ALD-090

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-3133**

KURTAVIUS JERMON SMITH, Appellant

VS.

SUPERINTENDENT GREENE SCI, ET AL

(W.D. Pa. Civ. No. 2:21-cv-01227)

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

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect; and

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253; Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has failed to show that jurists of reason would debate the District Court's conclusions that his claims of PCRA court error and PCRA counsel ineffectiveness were not cognizable, see Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004); see also 28 U.S.C. § 2254(i), that his ineffective assistance of trial counsel, sufficiency of the evidence, and trial court error claims were meritless, see 28 U.S.C. § 2254(d)(1), that the rest of his claims were procedurally defaulted, see Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir. 2012), and finally, that he failed to overcome the defaults. See Levya v. Williams, 504 F.3d 357, 366 (3d Cir. 2007). Accordingly, we need not consider whether the notice of appeal was timely filed. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 578, 584 (1999) (noting no mandatory

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sequencing of jurisdictional issues); see also Gonzalez v. Thaler, 565 U.S. 134, 142 (2012) (explaining that the certificate of appealability requirement is jurisdictional).

By the Court,

s/David J. Porter
Circuit Judge

Dated: March 4, 2025
PDB/cc: Kurtavius Jermon Smith

A True Copy:

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

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RE: Kurtavius Smith v. Superintendent Greene SCI, et al
Case Number: 24-3133
District Court Case Number: 2:21-cv-01227

ENTRY OF JUDGMENT

Today, **March 04, 2025,** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

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

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

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

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

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. A party seeking both forms of rehearing must file the petitions as a single document. Fed. R. App. P. 40(a).

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

For the Court,

s/ Patricia S. Dodszuweit
Clerk

s/ pdb Case Manager:

cc:
Brandy S. Lonchena

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

KURTAVIUS JERMON SMITH,	)	
	)	**Civil Action No. 21-1227**
Petitioner,	)	
	)	
v.	)	**District Judge Arthur J. Schwab**
	)	**Magistrate Judge Kezia O.L.**
SCI GREENE, THE DISTRICT ATTORNEY OF THE COUNTY OF FAYETTE, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,	)	**Taylor**
	)	
Respondents.	)	

ORDER

On September 13, 2021, Petitioner Kurtavius Jermon Smith ("Petitioner") filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254 (Doc. 1).

This matter was referred to U.S. Magistrate Judge Lisa Pupo Lenihan, and upon her retirement, to Chief U.S. Magistrate Judge Richard A. Lanzillo, and then to U.S. Magistrate Judge Kezia O.L. Taylor, for proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636, and Local Civil Rule 72.

On May 23, 2024, U.S. Magistrate Judge Taylor filed a Report and Recommendation, recommending that Petitioner's Petition for Writ of Habeas Corpus be denied and that a certificate of appealability be denied. (Doc. 23).

In the Report and Recommendation, Petitioner was notified that, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.D.2, he had fourteen (14) days from the date of service of a copy of the Report and Recommendation to file written objections to the Report and Recommendation. (*Id.*).

On June 10, 2024, Petitioner filed a Motion for an Extension of Time to file his objections to the Report and Recommendation, specifically an additional 60 days. (Doc. 24).

On June 12, 2024, the Court granted in part and denied in part Defendant's Motion for an Extension of Time to file his objections to the Report and Recommendation. (Doc. 25).

In particular, the Court granted Petitioner's Motion to the extent Petitioner sought an extension of time to file objections to the Report and Recommendation, but denied the Motion to the extent Petitioner requested a 60 day extension to file said objections. (*Id.*). The Court then ordered Petitioner to file any and all objections to the Report and Recommendation later than July 10, 2024. (*Id.*).

Petitioner filed Objections to the Report and Recommendation. (Doc. 26). While Petitioner's Objections are postmarked July 11, 2024, Petitioner's Objections are dated July 5, 2024, as is the Certificate of Service attached to the Objections. (*Id.*, Doc. 26-1). Accordingly, the Court deems Petitioner's Objections timely filed.

After *de novo* review of the Record in this matter, U.S. Magistrate Judge Taylor's thorough Report and Recommendation (Doc. 23), and Petitioner's Objections to the Report and Recommendation (Doc. 26), which the Court finds are meritless, the Court ORDERS that Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is DENIED.

The Court further ORDERS that a certificate of appealability is DENIED.

The Court further ORDERS that U.S. Magistrate Judge Taylor's May 23, 2024 Report and Recommendation (Doc. 23) is adopted as the Opinion of the Court.

The Clerk of Court shall mark this case CLOSED.

SO ORDERED, this 30th day of July, 2024,

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: U.S. Magistrate Judge Kezia O.L. Taylor

Kurtavius Jermon Smith
LL8060
SCI GREENE
169 PROGRESS DRIVE
WAYNESBURG, PA 15370

Counsel for Respondents
(Via CM/ECF electronic mail)

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

KURTAVIUS JERMON SMITH, *Petitioner,* v. SCI GREENE, THE DISTRICT ATTORNEY OF THE COUNTY OF FAYETTE, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, *Respondents.*	Case No. 2:21-cv-01227 District Judge Arthur J. Schwab Magistrate Judge Kezia O. L. Taylor

REPORT AND RECOMMENDATION

I. RECOMMENDATION

For the reasons set forth herein, it is respectfully recommended that the Petition for Writ of Habeas Corpus, ECF No. 1, be denied and further recommended that a certificate of appealability also be denied.

II. REPORT

Presently before the Court is a Petition for Writ of Habeas Corpus ("Petition") filed by Kurtavius Jermon Smith ("Petitioner") pursuant to 28 U.S.C. § 2254. ECF No. 1. Petitioner challenges his judgment of sentence entered in the Court of Common Pleas of Fayette County at criminal docket number CP-26-CR-0001172-2012.

A. Factual Background and Procedural History

The trial court set forth the relevant factual background as follows:

"APPENDIX C"

The incident giving rise to this case occurred during the early morning hours of May 13, 2012 in Pershing Court located in Uniontown, Fayette County, Pennsylvania. At approximately 4:45 a.m., Officer Jamie Holland of the Uniontown City Police Department was dispatched to the housing complex for a report of a male lying on the ground with possible gunshot wounds. Officer Delbert DeWitt, who was also dispatched to the scene, had noticed a white Jeep SUV leaving Pershing Court when he was entering it. The vehicle's headlights were off.

When Officer Holland arrived first, he observed a non-responsive male with a single gunshot wound to the head. The male was identified as Marlin Crawford (street name "Zeus") and was pronounced dead at the scene. The cause of death was a gunshot wound to the head, which went through to his skull and brain. Two firearms, two cards with envelopes, and a red rose were found on Crawford. The firearms were a .357 revolver with six live rounds in it located in Crawford's pocket and a fully loaded 9mm Taurus semiautomatic pistol that was partially tucked underneath his right hip.

After receiving further information on the white Jeep's whereabouts, officers traveled to Millview Street in Uniontown. The Jeep was parked in an unnamed alley, and the hood was warm. An unidentified witness told the officers that he observed two males exit the Jeep and enter a residence at 20 Millview Street. The officers approached the residence and demanded that all occupants exit with their hands up. It took between five and ten minutes for the first occupant to exit the residence and an additional twenty minutes for [Petitioner] and the final remaining occupant to exit.

[Petitioner] was interviewed by Captain David Rutter, who read [Petitioner] his *Miranda* warnings. [Petitioner] acknowledged his rights and waived them. When he was asked about the shooting, [Petitioner] indicated that he had no knowledge of the shooting, the victim, or the white Jeep SUV in question. He was then escorted into a holding cell while other interviews were being conducted. While in the cell, [Petitioner] asked to speak with Captain Rutter alone. After several exchanges with Captain Rutter while in the holding cell, [Petitioner] was escorted back into the interview room approximately five hours after his initial interview.

[Petitioner] was again read his *Miranda* warnings, which he again acknowledged and waived. [Petitioner] told Captain Rutter that his girlfriend at the time, Kimberly Johnson, had been involved with Crawford, and he went to Crawford's home in Pershing Court to confront him about the relationship the night before the shooting. [Petitioner] said he was beating and kicking the front door, and that he and Crawford exchanged gunfire. [Petitioner] claimed [that he] fled the scene.

The next evening, [Petitioner] said he was in Pershing Court and saw Crawford on the street. He indicated that he walked over to Crawford in order to confront him again. This time it had to do with negative remarks Crawford allegedly made about [Petitioner]. [Petitioner] claimed that another African-American male got in between them and punched [Petitioner] in the face. When [Petitioner] jumped to his feet, he claimed that Crawford fired shots at him, and he saw a gun on the ground, picked it up, and fired at Crawford as [Petitioner] ran away. [Petitioner] said that he did not know if he had hit Crawford because [Petitioner] was running for his life. He claimed to have thrown the gun in a very specific area, but the officers were unable to locate it.

Meanwhile, Captain Rutter was aware of text messages that [Petitioner] sent to Ms. Johnson, which included, ". . . ima kill him thats my [fucking] word," and he mentioned to [Petitioner] these text messages would be used against him. [Petitioner] remained in the holding cell where he was eventually charged in connection with the shooting.

On January 3, 2013, [Petitioner] and his counsel volunteered another statement, and [Petitioner] was interviewed again by Detective Donald Gmitter at the Fayette County District Attorney's Office. He was read his *Miranda* warnings, which he acknowledged and waived. [Petitioner] said that on the evening in question a person named Paige Fairfax was driving the rented Jeep SUV. He had gone to a club in Morgantown, West Virginia, and then returned to [Jason] Miller's home on Millview Street. Another individual named Deaundrey Fielder (street name "K-Dub") was with them and carried a 9mm semiautomatic firearm. [Petitioner] and Fielder were dropped off at the entrance of Pershing Court in order to make a drug purchase. It was there that they had encountered Crawford with some unidentified African-American males. [Petitioner] and Crawford exchanged words and a physical altercation between all of the men occurred. [Petitioner] saw the gun fall out of one of the men's waist bands and took it. While he was leaving, he claimed to have heard shots but did not know who was shooting. He observed Fielder running towards Crawford but [Petitioner] admitted to firing some shots as he ran away.

Further, according to the latest statement: Fairfax picked up [Petitioner] and Fielder, and [Petitioner] claimed to have thrown the gun in an alley on Millview Street before purchasing drugs elsewhere and returning to Miller's home. Fielder then retrieved the gun and put it, the drugs, and a scale in the floorboard at Miller's house.

[Petitioner] was ultimately charged with Criminal Homicide and Firearms not to be Carried without a License. On August 10, 2012, following a Preliminary Hearing before Magisterial District Judge Michael Metros, all charges were bound over to the Court of Common Pleas. Following his waiver of formal arraignment,

> [Petitioner] filed an Omnibus Pretrial Motion, which was denied by the Honorable Gerald R. Solomon, Senior Judge on March 28, 2013.
>
> [Petitioner's] trial was held . . . on February 4-7, 2014. The jury convicted him of Third Degree Murder and acquitted him of the firearms charge. On February 25, 2014, he was sentenced to eighteen (18) to forty (40) years of incarceration. A timely Post-Sentence Motion followed, and [Petitioner's] trial counsel withdrew his representation. The Fayette County Public Defender's Office was appointed to represent [Petitioner] in all further proceedings.

ECF No. 17-7 at 2-6.

The trial court denied Petitioner's post-sentence motion on July 7, 2014. ECF No. 17-7. Petitioner appealed, and the Pennsylvania Superior Court affirmed his judgment of sentence on March 9, 2015. *See Commonwealth v. Smith*, 2015 WL 7458862 (Pa. Super. Mar. 9, 2015). Petitioner then filed a petition for allowance of appeal, and the Pennsylvania Supreme Court denied it on July 15, 2015. *See Commonwealth v. Smith*, 118 A.3d 1108 (Pa. 2015).

Petitioner filed a petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA") on September 11, 2015. ECF No. 17-8. Counsel was appointed to assist him in seeking post-conviction relief, and an amended PCRA petition was filed by counsel on Petitioner's behalf on June 11, 2019. ECF No. 17-9. On July 3, 2019, the PCRA court entered notice of its intention to dismiss the petition without a hearing, ECF No. 17-10, and the petition was subsequently dismissed without a hearing on August 6, 2019, ECF No. 17-11. Petitioner appealed, and the Pennsylvania Superior Court affirmed the dismissal on May 27, 2020. *See Commonwealth v. Smith*, 2020 WL 2764397 (Pa. Super. May 27, 2020). His petition for allowance of appeal was denied by the Pennsylvania Supreme Court on December 16, 2020. *See Commonwealth v. Smith*, 242 A.3d 1249 (Pa. 2020).

Petitioner filed his Petition in this case on September 2, 2021. ECF No. 1. Respondents filed an Answer to the Petition on January 24, 2022. ECF No. 17. The Petition, which is ripe for review, raises the following six claims for relief:

1. The PCRA court erred in dismissing Petitioner's amended PCRA petition without a hearing.

2. Trial counsel was ineffective for failing to have the gunshot residue kit obtain from Crawford analyzed prior to trial, failing to argue self-defense in his closing, and failing to object to testimony referencing Petitioner's pretrial incarceration status.

3. PCRA counsel was ineffective for failing to raise certain claims Petitioner requested that counsel raise in the amended PCRA petition.

4. The evidence was insufficient to sustain the jury's verdict.

5. The trial court erred in denying Petitioner's omnibus pre-trial motion.

6. The trial court erred by allowing police to testify about statements made by Christopher Teets and Ms. Johnson.

ECF No. 1.

B. Federal Habeas Standard

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, April 24, 1996 ("AEDPA"), habeas relief is only available for "a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

> (1) 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). For purposes of § 2254(d), a claim has been "adjudicated on the merits in State court proceedings" when the state court made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011); *Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2014).

The majority of federal habeas claims need only be analyzed under § 2254(d)(1), which applies to questions of law and mixed questions of law and fact. In applying § 2254(d)(1), the federal habeas court's first task is to ascertain what law falls within the scope of the "clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1). The phrase "clearly established," as the term is used in § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of the [United States Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 363, 412 (2000). Thus, "clearly established Federal law" is restricted to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

Once the "clearly established Federal law, as determined by the Supreme Court of the United States" is ascertained, the federal habeas court must determine whether the state court's adjudication of the claim at issue was "contrary to" that law. *Williams*, 529 U.S. at 404-05 (explaining that the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1) have independent meaning). A state-court adjudication is "contrary to" clearly established Federal law

"if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 405, 406. A "run-of-the-mill" state-court adjudication applying the correct legal rule from Supreme Court decisions to the facts of a particular case will not be "contrary to" Supreme Court precedent. *Id.* at 406. Thus, the issue in most federal habeas cases is whether the adjudication by the state court survives under § 2254(d)(1)'s "unreasonable application" clause.

A state court decision is an "unreasonable application" of clearly established Federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. To satisfy his burden under this provision of AEDPA's standard of review, the petitioner must do more than convince the federal habeas court that the state court's decision was incorrect. He must show that it "was objectively unreasonable." *Id.* at 409. This means that the petitioner must prove that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

As the Supreme Court has noted:

> .... It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer*, *supra*, at 75, 123 S. Ct. 1166.
>
> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is

> no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Richter, 562 U.S. at 102.

If a petitioner is able to satisfy the requirements of § 2254(d)(1), then the state court decision is not entitled to deference under AEDPA and the federal habeas court proceeds to a *de novo* evaluation of the constitutional claim on the merits. *See Tucker v. Superintendent Graterford SCI*, 677 F. App'x 768, 776 (3d Cir. 2017) (citing *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When . . . the requirement set forth in § 2254(d)(1) is satisfied[,] [a] federal court must then resolve the claim without the deference AEDPA otherwise requires."). The Court of Appeals for the Third Circuit has explained that,

> [w]hile a determination that a state court's analysis is contrary to or an unreasonable application of clearly established federal law is necessary to grant habeas relief, it is not alone sufficient. That is because, despite applying an improper analysis, the state court still may have reached the correct result, and a federal court can only grant the Great Writ if it is "firmly convinced that a federal constitutional right has been violated," *Williams*, 529 U.S. at 389, 120 S.Ct. 1495. *See also Horn v. Banks*, 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review . . . none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"). Thus, when a federal court reviewing a habeas petition concludes that the state court analyzed the petitioner's claim in a manner that contravenes clearly established federal law, it then must proceed to review the merits of the claim de novo to evaluate if a constitutional violation occurred. *See Lafler v. Cooper*, 566 U.S. 156, 174, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

Vickers v. Superintendent Graterford SCI, 858 F.3d 841, 848-89 (3d Cir. 2017) (internal footnote omitted).

The standard of review set forth at § 2254(d)(2) applies when a petitioner "challenges the factual basis for" the state court's "decision rejecting a claim[.]" *Burt v. Titlow*, 571 U.S. 12, 18 (2013). "[A] state court decision is based on an 'unreasonable determination of the facts' if the

state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding,' which requires review of whether there was sufficient evidence to support the state court's factual findings." *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 281 (3d Cir. 2016) (quoting § 2254(d)(2) and citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). "'[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Titlow*, 571 U.S. at 18 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)); *see Rice v. Collins*, 546 U.S. 333, 342 (2006) (reversing court of appeals' decision because "[t]he panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."). Thus, "if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede'" the state court's adjudication. *Woods*, 558 U.S. at 301 (quoting *Collins*, 546 U.S. at 341-42).

If the state court did not adjudicate a claim on the merits, the federal habeas court must determine whether that was because the petitioner procedurally defaulted it. *See, e.g., Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002). If the claim is not defaulted, or if the petitioner has established grounds to excuse his default, the standard of review at § 2254(d) does not apply and the habeas court reviews the claim *de novo*. *See, e.g., Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). However, in all cases and regardless of whether the standard of review at § 2254(d) applies, the state court's factual determinations are presumed to be correct under § 2254(e)(1) unless the petitioner rebuts that presumption by clear and convincing evidence. *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010); *Nara v. Frank*, 488 F.3d 187, 201 (3d Cir. 2007) ("the § 2254(e)(1)

presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d).") (citing *Appel*, 250 F.3d at 210).

C. Discussion

1. Claim 1: PCRA court error

Petitioner claims that the PCRA court erred by dismissing his amended PCRA petition without a hearing. This claim is simply not cognizable in federal habeas proceedings. Indeed, in conducting habeas review for a state prisoner, this Court is limited to deciding whether the prisoner's conviction violated the Constitution of the United States. *See* 28 U.S.C. § 2254(a). As the Third Circuit explained in *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998):

> The federal courts are authorized to provide collateral relief where a petitioner is in state custody or under a federal sentence imposed in violation of the Constitution or the laws or treaties of the United States. 28 U.S.C. §§ 2254, 2255. Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation. We have often noted the general proposition that habeas proceedings are "hybrid actions"; they are "independent civil dispositions of completed criminal proceedings." Federal habeas power is "limited . . . to a determination of whether there has been an improper detention by virtue of the state court judgment."

Id. at 954-55 (internal citations omitted); *see also Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004). Habeas proceedings are not the appropriate forum for Petitioner to pursue his claim of error at the PCRA proceeding, and, as such, this claim should be denied.

2. Claim 2: Ineffective assistance of counsel

Petitioner claims that his trial counsel rendered constitutionally ineffective assistance for failing to (1) have the gunshot residue kit obtained from Crawford analyzed prior to trial, (2) argue

self-defense in his closing argument, and (3) object to testimony referencing Petitioner's pretrial incarceration status.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court recognized that a defendant's Sixth Amendment right to the assistance of counsel for his defense entails the right to be represented by an attorney who meets at least a minimal standard of competence.[1] *Id.* at 685-87. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" *Burt v. Titlow*, 571 U.S. 12, 24 (2013).

Under *Strickland*, it is a petitioner's burden to establish that his "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. The Supreme Court has emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" *Titlow*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690); *Richter*, 562 U.S. at 104 ("A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.") (quoting *Strickland*, 466 U.S. at 689). Counsel cannot be deemed ineffective for failing to raise a meritless claim. *See, e.g., Preston v. Sup't Graterford SCI*, 902 F.3d 365, 379 (3d Cir. 2018).

[1] Since the Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain "minimum safeguards necessary to make that appeal 'adequate and effective,'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)), including the right to the effective assistance of counsel, *id.* at 396, the ineffective assistance of counsel standard of *Strickland* applies to a claim that direct appeal counsel was ineffective. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *United States v. Cross*, 308 F.3d 308, 315 (3d Cir. 2002).

Strickland also requires that a petitioner demonstrate that he was prejudiced by counsel's alleged deficient performance. This places the burden on him to establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The Supreme Court in *Strickland* noted that although it had discussed the performance component of an ineffectiveness claim before the prejudice component, there is no reason for an analysis of an ineffectiveness claim to proceed in that order. 466 U.S. at 697. If it is more efficient to dispose of an ineffectiveness claim because the petitioner failed to meet his burden of showing prejudice, a court need address only that prong of *Strickland*. *Id.*

Pennsylvania courts typically articulate *Strickland*'s standard in three parts, while federal courts set it out in two. The legal evaluation is the same, and the differences merely reflect a stylistic choice on the part of state courts. *See, e.g.*, *Commonwealth. v. Mitchell*, 105 A.3d 1257, 1266 (Pa. 2014) ("[T]his Court has divided [*Strickland*'s] performance component into sub-parts dealing with arguable merit and reasonable strategy. Appellant must, therefore, show that: the underlying legal claim has arguable merit; counsel had no reasonable basis for his act or omission; and Appellant suffered prejudice as a result."); *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117-18 (Pa. 2012) ("In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland*[.]").

Petitioner raised all three of his ineffective assistance of counsel subclaims before the PCRA court and on appeal to the Superior Court.

a. <u>Gunshot residue kit</u>

With respect to his first subclaim, Petitioner states that counsel was ineffective by not having the gunshot residue kit, which was obtained from the victim, analyzed prior to trial. As background, Officer Holland and Officer Painter both testified at trial that a nickel-plated, 9-millimeter, semi-automatic pistol was found under the victim, and Officer Holland indicated that the gun held 12 bullets when it was recovered by the officers, which included 11 bullets in the magazine and a single, live round in the pistol's chamber.[2] The gunshot residue kit was subsequently analyzed after trial by RJ Lee Group, which found that the victim's right hand contained two component particles of gunshot residue. According to Petitioner, these results demonstrate that the victim may have discharged a firearm before his death, which fact could have been used to persuade the jury that he acted in self-defense. Relying on the PCRA court's analysis of this claim, the Superior Court concluded that Petitioner suffered no prejudice as a result of counsel's failure to analyze the gunshot residue kit of the victim prior to trial. Specifically, the court stated:

> [t]he Commonwealth presented an expert witness whose uncontradicted testimony was that the lab the witness works for does not test for [gunshot residue] particles on the [v]ictim's hands[,] since the test would be inconclusive because the particles could be present as a result of him being shot, with no way to determine whether the [v]ictim discharged a firearm. In addition, now that the [gunshot residue] test has been performed on the [v]ictim's hands, with only one two-component particle and zero "characteristic" particles found, it is clear that the [gunshot residue] test could not have affected the outcome of the trial.

Smith, 2020 WL 2764397, at *3 (citing ECF No. 17-10 at 1-2).

[2] Officer Holland testified that the firearm was considered "fully loaded" as found, although he conceded that it technically had a 13-bullet capacity. Specifically, he noted that the magazine had a capacity of 12 bullets and the firearm's chamber held a single bullet. However, he noted that to hold 13 bullets, someone would have to load the magazine, chamber a live round, and then reload the magazine to full capacity. ECF No. 17-12 at 34-35, 42-43.

With respect to this first subclaim, Petitioner has not met his burden imposed on him by AEDPA's standard of review at § 2254(d)(1), which is the applicable provision that applies to this Court's review of this claim.[3] The state courts applied the correct deficient performance and prejudice analysis when it evaluated Petitioner's ineffectiveness claim, and therefore it cannot be said that the state court's adjudication was "contrary to" *Strickland*. *See Wertz*, 228 F.3d at 202-04 ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted *Strickland* and thus was not 'contrary to' established Supreme Court precedent.")

The state court's adjudication was also not an "unreasonable application of" *Strickland*. Under the "unreasonable application" provision of § 2254(d)(1), the appropriate inquiry is whether the state courts' application of *Strickland* to a petitioner's ineffectiveness claim was objectively unreasonable, *i.e.*, the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under *Strickland*. To satisfy his burden under § 2254(d)(1), a petitioner must do more than convince this Court that the Superior Court's decision denying a claim was incorrect. *Dennis v. Secy., Pennsylvania Dept. of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016). He must show that it "was objectively unreasonable." *Id.* (internal quotation omitted). This requires that he establish that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any

[3] The Court notes that the standard of review set forth at 28 U.S.C. § 2254(d)(2) is not applicable to this claim because the state court's decision was not premised upon a finding of fact. *See Burt v. Titlow*, 571 U.S. 12, 18 (2013) (Section 2254(d)(2) applies when a petitioner "challenges the factual basis for" the state court's "decision rejecting a claim[.]")

possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. In addressing *Strickland*'s ineffective assistance standard and its relationship to AEDPA, the Supreme Court explained,

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689; *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at 123. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). 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.

Harrington, 562 U.S. at 105. *See also Grant v. Lockett*, 709 F.3d 224, 232 (3d Cir. 2013) ("A state court must be granted a deference and latitude that are not in operation when the case involves [direct] review under the *Strickland* standard itself. Federal habeas review of ineffective assistance of counsel claims is thus doubly deferential.") (internal citations and quotations omitted).

Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, there is no basis for this Court to conclude that the state court's adjudication of Petitioner's ineffectiveness claim was an "unreasonable application of" *Strickland*. Put simply, the state court reasonably determined that Petitioner was not prejudiced by his attorney's failure to analyze the gunshot reside kit of the victim because it was not substantially likely that the kit would have produced a different result for Petitioner at trial. The result of the analysis was not evidence that the victim more likely than not fired a gun prior to his death since no characteristic particles were found after the kit was analyzed, and even if found, the victim

could have acquired particles on his body without handling a gun.[4] For these reasons, Petitioner has failed to satisfy his burden under the AEDPA, and therefore this claim should be denied.

b. Self-defense

With respect to his second subclaim, Petitioner states that his counsel was ineffective for failing to argue in his closing to the jury that Petitioner acted in self-defense. He states that some of the evidence presented at trial raised questions of whether he acted in self-defense when he fired at the victim and he maintains that his counsel had no reasonable basis for failing to argue self-defense during the closing argument. While the PCRA court determined that this was a strategic decision made by trial counsel, and therefore not a basis for deeming counsel ineffective, *see* ECF No. 17-10, the Superior Court concluded that Petitioner had waived the claim on appeal for his failure to develop it in his appellate brief. *Smith*, 2020 WL2764397, at *4.

Petitioner's failure to develop the claim in his appellate brief resulted in the Superior Court declining to adjudicate the claim on the merits, and therefore the claim is defaulted under the procedural default doctrine, which prohibits federal habeas courts from reviewing a state court decision involving a federal question. *See Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012) ("Procedural default occurs when a claim has not been fairly presented to the state courts . . . and

[4] According to testimony from Susan Atwood, the Commonwealth's gunshot residue analysis expert, characteristic gunshot residue particles contain all three of the following elements or components: antimony, barium and lead. ECF No. 17-12 at 173. Characteristic gunshot residue particles most likely come from "something to do with a weapon," including handling, discharging or being near a weapon when it is discharged. *Id.* at 174. On the other hand, indicative gunshot residue particles contain only one or two of the elements or components of antimony, barium and lead. *Id.* at 173. While indicative particles are also found along with characteristic particles when a weapon is fired, "[indicative particles] could also come from various sources in the environment . . . ." *Id.* at 174. According to Ms. Atwood, a majority of test kits come back positive for at least indicative gunshot residue particles because they are so common in the environment. *Id.* at 181.

there is no additional state remedies available to pursue . . . or, when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule . . . .). While federal courts may consider procedurally defaulted claims when "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice[,]" *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), Petitioner has failed to argue, much less establish, any basis to excuse his default. As such, the Court should find that this ineffective assistance of counsel subclaim is procedurally defaulted.

In the alternative, even if Petitioner could overcome the default of this claim, in which case this Court's review would be *de novo*, *see Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001), the state court record establishes that counsel was not ineffective in the manner alleged by Petitioner. In fact, counsel did argue that, even though Petitioner admitted to police that he fired a gun while running away, the evidence presented indicated the possibility that the weapon found under the victim was also fired on that day. *See* ECF No. 17-12 at 561, 563; *see* FN2, *supra*. In other words, counsel argued that the facts in evidence did not exclude the theory that Petitioner fired shots in response to the victim firing at him.

Petitioner fails to point to any other evidence that was or was not presented at trial to support his self-defense claim other than the victim's gunshot residue kit that he alleged in his previous claim counsel was ineffective for failing to have analyzed, and which ultimately did not demonstrate that the victim more likely than not fired any weapon that night. *See supra*. While Petitioner may have wanted counsel to argue self-defense more vigorously during his closing to the jury, counsel could not argue facts not in evidence to support such a theory. For this reason,

counsel's performance was not deficient. Furthermore, the Court can see no prejudice suffered by Petitioner given that the overwhelming evidence presented at trial supported the jury's verdict and not Petitioner's theory that he shot the victim in self-defense. As such, this claim should be denied.

c. Testimony referencing pretrial incarceration

With respect to his third subclaim, Petitioner states that his counsel was ineffective for failing to object to testimony by witnesses that referenced his pretrial incarceration status. A review of the trial transcript reveals that Petitioner's incarceration was referred to on three occasions. The first was through Petitioner's own letter introduced through the testimony of Diana Long. ECF No. 17-12 at 380-81. The second was through another letter authored by Petitioner introduced through the testimony of Gerald Secrest, and the third was also through Secrest when he testified about a conversation that he had with Petitioner while in jail. ECF No. 17-12 at 386, 388. Petitioner claims that his trial counsel was ineffective for failing to object to these references and for failing to ask the court to issue a cautionary instruction to reduce the impact that these references had on the jury. In addressing this claim, the PCRA court concluded that Petitioner was not prejudiced by references to his imprisonment before trial, and, on appeal, the Superior Court concluded that Petitioner had failed to demonstrate that counsel lacked a reasonable basis for his inaction. *Smith*, 2020 WL 2764397, at *4.

Respondents argue that this claim is procedurally defaulted and that Petitioner has not demonstrated a basis to overcome the default. However, even if this claim were reviewed *de novo*, Petitioner has not demonstrated that his counsel was ineffective pursuant to *Strickland*.

First, there is no rule in Pennsylvania that prohibits references to a defendant's incarceration awaiting trial or arrest for the crimes charged. *See Commonwealth v. Johnson*, 838

A.2d 663, 680 (Pa. 2001). While the United States Supreme Court has found that it is a due process violation to compel a defendant to wear prison clothes at trial, this is because the jury's judgment may be affected by "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire," which is "likely to be a continuing influence throughout the trial." *Estelle v. Williams*, 425 U.S. 501, 504-06 (1976). However, brief mentions or references to a defendant's imprisonment do not serve as the same type of "constant reminder" to the jury which would impair the presumption of innocence. *See, e.g., Coles v. Folino*, 162 F. App'x 100 (3d Cir. 2005); *United States v. Faulk*, 53 F. App'x 644, 647 (3d Cir. 2002).

Not only were the references to Petitioner's pretrial incarceration fleeting, and not the type of "constant reminder" proscribed by *Estelle*, but the substance of the conversations and letters between Petitioner and Diana Long, as well as Petitioner and Gerald Secrest, as revealed through these witnesses' testimony, support the inference that Petitioner was being detained for the criminal conduct for which he was on trial and not for any previous crime for which generally no reference may be made. *See Commonwealth v. Williams*, 660 A.2d 1316, 1321 (1995) ("Evidence of a defendant's prior arrest or incarceration is generally inadmissible because the trier of fact may infer past criminal conduct by the defendant from such evidence.). Accordingly, there is no merit to Petitioner's claim that counsel was ineffective for failing to object to such references or request a cautionary instruction regarding same.

3. <u>Claim 3: PCRA counsel ineffectiveness</u>

Petitioner claims that his PCRA counsel was ineffective for failing to raise claims in the amended PCRA petition that he repeatedly asked her to raise; specifically, ineffective assistance

of trial counsel claims relating to a jailhouse informant, warrantless search of cellular phone records and proving intent for third-degree murder.[5]

First and foremost, Petitioner's claim that PCRA counsel rendered ineffective assistance is not a cognizable ground for relief in a proceeding arising under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2254(i). However, the undersigned recognizes that Petitioner is likely raising this claim to excuse the procedural default of his underlying claims of ineffective assistance of trial counsel which were not fairly presented in a PCRA petition to the state courts. In this regard, the provisions of the federal habeas corpus statute at 28 U.S.C. § 2254(b) require a state prisoner to exhaust available state court remedies before seeking federal habeas corpus relief. "When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999). However, in such cases applicants are considered to have procedurally defaulted their claims. *See Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012). Because Petitioner would be time barred from returning to state court and raising these underlying ineffective assistance of counsel claims in a PCRA petition, they are procedurally defaulted.

As previously stated, federal courts may not consider procedurally defaulted claims unless "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

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[5] Petitioner does not set forth any factual support for the underlying claims that he wanted counsel to raise.

Relevant here is the general rule that because there is no federal constitutional right to counsel in a PCRA proceeding, a petitioner cannot rely on PCRA counsel's ineffectiveness to establish the "cause" necessary to overcome the default of a federal habeas claim. *Davila v. Davis*, 582 U.S. 521, 29 (2017) (citing *Coleman*, 501 U.S. at 755). In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court announced a narrow exception to this rule. In relevant part, it held that in states like Pennsylvania, where the law requires that claims of ineffective assistance of trial counsel be raised for the first time in a collateral proceeding,[6] a petitioner may overcome the default of a claim of trial counsel's ineffectiveness. To do so, the petitioner must show: (1) the defaulted claim of trial counsel's ineffectiveness is "substantial"[7] and (2) PCRA counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for (3) failing to raise that claim in the "initial review collateral proceeding" (meaning to the PCRA court). *Martinez*, 566 U.S. at 17. The holding in *Martinez* is limited to defaulted claims asserting trial counsel was ineffective. *See, e.g., Davila*, 582 U.S. at 529-31. It does not apply to any other type of defaulted claim. *Id.*

Although Petitioner makes no reference to *Martinez*, the undersigned assumes that, by raising a claim of PCRA counsel ineffectiveness, Petitioner is attempting to use the exception set

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[6] In Pennsylvania, a defendant typically may not litigate ineffective assistance of trial counsel claims on direct appeal. Such claims must be raised in a PCRA proceeding. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002) (*abrogated in part on other grounds by Commonwealth v. Bradley*, 261 A.3d 381 (Pa. 2021)).

[7] For a defaulted claim of trial counsel ineffectiveness to be "substantial" it must have "some merit," meaning that a petitioner must "show that reasonable jurists could debate whether . . . [the claim is] adequate to deserve further encouragement to proceed further." *Martinez*, 566 U.S. at 14 (citing *Miller-El*, 537 U.S. 322, 336 (2003)). This is a threshold inquiry that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336.

forth in that case to excuse the default of his underlying claims of ineffective assistance of trial counsel. However, Petitioner has utterly failed to explain why PCRA counsel was ineffective pursuant to *Strickland* for failing to raise the specific claims at issue, and because he has failed to provide any factual support for his underlying ineffective assistance of trial counsel claims, he has also failed to demonstrate that the defaulted claims are "substantial" as required by *Martinez*. Since Petitioner has not established these two requisite factors, the Court should find that Petitioner cannot overcome the procedural default of his underlying ineffective assistance of counsel claims.

4. Claim 4: Sufficiency of the evidence

Petitioner claims that the evidence presented at trial was insufficient for the jury to find him guilty of third-degree murder. When a petitioner alleges entitlement to habeas relief by challenging the sufficiency of the evidence supporting his state court conviction, as Petitioner does here, the clearly established federal law governing the insufficient evidence claim is the standard set out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See, e.g., Eley v. Erickson*, 712 F.3d 837, 847 ("The clearly established federal law governing Eley's [insufficient evidence] claim was determined in *Jackson*[.]"). Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)).

The reasonable doubt standard of proof requires the finder of fact "to reach a subjective state of *near certitude* of the guilt of the accused." *Id.* at 315 (citing *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)) (emph. added). It "'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of

innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Id.* (quoting *Winship*, 397 U.S. at 363). A conviction that fails to satisfy the *Jackson* standard violates due process, *see Jackson*, 443 U.S. at 319, and thus a convicted habeas petitioner is entitled to relief if the state court's adjudication denying the insufficient evidence claim was objectively unreasonable, *see Parker v. Matthews*, 567 U.S. 37, 43 (2012).

In this case, Petitioner was convicted of third-degree murder. On direct appeal, Petitioner claimed that the Commonwealth failed to prove that he acted with malice, a necessary element of the crime, and that the Commonwealth failed to prove that he did not act in justifiable self-defense. The Superior Court deemed his claims waived after finding that Petitioner had failed to adequately develop them on appeal. However, it also concluded that the Commonwealth presented sufficient evidence for the jury to find, beyond a reasonable doubt, that Petitioner had fired the gun which killed Crawford, and that he did so "with hardness of heart or recklessness of consequences." *Smith*, 2015 WL 7458862, at *8.

This Court's first inquiry is to ask whether the Superior Court's denial of Petitioner's sufficiency of the evidence claim resulted in a decision contrary to *Jackson*. Here, there is no question that the Superior Court applied Pennsylvania's equivalent of the Supreme Court's *Jackson* standard to Petitioner's sufficiency of the evidence claim, *see Smith*, 2015 WL 7458862, at *4, and therefore its decision was not contrary to clearly established Federal law. *See Eley*, 712 F.3d at 848 (holding that Pennsylvania's test for insufficient evidence "[do]es not contradict *Jackson*"); *Evans v. Ct. of Common Pleas, Del. Cty.*, 959 F.2d 1227, 1233 (3d Cir. 1992) ("the test for insufficiency of the evidence is the same under both Pennsylvania and federal law"). As a result, Petitioner is not entitled to relief under the first clause of 28 U.S.C. § 2254(d)(1).

The next question before this Court is whether the adjudication of this claim was an unreasonable application of *Jackson* or an unreasonable determination of the facts in light of the evidence presented. In other words, because the Superior Court found that there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Petitioner had fired the gun that killed Crawford, and that he did so with hardness of heart or recklessness of consequences, this Court must ask whether that decision was objectively unreasonable.

The Superior Court set forth a thorough analysis of the evidence in Petitioner's case and concluded that, when viewed in the light most favorable to the Commonwealth, it was sufficient to enable the jury to find that Petitioner was guilty of third-degree murder. In support of its finding, it heavily relied on the following portion of the trial court's opinion:

> In the instant case, the Commonwealth presented a myriad of evidence that a reasonable jury could have properly convicted [Petitioner] of Third Degree Murder. First, the Commonwealth had the text messages sent by [Petitioner] to Ms. Johnson. [Petitioner] admitted to the police that he was upset that Ms. Johnson, who was [Petitioner's] girlfriend at the time, was also involved with Crawford. One of the text messages [Petitioner] sent to Ms. Johnson said, "Lmao . . . then you told this nigga where im at? Bitch yur way too much right now! Ima kill him that's my [fucking] word." That message was sent on May 12, 2012 at 5:28 p.m., less than 12 hours before Crawford's body was found.
>
> Second, [Petitioner] changed his version of events three (3) different times. When Captain Rutter initially interviewed him, [Petitioner] indicated that he had no knowledge of the shooting and had never heard the names "Zeus" or "Marlin Crawford" in his life. [Petitioner] also gave a detailed description as to his whereabouts elsewhere at the time of the shooting.
>
> Several hours later, [Petitioner] gave Captain Rutter a different version of events. This time, [Petitioner] said that he knew Crawford ("Zeus"), and he was very upset that Ms. Johnson was 'messing with Zeus." [Petitioner] then gave the version of the story where he went to Crawford's home the night before the shooting in order to confront him, and the two men exchanged gunfire. The two men encountered each other the following evening, and a physical altercation ensued with other unaffiliated parties. The altercation ended with more gunfire, and [Petitioner], who picked up a gun off the street, returned fire as he was running

away. [Petitioner] did not know if he hit Crawford, and [Petitioner] claimed to have thrown the gun in a specific location, which the police were unable to locate. When asked why he threw the gun, [Petitioner] responded, "Because I knew what I had done."

Several months after the shooting, [Petitioner] voluntarily came in for questioning at the District Attorney's Office and gave an entirely different version of events to Detective Gmitter. [Petitioner] told the story of riding in the white Jeep in question to Pershing Court with Fairfax and Fielder in order to purchase drugs. [Petitioner] and Crawford encountered each other, and [Petitioner] attempted to "squash the bad blood between them." A physical altercation ensued with unaffiliated parties, and [Petitioner] picked up a gun from the ground and began running. [Petitioner] claimed to have heard shots but was unsure of who the shooter(s) was (were) when he fired back while still running. All [Petitioner] observed was Fielder running towards Crawford with a gun. [Petitioner] then claimed that Fielder asked [Petitioner] why he threw the gun, and Fielder retrieved it and hid it in a floorboard at Miller's house. [Petitioner] had no justification for not calling the police after this had occurred.

Third, the Commonwealth presented a letter that [Petitioner] had written to a friend from prison where [Petitioner] pleaded with her to present a false account of his whereabouts on the night of the shooting.

Commonwealth witness Diana Long had received a letter from [Petitioner] that read in relevant part:

> I got my situation under control and the table is starting to turn around now. My lawyer will be coming to see you very soon. I need you to write this down and remember it and tell him when he comes. I came in your house a little bit after two - two a.m., you let me in and went back to sleep. You woke up at four a.m., heard the TV, came down and turned it off. At this time, I was still on the floor sleeping, and went back to sleep after you turned the TV off. I will call you soon to make sure you got this letter.
>
> Miss you very much. Love always.

This version of events was never conveyed to police by [Petitioner] in any of the three (3) times he spoke with them regarding this case.

Fourth, the Commonwealth presented both a conversation between [Petitioner] and Gerald Secrest and a letter written by [Petitioner] to Secrest.

Secrest described the first conversation as follows:

> [Petitioner] was reading the paper after a young male was shot here in Uniontown and he said about, you can't be a porch nigger, you got to be a real nigger. His situation, as soon as he seen the guy, he shot him . . . . He said about him, another fellow and his girlfriend went that night and shot Crawford.
>
> [Petitioner] also wrote Secrest a letter from prison, which read:
>
> What's up? This is Tay. I want to know what did Chris Teets tell you about my case and why is he trying to take my life away? Whatever he said, he is lying. I never talked to him about my case. He came to me once on C block and asked me if I wanted him to help with my case, and I said no, I am good because I know he worked for the police. The only thing that I told him was the truth, that my life was in danger and I didn't do it. I could have been dead right now with my mom crying because her baby child is gone, but God protected me. That's why I pray to him even right now for keeping me safe. I am thanking him for protecting me. I am not that type of person. The boy, Craig Rugg, on C block told me Chris told him that he is going to set me up because I slapped him when I caught him stealing out of my cell. So, please don't do nothing to take my life.
>
> Finally, Secrest testified to a conversation he overheard between [Petitioner] and Teets where [Petitioner] "asked [Teets] to be an alibi for him. [Petitioner] was willing to pay [Teets]."
>
> The decedent was killed by a gunshot to the head. There is ample circumstantial evidence to show that [Petitioner] had motive, opportunity, and actually did fire the fatal shot. The jury was not required to believe any of [Petitioner's] self-serving statements.
>
> Based on this evidence, it was reasonable that the jury found that the Commonwealth met its burden of proof for a Third Degree Murder conviction.

Smith, 2015 WL 7458862, at *5-7 (citing Trial Court Opinion at 6-13) (internal citation to record omitted).

The Superior Court also determined that the Commonwealth had presented sufficient evidence to refute that Petitioner acted in justifiable self-defense and concluded that the jury could

have found that he was the initial aggressor, that he was not actually in fear, and that he failed to retreat. *Smith*, 2015 WL 7458862, at *7.

Based on the evidence adduced at trial, a reasonable jury could have certainly found Petitioner guilty of third-degree murder, and, as such, the state court's decision was not an objectively unreasonable application of *Jackson*. Petitioner is thus not entitled to relief under the second clause of 28 U.S.C. § 2254(d)(1). Finally, to the extent that it is applicable, the state court's decision was also not based on an unreasonable determination of the facts, and thus he is not entitled to relief under 28 U.S.C. § 2254(d)(2).

5. Claim 5: Trial court error in denying motion to suppress

Petitioner claims that the trial court erred in denying his omnibus pre-trial motion to suppress statements he made to the police because police failed to advise him of his *Miranda* rights when he was first arrested and he did not understand those rights when he finally received *Miranda* warnings, thereby making him incapable of waiving those rights. Petitioner raised this claim on direct appeal from his judgment of sentence, and, in denying it, the Superior Court cited and relied on the relevant portion of the suppression court's order finding that Petitioner's waiver of *Miranda* rights was made voluntarily, knowingly and intelligently. *Smith*, 2015 WL 7458862 at *10-11. The relevant portion of the suppression court's order is set forth as follows:

> The omnibus pre-trial motion of [Petitioner] . . . contended that [Petitioner] did not knowingly, intelligently and/or voluntarily waive his right to self-incrimination. Instantly, [Petitioner] made two incriminating statements, both on May 13, 2012. Captain David Rutter of the Uniontown Police Department, after he had responded to the crime scene, interviewed [Petitioner] at 9:17 [a.m.] that morning. [Petitioner], who did not appear to be under the influence of drugs or alcohol, was given his Miranda rights by Captain Rutter and acknowledged that he understood his rights. He then executed a rights waiver form and made an incriminating statement. Later that day, at 3:04 [p.m.], while still in custody, [Petitioner] was again advised of his Miranda rights, again executed a rights waiver

> form and made a second incriminating statement. No threats, promises or other improper incentives were made to [Petitioner] to cause him to waive his rights and make this second statement.
>
> The only evidence offered at the omnibus pre-trial hearing was that the waiver of his Miranda rights was made voluntarily, knowingly and intelligently by [Petitioner], and we so found.

Smith, 2015 WL 7458862, at *11 (citing Suppression Court Opinion, filed July 15, 2014, at 2-5, 9).

The clearly established federal law at issue here stems from *Miranda v. Arizona*, wherein the Supreme Court held that a criminal defendant may only waive his Fifth Amendment right to have an attorney present during custodial interrogation if "the waiver is made voluntarily, knowingly and intelligently." 384 U.S. 436, 444 (1966). The Supreme Court has stated that a valid *Miranda* waiver has two dimensions:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). "The ultimate question in the voluntariness calculus is 'whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution.'" *Fahy v. Horn*, 516 F.3d 169, 194 (3d Cir. 2008) (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)). These surrounding circumstances can include "not only the crucial element of police coercion, but may also include the length of the interrogation, its location, its continuity, [and] the defendant's maturity, education, physical condition, and

mental health." *Lam v. Kelchner*, 304 F.3d 256, 264 (3d Cir. 2002) (internal citations and quotations omitted).

Upon review, the undersigned finds that there is no basis to disturb the state court's decision to deny relief on this claim under AEDPA's deferential standards of review. In evaluating this claim, the state court appropriately cited and reasonably applied *Miranda* to the events surrounding Petitioner's incriminating statements made to police and it reasonably concluded that Petitioner validly waived his *Miranda* rights. Thus, this claim withstands review under 28 U.S.C. § 2254(d)(1). Furthermore, Petitioner has not presented this Court with "clear and convincing" evidence rebutting the presumption of correctness that under 28 U.S.C. § 2254(e)(1) this Court must give to the state court's factual determinations that were made following the suppression hearing, and, in light of the evidence presented at that hearing, the state court's decision was not an unreasonable determination of those facts. Thus, this claim also withstands review under 28 U.S.C. § 2254(d)(2). Accordingly, this claim should be denied.

6. Claim 6: Trial court error in permitting certain testimony

In his final claim, Petitioner argues that the trial court erred in permitting police to testify as to what Christopher Teets and Kim Johnson "learned through unsubstantiated sources." Petitioner raised this claim in a post-sentence motion, but his attempt to have the Superior Court review it on appeal was rejected because he failed to present it in his Rule 1925(b) statement or list the claim in the formal "Statement of Questions Involved" in violation of Pa. R.A.P. 2116(a). As such, the Superior Court found that the claim was waived. *See Smith*, 2015 WL 7458862, at *3 n.5.

Applicable here, the procedural default doctrine prohibits federal habeas courts from reviewing a state court decision involving a federal question if the state court declined to rule on the merits of the claim because it determined that the petitioner did not comply with a state procedural rule, and that rule is independent of the federal question and adequate to support the judgment. *See Nara v. Frank*, 488 F.3d 187, 199 (3d Cir. 2007). State procedural rules include, but are not limited to, the PCRA's timeliness requirement, 42 Pa. C.S.A. § 9545(b), failing to adequately develop the claim in one's briefing, Pa. R.A.P. 2116, 2119(a), and presenting a claim on appeal without having first presented it to the lower court, Pa. R.A.P. 302(a). The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557-59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground rested primarily on federal law or is so "interwoven with federal law" that it cannot be said to be independent of the merits of petitioner's federal claims. *Coleman v. Thompson*, 501 U.S. 722, 739-40 (1991). A state rule is "adequate" if it is "firmly established and regularly followed." *Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016) (citation omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Bronshtein v. Horn*, 404 F.3d 700, 707, 708 (3d Cir. 2005).

As noted by the Superior Court, Petitioner's failure to raise this claim in his 1925(b) statement and in his statement of questions involved in compliance with Pa. R.A.P. 2116(a) constituted a waiver of the claim under Pennsylvania state procedural rules. Waiver of a claim for failure to comply with these procedural requirements has been found to be both independent and

adequate grounds for purposes of procedural default on federal habeas review. *See, e.g., Buck v. Colleran*, 115 F. App'x 526, 528 (3d Cir. 2004); *Diggs v. Diguglielmo*, 2007 WL 4116311, at *11 (E.D. Pa. Nov. 15, 2007); *Jones v. Lavan*, 2002 WL 31761423 at *2 (E.D. Pa. Dec. 9, 2002). Consequently, this claim is procedurally defaulted, and, because Petitioner has failed to argue, much less demonstrate, a basis for excusing the procedural default, the Court should deny it as such.

D. Certificate of Appealability

AEDPA codified standards governing issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals form . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by the State court[.]" 28 U.S.C. § 2253(c)(1)(A). It also provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2).

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

Applying this standard here, Petitioner has not made the requisite showing. Accordingly, the undersigned does not recommend granting a certificate of appealability on any of Petitioner's claims.

III. CONCLUSION

For the reasons discussed above, it is respectfully recommended that the Petition for Writ of Habeas Corpus be denied and that a certificate of appealability also be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. §636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of a copy of this Report and Recommendation to file objections. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: May 23, 2024.

s/Kezia O. L. Taylor
KEZIA O. L. TAYLOR
United States Magistrate Judge

Cc: Kurtavius Jermon Smith
LL8060
SCI Greene
169 Progress Drive
Waynesburg, PA 15370

Counsel for Respondents
(via CM/ECF electronic mail)

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

APPELLATE NO. 24-3133

KURTAVIUS JERMON SMITH

Appellant-Petitioner

V.S.

SCI-GREENE, THE DISTRICT ATTORNEY OF

THE COUNTY OF FAYETTE, AND THE

ATTORNEY GENERAL OF THE STATE

OF PENNSYLVANIA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA, dated July

7th, of 24, NO. 21-1227 (Arthur J. Schwab, J.).

APPLICATION FOR CERTIFICATE OF APPEALABILITY

(To Attention To Case: 24-3133, Document: 2:)

KURTAVIUS JERMON SMITH

Prison# LL8060

SCI-Greene, 169 Progress Drive,

Waynesburg, PA. 15370

"APPENDIX D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KURTAVIUS JERMON SMITH,
Appellant-Petitioner

V.S.

Appellate NO. 24-3133

SCI-GREENE, THE DISTRICT ATTORNEY OF
THE COUNTY OF FAYETTE AND THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA,
Respondents.

MEMORANDUM IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY (In Attention To Case: 24-3133, Document: 8).

TO THE HONORABLE JUDGES OF THE THIRD CIRCUIT:

Comes Now Kurtavius Jermon Smith, the Petitioner, pro se, and respectfully files this Memorandum in Support of Application for Certificate of Appealability pursuant to the Applicable Federal Statutes Listed herein below.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an Appeal From A District Court Order Denying habeas relief with respect to Petitioner's State Jury trial Convictions And judgment of sentence entered in the Court of Common Pleas of Fayette County Criminal

LEAF 2-

docket number CP-26-CR-0001122-2012.

Petitioner stood trial by Jury commencing February 4-7, 2014 the jury convicted him of Third Degree. Subsequent the court imposed a sentence having eighteen (18) to forty (40) years imprisonment, issued on or about February 26, 2014.

Petitioner's trial Attorney submitted a timely Post-Sentence Motion before withdrawing his representation. As such, all further proceedings was represented by The Fayette County Public Defender's Office via court Appointment. On July 7, 214 the trial court denied Petitioners post-Sentence Motion. And Upon Appeal the Pennsylvania Superior Court Affirmed judgment of Sentence on March 9, 2015.

cited: Commonwealth v. Smith, 2015 WL 7455868 (Pa. Super. Mar. 9, 2015).

Subsequent Petitioner timely filed a petition for Allowance of Appeal and the Pennsylvania Supreme Court denied (Per Curiam), on July 15, 2015. cited: Commonwealth v. Smith 118 A. 3d 1108 (Pa. 2015).

At next course of Action; On September 11, 2015, Petitioner filed State-Post-Conviction Relief Act Petition ("PCRA") ECF No. 17-8. Of which Allowed for Appointment of Counsel to further Amend said Action on behalf of Petitioner. June 14, 2019, ECF No. 17-9. the PCRA petition was subsequently dismissed without a hearing on August 6, 2019. ECF No. 17-11.

Upon Appeal the Pennsylvania Superior Court Affirmed the dismissal on May 27, 2020. cite at: Commonwealth v. Smith, 2020 WL 2764397 (Pa. Super. May 27, 2020). In turn Allowance of Appeal was denied by the Pennsylvania Supreme Court on December 15, 2020.

cited: Commonwealth v. Smith, 242 A.3d 1249 (Pa. 2020).

Petitioner filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. ECF No. 1. which is now ripe for Appellate Review. The Claims for Relief:

1. The PCRA Court erred in dismissing Petitioner's Amended PCRA petition without A hearing.

2. A. Trial Counsel was ineffective for failing to have the gunshot residue kit obtain from Crawford Analyzed prior to trial, B. failing to Argue Self-defense in his Closing, and C. failing to object to testimony Referencing Petitioner's Pretrial incarceration status.

3. PCRA Counsel was ineffective for failing to raise Certain Claims Petitioner Requested that Counsel raise in the Amended PCRA petition.

4. The evidence was insufficient to sustain the jury's Verdict

5. The Trial Court erred in denying Petitioner's Omnibus pre-trial Motion.

6. The Trial Court erred by Allowing prosecutorial police Agents to testify About Statements Made by Christopher Teets And Ms. Johnson. [Absent Exception to hearsay]

Petitioner contend that the above numbered claims one thru six are of merit and are of Constitutional importance. Accordingly Petitioner hereby adopt "PETITIONER'S OBJECTIONS TO THE MAGISTRATE JUDGE REPORT AND RECOMMENDATION," in it's entirety - listed as Appendix that was (Affixed) proffered in Legal Union initially with case: 24-3139, at Document: 8 And Document 11, All of which Subsequent was/is permissable and Can currently be Viewed VIA Electronic Court Filing System (ECF).

Respectfully Petitioner calls upon this esteem Court of Appeals to recognize that Petitioner represent Argument of A Substantial showing reaching Constitutional - Ineffective Assistance of Trial and PCRA - Counsel's. And in doing so, May the Court be mindful that the sixth Amendment of the United States Constitution guarantee's the right to Counsel, From A Legal prospective - Mean right to effective Assistance of Counsel in Criminal prosecutions. Moreover the Sixth Amendment right to effective Assistance of Counsel is made Applicable to the States through the fourteenth Amendment.

In the case in chief, Attorney for Petitioner, representation fell below an objective standard of Reasonableness, Counsel's deficient performance prejudiced Mr. Kurtavius Jermon Smith, (Herein Petitioner). Recognizing: Gideon V. Whinwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); McMann V. Richardson, 397 U.S. 759, 771 n. 14 (1970) and Strickland V. Washington, 466 U.S. 687-688, 104 S. Ct. 2052, 2064-74, 80 L. Ed. 2d 674 (1984).

With the Courts indulgence, Petitioner will Attempt to Address State-
ment of fact As pertain to Claim 2(A) "TRIAL COUNSEL WAS CONSTITUTIONALLY
INEFFECTIVE FOR FAILING TO HAVE THE GUNSHOT RESIDUE KIT OBTAIN
FROM CRAWFORD ANALYZED PRIOR TO TRIAL."

IN Brief Digest: Petitioner's jury never heard forensic evidence that the Victims right hand Contained two (2) Component particles of gunshot residue. The importance being, the jury was presented with Solely the Expert Witness testimony from the prosecutions perspective regarding All Manner of Conducted Forensic Science.

In Consequence, Petitioner was prejudiced in light of trial Counsel's gross ineffectiveness for not obtaining the Gunshot Residue kit pertaining to the Victim to be Analyzed prior to trial with/by A defense Expert Witness to establish A valid Self defense (IN Theory) Scientifically Acceptable in representation that the fatal incident occurred from demeanor of the deceased Victim which however resulted in his demise.

Overwhelming prejudice towards Petitioner was establish when prosecution Witness, Ms. Susan Atwood, Forensic Scientist Supervisor for Pennsylvania State Police Crime Laboratory testified that she perform At best 25 hundred Analysis with gunshot residue kits. however if the person is the victim of A gunshot wound then she will not perform the residue test per Laboratory policy not to do it. And that only the Commissioner CAN Authorize her to breach policy.

the witness testimony went Unchallenged by defense Counsel. Such a breakdown within the Judicial System remain shocking to the Universal sense of Justice - Considering that police statements were obtain from Petitioner Consistent with self defense. Yet no gunshot residue test was conducted on the victim to determine if indeed he Actually fired A gun (shot) At Petitioner. see; DAY (2) Two JURY TRIAL proceedings Before the Honorable Steve R Leskinen, Judge of the Court of Common Pleas, Fayette County. Dated; February 4, 2014.

WHEREFORE based on the Above, Mr. KURTAVIUS JERMON SMITH, the Petitioner, Respectfully Move this Third Circuit Court of Appeals to; issue Certificate of Appealability. Alternatively, Appoint Counsel And Remand to Conduct An Evidentiary hearing to resolve the factual disputes.

Respectfully Submitted on this 8th day of JAN, 2025.

/s/ K Smith

Mr. Kurtavius Jermon Smith
Prison# LL8060
SCI-Greene
169 Progress Drive
Waynesburg, PA. 15370

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

KURTAVIUS JERMON SMITH
Petitioner,

V.

SCI GREENE, THE DISTRICT ATTORNEY OF THE COUNTY OF FAYETTE, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents.

CASE No. 2:21-CV-01227

District Judge Arthur J. Schwab
Magistrate Judge Kezia O.L. Taylor

PETITIONER'S OBJECTIONS TO THE MAGISTRATE JUDGE
REPORT AND RECOMMENDATION

TO THE HONORABLE JUDGE ARTHUR J. SCHWAB:

COMES NOW Mr. Kurtavius Jermon Smith, the Petitioner, pro se, respectfully files his objections to the Magistrate Judge's "Report And Recommendation" to deny Petitioner's 28 U.S.C. §2254, Petition for Writ Of Habeas Corpus, Without Conducting An evidentiary hearing or resolve factual disputes. Petitioner makes the following objections to wit:

OBJECTION No. 1: Petitioner objects to the Report of the Magistrate Judge's (hereinafter "RMJ"), Mischaracterization of the Constitutional Claims by issuance of Unreasonable Application Regarding the Record base facts of Petitioner's Case.

LEAF-1-

"APPENDIX E."

Discussion; initially At State Court Level, the PCRA-Court erred in dismissing Petitioner's Amended petition Without A hearing -And- Subsequent [Timely filing] this U.S. District in turn chose to practice the Same indifference / contrary to established federal Law of Which encompass Controling decisional Laws rendered by the Supreme Court of the United States. Recognizing: Strickland V. Washington, 466 U.S. 668 (1984).

OBJECTION No. 2: Petitioner's Jury never heard nor proffered forensic-Scientific evidence that the victims right hand Contained 2 Component particles of gunshot residue. Discussion; The importance being, the jury presented with "ONLY" the expert Witness testimony from the prosecutions perspective regarding All manner of forensic Science. I). In Consequence, Petitioner was prejudiced in light of trial Counsel's gross ineffectiveness for not obtaining the Gunshot Residue Kit pertaining to the victim to be Analyzed prior to trial with A defense expert Witness to establish A Meaningful self defense (theory), Scientifically Acceptable in explanation that the incident occurred from demeanor of the victim Which however resulted in his demise.
II). Petitioner note further objection Whereas the RING is based on An Unreasonable determination of the facts. Such exclusion had A Substantial And injurious effect or influence in determining the jurys verdict. Recognizing: Brecht V. Abrahamson, 507 U.S. 619, 637 (1992). And Ake v Oklahoma, 470 U.S. 68 (1985).

OBJECTION No. 3: Petitioner Object to the RING concluding that post Conviction (PCRA), Attorney was not Constitutionally ineffective And that Petitioner is procedurally defaulted.
III). Discussion; Petitioners PCRA-Attorney failed to issues in the Amended petition Although Petitioner repeatedly Asked his Attorney to Argue before the Court Specifically ineffective Assistance of trial Counsel, On Matters relating to A jailhouse informant,

LEAF-2-

Warrantless Search of Cellular phone records And that the Commonwealth failed to prove the required intent As Charged for third-degree Murder.

IV). Moreover, A new trial should be granted if the evidence prove to be Material, Also inadmissible evidence may be "Material" if it could have Led to the discovery of Admissible evidence. Recognizing: Johnson V. Folino, 705 F.3d 117 (3d Cir. 2013).

OBJECTION No. 4: Petitioner Object to the RMJ Conclusion of facts And Law for habeas relief.

V). Discussion; When Challenging Sufficiency of the evidence the standard is Addressed under Jackson V. Virginia, 443 U.S. 307 (1979). However, in the case in chief the record is Silent And Without More the RMJ is not to presume but review whether there was Sufficient evidence to justify A rational trier of facts to find guilt of third degree Murder beyond A reasonable doubt [An Essential of Due Process, Guaranteed by the 14th Amendment].

VI). Furthermore the Afore stated Standard Alone is Simply inadequate to protect Against Mis Applications of the Constitutional Standard of reasonable doubt.

VII). Petitioner is entitled to habeas Corpus relief.

"FOR THE COURTS INFORMATION"

Your Petitioner, Mr. Kurtavius Jermon Smith, Seek Leave upon request for Appointment of Counsel. I have no training (Legal Expertise), in the field of Law. Respectfully Stand by Counsel would serve for purpose to Articulate Argument with the necessary citations of Law in objection of the RMJ finding of fact based Solely on A State procedural Rule As pertain to the Above discussion. "The Courts immediate Attention And discretionary Mandate (in the interest of Justice), will be Greatly Appreciated."

/s/ KSmith LL8060

7/5/2024

LEAF-3-

OBJECTION No. 5: The RMJ denied Petitioner's claim that the State-trial Court erred in denying his Omnibus pre-trial Motion to Suppress Statements he made to the police because police failed to Advise him of the Miranda rights when first Arrested.

VIII). Discussion: Petitioner Asserts that the Magistrate Judge is wrong in reliance upon a Relevant portion of the Suppression Courts Order in finding that Petitioner's Waiver of Miranda rights was made Voluntarily, Knowingly And intelligently.

IX). It is Acknowledge that Captain David Rutter of the Uniontown Police Department responded to the Crime Scene And interviewed Petitioner At Approximately 9:17 A.M. while Petitioner was placed Under Arrest & Rights Waiver form was executed And Petitioner Allegedly Made An incriminating Statement - And - Later that day While still in police Custody. Petitioner was Again provided with A Rights Waiver form And Again executed Allegedly Making A Second incriminating statement.

X). The fact that the prosecutorial police Agents All claim that no threats, promises or other improper incentives were Made to Cause Petitioner to Make Statements And the contention that Petitioner may have in Calculus Appeared to Voluntarily, Knowingly, And intelligently Cooperate With Law enforcement, is not of Moment, "Simply put, immaterial." Because Petitioner At no time was At liberty to Leave.

XI). There Can be no dispute that Petitioner was Under Arrest thus right to Counsel Assistance And Attached Also invoked With respect to the Criminal Offense. And May this Court be Attentive, Petitioner initially told Officer Rutter that he did not Want to talk About the incident during the police-initiated Custodial interview.

Wherefore, Any or All Statements Made by Petitioner Constitute invocation of his fifth Amendment right to Counsel And thereby Obtained in violation of Petitioners rights Against self incrimination. Such Confessions / Statement Can never be Used At trial And their use

results in reversal of any subsequent conviction. Recognizing: McNeil V. Wisconsin, 501 U.S. 171 (1991).

OBJECTION NO. 6: Petitioner objects to the RR's failure to address claims not previously raised because Petitioner did not secure or preserve the claim.

XII). Discussion; The claim - "TRIAL COURT ERRED IN PERMITTING CERTAIN TESTIMONY." respectfully the claim was raise in a post-Sentence Motion Although subsequent rejected by the Superior Court because the claim was not first represented in Petitioner's Rule 1925(b) statement or List the claim in the formal Statement of Questions Involved. Violative of PA.R.A.P. 2116 (A). for indepth discussion please refer to [Document 23] Magistrate Judge Taylor's May 23, 2014, Report And Recommendation. (Pg's 29-31), via Electronic filing.

XIII). With all due respect to the court, Petitioner is inclined to Adopt - Boxell - Rely Upon the Judicious Language of the Third Circuit Court of Appeals; "State procedural grounds are not independent, And will not bar federal habeas relief, if the State Law ground rested primarily on federal Law or "is so interwoven with federal Law." to the point it cannot be said to be independent of the merits of Petitioner's federal claims. Recognizing: Johnson V. Pinchak, 392 F.3d 551, 557-59 (3d Cir. 2004).

XIV). Petitioner Asserts in understanding that State procedural grounds i.e. Pa. R. Crim. P. And/or Pa. R. A. P. indeed interwoven with federal Law. for instance Claims of ineffective Assistance of Counsel [Objection #2 and #3] violate the fifth and Sixth Amendments to the U.S. Constitution

LEAF-5-

XV). Equally Applied - Petitioner's Claims of Courtesy [OBJECTION #5 and #6] premise upon "Fundamental Fairness" Stand violative of Fourteenth Amendment to the U.S. Constitution And Article 1, Section 9 of the Pennsylvania Constitution [Concerning the Denial of Refund-Tax] of Which is Also premise upon the Federal Sense of "Fundamental Fairness" As well Due process.

XVI). Both the State And Federal Constitutions govern the Rules of Law be it domestic, Corporation, Civil or As here, Criminal. Accordingly All Claims As proffered hereto in there procedural posture Are interwoven With State And Federal Law. This Fact-in And of it's Genuine Applicability Serve As the exception to procedural requirements i.e. default, Rule or Waiver for purpose of habeas Corpus relief.

XVII). Petitioner notes objection to the R&R findings And Conclusion of Law towards OBJECTION #6, As being based on An incorrect finding of Fact resulting in An incorrect Conclusion of Law.

Wherefore Petitioner Objects to the Overall Conclusion of R&R based on the foregoing reasons stated (Embodied-Amplified), herein Above And Respectfully Moves this Court to Overrule As premature the R&R recommendation denying Certificate of Appealability. Finally Petitioner seek remand for An evidentiary hearing to be held before Magistrate Judge Kezia O.L. Taylor or schedule before A new Magistrate Judge. Recognizing; Martinez V. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012).

Respectfully Submitted on this 5th day of July, 2024.

/s/ [signature]

Mr. Kurtavius Jermon Smith, Pro Se.

Prison # LL8060 - LL8060

SCI-Greene, 169 Progress Drive,

Waynesburg, Pa. 15370

KURTAVIUS SERMON SMITH
Petitioner,

V.

SCI GREENE, ET AL.
Respondents.

CASE NO. 2:21-CV-01227

District Judge Arthur J. Schwab

Magistrate Judge Kezia O.L. Taylor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY [28 U.S.C. § 1746] that A true And correct Copy Of this foregoing instrument has been Mailed first class postage Affixed thereto On this 5th day of July, 2024, by hand delivering the same to Mail Room Staff for processing through the internal Legal Mail System Addressed to:

District Judge Arthur J. Schwab
c/o CLERK'S OFFICE
UNITED STATES DISTRICT COURT
700 Grant Street, Rm. 3110
Pittsburgh, PA. 15219
-AND-
Counsel for Respondents.

NOTICE: This Matter Also Satisfies The Prisoner's Mailbox Act; Houston v. Lack, 108 S. Ct. 2379 (1988).

Executed On this 5th day of July, 2024.

/s/ K. Smith LL8060

NOTE: Late filing of this "objection by Petitioner is due to the following beyond Petitioner's control. Be Advise, SCI-Greene has commenced its Annual institutional lock down of ALL dept. and inmate housing units for security Reasons. initiated 7/5/2024. LEAP-7-
for further verification-contact M. Switzer, Superintendents Assistant, Phone: 724-852-2902