No. 19-3947

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Tola Ross,

Petitioner,

v.

Superintendent Pine Grove SCI, et al.,

Respondents.

On Appeal from a Final Order of the
United States District Court for the Eastern District of Pennsylvania
Case No. 2:17-cv-73, Hon. Timothy Savage

BRIEF FOR PETITIONER URGING REVERSAL AND VOLUME I OF THE APPENDIX

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August 27, 2021

CORPORATE DISCLOSURE STATEMENT

Tola Ross is an individual, and not a corporation. He issues no stock, and has no parent corporation.

STATEMENT OF RELATED CASES

This appeal follows several proceedings in various courts involving three co-defendants:

Tola Ross was originally prosecuted in the Court of Common Pleas of Philadelphia, docket number CP-51-CR-806531-2004. He sought collateral review in state court, on docket number 2716 EDA 2010. He pursued habeas relief in the Eastern District of Pennsylvania on the 2:17-cv-73 docket from which he appeals here.

Michael To was originally prosecuted in the Court of Common Pleas of Philadelphia, on the same underlying docket. Neither Appellant's counsel nor counsel for the Commonwealth believe that To appealed or sought collateral review of his negotiated guilty plea.

Tola Ross's father, Samnang Ros, was originally prosecuted in the Court of Common Pleas of Philadelphia, on the same docket. He sought collateral review in state court on docket number 854 EDA 2006. Neither Appellant's counsel nor counsel for the Commonwealth has located any subsequent federal habeas proceedings.

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INTRODUCTION

Petitioner Tola Ross has never had a direct appeal from the trial court's denial of his motion to withdraw his guilty plea immediately after his sentencing. He has wanted one for the entire ensuing fifteen years. Ross has never had a direct appeal because his counsel never filed the notice of appeal that Ross wanted. Despite knowing that Ross wished to withdraw his plea and reinstate his trial rights, plea counsel acknowledged in the state PCRA proceedings that he declined to consult with Ross about his appellate options or wishes at any point after his plea and sentencing hearing, including after the court denied Ross's motion to withdraw his plea. By failing to consult with Ross about his appeal options despite having had a duty to do so, and failing to file the notice of appeal, Ross's plea counsel rendered ineffective assistance of counsel to Ross.

Ross has since tried to get his appeal rights reinstated through collateral attack in state and federal courts. Although he has periodically asserted different bases in seeking review, sometimes with counsel and sometimes *pro se*, the one constant has been his timely and fully exhausted claim that his plea counsel never filed the notice of appeal. Despite his plea counsel's admissions at the evidentiary hearing in state PCRA court, the state PCRA courts denied his petition by relying on state precedent that had been abrogated by the U.S. Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), just a year after it issued—citing the state case for exactly the proposition that *Flores-Ortega* rejected. The state court used a framework for ineffective assistance of counsel claims based on failure to file the notice of appeal purporting to require a petitioner to prove that his counsel had not

filed the notice despite explicit instructions to do so. But that is not the law, and was not even at the time of Ross's plea. After a motion to withdraw plea is denied, the law requires consultation that plea counsel avowedly never provided.

The District Court denied habeas relief out of deference to the state PCRA courts without even holding an evidentiary hearing. In doing so, the Court incorrectly treated plea counsel's failure to consult as a distinct and unexhausted claim based upon the PCRA courts' misstatement of the law. In briefly considering the merits anyway, it misapplied binding precedent of both the Supreme Court and this Court. This Court should reverse with instructions for the District Court to grant the writ. But if it has any doubts, this Court could remand for an evidentiary hearing on the nature of Ross's interactions with his counsel surrounding his plea, sentencing, and post-trial motions.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 2253(c)(1), as Petitioner Ross appeals from a final order denying habeas relief of the United States District Court for the Eastern District of Pennsylvania, and received a certificate of appealability from this Court. *See* Doc. 13. The District Court had jurisdiction pursuant to 28 U.S.C. § 2254, as Ross collaterally attacked his conviction in a state court. A final order was entered on November 14, 2019. *See* JA 3. The Notice of Appeal was signed and timely mailed by Petitioner on Dec. 13, 2019. *See* JA 1.

ISSUE PRESENTED

This Court granted a Certificate of Appealability as to the following question: Whether the District Court erred in denying [Petitioner's] claim that his counsel was ineffective for failing to perfect a direct appeal on his behalf?

Proposed answer: YES

STATEMENT OF THE CASE

Factual Background

In 2004, 18-year-old Tola Ross was charged with murder, arson, and criminal conspiracy in connection with an overnight fire that burned down a house and killed a 10-year-old girl who had been asleep inside. JA 4-5. In charging Ross, a 15-year-old friend, and Ross's father, Samnang Ros, prosecutors alleged that Ross had undertaken to do this at his father's behest—and in exchange for a used car—because the house belonged to a man who had engaged in an affair with Ross's mother. JA 4-5. Prosecutors regarded the elder Ros as the mastermind, and indeed, Samnang Ros was eventually convicted at trial of second-degree murder and sentenced to life in prison without the possibility of parole. *See* Dist. Ct. Doc. 50-5.

Despite that recognition, the Commonwealth charged Tola Ross with a number of crimes, including first-degree murder—for which the Commonwealth sought the death penalty. *E.g.* JA 55. Ross received inconsistent representation, as his counsel—privately retained on his behalf by his parents, including his co-defendant father—changed twice between his arraignment and his eventual plea. Despite the key role that family relationships played in the case, the counsel who would have represented

him at trial undertook no investigation into Ross's family circumstances and background. *E.g.* JA 53-54; 58. Those circumstances included emotional and physical abuse by his father. JA 152. The elder Ros kicked Ross out of the house when he was 12 years old, refused to accept him back into the house for six years, and, during that period of time, Ross's mother obtained an order of protection against the elder Ros on the basis of his physical abuse. *See* Dist. Ct. Doc. 39 at 7-11; *see also* Dist. Ct. Doc. 19 at 1-2; 6; 8.

Ross's third counsel negotiated a plea deal in which Ross would plead guilty to third degree murder, arson, and criminal conspiracy, in exchange for an aggregate sentence of 27 and ½ to 60 years. JA 4. He shared this information with Ross directly before the plea hearing and insisted that Ross take the plea, in part by explaining, incorrectly, that he could always get out of it later. JA 87; 91. Ross pleaded guilty on February 1, 2006, but virtually immediately realized the ramifications and sought to withdraw his plea the next day. JA 91. Counsel filed a bare-bones, seven-line motion to withdraw the plea that offered no reason or justification as to why Ross sought to do so, as required under the law. JA 161-62. The motion, unsurprisingly, was denied on February 24, 2006. JA 166.

Ross had told his attorney that he wanted to do anything possible to withdraw his plea. But after the motion was denied, his plea counsel declined to consult with him and refused to file the notice of appeal. *E.g.* JA 93-94; 99-100. Ross, realizing that his counsel was not going to file the notice despite his desire to appeal, attempted to file a *pro se* notice of appeal. JA 101. Although that notice apparently reached the court, it was apparently mis-directed and therefore never docketed. JA 102. As a

result, Ross never received a direct appeal of his conviction at all, much less with the assistance of counsel. Ross is currently serving the 27 and ½ to 60-year sentence.

Procedural History

After his plea counsel prevented him from taking a direct appeal, Ross turned to collateral attack. Ross initially filed a *pro se* PCRA petition on September 8, 2006, and had counsel appointed who filed an amended petition and memorandum on October 26, 2007. JA 45-82. In his PCRA filing, Ross raised a number of errors, including, as relevantly here, "ineffective assistance of counsel for failing to file post-trial motions or a direct appeal." JA 51.

The Court of Common Pleas held evidentiary hearings on July 14, 2010 and September 20, 2010,[1] at the latter of which Ross and his counsel both testified. Ross testified that shortly after he pleaded guilty, he wanted to withdraw his plea or file an appeal—whatever it would take to obtain reconsideration of his sentence. JA 86-87. He testified that he told his plea counsel that he wanted to do this in writing, and that he attempted to reach him by phone. JA 87. Ross wanted to withdraw the plea because he felt that the sentence was excessive and that he had reasonable defenses and mitigating evidence should he go to trial, and he expected to be able to do so because his plea counsel had told him he could withdraw within ten days. JA 87. He said that in the only conversation they had about it in advance of the motion to withdraw, plea counsel told him he was stupid for wanting to withdraw his plea. JA 87. Ross testified that he wrote to the clerk of court to attempt to file a notice of appeal

[1] Counsel for both Ross and the Commonwealth have been unable to locate or obtain a transcript of the July 14 hearing.

pro se because he did not receive a response from plea counsel to his request to file a notice of appeal—and produced that letter. JA 88; JA 101. And he produced a note from the Clerk's office saying that it had forwarded his letter, which Ross had incorrectly believed meant that the appeal would be docketed. JA 88; JA 102.

Ross's plea counsel affirmed some of Ross's testimony and contradicted other aspects of it. He affirmed, among other things, that Ross entered a negotiated guilty plea very shortly after learning of it. JA 91. Similarly, he testified that he advised Ross on the record at the plea hearing of "the ten-day rule to withdraw the guilty plea and/or file a petition for reconsideration as well as the 30 days to file an appeal." JA 91; *see also* JA 160. He testified that Ross called him and asked to withdraw the plea, and that he filed that motion despite believing it unlikely to be granted. JA 91. On the other hand, he insisted that Ross never specifically asked him to file a notice of appeal, stating simply "I wasn't asked about an appeal." JA 93. Indeed, plea counsel disclaimed any consultation with Ross about an appeal at all. He admitted that he did not ever discuss an appeal with Ross, because "the appeal never came up" and "[t]here was really nothing to appeal," JA 94, despite the denial of the motion to withdraw the guilty plea. He repeated again that he "never had any conversations with him" about the appeal "other than what I told him his rights were after the sentencing." JA 94. And he immediately clarified that that sole conversation was "on the record"—part of the colloquy at sentencing, not an attorney-client consultation involving strategy or discussion of his client's wishes. JA 94; *see also* JA 157-160.

The PCRA court rejected Ross's collateral attack. The Court of Common Pleas issued an order after the evidentiary hearing dismissing the petition, JA 103, and

after Ross filed a statement of errors, issued a subsequent opinion affirming that dismissal. JA 116-122. In rejecting the petition, the Court of Common Pleas framed the relevant question as whether Ross had requested a direct appeal that plea counsel failed to file, and resolved the purported credibility dispute as to whether Ross had requested one in favor of Ross's counsel. JA 121.

The Pennsylvania Superior Court affirmed that decision on January 20, 2012. As the Court of Common Pleas had, the Superior Court regarded the issue as involving solely the question of whether Ross had requested a direct appeal. JA 127. In formulating the question that way, and affirming the decision, the Court did not apply binding U.S. Supreme Court precedent that already existed and had set out the standard for ineffective assistance of counsel based upon failure to file a notice of appeal. Instead, it applied abrogated state precedent that predated *Flores-Ortega*, which the Court said required that a petitioner "must prove that he requested an appeal and that counsel disregarded that request." JA 127-28 (citing *Commonwealth v. Knighten*, 742 A.2d 679, 682 (Pa. Super. Ct. 1999)). Even while applying abrogated state precedent, the Commonwealth Court admitted that "the validity and legality of the plea" had been "before the [PCRA] trial court," but nevertheless found that it "cannot discern what issue [Ross] would have raised in his appeal" and therefore found "no arguable merit" to a possible appeal. JA 127. It also made that finding despite acknowledging that ineffective assistance of counsel claims based upon a failure to file a notice do not require a petitioner to show merit. JA 127.

When Ross's PCRA counsel failed to appeal the Superior Court opinion, Ross engaged in separate PCRA motions practice to exhaust his first timely-filed PCRA

petition. He filed a second PCRA petition on June 6, 2012, that the Court of Common Pleas initially dismissed as untimely. JA 6. After appealing that, however, Ross won the right to appeal *nunc pro tunc* from the Superior Court's January 20, 2012 order affirming the denial of his first PCRA petition. He sought review in the Pennsylvania Supreme Court, but that court declined to review his case on August 28, 2016. JA 6.[2]

After exhausting his state remedies, Ross timely filed a § 2254 petition in the Eastern District of Pennsylvania. JA 129-156. In that petition, he raised ineffective assistance of counsel claims for, among other bases, counsel having failed to perfect his direct appeal. JA 133. Ross filed his petition on December 29, 2016. Following that, the Commonwealth sought and received 14 extensions totaling more than two years. *See* Dist. Ct. Docs. 5-8, 10-17, 20-23, 27-28, 34-35, 37, 40-43, 46, 48. After the 8th extension motion Ross sought and received leave to amend his petition, *see* Dist. Ct. Docs. 24-25; after the 10th extension motion Ross sought and received leave to amend again, *see* Dist. Ct. Doc. 39. Ross's amendments generally expanded upon his existing arguments, including by providing additional evidence as to his father's abuse during his childhood. *See, e.g.*, Dist. Ct. Doc. 39 (attaching letters from his family, including from his father admitting to abuse). While Ross included for the first time an unexhausted and untimely claim he labeled as asserting actual innocence, that argument was a mis-labeled argument for legal innocence. *See id*.

[2] Because the reinstatement briefing is entirely separate from the exhausted notice of appeal issue, Petitioner and Respondent have excluded the briefing and relevant opinions from the Joint Appendix. It is available within Doc. 4 on this docket, however.

When the Commonwealth ultimately filed its opposition on May 29, 2019, it asserted timeliness and default defenses to Ross's other claims, but acknowledged that his notice of appeal claim was timely and not defaulted. *See* Dist. Ct. Doc. 50 at 16. In disputing it on the merits, the Commonwealth acknowledged that Ross had raised and cited *Flores-Ortega*, but simply disputed its meaning and application. *See* Dist. Ct. Doc. 50 at 16-18. The Magistrate Judge issued a Report & Recommendation purporting to defer to the state court finding that he had never requested a direct appeal, accepting the state PCRA court framing of the law for ineffective assistance claims based on failure to file a notice of appeal, and accordingly recommending that the petition be denied. JA 15-17. Despite accepting the incorrect framing of the law and regarding the operative question as whether Ross had actually requested the notice be filed, the Magistrate Judge declined to order an evidentiary hearing before entering the Report & Recommendation on July 18, 2019. Ross filed objections, which the District Court overruled. JA 3.

Although the District Court declined to issue a COA, this Court issued a COA as to the notice of appeal issue, and appointed counsel.

STANDARD OF REVIEW

Because the District Court declined to hold an evidentiary hearing, this Court's review of the opinion and order denying a writ of habeas corpus is plenary. *Robinson v. Beard*, 762 F.3d 316, 323 (3d Cir. 2014). It reviews legal conclusions and resolutions of mixed questions of law and fact by the District Court *de novo*. *United States v. Doe*, 810 F.3d 132, 142 (3d Cir. 2015).

Under AEDPA, to the extent that the state PCRA courts ruled on the merits of Ross's claim of ineffective assistance of counsel,[3] this Court need only defer to a decision that is not "contrary to" or "an unreasonable application of, clearly established Federal law." *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 265-66 (3d Cir. 2018) (citing 28 U.S.C. § 2254). An "unreasonable application" of law to which this Court need not defer includes any decision where the state PCRA court identifies the "correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the" case. *Id.* State post-conviction decisions that do not even identify or apply the correct governing principle are contrary to federal law. *E.g. Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("a decision is contrary to federal law if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases") (cleaned up). Even where the state court identifies the right law and applies it to facts as it finds them, this Court need not defer to a state PCRA court ruling that is "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Abdul-Salaam*, 895 F.3d at 265-66.

For questions that the Commonwealth did not address, this Court owes no deference at all and conducts "a de novo review over pure legal questions and mixed questions of law and fact." *Id.* (citing *Johnson v. Folino*, 705 F.3d 117, 127 (3d Cir. 2013)).

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[3] In the District Court, the Commonwealth conceded that Ross's claim of ineffective assistance of counsel based upon his plea counsel's failure to file a notice of appeal was both properly exhausted and timely. *See* Dist. Ct. Doc. 50 at 16; JA 16.

SUMMARY OF ARGUMENT

Tola Ross's plea counsel was ineffective because he failed to consult with Ross about whether Ross wanted to appeal when his motion to withdraw his guilty plea was denied. Independently, plea counsel was ineffective because evidence in the record shows that he failed to file a notice of appeal that he knew that Ross wanted even prior to the trial court denying Ross's motion to withdraw his plea. Even accepting plea counsel's testimony that Ross asked him to file a motion to withdraw his plea but not to try to appeal if that motion was denied, plea counsel's own story is that he abdicated his duty to consult with Ross about an appeal after his sentencing. Ross provided every indication that he wanted to appeal—including asking his counsel immediately to withdraw his guilty plea, having counsel file a motion to do just that, and attempting to file his own *pro se* notice of appeal from the denial of that motion. After the trial court denied the short, boilerplate motion that counsel filed for Ross to withdraw the plea, counsel avowedly failed to consult with Ross about his appellate options or file a notice of appeal. Counsel provided ineffective assistance.

On state collateral attack, Pennsylvania courts acted contrary to binding Supreme Court precedent when they failed to grant Ross's PCRA petition on that basis—in fact, the Court of Common Pleas and the Superior Court relied on state court precedent for a legal framework that the Supreme Court and this Circuit had already explicitly rejected. Although binding precedent establishes that a petitioner may prevail on an ineffective assistance of counsel claim based upon failure to file a notice of appeal if counsel either fails to file a requested notice *or* fails to consult with the client about an appeal prior to not filing, the state PCRA court rejected Ross's

claim after imposing an affirmative burden on Ross to show that he had demanded an appeal and then finding that he had "failed to establish that he requested trial counsel to file a direct appeal." JA 127-28. In doing so, the PCRA court relied on a state case from 1999 that had been abrogated by the Supreme Court's just a year later in 2000, even though the PCRA court considered Ross's claim in 2006. Even under its own misstatement of the law, however, the PCRA court's factual findings were unreasonable in light of the evidence in the record that Ross wanted to withdraw his plea by motion or appeal, and precedent interpreting similar facts.

The District Court erred in denying Ross's petition because it accepted the state PCRA courts' incorrect framing of the claim, despite the binding precedent from the Supreme Court and this Court. Given that precedent and plea counsel's testimony at the PCRA hearing, this Court could reverse with instructions to grant the writ. Independently, this Court could reverse based upon the PCRA courts' unreasonable factual findings and unreasonable application of law to those facts. The weight of the evidence shows that plea counsel ignored Ross's instructions to file issued prior to the denial of the motion to withdraw, and prior to plea counsel's abdication of his duty to consult after that denial. But if this Court has any doubts or questions as to the nature of those communications, the Court should reverse and remand for an evidentiary hearing.

ARGUMENT

Tola Ross's plea counsel was ineffective because he failed to file a notice of appeal, or even to consult with Ross about whether Ross wanted to appeal. Even deferring to the PCRA courts' credibility determination on the question of whether Ross requested a notice of appeal from his counsel, plea counsel's own testimony at the evidentiary hearing in the state proceedings candidly acknowledged that he did not consult Ross at all after filing Ross's requested motion to withdraw his plea. He failed to do that even though it was required by *Flores-Ortega* and subsequent cases of this Court. Pennsylvania state courts acted contrary to federal law when they failed to grant Ross's PCRA petition on this basis—in fact, the Court of Common Pleas and the Superior Court framed their analysis in a manner that the U.S. Supreme Court and this Circuit had already explicitly rejected. Although binding precedent establishes that defense counsel may be ineffective for failing to file a requested appeal *or* to consult with the client about an appeal, the state PCRA courts rejected Ross's claim after only considering whether he had made the request at all. The Supreme Court has described the attorney-client consultation as the "antecedent question" to answer in a notice of appeal claim. *Flores-Ortega*, 528 U.S. at 478. The PCRA courts did not even inquire. The District Court similarly erred by accepting that framing, despite it being contrary to federal law. This Court owes no deference to state court decisions made contrary to federal law and should reverse on this basis.

Although Ross's plea counsel failed to consult after his duty to do so had been established, Ross may still prevail on his claim because plea counsel ignored his clear desire to appeal. Evidence in the record shows that Ross asked for an appeal as part

of his request for a motion to withdraw his plea. The PCRA courts' credibility determination in favor of plea counsel is unreasonable in light of that record, and in similar circumstances this Court has observed that it strains credulity to believe that a client who requests a motion to withdraw a plea does not also ask for an appeal. Plea counsel's statement that Ross asked only for the motion is belied by substantial evidence in the record, and this Court should not defer to that finding. If the Court considers the record in light of past precedent and determines that the PCRA courts' credibility determination was unreasonable, it could reverse on that basis. But especially if it has serious questions about plea counsel's testimony and about the nature and scope of any consultation that may have taken place, this Court should remand for an evidentiary hearing to allow Ross to substantiate his claim about his plea counsel's failure to file a direct appeal.

I. Ross's plea counsel's avowed failure to consult with his client about a possible direct appeal was ineffective assistance of counsel.

After his initial guilty plea, Tola Ross received ineffective assistance of counsel. This Court should not defer to the unreasonable state PCRA court finding that Ross did not request a direct appeal. *See* Section II, *infra*. But even if this court believes that it must defer to the state court credibility determination in favor of Ross's plea counsel, counsel's own testimony establishes that he completely failed to consult with Ross about an appeal after Ross's motion to withdraw his plea was denied. In considering Ross's claim, the state PCRA courts apparently did not consider that failure at all, because those courts used a framework from state case law that—even at the time of Ross's collateral attack—had been abrogated by the Supreme Court

and subsequent decisions of this Circuit. In requiring Ross to prove that he had requested counsel file a notice of appeal without answering the "antecedent question," *Flores-Ortega*, 528 U.S. at 478, the state PCRA courts affirmatively misstated the law and acted contrary to federal law, and this Court owes them no deference. To the extent the District Court accepted that framing, it was incorrect to do so. Plea counsel's avowed failure to consult with Ross despite substantial evidence that Ross wished to appeal amounted to objectively unreasonable representation that prejudiced Ross—paradigmatic ineffective assistance of counsel. This Court should recognize the state courts' use of abrogated state law and consider counsel's candid admissions at the PCRA evidentiary hearing under the appropriate standard, and should reverse.

A. Counsel's failure to consult with a Ross about a direct appeal violates the Sixth Amendment.

Failing to file a requested notice of appeal violates an individual's Sixth Amendment rights, and failure to consult with a client about a potential appeal causes exactly that failure. *Flores-Ortega*, 528 U.S. at 478, 484. As with all claims involving failure to file a notice of appeal, habeas courts use the *Strickland* framework requiring objectively unreasonable performance and prejudice to the client. *Id*. at 476-77. Under *Strickland*'s first prong, failure to consult before declining to file a notice of appeal is professionally unreasonable in all circumstances because it is the "antecedent question" in the analysis about failure to file the notice of appeal at all. *Flores-Ortega*, 528 U.S. at 478. Whether consultation took place is the first question because it makes the subsequent "question of deficient performance" based

upon failure to file the notice easier to answer; if counsel consulted with the client, whether counsel did or did not comply with explicit instructions becomes a simple question of fact. *Id*. Failing to consult about an appeal violates the Sixth Amendment because it causes the failure to appeal even prior to letting counsel reject explicit instructions. Counsel who ignores "a constitutionally imposed duty to consult with the defendant about an appeal," *id.* at 480, deprives his or her client "of the appellate proceeding altogether," *id*. at 483, in exactly the same way as if counsel ignored instructions.

The consultation in question must include a meaningful discussion of strategy that helps a client understand his or her options in the context of his or her situation. Consultation must at a minimum involve "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendants' wishes." *Flores-Ortega*, 528 U.S. at 478. "[A]n attorney may not speak cursorily with a client about an appeal and call it a 'consultation.'" *Hodge v. United States*, 554 F.3d 372, 380 (3d Cir. 2009). Consultation that discusses strategy must involve a privileged conversation; discussion on the record during a sentencing hearing or a hurried conversation in open court shortly thereafter does not fulfill counsel's obligation. *Lewis v. Johnson*, 359 F.3d 646, 660 (3d Cir. 2004). Anything less does not meet *Strickland*'s objective standard of reasonableness. *Hodge*, 554 F.3d at 380.

A client need not explicitly ask for appeal in order to put counsel on notice that he might wish to take one and confirm counsel's duty to consult. The duty to consult applies where a client "has reasonably demonstrated to counsel that he was

interested in appealing." *Flores-Ortega*, 528 U.S. at 480. That interest in appealing can be determined by contemporaneous contextual evidence, and factual context can put an attorney on notice to consult even beyond that attorney's baseline professional responsibilities. In considering counsel's failure to consult about an appeal, "courts must take into account all the information counsel knew or should have known." *Flores-Ortega*, 528 U.S. at 480; *Lewis*, 359 F.3d at 660 (describing that *Flores* quote as having "instructed" subsequent courts). Counsel has an affirmative obligation to consult the client, not vice versa; his client need not "have done more to contact Counsel" because that framing "casts aside the constitutionally imposed duty of counsel to consult with his or her client about the advantages and disadvantages of taking an appeal." *Battaglini v. United States*, 198 F.Supp.3d 465, 475 (E.D. Pa. 2016). If counsel ignores information that suggests a client might want to appeal while declining to even consult with the client, he or she provides ineffective assistance of counsel.

Several types of contemporaneous evidence can put counsel on notice that his client might want to appeal. The most probative evidence that courts can use to discern a petitioner's clear desire to appeal is—as Ross filed here—"a motion to withdraw a guilty plea," which "at a minimum . . . should have put [plea counsel] on notice that [petitioner] may have been interested in appealing." *Lewis*, 359 F.3d at 660; *see also id.* at 661 n.14 (holding this despite spare motion to withdraw plea that "stated only that 'Defendant avers that his plea was not knowingly or intelligently entered'"); *see also Harrington v. Gillis*, 456 F.3d 118, 127 (3d Cir. 2006) (confirming that a "bareboned and untimely motion to withdraw" a plea still should have signaled

to counsel the client's interest in appeal). This Court has previously reversed a denial of a writ in a case where counsel failed to consult after the underlying trial court denied the petitioner's motion to withdraw his guilty plea because "we can think of no strategic reason to explain why [counsel] failed to follow up with Lewis either following the sentencing or after the trial court denied the motion to withdraw." *Lewis*, 359 F.3d at 661.[4] Failing to do so "abandon[s] his client at this critical stage in the proceedings." *Id*. (citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)).

Plea counsel cannot use the fact of a guilty plea as evidence that a client did not wish to appeal or to absolve counsel of failing to inquire. This Court has repeatedly reversed denials of writs of habeas corpus based on failure to consult or file a notice of appeal coming off of a guilty plea. *See, e.g.*, *Harrington*, 456 F.3d at 127; *Lewis*, 359 F.3d at 660 (involving counsel failing to file an appeal after denial of a motion to withdraw plea). For one thing, a client might wish to appeal the denial of a motion to withdraw the plea itself. For another thing, a client might take issue with the sentence imposed by the court even after a negotiated plea. And indeed, even where counsel believes that an appeal would be frivolous, counsel cannot "disregard the evidence of [petitioner's] unequivocal desire to challenge his sentence and his

[4] To the extent that *Flores-Ortega* mused in dicta that a sentencing judge's on-the-record instructions about appeal rights at an allocution could be "so clear and informative as to substitute for counsel's duty to consult," *Flores-Ortega*, 528 U.S. at 479-80, even that dicta has no application in cases like this where a motion to withdraw plea has been denied. Almost by definition, any discussion of appeal rights by the judge at the plea hearing would not include discussion of rights or options regarding appealing a motion to withdraw plea, because that motion could not be filed until after the hearing. And if the judge had reason to believe such a motion might follow, he or she would likely not accept the plea in the first place.

guilty plea," *Lewis*, 359 F.3d at 661, and at least should file the notice of appeal on his client's behalf prior to subsequently filing an *Anders*-style brief or seeking permission to withdraw from the case. *Id.* at 661 n.14.

Other contemporaneous evidence can confirm that a petitioner wished to appeal and put counsel on notice that he or she needed to consult with his or her client. For example, a client may have taken additional steps to seek out his or her own appeal, even if those steps are ineffective. Courts can infer a desire to appeal based upon a petitioner—as Ross did here—contacting the clerk's office himself in an attempt to appeal. *Harrington*, 456 F.3d at 127 (discussing *Lewis*). *Pro se* notices or motions are strong evidence that a petitioner wanted to appeal even at the time. That contact need not even be styled as a *pro se* notice of appeal, as Mr. Ross attempted to file; while a formal attempt to file would buttress a finding that petitioner intended to appeal, it is not necessary. *Id.* at 129-30 (contrasting Harrington's attempts to contact counsel with the *Lewis* petitioner's attempts to file with the court, while still granting relief).

As to *Strickland*'s second prong, once counsel fails to consult with his or her client about whether to file an appeal and consequently fails to file the notice of appeal, prejudice is presumed. A habeas petitioner's burden to show prejudice is light, because failing to consult to ascertain a client's desire to appeal or failing to file a requested notice "deprive[s] respondent of more than a *fair* judicial proceeding; that deficiency deprive[s] respondent of the appellate proceeding altogether." *Flores-Ortega*, 528 U.S. at 483 (emphasis in original). That deprivation "mandates a presumption of prejudice because the adversary process itself has been rendered

presumptively unreliable." *Id*. (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)). A habeas petitioner must merely show that "but for counsel's deficient failure" he would have appealed. *Flores-Ortega*, 528 U.S. at 484.

The presumption of prejudice is strong. To make the but-for showing, a habeas petition need not even assert what he would have appealed. *Id*. at 484. This Court has subsequently held that a petitioner deprived of an appeal notice by deficient counsel need not show what he would have appealed, why he would have appealed, nor even how strong his potential appeal might have been. *Harrington*, 456 F.3d at 130-31. "The Sixth Amendment is equally violated when a defendant is summarily denied access to an uncertain appeal and to a strong appeal." *Id*. at 130 (citing *Flores-Ortega*, 528 U.S. at 482-83). The appeal need merely be "non-frivolous." *United States v. Sheldrick*, 478 F.3d 519, 530 n.8 (3d Cir. 2007) (rejecting "those concerned that Sheldrick gets to appeal because of a technicality that will prove fruitless" because the "likelihood of success on appeal is of no moment here"). Prosecutors have previously asked this Court to require that a petitioner show that a potential appeal would have had some amount of merit, which this Court rejected based upon clear Supreme Court direction. *Velazquez v. Grace*, 277 F. App'x 258, 260 (3d Cir. 2008) (observing that "the asked-for addition of the requirement that the appeal not taken have merit contradicts *Rodriguez v. United States*[, 395 U.S. 327 (1969)]").[5]

[5] Since the state PCRA decisions in this case, the Supreme Court has only reconfirmed these principles. The presumption of prejudice even applies when the individual in question has signed an appeal waiver. *Garza v. Idaho*, 139 S.Ct. 738, 742 (2019); *see also id*. at 747 (instructing courts that they may "not bend the presumption-of-prejudice rule simply because a particular defendant seems to have

B. Ross's plea counsel testified that he failed to consult Ross about an appeal, despite having had a duty to do so.

Ross's circumstances are exactly those that this Court has previously held warrant reversal of District Court denials of the writ. Even deferring to the PCRA courts' unreasonable credibility finding, plea counsel's testimony establishes that he failed to consult with Ross about an appeal at the crucial moment when manifest evidence about Ross's desire to appeal meant that he had a duty to undertake that consultation. The facts of this case present a clearer case for reversal with instructions to grant the writ than other cases this Court has considered on this topic.

Ross exhibited virtually all of the indicia that cases describe as putting counsel on notice that a client wants to appeal. The facts in the record go beyond even the facts of *Lewis*, where this Court reversed with instructions to grant the writ directly. *Lewis* featured a petitioner who had initially pleaded guilty in exchange for a sentence of 30-60 years; quickly sought to withdraw that guilty plea; tried to file his own motion to withdraw his plea before having had counsel file a "bare-boned post-trial motion to withdraw the guilty plea," *Lewis*, 359 F.3d at 660-61; had that withdrawal motion denied; and subsequently had his counsel fail to file a notice of appeal. *Id.* at 660-61. When Lewis attacked his conviction collaterally, the state PCRA court held an evidentiary hearing where plea counsel testified that his client had not requested a direct appeal despite Lewis saying that he had, and then the PCRA court resolved the credibility determination as to whether Lewis had requested an appeal in favor of plea counsel. *Id*. at 660. The PCRA court relied on abrogated

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had poor prospects" on appeal and citing *Jae Lee v. United States*, 137 S.Ct. 1958, 1966-67 (2017)).

state precedent purporting to require the client to request one—there, *Commonwealth v. Dockins*, 471 A.2d 851 (Pa. Super. 1984)—in denying relief. *Lewis*, 359 F.3d at 650-51. This Court reversed because even accepting the PCRA court's credibility determination in Lewis's counsel's favor, Lewis's counsel's own testimony established that he had not engaged in meaningful consultation regarding potential appellate issues with Lewis prior to failing to file the notice of appeal, and ignored contextual evidence that Lewis wanted one. *Id*. at 660.

Ross experienced that exact chain of events. He initially pleaded guilty to a 27 and ½ to 60-year sentence on extremely short notice, based upon counsel's assertion that he would have options to withdraw his plea. JA 87; 91. He immediately wanted to withdraw that plea based upon the length of the sentence and his reasonable sense that substantial mitigating evidence in the record might result in a lower sentence even if he went to trial and lost. JA 91. Plea counsel subsequently filed a "bare-boned" seven-line motion to withdraw the plea that offered no legal reasoning, supporting facts, or much beyond an assertion that Ross wanted to withdraw the plea. JA 161-62. When the court denied that motion, when he had a duty to undertake consultation because of the likelihood Ross would want to appeal, counsel failed to even consult with Ross about that, and subsequently did not file a notice of appeal. JA 93-94; 99-100. When Ross repeatedly sought to vindicate his right to appeal via collateral attack, the PCRA court held an evidentiary hearing at which it resolved a credibility dispute about whether he had requested an appeal in favor of plea counsel, who testified that Ross had not. JA 93.

As in *Lewis*, regardless of their determination about credibility, the PCRA courts here also made the same legal error. In their application of law to facts, the PCRA courts here also cited abrogated state precedent—*Commonwealth v. Knighten*, 742 A.2d 679, 682 (Pa. Super. 1999)—that predated a binding decision of the U.S. Supreme Court. JA 127-28. In relying on abrogated state law, the PCRA court ignored plea counsel's avowed lack of consultation with Ross about appellate options. At the evidentiary hearing, plea counsel framed his obligation in the passive formulation rejected by *Flores-Ortega*, testifying simply: "I wasn't asked about an appeal." JA 93. Counsel insisted that he "Never had any conversations with him, initiated by him with me about the appeal," JA 93. Counsel answered the question "Did you ever discuss an appeal with Mr. Ross?" by confirming that he had not because he had imposed his own judgment about the possible merits, saying that "There was really nothing to appeal," because it had been a guilty plea. JA 93. This ignored both substantial indicia that Ross wanted to appeal and his consequent duty to consult, which had the effect of depriving Ross of subsequent proceedings—paradigmatic ineffective assistance of counsel under *Flores-Ortega*.[6]

[6] Ross need not assert the subject of his appeal, and indeed, this Court should not deny issuing the writ based upon any judgment as to the possible merits of a direct appeal. *See, e.g., Sheldrick*, 478 F.3d at 530 n.8. An appeal of a denial of his motion to withdraw his plea would at least not have been frivolous. *See, e.g.*, *United States v. King*, 604 F.3d 125, 139 (3d Cir. 2010) (describing framework federal courts use to assess plea withdrawal motions). And Ross's sentence may well have been excessive, particularly in light of his young age (18) at the time of the offense, evidence in the record even at the time about his father's physical and emotional abuse, his lack of criminal history, and other factors Ross has discussed in various *pro se* post-conviction petitions. Moreover, Ross's father—regarded as more culpable by the Commonwealth, much older, with a concerning history of domestic violence—was

If anything, additional contextual facts make Ross's case for a writ clearer than Lewis's. First, Ross's plea counsel filed his motion to withdraw the plea in the first instance. In *Lewis*, the petitioner had initially filed a motion to withdraw *pro se*, and this Court imputed the knowledge that it had been filed to counsel because counsel should have stayed abreast of the docket. *Lewis*, 359 F.3d at 660.[7] Here, plea counsel knew about the motion to withdraw because, as bare-bones as it was, counsel himself filed it. Second, Ross attempted to file his own notice of appeal without assistance of counsel, only for it to be rejected because of an apparent filing error upon receipt. JA 101-02. In *Lewis*, the petitioner wrote to the clerk's office in a much more equivocal way. *Lewis*, 359 F.3d at 660. Third, Ross's plea counsel acknowledged receiving notice in writing that Ross did not want to honor the plea agreement and wanted to withdraw the plea. JA 93. In *Lewis*, the Court found a Sixth Amendment violation in less clear-cut circumstances that involved an absence of direct communication with counsel at all.

C. The state PCRA courts cited abrogated state precedent contrary to binding federal law, and the District Court made the same error.

In considering Ross's ineffective assistance of counsel claim, the state PCRA courts both cited already-abrogated state case law for a framework that binding federal law had already rejected. The state PCRA courts ignored *Flores-Ortega*'s

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acquitted at his own trial on the top charge. *See* Dist. Ct. Doc. 50-5 at 2 (describing acquittal of Ros on first degree murder charges and two attempted murder charges).

[7] "It is not clear from the hearing transcripts whether [counsel] was aware that Lewis had filed a motion *pro se* to withdraw the guilty plea, but the motion was entered on the trial docket and [counsel] should have been aware of it."

framing of ineffective assistance of counsel claims based upon a failure to file a notice of appeal, in which the question of consultation is "antecedent" to that of whether counsel rejected explicit instructions, and a violation may be shown by a failure to do either. *Flores-Ortega*, 528 U.S. at 478. In such cases, a petitioner may exhaust and put the state on notice of his claim by asserting, for example, that counsel "denied assistance by unconstitutionally abandoning his assignment to my case during critical judicial proceedings without filing an appeal" and citing *Flores-Ortega*. *Lewis*, 359 F.3d at 651. This Court has characterized such a claim as "whether trial counsel was ineffective for failing file a direct appeal," *id.*, in keeping with *Flores-Ortega*'s characterization of lack of consultation as the antecedent failure that causes counsel's ensuing failure to file a notice of appeal. And when the state PCRA courts used the wrong framework there, the *Lewis* Court properly reversed.

Under *Flores-Ortega*, a habeas petitioner may prevail on a notice of appeal claim by demonstrating a failure of counsel to consult about an appeal, or by counsel failing to file a requested notice, because both claims result in the same error. *Flores-Ortega*, 528 U.S. at 478. The Supreme Court has subsequently confirmed this in a case describing a how petitioner asserting the counsel failed to file the notice of appeal "need make only one showing: but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Garza*, 139 S.Ct. at 746. The PCRA courts' legal analysis that entirely ignored the first question was contrary to binding federal law, and therefore unreasonable.[8] *See Abdul-Salaam*, 895 F.3d at 265-66

[8] Under the circumstances, this Court could choose to characterize the state PCRA courts as having failed to consider Ross's timely and exhausted claim on the merits, or it could recognize that the state PCRA courts applied abrogated state precedent

(citing 28 U.S.C. § 2254). Both the Court of Common Pleas and the Superior Court failed to address the antecedent question because they used the wrong framework like the PCRA courts in *Lewis*. The Superior Court cited *Commonwealth v. Knighten*, 742 A.2d 679, 682 (Pa. Super. Ct. 1999), a decision that did not mention consultation at all and whose framework was virtually immediately abrogated by *Flores-Ortega* in 2000. The PCRA courts specifically cited to exactly the part of *Knighten* that *Flores-Ortega* had rejected: "'[b]efore a court will find ineffectiveness of counsel for failing to file a direct appeal, the defendant must prove that he requested an appeal and that counsel disregarded that request.' *Commonwealth v. Knighten*, 742 A.2d 679, 682 (Pa. Super. 1999)." JA 127-28. *Harrington* (2006) and *Lewis* (2004), among other decisions of this Court, reemphasized that *Flores-Ortega* barred a petitioner having to carry an affirmative burden to show that his attorney had rejected an explicit request as the only way to prevail on a notice of appeal claim. The Court of Common Pleas entered its decision in 2010, and the Superior Court affirmed that decision in 2012, each a decade or more after *Flores-Ortega* and years after both *Harrington* and *Lewis*. Despite that, the state PCRA courts rejected Ross's argument because of a bald misstatement of law by citing that bad precedent. Those decisions are contrary to binding federal law as articulated by the Supreme Court and this Court.

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that was already contrary to binding federal law articulated by the Supreme Court in *Flores-Ortega*. *See Lewis*, 359 F.3d at 659 ("none of the state courts which reviewed Lewis's claims during the two rounds of post-conviction review made a finding as to whether Lewis's court-appointed attorney consulted him regarding his appellate rights following the entry of the guilty plea, his sentencing or the trial judge's denial of his post-trial motion"). In either formulation, this Court owes the state PCRA courts no AEDPA deference and should not hesitate to reverse with instructions to grant the writ based upon the clear ineffective assistance of counsel.

The District Court's deference and adoption of that same framework erred as a matter of law. The District Court acknowledged that Ross exhausted his notice of appeal claim, but erroneously described the *Flores-Ortega* questions as being two separate claims. JA 15. In going on to reject the claim on the merits in the same footnote, the District Court described the "plea colloquy" as having "fully advised" Ross of "his post sentence rights." JA 15. That description fully ignores *Flores-Ortega* itself, *Harrington*, *Lewis*, *Hodge*, and other cases that all held that if counsel has a duty to consult, the colloquy in open court cannot fulfill it. And in cases where an individual files a motion to withdraw his or her plea after the colloquy, counsel has such a duty—because the colloquy does not discuss appellate rights, options, or considerations as to the motion that does not even exist yet. *Lewis*, 359 F.3d at 660; *see also* note 4, *supra*. The District Court's error flows from adopting the PCRA courts' framing of notice appeal claims based on abrogated precedent. This Court should reverse.

II. Ross's plea counsel's failure to file the notice of appeal against Ross's clear wishes was ineffective assistance of counsel.

The state PCRA courts recognized correctly that counsel must file a notice of direct appeal when a client—like Ross—requests one. In considering that claim on the merits, the Court of Common Pleas held an evidentiary hearing, after which the PCRA courts ignored the weight of evidence presented at that hearing and misapplied holdings of the Supreme Court and this Court in factually-similar circumstances to reject Ross's claim. When Ross and his plea counsel disputed whether Ross had ever requested that counsel file a notice of appeal, the PCRA courts resolved the credibility

dispute in favor of plea counsel. Although Ross need not prove that he asked counsel to file a notice of appeal and counsel failed to honor that request in light of counsel's avowed lack of consultation at the critical moments, *see* Section I, *supra*, the state court determination that he did not ask even prior to counsel's duty to consult kicking in strains credulity and was unreasonable in light of the whole record. Accordingly, this Court could independently reverse on this basis. At the very least, if this Court believes that the case turns on whether Ross requested that his plea counsel file a notice of appeal, it should remand for an evidentiary hearing.

A. Failure to file a requested notice of direct appeal is ineffective assistance of counsel.

Failure to file a requested notice of appeal straightforwardly violates an individual's Sixth Amendment rights and is ineffective assistance of counsel. Ross's plea counsel's failure to file the requested notice violated a clear right as articulated more than thirty-five years before Ross's plea. *E.g. Rodriguez v. United States*, 395 U.S. 237 (1969); *Peguero v. United States*, 526 U.S. 23, 28 (1999). That precedent requires counsel to file a notice of appeal requested by a client; holds that prejudice is presumed by the failure to file the notice because such a failure effects the denial of an entire criminal appellate proceeding; and merely requires a habeas petitioner to show that but for that failure, he would have appealed. *See Flores-Ortega*, 528 U.S. at 477.

Whether counsel failed to file an explicitly requested notice of appeal is the subsequent question asked in ineffective assistance of counsel claims about failure to file notices of appeal. As described in Section I, the *Strickland* framework for

ineffective assistance of counsel petitions governs claims based upon failure to file a notice of appeal, and that *Strickland* requires objectively unreasonable performance and prejudice to the client. *Id.* at 477. But disregard of specific instructions to file a notice of appeal is professionally unreasonable in all circumstances because it is not defensible strategy—it is "a purely ministerial task" that counsel must undertake for a client. *Id*. at 477 (citing *Rodriguez*, 395 U.S. at 327). In claims where a petitioner asserts that his defense counsel failed to file a requested notice of appeal, that petitioner has asserted objectively unreasonable performance on the part of his counsel.

As to *Strickland*'s second prong, prejudice, *Flores-Ortega* confirmed that reviewing courts must presume prejudice to the client because of the effect on the client's criminal proceeding. Failing to file a notice of appeal "deprive[s] respondent of more than a *fair* judicial proceeding; that deficiency deprive[s] respondent of the appellate proceeding altogether." *Flores-Ortega*, 528 U.S. at 483 (emphasis in original). Citing a litany of cases, the Court held that that deprivation "mandates a presumption of prejudice because the adversary process itself has been rendered presumptively unreliable." *Id.* (citing *e.g. Cronic*, 466 U.S. at 659). Habeas petitioners need not do much to demonstrate prejudice when their counsel fails to file a direct appeal. A habeas petitioner must merely show that "but for counsel's deficient failure" he would in fact have appealed. *Id.* at 484. The Supreme Court explicitly said that a petitioner did not even have to say what he or she would have appealed, and simply had to show that he or she would have. *Id*.

As where a client loses his chance to appeal because his counsel fails even to consult him, in situations where the attorney fails to follow instructions, the presumption of prejudice is strong. Similarly, a petitioner deprived of an appeal notice by deficient counsel need not show what he would have appealed, need not show why he would have appealed, nor make any showing about how strong his potential appeal might have been. *Harrington*, 456 F.3d at 128-29. "The Sixth Amendment is equally violated when a defendant is summarily denied access to an uncertain appeal and to a strong appeal." *Id*. at 130 (citing *Flores-Ortega*, 528 U.S. at 482-83). A not-taken appeal need only be "non-frivolous." *Sheldrick*, 478 F.3d at 530 n.8; *see also Fountain v. Kyler*, 420 F.3d 267, 275 n.6 (3d Cir. 2005) (confirming that in failure to file notice of appeal claims, the court should focus not on "the substantive merits of the hypothetical appeal but rather on whether counsel's constitutionally deficient performance deprived the defendant of an appeal that he otherwise would have taken").

This Court has even held that the presumption cannot be rebutted in cases involving clients wishing to appeal denials of motions to withdraw guilty pleas by plea counsel insisting that an appeal was ill-advised because the deal was good. Even if an individual gets something in the deal, such as the government agreeing to drop the top charge, the right to trial matters so much that a lawyer must help an individual whose motion to plead guilty is denied appeal so as to preserve his trial rights. *See Meyers v. Gillis*, 142 F.3d 664, 668 (3d Cir. 1998) (holding that client was still prejudiced even though his plea deal took a first-degree murder charge off the table). That particular prosecutorial rejoinder to the presumption of prejudice

matters even less when contextual facts about the petitioner suggest that the top-level charge or sentence might not have even been proven or imposed after a trial. *See id.* at 669 (describing petitioner who was "only eighteen years old at the time of the offense, and he did not have a history of violent crime").

B. The state PCRA court finding that Ross had not directed his counsel to appeal was unreasonable in light of the evidence in the record.

The PCRA courts acted unreasonably in light of the evidence in the record, especially given how this Court has treated similar facts in past cases. In situations where "nobody contends that [the client] told his lawyer that he did not want to appeal," the only two viable possibilities are that the client told his lawyer that he did want to appeal, or that counsel "was unsure about [the client's] wishes." *Hodge*, 554 F.3d at 380. If counsel fails to file a notice in the second situation without consulting to determine whether the client wants to appeal, he provides ineffective assistance. *Id.*; *see also* Section I, *supra*. If counsel fails to file a notice in the first situation, he also provides ineffective assistance. *See, e.g.*, *Rodriguez*, 395 U.S. at 327; *Hodge*, 554 F.3d at 380. The PCRA courts acted unreasonably by failing to recognize that the facts in the record had to make out either the first or the second of the two options "we are left with" given that nobody has argued that Ross specifically disclaimed an appeal. *Id.*

Ross has argued repeatedly that he asked his plea counsel to do everything possible to withdraw his plea. At the evidentiary hearing in the Court of Common Pleas, Ross testified that the day after pleading guilty, he asked his plea counsel specifically for a motion for reconsideration of sentence and an appeal. JA 87. Noting

that he accepted the deal under duress the morning he had to enter his plea, without even talking to his parents, Ross relied on plea counsel's assertion that he could withdraw it within 10 days. JA 87. Plea counsel testified in ways that largely confirmed Ross's testimony—he acknowledged that he had advised Ross at sentencing of a "10-day rule" to withdraw his plea and admitted that Ross asked to withdraw his plea the very next day. JA 91. He filed a very short motion that did not explain Ross's stated basis—duress—for wanting to withdraw the plea. JA 161-62. Plea counsel did not testify that Ross had disclaimed an appeal, and the suggestion that Ross would have specifically requested a motion to withdraw but specifically disclaimed an appeal if the trial court denied that motion strains credulity. *See Hodge*, 554 F.3d at 380 (describing the hypothetical suggestion that a client would "say nothing" about an appeal under similar circumstances as "implausible"). Contemporaneous evidence only buttresses Ross's credibility on this point. Ross attempted to file his own *pro se* notice of appeal, specifically noting in it that he did so because he believed it was his only option. JA 101. The letter itself noted that he believed it was "the only form of appeal notice that I can produce" because he did not believe that counsel would do it for him. JA 101.

The state PCRA courts made unreasonable factual findings about credibility and unreasonably applied law to those facts. First, the PCRA courts treating plea counsel's equivocal and implied testimony on that point as more credulous than Ross's consistent assertions is unreasonable in light of the record. Ross's own contemporaneous attempt to file a *pro se* notice reflected his knowledge that counsel was not going to do so. Second, the Superior Court in particular applied the law to

facts in precisely the opposite manner as the *Hodge* Court did—describing the "contemporaneous nature of [Ross's] request to file a motion" as having demonstrated "that he did not ask trial counsel to appeal the denial of his motion to withdraw the guilty plea." JA 127. The Superior Court also made unreasonable inferences about Ross's desires based upon internally contradictory and unclear reasoning. For example, the court asserted that Ross had not "allege[d] that he wished to challenge the legality of the sentence or validity of his plea on direct appeal" exactly one sentence before acknowledging that his motion to withdraw the guilty plea had, "albeit in a cursory manner, put the validity and the legality of the plea before the trial court." JA 127. The Superior Court also appeared to treat the procedural posture and its own view that an appeal would have "no arguable merit" as evidence that Ross had not requested an appeal at all. JA 127. This Court does not owe the state PCRA unreasonable fact finding and unreasonable application of law to those facts any deference, and if it believes that a consultation did in fact take place, it should reverse to grant relief.

III. This Court should reverse with instructions to grant the writ directly based on the existing record, but could remand for an evidentiary hearing.

This Court could reverse and grant Ross's writ of habeas corpus because of the clear the Sixth Amendment violation based upon information already in the record. Even deferring to the state PCRA court's credibility determination, plea counsel's self-avowed failure to consult with Ross after the sentencing—including especially after the court denied Ross's motion to withdraw his plea—violated the Sixth Amendment. The state PCRA court's citation to an abrogated case from a lower state

court for a framework that had been rejected by the Supreme Court caused the PCRA Court to deny Ross's petition contrary to binding federal law. Applying *Flores-Ortega*, *Harrington*, *Lewis*, and the proper framework to consider ineffective assistance of counsel claims in the context of failing to file a notice of appeal, this Court should reverse the District Court with instructions to grant the writ directly. In similar circumstances, this Court has done exactly that. If, however, this Court has any doubts as to the facts in the record concerning the existence or scope of any consultation, the Court could reverse and remand to the District Court with instructions to hold the evidentiary hearing that it did not hold prior to its initial decision.

First, this Court reverses and grants the writ directly when a state PCRA court unreasonably applies federal law or acts contrary to federal law when the record warrants it. In *Lewis*, the Court reversed and granted a writ in similar circumstances because counsel's failure to consult with the petitioner was clear on the record, and because the state PCRA court had applied abrogated state law in declining to grant Lewis relief. *Lewis*, 359 F.3d at 650 (describing state court's citation to *Commonwealth v. Dockins*, 471 A.2d 851 (Pa. Super. 1984)). The record "compels a finding that trial counsel's conduct was objectively unreasonable," *id.* at 661, Lewis had met his low burden given presumed prejudice to show that he would have appealed but for counsel's conduct, and this Court reversed with instructions to grant the writ. Given the substantial similarities between this case and *Lewis*, this Court should do the exact same thing here.

The record in this case is sufficiently more developed compared to *Harrington* and *Hodge* that no additional hearing should be required. One of the key differences between this Court granting the writ directly in *Lewis* and remanding for an evidentiary hearing in *Harrington* is that while the petitioner in *Lewis* attempted to file a *pro se* notice or motion to start his appeal, the *Harrington* petitioner offered only his own testimony that he would have appealed. *Compare Lewis*, 359 F.3d at 660, *with Harrington*, 456 F.3d at 130 (describing the difference and remanding because "the evidence in Mr. Harrington's case is less clear than the evidence in *Lewis*"). Here, as discussed in Section I.c., *supra*, Ross's evidence of a desire to appeal far exceeds the record in *Harrington*, and meets or exceeds the evidence that the *Lewis* petitioner wanted to appeal. Ross filed a counseled motion to withdraw his plea that, when denied, should have put counsel on notice that Ross would likely want to appeal and that he had an obligation to consult with Ross about that. Like Lewis, Ross's counsel freely admitted under oath that he could not recall discussing an appeal other than briefly at the sentencing. Like Lewis (and unlike Harrington), Ross attempted to file his own notice of appeal when he worried that counsel might not do so on his behalf. And like Lewis, the state PCRA court resolved a credibility determination against Ross in light of facts which it considered solely within a framework contrary to federal law, purporting to require him to have demonstrated that he requested a direct appeal that his counsel failed to file, with no mention of counsel's unfulfilled duty to consult.

Second, however, should this Court have any doubt at all about any factual element of Ross's petition, or particularly if it should wish to explore whether Ross

explicitly requested a direct appeal that his counsel refused to file, it can reverse and remand for an evidentiary hearing. In *Harrington*, this Court did exactly that because the only evidence then in the record as to Harrington's desire to appeal was Harrington's own testimony. *Harrington*, 456 F.3d at 127. Because "the most reasonable conclusion to be drawn from" even the under-developed record was that he "reasonably demonstrated an interest in appealing," the Court held that Harrington "is entitled to develop a record and secure a finding on whether he would have appealed had his attorney given him the counsel to which he was entitled." *Id.* at 128-29. Similarly, in *Hodge*, this Court similarly reversed and remanded for an evidentiary hearing—even though it observed that the record already contained substantial evidence corroborating the petitioner's claim that his counsel had ignored his instruction to file a notice of appeal. *Hodge*, 554 F.3d at 380 n.10. Any remand hearing need not explore the nature of the appeal or the likelihood of success on the merits. *See Harrington*, 456 F.3d at 130. But especially where the District Court never held an evidentiary hearing in the first instance, this Court could consider ordering one if it has any doubts.

CONCLUSION

Tola Ross has never had his chance to appeal the withdrawal of his plea motion because of the ineffective assistance of his plea counsel. He has fought doggedly for nearly fifteen years, often *pro se*, to try to vindicate those rights. In denying his petitions, the state PCRA courts acted contrary to binding federal law as articulated by the Supreme Court, and accordingly, this Court should reverse with instructions to grant his petition.

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Dated: August 27, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 10,153 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word version 16.41, set in Century Schoolbook 12-point type.

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CERTIFICATE OF BAR MEMBERSHIP

I certify pursuant to L.A.R. 28.3(d) that I am a member in good standing of the Bar of the Third Circuit.

/s/ Jim Davy
Jim Davy

Dated: August 27, 2021

CERTIFICATE OF SERVICE

I certify that on August 27, 2021 this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system. I also certify that within the time required, the paper copies described in the certificate of compliance will be delivered to the Clerk's office at 601 Market Street.

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TO
U. S. COURT OF APPEALS - THIRD CIRCUIT

U.S. DISTRICT COURT: Eastern District of Pennsylvania
(District/State) (Location)

U.S. TAX COURT: ( )

(full caption of Dist. Ct. case)
TOLA ROSS

vs.

ERIC P. BUSH, Warden SCI-Pine Grove, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Circuit Court Docket Number: _____

District Ct. or Tax Court Docket Number: NO. 17-73

District Ct. or Tax Court Judge: Timothy Savage, J.

Notice is hereby given that TOLA ROSS
(Named Party)
appeals to the UNITED STATES COURT OF APPEALS for the THIRD CIRCUIT from
( ) JUDGEMENT (x)ORDER

( )OTHER(specify) _____

entered on 11-14-19
(date)

DATED: 12-13-19

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Counsel for Appellant - signed Counsel for Appellee

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NOTE: Use additional sheets if all appellants and/or all counsel for appellees cannot be listed on the Notice of Appeal form.

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

TOLA ROSS	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ERIC P. BUSH, Warden SCI-Pine Grove, THE DISTRICDT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA	:	**NO. 17-73**

ORDER

NOW, this 14th day of November, 2019, upon consideration of the Petition for Writ of *Habeas Corpus* (Document No. 1) and the Final Amended Petition for Writ of *Habeas Corpus* (Document No. 39), the response to the amended petition, the Report and Recommendation filed by United States Magistrate Judge Thomas J. Rueter (Document No. 53), and the petitioner's objections to the Report and Recommendation, and after a thorough and independent review of the record, it is **ORDERED** that:

1. The petitioner's objections are **OVERRULED**;

2. The Report and Recommendation of Magistrate Judge Thomas J. Rueter is **APPROVED** and **ADOPTED**;

3. The Petition for Writ of *Habeas Corpus* and the Final Amended Petition for Writ of *Habeas Corpus* are **DENIED**; and,

4. There is no probable cause to issue a certificate of appealability.

/s/ TIMOTHY J. SAVAGE J.

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

TOLA ROSS	:	CIVIL ACTION
v.	:	
ERIC P. BUSH, et al.	:	NO. 17-0073

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

July 18, 2019

Presently before the court is a pro se petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated at the State Correctional Institution located in Indiana, Pennsylvania. For the reasons that follow, the court recommends that the petition be **DENIED**.

I. BACKGROUND

On February 1, 2006, petitioner entered a negotiated guilty plea in the Court of Common Pleas of Philadelphia County to charges of third-degree murder, arson, and related offenses. See No. CP-51-CR-806531-2004. The same day, petitioner was sentenced to twenty to forty years' imprisonment on the third-degree murder charge, with a consecutive term of seven-and-a-half to twenty years' imprisonment on the arson charge. The remaining charges carried concurrent sentences.

The facts underlying these charges were set forth by the state courts as follows:

> On February 29, 2004, [at] approximately 1:55 AM, Philadelphia police officers and firefighters responded to a call at 5402 B Street, Philadelphia, PA and found the house at that location engulfed in flames. Upon arriving, Officer Flagler observed Hein Son, the decedent's father, on the front porch screaming. Decedent, Thiayanna Son, whose body was covered in soot and appeared to be burned, was removed from the home. Decedent's mother, Kimsia Phoen, reported to police that she heard her daughter screaming and attempted to find her, however, the smoke prevented her from locating her child and she was unable to reenter once she exited the building. Decedent was taken to Temple University

> Hospital where she was pronounced dead. An autopsy established that decedent suffered second degree burns over ninety percent (90%) of her body, that the cause of her death was smoke inhalation along with thermal injury, and that the manner of death was homicide.
>
> [Petitioner's] friend and co-defendant Michal To pled guilty to third degree murder. According to To [petitioner] asked him on numerous occasions to help him burn down a house, explaining that the motive for the arson was [petitioner's] mother having an affair with the victim's father for which [petitioner] was seeking revenge. [Petitioner] also stated to To that [petitioner's] father suggested the arson and had offered [petitioner] a new car as a reward. On the day of the arson To and [petitioner] drove to a gas station in a white van belonging to [petitioner's] father where they [filled] two red plastic cans with gasoline. Thereafter, the pair proceeded to the decedent's home and [petitioner] torched the house. After [petitioner] set the fire, he returned to the van where To was waiting and the two males went to the home of a mutual friend MJ (Mjad Barakat) who observed them to be in possession of the gas cans. Several days later MJ learned that the victim died as a result of the fire and he confronted [petitioner] who responded that the victim was in the wrong place at the wrong time. Philadelphia Police Officer recovered the white van and other evidence relating to the arson. The day after the fire, while [petitioner's] father transferred title and registration of a new car to [petitioner] To observed [petitioner's] father give [petitioner] a hundred dollars and pat him on the back. [Petitioner] gave a videotaped confession of admission to setting the fire.

Commonwealth v. Ross, No. CP-51-CR-806531-2004, slip op. at 2-4 (C.P. Phila. Feb. 11, 2011) (unpublished memorandum) (Bright, J.) (hereinafter "PCRA Opinion").

Following his plea, petitioner filed post-sentence motions, which were denied on February 24, 2006. Petitioner did not seek direct appellate review of his judgment of sentence in the Pennsylvania Superior Court.

On September 8, 2006, petitioner filed a pro se petition for state collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. The PCRA court appointed counsel, who filed a PCRA petition with consolidated memorandum of law on October 26, 2007. After evidentiary hearings held on July 14, 2010, and September 20, 2010, the PCRA court dismissed petitioner's PCRA petition. Petitioner appealed

the dismissal to the Pennsylvania Superior Court, which affirmed on January 20, 2012. Commonwealth v. Ross, 43 A.3d 523 (Table), No. 2716 EDA 2010 (Pa. Super. Ct. Jan. 20, 2012) (unpublished memorandum).

Petitioner filed a second PCRA petition on June 6, 2012. After issuing notice pursuant to Pa. R. Civ. P. 907, the PCRA court dismissed petitioner's PCRA petition as untimely on December 3, 2013. Petitioner filed an appeal with the Pennsylvania Superior Court, which remanded for an evidentiary hearing on September 22, 2015. Commonwealth v. Ross, 2015 WL 6471486 (Pa. Super. Ct. Sept. 22, 2015). Petitioner then was granted the right to appeal nunc pro tunc from the Superior Court's order affirming the dismissal of his first PCRA petition. Petitioner filed a request for review of the dismissal of his first PCRA petition in the Pennsylvania Supreme Court, but his request was denied on August 28, 2016. Commonwealth v. Ross, 145 A.3d 725 (Table), No. 196 EAL 2016 (Pa. 2016).

Petitioner filed a third pro se PCRA petition on March 28, 2016. On August 29, 2017, after issuing notice pursuant to Pa. R. Civ. P. 907, the PCRA petition was dismissed. Petitioner did not appeal the dismissal to the Pennsylvania Superior Court.

The instant pro se habeas petition and accompanying memorandum of law were filed on December 29, 2016 ("Pet.," Doc. 1; "Pet'r's Mem. of Law," Doc. 1 at 18-28).[1] The petition raises the following grounds for relief:

[1] "[A] pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court." Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). The court presumes that the petition was delivered on the date it was executed by petitioner. See Baker v. United States, 670 F.3d 448, 451 n.2 (3d Cir. 2012).

1. Ineffective Assistance of Counsel
   a. Counsel (Plea) was ineffective when he failed to perfect petitioner's direct appeal as requested.
   b. Counsel (Plea) was ineffective when he waived petitioner's application for a pre-sentence investigation and mental health evaluation to mitigate sentence.
   c. Counsel (Plea) was ineffective when he failed to raise the issue of double jeopardy during the filing of petitioner's post-sentence motion to preserve the issue for appeal.
   d. Counsel was ineffective when he failed to file a motion to dismiss for reasons of double [jeopardy].
2. Commonwealth's Procedural Defect

(Pet. ¶ 12.)

Petitioner filed an addendum to his petition on August 4, 2017, alleging an additional ground for relief: "Petitioner's sentence was entered in violation of Miller v. Alabama when the sentencing authorities were prevented from considering juveniles 'diminished culpability and heightened capacity for change.'" (Doc. 9 at 2.)

Petitioner thereafter filed requests to amend his petition in January and February 2018. (Docs. 18, 24.) These requests were granted "without prejudice to the right of respondents to raise any defenses and/or objections to the amended memorandum of law (Doc. 19), including the statute of limitations." (Doc. 25.) Petitioner's first amendment sought to supplement Claim B, as well as his diminished culpability argument. See Doc. 19. His second amendment sought to supplement Claims B, C, and D, and also alleged an additional claim of ineffective assistance of counsel, "Claim E": "PCRA Counsel is constitutionally ineffective for failing to raise trial counsel's ineffectiveness for failing to investigate petitioner's case prior to advising petitioner to plead guilty." (Doc. 33 at 3.)

In August 2018, petitioner again sought leave to amend his petition to "clarify Claim E." (Doc. 36.) His request was again "granted without prejudice to the right of the respondent to raise any defense and/or objections to the amended petition." (Doc. 38.) Petitioner's "Final Amended Petition" was filed in October 2018 and "delet[ed] Argument E and Insert[ed] New Argument E": "Petitioner's guilty plea was unknowingly and involuntarily entered because he is innocent of the charges he plead guilty to." (Doc. 39.) This submission also sought to insert an additional ineffective assistance of counsel claim: "Plea Counsel failed to investigate presentation of a duress defense prior to advising petitioner to plead guilty." (Doc. 39 at 5.)

Respondents filed a response to the petition on May 29, 2019, arguing that the petition is meritless, defaulted and/or untimely ("Resp."; Doc. 50).

II. DISCUSSION

A. Habeas Corpus Standards

Petitioner's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The provisions of AEDPA relevant to the instant matter provide as follows:

> (d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) 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). The Supreme Court emphasized that "AEDPA's standard is intentionally difficult to meet." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). In other words, habeas review exists as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979)).

With respect to § 2254(d)(1), the Third Circuit has determined that the "'contrary to' and 'unreasonable application of' clauses should be accorded independent meaning." Werts v. Vaughn, 228 F.3d 178, 197 (3d. Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 405 (2000)). A federal habeas petitioner is entitled to relief under the "contrary to" clause only 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, 529 U.S. at 413. Under this clause, the relevant question is "whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is 'contrary to' the governing rule." Matteo v. Sup't SCI Albion, 171 F.3d 877, 885 (3d Cir.) (quoting O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir. 1998)), cert. denied, 528 U.S. 824 (1999). To establish that the state court decision is "contrary to" the federal precedent, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Id. at 888 (citations omitted).

If the state court decision correctly identified the Supreme Court rule governing the claim, the next step of the inquiry is the "unreasonable application" clause. Under this

clause, the relevant question is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409. Relief should not be granted "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo, 171 F.3d at 890.

With respect to 28 U.S.C. § 2254(d)(2), the petitioner must demonstrate that the state court's factual determination was "objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). If a reasonable basis existed for the factual findings reached in the state courts, habeas relief is not warranted. Burt v. Titlow, 571 U.S. 12, 17 (2013); Campbell v. Vaughn, 209 F.3d 280, 290-91 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001). Additionally, § 2254(d)(2) should be considered in conjunction with 28 U.S.C. § 2254(e)(1), which provides that "a determination of a factual issue made by a State court shall be presumed to be correct." The petitioner bears the burden of "rebutting the presumption of correctness by clear and convincing evidence." Id. See also Rountree v. Balicki, 640 F.3d 530, 538 (3d Cir.) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (quotation omitted), cert. denied, 565 U.S. 992 (2011); Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009) ("Under the § 2254 standard, a district court is bound to presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence.").

A federal habeas court may not consider a petitioner's claims of state law violations, but must limit its review to issues of federal law. See Estelle v. McGuire, 502 U.S.

62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); Engle v. Isaac, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

B. Exhaustion and Procedural Default Standards

It is well-established that a petitioner must present all of his claims to a state's intermediate court before a district court may entertain a federal petition for habeas corpus. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845, 847 (1999); Rolan v. Coleman, 680 F.3d 311, 317 (3d Cir.), cert. denied, 568 U.S. 1036 (2012). "The exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). A petitioner must demonstrate that the claim raised in the federal petition was "fairly presented" to the state courts. Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)). See also Baldwin v. Reese, 541 U.S. 27, 29 (2004) (same). To be fairly presented, "a habeas petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'" Laird v. Horn, 159 F. Supp. 2d 58, 69 (E.D. Pa. 2001) (quoting McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999)), aff'd, 414 F.3d 419 (3d Cir. 2005), cert. denied, 546 U.S. 1146 (2006). "The habeas petitioner carries the burden of proving exhaustion of all available state remedies." Boyd v.

Waymart, 579 F.3d 330, 367 (3d Cir. 2009) (quoting Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997)).

When a petitioner is unable to obtain state court review of his claims because of noncompliance with state procedural rules, the doctrine of procedural default generally bars federal habeas corpus review. Martinez v. Ryan, 566 U.S. 1, 9-10 (2012); Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). The Third Circuit Court of Appeals explained:

> Procedural default occurs when a claim has not been fairly presented to the state courts (i.e., is unexhausted) and there are no additional state remedies available to pursue . . . ; or, when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule[.]

Rolan, 680 F.3d at 317 (citations omitted). See also Bey v. Sup't Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017) (same). "A state [procedural] rule provides an adequate and independent basis for precluding federal review if (1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claims on the merits; and (3) their refusal is consistent with other decisions." Nara v. Frank, 488 F.3d 187, 199 (3d Cir. 2007) (citations omitted).

Upon a finding of procedural default, review of a federal habeas petition is barred unless the habeas petitioner can show cause for the procedural default and actual prejudice arising therefrom, or that a fundamental miscarriage of justice will result if the claim is not considered. Coleman, 501 U.S. at 750. Petitioner can demonstrate cause for procedural default if he can show that some objective factor external to the defense impeded or prevented his ability to comply with the state procedural rules. Caswell, 953 F.2d at 862. The cause must be "something that cannot fairly be attributed to [the petitioner]." Coleman, 501 U.S. at 753. To show prejudice, petitioner must present evidence that this factor did more than merely create a

possibility of prejudice; it must have "worked to [petitioner's] actual and substantial disadvantage." Murray v. Carrier, 477 U.S. 478, 494 (1986) (emphasis in original) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The "fundamental miscarriage of justice" exception to procedural default is concerned only with "actual" innocence and petitioner must show that in light of new evidence it is more likely than not that no reasonable juror would have convicted him absent the claimed error. Schlup v. Delo, 513 U.S. 298, 327-28 (1995). See also Hubbard v. Pinchak, 378 F.3d 333, 338 (3d Cir. 2004) (finding that a credible allegation of actual innocence constitutes a miscarriage of justice that enables a federal court to hear the merits of otherwise procedurally defaulted habeas claims), cert. denied, 543 U.S. 1070 (2005).

C. Petitioner's Claims

1. Ineffective Assistance of Counsel Claims

Petitioner's first ground for relief asserts multiple claims of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test that a petitioner must satisfy before a court will find that counsel did not provide the effective assistance guaranteed by the Sixth Amendment. Under this test, a petitioner must show: (1) that counsel's performance was deficient; and (2) counsel's deficient performance caused the petitioner prejudice. Id. at 687-96. See also Harrington, 562 U.S. at 86 (same); Premo v. Moore, 562 U.S. 115 (2011) (same). The United States Supreme Court observed that "[s]urmounting Strickland's high bar is never an easy task." Harrington, 562 U.S. at 105 (quotation omitted). See also Collins v. Sec'y, Pa. Dep't of Corrs., 742 F.3d 528, 544 (3d Cir. 2014) (discussing Strickland).

To show deficient performance, a petitioner must show "that counsel's

representation fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687-88. In evaluating counsel's performance, a reviewing court should be "highly deferential" and must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Moreover, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted). The Court has cautioned that the appropriate "question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Premo, 562 U.S. at 122 (quoting Strickland, 466 U.S. at 690).

In the context of a guilty plea, prejudice can be demonstrated by "a 'reasonable probability that, but for counsel's errors, [a defendant] would not have pleaded guilty and would have insisted on going to trial." Lee v. United States, 137 S. Ct. 1958, 1965 (2017) (citation omitted). The Court cautioned that "courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. at 1967.

Additionally, where, as here, the state court already has rejected an ineffective assistance of counsel claim, a federal court must defer to the state court's decision in accordance

with 28 U.S.C. § 2254(d). As the Supreme Court stated,

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington, 562 U.S. at 105 (citations omitted). See also Woods, 135 S. Ct. at 1376 (when considering claims of ineffective assistance of counsel, AEDPA review must be "'doubly deferential' in order to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting Titlow, 571 U.S. at 15).

a. Plea counsel was ineffective when he failed to perfect petitioner's direct appeal as requested.

Petitioner's first allegation of ineffective assistance of counsel stems from plea counsel's alleged failure to perfect a direct appeal.[2] (Pet. ¶ 12; Pet'r's Mem. of Law at 3-5.)

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[2] To the extent petitioner claims that his counsel failed to consult with him regarding an appeal, such a claim is unexhausted. See Laird, 159 F. Supp. 2d at 69. In the instant case, the PCRA and Superior Court opinions reflect that petitioner argued only that counsel failed to file a direct appeal, which they found was not requested. See PCRA Opinion at 2; Ross, No. 2716 EDA 2010, slip op. at 3. Because the time has now passed to raise this claim in a successive PCRA petition, the claim is procedurally defaulted. Petitioner has not alleged or established cause to overcome this default.

Even if the claim were not defaulted, the court would find it meritless. In addressing petitioner's claim that counsel failed to file an appeal, the PCRA court observed that in his plea colloquy, petitioner acknowledged that he "was fully advised of his post sentence rights and stated that he understood them." PCRA Opinion at 6. The court further found that petitioner "knew and understood his right to a direct appeal and his right to have counsel appointed for him to file an appeal or his right to file an appeal pro se if he was unable to afford to retain counsel." Id. As discussed supra, this finding is "presumed to be correct" under § 2254(e)(1). This presumption must be rebutted by clear and convincing evidence. See id.

Petitioner raised this claim in the state courts on PCRA review. The state courts denied the claim, first noting the "procedural posture" of the case:

> [W]hen an appellant enters a guilty plea, he waives his right to challenge on appeal all non-jurisdictional defects except the legality of his sentence and the validity of his plea. Commonwealth v. Pantalion, 957 A.2d 1267 (Pa. Super. 2008) (quotation omitted). Nowhere in his brief on appeal, or in his PCRA petition does [petitioner] allege that he wished to challenge the legality of the sentence or the validity of his plea on direct appeal. Indeed, given that counsel attempted to withdraw the guilty plea which, albeit in a cursory manner, put the validity and legality of the plea before the trial court, we cannot discern what issue [petitioner] would have raised in his appeal. Consequently, we discern no arguable merit to [petitioner's] claim of ineffectiveness.

Ross, No. 2716 EDA 2010, slip op. at 5. The court further noted that, to show ineffective assistance for failure to file a direct appeal, petitioner would have to prove that he requested an appeal, and that such request was disregarded. Id. at 6 (quoting Commonwealth v. Knighten, 742 A.2d 679, 682 (Pa. Super. Ct. 1999)). The state courts found, however, that petitioner had not established he made any such request. Id. at 5 n.1. Accordingly, the court stated, "we cannot conclude that counsel provided ineffective assistance of counsel." Id.

Petitioner has not established that he is entitled to habeas relief on this claim. The standard used by the state courts is neither contrary to nor an unreasonable application of federal law. The Pennsylvania standard for ineffective assistance of counsel is "the same as Strickland's standard." Boyd, 579 F.3d at 334 n.2. Moreover, to show ineffective assistance of counsel for failing to file a direct appeal, the federal standard likewise provides that counsel "performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000). Under

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Petitioner has not offered any evidence to rebut this presumption here.

the state standard, which requires petitioner to specifically request an appeal and for such request to be disregarded, the Pennsylvania courts found that petitioner had not shown that he requested counsel to file a direct appeal. Accordingly, the determination by the state courts is neither contrary to or an unreasonable application of clearly established federal law.

Additionally, the factual finding that petitioner did not request the filing of a direct appeal is governed by the statutory presumption of correctness of state court factual findings set forth in 28 U.S.C. § 2254(e)(1). Petitioner has not submitted to this court any evidence to rebut this presumption and show that the state court erred in its factual finding.[3] Accordingly, the finding is entitled to deference under AEDPA.

b. Plea counsel was ineffective when he waived petitioner's application for a pre-sentence investigation and mental health evaluation to mitigate sentence.

c. Plea counsel was ineffective when he failed to raise the issue of double jeopardy during the filing of petitioner's post-sentence motion to reserve the issue for appeal.

d. Plea counsel was ineffective when he failed to file a motion to dismiss for reasons of double jeopardy.

Petitioner's remaining ineffective assistance of counsel claims are unexhausted. As discussed supra, a petitioner's claims must be presented to at least the state's intermediate court before they can be considered in a habeas petition. Petitioner's claims were not presented to the Pennsylvania Superior Court either on direct appeal or on collateral appeal. Petitioner did not file any direct appeal following his guilty plea. Additionally, while the record reflects that petitioner raised these issues in his initial PCRA petition, he failed to include these issues in his

[3] Moreover, petitioner does not allege before this court that he specifically requested counsel to file a direct appeal. Rather, petitioner "avers that it was clear that by asking his plea counsel to file a post-sentence motion, petitioner also wanted counsel to appeal if the determination was adverse." (Pet'r's Mem. of Law at 4-5.)

collateral appeal at the Superior Court level. The sole issue appealed to the Superior Court was whether counsel was ineffective for failing to file a direct appeal. See Ross, No. 2716 EDA 2010, slip op. at 3. Thus, petitioner's remaining claims are unexhausted and, because the time has passed for him to further pursue his claims in the state courts, they are procedurally defaulted.

Moreover, petitioner has not established any exception that would permit him to overcome the procedural default doctrine. As discussed supra, to overcome the procedural default of these claims, petitioner would have to establish cause and actual prejudice, or that a fundamental miscarriage of justice will result if the claim is not considered by this court. Coleman, 501 U.S. at 750. In order to show cause, petitioner must demonstrate that an objective factor external to the defense impeded his ability to comply with state procedural rules. Caswell, 953 F.2d at 862. Additionally, this factor must have worked to petitioner's "actual and substantial disadvantage." Murray, 477 U.S. at 494 (quoting Frady, 456 U.S. at 170).

Petitioner's submissions can be construed as alleging that his default is excused based on a "procedural defect," the Supreme Court's holding in Martinez v. Ryan, 566 U.S. 1 (2012), petitioner's actual innocence, and ineffective assistance of counsel. However, for the reasons set forth herein, petitioner's allegations do not excuse his default. The court will address each of these allegations in turn.

i. Procedural Defect

Petitioner's second ground for relief alleges that there was a "procedural defect" in Philadelphia County's prothonotary's office, causing him to be "denied his right to appeal his conviction and sentence." (Pet'r's Mem. of Law at 10.) Specifically, petitioner alleges that a

letter of receipt from the Philadelphia prothonotary shows that "his pro se notice of appeal was timely-filed and but for a breakdown in the judicial system, he would have had his appeal docketed." Id. The court interprets this argument in part as an attempt to excuse the procedural default of these unexhausted claims.[4] However, this alleged "procedural defect" does not permit this court's review of petitioner's defaulted claims.

The court first notes that petitioner has not provided this court with the letter allegedly demonstrating receipt of his appeal by the state courts. Moreover, he cannot establish cause and prejudice with respect to these issues. Generally, in Pennsylvania, claims of ineffective assistance of counsel are permitted only on collateral review. See Commonwealth v. Holmes, 79 A.3d 562, 575-76 (Pa. 2013) (affirming that absent special circumstances, "claims of ineffective assistance of counsel are to be deferred to PCRA review"). Therefore, the "procedural defect," the alleged failure to properly docket petitioner's direct appeal, could not have prejudiced defendant with respect to his ability to raise the instant ineffective assistance of counsel claims.

ii. Martinez v. Ryan

In petitioner's supplemental habeas submission, he asserts that PCRA counsel was ineffective for failing to raise these claims during PCRA proceedings. (Doc. 33.) The court understands this argument as a claim that the Supreme Court's holding in Martinez excuses the default of these claims. However, petitioner's assertion is meritless.

[4] The court will address petitioner's substantive claim regarding this alleged procedural defect infra.

Under the exception outlined in Martinez, in states like Pennsylvania where state law requires that ineffective assistance of trial counsel claims be raised in an initial-review collateral proceeding, a petitioner may establish "cause" sufficient to overcome a procedural default if "appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington." Martinez, 566 U.S. at 14. The exception is thus available "to a petitioner who can show that: 1) his procedurally defaulted ineffective assistance of trial counsel claim has 'some merit'; and that 2) his state-post conviction counsel was 'ineffective under the standards of Strickland v. Washington." Workman v. Sup't SCI Albion, 915 F.3d 928, 937 (3d Cir. 2019) (citing Martinez, 566 U.S. at 14). However, "Martinez made very clear that its exception to the general rule of Coleman applies only to attorney error causing procedural default during initial-review collateral proceedings, not collateral appeals." Norris v. Brooks, 794 F.3d 401, 405 (3d Cir. 2015) (emphasis added) (citing Martinez, 566 U.S. at 10-11, 16) (finding Martinez inapplicable where the ineffective assistance of counsel claim was "presented on initial collateral review and only waived on collateral appeal."). See also Wilkerson v. Pa. Bd. of Prob. & Parole, 2018 WL 2472597, at *11 (E.D. Pa. Mar. 29, 2018) ("[T]he Martinez exception applies only to claims of ineffective assistance of trial counsel where the errors or absence of post-conviction counsel caused a default of these claims at the initial-review post-conviction proceeding."), R&R Approved and Adopted, 2018 WL 2462003 (E.D. Pa. May 31, 2018).

In the case at bar, the default of these claims was not due to ineffective assistance of counsel or the absence of counsel during petitioner's initial-review PCRA proceeding. Each of these three issues was presented in the initial-review PCRA proceeding, as well as in

petitioner's pro se statement under Pa. R. App. P. 1925(b). (PCRA Opinion at 2.) However, the sole issue petitioner raised in his pro se appellate brief was the claim that counsel was ineffective for failing to file a direct appeal. See Ross, No. 2716 EDA 2010, slip op. at 3. Thus, as in Norris, Martinez is inapplicable because the defaulted issues were "presented on initial collateral review and only waived on collateral appeal." 794 F.3d at 405. The Martinez exception is unavailable to petitioner.

iii. Actual Innocence

A claim filed by petitioner in October 2018 involves the allegation that petitioner "is innocent of the charges he plead guilty to." (Doc. 39 at 1.) Because petitioner is proceeding pro se, the court will construe his claim as one that he is actually innocent of this crime, thereby excusing his procedural default of these claims. However, the court funds that such an argument would not excuse petitioner's default of these claims.

A credible claim of "actual innocence" can, in some circumstances, act as a "gateway" through which a federal habeas petitioner may pass to have an otherwise procedurally barred constitutional claim considered on the merits. See Schlup, 513 U.S. at 315 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)). This exception is limited to cases where the petitioner can show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. Id. at 327. To be credible, a claim of actual innocence must be based on reliable new evidence not presented at trial. Id. at 324. See also Sistrunk v. Rozum, 674 F.3d 181, 191 (3d Cir. 2012) ("Proving actual innocence based on new evidence requires the petitioner to demonstrate (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner.") (citing

Schlup, 513 U.S. at 324, 327). It is thus petitioner's "extremely high burden" to establish actual innocence. Knecht v. Shannon, 132 F. App'x 407, 409 (3d Cir. 2005) (not precedential) (citing Sweger v. Chesney, 294 F.3d 506, 523-24 (3d Cir. 2002)).

Petitioner has not met this burden in the instant case. Petitioner's innocence argument centers on legal innocence, not actual innocence. In the habeas context, to overcome procedural default, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). Petitioner has not demonstrated any new, reliable evidence that is "so probative of innocence that no reasonable juror would have convicted the petitioner." Sistrunk, 674 F.3d at 191 (citing Schlup, 513 U.S. at 324, 327). Therefore, the "actual innocence" exception does not excuse petitioner's procedural default of his habeas claims.

iv. Ineffective Assistance of Counsel

Petitioner asserts several claims of ineffective assistance of counsel. Ineffective assistance of counsel can, under some circumstances, serve as cause to excuse procedural default. However, "for ineffective assistance of prior counsel to serve as 'cause' to excuse a procedural default, habeas petitioners must first exhaust the ineffective assistance claim itself in state court, or show cause and prejudice for that failure to exhaust." Tome v. Stickman, 167 F. App'x 320, 325 (3d Cir. 2006) (not precedential) (citing Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000); Murray, 477 U.S. at 489).

Petitioner has properly exhausted only one ineffective assistance of counsel claim in the state courts, Claim A, addressing counsel's alleged failure to perfect a direct appeal. Claim A does not offer any explanation for why petitioner's remaining ineffective assistance of

counsel claims, Claims B, C, and D, were not exhausted; nor has he established cause and prejudice for failure to exhaust Claims B, C, and D. Moreover, he does not indicate how counsel's alleged ineffective assistance caused his default of these claims. Therefore, the alleged ineffective assistance of counsel cannot serve as cause to excuse petitioner's procedural default of Claims B, C, and D.

Claim 2 **Petitioner encountered a "procedural defect" in the Philadelphia Clerk of Court which denied him his right to appeal.**

Petitioner's second ground for relief is that "due to the procedural defect by the Philadelphia Clerk of Court, he was denied his right to appeal." (Pet. ¶ 12.) Specifically, petitioner argues that "his pro se notice of appeal was timely filed and but for a breakdown in the judicial system, he would have had his appeal docketed and certified." Id.

This claim was not properly exhausted in accordance with the standards as described supra. While petitioner asserts that "the PCRA court and the Superior Court ignored this issue in their opinions," see Pet'r's Mem. of Law at 10, he has not submitted any evidence to indicate that the issue was properly raised. Upon this court's review of the state court record, it does not appear that petitioner raised this issue in any of his PCRA submissions, whether counseled or pro se. It is petitioner's burden to show that his claims have been properly exhausted in the state courts. See Boyd, 579 F.3d at 367 (citing Lambert, 134 F.3d at 513). Petitioner has not met his burden here.

Additionally, petitioner has not set forth any grounds for overcoming the default of this claim. He has not established cause for the procedural default or prejudice arising therefrom, or that a fundamental miscarriage of justice will result of the claim is not considered.

See Coleman, 501 U.S. at 750. Moreover, because the claim is not an ineffective assistance of counsel claim, the default is not subject to excusal under Martinez. See Martinez, 566 U.S. at 9. Accordingly, petitioner's second claim should be denied.

2. Additional Claims

Petitioner's habeas petition was amended several times to supplement his existing claims, as well as to assert additional claims. As discussed supra, leave to submit these amendments was granted "without prejudice to the right of the respondent to raise any defense and/or objections" to the amendments. See Docs. 25, 38. Petitioner's first supplemental submission, an addendum filed August 4, 2017, advanced the argument that "petitioner's sentence was entered in violation of Miller v. Alabama [,567 U.S. 460 (2012)], when the sentencing authorities were prevented from considering juveniles "diminished culpability and heightened capacity for change." (Doc. 9.)

Petitioner's next submission sought permission to supplement his Claim B, as well as his Miller claim. See Docs. 18, 19. The February 2018 petition to sought to "supplement[] petitioner's arguments at the second to last paragraph of [his memorandum of law]." (Doc. 24.) The corresponding amendment was then filed in May 2018, supplementing Claims A, B, C, and D, and "inserting argument E," a claim that "PCRA counsel is constitutionally ineffective for failing to raise trial counsel's ineffectiveness for failing to investigate petitioner's case prior to advising petitioner to plead guilty." (Doc. 33.)

Petitioner then sought leave to amend his petition "in order to clarify claim (E), which petitioner believes fails to state a cause of action." (Doc. 36.) Petitioner's final amendment "delet[ed] Argument E and insert[ed] new Argument E." (Doc. 39.) Petitioner's

"new Argument E" was set forth as follows: "Petitioner's guilty plea was unknowingly and involuntarily entered because he is innocent of the charges he plead guilty to." Id. at 1. It also set forth a fifth ineffective assistance of counsel claim: "Plea counsel failed to investigate presentation of a duress defense prior to advising petitioner to plead guilty." Id. at 5.

In sum, petitioner's supplemental submissions raised three issues that were not raised in his original petition: 1) diminished culpability under Miller; 2) that his plea was unknowingly and involuntarily entered; and 3) ineffective assistance of counsel for failing to investigate presentation of a duress defense. However, petitioner's amendments were not timely filed with this court.

Each of a petitioner's habeas claims must be filed in a timely manner under Title 28 U.S.C. § 2244(d), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA set a one-year time limit for filing a habeas corpus petition, beginning from "the date on which the judgment of sentence became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).[5] Because "allowing a habeas petitioner to amend a habeas petition in order to raise a new claim or new theory of relief would frustrate Congress' intent under the AEDPA," the limitations period applies to requests to amend habeas petitions. See Peterson v. Brennan, 196 F. App'x 135, 138-39 (3d Cir. 2006) (not precedential) (citing United States v. Thomas, 221 F.3d 430 (3d Cir. 2000)).

In the instant case, petitioner's conviction became final on March 27, 2006, thirty

[5] Petitioner has not alleged facts that would support the application of any of § 2241(d)(1)'s alternate start dates to the instant case.

days after his post-sentence motions were denied. See Nara v. Frank, 264 F.3d 310 (3d Cir. 2001) (finding that a conviction and judgment of sentence become final when the time for filing a direct appeal expires); Pa. R. App. P. 903(a) ("[T]he notice of appeal . . . shall be filed within 30 days after the entry of the order from which the appeal is taken."). The AEDPA statute of limitations was then tolled from September 8, 2006, to August 28, 2016, during the pendency of the proceedings related to petitioner's first PCRA. See 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."). At the time the statute of limitations was tolled, 165 days had elapsed toward the limitations period. Petitioner thus had 200 days remaining when the statute of limitations resumed on August 28, 2016, to timely pursue habeas relief. Accordingly, petitioner had until March 16, 2017, to timely add claims to his habeas petition.

While petitioner's original habeas petition was timely filed on December 29, 2016, each of petitioner's new claims were raised after the AEDPA statute of limitations expired on March 16, 2017. His first supplemental submission was filed in August 2017, after which he filed additional requests in December 2017, February 2018, May 2018, and August 2018. Because none of these claims were raised on or before March 1, 2017, they are barred as untimely under the AEDPA statute of limitations unless an exception to the limitations period applies.

a. Relation Back

It is possible for a newly-asserted claim to be considered timely under AEDPA if it "relates back" to a claim raised in the original, timely habeas petition. See Mayle v. Felix, 545

U.S. 644, 646 (2005). The relation back doctrine is applicable where the claims arise from a "common core of operative facts uniting the original and newly asserted claims." Id. However, an amendment does not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650.[6] The Court cautioned that "[i]f claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance." Id. at 662.

The Third Circuit interpreted Mayle in Hodge v. United States, finding that "[a]fter Mayle, it is apparent that new claims can relate back if they arise from the same conduct, transaction, or occurrence." 554 F.3d 372, 378 (3d Cir. 2009) (quoting Mayle, 545 U.S. at 650). In considering relation back, "courts should remain aware that 'the touchstone for relation back is fair notice.'" United States v. Santarelli, __ F.3d __, 2019 WL 2896613, at *4 (3d Cir. July 5, 2019) (quoting Glover v. FDIC, 698 F.3d 139, 146 (3d Cir. 2012)). "Thus, only where the opposing party is given fair notice of the general fact situation and legal theory upon which the amending party proceeds will relation back be allowed." Id. (quoting Glover, 698 F.3d at 146) (internal quotation marks omitted).

[6] Insofar as petitioner's amendments modify claims raised in his initial petition, for example his supplement to Claim B (Doc. 19), the court finds that the amendments relate back and are thus timely before the court. See Peterson, 196 F. App'x at 140 (explaining that "insofar as a petitioner seeks to amend his petition to 'provide factual clarification or amplification after the expiration of the one-year period of limitations,'" it may relate back (citations omitted)). Such amendments were considered by the court in conjunction with petitioner's original claims. However, as discussed supra, the claims remain unexhausted and procedurally defaulted.

Following careful review of the record, the court finds that none of petitioner's three new claims relate back to his original claims.[7]

Petitioner's first new claim alleges that his sentence amounts to cruel and unusual punishment under the Eighth Amendment, in that Miller should have been applied to his case. (Doc. 9 at 2.) Despite having been eighteen at the time his offenses were carried out, petitioner asserts that the sentencing court was "prevented from considering juvenile 'diminished culpability and heightened capacity for change.'" Id. at 3. Petitioner's first new claim does not relate back to any of petitioner's original claims; rather, it asserts an entirely new legal theory for relief, which is not supported by any common core of operative facts. Therefore, this claim cannot be considered timely under the relation back doctrine.

Petitioner's second new claim challenges the knowing and voluntary nature of his plea. (Doc. 39 at 1.) He alleges that he did not understand "the law in relation to the facts of his case," nor did he understand his plea. Id. at 4-5. Like petitioner's first new claim, this claim asserts an entirely new legal theory for relief, and does not arise from the same common core of operative fact as any of the original claims. Accordingly, petitioner's argument that his plea was not knowing and voluntary cannot be considered timely under the relation back doctrine.

Petitioner's third claim alleges that counsel was ineffective by failing to "investigate presentation of a duress defense" before advising petitioner to plead guilty. (Doc. 39 at 5.) Petitioner argues that his state of mind at the time of the crime was impacted by abuse

[7] Many of petitioner's claims conflate different legal arguments and factual scenarios. To the extent any discussion of his new claims provides "factual clarification or amplification" with respect to his original claims, see Peterson, 196 F. App'x at 140, the court has considered this factual information in connection therewith. However, as discussed supra, the claims remain unexhausted and procedurally defaulted.

he suffered at the hands of his father. Id. at 6. While petitioner raised other ineffective assistance of counsel arguments, none pertain to counsel's advice leading up to petitioner's decision to plead guilty. Accordingly, this claim differs in time and type from the other ineffective assistance of counsel claims and thus does not relate back.

b. Equitable Tolling

The Supreme Court has held that the federal habeas statute of limitations may be subject to equitable tolling. Holland v. Florida, 560 U.S. 631, 647-49 (2010). However, the AEDPA statute of limitations will be tolled only if petitioner shows: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Id. at 649 (quoting Pace, 544 U.S. at 418). "The diligence required for equitable tolling purposes is 'reasonable diligence.'" Id. at 653. The Supreme Court recently reaffirmed that "the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control." Menominee Indian Tribe v. United States, 136 S. Ct. 750, 756 (2016) (emphasis in original). The burden of establishing entitlement to equitable tolling lies with the petitioner. See Pace, 544 U.S. at 418. See also Cooper v. Price, 82 F. App'x 258, 260 (3d Cir. 2003) (not precedential) ("The burden rests on the petitioner to prove all facts, both procedural and substantive, entitling him or her to [equitable tolling under the AEDPA statute of limitations]."), cert. denied, 541 U.S. 991 (2004).

After a thorough examination of petitioner's submissions, the court finds he has not set forth any basis for equitable tolling. Petitioner has not addressed the issue of timeliness, or alleged any extraordinary circumstances that stood in the way of his timely amending his

petition to add these claims. Moreover, none of the allegations of error raised by petitioner would explain his failure to timely file the new claims. Because petitioner has not alleged or demonstrated extraordinary circumstances, nor has he established that such circumstances prevented him from timely raising these claims, equitable tolling should not be applied in the instant case.

D. Request for Counsel

Petitioner also filed requests for the appointment of counsel to represent him in this habeas litigation (Doc. 3; Doc. 51 (Ex Parte)). There is no constitutional right to counsel in a federal habeas corpus proceeding. See Reese v. Fulcomer, 946 F.2d 247, 263 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). Appointment of counsel in a habeas proceeding is mandatory only if the district court determines that an evidentiary hearing is required, and the petitioner qualifies to have counsel appointed under 18 U.S.C. § 3006A. See Rule 8(c) of the Rules Governing Section 2254. In the instant case, the court finds that an evidentiary hearing is not required.[8]

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[8] The Supreme Court set forth the following standard to determine whether to grant an evidentiary hearing:

> [A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.

Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (internal citations omitted).

In the instant case, an evidentiary hearing is not required. The bulk of petitioner's claims are procedurally defaulted or untimely as discussed supra. The only claim properly before this court is petitioner's first ineffective assistance of counsel claim, alleging that his counsel failed to file a direct appeal upon request. Such a claim is subject both to "doubl[e] deferen[ce]" to state courts' application of Strickland, see Harrington, 562 U.S. at 105, as well as the presumption of correctness of state court factual findings, 28 U.S.C. § 2254(e)(1).

In addition to mandatory appointment of counsel, a court may exercise its discretion in appointing counsel to represent a habeas petitioner who is "financially eligible" under the statute, if the court "determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2); Reese, 946 F.2d at 263-64. Under these guidelines, counsel may be appointed where a pro se petitioner in a habeas action has made a colorable claim, but lacks the means to adequately investigate, prepare, or present the claim. Id. Factors to consider include whether the claims raised are frivolous, the complexity of the factual and legal issues, and if appointment of counsel will benefit the petitioner and the court. See, e.g., Reese, 946 F.2d at 263-64.

Here, as discussed supra, many of petitioner's claims are procedurally defaulted or untimely. Petitioner's remaining claim is meritless. Counsel will provide no benefit to petitioner or the court, and the interests of justice do not require appointment of counsel. Petitioner's requests for appointment of counsel should be denied.

E. Ex Parte Request for Financial Assistance

On May 29, 2019, petitioner submitted an "Ex Parte Application for Financial Assistance and Appointment of Counsel." (Doc. 51 (Ex Parte).) The application seeks financial assistance to retain "an expert in Forensic Psychology, who specializes in the effects of child abuse," a "Cultural Expert, specializing in the field of Cambodian culture, and how their children are taught to obey their parents through discipline," and "an expert in the field of neuroscience" to develop petitioner's Miller claim. (Doc. 51 (Ex Parte) at 3-4.)

Accordingly, taking into account these standards, an evidentiary hearing is not required, and petitioner is thus not entitled to mandatory appointment of counsel.

The court first notes that petitioner has not identified any source of authority for making the instant application ex parte. It thus appears to the court that such an ex parte request is inappropriate. See Johnson v. Lamas, 2011 WL 2982692, at *3 (E.D. Pa. July 21, 2011) (concluding that ex parte request was inappropriate in a § 2254 habeas proceeding). Moreover, as in Johnson, the court can see no justification for considering the instant application ex parte. Id. at *4. Even in cases where an ex parte application is properly submitted, such as capital habeas cases, a petitioner "has no right to proceed ex parte when requesting expert assistance unless the petitioner makes a 'proper showing' concerning the 'need for confidentiality.'" Wood v. Quarterman, 572 F. Supp. 2d 814, 821 (W.D. Tex. 2008) (citing 18 U.S.C. § 3599(f)). Petitioner has not demonstrated any need for confidentiality here. Petitioner's ex parte request does not advance any arguments or evidence not provided in his prior submissions to this court. See, e.g., Docs. 1, 9, 19, 33, 39 (advancing petitioner's arguments that he had been abused at the hands of his father), Doc. 9 (arguing that Miller should be extended to individuals eighteen and over), Doc. 39 (setting forth petitioner's argument related to his Cambodian culture), Docs. 19, 39 (attaching the affidavits of petitioner's mother, father, and brother that were submitted with his ex parte application).

Nonetheless, the court does not see any reason to require a response in the instant matter. The court first notes that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, discovery in habeas proceedings is governed by Rules 6 and 7 of the Rules Governing § 2254 Cases. Under these rules, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent

of discovery." Rule 6(a) of the Rules Governing § 2254 Cases. A habeas petitioner is not entitled to discovery as a matter of due course; but "only upon a showing of 'good cause' and even then, the scope of discovery is subject to the district court's sound discretion." Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011), cert. denied, 567 U.S. 952 (2012). A habeas petitioner may satisfy the "good cause" requirement by setting forth specific factual allegations which, if fully developed, would entitle him to habeas relief. Id. The burden rests on the petitioner to demonstrate that the requested information is pertinent and that there is good cause for its production. Id. The grant or denial of a request for discovery is within the discretion of the district court. Id.

The court finds that petitioner has not alleged facts sufficient to warrant the discovery requested by petitioner. Even if petitioner were able to prove that he suffered abuse at the hands of his father, or that his culture emphasizes obeying parents' orders, he would not be entitled to habeas relief. His claims related to this evidence are, as discussed supra, unexhausted and procedurally defaulted, or untimely. Moreover, the information petitioner seeks to introduce would not provide cause and prejudice or establish a fundamental miscarriage of justice to overcome this default. See Coleman, 501 U.S. at 750. Therefore, petitioner has not established good cause which would warrant discovery.

With respect to the request to develop petitioner's Miller claim, the Supreme Court expressly limited Miller to individuals "under the age of 18." Miller, 567 U.S. at 465. Because petitioner was eighteen at the time he committed this crime, he cannot establish good cause to warrant discovery.

Because petitioner has not set forth specific factual allegations which, if fully developed, would entitle him to habeas relief, his request for discovery should be denied. Because discovery is not warranted, petitioner's Application for Financial Assistance (Doc. 51 (Ex Parte) should be denied.

III. CONCLUSION

Accordingly, the court makes the following:

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

AND NOW, this 18th day of July, 2019, the court respectfully recommends that the petition for writ of habeas corpus be **DENIED**, the request for appointment of counsel be **DENIED**, and that no certificate of appealability ("COA") be granted.[9]

The parties may file objections to the Report and Recommendation. See Loc. R. Civ. P. 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

[9] The COA should be denied because petitioner has not shown that reasonable jurists could debate whether his petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. See Miller-El, 537 U.S. at 336.