

DLD-262

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1966

IN RE: LARRY CHARLES,
Petitioner

On a Petition for Writ of Mandamus from the
United States District Court for the Eastern District of Pennsylvania
(Related to E.D. Pa Civ. Nos. 2-13-cv-07548 & 2-14-cv-00189)

Submitted Pursuant to Rule 21, Fed. R. App. P.
May 25, 2017

Before: CHAGARES, VANASKIE, and KRAUSE, Circuit Judges

(Opinion filed: June 14, 2017)

OPINION*

PER CURIAM

In this mandamus petition, Larry Charles “seeks an Order to compel the United States District Court for the Eastern District of Pennsylvania to issue a Certificate of Appealability” in connection with a 28 U.S.C. § 2254 petition he filed in 2013. Because mandamus may “not be used as a substitute for the regular appeals process,” Cheney v. U.S. Dist. Court, 542 U.S. 367, 380–81, (2004), we will deny Charles’ petition.

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

Appendix A

Charles filed a § 2254 petition in 2013, seeking to attack a 25–50 year sentence imposed after he pleaded no contest to various sex crimes in Philadelphia County. The District Court denied his petition and his request for a certificate of appealability. We denied his request for a certificate of appealability—concluding that “jurists of reason would not debate the District Court’s assessment of his constitutional claims”—and also denied his request for rehearing. C.A. No. 15-3064. The Supreme Court denied his petition for a writ of certiorari, and also his petition for rehearing. Charles v. Harry, 137 S. Ct. 671, reh’g denied, 137 S. Ct. 1369 (2017).

Charles has exhausted all avenues to appeal the District Court’s denial of his request for a certificate of appealability—and has lost. He may not now use mandamus as yet another attempt at an appeal. Cheney, 542 U.S. at 380–81. We will deny his petition.¹

¹ In the alternative, Charles asks us to recall our mandate denying his request for a certificate of appealability—a request that is “regarded as a second or successive application for purposes of [28 U.S.C.] § 2244(b).” Calderon v. Thompson, 523 U.S. 538, 553 (1998). Because Charles cannot meet § 2244(b)’s gatekeeping requirements—he does not claim to have newly discovered evidence of his actual innocence, or rely on a new rule of constitutional law, made retroactive to cases on collateral review—we will not recall our mandate. See United States v. Winkelman, 746 F.3d 134, 135 (3d Cir. 2014).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1966

IN RE: LARRY CHARLES,
Petitioner

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Related to E.D. Pa Civ. Nos. 2-13-cv-07548 & 2-14-cv-00189)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, and
RESTREPO, *Circuit Judges*

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

BY THE COURT,

s/ Thomas I. Vanaskie
Circuit Judge

Dated: November 7, 2017
sb/cc: Larry Charles
Simran Dhillon, Esq.

Appendix B

DLD-209

April 14, 2016

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 15-3064

LARRY CHARLES, Appellant

VS.

SUPERINTENDENT CAMP HILL SCI; ET AL.

(E.D. Pa. Civ. Nos. 2-13-cv-07548 & 2-14-cv-00189)

Present: CHAGARES, GREENAWAY, JR., and GARTH, Circuit Judges

Submitted is appellant's Motion for Certificate of Appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/BPM/mlr

ORDER

Appellant's request for a certificate of appealability is denied because he has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). While Appellant has presented exhaustive arguments in his extensive request, jurists of reason would not debate the District Court's assessment of his constitutional claims. Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). Appellant's first argument did not state a valid claim of ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Bui, 795 F.3d 363, 366 (3d Cir. 2015). Despite Appellant's contentions, he was not denied counsel. See Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000). Because Appellant did not state a valid claim of effective assistance of counsel, his second argument was meritless. Finally, Appellant is correct that his third claim is cognizable. See Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003); United States v. Miknevich, 638 F.3d 178, 185-86 (3d Cir. 2011). However, his

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third claim is procedurally defaulted, and he has not demonstrated cause and prejudice sufficient to overcome the procedural bar. See Murray v. Carrier, 477 U.S. 478, 485 (1986); Slutzker v. Johnson, 393 F.3d 373, 381 (3d Cir. 2004). As Appellant has not made a substantial showing of the denial of a constitutional right, his request for a certificate of appealability is denied.

By the Court,

s/ Michael A. Chagares
Circuit Judge

Dated: May 16, 2016

mlr/cc:

Larry Charles
Simran Dhillon, Esq.



A True Copy

Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

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

LARRY CHARLES,:

Petitioner,

v.

LAUREL HARRY, et al.,

Respondents.

Civ. Nos. 13-7548, 14-189

FILED

JUL 30 2015

MICHAEL E KUNZ, Clerk

By _____ Dep. Clerk

ORDER

Petitioner Larry Charles has filed *pro se* objections to Magistrate Judge Heffley's Report and Recommendation regarding his Petition for habeas relief. (Doc. Nos. 19, 21); 28 U.S.C. § 2254. I will overrule the objections, adopt Judge Heffley's recommendations, and deny the Petition.

I. STANDARD OF REVIEW

I must review *de novo* those portions of the Report to which timely, specific objections have been filed. 28 U.S.C. § 636(b)(1)(C). I may "accept, reject, or modify, in whole or in part" the Judge Heffley's findings or recommendations. Id.; Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001). As to those portions to which no objections have been made, I must "satisfy [myself] that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) Advisory Committee Notes; see Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (explaining the district court's responsibility "to afford some level of review" when no objections have been made).

I may grant habeas relief only if the state courts' adjudication of Petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted

ENTERED

JUL 31 2015

CLERK OF COURT

APPENDIX 10

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). To warrant habeas relief, the state courts’ decision must be “objectively unreasonable;” I may not grant relief “merely because [I] conclude that the state court applied federal law erroneously or incorrectly.” Jacobs v. Horn, 395 F.3d 92, 100 (3d Cir. 2005); see also Cavazos v. Smith, 132 S. Ct. 2, 4 (2011) (“[A] federal court may not overturn a state court decision . . . simply because the federal court disagrees with the state court.”).

II. BACKGROUND

The Commonwealth charged that over the course of more than five years, Petitioner, a former criminal defense attorney in Philadelphia, sexually abused six girls aged five to sixteen. Commonwealth v. Charles, No. 893 EDA 2008, slip op. at 2 (Pa. Super. Ct. May 3, 2010). The abuse stopped on January 15, 2007, “when he was caught, naked, with a 14-year-old victim in the lawyer’s lounge of the Criminal Justice Center in Philadelphia.” Id. On September 10, 2007, Petitioner pled nolo contendere to sixteen counts, including rape, involuntary deviate sexual intercourse, unlawful contact/communication with a minor, aggravated indecent assault, and indecent assault. (Pet., Doc. No. 1 at 1); Charles, No. 893 EDA 2008 at 2. The Sexual Offenders Assessment Board evaluated Petitioner and determined that he was a sexually violent predator. Charles, No. 893 EDA 2008 at 2.

On December 20, 2007, the trial court sentenced Petitioner—who was 52 years old—to consecutive sentences for the most serious charge related to each victim: 6-12 years for rape of victim L.W.; 5-10 years for unlawful contact or communication with a minor, a second victim L.W.; 1-2 years for unlawful contact or communication with a minor, victim D.J.; 5-10 years for rape of victim J.T.; 1-2 years for unlawful contact or communication with a minor, victim K.W.;

and 6-12 years for rape of victim C.W. Charles, No. 893 EDA 2008 at 2; Charles, No. 953 EDA 2012, slip op. at 3 n.4, 5. The trial court also imposed a consecutive sentence of one to two years for indecent assault of the youngest victim, C.W., who was five to six years old when Petitioner raped and assaulted her. Charles, No. 953 EDA 2012, slip op. at 3 n.4. Petitioner received a concurrent sentence for the remainder of the charges. Id. His aggregate sentence was thus 25 to 50 years imprisonment. Charles, No. 893 EDA 2008 at 2. Defense counsel did not object to the aggregate sentence or any of the individual sentences. Id. Petitioner subsequently moved for reconsideration, asking the trial court to impose concurrent, rather than consecutive, sentences for all the charges. Charles, No. 953 EDA 2012 at 3. On February 21, 2008, the trial court denied the motion. Id.

On direct appeal, Petitioner argued that his aggregate sentence was “arbitrary, excessive, unreasonable, shocking to the conscience, and disproportionate to the crime, and amounted to an abuse of discretion.” Charles, 893 EDA 2008 at 2. On May 3, 2010, the Pennsylvania Superior Court ruled that Petitioner had waived these contentions because he did not raise them at sentencing or in his motion for reconsideration. Id. at 4-5. The Pennsylvania Supreme Court denied allocatur. Charles, 953 EDA 2012 at 3.

On January 13, 2011, Petitioner filed a *pro se* petition for relief under the Post-Conviction Relief Act. Id. The Court appointed counsel, who filed an amended PCRA petition on December 5, 2011, raising one claim: that trial counsel had ineffectively failed to challenge the discretionary aspects of the sentence. Id. at 3-4; Commonwealth v. Charles, CP-51-CR-005639-2007, slip op. at 1. On March 20, 2012, the PCRA Court denied relief, ruling that although trial counsel’s performance was deficient, Petitioner had not demonstrated prejudice. Charles, 953 EDA 2012 at 4, 6. On August 17, 2012, the Superior Court affirmed. Id. The

Supreme Court again denied allocatur. (Rep., Doc. No. 19 at 3.)

On December 23, 2013, Petitioner filed the instant *pro se* Petition, alleging that: 1) trial counsel was ineffective in failing to preserve the sentencing challenge for appeal; 2) the PCRA Court and the Superior Court erroneously failed to grant Petitioner a *nunc pro tunc* appeal; and 3) Petitioner's sentence amounts to cruel and unusual punishment, violating his due process and equal protection rights, as it is effectively a life sentence. (Pet., Doc. No. 1 at 7.) I referred the Petition to Judge Heffley on April 30, 2014. (Doc. No. 8.) Respondents filed a Response on October 2, 2014. (Doc. No. 17.)

Judge Heffley filed her Report and Recommendation on February 27, 2015, concluding that all Petitioner's claims were meritless. (Doc. No. 19.) Petitioner filed objections on March 16, 2015. (Doc. No. 21.)

III. OBJECTIONS

Although couched differently, Petitioner's habeas claims—and the instant objections—all iterate and belatedly reiterate Petitioner's belief that his sentence was too long. Because, like Judge Heffley, I conclude that the state courts' decisions were not "objectively unreasonable," I will overrule Petitioner's objections.

A. Ineffective Assistance of Counsel

Petitioner first objects to Judge Heffley's rejection of his ineffectiveness claim.

Standard

Petitioner argues that Judge Heffley applied the wrong ineffectiveness standard: "[U]nbelievably, and without comment the Magistrate quotes the Superior Court incorrectly stating that [Petitioner] had to establish that the outcome of the challenged proceeding 'would have been different.' . . . [A] Petitioner does not have to show that he 'would' definitely succeed

with his ineffectiveness claims.” (Pet’r Obj., Doc. No. 21 at 7.) In fact, Judge Heffley quoted the Superior Court’s recitation of the correct prejudice standard: “[A]ppellant had to establish that but for counsel’s failure to properly challenge his sentence, ‘there is a reasonable probability that the outcome of the challenged proceeding would have been different.’” (Rep., Doc. No. 19 at 10 (quoting Comm. v. Charles, 953 EDA 2012, slip op. at 7 (citing Comm. v. Whitmore, 860 A.2d 1032, 1036 (Pa. Super. Ct. 2004)))); see also Strickland v. Washington, 466 U.S. 668, 694 (1984) (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”). Accordingly, I will overrule the objection.

Sentencing Considerations

Petitioner argues that Judge Heffley did not adequately address the sentencing court’s failure to consider Petitioner’s potential for rehabilitation. Although his contention is not entirely clear, Petitioner seems to argue that he has demonstrated prejudice from his trial counsel’s failure to object to the manner in which the sentencing court considered rehabilitation. I disagree.

At sentencing, the Commonwealth presented the testimony of an expert who found that Petitioner’s risk of recidivism was high. N.T. 12/20/07 at 43, 65, 68. Petitioner presented expert testimony that his recidivism risk was in the “moderate range,” but, with proper intervention, could be “relatively low to moderate.” Id. Before pronouncing sentence, the court explained:

And also taking into consideration the rehabilitative needs of you, Larry Charles, to the extent there are any, because I don’t know what they are. I think you’ve heard me say that with both doctors that testified here this morning. That to me, at this point is speculation; but nevertheless, that testimony has been seriously considered.

I also from a personal viewpoint agree with the district attorney here, I can't believe that if you were out on the street that you would ever stop. And perhaps my effort here is to try to stop you as best I can.

(N.T. 12/20/07 at 166-69.)

The sentencing judge thus took into account Petitioner's capacity for rehabilitation, and found that if Petitioner were "out on the street" he would continue assaulting underage victims. After examining the sentencing transcript, the Pennsylvania Superior Court ruled that Petitioner had not demonstrated that he was prejudiced by counsel's failure to object to the sentencing court's finding. Charles, 953 EDA 2012 at 9-11. Because construing the expert testimony was certainly the sentencing judge's prerogative, it appears that counsel's objection to that construction would have done little more than confirm counsel's disagreement with the judge. In light of the trial court's "serious[] consider[ation]" of the testimony of two experts regarding recidivism, it is thus highly unlikely that an objection would have resulted in a different sentence. In these circumstances, the Pennsylvania Superior Court's ruling that Petitioner had failed to show prejudice was not "contrary to, or . . . an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254. Accordingly, I will overrule the objection.

Federal Law

Petitioner objects to Judge Heffley's characterization of his sentencing challenge as being primarily based on state law. (See Doc. No. 19 at 11 (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Milton v. Graterford, No. 1:09-CV-1477, 2010 WL 5060199, at *1-3 (M.D. Pa. Dec. 6, 2010) (sentencing is a state law question, and a sentence does not implicate federal law if it falls within statutory bounds).) Petitioner is correct that his ineffectiveness claim is based on federal constitutional law. See Strickland, 466 U.S. at 694.

Judge Heffley plainly understood this. Like Judge Heffley, I conclude that because Petitioner has not demonstrated prejudice, there was no ineffectiveness. In these circumstances, I will overrule the objection.

B. Prejudice Inquiry

Petitioner repeatedly objects to the Superior Court's prejudice inquiry, and Judge Heffley's recommendation that it remain undisturbed, arguing that "prejudice should have been presumed." (Pet'r Obj., Doc. No. 21 at 8, 9.) I disagree.

Prejudice is presumed when a defendant is deprived of counsel entirely, or when counsel's ineffectiveness deprives a defendant of an entire procedure, such as an appeal. See United States v. Cronin, 466 U.S. 648, 658-59 (1984) ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. . . . There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel."); Roe v. Flores-Ortega, 528 U.S. 470, 482-84 (2000) (applying a "presumption of prejudice" to cases where counsel fails to file a notice of appeal, and defendant shows a reasonable probability that he wanted to appeal).

As Judge Heffley noted, counsel's failure to object to Petitioner's sentence did not deprive Petitioner of counsel or of the appellate process altogether. (See Doc. No. 19 at 13.) Petitioner has not cited any Supreme Court authority that failure to preserve an issue for appeal is tantamount to the outright denial of an appeal, warranting the presumption of prejudice. In these circumstances, I conclude that the Superior Court's application of the Strickland standard, requiring the showing of prejudice, was neither "contrary to" nor "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States."

28 U.S.C. § 2254. Accordingly, I will overrule the objection.

C. Sentencing Procedure

Judge Heffley rejected as procedurally defaulted and non-cognizable Petitioner's arguments that his sentencing procedure violated the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment. (Doc. No. 19 at 14.) Petitioner objects.

Procedural Default

Judge Heffley found that these sentencing claims were procedurally defaulted because Petitioner never raised them in state court. Petitioner argues there was no procedural default because: (1) PCRA counsel was appointed solely to raise counsel's ineffectiveness, and so was not given an opportunity to present other claims; and (2) Petitioner nevertheless presented these claims. I will overrule these objections.

Even assuming, *arguendo*, that PCRA counsel was appointed to allege only trial counsel's ineffectiveness, that would not have precluded him from arguing that counsel was ineffective for failing to raise the Fourteenth and Eighth Amendment claims. Plainly, Petitioner has not made out the "cause" required to overcome procedural default. See Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (a petitioner attempting to excuse a procedural default must demonstrate "cause" and "prejudice"); Coleman v. Thompson, 501 U.S. 722, 753 (1991) ("interference by officials ma[king] compliance impracticable" constitutes "cause"). Moreover, Petitioner himself failed to raise these Fourteenth and Eighth Amendment claims at the PCRA stage—before counsel filed an amended petition. (PCRA Pet.; PCRA Am. Pet.) Indeed, Petitioner did not raise a constitutional claim at sentencing or on direct appeal, and has not sought to excuse his failure to do so.

To the extent that Petitioner argues that his failure to raise these issues earlier was the

result of ineffective assistance of trial counsel, he has failed to demonstrate prejudice. Petitioner offers no federal authority requiring more process than he was afforded, identified a way in which he was treated differently from similarly situated individuals, or explained how his punishment is "cruel and unusual." He has merely argued that the sentencing judge should have made a finding regarding his potential for rehabilitation, and added a constitutional label to the claims. He has not shown, however, that an earlier assertion of these relabeled claims would have resulted in a different outcome. See Murray v. Carrier, 477 U.S. 478, 493 (1986) (habeas petitioner attempting to excuse procedural default must show "actual prejudice").

Petitioner also argues that he in fact did present these claims to the PCRA court, but simply failed to identify the constitutional provisions by name. This is simply untrue. See Baldwin v. Reese, 541 U.S. 27, 29 (2004) ("Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." (internal citations and quotation marks omitted)); Nara v. Frank, 488 F.3d 187, 197-98 (3d Cir. 2007) ("A petitioner can 'fairly present' his claim through: (a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." (internal citation omitted)).

At the PCRA, Petitioner raised the federal ineffectiveness standard and state authority regarding sentencing, and made no mention of Due Process, Equal Protection, or the Eighth Amendment. (PCRA Pet., PCRA Am. Pet); Colon v. DiGuglielmo, No. 05-cv-4343, 2007 WL 4976518, at *7 (E.D. Pa. Apr. 11, 2007) ("[A]ny attempt by Petitioner to convert this claim into

a federal issue by adding 'Due Process' language for the first time in this forum results in an unexhausted and procedurally defaulted claim.”).

In these circumstances, Petitioner failed fairly to present his constitutional claims.

Cognizability

To the extent that Petitioner presented these claims in state court, I agree with Judge Heffley's conclusion that Petitioner merely seeks to challenge his sentence under state law, and this claim is non-cognizable in federal court. See Milton v. Graterford, No. 1:09-cv-1477, 2010 WL 5060199, at *1 (M.D. Pa. Dec. 6, 2010) (“[A]bsent some constitutional violation, it is clear that, particularly in the area of state sentencing guidelines, federal courts cannot review a state's alleged failure to adhere to its own sentencing procedure. Accordingly, a federal court will not reevaluate a sentence in a habeas corpus proceeding unless it exceeds statutory limits.” (internal citations and quotation marks omitted)). Petitioner's sentence was within the statutory limits under Pennsylvania law. Charles, 953 EDA 2012 at *9. Accordingly, I will overrule Petitioner's objections.

D. Evidentiary Hearing

Petitioner also objects to Judge Heffley's refusal to conduct an evidentiary hearing. (Pet'r Obj. at 5.) I agree with Judge Heffley. In exercising my discretion when considering Petitioner's request, I must “focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim.” Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000). Because the pleadings here clearly demonstrate that Petitioner's claims are procedurally defaulted, non-cognizable, meritless, or all three, a hearing would be pointless. Accordingly, I will overrule the objection.

E. Certificate of Appealability

Finally, Petitioner objects to Judge Heffley's recommendation that I decline to issue a certificate of appealability. (Pet'r Obj. at 1-4, 21.) Petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). No "reasonable jurist" could conclude that the Superior Court's disposal of Petitioner's ineffectiveness claim was "contrary to" or an "unreasonable application" of United States Supreme Court authority. See 28 U.S.C. § 2254; Slack v. McDaniel, 529 U.S. 473, 484 ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."). Moreover, Petitioner's failure to present Due Process, Equal Protection, and Eighth Amendment claims in state court constitutes a "plain procedural bar." Slack, 529 U.S. at 484 ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."). In these circumstances, there are no grounds to issue a certificate of appealability.

IV. CONCLUSION

AND NOW, this 30th day of July, 2015, upon consideration of the pleadings and record herein, and after careful review of Judge Heffley's Report and Recommendation (Doc. No. 19) and all related filings, it is hereby **ORDERED** that:

1. Petitioner's objections to the Report and Recommendation (Doc. No. 21) are **OVERRULED**;
2. Judge Heffley's Report and Recommendation (Doc. No. 19) is

APPROVED and ADOPTED;

3. There are no grounds to issue a certificate of appealability; and
4. The Clerk of Court shall mark this case closed for statistical purposes.

AND IT IS SO ORDERED.

Paul S. Diamond 4/30/15
Paul S. Diamond, J.

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

LARRY CHARLES,

Petitioner,

v.

LAUREL HARRY, et al.,

Respondents.

CIVIL ACTION

NO. 13-7548

FILED FEB 27 2015

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J.

February 27, 2015

This is a pro se petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Larry Charles ("Petitioner" or "Charles"), a prisoner incarcerated at the State Correctional Institution in Camp Hill, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

On September 10, 2007, Charles entered pleas of nolo contendere to 16 counts, including multiple charges of rape, involuntary deviate sexual intercourse, unlawful contact/communication with a minor, aggravated indecent assault, and indecent assault.¹

Commonwealth v. Charles, 953 EDA 2012, slip op. at 2 (Pa. Super. Ct. Aug. 17, 2012). The charges arise from "Charles' repeated sexual assault of six minors, ranging in age from five to

¹ The statement of the factual and procedural background is based upon the information provided in Charles' petition and his accompanying memorandum of law ("Petitioner's Brief") (Doc. No. 1), the response to the petition by the District Attorney of Philadelphia ("Response") (Doc. No. 17), Charles' reply to the Commonwealth's response ("Petitioner's Reply") (Doc. No. 18), and the state court record.

APPENDIX E

16, over the course of more than five years. Charles was finally stopped on January 15, 2007 when he was caught, naked, with a 14-year-old victim in the lawyer's lounge of the Criminal Justice Center in Philadelphia.” Commonwealth v. Charles, 893 EDA 2008, slip op. at 2 (Pa. Super. Ct. May 3, 2010). On December 20, 2007, the trial court held a sentencing hearing and, thereafter, imposed an aggregate term of imprisonment from 25 to 50 years.² Commonwealth v. Charles, 953 EDA 2012, slip op. at 2-3. Charles' sentence is within the standard sentencing range under Pennsylvania law. Commonwealth v. Charles, 953 EDA 2012, slip op. at 8. After sentencing, Charles filed a motion for reconsideration of his sentence, requesting that the trial court impose the sentences to run concurrently. Id. at 3. The trial court denied the motion on February 21, 2008. Id.

Charles, through counsel, subsequently filed a timely direct appeal, raising the following issue: “Whether the sentence was appropriate for [Charles], in that the sentence of 25 to 50 years was arbitrary, excessive, unreasonable, shocking to the conscience, and disproportionate to the crime, and amounted to an abuse of discretion by the [trial] court.” Commonwealth v. Charles, 893 EDA 2008, slip op. at 2. On May 3, 2010, a divided panel of the Pennsylvania Superior

² The sentence imposed, as summarized by the Pennsylvania Superior Court, is as follows:

The trial court imposed consecutive sentences on the most serious charge for each victim – (1) victim L.W. (age 13-14), rape, 6-12 years; (2) victim L.W. (age 13-15), unlawful contact or communication with a minor, 5-10 years; (3) victim D.J. (age 10), unlawful contact or communication with a minor, 1-2 years; (4) victim J.T. (age 10-16), rape, 5-10 years; (5) victim K.W. (age 9-12), unlawful contact or communication with a minor, 1-2 years; (6) victim C.W. (age 5-6), rape, 6-12 years. With respect to the youngest victim, C.W., the court also imposed a consecutive sentence of one to two years for the charge of indecent assault. All of the other sentences were imposed to run concurrently.

Commonwealth v. Charles, 893 EDA 2008, slip op. at 3 n.4.

Court affirmed the sentence imposed, holding that Charles had waived his claim by failing to raise the issue either at sentencing or in his post-sentence motion for reconsideration. Id. at 4. Charles filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on November 16, 2010.

On January 13, 2011, Charles filed a pro se Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9545 et seq. (“PCRA”), petition. Commonwealth v. Charles, 953 EDA 2012, slip op. at 3. Counsel was appointed and filed an amended PCRA petition on December 5, 2011. Id. at 3-4. Charles raised one claim in his amended petition, alleging his trial counsel was ineffective for failing to file a motion for reconsideration that challenged the discretionary aspects of his alleged excessive sentence. Commonwealth v. Charles, CP-51-CR-005639-2007, slip op. at 1 (Phil. C.P. Ct. Mar. 20, 2012). On March 20, 2012, the PCRA court dismissed his amended petition as meritless, finding that he was not prejudiced by his trial counsel’s alleged ineffective assistance. Id. at 1-5.

Charles appealed the PCRA court’s decision, raising the following question:

Did the PCRA court err in dismissing appellant’s PCRA petition when appellant was deemed not to have suffered prejudice when his sole issue on direct appeal was waived, when appellant was sentenced to an effective life sentence, and when the sentencing judge did not realize that he was imposing a life sentence and failed to account for rehabilitation?

Commonwealth v. Charles, 953 EDA 2012, slip op. at 4. On August 17, 2012, the Pennsylvania Superior Court affirmed the PCRA court’s decision, holding that Charles had “not demonstrated that he was prejudiced by plea counsel’s failure to properly challenge the discretionary aspects of his sentence prior to his direct appeal.” Id. at 11. Charles filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on March 27, 2013.

On December 23, 2013, Charles filed the present pro se habeas petition, raising the following three claims for relief:

1. Did trial counsel violate Petitioner's 6th Amendment right to effective counsel by not perfecting his right to appeal the discretionary aspects of his sentence;
2. Did the PCRA Court and the Superior Court err and violate the Petitioner's 6th and 14th Amendment rights by not granting a Nunc Pro Tunc Appeal and by instead reviewing Petitioner's case on the merits and stating Petitioner needed to show that he was prejudiced by trial counsel's alleged ineffectiveness; and
3. Did the Trial Court violate Petitioner's 8th Amendment right by imposing a sentence that amounts to cruel and unusual punishment, and violate Petitioner's 14th Amendment rights by imposing a sentence that violated Petitioner's due process and equal protection rights, by imposing an effective life sentence without following established sentencing procedures.

Pet'r's Br. at 1. Respondents contend that Charles' claims are non-cognizable, procedurally defaulted, and/or meritless. For the reasons set forth below, I find that Charles is not entitled to habeas relief and recommend that his petition be denied.

II. APPLICABLE LEGAL STANDARDS

A. Standard for Issuance of a Writ

Congress, by its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), significantly limited the federal courts' power to grant a writ of habeas corpus.

Where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, a federal court shall not grant habeas relief unless the adjudication:

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

28 U.S.C. § 2254(d).

The United States Supreme Court has made clear that a writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” Bell v. Cone, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court “unreasonably applies it to the facts of the particular case.” Id. This requires a petitioner to demonstrate that the state court’s analysis was “objectively unreasonable.” Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

State court factual determinations are also given considerable deference under the AEDPA. Lambert v. Blackwell, 387 F.3d 210, 239 (3d Cir. 2004). A petitioner must establish that the state court’s adjudication of the claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(2).

B. Cognizable Claims

It was well-established, even prior to the passage of the AEDPA, that state courts are the final arbiters of state law and assertions of state court error in the application of state law are not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). In McGuire, the United States Supreme Court expressly held that “federal habeas corpus relief does not lie for errors of state law” and “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Id. (citations and quotations omitted). In reviewing a habeas petition, “a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States.” Id. at 68 (citations omitted). This

standard has long been codified:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in [sic] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a). Accordingly, only claims asserting such grounds are cognizable on federal habeas review.

C. Exhaustion and Procedural Default

“[A] federal habeas court may not grant a petition for writ of habeas corpus unless the petitioner has first exhausted the remedies available in the state courts.” Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(A)). The procedural default barrier, in the context of habeas corpus, also precludes federal courts from reviewing a state petitioner’s habeas claims if the state court decision is based on a violation of state procedural law that is independent of the federal question and is adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). “[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . .” Id. at 735 n.1; McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999).

1. Exceptions to Procedural Default

To survive procedural default in the federal courts, a petitioner must either “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 claims will result in a fundamental miscarriage of justice.” Coleman, 501 U.S. at 750.

a. Cause and Prejudice Exception

In order to show “cause,” a petitioner must point to the existence of some objective, external factor that impeded his efforts to comply with Pennsylvania’s procedural rules. Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of suitable cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; or (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable. Coleman, 501 U.S. at 753-54. “Prejudice” can be established if the petitioner can demonstrate that the outcome of the state proceeding was unreliable or fundamentally unfair as a result of a violation of federal law. See Lockhart v. Fretwell, 506 U.S. 364, 366 (1993).

b. Fundamental Miscarriage of Justice Exception

To establish the fundamental miscarriage of justice exception, the petitioner must demonstrate his or her “actual innocence.” Schlup v. Delo, 513 U.S. 298, 324 (1995); Calderon v. Thompson, 523 U.S. 558, 559 (1998). A demonstration of actual innocence requires the petitioner to present new, reliable evidence of his or her innocence that was not presented at trial. Schlup, 513 U.S. at 324. The new evidence must be considered along with the entire record, including that which was excluded or unavailable at trial. Id. at 327-28. Once such evidence is presented, the petitioner’s defaulted claims can only be reviewed if “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt” in light of the new factual evidence. Id. at 327.

D. Ineffective Assistance of Legal Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth

Amendment. Counsel is presumed to have acted effectively unless the petitioner demonstrates both that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 686–88, 693–94.

To satisfy the reasonable performance prong of the analysis, the petitioner must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Harrington v. Richter, 131 S. Ct. 770, 778 (2011) (quoting Strickland, 466 U.S. at 687). In evaluating counsel’s performance, the reviewing court “must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance” and that there are “countless ways to provide effective assistance in any given case”; “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” Id. at 778–89 (quoting Strickland, 466 U.S. at 689). The reviewing court must “reconstruct the circumstances of counsel’s challenged conduct” and “evaluate the conduct from counsel’s perspective at the time.” Id. at 779 (quoting Strickland, 466 U.S. at 689). “[I]t is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” Id. at 791.

To satisfy the prejudice prong of the analysis, a petitioner must demonstrate that “counsel’s errors were so serious as to deprive [petitioner] a fair trial, a trial whose result is reliable.” Id. at 687. Thus, a petitioner must show a reasonable probability that, but for counsel’s “unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome.” Id. at 694. This determination must be made in light of “the totality of the evidence before the judge or jury.” Id. at 695.

III. DISCUSSION OF PETITIONER'S THREE CLAIMS

A. Petitioner's First Claim Alleging Ineffective Assistance of Counsel is Meritless

In his first claim, Charles maintains that his trial counsel was ineffective for failing to raise and preserve an abuse of discretion objection to the discretionary aspects of his sentence. Pet'r's Br. at 3. Charles argues that trial counsel failed to make an oral objection at sentencing or "file a Motion for Reconsideration of Sentence that challenged the sentence on the basis that it was the result of abuse of discretion by the trial court and was the product of partiality, prejudice, bias, ill will, or manifestly unreasonable." *Id.* Respondents contend that Petitioner's claim was properly rejected by the state courts and is meritless. This Court agrees with Respondents.

In consideration of this claim on appeal, the Pennsylvania Superior Court first set out the Pennsylvania standard for ineffective assistance of counsel, stating that a petitioner must show the following: "(1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceeding would have been different." Commonwealth v. Charles, 953 EDA 2012, slip op. at 5 (citing Commonwealth v. Rathfon, 899 A.2d 365, 369 (Pa. Super Ct. 2006)).³

Next, the Superior Court acknowledged that "the PCRA court conceded that appellant had satisfied the first two prongs of his ineffectiveness claim." *Id.* at 6. The PCRA court determined that the "real issue in this case is whether the petitioner suffered prejudice as a result of counsel's inaction, to wit: whether [the] sentencing court in imposing a sentence of 25-50

³ The Pennsylvania standard for judging ineffective assistance of counsel claims is equivalent to the ineffectiveness standard enunciated in Strickland. Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000).

years imprisonment acted unreasonably.” Commonwealth v. Charles, CP-51-CR-005639-2007, slip op. at 2. The Superior Court agreed with the lower court’s determination, explaining that “to be eligible for relief, appellant had to establish that but for counsel’s failure to properly challenge his sentence, ‘there is a reasonable probability that the outcome of the challenged proceeding would have been different,’ – that is, appellant would have been entitled to have his sentence vacated and remanded.” Commonwealth v. Charles, 953 EDA 2012, slip op. at 7 (citing Commonwealth v. Whitmore, 860 A.2d 1032, 1036 (Pa. Super Ct. 2004)).

The Superior Court then summarized Charles’ argument as follows: “Appellant argues that the sentence imposed by the trial court was unreasonable because ‘the sentencing court seemed to fail to realize that it was imposing a life sentence and [that] appellant has potential for rehabilitation, an issue the sentencing court failed to assess.’” Id. The Superior Court found that Charles’ claim was meritless under Pennsylvania law, explaining that “the sentencing transcript reveals that the trial court considered all the relevant factors, and imposed a sentence that was, in the circumstances of this case, reasonable.” Id. at 10. After completing its analysis, the Superior Court held that Charles had “not demonstrated that he was prejudiced by plea counsel’s failure to properly challenge the discretionary aspects of his sentence prior to his direct appeal.” Id. at 11.⁴

Considering its well-reasoned analysis, this Court finds that the Pennsylvania Superior Court’s rejection of Charles’ claim for lack of prejudice does not amount to an unreasonable application of Strickland. While the Superior Court previously held that Charles had waived his

⁴ Where a state court has already rejected an ineffective assistance of counsel claim, a federal court must defer to the state court ruling unless the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

abuse of discretion claim on direct appeal, in consideration of his ineffective assistance claim, the court considered the merits of his abuse of discretion claim to determine whether he was prejudiced.⁵ Before this Court, Charles raises the same ineffective assistance claim, which challenges whether the trial court appropriately weighed the relevant sentencing factors and imposed a sentence that was reasonable under Pennsylvania law. However, “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Sentencing is a matter of state law and, so long as the sentence imposed falls within the statutory bounds, it does not implicate federal constitutional issues. Milton v. Graterford, No. 1:09-CV-1477, 2010 WL5060199, at *1-3 (M.D. Pa. Dec. 6, 2010). Therefore, this Court, in considering the merit of Charles’ underlying claim, must defer to the Superior Court’s finding that the trial court’s sentencing decision was reasonable under state law. Commonwealth v. Charles, 953 EDA 2012, slip op. at 10.

As the United States Court of Appeals for the Third Circuit has explained, under Strickland, “[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney’s failure to raise a meritless argument.” United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). Charles, therefore, cannot be prejudiced by his trial counsel’s failure to preserve his right to appeal a meritless abuse of discretion claim. See Wright v. Smeal, No. 08-2073, 2009 WL 5033967, at *8 (E.D. Pa. December 23, 2009) (“Because the sentencing court did not abuse its discretion in imposing sentence upon [the petitioner], and the sentence was legal under the

⁵ The Supreme Court has noted that analysis of each prong in Strickland is unnecessary if a petitioner clearly cannot establish one of the elements. Strickland, 466 U.S. at 697. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

law, trial counsel cannot be found ineffective for failing to object to the sentence the court imposed.”) (footnote omitted); United States v. Clarke, Nos. Cr. 99-280-02, Civ. A. 02-2767, 2002 WL 1744143, at *2 (E.D. Pa. July 23, 2002) (denying relief on an ineffective assistance of counsel claim for failure to object to the imposition of consecutive sentences, “[b]ecause such an objection would have been meritless).

In light of the foregoing analysis, this Court finds that the state courts’ rejection of Charles’ claim was not contrary to, or involved an unreasonable application of, clearly established federal law. Nor has Charles demonstrated that the state courts’ adjudication of his ineffective assistance claim “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.” See 28 U.S.C. § 2254(d)(2).⁶ Consequently, pursuant to 28 U.S.C. § 2254(d), habeas relief is not warranted and this claim should be dismissed.

B. Petitioner’s Second Claim Challenging the State Courts’ Application of Strickland is Meritless

In his second claim, Charles contends that the PCRA Court and the Pennsylvania Superior Court erred and violated his “6th and 14th Amendment rights by not granting a Nunc Pro Tunc Appeal and by instead reviewing Petitioner’s case on the merits and stating Petitioner needed to show that he was prejudiced by trial counsel’s alleged ineffectiveness.” Pet’r’s Br. at 1, 10, 53-54. After carefully reviewing his Brief and Reply, it becomes clear that Charles is challenging the state courts’ application of the Strickland standard. Charles argues that prejudice

⁶ Under 28 U.S.C. § 2254(e)(1), this Court must presume state court determinations of factual issues to be correct unless the Petitioner meets his “burden of rebutting the presumption of correctness by clear and convincing evidence.”

may be presumed in this case because “due to errors by petitioner’s trial counsel, petitioner was placed in the same position as a defendant who had trial counsel who failed to file an appellant brief.” Pet’r’s Br. at 11. Charles, however, is mistaken and this Court finds that the state courts properly applied Strickland and denied his ineffective assistance of counsel claim.

The United States Supreme Court has found that prejudice may be presumed in certain contexts. For instance, the Court commented in Strickland that “[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” Strickland, 466 U.S. at 692. Applying this reasoning in Flores-Ortega, 528 U.S. 470, 482-84 (2000), the Supreme Court held that prejudice may be presumed where a defendant is deprived an appellate proceeding altogether.

However, in this case, trial counsel’s representation, unlike that contemplated in Flores-Ortega, did not deny Charles of the state appellate process. Trial counsel’s alleged error in failing to object to the discretionary aspects of his sentence occurred at sentencing and prior to the filing of his direct appeal. Furthermore, despite trial counsel’s failure to object, which precluded direct appellate review of this particular claim, Charles was not deprived of an appellate proceeding altogether. In this case, trial counsel’s failure to preserve one claim for appeal constitutes a “deficient performance” or “attorney error” that is “subject to [the] general requirement that the defendant affirmatively prove prejudice.” Strickland, 466 U.S. at 693. The Pennsylvania state courts, therefore, correctly applied Strickland’s prejudice prong and found Charles’ claim to be meritless.⁷ For these reasons, Charles’ second claim should be dismissed.

⁷ Charles has failed to cite any clearly established federal law as determined by the United States Supreme Court, which would require the presumption of prejudice in this particular case.

C. Petitioner's Third Claim is Non-Cognizable and Procedurally Defaulted

In his third claim, Charles contends that the trial court violated his "8th Amendment right by imposing a sentence that amounts to cruel and unusual punishment" and violated his "14th Amendment rights by imposing a sentence that violated Petitioner's due process and equal protection rights, by imposing an effective life sentence without following established sentencing procedures." Pet'r's Br. at 1. Respondents argue that Petitioner's due process claim is non-cognizable and that his Eighth Amendment claim is procedurally defaulted. This Court agrees with Respondents and recommends that both claims be dismissed.

1. What Petitioner Calls his Due Process and Equal Protection Claim is Procedurally Defaulted and Non-Cognizable

Charles alleges that the trial court violated his due process and equal protection rights by abusing its discretion and "imposing an effective life sentence without following established sentencing procedures." Pet'r's Br. at 1, 46-47. Charles, however, did not raise a due process and equal protection claim in state court.⁸ Therefore, to the extent he does so here, such a claim is now procedurally defaulted. Furthermore, while Charles characterizes his claim as a violation of "due process and equal protection" in his habeas petition, he actually challenges the discretionary aspects of his sentence under state law, making his claim non-cognizable. For these reasons, Charles' due process and equal protection claim is procedurally defaulted, his abuse of discretion claim is non-cognizable, and consequently, should be dismissed.

See 28 U.S.C. § 2254(d).

⁸ A review of the Pennsylvania Superior Court opinion affirming the denial of his PCRA petition confirms that Charles did not allege a violation of a specific constitutional right in state court. Commonwealth v. Charles, 953 EDA 2012.

“The Supreme Court has held that habeas matters involving a state court’s discretionary acts in sentencing proceedings are not subject to federal review, unless a specific constitutional claim is allegedly violated.” Milton v. Graterford, 2010 WL5060199, at *1 (citing Estelle v. McGuire, 502 U.S. at 67; see Jones v. Superintendent of Rahway State Prison, 725 F.2d 40, 42-43 (3d Cir. 1984) (a federal court has no power to review a state-imposed sentence in a habeas matter unless it involves a violation of a specific constitutional right)). “[A]bsent some constitutional violation, it is clear that, particularly in the area of state sentencing guidelines, federal courts cannot review a state’s alleged failure to adhere to its own sentencing procedure.” Milton v. Graterford, 2010 WL 5060199, at *1 (quoting Knight v. Beyer, No. 88-cv-3180, 1989 WL 68618, at *6 (E.D. Pa. June 22, 1989)). Furthermore, “a federal court will not reevaluate a sentence in a habeas corpus proceeding unless it exceeds the statutory limits.” Id. Adding the words “due process” and “equal protection” does not create a cognizable claim where Petitioner is alleging an error of state law. See Rivera v. Illinois, 556 U.S. 148; 158 (2000); see also Colon v. DiGuglielmo, No. 05-cv-4343, 2007 WL 4976518, at *6-7 (E.D. Pa. Apr. 11, 2007) (holding that any attempt by a petitioner to convert a claim into a federal issue by adding “due process” language for the first time in this forum results in an unexhausted and procedurally defaulted claim).

Charles did not present a due process and equal protection claim in state court, and therefore, to the extent he raises such a claim here, it is unexhausted and procedurally defaulted. See Colon v. DiGuglielmo, 2007 WL 4976518, at *6-7. Rather than asserting a clearly established constitutional violation, Charles’ claim challenges the discretionary aspects of his sentencing. As the Pennsylvania Superior Court noted, Charles’ sentence is within the standard sentencing range under Pennsylvania law. Commonwealth v. Charles, 953 EDA 2012, slip op. at

8. Therefore, in light of the foregoing, Charles' abuse of discretion claim is unreviewable in federal court.⁹

2. Petitioner's Eighth Amendment Claim is Procedurally Defaulted

Charles argues that the trial court violated the Eighth Amendment of the United States Constitution by imposing a sentence that constitutes cruel and unusual punishment. Pet'r's Br. at 1, 45. Charles' claim, however, is procedurally defaulted. He did not present the claim in his direct appeal or PCRA proceedings; and, consequently, did not exhaust his state court remedies. At this juncture, Charles is time-barred from presenting his Eighth Amendment claim in state court and, therefore, review on the merits in federal court is procedurally barred. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

The default may be excused, however, if Charles demonstrates both "cause" for the default and "actual prejudice" as a result of the alleged violation of federal law, or if Charles shows that failure to consider the claim will result in a "fundamental miscarriage of justice." Coleman, 501 U.S. at 750. Charles, however, does not demonstrate cause for the default and actual prejudice, nor does he demonstrate that failure to consider his claim will result in a fundamental miscarriage of justice. His Eighth Amendment claim warrants dismissal.

⁹ In addition to being non-cognizable, Respondents correctly argue that Charles' abuse of discretion claim is also procedurally defaulted and meritless. First, as previously explained, the Pennsylvania Superior Court on direct appeal held that Charles had waived his abuse of discretion claim. Commonwealth v. Charles, 893 EDA 2008, slip op. at 4-5. Second, on appeal of his PCRA petition, the Superior Court, in considering Charles' ineffective assistance of counsel claim, found his underlying abuse of discretion claim to be meritless. Commonwealth v. Charles, 953 EDA 2012, slip op. at 10. As addressed above, this Court must defer to the Superior Court's finding that the trial court's sentencing decision was proper under Pennsylvania law.

IV. CONCLUSION

For all of the foregoing reasons, I recommend that Charles' habeas petition be denied in its entirety.¹⁰ Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 27th day of February, 2015, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED and DISMISSED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability. The Petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Marilyn Heffley
MARILYN HEFFLEY
UNITED STATES MAGISTRATE JUDGE

¹⁰ Charles requests an evidentiary hearing. In light of this Court's recommendation that the case be dismissed, Charles' request for an evidentiary hearing is denied. See Goldblum v. Klem, 510 F.3d 204, 221 (3d Cir. 2007) (citing Schriro v. Landrigan, 550 U.S. 465, 473 (1993)).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-3064

LARRY CHARLES,
Appellant

v.

SUPERINTENDENT CAMP HILL SCI;
ATTORNEY GENERAL PENNSYLVANIA

Present: McKEE, Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE,
and RESTREPO, Circuit Judges, and GARTH*, Senior Circuit Judge

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

BY THE COURT,

s/ Michael A. Chagares
Circuit Judge

Dated: June 14, 2016
mlr/cc: Larry Charles
Simran Dhillon, Esq.

* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Garth's vote is limited to panel rehearing.

APPENDIX F

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

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

LARRY CHARLES

Appellant

No. 953 EDA 2012

Appeal from the PCRA Order March 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at Nos:
CP-51-CR-0002094-2007
CP-51-CR-0005612-2007
CP-51-CR-0005630-2007
CP-51-CR-0005636-2007
CP-51-CR-0005639-2007
CP-51-CR-0005641-2007

BEFORE: MUSMANNO, BOWES, JJ., and McEWEN, P.J.E.

MEMORANDUM PER CURIAM

FILED AUGUST 17, 2012

Appellant, Larry Charles, brings this appeal from the order denying his petition for post conviction collateral relief¹ from the judgment of sentence to serve a term of imprisonment of from twenty-five years to fifty years. The sentence was imposed after appellant entered a plea of *nolo contendere* to multiple counts of rape and related charges, in connection with the sexual abuse of six minor females, ranging in age from five years old to sixteen years old, over a period of eight years. We affirm.

¹ Appellant sought relief pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

APPENDIX 9

As we write exclusively for the parties, who are familiar with the facts underlying appellant's conviction, we need not recite them in depth. Suffice it to say that appellant, a former criminal defense attorney in Philadelphia, befriended the subject girls, several of whom were related, and bought them dinner and gifts. The "relationships" then escalated into sexual assaults. Appellant was eventually arrested on January 15, 2007, after he was caught, naked, in the lawyer's lounge of the Criminal Justice Center in Philadelphia, with one of the 14 year old victims.

Appellant entered pleas of *nolo contendere*, on September 10, 2007, to sixteen charges, including rape, involuntary deviate sexual intercourse, unlawful contact/communication with a minor, aggravated indecent assault, and indecent assault, with regard to his sexual assault of six minor victims. Three months later, on December 20, 2007, the trial judge² held a combined Megan's Law³/sentencing hearing, at the conclusion of which he concluded that appellant met the criteria for classification as a sexually violent predator, and imposed an aggregate term of imprisonment of from 25 years

² Judge Albert A. Stallone, of the Berks County Court of Common Pleas, was specially appointed to preside over appellant's case because, at the time of his arrest, appellant was a practicing trial attorney in Philadelphia County. **See:** Order, January 19, 2006 (recusing Philadelphia Court of Common Pleas bench from appellant's case).

³ 42 Pa.C.S. §§ 9791-9799.9, amended December 20, 2011.

to 50 years.⁴ Appellant filed a motion for reconsideration of sentence, requesting that the court impose the sentences to run concurrently, which the trial court denied on February 21, 2008.

Thereafter, appellant filed a direct appeal to this Court contending that the aggregate sentence imposed by the trial court was excessive and constituted an abuse of discretion. On May 3, 2010, we affirmed the judgment of sentence, concluding that the particular sentencing claim raised on appeal was waived since it was not included in appellant's motion for reconsideration. ***Commonwealth v. Charles***, 4 A.3d 181 (Pa.Super. 2010) (unpublished memorandum). Appellant subsequently filed a petition for allowance of appeal, which the Pennsylvania Supreme Court denied on November 16, 2010. ***See: Commonwealth v. Charles***, 608 Pa. 652, 12 A.3d 751 (2010). Two months later, on January 13, 2011, appellant filed a *pro se* PCRA petition. Counsel was appointed, and filed an amended petition

⁴ The trial court imposed consecutive sentences on the most serious charge for each victim — (1) victim L.W. (age 13-14), rape, 6-12 years; (1) victim L.W. (age 13-15), unlawful contact or communication with a minor, 5-10 years; (3) victim D.J. (age 10), unlawful contact or communication with a minor, 1-2 years; (4) victim J.T. (age 10-16), rape, 5-10 years; (5) victim K.W. (age 9-12), unlawful contact or communication with a minor, 1-2 years; (6) victim C.W. (age 5-6), rape, 6-12 years. With respect to the youngest victim, C.W., the court also imposed a consecutive sentence of from one year to two years for the charge of indecent assault. All of the other sentences were imposed to run concurrently.

on December 5, 2011. By Order dated March 20, 2012, the trial court⁵ denied appellant's petition for PCRA relief,⁶ and this timely appeal followed.

Appellant, in the brief submitted on appeal, raises one question for our review:

Did the PCRA court err in dismissing appellant's PCRA petition when appellant was deemed not to have suffered prejudice when his sole issue on direct appeal was waived, when appellant was sentenced to an effective life sentence, and when the sentencing judge did not realize that he was imposing a life sentence and failed to account for rehabilitation?

Brief of Appellant, p. 4.

Our review of an order denying PCRA relief is limited to a consideration of "whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Carter***, 21 A.3d 680, 682 (Pa.Super. 2011). The findings of the trial court will not be disturbed unless there is no support for those findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super. 2001).

⁵ It bears noting that Chester County Court of Common Pleas Senior Judge Charles B. Smith presided over appellant's PCRA proceedings. ***See: Supra***, n.2.

⁶ While the record reveals that the trial court failed to issue notice, pursuant to Pa.R.Crim.P. 907, of its intent to dismiss appellant's petition without first conducting an evidentiary hearing, our review of the briefs reveals that appellant did not object to the court's omission. Thus, any defect in notice is now waived. ***See: Commonwealth v. Boyd***, 923 A.2d 513, 514 n.1 (Pa.Super. 2007), ***appeal denied***, 593 Pa. 754, 932 A.2d 74 (2007); ***Commonwealth v. Williams***, 909 A.2d 383, 384, n.4 (Pa.Super. 2006).

Appellant's sole issue on appeal asserts the ineffective assistance of plea counsel for failing to properly challenge the discretionary aspects of his sentence.⁷ He argues that while plea counsel filed a motion for reconsideration of sentence, that motion failed to include the argument that appellant's sentence was excessive and clearly unreasonable under the circumstances of his case. Appellant contends that considering his age — 52 years at the time of sentencing — the court had imposed a virtual life sentence without due consideration of his potential for rehabilitation.

When reviewing a collateral claim of ineffective assistance of counsel, we are mindful of the following principles:

In order for appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. The petitioner bears the burden of proving all three prongs of the test.

⁷ Although a direct challenge to the discretionary aspects of sentencing is not a cognizable claim under the PCRA, a petitioner is permitted to challenge the discretionary aspects of sentencing as part of an ineffectiveness of counsel claim. **See:** 42 Pa.C.S. § 9543(a)(2)(ii); **Commonwealth v. Watson**, 835 A.2d 786, 801 (Pa.Super. 2003).

Commonwealth v. Rathfon, 899 A.2d 365, 369 (Pa.Super. 2006) (citations omitted). Further, as the underlying issue involves appellant's sentence, we must be cognizant of the fact that sentencing is a matter within the sound discretion of the trial court,⁸ and an appellant who wishes to challenge the discretionary aspects of his sentence must demonstrate that there is a substantial question that the sentence imposed is inappropriate under the sentencing guidelines. **Commonwealth v. L.N.**, 787 A.2d 1064, 1071 (Pa.Super. 2001), **appeal denied**, 569 Pa. 680, 800 A.2d 931 (2002).

Here, the PCRA court conceded that appellant had satisfied the first two prongs of his ineffectiveness claim. Specifically, the court found (1) that appellant's claim had arguable merit, in that a challenge to appellant's sentence as excessive or unreasonable raised a substantial question, and (2) that counsel had no reasonable basis for failing to include that claim in the motion for reconsideration. PCRA Court Opinion, March 20, 2012, pp. 1-2. **See: Commonwealth v. Whitmore**, 860 A.2d 1032, 1036 (Pa.Super. 2004), **rev'd in part**, 590 Pa. 376, 912 A.2d 827 (2006). Thus, the PCRA court concluded that the "real issue in this case is whether the petitioner suffered prejudice as a result of counsel's inaction, to wit: whether [the] sentencing court in imposing a sentence of 25-50 years imprisonment acted

⁸ **Commonwealth v. Bromley**, 862 A.2d 598, 604 (Pa.Super. 2004), **appeal denied**, 584 Pa. 684, 881 A.2d 818 (2005), **cert. denied**, 546 U.S. 1095, 126 S.Ct. 1089, 163 L.Ed.2d 863 (2006) (citation omitted).

unreasonably.” PCRA Court Opinion, *supra*, p. 2 (footnote omitted). Thus, to be eligible for relief, appellant had to establish that but for counsel’s failure to properly challenge his sentence, “there is a reasonable probability that the outcome of the challenged proceeding would have been different,” — that is, appellant would have been entitled to have his sentence vacated and remanded. **See: Commonwealth v. Whitmore, supra**, 860 A.2d at 1036 (citation omitted).

Appellant argues that the sentence imposed by the trial court was unreasonable because “the sentencing court seemed to fail to realize that it was imposing a life sentence and [that] appellant has potential for rehabilitation, an issue the sentencing court failed to assess.” Brief of Appellant, p. 9.

The Sentencing Code mandates that an appellate court vacate a sentence when that court concludes, *inter alia*, that “the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable.” 42 Pa.C.S. § 9781(c)(2). In making a determination of reasonableness, the Pennsylvania Supreme Court, in **Commonwealth v. Walls**, 592 Pa. 557, 926 A.2d 597 (2007), instructed that appellate courts should consider both sections 9721 and 9781 of the Sentencing Code. Section 9721(b) of the Sentencing Code, 42 Pa.C.S. § 9721(b), directs a trial court to follow the general principle that the sentence imposed should call for confinement that “is consistent with the protection of the public, the

gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” *Id.*, 592 Pa. at 566, 926 A.2d at 962. Furthermore, section 9781 sets forth the following four factors for an appellate court to consider when evaluating the reasonableness of a sentence:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant.
- (2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation.
- (3) The findings upon which the sentence was based.
- (4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Here, the trial court specifically stated at sentencing that he “carefully considered” all the relevant factors bearing upon the imposition of sentence, including, “the defendant’s age ... and potential for rehabilitation.” N.T., December 20, 2007, p. 158. The court acknowledged that the sentences he imposed reflected the required mandatory minimums, and were all within the standard range of the guidelines. *Id.*, p. 166. Moreover, a review of the trial court’s comments following the imposition of sentence reveals that he considered all the relevant factors outlined in the Sentencing Code:

These sentences, at least in this Court’s opinion further reflect the seriousness of the offenses upon which each sentence has been imposed. And obviously, all of these are very, very, serious offenses. They’re all egregious. We’ve heard time and time again the lasting effect they’re going to have on each of these six young lady’s as well as their family and as well as you, and you[r] family as well.

And the impact that they're going to have on the legal community of Philadelphia.

* * * *

I also want to say that each of these sentences obviously are consistent with this Court's concern for the protection of the public. The impact upon each of these six young ladies as well as their families as expressed here today.

And also taking into consideration the rehabilitative needs of you, Larry Charles, to the extent there are any, because I don't know what they are. I think you've heard me say that with both the doctors that testified here this morning. That to me, at this point is speculation; but nevertheless, that testimony has been seriously considered.^[9]

I also from a personal viewpoint agree with the district attorney here, I can't believe that if you were out on the street that you would ever stop. And perhaps my effort here is to try to stop you as best as I can.

* * * *

Now, finally am I sending a message to other who may be thinking of preying on children in this community and throughout the state? The answer is obviously, yes, I am.

Id., pp. 166-169. Although the trial court did not specifically acknowledge that a 25 to 50 year sentence constituted a virtual life sentence for the 52

⁹ Both the prosecution and defense presented expert testimony regarding appellant's risk of recidivism. Dr. Barbara Ziv, a board certified psychiatrist, evaluated appellant in her capacity as a member of the Sexual Offenders Assessment Board, and opined that appellant met the criteria for classification as a sexually violent predator, and, in particular, that he was a "high" risk to reoffend. N.T., December 20, 2007, p. 43. Dr. Barry Zakireh, a psychologist and expert in the field of sexual offenses, testified on behalf of appellant. Dr. Zakireh opined that appellant was in the "moderate range" for recidivism, but that, with strict monitoring and regular treatment, "his risk would be relatively low to moderate." *Id.*, pp. 65, 68.

year old appellant, he did state that he considered appellant's age,¹⁰ and defense counsel had urged the trial court to give appellant the opportunity to get back into the community, arguing that "to throw his life away for 25 to 50 years, you might as well give him a life sentence." *Id.*, p. 156. Thus, our review of the sentencing transcript reveals that the trial court considered all the relevant factors, and imposed a sentence that was, in the circumstances of this case, reasonable.¹¹

¹⁰ N.T., December 20, 2007, p. 158.

¹¹ We note that the appellant's reliance on ***Commonwealth v. Coulverson***, 34 A.3d 135 (Pa.Super. 2011), is misplaced. In that case, the 19 year old defendant was sentenced to a term of imprisonment of from 18 years to 90 years, for his involvement in a two-day crime spree that included a rape and several robberies. While the minimum sentences were imposed in the standard range of the guidelines, the maximum sentences were the statutory maximums allowed by law. On appeal, this Court concluded that "the record reveal[ed] scant consideration of anything other than victim impact and the court's impulse for retribution on the victims' behalf." *Id.*, 34 A.3d at 148. We found, in particular, that the trial court had not properly considered the individual and rehabilitative needs of the 19 year old defendant who had suffered "a series of hardships" in his young life, including the death of his mother when he was six years old, life with an abusive, alcoholic stepfather, and homelessness. *Id.*, 34 A.3d at 140. Moreover, this Court concluded that, based upon comments at argument on post sentence motions, the trial court "evinced a] determination not to consider any sentencing other than a statutory maximum, notwithstanding any factor that might counsel to the contrary." *Id.*, 34 A.3d at 149.

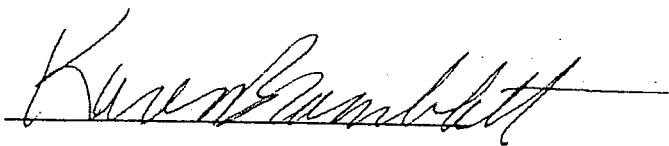
Conversely, in the present case, a 52 year old criminal defense attorney developed friendships with six minor females for the sole purpose of grooming them for sexual abuse, which occurred several times in the Criminal Justice Center. The sentences imposed were within the standard range of the guidelines and reflected both the seriousness of the offenses, as well as the individual needs of the defendant. Indeed, any lesser term of

(Footnote Continued Next Page)

Therefore, since we conclude that appellant has not demonstrated that he was prejudiced by plea counsel's failure to properly challenge the discretionary aspects of his sentence prior to his direct appeal, we affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 8/17/2012

(Footnote Continued) _____

imprisonment, which would necessarily involve the imposition of concurrent sentences, would afford appellant a "volume discount" for his crimes. This, we are unwilling to encourage or condone. ***Commonwealth v. Hoag***, 665 A.2d 1212, 1214 (Pa.Super. 1995).

COMMONWEALTH OF PENNSYLVANIA

: IN THE COURT OF COMMON PLEAS

v.

: PHILADELPHIA COUNTY, PENNSYLVANIA

LARRY CHARLES

FILED

MAR 20 2012

Post Trial Unit

CP-51-CR-002094-2007

CP-51-CR-005612-2007

CP-51-CR-005630-2007

CP-51-CR-005636-2007

CP-51-CR-005639-2007

CP-51-CR-005641-2007

OPINION

The petitioner was sentenced to 25-50 years imprisonment following his plea of no contest to a multitude of sexual assaults and related crimes inflicted upon six (6) young girls between the ages of five (5) and sixteen (16) years; these crimes were committed on numerous occasions between the years 1999 and 2007.

The petitioner, who is a criminal defense attorney claims his lawyer was ineffective when he failed to file a timely Motion for Reconsideration of Sentence. Such action constitutes a waiver of petitioner's ability to attack the discretionary aspects of sentencing (i.e. that the sentence is excessive).

To prevail on an ineffectiveness of counsel petition, a petitioner must show that: (1) the underlying claim has arguable merit; (2) counsel did not have a reasonable basis for his inaction; and (3) the petitioner suffered prejudice as a result of counsel's inaction.¹

I concede that the petitioner has satisfied the first two prongs of this three-prong test. To my way of thinking anyone convicted of crimes which occasion a

¹ Commonwealth v. Cam Ly, 980 A.2d 61, 65 (Pa. 2009)

APPENDIX 34

sentence of 25-50 years justify appellate scrutiny, especially when the defendant is a man of fifty-two (52) years of age.

The real issue in this case is whether the petitioner suffered prejudice as a result of counsel's inaction, to wit: whether sentencing court in imposing a sentence of 25-50 years imprisonment acted unreasonably.²

My first observation is that there are six (6) victims, three (3) of whom are siblings and all are juveniles. The victims were children who were immature and impoverished. The petitioner exploited this by using gifts and trinkets as a lure. In some instances they were told to think of him as a "Godfather." The sexual acts in question repeatedly took place over a period of nearly a decade. In some instances actual force was involved.

My second observation is that apart from the vulnerable victims the petitioner selected, I am appalled by venue which the petitioner selected to commit these despicable acts. That the Criminal Justice Center (CJC), of all places, was used to perpetrate these injustices is the ultimate irony. Indeed, if I had sentenced the petitioner, any corruption taking place in the CJC would have moved me into the aggravating range on the basis of defendant's site selection alone.

My third observation is that the testimony of Dr. Barbara Ziv of the Pennsylvania Sex Offender Assessment Board found that defendant had a high risk of recidivating for several reasons:

- (1) Defendant has a deviant sexual interest, specifically pedophilia. He met this classification because he "had been arrested and

² Commonwealth v Dodge, 957 A.2d 1198, 1202 (PA. Super. 2008)

- incarcerated for sexually assaulting many multiple pre-pubertal children over a period of many years" (N.T. 12/20/07, 14).
- (2) The fact that things progressed from touching to rape is "associated with recidivism" (N.T. 12/20/07, 19).
 - (3) An increase in defendant's age would not decrease his likelihood of recidivism. Although some studies show that the risk of recidivism for violent rapists "decreases with increase in age . . . that is not true for pedophiles" (N.T. 12/20/07, 19).
 - (4) Defendant made disturbing comments in his interview with Dr. Ziv, who explained, "And what was really alarming to me, I said, well, so how long could you stop on your own? And he said a couple of weeks. I said, well, what's the longest period of time you've ever been able to stop on your own? And he said four weeks" (N.T. 12/20/07, 30).
 - (5) Dr. Ziv also discovered during her interview with defendant that he has had a problem for approximately thirty (30) years and "never made use of anything that he could have been, that he could have accessed in the community in terms of sex offender treatment" (*id.* At 30-31).

My final observation is that the state's basic sentencing matrix calls for a minimum sentence of four (4) years for each rape count without aggravating circumstances; in this case, the victim and site selection here I would consider

aggravating. The statutory minimum sentence for rape of victim under the age of sixteen (16) is enhanced to five (5) years.

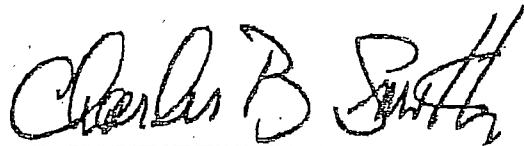
The sentencing Court adopted the recommendations for sentencing by the District Attorney, which were within the sentencing guidelines and at or near the minimum sentencing range. The lesser charges involving the same victim were sentenced to run concurrently. The lead charges for each victim run were sentenced to run consecutively.

In light of the fact that there were six (6) victims, all who were juveniles, some who were siblings, all who were repeatedly abused over a period of years, some who were abused at the CJC, and the high risk of recidivism; I conclude that sentencing court that imposed a sentence of 25-50 years imprisonment on the petitioner acted reasonably. The petitioner suffered no prejudice as a result of counsel's inaction; therefore, the petitioner cannot meet the third prong of the test required to establish an ineffective assistance of counsel claim.

ORDER

AND NOW, this 20th day of March, 2012, upon consideration of Plaintiff's Post Conviction Relief Act Petition and the Commonwealth's Response and Motion to Dismiss, it is hereby **ORDERED** and **DECREED** that Plaintiff's Post Conviction Relief Act Petition is **DISMISSED**.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Charles B. Smith", written over a horizontal line.

Hon. Charles B. Smith, Sr.J.

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

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LARRY CHARLES,	:	
	:	
Appellant	:	No. 893 EDA 2008

Appeal from the Judgment of Sentence December 20, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0002094-2007,
CP-51-CR-0005612-2007, CP-51-CR-0005630-2007,
CP-51-CR-0005636-2007, CP-51-CR-0005639-2007
and CP-51-CR-0005641-2007

BEFORE: MUSMANNO, DONOHUE and FITZGERALD*, JJ.

MEMORANDUM:

FILED MAY 3, 2010

Larry Charles ("Charles") appeals from the judgment of sentence entered following his plea of *nolo contendere* on multiple charges of rape, involuntary deviate sexual intercourse, criminal trespass, indecent assault, aggravated indecent assault and unlawful contact or communication with a minor.¹ Because we find that Charles has waived the issue he seeks to present on review, we affirm.

Due to the nature of our disposition, we need not recite the events that gave rise to the charges involved in this case in detail. It is sufficient to state

¹ 18 Pa.C.S.A. §§ 3121, 3123, 3503, 3126, 3125 and 6318, respectively.

*Former Justice specially assigned to the Superior Court.

APPENDIX I

that the charges stem from Charles' repeated sexual assault of six minors, ranging in age from five to 16, over the course of more than five years. Charles was finally stopped on January 15, 2007 when he was caught, naked, with a 14-year-old victim in the lawyer's lounge of the Criminal Justice Center in Philadelphia.

On September 10, 2007, Charles pled *nolo contendere* to 16 charges of the above-mentioned crimes. Sentencing was postponed pending an evaluation of Charles by the Sexual Offenders Assessment Board ("SOAB"). The SOAB determined that Charles met the definition of a sexually violent predator, and a sentencing hearing was scheduled for December 20, 2007. At that time, the trial court sentenced Charles on each charge to which he pled and ordered that the sentences run consecutively. This resulted in an aggregate sentence of 25 to 50 years of imprisonment. Charles raised no objections to the sentence at the hearing.

Charles subsequently filed a motion for reconsideration of sentence, requesting only that the trial court order his sentences to run concurrently. The trial court denied this request. This appeal followed, in which Charles presents the following issue for our review:

Whether the sentence was appropriate for [Charles], in that the sentence of 25 to 50 years was arbitrary, excessive, unreasonable, shocking to the conscience, and disproportionate to the crimes, and amounted to an abuse of discretion by the [trial] court.

Appellant's Brief at 3.

This question challenges the discretionary aspects of Charles' sentence.

Our standard of review in an appeal from the discretionary aspects of a sentence is well settled: Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. LeBarre, 961 A.2d 176, 178 (Pa. Super. 2008).

Moreover, "the right to appeal a discretionary aspect of sentencing is not absolute and *is waived* if the appellant does not challenge it in post-sentence motions or by raising the claim during sentencing proceedings." *Id.* (emphasis in the original).

As noted above, Charles did not challenge his sentence as excessive at the time of sentencing. In his motion for reconsideration, Charles set forth the length of his sentence, stated that he is remorseful for his crimes and requested that the trial court run his sentences concurrently. **See** Motion for Reconsideration, 12/31/07 at 1-2. Absent from this motion is any allegation that Charles' sentence is in any way arbitrary, excessive, unreasonable, shocking to the conscience, or disproportionate to the crimes. There is no allegation that the trial court abused its discretion in formulating this

sentence, much less any specific allegation as to how the trial court abused its discretion.

In *Commonwealth v. Bullock*, 948 A.2d 818 (Pa. Super. 2008), the appellant sought to raise the claim that his sentence was unduly harsh given the circumstances of his case and inconsistent with the sentencing act because the sentencing court failed to balancing of the welfare of the community with the rehabilitative needs of the appellant. *Id.* at 826. However, the appellant failed to raise this specific argument either at sentencing or in a post-sentence motion, therefore denying the sentencing court the opportunity to reconsider or modify the sentence on that basis. Because of this failure to raise the issue below, we concluded that appellant had waived it on appeal. *Id.*

Presently, we reach the same conclusion. Charles wholly failed to raise the issue he now presents for our review either at sentencing or in his motion for reconsideration of sentence. We recognize that in his post-sentence motion, Charles sought a reduction in the length of his sentence, as he does on appeal. In his post-sentence motion, however, he did not argue that his sentence was excessive or that the trial court abused its discretion in sentencing him – the argument he now presents on appeal. Instead, based upon our review of his post-sentence motion, we must agree with the trial court that the post-sentence motion was “a plea for leniency, albeit without any grounds to support it.” Trial Court Opinion, 7/21/08, at 9.

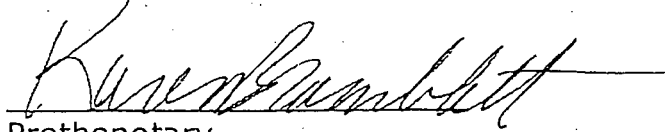
J. A21023/09

By so doing, Charles denied the trial court the opportunity to reconsider or modify his sentence based on the argument he now seeks to present. As a result, we conclude that it has been waived.

Judgment of sentence affirmed.

Fitzgerald, J. files a Dissenting Statement.

Judgment Entered.


Prothonotary

Date: MAY 3 2010

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
LARRY CHARLES,	:	
	:	
Appellant	:	No. 893 EDA 2008

Appeal from the Judgment of Sentence December 20, 2007,
Court of Common Pleas, Philadelphia County,
Criminal Division at Nos. CP-51-CR-0002094-2007,
CP-51-CR-0005612-2007, CP-51-CR-0005630-2007,
CP-51-CR-0005636-2007, CP-51-CR-0005639-2007
and CP-51-CR-0005641-2007

BEFORE: MUSMANNO, DONOHUE and FITZGERALD*, JJ.

DISSENTING STATEMENT BY FITZGERALD, J.: **FILED MAY 3, 2010**

I respectfully dissent. As the learned majority observes, Appellant filed a post-sentence motion for reconsideration of his sentence. I agree with the majority's contention that Appellant sought a reduction of his sentence in this motion. I disagree, however, with the majority's interpretation of the effect of his request. In my view, by citing his remorse for the crimes, Appellant has alleged, perhaps inartfully so, that the sentence was excessive because the court did not properly consider his remorse. Accordingly, I would not find his claim waived, and I would instead address his claim on the merits.¹

¹ Moreover, because he entered into an open plea, he is not precluded from appealing the discretionary aspects of this sentence. **See Commonwealth v. Boyd**, 835 A.2d 812, 816 (Pa. Super. 2003) (quoting **Commonwealth v. Guff**, 735 A.2d 709, 711 n.3 (Pa. Super. 1999)).

*Former Justice specially assigned to the Superior Court.

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS OF
: PHILADELPHIA COUNTY
VS. :
: CRIMINAL DIVISION
LARRY CHARLES, :
Defendant :
: No. CP-51-CR-002094-2007
: No. CP-51-CR-005612-2007
: No. CP-51-CR-005630-2007
: No. CP-51-CR-005636-2007
: No. CP-51-CR-005639-2007
: No. CP-51-CR-005641-2007

James Carpenter, Esquire, Assistant District Attorney, Attorney
for the Commonwealth

Angelo L. Cameron, Esquire, Attorney for the Defendant

OPINION, STALLONE, ALBERT A., JUDGE, FEBRUARY 21, 2008

On September 10, 2007, the Defendant, Larry Charles, entered open pleas of nolo contendere to multiple offenses arising out of his repeated sexual assaults, over the better part of a decade, of six girls ranging between 5 and 16 years of age.

Due to the nature of the offenses involved, the Defendant was subsequently evaluated by Dr. Barbara A. Ziv of the Pennsylvania Sexual Offenders Assessment Board. Following her issuance of a written report, in which she concluded that the Defendant met the criteria for classification as a "sexually violent predator," the Commonwealth filed a praecipe with this

APPENDIX 27

Court under what is known as "Megan's Law", at Title 42, 42 Pa.C.S.A. Section 9795.4(e) (Supp. 2007), requesting that a hearing be held for the purpose of making a determination on that issue. That hearing was held before this Court on December 20, 2007, at which time we decided that the Commonwealth had met its burden of proving by clear and convincing evidence that the Defendant was in fact a "sexually violent predator".

Immediately thereafter, this Court conducted a thorough sentencing hearing, after which we sentenced the Defendant to a total of 25 to 50 years in state prison, with credit for 251 days time served, and requiring him to comply with the registration and notification requirements of "Megan's Law". The sentences imposed by this Court in each of the six cases were as follows:

1. As to the victim, Liana Wilson, when she was between the ages of 13 and 14, in No. CP-51-CR-002094-2007:

- A sentence of 6-12 years on Count 11, Rape by Threat of Forcible Compulsion, for acts committed from 2005 to 2007;

- A sentence of 6-12 months on Count 3, Criminal Trespass, to run concurrently with the sentence imposed on Count 11 under this term number, for acts committed on January 15, 2007;

- A sentence of 6-12 months on Count 8, Indecent Assault on Person Less than 16 Years of Age, to run concurrently with the sentence imposed on Count 11 under this term number, for acts committed from 2005 to 2007; and

- A sentence of 3-6 years on Count 15, Aggravated Indecent Assault on Person Less than 16 Years of Age, to run concurrently with the sentence imposed on Count 11 under this term number, for acts committed from 2005 to 2007;

2. As to the victim, Lisa Wilson, when she was between the ages of 13 and 15, in No. CP-51-CR-005612-2007:

- A sentence of 5-10 years on Count 1, Unlawful Contact or Communication with a Minor, to run consecutively to the sentence imposed on Count 11 in No. CP-51-CR-002094-2007, for acts committed from 2004 to 2006; and

- A sentence of 6-12 months on Count 7, Indecent Assault on Person Less than 16 Years of Age, to run concurrently with the sentence imposed on Count 1 under this term number, but consecutively to the sentence imposed on Count 11 in No. CP-51-CR-002094-2007, for acts committed from 2004 to 2006;

3. As to the victim, Daneisha Jeffcoat, when she was 10 years old, in No. CP-51-CR-005630-2007:

- A sentence of 1-2 years on Count 1, Unlawful Contact or Communication with a Minor, to run consecutively to the sentence imposed on Count 1 in No. CP-51-CR-005612-2007, for acts committed in Fall, 2005; and

- A sentence of 1-2 years on Count 3, Indecent Assault on Person Less than 13 Years of Age, to run concurrently with the sentence imposed on Count 1 under this term number, but consecutively to the sentence imposed on Count 1 in No. CP-51-CR-005612-2007, for acts committed in Fall, 2005;

4. As to the victim, Jasmine Tolliver, when she was between the ages of 10 and 16, in No. CP-51-CR-005636-2007:

- A sentence of 5-10 years on Count 2, Rape by Threat of Forcible Compulsion, to run consecutively with the sentence imposed on Count 1 in No. CP-51-CR-005630-2007, for acts committed in September, 2005;

- A sentence of 5-10 years on Count 4, Involuntary Deviate Sexual Intercourse by Threat of Forcible Compulsion, to run concurrently with the sentence imposed on Count 2 under this term number, but consecutively to the sentence imposed on Count 1 in No. CP-51-CR-005630-2007, for acts committed in September, 2005; and

- A sentence of 6-12 months on Count 14, Indecent Assault on Person Less than 16 Years of Age, to run concurrently to the sentence imposed on Count 2 under this term number, but consecutively to the sentence imposed on Count 1 in No. CP-51-CR-005630-2007, for acts committed from 1999 to 2002;

5. As to the victim, Kenya Wilson, when she was between the ages of 9 and 12, in No. CP-51-CR-005639-2007:

- A sentence of 1-2 years on Count 1, Unlawful Contact or Communication with a Minor, to run consecutively to the sentence imposed on Count 2 in No. CP-51-CR-005636-2007, for acts committed from 2003 to 2006; and

- A sentence of 1-2 years on Count 5, Indecent Assault on Person Less than 13 Years of Age, to run concurrently with the sentence imposed on Count 1 under this term number, but consecutively to the sentence imposed on Count 2 in No. CP-51-CR-005636-2007, for acts committed from 2003 to 2006;

6. As to the victim, Crystal Webster, when she was between the ages of 5 and 6, in No. CP-51-CR-005641-2007:

- A sentence of 6-12 years on Count 4, Rape by Threat of Forcible Compulsion, to run consecutively with the sentence imposed on Count 1 in No. CP-51-CR-005639-2007, for acts committed from 2001 to 2002;

- A sentence of 6-12 years on Count 7, Involuntary Deviate Sexual Intercourse by Threat of Forcible Compulsion, to run concurrently with the sentence imposed on Count 4 under this term number, but consecutively to the sentence imposed on Count 1 in No. CP-51-CR-005639-2007, for acts committed from 2001 to 2002;

- A sentence of 1-2 years on Count 13, Indecent Assault on Person Less than 13 Years of Age, to run consecutively to the sentences imposed on Count 4 under this term number and on Count 1 in No. CP-51-CR-005639-2007, for acts committed from 2001 to 2002.

The Defendant has now filed a timely post-sentence "Motion for Reconsideration of Sentence," in which he is asking this Court to reduce his sentence to a total of 5 to 10 years. Essentially, he is asking this Court to order the sentences imposed as to Lisa Wilson in No. CP-51-CR-005612-2007, as to Daniesha Jeffcoat in No. CP-51-CR-005630-2007, as to Jasmine Tolliver in No. CP-51-CR-005636-2007, as to Kenya Wilson in No. CP-51-CR-005639-2007 and as to Crystal Weber in No. CP-51-CR-005641-2007 to run concurrently, rather than consecutively, to the sentence imposed as to Liana Wilson in No. CP-51-CR-002094-2007. We have reviewed his motion and supporting brief, together

with the Commonwealth's response thereto, and now file this Opinion in disposition thereof, as the Defendant informed the Assistant District Attorney that he did not want either an evidentiary hearing or oral argument.

It is well settled that, before imposing sentence in any given case, the sentencing judge must consider the defendant's age, his prior record, his personal background and characteristics as well as his potential for rehabilitation. See *Commonwealth v. Martin*, 351 A.2d 650, 655 (Pa. 1976); *Commonwealth v. Viera*, 659 A.2d 1024, 1030 (Pa. Super. 1995). Accordingly, a sentence should not be disturbed where it is evident that the sentencing judge weighed these considerations in a totally open and meaningful fashion. *Commonwealth v. Devers*, 546 A.2d 12 (Pa. 1988).

In what this Court can only describe as multiple criminal events that were "utterly tragic", and not a single criminal episode involving any one of these six young girls, we carefully considered not only the Defendant's prior history, the serious nature of the offenses at issue and their impact upon them and their families, but also the Defendant's personal characteristics, his potential for rehabilitation and the statements which both he and his counsel made to this Court at

the time of sentencing. In our opinion, the totality of the circumstances calls for nothing less than the 25 to 50 year sentence. For if we were to grant the Defendant's request, we would, in effect, be giving him a volume discount for his many separate and distinct offenses, which is something that this Court will not allow itself to do. If anyone knew what he was doing and the consequences of his criminal acts, it was Attorney Larry Charles.

It is also well settled that sentencing is a matter which is addressed to the sound discretion of the sentencing judge, whose decision will not be disturbed absent evidence of an "abuse of discretion". *Commonwealth v. Littlehales*, 915 A.2d 662 (Pa. Super. 2007). In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the defendant must establish by a preponderance of the evidence of record that the sentencing judge misapplied the law, engaged in partiality, prejudice, bias or ill will or arrived at an otherwise manifestly unreasonable decision. Id.

We note that the Defendant has not challenged the sentence on the basis that it is the result of any abuse of discretion in the form of misapplication of the law by this Court, that it was a product of any partiality, prejudice, bias or ill will on our

part or that it was otherwise manifestly unreasonable under the circumstances. Rather, his request for a modification is premised upon what can only be characterized as a plea for "leniency", albeit without any grounds to support it.

The Defendant has also referred us to testimony presented on his behalf by Dr. Barry Zakireh, a licensed psychologist, at the sentencing hearing that the Defendant is "amenable to treatment," as additional grounds for his motion. However, as this Court noted at the sentencing hearing, this is an issue which is best left to the discretion of the Commonwealth of Pennsylvania, Board of Probation and Parole, at the time that the Defendant applies for parole. N.T., Sentencing Hearing, December 20, 2007, pp. 113-115.

Accordingly, we enter the following attached Order.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 438 EAL 2012

Respondent

v.

LARRY CHARLES,

Petitioner

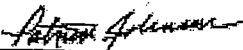
: Petition for Allowance of Appeal from the
: Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 27th day of March, 2013, the Petition for Allowance of Appeal is
DENIED.

A True Copy
As Of 3/27/2013

Attest: 
Patricia A. Johnson
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX K

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 9, 2017

Mr. Larry Charles
Prisoner ID #HJ2769
P.O. Box 200
Camp Hill, PA 17001-0200

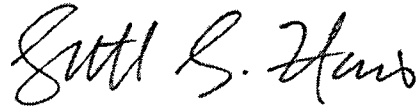
Re: Larry Charles
v. Larry Harry, Superintendent, State Correctional Institution at
Camp Hill, et al.
No. 16-6768

Dear Mr. Charles:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk

Appendix 5 L

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 20, 2017

Mr. Larry Charles
Prisoner ID #HJ2769
P.O. Box 200
Camp Hill, PA 17001-0200

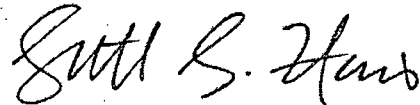
Re: Larry Charles
v. Larry Harry, Superintendent, State Correctional Institution at
Camp Hill, et al.
No. 16-6768

Dear Mr. Charles:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,



Scott S. Harris, Clerk

Appendix 

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. [REDACTED]

[REDACTED], Appellant

v.

SUPERINTENDENT, GRATERFORD SCI; ET AL.

(M.D. Pa. Civ. No. 3-13-cv-01122)

Present: SMITH, HARDIMAN and NYGAARD, Circuit Judges

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

Respectfully,

Clerk

MMW/JJA/tmm

ORDER

Grimes's request for a certificate of appealability is granted on the following issue: whether the District Court erred in denying, without an evidentiary hearing, Grimes's claim that his counsel was ineffective for failing to perfect a direct appeal on his behalf. See Martinez v. Ryan, 132 S. Ct. 1309 (2012); Roe v. Flores-Ortega, 528 U.S. 470 (2000). As to this claim, we are satisfied 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).

The application is otherwise denied because jurists of reason would not debate the District Court's denial of Grimes's remaining claims, for substantially the same reasons discussed in the magistrate judge's September 9, 2013 memorandum. See id. As to Grimes's claim that counsel should have challenged his nolo contendere plea, we conclude that Grimes's claim is not "substantial" under Martinez, 132 S. Ct. at 1320, because Pennsylvania and federal law permit courts to accept pleas from defendants who are unwilling to admit their guilt, see North Carolina v. Alford, 400 U.S. 25, 37-38

Appendix N

(1970); Commonwealth v. Fluharty, 632 A.2d 312, 315-18 (Pa. Super. Ct. 1993), and because Grimes has not established "a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial," Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The Clerk will appoint counsel to represent appellant on appeal. See 3d Cir. I.O.P. 10.3.2.

By the Court,

s/ Thomas M. Hardiman
Circuit Judge

Dated:

EXAMPLE PETITION FOR WRIT OF CERTIORARI (continued)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

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

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, 62 Stat. 928; June 27, 1988, P. L. 100-352, § 2(a), (b), 102 Stat. 662 .)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on title 28, U.S.C., 1940 ed., §§ 346 and 347 (Mar. 3, 1911, ch. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words "or in the United States Court of Appeals for the District of Columbia" and "or of the United States Court of Appeals for the District of Columbia" in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 346 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

Amendments:

1988. Act June 27, 1988 (effective 90 days after enactment except as provided by § 7 of such Act, which appears as a note to this section) in the section catchline, deleted "appeal;" following "certiorari;"; deleted para. (2) which read: "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"; and redesignated former para. (3) as para. (2).

Other provisions:

Effective date of Act June 27, 1988 amendments. Act June 27, 1988, P. L. 100-352, § 7, 102 Stat. 664, provides: "The amendments made by this Act [for full classification consult USCS Tables

USCS

1

Appendix P

Volumes] shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."



§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch 646, 62 Stat. 944; May 24, 1949, ch 139, § 90, 63 Stat. 102 .)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

1948 Act

Based on title 28, 1948 Act U.S.C., 1940 ed., §§ 342, 376, 377 (Mar. 3, 1911, ch 231, §§ 234, 261, 262, 36 Stat. 1156, 1162).

Section consolidates sections 342, 376, and 377 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Such section 342 provided:

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

APPENDIX

Section 2244 Finality of Determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in Section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed unless -

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Appendix R

APPENDIX

Section 2253 Appeal

(a) In a habeas corpus proceeding or a proceeding under 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under Section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of a denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Appendix B

EXAMPLE PETITION FOR WRIT OF CERTIORARI (continued)

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

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

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

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

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

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

EXAMPLE PETITION FOR WRIT OF CERTIORARI (continued)

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

EXAMPLE PETITION FOR WRIT OF CERTIORARI (continued)

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State

EXAMPLE PETITION FOR WRIT OF CERTIORARI (continued)

official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.