BLD-150

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-1202**

DAVID NAM, Appellant

VS.

SUPERINTENDENT HUNTINGTON SCI, et al.
(E.D. Pa. Civ. No. 2:20-cv-02701)

Present: KRAUSE, PORTER, and MONTGOMERY-REEVES, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability

in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. See Slack v. McDaniel, 529 U.S. 473, 478 (2000). In Baxter v. Superintendent Coal Township SCI, 998 F.3d 542, 549 (3d Cir. 2021), we held that the petitioner was required to show actual prejudice to obtain relief on an ineffective assistance claim based on trial counsel's failure to object to a materially indistinguishable reasonable-doubt instruction. Given the substantial evidence of guilt presented at trial, jurists of reason would agree without debate that Nam cannot show prejudice.

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: June 5, 2023
CJG/cc: David Nam

A True Copy:

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1202

DAVID NAM,
Appellant

v.

SUPERINTENDENT HUNTINGDON SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(E.D. Pa. No. 2-20-cv-02701)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant David Nam 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 petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: August 31, 2023
Tmm/cc: David Nam
Peter F. Andrews, Esq.
Ronald Eisenberg, Esq

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

DAVID NAM, Petitioner,	:	CIVIL ACTION
v.	:	
KEVIN KAUFFMAN, *et al.*, Respondents	:	NO. 20-2701

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

September 2, 2022

Before the Court for a Report and Recommendation is the *pro se* petition of David Nam ("Petitioner" or "Nam") for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Nam is currently incarcerated at the State Correctional Institution – Huntingdon serving a mandatory term of life in prison without parole, plus an additional term of 12½ to 25 years following a 2010 jury trial in the Philadelphia Court of Common Pleas. He was convicted on charges of second-degree murder, robbery, possessing an instrument of crime, and criminal conspiracy. He seeks federal habeas relief on the grounds that he received deficient representation when counsel failed to object to the trial court's allegedly faulty reasonable doubt instruction, and that his sentence of mandatory life imprisonment without the possibility of parole violates the Eighth and Fourteenth Amendments as recognized in *Miller v. Alabama*, 567 U.S. 460 (2012). For the reasons set out below, we conclude that the state court's adjudication of his ineffective assistance of counsel claim was not unreasonable and that his *Miller* claim is procedurally defaulted and without merit. Accordingly, we recommend that his petition be denied and dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Nam was 19 years old on August 16, 1996 when he shot and killed a Philadelphia man in the doorway of the man's home during a robbery attempt. The state court provided the following description of the circumstances of the crime, the actions of Nam and his juvenile co-defendants in the immediate aftermath of the killing, and the circumstances that resulted in Nam not being tried for this crime for many years:

> On August 16, 1996, [Nam] and four of his friends attempted to rob the home of Anthony Schroeder. When Schroeder came to the door with a gun, [Nam] immediately shot him through the screen door and killed him. [Nam] and [his] co-conspirators ran away but returned a few minutes later to steal Schroeder's gun. Several days later, [Nam's] co-defendants committed another robbery during which time they were arrested. Police recovered [Schroeder's] stolen gun from [Nam's] co-defendants and eventually connected Schroeder's murder to [Nam]. On January 18, 1997, [Nam] was arrested and charged with murder. [Nam] was originally held without bail. On May 22, 1997, the Honorable Carolyn Temin granted [Nam's] motion to change his bail status. On January 12, 1998, [Nam] was released on bail and placed on house arrest. After appearing at several pretrial hearings, [Nam] eventually fled to South Korea on March 12, 1998, the date of his next court hearing.[2] He was detained by Korean authorities in 1999 but was eventually released as a South Korean citizen, since no extradition agreement existed between South Korea and the United States at that time. Later that same year, an extradition agreement was ratified between the two countries[,] but [Nam] managed to evade both South Korean and American authorities. [Nam] remained in South Korea for over ten years. On March 18, 2008, [Nam] was arrested in South Korea. In order to fight extradition to the United States, [Nam] wrote to the South Korean [j]udge handling his matter[,]

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[1] In preparing this Report, we have considered the original petition ("Pet."), with appended memorandum ("Pet. Mem.") and exhibits (Doc. 1); the amended petition memorandum and appended exhibits (Doc. 6) ("Am. Pet. Mem."); the response of the Philadelphia District Attorney's Office (Doc. 24) ("Resp."); and the record of the state court proceedings provided by the Court of Common Pleas or as otherwise publicly available.

[2] By the time of that hearing, three of Nam's co-conspirators had decided to cooperate and were going to testify against Nam. The co-conspirators were all 14 years old at the time of the crime. Nam was five years their senior. *See* Resp. at 1.

> admitting to his crimes and expressing deep remorse. He also begged the [j]udge not to extradite him to the United States.
>
> On September 16, 2008, the South Korean government granted the FBI's extradition request and [Nam] was placed into the custody of the FBI and brought back to Pennsylvania to stand trial. Before leaving South Korea[,] [Nam] was notified that he would not be able to bring any of his belongings with him. As a result, [Nam] requested that FBI Agent [Kevin] McShane take possession of several documents and photographs belonging to [Nam] and bring them back to the United States.
>
> Several of these documents were letters which [Nam] wrote and sent to the South Korean [j]udge handling his extradition matter. These letters included incriminating statements and admissions to his crime. Ultimately, after a motion to suppress these documents was argued before the Honorable Renee Cardwell Hughes, these documents were [ ] allowed into evidence at trial.

Commonwealth v. Nam, No. 3641 EDA 2018, 2019 WL 3946049, at *1 (Pa. Super. Ct. Aug. 21, 2019) (quoting PCRA Ct. Opin., Feb. 28, 2019, at 1-3).

Nam proceeded to trial before a jury in early 2010, and his three co-conspirators, as well as the brother of one who also heard Nam make incriminating statements, testified about his role in Schroeder's death. On January 29, 2010, the jury convicted Nam of second-degree murder, robbery, possessing an instrument of crime, and criminal conspiracy. On February 19, 2010, the court imposed the mandatory sentence of life imprisonment without parole for the second-degree murder conviction, plus an aggregate term of 12½ to 25 years for the other offenses.

On direct appeal, Nam challenged the sufficiency of the evidence and the admission of his incriminating statements in the documents he entrusted to the FBI upon his extradition from South Korea. The Superior Court, however, affirmed his sentence on March 25, 2011, and the Pennsylvania Supreme Court denied allowance of appeal on September 14, 2011.

On or about August 8, 2012, Nam filed a timely *pro se* petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541, *et seq.* He amended the petition

once himself before counsel was appointed and amended the petition again. The petition as amended sought relief on the grounds that trial counsel provided ineffective assistance of counsel when he failed to object to the jury instruction given by the trial judge relative to the definition of reasonable doubt as it pertains to the Commonwealth's burden of proof of his guilt. After a lengthy period that is not accounted for in the record, the PCRA Court gave notice on November 19, 2017 of its intent to dismiss the petition. Nam responded to that notice, addressing the original ineffectiveness claim and adding a claim that his sentence was unconstitutional as recognized by *Miller v. Alabama*, 567 U.S. 460 (2012). The PCRA Court proceeded to formally dismiss the petition on December 19, 2018, finding no merit to either claim. *See Nam*, 2019 WL 3946049, at *1. The Pennsylvania Superior Court affirmed the denial of PCRA relief on August 21, 2019, and on February 11, 2020 the Pennsylvania Supreme Court declined to take the requested appeal.

On or about May 5, 2020, Nam filed in this Court his form petition for federal habeas corpus relief, accompanied by a "Memorandum of Fact and Law," raising only the ineffective assistance of counsel claim regarding the reasonable doubt instruction that he had presented on PCRA review. (Docs. 1 & 1-1.) Pointing to a recent habeas decision involving a "similarly situated" habeas petitioner whose trial included the same reasonable doubt instruction, *Brooks v. Gilmore*, Civ. A. No. 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017) (McHugh, J.),[3] he argued that, as a matter of "equal protection," he should be given a new trial as that petitioner was. (Pet. Mem. at 17-20.) Two months later, on or about July 9, 2020, Nam filed an amended "Memorandum of Fact and Law" (Doc. 6), which provided additional argument on his ineffectiveness claim pled in his original petition and brief. (Am. Pet. Mem. at 1-21.) He also, however, included argument on the entirely separate assertion that his sentence of a mandatory

[3] We discuss this case further in Section III.A., *infra*.

burden of proving the exhaustion of all available remedies for each claim. *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).

The Supreme Court has explained that, just as in the situation where a prisoner fails to first exhaust state remedies, a habeas petitioner who fails to meet the State's *procedural* requirements for presenting his federal claims "has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). If a claim was rejected by a state court and "the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment," the federal habeas court will not review the claim. *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (internal quotation marks omitted)). Such claims are considered procedurally defaulted.

A procedurally defaulted claim may not be reviewed unless the petitioner can show "cause for the default and actual prejudice as a result of the alleged violation of federal law, or [unless he] demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. "[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). It is the petitioner's burden to prove his allegations of cause and prejudice. *Coleman*, 501 U.S. at 750.

B. Federal habeas corpus standard

Pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may not grant habeas corpus relief to a state prisoner with respect to a claim that had been adjudicated on the merits in state court unless that state adjudication:

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

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A decision is considered "contrary to ... clearly established federal law" if the state court either applied a rule that contradicted established Supreme Court precedent or reached a decision different from the Supreme Court despite both cases having "materially indistinguishable" facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Further, a decision is considered an "unreasonable application" where the state court identifies the correct governing legal principle from the Supreme Court but unreasonably applies that principle to the facts of the petitioner's case. *Id.* Any factual determination made by a state court is presumed to be correct; the applicant for federal relief bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III. DISCUSSION

Nam's petition as amended presents two substantively unrelated and procedurally distinct claims. The first claim, although it implicates notions of due process and the government's burden to establish his guilt beyond a reasonable doubt, was presented to the state courts, as it is here, as a question of ineffective assistance of counsel, where trial counsel did not raise an objection to a jury charge given at trial. His argument that we should recognize the impropriety of the jury instruction also sounds in equal protection law, as he argues that he is "similarly situated" to a state prisoner whose conviction was vacated due to the same instruction having been given at his trial before the same judge, and similarly without objection by his trial counsel. Nam's second claim derives from the more recently recognized protection afforded to juveniles, arising from the Eighth Amendment, against mandatory imposition of "life without parole" sentences. Nam argues that the guarantees of the Equal Protection Clause should extend the reach of that protection to persons such as himself who were under age 25 when they offended, as they are similarly situated to

juveniles in terms of their brain development. This claim was imperfectly presented to the state court, which creates impediments to our review here. As we set forth below, neither claim provides a basis for relief from Petitioner's judgment and sentence.

A. IAC: Failure to object to reasonable doubt jury instruction

Nam first argues he is entitled to habeas relief where the state court, without benefit of an evidentiary hearing, unreasonably applied the Supreme Court's ineffective assistance of counsel standard and found no Sixth Amendment violation. (Am. Pet. Mem. at 13.) Petitioner asserts that his trial counsel was ineffective for failing to object to what he contends was an unconstitutional jury instruction given by Judge Hughes when she illustrated the reasonable doubt standard by way of an analogy to a loved one's surgery. *Id.* at 4-17. He claims that the hypothetical used in the jury instruction was "prosecution-friendly" and unconstitutionally lowered the government's burden of proof. *Id.* He argues that counsel's failing in this regard amounted to a "structural" error. *Id.* at 14.

In its response to the habeas petition, and contrary to its position on PCRA review, the Philadelphia District Attorney's Office concedes that the jury instruction given was unconstitutional and that trial counsel performed deficiently in failing to object to it. (Resp. at 10.) However, Respondents contend that Petitioner was not prejudiced by this deficient performance. Accordingly, they argue that the state courts' denial of this claim on its merits was not an unreasonable application of Supreme Court precedent and therefore that relief is precluded by 28 U.S.C. § 2254.

We first describe the standards that apply to this claim of ineffective assistance of counsel. Inasmuch as we need to understand the nature of the alleged impropriety in the jury instruction in order to evaluate the ineffectiveness claim, we next look at the instruction that was given and then consider the effect of that instruction in the context of the case as a whole.

1. The *Strickland* standard

The Supreme Court employs the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine if the defendant was deprived of his right to counsel as guaranteed by the Sixth Amendment. Pursuant to *Strickland*, a defendant who raises claims based on the ineffective assistance of his counsel must prove that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

To satisfy the first prong of the *Strickland* test, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, a reviewing court must be "highly deferential" and must make "every effort ... 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." *Id.* at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

To satisfy the second prong of the *Strickland* test, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* Inasmuch as ineffectiveness claims are highly fact-dependent, reviewing courts "must consider the totality of the evidence before the judge or jury." *Id.* at 695. Because of this, "a verdict or conclusion only weakly supported by the

record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

2. Structural error?

We note here that Nam suggests that he need not prove *Strickland* prejudice in this ineffectiveness claim. He argues that errors in a reasonable doubt instruction are "structural" and thus the "resulting trial is always a fundamentally unfair one," citing to *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

The Supreme Court has defined a "structural error" as one that "affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Weaver*, 137 S. Ct. at 1907. Over the years, the Court has identified as structural errors: (1) the complete deprivation of the right to counsel; (2) the lack of an impartial judge; (3) the unlawful exclusion of grand jurors of the defendant's race; (4) the denial of the right to self-representation at trial; (5) the denial of a public trial; and (6) an erroneous reasonable doubt instruction. *See Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (collecting cases). Our Court of Appeals has recently noted, however, that while "a complete failure" to give a reasonable doubt instruction is a structural error, the same is not true where a reasonable doubt instruction *is* given. When *some* instruction on the notion of reasonable doubt is provided to the jury, then "the rules concerning evaluating a jury instruction apply," and the reviewing court undertakes an examination of "the language in its totality" to "determine[e] whether the instructions correctly captured the applicable legal concepts." *Baxter v. Superintendent Coal Township SCI*, 998 F.3d 542, 548 (3d Cir. 2021). In a case on direct review, for example, our Court of Appeals upheld a challenged reasonable doubt instruction where, although part of the instruction was erroneous, "this defect was counterbalanced by the explanation that preceded and succeeded it." *United States v. Isaac*, 134 F.3d 199, 204 (3d Cir. 1998). Accordingly, since *Baxter* we are instructed that: "In the context of an ineffective

assistance of counsel claim, if we conclude that the instruction contains an error, we then examine whether the instruction resulted in actual prejudice." *Baxter*, 998 F.3d at 548 (footnote omitted).

Inasmuch as a reasonable doubt instruction *was* given to the jury at Nam's trial, his case does not present a situation in which he was subjected to a structural error. Therefore, we will evaluate the impact of the instruction on the trial as a whole to determine if the PCRA Court reasonably determined that Nam was not prejudiced by counsel's failure to object.

3. The instruction to which no objection was made

When charging the jury, Judge Hughes gave the following jury instruction on the burden borne by the Commonwealth:[4]

> [T]his burden we talk about, proof beyond a reasonable doubt, is the highest standard in the law. There is nothing greater, and that is the burden the Commonwealth bears. But this does not mean that the Commonwealth must prove its case beyond all doubt. The Commonwealth is not required to meet some mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence. The Commonwealth is[,] in fact[,] not required to answer every single question you may have.
>
> The Commonwealth's burden is to prove the elements of each and every crime beyond a reasonable doubt. Now, a reasonable doubt is a doubt that would cause a reasonably careful and sensible person to pause, to hesitate or to refrain from acting upon a matter of the highest importance to their own affairs or their own interests. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence that was presented or out of the lack of evidence that was presented with respect to some element of each of the crimes charged.
>
> *I find it useful to think about reasonable doubt this way. Now, because I was fortunate to speak with each and every one of you, I know each and every one of you has someone in your life you love; a sibling, a spouse, a significant other, a parent. Each one of you loves somebody.*

[4] The language about which Nam complains is italicized.

> *What if you were told that your precious one had a life-threatening condition and that the only medical protocol for that life-threatening condition was a surgery. Now, if you're like me, you're probably going to ask for a second opinion. You might ask for a third opinion. You'd probably do research; what is this condition, what are the accepted protocols for this condition, what's the likelihood of success, probably go on the internet, do everything you can, and if you're like me, you're going to go through your Rolodex, and everybody that you know who has any relationship to medicine you're going to call them. You're going to talk to them, but at some moment the question is going to be called. You are going to have to cut your research. Do you allow your loved one to go forward[?] If you allow your loved one to go forward with the surgery, it's not because you have moved beyond all doubt. Ladies and gentlemen, there are no guarantees in life. If you go forward, it's because you have moved beyond all reasonable doubt.*
>
> A reasonable doubt must be a real doubt, ladies and gentlemen. It may not be a doubt that is imagined or manufactured to avoid carrying out an unpleasant responsibility. You may not find David Nam guilty based on a mere suspicion of guilt. The Commonwealth's burden is to prove David Nam guilty beyond a reasonable doubt. If the Commonwealth has met that burden, then David Nam is no longer presumed to be innocent and you should find him guilty. If on the other hand the Commonwealth has not met that burden, then you must find him not guilty.

Nam, 2019 WL 3946049, at *2-3 (quoting N.T. 1/29/10, at 99-101) (emphasis added by Superior Court).

4. The state court's analysis: deficient performance vs. prejudice; analysis subject to § 2254(d) deferential review vs. *de novo* review

Nam's concerns about the effect of this instruction were first presented in the context of his claim that trial counsel was ineffective for failing to object when Judge Hughes delivered this instruction. He presented the claim on PCRA review, at which point the Honorable Genece Brinkley was assigned the matter, following the retirement of Judge Hughes. The PCRA Court rejected the ineffectiveness claim on the merits, concluding that Nam did not establish deficient performance by counsel in failing to object to this instruction and that he was not prejudiced as a result of this instruction. *See Commonwealth v. Nam*, No. CP-51-CR-0302561-1997, slip op. at

4-8 (Phila. Comm. Pl. Ct. Feb. 28, 2019).[5] When Nam appealed to the Superior Court, he continued to assert: that the instruction was problematic, as noted by a federal court reviewing it in a similar case; that the federal courts "indicate near per se prejudice for a jury instruction as defective as this one"; and that he could establish prejudice where the fact witnesses against him were "compromised." Brief for Appellant, *Commonwealth v. Nam*, No. 3641 EDA 2018, 2019 WL 2273284, at *12-13 (Mar. 11, 2019).

a. Superior Court analysis

The Superior Court affirmed the dismissal of the PCRA petition. In so doing, it explained that it found no constitutionally-deficient performance by counsel, as it found that Judge Hughes's jury instruction, when read in the context of the entire instruction, "states the law accurately" and thus did not warrant an objection. *Nam*, 2019 WL 3946049, at *3. The court noted that Judge Hughes used standard language for the reasonable doubt instruction both before and after her hypothetical and concluded that she "stayed within [the] boundaries" of the degree of latitude that are afforded to trial judges in their jury instructions. *Id.* It held that because the jury instruction was "permissible," Nam's underlying ineffectiveness claim did not have merit. *Id.* The Superior Court thus addressed only *Strickland*'s deficient performance prong relating to whether an objection was warranted. It did not address the question of whether, had the jury been given an instruction that had warranted an objection by counsel, Nam suffered prejudice.

Respondents argue that although the state appellate court addressed only one of the two *Strickland* prongs to deny relief to Nam, the assessment of the lower court of the other prong – that is, the PCRA Court's prejudice analysis – should be afforded deference under § 2254(d). They

[5] This document, which reflects the lower court's reasoning for the benefit of the Superior Court pursuant to Pa. R.A.P. 1925, is contained in the original state court record received from the Court of Common Pleas.

cite to *Collins v. Secretary of Pa. Dep't of Corrections*, 742 F.3d 528 (3d Cir. 2014), which explains that "[AEDPA] Section 2254(d) deference applies to any claim that has been adjudicated on the merits in any state court proceeding, which 'can occur at any level of state court' as long as the state court's resolution has preclusive effect." *Collins*, 742 F.3d at 545. This can mean that federal review of an ineffectiveness claim may turn on the reasonableness of a PCRA court's finding regarding prejudice. *See id.* at 547. Respondents argue that the state courts' application of *Strickland* was not unreasonable as to the prejudice prong and that Nam's petition for habeas relief on this ineffectiveness claim must therefore fail.[6]

Courts are free to address the components of the *Strickland* prejudice standard in whichever order they wish and to conclude their analysis after identifying a failing in either prong. *See Strickland*, 466 U.S. at 697 (noting that reviewing court need not "address both components of the inquiry if the defendant makes an insufficient showing on one"). Therefore, we put aside for the time being the question of whether Nam satisfies the performance prong and has identified a jury instruction – Judge Hughes's analogy to a loved one's surgery to illustrate reasonable doubt – that was improper and warranted an objection. *Cf. Brooks v. Gilmore*, Civ. A. No. 15-5659, 2017 WL 3475475, *6-7 (E.D. Pa. Aug. 11, 2017) (McHugh, J.) (finding nearly identical analogy used by same trial judge rendered reasonable doubt instruction "constitutionally infirm" and warranted an objection). We will instead proceed to review the prejudice analysis undertaken by the PCRA Court.

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[6] Respondents no longer take the position that the instruction given by Judge Hughes was not objectionable. Rather, their response to the petition makes clear that "[t]he Philadelphia District Attorney's Office does not dispute the instruction's unconstitutionality." (Resp. at 10.) In light of that assessment, it therefore "will not argue that counsel performed competently in failing to object." (*Id.*)

We note that in *Baxter v. Superintendent Coal Township SCI*, 998 F.3d 542 (3d Cir. 2021), the Third Circuit considered: (1) the surrounding language of the jury instruction that correctly expressed the reasonable doubt standard despite the problematic example used, as well as (2) the magnitude of the evidence presented against the petitioner by the Commonwealth, which in that case included (a) eyewitness testimony, (b) the petitioner's own incriminating statements, and (3) the petitioner's flight and other examples from which a jury could infer consciousness of guilt. *Baxter*, 998 F.3d at 549. This case presents much of the same strong evidence of guilt and a similar context in which the jury instruction was used.

b. PCRA Court analysis

Nam's PCRA petition presenting this claim was already pending when a federal court found, in an unrelated habeas action, that Judge Hughes's reasonable doubt jury instruction, using this hypothetical of the loved one in need of surgery, was objectionable. *See Brooks v. Gilmore*, Civ. A. No. 15-5659, 2017 WL 3475475 (E.D. Pa. Aug. 11, 2017). The PCRA Court was aware of this decision when it adjudicated Nam's petition but noted that his trial counsel could not have been expected to predict future case law. It also noted that the decision of a federal district court is not binding upon the state courts and that in 2009, prior to Nam's trial, the Pennsylvania Superior Court had found, albeit in a non-precedential opinion, that Judge Hughes's reasonable doubt instruction did not unlawfully restrict the definition of reasonable doubt. *Commonwealth v. Nam*, No. CP-51-CR-0302561-1997, slip op. at 5-6 (Phila. Comm. Pl. Ct. Feb. 28, 2019) (citing *Brooks* and *Commonwealth v. Grant*, No. 1612 EDA 2007 (Pa. Super. Ct. 2009)). The state court then provided the following analysis:

> Assuming, *arguendo*, that this Court were to follow the decision of the Pennsylvania Eastern District Court, Defendant's claim still failed because he could not prove that prejudice resulted from counsel's failure to object. In the case at bar, Defendant's claim is

> wholly without merit because a change in the jury instruction would not have resulted in a different outcome at trial, given the overwhelming evidence presented at trial against Defendant.

Id. at 6. The PCRA Court went on to recite in a block quote the analysis of the federal court in *Brooks*, in which it noted that the case against Brooks was not one "where there was overwhelming evidence of guilt," as there was no corroborating physical evidence and the jury was left to accept testimony from "an eyewitness that suffered from multiple flaws, the most glaring of which was his initial accusation against someone other than the defendant, and a subsequent photo identification of two other individuals as the perpetrator." *Id.* at 7 (quoting *Brooks*, 2017 WL 3475475, at *14-15). As the *Brooks* court had put it, *Brooks* was "the type of case where reasonable doubt plays a fundamental role." *Id.* (quoting *Brooks, id.*). *See also id.* (observation of PCRA Court that "[t]he district court concluded that Brooks was an exceptional case because overwhelming evidence of guilt did not exist, thus the jury instruction by Judge Hughes, which arguably heightened the reasonable doubt instruction, was more likely to impact the jury's decision on whether or not the defendant was guilty")

The PCRA Court then proceeded with its analysis of Nam's case:

> The case at bar [*Nam*] is distinguishable from the Brooks case because the evidence against Defendant **was** overwhelming. His own handwritten documents confessing to the crime were admitted into evidence at trial. **All four** of his co-conspirators testified against him, ten years after the crime, clearly with no benefit to themselves. Additionally, Defendant fled the country and remained a fugitive in South Korea for nearly ten years to avoid punishment for his crime. All of these facts were presented to the jury for their consideration of guilt. Thus, even if this Court were to look at this case pursuant to the federal district court's decision in Brooks, it still does not satisfy the prejudice prong of the Pierce test[7] because such overwhelming evidence existed in this case that Defendant was in no way prejudiced by a more stringent jury instruction. Unlike in Brooks, this is a case with overwhelming evidence incriminating

[7] *Pierce* is the Pennsylvania equivalent of *Strickland*.

> Defendant. Defendant[']s own admissions in his letter to a South Korean Judge sealed his fate, along with the testimony of his co-conspirators, rather than the hypothetical given in the court's reasonable doubt jury instruction.

Id. at 7 (emphasis in original) (footnote omitted). The PCRA Court noted that when the ineffectiveness claim was analyzed "even ... under the standard laid out in Brooks," the claim failed, as Nam was not prejudiced by counsel's failure to object to the jury instruction." *Id.* at 7-8.

c. Our analysis

Given the particular facts of Nam's trial record, we cannot say that the Pennsylvania state courts' rejection of this ineffectiveness claim involved an unreasonable application of *Strickland* as to permit federal habeas corpus relief under 28 U.S.C. § 2254. Even if we were to subject this ineffectiveness claim to *de novo* review, we would reach the same conclusion: Nam did not suffer prejudice as defined in *Strickland* as a result of this jury instruction having been given at his trial without objection by counsel.

Petitioner's prejudice argument recalls the Court's analysis of the prejudice to the petitioner in *Brooks*, who prevailed on an ineffective assistance of counsel claim regarding counsel's failure to object to the same Judge Hughes jury instruction. (Am. Pet. Mem. at 14-15.) He also argues that, as to the question of "overwhelming evidence" of his guilt, the Court should recognize that his flight "is not indicative of criminal culpability," citing state cases for the proposition that "flight alone does not constitute reasonable suspicion). (*Id.* at 16.) Neither of these arguments is availing.

First, as to *Brooks*, the petitioner's conviction in that case for first-degree murder followed from a very different factual context. The federal court observed that it was "not a case where there was overwhelming evidence of guilt," particularly where the sole witness to the murder

testified that he was "high on Xanax and 'buzzed' on alcohol" when he witnessed the murder. *Brooks*, 2017 WL 3475475, at *1, 8. To be sure, other courts in our district have found prejudice warranting habeas relief due to ineffective assistance of counsel where the conviction was based on the testimony of questionable witnesses. *See Corbin v. Tice*, No. 16-4527, 2021 WL 2550653, at *3, *6 (E.D. Pa. June 22, 2021) (conviction relied upon "dubious confessions" reported by three heavily biased witnesses; no physical evidence implicated defendant); *Edmunds v. Tice*, No. 19-1656, 2020 WL 6810409, at *10 (E.D. Pa. Aug. 31, 2020), *approved and adopted* (Nov. 19, 2020) (prosecution's sole eyewitness admitted he lied to police and destroyed evidence, and he refused to testify until he received immunity; lengthy jury deliberations suggested case was a close one).

Nam's conviction, however, is based on a markedly different evidentiary background. At trial, all three of his co-conspirators testified that he had shot Schroeder. They offered this testimony years after their own cases would have been adjudicated, thus reducing the concerns that they were principally motivated to protect their own interest. Additionally, Souvannavong's brother, who was home on the night of the murder when the conspirators discussed it but not otherwise involved in any of the criminal activity, provided corroborating testimony as to the group's claims. Evidence was also introduced regarding Nam's flight to South Korea, his efforts to avoid detection once extradition became a possibility, and his admissions to a South Korean judge regarding his guilt.[8] Nam's case is not one "where reasonable doubt plays a fundamental role" in the question of his guilt – the proof of his guilt was overwhelming. *Cf. Brooks*, 2017 WL 3475475, at *1, 8. Nam has not met his burden of proving prejudice under *Strickland*. "[E]ven the inapt example" employed by Judge Hughes regarding reasonable doubt did not prejudice Nam.

[8] Thus, contrary to Petitioner's suggestion in his brief, his flight is not the *only* indicator of his guilt. It is, however, a relevant circumstance that the Court may consider when evaluating the impact of a piece of evidence on the jury.

See Baxter, 998 F.3d at 549 (analyzing jury instruction). Even under a *de novo* review, then, he is not entitled to habeas relief on this claim of ineffective assistance of counsel regarding the reasonable doubt instruction given by the trial court.

B. Eighth Amendment *Miller* claim, with an equal protection twist

Nam separately argues that his mandatory sentence of life without parole violates the Eighth Amendment prohibition on cruel and unusual punishment and his Fourteenth Amendment right to Equal Protection. He contends that the prohibition on mandatory life without parole sentences for juveniles, as recognized in *Miller,* should be extended to youth offenders up to age twenty-five because the scientific and medical research upon which the *Miller* decision was based also shows that young persons aged eighteen to twenty-five suffer from the same transient immaturity cited as characteristic of juvenile offenders. (Am. Pet. Mem. at 34.) As Nam was 19 years old at the time he committed this crime, he seeks to receive the same Eighth Amendment benefit as juveniles. This claim, however, is both procedurally defaulted and without merit.

1. Cruel and unusual punishment: The *Miller* standard

The Eighth Amendment prohibits the infliction of cruel and unusual punishment on criminal offenders. U.S. Const. amend. VIII. Recognizing that "proportionality is central to the Eighth Amendment," the Supreme Court in the 2012 *Miller v. Alabama* decision held that mandatory life without parole ("LWOP") sentences for juvenile offenders violated the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 469 (2012). The Court cited evidence of "fundamental differences" in the brain development, appreciation for risk and consequences, and capacity for rehabilitation between juveniles and adults, reasoning that mandatory LWOP sentences "mak[e] youth irrelevant" and pose "too great a risk of disproportionate punishment." *Id.* at 471-73, 479. A few terms later, in the 2016 *Montgomery v. Louisiana* case, the Court held that *Miller* applied retroactively to mandatory LWOP sentences and further stressed that any

LWOP sentences imposed on juvenile offenders be done so only in rare cases of "permanent incorrigibility." *Montgomery v. Louisiana*, 577 U.S. 190, 209 (2016).

2. Procedural default

Nam raised this *Miller* claim to the Court of Common Pleas in his initial PCRA petition but did not bring the claim on appeal to the Pennsylvania Superior Court. Nam admits that his *Miller* claim was thus not properly presented and that the claim is now procedurally defaulted. He contends, however, that the default is excused under *Martinez v. Ryan*, which held that federal courts may hear defaulted ineffective assistance of trial counsel claims if the petitioner demonstrates: (1) collateral review counsel was ineffective under the *Strickland* standard for failing to raise the trial counsel ineffectiveness claim, and (2) the underlying trial counsel ineffectiveness claim "has some merit." *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). (Am. Pet. Mem. at 39.)

Nam's invocation of *Martinez* is inapposite. *Martinez* applies only to defaulted claims of *ineffective assistance of trial counsel*. Nam's papers make clear that his claim is an Eighth and Fourteenth Amendment challenge, not a Sixth Amendment claim. *See, e.g.*, Am. Pet. Mem. at 40 ("The federal claim for relief remains the petitioner's equal protection rights under Fourteenth Amendment (U.S.C.A. 14) to Montgomery"). Thus, *Martinez* is inapplicable.

Nam presents no other "cause" for the default of his Eighth Amendment claim apart from the failure of PCRA counsel to have raised it. *Id.* at 38. The Supreme Court has long recognized, however, that the existence of cause for a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor *external to the defense* impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 486 (1986) (emphasis added). While *Martinez* reflects an exception to that rule, it applies narrowly only to the

circumstance of a defaulted claim of ineffective assistance of trial counsel. Again, the claim that has been defaulted here is the Eighth Amendment claim regarding mandatory life sentences applied to juveniles, which Petitioner believes should apply to him as well by virtue of the Equal Protection Clause. It cannot, and Nam has not presented any acceptable cause to excuse the procedural default of this claim. The *Miller* claim asserted in his petition thus remains procedurally defaulted. As we set forth below, however, even if this claim could be considered on the merits, it is clear that relief is not available to him. *See* 28 U.S.C. § 2254(b)(2) (allowing federal court to deny claim on its merits notwithstanding petitioner's failure to exhaust state remedies on that claim).

3. Alternative merits analysis

It is uncontested that Nam was nineteen years old at the time of his offense. While Nam argues that both *Miller* and *Montgomery* render his mandatory life without parole sentence unconstitutional, a plain reading of these cases shows their holding is only applicable to juvenile offenders under the age of eighteen. *Miller*, 567 U.S. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *Montgomery*, 577 U.S. at 206 (describing line of precedent from *Roper* and *Graham* establishing Eighth Amendment protections applied to juveniles, "those under the age of 18 at the time of their crimes")

To circumvent this, Nam argues that his Fourteenth Amendment Equal Protection rights were violated because the "transient immaturity confirmed by medical/scientific research for individuals between the ages of '18 to 25'" renders him "similarly situated" to juvenile offenders. (Doc. 6 at 38.) The Third Circuit, however, has already addressed and rejected this very argument, finding it irrelevant to relief under *Miller:*

> *Miller* set a clear age limit. [Petitioner] falls on the wrong side of that limit. And we cannot extend it. A nonfrivolous extension of a precedent cannot go beyond the precedent's bright line. Someday, the Supreme Court may redraw that line. But we cannot.

In re Rosado, 7 F.4th 152, 160 (3d Cir. 2021). Courts within this district have uniformly rejected *Miller* claims brought by petitioners who were not juveniles at the time of the offense. *See, e.g., Jones v. Walsh*, Civ. A. No. 13-1316, 2013 WL 6159286, *4 (E.D. Pa. Nov. 25, 2013) (noting claim "is not actually based upon a new rule of law ... but instead is an argument that the law should be changed" where petitioner was 27 years old when the offense occurred); *Williams v. Garman*, Civ. A. No. 15-cv-06066, 2019 WL 1046024, *3 (E.D. Pa. Mar. 4, 2019) (noting petitioner "argues that this Court should expand *Miller* and not simply apply it" where petitioner was 19 years old); *Leafey v. Kerestes*, Civ. No. 14-3009, 2014 WL 5823067, *6 (E.D. Pa. Nov. 7, 2014) (finding "the protections in *Miller* do not extend to petitioner," where he was 21 years old at the time he committed his underlying offense).

Because Nam was nineteen years old at the time he committed the offense that carries the mandatory sentence of life without the possibility of parole, his sentence cannot be deemed cruel and unusual punishment under the Eighth Amendment. Notions of equal protection of the law do not require a different outcome. His claim seeking relief from his sentence under *Miller* is without merit and may be denied, even as it is also subject to dismissal as procedurally defaulted.

IV. CONCLUSION

Nam properly exhausted state court remedies as to his Ground One claim that trial counsel provided ineffective assistance when he failed to object to the hypothetical example that the trial judge used when she charged the jury on reasonable doubt. However, AEDPA precludes habeas relief following the state court's rejection of that claim on its merits on PCRA review, where the state court's finding that Petitioner was not prejudiced by the lack of an objection cannot be

deemed unreasonable in the context of his trial. Even under a *de novo* review standard we would reach the same conclusion. Nam's only other claim for relief, which we consider as Ground Two, fails procedurally, and would alternatively fail on the merits. Nam failed to exhaust available state court remedies by not presenting his Eighth Amendment claim through all levels of the state review process. Even with that procedural default, he could not receive habeas relief on that claim, where it has no support in Supreme Court precedent and where the Equal Protection Clause has not been held to extend the benefits of *Miller* to non-juveniles such as Nam. Therefore, the petition as a whole may be denied and dismissed.

Pursuant to Local Appellate Rule 22.2 of the Rules of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district court judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. A COA should not issue unless the petitioner demonstrates that jurists of reason would find it to be debatable whether the petition states a valid claim for the denial of a constitutional right. As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurists of reason would also debate the correctness of the procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For the reasons set forth above, we do not believe that a reasonable jurist could debate our conclusions in relation to the foregoing claims.

RECOMMENDATION

AND NOW, this 2nd day of September, 2022, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED AND DISMISSED.** It is **FURTHER RECOMMENDED** that a Certificate of Appealability should **NOT ISSUE,** as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right or that reasonable jurists would find the correctness of the procedural aspects of this Recommendation debatable.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE