APPENDIX-A-1

Denial of petition For Re-hearing

BLD-021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-1926**

LAMAR HAYMES, Appellant

VS.

ATTORNEY GENERAL PENNSYLVANIA; ET AL.

(E.D. Pa. Civ. No. 2-21-cv-01022)

Present: SHWARTZ, MATEY, and CHUNG, Circuit Judges

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

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability ("COA") is denied. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has not shown that jurists of reason could debate the District Court's denial of his claims as procedurally defaulted. Contrary to appellant's sole argument in his objections (ECF No. 49) and his motion for a COA on appeal, the District Court did not fault him for failing to raise his claims in his first PCRA petition. Instead, the District Court held that he procedurally defaulted his claims by failing (as the Pennsylvania Superior Court held) to raise them in his second PCRA petition. Appellant has not acknowledged that ruling, let alone provided any basis to debate it.

But even if jurists of reason could debate the issue of procedural default, jurists of reason would not debate the validity of any of appellant's five claims. Having carefully reviewed both the District Court and the state court record, we conclude that jurists of reason could not debate whether appellant was entitled to relief on the merits. We reach that conclusion as to some of the claims, and in part, for the reasons given by the PCRA

court. We otherwise conclude, in light of the evidence presented at trial and the record as a whole, that jurists of reason would not debate whether the prosecutor violated appellant's due process rights, whether appellant's trial or appellate counsel performed deficiently, whether petitioner suffered any prejudice, or whether appellant made a colorable showing of innocence for any purpose.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: November 6, 2024
JK/cc: Lamar Haymes
All Counsel of Record

A True Copy:

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

Ex. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1926

LAMAR HAYMES, Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA; ET AL.

(E.D. Pa. Civ. No. 2:21-cv-01022)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES and CHUNG, Circuit Judges

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

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: January 8, 2025
JK/cc: Lamar Haymes
All Counsel of Record

APPENDIX-A-2

THIRD CIRCUIT DENIAL OF C.O.A.

APPENDIX-A-3

Denial of Writ of Habeas Corpus

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

LAMAR HAYMES, Petitioner,	:	
v.	:	Civil No. 2:21-cv-1022-JMG
MICHAEL GOURLEY, *et al.*, Respondents.	:	

ORDER

AND NOW, this 19th day of April, 2024, after considering (1) the *pro se* Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 filed by Petitioner Lamar Haymes ("Haymes") (ECF No. 1), (2) Haymes' separately filed exhibits in support of his Petition (ECF No. 4), (3) the state court record, (4) Haymes' Memorandum of Law in Support of his Petition for Writ of Habeas Corpus (ECF No. 29), (5) Respondents' Response to Petition for Writ of Habeas Corpus (ECF No. 37), (6) United States Magistrate Judge Lynne A. Sitarski's Report and Recommendation (ECF No. 46), and (7) Haymes' Objections to the Report and Recommendation (ECF No. 49), **IT IS HEREBY ORDERED AS FOLLOWS:**

1. The Clerk of Court is **DIRECTED** to **AMEND** the caption in this case to **REMOVE** Mark Garman as a Respondent and **ADD** Michael Gourley, Superintendent of SCI-Camp Hill, as a Respondent;[1]

2. The Clerk of Court shall **SERVE** a copy of this Order upon Mr. Gourley at the following address: SCI-Camp Hill, P.O. Box 8837, 2500 Lisburn Road, Camp Hill, PA 17001;

3. Haymes' Objections to the Report and Recommendation (ECF No. 49) are **OVERRULED**;[2]

4. Judge Sitarski's Report and Recommendation (ECF No. 46) is **APPROVED** and **ADOPTED**;

5. Haymes' Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**;

6. There is no cause for the issuance of a certificate of appealability;[3] and

7. The Clerk of Court shall **MARK** this action as **CLOSED**.

BY THE COURT:

/s/ John M. Gallagher
JOHN M. GALLAGHER
United States District Court Judge

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[1] As Judge Sitarski indicates in the Order attached to her Report and Recommendation, Haymes named Mark Garman as a Respondent in his Petition because Haymes was incarcerated at SCI-Rockview at the time of its filing, and Mr. Garman was the Superintendent of that Pennsylvania state correctional institution. *See* ECF No. 46-1 n.1; *see also* 28 U.S.C. 2243 ("The writ, or order to show cause shall be directed ***to the person having custody of the person detained.***" (emphasis added)). As the Court explains below, Haymes is now incarcerated at SCI-Camp Hill, and Michael Gourley is the Superintendent of that correctional facility. Accordingly, the caption is amended to included Mr. Gourley as a Respondent.

[2] The Court must first address the timeliness of Haymes' Objections. Ordinarily, parties have 14 days to file objections to a report and recommendation. *See* 28 U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court."); E.D. Pa. Loc. Civ. R. 72.1IV(b) ("Any party may object to a magistrate judge's proposed findings, recommendations or report under 28 U.S.C. 636(b)(1)(B), and subsections 1(c) and (d) of this Rule within fourteen (14) days after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on the magistrate judge and all parties, 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."). In this case, because the Clerk of Court attempted to serve the Report and Recommendation on Haymes by mail, *see* Third Unnumbered Docket Entry Between ECF Nos. 46 and 47, Haymes would have been entitled to an additional three days to file objections. *See* Fed. R. Civ. P. 6(d) ("When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail) . . . 3 days are added after the period would otherwise expire under Rule 6(a)."); *Kabacinski v. Bostrom Seating, Inc.*, 98 F. App'x 78, 82 (3d Cir. 2004) ("We have recognized that Rule 6[(d)] 'adds a rebuttable presumption of three

days' mailing time to be added to a prescribed period whenever a statutory period begins on receipt or service of notice.'" (quoting *Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 108 n.5 (3d Cir. 2003))). This additional period would have given Haymes until November 26, 2023, to file objections; however, since this date was a Sunday, Haymes would have had until Monday, November 27, 2023, to file objections. *See* Fed. R. Civ. P. 6(a)(1)(C) ("When the period [for a party to act] is stated in days or a longer unit of time . . . include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."). Haymes' Objections were not docketed by the Clerk of Court until January 4, 2024, which was more than a month after they were due. *See* ECF No. 49. Nevertheless, it appears that the Objections are timely due to how Haymes first received notice of the Report and Recommendation.

In this regard, the Clerk of Court had to resend the Report and Recommendation to Haymes at his current mailing address on December 12, 2023, because Haymes had failed to notify the Court that he was transferred from SCI-Rockview to SCI-Camp Hill. *See* ECF No. 48 (showing envelope containing Report and Recommendation was returned to the Clerk of Court because it was addressed to Haymes at SCI-Rockview and he was no longer incarcerated at that location); E.D. Pa. Loc. Civ. R. 5.1(b) ("Any party who appears *pro se* shall file with the party's appearance or with the party's initial pleading, a physical address and an email address when available where notices and papers can be served. The party shall notify the Clerk within fourteen (14) days of any change of address."); Notice of Guidelines for Representing Yourself (Appearing "Pro Se") in Federal Court at 1, ECF No. 2 ("The Court will send orders or notices filed in your case to you at the address you provided to the Court. It is important to keep the Court and opposing counsel, if any, advised of your current address. Failure to do so could result in Court orders or other information not being timely delivered, which may result in your case being dismissed for failure to prosecute or otherwise affect your legal rights. The Court's local rules require you to file a notice of change of address with the Clerk of Court within fourteen (14) days of an address change." (citing E.D. Pa. Loc. Civ. R. 5.1(b))). This mailing date would have given Haymes until December 29, 2023, to file objections. Haynes has certified that he submitted the Objections for service on December 28, 2023, *see* ECF No. 49 at ECF pp. 6–8. Pursuant to the federal prisoner mailbox rule, the Court uses December 28, 2023, as the filing date. *Houston v. Lack*, 487 U.S. 266, 275–76 (1988) (providing that *pro se* petitioner's petition is deemed filed "at the time petitioner delivered it to the prison authorities for forwarding to the court clerk"). Therefore, Haymes' Objections are timely filed.

Turning now to the review of those Objections, this Court conducts a de novo review and determination of the portions of the report and recommendation by the magistrate judge to which Haymes has objected. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); see also E.D. Pa. Loc. R. Civ. P. 72.1(IV)(b) (providing requirements for filing objections to magistrate judge's proposed findings, recommendations or report). As best the Court can discern, Haymes objects only to Judge Sitarski's reference to him having not raised ineffective assistance of counsel claims as part of his first Post Conviction Relief Act ("PCRA") petition, which ultimately resulted in his state direct appellate rights being reinstated *nunc pro tunc*. *See* Objs. to Magistrate's R. & R. at ECF p. 2, ECF No. 49. He appears to object by explaining that he did not have to raise other ineffective assistance of counsel claims as part of his first PCRA petition. *See id.*

This objection is meritless. Judge Sitarski was merely stating, factually, that Haymes did not raise any of the ineffective assistance of counsel claims he included in his Petition on direct appeal or in his first PCRA petition. *See* R. & R. at 7, ECF No. 46. While Haymes might have had a legitimate reason for not including such claims in his first PCRA petition, this reason is inconsequential because, more importantly, he never included such claims in his second PCRA petition, which he filed after exhausting his direct appeal rights. *See id.* (explaining that Haymes failed to include his ineffective assistance of counsel claims in his second PCRA petition); *Commonwealth v. Haymes*, No. 1325 EDA 2019, 2020 WL 3960353, at *4 (Pa. Super. Ct. July 13, 2020) (concluding Haymes waived ineffective assistance of counsel claims by failing to seek permission from PCRA court to file amended second PCRA petition to include such claims when original second PCRA petition lacked those claims).

[3] A court should only issue a certificate of appealability ("COA") if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If, however, the district court

> denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. Here, Haymes has failed to meet his burden to show that a certificate of appealability should issue in this case.

APPENDIX-A-4

Magistrate Report & Recommendation

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

LAMAR HAYMES,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 21-cv-1022**
	:	
MICHAEL GOURLEY,[1] et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **November 9, 2023**

Presently before the Court is a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, by Lamar Haymes ("Petitioner"), an individual currently incarcerated at the State Correctional Institution (SCI) – Camp Hill in Cumberland County, 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. FACTUAL AND PROCEDURAL BACKGROUND[2]

In its July 13, 2020 opinion affirming the denial of Petitioner's petition under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. § 9541 *et seq.*, the Superior

[1] At the time Petitioner filed his petition, he was incarcerated at SCI Rockview and therefore named its superintendent, Mark Garman, as a respondent. However, according to the Pennsylvania Department of Corrections Inmate Locator, he has since been transferred to SCI Camp Hill. Accordingly, I have substituted Michael Gourley, the Superintendent of that facility, as a respondent in this case. *See* Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

[2] The Court has received the State Court Record (SCR) in this matter, but the documents contained therein have not been numbered.

> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). Fair presentation requires more than a "mere similarity" between the claim presented in the state court and the claim raised in federal court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). 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).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683.

The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman*, 501 U.S. at 730).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557–59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40. A state rule is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802, 1804 (2016) (*per curiam*) (citation omitted); *see also Kellam v. Kerestes*, No. 13-6392, 2015 WL 2399302, at *4 (E.D. Pa. May 18, 2015) (citations omitted). In the Third Circuit, "[a] state rule is adequate only if it is 'consistently and regularly applied.'" *Doctor v. Walters*, 96 F.3d 675, 684 (3d Cir. 1996) (quoting

properly include his claims in his second PCRA petition and was thereby precluded from raising those issues on appeal, stating that "[i]t is well settled that where a petitioner fails to include an issue in his original PCRA petition or any court-approved amended PCRA petition, the petitioner waives the issue on appeal." *Id.* (citing *Commonwealth v. Ousley*, 21 A.3d 1238, 1242 (Pa. Super. 2011)). The Superior Court "emphasize[d]" that:

> [t]he purpose of a Rule 907 pre-dismissal notice is "to allow a petitioner an opportunity to seek leave to amend his petition and correct any material defects, the ultimate goal being to permit merits review by the PCRA court of potentially arguable claims." [*Commonwealth v. Rykard*, 55 A.3d 1177, 1189 (Pa. Super. 2012), *appeal denied*, 64 A.3d 631 (Pa. 2013)]. The response to the Rule 907 notice "is an opportunity for a petitioner and/or his counsel to object to the dismissal and alert the PCRA court of a perceived error, permitting the court to discern the potential for amendment." *Id.* The response is also the opportunity for the petitioner to object to counsel's effectiveness at the PCRA level. *Id.*

Id. at *4.

Petitioner had the opportunity to properly state his PCRA claims by requesting permission from the PCRA court to file an amended petition. *See Rykard*, 55 A.3d at 1186-1189. As he did not do so, the Superior Court held that Petitioner had waived those ineffectiveness claims in his PCRA petition and on appeal. *Haymes*, 2020 WL 3960353, at *3. Pennsylvania Rule of Appellate Procedure 302(a) ("issues not raised in the lower court are waived and cannot be raised for the first time on appeal") is recognized in the Third Circuit as an independent and adequate state rule. *See Werts v. Vaughn*, 228 F.3d 178, 194 (3d Cir. 2000). The Third Circuit has similarly recognized that failure to raise a claim in PCRA court under Pa. R. Crim. P. 902(B) is also an adequate and independent state procedural rule that is consistently applied. *Suny v. Pennsylvania*, 687 F. App'x 170, 174-75 (3d Cir. 2017) (Superior Court's dismissal of claim due to petitioner's

failure to raise it in PCRA court was based on adequate and independent state ground); *see also Hall v. Beard*, 55 F. Supp. 3d 618, 641 (E.D. Pa. 2014) ("claims not raised on PCRA review, but raised for the first time to the Supreme Court of Pennsylvania on PCRA appeal, which were held to be waived, are procedurally defaulted and not subject to federal habeas review"). Since none of Petitioner's claims were raised in his PCRA petition and Petitioner is time-barred from returning to PCRA court to file them, all claims are procedurally defaulted. *See Suny*, 687 F. App'x at 175 ("[F]ederal courts generally will not consider whether the state court properly applied its own default rule to the petitioner's facts.") (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

As the claims in Petitioner's original habeas petition are procedurally defaulted, the Court may not review the merits of those claims unless Petitioner has established cause and prejudice, or a fundamental miscarriage of justice to excuse the procedural default. *Coleman*, 501 U.S. at 750. To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded efforts to comply with some state procedural rule, such as where the default is occasioned by the failure of state post-conviction counsel to raise a trial-counsel ineffectiveness claim. *See Martinez v. Ryan*, 566 U.S. 1, 12–13 (2012); *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995) (describing a "quintessential miscarriage of justice" claim as one that a petitioner is actually innocent of the crime). The United States Supreme Court has held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct 1924, 1928 (2013). To show actual innocence, a petitioner must present "*new reliable evidence*—whether it be

exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," and "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995) (emphasis added). The *Schlup* standard is "demanding" and seldom met. *House v. Bell*, 547 U.S. 518, 538 (2006) (satisfying the high *Schlup* standard by providing, *inter alia*, new DNA evidence, proof of laboratory blood spill errors, and testimony from two witnesses that someone else confessed to the crime).

Neither Petitioner's original habeas petition nor his Memorandum plead facts demonstrating good cause and prejudice, nor does he identify new evidence that could evince actual innocence. Even affording Haymes "the liberal construction afforded to all *pro se* litigants" in habeas proceedings, *Suny*, 687 F. App'x 174 (citing *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013)), neither his habeas petition nor his Memorandum of Law plead "some objective factor external to the defense" that impeded his efforts to correctly file his PCRA claims in state court. This Court agrees with the Commonwealth's assertion that while Petitioner's Memorandum of Law mentions his PCRA counsel at numerous junctures, his impetus for doing so is unclear; he does not argue that PCRA counsel's ineffectiveness should overcome procedural default of his claims under *Martinez* but rather appears to make a new, independent claim that PCRA counsel was ineffective.[4] Petitioner does not demonstrate any other potential cause that could overcome the default.

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[4] To the extent that Petitioner raises a stand-alone claim for PCRA counsel ineffectiveness, it would not be cognizable on federal habeas review. *See Martel v. Clair*, 565 U.S. 648, 662 n.3, 132 S.Ct. 1276, 182 L.Ed.2d 135 (2012) ("[M]ost naturally read, § 2254(i) prohibits a court from granting substantive habeas relief on the basis of a lawyer's ineffectiveness in post-conviction proceedings...."); *Burton v. Glunt*, No. 07-1359, 2013 WL 6500621, at *46 (E.D. Pa. Dec. 11, 2013) (claim of PCRA counsel's ineffectiveness not cognizable under 28 U.S.C. § 2254(i)).

Petitioner does not provide any argument for or evidence of actual innocence as grounds to overcome procedural default, let alone evidence that could be exculpatory under the "demanding" *Schlup* standard. Petitioner's lengthy Memorandum of Law largely recites and recharacterizes existing evidence. Thus, Petitioner has not demonstrated actual innocence, and his claims remain procedurally defaulted. This Court respectfully recommends that the claims in his original habeas petition be denied.

B. Memorandum of Law

Petitioner's Memorandum of Law provides further discussion on his habeas claims and, giving him the benefit of the doubt in light of his *pro se* status, arguably asserts additional free-standing claims of ineffective assistance of PCRA counsel and actual innocence. (Memo. of Law, ECF No. 29, at 22, 31, 40, 42 (complaining of PCRA counsel's filing of a *Finley* letter rather than an amended petition); *id.* at 43 (claiming, albeit without specifics, "that he has presented several forms of exculpatory evidence throughout his appeal proceeding")). However, such claims are non-cognizable on habeas review.[5] *See Martel*, 565 U.S. at 662 n.3; *Rainey v. Superintendent Coal Township SCI*, No. 16–3184, 2016 WL 9410906, at *1 (3d Cir. Oct. 27, 2016) (stating "assertion of actual innocence is not cognizable as a freestanding claim that would entitle him to habeas relief"). Accordingly, this Court respectfully recommends that any claims asserted in Petitioner's Memorandum of Law be denied as well.

[5] Petitioner also fails to identify "reliable" evidence that would support his assertion of actual innocence, instead only vaguely citing unspecified "forms" of evidence. *See Schlup*, 513 U.S. at 324-25 (noting that the petition may present "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence").

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the petition for writ of habeas corpus be DENIED, without the issuance of a certificate of appealability.

Therefore, I make the following:

RECOMMENDATION

AND NOW this 9TH day of November, 2023, I respectfully **RECOMMEND** that the petition for writ of habeas corpus be DENIED, 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

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

LAMAR HAYMES, **Petitioner,**	:	**CIVIL ACTION**
v.	:	**NO. 21-cv-1022**
MICHAEL GOURLEY,[1] et al., **Respondents.**	:	

ORDER

AND NOW, this day of , 2023, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
EDWARD G. SMITH, J.

[1] At the time Petitioner filed his petition, he was incarcerated at SCI Rockview and therefore named its superintendent, Mark Garman, as a respondent. However, according to the Pennsylvania Department of Corrections Inmate Locator, he has since been transferred to SCI Camp Hill. Accordingly, I have substituted Michael Gourley, the Superintendent of that facility, as a respondent in this case. *See* Rules Governing Section 2254 Cases, Rule 2 (requiring the current custodian to be named as respondent).

APPENDIX - A-5

SUPERIOR COURT

MEMORANDUM

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LAMAR HAYMES,	:	No. 1325 EDA 2019
Appellant	:	

Appeal from the PCRA Order Entered April 24, 2019,
in the Court of Common Pleas of Delaware County
Criminal Division at Nos. CP-23-CR-0000051-2005,
CP-23-CR-0000865-2005

BEFORE: BOWES, J., KING, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JULY 13, 2020**

Lamar Haymes appeals ***pro se*** from the April 24, 2019 order entered in the Court of Common Pleas of Delaware County that dismissed, without a hearing, his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The record reflects that on January 30, 2007, a jury convicted appellant of first-degree murder, rape, kidnapping, and abuse of a corpse at No. CP-23-CR-0000051-2005. These convictions arose from the murder, rape, and dismemberment of 15-year-old Deanna Wright-McIntosh. Appellant committed these crimes with his cohort, Anwar Gettys, who was tried and convicted separately. In the same proceeding, the jury also convicted appellant of simple assault, aggravated assault, and false imprisonment at

No. CP-23-CR0000865-2005. These convictions arose from appellant's violent beating of a prostitute. On the same day that the jury convicted appellant of these crimes, the trial court sentenced appellant to life imprisonment without parole on the first-degree murder conviction plus a consecutive aggregate sentence of 285 to 570 months of imprisonment on the remaining convictions. This court affirmed appellant's judgment of sentence on November 24, 2008. ***Commonwealth v. Haymes***, No. 566 EDA 2007, unpublished memorandum (Pa.Super. filed November 24, 2008). Appellant did not seek discretionary review with our supreme court.

On November 6, 2009, appellant filed a timely ***pro se*** PCRA petition. The PCRA court appointed counsel, but appointed counsel never filed an amended petition. The PCRA court then dismissed appellant's ***pro se*** petition. On appeal, this court noted the "deplorable" state of the record and ultimately vacated the PCRA court's order that dismissed appellant's petition and directed it to appoint counsel to file an amended petition. ***Commonwealth v. Haymes***, No. 2136 EDA 2012, unpublished memorandum (Pa.Super. filed October 29, 2013). Following appointment of counsel and the grant of several extensions of time to file an amended PCRA petition, appointed counsel filed the amended petition on June 26, 2015. On July 15, 2015, the PCRA court reinstated appellant's right to seek discretionary direct review by our supreme court. On December 11, 2015, our supreme court denied appellant's petition

for allowance of appeal. ***Commonwealth v. Haymes***, 130 A.3d 1287 (Pa. 2015). Appellant did not seek review by the United States Supreme Court.

On November 7, 2016, appellant filed a ***pro se*** PCRA petition, and the PCRA court then appointed counsel. Following numerous extensions of time to file an amended petition, appointed counsel ultimately filed a motion for leave to withdraw and a ***Turner/Finley***[1] letter on January 31, 2019. On March 28, 2019, the PCRA court filed a notice of intent to dismiss pursuant to Pa.R.Crim.P. 907. Appellant filed ***pro se*** "objections to notice of intent to dismiss [PCRA] petition without hearing"[2] on April 16, 2019. On April 24, 2019, the PCRA court granted counsel's request to withdraw and dismissed the PCRA petition. Appellant filed a timely ***pro se*** notice of appeal.[3] The PCRA court then ordered appellant to file a concise statement of errors complained

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[1] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (***en banc***).

[2] Full capitalization omitted.

[3] We note that because appellant filed one ***pro se*** notice of appeal that listed two trial court docket numbers, this court issued a rule to show cause why the appeal should not be quashed pursuant to ***Commonwealth v. Walker***, 185 A.3d 969 (Pa. 2018). Appellant filed a timely response. This court then discharged the show-cause order and referred the issue to this panel. Because the record reflects that the April 24, 2019 order that dismissed appellant's PCRA petition lists two docket numbers and because the order states that appellant "has a right to file an appeal from this Order by filing a Notice of Appeal to the Superior Court within thirty (30) days of the date of this order is docketed," we decline to quash. ***See Commonwealth v. Stansbury***, 219 A.3d 157 (Pa.Super. 2019) (declining to quash pursuant to ***Walker*** where record reflects a breakdown in court operations).

of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied, and the PCRA court filed its Rule 1925(a) opinion.

Appellant raises the following issues:

> I. Whether the prosecutor John F.X. Reilly violated the appellant[']s Constitutional Rights to the Due Process Clause, Sixth and Fourteenth Amendment by securing a conviction in Com v. Gettys[] (Case No. 4425-2005) by arguing to the jurors that Gettys[] was the one who murdered the victim Deanna Wright Macintosh[?] The prosecution then changed his theory in Com v. Haymes (Case No. 051-2005) in order to gain a second conviction for the same murder, by claiming that Haymes and Gettys[] both murdered the victim. Were these acts a violation of the Due Process Clause guaranteed by the Fourteenth Amendment. Also was this judicial estoppel.
>
> II. Whether the trial court committed an error of law / abuse by violating the appellant[']s Fourteenth Amendment Right to Fundamental Fairness and Equal Protection of the Law, and Sixth Admendment [sic] Right to a Fair Trial, by denying the defense the opportunity to introduce as evidence the out-of-court statements of Anwaar Gettys[] and Lauren Lenton[?]
>
> III. Whether trial counsel Mark P. Much Esq. violated the appellant[']s Constitutional Righ[ts] guaranteed by the Sixth Amendment, Fourteenth Amendment and Pa. Const. [A]rt. 1 § 9, due to the trial attorney's failure / refusal to interview Dayon Pinder, introduce Dayon Pinder's letters and statements to the trial judge for review, call Dayon Pinder as a witness to testify on behalf of the defense[?] Trial counsel's ineffectiveness denied the appellant the opportunity to compel witnesses on his behalf, require the prosecution[']s case

to survive the crucible of meaningful adversarial testing, and present evidence that would aide [sic] and assist with the presentation of the appellant[']s defense.

IV. Whether trial counsel Mark P. Much Esq. violated the appellant[']s Fourteenth Amendment Right to Fundamental Fairness and Equal Protection of the Law, Sixth Amendment Right to a Fair Trial and Effective Assistance of counsel by refusing to obtain the in-coming and out-going home and cell phone records of Zaron Holbrook and Anwaar Gettys[] which denied the appellant the opportunity to present exculpatory evidence, and impeachment evidence in order to require the prosecution[']s case to survive the crucible of meaningful adversarial testing[?]

V. Whether appellate counsel Patrick J. Connors violated the appellant[']s Constitutional Rights guaranteed by the Sixth and Fourteenth Amendment[s] and Due Process Clause, by failing to seek review of appeable [sic] issues that were preserved by trial counsel and apart [sic] of the appellant[']s records, (1) prosecutor changing versions of what he argued occurred in separate trials (Case No. 4425-2005 Com. v. Gettys[] and Case No. 51-2005 Com. v. Haymes) in order to gain convictio[ns] against both individuals. (2) The trial court abused it's [sic] discretion when denying the defense the opportunity to present Anwaar Gettys'[s] and Lauren Lenton's out[-]of[-]court statements to the jurors in order to show their course of action. These issues were not only obvious, they were stronger than the single issue that appellate counsel raised on direct appeal.

VI. Whether trial counsel violated the appellant[']s Constitutional Rights guarantted [sic] by the Sixth Amendment, Fourteenth Amendment, Due Process Clause and Pa. Const. [A]rt. 1 § 9

> by the trial attorney failing to illict [sic] testimony from the witness Anwar Robinson, trial counsel's deficient performance and ineffective assistance of counsel prejudiced the defense[?]

Appellant's brief at 9-11 (emphasis and extraneous capitalization omitted).

"In reviewing the denial of PCRA relief, we examine whether the PCRA court's determinations are supported by the record and are free of legal error." ***Commonwealth v. Watkins***, 108 A.3d 692, 701 (Pa. 2014) (citation omitted). We defer to the PCRA court's factual findings and credibility determinations supported by the record. ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa.Super. 2014) (***en banc***). In contrast, we review the PCRA court's legal conclusions ***de novo***. ***Id.***

Appellant first claims that the Commonwealth engaged in prosecutorial misconduct by arguing to the jury in Gettys's prosecution that Gettys murdered Deanna Wright-McIntosh and then arguing to the jury in appellant's prosecution that appellant and Gettys murdered the girl. Under the PCRA, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S.A. § 9544(b). Here, because appellant could have raised this issue at trial, during unitary review, or on direct appeal, appellant waives the issue on appeal. ***Id.***; ***see also Commonwealth v. Keaton***, 45 A.3d 1050, 1060 (Pa. 2012).

Appellant next claims that the trial court abused its discretion by denying his request to introduce certain out-of-court statements at trial. Because appellant could have raised this issue at trial, during unitary review, or on direct appeal, appellant waives the issue on appeal. ***See*** 42 Pa.C.S.A. § 9455(b); ***see also Keaton***, 45 A.3d at 1060.

Appellant's remaining claims allege ineffective assistance of trial and direct appeal counsel. A review of appellant's original PCRA petition, however, reveals that appellant did not include any of these issues in that petition. The petition contains one bald allegation of ineffective assistance of counsel, followed by 37 typed pages of facts in support of alleged errors upon which the PCRA petition is based that merely rehash trial testimony and attack witness credibility. (PCRA petition, 11/7/16 at 3, ¶ 5(C) and attachments.) It is in appellant's Rule 907 objections that appellant improperly raises his ineffectiveness claims.

It is well settled that where a petitioner fails to include an issue in his original PCRA petition or any court-approved amended PCRA petition, the petitioner waives the issue on appeal. ***See Commonwealth v. Ousley***, 21 A.3d 1238, 1242 (Pa.Super. 2011) (reiterating that "issues not raised in a PCRA petition cannot be considered on appeal" (citation omitted)), ***appeal denied***, 30 A.3d 487 (Pa. 2011). A petitioner may, however, raise claims not presented in his original petition if he either (1) requests, and is granted, permission from the PCRA court to file an amended petition, or (2) raises a

claim asserting PCRA counsel's ineffectiveness in response to the PCRA court's Rule 907 notice of intent to dismiss. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1186-1189 (Pa.Super. 2012), ***appeal denied***, 64 A.3d 631 (Pa. 2013). The PCRA court is under no obligation to address new issues where the petitioner fails to seek leave to amend his petition after counsel has filed a ***Turner/Finley*** no-merit letter. ***Commonwealth v. Rigg***, 84 A.3d 1080, 1085 (Pa. Super. 2014).

We emphasize that

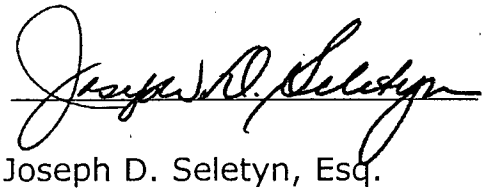
> [t]he purpose of a Rule 907 pre-dismissal notice is "to allow a petitioner an opportunity to seek leave to amend his petition and correct any material defects, the ultimate goal being to permit merits review by the PCRA court of potentially arguable claims." [***Rykard***, 55 A.3d at 1189]. The response to the Rule 907 notice "is an opportunity for a petitioner and/or his counsel to object to the dismissal and alert the PCRA court of a perceived error, permitting the court to discern the potential for amendment." ***Id.*** The response is also the opportunity for the petitioner to object to counsel's effectiveness at the PCRA level. ***Id.***

Commonwealth v. Smith, 121 A.3d 1049, 1054 (Pa.Super. 2015), ***appeal denied***, 136 A.3d 981 (Pa. 2016).

Here, appellant did not seek permission from the PCRA court to file an amended petition that included any of his ineffectiveness claims. Having failed to do so, appellant waives his ineffectiveness claims on appeal.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/13/20

APPENDIX-A-6

LOWER COURT OPINION

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	**No. 51 of 2005 and 865 of 2005**
	)	
vs.	)	
	)	**Superior Court No. 1325 EDA 2019**
LAMAR HAYMES	)	
	)	
	)	

Jessica Devers, Coordinator for the District Attorney's Office
Stephen D. Molineux, Esq., 227 MacDade Blvd., Collingdale, PA 19023
Lamar Haymes, #HH-9984, SCI Rockview, P.O. Box A, Bellefonte, PA 16823

OPINION

Statement of Facts

In the morning of December 2, 2004, 15-year old Deanna Wright-McIntosh ("Deanna") had an argument with her mother. Later that day, Deanna called her mother and explained that she would not return home that evening. [N.T. 6/22/07, pp. 70-75]

Deanna and her mother met with her counselor at school the next morning. That evening, she failed to come home. The following day, Deanna's mother reported to the police that she was missing. [*Id.* at 78-81, 84-86]

Deanna worked part-time at a pizza shop frequented by Defendant, Lamar Haymes. Deanna's mother disapproved of Defendant and instructed her daughter not to bring him home. [*Id.* at 75-78]

The Evening of December 3, 2004

Deanna was last seen alive on the evening of December 3, 2004. Her last cell phone call was to Defendant at 9:47 p.m. that evening. [N.T. 1/24/07, pp. 55, 121]

On December 3, 2004, Ralph Kyser drove to the home of Anwar Gettys at 40 Linden Avenue in Lansdowne, Pennsylvania. There, Kyser met his cousin, Mustafa Braxton, and Defendant and then drove both to Southwest Philadelphia, where they picked up a woman and then returned to 40 Linden Avenue. [N.T. 6/22/07, pp. 92-100, 187]

After arriving at the destination, Kyser saw Deanna sitting on the couch with Anwar Gettys. Defendant went upstairs with the woman. Kyser sat in a chair across from Deanna and Gettys for about an hour. He went upstairs briefly and spied Defendant in a bedroom having sex with the woman. Braxton then went upstairs and also had sex with the woman. [*Id.* at 100-104, 120]

Defendant came downstairs with the woman and told Kyser to "take her with you." Defendant stayed at 40 Linden Avenue while Kyser returned the woman to Southwest Philadelphia. [*Id.* at 104-106]

Kyser and Braxton returned to 40 Linden Avenue. The Defendant exited the house, entered the vehicle and was driven to North Philadelphia. [*Id.* at 106-112]

Defendant's Assault of Tanisha Moore

There they met Tanisha Moore ("Moore"), a prostitute who worked at Broad and Wingohocking Streets in North Philadelphia. After negotiating a price for her services, Moore got in the vehicle and was driven to a park in Yeadon, PA. [*Id.* at 106-112, 134-146; N.T. 1/23/07, pp. 116-119, 124; C-88] Defendant and Moore exited the vehicle at the park and walked to a picnic table, where Defendant began beating Moore with his fists in her face and stomach. He climbed on top of Moore, who was face-down on the table, removed her pants and rubbed his penis on her vagina. After failing to achieve an erection, he permitted her to leave. [*Id.* at 134-147]

She fled the scene and after receiving medical attention, reported the event to the police. She was able to identify Defendant from a photo array. [N.T. 1/24/07, pp. 97-100] A subsequent investigation led the police to find blood containing Moore's DNA on the picnic table. [*Id.* at 31-33; N.T. 1/23/07, p. 121; C-88]

The Defendant Disposes of Deanna's Body

Several days later, Vanessa Pollard drove Defendant and Gettys to a park, where they retrieved a large green trash barrel and placed it in her car. They returned to 40 Linden Avenue. About one-half hour later, Pollard drove Defendant and the barrel to 63rd Street in Philadelphia, where he placed it next to a gate near some steps. [N.T. 1/22/07, pp. 185-194]

Defendant later explained to Pollard that he had to dispose of a body of a girl who witnessed Gettys killing a boy. He asked to borrow her car to "take the little girl's body down there." He pointed to a "missing persons" poster with Deanna's photograph and explained that she was the girl Gettys had killed. [*Id.* at 194-202]

Defendant's Admission to Zaron Holbrook

On December 11, 2004, Defendant confessed to a friend, Zaron Holbrook, that he "killed a little girl from his neighborhood." He explained that he and Gettys raped and killed the little girl, raped her again, and then chopped up her body. He further related that he and Vanessa purchased gasoline and used it to burn the girl's body in a barrel, which he left in an alley near 60th St. in Philadelphia. [N.T. 1/23/07, pp. 21-28] Holbrook reported Defendant's admission to the police. [N.T. 1/24/07, p. 58, 154-155]

Police Recover Deanna's Body at 63rd Street in Philadelphia

On December 30, 2004, Gettys led police to 103 North 63rd Street in Philadelphia, where they located human remains in a barrel. *Id.*, p. 59. The barrel was scorched and covered with soot and contained charred bones. The police took the barrel and remains to the Philadelphia Medical Examiner's Office. [N.T. 1/23/07, pp. 70-74, 76-90] Vanessa Pollard identified the barrel and the location at which it was found.]N.T. 1/22/07, p. 194]

Dr. Ian Hood, an expert in forensic pathology, removed the contents from the barrel, which smelled of gasoline, and identified the skull of an adolescent, flesh, charred human bones, and two rings, one with the letter "D." In the barrel, he also found several large knives, including two butcher knives, a meat cleaver and a steak knife. [N.T. 1/23/07, pp, 70-74, 76-90]

The skull had a large chunk chopped from it. The flesh and bone had cuts and incisions. A femur bone had some thigh flesh and skin on it. Dr. Hood saved part of this tissue for DNA testing. [*Id.* at 85-87, 94-95, 123-124; C-49]

Dr. Hood concluded that after death, Deanna's body was dismembered and placed in a black plastic bag for disposal. He determined that Deanna's death was a homicide, reasoning that "15-year old females don't end up cut up in bits in barrels and burned unless they had died by homicidal mechanisms." [*Id.* at 87-94]

DNA Testing on Evidence Recovered at 40 Linden Avenue

A search of 40 Linden Avenue revealed blood on a mirror on a basement wall, on a seat cushion in the basement and on a seat cushion in the living room. Knives were missing from two butcher blocks in the kitchen. The basement smelled like bleach. [N.T. 1/23/07, pp. 127-135; C-51, 52 and 54] Deanna's DNA was found in the tissue sample in the barrel, C-49, in the blood

stain on mirror, C-51, on the basement seat cushion, C-52, and on the living room seat cushion, C-54. [N.T. 1/23/07, p. 128; N.T. 1/24/07, pp. 22-31]

Defendant's Statements to Police

At his first interview by police, Defendant insisted that he last saw Deanna on December 3, 2004. [N.T. 1/24/07, pp. 60-64; C-92, C-93] At a subsequent interview a few days later, he admitted to being present when Gettys beat Deanna to death. He and Gettys then dismembered Deanna's body, took the remains to 63rd Street in Philadelphia, placed them in a barrel, poured gasoline into the barrel, and then ignited them. [N.T. 1/24/07, pp. 80-84, 94, C-94; C-95]

Procedural History

Defendant was charged in separate cases with criminal homicide and related offenses in the death of Deanna Wright-McIntosh and rape and related offenses against Tanisha Moore. At the arraignment, the Commonwealth filed notice of its intention to seek the death penalty. The cases were tried before a jury from January 22, 2007 to January 26, 2007. At trial, Defendant testified that Deanna had an argument with her mother, so she went to stay at Gettys' house at 40 Linden Avenue, where he had been staying. On the night of December 3, 2004, he, Kyser and Braxton went out and drove around Southwest and West Philadelphia. They met a woman named Aliah, who accompanied them back to 40 Linden Avenue. [N.T. 1/25/07, pp. 103-120]

When they returned, Gettys and Deanna were on the couch. He and Braxton went upstairs, where they had sex with Aliah. Kyser and Braxton took Aliah back to Southwest Philadelphia. [*Id.* at 121-124] They returned to 40 Linden Avenue, and Defendant drove them to North Philadelphia, where they met Tanisha Moore. After he and Moore quarreled about money, he struck Moore. [*Id.* at 123-133]

He returned to 40 Linden Avenue, where he encountered Gettys, who admitted to raping and then imprisoning Deanna. Gettys then beat Deanna to death in his presence. Although he asked Gettys to stop, he never intervened. [*Id.* at 133-148]

He and Gettys then dismembered Deanna's body, placed the remains in a barrel and then ignited them with gasoline. [*Id.* at 148-176]

In case 0051-05, concerning victim Deanna Wright-Mclntosh, Defendant was convicted of First-Degree Murder, Kidnapping, Rape, and Abuse of Corpse.

In case 0865-05, concerning victim Tanisha Moore, Defendant was convicted of Aggravated Assault, Simple Assault, and False Imprisonment but was acquitted of rape.

On January 30, 2007, the trial court conducted the penalty phase of the trial. The jury failed to reach a sentencing verdict. The trial court then sentenced the defendant as follows:

0051-05 (Victim Deanna Wright-Mclntosh)

Murder, First-Degree	Life;
Kidnapping	72 to 144 Months, consecutive;
Rape	102 to 204 Months, consecutive;
Abuse of Corpse	12 to 24 Months, consecutive.

0865-05 (Victim Tanisha Moore)

Aggravated Assault	90 to 180 Months;
False Imprisonment	9 to 18 Months, consecutive;
Simple Assault	No sentence imposed.

All sentences ran consecutively to one another.

Defendant appealed his convictions and sentences to the Superior Court, which affirmed them on November 24, 2008. [565 EDA 2007; 566 EDA 2007]

In November 2009, Defendant filed a Petition for Relief under the Post-Conviction Relief Act. After a tortured history, Defendant file another *pro se* PCRA petition on November 7, 2016. This Court appointed Stephen D. Molineux, Esq. to represent him.

On February 2, 2019, Attorney Molineux issued a "no-merit" letter pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). He has asked for leave to withdraw his representation.

On March 28, 2019, this Court issued a Notice of Intent to Dismiss the Post-Conviction Relief Act Petition Without Hearing. In response to that Notice of Intent, Defendant filed "Objections," in which he raised various arguments and issues.

On April 24, 2019, this Court entered an Order denying the PCRA petition and granting counsel's request for leave to withdraw. On May 2, 2019, Defendant filed a *pro se* Notice of Appeal. In response to an Order, he filed Concise Statements of Matters Complained of on Appeal.

DISCUSSION

Principles Governing PCRA Petitions

The defendant bears the burden of proof by establishing by a preponderance of the evidence that the conviction(s) resulted from one or more of the Act's specifically enumerated errors or defects and that error has not been waived. 42 Pa. C.S.A. § 9543; *Commonwealth v. Banks*, 656 A.2d467, 469 (Pa. 1995). The law presumes that trial counsel was not ineffective, and the defendant bears the burden to prove otherwise. *Commonwealth v. Hall*, 549 Pa. 269, 701 A.2d 190 (1997), cert. denied 523 U.S. 1082 (1998).

The PCRA precludes relief for claims that have been previously litigated on direct appeal. 42 Pa. C.S.A. § 9543(a)(3). The PCRA cannot be used to raise a previously litigated

claim under the guise of ineffective assistance of counsel by presenting new theories of relief to support previously litigated claims. *Commonwealth v. Christy*, 656 A.2d 877 (Pa. 1995); *Commonwealth v. Travagli*, 661 A.2d 352 (Pa. 1995). A claim is previously litigated for purposes of the PCRA where the "highest appellate Court in which the Petitioner could have had review as a matter of right has ruled on the merits of the issue or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa. C.S.A. § 9544(a)(3). A defendant seeking post-conviction relief on the grounds of constitutional error must establish that the error so undermined "the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a)(2)(i). Harmless error analysis further limits relief under the Act. *See e.g., Commonwealth v. Travaglia*, 661 A.2d 352,359 (Pa. 1995). Bald, undeveloped allegations fail to satisfy a defendant's burden of establishing entitlement to PCRA relief when such allegations are mere boilerplate constitutional claims. *Commonwealth v. Hall*, 872 A.2d 1177 (Pa. 2005); *Commonwealth v. Washington*, 880 A.2d 536 (Pa. 2005). To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that: (1) the claim(s) are of arguable merit, (2) counsel had no reasonable basis for his or her action(s) and/or omission(s) in question, and (3) counsel's action(s) and/or inaction(s) prejudiced the defendant, that is, there was a reasonable possibility that, but for the act or omission challenged, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Commonwealth v. Allen*, 732 A. 2d 582 (Pa. 1999); *Commonwealth v. Halloway*, 739 A. 2d 1039 (Pa. 1999).

With respect to whether counsel's acts or omissions were reasonable, defense counsel is afforded broad discretion to determine tactics and strategy. *Commonwealth v. Thomas*, 744 A. 2d 713 (Pa. 2000). The test is not whether other alternatives were more reasonable, employing a

hindsight evaluation of the record, but whether counsel's decision had any reasonable basis to effectuate or advance the interests of the defendant. *Commonwealth v. Speight*, 677 A. 2d 317 (Pa. 1996). The fact that counsel's strategy in a given case is not successful is irrelevant as long as the decision by counsel "may be objectively viewed" as one that is reasonably designed to benefit the client. *Commonwealth v. Mickens*, 597 A. 2d 1196 (Pa. Super. 1991).

The *Strickland* standard encompasses all constitutionally-cognizable claims of ineffective assistance of counsel. Under the Strickland standard, an allegation of ineffectiveness cannot be established without a finding of prejudice [but for the act or omission challenged, the outcome of the proceedings would have been different]. *Commonwealth v. March*, 598 A. 2d 961 (Pa. 1991).

I. The prosecutor did not violate Defendant's constitutional rights.

A. 0865-2005 case

In his first assignment of error in the 0865-2005 case, Defendant argues that the prosecutor "violated the appellants Constitutional Right's guaranteed by the Sixth Amendment, Fourteenth Amendment, and the Due Process Clause by denying the appellant Equal Protection, Fundamental Fairness and a Fair Trial by presenting False Testimony in order to Gain a conviction for the Charge of Aggravated Assault." [SMCOOA, (0865) ¶ 1] Defendant did not raise this issue in his PCRA petition. Rather, in that petition, he argued that his trial counsel was ineffective by virtue of his failure to object to the prosecutor's inflammatory remarks and "false statements" to the jury. He did not allege that the prosecutor suborned perjured or otherwise false testimony. He has, therefore, waived this issue. Furthermore, his statement does not identify the testimony that he maintains was false. This Court cannot respond to this assertion in any meaningful manner. The Superior Court should, therefore, reject it.

B. 051-2005 case.

In his first assignment of error in the 051-2005 case, Defendant argues that the prosecutor violated his rights by arguing inconsistent theories in the *Commonwealth v. Gettys* and the *Commonwealth v. Haymes* cases. [SMCOOA, (051)¶ 1] Defendant did not raise this issue in his PCRA petition. He has, therefore, waived this issue.

Furthermore, he fails to identify the inconsistent theories or argue why they resulted in a violation of his constitutional rights. This Court cannot respond to this assertion in any meaningful manner. The Superior Court should, therefore, reject it.

II. Trial and appellate counsel were not ineffective.

The Superior Court should reject Defendant's assignments of error concerning the ineffectiveness of trial and appellate counsel.

A. False testimony.

Defendant claims that his trial attorney was ineffective by virtue of his failure/refusal to object to the prosecution's presentation of false testimony. [SMCOOA, ¶ 2] However, once again, he does not identify the testimony that he now claims is false. The Court cannot respond to this assertion, so the Superior Court should reject it.

B. Krista Avicoli.

Defendant claims that his trial attorney was ineffective by virtue of his failure/refusal to interview Krista Avicoli, a hospital Social Worker, and to call her as a witness. Ms. Avicoli treated Ms. Moore at Temple Hospital. Ms. Moore testified that her liver was bleeding as a result of the assault, but on cross-examination she admitted that no liver tests were performed at the hospital. She admitted that she did not have any stitches on her face. Defendant asserts that if Ms. Avicoli had been called to the stand, she would have testified that Ms. Moore

sustained only facial bruising. No mention was made in the Incident Investigation Report that Ms. Moore sustained a bruised liver and/or had facial cuts. Had the witness been called, he would not have been convicted of Aggravated Assault, Simple Assault and False Imprisonment of Ms. Moore.

However, Defendant, who weighs approximately 300 pounds, admitted to hitting Ms. Moore two times. [N.T. 1/27/07, p. 132, line 19-20, p. 170, line 23-25] Also, trial counsel cross examined Ms. Moore about the hospital's failure to test her liver or to stitch any facial lacerations. The failure to call Ms. Avicoli to testify was not prejudicial to Defendant because the jury learned through cross-examination that no liver tests were conducted and no lacerations were stitched. Furthermore, while on the stand, Defendant admitted to assaulting Ms. Moore. This assignment of error lacks any merit. The Superior Court should reject it.

C. Dayon Pinder.

Defendant claims that his trial attorney was ineffective by virtue of his failure/refusal to interview Dayon Pinder, call him as a witness or attempt to introduce into evidence allegedly exculpatory letters that Pinder wrote "to the jurors." [SMCOOA, (051a) ¶ 3] Pinder gave a statement to CID on September 23, 2005 in which he asserted that while he and Defendant were incarcerated, Defendant admitted to having raped and killed a girl. Defendant attached an undated handwritten letter, (Ex. 4-C to pro se petition) purportedly authored by Mr. Pinder, recanting his September 23, 2005 statement.

This claim does not have merit because Mr. Pinder's alleged recantation of a prior statement is irrelevant. It is unclear when or if Mr. Pinder recanted his former statement implicating Defendant in the crime. If he had taken the stand and recanted, the prosecution

would have cross-examined him with his September 23, 2005 statement. The Superior Court should, therefore, reject this assignment of error.

D. Anwar Robinson.

Defendant claims that his trial attorney was ineffective by virtue of his failure to elicit testimony from a trial witness, Anwar Robinson, to the effect that he told the authorities that Anwaar Gettys had confessed to the murder of Deanna. [SMCOOA, (051a) ¶ 6] Defendant failed to make this allegation in his PCRA petition, so he has waived it. Furthermore, this Court cannot discern how this proposed evidence would have assisted Defendant's defense. The Superior Court should, therefore, reject this assignment of error.

E. Cell phone records.

Defendant claims that his trial attorney was ineffective by virtue of his failure to obtain cell phone records of Zaron Holbrook and Anwaar Gettys. [SMCOOA, (051a) ¶ 4] In his PCRA petition, he asserted that the cell phone records would have shown the activity between them, presumably to show that Gettys induced Holbrook to implicate Defendant to the police and that Holbrook was a liar. For example, Mr. Holbrook stated that he made several calls to the police, but the evidence indicated that he called 911 and then hung up. The police appeared at his home to investigate the 911 hang up.

Defendant suffered no prejudice from this failure as trial counsel was able to introduce evidence to support this argument. Holbrook stated that he called police and spoke to someone, but the police records indicate he called 911, and hung up and the police came to his house to investigate the 911 hang-up. [N.T 1/23/07, p. 46] Holbrook stated that he had been drinking that night. Further, trial counsel was able to cross-examine Holbrook and Pollard about their conversations with Gettys prior to making Holbrook's statement to police implicating

Defendant. [N.T. 1/23/07, pp. 24-28, 58-59, 61-63] The Superior Court should, therefore, reject this assignment of error.

F. Out-of-court statements of Anwaar Gettys and Lauren Lenton.

Defendant asserts that the "Lower Court Abused their Discretion" by preventing him from introducing certain out-of-court statements of Anwaar Gettys and Lauren Lenton. [SMCOOA (051), ¶ 2] To the extent that Defendant seeks a review of a trial court's evidentiary decision, he cannot do so in a collateral review under the PCRA.

To the extent that he challenges his trial attorney's failure to attempt to introduce statements into evidence, it is noted that he did not mention Lauren Lenton in his PCRA petition. He has waived that issue.

Defendant has challenged his appellate attorney's failure to challenge the trial court's refusal to admit Gettys' prior statements. [SMCOOA (051), ¶ 5] This Court finds that if the issue had been raised on appeal, the Superior Court would have rejected it because the statements made by Mr. Gettys to the police were all hearsay, and no exception exists that would allow their introduction at trial because Gettys did not testify at trial.

The Superior Court should, therefore, reject this argument.

G. Miscellaneous appellate issues.

Defendant faults his appellate attorney's failure to preserve "obvious" issues such as (1) inconsistent theories and (2) out-of-court statements by Gettys and Lenton. [SMCOOA (051), ¶ 5] These have been addressed elsewhere in this opinion. In addition, he points to unidentified issues that were "stronger than the one and only issue that counsel raised on Direct Appeal." [*Id.*] In the absence of any identification of these issues, this Court cannot

respond in any meaningful manner. The Superior Court should, therefore, reject these assignments of error.

CONCLUSION

The Superior Court should, therefore, affirm this Court's dismissal of the PCRA petition without a hearing.

M.F.X. Coll 8-15-19

MICHAEL F. X. COLL, S. J.

APPENDIX-A-7

DISTRICT COURT MOTION

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

LAMAR HAYMES, Petitioner,	:	
v.	:	Civil No. 2:21-cv-1022-JMG
MICHAEL GOURLEY, *et al.*, Respondents.	:	

ORDER

AND NOW this 2nd day of October, 2024, upon consideration of Petitioner Lamar Haymes' Application for Certificate of Appealability (ECF No. 58) construed as a Motion to Reconsider under F.R.C.P. 60(b), Petitioner's Letter dated September 12, 2024 (ECF No. 60), and this Court's Order dated April 19, 2024 (ECF No. 54), **IT IS HEREBY ORDERED** that Defendant's Motion (ECF No. 58) is **DENIED**.[1]

BY THE COURT:

/s/ John M. Gallagher
JOHN M. GALLAGHER
United States District Court Judge

[1] "A claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). The Court declined to issue a certificate of appealability and denied Mr. Haymes' Petition for Writ of Habeas Corpus in its April 19, 2024 Order. ECF No. 54. To the extent that Mr. Haymes' Motion raises the same meritorious arguments challenging the constitutionality of his state court conviction as his Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (ECF No. 1), the Motion will be construed as a Motion to Reconsider under F.R.C.P. 60(b). Under Rule 60(b), "[a] judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F. 3d 669, 677 (3d Cir. 1999). Mr. Haymes has not raised, let alone demonstrated, any grounds for reconsideration.

APPENDIX A-8

NOTIFICATION

UNITED STATES SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

February 28, 2025

Lamar Haymes
#QP-1523
SCI-Camphill
2500 Lisburn Road
Camphill, PA 17001

RE: Haymes v. District Attorney Delaware County, et al.
USAP3 No. 24-1926

Dear Mr. Haymes:

The above-entitled petition for writ of certiorari was postmarked February 19, 2025 and received February 28, 2025. The papers are returned for the following reason(s):

No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form.

The petition fails to comply with the content requirements of Rule 14. A guide for in forma pauperis petitioners and a copy of the Rules of this Court are enclosed. The guide includes a form petition that may be used.

The petition fails to comply with the content requirements of Rule 14, in that the petition does not contain:

The questions presented for review. Rule 14.1(a).

A reference to the opinions below. Rule 14.1(d).

A concise statement of the grounds on which jurisdiction is invoked. Rule 14.1 (e).

A concise statement of the case. Rule 14.1(g).

The reasons relied on for the allowance of the writ. Rules 10 and 14.1(h).

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The lower court opinion(s) must be appended.

The opinion of the United States district court must be appended.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:

Angela Jimenez
(202) 479-3392

Enclosures