No. 24-

IN THE

Supreme Court of the United States

HAMETT DIAZ,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, ATTORNEY GENERAL PENNSYLVANIA, AND SUPERINTENDENT FOREST SCI,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ZAK T. GOLDSTEIN, ESQUIRE
Counsel of Record
GOLDSTEIN MEHTA LLC
1717 Arch Street, Suite 320
Philadelphia, PA 19103
(267) 225-2545
ztg@goldsteinmehta.com

130388

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Petitioner Hamett Diaz received the ineffective assistance of counsel from his trial attorney. As a result, he was convicted of rape of an unconscious person in Pennsylvania state court even though the complainant testified that she believed the assault was a dream. There were no other witnesses to the alleged assault or forensic evidence which proved that it occurred.

Diaz was convicted because his trial attorney inexplicably failed to object when the complainant herself and nearly every other witness who testified at trial said that Diaz's stepdaughter, K.C., who would not even have been present for the alleged assault, confirmed that the rape occurred. Barring the application of an exception, hearsay is inadmissible in state and federal court. Neither the prosecution nor any of the courts to address the issue have ever suggested that this hearsay would have been admissible under any exception to the rule. Instead, the Commonwealth and the lower courts concluded that trial counsel acted reasonably strategically in failing to object to this directly incriminating hearsay from a witness who the jury would have expected Diaz to produce to say it was not true. No one has ever explained how that could be.

Trial counsel's decision was not strategic. The admission of the out-of-court statements that Diaz's stepdaughter believed he committed the rape of her 17-year-old friend directly led to his wrongful conviction. The complainant thought the incident was a dream. Therefore, the question presented is:

Whether the Third Circuit erred in failing to find that trial counsel provided the ineffective assistance of counsel in failing to object to the admission of

extremely incriminating and otherwise inadmissible hearsay testimony of multiple witnesses who testified that Petitioner Hamett Diaz's stepdaughter, K.C., confirmed that Diaz raped the complainant and encouraged the complainant to call for help, given that K.C. did not testify at trial?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption of the case.

STATEMENT OF RELATED PROCEEDINGS

- *Commonwealth of Pennsylvania v. Hamett Diaz*, CP-45-CR-396-2014, Monroe County Court of Common Pleas. The trial court's final judgment of sentence was entered on September 8, 2017. The same trial court dismissed a Post-Conviction Relief Act Petition on June 11, 2019.

- *Commonwealth of Pennsylvania v. Hamett Diaz*, 3165 EDA 2015, Pennsylvania Superior Court. The Pennsylvania Superior Court affirmed the conviction but vacated the judgment of sentence and remanded for a new sentencing hearing on December 16, 2016.

- *Commonwealth of Pennsylvania v. Hamett Diaz*, 1965 EDA 2019, Pennsylvania Superior Court. The Superior Court affirmed the order dismissing the Post-Conviction Relief Act Petition on May 7, 2020.

- *Commonwealth of Pennsylvania v. Hamett Diaz*, No. 449 MAL 2020, Supreme Court of Pennsylvania. The Pennsylvania Supreme Court denied a petition for allowance of appeal seeking review of the denial of the Post-Conviction Relief Act Petition on January 6, 2021.

- *Hamett Diaz v. Derek Oberlander*, No. 4:20-CV-01667, Middle District of Pennsylvania. The District Court issued a memorandum opinion and denied the habeas petition on February 14, 2023.

- *Hamett Diaz v. Commonwealth of Pennsylvania; Attorney General Pennsylvania; Superintendent Forest SCI*, No. 23-1490, United States Court of Appeals for the Third Circuit. The Third Circuit issued an order granting a motion for the issuance of a certificate of appealability on July 24, 2023. The Third Circuit denied the appeal on April 22, 2024. That Court also denied a timely application for rehearing on May 22, 2024.

TABLE OF CONTENTS

TABLE OF APPENDICES

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

CONSTITUTIONAL PROVISIONS

Page

STATUTES, RULE AND REGULATIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner Hamett Diaz respectfully petitions the Court for a writ of certiorari to review the Order of the Third Circuit affirming the denial of his federal habeas petition filed under 28 U.S.C. § 2254.

DECISIONS BELOW

The citation to the Third Circuit Opinion denying the appeal is *Hamett Diaz v. Commonwealth of Pennsylvania; Attorney General Pennsylvania; Superintendent Forest SCI*, No. 23-1490, 2024 WL 1715108 (3d Cir. April 22, 2024). It is included in the Appendix at 1a–9a. The citation to the District Court memorandum opinion denying the habeas petition is *Hamett Diaz v. Derek Oberlander*, No. 4:20-CV-01667, 2023 WL 1994389 (M.D.Pa. February 14, 2023). It is included in the Appendix at 12a–59a. Finally, the Third Circuit's Order denying rehearing is included in the appendix at 114a–115a.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Pennsylvania had jurisdiction over this matter pursuant to 28 U.S.C. § 2554. The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Third Circuit denied the appeal on April 22, 2024. Diaz filed a timely petition for rehearing on May 6, 2024. The Third Circuit denied the petition for rehearing on May 22, 2024, giving Diaz until August 20, 2024, to file

this Petition for Writ of Certiorari. This Petition is timely-filed on or before August 20, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF CASE

Petitioner Hamett Diaz was convicted of rape and related charges following a jury trial in the Monroe County Court of Common Pleas. After a successful appeal of his initial sentence, the trial court re-sentenced him

on September 8, 2017, to a final sentence of 140 to 240 months' incarceration. Diaz's challenge to the conviction itself was rejected by the Pennsylvania appellate courts. Diaz filed a timely Post-Conviction Relief Act (PCRA) Petition. The state court denied that petition, and Diaz exhausted his claims by appealing the denial of the petition to the Pennsylvania Superior Court. The Superior Court affirmed, and Diaz's request for review was denied by the Pennsylvania Supreme Court.

Diaz filed a timely petition under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Pennsylvania challenging his Pennsylvania state court conviction. In that petition, he alleged that he received the ineffective assistance of counsel from trial counsel when counsel failed to object to incriminating hearsay testimony from multiple witnesses. The district court denied the petition, finding that counsel acted reasonably in repeatedly failing to object to obvious, extremely incriminating hearsay. Diaz appealed to the United States Court of Appeals for the Third Circuit and moved for a certificate of appealability. The Third Circuit granted a certificate of appealability on whether trial counsel's decision not to object to the incriminating hearsay was reasonably strategic. The Third Circuit found that counsel acted reasonably, so it affirmed and denied a subsequent petition for rehearing.

The trial can be summarized as follows:

First, the Commonwealth called the complainant to testify. The complainant was a friend of Diaz's stepdaughter, K.C. In 2013, she accompanied Diaz and K.C. on a trip to New York. She planned to stay the night

when they returned. The three traveled in Diaz's minivan and drank Vodka on the way.

When they arrived, the complainant and K.C. went to a nail salon. The complainant and Diaz purchased more liquor while K.C. got her nails done. After the complainant and K.C. were finished, they returned home to Pennsylvania. The complainant testified that she was "blacking in and out" during the return trip.

The group arrived home at around 11pm. Diaz asked K.C. to go into the house and see if K.C.'s mother was still awake. He then drove the complainant to a service road, opened the trunk, put the back seat down, and had vaginal and oral intercourse with her. She remembered some of what happened but stated that she was unable to move or resist. After it was over, she asked Diaz if he ejaculated. He said that he did. She did not see a condom, however.

Diaz then drove her back to the house. She got out of the car and wobbled to the door. She went upstairs. As she went upstairs, she had to hold onto the wall and climb up the stairs on her hands and knees. When she got up the stairs, she saw her friend, K.C. She started crying, went into the bathroom, threw up, changed into pajamas, and went to bed in K.C.'s house despite living only a few blocks away.

She awoke at around 4:30 am and told K.C. that she had had a crazy dream. K.C., who did not testify at trial, confirmed that it was not a dream, stating, "She was like everything that you told me, it happened." K.C. encouraged her to tell someone. In other words, trial counsel did not object when the complainant testified that K.C. confirmed that the rape happened.

K.C. called the complainant's ex-boyfriend and told him that Diaz raped the complainant. Again, counsel did not object. After the call, the complainant's mother and other family members arrived at the house to pick her up. They confronted Diaz, and a minor physical altercation occurred. The complainant left with her family and went to the hospital.

On cross-examination, trial counsel highlighted the inconsistencies in the complainant's testimony. First, the complainant agreed that her ex-boyfriend had recently broken up with her and that she had not wanted the relationship to end. Second, the complainant made several inconsistent statements when the police interviewed her. For example, she made no mention of oral sex to the police or hospital personnel. Although the complainant initially insisted that she told the nurse at the hospital about oral sex, she eventually admitted that she may not have. She also acknowledged that she initially believed that she had been having sex with her ex-boyfriend. She admitted testifying at the preliminary hearing that she was not sure if something really happened or if it was a dream. She stated: "When I woke up, I didn't know it happened. Because I'll remind you that I was still intoxicated. So I asked [K.C.] to confirm because I tell [her] everything." She then reiterated that K.C. confirmed that she was raped and called her ex-boyfriend. Defense counsel failed to object.

The complainant stated again, without defense objection, that it was K.C. who confirmed to her mother that Diaz raped her, stating, "Yeah. She said it was true, and I nodded yes." She confirmed that she relied on K.C. in reaching this conclusion. On re-direct, the Commonwealth

again elicited this hearsay. She wrote one statement at the police station, but the trooper told her that if she remembered anything else, she could re-write it. She took a blank form home with her and wrote another statement. On re-cross, counsel again introduced K.C.'s hearsay statement confirming that the rape happened and that the complainant needed to call someone.

Other witnesses testified, but none of them had seen anything. The complainant's ex-boyfriend, for example, received a frantic phone call from K.C. and went to Diaz's house. Again, defense counsel did not object to testimony that K.C. told E.J. that Diaz raped the complainant. Similarly, the ex-boyfriend's mother testified to being woken up in the middle of the night and driving him to Diaz's house. She apparently heard from her son that the complainant had been raped by Diaz. Then, despite the absence of any personal knowledge of anything whatsoever, the complainant's mother was allowed to testify that E.J.'s mother called her to tell her that the complainant had in fact been raped by Diaz. She described receiving that phone call. She also confirmed that the complainant was sober enough to answer questions.

The Commonwealth attempted to introduce the 911 call into evidence. The court sustained counsel's objection to the playing of the call itself because the complainant did not make the call.

The emergency room nurse who examined the complainant prepared a report after conducting an interview and exam at the hospital. She did not note any physical findings. She repeated the complainant's initial version of events, which the complainant later contradicted,

to the jury from her report. Defense counsel did not object to this hearsay. She swabbed the complainant's neck and vaginal area for DNA and provided the sexual assault kit to the police. The complainant was alert at the time of the interview. She was oriented to person, time, place, and surroundings, and her gait was normal. She was able to communicate normally. The complainant was specifically asked about and made no mention of oral sex. She did report that Diaz ejaculated inside of her and that she used the restroom to urinate when she returned to Diaz's house. Defense counsel inexplicably once again introduced into evidence the hearsay testimony that it was K.C. who initially reported the assault and not the complainant. The nurse confirmed that the complainant had not bathed since the incident or washed her clothes. She did not find any injuries, pubic hairs, or physical trauma of any kind.

The Commonwealth introduced expert testimony that the complainant had alcohol in her urine.

Trooper Bruce Wesnak spoke with the complainant at the hospital. He sent the swabs from the hospital to the serology lab for testing. He also called Diaz's wife. She told him Diaz was not there and had left early in the morning. Diaz did not have a cell phone, and she did not know how to contact him. Counsel objected to this hearsay, but he did not move for a mistrial. The trooper did not reach Diaz that day, but he let Diaz's wife know that he was looking for him. He also had another trooper go and try to interview K.C. without success. He obtained a search warrant for Diaz's DNA and later took a DNA sample. He sent it out for analysis. He took some photographs of the general area where the assault could have occurred.

On cross-examination, the trooper confirmed that the complainant never mentioned oral sex at the hospital. Despite the complainant's testimony that she wrote two statements, he only interviewed her one time. He never obtained a search warrant for Diaz's van. He did not think much of Diaz's decision not to make a statement.

The Commonwealth presented additional expert testimony. A serologist tested the swabs in the rape kit and did not find any semen. She did find possible saliva on the neck swab of the complainant, but it could have also been sweat. She sent various DNA samples to the lab. She did not find any semen on the complainant's underwear. She did not test the vaginal swabs for saliva because the complainant had not reported oral-genital contact.

Finally, a DNA expert determined that the DNA in the neck swab likely came from Diaz and the complainant. On cross-examination, she testified that DNA can be transferred by touch. With that, the Commonwealth rested.

Diaz's wife, Nilda Diaz, was home on the night in question. She was watching TV in the living room with her other two children when K.C. arrived home. K.C. told her that Diaz and the complainant went to get cigarettes. 15 minutes later, she saw the complainant enter the house and go upstairs. Diaz had cigarettes out. The complainant did not look drunk. The defense did not present any other evidence. The jury found Diaz guilty, and the trial court sentenced him to a lengthy period of state incarceration.

After vacating the original sentence due to the improper application of a mandatory minimum, the

Pennsylvania appellate courts ultimately affirmed the conviction on appeal. Diaz challenged the conviction by filing a timely Post- Conviction Relief Act Petition. The Court of Common Pleas held an evidentiary hearing and ultimately denied the petition. The Superior Court affirmed, and the Pennsylvania Supreme Court denied allocatur. Diaz then filed a timely habeas petition under § 2254. The district court denied the petition. The Third Circuit granted a certificate of appealability but eventually affirmed and denied a timely petition for rehearing. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Court should grant a writ of certiorari on the issue of whether Diaz received the ineffective assistance of counsel when trial counsel failed to object to incriminating hearsay statements. Specifically, trial counsel failed to object to inadmissible hearsay testimony from Diaz's stepdaughter in which she purportedly confirmed that Diaz had raped the complainant, who was her 17-year-old friend. Because this was essentially a one-witness case in which the complainant alleged that Diaz assaulted her, the failure to object to this patently inadmissible testimony provided the jury with corroboration in a case in which there would have been none. The reviewing courts in both the PCRA and habeas proceedings erred in simply accepting counsel's *post hoc* attempts to explain his complete failure to object to obvious, incriminating, and inadmissible hearsay statements. *See Wiggins v. Smith*, 539 U.S. 510 (2003). None of the reviewing courts concluded that the hearsay would have been admissible

had trial counsel objected, but they all found that trial counsel somehow acted strategically in admitting this incredibly damaging, otherwise inadmissible evidence.

Trial counsel allowed multiple witnesses to testify to this hearsay even though Diaz's stepdaughter did not testify at trial, and he later explained at an evidentiary hearing that allowing multiple witnesses to testify to this incredibly damaging hearsay was part of his strategy of suggesting both that the complainant had been dreaming and that the evidence was somehow insufficient. The record shows that trial counsel was not actually acting out of any particular strategy, and if he was, the strategy certainly was not reasonable. Although the decisions of trial counsel and the state courts are entitled to a great deal of deference, that deference is not unlimited. Here, the hearsay statements could not have been more damaging or inadmissible, and counsel already had what he needed to argue his theory to the jury. The Third Circuit and the district court erred in denying the habeas petition, so the Court should grant review in this case to provide clarification that simply being able to articulate some kind of ostensible strategy after the fact does not mean counsel provided effective assistance. Instead, the strategy must be reasonable.

B. Trial Counsel Should Have Objected to Damaging, Inadmissible Hearsay

The lower courts should have granted Diaz's habeas petition and found that trial counsel provided the ineffective assistance of counsel at trial in failing to object to the hearsay. The Third Circuit should have found that the state courts violated Diaz's rights under the United

States Constitution by failing to properly apply *Strickland* to the facts of this case. Defense counsel was ineffective in failing to object as multiple witnesses testified that Diaz's stepdaughter, K.C., confirmed that Diaz raped the complainant and encouraged the complainant to call for help.

Defense counsel should have objected to the statements as hearsay and under the Confrontation Clauses of the Pennsylvania and United States Constitutions. His failure to do so amounted to the ineffective assistance of counsel and resulted in a due process violation.

K.C. did not testify at trial, and police testified that they were never able to obtain a statement from her. Nonetheless, the complainant repeatedly testified without objection that it was K.C. who told her that she was raped and it was not a dream. The complainant repeatedly testified without objection to K.C. confirming that she had been raped despite K.C.'s absence from the trial. Specifically, she testified, "[a]nd that's when [K.C.] was like, Yeah, it's true." (N.T. Trial, Volume I, 51–52). Counsel even elicited more hearsay testimony himself, asking, "And she says, it's true, right?" *Id.* at 74. He also asked: "It's [K.C.] who says, We've got to call somebody, right?" *Id.* at 77.

Counsel clearly recognized that K.C. confirming the rape was problematic, and he attempted to mitigate against this testimony by asking whether K.C. had personal knowledge of what happened. *Id.* at 74. On re-direct, the prosecutor again confirmed that the complainant thought the alleged assault was a dream until K.C. confirmed that it happened for her. *Id.* at 84. The complainant's

ex-boyfriend, his mother, and the ER nurse all testified similarly, and defense counsel never once objected. (N.T. PCRA Hearing, 23); (N.T. Trial, Volume I, 100–01).

Trial counsel should have objected to this testimony. The testimony was highly prejudicial hearsay which would not have been admissible had he objected. Pa.R.Evid. 801(c); 802. That it would not have been admissible does not seem to be in dispute. Instead, the district court and the Third Circuit both accepted the state courts' conclusions that trial counsel wanted the hearsay admitted despite the overwhelming evidence to the contrary.

Ultimately, multiple witnesses testified as to what K.C. told them—that she confirmed that the rape happened and was the one who called the ex-boyfriend to tell him about it. K.C., however, did not testify at trial. The statements that she made which were introduced at trial by both the prosecution and defense counsel were therefore hearsay. Their admission also violated the Pennsylvania and United States Confrontation Clauses. *See Crawford v. Washington*, 541 U.S. 36 (2004).

Of course, there are various exceptions to the rule against hearsay under state law. The only exception that could have arguably applied here would be that the statements did not come in for their truth but for their effect on the listener. However, Pennsylvania and federal appellate courts have found limits to that exception. Although the prosecution may sometimes introduce statements that would normally be hearsay to show the effect on the listener or provide background on how an investigation unfolded, there are situations in which the hearsay is so detailed, specific, and inculpatory that

its erroneous admission requires a new trial. *See e.g.*, *Commonwealth v. Yates*, 613 A.2d 542 (Pa. 1992) (finding some hearsay admissible when relevant to effect on listener, but reversing conviction where police testified that confidential informant told them defendant was dealing drugs); *Commonwealth v. Palsa*, 555 A.2d 808, 811 (Pa. 1989) (reversing conviction because hearsay statements "contained specific assertions of criminal conduct by a named accused, and indeed, were likely understood by the jury as providing proof as to necessary elements of the crime for which appellant was being tried."); *see also Klein v. Kaufmann*, Civ No. 15-0065, 2019 WL 1285474 (E.D. Pa. 2019) (citing *Palsa* in finding trial counsel erred in failing to object to hearsay but concluding petitioner did not suffer prejudice as petitioner confessed).

The Third Circuit has handled hearsay which could have potentially been offered for the effect on the listener similarly to the Pennsylvania appellate courts. *See United States v. Sallins*, 993 F.2d 344 (3d Cir. 1993). In *Sallins*, the Court reversed the appellant's conviction where the district court had improperly allowed the admission of hearsay in the form of a recorded police radio call and a police computer-aided dispatch report. *Id.* at 345. The district court allowed the hearsay into evidence ostensibly to explain the officers' actions in arresting the appellant. *Id.* at 345.

Specifically, Philadelphia Police Officers had received a police radio dispatch which informed them that a black male wearing all black clothing was carrying a gun at a particular location. *Id.* The officers went to that location, and they found Sallins wearing all black. *Id.* They testified at trial that Sallins then threw down what appeared to

be a gun and ran. *Id.* The police arrested him, took him into custody, and then recovered a gun in the area from which he had run. *Id.* The government introduced both the police radio recording and the corresponding computer dispatch record into evidence. *Id.* at 345-46. The defense objected, but the district court overruled the objection. *Id.* A jury found Sallins guilty, and he appealed to the Third Circuit. *Id.*

The Third Circuit reversed. The Court recognized that "[w]hile officers generally should be allowed to explain the context in which they act, the use of out-of-court statements to show background has been identified as an area of 'widespread abuse.'" *Id.* at 346 (citing McCormick On Evidence § 249, at 104 (4th ed.1992)). The *Sallins* Court emphasized:

> If the hearsay rule is to have any force, courts cannot accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose. Rather, courts have a responsibility to assess independently whether the ostensible non-hearsay purpose is valid.

Id.

The Court found that instead of permitting the government to rely on the detailed hearsay description of the person with the gun, the district court should have simply instructed the officers to testify that they responded to the area based on information received. *Id.* Further, the Court noted that the background information was not necessary to explain why the officers had arrested

Sallins. The officers were on patrol, they saw him throw a gun and then run, and they stopped him and found a gun. *Id.* This was more than sufficient to establish why they arrested him. *Id.* Given that the government also made argument based on the hearsay in closing, the Court found that the testimony had clearly been offered for the truth of the matter asserted. *Id.* at 347.

Therefore, the Court reversed, finding that in a case in which the defendant had vigorously challenged the credibility of the officers, the admission of the hearsay did not constitute harmless error. *Id.* at 348. "The evidence cemented the government's case by adding an invisible, presumably disinterested witness who allegedly saw precisely what the police said they saw." *Id.*

The Third Circuit relied on *Sallins* in reaching a similar conclusion in *United States v. Lopez*, 340 F.3d 169 (3d Cir. 2003). Lopez was charged with possession of heroin and possession of contraband by an inmate after prison guards found heroin in his cell. *Id.* at 171. Prison officials had received information that Lopez was in possession of heroin. *Id.* They searched his cell and in fact found heroin. *Id.* At trial, the district court permitted the government to introduce testimony from the guards to the effect that they had received information that Lopez was in possession of heroin prior to searching the cell. *Id.* at 174-75. The district court overruled the defense's objection, ostensibly so that the guards could provide the background for the search. *Id.* A jury found Lopez guilty, and he appealed.

Relying on *Sallins*, the Court reversed. The Court found that the testimony was clearly offered for the truth

of the matter asserted. *Id.* at 177. Because the guards never saw Lopez in physical possession of heroin and because other people had access to his cell when he was not in it, someone else could have been storing the heroin in the location where the guards found it. *Id.* Accordingly, the real purpose of the evidence was to show that the true possessor of the contraband must have been Lopez. *Id.*

The Court further found that the error was not harmless. "The inquiry cannot be merely whether, notwithstanding the error, there was enough to support the conviction." *Id.* (citing *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Instead, in order to find harmless error, the Court must be able to say "that the judgment was not substantially swayed by the error." *Id.* Therefore, although the government had introduced sufficient evidence that Lopez possessed the contraband in his cell, the Court could not find harmless error because a jury could have concluded that someone else had put the heroin there in the absence of this hearsay testimony. *Id.* This was true even though Lopez tested positive for morphine, which suggested heroin use. *Id.*

Here, just as in *Palsa*, *Yates*, *Sallins*, and *Lopez*, the hearsay statements contained specific assertions of criminal conduct by a named accused that even the complainant was not quite able to provide herself. She was not sure if she was dreaming or had perceived real events until K.C. confirmed that she had been raped. The hearsay was inadmissible. Defense counsel should have objected.

Counsel had no reasonable, strategic basis for failing to object to obvious hearsay testimony in which a witness

who did not testify confirmed for the jury that Diaz raped the complainant. Despite his testimony to the contrary, counsel clearly recognized the damaging nature of these out-of-court statements. *See Sallins*, 993 F.2d at 348 ("The evidence cemented the government's case by adding an invisible, presumably disinterested witness . . . ") For example, he cross-examined the witnesses to try to show that K.C. would not have had personal knowledge of whether a rape occurred because she was not there at the time. (N.T. Trial, Volume I, 77). He also successfully objected to the 911 calls because they contained the same hearsay, and he argued in closing that the jury had not heard from K.C. He argued: "Of course, we never hear from [K.C.], we never know if that's confirmed by another independent source." (N.T. Trial, Volume II, 22). Despite his argument, however, counsel had allowed the jury to hear from K.C. through the hearsay testimony introduced by nearly every other witness without objection.

When called to testify at the evidentiary hearing in the state court PCRA proceedings, trial counsel testified that he intentionally chose not to object because he wanted the introduction of hearsay testimony that Diaz's stepdaughter also accused him of raping her friend. (N.T. PCRA Hearing, 24). This strategy does not make any sense, it is unreasonable, and as previously explained, counsel's assertion that it was his strategy is not supported by his own closing argument. If counsel wanted to argue that the complainant had dreamed of the incident, then there would be no reason to allow testimony that the defendant's own stepdaughter agreed that her stepfather raped her friend. Further, counsel's decision to cross-examine the complainant on how K.C. was not actually there and then argue that fact to the

jury in closing highlights that he actually recognized the damaging nature of this testimony.

To the extent trial counsel actually pursued a theory that the complainant had confused a dream for reality, he already had what he needed to argue such a theory without admitting inculpatory hearsay. The complainant admitted at trial that at first, she believed that it had all been a dream. Thus, counsel already had the testimony that he needed to argue that the assault did not really happen if that was his chosen strategy. Instead, he failed to object and allowed the inadmissible hearsay testimony from the stepdaughter to be introduced into evidence. Had counsel pursued a strategy of arguing that the complainant chose to fabricate the assault allegations rather than explain to her friend that she had consented to sexual intercourse with her friend's married stepfather, it may have made sense not to challenge the introduction of the hearsay evidence. But trial counsel instead apparently pursued mutually exclusive dual theories of defense that despite the unchallenged admission of DNA evidence, no sexual contact occurred at all, and that the complainant was not too intoxicated to resist. Therefore, there was no benefit to admitting the incriminating hearsay testimony from the stepdaughter.

Given counsel's cross-examination of the complainant on K.C.'s lack of personal knowledge and his objection to the 911 call, the record shows that trial counsel's claimed strategy was not in fact motivating him. *See Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005). Instead, he simply missed the objection. Trial counsel was not acting based on some reasonable, strategic basis in failing to object to this highly damaging, inadmissible testimony.

And if this really was his strategy, it was an incredibly bad one. There is no reasonable basis for allowing such incriminating out-of-court statements to be introduced into evidence with no opportunity to challenge them. The state courts were wrong to conclude that this was in fact counsel's strategy, the district court erred in accepting those conclusions despite the record, and the Third Circuit should have reversed because the strategy was not reasonable. Trial counsel could have argued that the complainant imagined or dreamed of the incident instead of allowing a second witness to testify against his client without the witness appearing in court. He also did not only allow this testimony in through the complainant. Instead, he allowed all of the other non-law-enforcement witnesses to testify to it, as well.

Given the lack of corroboration to show that the allegations were true, Diaz suffered prejudice from the failure to object because it allowed the Commonwealth to introduce evidence that K.C., who was the closest thing to an independent witness, agreed with the allegations. *See Palsa*, 555 A.2d at 811 (recognizing highly incriminating nature of specific hearsay allegations); *Commonwealth v. Rush*, 605 A.2d 792 (Pa. 1992) (reversing conviction where police witness testified that defendant's mother told them he made picture frames out of cigarette boxes and perpetrator of crime had made similar statement to victim prior to stabbing her); *Gov't of the V.I. v. Muirui*, 340 Fed. Appx. 794 (3d Cir. 2009) (finding hearsay statement from security guard that he heard someone tell complainant's husband "your wife has been raped" required reversal of conviction).

These out-of-court statements were incredibly prejudicial to Diaz because K.C. did not testify. This was a

case in which one witness claimed that Diaz raped her. Yet that witness testified that prior to her conversation with K.C., she was not sure if she had been raped and believed that it may have been a dream. She also made inconsistent statements regarding the types of sex acts performed and testified to things that were contradicted by the scientific evidence. For example, she testified that Diaz ejaculated inside of her without wearing a condom even though the ER nurse was unable to find any semen in her underwear or vagina. (N.T. Trial, Volume I, 199). The DNA evidence thus did not support her version of events. This left K.C. as the decisive witness. The Commonwealth did not call her as a witness at trial, but the jury heard everything that she supposedly would have said as multiple witnesses confirmed that she agreed that a rape had occurred. This is hearsay testimony, and it was incredibly prejudicial to Diaz.

Although counsel testified that he had a strategic basis for allowing this hearsay into evidence, it is impossible to imagine what benefit accrued to Diaz from the jury believing that his stepdaughter agreed with the complainant that he had committed a rape. The idea that it was beneficial to have a second person, who presumably had no reason to falsely implicate her stepfather in a rape, confirm that a rape had occurred defies logic. Counsel should have objected. He was ineffective for failing to do so, and the state courts should have granted Diaz a new trial. The lower courts likewise erred in denying the habeas petition.

The state courts rejected the claim, finding that trial counsel had a strategic basis for failing to object. The Pennsylvania Superior Court concluded:

> Counsel admittedly chose a hybrid strategy, which required him to walk a fine line between the scenario where Victim was so intoxicated that her memory was unreliable, and the situation where, although she had been drinking, she was not unconscious and, thus, capable of consenting. In either scenario, there was no rape. With regard to the first strategy, counsel sought to establish that K.C. made up the rape and suggested that it occurred to the intoxicated and confused Victim. The value in the hearsay testimony lay in painting K.C., whom counsel established was not present when the rape allegedly occurred, who would have had no personal knowledge of the facts, and who did not testify at trial, as the fabricator of the rape story. Furthermore, K.C. propagated the lie when she called Victim's former boyfriend to report it. Admittedly, the strategy was not successful, but it was not unreasonable.

Commonwealth v. Diaz, 237 A.3d 436, 2020 WL 2299741, *4 (Pa. Super. 2020). This analysis mirrors the PCRA court's reasoning, and the district court and Third Circuit both found that they both properly applied *Strickland*. But the reasoning does not make any sense. Trial counsel's "hybrid strategy" did not require him to walk a fine line; it required him to argue two mutually exclusive theories. Either her memory was unreliable and she dreamed it, or she was not too intoxicated to consent and in fact consented. Counsel did not actually pick a strategy. Instead, he threw everything at the wall and hoped for the best. A strategy would require picking a theory of the case. Either she consented to sexual intercourse, or

she fabricated the assault. Trial counsel did not actually argue either, and so his defense had no chance of success.

To justify counsel's failures, the state courts had to ignore their own precedents. They disregarded *Palsa* and *Commonwealth v. Thomas*, 578 A.2d 422 (Pa. Super. 1990). In *Thomas*, the defendant and a second man stopped and offered to help a motorist who was having car trouble. *Thomas*, 578 A.2d at 423. The defendant got in the car and drove away. *Id.* The second man led the police to the defendant's residence. Police arrested the defendant. *Id.* Defense counsel failed to properly object when the officers implied that the second man had identified the defendant as the thief. *Id.* at 425–26.

Applying *Palsa*, the Pennsylvania Superior Court reversed the conviction, finding counsel ineffective for failing to object. The court reasoned that the obvious purpose of the hearsay testimony was to buttress the less reliable testimony of the victim with the testimony of someone who could make a stronger identification. *Id.* at 427. Given that the hearsay's illegitimate purpose was so obvious, the court found that trial counsel could not have possibly had a reasonably strategic basis for failing to preserve the issue for appeal. The court reversed the conviction without even requiring an evidentiary hearing. *Id.* at 428. *Thomas* is persuasive authority and shows that the state courts have completely disregarded their own binding precedent to uphold the conviction. Had trial counsel objected, the objection almost certainly would have been sustained.

Although the state court rulings are entitled to deference, that deference is not unlimited. The state

courts unreasonably applied the law, and the lower courts should have applied § 2254(d)(1). "A state court decision is an unreasonable application under § 2254(d)(1) if the court 'identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'" *Varner*, 428 F.3d at 497 (citing *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002)).

In *Thomas v. Varner*, the Court found the ineffective assistance of counsel where trial counsel failed to move to suppress an identification. Counsel had filed a motion to suppress an identification of the defendant. After the witness in question recanted his testimony prior to trial, counsel withdrew his motion to suppress. *Id.* at 500. The witness then identified the defendant at trial, and counsel did not object or move for a mistrial. *Id.* In the subsequent habeas litigation, counsel testified that he withdrew the motion to suppress because the witness had recanted the identification and that he did not think he had valid grounds for an objection once the identification had been made at trial. *Id.* He also claimed that allowing the identification into evidence was helpful because it allowed him to cross-examine the witness about the allegedly improper police tactics used to obtain the identification. *Id.*

The Court rejected this explanation and found that even though counsel had articulated a strategy for failing to object, it was not reasonable. The Court further found that "failure to move to suppress or otherwise object to

an in-court identification by the prosecution's central witness, when there are compelling grounds to do so, is not objectively reasonable representation, absent some informed strategy." *Id.* at 501–02. Because counsel did not understand the law and could have cross-examined witnesses about police misconduct anyway, the strategy chosen was not reasonable. The Court therefore ordered a new trial.

Similarly, in *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 937 (3d Cir. 2019), the Court recognized that simply claiming some strategy is not enough to defeat a claim of ineffective assistance of counsel where the strategy is unreasonable. In *Workman*, the Court found that the appellant received the ineffective assistance of counsel from both PCRA counsel and trial counsel. *Id.* at 944. Trial counsel's defense at trial had been that Workman could not be found guilty of murder because someone else shot the decedent shortly before Workman did, and so it is impossible to kill someone who is already dead. *Id.* The evidence, however, suggested that the decedent was in fact still alive at the time that Workman shot him. *Id.* Accordingly, there was no basis for trial counsel's strategy, and PCRA counsel was ineffective in failing to raise the issue. *Id.*

The *Workman* Court found that a defense centered around not being able to kill someone who is already dead was not reasonable without some evidence that the decedent was already dead at the time of the shooting. *Id. Workman* establishes that claiming a strategy alone is not enough. Instead, the strategy must be reasonable and related to the evidence. As the Court noted, "[a]ny objective standard of reasonableness requires counsel to

understand facts and testimony and adapt to them, even at the expense of purportedly clever theories." *Id.*; *see also Rogers v. Superintendent Greene SCI*, No. 21-2601 (3d Cir. September 7, 2023) (finding counsel ineffective for failing to object to improper threats from judge to key Commonwealth witness and for failing to impeach same witness with prior inconsistent statements).

Other circuits have also recognized that simply articulating some kind of strategy does not defeat an ineffective assistance of counsel claim where the strategy is unreasonable. *See Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005); *Mason v. Scully*, 16 F.3d 38 (2nd Cir. 1994). For example, in *Boyde*, the Ninth Circuit affirmed a grant of penalty phase habeas relief where the defense attorney argued to the jury that like Charles Manson, his client was a product of the prison system and the crimes were likely committed at least in part because of the trauma he suffered in prison. *Id.* at 1178.

In *Mason*, the Second Circuit affirmed the grant of habeas relief where the trial attorney failed to object to testimonial hearsay to the effect that after speaking with a co-defendant, the detective had decided to also arrest the defendant. 16 F.3d at 44. The Court recognized that *Bruton* had long been established, the statement would not have been admissible had trial counsel objected, and the failure to object was inexplicable. *Id.*; *see also Byrd v. Trombley*, 352 F. App'x. 6, 10 (6th Cir. 2009) (unpublished) (affirming finding of ineffective assistance of counsel where, in sexual assault trial that rested on credibility, defense counsel introduced defendant's prior forgery conviction which was likely inadmissible).

Workman, *Thomas*, *Boyde*, and *Mason* are on point. They all establish that it is not enough for trial counsel to simply articulate some kind of strategy. Instead, the strategy must be reasonable. If trial counsel's defense was that the complainant was confused or dreaming, then trial counsel already had sufficient evidence in the record from which to make that argument without allowing incriminating hearsay statements from K.C. into evidence. Instead, trial counsel chose a strategy which allowed the jury to hear that the defendant's own stepdaughter had also accused him of rape.

At the same time, trial counsel offered no explanation whatsoever as to why K.C. would have made such a serious, false accusation. If the evidence established that K.C. hated her stepfather, then perhaps there would have been a reasonable strategy behind counsel's decision. But the record provides absolutely no reason for K.C. to lie. Trial counsel should have picked an actual strategy—either the complainant dreamed the assault, as she testified, or she consented to sexual intercourse. Either way, K.C.'s hearsay confirmation that the crime occurred did nothing to help the defense.

Counsel did not decide on a reasonable strategy. He simply missed a critical objection. The record does not support his testimony that he had a strategy, and even if it did, the strategy was self-defeating. Certainly, the admission of hearsay can be strategic. If a potential witness for the defense is unpredictable or unreliable or cannot be located but has said some things which could be helpful, it may be a good idea to try to bring in the out-of-court statements through the detective who obtained them. It is also not unreasonable to introduce

hearsay on an issue that is not in dispute to save time; defense attorneys routinely stipulate to the results of drug testing at the crime lab, DNA results, ballistics results, or other expert testing where the analysts work for the Commonwealth and calling them to testify at trial will do nothing to advance the defendant's interests and there are no issues with the testing.

Moreover, a witness may have said good things and bad things. For example, a witness may have told the detective in a second-degree murder case that the defendant came along for the ride and carried a gun illegally but had no idea that the other occupants of the car planned to go into the bank and commit the robbery that led to a fatal shooting. Allowing such evidence to be introduced without the in-court testimony of that cooperator would be a risky strategy, but it might be a reasonable one. *See Bullock v. Carver*, 297 F.3d 1036, 1053–54 (10th Cir. 2002). It puts the defendant at the scene with a gun, which is probably a crime, but it separates him from the far more serious charge of felony murder. It would be difficult to argue later that the lawyer was ineffective for letting that statement in if the strategy fails and the defendant is convicted of the murder.

Thus, there are situations where an attorney could use the rules of evidence to exclude hearsay but is not obligated to do so. The problem is that this just was not one of those situations. The hearsay here had no upside for Diaz. It was an out of-court statement from his own stepdaughter, apparently made or repeated to numerous other witnesses, indicating that he did in fact rape her 17-year-old friend. There is no benefit from allowing that statement into evidence. It was directly accusatory, it

could not be tested through cross-examination, and it came from a witness who the jury would have expected Diaz to produce if the statement were not true. The witness was not a police officer, a detective, the complainant's mother, or some other friend with whom Diaz had no relationship. She was his stepdaughter, and her mother testified at trial. *See Workman*, 915 F.3d at 937 ("[a]ny objective standard of reasonableness requires counsel to understand facts and testimony and adapt to them, even at the expense of purportedly clever theories.")

Although defense counsel can often attack the Commonwealth's case by noting witnesses who they did not call to testify or evidence the prosecution failed to present, the jury would have naturally looked to Diaz to call his own stepdaughter to testify if she did not agree. But he did not do so, and probably for the very reasons counsel noted; he thought she could be a damaging witness. Instead, his trial attorney effectively allowed her to testify in the worst possible light, without being subjected to any challenge, that her stepfather raped her friend. *See Thomas*, 428 F.3d at 499 (3d Cir. 2005) (finding trial counsel ineffective for failing to move to suppress inculpatory identification).

Such testimony could not have been worse even if given live. Had she testified live, at least trial counsel could have cross-examined her on the fact that she really had no way of knowing if the rape occurred. She was home at the time, and the rape allegedly took place in the car. She did not testify, and counsel instead allowed her to say out-of-court that her stepfather raped her friend. The testimony was unchallenged. The decision to introduce it was inexplicable. The courts do not second-guess plausible,

reasonable strategies or the decisions of the state courts accepting those strategies, but the strategy here was absurd. *See Roe v. Flores- Ortega*, 528 U.S. 470, 481 (2000) ("[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable.")

Trial counsel had two options—he could argue fabrication, or because the complainant was 17, he could argue consent. Admittedly, a consent defense on behalf of a married man with an intoxicated 17-year-old who was friends with the man's stepdaughter is a risky one. Maybe it would have worked, but counsel cannot be faulted for deciding on fabrication. Diaz has also always maintained his innocence.

Trial counsel can be faulted for what he did here. There should have been no other witnesses, and the DNA evidence did not prove anything. The Commonwealth found no semen, and so the rest of the DNA could have been explained from the complainant spending the day with Diaz, riding in his car, and using his bathroom. To argue fabrication, trial counsel had exactly what he needed: the complainant already testified that she originally thought she had dreamed up the whole thing and that she also thought she may have been having sex with her ex-boyfriend.

Trial counsel should have stopped there. She testified that she was not sure if it really happened and that it could have been a dream. That gave trial counsel everything he needed to argue a fabrication defense to the jury. Instead, he allowed the Commonwealth to repeatedly introduce the necessary corroboration from Diaz's stepdaughter, leaving the jury inevitably wondering why Diaz's own

stepdaughter would say such a thing if it were not true. More importantly, it left the jury to wonder why Diaz would not have produced his own stepdaughter to testify at trial given that her mother was there to testify on Diaz's behalf.

The strategy claimed by counsel was no strategy at all. Had he objected, the testimony would have been that the complainant awoke, unsure if she had been dreaming of a sexual assault or sex with her boyfriend, spoke with her friend, and then reported the alleged assault. There were no other witnesses, and the DNA could be explained. Instead, due to trial counsel's failure, the testimony was that she awoke, unsure if she had been sexually assaulted or dreaming, and confirmed that she was in fact sexually assaulted by speaking with Diaz's own stepdaughter.

The second version is obviously far more damning. It led directly to Diaz's conviction in this case. Habeas proceedings require a great deal of deference to the state courts, and trial counsel indeed articulated a strategy, but the strategy was preposterous and doomed to failure. Counsel did everything possible to convict his own client, and so this is the rare case in which such an extreme malfunction in the system occurred that counsel "was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *See Harrington v. Richter*, 562 U.S. 86 (2011).

The state courts unreasonably applied the *Strickland* standard to the facts. Trial counsel missed a meritorious objection and introduced damaging, otherwise inadmissible evidence himself, he had no reasonably strategic basis for failing to object, and Diaz suffered prejudice as a result.

The failure to object allowed an invisible, independent, disinterested witness to testify against him through the hearsay testimony of multiple witnesses who did testify. The Court should grant review here to clarify that simply claiming a strategy does not make the strategy reasonable.

CONCLUSION

For the foregoing reasons, Petitioner Hamett Diaz respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ZAK T. GOLDSTEIN, ESQUIRE
Counsel of Record
GOLDSTEIN MEHTA LLC
1717 Arch Street, Suite 320
Philadelphia, PA 19103
(267) 225-2545
ztg@goldsteinmehta.com

APPENDIX

TABLE OF APPENDICES

Page

Table of Appendices

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1490

HAMETT DIAZ,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA;
ATTORNEY GENERAL PENNSYLVANIA;
SUPERINTENDENT FOREST SCI

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 4-20-cv-01667)
District Judge: Honorable Matthew W. Brann

Submitted Under Third Circuit L.A.R. 34.1(a)
April 16, 2024

Before: HARDIMAN, SMITH, and FISHER,
Circuit Judges.

(Filed April 22, 2024)

OPINION[*]

---

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

Appendix A

HARDIMAN, *Circuit Judge.*

Hamett Diaz appeals an order of the District Court denying his petition for a writ of habeas corpus. Diaz argues his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for failing to object to inculpatory hearsay. Perceiving no error by the District Court, we will affirm.

I

On October 19, 2013, Diaz drove his 15-year-old stepdaughter, K.C., and her 17-year-old friend (the victim), to get their nails done at a salon in New York City. During the drive from Pennsylvania, the trio drank flavored vodka. Once at the salon, K.C. got her nails done while Diaz and the victim bought more vodka from a nearby liquor store. During the drive back to Pennsylvania, the victim was so drunk that she was blacking out.

Upon arriving home late that evening, Diaz stayed in the car with the victim while K.C. went inside to see what her mother was doing. With the victim still fading in and out of consciousness, Diaz drove away from his house, parked on a secluded service road, and sexually assaulted her. Immobilized and disoriented, the victim could not speak or resist.

After the assault, Diaz drove back home and went inside with the victim. The victim crawled up the stairs and tearfully recounted the rape to K.C., who then helped the victim change into pajamas and get into bed. Early the

next morning, the victim—unsure if she had dreamt the assault—asked K.C. what had happened the night before. K.C. told her it was not a dream and urged her to tell someone. Eventually, K.C. told the victim's ex-boyfriend about the assault. The ex-boyfriend's mother called the victim's mother, who then contacted the police. The victim was taken to a hospital where she received a sexual assault examination. She identified Diaz as her assailant and described the rape to a forensic nurse examiner and a Pennsylvania state trooper.

Diaz was charged with rape of an unconscious victim and other offenses. The victim testified that, after waking up the next morning, K.C. confirmed to her that the rape had in fact occurred and was not a dream: "[W]hen I woke up . . . I had told [K.C.] like I had this crazy dream. And [K.C.] was like, ['']Oh, . . . it wasn't a dream . . . everything that you told me, it happened.['']" App. 367. Diaz's counsel did not object to this testimony, and K.C. never testified at trial. Nor did Diaz's counsel object to testimony from other prosecution witnesses who recounted details of the assault as relayed to them by others.

The jury convicted Diaz, and he was sentenced to 10 to 20 years' imprisonment. Diaz sought collateral relief under Pennsylvania's Post Conviction Relief Act (PCRA). He claimed ineffective assistance of counsel based on his trial attorney's failure to object to the victim's inculpatory hearsay testimony. At the PCRA hearing, Diaz's counsel testified that he intentionally chose not to object. In his opinion, K.C.'s statements, as relayed by the victim, supported the defense's theory that the intoxicated

victim's memory was unreliable and the notion of rape grew from a "seed [that] was planted in [the victim's] head by [K.C.]." App. 273. He also explained that admitting this testimony removed the need to call K.C., who might have testified unfavorably for the defense.

The PCRA court denied Diaz relief, concluding that K.C.'s testimony supported the defense's "confabulation theory," so the choice not to object had "a reasonable basis." App. 235-36. The Superior Court affirmed, finding that Diaz's counsel employed a "hybrid strategy," arguing both that the "[v]ictim was so intoxicated that her memory was unreliable, and . . . although she had been drinking, she was not unconscious." *Commonwealth v. Diaz*, 237 A.3d 436, at *4 (Pa. Super. Ct. 2020). "The value in the hearsay testimony," the court concluded, "lay in painting K.C. . . . as the fabricator of the rape story." *Id.* Applying Pennsylvania's standard for ineffective assistance, the court concluded that the strategy, while "not successful," "had some reasonable basis designed to effectuate [the] client's interest" and thus no relief was due on Diaz's claim. *Id.* (citation omitted). The Pennsylvania Supreme Court denied Diaz's petition for an appeal. *See Commonwealth v. Diaz*, 664 Pa. 263, 244 A.3d 5 (Pa. 2021).

After exhausting state court remedies, Diaz filed an amended habeas petition in the District Court. He again raised his ineffective assistance claim, asserting that his conviction violated his rights to counsel and due process under the United States Constitution. Agreeing with the state courts' conclusion that Diaz's "counsel had a rational, strategic basis for not objecting to the hearsay

testimony," the District Court denied habeas relief. *Diaz v. Oberlander*, 2023 U.S. Dist. LEXIS 25181, 2023 WL 1994389, at *10 (M.D. Pa. Feb. 14, 2023). Diaz timely appealed.[1]

II

We issued a certificate of appealability to consider "whether the District Court erred in denying [Diaz's] claim that trial counsel was ineffective for failing to object to the introduction of out-of-court statements by Diaz's stepdaughter, who did not testify at trial." App. 38. Because Diaz's ineffectiveness claim was "adjudicated on the merits in State court proceedings" we consider only whether that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). To prevail on his ineffectiveness claim in state court, Diaz had to show that his "counsel's action or inaction lacked any reasonable basis designed to effectuate [his] interest," and that he suffered prejudice as a result. *Diaz*, 237 A.3d 436, at *3 (citation omitted). *See also Strickland*, 466 U.S. at 687.[2] But to be entitled to relief under AEDPA's "most

1. The District Court had jurisdiction over Diaz's habeas petition under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Where, as here, a district court dismisses a habeas petition based on a review of the state court record without holding its own evidentiary hearing, "our standard of review . . . is plenary." *Marshall v. Hendricks*, 307 F.3d 36, 50 (3d Cir. 2002).

2. We have held that "Pennsylvania's test for ineffective assistance of counsel is consistent with the Supreme Court's decision

deferential" standard, Diaz must show that there is *no* "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The District Court held that Diaz did not meet this exacting burden. We agree.

On appeal, Diaz argues that the Superior Court misapplied *Strickland* for three reasons: (1) Pennsylvania law requires a conviction to be vacated when counsel fails to object to inculpatory hearsay; (2) his trial counsel pursued inherently contradictory theories; and (3) his trial counsel could have pursued the same fabrication theory without the hearsay testimony. We address each argument in turn.

First, Diaz argues "the state courts had to ignore their own precedents" in denying his ineffectiveness claim, citing two Pennsylvania cases—*Commonwealth v. Thomas* and *Commonwealth v. Palsa*—reversing convictions where the trial court admitted inculpatory hearsay. Diaz Br. 29. But these cases are inapposite. Both involved hearsay testimony admitted *despite* counsel's objections, not testimony intentionally elicited to support the defense's theory.[3] We also note that our sister circuits

---

in *Strickland* because it requires findings as to both deficient performance and actual prejudice." *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 391 (3d Cir. 2020).

3. *See Commonwealth v. Palsa*, 521 Pa. 113, 555 A.2d 808, 809 (Pa. 1989) (reversing conviction where prejudicial police testimony was admitted "despite objections from defense counsel alleging hearsay"); *Commonwealth v. Thomas*, 396 Pa. Super. 92, 578 A.2d

have rejected similar ineffectiveness claims where the elicited hearsay "bolster[ed] the defense's theories that the victim's allegations were unreliable or fabricated." *Quintanilla v. Marchilli*, 86 F.4th 1, 23 (1st Cir. 2023); *see also Gilbreath v. Winkleski*, 21 F.4th 965, 985 (7th Cir. 2021). So Diaz's first argument fails.

Diaz next argues that his trial counsel's "'hybrid strategy'" was no strategy at all, as it sought to advance "two mutually exclusive theories. Either [the victim's] memory was unreliable and she dreamed it, or she was not too intoxicated to consent and in fact consented." Diaz Br. 28-29. We disagree. "[T]here is nothing unusual about" Diaz's counsel "arguing inconsistent or alternative theories of defense." *Singleton v. Lockhart*, 871 F.2d 1395, 1400 (8th Cir. 1989). As the Supreme Court has emphasized, "[f]ederal appellate cases . . . permit the raising of inconsistent defenses." *Mathews v. United States*, 485 U.S. 58, 64, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988).

Diaz also misstates his counsel's strategy. His counsel explained at the PCRA hearing that the hearsay testimony supported his theory that the victim imagined the assault and pursued the rape accusation at K.C.'s urging. At the same time, he argued that the victim was sober enough that she remained conscious. That dual argument was rational because several of Diaz's charges required

422, 428 (Pa. Super. Ct. 1990) (finding ineffective assistance where "inadmissible hearsay was objected to by counsel at trial, but the objections were not preserved for appeal through appropriate post-verdict motions").

the state to prove that the victim was unconscious. So counsel for Diaz argued both that no sexual contact had occurred—as the victim had simply adopted K.C.'s suggestion—and that, even if it had occurred, the victim was conscious. While ultimately not a winning approach, the Superior Court concluded that counsel's strategy was reasonably calculated to serve Diaz's interests and thus no relief was due. *See Diaz*, 237 A.3d 436, at *4. Like the District Court, we find no misapplication of *Strickland* in the Superior Court's analysis. *See Bullock v. Carver*, 297 F.3d 1036, 1053-54 (10th Cir. 2002) (finding *Strickland* was satisfied where "a fully informed attorney could have concluded that admitting the hearsay statement was to [the defendant's] strategic advantage"). So Diaz's second argument fails.

Finally, Diaz claims that his counsel's strategy was unreasonable because he could have argued a confabulation theory without the victim's hearsay testimony. We disagree because this is the "second-guess[ing]" of trial strategy that *Strickland* demands we reject. *Rolan v. Vaughn*, 445 F.3d 671, 681 (3d Cir. 2006) (citing *Strickland*, 466 U.S. at 689). In any event, like the Pennsylvania courts, we are unpersuaded that the defense's confabulation theory would have been equally credible without K.C.'s statements. The victim did not equivocate on the stand; "she testified that [the rape] happened" and "gave a detailed description of" Diaz assaulting her in the minivan. App. 275-76. The hearsay supported the defense's theory that an intoxicated victim, with a cloudy memory, adopted the rape suggestion from her friend, K.C.

The Pennsylvania courts concluded that Diaz's counsel elicited the victim's hearsay to argue that she adopted a false rape accusation at the urging of a close friend. Because there was a "reasonable argument" that counsel's actions fell "within the wide range of reasonable professional assistance," *Harrington*, 562 U.S. at 104-05 (cleaned up), the District Court did not err in holding that the state court's decision was neither contrary to, nor an unreasonable application of, *Strickland*. So we will affirm the District Court's order and deny Diaz's petition for a writ of habeas corpus.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 24, 2023

CLD-169

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 23-1490

HAMETT DIAZ,

Appellant ,

vs.

COMMONWEALTH OF PENNSYLVANIA; *et al.*

(M.D. Pa. Civ. No. 4-20-cv-01667)

Present: SHWARTZ, MATEY, and FREEMAN, *Circuit Judges*

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

Appendix B

ORDER

Diaz's request for a certificate of appealability ("COA") is granted. Jurists of reason could debate whether the District Court erred in denying his claim that trial counsel was ineffective for failing to object to the introduction of out-of-court statements by Diaz's stepdaughter, who did not testify at trial. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The Clerk shall issue a briefing schedule at the appropriate time.

By the Court,
s/ Arianna J. Freeman
Circuit Judge

Dated: July 24, 2023
Lmr/cc: All Counsel of Record

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED FEBRUARY 14, 2023

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

No. 4:20-CV-01667

HAMETT DIAZ,

Petitioner,

v.

DEREK OBERLANDER,

Respondent.

(Chief Judge Brann)

February 14, 2023, Decided
February 14, 2023, Filed

MEMORANDUM OPINION

Petitioner Hamett Diaz, ("Diaz"), an inmate confined in the Forest State Correctional Institution, Marienville, Pennsylvania, files the instant counseled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging a conviction and sentence imposed in the Court of Common Pleas of Monroe County in criminal case CP-45-CR-0000396-2014.

Appendix C

For the reasons set forth below, the petition for writ of habeas corpus, which is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214, April 24, 1996 ("AEDPA"), will be denied.

I. BACKGROUND

The relevant facts and procedural history, extracted from the Pennsylvania Superior Court's May 7, 2020 decision, affirming the denial of Diaz's PCRA petition, are as follows:

> [Appellant] is the stepfather of K.C., a 15 year old female. K.C. has a 17 year old friend, K.O., who is the victim (hereinafter referred to as "Victim"). On October 19, 2013, at around 12:00 p.m., [Appellant] drove K.C. and Victim from Blakeslee, Monroe County, Pennsylvania to New York City, NY, so that K.C. and Victim could get their nails done. During the drive, [Appellant] furnished K.C. and Victim with alcohol. [Appellant] also drank alcohol. While in New York when K.C. was getting her nails done, [Appellant] and Victim went to a liquor store in order to purchase more alcohol.
>
> After K.C. and Victim were finished with their nails, [Appellant], K.C., and Victim headed back to Pennsylvania. Upon returning to Pennsylvania, they stopped at a Burger King restaurant for Victim to use the bathroom.

Victim was so intoxicated, she required assistance walking to and using the bathroom. Around 11:00 p.m., [Appellant], K.C. and Victim arrived back at [Appellant] and K.C.'s home in Blakeslee. When they arrived at the home, [Appellant] sent K.C. into the house to see if K.C.'s mother, [Appellant's] wife, was awake.

After K.C. went into the house, [Appellant] drove off with the Victim to a secluded service road. At this point, Victim began zoning in and out. After pulling onto the service road, Victim recalls [Appellant] getting out of the minivan, opening the trunk door, and laying out the backseat. [Appellant] then called Victim to move to the back of the minivan. When Victim moved to the back of the minivan she hit her head. The next thing Victim recalls she was lying on her back in the rear of the minivan. Victim then remembers [Appellant] putting his mouth on her vagina. Victim recalls [Appellant] putting his penis in her vagina. She testified that she was in and out of consciousness and that she was so intoxicated she was slurring her words and unable to speak.

[Appellant] and Victim arrived back at [Appellant] and K.C.'s house and she was unable to walk. Victim stated she "crawled" up the stairs. When Victim entered the house, she was crying and she immediately told K.C. that she and [Appellant] had driven down the

mountain and she believed "something may have happened." K.C. then helped Victim wash up, get changed, and get into bed.

Victim later woke up around 4:00 a.m. on October 20, 2014, and told K.C. that she thought [Appellant] had sex with her. K.C. confirmed that Victim had come back to the house crying. Victim then called her ex-boyfriend about the incident. Victim's ex-boyfriend told his mother; the ex-boyfriend's mother called Victim's mother who called the police. Victim's mother then drove to [Appellant's] house and waited with Victim until the police arrived. The police arrived with an ambulance and Victim was transported to the hospital.

Commonwealth v. Diaz, 2016 PA Super 291, 152 A.3d 1040, 1042 (Pa.Super. 2016) (quoting Trial Court Opinion, 10/2/15, at 1-3).

Appellant was convicted by a jury of rape of a person who is unconscious, aggravated indecent assault, unlawful contact with a minor, corruption of minors, and endangering the welfare of children. The trial court sentenced him to a mandatory minimum sentence on the rape conviction pursuant to 42 Pa.C.S. § 9714(a)(2) ("Where the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal

transactions, the person shall be sentenced to a minimum sentence of at least 25 years of total confinement"). On appeal, this Court vacated the judgment of sentence after concluding that the mandatory minimum sentence was inapplicable. Appellant was resentenced on September 8, 2017, to an aggregate term of incarceration of 140 to 280 months, and he did not file a direct appeal.

On September 15, 2018, Appellant filed the instant, counseled PCRA petition in which he identified three omissions of trial counsel that he contended deprived him of a fair trial. First, he faulted counsel for failing to object to inculpatory hearsay testimony elicited from Victim. Second, he alleged that counsel should have called four witnesses, some of whom would have impeached Victim's testimony regarding her level of intoxication and others also offering testimony as to the reasons why Appellant went to New York the next day. Several of the witnesses would have confirmed that Appellant's minivan remained in Appellant's driveway for at least one week in order to contradict State Police Trooper Wesnak's testimony that he did not obtain a search warrant for DNA testing on the minivan because he could not locate it until such time as the testing would have been futile. Finally, Appellant alleged that counsel was ineffective when he failed to object and seek a curative instruction when the Trooper testified

that Appellant opted not to answer questions on the advice of his attorney.

Following an evidentiary hearing on March 25, 2018, the PCRA court concluded that no relief was due. Appellant timely appealed, and both Appellant and the PCRA court complied with Pa.R.A.P. 1925. Appellant presents three issues for our review:

I. Whether the trial court erred[1] in denying the [PCRA] Petition where trial counsel was ineffective in failing to object to the admission of hearsay testimony in which multiple witnesses testified that [Appellant's] step-daughter, K.C., confirmed that [Appellant] raped [Victim] and encouraged [Victim] to call for help.

II. Whether the trial court erred in denying the [PCRA] Petition where trial counsel was ineffective in failing to call defense witnesses who would have directly impeached critical testimony from the Commonwealth's witnesses such as the allegations that [Victim] was too intoxicated to consent to sexual intercourse and that [Appellant] had tampered with the alleged crime scene and fled the jurisdiction.

---

1. This Court notes that while the Pennsylvania Superior Court identifies the issues raised as trial court error, they address the issues in the same manner as the PCRA court did, solely as trial counsel ineffectiveness.

> III. Whether the trial court erred in denying the [PCRA] Petition where trial counsel was ineffective in failing to object to the investigating officer's disparagement of [Appellant's] refusal to give a statement and instead hire an attorney on the basis that the testimony violated [Appellant's] rights to counsel and his rights against self-incrimination under the Pennsylvania and United States Constitutions.[2]

In a Memorandum Opinion filed May 7, 2020, the Superior Court affirmed, finding no error in the PCRA court's conclusion that Petitioner was not entitled to relief on his claims.[3] On January 6, 2021, the Pennsylvania Supreme Court denied Diaz's petition for allowance of appeal.[4]

On August 10, 2020, while Diaz's state court litigation was pending, he filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania.[5] By Order dated September 11, 2020, the Eastern District transferred Diaz's action to

---

2. *Commonwealth v. Diaz*, 1965 EDA 2019 at 1-4, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum).

3. *Id.*

4. *Commonwealth v. Diaz*, No. 449 MAL 2020, 244 A.3d 5 (Table) (Pa. 2021).

5. Doc. 1.

the Middle District.[6] On September 15, 2020, Diaz filed a motion to stay his federal proceedings while he exhausted his state court remedies.[7] By Memorandum and Order dated September 18, 2020, Petitioner's motion to stay was granted and Petitioner was directed to notify the Court within thirty (30) days of the termination of his pending state court review.[8]

On March 1, 2021, after exhausting state court remedies, a counseled amended petition was filed on behalf of Diaz, raising for federal review, the following three issues of ineffective assistance of counsel:

> 1. Trial counsel failed to object to inadmissible hearsay testimony from Diaz's stepdaughter in which she confirmed that Diaz had raped the complainant, who was her 17-year-old friend. Because this was essentially a one-witness case in which the complainant alleged that Diaz assaulted her, the failure to object to this patently inadmissible testimony provided the jury with corroboration in a case in which there would have been no corroboration. Trial counsel allowed multiple witnesses to testify to this hearsay despite the fact that Diaz's stepdaughter did not testify at trial.

---

6. Doc. 5.

7. Doc. 7.

8. Doc. 11.

> 2. Second, trial counsel was ineffective in failing to call defense witnesses who would have impeached the testimony of the investigating officer and the complainant. The complainant claimed at trial that the alleged assault took place while she was incapacitated from drinking alcohol, but three of Diaz's family members saw her shortly after the alleged assault and saw that she did not exhibit any signs of intoxication. Trial counsel inexplicably failed to call these witnesses at trial to impeach her testimony.
>
> 3. Third, trial counsel was ineffective in failing to object when the investigating officer disparaged Diaz's decision to retain counsel and decline to give a statement. This testimony should have resulted in a mistrial, or at a minimum, a cautionary instruction, as the jury was left with the inference that Diaz must have been guilty because he decided to exercise his Fifth and Sixth Amendment rights rather than give a statement to police.[9]

On March 17, 2021, the above captioned action was reopened and a Show Cause Order, requiring a response to the petition, was issued.[10] On April 5, 2021, a response was filed;[11] on March 14, 2022, Petitioner filed a supplement to his amended petition.[12]

---

9. Doc. 16.

10. Doc. 17.

11. Doc. 18.

12. Doc. 19.

II. DISCUSSION

A habeas corpus petition pursuant to 28 U.S.C. § 2254 is the proper mechanism for a prisoner to challenge the "fact or duration" of his confinement.[13] Petitioner's case is governed by the AEDPA, 28 U.S.C. § 2254, which provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in 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.
>
> ...
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

13. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973).

> (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....[14]

Section 2254 sets limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner.[15] A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[16] This limitation places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings resulted in a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure.[17]

Further, a federal habeas court may not consider a petitioner's claims of state law violations; review is limited to issues of federal law.[18]

---

14. 28 U.S.C. § 2254.

15. *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011); *Glenn v. Wynder*, 743 F.3d 402, 406 (3d Cir. 2014).

16. 28 U.S.C. § 2254(a).

17. *See, e.g., Reed v. Farley*, 512 U.S. 339, 354, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994).

18. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("[I]t is not the province of a federal habeas court

Appendix C

A. Merits Analysis

Under the AEDPA, federal courts reviewing a state prisoner's application for a writ of habeas corpus may not grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless 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."[19]

"[B]ecause the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction,"[20] "[t]his is a difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt."[21] Here, the burden is on Diaz to prove entitlement to the writ.[22]

---

to reexamine state-court determinations on state-law questions."); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Engle v. Isaac*, 456 U.S. 107, 120 n.19, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable.").

19. 28 U.S.C. § 2254(d).

20. *Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (internal quotations and citations omitted),

21. *Cullen*, 563 U.S. at 181(internal quotation marks and citation omitted).

22. *Id.*

Appendix C

A decision is "contrary to" federal law if "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent."[23] "[A] state court decision reflects an 'unreasonable application of such law' only 'where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents,' a standard the Supreme Court has advised is 'difficult to meet' because it was 'meant to be.' [*Harrington v.*] *Richter*, 562 U.S. 86, [ ] 102, 131 S.Ct. 770, 178 L. Ed. 2d 624. As the Supreme Court has cautioned, an 'unreasonable application of federal law is different from an incorrect application of federal law,' *Richter*, 562 U.S. at 101, 131 S.Ct. 770 (quoting *Williams*, 529 U.S. at 410, 120 S.Ct. 1495), and whether we 'conclude[ ] in [our] independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly' is irrelevant, as AEDPA sets a higher bar. *Williams*, 529 U.S. at 411, 120 S.Ct. 1495."[24] A decision is based on an "unreasonable determination of the facts" if the state court's factual findings are objectively unreasonable in light of the evidence presented to the state court.[25]

---

23. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

24. *Mathias v. Superintendent Frackville, SCI*, 876 F.3d 462, 476 (3d Cir. 2017).

25. *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Finally, Section 2254(e) provides that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Ineffective Assistance of Counsel

Diaz raises three ineffective assistance of counsel claims. The clearly established ineffective assistance of counsel standard as determined by the Supreme Court of the United States is as follows:

> Ineffective assistance of counsel claims are "governed by the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *Shelton v. Carroll*, 464 F.3d 423, 438 (3d Cir. 2006) (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). For AEDPA purposes, the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court." *Williams*, 529 U.S. at 391, 120 S.Ct. 1495. Under *Strickland*, a habeas petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result would have been different. 466 U.S. at 687, 104 S.Ct. 2052. For the deficient

performance prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052. This review is deferential:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance....
>
> *Id.* at 689, 104 S.Ct. 2052
>
> Not every "error by counsel, even if professionally unreasonable, ... warrant[s] setting aside the judgment of a criminal proceeding." *Id.* at 691, 104 S.Ct. 2052. "Even if a defendant shows that particular errors of counsel were unreasonable, ... the defendant must show that they actually had an adverse effect on the defense"; in other words, the habeas petitioner

> must show that he was prejudiced by counsel's deficient performance. *Id.* at 693, 104 S.Ct. 2052. To establish prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.
>
> In assessing an ineffective assistance of counsel claim, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding.... In every case the court should be concerned with whether ... the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696, 104 S.Ct. 2052.[26]

When the state court has decided the claim on the merits, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'"[27] "And, because the *Strickland* standard is a

---

26. *Rainey v. Varner*, 603 F.3d 189, 197-98 (3d Cir. 2010).

27. *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411,

general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."[28]

The Superior Court stated that the proper standard governing ineffective assistance of counsel claims is as follows:

> In order to overcome that presumption, "a PCRA petitioner must plead and prove that: (1) the legal claim underlying the ineffectiveness claim has arguable merit; (2) counsel's action or inaction lacked any reasonable basis designed to effectuate petitioner's interest; and, (3) counsel's action or inaction resulted in prejudice to petitioner." *Commonwealth v. Mason*, 634 Pa. 359, 130 A.3d 601, 618 (Pa. 2015).
>
> In determining whether counsel had a reasonable basis, the issue is not "whether there were other more logical courses of action which counsel could have pursued[,]" but "whether counsel's decisions had any reasonable basis." *Commonwealth v. Bardo*, 629 Pa. 352, 105 A.3d 678, 684 (Pa. 2014) (citations omitted). If it is a matter of strategy, we will not find a lack of reasonable basis unless "an alternative not chosen offered a potential for success

173 L. Ed. 2d 251 (2009) (quoting *Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)).*

28. *Id.*

> substantially greater than the course actually pursued." *Commonwealth v. Spotz*, 624 Pa. 4, 84 A.3d 294, 311-12 (Pa. 2014). In order to demonstrate prejudice, "a petitioner must show that there is a reasonable probability that, but for counsel's actions or inactions, the result of the proceeding would have been different." *Mason, supra* at 389. All three prongs of the test must be satisfied in order for a petitioner to be entitled to relief. *Id.*[29]

The United States Court of Appeals for the Third Circuit has specifically held that the very ineffectiveness assistance of counsel test relied upon by the Superior Court in this matter is not contrary to the Supreme Court's Strickland standard.[30] Therefore, the Court finds that the Superior Court's decision is not contrary to *Strickland*.

The Court next considers whether the state courts' disposition of Diaz's exhausted ineffective assistance of counsel claims involved an unreasonable application of *Strickland* or resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

---

29. *Commonwealth v. Diaz*, 1965 EDA 2019 at 5-6, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum).

30. *See Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000).

Appendix C

1. Trial counsel was ineffective in failing to object to inadmissible, incriminating hearsay testimony.

Diaz argues that defense counsel was ineffective in failing to object to the victim's testimony regarding her conversation with Diaz's stepdaughter, K.C., who confirmed that Diaz raped the complainant and encouraged the complainant to call for help.[31] Diaz claims that defense counsel should have objected to the statements as both hearsay and as violative of his right to confrontation under the Pennsylvania and United States Constitution.[32]

In recounting the testimony at issue, the PCRA court addressed Petitioner's ineffective assistance claim as follows:

> Q: And then at some point, did you wake up or regain consciousness or something?
> A: Yes.
> Q: And then what happened then at that point?
> A: Well, then I woke up it was 4:30 and then I had told [K.C.] like I had this crazy dream. And she was like, oh [K.C.], it wasn't a dream. And she was - then I said, you know, what do you mean? She was like everything that you told me, it happened. So then she said that I needed to - so then I started crying and she said I needed to tell somebody.[33]

31. Doc. 16 at 26.

32. *Id.*

33. Doc. 16-1 at 131.

She also repeated parts of a phone call she heard between K.C. and K.O's ex-boyfriend, where K.C. told him "my stepfather [the Defendant] raped [K.O.]." (N.T., Volume I, at 52). Continuing in her testimony, she recalled K.C. telling her mother "it was true" that Defendant had raped K.O. (N.T. Volume 1 at 54.) Trial counsel did not make a hearsay objection during the victim's testimony.

On cross examination, defense counsel referred to K.O.'s fragmentary memory of the rape to elicit hearsay implying she only came to believe it happened on K.C.'s insistence.[34]

---

34. Defendant claims trial counsel introduced more hearsay through the testimony of Nurse Showers. (PCRA Petition, 8/15/18, at p. 13.) The Commonwealth called Nurse Showers. On cross, counsel asked the witness to explain her finding recorded on a report she produced after examination of K.O. for evidence of sexual assault; the Commonwealth introduced the report as an exhibit. (N.T., Volume 1, at 131.) He accented parts of the report where K.O.'s recollections might have seemed "hazy" to the witness. He questioned Nurse Showers about her conclusions that K.O.'s body had no signs of physical injury. (N.T., Volume 1, at 142-53.) Trial counsel did not, then, introduce hearsay. Defendant does not claim counsel should have objected to the exhibit. If Defendant had, it would have been meritless. Statements recorded in the course of medical examination may be admitted to prove acts of sexual abuse under the medical-treatment exception to the hearsay rule. *See Commonwealth v. Sanford*, 397 Pa. Super. 581, 580 A.2d 784, 792 (Pa. Super. 1990). Regardless, Defendant has not developed this argument at the hearing or in his brief, so we cannot rule on it. *See Commonwealth v. DiNicola*, 581 Pa. 550, 866 A.2d 329, 335-37 (Pa. 2005).

Q: And when you wake up you tell [K.C.] that you thought you had a dream that you had sex with my client?
A: Yes.
Q: And you said, I'm not sure if I was dreaming or if this is true, right?
A: Yes.
Q: And she says, it's true, right?
A: Yes.
(N.T. Volume 1, at 74.)

Defendant claims counsel had no conceivable reason not to object to this testimony, or to elicit it. (Defendant's Brief at p. 7.) The parties do not dispute that the testimony in question constitutes hearsay. To begin, we note that that not objecting to hearsay testimony is not ineffectiveness *per se. See, e.g., Commonwealth v. Thomas*, 396 Pa. Super. 92, 578 A.2d 422, 423 (Pa. Super. 1990) (analyzing all elements of the ineffectiveness test applied to a failure-to-object claims, because no presumption arises directly from that omission).

Trial counsel's testimony at the PCRA hearing shows he intended to have the jury hear the testimony, as it supported the defense theory of the crime. He strategized that the prosecution could not prove intercourse beyond a reasonable doubt if it could have occurred entirely as a figment of K.O.'s intoxication. (N.T., PCRA Hearing, at 8-9, 12-13, 14, 16, 24-25.)

> Counsel testified that he believed the hearsay statements would show K.O. waking up certain about her own memories, suggesting she was capable of imagining the crime based on K.C.'s suggestion as compensation for her memory loss. (N.T., PCRA Hearing, at 8-9, 12-13, 14, 16, 24-25.) Allowing the victim to narrate her realization with K.C. provided the most direct evidence to support this theory. (N.T., PCRA Hearing, at 24-25, 27-28.) Further, allowing the Commonwealth to introduce the victim's statement for this purpose avoided the defense having to call K.C. herself. Counsel stated he would not have called K.C. to testify, as her testimony could have reflected poorly on the defense. (N.T., PCRA Hearing, at 24.) Counsel's testimony shows he acted with a strategic basis, which he designed to advance an alternate theory that supports Defendant's innocence.[35]

The Superior Court adopted the PCRA court's findings, crediting trial counsel's explanation of his strategy as follows:

> The PCRA court credited trial counsel's explanation of the reason why he did not object. PCRA Court Opinion, 6/11/19, at 11. The court also concluded that counsel "acted with a strategic basis, which he designed to advance an alternate theory that supports [Appellant's]

35. Doc. 16-1 at 131-133.

innocence." *Id.* at 10. According to the PCRA court, both Victim's hearsay testimony of her conversation with K.C. and her account of K.C.'s conversation with Victim's boyfriend served the same strategic purpose, and thus, did not lack a reasonable basis.

Appellant contends that counsel had no reasonable strategic basis for failing to object to hearsay statements made by a non-testifying witness that Appellant raped Victim. Appellant's brief at 8. He alleges further that counsel recognized the damaging nature of the statements when he established on cross-examination that the declarant would not have had any personal knowledge of whether a rape occurred. *Id.* Appellant maintains that, "to the extent that trial counsel actually pursued a theory that [Victim] had confused a dream for reality, trial counsel already had what he needed to argue such a theory . . . without admitting inculpatory hearsay." *Id.* at 9. He directs our attention to Victim's testimony that she believed the alleged incident was dream. N.T. Trial Vol. 1, 2/11/15, at 170. He contends that counsel could have argued that Victim imagined the incident without allowing hearsay evidence of statements by K.C. incriminating Appellant. Appellant argues in the alternative that there were wiser strategies, such as arguing that Victim "fabricated the assault allegations rather than explain to her friend

that she had consented to sexual intercourse with her friend's married step-father."[36] Appellant's brief at 10.

Counsel's assistance is deemed constitutionally effective "if he chose a particular course that had some reasonable basis designed to effectuate [the] client's interest." *Commonwealth v. Sneed*, 616 Pa. 1, 45 A.3d 1096, 1107 (Pa. 2012). Counsel admittedly chose a hybrid strategy, which required him to walk a fine line between the scenario where Victim was so intoxicated that her memory was unreliable, and the situation where, although she had been drinking, she was not unconscious and, thus, capable of consenting. In either scenario, there was no rape. With regard to the first strategy, counsel sought to establish that K.C. made up the rape and suggested that it occurred to the intoxicated and confused Victim. The value in the hearsay testimony lay in painting K.C., whom counsel established was not present when the rape allegedly occurred, who would have had no personal knowledge of the facts, and who

36. In the PCRA court, Appellant argued that the only two realistic defenses once the Commonwealth introduced DNA testimony were: (1) that Victim was capable of consenting, in fact consented, and later fabricated the rape allegation; or (2) that the DNA results were erroneous. *See* Defendant's Supplemental Brief, 5/12/19, at 4. The PCRA Court found that neither strategy was "so much more likely to succeed that it made trial counsel's chosen defense unreasonable." *See* PCRA Court Opinion, 6/11/19, at 10 n.4.

> did not testify at trial, as the fabricator of the rape story. Furthermore, K.C. propagated the lie when she called Victim's former boyfriend to report it. Admittedly, the strategy was not successful, but it was not unreasonable.
>
> The existence of other strategies that may have offered a greater likelihood of success is of no moment unless the petitioner proves that the alternative not chosen offered a substantially greater potential for success, which the PCRA court found Appellant did not demonstrate. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167, 1189 (Pa. 1999). We find no error. Hence, no relief is due on this claim.[37]

Under *Strickland*, counsel is presumed to be operating under sound legal strategy, even if not the most effective strategy.[38] A petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[39] To overcome that presumption, "a habeas petitioner must show either that: (1) the suggested strategy (even if sound) was not in fact motivating counsel or, (2) that the actions could never be considered part of a sound strategy."[40] This test tasks

---

37. *Commonwealth v. Diaz*, 1965 EDA 2019 at 7-9, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum).

38. *Strickland*, 466 U.S. at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

39. *Strickland*, 466 U.S. at 689 (quotations omitted).

40. *Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005).

the district court with assessing "counsel's reasonableness ... on the facts of the particular case, viewed as of the time of counsel's conduct."[41]

Elaborating on *Strickland*'s standard, the Third Circuit has defined a "tiered structure" with respect to the strategic presumptions:

> At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound.... In cases in which the record does not explicitly disclose trial counsel's actual strategy or lack thereof (either due to lack of diligence on the part of the petitioner or due to the unavailability of counsel), the presumption may only be rebutted through a showing that no sound strategy posited by the Commonwealth could have supported the conduct ... However, if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the "weak" presumption becomes a "strong" presumption, which is "virtually unchallengeable."[42]

---

41. *Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005).

42. *Thomas*, 428 F.3d at 499-500 (footnotes and internal citations omitted).

"Courts have routinely declared assistance ineffective when 'the record reveals that counsel failed to make a crucial objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles.'"[43] "[T]he defendant is most likely to establish incompetency where counsel's alleged errors of omission or commission are attributable to a lack of diligence rather than an exercise of judgment."[44]

In their review of this issue, the state courts found that Diaz's trial counsel had a tactical reason for not objecting to the hearsay testimony. Diaz's counsel testified at the PCRA hearing, that he intended to have the jury hear the testimony, as it supported the defense theory of the crime, which strategy was that the prosecution could not prove intercourse beyond a reasonable doubt if it could have occurred entirely as a figment of K.O.'s intoxication. Counsel further testified that he believed that the most direct evidence to support his theory was to allow the victim to narrate her realization with K.C as he believed that calling K.C. to testify would have reflected poorly on the defense. Thus, the state courts reasonably concluded that trial counsel had a rational, strategic basis for not objecting to the hearsay testimony. As such, Petitioner

---

43. *Id.* at 501 (quoting 3 *Wayne LaFave et al., Criminal Procedure* § 11.10(c), at 721 (2d ed. 1999)); *see also Cofske v. United States*, 290 F.3d 437, 443 (1st Cir. 2002) ("[C]ourts tend to be somewhat less forgiving where counsel altogether overlooks a possible objection or opportunity.") (citing *LaFave, supra*, § 11.10(c), at 714-15).

44. *Thomas*, 428 F.3d at 501 (quoting *LaFave, supra*, § 11.10(c), at 714).

fails on the first prong of the *Strickland* analysis. Habeas relief is not warranted on this claim.

2. Trial counsel erred in failing to present exculpatory defense witnesses.

Petitioner's second claim is that trial counsel was ineffective for failing to call four defense witnesses who were willing to testify.[45] Specifically, Petitioner claims that two witnesses, Angel Ramos and Iraida Geldres would have testified that they were home when the complainant entered the house after the alleged rape and that she did not appear to be intoxicated in or in distress.[46] A third witness, Nilda Diaz's step-son, Andrew Cordova, would have testified to the location of the van and that Diaz did not move the van for weeks.[47] Finally, Petitioner claims that a fourth witness, Diaz's cousin, Damaris Otero, would have confirmed that Diaz was dropped off by his step-son Angel Ramos and that Diaz did not have the van with him.[48] Petitioner claims that counsel was aware of the existence of the witnesses and that trial counsel had no strategic basis for failing to hire an investigator, speak with potential defense witnesses, or present the testimony of those witnesses who could have testified that the complainant was not intoxicated when she arrived home and further that Diaz did not attempt to hide the van from the police.[49]

---

45. Doc. 16 at 39.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 40.

Appendix C

In Pennsylvania, to prevail on a claim of ineffective assistance of counsel for failure to call a witness, the appellant must show:

> (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant.[50]

Although this standard is not identical to the *Strickland* standard, the Third Circuit has held that "the Pennsylvania test is not contrary to the test set forth in *Strickland*."[51] In this case, the state courts carefully considered Diaz's claim regarding the alleged failure of trial counsel to investigate or question witnesses and found this claim to be without merit. Specifically, the Superior Court provided the following details and analysis regarding the claim:

> Appellant's second claim of ineffectiveness involves counsel's alleged failure to investigate

---

50. *Commonwealth. v. Fulton*, 574 Pa. 282, 830 A.2d 567, 572 (Pa. 2003) (citations omitted).

51. *Moore v. DiGuglielmo*, 489 Fed.App'x. 618, 626 (3d Cir. 2012) ("The five requirements set forth by the Pennsylvania Supreme Court would necessarily need to be shown to prevail under *Strickland* on a claim of this nature.")

and call four witnesses, three of whom were present when he and Victim arrived home. Two of the proffered witnesses would have offered testimony tending to explain that Appellant went to New York for fear for his safety and established that the minivan where the alleged sexual assault occurred remained in Appellant's driveway for at least a week after the incident. Such testimony, Appellant contends, would have undercut Trooper Wesnak's testimony implying that Appellant fled in the minivan to avoid apprehension and that the minivan was unavailable for execution of a search warrant.

All four witnesses testified at the evidentiary hearing. Appellant's stepson, Angel Ramos, and Mr. Ramos's girlfriend, Iraida Geldres, testified that they were at Appellant's home that evening when he and Victim returned. Mr. Ramos stated that when Victim walked in, "she walked in normally. She wasn't stumbling or staggering or anything like that. She just went right upstairs to my sister's room." N.T. PCRA Hearing, 3/25/19, at 32. He also reported that he received a telephone call early in the morning from Appellant. Appellant told him that "he was in trouble, that somebody was threatening his life[,]" and "I believe that somebody had came to the front door with a baseball bat and the husband . . . had a weapon . . . a firearm." *Id.* at 34. In response to that call, Mr. Ramos went to Appellant's home, retrieved him, and drove

him to New York. At that time, Mr. Ramos saw the gray minivan parked in the driveway by the side entrance to the house, and he testified that the vehicle remained in that location for two weeks. *Id.* at 35.

Ms. Geldres confirmed that she saw Victim and Appellant briefly when they entered the kitchen that night. Victim was walking fine and showed no signs of inebriation. *Id.* at 43-44. Ms. Geldres stated that she would have been willing to testify if she had been asked.

Another stepson, Andrew Cordova, testified that he saw Victim come into the house and go upstairs. He saw nothing unusual in the way she proceeded. She seemed perfectly fine and there was no indication that she was intoxicated. *Id.* at 52-53. He also explained that, at around 2:00 or 3:00 a.m. that night, Victim's parents banged on the door. *Id.* at 54. The mother had a bat in her hand and the father carried a firearm. *Id.* The father said he was going to kill Appellant. *Id.* Mr. Cordova also testified that the van remained in the driveway for one week, and that he then moved it elsewhere. *Id.* at 56. Two weeks after the incident, Mr. Cordova drove it to New York and left it with his stepfather. No one contacted Mr. Cordova to determine what he knew about the incident or whether he was willing to testify, although he was willing to testify.

The fourth proffered witness was Appellant's cousin, Damaris Otero. Mr. Otero confirmed that Appellant was dropped off at his home in New York and remained there for several weeks. While there, Appellant used Mr. Otero's truck, and Mr. Otero stated that he never saw Appellant with a van while he was in New York. The witness stated that he would have testified if asked.

Trial counsel testified that he did not call Mr. Ramos, Ms. Geldres, and Mr. Cordova because they would have undermined the defense's theory that Victim was so intoxicated that her memory was unreliable. *Id.* at 54. He only called Appellant's wife because he wanted the jury to see that they were still together.

The PCRA court accepted that there were four witnesses willing and available to provide allegedly exculpatory testimony for Appellant, that Appellant informed his counsel of these witnesses, and that other trial witnesses referred to them. Addressing first the question of whether counsel was ineffective for failing to elicit testimony from these witnesses impeaching Victim's account of her intoxicated condition, the court concluded that counsel's decisions "were strategic decisions done with a purpose, as part of a coherent plan for the defense." PCRA Court Opinion, 6/11/19, at 14. Moreover, the court concluded that such

testimony would have been cumulative of the testimony offered by Nilda Diaz, Appellant's wife, and thus, there was no prejudice. *See Commonwealth v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1229 Pa. 2006) (finding no prejudice for purposes of PCRA where counsel failed to introduce cumulative testimony of substance abuse).

In addition, the PCRA court found no prejudice as the testimony of these witnesses "carried little probative value." PCRA Court Opinion, 6/11/19, at 15. The court pointed to inconsistencies in the testimony of Mr. Ramos and Ms. Geldres about their marital status, where they were standing when Victim entered the home that night, and whether Mr. Ramos was smoking a cigarette at the time. Their testimony also contradicted that of Appellant's wife, who told the jury that only her children were with her that night. In the court's view, the inconsistencies in the evidence diminished its value as impeachment, and its admission would have not changed the outcome of the case. *Id.* at 16.

As the PCRA court has the opportunity to assess and weigh the credibility of witnesses, we generally defer to its credibility determinations. *See Commonwealth v. Spotz*, *supra* at 1227 (citing *Commonwealth v. Spotz*, 582 Pa. 207, 870 A.2d 822, 836 (Pa. 2005)) ("Appellate courts do not act as fact finders, since to do so

would require an assessment of the credibility of the testimony and that is clearly not our function."). We find support for the PCRA court's conclusion that the proffered testimony tended to undercut counsel's strategy, was cumulative of the testimony of Appellant's wife, and contained inconsistencies that rendered it weak impeachment evidence. In light of the foregoing, Appellant failed to demonstrate that there was a reasonable probability that, but for counsel's failure to elicit the foregoing testimony from these witnesses, the outcome of the trial would have been any different. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001) (defining prejudice in the PCRA context as a demonstration "that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.").

Appellant also contends that the proffered testimony of Mr. Ramos and Mr. Cordova regarding the threats made against Appellant were critical to rebut Trooper Wesnak's implication that Appellant fled to avoid police questioning. In addition, their testimony that the minivan remained in the driveway tended to refute the Trooper's testimony that he could not find and impound the minivan and obtain a search warrant to examine it for DNA and other evidence. Appellant maintains that, without the witnesses' testimony, the jury was left to

infer that Appellant fled out of consciousness of guilt, and that he hid the minivan to avoid its inspection and perhaps destroy evidence.

The PCRA court concluded that the proffered testimony did "not rebut Trooper Wesnak's testimony in any material way, and so would not have had a consequence on the trial." PCRA Court Opinion, 6/11/19, at 18. The court pointed to cross-examination of the Trooper that he did "not examine the van because he did not know where it was and could not contact [Appellant] about locating it." *Id.* (referencing N.T. Vol. 1, 2/11/15, at 187). The PCRA court found that none of the witnesses would have dispelled any suggestion that Appellant hid and destroyed evidence. The court characterized the Trooper's testimony as establishing only that, by the time he could locate the van, any evidentiary value would have been compromised. In the court's view, the proffered testimony regarding the whereabouts of Appellant and the minivan "would not have been material or helpful to the defense, and so [Appellant's] claim for ineffective assistance must fail." *Id.* at 19.

Preliminarily, we note that much of what Appellant allegedly told Mr. Ramos during the late night telephone call, specifically that he had been threatened by Victim's parents, was arguably inadmissible hearsay. Mr. Cordova's account of Victim's parents banging on the door and threatening Appellant was

largely cumulative of the testimony of Victim's mother. She testified that she had a baseball bat in her hand when she, accompanied by her former husband, entered Appellant's home to retrieve Victim on the night of the incident. Furthermore, neither Mr. Ramos nor Mr. Cordova could have testified from his own personal knowledge that Appellant went to New York for fear of retaliation from Victim's family, rather than to avoid police questioning.

Mr. Ramos and Mr. Cordova proffered inconsistent testimony regarding the length of time the minivan remained in Appellant's driveway. Assuming that the minivan was at Appellant's home for some time after the incident, perhaps Trooper Wesnak could have obtained a warrant to examine and test it for DNA evidence. However, such testimony did not exclude the possibility that the minivan would have been cleaned before a warrant could have been obtained. In short, while there may have been some minimal impeachment value from the testimony of these witnesses regarding the whereabouts of the minivan and its accessibility for testing, it was unlikely that the absence of this evidence changed the outcome of the proceeding in light of DNA evidence obtained from Victim. Hence, this claim does not merit relief.[52]

---

52. *Commonwealth v. Diaz*, 1965 EDA 2019 at 9-15, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum).

Appendix C

Under federal law, a failure to investigate potentially exculpatory witnesses may form the basis of ineffective assistance of counsel.[53] To successfully establish this claim, a petitioner "must make a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained ... and whether such information, assuming admissibility in court, would have produced a different result."[54] The petitioner must also demonstrate he suffered prejudice.[55]

Here, in finding counsel's performance was not deficient, the state courts did not violate clearly established law, and were not unreasonable in their application of *Strickland*. As the Superior Court stated, the testimony of these witnesses would have carried little probative value and would have been cumulative of the testimony offered by Diaz's wife, Nilda Diaz. Specifically, the court pointed to inconsistencies in the testimony of Mr. Ramos and Ms. Geldres about their marital status, where they were standing when the victim entered the home that night, and whether Mr. Ramos was smoking a cigarette at the time. Their testimony also contradicted that of Nilda Diaz, who told the jury that only her children were with

53. *See Strickland*, 466 U.S. at 690-91; *see also Brown v. United States*, No, 13-2552, 2016 U.S. Dist. LEXIS 57723, 2016 WL 1732377, at *4-5 (D.N.J. May 2, 2016).

54. *See Brown*, 2016 U.S. Dist. LEXIS 57723, 2016 WL 1732377, at *5 (quoting *United States v. Askew*, 88 F.3d 1065, 1073, 319 U.S. App. D.C. 2 (D.C. Cir. 1996) (internal quotation marks omitted)).

55. *See Strickland*, 466 U.S. at 690-91.

her that night. In the court's view, the inconsistencies in the evidence diminished its value as impeachment, and its admission would have not changed the outcome of the case. Additionally, the court found Mr. Cordova's testimony cumulative of the testimony of Victim's mother and that neither Mr. Ramos nor Mr. Cordova could have testified from his own personal knowledge that Diaz went to New York for fear of retaliation from Victim's family, rather than to avoid police questioning. Finally, while the court found that there may have been some minimal impeachment value from the testimony of these witnesses regarding the whereabouts of the minivan and its accessibility for testing, it was unlikely that the absence of this evidence changed the outcome of the proceeding particularly in light of DNA evidence obtained from victim.

The Court is mindful that the Supreme Court has observed that a "doubly deferential judicial review ... applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard."[56] Given this deferential standard, the Court cannot conclude that the state courts' decisions relating to these ineffective assistance of counsel claims were an unreasonable application of *Strickland* or based on an unreasonable determination of the facts.[57] To the contrary,

---

56. *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009); *see also Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas").

57. *See, e.g., Eaddy v. Sauers*, No. 10-7538, 2011 U.S. Dist. LEXIS 153441, 2011 WL 7409076, at *8 (E.D. Pa. Aug. 2, 2011) ("counsel's decision to not call William Jones as a witness was

both the PCRA court's and Superior Court's analyses of these ineffective assistance of counsel claims are thorough and well-supported by both the law and the facts of the Petitioner's case. Diaz has also failed to show potential information from these witnesses would have produced a different result at his trial. He has thus failed to establish prejudice.[58] Accordingly, Petitioner is not entitled to relief on this claim.

3. Trial counsel erred in failing to object to Trooper Wesnak's testimony.

Petitioner's final claim is that trial counsel was ineffective for failing to object and seek a curative instruction to Trooper Wesnak's commentary on Petitioner's refusal to give a statement and his decision to hire an attorney.[59] Specifically, Petitioner claims that Trooper Wesnak testified on direct examination that he told Nilda Diaz that he was looking for Diaz and that he was unable to make contact with him.[60] Trooper Wesnak was then asked, "Did you let his wife know that you were looking for him," to which he responded, "Yes." Wesnak

---

reasonable since his proposed testimony ... would not have helped Petitioner"), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 21940, 2012 WL 569369 (E.D. Pa. Feb. 22, 2012).

58. *See Blasi v. Atty gen. of Com. Of Pa*, 120 F. Supp. 2d 451, 474 (M.D. Pa. 2000) ("the defense cannot have been prejudiced unless the potential witness had favorable evidence to provide").

59. Doc. 16 at 49.

60. *Id.*

testified that he drove by Diaz's house several times as part of the effort to locate Diaz, suggesting that Diaz was evading Trooper Wesnak's attempts to question him.[61]

On cross-examination, defense counsel attempted to question the trooper regarding whether he had obtained a search warrant for Diaz's van. Instead of simply answering the question regarding the van, Trooper Wesnak volunteered that "unfortunately he [Diaz] fled the area prior to my being able to question him on that date, and I was never able to find it."[62] When defense counsel asked, "Did you subsequently apply for a search warrant for the van?", Trooper Wesnak responded, "By the time Mr. Diaz turned himself in, on the advice of his attorney, he didn't want to answer any more questions.[63] And by that time it was very obvious that he could have cleaned up the van and no other evidence would have been able to be obtained from the van."[64] Relying on *Commonwealth v. Molina*,[65] Petitioner argues that defense counsel should have objected because both Pennsylvania and federal appellate courts have long held that the prosecution may not use a defendant's decision to remain silent or decision to retain counsel as evidence of guilt.[66]

---

61. *Id.*

62. *Id.* at 50.

63. *Id.*

64. *Id.*

65. 628 Pa. 465, 104 A.3d 430 (Pa. 2014).

66. *Id.*

"*Miranda*[67] warnings carry the Government's 'implicit assurance' that an arrestee's invocation of the Fifth Amendment right to remain silent will not later be used against him."[68] In *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 49 L. Ed. 2d 91, (1976), the United States Supreme Court held that "every post-arrest silence is insolubly ambiguous" because it "may be nothing more than the arrestee's exercise of [her] *Miranda* right." *Doyle* errors of prosecutorial comment on a defendant's post-arrest silence can be harmless if the Government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[69] This analysis requires an examination of "the totality of the circumstances."[70] The question becomes whether the "constitutional trial error was harmless beyond a reasonable doubt."[71]

Furthermore, not every reference to a defendant's silence results in a *Doyle* violation. There is no due process violation when a prosecutor comments on a defendant's pre-arrest silence or failure to come forward because

---

67. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

68. *Gov't of the V.I. v. Martinez*, 620 F.3d 321, 335, 54 V.I. 900 (3d Cir. 2010) (quoting *Gov't of the V.I. v. Davis*, 561 F.3d 159, 163-64, 51 V.I. 1179 (3d Cir. 2009)).

69. *Davis*, 561 F.3d at 165 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

70. *Martinez*, 620 F.3d at 337-38.

71. *Davis*, 61 F.3d at 165.

there has been no "implicit promise that his choice of the option of silence would not be used against him."[72] In *Fletcher v. Weir*, 455 U.S. 603, 606, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the United States Supreme Court held where there has been no governmental action to induce the defendant to remain silent, the *Miranda*-based rationale does not apply. A prosecutor may impeach a defendant's testimony using pre-arrest silence,[73] post-arrest, pre-*Miranda* warning silence,[74] and any voluntary post-*Miranda* warning statements.[75]

In denying the claim on its merits, the Superior Court began its analysis by reiterating the Fifth Amendment's protection against self-incrimination:

> Preliminarily, we note that while Appellant characterizes the Trooper's testimony as a reference to his **post-arrest** silence, it is unclear from the certified record whether Appellant was under arrest or had received his *Miranda* warnings when he invoked his Fifth Amendment right against self-incrimination. However, the timing of Appellant's assertion of

72. *Portuondo v. Agard*, 529 U.S. 61, 75, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (emphasis in original).

73. *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1908)

74. *Fletcher*, 455 U.S. at 605-606.

75. *See Anderson v. Charles*, 447 U.S. 404, 408-409, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980).

his right to remain silent does not impact our legal analysis.[76] In *Molina, supra* at 450-51, a pre-arrest silence case, our Supreme Court held that "the timing of the silence in relation to the timing of an arrest is not relevant to the right against self-incrimination." The relevant inquiry was whether the mention of the defendant's silence was used by the prosecution as substantive evidence of guilt. The Court held that such use was prohibited unless it fell within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense.

In *Molina*, the prosecutor argued that the defendant's silence was "most telling," asked the jury "why" the defendant refused to cooperate with the detective, and directed the jury to "[f]actor that in when you're making an important decision in this case as well." *Id.* at 452-53. Our High Court held that the defendant's right against self-incrimination was violated as the prosecutor used the defendant's silence to imply his guilt, and concluded that the error was not harmless.

---

76. Appellant's argument did not turn on whether the Trooper's reference was to his pre-arrest or post-arrest silence. He cited Commonwealth v. Molina, 628 Pa. 465, 104 A.3d 430, 450-51 (Pa. 2014), for the proposition that the timing of the silence in relation to an arrest was not relevant to the right against self-incrimination. See Appellant's brief at 24.

Appendix C

* * *

> As this Court held in *Commonwealth v. Guess*, 2012 PA Super 196, 53 A.3d 895, 903 (Pa. Super. 2012), the rule precluding reference to a defendant's silence "'does not impose a *prima facie* bar against any mention of a defendant's silence' but rather 'guards against the exploitation of a defendant's right to remain silent by the prosecution.'" *Id.* citing *Commonwealth v. Adams*, 2012 PA Super 11, 39 A.3d 310, 318 (Pa.Super. 2012) (quoting *Molina*, supra at 63) (emphasis in original). Moreover, in *Adams*, we relied upon *Molina*, in concluding that, "the mere revelation of a defendant's pre-arrest silence does not establish innate prejudice where it was not used in any fashion that was likely to burden defendant's Fifth Amendment right or to create [an] inference of admission of guilt." *Adams, supra* at 318 (quoting *Molina*, supra at 56).[77]

The Court finds that the Superior Court did not apply a rule of law that contradicts established Supreme Court precedent, and its decision was not contrary to clearly established Supreme Court precedent. Accordingly, the issue that remains is whether the adjudication by the Superior Court survives review under the "unreasonable application" clause of § 2254(d)(1).

---

77. *Commonwealth v. Diaz*, 1965 EDA 2019 at 9-15, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum) (emphasis in original).

Appendix C

At Petitioner's evidentiary hearing, trial counsel maintained that he did not object to Trooper Wesnak's testimony because the jury had already heard the statement, and based on his experience, an objection or curative instruction would only have highlighted the testimony.[78] The PCRA court viewed Trooper Wesnak's reference as fair response to the defense's criticism of the Trooper's thoroughness in failing to apply for a search warrant for the Diaz's minivan.[79] The court also characterized the Trooper's statement as a "fair recounting of the investigation concerning the van" and an explanation why he believed that "enough time had passed to make . . . a search . . . futile."[80] In the court's view, the answer did not imply that Diaz's silence was an admission of guilt, but merely explained the limits placed on the police investigation.[81] Thus, the PCRA court concluded, there was "no arguable merit to the claim that trial counsel should have objected[,]" or in the alternative, trial counsel had a reasonable basis for not objecting.[82]

The Superior Court, in finding no error in the PCRA court's conclusion that Diaz is not entitled to relief on this claim, rendered the following opinion:

---

78. Doc. 16-1 at 170, N.T. PCRA Hearing, 3/25/19, at 23.

79. Doc. 16-1 at 145.

80. *Id.*

81. *Id.*

82. *Id.*

The reference herein was brief and elicited upon questioning by the defense. It was not exploited by the Commonwealth on cross-examination or during closing argument. In response to defense counsel's question why he did not obtain a search warrant to examine the minivan for evidence of the alleged sexual assault, Trooper Wesnak testified that he did not seek a search warrant because he did not know where the van was and he could not locate Appellant to ask him. He added that, by the time Appellant turned himself in, he would not answer questions based on the advice of counsel.

* * *

We find that such evidence of Appellant's silence was fair response to the defense's argument that the Trooper had not sought a search warrant for the vehicle and an explanation of the investigative timeline. Consequently, an objection would not have altered the outcome of this case. *See Commonwealth v. DiNicola*, 581 Pa. 550, 866 A.2d 329 (Pa. 2005) (reference to a defendant's refusal to speak to trooper constituted fair response to defense counsel's questioning of the adequacy of the trooper's investigation). Herein, the brief reference to Appellant's silence served another purpose other than suggesting guilt. *See Adams*, supra (finding that a brief reference by detective to

> defendant's silence did not violate the Fifth Amendment where it was not intended to imply a tacit admission of guilt but to recount the sequence of the investigation).
>
> We find misplaced Appellant's reliance upon *Costa, supra*. Therein, we determined that trial counsel was ineffective for failing to object when a police detective testified that the defendant said nothing to him when charges were filed against him for the molestation of a young boy. The court concluded that there was no proper purpose for the testimony other than to highlight the defendant's silence, which was not the case herein. Hence, we find no error in the PCRA court's conclusion that Appellant is not entitled to relief on this claim.[83]

Viewing the Superior Court's disposition of this claim through the deferential lens of the AEDPA, we conclude that Diaz has failed to carry his burden to persuade this Court that the Superior Court's adjudication was unreasonable. The record supports the Superior Court's conclusion that the reference to Diaz's silence, elicited in questioning by defense counsel, was brief in context and did not occur in a context likely to suggest to the jury that Diaz's silence was the equivalent of a tacit admission of guilt. For these reasons, the Court finds that Diaz is not entitled to habeas relief on his third and final ground.

---

83. *Commonwealth v. Diaz*, 1965 EDA 2019 at 9-15, 237 A.3d 436, 2020 WL 2200741 (Pa. Super. 2020) (unpublished memorandum).

Appendix C

III. CERTIFICATE OF APPEALABILITY

"Under the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), a 'circuit justice or judge' may issue a COA [certificate of appealability] only if the petitioner 'has made a substantial showing of the denial of a constitutional right.'"[84] "Where a district court has rejected the constitutional claims on the merits, ... the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[85]

For the reasons set forth herein, Petitioner has not made a substantial showing of the denial of a constitutional right or that jurists of reason would find it debatable that Court's assessment of the claims debatable or wrong. Accordingly, a certificate of appealability will not issue.

IV. CONCLUSION

For the reasons set forth above, the Court will deny the petition for writ of habeas corpus. An appropriate Order follows.

BY THE COURT:

/s/ Matthew W. Brann
Matthew W. Brann
Chief United States District Judge

---

84. *Tomlin v. Britton*, 448 Fed.Appx. 224, 227 (3d Cir. 2011) (citing 28 U.S.C. § 2253(c)).

85. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

APPENDIX D — DENIAL OF REHEARING IN THE SUPREME COURT OF PENNSYLVANIA, DATED JANUARY 6, 2021

SUPREME COURT OF PENNSYLVANIA

No. 449 MAL 2020
Trial Court Docket No: CP-45-CR-0000396-2014
Superior Docket Number: 1965 EDA 2019
Appeal Docket No:

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

HAMETT DIAZ,

Petitioner

Date Petition for Allowance of Appeal Filed:
August 14, 2020

Disposition: Order Denying Petition
for Allowance of Appeal

Disposition Date: January 06, 2021

Petition for Allowance of Appeal from
the Order of the Superior Court.

Appendix D

ORDER

PER CURIAM

AND NOW, this 6th day of January, 2021, the Petition for Allowance of Appeal is **DENIED.**

APPENDIX E — MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA, FILED MAY 7, 2020

SUPERIOR COURT OF PENNSYLVANIA

No. 1965 EDA 2019

COMMONWEALTH OF PENNSYLVANIA,

v.

HAMETT DIAZ,

Appellant.

May 7, 2020, Decided
May 7, 2020, Filed

Appeal from the PCRA Order Entered June 11, 2019. In the Court of Common Pleas of Monroe County Criminal Division at No(s): CP-45-CR-0000396-2014.

BEFORE: BOWES, J., KUNSELMAN, J., and STRASSBURGER, J.*

MEMORANDUM BY BOWES, J.:

Hamett Diaz appeals from the June 11, 2019 order denying his petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. After thorough review, we affirm.

---

* Retired Senior Judge assigned to the Superior Court.

Appendix E

We reproduce the trial court's summary of the underlying facts from this Court's opinion on direct appeal:

> [Appellant] is the stepfather of K.C., a 15 year old female. K.C. has a 17 year old friend, K.O., who is the victim (hereinafter referred to as "Victim"). On October 19, 2013, at around 12:00 p.m., [Appellant] drove K.C. and Victim from Blakeslee, Monroe County, Pennsylvania to New York City, NY, so that K.C. and Victim could get their nails done. During the drive, [Appellant] furnished K.C. and Victim with alcohol. [Appellant] also drank alcohol. While in New York when K.C. was getting her nails done, [Appellant] and Victim went to a liquor store in order to purchase more alcohol.
>
> After K.C. and Victim were finished with their nails, [Appellant], K.C., and Victim headed back to Pennsylvania. Upon returning to Pennsylvania, they stopped at a Burger King restaurant for Victim to use the bathroom. Victim was so intoxicated, she required assistance walking to and using the bathroom. Around 11:00 p.m., [Appellant], K.C. and Victim arrived back at [Appellant] and K.C.'s home in Blakeslee. When they arrived at the home, [Appellant] sent K.C. into the house to see if K.C.'s mother, [Appellant's] wife, was awake.

Appendix E

After K.C. went into the house, [Appellant] drove off with the Victim to a secluded service road. At this point, Victim began zoning in and out. After pulling onto the service road, Victim recalls [Appellant] getting out of the minivan, opening the trunk door, and laying out the backseat. [Appellant] then called Victim to move to the back of the minivan. When Victim moved to the back of the minivan she hit her head. The next thing Victim recalls she was lying on her back in the rear of the minivan. Victim then remembers [Appellant] putting his mouth on her vagina. Victim recalls [Appellant] putting his penis in her vagina. She testified that she was in and out of consciousness and that she was so intoxicated she was slurring her words and unable to speak.

[Appellant] and Victim arrived back at [Appellant] and K.C.'s house and she was unable to walk. Victim stated she "crawled" up the stairs. When Victim entered the house, she was crying and she immediately told K.C. that she and [Appellant] had driven down the mountain and she believed "something may have happened." K.C. then helped Victim wash up, get changed, and get into bed.

Victim later woke up around 4:00 a.m. on October 20, 2014, and told K.C. that she thought [Appellant] had sex with her. K.C. confirmed that Victim had come back to the house crying.

> Victim then called her ex-boyfriend about the incident. Victim's ex-boyfriend told his mother; the ex-boyfriend's mother called Victim's mother who called the police. Victim's mother then drove to [Appellant's] house and waited with Victim until the police arrived. The police arrived with an ambulance and Victim was transported to the hospital.

Commonwealth v. Diaz, 2016 PA Super 291, 152 A.3d 1040, 1042 (Pa.Super. 2016) (quoting Trial Court Opinion, 10/2/15, at 1-3).

Appellant was convicted by a jury of rape of a person who is unconscious, aggravated indecent assault, unlawful contact with a minor, corruption of minors, and endangering the welfare of children. The trial court sentenced him to a mandatory minimum sentence on the rape conviction pursuant to 42 Pa.C.S. § 9714(a)(2) ("Where the person had at the time of the commission of the current offense previously been convicted of two or more such crimes of violence arising from separate criminal transactions, the person shall be sentenced to a minimum sentence of at least 25 years of total confinement"). On appeal, this Court vacated the judgment of sentence after concluding that the mandatory minimum sentence was inapplicable. Appellant was resentenced on September 8, 2017, to an aggregate term of incarceration of 140 to 280 months, and he did not file a direct appeal.

On September 15, 2018, Appellant filed the instant, counseled PCRA petition in which he identified three

omissions of trial counsel that he contended deprived him of a fair trial. First, he faulted counsel for failing to object to inculpatory hearsay testimony elicited from Victim. Second, he alleged that counsel should have called four witnesses, some of whom would have impeached Victim's testimony regarding her level of intoxication and others also offering testimony as to the reasons why Appellant went to New York the next day. Several of the witnesses would have confirmed that Appellant's minivan remained in Appellant's driveway for at least one week in order to contradict State Police Trooper Wesnak's testimony that he did not obtain a search warrant for DNA testing on the minivan because he could not locate it until such time as the testing would have been futile. Finally, Appellant alleged that counsel was ineffective when he failed to object and seek a curative instruction when the Trooper testified that Appellant opted not to answer questions on the advice of his attorney.

Following an evidentiary hearing on March 25, 2018, the PCRA court concluded that no relief was due. Appellant timely appealed, and both Appellant and the PCRA court complied with Pa.R.A.P. 1925. Appellant presents three issues for our review:

> I. Whether the trial court erred in denying the [PCRA] Petition where trial counsel was ineffective in failing to object to the admission of hearsay testimony in which multiple witnesses testified that [Appellant's] step-daughter, K.C., confirmed that [Appellant] raped [Victim] and encouraged [Victim] to call for help.

> II. Whether the trial court erred in denying the [PCRA] Petition where trial counsel was ineffective in failing to call defense witnesses who would have directly impeached critical testimony from the Commonwealth's witnesses such as the allegations that [Victim] was too intoxicated to consent to sexual intercourse and that [Appellant] had tampered with the alleged crime scene and fled the jurisdiction.
>
> III. Whether the trial court erred in denying the [PCRA] Petition where trial counsel was ineffective in failing to object to the investigating officer's disparagement of [Appellant's] refusal to give a statement and instead hire an attorney on the basis that the testimony violated [Appellant's] rights to counsel and his rights against self-incrimination under the Pennsylvania and United States Constitutions.

Appellant's brief at vi.

On appeal from the denial of PCRA relief,

> our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error. The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo*

> standard of review to the PCRA court's legal conclusions.

Commonwealth v. Williams, 196 A.3d 1021, 1026-27 (Pa. 2018) (internal citations and quotations omitted).

All three of Appellant's issues involve claims of ineffective assistance of counsel. The law is well settled that counsel is presumed effective. *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 594 (Pa. 2007). In order to overcome that presumption, "a PCRA petitioner must plead and prove that: (1) the legal claim underlying the ineffectiveness claim has arguable merit; (2) counsel's action or inaction lacked any reasonable basis designed to effectuate petitioner's interest; and, (3) counsel's action or inaction resulted in prejudice to petitioner." *Commonwealth v. Mason*, 634 Pa. 359, 130 A.3d 601, 618 (Pa. 2015).

In determining whether counsel had a reasonable basis, the issue is not "whether there were other more logical courses of action which counsel could have pursued[,]" but "whether counsel's decisions had any reasonable basis." *Commonwealth v. Bardo*, 629 Pa. 352, 105 A.3d 678, 684 (Pa. 2014) (citations omitted). If it is a matter of strategy, we will not find a lack of reasonable basis unless "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Spotz*, 624 Pa. 4, 84 A.3d 294, 311-12 (Pa. 2014). In order to demonstrate prejudice, "a petitioner must show that there is a reasonable probability that, but for counsel's actions or inactions, the result of the

proceeding would have been different." *Mason, supra* at 389. All three prongs of the test must be satisfied in order for a petitioner to be entitled to relief. *Id.*

We turn first to Appellant's claim that counsel was ineffective when he failed to object to Victim's testimony recounting her conversations with K.C. Victim testified to the following. She awoke at 4:30 a.m., and she told K.C. that she had a crazy dream. K.C. replied, "it wasn't a dream." N.T. Trial Vol. I, 2/11/15, at 51. K.C. added, "everything you told me, it happened." *Id.* According to Victim, K.C. told her she "needed to tell somebody." *Id.* Victim also recounted a telephone conversation she overheard between K.C. and Victim's former boyfriend in which K.C. told him "my stepfather [Appellant] raped [Victim]." *Id.* at 52. Defense counsel did not object to any of the foregoing hearsay testimony, and Appellant claims on appeal that counsel had no reason not to object.

At the evidentiary hearing, trial counsel offered the following strategic basis for not objecting to the hearsay testimony. He "wanted the testimony in" because it supported the defense theory that Victim was intoxicated and uncertain of what had occurred, and that K.C. "planted the seed" of the rape. N.T. PCRA Hearing, 3/25/19, at 24. In counsel's view, the hearsay testimony obviated the need for the defense to call K.C., whom counsel believed would not have offered testimony favorable to the defense. *Id.*

The PCRA court credited trial counsel's explanation of the reason why he did not object. PCRA Court Opinion, 6/11/19, at 11. The court also concluded that counsel "acted

with a strategic basis, which he designed to advance an alternate theory that supports [Appellant's] innocence." *Id.* at 10. According to the PCRA court, both Victim's hearsay testimony of her conversation with K.C. and her account of K.C.'s conversation with Victim's boyfriend served the same strategic purpose, and thus, did not lack a reasonable basis.

Appellant contends that counsel had no reasonable strategic basis for failing to object to hearsay statements made by a non-testifying witness that Appellant raped Victim. Appellant's brief at 8. He alleges further that counsel recognized the damaging nature of the statements when he established on cross-examination that the declarant would not have had any personal knowledge of whether a rape occurred. *Id.* Appellant maintains that, "to the extent that trial counsel actually pursued a theory that [Victim] had confused a dream for reality, trial counsel already had what he needed to argue such a theory . . . without admitting inculpatory hearsay." *Id.* at 9. He directs our attention to Victim's testimony that she believed the alleged incident was dream. N.T. Trial Vol. 1, 2/11/15, at 170. He contends that counsel could have argued that Victim imagined the incident without allowing hearsay evidence of statements by K.C. incriminating Appellant. Appellant argues in the alternative that there were wiser strategies, such as arguing that Victim "fabricated the assault allegations rather than explain to her friend that she had consented to sexual intercourse with her friend's married step-father."[1] Appellant's brief at 10.

1. In the PCRA court, Appellant argued that the only two realistic defenses once the Commonwealth introduced DNA testimony were: (1) that Victim was capable of consenting, in fact

Counsel's assistance is deemed constitutionally effective "if he chose a particular course that had some reasonable basis designed to effectuate [the] client's interest." *Commonwealth v. Sneed*, 616 Pa. 1, 45 A.3d 1096, 1107 (Pa. 2012). Counsel admittedly chose a hybrid strategy, which required him to walk a fine line between the scenario where Victim was so intoxicated that her memory was unreliable, and the situation where, although she had been drinking, she was not unconscious and, thus, capable of consenting. In either scenario, there was no rape. With regard to the first strategy, counsel sought to establish that K.C. made up the rape and suggested that it occurred to the intoxicated and confused Victim. The value in the hearsay testimony lay in painting K.C., whom counsel established was not present when the rape allegedly occurred, who would have had no personal knowledge of the facts, and who did not testify at trial, as the fabricator of the rape story. Furthermore, K.C. propagated the lie when she called Victim's former boyfriend to report it. Admittedly, the strategy was not successful, but it was not unreasonable.

The existence of other strategies that may have offered a greater likelihood of success is of no moment unless the petitioner proves that the alternative not chosen offered a substantially greater potential for success, which the PCRA court found Appellant did not demonstrate.

---

consented, and later fabricated the rape allegation; or (2) that the DNA results were erroneous. *See* Defendant's Supplemental Brief, 5/12/19, at 4. The PCRA Court found that neither strategy was "so much more likely to succeed that it made trial counsel's chosen defense unreasonable." *See* PCRA Court Opinion, 6/11/19, at 10 n.4.

Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167, 1189 (Pa. 1999). We find no error. Hence, no relief is due on this claim.

Appellant's second claim of ineffectiveness involves counsel's alleged failure to investigate and call four witnesses, three of whom were present when he and Victim arrived home. Two of the proffered witnesses would have offered testimony tending to explain that Appellant went to New York for fear for his safety and established that the minivan where the alleged sexual assault occurred remained in Appellant's driveway for at least a week after the incident. Such testimony, Appellant contends, would have undercut Trooper Wesnak's testimony implying that Appellant fled in the minivan to avoid apprehension and that the minivan was unavailable for execution of a search warrant.

All four witnesses testified at the evidentiary hearing. Appellant's stepson, Angel Ramos, and Mr. Ramos's girlfriend, Iraida Geldres, testified that they were at Appellant's home that evening when he and Victim returned. Mr. Ramos stated that when Victim walked in, "she walked in normally. She wasn't stumbling or staggering or anything like that. She just went right upstairs to my sister's room." N.T. PCRA Hearing, 3/25/19, at 32. He also reported that he received a telephone call early in the morning from Appellant. Appellant told him that "he was in trouble, that somebody was threatening his life[,]" and "I believe that somebody had came to the front door with a baseball bat and the husband . . . had a weapon . . . a firearm." *Id.* at 34. In response to that call,

Mr. Ramos went to Appellant's home, retrieved him, and drove him to New York. At that time, Mr. Ramos saw the gray minivan parked in the driveway by the side entrance to the house, and he testified that the vehicle remained in that location for two weeks. *Id.* at 35.

Ms. Geldres confirmed that she saw Victim and Appellant briefly when they entered the kitchen that night. Victim was walking fine and showed no signs of inebriation. *Id.* at 43-44. Ms. Geldres stated that she would have been willing to testify if she had been asked.

Another stepson, Andrew Cordova, testified that he saw Victim come into the house and go upstairs. He saw nothing unusual in the way she proceeded. She seemed perfectly fine and there was no indication that she was intoxicated. *Id.* at 52-53. He also explained that, at around 2:00 or 3:00 a.m. that night, Victim's parents banged on the door. *Id.* at 54. The mother had a bat in her hand and the father carried a firearm. *Id.* The father said he was going to kill Appellant. *Id.* Mr. Cordova also testified that the van remained in the driveway for one week, and that he then moved it elsewhere. *Id.* at 56. Two weeks after the incident, Mr. Cordova drove it to New York and left it with his stepfather. No one contacted Mr. Cordova to determine what he knew about the incident or whether he was willing to testify, although he was willing to testify.

The fourth proffered witness was Appellant's cousin, Damaris Otero. Mr. Otero confirmed that Appellant was dropped off at his home in New York, and remained there for several weeks. While there, Appellant used Mr. Otero's

truck, and Mr. Otero stated that he never saw Appellant with a van while he was in New York. The witness stated that he would have testified if asked.

Trial counsel testified that he did not call Mr. Ramos, Ms. Geldres, and Mr. Cordova because they would have undermined the defense's theory that Victim was so intoxicated that her memory was unreliable. *Id.* at 54. He only called Appellant's wife because he wanted the jury to see that they were still together.

The PCRA court accepted that there were four witnesses willing and available to provide allegedly exculpatory testimony for Appellant, that Appellant informed his counsel of these witnesses, and that other trial witnesses referred to them. Addressing first the question of whether counsel was ineffective for failing to elicit testimony from these witnesses impeaching Victim's account of her intoxicated condition, the court concluded that counsel's decisions "were strategic decisions done with a purpose, as part of a coherent plan for the defense." PCRA Court Opinion, 6/11/19, at 14. Moreover, the court concluded that such testimony would have been cumulative of the testimony offered by Nilda Diaz, Appellant's wife, and thus, there was no prejudice. *See Commonwealth v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1229 (Pa. 2006) (finding no prejudice for purposes of PCRA where counsel failed to introduce cumulative testimony of substance abuse).

In addition, the PCRA court found no prejudice as the testimony of these witnesses "carried little probative value." PCRA Court Opinion, 6/11/19, at 15. The court

pointed to inconsistencies in the testimony of Mr. Ramos and Ms. Geldres about their marital status, where they were standing when Victim entered the home that night, and whether Mr. Ramos was smoking a cigarette at the time. Their testimony also contradicted that of Appellant's wife, who told the jury that only her children were with her that night. In the court's view, the inconsistencies in the evidence diminished its value as impeachment, and its admission would have not changed the outcome of the case. *Id.* at 16.

As the PCRA court has the opportunity to assess and weigh the credibility of witnesses, we generally defer to its credibility determinations. *See Commonwealth v. Spotz, supra* at 1227 (citing *Commonwealth v. Spotz*, 582 Pa. 207, 870 A.2d 822, 836 (Pa. 2005)) ("Appellate courts do not act as fact finders, since to do so would require an assessment of the credibility of the testimony and that is clearly not our function."). We find support for the PCRA court's conclusion that the proffered testimony tended to undercut counsel's strategy, was cumulative of the testimony of Appellant's wife, and contained inconsistencies that rendered it weak impeachment evidence. In light of the foregoing, Appellant failed to demonstrate that there was a reasonable probability that, but for counsel's failure to elicit the foregoing testimony from these witnesses, the outcome of the trial would have been any different. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (Pa. 2001) (defining prejudice in the PCRA context as a demonstration "that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.").

Appellant also contends that the proffered testimony of Mr. Ramos and Mr. Cordova regarding the threats made against Appellant were critical to rebut Trooper Wesnak's implication that Appellant fled to avoid police questioning. In addition, their testimony that the minivan remained in the driveway tended to refute the Trooper's testimony that he could not find and impound the minivan and obtain a search warrant to examine it for DNA and other evidence. Appellant maintains that, without the witnesses' testimony, the jury was left to infer that Appellant fled out of consciousness of guilt, and that he hid the minivan to avoid its inspection and perhaps destroy evidence.

The PCRA court concluded that the proffered testimony did "not rebut Trooper Wesnak's testimony in any material way, and so would not have had a consequence on the trial." PCRA Court Opinion, 6/11/19, at 18. The court pointed to cross-examination of the Trooper that he did "not examine the van because he did not know where it was and could not contact [Appellant] about locating it." *Id.* (referencing N.T. Vol. 1, 2/11/15, at 187). The PCRA court found that none of the witnesses would have dispelled any suggestion that Appellant hid and destroyed evidence. The court characterized the Trooper's testimony as establishing only that, by the time he could locate the van, any evidentiary value would have been compromised. In the court's view, the proffered testimony regarding the whereabouts of Appellant and the minivan "would not have been material or helpful to the defense, and so [Appellant's] claim for ineffective assistance must fail." *Id.* at 19.

Appendix E

Preliminarily, we note that much of what Appellant allegedly told Mr. Ramos during the late night telephone call, specifically that he had been threatened by Victim's parents, was arguably inadmissible hearsay. Mr. Cordova's account of Victim's parents banging on the door and threatening Appellant was largely cumulative of the testimony of Victim's mother. She testified that she had a baseball bat in her hand when she, accompanied by and her former husband, entered Appellant's home to retrieve Victim on the night of the incident. Furthermore, neither Mr. Ramos nor Mr. Cordova could have testified from his own personal knowledge that Appellant went to New York for fear of retaliation from Victim's family, rather than to avoid police questioning.

Mr. Ramos and Mr. Cordova proffered inconsistent testimony regarding the length of time the minivan remained in Appellant's driveway. Assuming that the minivan was at Appellant's home for some time after the incident, perhaps Trooper Wesnak could have obtained a warrant to examine and test it for DNA evidence. However, such testimony did not exclude the possibility that the minivan would have been cleaned before a warrant could have been obtained. In short, while there may have been some minimal impeachment value from the testimony of these witnesses regarding the whereabouts of the minivan and its accessibility for testing, it was unlikely that the absence of this evidence changed the outcome of the proceeding in light of DNA evidence obtained from Victim. Hence, this claim does not merit relief.

Appendix E

Finally, Appellant contends that his counsel was ineffective for failing to object and seek a curative instruction when Trooper Wesnak testified in response to a question as to why he did not obtain a warrant for the minivan, that Appellant chose to retain counsel and not make a statement. The Trooper stated, "by the time [Appellant] had turned himself in, on the advice of his attorney, he did not want to answer anymore (sic) questions." *See* N.T. Trial Vol. 1, 2/11/15, at 187. Appellant characterizes the Trooper's offending testimony as a non-responsive answer to defense counsel's question whether he had sought a warrant for the minivan. Appellant contends that there was no legitimate purpose for the officer to refer to his post-arrest silence and decision to hire an attorney, as it was not impeachment or fair response to the defense. He argues that the claim is of arguable merit as the prosecution is not permitted to use a defendant's decision to remain silent or retain counsel as evidence of guilt, citing, *inter alia, Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430 (Pa. 2014) (plurality) (reversing and ordering a new trial as prosecutor's exploitation of non-testifying defendant's silence as substantive evidence of guilt was not harmless). Appellant also directs our attention to *Commonwealth v. Costa*, 560 Pa. 95, 742 A.2d 1076, 1077 (Pa. 1999), where the court found no reasonable basis for counsel not to object to a police officer's testimony elicited by the prosecutor that the defendant did not say anything to him after the charges were filed.

At the evidentiary hearing, trial counsel maintained that he did not object because the jury had already heard the statement, and based on his experience, an objection

or curative instruction would only have highlighted the testimony. N.T. PCRA Hearing, 3/25/19, at 23.

The PCRA court viewed Trooper Wesnak's reference as fair response to the defense's criticism of the Trooper's thoroughness in failing to apply for a search warrant for the Appellant's minivan. The court also characterized the Trooper's statement as a "fair recounting of the investigation concerning the van" and an explanation why he believed that "enough time had passed to make . . . a search . . . futile." PCRA Court Opinion, 6/11/19, at 22. In the court's view, the answer did not imply that Appellant's silence was an admission of guilt, but merely explained the limits placed on the police investigation. Thus, the court concluded, there was "no arguable merit to the claim that trial counsel should have objected[,]" or in the alternative, trial counsel had a reasonable basis for not objecting. *Id.* at 23.

Preliminarily, we note that while Appellant characterizes the Trooper's testimony as a reference to his post-arrest silence, it is unclear from the certified record whether Appellant was under arrest or had received his *Miranda* warnings when he invoked his Fifth Amendment right against self-incrimination. However, the timing of Appellant's assertion of his right to remain silent does not impact our legal analysis.[2] In *Molina,*

2. Appellant's argument did not turn on whether the Trooper's reference was to his pre-arrest or post-arrest silence. He cited *Commonwealth v. Molina*, 628 Pa. 465, 104 A.3d 430, 450-51 (Pa. 2014), for the proposition that the timing of the silence in relation to an arrest was not relevant to the right against self-incrimination. ***See*** Appellant's brief at 24.

supra at 450-51, a pre-arrest silence case, our Supreme Court held that "the timing of the silence in relation to the timing of an arrest is not relevant to the right against self-incrimination." The relevant inquiry was whether the mention of the defendant's silence was used by the prosecution as substantive evidence of guilt. The Court held that such use was prohibited unless it fell within an exception such as impeachment of a testifying defendant or fair response to an argument of the defense.

In *Molina*, the prosecutor argued that the defendant's silence was "most telling," asked the jury "why" the defendant refused to cooperate with the detective, and directed the jury to "[f]actor that in when you're making an important decision in this case as well." *Id.* at 452-53. Our High Court held that the defendant's right against self-incrimination was violated as the prosecutor used the defendant's silence to imply his guilt, and concluded that the error was not harmless.

The reference herein was brief and elicited upon questioning by the defense. It was not exploited by the Commonwealth on cross-examination or during closing argument. In response to defense counsel's question why he did not obtain a search warrant to examine the minivan for evidence of the alleged sexual assault, Trooper Wesnak testified that he did not seek a search warrant because he did not know where the van was and he could not locate Appellant to ask him. He added that, by the time Appellant turned himself in, he would not answer questions based on the advice of counsel.

Appendix E

As this Court held in *Commonwealth v. Guess*, 2012 PA Super 196, 53 A.3d 895, 903 (Pa.Super. 2012), the rule precluding reference to a defendant's silence "'does not impose a *prima facie* bar against any mention of a defendant's silence' but rather 'guards against the exploitation of a defendant's right to remain silent by the prosecution.'" *Id.* citing *Commonwealth v. Adams*, 2012 PA Super 11, 39 A.3d 310, 318 (Pa.Super. 2012) (quoting *Molina, supra* at 63) (emphasis in original). Moreover, in *Adams*, we relied upon *Molina*, in concluding that, "the mere revelation of a defendant's pre-arrest silence does not establish innate prejudice where it was not used in any fashion that was likely to burden defendant's Fifth Amendment right or to create [an] inference of admission of guilt." *Adams, supra* at 318 (quoting *Molina, supra* at 56).

We find that such evidence of Appellant's silence was fair response to the defense's argument that the Trooper had not sought a search warrant for the vehicle and an explanation of the investigative timeline. Consequently, an objection would not have altered the outcome of this case. *See Commonwealth v. DiNicola*, 581 Pa. 550, 866 A.2d 329 (Pa. 2005) (reference to a defendant's refusal to speak to trooper constituted fair response to defense counsel's questioning of the adequacy of the trooper's investigation). Herein, the brief reference to Appellant's silence served another purpose other than suggesting guilt. *See Adams, supra* (finding that a brief reference by detective to defendant's silence did not violate the Fifth Amendment where it was not intended to imply a tacit admission of guilt but to recount the sequence of the investigation).

Appendix E

We find misplaced Appellant's reliance upon *Costa, supra*. Therein, we determined that trial counsel was ineffective for failing to object when a police detective testified that the defendant said nothing to him when charges were filed against him for the molestation of a young boy. The court concluded that there was no proper purpose for the testimony other than to highlight the defendant's silence, which was not the case herein. Hence, we find no error in the PCRA court's conclusion that Appellant is not entitled to relief on this claim.

Order affirmed.

Judgment Entered.

/s/_____
Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/7/20

APPENDIX F — OPINION OF THE COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA, DATED JUNE 11, 2019

COURT OF COMMON PLEAS OF MONROE
COUNTY FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

396 CR 2014

Post-Conviction Relief Act Petition

COMMONWEALTH OF PENNSYLVANIA

v.

HAMETT DIAZ,

Defendant.

OPINION

Hammett Diaz ("Defendant") has filed a Petition for relief in the form of a new trial, pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Defendant asserts claims of ineffective assistance of counsel, alleging failure to object to inculpatory hearsay testimony, failure to call exculpatory witnesses, and failure to object to testimony referring to Defendant's silence before arrest. For the reasons that follow, we will deny the petition.

Appendix F

Facts and Procedural History

On February 12, 2015, a jury convicted Defendant of Rape of an Unconscious Victim and numerous related offenses.[1] The evidence showed that, on October 20, 2013, Defendant drove the minor victim K.O. (or "victim") and his minor stepdaughter K.C. on a trip to New York to have their nails done. (N.T., Volume 1, at 33-34, 36-38, 61.) Once on the road, he plied the two minors with liquor until they became severely intoxicated. (N.T., Volume 1, at 36-39, 41-42, 64, 114, 142). After returning to Pennsylvania and dropping K.C. off at Defendant's home, he took K.O. to a service road where he parked and brought her to the back of his van. (N.T., Volume 1, at 40-45.) She hit her head and fell down in the back seat, going in and out of a stupor, unaware of what was happening and too weak to move. The next thing she remembers, Defendant was performing intercourse on her. (N.T., Volume 1, at 45-48.) They returned to Defendant's house, where K.O. woke up early in the morning in K.C.'s room, saying she had this terrible dream. K.C. then told her what K.O. said the night before and reassured her what happened was no dream. (N.T., Volume 1, at 51.)

---

1. 18 Pa.C.S.A. §§ 3121(a)(3). Defendant was also convicted of Unlawful Contact with a Minor, Sexual Assault, Aggravated Indecent Assault, Corruption of Minors at two counts, Indecent Assault on Unconscious Victim, Indecent Assault without Consent, Furnishing Alcohol to Minors at two counts, and Endangering Welfare of Children. 18 Pa.C.S.A. §§ 6318(a)(1), 3124.1, 3125(a)(1), 6301(a)(i), 3126(a)(4), 3126(a)(1), 6310.1(a), and 4304(a)(1), respectively.

Appendix F

After conviction, the Commonwealth filed notice that it would seek the 25-year mandatory minimum sentence under 42 Pa.C.S.A. § 9714(a)(2) (mandatory minimum sentence applied to defendant convicted of two crimes of violence arising from separate occurrences). The Commonwealth submitted Defendant's 1998 conviction in New York for Attempted Third-Degree Robbery and his 2001 federal conviction for Conspiracy to Commit Robbery as prior convictions of crimes of violence. *Commonwealth v. Diaz,* 3165 EDA 2015, at 4 (Pa. Super., Dec. 16, 2016) (unpublished memorandum). At a hearing May 28, 2015, this Court found Defendant's New York conviction not to be equivalent to one of the enumerated crimes of violence that trigger the 25-year mandatory minimum. *Id.* We nevertheless found that his federal conviction qualified as a crime of violence and applied the mandatory minimum term of 10 to 20 years under 42 Pa.C.S.A. § 9714(a)(1) (applicable to defendant previously convicted of a single crime of violence). The Court sentenced Defendant to 144 to 188 months' incarceration, inclusive of the mandatory minimum. Defendant appealed to the Superior Court, which affirmed his conviction but, finding that neither prior conviction fell within § 9714, remanded for resentencing without the mandatory minimum. *See Diaz,* 3165 EDA 2015, at 15-24. This Court then resentenced Defendant, within the standard guidelines, to incarceration for an aggregate term not less than 140 and not more than 280 months. (Sentencing Order, 9/8/17.) Defendant did not file a direct appeal after sentencing.

Appendix F

On September 15, 2018, Defendant filed this counseled PCRA petition, his first.[2] The Court held a hearing March 25, 2019. At the hearing, Defendant first called trial counsel, Paul Ackourey, Esq. He described his "hybrid" defense strategy. He intended to show the jury they should not rely on K.O.'s memory because she was so intoxicated it might have all been confabulation based on K.C.'s suggestion. At the same time, he argued in pretrial motions and at trial that K.O. was not so intoxicated as to be "unconscious" within the meaning of the statute. (N.T., PCRA Hearing, at 8-9.) Defendant next called Angel Ramos, Iraida Geldres, Andrew Cordova, and Damaris Otero, who related the allegedly exculpatory facts they would have testified to for the defense.

We now rule on the present Petition.

Discussion

In his petition, Defendant claims trial counsel made three omissions that deprived him of effective assistance. First, trial counsel failed to object to inculpatory hearsay testimony by K.O. (PCRA Petition, 8/15/18, at pp. 11-14.) Defendant next claims trial counsel performed deficiently for failing to call four witnesses who would have allegedly impeached K.O.'s testimony and rebutted Trooper Bruce Wesnak's. (PCRA Petition, 8/15/18, at pp. 14-17.) Finally,

2. This Petition is timely, as Defendant filed it within one year from the judgment of sentence imposed after remand from the Superior Court. *See* 42 Pa.C.S.A. § 9545(b)(1).

Defendant assigns error to trial counsel's failure to object and seek a curative instruction to references made to Defendant's choice not to answer questions on the advice of his attorney. (PCRA Petition, 8/15/18, at pp. 17- 19.) None of these allegations state a claim for relief showing that no reliable adjudication of guilt could have taken place.

Jurisdiction

First, we must determine whether the Court has jurisdiction to adjudicate Defendant's Petition. To establish jurisdiction, Defendant must show that he is eligible for relief under the PCRA and that he has timely filed his Petition. Based on the sentence Defendant is serving and the claims he raises, eligibility requires him to plead and prove by a preponderance of the evidence that:

(1) He has been convicted of a crime under the laws of this Commonwealth and is, at the time relief would be granted, currently serving a sentence of imprisonment, parole, or probation for the crime. 42 Pa.C.S.A. § 9543(a)(1)(i).

(2) The conviction or sentence resulted from 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 innocent could have taken place. § (a)(2)(ii).

(3) The allegation of error has not been previously litigated or waived. § 9543(3).

(4) The failure to litigate the issue prior to or during trial, during unitary review, or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel. § (a)(4).

Here, Defendant is serving a sentence of incarceration imposed following conviction in the case for which he now seeks collateral relief. He alleges ineffective assistance of counsel, which is a basis for relief cognizable under the PCRA. He has not previously litigated these claims, as ineffectiveness claims are not reviewable in a post-sentence motion or direct appeal. *See generally Commonwealth v. Grant,* 813 A.2d 726 (Pa. 2002). None of them are waived, as they should only be brought in a PCRA Petition, and this Petition is Defendant's first. *See Id.* Therefore, this Court has jurisdiction to grant relief on the Petition, provided it is timely.

The mandate to file a timely Petition is "jurisdictional in nature and strictly construed." *Commonwealth v. Taylor,* 65 A.3d 462, 468 (Pa. Super. 2013). The untimeliness of a Petition deprives a court of any authority to order relief. *Id.*

Whether a petition is timely is a question of law. *Id.*

42 Pa.C.S.A. § 9545(b) provides that:

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed

within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

* * *

(3) For purposes of this subchapter, a judgment 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.

Here, Defendant's judgment of sentence became final when the period for filing notice of appeal from the

resentencing order concluded, 30 days after the date of that order. *See Commonwealth v. Brown,* 943 A.2d 264, 268 (Pa. 2008). This Court resentenced Defendant on September 8, 2017. The time for seeking a direct appeal from that order expired October 8, 2017. Defendant filed the present Petition on September 15, 2018, within one year of that date, and it is therefore timely.

Having concluded we hold jurisdiction to examine Defendant's Petition, we will now consider its merits.

Standard for Relief under the PCRA

A PCRA petitioner may receive a new trial by showing ineffective assistance of counsel which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. § 9543(a)(2)(ii).

We presume counsel to have been effective. *Commonwealth v. Rollins,* 738 A.2d 435, 441 (Pa. 1999). To overcome this presumption, a petitioner must plead and prove each of three elements: 1.) that the underlying claim has arguable merit; 2.) that counsel's course of conduct was without a reasonable basis designed to effectuate the client's interest; and 3.) that counsel's ineffectiveness prejudiced the petitioner. *Commonwealth v. Johnson,* 179 A.3d 1105, 1114 (Pa. Super. 2018). Failure of any one element negates the claim. *Id.*

A court finds prejudice where a reasonable probability exists that, but for the act or omission in question, the

outcome of the proceeding would have been different. *Commonwealth v. Lauro,* 819 A.2d 100, 106 (Pa. Super. 2003). Counsel's failure to present merely cumulative evidence does not prejudice the petitioner. *Commonwealth v. Spotz,* 896 A.2d 1191, 1229 (Pa. 2006).

Where a reasonable basis exists to support counsel's chosen course of action, this ends the inquiry, and we deem counsel's performance constitutionally effective. *Commonwealth v. Abdul-Salaam,* 808 A.2d 558, 561 (Pa. 2001). We do not question whether counsel could have pursued other plans and actions; rather, we determine whether what counsel did or did not do had any reasonable basis. *Rollins,* 738 A.2d at 441. "Where matters of trial strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if [he or she] chose a particular course that had some reasonable basis designed to effectuate [the] client's interests." *Commonwealth v. Williams,* 732 A.2d 1167, 1189 (Pa. 1999). To find that a chosen strategy lacks a reasonable basis, the petitioner must prove that an alternative not chosen offered a potential for success substantially greater than that actually pursued. *Id.*

Ineffectiveness for failing to call a witness requires proof that: 1.) the witness existed; 2.) the witness was available; 3.) counsel was informed or should have known of the existence of the witness; 4.) the witness was prepared to cooperate and would have testified on the petitioner's behalf; and 5.) the absence of the testimony resulted in prejudice depriving the defendant of a fair trial. *Commonwealth v. Reid,* 99 A.3d 427, 438 (Pa. 2014).

Trial counsel does not under perform for failing to call a witness unless a petitioner makes some showing that the witness's testimony would have been material and helpful to the defense. *Commonwealth v. Aucker*, 681 A.2d 1305, 1319 (Pa. 1996). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." *Id.*

Defendant's Claim that Trial Counsel Failed to Object to Hearsay

At trial, the victim referred to her conversations with K.C. as she described her realization that she had been raped. (N.T., Volume 1, at 51.)

Q. And then at some point, did you wake up or regain consciousness or something?

A. Yes.

Q. And then what happened then at that point?

A. Well, when I woke up it was 4:30 and then I had told [K.C.] like I had this crazy dream. And she was like, oh [K.O.], it wasn't a dream. And she was – then I said, you know, what do you mean? She was like everything that you told me, it happened. So then she said that I needed to – so then I started crying and she said I needed to tell somebody.

(N.T., Volume 1, at 51.)

She also repeated parts of a phone call she heard between K.C. and K.O.'s ex-boyfriend, where K.C. told him "my stepfather [the Defendant] raped [K.O.]." (N.T., Volume 1, at 52.) Continuing in her testimony, she recalled K.C. telling her mother "it was true" that Defendant had raped K.O. (N.T., Volume 1, at 54.) Trial counsel did not make a hearsay objection during the victim's testimony.

On cross examination, defense counsel referred to K.O.'s fragmentary memory of the rape to elicit hearsay implying she only came to believe it happened on K.C.'s insistence.[3]

---

3. Defendant claims trial counsel introduced more hearsay through the testimony of Nurse Showers. (PCRA Petition, 8/15/18, at p. 13.) The Commonwealth called Nurse Showers. On cross, counsel asked the witness to explain her findings recorded on a report she produced after examination of K.O. for evidence of sexual assault; the Commonwealth introduced the report as an exhibit. (N.T., Volume 1, at 131.) He accented parts of the report where K.O.'s recollections might have seemed "hazy" to the witness. He questioned Nurse Showers about her conclusions that K O.'s body had no signs of physical injury. (N.T., Volume I, at 142-53.) Trial counsel did not, then, introduce hearsay: Defendant does not claim counsel should have objected to the exhibit. If Defendant had, it would have been meritless. Statements recorded in the course of medical examination may be admitted to prove acts of sexual abuse under the medical treatment exception to the hearsay rule. *See Commonwealth v. Stanford,* 580 A.2d 784, 792 (Pa. Super. 1990). Regardless, Defendant has not developed this argument at the hearing or in his brief, so we cannot rule on it. *See Commonwealth v. DiNicola,* 866 A.2d 329, 336-37 (Pa. 2005).

Q. And when you wake up you tell [K.C.] that you thought you had a dream that you had sex with my client?

A. Yes.

Q. And you said, I'm not sure if I was dreaming or if this is true, right?

A. Yes.

Q. And she says, it's true, right?

A. Yes.

(N.T., Volume 1, at 74.)

Defendant claims counsel had no conceivable reason not to object to this testimony, or to elicit it. (Defendant's Brief, at p. 7.) The parties do not dispute that the testimony in question constitutes hearsay. To begin, we note that not objecting to hearsay testimony is not ineffectiveness *per se. See, e.g., Commonwealth v. Thomas,* 578 A.2d 422, 423 (Pa. Super. 1990) (analyzing all elements of the ineffectiveness test applied to a failure-to-object claim, because no presumption arises directly from that omission).

Trial counsel's testimony at the PCRA hearing shows he intended to have the jury hear the testimony, as it supported the defense theory of the crime. He strategized that the prosecution could not prove intercourse beyond a reasonable doubt if it could have occurred entirely as a figment of K.O.'s intoxication. (N.T., PCRA Hearing,

at 8-9, 12-13, 14, 16, 24-25.) Counsel testified that he believed the hearsay statements would show K.O. waking up uncertain about her own memories, suggesting she was capable of imagining the crime based on K.C.'s suggestion as compensation for her memory loss. (N.T., PCRA Hearing, at 8-9, 12-13, 14, 16, 24-25:) Allowing the victim to narrate her realization with K.C. provided the most direct evidence to support this theory. (N.T., PCRA Hearing, at 24-25, 27-28.) Further, allowing the Commonwealth to introduce the victim's statements for this purpose avoided the defense having to call K.C. herself. Counsel stated he would not have called K.C. to testify, as her testimony could have reflected poorly on the defense. (N.T., PCRA Hearing, at 24.) Counsel's testimony shows he acted with a strategic basis, which he designed to advance an alternate theory that supports Defendant's innocence.[4]

Courts in Pennsylvania have observed that counsel in sex-abuse cases can have a reasonable basis to admit

4. Defendant in his Supplemental Brief argues this defense is "facially absurd and unreasonable." (Defendant's Supplemental Brief, at 4.) He believes that once the Commonwealth had admitted DNA evidence, the only two realistic defenses were: I.) that K.O. in fact did consent, and was able to consent, and later fabricated the rape allegation; or 2.) that the DNA results were made in error. (Defendant's Supplemental Brief, at 4.) At the PCRA Hearing, trial counsel testified that the DNA evidence was susceptible to attack, because it was not recovered within K.O.'s body and could have been transferred through bodily contact with surfaces in the home they shared. (N.T., PCRA Hearing, at 14-15.) We do not find that either of these proposed alternative strategies was so much more likely to succeed that it made trial counsel's chosen defense unreasonable.

the victim's hearsay testimony to show how claims developed over time, as an attack on credibility. *See, e.g., Commonwealth v. Reed*, 42 A.3d 314,325 (Pa. Super. 2012). To show how counsel similarly used K.O.'s hearsay testimony to suggest K.C. had motivated her to believe she was raped, see questions including:

- "And [K.C.] says it's true, right?" (N.T., Volume 1, at 74.)

- "It's [K.C.] who says we've got to call somebody, right?" (N.T., Volume 1, at 83.)

In support of the defense confabulation theory, trial counsel asked K.O. on cross what basis K.C. had to tell her she had been raped. This prompted further hearsay, in which K.O. talked about confiding in her best friend, which then allowed counsel to ask the victim if she was "even sure" she had been raped. (N.T., Volume 1, at 77.) All of these questions served to advance trial counsel's theory that K.O. imagined the rape from her lost memory. These questions as a whole reveal a strategic design to advance the theory described above.

With regard to the alleged error concerning K.C.' s phone call, counsel believed the hearsay statement K.C. made to E.J. would serve the same strategic purpose. In addition, counsel stated in response to the Commonwealth's rape-shield objection to questioning about K.O.'s sexual history with E.J.:

> But certainly one of the arguments of the defense is that this is a young girl who is looking for attention, and is playing the "damsel in distress" to get [E.J.'s] attention. He's the first one – well, he's the one that they called to report this assault. I'm simply trying to establish that she wanted to maintain a relationship with this gentleman.

(N.T., Volume 1, at 59.) K.O.'s hearsay testimony describing K.C.'s call to E.J. would have been necessary to establish that E.J. was the first to be told of the rape and to connect the rape accusation to this supposed motivation.

The Court credits trial counsel's explanation of his strategy. The hearsay testimony counsel did not object to appears consistent with this strategy in a way calculated to advance Defendant's interests. *See Abdul-Salaam,* 808 A.2d 558, 561; *Williams,* 732 A.2d at 1139; *see also, Commonwealth v. Reed,* 42 A.3d 314 (Pa. Super. 2012) (counsel's deliberate choice not to object to victim's hearsay was reasonable when hearsay supported negative inference on victim's reliability).[5] Therefore, counsel's

5. In fact, not objecting in this case would effectuate the defense strategy more than it did in *Reed.* There, a witness recounted hearsay statements made to her, and trial counsel allowed the Commonwealth to elicit these statements so he could compare them to her inconsistent statement to a social worker. 42 A.3d 314, 324-25 (Pa. Super. 2012). Here, K.O.'s hearsay narrated the way she had formed her memory of the rape, and counsel could question not only her reliability but suggest she had no genuine memory whatsoever.

choice not to object to the testimony at issue did not lack a reasonable basis. *See Rollins,* 738 A.2d at 441 (test for ineffective assistance requires counsel's chosen action or inaction to have no basis). Defendant's claim therefore fails before we have to reach any other element. *See Johnson,* 179 A.3d at 1114 (failure of any one element is fatal to the ineffective-assistance claim).

This claim provides no relief for Defendant.

Defendant's Claim that Trial Counsel Failed to Call Exculpatory Witnesses

Defendant presents four witnesses who were available and willing to provide allegedly exculpatory testimony for the defense. He names Angel Ramos, Iraida Geldres, Andrew Cordova, and Damaris Otero. The first three were allegedly present in Defendant's house when he returned with K.O. and would have testified that K.O. was not visibly intoxicated or in distress. (Defendant's Brief, at p. 8.) Ramos, Cordova, and Otero would have testified that Defendant could not have fled in his van to New York, allegedly rebutting Trooper Bruce Wesnak's testimony that Defendant's flight prevented him from examining the van.

We accept that all four were available and willing to cooperate in the defense.[6] Defendant pleads in his petition

6. At the PCRA hearing, only Ramos was not asked specifically whether he would have been willing to testify at the time of trial.

that he informed trial counsel of all four, and he argues that counsel should have identified them because other witnesses named them at trial. (PCRA Petition, 8/15/18, at p. 15.) As the Court's analysis does not depend on this element of the claim, we will assume its satisfaction as we proceed.[7]

We will treat the testimony that would allegedly impeach the victim as a group and the matter of the van as a separate group. Observe that the failure to call a witness is not *per-se* ineffectiveness. *See, e.g., Commonwealth v. Aucker,* 681 A.2d 1305, 1319 (Pa. 1996).

Ramos*, *Geldres*, and *Cordova

Defendant claims trial counsel provided ineffective assistance by not calling these three witnesses to testify

---

7. In Defendant's Supplemental Brief following the PCRA Hearing, he faults trial counsel for failing to hire an investigator in preparation for his case, and generally for not learning what these four knew as potential witnesses. (Defendant's Supplemental Brief, at 2.) From trial counsel's testimony at the PCRA hearing, it is unclear whether trial counsel did in fact speak with some of these potential witnesses. (*See* N.T., PCRA Hearing, at 15-16 (unclear whether counsel spoke to Nilda Diaz's stepchildren or only to Defendant and his wife, Nilda.)) However, we will conclude that trial counsel acted reasonably and deliberately in not presenting evidence of this kind; for the purpose Defendant proposes to use it now. Therefore, we do not consider their absence at trial an error of general unpreparedness, and so do not reach this specific allegation. Our own conclusions about the relevance and weight of their proposed testimony support trial counsel's explanation for why he did not call them.

that K.O. did not appear intoxicated or in distress when she returned with Defendant to his home. (PCRA Petition, 8/15/18, at p. 15.) These witnesses would allegedly have impeached the victim's testimony that she was so drunk she could not move when Defendant took her to the trunk of the van. (Defendant's Brief, at 9.) Defendant claims to have suffered prejudice from not calling these witnesses because the case depended on K.O.'s testimony, and her credibility as a witness was never impeached. (Defendant's Brief, at p. 9.)

At the PCRA hearing, Defendant called Angel Ramos, his stepbrother. The witness testified he was smoking a cigarette by the side door at Defendant's house the night of the rape, and he saw him return with K.O. between 10:30 and 11 o'clock. (N.T., PCRA Hearing, at 30.) He believes he can tell whether people have consumed alcohol. (N.T., PCRA Hearing, at 32.) Observing K.O. walk past the kitchen and up the stairs, he did not get the impression that she was intoxicated. (N.T., PCRA Hearing, at 32-33.) He said she "walked fine," without assistance or stumbling, and without smelling of alcohol. Ramos saw no disarray in her clothing and nothing that struck him as out of the ordinary. (N.T., PCRA Hearing, at 32-34.)

Iraida Geldres testified next for Defendant at the hearing. She is either Ramos's wife or girlfriend. (N.T., PCRA Hearing, at 36, 43, 46-47.) She was also present in Defendant's house the night of the rape. In her version, both she and Ramos were in the kitchen when K.O. returned and walked up the stairs to her room. (N.T., PCRA Hearing, at 43.) In her opinion, she can tell whether

someone has been drinking. (N.T., PCRA Hearing, at 44-45.) Geldres did not observe anything to suggest K.O. was severely intoxicated. (N.T., PCRA Hearing, at 44-45.)

Defendant's brother Andrew Cordova also testified that he saw the victim when she returned with Defendant. (N.T., PCRA Hearing, at 52.) He observed "nothing at all" unusual about her. (N.T., PCRA Hearing, at 53.) He did not see her struggle to climb the stairs or fail down, and nothing about her clothes or mannerisms struck him as suspicious. (N.T., PCRA Hearing, at 54.) In his opinion, she was not intoxicated. (N.T., PCRA Hearing; at 54.)

Trial counsel testified that he did not call these witnesses because they would have subverted the defense theory that the victim was so intoxicated the jury should not rely on her memory. (N.T., PCRA Hearing, at 14-17.) While counsel did call Nilda Diaz, who made similar observations about K.O., he stated he called her primarily for the psychological effect on the jury of seeing that Defendant's wife was supporting him. (N.T., PCRA Hearing, at 11-12.)

These were strategic decisions done with a purpose, as part of a coherent plan for defense, described above. *See Williams,* 732 A.2d at 1189 (ineffectiveness requires counsel's course of conduct not to call witnesses not *per-se* ineffective if it has a basis in trial strategy and tactics). Defendant cannot sustain his ineffectiveness claim if counsel's conduct had a reasonable basis designed to protect his interests, as it did in this case. *See Abdul-Salaam,* 808 A.2d at 561; *Johnson,* 179 A.3d

at 1114 (counsel's ineffective decision must have no reasonable basis to advance client's interests); *Aucker*, 681 A.2d at 1319 (failure to meet the reasonable-basis element nullifies the entire claim).

In addition, counsel cannot have rendered ineffective assistance by not calling these three, because their testimony would have been cumulative to Nilda Diaz's. *See Spotz,* 896 A.2d at 1229 (not offering cumulative evidence does not prejudice a defendant). She testified that: 1.) K.O. entered the house with Defendant, and she appeared "fine;" 2.) nothing about her hair or clothing drew her attention; 3.) she did not stagger or have to crawl up the stairs; 4.) K.O. walked without assistance; 5.) K.O. said hello to her, and apparently nothing about her speech seemed unusual or remarkable enough to draw her attention. (N.T., Volume 1, at 245-46.) Counsel does not fail as an advocate for not presenting cumulative evidence. *See Johnson,* 179 A.3d at 1114 (defendant's failure to show prejudice is fatal to an ineffectiveness claim).

Finally, the absence of these witnesses did not prejudice Defendant as their testimony would have carried little probative value. *See Aucker,* 681 A.2d at 1319 (not calling a witness prejudices the defendant only if the witness's testimony would have been material and helpful to the defense); *Lauro,* 819 A.2d at 106 (prejudice requires a fair probability that, but for counsel's challenged inaction, the outcome would have been different). In his petition, Defendant claims these witnesses would have impeached the victim by showing she was not as drunk as she described herself being. (Defendant's Brief, at

9.) However, Ramos and Geldres contradicted each other's testimony, severely, at the PCRA hearing. Ramos described Geldres as his wife, while Geldres testified that they were never married. (N.T., PCRA Hearing, at 36, 43, 46-47.) In Ramos's narrative, he was smoking a cigarette outside when he watched K.O. coming in. (N.T., PCRA Hearing, at 39-40.) Geldres testified Ramos was inside in the kitchen with her when K.O. entered, and specifically denied that Ramos was smoking at the time. (N.T., PCRA Hearing, at 43, 48.) Both of the witnesses would have also contradicted Nilda Diaz, who testified that only her stepchildren were at home with her on that night. (N.T., Volume 1, at 245-46.) These inconsistences would have diminished the value of these witnesses' testimony as impeachment evidence, so that it would have done little, if anything, to change the outcome. *See Commonwealth v. Hannibal,* 156 A.3d 197, 210 (Pa. 2016) (ineffectiveness claim for failure to discover impeachment evidence lacked prejudice or arguable merit where the purported evidence contained inconsistencies making it unpersuasive on its face). Cordova's testimony was vague and consisted only of answering no when PCRA counsel asked if he observed various indicia of alcohol intoxication. (N.T., PCRA Hearing, at 52-54.) Further, we cannot find probative value in the witnesses' testimony that they can conclusively determine who is or is not drunk by watching someone they have barely met walk a short distance past them without speaking. As the absence of this evidence did not so prejudice Defendant as to deprive him of a fair trial, the ineffective-assistance claim pertaining to Ramos and Geldos must fail. *See Reid,* 99 A.3d at 438.

As trial counsel had a conscientious reason not to call these witnesses and the cumulative, unpersuasive evidence they offer would unlikely have changed the outcome, there is no ineffective assistance in this matter. *See Reid,* 99 A.3d at 438; *Abdul-Salaam,* 808 A.2d at 561.

Proffered Testimony Concerning Defendant's Van

Defendant argues Ramos, Cordova, and Otero would have directly contradicted Trooper Wesnak's testimony referencing Defendant's flight to New York. (Defendant's Briet at p. 8.) At trial, Trooper Wesnak testified on cross-examination about the course of his investigation as follows:

Q: Did you think that it might be prudent to check the van to determine if there was either seminal fluid or other forensic evidence within that van?

A: I would have impounded the van and got a search warrant if I was able to locate Mr. Diaz and his van; but unfortunately he fled the area prior to my being able to question him on that date, and I was never able to find it. By the time –

Q: Did you subsequently apply for a search warrant for the van?

A: By the time Mr. Diaz turned himself in, on the advice of his attorney, he didn't want to answer anymore (*sic*) questions. And by that time it was very obvious that he could have cleaned up the van and no other evidence would have been able to be obtained from the van.

(N.T., Volume 1, at 187.) In the absence of rebuttal evidence, Defendant argues the jury was left to infer that Defendant fled out of consciousness of guilt. (Defendant's Brief, at p. 9.) Ramos, Cordova, and Otero would have allegedly testified that Defendant could not have taken the van in flight to New York. However, this testimony would not rebut Trooper Wesnak's.

At the hearing, Ramos testified that he frequently came from New York to visit Defendant on the weekends. (N.T., PCRA Hearing, at 30.) Around 4 or 5 in the morning after the rape, Defendant called Ramos saying someone was threatening his life. (N.T., PCRA Hearing, at 34.) Ramos picked him up in Ramos's car and drove him to New York. (N.T., PCRA Hearing, at 34.)

Andrew Cordova testified he does not know if Defendant fled to New York, but that he did leave with Ramos after the victim's parents appeared at the house early in the morning. (N.T., PCRA Hearing, at 55.) He says he saw the van parked in its usual spot in the driveway for the next 2 weeks. (N.T., PCRA Hearing, at 55.) He moved it once about a week after Defendant left. (N.T., PCRA Hearing, at 55-56.)

Defendant next offers the testimony of Damaris Otero. Defendant came to stay with her for "a few weeks" the morning he left with Ramos. (N.T., PCRA Hearing, at 63.) Someone else had dropped him off, although she could not identify that person. (N.T., PCRA Hearing, at 63.) He did not have a vehicle with him and had to use hers for the entire time he stayed. (N.T., PCRA Hearing, at 63.)

The sum of proffered testimony does not rebut Trooper Wesnak's in any material way, and so would not have had a consequence on the trial. *See Aucker,* 681 A.2d at 1319 (not calling a witness prejudices the defendant only if the witness's testimony would have been material and helpful to the defense); *Lauro,* 819 A.2d at 106 (prejudice requires a fair probability that, but for counsel's challenged inaction, the outcome would have been different). Trooper Wesnak testified on cross that he had not examined the van because he did not know where it was and could not contact Defendant about locating it. He did not claim that Defendant actually took the van out of the state. (N.T., Volume 1, at 187.) Only evidence against Defendant's absence would refute Trooper Wesnak's testimony, but neither party disputes that Defendant left the area the morning after, and the testimony at the PCRA hearing agrees. (N.T., PCRA Hearing, at 30, 55, 63.) Evidence showing how or in what vehicle Defendant may have left would not have impeached the trooper's reliability, nor contradicted his testimony in substance.

Defendant claims prejudice from the un-rebutted testimony's suggestion that he hid and destroyed evidence. (PCRA Petition, 8/15/18, at p. 16.) None of these witnesses would have dispelled this suggestion. *See Aucker,* 681 A.2d at 1319. Trooper Wesnak surmised that the van would have little to no value to the investigation, because by the time he could locate it, any evidence could have been removed or destroyed. The operative fact here is not actual possession but time. Whether or not Defendant had been driving the van at any particular moment, it remained long enough outside

police control that Trooper Wesnak felt whatever evidentiary value it might have was compromised.

The proffered testimony would not have been material or helpful to the defense, and so Defendant's claim for ineffective assistance must fail. *See Reid*, 99 A.3d at 438 (the absence of proffered witness's testimony must prejudice Defendant, so as to deny him a fair trial); *Aucker*, 681 A.2d at 1319 (no ineffectiveness in the omission of testimony not material or helpful to the defense); *Johnson*, 179 A.3d at 1114 (failure to demonstrate prejudice ends the viability of an ineffective-assistance claim).

For the reasons given above, as to both the alleged impeachment witnesses and those volunteering to testify about the van, Defendant has not proven ineffective assistance with regard to any of the four witnesses.

Defendant's Claim that Trial Counsel Failed to Object to Trooper Wesnak's References to his Silence and Representation by Counsel

Defendant claims trial counsel's failure to object and seek a curative instruction following certain testimony by Trooper Wesnak denied him the effective assistance of counsel. During cross-examination, Trooper Wesnak made references to Defendant's choice not to make a statement to police and to retain counsel.[8] (Defendant's

8. Under this heading in his Petition and Brief. Defendant also refers to an exchange where the district attorney asked Trooper

Brief, at p. 11.) In the portion of the transcript reproduced in the preceding section, trial counsel asked the trooper if he thought it would be prudent to search Defendant's van for evidence. (N.T., Volume 1, at 187.) Trooper Wesnak answered that he could not make contact with Defendant to determine the location of the van, and "by the time [Defendant] had turned himself in, on the advice of his attorney, he did not want to answer anymore (*sic*) questions." (N.T., Volume 1, at 187.) In commenting on Defendant's decision not to answer questions from police, Trooper Wesnak was explaining why he could not locate the van to search it until enough time had passed to make a search fruitless. (N.T., Volume 1, at 186-87.)

At the PCRA hearing, trial counsel testified he did not object or request a curative instruction, because the jury had already heard the statements, and he felt, as a matter of experience, that an objection or instruction would have drawn more of the jury's attention. (N.T., PCRA Hearing, at 23.) The Superior Court has recognized that this decision can have a reasonable basis, as a matter of sound trial tactics. *See Commonwealth v. Loner,* 836 A.2d 125, 134 (Pa. Super. 2003).

Wesnak if he had been able to make contact with Defendant. (Defendant's Brief, at p. 10; PCRA Petition, 8/5/15, at p. 17.) The trooper answered no, but that he had spoken to Defendant's wife. He began to describe what he said to her and how she responded. (N.T., Volume 1, at 178.) Trial counsel objected to this hearsay question. This Court sustained the objection. Defendant has not explained how counsel's conduct was insufficient or what more he should have done.

Appendix F

Defendants possess a right to remain silent, and the prosecution may violate it by eliciting references to a defendant's pre-arrest silence or representation by an attorney. *Commonwealth v. Costa,* 742 A.2d 1076, 1077 (Pa. 1999). But remarks on a defendant's silence do not necessarily require a new trial if made in fair response to defense rhetoric. *Commonwealth v. DiNicola,* 866 A.2d 329, 336 (Pa. 2005). To impinge on the privilege against self-incrimination, the reference must "create an inference that silence is an admission of guilt." *Commonwealth v. Adams,* 104 A.3d 511, 517 (Pa. 2014). Even an explicit reference to the defendant's silence is not error where it occurs in a context unlikely to suggest that silence is a tacit admission of guilt. *Commonwealth v. Whitney,* 708 A.2d 471, 478 (Pa. 1998).

Testifying officers may refer to a defendant's counseled exercise of the right to remain silent when reporting the course of their investigation, particularly when the defense questions it. *See DiNicola,* 866 A.2d at 336. In *DiNicola,* where the defense strategy questioned the government's zeal in finding potentially-exculpatory evidence, there was no error in a testifying officer's reference to the defendant's silence to explain how it limited the investigation. *Id.* Our Supreme Court has also found no error in a detective's limited and contextual references to the defendant's silence, which were made not to imply guilt but to explain how it shaped the course of the investigation. *Adams*, 104 A.3d at 517-18.

Here, trial counsel asked Trooper Wesnak why he chose not to apply for a search warrant for physical

evidence which might be found in Defendant's van. This questions the thoroughness of the government's investigation, as the defendants in *DiNicola* and *Adams* did. *See* 886 A.2d at 336; 104 A.3d at 517-18. The trooper explained that he would have applied for a search warrant if he knew where the van was, but Defendant was unavailable to ask, and when Defendant returned to the jurisdiction, he was declining to respond to police inquiries on the advice of his attorney. This is a fair recounting of the investigation concerning the van, which specifically explains why enough time had passed to make the trooper believe a search would be futile. Nothing on the record shows that the trooper's answers implied that Defendant had admitted his guilt by choosing to remain silent. *See Adams,* 104 A.3d at 517; *DiNicola,* 866 A.2d at 336; *Whitney*, 708 A.2d at 478.

Against our conclusion, Defendant cites cases where the prosecution referred to a defendant's pre-arrest silence to imply guilt of the offense. *See Commonwealth v. Molina,* 104 A.3d 430 (Pa. 2014) (prosecutor referenced defendant's silence in closing argument, asking why someone would refuse to cooperate with law enforcement); *Commonwealth v. Costa,* 742 A.2d 1076 (Pa. 1999) (prosecutor obviously and intentionally elicited reference to defendant's silence to police, for no apparent explanatory purpose other than to imply a guilty mind). These cases differ because the prosecutors had elicited comment on the defendant's silence and that commentary served no explanatory purpose other than to imply consciousness of guilt as substantive evidence. But here, defense counsel raised the issue in his attack

on the completeness of the government's investigation, and Trooper Wesnak responded only to explain how Defendant's silence delayed his access to the van long enough for it to have no reliable evidentiary value. *See Adams,* 104 A.3d at 517; *DiNicola,* 866 A.2d at 336; *Whitney,* 708 A.2d at 478.

As Trooper Wesnak referred to Defendant's silence only to explain the limits it placed on his investigation, there is no Fifth Amendment violation in his testimony. Therefore, there is no arguable merit to the claim that trial counsel should have objected. *See Johnson,* 179 A.3d 1105, 1114. Alternatively, assuming this testimony did merit an objection and curative instruction, trial counsel had a reasonable basis to decline to do so. *See Abdul-Salaam,* 808 A.2d at 561; *Williams,* 782 A.2d at 1189. Therefore, Defendant has no relief on this basis.[9]

Conclusion

Defendant has not proven any of his claims for relief under the PCRA. Therefore, we deny his Petition and enter the following Order.

---

9. Although Defendant does not raise this point, we note that in *DiNicola,* our Supreme Court held trial counsel was not ineffective for "opening the door" to comments on the defendant's silence, as these references were limited and circumscribed and did not raise an adverse inference of guilt. 866 A.2d at 563.

Appendix F

COURT OF COMMON PLEAS OF MONROE
COUNTY FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

396 CR 2014

Post-Conviction Relief Act Petition

COMMONWEALTH OF PENNSYLVANIA

v.

HAMETT DIAZ,

Defendant.

ORDER

AND NOW, this 11th day of June, 2019, it is hereby **ORDERED** that:

1. Defendant's PCRA Petition is **DENIED**.

2. Defendant is further advised that:

   (a) an appeal to the Pennsylvania Superior Court must be filed within 30 days from the above date;

   (b) he has the right to assistance of counsel in the preparation of the appeal; and

(c) he has the right, if indigent, to appeal *in forma pauperis* and to proceed with assigned counsel as provided in Rule 122.

BY THE COURT:

/s/ Stephen M. Higgins, J.
STEPHEN M. HIGGINS, J.

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MAY 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1490

HAMETT DIAZ,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA *et al.*

(District Court No.: 20-cv-01667)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, SMITH[1], and FISHER[1], *Circuit Judges.*

The petition for rehearing in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the

1 Judge Smith and Fisher's votes are limited to panel rehearing only.

petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Dated: May 22, 2024
Lmr/cc: All Counsel of Record