Appendix

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1692

BRIAN TOOTLE,
Appellant

v.

SUPERINTENDENT DALLAS SCI; DISTRICT ATTORNEY PHILADELPHIA;
ATTORNEY GENERAL PENNSYLVANIA

(D.C. Civ. No. 2:22-cv-02947)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, and SCIRICA*, 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,

*As to panel rehearing only.

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/Anthony J. Scirica
Circuit Judge

Dated: October 7, 2025
Tmm/cc: Brian Tootle
Theresa Z. Glinski, Esq.
Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.

Appendix B

CLD-166

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **25-1692**

BRIAN TOOTLE, Appellant

VS.

SUPERINTENDENT DALLAS SCI; ET AL.

(E.D. Pa. Civ. No. 2:22-cv-02947)

Present: KRAUSE, PHIPPS, and SCIRICA, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's "Motion for Expedited Consideration"

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied. For substantially the reasons set forth in the Magistrate Judge's report, which the District Court adopted, reasonable jurists would not debate the District Court's denial of Appellant's habeas petition or otherwise conclude that any of his claims are "adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant's motion to expedite is denied.

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: July 11, 2025
Tmm/cc: Brian Tootle
Theresa Z. Glinski, Esq.

A True Copy:

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

Susan E. Affronti, Esq.
Ronald Eisenberg, Esq.

Appendix C

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

BRIAN TOOTLE,	:	
Petitioner,	:	
	:	
v.	:	**CIVIL ACTION NO. 22-CV-2947**
	:	
ALEN IRWIN, *et al.*,	:	
Respondents.	:	

ORDER

AND NOW, this 21st day of March, 2025, upon careful and independent consideration of the Petition for a Writ of Habeas Corpus (ECF No. 1) filed pursuant to 28 U.S.C. § 2254, the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski (ECF No. 39), and Petitioner's Objections to the Report and Recommendation (ECF Nos. 41 and 42), **IT IS ORDERED** that:

1. The Report and Recommendation (ECF No. 39) is **APPROVED** and **ADOPTED**.
2. The Petition for Writ of Habeas Corpus (ECF No. 1) filed pursuant to 28 U.S.C. § 2254 is **DENIED**.
3. Petitioner's Motion for an Extension of Time (ECF No. 40) is **DENIED as moot**.
4. There is no basis for the issuance of a certificate of appealability
5. The Clerk of Court is **DIRECTED** to **CLOSE** this case.

BY THE COURT:

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

Appendix D

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

BRIAN TOOTLE,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 22-cv-2947**
	:	
JASEN BOHINSKI, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **October 23, 2024**

Presently before the Court is a *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, by Brian Tootle (Petitioner), an individual currently incarcerated at the State Correctional Institution – Dallas in Dallas, 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[1]

In its March 31, 2021 opinion affirming the denial of Petitioner's petition filed pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§ 9541-46, the Superior Court set forth the following factual and procedural history through that point:

[1] The Commonwealth has submitted the state court record in hard-copy format. This Court has also consulted the Philadelphia Court of Common Pleas criminal docket sheet for *Commonwealth v. Tootle*, No. CP-39-CR-0014103-2012, *available at* https://ujsportal.pacourts.us/Report/CpDocketSheet?docketNumber=CP-51-CR-0014103-2012&dnh=nPYv3DUcWtM0qIrtv1FVaA%3D%3D (last visited Oct. 23, 2024) ("Crim. Docket") and the Pennsylvania Supreme Court appellate docket sheet for *Commonwealth v. Tootle*, No. 58 EM 2021, *available at* https://ujsportal.pacourts.us/Report/PacDocketSheet?docketNumber=58%20EM%202021&dnh=1UQmXI0Qy2XMoH2trWXtpA%3D%3D (last visited Oct. 23, 2024) ("Pa. Supr. Ct. Docket").

On July 27, 2012, at approximately 8:37 p.m., Gerald Jones, Nafis Armstead, and several of their friends were outside on the 200 block of East Sharpnack Street in Philadelphia. Earlier, and throughout the day, [Tootle] and two individuals were in a green van driving around the block and parking several times before driving off again.[ ] As Jones and Armstead were talking, the van pulled up to the curb and parked. [Tootle] and at least one of the other passengers exited the vehicle wearing hats and with bandanas over their faces. They brandished firearms and opened fire on Jones and Armstead. After the shooting stopped, [Tootle] and the other men fled the scene in the van, with [Tootle] driving. Neither Jones nor Armstead were armed at the time.

Police responded to the scene to find Armstead lying in the middle of the road. Armstead was declared dead at 8:58 p.m. Jones was shot a total of five times in the back, leg, arm, and hip. Police placed Jones in the back of a police cruiser and transported him to Einstein Hospital. Information that the shooters were driving a green van was broadcast over police radio as police continued to respond to the scene.

Officer [Tyrone] Broaddus, who was in his patrol car responding to the radio call regarding the shooting, observed a green van matching the description of the getaway vehicle. He followed the van to the parking lot of an apartment building, where it stopped. [Tootle] and another man then got out of the van and [Tootle] walked toward the back of the lot. Additional officers arrived, and [Tootle] was located and apprehended. No other individuals were apprehended at that time.

At the time of his arrest, [Tootle] gave police the false name of Brandon Harris. As [Tootle] was taken into custody, [he] asked the arresting officers: "Can I say my last good-byes to my cousin?" [Tootle] also asked how many people were shot and if anyone was killed. Michael Jordan, a witness to the shooting's aftermath and [Tootle's] flight in the van, was taken to where the van was located, where he identified the van as the vehicle he saw leaving the scene of the shooting. . . .

Police recovered two firearms. A loaded .40 caliber Glock with an extended magazine was recovered inside of [Tootle's] vehicle. [Tootle's] fingerprints were recovered from that Glock. Additionally, police recovered a .357 caliber six shot revolver, with six spent cartridge cases in the cylinder, approximately ten feet from where [Tootle] was apprehended. Police also recovered a cell phone from the vehicle which bore fingerprints from [Tootle's] thumb. Police recovered and identified eighteen .40 caliber fired cartridge cases. A bullet jacket and core recovered

> from Armstead's head by the medical examiner matched the revolver recovered near [Tootle]. Bullets recovered from Armstead's torso, chest, and leg were consistent with the .40 caliber Glock having [Tootle's] fingerprint. In addition, all of the recovered .40 caliber fired cartridge cases were fired from the Glock. The clothing [Tootle] was wearing at the time of his arrest was seized and tested for gunpowder residue. Gunpowder residue was found on [Tootle's] black T-shirt and sweatpants.
>
> Tootle proceeded to a jury trial and was convicted of first-degree murder, criminal conspiracy, carrying a firearm without a license, carrying a firearm on the public streets of Philadelphia, and possessing an instrument of crime. He was subsequently sentenced to an aggregate term of life without parole plus 24.5 to 52 years of incarceration. This court affirmed the judgment of sentence and our Supreme Court denied *allocatur*. *Commonwealth v. Tootle*, 3030 EDA 2014, at *5 (Pa. Super. Nov. 1, 2016), *allocatur denied*, 169 A.3d 559 (Pa. 2017).
>
> Tootle filed the instant timely, counseled PCRA petition on May 18, 2018, raising several claims of ineffective assistance of trial and appellate counsel. The Commonwealth filed a motion to dismiss the petition and Tootle filed a response. The Commonwealth then filed a sur-reply to Tootle's response. The PCRA court issued a notice of its intent to dismiss the petition without a hearing pursuant to Pa.R.Crim.P. 907. On August 1, 2019, the PCRA court dismissed the petition. Tootle timely appealed and he and the PCRA court have complied with Pa.R.A.P. 1925.

Commonwealth v. Tootle, 251 A.3d 1273, 2021 WL 1233389, at *1-2 (Pa. Super. Ct. 2021) (table opinion) (alterations in original) (footnotes and some internal citations omitted). On August 20, 2021, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. (*See* Crim. Docket. at 19).

On July 19, 2022,[2] Petitioner timely filed the instant habeas petition asserting the

[2] Pennsylvania and federal courts employ the prisoner mailbox rule, pursuant to which a *pro se* petition is deemed filed when it is given to prison officials for mailing. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. Ct. 1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998); *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. Ct. 2001). In this case, Petitioner certified that he gave his habeas petition to prison officials on July 19, 2022, (Hab. Pet., ECF No. 1, at 17), and it

following seven claims:

(1) The trial court error in allowing the Commonwealth to reopen its case after it had rested was contrary to clearly established federal law, in violation of Mr. Tootle's Sixth and Fourteenth Amendment rights to a fair trial and due process;

(2) The trial court erred in excusing Juror 8 after individual questioning confirmed that she would be fair, in violation of Mr. Tootle's Sixth Amendment right to a fair trial and an impartial jury;

(3) Trial counsel was ineffective when counsel failed to present DNA evidence that excluded Mr. Tootle from possessing both of the firearms, in violation of Mr. Tootle's Sixth Amendment right;

(4) The state court erred in handling Mr. Tootle's PCRA appeal proceeding, where appellate PCRA counsel was *per se* ineffective, and where the facts were unreasonably determined, in violation of Mr. Tootle's right to due process;

(5) Trial counsel was ineffective for failing to object and move to suppress Christina Dorman's in-court identification of Mr. Tootle;

(6) Trial counsel was ineffective for failing to object to prosecutorial misconduct, and appellate counsel failed to preserve and argue the same on appeal, where a conviction obtained through material use of false testimony cannot stand where a fraud upon the court exists; and

(7) PCRA counsel was ineffective for failing to raise trial counsel ineffectiveness for failing to investigate, in violation of Mr. Tootle's Sixth and Fourteenth Amendment rights to counsel and due process.

(Hab. Pet., ECF No. 1, at 23-27) (edited for clarity).

On September 30, 2022, the Honorable John M. Gallagher referred this matter to United States Magistrate Judge Richard A. Lloret for a Report and Recommendation. (Order, ECF No.

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will be deemed filed on that date.

6). After receiving three extensions, the Commonwealth filed a response to the petition on May 26, 2023. (Resp., ECF No. 21). On May 30, 2023, Judge Lloret granted Petitioner's earlier-filed motion to amend the relief sought to include an evidentiary hearing if the court found the existing record insufficient to excuse any failure to exhaust, procedural default or untimeliness.[3] (Order, ECF No. 22; *see also* Mot. to Am. Relief, ECF No. 20, at 4). After the Commonwealth provided Petitioner with various documents requested in discovery and he received multiple extensions from the court, Petitioner filed his reply on February 20, 2024. (Reply, ECF No. 36). In his reply, Petitioner waived his seventh claim listed above. (*Id.* at 18). On May 23, 2024, the case was reassigned from Judge Lloret to me. (Order, ECF No. 37).

II. LEGAL STANDARDS

A. Exhaustion and Procedural Default

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. Pursuant to the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> > (B)(i) there is an absence of available State corrective process; or
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to

[3] The remaining purportedly new relief sought by Petitioner was in fact sought in the original petition. (*Compare* Hab. Pet., ECF No. 1, at 16, *with* Mot. to Am. Relief, ECF No. 20, at 4).

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). 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) (not precedential) (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 v. Thompson*, 501 U.S. 722, 730 (1991)).

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). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id*. at 451; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (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).

B. Merits Review

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 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 (citation omitted).

III. DISCUSSION[4]

[4] The Commonwealth observes that the petition is "facially untimely" because the period between the conclusion of Petitioner's direct appeal and the filing of his PCRA petition, coupled with the period between the termination of PCRA proceedings and the filing of the instant habeas petition, exceeded one year. (Resp., ECF No. 21, at 6 n.2 (citing 28 U.S.C. § 2254(d)(1)(A)); *see also Rhines v. Weber*, 544 U.S. 269, 274-75 ("the [AEDPA] limitations period is tolled during the pendency of a 'properly filed application for State post-conviction or other collateral review'") (citing 28 U.S.C. § 2254(d)(2))). However, it does not dispute that Petitioner "is entitled to equitable tolling due to attorney abandonment," instead arguing that his claims should be denied for other reasons. (Resp., ECF No. 21, at 6 n.2); *see Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 89 (3d Cir. 2013) (AEDPA's statute of limitations is subject to tolling if "principles of equity would make [its] rigid application unfair"). In light of Petitioner's contention that his initial attorney on PCRA appeal abandoned him, (*see* Hab. Pet., ECF No. 1, at 24-25), and particularly the Commonwealth's apparent lack of opposition to his invocation of equitable tolling, the Court construes the instant petition as timely filed. (*See also* Reply, ECF No. 36, at 7-13 (arguing that his petition is timely due to statutory and equitable tolling) (citation omitted)).

A. Procedural Default: Claims Five and Six[5]

1. The Parties' Positions

In his fifth claim, Petitioner posits that one of his trial attorneys, Shawn Page, was ineffective for not objecting and/or moving to suppress Dorman's in-court identification of him, even though she had never identified him in a pretrial photo array and Attorney Page was provided ample opportunity to seek relief after this fact was acknowledged by the parties and court at trial. (Hab. Pet., ECF No. 1, at 25). In his sixth claim, Petitioner contends that "trial counsel [was] ineffective for failing to object to prosecutorial misconduct [namely, the presentation of Dorman's identification and the fingerprint evidence at issue in Claim One], and appellate counsel[ ] fail[ed] to preserve and argue the same on appeal, where a conviction obtained through materially use of false testimony cannot stand where a fraud upon the court exist[s]." (*Id.* at 26; *see also infra* § III.C.1). No doubt anticipating the Commonwealth's invocation of the defense of procedural default, Petitioner argues that Claims Five and Six were not raised on PCRA appeal due to the ineffectiveness of counsel, which Petitioner also raised before the Pennsylvania Supreme Court but it "unreasonably determined the facts [in] refusing to adjudicate the issue." (Hab. Pet., ECF No. 1, at 26). The Commonwealth responds that these claims are procedurally defaulted because they were never briefed in front of, and therefore not addressed by, the Superior Court. (Resp., ECF No. 21, at 8-9). In reply, Petitioner emphasizes that these claims are "predicated upon appellate counsel ineffectiveness 'alone' for failing to raise and argue [them] on appeal despite [their] being preserved by trial counsel."[6] (Reply, ECF

[5] The Court begins by addressing Petitioner's procedurally defaulted and non-cognizable claims then proceeds to an analysis of his claims resolved on the merits.

[6] Both parties also make additional merits-based arguments as to these claims, but because the Court concludes that they are procedurally defaulted, it does not summarize these arguments here. (Resp., ECF No. 21, at 8-9).

No. 36, at 25, 28-29 (making argument as to Claim Six and incorporating it as to Claim Five)).

2. Relevant State Court Proceedings

Defendant included these two claims in his counseled PCRA petition, but on July 1, 2020, the PCRA court rejected them on the merits. *Commonwealth v. Tootle*, No. CP-51-CR-0014103-2012, at 3, 14-15, 17-18 (Phila. Ct. Com. Pl. July 1, 2020) (ECF No. 1, Ex. B). However, as noted, appellate PCRA counsel, Todd Mosser, omitted them in the ensuing appellant brief. (Hab. Pet., ECF No. 1, at 26-27; Reply, ECF No. 36, at 25, 28-29; *see also Tootle*, 2021 WL 1233389, at *2 (noting a different issue raised on PCRA appeal)). According to Petitioner, on November 20, 2020, upon learning of this omission, Petitioner filed an "Application for Relief" with the Superior Court, and Mosser subsequently moved to withdraw, but on January 11, 2021, the court denied both motions because the appellant brief had already been filed. (Hab. Pet., ECF No. 1, at 24, 57-58). On March 31, 2021, the Superior Court affirmed the dismissal of Petitioner's PCRA petition, leading him to file a petition for allowance of appeal with the Pennsylvania Supreme Court on April 22, 2021. (*Id.*). A few days later, counsel contacted him advising that counsel was not representing him as to his continuing appeal. (*Id.*). On August 3, 2021, Petitioner contacted the Pennsylvania Supreme Court regarding the status of his appeal but was informed that it had not been received. (*Id.*). Approximately two weeks later new counsel, Jonathan Consadene, also contacted the Pennsylvania high court, which this time located the appeal but explained that rather than being docketed it had been sent to prior counsel, as attorney of record at the time. (*Id.* at 25). Consadene then moved *nunc pro tunc* to file a petition for allowance of appeal, but this application was denied, as was a later motion for reconsideration of that denial. (*Id.*).

3. Analysis

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*, 387 F.3d at 233-34. Here, the instant claims are unexhausted because Petitioner never briefed them before that court. *Tootle*, 2016 WL 6459816, at *2; *Tootle*, 2021 WL 1233389, at *2. Further, because Petitioner's judgment of sentence became final on April 30, 2021, 30 days after the Superior Court affirmance, *see* Pa. R.A.P. 903, he was required to file any new PCRA petition within one year of that date. *See* 42 Pa. C.S. § 9545(b)(1). Therefore, any new and subsequent PCRA petition filed to raise these unexhausted claims would be time-barred by the one-year PCRA statute of limitations. The PCRA statute of limitations is an "adequate" and "independent" state procedural rule that is consistently applied, and thus these claims are procedurally defaulted. *Doctor v. Walters*, 96 F.3d 675, 684 (3d Cir. 1996) ("A state rule is adequate only if it is 'consistently and regularly applied.'") (quoting *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *see also Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001); *Smith v. Luther*, No. 18-200, 2018 WL 3581140, at *3 (E.D. Pa. June 22, 2018) (finding that the claims are "procedurally defaulted, because the PCRA statute of limitations has expired for them").

Accordingly, because the claims are procedurally defaulted, the Court may not review their merits unless Petitioner has established cause and prejudice, or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Petitioner asserts that that he did not present his claims to the Superior Court on PCRA appeal due to counsel's ineffectiveness, which can be construed as an assertion of "cause" under *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding that "[i]nadequate assistance of counsel at

initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9 (emphasis added). To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14; and that petitioner had "no counsel" or "ineffective" counsel during the *initial* phase of the state collateral review proceeding. *Id.* at 17; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014). Both prongs of *Martinez* implicate the controlling standard for ineffectiveness claims first stated in *Strickland v. Washington*: (1) that counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. 466 U.S. 668, 687 (1984).

The defaulted claims do not fit within *Martinez*'s narrow exception because the alleged ineffectiveness leading to the default occurred during appellate, rather than initial-level, PCRA proceedings. (Hab. Pet., ECF No. 1, at 26-27; Reply, ECF No. 36, at 25, 28-29). As the Court explained in *Martinez*, there is "a key difference between initial-review collateral proceedings and other kinds of collateral proceedings," such as appellate proceedings. 566 U.S. at 8, 10 (defining "initial-review collateral proceedings" as the first occasion to raise a claim of ineffective assistance at trial). "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim," since it has not been preserved for appeal. *Id.* "And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *See id.* ("this makes the initial-review collateral proceeding a prisoner's 'one and only appeal' as to an ineffective-assistance claim") (citation omitted). However, "[t]he same is not true" when the attorney error occurs on postconviction appeal. *Id.* "While counsel's errors in these proceedings preclude any further review of the prisoner's claim,

the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or [as here,] the trial court in an initial-review collateral proceeding." *Id.* (citation omitted). Because Petitioner's claims were properly raised in initial-level collateral proceedings to the PCRA court, which rejected them on the merits, any subsequent error in not maintaining the claims on PCRA appeal does not establish the requisite "cause" to excuse the procedural default.[7]

For the foregoing reasons, the Court respectfully recommends that these claims be denied as procedurally defaulted.[8]

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[7] Petitioner alternatively posits in Claim Four, which he submits is "intend[ed] . . . to envelope his procedural default contention" in Claims Five and Six although admittedly "addressed separately" in his brief, that if the Court does not find counsel's ineffectiveness on PCRA appeal sufficient to establish cause for the default, cause should be "impute[d]" to the Commonwealth for the reasons set forth therein. (Reply, ECF No. 36, at 13-14). Because Petitioner asserts these arguments as a separate claim, the Court addresses them in the ensuing section dealing with Claim Four. (*See infra* § III.B.2).

[8] Borrowing from 28 U.S.C. § 2254(d)(2), Petitioner suggests that he is entitled to relief because the Pennsylvania Supreme Court "unreasonably determined the facts" in not addressing appellate PCRA counsel's ineffectiveness. (Hab. Pet., ECF No. 1, at 26). Even putting aside that the court's decision not to address these claims on procedural grounds does not constitute a factual determination, the cited subsection provides a substantive basis for relief for claims considered on the merits, not a means to evade the ramifications of a procedural default.

Furthermore, Petitioner requests "an evidentiary hearing, in the event of the record not being tenable to excuse any procedural defaults . . . ." (Mot. to Am. Relief, ECF No. 20, at 4). However, pursuant to Third Circuit caselaw, an "evidentiary hearing should not be available to a habeas petitioner who claims relief from the exhaustion rule unless the petitioner sets forth facts with sufficient specificity that the district court may be able, by examination of the allegations and the response, to determine if further proceedings are appropriate." *Mayberry v. Petsock*, 821 F.2d 179, 186 (3d Cir. 1987). Moreover, "conclusory allegations will not suffice to require . . . an evidentiary hearing in determining whether non-exhausted claims can be excused." *Richardson v. Varano*, No. 2:07-CV-2067, 2011 WL 2936019, at *1 (E.D. Pa. July 20, 2011) (citing *Mayberry*, 821 F.2d at 185). Here, Petitions proffers no factual allegations, even conclusory ones, that he would seek to prove at an evidentiary hearing if permitted. (*See generally* Mot. to Am. Relief, ECF No. 20). Because Petitioner has failed to meet the standard for obtaining an evidentiary hearing, the Court recommends that his request be denied.

B. Non-cognizable – Claim Four

1. The Parties' Positions

In his fourth claim, Petitioner asserts that "[t]he state court erred in handling Mr. Tootle's PCRA appeal proceeding, where appellate PCRA counsel was per se ineffective, and where the facts were unreasonably determined, in violation of Mr. Tootle's right to due process." (Hab. Pet., ECF No. 1, at 24). In support of this claim, Petitioner sets forth the procedural history of his PCRA appeal, highlighting Mosser's alleged ineffectiveness in omitting purportedly meritorious claims from his appellant brief after the claims were rejected by the PCRA court.[9] (*Id.*). The Commonwealth responds that Petitioner's claim is non-cognizable because it challenges errors allegedly made in postconviction proceedings rather than in the proceedings giving rise to his conviction and sentence. (Resp., ECF No. 21, at 13 (citing *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998))).

In reply, Petitioner attempts to distinguish *Hassine* as holding only that damages, rather than a writ of habeas corpus, are the proper remedy to address an excessive, constitutionally violative delay in state collateral proceedings. (Reply, ECF No. 36, at 14 (citation omitted)). He adds, enigmatically, that "[c]ontextually speaking, *Hassine* is proof against *Hassine*." (*Id.*). He continues that "there cannot be a mustard seed of weight imputed to the Commonwealth's" reliance on *Hassine* because the United States Supreme Court has held, in Petitioner's words,[10]

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[9] Petitioner also cross-referenced this background in support of Claims Five and Six, (Hab. Pet., ECF No. 1, at 26-27), and, accordingly, it is summarized above in § III.A.2.

[10] Petitioner's single quotation mark at the beginning of the quotation in the text makes it unclear whether he attributes this exact language to the cited case, but in any event it does not appear therein. *See generally Evitts v. Lucy*, 469 U.S. 387 (1985). However, his later quote standing for a similar proposition is drawn directly from *Evitts*. (*See* Reply, ECF No. 36, at 16 ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause.") (quoting *Evitts*, 469 U.S. at 401)).

that "although states need not provide appeals, if they do, [the] due process clause requires that appeals conform in dictates of fundamental fairness and, accordingly, that counsel be made available and render effective assistance." (*Id.* (citing *Evitts*, 469 U.S. at 396)). He concludes, therefore, that his claim is cognizable. (*Id.*). Additionally, he suggests that Federal Rule of Civil Procedure 11 requires the Commonwealth to withdraw its opposition to it. (*Id.* (citing F.R.C.P. 11)).

Returning to the "cause" factor, (*cf. supra* § III.A.3), Petitioner insists that Mosser was not acting as his agent when he failed to brief Claims Five and Six on PCRA appeal because that omission constituted "a serious breach of loyalty," particularly in light of Petitioner's letter to him "specifically expressing the preservation of the claims" and requesting that he "make[ ] the best decision concerning his freedom." (*Id.* at 15 (citing *Maples v. Thomas*, 565 U.S. 266, 287-88 (2012); RESTATEMENT (SECOND) OF AGENCY § 112 (1957))). He claims that Mosser's motions to withdrawal filed in the state appellate courts and refunding of at least a portion of the money paid to him by Petitioner proves his breach. (*Id.* at 16). Petitioner additionally maintains that Mosser's actions cannot bind him because "the client is and always remains the master of his cause." (*Id.* (quoting *Clemmons v. Delo*, 100 F.3d 1394, 1398-99 (8th Cir. 1996))). He notes that he raised Mosser's ineffectiveness in the Pennsylvania appellate courts and insists that "his circumstances [are] significantly more exasperating than [in] the [Pennsylvania] Supreme Court's . . . holdings . . . in *Commonwealth v. Shaw*, [247 A.3d 1008 (Pa. 2021)] and *Commonwealth v. Clark*, [254 A.3d 723 (Pa. 2021) (table opinion)]." (*Id.* at 15-16).

Petitioner suggests that cause is further established in this case because "[t]he Pennsylvania Supreme Court opted to act" when it failed to notify him that his petition had not been docketed and, moreover, that "such inactions" caused the procedural default of Claims Five and Six, depriving him of his right to file a further state court appeal as allegedly guaranteed by

Shaw/Clark and the federal Due Process Clause. (Reply, ECF No. 36, at 16-17 (again citing the legal principle announced in *Evitts* that if "a state opts to act" it must exercise its discretion consistent with the Due Process Clause)). He points out that the United States Supreme Court has recognized that cause is established where "some interference by officials . . . made compliance [with a state procedural rule] impracticable" and that in applying this principle, courts must consider the limitations and constraints upon *pro se* prisoners because, for them, even minor impediments may prove insurmountable due to lack of legal or procedural knowledge or access to courts. (*Id.* at 17 (quoting *Coleman*, 501 U.S. at 753; citing *Alexander v. Dugger*, 841 F.2d 371, 373 (11th Cir. 1998) (alterations added by Petitioner))). He posits that the instant case is "a personification of the circumstances Justice Stevens warned against" in his concurrence in *Wainwright v. Sykes*, 433 U.S. 72 (1977), in which he opined that "[i]f the constitutional issue is sufficiently grave," such as in matters involving "the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceeding," "even an express waiver by the defendant himself may sometimes be excused." (*Id.* at 16 (quoting 433 U.S. at 94-96 (Breyer, J., concurring))).

As for prejudice, Petitioner argues that whether cause for the default is imputed to appellate PCRA counsel or "the state," its existence is established in this case by "both situations" impeding him from exhausting his claims in state court. (Reply, ECF No. 26, at 17-18 (citing *Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *McCandless*, 172 F.3d at 260)).

2. Analysis

a. *Hassine v. Zimmerman* and *Evitts v. Lucy*

Petitioner complains of various alleged errors and omissions by Mosser and the state appellate courts during the course of his PCRA appeal. (Hab. Pet., ECF No. 1, at 24; Reply,

ECF No. 36, at 13-18). He claims that as a result he was deprived of his right to appeal the denial of his postconviction petition to the Pennsylvania Supreme Court. (Reply, ECF No. 36, at 16 (citing *Shaw*, 247 A.3d 1008; *Clark*, 254 A.3d 723)). However, it is well-settled under federal law that "the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's *collateral* proceeding does not enter into the habeas calculation." *Hassine v. Zimmerman*, 160 F.3d 941, 954 (3d Cir. 1998) (emphasis in original); *see Lambert*, 387 F.3d at 247 ("alleged errors in collateral proceedings . . . are not a proper basis for habeas relief from the original conviction. It is the original trial that is the 'main event' for habeas purposes."); *see also* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Petitioner dismisses *Hassine* as dealing only with the type of relief that is available to a habeas petitioner who has experienced "excessive delay in state collateral proceedings [that] could violate due process . . . ." (Reply, ECF No. 36, at 14). Although *Hassine* arose under those circumstances, the limitation set forth in that case applies generally to claims of attorney and judicial error committed on postconviction appeal, as alleged here. *See Saunders v. Superintendent Camp Hill SCI*, No. 22-1841, 2022 WL 16626824 (3d Cir. Aug. 24, 2022) ("Jurists of reason also would not debate that Saunders' claim that his counsel on post-conviction collateral review rendered ineffective assistance and his claim that the Superior Court made an error during the course of his PCRA appeal are not cognizable in habeas.") (citing 28 U.S.C. § 2254(i); *Hassine*, 160 F.3d 941, 954 (3d Cir. 1998)); *see also Taylor v. May*, No. 17-1664-LPS, 2021 WL 3796746, at *9 (D. Del. Aug. 26, 2021) (rejecting claim of ineffective assistance of postconviction counsel as non-cognizable) (citing *Hassine*); *Rollins v. Snyder*, 2002 WL 226618

at *5 (D. Del. Feb. 13, 2002) ("Rollins' claims based on the [state] courts' actions in his [post conviction proceedings] are not cognizable on federal habeas review.").

Relying on the United States Supreme Court's pronouncement in *Evitts* that if a state chooses to act in an area where it has significant discretion it must exercise it consistent with the Due Process Clause, Petitioner posits "that counsel must be made available and render effective assistance" on appeal, including, apparently, postconviction appeal. (Reply, ECF No. 36, at 14, 16 (citing *Evitts*, 469 U.S. at 396, 401)). But in *Pennsylvania v. Finley*, 481 U.S. 551 (1990), the Court flatly rejected such an application of *Evitts* to postconviction proceedings, stating: "*Evitts* provides [the habeas petitioner] no comfort. Initially, the substantive holding of *Evitts* – that the State may not cut off a right to appeal because of a lawyer's ineffectiveness – depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings." *See Finley*, 481 U.S. at 555, 558 ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today.") (citing *Johnson v. Avery*, 393 U.S. 483, 488 (1969)). As the Court explained:

> At bottom, the decision below [and petitioner's argument] rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right.

481 U.S. at 559; *see also Moses v. Kraser*, No. 21-5466, 2022 WL 22744594, at *2 (E.D. Pa. Oct. 28, 2022) ("There is no federal constitutional right to counsel for a state collateral attack on a conviction. Hence, there is also no Sixth Amendment right to the effective assistance of counsel, if state law provides for an attorney during a state collateral attack, such as a PCRA

petition.") (citing *Finley* and *Coleman*).

b. Attorney Abandonment

Turning to Petitioner's argument that cause exists to excuse the procedural default of Claims Five and Six, he maintains that Mosser abandoned him and thus was no longer acting as his agent when he omitted those claims from Petitioner's appellate PCRA brief because the omission was a breach of the duty of loyalty owed to him by Mosser, especially in light of a letter Petitioner had previously sent him regarding the claims. (Reply, ECF No. 36, at 16 (citing *Maples*, 565 U.S. at 287-88) (additional citation omitted)). In *Maples*, relied upon by Petitioner, an Alabama death-row inmate's two out-of-state attorneys, Clara Ingen-Housz and Jaasi Munanka,[11] filed a state postconviction petition following his trial and sentencing but then departed their firm approximately seven months later for new positions in the federal judiciary and European Commission in Belgium and the federal judiciary, respectively, without notifying Maples or the state court, seeking leave to withdraw, or substituting another attorney(s). *Id.* at 275. Nearly one year after that, the state court dismissed the petition without a hearing and mailed associated notices, but after notices to Ingen-Housz and Munanka were returned as undeliverable, the state court clerk took no further action. *Id.* at 276-77. The time to file an appeal elapsed six weeks after the dismissal, and the attorney for the state, Jon Hayden, mailed a letter directly to Maples in prison informing him of the missed deadline and his remaining four weeks to file a federal habeas petition. *Id.* at 277. Upon receiving the letter, Maples, through his mother, immediately contacted Ingen-Housz and Munanka's former law firm, which moved to restart the postconviction appeal period. *Id.* However, the court denied the motion, and the

[11] These two attorneys were admitted pursuant to *pro hac vice* applications sponsored by local counsel, John Butler, who informed them "at the outset" that he would serve as local counsel only for the purpose of facilitating their representation of Maples in the Alabama courts. *Maples*, 565 U.S. at 274.

appellate court subsequently denied the firm's motion for leave to file an out-of-time appeal. *Id.* at 278.

On federal habeas review, the district court determined that Maples' claims were procedurally defaulted because postconviction appellate counsel ineffectiveness cannot establish cause to excuse a procedural default. *Id.* at 279 (citing *Coleman*). On appeal, a divided panel of the Eleventh Circuit Court of Appeals affirmed. *Id.*

After reiterating that a postconviction attorney's negligence, including in missing a deadline, is attributable to his client pursuant to agency law, the United States Supreme Court explained that "[a] markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default[,]" because his ensuing omissions are not fairly attributable to the client once the agency relationship has been severed. *Id.* at 281 (citations omitted). Noting that Maples' ability to establish cause turned on whether his attorneys had abandoned him, the Court revisited the facts set forth above, finding that Ingen-Housz and Munanka severed their relationship with him when they began new positions that prohibited their continued representation. *Id.* at 283-84 (citing their employee manuals). It also stressed their failure to withdraw from the case, which ensured that the state courts continued to misdirect mailings to them instead of to Maples directly. *Id.* at 284. Accordingly, the Court concluded that "[a]t the time critical to preserving Maples' access to an appeal, . . . Munanka and Ingen–Housz, were not Maples' authorized agents." *Id.* at 287.

It further determined that "Maples' only other attorney of record, local counsel Butler, also left him abandoned. Indeed, Butler did not even begin to represent Maples." *Id.* In reaching this conclusion, the Court highlighted his role limited to supporting Ingen-Housz's and Munanka's *pro hac vice* admissions and not "deal[ing] with substantive issues in the case;" the state's service of its response to Petitioner's postconviction petition upon only Ingen-Housz and

Munanka, not Butler; his failure to contact them in response to the denial of Petitioner's postconviction petition; and Hayden's letter sent directly to Petitioner (rather than counsel) regarding the passing of his postconviction appellate deadline, reflecting that Hayden "must have believed that Maples was no longer represented by counsel, out-of-state or local." *Id.* The Court added that not only did Maples' attorneys abandon him, but their continued listing as counsel of record deprived him of the right to receive notice personally, and he received no "warning that he had better fend for himself." *Id.* "Given no reason to suspect that he lacked counsel able and willing to represent him," the Court reasoned, "Maples surely was blocked from complying with the State's procedural rule," establishing cause to excuse the procedural default. *Id.* at 288-89.

"[T]he extraordinary facts of Maples' case" differ substantially from those here. *Maples*, 565 U.S. at 287-88. In this case, Petitioner, through Mosser, timely appealed the initial denial of his postconviction petition. (Hab. Pet., ECF No. 1, at 24; Reply, ECF No. 36, at 15). Upon learning of Mosser's decision to drop six of the claims rejected below from the appellate brief, and instead focus on a single claim on appeal, Petitioner filed a *pro se* "Application for Relief,"[12] but the Superior Court denied it. (Hab. Pet., ECF No. 1, at 24, 57; Reply, ECF No. 36, at 15). Per Petitioner, Mosser's "abandoning all but one claim in his brief, the least potent claim at that," effectively severed the attorney-client relationship. (Reply, ECF No. 36, at 15). "But this argument is a nonstarter since claim abandonment—while perhaps ineffective assistance—is not the same as client abandonment." *Young v. Westbrooks*, 702 F. App'x 255, 262 (6th Cir. 2017) (citations omitted). This fact remains true even if, as Petitioner maintains was the case here, the claim was potentially "meritorious" and the attorney was advised by the client that he wished the

[12] The exact nature of this application, which Petitioner does not specify and which was not made a part of the SCR, is unclear.

claim to be asserted.[13] (Hab. Pet., ECF No. 1, at 24; Reply, ECF No. 36, at 15); *Towery v. Ryan*, 673 F.3d 933, 942 (9th Cir. 2012) (finding "no authority for the proposition that counsel's failure to raise a colorable habeas claim . . . severs the attorney-client relationship" because counsel is at most "negligent in failing to raise a colorable . . . claim"), *overruled on other grounds*, *McKinney v. Ryan*, 813 F.3d 798, 824 (9th Cir. 2015); *Wilkins v. Stephens*, 560 F. App'x 299, 304 (5th Cir. 2014) ("We have noted that counsel's failure to raise all issues a petitioner would like to argue does not amount to abandonment."). As the Sixth Circuit Court of Appeals has explained, "[t]he type of abandonment contemplated by the Court in *Maples* occurs when a petitioner is 'left without any functioning attorney of record.'" *Young*, 702 F. App'x at 262 (quoting *Maples*, 565 U.S. at 288). However, this situation does not arise when the attorney continues to press the claims "viewed worthy of pressing." *Id.*

Petitioner insists that Mosser's filing of motions to withdraw in the Pennsylvania Superior and Supreme Courts proves that he abandoned him. (Hab. Pet., ECF No. 1, at 24). However, by the time Mosser filed even his first withdrawal motion (which was in any event denied), Claims Five and Six had already been waived in the Pennsylvania state courts, leading to their ultimate procedural default in this Court, by virtue of counsel's decision not to include the claims on PCRA appeal to the Superior Court. (*See* Hab. Pet., ECF No. 1, at 24 (noting that first withdrawal motion was filed after the appellate brief)); *see also Commonwealth v. Johnson*, 985 A.2d 915, 924 (Pa. 2009) ("[W]here an appellate brief fails to provide any discussion of a

[13] Petitioner submits a letter he sent to Mosser during PCRA proceedings that he contends "specifically expressed the preservation of Claims Five and Six for direct review." (Reply, ECF No. 36, at 15). Whatever the meaning of Petitioner's unclear characterization, the actual letter asked Mosser for his "legal opinion about their merit, and the possibility of . . . obtaining relief in the Superior Court," and requested that he "make the best decisions regarding [Petitioner] obtaining his freedom." (Reply, ECF No. 36, at 47, 50). Thus, there exists ambiguity as to whether Petitioner ever even requested that Mosser assert the claims at issue herein.

claim . . . or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived.") (citation omitted); *Lambert*, 387 F.3d at 233-34 (to exhaust claims in Pennsylvania state courts, they must be litigated through the Superior Court). Petitioner submits that this decision represents "per se ineffectiveness," but even if that were true, "ineffective assistance[ ]is not the same as client abandonment." *Young*, 702 F. App'x at 262. What matters is that Petitioner had representation – whether he agreed with all decisions being made or not – "at the time critical to preserving his access to an appeal." *Maples*, 565 U.S. at 287. Because Petitioner's failure to exhaust Claims Five and Six was not the result of "attorney abandonment,"[14] but rather an apparent strategic choice by his then-attorney, he has failed to establish cause to excuse the procedural default on this basis.

c. Petitioner's Pennsylvania Supreme Court Proceedings

Petitioner's final[15] argument in support of Claim Four is that cause to excuse the

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[14] Petitioner's related arguments are also without merit. He complains that Mosser's conduct was "significantly more exasperating" than what occurred in *Shaw* and *Clark*, (Hab. Pet., ECF No. 36, at 15-16), but the relevant standard to determine attorney abandonment for purposes of establishing cause to excuse a procedural default of habeas claims is set forth in *Maples* and its progeny, not these state cases. On this point, it bears noting that when Mosser ultimately ceased representing Petitioner, following his filing of a *pro se* petition for allowance of appeal, he informed him as much, (Hab. Pet., ECF No. 1, at 24), unlike in *Maples*, where Maples' attorneys gave him no "warning that he had better fend for himself" and "no reason to suspect that he lacked counsel able and willing to represent him," thereby impeding his ability to represent himself or seek other representation. *Maples*, 565 U.S. at 289.

Petitioner also suggests that Mosser somehow implicitly acknowledged his abandonment of Petitioner by refunding him $4500, but it is undisputed that Mosser did not represent him throughout the entire appeal and that a Consadene was ultimately substituted. (*See* Pa. Supr. Ct. Docket at 3). Petitioner does not specify the portion of unperformed work to which this money corresponded, and it may have represented work originally planned to be performed by Mosser but ultimately undertaken by Petitioner himself and/or Consadene. In any event, the refund does not establish attorney abandonment.

[15] Petitioner also argues that Mosser's purported abandonment of him and the Pennsylvania Supreme Court's actions establish the necessary prejudice to excuse the procedural default, but this contention adds nothing new and merely incorporates the foregoing arguments. (*See* Reply, ECF No. 36, at 16 (arguing the existence of prejudice "for all the reasons stated

procedural default of Claims Five and Six exists because the Pennsylvania Supreme Court "opted to act" when it took "such inactions" as not docketing his *pro se* petition for allowance of appeal or notifying Petitioner of the same, thus depriving him of the right to continue his PCRA appeal to Pennsylvania's highest court as allegedly guaranteed by *Shaw/Clark* and the federal Due Process Clause as stated in *Evitts*. (Reply, ECF No. 36, at 16). He claims that this "interference by officials" rendered compliance with Pennsylvania appellate rules impracticable, particularly in light of his prisoner status. (*Id.* at 17 (quotation omitted)). According to Petitioner, this case represents the exact circumstances described by Justice Stevens in his *Wainwright* concurrence, in which he opined that "even an express waiver by the defendant himself" of a "sufficiently grave" constitutional issue may be excusable. (*Id.* at 16 (citation omitted)).

Petitioner's reliance on *Evitts* is again misplaced in light of *Finley*. In *Evitts*, the United States Supreme Court held that under the Due Process Clause a criminal defendant's right to counsel "on his first appeal as of right" includes a right to effective assistance of counsel "on such an appeal." 469 U.S. at 388-89 (citing *Douglas v. California*, 372 U.S. 353 (1963)). However, "[i]n *Finley*, the Supreme Court refused to extend the due process clause to post-conviction proceedings that were purely collateral attacks on the conviction." *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143, 1150 (7th Cir. 1991); *see also Espinal v. Warden, Noble Correctional Inst.*, No. 1:05cv812, 2007 WL 1288175, at *10 (S.D. Ohio May 1, 2007) ("federal due process protection[s] . . . do not extend beyond the appellant's appeal as of right . . . to subsequent state discretionary appeals or collateral review.") (citing *Finley*, 481 U.S. at 556) (additional citations omitted). The Court explained the inapplicability of the Due Process Clause

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above"); *see also supra* § III.B.2.a-c). Therefore, the Court does not separately address this argument.

to collateral proceedings as follows:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

Finley, 481 U.S. at 556-57 (citing *Fay v. Noia*, 372 U.S. 391, 423-24 (1963), *overruled on other grounds*, *Wainwright*, 433 U.S. 72). Because "[s]tates have no obligation to provide this avenue of relief," the protections of the Due Process Clause do not apply. *Id.* at 557. Accordingly, Petitioner's *Evitts*-based challenge to any irregularities[16] in the state courts' handling of his collateral attack under the PCRA is unavailing.

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[16] Even if the protections of the Due Process Clause applied to Petitioner's postconviction proceedings, his underlying allegation of state court error and "interference by officials" lacks merit. Petitioner complains that rather than docket his petition for allowance of appeal the Pennsylvania Supreme Court forwarded it to Mosser "due to him being attorney of record," all without notifying Petitioner (although Mosser, in turn, immediately advised Petitioner that he was not handling the appeal). (Hab. Pet., ECF No. 1, at 24-25). However, the court's actions were consistent with Pennsylvania law, which states that "there is no constitutional right to hybrid representation" and that a court may "refus[e] to consider the[ ] pro se briefs" of "appellants in criminal cases." *Commonwealth v. Ellis*, 626 A.2d 1137, 1139, 1141 (Pa. 1993). Thus, the instant case is distinguishable from *Alexander*, cited by Petitioner, in which the Eleventh Circuit Court of Appeals found cause to excuse the procedural default because, "[f]or some unknown reason, [Petitioner's] motion was never placed on the court's docket." 831 F.2d at 373.

Petitioner further takes issues with the Pennsylvania Supreme Court's denial of his petition for leave to file for allowance of appeal *nunc pro tunc*, claiming that the court "predicated its denial on Attorney Consadene being 'Substitute Counsel' for Attorney Mosser, instead of 'New Counsel.'" (Hab. Pet., ECF No. 1, at 25). He adds that the court also failed to inform Consadene of the denial. (*Id.*). But the docket indicates that the court raised the issue of Consadene being substitute rather than new counsel only to point out that Mosser need not have filed an application to withdraw as counsel, not as the basis for rejecting the *nunc pro tunc* petition. (Pa. Supr. Ct. Docket at 3). And even if the court failed to send Consadene notice of the denial, Petitioner identifies no resulting prejudice. Petitioner was already timed out from any further appeal by failing to file a timely petition for allowance of appeal, but even assuming, *arguendo*, that the denial of his *nunc pro tunc* submission reset the clock, it is undisputed that Petitioner and Consadene learned of the denial within the time to continue the appeal by moving for certiorari with the United States Supreme Court. (Hab. Pet., ECF No. 1, at 25); Sup. Ct. R. 13(1); *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012).

Petitioner's reliance on Justice Stevens' concurrence in *Wainwright* is similarly misplaced. The issue in that case was whether "the rule . . . barring federal habeas review absent a showing of 'cause' and 'prejudice' attendant to a state procedural waiver . . . applied to a waived objection to the admission of a confession at trial[.]" *Wainwright*, 433 U.S. at 87. The majority opinion concluded that it did, rejecting "the sweeping language of *Fay v. Noia*," 372 U.S. 391, which, in dicta, had extended the right to federal habeas review to state convicts based simply on a showing that in state court there was no "knowing and deliberate waiver of the federal constitutional right" at issue. *Wainwright*, 433 U.S. at 87. Justice Stevens, while criticizing this "knowing and deliberate" requirement for waiver as "unrealistic," opined that, on the contrary, even express waivers of sufficiently serious constitutional issues (such as the effectiveness of counsel or the fairness of the proceeding) could be excused "sometimes." *Id.* at 95-96. However, he did not elaborate on this view and instead praised the majority decision for "wisely refrain[ing] from attempting to give precise content to its 'cause'-and-'prejudice' exception to the rule" against permitting review of claims waived on state procedural grounds. *Id.* at 96. This is the same cause-and-prejudice exception this Court has considered relative to the instant claim, as well as to procedurally defaulted Claims Five and Six. (*See supra* III.A.3, B.2.b-c). And even putting aside that the dicta from Justice Stevens' concurrence quoted by Petitioner is nonbinding, nothing therein suggests that a different standard should apply, even when the issue is "sufficiently grave." *Wainwright*, 433 U.S. at 94-97. On the contrary, Justice Stevens agreed that the cause-and-prejudice test utilized here by the Court to determine whether to excuse a state court waiver remains the appropriate one, to be applied "with flexibility and regard for the necessities of each case . . . ." *Id.* at 96 n.4 (citation omitted).

For these reasons the Court respectfully recommends that this claim be denied.

C. Merits Review – Claims One, Two and Three

1. Trial Court Erred In Allowing Commonwealth to Reopen Case

a. The Parties' Positions

In his first claim, Petitioner contends that the trial court erred in permitting the Commonwealth to reopen its case after resting pursuant to a stipulation with the defense to present testimony from forensic technician Patrick Raytik that Petitioner's fingerprints were obtained from one of the murder weapons and the cell phone recovered from the van. (Hab. Pet., ECF No 1, at 23). However, he complains that the testimony presented exceeded the terms of the stipulation insofar as it had not been previously presented to him. (*Id.*). He notes that his trial attorney, Shaka Johnson, "adequately objected and stated how [Petitioner] was prejudiced," but the court nonetheless reopened the case, violating his Sixth and Fourteenth Amendment fair trial and due process rights. (*Id.*). The Commonwealth responds that a trial court's decision to reopen a case is reviewed for abuse of discretion and whether the party who opposed reopening was prejudiced. (Resp., ECF No. 21, at 11 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971))). It denies that Petitioner was prejudiced in light of the substantial evidence of his guilt presented at trial. (*Id.*). It adds that the Superior Court reasonably rejected this claim on direct appeal when it determined that reopening caused only a *de minimis* disruption and did not prejudice Petitioner. (*Id.*).

In reply, Petitioner acknowledges that it is "well-settled" that a trial court has discretion to reopen a case to received additional evidence. (Reply, ECF No. 36, at 30 (citing *Turner v. United States*, 441 F.2d 736, 739)). He continues that in exercising this discretion the court must consider the timeliness of the motion, the character of the evidence to be presented, the effect of granting the motion, the reason for not presenting the evidence in the case-in-chief and the relevance, admissibility, and technical adequacy of the evidence. (*Id.* (citing *United States v.*

Peterson, 233 F.3d 101, 106 (1st Cir. 2000) (internal citations omitted))). Applying these factors, he maintains that the Superior Court's decision upholding the trial court's action does not comport with *Peterson* and/or is based upon an unreasonable determination of the facts. (*Id.*). Regarding timeliness, he posits that the Commonwealth received "a strategic advantage" by presenting Raytik's testimony as the last piece of evidence before the close of trial. (*Id.*). As for the character of the testimony, Petitioner maintains that the evidence should have been disallowed pursuant to Johnson's objection due to "fairness," "Pennsylvania and federal rules of discovery," the Commonwealth's abrogation of the stipulation, and the lack of a property receipt or other established chain of custody for the proffered physical evidence. (*Id.* at 31).

Petitioner claims, furthermore, that reopening the Commonwealth's case prejudiced him for the reasons stated by Johnson in his objection, because the new evidence placed "undue emphasis" on the "appearance that Mr. Tootle was one of the culprits in the van," and because the defense had been built upon the previously admitted evidence. (*Id.*). He adds that, conversely, refusing to reopen the case would not have prejudiced the Commonwealth. (*Id.* (citation omitted)). He also argues that the Commonwealth failed to offer a reasonable excuse for not presenting the evidence earlier, pointing to the trial court's observation during the entry of the stipulation into the record that defense counsel had stipulated only to the fingerprint evidence regarding the gun, not the phone. (*Id.* at 32 (citation omitted)). Turning to the last factor, he insists that, although relevant, the physical fingerprint evidence was inadmissible under discovery rules and technically inadequate due to the absence of a chain of custody. (*Id.*).

b. State Court Opinion

The Superior Court addressed this claim on direct appeal as follows:

> Defendant's final issue on appeal states that the Court erred in permitting the Commonwealth to reopen its case after both parties had rested. Supplemental Statement of Errors at ¶ 5. This claim is without merit.

"[T]he reopening of a case after the parties have rested, for the taking of additional testimony, is within the trial court's discretion; this Court has couched the exercise of this discretion in terms of 'prevent[ing] a failure or miscarriage of justice.'" *Commonwealth v. Baldwin*, 58 A.3d 754, 763 (Pa. 2012), quoting *Commonwealth v. Chambers*, 685 A.2d 96, 109 (Pa. 1996); *see Commonwealth v. Tharp*, 575 A.2d 557, 558–559 (Pa. 1990) (permitting the Commonwealth to reopen after failing to prove an essential element of an offense in its case-in-chief). In determining whether or not to permit a party to reopen its case, the Court may consider such factors as the timing of the request to open, the nature of the proffered testimony compared to its potential for disruption or prejudice, as well as the party's reason for failing to present the evidence during its case-in-chief. *Baldwin*[,] 58 A.3d at 763–64.

Here, the Commonwealth sought to reopen its case after a dispute with the defense over a stipulation regarding the testimony of Patrick Raytik, the latent fingerprint technician who identified fingerprints lifted from one of the murder weapons and from the cell phone recovered from the van, as belonging to defendant. Raytik's entire report was admitted into evidence without objection from the defense. N.T. 7/2/2014 at 229–230. However, when the prosecutor recited a stipulation as to Raytik's testimony, he referenced the report, but only stated Raytik's opinion regarding the fingerprint found on the murder weapon, making no mention of the fingerprints from the phone. N.T. 7/2/14 at 199–200. The next day, right before closing arguments, defense counsel, in making the motion for a mistrial . . . , denied stipulating to the cell phone prints, and argued that the Commonwealth failed to prove a chain of custody sufficient to connect any of Raytik's analysis to prints lifted from the cell phone taken from the van. N.T. 7/3/14 at 8–37. The Commonwealth, on the other hand, argued that defense counsel had agreed to stipulate to Raytik's entire report, which rendered any chain of custody issues moot. The prosecutor averred that he did not call Raytik as a witness the day before in reliance on defense counsel's agreement, even though Raytik was present in court and available to testify for six hours. N.T. 7/3/14 at 21–23, 31–32.

Clearly the prosecutor and defense counsel had a misunderstanding regarding the scope of their stipulation regarding the fingerprint evidence. For that reason, the Court concluded that it was fair to both sides to permit the Commonwealth to reopen to offer evidence on the matters that were purportedly covered by the stipulation, that is, Raytik's opinion regarding the prints taken off of the telephone, as well as any additional testimony necessary to establish that the prints that he analyzed were the prints that had been lifted from the phone. N.T. 7/3/14 at 35–41. The additional

> presentation of evidence took less than one half hour to present to the jury, and was followed immediately by closing arguments. N.T. 7/3/14 at 44–72. Accordingly, there was only *de minimis* disruption of the trial, and defendant was not prejudiced in any way. No relief is due.

Commonwealth v. Tootle, No. 3030 EDA 2014, 2016 WL 6459816, at *8-9 (Pa. Super. Ct. Nov. 1, 2016) (alterations added).

c. Analysis

Petitioner suggests that the First Circuit Court of Appeals' decision in *Peterson* supplies the "clearly established law" that gives rise to his habeas claim. (*See* Reply, ECF No. 36, at 31 ("When the above averment is equated to the contours of *Peterson*, it becomes clear that the Superior Court's findings [are] utterly erroneous, contrary to clearly established federal law, [and] objectionably unreasonable . . . .")). However, to obtain habeas relief based on an error of law, Petitioner must "be able to point to a *Supreme Court* precedent that he thinks the . . . state courts acted contrary to or unreasonably applied" in reaching their decision. *See Owsley v. Bowersox*, 234 F.3d 1055, 1057 (8th Cir. 2000) (rejecting petitioner's claim for failing to identify "any Supreme Court opinion justifying his position") (emphasis added). Here, Petitioner cites only circuit-level authority, which, in turn relies on additional such cases, not any pronouncement by the United States Supreme Court. (*See* Reply, ECF No. 36, at 31 (citation omitted)). Thus, "Petitioner has not even begun to shoulder this burden with citation to apposite United States Supreme Court authority."[17] *Baldwin v. Superintendent, SCI Albion*, No. 17-540,

[17] One court within this district has determined, in a footnote, that *Zenith Radio*, 401 U.S. 321, cited by the Commonwealth in its response, "has clearly established that the question of whether to reopen a record to admit additional evidence is a matter for the sound discretion of the trial court." *Eichinger v. Wetzel*, No. 07-4434, 2019 WL 248977, at *35 n.25 (E.D. Pa. Jan. 16, 2019). However, this Court has located no other authority, within or outside this circuit, stating that *Zenith Radio* constitutes clearly established law in this area, and *Eichinger* cited no support for this proposition. *See generally id.* Moreover, another court has determined, consistent with this Court's research, that "there is no clearly established Supreme Court law prohibiting the trial court from exercising its discretion to reopen the evidence" under similar

2020 WL 2950902, at *4 (W.D. Pa. Feb. 6, 2020) (quoting *West v. Foster*, 2:07-CV-00021, 2010 WL 3636164, at *10 (D. Nev. Sept. 9, 2010), *aff'd*, 454 F. App'x 630 (9th Cir. 2011)) (rejecting claim on this basis), *report and recommendation adopted by* 2020 WL 1074282 (W.D. Pa. Mar. 6, 2020).

Alternatively, Petitioner submits that the Superior Court decision was based on "an unreasonable determination of the facts." (Reply, ECF No. 36, at 31). To maintain this challenge, Petitioner "must point to specific factual findings by the state courts" that were determined unreasonably. *Baldwin* 2020 WL 2950902, at *4 (citing *Davis v. Jones*, 506 F.3d 1325, 1330 n.8 (11th Cir. 2007)). The closest Petitioner comes to fulfilling this responsibility is when he argues that the Superior Court's conclusion that a "misunderstanding" existed between counsel regarding the terms of the stipulation "is undermined by the record itself," which shows

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circumstances. *See Hardy v. Gipson*, No. 14-4521-SJO (KK), 2015 WL 3498465, at *7 (C.D. Cal. Apr. 29, 2015) (finding absence of any such law, at least when basis for reopening was a jury request). As that court explained, "the Supreme Court has suggested abuse of discretion is an appropriate standard on direct review, but not in federal habeas proceedings." *Id.* (citing *Renico v. Lett*, 559 U.S. 766, 772–73 (2010)). Notably, *Zenith Radio* was not a habeas case. 401 U.S. 321.

"If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004). But even if the Court were to apply the abuse of discretion standard from *Zenith Radio*, Petitioner's claim would fail. (*See also* Reply, ECF No. 36, at 30 (asserting that an abuse of discretion standard applies) (citation omitted)). First, the Superior Court also applied such a standard; thus, it did not apply law "contrary to" *Zenith Radio*. *Tootle*, 2016 WL 6459816, at *8. Additionally, its determination would not constitute an unreasonable application of *Zenith Radio* because, as the Superior Court explained, fairness dictated that the evidence be reopened after the Commonwealth chose not to call Raytik as a witness in reliance upon the stipulation, the decision not to call him had been the result of a "misunderstanding" between counsel, and the additional evidence took less than 30 minutes to present, causing only a *de minimis* delay before the attorneys proceeded to closing statements. *Id.* at *9; *see also Eichinger*, 2019 WL 248977, at *35 n.25 ("As the [state] [c]ourt provided a reasoned rationale for its decision, we fail to see how it abused its discretion when it refused to reopen the record.") (alterations added).

that the trial court "admonished" the prosecutor, Assistant District Attorney (ADA) Richard Sax, for claiming that Johnson had stipulated to Raytik's full report (which discussed both the gun and phone) even though the stipulation referred only to the gun, not the phone. (Reply, ECF No. 36, at 33 (citing N.T. 7/3/14 at 27-37)). However, even assuming that this conclusion constituted a "factual" determination as required by the case law, *see Baldwin* 2020 WL 2950902, at *4, Petitioner's claim has no merit because the cited notes of testimony support the notion that the two attorneys, in fact, had a good faith misunderstanding about the reach of the stipulation. As Petitioner notes, the court pointed out that "there was no reference to the cell phone," thus excusing Johnson for not raising an objection earlier, but it went on to explain: "At the same time the beginning part of the stipulation did refer to [Raytik's] report. I could see [Sax's] misunderstanding. I think that's possible. I accept both what you tell me as they can both be true and if they're both true, then there was just a misunderstanding and if that's true, I don't see how [Petitioner is] prejudiced." (N.T. 7/3/14 at 36). Accordingly, the state court's ruling was not based upon unreasonably determined facts.

For these reasons, the Court respectfully recommends that this claim be denied.

2. Trial Court Erred in Excusing Juror Eight

a. The Parties' Positions

In his second claim, Petitioner contends that the trial court erred in excusing Juror Eight, resulting in a violation of his Sixth Amendment rights to an impartial jury and fair trial. (Hab. Pet., ECF No. 1, at 23). He explains that the trial court questioned the juror about her impartiality after she complained to a court officer that Sax's facial expressions were distracting, but he insists that the court improperly replaced her with an alternate juror over Johnson's objection even after she confirmed that she could remain fair and impartial. (*Id.*). In response, the Commonwealth asserts that the Superior Court's dismissal of this claim on direct appeal was

not unreasonable where, relying on state and federal law, it reasoned that a trial court may replace a juror if facts convince the court that the juror has an impaired ability to carry out his or her duties. (Resp., ECF No. 21, at 12). It notes that, here, the facts showed that Juror Eight made facial expressions and paused before responding to a question about her ability to remain impartial, thus establishing a reasonable basis for the trial court's actions and, in turn, the Superior Court's decision upholding them. (*See id.*).

Citing Pennsylvania Supreme Court case law, Petitioner replies that the Sixth Amendment guarantees an impartial jury and that once a juror is seated and sworn he or she may only be removed for good cause shown on the record, which Petitioner maintains is absent in this matter. (Reply, ECF No. 36, at 34-35 (citations omitted)). He dismisses Juror Eight's actions as merely "doing exactly what the court instructed her to do," which was to "notify the court of any problems." (*Id.* at 35). He insists that real fault lies with Sax for "making faces amidst . . . trial," which he and the judge acknowledged occurred, and that Juror Eight should not have been removed after she assured the court that she could carry out her responsibilities impartially. (*Id.*). He insists that the Commonwealth would not have been prejudiced by her continued service and quotes at length the trial court's exchange with her in which she repeatedly denied that her feelings about Sax's facial expressions would interfere with the fair completion of her duties. (*Id.* at 35-36 (citing N.T. 7/2/14 at 120-23) (case citation omitted)).

Petitioner adds that the justification for excusing Juror Eight is "feeble on its face" when compared with the impartiality issues of her replacement, Juror Thirteen, who during voir dire "manifested his bias that emanated from Mr. Tootle electing not to testify at trial." (*Id.* at 36). He quotes from Juror Thirteen's exchange with the court in which the former expressed reluctance about following the instruction that Petitioner's silence at trial could not be held against him (but also twice confirmed that he would do so). (*Id.* (citing N.T. 6/30/14 at 250-55)).

He notes that Johnson moved to strike Juror Thirteen for cause, but the trial court refused on the basis that he was a "competent juror." (*Id.* (citing N.T. 6/30/14 at 256-59)). He insists that it was objectively unreasonable for the court to "allow[ ] a partial juror [Juror Thirteen] to sit in lieu of an impartial juror [Juror Eight]" and that doing so deprived him of his Sixth Amendment rights. (*Id.* (citing *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021))).

b. State Court Opinion

The Superior Court addressed this claim on direct appeal as follows:

> Defendant next asserts that the Court "erred in excusing Juror 8, after individual questioning confirmed that she would be fair . . . ; further, excusing the juror had the effect of seeming to punish a member of the jury for criticizing the conduct of the representative of the Commonwealth, to the derogation of the jury's impartiality." Statement of Errors at ¶ 2. This claim is without merit.
>
> "The decision to discharge a juror is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. This discretion exists even after the jury has been impanelled and the juror sworn." *Commonwealth v. Carter*, 643 A.2d 61, 70 (Pa. 1994) (internal citations omitted). "[T]he common thread of the cases is that the trial judge, in his sound discretion, may remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." *Bruckshaw v. Frankford Hosp. of City of Philadelphia*, 58 A.3d 102, 110–11 (Pa. 2012), quoting *United States v. Cameron*, 464 F.2d 333, 335 (3d Cir. 1972).
>
> During trial, Juror No. 8 told a court officer that she saw the Assistant District Attorney, Richard Sax, making faces during trial and that she found these faces distracting. N.T. 7/2/14 at 116–117. After Juror No. 8's complaint was reported to counsel, the Commonwealth moved to excuse the juror and proceed with an alternate, which defendant opposed. N.T. 7/2/14 at 117–118. The Court then conducted an examination of the juror, outside the presence of the rest of the jury. Juror No. 8 stated that she had seen Mr. Sax's reactions to the questions that were being asked and "felt that it seemed like it was very disparaging to the questioners, to the counsels, and like [Mr. Sax] was very exasperated or whatever was being asked was ridiculous and his faces I just find very annoying and it's difficult to avoid them." N.T. 7/2/14 at 118–119. Upon questioning by the Court, the juror stated that she would not let the

> behavior of the prosecutor affect her view of the evidence and that she could be fair. N.T. 7/2/14 at 120–122. However, the Court observed that after being asked whether she could disregard her impression of the prosecutor and be fair, Juror No. 8 "made a face and hesitated before answering." N.T. 7/2/14 at 122–123. The Court specifically found that the juror's reaction to the prosecutor was "extraordinary," and that "the expression on this juror's face and the hesitation with which she deliberated before answering my question . . . gives me great concern that she could be fair and impartial . . . ." N.T. 7/2/14 at 125–126. The Court, therefore, dismissed Juror No. 8 and substituted Juror No. 13. N.T. 7/2/14 at 126. Upon the resumption of trial, the Court instructed the jury that it had excused a juror and that the remainder of the jury should not concern itself with the matter in any way. N.T. 7/2/14 at 128–129.
>
> Accordingly, the record establishes that after a juror took the extraordinary measure of reporting to a court officer that the appearance of the prosecutor was distracting her during the trial, the court held a hearing to explore the matter after the Commonwealth moved to exclude her from the trial. After interrogating the juror, the Court found, based on the demeanor and behavior of the juror, that her statement that she could be fair was not credible, and therefore excused her. Because the Court's decision was based upon a factual finding, supported by the record, that Juror No. 8's ability to perform her duty impartially was impaired, the decision was well within the discretion of the Court. No relief is due.

Tootle, 2016 WL 6459816, at *7 (alterations in original).

c. Analysis

Although Petitioner again fails to directly identify any United States Supreme Court precedent with which the Superior Court decision is allegedly inconsistent, (*Cf.* § III.C.1.c), one of his cited cases explains that, pursuant to the high court's decision in *Skilling v. United States*, "review of a ruling on a motion to strike a juror for cause is for manifest error – a most deferential standard." *Nasir*, 17 F.4th at 467 (citing *Skilling*, 561 U.S. 358, 396 (2010)). *Skilling* further "emphasized that jury selection is 'particularly within the province of the trial judge' and cautioned against 'second-guessing the trial judge's estimation of a juror's impartiality[.]'" *Id.* (quoting *Skilling*, 561 U.S. at 386). Accordingly, the Superior Court's application here of an

abuse-of-discretion standard was not contrary to *Skilling*'s "manifest error" standard. *See United States v. Salcedo*, 840 F. App'x 184, 185 (9th Cir. 2021) ("We 'review[ ] a court's findings regarding actual juror bias for manifest error or abuse of discretion.'") (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000)) (additional internal quotations omitted). Thus, Petitioner is entitled to habeas relief only if he can demonstrate that the state court's decision was an unreasonable application of *Skilling* or involved an unreasonable determination of the facts.

The Superior Court did not unreasonably apply *Skilling*. On the contrary, it highlighted the trial court's reasons for removing Juror Eight, including her taking the "extraordinary measure" of, *sua sponte*, complaining to the court "that the appearance of the prosecutor was distracting her during trial," followed by her own facial contortions and hesitation upon questioning about whether she could serve impartially in the case. *Tootle*, 2016 WL 6459816, at *7. Petitioner attempts to downplay Juror Eight's actions as merely "notify[ing] the court of any problems" and to shift blame to Sax for "making faces" first, (Reply, ECF No. 36, at 35), but the trial court retained discretion to remove her consistent with *Skilling* based on its judgments about her impartiality after observing her "demeanor and behavior," even though she purported to confirm her ability to act without bias in the matter. *Tootle*, 2016 WL 6459816, at *7; *see United States v. Lowe*, 145 F.3d 45, 49 (1st Cir. 1998) (trial court properly excused jurors, although they asserted their impartiality, because "the judge did not believe [the] jurors after assessing their demeanor"), *overruled on other grounds*, *United States v. Martinez-Salazar*, 528 U.S. 304 (2000); *see also United States v. Meehan*, 741 F. App'x 864, 872 (3d Cir. 2018) ("We . . . give broad latitude to the [trial court] to determine whether to excuse a prospective juror based on actual bias because it 'possesses a superior capacity to observe the demeanor of prospective jurors and to assess their credibility.'") (quoting *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012)).

Nor did the Superior Court unreasonably determine the applicable facts. Petitioner maintains "that the record is void of competent evidence supporting" its finding that Juror Eight's alleged facial expressions and hesitation called into question her impartiality. (Reply, ECF No. 36, at 35). But the Superior Court's opinion is replete with citations to the trial court record, including the latter's findings that Juror Eight engaged in this behavior, that it was "extraordinary," and that it gave the judge "great concern that she could be fair and impartial . . . ." *Tootle*, 2016 WL 6459816, at *7 (citing N.T. 7/2/14 at 116-23, 125-26, 128-29). Indeed, Petitioner's argument suggesting that Juror Eight's oral responses to questioning did not warrant her removal only underscores the need to reasonably defer, as the Superior Court did, to the trial judge's first-hand observations and impressions regarding her manner and bearing. *See Stevens v. Beard*, 701 F. Supp. 2d 671, 719 (W.D. Pa. 2010) ("the trial court's assessment of a . . . juror's demeanor is of primary importance, especially when there is ambiguity in the printed record"); *see also Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220-21 (9th Cir. 1997) ("the trial judge, who observes the demeanor and credibility of a juror, is best suited to determine a juror's impartiality"). Accordingly, the state court opinion was not based upon an unreasonable determination of the facts.[18] *See Tootle*, 2016 WL 6459816, at *7

[18] In his reply, Petitioner springs upon the Commonwealth the new argument that it was "objectively unreasonable" for the trial court to deny his motion to excuse Juror Thirteen for cause, particularly when contrasted with its removal of Juror Eight. (*See supra* III.B.1). *But see Marcum v. Columbia Gas Transmission, LLC*, 549 F. Supp. 3d 408 (E.D. Pa. 2021) ("Courts need not address arguments raised for the first time in a reply brief.") (citation omitted). But even considering this untimely contention, it lacks merit as well. Although the trial court had a similar opportunity to evaluate Juror Thirteen's comportment while he answered questions about his ability to serve impartially, the record reflects no concerns about whether his responses accurately reflected his intention or ability to remain unbiased, unlike those of Juror Eight. *See United States v. Dale*, 614 F.3d 942, 959 (8th Cir. 2010) ("[A] [trial] court does not abuse its discretion by refusing to excuse a challenged juror after the juror affirmed [his] impartiality and the judge favorably evaluated [his] demeanor.") (citations omitted). Because there was no abuse of discretion in refusing to strike Juror Thirteen, this claim also fails.

("Because the Court's decision was based upon a factual finding, supported by the record, that Juror No. 8's ability to perform her duty impartially was impaired, the decision was well within the discretion of the Court. No relief is due.").

For these reasons, the Court respectfully recommends that this claim be denied.

3. Ineffectiveness for Not Presenting DNA Evidence at Trial

a. The Parties Positions

In his third claim, Petitioner argues that trial counsel Page was ineffective for failing to present the testimony of a DNA expert who authored a report purportedly excluding him from possessing either of the recovered firearms. (Hab. Pet., ECF No. 1, at 23). Specifically, he complains that the report was not admitted because trial counsel attempted to introduce it through a detective rather than by calling to the witness stand the expert who could have authenticated it. (*Id.* at 25 (citing N.T. 7/2/14 at 245-46)). The Commonwealth responds that under *Strickland* the Superior Court's determination that Petitioner cannot show prejudice was not unreasonable, pointing to its observation that an individual may handle a firearm and not leave DNA on it and the fact that Petitioner's fingerprints were recovered from the Glock, proving that he handled that weapon. (Resp., ECF No. 21, at 7). It adds that Petitioner was also not prejudiced in light of the other substantial evidence of his guilt. (*Id.* (citation omitted)).

After cross-referencing background law from elsewhere in his reply regarding *Strickland* and the standard for granting habeas relief, Petitioner contends that the Superior Court unreasonably determined the facts when it rejected his claim on PCRA appeal, including when it stated that alleged eyewitness Christina Dorman identified Petitioner as a perpetrator two years prior to trial, contrary to the PCRA court's finding that the array she had been shown at that time included a photo of the other suspect but not Petitioner. (Reply, ECF No. 36, at 38, 40-41 (citing *Tootle*, No. CP-51-CR-0014103-2012, at 12 (ECF No. 1, Ex. B))). Asserting deficient

performance and prejudice, he also impliedly argues that that adjudication was an unreasonable application of *Strickland*. (*Id.*); *see also Strickland*, 466 U.S. at 687 (setting forth this two-pronged test for ineffectiveness). He maintains that Page performed deficiently by attempting to question the lead detective about the DNA report, resulting in a sustained objection and the termination of that line of questioning, instead of introducing it through the expert who authored it. (Reply, ECF No. 36, at 38 (citing *United States v. Weatherwax*, 20 F.3d 572 (3d Cir. 1994))).

As for prejudice, he sets forth applicable background law and then posits that the other evidence of his guilt "was either wrongly admitted, tainted or contradicted by other evidence at trial." (*Id.* at 38-39 (citations omitted)). Specifically, he insists that the DNA report "contradicted the fingerprint evidence" and the in-court identification of Dorman. (*Id.* at 39). He further attacks Dorman's testimony incriminating him as inconsistent with that of Jones, who testified that no females were present at the time of the shooting, that he had never seen the van prior to the shooting (unlike Dorman, who testified to seeing it circle the block ten times that day), and that two men (not three, as Dorman stated) exited the van, a fact consistent with Officer Broaddus's initial radio description and later testimony regarding the van's occupants when it was pulled over. (*Id.* at 39-40 (citing N.T. 7/1/14 at 29-31, 195; 7/2/14 at 17-18, 27)). Petitioner also contends that Broaddus initially called in that the suspects were wearing black shorts, although when he apprehended Petitioner he was wearing gray sweat pants, and that Officer Broadus testified that the revolver was found in the grass, while another officer claimed it was located on a concrete stairwell. (*Id.* at 40 (citing N.T. 7/1/14 at 195, 221, 225-26; N.T. 7/2/14 at 185-86)). He adds that "only one particle of gunpowder" was found on his shirt. (*Id.* (citing N.T. 7/3/14 at 119-20)). Furthermore, he points out that a woman called 9-1-1 shortly after his arrest reporting that "the police are going the wrong way" and that "the guys got away." (*Id.* (citing N.T. 7/3/14 at 106)).

Quoting a *Rolling Stone* article, Petitioner next posits that 325 inmates have been exonerated by DNA testing, which often also points to the real perpetrator. (*Id.* at 40-41 (citation omitted)). He concludes that if Page had had the DNA report properly admitted through its author, it would have excluded him as a suspect and underscored that the real perpetrators "got away," establishing deficient performance, prejudice and the Superior Court's unreasonable determination of the facts. (*Id.* at 41). He maintains that because of this unreasonable determination, he need not rebut the presumption of the correctness of its factual determinations with clear and convincing evidence. (*Id.* (citing 28 U.S.C. § 2254(d)(2), (e)(1); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004))). He closes by requesting that the Commonwealth withdrawal any unwarranted denials of his alleged facts. (*Id.*).

b. State Court Opinion

The Superior Court addressed this claim on PCRA appeal as follows:

> Tootle raises a single issue on appeal: "Did the lower court abuse its discretion when it dismissed, without a hearing, [Tootle's] claim that counsel was ineffective in failing to present the testimony of the Commonwealth's DNA expert?" Tootle's Brief at 2. Tootle attached to his petition a DNA laboratory report he received from the Commonwealth in discovery prior to his trial. Petition for Post Conviction Relief, 5/18/18, Exhibit A. According to the report, the laboratory tested five swabs of different areas of the Glock handgun and four swabs of different areas of the revolver for DNA evidence. The lab recovered partial DNA profiles from two of the Glock swabs and one of the revolver swabs and concluded that Tootle was "excluded as a source of the DNA" in those swabs. *Id.*
>
> The Commonwealth did not call the laboratory technician who performed the DNA analysis or attempt to introduce the DNA test results at trial. Tootle's counsel attempted to question the lead detective on the case regarding the DNA laboratory report but she testified that she had not seen the DNA report prior to trial. Notes of Testimony, 7/2/14, at 227-29. When Tootle again attempted to question the detective regarding the conclusions in the DNA report, the trial court sustained the Commonwealth's objection to the line of questioning. *Id.* at 245-46.

Tootle's argument is two-fold. First, he contends that the DNA report was substantive exculpatory evidence that he had not handled the firearms that were used in the shooting and would have allowed the jury to conclude that he was not one of the shooters. Second, he argues that this DNA evidence was more reliable than other kinds of evidence of his guilt presented at trial, such as the fingerprint evidence and eyewitness testimony. He argues that the jury could have credited the DNA analysis results as more scientifically valid than the fingerprint evidence and that it would have further discredited eyewitness testimony from Christina Dorman.

"To prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." *Commonwealth v. Sarvey*, 199 A.3d 436, 452 (Pa. Super. 2018). "[F]ailure to prove any of these prongs is sufficient to warrant dismissal of the claim without discussion of the other two." *Commonwealth v. Robinson*, 877 A.2d 433, 439 (Pa. 2005) (citation omitted). We presume that counsel has rendered effective assistance. *See Commonwealth v. Treiber*, 121 A.3d 435, 445 (Pa. 2015).

To succeed on a claim that counsel was ineffective for failing to call a witness at trial, a PCRA petitioner must establish:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew, or should have known, of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Wantz, 84 A.3d 324, 331 (Pa. Super. 2014) (citation omitted). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." *Commonwealth v. Sneed*, 45 A.3d 1096, 1108-09 (Pa. 2012) (quotations & citation omitted). When analyzing the prejudice prong under our standards for ineffectiveness, we must determine whether there is a reasonable probability that the outcome of the trial would have been different if the witness had testified. *Wantz*, *supra*, at 333-34.

In rejecting this claim, the PCRA court determined that the evidence against Tootle was overwhelming such that testimony regarding the DNA analysis of the two firearms would not have affected the outcome of the trial. PCRA Court Opinion, 7/1/2020, at 8-9. We agree. At trial, the Commonwealth presented testimony

from three eyewitnesses who observed the green van involved in the shooting. One of the witnesses, Dorman, saw the shooting itself and was able to identify Tootle as one of the shooters because she had known him for several years. The second witness, Jones, was one of the victims of the shooting and recalled seeing the assailants pull up in a green van before the shooting. The third witness, Jordan, observed the green van driving away from the scene of the shooting after the gunshots ceased. He and Jones reported this description to law enforcement and police in the area immediately began looking for the vehicle.

Officer Broaddus testified that he observed a green van soon after the shooting and followed it to an apartment complex. He saw Tootle exit the vehicle and shortly thereafter placed him under arrest. Jordan was then transported to the apartment complex by police where he confirmed that the green van was the vehicle he had observed leaving the scene of the shooting. During his arrest, Tootle gave a false name and made several incriminating statements. He asked how many people had been shot, whether anyone was killed, and whether he could say his "last goodbyes" to his cousin. Notes of Testimony, 7/1/2014 at 135-36; 7/2/2014 at 69, 174-75.

Upon searching the van, officers recovered a cell phone and a Glock handgun. They also recovered a revolver approximately ten feet from where Tootle was arrested on the apartment complex grounds. Ballistics testing confirmed that both firearms were involved in the shooting. Bullets fired from each weapon were recovered from the victim's body and cartridge casings from the scene matched the Glock. In addition, Tootle's fingerprint was found on the Glock and on the cell phone that was found in the van. Tootle's shirt and pants also tested positive for gunshot residue.

Weighed against this evidence of Tootle's involvement in the shooting, the DNA analysis results would not have compelled a different result at trial. The report analyzed five swabs of different areas of the Glock handgun and four swabs of different areas of the revolver. The laboratory was only able to analyze partial DNA from three of these swabs, and in those cases it excluded Tootle as a source of the sample. While these results provided proof that an unidentified individual had touched the firearms at some point, they do not conclusively prove that Tootle never handled the weapons. In light of the evidence that Tootle's fingerprint was recovered from the Glock, that the revolver was recovered outside near where Tootle was arrested, and the eyewitness testimony identifying him as one of the shooters, we cannot conclude that the DNA analysis results would have resulted in a different outcome at

> trial. Because Tootle cannot establish that he was prejudiced by trial counsel's failure to introduce this evidence, his ineffectiveness claim is without merit.

Tootle, 2021 WL 1233389, at *2-4 (alterations in original) (footnotes omitted).

c. Analysis

Claims for ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668. In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief based on ineffectiveness:

> 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.

466 U.S. at 687. 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." *Strickland*, 466 U.S. at 694.

Strickland is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to relief if the Pennsylvania Court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; 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)(1)-(2).

Although the five-part test to establish ineffectiveness for failing to call a potential trial witness employed by the Superior Court is not identical to the *Strickland* standard, the Third Circuit has held that "the Pennsylvania test is not contrary to the test set forth in *Strickland*." *See*

Moore v. Diguglielmo, 489 F. App'x 618, 626 (3d Cir. July 18, 2012) ("The five requirements set forth by the Pennsylvania Supreme Court would necessarily need to be shown to prevail under Strickland on a claim of this nature."); *see also Rolan v. Coleman*, 445 F.3d 311, 316 (3d Cir. 2012). Thus, the use of the above standard was not "contrary to clearly established federal law."

Nor was the Superior Court's decision an "unreasonable application" of clearly established federal law: even assuming that Page performed deficiently in not calling the DNA expert to introduce her report, he has failed to demonstrate prejudice because "the evidence against Tootle was overwhelming such that testimony regarding the DNA analysis of the two firearms would not have affected the outcome of the trial." *Tootle*, 2021 WL 1233389, at *3; *see also Buehl v. Vaughn*, 166 F.3d 163, 180 (3d Cir. 1999) (overwhelming evidence of guilt prevents a habeas petitioner from establishing prejudice under *Strickland*). Petitioner's argument to the contrary is premised on the notion that the absence of his DNA "exclude[ed] Mr. Tootle from both firearms . . . ." (Reply, ECF No. 36, at 41). But this supposition is fallacious. *See Bailey v. Johnson*, No. 20-CV-211, 2021 WL 2291358, at *2 (E.D. Wis. June 4, 2021) ("The absence of proof of Bailey's . . . DNA on the gun . . . did not preclude the jury from finding that Bailey possessed the gun."); *Day v. Mahally*, 230 F. Supp. 3d 420, 426-27 (E.D. Pa. 2017) ("While DNA evidence may be conclusive of guilt, the absence of DNA evidence cannot, conversely, show that Petitioner did not commit the crimes with which he was charged."); *see also* 7 JONES ON EVIDENCE § 60:9, Clifford S. Fishman & Anne Toomey McKenna (7th ed. 2023) ("***[S]ometimes*** a person leaves DNA merely by touching an object . . . . Advances in DNA gathering and analysis now ***sometimes*** make it ***possible*** to recover such 'touch DNA' . . . and obtain a usable DNA profile from it.") (emphasis added).

Moreover, Petitioner's attempt to explain away the mountain of evidence against him

fails. Perhaps most glaringly, he does not substantiate his contention that "the DNA evidence contradicted the fingerprint evidence," which established that he handled the .40 caliber Glock that was matched via ballistics to the recovered casings and the rounds lodged in Armstrong's torso, chest, and leg.[19] *Tootle*, 2021 WL 1233389, at *1, 4. He further claims that this fingerprint evidence was "wrongly admitted," (Reply, ECF No. 36, at 39), but allegations of error challenging "state law evidentiary decisions are not cognizable" in habeas matters. *Guzman v. Rozum*, No. 13-7083, 2016 WL 8732181, at *2 (E.D. Pa. June 16, 2016). He downplays the gunpowder recovered from his shirt as "only one particle," but even if the amount (as opposed to the mere existence) of residue located on his clothing was somehow relevant to the prejudice analysis, it would not change the fact that his pants also "tested positive for gunshot residue." *Tootle*, 2021 WL 1233389, at *1, 4.

Additionally, Petitioner ignores the false name and incriminating statements he gave to police at the time of his arrest, including asking the number of people shot, if anyone was killed, and whether he could bid farewell to his cousin. *Id.* Petitioner is left pointing out apparent inconsistencies in the testimony of Jones, Broaddus and Dorman, but the jury heard all their testimony – including the testimony cited by Petitioner – and nonetheless convicted him. (Reply, ECF No. 36, at 40 (citing N.T. 7/1/14 at 29-31, 195, 221, 225-26; N.T. 7/2/14 at 17-18, 27, 185-86)). In light of this overwhelming evidence of Petitioner's guilt, it is not reasonably probable that the result of Petitioner's trial would have been different if the report and testimony of the

[19] This fact also undercuts Petitioner's theory of the case, that the real shooters "got away" as suggested by the unidentified emergency caller, and that Officer Broaddus tailed the wrong green van (despite Jordan subsequently identifying it as the escape vehicle). (Reply, ECF No. 36, at 40); *Tootle*, 2021 WL 1233389, at *1, 4. Petitioner does not address why, if the vehicle in which he was riding was not the one involved in the shooting, a gun used in the shooting was found in proximity to it and him after Officer Broaddus witnessed him exiting it. *Tootle*, 2021 WL 1233389, at *1, 4.

DNA expert had been presented, and thus the Superior Court's decision was not an unreasonable application of *Strickland*. *See Strickland*, 466 U.S. at 694.

Petitioner also argues that "the Superior Court unreasonably determined the facts where it failed to find Attorney Page ineffective for failing to present the testimony of [the] Commonwealth's DNA expert." (Reply, ECF No. 36, at 38); *see also* 28 U.S.C. § 2254(d)(2) (habeas relief is appropriate where the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"). Although this determination by the Superior Court was legal rather than factual, Petitioner observes that it was itself premised upon the erroneous finding that "Dorman identified Mr. Tootle as one of the shooters two years after the incident while this case was awaiting trial." (*Id.* at 40 (quoting *Tootle*, 2021 WL 1233389, at *3 n.5)). Citing the PCRA Court's finding that "Dorman was never presented a photo array containing a picture of defendant[,]" he contends that the Superior Court's contrary determination was incorrect. (*Id.* (citing *Tootle*, No. CP-51-CR-0014103-2012, at 12) (internal citation omitted)). This PCRA Court finding, in turn, was based on notes of testimony confirming that Dorman was never shown a pretrial photo array including Petitioner (and thus never identified him therein). (N.T. 7/2/14 at 113 (The Court: "[I]t's an array that does not contain the defendant's photo." Mr. Sax: "It does not. . . . I think she is confused about that as to which array or which photo or whatever.")). Accordingly, pursuant to *28 U.S.C. § 2254(e)(1)*, Petitioner has successfully rebutted with clear and convincing evidence the presumption of correctness attached to the Superior Court's determination that Dorman identified Petitioner as one of the perpetrators in a pretrial photo array.

But that is not the end of the inquiry because Petitioner must still show a right to relief under § 2254(d)(2). As our circuit court has explained:

> We . . . read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries. . . . Section 2254(d)(2) mandates

> the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted.
>
> Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision. Here, section 2254(e)(1) comes into play, instructing that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. . . . In the final analysis however, even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2).

Lambert, 387 F.3d at 235-36 (footnote omitted).

With this instruction in mind, the Court turns to the Superior Court's remaining factual findings offered in support of its rejection of Petitioner's claim that counsel was ineffective for failing to present evidence that his DNA was not found on the guns used in the double shooting. In determining that Petitioner suffered no prejudice, the Superior Court also found that fingerprint evidence established that Petitioner handled the Glock matched via ballistics to the shooting; that his shirt and pants tested positive for gunpowder residue; and that he gave a false name and incriminating statements to police upon his arrest. *Tootle*, 2021 WL 1233389, at *1, 4. These findings are well-supported with citations to the record. *See id.* Moreover, the Superior Court made additional factual findings, also well-founded in the record, relevant to Dorman's credibility, separate and apart from its misstatement that she first identified Petitioner in a pretrial photo array. *Id.* at *3 n.5. These findings were based on her testimony that she had known Petitioner for "a couple years" prior to the shooting, that she did not come forward sooner due to fear for the safety of her family living in the neighborhood and that she had not been offered anything by the Commonwealth in exchange for her testimony despite her recent robbery arrest. *Id.* (citing N.T. 7/2/14 at 89-90, 92). In addition, the Superior Court found that "[t]rial counsel

cross-examined Dorman extensively regarding her motives for testifying against Tootle, her pending criminal charges, her delay in giving her statement, and the inconsistencies in her testimony." *Id.* (citing N.T. 7/2/14 at 104-09, 129-31, 146-48). Accordingly, Petitioner has failed to establish an "overarching" right to relief under 28 U.S.C. § 2254(d)(2), even if he has established that certain "subsidiary" factual determinations were incorrect. *See Lambert*, 387 F.3d at 235.

For the foregoing reasons, the Court respectfully recommends that the claim be denied.

IV. CONCLUSION

Because Petitioner is not entitled to relief on any of his claims, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 23RD day of October, 2024, 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

Appendix E

Commonwealth v. Tootle

Supreme Court of Pennsylvania

January 4, 2022, Decided

No. 58 EM 2021

Reporter
2022 Pa. LEXIS 30 *

COMMONWEALTH OF PENNSYLVANIA, Respondent v. ***BRIAN TOOTLE***, Petitioner

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: *Commonwealth v. Tootle, 251 A.3d 1273, 2021 Pa. Super. Unpub. LEXIS 848, 2021 WL 1233389 (Mar. 31, 2021)*

Core Terms

Withdraw, appearance, Praecipe

Judges: **[*1]** Justice Brobson did not participate in the consideration or decision of this matter.

Opinion

ORDER

PER CURIAM

AND NOW, this 4th day of January, 2022, the Petition for Leave to File Petition for Allowance of Appeal *Nunc Pro Tunc* is DENIED.

With respect to the Application to Withdraw as Counsel filed by Attorney Todd M. Mosser, Petitioner's former counsel, it is noted that Petitioner's present counsel had filed an entry of appearance in this Court, confirming that his appearance substitutes for that of Attorney Mosser. Attorney Mosser thus need not have filed an Application to Withdraw as Counsel. *See* *Pa.R.A.P. 120* (stating that, with respect to matters in which "an attorney enters an appearance as substitute counsel for a party, the original counsel of record for that party may withdraw by *praecipe*, without filing an application for permission to withdraw"). Accordingly, the Prothonotary is DIRECTED to treat Attorney Mosser's Application to Withdraw as Counsel as a Praecipe to Withdraw as Counsel.

Justice Brobson did not participate in the consideration or decision of this matter.

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Appendix F

Commonwealth v. Tootle

Superior Court of Pennsylvania

March 31, 2021, Decided; March 31, 2021, Filed

No. 2542 EDA 2019

Reporter
2021 Pa. Super. Unpub. LEXIS 848 *; 251 A.3d 1273; 2021 WL 1233389

COMMONWEALTH OF PENNSYLVANIA v. ***BRIAN TOOTLE***, Appellant

Notice: PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

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

Subsequent History: Petition denied by *Commonwealth v. Tootle, 2022 Pa. LEXIS 30 (Pa., Jan. 4, 2022)*

Prior History: [*1] Appeal from the PCRA Order Entered July 1, 2019. In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0014103-2012.

Commonwealth v. Tootle, 159 A.3d 573, 2016 Pa. Super. Unpub. LEXIS 3995, 2016 WL 6459816 (Nov. 1, 2016)

Core Terms

van, recovered, shooting, firearms, ineffective, swabs, fingerprint, revolver, arrest, scene, laboratory, caliber, driving, cases

Judges: BEFORE: PANELLA, P.J., NICHOLS, J., and PELLEGRINI, J.* MEMORANDUM BY PELLEGRINI, J.

Opinion by: PELLEGRINI

Opinion

MEMORANDUM BY PELLEGRINI, J.:

Brian Tootle (Tootle) appeals from the July 1, 2019 order of the Court of Common Pleas of Philadelphia County (PCRA court) dismissing his petition for relief pursuant to the *Post-Conviction Relief Act*.[1] Tootle argues that trial counsel was ineffective because he failed to call the witness who performed a DNA analysis of two firearms at trial. We affirm.

I.

The trial court previously set forth the facts of this case as follows:

> On July 27, 2012, at approximately 8:37 p.m., Gerald Jones, Nafis Armstead, and several of their friends were outside on the 200 block of East Sharpnack Street in Philadelphia. Earlier, and throughout the day, [Tootle] and two individuals were in a green van driving around the block and parking several times before driving off again.[] As Jones and Armstead were talking, the van pulled up to the curb and parked. [Tootle] and at least one of the other passengers exited the vehicle wearing hats and **[*2]** with bandanas over their faces. They brandished firearms and opened fire on Jones and Armstead. After the shooting stopped, [Tootle] and the other men fled the scene in the van, with [Tootle] driving. Neither Jones nor Armstead were armed at the time.
>
> Police responded to the scene to find Armstead lying in the middle of the road. Armstead was declared dead at 8:58 p.m. Jones was shot a total of five times in the back, leg, arm, and hip. Police placed Jones in the back of a police cruiser and transported him to Einstein Hospital. Information that the shooters were driving a green van was broadcast over police radio as police continued to respond to the scene.
>
> Officer [Tyrone] Broaddus, who was in his patrol car responding to the radio call regarding the shooting, observed a green van matching the description of

* Retired Senior Judge assigned to the Superior Court.

[1] *42 Pa.C.S. §§ 9541 et seq.*

the getaway vehicle. He followed the van to the parking lot of an apartment building, where it stopped. [Tootle] and another man then got out of the van and [Tootle] walked toward the back of the lot. Additional officers arrived, and [Tootle] was located and apprehended. No other individuals were apprehended at that time.

At the time of his arrest, [Tootle] gave police the false **[*3]** name of Brandon Harris. As [Tootle] was taken into custody, [he] asked the arresting officers: "Can I say my last good-byes to my cousin?" [Tootle] also asked how many people were shot and if anyone was killed. Michael Jordan, a witness to the shooting's aftermath and [Tootle's] flight in the van, was taken to where the van was located, where he identified the van as the vehicle he saw leaving the scene of the shooting. . . .

Police recovered two firearms. A loaded .40 caliber Glock with an extended magazine was recovered inside of [Tootle's] vehicle. [Tootle's] fingerprints were recovered from that Glock. Additionally, police recovered a .357 caliber six shot revolver, with six spent cartridge cases in the cylinder, approximately ten feet from where [Tootle] was apprehended. Police also recovered a cell phone from the vehicle which bore fingerprints from [Tootle's] thumb. Police recovered and identified eighteen .40 caliber fired cartridge cases. A bullet jacket and core recovered from Armstead's head by the medical examiner matched the revolver recovered near [Tootle]. Bullets recovered from Armstead's torso, chest, and leg were consistent with the .40 caliber Glock having [Tootle's] **[*4]** fingerprint. In addition, all of the recovered .40 caliber fired cartridge cases were fired from the Glock. The clothing [Tootle] was wearing at the time of his arrest was seized and tested for gunpowder residue. Gunpowder residue was found on [Tootle's] black T-shirt and sweatpants.

Trial Court Opinion, 7/2/15, at 3-5 (citations & footnote omitted).

Tootle proceeded to a jury trial and was convicted of first-degree murder, criminal conspiracy, carrying a firearm without a license, carrying a firearm on the public streets of Philadelphia, and possessing an instrument of crime.[2] He was subsequently sentenced to an aggregate term of life without parole plus 24.5 to 52 years of incarceration. This court affirmed the judgment of sentence and our Supreme Court denied *allocatur*. ***Commonwealth v. Tootle***, *159 A.3d 573, 2016 Pa. Super. Unpub. LEXIS 3995 at *6 (Pa. Super. 2016)*, *allocatur denied*, *641 Pa. 716, 169 A.3d 559 (Pa. 2017)*.

Tootle filed the instant timely, counseled PCRA petition on May 18, 2018, raising several claims of ineffective assistance of trial and appellate counsel. The Commonwealth filed a motion to dismiss the petition and Tootle filed a response. The Commonwealth then filed a sur-reply to Tootle's response. The PCRA court issued a notice **[*5]** of its intent to dismiss the petition without a hearing pursuant to *Pa.R.Crim.P. 907*. On August 1, 2019, the PCRA court dismissed the petition. Tootle timely appealed and he and the PCRA court have complied with *Pa.R.A.P. 1925*.[3]

II.

Tootle raises a single issue on appeal: "Did the lower court abuse its discretion when it dismissed, without a hearing, [Tootle's] claim that counsel was ineffective in failing to present the testimony of the Commonwealth's DNA expert?" Tootle's Brief at 2. Tootle attached to his petition a DNA laboratory report he received from the Commonwealth in discovery prior to his trial. Petition for Post Conviction Relief, 5/18/18, Exhibit A. According to the report, the laboratory tested five swabs of different areas of the Glock handgun and four swabs of different areas of the revolver for DNA evidence. The lab recovered partial DNA profiles from two of the Glock swabs and one of the revolver swabs and concluded that Tootle was "excluded as a source of the DNA" in those swabs. ***Id.***

The Commonwealth did not call the laboratory

[2] *18 Pa.C.S. §§ 2502(a)*, *903*, *6106*, *6108*, & *907*.

[3] "The standard of review of an order dismissing a PCRA petition is whether that determination is supported by the evidence of record and is free of legal error." ***Commonwealth v. Weimer***, *2017 PA Super 212, 167 A.3d 78, 81 (Pa. Super. 2017)*. "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id.*** (citation omitted). "[A] PCRA court has discretion to dismiss a PCRA petition without a hearing if the court is satisfied that there are no genuine issues concerning any material fact; that the defendant is not entitled to post-conviction collateral relief; and that no legitimate purpose would be served by further proceedings." ***Commonwealth v. Brown***, *2017 PA Super 133, 161 A.3d 960, 964 (Pa. Super. 2017)* (citations omitted).

technician who performed the DNA analysis or attempt to introduce the DNA test results at trial. Tootle's counsel attempted to question the lead detective on the case regarding **[*6]** the DNA laboratory report but she testified that she had not seen the DNA report prior to trial. Notes of Testimony, 7/2/14, at 227-29. When Tootle again attempted to question the detective regarding the conclusions in the DNA report, the trial court sustained the Commonwealth's objection to the line of questioning. ***Id.*** at 245-46.

Tootle's argument is two-fold. First, he contends that the DNA report was substantive exculpatory evidence that he had not handled the firearms that were used in the shooting and would have allowed the jury to conclude that he was not one of the shooters. Second, he argues that this DNA evidence was more reliable than other kinds of evidence of his guilt presented at trial, such as the fingerprint evidence and eyewitness testimony. He argues that the jury could have credited the DNA analysis results as more scientifically valid than the fingerprint evidence[4] and that it would have further discredited eyewitness testimony from Christina Dorman.[5]

"To prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result." **[*7]** ***Commonwealth v. Sarvey***, *2018 PA Super 307, 199 A.3d 436, 452 (Pa. Super. 2018)*.

"[F]ailure to prove any of these prongs is sufficient to warrant dismissal of the claim without discussion of the other two." ***Commonwealth v. Robinson***, *583 Pa. 358, 877 A.2d 433, 439 (Pa. 2005)* (citation omitted). We presume that counsel has rendered effective assistance. ***See*** ***Commonwealth v. Treiber***, *632 Pa. 449, 121 A.3d 435, 445 (Pa. 2015)*.

To succeed on a claim that counsel was ineffective for failing to call a witness at trial, a PCRA petitioner must establish:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew, or should have known, of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Wantz, *2014 PA Super 6, 84 A.3d 324, 331 (Pa. Super. 2014)* (citation omitted). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." ***Commonwealth v. Sneed***, *616 Pa. 1, 45 A.3d 1096, 1108-09 (Pa. 2012)* (quotations & citation omitted). When analyzing the prejudice prong under our standards for ineffectiveness, we must determine whether there is a reasonable probability that the outcome of the trial would have been different if the witness had testified. ***Wantz, supra***, *at 333-34*.

In rejecting this claim, the PCRA court determined that the evidence against Tootle was overwhelming such that testimony **[*8]** regarding the DNA analysis of the two firearms would not have affected the outcome of the trial. PCRA Court Opinion, 7/1/2020, at 8-9. We agree. At trial, the Commonwealth presented testimony from three eyewitnesses who observed the green van involved in the shooting. One of the witnesses, Dorman, saw the shooting itself and was able to identify Tootle as one of the shooters because she had known him for several years. The second witness, Jones, was one of the victims of the shooting and recalled seeing the assailants pull up in a green van before the shooting. The third witness, Jordan, observed the green van driving away from the scene of the shooting after the gunshots ceased. He and Jones reported this description to law enforcement and police in the area immediately began looking for the vehicle.

Officer Broaddus testified that he observed a green van soon after the shooting and followed it to an apartment complex. He saw Tootle exit the vehicle and shortly

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[4] While Tootle assails the validity of the fingerprint evidence generally, he did not raise a claim of ineffectiveness challenging counsel's investigation or cross-examination regarding this evidence at trial.

[5] Dorman testified at trial that she had witnessed the shooting and identified Tootle as one of the shooters. She had known Tootle for a couple of years at the time and recognized him when he exited the green van even though he had a hat and bandanna covering his face. Notes of Testimony, 7/2/14, at 89-90. Dorman did not give an official statement on the night of the shooting because she was afraid for the safety of her family that lived in the neighborhood. She spoke to detectives and identified Tootle as one of the shooters two years later when this case was awaiting trial and she had recently been arrested for robbery. She testified that she had not been offered anything by the Commonwealth in exchange for her testimony. ***Id.*** at 92. Trial counsel cross-examined Dorman extensively regarding her motives for testifying against Tootle, her pending criminal charges, her delay in giving her statement, and the inconsistencies in her testimony. ***Id.*** at 104-09, 129-31, 146-48.

thereafter placed him under arrest. Jordan was then transported to the apartment complex by police where he confirmed that the green van was the vehicle he had observed leaving the scene of the shooting. During his arrest, Tootle **[*9]** gave a false name and made several incriminating statements. He asked how many people had been shot, whether anyone was killed, and whether he could say his "last goodbyes" to his cousin. Notes of Testimony, 7/1/2014 at 135-36; 7/2/2014 at 69, 174-75.

Upon searching the van, officers recovered a cell phone and a Glock handgun. They also recovered a revolver approximately ten feet from where Tootle was arrested on the apartment complex grounds. Ballistics testing confirmed that both firearms were involved in the shooting. Bullets fired from each weapon were recovered from the victim's body and cartridge casings from the scene matched the Glock. In addition, Tootle's fingerprint was found on the Glock and on the cell phone that was found in the van. Tootle's shirt and pants also tested positive for gunshot residue.

Weighed against this evidence of Tootle's involvement in the shooting, the DNA analysis results would not have compelled a different result at trial. The report analyzed five swabs of different areas of the Glock handgun and four swabs of different areas of the revolver. The laboratory was only able to analyze partial DNA from three of these swabs, and in those cases it excluded **[*10]** Tootle as a source of the sample. While these results provided proof that an unidentified individual had touched the firearms at some point, they do not conclusively prove that Tootle never handled the weapons. In light of the evidence that Tootle's fingerprint was recovered from the Glock, that the revolver was recovered outside near where Tootle was arrested, and the eyewitness testimony identifying him as one of the shooters, we cannot conclude that the DNA analysis results would have resulted in a different outcome at trial. Because Tootle cannot establish that he was prejudiced by trial counsel's failure to introduce this evidence, his ineffectiveness claim is without merit.

Order affirmed.

Judgment Entered.

Date: 3/31/21

Appendix G

Commonwealth v. Tootle

Supreme Court of Pennsylvania

June 1, 2017, Decided

No. 520 EAL 2016

Reporter
169 A.3d 559 *; 2017 Pa. LEXIS 1272 **; 641 Pa. 716; 2017 WL 2389297

COMMONWEALTH OF PENNSYLVANIA, Respondent
v. ***BRIAN TOOTLE***, Petitioner

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [1]** Petition for Allowance of Appeal from the Order of the Superior Court.

Commonwealth v. Tootle, 159 A.3d 573, 2016 Pa. Super. Unpub. LEXIS 3995 (Nov. 1, 2016)

Opinion

[*560] ORDER

PER CURIAM

AND NOW, this 1st day of June, 2017, the Petition for Allowance of Appeal is **DENIED**.

End of Document

Appendix H

Commonwealth v. Tootle

Superior Court of Pennsylvania

November 1, 2016, Decided; November 1, 2016, Filed

No. 3030 EDA 2014

Reporter
2016 Pa. Super. Unpub. LEXIS 3995 *; 159 A.3d 573; 2016 WL 6459816

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ***BRIAN TOOTLE***, Appellant

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

PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Subsequent History: Appeal denied by *Commonwealth v. Tootle, 641 Pa. 716, 169 A.3d 559, 2017 Pa. LEXIS 1272, 2017 WL 2389297 (June 1, 2017)*

Post-conviction relief dismissed at *Commonwealth v. Tootle, 2021 Pa. Super. Unpub. LEXIS 848, 2021 WL 1233389 (Mar. 31, 2021)*

Prior History: [*1] Appeal from the Judgment of Sentence September 12, 2014. In the Court of Common Pleas of Philadelphia County. Criminal Division at No(s): CP-51-CR-0014103-2012.

Commonwealth v. Tootle, 2015 Phila. Ct. Com. Pl. LEXIS 652 (July 2, 2015)

Core Terms

trial court, recovered, van, supplemental, caliber, scene

Judges: BEFORE: LAZARUS, J., DUBOW, J., and STEVENS, P.J.E.* MEMORANDUM BY LAZARUS, J.

Opinion by: LAZARUS

Opinion

MEMORANDUM BY LAZARUS, J.:

Brian Tootle appeals from the judgment of sentence, imposed in the Court of Common Pleas of Philadelphia County, after a jury found him guilty of first-degree murder[1] and related charges.[2] Upon review, we affirm on the basis of the July 2, 2015 supplemental opinion authored by the Honorable Glenn B. Bronson.

The trial court set forth the facts of this case as follows:

> On July 27, 2012, at approximately 8:37 p.m., Gerald Jones, Nafis Armstead, and several of their friends were outside on the 200 block of East Sharpnack Street in Philadelphia. Earlier, and throughout the day, [Tootle] and two individuals were in a green van driving around the block and parking several **[*2]** times before driving off again. As Jones and Armstead were talking, the van pulled up to the curb and parked. [Tootle] and at least one of the other passengers exited the vehible wearing hats and with bandanas over their faces. They brandished firearms and opened fire on Jones and Armstead. After the shooting stopped, [Tootle] and the other men fled the scene in the van, with [Tootle] driving. Neither Jones nor Armstead were armed at the time.
>
> Police responded to the scene to find Armstead lying in the middle of the road. Armstead was declared dead at 8:58 p.m. Jones was shot a total of five times in the back, leg, arm, and hip. Police placed Jones in the back of a police cruiser and transported him to Einstein Hospital. Information that the shooters were driving a green van was broadcast over police radio as police continued to respond to the scene.

* Former Justice specially assigned to the Superior Court.

[1] *18 Pa.C.S.A. § 2502*.

[2] Tootle was also convicted of one count each of: criminal conspiracy, *18 Pa.C.S.A. § 903*; carrying a firearm without a license, *18 Pa.C.S.A. § 6106*; carrying a firearm on the public streets of Philadelphia, *18 Pa.C.S.A. § 6108*; and possessing instruments of crime, *18 Pa.C.S.A. § 907*.

> Officer [Tyrone] Boaddus, who was in his patrol car responding to the radio call regarding the shooting, observed a green van matching the description of the getaway vehicle. He followed the van to the parking lot of an apartment building, where it stopped. [Tootle] and another man then got out of the van and [Tootle] walked toward the back **[*3]** of the lot. Additional officers arrived, and [Tootle] was located and apprehended. No other individuals were apprehended at that time.
>
> At the time of his arrest, [Tootle] gave police the false name of Brandon Harris. As [Tootle] was taken into custody, [he] asked the arresting officers: "Can I say my last good-byes to my cousin?" [Tootle] also asked how many people were shot and if anyone was killed. Michael Jordan, a witness to the shooting's aftermath and [Tootle's] flight in the van, was taken to where the van was located, where he identified the van as the vehicle he saw leaving the scene of the shooting.
>
> . . .
>
> Police recovered two firearms. A loaded .40 caliber Glock with an extended magazine was recovered inside of [Tootle's] vehicle. [Tootle's] fingerprints were recovered from that Glock. Additionally, police recovered a .357 caliber six shot revolver, with six spent cartridge cases in the cylinder, approximately ten feet from where [Tootle] was apprehended. Police also recovered a cell phone from the vehicle which bore fingerprints from [Tootle's] thumb. Police recovered and identified eighteen .40 caliber fired cartridge cases. A bullet jacket and core recovered from Armstead's **[*4]** head by the medical examiner matched the revolver recovered near [Tootle]. Bullets recovered from Armstead's torso, chest, and leg were consistent with the .40 caliber Glock having [Tootle's] fingerprint. In addition, all of the recovered .40 caliber fired cartridge cases were fired from the Glock. The clothing [Tootle] was wearing at the time of his arrest was seized and tested for gunpowder residue. Gunpowder residue was found on [Tootle's] black T-shirt and sweatpants.

Trial Court Opinion, 7/2/15, at 3-5.

Following a jury trial, on July 3, 2014, Tootle was convicted of the aforementioned offenses. On September 12, 2014, the trial court sentenced him to an aggregate sentence of life without parole plus 24 1/2 to 52 years' incarceration. Tootle did not file post-sentence motions, but filed a notice of appeal to this Court on October 12, 2014. After he failed to file a court-ordered statement of issues complained of on appeal pursuant to *Pa.R.A.P. 1925(b)*, the trial court issued a *Rule 1925(a)* opinion finding all appellate issues to have been waived.

By *per curiam* order filed February 19, 2015, this Court granted counsel's motion to withdraw and directed the trial court to determine whether Tootle was eligible for **[*5]** court-appointed counsel. Following a hearing, the trial court appointed Henry M. Sias, Esquire, to represent Tootle on appeal. Attorney Sias subsequently applied to this Court to remand the matter to the trial court for the filing of a *Rule 1925(b)* statement, *nunc pro tunc*, and the issuance of a supplemental *Rule 1925(a)* opinion by the trial court. This Court granted the application on May 18, 2015. Counsel subsequently filed a *Rule 1925(b)* statement and the trial court issued a supplemental *Rule 1925(a)* opinion.

On appeal, Tootle raises the following issues for our review:

> 1. Was the evidence insufficient to support a verdict of [f]irst[-d]egree [m]urder?
>
> 2. Did the trial court err in excusing Juror 8, after individual questioning confirmed that she would be fair, in violation of the *Sixth Amendment* and *Article I, Section 6 of the Pennsylvania Constitution*; further, did excusing the juror having the effect of seeming to punish a member of the jury for criticizing the conduct of the representative of the Commonwealth, to the derogation of the jury's impartiality?
>
> 3. Did the trial court err in denying [Tootle's] motion[] for mistrial[?]
>
> 4. Was the weight of the evidence against the verdict, given the polluted and corrupt nature of the sole testimony placing [Tootle] at the scene of the crime?
>
> 5. Did the trial court err **[*6]** in allowing the Commonwealth to reopen its case after it had rested[?]

Brief of Appellant, at 5.

We have reviewed the record and the briefs submitted by the parties. In his supplemental *Rule 1925(a)* opinion, Judge Bronson properly concludes that: (1) the evidence was sufficient to convict Tootle of first-degree murder, ***see*** Trial Court Opinion, 7/2/15, at 5-8; (2) the court's decision to excuse Juror 8 was not an abuse of discretion, ***see id.*** at 9-10; (3) the court did not err in declining to grant Tootle's motion for mistrial, ***see id.*** at 11-12; (4) Tootle's weight of the evidence claim is

waived for failure to preserve it through the filing of post-sentence motions, ***see id.*** at 8-9; and (5) the court did not err in permitting the Commonwealth to reopen its case after defense counsel disputed the scope of a stipulation regarding the testimony of latent fingerprint technician Patrick Raytik, ***see id.*** at 12-13.

In his supplemental opinion, Judge Bronson thoroughly and correctly disposes of all issues Tootle raises on appeal. Accordingly, we affirm on the basis of his well-reasoned opinion and instruct the parties to attach a copy in the event of further proceedings in this matter.

Judgment of sentence affirmed. **[*7]**

Judgment Entered.

Date: 11/1/2016

Appendix I

Commonwealth v. Tootle

Common Pleas Court of Philadelphia County, First Judicial District of Pennsylvania, Criminal Trial Division

July 2, 2015, Decided; July 2, 2015, Filed

CP-51-CR-0014103-2012

Reporter
2015 Phila. Ct. Com. Pl. LEXIS 652 *

COMMONWEALTH OF PENNSYLVANIA v. ***BRIAN TOOTLE***

Subsequent History: Affirmed by *Commonwealth v. Tootle, 2016 Pa. Super. Unpub. LEXIS 3995 (2016)*

Core Terms

van, juror, recovered, fingerprint, shot, shooting, mistrial, cell phone, driving, scene, murder, reopen, arrested, caliber, custody, prints, fired, weight of the evidence, sentence, killed, specific intent to kill, excusing, firearms, revolver, Street, lifted, block, cases, faces, phone

Case Summary

Overview

HOLDINGS: [1]-In a *Pa. R. App. P. 1925* opinion, the court recommended its order convicting defendant of first degree murder, *18 Pa.C.S. § 2502*, be affirmed, as there was overwhelming evidence that defendant shot and killed a victim with the specific intent to kill; specific intent was clearly established by his shooting the victim multiple times in the head and chest, both vital areas of the human body, and gunshot residue was found on the clothing defendant was wearing when arrested; [2]-Because the decision dismissing a juror was based upon a factual finding, supported by the record, that the juror's ability to perform her duty impartially was impaired, the decision was well within the discretion of the court; [3]-Defendant's motion for a mistrial was completely without merit, as any infirmities regarding the chain of custody pertaining to a cell phone could not have prejudiced him.

Outcome
The court recommended that its decision be affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Types of Evidence > Circumstantial Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Evidence > Inferences & Presumptions > Inferences

HN1 **Substantial Evidence, Sufficiency of Evidence**

In considering a challenge to the sufficiency of the evidence, the court must decide whether the evidence at trial, viewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, could enable the fact-finder to find every element of the crimes charged beyond a reasonable doubt. In making this assessment, a reviewing court may not weigh the evidence and substitute its own judgment for that of the fact-finder, who is free to believe all, part, or none of the evidence. A mere conflict in the testimony of the witnesses does not render the evidence insufficient. The Commonwealth may satisfy its burden of proof entirely by circumstantial evidence. If the record contains support for the verdict, it may not be disturbed.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2 First-Degree Murder, Elements

The evidence is sufficient to establish first-degree murder where the Commonwealth proves that (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with the specific intent to kill. 18 Pa.C.S. § 2502(d). The specific intent to kill can be inferred from the manner in which the homicide was committed, such as, multiple gunshot wounds. Moreover, specific intent to kill may be inferred from a defendant's use of a deadly weapon on a vital part of the victim's body.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Evidence > Weight & Sufficiency

HN3 Preservation for Review, Requirements

A weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Abuse of Discretion

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Judicial Discretion

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Alternate Jurors

HN4 Disqualification & Removal of Jurors, Abuse of Discretion

The decision to discharge a juror is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. This discretion exists even after the jury has been impanelled and the juror sworn. The common thread of the cases is that the trial judge, in his sound discretion, may remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired.

Criminal Law & Procedure > Trials > Motions for Mistrial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN5 Trials, Motions for Mistrial

A mistrial is an extreme remedy that must be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial.

Criminal Law & Procedure > Trials > Judicial Discretion

HN6 Trials, Judicial Discretion

The reopening of a case after the parties have rested, for the taking of additional testimony, is within the trial court's discretion; the Supreme Court of Pennsylvania has couched the exercise of this discretion in terms of preventing a failure or miscarriage of justice. In determining whether or not to permit a party to reopen its case, the Court may consider such factors as the timing of the request to open, the nature of the proffered testimony compared to its potential for disruption or prejudice, as well as the party's reason for failing to present the evidence during its case-in-chief.

Judges: [*1] GLENN B. BRONSON, J.

Opinion by: GLENN B. BRONSON

Opinion

SUPPLEMENTAL OPINION

BRONSON, J.

On July 3, 2014, following a jury trial before this Court, defendant ***Brian Tootle*** was convicted of one count of first degree murder (18 Pa.C.S. § 2502), one count of criminal conspiracy (18 Pa.C.S. § 903), one count of carrying a firearm without a license (18 Pa.C.S. § 6106), one count of carrying a firearm on the public streets of Philadelphia (18 Pa.C.S. § 6108), and one count of possessing an instrument of crime (18 Pa.C.S. § 907). On September 12, 2014, the Court sentenced defendant to an aggregate sentence of life without parole plus 24 1/2 to 52 years incarceration. Defendant did not file

post-sentence motions.

Defendant filed a Notice of Appeal on October 12, 2014. The Court ordered defendant to file a Statement of Errors Complained of on Appeal ("Statement of Errors") by November 4, 2014. On October 31, 2014, defendant filed a motion for an extension of time to file a Statement of Errors. The Court granted the request and set a new deadline of November 13, 2014. On December 15, 2014, with no Statement of Errors having been received by the Court, the Court filed an Opinion pursuant to *Pa.R.A.P. 1925(a)* finding all issues to have been waived.

On February 19, 2015, the Superior Court granted defense counsel's motion **[*2]** to withdraw and directed this Court to determine whether defendant was eligible for court appointed counsel. Following a hearing on April 2, 2015, the Court appointed Henry M. Sias, Esquire, to represent defendant on appeal. Mr. Sias petitioned the Superior Court to remand this matter to the trial court for the filing of a Statement of Errors *nunc pro tunc* and the filing of an additional opinion by the trial court. That petition was granted by the Superior Court on May 21, 2014.

On June 8, 2015, defendant filed a Concise Statement of Errors Complained of on Appeal ("Statement of Errors"), which raises the following grounds for relief: 1) the evidence was insufficient to support the verdict of first degree murder; 2) the verdict was against the weight of the evidence; 3) the Court erred in excusing a juror during the trial; 4) the Court erred in denying defendant's motion for mistrial; and 5) the Court erred in permitting the Commonwealth to reopen its case-in-chief after it had rested.[1]

For the reasons set forth below, defendant's claims are without merit and the judgment of sentence should be affirmed.

I. FACTUAL BACKGROUND

At **[*3]** trial, the Commonwealth presented the testimony of Philadelphia Police Detective Norma Serrano, Philadelphia Police Officers L'tanya Cousins, Synell Hall, Eric Person, Elena Rodriguez, Tyrone Boraddus, Lesinette Ortiz, Daisy Medycki, Johnathan Berryman, and Matt McCuen, Chief Medical Examiner Dr. Sam Gulino, Sharon Armstead, Michael Jordan, Gamal Emira, Gerald Jones, Ann Marie Barnes, Christina Dorman, and Patrick Raytik. Defendant recalled Detective Serrano. Viewed in the light most favorable to the Commonwealth as the verdict winner, the evidence established the following.

On July 27, 2012, at approximately 8:37 p.m., Gerald Jones, Nafis Armstead, and several of their friends were outside on the 200 block of East Sharpnack Street in Philadelphia. N.T. 7/2/14 at 16-17, 30. Earlier, and throughout that day, defendant and two individuals were in a green van driving around the block and parking several times before driving off again.[2] 7/2/14 at 88, 93. As Jones and Armstead were talking, the van pulled up to the curb and parked. Defendant and at least one of the other passengers exited the vehicle wearing hats and with bandanas over their faces. N.T. 7/2/14 at 17, 21, 88-89. They brandished **[*4]** firearms and opened fire on Jones and Armstead. N.T. 7/2/14 at 17-18, 23, 88-89. After the shooting stopped, defendant and the other men fled the scene in the van, with defendant driving. N.T. 7/1/14 at 100-102; 7/2/14 at 18, 89. Neither Jones nor Armstead were armed at the time. N.T. 7/2/14 at 23-24.

Police responded to the scene to find Armstead lying in the middle of the road. N.T. 7/1/14 at 100, 146; 7/2/14 at 80, 89. Armstead was declared dead at 8:58 p.m. N.T. 6/30/14 at 105. Jones was shot a total of five times in the back, leg, arm, and hip. N.T. 7/2/14 at 16-17. Police placed Jones in the back of a police cruiser and transported him to Einstein Hospital. N.T. 7/1/14 at 101, 115-116; 7/2/14 at 19-20, 80-81. Information that the shooters were driving a green van was broadcast over police radio as police continued to respond to the scene. N.T. 7/1/14 at 196; 7/2/14 at 81.

Officer Boaddus, who was in his patrol car responding to the radio call regarding the shooting, observed a green van matching the description of the getaway vehicle. He followed the van to the parking lot of an apartment building, where it stopped. N.T. **[*5]** 7/1/14 at 196-197. Defendant and another man then got out of the van and defendant walked toward the back of the lot. N.T. 7/1/14 at 197, 201, 204. Additional officers arrived, and defendant was located and apprehended. N.T. 7/1/14 at 201; 7/2/14 at 173. No other individuals were apprehended at that time. N.T. 7/1/14 at 204.

At the time of his arrest, defendant gave police the false name Brandon Harris. N.T. 7/1/14 at 205. As defendant was taken into custody, defendant asked the arresting officers: "Can I say my last good-byes to my cousin?"

[1] Defendant's claims have been reordered for ease of analysis.

[2] Defendant was also identified as "Poodle." N.T. 7/2/14 at 90.

N.T. 7/1/14 at 135-136; 7/2/14 at 69. Defendant also asked how many people were shot and if anyone was killed. N.T. 7/2/14 at 174-175. Michael Jordan, a witness to the shooting's aftermath and defendant's flight in the van, was taken to where the van was located, where he identified the van as the vehicle he saw leaving the scene of the shooting. N.T. 7/1/14 at 110, 117.

The decedent, Armstead, was shot a total of seven times. N.T. 6/30/14 at 107. He suffered a graze wound to his ear, a shot to his right temple and eye, a shot to the back of his head that penetrated his brain, a shot to his chest that penetrated his superior vena cava, a shot to **[*6]** his right back that severed his spinal column, and two shots to his right thigh. N.T. 6/30/14 at 107-111. Armstead had stippling on his left forearm, which indicated that the arm was in close proximity to a firing gun. N.T. 6/30/14 at 112.

Police recovered two firearms. A loaded .40 caliber Glock with an extended magazine was recovered inside of defendant's vehicle. N.T. 7/1/14 at 18-19, 202. Defendant's fingerprints were recovered from that Glock. N.T. 7/1/14 at 20, 22; 7/2/14 at 200. Additionally, police recovered a .357 caliber six shot revolver, with six spent cartridge cases in the cylinder, approximately ten feet from where defendant was apprehended. N.T. 7/1/14 at 25-28, 48-49, 202; 7/2/14 at 174. Police also recovered a cell phone from the vehicle which bore fingerprints from defendant's thumb. N.T. 7/1/14 at 46-47; 7/3/14 at 54-55, 69-70. Police recovered and identified eighteen .40 caliber fired cartridge cases. N.T. 7/1/14 at 147; 7/2/14 at 59. A bullet jacket and core recovered from Armstead's head by the medical examiner matched the revolver recovered near defendant. N.T. 7/2/14 at 54, 56. Bullets recovered from Armstead's torso, chest, and leg were consistent with the **[*7]** .40 caliber Glock having defendant's fingerprint. N.T. 7/2/14 at 56, 58-59. In addition, all of the recovered .40 caliber fired cartridge cases were fired from the Glock. N.T. 7/2/14 at 59-60. The clothing defendant was wearing at the time of his arrest was seized and tested for gunpowder residue. N.T. 7/1/14 at 168. Gunpowder residue was found on defendant's black T-shirt and sweatpants. N.T. 7/1/14 at 173, 175-176.

II. DISCUSSION

A. *Sufficiency of the Evidence*

Defendant first claims on appeal that the "evidence was insufficient to support the verdict of First Degree Murder." Statement of Errors at ¶ 1. This claim is without merit.

HN1 In considering a challenge to the sufficiency of the evidence, the Court must decide whether the evidence at trial, viewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, could enable the fact-finder to find every element of the crimes charged beyond a reasonable doubt. *Commonwealth v. Walsh, 2012 PA Super 9, 36 A.3d 613, 618 (Pa. Super. 2012)* (quoting *Commonwealth v. Brumbaugh, 2007 PA Super 226, 932 A.2d 108, 109 (Pa. Super. 2007)*). In making this assessment, a reviewing court may not weigh the evidence and substitute its own judgment for that of the fact-finder, who is free to believe all, part, or none of the evidence. *Commonwealth v. Ramtahal, 613 Pa. 316, 33 A.3d 602, 607 (Pa. 2011)*. "[A] mere conflict in the testimony **[*8]** of the witnesses does not render the evidence insufficient..." *Commonwealth v. Montini, 712 A.2d 761, 767 (Pa. Super. 1998)*. The Commonwealth may satisfy its burden of proof entirely by circumstantial evidence. *Ramtahal, 33 A.3d at 607*. "If the record contains support for the verdict, it may not be disturbed." *Commonwealth v. Adams, 2005 PA Super 296, 882 A.2d 496, 499 (Pa. Super. 2005)* (quoting *Commonwealth v. Burns, 2000 PA Super 397, 765 A.2d 1144 (Pa. Super. 2000)*, *appeal denied*, *566 Pa. 657, 782 A.2d 542 (Pa. 2001)*).

HN2 "The evidence is sufficient to establish first-degree murder where the Commonwealth proves that (1) a human being was unlawfully killed; (2) the person accused is responsible for the killing; and (3) the accused acted with the specific intent to kill." *Commonwealth v. Edwards, 588 Pa. 151, 903 A.2d 1139, 1146 (Pa. 2006)* (quoting *18 Pa.C.S. § 2502(d)*). The specific intent to kill can be inferred "from the manner in which the homicide was committed, such as, multiple gunshot wounds." *Commonwealth v. Hughes, 581 Pa. 274, 865 A.2d 761, 793 (Pa. 2004)*. Moreover, specific intent to kill may be inferred from a defendant's use of a deadly weapon on a vital part of the victim's body. *Commonwealth v. Robertson, 2005 PA Super 152, 874 A.2d 1200, 1207 (Pa. Super. 2005)*.

Here, there was overwhelming evidence that defendant shot and killed Armstead on the 200 block of East Sharpnack Street with the specific intent to kill. Prior to the actual shooting, eyewitness Christina Dorman saw defendant's van make several tours of the block. N.T. 7/2/14 at 88, 93. Dorman, who had known defendant for several years before the shooting, also testified that she recognized defendant after he **[*9]** had stepped out of the van, despite the bandana covering his face. N.T. 7/2114 at 89-90. Under cross-examination, Dorman

further testified that defendant was the individual driving the van, both before and after the shooting. N.T. 7/2/14 at 141. Dorman additionally testified that she witnessed defendant and two other men shoot Armstead and Jones over sixteen times. N.T. 7/2/14 at 89.

Gerald Jones testified similarly, stating that he observed a "greenish" van pull up and sit for a few moments before two individuals exited the van. N.T. 7/2/14 at 17-18. Jones testified that these individuals had bandanas covering their faces. N.T. 7/2/14 at 17. Jones testified that he began to flee as these individuals opened fire. N.T. 7/2/14 at 17-18. Jones would later identify a photo of the van that defendant drove as the van from which the shooters emerged. N.T. 7/2/14 at 19.

Michael Jordan, a resident of the neighborhood, heard the gunshots and witnessed a dark green minivan drive away. N.T. 7/1/14 at 100, 102, 104. After police brought Jordan to the location where defendant was arrested, Jordan identified the van as the vehicle that he saw flee the scene of the shooting. N.T. 7/1/14 at 109-110.

[*10] Relying on the flash information broadcast over police radio, Officer Tyrone Broaddus testified that he observed defendant driving a green minivan at the corner of Emlen Street and Carpenter Lane. N.T. 7/1/14 at 196-198. Officer Broaddus testified that he immediately made a U-turn and followed the van as it eventually pulled into an apartment complex parking lot on Rosemary Lane. N.T. 7/1/14 at 196-197. Officer Broaddus then witnessed defendant exit the driver side door and walk further into the parking lot. N.T. 7/1/14 at 197, 201. Officer Broaddus testified that, with the assistance of additional responding officers, defendant was taken into custody. N.T. 7/1/14 at 201. In searching the van and area where defendant was arrested, Officer Broaddus testified that he observed a Glock handgun with an extended magazine in the van and a revolver approximately ten feet from where defendant was arrested. N.T. 7/1/14 at 202.

Officer Broaddus testified that, as police confronted defendant, defendant provided the alias "Brandon Harris." N.T. 7/1/14 at 205. In addition, both Officer Eric Person and Officer Lesinette Ortiz testified that defendant asked to "say his last good-bye's" to his cousin **[*11]** as he was being taken into custody. N.T. 7/1/14 at 135-136; 7/2/14 at 69. Officer Matthew McCuen testified that while defendant was detained at the scene, he asked to know how many people had been shot and if anyone was killed. N.T. 7/2/14 at 174-175.

The above testimony was fully corroborated by the physical evidence. As stated above, police recovered both murder weapons in close proximity to defendant. The Glock was in the van that defendant had been driving and the revolver was ten feet from where defendant was apprehended. N.T. 7/1/14 at 16-18, 202. Defendant's fingerprint was found on the Glock. Defendant's fingerprint was also lifted from a cell phone that was recovered from the van. N.T. 7/2/14 at 200; 7/3/14 at 54-55. A subsequent ballistics examination of the firearms revealed that the bullet which penetrated Armstead's head was fired from the revolver. N.T. 7/2/14 at 54, 56. The .40 caliber bullet recovered from Armstead's chest was also consistent with the Glock. N.T. 7/2/14 at 58-59. Additionally, the ballistics examination revealed that all eighteen of the recovered .40 caliber fired cartridge cases from the scene of the shooting were fired from the Glock. N.T. 7/2/14 at **[*12]** 59-60. Gunshot residue was found on the T-shirt and sweatpants that defendant was wearing when he was arrested. N.T. 7/1/14 at 168, 175-176.

The above evidence was sufficient for the jury to find, well beyond a reasonable doubt, that defendant shot and killed Armstead on the 200 block of East Sharpnack Street. Defendant's specific intent to kill was clearly established by his shooting Armstead multiple times in the head and chest, both vital areas of the human body.

b. *Weight of the Evidence*

Defendant also asserts that the verdict was against the weight of the evidence as the "sole testimony placing the defendant at the scene of the crime" was polluted and corrupt. Statement of Errors at ¶ 4. Defendant did not file a post-sentence motion challenging the weight of the evidence in this matter. Because defendant's claim was never raised in the trial court, it is waived for purposes of appeal. *See* *Pa. R. Crim. P. 607*; *Commonwealth v. Griffin, 2013 PA Super 70, 65 A.3d 932, 938 (Pa. Super. 2013)*, *appeal denied*, *621 Pa. 682, 76 A.3d 538 (Table)* (Pa. 2013) (***HN3*** "A weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing.").

In any event, defendant's weight claim is frivolous. As stated above, the evidence overwhelmingly established **[*13]** that defendant was guilty as charged.

C. *Dismissal of Juror Number 8*

Defendant next asserts that the Court "erred in excusing Juror 8, after individual questioning confirmed that she

would be fair...; further, excusing the juror had the effect of seeming to punish a member of the jury for criticizing the conduct of the representative of the Commonwealth, to the derogation of the jury's impartiality." Statement of Errors at ¶ 2. This claim is without merit.

HN4 "The decision to discharge a juror is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. This discretion exists even after the jury has been impanelled and the juror sworn." *Commonwealth v. Carter, 537 Pa. 233, 643 A.2d 61, 70 (Pa. 1994)* (internal citations omitted). "[T]he common thread of the cases is that the trial judge, in his sound discretion, may remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." *Bruckshaw v. Frankford Hosp. of City of Philadelphia, 619 Pa. 135, 58 A.3d 102, 110-11 (Pa. 2012)*, *quoting United States v. Cameron, 464 F.2d 333, 335 (3d Cir. 1972)*.

During trial, Juror No. 8 told a court officer that she saw the Assistant District Attorney, Richard Sax, making faces during trial and that she found these faces distracting. N.T. 7/2/14 at 116-117. **[*14]** After Juror No. 8's complaint was reported to counsel, the Commonwealth moved to excuse the juror and proceed with an alternate, which defendant opposed. N.T. 7/2/14 at 117-118. The Court then conducted an examination of the juror, outside the presence of the rest of the jury. Juror No. 8 stated that she had seen Mr. Sax's reactions to the questions that were being asked and "felt that it seemed like it was very disparaging to the questioners, to the counsels, and like [Mr. Sax] was very exasperated or whatever was being asked was ridiculous and his faces I just find very annoying and it's difficult to avoid them." N.T. 7/2/14 at 118-119. Upon questioning by the Court, the juror stated that she would not let the behavior of the prosecutor affect her view of the evidence and that she could be fair. N.T. 7/2/14 at 120-122. However, the Court observed that after being asked whether she could disregard her impression of the prosecutor and be fair, Juror No. 8 "made a face and hesitated before answering." N.T. 7/2/14 at 122-123. The Court specifically found that the juror's reaction to the prosecutor was "extraordinary," and that "the expression on this juror's face and the hesitation with **[*15]** which she deliberated before answering my question ... gives me great concern that she could be fair and impartial...." N.T. 7/2/14 at 125-126. The Court, therefore, dismissed Juror No. 8 and substituted Juror No. 13. N.T. 7/2/14 at 126. Upon the resumption of trial, the Court instructed the jury that it had excused a juror and that the remainder of the jury should not concern itself with the matter in any way. N.T. 7/2/14 at 128-129.

Accordingly, the record establishes that after a juror took the extraordinary measure of reporting to a court officer that the appearance of the prosecutor was distracting her during the trial, the court held a hearing to explore the matter after the Commonwealth moved to exclude her from the trial. After interrogating the juror, the Court found, based on the demeanor and behavior of the juror, that her statement that she could be fair was not credible, and therefore excused her. Because the Court's decision was based upon a factual finding, supported by the record, that Juror No. 8's ability to perform her duty impartially was impaired, the decision was well within the discretion of the Court. No relief is due.

D. *Motion for Mistrial*

Defendant next asserts **[*16]** that the Court "erred in denying the defendant's motions for mistrial." Statement of Errors at ¶ 3. Specifically, defendant cites to the portion of the record in which defendant moved for a mistrial due to the alleged failure of the Commonwealth to establish the chain of custody for a cell phone that was recovered from the van that defendant was driving at the time of the murder, and which contained defendant's fingerprints.[3] *Id.*; *see* N.T. 7/3/14 at 8-26. This claim is without merit.

HN5 "A mistrial is an extreme remedy ... [that] ... must be granted only when an incident is of such a nature that its unavoidable effect is to deprive defendant of a fair trial." *Commonwealth. v. Manley, 2009 PA Super 227, 985 A.2d 256, 266 (Pa, Super. 2009)* (internal citations and quotations omitted). Here, defendant's request for a mistrial failed to identify anything in the trial that was in any way unfair or unlawful.

The cell phone at issue was never offered into evidence. It is true that Officer John Taggart of the Crime Scene Unit testified that he recovered **[*17]** a cell phone underneath a shirt inside of the van, and that he lifted fingerprints off of that phone that were subsequently identified by Patrick Raytik, a latent fingerprint technician. N.T. 7/1/14 at 20, 23, 25. However, at the time that defendant moved for a mistrial, both sides had

[3] Defendant's Statement of Errors states that the Court denied defendant's "motions" for mistrial. However, defendant only moved for mistrial once, relating to the chain of custody issue of the cell phone found in defendant's van.

rested without Raytik having testified. While Raytik's report had been admitted into evidence without objection (Commonwealth Exhibit C-32), and identified two prints from the cell phone as belonging to defendant, the jury had never heard during the trial that defendant's print was on the phone.[4] Because the jury had heard no evidence linking defendant to the cell phone prior to the time that defendant moved for a mistrial, any infirmities regarding the chain of custody pertaining to that phone could not have prejudiced him. Accordingly, his motion for a mistrial was completely without merit.[5]

E. *Permitting the Commonwealth to Reopen its Case-in-Chief*

Defendant's final issue on appeal states that the Court erred in permitting the Commonwealth to reopen its case after both parties had rested. Supplemental Statement of Errors at ¶ 5. This claim is without merit.

HN6 "[T]he reopening of a case after the parties have rested, for the taking of additional testimony, is within the trial court's discretion; this Court has couched the exercise of this discretion in terms of 'prevent[ing] a failure or miscarriage of justice.'" *Commonwealth v. Baldwin, 619 Pa. 178, 58 A.3d 754, 763 (Pa. 2012)*, quoting *Commonwealth v. Chambers, 546 Pa. 370, 685 A.2d 96, 109 (Pa. 1996)*; *see Commonwealth v. Tharp, 525 Pa. 94, 575 A.2d 557, 558-559 (Pa. 1990)* (permitting the Commonwealth to reopen after failing to prove an essential element of an offense in its case-in-chief). In determining whether or not to permit a party to reopen its case, the Court may consider such factors as the timing of the request to open, the nature of the proffered testimony compared to its potential **[*19]** for disruption or prejudice, as well as the party's reason for failing to present the evidence during its case-in-chief. *Baldwin. 58 A.3d at 763-64*.

Here, the Commonwealth sought to reopen its case after a dispute with the defense over a stipulation regarding the testimony of Patrick Raytik, the latent fingerprint technician who identified fingerprints lifted from one of the murder weapons and from the cell phone recovered from the van, as belonging to defendant. kayak's entire report was admitted into evidence without objection from the defense. N.T. 7/2/2014 at 229-230. However, when the prosecutor recited a stipulation as to Raytik's testimony, he referenced the report, but only stated Raytik's opinion regarding the fingerprint found on the murder weapon, making no mention of the fingerprints from the phone. N.T. 7/2/14 at 199-200. The next day, right before closing arguments, defense counsel, in making the motion for a mistrial discussed in section II.D., above, denied stipulating to the cell phone prints, and argued that the Commonwealth failed to prove a chain of custody sufficient to connect any of Raytik's analysis to prints lifted from the cell phone taken from the van. N.T. 7/3/14 at 8-37. The Commonwealth, **[*20]** on the other hand, argued that defense counsel had agreed to stipulate to Raytik's entire report, which rendered any chain of custody issues moot. The prosecutor averred that he did not call Raytik as a witness the day before in reliance on defense counsel's agreement, even though Raytik was present in court and available to testify for six hours. N.T. 7/3/14 at 21-23, 31-32.

Clearly the prosecutor and defense counsel had a misunderstanding regarding the scope of their stipulation regarding the fingerprint evidence. For that reason, the Court concluded that it was fair to both sides to permit the Commonwealth to reopen to offer evidence on the matters that were purportedly covered by the stipulation, that is, Raytik's opinion regarding the prints taken off of the telephone, as well as any additional testimony necessary to establish that the prints that he analyzed were the prints that had been lifted from the phone. N.T. 7/3/14 at 35-41. The additional presentation of evidence took less than one half hour to present to the jury, and was followed immediately by closing arguments. N.T. 7/3/14 at 44-72. Accordingly, there was only *de minimis* disruption of the trial, and defendant was not **[*21]** prejudiced in any way. No relief is due.

III. CONCLUSION

For all of the foregoing reasons, the Court's judgment of sentence should be affirmed.

BY THE COURT:

/s/ Glenn B. Bronson

[4] The prosecutor did ask Officer Taggert, referring to the phone, "whether there were any other fingerprints attributed by Officer [sic] Raytik to someone who we'll get to later on in this case." N.T. 7/1/15 at 22. However, when a stipulation was read later in the case regarding Raytik's report, it referred only to **[*18]** the fingerprint on the Clock and made no mention of the phone. N.T. 7/2/14 at 200.

[5] As we discuss below, *after* defendant's motion for a mistrial, the Court permitted the Commonwealth to reopen and evidence that defendant's print was on the phone was admitted. Whether the Commonwealth was properly permitted to reopen is discussed in Section E, below.

GLENN B. BRONSON, J.

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