

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-1230

KENNETH PHILLIP JACKSON,
Appellant

v.

SUPERINTENDENT SOMERSET SCI;
ATTORNEY GENERAL PENNSYLVANIA

(W.D. Pa. No. 2-15-cv-00871)

SUR PETITION FOR REHEARING

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

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

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: December 1, 2017
kr/cc: All Counsel of Record

* Judge Fuentes' vote is limited to panel rehearing only.

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

KENNETH PHILIP JACKSON, FX-4662,	)	
Petitioner,	)	
	)	
v.	)	2:15-cv-871
	)	
TREVOR A. WINGARD, et al.,	)	
Respondents.	)	

MEMORANDUM and ORDER

Mitchell, M.J.:

Kenneth Phillip Jackson, an inmate at the State Correctional Institution at Somerset presented a petition for a writ of habeas corpus (ECF No. 3). In a Memorandum filed on December 7, 2015 (ECF No. 19), we denied the petition on the grounds that since Jackson pled guilty to the underlying criminal charges, the only issue properly before the Court was whether his plea was knowingly, intelligently and voluntarily entered. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005).

On December 22, 2015, Jackson filed a notice of appeal (ECF No. 21), and on December 24, 2015 he filed objections to the December 7, 2015 Memorandum and Order (ECF No. 24). Upon notification to the Court of Appeals, on January 6, 2016 the latter Court dismissed the appeal so that the objections might be considered by this Court.

We observe that on July 21, 2015 Jackson filed his consent to this matter being determined by a Magistrate Judge pursuant to 28 U.S.C. §636(c)(1) with a direct appeal to the Court of Appeals (ECF No. 7). Thus, the Memorandum and Order filed on December 7, 2015 was appropriate and not subject to the filing of objections. 28 U.S.C. § 636(b)(1). For this reason, we will consider the objections as a Rule 60 Motion for Relief from Judgment or Order.

In his objections, Jackson seeks to raise the same substantive allegations raised in his original petition which we previously determined not matters properly subject to review as a result of his competent guilty plea. Thus, they will not be considered again, and we adopt and incorporate the reasoning as set forth in our December 7, 2015 Memorandum. For this reason,

IT IS ORDERED this 7th day of January, 2016, that the objections filed in this case, considered as a motion for relief from judgment be and the same are hereby DENIED.

The petitioner is advised that if he desires to appeal this decision, he must do so within thirty (30) days of this date by filing a notice of appeal.

s/ Robert C. Mitchell
United States Magistrate Judge

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

KENNETH PHILLIP JACKSON, FX-4662,	)	
Petitioner,	)	
	)	
v.	)	2:15-cv-871
	)	
TRAVOR A. WINGARD, et al.,	)	
Respondents.	)	

MEMORANDUM

Mitchell, M.J.:

Kenneth Phillip Jackson, an inmate at the State Correctional Institution at Somerset has presented a petition for a writ of habeas corpus. For the reasons set forth below, the petition will be dismissed and because reasonable jurists could not conclude that a basis to appeal exists, a certificate of appealability will be denied.

Jackson is presently serving a 32 ½ to 65 year sentence imposed following his conviction, upon a plea of guilty to charges of third degree murder, abuse of a corpse, forgery, theft by deception, and identity theft at Nos. CC 200201068, and 200202589 in the Court of Common Pleas of Allegheny County, Pennsylvania.¹ Following a denial of a motion to withdraw his plea, petitioner was sentenced on July 19, 2004.²

An appeal was taken to the Superior Court in which the sole question was:

Whether the trial court abused its discretion by denying the appellant's motion to withdraw guilty plea where the appellant both asserted his innocence and made said motion before sentencing?³

Agreeing with the trial court's October 15, 2005 opinion, on June 23, 2006 the judgment was affirmed.⁴ Allowance of appeal was denied by the Pennsylvania Supreme Court on January 3, 2007.⁵

¹ See: Petition and p.2 of the answer. Charges filed at CC 200203968 were withdrawn as part of the plea agreement.

² See: Petition at ¶2.

³ See: Appendix p.77.

⁴ Id. p.118.

⁵ Id. p.135.

A post-conviction petition was filed on May 29, 2007.⁶ On January 4, 2014 relief was denied.⁷ An appeal to the Superior Court was filed in which the issues presented were:

1. Whether the PCRA court erred in re-imposing a sentence which is illegal as it violates the terms of the plea agreement reached by the parties and expressly accepted by the trial court during the original plea proceeding?
2. Whether the PCRA court erred in imposing a sentence which is an abuse of discretion and/or manifestly excessive because the re-imposed sentences on five (5) counts were jurisdictional maximums run consecutively, were also run consecutively to the third degree murder statutory maximum of twenty (20) to forty (40) years, and were otherwise excessive?
3. Whether the PCRA court erred in finding that trial counsel was effective during voir dire, trial, plea proceedings and original sentencing despite repeatedly stating that he was unable to provide effective representation?
4. Whether the PCRA court erred when it upheld its refusal to appoint counsel to represent Mr. Jackson at the original sentencing?⁸

On January 9, 2015, the denial of post-conviction relief was affirmed and on June 23, 2015, allowance of appeal was denied by the Pennsylvania Supreme Court.⁹

In the instant petition received on July 6, 2015, Jackson contends he is entitled to relief on the following grounds:

1. Ineffective assistance of counsel. 6th, 5th, 8th, and 14th amendment violations. Failed to subject the prosecution's case to meaningful adversarial testing. All proceedings support finding [that counsel] could not ethically represent Mr. Jackson.
2. Layered claims of ineffective assistance of counsel.
3. Trial counsel not true advocate counsel. Attorney ... gave false information to plaintiff about plea agreement. Attorney ... told plaintiff he did not have plaintiff's best interest at heart nor in his heart...
4. Illegal sentence based on violation of plea agreement.
5. Violation of plea agreement.
6. [Denied counsel when he sought to withdraw his guilty plea].
7. Denied counsel at sentencing hearing.
8. Due process violation for illegal sentence based on plea agreement.

⁶ Id. p.136.

⁷ Id. pp.218-222.

⁸ Id. p.238.

⁹ Id. pp.311-325, 352.

The background to this prosecution is set forth in the January 9, 2015 Memorandum of the Superior Court:

Preliminarily, we observe that the PCRA court vacated appellant's original sentence and then re-imposed an identical sentence. Appellant treats this appeal as a direct appeal from a new judgment of sentence. We do not regard it as such. The court's purpose in entering the new sentence was simply to make an administrative correction to the original sentence which had transposed the criminal information count numbers for one count of forgery and one count of theft by deception.¹

1. The transposition and its correction upon collateral review were of no moment because identical sentences were imposed at each count.

We note that the trial court may always correct obvious errors in its sentence, even after the statutorily imposed 30-day modification limit has expired ...

Thus, the "new" sentence was merely a ministerial correction of an obvious error in the original sentence. By simply correcting the sentence and taking no further action, the PCRA court effectively denied all of appellant's PCRA claims. Consequently, we regard this appeal as being taken from the order of February 27, 2012, operating as a denial of the PCRA petition, rather than operating as from a new judgment of sentence.

The charges against appellant arose following the December 18, 2001 discovery of the remains of appellant's uncle in a garage behind appellant's house. The cause of death was blunt force injury, and appellant subsequently confessed to the homicide. Appellant also cashed his uncle's Social Security checks and used his uncle's identification papers in doing so. ..

During appellant's jury trial, appellant and the Commonwealth came to a plea agreement. Appellant subsequently pleaded guilty to third degree murder, one count of abuse of a corpse, two counts of theft by deception, two counts of forgery, and one count of identity theft. The Commonwealth agreed to *nolle pros* all other charges. The plea agreement also required that the sentence that would be imposed would be within the Sentencing Guidelines...¹⁰

A federal habeas corpus court reviewing a conviction upon a plea of guilty must determine whether or not the plea was knowingly, intelligently and voluntarily entered. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005).

¹⁰ Id. pp.311-313.

Even before jury selection commenced, defense counsel moved to withdraw.

Specifically, counsel stated:

Your Honor, I'm here to once again beg the Court to permit me [to] withdraw from this case. I cannot continue an attorney/client relationship with this man.

He berates me, insults me. He tells me I'm in bed with the DA, tells me I'm selling him out. He just makes nasty comments towards me.

I cannot ethically represent this man because at this point, I don't have his best interest at heart in my heart.

I have never done this before [in] almost 30 years, Judge. I don't know what he's doing, but I cannot continue to represent this man. I can't do it...

THE COURT: Mr. Jackson, you started out with Attorney Foreman from the Public Defender's Office. You didn't like Mr. Foreman. Didn't get along with Mr. Foreman. And for a short period of time the Public Defender appointed Mr. Sheets to represent you. Then you didn't like Mr. Sheets...

THE COURT: Problem was, Mr. Jackson, you went off and decided you were going to join into the American Civil Liberties Union suit or injunction action involving the Allegheny County Public Defenders' Office, which immediately made all members of the Public Defenders' Office, made them defendants, essentially with you as a witness.

And, therefore, they were in the position of conflict of interest, so they were conflicted out.

So I appointed, as I have already expressed to you, I'm amazed he took the appointment, Mr. Thomassey, the best lawyer around here.

So you['ve] got two choices. Either have Mr. Thomassey represent you – actually you have three. You have – another lawyer walks through the door, willing to pick up this case and represent you right now, Mr. Thomassey can represent you, or you represent yourself.

THE DEFENDANT: Well, I never fired Mr. Thomassey.

THE COURT: He wants to withdraw, doesn't want to work for you.

THE DEFENDANT: That's on Mr. Thomassey. That has nothing to do with me, and I'm not a fool so I'm not going to represent myself.

THE COURT: I think you're doing everything you can, Mr. Jackson, to --

THE DEFENDANT: I'm picking my jury...(TT.42-46)

The court then reviewed the various charges with the petitioner, postponed jury selection and advised the petitioner that when court commenced in the morning, he could either cooperate with his attorney or represent himself (TT.47-51). The next morning jury selection commenced with Mr. Thomassey representing the petitioner.

On April 22, 2004, after testimony had commenced, Mr. Thomassey informed the court that a plea agreement had been reached (TT.365) although he clearly represented that there was no agreement as to sentencing (TT.367).

At the time the petitioner changed his plea, he was placed under oath and testified that he was 39 years old, had a tenth grade education and could read and write (T.368); that he acknowledged that he was pleading to third degree murder, abuse of a corpse, access device fraud, theft by deception and forgery (TT.367); that he understood the elements of the charges and penalties as advised by the court (TT.370-374); that he understood that any sentence imposed would be within the guidelines (TT.372); that he had answered the court's questions truthfully (TT.374); that his attorney had explained all of his rights including a jury trial, the burden of proof, the presumption of innocence and not having to testify (TT.374-376); that he understood that he was giving up his right to proceed further with trial and understood that his right to appeal would be limited to the issue of the voluntariness of his plea (TT.376-377); that he had not consumed any alcohol or drugs in the prior twenty-four hours (TT.377); that he had no mental or physical disabilities (TT.377); that no promises other than the plea agreement had been made (TT.377); that he understood that in order to withdraw his guilty plea he would have to demonstrate that it was not voluntary (TT.378); that he had no questions as "my attorney explained everything to me" (TT.378); that he understood the penalties that could be imposed (TT.378); that his plea was voluntary because he indeed was guilty (TT.378-379, 391); that no coercion had been employed to induce his plea (TT. 379) and that he wanted his counsel to continue to represent him (TT.392-393). The prosecutor also summarized the evidence that would be presented if the trial proceeded (TT.380-388).

Thus, the record is devoid of any bases which would support a conclusion that the plea was not knowingly, intelligently and voluntarily entered with the assistance of counsel, and this claim is meritless.

Petitioner also contends that he should have been permitted to withdraw his guilty plea. "On collateral review, a court may only vacate a guilty plea where the petitioner can establish that the plea was not made knowingly and voluntarily..." Ferrer v. Superintendent, 628 F.Supp.294, 304 (N.D.N.Y. 2008).

In its opinion, the trial court set forth its reasons for denying Jackson's motion to withdraw his guilty plea:

The defendant entered his plea of guilty while under oath. He admitted to the crimes to which the plea was entered. He listened to a summary of the evidence that the Commonwealth would have presented had the matter continued in trial, he also had heard a substantial portion of that evidence presented in Court during his trial. He admitted that the facts as represented by the Commonwealth at the time of the plea as presented during the trial were true. He admitted to having committed the acts that constituted the crimes to which he was pleading guilty and he admitted to his guilt of those crimes. Given the qualified nature of his assertion of innocence as set forth in his two withdrawal request, coupled with the circumstances of the plea, this Court found that the defendant's assertion of innocence were completely incredible and made only in an attempt to continue his practice of delaying final disposition of this matter.

In addition to the lack of credibility to the assertion of innocence, this Court denied the Motion because of the substantial prejudice the Commonwealth would have suffered had the matter proceeded to trial... [T]he defendant entered his plea knowing that he could not withdraw it if the Commonwealth's ability to prosecute him would be substantially impaired. He was also aware at the time he entered his plea of the nature and extent of the Commonwealth's evidence against him, having heard a considerable portion of that evidence during his aborted trial.

The Commonwealth's assertion as to the prejudice it would have suffered if the defendant were permitted to withdraw his plea were (sic.) not contradicted. Those claims were well established on the record. The defendant did cause substantial delay in having this matter brought to conclusion. The Court must recognize and give weight to the difficulty the Commonwealth faced in securing the attendance of witnesses again and again as the matter was delayed... The Commonwealth asserted that it would not be able to secure the attendance of between five and eight of its witnesses if this matter were again scheduled for trial...

This defendant complained about the jury panel and complained about his attorney. Both series of complaint were without any basis in fact. His jury was properly selected and he was properly represented by counsel. It certainly seems to this Court that the defendant sought to use the entry and later withdrawal of his guilty plea as a means of obtaining a new jury and a new attorney. This Court properly refused to permit him to do so.¹¹

This conclusion was adopted by the Superior Court¹² and clearly contradicts any conclusion that the plea was not knowingly and voluntarily entered.

The remainder of petitioner's claims are that he was denied the effective assistance of counsel. Under the Sixth Amendment a defendant is entitled to the assistance of counsel at all critical stages of the prosecution. Iowa v. Tovar, 541 U.S. 77 (2004).

¹¹ Id. at.62-65.

¹² Id. at 118.

At the sentencing hearing held on July 19, 2004 ("SH") it appeared that Jackson had apparently fired his fourth attorney (SH 3) and proclaimed his innocence (SH 4,7,10). However, Mr. Thomassey was present. On the record, the court stated,

Mr. Jackson, I can only tell you that in 16 years on the bench, I have never seen an individual intentionally obstruct the requirements of the process of a just and fair hearing as you have.

I in fact had you examined by the Behavior Clinic, and they sent you to Mayview to determine if you had any mental illness. Mayview says that the diagnosis is one of malingering. There is a very high suspicion that the patient's symptomatology is intentionally produced. The patient has a high-risk factor from malingering, including discrepancies between presenting significant memory deficits and his actual functioning on the ward. He has very poor cooperation with diagnostic evaluations or compliance with any kind of treatment.

That's exactly the same thing that your lawyers have said about you.

I am satisfied that the Commonwealth is significantly prejudiced, and I am further satisfied that the defendant entered a knowing, intelligent and voluntary plea of guilty to the charge of third degree murder. And accordingly, the motion to withdraw the guilty plea is denied (SH 11-12).

As the sentencing hearing progressed, the following exchange occurred:

THE COURT: It's apparent to the court, Mr. Jackson, you don't want Mr. Thomassey to represent you anymore. And Mr. Thomassey doesn't want to represent you anymore. Is that accurate?

MR. JACKSON: Yes.

THE COURT: Okay. Then you will represent yourself. I'm not going to appoint you yet another lawyer... You have elected by reason of your recalcitrance, your abuse of counsel, to represent yourself... (SH 15 -17).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained that there are two components to demonstrating a violation of the right to the effective assistance of counsel. First, the petitioner must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466

U.S. at 687, 104 S.Ct. 2052. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The Strickland test is conjunctive and a habeas petitioner must establish both the deficiency in performance prong and the prejudice prong. *See Strickland*, 466 U.S. at 687; *Rainey v. Varner*, 603 F.3d 189,197 (3d Cir.2010) cert. denied 131 S.Ct. 1673 (2011). As a result, if a petitioner fails on either prong, he loses. *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir.2006).

From the record here, it is readily apparent that Jackson was not denied the assistance of counsel at any time, but instead rejected that assistance. Rather, the record demonstrates that petitioner was merely attempting to manipulate the judicial system and as a result of his failure he now alleges that he was denied the assistance of counsel. In *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004), the Court wrote:

A court may find that a defendant has forfeited his or her right to counsel after having engaged in "extremely dilatory conduct" or "extremely serious misconduct." Forfeiture can be found "regardless of whether the defendant has been warned about engaging in misconduct, and regardless of whether the defendant has been advised of the risks of proceeding *pro se*." (citing to *United State v. Goldberg*, 67 F.3d 1092 (3d Cir. 1995).

While sentencing is a critical stage at which the assistance of counsel is necessary, there is no doubt that at some point the court need not jump through any further hoops to attempt to conduct proceedings with an obstreperous defendant. Such is the case here. Both appointed counsel and the trial court had extensive criminal practice experience and both expressed their utter frustration in dealing with the petitioner. As a result Jackson comes before this Court and contends they violated his Sixth Amendment rights. To the contrary, the state courts' conclusions that by his conduct the petitioner waived his right to further appointed counsel is appropriate under federal law. In *Thomas*, the Court wrote, "although waiver most commonly is effected by an "affirmative, verbal request" to proceed *pro se*, waiver also may be effected by conduct..." 357 F.3d at 362.

Thus, these ineffective assistance allegations likewise do not provide a basis for relief.

Because there is no showing that the petitioner's conviction was secured in any manner contrary to federal law as determined by the Supreme Court nor involved any improper application of that law, he is not entitled to relief here. For this reason, the petition of Kenneth Phillip Jackson for a writ of habeas corpus will be denied, and because reasonable jurists could not conclude that a basis for appeal exists, a certificate of appealability will be denied.

An appropriate Order will be entered.

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

KENNETH PHILLIP JACKSON, FX-4662,	)	
Petitioner,	)	
	)	
v.	)	2:15-cv-871
	)	
TRAVOR A. WINGARD, et al.,	)	
Respondents.	)	

ORDER

AND NOW, this 7th day of December, 2015, for the reasons set forth in the Memorandum filed this day, the petition of Kenneth Phillip Jackson for a writ of habeas corpus (ECF No. 3) is DISMISSED and because reasonable jurists could not conclude that a basis for appeal exists, a certificate of appealability is DENIED.

The petitioner is advised that if he desires to appeal this decision, he must do so within thirty (30) days of this date by filing a notice of appeal.

s/ Robert C. Mitchell
United States Magistrate Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1230

KENNETH PHILLIP JACKSON,
Appellant

v.

SUPERINTENDENT SOMERSET SCI;
ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 2-15-cv-00871)
Magistrate Judge: Honorable Robert C. Mitchell

Submitted Under Third Circuit LAR 34.1(a)
October 13, 2017

Before: CHAGARES, JORDAN, and FUENTES, *Circuit Judges*.

(Filed: November 2, 2017)

OPINION*

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

JORDAN, *Circuit Judge*.

Kenneth Jackson appeals the denial of his petition for a writ of habeas corpus. For the reasons set forth below, we will affirm.

I. Background

Kenneth Jackson pleaded guilty in Pennsylvania state court to one count of third-degree murder, one count of abuse of a corpse, two counts of theft by deception, two counts of forgery, and one count of identity theft. That plea was entered after trial had already begun in the case, which arose from Jackson's murder of his uncle and use of his uncle's identification papers to cash social security checks. Prior to sentencing, Jackson sent the trial judge a *pro se* letter and motion asking to withdraw his guilty plea. At the time, Jackson was represented by court-appointed counsel Patrick Thomassey. At Jackson's July 19, 2004 sentencing hearing, the judge denied Jackson's *pro se* motion to withdraw his guilty plea.

After denying the motion, the judge turned his attention to Thomassey's representation of Jackson. Thomassey said he was in a "precarious position" because of his contentious relationship with Jackson. (App. at 130.) After the judge reminded Thomassey that the court had appointed him as defense counsel, Thomassey replied, "I will do as instructed by the court." (App. at 130.) Jackson then stated, "I'm asking for a new counsel to be appointed to me. I do not want this man." (App. at 130.) The judge, after listening to Thomassey and Jackson, said, "Well, it's apparent to the court, Mr. Jackson, you don't want Mr. Thomassey to represent you anymore. And Mr. Thomassey doesn't want to represent you anymore. Is that accurate?" (App. at 132.) Jackson

replied, “Yes.” (App. at 132.) Recalling that Jackson had already had a Public Defender with whom he had difficulty working, the judge told Jackson, “Then you will represent yourself. I’m not going to appoint you yet another lawyer.” (App. at 132.) The judge instructed Thomassey to “have a seat.” (App. at 133.) Jackson represented himself during the remainder of the sentencing hearing. That was not the first time the judge and Jackson spoke about Jackson’s dissatisfaction with Thomassey. Immediately prior to Jackson’s trial, the judge had given Jackson three options: (1) hire a private attorney; (2) continue to be represented by Thomassey; or (3) proceed on his own without an attorney. The judge warned Jackson then that if he did not cooperate with Thomassey, he would be on his own.

The judge ultimately sentenced Jackson to a term of imprisonment of 240 to 480 months on the homicide charge and a term of imprisonment of two-and-a-half years to five years for each of the five counts of theft and forgery. The several terms of imprisonment were to run consecutively. The judge did not impose an additional sentence on the charge for abuse of a corpse. Although the record demonstrates that all parties understood the plea agreement to contemplate a sentence in accordance with the applicable guidelines range, Jackson’s sentence on the five theft and forgery counts exceeded Pennsylvania’s sentencing guidelines range. The judge appointed counsel to assist Jackson with his post-sentence motions and his appeal. On July 29, 2004, Jackson’s appointed direct appeal counsel filed a motion to reconsider the sentence, which was denied by operation of law on December 2, 2004 pursuant to Pennsylvania Rule of Criminal Procedure 720. *See* Pa. R. Crim. P. 720(B)(3)(a) (“If the judge fails to

decide the [post-sentence] motion within 120 days, or to grant an extension ... , the motion shall be deemed denied by operation of law.”).

Jackson appealed to the Pennsylvania Superior Court. His direct appeal counsel raised a single issue: whether the trial court erred in denying Jackson’s pre-sentence request to withdraw his guilty plea. The Superior Court affirmed Jackson’s conviction and sentence. On January 3, 2007, the Pennsylvania Supreme Court denied Jackson’s Petition for Allowance of Appeal.

Jackson then filed a *pro se* petition pursuant to Pennsylvania’s Post-Conviction Relief Act (“PCRA”), 42 Pa. Cons. Stat. § 9541 *et. seq.* After the court appointed the Office of Conflicts Counsel to represent Jackson on post-conviction review, counsel filed an amended PCRA petition raising four issues: (1) appellate counsel was ineffective for failing to challenge the sentencing judge’s imposition of sentences above the guidelines range on the theft and forgery charges; (2) appellate counsel was ineffective for failing to challenge the sentencing judge’s imposition of consecutive sentences; (3) trial counsel was ineffective throughout *voir dire*, trial, plea, and sentencing proceedings; and (4) Jackson was denied counsel at sentencing, in contravention of *United States v. Cronin*, 466 U.S. 648 (1984). The PCRA court denied Jackson’s PCRA claims but re-imposed sentence to correct a clerical error. Through counsel, Jackson filed a motion for reconsideration, which was denied, and then filed a notice of appeal to the Superior Court, challenging only the sentences imposed in connection with the non-homicide charges.

That PCRA appeal raised four issues: (1) the re-imposed sentence was illegal because it violated the terms of the plea agreement; (2) the re-imposed sentence was an abuse of discretion and manifestly excessive because the sentences ran consecutively; (3) trial counsel was ineffective throughout the underlying proceedings; and (4) the sentencing court erred in refusing to appoint Jackson counsel at the sentencing hearing. The Superior Court affirmed the PCRA court's denial of Jackson's petition. In relevant part, the Court held that Jackson had waived his argument that his sentence violated his plea agreement because he did not raise the issue on direct appeal and his amended PCRA petition did not argue that direct appeal counsel was ineffective for failing to challenge the sentence on that basis. The Court further held that Jackson had waived his argument that he was denied counsel at sentencing because he failed to raise the issue on direct appeal. The Pennsylvania Supreme Court denied Jackson's Petition for Allowance of Appeal on June 23, 2015.

Jackson next filed the present petition for a writ of habeas corpus, which was denied on December 7, 2015. We granted Jackson's request for a certificate of appealability to address only whether "counsel on direct appeal rendered ineffective assistance in failing to argue that [Jackson's] sentence violates the plea agreement because sentencing was to be within the standard guidelines range for all counts," and whether Jackson "was denied his Sixth Amendment right to counsel at sentencing." (Certificate of Appealability, dated August 11, 2016, at 1.) The certificate of appealability also directed counsel to "address whether procedural default applies to either issue, and the impact, if any, of [*Martinez v. Ryan*, 566 U.S. 1 (2012)]."

(Certificate of Appealability, dated August 11, 2016, at 1.) Because we conclude that Jackson's claims on appeal are procedurally defaulted, we will affirm the denial of Jackson's petition for a writ of habeas corpus.

II. Discussion¹

The Magistrate Judge exercised jurisdiction under 28 U.S.C. §§ 636(c)(1), 1331, and 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. Because the Magistrate Judge denied Jackson's petition without conducting an evidentiary hearing, our review is plenary. *Jacobs v. Horn*, 395 F.3d 92, 99 (3d Cir. 2005).

A petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is procedurally defaulted if a state court has declined to consider the petitioner's claims based on a failure to meet the state's procedural requirements. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Johnson v. Pinchak*, 392 F.3d 551, 556 (3d Cir. 2004). A federal habeas court is thus prohibited from hearing a petitioner's claims if the state court's denial rested on independent and adequate state procedural grounds, unless the petitioner can demonstrate "cause" for the default and "prejudice" resulting from the alleged violation. *Coleman*, 501 U.S. at 750; *Johnson*, 392 F.3d at 556.

The Superior Court held that Jackson had waived both issues that we identified in the certificate of appealability. First, it held Jackson had waived his argument that his sentence was illegal for violating the terms of his plea agreement. The basis of the

¹ The court below denied Jackson's habeas corpus petition on the merits. Because we affirm on the basis that Jackson has not established cause to excuse his procedural default of the claims that we certified for appeal, we do not reach the merits of Jackson's claims.

waiver was direct appeal counsel's failure to raise that issue, and failure to raise in the amended PCRA petition direct appeal counsel's ineffectiveness for failing to raise the issue. Second, the Superior Court held that Jackson had waived his argument that he was denied counsel at his sentencing hearing because he failed to raise that issue on direct appeal.² See 42 Pa. Cons. Stat. § 9544(b) ("[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding."). Jackson is time barred from further litigating those issues through the Pennsylvania state courts. 42 Pa. Const. Stat. § 9545(b). He has thus procedurally defaulted on the two claims certified for appeal by the certificate of appealability. See *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 542 (3d Cir. 2014) ("A claim is procedurally defaulted if the petitioner failed to exhaust that claim in state court and if state procedures prohibit the petitioner from later presenting the claim in state court."). We can only proceed to the merits of Jackson's claims if cause and prejudice exist to excuse the procedural default, *Coleman*, 501 U.S. at 750; *Johnson*, 392 F.3d at 556, but Jackson has not established cause for his procedural default.

² That the Superior Court opinion contains an alternative holding on the merits does not alter our conclusion that Jackson's denial-of-counsel argument is procedurally defaulted. We have previously emphasized that, even if a state court provides an alternative holding, "the adequate and independent state ground doctrine [still] requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment[.]" *Johnson*, 392 F.3d at 558 (quoting *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989)). Here, it is clear that the procedural ground for denying Jackson's claim (*i.e.*, waiver) was a distinct and separate basis for the Superior Court's decision. Because we are not reaching the merits of Jackson's claims, we decline to address the Superior Court's alternative holding.

Jackson does not appear to dispute that he procedurally defaulted on the issues identified in the certificate of appealability. Rather, he maintains that his procedural default of both issues is excused by the United States Supreme Court's holding in *Martinez v. Ryan*, 566 U.S. 1 (2012). (See Opening Br. at 6 ("The above issues may have been procedurally defaulted in the state courts, but this Court should excuse the procedural default pursuant to *Martinez* ...").)

In *Martinez*, the Supreme Court created an equitable exception to the rule announced in *Coleman v. Thompson* that ineffectiveness of post-conviction counsel does not establish cause to excuse a procedural default. *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (citing *Martinez*, 566 U.S. at 16-17). The *Martinez* Court held that, in situations where state law prevents an inmate from litigating claims of ineffective assistance of trial counsel on direct appeal, the ineffective assistance of state post-conviction counsel can serve as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim. 566 U.S. at 17.

After we granted Jackson's request for a certificate of appealability, the Supreme Court, in *Davila v. Davis*, declined to extend the *Martinez* exception to cover claims of ineffective assistance of appellate counsel. 137 S. Ct. at 2065. The Supreme Court thus clarified that ineffectiveness of post-conviction counsel does not establish cause to excuse the procedural default of an "ineffective assistance of appellate counsel" claim. *Id.*

Davila definitively forecloses Jackson's first claim over which we granted appeal: whether Jackson's direct appeal counsel was ineffective for failing to object that his

sentence was illegal for violating the terms of his plea agreement. Jackson argues that his procedural default of that claim should be excused pursuant to *Martinez* because his “PCRA counsel was ineffective for failing to properly raise the plea bargain issue on appeal.” (Opening Br. at 12.) Because the Supreme Court rejected that precise argument in *Davila*, it is plain that Jackson has failed to establish cause for his procedural default of that claim.

Jackson largely fails to address the second claim that we allowed him to appeal, *i.e.*, whether the state sentencing court denied his Sixth Amendment right to counsel at the sentencing hearing. Instead, he focuses on whether trial counsel Thomassey rendered ineffective assistance of counsel at sentencing. The record demonstrates, however, that Thomassey was not acting as Jackson’s lawyer at the sentencing hearing. The sentencing judge explicitly told Jackson, “you will represent yourself[,]” and instructed Thomassey to “have a seat.” (App. at 132-33.) The issue of Thomassey’s alleged ineffectiveness at sentencing is thus outside the scope of the certificate of appealability and is not properly before us.³ 28 U.S.C. § 2253(c)(3); 3d Cir. L.A.R. 22.1(b); *see also Miller v. Dragovich*, 311 F.3d 574, 577 (3d Cir. 2002) (refusing to address argument that was outside the scope of the relevant certificate of appealability).

To the extent that Jackson does address the Sixth Amendment denial of counsel claim we certified for appeal, he argues that we should excuse the procedural default of

³ We again note that we do not reach the propriety of the sentencing judge’s decision to compel Jackson to proceed *pro se*.

that claim pursuant to the *Martinez* exception.⁴ But *Martinez*, as the Supreme Court recently clarified, only allows the ineffectiveness of post-conviction counsel to excuse the procedural default “of a single claim—ineffective assistance of trial counsel”

Davila, 137 S. Ct. at 2062. The *Martinez* exception does not apply here for two distinct reasons. First, we did not grant a certificate of appealability as to Jackson’s ineffective assistance of trial counsel claim, which means *Martinez* is inapplicable to the claim at issue. Second, *Davila* mandates that Jackson could not establish cause to overcome the default even if he argued (which he does not) that post-conviction counsel was ineffective for failing to raise a claim on collateral review that direct appeal counsel was ineffective for failing to appeal the denial of counsel claim. *Id.* at 2065. Accordingly, Jackson has failed to establish cause for the procedural default of his Sixth Amendment denial of counsel claim.

III. Conclusion

For the foregoing reasons, we will affirm the denial of Jackson’s petition for a writ of habeas corpus.

⁴ Jackson makes this argument primarily in connection with the ineffective assistance of trial counsel claim he attempts to bring, which, as discussed above, falls outside the scope of the certificate of appealability. He advances no separate argument for why we should excuse the procedural default of his Sixth Amendment denial of counsel claim, but we construe his argument to also refer to the Sixth Amendment denial of counsel claim that we did certify for appeal.