No. 00-0000

IN THE SUPREME COURT OF
THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

RODERICK JOHNSON,
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
PENNSYLVANIA SUPREME COURT

APPENDICES TO PETITION FOR WRIT OF *CERTIORARI*

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

JAMES BARKER
Chief Deputy Attorney General
Appeals & Legal Services Section

WILLIAM R. STOYCOS *
Senior Deputy Attorney General
Counsel of Record

Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1401

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX "A"

[J-135-2016]

IN THE SUPREME COURT OF
PENNSYLVANIA EASTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE,
DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,
Appellant
v.
RODERICK ANDRE JOHNSON,
Appellee
No. 713 CAP

Appeal From The Order Of The Court Of Common Pleas, Berks County, Criminal Division Dated July 6, 2015 At No. CP-06-CR-0000118-1997, Directing That A New Trial Be Held

SUBMITTED: December 2, 2016

OPINION

JUSTICE WECHT DECIDED: December 19, 2017

In 1997, Roderick Johnson was convicted on two counts of first-degree murder. He was

sentenced to death. Several years later, Johnson discovered that the Commonwealth had concealed certain documents that would have cast doubt upon the credibility of a key prosecution witness. The court of common pleas held that the Commonwealth's failure to disclose this evidence violated Johnson's right to due process of law, in accordance with *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose evidence favorable to the accused that is material either to guilt or to punishment). The court awarded Johnson a new trial. We affirm.

On December 7, 1996, in the city of Reading, cousins Damon and Gregory Banks (collectively, "the Banks cousins") robbed Madelyn Perez at gunpoint in her boyfriend's apartment. The Banks cousins stated that they were looking for drugs and money. They found neither. Instead, they took a camcorder and a Sony PlayStation before fleeing.

Perez told her boyfriend, Shawnfatee Bridges, about the robbery. She told him that the robbers were wearing green masks and green hoodies. This fact was significant, because Bridges recalled seeing the Banks cousins wearing green hoodies earlier that day. When Bridges met with co-defendants Johnson and Richard Morales that same evening, he was angry about the robbery. At one point, Bridges grabbed a shotgun and stated that he wanted

to go to the Banks cousins' house and kill them. Bridges also showed Johnson and Morales a 9-mm Glock pistol that he was carrying.

The following day, Johnson, Bridges, and Morales went to a nearby K-Mart and purchased shotgun shells. The trio then traveled in a minivan to the Banks cousins' home. When they arrived, Bridges pretended that he was interested in recruiting the Banks cousins to oversee his drug-dealing business while he was out of town. The Banks cousins, apparently believing this pretext, got into the minivan.

Later that evening, police officers found the dead bodies of the Banks cousins on a gravel driveway leading to a silt basin. Around this time, police also received a report from a local restaurant (located fewer than five miles from the silt basin) that an unknown man had been shot. Upon arrival, the police identified the wounded man as Johnson. He was transported to a local hospital.

A few days later, while still hospitalized, Johnson gave a statement to the police. He confessed to his participation in the Banks cousins' murders. According to Johnson, his role in the conspiracy was limited to driving the minivan. Johnson told police that, after picking up the Banks cousins, he drove Bridges, Morales, and the cousins to a dirt road near a construction site. He recounted that Bridges and Morales got out of the van and told the Banks

cousins to follow them, claiming that they would show the cousins where Bridges' drugs were stashed. When the Banks cousins grew suspicious and refused to comply, Bridges walked around to the front of the minivan and started shooting. Johnson claimed that, as he was exiting the van, Bridges shot him in the torso. Johnson stated that, as he was attempting to flee, he saw Bridges shoot into the van at the Banks cousins. Johnson said he then walked to the restaurant, where the police found him.

The Commonwealth's scenario of the murders differed substantially from Johnson's. At Johnson's capital murder trial, a forensic pathologist testified that one of the bullets recovered from the body of Damon Banks was a .38 caliber projectile. The Commonwealth presented evidence that a .38 caliber handgun was recovered close to the murder scene, and the Commonwealth's ballistics expert matched that firearm with the bullet recovered during Damon Banks' autopsy. In order to rebut Johnson's claim that he was merely present at the scene of the murders, the Commonwealth sought to prove that Johnson fired the .38 caliber bullet recovered from Damon Banks' body.

To refute Johnson's version of events, the Commonwealth called George Robles as a trial witness. Robles testified that Johnson owned a .38 caliber handgun like the one found near the crime scene. He also testified that he visited Johnson in the hospital just after the murder,

and that Johnson confessed to taking the .38 caliber murder weapon from the murder scene, wiping it off with his shirt, and then throwing it on the side of the road about a quarter mile from the construction site. At trial, Robles provided the crucial link between Johnson and the murder weapon, and supplied the testimony that countered Johnson's defense.

Given the importance of Robles' testimony, defense counsel attempted to undercut his credibility on cross-examination by showing that he was involved in ongoing criminal activities and was an informant for the Reading Police Department. The assistant district attorney objected to this line of questioning, characterizing as "absurd" defense counsel's belief that Robles was a drug dealer or an informant, and emphasizing that Robles had never been convicted of, or even arrested for, any crime. R.R. at 589a. Defense counsel responded that his questioning "does go to [Robles'] credibility." *Id.* at 590a. The trial court sustained the prosecutor's objection in part, but did not prevent the defense from "inquiring as to any legitimate area of [Robles'] possible bias or interest in the outcome" of the trial. *Id.* at 591a.

The problem was that defense counsel was flying blind; he had the court's permission to inquire into Robles' bias, self-interest, or motivation to lie, but he knew of nothing concrete to ask Robles. Defense counsel did the best that he could. He asked Robles if

the Reading Police had ever paid him for information (Robles denied this). He asked whether Robles' nickname was "Gambino" (Robles admitted this). And he asked if Robles was the leader of a gang (Robles denied this). To the extent that Robles' answers did any harm to his credibility, the damage likely was repaired on redirect, when Robles reminded the jury that he had never been arrested for, charged with, or convicted of, any crime. *Id.* at 593a.

Ultimately, Johnson was convicted on two counts of first-degree murder. Following a penalty phase trial, the jury sentenced Johnson to death. After his trial, Johnson obtained a letter that Robles had sent to Reading Police Detective Angel Cabrera while Robles was jailed as a material witness[1] (after he failed to appear in court to testify against Johnson). In the letter, Robles stated that he would "do anything" to get out of jail. On direct appeal, Johnson argued that Robles' letter constituted material impeachment evidence that the Commonwealth was required to disclose pursuant to *Brady*. This Court rejected Johnson's argument, finding that "the Commonwealth discharged its *Brady* disclosure

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[1] *See* Pa.R.Crim.P. 522 (permitting courts to set bail for any material witness in a criminal proceeding when there exists adequate cause for the court to conclude that the witness will fail to appear when required).

responsibilities by providing [Johnson's] counsel with [a] police report that referenced the Robles letter." C*ommonwealth v. Johnson*, 727 A.2d 1089, 1095 (Pa. 1999).[2] This Court affirmed Johnson's death sentence. *Id.* The United States Supreme Court denied *certiorari*. *Johnson v. Pennsylvania*, 528 U.S. 1163 (2000).

In April 2000, Johnson filed a petition for post-conviction relief, followed by a second petition in September 2003.[3] The PCRA court denied the former and dismissed the latter. This Court affirmed both of those decisions. *See Commonwealth v. Johnson*, 815 A.2d 563 (Pa. 2002); *Commonwealth v. Johnson*, 863 A.2d 423 (Pa. 2004).

In 2005, Johnson filed the PCRA petition that led to this appeal. While his petition was pending in the PCRA court, Johnson also was pursuing federal *habeas corpus* relief in connection with an unrelated homicide case. In that unrelated case, much like in the first-degree murder conviction underlying today's appeal, Johnson was found guilty of the killing after the Commonwealth called Robles to testify that Johnson had confessed to committing the killing. During

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[2] Although unnecessary to our holding, we also opined that Robles' letter was not material for *Brady* purposes.

[3] *See* 42 Pa.C.S. § 9541, *et seq* (Post Conviction Relief Act) (hereinafter, "PCRA").

Johnson's federal *habeas* proceedings, the United States District Court for the Eastern District of Pennsylvania ordered the Commonwealth to disclose to Johnson any evidence of a relationship between Robles and the Reading Police Department and/or the Berks County District Attorney's Office, "including any documents relevant to Robles being a paid or unpaid informant or a cooperating witness." *See Johnson v. Folino*, 671 F. Supp. 2d 658, 664, n.4 (E.D. Pa. 2009), *rev'd on other grounds*, 705 F.3d 117 (3d Cir. 2013).

In response to the federal court's discovery order, the Commonwealth produced five police reports, each of which detailed distinct investigations into Robles' criminal conduct. The first of these reports, dated February 27, 1996, described an incident in which Robles approached two individuals, threatened them at gunpoint, and discharged his firearm into the air. When Detective Cabrera confronted Robles about the incident, Robles attempted to avoid arrest by offering to provide information about an unsolved murder. Robles ultimately identified to police the perpetrator of that homicide. Robles was never charged in connection with the assault.

The second police report, dated April 25, 1996, involved a gang-related shootout near Robles' residence. During their investigation, the police learned that, immediately after the shooting, a juvenile who had been staying with

Robles hid guns and drugs in a safe that Robles owned and kept in a nearby apartment. The police also discovered that Robles' neighbors suspected that Robles was selling drugs out of his residence. Detective Cabrera recovered the then-empty safe from a neighbor. Instead of seizing the safe, Detective Cabrera returned it to Robles. When the police questioned the juvenile, Robles falsely claimed that he was the juvenile's guardian so that he could remain present during the interview. Robles ultimately advised the juvenile to confess in a manner that did not implicate Robles. Although Detective Cabrera discovered Robles' fingerprint on a cigar box containing 103 bags of crack cocaine that was recovered from the shooting suspect, and although Detective Cabrera threatened to arrest Robles, the police never charged Robles in connection with this incident.

The third withheld police report, dated August 1, 1997, involved the investigation of a call for shots fired. When police responded, they encountered Robles, who admitted to being armed with a firearm that he lawfully was licensed to carry. A man with Robles matched the description of the shooter, and the ammunition from Robles' gun matched the spent shell casings found on the ground. Robles denied any involvement, the complainant remained anonymous, and Robles was not charged in connection with this incident.

The Commonwealth withheld a fourth police report, this one from September 18, 1997, that documented a police response to a report of shots fired on the block where Robles lived. The responding officer, who spoke with Robles, wrote in the report that he suspected Robles was involved in drug dealing. Robles was not charged in connection with this incident.

The fifth police report, dated November 7, 1997, described an investigation of yet another call for shots fired near Robles' residence. Three witnesses reported that shots were fired from Robles' residence. Upon arrival, the police recovered shell casings from a .40 caliber weapon. Robles told the police that he was not home when the shots were fired, and he denied owning a .40 caliber weapon. Despite Robles' denials, Detective Cabrera recovered a .40 caliber pistol that was registered to Robles. The police did not follow up with Robles or the witnesses. Once again, Robles was not charged.

In August 2010, Johnson amended his pending PCRA petition to allege that the Commonwealth violated *Brady* by withholding the above-described police reports. The PCRA court dismissed Johnson's amended petition as untimely. On appeal, however, this Court reversed and remanded for a merits review of Johnson's *Brady* claim. *See Commonwealth v. Johnson*, 64 A.3d 621 (Pa. 2013) (*per curiam*) (holding that "the information discovered during the federal *habeas* proceedings constitutes 'newly discovered' facts for purposes

of the (b)(1)(ii) exception to the [PCRA's] jurisdictional time bar").

After remand, the PCRA court granted Johnson's petition for relief, and awarded him a new trial. The court characterized Robles as "an important Commonwealth witness," PCRA Ct. Op. at 8, and explained that trial counsel could have used the withheld evidence to expose Robles' potential bias. According to the PCRA court, "[t]he volume of [ ] Robles' interactions with the Reading Police Department is clearly relevant to his bias and desire to assist the police and the Commonwealth to avoid interference with his own activities," especially in light of defense counsel's attempt at trial to introduce evidence of "Robles' interest." *Id.* at 6. The PCRA court also reasoned that, had the Commonwealth disclosed the police reports, defense counsel's cross- examination of Robles might have been very different, since the withheld impeachment evidence had "a direct bearing on [ ] Robles' desire to testify against [Johnson]". *Id.* at 8. Put simply, the PCRA court believed that, if the Commonwealth had disclosed the police reports prior to Johnson's trial, there was a reasonable probability that the jury's verdict would have been different. Consequently, the court found its confidence in the outcome of the trial to be undermined. The Commonwealth now appeals the PCRA court's ruling.[4] We review the PCRA court's grant of

[4] After the Commonwealth filed its Pa.R.A.P. 1925(b)

relief to determine whether its decision is supported by the record and free of legal error. *Commonwealth v. Champney*, 65 A.3d 386, 396 (Pa. 2013). So long as the PCRA court's factual findings are supported by the record, we will not disturb them. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1127 (Pa. 2011).

It is well-settled that the Commonwealth violates a defendant's right to due process when it withholds evidence that is both favorable to the defense and material to the defendant's guilt or punishment. *Brady*, 373 U.S. at 87. "When the reliability of a given witness may well be

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statement, the PCRA court issued an order stating that it had already addressed each of the Commonwealth's issues in its July 6, 2015 opinion and order granting Johnson a new trial. The Commonwealth, however, contends that it raised eight additional issues that the PCRA court did not address in its July 6, 2015 opinion, and asks us to remand this case to the PCRA court with instructions to prepare a supplemental Rule 1925(a) opinion. We decline to do so, because the eight "issues" that the Commonwealth highlights are better understood as specific arguments regarding the PCRA court's *Brady* analysis. *See, e.g.,* Brief for Commonwealth at 29 (arguing that the PCRA court never responded to the Commonwealth's contention that the court's "ruling vastly expands the *Brady* requirement to encompass all police reports and other information available to the prosecution indicating that a prosecution witness has interacted with police and/or the witness' name has surfaced in a criminal investigation…"). The issue in this appeal is whether the PCRA court erred in granting Johnson a new trial. The July 6, 2015 opinion fully explains the court's rationale for having done so.

determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The Commonwealth does not dispute that the withheld evidence is "favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Nor does the Commonwealth deny that it "suppressed" the police reports, "either willfully or inadvertently." *Id.* at 282. Instead, the Commonwealth's primary contention is that the undisclosed police reports are not *Brady* material because they would not have been admissible as substantive evidence at Johnson's trial. *See* Brief for Commonwealth at 33-34.

The substantive admissibility of impeachment evidence, *vel non*, is not dispositive of a *Brady* claim. *See Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013) (clarifying that *Brady*'s materiality standard "is not reducible to a simple determination of admissibility"). The Commonwealth violates *Brady* by failing to disclose exculpatory evidence as well as evidence that may be used to impeach a prosecution witness. *Bagley*, 476 U.S. at 676. Documents like the police reports at issue here—which would not have been admissible as substantive evidence at Johnson's trial—may nevertheless contain information that can be used to impeach a witness. As the

Second and Third Circuits have explained, "inadmissible evidence may be material if it could have been used effectively to impeach or corral witnesses during cross-examination." *Johnson v. Folino*, 705 F.3d at 130 (citing *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)).

The Commonwealth's claim that materiality hinges upon admissibility is based upon a misreading of *Wood v. Bartholomew*, 516 U.S. 1 (1995). In that case, the government withheld the results of a witness' pre-trial polygraph test. Notably, however, the prosecution and the defense agreed that those results were inadmissible (both as substantive evidence and for impeachment purposes) as a matter of state law. Furthermore, trial counsel conceded that the polygraph results would not have affected his cross-examination of the prosecution's witness. In light of these two crucial concessions, the Supreme Court held that the polygraph results were not material for *Brady* purposes. *Wood*, 516 U.S. at 6-7.

Contrary to the Commonwealth's suggestion, *Wood* does not stand for the proposition that undisclosed impeachment evidence must be admissible (or lead to the discovery of admissible evidence) before it can be considered material. Rather, the *Wood* Court simply examined materiality by looking at the effect that the withheld evidence would have had on the outcome of the trial. The court determined that it would have had none.

Wood sheds no light on the issue that we address here today.

Far from embracing an admissibility litmus test, the United States Supreme Court has explained that evidence is "material" for *Brady* purposes "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence"; it means only that the likelihood of a different result is great enough to "undermine [ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotation marks omitted).

Applying these principles, the PCRA court concluded that the withheld police reports would have given defense counsel a basis to impeach Robles, and it discerned a reasonable probability that the cumulative effect of the reports would have changed the result of Johnson's trial. We have little difficulty agreeing with the PCRA court. The reports are textbook impeachment evidence.[5] They suggest that

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[5] *See* Pa.R.E. 607(b) ("The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules."); *see also Commonwealth v. Collins*, 545 A.2d 882, 885 (Pa. 1988) ("Our law clearly establishes that any witness may be impeached by showing his bias or hostility, or by

Robles sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct. And they would have guided defense counsel's efforts to expose to the jury the "subtle factors" of self-interest upon which Johnson's life or liberty may have depended.[6]

Robles was the linchpin to the Commonwealth's case against Johnson. Competent counsel could have used the information in the police reports to cross-examine Robles and to weaken his credibility by exposing his bias and interest in

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proving facts which would make such feelings probable."); *Danovitz v. Portnoy*, 161 A.2d 146 (Pa. 1960) (providing that a witness' bias towards a party against whom he or she is called to testify is pertinent to the question of the witness' credibility); *Grutski v. Kline*, 43 A.2d 142, 144 (Pa. 1945) ("Whatever tends to show the interest or feeling of a witness in a cause is competent by way of cross examination."); *Lenahan v. Pittston Coal Min. Co.*, 70 A. 884, 885 (Pa. 1908) ("It is always the right of a party against whom a witness is called to show by cross-examination that he has an interest direct or collateral in the result of the trial, or that he has a relation to the party from which bias would naturally arise. Such an examination goes to the credibility of the witness.").

[6] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

cooperating with the Reading Police Department. A thorough cross-examination would have revealed that Robles hoped to receive favorable treatment from the authorities in exchange for providing information. For example, the first police report revealed that Robles had responded to the investigation into his criminal activity by providing information regarding an unsolved murder; ultimately, Robles was not charged in connection with the incident under investigation. Evidence that Robles had provided information to the police out of his own self-interest might have cast doubt upon the veracity of Robles' testimony against Johnson. The police reports further evidenced Robles' motive to cooperate with the police in order to discern the status of investigations into his own crimes. *See* N.T. PCRA Hearing, 10/20-21/2014, at 105-106 (Detective Cabrera testifying that he believed that Robles' had a "vested interest," and was motivated to provide information to the police in order to ascertain the extent of police investigation into his own activities).

The withheld evidence also revealed instances where Robles had lied or deceived the police when it was in his interest to do so, by, for example, falsely claiming to be the juvenile's guardian when police were investigating the April 25, 1996 shots-fired incident, and by falsely denying ownership of a .40 caliber gun in connection with the November 7, 1997 investigation. In addition, the withheld evidence

revealed that Robles had a motive to eliminate rival drug dealers such as Johnson's affiliates. Counsel attempted to explore this motivation at trial by suggesting that, as a known drug dealer, Robles had an ulterior motive in testifying for the prosecution. The trial court precluded this questioning after the prosecutor denied the existence of any evidence to support counsel's assertions. When confronted with the police reports at the PCRA hearing, Robles admitted that he was, in fact, a drug dealer.

The withheld police reports also would have permitted defense counsel to establish for the jury Robles' motive to lie to further his ongoing collaboration with the Reading Police Department. Evidence that Robles benefited from his relationship with the police by being able to engage in drug sales without fear of repercussions would have suggested that Robles was motivated to provide testimony helpful to the prosecution in this case. *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) ("Evidence that [the witness] continually used drugs while acting as an informant and that the police knew about this but chose not to prosecute him would also be relevant to show his bias. If [the witness] was continually receiving a benefit from the prosecution—the ability to use drugs without fear of criminal repercussions—that would have given him a motive to provide the prosecution with inculpatory information, even if he had to fabricate it.").

Robles' criminal conduct, and his willingness to provide information implicating other individuals in criminal activity, likely would have elevated the importance of the letter that Robles sent to Detective Cabrera offering "to do anything" to get out of jail by demonstrating that Robles was motivated to provide information to the police to serve his own interests. On direct appeal, this Court found that, although this letter would have been "useful" in cross-examining Robles, it was, standing alone, insufficient to warrant a new trial. *Johnson*, 727 A.2d at 1096. It now turns out that the letter did not stand alone. Placed into the context of the other withheld evidence, the impeachment value of this letter becomes even stronger.

All of this notwithstanding, the Commonwealth now contends that the police reports are not material "in light of the evidence of [Johnson's] guilt" presented at trial, and because of the "truly insignificant nature of the information contained in the five reports." Brief for Commonwealth at 55 n.7. As we explained on direct appeal, however, Robles' testimony was the only evidence linking Johnson to the .38 caliber gun, and that gun was the only physical evidence linking Johnson to the Banks cousins' murders.[7] Without Robles' testimony, the

[7] Additionally, Robles tied Johnson to the drug trade, asserted that Johnson and Bridges were drug partners,

Commonwealth was left with Johnson's account of the shootings, which fell short of proving the intent required for a first-degree murder conviction. Robles, in other words, was the Commonwealth's keystone. He tied Johnson to the murder weapon, and he undermined Johnson's defensive claim that he was not the gunman.

Without the police reports, Johnson's counsel was limited severely in his cross examination of Robles. The most scandalous detail that counsel was able to elicit during his questioning was that Robles went by the nickname "Gambino."[8] Because of the Commonwealth's nondisclosure, counsel was

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stated that the motive for the murders was revenge, and provided testimony to support an aggravating factor at the penalty phase. *See* R.R. 1016-27a; *Johnson*, 727 A.2d at 1102 (observing that the Commonwealth presented Robles' testimony in the penalty phase "that [Johnson] was the 'enforcer' for co- defendant Bridges' drug operations, and that the murder was in connection with drug sales" to support the aggravating factor of 42 Pa.C.S. § 9711(d)(14) (that the murder was committed in connection with drug activity)).

[8] In his closing argument, defense counsel reiterated this fact to the jury, clearly hoping that it would shade the jurors' assessment of Robles' credibility. *See* R.R. at 863a ("Now, as I told you, the only connection that the Commonwealth can reasonably argue is the testimony of 'Gambino.' Mr. Gambino—and he tries to say that [Johnson] wiped the gun and threw it away. Well, Gambino's testimony is false.").

unable to explore—let alone establish—Robles' motive for testifying against his former friend. We agree with the PCRA court that, had counsel been able to conduct this exploration, there is a reasonable probability that Johnson would not have been convicted of first-degree murder.

We affirm the PCRA court's order granting Johnson a new trial.[9]

Chief Justice Saylor and Justices Baer, Todd, Donohue and Dougherty join the opinion.

Justice Mundy files a dissenting opinion.

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[9] Johnson has requested leave to file a post-submission communication pursuant to Pa.R.A.P. 2501, wherein he updates the Court on the status of co-defendant Shawnfatee Bridges' federal *habeas corpus* appeal. Specifically, Johnson notes that the United States Court of Appeals for the Third Circuit recently affirmed a district court ruling awarding Bridges a new trial in connection with his claim that the Commonwealth failed to disclose exculpatory evidence. *See Bridges v. Sec'y of Pa. Dept. of Corr.*, 2017 WL 3834740 (3rd Cir. 2017). Although we grant Johnson's application, we do not rely upon the Third Circuit's reasoning, since the evidentiary record in Bridges' appeal is distinct from the one before us. *See id.* at *8 n.7 (discussing several affidavits that Bridges presented to the federal *habeas* court).

APPENDIX "B"

[J-135-2016] [MO: Wecht, J.]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellant
v.
RODERICK ANDRE JOHNSON,
Appellee
No. 713 CAP

Appeal From The Order Of The Court Of Common Pleas, Berks County, Criminal Division Dated July 6, 2015 At No. CP-06-CR-0000118-1997, Directing That A New Trial Be Held

SUBMITTED: December 2, 2016

DISSENTING OPINION

JUSTICE MUNDY DECIDED: December 19, 2017

Because I would conclude the five undisclosed police reports are not material under *Brady v. Maryland*, 373 U.S. 83 (1963), I dissent. I disagree with the Majority's conclusion that if trial counsel had been able to suggest to the jury Robles was motivated by bias to provide evidence to the police, "there is a reasonable probability that Johnson would not have been convicted of first-degree murder." Majority Opinion, slip op. at 14. Instead, I would conclude that the suppression of the police

reports, when considered in the context of all the evidence presented at trial, does not undermine confidence in the outcome of Johnson's trial. Accordingly, I would hold that the PCRA court's decision to award Johnson a new trial is not supported by the record.

As the Majority states, to establish a *Brady* violation, the defendant must prove that: (1) the Commonwealth suppressed the evidence, either intentionally or unintentionally; (2) the evidence was favorable to the defendant in that it was exculpatory or useful for impeachment; and (3) the evidence was material such that prejudice ensued. *Commonwealth v. Champney*, 65 A.3d 386, 397 (Pa. 2013) (citation omitted). Further, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Majority emphasizes that the police reports would have exposed Robles' self-interest and "cast doubt upon the veracity of Robles' testimony" by showing: "Robles' motive to cooperate with the police in order to discern the status of investigations into his own crimes," Majority Opinion, slip op. at 12; "instances where Robles had lied or deceived the police," *id.*; "Robles had a motive to eliminate rival drug dealers," *id.*; "Robles had an ulterior motive in testifying for the prosecution," *id.*;

"Robles admitted that he was . . . a drug dealer," *id.*; and "Robles' motive to lie to further the ongoing collaboration between himself and the Reading Police Department," *id.* The Majority evaluates the cumulative effect of the suppressed evidence in isolation from the other evidence tending to corroborate Robles' statement inculpating Johnson and from the other evidence of Johnson's guilt. The Majority's analysis falls short because "a reviewing court is not to review the undisclosed evidence in isolation, but, rather, the omission is to be evaluated in the context of the entire record." *Commonwealth v. Dennis*, 17 A.3d 297, 309 (Pa. 2011).

Viewing the suppressed evidence in light of the totality of the evidence, I would conclude there is no reasonable probability that the result of the proceeding would have been different. Ultimately, Robles' motive to testify is probative of the truthfulness of his testimony. However, a witness may be predisposed to provide the police with information, yet still provide accurate information. In this case, the evidence corroborating Robles' statement tends to confirm the truthfulness of his statement. On December 17, 1996, Robles gave the statement in which he averred that Johnson had told him he was carrying a .38-caliber revolver on the night of the Banks cousins' murders. According to Robles, Johnson also told Robles that he wiped the revolver clean and discarded it on the side of the road. The next day, December 18, 1996, police found a .38-caliber revolver approximately a quarter of a mile from the

crime scene, eight to twelve feet from the side of the road. Additionally, a .38-caliber bullet was recovered from Damon Banks' body. Moreover, in Johnson's statements to police, he mentioned that Bridges took a 9-millimeter handgun and a shotgun with him when they went to find the Banks cousins; Johnson never claimed that Bridges had a .38- caliber gun. Accordingly, I would conclude that the *Brady* evidence was not material because the totality of the evidence tended to corroborate Robles' statement. Evidence of Robles' bias does not undermine confidence in the outcome of Johnson's trial.

Even discounting Robles' testimony, the totality of the remaining evidence also supports the verdict. On December 11, 1996, Johnson confessed in a written, signed statement to driving with Bridges and Morales to pick up the Banks cousins, then driving them to a remote location, knowing that Bridges intended to kill the Banks cousins. At trial, Detective Albert Schade testified that he conducted an oral follow-up interview of Johnson on December 11, 1996, during which Johnson stated that "they"—meaning Johnson, Bridges, and Morales—planned on shooting the Banks cousins and went to the Banks' residence with the intent to murder them. N.T., Trial, 11/21/97, at 677.

Johnson's version of events—that he was not a shooter and that Bridges shot him first, causing Johnson to flee—was contradicted by his confession and by the other evidence. Johnson's

claim that Bridges shot him before he shot the Banks cousins was inconsistent with the evidence that Johnson was shot with a .32-caliber handgun, which was the caliber of handgun that Damon Banks was carrying the day of the shootings, according to the testimony of Damon's friend. N.T., Trial, 11/20/97, at 474-75. Moreover, Johnson's version of the events does not exculpate him because, by his own admission, he participated in the planning of the murders and drove the van with the intent to kill the Banks cousins. Based on this evidence of Johnson's guilt, I would conclude Robles' bias was not determinative, and there is no reasonable probability that the result of Johnson's trial would have been different. Accordingly, I would reverse the PCRA court's decision to award Johnson a new trial because it is not supported by the record. *See Champney*, 65 A.2d at 396.

APPENDIX "C"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	: : CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER AND OPINION

AND NOW, this 6th day of July 2015, it is hereby **ordered** and **decreed** that the Post Conviction Relief Act (hereinafter "PCRA") relief is **GRANTED** and a new trial shall be held.

In its March 25, 2013, order, the Pennsylvania Supreme Court directed this Court to "conduct an appropriate merits review of [Defendant's] Brady claim."[1] Furthermore, the Supreme Court directed that we consider the cumulative or collective effect of the undisclosed evidence.[2] In response to the directive, the Court accepted and considered PETITIONER'S SUPPLEMENTAL MEMORNDAUM IN SUPPORT OF RELIEF, filed on October 3, 2013, and the COMMONWEALTH'S RESPONSE, filed on December 11, 2013. The Court also considered oral argument on January 13, 2014. Additionally, in response to Defendant's request for a hearing and after considering the Commonwealth's opposition

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[1] 652 CAP.

[2] The Supreme Court cited *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Bell v. Cone*, 129 S.Ct. 1769 (, 1782-86 (2009).

thereto, the Court held a PCRA hearing on October 20, 2014, and October 21, 2014. Lastly, the Court considered post-hearing filings by both parties: a POST HEARING MEMORANDUM OF LAW filed by Defendant on February 17, 2015, and a POST-REMAND POST-HEARING BRIEF ON BRADY CLAIM filed by the Commonwealth on June 30, 2015.

Brady v. Maryland

"[S]uppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is a material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 1963). Therefore, the "prosecutor has an obligation to disclose all exculpatory information material to the guilt or punishment of an accused, including evidence of an impeachment nature." *Commonwealth v. Spotz*, 18 A.3d 244, 275-76 (Pa.2011). A *Brady* violation occurs when: "(1) the evidence [at issue] was favorable to the accused, either because it is exculpatory or because it impeaches; [2] the evidence was suppressed by the prosecution, either willfully or inadvertently; and [3] prejudice ensued." Id. (quoting *Commonwealth v. Lambert*, 884 A.2d 848, 854 (Pa. 2005)). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)(quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In defining the reasonable

probability of a different result, the Court further explained:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability: of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. At 434 (quoting *Bagley*, 473 at 678). Furthermore, "suppressed evidence [shall be] considered collectively, not item by item." *Id* at 436.

Suppressed Evidence

In assessing the Defendant's *Brady* claim, the Court considered the following evidence related to George Robles, a Commonwealth witness at trial:

Police Report of February 27, 1996

On February 27, 1996, Angel Alvarez and Alberta Collins reported that they were approached by a man they knew as "Giovanni," who pulled a gun, pointed it at them and threatened them. Reading Bureau of Police (hereinafter"RBP") Crime Investigation Report-Assignment Number 994-96 – dated February 27, 1996 (Notes of Testimony, hereinafter N.T., PCRA Hearing, 10/20-21/14, at

Exhibit 2). The police later identified "Giovanni" as George Robles, also known as "Geo." (N.T., PCRA Hearing, 10/20-21/14, at 15). A few days later, Mr. Alvarez and Ms. Collins were interviewed by the police. After speaking with a relative, the victims decided not to pursue criminal charges. (N.T., PCRA Hearing, 10/20-21/14, at 16-19). In an interview about this incident, Mr. Robles reported that he had information about the Ricky Cintron murder. (N.T., PCRA Hearing, 10/20-21/14, at 25). Mr. Robles was not charged in connection to this incident.

Police Reports of April 25, 1996

On April 25, 1996, the police responded to the intersection of 7th and Bingaman Streets based on a report of shots fired. RBP Crime Investigation Report -Assignment Number 19896-96 - dated April 25, 1996 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 5). At this time, George Robles lived at 644 Bingaman Street. (N.T., PCRA Hearing, 10/20-21/14, at 231, 243). During their investigation, the police learned that Edwin Ruiz, a juvenile who had been staying with George Robles, placed a red bag, containing guns and drugs, in a nearby apartment immediately after the shooting. RBP Crime Investigation Report -Assignment Number 19948-96 - dated April 25, 1996 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 6, at 47, 243-44). Mr. Robles was allowed to accompany the juvenile to his interview with the police. (N.T., PCRA Hearing, 10/20-21/14, at 61- 62, 245-46). The police also recovered a safe, which Mr. Robles had reported stolen, from a neighbor's house. (N.T., PCRA Hearing; 10/20-21114, at 57-59). Neighbors, Amy

Sell and Rafael Melendez, reported that they believed George Robles was selling drugs from his residence. RBP Crime Investigation Report - Assignment Number 19948-96 -dated April 25, 1996 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 6, pages 20-22). Again, Mr. Robles was not charged in connection to this incident.

Police Report of August 1, 1997

On August 1, 1997, the police responded to the intersection of 10th and Elm Streets based on a report of shots fired. Reading Police Department (hereinafter "RPD") Crime Investigation Report- Assignment Number 44100-97 dated August 1, 1997 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 16). Upon arrival, the police met with George Robles, who admitted to being armed. (N.T., PCRA Hearing, 10/20-21/14, at 298). The police removed a firearm from Mr. Robles, which he was lawfully licensed to carry. (N.T., PCRA Hearing, 10/20-21114, at 298). Orlando Alvarado, who was with Mr. Robles, matched the description of the alleged suspect. (N.T., PCRA Hearing, 10/20-21/14, at 299). The ammunition from Mr. Robles' gun matched the spent shell casings found on the ground. (N.T., PCRA Hearing, 10/20-21/14, at 299-300). Both Mr. Robles and Mr. Alvarado denied any knowledge or involvement in the shooting and the complainant wished to remain anonymous. (N.T., PCRA Hearing, 10/20-21/14, at 298-99). Again, Mr. Robles was not charged in connection to this incident.

Police Report of September 18, 1997

On September 18, 1997, the police responded to the 500 block of Cedar Street based on a report of shots fired. RPD Miscellaneous Offense Report - Assignment Number 54413-97 -dated September 18, 1997 (N.T., PCRA Hearing 10/20-21/14, at Exhibit 12). The investigating officer spoke with George Robles and Orlando Alvarado, occupants of 545 Cedar Street. (N.T., PCRA Hearing, 10/20-21/14, at 215-16). From his patrol of the area, the investigating officer knew Robles and Alvarado to be involved with drug dealing. (N.T., PCRA Hearing, 10/20-21/14, at 216). Again, Mr. Robles was not charged in connection to this incident.

Police Report of November 7, 1997

On November 7, 1997, the police responded to the 500 block of Cedar Street based on a report of shots fired. RPD Crime Investigation Report - Assignment Number 65117-97- dated November 7, 1997 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 9). Three victims reported that shots were fired by a Hispanic male from 545 Cedar Street. RPD Crime Investigation Report - Assignment Number 65117-97 -dated November 7, 1997 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 9, page 2). Mr. Robles stated that he had been at a nearby bar when the shooting occurred. RPD Crime Investigation Report - Assignment Number 65117-97 - dated November 7, 1997 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 9). The police recovered a recently-fired pistol, which was owned by Mr. Robles and matched the shell casings found. RPD Crime Investigation Report - Assignment Number 65117-97 -dated November 7, 1997 (N.T., PCRA Hearing, 10/20-

21/14, at Exhibit 9). Again, Mr. Robles was not charged in connection to this incident.

The Court also considered a letter sent by Mr. Robles to Detective Cabrera on while he was incarcerated as a material witness.[3] (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 13).

Analysis

After considering the above evidence and all of the testimony presented at the October 2014 PCRA hearing, the Court is constrained to conclude that a *Brady* violation occurred and, as a result, a new trial is required. Initially, the Court believes that the police reports and questions about the events they describe would have been admissible at Defendant's trial as they relate to Mr. Robles' potential bias. "[A] criminal defendant must be permitted to challenge a witness's self-interest by questioning him about possible or actual favored treatment by the prosecuting authority in the case at bar, **or in any other non-final matter involving the same prosecuting authority**."

Commonwealth v. Evans, 512 A.2d 626, 632 (Pa. 1986) (emphasis added). "[Pennsylvania] law clearly establishes that any witness may be impeached by showing his bias or hostility, or by proving facts which would make such feelings

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[3] The Court acknowledges that the Pennsylvania Supreme Court previously held that this letter alone did not constitute a *Brady* violation justifying relief. *Commonwealth v. Johnson,* 727 A.2d 1089, 1093-96 (Pa.1999). However, the Court now considers Mr. Robels' letter in connection with the other *Brady* material in conducting a cumulative analysis.

probable. "*Commonwealth v. Collins*, 545 A.2d 882, 885 (Pa. 1988) (emphasis added). "[A] witness may be cross-examined for the purpose of showing a motive to give false testimony." *Commonwealth v. Robinson*, 491 A.2d 107, 110 (Pa. 1985).

The Court believes that the suppressed evidence was favorable to the Defendant because it could have been used to impeach Mr. Robles at trial. The volume of Mr. Robles' interactions with the Reading Police Department is clearly relevant to his bias and desire to assist the police and the Commonwealth to avoid interference with his own activities. *See Evans*, 512 A.2d at 632; see also Robinson, 491 A.2d at 110 (Pa. 1985); *Commonwealth v. Dawson*, 405 A.2d 1230, 1231 (Pa. 1979). The evidence is particularly important in light of defense counsel's attempt at trial to introduce evidence of Mr. Robles' interest.[4]

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[4] The following exchange occurred at trial:

Mr. Adams:	Now, in July of 1997, were you employed?
Mr. Baldwin:	Objection, Your Honor.
The Court:	I will see you at sidebar. (Sidebar Discussion)
The Court:	What's the relevance of that?
Mr. Adams:	Well, the relevance is that this individual had - doesn't work, hasn't worked, and –
The Court:	So?
Mr. Adams:	***And I think he's a dealer of drugs*** or a paid informant by the Reading Bureau of Police.
Mr. Baldwin:	That's absurd. He's on material witness bail.
Mr. Adams:	C'mon [sic], I mean, this guy hasn't worked for ages. He is clearly either-
The Court:	Wait a second. All right, I was going to ask somebody at some point in time to clarify the bail situation, and it's not clear to me, and if

it's not clear to me I don't think the jury knows what bail we're talking about.

Mr. Baldwin: He's on material witness bail, Your Honor. Material witness bail, not bail for any known or charged crimes, Your Honor.

The Court: he's not charged with anything?

Mr. Baldwin: No, sir, which we will be bringing out on our redirect now that Mr. Adams brought it up. In fact, ***he's not been convicted of or arrested on any crime,*** Your Honor.

The Court: Well, I will sustain your objection. **Do you have any hard evidence that this man - - even that wouldn't affect his truthfulness or veracity**.

Mr. Adams: It does go to credibility.

The Court: That's not a crimen falsi crime.

Mr. Adams: Well, clearly he's got a - - I mean, the guy hasn't worked, according to our investigation, a day in his life, since this case began. He's receiving income from somewhere.

Mr. Baldwin: Could you - - could you see if that argument were turned over? The argument that if someone doesn't work, he is a drug dealer?

Mr. Adams: ***He's also testified that he is constantly talking to police, constantly giving information,*** and I'd like to inquire whether or not he received money from the Reading police.

The Court: Well, you can do that - - you can do that, but you don't start with saying, are you employed and were you employed in July. You can do that, I am not stopping you from inquiring as to ***any legitimate area of possible bias or interest in the outcome***, that type of thing, but just to ask if he is employed on a date in July, which I don't even understand what the date is all about, but anyway- -

Defense counsel was clearly hampered by the inability to impeach Mr. Robles without evidence of his interactions with the police. The Court also emphasizes that the prosecuting attorney had knowledge of the criminal investigation of Mr. Robles within the months leading to Defendant's trial. RPD Crime Investigation Report-Assignment Number 65117-97 – dated November 7, 1997 (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 9, page 8, at 88).

Furthermore, the relevant evidence was not turned over to Defendant until after trial during the course of subsequent federal proceedings. (N.T., PCRA Hearing, 10/20-21/14, at Exhibit 1). The Commonwealth had a duty to disclose the police reports, detailing Mr. Robles' interactions with the police, to Defendant for use during trial. *See Commonwealth v. Burke*, 781 A.2d 1136, 1141 (Pa.2001) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (The Commonwealth has a duty to disclose evidence, whether directly exculpatory or impeachment evidence, even if no request has been made. This duty applies to evidence held by the prosecutor and police agencies.)). Common sense dictates that, in this specific case, these police reports were the type of *Brady* material that should have been disclosed to Defendant's counsel. In making this case-specific conclusion, the Court sees

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Mr. Adams: Just that the first time that we had contact with him-

(N.T., Trial, Excepts—Courtney Johnson & Greg Robes, 11/20/97, at 58-60)(emphasis added)

no need to expand on the traditional disclosure obligations under *Brady.*

Lastly, considering the cumulative effect of the suppressed evidence, the Court believes there is a reasonable probability that, had the evidence been disclosed during trial, the proceeding would have been different and the suppression of the impeachment evidence undermines confidence in the outcome of Defendant's trial. Armed with the suppressed evidence at trial, defense counsel's cross examination of Mr. Robles, an important Commonwealth witness,[5] would have been very different. The suppressed evidence illustrates that Mr. Robles was involved in five (5) serious police investigations in less than three (3) years. There is clear evidence that during these investigations the police learned that Mr. Robles was involved in drug transactions. On at least one (1) prior occasion, Mr. Robles, when confronted with police questioning, offered to supply information about an unsolved murder. This information had a direct bearing on Mr. Robles' desire to testify against Defendant and was unavailable to Defendant for impeachment purposes at trial.

While the Court acknowledges that even presented with the suppressed evidence at trial, the credibility of Mr. Robles may not have been so sufficiently damaged as to cause the jury to return an opposite verdict for Defendant; however, the standard does not require a clear showing that an

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[5] In its closing, the Commonwealth referenced Mr. Robles' testimony as supporting the charges against Defendant. N.T., Trial, 11/18-26/97, at 803-04).

opposite verdict would have been reached. Instead, the required finding is that in the absence of the suppressed evidence, Defendant did not receive a fair trial and confidence in the outcome is undermined. Thus, the Court believes that the cumulative effect requires a finding that the suppressed *Brady* evidence was material.

Additional Matters

The Court's above conclusion is compatible with the outcomes in federal proceedings on similar issues. In *Johnson v. Folino*, 705 F.3d 117 (3d Cir. 2013), the Third Circuit considered the same suppressed evidence in Defendant's non-capital murder case. The Third Circuit remanded to the district court to evaluate the materiality of the *Brady* violation. *Id.* At 132-33. On remand, the Third Circuit instructed that the district court consider not only the suppressed evidence itself "but also where it might have led the defense in its efforts to undermine Robles." *Id.* At 131. In *Bridges v. Beard*, 941 F.Supp.2d 584 (E.D.PA.2013), the district court evaluated co-Defendant's *Brady* claim relative to the same suppressed material. *Id.* At 602-04. Judge Brody concluded that "[t]he evidence was favorable to [co-Defendant], withheld by the prosecution, and material.…These violations of *Brady v. Maryland* undermine confidence in [co-Defendant's] verdict. He is therefore entitled to habeas relief, and a new trial." *Id.* At 609.

Lastly, based on the nature of the arguments presented and testimony elicited by defense counsel at the recent PCRA hearing, the Court wishes to make a specific factual finding that neither

Detective Angel Cabrera nor Detective Bruce Dietrich were engaged in corrupt or improper dealings with George Robles during their time with the Reading Police Department. However, Defendant need not prove the existence of a corrupt relationship to be entitled to the relief described above.

BY THE COURT:

S/ Scott D. Keller
Scott D. Keller, Judge

APPENDIX "D"

[J-113-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT
No. 652 CAP

COMMONWEALTH OF PENNSYLVANIA
Appellee
v.

RODERICK ANDRE JOHNSON,
Appellant

Appeal from the denial of PCRA relief by Order dated January 20, 2012, in the Court Of Common Pleas of Berks County, Criminal Division, at No. CP-06-CR-118-1997

SUBMITTED: August 15, 2012

ORDER

PER CURIAM

AND NOW, this 25th day of March, 2013, the Order of the PCRA court dismissing appellant's third PCRA petition is AFFIRMED in part and REVERSED in part. The Order of the Court of Common Pleas of Berks County is affirmed to the extent it concludes that recusal of the Honorable Scott D. Keller of the Court of Common Pleas is unwarranted. See Memorandum Opinion, CP-06-CR-118-97, dated 2/29/12. The Order is reversed to the extent it determines that appellant Roderick Johnson's Brady[1] claim, arising from discovery

[1] Brady v. Maryland, 373 U.S. 83 (1963).

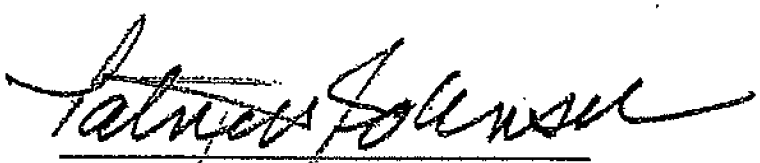
materials produced during the federal *habeas corpus* proceedings in the unrelated case of *Johnson v. Folino*, No. 2:04-cv-02835 (U.S. District Court, E.D.Pa.), is untimely under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

This Court concludes that appellant has demonstrated that the information discovered during the federal *habeas* proceedings constitutes "newly discovered" facts for purposes of the (b)(1)(ii) exception to the jurisdictional time bar. See 42 Pa.C.S. §9545(b)(1)(ii). The PCRA court's alternative merits holding on the Brady claim was conclusory and conflated the timeliness assessment and the merits. Accordingly, on remand, the PCRA court is directed to conduct an appropriate merits review of appellant's Brady claim. Furthermore, in assessing Brady materiality, the court is reminded of the requirement to consider the "cumulative" or "collective" effect of all of the relevant undisclosed evidence. Kyles v. Whitley, 514 U.S. 419 (1995); see also Bell v. Cone, 129 S.Ct 1769, 1782-86 (2009) (discussing Kyles and considering whether cumulative or collective effect of undisclosed evidence was material).

Furthermore, appellant's Application for Leave to File Post-Submission Communication is GRANTED.

Madame Justice Orie Melvin did not participate in the consideration or decision of this case.

Judgment entered: Dated: March 25, 2013



Patricia Johnson
Chief Clerk

APPENDIX "E"

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
V.	:	
	:	CRIMINAL DIVISION
	:	
RODERICK JOHNSON	:	NO. 118-1997
	:	Assigned to: Keller, J

MEMORANDUM OPINION, S.D. Keller, J.
February 29, 2012

On April 7, 2005 Defendant filed his third Petition pursuant to the Post Conviction Relief Act (hereinafter PCRA) and Consolidated Memorandum of Law. Defendant filed multiple supplements to said Petition, and this Court held the matter in abeyance several times pending resolution of Defendant's case in a corresponding Federal matter. On February 8, 2011 we issued our ORDER AND NOTICE OF INTENT TO DISMISS. Defendant responded to said Order on February 25, 2011. Defendant asked for reconsideration and after careful review, this court held Defendant's PCRA petition in abeyance pending resolution of *Roderick Johnson v. Louis Folino, et al* at docket 04-2835, defendant's companion case in federal court. Appellant then filed a Motion to withdraw his current counsel. We set a hearing date of January 5, 2012. At that hearing this Court learned that Defendant's case in Federal Court had been decided. After careful review of the record this Court dismissed Defendant's *third* PCRA Petition on January 20, 2012. On February 3, 2012

Defendant filed a timely Notice of Appeal to the Superior Court of Pennsylvania. Pursuant to Pa.R.A.P. 1925(b) we issued an Order for Concise Statement of Errors complained of on Appeal on February 3, 2012. Defendant filed his statement on February 24, 2012. He raises the following issues of error:

1. Did the PCRA Court wrongfully deny the motion for recusal where an actual bias against Appellant was demonstrated and where recusal is warranted even where an appearance of impropriety is shown, in violation of the Sixth, Eighth, and Fourteenth Amendments and Article 1, Sections 1, 9, 13, & 25.

2. Did the Commonwealth suppress exculpatory evidence, including numerous police reports and witness statements demonstrating George Robles' involvement in drug-dealing and drug-related violence, and coercive police, tactics, evidencing his bias against Appellant, in violation of the Sixth, Eighth, and Fourteenth Amendments, Article 1, Sections 1, 9, 13, & 25, and Rule 573 of the Pa. Rules of Criminal Procedure?

3. Did the Commonwealth affirmatively misrepresent that numerous police reports and witness statements demonstrating George Robles' involvement in drug-dealing and drug related violence did not exist, in violation of the Sixth, Eighth and Fourteenth Amendments, Article 1, Sections I, 9, 13, & 25, and Rule 573 of the PA. Rules of Criminal

Procedure?

4. Did the Commonwealth fail to correct false and erroneous testimony by George Robles, where Robles denied involvement in the drug trade and drug-related violence, in violation - 0f the Sixth, Eight and Fourteenth Amendments and Article 1, Sections 1, 9, 13 &25 and Rule 573 of the Pa. Rules of Criminal Procedure?

5. Did the Commonwealth violate due process by continuing withhold throughout the post-conviction process many of the later disclosed reports, and only making full disclosure, in piecemeal fashion, after repeated orders by the federal judiciary, prompting years of delay and thereby prejudicing Appellant, in violation of the Sixth, Eighth and Fourteenth Amendments and Article l, Sections 1, 9, 13, & 25 and Rule 573 of the PA Rules of Criminal Procedure?

6. Did the Commonwealth violate due process by knowingly permitting George Robles, a known suspect in the seizure of a large amount of drugs, to visit the incarcerated Edwin Ruiz; the juvenile arrested in the case, on the false pretense Robles was a "guardian," and where thereafter Ruiz declined to further implicate Robles; in violation of the Sixth, Eighth, and Fourteenth Amendments and Article Sections 1, 9, 13 & 25?

7. Did the Court err when it dismissed, without

a hearing, the Petition for Habeas Corpus Relief and/or Statutory Post-Conviction Relief under 42 Pa.C.S. §9542 et seq. and Consolidated Memorandum of Law (filed April 7, 2005); Supplement to Petition's Post Conviction Petition (filed June 19, 2007); Second Supplemental Petition for Statutory Post-Conviction Relief & Consolidated Memorandum of Law (filed August 2, 2007); Third Supplemental Petition for Statutory Post-Conviction Relief & Consolidated Memorandum of Law (filed November 16, 2007); Fourth Supplemental Petition for Statutory Post-Conviction Relief & Consolidated Memorandum of Law (filed September 26, 2008); and Fifth Supplemental Petition for Statutory Post-Conviction Relief & Consolidated Memorandum of Law (filed September 3, 2010)?

8. Did the Court err in its conclusions that Petitioner's petition was untimely and the issues in the supplements were immaterial and none of the statutory exceptions to the PCRA one-year filing requirement applied?

9. After the court had entered a Protective Order in the case of Commonwealth v. Bridges, No.117-97 (Berks County C.C.P.), directing the Commonwealth not to destroy evidence relating to George Robles' activities as a paid informant, did the court err and abuse its discretion when it did not grant Petitioner's discovery requests for Brady material including but not limited to records about gun permits issued to Commonwealth

witness, George Rubles; records showing funds paid to George Robles by law enforcement officials; videotapes of Robles in Reading City Hall; letters written by Commonwealth witnesses George Robles and/or Luz Cintron to former District Attorney Mark Baldwin?

10. Did the trial court err in denying a new trial based on February 17, 2009 release of a report by the National Academy of Sciences casting · doubt on the validity of the ballistics and other forensic evidence in this case, in violation of the Sixth, Eighth and Fourteenth Amendments and Article 1, Sections 1, 9, 13, & 25?

DISCUSSION

This Court meaningfully addressed the Defendant's PCRA petition in our Orders and Notice of Intent to Dismiss dated June 6, 2005 and February 8, 2011, copies of which are attached to this opinion. We incorporate said Orders into this Opinion as though same were set forth fully herein. Moreover, we believe, as stated in those Orders that defendant's PCRA is patently untimely and meets none of the exceptions to the one (1) year filing requirement.

However, we do specifically want to address Defendant's first issue as it was not addressed in either the Order and Notice of Intent to Dismiss of June 6, 2005 or in the Order and Notice of Intent to Dismiss of February 8, 2011. Defendant argues that this court wrongfully denied his motion for recusal

where an actual bias against Appellant was demonstrated and where recusal is warranted. First and foremost this issue should be deemed waived. The Defendant alleges that the prejudicial statements made by this Court were done so in January of 2003 and in January of 2004. The Defendant filed his Motion for Recusal on April 7, 2005, more than two (2) years after the alleged prejudicial statement. This Court denied Defendant's Motion without a hearing on April 13, 2005. Defendant did not appeal the denial. That same month the Defendant filed his third PCRA Petition with this Court. He did not raise the issue of this Court's recusal. It is well settled law that the PCRA is the subject of jurisdictional time requirements and that any PCRA must be filed within one year of the judgment of sentence becoming final unless it meets one of the statutory exceptions to the one (1) year filing requirement. The exceptions themselves are subject to a time restriction and must be invoked within sixty days from the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2). Therefore, as the alleged inflammatory statement was made in 2003 and Defendant failed to raise the issue within sixty (60) days this issue is untimely. Moreover, as Defendant did not appeal the denial of the Motion for Recusal, the issue should also be deemed waived. "It is well-settled that a party seeking recusal or disqualification must raise the objection at the earliest possible moment or that party will suffer the consequence of being time barred." *Commonwealth v. Pappas*; 845 A.2d 829, 846 (Pa.Super.2004). Finally, even if the issue were timely and not waived, it is non-meritorious. Defendant bases his argument on an inaccurate

interpretation of the statement made. Defendant quotes the statement in his 2005 Motion for Recusal as follows:

> This Court – and I'm giving you notice, defense counsel and you Assistant D.A's - on *appropriate* cases, on *appropriate* delivery of drug cases and gun cases, this Court has decided that due to the crisis in this city, I will be imposing the maximum sentences possible from here on out ... There has to be some change in this city, and it's going to start in this courtroom.
>
> *Commonwealth v. Morales-Gonzalez*, N.T. 1/27/03, at 8. *Emphasis Added.*

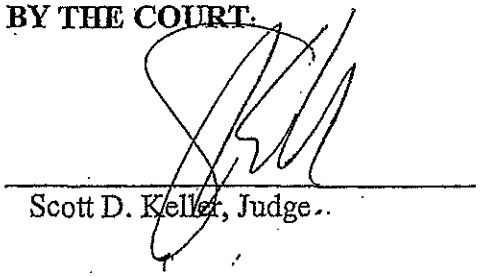
To interpret this-statement as Defendant does as an "unwillingness to consider individualized sentencing for offenders convicted in drug and gun cases," is absurd. By the Court's own statement, it would sentence offenders to the maximum sentences on *appropriate cases*. That statement, by its very nature, assumes individualized sentencing. Moreover, the second (2nd) statement the Defendant cites is quoted from a January 17, 2004 article in the Reading Eagle newspaper. This article in no way shows bias or prejudice towards the Defendant; it simply states this Court was frustrated with the drugs and violence in the City of Reading, a sentiment most would echo. This Court's statement and the aforementioned article have no bearing upon Defendant's case.

Simply, we are intimately familiar with this

case and the Defendant. We are not biased or prejudiced, but seek to uphold and implement the law of this Commonwealth. This issue should be deemed time-barred pursuant to the PCRA, and at the very least unfounded and unsupported by evidence.

Therefore, for all of the reasons set forth in this Court's orders and Notice of Intent to Dismiss, dated June 6, 2005 and February 8, 2011, we respectfully request that Defendant's appeal be DENIED.

BY THE COURT:



Scott D. Keller, Judge

APPENDIX "F"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	: : CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER AND NOTICE OF INTENT TO DISMISS

AND NOW, this 6th day of June 2005, notice is hereby given by the Honorable Scott D. Keller of his intention to dismiss the defendant's third Petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §9541 et seq., pursuant to Pennsylvania Rule of Criminal Procedure 907. The Court finds the petition is untimely and none of the exceptions to the one-year filing requirement are met.

On November 25, 1997, this Court found the defendant guilty of two counts of murder in the first degree and related offenses and was represented at trial by Jenn Adams, Esquire and Randall Miller, Esquire. The defendant was sentenced to death on November 26, 1997.

The defendant appealed and the Supreme Court of Pennsylvania affirmed the defendant's convictions and sentence on March 26, 1999. The

defendant filed an application for re-argument, which was denied on June 28, 1999. On August 31, 1999 a petition for writ of certiorari to the Supreme Court of the United States was filed with the court, but was denied on February 22, 2000.

On April 26, 2000, the defendant's first PCRA petition was filed. On July 7, 2000, after the court had already denied the defendant's request to file a second amended petition, the defendant filed "Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. §9542 et. seq. This was followed by a second attempt by the defendant to supplement his petition, however, the court refused to consider it. On February 5, 2001 the Commonwealth filed an Answer to the defendant's requests for relief. On May 1, 2001, the defendant again attempted to supplement his petition, and again this court denied it by an order dated May 11, 2001.

A hearing was held on the PCRA petition on May 11, 2001, during which numerous pages of testimony were taken. The court determined another hearing was necessary and held that hearing on August 3, 2001. Before that hearing, on July 1, 2001, the defendant again filed a motion to supplement his PCRA petition, and said motion was denied on the same day.

On October 2, 2001, this Court issued an Order and Notice of Intent to Dismiss the defendant's petition and on October 25, 2001, the defendant's petition was dismissed. The defendant appealed the dismissal of his PCRA petition to the Supreme Court of Pennsylvania, which affirmed this Court's denial of relief on December 27, 2002. On February 21, 2003, the defendant's timely application for reargument was denied.

On September 11, 2003 the defendant filed his second PCRA petition, through his counsel, Billy H. Nolas, Esquire and Samuel J.B. Angell, Esquire, Defender Association of Philadelphia. On September 23, 2003, this Court ordered the Commonwealth to file a response to the defendant's petition within thirty (30) days. The Commonwealth filed its response on October 23, 2003, finding that no relief was warranted. After conducting an independent review of the defendant's second PCRA petition and the complete record on file with the Berks County Clerk of Courts, this court found that defendant's petition should be dismissed without a hearing pursuant to Pa. Rule Crim. P. 907(a) because it was untimely, and the exceptions were not met.

On October 31, 2003, this Court filed its Order and Notice of Intent to Dismiss the defendant's second PCRA petition. On November 20, 2003 the defendant filed his objections to this Court's Order and Notice of Intent to Dismiss. On

November 26, 2003, after review of the defendant's objections to our Order, this Court dismissed the defendant's second PCRA petition as untimely filed and not meeting any of the exceptions to the one-year filing requirement.

On December 24, 2003, the defendant filed a Notice of Appeal to this Court's order of November 26, 2003 dismissing his second PCRA petition. The Pennsylvania Supreme Court affirmed this Court and on February 8, 2005, the defendant's application for reargument was denied.

On April 7, 2005, the defendant filed *his* third PCRA petition, through his counsel, James Moreno, Esquire, Defender Association of Philadelphia. On April 20, 2005, this Court ordered the Commonwealth to answer the defendant's third PCRA petition within thirty days. The Commonwealth filed their response finding that no relief is warranted. After conducting an independent review of the defendant's third PCRA petition and the complete record on file with the Berks County Clerk of Courts,[1] this court is of the opinion that the defendant's petition should be dismissed without a hearing pursuant to Pa. Rule Crim. P. 907(a) because it is untimely, and none of the exceptions are met.

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[1] This Court's review consisted, among other things, all documents imaged on our computer system, as the original record, as of today, has not been returned by the Pennsylvania Supreme Court Prothonotary's Office.

The defendant raises the following issue:

1. Petitioner was denied his state and federal constitutional rights where the Commonwealth failed to disclose exculpatory evidence that was material to petitioner's guilt or innocence and *his* sentencing proceeding.

(Defendant's "Petition for Habeas Corpus Relief ...", 4/7/05, pg.4)

Before reaching the merits of the defendant's petition, this court must determine whether his motion satisfies the PCRA's jurisdictional time restrictions. Commonwealth v. Breakiron, 781 A.2d 94, 97 (Pa. 2001). Pursuant to 42 Pa.C.S.A. §9545(b)(l), the filing of a PCRA petition is governed by specific time restrictions:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.

(emphasis added). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." 42 Pa.C.S.A. §9545(b)(3).

The one year filing time restriction is subject to three statutorily listed exceptions, where the petitioner alleges and proves (1) governmental interference prevented the raising of a claim; (2) new facts are discovered which could not have been ascertained earlier with due diligence; or (3) a newly recognized constitutional right that applies retroactively. 42 Pa.C.S.A. §9545(b)(1)(i), (ii), (iii). The exceptions themselves are subject to a time restriction and must be invoked within sixty days from the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2).

The petitioner concedes that his third PCRA petition is filed more than one year-beyond the date his conviction became final. (PCRA petition, p.13). Therefore, in order for this Court to have jurisdiction to review the merits of the petitioner's petition, he must plead and prove that one of the exceptions to the one-year filing requirement exists. This the defendant has not done.

Timeliness

The petitioner makes the same claim that was made in his untimely Second PCRA petition, that the Commonwealth withheld evidence that could have been used to impeach George Robles. In his third petition, the defendant includes an affidavit of Richard Morales in an attempt to support his position. The defendant again asserts that his claims meet the governmental interference

exception based on a Brady violation and the newly discovered facts exception. Further, again, the defendant claims the defendant's petition should be considered timely, because not to do so would be a "miscarriage of justice."

When a defendant, as here, claims governmental interference based on a Brady violation, the defendant must establish when and how he discovered the material allegedly withheld and explain why the information, with due diligence, could not have been obtained earlier. Commonwealth v. Breakiron, 781 A.2d 94, (Pa. 2001). The defendant claims, similarly to his second petition, that this claim could not have been presented before this time as the government failed to disclose information that would have impeached Mr. Robles's testimony. This Court does not classify the material allegedly withheld as Brady material and, further this claim clearly does not fall under the governmental interference exception. The claim relating to Mr. Robles has been presented and discussed in his first PCRA petition, as well as being raised again in his second PCRA petition. Further, Mr. Morales's affidavit does not support the defendant's claim that the Commonwealth withheld any exculpatory evidence. Therefore, this Court fails to see how this claim meets the governmental interference exception to the one-year filing requirement.

To meet the newly discovered facts exception to the one-year filing requirement, the defendant must show "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." Commonwealth v. Yarris, 731 A.2d 581, 587 (Pa.1999). Further, the defendant must show the new facts constitute "exculpatory evidence" that "would have changed the outcome of the trial had it been introduced." Commonwealth v. Palmer, 814 A.2d 700, 706 (Pa. Super. 2002). The petitioner claims that the information that Mr. Morales has is "newly discovered," is exculpatory and would have changed the outcome of the case. First, this alleged information that Mr. Robles had a corrupt relationship with the Reading Police Department is not "newly discovered" at all. Even though Mr. Morales only chose to speak with investigators in July 2004, the general foundation of the information given by Mr. Morales has been discussed and presented in all PCRA petitions and was referenced in the trial transcript from 1998. The only reason it could be considered new is that a new person is discussing the alleged corruption. Further the Court finds the defendant has not met his burden in showing the information in Mr. Morales's affidavit is exculpatory in nature to the extent that it would have changed the outcome of the trial. This information would have impeached Mr. Robles' testimony, but does not overcome the large amount of evidence against the petitioner in this case. Therefore, this Court finds that the

defendant's PCRA petition was untimely filed and does not meet any of the exceptions to the one-year filing requirement.

The petitioner claims, that to the extent the information could have been discovered by counsel, counsel was ineffective for failing to discover and/or use the information on behalf of the defendant. Ineffective assistance of counsel does not save an otherwise untimely petition, and therefore the merits of the ineffective assistance of counsel claim cannot be reviewed.

Miscarriage of Justice

Finally, the defendant claims that not to consider his petition timely would result in a "miscarriage of justice." In addition to satisfying the eligibility and timeliness requirements of the PCRA, the defendant is required to make a strong prima facie showing that a miscarriage of justice may have occurred. "This standard is met only if the petitioner can demonstrate either: (a) the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate; or (b) his is innocent of the crimes charged." Commonwealth v Palmer, 814 A.2d 700, 709 (Pa.Super.2002) quoting Commonwealth v. Szuchon, 633 A.2d 1098, 1099-1100 (Pa. 1993). However, timeliness is a threshold matter.

Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (1999). Consequently, even if the defendant can show a miscarriage of justice, the PCRA petition cannot be entertained if it is untimely. *Id.*

Although this Court finds the defendant's petition untimely, it will briefly discuss the miscarriage of justice claim.

The defendant is basing his miscarriage of justice claim on the fact that the Commonwealth failed to produce Brady material and that there is after-discovered evidence. The evidence that the defendant is claiming the Commonwealth failed to disclose is apparently the information that Mr. Morales swore to in his affidavit. As stated above, this Court does not characterize this information as Brady material, nor does this court find that the alleged after-discovered evidence would have changed the outcome of the trial. The defendant also alleges his innocence in his PCRA petition. However, he does not supply any supporting facts whatsoever to demonstrate his innocence. Therefore, the defendant has failed to demonstrate that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate or that he is innocent of the crimes charged.

For all of the foregoing reasons, this court finds the defendant's petition is untimely and does

not meet one of the exceptions to the one-year filing requirement. As a result, the defendant's third petition under the PCRA must be dismissed. The defendant has twenty (20) days from the date of this notice of intent to dismiss to respond to the proposed dismissal. If this court receives no response within the twenty-day time period, an order dismissing the petition for post-conviction relief will be filed with the Berks County Clerk of Courts.

BY THE COURT:

S/ Scott D. Keller
Scott D. Keller, Judge

APPENDIX "G"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
	: CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER AND NOTICE OF INTENT TO DISMISS,
S.D. KELLER, J.
FEBRUARY 8, 2011

FACTUAL AND PROCEDURAL HISTORY

AND NOW, this 8th day of February 2011, notice is hereby given by the Honorable Scott D. Keller of his intention to dismiss the defendant's third Petition for relief under the Post Conviction Relief Act (hereinafter PCRA), 42 Pa. Const. Stat. Ann. § 9541 et seq. pursuant to Pennsylvania rule of Criminal Procedure 907. This Court finds the petition is untimely and none of the statutory exceptions to the one-year filing requirement exist. The Defendant is not entitled to post-conviction. collateral relief, and no purpose would be served by a hearing on the matter.

Senior Deputy Attorney General Andrea F. McKenna, Esq. aptly summarized the facts of this case in the COMMONWEALTH'S RESPONSE IN OPPOSITION TO ALL OUTSTANDING POST CONVICTION FILINGS ("Commonwealth's Response in Opposition…", 11/1/10, 1-4). We adopt her recitation of the facts and set it forth below:

Roderick Johnson was convicted by a jury on November 25, 1997, of two counts of first degree murder for the December 1996 shooting deaths of cousins Damon Banks and Gregory Banks. This Court sentenced Johnson to death the following day. His conviction was affirmed on direct appeal. *Commonwealth v. Johnson*, 556 Pa. 21, 6, 727 A. 2d 1089 (1999). The United States Supreme Court declined to issue a writ of certiorari. *Johnson v.* Pennsylvania, 528 U.S. 1163, 120 S.Ct. 1180 (2000).

Johnson filed a petition for post-conviction relief on April 26, 2000. After hearing two days of testimony, this Court dismissed Johnson's petition on October 25, 2001. The Pennsylvania Supreme court affirmed the denial of relief. *Commonwealth v. Johnson*, 572 Pa. 283, 815 A.2d 563 (2002).

Johnson filed a second petition for post conviction relief September 11, 2003. By order of November 26, 2003, this Court denied relief and dismissed the second petition as untimely. The

Pennsylvania Supreme court affirmed. *Commonwealth v. Johnson*, 580 Pa. 594, 863 A.2d 423 (2004), remand and re-argument denied February 8, 2005.

In April of 2005, Johnson filed a third petition for post conviction relief. On June 6, 2005, this Court found the April 2005 petition untimely and issued a notice of intent to dismiss the third PCRA petition without a hearing. Johnson filed objections to the proposed dismissal on June 23, 2005. The notice of intent to dismiss remains outstanding.

On June 19, 2007, Johnson filed a supplement to the third PCRA petition. Shortly thereafter, on July 12, 2007, this Court entered an order holding proceedings in abeyance pending resolution of Johnson's federal petition for writ of habeas corpus. The federal proceeding in which Johnson seeks relief from his capital murder conviction is docketed at *Johnson v. Beard*, No.03-2156 (U.S. District Court, E.D. Pa). This federal proceeding had itself been in abeyance since March 15, 2004, when the United States District Court granted Johnson's motion and entered an order holding proceedings in abeyance pending completion of state court proceedings. This order remains in effect to this day.

In a different federal proceeding, Johnson

challenged the life sentence obtained in Berks County at No.1537 97 for his conviction of the 1996 murder of Jose Martinez. *Johnson v. Folino*, No. 04-02835 (U.S. District Ct., E.D. Pa.) In these federal proceedings, Johnson was able to obtain discovery. On August 3, 2007, the Berks County district Attorney filed a document stating the office had ful1y complied with the U.S. District Court order of January 4, 2007, to provide discovery. *See Johson v. Folino*, No. 04-2835 (U.S. District Court, E.D. Pa.) Doc. 72. 11. Johnson continued to press for, and obtain, various items of discovery through the Berks County District Attorney. By order of November 23, 2009, the U.S. District Court ruled on all outstanding requests for discovery and discovery was closed.

By order and opinion of August 12, 2010, the U.S. District Court denied a petition for writ of habeas corpus and ruled that a certificate permitting appeal to the United States Court of Appeals for the Third Circuit should not issue. Johnson filed a motion for re-consideration which is pending.

Even after Johnson's request to hold the instant PCRA proceedings in abeyance was granted, Johnson continued to file documents on August 2, 2007, November 16, 2007, September 26, 2008, and April 20, 2009.

Most recently, this Court entered an order on August 3, 2010, which allowed Johnson 30 days to file any amendment based upon completion of discovery in matter of *Johnson v. Folino*, No. 04-2835 (U.S. District Court, E.D. Pa)." In response, petitioner filed a document styled Fifth Supplemental Petition for post conviction relief. This filing continues to aver that the Commonwealth violated its obligation to produce impeachment evidence against Commonwealth witness George Robles. Johnson continues to allege that such materials would have demonstrated the Robles offered false testimony about Johnson to preserve and further Robles' "corrupt relationship" with Reading police.

DISCUSSION

The PCRA was enacted as a means of providing collateral relief for persons who have either been convicted of crimes they did not commit, or persons who are serving illegal sentences. 42 Pa. C.S.A. § 9543(a)(2). Pennsylvania law provides that in order to qualify for relief under the PCRA, the defendant must plead and prove by a preponderance of the evidence the following:

That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;
(ii) awaiting execution of a sentence of death for the crime; or
(iii) serving a sentence which much expire before the person may commence serving the disputed sentence.

That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth- determining process that no reliable-adjudication of guilt or innocence could have taken place.
(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.
(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed

and was properly preserved in the trial court.

(v) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vi) The imposition of a sentence greater than the lawful maximum.

(vii) A proceeding in a tribunal without jurisdiction.

That the allegation of error has not been previously litigated or waived. However, before we may reach the merits of the defendant's petition, we must first determine whether his petition satisfies the PCRA's jurisdictional time restrictions. It is well settled law that the filing of a PCRA petition is governed by specific time limitations, namely "any petition including a second or subsequent petition, *shall be filed within one year of the date the judgment becomes final*." 42 Pa. C.S.A. § 9545(b)(l). *Emphasis added*. A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." 42 Pa. C.S.A. § 9545(b)(3). Our Supreme Court has recognized that the PCRA time requirements are jurisdictional and go to the right or competency of the court to adjudicate a

controversy. *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). These limitations are mandatory and are interpreted literally; thus, a court has no authority to extend filing periods except as the statute permits. *Id.*

Under certain statutory exceptions, a PCRA court may entertain the merits of a petition that is untimely filed. In order to qualify for such an exception, a petitioner must plead and prove:

(i) the failure to raise the claim previously was the result of interference by government officials with presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
(ii) The facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
(iii) The right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(l)(i),(ii),(iii). The exceptions

themselves are subject to a time restriction and must be invoked within sixty days from the date the claim could have been presented. 42 Pa.C.S.A §9545(b)(2). Where the petition is untimely, the defendant has the .burden to plead in the petition and prove that one of the exceptions to the one-year filing requirement exists. *Commonwealth v. Murray*, 753 A.2d 201 (Pa. 2000).

In the instant case, defendant's petition patently exceeds the PCRA's time requirements and fails to meet any of the exceptions. Judgment against the Defendant became final on February 22, 2000, when the United States Supreme Court denied certiorari. *Johnson v. Pennsylvania*, 528 U.S. 1163, 120 S.Ct 1180, 145 L.Ed. 2d 1087 (February 22, 2000). Defendant had one year from that date in which to file a timely PCRA petition. Defendant has certainly utilized the PCRA and did indeed file a timely PCRA. This Court conducted hearings and denied relief. The most recent amendments to the Petition were filed in September of 2010. While we have given the defendant some leeway considering the capital nature of this case, the defendant fails to assert anything that will get him over the jurisdictional time bar hurdle. Defendant's third PCRA petition, as well as five of the six supplements to said petition each argue that additional evidence was available that would have enabled the defendant to better impeach Commonwealth witness, George Robles

(hereinafter Robles), and that said evidence was not turned over to the defense at the time of trial. This issue has already been litigated. On December 27, 2002, the Supreme Court of Pennsylvania affirmed this Court's dismissal of Defendant's PCRA Petition. In that opinion the court specifically addresses the Defendant's argument that the Commonwealth failed to disclose Robles' bail report as well as other evidence that Robles paid off the police. The Court determined that said evidence was not material and thus was not a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) as the defense did have an opportunity to question Robles regarding the conditions of his bail, and the defendant did not cite specific evidence regarding the conduct of the police. Similarly, the issues defendant has in his current PCRA Petition as well as in the supplements are immaterial. The Defendant argues again that Robles had a corrupt relationship with the police and cites several incidents unrelated to the Defendant's case in which Robles was allegedly involved and was not arrested. Some of the alleged incidents are post trial date. Access to other reports could pave been obtained through the exercise of due diligence. As the Commonwealth points out, on May 15, 1998 at a trial conference for Defendant's trial in the murder of Jose Martinez, a murder for which the Defendant was convicted and is currently serving a life sentence, Defendant's counsel, William C. Bispels, Jr., Esq. argued that Robles was involved

in criminal activity and remained uncharged. *See Commonwealth's Response*, 11/1/10 at 8. The Defendant himself notes, through the declaration of Dorothy Colona, that, "In 1998, everyone who lived on the block where George Robles lived knew he sold drugs." *See Fifth Supplemental Petition*, 9/3/l 0, at 6-7. Mr. Robles is clearly not a gentlemen of outstanding moral character, and by all accounts was a rather distasteful individual. However all of that information was previously available to the Defendant. The Defendant has raised the issue of Robles' credibility on direct appeal and in each PCRA he has filed to date.

Moreover, even were this petition to be deemed timely, the defendant's issues are non-meritorious. Nothing that the defendant alleges casts doubt upon the verdict rendered, nor has a miscarriage of justice occurred. There is nothing in any of defendant's filings since 2005 that warrant this Court give pause before dismissing the current PCRA Petition and the subsequent supplements.

While the Defendant argues that his failure to raise these challenges in a timely manner was the result of the interference of government officials there is no factual basis to support this contention. The documents alleged to have been withheld regarded Robles' conduct in other non-related cases. Moreover, the defense was well aware, as we noted above, of the character of George Robles. Due

diligence would have procured the documents sought.

Finally, the Defendant's claims are not based upon a right recently recognized by either the United States Supreme Court or the Pennsylvania Supreme Court.

We also note that in addition to the allegations regarding Robles, the defendant has filed
an additional supplemental petition entitled SUPPLEMENTAL PEITION PROMPTED BY A NEW NATIONAL ACADEMY OF SCIENCES REPORT FOR STATUTORY POST-CONVICTION RELIEF UNDER 42Pa.C.S. § 9542 et seq. AND CONSOLIDATED MEMORANDUM OF LAW. He alleges that STRENGTHENING FORENSIC SCIENCE- IN THE UNITED STATES: A PATH FORWARD (Feb. 2009) (hereinafter NAS Report) a report produced by the National Academy of the Sciences, constitutes •'newly discovered evidence," thus allowing him to get over the jurisdictional time bar hurdle. We do not agree. Chapter three of said report deals exclusively with "The Admission of Forensic Science Evidence in Litigation." In the first paragraph of The NAS report the author states that, [this] report describes and analyzes the current situation and makes recommendations for the future. No Judgment is made about past convictions and no view is expressed as to whether

courts should
reassess cases that already have been tried;" See NAS Report, Feb. 2009, at 85. (*emphasis added*). In *Johnston v. Florida*, 27 So.3d 11, 21 (Fl. 2010), the Florida Supreme Court, in a case similar to the one before this Court, denied the Defendant's Fifth (5th) PCRA Petition arguing that the NAS Report did not constitute "newly discovered evidence." The Court states:

The report cited by [the defendant] does not meet the test for newly discovered evidence. Pursuant to a 2005 federal law, a forensic science committee was created by the National Academy of Sciences to examine the status of and address the most important issues facing the forensic science community. The committee considered testimony and other data from a diverse group of entities and individuals who play a role in the field of forensic science. The committee developed a number of recommendations directed at enhancing education, furthering research, and developing more consistency across the forensic science disciplines. These findings and recommendations are discussed in the report ... First, we note that the report cites to existing publications, some of which were published even before [the victims] murder. The majority of the
remaining pub1ications were published during the years when [the defendant] was pursuing post conviction relief. Therefore, we decline to conclude

that the report is newly discovered evidence. Moreover, even if the report were newly discovered evidence, we conclude that the report lacks the specificity that would justify a conclusion that it provides a basis to find the forensic evidence admitted at trial to be infirm or faulty. The following statement in the report's executive summary is particularly telling: 'The committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning, level of development, and ability to provide evidence to address the major types of questions raised in criminal productions and civil litigation.

We too believe that the NAS Report does not constitute "newly discovered evidence." While the report seeks to advance the scientific community and the reliability of forensic evidence in the future, its suggestions and observations are not applicable or specific enough to call into question justly obtained past convictions. As the Florida Supreme Court noted above, some of the cited publications were available before defendant's trial and especially during the time when he filed his post conviction pleadings. These cited publications and cases could have been utilized by the defense at an earlier time with the exercise of due diligence. Moreover, the practices suggested by the NAS Report are not in place and are simply suggestions at this point in time. The methods used in this case

were the best available. To re-litigate every case based on speculations regarding how the evidence could and could not have been tested, would be not only impractical, but impossible.

We are cognizant of the capital nature of this case and the great burden which this Court bears in reviewing all of the evidence and case law. But, upon doing so, we do not waiver in the slightest that the Defendant's conviction was a just verdict, and that the Petitions presently before this Court are non-meritorious.

For all of the foregoing reasons, this court finds that defendant's PCRA should be DISMISSED without a hearing. The Defendant shall have twenty (20) days from the date of this Notice to respond to the proposed dismissal. If this court receives no response within that time period, an Order dismissing Defendant's Motion for Post Conviction Collateral Relief will be filed with the Clerk of Courts.

BY THE COURT:

Scott D. Keller, Judge

APPENDIX "H"

[J-148-2004]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 435 CAPITAL APPEAL DOCKET
Appellee	:	Appeal from the Order of the Court of Common Pleas of Berks County, Criminal Division, entered on November 26, 2003, denying PCRA relief at No. 118-97
v.	:	
RODERICK JOHNSON, Appellant	:	
	:	SUBMITTED: August 9, 2004

OPINION

MR. JUSTICE NIGRO

DECIDED: December 20, 2004

Appellant Roderick Johnson appeals from the order of the Court of Common Pleas dismissing his petition for relief filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, as untimely. We affirm.

On November 25, 1997, a jury convicted Appellant of, inter alia, two counts of murder in the first degree and, following a penalty-phase hearing, the jury returned a verdict of death against Appellant for each murder count. The trial court

officially imposed the sentences of death against Appellant on November 26, 1997. On direct appeal, this Court affirmed Appellant's judgment of sentence, Commonwealth v. Johnson, 556 Pa. 216, 727 A.2d 1089 (1999), and the U.S. Supreme Court denied certiorari in February 2000, Johnson v. Pennsylvania, 528 U.S. 1163, 120 S.Ct. 1180, 145 L.Ed.2d 1087 (2000).

Appellant then filed his first PCRA petition, which the PCRA court dismissed in October 2001. This Court affirmed in December 2002. Commonwealth v. Johnson, 572 Pa. 283, 815 A.2d 563 (2002). On September 11, 2003, Appellant filed the instant PCRA petition, his second, which the PCRA court dismissed as untimely. Appellant appealed to this Court, which has jurisdiction over the matter pursuant to 42 Pa.C.S. § 9546(d).[1]

Pursuant to the PCRA, a PCRA petition must be filed within one year of the date that the petitioner's judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). A judgment becomes final for purposes of the PCRA "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." 42 Pa.C.S. §

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[1] 42 Pa.C.S. § 9546(d) provides, in part, that "[a]n order under this subchapter denying a petitioner final relief in a case in which the death penalty has been imposed shall not be reviewable in the Superior Court but shall be reviewable only by petition for allowance of appeal to the Supreme Court."

9545(b)(3). If a PCRA petition is untimely, this Court has no jurisdiction over that petition. Commonwealth v. Murray, 562 Pa. 1, 753 A.2d 201, 202-203 (2000).

Here, Appellant concedes that he did not file his PCRA petition within one year of the date that his judgment became final. Appellant nonetheless contends that this Court must consider his petition as it fits within two of the three exceptions to the PCRA's timeliness requirements provided for by Section 9545(b)(1) of the PCRA. That Section provides:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> > (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> >
> > (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held to apply retroactively.

42 Pa.C.S. § 9545(b)(1). Any petition invoking one or more of these exceptions must be filed within 60 days from the date that the claim could have been presented. See 42 Pa.C.S. § 9545(b)(2).

Appellant argues that his petition falls both within the "governmental interference" exception, 42 Pa.C.S. § 9545(b)(1)(i), and the "newly-discovered evidence" exception, id. § 9545(b)(1)(ii), to the timeliness requirements, because the Commonwealth withheld impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In support of his claim, Appellant points to an affidavit written in July 2003 and signed in August 2003 by George Robles, a Commonwealth witness at Appellant's trial. Appellant contends that the Commonwealth withheld valuable impeachment evidence contained in Robles' affidavit, which, according to Appellant, demonstrates that Robles was a drug dealer who colluded with police.[2] As we

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[2] Appellant claims that Robles' July 2003 affidavit contained the following admissions:

> 1. Robles was a member of the group called Nyte Life Clique ("NLC"), which enabled him to "run the streets," *i.e.,* engage in drug trafficking.

conclude that Appellant's underlying Brady claim is without merit, we necessarily also conclude that Appellant has failed to show that his petition falls within any of the exceptions to the PCRA's time requirements. Cf. Commonwealth v. Breakiron, 566 Pa. 323, 781 A.2d 94, 98 (2001) (Section 9545(b)(1)(i) timeliness exception can be satisfied if appellant establishes meritorious Brady claim).

To prevail on a Brady claim, an appellant must demonstrate that "the evidence was favorable to [him], either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and

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2. Robles and other NLC members all had tattoos and Robles' tattoo specifically read "Gambino."
3. Robles once smoked marijuana with Angel Cabrera, a police officer involved in Appellant's case.
4. Officer Cabrera, Detective Bruce Dietrich and Officer Gerardo Vega would come to Robles for information.
5. Robles' relationship with law enforcement grew out of the fact that he ran the streets from 1994 to 2001.
6. Robles arranged for Appellant, who had been injured at the crime scene, to leave the hospital and come and stay with him for protection.

Appellant's PCRA petition, 9/12/03, Affidavit of George Robles. As a threshold issue, we note that Appellant fails to mention in his brief to this Court that Robles actually struck out two statements, numbered 3 and 5 above, in the affidavit and struck out the last portion of the statement numbered 1 above, i.e., that he engaged in drug trafficking. Thus, any of Appellant's arguments that are based on those statements necessarily fail and we will review only those arguments offered by Appellant that are based on the statements in the affidavit that were not crossed out by Robles

prejudice ensued." Commonwealth v. Burke, 566 Pa. 402, 781 A.2d 1136, 1141 (2001). No Brady violation occurs where the appellant knew or could have uncovered the evidence at issue with reasonable diligence. Commonwealth v. Morris, 573 Pa. 157, 822 A.2d 684, 696 (2003).

Here, Appellant first claims that the Commonwealth withheld information, outlined in Robles' affidavit, that Robles was a member of the NLC, that Robles and other members of the NLC had tattoos and that Robles' tattoo specifically read "Gambino." This claim is completely specious. In the first instance, the record establishes that Appellant plainly knew that Robles had a tattoo reading "Gambino," as his trial counsel actually asked Robles about the tattoo during cross-examination. See N.T., 11/20/97, at 528-29 (testimony from Robles in response to question from defense counsel that he has a tattoo that says "Gambino"). As for Appellant's contention regarding the fact that Robles was a member of the NLC and that members of the NLC had tattoos, the record clearly reflects that, at the very least, Appellant could have uncovered this evidence prior to trial with reasonable diligence. See Aff. of Iris Alvarez, attached to Appellant's Mot. for Certificate of Materiality Pursuant to 42 Pa.C.S. § 5961 et seq., 3/20/01 (stating that, as Appellant's then-girlfriend and Robles' cousin, she possessed information that Robles was a member of the NLC and that members of the NLC had tattoos). Thus, it is clear that there was no Brady violation in connection with this information. See Morris, 822 A.2d at 696.

Appellant also claims that Robles' affidavit contained an admission that he arranged for Appellant to stay at Robles' house after Appellant was injured at the crime scene. However, the record again shows that Appellant must have been aware of this information, given that Appellant did, in fact, stay with Robles after checking himself out of the hospital, contrary to medical advice. Tr. Ct. Findings of Fact in Disposition of Def.'s Pretrial Omnibus Mot., 7/17/97, at 6. Accordingly, as with his claim regarding the tattoos, Appellant has completely failed to establish that the Commonwealth violated Brady, as the record shows that he was already well aware of the information allegedly withheld by the Commonwealth. See Morris, 822 A.2d at 696.

Appellant also bases his Brady claim on his contention that the Commonwealth withheld the information offered by Robles in his affidavit that Officers Cabrera and Vega and Detective Dietrich often came to Robles for information. Appellant, however, completely fails to show why this evidence could not have been obtained prior to trial, especially when he alleges in his own brief that other witnesses were aware that Robles provided police with information. See Appellant's Bf. at 9 ("Robles boasted to Allyn Ammoons that Mr. Robles did not have to worry about the police because he ... provided them with information"). Thus, Appellant has simply failed to show that the Commonwealth violated Brady and we therefore agree with the PCRA court that Appellant has, in turn, failed to satisfy any of the exceptions to the PCRA's time

restrictions based on his Brady claim.[3]

Appellant argues, however, that he could not have discovered any of the information contained in Robles' affidavit, even with due diligence, before the taking of Robles' affidavit in July 2003 because Robles threatened defense investigators when they approached him in the summer of 2000, and that "the investigators could not interview Mr. Robles earlier." Appellant's Bf. at 13. This claim is completely disingenuous, however, as Appellant's counsel did in fact interview Robles twice prior to Appellant's trial. See Tr. Ct. Op., 6/3/98, at 18. Moreover, Appellant does not address why he could not get the information contained in Robles' affidavit from other sources. Instead, Appellant

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[3] In apparent support of his general allegation that the Commonwealth withheld information reflecting that Robles had an improper relationship with the police, Appellant seems to aver that the Commonwealth also withheld a letter Robles wrote to Officer Cabrera, evidence that Robles was paying off the police, as well as a material witness bail reduction report relating to Robles. However, given that Appellant has previously brought Brady claims, on direct appeal or in his first PCRA petition, based on these very pieces of evidence, it is abundantly clear that Appellant cannot now say that any of this evidence is "newly-discovered" or that he brought this claim within 60 days of the date the claim could have been presented. *See* Commonwealth v. Johnson, 815 A.2d at 573 (rejecting Appellant's Brady claim based on bail report and "pay-off" evidence); Commonwealth v. Johnson, 727 A.2d at 1094-96 (rejecting Appellant's Brady claim based on letter Robles wrote to Officer Cabrera). Thus, Appellant has failed to demonstrate that his petition fits within any of the timeliness exceptions based on a Brady claim relating to these particular pieces of evidence.

appears to argue that, even if this information had been available prior to the taking of the affidavit, the fact that Robles subsequently admitted to these alleged facts brings his claim within the scope of the after-discovered evidence exception. The after-discovered evidence exception, however, focuses on newly discovered facts, not on a newly discovered or a newly willing source for previously known facts. See 42 Pa.C.S. § 9545(b)(1)(ii). Thus, a witness' admission of evidence previously available to a petitioner cannot resurrect an untimely PCRA claim as such a result would clearly run contrary to the plain language of the exception that "the facts upon which the claim is predicated were unknown to the petitioner...." See id. (emphasis added).

In the alternative, Appellant argues that his trial counsel was ineffective because he failed to use either the information referenced above or other impeachment evidence he had in his possession on Appellant's behalf. Apparently, Appellant claims that such ineffectiveness constitutes after-discovered evidence and his petition should therefore be considered timely under the after-discovered evidence exception to the timeliness restrictions. However, this Court has previously held that the after-discovered evidence exception does not apply where a petitioner merely alleges that competent counsel would have presented other claims based on a better evaluation of the facts available at the time of trial. Commonwealth v. Gamboa-Taylor, 562 Pa. 70, 753 A.2d 780, 786 (2000); Commonwealth v. Pursell, 561 Pa. 214, 749 A.2d 911, 916-17 (2000). Thus,

this claim also fails.[4]

In sum, we conclude that Appellant's PCRA petition was untimely and did not meet any of the exceptions to the PCRA timeliness requirements. We therefore affirm the order of the PCRA court dismissing the instant petition for lack of jurisdiction.

Judgment entered
Dated: December 20, 2004

/s/
John W. Person, Jr., Esquire
Deputy Prothonotary

[4] Within his argument that his petition fits within two of the exceptions to the timeliness requirements of the PCRA, Appellant argues that dismissing his petition would constitute a miscarriage of justice because the prosecution violated his fundamental constitutional rights, the PCRA court's reasoning was incorrect, and the PCRA court was biased against him. This Court has held, however, that an allegation of miscarriage of justice may not be considered unless the Court has jurisdiction to review the appellant's petition, and such jurisdiction does not exist when the appellant's petition is untimely and fails to satisfy one of the exceptions to the PCRA timeliness requirements. Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214, 223 (1999); Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d 638, 642 (1998).

APPENDIX "I"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
	: CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER AND NOTICE OF INTENT TO DISMISS

AND NOW, this 31st day of October 2003, notice is hereby given by the Honorable Scott D. Keller of its intention to dismiss the defendant's second Petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. 9541 et seq., pursuant to Pennsylvania Rule of Criminal Procedure 907. The Court find the petition is out of time and none of the exceptions to the one-year filing requirement are met.

On November 25, 1997, the defendant was convicted of two counts of murder in the first degree and related offenses and was represented at trial by John Adams, Esquire and Randall Miller, Esquire. The defendant was sentenced to death on November 26, 1997 after a sentencing hearing.

The defendant appealed and the Supreme Court of Pennsylvania affirmed the defendant's convictions and sentence on March 26, 1999. The defendant filed an application for reargument which was denied on June 28, 1999. On August 31, 1999, a petition for certiorari to the Supreme Court of the United States was filed with the court but

was denied on February 22, 2000.

On April 26, 2000, the defendant's first PCRA petition was filed. On July 7, 2000, after the court had already denied the defendant's request to file a second amended petition, the defendant filed a "Supplement to Amended Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. §9542 et. seq." This was followed by a second attempt by the defendant to supplement his petition, however the court refused to consider it. On February 5, 2001, the Commonwealth filed an Answer to the defendant's requests for relief. On May 1, 2001, the defendant again attempted to supplement his petition, and again this court denied it by an order dated May 11, 2001.

A hearing was held on the PCRA petition on May 11, 2001, during which numerous pages of testimony were taken. The court determined another hearing was necessary and held that hearing on August 3, 2001. Before that hearing on July 1, 201, the defendant again filed a motion to supplement his PCRA petition, and said motion was denied on the same day.

On October 2, 2001, this Court issued an Order and Notice of Intent to Dismiss the defendant's petition and on October 25, 2001, the defendant's petition was dismissed. The defendant appealed the dismissal of his PCRA petition all the way to the Supreme Court of Pennsylvania, which affirmed this Court's denial of relief on December 27, 2002. On February 21, 2003, the defendant's

timely application for re-argument was denied.

On September 11, 2003, the defendant filed his second PCRA petition, through his counsel, Billy H. Nolas, Esquire and Samuel J.B. Angell, Esquire, Defender Association of Philadelphia. On September 23, 2003, this Court ordered the Commonwealth to file a response to the defendant's petition within thirty (30) days. The Commonwealth filed its response on October 23, 2003, finding that no relief is warranted. After conducting an independent review of the defendant's second PCRA petition and the complete record on file with the Berks County Clerk of Courts, this court is of the opinion that the defendant's petition should be dismissed without a hearing pursuant to Pa. Rule Crim. P. 907(a) because it is untimely and none of the exceptions are met.

Throughout the defendant's petition, the following issues were raised:

1. Petitioner was denied *his* state and federal constitutional rights where the Commonwealth failed to disclose exculpatory evidence that was material to petitioner's guilt or innocence and his sentencing proceeding.

2. The evidence not disclosed goes to the heart of the Commonwealth's case against Petitioner. The prosecution's failure to disclose this evidence undermines confidence in the outcome of both the guilt and penalty phases of the trial. The evidence was

admissible to show Robles' bias and to show that Robles inculpated Petitioner to protect Robles' drug operation.

1. The information obtained from Robles could not have been obtained earlier in the exercise of due diligence. To the extent that counsel became aware of this withheld evidence but failed to use this information on Petitioner's behalf, either by impeaching witnesses, moving for appropriate relief before the trial court, incorporating this evidence in post-trial motions, or in seeking relief in the Pennsylvania Supreme Court, Counsel was ineffective and had no tactical or strategic reason for failing to do so, violating Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and *his* corresponding rights under Article 1, sections 9 and 13 of the Pennsylvania Constitution.

(Defendant's "Petition for Statutory Post Conviction Relief..."at 3, 7 and 8).

Before reaching the merits of the defendant's petition, this court must determine whether *his* motion satisfies the PCRA's jurisdictional time restrictions. Commonwealth v. Breakiron, 781 A.2d 94, 97 (Pa. 2001). Pursuant to 42 Pa.C.S.A. §9545 (b)(1), the filing of a PCRA petition is governed by specific time restrictions:

> Any petition under this subchapter, including a second or subsequent petition,

> shall be filed within one year of the date the judgment becomes final.

(emphasis added). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking review." 42 Pa.C.S.A. §9545(b)(3).

The one year filing time restriction is subject to three statutorily listed exceptions, where the petitioner alleges and proves (1) governmental interference prevented the raising of a claim; (2) new facts are discovered which could not have been ascertained earlier with due diligence; or (3) a newly recognized constitutional right that applies retroactively. 42 Pa.C.S.A. §9545(b)(l)(i);(ii),(iii). The exceptions themselves are subject to a time restriction and must be invoked within sixty days from the date the claim could have been presented. 42 Pa.C.S.A. §9545(b)(2).

The defendant has conceded that his second petition has been filed well beyond the one-year filing deadline, however he has asserted that his claims meet the first two exceptions to the filing requirement. Further he has claimed, if they do not meet these exceptions, the petition should be considered timely because to not do so would be a "miscarriage of justice." The defendant claims that the Commonwealth failed to disclose exculpatory material, namely impeachment evidence that would have discredited Mr. Robles and that this resulted in governmental interference and the

discovery of new facts. However, this Court finds the defendant has not met either exception.

The defendant asserts in his petition that the Commonwealth failed to introduce impeachment evidence relating to the key witness to the shooting, Mr. Robles, in that an affidavit was taken by Mr. Robles that shows he allegedly was taking part in illegal actions with and around officers. This information, the defendant argues, could fall under the governmental interference exception or the newly discovered facts exception.

When a defendant, as here, claims governmental interference based on a Brady violation, the defendant must establish when and how he discovered the material allegedly withheld and explain why the information, with due diligence, could not have been obtained earlier. Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa.2001). In this case, the information that was allegedly withheld could have been obtained prior to the time the affidavit was' written by Mr. Robles. The same information was referenced in the defendant's first PCRA petition, and the information about Mr. Robles was included in the trial transcript from 1998. Therefore, the information could have been obtained and included in the previous PCRA petition, and does not meet the governmental interference exception.

To meet the second exception to the one-year filing requirement, the defendant must show "the facts upon which the claim is predicated were unknown to the petitioner · and could not have been ascertained by the exercise of due diligence."

Commonwealth v. Yarris, 731 A.2d 581, 587 (Pa.1999). The defendant does not meet this standard for several reasons. First, the defendant argues this evidence could not have been obtained prior to Mr. Robles' affidavit, and this affidavit could not be taken previously because he refused to be interviewed. However, he also admits that previous counsel became aware of this information to some extent. (See paragraph 26 of petition). This court finds that the information was clearly available, as was explained above. Defendant claims that counsel was ineffective for not using this information, and, impliedly, they should now be a claim that it is new information. However, ineffectiveness is not an exception to the one-year filing requirement and will not be taken into consideration. Therefore, because the information about Mr. Robles was included in a trial transcript from 1998 and the defendant's first PCRA petition referenced information from that same trial, the information at issue here is not after-discovered evidence.

The defendant also argues, even if this court finds the claims in his petition do not meet the exceptions to the one-year filing requirement, the petition is entitled to adjudication based on its merits because to not do so would create a "miscarriage of justice." A "miscarriage of justice" occurs only when it is established that a particular omission or commission was so serious as to undermine the reliability of the proceeding. Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988) (Papadakos, J., concurring). The defendant bases his "miscarriage of justice" claim on the alleged Brady violations. He claims that the

impeachment information that was allegedly withheld would have affected the reliability and fairness of the proceedings, and therefore to not review his petition on the merits would be a "miscarriage of justice." However, this Court does not characterize the evidence as Brady material, and even if it were characterized as such, there was overwhelming evidence of guilt presented at trial, to the point that even if this was presented, the outcome likely would not have changed. Clearly, the omission of this evidence does not rise to the level of undermining the reliability of the proceedings. Therefore, the claims presented are not sufficient to meet the "miscarriage of justice" standard.

Therefore, because the defendant's petition does not meet one of the timeliness exceptions, nor would dismissing the petition create a "miscarriage of justice," this Court considers it untimely and intends to dismiss it. The defendant has twenty (20) days from the date of this notice of intent to dismiss to respond to the proposed dismissal. If this court receives no response within the twenty-day time period, an order dismissing the Motion for Post Conviction Relief will be filed with the Berks County Clerk of Courts.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

APPENDIX "J"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
	: CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER

AND NOW, this 26th day of November 2003, this court having taken due consideration of Defendant's "Objection To Order and Notice Of Intent To Dismiss," pursuant to the Post Conviction Relief Act (hereinafter "PCRA'), 42 Pa.C.S.A. §9541 et seq., and Pennsylvania Rule of Criminal Procedure 907, it is hereby ORDERED AND DECREED that defendant's PCRA petition is DISMISSED.

The defendant asserts in his objection that this Court misconstrued paragraph 26 in his PCRA petition by reading it as stating that previous defense counsel knew about the information, not reading it as stating the alternative argument if the defense counsel knew about this information and did not use it, counsel was ineffective. This Court admits that it may have misconstrued what petitioner's argument was, however, even if defense counsel did not know about the information, it was still possible it could have been obtained with the exercise of due diligence, which is the basis of the newly discovered facts exception. As stated in the order and notice of intent to dismiss,

ineffectiveness of counsel is not an exception to the filing requirement. Therefore, the alternate argument will not be entertained. This Court's decision that the petition does not meet the newly discovered facts exception will be based on the fact that the information allegedly newly discovered was available previously, evidenced by the use of information in his first PCRA petition regarding Mr. Robles coming from a 1998 trial transcript.

The defendant's petition is dismissed based on the reasons set forth in this order and the order and notice of intent to dismiss. The defendant is hereby notified that he has the right to appeal this order to the Superior Court of Pennsylvania. An appeal must be taken within thirty (30) days from the date of this order.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

APPENDIX "K"

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 361 CAP
V.	:	Appeal from the Order of October 25, 2001 Court of Common Pleas of Berks County, Criminal Division,
RODERICK JOHNSON Appellant	:	dismissing PCRA relief No. 118-97
	:	SUBMITTED: July 22, 2002

OPINION

MADAME JUSTICE NEWMAN DECIDED: December 27, 2002

Roderick Andre Johnson (Johnson) appeals from an Order of the Court of Common Pleas of Berks County (PCRA court) denying his Petition for Post-Conviction Relief pursuant to the Post-Conviction Relief Act [1] (PCRA). For the reasons set forth herein, we affirm the decision of the PCRA court.

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[1] 42 Pa.C.S. § 9541, et seq.

FACTS AND PROCEDURAL HISTORY[2]

The police charged Johnson, along with co-Defendants, Shawn Bridges (Bridges) and Richard "Rambo" Morales (Morales), with the murders of Damon Banks (Damon) and Gregory Banks (Gregory). Based in large part on statements Johnson gave to police, the record indicated that someone robbed the girlfriend of Bridges at gunpoint on December 7, 1996. The robbers indicated that they were looking for drugs and money. They did not find any drugs or money, but they did abscond with a camcorder and Sony PlayStation. News of this incident traveled quickly to Bridges, whose girlfriend informed him that the robbers wore green masks and green "hoodies." Bridges recalled seeing Damon and Gregory wearing green "hoodies" earlier that day. Bridges and Johnson went to the home of Morales; while there, Bridges grabbed a shotgun and mentioned that he wanted to go to the home of Damon and Gregory and murder them. Bridges showed Johnson and Morales a 9-millimeter Glock pistol that he had on his person.

The following day, Johnson, Bridges, and Morales went to a local K-Mart© to purchase shotgun shells. Soon thereafter, they traveled in a minivan to the home of Damon and Gregory. While Bridges was in the house talking to Damon and

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[2] The facts recited herein are taken in large part from the March 26, 1999 Opinion of this Court, authored by this Justice, on direct appeal of Johnson's two convictions for first-degree murder. Commonwealth v. Johnson, 556 Pa. 216, 727 A.2d 1089 (1999), cert. denied, 528 U.S. 1163, 120 S.Ct. 1180, 145 L.Ed.2d 1087 (2000) (Johnson I).

Gregory, Johnson noticed a woman unloading groceries next door. Bridges emerged from the house with Damon and Gregory and stated that he wanted them to take care of drug-selling operations while he was away. Damon and Gregory got into the minivan with Bridges, Johnson, and Morales. The group drove to a dirt road near a car lot and construction site. Bridges and Morales got out of the van and asked Damon and Gregory to accompany them to the location where the drugs were hidden. When Damon and Gregory refused, Bridges and Morales returned to the van and Bridges separately informed Johnson that he (Bridges) was going to shoot Damon and Gregory on the count of three. According to Johnson, Bridges then walked around to the front of the minivan, where Damon and Gregory were standing, and shouted, "What's on station two and three?" At that point, Bridges started shooting. In his statements to the police, Johnson claimed that Bridges also fired a shot at him, striking Johnson in the side of his torso. Bridges then drove away and Johnson walked approximately two miles to the Queen City Restaurant, where he was subsequently picked up and taken to the hospital for treatment of his gunshot wound.

The Commonwealth tried Johnson separately from Bridges and Morales for the murders of Damon and Gregory. At trial, the Commonwealth presented a crucial piece of evidence contradicting the claim of Johnson that he was not involved as a shooter. The Commonwealth introduced the testimony of a forensic pathologist, who stated that one of the bullets recovered from the body of Damon was a .38 caliber bullet.

According to the testimony of the ballistics expert for the Commonwealth, the murder weapon was a .38 caliber handgun; police recovered a .38 caliber handgun close to the scene of the murder. George Robles (Robles), a friend of Johnson who was a witness for the Commonwealth, testified that Johnson possessed a .38 caliber handgun like the one found at the murder scene. Robles also stated at trial that when he visited Johnson in the hospital, Johnson told him that he had taken the handgun with him, had wiped it off with his shirt, and threw it on the side of the road within one-quarter mile of the murder scene. On November 26, 1997, a jury convicted Johnson of two counts of first-degree murder.[3]

During the penalty phase, the Commonwealth presented the testimony of Robles that Johnson was the "enforcer" for the drug operations of Bridges and that the murder occurred in connection with drug sales, in support of the aggravating circumstance that the murder was committed in connection with drug activity,[4] which the jury unanimously found. The jury found as a mitigating circumstance in the murder of Damon that Johnson had no significant criminal history.[5] The jury determined that the aggravating circumstance outweighed the mitigating circumstance and the court imposed a death sentence accordingly. When determining the

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[3] 18 Pa.C.S. § 2502(a).

[4] 42 Pa.C.S. § 9711(d)(14).

[5] 42 Pa.C.S. § 9711(e)(1).

sentence to impose on Johnson for the murder of Gregory, the jury found that the mitigating circumstance that Johnson had no significant criminal history was no longer true because Johnson had just killed Damon. "Upon questioning from the judge, the jurors stated that because there was testimony that [Damon] died before [Gregory], [Johnson] would have had a 'criminal history' (i.e. the murder of [Damon]) when [Gregory] was killed." Johnson I, 727 A.2d at 1102-1103. Thus, the jury found one aggravating circumstance and no mitigating circumstances, mandating a sentence of death.

On direct appeal, we affirmed the convictions and death sentences imposed on Johnson; the United States Supreme Court denied *certiorari.* On March 19, 2000, then Governor Ridge signed a death warrant for Johnson, whose execution the Commonwealth scheduled for May 11, 2000. On April 11, 2000, Johnson filed a Motion for an Emergency Stay of Execution and a *pro se* Petition for Post-Conviction Relief in the PCRA court. The PCRA court appointed counsel for Johnson, who filed a First Amended PCRA Petition on April 26, 2000. After reviewing the Motion for an Emergency Stay of Execution, the PCRA court refused to grant a stay. The court also denied the request of Johnson to file a Second Amended PCRA Petition. On May 8, 2000, this Court granted Johnson an Emergency Stay of Execution. Commonwealth v. Johnson, 561 Pa. 489, 751 A.2d 647 (2000) (Johnson II). On July 7, 2000, despite the Order of the PCRA court denying the request of Johnson for leave to file a Second Amended PCRA Petition, counsel for Johnson filed a Supplement to the First

Amended PCRA Petition. On August 25, 2000, the PCRA court conducted a hearing to determine whether to amend the First Amended PCRA Petition to include those issues raised in the Supplement to the First Amended PCRA Petition. The court permitted the amendment and gave Johnson forty-five additional days in which to file additional materials in support of his position. On October 10, 2000, counsel for Johnson filed a Second Supplement to the First Amended PCRA Petition. As Johnson presented this document to the court more than forty-five days after the August 25th Order, the PCRA court denied the Second Supplement to the First Amended PCRA Petition on October 12, 2000.

On February 23, 2001, the PCRA court dismissed most of the issues Johnson raised without a hearing and scheduled hearings for the remaining seven contentions. In July of 2001, Johnson again filed a Motion to Supplement the PCRA Petition, constituting his Third Supplement to the First Amended PCRA Petition. This new supplement raised two new issues; the PCRA court denied the motion. The PCRA court conducted hearings on the seven remaining issues on May 11, 2001, and August 2, 2001. By Order dated October 25, 2001, the PCRA court denied the PCRA Petition of Johnson. On November 21, 2001, Johnson filed a Notice of Appeal to this Court pursuant to). 42 Pa.C.S. § 9546(d).

ISSUES[6]

On appeal to this Court from the denial of his PCRA Petition, Johnson raises the following twenty-three allegations of error:

> 1. Did the Commonwealth present insufficient evidence to establish the aggravating circumstance set forth in 42 Pa.C.S. § 9711(d)(14), in violation of the Sixth, Eighth, and Fourteenth Amendments?
>
> 2. Was trial counsel ineffective for failing to adequately move to suppress Johnson's statements to law enforcement authorities?
>
> 3. Was Johnson denied a fair trial because counsel did not effectively cross-examine material witness George Robles and because the Commonwealth did not disclose a bail report and other evidence that Robles was paying off police officers, all in violation of Johnson's Sixth, Eighth, and Fourteenth Amendment rights?
>
> 4. Under the proper materiality standard, when considering the *Brady* claim regarding the Robles letter, is Johnson entitled to relief and was trial counsel ineffective for failing to get the Robles letter?

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[6] We have renumbered the issues presented by Johnson for ease of discussion.

5. Was counsel ineffective for failing to request that the trial court dismiss the venire panel when three potential jurors were involved in a conversation about the case with the investigating police officer, in violation of the Sixth, Eighth, and Fourteenth Amendments?

6. Was Johnson denied a fair and impartial jury in violation of his Sixth, Eighth, and Fourteenth Amendment rights where the Berks County jury selection procedure systematically excluded minorities?

7. Was Johnson denied his right to effective assistance of counsel during jury selection in violation of the Sixth, Eighth, and Fourteenth Amendments where trial counsel failed to object to removal for cause, or attempt to rehabilitate, jurors who expressed some reservations about the death penalty?

8. Was Johnson denied a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments when counsel failed to seek a mistrial when, at trial, the aunt of the decedent was disruptive and crying in the first row of the gallery, right next to the jury box?

9. Was counsel ineffective for presenting an inconsistent defense conceding guilt in violation of the Sixth, Eighth, and Fourteenth Amendments?

10. Was trial counsel ineffective for failing to investigate and raise a diminished capacity defense?

11. Was trial counsel ineffective for failing to call witness Iris Alvarez to testify regarding Commonwealth witness George Robles?

12. Was counsel ineffective for failing to object when the trial court gave an improper instruction on accomplice liability, in violation of Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments?

13. Did counsel's failure to employ a ballistics expert constitute ineffective assistance?

14. Was trial counsel ineffective for failing to investigate, develop, and present relevant mitigating evidence of Johnson's good conduct during incarceration?

15. Was counsel ineffective for failing to seek a proper jury instruction that the jury was bound by the stipulation of the parties and for failing to raise on appeal that the jury improperly rejected the 42 Pa.C.S. § 9711(e)(1) "no significant history of prior criminal convictions" mitigating circumstance in violation of the Sixth, Eighth, and Fourteenth Amendments?

16. Was trial counsel ineffective for failing to investigate substantial mitigating evidence that was readily available, to present that evidence to the jury, and to argue numerous mitigating factors as a basis to spare Johnson's life, in violation of the Sixth, Eighth, and Fourteenth Amendments?

17. Was counsel ineffective for failing to object to the trial court sending out written instructions with the jury during the sentencing phase, which error was compounded because the instructions erroneously denied Johnson the presumption of life?

18. Was counsel ineffective for failing to object to the trial court's jury instruction, for failing to request an Enmund v. Florida instruction at the sentencing stage, and for not raising the issue on appeal, in violation of Johnson's Sixth, Eighth, and Fourteenth Amendment rights?

19. Was trial counsel ineffective for failing to properly investigate the evidence of the 42 Pa.C.S. § 9711(d)(14) aggravator, and for failing to request, during the sentencing phase, an adequate period of time to investigate a police report requested before trial but received during trial?

20. Did the prosecutor engage in misconduct where he repeatedly asked about Johnson's alleged failure to show

remorse and, after this occurred, was counsel ineffective for failing to seek a curative instruction and/or a mistrial and for failing to raise the issue on appeal?

21. Is Johnson entitled to a new sentencing hearing because the trial court failed to properly instruct the jury on the nature and use of aggravating and mitigating factors, in violation of the Sixth, Eighth, and Fourteenth Amendments?

22. Was counsel ineffective for failing to move to bar the 42 Pa.C.S. § 9711(d)(14) aggravator as unconstitutionally vague, overbroad, and arbitrary, and for failing to object to the aggravator on these grounds and to raise the error on appeal, in violation of Johnson's Sixth, Eighth, and Fourteenth Amendment rights?

23. Was counsel ineffective for not seeking an instruction that Johnson would be ineligible for parole, did the trial court err in not providing such an instruction, and was counsel ineffective for failing to raise the error on appeal, in violation of the Sixth, Eighth, and Fourteenth Amendments?

DISCUSSION

Previously Litigated Claims

As a preliminary matter, Johnson's first two allegations of error-insufficiency of the 42 Pa.C.S. §

9711(d)(14) aggravating circumstance (claim 1) and ineffectiveness of counsel for failing to "adequately" move to suppress statements Johnson made to law enforcement authorities from December 8, 1996, through December 12, 1996 (claim 2)-have been previously litigated. Section 9544(a)(2), 42 Pa.C.S. § 9544(a)(2), provides that an issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.] As part of the independent review of the Record that this Court conducted in the direct appeal of Johnson's conviction and death sentence, we specifically addressed the sufficiency of the (d)(14) (murder committed in conjunction with drug activity) aggravating circumstance and found the evidence of that aggravator to be sufficient. Johnson I, 556 Pa. 216, 727 A.2d 1089, 1102-1103. Additionally, on direct review we rejected the arguments of Johnson that the trial court erred in failing to suppress the December 1996 statements of Johnson.[7] Id. at 1098-1099. For this reason, these issues are not appropriate for collateral review.

Commonwealth Witness Robles

Johnson raises four distinct claims stemming from the testimony of Commonwealth witness

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[7] On direct appeal we rejected the underlying substance of the claim of Johnson-he raises it here as a claim of ineffective assistance of counsel, but as one of the prerequisites for finding ineffective assistance of counsel we need to find that the underlying claim has arguable merit. Because there is no underlying claim with arguable merit, no further inquiry is necessary.

Robles. Johnson contends that: (1) the Commonwealth committed a Brady violation by failing to disclose a bail report and other evidence that Robles paid off police; (2) trial counsel was ineffective for failing to effectively cross-examine Robles; (3) this Court used the incorrect materiality standard for determining whether the Commonwealth violated Brady by not turning over a letter in which Robles stated that he would do anything to get out of jail; and (4) trial counsel was ineffective for failing to procure the Robles letter. To demonstrate ineffective assistance of counsel, one must show: (1) that the [underlying] claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and, (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999). Counsel will not be deemed ineffective for failing to raise a meritless claim. Commonwealth v. Tilley, 566 Pa. 312, 780 A.2d 649 (2001).

Regarding the first sub-issue, failure to disclose the bail report and other evidence that Robles paid off the police, this evidence is not material. It is well settled that a *Brady* violation exists only where the prosecution failed to disclose material evidence that deprived the defendant of a fair trial. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

the proceeding would have been different .... A reasonable probability [is a probability sufficient to] undermine confidence in the outcome." Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotations and citations omitted). Johnson cites to a bail report on Robles, that Johnson contends could have helped him impeach Robles. According to Johnson, the report states that his bail is conditioned upon his appearance at court proceedings, reporting any changes of address, and undergoing drug testing and counseling. We fail to see how this report, if it had been disclosed to Johnson, would have changed the result of the proceeding. In his question to this Court, Johnson refers to other evidence that the police paid off Robles, but he does not cite to any such evidence in his argument. Johnson also posits that trial counsel was ineffective for failing to cross-examine Robles in this regard, but the Record indicates otherwise. Attorney Adams specifically asked Robles the following question: "They gave you bail because you agreed to testify, is that correct?" Trial N.T., 11/20/97, page 523. Robles responded: "No, they gave me bail because I met whatever requirements I needed to make bail." Id. We refuse to find counsel ineffective because he did pursue this argument.

The other two allegations of Johnson in this regard stem from this Court's discussion of the Robles letter on direct appeal, wherein we stated that it was not material pursuant to Brady. Johnson correctly notes that we did not employ the proper standard for analyzing his claim. In Johnson I, we stated that where a defendant makes "a general request for exculpatory evidence, then the

evidence is considered material only if the omitted evidence creates a reasonable doubt that did not otherwise exist." Johnson I, 727 A.2d at 1094. However, the Supreme Court has abolished the distinction between general and specific discovery requests and now determines materiality by questioning whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433, 115 S.Ct. 1555. As it relates to the facts of this case, the difference between the two standards does not come into play in the case *sub judice* and, therefore, Johnson did not suffer any prejudice as a result of our error. Likewise, as we have determined that Johnson has failed to meet his burden of proving materiality pursuant to Brady, he cannot establish the requisite prejudice to succeed on a claim of ineffective assistance of counsel.

Venire Panel Members' Conversation with Police Officer

Johnson next contends that trial counsel was ineffective for failing to request that the trial court dismiss the venire panel when three potential jurors had an impermissible conversation with Lieutenant Dunn, the investigating police officer. During voir dire, Lieutenant Dunn described the conversation as follows:

> Lieutenant Dunn: I was talking with Children and Youth, one of their investigators from the case I'm working, and she asked me how the jury selection was going. I said, it's slow. And she said, how's Mr. Johnson. I said, he's cleaned up his act.

And one of the jurors said, oh, did we have to buy that suit? And I turned around, and there she was standing. She said, he looks nice in that suit, I guess we have to pay for it. And there was an older gentleman standing there. She said to me, are you an attorney? And he said, no, he's the Chief of Police from Exeter. So that's what was said.

The Court: Well, where did this occur?

Lieutenant Dunn: In the smoke-at the back of the building where they smoke, where people stand outside and smoke, in that little doorway.

The Court: In the services center?
Lieutenant Dunn: Yes, the Services Center. I believe they weren't picked yet.

The Court: All right. There were two then?

Lieutenant Dunn: Two females and a male.

The Court: Two females and a male. Three people.

Lieutenant Dunn: I said to them, don't talk to me. And the other female said, well, these people would do anything to get off the jury, something to that effect.

Notes of Testimony (N.T.), Voir Dire, 11/13/97, pages 300-301. The trial court identified the two female jurors and questioned them on the Record; both indicated that they had not told anyone else about the conversation. N.T. Voir Dire, 11/13/97,

pages 420-429. The court excused both potential jurors from the venire panel. Lieutenant Dunn was never able to identify the male whom he had observed, though both females thought that he may have been a venire person.

Johnson makes allegations that this male may have spoken with other jurors about the conversation; however, the PCRA court correctly notes that he has given "no indication other than the wildest speculation that this unknown man may have somehow tainted the jury." Opinion of the PCRA Court, February 23, 2001, page 18. Clearly this conjecture does not establish any prejudice suffered by Johnson. "Absent a demonstration of prejudice, [a PCRA petitioner] cannot prevail on a claim for ineffective assistance of counsel and no further inquiry into the claim is warranted." Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203, 221 (2001) (citing Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (2000), cert denied, 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000)).

Alleged Racial Bias of Berks County Jury Selection Procedure

Johnson next alleges that he was denied a fair and impartial jury because the jury selection procedure utilized in Berks County has a racial bias, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. To establish a violation of the requirement that the pool of prospective jurors is a fair representation of the community, "a defendant must show that: (1) the group allegedly excluded is a distinctive group

in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) this under[-]representation is due to systematic exclusion of the group in the jury selection process." Commonwealth v. Craver, 547 Pa. 17, 688 A.2d 691, 696 (1997), cert denied, 522 U.S. 834, 118 S.Ct. 104, 139 L.Ed.2d 58 (1997) (quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979)). "'Systematic' means caused by or inherent in the system by which juries were selected." Id. (quoting Duren, 439 U.S. at 366-367, 99 S.Ct. 664).

Specifically, Johnson complains that Berks County's use of driver's registration lists as the basis for the jury pool has the effect of systematically excluding minorities. In Commonwealth v. Bridges, 563 Pa. 1, 757 A.2d 859 (2000), cert denied, 535 U.S. 1102, 122 S.Ct. 2306, 152 L.Ed.2d 1061 (2002), the same Bridges involved in the case *sub judice,* we rejected a similar claim that a jury pool compiled from voter registration lists systematically excluded minorities. In Bridges, we stated that "a criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that blacks are underrepresented in voter lists because such computer generated lists are compiled without regard to race." *Id.* at 868 (quoting Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 933 (1990), cert denied, 499 U.S. 931, 111 S.Ct. 1338, 113 L.Ed.2d 269 (1991)) (internal quotation omitted); *see also* Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 114 (1998),

cert denied, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999); Commonwealth v. Ronald Jones, 465 Pa. 473, 350 A.2d 862, 866 (1976). Likewise, driver's license lists are compiled without regard to race. Other than a bald statement that "[c]ustomarily African Americans and Hispanics have been inadequately represented in driver's license registration lists[,]" (Brief of Johnson, page 73) Johnson makes no argument that the method used to select drivers is inherently biased. Absent some showing that driver's license selection procedures are inherently biased, Johnson has failed to distinguish jury pool lists derived from voter registration records from those derived from driver's license registration lists. Accordingly, Johnson has failed to establish a constitutional violation.

Alleged Failure to Rehabilitate Jurors Who Expressed Opposition to Death Penalty

Johnson next asserts that trial counsel was ineffective for failing to attempt to rehabilitate jurors who expressed opposition to the death penalty. Specifically, Johnson objects to the alleged failure of counsel to rehabilitate eleven jurors, each of whom the trial court struck for cause. During either general questioning or individual voir dire, each of the eleven jurors stated that they had beliefs that would prevent him or her from imposing the death penalty. It is well settled that "whenever a juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath, he is properly excluded from the jury." Commonwealth v. Lark,

548 Pa. 441, 698 A.2d 43, 48 (1997) (citing Commonwealth v. Jasper, 531 Pa. 1, 610 A.2d 949, 952-53 (1992)) (internal quotation omitted). Additionally, "[i]t is within the trial court's discretion to strike a juror for cause, and such a decision will not be disturbed absent a showing of abuse of discretion." Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435, 442 (1999) (citing Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130 (1996)).

The PCRA court reviewed the voir dire record and found it unlikely that counsel could have rehabilitated any of the eleven jurors. We have conducted an independent review of the transcripts and agree. Moreover, the PCRA court, which also sat as the original trial court, stated that, "had trial counsel failed to agree to striking each of these jurors for cause, we would have struck them from the panel, as is our discretion to do. Therefore, it would have been futile for counsel to have attempted to rehabilitate these jurors." Opinion of the PCRA Court, February 23, 2001, page 24. Accordingly, we find no error in the decision of counsel to not attempt to rehabilitate these jurors.

Alleged Failure to Seek a Mistrial Due to Allegedly Disruptive Behavior

Johnson next avers that trial counsel rendered ineffective assistance by failing to move for a mistrial when Eugenia Banks (Eugenia), the aunt of the victims, began crying in the courtroom. According to the PCRA court, "[t]his incident arose early on in the guilt phase of trial when [Eugenia]

was observed to be crying with her head down in the gallery near the jury box. At this time a sidebar was held in which the matter was discussed and it was ultimately resolved to move [Eugenia] away from the vicinity of the jury." Opinion of the PCRA Court, February 23, 2001, page 14 (citing N.T. Guilt Phase, 11/18/97, pages 169-170). "Mistrials should be granted only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376, 1383 (1989) (internal quotation omitted) (citing Commonwealth v. Chestnut, 511 Pa. 169, 512 A.2d 603, 606 (1986)). We cannot say that this incident, which was quickly ameliorated by moving Eugenia, had the unavoidable effect of depriving Johnson of a fair trial. As the PCRA court aptly notes, "as this is a homicide case, we would trust that every juror with even the merest scintilla of common sense would realize that there are likely to be grieving relatives for the victims." Opinion of the PCRA Court, February 23, 2001, page 15. As there is no merit to Johnson's contention that he was entitled to a mistrial as a result of this incident, counsel was not ineffective for failing to request one. Commonwealth v. Tilley, 566 Pa. 312, 780 A.2d 649 (2001) (counsel will not be deemed ineffective for failing to raise a meritless claim).

Allegedly Inconsistent Defense Strategy

Johnson avers that counsel was ineffective for presenting a defense that conceded his guilt. Johnson fails to realize, however, that his several statements to police in December of 1996 severely constrained the avenues of defense left viable for

counsel to pursue. In these statements to police, Johnson conceded that he knew Bridges planned to murder Damon and Gregory and that he drove Bridges, Damon, and Gregory to the location of the murders. Trial counsel could not pretend that these statements did not exist, as the jury would consider them. The only credible defense for counsel to present was one in which Johnson admitted the above-recited participation. Counsel chose to submit that it was Bridges, not Johnson, whose girlfriend was the victim of the robbery and that Bridges, not Johnson, had a motive to kill Damon and Gregory. Counsel also argued that Bridges shot Johnson before shooting Damon or Gregory and that Johnson fled the scene immediately, before Bridges fired at Damon or Gregory.

In this manner, counsel admitted that Johnson was present at the scene, but argued that Johnson was not an accomplice because he stopped facilitating commission of the crimes prior to Bridges' act of shooting Damon and Gregory. Additionally, counsel presented evidence that Bridges fled the county, while Johnson stayed and met with police, to mitigate the culpability of Johnson. While this strategy ultimately did not succeed, given the evidence against Johnson, it was nonetheless one of the very few arguments that counsel could have reasonably made to the jury. Accordingly, we find that counsel had a reasonable basis for conceding Johnson's presence at the scene and some degree of complicity and, thus, counsel was not ineffective in this regard. *See* Commonwealth v. Paolello, 542 Pa. 47, 665 A.2d 439, 454 (1995) (where "the particular course chosen by counsel had some reasonable basis, our

inquiry ceases and counsel's assistance is deemed effective").

Alleged Failure to Raise a Diminished Capacity Defense

Johnson next argues that trial counsel was ineffective for failing to present a diminished capacity defense. Johnson avers that there was significant evidence that he suffered from mental health and cognitive impairments that prevented him from forming the requisite intent necessary for the commission of first-degree murder. At the PCRA hearing, Johnson presented the testimony of two mental health experts on this point. Dr. Carol Armstrong (Dr. Armstrong), a neuropsychologist, testified that Johnson suffered from right brain hemisphere dysfunction encompassing multiple neurocognitive domains, including memory, perception, and reasoning. Dr. Armstrong opined that these impairments surfaced during the childhood of Johnson and remained through his adolescence. N.T. PCRA, 5/11/01, pages 6-22. Dr. Armstrong testified that Johnson suffered from an impairment in judgment and reasoning that was present at the time of the murder; she further stated that the impairment "probably would have been greater because [Johnson] was drinking and taking drugs at the time and was in a complex situation." N.T. PCRA, 5/11/01, page 25. When asked by PCRA counsel for Johnson if these mental problems impaired the ability of Johnson to appreciate the criminality of his conduct, Dr. Armstrong replied that they did "because ... they caused him to act without thinking. He has poor control of his mental thoughts. If you put him

under stress, inebriate him and give him drugs, he's going to act with even less forethought." *Id.* at 36.

At the PCRA hearing, Johnson also presented the testimony of Dr. Julie B. Kessel (Dr. Kessel), a psychiatrist, who stated that Johnson suffered from depression, organic mental symptom with baseline brain impairments ("[p]eople with baseline brain dysfunction tend to have a harder time judging reality, not saying over inadvertently out of touch with reality, but they tend to respond to interpret reality"), substance abuse and alcohol dependency, and attention deficit disorder. Id. at 57-60. Dr. Kessel agreed with Dr. Armstrong that Johnson suffered from these impairments at the time of the shooting of Damon and Gregory and that these problems substantially impaired the ability of Johnson to appreciate the criminality of his conduct. Id. at 62-64.

At the PCRA hearing, when questioned by the Commonwealth, trial counsel [8] testified as follows:

> Q: Mr. Adams, with regard to the discussion that you had with diminished capacity, did you ever consider a diminished capacity defense?

[8] Johnson was represented by two attorneys at trial, Mr. Adams and Mr. Miller. Mr. Adams served as primary counsel and took the lead during the guilt phase; Mr. Miller assumed responsibilities primarily during the penalty phase. N.T. PCRA 5/11/01, page 158. Unless otherwise indicated, references to trial counsel indicate Attorney Adams.

A: No.

Q: I believe it was, in fact, your testimony that your client was merely interested in beating the charges; isn't that correct?

A: Yes. And he-after-we discussed the plea agreement on a number of occasions, but he would not accept it. He wanted to take his chance and try to beat it.

Q: And, in fact, with regard to a diminished capacity defense, isn't it true that you have to admit your culpability in your defense and merely show that he didn't have the specific intent to commit first degree murder; is that correct?

A: I think that is a fair statement.

Id. at 156-157. Attorney Miller testified consistently, stating that "the case in chief during the guilt phase was that [Johnson] was a follower and that [Bridges] was acting in retaliation for what happened to [his girlfriend], that being the robbery by the Bankses .... After all, we said Bridges shot [Johnson]." Id. at 185.

We have held that "[a] defense of diminished capacity is only available to a defendant who admits criminal liability but contests the degree of guilt." Commonwealth v. Laird, 555 Pa. 629, 726 A.2d 346, 353 (1999) (citing Commonwealth v. Weaver, 500 Pa. 439, 457 A.2d 505 (1983)). In Weaver, counsel for Weaver had presented, without

the consent of Weaver, a diminished capacity defense, even though Weaver insisted that someone else had committed the murder for which he was on trial. A jury convicted Weaver of first-degree murder and related crimes and the Court of Common Pleas of Tioga County sentenced Weaver to life imprisonment. Weaver filed a direct appeal to this Court.[9] We determined that counsel for Weaver presented the only viable defense but, nonetheless, we vacated the Judgment of Sentence imposed by the Court of Common Pleas of Tioga County, finding that the authority to present a defense of diminished capacity, thereby conceding general criminal liability, is solely within the province of the accused. Weaver, 457 A.2d at 506.

"[C]ounsel's strategic decision to seek acquittal rather than pursue a diminished capacity defense does not constitute ineffective assistance if there is a reasonable basis for the strategy chosen." Commonwealth v. James Jones, 539 Pa. 222, 651 A.2d 1101, 1109 (1994), cert denied, 516 U.S. 835, 116 S.Ct. 113, 133 L.Ed.2d 65 (1995). Johnson maintained throughout the trial that Bridges, not he, had shot Damon and Gregory; Johnson even contended that Bridges had shot Johnson. Absent an admission from Johnson that he had been the

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[9] At the time of Weaver's conviction, the statute detailing the direct appellate jurisdiction of this Court, 42 Pa.C.S. § 722, provided that "[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: (1) [f]elonious homicide ...." Repealed by Act of 1980, No. 137.

one to shoot Damon and Gregory, trial counsel could not have presented a diminished capacity defense. Thus, we cannot say that trial counsel did not have a reasonable strategic basis for rejecting such a tactic. Consequently, trial counsel was not ineffective for failing to present diminished capacity evidence. *See* Commonwealth v. Paolello, 542 Pa. 47, 665 A.2d 439, 454 (1995) (where "the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective").

Alleged Failure to Call Witness Iris Alvarez

Johnson next posits that trial counsel was ineffective for failing to call Iris Alvarez (Alvarez) to refute the testimony of Robles, who testified that he visited Johnson at Reading Hospital and heard Johnson confess to participating in the murders of Damon and Gregory. To succeed on a claim of ineffective assistance of counsel for failure to present witnesses, a defendant must establish: "(1) the witnesses existed; (2) the witnesses were available; (3) that counsel was informed of the existence of the witnesses or should have known of the witnesses' existence; (4) that the witnesses were available and prepared to cooperate and would have testified on [the defendant's] behalf; and (5) the absence of the testimony prejudiced the [defendant]." Commonwealth v. Crawley, 541 Pa. 408, 663 A.2d 676, 679-680 (1995), cert denied, 517 U.S. 1212, 116 S.Ct. 1832, 134 L.Ed.2d 936 (1996).

At the PCRA hearing, Alvarez testified that she was a former girlfriend of Johnson and a cousin

of Robles. She told the PCRA court that, at the time Robles visited Johnson, Johnson had tubes in his mouth and could barely speak. She stated that Robles was never alone with Johnson at the hospital and that she never heard Johnson say anything about the shooting other than to state that Bridges shot him. N.T. PCRA, 5/11/01, pages 88-95. Alvarez admitted that she was subpoenaed to testify at the trial of Johnson, but stated that she told trial counsel that she could not attend because she was one-and-one-half months pregnant at the time and experiencing abdominal pains. Alvarez claimed at the PCRA hearing that she informed trial counsel that she could testify if the trial was postponed until after she gave birth.

In direct contradistinction to these statements, trial counsel testified at the PCRA hearing that Alvarez was uncooperative and "refused to come down [to Pennsylvania from Connecticut] and testify." Id. at 117. Trial counsel did not recall Alvarez asking him to request a continuance so that she could testify after she gave birth. Moreover, trial counsel testified that during his conversations with Alvarez in advance of the trial of Johnson, Alvarez never told him that she was always in the room with Robles and Johnson. Attorney Miller gave testimony consistent with that of trial counsel, stating that Alvarez told him that she did not have any interest in Johnson's situation. Id. at 180-181. The PCRA court, which had the opportunity to observe the demeanor of the witnesses, credited the testimony of trial counsel and Attorney Miller over the testimony of Alvarez. The PCRA court concluded that Alvarez "simply refused to cooperate in any respect ...." Opinion of

the PCRA Court, October 10, 2001, page 19. Thus, we find that Johnson has failed to meet his burden of establishing that Alvarez was available and prepared to cooperate and testify on behalf of Johnson.

Alleged Failure to Object to Accomplice Liability Instruction

Johnson avers that trial counsel was ineffective for failing to object to the trial court's jury instruction on accomplice liability; specifically, he asserts that the instruction allowed the jury to believe that he could be convicted of first-degree murder if Bridges possessed specific intent to kill, even if Johnson did not. The court read the following instruction to the jury:

> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it. It does not matter whether the person you believe committed the crime has not been prosecuted or convicted. What is important, I think, is the analysis of whether or not the defendant is an accomplice or was an accomplice of anyone, first, you must remember my instructions and definition as to the offenses. The different offenses. You must decide whether or not anyone committed murder of the first degree or murder of the third degree, or aggravated assault, either type. If you

> decide that one or more of those offenses have been proven beyond a reasonable doubt by the Commonwealth, you decide who, in fact, committed one or more of these offenses, then you must decided if you have not decided the defendant actually committed it, but if you decided that he did not commit it, but was acting as an accomplice, then you must look at that language of accomplice liability. **Did the defendant have the same intent when he acted in aiding or agreeing to aid or attempting to aid the person who actually committed it?**
>
> The Commonwealth must prove, if you find that there was a murder of the first degree, **that the defendant, as an accomplice, had the same mental state, the same intent to kill as the actual killer, the specific intent to kill, for first degree murder.** And he aided-agreed to aid or attempted to aid the other person in planning or committing it.

N.T. Trial, 11/25/97, pages 832-833 (emphasis added).

When reviewing a challenge to a jury instruction, we must review the charge as a whole. Commonwealth v. Spotz, 563 Pa. 269, 759 A.2d 1280, 1290 (2000); *see* Commonwealth v. Gilbert Jones, 546 Pa. 161, 683 A.2d 1181 (1996). An instruction will be upheld if it clearly, adequately and accurately reflects the law. The trial court may use its own form of expression to explain difficult legal concepts to the jury, as long as the trial

court's instruction accurately conveys the law. Spotz, 759 A.2d at 1287. A trial court has broad discretion in phrasing its instructions and is permitted to choose its own wording. Commonwealth v. Hawkins, 549 Pa. 352, 701 A.2d 492 (1997), cert denied, 523 U.S. 1083, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998). The above-quoted instruction, when read as a whole, clearly indicated to the jury that, to find Johnson guilty of murder in the first degree, they needed to find that he possessed the requisite specific intent to kill, even if they determined that he was not the person who actually pulled the trigger. Therefore, the jury charge was not erroneous and counsel will not be deemed ineffective for failing to raise a meritless claim. Tilley, supra.

Alleged Failure to Employ a Ballistics Expert

Johnson posits that trial counsel rendered ineffective assistance by failing to obtain a ballistics expert to examine the bullets recovered from the crime scene, the vehicle driven by Bridges, and the body of Johnson. The Commonwealth presented the testimony of ballistics expert State Trooper Kurt Tempinski (Trooper Tempinski) at the trial of Johnson; Johnson asserts that trial counsel was ineffective for failing to have an expert employed by the defense examine the bullets. However, Johnson merely makes bald assertions that: (1) it is "reasonably likely such evidence would have aided the defense [;]" (2) there was no reasonable basis for the omission of trial counsel; and (3) Johnson suffered prejudice as a result. Brief of Johnson, page 75. Johnson fails to contend that the conclusions of Trooper Tempinski were in any

way incorrect and fails to support his contention that a ballistics expert employed by the defense would have uncovered evidence that would have aided the defense; thus, he has failed to meet his burden of proving that the underlying claim has arguable merit.

Alleged Failure to Present Evidence of Good Conduct During Incarceration

Johnson also alleges that trial counsel was ineffective for failing to present to the jury evidence of his good behavior while in prison awaiting trial as a mitigating circumstance pursuant to 42 Pa.C.S. § 9711(e)(8) (the catchall mitigator). However, the PCRA transcript clearly indicates that Johnson never informed trial counsel or Attorney Adams that such evidence existed. See PCRA N.T., 5/11/01, page 149 ("We were never made aware by him that he had an outstanding prison record, and I am not aware of his prison record"). Trial counsel did not present this evidence to the jury because Johnson himself never made his defense team aware of his good prison conduct or the existence of witnesses to that effect. We refuse to deem trial counsel ineffective for failing to present mitigation evidence that he did not know existed.

Allegedly Improper Rejection of (e)(1) Mitigator

Johnson finds error with the decision of the jury to reject the (e)(1) mitigating circumstance with respect to the murder of Gregory; he raises the claim as one of ineffective assistance of counsel for failing to seek an instruction that the jury was

bound by the stipulation of the parties. During the penalty phase, the Commonwealth and Johnson stipulated to the fact that Johnson had no significant history of prior criminal convictions. As discussed above, the jury found the existence of the (e)(1) mitigator (no significant history of prior criminal convictions) with respect to the murder of Damon, but rejected this mitigating circumstance when determining the sentence for the death of Gregory. The jurors each indicated that they made this determination based upon the medical testimony that Damon died before Gregory. Johnson now submits that trial counsel erred by failing to raise on direct appeal to this Court that the jury improperly rejected the (e)(1) mitigating circumstance with respect to the murder of Gregory.

Johnson cites to our decision in Commonwealth v. Rizzuto, 566 Pa. 40, 777 A.2d 1069 (2001), for the proposition that a jury is bound by the stipulation of the defendant and the Commonwealth to the existence of any mitigating circumstances. In that case, the parties stipulated that the defendant did not have a previous criminal record. The jury rejected the (e)(1) mitigating circumstance and sentenced the defendant to death. We reversed, holding that "where a mitigating circumstance is presented to the jury by stipulation, the jury is required by law to find that mitigating factor." Id. at 1089. Thus, we expressly overruled Commonwealth v. Copenhefer, 526 Pa. 555, 587 A.2d 1353 (1991), in which we had held that a jury was free to refuse to find the (e)(1) mitigating circumstance even when the parties stipulated that the defendant did not have a prior

criminal record.

As a preliminary note, at the time of the sentencing phase of Johnson, on November 26, 1997, Copenhefer was the law of this Commonwealth. As we have held on myriad previous occasions, counsel will not be deemed ineffective for failing to divine a change in the law. *See, e.g.,* Commonwealth v. Tilley, 566 Pa. 312, 780 A.2d 649, 653 (2001) (citing Commonwealth v. Fowler, 550 Pa. 152, 703 A.2d 1027 (1997)). On a more substantive basis, this case is clearly distinguishable from Rizzuto. In Rizzuto, the jury convicted the defendant of one murder, which the parties stipulated at the penalty phase was his first criminal conviction. In the case *sub judice,* the jury convicted Johnson of two separate murders. During the penalty phase, the trial court instructed the jurors that they would be rendering two separate verdicts, one with respect to Damon and the other with respect to Gregory. Sentencing N.T. 11/26/97, page 1031. Prior to the trial in this case, Johnson had no significant history of criminal convictions, which the jury found as a mitigating circumstance in the death of Damon. However, given the evidence that Gregory died after Damon, the jury found that the (e) (1) mitigator no longer existed. Johnson and the Commonwealth did not stipulate to the existence of the (e)(1) mitigator as to both murders; rather they agreed that at the beginning of the proceedings Johnson did not have a significant criminal past. Rizzuto mandates that the jury find the (e) (1) mitigator with respect to the first murder, but the jury was well within its bounds to reject the (e)(1) mitigator with respect to the second murder.

Alleged Failure to Present Mitigation Evidence

Johnson contends that trial counsel was ineffective for failing to conduct a reasonable investigation of his life history, mental health, drug and alcohol abuse, and other avenues of mitigation. At the PCRA hearing, trial counsel testified that he obtained a detailed family history, prepared by the sister of Johnson, school records, and medical records. However, neither Johnson nor his family provided any information about alleged suicide attempts or head trauma that Johnson now alleges he suffered. Trial counsel stated at the PCRA hearing that Johnson did not show any signs of mental infirmity or an inability to communicate. PCRA N.T., 5/11/01, page 198. Trial counsel testified that "[Johnson] said that [drug and alcohol abuse] was not an issue. There wasn't a degree of alcohol [and] he was not under the influence of a controlled substance. That is why that particular issue was not pursued." Id. at 183. Trial counsel also stated that he did not present much evidence on drug and alcohol abuse in mitigation as "one of the [Commonwealth's] aggravating factors was, to paraphrase, homicide during the course of a drug transaction involving drug activity." Id. at 184. It was reasonable for trial counsel to attempt to avoid portraying Johnson as someone heavily involved in the drug scene, which could have the effect of solidifying in the minds of the jurors the existence of the (d)(14) drug activity aggravator.

Our review of the original sentencing phase transcript indicates that trial counsel presented the

evidence that he gleaned from his communications with the family of Johnson and Johnson himself. The only avenues of mitigation that the family or Johnson advised trial counsel of prior to the penalty phase were: (1) Johnson's age at the time of the murders; (2) his drug and alcohol abuse; and (3) his troubled family household. Trial counsel sought as a mitigating circumstance the age of Johnson. Counsel did present some evidence of Johnson's drug and alcohol abuse and, as discussed above, had a reasonable basis for not presenting more. Counsel also introduced the testimony of the family members of Johnson to show that he came from a family with problems and that they had high expectations of him. As the PCRA court correctly found, "[u]nder the facts and circumstances of this case, trial counsel cannot be held ineffective for what he did not know and was not made aware of by [Johnson] or his family." Opinion of the PCRA Court, October 2, 2001, page 22. Counsel conducted a reasonably thorough review and sought relevant information for the penalty phase. He presented his findings in a manner reasonably designed to highlight the positives of Johnson without bringing too much attention to the negatives. Any deficiencies in the presentation of counsel stem not from his performance as counsel, but from Johnson's own failure to advise.

Alleged Failure to Object to Written Instructions

Johnson also alleges that trial counsel was ineffective for failing to object to the decision of the trial court to send written instructions with the jury into deliberations. The written instructions were designed to assist the jury in completing the

somewhat complicated verdict forms and did not contain any statements on points of law. Johnson cites to three cases of this Court to establish that a court commits reversible error when it gives written instructions to a jury. Commonwealth v. Karaffa, 551 Pa. 173, 709 A.2d 887 (1998); Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38 (1994); Commonwealth v. Oleynik, 524 Pa. 41, 568 A.2d 1238 (1990). Johnson relies on the following language from Oleynik:

> Where a jury is permitted to take with them written instructions during their deliberations, a question may arise as to the appropriate application of the written instruction when resolving an issue in the cause [sic]. In such a case, it is highly probable the jury would resort to its interpretation of the written instructions in reaching its verdict. Where the jury is required to rely upon the oral instructions given by the judge in his charge, if disagreement arises concerning the oral instructions, it is more likely that the jury would seek further instructions from the judge to resolve the question. When an issue is resolved by further instructions from the court, that procedure insures that misconceptions are not permitted to infect the deliberative process. On the other hand, when a jury is left to its own devices to interpret a written instruction, the possibility of a misconception is significantly enhanced. Moreover, the submission of written instructions would tend to encourage the jury to ignore the

> court's general instruction and focus upon the written instructions supplied to them. This undue emphasis on portions of the charge has the potential of undermining the integrity of the deliberative process.

Oleynik, 568 A.2d at 1241.

In Oleynik, the court sent out with the jury written instructions on the definitions of legal causation, third-degree murder, and involuntary manslaughter. That situation is obviously distinguishable from the present case, where the instructions did not contain an articulation of points of law, but merely explained to the jury how to fill out the verdict slip. In DeHart, the court gave to the jury a written instruction that itself misstated the law. That error is in a different class from the error alleged herein. In Karaffa, similar to Oleynik, the court provided the jury with written instructions on the definitions of unlawful restraint and reasonable doubt. These errors clearly and directly implicate the concerns we addressed in Oleynik; the written "instructions" in the case *sub judice* do not. Written directions to the jury detailing the procedure for filling out a verdict slip are not subject to interpretations that could potentially prejudice a defendant. For this reason, we refuse to find that trial counsel was ineffective for failing to object to the written instructions.

Alleged Failure to Request an
Enmund v. Florida Instruction
38k

Johnson next faults trial counsel for failing to request an instruction during the penalty phase, pursuant to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), that an accomplice to a murder cannot be sentenced to death absent proof that he intended to take life or contemplated that life would be taken in the process. During the penalty phase, the trial court instructed the jury as follows:

> With regard to Damon Banks, there is one (1) aggravating circumstance that may be considered by you. That is, that at the time of the killing, Damon Banks was or had been involved, associated, or in competition with the defendant in the sale, distribution, or delivery of any controlled substance, and the defendant committed the killing or was an accomplice to the killing, and the killing resulted from or was related to that association, involvement or competition, to promote the defendant's activities in selling, distributing or delivering controlled substances.
>
> Since I have used the term "accomplice" again, and I, in no way can ask you what your verdicts were predicated upon yesterday, the Commonwealth needs to prove that the defendant killed or was an accomplice and cannot rely upon conspiracy liability for this aggravated circumstance. Therefore, I will briefly again tell you an accomplice is-the defendant is an accomplice of someone else if with the

> intent of promotion, or facilitating the commission of the crime, he solicits, commands, encourages, or requests the other person to commit it, or aids, agrees to aid, or attempts to aid the other person in planning or committing it.

Sentencing N.T., 11/26/97, page 1033. We see nothing improper with this instruction as it clearly, adequately, and accurately reflects the law. Spotz, supra, 759 A.2d at 1287. Moreover, as we discussed above, the jury instruction on accomplice liability during the guilt phase was correct. As the jury had already determined that Johnson possessed the requisite intent to kill to support a finding of first-degree murder, the instruction was superfluous. In Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367, 1385 (1991), cert denied *sub nom* Laird v. Pennsylvania, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991) (Chester I), we held that by virtue of a jury finding a defendant guilty of first-degree murder based on a proper guilt phase accomplice liability instruction, as a matter of law, the defendant possessed the minimum culpability required under Enmund and its progeny. Accordingly, this issue does not present an avenue by which Johnson could obtain relief, as counsel will not be deemed ineffective for failing to raise a claim that is devoid of arguable merit.

Alleged Failure to Investigate Aggravating Factor and Request a Continuance

Johnson asserts that trial counsel was ineffective for failing to adequately investigate a police report that detailed Robles' knowledge of the drug activities of Johnson that supported the (d)(14) drug involvement aggravating circumstance and for failing to request an adequate continuance to prepare a cross-examination of Robles. Johnson raised much of this contention on direct appeal of his conviction and death sentence. We addressed the claim at that time as follows:

> Two days before the penalty phase of [Johnson's] trial was to begin, the Commonwealth disclosed to [Johnson's] counsel the existence of a police report that described statements Robles made regarding [Johnson's] participation in Shawn Bridges' drug activities. The Commonwealth produced a copy of this report to [Johnson's] counsel the day before the penalty phase was to begin. At the commencement of the penalty phase, [Johnson] sought to preclude the Commonwealth from introducing any evidence concerning the aggravating circumstance found at 42 Pa.C.S. § 9711(d)(14) that the murder occurred in connection with illegal drug trafficking-as a sanction for the Commonwealth's late production of the report. The trial court denied [Johnson's] request, noting that the Commonwealth had produced the report and that [Johnson] had been on notice that

the Commonwealth was seeking the death penalty on the basis of this aggravating circumstance. [Johnson] now claims that the Commonwealth engaged in misconduct by failing to produce this police report when [Johnson] made his general discovery requests nine months before trial.

We find no violation of Brady here, and there was no error made by the trial court denying [Johnson's] request to preclude the Commonwealth from presenting evidence of the relationship between the murders and [Johnson's] drug dealing activities. The Commonwealth produced the police report before the penalty phase of [Johnson's] trial. The basis for [Johnson's] complaint, therefore, is that the Commonwealth failed to comply in a timely fashion with his discovery request for statements of all witnesses that the Commonwealth intended to call at the sentencing phase, and that he was prejudiced by this late production of the report. In evaluating this claim, we must look at: (1) whether the discovery rules were violated; and (2) whether the trial court abused its discretion in not excluding evidence pursuant to Rule 305(E) of the Pennsylvania Rules of Civil Procedure. The trial court has broad discretion in choosing the appropriate remedy for a discovery violation. Moreover, a defendant seeking relief from a discovery violation must demonstrate prejudice. The production of statements made by the witnesses of the Commonwealth is within

> the discretion of the trial court. In refusing to grant [Johnson's] request that the Commonwealth be precluded from introducing any evidence regarding the aggravating circumstance of Section 9711(d)(14), the trial court found that the Commonwealth had disclosed-several months before the trial-that it planned on calling Robles during the penalty phase. Further, the trial court noted that [Johnson's] investigator had interviewed Robles on previous occasions and had the opportunity to question Robles about his knowledge of [Johnson's] involvement in Bridges' drug activities, if he chose to do so. The trial court granted [Johnson] some relief by granting him a half-hour continuance to prepare for cross examination of Robles on the basis of this police report, and found this adequate in light of the advanced notice that [Johnson] had of the subject matter of Robles' testimony at the penalty phase. According to these circumstances, we find no abuse of the discretion of the trial court in refusing [Johnson's] request for further relief.

Johnson, 727 A.2d at 1096-1097 (internal footnote and citations omitted). To the extent that this claim is not previously litigated, it still does not entitle Johnson to any relief as Johnson has failed to articulate what additional investigation or a longer continuance might have uncovered. Thus, Johnson has not met his burden of proving prejudice and, accordingly, his claim of ineffective assistance of counsel fails. Commonwealth v. Pierce, 567 Pa. 186,

786 A.2d 203, 221 (2001) (citing Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (2000), cert denied, 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000)).

Alleged Prosecutorial Misconduct

Johnson contends that trial counsel was ineffective for failing to seek a curative instruction or a mistrial when the prosecutor mentioned his lack of remorse during the penalty phase; he also raises this claim as one of prosecutorial misconduct. Johnson points to the following comments of the prosecutor as error:

> Detective Bailey, on direct examination by [Attorney] Miller, he asked you to describe the events in the course of the two statements, the written statement from December 11th, 1996, and then your follow-up on December 12th, and he asked you if he was cooperative, and you said, yes.
>
> [Johnson], in the course of those two statements, at any time did he show remorse for his actions-
>
> * * *
>
> [To Sergeant Godshall] In the course of this first statement on December 11th of 1996, at any time did [Johnson] show you remorse for his actions?

Sentencing N.T. 11/26/97, pages 973, 980. Trial counsel objected to both comments and the trial court sustained the objections.

It is well settled that "brief comments regarding a defendant's remorse-particularly when ... in response to a defendant's self-centered display of emotion-do not constitute misconduct." Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435, 449 (1999) (citing Commonwealth v. King, 554 Pa. 331, 721 A.2d 763, 784 (1998), cert. denied, 528 U.S. 1119, 120 S.Ct. 942, 145 L.Ed.2d 819 (2000); Commonwealth v. Harris, 550 Pa. 92, 703 A.2d 441, 451 (1998), cert. denied, 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998)). While the comments of the prosecutor in the case *sub judice* were not made in response to a "self-centered display of emotion" by Johnson, nonetheless, the statements are of the ilk contemplated by this Court in Rollins. Trial counsel objected to the statements and the court sustained the objections. As the Commonwealth and PCRA court point out, had trial counsel requested a curative instruction, that action would have brought the lack of remorse of Johnson more into the cognizance of the jury. Requesting a mistrial would have been fruitless, as the trial court would not have granted it for such minimal comments. The trial court instructed the jury to disregard matters to which objections were sustained. N.T. Trial, 11/18/97, pages 22-23. "The law presumes that the jury will follow the instructions of the court." Commonwealth v. Brown, 567 Pa. 272, 786 A.2d 961, 971 (2001); Commonwealth v. O'Hannon, 557 Pa. 256, 732 A.2d 1193, 1196 (1999) ("[a]bsent evidence to the contrary, the jury is presumed to have followed the

trial court's instructions"). Hence, trial counsel did not render ineffective assistance in this regard. The underlying claim of prosecutorial misconduct is waived because trial counsel did not seek a curative instruction or a mistrial at the time of the comment and did not raise the issue on direct appeal to this Court.

Nature and Use of Aggravating and Mitigating Circumstances Instruction

Johnson next asserts that trial counsel was ineffective for failing to object to the trial court's jury instruction on the nature and use of mitigating circumstances. [10] The instruction about which Johnson complains was as follows:

> The sentence you impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the killing and the killer which make a first degree murder case more terrible and deserving of the death penalty, while mitigating circumstances are those things which make

[10] In the Questions Presented section of his brief to this Court, Johnson raises this claim as one of trial court error; however, in the text of his argument, he contends that trial counsel was ineffective for failing to object to the instruction. We cannot address the alleged trial court error as that contention is waived; we will, however, address the stewardship of counsel in this regard.

> the case less terrible and less deserving of death.

Sentencing N.T. 11/26/97, page 909. Johnson maintains that this instruction "impermissibly diverted the focus of the jury's life or death deliberation from a reasoned determination as to [Johnson's] personal culpability, to an amorphous and unguided consideration of how terrible 'the case' was." Brief of Johnson, page 86. We addressed this exact claim in Commonwealth v. Stevens, 559 Pa. 171, 739 A.2d 507 (1999). We discussed and rejected the contention in Stevens as follows:

> Appellant claims that previous counsel was ineffective for not challenging the instruction of the trial court concerning the purpose of aggravating and mitigating circumstances in capital cases. Specifically, Appellant complains that the following portion of the instruction of the trial court interfered with the determination of the jury of Appellant's personal moral culpability for these murders: "[t]he Sentencing Code defines aggravating and mitigating circumstances. There [sic] are things that make a first degree murder case either more terrible or less terrible." According to Appellant, the use of the word "terrible," in conjunction with the use of the word "case," improperly distracted the jury from consideration of Appellant's mitigation evidence by drawing their attention to a generalized conception of the 'case.'

When reviewing a challenge to a part of a jury instruction, an appellate court must review the jury charge as a whole to determine if it is fair and complete. A trial court has broad discretion in phrasing its charge and can choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Appellant ignores an earlier instruction by the trial court regarding the function of aggravating and mitigating circumstances, where the court stated:

> Now, the sentence that you impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the killing and the killer which make a first degree murder case more terrible and deserving of the death penalty, while mitigating circumstances are those things which make the case less terrible and less deserving of the death penalty.

We do not find that the instructions of the trial court, as a whole, interfered with the jury's evaluation of the specific mitigation evidence presented by Appellant or their assessment of his personal moral culpability. These instructions merely expressed to the jury, in laymen's terms, the purpose for the distinction between

> aggravating and mitigating circumstances in a capital penalty phase.

Id. at 526-527 (internal citations omitted). Therefore, trial counsel in the case *sub judice* was not ineffective for failing to object to the jury instruction.

Constitutionality of the (d)(14) Drug Activity Aggravator

Johnson's penultimate argument is that the (d)(14) aggravating circumstance is unconstitutional and that trial counsel was ineffective for failing to raise this issue at trial or on appeal. 42 Pa.C.S. § 9711 (d)(14) includes as an aggravating circumstance that:

> At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or

> delivering controlled substances or counterfeit controlled substances.

Johnson posits that the words "involved," "associated," and "competition" are unconstitutionally vague and that the aggravating circumstance *in toto* is unconstitutionally overbroad "because it could apply to any murder in a drug saturated urban setting in which the perpetrator or victim are involved with drugs." Brief of Johnson, page 88.

The Supreme Court of the United States has held that, "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' " Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (citing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The statute "must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Id. (internal quotations and footnotes omitted). An aggravating circumstance is unconstitutionally vague if it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33

L.Ed.2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361-362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). "Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not." Id. at 362, 108 S.Ct. 1853. In the context of a challenge to the breadth of an aggravator, to survive an Eighth Amendment challenge "[a]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

The (d)(14) aggravating circumstance is not constitutionally void for vagueness. Johnson's vagueness challenge fails because the aggravator adequately informs the jury that they must find that the victim was or had been involved, associated, or in competition with the defendant in the sale, manufacture, distribution, or delivery of any controlled substance and that the killing occurred in relation to that involvement, association, or competition to promote the activities of the defendant in the sale, manufacture, distribution, or delivery of controlled substances. "Involved," "associated," and "competition" are words of common usage and meaning and do not require additional definition. This aggravator does not leave the jury with unfettered or open-ended discretion to arbitrarily impose the death penalty.

Likewise, the (d)(14) aggravating circumstance is not overbroad. It clearly both "genuinely narrow[s] the class of persons eligible for the death penalty" and "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant, 462 U.S. at 877, 103 S.Ct. 2733. The aggravator requires a relationship between the defendant and the victim where they either act in concert or are competitors in the illicit drug market and that the killing occurred to promote the activities of the defendant over the victim in that market, whether the defendant was the actual killer or an accomplice. To consider this an aggravating circumstance that could, by itself, justify the imposition of a capital sentence, is consistent with the public policy of this Commonwealth, which reasonably seeks to reduce the harmful effects that drugs have on our society. Thus, Johnson has failed to meet his burden of proving that his claim that the (d)(14) aggravator is unconstitutional has arguable merit and, accordingly, counsel was not ineffective for failing to raise this issue.

Life Means Life Instruction

The final allegation of error of Johnson is that trial counsel rendered ineffective assistance by failing to request a jury instruction that a life sentence in Pennsylvania means life without the possibility of parole in accordance with Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). In Simmons, the Supreme Court of the United States held that a state "may not create a false dilemma by advancing

generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." Id. at 171, 114 S.Ct. 2187. The Court determined that due process requires that the defendant is entitled to inform the jury that he is ineligible for parole **where the state puts the future dangerousness of the defendant into issue.** Id. (emphasis added). As we stated in Commonwealth v. Bridges, 563 Pa. 1, 757 A.2d 859 (2000), cert denied, 535 U.S. 1102, 122 S.Ct. 2306, 152 L.Ed.2d 1061 (2002), "[t]his issue has been before this Court numerous times. The law of this Commonwealth is that a Simmons instruction is required to be given only in those cases where the future dangerousness of the defendant is placed at issue."[11] Id. at 881 (citing Commonwealth v. Chester, 557 Pa. 358, 733 A.2d 1242, 1257 (1999) (Chester II)). A review of the Record shows that the Commonwealth did not put the future dangerousness of Johnson into issue and, thus, there was no need for a Simmons "life means life without parole" instruction. Counsel will not be deemed ineffective for failing to raise a claim that has no merit. Tilley.

CONCLUSION

We affirm the decision of the PCRA court to

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[11] We also noted in Bridges that "[a] minority of this Court is of the view that a Simmons instruction should be given, prospectively, in all capital cases." Id. at 881, n. 20 (citing Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31 (1998), cert. denied, 526 U.S. 1070, 119 S.Ct. 1465, 143 L.Ed.2d 550 (1999)).

deny the Petition of Johnson. Pursuant to 42 Pa.C.S. § 9711(i), we direct the Prothonotary of the Supreme Court of Pennsylvania to transmit the complete record of this case to the Governor of Pennsylvania.

Justice SAYLOR files a concurring opinion in which Justice NIGRO joins.

Justice EAKIN files a concurring and dissenting opinion, joined by Justice CASTILLE, who also joins the majority opinion.

Judgement entered
Dated: December 27, 2002

/s/
John W. Person, Jr., Esquire
Deputy Prothonotary

APPENDIX "L"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
	: CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER AND NOTICE OF INTENT TO DISMISS

AND NOW this 23rd day February, 2001 notice is hereby given by the undersigned, the Honorable Scott D. Keller of his intention to dismiss without a hearing certain issues from Defendant's Petition for Post Conviction Collateral Relief, pursuant to Pennsylvania Rule of Criminal Procedure 1507(a). Defendant having filed a Petition for Post Conviction Collateral Relief, dated April 26 and July 7, 2000 and those issues being without merit. Hearing will be held on the remaining issues on March 23, 2001 at 9:30 AM in courtroom SA of the Berks County Courthouse.

On November 25, 1997, a jury found Defendant Roderick Andre Johnson guilty of two counts of Murder of the First Degree, two counts of Murder of the Third Degree, four counts of Aggravated Assault, two counts of Conspiracy to Commit Murder, and four counts of Conspiracy to

Commit Aggravated Assault.[1] These convictions stem from the brutal murders of Gregory and Damon Banks. After a penalty hearing, the jury found: (1) as to Damon Banks, the aggravating circumstances outweighed the mitigating circumstances; and (2) as to Gregory Banks, at least one aggravating circumstance and no mitigating circumstances. The jury set the penalty at death for each count of first degree murder. On November 26, 1997, this Court formally imposed the sentence of death. Thereafter, on December 16, 1997, Defendant, by and through John T. Adams, Esquire, and Randall Miller, Esquire filed a Notice of Appeal to the Supreme Court of Pennsylvania.

On March 26, 1999, the Supreme Court of Pennsylvania Affirmed the Defendant's Convictions and Sentence. Commonwealth v. Johnson, 727 A.2d 1089, 556 Pa. 216 (1999). Defendant subsequently sought Certiorari in the United States. Supreme Court. Certiorari was denied on February 22, 2000. The Defendant continued to be represented on appeal by John Adams and Randall Miller, Esquires.

On March 19, 2000, Pennsylvania Governor Thomas Ridge signed a death warrant for the Defendant, Roderick Johnson. Defendant's execution was scheduled for May 11, 2000.

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[1]18 Pa.C.S.A. 2502(a)(1); 2702(a)(l), 2702(a)(4), 903(a)(1)(2), respectively.

On April 11, 2000, a Motion for an Emergency Stay of Execution was filed on behalf of the Defendant by J. Michael Farrell, Esquire with the Berks County Clerk of Courts. At the same time, Defendant filed a pro se petition for Post Conviction Collateral Relief in which he alleged that he was not currently represented by counsel and was seeking appointment of counsel. Upon contacting Mr. Farrell, he indicated to this Court that he would be representing the Defendant in respect to the disposition of the Motion for Emergency Stay and Post Conviction Relief Act (hereinafter "PCRA") petition. Additionally, Mr. Farrell indicated that he had previously been representing the Defendant on a Federal Habeas Corpus claim.

On April 13, 2000, in light of Defendant's pending execution, we directed Counsel Farrell to file an amended Post Conviction Relief Act petition detailing the Defendant's eligibility for relief within twenty days. Ruling on Defendant's Motion for an Emergency Stay of Execution was deferred twenty days pending receipt of the Amended petition.

On April 24, 2000, John Adams and Randall Miller were permitted to withdraw from their representation of the Defendant in light of indications from the Defendant that he wished to pursue ineffective assistance of counsel claims.

On April 26, 2000 PCRA Counsel Farrell filed with the Court a "First Amended Petition for Post Conviction Relief."

After reviewing said petition, on April 27, 2000, we determined that Defendant had failed to make a "strong showing of likelihood of success on the merits" as is required in order to stay an execution. 42 Pa. C.S.A. §9545(c)(2). We additionally denied the Defendant's request to file a Second Amended Petition for PCRA relief.

Defendant subsequently filed a petition for an Emergency Stay of Execution in the Supreme Court of Pennsylvania. The Supreme Court granted the Defendant's Emergency Stay on May 8, 2000. Commonwealth v. Johnson, 751 A.2d 647, 561 Pa. 489 (2000).

On July 7, 2000 Defense Counsel Farrell took an extraordinary step. Although we had denied additional time to file a second amended PCRA petition, Counsel nevertheless prepared and filed a document entitled "Supplement to Amended Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa. C.S. §9542 et seq."

On August 25, 2000, a hearing was held to

determine whether the second amended petition of July 7, 2000 should be incorporated as part of Defendant's PCRA petition. At said hearing, we permitted the amendment and granted the Defendant 45 days to file additional affidavits in support of his petition. The Commonwealth was to receive 120 days after said time in which to respond to the Defendant's petition. Furthermore, by stipulation of the Commonwealth and the Defendant, issue 42 of the Defendant's petition was withdrawn.

On October 10, 2000, Defendant filed a "Second Supplement to Amended Petition for Habeas Corpus Relief" While this document did contain additional affidavits, it also contained new legal arguments, a new prayer for relief, and various exhibits. As the filing of this document was in contravention of the August 25, 2000 order, we denied Defendant's Second Supplement on October 12, 2000.

Defendant subsequently submitted a request for reconsideration of the denial of his Second Supplement. On October 24, 2000, we denied reconsideration, but did clarify that the second supplement was only denied to the extent that it contained documents that were not affidavits. To date, no further action has occurred with respect to the denial of reconsideration.

The Commonwealth filed their Answer to the Defendant's petition on February 5, 2001.

On February 19, 2001, Defendant submitted a letter to this Court requesting an opportunity to respond to the Commonwealth's answer. Seeing such a response as unnecessary, we denied this request on February 21, 2001.

Prior to addressing Defendant's claims, we would note that for, the sake of clarity that we have dispensed with. Roman numeral numbering of issues used by the Defendant in presenting his claims. This Court finds it to be much less awkward to simply use standard Arabic numerals to organize Defendant's claims, and would ask both the Commonwealth and the Defense to also do so in all future filings.[2]

Defendant has requested post-trial relief under the Post Conviction Relief Act (42 Pa.C.S.A. §9541 *et. seq.*) and the Habeas Corpus provisions of Article I, §14 of the Pennsylvania Constitution.[3] We

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[2] When this Court realized that XLVIII equaled 48, it could not help but wonder if the Roman Empire might have survived a few years longer if it had focused less of its attention on its numeration and more of its attention on its declining social structure and the invading hordes of Goths, Visigoths and Vandals.

[3] Defendant makes argument in footnote 3 of his "Supplement to Amended Petition" that the Post Conviction Relief Act unconstitutionally limits the right to habeas corpus review

would initially note that the Post Conviction Relief Act encompasses post-conviction Habeas Corpus relief. 42 Pa. C.S.A. §9542. Accordingly Defendant shall have to comply with all mandated PCRA statutes, rules and case law in order to obtain any type of relief. See 42 Pa. C.S.A. §9541 *et. seq.* and Pennsylvania Rule of Criminal Procedure 1500 et seq.

As this Court understands the PCRA, a petitioner must plead and prove four things by a preponderance of the evidence to be entitled to relief:

First, that petitioner has been convicted of a crime under the laws of Pennsylvania and is serving a sentence or awaiting a sentence of execution. 42 Pa.C.S.A. §9543(a)(l)(ii). There is no question that Defendant has met this requirement.

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provided for in Article 1, § 14 of the Pennsylvania Constitution. Given the substantial significance of this argument, it certainly does not belong in a footnote. Nonetheless, Defendant has provided no case law or detailed legal argument in support of his position. Accordingly, we find that this argument must fail and that Defendant's petition for relief falls within the PCRA. This Court takes the position that there is no post-conviction collateral relief available under the laws of Pennsylvania other than through the PCRA.

Second, that the conviction or sentence resulted from one of the statutorily enumerated errors. See 42 Pa. C.S.A. §9543(a)(2). Defendant unfortunately has failed to show where each of his claims falls within the statutory scheme. Nevertheless, after reviewing Defendant's claims, we are of the belief that each of Defendant's claims would fall somewhere within the scheme and therefore find this requirement to be met. Defendant is, of course, still required to prove the legal and factual merits of each of his claims. See Pa.R.C.R.P. 1502(A)(l2)(a)(b). There are multiple claims of Defendant that we intend to dismiss as Defendant has failed to provide sufficient legal and/or factual support. The merits of each of Defendant's claims claim are reviewed at length later in this document.

Third, that the allegation of error has not been previously litigated or waived. 42 Pa. C.S.A. §9543(a)(3). This is the greatest failing of Defendant's petition. Defendant was warned about compliance with this provision in our April 13, 2000 and April 27, 2000 orders in this matter. While this provision is vaguely raised at various places throughout the Defendant's Supplement to his Amended Petition, Defendant never clearly or consistently addresses this issue.

In regard to waiver, "an issue is waived if the petitioner could have raised it but failed to do so

before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa. C.S.A. §9544(b).

Counsel can, of course, not claim their own ineffectiveness and claims of ineffectiveness of prior counsel must be raised at the earliest stage of proceedings in which a petitioner is no longer represented by the allegedly ineffective counsel in order to avoid waiver. Commonwealth v. White, 674 A.2d 253, 449 Pa. Super. 386 (1996). As this is the first proceeding in the Courts of Pennsylvania in which Defendant is not represented by Trial Counsels Adams and Miller, Defendant may raise claims of their ineffective assistance without those claims being subject to the waiver provision. These claims must still be shown not to have been previously litigated to be entitled to relief.

Several of Defendant's other claims could have been raised at trial or on direct appeal to the Supreme Court of Pennsylvania and were not. Specifically, we refer to the following claims:[4]

37-Improper Rejection of No Prior Criminal Convictions by Jury

46- Cumulative Errors

[4] We have not included issues found to be previously litigated in this list. Most of the issues deemed to be previously litigated could theoretically also have been considered to have been waived.

49- Racially Biased Peremptory Challenges
52- Jury Foreman was Asleep

Accordingly we find that these claims were waived for purposes of the Post Conviction Relief Act.[5] There is of course, an "anti-waiver" provision to overcome this situation. 42 Pa. C.S.A. §9543(a)(4). If a petitioner can prove "that the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel" waiver may be avoided. Id. Defendant has never clearly proven or discussed "anti-waiver." It is vaguely referenced in several cases in the petition, but never fully dealt with. In analyzing this situation, we agree with the Commonwealth that Defendant has failed to meet the anti-waiver provision through his textual arguments. We additionally find that as Defendant is required to make a showing that the decision not to litigate these issues was not a rational decision by Trial Counsel and as Defendant has failed to

[5]Defendant presents a claim in paragraph 12 of his "Supplement to Amended Petition" that waiver should be excused because this is a capital case. Defendant presents no legal argument in support of this position. Furthermore, the Supreme Court of Pennsylvania has specifically rejected the application of the "relaxed waiver" rule to capital post-conviction relief act petitions. Commonwealth v. Albrecht, 720 A.2d 693, 700, 554 Pa. 31, 46 (1998). Accordingly, we find that the standard PCRA waiver provisions will be applied in this instance.

offer certification that Trial Counsel will testify at the evidentiary hearing in this matter, (See 42 Pa. C.S.A. §9545(d)(l)), that all the aforecited issues are waived and should be dismissed.

Nevertheless, as this Court is well aware of the gravity of the situation, we have decided to evaluate the merits of each of these issues in this document. Defendant can respond to the conclusion that these issues have been waived and our findings on their merits in his response to this Notice.

An issue has been previously litigated if the highest court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa. C.S.A. §9544(a)(3). As noted above, the Supreme Court of Pennsylvania has ruled on Defendant's direct appeal and the United States Supreme Court has denied certiorari. Defendant has attempted to raise several of the issues previously raised before the Supreme Court of Pennsylvania in this petition. We find those issues to be previously litigated. Those issues will be identified individually within this document.

Finally, the fourth requirement for entitlement for PCRA relief is to show that the petition for relief has been timely filed. 42 Pa.

C.S.A. §9545(b). In this instance, there is no question that this petition is timely for the purposes of the PCRA statute.

In conclusion we again emphasize that the burden under the PCRA is on the Defendant to make out his claims. Seeing as this is a death penalty case, this Court has done far more research and analysis than usual to fully evaluate Defendant's claims. While we have given the Defendant the benefit of the doubt time and again, the burden still falls on the Defendant, and where these claims do fail, it is because the Defendant has failed to meet that burden.

Before proceeding to the merits of Defendant's petition, we also wish to note that ineffective assistance of counsel is raised in nearly all of Defendant's issues. To avoid repetition, we set forth the standard here:

To establish ineffectiveness of counsel, an appellant must prove that: (1) the underlying claim is of arguable merit; (2) the counsel had no reasonable basis for his conduct; and (3) the ineffectiveness caused the appellant prejudice. Commonwealth v. Copenhefer, 553 Pa. 285, 719 A.2d 242, 250 (1998); Commonwealth v. Weiss, 530 Pa. 1, 5-6, 606 A.2d 439, 441-42 (1992). The presumption is that counsel was effective when representing his client. Commonwealth v. Baez,

554 Pa. 66, 720 A.2d 711, 733 (1998) (citing Commonwealth v. Miller, 494 Pa. 229, 431 A.2d, 233 (1981)). Counsel will not be deemed ineffective for failing to pursue a meritless issue. Commonwealth v. Lennox, 250 Pa.Super. 80, 378 A.2d 462 (1977).

This standard will be referenced throughout this order without necessarily again citing it. We now address each of the Defendant's PCRA issues in turn:

1-5. The Robles Statements and Letter

The alleged improprieties surrounding the Robles Statements and Letter were specifically raised by Appellate Counsel in his Concise Statement of Matters Complained of on Appeal and cited in the trial court's June 3, 1998 opinion as numbers 7-10. The Supreme Court of Pennsylvania extensively discussed the Robles statements and letter in their opinion on this matter. Commonwealth v. Johnson, 727 A.2d 1089, 1093-97, 556 Pa. 216, (1999). We therefore submit that all issues regarding the Robles letter and statements have been previously litigated. Furthermore even if the issues had not been previously litigated, they could have been presented at trial, or on the initial direct appeal. We therefore find any remaining issues in regards to this letter and statements to have been waived.

We again note that under the PCRA the burden is on the Defendant to "prove by a preponderance of the evidence...that the allegation of error has not been previously litigated or waived." 42 Pa. C.S.A. §9543(a)(3). Defendant has utterly failed to address this limitation and has also failed to show that the exception to previous litigation and waiver for irrational decisions by counsel may be applicable. 42 Pa. C.S.A. §9543(b).

6. December 8 Statement

The December 8, 1996 statement to Exeter police was specifically raised in an almost identical manner by Appellate Counsel and is listed as item 1 in the Trial Court's opinion. The Supreme Court in its opinion discussed the statement. Commonwealth v. Johnson, 727 A.2d 1089, 1099, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

7-8. December 11 Statement

The December 11, 1996 Statement to Exeter police was specifically raised in an almost identical manner by Appellate Counsel and is listed as items 2 and 3 in the Trial Court's opinion. The statement was discussed by the Supreme. Court in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1099-1101, 556 Pa. 216, __ (1999). As above, we find this

issue to be waived and/or previously litigated.

9. December 12 Statement

The December 12, 1996 Statement to Exeter police was specifically raised in an almost identical manner by Appellate Counsel and is listed as item 4 in the Trial Court's opinion. The statement was discussed by the Supreme Court in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1101-02, 556 Pa. 216; ___ (1999). As above, we find this issue to be waived and/or previously litigated.

10. The Bullet

The recovery of the bullet from Defendant's body was specifically raised as an issue on appeal and is listed in the Trial Court's opinion as item 5. The recovery of the bullet was specifically discussed by the Supreme Court in its opinion. Commonwealth v. Johnson, 727 A.2d. 1089, 1097-98, 556 Pa. 216, ___ (1999). As above, we find this issue to be waived and/or previously litigated.

11. Defendant's December 12 Statement

Defendant again challenges a December 12, 1996 statement that he claims to be prejudicial. This argument was already raised by Appellate Counsel and listed as item 6 in the Trial Court's opinion. It has also been specifically addressed by

the Supreme Court of Pennsylvania in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1102, 556 Pa. 216 _____ (1999). As above, we find this issue to be waived and/or previously litigated.

12. Misapplication of Law

Defendant next contends that the Supreme Court of Pennsylvania misapplied Brady to this case. We believe that this issue is not cognizable under the PCRA. The Pennsylvania Supreme Court has already ruled on this matter. The binding power of precedent precludes this Court from attempting to reverse the High Court's decision. This issue is properly raised only before the U.S. Supreme Court, as they may overturn the Pennsylvania Supreme Court. For this reason, we find this issue not to be cognizable under the PCRA, and to have no chance of success on its merits even if it is cognizable.

13. Insufficient Evidence of Aggravating Circumstances

Again, this issue was specifically raised by appellate counsel and is numbered in the Trial Court's Opinion at 11. The Supreme Court of Pennsylvania also addressed this issue. Commonwealth v. Johnson, 727 A.2d 1089, 1102-03, 556 Pa. 216, _ (1999). As above, we find this issue to be waived and/or previously litigated.

14. Sufficiency of Trial Evidence

The sufficiency of the evidence was automatically considered by the Pennsylvania Supreme Court on Appeal, and evidence was found to be sufficient. Commonwealth v. Johnson, 727 A.2d 1089, 1093, 556 Pa. 216, ___ (1999). As above, we find this issue to be waived and/or previously litigated.

15. Failure to Develop Exculpatory Evidence

While Defendant cites a tremendous amount of case law, he alleges no specific factual allegations in support of this argument. There is nothing present in this argument that would lead us to believe that the ineffectiveness alleged here would even come close to so undermining "the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii). We therefore find this issue to be waived and/or without merit for failure to make his allegations with appropriate specificity.

16. Error in Instructions

This issue serves as merely an introduction to a full argument presented as Defendant's PCRA issue 35. See issue 35 for a full discussion of why Defendant was not entitled to a Simmons

instruction.

17-22. Various Items

Defendant has presented no argument nor any facts in respect to any of these issues. We therefore cannot adequately determine their merits and must find them to be lacking and completely ineligible to serve as a basis for PCRA relief. Accordingly, these issues should be dismissed.

23. No Issue

Defendant's petition has been misnumbered. There is no issue numbered as 23 in any of Defendant's documents to this Court's knowledge

24. Suppression of Statements

Defendant next challenges statements that were taken at Reading Hospital by Criminal Investigator Dunn, Sergeant Godshall and Officer Bailey from the Defendant on the theory that Trial Counsel was ineffective for failing to move to suppress these statements. This issue was specifically raised in an almost identical manner by Appellate Counsel and is listed as items 2 and 3 in the Trial Court's opinion.[6] These statements were

[6] On direct appeal this issue was raised as Trial Court error, whereas here it is couched as ineffective assistance of counsel.

discussed by the Supreme Court in its opinion and found to be admissible. Commonwealth v. Johnson, 727 A.2d 1089, 1099-1101, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

25. Character Evidence

Defendant has claimed that Trial Counsel was ineffective for failing to present relevant character evidence on behalf of the Defendant. This Court has reviewed Defendant's PCRA petition and affidavits of potential character witnesses Sonia Johnson, Rex Johnsen, Gloria Johnson, Tarik Turner, Odetta Quintero and Janyne Quintero. On this basis we believe that Defendant has presented sufficient material issues of fact so as to require a hearing on this issue. Hearing will accordingly be scheduled and Defendant will present evidence in support of said claim.

26. Robles Letter Redux

Defendant again raises the issue of the failure to disclose the letter from prosecution witness George Robles that was written to Criminal Investigator Angel Cabrera of the Reading Bureau of Police. The letter stated:

Angel Cabrera:

> Angel, Look I can't take this jail.[7] I am doing everything possible to help you. Please, Please help me. I'm not a runner. You know that. I just want to go home. I can't eat. I can hardly sleep and I feel like I'm in here forever. Angel, I feel like I'm dying in here. I am begging you and [Criminal Investigator] Vega with my word as a man and Father to be, I'm not running. Just send me home please. I will do anything.
> P.S. - I know me + Vega don't get along but Angel, Please I'm not the killer. Help me. Please.

(N.T., Post-Trial Hearing, 2/26/98 p.9-12, Defendant's exhibit 2). Counsel for the defense were allegedly made aware of this letter after trial and after a Notice of Appeal had been sent to the Supreme Court. This issue was addressed in the Pennsylvania Supreme Court's opinion on this matter. Commonwealth v. Johnson, 727 A.2d 1089, 1093-96, 556 Pa. 216, ___ (1999).

In this instance, Defendant attempts to differentiate this presentation of the issue from the way in which this issue had been previously raised on direct appeal and as Defendant's PCRA issues 1-

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[7] Initially, George Robles was being held in jail because he was an important Commonwealth witness. Material witness bail had been set and he was released at a later date.

5. Specifically, Defendant states that there was an obligation to disclose the letter as impeachment evidence under Giglio v. United States, 405 U.S. 150. 154 (1972) and United States v. Bagley, 473 U.S. 667, 676 (1985) separate from the obligation under Brady v. Maryland, 373 U.S. 83, 87 (1963) which had already been raised and litigated on direct appeal. We disagree.

In reviewing Giglio and Bagley, we see the disclosure obligations presented in these cases as subsets of the greater obligation presented in Brady. In fact, Bagley states "[I]mpeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972)." United States v. Bagley, 473 U.S. 667, 676 (1985).

We would therefore submit that once the Pennsylvania Supreme Court decided that there was no disclosure violation under Brady, the Supreme Court also resolved that there was no disclosure violation under any subset of Brady. Accordingly, this issue has been previously litigated and is not eligible for PCRA review. For this reason, this issue should be dismissed.

Defendant presents an additional argument in this subsection at paragraph 50 that Trial Counsel was ineffective for not properly cross-examining Mr. Robles. Defendant submits that

there was significant additional evidence that could have been presented for impeaching Mr. Robles including the testimony of Carlos Diaz. While Defendant certainly presents an intriguing claim, this argument turns out to be the baldest of assertions. Defendant fails to provide any specificity as to what should have been asked on cross-examination, what documents should have been used or what Carlos Diaz[8] would have said had he been called to testify. No affidavit from Mr. Diaz was ever filed with the Court or any type of documentation to support this claim. Accordingly, this claim fails for lack of specificity.

27. Crying Aunt

Defendant has also alleged ineffective assistance of counsel in that Trial Counsel failed to request a mistrial when it was observed that the victims' aunt Eugenia Banks was crying in the courtroom.

This incident arose early on in the guilt phase of trial when Ms. Banks was observed to be crying with her head down in the gallery near the jury box. (N.T., Jury Trial-Guilt Phase,

[8] In yet another interesting and bizarre coincidence, since the time of Defendant's trial, Carlos "Angel" Diaz was convicted of unrelated quadruple third degree murders and has been sentenced to 80 to 160 years in a State Correctional Institution.

11/18/97, p. 169). At this time a sidebar was held in which the matter was discussed and it was ultimately resolved to move Ms. Banks away from the vicinity of the jury. (N.T., Jury Trial-Guilt Phase, 11/18/97, p. 170).

We find this claim to be utterly without merit. This Court would note that the Defendant was being tried for a double murder. Generally in such cases there are certain to be grieving relatives. We have had displays of the grief of relatives in virtually every homicide case with which we have been associated, and this case was certainly no exception. While the sobbing of Ms. Banks was certainly somewhat more visible than what usually occurs, it was also far from being the most extreme example of grieving in court that we have ever observed. Furthermore, as this is a homicide case, we would trust that every juror with even the merest scintilla of common sense would realize that there are likely to be grieving relatives for the victims.

In light of the fact, that the conduct of Ms. Banks was not extreme, and the fact that grieving relatives are commonplace to trials of this -nature, we fail to see how Defendant was or could be prejudiced by this conduct. As Defendant was not prejudiced, we would submit that counsel could not be found to be ineffective for failing to ask for a mistrial. We would also point out that given the

nature of the conduct involved, this Court certainly would not have found any necessity for a mistrial, and it would have been pointless for counsel to even attempt to request one.

Finally, we would point out that this Court did take steps to distract the jury while Ms. Banks was moved, so as to minimize the impact of her conduct on the jury. (N.T., Jury Trial- Guilt Phase, 11/18/97, pp. 169-170).

For these reasons, we fail to find that counsel was ineffective in not requesting a mistrial, and would see this claim dismissed.

28. Inconsistent Defense

Defendant has also claimed that Trial Counsel raised an inconsistent defense in that Defense counsel conceded the Defendant's guilt. Specifically, Defendant finds error in that trial counsel admitted the Defendant's involvement in the crime and presented evidence of codefendant Shawn Bridges' flight through witness Yusuf Benton. (N.T., Jury Trial-Guilt Phase, 11/25/97, p. 746).

After thoroughly reviewing Defendant's petition, the Court fails to comprehend the inconsistency. In light of the multitude of statements given by the Defendant, the only

reasonable course of action for Defense Counsel to take was to admit the Defendant's presence at the scene, but to attempt to mitigate Defendant's culpability by alleging that Defendant was not an accomplice to Shawn Bridges and focusing the Jury's attention as to this incident as having been planned by Mr. Bridges. Shawn Bridges' flight, while it can be used against the Defendant, is also strong evidence that goes to establish Mr. Bridges' overall guilt in this scheme.

While this argument is not overwhelmingly compelling, it is nevertheless one of the few rational avenues of defense that was open to Trial Counsel. Accordingly, we find Defense Counsel's conduct to be reasonable and not ineffective. For this reason, this issue should be dismissed.

29. Diminished Capacity Defense

After reviewing Defendant's claims that Counsel was ineffective for failing to raise a diminished capacity defense and the affidavits of witnesses Sonia Johnson, Rex Johnson, Gloria Johnson, Janyne Quintero, Frances Stephens, Dr. Carol Armstrong and Dr. Julie Kessel, we find that Defendant has raised sufficient issues of material fact to require a hearing. At said hearing, Defendant will present evidence in support of this claim.

30. Failure to Call Iris Alvarez to Show Robles Bad Character

Defendant has claimed ineffective assistance of Trial Counsel in that counsel failed to call Iris Alvarez to testify as to the credibility of Commonwealth's witness George Robles. After reviewing Defendant's claim, we find that the Defendant has raised sufficient issues of material fact so as to require a hearing on this issue.

31. Jurors Involved in Conversation with Police Officer

Defendant has also found error in that Trial Counsel failed to request dismissal of the entire jury panel after two prospective female jurors and an unknown male had an impermissible conversation with police prosecutor Dunn.

Criminal Investigator Dunn described the conversation as follows:

Criminal Investigator Dunn: I was talking with Children and Youth, one of their investigators from the case I'm working, and she asked me how the jury selection was going. I said, it's slow. And she said, how's Mr. Johnson. I said, he's cleaned up his act. And one of the jurors said, oh, did we have to buy that suit? And I turned around, and there she was standing. She said, he

looks nice in that suit, I guess we have to pay for it. And there was an older gentleman standing there. She said to me, are you an attorney? And he said, no, he's the Chief of Police from Exeter. So that's what was said.

The Court: Well, where did this occur?

Criminal Investigator Dunn: In the smoke- at the back of the building where they smoke, where people stand outside and smoke, in that little doorway.

The Court: In the services center?

Criminal Investigator Dunn: Yes, the Services Center. I believe they weren 't picked yet. The Court: All right. There were two then?

Criminal Investigator Dunn: Two females and a male. The Court: Two females and a male. Three people.

Criminal Investigator Dunn: I said to them, don't talk to me. And the other female said, well, these people would do anything to get off the jury, something to that effect.

(N.T., Voir Dire, 11/13/97, pp. 300-01). After the incident, the two female jurors were identified and questioned about the incident: At that time they

stated that they had not told anyone else about the incident and were excused from the panel. (N.T., Voir Dire, 11/13/97, pp. 420-429). Criminal Investigator Dunn was never able to identify the male as being on the jury panel, although both female jurors indicated that he may be a venire person.

As noted several times throughout this order, it is Defendant's burden to establish prejudice under the PCRA, and he has certainly failed to do so in this instance. There has been absolutely no indication other than the wildest speculation that this unknown man may have somehow tainted the jury. Had the unknown individual actually ended up on the jury, Criminal Investigator Dunn would certainly have brought this fact to the attention of the Court, and he did not do so. We would also point out that although the conversation was impermissible, all things considered, it was relatively benign in nature. (N.T., Voir Dire, 11/13/97, pp. 300-01). In light of this conversation and in light of the extensive instructions that the jury was given about burdens of proof and the presumption of innocence before, during and at the conclusion of trial, we submit that the Defendant has not established any prejudice from this incident. As Defendant was not prejudiced, Trial Counsel cannot be deemed to be ineffective and Defendant is therefore not entitled to PCRA relief.

32. Exclusion of Minorities from Jury Panel

Defendant has alleged that minorities were systematically excluded from the jury panel by the use of driver's registration lists as the basis for the jury pool in Berks County. This issue has recently been considered by the Pennsylvania Supreme Court and has been concluded to be without merit. Commonwealth v. Bridges, 757 A.2d 859, 867 (Pa. 2000). In Bridges, the Pennsylvania Supreme Court was asked to review whether a statistician was necessary to review the jury pool available for the Bridges trial. Bridges, of course, was the codefendant of Defendant Johnson and the same system of jury pool selection was used for Bridges as was used for Defendant Johnson. The Supreme Court ultimately concluded that:

"A criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that blacks are underrepresented in voter lists" because such computer generated lists are compiled without regard to race. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 933 (1990), cert. denied, 499 U.S.
931, 111 S.Ct. 1338, 113 L.Ed.2d 269 (1991). This Court has repeatedly rejected the argument that a jury pool chosen from voter registration does not represent a fair cross section of the community.

Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 114 (1998), cert. denied, --- U.S. ----, 120 S.Ct 41, 145 L.Ed.2d 38 (1999). For that reason, the trial court did not err in denying this request.

Id. As the Supreme Court found the method of calling jury panels to be fair in Bridges, we find the same holding to be applicable to the instant case and therefore reject the Defendant's claims. For this reason, the Defendant's claim should be dismissed.

33. Failure to Obtain Ballistics Expert

Defendant also finds error in Trial Counsel's failure to obtain a ballistics expert. We find this issue to be without merit, as Defendant has failed to suggest what an additional ballistics expert might have shown. While the ballistics of this case are undeniably significant, Defendant has never suggested that that the conclusions of Commonwealth Ballistics Expert Pennsylvania State Police Trooper Kurt Tempinski was in any way inaccurate or how the evidence of this case might possibly be viewed differently by an expert for the Defense. We believe this holding to be consistent with the opinion of the Pennsylvania Supreme Court as recently stated in Commonwealth v. Bridges, 757 A.2d 859, 867 (Pa. 2000). As Defendant has failed to establish even the slightest necessity for a defense ballistics

expert, we cannot find Trial Counsel to be ineffective and we must see this claim denied as being without merit.

34. Improper Accomplice Liability Instruction

Defendant next claims that this Court improperly instructed the jury as to accomplice liability. Specifically Defendant claims that the Court's instructions would lead the jury to believe that the specific intent to kill of an accomplice would be sufficient to convict the Defendant of first degree murder.

While Defendant has cited several examples where isolated excerpts of text could be construed in such a manner (see N.T., Jury Trial-Guilt Phase, 11/25/97, pp. 826, 831 and 849, and Defendant's "Supplement to Amended Petition" p. 37, paragraph 107), when the charge is viewed as a whole, this clearly was not the case. We would point specifically to our instruction as to the state of mind necessary for first degree murder in which we stated in part:

> The Commonwealth must prove, if you find that there was a murder of the first degree, that the defendant, as an accomplice, had the same mental state, the same intent to kill as the actual killer, the specific intent to kill for first degree murder ...

(N.T. Jury Trial-Guilt Phase, 11/25/97, p. 833). We would submit that this portion of the instructions remedied any other confusion that may have been generated by the other portions. Additionally, when read as a whole, the guilt phase instructions to the jury were in fact legally sound. Accordingly, we find this issue to be without merit and would see that it was dismissed.

35. Life Without Parole Instruction

While Defendant has produced a host of case law in support of his proposition that the failure to instruct the jury that a life sentence in Pennsylvania means life without parole was in error, we believe little discussion of this subject is necessary, as the Supreme Court of Pennsylvania has spoken dispositively on this issue.[9] In two recent cases, the Supreme Court of Pennsylvania has unequivocally stated that such an instruction "is required to be given only in those cases where the future dangerousness of the Defendant has been placed at issue." Commonwealth v. Bridges, 757 A.2d 859, 881 (Pa. 2000), citing Commonwealth v. Chester, 733 A.2d 1242, 1257 (Pa. 1999). As Defendant has failed to show that future

[9] This instruction is also known as a Simmons instruction in accordance with Simmons v. South Carolina, 114 S.Ct. 2187, 2197 (1994).

dangerousness was ever placed into issue in the instant case[10], we are bound by the holding of the Pennsylvania Supreme Court, and accordingly find that there was no error in failing to give said instruction. For these reasons Defendant's PCRA petition should be dismissed in respect to this issue.

36. Failure to Rehabilitate Jurors in Opposition to Death Penalty

It has also been alleged that Trial Counsel was ineffective for failing to attempt to rehabilitate jurors who opposed the death penalty. Specifically Defendant objects to the failure to rehabilitate juror numbers 5, 6, 22, 23, 46, 48, 57, and 79 from the first panel and jurors 12, 14, and 25 from the second panel. All these jurors were ultimately struck for cause.

We now review the reasons for striking each of these jurors in detail.

We would first note that jurors number 5, 6, 22, 23, 48, 57 59 and 14 stated during general questioning that they had beliefs that would prevent him or her from imposing the death penalty. (N.T., Voir Dire, 11112/97, p: 36 and

[10] See also N.T., Jury Trial-Penalty Phase, 11/26/97, pp. 1003-04.

11114/97, p. 476). The remaining jurors stated this concern during their individual questioning.

Juror number 5 also stated that he had a friendship, association with or had been a police officer, that himself, a family member or close friend had been a victim of crime and that he had a prejudice against African-Americans. (N.T., Voir Dire, 11/12/97, pp. 28, 32 and 48). Juror 5 was excused for cause without individual questioning. (N.T., Voir Dire, 11112/97, p. 69).

Juror number 6 had also stated that he had a close relationship with a police officer or had been a police officer, that himself, a family member or close friend had been a victim of crime, that he had a hardship that would preclude attendance at trial, and that he had religious or ethical beliefs that would prevent him from being a fair and impartial juror. (N.T., Voir Dire, 11/12/97, pp. 28, 32, 41 and 46). Juror 6 also went on to state that he could not impose the death penalty or life imprisonment or give the Defendant a fair and impartial trial. (N.T., Voir Dire, 11/12/97, pp. 37 and 39). Juror 6 was excused for cause without individual questioning. (N.T., Voir Dire, 11/12/97, p. 69).

Juror number 22 stated that he would not consider the imposition of the death penalty under any circumstance and was struck for cause during individual questioning. (N.T., Voir Dire, 11/13/97,

p. 232).

Juror number 23 had previous knowledge of this case (N.T., Voir Dire, 11/12/97, p. 23), and either herself or a close friend of family member had been a victim of crime. (N.T., Voir Dire, 11/12/97, p. 29). Juror 23 was excused for cause without individual questioning. (N.T., Voir Dire, 11/12/97, p. 69).

Juror number 46 stated that he could not promise to follow instructions in respect to the death penalty, as he was not one to play God; he was struck for cause during individual questioning (N.T., Voir Dire, 11/12/97, pp. 350-51).

Juror number 48 stated that she did not know if she could impose a death sentence and was struck for cause during individual questioning. (N.T., Voir Dire, 11/12/97, pp. 361-62).

Juror number 57 stated that she could not condemn anyone to death and was excused for cause during individual questioning. (N.T., Voir Dire, 11/12/97, pp. 388-90).

Juror number 79 stated that he knew of these murders, (N.T., Voir Dire, 11/12/97, p. 26), that he was friends, related to or had been a law enforcement officer, (N.T., Voir Dire, 11/12/97, p. 34), that he had a hardship and could not attend

trial, (N.T., Voir Dire, 11/12/97, p. 45), and that he had religious or ethical beliefs that would prevent him from being fair and impartial (N.T., Voir Dire, 11/12/97, p. 46). It was additionally noted that this juror's wife worked for the prison crime must be substantial and mental state must rise to level of "reckless disregard for human life" to sentence to death). We disagree.

The instruction at issue is as follows:

With regard to Damon Banks, there is one (1) aggravating circumstance that may be considered by you. That is, that at the time of the killing, Damon Banks was or had been involved, associated, or in competition with the defendant in the sale, distribution, or delivery of any controlled substance, and the defendant committed the killing or was an accomplice to the killing, and the killing resulted from or was related to that association, involvement or competition, to promote the defendant's activities in selling, distributing or delivering controlled substances.

Since I have used the term "accomplice" again, and I in no way can ask you what your verdicts were predicated upon yesterday, the Commonwealth needs to prove that the defendant killed or was an accomplice and cannot rely upon conspiracy liability for this aggravated circumstance.

(N.T., Jury Trial-Penalty Phase, 11/26/97, p. 1033). After thoroughly reviewing this instruction and the case law related to Enmund, we find that the instruction was sufficiently clear and would not have misled a reasonable jury. The first paragraph of this instruction was substantially in compliance with the language of the statutory provision that defined the "drug involvement" aggravator. 42 Pa. C.S.A. §9711(d)(l4). Accordingly, there was no error in that paragraph. In the second paragraph, this Court simply explained how accomplice and conspiratorial liability played into consideration of this aggravator. This explanation was clearly not an attempt by the Court to define the mindset necessary to impose the death penalty. We believe that this fact would have been obvious to the jury, as the necessary mental state to impose the death penalty had already been found by the jury earlier in this trial.

The jury was given a more specific instruction consistent with Enmund when it was instructed the day before as to first degree murder. At that time we stated:

> The Commonwealth must prove, if you find that there was a murder of the first degree, that the defendant, as an accomplice, had the same mental state, the same intent to kill as the actual killer, the specific intent to

kill for first degree murder ...

(N.T. Jury Trial-Guilt Phase, 11/25/97, p. 833). As the jury had previously found an intent to kill by convicting Defendant of first degree murder, and had already been instructed dearly in a manner consistent with Enmund, we find that there was no error in the penalty phase instruction. *See also* Commonwealth v. Chester, 587 A.2d 1367, 1385 (Pa. 1991); (conviction of first degree murder satisfies the minimum culpability requirements of Tison and Enmund).

As to Defendant's second claim that Trial Counsel was ineffective for failing to request an Enmund instruction, this claim also fails. As noted above, Enmund only applies in instances in which there is a possible lack of sufficient mental state on the part of the defendant. In this instance, the jury, by convicting the Defendant of first degree murder had already found that the necessary mental state to impose the death penalty was present. Additionally, the Defendant's own statements to police establish that he knew that Bridges was going to kill the Banks cousins when he picked them up on the day of the murder. As a more than sufficient mental state had been established by Defendant's conviction of first degree murder and his statements to police, there was no call for this Court to give an Enmund instruction during the penalty phase. Accordingly, this issue is without

merit and Trial Counsel was not ineffective.

For these reasons, this claim should be dismissed.

39. Failure to Present Mitigation Evidence

Defendant has claimed that Trial Counsel was ineffective for failing to present relevant mitigation evidence on behalf of the Defendant. This Court has reviewed Defendant's PCRA petition and affidavits of potential mitigation witnesses Gloria Johnson, Rex Johnson, Sonia Johnson, Janyne Quintero, Odetta Quintero and Frances Stephens. On this basis we believe that Defendant has presented sufficient material issues of fact so as to require a hearing on this issue. Hearing will accordingly be scheduled and Defendant will present evidence in support of said claim.

40. Mitigating Evidence of Defendant's Prison Good Conduct

Defendant has claimed that Trial Counsel was ineffective for failing to present relevant mitigation evidence on behalf of the Defendant pertaining to Defendant's conduct while incarcerated. This Court has reviewed the factual claims in Defendant's PCRA petition. To our knowledge, Defendant has presented no affidavits

of any witness in regards to this claim. Nevertheless we believe that Defendant has presented sufficient material issues of fact so as to require a hearing on this issue. Hearing will accordingly be scheduled and Defendant will present evidence in support of said claim.

41. Court Sent Out Written Instructions

Defendant has also claimed error on the part of this Court and his Trial Counsel in allowing written instructions to be sent out with the jury. (N.T., Jury Trial, Penalty Phase, 11/26/97, p. 1000). After reviewing the Defendant's claims, we are of the belief that this issue is without merit and should therefore be dismissed.

The line of cases finding reversible error in sending written instructions to the jury are not applicable to the instant case. In this instance all that was sent to the jury was a document from the Court's bench book containing instructions on completing the somewhat complicated verdict slip. (See Attached Exhibit A).[11] The Defendant has

[11]This document was reproduced from the Pennsylvania Homicide Benchbook page XII-B-39. The document is identical in substance to the form "Jury Instructions Completion of Verdict S1ip" §100.24, from the Pennsylvania Benchbook for Criminal Proceedings, Third Edition, Volume II, Judge Carolyn Engel Temin, Lexis Publishing, 1999.

cited three cases in which the Supreme Court of Pennsylvania found reversible error where courts have sent out written instructions on points of law. In Commonwealth v. Oleynik, the Supreme Court of Pennsylvania found reversible error where the court sent out written instructions as to legal causation and definitions of third degree murder and involuntary manslaughter. Commonwealth v. Oleynik, 568 A.2d 1238, 1239, 524 Pa. 41, 43 (1990). That case is obviously distinct from the instant case.

The Defendant has also cited Commonwealth v. DeHart, in support of his position. Commonwealth v. DeHart, 650 A.2d 38, 539 Pa. 5 (1994). DeHart is, quite simply, not relevant. DeHart addresses a situation in which the verdict slip itself contained a misstatement of the law as to the death penalty. The error in DeHart is clearly not analogous with the instant case and DeHart is not applicable.

Finally, Defendant has cited Commonwealth v. Karaffa, where the Supreme Court found reversible error after a trial court gave the jury a written instruction on the elements of unlawful restraint and the definition of reasonable doubt. Commonwealth v. Karaffa, 709 A.2d 887, 551 Pa. 173 (1998). Once again, that case differs sharply

from the instant case.

The attached instructions are not of the ilk contemplated by the aforementioned line of cases and therefore all these cases are not applicable. Accordingly, there was no error in submitting these instructions to the jury and Defendant's claim should be dismissed in this regard.

42. Trial Counsel's Failure to Investigate Aggravating Factor and Failure to Ask for Continuance

The Defendant's next allegation of error claims that Trial Counsel was ineffective for failing to adequately investigate evidence from George Robles in support of the "drug involvement" aggravator and for failing to request an adequate continuance.

Trial Counsel was made aware of Mr. Robles' statements as soon as the prosecutor received them. The report was given to defense counsel the very next morning one day before the commencement of the penalty phase. This Court, acknowledging that no discovery violation occurred due to the actual receipt of the report by defense counsel, delayed its ruling on a defense request for a continuance until the testimony was received into evidence.

After direct examination, defense counsel requested a 30-minute recess to better prepare themselves for cross-examination of Mr. Robles. This request was granted. (N.T., Jury Trial-Penalty Phase, 11/26/97 p. 937-38).

This issue was raised on direct appeal in the context of it being Trial Court error. The Supreme Court of Pennsylvania briefly addressed this issue in its opinion and found no error. Commonwealth v. Johnson, 727 A.2d 1089, 1096-97 (Pa. 1999). Accordingly we find this issue to be previously litigated and submit that this issue must be dismissed.

Furthermore, assuming arguendo that this issue had not been previously litigated, it must still be dismissed as Defendant has failed to make any showing of prejudice. Defendant has never indicated what additional information about Mr. Robles could have been uncovered with a longer continuance or additional investigation. As the burden under the PCRA is on the Defendant and the Defendant has failed to make any showing of actual prejudice, the foregoing claim should be dismissed.

43. Prosecutorial Misconduct by Mentioning Defendant's Failure to Show Remorse

Defendant next finds error in two questions

asked by the prosecution during the penalty phase in which the Defendant's lack of remorse was mentioned. Defendant submits that Trial Counsel was ineffective for failing to request a curative instruction or mistrial due to the prejudice created by these questions.

The questions at issue were as follows:

District Attorney Baldwin: Detective Bailey, on direct examination by Mr. Miller, he asked you to describe the events in the course of the two statements, the written statement from December 11th 1996 and the your follow up on- December 12th, and he asked you if he was cooperative, and you said yes.

The defendant, in the course of those two statements, at any time did he show remorse for his actions ...

* * *

District Attorney Baldwin: [to sergeant Godshall] In the course of this first statement on December 11th of 1996, at any time did the defendant show you remorse for his actions?

(N.T., Jury Trial- Penalty Phase, 11/26/97, pp. 973 and 980). Trial Counsel objected to both questions at the time they were asked and the objections were sustained by this Court without further

comment.

We find no error or misconduct in these references. In fact, the Supreme Court of Pennsylvania has recently held that brief comments or questions by a prosecutor regarding a defendant's lack of remorse do not constitute misconduct. Commonwealth v. Rollins, 558 Pa. 532, 556, 738 A.2d 435, 449 (1999). We find that the statements in this instance fall into the same category as the statements in Rollins and that there was no misconduct on the part of prosecutors. Furthermore, we would submit that Trial Counsel's conduct was not ineffective and was inherently reasonable under the circumstances. To request a cautionary instruction would only serve to underscore the Defendant's alleged lack of remorse and would not be helpful to his client. Further, the alleged misconduct of the prosecution in this instance was so minimal in nature, this Court would not have granted a mistrial. Asking for a mistrial would have been pointless. We think the best and most reasonable course of conduct to be letting the objections be sustained without further comment.

We would additionally point out that the jury was instructed that matters to which objections have been sustained should be disregarded. (N.T., Jury Trial Guilt Phase, 11/18/97, pp. 22-23). Since a jury is presumed to follow these instructions and

Defendant has failed to demonstrate this instruction was disregarded, we would submit that merely sustaining the objection was sufficient to cure any error under these circumstances.

As Trial Counsel's actions were reasonable in light of the circumstances, we find no ineffective assistance. Accordingly we dismiss this issue as it is without merit.

44. Errors in Jury Instructions as to Aggravators and Mitigators

Defendant has alleged that this Court erred in its instructions to the jury as to aggravating and mitigating circumstances. Specifically, Defendant finds issue with this Court's statement that aggravating and mitigating circumstances "are things that make first degree murder case ... either more terrible or Jess terrible." (N.T., Jury Trial-Penalty Phase, 11/26/97, p. 1031). We respond to this contention in two ways: First, we would point out that a similar statement was made by the trial court in Commonwealth v. Stevens, 739 A.2d 507 (Pa. 1999). After reviewing the issue, the Supreme Court ultimately determined that there was no error in the phraseology used by the Court. Id. at 527.

Second, in respect to evaluating the sufficiency of jury instructions, the Superior Court

of Pennsylvania has stated:

> "Because jury instructions are the principal medium for communicating to the jury the legal bases upon which its verdict is to rest, they should be 'clear, concise accurate and impartial statements of the law written in understandable language.'" Commonwealth v. Ford-Bey, 504 Pa. 284, 289, 472 A.2d 1062, 1064 (1984) (Quoting ABA standards for Criminal Justice 15-3.6(a) Commentary at 100 (citation omitted)). In charging a jury, the trial judge must clarify issues so that the jurors may comprehend the questions they are to resolve, elucidate correct principles of law applicable to the pending case, and endeavor to make those principles understandable in plain language. Commonwealth v. Sherlock, 326 Pa. Super. 103, 106, 473 A.2d 629, 631 (1984).
>
> When reviewing jury instructions for reversible error, an appellate court must read and consider the charge as a whole. Commonwealth v. Dietterick, 429 Pa. Super. 180, 188, 631 A.2d 1347, 1352 (1993), appeal denied, 538 Pa. 608, 645 A.2d 1312 (1994). We will uphold an instruction if it adequately and accurately reflects the law and is sufficient to guide the jury through its deliberations. Commonwealth v. Ahlborn,

> 441 · Pa. Super. 296, 300, 657 A.2d 518, 520 (1995). Error will not be predicated on isolated excerpts. Instead it is the general effect of the charge that controls. Commonwealth v. Zewe, 444 Pa. Super. 17, 28, 663 A.2d 195, 201 (1995), appeal denied, 544 Pa. 629, 675 A.2d 1248 (1996); Commonwealth v. Anderson, 410 Pa. Super. 524, 526, 600 A.2d 577, 578 (1991), appeal denied, 531 Pa. 644, 612 A.2d 983 (1992). An erroneous charge warrants the grant of a new trial unless the reviewing court is convinced beyond a reasonable doubt that the error is harmless. Diettrick, 429 Pa. Super. at 189, 631 A.2d at 1352.

Commonwealth v. Clark, 453 Pa. Super 257, 263, 683 A.2d 901, 904 (1996). Even if this one statement was in any way erroneous, this Court would submit that the overall charge was without error. Accordingly this issue is without merit and we would see it dismissed.

45. Drugs Aggravator Unconstitutional

Defendant has also alleged that Trial Counsel was ineffective for failing to challenge the constitutionality of the "drug involvement" aggravator of 42 Pa. C.S.A. 9711(d)(l4). Defendant specifically takes issue with the fact that the aggravator does not define the terms "associated,"

"involved," or "competition." We find no error in this instance as all three terms are commonly known and understood enough to not require additional definition. Accordingly, we find that the aggravator was not unconstitutionally vague and that this claim is without merit.

We would also note that the Pennsylvania Supreme Court has had several opportunities to consider the applicability of this aggravator and in no case ever found there to be any question of its clarity. See Commonwealth v. Johnson, 727 A.2d 1089, 555 Pa. 216 (1999); Commonwealth v. Bridges, 757 A.2d 859 (Pa. 2000); Commonwealth v. Fletcher, 750 A.2d 261, 561 Pa. 266 (2000); Commonwealth v. Thompson, 739 A.2d 1023, 559 Pa. 229 (1999); and
Commonwealth v. Jones, 668 A.2d 491, 542 Pa. 464 (1995).

46. Cumulative Errors

Defendant has also alleged that the cumulative effect of any harmless error in his trial prejudiced him to such a degree so as to require .PCRA relief. Claims of cumulative error have generally been rejected by the appellate courts of Pennsylvania in favor of individualized assessment of the merits of a defendant's claims. Commonwealth v. Williams, 732 A.2d 1167, 1191, 557 Pa. 207 (1999); see generally Commonwealth v.

Murphy, 540 Pa. 318, 336 n. 6, 657 A.2d 927, 936 n. 6 (1995)(citing Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992)). In light of this position by the appellate courts, we find no merit to Defendant's claims of cumulative error, and must therefore see this claim dismissed.

47. Ineffective Assistance of Counsel in Filing PCRA

This issue was withdrawn at the August 25, 2000 hearing on this matter. Therefore the Court will not address this issue.

48. All Prior Counsel Ineffective

Defendant has also claimed that all prior counsel were ineffective, yet fails to state exactly how counsel were ineffective. Defendant instead realleges all prior allegations of ineffectiveness in support of this proposition (See paragraph 340). We find that this claim of Defendant's must fail for lack of specificity. Where applicable, ineffective assistance of counsel has been addressed in each of Defendant's prior claims. This broad claim serves no purpose and this Court can see no way to adequately evaluate it, therefore, this claim should be dismissed.

49. Racially Biased Peremptory Challenges

Defendant has also alleged that the Commonwealth exercised peremptory challenges in a racially biased manner. Defendant has, however, provided no factual support for this claim. Defendant's petition fails to address which peremptory challenges are alleged to be racially based or show any type of common scheme in the use of challenges to exclude minority jurors.

As the burden under the PCRA is on the Defendant, we find that the Defendant has failed to allege sufficient facts for this to even be a cognizable claim. Accordingly, without more, we must see this claim dismissed.

50. Death Penalty Imposed in a Racially Biased Manner in Berks County

Defendant has alleged that the death penalty has been imposed in a racially biased and arbitrary and capricious manner in Berks County. Defendant however, provides no argument or proffer of evidence in support of this claim. As the burden of proof rests upon the Defendant in seeking PCRA relief, we find that this issue must fail, as Defendant has not offered any evidence to support his claim. 42 Pa. C.S.A. §9543(a).

We would additionally note that we look upon this issue with some distaste. To make such a grave assertion about the Courts of Berks County

and not provide any evidence in support of said claims, we consider to be most brazen and irresponsible. This Court as a sitting judge of Berks County and former President Judge has always held its responsibility in death penalty cases to be a sacred trust. Statements a11eging misconduct by this Court or any other judge of this county without support are not favorably looked upon.

51. Defendant Entitled to Experts

This claim is essentially a request by Defendant for appointment of a psychiatric expert, an expert on application of the death penalty and a ballistics expert. This Court has already denied appointment of a ballistics expert as Defendant has failed to make a showing of the necessity for such an expert (see issue 33). Additionally, Defendant has presented no cogent argument of any sort that would support the necessity for an expert on application of the death penalty in Pennsylvania (see issues 32 and 50). However, after reviewing Defendant's request and the Commonwealth's response, we are of the opinion that additional argument on the issue of a psychiatric expert is necessary. Defendant shall therefore address this issue at the hearing on this matter. Defendant apparently has already has been evaluated by psychiatric experts Dr. Carol Armstrong arid Dr. Julie Kessel. These witnesses will be permitted to testify at the hearing in this matter in conjunction

with issue number 29. At the time of the hearing on this matter, Defendant shall be prepared to offer a specific proffer as to what evidence a court-appointed psychiatric expert could possibly offer beyond that which we will permit to be introduced at the hearing on this matter.

We would also point out that what Defendant has essentially requested in this claim is a form of discovery. Discovery is generally precluded under the PCRA without a showing of good cause. Pa.R. Cr.P. 1502(E)(2). Defendant has not as of yet demonstrated good cause in any of his requests for experts.

52. Jury Foreman was Asleep

Defendant has also claimed to have a witness, Gloria Johnson, which will testify that the jury foreperson was asleep during portions of the proceedings. We find that this claim does raise a material issue of fact and order that a hearing be held. At said hearing, Defendant will present evidence in support of this claim.

53. Entitled to Evidentiary Hearing

Defendant's final issue is not truly an issue at all; it simply serves to clarify the legal reasons why Defendant believes that he may be entitled to an evidentiary hearing. We concur with

Defendant's argument and have granted a hearing as to those claims that raise "material issues of fact." Pa.R.Cr.P., 1508(a). However, most of Defendant's issues are not factually in dispute, and therefore a hearing as to those issues will be denied.

A hearing in this matter is scheduled for March 23, 2001 at 9:30 AM in Courtroom SA of the Berks County Courthouse. At said time, Defendant shall present evidence in support of the above issues for which hearing was granted. To summarize, the issues on which hearing has been granted are as follows:

25- Failure to Present Character Evidence
29- Failure to Pursue Diminished Capacity Defense
30- Failure to Call Iris Alvarez to Show Robles Bad Character
39- Failure to Present Mitigation Evidence
40- Failure to Present Evidence of Defendant's Good Conduct while in Prison
51- Defendant Entitled to Experts
52- Jury Foreman was Asleep

Pursuant to the Pennsylvania Rules of Criminal Procedure, a Post Conviction Relief Act Petitioner is required to present affidavits from al-1 witnesses expected to be called to testify. Defendant has had ample opportunity to assemble these affidavits. Accordingly Defendant's testimony

at the hearing on this matter will be limited to the following witnesses:

Iris Alvarez
Dr. Carol Armstrong
Gloria Johnson
Rex Johnson Sonia Johnson
Dr. Julie Kessel
Odetta Quintero
Janyne Quintero
Frances Stephens
Tarik Turner

Defendant has also provided affidavits from Allyn Ammons and Liz Ruiz. These parties are apparently only witnesses to Defendant's claim number 55. As claim 55 was part of the Second Amended Petition disallowed by this Court due to its untimely filing, Defendant is precluded from calling these witnesses unless he can demonstrate that either of these witnesses can provide testimony as to one of the issues for which hearing has been approved. No witnesses other than those listed above may be called without extraordinary cause being shown by Defendant.

Testimony of the above-listed witnesses will also be limited to the subjects for which they have been identified as witnesses earlier in this document and for which they have submitted affidavits. Defendant may not solicit testimony

from these witnesses about subjects for which they have not provided affidavits or in regard to issues in which they have not been identified as a witness without good cause being shown.

Defendant has presented affidavits from Sonia Johnson, Rex Johnson and Gloria Johnson who did testify during the penalty phase in this matter. (N.T., Jury Trial-Penalty Phase, 11/26/97, pp. 982-96). Testimony of these witnesses at this hearing will be limited to matters not already the subject of testimony during their penalty phase hearing.

We would also note that Defendant has failed to comply with Pennsylvania Rule of Criminal Procedure (A)(l5) and 42 Pa. C.S.A. §9545(d)(1). This rule and statute require a defendant requesting an evidentiary hearing to provide signed certifications of each intended witness. These documents are to state each witness' name, address, date of birth and the substance of the witness' testimony. While the provided affidavits do cover some of these areas, Defendant still needs to provide the appropriate certification. Defendant is to assemble and promptly file the appropriate certifications with the Court. Failure to do so may result in the preclusion of witnesses from testifying at the hearing in this matter.

Upon conclusion of the hearing on these

issues, this Court shall promptly issue an order disposing of the issues set for hearing. Pa.R.Cr.P. 1509(D). That order will either grant relief in respect to or propose dismissal of each of the issues addressed at the evidentiary hearing. Defendant shall have twenty (20) days from the date of said order to respond to any proposed dismissal of issues for which the evidentiary hearing was held and the proposed dismissal of issues through the instant Order and Notice of Intent to Dismiss. Defendant shall file a single unified response in respect to all PCRA issues.

The issues not set for hearing by the instant Order and Notice of Intent to Dismiss will be subject to the provisions of Pennsylvania Rule of Criminal Procedure 1509(C). Defendant, pursuant to Rule l 509(C)(2), may request an oral argument on issues for which hearing has not been granted within twenty (20) days of the order disposing of the hearing issues. Defendant is also free to respond to the proposed dismissal of these issues in writing in his unified response. Request for oral argument should be filed as part of the unified response that this Court requires.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

Exhibit A

DIRECTIONS FOR COMPLETING SENTENCING VERDICT SLIP

(To Be Given To Jury With The Verdict Slip)

1. READ THE VERDICT SLIP AND THESE DIRECTIONS BEFORE YOU BEGIN TO DELIBERATE.

2. KEEP IN MIND THESE POINTS:

A. THE COMMONWEALTH MUST PROVE AGGRAVATING CIBCUMSTANCES BEYOND A REASONABLE DOUBT. YOU CAN REGARD AN AGGRAVATING CIRCUMSTANCE AS PRESENT ONLY IF YOU ALL AGREE THAT IT IS PRESENT.

B. THE DEFENDANT MUST PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE. OF THE EVIDENCE, THAT IS BY THE GREATER WEIGHT OF THE EVIDENCE. EACH OF YOU IS FREE TO REGARD A MITIGATING CIRCUMSTANCE AS PRESENT, REGARDLESS OF WHAT THE OTHER JURORS BELIEVE ABOUT THAT CIRCUMSTANCE.

3. FOLLOW THESE DIRECTIONS WHEN COMPLETING PART II OF THE VERDICT SLIP ENTITLED "SENTENCING VERDICT AND

FINDINGS."

A. YOU MUST AGREE UNANIMOUSLY ON THE GENERAL FINDING IN B.1 OR ON THE GENERAL FINDING IN B.2. BEFORE YOU CAN SENTENCE THE DEFENDANT TO DEATH. IF ALL JURORS AGREE ON ONE OR MORE AGGRAVATING CIRCUMSTANCES AND ALL AGREE THAT THERE ARE NO MITIGATING CIRCUMSTANCES, THEN CHECK. B.1. ALSO, COPY FROM PART I THE AGGRAVATING CIRCUMSTANCES ON WHICH YOU ALL AGREE. IF ALL JURORS AGREE ON ONE OR MORE AGGRAVATING CIRCUMSTANCES AND, ALTHOUGH ONE OR MORE JUROR FINDS MITIGATING CIRCUMSTANCES, ALL JURORS AGREE THAT AGGRAVATING OUTWEIGHS MITIGATING CIRCUMSTANCES, THEN CHECK B.2. ALSO COPY FROM PART I THE AGGRAVATING CIBCUMSTANCES ON WHICH YOU ALL AGREE AND THE MITIGATING CIBCUMSTANCES THAT ONE OR MORE OF YOU FIND ARE PRESENT.

B. YOU MAY STOP DELIBERATING AND SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT ONLY IF ALL JURORS AGREE TO DO SO. IF YOU SENTENCE IS LIFE IMPRISONMENT, YOU SHOULD CHECK THE FINDING, C.1. OR C.2., WHICH EXPLAINS ·WHY YOUR JURY REJECTS THE DEATH

PENALTY AND IMPOSES A LIFE SENTENCE. IF THE REASON FOR REJECTING THE DEATH PENALTY IS THAT ONE OR MORE JURORS FIND NO AGGRAVATING CIRUMSTANCES, THEN CHECK C.1. IF THE REASON FOR REJECTING DEATH IS THAT, ALTHOUGH ALL JURORS AGREE ON AT LEAST ONE AGGRAVATING CIRCUMSTANCE, ONE OR MORE JURORS FIND THAT MITIGATING ARE NOT OUTWEIGHED BY AGGRAVATING CIRCUMSTANCES, THEN CHECK C.2. ALSO COPY FROM PART I ANY MITIGATING CIRCUMSTANCES FOUND BY ONE OR MORE JURORS AND ANY AGGRAVATING CIRCUMSTANCES ON WHICH YOU ALL AGREE.

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	: : CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J

ORDER

AND NOW this 15th day of March, 2001, we enter the following orders in regard to supplemental motions submitted by the Defendant:

On March 12, 2001, Defendant submitted three motions to this Court in respect to his Post Conviction Relief Act Petition. We address each of these motions individually:

Defendant has filed a Motion for a Certificate of Materiality pursuant to the Uniform Act to Secure Attendance of Witness Iris Alvarez, 42 Pa.C.S.A. §5961 et seq. Said motion is GRANTED. A signed copy of the requested Certificate is attached to this order.

Defendant has filed a Motion for Expert Funds to Aid Counsel in his PCRA preparation. At this time, we lack sufficient information to make a

ruling on this motion. We hereby request that Defendant submit a statement verifying his current *in forma pauperis* status as well as a statement as to what services expert witnesses Dr. Carol Armstrong and Dr. Julie Kessel have provided or are expected to provide as well as the estimated cost of those services. Upon provision of those documents, this Court will make a prompt ruling as to this motion.

Defendant has filed a Motion to Transfer and Produce Inmate Carlos Diaz. Defendant apparently seeks to transfer Mr. Diaz so that Mr. Diaz may be used as a witness in Defendant's May 11, 2001 PCRA filing. Defendant submits that the notes of an interview conducted in by private investigator Michael White (Tab C, Defendant's Second Supplement to Amended Petition) provide a sufficient basis for the certification required under PCRA law. 42 Pa. C.S.A. §9545(d)(l) and Pa.R.Cr.P. 1502(A)(l5). We disagree.

Both the statute and the rule of criminal procedure provide that a defendant seeking an evidentiary hearing must provide a "signed certification as to each intended witness." In this instance the document proffered by Defendant has not been signed in any manner and we therefore reject the document as a certification and deny Defendant's Motion to Transfer and Produce Carlos Diaz. Accordingly, this Motion is DENIED.

On a side note, Defense Counsel's first inclination may be simply to sign a certification himself, or get Mr. White to sign a certification and resubmit this document to the Court. Neither of those options are appropriate. Until recently, one of the great mysteries of the PCRA was: who must sign the certifications mentioned in the PCRA statute and Rules of Criminal Procedure? Until this past January, to our knowledge, no case has ever addressed this point. However, the Superior Court of Pennsylvania has recently shed some light on the subject. In evaluating whether a PCRA court could require affidavits of a PCRA petitioner, the Superior Court cited the legislative history of the PCRA, which broached this subject. The relevant text is as follows:

> So as a result, this amendment allows a defendant to merely present a summary of the statement so we know generally what that witness is going to say and merely sign a certification. Either the witness, his attorney, the defendant's attorney, or the petitioner himself, the defendant himself can sign a certification saying to his best knowledge that this was an accurate statement of what the witness would testify to. So I think it is an effort, again, not to take anyone's rights away from him but also to

> help that defendant in the processing of his appeal and hopefully to make it easier for him to obtain a hearing which we want him to obtain.

Commonwealth v. Brown, 2001 Pa Super 18 (filed January 17, 2001); citing Pa. Senate Journal, 1st Spec. Sess., June 13, 1995, at 217. The foregoing remarks were made by State Senator Stewart Greenleaf, a principal architect of the PCRA just prior to the adoption of the amendment requiring certification. While the statements of legislators voiced during floor debates are not controlling in determining the legislative intent of a statute, they are a legitimate aid in construing a statute and warrant due consideration. Commonwealth v. Defusco, 549 A.2d 140, 143, n.2 (Pa. Super. 1988).

Accordingly, we hold that any certification submitted to this Court must be signed by the proposed witness, the witness' attorney, the Defendant, or the Defendant's attorney. Additionally, whoever signs the statement must demonstrate some personal knowledge of the accuracy of the statements in the certification. While we deem hearsay statements (e.g., a summary of testimony taken from the witness by defense counsel and signed by defense counsel) to be acceptable, double hearsay (e.g., defense counsel signing a summary of testimony taken from the witness by a third party who is not the agent of

defense counsel) is not acceptable as it is too far removed from the knowledge of the signer to be a basis for certification.

If Defendant can obtain an appropriate certification for Mr. Diaz, he is welcome to petition the Court for reconsideration of this issue. We would also note that we require any petition for reconsideration must demonstrate that the testimony of Mr. Diaz will be admissible at hearing and will not be cumulative of the testimony of other witnesses previously approved As hearing on this matter is currently scheduled for May 11, 2001, we suggest that Defendant has ample time to assemble said documents and that the requirements of this Court are not unduly burdensome.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
	: CRIMINAL DIVISION
RODERICK JOHNSON	: NO. 118-1997
	: Assigned to: Keller, J.

CERTIFICATE OF MATERIALITY PURSUANT TO THE UNIFORM ACT TO SECURE ATTENDANCE OF WITNESS, 42 PA.C.S. SEC. 5961, ET SEQ.

AND NOW, this ___ day of _____ 2001, upon consideration of Petitioner's Motion for a Certificate of Materiality Pursuant to the Uniform Act to Secure Attendance of Witnesses, 42 Pa.C.S. Sec. 5961, et seq. ("Uniform Act"), the Court hereby finds and orders that Iris Alvarez is a material witness to this proceeding under the Uniform Act and that her presence is required in the County of Berks, Commonwealth of Pennsylvania to testify for one day or a part thereof in the above-captioned capital matter at a Post-Conviction Relief Act hearing scheduled to commence on the ____ day of _____, 2001 at _____ Courtroom.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

APPENDIX "M"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	: : CRIMINAL DIVISION :
RODERICK JOHNSON	: NO. 118-1997 : Assigned to: Keller, J.

ORDER AND NOTICE OF INTENT TO DISMISS

AND NOW, this 2nd day of October 2001, notice is hereby given by the Honorable Scott D. Keller of his intention to dismiss the defendant's Petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §9541 et seq., pursuant to Pennsylvania Rules of Criminal Procedure 907, 908(D) and 909(D). We hereby incorporate all finding from our previous Notice of Intent to Dismiss issued on February 23, 2001. After consideration of all testimony at the PCRA evidentiary hearings conducted on May 11, 2001, and August 8, 2001, we find the defendant has presented no meritorious issues entitling him to post conviction relief.

Prior to addressing the defendant's

remaining issues, we note that on July 23, 2001, the defendant filed a "Motion to Supplement Petitioner's Post-Conviction Petition."[1] The defendant's Motion constituted his third supplement to the amended PCRA petition and raised two new issues, specifically ineffective assistance of counsel for failing to object to the court's jury charge defining reasonable doubt and alleging an illegal sentence because the Commonwealth's information did not satisfy the minimum constitutional standard. By Order dated July 1, 2001, we denied said Motion.

We shall now address the seven (7) issues upon which we granted the PCRA evidentiary hearings, namely:

Issue #25-Failure to Present Character Evidence
Issue #29-Failure to Pursue Diminished Capacity Defense
Issue #30-Failure to Call Iris. Alvarez to Show Robles Bad Character

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[1] The defendant sent this Motion to Supplement Petitioner's Post-Conviction Petition" on July 23, 2001, apparently without consulting his counsel, and after we had conducted the first half of the PCRA evidentiary hearings upon limited issues. We forwarded a copy to counsel who then filed it on behalf of the defendant.

Issue #39-Failure to Present Mitigation Evidence
Issue#40-Failure to Present Evidence of Defendant's Good Conduct in Prison
Issue #51 -Defendant Entitled to Experts
Issue #52 -Jury Foreman was Asleep

Excluding issue #51, which we shall address later in this Notice, the remaining issues involve claims of ineffective assistance of trial counsels John T. Adams and Randall L. Miller, Esquires. The law requires that to qualify for relief under the PCRA on a claim of ineffective assistance of counsel, a petitioner must plead and prove by a preponderance of the evidence that his conviction resulted from ineffective assistance of counsel "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. Cons. Stat. Ann. §9543(a)(2)(ii).

The standard for determining ineffective assistance of counsel is well settled and requires that a petitioner show the following: (1) that the underlying claim is of arguable merit; (2) that the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3) that counsel's ineffectiveness

prejudiced him. Commonwealth v. Carson, 559 Pa. 460, 480, 741 A.2d 686, 697 (1999); Commonwealth v. Murphy, 559 Pa. 71, 79-80, 739 A.2d 141, 145 (1999); Commonwealth v. Kimball, 555 Pa. 299, 312, 724 A.2d 326; 333 (1999). Prejudice in this context has been defined to mean that the petitioner must establish that but for the arguably ineffective act or omission there is a reasonable probability that the result would have been different. Commonwealth v. Douglas, 537 Pa. 588, 597, 645 A.2d 226, 230 (1994). Counsel is presumed effective and the burden of establishing ineffective assistance rests upon the petitioner. Commonwealth v. Rollins, 558 Pa. 532, 542, 738 A.2d 435, 441 (1999). Counsel will not be deemed ineffective for failing to assert a meritless claim. Commonwealth v. Michael, 562 Pa. 356, 362, 755 A.2d 1274, 1277 (2000).

Pennsylvania law requires that to establish ineffectiveness of counsel for failing to present witnesses, a defendant must establish: (1) the witnesses existed; (2) the witnesses were available; (3) that counsel was informed of the existence of the witnesses or should have known of the witnesses' existence; (4) that the witnesses were available and prepared to cooperate and would have testified on the defendant's behalf; and (5) the absence of such

testimony prejudiced the defendant. Commonwealth v. Bolden, 562 Pa. 94, 103, 753 A.2d 793, 798 (2000); Commonwealth v. Fletcher, 561 Pa. 266, 292, 750 A.2d 261, 275 (2000). Additionally, we note that trial counsel's failure to call a particular witness will not constitute ineffective assistance without some showing by the defendant that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense. Commonwealth v. Shaffer, ___ Pa. Super. ___, ___, 763 A.2d 411, 415 (2000).

Issue #25 -Failure to Present Character Evidence[2]

The defendant contends in his Supplement to Amended Petition for Habeas Corpus Relief and Statutory Post-Conviction Relief that trial counsels were ineffective for failing to present available character witnesses to testify regarding the defendant's reputation for being a peaceful, law abiding citizen, namely Gloria Johnson (defendant's mother), Rex Johnson (defendant's father), Sonia Johnson (defendant's sister), Frances

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[2] In addressing this issue, we note there will be some overlap with issue #39 because character evidence is a form of mitigation evidence that may be presented during the penalty phase of the trial. 42 Pa. Cons. Stat. Ann. §9711(e)(8).

Stephens (defendant's maternal aunt and Godmother), Odetta Quintero (defendant's friend), Janyne Quintero (defendant's former girlfriend), and Tarik Turner (defendant's friend).

The defendant presented the following witnesses who testified they would have been available and willing to testify at the defendant's trial, but were not contacted: Janyne Quintero, Odetta Quintero, Tarik Turner, and Frances Stephens. (N.T. Continued Post-Conviction Relief Act Hearing, 08/03/01, p. 17-23, 30-32). We note that witnesses Rex Johnson, Gloria Johnson and Sonia Johnson, did previously testify during the penalty phase of the trial, but were not called to testify during the guilt phase.

Janyne Quintero, hailing from Bronx, New York, testified the defendant had been her boyfriend for six years and that she had met the defendant when he also lived in Bronx. She provided testimony about the defendant's life and behavior while he lived in Bronx and after his arrest and incarceration in Pennsylvania. She stated the defendant abused drugs and alcohol, but that he was remorseful about selling drugs. She provided no testimony about the defendant's life in Reading, Pennsylvania. Id. at 6-17. She also

provided no testimony about the defendant supporting the character trait for being peaceful or law abiding. She did, however, testify the defendant would drink alcohol on a regular basis and "he would get like really angry, very violent, go outside for hours at a time, you know, wouldn't come back, and just do all types of things." (N.T. Continued Post-Conviction Relief Act Hearing, 08/03/01, p.9).

Janyne Quintero denied ever receiving a certified return-receipt letter from attorney Adams dated November 7, 1997, or the accompanying subpoena for trial.[3] She admitted the letter was properly addressed, but that she never saw it and never received it. She testified that she was aware the defendant was being tried for murder, but made no efforts to contact the defendant's lawyers. Id. at 19-21. She further denied ever receiving a letter from Attorney Miller dated November 8, 1997, concerning possible testimony from her at the penalty phase of the trial though she agreed it was properly addressed.[4] Id. at 22-23.

Odetta Quintero, twin sister of Janyne

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[3] The letter envelope was marked "unclaimed" by the U.S. Postal Service. Defendant's Exhibit No. 17.

[4] Commonwealth's Exhibit No. 6.

Quintero and friend of the defendant, testified she knew the defendant when he lived in Bronx, New York. She also provided testimony about the defendant's life and behavior while he lived in Bronx, including that he always appeared to be drinking alcohol and it was rumored he used drugs. Like Janyne Quintero, she provided no testimony about the defendant's life in Reading, Pennsylvania. Odetta Quintero also provided no testimony about the defendant supporting the character trait for being peaceful or law abiding. Id. at 24-32.

Tarik Turner testified he knew the defendant when he lived in Bronx. He provided testimony about his friendship with the defendant and the defendant's behavior and home life. As with the Quintero sisters, Turner provided no testimony about the defendant's life in Reading, Pennsylvania. Id. at 6-17. Turner also provided no testimony about the defendant supporting the character trait for being peaceful or law abiding. He did, however, testify that the defendant sold drugs and that he was "a good person to me." Id. at 39. Turner added that other members of the Bronx community, with whom the defendant grew up and who also sold drugs, shared his opinion that the defendant was a good person. Id. at 39-40.

Frances Stephens, the maternal aunt and Godmother to the defendant, testified about her observations of the defendant from childhood to early adulthood while he lived in the Bronx, New York. She detailed how the defendant transformed from a cheerful, happy, very friendly, ambitious child to a lying, attention-seeking, alcohol and drug abusing, young adult who ran with an older crowd of loitering black males near the high rise where he resided. Id. at 45-52. Stephens provided no testimony about the defendant's life in Reading, Pennsylvania, nor did she provide testimony about the defendant supporting the character trait for being peaceful or law abiding. Stephens stated that while she knew about the defendant's trial and would have been willing to testify on his behalf, attorneys Adams and Miller had not contacted her. Id. at 53-54.

Rex Johnson, the defendant's father, testified about his relationship with the defendant and the defendant's behavior when they lived in Bronx, New York. He provided information about the defendant's medical conditions and afflictions, abuse of drugs and alcohol, rehabilitation efforts, and friendships with older people. Id. at 74-82. Rex Johnson testified that one of these older friends

named Edgar convinced the defendant to move to Reading, Pennsylvania: "Roddy was going to go down and work with him in a drug kennel. I'm sorry, not a drug kennel. They were a dog kennel. They were going to raise and sell dogs." Id. at 81.

Rex Johnson testified he first met attorney Adams at the defendant's preliminary hearing. He also stated that he might have spoken with attorney Adams once on the telephone and met with him briefly after the first day of trial. He testified there was no discussion about preparing him to testify. He did state that he spoke with attorneys Adams and Miller prior to testifying during the penalty phase of the trial and they told him not to say anything negative or mention anything bad about the Defendant. He denied ever discussing the family history prepared by Sonia Johnson with attorneys Adams or Miller. He also denied receiving a letter from attorney Miller dated November 3, 1997, sent to him and Sonia Johnson concerning possible testimony at the penalty phase of the trial, though he admitted the mailing address was correct.[5] Id. at 83-86. Consistent with all other defense witnesses, Rex Johnson provided no testimony about the defendant's life in Reading,

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[5] Commonwealth's Exhibit No. 5.

Pennsylvania, nor did he provide testimony about the defendant supporting the character trait for being peaceful or law abiding.

Gloria Johnson, the defendant's mother, also testified about her life with the defendant and observations concerning his behavior when they lived in Bronx, New York. She chronicled his early childhood hyperactivity, drug and alcohol abuse, lying, rehabilitation efforts, medical problems, and how "[h]e didn't really care about anything or anyone" until after his arrest when he became more positive. Id. at 86-97. She testified that she did not meet attorneys Adams or Miller until the third day of trial, when she attended a brief meeting at their office. She related that she was instructed that she would testify at the penalty phase. She was told not to say anything negative, but instead to plead for her child's life. Id. at 98-99, 102. She also stated that she never discussed the family history prepared by Sonia Johnson with attorneys Adams or Miller. Id. at 99-100. Gloria Johnson provided no testimony about the defendant's life in Reading, Pennsylvania, nor did she provide testimony about the defendant supporting the character trait for being peaceful or law abiding.

Finally, Sonia Johnson, the defendant's

sister, likewise provided testimony about her life with the defendant and observations about his behavior while in the Bronx, New York. She detailed the defendant's jealousy of her and low self-esteem, his history of drug and alcohol abuse, medical problems, and the defendant's transformation from being drunk and high on drugs all the time to more spiritual after his arrest and incarceration. Sonia Johnson acknowledged preparing and providing to the defendant's attorneys a family history. The family history included information that the defendant and his friends would steal things from his mother's apartment, that the defendant had difficulty following his father's rules about how long he could stay out or who he could bring to the house, and the defendant's drug use and drug selling activity.[6] Id. at 56-73.

Sonia Johnson pointedly testified that

> [b]efore his arrest, I barely knew my brother. He definitely wasn't the brother I knew growing up. He was drunk all the time. Every time I saw him, he was high. And because of that, he shied away from me

[6] Commonwealth's Exhibit No. 1.

because he knew that I didn't like that.

Id. at 67. She provided no testimony about the defendant's life in Reading, Pennsylvania, nor did she provide testimony about the defendant supporting the character trait for being peaceful or law abiding.

Sonia Johnson stated that she first met attorney Adams at the preliminary hearing and spoke with him briefly to introduce herself for 5-10 ten minutes. She later met with attorney Adams at his office in February, 1997 for 15-20 minutes and he asked her to prepare a family history. She met again with attorney Adams after the second day of the defendant's trial for 20-30 minutes. She stated that she spent 10 minutes with attorney Miller before testifying at the penalty phase of the trial and that he told her to appear sympathetic. Id. at 63-67. Like Rex Johnson, Sonia Johnson denied receiving a letter from attorney Miller dated November 3, 1997, sent to her and Rex Johnson concerning possible testimony at the penalty phase of the trial. Id. at 71.

Attorney Adams testified that the defendant provided no character witnesses or character evidence to present at trial. "I am unaware of being

provided any. And I know we discussed it and we made a decision that we would not present character evidence at the guilt phase of the trial." (N.T. PCRA Hearing, 05/11/01, p. 155-156). Attorney Adams explained that he was concerned that if he called character witnesses, they would have been subject to cross examination about the defendant's nickname Demon," the existence of a tattoo "Demon," and that the defendant portrayed himself as a hit man and made a statement to that effect. Id. at 141. He did acknowledge being provided the name of Janyne Quintero, speaking with her on the telephone, and subpoenaing her, but that she failed to honor the subpoena and would not come to the trial. Id. at 162, 164.

We note that attorney Adams filed a motion in limine requesting the Commonwealth be barred from referring to the defendant as associated with the nickname "Demon."[7] Id. at 141-144. While we granted this motion in limine, we did not preclude all questioning about the nickname: "The Commonwealth is granted leave, however, to request permission to specifically ask questions with regard to this or make reference at such time as it may become relevant and the prejudicial value

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[7] Defendant's Supplemental Pretrial Motions and Motion. In Limine were filed on Halloween.

would be outweighed by the probative value of that fact or information." (N.T. Colloquy-Pretrial Hearing, 11/07/97, p. 11). We also specifically made clear that our granting of the motion in limine only precluded the Commonwealth's attorney from requesting that witnesses divulge the nickname:

> If a witness in the course of examination - certainly you could not coach that witness to do that. But one can readily foresee a situation where witnesses that may be familiar with the defendant and know him as a certain - by a certain name would make that reference without any prompting or questioning by the Commonwealth. And that would not be a violation of the motion in limine because that witness was the one that made the reference.

Id. at 7-8. Attorney Adams was concerned that testimony might inadvertently open the door to questioning about the nickname. (N.T. PCRA Hearing, 05/11/01, p. 155).

Attorney Adams also decided not to call character witnesses because the defendant had no job record in Reading other than working as a bouncer at a club of ill repute that was the subject

of numerous shootings. Setting the bouncer job aside, the defendant had no work history in Reading other than illegal drug activity working for co-defendant, Shawnfatee Bridges. "There was little, if any, evidence that we were able to discover that would point to anything which we felt would establish good character." Id. at 141-144.

Attorney Randall Miller testified that he shared the same concerns raised by attorney Adams regarding the presentation of character evidence, namely that testimony of certain individuals might open the door to revelations about the defendant's nickname and tattoo. Additionally, because prosecution witness George Robles "took great pains to describe Mr. Johnson as an enforcer," there was a concern that the defendant could be characterized the same way "by people other than Robles, which in tum added credence to Robles' testimony, which we didn't want to do." Id. at 194-195.

During the penalty phase of the trial, the defense presented three character witnesses: Gloria Johnson, Rex Johnson, and Sonia Johnson. Attorney Miller stated that he was aware of the existence of Janyne Quintero and had sent-her a letter dated November 8, 1997, concerning her

testifying at the penalty phase of the trial.[8] While attorney Miller felt Janyne Quintero was necessary to provide testimony that the defendant cared for his parents, that he was considerate, and that the defendant was a follower, he ultimately decided not to present her testimony. Id. at 178-179. Attorney Miller explained:

> My point is, if Janyne Quintero testified to good acts or good deeds, if it would have been admissible, I would expect it would be in the penalty phase, I thought Mr. Baldwin may very well cross-examine her on his bad acts or bad deeds, that being the tattoo Demon; that being the fact that he's allegedly the enforcer for Bridges and Morales; that he was the person who collected debts. I was very much concerned about that kind of language coming into the trial.

Id. at 195. Attorney Miller shared these concerns with the defendant and the defendant agreed that they should not present character evidence. Id. at 195-196. Attorney Miller testified that he met with Gloria and Sonia Johnson and possibly Frances-Stephens for roughly 1 hour and 20 minutes about

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[8] Commonwealth's Exhibit No. 6.

the penalty phase of the trial. Id. at 196. He also stated that he sent a letter to one Jamie Hess as a potential mitigation witness, but received no information back. Id. at 200-202.

We now provide the legal framework which must guide our analysis of this issue. Pennsylvania Rules of Evidence 404 and 405 govern the use of character evidence. Unlike the Federal Rules of Evidence, Pennsylvania requires that character evidence must be relevant and presented in the form of reputation evidence:

> (a) Reputation Evidence. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination of the reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into arrests of the accused not resulting in conviction is not permissible.

Pa.R.Evid. 405. As our law recognizes,

> [A] character witness must be able to testify to the accused's reputation within a

> particular community. The witness may relate what he or she has heard about the accused, though it must appear that the witness moved in the same circles as the accused. However, the witness does not have to testify to having heard favorable comments about the accused. It is sufficient if the witness could have heard adverse comment but heard none.

Commonwealth v. Trimble, 419 Pa. Super. 108, 118, 119, 615 A.2d 48, 53 (1992) (quoting with approval L. Packel and A. Poulin, Pennsylvania Evidence Section 404.2 at 144 (1987)).

Our Supreme Court has made clear that once a defendant places his character into evidence, the Commonwealth may properly inquire regarding the scope of the character witnesses' knowledge and the basis for their opinion. Character witnesses may be cross examined regarding their knowledge of specific instances of conduct in order to test the accuracy of their testimony and the standards by which they measure reputation. Commonwealth v. Gibson, 547 Pa. 71, 100-101, 688 A.2d 1152, 1167 (1997); Commonwealth v. Johnson, 542 Pa. 384, 404-405, 668 A.2d 97, 107 (1995) (hereinafter "Johnson"); Commonwealth v. Fisher, 559 Pa. 558,

579, 741 A.2d 1234, 1245 (1999) (hereinafter "Fisher"). Where a character witness has testified to a defendant's reputation for being a law-abiding citizen, that witness may be impeached, on credibility grounds, just like any other witness. Commonwealth v. Adams, 426 Pa. Super. 332, 335, 626 A.2d 1231, 1233 (1993). Furthermore, it is well settled that character evidence presented must relate to the defendant's reputation at or about the time the offense was committed. Commonwealth v. Nellom, 388 Pa. Super. 314, 321, 565 A.2d 770, 775 (1989).

Our courts have long recognized the importance of character evidence in criminal trials in order to demonstrate that the accused possesses character traits at odds with the criminal offenses charged. The rationale for the admission of character evidence is that an accused may be unable to produce other exculpatory evidence except his own oath and evidence of good character. Id. at 322, 565 A.2d at 775. We affirm the importance of character evidence and do find the defendant has presented an issue of arguable merit; however, he has failed to carry his burden of proving trial counsel ineffective.

First, none of the defendant's witnesses

could provide relevant testimony concerning the defendant's reputation for being a peaceful, law abiding citizen within the community of Reading, Pennsylvania. The proffered testimony centered on the defendant's childhood and young adult life in Bronx, New York. That had absolutely no relevance or bearing on the defendant's reputation for being a peaceful, law abiding citizen as an adult living in the community of Reading, Pennsylvania. The proffered testimony demonstrated the defendant's witnesses were out of touch with the defendant and his life in Reading, Pennsylvania.

Furthermore, some of the witnesses provided harmful, contrary information on the character trait in question. Janyne Quintero testified that the defendant sold drugs and after drinking alcohol became very angry and violent, demonstrating the defendant was neither law abiding nor entirely peaceful. Tarik Turner provided similar testimony that the defendant sold drugs and was thought a good person by other drug dealers in the Bronx community. This testimony encompassed the wrong community and demonstrated law-breaking conduct. The vast majority of defense character witness testimony painted the defendant as a drug and alcohol abusing, deceitful, sometimes violent, law-breaking man who progressively became worse

in his behavior as he grew older and consorted with drug dealers and other questionable persons. The witnesses could say nothing about the defendant's reputation in. the community of Reading, Pennsylvania, nor did they offer any supportive testimony for the character traits in question.

Second, we find the rationale for not presenting this testimony proffered by attorneys Adams and Miller to have been eminently reasonable and designed to effectuate the defendant's interests. It certainly would have been permissible for the Commonwealth to cross examine defense character witnesses to test the basis by which they arrived at their conclusions about the character traits in question. Such cross examination would not only have emphasized that the witnesses had no contact with the defendant's life in Reading or the community of people with which he consorted, but opened the door for permissible questioning about the defendant's tattoo "Demon," his nickname "Demon," and his portraying himself in Reading as a hit man. Johnson at 404-405, 668 A.2d at 107 (no prosecutorial misconduct where prosecutor asked defendant's character witness if he knew the defendant's nickname was "Will Kill" because witness' knowledge that appellant was known as

'Will Kill' was relevant to impeach testimony that appellant's reputation was that of kind and-helpful.); Fisher at 579, 741 A.2d at 1245 (no trial court error for permitting Commonwealth to question defendant about his tattoo "Kuda," short for barracuda, where appellant put his character in evidence that he was kind and courteous.). Our ruling on the defense motion in limine specifically left open the possibility for such cross examination.

Finally, we credit trial counsel's testimony that the defendant provided no list of character witnesses that he wished called but agreed after discussing the issue with counsel that presenting character witnesses would not have been helpful to his case. Concerning witnesses Janyne Quintero and Rex Johnson, we find it incredible that neither received the letters mailed to them at their proper addresses concerning possible testimony at the trial.

Issue #29- Failure to Pursue Diminished Capacity Defense

The defendant maintains that trial counsel were ineffective in failing to investigate and present a diminished capacity defense because he "was drunk and high at the time of the offense to

such an extent that he was unable to form the requisite intent to commit the offense of first degree murder."

Our law recognizes that

> An accused offering evidence under the theory of diminished capacity concedes general criminal liability. The thrust of this doctrine is to challenge the capacity of the actor to possess a particular state of mind required by the legislature for the commission of a certain degree of the crime charged.

Commonwealth v. Walzack, 468 Pa. 210, 221, 360 A.2d 914, 920 (1976); Commonwealth v. Stevens, 559 Pa. 171, 186, 739 A.2d 507, 515 (1999); Commonwealth v. Jones, 539 Pa. 222, 238, 651 A.2d 1101, 1109 (1994) (hereinafter "Jones"). Counsel's strategic decision to seek acquittal rather than pursue a diminished capacity defense does not constitute ineffective assistance if there is a reasonable basis for the chosen strategy. Jones at 238, 651 A.2d at 1119.

In the matter *sub judice*, the defendant presented testimony from two expert witnesses,

namely Dr. Carol Armstrong and Dr. Julie Kessel.

Dr. Armstrong, a neuropsychologist, testified she reviewed the defendant's history from childhood to adulthood, his medical experiences and symptoms, school records, statements from family members, the conclusions of Dr. Kessel, and administered to the defendant a neuropsychological exam. From this information, Dr. Armstrong concluded the defendant suffered from right brain hemisphere dysfunction encompassing multiple neurocognitive domains, such as memory, perception, and reasoning. She stated her opinion that these impairments began during the defendant's childhood and were extant during his adolescence. (N.T. PCRA Hearing, 05/11/01, p. 6-22).

She highlighted problem solving as the defendant's biggest deficit and stated that he was unable to benefit or use feedback in problem solving tasks. Id. at 23-24. She stated the defendant "breaks down cognitive functions when situations get complex." Id. at 24. She ultimately concluded the defendant suffered from extreme mental disturbance and that his judgment and reasoning were substantially impaired at the time of the shooting of Gregory and Damon Banks. Dr.

Armstrong added, "[T]hey probably would have been greater because he was drinking and taking drugs at the time and was in a complex situation." Id. at 25-26. Dr. Armstrong testified that she felt the brain deficits substantially impaired the defendant's ability to appreciate criminality "because I think that they caused him to act without thinking. He has poor control of his mental thoughts. If you put him under stress, inebriate him and give him drugs, he's going to act even with less forethought." Id. at 36.

Dr. Kessel, a psychiatrist, testified that she reviewed the defendant's verbally provided family history, reviewed his school and medical records, administered to the defendant a mental status examination, and considered the conclusions of Dr. Armstrong. Id. at 45-46. Dr. Kessel expressed an opinion that the defendant suffered from chronic dysthymia (depression), organic mental syndrome with baseline impairments (behaviorally disruptive, impulsive, trouble judging consequences, distorts reality), substance abuse and alcohol dependency, and various cognitive disorders (Attention Deficit Hyperactivity Disorder, math problems). Id. at 57-61. Dr. Kessel maintained the defendant was suffering from her diagnosis at the time of the shooting of Gregory and

Damon Banks and that his organic mental syndrome substantially impaired his ability to conform his conduct to the law or appreciate criminality. Id. at 62-65, 75.

Attorney Adams explained that his defense strategy was to admit the defendant was present at the shooting of Gregory and Damon Banks, but at some point withdrew from the conspiracy; "Mr. Johnson, in discussions with us, was interested in beating these charges." Id. at 114, 148-149. Attorney Adams added that the defendant had rejected plea negotiation offers because "[h]e wanted to take his chance and try to beat it." Id. at 157. Attorney Adams testified that he never sought the assistance of experts in mental health to evaluate school records or the defendant because "[t]here were some problems, no question about it, but nothing that indicated to me that he was suffering from a mental illness." Id. at 123. Attorney Adams also acknowledged not hiring mental health-experts to evaluate the records from Mountain View Rehabilitation Center to determine whether there existed a defense based upon diminished capacity. Attorney Adams stated, "I never heard nor did I see any evidence in my records that Mr. Johnson had any brain injury." Id. at 124.

Attorney Adams related that he and attorney Miller discussed with the defendant having him, but determined collectively that he would not be evaluated, in part because he believed the law would have required disclosure of the evaluation results to the Commonwealth and because he did not feel a diminished capacity defense was viable. Id. at 127-128, 131. Attorney Adams explained that he had school records, records from Mountain View Rehabilitation Center, drug treatment records, and the family history prepared by Sonia Johnson. He denied ever hearing about records pertaining to hospital admissions for nose bleeds and upper GI bleeds, paralysis, or for a head laceration. He also stated the defendant never informed him that he was placed in the mental health unit of the Berks County Prison. Id. at 131-133. Furthermore, he was never provided information from the defendant or anyone else that the defendant had a drug or alcohol addiction at the time of the offense in Reading and never provided "any information from anybody regarding mental illness." Id. at 145, 151, 154, 160.

Attorney Miller testified that the guilt phase trial strategy was to paint the defendant as a victim,

> that Mr. Johnson was a follower and that Mr. Bridges was acting in retaliation for what happened to Madelyn Perez, that being the robbery by the Banks of Madelyn Perez, and the baby. So, I think strategically I wanted to keep as much distance as possible under the circumstances between Bridges. After all, we said Bridges shot him.

Id. at 185, 192, 194.

Attorney Miller also testified that he did not ask for the assistance of mental health experts to evaluate school records, Pocono Medical Center records, or the defendant, for mental health issues. Id. at 172-175. He explained the defendant never told him about the numerous hospitalizations for nose bleeds or head trauma. Id. at 196. Attorney Miller related that the family also gave him no information about suicide attempts and that the records he possessed only indicated the defendant had suffered an episode of hyperventilation. Id. He stated that from his discussions with the defendant, it was clear the defendant was using drugs and alcohol; however, when specifically asked whether he did so at the time of the offense, the defendant denied being under the influence of

drugs or alcohol at the time of the shooting. Id. at 182-183.

After considering all testimonial evidence on this issue, we find it has arguable merit; however, as we concluded with issue #25, the defendant has failed to carry his burden of proving trial counsel ineffective. We credit trial counsel testimony that the defendant was interested in beating the charges and the trial strategy was to deny criminal liability and fight them. Counsel presented the defendant at trial as another victim shot by co-defendant Shawnfatee Bridges. It would have been incongruous to juxtapose this defense with an assertion of diminished capacity, which would require an admission of criminal liability. We believe the uncontradicted testimony demonstrates the defendant was unwilling and uninterested in making any admissions of criminal liability.

Furthermore, neither the defendant nor his family brought to the attention of attorneys Adams or Miller the full medical history to establish a diminished capacity defense. The school records chronicled behavioral problems, unruliness; and poor grades, not mental health problems. There was nothing in the records viewed by attorney Adams or Miller indicating mental health

problems. The family history prepared by Sonia Johnson also mentioned nothing about head traumas, nose bleeds, or strokes; it referred to drug and alcohol abuse and rehabilitation efforts. Most importantly, the defendant never mentioned any of this to his attorneys or even that he had been housed in the mental health unit of the Berks County Prison. We note that Dr. Armstrong's evaluation and opinion were in part formulated upon the premise that the defendant was under the influence of drugs and alcohol at the time of the shooting incident, something the defendant specifically denied to attorney Miller, whose testimony was credible and uncontradicted. Dr. Armstrong's conclusion that the defendant could not act with forethought or appreciate criminality is strongly called into question because associated with a premise that the defendant was under stress, inebriated, and under the influence of drugs. We believe this likewise affected the conclusions of Dr. Kessel, who relied in part on the conclusions of Dr. Armstrong.

Under the circumstances, trial counsel's decision to seek acquittal rather than pursue an inconsistent diminished capacity defense was reasonable and designed to effectuate the interests of the defendant, who sought to beat his charges

and not admit criminal liability.

Issue #30 -Failure to Call Iris Alvarez to Show Robles Bad Character[9]

The defendant al1eges that trial counsel was ineffective in failing to present testimony from Iris Alvarez to refute the testimony of George Robles, a prosecution witness. At trial, George Robles testified that he visited the defendant at Reading Hospital and heard the defendant confess to participating in the murder of Gregory and Damon Banks. He also testified that he heard the defendant admit to possessing a .38 caliber gun. The defendant told George Robles that he wiped off the gun with his shirt and dumped it on the side of the highway after the shooting. (N.T. Trial Excerpts-Courtney Johnson and George Robles, 11/20/97, p. 44-46).

At the PCRA evidentiary hearing, Iris Alvarez testified that she was the defendant's

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[9] While this issue was identified in our Notice of Intent to Dismiss of February 23, 2001, as relating to showing Robles' bad character, we modified it at the evidentiary hearing to relate to impeachment of Robles' trial testimony about the defendant's confession. We retain the issue description formerly used for consistency.

former girlfriend and cousin to George Robles. She testified that after the shooting incident, she visited the defendant at the hospital. She stated that the defendant had tubes in his mouth and could barely speak, that the defendant was at the hospital for approximately three days, and that George Robles did visit the defendant. She claimed to have never left the hospital room at all times George Robles was present and never heard the defendant talk about having a .38 caliber gun, wiping it off, or disposing of it. She also stated that she never heard the defendant say anything to George Robles about the shooting except to say that he was with Richard Morales and Shawn Bridges when Shawn Bridges shot him.[10] (N.T. PCRA Haring, 05/11/01, p. 88-90, 94-95).

Ms. Alvarez admitted that she had received from attorney Adams a Pennsylvania subpoena to appear at the defendant's trial in November 1997

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[10] The signed Affidavit/Declaration of Iris Alvarez (Defendant's Exhibit No. 12) provides the only information about what the defendant did say about the shooting while at the hospital, though it does not clarify whether George Robles was present at that time. Ms. Alvarez' PCRA evidentiary hearing testimony simply related that the defendant said nothing about the shooting to George Robles.

prior to the date of trial.[11] She also admitted that she spoke with attorney Adams prior to trial and told him she was unable to come to the trial because she was a month and a half pregnant, experiencing abdominal pain, and could not travel to Pennsylvania from Connecticut, where she was then residing. Ms. Alvarez stated that she would have been able to testify if the trial was postponed until after she gave birth. She explained that if "they would have made it an issue, I would have to come regardless because I would have got into trouble:" She further stated that attorney Adams told her it was fine if she was unable to make it to the trial, even though she was subpoenaed. Ms. Alvarez never came to the trial and never testified. Id. at 90-94, 97.

Attorney Adams testified that while he subpoenaed Ms. Alvarez at an address in Connecticut, she "did not cooperate with me" and "never cooperated with me for me to be able to find out [that she was prepared to testify that the defendant never made inculpatory admissions to George Robles.]" Id. at 118. Attorney Adams

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[11] Commonwealth's Exhibit No. 2 included the subpoena and the accompanying cover letter from attorney Adams dated November 7, 1997.

testified he spoke with Ms. Alvarez once but "[s]he refused to come down here and testify." Id. at 117. Attorney Adams testified that he recalled that Ms. Alvarez was pregnant and afraid, but nothing about her expressing a willingness to come to Pennsylvania or testify if the trial was continued. Attorney Adams stated the defendant did not inform him that he never told George Robles that he was involved in the shooting, that he possessed a .38 caliber gun, that he wiped it off, or that Ms. Alvarez was present during all of his conversations with George Robles. Attorney Adams testified that what the defendant did tell him about the .38 caliber gun was that he "shot it and unloaded it into the van." Id. at 117-120.

Attorney Randall Miller testified that he sent a letter to Ms. Alvarez concerning the death penalty phase of the defendant's trial and that he spoke with her on the telephone. Pointedly, attorney Miller testified:

> [Ms. Alvarez] told me that she was the former girlfriend of Mr. Johnson; that she was seven weeks pregnant; that for medical reasons she could not travel; that Mr. Johnson was corresponding with her; that she was no longer corresponding with Mr.

> Johnson; and that she didn't have an interest in his situation. I paraphrase the last phrase that I gave you, but I don't recall the specific language. But she made it clear to me and Mr. Farrell that she would not be helpful. As far as mitigation was concerned, this young lady would not be helpful.

Id. at 180-181 (emphasis added). Attorney Miller further testified that he was aware that Ms. Alvarez had been at the hospital "at least at some point in time," but that Ms. Alvarez never told him that she had been present when George Robles spoke with the defendant. Attorney Miller stated that he did not take any action to have Ms. Alvarez ruled a material witness to compel her attendance. Id. at 205-207.

We have no doubt that it would have been helpful to the defendant's case to present testimony from Ms. Alvarez to impeach the testimony of George Robles. We find, however, that the defendant has failed to carry his burden of showing ineffective assistance of counsel on this issue. We had the opportunity to observe Ms. Alvarez, attorney Adams, and attorney Miller testify. We find the testimony of attorneys Adams and Miller more credible than Ms. Alvarez. Attorney Adams

did subpoena Ms. Alvarez and spoke with her. Attorney Miller also sent her a letter concerning the trial and spoke with her on the telephone. She simply refused to cooperate in any respect and did not appear as a witness during any stage of the trial.

There was no testimony from attorney Adams or attorney Miller that Ms. Alvarez expressed a willingness to testify at any time, whether the trial was postponed or not. We do not give credence to Ms. Alvarez's testimony that she was willing to testify if the trial were postponed. Furthermore, there was no testimony that the defendant ever told attorney Adams or attorney Miller that Ms. Alvarez had crucial information to impeach George Robles' testimony about the defendant's inculpatory admissions regarding the .38 caliber and the shooting incident. In fact, all the defendant said about the matter to attorney Adams was that he fired the .38 caliber gun into the van occupied by the victims, Gregory and Damon Banks. This was uncontradicted by the defendant at the PCRA evidentiary hearing. Trial counsel cannot be held ineffective for "failing to call" Ms. Alvarez under these circumstances.

Issue #39- Failure to Present Mitigation Evidence

The defendant contends that trial counsel were ineffective in failing to "conduct a reasonable investigation of Petitioner's life-history, mental health and the mitigating circumstances available in this case" as well as secure expert assistance to prepare a defense.

Pursuant to 42 Pa. Cons. Stat. Ann. §9711, mitigating circumstances that may be presented at trial include the following:

1. The defendant has no significant history of prior criminal convictions.

2. The defendant was under the influence of extreme mental disturbance.

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

4. The age of the defendant at the time of the crime.

5. The defendant acted under extreme duress, although not such duress as to constitute a

defense to prosecution under 18 Pa.C.S. §309 (relating to duress), or acted under the substantial domination of another person.

6. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

7. The defendant's participation in the homicidal act was relatively minor.

8. Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

Attorney Miller testified concerning his handling of the penalty phase of the trial and his presentation of mitigation evidence. He testified that he presented testimony from Gloria, Rex, and Sonia Johnson, and from Sergeant Walter Godshall and Criminal Investigator Michael Bailey. (N.T. PCRA Hearing, 05/11/01, p. 175). In preparation for the penalty phase, attorney Miller related that he had obtained the family history prepared by Sonia Johnson, school records, and medical records from Pocono Medical Center. Id. at 173-174. No information was provided from either the defendant or his family about the defendant's past

suicide attempts, nose bleeds, or head trauma. Id. at 196. Attorney Miller noted that the defendant exhibited no signs to him of mental infirmities or inability to communicate and relay information. Id. at 198.

A stipulation had been admitted establishing the defendant's youthful age at the time of the incident (20 years) and that he had no prior juvenile or adult criminal convictions. Id. at 175-176. (N.T. Jury Trial, 11/18/97-11/26/97, Vol. IV, p. 981). No expert evidence was presented to support that the defendant was under extreme emotional disturbance or that because of mental impairments he could not appreciate criminality or conform his conduct to the law. (N.T. PCRA Hearing, 05/11/01, p. 176). The defendant's prison conduct record prior to trial was not investigated. Id. at 185-186.

Attorney Miller stated that he had spoken with the defendant, Gloria and Sonia Johnson, and possibly Frances Stephens, about the defendant's drug and alcohol abuse. He explained that the defendant denied drug or alcohol use at the time of the shooting incident: "He cleared that up and said that was not an issue. There wasn't a degree of alcohol nor was he under the influence of a controlled substance. That is why that particular

issue was not pursued." Id. at 183. Attorney Miller explained that he introduced only limited testimony about the defendant's drug and alcohol use for purposes of mitigation because "one of the District Attorney's aggravating factors was, to paraphrase, homicide during the course of a drug transaction involving drug activity." Id. at 184. Attorney Miller testified that he was concerned about buttressing the aggravating factor and George Robles' picture of the defendant as involved in drug transactions and an enforcer protecting merchandise. Id. at 184, 193-194.

Attorney Miller further stated that he called Sergeant Godshall and Criminal Investigator Bailey to establish the defendant had been cooperative in the investigation. He also emphasized the defendant's minor role in the homicide and that Shawnfatee Bridges was the mastermind behind the incident who also shot the defendant. Attorney Miller related that the defendant's statements to the police, which he felt were helpful in arresting other co-defendants, outlined the defendant's minor role in the homicide. Id. at 191-192, 204.

The testimony of family members was presented for "any sort of good character." Attorney

Miller explained that he wanted to show the jury there were problems in the family household, high expectations for the defendant because of Sonia Johnson's success, and have them see family asking to spare the defendant's life. Id. at 192-193.

In addressing this issue, we incorporate our discussions concerning issues #25, #29, #30, and #40, which overlap or directly relate to the penalty phase of the trial and mitigation evidence. We find the defendant has failed to carry his burden of showing trial counsel ineffective. Trial counsel spoke with the defendant and his family. The defendant's sister provided a written family history. The defendant provided no information about his past medical problems, suicide attempts, or hospitalizations to augment what his sister wrote in the family history. None of the family members made trial counsel aware of anything other than the defendant's abuse of drugs and alcohol and his troubled family household. Under the circumstances and facts of this case, trial counsel cannot be held ineffective for what he did not know and was not made aware of by the defendant or his family. Attorney Miller secured relevant information for the penalty phase and presented that evidence in a manner that enhanced the defendant while avoiding opening the door to

information that would have been harmful. Inasmuch as we have already found the defendant has failed to carry his burden of proving trial counsel ineffective on all other sub-issues relating to this issue, we conclude this issue has no arguable merit and trial counsel's handling of the presentation of mitigation evidence was reasonable.

Issue. #40 -Failure to Present Evidence of Defendant's Good Conduct in Prison

The defendant presented testimony from two witnesses concerning his good conduct in prison. Reverend John Rush testified that he was serving as the Berks County Prison Chaplain when he had contact with the defendant. He stated that he met with the defendant at least twice alone and less than ten times in group settings as part of chapel services. He also participated in the defendant's confession to have forgiveness of sin and commit his life to Christ, followed by baptism. Reverend Rush explained that in his twenty-five years of exposure to persons in prison and on death row, the defendant lacked arrogance and had a more positive attitude than he normally encountered with inmates at that level. He further mentioned that the defendant had expressed interest in taking ministry courses and in being a local pastor.

Reverend Rush testified that he would have been available to testify at the defendant's trial, but that he was never contacted about doing so. Id. at 77-82.

The defendant also presented testimony from Chris Readinger, a volunteer with the Yokefellow Prison Ministry at the Berks County Prison. Mr. Readinger testified that he met the defendant when he came to his Bible study group. He also met with the defendant individually when the Chaplain started a new one-on-one mentorship program and he became the defendant's mentor. Mr. Readinger related that the defendant exhibited a "remarkable boldness of his faith" and that he was "obviously, sorry for what brought him to that point in his life." Id. at 166-167. He stated that the defendant stood out among the other inmates and was respected by them, helped diffuse explosive situations in the housing unit, and provided him with several letters to read to the Bible study group at the Berks County Youth Detention Center. He also testified that the defendant spent a lot of time counseling other inmates in the housing unit, that he was very outgoing and more concerned with others than himself. Mr. Readinger stated that he would have been willing to testify at the defendant's trial, but no one contacted him. Id. at 168-169.

Attorney Adams credibly testified "[w]e were never made aware by [the defendant] that he had an outstanding prison record, and I am not aware of his prison record." Because of this, attorney Adams explained that it was never discussed and never actually considered that testimony about the defendant's good prison conduct would be presented. Id. at 149. Attorney Miller also testified that introducing testimony of the defendant's good prison conduct was not something considered and that it was not a strategic or tactical decision that such testimony was not introduced. Id. at 186.

Pursuant to 42 Pa. Cons. Stat. Ann. §971 l{e)(8), a defendant has an opportunity to present mitigating evidence at a death penalty sentencing hearing, which may include "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." The United States Supreme Court has held that where the death penalty is sought, the sentencer may not be precluded from considering, "as a mitigating factor, any aspect of a defendant's character or record." Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-1671, 90 L.Ed.2d 1, __ (1986) (hereinafter "Skipper"); Commonwealth v.
Travaglia, 541 Pa. 108, 133, 661 A.2d 352, 364

(1995).

The defendant relies on Skipper to support his argument that he was denied his right to present relevant mitigation evidence concerning his good prison conduct. We acknowledge that testimony of Reverend Rush and Chris Readinger would have been appropriate and relevant mitigating evidence had it been proffered for presentation at the death penalty sentencing hearing. Had we excluded such evidence, as was done by the trial court in Skipper, the defendant would have been denied his right to present mitigation evidence. This, however, is not the defendant's case.

The defendant was not prevented from presenting good prison conduct mitigation evidence. Such evidence was not presented *because the defendant never informed his counsel about his good prison record or witnesses to that effect*. Attorney Adams testified they were never made aware by the defendant of his good prison record. This was uncontradicted by the defendant at the PCRA evidentiary hearing. No evidence was presented showing that trial counsels were aware of the relevant witnesses or that they should have been aware of them. Trial counsels cannot be

deemed ineffective for failing to present mitigating evidence and witnesses the defendant failed to bring to their attention. Accordingly, we find this issue wanting in arguable merit.

Issue #52 -Jury Foreman was Asleep

The defendant presented no testimony to substantiate his claim that the jury foreman was sleeping during his trial. Attorneys Adams and Miller provided the only testimony on this issue, wherein they both stated they recalled no one being asleep. Attorney Miller pointedly testified that not only did he not see a juror sleeping, but that neither the defendant nor anyone else brought such a matter to his attention during the trial. (N.T. PCRA Hearing, 05111/01, p. 157-158, 198-199). This issue has no underlying arguable merit and trial counsel cannot be deemed ineffective for failing to pursue a meritless claim.

Issue #51-Defendant Entitled to Experts

Issue #51 claimed necessity for the appointment of a psychiatric expert, a ballistics expert, and an expert on the application of the death penalty. Our Notice of Intent to Dismiss of February 23, 2001, addressed the question of

ballistics expert and rule expert on the application of the death penalty. We now address the appointment of a psychiatric expert.

A request for the appointment of an expert is addressed to the discretion of the court. Commonwealth v. Chester, 551 Pa. 358, 378, 733 A.2d 1242, 1252 (1999). We note the defendant took the affirmative step of securing his own expert assistance for the PCRA hearings, namely Dr. Carol Armstrong and Dr. Julie Kessel. By Order dated March 15, 2001, we requested the defendant submit a statement verifying his current *in forma pauperis* status as well as a statement as to what services the expert witnesses would provide and estimated costs. This has not been done and was not done in advance of the PCRA hearings. We hereby DENY Defendant's request for appointment and funding of experts in psychiatry.

For all of the foregoing reasons, we find that the defendant's petition under the PCRA should be dismissed. The defendant shall have twenty (20) days from the date of this Notice of Intent to Dismiss to respond to the proposed dismissal. If this Court receives no response within the twenty (20) day time period, an Order dismissing the Petition for Post-Conviction Collateral Relief will

be filed with the Clerk of Courts.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge

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APPENDIX "N"

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA
V.	:
RODERICK JOHNSON	: CRIMINAL DIVISION : NO. 118-1997 : Assigned to: Keller, J

ORDER

AND NOW, this 27th day of April, 2000, Defendant's motion for a stay of execution is hereby DENIED. Defendant's request for a six month extension to file a Second Amended Petition for Post Conviction Relief is DENIED. The Commonwealth will have 120 days to answer Defendant's petition for Post Conviction Relief.

On March 19, 2000, Pennsylvania Governor Thomas Ridge signed a death warrant for the Defendant, Roderick Johnson. Defendant's execution has been scheduled for May 11, 2000.

On April 11, 2000, a Motion for an Emergency Stay of Execution was filed on behalf of the Defendant by J. Michael Farrell, Esquire with the Berks County Clerk of Courts. At the same time, Defendant filed a pro-se petition for Post Conviction Collateral Relief in which he alleged that he was not presently represented by counsel and was seeking appointment of counsel. On April 13, 2000, this Court, upon finding no merit to Defendant's PCRA petition took the extraordinary step of granting twenty days to amend said petition so that Defendant might be eligible for a stay of

execution and deferred a ruling on Defendant's stay of execution until said time. Mr. Farrell has subsequently entered his appearance on Defendant's behalf. Mr. Farrell has also indicated to this Court that he has been representing the Defendant in some capacity since he filed a Petition for Writ of Certiorari to the United States Supreme Court on Defendant's behalf in the summer of 1999.

On April 26, 2000 this Court received Defendant's First Amended Petition for Post Conviction Relief. In order for a PCRA court to grant a stay of execution, the Defendant must demonstrate "a strong likelihood of success on the merits."42 Pa. C.S.A. §9545(c)(2). We find this petition to be lacking any chance of success on its merits.

While there can admittedly be some debate among the courts as to what a "strong likelihood of success" might be, we think that there can be no disagreement as to what that underlying "likelihood of success" requires. It is our belief that to demonstrate a likelihood of success, a defendant must at the very least show compliance with the terms of the PCRA statute. Compliance requires a showing by the defendant of four things:

1. That the petitioner is eligible for relief as he has been convicted of a crime in Pennsylvania and is currently awaiting execution. 42 Pa. C.S.A. §9543(a)(l)(ii). This Court thinks that there is no question that Defendant has met this requirement.
2. That the Defendant's conviction or sentence resulted from one of the statutorily

generated defects. 42 Pa. C.S.A. §9543(a)(2). The Defendant has not even attempted to meet this requirement. While the Defendant has alleged twenty-two issues for PCRA review, he has failed to show how each issue fits within one of the categories of issues that are reviewable under the PCRA.

3. That the allegation of error has not been previously litigated or waived. 42 Pa.C.S.A. §9543(a)(3). In our previous order, we reminded the Defendant that he must show that issues have not been previously litigated and/or waived to be entitled to relief under the PCRA. Defendant has apparently ignored this suggestion and decided instead to again present many of the same tired issues on which the Supreme Court of Pennsylvania has already ruled. No mention is made anywhere in Defendant's amended petition as to why these issues have not been previously litigated and/or waived.
4. That the PCRA is brought in a timely manner. 42 Pa. C.S.A. §9545(b). Although Defendant has not alleged that his petition is timely, we nevertheless do find that this petition has been timely brought.

Had Defendant simply failed to meet the second requirement, we could likely have overlooked his petition's defects; however, the failure to meet the third requirement is inexcusable as it is apparent to this Court that virtually every issue raised has been previously litigated or waived.

All in all, we find the Defendant's approach most curious; instead of focusing his amended

petition on one issue which would be likely to succeed and thus grant him a stay of execution, Defendant has adopted a "shotgun" approach and presented twenty-two issues none of which bear any significant chance of success on their merits. Defendant seems to have mistaken quantity for quality. While uncovering twenty-two potential issues for PCRA review is certainly a Herculean effort on Defendant's part. It was certainly unnecessary at this time. All this Court needed to grant a stay was one issue that had a "strong likelihood of success." Had Defendant alleged that one issue, we would have granted a stay and given the Defendant ample time to amend his petition to include any other issues he felt were eligible for review.

Defendant's current counsel may argue that the reason the PCRA issues were presented in this manner were due to the limited time he had to prepare them. This argument is fallacious. Defendant's current counsel represented Defendant throughout the petition for certiorari to the United States Supreme Court. Defendant's PCRA petition states that the petition for Certiorari was filed on August 31, 1999. Therefore, Counsel has been representing Defendant since sometime prior to that date. Counsel should have realized that there was a strong possibility that a PCRA would have to be filed on Defendant's behalf sometime in the near future, and should have been preparing for that possibility. Defense counsel should certainly have at the very least had a strong familiarity with all the issues from having prepared the petition for certiorari. By our reckoning Defense Counsel has been representing the Defendant for at least nine

months. For this reason, we conclude that Defense counsel had ample time to familiarize himself with Defendant's case and the twenty days we gave him to submit an amended petition should not have been overly burdensome. We would also note that the amended petition was due on May 3, 2000. Defense Counsel did not ask for additional time, instead he submitted this petition to this Court on April 26, 2000- a week early. On that basis alone, we conclude that Defense Counsel was not pressed for time to complete the amended petition.

We also think it worth noting that Defendant has raised an argument in his Motion for an Emergency Stay of Execution suggesting that this Court must presume Defendant's PCRA petition to be meritorious until counsel has had an adequate opportunity to prepare and investigate. Defendant claims that on that basis, he must be granted a stay. Upon researching this issue, we have found no clear support for Defendant's position under Pennsylvania or Federal case law. Our research has uncovered no case that interprets the statute granting this Court the power to stay an execution in such a way. 42 Pa. C.S.A. §9545(c). Therefore, since we are faced with a clear, unambiguous statute limiting our powers in this situation, we have no choice but to follow the statute literally. Defendant will, as per the statute, be required to show a "strong likelihood of success on the merits" before we can grant a stay of execution.

Considering the gravity of this situation and in fairness to the Defendant, we will now briefly consider each of Defendant's issues and briefly state why we find no strong chance of success on

the merits. For purposes of clarity, we will follow the order and numbering in which Defendant presented his issues.

A-D. The Robles Letter. The alleged improprieties surrounding the Robles Letter were specifically raised by Appellate Counsel in his Concise Statement of Matters Complained of on Appeal and cited in the trial court's June 3, 1998 opinion as numbers 7-10. The Supreme Court of Pennsylvania extensively discussed the Robles letter in their opinion on this matter. Commonwealth v. Johnson, 727 A.2d 1089, 1093-96, 556 Pa. 216, __ (1999). We therefore submit that all issues regarding the Robles letter have been previously litigated. Furthermore even if the issues had not been previously litigated, they could have been presented at trial, or on the initial direct appeal. We therefore find any remaining issues in regards to this letter to have been waived.

We again note that wider the PCRA the burden is on the Defendant to "prove by a preponderance of the evidence ... that the allegation of error has not been previously litigated or waived." 42 Pa. C.S.A. §9543(a)(3). Defendant has utterly failed to address this limitation and has also failed to show that the exception to previous litigation and waiver for irrational decisions by counsel may be applicable. 42 Pa. C.S.A. §9543(b).

E. December 8 Statement. The December 8, 1996 statement to Exeter police was specifically raised in an almost identical manner by Appellate Counsel and is listed as item 1 in the Trial Court's opinion. The Supreme Court in its opinion discussed the

statement. Commonwealth v. Johnson, 727 A.2d 1089, 1099, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

F-G. December 11 Statement. The December 11, 1996 Statement to Exeter police was specifically raised in an almost identical manner to Defendant by Appellate Counsel and is listed as items 2 and 3 in the Trial Court's opinion. The statement was discussed by the Supreme Court in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1099, 556 Pa. 216, ___ (1999). As above, we find this issue to be waived and/or previously litigated.

H. December 12 Statement. The December 12, 1996 Statement to Exeter police was specifically raised in an almost identical manner by Appellate Counsel and is listed as item 4 in the Trial Court's opinion. The statement was discussed by the Supreme Court in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1101-02, 556 Pa. 216, ___ (1999). As above, we find this issue to be waived and/or previously litigated.

I. - The Bullet. The recovery of the bullet from Defendant's body was specifically raised as an issue by appellate counsel and is listed in the Trial Court's opinion as item 5. The recovery of the bullet was specifically discussed by the Supreme Court in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1097-98, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

J. Defendant's December 12 Statement.

Defendant again challenges a December 12, 1996 statement that he claims to be prejudicial. This argument was already raised by Appellate Counsel and listed as item 6 in the Trial Court's opinion. It has also been specifically addressed by the Supreme Court of Pennsylvania in its opinion. Commonwealth v. Johnson, 727 A.2d 1089, 1102, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

K. Misapplication of Law. Defendant next contends that the Supreme Court of Pennsylvania misapplied Brady to this case. We believe that this issue is not cognizable under the PCRA. The Pennsylvania Supreme Court has already ruled on this matter. The binding power of precedent precludes this Court from attempting to reverse the High Court's decision. This issue is properly raised only before the U.S. Supreme Court, as they may overturn the Pennsylvania Supreme Court. For this reason, we find this issue not to be cognizable under the PCRA, and to have no chance of success on its merits even if it is cognizable.

L. Insufficient Evidence of Aggravating Circumstances. Again, this issue was specifically raised by appellate counsel and is numbered in the Trial Court's Opinion at 11. The Supreme Court of Pennsylvania also addressed this issue. Commonwealth v. Johnson, 727 A.2d 1089; 11-02-03, 556 Pa. 216, __ (1999). As above, we find this issue to be waived and/or previously litigated.

M. Sufficiency of Trial Evidence. The sufficiency of the evidence was automatically considered by the Pennsylvania Supreme Court on

Appeal, and evidence was found to be sufficient. Commonwealth v. Johnson, 727 A.2d 1089, 1093, 556 Pa 216, ___ (1999). As above, we find this issue to be waived and/or previously litigated.

N. Failure to Develop Exculpatory Evidence. While Defendant cites a tremendous amount of case law, he alleges no specific factual allegations in support of this argument. There is nothing present in this argument that would lead us to believe that the ineffectiveness alleged here would even come close to so undermining "the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. §9543(a)(2)(ii). We therefore find this issue to be waived and/or without merit.

O. Error in Instructions. This issue could have been raised on direct appeal or at trial and was not. It is therefore waived.

P-U. Various items. Defendant has presented no argument in respect to any of these issues. We therefore cannot adequately determine their merits and must find them to be lacking and completely ineligible to serve as a basis for PCRA relief.

For all the foregoing reasons, we find Defendant's PCRA petition to be almost entirely lacking in merit. We therefore cannot find a strong likelihood of success on the merits and must deny Defendant's motion for a stay. Furthermore, Defendant was already given one chance to present an acceptable amended petition and has failed in that regard. Considering the gravity of this

situation we assume that this first try was his best effort. We presently see no compelling reason to give Defendant an extended period for a second try. Defendant's request for six months to amend his petition is Denied.

In accordance with the PCRA, the Commonwealth shall now have 120 days to file an answer to the Defendant's petition. Pa.R.Cr.P. 1506(e)(l)(i). While this may seem to be a ludicrous statement given that Defendant's execution is scheduled for May 11, past precedent has demonstrated to us that while this Court is not empowered to grant a stay in this situation, a higher court who is so empowered will in all likelihood grant a stay. We therefore will continue to evaluate Defendant's PCRA petition in the manner prescribed by statute and rule of Criminal Procedure.

Realizing the extreme gravity of this situation This Court will allow for the Defendant to have one final chance to stay his execution. Defendant may file a Motion for Reconsideration with this Court of the Order denying his motion for a stay. In said motion, the Defendant may present additional proposed issues for his PCRA or amend issues already presented. If Defendant can show a strong likelihood of success on the merits of those issues (42 Pa.C.S.A. §9545(c)(2)), and compliance with the other requirements of the PCRA this Court will grant Defendant's stay. Compliance with the requirements of the PCRA includes a showing that the issue is cognizable under the PCRA and that the issue has not been previously litigated and/or waived. 42 Pa. C.S.A. §9543.

BY THE COURT:
/s/ Scott D. Keller
Scott D. Keller, Judge

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APPENDIX "O"

[J-241-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	NO. 0206 Capital Appeal Docket
Appellee	:	Appeal from the Judgement of Sentence
v.	:	entered on November 26, 1997
RODERICK ANDRE JOHNSON,	:	ARGUED: November 17, 1998
Appellant	:	

OPINION

MADAME JUSTICE NEWMAN

DECIDED: March 26, 1999

Roderick Andre Johnson (Appellant) files this direct appeal of his two convictions for first-degree murder and death sentence following a jury trial. We affirm.

In our direct review of all cases in which the death penalty is imposed, this Court independently reviews the sufficiency of the evidence regardless of whether the defendant challenges the conviction on that ground. Commonwealth v. Jones, 546 Pa. 161, 173, 683 A.2d 1181, 1186 (1996) (citing Commonwealth v. Zettlemoyer, 500 Pa. 16, 454

A.2d 937 (1982)). In reviewing the sufficiency of the evidence, we must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all the elements of the offenses beyond a reasonable doubt. Jones, supra. We review the evidence, discuss the issues, and conclude if there were errors.

I. FACTS AND PROCEDURAL HISTORY

Appellant, along with co-Defendants Shawn Bridges (Bridges) and Richard "Rambo" Morales (Morales), was charged in connection with the murders of Damon Banks and Gregory Banks. The trial court record shows, based substantially on statements that Appellant gave to police, that on Saturday, December 7, 1996, the girlfriend of co-Defendant Bridges was robbed at gunpoint. The robbers indicated that they were looking for drugs and money. Although no drugs or money were found, the robbers took a camcorder and a Sony Playstation. News of this incident quickly made its way to Bridges. Bridges' girlfriend told him that the robbers had been wearing green masks and green "hoodies." Bridges recalled seeing Gregory and Damon Banks wearing green hoodies earlier that day. Bridges and the Appellant went to the home of co-Defendant Morales. While there, Bridges grabbed a shotgun and mentioned that he wanted to go to the house of Gregory and Damon Banks and murder them. Bridges showed the

Appellant and Morales a 9–mm Glock pistol that he had on him.

On December 8, 1996, the three co-conspirators headed to a local K-mart to purchase shotgun shells. They traveled in a minivan and arrived at Gregory and Damon Banks' house. While Bridges went to talk to them, the Appellant noticed a woman unloading groceries next door. Bridges came out of the house with Gregory and Damon Banks, and stated that he wanted them to take care of his drug-selling operations while he was away. Gregory and Damon Banks entered the minivan with Bridges, the Appellant, and Morales, and the group drove to a dirt road near a car lot and construction site. Bridges and Morales said that they were going to show Gregory and Damon Banks where the drugs were hidden, and asked Gregory and Damon Banks to accompany them. They refused, and Bridges and Morales returned to the van. Bridges then approached Appellant and told him that he would shoot Gregory and Damon Banks on the count of three. Bridges then walked around the front of the van, and shouted "What's on station two and three?" At that point, Bridges started shooting. In statements given to police, Appellant claimed that Bridges also fired a shot at him, hitting him in the side of his torso. Appellant stated that the van then drove away, and Appellant walked two miles to the Queen City Restaurant, where he was subsequently picked up and taken to the hospital for treatment of his gunshot wound.

Appellant was tried separately from the other co-defendants for the murders of Gregory and Damon Banks from November 13, 1997 to November 26, 1997, with the jury returning guilty verdicts of first-degree murder for both victims. At trial, the Commonwealth presented a crucial piece of evidence that contradicted Appellant's claims that he was not involved as a shooter. The Commonwealth presented testimony from a forensic pathologist that one of the bullets recovered from the body of Damon Banks was a .38 caliber bullet. A .38 caliber handgun was recovered close to the murder scene and, according to the testimony of the Commonwealth's ballistics expert, was the weapon used to fire that bullet. George Robles testified at trial that Appellant possessed a .38 caliber handgun like the one found at the murder scene. Robles testified that Appellant told him, while he was visiting Appellant at the hospital, that he had taken the .38 caliber handgun with him, had wiped it off with his shirt and threw it on the side of the road within a quarter mile of the murder scene.

We conclude, based on our independent review of the record, that the Commonwealth presented sufficient evidence to prove Appellant's guilt of the murders of Gregory and Damon Banks beyond a reasonable doubt. We now turn to the specific allegations of trial court error raised by Appellant.

II. DISCUSSION OF ALLEGED TRIAL COURT ERRORS

A. Alleged Brady Violations

1. The Robles Letter

Appellant claims that the Berks County District Attorney's office violated the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which requires the production of all material evidence tending to exculpate the defendant. The basis of this claim is the prosecutor's failure to produce a letter written by George Robles, a crucial witness for the Commonwealth, while Robles was in prison on material witness bail[1] in connection with another murder case involving Appellant, referred to as the "Schuylkill Avenue" murder. Robles wrote this letter to Angel Cabrera, a member of the Reading police department, and stated:

> Angel. Look I can't take this jail. I am doing everything possible to help you. Please, Please help me. I'm not a runner you know that I just want to go home. I can't eat. I can hardly sleep and I feel like I'm in here forever. Angel, I feel like I'm dying here. I am begging you and [Detective] Vega with

[1] The Commonwealth may seek material witness bail where there is adequate cause to believe that a material witness to a crime will fail to appeal when required if not held in custody or release on bail. Pa.r.Crim.P. 4017(a).

> my word as a man and father to be. I'm not running. Just send me home please. I will do anything....

The letter is not dated, but a police report prepared by Detective Cabrera noting receipt of the letter was dated February 28, 1997. Appellant claims that, had he been in possession of this letter, he could have impeached Robles by showing a strong motive for Robles to fabricate his testimony, and that this letter constituted material impeachment evidence that the prosecutor was required, pursuant to Brady, to produce.

The Sixth Amendment concerns implicated in the Brady rule focus on whether the prosecutor's failure to disclose material exculpatory evidence deprived the defendant of a fair trial. U.S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The standard for determining whether the information is "material" varies depending on whether the failure to disclose follows a specific request by the defendant for the information, or a general request for all exculpatory evidence. See Commonwealth v. Green, 536 Pa. 599, 604, 640 A.2d 1242, 1244–45 (1994) (citing Commonwealth v. Moose, 529 Pa. 218, 233, 602 A.2d 1265, 1272 (1992)). If the defendant made a specific request for the information, then the test for materiality is "whether the evidence might have affected the outcome of the trial." Green, 536 Pa. at 604, 640 A.2d at 1245. However, if the defendant made a general request for exculpatory evidence, then the

evidence is considered material only if the omitted evidence creates a reasonable doubt that did not otherwise exist. Id.

Material impeachment evidence is included within the scope of the Brady rule. See U.S. v. Pelullo, 105 F.3d 117, 122 (3d. Cir.1997). However, in order to be entitled to a new trial for failure to disclose evidence affecting a witness' credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence. Commonwealth v. Morales, 549 Pa. 400, 414, 701 A.2d 516, 523 (1997).

The record indicates that Appellant's counsel filed formal discovery requests with the District Attorney's office on January 31, 1997, and February 4, 1997, in which he requested "[a]ny evidence favorable to the accused which is material either to guilt or to punishment, and which is in the possession or control of the attorney for the Commonwealth." The record contains no further formal discovery requests from Appellant's counsel. However, during a post-trial evidentiary hearing conducted by the trial court,[2] the parties submitted

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[2] The trial court held this hearing on February 26, 1998, pursuant to Appellant's "Motion for an Evidentiary Hearing Regarding After–Discovered Evidence." The Commonwealth objected to this hearing because the trial court lacked jurisdiction due to Appellant's filing of a Notice of Appeal to this Court on December 22, 1997. Inexplicably, the record had not been transferred to this Court by the time of the trial court's February 26, 1998 evidentiary hearing. The trial court noted the Commonwealth's jurisdictional objection, and later

a June 4, 1997 letter from the District Attorney to Appellant's counsel, which was in response to an informal discovery request.[3] This letter noted that the discovery packet enclosed with the District Attorney's letter contained "Reading Police Department Crime Investigation Report, Assignment # 96–57168."

Detective Cabrera testified that the Reading Police Department Crime Investigation Report, Assignment Number 96–57168, referred to the department's file on the Schuylkill Avenue murder case. Included in this file was a two-sentence report, dated February 28, 1997, prepared by

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stated in its Pa.R.A.P. 1925(a) Opinion that it did not have jurisdiction to grant Appellant relief respecting the February, 1998 motion. However, the trial court wisely decided that it would be in the interests of "judicial economy" to create an evidentiary record to facilitate this Court's review of Appellant's Brady issue.

We applaud the trial court's decision to proceed with an evidentiary hearing to create a record for our review of Appellant's Brady claims. In direct review of capital cases, we relax the rules regarding waiver of issues on appeal and examine issues despite counsel's failure to preserve them properly. The trial court's decision to create an evidentiary record notwithstanding the filing of the Notice of Appeal unquestionably aids our review of this issue, and accords with the trial court's limited authority following appeal. See Pa.R.A.P. 1701(b)(4) (following appeal, trial court may "[a]uthorize the taking of depositions or the preservation of testimony where required in the interests of justice").

[3] There is no mention in the record as to how Appellant made this informal discovery request, or what specifically Appellant requested.

Cabrera. This report referred to the Robles' letter, and contained a notation "See Letter" at the end of the report. The letter was not, however, appended to the report in the materials produced to Appellant's counsel. On examination, Detective Vega, who was also involved in the investigation of the Schuylkill Avenue murder, testified that the letter was not included in the materials forwarded to the District Attorney, and that only the report had been forwarded. Vega further testified that the letter was not sent to the District Attorney's office until July 15, 1997, when LeRoy Levan, counsel for Shawn Bridges in the Schuylkill Avenue murder case, specifically requested a copy of the letter. Mr. Levan testified that, after reviewing the February 28, 1997 police report included in the discovery packet for the Schuylkill Avenue murder case, he wrote to the District Attorney and requested a copy of the letter referenced in the report. He also testified that the District Attorney gave him this letter on September 29, 1997, and this was provided him without the need for a court order.

Appellant's counsel was provided a copy of the police report that referred to the Robles letter but never requested an actual copy of the letter. The contrast between his actions and those of Mr. Levan illustrate the difference between "general" requests for discovery and "specific" requests for purposes of determining which Brady standard applies. Appellant's counsel requested exculpatory material generally, and his other discovery requests swept as broadly as Brady would permit.

By comparison, Mr. Levan wrote to the District Attorney specifically requesting production of the Robles letter. Had the District Attorney failed to comply with Mr. Levan's request, our standard for evaluating the "materiality" of the Robles letter would be whether production of the letter might have affected the outcome of Shawn Bridges' trial. See Green, supra. However, in this situation, Appellant's counsel relied on his general discovery requests and, after having been made aware of the existence of the letter, never specifically requested it. Therefore, our determination of whether the Robles letter constitutes "material" exculpatory evidence for Brady purposes depends on whether its omission creates a reasonable doubt that did not otherwise exist. See Moose, supra.

Preliminarily, we believe that the Commonwealth discharged its Brady disclosure responsibilities by providing Appellant's counsel with the police report that referenced the Robles letter. The thrust of the Brady rule is to allow for fair trial preparation through the disclosure of material exculpatory information. See Green, 536 Pa. at 605, 640 A.2d at 1245 ("we must, therefore, consider any adverse effect that the prosecutor's failure to disclose might have had on not only the presentation of the defense at trial, but the preparation of the defense as well") (emphasis added). Indeed, in Commonwealth v. Moose, 529 Pa. 218, 602 A.2d 1265 (1992), this Court found a Brady violation where the prosecutor failed to provide the identity of Sonny Oglesby, an

important jailhouse informant. As we stated in Moose:

> [i]n the case before us, Moose never made a request for the criminal records of any government witnesses, nor did he request information about any promises, inducements, rewards or agreements between the witnesses and the Commonwealth. However, Moose's failure to seek such information is directly traceable to the failure of the district attorney in this case ... to identify Oglesby. Had the Commonwealth provided the appellee with Oglesby's name, Moose would then have had the opportunity to seek further information about Oglesby. Thus, in the case before us, the failure of the Commonwealth to disclose the identity of Oglesby as a witness impermissibly interfered with the [sic] Moose's ability to seek information concerning Oglesby's understanding with the Commonwealth.

Id. at 234, 602 A.2d at 1273 (emphasis added). Here, the Commonwealth unquestionably disclosed the existence of the Robles letter to Appellant's counsel by providing a police report whose sole subject was the letter, and counsel's failure to pursue the matter with the District Attorney is not a fault of the Commonwealth.

Moreover, we do not find that the Robles letter meets the test for "materiality" where there has been only a general request for Brady materials.

Appellant's counsel asked Robles on cross-examination whether he had been released from material witness bail because he had an agreement with the District Attorney's office that he would cooperate with the police. Robles denied that he was given any deal in return for his release from jail, and stated that "whether I'm on bail or in jail, I still got to cooperate any way I put it, so it doesn't matter. Cooperating helps." Notes of Testimony, 11/20/97, p. 524. Robles testified that he was released from jail because he met the conditions of his bail and posted the requisite bond. Appellant's counsel also asked Robles whether he had ever received money from the Reading Police Department in exchange for his cooperation. Robles denied that he had been paid for his cooperation. The impeachment value of the February 1997 letter would be to suggest that Robles had made an agreement with the police to testify, and that he would fabricate testimony in order to fulfill any such agreement. When directly questioned about his cooperation, however, Robles denied that he had made any deal with the police. Although the letter may have been useful in undermining Robles' credibility, we do not conclude that such an impeachment strategy would have created a reasonable doubt that did not otherwise exist, particularly in light of Robles' testimony that his cooperation was not pursuant to any agreement with the police. See Green, supra.

2. *Police Report Regarding Robles' Knowledge of Appellant's Drug Activities*

Two days before the penalty phase of Appellant's trial was to begin, the Commonwealth disclosed to Appellant's counsel the existence of a police report that described statements Robles made regarding Appellant's participation in Shawn Bridges' drug activities. [4] The Commonwealth produced a copy of this report to Appellant's counsel the day before the penalty phase was to begin. At the commencement of the penalty phase, Appellant sought to preclude the Commonwealth from introducing any evidence concerning the aggravating circumstance found at 42 Pa.C.S. § 9711(d)(14)—that the murder occurred in connection with illegal drug trafficking—as a sanction for the Commonwealth's late production of the report. The trial court denied Appellant's request, noting that the Commonwealth had produced the report and that Appellant had been on notice that the Commonwealth was seeking the death penalty on the basis of this aggravating circumstance. Appellant now claims that the Commonwealth engaged in misconduct by failing to produce this police report when Appellant made his general discovery requests nine months before trial.

[4] This report, like the police report that described Robles' letter, had been filed under the Reading police file number for the Schuylkill Avenue murder.

We find no violation of Brady here, and there was no error made by the trial court denying Appellant's request to preclude the Commonwealth from presenting evidence of the relationship between the murders and Appellant's drug dealing activities. The Commonwealth produced the police report before the penalty phase of Appellant's trial. The basis for Appellant's complaint, therefore, is that the Commonwealth failed to comply in a timely fashion with his discovery request for statements of all witnesses that the Commonwealth intended to call at the sentencing phase, and that he was prejudiced by this late production of the report. In evaluating this claim, we must look at: (1) whether the discovery rules were violated; and (2) whether the trial court abused its discretion in not excluding evidence pursuant to Rule 305(E) of the Pennsylvania Rules of Criminal Procedure. Commonwealth v. Jones, 542 Pa. 464, 507, 668 A.2d 491, 512 (1995). The trial court has broad discretion in choosing the ***232** appropriate remedy for a discovery violation. *Id., citing Commonwealth v. Rodgers,* 500 Pa. 405, 412, 456 A.2d 1352, 1355 (1983). Moreover, a defendant seeking relief from a discovery violation must demonstrate prejudice. *Commonwealth v. Counterman,* 553 Pa. 370, 719 A.2d 284, 298 (1998). The production of statements made by the witnesses of the Commonwealth is within the discretion of the trial court. Pa.R.Crim.P. 305(B)(2)(a)(ii). In refusing to grant Appellant's request that the Commonwealth be precluded from introducing any evidence regarding the

aggravating circumstance of Section 9711(d)(14), the trial court found that the Commonwealth had disclosed—several months before the trial—that it planned on calling Robles during the penalty phase. Further, the trial court noted that Appellant's investigator had interviewed Robles on previous occasions and had the opportunity to question Robles about his knowledge of Appellant's involvement in Bridges' drug activities, if he chose to do so. The trial court granted Appellant some relief by granting him a half-hour continuance to prepare for cross examination of Robles on the basis of this police report, and found this adequate in light of the advanced notice that Appellant had of the subject matter of Robles' testimony at the penalty phase. According to these circumstances, we find no abuse of the discretion of the trial court in refusing Appellant's request for further relief.

B. Recovery of Bullet from Appellant

Appellant argues that the bullet[5] removed from Appellant, in the course of his surgery, and handed over to the police should have been suppressed,

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[5] The bullet recovered from Appellant was a .32 caliber bullet that, the Commonwealth's ballistics expert testified, did not come from the same 9–mm weapon that was used to shoot Gregory and Damon Banks. The Commonwealth presented testimony that Damon Banks had taken a .32 caliber pistol with him when he left with Bridges, Morales, and Appellant. The Commonwealth sought to discredit Appellant's version that Bridges had shot him, and instead prove that one of the victims, Damon Banks, had shot him.

because the police did not obtain a warrant or a subpoena prior to requesting the bullet from the hospital. The trial court denied Appellant's pretrial motion to suppress the bullet. Our standard for reviewing suppression claims that the trial court decided in favor of the Commonwealth is well settled:

> we must determine whether the record supports the court's factual findings. In so doing, we consider only the evidence of the prosecution and so much of the evidence for the defense as, when fairly read in the context of the record as a whole, remains uncontradicted. Assuming that the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Abdul–Salaam, 544 Pa. 514, 524, 678 A.2d 342, 347 (1996) (citing Commonwealth v. Hughes, 536 Pa. 355, 367, 639 A.2d 763, 769 (1994); Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, cert. denied, 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985)). Appellant does not challenge the factual basis of the trial court's suppression decision, but instead claims that the trial court erred in concluding that Appellant had no constitutionally protected interest in the bullet removed from him.

In order for Appellant to have a constitutional claim against the removal of the bullet from him, he must show that the removal

was done by, or at the behest of, a government agent. See Commonwealth v. Kohl, 532 Pa. 152, 166, 615 A.2d 308, 315 (1992) (administration of blood test is a search within the meaning of Article I, Section 8 of the Pennsylvania Constitution if performed by an agent of, or at the direction of the government); *see also* Commonwealth v. Ellis, 415 Pa.Super. 220, 223, 608 A.2d 1090, 1091 (1992), allocatur denied, 533 Pa. 623, 620 A.2d 489 (1993) (Fourth Amendment proscribes only government action, not searches by private individuals). In the absence of governmental action, the search or seizure in question cannot give Appellant ground for a claim of violation of constitutionally-protected interests under either the Federal or Pennsylvania Constitutions. Moreover, individual acts do not become imbued with the character of governmental action merely because they are later relied upon and used by the government in furtherance of their objectives. Commonwealth v. Hawkins, 549 Pa. 352, 377–78, 701 A.2d 492, 505 (1997). To determine whether a particular search or seizure constituted governmental action, we must examine the purpose of the search, the party who initiated it, and determine whether the government acquiesced in it or ratified it. Ellis, supra.

Here, the removal of the bullet from Appellant was not at the behest of the police, but was for Appellant's medical well-being as determined by the surgeon who treated Appellant on his arrival at Reading Hospital. While Appellant was already in the operating room undergoing

surgery, Sgt. Johnson of the Reading Police requested that if the bullet were removed, he would like to have it. Under these circumstances, where a medical professional has made an independent decision that removal of the bullet was in the best interests of the patient, and where there was no antecedent direction from the authorities to do so, we cannot find the requisite governmental action to support Appellant's claims of violation of his constitutionally-protected interests.[6]

Having found that the removal of the bullet implicated no constitutional concerns, our inquiry shifts to examine whether the warrantless seizure of the bullet, after its removal from Appellant, violated any of Appellant's constitutionally-protected interests. An individual whose constitutionally protected rights are not violated cannot claim any injury by a warrantless police seizure. [7] In order to claim a

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[6] The United States Supreme Court's decision in Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), is distinguishable. In that case, the authorities sought a court order to compel a suspect to undergo surgery to remove a bullet that the government wished to use as evidence. Because the surgery would "intrude substantially" on the defendant's protected interests, and would not be undertaken absent the government's motion, the Court held that the Fourth Amendment prohibited the government from compelling the operation. In Appellant's case, by contrast, removal of the bullet occurred irrespective of the wishes of the police, because Appellant's medical condition required it.

[7] We have divided this principle into two concepts: (1) standing to litigate a suppression claim; and (2) the existence

constitutionally-protected right in an item seized, the defendant must show: (1) that he had a subjective expectation of privacy; and (2) that the expectation is one that society is prepared to recognize as reasonable and legitimate. See Commonwealth v. Gordon, 546 Pa. 65, 71, 683 A.2d 253, 256 (1996). We consider the totality of the circumstances and carefully weigh the societal interests involved when determining the legitimacy of such an expectation. Id. at 71, 683 A.2d at 257. The circumstances in this case clearly demonstrate that Appellant had no reasonable expectation of privacy, which is to say, one that society would accept as legitimate, once the bullet had been removed from him. Accordingly, Appellant is entitled to no relief on this claim.

C. Suppression of Statements

Appellant challenges the trial court's denial of his Motion to Suppress statements that he made to police beginning on December 8, 1996, and ending on December 12, 1996, claiming that the four statements he gave during this time were either given involuntarily, unknowingly, and unintelligently, in violation of his Miranda rights, or that they were the "fruit of the poisonous tree."

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of a reasonable and legitimate expectation of privacy in the thing seized. See Commonwealth v. Peterson, 535 Pa. 492, 497, 636 A.2d 615, 617 (1993). Because we find that Appellant had no reasonable expectation of privacy in the bullet, we do not address whether Appellant had standing to seek suppression of this evidence.

1. The December 8, 1996 Statement

The first statement that Appellant challenges occurred on December 8, 1996, immediately following the shooting and while Appellant was in the ambulance en route to the hospital for emergency treatment. The officers who arrived at the Queen City Restaurant found Appellant with a gunshot wound to the stomach. He was doubled over in pain, and vomiting a brown and red substance. They asked Appellant what had happened, and he stated that an individual at the A–Plus Mini Market in the Mount Penn area had shot him. Although in a great deal of pain, Appellant was lucid and able to converse with the officers and emergency personnel who treated him. One of the officers traveled in the ambulance and asked Appellant who had shot him. Appellant identified the shooter as "James," and stated that the shooting happened after an argument he had with "James" about money. At the time of this questioning, the interrogating officer was not aware of the murders of Gregory and Damon Banks, and therefore did not suspect any connection between the shooting of Appellant and those murders.

Appellant argues that his physical condition was so severe that any statement given to police was not given knowingly, voluntarily, and intelligently. Appellant does not claim that this questioning amounted to a custodial interrogation requiring Miranda warnings, but alleges he was

subjected to questioning by police. We have held that we will examine the totality of the circumstances surrounding statements given during noncustodial interrogations, "because a noncustodial interrogation 'might possibly in some situations, by virtue of some special circumstances,' result in an involuntary confession." Commonwealth v. Nester, 551 Pa. 157, 709 A.2d 879, 882 (1998) (quoting Beckwith v. United States, 425 U.S. 341, 347–48, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976)). When assessing voluntariness pursuant to the totality of the circumstances, a court should look at the following factors: the duration and means of the interrogation; the physical and psychological state of the accused; the conditions attendant to the detention; the attitude of the interrogator; and any and all other factors that could drain a person's ability to withstand suggestion and coercion. Nester, 709 A.2d at 882 (citing Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996) (citing Commonwealth v. Edmiston, 535 Pa. 210, 634 A.2d 1078 (1993))).

Here, the record supports the trial court's finding that Appellant's physical condition was not so impaired as to render him incapable of voluntarily describing to the police how he had been shot. Police questioned Appellant primarily because they believed he was the victim of a crime, and sought information to pursue their investigation of Appellant's shooting. Appellant was not, at that time, a suspect in Gregory and Damon Banks' murder case, and was not

questioned about those murders. The testimony at the preliminary hearing supports the conclusion of the trial court that Appellant was lucid and capable of responding to the officers' questions. Moreover, the result of this initial questioning was not a "confession" by Appellant of participation in the murders, but rather a false story designed to mislead police concerning the circumstances of Appellant's shooting. While Appellant contends that he was incapable of voluntarily giving statements to the police due to his "delirium," his presence of mind in fabricating a story about his shooting seriously undermines that claim. Considering the totality of the circumstances, we do not find that this noncustodial interrogation resulted in an involuntary confession from Appellant, and find no basis for suppressing these statements.

2. The December 11, 1996 (Morning) Statement

On December 11, 1996, Appellant made statements to police on two separate occasions admitting to participation in the murders of Gregory and Damon Banks. Appellant challenges the first statement as involuntarily given because he claims that he was subject to a custodial interrogation without the requisite Miranda warnings. The Opinion of the trial court describes its factual findings regarding the initial police interview of Appellant:

On December 11, 1996, Sgt. Walter Godshall and Lt. Robert Dunn of the Exeter Township Police Department went to the Reading Hospital to interview the Defendant. At this point no arrests had been made concerning the deaths of Damon and Gregory Banks. The officers arrived at the hospital at approximately 11 a.m. and inquired at the nurses [sic] station if they could speak with the Defendant. They were informed that they could speak with him and were directed to the Defendant's room which he shared with another patient. Upon entering the Defendant's room, they identified themselves as police officers with the Exeter Police Department and they were there to ascertain who shot the Defendant. Both officers wore business suits and had revolvers concealed under their suit jackets. Lt. Dunn began the interview by asking the Defendant what had happened and, after the Defendant again told the version of events as previously indicated to other officers, Lt. Dunn told the Defendant he didn't believe him and left the room. Sgt. Godshall told the Defendant that they looked at the Defendant as a victim and they were trying to find out who shot him. He also stated that whoever did it has not been apprehended and is probably aware that the Defendant was still alive. At this point, the Defendant in a quiet voice stated, "Shawn shot me and left me lay there to die." Sgt. Godshall asked the Defendant if he was referring to the shootings on

> December 8 and asked the Defendant what happened. The Defendant stated he knew he was in trouble and then went on to give an incriminating oral statement admitting his involvement in the shooting deaths of Damon Banks and Gregory Banks. The Defendant implicated Shawn Bridges as the trigger man and Richard Morales as another individual involved. Sgt. Godshall asked clarifying questions during this statement. This statement was not recorded, reduced to writing, nor did Sgt. Godshall take notes while the Defendant spoke with him. The interview lasted approximately [one-half] hour.

Trial Court, Slip. Op., p. 9. In addition to these factual findings in the trial court's Opinion, the record indicates that the officers did not inform Appellant that he was free to decline to speak with them, and did not provide Appellant with Miranda warnings.

Before an individual is subjected to a custodial interrogation, he must make a knowing and intelligent waiver of his privilege against self-incrimination and right to counsel after adequate warning as to those rights. Commonwealth v. Williams, 539 Pa. 61, 74, 650 A.2d 420, 427 (1994) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Statements obtained by the police during a custodial interrogation without prior Miranda warnings are presumed to be given without a

knowing and intelligent waiver, and are subject to suppression. To determine if a person is in custody for Miranda purposes, however, depends on whether the person is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. Williams, supra, citing Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713, *cert. denied,* 419 U.S. 1092, 95 S.Ct. 686, 42 L.Ed.2d 685 (1974).

We agree with the trial court that Appellant was not in custody, and therefore not subject to custodial interrogation, such that Miranda warnings were required. Appellant's inability to leave was not the result of any action of restraint by the police, but was due to his physical condition at the time. Although the officers displayed their badges, they were not in uniform and conducted the interview with the hospital door open and while another patient was in the room with Appellant. There was no suggestion by Appellant that he wanted police questioning to cease, or that he objected to the questioning. Further, Appellant offered his confession early in the interrogation, and gave an extensive narration of his involvement in the murders of Gregory and Damon Banks without repeated prompting by Sgt. Godshall. When Appellant became distraught at the end of his confession, Sgt. Godshall terminated the interview and asked Appellant's consent to return later that afternoon to record Appellant's

statement. Appellant agreed to give a recorded statement. In these circumstances, we do not find that Appellant's freedom of action was so restricted by the police questioning that he could reasonably believe that he was not free to terminate the interview. Because we find that Appellant was not subject to a custodial interrogation, no *Miranda* warnings were required.

3. The December 11, 1996 (Afternoon) Statement

Later the afternoon of December 11, 1996, the police returned to the hospital to record Appellant's confession. Before giving his statement, Appellant was apprised of his Miranda rights. Appellant acknowledged that he understood his rights and that he was willing to give the statement without consulting an attorney. Appellant reviewed the warning and waiver provisions of the form on which his statement was to be recorded, and signed the waiver portion of the form. Recognizing that he was properly advised of his Miranda rights, Appellant now asserts that this statement was the "fruit of the poisonous tree" of his previous, allegedly-tainted statement. We have found, however, that Appellant's earlier statement was not the product of a violation of his constitutional rights, and therefore we do not find any "poisoned tree" of which Appellant's later statement would be the "fruit."

4. The December 12, 1996 Statement

Appellant also challenges the statement he made to police shortly after midnight on December 12, 1996, on the grounds that his Miranda warnings were "stale" by the time he repeated his confession to the police. Following the recording of his confession on the afternoon of December 11, 1996, the police officers left Appellant, unguarded, at the hospital. He had not been placed under arrest. Later that afternoon, the police learned that Appellant had checked himself out of the hospital against his physician's advice. Suspecting that Appellant was staying at George Robles' residence, Detective Vega of the Reading Police called Robles and asked him whether Appellant was with him. Robles confirmed that Appellant was with him, and Detective Vega spoke with Appellant. Detective Vega asked Appellant if he would go to the District Attorney's office so that they could talk about the possibility of retaliation from Shawn Bridges, and about the murders of Gregory and Damon Banks. Appellant agreed to go the District Attorney's office, but asked if friends could accompany him. The police transported Appellant and two of his friends to the District Attorney's office, for the purpose of administering a polygraph examination that Appellant had agreed to undergo. At approximately 7:20 p.m., Detective Stajkowski gave Appellant Miranda warnings and conducted a pre-polygraph interview of Appellant. Due to Appellant's physical condition, however, Detective Stajkowski did not administer the polygraph test. At about midnight, Detective Schade of the

Reading Police and Detective Bailey of the Exeter Police took Appellant to another conference room and questioned Appellant about Gregory and Damon Banks' murders. The officers did not give Appellant Miranda warnings prior to this questioning.

Whether the police were required to give Appellant Miranda warnings depends on whether this interview constituted a custodial interrogation. We find that this questioning did not amount to a custodial interrogation. Appellant agreed to accompany the police to the District Attorney's office, and was not placed in handcuffs or otherwise placed under arrest. The officers permitted Appellant to bring two of his friends with him, and these individuals were present at the District Attorney's office during part of the questioning. Appellant was left unattended at various times, and was permitted to take breaks when needed. When Appellant requested that the interview stop, the police ceased questioning him and offered to take him to the hospital or, when Appellant refused to go the hospital, to return him to Robles' house. In these circumstances, we do not find that Appellant was in custody such that Miranda warnings were required prior to the interview. Because we conclude that there was no custodial interrogation, Appellant is entitled to no relief for the police's failure to "refresh" the Miranda warnings that the officers, in an abundance of caution, had given Appellant when he first arrived at the District Attorney's office.

D. Prejudicial Effect of Appellant's Statement to Police

Appellant contends that the trial court erred in permitting testimony regarding Appellant's statements to the investigating officers that he did not understand why Bridges continued to speak with Gregory and Damon Banks while standing on the front porch of their house and that, if he were in Bridges' position, he would have shot them at that moment and then would have killed the lady who was unloading her packages next door so that there would not have been any witnesses. Admission of the portion of the statement concerning the shooting of the neighbor, Appellant contends, was so prejudicial as to require a new trial.

Evidentiary rulings are committed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. Commonwealth v. Cohen, 529 Pa. 552, 563, 605 A.2d 1212, 1218 (1992) (citing Commonwealth v. Jermyn, 516 Pa. 460, 533 A.2d 74 (1987)). Evidence is relevant and, therefore, admissible if it logically tends to establish a material fact in the case, if it tends to make a fact at issue more or less probable, or if it supports a reasonable inference or presumption regarding the existence of a material fact. Commonwealth v. Bronshtein, 547 Pa. 460, 480, 691 A.2d 907, 917 (1997) (citing Commonwealth v. LaCava, 542 Pa.

160, 172–76, 666 A.2d 221, 227–28 (1995)). A trial court may exclude otherwise admissible evidence, however, if it concludes that the prejudicial effect of that evidence outweighs its probative value. *See* Commonwealth v. Boyle, 498 Pa. 486, 494, 447 A.2d 250, 254 (1982).

We do not discern an abuse of discretion by the trial court in admitting Appellant's statement that he would have shot Gregory and Damon Banks on their front porch and would have shot the neighbor/witness. The portion of the statement regarding the killing of Gregory and Damon Banks indicates Appellant's intent to kill, and the Commonwealth must establish premeditation as an element of first degree murder. See 18 Pa.C.S. § 2502(a), (d). Clearly, Appellant's statement that he would have killed Gregory and Damon Banks at that moment makes it more probable that he intended to kill them later that day. The statement is therefore relevant, and because it constitutes evidence of the element of intent for first-degree murder, we cannot find that the statement's prejudicial impact, assuming it had any, outweighed its significant probative value. Moreover, we do not find that the trial court abused its discretion in admitting that portion of the statement regarding the killing of the neighbor. In addition to being charged with the murders of Gregory and Damon Banks, Appellant was charged with conspiracy to commit murder. His statement that he would have shot a witness to the murders is proof of his intent to participate in the conspiracy,

and is therefore relevant. We do not find an abuse of the discretion of the trial court in ruling that the prejudicial impact of this statement did not outweigh its probative value.

E. Sufficiency of Evidence of Aggravating Circumstances

At the penalty phase, the Commonwealth presented the testimony of George Robles that Appellant was the "enforcer" for co-defendant Bridges' drug operations, and that the murder was in connection with drug sales. The Commonwealth presented the aggravating factor of Section 9711(d)(14)—that the murder was committed in connection with drug activity. The jury found that the aggravating circumstances outweighed the mitigating circumstances for the murder of Damon Banks, and at least one aggravating factor and no mitigating factors for the murder of Gregory Banks. While the jury found that Appellant had a mitigating factor of no significant criminal history at the time of the murder of Damon Banks, the jury found that was no longer true when Gregory Banks was murdered. Upon questioning from the judge, the jurors stated that because there was testimony that Damon Banks died before Gregory Banks, Appellant would have had a "criminal history" (i.e., the murder of Damon Banks) when Gregory Banks was killed.

Appellant contends that there was insufficient evidence to establish the aggravating circumstance

pursuant to Section 9711(d)(14). Our standard for reviewing sufficiency of the evidence claims is that we must view all the evidence and reasonable inferences therefrom in a light most favorable to the Commonwealth as the verdict winner and must determine whether the evidence was such as to enable the factfinder to find that all of the elements were established beyond a reasonable doubt. Commonwealth v. Rucci, 543 Pa. 261, 670 A.2d 1129 (1996). The aggravating circumstance found at Section 9711(d)(14) provides:

> [a]t the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

42 Pa.C.S. § 9711(d)(14).

George Robles testified at the penalty phase that Appellant was the "tough guy" whom Shawn Bridges used as his "protection" in his crack cocaine distribution operation. Robles had personally witnessed Appellant sell crack cocaine. Courtney Johnson, a friend of Damon and Gregory Banks, and a participant in the robbery of Bridges' girlfriend, testified that he, Damon, and Gregory Banks went looking for "drugs and money" when they went to rob Bridges' apartment. N.T., 1/20/97, p. 491. Robles testified that, according to conversations he had with Appellant, Gregory and Damon Banks' murders occurred because "they tried to take Shawn's drugs. That's the consequence in that business." Moreover, Appellant admitted in his statements to the police that the ruse employed by Bridges to get Gregory and Damon Banks to accompany them was that Bridges was leaving town for three to five days and that Bridges was showing the victims where his drugs were hidden so that Gregory and Damon Banks could "watch over his business" in Bridges' absence. N.T. 1/21/07, p. 605. This testimony was sufficient to support the jury's finding of the aggravating circumstance pursuant to 42 Pa.C.S. § 9711(d)(14).

III. CONCLUSION

We find no errors as alleged by Appellant. There was sufficient evidence to support the jury's determination of Appellant's guilt, and sufficient evidence to support the aggravating circumstances

found by the jury in imposing the death penalty. Accordingly, we affirm[8] the Judgment of Sentence.[9]

Mr. Justice Zappala concurs in the result only.

Judgement entered
Dated: March 26, 1999

/s/
Charles W. Johns, Esquire
Prothonotary

[8] Pursuant to the 1997 Amendments to 42 Pa.C.S. § 9711(h), which was effective prior to the date of Appellant's trial, we do not conduct a comparative proportionality review of Appellant's sentence. See Commonwealth v. Gribble, 550 Pa. 62, 91, 703 A.2d 426, 441 (1997).

[9] The Prothonotary of the Supreme Court of Pennsylvania is directed to transmit, within 90 days, the full and complete record of the trial, sentencing hearing, imposition of sentence and review by this Court to the Governor and to notify the Secretary of Corrections, pursuant to 42 Pa.C.S. § 9711(i).

APPENDIX "P"

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
V.	:	
	:	CRIMINAL DIVISION
	:	
RODERICK JOHNSON	:	NO. 118-1997
	:	Assigned to: Keller, J.

Mark Baldwin, Esquire,
District Attorney Attorney
for the Commonwealth

John T. Adams, Esquire,
Attorney for the Defendant

Randall Miller, Esquire,
Attorney for the Defendant

MEMORANDUM OPINION, KELLER, S.D.,
PRESIDENT JUDGE, JUNE 3, 1998

On November 25, 1997, a jury found Defendant Roderick Andre Johnson guilty of two counts of murder of the First Degree, two counts of Murder of the Third Degree, four counts of Aggravated Assault, two counts of Conspiracy to Commit Murder, and four counts of Conspiracy to Commit Aggravated Assault.[1] These convictions stem from the brutal murders of Gregory and Damon Banks. After a penalty hearing, the jury

[1] 18 Pa.C.S.A. § § 2502(a), 2502(c), 2702(a)(l), 2702(a)(4), 903(a)(l)(2), respectively.

found: (1) as to Damon Banks, the aggravating circumstances outweighed the mitigating circumstances; and (2) as to Gregory Banks, at least one aggravating circumstance and no mitigating circumstances. The jury set the penalty at death for
each count of first degree murder. On November 26, 1997, this Court formally imposed the sentence of death. Thereafter, on December 16, 1997, Defendant, by and through John Adams, Esquire, and Randall Miller, Esquire, filed a Notice of Appeal to the Supreme Court of Pennsylvania. Pursuant to Rule l 925(b) of the Pennsylvania Rules of Appellate Procedure, this Court requested, and did subsequently receive, a Concise Statement of Matters Complained of on Appeal.[2] In his Concise Statement, Defendant makes sixteen (16) allegations of error. They can be characterized as follows:

1. The Trial Court erred by not suppressing the Defendant's statements given to members of the Reading and Exeter Police and to the ambulance personnel on December 8, 1996 because the statements were involuntary;
2. The Trial Court erred in denying Defendant's Motion to Suppress his statements on December 11, 1996 to members of the Exeter Township Police Department due to the absence of Miranda warnings during a custodial interview;

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[2] This Court granted the Defendant 20 days from the date the transcripts were filed to file his Concise Statement on May 19, 1998, after all transcripts were filed, this Court received Defendant's Concise Statement.

3. The Trial Court erred in denying Defendant's Motion to Suppress his December 11, 1.996 written statement to members of the Exeter Township Police Department because the statement was fruit of the poisonous tree;
4. The Trial Court erred in denying Defendant's Motion to Suppress his December ·12, 1996 statement to Criminal Investigator Michael Bailey of the Exeter Township Police Department and Criminal Investigator Albert Schade of the Reading Bureau of Police;
5. The Trial Court erred in denying Defendant's Motion to Suppress the .32 caliber bullet recovered from the Defendant's torso;
6. The Trial Court erred in denying the Defendant's Motion in Limine regarding the Defendant's statement that "he would have shot the Banks on the porch and shot the woman in the head so there would be no witnesses," because the probative value of the alleged statement is outweighed by its prejudicial effect and the statement is not relevant;
7. The Commonwealth violated Pa.R.Crim.P. 305 by failing to provide to the defense prior to or during trial a letter written by Jorge Robles to Angel Cabrera;
8. The Defendant, Roderick Andre Johnson, is entitled to a new trial due to the Commonwealth's intentional violation of Pa.R.Crim.P. 305;
9. The District Attorney committed prosecutorial misconduct by intentionally

withholding exculpatory evidence from the defense and. by intentionally violating Pa.R.Crim.P. 305 prior to and during the trial;

10. The District Attorney violated Pa.R.Crim.P. 305 by failing to provide timely discovery to the Defendant with regard to a report regarding Jorge Robles· statement pertaining to the Defendant's alleged involvement, association or competition in the sale, manufacture, distribution or delivery of any controlled substance;
11. The Commonwealth presented insufficient evidence to establish the aggravating circumstance set forth in 42 Pa.C.S.A. § 971 l(d)(l4);
12. The District Attorney's intentional violation of Pa.R.Crim.P. 305 and the District Attorney's s prosecutorial misconduct entitles the Defendant to a dismissal of the charges;
13. The District Attorney's intentional violation of Pa.R.Crim.P. 305 entitles the Defendant to a new penalty phase hearing;
14. The District Attorney's intentional violation of Pa.R.Crim.P. 305 bars the Commonwealth, by and through the District Attorney to seek the death penalty in a re-trial;
15. The Trial Court erred in denying Appellant's Motion for extraordinary relief for a new penalty phase trial after the jury failed to find the stipulated and uncontested mitigating factor that the Defendant has no

significant history of prior criminal convictions-, with respect to the death sentence based on the murder of Gregory Banks; and

16. The Trial Court erred by not permitting the defense a continuance to investigate a report given to the defense on the eve of the death penalty phase of the trial to investigate an alleged statement made by Jorge Robles regarding the Defendant's alleged involvement with drug dealing.

This Opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure and for the following reasons, we request the instant appeal be denied.

SUFFICIENCY OF THE EVIDENCE

It is well settled that upon a conviction for Murder of the First Degree and a sentence of death, it is incumbent upon the Supreme Court of Pennsylvania to perform an independent review of the sufficiency of the evidence, "regardless of whether the appellant seeks such review." Commonwealth v. Collins, 703 A.2d 418, 420 (Pa. 1997). When reviewing the sufficiency of the evidence, we view all of the evidence, and all reasonable inferences derived therefrom, "in the light most favorable to the Commonwealth as verdict winner to determine if the evidence was sufficient to enable the fact finder to conclude that all of the elements of the offenses were established beyond a reasonable doubt." Id. (citing

Commonwealth v. Burgos, 530 Pa. 473, 610 A.2d 11 (1992)): In order to sustain a conviction for murder in the first degree, the Commonwealth must prove that a human being was unlawfully killed; that the defendant did the killing; that the killing was done with malice aforethought; and that the killing was done intentionally. See, 18 Pa. CS.A. Section 2502(a),(d); Commonwealth v. Washington, 700 A.2d 400 (Pa. 1997); Commonwealth v. Wilson, 543 Pa. 429, 672 A.2d 293 (1996). Additionally, the specific intent to kill may be inferred from the Defendant's use of a deadly weapon upon a vital part of the victim's body. Collins,; Washington,; Commonwealth v. Bond, 539 Pa. 299, 652 A.2d 308 (1995). Viewed with these standards in mind, the evidence was clearly sufficient to support Defendant's convictions for murder.

At trial, the testimony established that on December 8, 1996, the bodies of two cousins, Damon and Gregory Banks, were found lying along a secluded and semi abandoned dirt road in Exeter Township, Berks County, Pennsylvania.[3] Soon thereafter, police officers from the Reading Bureau of Police responded to the Reading Hospital to interview an individual who claimed he was shot the same night as the two bodies were found on West Neversink Road. The name of that individual was Roderick Andre Johnson, the Defendant. As a

[3] Unless otherwise indicated, the following facts are taken from the notes of testimony from the trial dated November 18-21, 24 -25, 1997.

result of the initial interview and several follow-up interviews with the Defendant, the Exeter Police Department filed charges against three individuals for the killing of Damon and Gregory Banks: the Defendant Roderick Johnson, and Co-Defendants Shawnfatee Michael Bridges, and Richard Morales. According to Defendant's statements, as read to the jury by Criminal Investigators Michael Bailey and Albert D. Schade,[4] the following occurred:

On Saturday, December 7, 1996, the girlfriend of Co-Defendant Shawn Bridges was robbed at gunpoint. The robbers indicated that they were looking for drugs and money. Although no drugs or money were found, the robbers took a camcorder and a Sony Playstation game machine.[5] News of this incident quickly made its way to boyfriend and co-Defendant Bridges, who was at the Casa Blanca Club on Eighth and Franklin Streets, Reading, Pennsylvania. At 5:00 AM. on Sunday the 8th, the

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[4] Criminal Investigator Michael Bailey's testimony can be found at pages 531-548, 593-618, 649-669.
Criminal Investigator Albert D. Schade's testimony can .be found at pages 676-682.

[5] This portion of the testimony was confirmed by Courtney Johnson, who testified that he was present when Greg and Damon Banks planned the robbery of Shawn Bridges home. He was also driving the car when Greg and Damon went inside to perform the robbery. Mr. Johnson also testified that he was present when co-Defendant Bridges came to the victims' house prior to the murders. Further, Mr. Johnson testified that prior to the murders, he saw Damon Banks come upstairs and grab a .32 caliber handgun. (N.T. I l /20/97 p. 468-481).

Defendant was informed about the robbery and he immediately proceeded to the Casa Blanca, where he spoke with Bridges and co-Defendant Morales. Later that day, at approximately 1:00 P.M., the Defendant and Bridges spoke with the victim of the robbery, and the girlfriend of Bridges, Madelyn Perez. Madelyn relayed that the two people who robbed her were wearing green masks and green "hoodies." Immediately, the Defendant .and Bridges recalled that they had seen Greg and Damon Banks earlier on the 7th. The Defendant specifically recalled that Greg Banks was wearing a green "hoodie" and a green mask. At that point, the Defendant and Bridges believed that it was Greg and Damon who robbed Ms. Perez. From there, Defendant and co-Defendant Bridges went to the home of co-Defendant Morales. While there, co-Defendant Bridges grabbed a shotgun and mentioned that he wanted to go to their house, confront them, and if he got the reaction he was looking for, he was going to murder them. At that point, Morales and the Defendant said "fine." The Defendant then mentioned that they should take care of business right away but Bridges responded that they should wait until it was dark. (N.T. 11121/97 p. 6S3). Bridges then showed Morales and Defendant a .9 millimeter Glock that he had on him. All three of them then proceeded to the K-Mart Department Store on 5th Street and bought a box of .410 shotgun shells for the shotgun. From there, all three proceeded back to Bridges' house where Bridges loaded his .9 mm and the shotgun. Bridges gave the shotgun to Morales and all three went to Bridges' mini-van. The Defendant drove

the mini-van, Bridges was in the passenger seat and Morales was seated in the back seat behind the Defendant. The plan was that co-Defendant Bridges would go to Greg and Damon's house and start shooting with his .9 mm Glock once he got the reaction he was looking for. In case anything went wrong inside the house, co-Defendant Morales was supposed to come in with the shotgun and start shooting. The Defendant was to act as the driver of the van. (N.T. 11/21197 p. 610, 655). When they got to Damon and Greg's house located at 545 South Seventeenth and a half Street, Bridges went up to the door and started talking to them. Back in the mini-van, the Defendant noticed a White Ford Taurus parked next to the house. It was a next door neighbor with her groceries. By this time, Bridges had been talking to Greg and Damon for nearly 10 minutes. The Defendant remarked to police that if he had been Bridges, he would have shot Greg and Damon right there and also shot the woman so that there would be no witnesses. (N.T. 11/21/97 p. 655-56, 678-79). Soon thereafter, Bridges came out of the house and said that Greg and Damon were going to go with them to Mount Penn. Bridges told Greg and Damon that he was going out of the area and that he wanted Greg and Damon to handle his drug business for him. Therefore, he wanted to show Greg and Damon where the drugs were hidden. Greg and Damon then got into the van and everyone proceeded toward Mount Penn. As they approached Mount Penn, the Defendant turned onto West Neversink Road. While driving on that road, they saw the Forest Hills Cemetery. At this point, co- Defendant

Bridges and Greg Banks were discussing Greg's cousin, Anthony, who was buried there. Greg had never seen the grave and asked if Bridges could show it to him. They went into the cemetery and Bridges showed Greg the burial site. According to his statement to police, the Defendant thought that this would be a good place to murder them because they had family buried there. (N.T. 11121/97 p. 657). As they proceeded out of the cemetery, Bridges instructed the Defendant to drive another *Yi* mile to his uncle's car lot. As they approached the car lot, the Defendant pulled the van onto a dirt road that was off to the side. There, Bridges and Morales said they would go to get the drugs. Bridges then asked Greg and Damon to come with them so he can show them where the drugs were at. Although Greg and Damon followed for a few feet, both Greg and Damon said that it did not make sense to have the drugs where they were going and that they would rather wait in the car. At that point, Greg, Damon, and the Defendant got back into the car. Bridges then came back and tried to convince them to come with him so that he could show him the drugs. The Banks cousins declined but did get out of the van momentarily. Bridges there said he would go get the drugs whereupon Damon and Greg got back into the van. Immediately, Bridges went to the Defendant and said that on the count of three, he was going to start shooting. According to the Defendant, Bridges then walked around the front of the van, then shouted to the Defendant: "What's on stations two and three?" At that point, as the Defendant went to get out of the van, he turned around and Bridges

looked right at him and fired the first shot into the Defendant's side. The Defendant said that he then ran away from the van toward the bushes and trees. As he ran, the Defendant stated that he turned around and saw Bridges shooting into the van at Greg and Damon. He then stated that the van drove away and he proceeded to walk roughly 2 miles to the Queen City Restaurant where police and ambulance officials were detailed. He was rushed to the Reading Hospital and surgery was performed. It was there at the hospital and later at the District Attorney's Office that the Defendant made incriminating statements.

Jorge Robles, a one-time friend of the Defendant's, stated that he went to visit the Defendant in the hospital after the surgery. While there, the Defendant recounted the story of the murders of Greg and Damon Banks, saying that he, along with Shawn Bridges and Richard Morales, took the Banks cousins and murdered them and left them on West Neversink Road. (N.T.1/19/97 p. 512). The Defendant further told Mr. Robles that he had a .38 caliber gun with him the night of the shooting. The Defendant said that he took the gun; wiped it off with his shirt and threw it on the side of the road, within a quarter mile of the murder scene. A search was later conducted by the police and the weapon was found by a member of the Exeter Township Highway Department, Jack Harrell, who turned it over to police. (N.T. 11/19/98 p. 347).

Dr. Neil Hoffman, Forensic Pathologist,

testified that the body of Greg Banks was riddled with five (5) gunshot wounds, the most fatal of which were the two (2) head wounds. Additionally, he testified that, at a minimum, thirteen (13) projectiles passed through the body of Damon Banks. One of those thirteen projectiles was bullet "D" which was removed from behind the chest plate of Damon Banks. According to Dr. Hoffman, bullet "D" entered the back of the neck just below the hairline. The bullet then passed through and totally cut the spinal cord, which instantaneously rendered Damon Banks a quadriplegic. (N.T. 11/19/97 p. 156-57, 159). Dr. Hoffman testified that the manner of death for both Gregory and Damon Banks was homicide.

Finally, Trooper Kurt Tempinski of the Pennsylvania State Police Laboratory, Ballistics Section, testified that he examined the now infamous bullet "D" and the .38 caliber revolver that the Defendant stated he had possession of the night of the murders. Trooper Tempinski stated in his expert opinion that bullet "D" was fired from exhibit number 46, the .38 caliber revolver which the
Defendant said he had, "to the exclusion of all other firearms." (N.T. 11/20/97 p. 407).

Based on the aforementioned testimony, the evidence was clearly sufficient to sustain the verdicts of guilty as to murder of the first degree.

THIS COURT DID NOT ERR IN REFUSING TO SUPPRESS THE DEFENDANT'S STATEMENTS

The Defendant's first four allegations claim that this Court erred in refusing to suppress statements that the Defendant made to ambulance personnel and to members of the Exeter and Reading Police Departments. These statements were made in the ambulance, in his recovery room after the surgery, and later on December 12, 1996 at the District Attorney's Office. Additionally, Defendant's fifth allegation of error asserts that this Court erred in refusing to suppress the .32 caliber bullet that was retrieved from Defendant's side during the surgery. We disagree.

On July 11, 1997, this Court conducted a pre-trial hearing to determine whether the aforementioned statements and bullet, along with the Defendant's clothes, should be suppressed. On July 17, 1997, this. Court entered its Findings of Fact and Conclusions of Law in which we denied the motion to suppress the statements and the bullet. However, this Court did grant the suppression of the Defendant's clothes which, in this Court's opinion, was unlawfully obtained.[6]

Because the Defendant's statements were somewhat crucial to the conviction, we will reiterate our Findings of Fact below. At the pre-trial hearing, this Court found the following:

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[6] We would note that, despite granting the defense's motion to suppress the Defendant's clothes, defense counsel later asked this Court to rescind our suppression order insofar as the clothes were concerned. This Court granted this request on November 17, 1997.

In the evening hours of December 8, 1996, members of the Reading Police Department were dispatched to The Queen City Restaurant, located on Lancaster Avenue in Reading. Upon arrival, Officers Monteiro and Acker observed the Defendant reclined on a bench in the vestibule area of the restaurant. The Defendant indicated that he had been shot and showed the officers a wound in his stomach area. The Defendant stated that someone had shot him near an A-Plus Mini market in the Mt. Penn area and he had walked to the restaurant. Mt. Penn is a borough contiguous to the City of Reading but is approximately 2 miles from the restaurant. The Police called for an ambulance. While waiting, the Defendant vomited a red and brown substance and stated he wanted help so he wouldn't die. The ambulance arrived within 5 minutes of the police arrival and Robert Hancock, a paramedic, began treatment after placing the Defendant in the ambulance. Hancock described the Defendant as being in pain, however, he had good skin color, stable blood pressure and was conversant during the trip to Reading Hospital. Mr. Hancock began 2 IV injections for lost blood which contained only the standard saline solutions. He notified the hospital and placed them on trauma alert. Officer Acker accompanied the Defendant in the ambulance ride and inquired of the Defendant as to what had happened. The Defendant told Officer Acker that another Black Male had shot him at a mini market in Mt. Penn up from McDonald's; they were arguing about money and this individual, known to him as

"James," started shooting at him; he began to run away and was shot. The Defendant gave a description of "James" and again stated he walked to the Queen City Restaurant. Upon arrival at the Reading Hospital, personnel began to treat the Defendant and prepare him for surgery. At about the same time, Sgt. George Johnson of the Exeter Township Police was investigating a double homicide that was reported earlier on December 8, 1996. Exeter Township is located just beyond the Borough of Mt. Penn, Berks County, Pennsylvania. Sgt. Johnson was dispatched to the Reading Hospital to interview the Defendant as a result of communications between the Reading Police and Exeter Township Police. Upon arrival at the Hospital, Sgt. Johnson went to the Hospital, talked briefly with Officer Acker and, after obtaining permission from the treating doctor, spoke with the Defendant who basically told Sgt. Johnson again what he had asserted to Officer Acker. The Defendant was taken to an operating room for surgery, curtailing any further interview. Sgt. Johnson retrieved two bags of the Defendant's clothing and his wallet and requested that if a projectile was removed from the Defendant during surgery, he wanted it. A projectile was later removed from the Defendant's body during surgery and given to the Exeter Township police. On December 11, 1996, Sgt. Walter Godshall and Lt. Robert Dunn of the he Exeter Township Police Department went to the Reading Hospital to interview the Defendant. At this point no arrests had been made concerning the deaths of Damon and Gregory Banks. The officers arrived at the

hospital at approximately 11 a.m. and inquired at the nurses' station if they could .speak with the Defendant. They were informed that they could speak with him and were directed to the Defendant's room which he shared with another patient. Upon entering the Defendant's room, they identified themselves as police officers with the Exeter Police Department and they were there to ascertain who shot the Defendant. Both officers wore business suits and had revolvers concealed under their suit jackets. Lt. Dunn began the interview by asking the Defendant what had happened and, after the Defendant again told the version of events as previously indicated to other officers, Lt. Dunn told the Defendant he didn't believe him and left the room. Sgt. Godshall told the Defendant that they looked at the Defendant as a victim and they were trying to find out who shot him. He also stated that whoever did it has not been apprehended and is probably aware that the Defendant was still alive. At this point, the Defendant in a quiet voice stated, "Shawn shot me and left me lay there to die." Sgt. Godshall asked the Defendant if he was referring to the shootings on December & and asked the Defendant what happened. The Defendant stated he knew he was in trouble and then went on to give an incriminating oral statement admitting his involvement in the shooting deaths of Damon Banks and Gregory Banks. The Defendant implicated Shawn Bridges as the trigger man and Richard Morales as another individual involved. Sgt. Godshall asked Clarifying questions during this statement. This statement was not recorded,

reduced to writing, and Sgt. Godshall take notes while the Defendant spoke to him. The interview lasted approximately 1 hour. At approximately 2:20 P.M. on December 11, 1996, Sgt. Godshall and Officer Bailey returned to the hospital with a secretary for the purpose of taking a typewritten statement of the Defendant. (Exhibit C-2). Sgt. Godshall witnessed Officer Bailey give the Defendant his Miranda Rights and the taking of the statement. The statement was taken in the same hospital room as the earlier interview, however, at this time the Defendant was the only patient in the room. Detective Bailey read the Miranda Rights to the Defendant off of the Statement form and asked the Defendant the waiver questions. The Defendant responded affirmatively that he understood his rights and that he was willing to give a statement without consulting an attorney. The Defendant was shown the statement form and asked to read the warning and waiver questions. Det. Bailey asked the Defendant if he could read and write English, to which the Defendant responded affirmatively. The Defendant read the warning and waiver part of the statement form and signed the waiver portion and the bottom of each of the pages in Exhibit C-2. The Defendant appeared to Det. Bailey to be alert and responsive to questions. After signing the waiver, Det. Bailey asked the Defendant to explain what occurred concerning the shooting. After giving a narrative, Detective Bailey then went over the Defendant's version, asking specific questions that were typed by the secretary and the Defendant orally responded, which responses were also typed

by the secretary. Det. Bailey gave the Defendant an opportunity to review the statements, consisting of 5 typewritten pages, and make any corrections or changes. The Defendant did make a correction to the typed statement on page 4 changing the pronoun "he" to the personal name "Shawn". The Defendant then signed at the bottom of each page of the statement as did Det. Bailey and Sgt. Godshall. The statement was concluded at 4:22 P.M. The officers left and the Defendant remained unguarded in the hospital room. Later on December 11, 1996, the Reading Police were informed that the Defendant had checked himself out of the Reading Hospital against medical advice. Criminal Investigator Gerardo Vega of the Reading Police called Jorge Robles of 428 Buttonwood Street, Reading, Pa., with whom he believed the Defendant was residing, to speak with the Defendant. Mr. Robles confirmed that the Defendant was at his house and C.I. Vega told him that he needed to speak to the Defendant because there were rumors that friends of the victims were going to retaliate. Shortly after talking with the Defendant, C.I. Vega went to Defendant's location and spoke with him about his situation. C.I. Vega offered to return the Defendant to the Hospital, however; the Defendant declined. C.I. Vega then asked the Defendant if he would accompany him to the District Attorney's Office so they could talk further about his situation. The Defendant agreed to go with C.I. Vega and asked W his friends could accompany him. C.I. Vega and other police transported the Defendant and his two friends to the District Attorney's Office on the 5th floor of the

Berks County Service Center. The Defendant was not handcuffed and he and his friends were initially placed in the witness room and left unattended. This was in the early evening hours of Dec. 11, 1996. The doors to the District Attorney's Office were propped open and no one was guarding the Defendant. The Defendant was taken to the office of a County Detective Joseph Stajkowski for the purpose of conducting a polygraph test which the Defendant had agreed to undergo. At approximately 7:20 P.M., Det. Stajkowski advised the Defendant of his rights and went over a Consent and Waiver Form with the Defendant who signed and initialed the form. The Defendant appeared coherent to Det. Stajkowski and was cooperative in the pre-test interview phase that took a number of hours and was interrupted by breaks and an opportunity for the Defendant to speak with his friends. Det. Stajkowski determined that due to the Defendant's wounds, a polygraph examination on could not be conducted. Shortly before midnight, Det. Schade of the Reading Police and Det. Bailey of the Exeter Police took the Defendant to the conference room of the District Attorney's Office to re-interview the Defendant. Det. Schade asked the Defendant if he was under a doctor's care and the Defendant said no and that he was not under any medication. He declined offers to be taken back to the Reading Hospital. The Defendant complained of being in some discomfort but still declined the offers to go to the hospital. Det. Bailey told the Defendant that they wanted to clarify some things from his earlier statement and proceeded to ask him specific questions about the

shooting incident and the Defendant's actions leading up to the shooting. The Defendant responded to the questions and Det. Bailey took notes that were ultimately reduced to typewritten form in a police report. This oral statement contained incriminating admissions. At the conclusion of the interview, the Defendant was again offered a ride to the hospital, he declined; instead, the Reading Police took the Defendant and his friends back to Jorge Robles' house.

Based on the aforementioned facts, this Court did not suppress any of the statements made by the Defendant nor the bullet which was removed from his body. However, this Court did suppress the wallet and clothes which were taken from his person.

As stated in this Court's Findings of Fact and Conclusions of Law, it is well settled that an incriminating statement is not voluntary with the meaning of the United States Constitution if it was not "the product of a rational intellect." Commonwealth v. Maroney, 422 Pa. 171, 177, 220 A.2d 628, 631 (1966). In deciding whether a statement is voluntary and essentially the product of a free, unconstrained choice by its maker, the trial court must "consider the totality of the circumstances; inducting the accused's mental and physical condition." Commonwealth v. Hallowell, 444 Pa. 221, 282 A.2d 327 (1971). The testimony of Police Officers Monteiro, Acker, and Sgt. Johnson together with the paramedic, Robert Hancock, established that the Defendant, although in pain,

was coherent, verbally responsive and conscious from the point of police contact until he was taken to the operating room. The Defendant did not testify as to his physical and/or mental state but relied upon a forensic pathologist to give an opinion based upon a review of the medical records. Under the totality of the circumstances we believe the statements made by the Defendant to the police officers at the restaurant, in the ambulance and at the hospital were voluntary and a product of the free choice of the Defendant and as such, are admissible. See Commonwealth v. Hunt, 263 Pa. Super. 504, 511, 398 A. 2d 690, 690 (1979) (stating that the credible testimony of the interrogating officers alone can substantiate a finding of voluntariness).

It is further axiomatic that the Miranda protections are necessary whenever an individual is subject to "custodial interrogation." By this, courts mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." Commonwealth v. Ellis, 379 Pa. Super. 337, 351, 549 A.2d 1323, 1330 (1988)(citing Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16
L.Ed.2d 694, 706 (1966)). In the instant case, the interview of the Defendant in his hospital room on December 11, 1996, at approximately 11:00 A.M. for a period of approximately 1 hr. was, under the totality of the circumstances, not detention and not custodial. Additionally, the restraint placed on the Defendant was not caused by police action, but,

rather was due to his medical condition. The questioning occurred in the presence of a total stranger and was not the functional equivalent of an arrest. Therefore, Miranda warnings were not required for this initial interview. Finding no constitutional deprivation concerning the morning statement of December 11, 1996, the argument that the afternoon statement was a fruit of the poisonous tree must fail. As to the oral statement of the Defendant to police beginning shortly before midnight on December 11, 1996, we again must determine whether the Defendant was in custody, subject to interrogation at the time of the statement and whether, if in custody, the police were required to re-mirandize the Defendant after Miranda was given and waived by the Defendant to the polygraph examiner. When we apply the analysis of the factors enunciated in Ellis, supra, we again find the Defendant was not in custody at the time he made the volunteered statements to Detectives Schade and Bailey. According to the facts, the Defendant came to the District Attorney's Office on his own free will. He was not handcuffed and was left alone for periods of time. His friends were allowed to accompany him to the DA's office and he was free to leave whenever he wanted. Accordingly, Miranda warnings were not required.

Even if the Defendant was in custody, we are of the opinion that the police were not required to re-Mirandize the Defendant. It is clear that "every renewal of interrogation" does not require "a repetition of the Miranda warnings." Commonwealth v. Ferguson, 444 Pa. 478, 282 A.2d

378 (1971) (applying the "objective indicia" test and holding that the absence of Miranda warnings immediately preceding questioning did not render a statement inadmissible where the Defendant was given two Miranda warnings 7 hours and 3 hours prior to the interrogation). Instantly, Defendant was given the Miranda warnings during the attempted polygraph examination. This was conducted very shortly before the statements were made to Criminal Investigators Michael Bailey and Albert Schade. Accordingly, the Defendant was not required to be re-Mirandized.

Finally, it is clear that the .32 caliber bullet was removed by the surgeons, not at the direction of the police, but by physicians, for the medical well-being of the Defendant. The Fourth Amendment of the United States Constitution and similar provisions of The Pennsylvania Constitution do not protect an individual who claims to have been a **victim** of a shooting from police acquisition of evidence of that shooting. The seizure was in fact of evidence (the bullet) not owned or possessed by the Defendant, given to police voluntarily by Hospital personnel, after they removed the item from the Defendant's body. Accordingly, suppression of the bullet is not warranted.

For the foregoing reasons, we request that allegations one through five be denied.

THIS COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION IN LIMINE

Defendant's sixth allegation of error charges that this Court erred in denying the Motion in Limine regarding the Defendant's statement that "he would have shot the Banks on the porch and shot the woman in the head so there would be no witnesses." (N.T. 11/21/97 p. 655-56, 678-79). Specifically, Defendant alleges that the probative value of the alleged statement is outweighed by its prejudicial effect and the statement is not relevant.[7] We disagree.

It is well settled that the admission of evidence is in the sound discretion of the trial judge, and will not be disturbed absent a manifest abuse of discretion. Commonwealth v. Smith, 548 Pa. 65, 694 A.2d 1086 (1997); Commonwealth v. Brennan, 696 A.2d 1201, 1203 (Pa. Super. 1997). Evidence is admissible in a criminal case "if it logically or reasonably tends to prove or disprove a material fact in issue, tends to make a fact more or less probable, or if it is a basis for or supports a reasonable inference or presumption regarding the existence of a material fact. All relevant evidence should be admitted unless a specific rule bars its admission." Commonwealth v. Dean, 693 A.2d 1360, 1367 (Pa. Super. 1997). However, "even relevant evidence may be excluded if the probative value of admitting it is substantially outweighed by the danger of unfair prejudice." In the case at bar,

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[7] We would note that the proper standard is: "relevant evidence may be excluded if the probative value of admitting the evidence is *substantially* outweighed by the danger of unfair prejudice." See, Dean, infra.

it is clear that the Commonwealth was required to prove a killing with malice aforethought and that the killing was done with a specific intent to kill, i.e. willful, deliberate and premeditated. See, 18 Pa.C.S.A. Section 2502(a). According to our facts, the statement by the Defendant that if it had been him on the porch talking to the victims he would have shot the Banks "and shot the woman in the head so there would be no witnesses" was highly relevant. Not only was it indicative of the Defendant's state of mind and his intent, but it also allowed the jury to gain insight into the Defendant's role in the conspiracy. This voluntary and un-coerced statement was therefore highly relevant in establishing the elements the Commonwealth was required to prove. Accordingly, the probative value was not substantially outweighed by its prejudicial effect and this Court did not err in refusing to grant Defendant's Motion in Limine. We therefore request that the sixth claim be denied.

THIS COURT IS WITHOUT JURJSDICTION TO RULE ON THE POTENTIAL DISCOVERY VIOLATIONS AND THEIR APPROPRIATE REMEDIES

Defendant next makes several allegations concerning potential Discovery violations. Additionally, Defendant requests several forms .of relief based upon these potential violations. Specifically, allegations number 7, 8, 9, 12, 13, and 14.relate to a letter from key Commonwealth witness Jorge Robles that was written to Criminal

Investigator Angel Cabrera of the Reading Bureau of Police. The letter stated:

Angel Cabrera:

Angel, Look I can't take this jail.[8] I am doing everything possible to help you. Please, please help me. I'm not a runner. You know that. I just want to go home. I can't eat. I can hardly sleep and I feel like I'm in here forever. Angel, I feel like I'm dying in here. I am begging you and [Criminal Investigator] Vega with my word as a human and father to be, I'm not running. Just send me home please. I will do anything.

P.S. - I know me + Vega don't get along but Angel, please I'm not the killer. Help me. Please.

(N.T. 2/26/98 p. 9-12, Defendant's exhibit 2). Counsel for the defense were allegedly made aware of this letter after trial and after a Notice of Appeal had been sent to the Supreme Court. Acting on this information, the Defendant submitted a request for an evidentiary hearing on the matter. Such a hearing was conducted by this Court on February 26, 1998. Although this Court did not rule on any specific motions or requests, we simply allowed both-sides an opportunity to make a record for appellate review.

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[8] Initially, Jorge Robles was being held in jail because he was an important Commonwealth witness. Material witness bail had been set and he was released at a later date.

It is well settle that once a notice of appeal has been filed, the trial court is divested of its jurisdiction. Pa.R.App.P. 1701(a),(b). See also, Commonwealth v. Pearson, 685 A.2d 551 (Pa. Super. 1996) (stating that once a notice of appeal has been filed, a trial court is divested of jurisdiction to act further on the case). While this Court acknowledges its lack of jurisdiction in the instant matter, we would note that, based upon a detailed review of all the evidence throughout the entire case, we are of the opinion that any error or prosecutorial misconduct, if any, is harmless. See, Commonwealth Washington, 692 A.2d 1018 (Pa. 1997); Commonwealth v. Mulligan, 693 A.2d 1313, 1318-19 (Pa. Super. 1997). By virtue of the Defendant's own statements, which were procured voluntarily and without coercion, the Defendant implicates himself as an accomplice to the first degree murders of Gregory and Damon Banks. While Mr. Robles' testimony was also utilized in the sentencing phase of the trial, we would likewise note that the Defendant acknowledged, in some form, that the killings were drug related. Initially, the Defendant and co-Defendants were aware that the attempted robbery was for drugs and money. Moreover, Defendant acknowledged in his statement that the sale of drugs was used as a ruse to get the Banks cousins in the van prior to their murders. Therefore, this Court opines that even if Mr. Robles testimony was excluded from the trial and sentencing phase, the jury could have logically and rationally reached the same result. Accordingly, we ask the Supreme Court to deny claims seven, eight, nine, twelve, thirteen, and

fourteen.

THE DISTRICT ATTORNEY DID NOT VIOLATE PA.R.CRIM.P. 305 REGARDING A REPORT CONCERNING STATEMENTS MADE BY MR. ROBLES ABOUT THE AGGRAVATING FACTORS

The Defendant's tenth allegation of error claims that the District Attorney violated Rule 305 of the Pennsylvania Rules of Criminal Procedure by failing to provide timely discovery to the Defendant. Specifically, the claim involves a report concerning a statement given by Jorge Robles pertaining to Defendant's alleged involvement, association or competition in the sale, manufacture, distribution or delivery of any controlled substance. See, 42 Pa.C.S.A. Section 9711(d)(l4). We find no discovery violation and request the instant claim be denied.

Pursuant to Rule 305(B)(2), it is clear that the Commonwealth is under a continuing duty to disclose any and all information concerning an alleged statement by a key Commonwealth witness, whether it be for purposes of the guilt or sentencing phase of trial. In the instant case, counsel for the Defendant acknowledged that they did in fact receive this information. (N.T. 11/26/97 p. 877). As such, no discovery violation occurred. However, Defendant complains that he did not receive it in enough time.

It is clear that a defendant seeking relief from

tardy disclosure under the rule must demonstrate prejudice. Commonwealth v. Gordon, 364 Pa. Super. 521, 530, 528 A.2d 631, 635 (1987). In the instant case, the Defendant cannot meet this burden as it clear that they had the opportunity to investigate this potential testimony. According to the facts of the instant case, it is undisputed that the prosecutor and the criminal investigator met with Mr. Robles two days prior to the commencement of the sentencing phase. Defense counsel was informed about that meeting and was also informed about the contents of the interview. The prosecutor advised defense counsel that he would be supplied with the supplemental report which documented the facts of the interview. Defense counsel was subsequently supplied with this information the very next day, as promised.

Instantly, the defense was provided not only with over 400 pages of discovery in the instant matter, but they were provided with discovery from another case involving the Defendant in which Mr. Robles testified. (N.T. 11/26/97 pp. 879-80, 898-901). Moreover, Jorge Robles was listed on the Commonwealth's witness list several months prior to trial. Additionally, at the time of arraignment, defense counsel was aware that the Commonwealth was proceeding with the specific aggravating factor that Jorge Robles would testify to. Based on all of the aforementioned facts, it is clear that defense counsel had ample opportunity to interview Mr. Robles, which they did -- twice. Specifically, Mr. Robles was interviewed by Michael White, a private investigator retained by the defense. On one of

those occasions, Mr. Adams, the Defendant's attorney, was present for the interview.

Finally, we should note that this Court granted the defense request for a brief continuance so that they may prepare more thoroughly for cross-examination of Mr. Robles during the sentencing phase. (N.T. 11/26/97 p. 937). Accordingly, because no discovery violation occurred and because the Defendant cannot establish the requisite prejudice needed to sustain his burden, the instant claim should be denied.

THE TRIAL COURT DID NOT ERR BY REFUSING TO GRANT A CONTINUANCE TO THE DEFENSE TO INVESTIGATE THE REPORT CONCERNING STATEMENTS BY GEORGE ROBLES PRIOR TO THE CONVENING OF THE PENALTY PHASE OF TRIAL

The Defendant's sixteenth allegation of error claims that this Court erred by not permitting the defense a continuance to investigate a report given to the defense on the eve of the death penalty phase of the trial to investigate an alleged statement made by Jorge Robles regarding the Defendant's alleged involvement with drug dealing. We disagree.

As stated in the above argument, defense counsel was made aware of these statements as soon as they were received by the prosecutor. The report was given to defense counsel the very next morning - one day before the commencement of the

penalty phase. This Court, acknowledging that no discovery violation occurred due to the actual receipt of the report by defense counsel, delayed its ruling on a defense request for a continuance until the testimony was received into evidence. After direct examination, defense counsel requested a 30 minute recess to better prepare themselves for cross-examination of Mr. Robles. This request was granted. (N.T. 11/26/97 pp. 937-38). Therefore, allegation of error number 16 is itself, factually, erroneous. Accordingly, we request this claim be deed.

SUFFICIENT EVIDENCE WAS PRESENTED BY THE COMMONWEALTH TO ESTABLISH THE AGGRAVATING FACTOR LISTED IN 42 PA.C.S.A. SECTION 9711(d)(l4)

The Defendant's eleventh allegation of error is that the Commonwealth presented insufficient evidence to establish the aggravating circumstance set forth in 42 Pa.C.S.A. § 9711 (d)(l4). We disagree.

Section 9711 (d)(l 4) provides as follows:

At the time of the killing, the victim was or had been involved, associated or in competition with the defendant in the sale, manufacture, distribution or delivery of any controlled substance or counterfeit controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act or similar law of any other state, the District of Columbia or the United States, and the defendant

committed the killing or was an accomplice to the killing as defined in 18 Pa.C.S.A. § 306(c), and the killing resulted from or was related to that association, involvement or competition to promote the defendant's activities in selling, manufacturing, distributing or delivering controlled substances or counterfeit controlled substances.

When we apply this section with the aforementioned sufficiency standard,[9] we believe sufficient evidence existed for the jury to return unanimous verdicts of death.

In the instant case, the evidence, taken from the trial and from the sentencing phase, clarified that the Defendant and Shawn Bridges were involved with the sale and distribution of drugs. The Defendant was actually labeled as the "muscle" of the business who would act as manager in the drug sales. Jorge Robles testified that on several occasions he witnessed the Defendant "enforcing" the "business" by physically assaulting individuals in the street. (N.T. 11/26/97 pp. 932-35). During trial, it was established that Greg and Damon Banks went to the home of Shawn Bridges and his girlfriend looking for "drugs and money."[10] As a

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[9] For a detailed analysis of the standard for sufficiency of the evidence claims, see section on sufficiency of the evidence at page 3-4.

[10] During trial, Courtney Johnson testified that he knew that Shawn Bridges lived at the apartment that they were going to rob. (N.T. 1 1120/97 p. 471).

result, Shawn Bridges, along with the Defendant and Richard Morales, lured the two victims into the van with the promise that they would show the victims where the drugs were at so that they could take care of the drug business while Shawn was out of town. According to Mr. Robles, there was no doubt that these murders occurred because "they tried to take Shawn's drugs." (N.T. 11/26/97 p. 936). According to Mr. Robles, who was present during the planning of the murders:

> That's the consequence of the business . . . . That's the consequences; try to disrespect to a certain level, you try to steal a person's drugs, you hurt someone in that person's family, you die. Straight consequence. A lot of people wouldn't understand that, but if you're mixed up with that, you know it. (N.T. 11/26/97 p.936).

Based on the combined testimony, the jury could logically infer that the Defendant was one of the leaders in a business; that this business existed for the purpose of trafficking drugs; that it used violence to ensure that individuals distributed drugs supplied by the business; that the Banks cousins tried to interfere with that business; and that the murders of Greg and Damon Banks were carried out in order to promote the activities of the business and to prevent others from attempting to interfere with the business in the future. See, Commonwealth v. Jones, 542 Pa. 464, 524-25, 668 A.2d 491, 520-21 (1995). See also, Commonwealth v. Collins, 703 A.2d

418 (Pa. 1997) (stating that the aggravating circumstance was that the victim was killed to further the Defendant's drug business, thus supporting section 971 l (d)(l4)). Therefore, the evidence was clearly sufficient to sustain the aggravating factor under section 9711(d)(14). Accordingly, we request the instant claim be denied.

THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION FOR EXTRAORDINARY RELIEF

Defendant's final allegation of error claims that this Court erred by not granting Defendant's Motion for Extraordinary Relief[11] for a new penalty phase. Specifically, Defendant argues that he was entitled to a new penalty phase after the jury failed to find the stipulated and uncontested mitigating factor that the Defendant has no significant history of prior criminal convictions, with respect to the

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[11] This is governed by Rule 1405(B) of the Pennsylvania Rules of Criminal Procedure, which provides:

(1) Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion in arrest of judgement, for a judgement of acquittal, or for a new trial.

(2) The judge shall decide a motion for extraordinary relief before imposing sentence, and shall not delay the sentencing proceeding in order to decide it.

(3) A motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal.

death sentence based on the murder of Gregory Banks. We disagree.

Upon returning from deliberations, the jury found that one aggravating circumstance had applied to the murders of both Gregory and Damon Banks.[12] However, the jury found that the mitigating circumstance of no prior criminal history had applied only to Damon Banks. Acting on this information, this Court surmised that the reason the jury did not find the mitigating factor relative to Greg Banks was due to the testimony of Doctor Hoffman, who testified that Damon Banks died prior to Greg Banks. (N.T. 11/26/97 p. 162, 168, 175). Therefore, the jury perhaps found that upon the death of Damon Banks, the Defendant would then have a history of criminal activity. (N.T. 11/26/97 p. 1071). This supposition was confirmed when this Court asked the jury if that was their rationale. Every member of the jury responded that indeed, that was their thinking. (N.T. 11/26/97 p. 1072-74).

Instantly, this Court did not abuse its discretion by denying the motion for extraordinary relief. Based on the evidence presented at trial and during the sentencing phase, it was entirely reasonable for the jury to conclude that Damon Banks was the first victim of homicide.

Therefore, before the Defendant could be convicted of the second homicide, he had already

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[12] See, 42 Pa.C.S.A. Section 9711(d)(14).

been involved in prior criminal activity. Therefore, the verdict of the jury being reasonable, it should be left unchanged. Accordingly, we request this claim be denied.

CONCLUSION

Based on the aforementioned argument, it is the opinion of this Court that the evidence was sufficient to sustain the verdicts of the jury, that this Court did not err in its judgements, and that, even if the Supreme Court were to find prosecutorial misconduct or a violation of Rule 305, such error was harmless in light of Defendant's own statements which, by their literal interpretation, places the Defendant in an accomplice role in the murders of Damon and Greg Banks.

BY THE COURT:

/s/ Scott D. Keller
Scott D. Keller, Judge