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

JOHN PAUL CURRIN, Petitioner,	)	
vs.	)	Civil Action No. 14-1523
	)	Chief Magistrate Judge Maureen P. Kelly
KENNETH R. CAMERON; KATHLEEN KANE *The Attorney General of the State of Pennsylvania*, Respondents.	)	

OPINION

John Paul Currin ("Petitioner") was convicted of, *inter alia*, aggravated assault, robbery and other charges related to a December 16, 2008, bank robbery and subsequent attempt to flee from police. As a consequence, Petitioner was sentenced to 20 to 40 years incarceration.

Petitioner, proceeding pro se, raises two Grounds for Relief in the instant Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (the "Petition"). Because neither of the Grounds merits the grant of federal habeas relief, the Petition will be denied. Because jurists of reason would not find denial of the Petition debatable, a Certificate of Appealability will also be denied.

I. FACTUAL HISTORY

The Court of Common Pleas of Fayette County summarized the factual background of this case as follows in its Opinion filed March 2, 2012:

> On December 16, 2008, defendant was living with his girlfriend, Ashley Lynn Johnston, in Youngwood, Westmoreland County, Pennsylvania. Defendant told Johnston that he was going to rob the Parkvale Bank located at Uniontown, Pennsylvania, and that they would use two vehicles to commit the robbery.
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> Defendant drove his pickup truck from Youngwood to South Union Township, Fayette County, followed by Johnston who was operating her silver Chevrolet Malibu automobile. Defendant parked his truck in the Home Depot parking lot and had Johnston drive him a short distance down Matthew Drive to the

Parkvale Bank. Defendant entered Parkvale Bank and approached the bank teller, Betty Jo Helmick. Defendant told Helmick, "no dye packs, give me your money, no dye packs." Helmick observed that the defendant had his right hand in his jacket pocket like he had a gun. She picked up a row of currency from her cash drawer and placed it in a stack on the counter. Defendant grabbed the money with his left hand, exited the bank through the side door and entered Johnston's vehicle. Johnston returned to the Home Depot parking lot where she dropped defendant off at his truck.

The state police responded to the robbery. At the time of the alarm a patrol vehicle was in the immediate vicinity and stopped Johnston's vehicle near the Uniontown Mall approximately a quarter mile from the Parkvale Bank. Johnston confessed her involvement to the police and identified defendant as her accomplice. She told the police that defendant was operating a bluish Chevrolet truck and that he usually travelled home by way of State Route 119. Other officers spotted the truck described by Johnston and gave pursuit using visible and audible signals for defendant.

During the pursuit defendant entered onto Richmond Road which dead-ends into a parking lot. As the state police attempted to effectuate his arrest, defendant rammed the police vehicles and tried to strike the police with his vehicle in an attempt to escape. Defendant received a gunshot wound to his hand after which he was apprehended.

ECF No. 10-16 at 3 – 5.

II. PROCEDURAL HISTORY

A. State Court

The Pennsylvania Superior Court recounted the procedural history in the state courts as follows in its Opinion dated June 18, 2014:

On June 3, 2009, after rejecting a plea offer of 15 to 30 years of incarceration, Currin entered an open guilty plea to three counts each of aggravated assault and criminal conspiracy, and one count each of robbery, theft by unlawful taking, receiving stolen property, fleeing or attempting to elude police officers, and criminal mischief. On July 31, 2009, the trial court sentenced him to 20 to 40 years of incarceration.

While represented by counsel, Currin filed a premature pro se PCRA petition on August 7, 2009. The trial court incorrectly labeled the petition as untimely and dismissed it without prejudice because of the court's lack of jurisdiction. On August 10, 2009, Currin filed a pro se motion to modify his sentence. He filed pro se notices of appeal on December 21, 2009 and December 29, 2009, docketed at Nos. 2186 WDA 2009 and 19 WDA 2010, respectively. This Court ultimately quashed both appeals as premature because of the pending post-sentence motion. In response to newly-appointed counsel's August 26, 2011 motion to compel judgment, the trial court directed the clerk of courts to enter an

> order indicating that Currin's pro se post-sentence motion was denied by operation of law. Currin filed a counseled appeal, docketed at No. 1478 WDA 2011, and on August 14, 2012, a panel of this Court affirmed the judgment of sentence.
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> On July 12, 2013, Currin filed a pro se PCRA petition. The court appointed James V. Natale, Esquire to represent Currin. Attorney Natale filed a "Motion to Withdraw with Supporting Brief" pursuant to ***Commonwealth v. Turner***, 544 A .2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), in which he asserted that Currin's PCRA claims were time-barred and otherwise lacked merit. On September 6, 2013, the PCRA court granted Attorney Natale's motion to withdraw. On September 5, 2013, the PCRA court issued a Pa.R.Crim.P. 907 notice in which it advised Currin of its intention to dismiss his PCRA petition as untimely. On September 11, 2013, Currin filed a pro se motion in opposition to counsel's motion to withdraw and a petition for writ of habeas corpus, which the court treated as a response to the Rule 907 Notice rather than another PCRA petition. On September 30, 2013, the PCRA court dismissed Currin's PCRA petition without an evidentiary hearing.

ECF No. 1-1 at 2 – 3 (footnotes omitted). The Superior Court affirmed the denial of PCRA relief. On October 6, 2014, Petitioner filed a Petition for leave to file a Petition for Allowance of Appeal Nunc Pro Tunc ("Petition for Leave to File") in the Pennsylvania Supreme Court, which denied the Petition for Leave to File on November 6, 2014. ECF No. 10-3 at 2.

B. Federal Court

On the very day that the Pennsylvania Supreme Court denied the Petition for Leave to File, i.e., November 6, 2014, Petitioner filed the instant pro se Petition in this Court, raising the following two Grounds for Relief:

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

ECF No. 1 at 5.

GROUND TWO: INEFFECTIVE ASSITENCE [sic] OF COUNSEL

Id. at 7.

Petitioner also filed a Petition to Stay and Petition to Abey ("Petition to Stay"). ECF No. 2. Petitioner sought to have this present habeas Petition stayed pending the decision of the

Pennsylvania Supreme Court. However, given that the Pennsylvania Supreme Court denied his Petition for Leave to File the very same day that the Petition to Stay was filed, the Petition to Stay was rendered moot.

Respondents, through the District Attorney of Fayette County, filed an Answer denying that Petitioner was entitled to any federal habeas relief. ECF No. 10. All parties have consented to have the United States Magistrate Judge exercise plenary jurisdiction. ECF Nos. 5 and 9.

III. AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, §101 (1996) (the "AEDPA") which amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254 was enacted on April 24, 1996. Because Petitioner's habeas Petition was filed after its effective date, the AEDPA is applicable to this case. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000).

Where the state courts have reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state courts' disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court expounded upon the standard found in 28 U.S.C. § 2254(d). In Williams, the Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of … clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted). A state court decision can be

contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Secondly, the state courts can apply the correct rule of law but reach an outcome that is different from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case.

The AEDPA also provides another ground for claiming relief, namely, where the state court's adjudication of the claim "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)(2).

IV. DISCUSSION

A. Ground One – Ineffective Assistance of Counsel.

In Ground One, Petitioner contends that he received ineffective assistance of counsel for several different reasons. Specifically, Petitioner complains that:

> Counsel did not familarize [sic] himself with the case enough to advise petitioner to plead guilty, gave errornous [sic] advise [sic] to plead guilty and reject plea offer[.] Failed to object to Asst. Da. asserting false evidence onto record. Following plea hea[r]ing petitioner told counsel Keiser [sic] to move to withdraw the guilty plea becasue [sic] he was not guilty of aggravated assaults, counsel failed to do so and failed to appear at pettioners [sic] sentencing hearing.

ECF No. 1 at 5.[1]

We deem Ground One to be substantially equivalent to the issues raised by Petitioner in his appeal of the PCRA petition, specifically his issues enumerated as Issues Three and Four in the appeal. Issues Three and Four as raised in the Pennsylvania Superior Court were as follows:

[1] Although Petitioner repeatedly refers to his plea counsel as "Keiser" in fact, it appears that the correct spelling of Attorney David Kaiser's name is "Kaiser." ECF No. 10-17 at 1.

> 3. Was Defense Counsel Keiser [sic] Ineffective for not objecting and allowing the prosecutor to enter false/fabricated evidence or acts not based nor alleged in the complaint/indictment.
> 4. Was defense (plea) counsel ineffective for failing to perform any pre-trial investigation which in turn led to an erroneous advisement to the Appellant's plea of guilty.

ECF No. 1-1 at 5 – 6.

1. The Superior Court's disposition was not "contrary to" in the first sense.

The Pennsylvania Superior Court addressed these two issues on the merits in the PCRA opinion. ECF 1-1 at 10 – 13. In addressing the claim of plea counsel's alleged ineffectiveness raised in Ground One, the Superior Court applied the state court test for ineffective assistance of counsel derived from Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987) (the "Pierce standard"). Id. at 13 n.6. Essentially, the Superior Court found, under Pierce, that there was no merit to the claims that Petitioner alleges counsel was ineffective for failing to raise or to pursue. The Pierce standard has been found to be materially identical to the ineffectiveness test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Werts, 228 F.3d at 203. The United States Court of Appeals for the Third Circuit has ruled that this Pierce standard is not "contrary to" Strickland in the first sense of being a wrong rule of law. Hence, Petitioner cannot show that the Superior Court's disposition of Ground One is contrary to United States Supreme Court precedent in the first sense of applying a wrong rule of law.

2. The Superior Court's disposition is not "contrary to" in the second sense.

Nor has Petitioner shown that the Superior Court's disposition is contrary to United States Supreme Court precedent in the second sense, i.e., he fails to point to a case decided by the United States Supreme Court where the facts are indistinguishable from his case but where the Superior Court here reached an outcome different from the outcome reached by the United States Supreme Court.

3. The Superior Court did not unreasonably apply Strickland.

Petitioner does not even argue that the Superior Court's disposition is an unreasonable application of Strickland, Petitioner has failed to show that the Superior Court's decision was an unreasonable application of United States Supreme Court precedent on ineffective assistance of counsel.

a. The Strickland test

In Strickland, the United States Supreme Court explained that there are two components to demonstrating a violation of the right to effective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. at 390-91. In reviewing counsel's actions, the court presumes that counsel was effective. Strickland, 466 U.S. at 689. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990)("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."). In light of the foregoing, the United States Court of Appeals for the Third Circuit has explained, "[i]t is [] only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997)(quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To

establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Williams, 529 U.S. at 391.

b. Strickland and AEDPA taken together are doubly deferential.

Moreover, because the Superior Court addressed Petitioner's claims of ineffectiveness on the merits, this Court must apply the deferential standards of the AEDPA as to those claims, which results in a doubly deferential standard as explained by the United States Supreme Court:

> 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,' *id.*, at 689 [104 S.Ct. 2052]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at ——, 129 S.Ct., at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at —— [129 S.Ct., at 1420]. 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.

Premo v. Moore, 562 U.S. 115, 122 - 123 (2011) (quoting Harrington v. Richter, 562 U.S. 86, 105 (2011)). Accord Grant v. Lockett, 709 F.3d 224, 232 (3d Cir. 2013) ("'A state court must be granted a deference and latitude that are not in operation when the case involves [direct] review under the *Strickland* standard itself.' *Id.* Federal habeas review of ineffective assistance of counsel claims is thus 'doubly deferential.' *Pinholster*, 131 S.Ct. at 1403. Federal habeas courts must 'take a highly deferential look at counsel's performance' under *Strickland*, 'through the deferential lens of § 2254(d).'"). As explained below, Petitioner fails to show under this doubly deferential standard that the Superior Court's disposition of Ground One constituted an unreasonable application of Strickland.

c. The Superior Court's application of the ineffectiveness standard.

In addressing Ground One, the Superior Court found that Petitioner's plea counsel was not ineffective for failing to "investigate, review the evidence, and prepare his case [which allegedly] resulted in circumstances that forced him to plead guilty to crimes that he did not commit." ECF No. 1-1 at 10. Essentially, Petitioner alleged that he was actually innocent of at least two of the aggravated assault charges because he did not damage the police cars in driving away from the police or trying to back up when the police cornered him with three police cars. The Superior Court rejected this claim of actual innocence of two of the aggravated assault charges as follows:

> Based upon our independent review of the record in this case, however, we conclude that none of the issues Currin wanted to raise in a counseled PCRA petition were meritorious, and thus, the deprivation of counsel [during the PCRA proceedings] was not prejudicial to him. In reviewing the list of issues that Currin wanted to raise in a counseled PCRA petition (as well as his third, fourth, and fifth issues raised here on appeal), we conclude that they all lack any merit.
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> . . . .
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> With respect to Currin's claims regarding Attorney Kaiser's alleged ineffectiveness, including both those set forth in Attorney Natale's motion to withdraw (second issue) and the third, fourth and fifth issues here on appeal, they all essentially make the same argument – namely that Attorney Kaiser's failure to investigate, review the evidence, and prepare his case, resulted in circumstances that forced him to plead guilty to crimes that he did not commit. In particular, Currin claims that the evidence supports his testimony at his plea proceedings (N .T., 6/ 3/2009, at 23) that there was little or no damage to two of the three police cars at the scene, and that two of the three officers involved in his capture suffered no injuries at all. Currin's Brief at 20- 26. According to Currin, Attorney Kaiser's lack of information on these points prejudiced him, as it caused Attorney Kaiser to ignore Currin's claims of innocence as to the two aggravated assault charges and to advise instead that he plead guilty to every charged offense (including the two aggravated assaults he did not commit).
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> These claims, however, are clearly meritless. Currin plead guilty to three counts of aggravated assault under 18 Pa. C.S.A. § 2702(a)(2), which provides as follows:

§2702. Aggravated assault

(a) Offense defined.--A person is guilty of aggravated assault if he :

* * *

> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation, while in the performance of duty;

18 Pa.C.S.A. § 2702(a)(2). To be found guilty under this provision, the Commonwealth has no obligation to demonstrate any serious bodily injury to a police officer. Instead, it is sufficient for the Commonwealth to establish intent to inflict a serious bodily injury. ***Commonwealth v. Marti***, 779 A.2d 1177, 1183 (Pa. Super. 2001). This intent may be proven by circumstances that reasonably suggest the defendant intended to cause a serious bodily injury. ***Id.*** The certified record on appeal plainly reflects that the Commonwealth could satisfy this evidentiary burden at trial, as the Affidavit of Probable Cause attached to the criminal complaint against Currin stated, in pertinent part, as follows:

> CURRIN's vehicle came to rest facing these Troopers and as the troopers attempted to arrest CURRIN, CURRIN began to spin his tires in another attempt to flee these Troopers[,] placing these Troopers in fear of their lives by CURRIN attempting to run over the Troopers to flee this area of Fayette County.

Affidavit of Probable Cause, 12/16/2008, at 1.

Accordingly, contrary to his protestations, Currin could well have been convicted of three counts of aggravated assault at trial regardless of whether there was actual damage to all three police cars or actual injuries to the three police officers. Instead, the Commonwealth needed to prove only that Currin attempted to inflict serious bodily injury on the three police officers, which likely could have been established by the trial testimony of those police officers. As such, Currin's contention that Attorney Kaiser negligently advised him to plead guilty to all three counts of aggravated assault (in exchange for a potential reduction in sentence) is meritless. Even if, as Currin now contends, Attorney Kaiser failed to ferret the evidence regarding the lack of damage to the police cars and/ or the lack of injuries to the police officers, Currin cannot state a meritorious claim of ineffective assistance of counsel since he has not established how Attorney Kaiser's advice to plead guilty was deficient in any manner.

ECF No. 1-1 at 10 – 13 (footnotes omitted).

Petitioner simply fails to carry his burden to show that the foregoing was unreasonable application of Strickland as to the claims of ineffectiveness in Ground One. Essentially, the Superior Court found Petitioner's assertions of actual innocence of two of the crimes of aggravated assault to be meritless. Accordingly, his counsel could not be ineffective for failing to pursue a meritless claim of actual innocence or for advising him to plead guilty as to those two charges of aggravated assault notwithstanding Petitioner's erroneous belief in his actual innocence. The Superior Court's disposition of Ground One is an eminently reasonable application of Strickland. Werts, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim."). Accordingly, Ground One does not afford Petitioner any relief in these federal habeas proceedings.

4. Ineffectiveness for advising to enter open plea.

To the extent that the Superior Court did not address the claim that Attorney Kaiser was ineffective for advising Petitioner to plead guilty to an open charge and to reject the plea offer from the prosecution of 15- 30 years, and to the extent this claim was not procedurally defaulted, the record is sufficient before this Court to conclude, even under de novo review, that Attorney Kaiser was not ineffective. Attorney Kaiser was not ineffective when he advised Petitioner that he considered the sentence of 15 – 30 years in the plea offer to be excessive and that it was a calculated gamble to make an open plea as Petitioner might get a lesser sentence but that he might also get a greater sentence. The plea Court engaged in a colloquy with Petitioner about his open plea, assuring that Petitioner understood what he was doing and assuring that Petitioner himself thought 15 – 30 years was too long of a sentence and informing Petitioner that there was a possibility that Petitioner could receive a sentence higher than 15 - 30 years. ECF No. 10-17 at 5 – 6; 10 – 11. Petitioner's counsel explained during the plea colloquy that "I did tell Mr. Currin

that he is taking a gamble. You could give him up to that statutory maximum or you could give him less than the plea offer. I told him that it is a gamble with a general plea. It is in your discretion. I did explain that to him." Id. at 11. The plea judge asked Petitioner whether he understood that and Petitioner replied "Yes." Id.

In light of the calculated risk that Petitioner knowingly undertook, he cannot establish ineffectiveness on the part of his plea counsel, Kaiser for advising an open plea. Yarborough v. Gentry, 540 U.S. 1, 9 (2003) ("While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion."); Howard v. Campbell, 305 F. App'x 442, 445 (9th Cir. 2008) ("It is not our task to reexamine the wisdom of taking (or not) a calculated risk at trial; counsel's election to avoid such a risk does not amount to ineffective assistance."); Tong Xiong v. Felker, 681 F.3d 1067, 1079 (9th Cir. 2012) ("Xiong's counsel took a calculated risk in an attempt to elicit testimony that he was ultimately unable to elicit; instead he elicited cross-examination testimony from the prosecution's expert that was unfavorable. Under Strickland, this is not enough to demonstrate the requisite incompetence, nor prejudice, to trigger § 2254(d) protection. A 'fairminded jurist' could conclude that the cross-examination did not constitute ineffective assistance."). Accordingly, this claim of Attorney Kaiser's alleged ineffectiveness contained in Ground One does not afford Petitioner federal habeas relief.

B. Ground Two – Ineffective Assistance of Counsel

In Ground Two, Petitioner claims that his plea counsel and sentencing counsel were ineffective. Specifically, Petitioner asserts that

> Counsel Jeremy Davis (Public Defender) made appearance at petitioners [sic] sentencing. Petitioner told him that (David Keiser) whom failed to appear, was

> told to withdraw guilty plea. Davis said "Too late, have something good to say to the judge.["] Following the sentencing hearing petitioner asked Counsel (Davis) to appeal the sentence and my plea. Counsel never did. Said counsel was removed from representation at a 'Grazier' hearing, and later was errornously [sic] re-appointed in place of "Conflicts Counsel" whom was in place of DAVIS, Petitioner told Davis to ammend [sic] Brief, refused and shortly thereafter withdrew.

ECF No. 1 at 7.

Certain factual background should be noted in the context of considering this claim. Apparently, Attorney Kaiser, who was Petitioner's attorney at the guilty plea negotiations and plea hearing, was a member of the Fayette County Public Defenders' Office. ECF No. 10-17 at 1. Attorney Davis was, at the time of the Petitioner's sentencing hearing, also a member of the Fayette County Public Defenders' Office. ECF No. 10-18. Attorney Davis represented Petitioner at the sentencing hearing. Id. Apparently, sometime after the sentencing, Petitioner filed a pro se post sentence motion, notwithstanding that he was still represented by counsel. See ECF No. 1-1 at 2 – 3. Petitioner filed an appeal to the Superior Court which was docketed at 1478 WDA 20-11 (Pa. Super.). Eventually, after a Grazier hearing, Petitioner was appointed new counsel to represent him on the direct appeal to the Superior Court. Attorney Brent Peck, of the Office of Conflicts Counsel, was appointed to represent Petitioner and Attorney Peck filed a Brief for Appellant in the Superior Court on April 18, 2012. ECF No. 10-5 at 1 – 40; ECF No. 10-2 (Superior Court Docket sheet). On June 22, 2012, Attorney Davis, the same attorney who represented Petitioner at the sentencing hearing, and who was now in private practice and no longer with the Fayette County Public Defenders' Office, ECF No. 10-2 at 1 (listing Attorney Davis's law firm as "Davis & Davis Attorneys at Law"), filed a praecipe for appearance for Petitioner. As such, Attorney Peck filed an application to withdraw as counsel. Id. at 3. As explained by the Superior Court, "Attorney Peck petitioned to withdraw after filing the brief in

this matter due to his resignation as conflicts counsel in Fayette County. Jeremy Davis, Esquire has entered his appearance on behalf of Appellant. Attorney Davis shall represent Appellant for purposes of any request for re-argument or potential petition for allowance of appeal." ECF No. 10-7 at 7 n.2.

1. Direct appeal claims against Attorney Davis.

a. Failure to file a direct appeal.

Apparently, Petitioner asked Attorney Davis to file a direct appeal after Petitioner was sentenced on July 31, 2009, ECF No. 10-1 at 8, and Attorney Davis never did so. It appears that this request was made at the post-trial stage, while Attorney Davis was still representing Petitioner as a member of the Fayette County Public Defenders' Office. This claim of ineffectiveness fails because Petitioner cannot show any prejudice, because a direct appeal to the Pennsylvania Superior Court was eventually filed by Attorney Peck on September 14, 2011, id. at 15, and was entertained by and disposed of by the Superior Court on August 14, 2012 on the merits. ECF No. 10-7. Petitioner cannot identify any prejudice from the allegedly deficient performance by Attorney Davis's alleged failure to file a direct appeal of his sentence or his plea.

b. Failure to amend the brief on direct appeal.

As to the appeal to the Superior Court, where Petitioner was initially represented by Attorney Peck, Petitioner asserts that Attorney Davis, as successor private counsel, was ineffective because he failed to amend the appellate brief filed by Attorney Peck, notwithstanding Petitioner's request that he do so.

There are at least two problems with this particular claim of Attorney Davis's alleged ineffectiveness. It does not appear that this claim of Attorney Davis's ineffectiveness was raised in the state courts. See ECF No. 1-1 at 5 – 7 (listing claims raised in the PCRA appeal and

claims raised in the PCRA petition.) Accordingly, this claim of Attorney Davis's alleged ineffectiveness is procedurally defaulted. Even if not procedurally defaulted, Petitioner offers no details about this claim. He does not indicate how he wanted Attorney Davis to amend the brief or which claim he wanted to be raised that was not raised. Without such information, Petitioner fails to carry his burden to show that Attorney Davis provided deficient performance, yet alone that Petitioner was prejudiced by Attorney Davis's actions or inactions.

c. Failure to file a motion to withdraw the plea.

The last claim of ineffectiveness concerns Petitioner's allegation that he asked Attorney Davis at the sentencing hearing, apparently before Petitioner was sentenced, to move to withdraw his guilty plea and that Attorney Davis allegedly told Petitioner, "Too late, have something good to say to the judge.["]

The Superior Court addressed this issue on the merits as follows, in its June 18, 2014, Opinion, affirming the denial of PCRA relief:

> The third issue, alleging ineffectiveness of Attorney Jeremy Davis, is facially meritless. While a claim that an attorney mistakenly advised Currin that he could not withdraw his guilty plea before sentencing would clearly have merit if factually supported, the record in this case shows that Attorney Davis was not appointed to represent Currin until well after his direct appeal had been filed with this Court. ***See Commonwealth v. John Paul Currin***, 1478 WDA 2011 *7 n.2 (Pa. Super. Aug. 14, 2012) (unpublished memorandum). Because Attorney Davis did not represent Currin prior to sentencing, he could not have advised Currin that he could not withdraw the plea at that time.

ECF No. 1-1 at 9.

As is obvious from the factual recounting above by this Court based on the record before this Court, Attorney Davis did, in fact, represent Petitioner at his sentencing hearing. Accordingly, we find that the foregoing disposition by the Superior Court of this claim of Attorney Davis's ineffectiveness to have "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)(2).

We note in this regard, that Petitioner failed to point out this fact, and Respondents likewise did not catch this error on the part of the Superior Court. Nevertheless, in light of Petitioner's pro se status and in light of the clarity of the factual error, this Court, sitting as a court in federal habeas, has the independent obligation to apply the law correctly, irrespective of the parties' arguments or lack thereof. Smith v. Mallick, 514 F.3d 48, 51 (D.C. Cir. 2008) (holding that courts have an independent obligation to apply the correct law regardless of the parties' arguments).

Although establishing that the Superior Court's decision 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, is a necessary precondition to warrant federal habeas relief under the AEDPA, it is not a sufficient condition to granting federal habeas relief. Dennis v. Sec., 834 F.3d 263, 283 (3d Cir. 2016) ("When a state court ruling is based on a reasoned, but erroneous, analysis, federal habeas courts are empowered to engage in an alternate ground analysis—relying on any ground properly presented—but, in such a case, the federal court owes no deference to the state court. In *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the state court had 'simply found that respondent's rejection of the plea was knowing and voluntary' in rejecting defendant's ineffective counsel claim and 'failed to apply *Strickland*,' despite referencing the performance and prejudice prongs of *Strickland* its opinion. Id. at 1390. 'By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law' and the Supreme Court analyzed the *Strickland* claim *de novo*. Id. at 1390. The Court was not filling a gap in *Lafler*.

Instead, it was employing different analysis that was very much a part of the case, and supplied an alternate ground for concluding, on *de novo* review, that there was no ineffectiveness of counsel."); Aleman v. Sternes, 320 F.3d 687, 690 (7th Cir. 2003) (if the state court erred and applied the wrong standard, rendering its decision as "contrary to" Supreme Court law, AEDPA's standard of review at §2254(d) no longer applies; but, petitioner still must establish under a de novo review an entitlement to the relief he seeks under § 2254(a): that he is "in custody in violation of the Constitution or laws or treaties of the United States."), *overruled on other grounds as recognized in* Eddleman v. McKee, 471 F.3d 576, 583 (6th Cir. 2006); Gibbs v. VanNatta, 329 F.3d 582, 584 (7th Cir. 2003) (the petitioner "is not entitled to relief in the federal courts unless he can show that he was in fact denied effective assistance of counsel, not merely that the state courts bobbled the issue."). Petitioner must establish for this Court that his Sixth Amendment right to counsel was violated.

Hence, confronted with this situation, our task is clear. We must undertake *a de novo* review of this ineffectiveness claim, and determine, in the first instance, whether Petitioner has established the ineffective assistance of Attorney Davis. For the purpose of considering this claim, we assume all of the following to be true: 1) Petitioner asked Attorney Davis prior to the sentencing hearing's commencement to withdraw the plea; 2) Attorney Davis told Petitioner that it was too late to move to withdraw his guilty plea, and 3) Attorney Davis was incorrect as a matter of state law that it was too late to withdraw the guilty plea. Essentially, we assume that Petitioner has established the deficient performance prong of Strickland as to this claim of ineffectiveness.

Next, we consider the prejudice prong of Strickland. In the context of a claim that Attorney Davis was ineffective for failing to make a motion to withdraw the plea before sentencing, the burden of proving prejudice is on Petitioner to show that if Attorney Davis did file such a motion,

there is a reasonable probability that the motion would have been granted. Boodie v. United States, No. 15-CV-02864-FB, 2017 WL 507281, at *1 (E.D.N.Y. Feb. 7, 2017) (in a Section 2255 proceeding the Court held: "Because the Petition bases Boodie's ineffectiveness claim on his counsel's alleged failure to move to withdraw his plea, Boodie must show a reasonable probability that the motion would have been granted. *See Gonzalez v. United States*, 722 F.3d 118, 130–33 (2d Cir. 2013). This requires the petitioner to 'show a fair and just reason for requesting the withdrawal.' Fed. R. Crim. P. 11(d)(2)(B)"); Blanton v. United States, No. 3:10-CR-0237-L (01), 2013 WL 6003453, at *6 (N.D. Tex. Sept. 9, 2013) ("With regard to Movant's contention that his attorney was ineffective for failing to file a motion to withdraw his guilty plea, he has not demonstrated that such a motion would have been granted."), *supplemented by*, No. 3:10-CR-0237-L (01), 2013 WL 6009949 (N.D. Tex. Sept. 30, 2013), *report and recommendation adopted*, No. 3:10-CR-0237-L, 2013 WL 6003482 (N.D. Tex. Nov. 13, 2013), *and report and recommendation adopted*, No. 3:10-CR-0237-L, 2013 WL 6003482 (N.D. Tex. Nov. 13, 2013).

Based on a thorough review of the record before this Court, Petitioner fails to establish the reasonable likelihood that if Attorney Davis had made the motion to withdraw, then the Court of Common Pleas of Fayette County would have granted such motion. We assume that Petitioner would have based his motion to withdraw his guilty plea on the same contention that he argued as to the alleged ineffectiveness of Attorney Kaiser, namely, that he was actually innocent of two of the three charges of aggravated assault. While, at the time of Petitioner's sentencing hearing in July 2009, there may have been some confusion regarding the state of the law for withdrawing a guilty plea before sentencing based upon an assertion of actual innocence, in 2015, the Pennsylvania Supreme Court clarified that a bald assertion of innocence would not be sufficient to merit the granting of a motion to withdraw a guilty plea and that trial courts had discretion to determine the

credibility of such assertions of innocence. Commonwealth v. Carrasquillo 115 A.3d 1284 (Pa. 2015). However, even if a bald assertion of actual innocence would have been sufficient to merit the withdrawal of a guilty plea and the trial court was not able to judge the credibility of a criminal defendant's assertion of actual innocence at the time of the sentencing hearing, i.e., July 31, 2009, here, it would not have been necessary to make a judgment about Petitioner's credibility in order to reject his actual innocence claim with respect to two of the tree counts of aggravated assault. This is because, as the Superior Court explained above in its June 18, 2014, Opinion, ECF No. 1-1 at 9 – 13, which rejected the ineffectiveness claims against Attorney Kaiser, rejection of Petitioner's claims of actual innocence is not based on believing or not believing Petitioner's statements but rather is based upon rejecting Petitioner's mistaken view of the law concerning aggravated assault.

The Pennsylvania Superior Court's rejection of Petitioner's claim that he was actually innocent of two of the three aggravated assault charges was not based on a credibility determination. The Superior Court did not reject as incredible Petitioner's assertions that he did not strike two of the three police cars and that he did not cause any injury to two of the three police officers but rather, the Superior Court accepted his assertions as true. However, the Superior Court simply rejected Petitioner's argument as to the legal significance of his asserted facts. The Superior Court found that Petitioner's failure to strike two of the three police cars and the absence of any injury to two of the three police officers did not mean, as Petitioner had argued, that he could not be guilty of two of three aggravated assault convictions. As the Superior Court explained, Petitioner simply had a mistaken view of the law; the acts that he undoubtedly did, fleeing from the officers and attempting to flee even after the officers boxed him in, when Petitioner spun his wheels in an attempt to escape, which the officers asserted put them in fear of their lives, constituted acts that qualify as "aggravated assault" irrespective of actual injury to the officers or to their vehicles. Accordingly, because

Petitioner fails to show that there is a reasonable probability that if Attorney Davis had made a motion to withdraw the guilty plea, based on such legally mistaken claims of actual innocence, it would have been granted, Petitioner cannot show prejudice under Strickland by Attorney Davis's failure to have filed such a motion. Therefore, this claim of Attorney Davis's ineffectiveness for failing to file such a motion to withdraw the guilty plea cannot provide a basis for relief in these federal habeas proceedings.

Accordingly, based on the foregoing, Ground Two fails to afford Petitioner any federal habeas relief because he fails to show that he was prejudiced by any alleged deficient performance by his counsel.

C. Certificate of Appealability.

Because jurists of reason would not find the foregoing denial of the habeas Petition debatable, a Certificate of Appealability is denied.

V. CONCLUSION

For the reasons set forth herein, the Petition is denied. A Certificate of Appealability is also denied.

BY THE COURT:

Date: April 3, 2017

s/Maureen P. Kelly
MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

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