UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1886

CLAUDE P. LACOMBE,
Appellant

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER; ATTORNEY GENERAL DELAWARE

(1-17-cv-01518)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, CHUNG, *ROTH, and *AMBRO, Circuit Judges

The petition for rehearing filed by Appellant Claude P. Lacombe 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,

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*Judge Roth's and Judge Ambro's votes are limited to panel rehearing.

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: May 10, 2024
Amr/cc: All counsel of record

PRECEDENTIAL

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CLAUDE P. LACOMBE,
Appellant

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER; ATTORNEY GENERAL DELAWARE

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-17-cv-01518)
District Judge: Honorable Leonard P. Stark

Argued on September 27, 2023

Before: KRAUSE, ROTH, and AMBRO, *Circuit Judges*

(Opinion filed: March 8, 2024)

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OPINION

KRAUSE, *Circuit Judge.*

The government, like all of us, must keep its word. This is especially true in the context of plea bargaining, where the government's word leads criminal defendants to surrender a host of constitutional rights. Yet in two different cases today[1] we confront situations where the government fell short.

This opinion concerns Claude Lacombe, who surrendered his rights in exchange for a promise that the government—here the State of Delaware—would recommend a sentence just one year above the mandatory minimum. The State did recommend the promised sentence. But before doing so, it called Lacombe a "gangsta," a "puppet master," and the one who "may as well have" pulled the trigger in a botched robbery that left two dead. App. A at 96. Lacombe, who had bargained for a 22-year sentence recommendation, was ultimately sentenced to life in prison.

Lacombe now appeals the District Court's denial of habeas relief, arguing that the Delaware Supreme Court erred in rejecting his claims that (1) the State breached its plea agreement in violation of *Santobello v. New York*, 404 U.S. 257 (1971), and (2) his counsel was ineffective for failing to demand specific performance of the plea agreement, *see*

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[1] Filed contemporaneously with this opinion is *United States v. Cruz*, No. 23-1192 (3d Cir. Mar. 8, 2024), which addresses plea breach in the context of a direct appeal.

Strickland v. Washington, 466 U.S. 668 (1984). To succeed on those arguments, Lacombe must show that the Delaware Supreme Court unreasonably applied *Santobello* and *Strickland* under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), and that he suffered "actual prejudice" as a result of the State's rhetoric and his counsel's failure to object, *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

As for the AEDPA inquiry, it may be that the State violated the spirit of its agreement by paying mere lip service to the stipulated sentence (and that the Delaware Supreme Court was unreasonable in concluding otherwise). But we need not resolve that issue because, in any event, Lacombe has not established prejudice. Finding any constitutional error harmless under *Brecht*, *Strickland*, and *Puckett v. United States*, 556 U.S. 129 (2009), we will affirm the order of the District Court.

I. Background

A. Lacombe's Sentencing

On December 26, 2011, Michael Thomas and Keifer Wright drove from Philadelphia to Delaware expecting to sell a quarter pound of marijuana to Lacombe's brother, Paul. But Paul never intended to buy the marijuana. Instead, he and Lacombe had hatched a plan to rob the men and take their drugs at gunpoint. That plan now in motion, Lacombe's girlfriend Christie drove Lacombe, Paul, and Lacombe's friend Elijah to the Harbor Club Apartments in Newark, Delaware. With Lacombe and Christie parked elsewhere, Paul and Elijah met Michael and Keifer at their car and got inside.

Things quickly went south. At some point during the attempted robbery, Paul panicked and shot Keifer in the back of the head with Lacombe's revolver. In the ensuing struggle, Paul also shot Michael several times. Michael was pronounced dead at the scene, and Keifer died a few days later. Lacombe, Paul, Elijah, and Christie fled in Christie's car.

The police apprehended Lacombe and Paul, and a New Castle County grand jury returned a 13-count indictment against the two men.[2] The indictment charged each with two counts of first-degree murder, two counts of attempted first-degree robbery, four counts of possession of a firearm during the commission of a felony, and one count of second-degree conspiracy. Paul faced four additional charges for first-degree murder and firearm possession, but in exchange for his agreement to plead guilty but mentally ill to first-degree murder, the State agreed to recommend a life sentence rather than the death penalty. Lacombe pleaded down to one count of second-degree murder, one count of attempted first-degree robbery, one count of possession of a firearm during the commission of a felony, and one count of second-degree conspiracy.

The charges to which Lacombe pleaded guilty carried a mandatory minimum sentence of 21 years and a maximum sentence of life plus 52 years. In exchange for that plea, the State agreed to recommend a sentence of 22 years—again, just one year above the mandatory minimum—followed by Level IV and Level III probation.[3] The Delaware Superior Court accepted Lacombe's plea as knowing and voluntary, and it ordered a presentence investigation to determine the relative culpability of the individuals involved in the shooting.

On September 17, 2013, the Superior Court held a joint sentencing for Lacombe and his brother. After "moving and powerful statements of loss and trauma" from the victims' families, Opening Br. 7, the prosecutor recounted the facts of the case. When the prosecutor finished her overview, the sentencing judge asked for clarification on "how [Lacombe

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[2] Elijah, who was sentenced the day after Lacombe and his brother, was charged with the same crimes as Lacombe. Christie was charged separately and apparently sentenced alongside Elijah.

[3] Lacombe affirmed in his plea agreement that nobody "promised [him] what [his] sentence [would] be," App. A at 69, and during his plea colloquy he recognized that the State's 22-year recommendation was not binding on the sentencing court. He also recognized that the sentencing court could lawfully impose the maximum sentence of life plus 52 years.

and the victims] hooked up and how they knew each other." App. A at 95. The prosecutor answered the question, but she did not stop there; she proceeded to state that Lacombe "was determined to live this lifestyle of this sort of gangsta rapper," and that his rap lyrics "about robbing, shooting, killing, [and] disrespecting women" reflected "a lifestyle that [he] embraced . . . [and] chose to act on . . . when this was all set into play." *Id.* at 96. By way of explanation for these statements, the prosecutor offered the following:

> [W]hen you look at what [Lacombe] physically did, he sat in the car while Paul and Elijah actually went when the robbery and the murder of both Michael and Keifer occurred. But [Lacombe] set all of this in motion. [Lacombe] is the one who put it all into play. [Lacombe] is the one who selected who would be present. [Lacombe] is the one who determined the location. [Lacombe] is the one who determined the time. [Lacombe] is the one who controlled all of this.

Id. The prosecutor then continued, describing Lacombe as "the older brother, the mastermind, [and] the puppet master" and concluding: "So don't be fooled when you consider what sentence to give [Lacombe] by the fact that he stayed in the car when this robbery and double homicide occurred. He didn't pull the trigger, but he may as well have, because he set the whole thing in play." *Id.*

Following this commentary, the prosecutor recommended the agreed-upon sentences of life in prison for Paul and "22 years Level V time followed by a lengthy period of probation" for Lacombe. *Id.*

Lacombe's attorneys did not object to the State's monologue. When given the chance to respond, they simply noted that "all the issues the State raised . . . about [Lacombe's] involvement and being the mastermind behind this [were] incorporated in the plea." *Id.* at 99. Given Lacombe's "fairly troubled childhood," the attorneys argued, 22 years was "a reasonable sentence recommendation." *Id.*

The sentencing judge disagreed. After emphasizing that "[t]he circumstances are horrible" and "there are no good results from this kind of thing," *id.* at 100, she sentenced Paul to life in prison for first-degree murder and to additional time for second-degree conspiracy. She then turned to Lacombe, noting that while she "wouldn't call [him] the mastermind," he was, based on the record, a "significant factor in the planning and determination of the events that transpired that led to the circumstances as they ended." *Id.* Because the judge saw Lacombe's role, "candidly, as being fairly equal in different respects to that of [his] brother," she sentenced Lacombe to the maximum of life for second-degree murder. *Id.* at 101. She also sentenced him to five years for possession of a firearm during the commission of a felony, five years for attempted first-degree robbery, and two years (suspended) for second-degree conspiracy.[4]

B. State Proceedings

In October 2013, shortly after the sentencing hearing, Lacombe filed a motion for modification of sentence. *See* Del. Super. Ct. R. Crim. P. 35(b). In that motion, he argued that (1) the State breached its plea agreement by raising his culpability "from that of a co-conspirator[] to 'mastermind' of [the] whole robbery," and (2) counsel was ineffective for failing to warn him about the possibility of a life sentence. App. A at 180. The Superior Court denied the motion, writing that "the sentence is appropriate for all the reasons stated at the time of sentencing" and that "this [was] not the proper [forum in which] to challenge compliance . . . with the plea agreement or conduct [of] defense counsel." App. B at 9 (capitalization altered).

Undeterred, Lacombe filed a second motion for modification of sentence with similar claims two months later. Although the State opposed the motion, it wrote that it was "not opposed to reconsideration of [Lacombe's] sentence on the Murder Second Degree charge in this case," noting that Lacombe's proposal of 15 to 30 years was "not an

[4] The mandatory minimum sentences for these crimes were three, three, and zero years, respectively. The maximum sentences were 25, 25, and two years, respectively.

unreasonable [resentencing] request." App. A at 188. But the sentencing judge remained unmoved. In a letter opinion, she stated that she was "not swayed in the decision to impose sentence on this matter by the State's comments, but [instead] by the facts and the Defendant's conduct." Letter Opinion at 1, *State v. LaCombe*, No. 1201018188 (Del. Super. Ct. Aug. 20, 2014).[5] After recounting that conduct, the sentencing judge concluded that because Lacombe's actions "in the planning and implementation of his design, and in providing the weapon used, reflected a comparable culpability" to Paul, who was sentenced to life, a "comparable sentence" was warranted for Lacombe himself. *Id.* at 1–2.

The Delaware Supreme Court affirmed Lacombe's sentence on direct appeal, rejecting Lacombe's "sole argument" that his life sentence violated the Eighth Amendment "because he received the same sentence as his brother, who was the shooter" and concluding that there was "nothing extreme, or grossly disproportionate, about sentencing a murderer to life in prison." *Lacombe v. State*, No. 560, 2014 WL 2522273, at *1–2 (Del. May 30, 2014).

In his motion for postconviction relief under Del. Super. Ct. R. Crim. P. 61, Lacombe argued that trial counsel was ineffective for failing to object to the State's plea breach and demand specific performance of the plea agreement.[6] The

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[5] While certain prior opinions have referred to Lacombe as "LaCombe," we use "Lacombe" throughout this opinion for consistency with the parties' filings.

[6] Although Lacombe had not raised this argument on direct appeal, the Superior Court considered it on the merits. Rule 61 bars relief on "[a]ny ground . . . that was not asserted in the proceedings leading to the judgment of conviction," but it exempts from that bar "colorable claim[s] that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings." Del. Super. Ct. R. Crim. P. 61(i)(3), (5). As the Superior Court wrote, "[a] claim of ineffective counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies" as such a colorable claim. *State v. LaCombe*, 2016 WL 6301233, at *5 (Del. Super. Ct. Oct. 25, 2016).

Superior Court ultimately denied relief. *See State v. LaCombe*, 2016 WL 6301233, at *8 (Del. Super. Ct. Oct. 25, 2016). Counsel was not ineffective, the Court held, because there was no breach to which to object—the State "recommended the agreed upon sentence of twenty-two years," and it therefore "performed exactly as the terms of the plea agreement stated." *Id.* at *7. Even if counsel's performance was deficient, the Court continued, there was "no prejudice from [the] failure to argue for . . . specific enforcement" because "[t]he State's recommendation [did] not bind the Superior Court." *Id.* at *8; *see Strickland*, 466 U.S. at 687 (holding that ineffective assistance of counsel requires two showings: one, that "counsel's performance was deficient," and two, that "the deficient performance prejudiced the defense"). The Delaware Supreme Court adopted the Superior Court's logic and affirmed. *Lacombe v. State*, No. 542, 2017 WL 2180545, at *5–7 (Del. May 17, 2017).[7]

C. Federal Proceedings

Lacombe filed a petition for a writ of habeas corpus in the District of Delaware on October 26, 2017. *See* 28 U.S.C. § 2254(a). As relevant here, Lacombe's amended petition asserted that (1) "the State . . . breach[ed] the plea agreement . . . [by] improperly bolstering its theory to increase [Lacombe's] sentence," and (2) "trial counsel was ineffective for failing to require specific performance from the State when

[7] Lacombe's subsequent efforts to obtain postconviction relief in the Delaware state courts proved unsuccessful. *See State v. Lacombe*, 2017 WL 6550430, at *2–4 (Del. Super. Ct. Dec. 21, 2017) (second motion for postconviction relief), *aff'd*, No. 22, 2018 WL 1678765 (Del. Apr. 5, 2018); *Lacombe v. State*, No. 204, 2022 WL 4114103, at *1 (Del. Sept. 8, 2022) (third motion for postconviction relief).

the State breached its plea agreement."[8] *LaCombe v. May*, No. 17-cv-01518, 2021 WL 1342223, at *1, *3 (D. Del. Apr. 9, 2021).

The District Court rejected both arguments. Concerning the first, the Court wrote that "the Delaware state courts reasonably determined . . . [the State's remarks] did not constitute a breach of the plea agreement." *Id.* at *6; *see* 28 U.S.C. § 2254(d)(1). "[T]he State's responsibility during the sentencing hearing was to recommend capping the sentence at 22 years . . . , which it did," and nothing in the agreement prohibited the State from explaining Lacombe's and Paul's relative roles, nor did the agreement prevent the State from arguing "that a long probation was needed" for Lacombe. *LaCombe*, 2021 WL 1342223, at *7 (quotation marks omitted). Taken in context, the District Court concluded, the State's rhetoric was not inflammatory, and the Delaware Supreme Court correctly—or at least reasonably—found no plea breach. *See id.* at *6–7.

Concerning Lacombe's second argument, the District Court concluded that because "the Delaware Supreme Court reasonably . . . applied clearly established federal law in holding that the State did not breach the plea agreement . . . , there was nothing more for trial counsel to seek in terms of specific performance" and counsel's conduct "did not fall below an objective standard of reasonableness." *Id.* at *10. It also held that, because the Superior Court "was not obligated to follow the State's sentencing recommendation and had discretion to sentence [Lacombe] to life in prison," the Delaware Supreme Court "reasonably applied *Strickland* in holding that [Lacombe] was not prejudiced by trial counsel's failure to seek specific performance of the plea agreement." *Id.*

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[8] In total, the amended petition asserted 14 grounds for relief. *LaCombe v. May*, No. 17-cv-01518, 2021 WL 1342223, at *3 (D. Del. Apr. 9, 2021). The District Court dismissed eight claims—those raised in Lacombe's second motion for postconviction relief—as procedurally defaulted, *id.* at *11–13; *see Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000), and it denied relief on the remaining six, *LaCombe*, 2021 WL 1342223, at *4–11.

Having denied relief on the above claims, the District Court declined to issue a certificate of appealability and dismissed Lacombe's habeas petition without holding an evidentiary hearing. *Id.* at *13; *see* 28 U.S.C. § 2253(c); 3d Cir. L.A.R. 22.2 (2011). Our Court, however, granted Lacombe's petition for a certificate of appealability with respect to the plea-breach and ineffective-assistance claims, to which we now turn.

II. Discussion[9]

Because the District Court ruled on Lacombe's habeas petition without an evidentiary hearing, "we review the state courts' determinations under the same standard that the District Court was required to apply." *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009). That standard consists of two inquiries: In weighing whether to grant habeas relief, we must "apply[] both the test [the Supreme] Court outlined in *Brecht* and the one Congress prescribed in AEDPA." *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022).

Under AEDPA, we may not grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the adjudication of the claim "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."[10] 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established law when it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result." *Williams v. Taylor*, 529 U.S.

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[9] The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

[10] Although we may also grant habeas relief when the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), the parties do not dispute the reasonableness of the Delaware courts' factual findings.

362, 405–06 (2000). Similarly, a decision involves "an unreasonable application of" clearly established law when it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular . . . case." *Id.* at 407–08. The application must be "objectively unreasonable," meaning that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 409, 411; *see also, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.").

Under *Brecht*, which adds a harmless-error element to our habeas analysis, we must ask two questions for each claim at issue. First, does the claim concern a trial error—meaning an error that "occur[s] during the presentation of the case" to the trier of fact and can "be quantitatively assessed in the context of other evidence presented in order to determine" harmlessness—or a structural defect, which is not susceptible to harmless-error analysis and likely entitles the petitioner to relief? *Brecht*, 507 U.S. at 629–30 (alteration in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991)). Second, if the claim concerns a trial error, did that error result in "actual prejudice" to the petitioner? *Id.* at 637 (quoting *Lane*, 474 U.S. at 449); *see Fry v. Pliler*, 551 U.S. 112, 121–22 (2007).

To satisfy his burden of proving "actual prejudice," a petitioner must show that the error "had [a] substantial and injurious effect or influence in determining" the relevant outcome. *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Absent that showing, we will not remedy a claim of trial error on collateral review. *See id.* at 637–38. If the petitioner can make the requisite showing, however, *Brecht* presents no barrier to relief. *Id.*; *see Brown*, 142 S. Ct. at 1517, 1520.

The upshot is that, to prevail on a habeas petition, a prisoner asserting trial error must establish *both* error under AEDPA and prejudice under *Brecht*. *Brown*, 142 S. Ct. at 1517, 1520; *see Freeman v. Superintendent Fayette SCI*, 62 F.4th 789, 802 (3d Cir. 2023); *Mathias v. Superintendent*

Frackville SCI, 876 F.3d 462, 475 (3d Cir. 2017). Failing to establish either one will preclude habeas relief, so "[w]hen a federal court determines . . . that a petitioner has failed to carry his burden under *Brecht*, that conclusion . . . obviates the need for . . . a separate AEDPA inquiry [and] relief must be denied." *Brown*, 142 S. Ct. at 1528 (emphasis omitted).

Such is the case for Lacombe's plea-breach claim. That claim concerns a trial error, not a structural error, and Lacombe has not carried his burden to show "actual prejudice" under *Brecht*.[11] Similarly, Lacombe has not carried his burden to show prejudice, let alone "actual prejudice," on his *Strickland* claim.

A. Lacombe's *Santobello* Claim

In *Santobello*, the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of [a] prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at

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[11] Based on this conclusion, we can affirm Lacombe's *Santobello* claim on harmlessness alone. That we do not reach the AEDPA inquiry for this claim, however, does not mean the Delaware Supreme Court's merits determination was necessarily reasonable. The State asserts on appeal that it properly emphasized Lacombe's role to ensure "a long probation." Answering Br. 38. But recall that the State offered its strong language in support of a sentence *just one year above* the statutory minimum. Given the facts here, we question whether fair-minded jurists could conclude that the State's actions comported with the "spirit of [the] agreement." *Dunn v. Colleran*, 247 F.3d 450, 461 (3d Cir. 2001). True, the government "need not endorse the terms of its plea agreements enthusiastically." *United States v. Badaracco*, 954 F.2d 928, 941 (3d Cir. 1992) (quotation marks omitted). And AEDPA's standard is no doubt difficult to meet. *See, e.g.*, *Harrington*, 562 U.S. at 102–03; *Renico v. Lett*, 559 U.S. 766, 773 (2010). But the government also may not introduce its agreed-upon terms with a wink and a nod. *See Cruz*, slip op. at 7–8; *see also, e.g.*, *United States v. Canada*, 960 F.2d 263, 269–71 (1st Cir. 1992); *United States v. Taylor*, 77 F.3d 368, 369–71 (11th Cir. 1996).

262. Lacombe argues here, as he did before the District Court, that (1) the State failed to fulfill its promise by implicitly advocating for a sentence longer than 22 years, and (2) the Delaware Supreme Court unreasonably applied *Santobello* when it reached the opposite conclusion. He also contends that the Delaware Supreme Court erred in considering prejudice because we have treated *Santobello* errors "as akin to structural defects not susceptible [to] harmless error analysis." Reply Br. 6 (quoting *Dunn v. Colleran*, 247 F.3d 450, 463 (3d Cir. 2001)). Lacombe makes the third argument under AEDPA,[12] but it is equally relevant for purposes of *Brecht*. Assuming we begin our analysis with *Brecht* and harmless error—as we elect to do here—a conclusion that *Santobello* violations are structural defects would foreclose our consideration of prejudice.

Whether *Santobello* violations are trial errors or structural defects was, until today, an open question in our Circuit. In *Dunn*, a plea-breach case decided on AEDPA grounds, the majority observed that "[t]he Supreme Court and this Court have, on direct appeal, regularly treated *Santobello* errors as akin to structural defects" and that "[n]othing in recent Supreme Court caselaw" suggested a different conclusion on habeas review. 247 F.3d at 451, 463. The dissent, meanwhile, pointed out that the Supreme Court has never identified plea breach as within the "limited class" of structural defects and that "there is a strong presumption against finding . . . a given type of violation [to be] structural." *Id.* at 470 (Cowen, J., dissenting) (quotation marks omitted); *see Neder v. United States*, 527 U.S. 1, 8 (1999); *Johnson v. United States*, 520 U.S. 461, 468–69 (1997). Ultimately, however, we had no reason

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[12] In Lacombe's view, the Delaware Supreme Court "contradict[ed] the governing law" set forth in *Santobello* when it framed its analysis "in the context of the need to prove prejudice occasioned by the breach." *Williams*, 529 U.S. at 405; Opening Br. 28. Even if *Santobello* prohibited harmless-error analysis, this argument would lack merit: The Delaware Supreme Court stated that it considered prejudice only under *Strickland*, *see Lacombe*, 2017 WL 2180545, at *6, and a contrary reading would be out of step with "the respect AEDPA requires us to afford our state counterparts," *Eizember v. Trammell*, 803 F.3d 1129, 1143 (10th Cir. 2015).

to resolve the issue, because "even if harmless error would apply to a *Santobello* violation," the error in *Dunn* was not harmless. 247 F.3d at 463.

Today, we confront the issue again with the benefit of "recent Supreme Court caselaw." *Id.* Eight years after *Dunn*, the Supreme Court decided *Puckett v. United States*, 556 U.S. 129. In that case, the government conceded on direct review that it had violated the terms of the plea agreement. *Id.* at 133. Because defense counsel failed to object to the plea breach at sentencing, however, the government argued that (1) plain-error review was appropriate for the unpreserved claim, and (2) Puckett could not show prejudice as required under the plain-error standard. *Id.*; *see* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 734–35 (1993). Puckett countered that even if plain-error review was appropriate, consideration of prejudice was not, because *Santobello* deemed plea-breach claims to be structural defects. *See Puckett*, 556 U.S. at 140. The Supreme Court disagreed, explaining:

> [B]reach of a plea deal is not a "structural" error as we have used that term. We have never described it as such, and it shares no common features with errors we *have* held structural. A plea breach does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence; it does not defy analysis by harmless-error standards by affecting the entire adjudicatory framework; and the difficulty of assessing the effect of the error is no greater with respect to plea breaches at sentencing than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review.

Id. at 141 (citations and quotation marks omitted). The Court also clarified that, while "*Santobello* did hold . . . automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved," that holding

rested on policy concerns.[13] *Id.* Those policy concerns and "the rule of contemporaneous objection," the Court said, are "equally essential and desirable, and when the two collide [there is] no need to relieve the defendant of his usual burden of showing prejudice." *Id.*

Puckett, then, stands for two propositions. First, plea breach is not a structural defect that defies analysis by harmless-error standards. Second, at least where there is no contemporaneous objection, *Santobello*'s automatic-reversal rule does not apply, and prejudice is relevant to a plea-breach claim.

Although *Puckett* dealt with plain-error review, its reasoning applies with equal force on habeas review. Just as a defendant "must make a specific showing of prejudice" to prevail in the plain-error context, *Olano*, 507 U.S. at 735, a habeas petitioner is "not entitled to habeas relief based on trial error unless [he] can establish that [the error] resulted in 'actual prejudice,'" *Brecht*, 507 U.S. at 637 (quoting *Lane*, 474 U.S. at 449). And we see no reason why the contemporaneous-objection rule—which is enough to overcome *Santobello*'s automatic-reversal rule in the context of plain error—should

[13] As the *Dunn* majority emphasized, the *Santobello* Court remanded the case despite evidence of harmlessness. *Dunn*, 247 F.3d at 463; *see Santobello*, 404 U.S. at 262–63. The *Puckett* Court explained, however, that it did so not because "plea-breach errors are (like structural errors) somehow not susceptible, or not amenable, to review for harmlessness," but instead based on "a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining—an essential and highly desirable part of the criminal process." 556 U.S. at 141 (emphasis omitted) (quotation marks omitted).

have any less force in the habeas context.[14] On collateral review too, then, a "defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway . . . or because he likely would not have obtained those benefits in any event." *Puckett*, 556 U.S. at 141–42. Because *Santobello* violations are not structural defects, and because *Puckett*'s logic extends to habeas, we hold that without a contemporaneous objection, an alleged *Santobello* violation is a trial error susceptible to harmless-error review under *Brecht*.

We qualify our holding with an important caveat. *Puckett* concluded that *Santobello* violations are amenable to harmless-error analysis when there is no contemporaneous objection, because in that scenario there is a "colli[sion]" between the "essential and desirable" contemporaneous-objection rule and the "policy interest in establishing . . . trust between defendants and prosecutors . . . necessary to sustain plea bargaining." 556 U.S. at 141. In the scenario where there *is* a contemporaneous objection, and so that collision is avoided, the *Puckett* Court explicitly declined to "confront . . . the question [of] whether *Santobello*'s automatic-reversal rule has survived [the] recent elaboration of harmless-error principles in such cases as *Fulminante* and *Neder*." *Id.* at 141 n.3. We adopt the same approach here, and we take no position on whether harmless-error analysis is appropriate—on habeas

[14] Indeed, the policy considerations weighing against automatic reversal are even greater when (1) there is no contemporaneous objection, and (2) the case reaches federal court under 28 U.S.C. § 2254. In *Brecht*, the Supreme Court wrote that "[o]verturning final and presumptively correct convictions on [habeas] review . . . undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." 507 U.S. at 637. The same logic, we believe, applies to "final and presumptively correct" sentences. *Id.*

review, direct appeal, or elsewhere—for *Santobello* violations where counsel lodges a timely objection.[15]

Here, it is undisputed that Lacombe's attorneys did not object to the State's rhetoric, so *Brecht*'s harmless-error rule governs.[16] And because Lacombe has not established "actual prejudice," that rule is dispositive. Even if the State breached the plea agreement, the sentencing judge was not bound by the State's recommendation, had independent access to information about Lacombe's and Paul's respective roles in the crimes, and indicated at sentencing that she was not swayed by the State's rhetoric. *See* App. A at 100–01 ("I wouldn't call you the mastermind, but, nonetheless, a significant factor in the planning and determination of the events that transpired . . . . I see your role, candidly, as being fairly equal in different respects to that of your brother . . . ."). In addition, and tellingly, the sentencing judge reaffirmed Lacombe's life sentence *even after* the State agreed that a reduction to 15 to 30 years was reasonable, writing that her original sentence was based solely on "the facts and the Defendant's conduct."[17] Letter Opinion, *supra*, at 1. Lacombe thus cannot show that the State's purported overreach had a "substantial and injurious

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[15] Had there been a contemporaneous objection here, the State could of course have attempted to cure the breach. *See Cruz*, slip op. at 8–10. But as *Cruz* confirms, "it [remains] an open question whether we may excuse . . . errors as harmless" in that scenario. *Id.* at 11.

[16] Lacombe did not forfeit his plea-breach claim despite his counsel's failure to object, instead preserving it (via an ineffective-assistance claim) in his Rule 61 motion. Because the Delaware Supreme Court reviewed the claim on the merits rather than for plain error, *see Lacombe*, 2017 WL 2180545, at *1–2, we need not concern ourselves with questions of procedural default or exhaustion, *see Picard v. Connor*, 404 U.S. 270, 275 (1971).

[17] Although it is possible that the State's words unconsciously influenced the sentencing judge, and that once the State said its piece the bell could not be unrung, the sentencing judge gave assurances to the contrary, and ignoring those assurances would be out of step with the principles of comity and federalism underlying federal habeas review. *See Brecht*, 507 U.S. at 635.

effect or influence" on the Superior Court's sentence, *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776); *see Puckett*, 556 U.S. at 141–42, or that there is "grave doubt about whether [the] trial error" affected the outcome, *see Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).[18] We conclude that any error here was harmless under *Brecht*,[19] and we will affirm the District Court's denial of relief on Lacombe's *Santobello* claim without reaching the AEDPA inquiry. *See Brown*, 142 S. Ct. at 1528.

B. Lacombe's *Strickland* Claim

Having disposed of Lacombe's *Santobello* claim on harmless-error grounds, the resolution of Lacombe's *Strickland* claim is fairly straightforward. As for this claim, we begin (and end) with AEDPA.

To sustain an ineffective-assistance claim under *Strickland*, a defendant must show that (1) counsel's performance was deficient, meaning that it "fell below an objective standard of reasonableness," and (2) the deficient performance "prejudiced the defense," meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 687–88, 694. Lacombe argues that the Delaware Supreme Court erred at both prongs of this analysis and unreasonably applied *Strickland* because, assuming a breach, it (1) failed to consider counsel's deficient failure to object, and

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[18] *See also, e.g.*, *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam) ("The social costs of retrial or resentencing are significant . . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.").

[19] As the Supreme Court clarified in *Puckett*, "the question with regard to prejudice is not whether [a defendant] would have entered the plea had he known about the future violation." 556 U.S. at 142 n.4. Instead, "[w]hen the rights acquired by the defendant relate to sentencing, the outcome he must show to have been affected is his sentence." *Id.* (quotation marks omitted).

(2) concluded there was no prejudice "because the sentencing court was not bound by the State's recommendation." *Lacombe*, 2017 WL 2180545, at *6.

Even assuming the State breached its plea agreement, we agree with the Delaware Supreme Court that counsel's failure to object or demand specific performance was harmless.[20] For the same reason we lack "grave doubt" as to whether the alleged plea breach affected the outcome (that is, the absence of "actual prejudice"), we do not believe the Delaware Supreme Court unreasonably applied *Strickland* when it concluded Lacombe's sentence would have been the same regardless of counsel's actions. Lacombe's *Strickland* claim therefore fails under AEDPA, and we will affirm the District Court's denial of relief on this claim as well.

III. Conclusion

Because Lacombe is not entitled to habeas relief for either claim at issue on appeal, we will affirm the order of the District Court.

[20] We take no position on whether the State actually breached the plea agreement for purposes of *Strickland*. *See Strickland*, 466 U.S. at 697, 700 (noting that, because "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats [an] ineffectiveness claim," a court can "dispose of [the] claim on the ground of lack of sufficient prejudice" alone).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CLAUDE P. LACOMBE,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. Act. No. 17-1518-LPS
	:	
ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE,	:	
	:	
Respondents.[1]	:	

MEMORANDUM OPINION

Claude P. LaCombe. *Pro so* Petitioner.

Carolyn S. Hake, Deputy Attorney General of the Delaware Department of Justice, Wilmington, Delaware. Attorney for Respondents.

April 9, 2021
Wilmington, Delaware

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[1]Warden Robert May replaced former Warden Dana Metzger, an original party to the case. *See* Fed. R. Civ. P. 25(d).

STARK, U.S. District Judge:

I. INTRODUCTION

Pending before the Court is a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 and an amended Petition (hereinafter collectively referred to as "Petition") filed by Petitioner Claude P. LaCombe ("Petitioner"). (D.I. 3; D.I. 11) The State filed an Answer in Opposition, to which Petitioner filed a Reply. (D.I. 20; D.I. 23) For the reasons discussed, the Court will dismiss the Petition.

II. BACKGROUND

On December 26, 2011, Petitioner participated in a robbery with three other men, including his brother, during which two individuals were killed. *See LaCombe v. State*, 93 A.3d 654 (Table), 2014 WL 2522273, at *1 (Del. May 30, 2014). In January 2012, Petitioner was indicted on two counts of first degree murder, four counts of possession of a firearm during the commission of a felony ("PFDCF"), two counts of attempted first degree murder, and second degree conspiracy. (D.I. 20 at 1) On April 11, 2013, Petitioner pled guilty to one count each of second degree murder (as the lesser-included offense of first degree murder), PFDCF, attempted first degree robbery, and second degree conspiracy. *Id.* In September 2013, the Superior Court sentenced Petitioner to life imprisonment for the murder conviction, pulse additional time for the related convictions. *See State v. LaCombe*, 2017 WL 6550430, at *1 (Del. Super. Ct. Dec. 21, 2017). Petitioner filed a *pro se* motion for modification of sentence, which the Superior Court denied. (D.I. 20 at 2)

In October 2013, Petitioner filed a direct appeal. While the appeal was pending, Petitioner's counsel filed a second motion for modification of sentence. On May 30, 2014, the Delaware Supreme Court affirmed Petitioner's sentence. *See LaCombe*, 2014 WL 2522273, at *2. On August

26, 2014, the Superior Court denied Petitioner's second motion for modification of sentence. (D.I. 18-1 at 12)

In May 2014, Petitioner filed in the Superior Court a motion for postconviction relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion") and a motion to appoint counsel. (D.I. 18-1 at 11) The Superior Court granted the motion to appoint counsel. Post-conviction counsel filed an amended Rule 61 motion, which the Superior Court denied. *See State v. Lacombe*, 2016 WL 6301233 (Del. Super. Ct. Oct. 25, 2016). The Delaware Supreme Court affirmed that decision on May 17, 2017. *See LaCombe v. State*, 2017 WL 2180545, at *1 (Del. May 17, 2017).

Petitioner filed a second *pro se* Rule 61 motion in June 2017, which the Superior Court summarily dismissed on December 21, 2017. (D.I. 18-1 at 16; *see also LaCombe*, 2017 WL 6550430, at *1. The Delaware Supreme Court affirmed that decision on April 5, 2018. *See LaCombe v. State*, 2018 WL 1678765 (Del. Apr. 5, 2018).

III. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Absent exceptional circumstances, a federal court cannot grant habeas relief unless the petitioner has exhausted all means of available relief under state law. *See* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-44 (1999); *Picard v. Connor*, 404 U.S. 270, 275 (1971). The AEDPA states, in pertinent part:

> 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.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement is based on principles of comity, requiring a petitioner to give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-45; *see also Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000). A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claims were "fairly presented" to the state's highest court, either on direct appeal or in a post-conviction proceeding, in a procedural manner permitting the court to consider the claims on their merits. *See Bell v. Cone*, 543 U.S. 447, 451 n.3 (2005); *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

A petitioner's failure to exhaust state remedies will be excused if state procedural rules preclude him from seeking further relief in state courts. *See Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989). Although treated as technically exhausted, such claims are nonetheless procedurally defaulted. *See Lines*, 208 F.3d at 160; *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). Similarly, if a petitioner presents a habeas claim to the state's highest court, but that court "clearly and expressly" refuses to review the merits of the claim due to an independent and adequate state procedural rule, the claim is exhausted but procedurally defaulted. *See Coleman*, 501 U.S. at 750; *Harris v. Reed*, 489 U.S. 255, 260-64 (1989).

Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. *See McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999); *Coleman*, 501 U.S. at 750-51. To

demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To demonstrate actual prejudice, a petitioner must show "that [the errors at trial] worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001). A petitioner demonstrates a miscarriage of justice by showing a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496. Actual innocence means factual innocence, not legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). In order to establish actual innocence, the petitioner must present new reliable evidence – not presented at trial – that demonstrates "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537-38 (2006); *see also Sweger v. Chesney*, 294 F.3d 506, 522-24 (3d Cir. 2002).

B. Standard of Review

If a state's highest court adjudicated a federal habeas claim on the merits, the federal court must review the claim under the deferential standard contained in 28 U.S.C. § 2254(d). Pursuant to 28 U.S.C. § 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial. 28 U.S.C.

§ 2254(d)(1) & (2); *see also Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim has been "adjudicated on the merits" for the purposes of 28 U.S.C. § 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). The deferential standard of § 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). As explained by the Supreme Court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99.

Finally, when reviewing a habeas claim, a federal court must presume that the state court's determinations of factual issues are correct. *See* 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact, and is only rebutted by clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (stating that clear and convincing standard in § 2254(e)(1) applies to factual issues, whereas unreasonable application standard of § 2254(d)(2) applies to factual decisions).

IV. DISCUSSION

The Petition asserts the following 14 grounds for relief: (1) trial counsel provided ineffective assistance by failing to present mitigating evidence during sentencing (D.I. 11 at 5; D.I.. 3 at 7); (2) trial counsel was ineffective for failing to require specific performance from the State when the State breached its plea agreement (D.I. 11 at 13); (3) appellate counsel provided ineffective assistance by failing to adequately argue the disproportionality of his sentence on direct appeal (D.I. 11 at 19; D.I. 3 at 7); (4) appellate counsel was ineffective for failing to adequately argue that his life

sentence is grossly disproportionate (D.I. 11 at 35; D.I. 3 at 7); (5) the State engaged in prosecutorial misconduct during the sentencing hearing by referring to rap lyrics, which were written by Petitioner, in violation of Delaware Rules of Evidence ("DRE") 404(b) (D.I. 11 at 40); (6) the State engaged in prosecutorial misconduct during the sentencing hearing by "improperly vouching" that Petitioner chose not to show his face because he intended to rob the victims again later (D.I. 11 at 44); (7) the State engaged in prosecutorial misconduct during the sentencing hearing by "vouching" that co-defendants Elijah Pressley and Christie Emmons were willing to testify and that their statements were credible (D.I. 11 at 47); (8) the State engaged in prosecutorial misconduct by denying Petitioner an opportunity to review his co-defendants' statements that were made four days before his plea hearing, in violation of DRE 807, and trial counsel provided ineffective assistance by failing to ask for such an opportunity (D.I. 11 at 55-57); (9) the State engaged in prosecutorial misconduct by improperly introducing evidence of uncharged misconduct at sentencing in violation of DRE 404(b) (D.I. 11 at 58-63); (10) the arrest warrant contained false information (D.I. 11 at 64); (11) the evidence was insufficient with respect to the felony murder charge, allowing Petitioner to make an "actual innocence" claim (D.I. 11 at 67; D.I. 3 at 8); (12) Petitioner's life sentence violates the Eighth Amendment (D.I. 3 at 5); (13) the State engaged in prosecutorial misconduct by breaching the plea agreement to "not" recommend more than 22 years at sentencing and improperly bolstering its theory to increase his sentence (D.I. 3 at 5, 10); and (14) Petitioner is actually innocent of second degree murder (D.I. 3 at 8; D.I. 11 at 67-68). For eases of analysis, the Court will address the claims reviewed under § 2254(d) first (Claims Twelve and Thirteen), the ineffective assistance of counsel claims second (Claims One through Four), the procedurally barred claims third (Claims Five through Eleven), and the actual innocence claim (Claim Fourteen) last.

A. Claim Twelve: Eighth Amendment Violation

In Claim Twelve, Petitioner asserts that his life sentence violates the Eighth Amendment because he was not the shooter. Petitioner raised this argument on direct appeal, and the Delaware Supreme Court denied it as meritless. Therefore, Claim Twelve will only warrant relief if the Delaware Supreme Court's decision was either contrary to, or an unreasonable application of, clearly established federal law.

The Eighth Amendment forbids cruel and unusual punishment, and it applies to the States via the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 667 (1962). Two decisions of the United States Supreme Court summarize the applicable Eighth Amendment principles for non-capital sentencing: *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Ewing v. California*, 538 U.S. 11 (2003). In *Lockyer*, the Supreme Court extensively reviewed its prior cases dealing with Eighth Amendment challenges to criminal sentences, and concluded that it has "not established a clear and consistent path for courts to follow" in determining whether a particular sentence for a term of years can violate the Eighth Amendment." 538 U.S. at 72. The *Lockyer* Court explained that, for the purposes of analyzing an Eighth Amendment claim under § 2254(d)(1), the only clearly established governing legal principle is that "the gross disproportionality principle, the precise contours of which are unclear, [is] applicable only in the 'exceedingly rare' and 'extreme' case." *Id.* The *Lockyer* Court then held that a recidivist's minimum sentence of 50 years was not grossly disproportionate to the two counts of petty theft offenses that triggered the application of the recidivist statute. *See id.* at 67, 77.

In *Ewing*, the Supreme Court rejected the defendant's claim that a sentence of 25 years to life for stealing three golf clubs was "grossly disproportionate" to the crime. 538 U.S. at 20, 28. The *Ewing* Court reiterated that the Eighth Amendment "contains a 'narrow proportionality principle'

that 'applies to noncapital sentences,'" which "does not require strict proportionality between the crime and the sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 20, 23. The *Ewing* Court explained that a court engaging in the proportionality analysis must compare the harshness of the penalty imposed upon the defendant with the gravity of his triggering offenses and criminal history. *See id.* at 28-29. "In weighing the gravity of [the defendant's] offense, [the court] must place on the scales not only his current felony, but also his long history of felony recidivism." *Ewing*, 538 U.S. at 29.

Petitioner argued to the Delaware Supreme Court that his sentence was grossly disproportionate because he received the same sentence as his brother, who was the shooter and who pled guilty to first degree murder. The Delaware Supreme Court rejected this claim. *See LaCombe*, 2014 WL 2522273, at *1-2. After reviewing the Delaware Supreme Court's denial of Petitioner's Eighth Amendment argument, the Court concludes that the Delaware Supreme Court's decision was neither contrary to, nor an unreasonable application of, the "gross proportionality" standard as articulated in *Lockyer* and *Andrade*. Petitioner's case started as a capital case, but trial counsel obtained a plea offer to second degree murder, resulting in Petitioner's maximum sentence for second degree murder being life imprisonment. Petitioner's life sentence was based on his guilty plea to second degree murder (as a lesser included offense of first degree murder), PFDCF, attempted first degree robbery, and second degree conspiracy for his role in the shooting deaths of two people. In accordance with *Lockyer* and *Ewing*, the Delaware Supreme Court compared the sentence imposed to the crime committed, and concluded that the facts did not come close to creating an inference of gross disproportionality:

> [Petitioner] pled guilty to murder – the most heinous violent crime. Although [Petitioner] did not pull the trigger, he gave the gun to his mentally ill brother, who was attempting to commit armed robbery.

> Two people were killed in an incident that [Petitioner] planned and set in motion. There is nothing extreme, or grossly disproportionate, about sentencing a murderer to life in prison.

LaCombe, 2014 WL 2522273, at *1-2.

Given these circumstances, the Court concludes that the Delaware Supreme Court's denial of Petitioner's Eighth Amendment argument was neither contrary to, nor an unreasonable application of, the "gross proportionality" standard as articulated in *Lockyer* and *Ewing*. Thus, the Court will deny Petitioner's Eighth Amendment Claim for failing to satisfy § 2254(d).

B. Claim Thirteen: Prosecutorial Misconduct

In Claim Thirteen, Petitioner contends that the State breached the plea agreement to "not" recommend more than 22 years at sentencing and improperly bolstered its theory to increase his sentence during the sentencing hearing. Petitioner alleges that the following statement made by the State during sentencing constituted an argument for a sentence greater than 22 years:

> So don't be fooled when you consider what sentence to give [Petitioner] by the fact that he stayed in the car when this robbery and the double homicide occurred. He didn't pull the trigger, but he may as well have, because he set the whole thing into play.

(D.I. 11 at 15; D.I. A53) (hereinafter referred to as the "don't be fooled" statement) According to Petitioner, the "don't be fooled" statement "signaled to the court [that] the sentencing recommendation was not appropriate in this case." (D.I. 11 at 18)

Petitioner raised this argument in his first Rule 61 motion and subsequent post-conviction appeal, along with a related argument that trial counsel provided ineffective assistance for not requiring specific performance from the State after it allegedly breached the agreement. The Superior Court denied both arguments, opining:

> [Petitioner's] contention that the State breached this agreement by indirectly arguing at sentencing that [Petitioner] deserved a harsher

> sentence than was agreed upon is without merit. The State's presentation was within the scope of appropriate comment during sentencing proceedings, and further, the Court was in no way obligated to impose the State's recommendation.
>
> In Delaware, agreements between a defendant and the State are governed by contract principles. Included in those general contract principles is the implied covenant of good faith and fair dealing. That covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to a contract from receiving the fruits of the bargain.
>
> In this case, the State did not breach its agreement with [Petitioner]. In fact, the State performed exactly as the terms of the plea agreement stated. The State recommended the agreed upon sentence of twenty-two years. Where a plea agreement exists, the State is entitled, as it did in this case, to support its plea agreement with the presentence investigation and other factors relevant to the reasonableness of the sentence recommendation. The State appropriately presented victim impact statements and brought aggravating factors to the attention of the Court. What the State presented in this case did not even rise to the level of the State's action in *Jones v. State*, where Justice Holland stated, "[a]lthough some of the State's comments at sentencing were speculative and more restraint might have been shown . . . we find that the State's comments failed to rise to the level of subverting the integrity of the plea bargaining process." Trial counsel, therefore, could not have been deficient for failing to seek the specific performance of the plea agreement.
>
> Even if the State did breach its agreement with [Petitioner], there was no prejudice from trial counsel's failure to argue for the specific enforcement of the plea agreement. The State's recommendation does not bind the Superior Court. The Court was free to exercise its discretion in sentencing [Petitioner] within the statutory limits. When accepting the plea agreement, [Petitioner] knew he faced exposure of up to life imprisonment for his offenses.

LaCombe, 2016 WL 6301233, at *7-8. The Delaware Supreme Court considered the argument in Claim Thirteen on the merits, and affirmed the Superior Court's judgment, opining:

> The Superior Court correctly observed that plea agreements are governed by contract principles, including an implied covenant of good faith and fair dealing. This principle "applies 'when the party asserting the implied covenant proves that the other party has acted

> arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.'" To put it simply, a deal is a deal: if the State makes a plea deal with a defendant, it should stick to it and not engage in conduct that is designed to undermine it. Here, the State should have exercised more restraint, but did not cross the line that would trigger reversal.

LaCombe, 2017 WL 2180545, at *6.

Pursuant to *Santobello v. New York*, 404 U.S. 257, 261-63 (1971), plea agreements are analyzed under contract law standards. *See United States v. Nolan-Cooper*, 155 F.3d 221, 236 (3d Cir. 1998). "When a criminal defendant claims that the government breached its plea agreement, the first step is to define what the government agreed to do." *Dunn v. Colleran*, 247 F.3d 450, 458 (3d Cir. 2001). Significantly, *Santobello* does not address implicit repudiations of a plea agreement, and the Constitution does not require a prosecutor to "enthusiastically" make an agreed-upon sentencing recommendation. *United States v. Benchimol*, 471 U.S. 453, 455-56 (1985).

In this case, the plea agreement specifically states that the "State will recommend 22 years Level 5 followed by L4 and L3 probation." (D.I. 18-6 at 23) While the State's "don't be fooled" statement could, when viewed in isolation, support different interpretations, reading the statement in context with the sentencing transcript demonstrates that the Delaware state courts reasonably determined that the "don't be fooled statement" did not constitute a breach of the plea agreement. Petitioner and his brother, Paul, the shooter, were sentenced together. (D.I. 18-2 at 13-26) At the start of the joint sentencing hearing, the Superior Court addressed preliminary matters, and then moved on to sentencing. The State explained that it would present one presentation for both defendants, and then would speak separately about the State's sentencing recommendation. (D.I. 18-2 at 17) The victims' families read statements to the Superior Court. (D.I. 18-2 at 17-20) After the victims' families spoke, the State briefly recited the facts of the case, Paul LaCombe's

(Petitioner's brother) confession and his acceptance of responsibility, and the relative roles of the various parties. (D.I. 18-2 at 20) The State then made the "don't be fooled" statement, but immediately followed that statement by reiterating its sentence recommendation:

> So don't be fooled when you consider what sentence to give [Petitioner] by the fact that he stayed in the car when this robbery and the double homicide occurred. He didn't pull the trigger, but he may as well have, because he set the whole thing into play.
>
> Now, he has pled to a series of charges before this Court, and the State is recommending that he receive 22 years Level V time followed by a lengthy period of probation when he is released.

(D.I. 18-2 at 21) Thereafter, the State addressed Paul LaCombe's sentence, stating: "Paul has pled to a murder first charge, and, as the Court and everyone in the room is aware, there is only one sentence available to Paul, and that is natural life, and that is what we're asking for Paul." (D.I. 18-2 at 21) The Superior Court then asked the attorneys for both defendants to speak. Petitioner's trial counsel stated:

> I would submit to the Court that when this plea offer was structured, that all the issues the State raised before Your Honor today about [Petitioner's] involvement and being the mastermind behind this was incorporated in the plea. He's facing a minimum of 21 years, and the State has capped the recommendation at 22 years.

(D.I. 18-2 at 24)

In this case, because two defendants were being sentenced at the same time, the State needed to explain their relative roles, especially when justifying the sentence it was seeking for Paul LaCombe, the shooter. The "don't be fooled" statement came after the State's straightforward recitation of the facts of the case, just prior to the State's explanation of its reasoning for accepting a guilty but mentally ill plea from Paul LaCombe, the shooter, and recommending a life sentence rather than otherwise seeking the death penalty for Paul. The "don't be fooled" statement

supported the State's sentence recommendation of 22 years "followed by a lengthy period of probation when he is released." Notably, Petitioner's plea agreement did not bind the State's recommendation regarding the length of probation, leaving the State to argue, as it did, that a long probation was needed. In contrast, pursuant to the plea agreement, the State's responsibility during the sentencing hearing was to recommend "capping" the sentence at 22 years of Level V incarceration, which it did. The State did not exceed its agreed-upon maximum sentencing recommendation and did not make inflammatory statements.

Given these circumstances, the Court concludes that the Delaware Supreme Court's holding that the State's "don't be fooled" comment did not breach the plea agreement constituted a reasonable determination of the facts under § 2254(d)(2), and also does not warrant relief under § 2254(d)(1). Accordingly, the Court will deny Claim Thirteen.

C. Claims One Through Four: Ineffective Assistance of Counsel

In Claims One and Two, Petitioner contends that trial counsel provided ineffective assistance by failing to present mitigating evidence during sentencing and by failing to require specific performance from the State when the State breached its plea agreement. In Claims Three and Four, Petitioner argues that appellate counsel provided ineffective assistance by failing to adequately argue the disproportionality of his sentence on direct appeal and by failing to adequately argue the two-prong *Crosby* standard on disproportionate sentencing. The Delaware Supreme Court denied all four Claims as meritless. *See LaCombe*, 2017 WL 2180545, at *4. Therefore, Claims One through Four will not warrant relief unless the Delaware Supreme Court's decision was either contrary to, or an unreasonable application of, clearly established federal law.

The clearly established federal law governing ineffective assistance of counsel claims is the two-pronged standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

See Wiggins v. Smith, 539 U.S. 510 (2003). Under the first *Strickland* prong, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. 466 U.S. at 688. Under the second *Strickland* prong, a petitioner must demonstrate "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." *Id.* A court can choose to address the prejudice prong before the deficient performance prong, and reject an ineffective assistance of counsel claim solely on the ground that the defendant was not prejudiced. *See Strickland*, 466 U.S. at 698.

In order to sustain an ineffective assistance of counsel claim, a petitioner must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal. *See Wells v. Petsock*, 941 F.2d 253, 259-60 (3d Cir. 1991); *Dooley v. Petsock*, 816 F.2d 885, 891-92 (3d Cir. 1987). Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

With respect to the first prong of the § 2254(d)(1) inquiry, a "state court decision is contrary to clearly established federal law if it applies a rule that contradicts the governing law set forth in Supreme Court precedent, or if it confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from that reached by the Supreme Court." *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013). Here, the Delaware Supreme Court decision was not contrary to *Strickland*. It correctly identified the *Strickland* standard

applicable to Claims One through Four.[2] *See Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case [does] not fit comfortably within § 2254(d)(1)'s 'contrary to' clause."). It also reasonably applied the *Strickland* standard to the facts of Petitioner's case.

When performing the second prong of the § 2254(d) inquiry, the Court must review the Delaware Supreme Court's decision with respect to Petitioner's ineffective assistance of counsel Claims through a "doubly deferential" lens.[3] *See Richter*, 562 U.S. at 105. The relevant question when analyzing counsel's performance under the "doubly deferential lens" "is not whether counsel's actions were reasonable, [but rather], whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* In turn, when assessing prejudice under *Strickland*, the question is "whether it is reasonably likely the result would have been different" but for counsel's performance, and the "likelihood of a different result must be substantial, not just conceivable." *Id.* Finally, when viewing a state court's determination that a *Strickland* claim lacks merit through the

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[2]In the context of guilty pleas, courts also refer to *Hill v. Lockhart*, 474 U.S. 52 (1985), as providing the relevant inquiry for the prejudice prong of *Strickland*. However, since Claims One through Four allege ineffective assistance with respect to his sentencing, and not his guilty plea, *Strickland* is the proper standard.

[3]As explained by the *Richter* Court,

> [t]he standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d).

562 U.S. at 105 (internal citations omitted).

lens of § 2254(d), federal habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 101.

1. Claim One: Trial counsel's failure to submit mitigation report

When denying Claim One, the Delaware Supreme Court reviewed the state court record and concluded that trial counsel's decision to withhold the mitigation report was objectively reasonable. Specifically, the Delaware Supreme Court opined:

> Trial Counsel engaged in a thorough investigation of potential mitigating evidence and made a strategic decision not to use it because it might open the door to harmful evidence. [Petitioner] has not overcome the strong presumption that this decision was a sound strategy designed to maximize [Petitioner's] opportunity to secure a favorable sentence.

Lacombe, 2017 WL 2180545, at *5.

The record supports the Delaware Supreme Court's conclusion. Although the practice of retaining a mitigation specialist "is more common in capital cases," trial counsel fulfilled his obligation to investigate by retaining "the services of a mitigation specialist in order to uncover evidence of potential mitigating value" for Petitioner's case. *LaCombe*, 2016 WL 6301233, at *6. In his Rule 61 affidavit, trial counsel explains that he made a strategic decision not to introduce the mitigation report, because it contained a disclosure from Petitioner's mother that Petitioner sexually abused his younger brother (co-defendant Paul LaCombe) throughout their childhood. Trial counsel believed this information would bolster the State's argument and potentially hurt Petitioner's case. Trial counsel's decision not to enter the mitigation report was reasonably objective at the time it was made, especially when viewed in connection with the Superior Court's already-existing perception of Petitioner's role in the incident as "being fairly equal in different respects to that of [Petitioner's] brother." (D.I. 18-6 at 61)

Significantly, the record reveals that trial counsel presented other types of mitigation evidence on behalf of Petitioner, including letters of support from friends and family and a timeline of Petitioner's life created by the mitigation specialist. Trial counsel also assisted Petitioner in preparing a statement to the Court, in which Petitioner expressed remorse. Given this record, the Court concludes that reasonable jurists could agree that trial counsel did not perform deficiently by not submitting the mitigation report. *See Richter*, 562 U.S. at 105 ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.").

Petitioner has also failed to establish prejudice. As the Delaware Supreme Court noted, "the Superior Court's comments after reviewing the mitigation report in this matter suggest that omitting the report did not result in prejudice because it would not have impacted [Petitioner's] sentence." *LaCombe*, 2017 WL 2180545, at *5. In fact, even after reviewing the mitigation report during the Rule 61 proceeding, the Superior Court held that Petitioner's sentence "remain[s] appropriate, and no degree of mitigating evidence, as represented by [Petitioner's] current counsel, would have changed the outcome of [Petitioner's] sentence." *LaCombe*, 2016 WL 6301233, at *7. Given these circumstances, the Court concludes that the Delaware Supreme Court's rejection of Claim One was not unreasonable under the doubly deferential lens of AEDPA and *Strickland.*

2. Claim Two: Trial counsel's failure to seek specific performance of plea agreement

In Claim Two, Petitioner contends that trial counsel was ineffective for failing to demand specific performance of his plea agreement. This argument is premised on Petitioner's belief that the State breached the plea agreement during the sentencing hearing when it made the "don't be fooled" statement, discussed at length above in the Court's analysis of Claim Thirteen. *See supra* at

Section IV.B. To briefly reiterate, the Court has concluded that the Delaware Supreme Court reasonably determined the facts and reasonably applied clearly established federal law in holding that the State did not breach the plea agreement by making the "don't be fooled" statement. If there was no breach, there was nothing more for trial counsel to seek in terms of specific performance. Therefore, Petitioner's failure to seek specific performance in a non-breach situation did not fall below an objective standard of reasonableness.

Moreover, Petitioner has not established that his sentence would have been different if the State refrained from making the "don't be fooled" statement. The Superior Court was not obligated to follow the State's sentencing recommendation and had discretion to sentence Petitioner to life in prison, which it did. Given these circumstances, the Delaware Supreme Court reasonably applied *Strickland* in holding that Petitioner was not prejudiced by trial counsel's failure to seek specific performance of the plea agreement.

3. Appellate counsel's alleged ineffective assistance

In Claims Three and Four, Petitioner contends that appellate counsel provided ineffective assistance by failing to effectively argue that the disproportionality of his life sentence violated his rights under the Delaware and United States Constitution. More specifically, citing the two-pronged test established in *Crosby v. State*, 824 A.2d 894, 908 (Del. 2003), Petitioner contends that appellate counsel should have provided more cases to demonstrate the disproportionality of his sentence.[4] The Delaware Supreme Court rejected Petitioner's complaints about appellate counsel, holding that

[4]In *Crosby v. State*, the Delaware Supreme Court discussed the requirements of the Eighth Amendment's prohibition against cruel and unusual punishment, and enumerated a two-pronged disproportionate sentence test. 824 A.2d 894, 908 (Del. 2003). Pursuant to the *Crosby* test, a court must "undertake a threshold comparison of the crime committed and the sentence imposed. If such a comparison leads to an inference of gross disproportionality, then [the reviewing court] must compare [defendant]'s sentence with other similar cases to determine whether the trial court acted out of step with sentencing norms." *Id.*

appellate counsel adequately represented Petitioner despite the fact that he failed to provide a survey of comparable cases to demonstrate the disproportionality of his sentence under the second prong of the *Crosby* test. The Delaware Supreme Court noted that the comparable case analysis relates to the second step of the *Crosby* analysis, which it expressly did not reach on direct appeal:

> The first part of the disproportionality test requires the Court to compare the crime [Petitioner] committed with the sentence imposed. [Petitioner] pled guilty to murder – the most heinous violent crime. Although [Petitioner] did not pull the trigger, he gave the gun to his mentally ill brother, who was attempting to commit armed robbery. Two people were killed in an incident that Lacombe planned and set in motion. There is nothing extreme, or grossly disproportionate, about sentencing a murderer to life in prison. Because the sentence does not raise an inference of gross disproportionality, the Court does not undertake the second step of the *Crosby* analysis, where the fact that [Petitioner] received the same sentence as his brother would be considered.

LaCombe, 2017 WL 2180545, at *5. The Delaware Supreme Court further found that Petitioner failed to demonstrate prejudice, given that Court's "continuing view that there was nothing grossly disproportionate about sentencing [Petitioner] to life in prison for his role in the shooting deaths of two people." *Id.*

As discussed at length in the Court's analysis of Claim Twelve, the Court has concluded that the Delaware Supreme Court reasonably applied clearly established federal law in holding that Petitioner's life sentence does not violate the Eighth Amendment. *See supra* Section IV.B. Consequently, the Delaware Supreme Court reasonably applied *Strickland* in holding that appellate counsel did not provide ineffective assistance by failing to present a meritless Eighth Amendment argument. Accordingly, the Court will deny Claims Three and Four for failing to satisfy § 2254(d).

C. Claims Five through Eleven: Procedurally Barred

Petitioner presented Claims Five through Eleven in his second Rule 61 motion. (D.I. 18-27 at 14-42) The Superior Court denied these Claims as time-barred under Rule 61(i)(1), successive under Rule 61(i)(2), and procedurally defaulted under Rule 61(i)(3). The Delaware Supreme Court affirmed that decision.

By applying the procedural bars of Rule 61(i)(1),(2), and (3), the Delaware Supreme Court articulated a "plain statement" under *Harris v. Reed*, 489 U.S. 255, 263-64 (1984), that its decision rested on state law grounds. This Court has consistently held that Rule 61(i)(1) and (3) are independent and adequate state procedural rules effectuating a procedural default. *See Trice v. Pierce*, 2016 WL 2771123, at *4 (D. Del. May 13, 2016). Therefore, the Court cannot review the merits of Claims Five through Eleven absent a showing of cause for the default, and prejudice resulting therefrom, or upon a showing that a miscarriage of justice will occur if the claim is not reviewed.

Petitioner attempts to establish cause for his default by claiming appellate and postconviction counsel were ineffective for failing to raise the instant seven Claims on direct appeal or in his first Rule 61 proceeding. (D.I. 11 at 30-34) To the extent this allegation is an attempt to demonstrate cause for his default under *Martinez v. Ryan*, 566 U.S. 1, 16-17 (2012), the attempt is unavailing. In *Martinez*, the Supreme Court held that inadequate assistance or the absence of counsel during an initial-review state collateral proceeding may (under certain circumstances) establish cause for a petitioner's procedural default of a claim of ineffective assistance of trial counsel. *Id.* at 12, 16-17. The Third Circuit has explained the application of *Martinez* in habeas cases:

> *Martinez* recognizes a narrow exception to the doctrine of procedural default: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." This exception is available to a petitioner who can show that: 1) his procedurally defaulted

> ineffective assistance of trial counsel claim has "some merit," and that 2) his state-post conviction counsel was "ineffective under the standards of *Strickland v. Washington*."

Workman v. Sup't Albion SCI, 915 F.3d 928, 937 (3d Cir. 2019). "To demonstrate that his claim has some merit, a petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* at 938 (quoting *Miller-El*, 537 U.S. at 336). To demonstrate that post-conviction counsel's ineffectiveness caused the procedural default, a petitioner must show that post-conviction counsel's performance was deficient under the first prong of the *Strickland* standard, *i.e.*, "that his state post-conviction counsel's performance fell below an objective standard of reasonableness." *Workman*, 915 F.3d at 941.

Since *Martinez* can only apply to excuse the default of claims alleging ineffective assistance of trial counsel, Petitioner's allegation of ineffective assistance of postconviction counsel does not excuse the procedural default of the freestanding claims for relief asserted in Claims Five through Eleven. Petitioner's attempt to establish cause by blaming appellate counsel's failure to raise the freestanding claims on direct appeal also cannot establish cause, because those ineffective assistance of appellate counsel allegations are themselves procedurally defaulted. *See Murray*, 477 U.S. at 488-89 (finding claim of ineffective assistance of counsel must be presented to state courts as independent claim before it may be used to establish cause for procedural default); *Kellum v. Pierce*, 24 F. Supp. 3d 390, 405 (D. Del. 2014). Finally, the limited *Martinez* rule does not apply to excuse any default that may have occurred in his second Rule 61 proceeding, because *Martinez* only excuses defaults occurring in the initial collateral proceeding.

Notably, Claim Eight presents two arguments: the freestanding prosecutorial misconduct argument that the Court just determined to be procedurally defaulted, and a related assertion that

trial counsel was ineffective for failing to ask for an opportunity to review his co-defendants' statements under DRE 807. To the extent Petitioner contends that postconviction counsel was ineffective for failing to assert the ineffective assistance of trial counsel argument contained in Claim Eight in his first Rule 61 motion as a method for establishing cause under *Martinez*, the attempt is unavailing. Petitioner has failed to demonstrate that the instant underlying ineffective assistance of trial counsel claim is substantial. A criminal defendant's valid guilty plea waives all non-jurisdictional issues and claims "relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Trice*, 2016 WL 2771123, at *5. Consequently, by entering a voluntary guilty plea, a petitioner waives claims of ineffective assistance of counsel involving counsel's performance prior to the entry of the guilty plea that do not challenge the voluntariness of the plea. *See Cooper v. Carroll*, 2007 WL 4168209, at *6 (D. Del. Nov. 7, 2007).

In this case, the plea colloquy, plea agreement and truth-in-sentencing guilty plea form reflect that Petitioner freely, knowingly, voluntarily, and intelligently pled guilty, and that he specifically stated he had consulted with trial counsel and understood the rights he was giving up by pleading guilty. (D.I. 18-6 at 23-28) By pleading guilty, Petitioner voluntarily relinquished his right to challenge the nature, sufficiency, and veracity of the State's evidence, including his co-defendants' statements. The instant underlying ineffective assistance of trial counsel claim also fails because Petitioner affirmed on his truth-in-sentencing guilty plea form and during the plea colloquy that he was satisfied with his attorney's representation and advice and that his attorney did not force him to enter the plea. (D.I. 18-6 at 24, 37-38) Petitioner's unsupported allegations in this Court fail to provide compelling evidence as to why the statements he made in the plea agreement and the truth-in-sentencing guilty plea form, and during the plea colloquy, should not be presumptively accepted as true. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a

strong presumption of verity [creating a] formidable barrier in any subsequent collateral proceedings.") For these reasons, Petitioner has failed to establish cause for the ineffective assistance of trial counsel allegation.

Petitioner does not provide any other cause for his default of Claims Five through Eleven. In the absence of cause, the Court will not address the issue of prejudice. Additionally, Petitioner has not satisfied the miscarriage of justice exception to the procedural default doctrine because he has not provided new reliable evidence of his actual innocence. *See infra* Section IV.D. Accordingly, the Court will deny Claims Five, Six, Seven, Eight, Nine, Ten, and Eleven as procedurally barred from habeas review.

D. Claim Fourteen: Actual Innocence

In his final Claim, Petitioner contends he is actually innocent of second degree murder, because the "murder was not committed in the furtherance of the commission of robbery. [Rather, the] murder of the victims was committed not while co-defendant attempted to rob victims, only when co-defendant attempted to escape from vehicle and realized doors were locked." (D.I. 11 at 67-68) Although, in "certain exceptional cases involving a compelling claim of actual innocence," a prisoner may assert actual innocence as a gateway for obtaining habeas review of defaulted claims,[5] whether a freestanding claim of actual innocence is cognizable on federal habeas review remains an open question in Supreme Court jurisprudence. *See Reeves v. Fayette SCI*, 897 F.3d 154, 160 n.4 (3d Cir. 2018) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013)). Even for gateway claims, "[a]ctual innocence means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. Assuming, arguendo, that an assertion of actual innocence could constitute a freestanding claim, a petitioner's burden on any such claim "would necessarily be extraordinarily high" and "more

[5]*See House v. Bell*, 547 U.S. 518, 521, 536-37 (2006).

demanding" than that applied to gateway actual-innocence claims. *Herrera v. Collins*, 506 U.S. 390, 416 (1993); *see also Reeves*, 897 F.3d at 160 n.4 (describing hypothetical freestanding actual-innocence standard as "more demanding" than that applied to gateway actual-innocence claims). To put the burden for establishing a freestanding claim of actual innocence in perspective, a gateway actual innocence claim that is asserted in an effort to overcome the statute of limitations bar for habeas cases will only succeed if it is based on "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence [ ] that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

Here, Petitioner has not presented any facts to establish his actual innocence; nor has he presented any colorable evidence of his actual innocence. Therefore, Petitioner's instant assertion of innocence does not satisfy the *McQuiggan/Schlup* standard for actual innocence.

V. CERTIFICATE OF APPEALABILITY

A district court issuing a final order denying a § 2254 petition must also decide whether to issue a certificate of appealability. *See* 3d Cir. L.A.R. 22.2 (2011); 28 U.S.C. § 2253(c)(2). A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court has concluded that the instant Petition does not warrant relief. Reasonable jurists would not find this conclusion to be debatable. Accordingly, the Court will not issue a certificate of appealability.

VI. CONCLUSION

For the reasons discussed, the Court will deny the Petition without holding an evidentiary hearing. An appropriate Order will be entered.