in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Civil Rules 72.C and D. Magistrate Judge Dodge issued a Report and Recommendation, ECF No. 29, filed July 7, 2022, recommending that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied. Petitioner timely filed Objections on August 4, 2022. ECF No. 33. As explained below, the Court finds that Plaintiff's Objections do not undermine the recommendation of the Magistrate Judge.

Discussion

The factual background and procedural background of this case are presented at length in the Magistrate Judge's Report and will not be repeated here. ECF No. 29, at 1-6. An abbreviated background, helpful to addressing Petitioner's Objections, follows. On the night of the events that led to his conviction, Petitioner was observed to be in possession of a silver firearm. When he was arrested a few days later, Petitioner was found to be in possession of six

.38 caliber bullets. The silver firearm was not found. Another person at the scene that night had fired bullets from his .45 caliber semi-automatic pistol. A victim of the gunshots that night, Mr. Elmore, was shot six times, with the bullets remaining lodged in his body, even as of the time of trial. The Commonwealth called William Best to testify as an expert in ballistics. The trial court found Mr. Best to be qualified and was he permitted to offer testimony. Relevant to the attempted murder charge against Petitioner, Mr. Best testified as to the measurements of a bullet depicted on Mr. Elmore's x-ray to conclude that the bullet in Mr. Elmore's body was not a .45 caliber bullet. He further testified that he could not make the same exclusion as to a .32 caliber or .38 caliber bullet. Petitioner raised two claims in his Petition, one aimed at Mr. Best's testimony, and the other at the sufficiency of the evidence on the attempted murder charge. ECF No. 29, at 5-6. Petitioner objects to the Magistrate Judge's recommendation to dismiss both claims.

Claim One

On direct appeal to the Pennsylvania Superior Court, Petitioner challenged the admission of Mr. Best's testimony, in part, as to the measurements of a bullet depicted on the x-ray. He argued that the admission of Mr. Best's expert testimony was an abuse of discretion under Pennsylvania Rule of Evidence 702. The Superior Court denied the challenge. In the present habeas petition Claim One states:

> The trial court's decision to permit Best's expert testimony violated Federal Rule of Evidence 702 and Petitioner's rights under the Due Process Clause of the Fourteenth Amendment because Best was allowed to opine on matters outside of his expertise.

Magistrate Judge Dodge found that the federal court had no authority to review the Superior Court's decision on a state law claim. ECF No. 29, at 14-15. Next, Judge Dodge found that Petitioner's alleged due process claim was procedurally defaulted because he had not raised a

due process claim before the Superior Court. Finally, Judge Dodge determined that Petitioner's due process claim had no merit, even if it had not been defaulted.

Sua Sponte Raising Procedural Default

Petitioner objects to the Magistrate Judge sua sponte finding that Claim One was procedurally defaulted. Under Third Circuit case law, courts have "the authority to raise the issue of procedural default sua sponte," so long as the petitioner is given notice and an opportunity to be heard. Evans v. Secretary Pennsylvania Dept. of Corr., 645 F.3d 650, 656 n.12 (3d Cir. 2011); see also Sweger v. Chesney, 294 F.3d 506, 520–21 (3d Cir. 2002) (courts may raise the issue of procedural default sua sponte). Here, Judge Dodge indicated that Petitioner was notified of the sua sponte procedural default argument in the Report and Recommendation, and his "opportunity to be heard" on the matter of procedural default occurs by way of Petitioner's Objections. Fortney v. Wainwright, No. 1:20-CV-339-SPB-RAL, 2022 WL 2790711, at *1–2 (W.D. Pa. July 15, 2022) (recognizing that the Magistrate Judge explained that the Report and Recommendation gave Petitioner the required notice and he was given the opportunity to respond to the issue of procedural default in his objections). In his Objections, Petitioner did present a thorough argument, not only on the issue of the Court addressing procedural default sua sponte, but also on the substantive issue of whether his claim was in fact procedurally defaulted. This Objection is overruled.

Non-Cognizable State Law Claim

Next, Petitioner objects to the conclusion that this Court cannot rule on his claim because it concerns an issue of state law; instead, he argues that his due process claim was fairly presented to the Superior Court. Petitioner argues that he "put the state court on notice that his

claim was embedded within the due process clause." ECF No. 33, at 8. On appeal to the Pennsylvania Superior Court, Petitioner's relevant claim was stated as:

> Was [it] error to qualify William Best as an expert witness by concluding that Mr. Best had a reasonably specialized knowledge as to the subject matter for which he rendered testimony?

Com. v. Shakir, No. 517 WDA 2013, 2013 WL 11248248, at *3 (Pa. Super. Ct. Dec. 17, 2013). The Court has reviewed the relevant pleadings, including the Superior Court's opinion addressing Petitioner's claim as to the ballistics expert. The Court agrees that Petitioner did not present a claim to the Superior Court that put that Court on notice that he was claiming his due process rights were violated by the admission of Mr. Best's testimony. Thus, the Superior Court's ruling, based on a Pennsylvania state law evidentiary issue, is not cognizable under 28 U.S.C. § 2254(a).

The Court also finds that Petitioner did not present his due process claim to the Superior Court. In his brief, Petitioner states that he argued before the state court that the expert's testimony "was premised on junk science and should not have been introduced." ECF No. 33, at 8. Petitioner's "subsidiary argument was that the expert was not qualified to render such a complex opinion without the proper education and training." Id. He concludes that his argument "is not a claim that is simply based on state law, but one firmly embedded in the United States Constitution." Id. The Court disagrees that Petitioner fairly presented a due process claim to the Superior Court. Even as the claim is presented in his Petition and Objections, it is clear that Petitioner's claim concerns an evidentiary issue primarily centered on Mr. Best testifying as a ballistics expert, with special focus on Mr. Best's testimony as to his measurement of the depiction of a bullet on an x-ray. This Objection is overruled.

Due Process Claim

Finally, Petitioner objects to the finding that there is no merit to his claim that his due process rights were violated. Specifically, he objects to the Magistrate Judge's conclusion that the admission of Mr. Best's testimony did not render Petitioner's trial fundamentally unfair. Petitioner again argues that because Mr. Best was permitted to testify, his due process rights were violated. He does not present a persuasive argument. In part, he argues, without sufficient explanation, that his counsel's thorough cross-examination of Mr. Best was not enough to provide due process. Petitioner also continues to incorrectly describe Mr. Best's testimony and measurement of the depiction of a bullet on the x-ray as somehow providing expert testimony on x-rays and x-ray reading and interpretation. The Court reiterates what the state courts have stated on this subject: Mr. Best was not qualified as an expert in reading or interpreting x-rays and he did not attempt to read or interpret an x-ray. Indeed, Petitioner's counsel evoked substantive testimony demonstrating that Mr. Best had no expertise with respect to x-rays. Mr. Best merely measured an object displayed on an x-ray. The Objection is overruled.

Petitioner's Objections do not undermine the Magistrate Judge's Report and Recommendation as to Claim One.

Claim Two

In Claim Two, Petitioner argues that there was insufficient evidence introduced at trial to sustain his conviction for attempted murder. Petitioner's Objection is a recitation of his argument as to why the evidence was insufficient and that no rational juror could conclude that he was guilty of attempted murder. The Court finds no error with the Magistrate Judge's analysis or conclusion, and therefore Petitioner's objection to Ground Two is overruled.

ORDER

After de novo review of the pleadings and the documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 21st day of November 2022,

IT IS HEREBY ORDERED that Petitioner's Objections are overruled and the Petition is DENIED.

IT IS FURTHER ORDERED that the Report and Recommendation, ECF No. 29, filed on July 7, 2022, by Magistrate Judge Dodge, is adopted as the opinion of the Court as supplemented by this Memorandum Opinion. A certificate of appealability is DENIED, as jurists of reason would not disagree with the analysis of the Report.

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

Marilyn J. Horan
United States District Court Judge

cc: Ya-Sin El-Amin Shakir, pro se
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3359

YA-SIN EL-AMIN SHAKIR,
Appellant

v.

SUPERINTENDENT FAYETTE SCI;
DISTRICT ATTORNEY BEAVER COUNTY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(No. 2-19-cv-01652)
District Judge: Honorable Marilyn J. Horan

SUR PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, *Circuit Judges*[*]

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[*]The Honorable Joseph A. Greenaway, Jr. was a member of the merits panel. Judge Greenaway retired from the Court on June 15, 2023 and did not participate in the consideration of the petition for rehearing.

The petition for rehearing filed by appellant Ya-Sin El-Amin Shakir in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court en banc. It is now hereby **ORDERED** that the petition is **DENIED**.

BY THE COURT

s/ Paul B. Matey
Circuit Judge

Dated: September 8, 2023
PDB/cc: Ya-Sin-El-Amin Shakir