

APPENDIX A

Third Circuit Opinion



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Wilkerson v. Superintendent Fayette State Corr. Inst.

United States Court of Appeals for the Third Circuit

March 8, 2017, Argued; September 8, 2017, Filed

No. 15-1598 & 15-2673

Reporter

871 F.3d 221 *; 2017 U.S. App. LEXIS 17380 **

VINCENT WILKERSON, Appellant in No. 15-2673 v. SUPERINTENDENT FAYETTE SCI; ATTORNEY GENERAL PENNSYLVANIA; DISTRICT ATTORNEY PHILADELPHIA, Appellants in No. 15-1598

Prior History: [**1] On Appeal from the United States District Court for the Eastern District of Pennsylvania. (District Court No. 2:12-cv-02190). Honorable Paul S. Diamond, District Judge.

Wilkerson v. Coleman, 2015 U.S. Dist. LEXIS 13710 (E.D. Pa., Feb. 4, 2015)

Core Terms

convictions, sentence, attempted murder, aggravated assault, double jeopardy claim, state court, merger, double jeopardy, serious bodily injury, jury instructions, criminal act, merits, cross-appeal, Jeopardy, shooting, Double, habeas relief, grounds, notice, direct appeal, issue preclusion, clearly established federal law, court's decision, federal claim, proceedings, defaulted, doctrine of relation back, internal quotation marks, habeas petition, state law

Case Summary

Overview

HOLDINGS: [1]-Because the petitioner had not demonstrated that the state court's rejection of his double jeopardy claim was contrary to, or involved an unreasonable application of, clearly established Federal law, as required by 28 U.S.C.S. § 2254(d)(1), he could not meet the high bar necessary to warrant habeas relief, and the district court erred in granting his petition on his claim under the *Double Jeopardy Clause of the Fifth Amendment*. It was sufficient under AEDPA that the jury could have convicted the petitioner on separate counts of attempted murder and aggravated assault,

and thus, no double jeopardy violation occurred; [2]-Because the petitioner did not timely raise his Apprendi claim or related ineffective assistance claims, he was not entitled to relief on those grounds.

Outcome

Affirm in part, reversed in part, and remanded.

LexisNexis® Headnotes

Criminal Law &

Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Habeas

Corpus > Review > Scope of Review

HN1[+] Standards of Review, De Novo Review

Where the district court based its rulings on the evidence contained in the state court record and did not conduct an evidentiary hearing or engage in any independent fact-finding, the United States Court of Appeals for the Third Circuit's review of the district court's decision is plenary.

Criminal Law & Procedure > Habeas

Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > Habeas

Corpus > Order & Timing of Petitions > Procedural Default

Criminal Law & Procedure > ... > Procedural

Defenses > Exhaustion of Remedies > Satisfaction

of Exhaustion

HN2 [v] Review, Antiterrorism & Effective Death Penalty Act

The United States Court of Appeals for the Third Circuit's habeas review of a state court's judgment is governed by the *Antiterrorism and Effective Death Penalty Act of 1996*, which imposes significant procedural and substantive limitations on the scope of our review. A petitioner must have exhausted the remedies available in the courts of the state, 28 U.S.C.S. § 2254(b)(1)(A), before seeking federal habeas relief, and a claim will be deemed unexhausted if the petitioner has the right under the law of the State to raise, by any available procedure, the question presented, but has failed to do so, § 2254(c). This exhaustion requirement does not require a habeas petitioner to cite the federal Constitution "book and verse," but rather to have fairly presented his federal claim to the state courts. That is, the petitioner must have presented a federal claim's factual and legal substance to the state courts in a manner that put the state courts on notice that a federal claim was being asserted. If a petitioner's federal claim was not "fairly presented," and further state-court review is no longer available under state law, the claim is procedurally defaulted and may be entertained in a federal habeas petition only if there is a basis for excusing the procedural default.

Criminal Law & Procedure > Habeas
Corpus > Review > Antiterrorism & Effective Death
Penalty Act

Criminal Law & Procedure > ... > Standards of
Review > Contrary & Unreasonable
Standard > Contrary to Clearly Established Federal
Law

Criminal Law & Procedure > ... > Standards of
Review > Contrary & Unreasonable
Standard > Unreasonable Application

HN3 [v] Review, Antiterrorism & Effective Death Penalty Act

Where a state court has rejected a petitioner's claim on the merits, the *Antiterrorism and Effective Death Penalty Act of 1996* limits the scope of substantive review to whether the state court's decision was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C.S. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. A decision involves an "unreasonable application" of federal law if no fairminded jurist could agree with the state court's decision. If this threshold seems difficult to meet, the U.S. Supreme Court has advised that is because it was meant to be. Thus, the United States Court of Appeals for the Third Circuit may not grant relief simply because it disagrees with the state court's decision or because it would have reached a different result if left to its own devices, but only if the state court's decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Criminal Law & Procedure > ... > Procedural
Defenses > Exhaustion of Remedies > Satisfaction
of Exhaustion

HN4 [v] Exhaustion of Remedies, Satisfaction of Exhaustion

A petitioner seeking 28 U.S.C.S. § 2254 relief from a Pennsylvania conviction exhausts his state remedies for a federal claim either by raising the claim on direct appeal or in a petition for collateral relief under Pennsylvania's Post-Conviction Relief Act.

Criminal Law & Procedure > ... > Procedural
Defenses > Exhaustion of Remedies > Satisfaction
of Exhaustion

HN5 [v] Exhaustion of Remedies, Satisfaction of Exhaustion

A state prisoner may fairly present a federal claim to state courts without specifically referencing the federal Constitution or a federal statute in four ways: (a) reliance on pertinent federal cases employing constitutional analysis, (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.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN6 [📄] Procedural Due Process, Double Jeopardy

The *Double Jeopardy Clause of the Fifth Amendment* prescribes that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, *U.S. Const. amend. V*, and it protects not only against a second trial for the same offense, but also against multiple punishments for the same offense. To assess whether two crimes constitute the "same offense" for double jeopardy purposes, the United States Court of Appeals for the Third Circuit employs the test established by the U.S. Supreme Court in *Blockburger v. United States*. That is, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. If this test yields only one offense, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > Aggravated Offenses

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Attempted Murder

Criminal Law & Procedure > Criminal Offenses > Lesser Included Offenses > Crimes Against Persons

HN7 [📄] Procedural Due Process, Double Jeopardy

Aggravated assault is a lesser-included offense of attempted murder under Pennsylvania law. That is—if one criminal act served as the basis for both of a defendant's convictions, he has been punished twice for the "same offense" in violation of the *Double Jeopardy Clause*.

Criminal Law & Procedure > ... > Review > Standards of Review > Deference

HN8 [📄] Standards of Review, Deference

The United States Court of Appeals for the Third Circuit's task on federal habeas review is not to decide whether it agrees with the state court's treatment of the petitioner's claim or with the result the state court reached, but to analyze whether the state court's ruling was so lacking in justification that, based on existing U.S. Supreme Court case law, it was unreasonable beyond any possibility for fairminded disagreement.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Multiple Punishments

HN9 [📄] Procedural Due Process, Double Jeopardy

Absent U.S. Supreme Court precedent dictating that a different analysis is required when a defendant's double jeopardy claim arises in the "multiple punishment" context rather than in the context of issue preclusion, the state court's analysis cannot be deemed "contrary to" any "clearly established Federal law," 28 U.S.C.S. § 2254(d)(1), or so unreasonable as to put it beyond any

possibility for fairminded disagreement.

Criminal Law & Procedure > Appeals > Procedural Matters > Notice of Appeal

Criminal Law & Procedure > Appeals > Procedural Matters > Time Limitations

HN10 **Procedural Matters, Notice of Appeal**

Under *Fed. R. App. P. 4(a)(3)*, if one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed.

Criminal Law & Procedure > Appeals > Procedural Matters > Notice of Appeal

Criminal Law & Procedure > Appeals > Procedural Matters > Time Limitations

HN11 **Procedural Matters, Notice of Appeal**

Fed. R. App. P. 4(a)(3) is not a jurisdictional constraint, but a claim-processing rule that the court may excuse in the interests of justice. And as a claim-processing rule, it remains subject to forfeiture and waiver.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

HN12 **Amendment of Pleadings, Relation Back**

The *Antiterrorism and Effective Death Penalty Act of 1996* imposes a one-year statute of limitations on state inmates seeking to file habeas claims in federal court. 28 U.S.C.S. § 2244(d)(1). If an inmate complies with this deadline, the Federal Rules of Civil Procedure allow him, like other any civil litigant, to later amend his petition to add additional claims so long as those additional claims arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading. *Fed R. Civ. P. 15(c)(1)(B)*.

Counsel: Max C. Kaufman [Argued], Susan E. Affronti,

Ronald Eisenberg, George D. Mosee, Jr., Anne Palmer, Philadelphia County Office of District Attorney, Philadelphia, PA, Counsel for Superintendent Fayette SCI, Attorney General Pennsylvania, and District Attorney Philadelphia.

Maria K. Pulzetti [Argued], Brett G. Sweitzer, Leigh M. Skipper, Federal Community Defender Office for the, Eastern District of Pennsylvania, Philadelphia, PA, Counsel for Vincent Wilkerson.

Judges: Before: HARDIMAN and KRAUSE, Circuit Judges, and STENGEL, Chief District Judge.*

Opinion by: KRAUSE

Opinion

[*224] OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

Following a trial in which the evidence reflected that Appellee/Cross-Appellant Vincent Wilkerson shot his victim in the chest and beat the victim with a gun, a Pennsylvania jury convicted Wilkerson of both attempted murder and aggravated assault. In his instant petition for habeas corpus, Wilkerson contends that these convictions violate the *Double Jeopardy Clause* because the jury instructions permitted the jury to convict on both offenses based on the shooting alone. **[**2]** Wilkerson also raises a challenge under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, [*225] 147 L. Ed. 2d 435 (2000), to the trial judge's imposition of an enhanced sentence for attempted murder based on a finding by the judge, but not the jury, that the victim suffered serious bodily injury and a related claim that his counsel was ineffective for failing to object to this finding at sentencing or to raise the issue on direct appeal. Because Wilkerson has not demonstrated that the state court's rejection of his double jeopardy claim was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), he cannot meet the high bar necessary to warrant habeas relief, and the District Court erred in granting his petition on that claim. Further, because Wilkerson did not timely raise his

*The Honorable Lawrence F. Stengel, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Apprendi claim or related ineffective assistance claims, he is no more entitled to relief on those grounds. Accordingly, we will affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. Factual Background

All charges against Wilkerson arose from a violent altercation outside of a night club in 1997. As reflected in the trial testimony, after Wilkerson approached a woman outside of the club and began talking to her and [**3] pulling on her clothing, a friend of hers, Nasir Hill, who was also leaving the night club, walked up to speak with her, prompting a heated verbal exchange in which Wilkerson accused Hill of being disrespectful for interrupting his conversation. Although the argument ended quickly and the two men separated, Wilkerson returned moments later, knocked Hill unconscious with a punch to the face, and then, after positioning Hill's body on the hood of a parked car, struck him in the head with a gun. With Hill still lying unconscious, Wilkerson stepped back two-to-four feet and shot Hill in the chest before fleeing the scene.

Wilkerson was charged with multiple crimes resulting from this incident including, among other things, attempted murder and aggravated assault. At the conclusion of his trial, the judge instructed the jury as to the various counts. As part of the instructions for the charge of attempted murder, the trial judge told the jury that a conviction would require that it find Wilkerson "did a certain act" and "[i]n this case that act is alleged to be a shooting . . . of [Hill]," App. 586. With respect to the crime of aggravated assault, the trial judge instructed the jury that, in [**4] order to convict, it would have to find "that [Wilkerson] caused or attempted to cause serious bodily injury to [Hill]." App. 587. Of relevance to this appeal, the trial judge did not specify that Wilkerson's shooting Hill could not, in addition to serving as the basis for an attempted murder conviction, also serve as the "attempt[] to cause serious bodily injury" for the aggravated assault conviction, and, after deliberations, the jury returned a guilty verdict on both counts on a general verdict form that likewise did not specify whether the "serious bodily injury" finding underlying the aggravated assault conviction related to the shooting or the assault that preceded it.

Wilkerson was sentenced to ten-to-twenty years of incarceration on the aggravated assault conviction and twenty-to-forty years on the attempted murder

conviction to be served consecutively.¹ That sentence for attempted murder reflected an enhancement, allowable under Pennsylvania law only where there has been a finding of [**226] "serious bodily injury," 18 Pa. Cons. Stat. § 1102(c)—a finding that here was made only by the judge at sentencing and had not been submitted to the jury.

II. Procedural History

A. Direct Appeal and Collateral Review in Pennsylvania [**5] State Court

Wilkerson appealed to the Pennsylvania Superior Court and argued that his convictions for attempted murder and aggravated assault should have merged for sentencing purposes. In making this argument, Wilkerson relied on Commonwealth v. Anderson, 538 Pa. 574, 650 A.2d 20 (Pa. 1994), where the Pennsylvania Supreme Court had held that aggravated assault is a lesser included offense² of attempted murder, so that if the convictions on both counts are based on the same criminal act, the sentences for the two crimes "merge" as a matter of state law. Id. at 24. Thus, Wilkerson asserted, because the bills of information under which he was charged and the jury instructions given at his trial reflected that he was convicted of both attempted murder and aggravated assault on the basis of a single violent episode, his sentences for the two crimes should have merged.

The Superior Court rejected that argument, holding that *Anderson* only applies "in those instances where multiple punishments arise from a single act," and that Wilkerson's convictions stemmed from two separate acts: (1) shooting Hill in the chest (the attempted murder), and (2) striking Hill with a gun (the aggravated assault). App. 717-18. According to the Superior Court, Wilkerson's challenge [**6] therefore was "more properly characterized as a challenge to the sufficiency

¹ Wilkerson was originally sentenced to life imprisonment without parole under Pennsylvania's "three strikes" law, 42 Pa. Cons. Stat. § 9714(a)(2) (1982 & Supp. 1997). That sentence was vacated after the Pennsylvania Supreme Court declared § 9714 unconstitutional, and the instant sentence was imposed.

² A lesser included offense is one that "does not require proof of any additional element beyond those required by the greater offense." Government of Virgin Islands v. Bedford, 671 F.2d 758, 765, 19 V.I. 641 (3d Cir. 1982).

of the evidence underlying the convictions." App. 718. As it concluded there was sufficient evidence to support the finding that Wilkerson was guilty of both criminal acts, the Superior Court affirmed Wilkerson's convictions and sentence.

Wilkerson then filed a petition pursuant to Pennsylvania's Post-Conviction Relief Act (PCRA), raising a different claim not relevant to this appeal. The PCRA court dismissed Wilkerson's petition, and the Pennsylvania Superior Court affirmed.

B. Federal Habeas Proceedings

Having been denied relief in state court, Wilkerson filed a petition for federal habeas relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. In that petition, Wilkerson claimed, among other things, that his convictions for both attempted murder and aggravated assault on the basis of the same conduct violated the *Double Jeopardy Clause of the Fifth Amendment*, made applicable to the states through the *Fourteenth Amendment*. A little over a year after filing his original petition, Wilkerson filed an "Amended Petition in Support of Memorandum of Law," in which he asserted for the first time that the application of the enhancement to [**7] his attempted murder sentence, reflecting the trial judge's finding of serious bodily injury, violated *Apprendi* because "the element of serious bodily injury was not made part of the jury instruction with respect to the charge of attempted murder." Supp. App. 38.

Wilkerson's habeas petition was referred to a Magistrate Judge who recommended that the District Court grant relief with respect to Wilkerson's double jeopardy claim and deny his petition with respect to [**227] all other claims. When addressing Wilkerson's *Apprendi* challenge, the Magistrate Judge agreed with Wilkerson that an error occurred when he was sentenced above the twenty-year statutory maximum without the requisite factual finding by the jury but held that this error was harmless and did not warrant habeas relief because it was "inconceivable that a properly-instructed jury would not find that Wilkerson created a substantial risk of Hill's death." App. 77. While the Commonwealth filed an objection to the Magistrate Judge's double jeopardy recommendation, Wilkerson did not object on any ground.

The District Court adopted the Magistrate Judge's recommendations in full. With respect to Wilkerson's

double jeopardy claim, the District [**8] Court held that the state court's decision to apply a sufficiency of the evidence analysis to Wilkerson's merger claim on direct appeal was an unreasonable application of clearly established federal law. Reasoning that the proper question for courts to consider when faced with a challenge to a trial court's jury instructions is "whether there is reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution," App. 12 (quoting *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)), the District Court determined the instructions here were framed in a way that allowed the jury to conclude that the shooting could form the basis of both the attempted murder and aggravated assault convictions. Thus, the District Court held "there is a 'reasonable likelihood' that the jury applied the trial court's attempted murder and aggravated assault instructions in an impermissible manner, and thus convicted [Wilkerson] of two crimes for a single act" in violation of the *Double Jeopardy Clause*. App. 14.

As for Wilkerson's *Apprendi* claim, the District Court observed that "neither party ha[d] objected" to the Magistrate Judge's analysis beyond the double jeopardy claim, including the Magistrate Judge's rejection of the sentencing challenge, [**9] and it proceeded to adopt the Report and Recommendation in full—granting Wilkerson relief on his double jeopardy claim and denying relief on his *Apprendi* claim. This appeal and cross-appeal followed.

III. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 2254, and we have jurisdiction under 28 U.S.C. § 2253. **HN1** [↑] Where, as here, the District Court based its rulings on the evidence contained in the state court record and did not conduct an evidentiary hearing or engage in any independent fact-finding, our review of the District Court's decision is plenary. *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993).

HN2 [↑] Our review of the state court's judgment is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which imposes significant procedural and substantive limitations on the scope of our review. Two such limitations have particular bearing on this appeal. First, a petitioner must "ha[ve] exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), before seeking federal habeas relief, and a claim will be deemed

unexhausted if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented," but has failed to do so, *id.* § 2254(c). This exhaustion requirement does not **[**10]** require a habeas petitioner to cite the federal Constitution "book and verse," but rather to have "fairly presented" his federal claim to the state courts. *McCandless v. Vaughn*, 172 F.3d 255, 261 **[**228]** (3d Cir. 1999) (quoting *Picard v. Connor*, 404 U.S. 270, 277-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). That is, the petitioner must have "present[ed] a federal claim's factual and legal substance to the state courts in a manner that put[] [the state courts] on notice that a federal claim [was] being asserted." *Id.* If a petitioner's federal claim was not "fairly presented," and further state-court review is no longer available under state law, the claim is "procedurally defaulted . . . and . . . may be entertained in a federal habeas petition only if there is a basis for excusing the procedural default." *Wenger v. Frank*, 266 F.3d 218, 223-24 (3d Cir. 2001).

Second, **HN3**  where a state court has rejected a petitioner's claim on the merits, AEDPA limits the scope of our substantive review to whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides **[**11]** a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Pazden v. Maurer*, 424 F.3d 303, 311 (3d Cir. 2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A decision involves an "unreasonable application" of federal law if "no 'fairminded jurist' could agree with the state court's decision." *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 848 (3d Cir. 2017) (quoting *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)) (alteration omitted). If this threshold seems "difficult to meet," the Supreme Court has advised that is because "it was meant to be." *Harrington*, 562 U.S. at 102. Thus, we may not grant relief "simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices," *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000), but only if the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond

any possibility for fairminded disagreement," *Davis v. Ayala*, 135 S. Ct. 2187, 2199, 192 L. Ed. 2d 323 (2015).

IV. Analysis

With these standards in mind, we will first address the Commonwealth's appeal of the District Court's grant of habeas relief on Wilkerson's double jeopardy claim, and then turn to Wilkerson's cross-appeal of the District Court's denial of habeas relief on his *Apprendi* claim.

A. Wilkerson's Double Jeopardy Claim

The Commonwealth contends that the District Court made two errors in granting Wilkerson habeas relief on his double **[**12]** jeopardy claim: first, it should not have reached the merits because that claim was not raised as a double jeopardy claim in the state court and thus was unexhausted and procedurally defaulted; and, second, it did not apply proper AEDPA deference in its review on the merits. We address these arguments in turn.

1. Procedural Default

HN4  A petitioner seeking § 2254 relief from a Pennsylvania conviction exhausts his state remedies for a federal claim either by raising the claim on direct appeal or in a petition for collateral relief **[**229]** under the PCRA.³ *Robinson v. Beard*, 762 F.3d 316, 328 (3d Cir. 2014). Here, it is undisputed that Wilkerson did not explicitly state that he was raising a federal constitutional claim under the *Double Jeopardy Clause* in either of those fora. It is also undisputed, however, that he did seek relief under Pennsylvania's merger doctrine on direct appeal, and the parties' disagreement centers on whether that state law merger claim, in the terms he argued it, was sufficient to "fairly present" his federal double jeopardy claim to the state court.⁴

³ Although Wilkerson did not seek discretionary review from the Pennsylvania Supreme Court, we have held that a petitioner need not seek such relief for his claims to be eligible for federal habeas review. *Lambert v. Blackwell*, 387 F.3d 210, 233 (3d Cir. 2004).

⁴ The Commonwealth also asserts that, even if Wilkerson's arguments on his merger claim were sufficient to present his double jeopardy claim to the state appellate court, his claim still was not properly exhausted because he did not first raise them in the trial court. This argument misapprehends the purpose of the exhaustion and procedural default rules, which are intended to ensure that habeas petitioners "meet the

We have held that HN5[↑] a state prisoner may "fairly present" a federal claim to state courts without specifically referencing the federal Constitution or a federal statute in four ways: "(a) reliance on pertinent federal **[**13]** cases employing constitutional analysis, (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." McCandless, 172 F.3d at 261-62 (quoting Evans v. Court of Common Pleas, Delaware Cty., Pa., 959 F.2d 1227, 1232 (3d Cir. 1992)).⁵

In view of the close relationship between Pennsylvania's merger doctrine and federal double jeopardy jurisprudence, and Wilkerson's citation to Anderson, which itself relies on Supreme Court jurisprudence, we conclude that Wilkerson has "assert[ed] [his] claim[s] in terms so particular as to call to mind a specific right protected by the Constitution," and thus did fairly present his claim to the Pennsylvania Superior Court. *Id.* HN6[↑] The Double Jeopardy Clause of the Fifth Amendment prescribes that "[n]o person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. amend. V, and it "protects not only against a second trial for the same offense, but also against multiple punishments for the same

State's procedural requirements for presenting [their] federal claims" and do not "depriv[e] the state courts of an opportunity to address those claims in the first instance," Coleman v. Thompson, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)—not to impose additional procedural burdens that go beyond those required by the state courts themselves. Here, because the state appellate court addressed Wilkerson's merger claim on the merits, irrespective of his failure to raise it in the trial court, our focus for federal habeas purposes is on the decision of the appellate court. Robinson, 762 F.3d at 328 (federal claims exhausted so long as they were properly presented "on direct appeal or in a petition under the PCRA"). Thus, if we agree with Wilkerson that his merger claim put the Superior Court "on notice" that he was making a federal double jeopardy argument and that the court rejected that argument, his double jeopardy claim was properly exhausted. McCandless, 172 F.3d at 261.

⁵To the extent the Commonwealth implies that the Supreme Court's decision in Baldwin v. Reese, 541 U.S. 27, 31, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004), may have imposed a higher standard for "fair presentation" than the standard we articulated in McCandless, our Court has already rejected that very argument. Nara v. Frank, 488 F.3d 187, 198 n.17. (3d Cir. 2007).

offense," Whalen v. United States, **[*230]** 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980) (internal quotation marks omitted). To assess whether two crimes constitute the "same offense" for double jeopardy purposes, we employ the test established by **[**14]** the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). That is, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. If this test yields "only one" offense, "cumulative sentences are not permitted, unless elsewhere specially authorized by Congress." Whalen, 445 U.S. at 693.

In Anderson, the Pennsylvania Supreme Court imported this federal double jeopardy test into its merger doctrine under state law. In that case, the petitioner had been convicted of aggravated assault and attempted murder on the basis of a single shooting and argued that his sentences should have "merged." 650 A.2d at 20-21. When analyzing the petitioner's claim, the Pennsylvania Supreme Court held that the analysis necessary to resolve the defendant's merger claim was "identical to the inquiry as to whether the double jeopardy protection of the Fifth Amendment has been violated." *Id.* at 23. The Pennsylvania Supreme Court explained that, when a defendant is charged with two crimes on the basis of the same criminal act, "there is no difference between a double jeopardy analysis and a merger analysis" because "the **[**15]** operative consideration in both is whether the elements of the offenses are the same or different." *Id.* And it proceeded to apply the Blockburger test to evaluate whether aggravated assault and attempted murder would constitute the "same offense" for merger purposes, concluding petitioner's sentence for his aggravated assault conviction must be vacated because "aggravated assault is necessarily included within the offense of attempted murder," *id.* at 24.

Here, Wilkerson argued on direct appeal that his sentences for attempted murder and aggravated assault should have been merged because both convictions arose from the same criminal act and, per Anderson, aggravated assault is a lesser included offense of attempted murder. Wilkerson directed the Superior Court to the jury instruction given at his trial for attempted murder, asserting that by convicting him on that charge, the jury "[n]ecessarily . . . also found that he intended to inflict serious bodily harm upon the victim," and that to convict him on the aggravated assault

charge, the jury was also only required to find that Wilkerson "caused or attempted to cause serious bodily injury to . . . the victim." App. 730. To reinforce his argument that he was **[**16]** convicted and sentenced twice for the same criminal act, Wilkerson also cited to the bills of information under which he was charged and pointed out that they did not distinguish which facts formed the basis of his attempted murder charge and which formed the basis of his aggravated assault charge. Thus, Wilkerson urged, because both convictions stemmed from the same criminal conduct and, under *Anderson*, aggravated assault is a lesser included offense of attempted murder, "the failure of the [trial] court to merge the sentence[] on aggravated assault with the sentence on attempted murder was error." App. 733.

Considering that the Pennsylvania state law doctrine invoked by Wilkerson is based on Supreme Court case law and involves an analysis that the Pennsylvania Supreme Court has described as "identical" to that governing a federal double **[*231]** jeopardy claim,⁶ *Anderson*, 650 A.2d at 23, we are persuaded that the Superior Court had fair notice of that claim and rejected it on the merits.⁷ *McCandless*, 172 F.3d at 261.

Having satisfied any threshold concerns as to whether AEDPA allows us to address Wilkerson's double jeopardy claim, we now turn to the merits of that claim to

⁶The Commonwealth contends that the Pennsylvania Supreme Court misconstrued federal law in *Anderson*, as the test it announced for analyzing a state law merger claim is not "identical" to a federal double jeopardy analysis. This argument misses the mark, as what is relevant for purposes of our analysis of fair notice is that *Anderson* explicitly adopted the *Blockburger* test.

⁷The Commonwealth also urges that Wilkerson's merger claim could not have alerted the state court that he was asserting a federal double jeopardy claim because merger and double jeopardy claims are subject to different waiver rules and, when successful, provide different remedies. Accepting these distinctions as accurate, they are irrelevant to whether Wilkerson fairly presented his double jeopardy claim in state court. Waiver is not an issue in this case and, although merger is a challenge to a defendant's sentence, *Anderson*, 650 A.2d at 21, while double jeopardy is a challenge to the underlying conviction, *Rutledge v. United States*, 517 U.S. 292, 301-02, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), the remedy that would follow from the finding of a violation is likewise immaterial to whether the nature of the violation claimed put the state court "on notice that a federal claim [was] being asserted," *McCandless*, 172 F.3d at 261.

assess whether the state court's analysis was **[**17]** "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1).

2. The Merits

Before we address the central issue of the parties' dispute, we take note of two points on which they agree. First, as set forth in *Anderson*, **HNT**  aggravated assault is a lesser-included offense of attempted murder under Pennsylvania law. That is—if one criminal act served as the basis for both of Wilkerson's convictions, he has been punished twice for the "same offense" in violation of the *Double Jeopardy Clause*. See *Whalen*, 445 U.S. at 692; *Anderson*, 650 A.2d at 24. Second, as even Wilkerson seems to acknowledge, based on the evidence at trial, a properly instructed jury could have convicted Wilkerson of attempted murder and aggravated assault on the basis of two distinct criminal acts. In other words, Wilkerson does not contest that the Commonwealth adduced sufficient evidence for a reasonable jury to find that he both shot Hill, supporting the attempted murder conviction, and beat Hill, supporting the aggravated assault conviction.

Where the parties part ways, however, is on the appropriate test to assess whether Wilkerson was legally convicted of both offenses based on separate criminal acts, or if he was illegally convicted twice on the basis of **[**18]** the shooting alone. According to the Commonwealth, the proper test is whether a reasonable jury could have convicted Wilkerson on both counts, so that a reviewing court need look no further than the trial evidence to determine, as the Superior Court did, whether it was sufficient to support both convictions. Wilkerson, on the other hand, urges that the relevant inquiry is not whether a reasonable jury could have premised the convictions on two different acts given the evidence at trial, but whether the jury in his case actually did so—a question that requires a reviewing court (1) to look not merely to the sufficiency of the evidence, but also to the indictment and jury instructions,⁸ and (2) to construe any ambiguity **[*232]** as to the basis of the jury's conviction in the defendant's

⁸In his briefing, Wilkerson appeared to take the position that, when assessing the basis for a jury's verdict, a reviewing court may not consider the evidence presented at trial at all, and must confine its inquiry to only the indictment, jury instructions, jury interrogatories, and verdict sheet. Wilkerson reversed course at oral argument, however, and conceded that a review of the entire trial record is appropriate when evaluating the grounds on which a jury reached its verdict.

favor. That is, according to Wilkerson, if it is possible the jury convicted him twice based on the shooting alone, his multiple convictions cannot stand.

On direct appeal, the state court applied the analysis now advocated by the Commonwealth, treating Wilkerson's claim as one of "sufficiency of the evidence," and holding that because the evidence at trial could have supported separate convictions for aggravated **[**19]** assault and attempted murder, there was no merger or double jeopardy violation. App. 718-20. **HN8**⁹ Our task on federal habeas review is not to decide whether we agree with this treatment of Wilkerson's claim or with the result the state court reached, but to analyze whether the state court's ruling "was so lacking in justification" that, based on existing Supreme Court case law, it was unreasonable "beyond any possibility for fairminded disagreement." *Davis*, 135 S. Ct. at 2199 (citation omitted). Upon review of the Supreme Court's double jeopardy jurisprudence and our Court's precedents in this context, we conclude that Wilkerson cannot satisfy this high threshold.⁹

The Supreme Court has never spoken directly to the appropriate test to determine whether multiple convictions resulting from the same trial were based on one criminal act or two. However, it has interpreted the *Double Jeopardy Clause* in an analogous context—cases in which a defendant previously has been acquitted of one charge and the Government seeks to prosecute the same defendant on another charge, arguably based on the same criminal act. And in those "issue preclusion"¹⁰ cases, the Supreme Court

assessed what facts formed the basis of a jury's verdict on the one charge **[**20]** in order to determine whether a double jeopardy violation would occur if a trial were to move forward on the other, in effect employing the very test applied by the Superior Court here.

In *Ashe v. Swenson*, for instance, the Supreme Court explained that, in the double jeopardy issue preclusion context, a reviewing court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury *could have* grounded its verdict **[*233]** upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) (emphasis added) (internal quotation marks omitted). *Ashe* makes clear that the correct approach in the issue preclusion context is to review the entire trial record in an attempt to discern the basis of the jury's conviction but that, where no clear answer emerges, the tie goes to the Government: so long as a reasonable jury "could have" based its decision on facts that would not create a double jeopardy violation, the subsequent prosecution may move forward. *Id.*; see also *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 365-66, 196 L. Ed. 2d 242 (2016) (inconsistent verdict at first trial did not prevent retrial on vacated conviction because it was a "mystery what **[**21]** the jury necessarily decided" and, therefore, the defendants could not "establish the factual predicate necessary to preclude the Government from retrying them . . . namely, that the jury in the first proceeding actually decided that they did not violate the [statute in question]"); *United States v. Rigas*, 605 F.3d 194, 219 (3d Cir. 2010) (en banc) (denying issue preclusion double jeopardy claim because it was "impossible to determine with any certainty" whether the issue in question was "definitively decided" at previous trial).

Moreover, although the Supreme Court has addressed this issue only in the issue preclusion context, we have addressed it in the context of multiple convictions resulting from a single trial—applying the exact same test. For example, in *United States v. Finley*, the defendant argued that a double jeopardy violation occurred when he was convicted of both "receiving" and

⁹Wilkerson argues that AEDPA's deferential standard does not apply to his double jeopardy claim because, by re-characterizing his merger claim as a sufficiency of the evidence challenge, the state court did not address the merits of that claim. This argument is meritless. When addressing Wilkerson's merger claim, the state court explained that merger only applies "in those instances where multiple punishments arise from a single act" and, because Wilkerson's attempted murder and aggravated assault convictions "stemmed from his alleged commission of two separate criminal acts," relief was not warranted. App. 717-18. By concluding that Wilkerson's multiple convictions each derived from a distinct criminal act, the state court unambiguously addressed and rejected Wilkerson's merger/double jeopardy claim on the merits. In any event, Wilkerson explicitly argued that AEDPA dictated the appropriate standard of review in his petition for habeas relief before the District Court, and any argument to the contrary is therefore waived, see *Bailey v. United Airlines*, 279 F.3d 194, 202 (3d Cir. 2002).

¹⁰Although the parties use the term "collateral estoppel" to describe the question at issue in those circumstances, the Supreme Court has recently advised that "'issue preclusion' is the more descriptive term." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356 n.1, 196 L. Ed. 2d 242 (2016).

"distributing" child pornography, each a distinct violation of 18 U.S.C. § 2252(a)(2). 726 F.3d 483, 495 (3d Cir. 2013). When analyzing whether the defendant had been convicted of multiple criminal acts or wrongly punished multiple times for one act, we assessed the evidence presented at trial and concluded that because the evidence supported separate convictions for separate criminal acts, no double jeopardy **[**22]** violation had occurred. Id. at 496. Likewise, in *United States v. Chorin*, the defendant argued that his convictions for both the attempt to manufacture more than one kilogram of methamphetamine, and for the possession of monomethylamine knowing, or having reasonable cause to believe, that it would be used to manufacture methamphetamine, violated the *Double Jeopardy Clause*. 322 F.3d 274, 276-77 (3d Cir. 2003). Citing primarily to the trial testimony, we concluded that the defendant "possessed different methylamine liquid at different places for different purposes on different occasions," and thus his convictions were not "based on the same predicate act

or transaction," and no double jeopardy violation had occurred. Id. at 282.

Against the backdrop of *Ashe* and these other double jeopardy cases, the Superior Court's analysis can hardly be deemed "an unreasonable application of . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1). On the contrary, that court reviewed the trial record and determined that there was sufficient evidence for the jury to convict Wilkerson of attempted murder based on the shooting and to convict him of aggravated assault based on the beating—concluding, in substance, that the jury "could have" reached its verdicts on grounds that posed no double jeopardy **[**23]** concern. Ashe, 397 U.S. at 444. Thus, although "sufficiency of the evidence" may have been an inartful descriptor,¹¹ App.

¹¹ In the double jeopardy context, of course, the inquiry cannot be strictly limited to sufficiency, as there may be situations where the trial evidence would allow a jury to convict on grounds that would not violate the *Double Jeopardy Clause*, but, once the jury instructions or indictment are considered, it becomes apparent the jury did, in fact, base its verdict on unconstitutional grounds. *E.g.*, if the trial judge in this case had instructed: "If you find that Mr. Wilkerson shot Mr. Hill, you must return a verdict of guilty as to both attempted murder and aggravated assault." In such situations, while there may be "sufficient evidence" for the jury to convict on constitutional grounds, an examination of the record as a whole may preclude a determination that a rational jury "could have" convicted on those grounds as it would have been explicitly

718, the approach the Superior **[*234]** Court took and the conclusion that it reached appear entirely consistent with *Ashe* and its progeny.¹²

At the very least, HN9 absent Supreme Court precedent dictating that a different analysis is required when a defendant's double jeopardy claim arises in this "multiple punishment" context rather than in the context of issue preclusion, the Superior Court's analysis cannot be deemed "contrary to" any "clearly established Federal law," 28 U.S.C. § 2254(d)(1), or so unreasonable as to put it "beyond any possibility for fairminded disagreement," Davis, 135 S. Ct. at 2199; see also Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) ("Given the lack of holdings from this Court [on the specific issue in question], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' (second and third alterations in original) (internal quotation marks omitted)).

Wilkerson counters that there is such precedent to be found in the Supreme Court's due process jurisprudence. Specifically, Wilkerson cites to the Supreme Court's decision in *Griffin v. United States*, where the Court explained that "where a provision of the Constitution forbids conviction **[**24]** on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." 502 U.S. 46, 53, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). Because the jury instructions and verdict sheet here leave open the possibility that Wilkerson's attempted murder and aggravated assault convictions

instructed to do otherwise. Ashe, 397 U.S. at 444. Here, however, where the jury instructions were merely ambiguous and did not foreclose the jury from rendering multiple constitutionally sound convictions, the state court was not unreasonable in sustaining those convictions based on the sufficiency of the trial evidence.

¹² Although Wilkerson points us to two Supreme Court cases in the issue preclusion context that reach the opposite outcome, both cases are simply applications of *Ashe* in which the trial record precluded the possibility that the jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," Ashe, 397 U.S. at 444. See, *e.g.*, Turner v. Arkansas, 407 U.S. 366, 369, 92 S. Ct. 2096, 32 L. Ed. 2d 798 (1972) (per curiam) (applying *Ashe* and ruling in defendant's favor on issue preclusion double jeopardy claim because "[t]he only logical conclusion" from the trial record was that the defendant had already been acquitted of the act for which the Government sought to retry him).

likewise may have rested on the impermissible basis of a single criminal act, the shooting, Wilkerson argues that one of those convictions must be vacated. This argument dovetails with the reasoning of the District Court which, relying on due process case law, granted Wilkerson habeas relief because it concluded that there was a "reasonable likelihood" that the jury applied the trial court's attempted murder and aggravated assault instructions in an impermissible manner." App. 14 (quoting *Estelle*, 502 U.S. at 72).

We acknowledge the tension between the Supreme Court's double jeopardy jurisprudence—which gives the benefit of [*235] the doubt to the Government and allows for a second criminal prosecution to move forward so long as the jury in the prior proceeding "could have grounded its verdict" on facts that would not create a double jeopardy violation, *Ashe*, 397 U.S. at 444 (emphasis added)—and its due process jurisprudence—which gives that same benefit to the [**25] defendant and requires reversal so long as the conviction "may have rested" on an unconstitutional basis, *Griffin*, 502 U.S. at 53, or there is a "reasonable likelihood" that the jury applied an ambiguous instruction "in a way that violates the Constitution," *Estelle*, 502 U.S. at 72 (internal quotation marks omitted); this case, however, arising in the context of deferential habeas review is not the forum for our Court to resolve that tension. While we commend the District Court's thoughtful analysis and recognize that we may need to address this issue at a later date if it comes before us on direct appeal, it is sufficient under AEDPA that the jury could have convicted Wilkerson on separate counts of attempted murder and aggravated assault, *Ashe*, 397 U.S. at 444, and thus, no double jeopardy violation occurred in this case.

Accordingly, we will reverse the District Court's order granting Wilkerson relief on that claim, and turn to Wilkerson's cross-appeal challenging the sentence imposed for his attempted murder conviction.

B. Wilkerson's *Apprendi* Claim

The claim at issue in Wilkerson's cross-appeal rests on the trial judge's failure to ask the jury to decide whether "serious bodily injury result[ed]," 18 Pa. Cons. Stat. § 1102(c), from Wilkerson's attempted murder before she imposed a sentence [**26] enhancement on that charge. See *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Commonwealth v. Johnson*, 2006 PA Super 265, 910 A.2d 60, 67 (Pa. Super. Ct. 2006) (holding that, under *Apprendi*, "it was not the prerogative of the trial court, but solely the responsibility of the jury . . . to find, beyond a reasonable doubt, whether a serious bodily injury resulted from [an] attempted murder"). Wilkerson asserts that he is entitled to habeas relief because his attempted murder sentence contravened *Apprendi* and also because his counsel's failure to either object at sentencing or to raise the issue on appeal constituted ineffective assistance of counsel.

The Commonwealth does not contest the error but urges that Wilkerson is not entitled to habeas relief because: (1) we lack jurisdiction to hear Wilkerson's cross-appeal because he did not timely file a notice of appeal under Rule 4(a)(3) of the Federal Rules of Appellate Procedure; (2) Wilkerson's claim is time barred under AEDPA's one-year statute of limitations; (3) the claim is procedurally defaulted; and (4) even if we have jurisdiction and can reach the merits of Wilkerson's claim, it fails on the merits under the [**27] appropriate standard of review.

Although we conclude we have jurisdiction over the claim, we agree with the Commonwealth that Wilkerson's cross-appeal is time barred under AEDPA's statute of limitations, and thus have no need to reach his remaining arguments.¹³

[*236] 1. Federal Rule of Appellate Procedure 4(a)(3)

We turn first to the Commonwealth's assertion that we lack jurisdiction over Wilkerson's cross-appeal because Wilkerson failed to comply with Federal Rule of Appellate Procedure 4(a)(3). **HN10** [↑] Under this rule, "[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Fed. R. App. P. 4(a)(3). Wilkerson did not file his cross-appeal within that allotted time frame, and the Commonwealth

¹³ Because we conclude that Wilkerson's failure to timely raise his *Apprendi* and ineffective-assistance-of-counsel claims bars him from habeas relief, we will neither address whether these claims were also procedurally defaulted nor, as Wilkerson asserts, qualify for the narrow exception to AEDPA's procedural default rule announced by the Supreme Court in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

maintains that this failure divests us of our jurisdiction to even consider his cross-appeal.

Our Court has recently addressed this very issue, however, and reached the opposite conclusion. As we explained in Mathias v. Superintendent Frackville, No. 15-2694, 869 F.3d 175, 2017 U.S. App. LEXIS 16394, 2017 WL 3687781, *10-14 (3d Cir. Aug. 28, 2017), HN11 [↑] Rule 4(a)(3) is not a jurisdictional constraint, but a "claim-processing" rule that we may excuse in the interests of justice. Id. at *13. And as a claim-processing rule, it remains subject to forfeiture and waiver, see Bowles v. Russell, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007); Baker v. United States, 670 F.3d 448, 455 (3d Cir. 2012); Gutierrez v. Johnson & Johnson, 523 F.3d 187, 197 (3d Cir. 2008)—doctrines that dispose of the Commonwealth's objection here in view of its failure to move to dismiss Wilkerson's [****28**] untimely cross-appeal despite multiple opportunities to do so over the course of six months prior to the instant merits briefing.¹⁴

Given its persistent refusal to oppose Wilkerson's cross-appeal on Rule 4(a)(3) grounds despite numerous invitations to do so, the Commonwealth forfeited that challenge to Wilkerson's cross-appeal, Baker, 670 F.3d at 455, and we move on to address whether Wilkerson's *Apprendi* and related ineffective-assistance-of-counsel claims were timely raised.

2. Timeliness

In addition to the requirements described above, HN12 [↑] AEDPA imposes a one-year statute of limitations on

¹⁴ When Wilkerson filed his notice of appeal on July 9, 2015, our Court's Clerk's Office noted the possible jurisdictional concern and gave both parties the opportunity to address Rule 4(a)(3)'s application in this case. Wilkerson responded to the Clerk's Office's letter and requested a certificate of appealability on the *Apprendi* issue now set forth in his cross-appeal. The Commonwealth, however, failed to respond to the Clerk's Office's letter or to Wilkerson's motion. The Commonwealth was then given yet another opportunity to take a position on Wilkerson's late notice of cross-appeal, as a motion's panel of our Court sent Wilkerson's request for a certificate of appealability back to the District Court. The Commonwealth, however, again failed to oppose Wilkerson's motion. As a result, the District Court granted Wilkerson a certificate of appealability in January 2016, and the case then returned to us for merits briefing. Only in its merits brief did the Commonwealth assert for the very first time that Wilkerson's claim must be dismissed for failure to comply with Rule 4(a)(3).

state inmates seeking to file habeas claims in federal court. 28 U.S.C. § 2244(d)(1). If an inmate complies with this deadline, the Federal Rules of Civil Procedure allow him, like other any civil litigant, to later amend his petition to add additional claims so long as those additional claims "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Here, it is not contested that Wilkerson filed a timely habeas petition raising his double jeopardy claim but did not file the "Amended Petition in Support [****237**] of Memorandum of Law" that added his *Apprendi* claim until well after the one-year mark.¹⁵ [****29**] Supp. App. 36. The timeliness of Wilkerson's *Apprendi*-related claims therefore depends on whether they "relate back" to the double jeopardy claim in his original habeas petition.

We conclude that they do not. In *Mayle v. Felix*, the Supreme Court addressed how this relation back rule applies in the context of a habeas petition. 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). The petitioner in *Mayle* had filed a petition asserting that his *Sixth Amendment* right to confront adverse witnesses had been violated when the trial judge admitted certain out-of-court statements made by a jailhouse informant. Id. at 650-51. The petitioner then sought to amend his petition to add another claim—this time that his *Fifth Amendment* right against self-incrimination had been violated when the trial judge allowed the prosecutor to introduce statements the petitioner had made during a pretrial police interrogation. Id. at 651-52. The Supreme Court rejected this amendment as time barred, explaining that while both claims related to the admission of pre-trial statements, those statements "were separated [from each other] in time and type," id. at 657, and the petitioner had thus defined "ar[ising] out of the conduct, transaction, or occurrence" for relation back purposes at "too high a level of generality," id. at 661 [****30**] (internal quotation marks omitted). The Court elaborated that two claims merely arising from the same "conviction or sentence" cannot be enough to satisfy the relation back standard and that, in order to properly relate to one another, the claims in the amendment and

¹⁵ It appears that, even in his amended petition, Wilkerson did not raise his ineffective-assistance-of-counsel claims that he has now derived from his *Apprendi* claim, and that claim is therefore waived, Bailey, 279 F.3d at 202. Nonetheless, even assuming the ineffective-assistance-of-counsel claims were somehow implicit in the underlying *Apprendi* claim, they were not timely raised for the reasons explained below.

the claims in the original petition must be "tied to a common core of operative facts." *Id.* at 657, 664.

Wilkerson urges that his claims meet this standard because both his double jeopardy claim and his *Apprendi* claim "arise from . . . the jury instructions, the jury verdict and the sentence imposed," Second Step Br. 49, and "both hinge upon [a] serious bodily injury finding," Fourth Step Br. 15. This explanation falls short. Like the petitioner in *Mayle*, Wilkerson defines the "same conduct, transaction, or occurrence" necessary for relation back at "too high a level of generality." *Mayle*, 545 U.S. at 661 (internal quotation marks omitted). To say that the claims relate to the same "jury verdict and sentence imposed" is just another way of couching the argument explicitly rejected in *Mayle*—that relation back can be satisfied simply because the amendment and petition pertain to the same "conviction or sentence." *Id.* at 657. Although both claims in this case also coincidentally [*31] relate to the jury charge and involve the term "serious bodily injury," these common features are not enough to make the claims arise from the same "operative facts" when the problems asserted with the jury charge are entirely unrelated, *id.* at 664.

The operative fact underlying Wilkerson's double jeopardy claim is that, for the aggravated assault charge, the jury instruction stated that Wilkerson could be found guilty for "caus[ing] or attempt[ing] to cause serious bodily injury," App. 587, without specifying that, if he was also convicted of attempted murder, his shooting of Nasir Hill could not be the act that [*238] satisfied that requirement. The operative facts for Wilkerson's *Apprendi*-related claims, on the other hand, are that for the attempted murder charge, the jury was never asked to determine whether Wilkerson inflicted serious bodily injury at all, and his counsel did not object on this ground at sentencing or raise the issue on direct appeal. These claims are not the same in "time and type," *Mayle*, 545 U.S. at 657, but are distinct claims with their own factual predicates that happen to involve the presence or absence of the phrase "serious bodily injury" in the jury instructions.¹⁶ For these reasons,

¹⁶ Perhaps recognizing the attenuated relationship between his original petition and its subsequent amendment, Wilkerson contends that his relation back claim should be accorded liberal treatment because he filed his original habeas petition and amendment pro se. While pro se litigants are, as a general matter, given more lenient treatment when assessing their compliance with pleading requirements, *Haines v.*

Wilkerson's untimely *Apprendi* [*32] claim and related ineffective-assistance-of-counsel claims do not relate back to his original petition for habeas corpus, and these claims are therefore barred by AEDPA's one-year statute of limitations.¹⁷

V. Conclusion

Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam), the petitioner in *Mayle* itself was pro se, *Mayle*, 545 U.S. at 648, eliminating any possibility that the Supreme Court's explanation of the relation back requirements in the habeas context would not apply with equal force to a pro se petitioner.

¹⁷ Even if we could reach the merits of Wilkerson's *Apprendi* claim, it would fail under the applicable standard of review. Because Wilkerson did not object to the Magistrate Judge's Report and Recommendation denying this claim, we review that denial for plain error. *Nara*, 488 F.3d at 196. When reviewing for plain error, we reverse only if the error is "(1) clear or obvious, (2) affect[ed] substantial rights, and (3) seriously affected the fairness, integrity or public reputation of judicial proceedings." *Leyva v. Williams*, 504 F.3d 357, 363 (3d Cir. 2007) (alteration in original) (internal quotation marks omitted). Only the first prong of this three-part test is satisfied in Wilkerson's case. At Wilkerson's trial, the parties stipulated to the introduction of medical records that reflected Nasir Hill was taken to the hospital to receive emergency surgery for a gunshot wound in his chest. In view of that record, Wilkerson does not challenge the seriousness of Hill's injuries resulting from the shooting, and we agree with the Magistrate Judge that, had the jury been asked, it is "inconceivable" that it would not have made the requisite finding of "serious bodily injury" for Wilkerson to receive an enhanced sentence. App. 77. Thus, because it is a near certainty that Wilkerson would have received the identical sentence had the jury been [*33] given the proper instruction, Wilkerson cannot demonstrate that this *Apprendi* error, or any ineffective-assistance-of-counsel claim derived from it, "affect[ed] his substantial rights" or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Leyva*, 504 F.3d at 363 (alteration in original). See *United States v. Cotton*, 535 U.S. 625, 632-33, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (holding *Apprendi* error cannot meet the plain error requirement of "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings" when the fact that increased the defendant's sentence without having been submitted to the jury was supported by "overwhelming" evidence that was "essentially uncontroverted"); *United States v. Vazquez*, 271 F.3d 93, 101 (3d Cir. 2001) (en banc) (holding substantial rights are not affected by an *Apprendi* violation where "the court determines that the evidence was sufficiently conclusive to support the sentence actually imposed").

For the foregoing reasons, we will reverse the District Court's order granting a writ of habeas corpus on Wilkerson's double jeopardy claim, affirm the District Court's order denying relief on all other claims, and remand the case for proceedings consistent with this opinion.

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APPENDIX B

District Court Opinion

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

VINCENT WILKERSON,
Petitioner,

v.

BRIAN COLEMAN, et al.,
Respondents.

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Civ. No. 12-2190

Diamond, J.

February 4, 2015

MEMORANDUM

The Magistrate Judge has recommended that I grant this *pro se* Petition for habeas relief. (Doc. Nos. 33, 43); 28 U.S.C. § 2254. I will overrule the Objections filed by the Commonwealth of Pennsylvania and grant 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 Magistrate Judge’s findings or recommendations. *Id.* 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).

II. BACKGROUND

The Commonwealth charged that on October 5, 1997, Petitioner Vincent Wilkerson punched Nasir Hill, rendering him unconscious, and then pistol-whipped him and shot him in the chest. *Commonwealth v. Wilkerson*, No. 117 EDA 1999, slip op. at 3 (Pa. Super. Ct. Dec. 22, 2000) (“*Wilkerson I*”). The Commonwealth also alleged that Petitioner stole Mr. Hill’s jewelry.

Id. Hill survived, and on October 8, 1998, a state court jury convicted Petitioner of attempted murder, aggravated assault, and possession of the instrument of a crime. 18 Pa. Cons. Stat. §§ 2502, 2702, 907; (Resp. Ex. B, Doc. No. 23 at 2-3). The jury acquitted him of robbery. 18 Pa. Cons. Stat. § 3701; (Resp. Ex. B, No. 23 at 2-3). The trial court sentenced Petitioner to life imprisonment for attempted murder, based on Pennsylvania's "three strikes" law. (Id. at 3); see 42 Pa. Cons. Stat. § 9174. The court imposed no sentence on the other charges. (N.T. 12/10/98 at 37, 43.) On direct appeal, the Pennsylvania Superior Court upheld the convictions, but vacated the sentence and remanded, ruling that the three strikes law had been improperly applied. Wilkerson I at 17-18. The trial court then sentenced Petitioner to consecutive prison terms of 20 to 40 years for attempted murder, 10 to 20 years for aggravated assault, and 2½ to 5 years for the weapons offense—an aggregate sentence of 32½ to 65 years. (Resp. Ex. A, Doc. No. 23 at 36.)

Petitioner again appealed, contending that his attempted murder and aggravated assault sentences should have merged at sentencing. (Resp. Ex. E, Doc. No. 23 at 8.) The Superior Court disagreed, citing evidence that Petitioner beat Hill and then shot him. Commonwealth v. Wilkerson, No. 1521 EDA 2002, at 9 (Pa. Super. Ct. Sept. 10, 2003) ("Wilkerson II").

In March 2004, Wilkerson filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act, contending, *inter alia*, that: (1) his trial counsel was ineffective for failing to call an alibi witness and refusing to call Hill to testify that he did not recognize Petitioner as his assailant; and (2) the court could not re-sentence him to separate terms for aggravated assault and the weapons offense when it did not do so in its original sentence. (Resp. Ex. G, Doc. No. 23 at 23, 25); 42 Pa. Cons. Stat. § 9541, et seq. The PCRA Court appointed counsel, who subsequently withdrew after filing a "no merit" letter. (Resp. Ex. H, Doc. No. 23); see Commonwealth v. Finley, 550 A.2d 13 (Pa. Super. Ct. 1988). The PCRA Court then dismissed

the petition as meritless. (Resp. Ex. I, Doc. No. 23 at 19.) The Superior Court ruled that the “no merit” letter contravened controlling authority, however, and vacated the PCRA dismissal. Commonwealth v. Wilkerson, No. 3120 EDA 2004, at 5-7 (Pa. Super. Ct. May 18, 2006) (“Wilkerson III”). On remand, new counsel filed an amended petition, which the PCRA Court dismissed as meritless on July 12, 2010. (Resp. Ex. L, Doc. No. 23 at 10.) The Superior Court affirmed. Commonwealth v. Wilkerson, No. 2139 EDA 2010, at 8 (Pa. Super. Ct. Nov. 15, 2011) (“Wilkerson IV”).

On April 12, 2012, Wilkerson submitted the instant *pro se* Habeas Petition, alleging that: (1) trial counsel was ineffective for failing to introduce evidence that Hill could not identify Petitioner; (2) his convictions for attempted murder and aggravated assault should have merged at sentencing; and (3) trial counsel was ineffective for failing to call several exculpatory witnesses. (Doc. No. 1 at 10, 13, 17); 28 U.S.C. § 2254. The Commonwealth filed a response, and Petitioner replied. (Doc. Nos. 23, 28.) Petitioner then submitted an “amended petition,” raising several new challenges to his sentence. (Doc. No. 31.) The Commonwealth filed a response. (Doc. No. 31.) Petitioner then filed a Motion to Amend, asking “the District Court to consider the United States Supreme Court decision in Alleyne v. [United States], 133 S. Ct. 2151 (2013).” (Doc. No. 32.)

Judge Strawbridge filed his Report and Recommendation on July 24, 2014, concluding that: 1) Petitioner was not entitled to habeas relief on his ineffective assistance claim related to failure to call the victim; 2) Petitioner’s ineffectiveness claim related to the failure to call other witnesses was not procedurally defaulted but was meritless; 3) Petitioner was entitled to habeas relief on Fifth Amendment Double Jeopardy grounds; and 4) Petitioner was not entitled to habeas relief on any of his other sentencing claims. (Doc. No. 33.) Petitioner filed a notice of no

objection on September 22. (Doc. No. 40.) The Commonwealth filed Objections on October 2. (Doc. No. 43.) On December 9, I denied Petitioner's Motion to Amend as moot, because Judge Strawbridge had recommended denying the Motion and neither Party objected. (Doc. No. 47.)

III. OBJECTIONS

The Commonwealth objects to Judge Strawbridge's rulings that: (1) the Petition should be granted as to Petitioner's Double Jeopardy claim; and (2) Petitioner's ineffective assistance of counsel claim was not procedurally defaulted.

A. Double Jeopardy

The Commonwealth objects to the determination that Petitioner's aggravated assault and attempted murder convictions merged at sentencing. It contends that Petitioner failed to raise this issue in state court, and that Judge Strawbridge did not sufficiently defer to the state courts.

I do not agree.

Exhaustion

The exhaustion requirement is intended to give the state court "the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Baldwin v. Reese, 541 U.S. 27, 29 (2004) (quoting Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam)) (internal quotation marks omitted). The Third Circuit has recently explained:

In looking at what claims were presented to state courts for the purposes of determining the applicable standard of review, we ask whether a court was given the *opportunity* to address a specific claim, regardless of whether the court actually addressed that claim.

Collins v. Sec. of Pa. Dept. of Corr., 742 F.3d 528, 544 n.10 (3d Cir. 2014) (emphasis in original). A petitioner may thus fairly present a 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.

Nara v. Frank, 488 F.3d 187, 197-98 (3d Cir. 2007) (internal citation omitted).

The Commonwealth's arguments are not entirely clear. It first suggests that the federal Double Jeopardy issue was not fairly presented because Petitioner, at PCRA, raised only a "*state law* claim that [his] sentences should have merged." (Objections at 16 (emphasis in original).) This is a distinction without a difference. Petitioner based his merger argument on Commonwealth v. Anderson, 650 A.2d 20, 23 (Pa. 1994). The Pennsylvania Supreme Court there held that a merger inquiry under state law is "identical" to a Fifth Amendment Double Jeopardy analysis, relying on Blockburger v. United States. Anderson, 650 A.2d at 23; Blockburger v. United States, 284 U.S. 299 (1932). The state court thus had the "opportunity to pass upon and correct" alleged violations of Petitioner's federal Double Jeopardy rights. Moreover, the Anderson Court addressed the question of whether the crimes at issue here—aggravated assault and attempted murder—merge at sentencing. See Anderson, 650 A.2d at 23. In these circumstances, Petitioner fairly presented his federal Double Jeopardy claim in state court.

The Commonwealth also apparently suggests that Petitioner "did not present a double jeopardy claim" at PCRA, "only a merger claim." (Objections at 13.) This is, once again, a distinction without a difference. Indeed, the Superior Court explicitly addressed merger and Double Jeopardy:

[I]ssues concerning multiple punishments generally arise from a single act that results in a violation of two penal provisions, with *the applicable double jeopardy analysis* focusing on a comparison of the elements of each offense

Wilkerson-II at 6-7 (quoting Commonwealth v. Andrews, 768 A.2d 309, 329 (Pa. 2001)) (emphasis added). In these circumstances, it is apparent that Petitioner presented—and so exhausted—his Double Jeopardy claim.

Merits

The Commonwealth does not dispute that aggravated assault is a lesser included offense of attempted murder. See Anderson, 650 A.2d at 24 (“It is clear that the offense of aggravated assault is necessarily included within the offense of attempted murder . . .”). Nor does the Commonwealth dispute that Double Jeopardy protection requires principal and lesser included offenses to merge at sentencing. See Jones v. Thomas, 491 U.S. 376, 380-81 (1989) (Double Jeopardy bars the imposition of multiple sentences for the same conduct). Rather, the Commonwealth objects to Judge Strawbridge’s conclusion that it was reasonably likely that the jury impermissibly convicted Petitioner of aggravated assault and attempted murder based on the same act: Petitioner’s shooting of Hill. See United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2012) (no Double Jeopardy violation where defendant was punished for separate acts).

The record shows that Judge Strawbridge is correct. Petitioner’s jury heard evidence that, in addition to shooting the victim, Petitioner punched and beat him with a gun. See Wilkerson II at 7. Although the trial judge told the jury that to convict Petitioner of attempted murder, it had to find that Petitioner shot Hill, she never instructed the jury that it could not base both attempted murder and aggravated assault convictions on the shooting alone. (N.T. 10/7/98 at 212-13; 10/8/98 at 8-11.) Nor did the court instruct the jury that it needed to find that Petitioner had in fact punched or hit the victim to convict Petitioner of aggravated assault. (*Id.*) Rather, the trial judge read the following instruction:

In order to find the defendant guilty of attempted murder, you must be satisfied that the following three elements have been proven beyond a

reasonable doubt: First, that the defendant did a certain act. *In this case that act is alleged to be a shooting, shooting of the victim.* Second, that the defendant did the act with intent to commit the crime of murder. And, third, that the act constituted a substantial step toward the commission of that crime. . . .

The defendant has also been charged with aggravated assault. In order to find the defendant guilty of aggravated assault, you must find that each of the elements of the crime has been established beyond a reasonable doubt. There are three elements: One, that the defendant caused or attempted to cause serious bodily injury to, in this case, the victim is Nasir Hill.

Two, that the defendant acted intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

A person acts intentionally with respect to serious bodily injury when it is his conscious object or purpose to cause such injury.

A person acts knowingly with respect to serious bodily injury when he is aware that it is practically certain that his conduct will cause such a result.

A person acts recklessly with respect to serious bodily injury when he consciously disregards a substantial and unjustifiable risk that serious bodily injury will result from his conduct. The risk must be of such a nature and degree that considering the nature and extent of the defendant's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

If, after considering all of the evidence, you find that the Commonwealth has established each of these elements beyond a reasonable doubt, then you should find the defendant guilty of aggravated assault. Otherwise, you must find the defendant not guilty of aggravated assault.

(N.T. 10/7/98 at 211-13 (emphasis added).)

The Commonwealth's Objection—that Petitioner never took issue with the jury's instructions—is beside the point. Judge Strawbridge did not decide that the trial court's instructions were erroneous. Rather, he ruled that in light of the Commonwealth's evidence and the trial court's instructions, it was reasonably likely that the jury impermissibly based its guilty

verdicts as to both attempted murder and aggravated assault on the same act—Petitioner’s shooting of Hill. Indeed, other than mentioning Petitioner’s flight after the shooting, the only evidence the trial court mentioned in its instructions was “a shooting, shooting of the victim.” (N.T. 10/7/98 at 206-20.)

In rejecting Petitioner’s merger claim, the Wilkerson II Court ruled that “sufficient evidence of record exists to demonstrate that [Petitioner’s] convictions did not arise from the same facts.” Slip op. at 9. Judge Strawbridge thus reasoned that this evidentiary sufficiency ruling was subject to review under § 2254(e), which applies to “a determination of a factual issue made by a State court.” The Commonwealth objects, arguing that the ruling should have been reviewed under § 2254(d), which applies to “any claim that was adjudicated on the merits in State court.” I agree that the Wilkerson II Court’s merger ruling was not the “determination of a factual issue”—thus making § 2254(e) inapplicable. Rather, the Superior Court ruled that Petitioner’s merger claim was meritless because the Commonwealth had introduced sufficient evidence to sustain Petitioner’s convictions for both attempted murder and aggravated assault. Accordingly, I am obligated to review that ruling under § 2254(d).

The Wilkerson II Court’s ruling “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.” See 28 U.S.C. § 2254(d). The Supreme Court has held that in evaluating jury instructions on § 2254 review, the federal courts must examine “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.” Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Boyde v. California, 494 U.S. 370, 380 (1990)) (internal quotation marks omitted). In making this determination, the court must examine the instruction in context, not in isolation. Estelle, 502 U.S. at 72 (analyzing

the entire trial record, rather than an instruction alone, to determine whether the jury had applied the instruction in an unconstitutional manner).

Here, there is a reasonable likelihood that the jury unconstitutionally applied the attempted murder and aggravated assault instruction. Although the trial judge instructed the jury that the shooting formed the basis of the attempted murder charge, she did not specify what acts could form the basis of the aggravated assault charge or that the jury had to find that Petitioner punched or beat Hill to convict him of that charge. (See N.T. 10/7/98 at 211, 212-213.) At the jury's request, the judge read the aggravated assault instruction a second time. During both readings, the judge never told the jury that convictions for both attempted murder and aggravated assault could not be based on the same conduct, nor did she ever mention evidence that Petitioner beat and hit his victim. (See N.T. 10/8/98 at 8-11.) As Judge Strawbridge discussed, the closings of the prosecutor and defense counsel included nothing that might have mitigated these omissions. Nor did the verdict sheet allow the jury to indicate the evidence on which it based the convictions. In the absence of any instruction or argument that both convictions could not be based on the shooting alone—the only evidence mentioned by the trial court—I agree with Judge Strawbridge's conclusion that “the jury instruction as to aggravated assault would otherwise certainly appear to apply to the act of shooting.” (Doc. No. 33 at 40.)

The Commonwealth suggests that because “the record reflects no fewer than *three* assaults,” Petitioner necessarily was not punished twice for the same conduct. (Objections at 24 (emphasis in original).) The Commonwealth thus seeks to cure the Wilkerson II Court's error by repeating it. Petitioner did not and does not raise a claim of evidentiary sufficiency.

Having considered all the evidence and the record, I conclude the Wilkerson II Court unreasonably applied federal law when it rejected Petitioner's merger claim on evidentiary

sufficiency grounds. Rather, there is a “reasonable likelihood” that the jury applied the trial court’s attempted murder and aggravated assault instructions in an impermissible manner, and thus convicted Petitioner of two crimes for a single act.

In making its “silent record” argument the Commonwealth similarly ignores the record. See Harris v. Rivera, 454 U.S. 339, 347 n.17 (1981) (“A silent record is not a sufficient basis for concluding that the state judge has committed constitutional error . . .”). As I have discussed, in defining attempted murder and aggravated assault, the trial court discussed only Petitioner shooting Hill. Its failure to instruct the jury that it could not convict of both crimes for that same act is not “silence.” Rather, as the Supreme Court made clear in Mills v. Maryland, it is error:

[T]he jury’s verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.

Mills v. Maryland, 486 U.S. 367, 376 (1988).

The Commonwealth also relies on Gillespie v. Ryan, where the Third Circuit explained that analyzing “multiple punishments” under the Double Jeopardy clause is tantamount to construing state substantive law. 837 F.3d 628, 632 (3d Cir. 1988) (citations omitted), cert. denied, 488 U.S. 833 (1988). The Third Circuit thus cautioned that “[a]bsent extraordinary circumstances, the state courts will have the final word on the substantive criminal law.” Gillespie, 837 F.3d at 632. The Commonwealth contends that in upholding Petitioner’s Double Jeopardy claim, Judge Strawbridge impermissibly construed Pennsylvania law in the absence of “extraordinary circumstances.” Again, I do not agree. Judge Strawbridge accepted the state courts’ construction of state law. As I have discussed, the state courts and Commonwealth agree that under the Pennsylvania Crimes Code, aggravated assault is a lesser included offense of attempted murder. Judge Strawbridge simply included that construction in his federal Double

Jeopardy analysis. It is undisputed that the jury was never informed that the single act of shooting Hill could not form the basis of Petitioner's convictions for attempted murder and aggravated assault. Moreover, when it defined both crimes, the trial court discussed only the shooting. In these circumstances, Judge Strawbridge did not need to find "extraordinary circumstances" to recommend relief.

Accordingly, I will overrule the Commonwealth's Objection.

B. Procedural Default of Ineffectiveness Claim

Judge Strawbridge ruled in the Commonwealth's favor as to Petitioner's ineffective assistance of counsel claims—denying them on the merits. The Commonwealth nonetheless argues that Petitioner's claim that his trial counsel should have called several exculpatory witnesses was procedurally defaulted. The Commonwealth has characterized this argument as a "response" to Petitioner's objections. Because Petitioner filed a notice that he has no objections, however, there is nothing to which the Commonwealth can "respond." Accordingly, to the extent that the Commonwealth objects, I overrule the Objection as moot.

IV. CONCLUSION

For these reasons, I will overrule the Commonwealth's Objections. Having reviewed the record, I will also accept the portions of the Report and Recommendation to which neither Party has objected. Accordingly, I accept and adopt Judge Strawbridge's Report and Recommendation.

Because it is reasonably likely that Petitioner's aggravated assault conviction was impermissibly based on the same single act that formed the basis of his attempted murder conviction, he must be retried or resentenced for aggravated assault.

An appropriate Order follows.

February 4, 2015

/s/ Paul S. Diamond

Paul S. Diamond, J.

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

VINCENT WILKERSON,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
SUPERINTENDENT,	:	
BRIAN COLEMAN, et al.,	:	NO. 12-2190
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

July 24, 2014

Before the Court for Report and Recommendation is the *pro se* petition of Vincent Wilkerson for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the State Correctional Institution – Retreat in Hunlock Creek, Pennsylvania serving a sentence of 32½ to 65 years arising from an October 8, 1998 conviction in the Philadelphia Court of Common Pleas for attempted murder, aggravated assault, and possession of an instrument of crime (“PIC”).¹ He seeks habeas relief on the grounds that counsel was ineffective for not introducing evidence that the victim failed to identify him at a preliminary hearing and for failing to call alleged exculpatory witnesses. He also asserts that his sentence for each of the three convictions is “illegal” for various reasons we discuss within. After full consideration of the issues raised, we conclude that there is merit to one of Wilkerson’s claims challenging his conviction and sentence as to aggravated assault. We therefore

¹ While Petitioner is currently confined within the Middle District of Pennsylvania, which includes Luzerne County, *see* 28 U.S.C. § 118(b), venue is proper here pursuant to 28 U.S.C. § 2241(d) in that his confinement grew out of a prosecution and conviction in a court of common pleas within the Eastern District of Pennsylvania.

recommend that the petition be granted in part and that his sentence of imprisonment for 10-20 years for aggravated assault be vacated. In all other respects we recommend that the petition be denied.

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I. FACTUAL AND PROCEDURAL OVERVIEW²

The state courts' summary of the events giving rise to Wilkerson's convictions provides a useful orientation to his claims:

On October 5, 1997, [Petitioner] encountered witness Sonia Cox at approximately 3:40 a.m. outside of the Dynasty Club, an after-hours establishment at 48th and Market Streets in Philadelphia. Ms. Cox was accompanied by another witness, Charnissa Alston, a cousin of the victim Nasir Hill. On the sidewalk outside the club, [Petitioner] pulled on her clothing and attempted to engage Ms. Cox in conversation, which she resisted. Nasir Hill, who was intoxicated, exited the club and began a conversation with Ms. Cox, who was previously known to him. According to eyewitnesses Cox and Alston, Vincent Wilkerson then approached Hill and accused him of being disrespectful to Wilkerson, by talking to Cox while Wilkerson was trying to talk to Cox. An argument erupted between [Petitioner] and Hill, then appeared to end as [Petitioner] signaled that the argument was over. [Petitioner] walked away as if to leave, then abruptly turned and punched Hill in the face. The punch rendered Hill unconscious. Thereafter, [Petitioner] allegedly removed Hill's gold chain, watch, and money from his pockets. As the witnesses watched, [Petitioner] picked up Hill, placed him on the hood of a nearby car and struck him on the head with a gun. [Petitioner] then pointed the gun at the victim's head and shot the victim in the chest while stating emphatically "You don't want to [f***] with me." After shooting the victim, [Petitioner] ran up 48th Street with an accomplice, entered a beige or tan Ford Taurus, and drove away.

² Our statement of the factual and procedural background of this petition is based upon the information provided in the *pro se* form petition submitted on April 12, 2012 (Doc. No. 1) ("Pet."); the Memorandum of Law Supporting Petition for Writ of Habeas Corpus Under 28 U.S.C. 2254 dated July 27, 2012 (Doc. No. 10) ("Pet'r Mem."); the Response to the petition filed by the Philadelphia District Attorney's Office on February 6, 2013 (Doc. No. 23) ("Resp."), with appended exhibits ("Resp. Ex."); the reply submitted by Petitioner on April 4, 2013 (Doc. No. 28) ("Pet'r Reply"); Petitioner's "Amended Petition in Support of Memorandum of Law" concerning Ground Two of his petition, dated June 18, 2013 (Doc. No. 30) ("Amend. Pet."); Respondents' "Combined Response to Petitioner's Reply and Amended Petition" filed on November 26, 2013 (Doc. No. 31) ("Resp. to Reply"); Petitioner's "Motion to Amend," raising further arguments relating to his sentence, dated May 27, 2014 (Doc. No. 32); and the state court record received from the Office of the Clerk of Court for the First Judicial District on May 11, 2012.

Nasir Hill was transported to the University of Pennsylvania Hospital. Witnesses Cox and Alston followed. [Petitioner] was later identified by Cox and Alston when he appeared at the emergency room, presumably to learn whether the victim had lived or died. [Petitioner] fled the hospital, pursued by members of Hill's family. Shortly thereafter, [Petitioner] was apprehended by a police officer. Witness Alston identified Vincent Wilkerson as Hill's assailant and filed a police report. Witness Cox later participated in a line up and identified Vincent Wilkerson as Hill's assailant.

Commonwealth v. Wilkerson, No. 117 EDA 1999, slip opin. at 2-3 (Pa. Super. Ct. Dec. 22, 2000) ("*Wilkerson-I*") [Resp. Ex. D] (quoting *Commonwealth v. Wilkerson*, No. 0022 Dec. Term, 1997, slip opin. at 2-3 (Phila. Comm. Pl. Ct. Mar. 7, 2000) [*see* Resp. Ex. C]). Hill, who survived the shooting, appeared at a preliminary hearing held a month after the incident. He advised the assistant district attorney that he could not positively identify Wilkerson as his assailant, stating that Wilkerson "kind of look[ed] like him" but that he remembered the shooter being taller than Wilkerson. *See* Resp. Ex. G.³

Wilkerson was tried in October 2008 by a jury seated before the Honorable Genece E. Brinkley. He was represented by Scott F. Griffith.⁴ Prior to the start of trial, the defense moved

³ The state court record we received does not contain any Notes of Testimony of the preliminary hearing in this case, although it suggests that counsel was in possession of the Notes of that proceeding at the time of the trial. *See* N.T. 10/7/98 at 126 (referring to Notes from a November 6, 1997 proceeding). Attached to an Amended PCRA petition that Wilkerson prepared on March 1, 2004, however, is what appears to be an excerpt of those Notes of Testimony. *See* Resp. Ex. G (with cover page, prepared by Wilkerson, referring to the notes as relating to "Preliminary Hearing Transcript (December [sic] 6, 1997)").

⁴ Griffith replaced another attorney who withdrew pre-trial upon discovering a conflict of interest due to a colleague's prior representation of victim Nasir Hill. While Griffith is one of the attorneys to whom Petitioner ascribes deficient performance, several other attorneys represented him in various stages of his protracted state court proceedings, which included two trips to the Pennsylvania Superior Court on direct appeal as well as PCRA review. Since his 1998 trial, at which he was represented by Griffith, he has been represented by the following attorneys: Teri B. Himebaugh (first direct appeal); Harvey Yanks (re-sentencing); Anthony G. Bateman (second direct appeal); David S. Winston (first PCRA counsel appointment); and
(...continued)

in limine to preclude Cox and Alston from testifying that the victim, Nasir Hill, had told them that Wilkerson had paid him not to testify at trial and that a similar payment was available to them. The court granted the defense motion, protecting Wilkerson from the disclosure of this testimony that he had paid the victim not to testify against him at trial.⁵

The prosecutor alerted the jury in his opening statement to the fact that they would not hear from the victim, explaining that Hill “doesn’t care about the criminal process, doesn’t care about the rules of law, doesn’t care to participate in the criminal process.” *See* N.T. 10/6/98 at 22. *See also id.* at 28 (defense opening agreeing that “the person who was robbed, as [the prosecutor] told you, doesn’t care enough about the process to come in here”). Before resting at the end of the defense case, however, defense counsel sought permission to read into the record the fact that Hill *did* appear *for the preliminary hearing* and that he failed to identify Wilkerson, which counsel thought could explain Hill’s decision not to participate in the trial of Wilkerson. *See, e.g.,* N.T. 10/7/98 at 133. The court explained that the defense could not “have it both ways,” *see* N.T. 10/7/98 at 134, and that if Wilkerson wanted to introduce evidence of Hill’s

Dennis Turner (second PCRA counsel).

⁵ The state court record before us does not contain any transcript from the motions hearing that appears to have been held with jury selection on October 5, 2008 before the trial began on October 6, 2008. The state courts’ opinions, however, refer to a defense motion *in limine* and discussion about the pre-trial rulings that concerned the permissible testimony of Wilkerson’s alleged tampering with witnesses, resulting in an “agreement that the defense would not comment on the absence of the victim in this case.” *See* N.T. 10/7/98 at 124. The court characterized the pre-trial ruling as having been “made with regard to bringing two witnesses in here who are Commonwealth witnesses to say why – to explain the absence of the defendant. The ruling was made to prevent the Commonwealth from using his witnesses to explain the absence of the complaining witness.” *See* N.T. 10/7/98 at 130. The court also observed that defense counsel’s “strategic choice at the beginning of this trial on the record was you would refrain from anything that would allow [Cox and Alston] to come in and explain why [Hill]’s not here today” and that the prosecution “would specifically not be able to say through two witnesses that they had been offered money and that they knew that Nasir Hill had been offered money not to be here[.]” *See id.* at 123-25.

failure to identify him at the preliminary hearing, then the Commonwealth could recall Cox and Alston to provide a possible explanation for Hill's non-identification in 1997 and his absence from trial in 1998, by testifying of Hill's admission to them that he had been paid by Wilkerson not to appear at trial. *See* N.T. 10/7/98 at 123-25. The defense retreated from that position, and the jury never learned that Hill had appeared for the 1997 preliminary hearing and failed to identify Wilkerson as his assailant --- but neither did they hear any testimony about Wilkerson allegedly paying off witnesses. *Id.* at 134-35.

The jury convicted Wilkerson on October 8, 2008 of attempted murder, aggravated assault, and PIC but acquitted him of the robbery charge relating to the chain and watch allegedly taken from Hill's person just prior to the shooting. Judge Brinkley sentenced Wilkerson on December 10, 1998 to a term of life imprisonment for attempted murder, citing Pennsylvania's "three strikes" law, 42 Pa. Cons. Stat. § 9174, but imposed no further penalty for his other convictions. Wilkerson obtained new counsel, Teri Himebaugh, and appealed his conviction and sentence. On December 22, 2000, the Superior Court vacated the life sentence for the attempted murder conviction, finding that the three-strikes provision had not been properly applied. *See Wilkerson-I* [Resp. Ex. D]. While it remanded the case for resentencing, the court rejected the various other claims that attacked his conviction, including Wilkerson's claim that counsel failed to present three witnesses whom Wilkerson wished to call. *See Wilkerson-I*, slip opin. at 7-8 [Resp. Ex. D] (rejecting claims of ineffectiveness "[i]n the absence of ... affidavits from the witnesses to support the claims of appellant"). Upon remand, Judge Brinkley re-sentenced Wilkerson on April 12, 2002 to consecutive prison terms of 20 to 40 years for attempted murder, 10 to 20 years for aggravated assault, and 2½ to 5 years for PIC, for an aggregate term of 32½ to 65 years. These are the sentences that he is currently serving.

Following re-sentencing, Wilkerson again obtained new counsel, Anthony G. Bateman, for a second appeal to the Superior Court, arguing that his sentences for attempted murder and aggravated assault should have merged given that aggravated assault of the same victim was a lesser-included offense as to the attempted murder. The Superior Court determined that Wilkerson's merger argument was inapposite, finding that his convictions stemmed from the alleged commission of two separate acts: beating Hill in the head and shooting him in the chest. It confirmed that there was sufficient evidence in the record that Wilkerson committed each of those acts and thus that there was no error in Wilkerson having been convicted and sentenced as to both aggravated assault and attempted murder. *See Commonwealth v. Wilkerson*, No. 1521 EDA 2002 (Pa. Super. Ct. Sept. 10, 2003) ("*Wilkerson-I*") [Resp. Ex. F]. Wilkerson did not seek further review.

On or about March 1, 2004, Wilkerson filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541, *et seq.* (the "PCRA"), seeking relief on the grounds that trial counsel failed to give notice of an alibi defense that Wilkerson wanted to present and therefore was unable to call at trial "my alibi witness."⁶ He also asserted that trial

⁶ Wilkerson's purported alibi witness was his girlfriend, Roxanne Mack. In his amended PCRA petition, he asserted that he told trial counsel, Attorney Griffith, "that his 'girlfriend' Roxanne Mack, was willing to testify as an alibi witness at trial," and that she would have testified that Wilkerson came home sometime after midnight and that he was with her until 5:45 a.m., when she asked him to take her to the hospital for "adverse symptoms from her pregnancy." He also asserted that she attended trial and was therefore presumably "available" to testify. *See* Amend. PCRA Pet. at 6 [Resp. Ex. G]. He claims that counsel acknowledged that he did not interview Mack, reportedly because he believed it was not necessary in light of the strong defense Wilkerson would have in the absence of the complaining witness. *Id.*

Wilkerson had also identified Ms. Mack as a potential witness on direct appeal, yet there he identified her as a source of testimony concerning his prior possession of the jewelry that he had been accused of taking from Hill during their encounter – not as an alibi witness. *See Wilkerson-I*, slip opin. at 7 [Resp. Ex. D].

counsel performed deficiently in failing to call Hill, as he would have testified that Wilkerson was not his assailant and that the eyewitnesses, Charnissa Alston and Sonia Cox, had motives to falsely accuse Wilkerson. *See* PCRA Pet. at 3 (Mar. 1, 2004) [Resp. Ex. G] (“[T]hey wanted my gold chain and did not like me from the neighborhood.”) In amendments to his petition, he also asserted that the court could not impose sentences for aggravated assault and PIC when, in the original sentence, it imposed no further penalty on those charges and given that that aspect of his sentence had not been challenged on appeal. *See* Am. Pet. at 8 [Resp. Ex. G]. The court appointed counsel, who sought leave to withdraw after filing a “no merit” letter pursuant to *Commonwealth v. Finley*, 550 A.2d 13 (Pa. Super. Ct. 1988). [Resp. Ex. H.]

The PCRA Court granted the motion to withdraw and dismissed the PCRA petition as without merit. Finding that counsel’s “no merit” letter did not comply with the requirements of *Finley* and other governing precedents, however, the Superior Court vacated the dismissal of the PCRA petition and remanded. *Commonwealth v. Wilkerson*, No. 3120 EDA 2004 (Pa. Super. Ct. May 18, 2006) (“*Wilkerson-III*”) [Resp. Ex. J]. New counsel --- the fifth to represent Wilkerson since trial --- filed an amended PCRA petition with an attached statement by Roxanne Mack, recounting that she had been with Petitioner “at least two hours prior to being accompanied by him to the University of Pennsylvania Hospital where we were confronted by individuals whom I later learned were the family of Nasir Hill.” *See* Aff. of Roxanne Mack, dated 6/27/07, appended to Counseled Amended PCRA Pet., 6/27/07 [Resp. Ex. K].⁷ The PCRA Court dismissed the amended PCRA petition on July 12, 2010 as meritless, without holding an evidentiary hearing. [Resp. Ex. L.] The Superior Court affirmed the dismissal of the petition. *See Commonwealth v. Wilkerson*, No. 2139 EDA 2010 (Pa. Super. Ct. Nov. 15, 2011) (“*Wilkerson-IV*”) [Resp. Ex. N].

⁷ Although entitled “Affidavit” and signed, the statement was unsworn.

Wilkerson sought no further review.

On or about April 12, 2012, Wilkerson submitted his petition for writ of habeas corpus (Doc. No. 1), and subsequently filed a supporting memorandum of law (Doc. No. 10). The Philadelphia District Attorney's Office filed a response (Doc. No. 23), and Wilkerson filed a reply (Doc. No. 28). After briefing had closed by several months, Wilkerson filed a further submission (Doc. No. 30), which he characterized as an amended petition and which advanced additional challenges to his sentence, the subject of Ground Two of his petition. Respondents then filed a response (Doc. No. 31), addressing both Wilkerson's reply brief and his amended petition. Months later, Wilkerson filed a Motion to Amend (Doc. No. 32), "for the District Court to consider the United States Supreme Court decision in *Alleyne v. U.S.*, 570 U.S. ---, 133 S. Ct. 2151 (2013)[.]" Briefing on this habeas petition is now complete.

II. DISCUSSION

Wilkerson presents as separate grounds for relief two ineffectiveness claims, one pertaining to the failure to call three different witnesses, and another concerning the circumstances that effectively precluded him from introducing evidence that Hill failed to identify him at the 1997 preliminary hearing. He also attacks the legality of various components of his sentence for a variety of reasons, the list of which has grown as he has amended and expanded upon his petition here, even in recent weeks.

Respondents do not challenge the timeliness of the petition and have not challenged the timeliness of any proposed "amendments." They concede that Wilkerson's first asserted ground for relief --- his claim involving counsel's alleged failure to elicit testimony that the victim did not identify him at the preliminary hearing --- was fairly presented to the state courts, exhausted under 28 U.S.C. § 2254(b), and ripe for federal court review under the standards set forth at 28

U.S.C. § 2254(d). (Resp. at 17.) As to his third asserted ground --- that counsel was ineffective for failing to call any of the three witnesses --- they contend that Wilkerson procedurally defaulted the claim due to his improper presentation of it in the state court. They further argue that his challenge to counsel's presumptively competent strategy is "patently groundless." (Resp. at 27.) With respect to his second asserted ground for relief --- his sentencing challenge -- - they take the position that such a claim is not cognizable on federal habeas review but without merit in any event. (Resp. at 23.)

We will discuss Grounds One and Three --- the two ineffectiveness challenges --- first. We will then explore the various components of the "sentencing" challenges encompassed within Ground Two, which present much closer questions.

A. Counsel's failure to introduce evidence that Nasir Hill did not identify Petitioner at the preliminary hearing

In his first asserted ground for relief, which was adjudicated on direct review and presented to the Pennsylvania Superior Court, Wilkerson contends that trial counsel was ineffective for not introducing evidence that Nasir Hill failed to identify him at the preliminary hearing held on November 6, 1997:

Trial counsel was ineffective for requesting, without reasonable tactical basis or the permission of the defendant, a pretrial motion in limine which he knew or should have known would prevent him from introducing exculpatory evidence that the victim could not identify the defendant at the preliminary hearing.

(Pet. at 8; Pet'r Mem. at 12.) While recognizing that counsel had a valid strategic reason "for attempting to prevent the introduction of testimony related to why Mr. Hill was not present at trial to testify," which was the purpose of the motion *in limine*, he contends that counsel should have elicited the fact that Hill was unable to identify Wilkerson at the preliminary hearing, which occurred prior to any allegations of interference by Wilkerson. (Pet. at 8; Pet'r Mem. at 12.) See

also Pet'r Mem. at 15 (arguing that there were no allegations that he "had attempted to prevent Mr. Hill from providing a correct identification *at the preliminary hearing*" (emphasis added)). He contends that "the exculpatory evidence" that Hill did not identify him at the preliminary hearing "outweighed the hearsay evidence" of his "attempt to bribe Mr. Hill" and, therefore, that "counsel was ineffective for submitting a motion in limine which prevented him from introducing admissible exculpatory evidence." (Pet'r Mem. at 15.) He recognizes that Hill would not have been the only witness to testify as to the identity of the assailant, but he dismisses the identification made by Ms. Cox as inherently unreliable, and her testimony as possibly "mistaken," citing to various criminology texts concerning the vagaries of eyewitness identification. (Pet'r Mem. at 15-16.)

In order to establish a violation of his Sixth Amendment rights, Wilkerson must show (1) "that counsel's representation fell below an objective standard of reasonableness"; and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). *Strickland* and its progeny make clear that counsel's strategic choices must not be second-guessed by *post-hoc* determinations that a different trial strategy would have produced a different result, although only those choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity. *See, e.g., id.* at 689-91.

In adjudicating Wilkerson's first direct appeal, the Superior Court provided the following description of the issue before it and its rationale in affirming the dismissal of his petition, addressing two claims that Petitioner raised regarding this subject, to which we add our emphasis:

... [Petitioner] argues that counsel was ineffective as a result of his decision to file a pre-trial motion *in limine*, which had the

effect of precluding otherwise admissible testimony concerning the failure of the victim to identify the [Petitioner] at the preliminary hearing. Prior to trial, the court granted [Petitioner]'s motion *in limine* for the limited purposes of: (1) showing the state of mind of the witnesses Sonia Cox and Charnissa Alston who alleged that they had been offered money by the victim not to testify, and (2) acknowledging that the victim was absent from the jury trial. At the request of defense counsel, the court excluded the testimony of Cox and Alston which asserted that the victim had been offered money by [Petitioner] not to appear at trial, and that in turn, the victim offered money to Cox and Alston for the same purpose. Based upon the potential for undue prejudice to [Petitioner], the court granted the motion *in limine* on a limited basis and prohibited any theories from being offered to explain the victim's absence from trial. *Although the effect of this motion was to preclude testimony concerning the victim's inability to identify the [Petitioner], we find that counsel had a reasonable basis for filing the motion.* In fact, [Petitioner] concedes that counsel's actions had a reasonable basis. Defense counsel determined that the value of the victim's inability to identify the [Petitioner], in light of the other firm identification of [Petitioner] as the offender, was outweighed by the danger of unfair prejudice if theories concerning the victim's absence from trial were introduced. As this strategy had a reasonable basis, it cannot constitute ineffectiveness. Trial counsel's assistance is deemed constitutionally effective if the particular course chosen by counsel was reasonably designed to effectuate his client's interests. *Commonwealth v. Murphy*, 559 Pa. 71, 80, 739 A.2d 141, 145-46 (1999). Thus, this claim of ineffective assistance must be rejected.

Wilkerson-I, slip opin. at 8-9 (emphasis added) [Resp. Ex. D].⁸

Wilkerson's claim here amounts to a regret that counsel took the path he did when presented with the need to navigate two hazards: on the one hand, to obtain protection from the anticipated testimony of Cox and Alston that Wilkerson was offering money to witnesses to sit

⁸ The court also addressed Wilkerson's related contention that the trial court erred in refusing to admit portions of the preliminary hearing transcript reflecting that Hill did not identify Wilkerson at that court listing. It found that the trial court denied the motion "in order to prevent undue prejudice to [Wilkerson]," because if such testimony were admitted, "this would open the door to the Commonwealth's exploration of the allegation that [Wilkerson] paid the victim to refrain from testifying." *Wilkerson-I*, slip opin. at 9-10 [Resp. Ex. D].

out trial — and that Hill had accepted such an offer and absented himself from trial, and on the other hand, to advance to the jury the notion that Hill’s absence could be attributable to the fact that he had notified authorities in 1997 that he believed his assailant was not Wilkerson but rather someone taller.⁹

In the context of a Sixth Amendment *Strickland* claim such as this, presented in a § 2254 petition following an adjudication on the merits in state court, this Court’s review of counsel’s strategic decision must be “doubly” “deferential.” *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009). Here, the record is clear that counsel filed the motion *in limine* in an effort to shield Wilkerson from testimony by Cox and Alston that Hill’s absence from trial had something to do with the allegation that Wilkerson paid \$10,000 to Hill not to come to trial, along with the fact that Hill “subsequently turned around and asked Miss Alston and Miss Cox if he could give them \$1,000 to not be here[.]” (N.T. 10/7/98 at 135.) By avoiding the question of why Hill was not at trial to identify Wilkerson as his attacker, and with a defense witness called to undermine the prosecution’s theory that the jewelry that

⁹ It is unknown whether counsel hoped he might be able to “have it both ways” or whether he did not appreciate that obtaining the favorable ruling to preclude Cox and Alston from testifying about the witness tampering --- which was suggestive of the reason for Hill’s absence from trial -- would mean that he could then introduce the record of Hill’s earlier non-identification, either through the notes of testimony of the preliminary hearing or by calling as an eyewitness the A.D.A. from that proceeding to testify to what she observed Hill say in court. From his statements in the argument at the close of evidence, he gave the impression that he did not expect that his strategic choice to obtain a ruling to limit Alston and Cox’s testimony would restrict him from introducing evidence from the earlier event of the preliminary hearing. *See* N.T. 10/7/98 at 123 (Griffith’s argument that introduction of facts regarding the preliminary hearing predating allegations of tampering would not open the door to rebuttal evidence regarding Hill’s absence from trial); *id.* at 131 (“And now the Court is saying that if I presented this evidence [of Hill’s non-identification of Wilkerson at the preliminary hearing] to the jury, that would then essentially vitiate the motion in limine, which was granted by this Court and would then subsequently open the door to having those two witnesses testify as to the reasons the Commonwealth believes Mr. Hill is absent from this case,” to which the Court responded, “[t]hat’s right.”).

Wilkerson was wearing when he was apprehended was Hill's, counsel could present a plausible case of misidentification. This was a reasonable strategy to pursue, even if it turned out to be at the expense of a possible opportunity to introduce through the preliminary hearing notes of testimony that Hill did not identify Wilkerson when he appeared for a court session that predated the allegations of witness tampering.¹⁰ The damage to the case had the jury heard that Wilkerson paid off Hill, as opposed to their being told in the openings that Hill just "chose" not to participate in the trial because he held little regard for the criminal justice system, would have been substantial. Counsel's pre-trial motion demonstrates that he anticipated the damaging testimony of Cox and Alston and prepared for it. Counsel need not be a "flawless strategist or tactician" in order to be considered "competent" under the Sixth Amendment. *See Harrington*, 131 S. Ct. at 791.¹¹ As the Supreme Court has recognized, attorneys whose "miscalculation[s]" can be characterized as "reasonable" are still considered "competent" under *Strickland*. *Id.*

The state court concluded that trial counsel had a reasonable strategic basis for filing the motion *in limine* and therefore was not deficient, even as the effect of this motion was to preclude testimony concerning the non-identification. We cannot say that this amounted to an

¹⁰ Without the record having been developed as to Griffith's decisionmaking as he prepared for this trial, we have no basis upon which to opine as to the reasonableness of any investigation undertaken by Griffith as to the risks and benefits of these two strategic options. However, we are quite comfortable characterizing the strategy employed by Griffith as the lesser of the two evils and certainly a reasonable defense.

¹¹ Had counsel gone down the road now suggested by Wilkerson, there would have been many dangers and little potential benefit. Wilkerson banks on the jury believing that Hill was telling the truth at the preliminary hearing when he advised the assistant district attorney that Wilkerson was not the assailant, even though the explanation for his absence at trial the following year appears to be that he was paid off. This strategy ran the quite serious risk that the jury would assume that Hill had been tampered with already when he arrived at the preliminary hearing. To be sure, a juror might wonder why Wilkerson would pay \$10,000 to a witness who had already done him the service of not identifying him at the preliminary hearing, thereby diminishing the likelihood that the Commonwealth would even seek to present him as a witness at trial.

unreasonable application of *Strickland*'s standard concerning deficient performance.

Moreover, we are not persuaded that Wilkerson could establish that he was prejudiced by counsel's strategy. As the Supreme Court reiterated in *Harrington*:

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [citations omitted] Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. [*Strickland*, ___ U.S.] at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693.

Harrington, 131 S. Ct. at 791-92 (2011). Wilkerson has not demonstrated that it is "reasonably likely" that the result of his trial would have been different had counsel preserved his option to introduce evidence of Hill's non-identification where the witness tampering evidence would have come in on rebuttal. While Wilkerson might believe there is a "conceivable" likelihood of a different result, this belief does not meet the "substantial" likelihood of a different result standard that *Strickland* demands. *See Harrington*, 131 S. Ct. at 792. We cannot recommend that habeas relief be granted on this ground.

B. The failure to call three witnesses at trial

In his third asserted ground for relief, Wilkerson contends that trial counsel provided constitutionally deficient representation by not calling his girlfriend, Roxanne Mack; another friend, Tracey Hambuea; and Sarah Wilkerson, his mother, to testify at trial. He contends that their testimony would have countered some of the physical evidence used by the Commonwealth to identify him as the perpetrator and they were thus "exculpatory" and "essential" witnesses. (Pet. at 12.) Inasmuch as the state courts found that relief was not available because these

contentions were not properly presented, we first examine the manner in which these assertions were brought in state court and the impact of that presentation on habeas review. Ultimately, we conclude that there is no merit to this claim, notwithstanding the state courts' rejection of this claim on its own procedural grounds.

1. The presentation in state court of the claim of IAC for failure to call Roxanne Mack, Tracy Hambuea, and Sarah Wilkerson

At trial, the defense called two witnesses. The first was Norman Walker, a long-time friend of Wilkerson. He authenticated a photograph dating to "around February 1997" --- e.g., before the assault on Hill and alleged theft of his jewelry --- in which Wilkerson appeared to be wearing a gold chain and medallion. He testified that he had seen Wilkerson wear a watch. The second defense witness called was a police officer who testified regarding the circumstances of Wilkerson wearing a watch upon his arrest.

Following his conviction, and still represented by trial counsel, Wilkerson offered comments at sentencing suggesting his dissatisfaction with Attorney Griffith. Pertinent here, he suggested that there were witnesses who had been ready and available to testify at trial, about whom Wilkerson claimed to have advised counsel, who were not called on his behalf. *See* N.T. 12/10/98 at 31. His comments to the court, however, did not identify those witnesses nor indicate what they would have offered at trial.

After Attorney Himebaugh was retained for his appeal, she was directed to file a Statement of Matters Complained of on Appeal.¹² In the opinion responding to that 1925(b) statement, the court observed that Wilkerson argued that trial counsel was ineffective in "failing

¹² Although it appears that such a statement was filed, it is not contained within the state court record before us.

to present witnesses who could have testified credibly in support of the defendant,” but that it was “not clear whether these alleged witnesses are fact or character witnesses” and that the claim lacked merit in any event. *See Commonwealth v. Wilkerson*, No. 0022, Dec. Term, 1997, slip opin. at 7 (Phila. Comm. Pl. Ct. Mar. 7, 2000) [Resp. Ex. B]. Judge Brinkley determined that Wilkerson failed to meet his burden “to assert and prove that the witnesses were actually available, prepared to cooperate and testify for the defense, and that because the missing witness’ testimony was essential, an unfair verdict resulted.” *Id.* at 8.

In the appellate brief filed on April 24, 2000 by Attorney Himebaugh, Wilkerson further pursued his contention that trial counsel failed to call witnesses at trial, identifying Roxanne Mack, Tracy Hambuea, and Sarah Wilkerson as the missing witnesses. *See Appellant’s Brief, Commonwealth v. Wilkerson*, No. 1127 EDA 1999 [Resp. Ex. C].¹³ The brief noted Wilkerson’s comments at sentencing on December 10, 1998, which memorialized his contention that he had advised counsel of witnesses who had been ready and available to testify at trial. *See id.* at 16 (citing N.T. 12/10/98 at 31). The appellate brief also included a short description of the proposed testimony of these individuals, although it did not incorporate affidavits from any of them. *See id.* at 16-17. The Superior Court denied relief, citing the absence of affidavits from these witnesses to support Wilkerson’s claims. *See Wilkerson-I*, slip opin. at 7-8 [Resp. Ex.

¹³ This was one of three claims of ineffective assistance of counsel presented in the brief. Wilkerson also raised eight claims of trial court error and challenged the sufficiency of the evidence to support his convictions.

At the time Wilkerson was pursuing his direct appeal, he was subject to *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977), which required that claims related to attorney ineffectiveness be raised at the earliest stage of the proceedings at which the allegedly ineffective counsel no longer represents the defendant or else such claims would be waived. Two years after Wilkerson’s appeal was filed, the Pennsylvania Supreme Court decided *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), and instructed defendants to save ineffectiveness claims for the collateral review process.

D)].¹⁴

2. Review of this claim is not foreclosed by the doctrine of procedural default

Respondents contend that this claim is “defaulted many times over,” and that it “could not result in a finding of ineffectiveness” even if Wilkerson’s complaints were considered on the merits. (Resp. at 27.) We begin by exploring the question of procedural default.

As alluded to *supra*, a prerequisite to the issuance of a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment is that a petitioner must have “exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). In order for a petitioner to satisfy this requirement and give the state courts “one full opportunity to resolve any constitutional issues,” he must have “fairly presented” the federal claim to the state courts “by invoking one complete round of the established appellate review process.” *Picard v. Connor*, 404 U.S. 270, 275 (1971); *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This requirement

¹⁴ Wilkerson brought a different claim of ineffective assistance of trial counsel relating to the failure to call witnesses when he amended a pending PCRA petition four years later. At that time, he alleged that Attorney Himebaugh, was ineffective for not alleging in the direct appeal that trial counsel was ineffective in failing to call Roxanne Mack *as an alibi witness*. See Amend. PCRA Pet. at 6 (dated Apr. 26, 2004) [Resp. Ex. G]. His petition did not make any reference to Mack having been identified by Himebaugh as a potential witness based upon different proposed testimony. In a filing dated April 26, 2004, he asserted that Mack was available to testify that he “came home at some time after midnight, and was with her until 5:45 a.m., when she asked him to take her to the hospital.” See Amend. PCRA Pet. at 6 [Resp. Ex. G]. Three years later, new counsel on the PCRA action filed an amendment to the petition that included an “Affidavit of Roxanne Mack.” In that un-notarized statement dated June 27, 2007, Ms. Mack reported that she “was with Vincent Wilkerson at least two hours prior to being accompanied by him to the University of Pennsylvania Hospital where [they] were confronted by individuals whom [she] later learned were the family of Nasir Hill.” Amend. Post Conv. Pet. with Consol. Mem. of Law (filed June 27, 2007) [Resp. Ex. K].

Wilkerson’s § 2254 petition does not advance this basis for his claim of ineffective assistance of counsel with respect to the failure to call Ms. Mack.

ensures that state courts have “an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.” *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Where a claim was not presented to the state court or was presented but not considered based upon a state procedural rule that was both independent of the federal question presented and adequate to support the denial of relief, the petitioner is considered to have defaulted that claim. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Federal habeas relief is precluded as to defaulted claims unless the petitioner can establish either “cause and prejudice,” *see, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991), or that a miscarriage of justice would result from the federal court’s failure to consider the merits of his claim because he is actually innocent. *See Schlup v. Delo*, 513 U.S. 298 (1995). *But see* 28 U.S.C. § 2254(b)(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.”).

Wilkerson sought to present this claim of ineffective assistance of trial counsel for failure to call these three witnesses in his first direct appeal, when he was represented by Attorney Himebaugh. The Pennsylvania Superior Court, however, observed that Wilkerson “failed to include any affidavits from these witnesses[FN3] indicating that they were available to testify, willing to testify at trial, and the content of their testimony,” and cited to some of its prior precedents for the proposition that it “will not grant relief based on an allegation that a certain witness may have testified in the absence of an affidavit to show that the witness would, in fact, testify.” *Wilkerson-I*, slip opin. at 7-8 [Resp. Ex. D]. *See also id.* at n.3 (“Appellant has provided his own handwritten, one-page summary of what the testimony would establish. However, he has not included any statements from the witnesses themselves.”). It concluded that Wilkerson’s claim “must be rejected” given “the absence of these affidavits[.]” *Id.* at 8. The

court then proceeded to address the other claims raised in the appeal, without otherwise analyzing whether the proposed testimony as described by Wilkerson in his handwritten summary might have supported a finding of deficient performance by counsel or prejudice to Wilkerson.

We take the Superior Court's discussion to reflect an adjudication based on Wilkerson's failure to adhere to a perceived state procedural requirement that claims of ineffectiveness for failure to call a witness must be supported *by an affidavit from that witness* demonstrating that they were available and willing to testify and confirming the content of their proposed testimony. This raises the question of whether reliance on that deficiency for the rejection of the claim is "adequate" to support the state judgment and thus insulate the judgment from review by the federal court.

Respondents acknowledge the determination of our Court of Appeals in *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007), that Pennsylvania courts did not develop the "missing witness affidavit rule" --- requiring an evidentiary proffer in an *affidavit*, as opposed to a "statement," "illustration," "demonstration," or "offer of proof" --- until the Superior Court issued its precedential opinion on August 2, 2002 in *Commonwealth v. Khalil*, 806 A.2d 415 (Pa. Super. Ct. 2002) --- some two years *after* the Superior Court rejected Wilkerson's claims on direct appeal here. The missing witness affidavit rule must be considered to be *inadequate* to support Pennsylvania state court judgments rendered prior to *Khalil*.¹⁵ Given our Court of

¹⁵ Respondents counter that *Leyva* does not apply here because the Superior Court did not reject Wilkerson's claims due to lack of *affidavits* but rather due to the absence of *any kind* of "statement" from the witness herself, pointing to the footnote in which the court observed that Wilkerson provided "*his own ... summary*" of their proposed testimony but did not provide "any statements *from the witnesses themselves*." See Resp. at 30; *Wilkerson-I*, slip opin. at 7 n.3 (emphasis added) [Resp. Ex. D]. While this is not an implausible argument, we note that the
(...continued)

Appeals' conclusions in *Leyva*, we cannot accept that the Superior Court's rejection of the ineffectiveness claims due to a failure to provide formal affidavits reflects reliance by the state court on a state rule that was "adequate" to the support the judgment. Therefore, we do not find review of this Sixth Amendment claim to be barred under the doctrine of procedural default.

3. Merits review

Wilkerson's claim of ineffective assistance of trial counsel in failing to call these witnesses requires an assessment pursuant to *Strickland* of whether counsel performed deficiently either in failing to investigate these witnesses or in choosing not to present them at trial, and whether Wilkerson has shown he was prejudiced by the absence of their testimony. Wilkerson must show (1) "that counsel's representation fell below an objective standard of reasonableness"; and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). As discussed above, counsel's strategic choices must not be second-guessed by *post-hoc* determinations that a different trial strategy would have produced a different result, although only those choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity. *See, e.g., id.* at 689-91. Our Court of Appeals has also instructed in cases involving a missing witness that the petitioner's evidentiary showing "may not be based on mere speculation about what the witnesses [that counsel] failed to locate might have said." *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989). Rather, it must be made based on the potential witness's testimony as provided to the

Superior Court repeatedly refers in its opinion to "affidavits" and concludes that it is "the absence of these affidavits from the witnesses" that required Wilkerson's claim to be rejected. *See Wilkerson-I*, slip opin. at 8.

habeas court. *See id.*

We first address the question of counsel's performance in not calling these witnesses. We are mindful of the lack of development of these issues in the state court. No evidentiary hearing was ever conducted as part of the direct appeal process, nor on subsequent PCRA review, to memorialize counsel's decision-making with regard to witness selection. Regardless of whether we would find Wilkerson subject to the constraints of 28 U.S.C. § 2254(e) based upon a "fail[ure]" on his part "to [have] develop[ed] the factual basis of a claim in State court proceedings," *see* 28 U.S.C. § 2254(e)(2), we are unable to recommend that an evidentiary hearing be held on this claim. As we discuss below, Wilkerson has failed to present any evidentiary proffers bearing upon counsel's allegedly deficient performance in this regard. Moreover, the lack of prejudice Wilkerson suffered from these alleged witness selection decisions made by counsel do not warrant this Court expanding the factual record as to this claim. *See Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000) (observing that "federal courts have discretion to grant a hearing or not," and that "[i]n exercising that discretion, courts 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").

a) The failure to call Roxanne Mack

Wilkerson asserts that Roxanne Mack should have been called at trial to offer evidence that, prior to the assault of Hill, he possessed the chain, charm, and watch that he was seen wearing at the hospital and upon his arrest. (Pet'r Br. at 26.)¹⁶ While he is silent before us on

¹⁶ This is consistent with his assertion presented in the direct appeal that Mack would have proved valuable as a witness concerning his alleged prior possession of some of the items that he was charged with taking from Hill and which the Commonwealth argued provided a physical link to the victim.

the question of whether Attorney Griffith knew of Mack and her availability to testify on this subject, his counseled direct appeal brief contended that “trial counsel was aware of the existence of several essential witnesses who were ready and available to testify on his behalf,” including Mack. *See* Appellant’s Br. in Supp. of Appeal, No. 1127 EDA 99, at 16 (filed Apr. 27, 2000) [Resp. Ex. C].

In considering whether Griffith’s failure to call Mack at trial can be attributable to deficient performance, we are mindful of *Strickland*’s instruction that:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

We cannot find Wilkerson to have suffered a deprivation of his right to the assistance of counsel based upon this record. Petitioner has provided no facts that would support a conclusion that counsel’s failure to call Mack to testify about Wilkerson’s alleged prior possession of the jewelry items constituted deficient performance. Counsel called another witness, Norman Walker, to testify to this same effect. Petitioner has offered nothing to demonstrate that Mack would have been a better witness as to this testimony or that she would have withstood impeachment better than Walker. In addition, more than fifteen years after first voicing his complaint that counsel did not call desired witnesses, *see* N.T. Sent’g 12/10/98 at 31, and thirteen years after receiving the criticism by the Superior Court for failure to produce a statement from Mack attesting to this proffered evidence and to her availability and willingness

to testify, *see Wilkerson-I* [Resp. Ex. D], Wilkerson still presents no sworn statement from Mack. Petitioner cannot make out his claim of deficient performance based upon his own speculation alone, and he has done nothing to justify an expansion of the record through an evidentiary hearing. *See* 28 U.S.C. § 2254(e)(2) (providing that the federal court “shall not hold an evidentiary hearing” on a claim as to which “the applicant has failed to develop the factual basis ... in State proceedings” absent circumstances not present here, such as a claim based on a new rule of law or newly-discovered facts or upon a suggestion of innocence). Wilkerson has failed to establish deficient performance by trial counsel in failing to call Roxanne Mack to testify at trial.

b) The failure to call Tracy Hambuea

The second witness that Wilkerson asserts should have been called at trial is Tracy Hambuea. (Pet. at 12.) Although his Memorandum of Law does not address what evidence Hambuea would have offered at trial, on direct appeal he asserted that she would have testified as to his prior possession of the charm of the necklace that he was wearing upon his arrest.

As with his assertions regarding Roxanne Mack, Wilkerson has not alleged that counsel failed to investigate Hambuea as a potential witness. Moreover, counsel on direct appeal in 2000 asserted that “trial counsel was aware of the existence of several essential witnesses who were ready and available to testify on his behalf,” including Hambuea. *See* Appellant’s Br. in Supp. of Appeal, No. 1127 EDA 99, at 16 (filed Apr. 27, 2000) [Resp. Ex. C]. *See also id.* (“Tracy Hambuea would have testified that she had given the Appellant the charm that was on the chain long before this incident.”). Moreover, he has provided no facts that would support a conclusion that Attorney Griffith’s failure to call Hambuea to testify about Wilkerson’s alleged prior possession of the charm constituted deficient performance. As was the case with Mack’s

proposed testimony on this subject, counsel called Norman Walker to testify to the same effect, and Petitioner has offered nothing to demonstrate that Hambuea would have been a better witness as to this testimony or that she would have withstood impeachment better than Walker. In addition, these many years later, Wilkerson still presents no evidentiary proffer from Hambuea whatsoever attesting to her availability and willingness to testify. Wilkerson has not yet presented, and cannot now develop, *see* 28 U.S.C. § 2254(e)(2), the factual basis for this claim. He has not established deficient performance by trial counsel in failing to call Tracy Hambuea to testify at trial.

c) The failure to call Sarah Wilkerson

The third and final witness that Wilkerson asserts should have been called at trial is his mother, Sarah Wilkerson. (Pet. at 12.) He contends in his Memorandum of Law that she would have testified that she observed the police searching through his car before they removed it to the police garage where they contended they conducted the search that yielded ammunition linked to the crime scene and to the bullets fired at Hill. (Pet'r Mem. at 27.) He believes that her testimony, which he believed contradicted the police testimony about where the search was conducted, would have supported the defense theory that the bullet found in the car linking Wilkerson to the crime scene was planted by police. (*Id.*)

While we might infer from her presence at both of the sentencing hearings that Mrs. Wilkerson would have been available to testify at the 1998 trial, Petitioner has never obtained and presented a statement from his mother, in any form, indicating that she had evidence to offer as fact witness. To be sure, given that Mrs. Wilkerson was aware of her son's case and present

for at least some of the proceedings,¹⁷ we would expect that subsequent counsel, at least, would have had her memorialize these alleged observations at some point. The time to have done so was in the state court proceedings, and there is no basis to permit Wilkerson to attempt to do so now. Wilkerson offers no explanation for why this alleged testimony has never been preserved over these past fifteen years.

Moreover, even in his own statements in his briefs, Wilkerson has provided no facts that would support a conclusion that Attorney Griffith's failure to call his mother to testify that she observed police activity which she (or Wilkerson) characterizes as a "search" constituted deficient performance. Mrs. Wilkerson would surely have been recognized by the jury as a biased witness, and the jurors' suspicions as to her motives in testifying as to any disputed facts may well have undermined counsel's attempts through other witnesses to suggest that the police did not follow proper procedures to ensure the integrity of their search. We conclude that Wilkerson has not established deficient performance by trial counsel in failing to call his mother to testify at trial.

d) Petitioner did not suffer *Strickland* prejudice from the absence of the testimony of these witnesses

Apart from establishing counsel's deficient performance, in order to prevail on a claim of ineffectiveness, Wilkerson must also show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Third Circuit has described a reasonable probability as a

¹⁷ The Notes of Testimony indicate that Mrs. Wilkerson was present for Wilkerson's initial sentencing hearing in 1998, at which point she cried out upon imposition of the life sentence, see N.T. Sent'g 12/10/98 at 37, and at the re-sentencing hearing upon remand, when she was permitted to ask for the court's mercy on her son. See N.T. Re-Sent'g 4/12/02 at 23-24.

probability “sufficient to undermine confidence in the outcome.” *See, e.g., Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999). Furthermore, in considering whether a petitioner suffered prejudice, “[t]he effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” *United States v. Gray*, 878 F.2d 702, 710-11 (3d Cir. 1989) (quoting *Strickland*, 466 U.S. at 696).

Mack’s and Hambuea’s testimony as suggested by Wilkerson would have corroborated the testimony offered by Norman Walker and undermined the prosecution’s claim that Wilkerson could be linked to the crime by his possession of the victim’s jewelry. But those facts were not essential to the case. To be sure, the jury acquitted Wilkerson of robbery --- presumably because they had doubts about whether a theft of any jewelry occurred --- yet still found sufficient evidence that Wilkerson was the person who was observed in possession of an instrument of crime (the gun) and who shot Hill in the chest. Therefore, further corroboration that the jewelry items belonged to Wilkerson and not Hill would seem to be of no meaningful additional value. The jury had already given Wilkerson the benefit of the doubt as to whether the jewelry items presented in court had been taken from Hill, yet it was still willing to accept Alston and Cox’s testimony that Wilkerson shot Hill. We see no reasonable probability that that the jury would have found Alston and Cox’s account to be unreliable and to have acquitted Wilkerson of the charges related to the shooting based upon further, cumulative testimony about the taking of jewelry.

Mrs. Wilkerson’s proposed testimony would have provided some basis in the record from which the jury *might* have found that various police officers lied in their testimony about the search of Wilkerson’s car and thus supported a theory advanced by counsel in his closing

argument that the ballistics evidence had been planted.¹⁸ We find the likelihood of the jury accepting the proposition --- that the police planted in Wilkerson's car a bullet that was linked to the bullet fired into Hill --- to be remote. The jury would have had to make an adverse credibility finding as to police personnel concerning what was found in the police search upon the testimony of the defendant's mother, a biased witness, particularly where her testimony --- as related by Wilkerson --- merely was that she observed what *she* characterized as a search prior to the car being removed. See Pet'r Mem. at 27. Moreover, the presence of the bullet in

¹⁸ Counsel elicited from Ms. Alston that when she saw Wilkerson get in his car after the shooting, there was a pink slip hanging in the back window. Testifying about the search in the police garage, Detective Pelosi reported that the pink slip, with two pieces of tape on it, was on the backseat of the car.

Counsel sought to exploit this change in condition of the car with respect to the pink slip, suggesting that it was evidence that the car had been entered before it was transported to the police garage. In the closing argument, Griffith argued in relevant part:

Charnissa Alston says she was there and identified the car. Detective Pelosi told you that the car was never touched. It was never touched. And when the car was at [the police impound lot at] Macalester and Whitaker when he ultimately opened the car and went in and got everything, that the pink slip, the title to the car, was on the backseat.

What does Charnissa Alston say? She says that she saw the pink slip in the back window. Okay. The car was never touched.

Now, I don't know how that bullet got there. I really don't. She says, of course, that Vincent Wilkerson runs away and gets in the car with his buddy, the light-skin male who nobody seems to know who that is.

I don't know how it got in here, but somehow that car had to have been touched. It had to have been opened at some point prior to the point at which it got to Macalester and Whitaker. How else did the pink slip get out of the window? I don't know, but that's reasonable doubt.

(N.T. 10/7/98 at 178.)

Wilkerson's car was hardly the only piece of evidence that tied him to the crime, particularly where Wilkerson presented himself to the same hospital to which Hill was admitted, and both Alston and Cox --- who were never shown to have any animus against Wilkerson --- testified consistently about the shooting. We are unable to conclude that the proposed testimony concerning the observation of police activity around Wilkerson's car, and the fact that the testimony would have been offered by the defendant's mother, would have created a "reasonable probability" of an acquittal of Wilkerson of any of the charges of which he was convicted.

There is insufficient evidence upon which this Court could find that trial counsel performed deficiently in failing to call any of these three witnesses to offer at trial the testimony suggested in Wilkerson's pleadings. Moreover, even when we aggregate the alleged prejudice to Wilkerson from the absence of the proposed testimony by these three witnesses, we do not believe there would have been a reasonable probability of a different outcome. This evidence is decidedly insufficient to undermine our confidence in the outcome, particularly when we evaluate counsel's failure to call these witnesses against the totality of the evidence at trial. The *Strickland* claim set out as Ground Three cannot provide a basis for habeas relief.

C. The "sentencing claim(s)"

In his second asserted ground for relief, Wilkerson contends that the court imposed an "illegal" sentence upon him at the 2002 re-sentencing.¹⁹ He asserts that "his convictions for attempted murder and aggravated assault should have merged for sentencing" and that the Superior Court erred in "fail[ing] to consider the total record and the totality of the evidence"

¹⁹ As might be apparent from the range of documents to which we cite and from which we perceive Wilkerson to be raising challenges to the various aspects of his sentence, his arguments as to Ground Two have evolved over the course of this litigation.

when considering this claim. (Pet. at 10 (Ground Two); Pet'r Reply at 6 (emphasis in original).) He also argues that he suffered "a miscarriage of justice" when, after initially determining that there would be "no further punishment" besides the term of life imprisonment on the attempted murder conviction, the court imposed terms of imprisonment for aggravated assault and PIC on re-sentencing. He characterizes those sentences as "Double Jeopardy terms," given that those convictions were not the subject of the remand by the Superior Court, causing him to believe that his original sentences on those particular convictions should not have been disturbed. (Pet. at 10 (Ground Two); Pet'r Reply at 11.) In addition, he suggests that he could not be convicted and sentenced for attempted murder because he was not properly charged with it (Pet'r Mem. at 19); that neither the evidence nor the jury instructions enabled the jury to find the "serious bodily injury" element necessary for him to be sentenced to the enhanced maximum term of 40 years for attempted murder (Amend. Pet. at 2-3); and that he was subjected to a 10-year "mandatory minimum sentence" on the aggravated assault conviction "in violation of the Sixth Amendment" because it was imposed without benefit of the jury having found the predicate fact giving rise to the mandatory minimum, that is, his prior commission of a crime of violence. (Mot. to Amend. at 1-2). We address each of these assertions in turn.

1. The sentence on aggravated assault in addition to attempted murder – Double Jeopardy Claim

Wilkerson first contends that he should not have received a sentence for aggravated assault of Hill in addition to the sentence imposed for the attempted murder of Hill. To the extent that the convictions were based upon the same conduct --- the shooting --- he contends that the sentences should have merged under state law, as the aggravated assault was the lesser included offense to the attempted murder. To the extent that the aggravated assault charge sought to punish him for punching and/or pistol-whipping Hill before he shot him, Wilkerson

argues that the instructions to the jury were deficient in that they lacked specificity as to the conduct that was alleged to constitute the aggravated assault. He asserts that because neither the judge nor the prosecutor advised the jury that the aggravated assault charge arose from the punch and slap, “the jury could reasonably infer” that the shooting of Hill was the basis for the aggravated assault charge. (Pet’r Mem. at 20-25; Pet’r Reply at 6-9, 12-13, 16.)

We consider this claim in light of the Double Jeopardy Clause of the Fifth Amendment, which provides that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb.” The Supreme Court has recognized that the Clause protects against, *inter alia*, multiple punishments for the same offense. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). To determine whether one offense is a lesser included offense of another for Double Jeopardy and merger purposes, the reviewing court looks at the two offenses and determines whether each requires proof of an element that the other does not. *See, e.g., Smith v. Vaughn*, Civ. No. 96-5537, 1997 WL 310075, *4 (E.D. Pa. May 9, 1997), *citing United States v. Blockburger*, 284 U.S. 299, 304 (1932).

a) Fair presentation of this issue to the state court

On direct appeal following the re-sentencing, Wilkerson raised the following issue in the Superior Court:

Was the Appellant illegally sentenced by the trial court to consecutive sentences on the charges of aggravated assault and attempted murder as the crimes merged for sentencing purposes.

Commonwealth v. Wilkerson, Br. for Appellant at 2 (Mar. 14, 2003) [Resp. Ex. E]. He argued that his convictions of attempted murder and aggravated assault involved the same victim and that sentencing him to consecutive maximum sentences on those convictions was prohibited by *Commonwealth v. Anderson*, 650 A.2d 20 (Pa. 1994), which held that those two crimes merged

for sentencing purposes. *Id.* at 4. His argument provided in block quotations the portion of the jury charge with respect to attempted murder, *id.* at 5, and to aggravated assault, *id.* at 6. After describing *Anderson* and the history of Pennsylvania cases addressing the doctrine of merger, he described as “[t]he operative facts in the instant case” the fact that the bill of information charging him with attempted murder and the bill of information charging him with aggravated assault each identified the sole victim as Nasir Hill. *Id.* at 8. He argued that the failure of the court to merge the sentence on aggravated assault with the sentence on attempted murder was error because it was “a necessarily lesser included offense to the attempted murder.” *Id.* at 9. Because he had already been sentenced to the maximum terms on his other convictions and thus no further increase to his overall sentence was available, he urged the Superior Court to amend his sentence directly and vacate the sentence of 10-20 years for aggravated assault. *Id.* at 9-10.

AEDPA generally restricts the federal court’s ability to grant relief to state prisoners “unless it appears that the applicant has exhausted the remedies available in the courts of the State[.]” 28 U.S.C. § 2254(b)(1)(A). The Supreme Court has noted that this condition requires the state prisoner to “give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). This process “giv[es] the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotations and citations omitted). “To provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly present’ his claim in each appropriate state court ... , thereby alerting that court to the federal nature of the claim.” *Id.* (citations omitted). A petitioner has fairly presented his claim if he presented the same factual and legal basis for the claim to the state courts. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (*per curiam*). Our

Court of Appeals has noted that:

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. *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999).

Nara v. Frank, 488 F.3d 187, 197-98 (3d Cir. 2007).

Wilkerson’s presentation of his “illegal sentence” issue to the Superior Court satisfied scenario (b) above. His brief relied upon *Commonwealth v. Anderson*, 650 A.2d 20 (Pa. 1994). That case supported the specific notion that aggravated assault is a lesser included offense of, and therefore merges with, attempted murder for purposes of sentencing. *See Anderson*, 650 A.2d at 24. Its analysis, however, was based upon the implications of these questions on the defendant’s Constitutional rights as reflected in the following discussion:

The operative inquiry here is whether the crimes involved are greater and lesser included offenses, i.e., whether the elements of the lesser included offense are a necessary subcomponent but not a sufficient component of elements of another crime, *Commonwealth v. Williams*, 559 A.2d at 28 n.2.

This inquiry, ultimately, is identical to the inquiry as to whether the double jeopardy protection of the Fifth Amendment has been violated. Prior to [*Commonwealth v. Weakland*, 555 A.2d 1228 (Pa. 1989)] and *Williams*, the merger analysis was “broader and more flexible” than the double jeopardy test in that it included a consideration as to whether a particular criminal act offended more than one interest of the state and whether “on the facts of the case, the two crimes were so intimately bound up in the same wrongful act that as a practical matter proof of one crime necessarily proves the other, so that they must be treated as the same offense.” *Commonwealth v. Williams*, 496 A.2d 31, 40 (1985). Thus, a merger analysis was different from a double jeopardy analysis, for it required a consideration of facts and the state’s interests which was not part of the double jeopardy analysis. Since *Weakland* and *Williams*, however, there is no difference between a double jeopardy analysis and a merger analysis: double jeopardy and merger are identical and the operative consideration

in both is whether the elements of the offenses are the same or different.

Anderson, 650 A.2d at 23. In his concurring opinion, Justice Castille further explained how the Fifth Amendment was implicated by these questions:

The Fifth Amendment forbids successive prosecutions and cumulative punishment for greater and lesser included offenses. *Commonwealth v. Tarver*, 426 A.2d 569 (Pa. 1981); U.S. Const. amend. 5, 14. That is, Fifth Amendment double jeopardy protections prohibit “multiple punishment for the same offense at one trial.” *Commonwealth v. Mills*, 286 A.2d 638, 641 (Pa. 1971). The applicable test in a double jeopardy context for determining whether two charges constitute the “same offense” is:

... where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not....

Commonwealth v. Tarver, 426 A.2d 569, 571 (Pa. 1981), quoting, *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).

Anderson, 650 A.2d at 25 (Castille, J., concurring).

Wilkerson’s reliance upon *Anderson* for his argument that his sentence on aggravated assault should have merged with his sentence for attempted murder fairly put before the Superior Court his contention that his Fifth Amendment rights under the Double Jeopardy Clause were violated because he received two sentences based upon what he suggested was the singular act of shooting Hill.

b) The Superior Court adjudicated the claim on the merits

The Superior Court recognized that Wilkerson’s challenge to the legality of his sentence was premised upon his argument that the trial court erred in imposing a second, consecutive sentence for the aggravated assault conviction. *Wilkerson-II*, slip opin. at 6 (citing Appellant’s Br. at 5, 7) [Resp. Ex. F]. The Superior Court offered the following analysis of the issue

presented:

Foremost, we find that Appellant has improperly characterized his claim as involving the legality of his sentence. *Although claims involving the common law doctrine of merger have been viewed as implicating the legality of a sentence, this doctrine applies in those instances where multiple punishments arise from a single act.* See *Commonwealth v. Andrews*, 564 Pa. 321, 329, 768 A.2d 309, 329 (2001) (stating “issues concerning multiple punishments generally arise from a single act that results in a violation of two penal provisions, with the applicable double jeopardy analysis focusing on a comparison of the elements of each offense to determine ‘whether each provision requires proof of a fact that the other does not’”); *Commonwealth v. Gatling*, 570 Pa. 34, 48, 807 A.2d 890, 899 (2002) (plurality opinion) (stating that merger analysis is not required where the offenses stem from two different criminal acts). *In the instant case, however, Appellant’s convictions stemmed from his alleged commission of two separate criminal acts (i.e. beating the victim’s head and shooting the victim in the chest).* A challenge of this sort is more properly characterized as a challenge to the sufficiency of the evidence underlying the convictions. See *Andrews, supra*, at 331, 768 A.2d 314.

Wilkerson-II, slip opin. at 6-7 [Resp. Ex. F] (emphasis added). Having identified in the record different actions allegedly taken by Wilkerson that satisfied the elements for an aggravated assault committed prior to the act of shooting,²⁰ the court concluded: “As sufficient evidence of

²⁰ After reciting the elements of aggravated assault, the court noted that:

[T]he Commonwealth presented testimony that [Petitioner] rendered the victim unconscious by a punch to the face, threw the victim’s unconscious body onto the hood of a car and then struck the victim in the head with a gun. See *Commonwealth v. Fierst*, 620 A.2d 1196, 1201-02 (Pa. Super. 1993) (providing that an assailant’s attempt to inflict serious bodily injury can be inferred from his act of beating the victim with a hard object). Viewing this evidence in the light most favorable to the Commonwealth, we find that sufficient evidence existed to sustain [Petitioner]’s conviction for aggravated assault.

Wilkerson-II, slip opin. at 8 [Resp. Ex. F].

record exists to demonstrate that [Petitioner]’s convictions did not arise from the same facts, we find [Petitioner]’s sole issue lacking in merit.” *Id.* at 9. Thus, the Superior Court found that Wilkerson did not suffer a Double Jeopardy violation because his convictions for aggravated assault and attempted murder “stemmed from his alleged commission of two separate criminal acts,” *Wilkerson-II*, slip opin. at 7, and thus did not implicate the merger doctrine or his concomitant right under the Double Jeopardy Clause not to be punished twice for the same offense.

c) The Superior Court’s adjudication of this claim resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The premise for the Superior Court’s rejection of Wilkerson’s merger / Double Jeopardy challenge was that “sufficient evidence of record exists to demonstrate that [Wilkerson’s] convictions did not arise from the same facts[.]” *Wilkerson-II*, slip opin. at 9 [Resp. Ex. F]. In reaching this conclusion, the Superior Court engaged in the familiar process of an appellate court conducting a Due Process sufficiency of the evidence inquiry: it assessed the evidence introduced at trial, viewing it in the light most favorable to the Commonwealth as verdict-winner, and applied it to the elements of the offenses as set out in the statute. Based upon the testimony offered by Alston and Cox about the events leading up to the shooting, and in light of the elements of the offenses as described in the Crimes Code, the court found “sufficient evidence” to sustain each of the convictions and therefore a proper basis for the separate punishments. *See id.* at 7-9. It did not, however, look to the jury instructions pursuant to which the jury assessed the evidence and returned the verdict it did. Without a review of how the jury was instructed as to these offenses in relation to the evidence introduced at trial, the Superior Court was not in a position to make a finding that Wilkerson’s “convictions stemmed from his

alleged commission of two separate criminal acts.” Rather, a review of the record as a whole --- which encompasses not just the evidence introduced at trial but also the jury charge, the verdict sheet, and counsel’s arguments --- reveals that *we cannot determine whether the jury convicted Wilkerson of aggravated assault based on criminal acts separate from the shooting.* To the extent that the state court’s determination that the convictions were based on separate acts reflects “a determination of a factual issue,” *see* 28 U.S.C. § 2254(e)(1), for the reasons set out below, we find that Wilkerson has rebutted the presumption of correctness that otherwise applies to state court factual determinations with the requisite “clear and convincing evidence.” *See id.*²¹

We find considerable merit in Wilkerson’s argument that, regardless of whether sufficient evidence of actions other than the shooting was presented to support the aggravated assault conviction, there is a real question as to whether the jury would have understood what evidence it was to assess when considering the aggravated assault charge. He points out that when the

²¹ Picking up on the Superior Court’s analysis of the sufficiency of the evidence, Wilkerson also argues that there was only weak evidence to support his conviction of aggravated assault based upon any action besides the shooting. He contends that there was no evidence presented to the jury “that the punch or the smack with the gun” caused, or could have caused, serious bodily injury to Hill, as “there was no medical testimony offered to show any injuries, nor was the victim at the trial to testify that he sustained any injuries” from those actions. *See* Pet’r Mem. at 22. He further argues that the punch and smack with the gun would not have been actions “manifesting extreme indifference to the value of human life,” as required for aggravated assault, and that the jury must not have found that the Commonwealth proved serious bodily injury in either of those actions because it acquitted him of robbery, which shared the “infliction of serious bodily injury” element. *See id.* at 23-24.

We find no merit to Wilkerson’s argument that there was insufficient evidence to support a conviction of aggravated assault had the jury been properly charged regarding the punch and/or smack with the gun. Ms. Cox’s testimony about the actions Wilkerson undertook prior to the shooting was legally sufficient to support a conviction for aggravated assault. *Accord Wilkerson-II*, slip opin. at 8 (“In the instant case, the Commonwealth presented testimony that Appellant rendered the victim unconscious by a punch to the face, threw the victim’s unconscious body onto the hood of a car and then struck the victim in the head with a gun. *See Commonwealth v. Fierst*, 620 A.2d 1196, 1201-02 (Pa. Super. 1993) (providing that an assailant’s attempt to inflict serious bodily injury can be inferred from his act of beating the victim with a hard object).”)”

judge charged the jury regarding aggravated assault, she did not specify the acts at issue, as she did when charging on attempted murder. *See* Pet'r Mem. at 20 [Doc. No. 10] (noting that judge advised the jury, "In this case that act [relating to attempted murder] is alleged to be a shooting, shooting of the victim"); N.T. 10/7/98 at 211. As Petitioner aptly notes, "nowhere in the record from the judge or the prosecutor was the jury told that the punch in the face and the smack with the gun was characterized as an **aggravated assault**." (Pet'r Reply at 7 (emphasis in original).) Wilkerson contends that absent clarification from the court that the aggravated assault related to actions preceding the shooting, "the jury could reasonably infer that serious bodily injury and indifference to the value of human life could only have occurred when [the victim] was shot, and not when he was punched in the face." (Pet'r Mem. at 20 (emphasis removed).) *See also* Pet'r Reply at 7 ("Without identifying which act constituted the aggravated assault, the jury could reasonably infer that the alleged shooting of the victim in the chest, did in fact manifest an extreme indifference to the value of human life.") (emphasis removed). Respondents' response on this point does not engage him on these questions. Rather, they retort that challenges to sentences imposed by state courts are generally matters of state law that are not cognizable on habeas review. *See, e.g.*, Resp. at 26 [Doc. No. 23]. They also justify the non-merger of the sentences as the Superior Court did, in light of evidence that Wilkerson committed more than one criminal act, warranting separate convictions and sentences. *See id.* at 27. They additionally point to another habeas case heard in this district in which a similar claim was deemed not to be cognizable. *See id.* at 26 and Resp. to Reply [Doc. No. 32] at 4 (referencing *Walls v. Harlow*, No. 11-3001, 2011 WL 7004397 (E.D. Pa. Dec. 20, 2011), *approved and adopted*, 2012 WL 94552 (Jan. 12, 2012)).

Our review of the jury charge confirms that the trial judge did not indicate which acts

gave rise to the charge of aggravated assault or how this crime related to the attempted murder charge. Rather, she simply explained:

The defendant has also been charged with aggravated assault. In order to find the defendant guilty of aggravated assault, you must find that each of the elements of the crime has been established beyond a reasonable doubt. There are three elements: One, that the defendant caused or attempted to cause serious bodily injury to, in this case, the victim is Nasir Hill.

Two, that the defendant acted intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

A person acts intentionally with respect to serious bodily injury when it is his conscious object or purpose to cause such injury.

A person acts knowingly with respect to serious bodily injury when he is aware that it is practically certain that his conduct will cause such a result.

A person acts recklessly with respect to serious bodily injury when he consciously disregards a substantial and unjustifiable risk that serious bodily injury will result from his conduct. The risk must be of such a nature and degree that considering the nature and extent of the defendant's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that reasonable person would observe in the defendant's situation.

If, after considering all of the evidence, you find that the Commonwealth has established each of these elements beyond a reasonable doubt, then you should find the defendant guilty of aggravated assault. Otherwise, you must find the defendant not guilty of aggravated assault.

(N.T. 10/7/98 at 212-13.) After receiving the charge and adjourning for the day on October 7, the jury returned on October 8, 1998. During its deliberations, it asked the court to reread the definition of aggravated assault. Judge Brinkley reread her instruction as given the day before, without any further comment. (N.T. 10/8/98 at 8-11.) The instruction given failed to provide any frame of reference for the aggravated assault charge. It failed to convey that the court sought

a verdict from the jury as to the criminality of any assault by Wilkerson prior to the shooting. By the same token, nothing in the instruction conveyed to the jury that the shooting could not be used as a basis to convict Wilkerson of aggravated assault, and the jury instruction as to aggravated assault would otherwise certainly appear to apply to the act of shooting.²²

While the Superior Court looked only to the evidence introduced at trial that could support a conviction of aggravated assault for actions other than the shooting, we agree with Petitioner that this is insufficient to ensure that Wilkerson was not subjected to two punishments for commission of a single criminal act in the shooting. In reaching this conclusion, we have been guided by cases in which the Supreme Court has faced challenges to jury instructions that defendants claimed subjected them to violations of their Due Process rights, including their entitlement to a jury finding that the government proved all of the elements of the offense beyond a reasonable doubt. In *Boyd v. California*, 494 U.S. 370 (1990), for example, the Supreme Court addressed a challenge on direct appeal to a jury instruction that the defendant claimed impermissibly restricted the jury's consideration of relevant evidence in the sentencing phase of his capital case. The challenged instruction was "not concededly erroneous," but the defendant claimed that the instruction was "ambiguous and therefore subject to an erroneous interpretation." *Boyd*, 494 U.S. at 380. The Court determined that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged

²² By contrast, in the instructions on the PIC charge, the court consistently identified the item alleged to be possessed by the defendant as a gun. *See, e.g.*, N.T. 10/6/98 at 12 (opening instruction); N.T. 10/7/98 at 214 (principal charge); N.T. 10/8/98 at 12 (rereading of this portion of charge at jury's request). Similarly as to the attempted murder charge, the court specified that the "act" that the defendant was alleged to have taken with the requisite intent was "a shooting." *See* N.T. 10/7/98 at 211. There was no such clarification regarding the acts that were the subject of the aggravated assault charge.

instruction” in an impermissible manner.²³ The Court has continued to apply that standard. *See, e.g., Weeks v. Angelone*, 528 U.S. 225, 236 (2000).

In *Estelle v. McGuire*, 502 U.S. 62 (1991), the habeas petitioner challenged a jury instruction that he claimed had allowed the jury to consider certain evidence for an improper purpose.²⁴ The Supreme Court reiterated that errors by a state court with respect to jury

²³ In *Boyde*, the concern was whether the jury applied a particular instruction to “prevent[] the consideration of constitutionally relevant evidence,” that is, the consideration of mitigating evidence of background and character, when it was instructed: “you shall consider ... [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” *Boyde*, 494 U.S. at 380-81. The challenged instruction was alleged to run afoul of requirement arising under the Eighth Amendment “that the jury be able to consider and give effect to all relevant mitigating evidence offered by” the defendant. *Id.* at 377-78.

²⁴ In *Estelle*, the court gave an instruction concerning the limited proper purpose for which the jury could consider evidence of prior injuries inflicted upon the infant victim whom the petitioner was accused of killing. The petitioner complained that the court’s wording in reference to “the other two offenses” left the jury with the mistaken impression that it could base its finding of guilt as to murder merely upon a finding that he had previously harmed the child --- an improper propensity instruction. *Estelle*, 502 U.S. at 71. The Court allowed that “the instruction was not as clear as it might have been.” *Id.* at 74. It found, however, that there was not a “reasonable likelihood” that the jury would have concluded that the instruction, read in the context of other instructions, authorized the use of propensity evidence:

It seems far more likely that the jury understood the instruction, *supra*, at 481, to mean that *if* it found a “clear connection” between the prior injuries, then it could use that fact in determining that McGuire committed the crime charged. The use of the evidence of prior offenses permitted by this instruction was therefore parallel to the familiar use of evidence of prior acts for the purpose of showing intent, identity, motive, or plan. *See, e.g., Fed. Rule Evid.* 404(b). Furthermore, the trial court guarded against possible misuse of the instruction by specifically advising the jury that the “[prior injury] evidence, if believed, was not received, and may not be considered by you[,] to prove that [McGuire] is a person of bad character or that he has a disposition to commit crimes.”

Estelle, 502 U.S. at 74-75 (citation omitted). The Court determined that the instruction given could not be characterized as a propensity instruction, “[e]specially in light of this limiting provision[.]” *Id.* at 75.

instructions require the federal habeas court to consider “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,” judging the deficient instruction not “in artificial isolation” but “in the context of the instructions as a whole and the trial record.” *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The Court also observed that “in reviewing an ambiguous instruction such as the one at issue here [in *Estelle*], we inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” *Id.* (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). *Estelle* thus instructs that a reviewing court must consider the record as a whole when assessing whether a jury’s verdict violated the defendant’s Due Process rights.

The Superior Court’s review of Petitioner’s merger challenge in *Wilkerson-II* in 2003 manifested no appreciation of the ambiguity that arose in the aggravated assault instruction given its failure to identify the conduct now alleged to have justified the conviction: the punch and strike to the head with the gun. While the court looked to the evidence introduced by the Commonwealth that was sufficient to support convictions for the separate acts of the punch/slap and the shooting, it did not demonstrate that it was cognizant of the danger created by the instructions, given the facts of the case, that would expose Wilkerson to multiple punishments from the same criminal act, *i.e.*, the shooting. As recognized by the United States Supreme Court in *Boyde*, criminal defendants have a right under the Due Process Clause to the presumption of innocence until the state proves every element of the offense beyond a reasonable doubt. A jury that has not been properly instructed cannot make that determination. The Superior Court here did not look at the instructions given to ensure that the jury knew how to convict Wilkerson of aggravated assault for acts other than the shooting.

We find the instruction as to aggravated assault lacked specificity as applied to the facts here and was subject to an erroneous interpretation by the jury that it could convict Wilkerson of aggravated assault based solely upon the evidence of the shooting.²⁵ Given the ambiguity in the

²⁵ Our concern in this regard was shared by Justice Cappy in a dissenting opinion to *Commonwealth v. Belsar*, 676 A.2d 632 (Pa. 1996). In that case, the jury heard evidence that Belsar had shot the victim in the chest, pectoral area, stomach, upper arm, and finger before leaving the immediate area. When Belsar later saw the victim moving and realized he was not dead yet, he and his co-conspirator began kicking the victim. *Belsar*, 676 A.2d at 633. The jury convicted him of first-degree aggravated assault for inflicting serious bodily injury; second-degree aggravated assault for aggravated assault for inflicting bodily injury with a deadly weapon; attempted murder and other offenses. He was given consecutive sentences for the first-degree felony aggravated assault and attempted murder. No sentence was imposed for the second-degree felony aggravated assault. *Id.*

Belsar complained on appeal that his sentence violated *Commonwealth v. Anderson*, 650 A.2d 20 (Pa. 1994), which recognized that aggravated assault merges into attempted murder for sentencing purposes. The majority found that Belsar's case was not analogous to *Anderson* because, "although the shooting was an aggravated assault, an additional aggravated assault was committed. The additional assault was the kicking of a seriously injured man." *Belsar*, 676 A.2d at 634. Thus, the court found that the first-degree aggravated assault sentence need not have merged with the sentence for attempted murder because, unlike the attempted murder premised upon the shooting, the aggravated assault was premised upon the kicking that followed.

Justice Cappy, joined by Justice Zappala, dissented. He could not agree with the majority's conclusion "that the assault charge of inflicting bodily injury [under 18 Pa. Cons. § 2702(a)(1), the first-degree felony] was supported by Appellant's kicking of the victim" and that the other aggravated assault conviction under § 2702(a)(4) and the attempted murder charge were supported by the shooting, "[b]ecause there is absolutely no indication in the record to support this characterization of the facts or to support the contention that this theory was ever presented to the jury[.]" *Belsar*, 676 A.2d at 636 (Cappy, J., dissenting). Rather, he found that "what little evidence of record which does exist relative to this point supports the conclusion that both the (a)(1) aggravated assault and the (a)(4) aggravated assault were based upon Appellant's shooting of the victim five times." *Id.* Justice Cappy pointed to the trooper's criminal complaint and District Attorney's criminal information, which referred only to shooting, as well as to a hearing at which Belsar was expected to plead guilty, at which the prosecutor described "criminal attempt to commit homicide in the shooting of James Bohatch. Aggravated assault with regard to the same shooting." *Id.* at 637. He also noted that the record did not include the opening or closing statements "and thus we do not have an exposition of the Commonwealth's theory of this case," which otherwise might have been pertinent. *Id.* He also found "no evidence of record whatsoever that the kicking caused such injury or could have caused such serious bodily injury" to satisfy the aggravated assault conviction where "[t]he only medical testimony offered related solely to the injuries caused by the gunshot wounds." *Id.* He concluded: "As the

(...continued)

instruction, *Boyde* required the Superior Court to assess the “reasonable likelihood” that the jury applied the instruction in a way that relieved the Commonwealth of its burden of proof as to every element of aggravated assault --- in this case, aggravated assault based upon the punch or strike to the head. Without any assessment of the likelihood that the jury based its verdict of aggravated assault on the evidence of the shooting, the Superior Court could not resolve against Wilkerson the Double Jeopardy / merger challenge. It was not sufficient simply to point to separate criminal actions from which Wilkerson’s two convictions *could* have stemmed.

We have searched the instructions as a whole for anything that might have mitigated the deficiency of the instruction as to aggravated assault or added clarity and found none. As did the Supreme Court in *Waddington v. Sarausad*, 555 U.S. 179 (2009), we have also considered whether the arguments of either the prosecutor or defense counsel might have “homed in on the key legal question” with regard to the aggravated assault charge as to decrease the “likelihood” that the jury “appl[ied] the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt.” *See Waddington*, 555 U.S. at 193. Defense counsel’s closing challenged the evidence offered about the punch and slaps with the gun but did so in the context of an attack principally directed to the credibility of Cox and Alston as witnesses generally. He did not describe the elements of aggravated assault or the facts alleged by the Commonwealth to support that charge, nor did he argue that particular evidence did or did not establish aggravated assault:

Commonwealth had the burden to prove every element of the crimes charged and failed to adduce evidence as to the significance of the kicking vis-à-vis serious bodily injury, the law requires a conclusion that the Commonwealth failed to prove aggravated assault (a)(1) based upon the kicking.” *Id. See also id.* at 639 (“[B]ecause aggravated assault under (a)(1) and the attempted homicide are lesser and greater included offenses, *Anderson*, and as importantly, because it is clear on this record that the charges were based on the ‘same facts’ (the shooting), the sentences for the crimes at issue must merge.”).

And what Miss Alston told you was that Mr. Wilkerson is suppose[d] to have basically slapped, punched Mr. Hill in the face, made his mouth bleed, hit him in the head with a gun twice, made his head bleed.

Ladies and gentlemen, ... we have medical records. ... C-22, which is all the medical records, ladies and gentlemen, these are the medical records of Nasir Hill from the University of Pennsylvania on the 5th of October of 1997.

We didn't speak specifically about these, but what I'll tell you is this, what the medical records say on the second page here, and this is trauma evaluation, page 2 of 4, right upon the front it says, "No facial trauma." What's that mean? It means that he wasn't hit in the face, in the mouth. And it means that he wasn't pistol whipped with the gun. Didn't happen, no facial trauma.

(N.T. 10/7/98 at 164.) He returned to this notion again:

Well, we know from Miss Alston and Miss Cox ... that they believe that Mr. Hill was knocked out when she says Mr. Wilkerson punches him in the face, which we now know didn't happen, didn't happen, because she said he was bleeding from his mouth.

Well, guess what? He wasn't bleeding from this mouth because there is no facial trauma. And then she says, Well, he picks him up and throws him on top of the car, okay. Then somewhere – from somewhere this gun appears. And we don't know where. For all we know Nasir had it.

So what happens?

Well, then she says he pistol whips the guy, pistol whips Nasir. No, he didn't. No head trauma, nothing.

I said to her, He was bleeding?

Yeah, he was bleeding.

And you would think he would have had to have stitches for that, right? Right? Guess what? No stitches in his head, none. So there is two – there is two things that they're both incorrect about.

(*Id.* at 172-73.) To the extent that the defense closing touched upon the testimony concerning the conduct relied upon by the Superior Court to support the aggravated assault conviction, it did so

in the context of the defense attempt to discredit the witnesses generally, such that they could not be relied upon to convict Wilkerson of any of the charges against him. *See, e.g., id.* at 178-79 (arguing that evidence concerning the watch and chain demonstrated that Wilkerson did not rob Hill of anything and further arguing that there was insufficient evidence that Hill was even shot in the presence of Alston and Cox). The defense closing offered no insights as to the nature of the aggravated assault charge lodged against Wilkerson.

More pertinent would be the closing argument of the Commonwealth --- the party that bore the burden of proof as to the charge of aggravated assault. We found nothing in the prosecutor's closing that would have helped the jury to appreciate which actions formed the basis for the aggravated assault charge or that that charge did not arise from the shooting. The prosecutor's closing did not touch upon the basis for the aggravated assault charge at all. It did not touch upon the criminality of the punches or hits about the head with a gun, although he did recite the witnesses' accounts of a sucker-punch and the slaps with the gun. (*Id.* at 182-83.) The verdict sheet offered no guidance either: it identified Hill as the victim of the charged aggravated assault but did not describe the conduct alleged to constitute that crime or otherwise provide any opportunity for the jury to differentiate its finding as to aggravated assault based on the shooting or based on other actions.

On the record before us, which we consider as a whole, we see "a reasonable likelihood" that the jury applied the instructions given by the trial court in a way that relieved the Commonwealth of its burden of proving beyond a reasonable doubt the elements of aggravated assault as to the events that preceded the shooting of Hill. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction itself was silent as to what conduct gave rise to the aggravated assault charge in the context of this case, and defense counsel's closing argument was insufficient to

alert the jury to the fact that the shooting was not the only contested action in the case and that the punch and/or smack with the gun was also alleged to be criminal conduct punishable as aggravated assault. The absence of clarification in the instruction and in the verdict sheet that the offensive conduct subject to the aggravated assault charge was the punching and slapping with the gun “so infected the entire trial that the resulting conviction [of aggravated assault] violates due process.” *See id.* The Superior Court’s factual finding that Wilkerson’s attempted murder and aggravated assault convictions stemmed from the commission of separate acts is thus belied by the record. Rather, with the record of this ambiguous instruction, the factual record does not establish that the jury’s convictions as to aggravated assault and attempted murder were based upon separate criminal acts warranting separate punishments.²⁶

²⁶ We recognize that the Court was presented with a similar claim in *Walls v. Harlow*, No. 11-3001, 2011 WL 7004397 (E.D. Pa. Dec. 20, 2011), *approved and adopted*, 2012 WL 94552 (Jan. 12, 2012). In that case, as here, the petitioner asserted that his sentence was illegal because the trial court failed to merge his aggravated assault and attempted murder sentences. When that issue was presented on direct appeal, the Pennsylvania Superior Court identified the threshold question as whether the defendant “committed one solitary criminal act,” and looked to what the record reflected in terms of the defendant’s actions taken against the victim. *Walls*, 2011 WL 7004397 at *8-*9. The court found that the first shot taken by the defendant, striking the victim in the neck, “was sufficient to support a verdict of attempted murder” and that the subsequent shots to the victim’s thighs and a subsequent beating of him with the pistol “were sufficient to support the crime of aggravated assault.” *Id.* at *9. As “the record reflect[ed] that Appellant committed numerous separate criminal acts[,]” the Superior Court found that no merger analysis was required and that therefore that the separate sentences were not illegal. *Id.*

Considering Walls’ presentation of the issue on habeas, the district court viewed the state court’s analysis as “reveal[ing] [that] petitioner’s claim challenging the legality of his sentence addresses only the application of Pennsylvania sentencing law, and as such is not cognizable by a federal court in a habeas proceeding.” *Id.* The court went on to state that “[g]enerally, a state court’s sentencing decision and claims arising out of that decision are not cognizable in a federal habeas proceeding, unless the sentence constitutes cruel and unusual punishment under the Eighth Amendment, exceeds the statutory limits[FN4 omitted], or is arbitrary or otherwise in violation of due process.” *Id.* The court then noted the limitation of § 2254 relief to violations of the federal Constitution or laws and cited to case law clarifying that “[c]laims asserting violations of state law, or claims challenging a state court’s interpretation of state law, are not cognizable on federal habeas review.” *Id.* The court concluded that “Plaintiff’s [sic] claim
(...continued)

We find that the state court violated Wilkerson's rights under the Double Jeopardy Clause not to be sentenced twice when it affirmed his judgment of sentence in 2003 without ensuring that the jury found him to have committed separate criminal acts and where there is a reasonable likelihood that the jury interpreted the jury instructions as to aggravated assault in such a way that it was not condemning Wilkerson for the punch or slap with the gun but rather for the shooting. In these circumstances, we believe Wilkerson's sentence of 10-20 years for the aggravated assault must be vacated.

2. The addition of sentences on aggravated assault and PIC following the remand

Wilkerson presents another challenge, also premised in part on the Double Jeopardy Clause, with respect to his aggravated assault sentence as well as his PIC sentence, which we address here in the interest of providing a complete report. In his reply brief, he contends that the sentence of 10-20 years for aggravated assault and 2½-5 years for PIC that he received on remand in 2002 were improper because sentences on those convictions were not the subject of the remand. He argues that this aspect of the court's original sentence --- which was that "no further penalty" would be imposed for those convictions --- should not have been disturbed. He characterizes the imposition of these additional sentences as a Double Jeopardy violation and "a

should be denied." *Id.*

We respectfully disagree with the notion that questions of merger involve only questions of state law that do not trigger habeas review. Rather, we believe we have demonstrated that while state law might determine whether two offenses are capable of merging because they share the same elements as set forth in the state's criminal code, *see, e.g., Commonwealth v. Anderson*, 650 A.2d 20, 24 (Pa. 1994) (finding attempted murder and aggravated assault based on same action merge), the question of whether two convictions are predicated upon the same act is not just a matter of state law but a mixed question of fact and law that necessarily has Fifth Amendment Double Jeopardy implications. The Court's analysis in *Walls* failed to manifest any appreciation of the Double Jeopardy basis for the petitioner's claim.

miscarriage of justice.” See Pet. at 10; Pet’r Reply at 10-11. See also Pet’r Reply at 11 (asserting that the trial judge “altered her prior sentence of ‘no further penalty’ and imposed double jeopardy terms of 10-20 years for the aggravated assault and 2½-5 years for the PIC”).²⁷

The Supreme Court has explained that the Double Jeopardy Clause protects against a second prosecution for the same offense after an adjudication that resulted in either a conviction or an acquittal, and against multiple punishments for the same offense. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). It “does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.” *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980). Nor is it violated when a more severe sentence is imposed on retrial than was imposed for a conviction that was vacated on appeal, although the Due Process Clause might be implicated upon a showing of vindictiveness. See, e.g., *Pearce*, 395 U.S. at 719-23, 725. Rather, the Supreme Court has recognized that its precedents “clearly establish that a sentence [in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal.” *DiFrancesco*, 449 U.S. at 134. Furthermore, “a resentencing after an appeal intrudes even less upon the values protected by the Double Jeopardy Clause than does a resentencing after retrial.” *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985). See also *DiFrancesco*, 449 U.S. at 136 (noting that Double Jeopardy provision is designed to bar

²⁷ The Superior Court opinion in the appeal following re-sentencing does not reflect that the court addressed this contention. Following re-sentencing, the single sentencing issue presented by Wilkerson related to the imposition of consecutive sentences for aggravated assault and attempted murder and Wilkerson’s contention that those crimes merged for sentencing purposes. See Br. of Appellant, *Commonwealth v. Wilkerson*, No. 1521 EDA 2002, at 2, 5 (filed Mar. 14, 2003) [Resp. Ex. E]. Respondents, however, have not asserted that this aspect of Wilkerson’s sentencing challenge was not properly presented to the state courts. Therefore, as do Respondents in their Response to the Reply, see Resp. to Reply [Doc. No. 31] at 6-7, we look at the merits of this claim. See also 28 U.S.C. § 2254(b)(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.”).

repeated attempts to convict, “with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent,” and noting those considerations had no significant application to a limited appeal by the prosecution that did not “involve a retrial or approximate the ordeal of a trial on the basic issue guilt or innocence”).

Wilkerson’s convictions for attempted murder, aggravated assault, and PIC were not final when, on direct appeal, the Superior Court affirmed his “convictions” but vacated his “[j]udgment of sentence” and ordered the “[c]ase remanded.” *Wilkerson-I*, slip opin. at 18 [Resp. Ex. D]. *See also id.* (“We, therefore, affirm the convictions of attempted murder, aggravated assault, and possession of an instrument of crime, but vacate the judgment of sentence and remand for imposition of sentence.”). Nothing in the Superior Court decision indicated that he could not be sentenced differently on *all* of his convictions. The Double Jeopardy provision did not limit the court upon re-sentencing from altering the composition of the judgment of sentence. Therefore, whether or not this argument was properly put before the state court, there is no merit to Wilkerson’s contention that the state court violated his rights under the Double Jeopardy Clause when it imposed terms of imprisonment for the aggravated assault and PIC convictions after his life sentence was vacated and the case remanded for re-sentencing. This aspect of his sentencing claim does not warrant habeas relief.

3. Whether Wilkerson was actually charged with attempted murder

Although not a sentencing claim per se, Wilkerson alleges in passing in his briefing on Ground Two that he should not have been convicted or sentenced on attempted murder because he was not properly charged with it. He contends that he was charged only with 18 Pa. Cons. Stat. § 2502 murder when he must also have been charged with criminal attempt under 18 Pa.

Cons. Stat. § 901(a). (Pet'r Mem. at 19; Pet'r Reply at 10.) Based upon the fact that his criminal docket, a portion of which he appended to his brief, identifies the attempted murder charge against him as deriving from 18 Pa. Cons. Stat. § 2502, he argues "that he was tried and convicted of violating a criminal statute that was never included with the charges." (Pet'r Mem. at 19 & Ex. 5; Pet'r Reply at 10.)

Respondents' reply brief references the Bill of Information, which is contained in the State Court Record. Unlike the online docket and its shorthand reference to the charges, the Bill of Information reflects the formal charges lodged against Wilkerson and references both Sections 2502 and 901 of Title 18 as to the attempted murder charge. It also specifically alleges that "serious bodily injury resulted" from Wilkerson's alleged conduct. This claim, which does not appear to have ever been presented to the state court in any event, is thus without merit. It cannot provide relief from Wilkerson's sentence on the attempted murder conviction. *See, e.g.*, 28 U.S.C. § 2254(b)(2) (permitting court to deny petition on the merits notwithstanding failure to exhaust).

4. The sufficiency of the jury instruction and finding as to attempted murder to support the 20-40 year enhanced sentence – *Apprendi* issue

The next aspect of Wilkerson's sentencing challenge was first raised in this Court in his filing submitted on June 18, 2013 that he entitled "Amended Petition in Support of Memorandum of Law."²⁸ He appears to contend that the court's imposition of the 40-year

²⁸ We note that this issue was presented well after the filing of the initial habeas petition and after briefing had closed. *See* note 2, *supra* (detailing filings, including reply brief submitted by Petitioner on April 4, 2013). Respondents, however, have not challenged the timeliness of Wilkerson's presentation of this issue. While we might have sought further briefing from the parties as to whether this issue could be considered timely as relating back to the sentencing claim presented in his original petition submitted on April 11, 2012, we instead provide the analysis leading to our conclusion that habeas relief is not available to Wilkerson on this claim
(...continued)

maximum sentence for attempted murder (expressed as a sentence of 20-40 years) was illegal where the jury did not specifically find that “serious bodily injury” resulted from the attempted murder – an element that permits a greater maximum sentence for this offense. *See* 18 Pa. Cons. Stat. § 1102(c).²⁹ Without great explication of his argument, he points to and relies upon a recent non-precedential Superior Court opinion, a portion of which he appended to his filing. *See* Amend. Pet. [Doc. No. 30], attaching *Commonwealth v. Naranjo*, No. 273 EDA 2012, slip opin. at 1, 10-13 (Pa. Super. Ct. May 23, 2013). He contends that that ruling is relevant to his case because Judge Brinkley, like the judge at Mr. Naranjo’s trial, “did not inform the jury that Petitioner was charged with attempted murder causing serious bodily injury,” (Amend. Pet. at 1, ¶ 3), and that, as in *Naranjo*, his sentence of 20-40 years is illegal because it “exceeded the statutory maximum[] where the trial court did not define serious bodily injury in its instructions

because of the harmless error doctrine described in *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

²⁹ At the time of Wilkerson’s trial, this section provided:

(c) Attempt, solicitation and conspiracy to commit murder or murder of an unborn child.—Notwithstanding section 1103(1) (relating to sentence of imprisonment for felony), *a person who has been convicted of attempt, solicitation or conspiracy to commit murder or murder of an unborn child where serious bodily injury results* may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years. Where serious bodily injury does not result, the person may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 20 years.

18 Pa. Cons. Stat. § 1102 (1997) (emphases added) (subsequently amended 2008 and 2012). At re-sentencing on April 12, 2002, Wilkerson was given a sentence of 20-40 years on the attempted murder conviction --- the enhanced maximum permitted by this section. Had he not been deemed subject to the “serious bodily injury” provision, he could not have been sentenced in excess of 10-20 years.

on the attempted murder.” (*Id.* at 2, ¶ 5 (capitalization removed).)³⁰ Citing also to the precedential decision of the Superior Court in *Commonwealth v. Johnson*, 910 A.2d 60 (Pa. Super. Ct. 2006), upon which the *Naranjo* court relied, he argues that “[s]ince a finding of serious bodily injury increases the maximum sentence, it is an element of the offense and must be proved beyond a reasonable doubt.” (*Id.* at 3, ¶ 6.)

Respondents properly recognize Wilkerson’s claim in this regard as based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the United States Supreme Court held that the Sixth Amendment right to a jury trial encompasses a jury finding as to any fact, other than a prior conviction, that increases the maximum sentence that may be imposed for a conviction. (Resp. to Reply [Doc. No. 31] at 7.)³¹ They observe that one impediment to Wilkerson obtaining relief on this claim is his “failure to fairly present it to the state courts.” (*Id.* at 8.) Notwithstanding that deficiency, they contend that if such a claim were considered, Wilkerson would have to show that the failure of the instruction to have included the serious bodily injury element as to the shooting was more than harmless error. They contend he cannot meet that burden in light of “the overwhelming and uncontroverted evidence supporting a finding of

³⁰ While Petitioner only appended a portion of the Superior Court’s opinion in *Naranjo*, the excerpt appears to reflect the entirety of the court’s discussion of the issue. The court determined that the defendant’s sentence of 20-40 years for attempted murder had to be vacated because the court did not define for the jury the term “serious bodily injury,” such that the jury could not have determined that *Naranjo*’s actions constituting attempted murder resulted in serious bodily injury to the victim and justifying the much higher maximum sentence. See *Commonwealth v. Naranjo*, No. 273 EDA 2012, slip opin. at 10 (Pa. Super. Ct. May 23, 2013) [Doc. No. 30].

³¹ This characterization is entirely appropriate, as both the *Naranjo* and *Johnson* cases cited by Petitioner derive from *Apprendi*. See, e.g., *Naranjo*, slip opin. at 10-13 (excerpt provided by Wilkerson in Doc. No. 30) (relying extensively on *Johnson* and acknowledging that *Johnson* was based on *Apprendi*); *Johnson*, 910 A.2d 60, 67 (Pa. Super. Ct. 2006) (relying upon *Apprendi*).

serious bodily injury resulting from the shooting of Nasir Hill at close range.” (*Id.* at 10.)³²

We first review the manner in which this claim has been presented to the courts. Ultimately, however, we find it most expedient to address the merits. *See* 28 U.S.C. § 2254(b)(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.”).

a) Fair presentation / procedural default

Respondents contend that this claim is procedurally defaulted because Wilkerson did not present it to the state courts in his challenge to his sentence on direct appeal following re-sentencing. *See* Resp. to Reply [Doc. No. 31] at 8. *See also* Br. of Appellant, *Commonwealth v. Wilkerson*, No. 1521 EDA 2002, at 2, 5 (filed Mar. 14, 2003) [Resp. Ex. E] (Question Presented and argument addressing only merger of sentences for attempted murder and aggravated assault); Resp. to Reply [Doc. No. 31] at 8 (referring to this brief). Respondents are correct that Wilkerson’s appeal to the Superior Court following the re-sentencing in which he was given the 20-40 year sentence on aggravated assault did not raise any constitutional concern relating to his right to factfinding by a jury as to all facts resulting in a greater maximum (and minimum)

³² Respondents also contend that relief is unavailable to Wilkerson because *Apprendi* and its progeny “do not apply retroactively on collateral review.” *See* Resp. to Reply [Doc. No. 31] at 9. That statement as to the retroactive effect of *Apprendi* is correct. *See, e.g., United States v. Reyes*, --- F.3d ---, No. 13-3537, slip opin. at 6 (3d Cir. June 18, 2014). Wilkerson’s conviction, however, was not yet final when *Apprendi* was decided in 2000. His conviction became final on October 10, 2003, upon the expiration of the 30-day period in which to seek review of the Pennsylvania Superior Court’s September 10, 2003 decision affirming the judgment of sentence after the 2002 re-sentencing. Therefore, the argument concerning the retroactive effect of *Apprendi* would appear to be misplaced. *See, e.g., Reyes*, slip opin. at 5 (observing that “[w]hen the Supreme Court announces a new rule of law, it generally applies to cases still on direct review”).

sentence. He thus missed his opportunity to raise this constitutional challenge when he filed his appellate brief in March 2003.

Wilkerson did try to present a claim that appears to reflect this *Apprendi* challenge while on PCRA review, although he did not refer to *Apprendi* by name. While represented by appointed counsel in his PCRA action, Wilkerson submitted to the PCRA Court on July 19, 2004 a *pro se* addendum to his PCRA petition, presenting a claim citing the recently-issued decision of the Court in *Blakely v. Washington*, 542 U.S. 296 (2004), a case that follows from *Apprendi*. See “Addendum to the Petition for Post Conviction Relief Seeking Modification and Reduction of Constitutionally Invalid Sentence,” dated July 19, 2004 [Resp. Ex. G]. Wilkerson’s counsel, however, did not apprehend the *Apprendi* issue in the sentence on the attempted murder conviction.³³ The court accepted a *Finley* letter from him and dismissed the PCRA petition.

Wilkerson succeeded in having that dismissal order vacated due to deficiencies in counsel’s *Finley* letter. See *Wilkerson-III* [Resp. Ex. J]. Although new counsel was appointed for PCRA review on remand, Wilkerson’s *Apprendi/Blakely* issue was not preserved and presented in the next amended PCRA petition filed by new counsel, nor in the appeal to the

³³ Wilkerson’s PCRA counsel filed a *Finley* letter, advising the PCRA Court that there were no meritorious claims to pursue on Wilkerson’s behalf. He considered the claim suggested by Wilkerson and explained in his *Finley* letter that he did not find merit in a claim based upon *Blakely* because Pennsylvania’s sentencing scheme is indeterminate, unlike the determinate sentencing scheme at issue in *Blakely*. In so doing, counsel appeared to have focused upon Wilkerson’s reference in his *pro se* filing to the conformity of his sentence to state sentencing guidelines, while overlooking Wilkerson’s additional assertion that “*the jury did not find beyond a reasonable doubt the factual basis for the trial court’s deviation beyond the mandatory minimum [sic]*,” which would seem to relate to the question of whether a 10-20 year sentence or a 20-40 year sentence applied to his attempted murder conviction. See “Addendum to the Petition for Post Conviction Relief Seeking Modification and Reduction of Constitutionally Invalid Sentence,” dated July 19, 2004, at 3, Sent. 2 [Resp. Ex. G]. After the PCRA Court dismissed his petition, Wilkerson complained that PCRA counsel “misconstrued *Blakely v. Washington* as applied to Defendant’s sentence.” See Opin. Sur Pa. R.A.P. 1925(b), slip opin. at 5, 12 (characterizing Wilkerson’s objections and issues on appeal) [Resp. Ex. I].

Superior Court of the subsequent dismissal of that amended petition. *See* Amend. Post Conv. Pet. with Consol. Mem. of Law, June 27, 2007 [Resp. Ex. K]; *Wilkerson-IV*, slip opin. at 7 [Resp. Ex. N]. Accordingly, any claim regarding the legality of the sentencing enhancement on the attempted murder conviction based upon “serious bodily injury” having resulted was never before the Pennsylvania Superior Court. As the opportunity to present such a claim to the Superior Court has now passed, the claim is procedurally defaulted.

The federal court’s ability to grant habeas relief as to claims that have not been properly presented to the state court is constrained to the circumstances set out in, *e.g.*, *McCleskey v. Zant*, 499 U.S. 467 (1991) (cause and prejudice exception), and *Schlup v. Delo*, 513 U.S. 298 (1995) (miscarriage of justice exception). Respondents’ response to Wilkerson’s reply and amended petition raised this question of his procedural default of this claim. *See* Doc. No. 31 at 8 (“But any Apprendi or Alleyne-based complaint are unavailing for several reasons, not the least of which being Petitioner’s failure to fairly present it to the state courts.”) (citing “Petitioner’s Superior Court Direct Appeal Brief, Exhibit E”). While Wilkerson may have anticipated a timeliness challenge to this claim, *see* Amend. Pet. at 4, his “amended petition” raising the *Apprendi* issue did not purport to demonstrate that it had been properly presented to the state court or that he met either the cause and prejudice exception or the miscarriage of justice exception to permit review of a procedurally defaulted claim.

In the absence of a response from Petitioner on whether there might be circumstances establishing cause for the default of this claim or circumstances involving the sentence that would satisfy the miscarriage of justice standard, we discuss below the merits of Wilkerson’s claim and conclude that *Apprendi* does not require the Court to disturb Wilkerson’s 20-40 year sentence for attempted murder.

b) Merits review

(1) The trial court erred

The version of Section 1102(c) of the Crimes Code in effect at the time of Wilkerson's re-sentencing in 2002 provided that the maximum sentence for attempted murder is 20 years, but that if "serious bodily injury results" from the attempted murder, the maximum sentence is 40 years. The Code defines "serious bodily injury" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." 18 Pa. Cons. Stat. § 2301. Based upon the United States Supreme Court's 2000 *Apprendi* decision, the Pennsylvania courts now recognize that it is "solely the responsibility of the jury ... to find, beyond a reasonable doubt, whether a serious bodily injury resulted from the ... attempted murder." *Commonwealth v. Johnson*, 910 A.2d 60, 67 (Pa. Super. Ct. 2006). *See id.* at 67-68 (vacating sentence of 17½-40 years on attempted murder where "the jury was never presented with, nor rendered a decision on, the question of whether a serious bodily injury resulted from the attempted murder"). *See also Commonwealth v. Taylor*, 65 A.3d 462, 465 (Pa. Super. Ct. 2013) ("Since a finding of serious bodily injury increases the maximum sentence, it is an element of the offense and must be proved beyond a reasonable doubt. *See generally Apprendi v. New Jersey*, 530 U.S. 466 (2000)."). *See also Taylor*, 65 A.3d at 465 (noting that verdict slip did not reflect conviction of "attempted homicide causing serious bodily injury" because Commonwealth had withdrawn that charge; verdict sheet addressed only "attempted homicide," and "[t]hus, Appellant's sentence, if the jury did not determine he caused serious bodily injury, exceeded the statutory maximum of ten to twenty years").

The trial court erred in sentencing Wilkerson in excess of 20 years without a jury finding, as *Apprendi* required, that serious bodily injury resulted from the attempted murder. The 20-40

year sentence was not an option at re-sentencing in 2002 given both the lack of an instruction to the jury that the attempted murder charge included anything having to do with substantial bodily injury resulting, *see* N.T. 10/7/98 at 210-12, and the absence of a special finding by the jury on the verdict form reflecting their conclusion in that regard.³⁴ *Cf. Johnson v. Rozum*, No. 2:11-CV-639, 2011 WL 6812828, *5 (W.D. Pa. Dec. 27, 2011) (finding no merit to *Apprendi* claim where “[t]he trial court, in its jury instruction, placed the issue of serious bodily injury before the jury, and the jury found beyond a reasonable doubt that the attempted homicide resulted in serious bodily injury,” supporting a maximum sentence in excess of 20 years on the attempted murder conviction).

(2) The error must not be harmless

Habeas relief, however, is not warranted for instances of trial court error if the error is “harmless.” In cases of trial court error relating to a jury instruction, it is clear that a grant of habeas relief is warranted only upon a finding that the error “had substantial and injurious effect or influence in determining the jury’s verdict.” *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (noting that “[a]n appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given”); *id.* at 154-55 (describing burden of demonstrating the prejudice of an erroneous instruction as habeas petitioner’s). As the Third Circuit has explained:

³⁴ Our review of the verdict form, found in the state court record, confirms that the jury was merely asked to indicate “guilty” or “not guilty” as to “robbery,” “aggravated assault,” “attempted murder,” and “possessing instruments of crime.” The only other details provided on the verdict sheet were the identification of the “Victim: Nasir Hill” on the first three charges and the specification on PIC of the “Instrument: Hand Gun.”

Pursuant to the *Brecht* standard,

[t]he crucial inquiry is the impact of the error on the minds of the jurors in the total setting. It is thus inappropriate to ask whether there was sufficient evidence to support the result, apart from the phase of the trial affected by the error. The correct inquiry is whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error.

Smith v. Horn, 120 F.3d 400, 418 (3d Cir. 1997) (quoting *Yohn v. Love*, 76 F.3d 508, 523 (3d Cir. 1996)). The Supreme Court has further distilled the analysis to the following maxim:

When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had “substantial and injurious effect or influence in determining the jury’s verdict,” that error is not harmless. And, the petitioner must win.

O’Neal v. McAninch, 513 U.S. 432 at 436 (1995). This approach to claims of trial court error survived the enactment of AEDPA. *See, e.g., Fry v. Pliler*, 551 U.S. 112, 120 (2007) (observing that the test of *Brecht* “obviously subsumes” the test of AEDPA); *id.* at 121-22 (holding, in case subject to AEDPA, that “in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious effect’ standard set forth in *Brecht*, whether or not the state appellate court recognized the error and reviewed it for harmlessness”).

Here, of course, the error relates to a jury instruction and jury finding that ultimately relates to sentencing, not the verdict of guilt. This different context, however, does not affect the standard by which we assess the impact of the trial court’s error. In *Washington v. Recuenco*, 548 U.S. 212 (2006), the United States Supreme Court determined that the failure to submit a sentencing factor to the jury was not a “structural” error requiring automatic reversal but, as with errors in jury instructions concerning the elements of a crime, requires the reviewing court to consider whether the error is merely harmless. Therefore, we proceed to consider how a properly-instructed jury would have assessed whether “serious bodily injury result[ed]” from the

attempted murder, thus permitting imposition of the 20-40 year sentence imposed by Judge Brinkley.

(3) The error here was harmless

Had the jury been properly instructed such that the court would have had the option of sentencing Wilkerson in excess of 10-20 years and up to 20-40 years on the attempted murder conviction, the jury would have assessed whether Wilkerson's shooting of Nasir Hill --- the conduct that formed the basis of the attempted murder charge --- resulted in serious bodily injury. It could find the "serious bodily injury" element to be satisfied if it found the bodily injury that Hill suffered in the course of the shooting either: (1) "create[d] a substantial risk of death"; (2) "cause[d] serious, permanent disfigurement," or (3) "cause[d] ... protracted loss or impairment of the function of any bodily member or organ." *See* 18 Pa. Cons. Stat. § 2301.

When we subject Wilkerson's claim to the *Brecht* harmless error analysis outlined above, we conclude that habeas relief should not be granted. The error of the trial court in sentencing Wilkerson as having inflicted "serious bodily injury" without benefit of a jury finding to that effect is harmless on this factual record. Medical records from the emergency room treatment at the Hospital of the University of Pennsylvania were admitted at trial. (N.T. 10/7/98 at 102, 115-16 (referring to Commonwealth Exhibit 22).)³⁵ Counsel stipulated to the authenticity of the records, and the prosecutor described them as concerning "treatment of a gunshot wound to [Hill's] right chest[.]" (N.T. 10/7/98 at 116.) The eyewitnesses testified that Wilkerson shot Hill from a distance of no more than three to four feet. (N.T. 10/7/98 at 63 (Cox).) *See also id.* at

³⁵ The state court record that we received from the First Judicial District did not include any of the exhibits marked at trial. Therefore, we do not have before us a copy of Hill's medical records for treatment of his gunshot wound.

140 (Alston's testimony that Wilkerson was "2 feet at the most" from Hill). Detective Blunt testified that he observed Hill at the hospital following the surgery to remove the bullet and described him as being "on oxygen in a hospital bed, intravenous line. I believe he had a chest tube in, difficulty speaking, severe pain." (N.T. 10/7/98 at 18.)

While there was not a great deal of focus at trial on the extent of Hill's injuries from the shooting, there was only uncontroverted evidence about the shooting having occurred at close range and the fact that a bullet was lodged in Hill's right chest, requiring emergency surgery. We might not say that the record would have supported a finding that the shooting "cause[d] serious, permanent disfigurement," or that it "cause[d] ... protracted loss or impairment of the function of any bodily member or organ." *See* 18 Pa. Cons. Stat. § 2301. It is sufficiently clear, however, that the shot to the chest "create[d] a substantial risk of death[.]" *See id.*³⁶

Having reviewed the record with care, we conclude that Petitioner has failed to establish that the erroneous instruction --- which failed to convey the requirement of a "serious bodily injury" resulting from the shooting in order for the jury to authorize a sentence by the court of up to 20-40 years --- "had substantial and injurious effect or influence in determining" the 20-40 year maximum sentence that the trial court gave him. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). There can be no credible argument that Wilkerson's act of shooting Hill in the chest at close range did not create a substantial risk of death. The jury found that Wilkerson shot at Hill and it received uncontroverted evidence that Hill endured a gunshot wound in the chest,

³⁶ Petitioner acknowledges as much in his argument distinguishing the evidence supporting the attempted murder conviction and the evidence supporting the aggravated assault conviction and discussing the elements of those offenses under 18 Pa. Cons. Stat. §§ 2301 and 2702: "When considering the facts of this case, the gun shot wound to the chest obviously caused serious bodily injury, manifested an extreme indifference to the value of human life, created a substantial risk of death, and possibly impairment of the function of a bodily member or organ." (Pet'r Reply [Doc. No. 28] at 16.)

fired at close range. It is inconceivable that a properly-instructed jury would not find that Wilkerson created a substantial risk of Hill's death. Accordingly, we believe that the error with respect to silence of the jury instruction on "serious bodily injury" resulting from the shooting was harmless under *Brecht*. Wilkerson simply has not met his burden to show that the deficiency in the instruction and verdict sheet had a substantial or injurious effect on the sentence that he ultimately received on resentencing. Accordingly, there is no basis for the Court to provide Wilkerson relief from his sentence of 20-40 years for attempted murder.

5. The mandatory minimum on the sentence of 10-20 years for aggravated assault – *Alleyne* claim

Finally, in his most recent filing, his Motion to Amend (Doc. No. 32), submitted on May 27, 2014, Wilkerson seeks relief based upon *Alleyne v. United States*, 133 S. Ct. 2151 (2013) as to his sentence of 10-20 years for aggravated assault. (Mot. to Amend. at 3, 5.) He contends that that sentence was "imposed under 42 Pa. C.S. §9714(a)(1)," ³⁷ and that the mandatory minimum sentence he is serving was "imposed in violation of the Sixth Amendment" because it was based upon facts not submitted to the jury. (*Id.* at 1, 4.) He contends that he is entitled to amend his petition under Rule 15 and that it be considered timely because it "relates back" to his claim that his sentence of 32½-65 years is illegal. (*Id.* at 5.) He seeks to have his "mandatory minimum

³⁷ This section provides for mandatory minimum sentences in certain circumstances. For example, § 9714(a)(1) provides that "[a]ny person who is convicted in any court of this Commonwealth of a crime of violence shall, if at the time of the commission of the current offense the person had previously been convicted of a crime of violence, be sentenced to a minimum sentence of at least ten years of total confinement[.]" 42 Pa. Cons. Stat. § 9714 (1995). As Petitioner notes, where § 9714 does not apply, a sentence for aggravated assault may not exceed 20 years pursuant to 18 Pa. Cons. Stat. § 1103(1) but is otherwise not subject to any mandatory minimum. Thus, § 9714 fixes a "prescribed range" for aggravated assault based upon a prior conviction of a "crime of violence," "remove[ing] the discretion of the sentencing court to impose any lesser sentence than provided for in [§ 9714(a).]" See Mot. to Amend. at 2.

sentence” vacated or to be given a re-sentencing on his aggravated assault conviction “without the application of 42 Pa. C.S. § 9714(a)(1).” (*Id.* at 7.)

Inasmuch as we will recommend that Wilkerson’s sentence on aggravated assault be vacated because it should have merged with the attempted murder sentence given the deficiency in the jury instructions as to the basis for the aggravated assault charge, further challenges to this aspect of his sentence may become moot. However, because this claim is subject to denial and dismissal, we have no difficulty recommending that Petitioner’s motion to amend his petition to add this claim be denied.

Wilkerson does not suggest in his motion to amend that he has sought relief in the state court on this claim. Thus, this claim would appear to be unexhausted and not ripe for federal habeas review at this juncture. Moreover, given recent Third Circuit guidance on the reach of *Alleyne*, it is clear that Wilkerson’s *Alleyne* claim is without merit, as he cannot claim the benefit of a new rule announced after his conviction was already final. See *United States v. Reyes*, No. 13-3537, --- F.3d ---, 2014 WL 2747216 (3d Cir. June 18, 2014).³⁸ As *Alleyne* cannot provide

³⁸ In *Alleyne*, the United States Supreme Court overruled its prior precedent and held that defendants have a Sixth Amendment right to a finding beyond a reasonable doubt as to “any facts that increase the prescribed range of penalties to which a criminal defendant is exposed[.]” *Alleyne v. United States*, --- U.S. ---, 133 S. Ct. 2151 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). This rule of *Alleyne* on which Wilkerson seeks relief was announced in 2013, ten years after Wilkerson’s conviction became final. The Supreme Court has explained that new rules may apply to cases in which the conviction is already final in only limited circumstances: either as to new rules “that place particular conduct or persons covered by the statute beyond the State’s power to punish,” or where the Court announces new “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” See *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004); *Teague v. Lane*, 489 U.S. 288, 307 (1989). Our Court of Appeals recently explained *United States v. Reyes*, No. 13-3537, --- F.3d ---, 2014 WL 2747216 (3d Cir. June 18, 2014), that “[t]he new rule announced in *Alleyne* falls under neither circumstance,” as *Alleyne* announced a procedural, rather than substantive rule, and its rule was not a “watershed rule” of criminal procedure. *Id.* at *2. Therefore, (...continued)

Wilkerson with any basis for relief, there is no reason to permit further amendment of his petition to advance this claim.

As set forth in the various sections above concerning Ground Two, we found no basis to set aside Wilkerson's sentence for attempted murder, even though Wilkerson did not receive a jury finding that he caused serious bodily injury. Nor was there a basis to set aside his sentence for PIC, even though his conviction for that offense had not been the subject of the appeal that resulted in the re-sentencing and the addition of a term of imprisonment for that offense. We found that Wilkerson could not claim the benefit of *Alleyne* as to the mandatory minimum sentence that applied to his aggravated assault sentence. However, we found that the imposition of a sentence for aggravated assault, in addition to attempted murder, implicated his Double Jeopardy rights and that the factual presumption made by the state court to resolve that Double Jeopardy concern was based on an unreasonable finding as to the factual record. Therefore, we believe that relief from the 10-20 year sentence imposed by the state court for the aggravated assault is warranted.

III. CONCLUSION

We have considered Wilkerson's contentions that he received ineffective assistance when counsel chose to keep out evidence of his witness tampering at the expense of evidence that the victim did not identify him at the preliminary hearing, as well as in not presenting two other witnesses to his alleged prior possession of the watch and chain he possessed upon arrest and testimony from his mother suggesting that his car was searched for ballistics evidence prior to when the prosecution contends it was searched. We find no merit in those claims. We have also

Alleyne's new rule does not affect Wilkerson's conviction and sentence and cannot provide a basis for a habeas claim.

considered the various theories on which he has attacked the validity of the different components of the sentence imposed in 2002 following remand, as well as his additional contention that he was not properly charged with attempted murder. We have found no basis for his 20-40 year sentence to be vacated based upon *Apprendi*, as the state court's failure to adhere to the Sixth Amendment as to his enhanced sentence for attempted murder can be considered harmless in these circumstances. Nor is Wilkerson due any relief from his 10-20 year aggravated assault sentence based upon *Alleyne*, as that rule was announced too late to benefit him. We have found no defect in the manner in which he was charged with attempted murder to require setting aside that conviction or sentence, nor do we find the Double Jeopardy Clause to have been violated by the later imposition of sentences for aggravated assault and PIC after the state court initially sentenced Wilkerson to life imprisonment on the attempted murder and determined that those two other convictions would warrant "no further sentence." We do, however, find that Wilkerson's rights under the Double Jeopardy Clause were violated when he was sentenced on both attempted murder and aggravated assault where the record did not establish that the jury convicted him of separate criminal acts. We conclude that habeas relief is warranted as to that portion of Wilkerson's sentence.

Our Recommendation follows.

R E C O M M E N D A T I O N

AND NOW, this 24th day of July, 2014, it is respectfully RECOMMENDED that the petition for a writ of habeas corpus be GRANTED IN PART and that Petitioner's sentence of 10-20 years for aggravated assault be VACATED.

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

BY THE COURT:

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

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

VINCENT WILKERSON,
Petitioner,

v.

SUPERINTENDENT,
BRIAN COLEMAN, et al.,
Respondents.

CIVIL ACTION

NO. 12-2190

ORDER

AND NOW, this day of , 2014, upon careful and independent consideration of the petition for a writ of habeas corpus and Petitioner's memorandum of law, the response, Petitioner's reply to the response, Petitioner's amended petition, the combined response to the reply and amended petition, and Petitioner's motion to further amend his petition, as well as available state court records, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for a writ of habeas corpus is **GRANTED IN PART AND DENIED IN PART**;
3. The sentence of a term of imprisonment of 10 to 20 years imposed for Petitioner's conviction of aggravated assault in No. CP-51-CR-1200221-1997 is **VACATED**; and
4. Petitioner's Motion to Amend (Doc. No. 32) is **DENIED**.

BY THE COURT:

PAUL S. DIAMOND, J.

**Additional material
from this filing is
available in the
Clerk's Office.**