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

MALIK MILES	:	CIVIL ACTION
v.	:	
MARK GARMAN, et al.	:	NO. 19-5243

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

June 17, 2020

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

I. BACKGROUND

On December 31, 2008, a heated dispute over territory for drug sales arose between petitioner and Eldridge Wesley. Petitioner and his co-defendant, Dontey Edwards, began shooting at Wesley. The bullets struck Wesley several times in the legs and abdomen. A witness flagged down two nearby officers, who rushed Wesley to the hospital. Wesley underwent approximately eighteen surgeries following the shooting, and ultimately survived. Police later apprehended petitioner and Edwards. See Commonwealth v. Miles, 2017 WL 65467, at *1 (Pa. Super. Ct. Jan. 6, 2017).

On February 23, 2010, petitioner was found guilty after a jury trial of attempted murder, possession of firearms by a person prohibited, aggravated assault, criminal conspiracy, carrying firearms without a license, possession of an instrument of crime and recklessly endangering another person. See CP-51-CR-6808-2009. On June 3, 2010, petitioner was sentenced to twenty to forty years imprisonment only for the attempted murder conviction.

Commonwealth v. Miles, 2019 WL 3764586, * at 1 (Pa. Super. Ct. Aug. 9, 2019) (citing 18 Pa.C.S. § 1102(c) (increasing maximum sentence for attempted murder from 20 years to 40 years in the event of a victim's serious bodily injury)). Petitioner received no further penalty on the remaining counts. Id. On July 23, 2012, the Superior Court affirmed petitioner's sentence. Commonwealth v. Miles, 55 A.3d 143 (Pa. Super. Ct. 2012) (Table) (unpublished memorandum.) Petitioner did not seek allowance of appeal to the Pennsylvania Supreme Court.

On May 13, 2013, petitioner filed a pro se petition for state collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. After waiving counsel, following a hearing pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998), petitioner proceeded pro se on a claim that his sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000), because the jury did not make the requisite finding of serious bodily injury. The PCRA court dismissed the petition on March 11, 2016. On January 6, 2017, the Superior Court reversed the dismissal of the petition, vacated petitioner's sentence, and remanded for sentencing on the basis that the sentencing court imposed a sentencing enhancement based on a factual finding not made by the jury in violation of Apprendi. Commonwealth v. Miles, 160 A.3d 245 (Pa. Super. Ct. 2017) (Table).

On December 1, 2017, petitioner was resentenced to ten to twenty years imprisonment for attempted murder, a consecutive term of three to six years for a violation of the Uniform Firearms Act (hereinafter referred to as "VUFA") and no further penalty on the remaining charge. On December 6, 2017, petitioner filed a post-sentence motion which was denied on March 16, 2018.

On appeal from the new judgment of sentence, petitioner argued that the sentence violated double jeopardy. On August 9, 2019, the Superior Court affirmed the judgment of sentence, rejecting petitioner's claim on the merits. Commonwealth v. Miles, 221 A.3d 251 (Pa. Super. Ct. 2019) (Table).

The instant pro se habeas petition was filed on November 5, 2019 ("Pet."; Doc. 1).[1] The petition raises one ground for relief: "Petitioner's Double Jeopardy rights were violated due to being punished twice for a sentence already served." (Pet. ¶ 12.) Petitioner also filed a memorandum of law in support of his petition. ("Petr.'s Mem. of Law"; Doc. 7). Respondents filed a response to the petition on April 15, 2019 ("Resp."; Doc. 10). The response argues that this claim was reasonably rejected by the state courts and that petitioner's new sentence for VUFA was clearly permissible under Supreme Court law. Id. Thus, respondents argue that the petition should be dismissed with prejudice and without a hearing.

II. DISCUSSION

A. Habeas Corpus Standards

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

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

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

> (1) 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
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court emphasized that "AEDPA's standard is intentionally difficult to meet." Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (quotation omitted). In other words, habeas review exists as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979)).

With respect to § 2254(d)(1), the Third Circuit has determined that the "'contrary to' and 'unreasonable application of' clauses should be accorded independent meaning." Werts v. Vaughn, 228 F.3d 178, 197 (3d. Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 405 (2000)). A federal habeas petitioner is entitled to relief under the "contrary to" clause only if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413. Under this clause, the relevant question is "whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is 'contrary to' the governing rule." Matteo v. Sup't SCI Albion, 171 F.3d 877, 885 (3d Cir. 1999) (quoting O'Brien v. Dubois, 145 F.3d 16, 24 (1st Cir. 1998)), cert. denied, 528 U.S. 824 (1999). To establish that the state court decision is "contrary to" the federal precedent, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more

plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Id. at 888 (citations omitted).

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

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

presume that the state court's factual findings are correct, with the burden on the petitioner to rebut those findings by clear and convincing evidence.").

A federal habeas court may not consider a petitioner's claims of state law violations, but must limit its review to issues of federal law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Pulley v. Harris, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); Engle v. Isaac, 456 U.S. 107, 120 n.19 (1982) ("If a state prisoner alleges no deprivation of a federal right, § 2254 is simply inapplicable."); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause.").

B. Petitioner's Claim

Claim 1 Double Jeopardy

Petitioner's sole claim for relief is that his "Double Jeopardy rights were violated due to being punished twice for a sentence already served." (Pet. ¶ 12.) In support of his claim, he alleges that: "Petitioner received no-further penalty on firearm charge completing sentence and 7 years after he received additional punishment for the same offense." Id. In petitioner's memorandum of law, he states that "the Pennsylvania Superior Court affirmed the judgment of sentence on July 23, 2012 …. making the judgment of sentence final on August 22, 2012." (Petr.'s Mem. of Law at 3.) Thus, petitioner argues that his "sentence of possession of a firearm [no further penalties] was satisfied once the judgment of sentence was final." Id.

Petitioner raised this argument on appeal following the Superior Court's remand for sentencing. As discussed supra, at petitioner's resentencing, he received a prison term of ten

to twenty years for attempted murder and a consecutive term of three to six years for possession of firearms by a person prohibited. Petitioner argued on appeal of the resentencing that the sentence on the firearms' possession counts violated the prohibition against double jeopardy. Miles, 2019 WL 3764586, *1 (Pa. Super. Ct. Aug. 9, 2019).

The central question before the Superior Court was "whether the trial court could resentence [petitioner] on the firearms' possession count even though he never disputed that specific aspect of the original sentencing order." Id. at 2. In affirming the sentence, the Superior Court reasoned:

> [W]e have held that if a trial court errs in its sentence on one count in a multi-count case, then all sentences for all counts will be vacated so that the court can restructure its entire sentencing scheme. Commonwealth v. Vanderlin, 580 A.2d 820, 831 (Pa. Super. Ct. 1990). This has been held true even where [petitioner] specifically limits his appeal to one particular illegal sentence based upon one bill of information and does not appeal sentences based upon other bills of information, where those sentences are part of a common sentencing scheme. Commonwealth v. Sutton, 583 A.2d 500, 502 (Pa. Super. Ct. 1991). Commonwealth v. Bartrug, 732 A.2d 1287, 1289 (Pa. Super. Ct. 1999) (some citations omitted).
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> Our Supreme Court gave the rationale for the above rule in Commonwealth v. Goldhammer, 517 A.2d 1280 (Pa. 1986), explaining that "where a defendant appeals a judgment of sentence, he accepts the risk that the Commonwealth may seek a remand for resentencing thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court." This is because by challenging one of several sentences, a defendant "in effect, challenges the entire sentencing plan." Id. (quoting United States v. Busic, 639 F.2d 940, 947 n.10 (3d Cir. 1981)). Accordingly, by seeking PCRA relief based on an unlawful enhancement for the attempted murder count, [petitioner] contested the entire judgment of sentence, including the terms relating to his remaining convictions.
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> [Petitioner] counters that his sentence of "no further penalty" on the firearms' possession count was satisfied 30 days after it was imposed, precluding the trial court from taking any further action as to that part of the sentence. (internal citation omitted). He similarly contends that this Court's order vacating the judgment of sentence in the PCRA appeal could not affect a term of "no further

> penalty" because other than the attempted murder count, "there was no other sentence open to vacate." Id.
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> However, the law is clear that a defendant may be resentenced on counts for which he originally received "no further penalty." See Bartrug, 732 A.2d at 1289. By vacating a judgment of sentence order, all interrelated sentencing terms are nullified. Id. at 1289-90. As a result of the nullification, none of the terms in a vacated order remain "open" or "closed" as [petitioner] suggests, but rather have no effect at all, as if they never existed in the first place. See Commonwealth v. Wilson, 934 A.2d 1191, 1196 (Pa. 2007) (stressing that to "vacate" an order means to invalidate it to the extent it is completely null and void); see also Commonwealth v. Kunish, 602 A.2d 849, 852-53 (Pa. 1992) (defendant has no expectation of finality in a sentence he appeals). Thus, once [petitioner's] original judgment of sentence was vacated in his PCRA appeal, the order became a total nullity and did not bar the trial court from resentencing him on the firearms' possession count.

Id.

The Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. "[T]he Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment." North Carolina v. Pearce, 395 U.S. 716, 717 (1960). The double jeopardy clause "protects against multiple punishments for the same offense." Id.

With the prohibitions of the double jeopardy clause in mind, the Supreme Court has concluded that if a defendant's conviction for one crime is vacated after a sentence has been imposed, there is no constitutional bar to resentencing for other convictions that have withstood challenge. See Pennsylvania v. Goldhammer, 474 U.S. 28, 29 (1985) (finding that where sentence of imprisonment was vacated on appeal because the statute of limitations had run before trial on that charge, the Double Jeopardy Clause did not bar remand to trial court for resentencing on counts that were not time-barred and for which sentence had been suspended at original sentencing hearing.) The Court made clear that sentencing in a noncapital case "does

not have the qualities of constitutional finality that attend an acquittal." Id. (quoting U.S. v. DiFrancesco, 449 U.S. 117 (1980)). The Third Circuit has also held that resentencing on counts that were not vacated is not a violation of double jeopardy. United States v. Murray, 144 F.3d 270, 275 (3d. Cir. 1998) (defendant's "double jeopardy claim is foreclosed by the fact that there can be no legitimate expectation of finality in a sentence and conviction which the defendant appeals.").

Here, upon remand, petitioner received ten to twenty years of incarceration for attempted murder and a consecutive term of three to six years imprisonment for VUFA. Petitioner presently contends that his sentence for VUFA violates double jeopardy. As explained by the Superior Court supra, however, the state court was permitted to resentence petitioner on the VUFA charge, even though he did not place that offense in dispute. The state court followed the clearly established federal law set forth by the Supreme Court in Goldenhammer and petitioner's argument contravenes federal law. Thus, the court finds that the state court's application of the above federal law was not contrary to or an unreasonable applicable of clearly established federal law. See 28 U.S.C. § 2254(d)(1). For all the above reasons, the court recommends that petitioner's habeas petition be denied as meritless.

III. CONCLUSION

Accordingly, the court makes the following:

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

AND NOW, this 17th day of June, 2020, the court respectfully recommends that the petition for a writ of habeas corpus be **DENIED**, and that no certificate of appealability (COA) be granted.[2]

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

BY THE COURT:

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

[2] The COA should be denied because petitioner has not shown that reasonable jurists could debate whether his petition should be resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

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ORDER

AND NOW, this day of , 2020, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of Thomas J. Rueter, United States Magistrate Judge, it is hereby

ORDERED

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for writ of habeas corpus is **DENIED**; and
3. A certificate of appealability is not granted.

BY THE COURT:

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JEFFREY L. SCHMEHL, J.