NO.

IN THE SUPREME COURT OF THE UNITED STATES

TYRE GABLE, PETITIONER

vs.

SUPERINTENDENT SCI FRACKVILLE, ET AL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jonathan J. Sobel, Esquire
LAW OFFICES OF JONATHAN J. SOBEL
15000 Walnut Street, Suite 2000
Philadelphia, PA 19102
(215) 735-7535

Attorney for Petitioner, Tyre Gamble

QUESTION PRESENTED

1. Did the Court of Appeals violate the statutory language of the Antiterrorism and Effective Death Penalty Act of 1996, by denying habeas corpus relief based upon Circuit precedent which itself extended this Court's holding in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), beyond the parameters of that decision?

2. Is it at all possible to demonstrate prejudice under *Strickland v. Washington,* 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) stemming from a defective reasonable doubt instruction when such an instruction has the effect of vitiating all of the jury's findings?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RELATED CASES

Court of Common Pleas Philadelphia County:

Commonwealth of Pennsylvania v. Tyre Gamble, CP-51-CR-0600981-2004, May 12, 2020

Superior Court of Pennsylvania:

Commonwealth v. Tyre Gamble, 2944 EDA 2019, June 8, 2021

United States District Court (Eastern District of Pennsylvania):

Tyre Gamble v. Superintendent, SCI Frackville, et al., 21-3015, 2022 U.S. Dist. LEXIS 239258 (E.D. Pa. Aug. 12, 2022); and 2023 U.S. Dist. LEXIS 32699 (E.D. Pa. Feb. 28, 2023)

United States Court of Appeals (3rd Circuit):

Tyre Gamble v. Superintendent, SCI Frackville, et al., 23-1448, July 11, 2023 and October 5, 2023

TABLE OF CONTENTS

INDEX TO APPENDIX:

TABLE OF AUTHORITIES CITED

Amendments

Statues

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tyre Gamble respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW:

Order and opinion of the Court of Common Pleas, Philadelphia County, First Judicial District, Criminal Trial Division, denying Petition for Post-Conviction Relief, Brinkley, J., dated May 12, 2020

Opinion of the Superior Court of Pennsylvania, affirming the PCRA Court's denial of the Petition for Post-Conviction Relief, Shogan, J., dated June 8, 2021

Report and Recommendation of the United States District Court for the Eastern District of Pennsylvania recommending denial of Petitioner's Petition for Habeas Corpus Relief of the Order of the United States District Court for the Eastern District of Pennsylvania approving and adopting the denial of Petitioner's Petition for Habeas Corpus Relief of the Honorable Gerald McHugh, U.S.D.J., dated February 28, 2023

Order of the United States Court of Appeals for the Third Circuit denying Petitioner's Application for a Certificate of Appealability, of the Honorable Anthony J. Scirica, U.S.C.J., dated July 11, 2023

Order of the United States Court of Appeals for the Third Circuit denying Petitioner's Request for a Rehearing *En Banc*, of the Honorable Anthony J. Scirica, U.S.C.J., dated October 5, 2023

JURISDICTION

The United States Court Of Appeals For The Third Circuit entered judgment on July 11, 2023. (A64-A67)

A timely Petition For Rehearing And Rehearing En Banc was thereafter denied on October 5, 2023, and a copy of the Order denying rehearing appears herein in the Appendix. (A68-69)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Amendments implicated in this matter are the 5th and 14th Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Tyre Gamble was convicted of murder and sentenced to life imprisonment following an admittedly defective jury instruction. The Pennsylvania Courts, both state and federal have routinely rejected the jury instruction on all fours with the instruction given in Gamble's case. However, because no assigning of error to the repugnant jury instruction on direct appeal was raised and objection was made only on petition for collateral relief, Petitioner was not entitled to any remedy because he had not demonstrated prejudice.

ARGUMENT

POINT I

Did the Court of Appeals Violate the Statutory Language of the Antiterrorism and Effective Death Penalty Act, of 1996, by Denying Habeas Corpus Relief Based Upon Circuit Precedent, which itself Extended the Holding in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) Beyond the Parameters of That Decision?

The first question presented in this petition requires direction from this court. Following the pronouncement of the rule established in *Weaver v. Massachusetts,* 137 S. Ct. 1899 (2017), Courts of Appeal(s) have taken liberty to apply its rationale beyond the natural reading of the decision. The Courts of Appeal for the Third Circuit, for the first time, required a showing of prejudice flowing from a defective reasonable doubt instruction. Petitioner hearing contends that doing so violates the plain language of the Antiterrorism and Effective Death Penalty Act of 1996 [hereinafter referred to as "AEDPA"].

Instantly, petitioner raised a claim of ineffective assistance of counsel in state court based on councils failure to object to a defective reasonable doubt instruction. Citing this court's seminal decisions in *Cage v. Louisiana*, 498 U.S. 39 (1990) and *Sullivan Louisiana,* 508 U.S. 275 (1993), petitioner argued violations of the right to due process. Following unsuccessful

challenges in the state courts, petitioner raised the same issue in the Federal District Court.

The District Judge to whom the case was assigned, the honorable Gerald A. McHugh, submitted the case to a Magistrate Judge for the issuance of a Report and Recommendation. The Magistrate Judge issued a report and recommendation recommending the petition be dismissed. The magistrate, relying on the Third Circuit precedent, *Baxter v. Superintendent, Coal Township*, 998 F.3d3 542 (3d Cir. 2021), held that under *Weaver*, a showing of actual prejudice was required.

The District Court authored the opinion in *Brooks v. Gilmore*, 2017 U.S. Dist. LEXIS 127703 (E.D. Pa. 2017). There, Judge McHugh found a reasonable doubt instruction mirroring the one given in petitioners trial to be unconstitutional. However faced with the same reasonable doubt instruction Judge McHugh previously determined warranted reversal, this time Judge McHugh found himself bound by the *Baxter* decision. Judge McHugh explained that:

> Although I read *Weaver* as supporting a continued presumption of prejudice, see 137 S. Ct. 1908, *Baxter* is binding in this Circuit with the result that petitioner's failure to show prejudice defeats his claim for relief here.

(A. 63).

Petitioner filed an application for a Certificate of Appealability, in the Third Circuit, arguing that reliance upon Circuit law as the basis to deny relief violated the plain language of the "AEDPA." The Third Circuit denied that application on July 11th, 2023 referencing *Baxter* in support of its rationale. Petitioner then sought rehearing, *en banc,* again asserting that the District Court erred in denying relief based on circuit precedent. Petitioner further argued that *Baxter* was wrongly decided as it impermissibly extended the scope of *Weaver* to a context beyond the decision. To that end, petitioner once more claimed that the adjudication violated the plain statutory language of the AEDPA.

In *Weaver*, this court discussed the two doctrines of structural error and ineffective assistance of counsel, deciding whether courtroom closure during the jury selection raised an ineffective assistance claim required a showing of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Ultimately concluding prejudice must be shown, the court made clear that "[n]either the reasoning nor the holding here calls into question the courts precedence determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness either to the defendant in the

specific case or by persuasive undermine undermining of the systemic requirements of a fair and open judicial process." *Weaver*, 137 U.S. at 1911.

Despite the unambiguous language of *Weaver,* the Third Circuit held quite the opposite. That court determined that the presumption of prejudice is triggered *only* when a trial court fails to *give* a reasonable doubt instruction, but when a reasonable doubt instruction is given, the rules concerning evaluating a jury instruction apply. *Baxter,* 998 F.3d at 548, citing *United States v. Isaac*, 134 F. 3d 1999 (3d Cir. 1998). This notwithstanding the explicit acknowledgment by the *Baxter* panel that this court limited the holding to the context of trial courts failure to object to the closure of the courtroom during jury selection. *Baxter,* 998 F.3d at 549 n. 6.

When interpreting a statute, this court has stated that its task is to construe what Congress has enacted. *Duncan v. Walker*, 121 S. Ct. 2120, 2124 (20000. "[W]e begin, as always with the language of the statute." *Id. Williams v. Taylor*, 529 U.S. 420, 431 (2000). Accordingly this court stated, "[i]t is our duty to give effect, if possible, to every clause and word of a statute." *Duncan*, 121 S. Ct. at 2125, citing *United States v. Menasche*, 348 U.S. 538, 539 (1955).

The AEDPA limits a federal court from grating relief unless the petitioner establishes that the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. §2254(d).

"'Clearly established federal law' means the 'governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). This court has "repeatedly emphasized" that "circuit precedent does not constitute 'clearly established federal law as determined by the Supreme Court.'" under section 2254(1). *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014)(per curiam), citing *Lopez v. Smith*, 135 U.S. 1, 4-5 (2010)(per curiam). Additionally "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the [Supreme Court] has not announced.'" *Lopez*, 135 S. Ct. at 4, quoting *Marshall v. Rodger*, 569 U.S. 58 (2013)(per curiam) That is precisely what the *Baxter* decision does.

Here, the decision to deny habeas corpus relief was predicated solely on circuit precedent. Not only did *Baxter* serve as the determining factor, but the decision also itself impermissibly extends the holding in *Weaver* to a context where it does not belong. *Williams*, 120 S. Ct. at 1521 (" . . . a state court decision also involves an unreasonable application of this court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply. . .") *Weaver* did not call the principal holding of *Sullivan* into question, nor did it supplant that decision. Yet, an inferior federal court has decided on its own to speak for this court on a matter that strikes at the core of fundamental fairness; defective reasonable doubt instruction. *Sullivan*, *supra*.

Unfortunately, at least in the Third Circuit, usurping this court's role as the final arbiter of determining clearly established federal law is not an isolated event. In *Mathias v. Superintendent*, 876 F.3d 462 (3d Cir. 2017), another case involving faulty jury instructions, the Court of Appeals reversed the grant of habeas corpus relief period applying the ruling of this court in *Francis v. Franklin*, 471 U.S. 307 (1985), the District Court in that case awarded the defendant a new trial. The judge found that the trial court instructed the jury in a manner that relieved the prosecutor of the duty to

prove reasonable doubt on a critical element of the crimes charged. The court found that the jury was instructed on an incorrect statement of Pennsylvania as well as an incorrect statement of law which did not cure the defective instruction.

On appeal by the Commonwealth, the Third Circuit reversed the judgment of the District Court. The panel held that the *per curiam* decision of this court in *Middleton v. McNeil*, 541 US 433 (2004) rendered *Francis* less than clearly established. Consequently, Matthias's failure to consider *Middleton* proved fatal to his claims.

In a twisted turn of events, less than one year later, another panel of the Third Circuit granted habeas relief on the very instructional error it reversed in *Mathias*. *Bennett v. Superintendent*, 886 F.3d 268 (3d Cir. 2018). In doing so, that panel pointed out that a previous panel had "noted a potential 'tension' between *Francis* and *Middleton* but declined to resolve it." *Bennett*, 886 F.3d at 291, n. 16. The court went on to state "[w]e now hold that *Middleton* did not overrule *Franklin*." *Id.*

The *Baxter* decision overturns *Sullivan* by implication. *Bennett*, 886 F.3d at 291, n. 16, citing *Agostini v. Felton*, 521 U.S. 203 (1997). No decision of this court has held a defective reasonable doubt instruction to be amenable

to harmless error analysis. *Sullivan*, *supra*. Indeed, the court in *Weaver* made clear its holding applied to no other structural errors beyond that before the bench. That is, courtroom closure during jury *voir dire*. But, the Third Circuit decided on its own that *Weaver* did not go far enough.

The necessity of clarity from this court is further demonstrated by the recent decision of the Pennsylvania Supreme Court in *Commonwealth v. Drummond*, 285 A.3d 625 (Pa. 2022). In that case, the court found that a reasonable doubt instruction, identical to the one given in this case, unconstitutional. Again, raised as an ineffective assistance of counsel claim for failing to object, the Pennsylvania Supreme Court denied relief upon concluding counsel was not required to predict a change in the law. Most notably, however the court declined to express a view on whether prejudice should be presumed or proven. *Drummond*, 285 A.3d at 650, n. 54. That the Pennsylvania Supreme Court left that question to another day is evidence that guidance from this court is critical to ensure that clearly established federal law, as determined by this court, remains "clearly established until this court states otherwise."

Petitioner navigated through the state court system relying primarily on this court's decision in *Sullivan*, only to be ambushed with *Baxter* in the final

hour. The decision here can best be read as petitioner failed to demonstrate the state courts adjudication of the claim was an unreasonable or contrary to application of clearly established federal law as determined by the United States Court of Appeals for the. Words that simply do not appear in the statutory text of the AEDPA. As such, certiorari should be granted so as to present inferior courts from devising their own interpretation of this court's decisions. Otherwise, congressional intent to limit federal law to that emanating from this court would be meaningless.

POINT II

Is it at all Possible to Demonstrate Prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), Stemming from a Defective Reasonable Doubt Instruction When such an Instruction has the Effect of Vitiating All of the Jury's Findings.

Lastly, petitioner asks whether prejudice can ever be shown resulting from a defective reasonable doubt instruction? As this court has consistently held, "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantees being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan*, 113 S. Ct. at 2083.

Thus, "whether raised on direct appeal or an ineffective assistance of counsel claim, the consequences remain unquantifiable and indeterminate."

In this case the trial court gave an instruction employing an emotionally charged metaphor as an example. That instruction went as follows:

> BY THE COURT: "Now, ladies and gentlemen, I find it helpful to think about reasonable doubt in this way I know that each of you has someone in your life that you love, a precious one, spouse, a significant other, a sibling, a niece and nephew, a grandchild, each of who loves somebody
>
> If you were told by your precious one that they had a life threatening condition and the doctor was calling for surgery, you would probably say, stop. Wait a minute. Tell me more about this condition, what is this? You probably want to know what's the best protocol for treating this condition? Who is the best doctor in the region? No you are my precious one who is the best doctor in the country? You will probably research the illness. You will research the people who handle this, the hospitals.
>
> If you are like me, you will call everyone who you know who has anything to do with medicine in their life. Tell me what you know. Who is the best? Where do I go? But at the same moment the question will be called. Do you go forward with the surgery or not? If you go forward, it is not because you have moved beyond all doubt. There are no guarantees. If you go forward, it is because you have moved beyond all reasonable doubt.

Drummond, 285 A.3d at 631.

The Pennsylvania Supreme Court later adopted the opinion of Judge McHugh that the instruction violated due process. *Id.*, at 644. The court in Drummond stated that:

> When the trial judge tells the jurors to do anything other than objectively evaluate the evidence, the court effectively creates twelve standards of review, each one different from the next, silently generated in each individual juror's mind based upon the individual's lived experiences and world use of that particular juror. For some, that standard might be higher than the point at which reasonable doubt exists on a continuum. For others it will be far lower. That is where the constitutional violation occurs, down in the murky realm that lies below proof beyond a reasonable doubt, where probabilities, whims, personal defaults, short hands, habits of mind, and suppositions exist.

Drummond, 285 A.3d at 641.

At the lower level of these proceedings the Commonwealth refused to contest or otherwise endorse the propriety of the challenged instructions. Instead, the inferior federal courts place an insurmountable burden of pond petitioner to prove the unprovable. As this court has held, "a misdescription of the burden of proof . . . vitiates all of the jury's findings." *Sullivan*, 113 S. Ct. 2082. "A reviewing court can only engage in pure speculation in its view of what a reasonable jury would have done. And when it does, the "wrong entity judges the defendant's guilt." *Id.* quoting *Rose v. Clark,* 478 U.S. 570 (1986).

Here, the Court of Appeals imposed a burden upon petitioner no one could carry indeed, the court engaged in *pure speculation* under the guise of applying a *Strickland* prejudice analysis. But, there is a reason the court held an error of this sort to be structural and not amenable to harmless error analysis. That reason led petitioner to ask simply: if it is impossible for the Commonwealth to prove this error harmless, how is it possible for petitioner to prove that it was? *Sullivan, supra.*

Finally, petitioner submits that certiorari should be granted so that this court can instruct that when a defective reasonable doubt instruction is at issue, reviewing courts are to apply the standard announced in the *United States v. Cronic*, 104 S. Ct. 2039 (1984), that way, competing interests will be avoided where a true structural error can be remedied without running afoul of *Strickland.*

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Petitioner, Tyre Gamble respectfully requests that Your Honorable Court grant his Petition for a Writ Of Certiorari and issue a Certificate of Appealability.

Because reasonable jurists could debate whether the District Court should have granted habeas relief on Gamble's claims, the Third Circuit should have authorized an appeal and this Court should not allow that error to go uncorrected.

Therefore, the court should grant the petition for a writ of certiorari and summarily reverse the order of the Third Circuit denying a Certificate of Appealability.

In the end, regardless of how the Third Circuit would resolve Gamble's appeal on the merits, it is beyond question that Gamble's claim is, at minimum, "reasonably debatable."

Respectfully submitted,

s/Jonathan J. Sobel, Esquire
Jonathan J. Sobel, Esquire,
Attorney for Tyre Gamble

CERTIFICATION OF BAR MEMBERSHIP IDENTICAL TEXT, VIRUS CHECK AND WORD COUNT

I, Jonathan J. Sobel Esquire, certify that:

1. I am a member in good standing of the bar of this Court;

2. The text of the electronic format of the Petition For A Writ Of Certiorari is identical to the hard copy format;

3. A virus check was performed on the Petition For A Writ Of Certiorari, using Avast Antivirus 21.7.2481 (build 21.6.6446.683), last updated 09/10/21, and no virus was detected;

4. This Petition For A Writ Of Certiorari contains less than 9000 words.

I make this combined certification under penalty of perjury, pursuant to 28 U.S.C. 1747.

s/Jonathan J. Sobel, Esquire
Jonathan J. Sobel, Esquire
1500 Walnut Street, Suite 2000
Philadelphia, PA 19102
Attorney for Petitioner, Tyre Gamble

No.

IN THE
SUPREME COURT OF THE UNITED STATES

TYRE GAMBLE, PETITIONER vs

SUPERINTENDENT FRACKVILLE SCI, ET AL., RESPONDENT

PROOF OF SERVICE

The undersigned hereby certifies that on this date I have served the enclosed Petition For A Writ Of Certiorari on each party to the above proceeding or that party's counsel and on every other person required to be served, in the manner indicated, addressed as follows:

VIA EMAIL:

Alexander Blumenthal, Assistant District Attorney
PHILADELPHIA DISTRICT ATTORNEYS' OFFICE
3 South Penn Square
Philadelphia, PA 19107

VIA PRIORITY MAIL:

Elizabeth Prelogar,
Acting Solicitor General Office of the Solicitor General
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

January 1, 2024

s/Jonathan J. Sobel, Esquire
Jonathan J. Sobel, Esquire
Attorney for Petitioner Tyre Gamble

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	CP-51-CR-0600981-2004 CP-51-CR-0601211-2004
	:	
vs.		
	:	
	:	
TYRE GAMBLE	:	SUPERIOR COURT 3032 EDA 2019 2944 EDA 2019

OPINION

BRINKLEY, J. **MAY 12, 2020**

Defendant Tyre Gamble filed his first petition for relief under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541 *et seq.* (eff. Jan. 16, 1996), claiming ineffective assistance of counsel. After reviewing Defendant's *pro se* petition, counsel's amended petition, and the Commonwealth's motion to dismiss, this Court dismissed Defendant's petition based upon lack of merit. Defendant appealed this dismissal to the Superior Court. This Court's dismissal should be affirmed.

Background

On April 6, 2004, at approximately 3:30 p.m., Defendant shot and killed victim Taj Brokenborough-Chavis at the corner of 33rd and Wallace Streets in Philadelphia. The victim suffered a gunshot in the chest and a second one to the head. Eleven-year-old Gerald B. ("Gerald", aka "Little G") and his younger brother and cousin witnessed the murder. Gerald

panicked and ran home down the street crying. His mother, Zakia Williams ("Zakia"), had heard the gunshots and had already run outside. Gerald told his mother that he saw the shooting and that Defendant was the shooter. Sixteen-year-old Mercedes B. was taking a group of young children to the nearby playground when she heard a gunshot and saw Defendant standing over the victim. She then saw him shoot the victim in the head. Mercedes grabbed the children and ran home screaming, "[Defendant] shot someone!" Zakia did not want her son involved in the investigation so she wrote an anonymous note, which included Defendant's name and home address, and dropped it next to a police officer after authorities arrived on the scene. Defendant was well known to all of these witnesses because he lived in their neighborhood.

On November 15-18, 2005, Defendant appeared before the Honorable Renee Cardwell-Hughes for a jury trial. Gerald, Mercedes, and Rasan Davis ("Davis") (who had been talking with Defendant and Taj at the time of the shooting), all testified at trial that Defendant was the shooter. Ronald Saunders ("Saunders") refused to testify at trial but in a police interview, he told police that he heard gunshots and then saw Defendant running down the street and that he knew Defendant owned a gun. Zakia and her mother Barbara Williams ("Barbara") testified that Defendant called them both on the phone and warned Zakia to stop talking to the police. At the conclusion of trial, the jury found Defendant guilty of first degree-murder, intimidation of a witness, and possession of an instrument of crime. On January 13, 2006, Judge Hughes sentenced Defendant to a mandatory term of life imprisonment on the murder charge. With respect to the other charges, she sentenced him to concurrent terms of 2 ½ to 5 years on PIC and 3 ½ to 7 years on intimidation of a witness.

Defendant filed a direct appeal and raised the following issues: (1) whether the trial court should have granted his motion for mistrial after Alvin Chavis' testimony; (2) whether the trial

court improperly permitted hearsay testimony by witnesses Barbara Williams and Zakia Williams; (3) whether the trial court improperly allowed hearsay and irrelevant testimony by Ronald Saunders; (4) whether the trial court improperly denied his motion for an adverse inference jury instruction with respect to a note written by Zakia and not produced at trial; and (5) whether there was prosecutorial misconduct with respect to three different parts of the Commonwealth's closing argument. On January 22, 2008, the Superior Court affirmed the judgment of sentence. The Superior Court rejected all of Defendant's claims on the merits except for two (Saunders' testimony and one allegation of prosecutorial misconduct), which it found waived. The Pennsylvania Supreme Court denied *allocatur* on September 30, 2008.

On February 11, 2009, Defendant filed a first and timely PCRA petition. Marc Arrigo, Esquire was appointed PCRA counsel on May 20, 2009. On June 8, 2010, Mr. Arrigo filed a Finley letter. On April 19, 2011, Judge Hughes sent Defendant a Notice of Intent to Dismiss pursuant to Rule 907 ("907 notice"). On May 12, 2011, Defendant filed a response to the 907 notice and filed a *pro se* amended petition. On May 16, 2011, this matter was reassigned to the Honorable Tracy Brandeis-Roman. On August 15, 2012, Defendant filed another *pro se* amended petition. On April 10, 2017, Judge Brandeis-Roman sent Defendant another 907 notice. On April 29, 2017, Teri Himebaugh, Esquire entered her appearance as PCRA counsel. On October 4, 2017, the matter was reassigned to this Court. On November 19, 2017, Ms. Himebaugh filed an amended petition. She filed a second amended petition on February 19, 2019. The Commonwealth filed its Motion to Dismiss on May 31, 2019. On August 20, 2019, this Court sent Defendant a Notice of Intent to Dismiss Pursuant to Rule 907. On September 18, 2019, this Court dismissed Defendant's petition as meritless. On October 13, 2019, Defendant filed a Notice of Appeal to Superior Court.

Discussion

This Court properly dismissed Defendant's petition as meritless. When reviewing the denial of PCRA relief, the appellate court's review is limited to determining whether the PCRA court's findings are supported by the record and without legal error. Commonwealth v. Edmiston, 65 A.3d 339, 619 Pa. 549, 558 (2013) (citing Commonwealth v. Breakiron, 566 Pa. 323, 781 A.2d 94, 97 n. 4 (2001)). The appellate court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in light most favorable to the prevailing party. Commonwealth v. Fahy, 598 Pa. 584, 959 A.2d 312, 316 (2008) (citing Commonwealth v. Duffey, 585 Pa. 493, 889 A.2d 56, 61 (2005)). The burden is on the petitioner in the PCRA petition to demonstrate by a preponderance of the evidence that he or she is eligible for PCRA relief. 42 Pa.C.S.A § 9543.

In his petition, Defendant claims that trial counsel was ineffective for failing to object to Judge Hughes' reasonable doubt jury instruction, a matter which has been under review by other courts. Defendant further argues that counsel was ineffective for failing to object properly to a portion of the Commonwealth's closing argument where the prosecutor stated, with regard to eyewitness Mercedes, "Why? You know it's because she can't snitch. I don't have to tell you that. Defense counsel can't claim that's not what occurred. We all know. It didn't just start now. It's gotten worse, and it doesn't require threats for you to be scared to talk." (N.T. 11/18/05, p. 91-92). Last, Defendant claims that counsel was ineffective for failing to object to a portion of Saunders' testimony that Defendant believed was hearsay. All of these claims were properly dismissed as meritless and no relief is due.

To prevail on a claim alleging counsel's ineffectiveness under the PCRA, the appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of

conduct was without a reasonable basis; and (3) that he was prejudiced by counsel's ineffectiveness, i.e. there is a reasonable probability that but for the act or omission in question the outcome of the proceedings would have been different. Commonwealth v. Timchak, 2013 PA Super 157, 69 A.3d 765, 769 (2013) (citing Commonwealth v. Wah, 42 A.3d 335, 338 (Pa.Super.2012)). A PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Id. (citing 42 Pa.C.S. § 9543(a)(2)(ii)). Counsel's assistance is deemed constitutionally effective once the court determines that the defendant has not established any one of the prongs of the ineffectiveness test. Id. (citing Commonwealth v. Rolan, 964 A.2d 398, 406 (Pa.Super.2008)). To establish prejudice, the defendant must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. Commonwealth v. Davido, 106 A.3d 611, 621 (Pa. 2014) (citing Commonwealth v. Williams, 587 Pa. 304, 899 A.2d 1060, 1064 (2006)). When an appellant fails to meaningfully discuss each of the three ineffectiveness prongs, "he is not entitled to relief, and we are constrained to find such claims waived for lack of development." Commonwealth v. Fears, 624 Pa. 446, 461, 86 A.3d 795, 805 (2014) (quoting Commonwealth v. Steele, 599 Pa. 341, 361, 961 A.2d 786, 797 (2008) ("[U]ndeveloped claims, based on boilerplate allegations, cannot satisfy Appellant's burden of establishing ineffectiveness.").

A. Trial counsel was not ineffective for failing to object to Judge Hughes' reasonable doubt jury instructions.

Defendant's claim that trial counsel was ineffective for failing to object to Judge Hughes' jury instruction regarding reasonable doubt is without merit. First, in his amended petition,

Defendant cites Commonwealth v. Ricky Jones, 1375 EDA 2008 and completely misrepresents the holding. Defendant claims that "the Pennsylvania Supreme Court vacated Jones' conviction on direct appeal based upon Judge Renee Cardwell Hughes having given the jury an unconstitutional reasonable doubt instruction violating the defendant's Fourteenth Amendment rights." Amended petition, 2/19/19, p. 5. This is false. A review of Jones' direct appeal shows that he never raised the issue of the reasonable doubt jury instruction. The Superior Court vacated the judgment of sentence and remanded the case for a new trial because the trial court excused a pregnant juror on the second day of deliberations and, over the objection of defense counsel, seated an alternate juror who had been discharged prior to the commencement of deliberations. On July 21, 2010, the Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal on the following issue: whether the Superior Court erred in holding that it is *per se* reversible error to seat a discharged juror after jury deliberations have begun. 606 Pa. 510. On October 4, 2012, the Pa. Supreme Court dismissed the appeal as having been improvidently granted. There is zero mention in any of the filings of Judge Hughes' reasonable doubt jury instructions. Nothing in this opinion supports Defendant's ineffective assistance argument.

Next, Defendant cites the 2017 Third Circuit case Brooks v. Gilmore, 2017 WL 3475475 (2017), the unpublished federal district court opinion. In this case, the court granted Brooks' writ of habeas corpus petition, finding that Judge Hughes' reasonable doubt jury instruction was unconstitutional and that trial counsel was ineffective for failing to object to the instructions. The court rejected the Pennsylvania Superior Court's holding which rejected Brooks' arguments, finding that the state court's decision on review depended on "an unreasonable determination of the facts and an unreasonable application of clearly established Supreme Court law." However, it

is well settled that Pennsylvania courts are not bound by decisions of federal courts that are inferior to U.S. Supreme Court. See Commonwealth v. Orie, 88 A.3d 983, 1009 (Pa.Super.2014); In re Stevenson, 40 A.3d 1212, 1216 (Pa.2012). As of this date, there is no **published** decision from the Pennsylvania Superior Court or Supreme Court that has decided whether the instruction at issue is constitutional. Since Brooks in 2017, Pennsylvania courts have had several opportunities to review Judge Hughes' reasonable doubt jury instructions and have issued four non-precedential, unpublished memorandum opinions: Commonwealth v. Twitty,2018 WL 3582355 (non-precedential opinion), 3282 EDA 2016; Commonwealth v. Green, 2018 WL 4102963 (non-precedential opinion), 1257 EDA 2017; Commonwealth v. Johnson, 2019 WL 1338679 (non-precedential opinion), 358 EDA 2018; Commonwealth v Moore, 2019 WL 6825166 (non-precedential opinion), 3211 EDA 2017. Since the Superior Court has declined to follow the Brooks holding, the above decisions are still considered persuasive authority. Until our Superior or Supreme Court issues an opinion that holds otherwise, the jury instructions at issue are constitutional and no relief is due to Defendant.

With respect to the ineffectiveness prongs, Defendant has failed to show prejudice. The evidence against Defendant in the instant matter was quite strong and he has failed to demonstrate that there was a reasonable probability that the outcome of his trial would have been different had trial counsel objected to the jury instructions, as required to prove ineffective assistance of counsel. In his petition, Defendant claims "[t]he Commonwealth's case was not as strong as it would initially appear. It hinged to a very significant degree on hearsay testimony elicited from Barbara Williams, Zakia Williams and Ron Saunders." Amended petition, p. 13.[1]

[1] In his petition, Defendant relies on Sullivan v. Louisiana, 508 U.S. 275, 279-82 (1993), a United States Supreme Court case which held that on direct appeal an unconstitutional reasonable doubt jury instruction is not subject to a harmless error analysis. However, in Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017), the US Supreme Court found that whether a PCRA petitioner claiming ineffective assistance of counsel must establish prejudice is a

This is not true; the evidence against Defendant was overwhelming. Three eyewitnesses, Gerald, Mercedes, and Rasan, actually saw Defendant shoot the victim and they knew Defendant from the neighborhood so there was no real chance of misidentification. All three testified at trial regarding what they saw. Moreover, Saunders' testimony was not hearsay. On the witness stand, Saunders' claimed that he could not recall anything about the case. The Commonwealth then read from Saunders' sworn statement to police. In this statement, Saunders told police that he heard gunshots on the day of the murder, ran outside, and saw Defendant running away. He told police that he later spoke to Defendant, who confessed to killing to Taj, getting rid of the gun, and feeling confident that he would "beat the case." Further implicating Defendant at trial was the fact that police recovered two empty gun holsters from his bedroom when they executed a search warrant at his house. In addition, the evidence showed that Defendant called both Barbara and Zakia, and threatened Zakia to stop talking to police. There was also Defendant's full detailed confession to his cellmate Raheem Blakely (although Blakely later recanted when he was unable to procure a deal with the prosecutors in his own case). Thus, contrary to what Defendant claims, the verdict did not "hinge" on "hearsay" testimony from Barbara Williams, Zakia Williams and Ron Saunders. Rather, the evidence of guilt was overwhelming and Defendant is unable to prove prejudice. As state above, Defendant bears the burden of pleading and proving ineffectiveness, and he has failed to do so. He has not shown that his claim has any arguable merit, he has failed to show that counsel had no reasonable basis for not objecting to the reasonable doubt jury instruction, and he has failed to demonstrate actual prejudice since the evidence supporting his guilt was overwhelming. Therefore, no relief is due.

---

different issue than whether a defendant on direct appeal must establish prejudice after finding a structural defect. In Commonwealth v. Fisher, 318 A.2d 761, 775 (Pa. 2002), the Pennsylvania Supreme Court found no prejudice, despite concluding that objection to a hypothetical on reasonable doubt would have had arguable merit, where other parts of instructions gave jury correct definitions of reasonable doubt and the evidence was overwhelming.

B. Trial counsel was not ineffective for failing to object to the Commonwealth's closing argument reference to Mercedes and snitching.

Next, Defendant argues that trial counsel was ineffective for failing to object properly to a portion of the Commonwealth's closing argument where the prosecutor stated, with regard to eyewitness Mercedes, "Why? You know it's because she can't snitch. I don't have to tell you that. Defense counsel can't claim that's not what occurred. We all know. It didn't just start now. It's gotten worse, and it doesn't require threats for you to be scared to talk." (N.T. 11/18/05, p. 91-92). At trial, defense counsel objected to this on the basis that the prosecutor improperly commented on defense counsel's conduct and tactics. Defendant raised this issue on direct appeal and the Superior Court found that it lacked merit. Now, on PCRA review, Defendant is attempting to make out an ineffectiveness claim based on the same statement, but arguing this time that defense counsel objected on the wrong basis. Instead of objecting to improperly commenting on conduct and tactics, Defendant argues that defense counsel was ineffective because he should have objected on the basis that the prosecutor was expressing his opinion improperly. This argument is without merit. Defendant is unable to prove any of the three prongs necessary to demonstrate ineffectiveness. First, Defendant cannot show that this claim has arguable merit. The law is well settled that prosecutors have wide latitude when making closing remarks and may "make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments." Commonwealth v. Chmiel, 612 Pa. 333, 453, 30 A.3d 1111, 1181 (2011)(citing Commonwealth v. Cox, 603 Pa. 223, 983 A.2d 666, 687 (2009)). Defendant was charged with, and ultimately convicted of, witness intimidation. Thus, the Commonwealth's comments regarding snitching were relevant to the charges and related to testimony of intimidation at trial. Second, Defendant is unable to show counsel had no reasonable basis for his action. Here, defense counsel did object to the Commonwealth's statements, but did so on an

arguably more meritorious basis (counsel's conduct and tactics). Defense counsel cannot be faulted for failing to object on a frivolous basis. Commonwealth v. Spotz, 896 A.2d 1191, 1247 (Pa.2006); Commonwealth v. Fears, 836 A.2d 52, 65 n. 13 (Pa.2003)(counsel cannot be found ineffective for failing to make a meritless objection.). Last, Defendant is unable to show that this in any way affect the outcome of his trial. As discussed above, the evidence against him was overwhelming. Thus, no relief is due.

C. Trial counsel was not ineffective for failing to object to a Saunders' testimony as hearsay.

Last, Defendant claims that counsel was ineffective for failing to object to a portion of Saunders' testimony that Defendant believed was hearsay.[2] This claim is without merit. On direct examination at trial, the following exchange took place, where the Commonwealth was questioning Saunders regarding his prior statement to police:

THE COMMONWEALTH:	"QUESTION: Do you know who witnessed [Defendant] killing Taj?" Do you remember that question?
WITNESS:	No.
THE COMMONWEALTH:	Do you remember your answer? "I heard three little girls, Little G, and the guys he was with." Do you remember that question and answer?
WITNESS:	No.
THE COMMONWEALTH:	Did he tell you how he knew Little G saw it?
WITNESS:	No.

(N.T. 11/16/05, p. 115-16). Defendant claims that the statement "I heard three little girls, Little G, and the guys he was with," was inadmissible hearsay. However, when reading this in context,

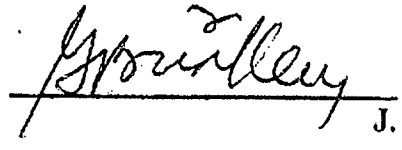
[2] Defendant raised this issue on direct appeal; however, the Superior Court found it waived as defense counsel had failed to object on hearsay grounds.

it's fairly clear that "he" in "guys he was with" was referring to Defendant, which would be admissible as a statement of a party opponent. Pa.R.E. 803(25). This is further supported by the subsequent question asking "Did he tell you he how he knew Little G saw it?" because this is clearly referring to Defendant. Even if this was inadmissible hearsay, Defendant is unable to prove prejudice since, as discussed at length above, the evidence against him was overwhelming and this would not have affected the jury's verdict. Since Defendant's is unable to plead and prove that this claim is of arguable merit and that he suffered prejudice, his ineffectiveness claim is meritless and no relief is due.

CONCLUSION

After reviewing the applicable case law, testimony, and statutes, no relief is due. This Court properly dismissed Defendant's PCRA petition as meritless. Accordingly, this Court's dismissal should be affirmed.

BY THE COURT:



J.

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
TYRE GAMBLE,	:	
Appellant	:	No. 2944 EDA 2019

Appeal from the PCRA Order Entered September 18, 2019
in the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0600981-2004

BEFORE: BENDER, P.J.E., SHOGAN, J. and STRASSBURGER, J.*

MEMORANDUM BY SHOGAN, J. **FILED JUNE 8, 2021**

Appellant, Tyre Gamble, appeals from the September 18, 2019 order dismissing, without a hearing, his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546. After review, we affirm.

Following a several-day jury trial beginning on November 14, 2005, the jury convicted Appellant on November 21, 2005, of first-degree murder, intimidation of a witness, and possessing instruments of crime ("PIC").[1] A prior panel of this Court summarized the relevant facts as follows:

> [Appellant's] conviction arises out of an April 2004 shooting incident in [W]est Philadelphia following a verbal exchange with victim Taj Chavis. While [walking with Rasan Davis] and holding an automatic handgun behind his back, [Appellant] approached Chavis at the corner of 33rd and Wallace

[1] 18 Pa.C.S. §§ 2502(a), 4952, and 907, respectively.

* Retired Senior Judge assigned to the Superior Court.

Streets[,] and the two began to quarrel. Following Chavis's challenge, ("You [*sic*] acting like you [*sic*] gonna do something"), [Appellant] pulled the gun from behind his back and shot Chavis in the chest. As Chavis lay bleeding on the sidewalk, [Appellant] fired a second shot into [Chavis's] head and then fled the scene. [Appellant] was then nineteen years old and [Chavis was] somewhat younger.

Prior to the shooting, as [Appellant] and [Chavis] exchanged words, ten[-]year[-]old G.B. ventured up the street with his brother and cousin as the three walked home from school. Upon seeing them, [Appellant] directed the boys to the other side of the street, where they witnessed the subsequent killing. Distraught, G.B. ran several doors down the street to the home of his grandmother, Barbara Williams, and upon entering, told his mother, Zakia Williams, "Mom, I seen the whole thing. I seen the whole thing." After calming her son, Zakia Williams left the house and went to the scene of the crime, where Philadelphia Police officers had by then converged. As she walked past, she threw a folded piece of paper to the ground before Officer Margarita Wilcox. Written on the paper was a note stating[,] "Everything you need to know is on this piece of paper," and "Tarie (shooter)." Officer Wilcox then gave the note to the investigating detective, who attached it to his report.

Police did not immediately apprehend [Appellant,] and he remained at large in the surrounding area during the investigation. In the intervening time, word circulated in the neighborhood that [Appellant] had killed ... Chavis, prompting [Appellant] to telephone the home of Barbara Williams in search of her daughter Zakia Williams, the mother of G.B. Although [Appellant] did not identify himself, his name and number appeared on Barbara's caller ID unit[,] and Barbara recognized the caller's voice. When [Appellant] asked for Zakia, Barbara told him that Zakia did not live there, to which [Appellant] asked[,] "Well, why does she keep pointing me out?" [Appellant] then clarified that he meant[,] "Telling people that I killed that boy." After Barbara told him, "the whole neighborhood is saying that you killed him," [Appellant] concluded the conversation with a warning, saying[,] "Tell Zakia to stop putting my name in. Tell her to stop putting my name in her mouth or she [*sic*] going to get f---d up."

> Following [Appellant's] apprehension, the Commonwealth charged him with the homicide and PIC offenses at issue as well as several firearms offenses, which the trial court ultimately *nol*[] *prossed*. The Commonwealth added the further charge of witness intimidation in view of [Appellant's] "warning" to Barbara Williams concerning her daughter's discussion of the killing. Thereafter, in November 2005, [Appellant's] case proceeded to a jury trial before the Honorable Renee Cardwell Hughes. During the presentation of its case in chief, the Commonwealth presented[, *inter alia*,] the testimony of the victim's father, Alvin Chavis, to establish a "life in being," as well as the testimony of [Rasan Davis, who identified Appellant as the shooter,] Zakia Williams and G.B. concerning G.B.'s account of the shooting, and Barbara Williams concerning [Appellant's] remarks threatening her daughter. The Commonwealth also presented the testimony of Ronald Saunders, who identified himself as [Appellant's] friend. Although Saunders had given a statement to the police implicating [Appellant], he professed at trial not to remember the contents of that statement, prompting the prosecutor to read from the statement in an attempt to refresh the witness's recollection. Finally, the Commonwealth presented the testimony of Mercedes Bradshaw, a [sixteen-year-old] resident of the neighborhood who saw [Appellant] fire the second shot as the victim lay on the ground.
>
> [Appellant] elected not to testify and presented no other evidence, following which the jury returned a verdict of guilty.... [T]he court sentenced [Appellant] to concurrent prison terms of three and one[-]half to seven years[] for witness intimidation and two and one half to five years[] for PIC to be served consecutive to life imprisonment for first-degree murder.

Commonwealth v. Gamble, 947 A.2d 824, 281 EDA 2006 (Pa. Super. filed January 22, 2008) (unpublished memorandum at *2–4). This Court affirmed Appellant's judgment of sentence, and our Supreme Court declined further review on September 30, 2008. ***Id.*** (unpublished memorandum at *2), *appeal denied*, 958 A.2d 1046, 78 EAL 2008 (Pa. filed September 30, 2008).

On February 11, 2009, Appellant *pro se* filed a timely PCRA petition ("2009 Petition").[2] The PCRA court appointed counsel, Attorney Marc Antony Arrigo, who subsequently filed a ***Turner/Finley***[3] no-merit letter on June 18, 2010.[4] Therein, Attorney Arrigo summarized the claims Appellant wished to raise: (1) ineffective assistance of trial counsel for failing to file a direct appeal, causing Appellant to retain private appellate counsel who was unfamiliar with his trial, thus rendering appellate counsel ineffective; and (2) the Commonwealth's failure to inform Appellant of the specific degree of murder it was prosecuting, which prejudiced Appellant's defense, denied him a fair and impartial trial, and caused trial counsel to be ineffective and the

---

[2] The 2009 Petition, as well as other filings, were docketed but do not appear in the certified record. However, they are attached to subsequent filings, which are part of the record.

[3] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[4] Appellant filed *pro se* amended PCRA petitions in April 2010 and August 2012. Our Supreme Court has a "long-standing policy that precludes hybrid representation." ***Commonwealth v. Jette***, 23 A.3d 1032, 1036 (Pa. 2011); ***see also Commonwealth v. Pursell***, 724 A.2d 293, 302 (Pa. 1999) ("We will not require courts considering PCRA petitions to struggle through the *pro se* filings of defendants when qualified counsel represent those defendants."); ***Commonwealth v. Williams***, 151 A.3d 621, 623 (Pa. Super. 2016) (citations omitted) (stating that "[i]n this Commonwealth, hybrid representation is not permitted" and our courts "will not accept a *pro se* motion while an appellant is represented by counsel; *pro se* motions have no legal effect and, therefore, are legal nullities"); ***Commonwealth v. Willis***, 29 A.3d 393, 400 (Pa. Super. 2011) (holding the PCRA court erred when it accepted and considered the merits of Willis's *pro se* amended PCRA petition while Willis was represented by counsel). Accordingly, we do not consider Appellant's *pro se* petitions.

trial court to lack jurisdiction over his case. ***Turner/Finley*** Letter, 6/18/10, at 3–4.

On April 19, 2011, the PCRA court entered a notice of intent to dismiss the 2009 petition without a hearing pursuant to Pa.R.Crim.P. 907, followed by Attorney Arrigo's filing of a motion to withdraw as counsel. Appellant filed a *pro se* response on May 12, 2011. In July 2011, a signed but undated order appears in the certified record, dismissing the 2009 Petition and permitting Attorney Arrigo to withdraw ("July 2011 Order"). As discussed more fully *infra*, no appeal was taken from the July 2011 Order, presumably because it was not docketed, and there is no indication in the record that it was served upon the parties.

For reasons that are unclear, the PCRA court issued another Rule 907 notice years later on April 10, 2017.[5] Shortly thereafter, Appellant retained private PCRA counsel, Attorney Teri B. Himebaugh, who continues to represent Appellant in the instant appeal. Attorney Himebaugh entered her appearance, along with a motion for leave to file an amended PCRA petition on April 29, 2017. Although the PCRA court did not rule on the motion, Attorney Himebaugh filed an amended PCRA petition on behalf of Appellant on November 19, 2017 ("2017 Amended Petition"). Therein, Appellant claimed constitutional violations based on the lack of notes of testimony

[5] We note that at least four different judges were assigned to oversee the PCRA proceedings in this case between 2009 and 2018, which explains some of the procedural irregularities.

from the trial and trial counsel's failure to object to the trial court's reasonable-doubt jury instruction. ***See generally*** 2017 Amended Petition, 11/19/17. Once Attorney Himebaugh requested and received transcripts, Appellant filed a second amended PCRA petition on February 19, 2019 ("2019 Second Amended Petition"). The 2019 Second Amended Petition raised three claims relating to the ineffectiveness of trial counsel for failing to object or to object properly at trial, which are at issue in the current appeal. 2019 Second Amended Petition, 2/19/19, at 5–24. The Commonwealth responded by filing a motion to dismiss on May 31, 2019, contending that Appellant's 2009 Petition and 2019 Second Amended Petition had no merit. The PCRA court issued a Rule 907 notice on August 20, 2019, to which Appellant did not respond. On September 18, 2019, the PCRA court dismissed Appellant's petition as meritless. This timely-filed appeal followed. Both Appellant and the PCRA court complied with Pennsylvania Rule of Appellate Procedure 1925.

On appeal, Appellant raises the following issues:

I. Did the PCRA Court err in finding that trial counsel was not ineffective when he failed to object to an unconstitutional reasonable doubt jury instruction, violating his Fourteenth Amendment due process rights?

II. Did the PCRA Court err in finding that trial counsel was not ineffective for failing to assert the correct objection to portions of the prosecutor's closing argument?

III. Did the PCRA Court err when it found that trial counsel was not ineffective for failing to make a timely and proper

hearsay objection to Ronald Saunders' testimony thereby waiving the claim for trial court and appellate review?

Appellant's Brief at 3.

Before we proceed to the merits of Appellant's appeal, we must consider which PCRA petitions are properly before us because such determination impacts our jurisdiction. The claims at issue on appeal were raised in the 2019 Second Amended Petition. The PCRA court and the parties treated the 2009 Petition as still pending and assumed the 2019 Second Amended Petition amended the 2009 Petition. Despite their assumption, the certified record contains the July 2011 Order, which, as noted *supra*, purported to dismiss the 2009 Petition.

"Appellate jurisdiction cannot be conferred by mere agreement or silence of the parties where it is otherwise nonexistent. We may accordingly raise this issue *sua sponte,* even though neither of the parties have done so." ***Commonwealth v. Borrero***, 692 A.2d 158, 159 (Pa. Super. 1997) (citations omitted). Thus, we must examine whether the 2009 Petition was dismissed by the July 2011 Order as well as whether Appellant's 2019 Second Amended Petition is an amended petition relating back to Appellant's 2009 Petition or a subsequent petition subject to the PCRA's one-year time limitation.

Neither this Court nor the PCRA court has jurisdiction to address the merits of an untimely-filed petition. ***Commonwealth v. Leggett***, 16 A.3d 1144, 1145 (Pa. Super. 2011). Any PCRA petition, including second and

subsequent petitions, must either be filed within one year of the judgment of sentence becoming final or plead and prove a timeliness exception. 42 Pa.C.S. § 9545(b). "For purposes of [the PCRA], a judgment [of sentence] becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3).

Herein, Appellant's judgment of sentence became final on December 29, 2008, *i.e.*, ninety days after our Supreme Court denied his petition for allowance of appeal on September 30, 2008. ***See*** U.S. Sup. Ct. R. 13 (requiring petition for writ of certiorari to be filed within ninety days after entry of the order denying discretionary review by state court of last resort). Appellant then had one year, until December 29, 2009, to file a timely PCRA petition. 42 Pa.C.S. § 9545(b). Accordingly, Appellant's 2009 Petition filed on February 11, 2009, was timely.

The July 2011 Order purported to dismiss the 2009 Petition without a hearing. Notably, this case continued to proceed for another eight years with the PCRA court and parties apparently unaware of the July 2011 Order. Appellant's 2017 Amended Petition and 2019 Second Amended Petition were filed after Appellant's sentence had become final and his window in which to file a timely serial PCRA petition had expired. If the July 2011 Order dismissed Appellant's 2009 Petition, we would be constrained to conclude

that the PCRA court was mistaken in treating Appellant's subsequently filed documents as amendments to his timely filed PCRA petitions, as opposed to subsequent PCRA petitions. In that event, we would be required to find the PCRA court was without jurisdiction to consider the 2017 Amended Petition and 2019 Second Amended Petition because Appellant failed therein to plead and prove an exception to the timeliness requirement under the PCRA. ***See*** 42 Pa.C.S. § 9545(b)(1)(i–iii).

However, after review of the certified record, we conclude that the July 2011 Order did not, in fact, operate to dismiss the 2009 Petition. Our Rules of Criminal Procedure mandate that, when a PCRA petition:

> is dismissed without a hearing, the judge promptly shall issue an order to that effect and shall advise the defendant by certified mail, return receipt requested, of the right to appeal from the final order disposing of the petition and of the time limits within which the appeal must be filed. The order shall be filed and served as provided in [Pa.R.Crim.P.] 114.

Pa.R.Crim.P. 907(4).

Rule 114 requires that all orders and court notices be docketed and that the docket entries contain the date the clerk's office received the order, the date of the order, and the date in which the clerk served the order to the party's attorney or the party if unrepresented. Pa.R.Crim.P. 114(B), (C)(2). "The comment to [Rule 114] suggests that the notice and recording procedures are mandatory and not modifiable." ***Commonwealth v. Davis***, 867 A.2d 585, 587 (Pa. Super. 2005). Thus, where the docket does not indicate when, or even if, an order was properly entered or served upon a

petitioner, its requirements are never triggered. ***Commonwealth v. Bush***, 197 A.3d 285, 288 (Pa. Super. 2018) (vacating order dismissing PCRA petition where Rule 907 notice of intent to dismiss was not entered on docket or served upon the petitioner as required by Pa.R.Crim. 114) (citing ***Commonwealth v. Jerman***, 762 A.2d 366, 368 (Pa. Super. 2000)) (holding time for filing notice of appeal never commenced because the docket did not indicate that the petitioner was provided with a copy of the final order).

Instantly, the July 2011 Order dismissing Appellant's 2009 Petition was not entered on the docket, and there is no indication in the record that it was served on the parties as mandated by Pa.R.Crim.P. 114. Thus, the requirements of Rule 114 never were triggered, and the July 2011 Order was a legal nullity, which did not dismiss the 2009 Petition. ***Accord Bush***, 197 A.3d at 288. Accordingly, the 2009 Petition remained pending at the time Appellant filed the 2019 Second Amended Petition ten years later. Therefore, we now turn our attention to whether the 2019 Second Amended Petition did, indeed, amend the timely filed 2009 Petition.

First, we observe that in the absence of a final ruling on a timely filed first PCRA petition, it is proper to treat a subsequent petition for post-conviction relief as an amendment to the first timely filed petition, even if there is substantial time between the two filings. ***See Commonwealth v. Sepulveda***, 144 A.3d 1270, 1280 (Pa. 2016) (approving the liberal

amendment policy of Pa.R.Crim.P. 905(A) as long as a PCRA petition is still pending before the PCRA court at the time the request for amendment is made); ***Commonwealth v. Williams***, 828 A.2d 981 (Pa. 2003) (holding that because the PCRA court never ruled on the petitioner's motion to withdraw his first PCRA petition, a subsequent PCRA petition constituted an amendment to a timely filed first petition); ***Commonwealth v. Flanagan***, 854 A.2d 489, 499 (Pa. 2004) (holding that since the original PCRA petition filed in 1988 was never withdrawn or dismissed, the PCRA court properly declined to treat a subsequent petition and motion for a hearing filed eleven years later as a "serial, post-conviction petition which would be independently subject to the PCRA's one-year time limitation"); ***Commonwealth v. Swartzfager***, 59 A.3d 616, 620–621 (Pa. Super. 2012) (construing *pro se* PCRA petition filed in 2011 as an amendment to petitioner's "still open and timely-filed" 2001 PCRA petition).

Second, we note that "PCRA courts are invested with great discretion to permit the amendment of a post-conviction petition." ***Commonwealth v. Mojica***, 242 A.3d 949, 954 (Pa. Super. 2020) (citation omitted) (citing ***Flanagan***, 854 A.2d at 499), *appeal denied*, ___ A.3d ___, 493 EAL 2020 (Pa. filed Apr. 13, 2021). Subsequent amendments do not need to raise the same issues as the initial filing. ***See Flanagan***, 854 A.2d at 499–500. "Rather, the prevailing rule remains simply that amendment is to be freely

allowed to achieve substantial justice." ***Id.*** at 500 (citing Pa.R.Crim.P. 905(A)).

Finally, in general, if an appellant fails to seek leave of court, any claim raised in an unauthorized supplemental petition is waived. ***Commonwealth v. Reid***, 99 A.3d 427, 437 (Pa. 2014). However, the PCRA court may implicitly allow amendment of a petition without formal leave of court if it does not strike the filing, and it considers the supplemental materials prior to dismissing the petition. ***Commonwealth v. Brown***, 141 A.3d 491, 503 (Pa. Super. 2016); ***see also Commonwealth v. Boyd***, 835 A.2d 812, 816 (Pa. Super. 2003) (holding that where a PCRA court denied a petition to amend, but later accepted and considered the amended petition on the merits, the PCRA court "effectively allowed [Boyd] to amend his petition to include those issues presented in the supplement" pursuant to Rule 905(A)).

Here, the PCRA court never ruled on Appellant's motion for leave to amend or formally grant Appellant leave to amend, nor did it strike the filing. The PCRA court stated later in the case that it had reviewed Appellant's "*Pro Se* PCRA Petition [*i.e.*, the 2009 Petition], **Counsel's Amended Petition** [*i.e.*, the 2019 Second Amended Petition], [and the] Commonwealth's Motion to Dismiss" before dismissing "based on lack of merit." Order, 9/18/19 (emphasis added); ***see also*** Pa.R.Crim.P. 907 Notice, 8/20/19 ("The issues raised in the [PCRA] petition **filed by your**

attorney [*i.e.*, the 2019 Second Amended Petition] are without merit.") (emphasis added). Moreover, in its Rule 1925(a) opinion, the PCRA court addressed the merits of the claims raised in the 2019 Second Amended Petition. PCRA Court Opinion, 5/12/20, at 5–11. Under these circumstances, we conclude the PCRA court implicitly allowed Appellant to amend his 2009 Petition to include those issues presented in the 2019 Second Amended Petition pursuant to Rule 905(A). Because the 2019 Second Amended Petition relates back to the timely filed 2009 Petition, we have jurisdiction over the matters raised in Appellant's appeal. Accordingly, we will address the merits of this appeal.

We view the findings of the PCRA court and the evidence of record in a light most favorable to the prevailing party. ***Commonwealth v. Hanible***, 30 A.3d 426, 438 (Pa. 2011) (citation omitted). "Our review of a PCRA court's decision is limited to examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." ***Id.*** (citation omitted). These errors include a constitutional violation or ineffectiveness of counsel, which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Cousar***, 154 A.3d 287, 296 (Pa. 2017); 42 Pa.C.S. § 9543(a)(2). The PCRA court's findings will not be disturbed unless there is no support for them in the certified

record. ***Commonwealth v. Lippert***, 85 A.3d 1095, 1100 (Pa. Super. 2014).

Appellant's claims challenge the effectiveness of trial counsel. It is well settled that counsel is presumed to be effective and "the burden of demonstrating ineffectiveness rests on [the petitioner]." ***Commonwealth v. Rivera***, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, the petitioner must plead and prove by a preponderance of the evidence that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. ***Commonwealth v. Housman***, 226 A.3d 1249, 1260 (Pa. 2020) (citing ***Strickland v. Washington***, 466 U.S. 668 (1984)). A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any one of these three prongs. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010).

In his first issue, Appellant argues trial counsel was ineffective for failing to object to the trial court's jury instructions. Appellant's Brief at 3. Specifically, Appellant asserts that a portion of the trial court's jury instruction relating to reasonable doubt was unconstitutional, and trial counsel was ineffective for failing to object to it. ***Id.*** at 9–23. As a result, Appellant contends he is entitled to a retrial. ***Id.*** at 10.

We review the challenged portion of a jury instruction in light of the entire instruction. ***Commonwealth v. Cam Ly***, 980 A.2d 61, 88 (Pa. 2009). Moreover, trial courts have broad discretion in phrasing a jury charge as long as the law is clearly, adequately, and accurately described. ***Id.*** (citation omitted). "[A]n imperfect instruction does not constitute reversible error where the charge, taken as a whole, fairly and accurately conveys the essential meaning." ***Commonwealth v. Uderra***, 862 A.2d 74, 92 (Pa. 2004).

The trial court's jury charge regarding reasonable doubt is set forth below:[6]

> Ladies and gentlemen, it is not [Appellant]'s burden to prove that he is not guilty. It is the Commonwealth that always bears the burden of proving each and every element of the crimes charged and that [Appellant] is guilty of those crimes beyond a reasonable doubt.
>
> * * *
>
> [I]f the evidence does prove beyond a reasonable doubt that [Appellant] is guilty of the crimes charged, then your verdict should be guilty.
>
> Ladies and gentlemen, the Commonwealth bears this burden of proof beyond a reasonable doubt. That is the burden they must reach to prove that [Appellant] is guilty, but this does not mean that the Commonwealth must prove its case beyond all doubt. The Commonwealth is not required to prove its case to a mathematical certainty nor must it demonstrate the complete impossibility of innocence.

---

[6] The portions of the jury charge that Appellant contends are improper are emphasized in bold-face type. ***See*** Appellant's Brief at 13–14.

A reasonable doubt is a doubt that would cause a careful, sensible person to pause, to hesitate, or to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests.

A reasonable doubt must fairly arise out of the evidence that was presented or the lack of evidence that was presented for each element of the crimes charged.

Ladies and gentlemen, it helps to think about reasonable doubt if you think about someone that you love, someone who is truly, truly precious to you -- a spouse, a significant other, a child, a grandchild -- someone truly precious in your life. Let's say that that person's physician told them that they had a life-threatening condition and the **best option** for treating that life-threatening condition was surgery.

Now, if you're like me, you're probably going to get a second opinion; you might get a third opinion. You're probably going to call everybody you know who has anything to do with medicine to say, well, what do you know about this condition? What do you know about this proposed surgical procedure? What do you know?

You probably go on the Internet, research everything you can find; but at some point the question will be called. **Do you go forward** with the surgery for your loved one, or don't you?

If you go forward, it is not necessarily because you have moved beyond all doubt. All doubt would be a promise that this would work. If you **go forward**, it is because **you have moved beyond all reasonable doubt**. A reasonable doubt must fairly arise out of the evidence. It may not be one that is manufactured. It may not be a doubt that is imagined to avoid carrying out an unpleasant responsibility. You may not find [Appellant] guilty based upon a mere suspicion of guilt.

The Commonwealth does bear its burden of proving him guilty beyond a reasonable doubt. If the Commonwealth has met that burden, then [Appellant] is no longer presumed to be innocent; and you should find him guilty. On the other hand, if the Commonwealth has not met its burden, you must find him not guilty.

N.T., 11/18/05, at 113–117 (emphases added).

Appellant argues that the trial court's analogy "inserted a requirement that any doubt worthy of acquittal must be so serious and grave that it would rise to the level causing a mother to reject surgery for her dying child when surgery was the best protocol that could save the child." Appellant's Brief at 15. According to Appellant, the analogy "relieved the Commonwealth of its' [*sic*] high burden to prove guilt beyond a reasonable doubt." ***Id.*** He also claims that "the repeated reference to 'going forward' was inconsistent with its instruction that the jury should vote for acquittal if the jury would pause or hesitate before acting." ***Id.*** Appellant further contends that trial counsel lacked an objectively reasonable basis for failing to object to this portion of the charge and preserve it for appellate review. ***Id.*** at 17. He asks us to remand this case for an evidentiary hearing, where trial counsel can testify as to why he did not object to the charge, but at the same time, Appellant argues that no matter how trial counsel testifies at such a hearing, it could not be objectively reasonable.[7] ***Id.*** at 18.

---

[7] The PCRA court concluded no relief was due because no precedential Pennsylvania appellate court decision has decided the constitutionality of the portion of the jury instruction at issue. PCRA Court Opinion, 5/12/20, at 7. While this Court's decisions on the matter thus far are not precedential, claims of error nearly identical to Appellant's have been presented on appeal to this Court to no avail. ***See, e.g., Commonwealth v. Nam***, 221 A.3d 301, 3641 EDA 2018 (Pa. Super. filed August 21, 2019) (non-precedential decision) (concluding that a claim that trial counsel was ineffective for failing to object to the Honorable Renee Cardwell Hughes's surgery analogy in her jury instruction on reasonable doubt lacked merit under the PCRA), *appeal denied*, 224 A.3d 1260, 446 EAL 2019 (Pa. filed February 11, 2020);

A jury instruction violates due process if there is a reasonable likelihood that the jury interpreted the instruction to allow a conviction based upon a degree of proof below the reasonable-doubt standard. ***Victor v. Nebraska***, 511 U.S. 1 (1994). When determining whether an instruction is unconstitutional, "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury **did** so apply it." ***Id.*** at 6 (emphasis in original) (citing ***Estelle v. McGuire***, 502 U.S. 62, 72 n.4 (1991)).

Commonwealth v. Moore, 225 A.3d 1155, 3211 EDA 2017 (Pa. Super. filed December 13, 2019) (non-precedential decision) (same); ***Commonwealth v. Santiago***, 240 A.3d 180, 3639 EDA 2018 (Pa. Super. filed August 20, 2020) (non-precedential decision) (same); ***Commonwealth v. Vando***, 242 A.3d 457, 2771 EDA 2018 (Pa. Super. filed November 30, 2020) (non-precedential decision) (same); ***Commonwealth v. Drummond***, ___ A.3d ___, 2187 EDA 2018 (Pa. Super. filed February 16, 2021) (non-precedential decision) (same); ***Commonwealth v. Warner***, 240 A.3d 943, 2171 EDA 2019, 2172 EDA 2019 (Pa. Super. filed September 18, 2020) (non-precedential decision) (same and alternatively concluding there was no prejudice); ***Commonwealth v. King***, 245 A.3d 1061, 2533 EDA 2018 (Pa. Super. filed December 11, 2020) (non-precedential decision) (same). ***See*** Pa.R.A.P. 126(b) (non-precedential decisions of the Superior Court filed after May 1, 2019, may be cited for their persuasive value).

Appellant contends that this argument was raised successfully by a petitioner in pursuit of a writ of *habeas corpus* in federal court. Appellant's Brief at 10–13, 18–19. In ***Brooks v. Gilmore***, No. 15-5659, 2017 WL 3475475 (E.D. Pa. filed August 11, 2017) (unpublished memorandum), a federal district court concluded a similar jury instruction given by the same trial judge was unconstitutional and ordered a new trial. Nevertheless, this argument has not prevailed in any precedential decision, and we are not bound by the decision in ***Brooks***. ***See Commonwealth v. Natividad***, 200 A.3d 11, 36 (Pa. 2019) (providing that although we are required to follow the decisions of the United States Supreme Court, we are not bound by the opinions of inferior federal courts).

Here, although the trial court's analogy may have focused on refraining from acting, as opposed to hesitating from acting, we cannot agree that this finite aspect of the instruction as a whole alters the reasonable-doubt standard. The Pennsylvania Supreme Court has upheld reasonable-doubt instructions that focus on restraint from acting. ***See, e.g.,*** ***Commonwealth v. Sattazahn***, 952 A.2d 640 (Pa. 2008). In ***Sattazahn***, the defendant argued that the trial court altered the reasonable-doubt standard when it used the word "refrains" as opposed to "hesitate." ***Id.*** at 668. Our Supreme Court disagreed and concluded that the trial court's word choice did not amount to reversible error due to the wide latitude given to judges in crafting instructions and the fact that federal and state courts have upheld charges using identical or substantially similar language. ***Id.*** at 668 and n.20.

Although Appellant takes issue with one aspect of the charge, we reiterate that jury instructions must be viewed in their entirety. ***Cam Ly***, 980 A.2d at 88. Here, the trial court correctly defined reasonable doubt as follows: "A reasonable doubt is a doubt that would cause a careful, sensible person to pause, to hesitate, or to refrain from acting upon a matter of the highest importance to your own affairs or to your own interests." N.T., 11/18/05, at 115. We conclude that this language is substantially similar to Pennsylvania's Suggested Standard Jury Instruction for reasonable doubt in criminal matters which provides, in pertinent part, "A reasonable doubt is a

doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs." Pa. Suggested Standard Criminal Jury Instruction, 7.01 Presumption of Innocence—Burden of Proof—Reasonable Doubt, Pa. SSJI (Criminal), § 7.01; ***see also Commonwealth v. Jones***, 912 A.2d 268, 287 (Pa. 2006) (*plurality*) (cited with approval in ***Commonwealth v. Cook***, 952 A.2d 594, 630 (Pa. 2008)).

The trial court's charge defined reasonable doubt and informed the jury that it could find Appellant guilty only if it found that the Commonwealth proved the elements of the crimes beyond a reasonable doubt. N.T., 11/18/05, at 113–117. When we review the trial court's surgery analogy in conjunction with the trial court's proper definition of reasonable doubt and the instruction as a whole, we discern no basis to conclude that there is a reasonable likelihood that the jury applied the instruction concerning reasonable doubt in an unconstitutional manner. ***See Victor***, 511 U.S. at 6.

Accordingly, we find no error in the PCRA court's conclusion that Appellant's claim of trial counsel's ineffectiveness for failing to object to the jury instruction lacked merit. PCRA Court Opinion, 5/12/20, at 5–8; ***see also Commonwealth v. Cox***, 863 A.2d 536, 549 (Pa. 2004) (trial counsel cannot be deemed ineffective for failing to object to a proper jury instruction).

Because we agree with the PCRA court that Appellant's claim lacks arguable merit, we need not reach the remaining two prongs of the test for ineffective assistance of counsel. ***Martin***, 5 A.3d at 183. However, if we were to address the prejudice prong, we would agree with the PCRA court that even if counsel had objected to the jury instruction, it would not have altered the result of the trial. PCRA Court Opinion, 5/12/20, at 7–8. Appellant's convictions were due to the overwhelming evidence against him, not trial counsel's failure to object to the trial court's reasonable-doubt instruction. ***Id.*** at 7. The PCRA court summarized the evidence against Appellant and concluded as follows:

> Three eyewitnesses, [G.B.], [Bradshaw], and Rasan [Davis], actually saw [Appellant] shoot the victim and they knew [Appellant] from the neighborhood so there was no real chance of misidentification. All three testified at trial regarding what they saw. ... On the witness stand, Saunders' [*sic*] claimed that he could not recall anything about the case. The Commonwealth then read from Saunders' sworn statement to police. In this statement, Saunders told police that he heard gunshots on the day of the murder, ran outside, and saw [Appellant] running away. He told police that he later spoke to [Appellant], who confessed to killing [Chavis], getting rid of the gun, and feeling confident that he would "beat the case." Further implicating [Appellant] at trial was the fact that police recovered two empty gun holsters from his bedroom when they executed a search warrant at his house. In addition, the evidence showed that [Appellant] called both Barbara and Zakia [Williams], and threatened Zakia to stop talking to police. There was also [Appellant's] full detailed confession to his cellmate Raheem Blakely (although Blakely later recanted when he was unable to procure a deal with the prosecutors in his own case). ... [T]he evidence of guilt was overwhelming and [Appellant] is unable to prove prejudice.

PCRA Court Opinion, 5/12/20, at 8.

We are cognizant that Appellant contends the jury instruction "resulted in a structural error which can never be considered harmless." Appellant's Brief at 20–23. However, Appellant does not address the distinction between the presumption of prejudice on direct appeal and the prejudice that must be proven in the context of ineffective assistance of counsel under the PCRA.

In ***Weaver v. Massachusetts***, ___ U.S. ___, 137 S.Ct. 1899 (2017), the United States Supreme Court discussed this distinction:

> The question then becomes what showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim. To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards. First, the defendant must show deficient performance—that the attorney's error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***[, 466 U.S. at 687]. Second, the defendant must show that the attorney's error "prejudiced the defense."

Weaver, 137 S.Ct. at 1910.

> When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, **petitioner must show prejudice** in order to obtain a new trial.

Id. at 1913 (emphasis added).

Additionally:

> The U.S. Supreme Court has emphasized that there are only "three categories of cases, described in ***Strickland***, in which we

> presume prejudice rather than require a defendant to demonstrate it." [***Smith v.***] ***Robbins***, 528 U.S. [259,] 287... [(2000)]. Those categories involve claims demonstrating (1) an actual denial of counsel, (2) state interference with counsel's assistance, or (3) an actual conflict of interest burdening counsel. ***Id.***

Commonwealth v. Lambert, 797 A.2d 232, 245 (Pa. 2001).

Because Appellant's claim of error concerning counsel's failure to object to the jury instruction does not fall into the categories enumerated in ***Robbins***, prejudice is not presumed. ***Lambert***, 797 A.2d at 245. Rather, Appellant is required to establish prejudice. ***Weaver***, 137 S.Ct. at 1910. Accordingly, we reiterate that if we were to reach the prejudice prong of the test for ineffective assistance of counsel, we would determine the PCRA court's conclusions are supported by the record and free of legal error because Appellant has not established prejudice; *i.e.*, there is not a reasonable probability that the outcome would have been different if counsel had objected. PCRA Court Opinion, 5/12/20, at 8; ***see also Housman***, 226 A.3d at 1260.

Turning to his second issue, Appellant claims trial counsel was ineffective for failing to object properly to portions of the prosecutor's closing argument, which referenced "snitching." Appellant's Brief at 23–31. The portion of the prosecutor's closing argument that Appellant finds objectionable is as follows:[8]

---

[8] The portions of the jury charge that Appellant contend are improper are emphasized in bold-face type. ***See*** Appellant's Brief at 25–26.

> Starting first with [Bradshaw], when you heard her testify, did you see how she walked in there? She's 16 years old. That's the same witness who could not go at the preliminary hearing and even sit on the stand and say what happened. **Why? You know it's because she can't snitch. I don't have to tell you that.** Defense counsel can't claim that's not what occurred. **We all know. It didn't just start now. It's gotten worse, and it doesn't require threats for you to be scared to talk.**

N.T., 11/18/05, at 91–92 (emphases added).

By way of background, trial counsel objected to the foregoing by arguing the prosecutor's comments were "designed for no other reason than to unfairly paint in a light that is improper what [trial counsel] did in closing argument and as counsel for [Appellant], which was certainly quite proper and certainly within the bounds of propriety, both professional and legal propriety." N.T., 11/18/05, at 106–107. The trial court noted the objection, and while not requested by trial counsel, the court stated no curative action was required. ***Id.*** at 107.

On direct appeal, Appellant raised the issue of prosecutorial misconduct by arguing the prosecutor improperly commented on the testimony of Bradshaw during closing argument. ***Gamble***, 281 EDA 2006 (unpublished memorandum at *19, 22). This Court found the issue waived for failure "to provide any analysis to support [the] contention." ***Id.*** (unpublished memorandum at *22).

On collateral appeal, Appellant now argues trial counsel, instead, should have objected on the basis that the prosecutor's comments "were not

based on evidence of record and were an expression of the prosecutor's personal opinion." Appellant's Brief at 26.[9]

A prosecutor is allowed wide latitude in advocating for the Commonwealth, including the right to argue all fair deductions from the evidence, to respond to defense arguments, and to engage in a certain degree of oratorical flair. ***Commonwealth v. Judy***, 978 A.2d 1015, 1020 (Pa. 2009). In addition, we are mindful of the following:

> A claim of ineffective assistance grounded in trial counsel's failure to object to a prosecutor's conduct may succeed when the petitioner demonstrates that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. The touchstone is fairness of the trial, not the culpability of the prosecutor.
>
> We further reiterate that a prosecutor has reasonable latitude during his closing argument to advocate his case, respond to arguments of opposing counsel, and fairly present the Commonwealth's version of the evidence to the jury. The court must evaluate a prosecutor's challenged statement in the context in which it was made. Finally, not every intemperate or improper remark mandates the granting of a new trial; reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict.

---

[9] Appellant does not argue on appeal that appellate counsel was ineffective for failing to provide any analysis to support this issue, which resulted in its waiver on direct appeal.

Hanible, 30 A.3d at 464–465 (quotation marks, brackets, and citations omitted).

In dismissing this claim, the PCRA court concluded that Appellant failed to prove all three prongs of the ineffective-assistance-of-counsel test. PCRA Court Opinion, 5/12/20, at 9–10. The PCRA court reasoned as follows:

> First, [Appellant] cannot show that this claim has arguable merit. The law is well settled that prosecutors have wide latitude when making closing remarks and may "make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments." ***Commonwealth v. Chmiel***, ... 30 A.3d 1111, 1181 ([Pa.] 2011) (citing ***Commonwealth v. Cox***, ... 983 A.2d 666, 687 ([Pa.] 2009)). [Appellant] was charged with, and ultimately convicted of, witness intimidation. Thus, the Commonwealth's comments regarding snitching were relevant to the charges and related to testimony of intimidation at trial. Second, [Appellant] is unable to show counsel had no reasonable basis for his action. Here, defense counsel did object to the Commonwealth's statements, but did so on an arguably more meritorious basis (counsel's conduct and tactics). Defense counsel cannot be faulted for failing to object on a frivolous basis. ***Commonwealth v. Spotz***, 896 A.2d 1191, 1247 (Pa. 2006); ***Commonwealth v. Fears***, 836 A.2d 52, 65 n.13 (Pa. 2003) (counsel cannot be found ineffective for failing to make a meritless objection). Last, [Appellant] is unable to show that this in any way affect[ed] the outcome of his trial. As discussed above, the evidence against him was overwhelming. Thus, no relief is due.

PCRA Court Opinion, 5/12/20, at 9–10.

We do not agree with Appellant's conclusion that this statement by the prosecutor was an invalid reflection of the evidence presented at trial. ***See*** Appellant's Brief at 26–27. Rather, our determination is supported by the following testimony at trial.

[Commonwealth:] And do you remember coming to court on May 25th, 2004, which was the first hearing?

[Bradshaw:] Yes.

* * *

[Commonwealth:] Okay. And on that day, did you talk to the judge?

[Bradshaw:] No.

[Commonwealth:] Okay. And why not?

[Bradshaw:] 'Cause I didn't want to talk. I didn't want to be a snitch.

[Commonwealth:] And why is that?

[Bradshaw:] I got to live there. I got to live in that neighborhood, and I don't want nobody to do nothing to me.

N.T., 11/15/05, at 144–145.

The prosecutor next asked why Bradshaw believed someone was going to do something to her. Trial counsel objected to this question, and the trial court sustained the objection. N.T., 11/15/05, at 145. The record reveals that this objection stemmed from a pretrial conference outside the presence of the jury. ***Id.*** at 40–53. During that conference, the Commonwealth explained that even though, at the time, Bradshaw had not yet talked to police, she had been subpoenaed to testify at the preliminary hearing. She showed up outside the courthouse that day, but was crying and refused to testify because she was scared. The day after the preliminary hearing, a drive-by shooting occurred at Bradshaw's residence, while she was at home

with her family on the front porch. After the drive-by shooting, Bradshaw came forward and talked to police. The Commonwealth wanted to present evidence of the drive-by shooting to explain why there was a delay in Bradshaw's statement to police. The trial court determined that without an offer of proof that Appellant was involved in the drive-by shooting, the prejudicial effect precluded it. ***Id.*** at 50–51. The trial court ruled, however, that the Commonwealth could present evidence of Bradshaw's refusal to cooperate at the preliminary hearing because she was scared. ***Id.*** at 51–52.

Thus, we conclude that the prosecutor's comments were an effort to present the Commonwealth's version of what the evidence established. ***Hanible***, 30 A.3d at 465. When we view the closing statement in its entirety, it is apparent the Commonwealth was highlighting Bradshaw's testimony that she was apprehensive and reluctant to help the Commonwealth, despite witnessing the incident. The prosecutor's comments were based on the evidence presented at trial and the inferences drawn therefrom. Appellant has not shown that the comments by the prosecutor had the unavoidable effect of prejudicing the jurors and forming in their minds a fixed bias and hostility toward Appellant, such that they could not weigh the evidence and render a true verdict. ***Id.*** Thus, Appellant's argument lacks arguable merit. In addition, for the reasons discussed above, Appellant cannot satisfy the prejudice prong of the test for

ineffective assistance of counsel. For all of the foregoing reasons, no relief is due on this issue.

Finally, Appellant argues that trial counsel was ineffective for failing to make a timely and proper hearsay objection during Saunders's testimony, which resulted in waiver of the issue on direct appeal. Appellant's Brief at 31–37; ***see also Gamble***, 281 EDA 2006 (unpublished memorandum at *14–16) (finding issue waived due to lack of objection). By way of background, on direct examination the Commonwealth questioned Saunders about his prior statement to police. Appellant takes issue with the following exchange, which occurred when the Commonwealth began to read from Saunders's statement:

> [Commonwealth:] QUESTION: Do you know who witnessed [Appellant] killing [Chavis]?
>
> [Saunders:] No.
>
> [Commonwealth:] Do you remember your answer? "I heard three little girls, Little G,[10] and the guys he was with." Do you remember that question and answer?
>
> [Saunders:] No.
>
> [Commonwealth:] Did he tell you how he knew Little G saw it?
>
> [Saunders:] No.

N.T., 11/16/05, at 115–116.

---

[10] "Little G" refers to G.B., who identified Appellant as the shooter at trial. N.T., 11/15/05, at 177–178; N.T., 11/16/05, at 103.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Generally, hearsay is inadmissible, "as it lacks guarantees of trustworthiness fundamental to our system of jurisprudence." ***Commonwealth v. Manivannan***, 186 A.3d 472, 480 (Pa. Super. 2018) (citations, internal quotation marks, and brackets omitted). To establish trustworthiness, "the proponent of a hearsay statement must establish an exception to the rule of exclusion before it shall be admitted." unless it falls within an exception to the hearsay rule. ***Id.*** Statements of an opposing party are a recognized exception to the hearsay rule. Pa.R.E. 803(25).

In dismissing this claim, the PCRA court explained that when read in context, the word "he" in the statement, "I heard three little girls, Little G, and the guys he was with," referred to Appellant. PCRA Court Opinion, 5/12/20, at 10–11. In further support, the court noted that "he" in the next question clearly referred to Appellant, that question asked, "Did he tell you how he knew Little G saw it?" ***Id.*** at 11. The PCRA court concluded the statement was admissible under the hearsay exception as statements of a party opponent. ***Id.*** (citing Pa.R.E. 803(25)). Further, the court determined that even if the statement were inadmissible hearsay, Appellant nonetheless failed to prove prejudice. PCRA Court Opinion, 5/12/20, at 11. We conclude that even if counsel had objected to this statement, it would not have

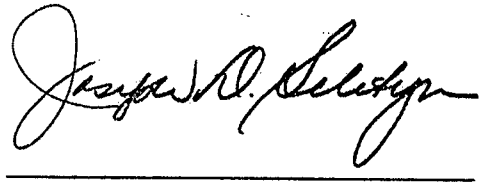
altered the result of the trial and thus, we find the PCRA court's conclusions are supported by the record and free of legal error. As discussed above, Appellant's convictions were due to the overwhelming evidence against him, including evidence corroborating the statement that G.B. witnessed the incident, not due to trial counsel's failure to object to Saunders's testimony. Accordingly, this issue is without merit because Appellant has failed to establish prejudice.

For the reasons set forth above, we discern no error in the PCRA court's order dismissing Appellant's PCRA petition. Accordingly, we affirm.

Order affirmed.

Judge Strassburger did not participate in the consideration or decision of this case.

Judgment Entered.



Joseph D. Seletyn, Esq.

Prothonotary

Date: 6/08/2021

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

TYRE GAMBLE	:	CIVIL ACTION
	:	
v.	:	
	:	
KATHY BRITTAIN, et al.	:	NO. 21-3015

REPORT AND RECOMMENDATION

SCOTT W. REID
UNITED STATES MAGISTRATE JUDGE

DATE: August 16, 2022

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Tyre Gamble, who is currently incarcerated at SCI Frackville, in Frackville, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. *Factual and Procedural Background*

On November 21, 2005, a jury sitting in the Court of Common Pleas for Philadelphia County convicted Gamble of first-degree murder, intimidation of a witness, and possessing instruments of crime. *Commonwealth v. Gamble*, 258 A.3d 505 (Table), Opinion at 2021 WL 239549 at *1 (Pa. Super. June 8, 2021).

As summarized by the Pennsylvania Superior Court, the facts underlying Gamble's conviction were the following:

> Gamble's conviction arises out of an April 2004 shooting incident in West Philadelphia following a verbal exchange with victim Taj Chavis. While holding an automatic handgun behind his back, Gamble approached Chavis at the corner of 33rd and Wallace Streets, and the two began to quarrel. Following Chavis's challenge, ("You acting like you gonna do something"), Gamble pulled the gun from behind his back and shot Chavis in the chest. As Chavis lay bleeding on the sidewalk, Gamble fired a second shot into Chavis's head and then fled the scene. Gamble was then nineteen years old and the victim somewhat younger.
>
> Prior to the shooting, as Gamble and Chavis exchanged words, ten-year-old G.B. ventured up the street with his brother and cousin as the three walked home from school. Upon seeing them, Gamble directed the boys to the other side of the street, where they

witnessed the subsequent killing. Distraught, G.B. ran several blocks down the street to the home of his grandmother, Barbara Williams, and upon entering, told his mother, Zakia Williams, "Mom, I seen the whole thing. I seen the whole thing." After calming her son, Zakia Williams left the house and went to the scene of the crime, where Philadelphia Police officers had by then converged. As she walked past, she threw a folded piece of paper to the ground before Officer Margarita Wilcox. Written on the paper was a note stating: "Everything you need to know is on this piece of paper," and "Tarie (shooter)." Officer Wilcox then gave the note to the investigating detective, who attached it to his report.

Police did not immediately apprehend Gamble, and he remained at large in the surrounding area during the investigation. In the intervening time, word circulated in the neighborhood that Gamble had killed Taj Chavis, prompting Gamble to telephone the home of Barbara Williams in search of her daughter, Zakia Williams, the mother of G.B. Although Gamble did not identify himself, his name and number appeared on Barbara's caller ID unit, and Barbara recognized the caller's voice. When Gamble asked for Zakia, Barbara told him that Zakia did not live there, to which Gamble asked: "Well, why does she keep pointing me out?" Gamble then clarified that he meant "Telling people that I killed that boy." After Barbara told him, "the whole neighborhood is saying that you killed him," Gamble concluded the conversation with a warning, saying: "Tell Zakia to stop putting my name in. Tell her to stop putting my name in her mouth or she[1] going to get f---ed up."

...

During the presentation of its case in chief, the Commonwealth presented, *inter alia*, the testimony of the victim's father, Alvin Chavis, to establish a "life in being," as well as the testimony of Zakia Williams and G.B. concerning G.B.'s account of the shooting, and Barbara Williams concerning Gamble's remarks threatening her daughter. The Commonwealth also presented the testimony of Ronald Saunders, who identified himself as Gamble's friend. Although Saunders had given a statement to the police implicating Gamble, he professed at trial not to remember the contents of that statement, prompting the prosecutor to read from the statement in an attempt to refresh the witness's recollection. Finally, the Commonwealth presented the testimony of Mercedes Bradshaw, a resident of the neighborhood who saw Gamble fire the second shot as the victim lay on the ground.

Gamble elected not to testify and presented no other evidence, following which the jury returned a verdict of guilty.

[1] Williams clarified on cross-examination that Gamble said "somebody" was "going to get f---ed up" if Zakia didn't stop "pointing him out," and that she understood this to mean that Zakia was threatened. *Notes of Testimony*, November 16, 2005, 43:2-13.

Commonwealth v. Gamble, No. 281 EDA 2006 (Pa. Super. Jan. 22, 2008) at 2-4. ("Gamble" substituted for "Appellant" and some brackets removed for clarity). Rasan Davis, who was walking with Gamble immediately before the shooting, also testified. 2021 WL 239549 at *1.

Following the submission of a pre-sentence report, the trial judge sentenced Gamble to concurrent terms of three and a half years' incarceration for witness intimidation, and one half to five years' incarceration for possession of instruments of crime, to be served consecutively to his life sentence for first-degree murder. No. 281 EDA 2006 at 4-5.

Gamble filed a direct appeal in the Pennsylvania Superior Court. In it, he argued that (1) he was unduly prejudiced by the testimony of Alvin Chavis, who wept openly as he identified documents belonging to his deceased son; (2) Barbara Williams' testimony contained hearsay; (3) Zakia Williams' testimony contained hearsay; (4) Ron Saunders' testimony contained both hearsay and irrelevant matters; (5) the Commonwealth's failure to present at trial the note Zakia Williams left on the sidewalk at the site of the shooting entitled him to a jury instruction that the jurors were entitled to make an inference which was unfavorable to the prosecution; and (6) the prosecutor committed misconduct in her closing argument. *Id.* at 5.

The Pennsylvania Superior Court affirmed Gamble's conviction in an opinion issued on January 22, 2008. *Id.* The Pennsylvania Supreme Court denied Gamble's petition for allowance of appeal on September 30, 2008. 598 Pa. 773 (2008) (Table)

On February 11, 2009, Gamble filed a timely, *pro se*, petition for relief under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, *et seq.* 2021 WL 2395949 at *2. Appointed counsel submitted a letter of no-merit under *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988). On April 19, 2011, the PCRA court signed a notice of intent to dismiss the PCRA petition without a hearing (called a "Rule 907 notice"), to which

Gamble filed a *pro se* response. 2021 WL 2395949 at *2. Sometime in July, 2011, the PCRA signed an order dismissing the petition, but this order was never docketed. *Id.*

On April 10, 2017, however, the PCRA court entered a second Rule 907 notice, presumably because its failure to docket the 2011 order had somehow come to its attention. *Id.* Through retained counsel, Gamble filed an amended PCRA petition on April 29, 2017, raising additional issues. *Id.* On August 20, 2019, the PCRA court entered a third Rule 907 notice, to which Gamble did not respond. *Id.* The PCRA court dismissed Gamble's PCRA petition on September 18, 2019. *Id.*

Gamble appealed the dismissal of his PCRA petition to the Pennsylvania Superior Court, arguing that trial counsel was ineffective in (1) failing to object to an unconstitutional jury instruction regarding reasonable doubt; (2) failing to object to the prosecutor's statement in her closing argument that Bradshaw would not cooperate with the Commonwealth initially because she did not want to be a "snitch," on the basis that the prosecutor's comments "were not based on evidence of record and were an expression of the prosecutor's personal opinion"; and (3) failing to make a timely and proper hearsay objection to testimony offered by Ronald Saunders. *Id.* at ** 3, 11. The Pennsylvania Superior Court denied relief on June 8, 2021. *Id.*

On July 7, 2021, Gamble filed the present counseled petition for habeas corpus relief. In it, he argues that (1) trial counsel was ineffective in failing to object to an unconstitutional jury instruction regarding reasonable doubt; (2) the trial court wrongly permitted the Commonwealth to elicit hearsay from Barbara Williams and Zakia Williams; (3) trial counsel was ineffective for failing to seek the exclusion of testimony from Ronald Saunders as irrelevant and hearsay; and (4) trial counsel was ineffective in failing to assert the correct objection to the prosecutor's comments regarding "snitches" in her closing argument.

II. *Legal Standards*

A. *Standard for Issuance of a Writ of Habeas Corpus*

In enacting the Antiterrorism and Effective Death Penalty Act of 1196 ("AEDPA"), Congress significantly limited the federal courts' power to grant a writ of habeas corpus. Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court may not grant habeas relief unless the adjudication either (a) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court; or (b) 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).

As the United States Supreme Court has explained, a writ may issue under the "contrary to" clause of Section 2254(d)(1) only if the "state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court] has done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the "unreasonable application" clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court "unreasonably applies it to the facts of the particular case." *Id.* This requires a petition to demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). State court factual determinations are given considerable deference under AEDPA. *Lambert v. Blackwell*, 387 F.3d 210, 233 (3d Cir. 2004).

B. *State Rulings on State Law*

In reviewing a habeas petition, "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). This standard is codified in AEDPA:

> [A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). Accordingly, the United States Supreme Court has decided that "federal habeas corpus relief does not lie for errors of state law," because "it is not the province of a federal habeas court to reexamine state-court determination on state-law questions." *Estelle*, *supra*, at 67-8.

Thus, a habeas petitioner can obtain relief for an error in a state law evidentiary ruling only where it so infected the entire trial that the resulting conviction violated the Due Process Clause. *Id.* at 70.

C. *Ineffective Assistance of Counsel*

In order to succeed on a claim of ineffective assistance of counsel, a habeas petitioner must show (a) that counsel's performance was deficient and (b) that counsel's actions prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1983). To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id* at 694. In other words, the petitioner must show that the "result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

Counsel's conduct is presumed to fall "within the wide range of professional assistance" and it is the petitioner's burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, at 466 U.S. 689-90.

III. *Discussion*

A. *The Jury Instruction Regarding Reasonable Doubt*

In Gamble's PCRA appeal, the Pennsylvania Superior Court rejected his claim that he was entitled to a new trial because trial counsel ineffectively failed to prevent the trial court from giving the jury an erroneous instruction regarding reasonable doubt. It relied upon *Commonwealth v. Housman*, 226 A.23d 1249, 1260 (Pa. 2020), which – in turn – relies upon *Strickland, supra*, the federal standard requiring both (1) attorney error and (2) prejudice to demonstrate ineffective assistance of counsel.

As to attorney error, the Pennsylvania Superior Court applied the standard set forth by the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1 (1994): "a jury instruction violates due process if there is a reasonable likelihood that the jury interpreted the instruction to allow a conviction based upon a degree of proof below the reasonable-doubt standard." 2021 WL 2395949 at *8. It concluded that the jury instructions on reasonable doubt, viewed in their entirety, did not support a conclusion that this standard was met. *Id.* Therefore, trial counsel was not ineffective for failing to object to them. *Id.* at *9.

The Pennsylvania Superior Court went on to write that it did not need to consider prejudice, the second prong of the *Strickland* test, because there was no attorney error. *Id.* However, it went on to make an alternative finding that Gamble could not show prejudice: "Appellant's convictions were due to the overwhelming evidence against him, not trial counsel's failure to object to the trial court's reasonable doubt instruction." *Id.*

As above, this Court is only empowered to offer relief where the state court's decision was contrary to, or involved an unreasonable application of, federal law; or where it was based on an unreasonable determination of the facts. 28 U.S.C. §2254(d).

In its response to Gamble's petition, the Commonwealth declines to defend the reasonable doubt jury instruction given by the trial court, even though it was approved as a whole by the Pennsylvania Superior Court. *Response* at 10. By inference, the Commonwealth concedes that trial counsel was ineffective in failing to object to the defective instruction. Thus, the first *Strickland* factor, regarding attorney error, is met. It is still necessary, however, to evaluate the state court's finding that Gamble could not show prejudice.

Gamble argues that the Pennsylvania Superior Court erred in requiring him to demonstrate actual prejudice. He points out that giving a jury a defective reasonable doubt instruction is considered structural error requiring automatic reversal of a conviction, and can never be considered harmless error. *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

In *Weaver v. Massachusetts*, however, the United States Supreme Court drew a distinction between structural error proved on direct appeal, which requires reversal because prejudice is assumed, and a claim of ineffective assistance of counsel for failing to object to structural error, which can require a showing of actual prejudice under *Strickland*. 137 S. Ct. 1899, 1910 (2017). The *Weaver* court required a petitioner to show prejudice where he argued that his counsel had been ineffective in failing to object when the judge closed the courtroom during *voir dire* proceedings. *Id.*

Nevertheless, the *Weaver* court specifically declined to decide whether prejudice must be shown in the context of counsel ineffectiveness claims involving forms of structural error other than the one before it. 137 S. Ct. at 1907. Thus, *Weaver* in itself does not decide the issue in this

case, which is whether a showing of prejudice was necessary where counsel failed to object to a defective reasonable doubt jury instruction. At least one judge in the Eastern District of Pennsylvania decided that this was so serious an error that prejudice must be presumed. *Brooks v. Gilmore*, Civ. A. No. 15-5659, 2017 WL 3475475 at *7 (E.D. Pa. Aug. 11, 2017).

More recently, however, the Court of Appeals for the Third Circuit interpreted *Weaver* differently than did the *Brooks* court. In *Baxter v. Superintendent Coal Township SCI*, the Third Circuit held that, where an ineffective assistance of counsel claim in a habeas corpus petition alleges an erroneous jury instruction, a defendant must still show actual prejudice to prevail. 998 F.3d 542, 548 and n.7[2] (3d Cir. 2021); *cert. denied sub nom Baxter v. McGinley*, 142 S. Ct. 1130 (2022). Thus, the Pennsylvania Superior Court's decision that Gamble would need to show actual prejudice was not contrary to *Weaver* as it is interpreted by the Third Circuit.

Further, the Pennsylvania Superior Court's decision was not based on an unreasonable interpretation of the facts. As above, the Pennsylvania Superior Court decided that the evidence against Gamble was so strong that he would have been convicted even if counsel had succeeded in correcting the erroneous jury instruction. In support of this conclusion, it set forth the PCRA court's summary of the trial evidence:

> Three eyewitnesses, G.B., Bradshaw, and Rasan Davis, actually saw Gamble shoot the victim and they knew Gamble from the neighborhood so there was no real chance of misidentification. All three testified at trial regarding what they saw ... On the witness stand, Saunders claimed that he could not recall anything about the case. The Commonwealth then read from Saunders' sworn statement to police. In this statement, Saunders told police that he heard gunshots on the day of the murder, ran outside, and saw Gamble running away. He told police that he later talked to Gamble, who confessed to killing Chavis, getting rid of the gun, and feeling confident that he would "beat the case." Further implicating Gamble at trial was the fact that police recovered two empty

[2] The Baxter court wrote: "The complete failure to give [a reasonable doubt instruction] is a structural error that so infects the trial process that the verdict cannot be said to reflect a proper verdict in a criminal case. ... When a reasonable doubt instruction is given, however, the rules concerning evaluating a jury instruction apply. ... In the context of an ineffective assistance of counsel claim, if we conclude that the instruction contains an error, we then examine whether the instruction resulted in actual prejudice." 998 F.3d at 548.

> gun holsters from his bedroom when they executed a search warrant at this house. In addition, the evidence showed that Gamble called both Barbara and Zakia Williams, and threatened Zakia to stop talking to police. There was also Gamble's fully detailed confession to his cellmate Raheem Blakely (although Blakely later recanted when he was unable to procure a deal with the prosecutors in his own case).

2021 WL 2395949 at *9. (Brackets replaced with proper names for clarity).

This analysis is quite similar to that in *Baxter*, where the Court of Appeals for the Third Circuit held that the petitioner was not prejudiced by counsel's failure to object to a defective reasonable doubt instruction because "various eyewitnesses who were in close proximity of and who knew Baxter for years testified that Baxter and [a co-defendant] chased [the victim] and repeatedly shot him," and another witness testified that she heard Baxter make incriminating remarks. 998 F.3d at 549.

Conversely, a recent case illustrates the sort of weak trial evidence which can make a defective reasonable doubt instruction prejudicial. In *Moore v. Rivello*, counsel's failure to object to a defective reasonable doubt instruction was found to have prejudiced a petitioner where "the Commonwealth's case rested on circumstantial evidence from the testimony of witnesses, none of whom actually witnesses the shooting," including two who were not interviewed by the police until 14 months after the shooting, and then recanted on the stand, causing the trial judge to remark at a sidebar that the testimony was "going south," and a third who had "several material inconsistencies in his version of events." Civ. A. No. 20-838, 2022 WL 1749250 at *17 (E.D. Pa. May 31, 2022). The witnesses at Gamble's trial, by contrast, did not have these defects.

With three eyewitnesses who knew Gamble from the neighborhood testifying that they saw him shoot Chavis, and another testifying that Gamble admitted to the shooting, it would not be reasonable to conclude that, but for counsel's error, Gamble would have been exculpated, as is required under *Strickland*. 466 U.S. at 687. Thus, the Pennsylvania Superior Court's conclusion that Gamble could not show the prejudice required to obtain relief under *Strickland* is based on a reasonable interpretation of the facts. Under AEDPA, therefore, there is no basis upon which this Court can disturb its decision.

B. *The Testimony of Barbara and Zakia Williams*

1. *Barbara Williams*

Gamble maintains that the trial court erred in permitting Barbara Williams to testify that she said to Gamble on the phone: "the whole neighborhood is saying you killed him." According to Gamble, this testimony was hearsay and violated his rights under the Confrontation Clause of the Sixth Amendment because it "contained information provided by unidentified members of the neighborhood" whom he never had the opportunity to cross-examine. His counsel objected to this testimony at trial, but the objection was overruled. 2018 EDA 2006 at 12.

The Pennsylvania Superior Court rejected this claim of trial court error in its opinion on Gamble's direct appeal. It found that, under state evidentiary law, the testimony was not hearsay because it was not admitted to prove that Gamble killed Chavis, or even to prove that the neighbors thought he had. *Id.* Instead, it was relevant to Gamble's conviction for witness intimidation, in that it was part of a conversation with Williams in which he told her that "someone" would be "f---ed up" if Zakia Williams kept mentioning him in connection with Chavis's death. *Id.*

The hearsay aspect of this claim is not cognizable under AEDPA. A habeas petitioner can obtain relief for an error in a state law evidentiary ruling only where it so infected the entire trial that the resulting conviction violated the Due Process Clause. *Estelle*, *supra*, 502 U.S. at 70. Barbara Williams' statement can hardly be said to have done that, when the prosecution presented the testimony of three witnesses to the shooting (G.B., Bradshaw and Davis), and another witness (Saunders) who saw Gamble fleeing immediately afterwards, and later heard Gamble admit to the killing.

As to the part of this claim alleging violation of the Confrontation Clause, however, this Court may decide it *de novo* because the Commonwealth agrees that it was raised by Gamble in his direct appeal, but the Pennsylvania Superior Court did not address it. *Response* at 15; *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009).

The Confrontation Clause of the Sixth Amendment of the United States Constitution states that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Its principal function is to prevent the use of *ex parte* examinations of suspected witnesses by government officials in criminal proceedings. *Michigan v. Bryant*, 562 U.S. 344, 353 (2011); *Crawford v. Washington*, 541 U.S. 36, 50 (2004). Not every out-of-court statement raises Confrontation Clause concerns. Even an interrogation by a law enforcement officer may not implicate the Confrontation Clause. *Bryant* at 562 U.S. 355.

Gamble relies upon *Crawford v. Washington*, but in that case, the United States Supreme Court specified that the Confrontation Clause applies only to "witnesses" who "bear testimony" against the accused, with "testimony" being "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51; and see *United States v. Gonzales*, 905 F.3d 165, 201-2 (3d Cir. 2018).

The amorphous comments Barbara Williams attributed to her unnamed neighbors fall far short of the *Crawford* standard. Accordingly, Gamble has not set forth a meritorious issue under the Confrontation Clause.

2. *Zakia Williams*

Gamble also argues that the trial court violated his Confrontation Clause rights "by allowing the Commonwealth to elicit hearsay testimony" from Zakia Williams. *Petition* at 11. He is referring to Zakia Williams' testimony as to "the contents of the conversation she had with" her son immediately after he witnessed the shooting. *Id.* at 10.

There is no merit to this argument. This testimony could not possibly raise Confrontation Clause concerns because Zakia Williams' son, G.B., testified at Gamble's trial, and was subjected to cross-examination. No. 281 EDA 2006 at 4. In *Crawford*, the United States Supreme Court wrote: "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." 541 U.S. 59 at n.9.

Gamble has also alleged that Zakia Williams' testimony about what her son said constituted hearsay. As above, however, this claim would not be cognizable here. *Estelle*, *supra*, 502 U.S. at 70. In any event, it seems likely that any hearsay issues would also have been resolved by the fact that G.B. later took the stand and testified himself as to what he saw.

C. *Counsel's Failure to Object to Testimony from Ronald Saunders*

During Ronald Saunders' testimony at Gamble's trial, the Commonwealth at times attempted to refresh his memory with a prior statement he made to police. The trial testimony at issue is as follows:

> COMMONWEALTH: Do you know who witnessed Gamble killing Chavis?
>
> SAUNDERS: No.
>
> COMMONWEALTH: Do you remember your answer? "I heard three little girls, [G.B.], and the guys he was with." Do you remember that question and answer?
>
> SAUNDERS: No.
>
> COMMONWEALTH: Did he tell you how he knew [G.B.] saw it?
>
> SAUNDERS: No.

Petition at 12; 2021 WL 2395949 at *13. (Brackets replaced with proper names, but added for G.B., for clarity); *Trial Transcript*, November 16, 2005, at 115:16-116:2.

Trial counsel objected to the question "Did he tell you how he knew [G.B] saw it?" on the basis that it implied that Gamble, in fact, knew G.B. was a witness to the shooting. *See Petition* at 13. The judge, however, refused to give a cautionary instruction. *Trial Transcript, id.*, at 121:25-123:7. On direct appeal, Gamble argued that the testimony should have been suppressed on the basis that it was hearsay and irrelevant, but the Pennsylvania Superior Court determined that this claim was waived under state law, because these were not the bases for counsel's objection at trial. 281 EDA 2006 at 16.

In his PCRA petition, Gamble argued that trial counsel was ineffective for waiving an objection to the Commonwealth's question, and also in failing to object to its prior question about the identity of the witnesses, on the basis of irrelevance and hearsay. The Pennsylvania Superior Court however, concluded that the statements made were references to information

Gamble gave Saunders, and were therefore those of a party opponent, which were admissible under the Pennsylvania Rules of Evidence. 2021 WL 2395949 at *13. It concluded trial counsel was not ineffective in failing to object, because such an objection would have been overruled. *Id.*

Gamble has raised the same claim of trial counsel ineffectiveness here as the one he raised in his PCRA petition. He has not, however, specifically addressed the Pennsylvania Superior Court's holding that both of the challenged statements were admissible as those of a party opponent. As such, there is no basis upon which this Court can question the Pennsylvania court's determination that the statements were appropriately admitted under Pennsylvania law.

Further, the PCRA appeals court went on to decide that, even if the statements were "inadmissible hearsay," Gamble could not prove the prejudice necessary under *Strickland* to show that his counsel was constitutionally ineffective, because his "convictions were due to the overwhelming evidence against him, including evidence corroborating the statement that G.B. witnessed the incident, not due to trial counsel's failure to object to Saunders's testimony." *Id.*

There is clearly a reasonable factual basis for the Pennsylvania Superior Court's decision in this regard. Given the testimony of three-eye witnesses, as well as other inculpatory evidence, it cannot be reasonably concluded that the outcome of Gamble's trial would have been different if counsel had succeeded in suppressing the limited portion of Saunders' testimony to which he points. Therefore, Gamble has not shown a basis upon which this Court could disturb the decision of the Pennsylvania court on this claim.

D. *The Prosecutor's Closing Remarks*

Finally, Gamble maintains that his trial counsel was ineffective for failing to object on the correct basis to remarks the prosecutor made in her closing arguments about Mercedes Bradshaw, the teen-aged witness who testified that she saw Gamble shoot Chavis when he was lying on the ground. Detective John Verrechio testified that, at the May 25, 2004, pre-trial hearing, Bradshaw refused to testify because she was afraid:

> COMMONWEALTH: Specifically, Mercedes, what do you recall about her on that day, May 25, 2004?
>
> VERRECHIO: Mercedes Bradshaw was brought there by her father. Her father didn't want her to have anything to do with the case, didn't want her to testify or be involved. She did not want to be involved mainly because she was scared to death, and that's what she said. She was scared to death. She was actually friends with the defendant, and she did not want to testify.
> ...
>
> COMMONWEALTH: And was she able to get on the stand and testify that day?
>
> VERRECHIO: No.

Trial Transcript, November 17, 2005, at 95:15-96:8.

Bradshaw herself testified that she did not take the stand at the preliminary hearing because she did not want to be a "snitch":

> COMMONWEALTH: And do you remember coming to court on May 25, 2004, which was the first hearing?
>
> BRADSHAW: Yes.
>
> ...
>
> COMMONWEALTH: Okay. And on that day, did you talk to the judge?
>
> BRADSHAW: No.
>
> COMMONWEALTH: Okay. And why not?
>
> BRADSHAW: 'Cause I didn't want to talk. I didn't want to be a snitch.

COMMONWEALTH: And why is that?

BRADSHAW: 'Cause I got to live there. I got to live in that neighborhood, and I don't want nobody to do nothing to me.

Trial Transcript, November 15, 2005, at 144:5-6, 24-145:8.

In her closing, the prosecutor said:

Starting first with Mercedes Bradshaw, when you heard her testify, did you see how she walked in there? She's 16 years old. That's the same witness who could not go at the preliminary hearing and even sit on the stand and say what happened. Why? You know it's because she can't snitch. I don't have to tell you that. Defense counsel can't claim that's not what occurred. We all know. It didn't just start now. It's gotten worse, and it doesn't require threats for you to be scared.

Trial Transcript, November 18, 2005, 91:13-24.

After the prosecutor's closing argument, trial counsel objected to her description of Bradshaw's testimony, but only to the statement that "Defense counsel can't claim that's not what occurred." *Id.* at 107:3-7. He argued that this statement unfairly painted his trial tactics as improper. *Id.* at 107:8-16. The Court overruled the objection. *Id.* at 107:19-21. On direct appeal, the Pennsylvania Superior Court deemed the issue to have been waived because of Gamble's failure to provide any analysis supporting it. 281 EDA 2008 at 22.

In his PCRA petition, however, Gamble argued that trial counsel was ineffective because, although he objected to the prosecutor's remarks about Bradshaw, he objected on the wrong basis. According to Gamble, trial counsel should have objected on the basis that: "The prosecutor's comments were ... not based on evidence of record and were an expression of the prosecutor's personal opinion" as to behavior in the neighborhood regarding "snitches", because "there was absolutely no evidence of record in the case at bar to support the prosecutor's

erroneous and highly prejudicial argument that multiple unnamed people in the neighborhood would retaliate against Bradshaw if she testified against" Gamble. *Response* at 32-3.[3]

This is essentially the same claim Gamble raises here, although she also specifies that trial counsel could have objected to the prosecutor's remarks as vouching. Vouching constitutes an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury. *Lam v. Kelchner*, 304 F.3d 256, 271 (3d Cir. 2002). Gamble never raised a specific "vouching" claim before the Pennsylvania courts. 2021 WL 2395949 at *3 (listing claims raised). Nevertheless, his reference to the prosecutor's statement as her "personal opinion" could arguably be seen as fairly presenting such a claim. *McCandless v. Vaughn*, 172 F.3d 225, 261 (3d Cir. 1999).

The Pennsylvania Superior Court found in Gamble's PCRA appeal that, under *Strickland*, trial counsel was not ineffective for failing to make this objection because it lacked merit. 2021 WL 2395949 at *11. The Superior Court agreed with the PCRA court that, under Pennsylvania law, the prosecutor's statements were within the prosecutor's "wide latitude" to make fair comment in closing on Bradshaw's testimony that she initially would not cooperate with the prosecution because she would be endangered if she was seen as a "snitch" in her "neighborhood." *Id.* at **11-12

[3] In fact, out of the presence of the jury, the prosecutor told the judge that the day after the preliminary hearing, "there was a drive-by shooting that occurred at Bradshaw's residence, while she was at home with her family on the front porch." 2021 WL 2395949 at *12. There was "shooting directly at her." *Trial Testimony*, November 15, 2005 at 41:7-11. The trial court would not let the Commonwealth make the drive-by shooting known to the jury, in the absence of evidence connecting it to Gamble, but ruled that the Commonwealth "could present evidence of Bradshaw's refusal to cooperate at the preliminary hearing because she was scared." *Id.* Nevertheless, Gamble is technically correct that there was "absolutely no evidence **of record**" regarding retaliation against Bradshaw for snitching.

The Pennsylvania Superior Court's conclusion relied upon a reasonable application of the law clearly established in *Strickland.* It was also based on a reasonable determination of the facts, since Bradshaw did, in fact, explicitly testify that someone could "do something" to her if she was viewed in her neighborhood as a "snitch." Therefore, no basis exists for disturbing the PCRA appellate court's finding that trial counsel was not ineffective in failing to object to the prosecutor's remarks on the basis suggested.

IV. *Conclusion*

For the reasons set forth above, I now make the following:

RECOMMENDATION

AND NOW, this 16th day of August, 2022, it is respectfully recommended that this petition be denied. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. *See Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Scott W. Reid

SCOTT W. REID
UNITED STATES MAGISTRATE JUDGE

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

TYRE GAMBLE	:	CIVIL ACTION
	:	
v.	:	
	:	
KATHY BRITTAIN, et al.	:	NO. 21-3015

ORDER

This 28th day of February, 2023, upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Scott W. Reid and the Petitioner's objections, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Petitioner's objections are **OVERRULED**;[1]
3. The petition for a writ of habeas corpus is **DENIED**; and
4. There is no basis for the issuance of a certificate of appealability.

The Clerk of Court is requested to mark this case closed.

BY THE COURT:

/s/ Gerald Austin McHugh
United States District Judge

[1] Mr. Gamble principally relies upon my decision in *Brooks v. Gilmore*, No. 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017), a decision recently endorsed by the Supreme Court of Pennsylvania. *Commonwealth v. Drummond*, 285 A.3d 625, 643-45 (Pa. 2022). In *Brooks*, I held that prejudice is to be presumed as to an erroneous instruction on reasonable doubt because the error is structural. I considered *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), and concluded that even if not all structural error can be deemed presumptively prejudicial, the Supreme Court would still presume prejudice where the error involves reasonable doubt. *Brooks*, 2017 WL 3475475, at *7. But Judge Reid is correct that the Third Circuit later interpreted *Weaver* differently in *Baxter v. Superintendent Coal Township SCI*, 998 F.3d 542, 547-48 (3d Cir. 2021). And in endorsing *Brooks*, the Pennsylvania Supreme Court took no position on whether prejudice should be presumed. *Drummond*, 285 A.3d at 645 n.54. Although I read *Weaver* as supporting a continued presumption of prejudice, see 137 S. Ct. at 1908, *Baxter* is binding in this circuit, with the result that petitioner's failure to show prejudice defeats his claim for relief here.

DLD-166

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-1448**

TYRE GAMBLE, Appellant

VS.

SUPERINTENDENT FRACKVILLE SCI, ET AL.

(E.D. Pa. Civ. No. 2:21-cv-03015)

Present: JORDAN, CHUNG, and SCIRICA, Circuit Judges

Submitted are:

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

(2) Appellant's motion to accept overlong filing

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motion to accept his overlong application for a certificate of appealability is granted. Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons set forth in the Magistrate Judge's report and recommendation and adopted by the District Court, jurists of reason would not debate that Appellant failed to show that he was prejudiced by counsel's failure to object to the trial court's jury instruction on reasonable doubt. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Baxter v. Superintendent Coal Township SCI, 998 F.3d 542, 548–49 (3d Cir. 2021).

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: July 11, 2023
Sb/cc: All Counsel of Record

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

June 11, 2023

Alexander C. Blumenthal, Esq.
Philadelphia County Office of District Attorney
3 S Penn Square
Philadelphia, PA 19107

Ronald Eisenberg, Esq.
Office of Attorney General of Pennsylvania
1600 Arch Street
Suite 300
Philadelphia, PA 19103

Jonathan J. Sobel, Esq.
1500 Walnut Street
Suite 2000
Philadelphia, PA 19102

RE: Tyre Gamble v. Superintendent Frackville SCI, et al
Case Number: 23-1448
District Court Case Number: 2-21-cv-03015

ENTRY OF JUDGMENT

Today, **July 11, 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.

Very truly yours,

Patricia S. Dodszuweit, Clerk

By: Stephanie
Case Manager
Direct Dial 267-299-4926

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1448

TYRE GAMBLE,
Appellant

v.

SUPERINTENDENT FRACKVILLE SCI;
DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civ. No. 2-21-cv-03015)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant 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,

*As to panel rehearing only.

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

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: October 5, 2023
Sb/cc: Tyree Gamble
All Counsel of Record