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

MICHAEL JASON STEVICK,	)	
	)	
Petitioner,	)	Civil Action No. 2:17-cv-949
	)	
v.	)	
	)	Magistrate Judge Patricia L. Dodge
DISTRICT ATTORNEY OF ALLEGHENY COUNTY, *et al.*,	)	
	)	
Respondents.	)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Pending before the Court is the counseled Petition for a Writ of Habeas Corpus filed by Michael Jason Stevick ("Petitioner") pursuant to 28 U.S.C. § 2254. ECF No. 1. It is respectfully recommended that for the reasons set forth below, the Court deny the Petition and deny a certificate of appealability.

II. REPORT

A. Introduction

On February 25, 2014, Petitioner, who faced numerous charges related to a drunk-driving accident, appeared in the Court of Common Pleas of Allegheny County and pleaded guilty to several criminal offenses, the most serious of which was a charge of Aggravated Assault by Vehicle While DUI, in violation of 75 PA. CONS. STAT. § 3735.1(a), which is a second-degree felony. In this habeas case, Petitioner challenges the voluntariness of his guilty plea on the grounds that his attorney, Patrick Thomassey, Esq. ("Defense Counsel") provided him with ineffective assistance in advising him to enter this plea, in violation of his Sixth Amendment rights.

The crime of Aggravated Assault by Vehicle While DUI has a causation element,[1] and in Claim 1 Petitioner contends that Defense Counsel's performance was deficient because he should have hired an expert in accident reconstruction to defend against that count on the ground that his intoxication was not the cause of the accident. ECF No. 1 at 4. In Claim 2, he contends that Defense Counsel gave him "bad advice" and made "false promises." *Id.* He asserts that, but for counsel's deficient performance, there is a reasonable probability that he would not have entered a guilty plea. In Claim 3, Petitioner contends that Defense Counsel was ineffective for failing to file a motion to withdraw the guilty plea. *Id.* at 5.

Petitioner raised the same claims to the state court in collateral proceedings he filed under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 PA. CONS. STAT. § 9541 *et seq.* The PCRA court held an evidentiary hearing on October 26, 2015.[2] Petitioner and Defense Counsel testified, as did Charles Porter, Esq., an attorney with whom Petitioner consulted about representing him, filing a motion to withdraw his guilty plea, and hiring an accident-reconstruction expert. Petitioner also presented testimony from Ronald Baade, an expert in accident reconstruction, who provided the type of testimony that Petitioner contends Defense Counsel should have presented at a trial in defense of the Aggravated Assault count. The PCRA court denied Petitioner's claims on the merits,[3] and the Superior Court of Pennsylvania affirmed, concluding that Petitioner failed to satisfy his burden of demonstrating that Defense Counsel

---

[1] Pursuant to § 3735.1(a), a defendant is guilty of Aggravated Assault by Vehicle While DUI when he or she "negligently causes serious bodily injury to another person as the result of a violation of section 3802 (relating to driving under the influence of alcohol or controlled substance) and who is convicted of violating section 3802…when the violation is the cause of the injury."

[2] The transcript of the PCRA hearing is at ECF No. 1-4 at 85-1 through ECF No. 1-5 at 1-66; the plea hearing is at ECF No. 9-3 at 15-22; and, the sentencing hearing is at ECF No. 9-3 at 23-40.

[3] The PCRA court's decision is set forth in its Notice of Intent to Dismiss ("PCRA Ct. Op."), which is at ECF No. 9-5 at 42-46. Its Rule 1925(a) Opinion is at ECF No. 9-6 at 45-48.

provided him with ineffective assistance. *Commonwealth v. Stevick*, No. 231 WDA 2016, slip op. (Pa. Super. Ct. Feb. 13, 2017).[4]

This Court is not reviewing Petitioner's claims *de novo*. As explained below, in order to receive federal habeas relief, Petitioner must demonstrate more than a violation of his Sixth Amendment rights. He also must overcome the standard of review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which is codified at 28 U.S.C. § 2254(d), as well as the presumption of correctness this Court must afford the PCRA court's findings under § 2254(e)(1). He has not satisfied his burden to do so and, therefore, this Court must deny his Petition.

B. Relevant Background

On March 26, 2011, Petitioner was driving on the Parkway East when his vehicle struck the rear of the vehicle in front of it, which was being driven by Bernie Brown. Mr. Brown's vehicle then hit a concrete barrier and rolled onto its roof. Mr. Brown suffered serious injuries as a result of the accident. The results of a subsequent intoxilyzer test indicated that Petitioner's blood alcohol content was 0.19 %. Petitioner told a police officer at the scene that he was not the driver of his vehicle at the time of the crash. A K-9 search of his car, as well as subsequent DNA testing, established that Petitioner was driving.

On May 11, 2012, the Commonwealth charged Petitioner, in relevant part, with Aggravated Assault by Vehicle While DUI, in violation of 75 PA. CONS. STAT. § 3735.1(a) (Count 1); DUI, 0.16 % or Higher, in violation of § 3802(c) (Count 2); and Recklessly Endangering Another Person ("REAP"), in violation of § 2705 (Count 5). Petitioner retained Defense Counsel to represent him in April 2012.

[4] The Superior Court's decision is at ECF No. 9-9 at 1-12.

At the PCRA hearing, Petitioner testified that he admitted to Defense Counsel early on in the case that he was driving his vehicle at the time of the accident, and that he told counsel that he wanted to hire an accident-reconstruction expert to develop evidence to defend against the Aggravated Assault count. PCRA Hr'g Tr. at 61-63. He testified that Defense Counsel failed to inform him of the extent of Mr. Brown's injuries or explain strategic decisions. *Id.* at 65-67. Defense Counsel testified that he met with Petitioner in person seven or eight times and sent him 21 letters. *Id.* at 12. According to Defense Counsel, Petitioner maintained "from the beginning" that he was not the one behind the wheel at the time of the accident, *id.* at 13, and it was not until much later (perhaps as late as the day of the plea hearing) that Petitioner admitted his culpability. *Id.* at 16-17.

Petitioner's reluctance to admit that he was the driver was one of the reasons that Defense Counsel did not hire an accident-reconstruction expert. *Id.* at 17 ("if my client says I wasn't driving, why would I hire an expert? I told him bring the [actual driver] in, bring him to court or tell me who he is, I'll get him a subpoena. I'll make him take the Fifth in front of the judge and the jury, then we'll get acquitted."). A more significant reason was that, based upon his experience, Defense Counsel did not believe that a defense challenging causation would succeed at trial. *Id.* at 18-21, 31. According to Petitioner, Defense Counsel "never really gave an explanation" as to why he did not hire an expert." *Id.* at 64. However, Defense Counsel testified that he discussed the matter with Petitioner, advised him that it would not be worthwhile to spend the money to hire an expert because he did not think Petitioner's proposed defense would be successful, and that Petitioner ultimately agreed with his advice. *Id.* at 18-19. Defense Counsel acknowledged that Mr. Baade's report pointed out issues with the police investigation of the accident and that the defense could have hired an expert like him to testify at a trial, but he

said that "on this set of facts, I would have never hired an expert. It made no sense to me, none, and [Petitioner] agreed to that." *Id.* at 19.

The police estimated that the speed of Petitioner's vehicle at the time of the crash was 90 miles an hour. *Id.* at 43. When he testified at the PCRA hearing, Mr. Baade said that the investigation of the accident was deficient because the police failed to properly photograph and map the accident scene, so the speed of the vehicles and the nature of braking could not be determined. *Id.* at 38-49. He stated that "[g]enerally a blood alcohol level is not the cause of a collision. Poor driving behavior is the cause." *Id.* at 50. On cross-examination, Mr. Baade admitted he had not reviewed some of the photographs taken at the scene of the accident. *Id.* at 51-52. He also acknowledged that alcohol impairs a person's ability to drive safely and extends perception and reaction time, and that it "tends to lengthen the amount of time it takes for [a driver] to perceive a hazard and potentially arrive at a solution to that hazardous situation." *Id.* at 55. Mr. Baade stated that it was his opinion that alcohol "was not a cause" of the accident, but he also stated that he "never said it was not a factor." *id.* at 56. He also admitted that Petitioner's intoxication could have affected his ability to perceive the distance between his vehicle and Mr. Brown's. *Id.* at 56-58.

When Defense Counsel was asked if he agreed that an expert like Mr. Baade could have created reasonable doubt about the cause of the accident, Defense Counsel replied:

> In this case, no.
>
> To restate what I said a few minutes ago, [Petitioner's] blood alcohol level was 2 ½ times the legal limit. He hit [Mr. Brown's] car in the rear with his car causing the car to flip over onto its roof. Then he stays at the accident scene, tells the police I wasn't driving the car, the dog sniffs the car, sniffs him, says he is driving the car… [C]ausation in that case is real simple in my legal opinion. He was drunk, he hit the car, that caused the accident which caused the injuries to this elderly man. That was just my opinion.

> Now, sometimes I'm wrong. But I gave [Petitioner] the best advice I could. I said, Take the plea or you're going to state prison for a year.
>
> . . . what I did know is that you're not going to hit the car in the rear at 20 miles an hour and cause it to flip over. That's not going to happen. You don't need to be an engineer to figure that out.

Id. at 20-21. Defense Counsel further explained: "you have to be practical about cases. I mean, you show that photograph [of Mr. Brown's car on its roof] to a jury and they'll be told that [Petitioner's] vehicle hit that vehicle, and you want to say it didn't cause the accident? I mean – [t]hey would laugh at me." *Id.* at 31.

Defense Counsel filed a motion to suppress the results of the intoxilyzer test on the grounds that it could not give an accurate reading above 0.15%. ECF No. 9-1 at 14-18. At the PCRA hearing, Defense Counsel explained that "[t]here was a case floating around out there at the time where a judge in Philadelphia had more or less ruled that the Intoxilyzer wasn't admissible. That case has since been reversed. We talked about that. And that all went into eventually the plea agreement I struck with the district attorney[.]" PCRA Hr'g Tr. at 15.

Under the terms of the negotiated plea agreement, the Commonwealth agreed to amend the criminal information to reduce the most serious DUI count (Count 2) from a charge under § 3802(c) to a charge under § 3802(b), which applies when the blood alcohol content is between 0.10 % and 0.16 %.[5] The amendment reduced the statutorily mandated sentence at that count from not less than one year, to not less than 90 days. In exchange, Petitioner agreed to plead guilty to Counts 1 through 5 and some of the summary offenses. There was no agreement as to sentencing. Plea Hr'g Tr. at 2-3.

Petitioner entered his guilty plea on February 25, 2014. He testified at the PCRA hearing that Defense Counsel told him a few days beforehand that the Commonwealth was going to drop

[5] The Commonwealth also agreed to withdraw three of the summary offense counts.

the Aggravated Assault charge and that he was "looking at 90 days" which he could serve on house arrest. PCRA Hr'g Tr. at 64-66. Petitioner said that he did not learn the extent of Mr. Brown's injuries or the actual terms of the negotiated agreement, under which he was pleading guilty to not only the DUI charge (Count 2), but also to the Aggravated Assault (Count 1) and REAP charges (Count 5), until the morning of the plea hearing. *Id.* at 65-68, 81. Petitioner admitted at the PCRA hearing that he understood the terms of the plea agreement and was aware that the Aggravated Assault charge was not being dropped, *id.* at 81, but he said that he entered his plea because he felt rushed and pressured by Defense Counsel, who told him that if he did not enter the plea he "would go to trial and go to jail." *Id.* at 68.

Petitioner's PCRA testimony was inconsistent with the representations he made to the court during the plea proceeding. Prior to entering his plea, Petitioner executed a document entitled *Guilty Plea Explanation of Defendant's Rights*, ECF No. 9-2 at 1-11, within which he acknowledged that he understood, among other things:

- that by pleading guilty he was admitting that he committed the offenses as charged and that the Commonwealth would not have to prove beyond a reasonable doubt every element of the offenses, as it would have to do at a trial;
- the elements of each offense and how the facts of his case proved those elements;
- the concept of guilt beyond a reasonable doubt;
- that he was giving up the right to present defenses to the offenses charged; and,
- that he could file a motion seeking to withdraw his guilty plea, either prior to sentencing or within 10 days after sentencing, on the grounds that his plea was not knowing, intelligent and voluntary or that his attorney was ineffective.

Petitioner also acknowledged:

- that he was entering his guilty plea of his own free will and that no one forced him to enter it;

- that no one, including Defense Counsel, had promised him anything in exchange for his plea other than the terms of the plea agreement; and,
- that he was satisfied with the legal advice and legal representation of Defense Counsel.

After Petitioner executed that document, the court held his plea hearing. Petitioner informed the court that he was satisfied with Defense Counsel's representation. Plea Hr'g Tr. at 4. He also said that no one had threatened him or promised him anything (except for the offer extended by the Commonwealth) to plead guilty. *Id.* He confirmed that he understood the terms of the plea agreement, including that there was no agreement as to the sentence; that he had enough time to speak with Defense Counsel about the plea agreement; and, that he was aware of the maximum penalties as an aggregate that the court could impose. *Id.* at 3-4.

Prior to Petitioner entering his plea, the prosecutor stated:

> If this case were to go to trial, the Commonwealth would call Trooper Maltoni of the Pennsylvania State Police, among other officers who would testify [that] on March 26, 2011 he responded to a two vehicle accident on I-376 in Churchill in which [Petitioner's] vehicle struck another vehicle causing it to up end and skid on its roof. The victim, Bernie Brown, suffered numerous injuries, including broken ribs and vertebrae, numerous internal damage. He was hospitalized for approximately 16 weeks requiring numerous surgical interventions. The defendant appeared to be intoxicated at the scene. He was given an intoxilyzer test which was over a .15. However, because the particular intoxilyzer was not calibrated over a .15, the Commonwealth would not be able to give an accurate BAC to a reasonable degree of scientific certainty. Additionally, [Petitioner] does have two prior ARD adjudications, one from March 2002, and one from September of 2002.

Id. at 5-6. The court asked if there were "[a]ny additions or corrections for the purposes of the plea?" *Id.* at 6. There were none. Petitioner confirmed that he was entering his plea to the charges because he was guilty. *Id.* The court then granted the Commonwealth's motion to amend the criminal information and accepted Petitioner's guilty plea. *Id.* At Defense Counsel's request, the court deferred sentencing pending the preparation of a presentence report and permitted Petitioner to remain free on bond. *Id.* at 6-7.

Petitioner second-guessed his decision to plead guilty and he introduced at the PCRA hearing a letter dated March 4, 2014, ECF No. 1-4 at 22-23, that evidences that he instructed Defense Counsel at that time to file a motion to withdraw his plea. Petitioner testified that Defense Counsel refused his directive and told him that he would have to hire a new attorney if that was the course of action he wanted to take. PCRA Hr'g Tr. at 74-75.

Defense Counsel disputed Petitioner's version of events, indicating that, while Petitioner definitely considered moving to withdraw his plea, he eventually decided not to pursue that course of action. According to Defense Counsel, Petitioner came to see him after the plea hearing and they discussed Petitioner's desire to file a motion to withdraw his plea. *Id.* at 23-25. Petitioner told counsel that he had been in communication with other attorneys, including Mr. Porter, about the possibility of hiring a new attorney, withdrawing the plea, and proceeding to trial. *Id.* Defense Counsel advised Petitioner that, while the court would permit him to withdraw his plea before the sentencing hearing,[6] it would be a mistake for Petitioner to do so because he would be convicted if he went to trial and he would be "looking at a year in jail[.]" *Id.* at 24. Defense counsel testified that he told Petitioner "[i]f you want to withdraw the plea, let me know." *Id.* at 25. In a subsequent letter he sent to Petitioner on April 24, 2014, Defense Counsel wrote:

> If you are going to retain new counsel to withdraw your guilty plea, you should do it sooner than later. The judge will grant the motion to withdraw your plea; however, you should keep in mind that we had the case reduced to a .15 blood alcohol level which took your mandatory minimum from a year down to 90 days.

[6] "The law governing the withdrawal of a guilty plea in Pennsylvania holds that, although a defendant has no absolute right to withdraw a guilty plea, a request to withdraw a guilty plea, if made before sentencing, should be allowed for any fair and just reason, unless the Commonwealth has demonstrated that it would be substantially prejudiced." 16A PENNSYLVANIA CRIMINAL PRACTICE § 25:6, Westlaw (database updated Sept. 2019). However, "[s]ince allowing the withdrawal of a guilty plea after sentencing would allow a defendant to use a guilty plea as a sentence testing device, a defendant must show prejudice on the order of manifest injustice before a guilty plea may be withdrawn after sentencing." *Id.*

> I don't know if the district attorney will do that again. He made the decision to do that based upon the motion to suppress that I had filed. Please advise who your new lawyer is going to be.

Id. at 24.

Around this same time, Petitioner had multiple discussions with Mr. Porter because Petitioner wanted to hire him as his new attorney. *Id.* at 5-7. Petitioner sent Mr. Porter his discovery materials and he also identified an accident-reconstruction expert who he wanted Mr. Porter to contact on his behalf. *Id.* Mr. Porter testified at the PCRA hearing that he decided not to take Petitioner's case for "multiple reasons[,]" including that he "wasn't sure it was in [Petitioner's] best interest to withdraw his plea." *Id.* at 9.

Petitioner's sentencing hearing was held on July 16, 2014. Defense Counsel testified that he had a conversation with Petitioner that day and recalled that he told Petitioner "[y]ou're probably going to get 90 days in a half-way house and you can work and keep your job, or withdraw your plea and we can go back to square one." *Id.* at 26. Under the guidelines, the minimum sentence for the Aggravated Assault conviction was six to 14 months in custody in the standard range, and Defense Counsel requested that the court impose a sentence in that range and also consider intermediate punishment or alternative housing. Sent. Hr'g Tr. at 3, 11. In his statement to the court, Mr. Brown asked that it impose "the maximum sentence allowed by law[.]" *Id.* at 5. The prosecutor argued that, under the circumstances, "some jail time is appropriate in this case." *Id.* at 13. Petitioner's father, sister, and girlfriend testified on his behalf, *id.* at 6-9, and Petitioner expressed his regret and remorse "for the injuries that I've caused Mr. Brown." *Id.* at 9.

Petitioner did not notify the court at any time during the sentencing hearing that he was dissatisfied with Defense Counsel's representation, that he wanted to withdraw his plea, or that the sentence Defense Counsel had requested varied from that which he expected he would

receive. When asked at the PCRA hearing why he did not inform the court that he wanted to withdraw his plea, Petitioner responded that he "didn't know that that was an option without having different counsel." PCRA Hr'g Tr. at 75-76.

The trial court sentenced Petitioner on the Aggravated Assault conviction to a standard-range sentence of 11 ½ to 23 months, with permission for work release or alternative housing, to be followed by three years of probation. It sentenced him on the DUI conviction to a concurrent sentence of 90 to 180 days. On the REAP conviction, the Court sentenced Petitioner to two years of probation to be served consecutive to the period of probation imposed on the Aggravated Assault. Sent. Hr'g Tr. at 15-16.[7] At the conclusion of the hearing, the court advised Petitioner that he could file a motion to withdraw his plea within ten days. *Id.* at 17. Petitioner did not file one. He testified at the PCRA hearing that Defense Counsel ignored his request to do so. PCRA Hr'g Tr. at 76. In contrast, Defense Counsel testified that he had no recollection of Petitioner making such a request. *Id.* at 26. He said that if Petitioner had asked him to do so, he would have advised him that the court would almost certainly deny it. *Id.* According to Petitioner, Defense Counsel ceased representing him sometime in July or August of 2014. *Id.* at 68.

The court granted Petitioner permission to serve his sentence in Arlington, Virginia, which is where he resided. On December 29, 2014, Petitioner filed, through new counsel, a motion requesting that he be permitted to serve his sentence under house arrest. The Court denied that motion on April 6, 2015, and on May 21, 2015 Petitioner reported to Goodwill Industries, an alternative housing program, to begin serving his sentence. On June 30, 2015,

[7] Upon the parties' stipulation, the PCRA court subsequently vacated the sentence imposed on the DUI conviction because it should have merged with the one imposed on the Aggravated Assault conviction. PCRA Hr'g Tr. at 3-4.

Petitioner, through his new counsel, commenced his PCRA proceeding, in which he raised the claims of ineffective assistance that are now before this Court.

The PCRA court did not credit Petitioner's PCRA testimony, found that Defense Counsel testified truthfully, and denied Petitioner's claims on the merits. PCRA Ct. Op. at 3-5; Rule 1925(a) Op. at 6-11. The Superior Court determined that the PCRA court's factual findings and credibility determinations were supported by the record, and it rejected Petitioner's claims on the merits. *Stevick*, No. 231 WDA 2016, slip op. at 4-12.

After the Supreme Court of Pennsylvania denied Petitioner's subsequent Petition for Allowance of Appeal, he filed his Petition with this Court. ECF No. 1. Respondents filed their Answer and the state court record. ECF No. 9. Petitioner then file his Brief in Support of Petition for Writ of Habeas Corpus and In Response to Respondents' Answer, ECF No. 20,[8] which he later supplemented, ECF No. 25.

B. Jurisdiction and Standard of Review

This Court has jurisdiction under 28 U.S.C. § 2254, which is the federal habeas statute applicable to prisoners in custody pursuant to a state-court judgment. It permits a federal court to grant a petitioner the writ of habeas corpus "on the ground that he or she is in custody in violation of the Constitution…of the United States." 28 U.S.C. § 2254(a).

It is Petitioner's burden to prove that he is entitled to the writ. *Id.; see, e.g., Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 848-49 (3d Cir. 2017). However, there are other prerequisites that he must satisfy before he can receive habeas relief. Most relevant here is the burden imposed upon him by the standard of review set forth at 28 U.S.C. § 2254(d), which is discussed below. Because § 2254(d) applies here and the Superior Court's adjudication survives

[8] Petitioner should have filed his memorandum of law when he filed the Petition, not after Respondents filed their Answer. Local Rule 2254.B.2.b.

review under it, this Court does not review Petitioner's Sixth Amendment claims *de novo*. 28 U.S.C. § 2254(a); *see, e.g., Vickers*, 858 F.3d at 849.[9]

In 1996, Congress made significant amendments to the federal habeas statutes with the enactment of AEDPA, which, among other things, "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone,* 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)). AEDPA reflects the view that habeas corpus is 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) (internal quotations and citation omitted).

A finding of fact made by a state court always has been afforded considerable deference in a federal habeas proceeding. AEDPA continued that deference and mandates that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*

Additionally, AEDPA put into place a new standard of review, which is codified at 28 U.S.C. § 2254(d). It provides that this Court cannot grant Petitioner relief on any claim unless he first establishes that the Superior Court's adjudication of a 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

[9] If, when evaluating a claim, this Court determines that Petitioner has satisfied his burden under either provision of § 2254(d), this Court must then "proceed to review the merits of the claim *de novo* to evaluate if a constitutional violation occurred." *Vickers*, 858 F.3d at 849. That is because a federal court can only grant the writ of habeas corpus if it is "firmly convinced that a federal constitutional right has been violated[.]" *Id.* (internal quotations and citation omitted); *Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review…none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard").

(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).

C. Discussion

In *Hill v. Lockhart*, 474 U.S. 52 (1984), the Supreme Court explained that "[t]he longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 474 U.S. at 56 (internal quotations and citations omitted). Where, as is the case here, the petitioner entered his plea upon the advice of counsel, the voluntariness of his plea depends on whether the advice counsel gave "was within the range of competence demanded of attorneys in criminal cases[,]" *Hill*, 474 U.S. at 56 (internal quotations and citation omitted), and the petitioner must satisfy the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in order to prevail on his challenge to his guilty plea. *Hill*, 474 at 52, 56-59.

Strickland recognized that a defendant's Sixth Amendment right to the assistance of counsel for his defense entails the right to be represented by an attorney who meets at least a minimal standard of competence. 466 U.S. at 685-87. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" *Burt v. Titlow*, 571 U.S. 12, 24 (2013). Under *Strickland*, it is Petitioner's burden to establish that his "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. The Supreme Court has emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" *Titlow*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690); *Richter*, 562 U.S. at 104 ("A court

considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.") (quoting *Strickland*, 466 U.S. at 689).

Strickland also requires that Petitioner demonstrate that he was prejudiced by his trial counsel's deficient performance. This places the burden on him to establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. When a petitioner claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, he can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

The state courts applied the *Strickland* standard when they evaluated Petitioner's claims. *Stevick*, No. 231 WDA 2016, slip op. at 3-4; Rule 1925(a) Op. at 6-7; PCRA Ct. Op. at 3-5.[10] The PCRA court denied Petitioner's claims because it did not credit his PCRA testimony and found that Defense Counsel testified truthfully. PCRA Ct. Op. at 3-5. In disposing of Claim 3, it found as fact that "Petitioner decided not to withdraw the plea prior to sentencing based on counsel's advice, and did not ask [Defense Counsel] to withdraw his plea after he was sentenced." *Id.* at 4. In rejecting Claim 1, the PCRA held that "given Defense Counsel's credible testimony that Petitioner adamantly claimed to have not been driving when the incident occurred, an expert would not have helped his case." *Id.* at 3. It also found as fact that Defense Counsel spoke with Petitioner about hiring an expert witness and that Petitioner agreed with his advice

[10] Pennsylvania courts typically articulate *Strickland's* standard in three parts, while federal courts set it out in two. The legal evaluation is the same, and the differences merely reflect a stylistic choice on the part of state courts. *See, e.g., Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117-18 (Pa. 2012) ("In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland*[.]"); *Commonwealth v. Kimball*, 724 A.2d 326, 330-33 (Pa. 1999); *Commonwealth v. Pierce*, 527 A.2d 973, 976 (Pa. 1987).

not to hire one. *Id.* at 3-4. As for Claim 2, the PCRA court rejected Petitioner's allegation that Defense Counsel did not adequately communicate with him about what was going on in the case, and it credited Defense Counsel's testimony that "he wrote 21 letters to Petitioner, and met with him approximately seven time before Petitioner's plea." *Id.* at 4. Based upon its rejection of Petitioner's PCRA testimony, as well as the confirmations Petitioner made when he entered his plea (including that he was satisfied with Defense Counsel's representation, understood that there was no agreement as to his sentence, and that he was aware of the maximum penalties as an aggregate that the court could impose), the PCRA court found that he entered "a knowing, intelligent, and voluntary guilty plea." *Id.*

In its decision affirming the PCRA court, the Superior Court concluded, in denying Claim 1, that Defense Counsel's testimony, which the PCRA court credited, demonstrated that counsel gave objectively reasonable advice to Petitioner regarding why he should not hire an expert, and that Petitioner ultimately agreed with that advice. *Id.* at 7. It also held that Petitioner was not prejudiced by the lack of an expert. *Id.*

In denying Claim 2, the Superior Court held that its "review of the certified record, including the notes of testimony for the guilty plea, sentencing and PCRA evidentiary hearing, as well as the written guilty plea form, confirms" that the PCRA correctly found that Petitioner's plea was knowing, intelligent, and voluntary. *Id.* at 8. The Superior Court pointed out that "[f]rom the guilty plea in open court through sentencing, [Petitioner] never expressed *any* concerns regarding his representation by counsel. Nor did he ever dispute being the factual cause of the accident or injuries to the victim." *Id*. at 8-9 (emphasis supplied by Superior Court). That Defense Counsel told Petitioner that he anticipated that Petitioner would receive a 90-day sentence did not render Petitioner's guilty plea involuntary, the Superior Court held, because

"the record clearly demonstrates that no promises were made to [Petitioner] regarding his sentence." *Id.* at 9.

In denying Claim 3, the Superior Court concluded that "[t]he PCRA court made a credibility determination that defeats [this] claim." *Id.* The Superior Court quoted portions of Defense Counsel's PCRA hearing testimony, which it found provided "ample" support for the "PCRA court's finding that [Defense Counsel] did not refuse to file a motion to withdraw [Petitioner's] guilty plea[.]" *Id.* at 10-11. Noting that it was bound by the PCRA court's credibility determinations where there is support for them on the record, the Superior Court concluded that Petitioner "is not entitled to relief on this claim." *Id.*

1. Petitioner Has Not Satisfied His Burdens Under § 2254(e)(1) and (d)(2)

Because the Superior Court denied Claims 1 and 2 in large part, and Claim 3 entirely, based upon the credibility determinations and findings of fact made by the PCRA court, the two provisions of AEDPA that pertain to such findings by the state courts–§ 2254(e)(1) and § 2254(d)(2)–will be discussed first. As set forth above, under § 2254(e)(1) this Court is bound by the credibility determinations and findings of fact that the PCRA court made unless Petitioner produced "clear and convincing evidence" that the PCRA court was wrong. *See also Vickers*, 858 F.3d at 850 n.9 (even in pre-AEDPA cases, "'federal habeas courts [had] no license to redetermine credibility of witnesses who demeanor ha[d] been observed by the state trial court, but not by them'") (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (bracketed text added by the Court of Appeals)).

The standard of review at § 2254(d)(2) requires that Petitioner demonstrate that the Superior Court's adjudication of a claim "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." "[A] state court decision is

based on an 'unreasonable determination of the facts' if the state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding,' which requires review of whether there was sufficient evidence to support the state court's factual findings." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016) (en banc) (quoting § 2254(d)(2) and citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). "'[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Titlow*, 571 U.S. at 18 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)); *see Rice v. Collins*, 546 U.S. 333, 342 (2006) (reversing court of appeals's decision because "[t]he panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."). Thus, "if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede'" the state court's adjudication. *Wood*, 558 U.S at 301 (quoting *Collins*, 546 U.S. at 341-42).

Sections 2254(d)(2) and (e)(1) "express the same fundamental principle of deference to state court findings[,]" and federal habeas courts "have tended to lump the two provisions together as generally indicative of the deference AEDPA requires of state court factual determinations." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). The Court of Appeals has instructed that § 2254(d)(2), when it applies (as it does here because the Superior Court adjudicated Petitioner's claims on the merits), provides the "overarching standard" that a petitioner must overcome to receive habeas relief, while 2254(e)(1) applies to "specific factual

determinations that were made by the state court, and that are subsidiary to the ultimate decision." *Id.* at 235.[11]

Petitioner has not met his burdens under § 2254(e)(1) and (d)(2). He cites to portions of the PCRA transcript and documents he introduced at that hearing which he contends support his allegations, but that evidence does not amount to "clear and convincing evidence" required under § 2254(e)(1) to rebut the presumption of correctness that this Court must afford the PCRA court's findings of fact and credibility determinations. Petitioner likewise has not demonstrated that the Superior Court's adjudication of any of his claims "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)(2). The Superior Court had before it the requisite evidence necessary for its adjudication to withstand review under § 2254(d)(2)'s deferential standard.

Although there can be the rare case where "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable [under § 2254(d)(2)] or that the factual premise was incorrect by clear and convincing evidence [under § 2254(e)(1)]" *Miller-El*, 537 U.S. at 340, this case is not one of them. There is no basis on the record before this Court to determine that Petitioner has overcome AEDPA's deference to the state courts' factual determinations.

---

[11] The Court of Appeals has declined to adopt a "rigid approach to habeas review of state fact-finding," *Lambert*, 387 F.3d at 236 n.19, and instead has provided the following guidance:

> In some circumstances, a federal court may wish to consider subsidiary challenges to individual fact-finding in the first instance applying the presumption of correctness as instructed by (e)(1). Then, after deciding these challenges, the court will view the record under (d)(2) in light of its subsidiary decisions on the individual challenges. In other instances, a federal court could conclude that even if petitioner prevailed on all of his individual factual challenges notwithstanding the (e)(1) presumption of their correctness, the remaining record might still uphold the state court's decision under the overarching standard of (d)(2). In that event, presumably the (d)(2) inquiry would come first.

Id.

2. Petitioner Has Not Satisfied His Burdens Under § 2254(d)(1)

Section 2254(d)(1) applies to questions of law and mixed questions of law and fact such as those presented by Claims 1 and 2.[12] It requires that Petitioner demonstrate that the Superior Court's adjudication of a claim "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[.]" 28 U.S.C. § 2254(d)(1). In applying this standard of review, this Court's first task is to ascertain what law falls within the scope of the applicable "clearly established Federal law[.]" *Id.* It is "'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision[,]'"[13] *Dennis*, 834 F.3d at 280 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (emphasis added), which in this case was February 13, 2017, the date the Superior Court issued its decision. *See also Greene v. Fisher*, 565 U.S. 34, 38-41 (2011). It "includes only 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *White v. Woodall*, 572 U.S. 415, 420 (2014) (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012), which quoted *Williams*, 529 U.S. at 412).

In this case, the "clearly established Federal law" is that which is set forth in *Strickland* (and its progeny, such as *Hill*). The state courts applied the analysis required by *Strickland* when it evaluated his claims, and Petitioner does not contend that the Superior Court's adjudication

[12] The Superior Court denied Claim 3 solely based upon the PCRA court's finding of fact that Defense Counsel did not refuse to file a motion to withdraw Petitioner's guilty plea. *Stevick*, No. 231 WDA 2016, slip op. at 9-11. Therefore, the relevant review of that claim is that which is set forth at § 2254(e)(1) and (d)(2). Although Petitioner argues that the Superior Court's rejection of Claim 3 was an "unreasonable application of" *Strickland*, under the facts as found by the PCRA court it could not be.

[13] The Supreme Court "has repeatedly emphasized" that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam) (quoting § 2254(d)(1) and citing *Lopez v. Smith*, 574 U.S. 1 (2014) (per curiam)). *See, e.g. Renico v. Lett*, 559 U.S. 766, 779 (2010) (state court's failure to apply decision by federal circuit court "cannot independently authorize habeas relief under AEDPA."). Additionally, "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.'" *Lopez*, 574 U.S. at 2 (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam)).

was "contrary to" it. *Williams*, 529 U.S. at 404-05 (§ 2254(d)(1)'s "contrary to" and "unreasonable application of" clauses have independent meaning); *id.* at 406 (a "run-of-the-mill" state-court decision applying the correct legal rule from Supreme Court decisions to the facts of a particular case does not fit within § 2254(d)(1)'s "contrary to" clause and should be reviewed under the "unreasonable application" clause).

Therefore, the only issue remaining in this case is whether Petitioner has demonstrated that the Superior Court's adjudication of any of his claims was an "unreasonable application" of *Strickland*. To satisfy his burden under this clause of § 2254(d)(1), Petitioner must do more than convince this Court that the Superior Court's decision denying a claim was incorrect. *Dennis*, 834 F.3d at 281. He must show that it "'was *objectively* unreasonable.'" *Id.* (quoting *Williams*, 529 U.S. at 409 (emphasis added by Court of Appeals). This requires that he establish that the Superior Court's decision "*was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement*." *Richter*, 562 U.S. at 103 (emphasis added).

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. *See Lockyer, supra*, at 75, 123 S. Ct. 1166.
>
> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Id. at 102.

Moreover, because the Superior Court denied Claims 1 and 2, at least in part, because he failed to establish *Strickland*'s deficient performance prong, Petitioner faces a particularly

difficult burden. Defense Counsel's advice to Petitioner that it was not worthwhile to retain an accident-reconstruction expert and that he should accept the terms of the negotiated plea agreement was premised upon precisely upon the type of strategic decisions that the Supreme Court in *Strickland* held to be protected from second-guessing. 466 U.S. at 690-91. "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 689). When AEDPA's standard or review applies, as it does here, the burden upon a petitioner "is all the more difficult." *Id.* That is because:

> [t]he standards created by *Strickland* and § 2254(d) are both "highly deferential," [*Strickland*, 466 U.S.] at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), and when the two apply in tandem, review is "doubly" so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. [*Id.*] 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.

Id. (parallel citations omitted).

Here, the Superior Court agreed with the PCRA court that trial counsel's advice to Petitioner fell within the wide range of reasonable professional assistance. It also concluded that Petitioner was not prejudiced by Defense Counsel's advice not to hire an expert. Further, it held that Defense Counsel's inaccurate prediction as to the sentence he thought Petitioner might receive was not sufficient to render his guilty plea involuntary in light of the other evidence in the record, which demonstrated, among other things, that Petitioner confirmed at his plea hearing that he understood that there was no agreement as to the sentence the court would impose, as

well as the maximum penalties as an aggregate that he faced. The Superior Court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Therefore, Petitioner has not satisfied his burden of demonstrating that the Superior Court's adjudication of Claims 1 and 2 were an "unreasonable application of" *Strickland*.

Finally, Petitioner argues in his Supplemental Brief, ECF No. 25, that the Superior Court's adjudication of Claims 1 and 2 was "an unreasonable application" of the Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958 (2017), which was decided on June 23, 2017. Because the Supreme Court decided *Lee* after the Superior Court issued its decision in this case (on February 13, 2017), *Lee* is not part of the "clearly established Federal law[,]" 28 U.S.C. § 2254(d)(1), under which this Court can evaluate the Superior Court's decision. *See*, *e.g.*, *Dennis*, 834 F.3d at 280; *Greene*, 565 U.S. at 38-41. Therefore, Petitioner's argument that he is entitled to habeas relief because the Superior Court's adjudication of his claims was an "unreasonable application of" *Lee* is misplaced.[14]

[14] *Lee* is only relevant to the extent that it could be deemed illustrative of the proper application of *Strickland* and *Hill* at the time the Superior Court issued its decision. *Lee* is also distinguishable. In it, there was no dispute that Lee's counsel provided him with objectively unreasonable assistance and the only issue was whether he was prejudiced. 137 S. Ct. at 1962. Lee, who was legal permanent resident from South Korea, was charged with a federal crime that subjected him to mandatory deportation if convicted. *Id.* at 1962-63. His counsel, when advising him of the potential consequences of accepting a plea agreement, incorrectly told him that he would not be deported following a conviction–a fact that was of "paramount importance" to Lee and that was the "determinative issue" in his deciding whether to accept a plea. *Id.* at 1967-68. During his plea colloquy, the district court asked Lee if the fact that his plea could result in his deportation affected his decision, and Lee answered "Yes, Your Honor." *Id.* at 1968. Additional comments made by Lee indicated that he did not understand the district court's inquiry into the matter, and "[o]nly when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty." *Id.* After learning that he was going to be deported as a result of his conviction, Lee filed a motion to vacate his sentence under 28 U.S.C. § 2255, in which he contended that, but for his counsel's incorrect advisement about the law, he would have gone to trial and fought the charge to avoid deportation, even though "his prospects of acquittal at trial were grim." *Id.* at 1963-65. Taking all of the evidence into account, the Supreme Court granted relief, finding that in Lee's specific case he demonstrated that he would have risked a trial had he been correctly informed of the immigration consequences of a conviction. *Id.* at 1968-69.

D. Certificate of Appealability

AEDPA codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. 28 U.S.C. § 2253 ("A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right.") Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because jurists of reason would not find it debatable that each of Petitioner's claims lack merit, the Court should deny him a certificate of appealability with respect to each claim.

III. CONCLUSION

Based upon the forgoing, it is respectfully recommended that the Court deny the Petition and deny a certificate of appealability. 28 U.S.C. § 2253; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Pursuant to the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Civil Rules, the parties are allowed fourteen (14) days from the date of this Order to file objections to this Report and Recommendation. Failure to do so will waive the right to appeal. *Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

Date: November 27, 2019

/s/ Patricia L. Dodge
PATRICIA L. DODGE
United States Magistrate Judge