

APPENDIX A

BLD-206

May 4, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 16-2285

LEWIS E. BENTLEY, Appellant

VS.

SUPERINTENDENT ALBION SCI, ET AL

(E.D. Pa. Civ. No. 2:11-cv-02423)

Present: AMBRO, GREENAWAY, JR., and SCIRICA, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
- (2) Appellant's concise statement of matters complained of on appeal;
- (3) By the Clerk for possible dismissal due to a jurisdictional defect; and
- (4) Appellant's jurisdictional response;

in the above-captioned case.

Respectfully,

Clerk

MMW/AS/pbd

ORDER

The foregoing application for a certificate of appealability is denied. Bentley has not met his burden of making "a substantial showing of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the reasons given by the District Court, Bentley has not arguably shown that trial counsel provided ineffective assistance or that the evidence was insufficient to support his convictions. See

Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: August 2, 2017
PDB/cc: Lewis E. Bentley
Max C. Kaufman, Esq.



A True Copy^o

Marcia M. Waldron

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

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-2285

LEWIS E. BENTLEY

v.

SUPERINTENDENT ALBION SCI;
THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Lewis Bentley,
Appellant

E.D. Pa. No. 11-cv-02423

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

SLR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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

* Judge Scirica's vote is limited to panel rehearing only.

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/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: September 11, 2016
sb/cc: Lewis E. Bentley
Max C. Kaufman, Esq.

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

LEWIS BENTLEY

v.

MICHAEL W. HARLOW, et al.

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CIVIL ACTION

NO. 11-2423

MEMORANDUM

Dalzell, J.

March 15, 2016

I. Introduction

We consider here Petitioner's objections to the Report and Recommendation ("R & R") issued by Magistrate Judge Lynne A. Sitarski.

Lewis Bentley filed this counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 against Michael Harlow, Superintendent of the State Correctional Institution in Albion, the District Attorney of the County of Philadelphia, and the Attorney General of the State of Pennsylvania. Bentley objects to the R & R, alleging that Judge Sitarski erred when analyzing his ineffective assistance of counsel and sufficiency of the evidence claims.

For the reasons set forth below, we will overrule Bentley's objections to the R & R, approve and adopt Judge Sitarski's R & R, dismiss Bentley's habeas petition with prejudice, and decline to issue a certificate of appealability.

II. Standard of Review

Gibson objects to the R & R pursuant to Local R. Civ. P. 72.1 IV(b), which provides that "[a]ny party may object to a magistrate judge's proposed findings, recommendations or report under 28 U.S.C. 636(b)(1)(B) ... within fourteen (14) days after being served with a copy

thereof” by filing “written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections.” We make de novo determinations on those portions of the R & R and specific proposed findings or recommendations to which the petitioner objects. See 28 U.S.C. § 636.

III. Factual and Procedural History

We recite the facts and procedural history as evidenced by the record and the R & R.¹

The Superior Court stated the facts as follows:

On March 4, 2005 at approximately 1:30 [p.m.], Philadelphia Police Officer Estella Tucker went to 6700 Linmore Avenue in the City and County of Philadelphia, in response to a radio call of a shooting. When she arrived, she . . . met a female later identified as Aisha Patton. Officer Tucker observed an abrasion on Patton’s left leg. When Patton rolled up her pant leg, a projectile fell to the ground. Office Tucker recovered the projectile from the ground and placed it on property receipt #2575183. . . .

On July 10, 2005, Philadelphia Police Officer Walter Burks responded to a radio call of a male shot on the street. In the 6600 block of Woodland Avenue, Officer Burks came into contact with Anthony Fitzsimmons. Fitzsimmons was bleeding from apparent gunshot wounds to his right arm and right leg. Officer Burks located the actual scene of the shooting as 66th and Greenway, about one block away, based on shell casings. . . .

Detective Brian Kelly of Southwest Detectives participated in the investigation into the shooting of Anthony Fitzsimmons. Detective Kelly went to 66th and Greenway and collected three .32 automatic fired cartridge casings (FCC’s), two from the street and one from the sidewalk. The FCC’s were placed on property receipt #2607455 and submitted to the Firearms Identification Unit. . . .

Anthony Fitzsimmons testified that on July 10, 2005, he was in the area of Upland and Greenway Street. He ran into [Petitioner] that morning and asked if he could use [Petitioner’s] cell phone to call a family member. [Petitioner] agreed and Fitzsimmons used the

¹ We may properly reference the R & R’s factual and procedural history because Bentley did not object to this portion of the R & R. Moreover, our thorough review of the record confirms that the R & R’s recitation of the factual and procedural history in this case is accurate.

phone for about five minutes, then returned the phone to [Petitioner]. At the time, [Petitioner] was asleep in his car. Some time later that day, Fitzsimmons was on 65th and Regent Street where he was staying with a female friend when a male banged on the door and told Fitzsimmons that [Petitioner] wanted to see him on Upland Street. . . . When he arrived, [Petitioner] was not there. [Petitioner's] brother told Fitzsimmons to wait for [Petitioner] to return [Petitioner's] brother and three other males were present at the time. . . . While Fitzsimmons was waiting, he and [Petitioner's] brother began arguing about [Petitioner's] cell phone. . . . Fitzsimmons claimed that he did not feel threatened by [Petitioner], even though he had seen [Petitioner] with a gun the day before, because [Petitioner] was wheelchair bound. He was more worried about being attacked by the other males. Fitzsimmons decided to walk out into the street where it was more open in the event that he needed help. He walked up towards Greenway Avenue and the males followed, threatening him. . . . By the time he reached the corner of 66th and Greenway, the argument between Fitzsimmons and [Petitioner's] brother had intensified. The three males were standing on the corner and [Petitioner] was a short distance away from them in his wheelchair, against the wall, next to a payphone. Fitzsimmons heard [Petitioner] say "[f---] that," then heard a pop and saw flashes coming from where [Petitioner] was sitting in his wheelchair. The males then fled. Fitzsimmons . . . felt a sharp pain in his leg. He realized he was shot and bleeding from his arm. . . Fitzsimmons suffered three gunshot wounds [to his right hip, right femur, and right elbow]. . . .

On July 21, 2005, at approximately 4:51 [a.m.], Police Officer Myra Vinson received a radio call to go to the 5300/5400 block of Thomas Avenue. . . . Upon her arrival, she observed a 2001 gray Hyundai two door with the driver side window shot out in front of 5416 Thomas Avenue. . . . Officer Vinson exited her patrol car, went around to the passenger's side and observed . . . Vernon Purnell, hanging out of the passenger side door, bleeding profusely. . . . Officer Vinson called paramedics, prepared a crime scene log and secured the crime scene. Outside the Hyundai, Officer Vinson observed four projectiles and twelve FCC's. Purnell was transported to the Hospital . . . where he died. Bennett Preston M.D., Assistant Medical Examiner . . . testified that Purnell's cause of death was multiple gunshot wounds to the chest, abdomen and extremities. . . ., a total of ten gun shot wounds. The two projectiles and the fragment that were recovered from Vernon Purnell's body were submitted to the [Firearms] Identification Unit for analysis.

Police Officer Lamont Fox and Brian Stark of the Crime Scene Investigation Unit processed the crime scene. . . . Police Office[r] Brian Stark photographed the scene and collected sixteen pieces of ballistic evidence: two .32 caliber FCC's; ten .40 caliber FCC's; three bullet specimens; and one fragment. Officer Stark placed the ballistic evidence on property receipt #9004283. The evidence was submitted to the Firearms Identification Unit.

Kenneth Lay of the Philadelphia Police Forensic Science Bureau analyzed all of the ballistic evidence. Mr. Lay testified that the bullet recovered on March 5, 2005 from Aisha Patton . . . was a .40 caliber automatic. The three .32 caliber automatic FCC's collected from [the Fitzsimmons shooting] were fired from the same firearm as the two .32 caliber automatic FCC's collected from [the Purnell shooting]. He also determined that the ten .40 caliber automatic FCC's [from the Purnell shooting] were fired from the same gun. Mr. Lay compared the evidence [from the Purnell, Fitzsimmons, and Patton shootings]. . . . The comparison yielded the following results: all five .32 caliber FCC's [from the Purnell and Fitzsimmons shootings] were fired [from] the same firearm; the bullet specimens and bullet jacket from [the Purnell shooting] were fired [from] the same firearm as the firearm from [the Patton shooting].

Homicide Detective Stephen Buckley of the Special Investigations Unit was assigned to look into the death of Vernon Purnell in late 2005. On April 12, 2006, he interviewed Aisha Patton. Detective Buckley asked Patton about the incident where she had been shot in her leg. Patton told the detective that, on March 4, 2005, [Petitioner] was her fiancé. [Petitioner] had not come home for a couple days, so Patton called [Petitioner's] ex-girlfriend, April Floyd, and [Petitioner] answered the phone. The following day, [Petitioner] came to Patton's house. Patton was angry and began grabbing and fighting with [Petitioner]. . . . Patton attacked [Petitioner] again and [Petitioner] reached into his waistband and retrieved the black automatic handgun that he carried for protection. [Petitioner] and Patton began fighting over the gun and it went off, striking Patton in her leg. She went to a neighbor's house and the neighbor called police. Patton [stated] . . . that the gun belong[ed] to [Petitioner] and that [Petitioner] got rid of the gun shortly after she was shot. Patton reviewed her statement, signed and dated it.

Detective Buckley obtain[ed] a warrant for [Petitioner's] arrest on May 2, 2006. On May 9, 2006, Detective Buckley interviewed [Petitioner] in the Homicide Unit. . . . [Petitioner] told Detective

Buckley that he did not know Purnell. The first time he saw Purnell was at April Floyd's house the night she called the police on him. Purnell came out of Floyd's house and got into a car. Floyd came out and got into the car and the two left. According to [Petitioner], until then, he was unaware that Floyd, h[is] former fiancée, was seeing anyone. Additionally, Appellant told Detective Buckley that, on the morning Purnell was killed, he was in Atlantic City, New Jersey, with Aisha Patton. [Petitioner's] statement was read into the record. [Petitioner] stated he called Floyd at 5:45 [a.m.] and Floyd told him that somebody had just been shot and she would call him back after she was interviewed by police. [Petitioner] also told Detective Buckley that[] Aisha Patton was shot essentially by accident. He said that the two were tussling over a gun during an argument and the gun went off, hitting her in the leg. [Petitioner] read the interview, and signed each page. Detective Buckley read [Petitioner's] statement into the record.

At trial, April Floyd testified that [Petitioner] was her ex-boyfriend. They were together for about 4-5 years and the relationship ended in 2004. They broke up because she suspected that [Petitioner] was seeing Aisha Patton. Patton called Floyd and told Floyd that she and [Petitioner] were seeing each other and she had recently had his baby. Floyd told [Petitioner] not to call her again. About five months before the shooting, Floyd became involved with Vernon Purnell. On one occasion, [on July 6, 2005, Petitioner] attempted to break into her house at 5416 Thomas Avenue through the window while she and Purnell were sleeping inside. Floyd called the police. On July 20, [2005,] Purnell came to her house at about 9:00 or 9:30 [p.m.] During the early morning hours [on July 21, 2005], Purnell arose and prepared to go to work. About ten minutes after he left, Floyd heard gunshots outside. She did not hear screaming or sirens so she went downstairs. She saw Purnell's car, still there and heard him calling her for help. She screamed for someone to call the police. Floyd did not see Purnell alive again. About two weeks later, [Petitioner] called and said that he was sorry about [what] happened to her friend.

The Commonwealth introduced telephone calls between [Petitioner] and Patton in an effort to impeach her testimony that she and [Petitioner] were in Atlantic City [when Purnell was murdered]. Patton identified the voices as hers and [Petitioner's]. Patton then admitted that she was not truthful before because [Petitioner] was the father of her son. She did not know where [Petitioner] was on July 21, 2005.

Commonwealth v. Bentley, No. 831 EDA 2013, slip op. at 1-9.

Bentley was convicted of first degree murder, aggravated assault, and two counts of carrying a firearm without a license after a jury trial in the Court of Common Pleas of Philadelphia County. R & R at 6. He was sentenced to life in prison. Id. Bentley appealed his conviction, challenging the weight and sufficiency of the evidence supporting his conviction, but the Superior Court affirmed the judgment of sentence and the Pennsylvania Supreme Court denied his petition for allowance of appeal. Id. Bentley then filed a counseled petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541, et seq. ("PCRA"). He filed an amended petition several months after his original petition, raising his insufficiency of the evidence claim and four ineffective assistance of counsel claims. Id. Before the PCRA Court ruled on his petition, Bentley filed a pro se habeas petition in this court which was stayed pending the resolution of the PCRA petition. Id.

The PCRA Court dismissed Bentley's petition and the Superior Court affirmed that dismissal. Id. Bentley did not seek allowance of appeal to the Pennsylvania Supreme Court. Id. His counsel informed the Honorable William Yohn, the presiding judge at that time, that Bentley's state proceedings had concluded, and Judge Yohn lifted the stay on this habeas petition. This case was referred to Magistrate Judge Sitarski for a Report and Recommendation, and subsequently transferred to our docket. Judge Sitarski issued her R & R on October 20, 2015, see docket entry #27, and Bentley timely filed his objections. Obj. to R & R, Nov. 3, 2015 (docket entry #29).

IV. Discussion

Bentley objects to the R & R's disposition of his ineffective assistance of counsel and sufficiency of evidence claims. We will analyze each objection separately and pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

A. AEDPA Standard

AEDPA permits someone in state custody to file a petition in federal court for a writ of habeas corpus, 28 U.S.C. § 2254(a), but mandates great deference to the state court's factual findings and legal determinations. See Woodford v. Viscotti, 537 U.S. 19, 24 (2002) (explaining Section 2254(d)'s highly deferential standard for evaluating state court rulings); see also Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (explaining that AEDPA increased the deference federal courts must give to a state court's factual findings and legal determinations). In fact, AEDPA only permits a federal court to grant habeas relief when it finds that a state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Moreover, we must presume that the state court's findings of fact are correct, and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

A state court's findings are "contrary to" Supreme Court precedent if the state court "arrives at a conclusion opposite to that reached by this Court on a question of law," or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision can be considered an "unreasonable application" of federal law under two circumstances. First, a state court decision is considered unreasonable when such court "identifies the correct governing legal rule...but unreasonably applies it to the facts" of a particular case. Id. at 407. Second, a state court decision can be considered unreasonable when

it extends a legal principle espoused by the U.S. Supreme Court to a new context or, conversely, refuses to extend that principle to a new context where it should indeed apply. Id.

A state court decision is considered to have come to an unreasonable determination of the facts only when its factual findings are “objectively unreasonable in light of the evidence presented in the state-court proceeding.” Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Moreover, “[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.” Id. But, “deference does not imply abandonment or abdication of judicial review [or]...by definition preclude relief.” Id.

A petitioner must exhaust his state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). In Pennsylvania, a petitioner exhausts his state court remedies by fairly presenting his claims to the state court and then the Pennsylvania Superior Court. A petitioner need not seek allocatur from the Pennsylvania Supreme Court in order to exhaust his state court remedies. Lambert v. Blackwell, 387 F.3d 210, 233-34 (3d Cir. 2004) (examining the effect of the Pennsylvania Supreme Court’s May 9, 2009 Order regarding appeals from criminal convictions and post-conviction relief matters).

If a petitioner fairly presented his claim to the state court, but the state court declined to review the claim on the merits because of a failure to comply with a state procedural rule, then the claim is procedurally defaulted. Harris v. Reed, 489 U.S. 255, 262-63 (1989). If a lower state court has declined to review a claim based on a procedural default, and the claim is not later addressed on the merits by a higher state court, then the federal habeas court must presume that the higher state court’s decision was founded upon a procedural default identified by the lower state court. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (explaining also that if a lower state court comes to a reasoned judgment in rejecting a federal claim, and a higher state court upholds

that judgment without explanation, then the federal habeas court must assume that the higher state court rested upon the same grounds as the lower state court). If a petitioner fails to exhaust a claim and it is clear that the state court did not consider that claim because of a state procedural rule, then the claim is procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 735 (1991).

We may also not review procedurally defaulted claims unless the petitioner can demonstrate a requisite cause for the default and show that actual prejudice exists as a result of the alleged violation of federal law, or that failure to consider the claims would result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. To demonstrate a requisite cause for default, a petitioner must show that some objective factor external to his defense impeded his efforts to comply with the state's procedural rules. Id. at 753. Such cause may include showing that (1) the factual or legal basis for a claim was not reasonably available, (2) some interference by state officials made compliance with the state procedural rules impracticable, or (3) there was ineffective assistance of counsel caused by attorney error. Id.

B. Insufficient Evidence Claims

Bentley objects to the R & R's finding that his insufficient evidence claims relating to his convictions on aggravated assault and first degree murder lacked merit.² The clearly-established federal law governing Bentley's claims that his conviction was based on insufficient evidence is governed by Jackson v. Virginia, 443 U.S. 307 (1979). The Supreme Court held that, when reviewing a petitioner's challenge to the sufficiency of the evidence, federal courts must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational

² While this was Bentley's final claim in both his petition and objections to the R & R, we analyze it first as it will be important to our analysis of Bentley's ineffective assistance of counsel claim.

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 319 (emphasis original).

This standard does not allow a reviewing court to substitute its judgment for that of the jury. Id. at 318-319 (“[T]his inquiry does not require a court to ‘ask’ itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.”). In fact, we must defer to the jury’s findings regarding the credibility of witnesses, the resolution of conflicts of evidence, and the drawing of reasonable inferences. Id. The question before us is whether the “record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Id. We must review the evidence “with reference to ‘the substantive elements of the criminal offense as defined by state law.’” Eley v. Erickson, 712 F.3d 837, 848 (3d Cir. 2013) (quoting Jackson, 443 U.S. at 324). But we must “also recognize that ‘the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.’” Id. (quoting Coleman v. Johnson, 132 S.Ct. 2060, 2064 (2012)). The Superior Court applied the Pennsylvania standard for the sufficiency of the evidence claims, and our Court of Appeals has held the Pennsylvania standard is consistent with the federal standard established in Jackson. See Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227, 1233 (3d Cir. 1992). Therefore, the state has not applied a standard “contrary to” clearly established federal law, so habeas relief is only appropriate if we found the Superior Court’s decision was based on unreasonable application of Jackson or involved an unreasonable determination of the facts.

The Superior Court found the evidence supported Bentley’s conviction for aggregated assault, which in Pennsylvania is defined as an “attempt[] to cause serious bodily injury to another, or cause[] such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.” 18 Pa.C.S. § 2702(a)(1). We find

that the Superior Court's decision did not involve either an unreasonable application of Jackson or an unreasonable determination of the facts. The record evidence, viewed in the light most favorable to the prosecution, could cause a rational fact finder to conclude that Bentley was guilty beyond a reasonable doubt. Fitzsimmons testified that, while engaged in an altercation with Bentley and several other individuals, he heard Bentley say, "fuck that," then heard several shots and saw flashes coming from the direction of Bentley's wheelchair. Notes of Testimony ("N.T.") Dec. 7, 2007 at 83-84. Fitzsimmons suffered gunshot wounds to his hip, leg, and elbow. Id. at 73-74. A rational trier of fact could have accepted only Fitzsimmons's testimony, and found Bentley guilty of aggravated assault beyond a reasonable doubt, and thus we find that neither the Superior Court nor Judge Sitarski erred in their analyses.

The Superior Court also found that there was sufficient evidence for a jury to convict Bentley of first-degree murder, which is proved when all three of these elements are met: "(1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with specific intent to kill." Commonwealth v. Wright, 961 A.2d 119, 130 (Pa. 2008) (internal citations and quotations omitted). We conclude that this finding is supported by the record evidence and therefore the Superior Court's decision did not constitute an unreasonable application of Jackson or an unreasonable determination of the facts.

As the Superior Court wrote, the evidence presented at Bentley's trial established that:

"(1) [Bentley] had [an] acrimonious relationship with Purnell's girlfriend; (2) he had recently broken into the girlfriend's home when both she and Purnell were sleeping; (3) [Bentley]'s alibi had been discredited; (4) the same guns in the two prior shootings were both used in the Purnell shooting; and (5) both victims of the two prior shootings identified [Bentley] as their shooter."

Commonwealth v. Bentley, No. 831 EDA 2013, slip op. at 17. The circumstantial evidence against Bentley was also strong. Purnell started dating Bentley's ex-girlfriend, Floyd, after she

and Bentley went through a contentious breakup. N.T. Dec. 11, 2007 at 20-21. Two weeks before Purnell's murder, Bentley tried to break into Floyd's home while she and Purnell were sleeping. Id. at 22-23. Moreover, Patton testified that she did not know where Bentley was at the time of the shooting and that she had lied to protect him since he was the father of her child -- thereby discrediting his alibi. Id. at 111-12.

The physical evidence also supported the jury's guilty verdict. Firearms Examiner Kenneth Lay analyzed the ballistic evidence from the Patton, Fitzsimmons, and Purnell shootings. Id. at 174-187. He testified that the .32 caliber cartridge casings collected at the scene of the Fitzsimmons shooting were fired from the same gun as those collected from the Purnell shooting, id. at 174-176, and the bullet specimens and jackets from the Purnell shooting came from the same gun used in the Patton shooting. Id. at 187. In addition, both Patton and Fitzsimmons identified Bentley as the gunman in their shootings. N.T. Dec. 7, 2007 at 83-84 and N.T. Dec. 10, 2007, at 66-67. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to find Bentley guilty of first degree murder beyond a reasonable doubt, and thus neither the Superior Court nor Judge Sitarski erred in their analyses. We will therefore overrule Bentley's objections to the R & R's as to his insufficient evidence claims.

C. Ineffective Assistance of Counsel Claims

Bentley next objects to the R & R's disposition of his ineffective assistance of counsel claims. To be sure, the Sixth Amendment guarantees every criminal defendant the right to assistance of able counsel. U.S. CONST. amend. VI. This assistance must not only be perfunctory, but effective. See Saranchak v. Sec'y Pa. Dep't of Corr., 802 F.3d 579, 588 (3d Cir. 2015) (stating that defendants are entitled to the effective assistance of counsel). The right to

effective assistance of counsel protects the fundamental right to a fair trial afforded to every criminal defendant. Id. (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984)).

The Supreme Court has set out a two-prong test for determining whether a criminal defendant has suffered a violation of his constitutional rights by having ineffective assistance of counsel. First, a habeas petitioner must show that his counsel's performance was deficient, meaning that the representation failed to meet an objective standard of reasonableness "as defined by 'prevailing professional norms.'" Saranchak, 802 F.3d at 588 (quoting Outten v. Kearney, 464 F.3d 401, 414 (3d Cir. 2006)). More specifically, "we must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, reviewed as of the time of counsel's conduct.'" Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998) (quoting Strickland, 466 U.S. at 690). But we must be highly deferential to counsel's performance and not "second-guess counsel's assistance after conviction." Id. (quoting Strickland, 466 U.S. at 689). Second, a petitioner must show prejudice, meaning that he must 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. This standard does not require the petitioner to prove that the evidence presented against him would have been insufficient if not for counsel's errors, nor must the petitioner show "that counsel's deficient conduct more likely than not altered the outcome." Id. at 693. But it does require the petitioner to go further than simply demonstrating "that the errors had some conceivable effect on the outcome of the proceeding." Id.; see also Saranchak, 802 F.3d at 588. We will analyze each of Bentley's ineffective assistance of counsel claims separately. If we find that counsel's performance was deficient in multiple instances, we will cumulatively analyze the prejudice those deficiencies

caused to determine whether, but for those errors, the result of Bentley's trial would have been different. See Fahy v. Horn, 516 F.3d 1698, 205 (3d Cir. 2008).

The Superior Court used Pennsylvania's three-prong test for analyzing ineffective assistance of counsel claims. This test requires the petitioner to show that: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his action; and (3) the petitioner was prejudiced by the ineffectiveness. See Commonwealth v. Roney, 79 A.3d 595, 604 (Pa. 2013) (citing Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987)). Our Court of Appeals has held that this test is not contrary to Strickland. See Wertz v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000). Therefore, we find that the state court did not apply law contrary to clearly-established Supreme Court precedent, and Bentley is only entitled to relief if he shows that the state court's decision was an unreasonable application of Strickland or involved an unreasonable determination of the facts.

1. Ineffective Assistance Of Counsel Claims As To Alibi Witness

Bentley's first ineffective assistance of counsel claim relates to trial counsel's alleged failure to object to prejudicial testimony the Commonwealth introduced rebutting Bentley's alibi. Judge Sitarski found that the Superior Court reasonably concluded that trial counsel did not err since the evidence rebutting the alleged alibi was admissible to show consciousness of guilt. Bentley objects to this finding but we will summarily overrule his objection.

Trial counsel had planned to introduce an alibi for Bentley based on Aisha Patton's testimony that Bentley was with her on the morning of the murder. But, on the first day of trial the prosecution notified trial counsel that it had prison telephone tapes of Bentley talking to Patton that appeared to show Bentley trying to manipulate Patton's story. See N.T. Dec. 6, 2007 at 5-8. Trial counsel then indicated that he would likely withdraw his notice of alibi, and did not

object to the prosecution's decision to call Patton as a prosecution witness. Id. at 7-8. ("[The prosecution] will do what [it] has to do with respect to any of the witnesses, but that's our intention at the moment, which is to withdraw the notices of alibi.")

Trial counsel's actions were in no way deficient. He planned to introduce an alibi for his client to bolster his defense, but decided to withdraw it once the prosecution informed him of the damning evidence in the prison phone calls. This evidence, as the Superior Court and Judge Sitarski properly noted, was admissible to show Bentley's consciousness of guilt. See Commonwealth v. Johnson, 838 A.2d 663, 680 (Pa. 2003). Moreover, a state court's application of state evidentiary law is binding on a federal habeas court. Estelle v. McGuire, 502 U.S. 62, 68 (1991). Because the evidence was relevant and admissible under state law, trial counsel cannot be found to be ineffective for his failure to object to admissible evidence. The Superior Court's determination that this claim lacked merit was a reasonable application of Strickland, and we will therefore overrule Bentley's objection as to this claim.

2. Ineffective Assistance Of Counsel Claim Relating To Prior Bad Acts

Bentley's next ineffective assistance of counsel claim relates to trial counsel's failure to object to prior bad act testimony or to ask for a limiting instruction from the trial court. Judge Sitarski found that the Superior Court reasonably concluded that this claim lacked merit since the evidence presented at trial was admissible to show motive and that Bentley, who uses a wheelchair, was physically capable of committing murder. Bentley objects to this finding, but we will overrule his objection.

April Floyd, Bentley's ex-girlfriend who was dating Purnell at the time of his murder, testified that Bentley had tried to break into her home -- where she and Purnell were sleeping -- several weeks before Purnell was killed. N.T. Dec. 11, 2007 at 22-24. The Superior Court found

that this testimony was admissible because it helped to establish that Bentley had a motive to kill Purnell and that Bentley was physically capable of committing murder. Commonwealth v. Bentley, No. 831 EDA 2013, slip op. at 13.³ Because the evidence was relevant and admissible under state law, trial counsel cannot have been ineffective for failing to object to the introduction of admissible evidence. The Superior Court's determination that this claim lacked merit was a reasonable application of Strickland and we will overrule Bentley's objection as to this claim.

**3. Ineffective Assistance Of Counsel
Claim Relating To Character Testimony**

Bentley next asserts a claim for ineffective assistance of counsel relating to trial counsel's failure to object to Taline Mason's testimony concerning Purnell's character and reputation. Judge Sitarski found that the Superior Court reasonably concluded that the claim lacked merit since the testimony did not in any way prejudice Bentley. Bentley objects to this finding, but we will overrule his objection.

Mason was a 'life in being' witness whose testimony was elicited to establish that Purnell was alive and well prior to his murder. She testified that (1) Purnell was the father of one of her children, (2) she knew Purnell for fourteen years, (3) Purnell had no criminal record, and (4) he had worked as a mechanic/engineer. N.T. Dec. 10, 2007 at 55-56. We do not find it unreasonable that counsel failed to object to such innocuous testimony -- which lasted just a few minutes. And, even if it were unreasonable under Strickland for trial counsel not to have objected during Mason's testimony, a five minute description of the victim's life would in no way have prejudiced the jury. We find that this claim satisfied neither prong of Strickland, and

³ As we noted earlier, a state court's application of state evidentiary law is binding on a federal habeas court. Estelle, 502 U.S. at 68.

thus the Superior Court's adjudication was reasonable. We will therefore overrule Bentley's objection.

4. Ineffective Assistance Of Counsel Relating To Closing Arguments

Bentley finally brings a claim for ineffective assistance of counsel relating to trial counsel's failure to object to the prosecutor's inflammatory closing arguments. Judge Sitarski found that the Superior Court reasonably concluded that the claim lacked merit since the prosecutor's comments did not prejudice the jury. Bentley objects to this finding, but we will overrule his objection.

To properly analyze this claim, which Bentley has categorized as an ineffective assistance of counsel claim, we must first review the Supreme Court's prosecutorial misconduct jurisprudence. A petitioner is entitled to habeas relief if "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1973)). Put another way, the prosecutorial misconduct must have been so significant that it denied the defendant a fair trial. United States v. Bagley, 473 U.S. 667, 676 (1985). Thus, "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden, 477 at 181. A court must examine the prosecutor's alleged misconduct in the context of the entire trial when deciding whether the conduct establishes a constitutional violation. Greer v. Miller, 483 U.S. 756, 765-66 (1987). This review includes evaluating the prosecutor's remarks by considering their "scope...relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the evidence supporting the conviction." United States v. Rivas, 493 F.3d 131, 140 (3d Cir. 2007). If the evidence in a case is strong, and the trial court instructs the jury that arguments from counsel are not evidence, it is less likely that the

prosecutor's alleged misconduct would influence the jury's verdict. Darden, 477 U.S. at 182. Finally, our Court of Appeals has determined that the Pennsylvania and federal tests regarding prosecutorial misconduct are "substantively identical," Reid v. Beard, 420 F. App'x 156, 160 (3d Cir. 2011), and therefore habeas relief is only appropriate if we find that the Superior Court's resolution of this claim involved an unreasonable application of Darden or an unreasonable determination of the facts.

Bentley specifically claims that the following excerpt from the prosecutor's closing arguments comprised a constitutional violation:

In one of the old Eastwood movies when he was talking about life and death, he said something to the effect, When you kill someone, it takes everything he has and everything he will have.

For whatever your selfish reasons were, Mr. Bentley, did Mr. Purnell deserve to die just because he was seeing your ex-fiancée? And by the way, when you were putting together your story, maybe you were leaning a little too heavy on love and not truth because Aisha gave you up.

So as I close, when you point a gun, not one gun but two, waistband, bracing yourself, ten shots from the ten that Aisha said is yours, two more shots from the .32 that Mr. Fitzsimmons said is yours, he had seen you with it before...

It was you. It was you. You pulled the trigger. You chose your target. And you didn't face him like a man. You snuck him. And back in the old game days, we would say you slid him, sneaked up, kind of like the midnight Rambler, emptied one gun, went to the second...

You went to get him, but now we got you. In the words of Aisha Patton, all DAs in a lie. You don't know what they're going to do. They sent the first team this time, sir, guilty of murder in the first degree because that's what you did. It was beyond assassination. It was beyond torment. [Objection, sustained by Court]

Twelve shots, dead body, all over. Lunchtime. Let's eat.

N.T. Dec. 12, 2007 at 97-99.

The question here is not just whether the prosecutor's remarks were improper, as Bentley seems to suggest in his Objections. One analysis must take another step and determine if those remarks were prejudicial enough that they "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181. Even if we were to agree that the prosecutor's statements were inappropriate or over the top, we cannot grant habeas relief unless we find that the Superior Court was unreasonable in its determination that Bentley was not prejudiced by these statements, and we cannot so find.

First, the prosecutor's closing arguments, while overly theatrical, accurately reflected the evidence presented. Second, as we noted earlier, the evidence in this case was strong. The prosecution presented evidence that Bentley had the motive to kill Purnell, that he had attempted to break into Floyd's house while she and Purnell were sleeping, that his alibi was discredited, and that the guns used in the Purnell murder were the same ones used in the Patton and Fitzsimmons shootings where Bentley was identified as the gunman. Third, the trial court judge instructed the jury that closing arguments are not evidence and could not be considered as such. N.T. Dec 12, 2007 at 117.

Bentley's claim here, though, is an ineffective assistance of counsel claim, and it fails for two reasons. First, trial counsel did object to the prosecutor's closing arguments. N.T. Dec. 10, 2007 at 99. Therefore, this claim does not satisfy the first prong of Strickland. Second, while no further analysis is necessary, we feel compelled to note that this claim also fails because Bentley has not demonstrated prejudice. As noted, we find no merit in the underlying prosecutorial misconduct claim. Bentley's final ineffective assistance of counsel claim thus fails both prongs of Strickland. We therefore find that the Superior Court's resolution of this claim was reasonable and thus will deny Bentley's objection.

V. Conclusion

We find that Bentley's objections to the R & R lack merit and we will therefore overrule them. We also find that reasonable jurists could not disagree with our resolution of this matter. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). We will therefore approve and adopt Judge Sitarski's R & R, dismiss Bentley's petition with prejudice and without an evidentiary hearing, and decline to issue a certificate of appealability.

BY THE COURT:

/s/ Stewart Dalzell, J.
Stewart Dalzell, J.

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

LEWIS E. BENTLEY,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
MICHAEL W. HARLOW, et al.,	:	NO. 11-2423
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

October 19, 2015

Before the Court is a counseled Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 on behalf of Lewis E. Bentley (“Petitioner”), an individual currently incarcerated at the State Correctional Institution in Albion, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be **DENIED**.

I. PROCEDURAL BACKGROUND

Petitioner is challenging convictions that arise out of two incidents. In one incident, on July 10, 2005, Petitioner shot Anthony Fitzsimmons multiple times in the right arm and right leg following an argument about a cellular phone. (*Commonwealth v. Bentley*, No. 2127 EDA 2008, slip op. at 2-4 (Pa. Super. Ct. Oct. 2, 2009) [hereinafter Pa. Super. Ct. Oct. 2009 Op.]). In the other incident, on July 21, 2005, Petitioner fatally shot Vernon Purnell multiple times in his chest, abdomen, and extremities. (*Id.* at 4-5).

The Pennsylvania Superior Court provided the following recitation of the facts underlying Petitioner's case:

On March 4, 2005 at approximately 1:30 [p.m.], Philadelphia Police Officer Estella Tucker went to 6700 Linmore Avenue in the City and County of Philadelphia, in response to a radio call of a shooting. When she arrived, she . . . met a female later identified as Aisha Patton. Officer Tucker observed an abrasion on Patton's left leg. When Patton rolled up her pant leg, a projectile fell to the ground. Office Tucker recovered the projectile from the ground and placed it on property receipt #2575183. . . .

On July 10, 2005, Philadelphia Police Officer Walter Burks responded to a radio call of a male shot on the street. In the 6600 block of Woodland Avenue, Officer Burks came into contact with Anthony Fitzsimmons. Fitzsimmons was bleeding from apparent gunshot wounds to his right arm and right leg. Officer Burks located the actual scene of the shooting as 66th and Greenway, about one block away, based on shell casings. . . .

Detective Brian Kelly of Southwest Detectives participated in the investigation into the shooting of Anthony Fitzsimmons. Detective Kelly went to 66th and Greenway and collected three .32 automatic fired cartridge casings (FCC's), two from the street and one from the sidewalk. The FCC's were placed on property receipt #2607455 and submitted to the Firearms Identification Unit. . . .

Anthony Fitzsimmons testified that on July 10, 2005, he was in the area of Upland and Greenway Street. He ran into [Petitioner] that morning and asked if he could use [Petitioner's] cell phone to call a family member. [Petitioner] agreed and Fitzsimmons used the phone for about five minutes, then returned the phone to [Petitioner]. At the time, [Petitioner] was asleep in his car. Some time later that day, Fitzsimmons was on 65th and Regent Street where he was staying with a female friend when a male banged on the door and told Fitzsimmons that [Petitioner] wanted to see him on Upland Street. . . . When he arrived, [Petitioner] was not there. [Petitioner's] brother told Fitzsimmons to wait for [Petitioner] to return [Petitioner's] brother and three other males were present at the time. . . . While Fitzsimmons was waiting, he and [Petitioner's] brother began arguing about [Petitioner's] cell phone. . . . Fitzsimmons claimed that he did not

feel threatened by [Petitioner], even though he had seen [Petitioner] with a gun the day before, because [Petitioner] was wheelchair bound. He was more worried about being attacked by the other males. Fitzsimmons decided to walk out into the street where it was more open in the event that he needed help. He walked up towards Greenway Avenue and the males followed, threatening him. . . . By the time he reached the corner of 66th and Greenway, the argument between Fitzsimmons and [Petitioner's] brother had intensified. The three males were standing on the corner and [Petitioner] was a short distance away from them in his wheelchair, against the wall, next to a payphone. Fitzsimmons heard [Petitioner] say "[f--] that," then heard a pop and saw flashes coming from where [Petitioner] was sitting in his wheelchair. The males then fled. Fitzsimmons . . . felt a sharp pain in his leg. He realized he was shot and bleeding from his arm. . . . Fitzsimmons suffered three gunshot wounds [to his right hip, right femur, and right elbow]. . . .

....

On July 21, 2005, at approximately 4:51 [a.m.], Police Officer Myra Vinson received a radio call to go to the 5300/5400 block of Thomas Avenue. . . . Upon her arrival, she observed a 2001 gray Hyundai two door with the driver side window shot out in front of 5416 Thomas Avenue. . . . Officer Vinson exited her patrol car, went around to the passenger's side and observed . . . Vernon Purnell, hanging out of the passenger side door, bleeding profusely. . . . Officer Vinson called paramedics, prepared a crime scene log and secured the crime scene. Outside the Hyundai, Officer Vinson observed four projectiles and twelve FCC's. Purnell was transported to the Hospital . . . where he died. Bennett Preston M.D., Assistant Medical Examiner . . . testified that Purnell's cause of death was multiple gunshot wounds to the chest, abdomen and extremities. . . ., a total of ten gun shot wounds. The two projectiles and the fragment that were recovered from Vernon Purnell's body were submitted to the [Firearms] Identification Unit for analysis.

Police Officer Lamont Fox and Brian Stark of the Crime Scene Investigation Unit processed the crime scene. . . . Police Officer[r] Brian Stark photographed the scene and collected sixteen pieces of ballistic evidence: two .32 caliber FCC's; ten .40 caliber FCC's; three bullet specimens; and one fragment. Officer Stark placed the ballistic evidence on property receipt #9004283. The evidence was submitted to the Firearms Identification Unit.

.....

Kenneth Lay of the Philadelphia Police Forensic Science Bureau analyzed all of the ballistic evidence. Mr. Lay testified that the bullet recovered on March 5, 2005 from Aisha Patton . . . was a .40 caliber automatic. The three .32 caliber automatic FCC's collected from [the Fitzsimmons shooting] were fired from the same firearm as the two .32 caliber automatic FCC's collected from [the Purnell shooting]. He also determined that the ten .40 caliber automatic FCC's [from the Purnell shooting] were fired from the same gun. Mr. Lay compared the evidence [from the Purnell, Fitzsimmons, and Patton shootings]. . . . The comparison yielded the following results: all five .32 caliber FCC's [from the Purnell and Fitzsimmons shootings] were fired [from] the same firearm; the bullet specimens and bullet jacket from [the Purnell shooting] were fired [from] the same firearm as the firearm from [the Patton shooting].

Homicide Detective Stephen Buckley of the Special Investigations Unit was assigned to look into the death of Vernon Purnell in late 2005. On April 12, 2006, he interviewed Aisha Patton. Detective Buckley asked Patton about the incident where she had been shot in her leg. Patton told the detective that, on March 4, 2005, [Petitioner] was her fiancé. [Petitioner] had not come home for a couple days, so Patton called [Petitioner's] ex-girlfriend, April Floyd, and [Petitioner] answered the phone. The following day, [Petitioner] came to Patton's house. Patton was angry and began grabbing and fighting with [Petitioner]. . . . Patton attacked [Petitioner] again and [Petitioner] reached into his waistband and retrieved the black automatic handgun that he carried for protection. [Petitioner] and Patton began fighting over the gun and it went off, striking Patton in her leg. She went to a neighbor's house and the neighbor called police. Patton [stated] . . . that the gun belong[ed] to [Petitioner] and that [Petitioner] got rid of the gun shortly after she was shot. Patton reviewed her statement, signed and dated it.

.....

Detective Buckley obtain[ed] a warrant for [Petitioner's] arrest on May 2, 2006. On May 9, 2006, Detective Buckley interviewed [Petitioner] in the Homicide Unit. . . . [Petitioner] told Detective Buckley that he did not know Purnell. The first time he saw Purnell was at April Floyd's house the night she called the

police on him. Purnell came out of Floyd's house and got into a car. Floyd came out and got into the car and the two left. According to [Petitioner], until then, he was unaware that Floyd, h[is] former fiancée, was seeing anyone. Additionally, Appellant told Detective Buckley that, on the morning Purnell was killed, he was in Atlantic City, New Jersey, with Aisha Patton. [Petitioner's] statement was read into the record. [Petitioner] stated he called Floyd at 5:45 [a.m.] and Floyd told him that somebody had just been shot and she would call him back after she was interviewed by police. [Petitioner] also told Detective Buckley that[] Aisha Patton was shot essentially by accident. He said that the two were tussling over a gun during an argument and the gun went off, hitting her in the leg. [Petitioner] read the interview, and signed each page. Detective Buckley read [Petitioner's] statement into the record.

At trial, April Floyd testified that [Petitioner] was her ex-boyfriend. They were together for about 4-5 years and the relationship ended in 2004. They broke up because she suspected that [Petitioner] was seeing Aisha Patton. Patton called Floyd and told Floyd that she and [Petitioner] were seeing each other and she had recently had his baby. Floyd told [Petitioner] not to call her again. About five months before the shooting, Floyd became involved with Vernon Purnell. On one occasion, [on July 6, 2005, Petitioner] attempted to break into her house at 5416 Thomas Avenue through the window while she and Purnell were sleeping inside. Floyd called the police. On July 20, [2005,] Purnell came to her house at about 9:00 or 9:30 [p.m.] During the early morning hours [on July 21, 2005], Purnell arose and prepared to go to work. About ten minutes after he left, Floyd heard gunshots outside. She did not hear screaming or sirens so she went downstairs. She saw Purnell's car, still there and heard him calling her for help. She screamed for someone to call the police. Floyd did not see Purnell alive again. About two weeks later, [Petitioner] called and said that he was sorry about happened to her friend.

The Commonwealth introduced telephone calls between [Petitioner] and Patton in an effort to impeach her testimony that she and [Petitioner] were in Atlantic City [when Purnell was murdered]. Patton identified the voices as hers and [Petitioner's]. Patton then admitted that she was not truthful before because [Petitioner] was the father of her son. She did not know where [Petitioner] was on July 21, 2005.

Petitioner was tried for the shootings of Purnell and Fitzsimmons. Following a jury trial in the Court of Common Pleas of Philadelphia County, Petitioner was convicted of first degree murder (the shooting of Purnell),¹ aggravated assault (the shooting of Fitzsimmons),² and two counts of carrying a firearm without a license.³ (*Id.* at 9). On February 15, 2007, Petitioner was sentenced to an aggregate term of life imprisonment plus five to ten years of imprisonment. (*Id.*).

Petitioner appealed, through counsel, challenging the weight and sufficiency of the evidence supporting his convictions. (*Id.* at 10). The Superior Court affirmed Petitioner's judgment of sentence, (*id.* at 1-19); and on March 17, 2010, the Pennsylvania Supreme Court denied his petition for allowance of appeal. (Order, *Commonwealth v. Bentley*, No. 653 EAL 2009 (Pa. Mar. 16, 2010)).

Petitioner later retained new counsel, Teri B. Himebaugh. On March 2, 2011, Ms. Himebaugh filed a counseled petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541, *et seq.* ("PCRA"). See *Commonwealth v. Bentley*, No. CP-51-CR-0408841-2006 (Phila. Cnty. Com. Pl.), Crim. Docket at 12 [hereinafter Crim. Docket I]; *Commonwealth v. Bentley*, No. CP-51-CR-0807031-2006 (Phila. Cnty. Com. Pl.), Crim. Docket at 10 [hereinafter Crim. Docket II]. Petitioner subsequently filed an amended counseled PCRA petition raising four ineffective assistance of trial counsel claims. (Am. Pet. for Post Conviction Relief, *Commonwealth v. Bentley*, Nos. CP-51-CR-0408841-2006, CP-51-CR-0807031-2006 (Phila. Cnty. Com. Pl. July 11, 2011)).

¹ 18 Pa. Cons. Stat. § 2502(a)(1).

² 18 Pa. Cons. Stat. § 2702(a).

³ 18 Pa. Cons. Stat. § 6106(a)(1).

Before the PCRA Court ruled on his petition, Petitioner filed a *pro se* habeas petition with this Court on March 23, 2011. (Hab. Pet., ECF No. 1). The matter was assigned to the Honorable William H. Yohn, Jr., who referred it to me for a Report and Recommendation. (Order, ECF No. 2). The undersigned determined that the habeas petition was a mixed petition, containing both exhausted and unexhausted claims, and therefore recommended that the petition be dismissed without prejudice. (R&R 8-9, ECF No. 6). Judge Yohn approved and adopted the recommendation. (Order, ECF No. 9). However, rather than dismissing the petition, Judge Yohn stayed the habeas petition pending resolution of Petitioner's PCRA petition, and placed the case in civil suspense. (*Id.*; Order, ECF No. 10).

The PCRA Court dismissed Petitioner's PCRA petition on March 8, 2013. Crim. Docket I at 13; Crim. Docket II at 11. On March 14, 2014, the Superior Court affirmed the PCRA Court, finding the claims had no merit. (*Commonwealth v. Bentley*, No. 831 EDA 2013, slip op. at 1-21 (Pa. Super. Ct. Mar. 14, 2014) [hereinafter Pa. Super. Ct. Mar. 2014 Op.]). Petitioner did not seek an allowance of appeal. Crim. Docket I at 15; Crim. Docket II at 13.

After the Superior Court affirmed the PCRA Court, Ms. Himebaugh entered her appearance with this Court on April 2, 2014. (Entry of Appearance, ECF No. 11). Ms. Himebaugh then informed this Court that Petitioner's state proceedings had concluded and filed an amended habeas petition on behalf of Petitioner. (Pet'r's Mot. for Leave to Re-activate and Amend Pet'r's Hab. Corpus Pet., ECF No. 12). Judge Yohn then lifted the stay, restored the matter to the Court's active docket, and referred the matter to me for a Report and Recommendation. (Order, ECF No. 25; Order, ECF No. 13).

The amended habeas petition asserts the following claims:

- (1) ineffective assistance of trial counsel for withdrawing Petitioner's alibi but then opening the door to the alibi, and failing to object to the highly prejudicial testimony introduced by the Commonwealth that rebutted the alibi;
- (2) ineffective assistance of trial counsel for failing to object to the introduction of prejudicial prior bad act testimony and failing to ask for a limiting instruction;
- (3) ineffective assistance of trial counsel for failing to object to the admission of testimony concerning the victim's character and reputation;
- (4) ineffective assistance of trial counsel for failing to object to the Commonwealth's prejudicial closing statements; and
- (5) the verdicts were not supported by sufficient evidence.

(Am. Hab. Pet. ¶ 12, ECF No. 12-1).

II. LEGAL STANDARDS

A. The AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or that involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are

presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, “[u]nder the ‘contrary to’ clause, a federal habeas court may grant the writ 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 a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); see also *Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*, 529 U.S. at 413.

The “unreasonable application” inquiry requires the habeas court to “ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). “In further delineating the ‘unreasonable application of’ component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court’s incorrect or erroneous application of clearly established federal law was also unreasonable.” *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389).

B. Exhaustion and Procedural Default

Pursuant to the AEDPA, “a district court ordinarily cannot grant a petition for a writ of habeas corpus arising from a petitioner’s custody under a state court judgment unless the

petitioner first has exhausted his available remedies in state court.” *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010) (citing 28 U.S.C. § 2254(b)). A petitioner will not be deemed to have exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c); *O’Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999) (“[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.”). The exhaustion requirement is rooted in considerations of comity, and is designed to protect the role of the state court in the enforcement of federal law and to prevent disruption of state judicial proceedings. *Duncan v. Walker*, 533 U.S. 167, 179 (2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)); *see also Castille v. Peoples*, 489 U.S. 346, 349 (1989). “Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” *O’Sullivan*, 526 U.S. at 844 (citing *Rose*, 455 U.S. at 515-16).

In order for a claim to be exhausted, “[b]oth the legal theory and facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court.” *Tome v. Stickman*, 167 F. App’x 320, 322-23 (3d Cir. 2006) (quoting *Evans v. Court of Common Pleas, Del. Cnty., Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)). A state prisoner must “fairly present” his federal claims to the state courts before seeking federal habeas relief by invoking “one complete round of the State’s established appellate review process.” *O’Sullivan*, 526 U.S. at 845; *see Halloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261

(3d Cir. 1999) (“‘Fair presentation’ of a claim means that the petitioner ‘must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.’”). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009) (quoting *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)).

If a petitioner presents unexhausted habeas claims to a federal court, but it would be futile for petitioner to seek relief in the state court system, the federal court will excuse the failure to exhaust but consider the claims procedurally defaulted.⁴ *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). Procedural default will only be excused in two circumstances. First, a petitioner can overcome procedural default if he can prove “cause” and “prejudice” for the default. *Coleman*, 501 U.S. t 750; *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Cause is present where the petitioner can demonstrate that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice exists where the petitioner shows “not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Id.* at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis omitted)). In the alternative, a petitioner also can overcome procedural default if he

⁴ A claim is also procedurally defaulted if the state court imposes a procedural bar to review, so long as the procedural rule applied is “‘firmly established and regularly followed’ at the time of the alleged procedural default.” *Lewis v. Horn*, 581 F.3d 92, 105 (3d Cir. 2009) (quoting *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)).

can demonstrate that the absence of federal consideration of his claims will lead to a “fundamental miscarriage of justice.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). Such a miscarriage of justice is established where the petitioner adduces “new reliable evidence . . . not presented at trial” of his actual innocence of the crimes for which he has been convicted. *Id.* at 324.

III. DISCUSSION

Petitioner raises two claims related to the sufficiency of evidence, and four claims related to the ineffective assistance of trial counsel. The Court will first address the sufficiency of evidence claims, and then address the ineffective assistance of trial counsel claims.

A. Sufficiency of Evidence (Claim Five)

Claim Five consists of two claims challenging the sufficiency of the evidence upon which Petitioner was convicted. Specifically, Petitioner claims that the evidence was insufficient to support his convictions for aggravated assault and first degree murder.⁵ (Pet’r’s Mem. of Law 35-38, ECF No. 12-2).

⁵ In his habeas petition, Petitioner asserts that *all* the verdicts were not supported by sufficient evidence. (Pet’r’s Mem. of Law 35) (emphasis added). However, Petitioner does not address how the evidence was insufficient to sustain his convictions for carrying a firearm without a license. (*See id.* at 35-38). Therefore, this undeveloped claim does not warrant habeas relief. *See Zettlemyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir.1991) (vague and conclusory allegations fail to make sufficient showing to justify habeas relief). In any event, this claim is procedurally defaulted because the Superior Court determined Petitioner waived this claim since he failed to raise the issue in his Rule 1925(b) statement. (Pa. Super. Ct. Oct. 2009 Op., at 10 n.3). Waiver of an issue by failing to comply with Rule 1925(b) is an independent and adequate state procedural bar to review, *Buck v. Collieran*, 115 F. App’x 526, 528 (3d Cir. 2004), and a federal habeas court is precluded from reviewing claims rejected by the state court if the state court relied upon “a state law ground that is independent of the federal question and adequate to support the judgment.” *Nolan v. Wynder*, 363 F. App’x 868, 871 (3d Cir. 2010) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)). Additionally, Petitioner has not

“The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). Thus, when reviewing a sufficiency of evidence claim, a court determines whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319 (emphasis in original). A petitioner is entitled to relief only “if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Id.* at 324. “[F]ederal courts must look to state law for ‘the substantive elements of the criminal offense,’ but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.” *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) (quoting *Jackson*, 443 U.S. at 324 n.16). The Commonwealth may sustain its burden of proof beyond a reasonable doubt entirely through circumstantial evidence. *Commonwealth v. Woody*, 939 A.2d 359, 361 (Pa. Super. Ct. 2007) (quoting *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. Ct. 1997)). The credibility of witnesses, the resolution of conflicts of evidence, and the drawing of reasonable inferences from proven facts all fall within the exclusive province of the factfinder and, therefore, are beyond the scope of federal habeas review. *See Jackson*, 443 U.S. at 319.

The Superior Court applied the Pennsylvania standard for the sufficiency of evidence claims. (*See* Pa. Super. Ct. Oct. 2009 Op., at 11 (citing *Commonwealth v. O’Brien*, 939 A.2d 912 (Pa. Super. Ct. 2007))). When evaluating challenges to the sufficiency of evidence, the

demonstrated cause and prejudice for his default or established a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Therefore, to the extent Petitioner raises a claim that the evidence was insufficient to sustain his convictions for carrying a firearm without a license, I recommend that this claim be dismissed.

Pennsylvania standard examines “whether the evidence presented, actual and/or circumstantial, was sufficient to enable a fact finder to find every element of the crime charged beyond a reasonable doubt.” (*Id.* (citing *O’Brien*, 939 A.2d at 913-14)). The Third Circuit has found this standard to be consistent with *Jackson*. See *Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1233 (3d Cir. 1992) (stating that the sufficiency of evidence standard is the same under both Pennsylvania and federal law). Thus, the state courts have not applied a standard “contrary to” clearly established federal law, and Petitioner is entitled to habeas relief only if he can demonstrate the state courts’ decision was an unreasonable application of *Jackson*, or involved an unreasonable determination of the facts.

1. Aggravated Assault

Petitioner asserts that the evidence was insufficient to convict him of aggravated assault for the July 10, 2005, shooting of Fitzsimmons. (Pet’r’s Mem. of Law 35-37). Specifically, Petitioner argues that the jury’s verdict was based on “speculation [or] conjecture” because Fitzsimmons did not testify that he actually saw Petitioner holding the gun used in his shooting, Fitzsimmons failed to identify Petitioner as the shooter when the police interviewed him at the scene of the crime, and Fitzsimmons only identified Petitioner as the shooter after seeing Petitioner’s photograph in two different photograph arrays.⁶ (*Id.*).

Under Pennsylvania law, a person is guilty of aggravated assault as a felony in the first degree if he “attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting an extreme indifference

⁶ To the extent Petitioner challenges the credibility of Fitzsimmons, this claim is non-cognizable. See *Marshall v. Lonberger*, 459 U.S. 422, 432, 434; *Franklin v. Klopotoski*, No. 09-3838, 2010 WL 9583309, at *2 (E.D. Pa. June 3, 2010).

to the value of human life.” 18 Pa. Cons. Stat. § 2702(a)(1); *Commonwealth v. Smith*, 626 A.2d 614, 620 (Pa. Super. Ct. 1993). A “serious bodily injury” is defined as “[b]odily injury that 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. Where the victim suffered serious bodily injury, proof of specific intent is not required to sustain a conviction for aggravated assault. Rather, the Commonwealth need only prove that the defendant, at minimum, acted recklessly under circumstances manifesting an extreme indifference to the value of human life. *Commonwealth v. Patrick*, 933 A.2d 1043, 1046 (Pa. Super. Ct. 2007). Pennsylvania courts have found the existence of intent to commit aggravated assault in instances where the defendant has drawn and fired a gun. *See, e.g., Commonwealth v. Matthews*, 870 A.2d 924, 929 (Pa. Super. Ct. 2005).

In denying Petitioner’s sufficiency claim, the Superior Court found that the evidence presented at trial was sufficient to prove aggravated assault. (Pa. Super. Ct. Oct. 2009 Op., at 13). The Court based its decision on Fitzsimmons’ testimony recalling the events on July 10, 2005, and determined that “[Petitioner] intentionally caused serious bodily injury to [Fitzsimmons].” (*Id.*).

The Superior Court’s decision was not an unreasonable application of *Jackson*, nor did it involve an unreasonable determination of the facts. Viewing Fitzsimmons’ testimony in the light most favorable to the Commonwealth, a rational trier of fact could have found Petitioner committed aggravated assault. Fitzsimmons testified that on July 10, 2005, he had an altercation with Petitioner and three other individuals. (N.T. 12/07/07 at 71-72, 80-85, 106-08). During the altercation, Fitzsimmons heard Petitioner say “f--- that,” and at the same time he heard gun shots

and saw flashes coming from Petitioner's wheelchair. (*Id.* at 83-85, 106-08). Fitzsimmons then felt sharp pains and realized that he had been shot in the arm and leg. (*Id.* at 84-85). As a result of the shooting, Fitzsimmons sustained injuries to his arm and leg, was hospitalized for twenty-four hours, and could not bend his leg for three weeks. (*Id.* at 73-74, 84-85). Fitzsimmons' testimony provided evidence sufficient to sustain a conviction for aggravated assault: on July 10, 2005, he suffered serious bodily injury after Petitioner had drawn a gun and fired at him. *See e.g., Commonwealth v. Landis*, 48 A.3d 432, 447 (Pa. Super. Ct. 2012) (finding sufficient evidence existed that appellee discharged his gun in an attempt to inflict bodily injury when he pointed it towards person and discharged it). Accordingly, this claim is meritless, and the Court recommends that Petitioner's sufficiency of the evidence claim relating to the aggravated assault conviction be denied.

2. First degree Murder

Petitioner also asserts that the evidence was insufficient to convict him of first degree murder. (Pet'r's Mem. of Law 37). Petitioner acknowledges that the ballistic evidence established that the same weapons were used in the Purnell, Fitzsimmons, and Patton shootings. (*Id.* at 37-38). However, he argues that because there is reasonable doubt that he committed the Fitzsimmons shooting, there is reasonable doubt that he murdered Purnell. (*Id.* at 38). Additionally, Petitioner argues that there was no evidence that Petitioner was at the scene of the crime when the murder was committed, no eyewitnesses, no confession, no DNA, no fingerprints, and no physical evidence to establish beyond a reasonable doubt that Petitioner shot and killed Purnell. (*Id.* at 37).

Under Pennsylvania law, a defendant is guilty of first degree murder if he intentionally caused the death of another human being. 18 Pa. Cons. Stat. §§ 2501(a), 2502(a). The specific

intent to kill element may be proven by circumstantial evidence alone, and “the use of a deadly weapon on a vital part of a victim’s body is sufficient to establish the specific intent to kill.”

Commonwealth v. Fletcher, 861 A.2d 898, 907 (Pa. 2004). “The period of reflection necessary to constitute premeditation may be very brief; in fact the design to kill can be formulated in a fraction of a second. Premeditation and deliberation exist whenever the assailant possesses the conscious purpose to bring about death.” *Commonwealth v. Drumheller*, 808 A.2d 893, 910 (Pa. 2002) (internal quotation omitted).

In denying Petitioner’s claim, the Superior Court noted that the “Commonwealth may establish that the [Petitioner] intentionally killed another human being wholly through circumstantial evidence.” (Pa. Super. Ct. Oct. 2009 Op., at 15 (citation omitted)). The Superior Court then determined that:

[the] evidence, and the reasonable inference drawn therefrom was sufficient to establish that [Petitioner killed Purnell]. The circumstantial evidence establishe[d] the following: (1) [Petitioner] had [an] acrimonious relationship with Purnell’s girlfriend[, Floyd]; (2) [Petitioner] had recently broken into [Floyd’s] home when both she and Purnell were sleeping; (3) [Petitioner’s] alibi had been discredited; (4) the same guns in . . . two prior shootings were both used in the Purnell shooting; and (5) both victims of the two prior shooting identified [Petitioner] as their shooter.

(*Id.* at 17-18)

The Superior Court’s decision was not an unreasonable application of *Jackson*, nor did it involve an unreasonable determination of the facts. Viewing the evidence admitted at trial in the light most favorable to the Commonwealth, any rational fact finder could find all the elements of first degree murder satisfied beyond a reasonable doubt. Floyd testified that she and Petitioner had a five year relationship that did not end amicably in 2004. (N.T. 12/11/07 at 19, 21). Floyd

later began dating the victim, Purnell; Petitioner became aware of this relationship on July 6, 2005, when he saw Purnell at Floyd's house. (*Id.* at 22). On the morning of July 21, 2005, Purnell left Floyd's home for work, and was shot several times in his car. (*Id.* at 25-28). The autopsy report showed that Purnell died as a result of multiple gunshot wounds to the chest, abdomen, and extremities. (*Id.* at 9-11). The firearms examiner testified that he analyzed the ballistic evidence from the July 21, 2005 shooting of Purnell, the July 10, 2005 shooting of Fitzsimmons, and the March 4, 2005 of Patton. (*Id.* at 172-87). Testimony from the victims in the March 4 and July 10 shootings, Patton and Fitzsimmons, identified Petitioner as the gunman in those shootings.⁷ The examiner determined that the same firearm was used in the Fitzsimmons and Purnell shootings, and the same firearm was used in the Patton and Purnell shootings. (*Id.* at 186-87). Thus, the evidence of record could lead a rational fact finder to conclude beyond a reasonable doubt that Petitioner intentionally caused the death of Purnell. Accordingly, this claim is meritless, and the Court recommends denying Petitioner habeas relief on this claim.

B. Ineffective Assistance of Counsel Claims

In his remaining claims, Petitioner contends that his constitutional rights were violated because trial counsel was ineffective.

A claim for ineffective assistance of counsel is governed by the well-established two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United

⁷ Fitzsimmons testified that when he was shot on July 10, 2005, he saw flashes and heard the shots coming from Petitioner's wheelchair. (N.T. 12/7/07, at 83-84). Patton testified that she had been shot in an altercation with Petitioner on March 4, 2005 (N.T. 12/10/07, at 66-67).

States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish prejudice, "[t]he 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 "[l]ikelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citations omitted). In considering whether a petitioner suffered prejudice, a court must consider the totality of the evidence presented at trial, including the strength of the evidence against the defendant. *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999). "The greater the support for a verdict in the record, the less likely it is that the verdict was affected by errors of counsel." *United States v. Parker*, No. 14-2657, 2015 WL 4620655, at *2 (3d Cir. Aug. 4, 2015) (citing *Strickland*, 466 U.S. at 696) (not precedential); see also *Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) ("[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.”) (quoting *United States v. Gray*, 878 F.2d 702, 710-11 (3d Cir. 1989)).

When Petitioner presented his ineffectiveness claims on PCRA appeal, the Pennsylvania Superior Court used the Pennsylvania courts’ three-prong test for analyzing ineffective assistance of counsel claims. (Pa. Super. Ct. Mar. 2014 Op., at 6). This three-part test requires that the petitioner establish the following: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for their action; and (3) the petitioner was prejudiced by the ineffectiveness. *Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa. 2013) (citing *Commonwealth v. Pierce*, 527 A.2d 973 (1987)). The Third Circuit has held that the Pennsylvania ineffectiveness test is not contrary to the Supreme Court’s *Strickland* standard. *See Werts*, 228 F.3d at 203-04. Thus, since the state court did not apply law contrary to clearly established Supreme Court precedent, Petitioner is entitled to relief only if he can demonstrate the state court’s decision was an unreasonable application of *Strickland*, or involved an unreasonable determination of the facts.

1. Ineffective Assistance of Counsel for failing to object to prejudicial testimony regarding an alibi witness (Claim One).

Petitioner’s first ineffective assistance of trial counsel claim asserts that “trial counsel withdrew Petitioner’s alibi but then opened the door to the alibi and failed to object to highly prejudicial testimony introduced by the Commonwealth that rebutted the alibi.” (Pet’r’s Mem. of Law 15).

The Superior Court summarized the facts pertaining to this claim as follows:

On the first day of trial[,] the prosecutor informed the [trial c]ourt and trial counsel that he had obtained prison phone

recordings that would be damaging to [Petitioner], showing [Petitioner's] attempt to manipulate the testimony of his alibi witness, Aisha Patton. In addition, [the prosecutor] informed the [trial c]ourt and counsel that he had subpoenaed Patton to testify for the Commonwealth. Trial counsel was permitted to listen to the recordings and confer with [Petitioner] and thereafter, with [Petitioner's] consent, withdrew the alibi notice citing credibility concerns. Later, when discussing the Commonwealth's intent to introduce [Petitioner's] police statement, [Petitioner's counsel did not wish] to redact the portion of the statement in which [Petitioner] spoke of an alibi. . . .

On direct examination [by the Commonwealth, over the objection of Petitioner's counsel], Patton testified, in pertinent part, that she and Petitioner were together in Atlantic City, New Jersey when Purnell was killed. She testified further that she did not recall having discussed her whereabouts on the night P[u]rnell was killed with [Petitioner] during their frequent visits and telephone conversations. Patton also testified that she did not remember ever having conversations with [Petitioner] about what her testimony would be at trial. The prosecutor then moved to introduce the prison telephone records representing to the [trial c]ourt that they were relevant as indicia of [Petitioner's] guilt. . . . Trial counsel made several objections to the introduction of certain portions of the recorded information some of which were sustained. The [trial c]ourt reviewed the recordings and determined which portions could be introduced into evidence. Patton was recalled to the stand by the prosecutor and asked if she wished to change any of her prior testimony. She declined and the portions of the recordings deemed relevant and admissible by the [trial c]ourt were played for the jury. After hearing the recordings, Patton recanted, testifying that she was not in Atlantic City with [Petitioner] at the time [Purnell] was killed, and she had been untruthful earlier because [Petitioner] was the father of her child.

(Pa. Super. Ct. Mar. 2014 Op., at 7-8 (citations omitted)). Petitioner argues that counsel should have prevented the introduction of the alleged alibi by redacting Petitioner's statement to the police, and by objecting to Patton's alibi testimony. (Pet'r's Mem. of Law 16, 20).

The Superior Court found this ineffectiveness claim meritless. (Pa. Super. Ct. Mar. 2014 Op., at 10). The Superior Court determined that the alleged alibi demonstrated Petitioner's

attempts to manipulate Patton's testimony. (*Id.* at 9). Therefore, evidence of the alleged alibi was admissible to show Petitioner's consciousness of guilt. (*Id.*) (first citing *Commonwealth v. Johnson*, 838 A.2d 663, 680 (Pa. 2003); then citing *Commonwealth v. Rega*, 933 A.2d 997, 1009 (Pa. 2007)). The Superior Court concluded that even if counsel had redacted Petitioner's statement to the police or objected to Patton's testimony related to the alibi, the outcome of the trial would not have been different because the Commonwealth intended to introduce the prison phone tapes. (*Id.*).

The Superior Court's decision was not an unreasonable application of *Strickland*, nor did it involve an unreasonable determination of the facts. The Superior Court determined that the evidence of the alibi defense was admissible to show Petitioner's consciousness of guilt, which is the state court's application of state evidentiary law and is binding on a federal habeas court. *See Estelle v. McGuire*, 502 U.S. 62, 68 (federal habeas review is not available to correct errors of state law). Because evidence of the alibi defense was relevant and admissible under state law, the Superior Court's determination that the claim was meritless was not unreasonable because counsel cannot be ineffective for failing to object to the introduction of admissible evidence. *See United States v. Krauss*, No. 06-4239, at *5 (E.D. Pa. May 11, 2009); *see also Wilson v. Vaughn*, 533 F.3d 208, 218 (finding appellant did not suffer prejudice because the evidence is question would have been admissible). Additionally, even if counsel was ineffective for failing to redact portions of Petitioner's statement relating to the alibi, the Court agrees with the Superior Court that Petitioner cannot show that he was prejudiced because the Commonwealth introduced evidence of the alibi through other means, including the prison phone tapes. Accordingly, this claim is meritless, and the Court recommends that this claim be denied.

2. Ineffective assistance of trial counsel for failing to object to, or request a limiting instruction regarding, Petitioner's prior bad act (Claim Two).

Petitioner's second ineffectiveness claim is that trial counsel failed to object to prior bad act testimony, or failed to ask for a limiting instruction regarding the prior bad act testimony. (Pet'r's Mem. of Law 24-29). Specifically, Petitioner argues that trial counsel should have objected to Floyd's testimony that Petitioner attempted to break into her house on July 6, 2005. (*Id.* at 24).

Floyd testified that on July 6, 2005, she and Purnell were asleep in her house. (N.T. 12/11/07, at 23, 56). In the early morning, Petitioner banged on her door and attempted to enter her house by moving a piece of an air conditioner that was against the window sill. (N.T. 12/11/07, at 23, 60-61). Floyd then called the police. (*Id.* at 23). After the police arrived, Floyd left her house with Purnell. (*Id.* at 23-24, 46). According to Floyd, this was the first time Petitioner was aware of, and/or came into contact with, Purnell. (*Id.* at 22, 46). Floyd also stated that when Petitioner attempted to move her air conditioner, he was without a wheelchair or crutches. (*Id.* at 58).

Petitioner argues counsel should have objected to this testimony because the evidence was improperly offered to show that when Purnell was shot, Petitioner was acting in conformity with the prior bad act, or that Petitioner had a criminal propensity. (Pet'r's Mem. of Law 25-26). Petitioner also argues that this evidence was prejudicial because the jury may have concluded from this prior bad act that Petitioner was physically able to remove an air conditioner unit and therefore physically capable of committing murder and aggravated assault, even though he was wheelchair bound. (*Id.* at 26-27). Additionally, Petitioner argues that counsel should have

requested a limiting instruction regarding the specific purpose of the prior bad act testimony. (*Id.* at 28-29).

The Pennsylvania Superior Court found that this claim meritless. First, it found that the Commonwealth sought to introduce the facts surrounding the attempted break-in to establish Petitioner's motive for killing Purnell. (Pa. Super. Ct. Mar. 2014 Op., at 13). Second, it determined that the evidence was admissible to establish opportunity because it demonstrated that Petitioner had the physical capacity to commit the act of murder. (*Id.* at 14 n.3). Third, the Superior Court concluded, Petitioner failed to show he was prejudiced by counsel's failure to request a limiting instruction. (*Id.* at 15).

The Superior Court's decision was not an unreasonable application of *Strickland*, nor did it involve an unreasonable determination of the facts. Petitioner cannot show counsel was ineffective for failing to object to the testimony of Floyd regarding the July 6, 2005 incident. The Superior Court determined that the testimony of the July 6, 2005 incident was admissible to prove opportunity, jealous motive, and specific intent to kill Purnell, which is the state court's application of state evidentiary law and is binding on a federal habeas court. *See Estelle v. McGuire*, 502 U.S. at 68. Because this evidence was admissible under state law, the Superior Court's determination that the claim was meritless was not unreasonable because counsel cannot be ineffective for failing to object to the introduction of admissible evidence. *See United States v. Krauss*, No. 06-4239, at *5 (E.D. Pa. May 11, 2009); *Baez v. Grace*, No. 06-5629, 2008 WL 2246312, at *6 (E.D. Pa. May 29, 2008) (finding counsel's failure to object to prior bad act testimony not deficient because the testimony was admissible to prove motive and for impeachment purposes) (citing *Strickland*, 466 U.S. at 687).

Additionally, Petitioner cannot show he suffered prejudice as a result of counsel's failure to request a limiting instruction. This Court has reviewed the record, and agrees with the Superior Court that even if a limiting instruction was warranted, there is not a reasonable probability that the outcome of the trial would have been different, considering the ample evidence presented at trial demonstrating Petitioner murdered Purnell: Petitioner had a five year relationship with Purnell's girlfriend, Floyd, which ended in 2004; Petitioner became aware that Floyd and Purnell were dating on July 6, 2005; on July 21, 2005, Purnell left Floyd's home for work and was shot several times in his car, which resulted in his death; and the ballistic evidence showed that the guns used in the shooting of Purnell were also used in two prior shootings in which the victims identified Petitioner as the shooter.⁸ (N.T. 12/11/07, at 9-11, 19, 21-22, 25-28, 172-87; N.T. 12/10/07, at 66-67; N.T. 12/7/07, at 83-84). The Superior Court's adjudication of this issue did not involve an unreasonable application of *Strickland*. Therefore, Petitioner's claim that he is entitled to habeas relief on the basis that trial counsel was ineffective with respect to prior bad act evidence is meritless, and the Court recommends that this claim be denied.

3. Ineffective assistance of trial counsel for failing to object to testimony concerning the victim's character and reputation (Claim Three).

Petitioner's third ineffectiveness claim is that trial counsel failed to object to Taline Mason's testimony concerning Purnell's character and reputation. (Pet'r's Mem. of Law at 29-32).

⁸ Petitioner contends that the outcome of the proceeding would have been different had counsel requested an appropriate limiting instruction, but he does not develop this argument. (*Id.* at 28-29). Consequently, this vague and conclusory allegation fails to warrant habeas relief. See *Zettlemoyer*, 923 F.2d at 298.

At trial, Mason was called as the Commonwealth's "life in being" witness, to establish that the victim, Purnell, was alive at the time prior to the murder.⁹ (Pa. Super. Ct. Mar. 2014 Op., at 16 & n.4). Mason testified that she was the mother of Purnell's oldest son, she had known Purnell fourteen years, Purnell did not have a criminal record, and Purnell had worked as a mechanic/engineer. (N.T. 12/10/07, at 55-56). Petitioner argues that counsel should have objected to this testimony because it was improper character evidence and was not relevant to establish a "life in being." (Pet'r's Mem. of Law 32). Petitioner avers that he was "severely prejudiced by this testimony because the testimony "only served to create sympathy for the victim and hardened the jury's 'heart' against the Petitioner." (*Id.*).

In rejecting this claim, the Pennsylvania Superior Court found that Petitioner's claim was not well-pled. (Pa. Super. Ct. Mar. 2014 Op., at 17). Additionally, the Superior Court determined that Petitioner failed to demonstrate prejudice based on this "bald claim that counsel[] fail[ed] to object to [a] few, fairly innocuous lines of testimony." (*Id.*).

In his habeas petition, Petitioner simply claims that this information played to the emotions of the jury and therefore "severely prejudiced the Petitioner." (Pet'r's Mem. of Law 32). However, he does not point to any evidence to support his contention that the outcome of the trial would be different. (*Id.* at 29-32). This "[b]ald assertion[] and conclusory allegation[] does not provide sufficient ground' for habeas relief." *McAndrews v. Chesney*, No. 07-1145, 1998 WL 136508, at *4 (E.D. Pa. Mar. 23, 1998) (quoting *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir.1991)). Moreover, the Pennsylvania Superior Court's adjudication of this ineffectiveness claim was not an unreasonable application of *Strickland*, nor did it involve an

⁹ Life in being testimony is relevant to the first element of murder, *i.e.*, that a human being was unlawfully killed. (Super Ct. Op. at 16 n.4.); *Commonwealth v. Jordon*, 65 A.3d 318, 331-32 (Pa. 2013).

unreasonable determination of the facts. The Court has reviewed the record and agrees with the Superior Court that there is not a reasonable probability that the outcome of the trial would have been different based on the substantial evidence presented at trial demonstrating Petitioner intended to murder Purnell. As previously noted, the evidence demonstrated that Petitioner had a five year relationship with Purnell's girlfriend, Floyd; on July 21, 2005, two weeks after Petitioner became aware of Floyd and Purnell's relationship, Purnell was shot and killed; and the guns used in the shooting of Purnell were used in two other shootings where Petitioner was identified as the shooter. (N.T. 12/11/07, at 9-11, 19, 21-22, 25-28, 172-87; N.T. 12/10/07, at 66-67; N.T. 12/7/07, at 83-84). Accordingly, this claim is meritless, and the Court recommends denying Petitioner habeas relief on this claim.

4. Ineffective assistance of trial counsel for failing to object to the prosecution's prejudicial closing statements (Claim Four).

Petitioner's fourth ineffectiveness claim is that trial counsel failed to object to the Commonwealth's prejudicial closing argument. (Pet'r's Mem. of Law 33-34).

During closing arguments, the prosecutor stated:

In one of the old Eastwood movies when he was talking about life and death, he said something to the effect, When you kill someone, It takes everything he has and everything he will have.

For whatever your selfish reasons were, Mr. Bentley, did Mr. Purnell deserve to die just because he was seeing your ex-fiancée? And by the way, when you were putting together your story, maybe you were leaning a little too heavy on love and not truth because Aisha gave you up. Aisha gave you up.

So as I close, when you point a gun, not one gun but two, waistband, bracing yourself, ten shots from the ten that Aisha said is yours, two more shots from the .32 that Mr. Fitzsimmons said is yours, he had seen you with it before

It was you. It was you. You pulled the trigger. You chose your target. And you didn't face him like a man. You snuck him. And back in the old game days, we would say you slid him, sneaked up, kind of like the midnight rambling, emptied one gun, went to the second. . . .

You went to get him, but now we got you. . . . They sent the first team this time, sir, guilty of murder in the first degree because that's what you did. It was beyond assassination. It was beyond torment. . . . Twelve shots, dead body, all over. Lunchtime. Let's eat.

(N.T. 12/12/2007 at 97-99). Petitioner asserts that these comments "went beyond simple oratorical flair" and "were made for the sole purpose of making the jury incapable of fairly weighing the evidence." (Pet'r's Mem. of Law 34). Petitioner acknowledges that counsel objected to the prosecutor's one comment that this crime was "beyond assassination and beyond torment," but contends that counsel should have objected to more of the closing argument. (*Id.*).

The Superior Court concluded that the underlying prosecutorial misconduct claim had no merit, and therefore Petitioner was not entitled to relief on this ineffectiveness claim. (Pa. Super. Ct. Mar. 14, 2014 Op., at 20). The Superior Court determined that the prosecutor's comments did not "prejudice the jury such that Petitioner's conviction was based upon bias or hatred rather than the evidence." (*Id.*). The Superior Court found that Petitioner's claim consisted of simply "bald allegations of prejudice, pleading no specific facts which . . . would entitle him to relief." (*Id.*). Additionally, the Superior Court noted that the allegedly inflammatory comments consisted of approximately one of the nineteen-page transcript of the prosecutor's closing argument, the trial court instructed the jury that the arguments of counsel are not evidence, and the comments were clearly supported by the evidence and reasonable inferences therefrom. (*Id.*).

Prosecutorial misconduct warrants federal habeas relief if the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In order to constitute a due process violation, “the prosecutorial misconduct must be ‘of sufficient significance to result in the denial of the defendant’s right to a trial.’” *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 96 (1976)). It is not sufficient to prove that the prosecutor’s remarks were “undesirable or inappropriate,” or even “universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The appropriate inquiry is whether such conduct was sufficiently prejudicial as to violate defendant’s due process rights. *Scott v. Sobrina*, CIV.A. 09-1081, 2010 WL 8128749, at *25 (E.D. Pa. Jan. 29, 2010) (citing *Walker*, 280 Fed. App’x at 216).

Prosecutorial misconduct is judged by measuring “the fairness of the trial, not the culpability of the prosecutor.” See *Marshall v. Hendricks*, 307 F.3d 36, 63-64 (3d Cir. 2002). To evaluate whether a prosecutor’s misconduct rose to the level of a constitutional violation, a federal habeas court must examine the prosecutor’s conduct in the context of the whole trial. *Greer*, 483 U.S. at 765-66. The allegedly objectionable remarks should be evaluated by considering their “scope,” their “relation to the context of the trial,” the “ameliorative effect of any curative instructions,” and the “evidence” presented in the case. *United States v. Rivas*, 493 F.3d 131, 140 (3d Cir. 2007). Where the evidence against the defendant is strong and the trial court instructed the jurors that the arguments of counsel were not evidence, it is less likely the prosecutor’s misconduct influenced the jury’s decision to convict the defendant. *Darden*, 477 U.S. at 182; *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001) (“[T]he reviewing court [must] weigh the prosecutor’s conduct, the effect of the curative instructions and the strength of the evidence.”).

The Third Circuit has determined that the Pennsylvania state test and federal test for prosecutorial misconduct are “substantively identical.” *Reid v. Beard*, F. App’x 156, 160 n.10.

Because the Superior Court did not apply law contrary to clearly established Supreme Court precedent, Petitioner is entitled to habeas relief only if he can demonstrate the state courts' decision was an unreasonable application of *Donnelly* and its progeny, or involved an unreasonable determination of the facts.

The Superior Court's decision was not an unreasonable application of *Donnelly* and its progeny, nor did it involve an unreasonable determination of the facts. In context of the entire trial, the allegedly objectionable comments did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; *see Darden*, 477 U.S. at 182; *Moore*, 255 F.3d at 107. The comments were based on the strong evidence against Petitioner — Petitioner's relationship with Purnell's girlfriend, Floyd; Petitioner learned of Floyd and Purnell's relationship on July 6, 2005; approximately two weeks later, Purnell was shot and killed in his car after leaving Floyd's house; and the ballistic evidence connected the guns used in the shooting of Purnell to two prior shootings in which the Petitioner was identified as the gunman. (N.T. 12/11/07, at 9-11, 19, 21-22, 25-28, 172-87; N.T. 12/10/07, at 66-67; N.T. 12/7/07, at 83-84). The allegedly objectionable comments accounted for a little over one page out of nineteen pages of the prosecutor's closing argument and over 800 pages of trial transcript. *See United States v. Berrios*, 676 F.3d 118, 135 (3d Cir. 2012) (finding minimal prejudice where the objectionable comment was brief). Additionally, after closing arguments, the trial court instructed the jury that "statements made by counsel are not evidence and are not binding on you[, the jury,]" N.T. 12/12/07, at 114, and a jury is presumed to follow a court's instruction, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Thus, the Superior Court reasonably concluded that the underlying claim of prosecutorial misconduct had no merit. Moreover, because "counsel

cannot be deemed ineffective for failing to raise a meritless claim,” the Superior Court’s determination that the ineffective assistance of counsel claim failed was not an unreasonable application of *Strickland*, nor based on an unreasonable determination of the facts. *See Werts*, 228 F.3d at 203. Accordingly, this claim is meritless, and the Court recommends denying Petitioner habeas relief on this claim.

IV. CONCLUSION

As fully explained herein, I conclude that Petitioner’s petition for writ of habeas corpus should be denied because the claims are meritless.

Therefore, I make the following:

RECOMMENDATION

AND NOW this 19th day of October, 2015, it is respectfully RECOMMENDED that the petition for writ of habeas corpus be DENIED with prejudice, without the issuance of a certificate of appealability.

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

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE

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