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

TRAVIS JOHNSON,	)	
Petitioner,	)	Civil Action No. 15-161 Erie
	)	
v.	)	District Judge Barbara Rothstein
	)	Magistrate Judge Susan Paradise Baxter
WARDEN SCI FOREST, et al.,	)	
Respondents.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the petition for a writ of habeas corpus filed by state prisoner Travis Johnson (the "Petitioner") pursuant to 28 U.S.C. § 2254 be denied and that a certificate of appealability be denied on all claims.

II. REPORT

A. Relevant Background[1]

The Petitioner was charged in the Court of Common Pleas of Erie County at Criminal Docket No. 3571 of 2012 with the following crimes: Count One–criminal conspiracy to manufacture methamphetamine with Byron Smith ("Smith") and Lisa Marie Kittle; Count Two–possession of red phosphorous, etc., with the intent to manufacture methamphetamine; Count Three–retail theft; Counts Four and Five–operating a methamphetamine lab; Count Six–possession of a controlled substance; and, Count Seven–possession with intent to deliver. (SCR No. 2). Lawrence A. D'Ambrosio, Esquire ("D'Ambrosio"), was his attorney.

[1] Respondents filed hard copies of the transcripts and relevant state court records. The records are indexed and numbered 1 through 40 and are cited herein as "SCR No. ___ ." In addition, the Respondents submitted documents relevant to the Petitioner's appeal before the Superior Court of Pennsylvania at No. 708 WDA 2014.

On the day of his trial, the Petitioner entered a no-contest pleas to Counts 1, 2, 4, 5, 6, and 7. The Commonwealth withdrew Count 3. (Plea Hr'g Tr., 5/13/13, at 1-11). After he entered his pleas, the following exchange occurred:

> The Court: Do you understand, also, that in pleading no-contest here today, you cannot come back at a later time and say, I made a mistake, I didn't want to plead, or make any other excuse for pleading guilty? If you wanted a jury trial, today was the time and the date for that jury trial, and it was your one and only time and date for that jury trial; do you understand that?
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> [The Petitioner]: Yes, Your Honor. Can I say something now?... Um, I was kind of–I just want to be honest, I was kind of forced into pleading no-contests–
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> The Court: Well, I don't want anybody to be forced into anything. You either plead no-contest because it's your own decision, or you don't— ….Like I said, you don't have to plead. We have a jury ready. The Commonwealth is ready to proceed to trial. They have their witnesses, and this is the time that has been scheduled for the trial.
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> [The Petitioner]: I'm pleading no-contest, Your Honor, just to cooperate with everybody, and they said that this is probably the best thing to do. But I just want you to know that I'm not guilty of all them things that they're telling me, but I will plead no-contest.
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> The Court: Well, look, nobody can force you to plead no-contest, number 1. And, number 2, the decision has to be yours and yours alone. So if you want to plead no-contest, that's up to you. If you want to go to trial, that's up to you. But today's the day and now is the time for that decision. So what do you want to do?
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> [The Petitioner]: No-contest, Your Honor.
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> The Court: All right. Now, do you understand that you can't come back at a later time and say, somebody forced me to plead, or somebody made me plead, or I didn't want to plead, this is the time. If you want to plead no-contest, that's now. But either way, it's your decision and the final decision is yours and yours alone. Do you want to plead no-contest at this time, or do you want to go to trial?
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> [The Petitioner]: No-contest, Your Honor.
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> The Court: All right. Then based on the Court's observations, the plea colloquy of record, [the Petitioner's] Statement of Understandings of Rights and the Criminal Information, both of which has been signed by [the Petitioner] and his attorney, the Court finds the pleas to be voluntarily and knowingly entered and accepts the pleas at this time.

(Id. at 14-15).

The Petitioner remained on bond until his sentencing hearing. The court gave the Petitioner written notice of his sentencing date and instructed him that:

> [he] is to appear for sentencing on June the 25th at 9 o'clock. This is the one and only notice you will get for your sentence date. You're going to sign that along with your attorney, and you're going to receive a copy to take with you, make sure you keep that. I will tell you also, sir, **that you will be sentenced on that date whether you show up or not. If you don't show up, you will not only be sentenced, but a bench warrant will be issued for your arrest.**

(Id. at 16) (emphasis added). The Petitioner replied: "Yes, sir." (Id.)

The Petitioner's sentencing hearing was conducted as scheduled on June 25, 2013, at 9:00 a.m. He did not appear. (Sent. Hr'g Tr., 6/15/13, at 2-3). The court decided to sentence *in absentia*. It explained:

> [H]e's got a history of not showing. There's warrants outstanding for his failure to appear in Michigan for possession of methamphetamine and possession with intent to deliver marijuana that were issued in…May, 2013. There's a warrant issued for him for probation violations out of California. There is a warrant outstanding for failure to pay fines and costs out of Michigan. There is a warrant pending here in Erie County for a summary offense and he's also failed to appear at least six times in the past on various charges that he had in Colorado, California and Michigan after he'd been sentenced and failed to appear to serve his probation or parole. So it's no surprise that he's not appeared today.

(Id. at 3). It imposed a total aggregate term of 126 to 252 months' imprisonment and issued a bench warrant for his arrest.

The Petitioner was apprehended in September 2013. On November 15, 2013, he filed a *pro se* motion for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq*. (SCR No. 15). The Petitioner claimed that his trial attorney, D'Ambrosio, was ineffective because he was not prepared to go to trial and "forced" him "to plea[d] no contest or go to trial with no witnesses on my behalf." (SCR No. 14 at 3). He requested an evidentiary hearing and asserted that he would call John Baker ("Baker") and Teresa Johnson ("Johnson") to testify. (Id. at 5). He contended that Baker was "there on my plea date" and was "going to testify on my behalf that my co-defendant was a

well known meth cook, and dealer." (Id. at 6). He asserted that Johnson "was there on my plea date when I was denied a continuance due to ineffective counsel." (Id.)

The Petitioner's claims of ineffective assistance are governed by the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). He has the burden of proving that Attorney D'Ambrosio's "representation fell below an objective standard of reasonableness." Strickland, 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 emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" Burt v. Titlow, — U.S. —, 134 S.Ct. 10, 17 (2013) (quoting Strickland, 466 U.S. at 690). See also Harrington v. Richter, 562 U.S. 86, 104 (2011) ("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 the Petitioner demonstrate that he was prejudiced by Attorney D'Ambrosio's alleged 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 his criminal proceeding "would have been different." Strickland, 466 U.S. at 694.

The court appointed Tina M. Fryling, Esquire ("Fryling"), to represent the Petitioner and she filed a supplemental PCRA motion in which she explained that "[t]he crux of [the Petitioner's] claims is that he entered a nolo contender plea in this case only because his attorney was unprepared for trial and did not explain all of the ramifications of entering a plea in this case." (SCR No. 22, ¶ 4).

In its response to the PCRA petition, the Commonwealth asserted that the Petitioner could not establish that his trial counsel was ineffective. It also pointed out that, by the Petitioner's own admission,

Baker and Johnson were in the courtroom for his May 13, 2013, proceeding, yet he still decided to enter his pleas and not proceed to trial. (SCR No. 24).

On February 26, 2014, the court issued its notice of intent to dismiss without a hearing. (SCR No. 38). It found the Petitioner's claims to be "meritless and contradicted by the record." (Id. at 1). It held that the transcript of his plea proceeding established the his pleas were "voluntary and knowing." (Id.). As for the Petitioner's allegation regarding Baker (the only witness he identified that allegedly had testimony to offer at a trial), the court explained that, "as the Commonwealth points out," Baker "was in fact in the courtroom at the time of the scheduled trial, and [the Petitioner's] subsequent plea. This issue is without merit in fact or law." (Id.)

After the court issued its notice of intent to dismiss without a hearing, the Petitioner, through Fryling, submitted an unsworn statement from Scott Hoag ("Hoag") in which Hoag wrote that he was in prison with Smith on December 2012, and that Smith had told him that "the police had found his meth making stuff at his girlfriend's house, but he didn't have to worry, because him and his girlfriend had given written statements to the police saying that it all belong to someone else, so he would not be charged for any of it." (SCR No. 26).

On April 8, 2014, the court issued its final order dismissing the Petitioner's PCRA motion. (SCR No. 27). It held that Hoag's statement "cannot be grounds for [the Petitioner's] allegation that counsel did not subpoena witnesses for trial since there is no contention that counsel was ever informed of Mr. Hoag or his alleged testimony." (Id. at 1). The court also explained that Hoag's statement "is not sworn to or notarized. Nor has it been set forth that the witness is available and willing to testify." (Id. at 1-2). The Court further pointed out that "if the statement by Smith was made in December of 2012, [the Petitioner] has not set forth when he learned of this information and why it took over a year to do so. Also, there is

nothing contained in the statement to tie this particular information to [the Petitioner] or his case." (Id. at 1). Finally, the court explained:

> In fact, Byron Smith was a named co-conspirator with [the Petitioner] and charged with similar offenses. He had already pled guilty at docket 3563-2012 to Possession of Red. Phos. etc. with Intent to Manufacture a Controlled Substance, the most serious charge[,] on March 19, 2013 and on May 29, 2013, sentenced to 8 to 16 months' incarceration followed by 24 months' probation. So there was no question that Mr. Smith, while he may have implicated [the Petitioner] had there been a trial, would not (and could not in light of his plea) have set forth as Mr. Hoag claimed, "that it all belonged to someone else, so he could not be charged with any of it."

(Id. at 1 n.1).

The Petitioner, through Fryling, filed an appeal with the Superior Court. In that appeal, he contended "that trial counsel was ineffective for failing to call witnesses, failing to explain the ramifications of entering a plea, and failing to file a motion to withdraw the no-contest plea." Commonwealth v. Johnson, No. 708 WDA 2014, 2014 WL 10753736, at 1 (Pa.Super.Ct. Dec. 2, 2014).

On December 2, 2014, the Superior Court issued its opinion and order in which it affirmed the PCRA court's decision. It held:

> Our review of the record discloses no basis for disturbing the PCRA court's determination. Although [the Petitioner] pleads that counsel was ineffective for not securing witnesses and for not informing [him] that he could withdraw his plea, [he] has failed to prove the underlying claims.
>
> In his PCRA petition, [the Petitioner] identified two witnesses who, he claims, were present at his plea hearing and willing to testify. Petition, 11/15/13, at 5-6. In his response to the PCRA court's notice of intent to dismiss, [the Petitioner] identified Scott Hoag and provided his statement of February 24, 2014, as exculpatory evidence. Response to Notice of Intent, 3/31/14, at 1 and Attachment. Yet, nothing in the record indicates that counsel knew, or should have known, of the existence of these witnesses. Moreover, at the plea hearing, the trial court gave [the Petitioner] multiple opportunities to enter a no-contest plea or proceed to trial. Each time, with two of his proffered witnesses in court, [the Petitioner] chose to plead no-contest. N.T., 5/13/13, at 13–14. As for Mr. Hoag, [the Petitioner] did not indicate in his response if this witness was available and willing to testify for the defense. Nor did [the Petitioner] explain why he waited more than a year to disclose the substance of Mr. Hoag's prison conversation in December 2012.

> Finally, we consider [the Petitioner's] argument that "counsel should have known that he wished to withdraw his plea based upon the fact that his plea was entered only after a discussion on the record which included his implication that he was reluctant to enter the plea" to be specious. Appellant's Brief at 3. [The Petitioner] acknowledged orally before the trial court and in writing that he understood his right to a jury trial, the Commonwealth's factual allegations, and the maximum sentences. N.T., 5/13/13, at 2–14, Statement of Understanding of Rights. [The Petitioner] also acknowledged that entry of a no-contest plea precluded any future challenge that he "made a mistake" or "didn't want to plead, or ... any other excuse for pleading" no-contest. Id. at 13-14. Nothing in the record indicates that [the Petitioner] was reluctant to enter a plea. Indeed, "to cooperate with everybody" and because it was "the best thing to do," the [Petitioner] chose to enter the no-contest plea after declining several opportunities from the trial court not to plead, but to summon the waiting jury and proceed with the scheduled trial. Id.
>
> In sum, [the Petitioner's] underlying claims that counsel failed to secure witnesses and failed to inform [him] that he could withdraw his plea lack merit. Based upon this record, we agree with the PCRA court that [the Petitioner's] plea was knowing, intelligent, and voluntary and that counsel was not ineffective. The record supports the PCRA court's determination, and its determination is free of legal error. Thus, we affirm the order denying collateral relief.

Johnson, 2014 WL 10753736 at 3 (footnote omitted).

After the Pennsylvania Supreme Court denied him an allowance of appeal, Commonwealth v. Johnson, 113 A.3d 279 (Pa. 2015), the Petitioner filed with this Court his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 3). He alleges that he is raising the same claims that he raised before the Superior Court in his PCRA proceeding.[2] The Respondents filed their answer (ECF No. 14) and the relevant state court records, and the Petitioner filed a reply. (See ECF No. 28).

B. Discussion

Section 2254 provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant

[2] Any claim that the Petitioner did not raise in his PCRA appeal to the Superior Court would be subject to denial on the basis that he failed to exhaust it and, therefore, defaulted it for the purposes of federal habeas review. See, e.g., Lines v. Larkins, 208 F.3d 153, 159-60 (3d Cir. 2000); Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000).

to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." The Petitioner carries the burden of proving that he is entitled to the writ. See, e.g., Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which, among other things, amended § 2254 to include a new standard of review of state court decisions. AEDPA imposes "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Pinholster, 563 U.S. at 181 (internal quotation marks and citations omitted). It is codified at § 2254(d) and provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).[3]

Because the Superior Court adjudicated the Petitioner's claims on the merits, this Court's analysis of them is governed by AEDPA's standard of review. As set forth above, the "clearly established Federal law," 28 U.S.C. §2254(d)(1), in which to analyze them is governed by Strickland.

Pennsylvania courts apply the Strickland standard when evaluating ineffective assistance of counsel claims. See, e.g., Commonwealth v. Kimball, 724 A.2d 326, 330-33 (Pa. 1999). Therefore, the Superior Court's adjudication was not "contrary to" to Strickland. Williams v. Taylor, 529 U.S. 362, 406

[3] In addition, state court findings of fact have always been afforded considerable deference in federal habeas corpus cases filed by state inmates. AEDPA continues that substantial deference and requires that "a determination of a factual issue made by a State court **shall be presumed to be correct**. The [petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1) (emphasis added).

(2000) ("a run-of-the mill state-court decision applying the correct legal rule from [Supreme Court] cases [does] not fit comfortably within § 2254(d)(1)'s 'contrary to' clause.") Nor was it "unreasonable application of" Strickland. The Supreme Court instructed that § 2254(d)(1)'s "unreasonable application" clause:

> 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…. **As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.**

Harrington, 562 U.S. at 102-03 (emphasis added). The Supreme Court also explained:

> 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," [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. at 105 (parallel citations omitted) (emphasis added).

There is no basis for this Court to conclude that the Superior Court's adjudication was an "unreasonable application of" Strickland. The Petitioner has not established that the Superior Court's decision to deny any of his claims "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

Finally, the Petitioner has failed to demonstrate that he can overcome AEDPA's standard of review at § 2254(d)(2). Upon review of the transcript of his plea proceeding and the other documents in

the record, this Court cannot conclude the Superior Court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).[4]

C. Certificate of Appealability

28 U.S.C. § 2253 governs the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. It provides that "[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). Applying that standard here, jurists of reason would not find it debatable whether the Petitioner's claims should be denied. Accordingly, a certificate of appealability should be denied on all claims.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that the petition for a writ of habeas corpus be denied and that a certificate of appealability be denied.

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[4] To the extent that the Petitioner is raising a stand-alone claim that he is innocent, that claim should be denied along with his ineffective assistance of counsel claims. "A freestanding claim of actual innocence in a non-capital case based on newly discovered evidence is not a ground for habeas corpus relief." BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 1:60, WestlawNext (database updated May 2016) (citing Herrera v. Collins, 506 U.S. 390 (1993) and additional citations omitted). See also Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004) ("It has long been recognized that '[c]laims of actual innocence based on newly discovered evidence' are never grounds for 'federal habeas relief absent an independent constitutional violation.'" (quoting Herrera, 506 U.S. at 400)); Albrecht v. Horn, 485 F.3d 103, 121-22 (3d Cir. 2007). In Herrera, the Supreme Court left open the possibility that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." 506 U.S. at 417. If indeed an actual innocence claim could be brought in a non-capital federal habeas case, the Petitioner has not offered the type of new evidence of innocence that would entitle him to habeas relief.

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 may seek review of this Report and Recommendation by the district court by filing objections within 14 days after service. Failure to do so will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n.7 (3d Cir. 2011).

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

March 23, 2017