No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEROME GIBSON,

Petitioner,

v.

SECRETARY OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT SCI-GREENE; ATTORNEY GENERAL PENNSYLVANIA; and DISTRICT ATTORNEY BUCKS COUNTY.

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Dated: July 12, 2018

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C. *Commonwealth v. Gibson*, 925 A.2d 167 (Pa. 2007).

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K. *Gibson v. Secretary, Pa. Dept. of Corr.*, No. 16-1729 (3d Cir. Feb. 12, 2018).

APP-A

ORDER

PER CURIAM.

AND NOW, this 12th day of November, 1998, the Petition for Allowance of Appeal is granted limited to the issue of whether or not the trial court erred in denying the suppression motion.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Jerome GIBSON, Appellant.

Supreme Court of Pennsylvania.

Argued Feb. 2, 1998.
Decided Nov. 17, 1998.
Reargument Denied Dec. 18, 1998.

Defendant was convicted in the Court of Common Pleas, Bucks County, Criminal, No. 5119 of 1994, Isaac S. Garb, J., of first-degree murder, robbery, and possession of instruments of crime, and was sentenced to death. Defendant appealed. The Supreme Court, No. 121 Capital Appeal Docket, Saylor, J., held that: (1) evidence was sufficient to support murder conviction; (2) *Miranda* warnings were not required prior to defendant's police station statements; (3) jury instruction on credibility of witnesses was adequate; (4) reasonable doubt instruction was adequate; (5) instruction did not bind jury to find, as matter of law, aggravating circumstance of significant history of felony convictions involving use or threat of violence to person; (6) instructions on mitigating circumstances were adequate; and (7) subsequent instructions were sufficient to dispel any mistaken impressions that jury might have had due to trial court's inaccurate paraphrasing of statute setting forth when death penalty must be imposed.

Affirmed.

1. Criminal Law ⇐1159.2(10)

Supreme Court is required to conduct independent review of sufficiency of evidence supporting first-degree murder conviction in all capital cases.

2. Criminal Law ⇐1144.13(8), 1159.2(10)

In conducting independent review of sufficiency of evidence supporting first-degree murder conviction in capital case, Supreme Court must view evidence, and all reasonable inferences drawn therefrom, in light most favorable to Commonwealth as verdict winner and determine whether jury could have found every element of crime to have been proven beyond reasonable doubt.

3. Homicide ⇐253(1)

Defendant's first-degree murder conviction was supported by evidence that victim was shot three times at close range with handgun, that one bullet perforated victim's left lung and aorta, that defendant was the assailant, that defendant told friend that he was going to rob "a guy that had money" and kill him if necessary, and that, after the shooting, defendant admitted to several friends and fellow inmates that he shot victim.

4. Criminal Law ⇐1134(8)

In reviewing challenge to denial of suppression motion, appellate court's relevant inquiry is whether factual findings of trial court are supported by record and whether legal conclusions drawn from those findings are correct.

5. Criminal Law ⇐1144.12

When reviewing rulings of suppression court, Supreme Court must consider only evidence of prosecution and so much of evidence for defense which remains uncontradicted when read in context of record as a whole.

6. Criminal Law ⇐1134(3), 1158(4)

Where record supports findings of suppression court, Supreme Court is bound by those facts and may reverse only if legal conclusions drawn therefrom are in error.

7. Criminal Law ⚿412.2(2)

Person is deemed to be "in custody" for *Miranda* purposes when he is physically denied of his freedom of action in any significant way or is placed in situation in which he reasonably believes that his freedom of action or movement is restricted by interrogation.

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⚿412.2(2)

Test for custodial interrogation does not depend on subjective intent of law enforcement officer interrogator; rather, test focuses on whether individual being interrogated reasonably believes his freedom of action is being restricted.

9. Criminal Law ⚿412.2(4)

Defendant's statements during interview at police station were not product of custodial interrogation for which *Miranda* warnings were required, where defendant agreed to go to station and talk to officers, officers told defendant that he was not under arrest, defendant voluntarily drove to station in his own car, defendant was told that he was free to leave station at any time, defendant was not restrained in any way, defendant was not subjected to force or threat of force, interview room door was not locked, defendant voluntarily consented to search of his vehicle at conclusion of interview, and, upon completion of search, defendant drove away and was not placed under arrest until four days later.

10. Criminal Law ⚿412.1(1)

Defendant's statements to police during search of his vehicle were voluntary and were not responsive to any queries by officers, and thus, no *Miranda* warnings were required, where defendant initiated conversation.

11. Criminal Law ⚿935(1), 1156(2)

Motion for new trial alleging that verdict was against weight of evidence is addressed to discretion of trial court, and thus, appellate review is a review of exercise of discretion, not underlying question whether verdict was against weight of evidence.

12. Criminal Law ⚿935(1)

Trial court, in exercise of its discretion, may award new trial on basis that verdict is against weight of evidence if verdict is so contrary to evidence as to shock one's sense of justice.

13. Criminal Law ⚿1159.2(9), 1159.4(2)

Credibility determinations are strictly within province of finder of fact; therefore, appellate court may not reweigh evidence and substitute its judgment for that of finder of fact.

14. Criminal Law ⚿935(1)

Trial court did not abuse its discretion in ruling that guilty verdict on first-degree murder charge was not against weight of evidence, despite claim that Commonwealth's case was based on contradictory identification testimony and unreliable testimony from incarcerated, convicted felons, in light of jury's determination that testimony of Commonwealth's witnesses was credible.

15. Criminal Law ⚿769, 805(1)

Trial court has broad discretion in phrasing its instructions to jury and can choose its own wording so long as law is clearly, adequately, and accurately presented to jury for consideration.

16. Criminal Law ⚿834(2)

Trial court need not accept counsel's wording for instruction, as long as instruction given correctly reflects the law.

17. Criminal Law ⚿822(1)

In reviewing challenged jury instruction, appellate court must consider entire charge as a whole, not merely isolated fragments, in order to ascertain whether instruction fairly conveys legal principles at issue.

18. Criminal Law ⚿785(4, 9)

Jury instruction on credibility of witnesses adequately and accurately conveyed law to jury, even though instruction did not explicitly refer to police officers' potential interest in outcome of capital murder case; instruction adequately conveyed concept that personal interest of witness might have impact upon his testimony and should be taken

into account in making credibility determinations.

19. Criminal Law ⇨789(12)

Reasonable doubt instruction stating that reasonable doubt was such a doubt as would cause a reasonable person to "stop, hesitate and seriously consider" whether he would do certain thing before finally acting adequately conveyed legal principle that reasonable doubt was one that would cause reasonable person to pause and contemplate prudence of his action.

20. Homicide ⇨357(7)

Death penalty aggravating circumstance for commission of homicide during perpetration of felony was not overbroad as applied to defendant who killed during a robbery. 42 Pa.C.S.A. § 9711(d)(6).

21. Homicide ⇨311

Instruction did not bind capital jury to find, as matter of law, death penalty aggravating circumstance of significant history of felony convictions involving use or threat of violence to person; although trial court defined burglary as type of crime included within aggravator as matter of law, it remained for jury to decide whether evidence of defendant's prior burglary convictions and convictions for other crimes amounted to "significant history," and counsel was free to argue, and in fact did argue, relevance of whether crimes involved actual threat or use of violence to issue of whether such significant history was established. 42 Pa.C.S.A. § 9711(d)(9).

22. Homicide ⇨311

Instructions on mitigating circumstances pertaining to death penalty determination were adequate, even though trial court did not specifically refer to sympathy or mercy; court instructed jury that based on mitigating evidence of defendant's childhood, they were to consider how defendant's background and history related to circumstances of offense, court told jury that evidence of defendant's family background and upbringing related to "catch-all" mitigating circumstance section, and court instructed jury to consider all evidence presented by defendant in determining whether "catch-all" section applied. 42 Pa.C.S.A. § 9711(e)(8).

23. Homicide ⇨311

Instruction regarding mitigating evidence pertaining to death penalty determination did not improperly convey to jury the impression that for evidence to be mitigating, it needed to be linked to circumstances of offense; instruction was merely an effort by trial court to further explain "catch-all" mitigating circumstance section, which was presented to jury. 42 Pa.C.S.A. § 9711(e)(8).

24. Homicide ⇨311

Instruction concerning jury's consideration of defendant's emotional disturbance with respect to death penalty determination accurately conveyed law to jury, and court's use of word "extreme" did not distort meaning of mitigating circumstance under "catch-all" section. 42 Pa.C.S.A. § 9711(e)(8).

25. Homicide ⇨311

Subsequent jury instructions were sufficient to dispel any mistaken impressions that jury might have had due to trial court's inaccurate paraphrasing of statute setting forth when death penalty must be imposed. 42 Pa.C.S.A. § 9711(c).

26. Homicide ⇨357(7)

Evidence that defendant shot victim while robbing store supported jury's finding of death penalty aggravating circumstance that homicide was committed during perpetration of felony. 42 Pa.C.S.A. § 9711(d)(6).

27. Homicide ⇨357(5)

Evidence of defendant's prior convictions for robbery and aggravated assault, in addition to his three prior burglary convictions, supported jury's finding of death penalty aggravating circumstance for history of felony convictions involving use or threat of violence to person. 42 Pa.C.S.A. § 9711(d)(9).

John J. Fioravanti, Jr., Doylestown, for J. Gibson.

C. Theodore Fritsch, Doylestown, Robert A. Graci, Office of the Atty. Gen., for Com.

Before FLAHERTY, C.J., and ZAPPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN and SAYLOR, JJ.

OPINION

SAYLOR, Justice.

This is a direct appeal from a sentence of death imposed by the Court of Common Pleas of Bucks County after a jury found Appellant, Jerome Gibson, guilty of first-degree murder, robbery and possession of instruments of crime. We affirm.

The following facts were adduced at trial. On the morning of September 29, 1994, Gibson sought to obtain an automobile, as his car had recently broken down. He asked a friend, Sean Hess, for $200 so that he could purchase a new vehicle. When Hess refused, Gibson spoke of "making a move," meaning that he would commit a robbery.

At approximately noon on that same day, Gibson went to an automobile dealership in Bristol Township to look for a replacement vehicle. Although he expressed an interest in purchasing a vehicle that was shown to him by salesman Glen Kashdan, he did not have the necessary funds. He told Kashdan, however, that his mother maintained sufficient funds in a bank account in Bristol Borough to pay for the vehicle. After Kashdan drove Gibson to the bank in a fruitless effort to withdraw the non-existent funds, he dropped Gibson off at a shopping center in Bristol Township, about one mile from the eventual scene of the crime. Gibson was wearing a dark hooded sweatshirt and jeans.

Melissa Paolini, who worked at the bank where Kashdan had taken Gibson, observed the two men enter the bank at approximately 1:15 p.m. Gibson's picture was taken by the bank's monitor camera and was later identified by Paolini at trial. The picture clearly depicted Gibson wearing a dark hooded sweatshirt.

Shortly before 2:00 p.m., Gibson met Paulinda Moore, a long-time acquaintance, in the shopping center. Gibson showed Moore a handgun that was tucked into the waistband of his pants and stated that he needed money and was going to rob somebody. He added that if his prospective victim saw his face, he would shoot him. Gibson and Moore then parted company and Gibson continued on foot to Bristol Borough.

Kevin Jones, another acquaintance, encountered Gibson a little while later. Gibson informed Jones that he knew "a guy that had money," whom he was going to rob, killing him if necessary.

At approximately 2:00 p.m., Vera DuBois, Gibson's aunt, saw Gibson on foot in Bristol Borough and noticed that he was wearing a dark hooded sweatshirt. At 2:20 p.m., Gibson entered a jewelry store. Leonard Wilson, the store's proprietor, became suspicious of Gibson when he noticed that Gibson appeared to be observing the store itself, rather than looking at jewelry. After a brief conversation with Wilson, Gibson left the store.

Between 2:30 and 3:00 p.m., Kimberly Rankins, another acquaintance, nearly hit Gibson with her car as he was crossing Mill Street in the direction of the Ascher Health Care Center ("Ascher Health") in Bristol Borough. The last time that Rankins observed Gibson that day, he was wearing a dark blue sweatshirt and was approximately twenty-five feet away from the entrance of Ascher Health, walking towards it.

Shortly before 3:00 p.m., Michael Segal, a shopkeeper at a store directly across the street from Ascher Health, heard a gunshot from inside Ascher Health. Segal looked across the street and saw Robert Berger, the proprietor of Ascher Health, struggling with an assailant behind the store counter. When Segal observed that the assailant had a gun, he dialed "911." While on the telephone, he heard two more gunshots. He looked across the street and saw Berger lying on the floor while the assailant rifled through the cash register drawers. Segal then observed the assailant leave the store, stuffing items into his pants, and walk up Mill Street towards an apartment building. Segal was unable to see the assailant's face, but he did observe that the man was wearing a dark blue hooded sweatshirt. Segal later testified at trial that the man's size, build and complexion matched those of Gibson.

Alfonso Colon, who was in a second floor apartment above Ascher Health that afternoon, walked downstairs and went outside

after hearing the three gunshots. He saw Gibson, whom he positively identified at trial, leaving Ascher Health and walking toward him while stuffing an object that appeared to be a handgun into his pants. Upon seeing Colon, Gibson crossed Mill Street and headed in a different direction.

At 2:58 p.m., the police responded to Segal's call. They entered Ascher Health and found Berger lying dead on the floor from gunshot wounds. A cash drawer was open and there was an empty gun holster on the floor. Berger was pronounced dead upon arrival at the hospital at approximately 3:45 p.m. An autopsy revealed that he had suffered three gunshot wounds: a fatal wound to the left chest, a wound to the upper right chest, and a wound to the upper left arm. Two .32 caliber projectiles were removed from the body. It was later determined that approximately $1,400 in cash had been stolen during the robbery, along with a .38 caliber handgun belonging to Berger. There was no evidence that Berger's gun had been fired during the robbery.

Shortly after 3:00 p.m. on the day of the shooting, Gibson arrived at the home of his cousin, Pamela Harrison. When Harrison responded to Gibson's knock on her door, she observed that he was wearing a dark hooded sweatshirt and was sweating. Harrison also heard police sirens. Gibson asked to come into the house and Harrison admitted him, noticing that he was carrying a handgun. After hiding his sweatshirt in Harrison's basement, Gibson left the house. He returned later that evening and retrieved the sweatshirt without Harrison's permission.

After leaving Harrison's house, Gibson met his friend, Sean Hess, in the shopping center where Gibson had been earlier that day. Gibson told Hess that he had shot a man three times and taken his money. Gibson also stated that the victim had a gun, but that he had used his own gun.

The following day, while at a bar, Gibson admitted to Bernard McClean that he had shot the old man in Bristol three times, explaining that he had been broke and needed the man's money. He later told his friends, Herman Carroll and Eddie Jones, that he had robbed and killed the victim. He also told Edward Gilbert, another friend, that he had killed the victim to obtain money with which to purchase a vehicle. He gave Gilbert the .32 caliber handgun, along with Berger's .38 caliber handgun, to keep for him. Berger's gun was later recovered at a motel in Bristol Township, but Gibson's gun was never located.

On October 2, 1994, three days after the murder, two detectives from the Bucks County District Attorney's Office, who had received information implicating Gibson in the murder, went to the apartment where Gibson was staying and waited outside in their car. Shortly thereafter, Gibson and some other individuals came out of the apartment. Gibson approached the detectives and asked them if they wished to speak with him. In response to Gibson's inquiry, the detectives told him that they wished to talk to him about a murder that had occurred on Mill Street on September 29, 1994. Gibson asked if he was under arrest and the officers replied that he was not. They suggested, however, that Gibson speak with them at the Bristol Borough Police Station, since there were other people nearby. The detectives made it clear that Gibson could proceed to the station by his own transportation, that he would be free to leave the station at any time, and that he could terminate the conversation whenever he wished. Gibson acquiesced and followed them to the police station in his own vehicle, which he had purchased the day after the shooting.

Upon arriving at the police station, the detectives led Gibson to an interview room, where another detective and a Bristol Borough police officer joined them. Gibson was again advised that he was not under arrest and could leave the station at any time. When the detectives told Gibson that they wanted to discuss the robbery and murder of Berger, he indicated that he wanted to clear the matter up and would speak with them. The interview lasted for a little over two hours, during which Gibson not only denied any culpability for the shooting, but also denied having been in Bristol Borough at any time after August 2, 1994. Following the interview, Gibson agreed to a search of his vehicle and signed a consent form. During

the search, Gibson initiated a conversation with one of the detectives, asking him a hypothetical question regarding what would happen if someone were attacked by a man with a gun and shot and killed his attacker. Gibson then left the police station in his vehicle.

On October 6, 1994, Gibson was arrested and charged with the robbery and murder of Berger, as well as possession of instruments of crime. Bail was denied, and while Gibson was incarcerated pending trial, he admitted to inmates Glenn Pollard, Kenneth Johnson and Kevin Jones that he had committed the crimes. Prior to trial, Gibson moved to suppress his statements to the police during the October 2, 1994 interview, as well as the statement that he made to the detective during the search of his car. The motion was denied following a hearing, and the case proceeded to trial.

During the guilt phase of trial, the Commonwealth presented the testimony of the numerous witnesses who had seen or spoken with Gibson either immediately before or after the shooting, including the testimony of those witnesses to whom Gibson had inculpated himself. Additionally, several detectives and police officers testified for the Commonwealth concerning their observations of the crime scene, the collection of evidence, and the statements that Gibson made during the course of his interview, as well as his hypothetical question concerning the shooting.

Gibson presented five witnesses whose testimony supported his alibi defense and contradicted the testimony of certain inmates who had testified concerning his inculpatory statements. Gibson also took the stand and testified that he was not on Mill Street on the afternoon of the murder, but did admit that he had been with Kashdan, the car salesman, at the bank in Bristol Borough earlier that day. Gibson further admitted that he had lied to the police concerning his whereabouts on the day of the murder.

At the conclusion of the guilt phase, the jury found Gibson guilty of first-degree murder, robbery and possession of instruments of crime. The trial proceeded to the penalty phase, during which the Commonwealth introduced evidence in support of two aggravating circumstances: perpetration of the homicide during the commission of a felony, 42 Pa.C.S. § 9711(d)(6), and a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9). The Commonwealth moved to incorporate the trial record to establish the fact that the homicide was committed during the perpetration of a felony, and the trial court granted the motion.

In support of the second aggravating circumstance, the Commonwealth introduced evidence of two prior robbery convictions, three prior burglary convictions, and a prior aggravated assault conviction. All of the burglary convictions involved residences.

Gibson presented four witnesses who testified concerning mitigating factors. Gibson's father, John Gibson, testified that Gibson had been neglected as a child and that Gibson's mother had been an alcoholic. Dr. Allan Tepper, a forensic psychologist, also testified concerning Gibson's childhood and stated that, in his opinion, Gibson suffered from mental and emotional retardation and had problems with impulse control. Charlene Walker, a neighbor of Gibson's, testified that Gibson had always treated her respectfully. LaSondra Williams, a former paramour of Gibson's, testified that aside from a few arguments, Gibson had treated her well.

At the conclusion of the penalty phase, the jury found the two aggravating circumstances to have been established beyond a reasonable doubt. The jury found one mitigating circumstance: the evidence of Gibson's character and record and the circumstances of his offense, 42 Pa.C.S. § 9711(e)(8). Finding that the aggravating circumstances outweighed the mitigating circumstance, the jury returned a verdict that Gibson be sentenced to death.

Gibson filed timely post-trial motions, which were denied by the trial court. On August 24, 1995, Gibson was sentenced to death for his first-degree murder conviction, with a consecutive sentence of ten to twenty years imprisonment imposed for his robbery conviction. No further penalty was imposed

for the offense of possession of instruments of crime. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

[1, 2] Although Gibson does not challenge the sufficiency of the evidence, this Court is required to conduct an independent review of the sufficiency of the evidence supporting a first-degree murder conviction in all capital cases. *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). In conducting this review, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth as the verdict winner and determine whether the jury could have found every element of the crime to have been proven beyond a reasonable doubt. *Commonwealth v. Michael,* 544 Pa. 105, 110, 674 A.2d 1044, 1047 (1996).

This Court succinctly summarized the requisite proof of first-degree murder in *Commonwealth v. Hall,* 549 Pa. 269, 701 A.2d 190 (1997):

> In first degree murder cases, the Commonwealth must prove that the defendant acted with a specific intent to kill, that a human being was unlawfully killed, that the person accused did the killing, and that the killing was done with deliberation. 18 Pa.C.S.A. §2502(d); *Commonwealth v. Mitchell,* 528 Pa. 546, 550, 599 A.2d 624, 626 (1991). Specific intent to kill can be proven where the defendant knowingly applies deadly force to the person of another. *Id.* Death caused by the use of a deadly weapon upon a vital part of the victim's body is sufficient to prove the specific intent required for a conviction of first degree murder. *Commonwealth v. LaCava,* 542 Pa. 160, 171, 666 A.2d 221, 226 (1995).

Id. at 281–82, 701 A.2d at 196.

[3] Here, the evidence at trial showed that Berger was shot three times at close range with a .32 caliber handgun. The post-mortem examination revealed that one of the bullets perforated the victim's left lung and aorta. The testimony of numerous witnesses, whom the jury found credible, identified Gibson as the assailant and placed him in the vicinity of Ascher Health at the crucial time, thereby negating his alibi defense. Moreover, prior to the shooting, Gibson told a friend that he was going to rob "a guy that had money" and kill him if necessary, and after the shooting he admitted to several friends and fellow inmates that he had shot the victim. Thus, the evidence in this case is clearly sufficient to support the conviction of first-degree murder, and we now turn to the issues raised by Gibson in this appeal.

GUILT PHASE

Gibson first challenges the admission of his statements to the police during the interview and subsequent search of his vehicle on October 2, 1994. He claims that the interview constituted a custodial interrogation for which *Miranda* warnings were required, and that the officers' failure to give such warnings rendered his statements during the interview inadmissible. He further claims that, although his remarks to the officers during the search of his car were unsolicited, they were tainted by the officers' initial failure to advise him of his privilege against self-incrimination during the interview. Accordingly, Gibson contends that the trial court erred in denying his motion to suppress all of his statements.

[4–6] In reviewing a challenge to the denial of a suppression motion, the relevant inquiry is whether the factual findings of the trial court are supported by the record and whether the legal conclusions drawn from those findings are correct. *Commonwealth v. Cortez,* 507 Pa. 529, 532, 491 A.2d 111, 112, *cert. denied,* 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985). "When reviewing rulings of a suppression court, we must consider only the evidence of the prosecution and so much of the evidence for the defense which remains uncontradicted when read in the context of the record as a whole. Where 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. Hall,* 549 Pa. at 283, 701 A.2d at 197 (citing *Cortez,* 507 Pa. at 532, 491 A.2d at 112).

[7, 8] A person is deemed to be in custody for *Miranda* purposes when "[he] is physically denied of 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. Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted." *Commonwealth v. Williams,* 539 Pa. 61, 74, 650 A.2d 420, 427 (1994) (citations omitted).

[9] Applying this standard to the record before us, we note that before Gibson agreed to go to the police station and talk to the officers, the officers told him that he was not under arrest. He voluntarily drove to the station in his own car. Once he arrived there, he was told that he was free to leave at any time. He was not restrained in any way, nor was he subjected to force or the threat of force. The door to the room where the interview took place was not locked. At the conclusion of the interview, Gibson voluntarily consented to the search of his vehicle and, upon completion of the search, he drove away and was not placed under arrest until four days later. Based upon these facts, the trial court did not err in concluding that a reasonable person in such circumstances would have believed that he was free to leave and therefore, that Gibson's statements during the interview were not the product of a custodial interrogation.

[10] Furthermore, Gibson's statements to the police during the search of his vehicle were made voluntarily and were not responsive to any queries by the officers; rather, Gibson initiated the conversation. It is well settled that a gratuitous utterance, unsolicited by the police, is admissible and that *Miranda* warnings are unnecessary under such circumstances. *Commonwealth v. Abdul–Salaam,* 544 Pa. 514, 533, 678 A.2d 342, 351 (1996), *cert. denied,* —— U.S. ——, 117 S.Ct. 1337, 137 L.Ed.2d 496 (1997). Accordingly, the trial court did not err in denying Gibson's suppression motion and admitting his statements at trial.

[11, 12] Gibson's second contention is that the verdict was against the weight of the evidence because the Commonwealth's case was based upon contradictory identification testimony and unreliable testimony from incarcerated, convicted felons. "A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court. Appellate review, therefore, is a review of the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence." *Commonwealth v. Brown,* 538 Pa. 410, 435–36, 648 A.2d 1177, 1189 (1994). The trial court, in the exercise of its discretion, may award a new trial on the basis that the verdict is against the weight of the evidence if the verdict is so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Whitney,* 511 Pa. 232, 239, 512 A.2d 1152, 1155 (1986).

Here, the credibility of the Commonwealth's identification witnesses was vigorously challenged on cross-examination by defense counsel. The trial court instructed the jury that where the accuracy of certain identification testimony is doubtful, such testimony is to be received with caution. *See Commonwealth v. Kloiber,* 378 Pa. 412, 106 A.2d 820, *cert. denied,* 348 U.S. 875, 75 S.Ct. 112, 99 L.Ed. 688 (1954). The jury, however, found such testimony to be credible. With respect to the testimony of Gibson's fellow inmates, the jury was instructed that, in evaluating the credibility of the witnesses, it should determine whether any witnesses had a deep interest in the outcome of the case. Again, the jury found the testimony to be credible.

[13, 14] Credibility determinations are strictly within the province of the finder of fact; therefore, an appellate court may not reweigh the evidence and substitute its judgment for that of the finder of fact. *See Commonwealth v. Pierce,* 537 Pa. 514, 530–31, 645 A.2d 189, 198 (1994) (citing *Commonwealth v. Farquharson,* 467 Pa. 50, 59–60, 354 A.2d 545, 550 (1976).). Accordingly, in light of the jury's determination that the testimony of the Commonwealth's witnesses was credible, we perceive no abuse of discre-

tion by the trial court in ruling that the verdict was not against the weight of the evidence.

In his next two issues, Gibson challenges the trial court's instructions to the jury. Specifically, he contends that the trial court abused its discretion in failing to instruct the jury that in evaluating the credibility of the police officers who testified at trial, they should consider the fact that the officers may have an interest in the outcome of the case because they sought a conviction. Gibson further contends that the trial court's instruction regarding reasonable doubt during both the guilt and penalty phases improperly diminished the Commonwealth's burden of proof and infringed upon the presumption of innocence, thereby entitling him to a new trial.

[15–17] A trial court has broad discretion in phrasing its instructions to the jury and can choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for consideration. *Commonwealth v. Hawkins*, 549 Pa. 352, 389–91, 701 A.2d 492, 511 (1997), *cert. denied*, —— U.S. ——, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998). Furthermore, a trial court need not accept counsel's wording for an instruction, as long as the instruction given correctly reflects the law. *Commonwealth v. Ohle*, 503 Pa. 566, 582, 470 A.2d 61, 70 (1983). In reviewing a challenged jury instruction, an appellate court must consider the entire charge as a whole, not merely isolated fragments, in order to ascertain whether the instruction fairly conveys the legal principles at issue. *Commonwealth v. Jones*, 546 Pa. 161, 192, 683 A.2d 1181, 1196 (1996).

[18] In this case, the trial court declined to use defense counsel's submitted point for charge that specifically referred to the officers' potential interest in the outcome of the case. However, the trial court gave the following instruction:

> Look to see whether any of the witnesses have a deep interest in the outcome of this case. I won't suggest to you that any witness or witnesses do or do not, but you determine whether any of the witnesses, and that includes all of the witnesses, have a deep interest in the outcome of this case, and if you decide that some witnesses have, then from that you may conclude that that witness would have a tendency to put his or her best foot forward, that is, to give his or her testimony in a light most favorable to himself or herself. . . . On the other hand, you may find a witness to be deeply interested in the outcome of this case, and in spite of that you may still find that that witness was truthful, and if you find that to be the case, then you should accept that witness' testimony.

Although this instruction does not explicitly refer to the officers, it adequately conveys the concept that the personal interest of a witness may have an impact upon his testimony and should be taken into account in making credibility determinations. Thus, the law was adequately and accurately conveyed to the jury.

Gibson also challenges the following portion of the trial court's instruction to the jury concerning reasonable doubt: "It should be such a doubt as would cause a reasonable person in the conduct of his or her own affairs to stop, hesitate and seriously consider as to whether or not he or she would do a certain thing before finally acting." [1]

Gibson claims that the trial court's conjunctive use of the words "stop" and "hesitate" improperly required doubt to rise to a higher level than that which would cause a reasonable person merely to "hesitate" before acting. Thus, Gibson contends that the jury was improperly led to believe that for reasonable doubt to exist, their doubt would have to rise to the level that would not merely cause hesitation, but would stop them from acting altogether.[2]

1. The trial court gave a similar instruction during the penalty phase:

> It should be a doubt which would cause a reasonable person in the conduct of his or her own personal affairs to stop, hesitate and to seriously consider whether or not he or she should do a certain thing.

2. We note that although defense counsel did not object to the trial court's instruction concerning reasonable doubt at either phase of the trial, the relaxed waiver standard employed in capital

[19] There is no merit to this argument. In *Commonwealth v. Pearson,* 450 Pa. 467, 303 A.2d 481 (1973), this Court approved a jury instruction that reasonable doubt is such a doubt that would cause jurors to "halt, hesitate and refuse to take action," concluding that this instruction did not require a higher quantum of doubt by the jury. *Id.* at 474, 303 A.2d at 484–85; *see also Commonwealth v. Cannon,* 453 Pa. 389, 309 A.2d 384 (1973); *Commonwealth v. Orlowski,* 332 Pa.Super. 600, 481 A.2d 952 (1984). The charge in the present case fairly conveyed the legal principle at issue, namely, that a reasonable doubt is one that would cause a reasonable person to pause and contemplate the prudence of his action.

PENALTY PHASE

Gibson next asserts that the aggravating circumstance at 42 Pa.C.S. § 9711(d)(6), commission of the homicide during the perpetration of a felony, is overbroad because there is no definition that limits the meaning of the term "felony." Thus, Gibson argues that this aggravating circumstance fails to genuinely narrow the pool of offenders eligible for imposition of the death penalty. *See Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

In *Commonwealth v. Basemore,* 525 Pa. 512, 582 A.2d 861 (1990), *cert. denied,* 502 U.S. 1102, 112 S.Ct. 1191, 117 L.Ed.2d 432 (1992), this Court rejected a vagueness challenge to Section 9711(d)(6), stating that the term "felony" is adequately defined by reference to the Crimes Code, 18 Pa.C.S. § 101 *et seq.,* which specifically designates those crimes which are felonies. Moreover, in *Commonwealth v. Edmiston,* 535 Pa. 210, 634 A.2d 1078 (1993), we stated that "[t]his court will not entertain arguments against the death penalty statute which are abstract in nature and are not relevant to the facts in the particular case." *Id.* at 235, 634 A.2d at 1090.

cases permits review of this issue on its merits. *See Commonwealth v. Gibson,* 547 Pa. 71, 91 n. 19, 688 A.2d 1152, 1162 n. 19, *cert. denied,* —— U.S. ——, 118 S.Ct. 364, 139 L.Ed.2d 284 (1997); *Commonwealth v. Zettlemoyer,* 500 Pa. at 50 n. 19, 454 A.2d at 955 n. 19.

[20] Here, not only has Gibson raised a challenge that is nearly identical to that rejected in *Basemore,* but he has also failed to demonstrate how, under the facts of this case, the term "felony" is vague or overbroad. The killing occurred during a robbery, which stands on its own as a dangerous felony and is not a lesser-included offense of murder, unlike aggravated assault. Thus, Gibson's argument is meritless.

Gibson's next claim is that the use of his three non-violent burglary convictions to establish the aggravating circumstance of a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9), was improper. He suggests that the trial court's instruction required the jury to find this aggravating circumstance as a matter of law.

[21] This Court has held that burglary is a crime involving the inherent use or threat of violence, and therefore the use of prior burglary convictions as an aggravating circumstance under Section 9711(d)(9) is appropriate. *See Commonwealth v. Rivers,* 537 Pa. 394, 415, 644 A.2d 710, 720 (1994), *cert. denied,* 516 U.S. 1175, 116 S.Ct. 1270, 134 L.Ed.2d 217 (1996); *Commonwealth v. Rolan,* 520 Pa. 1, 15, 549 A.2d 553, 559 (1988). The trial court's instruction was consistent with this precedent. Although it defined burglary as the type of crime included within the (d)(9) aggravator as a matter of law, it did not, as Gibson argues, bind the jury to find this aggravating circumstance. It remained for the jury to decide whether the evidence of Gibson's burglary convictions and convictions for other crimes amounted to a "significant history." Counsel was free to argue, and in fact did argue, the relevance of whether the crimes involved the actual threat or use of violence to the issue of whether such a significant history had been established.[3] Thus, we perceive no error by the trial court in permitting Gibson's prior burglary convictions to be used to establish the

3. Notably, although Gibson's appellate brief asserts that the three burglary convictions at issue involved no threat of violence, there was no evidence introduced in the penalty hearing to this effect.

aggravating circumstance under Section 9711(d)(9).

Gibson next contends that the trial court erred in failing to instruct the jury that it could consider sympathy or mercy for Gibson if such arose from the evidence presented. Gibson concedes that the law is well settled that absolute "mercy verdicts" are prohibited. *See Commonwealth v. Henry,* 524 Pa. 135, 159–60, 569 A.2d 929, 941 (1990). He argues, however, that in *Henry,* the Court approved a jury instruction "that jurors *are permitted* to be swayed by sympathy *but only* where the sympathy results from the *evidence.*" *Id.* (emphasis in original). Thus, Gibson contends that the jury should have been informed that it could consider and give effect to sympathy or mercy arising from the mitigating evidence by imposing a life sentence instead of the death penalty.

In *Commonwealth v. Hill,* 542 Pa. 291, 666 A.2d 642 (1995), this Court rejected the defendant's claim that the trial court should have instructed the jury that it could have dispensed mercy if it so chose, noting:

> [The a]ppellant was allowed to present and argue any evidence which was relevant and admissible in an attempt to convince the jury that the death sentence should not be imposed in his case. That is all that is constitutionally required.

Id. at 311, 666 A.2d at 652, quoting *Commonwealth v. Young,* 536 Pa. 57, 76, 637 A.2d 1313, 1322 (1993). Thus, the Court concluded that "the trial court did not err in failing to advise the jury that sympathy could be considered in its deliberations over the appropriate sentence." *Id.* at 312, 666 A.2d at 652.

[22] Here, the trial court instructed the jury that based upon the mitigating evidence of Gibson's childhood, they were to consider how all of Gibson's background and history related to the circumstances of the offense. Although the trial court did not specifically refer to sympathy or mercy, it went into great detail concerning Gibson's family background and upbringing, and how he might have been affected by his parents' alcoholism and lack of nurturing or attention. The trial court told the jury that all of this evidence related to the "catch-all" mitigating circumstance at Section 9711(e)(8). Furthermore, the trial court instructed the jury to consider all of the evidence presented by Gibson in determining whether Section 9711(e)(8) applied. Accordingly, viewed in the context of the entire charge, these instructions were adequate.

[23] Gibson also contends that the trial court's instruction regarding mitigating evidence improperly conveyed to the jury the impression that for evidence to be mitigating, it necessarily must be linked to the circumstances of the offense. Gibson bases his argument on the following excerpt from the trial court's instruction:

> Now, I'm not suggesting that you consider all of these other things and read out of that the circumstances of his offense, but I am saying that in considering this mitigating factor, you should consider all of that background, all of that history, what he was and how he got to be that. Whether or not he's borderline mentally retarded, whether that creates frustration, impulsiveness because of his inability to deal with the world around him the way others do, and consider how that, if you find that to be the case, of course, *how that relates to the circumstances of his offense,* what he did and how he did it.

(emphasis supplied).

Viewed in the context of the trial court's entire instruction as a whole, the portion of which Gibson complains was merely an effort by the trial court to further explain the "catch-all" mitigating circumstance of Section 9711(e)(8), which had been presented to the jury. Moreover, the trial court told the jury:

> You may find whatever you may find. Anything you may find in this case from the evidence that you've heard which constitutes in your mind, in the mind of any of you, a mitigating circumstance, then it is a mitigating circumstance.

Accordingly, the jury instructions, viewed in their entirety, did not limit or restrict the jury's consideration of what constituted mitigating evidence.

Gibson further contends that the trial court's jury instruction prevented the jury

from considering and giving mitigating effect to the uncontested evidence of his emotional disturbance. He claims that such instruction precluded the jury from considering any evidence of emotional disturbance with respect to Section 9711(e)(8) unless such disturbance was "extreme," as is required under the more specific aggravating circumstance set forth at Section 9711(e)(2). Again, Gibson's argument is merely an attempt to impose a contrary meaning upon the entire instruction by emphasizing an isolated fragment. Such approach is impermissible, as we must consider the instruction as a whole. *See Commonwealth v. Jones,* 546 Pa. at 192, 683 A.2d at 1196.

[24] Read in its entirety, the trial court's instruction concerning the jury's consideration of Gibson's emotional disturbance accurately conveyed the law to the jury, and the trial court's use of the word "extreme" did not distort the meaning of the mitigating circumstance at Section 9711(e)(8).

Finally, Gibson contends that the trial court's jury instruction improperly suggested that a life sentence could be imposed only if the mitigating evidence outweighed the aggravating evidence. During its instruction concerning the balancing of aggravating and mitigating circumstances, the trial court stated, "If the mitigating circumstance outweighs the aggravating circumstance, then the sentence is life." In *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 454 A.2d 937 (1982), this Court addressed an identical challenge to the trial court's instruction regarding the weighing of aggravating circumstances against mitigating circumstances. In that case, the trial court instructed the jury that if it found that the mitigating circumstances outweighed the aggravating circumstances, then the verdict must be life imprisonment. This Court held that although the charge did not comport with the instruction mandated by the Sentencing Code,[4] the trial court's subsequent instructions concerning the verdict slip cured the technical error in the charge. Thus, the Court concluded that "[w]hen read in its entirety, the court's instructions on the weighing process w[ere] correct, any possible error having been cured by subsequent instruction." *Id.* at 49, 454 A.2d at 954.

[25] In the present case, although the trial court inaccurately paraphrased Section 9711(c), the court subsequently rectified this error when it read the verdict slip to the jury and explained the slip line by line. Furthermore, the verdict slip, which accompanied the jury into the deliberation room "clearly and in writing instructed the jury that the death penalty was required if there was 'at least one aggravating circumstance and no mitigating circumstance,' or, as was checked by the jury foreman, if 'the aggravating circumstance outweighs the mitigating circumstances.' " *Id.* Thus, the subsequent instructions given to the jury were sufficient to dispel any mistaken impressions it may have had.

INDEPENDENT REVIEW OF THE DEATH SENTENCE

Having concluded that Gibson's claims are without merit, we must affirm the judgment of sentence unless we determine that

> (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;
>
> (ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or
>
> (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

42 Pa.C.S. § 9711(h)(3).[5]

Upon review of the record, we conclude that the sentence imposed in this case was

4. Section 9711(c) provides:

> [T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or *if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances.* The verdict must be a sentence of life imprisonment in all other cases.

42 Pa.C.S. §9711(c)(1)(iv) (emphasis supplied).

5. By legislation enacted June 25, 1997, subsection (h)(3)(iii) providing for proportionality review and a portion of subsection (h)(4) that references such review were stricken from 42 Pa.C.S.

not the product of passion, prejudice or any other factor, but rather was based upon the evidence that Gibson killed the victim with premeditation during the robbery.

[26, 27] Additionally, we conclude that the two aggravating circumstances found by the jury were supported by the evidence. The Commonwealth presented evidence that Gibson shot the victim while robbing the store, thereby establishing that the homicide was committed during the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6). The Commonwealth also presented evidence of Gibson's prior convictions for robbery and aggravated assault, in addition to his three prior burglary convictions, thus establishing that Gibson had a history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S. § 9711(d)(9).

Finally, having reviewed Gibson's sentence in light of the sentencing data compiled and monitored by the Administrative Office of the Pennsylvania Courts, we conclude that the sentence of death imposed upon Gibson is not excessive or disproportionate to the penalty imposed in similar cases. *See Commonwealth v. Frey,* 504 Pa. 428, 443, 475 A.2d 700, 707–08, *cert. denied,* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984).

Accordingly, we affirm the verdict and sentence of death imposed upon Jerome Gibson by the Court of Common Pleas of Bucks County.[6]

§9711(h). *See* Act of June 25, 1997, No. 28, §1 (Act 28), effective immediately. However, this Court will continue to undertake proportionality review in cases where the death sentence was imposed prior to the effective date of Act 28. *Commonwealth v. Gribble,* 550 Pa. 62, 89–91, 703 A.2d 426, 440 (1997).

Connie SLOUGH, Appellee,

v.

CITY OF PHILADELPHIA and Commonwealth of Pennsylvania, Department of Transportation, Appellants.

Appeal of COMMONWEALTH of Pennsylvania, DEPARTMENT OF TRANSPORTATION.

Supreme Court of Pennsylvania.

Argued Dec. 9, 1997.

Decided Nov. 23, 1998.

Appeal No. 42 E.D. Appeal Dkt. 1997 from order of Commonwealth Court, 686 A.2d 62 (Pa.Cmwlth.1996), entered on December 9, 1996, at Nos. 0698 and 1414 C.D.1996, affirming in part and reversing in part the Order of the Phila. Court of Common Pleas, Berel Caesar, J., entered at No. 1424, October Term, 1993.

Janet Selden, Alton G. Grube, Philadelphia, for the Com., DOT.

Wayne Maynard, Philadelphia, for Connie Slough.

Alan C. Ostrow, Philadelphia, for City of Philadelphia.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO and NEWMAN, JJ.

ORDER

PER CURIAM.

AND NOW, this 23rd day of November, 1998, the order of the Commonwealth Court is affirmed on the basis of its opinion. *Slough v. City of Philadelphia and Common-*

6. Pursuant to 42 Pa.C.S. §9711(i), the Prothonotary of the Supreme Court is directed to transmit, within ninety (90) days of the date the sentence of death is upheld by this Court, the complete record of this case to the Governor of Pennsylvania.

APP-B

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF NO. 5119, 5119-01/94

VS.

JEROME GIBSON

OPINION

In 1995, defendant was convicted in a trial by jury of murder in the first degree and sentenced to death. On direct appeal to the Pennsylvania Supreme Court that sentence was affirmed. A petition for certiorari to the United States Supreme Court was refused. Thereafter, the Governor issued a death warrant. Defendant filed a petition under the Pennsylvania Post-Conviction Relief Act (PCRA)[1] and a stay of execution was entered. Thereafter, counsel entered their appearance on behalf of the defendant and an amended petition was filed. Subsequently, a supplemental petition was likewise entered.[2]

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[1] 42 Pa.C.S.A. 9541 et seq.

[2] We will not burden this opinion with a statement of the facts of the case. A detailed account of the evidence presented at trial was set forth in our 1925 Opinion (Commonwealth v. Gibson, 67 Bucks Co. L. Rep. 13 (1995), and we will incorporate that by reference.

Hearings were held on those petitions. Essentially, the defendant raises four substantial issues, to wit: (1) ineffectiveness of counsel at the penalty phase; (2) ineffectiveness of counsel at the guilt phase; (3) after-discovered evidence as in the nature of recantation of various witnesses; (4) prosecutorial misconduct.

We first address the issue of after-discovered evidence as in the nature of recantation by several of the witnesses during the guilt phase of the trial. In order to justify a new trial on the basis of after-discovered evidence, such evidence must satisfy the following requirements: (1) It must have been discovered since the former trial; (2) it could not have been obtained at the former trial with reasonable diligence; (3) it must not merely be cumulative and corroborative of the other testimony given in the case; (4) it must go to the merits of the case, and must not be merely for the purpose of impeaching the credibility of the witnesses; and (5) it must be such as will probably produce a different verdict if a new trial should be awarded. Comm. v. Cobbs, 739 A.2d 932 (Pa. Super. 2000); Commonwealth v. Masson, 741 A.2d 708 (Pa. 1999); Commonwealth v. Small, 741 A.2d 666 (Pa. 1999). Furthermore, where the after-discovered evidence consists of recanting testimony by witnesses who testified at the trial, such evidence is suspect. Commonwealth v. Ellis, 700 A.2d 948 (Pa. Super. 1997); Commonwealth v. Douglas, 737 A.2d 1188 (Pa. 1998) and Commonwealth v. Thompson, 673 A.2d 357 (Pa. Super. 1996). Recanting testimony is exceedingly unreliable and the Court must deny a new trial based upon such evidence where it is not satisfied that such testimony is true. Commonwealth v. McClusas, 548 A.2d 573

(Pa. Super. 1988) and Commonwealth v. Henry, 706 A.2d 313 (Pa. 1997). In fact, an alleged recantation by a witness, constituting an admission of perjury, has often been recognized as the least reliable form of after-discovered evidence. Commonwealth v. Detman, 770 A.2d 39 (Pa. Super. 2001).

In the trial, Paulinda Moore testified that she had seen the defendant on September 29, 1994, the date of the murder, at sometime between twelve noon and 2:00 p.m. At that time, she walked with him towards the Lower Bucks County Hospital on Bath Road. The murder occurred at 3:00 p.m. that day. She testified that defendant told her that he was broke and he was going to rob someone. She further testified that he told her that if the person he robbed saw his face he would blow his brains out. At the PCRA hearing, together with other testimony that will be addressed subsequently, she testified that at that time she was suffering from mental illness of paranoid schizophrenia and being bipolar and therefore was on medication for those conditions. She further testified that in addition to those medications she was drinking alcohol and more particularly taking drugs, specifically crack cocaine. She testified that when she was engaged in such conduct she became a zombie and had no memory of what she had done or what she was doing. She testified that when in that condition she will do anything anyone tells her to do and that she was probably in that state when she testified at trial. When she was confronted with statements and affidavits that she had given prior to trial which were consistent with the testimony that she gave at trial, she testified that she cannot remember giving those statements. She testified

essentially that she could not remember the events of September and October 1994 but that the testimony she gave at trial might be correct but she cannot recall it.

Sean Hess testified at trial that on the morning of September 29, 1994 the defendant told him that he needed money to buy a car and he was going to commit a robbery to get it. Hess further testified that at sometime between 5:00 and 6:00 p.m. he again saw the defendant who told him that he had committed a robbery, showing him about one thousand dollars and said that he had to kill the "white devil". Hess's testimony was that the defendant told him that he shot the victim three times, that the victim had a gun but that he used his own gun. Hess lastly testified that on October 3, 1994, the defendant told him not to say anything and that Hess should say that he gave the defendant all the money for the car, which the defendant had purchased.

In the PCRA hearing, Hess testified the testimony he had given at trial was untrue and was a lie. He testified that after the murder was committed he was picked up by the police and questioned for four or five hours. He testified that he was threatened that he would be charged with conspiracy to commit murder if he did not give the statement the police wanted and was the reason for the false statement because he was afraid of being convicted. He testified that his trial testimony was untrue and that he never had those conversations with the defendant. He testified that he did loan the defendant two hundred dollars to buy the car. He admitted that he had signed a statement taken at police headquarters on October 4, 1994, which was consistent with his trial testimony. He further admitted that he had testified at the

preliminary hearing and that his testimony at that time was consistent with the testimony he gave at the trial. He further testified at the PCRA hearing that he loaned the defendant a hooded sweatshirt before the murder. He refused to take it back after the murder because he testified that he heard someone had killed someone and he thought that maybe the defendant had done it. He testified that he never heard that from the defendant but that Eddie Jones had said that maybe the defendant had done it.

Edward Jones testified at trial that in September of 1994 he heard the defendant telling a group of people that he had killed the "cracker" and when the "cracker" tried to pull out a gun, he shot him. He further testified that the defendant had a thirty-eight-caliber pistol when he made these statements.

At the PCRA hearing, he testified that he was a DEA informant beginning sometime in 1994. He testified that after this murder, Detective Mills called him into his office and told him that defendant had murdered a man in Bristol. He further testified that Mills told him a story and that was what Mills instructed him to tell the county detectives. That occurred in October of 1994. He testified that Mills told him that he had no evidence against the defendant and that they had made up a story and he would do a lot of time if he did not cooperate. He testified that Mills told him to say that he overheard the defendant state that he had killed "a white cracker" in Bristol Borough. He was told to say that he spoke to the defendant in Winder Village and in prison. He testified that he was scared so he told the county detectives that story in

January of 1995. He testified that he told that story to Detectives Randy Morris, Robert Gergel and Mills and two federal agents were present when he told that story. He testified, obviously, that the testimony he had given in Court was false. He testified that the defendant never spoke to him about a robbery and a murder and did not try to recruit him to do any robbery. He also testified that he never saw the defendant carrying a gun. He further testified that six months after the trial he tried to contact defendant's attorneys but was only successful in getting their answering machine or their secretary. The attorneys never called him back. He wanted to tell them about Mills and what Mills had done.

Vera DeBois testified at the trial that she is defendant's aunt and on September 29, 1994, as she was driving into Bristol Borough at approximately two p.m., she saw the defendant near the Bristol Fuel Company on Beaver Dam Road, one block from Mill Street. At that time, she testified that the defendant was wearing a dark hooded sweatshirt.

In the PCRA hearing, she testified that she was Corey Jones' grandmother, he not having testified at trial, but that he was called to police headquarters where he was questioned for some period of time. She testified that she and Corey Jones' mother went to headquarters to inquire. She was not asked to and did not recant her testimony at trial.

Cindy Rowe testified that she is an investigator for the Philadelphia Defender Association. She interviewed Herman Carroll who was a prosecution witness in

defendant's trial and who was incarcerated at the time of the interview in a federal penitentiary. She took a statement from him on October 23, 2000. She attempted to subpoena Carroll for the PCRA hearing but was unsuccessful. Carroll's statement was admitted for the limited fact that he had given one to her but not for the substance of the statement, it lacking the usual indicia of reliability for the admission of statements of an unavailable witness.

Robert J. Mills testified that at the time of this murder he was a detective for the Bristol Township Police Department. In the fall of 1994 and the winter of 1995 he was the officer in charge of the Township narcotics unit. He knew Eddie Jones. Sometime in the middle of 1994 Jones came in and informed Mills that certain people were after him and offered to assist in clearing up narcotics problems in the Township. In August of 1994 the DEA sent agents to assist in Mills' efforts with the use of Jones. Jones became a cooperating individual beginning in August or September of 1994. He testified in several narcotics' arrests with a one hundred percent conviction rate.

In October of 1994, Mills learned that Jones had some information about this murder. Jones called him in late September of 1994. Jones told Mills that he had heard the defendant admit to the homicide at some location in Winder Village in the Township. On October 3, 1994, Mills typed a report regarding the information he received from Jones and gave it to the county detectives and Detective Morris of Bristol Borough. The DEA and the county detectives later took a statement from Jones. Mills testified that he never told Jones what to say or to lie with respect to the information

he had regarding this homicide and told him never to lie or provide false information. He gave no details regarding this case to Jones because he did not know the details of the case. He did not tell Jones to use the words "white devil" or "white cracker". He testified that he did not tell him to talk about a Super Fresh Market robbery and did not tell him that it was his duty as a cooperating person to give false information. After January of 1995, Mills testified that he never spoke to Jones about this homicide. He further testified that he was aware of Glenn Pollard but never offered any assistance to him and that Jones did not request any money for information in this case and, so far as he knew, had not been paid. He did not know Paulinda Moore.

John Mullen testified that in 1994 and 1995 he was a Bucks County detective. On January 24, 1995 he took a statement from Eddie Jones. He had received a call from Detective Mills and took that statement in the presence of DEA agents and Mills. Jones had come to his office to give that statement. He did not prompt Jones and give him any information regarding the investigation surrounding the homicide. He did not ask for any untrue information. Jones did not tell him that the statement he was giving was not truthful. He had no indication that the information given was untrue and, in fact, believed the statement that Jones had given. He did not mention a Super Fresh Market robbery to Jones and did not tell Jones anything about the Asher Healthcare Center. He did not prompt Jones to use the words "white devil" and did not prompt him to mention a thirty-eight-caliber handgun. He asked Jones what he knew about what the defendant had taken from the store or what he did with the weapon but Jones

did not know. No one else at the interview prompted Jones in his answers in any way. He did not recall whether or not he spoke to Jones again before the trial.

Mullen testified that he spoke to Corey Jones on either October 3 or October 4, 1994 at the Bristol Borough headquarters. He did not threaten to charge Jones if he did not give a statement and did not threaten to charge him with conspiracy to commit murder. He did not prompt Corey Jones in any way and did not tell Jones to give false information. He testified that Jones left the headquarters with his grandmother who had told Jones to tell the truth. Jones replied that he had. Corey Jones was charged as an absconding witness and entered a plea of guilty to that on August 7, 1995. When asked why he had absconded when requested to testify he stated, "You had enough people testify, you didn't need me."

Mullen testified that he took a statement from Sean Hess on October 4, 1994 at the Bristol Borough headquarters. Hess had come to headquarters voluntarily. He testified that he did not prompt or give any information to Hess and did not ask him to give false information. He testified that he gave none of the details of the crime to Hess. He testified that he did speak to Hess while waiting to testify at the time of the trial as he sat with the witnesses during the trial. He testified that he went over Hess' statement with him but told Hess to tell the truth in his testimony. Hess never indicated to him that his statement was false. He did not threaten to charge Hess with conspiracy to commit murder. He testified that Hess was a reluctant witness at the trial and that the prosecution had secured a material witness warrant in order to secure his

testimony. Finally, it was Mullen's testimony that none of the witnesses said that they were not testifying truthfully.

Mullen testified that Corey Jones was never in custody, that he came to headquarters at 4:40 p.m. voluntarily although the statement was not taken until after midnight. He testified that he did not know Paulinda Moore. He testified that he interviewed Cyril Thomas who had been charged in juvenile court in another case and that he took a statement from Glenn Pollard on November 16, 1994. On November 12, 1994 he interviewed Ken Johnson. He further testified that he interviewed Herman Carroll and took a statement from him. He testified that he did not tell Carroll that if he gave a truthful statement an agent would appear before a judge and inform him of that. He testified that he did not trust Pollard. Notwithstanding that, it was his opinion that Pollard testified truthfully. He stated that Pollard did not ask for anything but that Pollard thought that what had happened in this case to the victim was not right.

Robert Gergel testified that he was a county detective in 1994 and 1995 and that he co-signed the criminal complaint as the prosecutor. He testified that he interviewed Paulinda Moore on November 15, 1994 at a time when she was a resident of Bucks County Prison. He testified that at that time she was alert, responded to questions, knew dates, knew the date of the murder as the same date on which Jermaine Brown was likewise murdered in Bristol Township and that was the date on which she received her welfare check. He testified that she responded appropriately and did not appear to be under the influence of any substances. She described where she had seen the

defendant put a pistol in his pants. She gave the background of herself and defendant and stated that she and he had grown up together. In her statement to Gergel, Moore gave details about the events of September 29, 1994 and that she walked with him towards the store. Her statement was consistent with her trial testimony and with her testimony at the preliminary hearing. She said that defendant told her that he needed money to buy a car since his car had broken down. He testified that it would be a daylight robbery and that he might be recognized and would blow the man's brains out. She told Gergel that the defendant was wearing blue jeans and a dark hooded sweatshirt. The day after the robbery, Moore stated that the defendant was driving a blue T-bird automobile. Gergel testified that he did not give Moore any information about the case nor did he suggest to her what to say. Moore did not claim any recall problems and he had no problem understanding her. Much of the statement she gave to Gergel was corroborated. All of her responses were normal.

Gergel testified that he met Corey Jones in October 1994 and that his first contact with him was as Jones was leaving Bristol Borough headquarters. At that time Gergel did not know who he was but he thought that he was Sean Hess. On October 3, 1994, Jones came to headquarters and gave a statement. The statement concerned a shooting of September 29, 1994, there having been two such shootings on that day. The first shooting was of an old white man and the second was at approximately six p.m. when Jermaine Brown was shot. He told Gergel that he had heard the defendant admit killing the guy in Bristol and that he had gotten rid of the "white devil".

Defendant allegedly made those statements at approximately five a.m. while seated in a car. Ray Thomas, who according to Jones was present at that time, asked defendant how much he got and the defendant said that he had to make a move and killed the guy. The next day, Jones stated to Gergel that "someone had to go". That was on Saturday, October 1, 1994. Gergel stated that he did not tell Jones what to say or to give fake information, that he told him to tell the truth if called at the trial. He did not threaten prosecution if Jones refused to give a statement and did not give details of the crime to prompt the statement. According to Gergel, no one threatened prosecution if he refused to give a statement. However, Gergel noted the similarities of the statement of other witnesses. But he did not tell Jones what those statements were. Later, Jones refused to testify and was prosecuted as an absconding witness.

Gergel took a statement from Edward Jones on January 24, 1995. On that date, Jones arrived with two federal narcotics detectives and Detective Mills. Gergel and Mills took a statement. In the statement, Edward stated that he heard the defendant speak of the robbery on two occasions and state that he intended to rob a Super Fresh. No one told Jones what to say or gave him any information regarding the murder. He did not give Jones terms to use describing the victim as "a white devil" or "cracker". He believed that Jones was telling the truth.

Gergel testified that he took a statement from Herman Carroll on January 27, 1995 with Detective Mullen. At that time, Carroll's attorney, Ann Faust, Esquire was present. He told Carroll that if he gave truthful testimony he would so report that to

Carroll's sentencing judge. No promises of reduced sentence or lesser charges were made. He was cross-examined at the trial as to that promise.

He testified that he had contact with the defendant on two occasions. The first was on October 2, 1994. On that occasion the defendant went to headquarters from his apartment in his own vehicle. During the course of that interview at headquarters, Gergel testified that he had no problem communicating with the defendant, that the defendant comprehended what was said, that the defendant responded to questions. The defendant stated that he was staying at the apartment of Sean Hess in the Korman Arms Apartments in Bensalem Township. The defendant stated that he was not in Bristol Borough at anytime in September of 1994 and was last in the Borough sometime in August 1994. The defendant understood what he was being questioned about and the significance of time and location of the homicide. Defendant denied having a "hoodie". He was shown the video made in the bank of him wearing a hoodie on the date of the murder and the defendant stated that it was not his hoodie. The defendant stood by his alibi. When reminded that he had bought an automobile the day after the robbery the defendant stated that he had borrowed the money from Sean Hess. Gergel testified that the defendant never lost touch with reality or became disoriented. The defendant stated that he was certain that he was not in Bristol Borough on September 29, 1994 because he remembered the shooting of his friend, Jermaine Brown, on that date. He, therefore, appreciated the significance of the time and place of the homicide.

The second time that Gergel had any contact with the defendant was on October 6, 1994 at which time the defendant was arrested and charged with this homicide. At that time the defendant was able to comprehend what he said to Gergel. Defendant understood the significance of the arraignment and stated, "I'm not stupid, I'm not going to admit I was in that store." He made that statement several times.

Randy Morris, currently the Bristol Borough Chief of Police, was a Bristol Borough detective in 1994 and 1995. On October 3 and 4, 1994 he spoke to Sean Hess at headquarters and took a statement from him on October 4, 1994. He testified that he did not threaten to charge Hess with conspiracy to commit murder, did not tell him what to say and told him to tell the truth. Hess never said that he was not telling the truth.

He took a statement from Corey Jones at headquarters at which time he did not threaten to charge him with conspiracy to commit murder, did not tell him what to say and did not tell him to lie. He did not tell Jones to use the terms "white devil".

Morris testified that on October 2, 1994 he spoke to the defendant at headquarters. Defendant understood everything Morris said, was very involved in the conversation and was articulate. Defendant understood the time and place of events and identity of the person. He gave an alibi. Morris testified that the defendant said, "I wouldn't be so stupid as to put me in the store." The defendant told him that he got the money for the T-bird from Sean Hess. He testified that the defendant was not detached from reality. He testified that the defendant denied that the hoodie in the

bank video was his. On October 6, 1994 Morris again spoke to the defendant at which time he was in the lock-up in the courthouse on the date of arrest. At that time the defendant was oriented as to time, place and person and responded to questions. He testified that he did not give Eddie Gilbert any information in his statement and did not tell him to lie or use descriptions. It was his ultimate testimony that he told no witness to say anything that did not come from him or her and not to tell any lies.

The foregoing constitutes all of the evidence having to do with after-discovered evidence. It does not require a great deal of analysis or evaluation to conclude that all of the testimony of these recanting witnesses in the PCRA proceeding is fabricated. We so find and we do not believe their recanting testimony at the PCRA hearing. We believe and accept the testimony of the various investigating police officers to the effect that they asserted no coercion or inducement to any of these recanting witnesses to give the testimony which they did at the trial. We believe the testimony of those recanting witnesses as given at the trial was truthful and was given voluntarily and by their own free will.

In any event, even if their recanting testimony is correct, in view of the overwhelming evidence, aside from their evidence, at trial, it is not such as would probably produce a different verdict if a new trial should be awarded. Furthermore, in evaluating the testimony of each of these witnesses together with the testimony of other witnesses who were not recanting, their trial testimony regarding the circumstances of the defendant's statements is consistent and rings true. Each of them

testified that he or she did not discuss his or her testimony with the other witnesses prior to trial. If, in fact, this testimony was the result of a script written by Mills and the other officers, then each of these witnessses' testimony at trial clearly evidences substantial rehearsal before the performance they allegedly gave. We find that incredible.

With respect to Paulinda Moore, the defendant tries to have it both ways. She was presented at the PCRA to testify that she had no recollection of the testimony she gave at the time of trial, but further to testify to various facts regarding defendant's childhood and upbringing for purposes of establishing, or at least buttressing, a mitigating circumstance at the penalty phase. Counsel, John Fioravanti, Esquire, who conducted the penalty phase, did not call her to testify to these facts. One can readily understand why he did not because counsel David Knight, Esquire, who conducted the degree of guilt proceeding, attacked her credibility based upon her mental illness and her drug abuse. Obviously, if defendant was to contend that she was incompetent to testify during the guilt phase, then obviously she was incompetent to testify during the penalty phase.

Under the PCRA, a person may be eligible for collateral relief if he can plead and prove by a preponderance of the evidence that his conviction is the result of the unavailability of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced. Commonwealth v. Lambert, 765 A.2d 306, (Pa. Super. 2000). As previously noted, the after discovered

evidence in this case is this recanting testimony which we reject. Accordingly, there is no exculpatory evidence of a credible nature and therefore it could not have changed the outcome of the trial.

We turn now to the ineffective assistance of counsel claim regarding David Knight, Esquire, in his representation of the defendant at the guilt phase of the trial. The law presumes that counsel was not ineffective and the defendant bears the burden of proving otherwise. Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190. (1997), certiorari denied 523 U.S. 1082, 118 Supreme Ct. 1534, 140 L. Ed.2d 684 (1998). To establish an ineffective assistance of counsel claim, Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987) and its progeny require the defendant to satisfy a three-prong inquiry: (1) whether the underlying claim is of arguable merit; (2) whether or not counsel's acts or omissions had any reasonable strategic basis designed to advance the interests of the defendant; and (3) whether there is a reasonable probability that the outcome of the proceedings would have been different but for the errors and omissions of counsel. Commonwealth v. Schaffer, 763 A.2d 411 (Pa. Super. 2000). Defendant is bound by counsel's strategic decisions if they are reasonably determined. Commonwealth v. Bowers, 369 A.2d 320 (Pa. Super. 1976) and Commonwealth v. Metzger, 441 A.2d 1225 (Pa. Super. 1982). Counsel's tactical decisions are virtually unassailable, Commonwealth v. Basemore, 744 A.2d 717 (Pa. 2000), so long as the course of action chosen by counsel has some reasonable basis, and cannot be deemed ineffective. Commonwealth v. Chester, 733 A.2d 1242 1999. See also Commonwealth

v. Poindexter, 646 A.2d 1211(Pa. Super. 1994) and Commonwealth v. Jones, 636 A.2d 1184 (Pa. Super. 1994).

Certainly, the defendant was not shortchanged in Knight's efforts on his behalf. Knight has an extensive criminal law history having served in the Public Defender's Office of Bucks County for a number of years and having been involved in criminal defense cases for virtually his entire legal career. He likewise had some prior experience in homicide cases. He spent a minimum of two hundred hours preparing for this trial, interviewed the defendant at least fifty times and saw him virtually everyday for the last month and a half prior to the trial.

Defendant asserts that Knight was ineffective in failing to secure past mental health records of Paulinda Moore in order to use them at trial to impeach her testimony. Clearly, Knight raised the issued of Paulinda Moore's credibility in view of her mental history and he argued it extensively to the jury. Although, if considered in a vacuum, Knight's failure to secure those records might constitute a claim of arguable merit, one certainly cannot argue that there is a reasonable probability that the outcome of the proceedings would have been different had he done so. She testified merely that she was with the defendant on September 29, 1994 at sometime between twelve noon and two p.m. when she walked with him towards the Lower Bucks County Hospital on Bath Road. She testified that he told her that he was broke and was going to rob someone. He further told her that if the person he robbed saw his face, he would blow his brains out. Although clearly that is damaging testimony, there were so many witnesses in this

case testifying to the same or similar facts that discrediting Paulinda Moore, if in fact she was not discredited, would not present a reasonable probability of changing the outcome of the case.

It is also asserted that Knight was ineffective for his failure to cross-examine Glenn Pollard respecting a letter Pollard had written to the District Attorney's Office in which he volunteered to give evidence against the defendant ostensibly to get a deal for himself. At that time Pollard was an inmate at the Bucks County Prison. Although Knight was aware of this letter, he chose not to use it to cross-examine Pollard because it had other matters contained in it which were damaging to the defendant, not the least of which was a statement about a prior shooting which the defendant had committed. He likewise stated in that letter that the victim had been like a grandfather to him and he did not want to see the defendant get away with the murder. Clearly, this explanation for the failure to use the letter had a reasonable strategic basis designed to advance the interests of the defendant.

Knight likewise conceded that Pollard had volunteered to the District Attorney's Office to do undercover drug buys and wear a wire in November 1991. He likewise conceded that he knew that Eddie Jones was an informant for the Drug Enforcement Administration. He testified that he chose not to use this information in impeaching the credibility of these witnesses because he believed that it could be a two-edged sword. While on the one hand it might furnish a reason for these witnesses to testify against the defendant, on the other hand, a jury might come to believe that in their effort to

aid the police, they were being good citizens. Therefore, because of the ambivalence of the value of this testimony, he chose not to use it. Once again, we believe that this was a reasonable strategic basis for his tactic in these respects.

There was a question raised as to whether or not he interviewed these Commonwealth witnesses prior to trial. He testified that he did interview Sean Hess and asked him if the police had pressured him into his testimony. He likewise testified that he could not recall talking to Eddie Jones, Corey Jones (who did not testify), Brian McClain and Eddie Gilbert. He testified, however, that on those many occasions that he went to the prison to interview witnesses, many of the witnesses in this case would not talk to him. However, he did testify, and we believe, that those witnesses that he did interview always stuck by their story, the ones to which they testified at trial.

He likewise testified that he attempted to speak to Vera DeBois at the preliminary hearing. She was present but did not testify at that hearing. He testified that he spoke to her only briefly at that time and that she was upset with the defendant and was not cooperating with him. He further testified that defendant's other relatives would not cooperate with him with the exception of John Gibson, defendant's father.

Based upon the foregoing, we are unable to find that Knight's representation of the defendant was ineffective and therefore deny the motion for a new trial on that basis.

Defendant asserts that he is entitled to a new trial based upon the allegation that the Commonwealth withheld certain information relating to the credibility of some of its

witnesses. Essentially he asserts a Brady violation. In Brady v. Maryland, 373 U.S. 83 Supreme Ct. 1194, 10 L.Ed. 2d 215 (1963), the United States Supreme Court held that the suppression of evidence by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or the punishment, irrespective of a good faith or bad faith of the prosecution. The prosecutor has an affirmative and continuing duty to disclose exculpatory information to the defense and to correct false testimony of a witness. See Commonwealth v. Hallowell, 383 A.2d 909 (Pa. 1978), see also, Giglio v. United States, 405 U.S. 150, 92 Supreme Ct. 465, 31 L.Ed. 2d 104 (1972).

The Brady Rule applies when the prosecution achieves a conviction through the use of materially false or perjured testimony. United States v. Agurs, 427 U.S. 97, 96 Supreme Ct. 2392 L.Ed. 2d 342 (1976); See also, Commonwealth v. Hallowell, supra.; Commonwealth v. Carpenter, 372 A.2d 806 (Pa. 1977) and Napue v. Illinois, 360 U.S. 264, 79 Supreme Ct. 1173, 3 L.Ed. 2d 1217 (1059). That clearly is not the case here. When the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence effecting credibility falls within the general rule. Giglio v. United States, supra., Commonwealth v. Cain, 369 A.2d 1234 (Pa. 1977). The good faith, or lack thereof, of the prosecutor is not determinative. Commonwealth v. Hallowell, supra., citing Brady v. Maryland, supra. and Commonwealth v. Jenkins, 383 A.2d 195 (Pa. 1978). A strict standard of materiality is applied, United States v. Agurs, supra., that is, the false testimony is material and a new trial required if it could "in any

reasonable likelihood have effected the judgment of the jury". Commonwealth v. Wallace, 455 A.2d 1187 (Pa. 1983). See also, Commonwealth v. Howard, 749 A.2d 941 (Pa. Super. 2000).

In this case, the evidence in question has to do with various police contacts with witnesses who testified to statements made to them by the Defendant, suggested certain favorable treatment for them, which would go to the credibility of these witnesses. However, there is no evidence in this case to establish that the Commonwealth suppressed this evidence upon request by the defense. In fact, there is no evidence that the defense requested any of this evidence. In addition, a good deal of the evidence cited by Defendant, regarding favorable treatment to these witnesses are matters of public record readily available to defense counsel in the Clerk of Courts office. The prosecution does not violate discovery rules when it fails to provide the defense with evidence that it does not possess and of which it is unaware during pretrial discovery. Comm. v. Burke, 781 A.2d 1136 (Pa. 2001). Additionally, the defendant may not use the discovery rules to compel the Commonwealth to obtain evidence to which the defendant has equal access. Commonwealth v. Hussman, 485 A.2d 58, (Pa. Super. 1984) and Commonwealth v. McElroy, 665 A.2d 813, (Pa. Super. 1995).

Of course, the foregoing does not end our inquiry with respect to this evidence. Although the lack of request and, therefore, the resulting non-suppression by the Commonwealth, and the ready availability of some of this evidence as public record,

does not resolve an allegation of ineffectiveness of counsel for failure to search this evidence out or demand its disclosure by the Commonwealth. Defense counsel was astutely aware of the apparent credibility shortcomings of these Commonwealth witnesses. He was aware of and argued the mental incapacities of Paulinda Moore. Furthermore, Knight was aware of the Pollard letter and explained the reason for his failure to have it admitted in evidence. He did, however, cross-examine Pollard with respect to it. He was fully aware of the histories and backgrounds of these various witnesses, in fact, knew that many of the statements of Defendant were made to these witnesses while the witnesses were incarcerated in the Bucks County Prison with the Defendant. Knight testified that he attempted to interview these witnesses but in most cases found that they would not talk to him. In spite of the cacophony of perceived Brady material, the record adequately reflects that Knight attempted to exploit the questionable credibility of each of these witnesses.

Regardless of the credibility issues respecting these particular issues, the Commonwealth's case, contrary to the assertions of the Defendant, was really quite strong. The testimony of Michael Segal, who did not specifically identify the Defendant at trial, Alfonso Colon, Pamela Harrison, Kimberly Rankins, Vera DeBois, and Leonard Wilson, all of whose testimony is untainted, weave a web of evidence very strongly pointing to guilt in this case. Added to that was the testimony of Glenn Kashdan and Joseph Clement establishing that the Defendant wished to buy a car but did not have the money the day before the robbery, and had the money and purchased the car the

day after, as well as the testimony of Melissa Paolini, Glenn Kashdan and Joseph Clement clearly refuting Defendant's alibi that he had not been in Bristol Borough at or about the time of the robbery. In view of this evidence, we do not believe that the evidence which the Defendant claims to have been deprived him could, "in any reasonable likelihood have effected the judgment of the jury". Commonwealth v. Wallace, supra.

In a P.C.R.A. proceeding, the defendant must plead and prove by a preponderance of the evidence, if based upon an assertion of ineffectiveness of counsel, that counsel's errors so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

P.C.R.A. claims are not merely direct appeal claims that are made at a later stage of the proceedings, cloaked in an assertion of counsel's ineffectiveness. In essence they are extraordinary assertions that the system broke down. To establish claims of constitutional error or ineffectiveness of counsel, the defendant must plead and prove by a preponderance of evidence that the system failed (i.e., for an ineffectiveness or constitutional error claim, that in the circumstances of his case, including the facts established at trial, guilt or innocence could not have been adjudicated reliably), that his claim has not previously been litigated or waived, and where a claim was not raised at an earlier stage of the proceedings, that counsel could not have had a rational strategic or tactical reason for failing to litigate those claims earlier. Commonwealth v. Rivers, 786 A.2d 923 (Pa. 2001). In reviewing a record on this basis, we must look at

the totality of all of the evidence presented to determine whether the alleged errors so undermined the truth determining process so that no reliable adjudication of guilt or innocence could have taken place. Commonwealth v. Rivers, id. The ultimate determination in a post conviction proceeding is to prevent the incarceration of innocent persons. Commonwealth v. Rivers, id. By that analysis, it is clear that in this case the defendant has failed to establish by a preponderance of the evidence, considering it in its totality, and considering all of the circumstances of this case, that the truth determining process was so undermined so that no reliable adjudication of guilty or innocence could have taken place. Commonwealth v. Rivers, id. See also Commonwealth v. Simmons, 786 A.2d 943 (Pa. 2001).

Defendant raises other issues which require little discussion. He makes reference to a hypothetical question posed by himself at a time when he had consented to a search of his automobile by the detectives. He argues that somehow the credibility of the testifying police officers is at issue because of some disparity between their testimony and their notes or lack thereof. Obviously, this was a trial issue and a matter for resolution by the jury.

He likewise contends that somehow he was prejudiced by the seizure of his automobile. However, the automobile rendered no evidence against him whatsoever. Therefore, we fail to see how any prejudice could arise from that seizure.

He asserts error in the failure of the court to charge that life imprisonment means life without parole and the failure of counsel to either request that charge or

object to its lack thereof. However, although that charge was not initially given, in the course of its deliberation, the jury submitted that question and we advised them that life in prison means life without parole.

Last, the suggestion that prosecutorial misconduct bars retrial, Commonwealth v. Smith, 532 A.2d 177 (Pa. 1992) and Commonwealth v. Lambert, 765 A.2d 306 (Pa. Super. 2000) warrants no response.

John Fioravanti, Esquire, represented the defendant in the penalty phase of the case. Mr. Fioravanti has extensive experience in criminal defense having been a long time member of the Bucks County Public Defender's Office, eventually the chief deputy thereof, having tried a great number of jury and non-jury cases and was involved in every homicide case in that office during his tenure in that office. His strategy in the penalty phase was to establish that the defendant was emotionally disturbed based upon his childhood and family background as mitigating factors. He wanted to establish as much mitigating evidence as he could. He engaged Dr. Allan M. Tepper, a clinical psychologist, to evaluate the defendant. Before getting to that aspect of this proceeding, there are some other matters which warrant brief attention.

In the penalty phase, the Commonwealth moved to incorporate the record of the guilt phase of the trial and then produced evidence to support its assertion that the defendant committed the killing the perpetration of a felony, and that he had a previous record of convictions of violent offenses. These were the aggravating circumstances the Commonwealth presented. Fioravanti called the defendant's father, two women

and Dr. Tepper as his witnesses in the penalty phase. He testified that he spoke to the father many times and established through the father that the home in which the defendant was raised was chaotic, that the defendant was abused and that his mother was an alcoholic. He testified that he did not interview Sean Hess with respect to the defendant's childhood because Sean Hess was a Commonwealth witness and, therefore, it would have been difficult, if not impossible for him to call Sean Hess as his witness in the penalty phase after Hess had testified against the defendant in the degree of guilt proceeding. He further testified that he did not interview Lynnwood or Donald Gibson, two of the defendant's brothers, because Donald Gibson was at that time serving a life sentence for murder himself and Lynnwood had an extensive criminal record as well. Obviously, Fioravanti did not wish to present them as witnesses to the jury, which would lead the jury to believe that defendant's family was crime-ridden.

He could not call Paulinda Moore to testify regarding the defendant's childhood because she had testified for the Commonwealth and it was the position of the defense that due to her mental illness she was totally incompetent as a witness. Having attempted to establish that with the jury and having argued it with some zest, it would be impossible to call her has a witness at the penalty phase and hope and expect the jury to afford her the credibility which they would have desired.

All other members of the family, who could have testified to the defendant's childhood, including Vera DeBois, his aunt, were hostile to the defense and refused to talk to them or cooperate with them in anyway. The defendant's attempts to contact

defendant's brother in Florida, apparently an upright citizen, were unavailing, he refusing to return the phone calls of defense counsel. However, considerable evidence was presented to the jury regarding the defendant's chaotic and abusive childhood and the jury was instructed extensively at the penalty phase with respect to that.

However, we believe that counsel stopped short in terms of developing and presenting evidence regarding the defendant's mental conditions resulting from his childhood and upbringing. It was Fioravanti's testimony that upon engaging Dr. Tepper he advised him that defendant might be suffering from organic brain damage. Tepper's conclusion in this regard was tenuous. Fioravanti conceded that there was no reason not to hire a neuropsychologist to conduct more intensive evaluation of the defendant and, in fact, testified that he now believed that he should have done so. He further testified that he believed that Tepper could conduct a neuropsychological evaluation but did not do so nor did Fioravanti request that he do so. Fioravanti testified that he has since learned of Dr. Carol Armstrong who apparently has a unique method of conducting such tests and who has been somewhat successful in diagnosing organic brain damage. He likewise testified that at that time he did not know of Dr. Julie Kessel who likewise conducted neuropsychological testing with a record of some success in diagnosing organic brain damage. Therefore, essentially, Fioravanti proceeded based upon the recommendation of Dr. Tepper that such testing would, in all probability, be fruitless and therefore that new evidence would not be collected in that manner. As a result, Fioravanti had no expert testimony to establish that the defendant was

organically brain damaged and no expert testimony of cognitive dysfunction. Therefore, he was not able to produce evidence that the defendant was unable to conform to the requirements of law or understand the criminality of his acts. This kind of testimony, obviously, would have strengthened the mitigating factor that Fioravanti attempted to establish through Dr. Tepper's testimony alone.

It is true that the defendant was reluctant to discuss his home life with Fioravanti and also Dr. Tepper. Therefore, it was difficult for them to accumulate the kind of narrative upon which a diagnosis of organic brain damage could be built. However, the mistake that Fioravanti made, which he readily concedes, was that he proceeded solely upon Tepper's opinion that additional testing would not be helpful and based upon that did not embark upon it. In fact, in an affidavit presented at the PCRA hearing, Dr. Tepper states that had he received the full panoply of information regarding the defendant's history and background prior to trial, he would undoubtedly have recommended a full course of psychiatric testing in order to attempt to determine whether there was in fact cognitive brain damage. Furthermore, affidavits of both Drs. Armstrong and Kessel were presented at the PCRA hearing in which each stated that based upon the evidence which they have received for evaluation, they would have expressed the opinion at trial that the defendant was suffering from cognitive brain damage.[3] In any event, if that testimony were offered and believed, it would certainly

[3] At the PCRA hearing, these affidavits were stipulated to be authentic and would represent what the witnesses would testify to if called. However, there was no stipulation as to the truth of the contents of these affidavits. That, of course, at trial, would be a matter for the fact-finder, be it judge or jury.

have offered a significantly stronger mitigating factor which might very well have influenced the result of the penalty phase of this case. His testimony that he failed to do so because he was afraid that it might have negative results does not constitute a reasonable explanation because it would not change the case one iota. Although he hoped that Tepper's testimony might suggest cognitive brain damage, he concedes that the testimony did not rise to the level where he could even request that as a charge from the Court. Therefore, a negative result would have left him in no worse position than he was without the testing at all.

Lastly, Fioravanti testified that he did not consider medical testing as in the nature of an EEG or a CAT scan in order to reveal organic brain damage because that was very expensive. Obviously, when addressing the imposition of a death penalty, expense cannot be a factor.

For the foregoing reasons, we are satisfied that defendant's representation in the penalty phase of the case did not rise to the standard required by law and that, therefore, in that phase, he was ineffectively represented.

For the foregoing reasons, we will order that defendant receive a new trial on the penalty phase only.

ORDER

AND NOW, to wit, this 22nd day of May 2002, it is hereby Ordered that defendant's Post-Conviction Relief Act application for a new trial on the degree of guilt phase of the case is denied, dismissed and overruled.

With respect to the petition for a new trial on the penalty phase, such petition is granted and a new trial is granted on the penalty phase only.

BY THE COURT,

Isaac S. Garb

ISAAC S. GARB, SENIOR JUDGE

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF

NO. 5119, 5119-01/94

VS.

JEROME GIBSON

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APP-C

H

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, Appellant,
v.
Jerome GIBSON, Appellee.
Commonwealth of Pennsylvania, Appellee,
v.
Jerome Gibson, Appellant.
Commonwealth of Pennsylvania, Appellee,
v.
Jerome Gibson, Appellant.
Submitted Nov. 22, 2005.
Decided June 26, 2007.

Background: After conviction and death sentence for capital murder were affirmed on direct appeal, 553 Pa. 648, 720 A.2d 473, defendant filed petition for post-conviction relief, based on claim that he was mentally retarded. The Court of Common Pleas, Criminal Division, Bucks County, No. 1994-5119,Isaac S. Garb, J., denied guilt-phase relief, but awarded new penalty phase hearing. Both parties appealed. In light of *Atkins v. Virginia*, the parties obtained remand for determination whether defendant was mentally retarded. Following evidentiary hearing, the Court of Common Pleas determined that defendant was mentally retarded, but denied request for imposition of life sentence in view of limited scope of remand. Defendant appealed.

Holding: The Supreme Court, Nos. 378 CAP, 380 CAP, and 467CAP, Saylor, J., held that substantial evidence supported determination that death-sentenced defendant was mentally retarded.

Affirmed; sentence modified; case transferred to Superior Court.

West Headnotes

[1] Criminal Law 110 1615

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1615 k. Degree of Proof. Most Cited Cases

Criminal Law 110 1661

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1661 k. Decision or Order. Most Cited Cases

Sentencing and Punishment 350H 1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally Retarded Persons. Most Cited Cases
On a petition for post-conviction relief by a defendant challenging his death sentence on the grounds of mental retardation, the defendant must establish the claim by a preponderance of the evidence, the post-conviction judge is the appropriate fact finder, and the standards set forth in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) and by the American Association for Mental Retardation (AAMR) are appropriate measures, which require the defendant to establish his: (1) limited or subaverage intellectual functioning; (2) significant adaptive limitations; and (3) age of onset as being prior to his eighteenth birthday.

[2] Sentencing and Punishment 350H 1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally Retarded Persons. Most Cited Cases
It is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75, for the purposes of determining whether they can be sentenced to death for capital murder, if they have significant deficits in adaptive behavior.

[3] Criminal Law 110 1134.90

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)10 Interlocutory, Collateral, and Supplementary Proceedings and Questions
110k1134.90 k. In General. Most Cited Cases
(Formerly 110k1134(10))

Criminal Law 110 1158.36

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 k. Post-Conviction Relief. Most Cited Cases
(Formerly 110k1158(1))
In the appellate review of the post-conviction court's determination, the standard of review is deferential and is limited to consideration of whether the factual findings are supported by substantial evidence and the legal conclusion is not clearly erroneous.

[4] Sentencing and Punishment 350H 1789(10)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(10) k. Determination and Disposition. Most Cited Cases
(Formerly 110k1181.5(8))

Sentencing and Punishment 350H 1793

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1793 k. Evidence. Most Cited Cases
Substantial evidence supported determination that death-sentenced defendant was mentally retarded, thus warranting remand for vacation of death sentence and imposition of life sentence; various experts testified that defendant's IQ was within 70-75 range, and defendant had severe deficits in multiple adaptive skills, including functional academic skills, self-direction, and work skills.

****168** Thomas Gary Gambardella, Esq., Amy Zapp, Esq., Bucks County District Attorney's Office, Doylestown, for Commonwealth of Pennsylvania.

Samuel J.B. Angell, Esq., James Milton Anderson, Esq., Helen A. Marino, Esq., Defender Association of Philadelphia, Philadelphia, for Jerome Gibson.

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Samuel J.B. Angell, Esq., Helen A. Marino, Esq., Defender Association of Philadelphia, Philadelphia, for Jerome Gibson.

BEFORE: CAPPY, C.J., and CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN and FITZGERALD, JJ.

****414 OPINION***

Justice SAYLOR.[FN1]

FN1. This matter was reassigned to this author.

Appellant, Jerome Gibson, was convicted of first-degree murder and sentenced to death in 1995, and this Court affirmed the conviction and sentence on direct appeal. *See Commonwealth v. Gibson*, 553 Pa. 648, 720 A.2d 473 (1998). In proceedings under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 (the "PCRA"), a post-conviction court denied guilt-phase relief but awarded a new penalty hearing, and cross-appeals to this Court ensued. In light of the United States Supreme Court's intervening decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that, under the Eighth Amendment to the United States Constitution, the government may not execute a mentally retarded person), the parties sought and obtained a remand to the post-conviction court for a determination as to whether Appellant is mentally retarded. The PCRA

court conducted an evidentiary hearing and issued an opinion finding that Appellant is mentally retarded. The court denied Appellant's request for the imposition of a life sentence, however, in light of the limited nature of the remand. Appellant lodged a further appeal, and the matter has been returned to this Court.

Presently, Appellant argues that he is mentally retarded in that he meets the definition under criteria identified by the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) ("DSM-IV"), and by the American Association for Mental Retardation ("AAMR"), *see* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed.2002).[FN2] It is the Commonwealth's position that the evidence presented at the hearing is insufficient to support the conclusion that Appellant is mentally retarded under these criteria.

> FN2. As of January 1, 2007, the AAMR is now known as the American Association on Intellectual and Developmental Disabilities.

[1]***415** In Pennsylvania, the prevailing standards governing a determination of mental retardation for purposes of *Atkins* are set forth in *Commonwealth v. Miller*, 585 Pa. 144, 888 A.2d 624 (2005). A post-conviction petitioner must establish the claim by a preponderance of the evidence, the PCRA judge is the appropriate fact finder, and the standards set forth in the DSM-IV and by the AAMR are appropriate measures. *See id.* at 155-56, 888 A.2d at 631. Those require a petitioner to establish his: 1) limited or subaverage intellectual functioning; 2) significant adaptive limitations; and 3) age of onset as being prior to his eighteenth birthday. *Id.* at 153, 888 A.2d at 630.

[2] In terms of intellectual functioning, the primary measure is an Intelligence Quotient ("IQ") of below 65-75 on the Wechsler scales. *Miller*, 585 Pa. at 154, 888 A.2d at 630. It is therefore possible to diagnose mental retardation in individuals with IQ scores between 71 and 75, if they have significant deficits in adaptive behavior. *See id.* at 155 n. 9, 888 A.2d at 631 n. 9; *see also id.* at 155, 888 A.2d at 631 (explaining that "we do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction****170** between limited intellectual functioning and deficiencies in adaptive skills that establishes mental retardation"). Adaptive behavior is "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives, and limitations on adaptive behavior are reflected by difficulties adjusting to ordinary demands made in daily life." *Miller*, 585 Pa. at 154, 888 A.2d at 630 (citing DSM-IV at 45; MENTAL RETARDATION, at 26). Examples of adaptive skills are money concepts and management, responsibility and ability to follow rules, and meal preparation. *See id.* at 154 n. 8, 888 A.2d at 630 n. 8. The DSM-IV requires significant limitations in at least two of the following skill areas: communications, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *See id.*

[3]***416** In the appellate review of the PCRA court's determination, the standard of review is deferential and is limited to consideration of whether the factual findings are supported by substantial evidence and the legal conclusion is not clearly erroneous. *See Commonwealth v. Crawley*, 592Pa. 222, ---- - ----, 924 A.2d 612 (2007).

[4] The PCRA court summarized the evidence extensively in its opinion. Briefly, Appellant presented testimony from a medical doctor who studies birth defects, a neuropsychologist, and an educator and learning disabilities specialist, all of who concluded that he is mentally retarded. Several of the witnesses traced Appellant's condition to fetal alcohol syndrome, a debilitating condition resulting from maternal alcohol consumption and characterized by impairments in the development of the brain. The witnesses highlighted that Appellant had been identified as a mentally retarded person in the elementary school system and was always placed in special education classes, with a recorded notation of an IQ score of 67 and his psychological record placing him below the third percentile for academic performance. Multiple adaptive deficits were discussed, including impairments in learning, executive function, problem-solving, memory, intellectual skills, work skills, communications, functional academics, health, safety, self-direction, and attention. The expert testimony indicated that Appellant functions at a second-to-third grade level, demonstrates an inability to manage money, and lacks the capacity to hold a steady job or maintain stable relationships. Various of the deficits, including those in academic skills and self-direction, were described as severe. One expert reported an IQ

test score of 81 but indicated that this was not a true score, and it was a consensus of the defense experts that Appellant's IQ was 70 to 75 or below. Appellant also presented testimony from two of his secondary school teachers, who explained that he was properly placed in the special education program, as he could not function in a regular classroom. Finally, Appellant presented affidavits from several other experts that were consistent with the live testimony. ***417** These were admitted into evidence, although the Commonwealth did not agree to their veracity.

The Commonwealth offered testimony from a board-certified forensic psychologist who concluded that Appellant had an IQ of approximately 74 and did not fall within the DSM-IV classification for mental retardation. The Commonwealth's expert conceded, however, that Appellant was severely impaired. He also acknowledged that an IQ test score of between 70 and 75 could indicate mental retardation, depending on the degree of adaptive deficits. It was his opinion, however, that ****171** Appellant functions in a borderline range, and his adaptive deficits are not so significant as to implicate mental retardation. Further, the expert explained that school systems in the past had sometimes used relaxed criteria for mental retardation to facilitate the provision of educational services.

The PCRA court did not find a great deal of difference in the testimony of the witnesses, except in terms of their ultimate conclusions. As between Appellant's and the Commonwealth's respective experts, the court noted that the real difference was the significance of the level of Appellant's cognitive abilities and adaptive functioning. Considering the DSM-IV and AAMR standards, the PCRA court found that the adaptive skills and behaviors in relation to Appellant's IQ indicated mental retardation.

Upon our review, we find that the PCRA court's findings are supported by substantial evidence and its legal conclusion is not clearly erroneous under *Miller*, 585 Pa. at 144, 888 A.2d at 624. The evidence plainly supports the finding that Appellant was identified as a mentally retarded person before his eighteenth birthday. *See* N.T., April 21, 2004, at 19 (testimony of Dr. Elizabeth McPherson that Appellant "had been diagnosed as mentally retarded in the school system and had been in special education classes throughout his schooling"); *id.* at 93 (testimony of Edward J. Dougherty, PhD., that Appellant "was identified actually in the first grade as being mentally retarded by the school system"). Various experts testified that Appellant's IQ was within the 70 to 75 range. ***418** *See id.* at 60, 118-19. Given that Appellant's IQ is apparently above 70, this is a close case; however, both parties agree that it is possible for a person with an IQ ranging from 70 to 75 to suffer from mental retardation, depending upon the degree of adaptive deficits. In this regard, the testimony of Appellant's expert witnesses was consistent with the PCRA court's understanding that, in Appellant's case, such deficits were on a scale supporting the finding of mental retardation. Appellant was evaluated, *inter alia*, via a formal assessment instrument called the Adaptive Behavior Assessment System, identifying severe deficits in functional academic skills, self-direction, and work skills, as well as significant impairments in other areas, which, according to the expert testimony, meet the criteria for mental retardation in terms of severe impairment in at least two out of ten identified areas of adaptive skills and behaviors. *See* N.T., April 24, 2004, at 95-98; *see also id.* at 100 (testimony of Edward J. Dougherty, PhD., that Appellant, at 43 years of age, functions at a third-grade level and at a mental age of a nine-year-old child). Again, Appellant's three testifying mental health experts specifically opined that he meets the criteria for mental retardation under the DSM-IV and AAMR standards. *See id.* at 20, 59, 120-21.

As the PCRA court's findings are supported by substantial evidence and its legal conclusion is not clearly erroneous, its determination that Appellant is mentally retarded is affirmed, and its orders are modified to reflect the imposition of a life sentence, subject to appellate merits review of Appellant's guilt-phase claims. The matter is transferred to the Superior Court to conduct the necessary merits review, as this is now a non-capital case.

Jurisdiction is relinquished

Pa.,2007.
Com. v. Gibson
592 Pa. 411, 925 A.2d 167

END OF DOCUMENT

APP-D

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P.65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JEROME GIBSON,	:	
Appellant	:	No. 1778 & 1779 EDA 2007

Appeal from the PCRA Orders of May 23, 2002,
and December 28, 2004, in the Court of Common Pleas
of Bucks County, Criminal Division at No. 5119, 5119-001/1994

BEFORE: ORIE MELVIN, BOWES and COLVILLE*, JJ.

MEMORANDUM: **FILED JULY 8, 2008**

Appellant appeals an order which, in part, denied his petition brought pursuant to the Post Conviction Relief Act ("PCRA"). Appellant also purports to appeal from orders which denied his requests for a new trial and to expand a remand hearing. We vacate the portion of the PCRA court's order which denied Appellant's request for a new trial and remand with instructions. We affirm in all other respects.

The background underlying this matter can be summarized as follows:

> Appellant, Jerome Gibson, was convicted of first-degree murder and sentenced to death in 1995, and th[e Supreme] Court affirmed the conviction and sentence on direct appeal. ***See Commonwealth v. Gibson,*** 553 Pa. 648, 720 A.2d 473 (1998) [("***Gibson I***")]. In proceedings under the [PCRA], a post-conviction court denied guilt-phase relief but awarded a new penalty hearing, and cross-appeals to th[e Supreme] Court

*Retired Senior Judge assigned to the Superior Court.

> ensued. In light of the United States Supreme Court's intervening decision in ***Atkins v. Virginia***, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that, under the Eighth Amendment to the United States Constitution, the government may not execute a mentally retarded person), the parties sought and obtained a remand to the post-conviction court for a determination as to whether Appellant is mentally retarded. The PCRA court conducted an evidentiary hearing and issued an opinion finding that Appellant is mentally retarded. The court denied Appellant's request for the imposition of a life sentence, however, in light of the limited nature of the remand. Appellant lodged a further appeal, and the matter [was] returned to [our Supreme] Court.

Commonwealth v. Gibson, 925 A.2d 167, 169 (Pa. 2007) ("***Gibson II***").

Our Supreme Court affirmed the PCRA court's determination that Appellant is mentally retarded. In accordance with this decision, the Supreme Court modified Appellant's sentence to a term of life in prison, subject to appellate merits review of Appellant's guilt-phase PCRA claims. Because Appellant's case is now non-capital, the Supreme Court transferred the case to this Court to conduct said merits review.

In his brief to this Court, Appellant asks us to consider the following questions:

> 1. Was Appellant denied his right to due process of law by the Commonwealth's introduction of false testimony and its failure to disclose ***Brady*** material? Alternatively, is Appellant entitled to relief based upon newly-discovered evidence, or upon trial counsel's ineffectiveness for failing to conduct appropriate investigation and impeachment of the witnesses and appellate counsel's ineffectiveness for failing to investigate and pursue these claims?

2. Were Appellant's federal and state constitutional rights violated by the Commonwealth's repeated elicitation and emphasis upon evidence that [Appellant] used the term "white devil," and were prior counsel ineffective for failing to litigate this claim?

3. Did the prosecutor engage in misconduct when, without a good faith basis in fact, he cross-examined Appellant's alibi witness about whether the witness had told a police officer that Appellant had committed the crime; were trial and appellate counsel ineffective?

4. Is Appellant entitled to a new trial because the Bucks County jury selection system denied him a jury from a fair cross section of the community, and were prior counsel ineffective for failing to litigate this claim?

5. Did police seize Appellant's car in violation of state and federal constitutional protections and were prior counsel ineffective for failing to litigate this claim?

6. Did the prosecutor knowingly present false testimony from a witness who testified he saw the victim shot, in violation of Appellant's right to due process of law, and were prior counsel ineffective for failing to litigate this claim?

7. Were Appellant's constitutional rights violated by the prosecution's elicitation of testimony about a hypothetical question that Appellant allegedly posed to the police, by the Commonwealth's failure to produce the relevant notes from which the detective testified at trial, and by prior counsels' ineffectiveness in failing to litigate this claim?

8. Was Appellant denied due process by the [c]ourt's improper guilt-phase instruction and were prior counsel ineffective for failing to litigate this claim?

9. Did the PCRA court err by refusing to consider the issue of competency on remand; must Appellant's conviction be vacated or, alternatively, should further inquiry be conducted; but if the court deems the issue waived, were counsel ineffective?

> 10. Did the trial court err by declining to expand the hearing on remand to include the unlawful circumstances of Appellant's false arrest, and were counsel ineffective in failing to pursue this claim?
>
> 11. Is Appellant entitled to a new a [sic] trial and sentencing because jurors were not searchingly questioned to uncover biases? Were counsel ineffective for failing to litigate this claim?
>
> 12. Whether Appellant is entitled to relief because of the cumulative errors in this case?

Appellant's Brief at 4.

The manner in which we review the determinations of a PCRA court has been stated as follows:

> We review an order granting or denying PCRA relief to determine whether the PCRA court's decision is supported by evidence of record and whether its decision is free from legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

Commonwealth v. Burkhardt, 833 A.2d 233, 236 (Pa. Super. 2003) (citations and quotation marks omitted).

Under his first issue, Appellant launches a multi-faceted challenge regarding testimony (and similar items) of ten persons related to his case.[1] Initially, Appellant claims that his right to due process was violated because

[1] Due to the shotgun nature by which Appellant presents his claims on appeal, it is difficult to discern whether he preserved his various claims for appellate review. Moreover, many of Appellant's claims are poorly developed and, thus, frustrate meaningful review. Appellant further strains appellate review by failing to adhere to Pennsylvania Rules of Appellate

the Commonwealth acted contrary to ***Brady v. Maryland***, 373 U.S. 83 (1963), by suppressing evidence that was favorable to him and material to his guilt or innocence and/or because the Commonwealth knowingly presented false testimony or failed to correct false or misleading testimony offered at Appellant's initial trial.

The law in this area can be summarized in this manner:

> Where evidence material to the guilt or punishment of the accused is withheld, irrespective of the good or bad faith of the prosecutor, a violation of due process has occurred. The ***Brady*** rule has been extended to require the prosecution to disclose exculpatory information material to the guilt or punishment of an accused even in the absence of a specific request. Exculpatory evidence also includes evidence of an impeachment nature that is material to the case against the accused. Any implication, promise or understanding that the government would extend leniency in exchange for a witness's testimony is relevant to the witness's credibility. When the failure of the prosecution to produce material evidence raises a reasonable probability that the result of the trial would have been different if the evidence had been produced, due process has been violated and a new trial is warranted. Impeachment evidence is material, and thus subject to obligatory disclosure, if there is a reasonable probability that had it been disclosed the outcome of the proceedings would have been different.

Burkhardt, 833 A.2d at 241 (citations omitted). Moreover,

> [w]hen multiple nondisclosures are alleged, the effect of each nondisclosure cannot only be considered alone; the cumulative effect of the nondisclosures must also be evaluated even if each single nondisclosure might not be in and of itself sufficient to justify relief.

Procedure 2117(c)(1)-(4) and 2119(e). Particularly frustrating is Appellant's failure to identify where in the record he preserved his many sub-issues.

Commonwealth v. Lambert, 765 A.2d 306, 326 (Pa. Super. 2000).

At the outset, Appellant focuses his attention upon Commonwealth witness Edward Jones. Appellant maintains that the Commonwealth failed to disclose to him that the DEA compensated Jones in the amount of $1,500 in exchange for incriminating Appellant at trial.

Appellant's PCRA petition makes no allegation that the DEA paid Jones for his testimony; the current claim, therefore, is waived.[2] ***See Commonwealth v. Wharton***, 811 A.2d 978, 987 (Pa. 2002) (citing, *inter alia*, Pa.R.A.P. 302(a) and finding a claim waived because it was not presented in a PCRA petition). Furthermore, at the PCRA hearing, no one testified that Jones received $1,500 for his testimony. In support of his

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[2] Appellant initially filed a *pro se* PCRA petition. Appellant's PCRA counsel later filed an amended PCRA petition and a supplement to the amended PCRA petition. In its opinion, the PCRA court noted the filing of these documents; moreover, these documents are in the certified record.

However, both parties indicate that PCRA counsel filed a second supplement to the amended PCRA petition. The PCRA court's docket reflects that Appellant filed two supplements to the amended PCRA petition. Yet, the court's inventory of the certified record does not list such a document. Despite a thorough search of the record, we were unable to locate a second supplement to the amended PCRA petition. Our Prothonotary's attempts at procuring such a document were unsuccessful.

"Our law is unequivocal that the responsibility rests upon the appellant to ensure that the record certified on appeal is complete in the sense that it contains all of the materials necessary for the reviewing court to perform its duty." ***Commonwealth v. Preston***, 904 A.2d 1, 7 (Pa. Super. 2006). "The law of Pennsylvania is well settled that matters which are not of record cannot be considered on appeal. Thus, an appellate court is limited to considering only the materials in the certified record when resolving an

assertion that Jones was paid for his testimony, Appellant cites to Jones' DEA file, which does not specify that Jones was paid for his testimony, and to an affidavit from Jones. This "evidence" was submitted after the PCRA hearing occurred and, therefore, was not tested at the hearing. Thus, the PCRA court was precluded from assessing the credibility of Jones' claim.

Next, Appellant claims that the Commonwealth violated ***Brady*** by failing to disclose to him that Commonwealth witness Glenn Pollard frequently contacts law enforcement officials offering to lie in criminal trials. Appellant failed to include this claim in his PCRA petition; it, therefore is waived. ***See Wharton***, *supra*. In addition, at the PCRA hearing, PCRA counsel questioned trial counsel about a letter that Pollard had sent to the district attorney's office. In the letter, Pollard stated he would testify against Appellant in exchange for all of Pollard's charges being dropped. PCRA counsel reminded trial counsel that, in his closing argument, trial counsel referenced this letter. Trial counsel then stated that he probably had seen the letter. Therefore, at the very least, trial counsel was aware that Pollard wrote a letter to the district attorney in which he expressed his willingness to testify against Appellant.

Appellant further claims that the Commonwealth failed to disclose that an investigating detective stated that he would threaten to charge

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issue." ***Id.*** at 6 (citations omitted). Accordingly, we only will consider the

Commonwealth witness Cyril Thomas with a gun violation if he refused to cooperate in this matter. Appellant goes on to contend that a few months after Thomas testified in Appellant's trial, the Commonwealth dismissed numerous charges filed against Thomas. Appellant submits that, despite the fact that this information represented relevant impeachment evidence, the Commonwealth failed to disclose it.

Appellant waived this claim by failing to include it in his PCRA petition. ***Id.*** Moreover, this claim is based upon mere speculation and innuendo. Appellant fails to cite to record evidence which establishes that the detective, in fact, threatened Thomas with a gun charge or that the prosecutor, in fact, gave Thomas a deal in exchange for his testimony against Appellant.

Appellant then turns his attention to Commonwealth witness Paulinda Moore. Moore's trial testimony reflected the following:

> Shortly before 2:00 p.m. [on the day of the murder], [Appellant] met Paulinda Moore, a long-time acquaintance, in the shopping center. [Appellant] showed Moore a handgun that was tucked into the waistband of his pants and stated that he needed money and was going to rob somebody. He added that if his prospective victim saw his face, he would shoot him. [Appellant] and Moore then parted company and [Appellant] continued on foot to Bristol Borough.

Gibson I, 720 A.2d at 476.

PCRA petitions in the certified record.

In his PCRA petition, Appellant claimed that the Commonwealth was aware that Moore had mental health and drug and alcohol problems. Appellant asserted that the day after Moore was questioned by police regarding this case, she was ordered, in a different criminal case, to have a mental health evaluation. Appellant contended that "none of this was turned over to the defense," Amended PCRA Petition, 11/03/00, at ¶206, and that this failure to disclose constituted a ***Brady*** violation.

The PCRA court summarized Moore's PCRA hearing testimony as follows:

> At the PCRA hearing, . . . [Moore] testified that at [the time of the murder] she was suffering from . . . paranoid schizophrenia and . . . bipolar and therefore was on medication for those conditions. She further testified that in addition to those medications she was drinking alcohol and more particularly taking drugs, specifically crack cocaine. She testified that when she was engaged in such conduct she became a zombie and had no memory of what she had done or what she was doing. She testified that when in that condition she will do anything anyone tells her to do and that she was probably in that state when she testified at trial. When she was confronted with statements and affidavits that she had given prior to trial which were consistent with the testimony that she gave at trial, she testified that she cannot remember giving those statements. She testified essentially that she could not remember the events of September and October 1994 but that the testimony she gave at trial might be correct but she cannot recall it.

PCRA Court Opinion, 5/23/02, at 3-4.

In its opinion, the PCRA court only briefly addressed Appellant's ***Brady*** claim regarding Moore, stating:

> [Trial] counsel was astutely aware of the apparent credibility shortcomings of these Commonwealth witnesses. He was aware of and argued the mental incapacities of Paulinda Moore.

PCRA Court Opinion, 5/23/02, at 23.

In his brief to this Court, Appellant contends that "Moore's mental health records from prison corroborate her post-conviction testimony and contain compelling impeachment evidence of her abject mental health status at the time of trial." Appellant's Brief at 23. Appellant states, "The prison records report that on September 22, 1994 - - just one week before the September 29, 1994 shooting . . . and the date of Ms. Moore's supposed conversation with Appellant – Ms. Moore was admitted in a psychotic state to the locked unit of Lower Bucks Hospital because of 'voices.'" ***Id.*** at 24. In addition to further referencing Appellant's prison records, Appellant adds:

> The Commonwealth was aware of Ms. Moore's mental health problems. The November 16, 1994 Order was entered in a case in which the Commonwealth was a party. The Order directed that notice should be provided to the District Attorney upon completion of Ms. Moore's mental health examination. Ms. Moore was even taken to the mental ward by police officers. The Commonwealth's failure to disclose this mental health impeachment evidence violated ***Brady***.

Appellant's Brief at 24 (citation omitted).

We initially observe that the PCRA court's finding that trial counsel was aware of and argued Moore's mental incapacities is not supported by the record. At the PCRA hearing, trial counsel was unable to recall whether he had presented the fact that Moore had mental health problems. A review of

the trial transcripts reveals that, while trial counsel diligently cross-examined Moore, he asked no questions related to her mental health status. We nonetheless conclude that Appellant is due no relief under this issue.[3]

"No ***Brady*** violation can occur where the evidence is available to the defense through non-governmental sources, or, with reasonable diligence, the defendant could have discovered the evidence." ***Commonwealth v. Carson***, 913 A.2d 220, 245 (Pa. 2006). Here, evidence of Moore's alleged mental health problems was not within the exclusive control of the Commonwealth, and Appellant fails to establish that he could not have ascertained Moore's mental health problems with the exercise of due diligence.

Moreover, assuming *arguendo* that Appellant could not have discovered this information through the exercise of due diligence and that the Commonwealth improperly withheld it, we conclude that such a failure to disclose does not equate to a reasonable probability that the result of the trial would have been different if the evidence had been produced. As previously noted, trial counsel diligently cross-examined Moore and

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[3] "It is well settled that where the result is correct, an appellate court may affirm a lower court's decision on any ground without regard to the ground relied upon by the lower court itself." ***Commonwealth v. Singletary***, 803 A.2d 769, 772-73 (Pa. Super. 2002) (quoting ***Boyer v. Walker***, 714 A.2d 458, 463 n.10 (Pa. Super. 1998)).

thoroughly attacked her credibility along the way. Counsel impeached Moore by questioning her about, *inter alia*, her drug use, her criminal history, and the alleged deal she received for testifying against Appellant. For these reasons, this claim fails.

Appellant next claims that the Commonwealth violated ***Brady*** by failing to disclose impeachment material concerning Kevin Jones. Appellant failed to include this claim in his PCRA petition; it, therefore, is waived. ***See Wharton***, *supra*.

Appellant also makes a ***Brady*** claim regarding Eddie Gilbert. In his PCRA petition, Appellant mentioned that another Commonwealth witness, Herman Carroll, alleged that Gilbert was a DEA informant. In his brief to this Court, Appellant again claims that Gilbert was a DEA informant and that the Commonwealth violated ***Brady*** by not disclosing this information. Other than citing to "Exhibit D-67,"[4] Appellant fails to indicate what evidence of record supports his claim. The claim, therefore, warrants no further consideration.

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[4] We were unable to locate an exhibit marked D-67. The notes of testimony indicate that the last exhibit admitted on Appellant's behalf was Exhibit D-66. The PCRA court granted Appellant permission to supplement the record after the PCRA hearing had occurred. Appellant then supplemented the record with Eddie Jones' DEA records, which also were designated Exhibit D-66.

Appellant argues that the Commonwealth failed to disclose the pressure it used to secure Sean Hess' testimony. Appellant waived this claim by failing to include it in his PCRA petition. ***See Wharton***, *supra*.

Appellant raises a ***Brady*** claim with regard to Corey Jones. In his PCRA petition, Appellant claimed that Corey Jones was an informant and that police secured a false statement from him by threatening to arrest him. He repeats this claim in his brief to this Court.

Appellant fails to adequately clarify how this alleged failure to disclose amounts to a ***Brady*** violation. Corey Jones did not testify at Appellant's trial, and Appellant does not explain how evidence that the police coerced a statement from Corey Jones is material to his guilt or punishment. Consequently, this claim warrants no further consideration.

The next Commonwealth witness to which Appellant attaches a ***Brady*** claim is Herman Carroll. In his brief to this Court, Appellant asserts that Carroll gave a statement to police because he believed he was a suspect in Appellant's case. According to Appellant, Carroll, therefore, had a motive to cast blame on Appellant. Appellant contends the Commonwealth violated ***Brady*** by failing to disclose this impeachment material.

Appellant did not specifically raise this claim in his PCRA petition; it, therefore, arguably is waived. To the extent that Appellant sufficiently preserved the claim, it is meritless. At trial, Carroll testified on direct

examination that Appellant informed him that his name came up when police questioned Appellant about the murder and robbery. N.T., 5/9/95, at 370. On cross-examination, trial counsel questioned Carroll as to why he spoke with the district attorney regarding this case, and Carroll insisted that he spoke to the district attorney in order to clarify why his name was coming up in connection with the murder and robbery for which Appellant was arrested. ***See id.*** at 376-78. Thus, the jury was fully aware of the fact that Carroll thought he was a suspect in Appellant's case and, therefore, that Carroll had a motive to implicate Appellant. Consequently, no possibility exists that the disclosure of this information would have changed the outcome of the proceedings.

Appellant claims that the Commonwealth violated ***Brady*** by failing to correct the false trial testimony of Bernard McLean. In his supplement to the amended PCRA petition, Appellant raised an ineffective assistance of counsel claim regarding McLean's trial testimony; however, Appellant failed to raise a ***Brady*** claim regarding McLean. Consequently, he waived his current claim. ***See Wharton***, *supra*. In sum, we conclude that Appellant's ***Brady*** claims, considered individually or cumulatively, do not warrant relief.

Appellant next claims that he is entitled to a new trial on the basis of newly/after-discovered evidence.[5] The entirety of Appellant's argument in support of this claim is as follows:

> The recanted testimony of Sean Hess, Edward Jones, and Paulinda Moore and the discovered impeachment materials including DEA reports, Cyril Thomas' Juvenile Files, the Paulinda Moore mental health reports and Court Ordered mental health evaluation, Kevin Jones' court documents, and the testimony of the police officers constitute newly-discovered evidence that entitle [Appellant] to a new trial. Commonwealth v. McCracken, 540 Pa. 541, 659 A.2d 541 (1995).

Appellant's Brief at 34-35.

Appellant's claim suffers from several maladies. First, it is woefully undeveloped. ***Commonwealth v. Snyder***, 870 A.2d 336, 342 (Pa. Super. 2005) ("Finally, we note appellant's argument on the issue is utterly undeveloped. Undeveloped claims are waived.") (citation omitted). Secondly, the PCRA court did not believe the witnesses' recantation testimony.[6] PCRA Court Opinion, 5/23/02, at 15 ("It does not require a great deal of analysis or evaluation to conclude that all of the testimony of these recanting witnesses in the PCRA proceeding is fabricated."). Lastly,

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[5] In between his ***Brady*** claims and his after-discovered evidence claim, Appellant raises a hodgepodge of undeveloped claims, including claims of ineffective assistance of counsel, which we refuse to extricate and develop on his behalf.

[6] "Credibility is at the sole discretion of the fact-finder, who is entitled to believe all, part or none of the evidence presented." ***Commonwealth v. McCloskey***, 835 A.2d 801, 807 (Pa. Super. 2003).

the "impeachment materials" listed by Appellant cannot serve as a basis for granting a new trial under an after-discovered evidence claim. ***Commonwealth v. McCracken***, 659 A.2d 541, 545 (Pa. 1995) ("After-discovered evidence can be the basis for a new trial if it . . . will not be used solely to impeach the credibility of a witness[.]") (citation omitted). For these reasons, this claim warrants no relief.

Appellant claims that trial counsel was ineffective for failing to adequately investigate and impeach the Commonwealth's witnesses and for failing to adequately discredit the police's investigation of this case.[7] Appellant's claim relates to the following persons: Eddie Jones, Glenn Pollard, Cyril Thomas, Paulinda Moore, Kevin Jones, Bernard McLean, Kenneth Johnson, Michael Segal, and Diane Hess. Within the context of an

---

[7] It is well-settled that trial counsel is assumed to have provided effective assistance. ***Commonwealth v. Rathfon***, 899 A.2d 365, 369 (Pa. Super. 2006). In order for Appellant to prevail on his claims of ineffective assistance of counsel, he must demonstrate that: (1) the underlying claims are of arguable merit; (2) trial counsel had no reasonable strategic basis for his or her actions or inactions; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Id.*** "The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail." ***Commonwealth v. Mallory***, 888 A.2d 854, 858 (Pa. Super. 2005) (citing ***Commonwealth v. Rush***, 838 A.2d 651 (Pa. 2003)).

We further note that, where Appellant raises layered claims of ineffective assistance of counsel, if he fails to prove any of the three prongs discussed above as to trial counsel's ineffectiveness, then "he will have failed to establish the arguable merit prong of the layered claim of appellate counsel's ineffectiveness, and the claim fails." ***Commonwealth v. Reyes***, 870 A.2d 888, 896 (Pa. 2005).

ineffective assistance of counsel claim, Appellant's PCRA petition makes no reference to Thomas, Kevin Jones, Johnson, or Diane Hess. Accordingly, these portions of Appellant's claim are waived. ***See Wharton***, *supra*.

With respect to Eddie Jones, in his appellate brief, Appellant asserts that, at the PCRA hearing, trial counsel testified that he did not investigate why DEA agents were present when Jones gave his statement to the police regarding Appellant. According to Appellant, had trial counsel made such an investigation, he would have discovered that Jones received $1,500 for testifying against Appellant.

Appellant failed to raise this specific claim in his PCRA petition. Moreover, as noted above, at the PCRA hearing, no one testified that Jones received $1,500 for his testimony. For these reasons, this claim warrants no further consideration.

As to Pollard, in the supplement to his amended PCRA petition, Appellant averred that, during discovery, the Commonwealth provided to trial counsel a letter from Pollard, which he had sent to the district attorney's office. According to the PCRA petition, in the letter, Pollard offered to testify against Appellant. Appellant noted that, while Pollard's trial testimony revealed that he wanted to help himself by contacting the district attorney's office and that he had cooperated with other investigations, neither the letter nor any of its contents were presented to the jury. Based on the

above, Appellant claimed trial counsel was ineffective for failing to cross-examine Pollard regarding the letter and that previous counsel were ineffective for failing to raise this claim.

The PCRA court addressed this claim as follows:

> It is also asserted that [trial counsel] was ineffective for his failure to cross-examine Glenn Pollard respecting a letter Pollard had written to the District's Attorney's Office in which he volunteered to give evidence against [Appellant] ostensibly to get a deal for himself. At that time Pollard was an inmate at the Bucks County Prison. Although [trial counsel] was aware of this letter, he chose not to use it to cross-examine Pollard because it had other matters contained in it which were damaging to [Appellant], not the least of which was a statement about a prior shooting which [Appellant] had committed. He likewise states in that letter that the victim had been like a grandfather to him and he did not want to see [Appellant] get away with the murder. Clearly, this explanation for the failure to use the letter had a reasonable strategic basis designed to advance the interests of [Appellant].

PCRA Court Opinion, 5/23/02, at 19. However, later in its opinion, the court inexplicably stated that, while trial counsel did not admit Pollard's letter into evidence, counsel did cross-examine Pollard with respect to it. ***Id.*** at 23.

In his brief to this Court, Appellant correctly point out that, contrary to the PCRA court's opinion, the notes of testimony reveal trial counsel did not cross-examine Pollard with respect to the letter he sent to the district attorney's office. Appellant, however, offers scant advocacy concerning the court's determination that counsel employed a reasonable strategy by not impeaching Pollard with the letter.

At the PCRA hearing, trial counsel testified in the following manner as to Pollard's letter:

> No, I don't remember any reason for not using it, no. I know I -- looking at it, I can surmise why I didn't use the letter. . . .
>
> And that would be the second page where he talks about a prior shooting that [Appellant] had, so I don't think I would have wanted to have that letter known to the jury or certainly not have the prior shooting known to the jury.

N.T., 3/27/01, at 221. Counsel went on to state that he could not recall whether he asked the trial court if he could have the letter redacted to exclude mention of the shooting.

This testimony is the only evidence presented by Appellant regarding counsel's basis for not impeaching Pollard with his letter. This evidence does not demonstrate that trial counsel had no reasonable strategic basis for his inaction. Consequently, Appellant has failed to meet his burden of proof with regard to this prong of the ineffective assistance of counsel standard. Even if he had met his burden of proof as to this prong, he still would not be entitled to relief.

At trial, during direct examination, Pollard admitted that he contacted the district attorney's office concerning this case. He further conceded that, at that time, he had open charges and, thus, contacted the district attorney's office regarding Appellant in order the help himself. Because it was revealed during direct examination that Pollard contacted the district

attorney in order to broker a deal as to his pending charges, Appellant cannot demonstrate that he suffered prejudice due to counsel's failure to impeach Pollard with a letter divulging the same information. For these reasons, this portion of Appellant's claim fails.

As to Paulinda Moore, in his appellate brief, Appellant contends that trial counsel provided ineffective assistance by failing to investigate and present evidence of Moore's unstable mental health. Appellant did not specifically raise this issue in his PCRA petition; moreover, as with most of his arguments, Appellant fails to adequately develop his argument under this claim. To the extent it can be argued that Appellant preserved this claim for appellate review, it is without merit.

As we have mentioned above, trial counsel diligently cross-examined Moore and thoroughly attacked her credibility along the way. Counsel impeached Moore by questioning her about, *inter alia*, her drug use, her criminal history, and the alleged deal she received for testifying against Appellant. Appellant fails to demonstrate but for counsel's failure to further impeach Moore with evidence of her mental health problems there is a reasonable probability that the outcome of the proceedings would have been different. In other words, Appellant has not established he was prejudiced by this alleged omission on the part of trial counsel.

With respect to McLean, Appellant merely presents the following in his appellate brief:

> [Trial counsel] failed to cross-examine Mr. McLean on a deal he received in consideration for cooperating against Appellant. Mr. McLean testified at the preliminary hearing that he received assistance resolving a bench warrant after agreeing to cooperate with the Commonwealth (even though Mr. McLean had been picked up out of state). Preliminary Hearing Notes of Testimony ("PH NT") 94-98. This flatly contradicted his testimony at trial where he denied getting any consideration for his statement. N.T. 3/9/95 at 248.

Appellant's Brief at 37-38. Appellant has waived this claim by failing to adequately develop it. We further note that Appellant's claim is dependent in part upon McLean's preliminary hearing testimony. Appellant provides a less than adequate citation to the notes of testimony from the preliminary hearing, and we were unable to locate these notes of testimony in the record. Moreover, the PCRA court's inventory of the record does not reflect that these notes of testimony were included in the certified record.

Next, Appellant asserts:

> Added to all of the above failures was trial counsel's acknowledged mistake in failing to cross-examine eyewitness Michael Segal regarding the fact that he had *not* identified [Appellant] at a line up: counsel simply forgot. Mr. Segal's testimony was critical to the Commonwealth's case, because it directly tied Appellant to the crime. He testified that he saw a person matching Appellant's description shoot the victim. NT 3/8/95 at 78-79. When the Commonwealth's second "eyewitness," Alfonso Colon, testified, he admitted that he had not identified Appellant at a lineup. N.T., 3/8/95 at 110. Counsel's failure to secure the same information from Mr. Segal is significant.

Appellant's Brief at 38 (emphasis in original).

Appellant fails to state where trial counsel acknowledged this mistake. A review of the PCRA hearing's notes of testimony reveals no such acknowledgment.[8] Moreover, while Appellant states that counsel's "failure to secure the same information from Mr. Segal is significant," he fails to further develop his claim. Thus, Appellant has waived this undeveloped claim. For all of the reasons expressed above, Appellant is due no relief under his first issue.

Under his second issue, Appellant asserts that, during trial, the prosecutor repeatedly elicited the fact that Appellant used the term "white devil" to refer to Caucasians. Appellant further states that in ***Dawson v. Delaware***, 503 U.S. 159 (1992), the United States Supreme Court held that the First Amendment prevents the state from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried. In terms of ***Dawson***'s applicability to the guilt phase of criminal trials, Appellant merely offers the following:

> In Dawson, the United States Supreme Court found that this material required resentencing when it was introduced at the

[8] Trial counsel testified at the PCRA hearing that he did not believe Segal identified Appellant at the line up; counsel did not acknowledge that he mistakenly failed to cross-examine Segal concerning his failure to identify Appellant. The PCRA court did cut short PCRA counsel's line of questioning with regard to Segal. Appellant, however, does not assign any error to the court's interruption.

> sentencing phase of the case. *A fortiori*, it is reversible error, when, as here, it is introduced in the guilt/innocence phase of [Appellant's] capital trial. Consequently, the prosecutor's actions violated the 1st, 6th, 8th, and 14th Amendments.

Appellant's Brief at 43 (emphasis in original). Appellant contends all previous counsel were ineffective for failing to litigate this claim. In terms of addressing trial counsel's basis for not objecting to the questioning which led to the revelation that Appellant referred to Caucasians as "white devils," Appellant simply asserts, "There was no conceivable reason to not have this inflammatory rhetoric kept out of the trial." ***Id.*** at 43.

Appellant fails to develop an adequate argument regarding the applicability of the ***Dawson*** to this matter. Furthermore, Appellant failed to question trial counsel at the PCRA hearing regarding why he did not object to the prosecutor's "white devil" lines of questioning. As such, Appellant has failed to demonstrate that trial counsel had no reasonable strategic basis for his inactions. For these reasons, this claim fails.

Under his third issue, Appellant contends the Commonwealth engaged in prosecutorial misconduct when, without a good faith basis in fact, the prosecutor questioned Appellant's alibi witness, Darnell Thompson, about whether Thompson had told a police officer that Appellant committed the

murder.[9] Appellant claims all previous counsel were ineffective for failing to litigate this claim. In terms of trial counsel's strategy for not objecting to the prosecutor's question, Appellant baldly asserts, "There was no conceivable strategic or tactical reason for counsel's inaction." Appellant's Brief at 45.

While Appellant may think there was no conceivable strategic basis for not objecting to this question, Appellant failed to question trial counsel at the PCRA hearing as to why he chose not to object. Thus, Appellant has failed to prove that trial counsel had no reasonable strategic basis for his inaction.

Under his fourth issue, Appellant maintains that he is entitled to a new trial because the Bucks County jury selection system denied him a jury from a fair cross-section of the community and that prior counsel were ineffective for failing to litigate this claim.[10] Appellant fails to indicate what evidence, if

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[9] The question and answer pertinent to this issue are as follows:

> Q: You never told Detective Gergal, did you, that [Appellant] committed the shooting in Bristol?
>
> A: I don't recall that.

N.T., 3/10/95, at 505.

[10] It is difficult to ascertain to what extent Appellant preserved this issue for appellate review. This claim first appears on page 116 of his PCRA petition. The claim continues past page 117; however, pages 118 through 122 are missing from the petition.

any, he presented to the PCRA court in support of this issue. ***See*** Pa.R.A.P. 2119(c) ("If reference is made to . . . evidence, . . . the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appears . . .."). For instance, in footnote 27 of his appellate brief, Appellant states that, according to voter registration information and recollections of witnesses, no one in Appellant's jury was black. Appellant provides no indication as to what portions of the record support this statement. For these reasons, we dismiss this claim.

Appellant next claims that, when the police arrested him, they unlawfully seized his car without a warrant. According to Appellant, prior counsel were ineffective for failing to litigate this claim.

Appellant fails to explain what impact, if any, the seizure of his car had on his trial. Moreover, at the PCRA hearing, PCRA counsel asked trial counsel whether he thought about litigating the seizure of the vehicle, and trial counsel answered, "No." N.T., 4/27/01, at 246. PCRA counsel did not bother to pursue the issue further by asking trial counsel why he did not consider litigating this issue. Thus, Appellant has failed to demonstrate that trial counsel had no reasonable strategic basis for his inaction.

Under his sixth issue, Appellant avers that the prosecutor knowingly presented false testimony from Michael Segal, the only eyewitness to the

shooting. Appellant points out that Segal's description of the shooting, including his description of the assailant, changed over time. Appellant insists that he was prejudiced by Segal's testimony because it altered in a way more favorable to the Commonwealth. Appellant further maintains that previous counsel were ineffective for failing to litigate this claim. Appellant argues that trial counsel should have objected to Segal's change in testimony and sought a mistrial and curative instruction.[11]

We can make no sense of this argument. Simply because a Commonwealth's witness' testimony varies from his previous statements does not mean the Commonwealth knowingly presented false testimony. Moreover, Segal testified at trial regarding his recollection of the shooting. His trial testimony differed slightly from statements he had given in the past. Trial counsel impeached Segal with his prior inconsistent statements. Thus, trial counsel appropriately attempted to undermine Segal's trial testimony. This issue is meritless.

Appellant's next issue is similarly confusing. At trial, Detective Randy Morris was asked whether Appellant ever posed a question to another detective. Detective Morris answered in the affirmative, and when asked what the question was, the detective indicated that he would probably have

[11] Appellant does not specify what theory he believes counsel's objection should have been grounded, nor does he propose a curative instruction that counsel should have sought.

to review his notes in order to remember exactly what Appellant had said. The detective then stated, "Well, looking at my notes if you go in and rob someone and shoot, or if he pulls a gun on you and you shoot him, what can you get if the fellow lies on the floor and dies?" N.T., 3/10/95, at 419.

In his PCRA petition, Appellant claimed that Detective Morris' notes were never turned over to trial counsel, thus depriving counsel of the opportunity to prepare for trial. According to the petition, Appellant was entitled to these notes, and the Commonwealth's failure to turn this material over to trial counsel violated Appellant's right to a fair trial and confrontation under the Sixth Amendment, his right to due process under the Fourteenth Amendment, his rights under the Eighth Amendment, and his pre-trial discovery rights under Pennsylvania law. Appellant went on to make several bald allegations of ineffective assistance of counsel.

At the PCRA hearing, PCRA counsel pressed Detective Morris regarding the notes he referred to during trial. Admittedly, Detective Morris' testimony was unclear, but in the end, he stated that the notes to which he referred at trial actually was a report authored by another detective. The PCRA court summarily rejected this claim, referring to it as a trial issue.

In his appellate brief, Appellant primarily focuses on the credibility of Detective Morris' PCRA hearing testimony; he, however, does very little to develop his claim that the Commonwealth's failure to turn over Detective

Morris' notes violated his rights. In fact, the only law Appellant offers in support of this claim is a footnote which contains three citations to cases. The footnote does not explain the significance of the cases cited.

In any event, within this underdeveloped claim, Appellant fails to adequately explain, let alone prove, how he was prejudiced by trial counsel's failure to request Detective Morris' notes. In this vein, Appellant argues that "the verdict might have been different had counsel possessed the notes and performed a more effective cross-examination to show how unbelievable the testimony about the hypothetical question was, as Detective Morris himself showed at the PCRA hearing." Appellant's Brief at 54. Our review of the trial transcripts reveals trial counsel adequately cross-examined Detective Morris as to the hypothetical question allegedly posed by Appellant. ***See*** N.T., 3/10/95, at 439-42.

For instance, trial counsel posed the following question to the detective:

> So that after being questioned for about two and one-half hours about what he knows about the crime, [Appellant] makes a statement that seems to indicate that he knows something and you don't ask him any further questions?

Id. at 441. Detective Morris answered this question in the negative. Indeed, trial counsel was able to establish that no one further questioned Appellant about his seemingly damaging hypothetical question, thus calling into question whether, in fact, Appellant asked such a question.

Consequently, in addition to offering an undeveloped argument in support of his underlying claim, Appellant has failed to demonstrate that, but for trial counsel's failure to request Detective Morris' notes, there is a reasonable probability that the outcome of the proceedings would have been different.

Under his eighth issue, Appellant maintains that he was deprived of due process when, during the guilt-phase jury instructions, the trial court stated:

> Now, as you also know, if you decide that the defendant is guilty of murder in the first degree, there will then be another proceeding and then you are going to have to decide what the penalty is, the penalty being either life or death.

N.T., 3/13/95, at 59. Appellant contends that trial counsel was ineffective for failing to object to this allegedly improper statement and that all previous counsel were ineffective for failing to litigate this claim.

Appellant again merely baldly asserts that trial counsel had no strategic basis for failing to object to the instruction. He did not question trial counsel about the instruction; therefore, he failed to meet his burden of proving by a preponderance of the evidence that counsel lacked a reasonable strategic basis for not objecting to the instruction. As such, this claim fails.

Appellant's next issue relates in part to the PCRA court's refusal to grant his motion for a new trial based upon his claim that he was incompetent to stand trial. As noted above, after the PCRA court disposed of

this case and while the parties' appeals from that disposition were pending in our Supreme Court, the United States Supreme Court decided ***Atkins***. Due to the ***Atkins*** decision, the parties to this matter sought and obtained a remand to the PCRA court for a determination as to whether Appellant is mentally retarded.

During the remand hearing, PCRA counsel asked Appellant's mental retardation expert whether, in his opinion, Appellant should have been tested for competency to stand trial. The Commonwealth immediately objected, and the PCRA court sustained the objection. After the PCRA court determined that Appellant is mentally retarded, PCRA counsel made an oral motion for a new trial. Counsel essentially maintained that Appellant's mental retardation suggests that he was incompetent to stand trial. In response, the Commonwealth argued that the motion was beyond the scope of the Supreme Court's remand and that Appellant waived the issue by failing to include it in his PCRA petition. The PCRA court denied the motion.

In his brief to this Court, Appellant baldly asserts that his due process rights were violated when the PCRA court refused to allow PCRA counsel to question the mental retardation expert regarding his competency to stand trial and that "Appellant should be granted a new trial, or at least be afforded a hearing at which he may present evidence specifically relevant to competency." Appellant's Brief at 60.

Appellant cannot be granted relief based upon his unsupported assertions regarding the PCRA court's refusal to grant him a new trial and the court's decision to sustain the Commonwealth's objection to the questioning of the mental retardation expert on the topic of competency. ***See*** Pa.R.A.P. 2119(a) (stating that arguments must be supported by citation to pertinent authority). By way of further comment, the question posed to the mental retardation expert concerning Appellant's competency to stand trial simply was irrelevant to the issue to be decided at the remand hearing, *i.e.*, the question was not probative of whether Appellant is mentally retarded for purposes of ***Atkins***. Moreover, the claim underlying Appellant's request for a new trial clearly was outside of the scope and purpose of the Supreme Court's remand. ***See Gibson II***, 925 A.2d at 169 ("In light of the United States Supreme Court's intervening decision in [***Atkins***], the parties sought and obtained a remand to the post-conviction court for a determination as to whether Appellant is mentally retarded."); ***see also*** PCRA Court Opinion, 12/20/04 at 1-2 ("As a result of joint petitions by the Commonwealth and [Appellant] to the Pennsylvania Supreme Court, it remanded the matter to this [c]ourt for a determination of whether [Appellant] is mentally retarded.").

Under this issue, Appellant also contends that trial counsel was ineffective for failing to investigate Appellant's competency and that

appellate counsel was ineffective for failing to litigate trial counsel's ineffectiveness on direct appeal. Appellant waived these contentions, as there is no indication that he presented them to the PCRA court. Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Appellant, however, attempts to avoid waiver by asserting that PCRA counsel was ineffective for failing to pursue the competency issue. In other words, PCRA counsel raises the effectiveness of his representation of Appellant.

In addressing a similar situation, our Supreme Court stated as follows:

> We find guidance from the standards developed for situations where counsel alleges his own ineffectiveness on appeal, and where claims of ineffectiveness of counsel are raised for the first time on direct appeal. When an appellant presents a claim of arguable merit, and there has been no evidentiary hearing in the trial court, we ordinarily remand to permit the parties to develop the record. Where, however, it is clear from the existing record that: (1) counsel was ineffective, or (2) the ineffectiveness claim is meritless, then we will rule accordingly without remanding.

Commonwealth v. Pursell, 724 A.2d 293, 303-04 (Pa. 1999) (citations omitted).

Appellant's underlying claim essentially is that he was incompetent to stand trial. This claim potentially has arguable merit. However, the parties did not litigate the claim during the evidentiary hearing, and the existing record is unclear as to whether all Appellant's counsel were ineffective for failing to litigate Appellant's competency claim. Consequently, we vacate

the portion of the May 23, 2002, order in so much as it denied Appellant's request for a new trial and remand the matter to the PCRA court for a hearing limited to Appellant's layered claim of ineffective assistance of counsel for failing to investigate Appellant's competency to stand trial.[12]

Under his tenth issue, Appellant contends that several errors occurred which render his arrest illegal. Appellant maintains that, upon remand from the Supreme Court, he filed a motion to expand the hearing to include his contentions regarding the illegality of his arrest, and the PCRA court erroneously denied the motion. Appellant goes on to assert that all previous counsel were ineffective for failing to litigate this claim.

Appellant supplies no argument in support of his claim that the PCRA court erred by denying his motion to expand the scope of the remand hearing. In any event, similar to his last claim of PCRA court error, Appellant's attempt to argue his illegal arrest claim clearly was outside the

[12] Because PCRA counsel has alleged his own ineffectiveness, we direct the PCRA court to appoint new counsel on remand. ***See Commonwealth v. Bond***, 819 A.2d 33, 39 n.2 (Pa. 2002) ("To the extent that present counsel raise their own ineffectiveness, the law generally is that this Court will remand to appoint new counsel unless counsel's self-accusation is clearly meritorious or clearly meritless.").

scope of the purpose of the remand. As to Appellant's layered claim of ineffective assistance of counsel, we find that Appellant has failed to properly develop his underlying claim that his arrest was illegal. Appellant fails to provide meaningful citations to support his argument. For instance, Appellant states, "These errors violated [Appellant's] rights under the Fourth, 6th, 8th and 14th Amendments to the Unites States Constitution and that [sic] he deserves either a new trial [sic]." Appellant's Brief at 63. This statement is unsupported by citation to authority; thus, it amounts to nothing more than a mere bald assertion. For these reasons, Appellant's tenth issue fails.

Under his penultimate issue, Appellant claims that trial counsel rendered ineffective assistance by failing to conduct an adequate *voir dire*. This claim fails on its face. Appellant has not provided citation to pertinent authority in support of his underlying claim. Appellant failed to provide any citation to the PCRA hearing as to where he attempted to prove his claim. He merely baldly asserts that counsel had no strategic basis for conducting the *voir dire* as he did. Appellant does not even baldly assert that he was prejudiced by counsel's allegedly poor performance during the *voir dire*.

Under his last issue, Appellant maintains he is entitled to relief from his conviction and sentence due to the cumulative effect of the errors he has

raised in this appeal. We have found no errors; consequently, Appellant's last issue warrants him no relief.

Order dismissing Appellant's PCRA petition vacated to the extent that it denied Appellant's request for a new trial. Orders denying Appellant a new trial and Appellant's request to expand the PCRA hearing affirmed. Remanded with instructions.[13] Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: JUL 8 2008

[13] To be clear, the remand is for the sole purpose of a hearing on Appellant's layered claim of ineffective assistance of counsel for failing to investigate his competency to stand trial. If the PCRA court determines that Appellant is due no relief under this claim, then the court should enter an order denying Appellant's PCRA petition.

APP-E

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. CP-09-CR-0005119-1994
	:	584 EDA 2014
vs.	:	
	:	
JEROME GIBSON	:	

OPINION

I. INTRODUCTION

Defendant Jerome Gibson ("Gibson" or "Defendant") appeals to the Superior Court of Pennsylvania from this Court's denial of his Post-Conviction Relief Act ("PCRA") petition. We file this Opinion pursuant to Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") 1925(a).

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this case have previously been set forth at length by our now deceased colleague, the Honorable Isaac S. Garb, in his Memorandum Opinion and Order dated June 12, 1995.[1] Briefly, on September 29, 1994, Defendant robbed and then intentionally killed Robert Berger, a seventy-six (76) year old employee of a retail establishment owned by his son in Bristol Borough, Bucks County, PA.

On March 13, 1995 Defendant was convicted by a jury of Murder of the First Degree,[2] two (2) counts of Robbery,[3] Theft by Unlawful Taking,[4] Receiving Stolen Property,[5] and

[1] Judge Garb was a Common Pleas Judge for over thirty-four (34) years in Bucks County and was both the trial judge for Gibson's original jury imposed death sentence and the PCRA judge for Defendant's first PCRA, finding Gibson mentally disabled and sending his case back to the Pennsylvania Supreme Court pursuant to Atkins v. Virginia wherein the death sentence was converted to life from which conviction Gibson now appeals.
[2] 18 Pa.C.S. § 2502(a).
[3] 18 Pa.C.S. § 3701(a)(1)(i)-(ii).
[4] 18 Pa.C.S. § 3921(a).
[5] 18 Pa.C.S. § 3925(a).

Possession of an Instrument of Crime.[6] On March 14, 1995 the jury returned a verdict of death on the conviction of murder. On March 24, 1995 Defendant filed a Motion for a New Trial and/or in Arrest of Judgment, which was denied on June 12, 1995.[7]

On August 24, 1995, Defendant was formally sentenced to death on First Degree Murder and received a consecutive sentence of not less than ten (10) nor more than twenty (20) years' incarceration on the Robbery counts. Thereafter, on December 4, 1995 Defendant filed a Notice of Appeal to the Pennsylvania Supreme Court. On November 17, 1998 the Supreme Court affirmed Defendant's judgment of sentence. Commonwealth v. Gibson, 720 A.2d 473 (Pa. 1998). Writ of certiorari to the United States Supreme Court was denied on October 4, 1999. Commonwealth v. Gibson, 120 S.Ct. 132 (1999).

Defendant filed his first pro se PCRA petition on November 1, 1999. He was thereafter appointed current counsel, Samuel B. Angell, to represent him on his appeal. Furthermore, Defendant's execution was stayed until resolution of the pending litigation.[8] An Amended counseled PCRA petition was filed on November 3, 2000. On March 9, 2001 Defendant filed a Supplement to the Amended Petition and a Second Supplement followed on April 24, 2001. Following counseled hearings on Defendant's claim on April 27, 2001 and May 29, 2001,[9] by Opinion and Order dated May 22, 2002, the court ordered that Defendant's application for a new trial on the degree of guilt phase was denied; however, it was also ordered that his application for

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[6] 18 Pa.C.S. § 907(a).

[7] Defendant was represented by John Fioravanti, Esquire, and David Knight, Esquire, respectively, during his trial and direct appeal.

[8] On March 9, 1999, then Pennsylvania Governor Thomas Ridge issued a death warrant in the case, scheduling Defendant's execution for May 6, 1999. The Pennsylvania Supreme Court issued an Order staying the execution on April 1, 1999. Governor Ridge signed a second death warrant on October 13, 1999, which was stayed in response to Defendant's Emergency Motion for Stay of Execution.

[9] Supplemental documentary evidence was offered by both the Commonwealth and Defendant prior to the ultimate May 22, 2002 Order. Although on August 22, 2001 we granted Defendant leave to file an Amended PCRA Petition based on these additional documents, Defendant failed to do so in the requisite ninety (90) day time period given.

a new trial on the penalty phase was granted. Defendant filed a Notice of Appeal to the Supreme Court on June 19, 2002.

Both the Commonwealth and Defendant filed a joint motion for remand to the Superior Court, which was granted by the Supreme Court on September 27, 2002.

On March 16, 2004 Defendant filed a Petition to expand the record to include the circumstances of Defendant's alleged "false arrest."[10] This court denied this petition on December 28, 2004. On this same date, Defendant's motion to vacate death sentence and impose a life sentence, motion for a new trial based on mental health finding, and motion for a new trial because of incompetency were also denied. Defendant filed a Notice of Appeal to the Supreme Court on January 6, 2005.

During the pendency of these first PCRA proceedings, the Commonwealth stipulated to Defendant's request to remand for an evidentiary hearing concerning the issue of his alleged mental retardation. A hearing was held on April 21, 2004. On November 24, 2004 Judge Garb found that Defendant met the criteria for mental retardation as that term is defined by Atkins v. Virginia, 536 U.S. 304 (2002), and, therefore, on June 26, 2007 the Pennsylvania Supreme Court modified Defendant's sentence to one of life imprisonment.[11] See Commonwealth v. Gibson, 925 A.2d 167 (Pa. 2007).

Following this, the Pennsylvania Supreme Court transferred Petitioner's appeal of the denial of his PCRA claims challenging his First Degree Murder conviction to the Superior Court. On July 8, 2008, in an unpublished Memorandum Opinion, the Superior Court affirmed our denial of Defendant's PCRA in all respects with one exception: our denial of Defendant's claim that he was incompetent to stand trial was vacated and remanded for a hearing. See

[10] A second petition requesting same was filed on April 5, 2004.
[11] Based on the limited scope of remand, Judge Garb declined Defendant's request for imposition of life sentence.

Commonwealth v. Gibson, 959 A.2d 962 (Pa. Super. 2008) (table). New counsel was appointed on October 23, 2008. Defendant filed a Petition for Allowance of Appeal, which was denied on February 27, 2009. See Commonwealth v. Gibson, 966 A.2d 570 (Pa. 2009) (table).

On May 28, 2009, new counsel, David Langfitt, Esquire, and Brian Sullivan, Esquire, entered their appearance. A hearing was held on November 5, 2009 and Gibson withdrew his remaining PCRA claim challenging his competency at trial as well as the layered ineffectiveness claim regarding same which terminated state post-conviction proceedings. On November 16, 2009 we granted leave for Attorneys Langfitt and Sullivan to withdraw their appearance.

On January 29, 2010, Defendant filed a Habeas Corpus Petition in the United States District Court for the Eastern District of Pennsylvania. Thereafter, he filed a Motion for Discovery, which was granted by the federal court on September 16, 2011. The federal court's order directed the Commonwealth to "search [the prosecutor's] entire file in this case for any information that qualifies under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny and disclose to Petitioner any *Brady* information not previously provided to Petitioner." In compliance therewith, the Commonwealth provided over 990 pages of documents to Defendant and an affidavit of counsel. In this affidavit, Deputy District Attorney Karen A. Diaz of the Bucks County District Attorney's Office asserted that: "[w]hile the undersigned believes that all discoverable and/or *Brady* materials have been previously provided to Petitioner through his trial and/or post-conviction counsel, either formally or informally, in an abundance of caution, the undersigned has made, and is forwarding to Petitioner's counsel, a complete copy of all discoverable and *Brady* materials contained within the Gibson file."

In addition to this, the Commonwealth provided copies of police reports of the interviews of Bernard McLean and Eddie Gilbert taken from the file of an unrelated criminal homicide

case[12] and all police/incident reports involving Commonwealth trial witness Edward Jones from 1993 through 1995 provided by another police department, Bristol Township, per Defendant's request.

On December 13, 2011 Defendant filed the instant "Protective 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." (referred hereinafter as "Protective Petition"). In this Petition, Defendant asserted that the Commonwealth's October 14, 2011 production of documents form the basis of the claims brought therein because they contain "highly relevant exculpatory evidence." Defendant claims that as a consequence he was denied his right to Due Process by the Commonwealth's failure to disclose this information prior to trial and trial counsel exhibited ineffective assistance of counsel due to his failure to discover and present this evidence in order to properly impeach Commonwealth witnesses at trial.

Throughout his Petition, Defendant undergoes the exhaustive process of listing numerous Commonwealth witnesses or potential witnesses at his 1995 trial, attempting to establish why the arguable new "*Brady*" information more recently provided could have been used to impeach said witnesses.

In response, on January 17, 2012, the Commonwealth filed a "Motion to Dismiss without a Hearing Second PCRA Action as Time Barred and as Otherwise Not Cognizable." After a hearing was scheduled, the Commonwealth filed a Motion to Limit PCRA Hearing on March 29, 2012. Defendant filed a response in opposition on April 10, 2012. Upon review of the foregoing motions, we ordered that the PCRA hearing shall initially proceed on the jurisdictional issue and, if permitted, shall thereafter proceed on the merits.

[12] Commonwealth v. Turner Rogers, No. CP-09-CR-0005296-6-1994.

On November 7, 2012 Defendant filed a Motion to Inspect the Prosecution file before the hearing. The Commonwealth filed a Motion to Deny Petitioner's Request to Inspect the Commonwealth's File on November 8, 2012. We denied Defendant's motion.

The Commonwealth filed an Amended Certification to the Commonwealth's Motion to Deny Petitioner's Request to Inspect the Commonwealth's File on November 13, 2012.

Hearings were held on November 19, 2012 and January 4, 2013, after which we took the matter under advisement and ordered both parties to submit briefs regarding the jurisdictional issue. Defendant claims that the following incident reports would have provided impeachment evidence at Defendant's trial had they been discovered. We will specifically address the relevant evidence submitted during these two hearings in turn below.

Based on the foregoing, we denied Petitioners Protective Petition because it was time-barred.

Defendant filed a Notice of Appeal to the Superior Court on February 12, 2014.[13]

III. MATTERS COMPLAINED OF ON APPEAL

On March 6, 2014, Defendant filed his Statement of Matters Complained of on Appeal, raising the following issues, *verbatim*:

1. Was Petitioner Jerome Gibson denied his right to due process of law by the Commonwealth's introduction of false testimony and its failure to disclose Brady material, both individually and cumulatively?

2. Were trial counsel ineffective for failing to discover and present evidence the Commonwealth did not disclose, and for failing to properly impeach witnesses at trial?

3. Did the combination of counsel's ineffectiveness and the Commonwealth's suppression of Brady evidence prejudice Petitioner?

[13] It should be noted that the federal court granted a stay of Defendant's federal habeas corpus action pending the outcome of this petition.

4. Did the Commonwealth engage in prosecutorial misconduct when, without a good faith basis in fact, it cross-examined Petitioner's alibi witness about whether the witness had told a police officer that Petitioner had committed the crime and were trial counsel ineffective failure to object and take appropriate corrective measures?

5. Was the *Second Petition* timely filed pursuant to 42 Pa. C.S. 9545(b)(1)(i) and (ii) and because Petitioner has shown a *prima facie* case of a miscarriage of justice?

6. Did the Court err in not granting Petitioner discovery?

7. Did the Court err in denying the claims in the *Second Petition* without a full hearing?

IV. ANALYSIS

As the instant petition is untimely and Defendant has failed to plead and prove any of the timeliness exceptions, we consider only the narrow issue of this Court's lack of jurisdiction to adjudicate Defendant's claims.

The PCRA requires that any petition for post-conviction relief must be filed within one year of the date judgment becomes final. 42 Pa.C.S. § 9545(b)(1). Unless the petition alleges and a defendant proves that one of the enumerated timeliness exceptions to Section 9545(b) applies, a PCRA court is without jurisdiction to review a petition. Commonwealth v. Stokes, 959 A.2d 306, 309 (Pa. 2008). In order to invoke an exception, a petition must allege and a defendant must prove one of the following:

> (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 defendant 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. § 9545(b)(1)(i) – (iii). When claiming one of the Section 9545(b) exceptions, a defendant has the burden to plead and prove the applicability of an exception. Commonwealth v. Beasley, 741 A.2d 1258, 1261 (Pa. 1999); Commonwealth v. Greer, 936 A.2d 1075, 1077 (Pa. Super. 2007). Any exception must further be filed within sixty (60) days from the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2). The Pennsylvania Supreme Court has held that "[t]he PCRA confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act." Commonwealth v. Robinson, 837 A.2d 1157, 1161 (Pa. 2003), citing Commonwealth v. Eller, 807 A.2d 838 (Pa. 2002). Significantly, "A second or subsequent request for PCRA relief will not be entertained unless the petitioner presents a strong *prima facie* showing that a miscarriage of justice may have occurred." Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1267 (Pa. 2008) (citation omitted). Even so, there is no "miscarriage of justice" exception to the PCRA timeliness requirements. Commonwealth v. Burton, 936 A.2d 521, 527 (Pa. Super. 2007) (citation omitted).

In this case, Petitioner's conviction became final on October 4, 1999, when the United States Supreme Court denied his Petition for Writ of Certiorari. See Commonwealth v. Peterkin, 722 A.2d 638, 641 (Pa. 1998). Therefore, the present Protective Petition that was filed on

December 13, 2011 is, obviously, untimely filed.[14]

Defendant acknowledges that his PCRA petition is untimely but claims that both the interference by government officials and after-discovered evidence timeliness exceptions are applicable in this case. 42 Pa.C.S. § 9545(b)(1)(i)-(ii). He attempts to justify his facially untimely PCRA Petition by asserting that he is entitled to relief pursuant to possible impeachment information regarding trial witnesses contained in documents provided to him by the Commonwealth on October 14, 2011. In addition, he claims prosecutorial misconduct in failing to previously provide this same evidence. Although the October 14, 2011 production of documents forms the basis for this appeal and Defendant filed the Protective Petition (PCRA) on December 13, 2011, we are not satisfied the sixty (60) day requirement of the exceptions has been met, as we conclude that Defendant could have, through due diligence, obtained many of these documents at an earlier date in which case the claims then would have been presented prior to this litigation. 42 Pa.C.S. § 9545(b)(2). Nevertheless, we will address the last issue first.

In order to prove a Brady violation, a defendant must establish the prosecution's suppression of either exculpatory or impeachment evidence that was favorable to the accused, and that the suppression of such evidence prejudiced the defendant. Commonwealth v. Morris, 822 A.2d 684, 696 (Pa. 2003). In other words: "there are three necessary components that demonstrate a violation of the *Brady* strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued." Commonwealth v. Lambert, 884 A.2d 848 (Pa. 2005), citing Commonwealth v. Burke, 781 A.2d 1136, 1141 (Pa.2001). To

[14]On June 26, 2007, the Pennsylvania Supreme Court reduced Defendant's sentence pursuant to Atkins from death to one of life imprisonment. As Defendant is now challenging his guilt phase as opposed to his penalty phase, his "final" date remains the same. See Commonwealth v. Lesko, 15 A.3d 345, 366-67 (Pa. 2011). Regardless, even if we were to calculate Defendant's final judgment of sentence as June 26, 2007, the filing of the instant petition would still be well outside the jurisdictional time limits set forth in 42 Pa.C.S. § 9545.

show prejudice, it must be established that the new information "would have changed the outcome of the trial if it had been introduced." Commonwealth v. Sattazahn, 869 A.2d 529, 534 (Pa. Super. 2005). **No Brady violation occurs where the parties had equal access to the information.** Id. (emphasis supplied.) Furthermore, the Supreme Court has found matters of public record are not unknown and, therefore, do not fall under the purview of Brady. Commonwealth v. Taylor, 67 A.3d 1245, 1248-49 (Pa. 2013). Evidence is not considered Brady material where it is merely "another conduit for or new source of previously known facts" or, in other words, is merely corroborative or cumulative. Commonwealth v. Williams, 732 A.2d 1167, 1180 (Pa. 1999); Commonwealth v. Johnston, 42 A.3d 1120, 1127-29 (Pa. Super. 2011). See also Abu-Jamal, 941 A.2d at 1269 (same). Finally, to constitute Brady evidence, it "cannot be directed solely to impeachment." Commonwealth v. Williams, 732 A.2d 1167, 1180 (Pa. 1999). The Commonwealth's duty to provide Defendant with Brady evidence is ongoing. Commonwealth v. Morris, 822 A.2d 684, 696 (Pa. 2003).

> In terms of a Brady claim advanced under the PCRA,
>
> a defendant must demonstrate that the alleged *Brady* violation 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' ...[T]he United States Supreme Court has held that '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.'

Commonwealth v. Cam Ly, 980 A.2d 61, 76 (Pa. 2009) (citations omitted).

An alleged Brady violation may fall within the governmental interference exception. Commonwealth v. Hawkins, 953 A.2d 1248 (Pa. Super. 2008). In that context, "the petitioner must plead and prove the failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise

of due diligence." Abu-Jamal, 941 A.2d at 1268.

By the same token, a Brady violation may fall under the newly-discovered evidence exception. The exception likewise requires a petitioner to allege and prove that the fact or facts underlying the claim for relief were unknown to him and that he exercised due diligence to ascertain such fact or facts. Commonwealth v. Bennett, 930 A.2d 1264, 1270 (Pa. 2007). The Supreme Court has held:

> ...the exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim. Rather, the exception merely requires that the 'facts' upon which such a claim is predicated must not have been known to appellant, nor could they have been ascertained by due diligence.

Abu-Jamal, 941 A.2d at 1268 (citations omitted). The Superior Court has explained that due diligence "demands that the petitioner take reasonable steps to protect his own interest" and "explain why he could not have obtained the new fact(s) earlier." Commonwealth v. Monaco, 996 A.2d 1076, 1080 (Pa. Super. 2010).

As noted above, Defendant raises twelve (12) separate Brady claims covering nineteen (19) separate documents in support of the after-discovered evidence and governmental interference exceptions.[15] We will address each document in turn.[16]

a. Edward Jones, Exhibits D-5, D-6, D-7, D-8, D-9, & D-10

As indicated above, Edward Jones ("Jones") testified at trial that he heard Defendant tell other people he had killed the "cracker" when the " 'cracker' tried to pull out a gun and he shot him" and that he had a .38 caliber pistol in his possession when he made these statements. (N.T., 347-48, 3/9/1995.)

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[15] Defendant claims the governmental interference occurred at the time of the initial PCRA proceedings, where the prosecuting attorney confirmed that Defendant received all "notes, handwritten material, memoranda regarding any statements of witnesses or potential witnesses in this case that weren't turned over." (N.T., 6, 4/27/2001.)

[16] For ease of reference, any Exhibit referred to herein was admitted during Defendants 2012-2013 PCRA litigation, unless otherwise indicated.

Exhibits D-5 to D-9 are Bristol **Township** Police Department undisclosed incident reports. In Exhibit D-5 it was reported that Jones was stopped by police on an active bench warrant and gave a fake name on October 30, 1993. (N.T., 23, 11/19/2012.) Exhibit D-6 reports that Jones was "acting suspiciously" on March 29, 1993 with two others and when requested by the responding officer he left the area. Exhibit D-7 was written on March 23, 1993 and stated that Jones was reportedly harassing his then-girlfriend. Next, Exhibit D-8 was taken on June 19, 1993 and stated that police were dispatched to a domestic altercation between Jones and his brother and, once on scene, Jones "left area on foot to handle things himself." Exhibit D-9 consists of a report that Jones allegedly attempted to illegally enter a residence. Notably, there is no evidence that any of these incident reports ultimately led to an arrest or conviction of any crime. (N.T., 27-28, 11/19/2012.)

Defendant holds that the defense "could have used these reports to show that Jones was susceptible to Commonwealth pressure to testify favorably for the Commonwealth and to show his bias in favor of the Commonwealth." (Protective Petition at ¶ 35.)

It is indisputable that the Commonwealth was not in possession of these documents prior to trial and, as a result, they were not turned over to Defendant in pre-trial discovery. (N.T., 23, 11/19/2012.) The prosecuting attorney, C. Theodore Fritsch, Jr., who is now a judge in the Court of Common Pleas of Bucks County, had no recollection as to whether these documents were turned over to the defense. (N.T., 26, 27, 101, 1/4/2013.) Further, trial counsel did not have these exhibits in his file. (N.T., 82-84, 11/19/2012; N.T., 115, 1/4/2013.) The Commonwealth received Exhibits D-5 to D-9 for the first time on August 11, 2011 pursuant to the federal court order directing the Commonwealth specifically to produce any and all incident reports relating to Edward Jones. (N.T., 23, 11/19/2012.) In fact, these incident reports arise out of occurrences in

Bristol Township, and, thus, were in the possession of the Bristol Township Police Department. (N.T., 23-24, 11/19/2012.) Notably, the instant case was wholly investigated by the Bristol Borough Police Department.[17]

We do not believe that the knowledge of these particular documents would have aided trial counsel in materially furthering the impeachment of Jones at trial. First, it is well-settled a witness cannot be impeached on collateral matters. See generally Commonwealth v. Holder, 815 A.2d 1115 (Pa. Super. 2003). Second, Defendant failed to establish prejudice because trial counsel challenged Jones's credibility before the jury. In fact, the jury was informed and aware of four (4) prior offenses relating to honesty, including Receiving Stolen Property and three (3) separate Burglary convictions. (N.T., 345, 3/9/1995). Therefore, the impact of these reports, if any, would have been minimal, cumulative, and corroborative.

Finally, Defendant could have subpoenaed these reports from the Bristol Township Police Department and his failure to do so does not constitute due diligence. Jones's criminal history was provided in discovery dated February 14, 1995, which showed his arrest and convictions. The Commonwealth is under no obligation to search for evidence that might be supportive of a defense. Commonwealth v. Bridge, 435 A.2d 151, 157 (Pa. 1981).

D-10 was an incident report of interviews with two female witnesses regarding an unrelated attempted homicide committed in 1994. The report states a witness, who was not present for the incident, "heard that Mr. Edward Jones chased 'Jim Jim' (James Walker) down the street with a shotgun in Bloomsdale after an argument over the fourteen year old son of Mr. Jones." A second witness told police, according to the report, that Edward Jones drove down the street with a "big gun" and hit another individual in the face with it. She claimed that later "Jim

[17] Although an investigator from Bristol Township (Detective Mills) shared information relating to the instant case, he ultimately was not an affiant nor was he directly part of the investigation in this case. (N.T., 25-26, 11/19/2012; N.T., 81, 94, 1/4/2013.)

Jim" went after Ed Jones in a vehicle and "did the shooting himself," i.e., fired shots at Jones. This report was contained in the Bristol Township Police Department's investigative case files of James ("Jim Jim") Walker (No. CP-09-CR-0005722-1994), Andre Mitchell (a.k.a. Andre Warren) (No. CP-09-CR-0005484-1994), Daniel "Bucky" Harris, and juvenile Cyril ("Moo-Moo") Thomas, each of whom were charged with the attempted murder of Jones.

This document was first entered into evidence prior to this hearing. It was contained in the juvenile file of In Re: Cyril Thomas, which was introduced during the 2001 PCRA proceeding as D-57.[18] (N.T., 27-28, 4/27/2001; N.T., 33, 5/29/2001; N.T., 35, 37, 11/19/2012.) Furthermore, the document was contained in Andre Mitchell's Clerk of Courts (Quarter Sessions) file in the discovery packet which was filed prior to Defendant Gibson's trial, an entire file copy of which was entered into evidence as Court's Exhibit 1 and a certified copy as Court's Exhibit 3. (N.T., 30-31, 35, 11/19/2012; N.T., 5-6, 8, 1/4/2013.) Furthermore, cross-examination of Edward Jones and Cyril Thomas evidenced that trial counsel was aware of Thomas' involvement in the shooting underlying this incident report. (N.T., 309-12, 357, 3/9/1995.)

Ultimately, based on our exhaustive review of the evidence, we are in agreement with the Commonwealth that Defendant had equal access to this document and, with knowledge of the witness's involvement in these prior crimes, could have subpoenaed the Bristol Township Police Department for copies of the same prior to trial. Exhibit D-10 was contained in two (2) Clerk of Courts files and, thus, constitutes public record. Additionally, in no way does Defendant claim that the Commonwealth denied him access to these documents.

For jurisdictional purposes, the imperative question is when Defendant could have discovered these documents. Because we find that he could have discovered the relevant

[18] As will be addressed later, Cyril Thomas was a witness at Defendant's trial. (N.T., 30, 11/19/2012.)

documents prior to trial and based on the foregoing, the two claimed exceptions are not applicable here.

b. Glenn Pollard, Exhibits D-11, D-12, & D-13

The next claimed Brady violation surrounds three documents related to Glenn Pollard ("Pollard"), a Commonwealth witness at Defendant's trial. He testified that while incarcerated at the Bucks County Correctional Facility ("BCCF") in October of 1994 he overheard Defendant discussing a robbery in Bristol Borough he committed and stated that things went "haywire" and he had to "shoot the guy." (N.T., 397-98, 3/10/1995.) He admitted that he spoke to one of the counselors "on the block" who informed him to get in contact with the County Detectives regarding this information. (N.T., 399, 3/10/1995.) As a result, he contacted the District Attorney's office in order to admittedly help himself out, as he had a pending charge and was at that time confined to maximum security and wished to be moved to the Rehabilitation Center. (N.T., 399-400, 3/10/1995.) Thereafter, Pollard's attorney and the District Attorney's Office agreed to the transfer.[19] (N.T., 400, 3/10/1995.) On the possession case he was at that time incarcerated on, he was sentenced prior to this testimony to not less than ten (10) nor more than twenty-three (23) months' incarceration, which, in Pollard's opinion, was "a little more...than I deserved." (N.T., 400-01, 3/10/1995.) He opined at trial that he felt the District Attorney's Office did not do anything to help him and he was unhappy with his sentence. (Id.) He also stated that his priors consist of escape, unsown statement to authorities, and two different cases of drug possession. (N.T., 396, 3/10/1995.)

Defendant argues that this evidence could have been used to impeach Pollard and "[t]he suppression of these letters deprived the defense of valuable impeachment regarding the extent to

[19] This stipulation, as well as a proposed Order, was provided in pre-trial Discovery to Defendant.

which the Commonwealth was willing to extend itself in return for testimony that supported its theory of the case." (Protective Petition at ¶ 44.)

We will first address Exhibits D-11 and D-12. Exhibit D-11 is a letter dated November 1, 1994 authored by Pollard and addressed to Detective Mullin. Pollard wrote "I've kept my mouth completely shut about all of our conversations {just like you've informed me to do.}" He stated he hoped Detective Mullin had not "forgotten about making the necessary arrangements to move" him from the BCCF to the Bucks County Rehabilitation Center. Exhibit D-12 is a letter authored by Pollard to then-District Attorney Fritsch. He again inquires about this transfer.[20]

While these two letters were not contained in the discovery packet provided to Defendant and were also not in trial counsel's file, the Commonwealth is unsure as to what point they were placed in the Commonwealth's file and the prosecuting attorney did not recall whether he provided them to the defense. (N.T., 40, 82-84, 11/19/2012; N.T., 28, 29, 101-02, 115, 1/4/2013.) Although these letters did not specifically come out in Pollard's testimony, his offer to receive consideration for his testimony, and thus the substantive information contained in these documents, was in fact made known to the jury, as set forth above. Therefore, introduction of the foregoing would have been cumulative evidence impeaching Pollard's credibility which is not sufficient to establish prejudice. To add, the content of the letters are similar to one identified during the first PCRA proceedings as Defense Exhibit 31 and also provided in discovery and another related letter was admitted and made known at this time.[21] (N.T., 7, 4/27/2001; N.T., 27, 250-51, 5/29/2001; PCRA Exh. D-31, D-43.)

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[20]This letter is not dated; however, it was stamped as received by the Bucks County District Attorney's Office on November 1, 1994.

[21] In both his Post-Hearing Memorandum in Support of Post-Conviction Relief Post-Hearing Reply to Commonwealth's Brief in Opposition to Post-Conviction Relief in relation to the 2001-2002 PCRA proceedings, Defendant first claimed that he was prejudiced by the failure of the Commonwealth to disclose Exhibit D-43 and it was a violation of Brady and, furthermore, counsel was likewise ineffective for solely utilizing the contents of the Exhibit D-31 in his closing argument as opposed to also developing the facts underlying the letter(s) on the stand.

Finally, in regards to the governmental interference exception, Defendant presents no evidence supporting the claim that the Commonwealth denied him access to the information contained in the documents and, to the contrary, all information discussed therein was established at trial.

Defendant makes the uncorroborated and bald accusation that the Commonwealth told Pollard not to reveal conversations that took place between he and Detective Mullin in an attempt to hide evidence from the defense. We find that this advice could easily have been related to Pollard's protection in BCCF and the consequences he could have faced if his fellow inmates knew of his cooperation, i.e., he would have been labeled a "snitch" and subject to retaliation as such.

Next, Defendant claims that suppression of a transcript of a November 20, 1991 interview of Pollard by Detective Eastlack of the Bristol Township Police Department Narcotics Unit regarding another unrelated case (Commonwealth v. Gail Nelms, No. CP-09-CR-0000542-1992) was in violation of Brady. In this interview, Pollard admits to selling drugs for Gail Nelms and that he was arrested on two different sales of drugs in Bristol Township. (See Exhibit D-13). As indicated above, Pollard's prior record, including these two drug offenses, was made known to the jury at trial. (See N.T., 396, 403-04, 3/10/1995.)

Again, this transcript was not provided to Defendant in discovery and was not in trial counsel's file. (N.T., 41, 11/19/2012.) The Commonwealth was not sure at what point it was placed into its file. (N.T., 41, 83-84, 11/19/2012; N.T., 115-17, 1/4/2013.) The prosecutor had no recollection of providing the document to defense counsel. (N.T., 29, 1/4/2013.) Although Gail Nelm's Clerk of Courts (Quarter Sessions) file was eventually shredded, a certified copy of the docket revealed that discoverable materials were forwarded to Gail Nelms' attorney in this case

on March 26, 1992.[22] (N.T., 41, 11/19/2012.) In fact, Mr. Fioravanti, who represented Defendant Gibson at trial, also represented Ms. Nelms in this case and, thus, the discoverable materials, including Exhibit D-13, were forwarded to him. (N.T., 41-42, 11/19/2012; N.T., 133, 1/4/2013.)

Defendant claims that "the defense was deprived of this evidence [as] it could have been used to show Pollard's motive to cooperate with the authorities." However, prior to Gibson's trial, the Commonwealth provided Defendant with a letter written by Pollard to the prosecutor inquiring about cooperation. (PCRA Exh. D-31; D-43.) His cooperation in this case was obviously disclosed to the jury. (N.T., 399-401, 3/10/1995.) Additionally, upon being asked whether he cooperated with authorities in the past, Defendant answered in the affirmative. (N.T., 403, 3/10/1995.)

Again, the jury was made aware of Pollards prior record and his proclivity towards cooperation with authorities both in the instant case as well as in the past. Furthermore, Pollard's criminal history was provided to Defendant in pre-trial discovery and, thus, with due diligence Defendant could have uncovered these documents. Again, these documents related to an investigation by the Bristol Township Police Department, whereas a wholly independent police municipality was responsible for the investigation in Defendant Gibson's case. Not only has Defendant not established that this document would have been admissible at trial, but there is no further evidence gleaned from this letter that was not made known to the jury at trial. Therefore, it is immaterial and we find, because it solely contained cumulative evidence, Defendant suffered no prejudice. There is no evidence that the Commonwealth interfered with Defendant's access to this transcript.

Therefore, we found that Defendant failed to establish the aforementioned timeliness exceptions.

[22] This certified copy was admitted into evidence as C-PCRA-1. (N.T., 42, 11/19/2012.)

c. Cyril "Moo Moo" Thomas, Exhibits D-14, D-15, D-16, & D-17

Next, Defendant claims Brady violations concerning numerous Bristol Township documents relating to the unrelated Attempted Murder of Edward Jones, in which Thomas was a suspect.

At trial, Thomas testified that he received a .38 caliber weapon from Eddie Gilbert in Bristol Township. (N.T., 303, 3/9/1995.) He initially put the gun in some bushes in the area he received it and later took it to the Day's Inn motel in Bristol Township and hid it in the ice room. (N.T., 304-05, 3/9/1995.) He also revealed that at the time of his testimony he had pending Attempted Homicide and Aggravated Assault charges in juvenile court. (N.T., 302, 309, 3/9/1995.) Furthermore, in response to trial counsel's inquiry as to whether he gave police information regarding Defendant Gibson's case to "help himself out of a bad situation," he replied in the affirmative. (N.T., 313, 3/9/1995.) In fact, trial counsel also established that he initially lied to investigating officers and informed them that Gibson had directly provided him with the gun. (Id.)

At the outset, just like D-10, all four of these documents were contained in Thomas's juvenile Clerk of Courts case file which was admitted into evidence during the 2001 PCRA proceedings as D-57. (N.T., 27-28, 4/27/2001; N.T., 33, 5/29/2001; N.T., 43-44, 11/19/2012.) Additionally, this document was contained in Mitchell's Clerk of Courts file as well, which was entered into evidence as Court's Exhibit 1. (N.T., 30-31, 35, 42-43, 11/19/2012.) As indicated above, a certified copy was entered into evidence as Court's Exhibit 3. (N.T., 5-6, 8, 1/4/2013.)

However, these documents were not contained in the Commonwealth's file, discovery packet, or trial counsel's file. (N.T., 37, 43-44, 83-84, 11/19/2012; N.T., 116-17, 1/4/2013.) Judge Fritsch had no recollection of producing these documents to the defense, nor does he recall

any plea negotiations entered into by Thomas in exchange for his testimony. (N.T., 30-33, 87, 102, 1/4/2013.) Regardless, Defendant had equal access to these documents since 1995. His failure to bring these claims on direct appeal or during his first PCRA litigation constitutes a waiver of such pursuant to the PCRA. See 42 Pa.C.S. § 9544(b). Further, they were also admitted into evidence during the 2001 PCRA proceedings and, thus, Defendant should have undoubtedly been aware of their existence at that point.[23] Thus, the fact that he did not bring the pending Brady claims until 2011 is also in violation of the sixty (60) day rule on both of the relied upon timeliness exceptions. 42 Pa.C.S. § 9545(b)(2).

There is no Brady violation in connection with these documents. D-14 is a memo dated October 18, 1994 in which Detective R.J. Mills of the Bristol Township Police Department lists "Moo Moo Harris" as a suspect and states "All subjects are known to be in possession of firearms. Information has recently been developed that these weapons are Tech-9's." Defendant argues that if the Commonwealth had produced this memo prior to trial, trial counsel could have cross-examined Thomas "as to whether he had a .38, as he claimed at trial, or a TEC-9, as stated in Det. Mills' report." (Protective Petition at ¶ 55.)

This argument is of no merit. Defendant Gibson's case and the Attempted Murder case relating to these reports and memos are separate and distinct. The only link tying Thomas to the instant case is his receipt of a .38 caliber gun (arguably the victims) from Eddie Gilbert, who in turn testified he had received this same gun from Defendant Gibson. Additionally, this Attempted Murder occurred eleven (11) days after the offenses underlying the instant case. Even if Thomas was cross-examined as to whether he was mistaken and actually had a TEC-9 in his possession (based on an unknown source of information contained in this memo), common sense

[23] Notably, the defense's PCRA investigator testified she first saw these documents during the first PCRA proceedings (which began in 2001) and, therefore, the office was in possession of these documents during this time. (N.T., 116-17, 1/4/2013.)

dictates it is possible for Thomas to have been in possession of more than one firearm during this time period, and he was steadfast throughout his testimony that he received a .38 caliber weapon from Gilbert.

Turning to the remaining documents relating to Thomas, D-15 and D-16 are Bristol Township reports relating to the Attempted Murder investigation dated October 18, 1994. In each of these three (3) reports, it is stated that at the time of Thomas' arrest for the crimes committed against Edward Jones he was found in possession of approximately eighty (80) packets of suspected crack cocaine. D-17 is a copy of a fax dated January 17, 1995 that was sent to Defendant of the first two (2) pages of the D-15 report.

Defendant claims this information was not made known to him and, if it was, it constituted evidence of Thomas' bias to testify favorably for the Commonwealth. In terms of this alleged cocaine possession, Defendant does not point to any negotiations placed on the record in exchange for his testimony. Therefore, we find that this information would have added little, if any, to the challenge of Thomas' credibility at trial which had already been seriously called into question by trial counsel on numerous grounds, including his pending Attempted Murder prosecution.

Finally, as with all documents we have analyzed thus far, not only did these documents originate from a separate police municipality than the one which investigated Defendant Gibson's instant case, Defendant could have easily obtained these documents pre-trial with a subpoena to the Bristol Township Police Department.

Defendant claims that because the Commonwealth only faxed over the first two pages of D-15 (reflected in D-17), this evidences the prosecution's intentional suppression of the portion of the report which discusses the alleged cocaine in Thomas' possession. During his testimony,

defense counsel asked Judge Fritsch (the prosecuting attorney) simply whether the date indicates he received this report on January 17, 1995, to which he responded he was unsure. (N.T., 33, 1/4/2013). Additionally, he indicated that there is no identifying information as to who this fax was sent to or where the fax came from. (N.T., 92, 1/4/2013.) He could not recall whether or not the District Attorney's Office had a fax machine at this time. (N.T., 93, 1/4/2013.) Even if no evidence to the contrary has been presented, and we assume in fact this was intentionally withdrawn, we still find this information would not have changed the outcome of the trial and, therefore, there was no Brady violation.

Based on the foregoing, we found the after-discovered evidence and governmental interference exceptions inapplicable.

d. Eric Jones, Exhibit D-18

Eric Jones is the twin brother of Kevin Jones. Kevin Jones testified on behalf of the Commonwealth at trial that in the Spring of 1994 Defendant made known his intent to rob an individual who had a lot of money, whom he referred to as "an old guy" and a "white devil," and would kill him if necessary. (N.T., 267-69, 3/9/1995.) Additionally, he testified that Defendant made an admission at BCCF in the Fall of 1995 that the police would not find the gun used in the robbery and shooting in Bristol Borough because he said "the gun is gone." (N.T., 270, 3/9/1995.) Kevin Jones admitted that he had three (3) prior burglary convictions and an assault conviction. (N.T., 267, 272, 3/9/1995.) At the time of his testimony, he also had a pending escape charge. (N.T., 280-81, 3/9/1995.) He discussed the fact that at the time he spoke to police at the Bristol Township Police Department on October 19, 1994 he had a bench warrant out for his arrest due to a parole violation. (N.T., 273-75, 3/9/1995.) He again was incarcerated in January 1995 on a parole violation and, following a hearing, was sentenced to his back time.

(N.T., 276-77, 3/9/1995.) He gave another statement following this at the District Attorney's Office following the issuance of a subpoena. (N.T., 277-78, 3/9/1995.)

This report was not in the Commonwealth's file, the discoverable materials turned over to Defendant, or trial counsel's file. (N.T., 47, 83, 11/19/2012; N.T., 33-35, 115, 1/4/2013.) However, on the report there was a notation that stated "Ted's copy," which indicated to the prosecutor he probably did receive it. (N.T., 95, 1/4/2013.) Judge Fritsch indicated that, had he received it, he did not think it was something discoverable and was generated for the purpose of informing him that a witness was not forthcoming with any information he may have had regarding the case. (N.T., 96, 1/4/2013.) The prosecuting attorney had no recollection of providing it to the defense nor did he recall any plea negotiations in connection with Kevin Jones. (N.T., 35, 87, 96, 102-03, 1/4/2013.)

Defendant claims a Brady violation based on suppression of notes taken from an interview of Eric Jones by Bucks County Detective Robert E. Gergal on November 2, 1994. The report indicates he inquired as to what kind of deal the Commonwealth would offer him in return for information he had relating to the Bristol Borough robbery and shooting involving Defendant Gibson and was interviewed at the suggestion of Kevin Jones. At the time the report was made, no offer was made because the detective noted he would have to consult with the prosecuting attorney. Furthermore, the Detective wrote that he informed Eric Jones that "the only guarantee [he] could offer [Eric Jones]" was to bring his cooperation "before the [sentencing] judge for whatever consideration [the judge] deemed appropriate."

Defendant makes the uncorroborated accusation that the prosecution was "selling or auctioning off favorable treatment at witnesses' sentencings in return for testimony that was 'beneficial' to the Commonwealth." (Protective Petition at ¶ 66.) In fact, there is no evidence that

this limited interview actually resulted in any plea negotiations regarding Eric Jones' sentence. Furthermore, Eric Jones did not testify at trial and, thus, this information has no impeachment value.

However, Defendant contends that, in the alternative, the contents of this report could have been used to impeach Kevin Jones. He argues that the evidence suggests that because Eric was preliminarily interviewed at the suggestion of Kevin and he immediately requested favorable treatment, this means that Kevin also requested or was offered such treatment, despite the fact that at trial he asserted that he did not receive anything in return for his cooperation. (Protective Petition at ¶ 66; N.T., 283-84, 3/9/1995.) This bald assertion is wholly unsupported by the evidence and Defendant fails to show how this report would have been admissible. Regardless, trial counsel cross-examined Kevin at length regarding his apparent transfer from BCCF back to the Rehab Center shortly after he gave a statement to authorities. (N.T., 278-84, 3/9/1995.)

e. Edward Gilbert, D-19 & D-20

Edward Gilbert ("Gilbert") testified that on September 29, 1994 in the late afternoon hours he was present with Defendant Gibson as well as other individuals and observed Gibson with "a lot of money rolled up." (N.T., 288, 3/9/1995.) When asked where he got the money, Defendant stated "he had to make a move, he had to get some money" and Gilbert testified that he didn't go into detail. (N.T., 289, 3/9/1995.) Coincidentally, the murder underlying Defendant Gibson's conviction was committed on the same day as the unrelated murder of Jermaine Brown in Bristol Township. (Id.) On October 1, 1994 Gilbert asked Defendant Gibson to follow him to the automotive shop so he could drop off his car. (N.T., 289-90, 3/9/1995.) Defendant was driving a blue Thunderbird, and Gilbert inquired as to how he got the car, to which Defendant replied he killed an old white guy in Bristol Borough to get money to buy it. (N.T., 290-91, 293,

3/9/1995.) He further testified that Defendant had two guns in his possession at this time- a .38 and a .32. (N.T., 291, 3/9/1995.) Defendant gave Gilbert these two guns and he explained that the .38 was the gun of the man he shot. (N.T., 291-92, 3/9/1995.) Gilbert put the weapons in his trunk and later gave the .38 to Cyril Thomas and the .32 back to Defendant. (N.T., 292-94, 3/9/1995.) Gilbert had a prior drug conviction. (N.T., 287, 296, 3/9/2014.)

D-19 is a Bristol Township Police Department report regarding a stop of Gilbert on October 3, 1994 in which he failed to appear at a scheduled interview relating to the Jermaine Brown investigation thereafter. Additionally, it contained notes from an interview with Defendant Gibson specifically regarding the Jermaine Brown murder, in which Defendant stated he had no information to provide police. D-20 is a report regarding an interview of Gilbert by Bucks County Detective Robert Gergal which occurred on April 13, 1995, after Defendant Gibson's trial. The defense specifically cites to the following two small portions of the three page report, which wholly relates to facts surrounding the Jermaine Brown murder:

> GILBERT advised that TURNER ROGERS had been threatening GILBERT because he believed his son, TERRANCE ROGERS, was selling drugs for GILBERT.
>
> ...
>
> Upon questioning EDDIE GILBERT as to his drug involvement, GILBERT admitted to selling drugs but advised that he stopped selling drugs around August of 1993. GILBERT, however, indicated that at no time did TERRANCE ROGERS sell drugs for him.[24]

Defendant asserts that the suppression of D-19 "deprived defense counsel of cross-examination that Gilbert did not help with the investigation into the shooting of his 'friend,' suggesting he had something to hide." (Protective Petition at ¶ 74.) Next, Defendant claims that suppression of D-

[24] To clarify, Jermaine Brown was shot "during an argument between Turner Rogers and his son during which Rogers accused his son of selling drugs for Eddie Gilbert." See Motion to Dismiss Without a Hearing Second PCRA Action.

20 (which was made after Defendant was convicted) is a Brady violation because "the timing of Gilbert's statement in the Jermaine Brown investigation, which was taken after the completion of Petitioner's trial, indicates that Commonwealth agents were hesitant to get a statement from Gilbert while Petitioner's trial was ongoing, for fear of documenting Brady evidence that could be used by Petitioner." (Protective Petitioner at ¶ 75.)

These documents were not in trial counsel's file, and a copy of them was not provided to Defendant's in discovery. (N.T., 54, 55, 83, 11/19/2012; N.T., 115, 1/4/2013.) The prosecuting attorney does not recall whether or not they were provided to Defendant. (N.T., 35-36, 103, 1/4/2013.)

Both D-19 and D-20 were contained in the discoverable materials filed in January 1995 in the Commonwealth v. Turner Rogers (who was charged with Jermaine Brown's murder) Clerk of Courts file, No. CP-09-CR-0005295-96-1994, which was admitted as Court's Exhibit 2. (N.T., 54, 11/19/2012.) Therefore, they were public record and thus available to Defendant since 1995.

Furthermore, in the discoverable materials provided to Defendant, references of the Jermaine Brown murder were included in numerous reports and notes of interviews of potential witnesses. Throughout the trial, the Jermaine Brown murder was also referenced numerous times by witnesses, including Defendant Gibson himself. (N.T., 212-13, 3/8/1995; N.T., 234-35, 289, 300-01, 369, 3/9/1995; N.T., 413-14, 464, 494, 503-04, 509, 517-18, 527-28, 3/10/1995.) This suggests that not only was the prosecutor not purposefully attempting to conceal this information, but defense counsel was also aware of some overlap of witnesses in both murder cases. Mr. Fioravanti testified he was familiar with the Jermaine Brown case at the time and, in fact, his partner was in communication with Turner Rogers' counsel, Ronald Elgart, to determine whether there was any kind of overlap. (N.T., 131-32, 1/4/2013.) Furthermore, Mr. Fioravanti

was later appointed as Turner Rogers' appellate counsel on October 6, 1995. (N.T., 55, 11/19/2012; N.T., 130-31, 1/4/2013.) At this point, the direct appeal was still pending in Defendant Gibson's case. (N.T., 55, 11/19/2012.) Trial counsel acknowledged he had unfettered access to the Turner Rogers Clerk of Courts' file and all the discoverable materials therein. (N.T., 131, 1/4/2013.)

As previously mentioned, the Jermaine Brown murder and the facts at issue in the instant case were wholly unrelated. Additionally, both occurred in neighboring jurisdictions and were investigated by different police municipalities. As with all of the Bristol Township documents analyzed thus far, Defendant, being aware of the overlap of witnesses, could have subpoenaed the Bristol Township Police Department for this information.

Regardless, we fail to see any additional impeachment value of the contents of these documents. Although Gilbert admits to drug involvement in D-19, at trial the jury was made aware of his prior drug conviction. This information is cumulative and collateral. In terms of the argument that he had something to hide because he failed to attend an interview with police, not only is this irrelevant to his testimony in Defendant's case, it is pure speculation at best. Finally, the allegation that the Commonwealth purposefully waited until after Defendant's trial to get a statement from Gilbert to avoid documenting Brady evidence is mere conjecture and wholly unsupported by the evidence. Defendant does not even assert how Gilbert's April 13, 1995 statement provided any impeachment evidence that would have been relevant and admissible at Defendant's trial, as all of the information contained therein is collateral.

In terms of the notes from an interview with Defendant, this interview was conducted on October 5, 1994 while Defendant was incarcerated on a parole violation. Defendant was arrested

the following day, October 6, 1994, for the charges underlying the instant offenses.[25] The facts he gave Bristol Township police- that he was in the area but did not witness the shooting of Jermaine Brown- are consistent with those he gave at his trial. (See N.T., 517-18, 3/10/1995.) We do not see any new facts that can be gleaned from this report nor does Defendant argue how this deprived him of a fair trial.

Defendant has not established that D-19 and D-20 are Brady material and, therefore, the timeliness exceptions are inapplicable.

f. Hermann Carroll, D-21

Hermann Carroll ("Carroll") testified at trial that a few days after the September 29, 1994 murder he was in Bristol Township at Gilbert's residence where Defendant explained he was at the police station being questioned about the murder and he said that Carroll's name came up. (N.T., 369-70, 3/9/1995.) Defendant then stated that if Gilbert had been around he could have gotten paid and "too bad, [he] could have been down there," which Gilbert stated meant he could have went with him to the robbery. (N.T., 370, 372, 3/9/1995.) Shortly thereafter, Gilbert was incarcerated at BCCF. (Id.) In January of 1995, he was in the C Block with Defendant, and Defendant revealed he was responsible for the robbery of the "white devil" in Bristol Borough, in which he had a .32 and .38 from the "merchant." (N.T., 370-71, 373, 3/9/1995.) Defendant stated he gave the guns to Eddie Gilbert but then got them back. (N.T., 371, 3/9/1995.) Defendant also mentioned that the .38 ended up with "Moo Moo" and he got rid of the .32. (N.T., 373, 3/9/1995.) Carroll has numerous priors dating back to the 1970s, including robbery, theft, and drug and assault convictions. (N.T., 368, 374-75, 3/9/1995.) At the time of this testimony, he was awaiting sentencing after previously pleading guilty to escape. (N.T., 368, 3/9/1995.) He was concerned that he might be charged with this robbery, as he heard his name

[25] The criminal complaint was filed on October 6, 1994 as well.

came up, and therefore his attorney arranged to have an interview at the District Attorney's Office. (N.T., 376-77, 3/9/1995.)

In addition to this, Carroll was effectively cross-examined by Gibson's trial attorney as to his desire to get favorable treatment at his sentencing and the interviewing detective's assurances of same if he provided beneficial information. (N.T., 376-78, 381-82, 3/9/1995.) He was also questioned about his apparent expectation to get a county sentence for the escape charge when his priors indicated a lengthier sentence was appropriate. (N.T., 375-77, 381, 3/9/1995.)

D-21 is a Bucks County Detectives report concerning the service of trial subpoenas. It was prepared on February 27, 1995 by Detective John L. Ziemba. In the report, Detective Ziemba states that he served Carroll and "he...was reluctant to appear as a Commonwealth witness." He "instructed [Carroll] to contact Mr. Ted Fritsch to arrange a compromise."

This report was not contained in trial counsel's file nor in the discoverable materials provided to Defendant. (N.T., 62, 83, 11/19/2012; N.T., 115, 1/4/2013.) Further, the prosecuting attorney did not recall producing this document to the defense before or during trial. (N.T., 39, 103, 1/4/2013.) Judge Fritsch indicated that he did not feel this was discoverable and, thus, was not surprised it was not contained in the discovery packet. (N.T., 96, 1/4/2013.) Further, Judge Fritsch does not recall a meeting with Carroll or any subsequent plea negotiation. (N.T., 97-98, 1/4/2013.)

Defendant claims the defense could have utilized this report to "show that, in order to obtain Carroll's testimony, the prosecution 'arrange[d] a compromise.'" (Protective Petition at ¶ 80.)

The assumption that this preliminary report establishes or even suggests the Commonwealth entered into a plea negotiation with Mr. Carroll is unsupported by the evidence

and, thus, mere conjecture. As indicated above, Carroll was cross-examined as to any favorable treatment he received in exchange for his testimony. Therefore, any introduction of the report at trial would have simply continued trial counsel's suspicion he in fact was benefitting in some way from his testimony. There were no additional facts gleaned from this report, and, thus, because it would have been cumulative, its suppression does not constitute a Brady violation.

Defendant has failed to establish the materiality of this report, any prejudice he suffered, and that as a result of its suppression he was denied a fair trial. As a result, suppression of this report cannot serve to overcome the time bar.

g. Bernard McLean, D-22 & D-23

Bernard McLean ("McLean") testified that on September 30, 1994 Defendant Gibson drove him and others to a bar in Bristol Borough in a blue Thunderbird. (N.T., 229-30, 3/9/1995.) After only about five (5) minutes, the group left and went to another bar about ten (10) minutes away, where Defendant explained that the police were looking for him. (N.T., 231-32, 3/9/1995.) While the others went inside, Defendant and McLean sat in the vehicle and Defendant admitted that he killed "that white guy" down in Bristol in order to get money. (N.T., 232-33, 3/9/1995.) Defendant stated he received $2,000 from the robbery and that he used a .38 or .32 caliber weapon. (N.T., 233, 3/9/1995.) Furthermore, McLean testified once Defendant disclosed this information to him he was upset because he felt he was going to lose Defendant just as he had so recently lost Jermaine Brown. (N.T., 234-35, 3/9/1995.) McLean has prior statutory rape and drug convictions. (N.T., 228, 237, 3/9/1995.) He was also cross-examined about the circumstances surrounding his statement to the police and, specifically, the fact that when he spoke to Bristol Borough police they informed him he had a warrant from 1989 for failure to pay court costs and, despite this, he was later released. (N.T., 239-245, 3/9/1995.)

D-22 is a September 29, 1994 report containing information solely related to the Jermaine Brown murder. Defendant specifically points to the fact that the report indicates that McLean gave police a false name of Bernard Johnson. Additionally, D-23 contains notes about a later Bristol Township interview (dated April 17, 1995) with McLean (given by Detective Lachman, a Bucks County Detective) where he denied some of the statements he made prior, as documented in D-22. They were not contained in the Commonwealth's file nor was it present in the discovery packet provided to the defense or in trial counsel's file. (N.T., 66-67, 83, 11/19/2012; N.T., 39-40, 115, 1/4/2013.) Additionally, Judge Fritsch had no recollection of turning the documents over to defense. (N.T., 39, 40, 103-04, 1/4/2013.) Detective Lachman, who authored D-23, was not involved in Defendant's case. (N.T., 98-99, 1/4/2013.)

Defendant argues that the suppression of D-22 and D-23 deprived the defense of the opportunity to challenge McLean's credibility because they demonstrate that McLean had a bias in favor of the Commonwealth because the "Commonwealth had leverage over McLean." (Protective Petition at ¶¶ 84, 87.)

For the sake of brevity and to avoid repetitiveness, we again emphasize that this document was contained in the Commonwealth v. Turner Rogers Clerk of Courts file, No. CP-09-CR-0005295-96-1994, which was admitted as Court's Exhibit 2 during the instant PCRA proceedings. (N.T., 54, 11/19/2012.) Therefore, it was public record. Furthermore, Mr. Fioravanti was also Turner Rogers' direct appeal counsel. Finally, due to the overlap of witnesses in both cases, it was mentioned throughout the trial. Defendant cannot demonstrate any diligence, let alone due diligence, in trying to obtain these records and, in fact, we find that all of the reports complained of in this litigation were readily available at defense counsel's fingertips.

In terms of Brady, Defendant fails to explain the admissibility of these two documents had they been discovered prior, nor does Defendant establish the way in which he was denied a fair trial. These two reports involve a wholly separate occurrence and were investigated by a different police municipality. The impeachment value they would have provided, if any, was minimal at best, and we fail to see how the fact that McLean gave a false name and later retracted certain statements made regarding the Jermaine Brown case would have been more damaging than his prior record and subsequent interest in testifying, as was deeply inquired into on cross-examination by trial counsel.

In summary, because we find there was no Brady violation, the after-discovered evidence and the governmental interference timeliness exceptions do not apply.

h. Judge Fritsch's PCRA Testimony[26]

Judge Fritsch was a prosecutor in the Bucks County District Attorney's office for twenty-two (22) years. (N.T., 12-13, 1/4/2013.) He was promoted to Chief Deputy District Attorney in 1986 and later became the chief of prosecution. (N.T., 13, 1/4/2013.) He was assigned over one-hundred cases during this time, and specifically pre-assigned to a significant number of cases as well. (N.T., 51-52, 1/4/2013.) In terms of homicide cases, he was assigned ten (10) or twelve (12) during his time in the District Attorney's office. (N.T., 52, 1/4/2013.) In all of these pre-assigned cases, he reviewed the discovery himself before it was forwarded to defense counsel. (Id.) He was specifically pre-assigned to Defendant's case, and handled proceedings from the preliminary hearing through trial, direct appeal, and a portion of Defendant's first PCRA litigation. (N.T., 64-65, 1/4/2013.) When Judge Fritsch left the office in 2001, another attorney took over the case, as the first PCRA litigation was still pending. (N.T., 65, 1/4/2013.) Although

[26] Although we touched on certain parts of Judge Fritsch's testimony throughout our opinion, we feel it necessary to set forth a summary of the remainder of his testimony in establishing his credibility.

he has been made aware of the developments in this case since 2001, he has not handled or seen the physical file during this time. (N.T., 65-66, 1/4/2013.)

He reviewed the discovery in this case himself and recalls providing it to the defense. (N.T., 17-18, 52-53, 1/4/2013.) He was in constant contact with trial counsel in terms of both formal and informal discovery provided in this case.[27] (N.T., 56-57, 1/4/2013.) Further, he would have segregated any material sent to the defense from the remainder of the Commonwealth's file.[28] (N.T., 17-18, 1/4/2013.) He testified that at the time of Defendant's trial, he was familiar with Brady and aware that "anything exculpatory should be handed over to the defense, and also anything which would be in the nature of impeaching testimony of a witness to indicate, obviously, that that witness was lying to us." (N.T., 16, 1/4/2013.) Additionally, he was aware of the then-existing Pennsylvania Discovery rules in effect. (N.T., 53, 1/4/2013.)

Moreover, he testified that in terms of information from other police departments (i.e., other than Bristol Borough's police department), it was not his practice "with respect to all Commonwealth witnesses to examine their history and all prior cases to find out—to get information from those cases," nor was it the general practice of the District Attorney's Office. (N.T., 16-17, 81-82, 109-10, 1/4/2013.) Trial counsel did not request any information regarding police contact with Commonwealth witnesses, aside from criminal history information which was always provided. (N.T., 82, 129, 1/4/2013.) In terms of the (attempted) homicide cases that occurred around this same time period, i.e., Edward Jones or Turner Rogers, Judge Fritsch was not the assigned prosecuting attorney on either. (N.T., 82-83, 1/4/2013.)

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[27] This was verified by Mr. Fioravanti, who testified that not only was the discovery formal and informal at times, he was given additional discovery closer to trial that was not accompanied by a formal cover letter. (N.T., 128, 1/4/2013.)

[28] Judge Fritsch identified D-34 as the Commonwealth's discovery file in this case. (N.T., 18-19, 1/4/2013.)

In fact, prior to the preliminary hearing, when the Bucks County Public Defender's Office was representing Defendant and the Commonwealth was under no obligation to provide any discovery, Judge Fritsch contacted Defendant's then-counsel and informed her the witnesses who would be called, those who "might be able to identify the defendant," and any prior juvenile or criminal records of such witnesses. (N.T., 58, 60, 1/4/2013; Exhibit D-34(a).) Additionally, arrangements were made for the defense to view and photograph the scene, if necessary, prior to the preliminary hearing. (N.T., 61-62, 1/4/2013; Exhibit D-34(b).)

The discovery file in the instant case (D-34) had Judge Fritsch's handwritten notation that on November 16, 1994 "Discovery re Sean Hess, Bernard McLean, John Robbins and Paulinda Moore given to Fioravanti. Includes statements and all prior record information," following by the judges initials. (N.T., 55, 1/4/2013.) This indicates that, because this was prior to the filing of the formal discovery, he handed this information over without any formal request by the defense. (N.T., 55-56, 1/4/2013.) Furthermore, Judge Fritsch identified various letters sent to Mr. Fioravanti presumably coupled with discoverable materials regarding numerous witnesses, and indicated the discovery to be more informal as the case progressed. (N.T., 73-80, 1/4/2013.)

Judge Fritsch testified that he would have expected to hear about any promise or deal made by a detective to a witness. (N.T., 106, 1/4/2013.) Further, he did not recall being informed of any such deal or offer. (N.T., 108, 1/4/2013.) At that time, it was a strict policy of the District Attorney's office that police officers were not permitted to make an offer or "deal" without the consent of the district attorney and any such offer, even if made, would not be binding on the district attorney. (N.T., 111, 1/4/2013.)

In summary, Judge Fritsch, unless otherwise specifically indicated, has no recollection of acquiring D-5 through D-10, D-13 through D-17, D-19 through D-23, which are all Bristol

Township reports, prior to these PCRA proceedings and, accordingly, does not recall turning them over to the defense. (N.T., 109, 1/4/2013.)

V. CONCLUSION

No new facts or evidence was established through the above referenced documents and any information contained therein that was not known by defense counsel was simply cumulative and corroborative to that which was submitted at trial. Furthermore, Defendant does not contest the fact that these documents were readily available to him prior, during and after trial and, in the alternative, he does not advance an argument or explain why these documents could not have been obtained earlier. Finally, there is no indication that Judge Fritsch, or any other Commonwealth agent, purposefully concealed these items. [29] Regardless, we are doubtful of their admissibility or relevance in Defendant's requested new trial.

In closing, we recognize the continued importance of Brady and its progeny in protecting the innocent. Here, we find Defendant is attempting to use Brady as a tool to undo his solid, fair and just conviction. Not only did we find Judge Fritsch eminently credible, we are thoroughly disturbed by the absence of any evidence offered otherwise. The unsupported attack on his integrity, both as a highly respected longstanding member of the Bucks County District Attorney's Office and now as a judge with the Court of Common Pleas for more than ten (10) years is unprecedented and, in this case, there is absolutely no evidence upon which this court could enter a finding that Judge Fritsch was anything but credible in his dealings with Gibson and Gibson's trial team. Further, in granting Gibson relief, we would not only be reversing a

[29] We are mindful of the Pennsylvania Supreme Court's decision in Commonwealth of Pennsylvania vs. James T. Williams, decided on February 19, 2014 and received in chambers on May 13, 2014. We did not use Williams in deciding this case but we recognize that the Supreme Court has now said that "the government is presumed to have fulfilled its Brady obligations absent a plausible showing to the contrary." Further, "Brady does not require disclosure of information that is merely 'not inculpatory,' even if the information may form the basis for some argument by the Defendant."

decision reached by twelve citizens of Bucks County after a fair and just trial before an icon of this historic bench (the Honorable Isaac S. Garb), but also be requiring all future district attorneys to search far and wide for any statements ever made by a potential witness in a capital murder trial and we would, therefore, be rewriting the rules of evidence and discovery in doing so. This, we decline to do.

As we have found this December 13, 2011 PCRA untimely, we will not reach the merits alleged in that Petition, as we do not have jurisdiction to address any further matter. The foregoing represents this court's opinion regarding Defendant's appeal from the denial of his PCRA Petition.

BY THE COURT:

Date: May 14, 2014

ALBERT J. CEPPARULO, JUDGE

COMMONWEALTH OF PENNSYLVANIA VS. JEROME GIBSON
No CP-09-CR-0005119-1994
584 EDA 2014

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APP-F

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JEROME GIBSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 584 EDA 2014

Appeal from the PCRA Order entered January 21, 2014
In the Court of Common Pleas of Bucks County
Criminal Division at No: CP-09-CR-0005119-1994

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and STABILE, J.

MEMORANDUM BY STABILE, J.: **FILED JANUARY 16, 2015**

Jerome Gibson is serving a life sentence for his conviction of first-degree murder and related offenses. He appeals from an order dismissing as untimely his second petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-46. Because the PCRA court correctly concluded that the petition fails to meet the exceptions to the PCRA's time bar, we affirm.

On September 29, 1994, Gibson shot and killed 76-year-old Robert Berger during a robbery in Bristol Borough, Bucks County.

> [That] morning . . . , Gibson sought to obtain an automobile, as his car had recently broken down. He asked a friend, Sean Hess, for $200 so that he could purchase a new vehicle. When Hess refused, Gibson spoke of "making a move," meaning that he would commit a robbery.
>
> At approximately noon on that same day, Gibson went to an automobile dealership in Bristol Township to look for a replacement vehicle. Although he expressed an interest in purchasing a vehicle that was shown to him by salesman Glen

Kashdan, he did not have the necessary funds. He told Kashdan, however, that his mother maintained sufficient funds in a bank account in Bristol Borough to pay for the vehicle. After Kashdan drove Gibson to the bank in a fruitless effort to withdraw the non-existent funds, he dropped Gibson off at a shopping center in Bristol Township, about one mile from the eventual scene of the crime. Gibson was wearing a dark hooded sweatshirt and jeans.

Melissa Paolini, who worked at the bank where Kashdan had taken Gibson, observed the two men enter the bank at approximately 1:15 p.m. Gibson's picture was taken by the bank's monitor camera and was later identified by Paolini at trial. The picture clearly depicted Gibson wearing a dark hooded sweatshirt.

Shortly before 2:00 p.m., Gibson met Paulinda Moore, a long-time acquaintance, in the shopping center. Gibson showed Moore a handgun that was tucked into the waistband of his pants and stated that he needed money and was going to rob somebody. He added that if his prospective victim saw his face, he would shoot him. Gibson and Moore then parted company and Gibson continued on foot to Bristol Borough.

Kevin Jones, another acquaintance, encountered Gibson a little while later. Gibson informed Jones that he knew "a guy that had money," whom he was going to rob, killing him if necessary.

At approximately 2:00 p.m., Vera DuBois, Gibson's aunt, saw Gibson on foot in Bristol Borough and noticed that he was wearing a dark hooded sweatshirt. At 2:20 p.m., Gibson entered a jewelry store. Leonard Wilson, the store's proprietor, became suspicious of Gibson when he noticed that Gibson appeared to be observing the store itself, rather than looking at jewelry. After a brief conversation with Wilson, Gibson left the store.

Between 2:30 and 3:00 p.m., Kimberly Rankins, another acquaintance, nearly hit Gibson with her car as he was crossing Mill Street in the direction of the Ascher Health Care Center ("Ascher Health") in Bristol Borough. The last time that Rankins observed Gibson that day, he was wearing a dark blue sweatshirt and was approximately twenty-five feet away from the entrance of Ascher Health, walking towards it.

Shortly before 3:00 p.m., Michael Segal, a shopkeeper at a store directly across the street from Ascher Health, heard a gunshot

from inside Ascher Health. Segal looked across the street and saw Robert Berger, the proprietor of Ascher Health, struggling with an assailant behind the store counter. When Segal observed that the assailant had a gun, he dialed "911." While on the telephone, he heard two more gunshots. He looked across the street and saw Berger lying on the floor while the assailant rifled through the cash register drawers. Segal then observed the assailant leave the store, stuffing items into his pants, and walk up Mill Street towards an apartment building. Segal was unable to see the assailant's face, but he did observe that the man was wearing a dark blue hooded sweatshirt. Segal later testified at trial that the man's size, build and complexion matched those of Gibson.

Alfonso Colon, who was in a second floor apartment above Ascher Health that afternoon, walked downstairs and went outside after hearing the three gunshots. He saw Gibson, whom he positively identified at trial, leaving Ascher Health and walking toward him while stuffing an object that appeared to be a handgun into his pants. Upon seeing Colon, Gibson crossed Mill Street and headed in a different direction.

At 2:58 p.m., the police responded to Segal's call. They entered Ascher Health and found Berger lying dead on the floor from gunshot wounds. A cash drawer was open and there was an empty gun holster on the floor. Berger was pronounced dead upon arrival at the hospital at approximately 3:45 p.m. An autopsy revealed that he had suffered three gunshot wounds: a fatal wound to the left chest, a wound to the upper right chest, and a wound to the upper left arm. Two .32 caliber projectiles were removed from the body. It was later determined that approximately $1,400 in cash had been stolen during the robbery, along with a .38 caliber handgun belonging to Berger. There was no evidence that Berger's gun had been fired during the robbery.

Shortly after 3:00 p.m. on the day of the shooting, Gibson arrived at the home of his cousin, Pamela Harrison. When Harrison responded to Gibson's knock on her door, she observed that he was wearing a dark hooded sweatshirt and was sweating. Harrison also heard police sirens. Gibson asked to come into the house and Harrison admitted him, noticing that he was carrying a handgun. After hiding his sweatshirt in Harrison's basement, Gibson left the house. He returned later that evening and retrieved the sweatshirt without Harrison's permission.

After leaving Harrison's house, Gibson met his friend, Sean Hess, in the shopping center where Gibson had been earlier that day. Gibson told Hess that he had shot a man three times and taken his money. Gibson also stated that the victim had a gun, but that he had used his own gun.

The following day, while at a bar, Gibson admitted to Bernard Mc[L]ean that he had shot the old man in Bristol three times, explaining that he had been broke and needed the man's money. He later told his friends, Herman Carroll and Eddie Jones, that he had robbed and killed the victim. He also told Edward Gilbert, another friend, that he had killed the victim to obtain money with which to purchase a vehicle. He gave Gilbert the .32 caliber handgun, along with Berger's .38 caliber handgun, to keep for him. Berger's gun was later recovered at a motel in Bristol Township, but Gibson's gun was never located.

On October 2, 1994, three days after the murder, two detectives from the Bucks County District Attorney's Office, who had received information implicating Gibson in the murder, went to the apartment where Gibson was staying and waited outside in their car. Shortly thereafter, Gibson and some other individuals came out of the apartment. Gibson approached the detectives and asked them if they wished to speak with him. In response to Gibson's inquiry, the detectives told him that they wished to talk to him about a murder that had occurred on Mill Street on September 29, 1994. Gibson asked if he was under arrest and the officers replied that he was not. They suggested, however, that Gibson speak with them at the Bristol Borough Police Station, since there were other people nearby. The detectives made it clear that Gibson could proceed to the station by his own transportation, that he would be free to leave the station at any time, and that he could terminate the conversation whenever he wished. Gibson acquiesced and followed them to the police station in his own vehicle, which he had purchased the day after the shooting.

Upon arriving at the police station, the detectives led Gibson to an interview room, where another detective and a Bristol Borough police officer joined them. Gibson was again advised that he was not under arrest and could leave the station at any time. When the detectives told Gibson that they wanted to discuss the robbery and murder of Berger, he indicated that he wanted to clear the matter up and would speak with them. The interview lasted for a little over two hours, during which Gibson

not only denied any culpability for the shooting, but also denied having been in Bristol Borough at any time after August 2, 1994. Following the interview, Gibson agreed to a search of his vehicle and signed a consent form. During the search, Gibson initiated a conversation with one of the detectives, asking him a hypothetical question regarding what would happen if someone were attacked by a man with a gun and shot and killed his attacker. Gibson then left the police station in his vehicle.

On October 6, 1994, Gibson was arrested and charged with the robbery and murder of Berger, as well as possession of instruments of crime.[1] Bail was denied, and while Gibson was incarcerated pending trial, he admitted to inmates Glenn Pollard, Kenneth Johnson and Kevin Jones that he had committed the crimes. Prior to trial, Gibson moved to suppress his statements to the police during the October 2, 1994 interview, as well as the statement that he made to the detective during the search of his car. The motion was denied following a hearing, and the case proceeded to trial.

During the guilt phase of trial, the Commonwealth presented the testimony of the numerous witnesses who had seen or spoken with Gibson either immediately before or after the shooting, including the testimony of those witnesses to whom Gibson had inculpated himself. Additionally, several detectives and police officers testified for the Commonwealth concerning their observations of the crime scene, the collection of evidence, and the statements that Gibson made during the course of his interview, as well as his hypothetical question concerning the shooting.

Gibson presented five witnesses whose testimony supported his alibi defense and contradicted the testimony of certain inmates who had testified concerning his inculpatory statements. Gibson also took the stand and testified that he was not on Mill Street on the afternoon of the murder, but did admit that he had been with Kashdan, the car salesman, at the bank in Bristol Borough earlier that day. Gibson further admitted that he had lied to the police concerning his whereabouts on the day of the murder.

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[1] 18 Pa.C.S.A. §§ 2502(a), 3701, and 907.

Commonwealth v. Gibson (Gibson I), 720 A.2d 473, 476-78 (Pa. 1998).

The jury convicted Gibson of all three counts. After a penalty phase, the jury returned a verdict that Gibson be sentenced to death, and the trial court duly imposed the sentence. On direct appeal, our Supreme Court affirmed the conviction and death sentence, and the Supreme Court of the United States denied Gibson's petition for writ of *certiorari* on October 4, 1999. ***Gibson v. Pennsylvania***, 528 U.S. 852 (1999).

Following direct review, on October 29, 1999, Gibson filed *pro se* a timely first PCRA petition. Current PCRA counsel assumed representation of Gibson and filed an amended PCRA petition and two supplements. Among other, numerous claims, Gibson raised ***Brady***[2] violations. He contended the Commonwealth failed to turn over material that could have been used to impeach its witnesses, including Edward "Eddie" Jones, Glenn Pollard, Cyril "Moo Moo" Thomas, Kevin Jones, Edward Gilbert, Herman Carroll, and Bernard McLean. ***See Commonwealth v. Gibson (Gibson III)***, 959 A.2d 962, No. 1778 EDA 2008, unpublished memorandum at 5-15 (Pa. Super. filed July 8, 2008). On May 22, 2002, the PCRA court denied guilt-phase relief, but granted Gibson a new penalty-phase hearing. The parties cross-appealed to the Supreme Court, which remanded for an evidentiary hearing

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[2] ***Brady v. Maryland***, 373 U.S. 83 (1963) (holding that the Due Process Clause of the Fourteenth Amendment requires prosecutors to give defendants any materially exculpatory evidence in their possession).

in light of the then-recent decision ***Atkins v. Virginia***, 536 U.S. 304 (2002), under which the mentally retarded, *i.e.*, the intellectually disabled, cannot be executed.

On remand, Gibson attempted to add a new claim to his PCRA petition regarding the legality of his arrest by police. The PCRA court denied Gibson's request, but found that ***Atkins*** barred his execution. The case returned to the Supreme Court, which affirmed the PCRA court's finding that Gibson is intellectually disabled. ***Commonwealth v. Gibson (Gibson II)***, 925 A.2d 167 (Pa. 2007). The Supreme Court modified Gibson's sentence to life without parole and transferred the case to this Court for adjudication of the remainder of Gibson's appeal. ***Id.*** at 171.

This Court affirmed the denial of PCRA relief in all respects except one: a layered ineffective assistance of counsel[3] claim regarding Gibson's competency to stand trial. ***Gibson III***, 959 A.2d 962 (Pa. Super. 2008) (unpublished memorandum), *appeal denied*, 966 A.2d 570 (Pa. 2009). We vacated and remanded to the PCRA court for a hearing on that claim. Because Gibson challenged the effectiveness of PCRA counsel, the trial court appointed separate counsel to litigate the competency claim. On remand,

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[3] In a layered ineffectiveness claim, a PCRA petitioner claims that a prior lawyer was ineffective for failing to raise the effectiveness of another prior lawyer. ***See Commonwealth v. McGill***, 832 A.2d 1014, 1022-23 (Pa. 2003) (setting forth the framework for layered ineffectiveness claims).

separate counsel withdrew the competency claim at Gibson's behest. ***See generally*** N.T. PCRA Hearing on Remand, 11/5/09, at 3-17.

On January 29, 2010, Gibson, again represented by PCRA counsel, filed a *habeas corpus* petition in the United States District Court for the Eastern District of Pennsylvania, ***Gibson v. Beard***, docketed at No. 10-CV-0445. The federal district court granted Gibson's motion for discovery. In response, the Bucks County District Attorney's Office provided over 990 pages of material to PCRA counsel. In an accompanying affidavit, counsel for the Commonwealth averred:

> Pursuant to [the federal *habeas* c]ourt's [o]rder of September 16, 2011, I have reviewed the entire contents of the Bucks County District Attorney's criminal case file in Commonwealth v. Jerome Gibson, Bucks County Case No. 5119 of 1994 for any information that qualifies under Brady v. Maryland, 373 U.S. 83 (1963), for subsequent disclosure to Petitioner of any ***Brady*** information not previously provided to Petitioner.
>
> While the undersigned believes that all discoverable and/or ***Brady*** materials have been previously provided to [Gibson] through his trial and/or post-conviction counsel, either formally or informally, in an abundance of caution, the undersigned has made, and is forwarding to [Gibson's] counsel, a complete copy of all discoverable and ***Brady*** materials contained within the ***Gibson*** file.

Affidavit of Karen A. Diaz, Esq., Deputy District Attorney (Diaz Affidavit), 10/14/11, ¶¶ a-b.[4] On Gibson's request, the Commonwealth also provided

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[4] In his brief, Gibson selectively quotes the Diaz Affidavit, giving the impression that the Commonwealth admitted it was turning over previously-undisclosed ***Brady*** material:

(Footnote Continued Next Page)

copies of police report interviews of two witnesses from the file of an unrelated homicide (the Turner Rogers case),[5] and all police incident reports between 1993 and 1995 for trial witness Eddie Jones. Gibson then filed a supplemental *habeas* petition, and the federal court granted his motion to stay *habeas* proceedings so Gibson could return to state court to exhaust his claims.

On December 13, 2011, Gibson filed a PCRA petition entitled "Protective Petition for Habeas Corpus Relief Pursuant to Article I Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief under

(Footnote Continued) ———————

> On October 14, 2011, the Commonwealth of Pennsylvania produced over 990 pages of documents to Appellant's counsel and filed an affidavit of counsel. **According to the affidavit, the Commonwealth produced "*Brady* information not previously provided to Petitioner**" and "all discoverable and ***Brady*** materials contained in the Gibson file" including "every police report, witness statement, laboratory reports, all criminal histories and other documents in connection to same that are contained within the file."

Appellant's Brief at 5 (quoting Diaz Affidavit) (emphasis added). The Commonwealth averred no such thing. A candid, forthright quotation of the Diaz Affidavit shows the Commonwealth merely averred that it searched the file **to determine whether any undisclosed *Brady* material existed**.

[5] ***Commonwealth v. Turner Rogers***, No. CP-09-CR-0005296-1994 (C.P. Bucks), *judgment aff'd*, 685 A.2d 1047 (Pa. Super. 1996) (unpublished memorandum), *appeal denied*, 698 A.2d 593 (Pa. 1997). The killing in the Turner Rogers case coincidentally happened on the same day as the murder in this case. As reflected in this Court's memorandum affirming the judgment of sentence, Turner Rogers was convicted of involuntary manslaughter for killing Jermaine Brown during an argument.

42 Pa.C.S. § 9542 et seq. and Consolidated Memorandum of Law," which we shall call Gibson's second PCRA petition. Gibson stated his belief that his case belongs in federal *habeas* court, but, citing nonspecific vagaries of PCRA law, claimed the second PCRA petition was necessary to protect his rights. ***See*** Second PCRA Petition, 12/13/11, ¶¶ 2-3. Gibson asserted he had received a number of the federal *habeas* discovery documents for the first time, and that they constituted ***Brady*** material. The ***Brady*** violations are based on the alleged suppression of impeachment material regarding the Commonwealth's witnesses at trial. In all Gibson advanced 12 separate ***Brady*** claims based on 19 documents. ***See*** PCRA Court Rule 1925(a) Opinion, 5/14/14, at 11. Those 19 documents were entered into evidence at the PCRA hearing as Exhibits D-5 to D-23.

PCRA Hearing Exhibits D-5 to D-10 pertain to Eddie Jones. Jones testified at trial that Gibson, while possessing a .38 caliber pistol, told other people he had killed a "cracker" during a robbery when the "cracker" pulled a gun. ***Id.*** at 11-12. Exhibits D-5 to D-9 are Bristol Township Police Department incident reports regarding Eddie Jones.[6] ***Id.*** The incident reports show that Eddie Jones gave a false name to police, and was involved in domestic disturbances, but was not arrested or convicted of any crimes.

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[6] The Bristol **Township** Police Department did not arrest or charge Gibson, or participate in his prosecution. As the robbery and murder occurred in Bristol Borough, the Bristol **Borough** Police Department prosecuted Gibson. ***See*** PCRA Court Rule 1925(a) Opinion, 5/14/14, at 12-13 & n.5.

Exhibit D-10 is another Bristol Township Police incident report found in the case files of James "Jim Jim" Walker, Andre Mitchell a/k/a Andre Warren, Daniel "Bucky" Harris, and Cyril "Moo Moo" Thomas, each of whom was charged with attempting to murder Jones. ***Id.*** at 13-14. Exhibit D-10 reports that a person heard that Jones chased Walker while brandishing a shotgun following an argument. ***Id.***

Exhibits D-11 to 13 pertain to Glenn Pollard, who was incarcerated with Gibson while Gibson was awaiting trial. Pollard testified he overheard Gibson say he had to shoot a person during a robbery attempt gone "haywire." ***Id.*** at 15 (quoting N.T. Trial, 3/10/95, at 396-401). In exchange for his testimony, the Commonwealth agreed to transfer Pollard out of maximum security—an agreement that was revealed at trial. Exhibits D-11 and 12 are letters Pollard sent to Commonwealth agents regarding the *quid pro quo* for his testimony, and are similar to another letter introduced at the first PCRA proceedings. ***Id.*** at 15-16. Exhibit D-13 is a transcript of Pollard's interview by Bristol Township Police in an unrelated case in which Pollard admitted to selling drugs.

Exhibits D-14 to 17 pertain to Cyril "Moo Moo" Thomas, who testified at trial that he received a .38 caliber handgun from Eddie Gilbert (who in turn had received it from Gibson) and hid it in a motel, where it was later recovered. ***Id.*** at 19. Thomas also admitted that he was hoping his testimony would help regarding charges of attempted murder and aggravated assault pending in juvenile court. ***Id.*** (quoting N.T. Trial,

3/9/95, at 302-03, 309, 313). The PCRA court noted all four of these exhibits were contained in Thomas's juvenile clerk of courts file, which was admitted into evidence at the hearing on Gibson's first PCRA petition. ***Id.***

Exhibit D-18 pertains to Eric Jones, Kevin Jones's twin brother. Kevin Jones testified at trial that Gibson made known his plans to rob and kill, if necessary, an "old guy" and a "white devil." ***Id.*** at 22 (quoting N.T. Trial, 3/9/95, at 267-70, 272-75, 280-81). Kevin Jones admitted at trial that he was a serial felon. ***Id.*** Exhibit D-18 is a Bristol Township Police detective's notes of his interview of Eric Jones—who did not testify at Gibson's trial—during which Eric Jones inquired if his twin brother could get a deal for testifying against Gibson. ***Id.*** at 23.

Exhibits D-19 and 20 pertain to Edward Gilbert, who saw Gibson driving a blue Ford Thunderbird bought with the robbery money. ***Id.*** at 24-25. As noted above, Gilbert also testified that Gibson gave him two firearms: Gibson's and the victim's. ***Id.*** Both D-19 and D-20 are police reports regarding Gilbert's possible involvement in the Turner Rogers case. ***Id.*** at 26.

Exhibit D-21 is a Bucks County detective's report relating to the subpoena of Herman Carroll. ***Id.*** at 28-29. Carroll, a career criminal with a record dating to the 1970s, testified that Gibson made various inculpatory statements. ***Id.*** (quoting N.T. Trial, 3/9/95, at 369-75). The report states Carroll was reluctant to testify at trial against Gibson, and the detective told Carroll to contact the district attorney to arrange plea negotiations. ***Id.***

Exhibits D-22 and 23 concern Bernard McLean, who testified that Gibson was driving a blue Thunderbird, said the police were looking for him, and admitted that he murdered a "white guy" for money. ***Id.*** at 30 (quoting N.T. Trial, 3/9/95, at 229-37). Exhibit D-22 is a report from the Turner Rogers case noting that McLean gave police a false name. Exhibit D-23 post-dates Gibson's trial, and is another Bristol Township Police report in which McLean denied previous statements he made to police. ***Id.***

The Commonwealth moved to dismiss Gibson's PCRA petition as time-barred. The PCRA court limited the hearing's scope to whether Gibson could meet one of the exceptions to the PCRA's time bar. After two days of hearings, and after receiving briefs from the parties, the PCRA court found Gibson's PCRA petition time-barred, and dismissed it for lack of jurisdiction. This appeal followed.

On appeal, Gibson raises five issues:

> 1. Was [Gibson] denied his right to due process of law by the Commonwealth's introduction of false testimony and its failure to disclose ***Brady*** material because of suppression [of] individual pieces of evidence and [the] cumulative effect of the suppression of evidence?
>
> 2. Did the combination of counsel's ineffectiveness and the Commonwealth's due process violations prejudice [Gibson]?
>
> 3. Was Gibson's [second PCRA petition] timely filed pursuant to 42 Pa.C.S. § 9545(b)(1)(i) and (ii) and because [Gibson] showed a *prima facie* case of miscarriage of justice?
>
> 4. Did the [PCRA court] err in not granting [Gibson] discovery?
>
> 5. Did the [PCRA court] err in denying the claims in the [second PCRA petition] without a full hearing?

Appellant's Brief at 2 (some up-style capitalization removed).

We must address Gibson's third issue (the timeliness of the second PCRA petition) first. Timeliness is jurisdictional, and cannot be disregarded to reach the merits of a PCRA petition. ***Commonwealth v. Taylor***, 67 A.3d 1245, 1248 (Pa. 2013); ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267-68 (Pa. 2008) ("The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed."). "Questions regarding the scope of the statutory exceptions to the PCRA's jurisdictional time-bar raise questions of law; accordingly, our standard of review is *de novo*." ***Commonwealth v. Fahy***, 959 A.2d 312, 315 (Pa. 2008); ***accord Commonwealth v. Callahan***, 101 A.3d 118, 121 (Pa. Super. 2014).

A PCRA petitioner must file any PCRA petition "within one year of the date the judgment [became] final." 42 Pa.C.S.A. § 9545(b)(1). "[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 the review." ***Id.*** § 9545(b)(3). Three narrow exceptions exist, including claims frustrated by governmental interference and claims based on previously unknown facts. ***Id.*** § 9545(b)(1)(i) and (ii). Any petitioner invoking one of the exceptions must file a PCRA petition within 60 days of the date on which the claim could have been brought. ***Id.*** § 9545(b)(2). "[I]t is the appellant's burden to allege and prove that one of the timeliness exceptions

applies." ***Commonwealth v. Edmonson***, 65 A.3d 549, 560 (Pa. 2013) (internal citation omitted).

In this case, Gibson's judgment of sentence became final on the date the Supreme Court of the United States denied his *certiorari* petition, October 4, 1999.[7] Gibson concedes the untimeliness of his second PCRA petition, which he filed more than ten years later. Gibson nevertheless claims he meets the governmental interference and previously unknown facts exceptions to the PCRA's time bar. He claims the Commonwealth's discovery disclosure in the federal *habeas* case allows him to invoke those exceptions. As such, Gibson notes that he filed the current PCRA petition within 60 days of receiving those documents.

Gibson spends the vast majority of his brief discussing the merits of his ***Brady*** claims.

> But the law is clear that neither of the statutory exceptions to the timeliness requirement can begin with a discussion of the merits of a ***Brady*** claim; rather, [Gibson] must begin with a discussion of why the instant petition was timely filed. As [our Supreme] Court has explained, the latter inquiry is separate and distinct from the former. ***See Abu-Jamal***, [941 A.2d] at 1268

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[7] The vacation of Gibson's death sentence does not restart the PCRA clock for his claims, none of which concerns his resentencing to life in prison. ***Cf. Commonwealth v. Lesko***, 15 A.3d 345 (Pa. 2011) (holding PCRA petitioner's right to file "new" first PCRA extended only to the portion of his judgment disturbed by a federal *habeas* court, *i.e.*, his resentencing to life, and not any guilt-phase claims). Even if the clock were restarted, Gibson filed his second PCRA petition years after our Supreme Court vacated his death sentence in ***Gibson II***, *i.e.*, outside of the 60-day window.

> (noting that the merits of an underlying ***Brady*** claim [are] not relevant to resolving a timeliness issue under either § 9454(b)(1)(i) or (ii)).

Commonwealth v. Stokes, 959 A.2d 306, 310 (Pa. 2008).

Gibson confuses the merits of a ***Brady*** claim with the PCRA's jurisdictional prerequisites. A ***Brady*** violation—on the merits—requires proof that (1) the prosecutor suppressed evidence; (2) the evidence is helpful and exculpatory or impeaching; and (3) the suppression of evidence prejudiced the defendant. ***Commonwealth v. Reid***, 99 A.3d 470, 496 (Pa. 2014). In addition, "[t]o obtain a new trial based on the Commonwealth's failure to disclose evidence affecting a witness's credibility, a defendant must demonstrate that the reliability of the witness may be determinative of the defendant's guilt or innocence." ***Id.***

The previously unknown facts "exception does not contain the same requirements as a ***Brady*** claim . . . ." ***Abu-Jamal***, 941 A.2d at 1268. Nor does the governmental interference exception. ***See Commonwealth v. Hawkins***, 953 A.2d 1248, 1253 (Pa. 2008) (Opinion Announcing the Judgment of the Court (OAJC)). In contrast to the merits of a ***Brady*** claim, the previously unknown facts exception requires a PCRA petitioner to plead and prove he could not have discovered those facts earlier through the exercise of due diligence. ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013). Similarly, "[a]lthough a ***Brady*** violation may fall within the governmental interference exception, the petitioner must plead and prove that the failure to previously raise these claims was the result of interference

by government officials, and that the information could not have been obtained earlier with the exercise of due diligence." ***Hawkins***, 953 A.2d at 1253 (OAJC); ***see also Edmiston***, 65 A.3d at 345.

Both exceptions therefore require Gibson to show he exercised due diligence in trying to uncover the alleged ***Brady*** material. ***Stokes***, 959 A.2d at 309-10. "Due diligence demands that the petitioner take reasonable steps to protect his own interests." ***Commonwealth v. Monaco***, 996 A.2d 1076, 1080 (Pa. Super. 2010) (internal citations omitted). A PCRA petitioner must show why he could not have presented the claim earlier with the exercise of due diligence. ***See id.***

Upon review, we agree with the PCRA court that Gibson cannot meet the exceptions to the PCRA's time bar. The alleged ***Brady*** material does not qualify for either exception, and Gibson has failed to show that he exercised due diligence to uncover the evidence. Many of the documents have been public record since 1995. Several others were entered as exhibits at the hearing on Gibson's first PCRA petition in 2001. All of those documents were discoverable for more than 60 days before Gibson filed his second PCRA petition.

First, the documents contained in the Turner Rogers and Cyril "Moo Moo" Thomas court files (Exhibits D-14 to 17, 19, 20, and 22) were matters

of public record.[8] Therefore, they cannot qualify as previously unknown facts. Information in the public record is not "unknown" under 42 Pa.C.S.A. § 9454(b)(1)(ii).[9] ***Taylor***, 67 A.3d at 1248-49 (holding that trial counsel's alleged conflict of interest was not unknown where the predicate information had been in the file of the clerk of courts for over 15 years). Moreover, those documents cannot qualify for the governmental interference exception. We are unable to conceive how the Commonwealth could have interfered with Gibson's access to documents in the public record. At any rate, Gibson has offered no evidence that the Commonwealth did so.

Similarly, we agree with the PCRA court that Gibson cannot invoke the timeliness exceptions based on documents (Exhibits D-10 and 13 to 17) he possessed as early as 2001. At the PCRA hearing, Gibson's investigator admitted she saw those documents in 2001. N.T. PCRA Hearing, 1/4/13, at 116-17. As Gibson was aware of those documents' existence in 2001, his second PCRA petition is untimely even under the exceptions to the time bar. 42 Pa.C.S.A. § 9545(b)(2) (requiring PCRA petitions invoking an exception to be filed "within 60 days of the date the claim could have been presented"). Gibson could have raised claims related to those documents

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[8] One of Gibson's trial counsel, John J. Fioravanti, Jr., Esq., also represented Turner Rogers in 1995. ***See*** N.T. PCRA Hearing, 1/4/13, at 130-32.

[9] Also, a ***Brady*** claim fails on the merits if the alleged ***Brady*** material is equally accessible to the defense, which certainly applies to matters of public record. ***See Commonwealth v. Weiss***, 81 A.3d 767, 783 (Pa. 2013).

over a decade ago, when he actually received those documents. ***Cf. Stokes***, 959 A.2d at 311-12 (holding PCRA petition was untimely when petitioner was aware of facts underlying claim but waited several years to request files forming basis of his ***Brady*** claim).

Gibson fails to show the time bar exceptions apply to the remaining documents (Exhibits D-5 to D-9, D-11, D-12, D-19, D-20, and D-22). He has not established that the Commonwealth interfered with his access to those documents—a necessary prerequisite to invoke the governmental-interference exception. Indeed, there is no evidence that the Commonwealth was even aware of these documents, which were in the possession of the Bristol Township Police Department, and some of which involved police contact with witnesses or potential witnesses not resulting in an arrest or conviction. Gibson baldly claims the Commonwealth hid the documents from him when the trial prosecutor allegedly claimed in 2001 that no other ***Brady*** material existed.[10] Hiding requires knowledge that the

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[10] Gibson offers another misleading quotation in support:

> At the initial PCRA hearing [in 2001], [Gibson] requested any additional Brady material and discovery from the Commonwealth. In response, **the Commonwealth claimed "no such thing exists**."

Appellant's Brief at 10; Reply Brief at 3 (emphasis added). In context, it is clear that the prosecutor merely stated his belief that all potential ***Brady*** material had been turned over at that time. Gibson's quotation of the Commonwealth is actually is from his own counsel:

(Footnote Continued Next Page)

thing to be hidden exists. Gibson did not show governmental interference regarding the alleged ***Brady*** material, which was in the possession of a police department not involved with Gibson's prosecution. As the Commonwealth notes, Gibson offers no authority to support his proposition that a district attorney's office must actively scour the police records of every department within its jurisdiction to uncover **any** reports of police contact between **potential** witnesses even where the police contact resulted in neither arrest nor conviction. Additionally, Gibson cannot meet the previously unknown facts exception. For both timeliness exceptions, Gibson had the burden to show due diligence in uncovering such information. Having failed to show that he did so, Gibson cannot invoke the timeliness exceptions.

Citing ***Commonwealth v. Johnson***, 64 A.3d 621 (Pa. 2013) (*per curiam*), Gibson argues that our Supreme Court has held that information

(Footnote Continued)

> MR. ANDERSON[, *i.e.*, formerly PCRA counsel]: Similarly, Your Honor, petitioner requests any other notes, handwritten materials, memoranda regarding any statements of witnesses or potential witnesses in this case that weren't turned over.
>
> Mr. Fritsch [*i.e.*, the prosecutor, and now a judge on the Court of Common Pleas of Bucks County] indicated, I believe that there are—**no such thing exists**.
>
> MR. FRITSCH: No, Your Honor. I believe everything has been turned over in the case, which certainly by way of witness—eyewitness statements and so forth and reports.

N.T. First PCRA Hearing, 4/27/01, at 6 (emphasis added).

discovered during federal *habeas* proceedings constitutes previously unknown facts and therefore qualifies for the PCRA's time-bar exception. But ***Johnson*** is a summary *per curiam* order—not a merits opinion. The Supreme "Court has made it clear that *per curiam* orders have no *stare decisis* effect." ***Commonwealth v. Thompson***, 985 A.2d 928, 937 (Pa. 2009). Thus, ***Johnson*** is not binding. Moreover, because of its summary nature, we find no persuasive value in the ***Johnson*** order.

Gibson also argues courts may consider untimely PCRA petitions if the petitioner shows *prima facie* that a "miscarriage of justice" may have occurred. This argument is frivolous. ***Lawson*** and ***Morales***, cited by Gibson, have nothing to do with the PCRA's time limits. The post-conviction petitions in those cases predate the 1995 amendment to the PCRA that added the jurisdictional time bar. ***Commonwealth v. Morales***, 701 A.2d 516, 519 (Pa. 1997) ("On November 15, 1994, petitioner filed his second [PCRA] petition[.]"); ***Commonwealth v. Lawson***, 549 A.2d 107, 109-110 (Pa. 1988) (noting the appellant's petition was filed in "March of 1982"). Gibson fails to acknowledge that—for 15 years—Pennsylvania appellate courts have repeatedly and unanimously held the PCRA's time limits are mandatory and jurisdictional. ***See, e.g., Edmiston***, 65 A.3d at 346 ("The time requirements established by the PCRA are jurisdictional in nature; consequently, Pennsylvania courts may not entertain untimely PCRA petitions."); ***Commonwealth v. Robinson***, 837 A.2d 1157, 1161 (Pa. 2003) ("This Court has repeatedly stated that the PCRA timeliness

requirements are jurisdictional in nature and, accordingly, a PCRA court cannot hear untimely PCRA petitions."); ***Commonwealth v. Banks***, 726 A.2d 374, 376 (Pa. 1999) (clarifying that the PCRA's jurisdictional time limits are mandatory in all cases); ***Commonwealth v. Lawson***, 90 A.3d 1, 4 (Pa. Super. 2014) ("The timeliness of a PCRA petition is a jurisdictional threshold and may not be disregarded in order to reach the merits of the claims raised in a PCRA petition that is untimely."); ***see also Whitney v. Horn***, 280 F.3d 240, 251 (3d Cir. 2002) ("It is now clear that this one-year limitation is a jurisdictional rule that precludes consideration of the merits of any untimely PCRA petition . . . .").

In sum, the PCRA court correctly concluded that Gibson's second PCRA petition is untimely, because he failed to show that an exception to the PCRA's time bar applies. Therefore, the PCRA court lacked jurisdiction to adjudicate the merits of Gibson's petition. Moreover, because the PCRA court lacked jurisdiction, it had no authority to grant Gibson's request for discovery, or to hold a full hearing on the merits. Given our conclusion that the PCRA court lacked jurisdiction, we do not need to address Gibson's remaining issues.[11] ***See Taylor***, 67 A.3d at 1249 ("As the PCRA court

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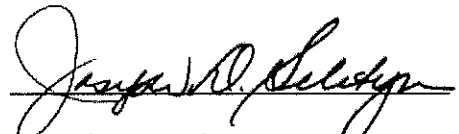
[11] Because we do not reach the merits, we do not need to address whether Gibson's ***Brady*** claims are waived or previously litigated, ***see*** 42 Pa.C.S.A. § 9543(a)(3), or whether Gibson met the miscarriage of justice standard that applies to second or subsequent PCRA petitions, ***see Lawson***, 549 A.2d at 112.

properly found the petition was untimely, we do not reach, and will not address, the merits.").

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/16/2015

APP-G

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

JEROME GIBSON,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
JEFFREY BEARD, *et al.*,	:	
Respondents	:	NO. 10-445

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS
CHIEF UNITED STATES MAGISTRATE JUDGE July 28, 2015

Presently before the court is a counseled Petition for a Writ of Habeas Corpus filed by Jerome Gibson ("Petitioner") pursuant to 28 U.S.C. § 2254.[1] Petitioner is a state prisoner serving a life term of incarceration at the State Correctional Institution-Greene, in Waynesburg, Pennsylvania. He seeks habeas relief based on claims of multiple violations of *Brady v. Maryland*, 373 U.S. 83 (1963), multiple instances of ineffective assistance of counsel, an unconstitutional jury selection system, a deficient reasonable doubt jury instruction, several instances of prosecutorial misconduct, and the cumulative effect of all the errors he alleges. The Honorable Stewart Dalzell referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that all of Petitioner's habeas claims be DISMISSED or DENIED without an evidentiary hearing.

[1] Petitioner is presently represented by attorneys Samuel J.B. Angell and Helen A. Marino of the Capital Habeas Corpus Unit of the Federal Defender's Office in Philadelphia, who also represented him during his state collateral attack on his conviction and sentence. *See Commonwealth v. Gibson*, 925 A.2d 167, 168-69 (Pa. 2007). Recently, Arianna Julia Freeman, also of the Capital Habeas Corpus Unit of the Federal Defender's Office in Philadelphia, entered her appearance on behalf of Petitioner.

I. FACTUAL AND PROCEDURAL HISTORY[2]

On direct appeal, the Pennsylvania Supreme Court summarized the facts that led to Petitioner's conviction as follows:[3]

> On the morning of September 29, 1994, [Petitioner] sought to obtain an automobile, as his car had recently broken down. He asked a friend, Sean Hess, for $200 so that he could purchase a new vehicle. When Hess refused, [Petitioner] spoke of "making a move," meaning that he would commit a robbery.
>
> At approximately noon on that same day, [Petitioner] went to an automobile dealership in Bristol Township to look for a replacement vehicle. Although he expressed an interest in purchasing a vehicle that was shown to him by salesman Glen Kashdan, he did not have the necessary funds. He told Kashdan, however, that his mother maintained sufficient funds in a bank account in Bristol Borough to pay for the vehicle. After Kashdan drove [Petitioner] to the bank in a fruitless effort to withdraw the non-existent funds, he dropped [Petitioner] off at a shopping center in Bristol Township, about one mile from the eventual scene of the crime. [Petitioner] was wearing a dark hooded sweatshirt and jeans.
>
> Melissa Paolini, who worked at the bank where Kashdan had taken [Petitioner], observed the two men enter the bank at approximately 1:15 p.m. [Petitioner's] picture was taken by the bank's monitor camera and was later identified by Paolini at trial. The picture clearly depicted [Petitioner] wearing a dark hooded sweatshirt.
>
> Shortly before 2:00 p.m., [Petitioner] met Paulinda Moore, a long-time acquaintance, in the shopping center. [Petitioner] showed Moore a handgun that was tucked into the waistband of his pants and stated that he needed money and was going to rob somebody. He added that if his prospective victim saw his face, he would shoot him. [Petitioner] and Moore then parted company and [Petitioner]

[2] The information set forth in this factual and procedural history was gleaned from Petitioner's Habeas Corpus Petition (Doc. No. 1), inclusive of all exhibits thereto, Petitioner's Memorandum of Law (Doc. No. 15), the Commonwealth's Amended Answer (Doc. No. 21), inclusive of all exhibits thereto, Petitioner's Reply Memorandum (Doc. No. 35), inclusive of all exhibits thereto, Petitioner's Supplement to his Habeas Petition (Doc. No. 49), inclusive of all exhibits related thereto (Doc. No. 48), the Commonwealth's Answer to Petitioner's Supplement (Doc. No. 53), Petitioner's Reply in Support of his Supplement (Doc. No. 59), inclusive of all exhibits thereto, Petitioner's Supplemental Memorandum of Law (Doc. No. 74), inclusive of all exhibits thereto, the Commonwealth's responsive Supplemental Memorandum of Law (Doc. No. 75), and the state court record.

[3] The court has read the entire trial transcript and finds that the Pennsylvania Supreme Court's summary accurately reflects the evidence presented at trial and reveals the strength of the prosecution's case.

continued on foot to Bristol Borough.

Kevin Jones, another acquaintance, encountered [Petitioner] a little while later. [Petitioner] informed Jones that he knew "a guy that had money," whom he was going to rob, killing him if necessary.

At approximately 2:00 p.m., Vera DuBois, [Petitioner's] aunt, saw [Petitioner] on foot in Bristol Borough and noticed that he was wearing a dark hooded sweatshirt. At 2:20 p.m., [Petitioner] entered a jewelry store. Leonard Wilson, the store's proprietor, became suspicious of [Petitioner] when he noticed that [Petitioner] appeared to be observing the store itself, rather than looking at jewelry. After a brief conversation with Wilson, [Petitioner] left the store.

Between 2:30 and 3:00 p.m., Kimberly Rankins, another acquaintance, nearly hit [Petitioner] with her car as he was crossing Mill Street in the direction of the Ascher Health Care Center ("Ascher Health") in Bristol Borough. The last time that Rankins observed [Petitioner] that day, he was wearing a dark blue sweatshirt and was approximately twenty-five feet away from the entrance of Ascher Health, walking towards it.

Shortly before 3:00 p.m., Michael Segal, a shopkeeper at a store directly across the street from Ascher Health, heard a gunshot from inside Ascher Health. Segal looked across the street and saw Robert Berger, the proprietor of Ascher Health, struggling with an assailant behind the store counter. When Segal observed that the assailant had a gun, he dialed "911." While on the telephone, he heard two more gunshots. He looked across the street and saw Berger lying on the floor while the assailant rifled through the cash register drawers. Segal then observed the assailant leave the store, stuffing items into his pants, and walk up Mill Street towards an apartment building. Segal was unable to see the assailant's face, but he did observe that the man was wearing a dark blue hooded sweatshirt. Segal later testified at trial that the man's size, build and complexion matched those of [Petitioner].

Alfonso Colon, who was in a second floor apartment above Ascher Health that afternoon, walked downstairs and went outside after hearing the three gunshots. He saw [Petitioner], whom he positively identified at trial, leaving Ascher Health and walking toward him while stuffing an object that appeared to be a handgun into his pants. Upon seeing Colon, [Petitioner] crossed Mill Street and headed in a different direction.

At 2:58 p.m., the police responded to Segal's call. They entered Ascher Health and found Berger lying dead on the floor from

gunshot wounds. A cash drawer was open and there was an empty gun holster on the floor. Berger was pronounced dead upon arrival at the hospital at approximately 3:45 p.m. An autopsy revealed that he had suffered three gunshot wounds: a fatal wound to the left chest, a wound to the upper right chest, and a wound to the upper left arm. Two .32 caliber projectiles were removed from the body. It was later determined that approximately $1,400 in cash had been stolen during the robbery, along with a .38 caliber handgun belonging to Berger. There was no evidence that Berger's gun had been fired during the robbery.

Shortly after 3:00 p.m. on the day of the shooting, [Petitioner] arrived at the home of his cousin, Pamela Harrison. When Harrison responded to [Petitioner's] knock on her door, she observed that he was wearing a dark hooded sweatshirt and was sweating. Harrison also heard police sirens. [Petitioner] asked to come into the house and Harrison admitted him, noticing that he was carrying a handgun. After hiding his sweatshirt in Harrison's basement, [Petitioner] left the house. He returned later that evening and retrieved the sweatshirt without Harrison's permission.

After leaving Harrison's house, [Petitioner] met his friend, Sean Hess, in the shopping center where [Petitioner] had been earlier that day. [Petitioner] told Hess that he had shot a man three times and taken his money. [Petitioner] also stated that the victim had a gun, but that he had used his own gun.

The following day, while at a bar, [Petitioner] admitted to Bernard McClean that he had shot the old man in Bristol three times, explaining that he had been broke and needed the man's money. He later told his friends, Herman Carroll and Eddie Jones, that he had robbed and killed the victim. He also told Edward Gilbert, another friend, that he had killed the victim to obtain money with which to purchase a vehicle. He gave Gilbert the .32 caliber handgun, along with Berger's .38 caliber handgun, to keep for him. Berger's gun was later recovered at a motel in Bristol Township, but [Petitioner's] gun was never located.

On October 2, 1994, three days after the murder, two detectives from the Bucks County District Attorney's Office, who had received information implicating [Petitioner] in the murder, went to the apartment where [Petitioner] was staying and waited outside in their car. Shortly thereafter, [Petitioner] and some other individuals came out of the apartment. [Petitioner] approached the detectives and asked them if they wished to speak with him. In response to [Petitioner's] inquiry, the detectives told him that they wished to talk

to him about a murder that had occurred on Mill Street on September 29, 1994. [Petitioner] asked if he was under arrest and the officers replied that he was not. They suggested, however, that [Petitioner] speak with them at the Bristol Borough Police Station, since there were other people nearby. The detectives made it clear that [Petitioner] could proceed to the station by his own transportation, that he would be free to leave the station at any time, and that he could terminate the conversation whenever he wished. [Petitioner] acquiesced and followed them to the police station in his own vehicle, which he had purchased the day after the shooting.

Upon arriving at the police station, the detectives led [Petitioner] to an interview room, where another detective and a Bristol Borough police officer joined them. [Petitioner] was again advised that he was not under arrest and could leave the station at any time. When the detectives told [Petitioner] that they wanted to discuss the robbery and murder of Berger, he indicated that he wanted to clear the matter up and would speak with them. The interview lasted for a little over two hours, during which [Petitioner] not only denied any culpability for the shooting, but also denied having been in Bristol Borough at any time after August 2, 1994. Following the interview, [Petitioner] agreed to a search of his vehicle and signed a consent form. During the search, [Petitioner] initiated a conversation with one of the detectives, asking him a hypothetical question regarding what would happen if someone were attacked by a man with a gun and shot and killed his attacker. [Petitioner] then left the police station in his vehicle.

On October 6, 1994, [Petitioner] was arrested and charged with the robbery and murder of Berger, as well as possession of instruments of crime. Bail was denied, and while [Petitioner] was incarcerated pending trial, he admitted to inmates Glenn Pollard, Kenneth Johnson and Kevin Jones that he had committed the crimes. Prior to trial, [Petitioner] moved to suppress his statements to the police during the October 2, 1994 interview, as well as the statement that he made to the detective during the search of his car. The motion was denied following a hearing, and the case proceeded to trial.

During the guilt phase of trial, the Commonwealth presented the testimony of the numerous witnesses who had seen or spoken with [Petitioner] either immediately before or after the shooting, including the testimony of those witnesses to whom [Petitioner] had inculpated himself. Additionally, several detectives and police officers testified for the Commonwealth concerning their observations of the crime scene, the collection of evidence, and the

> statements that [Petitioner] made during the course of his interview, as well as his hypothetical question concerning the shooting.
>
> [Petitioner] presented five witnesses whose testimony supported his alibi defense and contradicted the testimony of certain inmates who had testified concerning his inculpatory statements. [Petitioner] also took the stand and testified that he was not on Mill Street on the afternoon of the murder, but did admit that he had been with Kashdan, the car salesman, at the bank in Bristol Borough earlier that day. [Petitioner] further admitted that he had lied to the police concerning his whereabouts on the day of the murder.
>
> At the conclusion of the guilt phase, the jury found [Petitioner] guilty of first-degree murder, robbery and possession of instruments of crime.

Commonwealth v. Gibson, 720 A.2d 473, 476-78 (Pa. 1998).

After the jury rendered its guilty verdict, the case proceeded to a capital sentencing hearing. *Id.* at 478. The jury determined that Petitioner should be sentenced to death. *Id.* On direct appeal, the Pennsylvania Supreme Court affirmed the verdict and sentence.[4] *Id.* at 485. The U.S. Supreme Court denied *certiorari* on October 4, 1999. *Gibson v. Pennsylvania*, 528 U.S. 852 (1999).

Petitioner next sought relief under the Post Conviction Relief Act, ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. *Commonwealth v. Gibson*, 925 A.2d 167, 169 (Pa. 2007). The PCRA court denied guilt-phase relief but awarded a new sentencing hearing.[5] *Id.* The PCRA court, relying upon *Atkins v. Virginia*, 536 U.S. 304 (2002), determined that Petitioner was mentally retarded and, hence, could not be executed. 925 A.2d at 169. The Pennsylvania Supreme Court affirmed this conclusion and transferred Petitioner's appeal to the Pennsylvania Superior Court for appellate review of the PCRA court's guilt-phase rulings. *Id.* at 171. The Superior Court subsequently determined that all

[4]Petitioner raised several claims on direct appeal, however, only his claim that a portion of the trial court's reasonable doubt jury instruction improperly diminished the Commonwealth's burden of proof and infringed upon the presumption of innocence is herein pursued. 720 A.2d at 481-82.

[5]The PCRA court presided over evidentiary hearings on April 27, 2001 and May 29, 2001.

of Petitioner's guilt-phase claims were either waived or without merit.[6] *Commonwealth v. Gibson*, Nos. 1778 & 1779 EDA 2007, slip op. at 1-35 (Pa. Super. Ct. July 8, 2008) ("2008 Super. Ct. Op."). The Pennsylvania Supreme Court denied allowance of appeal on February 27, 2009. Petition ("Pet.") at 2-3.

On January 29, 2010, Petitioner filed a habeas petition that includes ten claims. The first claim is that the Commonwealth violated *Brady* by suppressing favorable, material evidence with respect to ten witnesses: Edward Jones, Glenn Pollard, Cyril Thomas, Paulinda Moore, Kevin Jones, Eddie Gilbert, Sean Hess, Corey Jones, Herman Carroll, and Bernard McLean. Pet. at 4-28. Second, Petitioner claims that trial counsel was ineffective for failing to investigate, discover and use impeaching evidence against the following ten witnesses: Edward Jones, Glenn Pollard, Cyril Thomas, Paulinda Moore, Kevin Jones, Bernard McLean, Kenneth Johnson, Michael Segal, Sean Hess and Diane Hess. *Id.* at 28-34. Third, the Bucks County jury selection system denied Petitioner a jury selected from a fair cross section of the community; trial and direct appellate counsel were ineffective for failing to pursue this claim. *Id.* at 34-36. Fourth, the reasonable doubt jury instruction given at Petitioner's trial violated his right to due process. *Id.* at 36-37. Fifth, trial counsel failed to "searchingly" question the jury venire to uncover bias; direct appellate counsel was ineffective for failing to pursue this claim. *Id.* at 38-41. Sixth, the prosecutor committed misconduct when, without a good-faith basis for doing so, he cross-examined Petitioner's alibi witness (Darnell Thompson) about whether the witness had told the police that Petitioner had committed the crime; trial counsel was ineffective for failing to object and direct appellate counsel was ineffective for failing to pursue the claim. *Id.* at 41-42. Seventh, the prosecutor knowingly presented false

[6] On PCRA appeal, Petitioner attempted to present the underlying substance of his present claims, except the fourth. *See* 2008 Super. Ct. Op. at 2-35.

testimony from Michael Segal; trial and direct appellate counsel were ineffective for failing to challenge this evidence. *Id.* at 42-44. Eighth, the prosecutor committed misconduct when he repeatedly elicited testimony that Petitioner (who is African-American) referred to the victim (who was Caucasian) as a "white devil;" trial counsel was ineffective for failing to object to this type of questioning and direct appellate counsel was ineffective for failing to challenge the questioning on appeal *Id.* at 44-49. Ninth, the prosecutor committed misconduct when he elicited testimony that Petitioner had asked the police an incriminating hypothetical question; trial counsel was ineffective with respect to this testimony and direct appellate counsel was ineffective for failing to challenge the propriety of this testimony on appeal. *Id.* at 49-53. Finally, Petitioner contends that the cumulative effect of the asserted errors requires habeas relief. *Id.* at 53-54. Petitioner subsequently filed a Memorandum of Law providing legal authority for his claims. Petitioner's Memorandum of Law in Support of Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Pet. Mem.") at 2-60.

The Commonwealth responded that all of Petitioner's claims are either procedurally defaulted or meritless. Amended Answer and Memorandum of Law in Opposition to Petition for Habeas Corpus Relief ("Am. Ans.") at 7-70.[7] The Commonwealth asserted that the following meritless claims are exhausted and, hence, ripe for review: Petitioner's original *Brady* claims concerning Paulinda Moore and Hermann Carroll; the ineffective assistance claim concerning Glen Pollard; Petitioner's challenge to the reasonable doubt jury instruction; Petitioner's prosecutorial misconduct claim concerning Michael Segal; and the cumulative effect claim. *Id.* at 9. All other claims Respondent deems defaulted; Petitioner disputes this procedural posture. Petitioner's Reply

[7] Inasmuch as the Commonwealth conceded that all claims in the initial habeas petition were timely filed, *see* Am. Ans. at 7, it has waived this affirmative defense, *see Day v. McDonough*, 547 U.S. 198, 202 (2006); this court declines to raise the issue *sua sponte*. *See id.* at 209 (holding that habeas courts have the power to raise timeliness *sua sponte*).

Memorandum ("Reply") at 1-33.

After obtaining additional discovery in this case, Petitioner, in a Supplement to his Habeas Petition, ("Supp."), alleges additional *Brady* claims concerning Edward Jones, Glenn Pollard, Cyril Thomas, Eddie Gilbert, Hermann Carroll, and Bernard McLean. Supp. at 6-22. Additionally, he claims that the prosecutor committed misconduct when he asked Petitioner's alibi witness (Darnell Thompson) whether he (Thompson) had told Bucks County Detective Gergal that Petitioner had committed a crime in Bristol Borough, despite possessing Detective Gergal's report from his interview with Thomson, which did not mention such a statement. *Id.* at 26. Furthermore, Petitioner contends that trial counsel was ineffective for failing to request Detective Gergal's notes, from which he testified about his interview of Thompson. *Id.* at 26-27.[8]

The Commonwealth generally asserts that all of Petitioner's supplemental claims are time-barred and, alternatively, lack merit. Answer in Opposition to Supplement to Petition for Writ of Habeas Corpus ("Supp. Ans.") at 3-25. However, the Commonwealth has declined to explain why several of these claims are untimely and Petitioner asserts that they are not time-barred and have merit. Reply in Support of Supplement to Petition for Writ of Habeas Corpus ("Supp. Reply") at 2-22. Accordingly, this court will address timeliness only in instances where the Commonwealth has specifically raised the defense. This court finds that Petitioner should not be afforded habeas relief on any of his claims.

[8]Petitioner asserted new *Brady* claims based on: (1) the results of fingerprint analysis of the victim's gun; (2) a pre-trial statement to police made by defense witness David R. Margerum; and (3) a pre-trial statement to police made by alibi witness Darnell Thomson. Supp. at 22-26. However, in his most recent filing, Petitioner expressly withdrew these three *Brady* claims. Pet'r Supplemental Memorandum of Law at 19.

II. BASIC PRINCIPLES

A. The AEDPA Statute of Limitations

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted on April 24, 1996, imposes a one year period of limitations ("AEDPA year") for habeas corpus petitions. The time period begins to run from the **latest** of the following:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). The Third Circuit has held that the starting date for the habeas period of limitations must be determined separately for each cognizable claim contained in the petition. *See Fiedler v. Varner*, 379 F.3d 113, 117-18 (3d Cir. 2004).

The AEDPA statute of limitations provides for statutory tolling. Statutory tolling provisions state that: "[t]he time that a properly filed application for state post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section." 28 U.S.C. § 2244(d)(2). A properly filed application for state collateral relief is one submitted in compliance with the applicable rules governing filings such as the form of the document, the time limits on filing, the court and office in which it must be filed

and the requisite filing fees.[9] *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Answering a question left open in *Artuz*, the United States Supreme Court later explained that, despite exceptions to the timely filing requirement, an untimely PCRA petition is not "properly filed" and cannot statutorily toll the federal habeas period of limitations. *Pace v. DiGuglielmo*, 544 U.S. 408, 413-17 (2005).

Equitable tolling is also available, but "only when the principle of equity would make the rigid application of a limitation period unfair." *Merritt v. Blaine*, 326 F.3d 157, 168 (3d Cir. 2003) (internal quotations omitted). Courts should be sparing when applying this doctrine. *LaCava v. Kyler*, 398 F.3d 271, 275 (3d Cir. 2005). The general requirements for equitable tolling are: (1) Petitioner's diligence in pursuing his rights, and (2) the existence of extraordinary circumstances that prevented timely filing. *Holland v. Florida*, 560 U.S. 641, 649 (2010). Petitioner bears the burden of proving both requirements. *Pace*, 544 U.S. at 418; *Urcinoli v. Cathel*, 546 F.3d 269, 273 (3d Cir. 2008).

B. Exhaustion and Procedural Default

A habeas petitioner must exhaust state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). The traditional way to exhaust state court remedies in Pennsylvania was to fairly present a claim to the trial court, the Pennsylvania Superior Court and the Pennsylvania Supreme Court. *See Evans v. Court of Common Pleas, Delaware County*, 959 F.2d 1227, 1230 (3d Cir. 1992). However, in light of a May 9, 2000 order of the Pennsylvania Supreme Court, it is no longer necessary for Pennsylvania inmates to seek allowance of appeal from the Pennsylvania Supreme Court in order to exhaust state remedies. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004).

[9]The Supreme Court initially declined to decide whether the existence of exceptions to a timely filing requirement can prevent a late application from being considered improperly filed. *Artuz,* 531 U.S. at 8 n.2.

If a habeas petitioner has presented his claim to the state courts but the state courts have declined to review the claim on its merits, because the petitioner failed to comply with a state rule of procedure when presenting the claim, the claim is procedurally defaulted. *See Harris v. Reed*, 489 U.S. 255, 262-63 (1989). When a lower state court has declined to review a claim based on a procedural default and the claim is not later addressed on the merits by a higher court, the habeas court must presume that the higher state court's decision rests on the procedural default identified by the lower state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Finally, when a habeas petitioner has failed to exhaust a claim and it is clear that the state courts would not consider the claim because of a state procedural rule, the claim is procedurally defaulted.[10] *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Procedurally defaulted claims, nevertheless, can be reviewed if, "the [petitioner] can demonstrate both cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id.* at 753 (citation omitted). Examples of cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id.* at 753-54.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence."

[10] A common reason the state courts would decline to review a claim that has not been presented previously is the expiration of the statute of limitations for state collateral review. *See Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001).

Schlup v. Delo, 513 U.S. 298, 321-22 (1995). In order to demonstrate that he is "actually innocent," the petitioner must present new, reliable evidence of his innocence that was not presented at trial.[11] *Id.* at 316-17, 324. The court must consider the evidence of innocence presented, along with all the evidence contained in the record, even that which was excluded or unavailable at trial. *Id.* at 327-28. Once all this evidence is considered, the petitioner's defaulted claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

C. The AEDPA Standard of Review

Any claims adjudicated by the state court must be considered under the standard of review established by AEDPA, which provides that this court cannot grant habeas relief on a claim unless the state court's resolution of it:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Further, the habeas statute also provides that any findings of fact made by the state court must be presumed to be correct; Petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A state court's adjudication of a claim is contrary to U.S. Supreme Court precedent if the state court has applied a rule that contradicts the governing law set forth in Supreme Court precedent or if the state court confronts a set of facts which are materially indistinguishable from a decision

[11] This evidence need not be directly related to the habeas claims the petitioner is presenting, because the habeas claims themselves need not demonstrate that he is innocent. *See Schlup*, 513 U.S. at 315.

of the Supreme Court and the state court arrives at a different result from the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). In determining whether a state court's decision was contrary to Supreme Court precedent, the habeas court should not be quick to attribute error. *See Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state court decisions should be "given the benefit of the doubt." *Id.* In this regard, it is not necessary that the state court cite the governing Supreme Court precedent or even be aware of the governing Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). All that is required is that "neither the reasoning nor the result of the state-court decision contradicts" Supreme Court precedent. *Id.*

If, however, the state court does correctly identify the governing U.S. Supreme Court precedent, unreasonable application analysis, rather than contrary analysis, is appropriate. *Williams*, 529 U.S. at 406. A state court decision constitutes an unreasonable application of Supreme Court precedent if the state court correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner's case. *Id.* at 407-08.

In making the unreasonable application determination, the habeas court must ask whether the state court's application of Supreme Court precedent was objectively unreasonable. *Id.* at 409. The habeas court may not grant relief simply because it believes the state court's adjudication of the petitioner's claim was incorrect. *Id.* at 411. Rather, the habeas court must be convinced that the state court's adjudication of the claim was objectively unreasonable. *Id.* In doing so, the habeas court is limited to considering the factual record that was before the state court when it ruled, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011), and the relevant U.S. Supreme Court precedent that had been decided by the date of the state court's decision. *Greene v. Fisher*, 132 S. Ct. 38, 44 (2012). It is permissible to consider the decisions of lower federal courts which have applied clearly

established Supreme Court precedent, when deciding whether a state court's application of U.S. Supreme Court precedent was reasonable. *See Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir. 2004). However, the § 2254(d)(1) bar to habeas relief cannot be surmounted solely based upon lower federal court precedent, *i.e.*, lower federal court precedent cannot alone justify a conclusion that a state court's application of U.S. Supreme Court precedent was unreasonable; only U.S. Supreme Court precedent may provide authority for that conclusion. *Renico v. Lett*, 559 U.S. 766, 778-79 (2010).

The Supreme Court, addressing the AEDPA's factual review provisions in *Miller-El v. Cockerell*, 537 U.S. 322 (2003), interpreted § 2254(d)(2) to mean that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Id.* at 340. A clear example of an unreasonable factual determination occurs where the state court erroneously finds a fact that lacks any support in the record. *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). In that extreme circumstance, the presumption of correctness under § 2254(e)(1) is also clearly and convincingly rebutted. *Id.* If the state court's decision based on a factual determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is not barred by § 2254(d)(2).[12] *Lambert,* 387 F.3d at 235.

[12] Within the overarching standard of § 2254(d)(2), a petitioner may attack specific factual determinations made by the state court that are subsidiary to the ultimate decision. *Lambert*, 387 F.3d at 235. Here, § 2254(e)(1) instructs that the state court's factual determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. *Id.* A petitioner may develop clear and convincing evidence by way of a hearing in federal court if he satisfies the prerequisites for that hearing found in 28 U.S.C. § 2254(e)(2). *Lambert*, 387 F.3d at 235. In the final analysis, even if a state court's individual factual determinations are overturned, the remaining findings must still be weighed under the overarching standard of § 2254(d)(2). *Lambert*, 387 F.3d at 235-36.

III. DISCUSSION

A. The *Brady* Claims - Claim 1

The Commonwealth argues that most of Petitioner's original *Brady* claims are procedurally defaulted. *See* Am. Ans. at 9, 12, 15, 18. Although this court agrees that four of Petitioner's original *Brady* claims are procedurally defaulted,[13] *Banks v. Dretke*, 540 U.S. 668 (2004), provides that, nevertheless, if Petitioner successfully demonstrates the second and third components for his *Brady* claims,[14] he simultaneously satisfies the cause and prejudice required to excuse the procedural default of those claims. 540 U.S. at 681. Hence, if Petitioner demonstrates all three elements to win a *Brady* claim, his default becomes irrelevant. In light of *Banks* and judicial efficiency, this court will address all of Petitioner's *Brady* claims on their merits, rather than laboring to explain which ones are procedurally defaulted and why and which ones are not and why. Also for reasons of efficiency, this court will review each *Brady* claim *de novo*.[15]

The Commonwealth argues that all of Petitioner's supplemental *Brady* claims are time-barred under 28 U.S.C. § 2244(d)(1)(A), because they should have been included in the initial habeas petition. Supp. Ans. at 3-4. Petitioner responds that new evidence obtained from the Commonwealth on October 14, 2011, which is within one year of filing his Supplement on November 23, 2011, forms the bases for his supplemental *Brady* claims. Supp. at 1-2, Supp. Rely

[13] Petitioner's original *Brady* claims concerning Glenn Pollard, Cyril Thomas, Kevin Jones and Sean Hess are procedurally defaulted.

[14] *See infra* Section III(A)(1).

[15] Any *Brady* claims that are procedurally defaulted would be subject to *de novo* review since there would be no state court merits adjudication. *See e.g. Bronshtein v. Horn*, 404 F.3d 700, 710 n.4 (3d Cir. 2005) (Alito, J.) For Petitioner's *Brady* claims that would be subject to deferential AEDPA review, the court notes that, if AEDPA review does not bar relief, Petitioner would still have to demonstrate that his claims have merit under *de novo* review in order to obtain habeas relief. *See id*. at 724 (explaining that, when a state court's resolution of a claim is contrary to or an unreasonable application of U.S. Supreme Court precedent, *see* 28 U.S.C. § 2254(d)(1), habeas relief can only be granted if the claim has merit under *de novo* review). Hence, since Petitioner's *Brady* claims fail under *de novo* review, it is more efficient to simply engage in that review.

at 2- 3. Hence, under 28 U.S.C. § 2244(d)(1)(D), his supplemental *Brady* claims are timely. Supp. Reply at 3. This court will address the question of timeliness with respect to each supplemental *Brady* claim for which the Commonwealth has provided an explanation for why the claim is untimely under § 2244(d)(1)(A). *See Day v. McDonough*, 547 U.S. 198, 202 (2006) (holding that the AEDPA statute of limitations is an affirmative defense).

1. Standard for Determining *Brady* Claims

The three necessary elements of a *Brady* claim are:

> The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either wilfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Prejudice is the materiality requirement, *id.* at 282, to wit, the defendant must show that there is a reasonable probability that, if the omitted evidence had been disclosed to him, the outcome of the proceeding would have differed. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). In order for omitted evidence to be material, it is not necessary that the evidence establish by a preponderance that disclosure of the evidence would have resulted in an acquittal. *Id.* at 434. Instead, the omitted evidence must detract from the court's confidence in the outcome that the jury did reach. *Id.* This requisite lack of confidence may exist despite there remaining sufficient record evidence to convict even after discounting the inculpatory evidence affected by the undisclosed evidence. *Id.* at 434-35. Materiality is evaluated by examining the effect of all the undisclosed evidence collectively, not evaluating the effect of each item of undisclosed evidence. *Id.* at 436. However, to determine whether the undisclosed evidence is favorable, each item is evaluated separately. *Id.* at 436 n.10. Hence, for each of Petitioner's *Brady*

claims, the court will address parts one and two individually. Once this analysis is completed, the collective materiality for all *Brady* claims that satisfy both parts one and two will be addressed.[16]

2. Edward Jones

a. Allegations

Petitioner initially asserted that the Commonwealth failed to disclose that Edward Jones was an informant provided with cash, auto repairs and an apartment by the DEA and Bristol Township Police Detective R.J. Mills during the last seven months prior to Petitioner's trial. Pet'r Mem. at 5-6. Further, in a *Napue* claim,[17] Petitioner asserts that all of Edward Jones' testimony was fabricated, because it was provided to him by Detective Mills. *Id.* at 5.

In his Supplement, Petitioner asserts that documents the Commonwealth disclosed on October 14, 2011, including several Bristol Township Police reports from March 1993 to October 1994, revealed additional police contact with Edward Jones. Supp. at 6-7. Petitioner maintains that this additional information suggests that Edward Jones was exposed to police pressure and, hence, could have been impeached for bias. *Id.* at 7 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

b. Evidence Petitioner has Obtained

At the April 27, 2001 PCRA evidentiary hearing, Edward Jones testified that he became a DEA informant in 1994. (N.T. 4/27/01 at 264). Detective R.J. Mills was the one who first recruited Jones to be an informant. *Id.* at 265. In late September or early October 1994, Detective Mills called

[16] The Third Circuit interprets *Kyles* to require both item-by-item materiality analysis and cumulative materiality analysis for any evidence that satisfies the first two parts of the *Brady* test. *See Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013) (citing *Kyles*, 514 U.S. at 436 n.10). This court finds that no favorable item of evidence suppressed by the Commonwealth satisfies the materiality requirement by itself. Hence, cumulative materiality analysis must be performed.

[17] *Napue v. Illinois*, 360 U.S. 264 (1959) holds that the prosecutor violates due process if he knowingly uses false evidence to obtain a conviction or if he knowingly allows false evidence to go uncorrected. 360 U.S. at 269.

Jones in and told Jones to say that Petitioner had killed Mr. Berger; Mills provided details to Jones about Petitioner's involvement. *Id.* at 266-68. Mills told Jones to cooperate or go to jail, because there was recorded evidence of Jones selling two ounces of crack cocaine. *Id.* at 267. Jones repeated the story Mills suggested to Bucks County Detectives in January 1995. *Id.* at 268. When Jones made his statement, Bristol Borough Detective Randy Morris, Bucks County Detective Robert E. Gergal, Mills, and two federal agents, Matt Donohue and Matt Connor, were present.[18] *Id.*

Jones admitted, at the PCRA hearing, that his trial testimony was false. *Id.* at 269. He specifically repudiated his trial testimony that Petitioner: (1) spoke to him about committing any robberies; (2) had recruited him to commit any robberies; (3) told Jones that he (Petitioner) was going to rob a store on Mill Street in Bristol Borough; (4) told Jones that he (Petitioner) had killed a storekeeper in Bristol Borough; and (5) referred to the victim as a white devil or a cracker. *Id.* at 269. Furthermore, Jones denied ever seeing Petitioner carrying a gun. *Id.* at 269-70.

Detective R.J. Mills testified at the May 29, 2001 PCRA evidentiary hearing. In June 1994, Edward Jones had offered to help Mills solve a narcotics trafficking problem in Bristol Township. (N.T. 5/29/01 at 38). Subsequently, in August 1994, Mills contacted Jones to determine if he would work on a DEA investigation into drug sales in Bristol Township; Jones agreed. *Id.* at 39. While wearing a wire, Jones would make drug purchases for Mills and the DEA. *Id.* Jones testified in several cases; the conviction rate was 100% in 84 arrests. *Id.* at 39-40.

Mills took Jones to the Bucks County detectives to provide a statement about the Berger homicide. (N.T. 5/29/01 at 42). He denied telling Jones what to say about that murder. *Id.* at 43.

[18]Bristol Borough, where the crime took place, is a small municipality with its own police force. Bristol Township, where many of the witnesses in this case lived and where Petitioner spent a great deal of time, surrounds Bristol Borough and also has an independent police force. Further, the Bucks County District Attorney's office has its own detectives and they performed a good deal of the investigation in this case.

Mills testified that he did not know any details about the Berger homicide, because it was not his case. *Id.* at 41, 43.

When Jones first approached Mills, Jones had no criminal charges pending against him and he had not been arrested with drugs. (N.T. 5/29/01 at 48). Jones had previously been convicted of burglary, but was trying to straighten out his life. *Id.* at 49. The DEA paid Jones $300 for each controlled drug purchase. *Id.* at 51. Mills and the DEA provided Jones an apartment where he could make controlled, monitored drug purchases and they fixed his car so that it would be legal to operate. *Id.* at 52. Jones never asked for, and Mills never offered, money in exchange for information about the Berger homicide. *Id.* at 61.

Bucks County Detective John Mullin interviewed Edward Jones about the Berger homicide on January 24, 1995. (N.T. 5/29/01 at 65). At that time, Mullin knew that Jones was cooperating with the DEA, but not that Jones was being paid by the DEA. *Id.* at 93-94.

Bucks County Detective Robert E. Gergal was one of the lead investigators on the Berger homicide. (N.T. 5/29/01 at 102). He spoke to Edward Jones on January 24, 1995. *Id.* at 122-23. Jones arrived with two federal narcotics agents and Detective Mills; Detective Mullin was present and prepared the interview report. *Id.* at 123. Detective Mills did not tell Gergal that Jones was a paid informant; *id.* at 197, however, Gergal said that information would not have been important to him. *Id.* at 198.

On October 14, 2011, the Commonwealth provided Petitioner with: (a) an October 30, 1993 incident report stating that, when Jones was stopped by a police officer, he had open warrants and provided police an alias; (b) March 23 and 29, 1993, May 19, 1993, June 19, 1993 and October 21, 1994 incident reports which revealed that police had been called to scenes where it was alleged that

Jones was acting suspiciously, harassed a girlfriend, attempted to illegally enter a home, refused to cooperate with police and chased a person with a shotgun. Pet'r Mot. to Expand the Record, Exhibit ("Exp. Exh.") B 89, 106-07, 109, 153.

The Commonwealth broadly alleges that (a) all of Petitioner's supplemental *Brady* claims are untimely, *see* Supp. Ans. at 3-5, and (b) the supplemental claims concerning Edward Jones are time-barred. *See id.* at 12. However, the Commonwealth fails to explain why the claim is not timely under 28 U.S.C. § 2244(d)(1)(D), and, instead, baldly asserts that Petitioner is not entitled to equitable tolling.[19] *See id.* Further, the Commonwealth states that it did not even obtain most of the documents at issue until August 11, 2011, shortly before providing them to Petitioner.[20] *See id.* at 9. Since it is the Commonwealth's burden to plead and prove that Petitioner's habeas claims are time-barred, *see Day*, 547 U.S. at 202, this court finds that the Commonwealth has failed to meet its burden, except for the October 21, 1994 incident report. Its own admission that it received the other *Brady* documents concerning Edward Jones on August 11, 2011, strongly suggests that Petitioner could not have diligently obtained them earlier. Indeed, it appears that the Commonwealth only searched for and obtained the missing documents, because Petitioner filed a discovery motion in this case on August 5, 2011. Therefore, this court considers Petitioner's supplemental claims to be timely, under 28 U.S.C. § 2244(d)(1)(D).

[19]This is a common theme in the Commonwealth's supplemental answer. Going forward, this court will only address timeliness for those supplemental claims that the Commonwealth provides an explanation for why the claim is not timely under 28 U.S.C. § 2244(d)(1)(D). For the others, the court finds the time-bar defense to be waived. *See Day*, 547 U.S. at 202.

[20]The Commonwealth fails to mention the May 19, 1993 incident report. *See* Supp. Ans. at 8-9. However, it maintains that Petitioner obtained the October 21, 1994 report during PCRA proceedings. *Id.* at 11. Petitioner does not contest that he had the document during PCRA proceedings. *See* Supp. Reply at 13. Hence, the *Brady* claim based on this document is governed by 28 U.S.C. § 2244(d)(1)(A), not 28 U.S.C. § 2244(d)(1)(D). The Commonwealth argues, without any opposition from Petitioner, that, under§ 2244(d)(1)(A), his AEDPA year began on November 5, 2009 and expired on November 5, 2010. Supp. Ans. at 4 & n. 2. Since Petitioner did not file his Supplement until November 23, 2011, the claim based on this document is time-barred.

c. First Two Parts of Brady

As to the original *Brady* claim, Detective Mills confirmed most of Petitioner's assertions concerning favors to Jones. This evidence was favorable in that it could have been used to impeach Jones' credibility. Hence, the first part of *Brady* is satisfied.

It is not clear whether the information Petitioner originally relied upon was disclosed to the defense prior to trial. However, it appears that only Detective Mills (and the DEA agents) actually knew of the benefits Edward Jones was receiving. Therefore, it is unlikely that the prosecutor who tried the case (C. Theodore Fritsch, now a Bucks County Common Pleas Court Judge) knew of and could have disclosed this information to trial counsel. In any event, Mills was not a member of the Berger homicide prosecution team;[21] instead, he was the Bristol Township police officer in charge of the narcotics unit. (N.T. 5/29/01 at 38). Hence, the prosecutor had no *Brady* obligation to discover the information Mills knew about the favors Jones had received. *See United States v. Pelullo*, 399 F.3d 197, 216 (3d Cir. 2005) (citing, *inter alia, United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003), and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that are not part of the defendant's prosecution team). Accordingly, this undisclosed evidence will not be considered for purposes of the *Brady* materiality analysis.

With respect to the supplemental *Brady* claim, the Commonwealth represents, *see* Supp. Ans. at 9, and Petitioner does not refute, that none of the documents which support the timely supplemental claims were in the prosecution's file at the time of trial. Further, these documents were prepared by the Bristol Township Police Department, which was not the entity that investigated the Berger homicide. This court finds that, inasmuch as the Bristol Township Police Department was

[21] Mills testified that he knew no details about the Berger homicide. (N.T. 5/29/01 at 43).

not part of the Berger homicide prosecution team, the prosecutor had no *Brady* duty to obtain this evidence and disclose it to Petitioner prior to trial. *See Pelullo*, 399 F.3d at 216 (citing, *inter alia, Merlino*, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that are not part of the defendant's prosecution team). Accordingly, this additional undisclosed evidence will not be considered for purposes of the *Brady* materiality analysis.

d. *Napue* Claim

The PCRA court disbelieved Edward Jones' PCRA testimony, including his assertion that Detective Mills told him what to say regarding Petitioner's involvement in the Berger homicide. *Commonwealth v. Gibson*, No. 5119, 5119-01 1994, slip op. at 15 (Bucks Cty. May 22, 2002) ("2002 PCRA Ct. Op."). The state court's fact finding is presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Thomas v. Horn*, 570 F.3d 105, 117 (3d Cir. 2009). Since Petitioner has failed to rebut the statutory presumption by clear and convincing evidence, *see* § 2254(e)(1), the PCRA court's fact finding defeats the *Napue* claim.

3. Glenn Pollard

a. Allegations

Petitioner claims that the prosecution failed to disclose before trial that Glenn Pollard was a serial informant willing to testify to "whatever might be necessary." Pet'r Mem. at 7. If trial counsel had known this information, Petitioner says his attorney could have impeached Pollard more effectively. *Id.*

In his Supplement, Petitioner claims that the Commonwealth suppressed a November 1, 1994 letter that Glenn Pollard wrote to Bucks County Detective John Mullin and an undated letter he

wrote to the prosecutor. Supp. at 7-9. Petitioner maintains that, since Pollard was requesting assistance from Mullin and the prosecutor in these letters, they would have provided trial counsel the ability to impeach Pollard. *Id.* at 8. Furthermore, Petitioner claims that a November 20, 1991 police interview during which Pollard admitted selling approximately $5,000 worth of crack in July and August 1991, Supp. at 10, could have been used to impeach Pollard. *Id.*

b. Evidence Petitioner has Obtained

Bristol Township Detective R.J. Mills testified that he was aware of Glenn Pollard, but does not know if Pollard offered to assist in the Berger homicide or the Gail Nelms case. (N.T. 5/29/01 at 58-59).

Bucks County Detective John Mullin took a statement from Glenn Pollard on November 16, 1994. (N.T. 5/29/01 at 89). According to Mullin, after Petitioner was arrested, Pollard wrote a weekly letter to the District Attorney's office offering to help in the Berger homicide. *Id.* at 89-90. Mullin believes that he probably told the prosecutor that Pollard was someone who often sought assistance from law enforcement. *Id.* at 96. Although Mullin is not aware that Pollard has ever given him a false statement, it is possible and he does not trust Pollard. *Id.* at 99-100.

Bucks County Detective Robert E. Gergal said that he personally does not know of any case where Glenn Pollard gave false testimony. (N.T. 5/29/01 at 194). Gergal also has not been told by anyone of such a case. *Id.*

Bristol Borough Detective Randy Morris knows Glenn Pollard and he has never known Pollard to give false testimony in a case. (N.T. 5/29/01 at 231).

A letter Glenn Pollard wrote, offering to testify against Petitioner, was admitted into evidence, without objection, as Exhibit D-31 at the May 29, 2001 PCRA evidentiary hearing. (N.T.

5/29/01 at 250-51). Pollard's letter offering to assist in the Gail Nelms case (Exhibit D-43) was also admitted, without objection, at that hearing. *Id.* at 252.

In October 2011, the Commonwealth provided Petitioner with Pollard's November 1, 1994 letter to Detective Mullin. Exp. Exh. B 37. In it, Pollard states that Mullin had offered to assist him with moving from the Bucks County Correctional Facility ("BCCF") to the Bucks County Rehabilitation Facility ("Rehab"). *Id.* Pollard asks Mullin when he can expect to move and to contact Pollard's Public Defender for him. *Id.* The Commonwealth also provided Petitioner with Pollard's undated letter to Chief Deputy District Attorney Fritsch (Petitioner's prosecutor), wherein Pollard asks if Detective Mullin has contacted Fritsch about moving him from the BCCF to Rehab. Exp. Exh. B 38. Finally, the Commonwealth provided Petitioner with Pollard's November 20, 1991 statement wherein he admits to the Bristol Township Police Department Narcotics Unit that he sold crack for Gail Nelms from July to August 1991 in the amount of $5,000. Exp. Exh. B 43-45.

c. First Two Parts of *Brady*

The prosecutor conceded in 2001 that he had failed to provide the defense with the letter (Exhibit D-43) Pollard wrote to the District Attorney's office offering to testify in the Gail Nelms case. (N.T. 5/29/01 at 27). At the May 29, 2001 PCRA evidentiary hearing, the prosecutor stated that, "some months ago," he found the letter in his Gail Nelms case files and produced it to Petitioner's PCRA counsel. *Id.* at 28-29. This admission constitutes a violation of the second part of *Brady*. It is not clear whether the prosecutor disclosed to trial counsel whether Pollard was a serial informant, as Detective Mullin confirmed. However, since the prosecutor is in the best position to answer this point, the court can infer that he did not disclose that information prior to trial. *See Slutzker v. Johnson*, 393 F.3d 373, 386 n.13 (3d Cir. 2004) (noting that the prosecution is

normally in the best position to know the contents of its own files and the burden of proof is traditionally allocated to the party best able to inform itself about an issue).

The Gail Nelms letter corroborates, to a degree, Detective Mullin's testimony that Glenn Pollard was a serial informant. In any event, the Gail Nelms letter and Detective Mullin's testimony are favorable to the defense, because they could have been used to impeach Pollard or detract from his credibility. Hence, this evidence will be evaluated for purposes of *Brady* materiality.

Likewise, the November 1, 1994 letter Pollard wrote to Detective Mullin and the undated letter Pollard wrote to the prosecutor could have been used to impeach Pollard. This means that each letter was favorable. The Commonwealth states that it does not know if these letters were disclosed prior to trial. Supp. Ans. at 13. Since the prosecutor is in the best position to answer this point, the court can infer that he did not disclose that information prior to trial. *See Slutzker*, 393 F.3d at 386 n.13 (noting that the prosecution is normally in the best position to know the contents of its own files and the burden of proof is traditionally allocated to the party best able to inform itself about an issue). Hence, this additional evidence will be evaluated for purposes of *Brady* materiality.

Pollard provided the November 20, 1991 statement concerning his drug dealing for Gail Nelms to the Bristol Township Police Department. This court has concluded that the Bristol Township Police Department was not part of Petitioner's prosecution team. *See supra* Section III(A)(2)(b). Hence, the prosecutor had no *Brady* duty to locate and disclose this evidence to Petitioner prior to trial. *See Pelullo*, 399 F.3d at 216 (citing, *inter alia, Merlino*, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that are not part of the defendant's prosecution team). Accordingly, this additional undisclosed item will not be considered for purposes of the *Brady* materiality analysis.

4. Cyril Thomas

a. Allegations

Petitioner initially claimed that the prosecution failed to disclose to him that the police threatened Cyril Thomas with prosecution for illegal possession of a handgun in order to secure his trial testimony. Pet'r Mem. at 7-9. Petitioner represents that, after his trial, the Commonwealth dismissed "numerous and substantial charges against [Thomas]." *Id.* at 8. Petitioner suggests that, since this benefit had already been offered to Thomas before Petitioner's trial, it should have been disclosed to Petitioner for impeachment purposes. *Id.* at 8-9.

In his Supplement, Petitioner claims that several police documents, dated October 18, 1994, reveal that Thomas may have possessed a TEC-9 weapon, not a .38, and was in possession of 80 packets crack cocaine when he was arrested on that date. Supp. at 12-14. Petitioner asserts that this information could have been used to impeach Thomas. *Id.* at 14-15.

b. Evidence Petitioner has Obtained

Bucks County Detective John Mullin testified that he interviewed Cyril Thomas on October 24, 1994. (N.T. 5/29/01 at 83). While interviewing Thomas about the Berger homicide, he does not recall threatening to charge Thomas with possession of a .38 caliber handgun. *Id.* at 87. During the interview, Mullin did not offer to help Thomas with his pending juvenile charges (related to a drive-by shooting). *Id.* at 89.

Bucks County Detective Robert E. Gergal was present when Cyril Thomas gave a statement regarding the Berger homicide. (N.T. 5/29/01 at 189-90). Gergal believes that he was not involved in Thomas' juvenile prosecution for attempted murder, possession of a firearm and drug charges. *Id.* at 190. Gergal doesn't know the disposition of those charges, because they were unrelated to his

investigation. *Id.* At the PCRA hearing, the prosecutor, Mr. Fritsch, confirmed that Cyril Thomas has a juvenile court record. (N.T. 5/29/01 at 33).

In October 2011, the Commonwealth produced to Petitioner the October 18, 1994 police records he relies upon in his Supplement. Those records demonstrate that, on October 18, 1994, Cyril Thomas, a minor, was arrested on suspicion of shooting at Edward Jones and the police found 80 packets of what they suspected to be crack cocaine on his person. Exp. Exh. B 30, 126, 151. In addition, an October 18, 1994 memorandum by Bristol Township Police Detective R.J. Mills, indicates that Thomas, along with others, is a suspect in the Edward Jones shooting and it is believed that Thomas and the others were armed with TEC-9s. *Id.,* B 124.

The Commonwealth maintains that Petitioner obtained Exp. Exh. B 30, 124, 126, 151 prior to his PCRA evidentiary hearings in 2001. Supp. Ans. at 16. Consequently, Petitioner's supplemental *Brady* claims concerning these documents are time-barred. *Id.* Petitioner admits that he had these documents by the time of his May 29, 2001 PCRA evidentiary hearing. Supp. Reply at 13. Since Petitioner had these documents almost nine years **before** he filed his initial habeas petition in 2010, he cannot avail himself of the alternative AEDPA year start date in 28 U.S.C. § 2244(d)(1)(D). Hence, any *Brady* claims arising from these documents are time-barred[22] and will not be considered further.

c. First Two Parts of *Brady*

There is no evidence that the prosecution offered Cyril Thomas any kind of deal concerning his pending charges, therefore, the prosecution did not withhold any favorable *Brady* evidence in

[22] The Commonwealth argues, without any opposition from Petitioner, that, under 28 U.S.C. § 2244(d)(1)(A), his AEDPA year began on November 5, 2009 and expired on November 5, 2010. Supp. Ans. at 4 & n. 2. Since Petitioner did not file his Supplement until November 23, 2011, any supplemental claims for which § 2244(d)(1)(A) sets the start date for the AEDPA year are time-barred.

regard to Thomas. Inasmuch as Petitioner cannot satisfy the first or second part of a *Brady* claim, no further *Brady* analysis is required for the original, meritless claim.

5. Paulinda Moore

a. Allegations

Petitioner claims that the prosecution failed to disclose evidence which would have revealed that Paulinda Moore suffered from severe mental illness and abused drugs both at the time of the crime, September 1994, and when she testified against Petitioner at trial, March 1995. Pet'r Mem. at 9-11. Petitioner maintains that the prosecution, aware of Moore's condition at the time of trial, should have provided the defense with her mental health records. *Id.* at 10-11.

b. Evidence Petitioner has Obtained

Paulinda Moore testified, at the April 27, 2001 PCRA evidentiary hearing, that she used drugs from 1976 or 1977 until June 28, 1999 when she became abstinent. (N.T. 4/27/01 at 44). Moore's daily use of crack cocaine (except when incarcerated) has caused memory loss. *Id.* at 45. Also, at the time of Petitioner's trial, Moore was taking psychiatric medication. *Id.* at 45-46. She had been diagnosed as bipolar and a paranoid schizophrenic. *Id.* at 46. In 1994 and 1995, she heard voices and had hallucinations, for which Sinequan, Mellaril, Depakote or Vistaril were prescribed. *Id.* at 46-47. Moore was shown Exhibit D-44, a police statement she gave on November 15, 1994; she said, at that time, she was using crack for several days in a row and would remain high all of her waking hours. *Id.* at 49-50. She has no recollection of facts contained in her statement. *Id.* at 51-52. At the time of Petitioner's trial in March 1995, Moore was taking psychotropic medication and abusing alcohol and crack and, hence, more likely to say anything suggested to her. *Id.* at 52.

On November 15, 1994, Bucks County Detective Robert E. Gergal interviewed Moore at his

office; she had been transported by the Bucks County Sheriff's Office from the Bucks County Prison. (N.T. 5/29/01 at 103). Bristol Borough police officers Ferry and Lebo had informed Detective Gergal that Moore had information about the Berger homicide. *Id.* at 103-04. Moore appeared quite alert and relayed accurate information to Gergal about another shooting and she correctly told Gergal that the day she spoke to Petitioner about the crime was the day she was supposed to receive her public assistance check. *Id.* at 104-05. Gergal said that he saw Moore testify at trial consistent with her statement. *Id.* at 109-10. He did not provide Moore any of the information contained in her statement. *Id.* at 112-13. At the time Moore gave her statement, Gergal knew she had drug problems and had several police contacts. *Id.* at 169. Gergal acknowledged that Moore's drug problem could bear on her truthfulness. *Id.* at 170. At the time he spoke to Moore, Gergal believed that her pending criminal charge was for stealing a carton of cigarettes, not drugs. *Id.* at 171.

Bristol Borough Detective Morris had known Moore since he started working as a Bristol Borough police officer in 1986. (N.T. 5/29/01 at 225). However, he did not know, in 1994 or 1995, that Moore was a drug addict. *Id.*

Exhibit D-23, admitted at the May 29, 2001 hearing, is a mental health evaluation of Paulinda Moore. (N.T. 5/29/01 at 249).

c. First Two Parts of *Brady*

At the May 29, 2001 PCRA evidentiary hearing, prosecutor Fritsch conceded that he did not produce to the defense Paulinda Moore's mental health records because the prosecution was not aware of them. (N.T. 5/29/01 at 26). Nevertheless, this does not constitute suppression under *Brady* because there is no indication that this item of evidence was possessed by any member of the Berger homicide investigation team. *See United States v. Pelullo*, 399 F.3d at 216-17 (citing *United*

States v. Merlino, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that have no involvement in the prosecution at issue). Since Petitioner cannot demonstrate the requisite suppression of Moore's mental health records, they should not be considered for purposes of the materiality assessment.

6. Kevin Jones

a. Allegations

Petitioner asserts that the prosecution concealed its plan to reward Kevin Jones for his testimony against Petitioner by keeping Jones out of prison despite his repeated failures to report to his parole officer and by clearing him for work release once he was finally arrested prior to Petitioner's trial. Pet'r Mem. at 11. Petitioner maintains that this would have been useful impeachment information at trial. *Id.* & n.8.

In his Supplement, Petitioner claims that representations made to Kevin Jones' twin brother, Eric Jones, demonstrate that the Commonwealth was open to providing assistance during sentencing to witnesses willing to testify against Petitioner. Supp. at 16-17. Hence, this evidence could have been used to impeach Kevin Jones. *Id.* at 17.

b. Evidence Petitioner has Obtained

Bucks County Detective Robert E. Gergal interviewed Kevin Jones on October 19, 1994 at the Bristol Township Police Station. (N.T. 5/29/01 at 182, 185). Gergal does not recall if Jones had been brought in because of an outstanding warrant. *Id.* at 182-83. When Gergal next spoke to Jones on February 24, 1995, Jones told Gergal that he had been returned to the Bucks County Prison three months before. *Id.* at 187-88.

In October 2011, the Commonwealth produced to Petitioner a November 2, 1994 interview

report, which reveals that Eric Jones (Kevin Jones' twin brother) asked Detective Gergal what assistance could be provided to him, if he testified against Petitioner. Exp. Exh. B 5. Detective Gergal told Eric Jones that, if he (Eric) provided truthful testimony against Petitioner, Gergal would appear before Eric's sentencing judge and advise the judge that Eric had provided beneficial testimony in a murder case. *Id.* at 5-6. Detective Gergal also indicated that Petitioner's prosecutor (Mr. Fritsch) was present for part of the interview. *Id.* at 6.

c. First Two Parts of *Brady*

The prosecutor conceded that, although he never produced Kevin Jones' court file to the defense, (N.T. 5/29/01 at 32), he did inform the defense of Jones' prior record. *Id.* at 33. The record is devoid of evidence that any member of the prosecution team (apparently, Detective Gergal is the only member of the prosecution team who had contact with Jones) offered or provided Jones any assistance with his incarceration status. Hence, there is no favorable evidence concerning Kevin Jones. Inasmuch as Petitioner cannot establish the first part of a *Brady* claim, his assertions concerning Kevin Jones are not relevant to the *Brady* materiality inquiry.

Eric Jones' interview report could not have been favorable to Petitioner. Jones did not testify against Petitioner; hence, the interview report could not have been used to impeach him. Accordingly, the Eric Jones' interview report will not receive *Brady* materiality consideration.

7. Eddie Gilbert

a. Allegations

Petitioner claims that the prosecution failed to disclose evidence in its possession that Eddie Gilbert had sold crack cocaine to a confidential informant on two occasions in September 1994, shortly before the September 29, 1994 Berger homicide. Pet'r Mem. at 12. This information would

have been available to impeach Gilbert's testimony against Petitioner. *Id.* at 13.

In his Supplement, Petitioner claims that the Commonwealth concealed evidence that Eddie Gilbert, who was avoiding the police in early October 1994, was the reason Turner Rogers killed Jermaine Brown. Supp. at 18-19. Petitioner asserts that this evidence could have been used to impeach Eddie Gilbert at trial. *Id.* at 19.

b. Evidence Petitioner has Obtained

Petitioner has obtained DEA records (Exhibit D-67) which demonstrate that Eddie Gilbert did engage in two crack cocaine sales to a confidential informant on September 15 and 23, 1994.

Bristol Township Detective R.J. Mills testified that Eddie Gilbert had made several drug purchases starting in September 1994. (N.T. 5/29/01 at 56). Mills said that Gilbert, subsequently, received a downward departure from the federal sentencing guidelines when he was prosecuted in federal court. *Id.* at 57-58. As explained below, Gilbert was not sentenced until September 10, 1996, over a year after Petitioner's trial.

Bristol Borough Detective Morris took a statement (Exhibit D-64) from Eddie Gilbert on November 29, 1994. (N.T. 5/29/01 at 226-27). Morris did not provide Gilbert any of the information contained in that statement. *Id.* at 235.

Prosecutor Fritsch stated that the prosecution did not have a copy of Eddie Gilbert's federal indictment at the time of Petitioner's trial. (N.T. 5/29/01 at 26). Gilbert was not indicted until September 14, 1995, several months after Petitioner's trial.

In October 2011, the Commonwealth produced to Petitioner a Bristol Township Police Department Addendum to its ongoing investigation of the September 29, 1994 shooting of Jermaine Brown, Exp. Exh. B 54, and an April 13, 1995 statement Eddie Gilbert gave to Bucks County

Detectives Terry Lachman and Robert Gergal. *Id.*, B 80-83. The first document indicates that, although a Bristol Township Police Officer encountered Eddie Gilbert on October 3, 1994 and told Gilbert to go to police headquarters the next day to speak about the Jermaine Brown shooting, Gilbert did not comply. *Id.*, B 54. In an April 13, 1995 statement, Gilbert denied witnessing Turner Rogers shoot and kill Jermaine Brown on September 29, 1994. *Id.*, B 81. In fact, Gilbert learned about the shooting from his brother William Gilbert. *Id.* Gilbert told the police that, prior to the shooting, Rogers was upset with Gilbert, because Rogers believed that his oldest son, Jerome Rogers, was selling drugs for Gilbert. *Id.* at B 80.

The Commonwealth asserts that any *Brady* claim premised on the supplemental documents is time-barred. Supp. Ans. at 20. However, October 2011 is the earliest it can confirm that it produced the precise documents at issue to Petitioner. *Id.* at 19. Hence, the Commonwealth has failed meet its burden to prove that the *Brady* claims premised on those documents are time-barred. *See Day*, 547 U.S. at 202.

c. First Two Parts of *Brady*

The DEA records indicate that Petitioner participated, along with Gilbert, in the September 23, 1994 drug sale. Pet., Appendix Volume III at 628-30. Hence, that information is not favorable to Petitioner and should be excluded from the *Brady* materiality determination. *See Strickler*, 527 U.S. at 281-82 (first component of a successful *Brady* claim is that the evidence be favorable to the defendant).

There is no indication that the prosecutor was aware of the September 15, 1994 drug sale at the time of trial. Although Mills' testimony implies that he knew about that sale, Mills was not a

member of the Berger homicide prosecution team;[23] but rather, he was the Bristol Township police officer in charge of the township's narcotics unit. (N.T. 5/29/01 at 38). Hence, the prosecutor had no *Brady* obligation to discover the information Mills knew about Gilbert's September 15, 1994 drug sale. *See Pelullo*, 399 F.3d at 216-17. This means that the prosecutor did not suppress the September 15, 1994 drug sale and it need not be evaluated in the context of the *Brady* materiality evaluation. Next, Eddie Gilbert was indicted on drug charges in this district court on September 14, 1995; the indictment was sealed. Crim. No. 95-506-1 (Docket Entry 1). Gilbert pled guilty on March 11, 1996, *id.* at Docket Entry 42, and was sentenced on September 10, 1996. *Id.* at Docket Entry 57. All of these events occurred well after Petitioner's trial in March 1995. Hence, no evidence related to Gilbert's favorable treatment concerning his federal charges even existed at the time of trial. Accordingly, it is not *Brady* information at all.

Both supplemental documents were Bristol Township Police Department documents. This court has concluded that the Bristol Township Police Department was not part of Petitioner's prosecution team. *See supra* Section III(A)(2)(b). Hence, Petitioner's prosecutor had no *Brady* duty to obtain this evidence and disclose it to Petitioner prior to trial. *See Pelullo*, 399 F.3d at 216 (citing, *inter alia, Merlino*, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that are not part of the defendant's prosecution team).

Furthermore, this court finds that neither document contained favorable evidence. First, the October 1994 police addendum simply indicates that Gilbert failed to go to the Bristol Township Police Department headquarters on October 4, 1994, as requested on October 3, 1994. The

[23]Mills testified that he knew no details about the Berger homicide. (N.T. 5/29/01 at 43).

document does not exculpate Petitioner and would not have helped impeach Gilbert. It is not Gilbert's statement and it does not, on its face, impugn his veracity, since it does not indicate that Gilbert broke a promise to go to the police headquarters. Petitioner seems to think that the addendum demonstrates that Jermaine Brown was not Gilbert's friend and that Gilbert had something to hide. Supp. at 19. Such an inference, if correct, would not be relevant to the Berger homicide.

The second document, Gilbert's April 13, 1995 statement, did not even exist at the time of Petitioner's trial in March 1995. That document suggests that Gilbert might have been hiding in early October 1994, based on his belief that Turner Rogers' son, Troy Turner, was going to kill him. Exp. Exh. B 82. By the time Gilbert gave his statement six months later, Troy Turner had been incarcerated. *Id.* Moreover, the April 13, 1995 statement could not have exculpated Petitioner or impeached Gilbert's testimony about the Berger murder, since it referenced an entirely distinct crime. Hence, the court finds that the suppressed documents were not favorable, within the meaning of *Brady*.

8. Sean Hess

a. Allegations

Petitioner asserts that the prosecution failed to disclose that it had threatened to bring criminal charges against Sean Hess and illegally towed his car in order to secure his testimony against Petitioner. Pet'r Mem. at 13. Petitioner maintains that this evidence would have allowed for effective impeachment of Hess at trial. *Id.* at 14.

b. Evidence Petitioner has Obtained

Sean Hess testified at the April 27, 2001 PCRA evidentiary hearing. After Mr. Berger was

killed, the police interrogated Hess for four to five hours. (N.T. 4/27/01 at 130). According to Hess, because the police threatened to charge him with conspiracy to commit murder, he gave a false statement implicating Petitioner to avoid jail himself. *Id.* at 131. A couple of days before trial, the police came to his mother's home to ask him if he intended to testify, Hess replied, "I don't know." *Id.* The police then followed him into his mother's home, kicked in the door and arrested him as a material witness. *Id.* at 131, 137. Hess stated that he gave false trial testimony that Petitioner had confessed to the Berger homicide, because he was afraid of going to jail for a murder he did not commit. *Id.* at 135. He admits that he did loan Petitioner $200 to buy a car. *Id.* at 135-36.

Bucks County Detective John Mullin took a statement from Sean Hess on October 4, 1994. (N.T. 5/29/01 at 73). Mullin did not prompt Hess or provide Hess with any information contained in Hess' statement. *Id.* at 74. Mullin denies that on October 4, 1994, he threatened Hess with prosecution for any crime in order to obtain the statement nor did Mullin hear anyone else make such a threat. *Id.* at 75-76. Hess was a reluctant witness, therefore, Mullin obtained a material witness warrant to assure his presence at trial. *Id.* at 76.

Bucks County Detective Robert E. Gergal is not sure if he was present when Sean Hess was arrested; he knows that Hess was arrested as a material witness in the Berger homicide. (N.T. 5/29/01 at 167). Gergal became aware, from hearing other people talk about the arrest, that the police broke down the door to Hess' home to effectuate his arrest. *Id.* at 168.

Bristol Borough Detective Randy Morris spoke to Sean Hess on October 3 and 4, 1994 about the Berger homicide. (N.T. 5/29/01 at 201-02). Hess' statement (Exhibit C-1) was completed on October 4, 1994. *Id.* at 202. Morris says he did not threaten to charge Hess with conspiracy to commit murder if he failed to provide a statement that implicated Petitioner. *Id.* at 202-03.

c. First Two Parts of *Brady*

The PCRA court disbelieved Hess' PCRA testimony. 2002 PCRA Ct. Op. at 15. This fact finding is presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Thomas*, 570 F.3d at 117. Since Petitioner has failed to rebut the statutory presumption of correctness by clear and convincing evidence, *see* § 2254(e)(1), this court must accept the PCRA court's fact finding. Hess' testimony that he was threatened with prosecution was uncorroborated and deemed not credible. Without any factual substantiation, no *Brady* evidence was concealed and the claim lacks merit. Information concerning Sean Hess, therefore, will not be considered for *Brady* materiality analysis.

9. Corey Jones

a. Allegations

Corey Jones did not testify at Petitioner's trial. Yet, Petitioner asserts a *Brady* violation based on the prosecution's failure to disclose that the police had coerced Jones to provide a statement implicating Petitioner by arresting Jones, detaining him for eight hours without food, and threatening to charge him with conspiracy. Pet'r Mem. at 14-15. Petitioner maintains that evidence of police coercion developed at his PCRA hearings, had not been disclosed in Jones' pre-trial statement provided to Petitioner. *Id.*

b. Evidence Petitioner has Obtained

Corey Jones, at the April 27, 2001 PCRA evidentiary hearing, testified that the first time he talked to the police about the Berger homicide, they thought he was Sean Hess. (N.T. 4/27/01 at 189-90). He had told the police he was Sean Hess, but didn't know anything about Petitioner killing anyone. *Id.* at 190. The police asked Jones to return to where Petitioner was staying, ask Petitioner if he had killed anyone, and report back to the police. *Id.* at 190-11. After Jones went inside and

spoke to Petitioner, Petitioner went outside and spoke to the police. *Id.* at 191.

Some time later, Bucks County Detective Robert E. Gergal "snatched him [Jones] up" outside 1004 Winder Drive and took him to the police station, without saying he was under arrest. *Id.* at 191-193. The police were angry that Jones had pretended to be Sean Hess; Jones still said he knew nothing about the Berger homicide. *Id.* Jones was questioned for five or six hours without any food or drink. *Id.* at 193-94. He signed a statement (Exhibit D-49) on that day, October 4, 1994, *id.* at 194, 198, falsely stating that Petitioner had told him he had killed someone, because he wanted to leave the police station. *Id.* at 194-95. Police told Jones he was not free to leave the station, *id.* at 197, and that he could be charged as an accessory or co-conspirator, facing ten to twenty years in prison. *Id.* at 197-98.

Jones said he refused to testify at trial because he knew his statement was not truthful. *Id.* at 195-96. Petitioner's lawyers did not interview Jones before trial; he would have been willing to speak to them. *Id.* at 196. After Petitioner's trial, Jones pled guilty to being an absconding witness, that is, an individual subpoenaed to testify who failed to come to court.[24] *Id.* at 208.

Bucks County Detective John Mullin was present when Corey Jones gave his October 4, 1994 statement. (N.T. 5/29/01 at 70). Neither Mullin nor anyone else threatened to charge Jones with a crime if he failed to provide a statement. *Id.* at 70-71. Corey Jones was detained at the police station for approximately seven or eight hours. *Id.* at 80-81.

On October 3, 1994, Bucks County Detective Robert E. Gergal met Corey Jones at the Bristol Borough Police Station. (N.T. 5/29/01 at 115-16). Gergal denied that he or anyone else threatened Jones with prosecution that day. *Id.* at 121. Gergal said that he drafted Corey Jones' statement (he

[24] After Jones testified at the PCRA hearing, he and the sheriff scuffled. (N.T. 4/27/01 at 210). Petitioner's counsel asserted that the sheriff had placed his hands on Jones' throat; the court stated that it could not see where the sheriff was holding Jones. *Id.*

posed questions and Jones answered them), in fifteen minutes. *Id.* at 154. Gergal says Jones was under arrest when he was taken to the police station for his statement; Jones had warrants pending for matters other than the Berger homicide. *Id.* at 157. The fact the Jones had been arrested was omitted from the October 4, 1994 statement. *Id.* at 159. Gergal said no one offered Jones a deal to testify in this case. *Id.* at 162.

Bristol Borough Detective Morris spoke to Corey Jones on October 3 and 4, 1994. (N.T. 5/29/01 at 203). Jones gave a statement (Exhibit C-4) on October 4, 1994. *Id.* Morris did not threaten to charge Jones with conspiracy to commit murder, if he failed to provide a statement. *Id.* at 204, 215.

c. First Two Parts of *Brady*

Corey Jones did not testify at Petitioner's trial. Hence, there was no inculpatory evidence from him that could be impeached. This makes it unlikely that there is a viable *Brady* claim with respect to Jones. Further, the PCRA court found that Jones was not credible. 2002 PCRA Ct. Op. at 15. This fact finding is presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Thomas*, 570 F.3d at 117. Since Petitioner has failed to rebut the statutory presumption by clear and convincing evidence, *see* § 2254(e)(1), this court must accept as true the PCRA court's factual conclusions. Hence, Jones provided no credible exculpatory evidence or credible facts to impugn the integrity of the prosecution's investigation. *See Kyles*, 514 U.S. at 446 (noting that it is a common defense tactic to discredit the quality of the police investigation or the decision to charge the defendant). Accordingly, Corey Jones is excluded from the *Brady* materiality analysis.

10. Hermann Carroll

a. Allegations

Petitioner initially claimed that the Commonwealth failed to disclose that Hermann Carroll approached the police because he believed that he was a suspect in the Berger homicide. Pet'r Mem. at 15-16. This information could have been used by Petitioner at trial to impeach Carroll by demonstrating his motive to falsely accuse Petitioner.[25] *Id.*

In his Supplement, Petitioner claims that the Commonwealth failed to disclose that, when Carroll was served with his subpoena to testify against Petitioner, he expressed reluctance and was told to contact the prosecutor to "arrange a compromise." Supp. at 20. Petitioner maintains that this evidence would have allowed trial counsel to impeach Carroll on the ground that the Commonwealth offered him favors in exchange for his testimony against Petitioner. *Id.*

The Commonwealth asserts that Petitioner's supplemental *Brady* claim concerning Carroll is time-barred. Supp. Ans. at 21. However, the Commonwealth has failed to demonstrate that Petitioner possessed the document at issue, prior to the October 2011 production, or to show how, *via* reasonable diligence, he could have obtained it before the Commonwealth produced it. *See id.* at 20-21. Hence, the Commonwealth has failed to prove that the *Brady* claim premised on this document is time-barred, which is its burden. *See Day*, 547 U.S. at 202.

b. Evidence Petitioner has Obtained

Bucks County Detective Mullin testified that, when he interviewed Hermann Carroll, he did not offer Carroll any assistance on his pending charges and Carroll did not request any assistance. (N.T. 5/29/01 at 96). Mullin denied telling Carroll that, if his testimony was truthful, an investigator

[25] Carroll testified that, while incarcerated at the Bucks County Correctional Facility with Petitioner, Petitioner told him he had killed Mr. Berger. (N.T. 3/9/95 at 371-73).

would appear before Carroll's sentencing judge. *Id.* at 98.

Bucks County Detective Robert E. Gergal talked to Hermann Carroll on January 27, 1995; Gergal, Mullin, Carrol and Carroll's attorney, Assistant Public Defender Ann Faust, were present. (N.T. 5/29/01 at 125-26). Gergal told Carroll that, if he testified truthfully at Petitioner's trial, he (Gergal) would testify about Carroll's assistance at Carroll's sentencing. *Id.* at 126. Detective Gergal did not consider Carroll to be a suspect in the Berger homicide. *Id.* at 152. Gergal never questioned anyone about Carroll being responsible for Mr. Berger's death. *Id.* at 153. At the time of the interview, Carroll had a pending escape charge. *Id.* at 191. Gergal does not know of any police officer who thought Carroll was a suspect in the Berger killing. *Id.* at 194. Instead, Carroll told Gergal that people in the neighborhood were mentioning his name in connection with the Berger homicide and he wanted to straighten that out. *Id.*

In October 2011, the Commonwealth provided Petitioner with a February 27, 1995 report by Bucks County Detective John L. Ziemba. Exp. Exh. B 25. Detective Ziemba indicates that he went to the Bucks County Correctional Facility that day to serve trial subpoenas on Paulinda Moore and Herman Carroll. *Id.* While there, Carroll told Detective Ziemba that he was reluctant to appear as a Commonwealth witness; Detective Ziemba told Carroll "to contact Mr. Ted Fritsch [Petitioner's prosecutor] to arrange a compromise." *Id.*

c. First Two Parts of *Brady*

Petitioner's original allegation (Carroll approached the police because he thought he was a suspect) is not the best *Brady* information. Further, Carroll testified at Petitioner's trial that Petitioner had told him the police thought he (Carroll) was a suspect in the Berger killing. (N.T. 3/9/95 at 370). Carroll was cross-examined about this issue at trial, *id.* at 376-78, hence, there was

no *Brady* violation. *See United States v. Kaplan*, 554 F.2d 577, 580 (3d Cir. 1977); *Govt. of the Virgin Islands v. Ruiz*, 495 F.2d 1175, 1178-79 (3d Cir. 1974).

Detective Gergal's admission that he told Carroll he would testify at Carroll's sentencing hearing could support a *Brady* claim. The prosecution did not disclose this information; hence, the second part of a *Brady* claim is made out. Further, that information is favorable to Petitioner because it would allow Carroll to be impeached. *See e.g., Breakiron v. Horn*, 642 F.3d 126, 132-33 & n.8 (3d Cir. 2011) (noting that the prosecution correctly did not appeal the district court's finding as favorable under *Brady* a prosecution witness seeking assistance from the prosecutor in exchange for his trial testimony against the defendant). Therefore, this evidence should be evaluated for purposes of *Brady* materiality.

The evidence that Carroll was reluctant to testify against Petitioner and was instructed to contact the prosecutor "to arrange a compromise," was subject to impeach Carroll regarding what "compromise" was offered by the prosecutor. Hence, the evidence is favorable. *See Breakiron*, 642 F.3d at 132-33 & n.8. Further, the Commonwealth makes no effort to demonstrate that it produced this evidence prior to trial, instead asserting that the evidence is not material. Supp. Ans. at 21. Since the Commonwealth is in the best position to answer when it disclosed the evidence, this court infers that it did not disclose that information prior to trial. *See Slutzker*, 393 F.3d at 386 n.13 (noting that the prosecution is normally in the best position to know the contents of its own files and the burden of proof is traditionally allocated to the party best able to inform itself about an issue). This evidence should be evaluated for purposes of *Brady* materiality.

11. Bernard McLean

a. Allegations

Petitioner originally claimed that the prosecution allowed Bernard McLean to testify falsely that the police had not assisted him in resolving an outstanding bench warrant, once he provided them with a statement incriminating Petitioner. Pet'r Mem. at 16. This is not a *Brady* claim, instead, it is a *Napue* claim and will be addressed as such.

In his Supplement, Petitioner alleges that the Commonwealth suppressed evidence that McLean gave a statement regarding the Jermaine Brown shooting, while using an alias; McLean, in a subsequent statement in the Brown case, acknowledged having previously used an alias and recanted some of his original statements. Supp. at 21. Petitioner's assertion that this evidence could have been used to impeach McLean, is a *Brady* claim and will be addressed as such.

b. Evidence Petitioner has Obtained

Bucks County Detective Gergal remembers speaking to Bernard McLean on at least one occasion around October 3, 1994. (N.T. 5/29/01 at 168). Gergal does not recall if McLean had an outstanding bench warrant at the time he spoke to McLean, or if he was released after providing his statement. *Id.* at 168-69.

Bristol Borough Detective Morris contacted McLean to give a statement, on October 3, 1994. (N.T. 5/29/01 at 217). At some point, on that day, McLean, Sean Hess and Corey Jones were all in the same police station. *Id.* In his statement (*id.* at 222, Exhibit D-63), McLean did not mention his open bench warrant, yet, at Petitioner's preliminary hearing, Morris testified that McLean had an open bench warrant when he gave the October 4, 1994 statement. *Id.* at 219. After McLean gave his statement in the early morning hours of October 4, 1994, he went home. *Id.* at 220. Morris says

McLean did not need permission to leave the police station after he gave his statement. *Id.* at 231.

With respect to the supplemental claims, the Commonwealth has produced to Petitioner a September 29, 1994 report prepared by Officer R. Johnson. Exp. Exh. B 61-63. That report concerns Officer Johnson's investigation of Turner Rogers' shooting of Jermaine Brown on September 29, 1994, the day of the Berger homicide. One of the witnesses Officer Johnson encountered was identified as "Bernard Johnson," that person was McLean. *See id.,* B 61. McLean (posing as Johnson) gave a statement concerning the Jermaine Brown shooting in the early morning hours of September 30, 1994. *Id.*, B 62-63. The Commonwealth also produced an April 17, 1995 interview report, authored by Bucks County Detective Terry Lachman, concerning Bernard McLean. *Id.,* B 76-79. In that report, McLean admits that he used an alias when he gave his prior statement to Officer Johnson. *Id.*, B 79. McLean described the Jermaine Brown shooting in a different manner than previously and, when confronted with the discrepancies, he denied making the prior inconsistent statements. *Id.*, B 77-79.

The Commonwealth maintains that Petitioner was aware of the Jermaine Brown shooting and "readily had access" to the reports in the investigation file for that homicide both before and after trial. Supp. Ans. at 22. Hence, the Commonwealth asserts that any claims based on the September 29, 1994 and April 17, 1995 reports are time-barred. *Id.* This court finds that the Commonwealth has failed to prove untimeliness.

First, the Commonwealth fails to explain how Petitioner could have obtained the September 29, 1994 report prior to trial. Since this is the basis for the Commonwealth's assertion that Petitioner's claim is time-barred and it has the burden of proving untimeliness, *see Day*, 547 U.S. at 202, this court finds that any *Brady* claim based on that report is not time-barred. Further, the

bottom of each page of the April 17, 1995 report states: "This document is the property of the Bucks County Detectives and is loaned to your agency; it and its contents are not to be distributed outside your agency." Exp. Exh. B 76-79. This strongly suggests that the Commonwealth would have been in a better position to obtain the report than Petitioner. Hence, the Commonwealth has not demonstrated that Petitioner had equal access to that report either. Since Petitioner's alleged ready access is the basis for the Commonwealth's time-bar defense, it has failed to prove untimeliness. *See Day*, 547 U.S. at 202.

c. *Napue* Claim

The preliminary hearing testimony, which is a matter of public record, reveals that McLean had an open bench warrant when he provided his October 4, 1994 statement. However, Petitioner did not present any evidence at the PCRA hearings that the police, in fact, assisted McLean with his outstanding warrant. Hence, there is no basis to conclude that the prosecution suppressed any evidence concerning McLean's status. Further, at trial, McLean testified that the police said they would assist him with his outstanding warrant after he provided a statement. (N.T. 3/9/95 at 244). Thus, the *Napue* claim lacks merit.

d. *Brady* Claim

The Commonwealth has made no effort to demonstrate that it produced either supplemental document, prior to its October 2011 production. *See* Supp. Ans. at 22. Instead, it defends the *Brady* claim on the ground that Petitioner had ready access to both documents. *Id.* The court has already explained that the Commonwealth has not demonstrated Petitioner's ready access to the April 17, 1995 report. *See supra* Section III(A)(11)(b). Hence, it was suppressed.

Petitioner maintains that the suppressed April 17, 1995 interview report was favorable,

because it could show McLean's bias towards the Commonwealth which had "leverage over McLean because of his use of a false name and his providing a false statement." Supp. at 21. That report is a Bristol Township Police Department document and this court has found that the Bristol Township Police Department was not part of the Berger homicide prosecution team, *see supra* Section III(A)(2)(c), hence, the prosecutor had no *Brady* duty to obtain this report and disclose it to Petitioner prior to trial. *See Pelullo*, 399 F.3d at 216 (citing, *inter alia, Merlino*, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies that are not part of the defendant's prosecution team).

Next, that report was created after Petitioner's trial in March 1995. Hence, it could not have been suppressed. Furthermore, this court disagrees with the premise that the April 17, 1995 report provided any leverage over McLean. McLean was a witness to, not a suspect in, the Jermaine Brown shooting. Hence, the Commonwealth needed him to assist in the prosecution of that case, McLean did not need the Commonwealth. Further, the discrepancies between McLean's first interview and the April 17, 1995 interview created problems for the Commonwealth, not for McLean, so, the Commonwealth had no "leverage" over McLean based on the inconsistencies. In particular, McLean's statements in the second interview minimized Turner Rogers' culpability by suggesting that the shooting was accidental. Finally, the fact that McLean used an alias when he was first interviewed provided no "leverage" for the Commonwealth. Instead, it might provide fodder for McLean's cross-examination by Turner Rogers' counsel, if that case proceeded to trial.[26] Accordingly, even if it had existed at the time of Petitioner's trial, the April 17, 1995 interview report was not favorable to Petitioner and will not be considered for purposes of the *Brady*

[26]The court is not aware of whether Turner Rogers was actually tried for the Jermaine Brown homicide.

materiality analysis.

The September 29, 1994 interview report is a Bristol Township Police Department document; this court already has found that the Bristol Township Police Department was distinct from the Berger homicide prosecution team, *see supra* Section III(A)(2)(c), hence, the prosecutor had no *Brady* duty to obtain this report and disclose it to Petitioner prior to trial. *See Pelullo*, 399 F.3d at 216 (citing, *inter alia, Merlino*, 349 F.3d at 154, and noting that the prosecutor has no *Brady* obligation to discover information held by government agencies outside of the defendant's prosecution team). Accordingly, the September 29, 1994 report will not be considered for purposes of the *Brady* materiality analysis.

12. Cumulative Materiality: the Third Part of *Brady*

The items of undisclosed evidence which must be evaluated for the purpose of determining materiality are the following: (1) Glenn Pollard's letter offering assistance in the Gail Nelms case; (2) Detective Mullin's testimony that Glenn Pollard was a serial informant; (3) Herman Carroll obtaining an offer of assistance from Detective Gergal in exchange for his testimony against Petitioner; and (4) Herman Carroll expressing reluctance to testify against Petitioner and being told by Bucks County Detective Ziemba to seek a compromise with the prosecutor.

The four items of suppressed evidence would have allowed Petitioner's trial counsel to cross-examine Pollard and Carroll more extensively; nevertheless, this court concludes that the suppressed evidence is not material. The Commonwealth presented a great number of witnesses who provided the same incriminating testimony that Pollard and Carroll did. Moreover, credible, additional testimony, untainted by the prosecutor's suppression of the evidence concerning Pollard and Carroll, was presented: (1) Alfonso Colon, saw Petitioner leave the victim's store moments after hearing the

fatal gunshots; (2) Michael Segal, witnessed the crime and accurately described the clothing the killer (Petitioner) wore on the day of the crime; (3) Vera DuBois, Petitioner's aunt, saw Petitioner in Bristol Borough about an hour before the crime occurred wearing clothes identical to those the killer wore; (4) Leonard Wilson, a jewelry store owner on Mill Street in Bristol Borough, encountered Petitioner about 40 minutes before the crime and noticed that Petitioner appeared to be observing the store, rather than looking for jewelry; (5) Pamela Harrison, Petitioner's cousin, whose home Petitioner entered shortly after the crime occurred, saw Petitioner with a handgun and wearing the same type of hooded sweatshirt the killer wore. *Gibson*, 720 A.2d at 476-78. Additionally, as the jury was instructed, because Petitioner had admitted to lying to the police about substantive matters related to the crime, the jury could use Petitioner's admission as evidence of his guilt. (N.T. 3/13/95 at 65). Accordingly, Petitioner was not harmed by the *Brady* violations and, hence, may not obtain habeas relief on that basis.

B. Initial Ineffective Assistance Claims - Claim 2

Petitioner asserts that trial counsel rendered ineffective assistance by failing to investigate, discover and use impeaching evidence against ten witnesses: Edward Jones, Glenn Pollard, Cyril Thomas, Paulinda Moore, Kevin Jones, Bernard McLean, Kenneth Johnson, Michael Segal, Sean Hess and Diane Hess. Pet. at 28-34. The Commonwealth contends and Petitioner disputes[27] that only Petitioner's claims concerning Glenn Pollard and Paulinda Moore are not procedurally defaulted. Am. Ans. at 12-13, 18, 52; Pet'r Mem. at 2 n.3, 26-28; Pet'r Reply at 3-30. This court would dismiss the claims concerning Cyril Thomas, Kevin Jones, Kenneth Johnson, Sean Hess and

[27] Petitioner does not provide evidence of cause and prejudice to excuse the default of any of his ineffective assistance claims. Although Petitioner asserts he is innocent, Pet. at 3; Pet'r Reply at 50, he has not provided any new, reliable evidence of his innocence. Hence, any ineffective assistance claims this court finds procedurally defaulted may not be reviewed on their merits.

Diane Hess as procedurally defaulted. The remaining six claims will be reviewed on their merits.

1. Standard for Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel must be evaluated against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense" by "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 694, but it is less than a preponderance of the evidence. *Id.* at 693, 694.

If the petitioner fails to satisfy either prong of the *Strickland* test, there is no need to evaluate the other part, as his claim will fail. *Id.* at 697. Further, counsel will not be deemed to be ineffective for failing to present an unmeritorious claim or objection. *Parrish v. Fulcomer*, 150 F.3d 326, 328-29 (3d Cir. 1998).

2. Edward Jones

a. Procedural Default

Petitioner claims that trial counsel was ineffective for failing to investigate why DEA agents were present when a statement was taken from Edward Jones. Pet'r Mem. at 21. Had counsel inquired, he would have learned that the DEA paid Jones thousands of dollars and that Jones had obtained other money and favors from local police. *Id.*

The Superior Court, viewing Petitioner's claim as being only that trial counsel had failed to discover that Jones had received $1,500 for testifying against Petitioner, 2008 Super. Ct. Op. at 17, stated that Petitioner had failed to raise this claim in his PCRA petition but did not deem the claim waived. *Id.* Instead, the state court found that, because no witness testified at the PCRA hearing that Jones received $1,500 for his testimony, the claim did not warrant further consideration. *Id.* This imprecise method of adjudication, nevertheless, appears to reach the merits. Since the Superior Court did not clearly and expressly identify a state procedural rule that Petitioner violated when presenting his claim, there is no procedural default.[28] *See Harris*, 489 U.S. at 266 (holding that there was no procedural default when the state court did not clearly and expressly rely upon a state law ground for denying relief). Although the claim could be resolved under the AEDPA standard, it will be reviewed *de novo*, because it fails even under that review.

b. Merits

Despite addressing this claim *de novo*, this court must still presume as correct the findings of fact made by the PCRA court, *see Thomas*, 570 F.3d at 117, and the Superior Court. *See Affinito*

[28] The Superior Court may have intended to invoke *Commonwealth v. Wharton*, 811 A.2d 978, 987 (Pa. 2002), a rule that is an adequate bar to habeas review. *See infra* Section III(B)(3). Regardless, this claim lacks merit, so it may be denied despite being defaulted. *Cf.* 28 U.S.C. § 2254(b)(2) (allowing the court to deny a habeas claim, despite the lack of exhaustion).

v. Hendricks, 366 F.3d 252, 256 (3d Cir. 2004). Petitioner has not provided clear and convincing evidence to rebut those findings, hence, this court must accept them. *See* 28 U.S.C. § 2254(e)(1). As with respect to Petitioner's original *Brady* claim concerning Edward Jones, the state courts' fact findings that no evidence substantiates Petitioner's allegation that Jones was paid $1,500 for testifying against him, 2008 Super. Ct. Op. at 17, means trial counsel was not ineffective for failing to seek such evidence. *See Parrish*, 150 F.3d at 328-29. Moreover, prejudice exists only when counsel's performance deprives the defendant of a fair trial, which means a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Because Edward Jones' trial testimony was truthful, *see* 2002 PCRA Ct. Op. at 15, it was reliable and Petitioner was not prejudiced by trial counsel's failure to cross-examine Jones more forcefully.

3. Cyril Thomas

Petitioner maintains that trial counsel was ineffective for failing to seek Cyril Thomas' juvenile file. Pet'r Mem. at 22. Had he done so, counsel would have learned that Bucks County Detective Mullin had used Thomas' pending charges to extract a statement from him. *Id.*

The Superior Court found that Petitioner waived his ineffective assistance claim concerning Cyril Thomas, because he failed to include it in his PCRA petition. 2008 Super. Ct. Op. at 17 (citing *Commonwealth v. Wharton*, 811 A.2d 978, 987 (Pa. 2002)). Petitioner asserts that the Superior Court's waiver finding is not an adequate basis to bar habeas relief, because the state court relied upon *Wharton*, which was decided after Petitioner submitted his PCRA petition. Pet'r Reply at 7-8, 16-17. The Superior Court did rely upon *Wharton*, which was decided after Petitioner filed his PCRA petition in 1999; however, the *Wharton* rule was derived from prior cases, including *Commonwealth v. Kenney*, 732 A.2d 1161, 1165 (Pa. 1999). Petitioner filed his PCRA petition on

October 29, 1999, *see* Pet. at 1, five months after *Kenney* had been decided on May 28, 1999. Hence, the waiver rule the Superior Court applied when resolving Petitioner's claim was adequate. *See Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005) (holding that, to be adequate, the state procedural rule must have been announced by the state supreme court prior to the petitioner's error which allegedly caused the default). Petitioner's claim is procedurally defaulted and may not be reviewed on its merits.

4. Kevin Jones

Petitioner maintains that trial counsel failed to inspect county court records, which would have revealed that the prosecution allowed Kevin Jones work release, after he gave a statement that incriminated Petitioner, despite Jones' repeated failures to report to his parole officer. Pet'r Mem. at 23. The Superior Court found that Petitioner waived his ineffective assistance claim concerning Kevin Jones, because he omitted it from his PCRA petition. 2008 Super. Ct. Op. at 17 (citing *Wharton*, 811 A.2d at 987). As explained *supra* Section III(B)(3), the *Wharton* rule is itself based upon Pennsylvania Supreme Court case law dating to May 28, 1999. Hence, the waiver rule the Superior Court applied to Petitioner was adequate. *See Jacobs*, 395 F.3d at 117. This procedurally defaulted claim may not be reviewed on its merits.

5. Bernard McLean

a. Procedural Default

Petitioner maintains that trial counsel failed to cross-examine Bernard McLean concerning assistance with a bench warrant that McLean allegedly received from the police, in exchange for providing a statement against Petitioner. Pet'r Mem. at 23. The Superior Court did not address this claim on its merits, because it was inadequately developed in the appellate brief and, hence, waived

and the necessary preliminary hearing notes of testimony were not included in the certified appellate record. 2008 Super. Ct. Op. at 21. Petitioner disputes these conclusions. Pet'r Reply at 28. Rather than resolving the complicated procedural issues Petitioner raises, the court will adjudicate this unmeritorious claim. *Cf.* 28 U.S.C. § 2254(b)(2) (allowing for a habeas claim to be denied on the merits despite the lack of exhaustion). Since the state court did not resolve this claim on its merits, it is subject to *de novo* review. *Bronshtein v. Horn*, 404 F.3d 700, 710 n.4 (3d Cir. 2005) (Alito, J.).

b. Merits

Petitioner's claim is not supported by the record. At trial, Bernard McLean testified that, on September 30, 1994, Petitioner told him that he had killed a white man in Bristol and had taken approximately $2,000 from the victim. (N.T. 3/9/95 at 232-33). McLean said he never spoke to Petitioner about the crime again. *Id.* at 235. On cross-examination, McLean stated that he had provided a statement to the police on October 4, 1994. *Id.* at 239. When he went to the police station on October 4, 1994, he was shown a warrant for his arrest based on unpaid court costs from 1989. *Id.* at 241. McLean spoke to two or three detectives, one of whom was Randy Morris.[29] *Id.* at 242-43. After McLean provided the police with his statement implicating Petitioner, the police advised that they would "take care of" his warrant. *Id.* at 244. McLean later testified that the District Attorney's office did not offer to abate the warrant, if he provided information about the Berger homicide. *Id.* at 248.

Based on McLean's testimony, there was no legitimate impeachment that trial counsel failed to pursue. As McLean testified at trial, the police, not the District Attorney's office, offered to discharge his warrant after he gave his statement. (N.T. 3/9/95 at 244. 248). In short, the record

[29]Randy Morris was a Bristol Borough police detective in 1994 and 1995. 2002 PCRA Ct. Op. at 14.

does not support Petitioner's assertion that he was prejudiced by trial counsel's failure to impeach McLean based upon preliminary hearing testimony that McLean thought he was going to receive police assistance with respect to a bench warrant.[30]

6. Kenneth Johnson

Petitioner maintains that trial counsel was ineffective for failing to: (1) impeach Kenneth Johnson's trial testimony using a discrepancy in his police statement concerning how he came to hear about Petitioner make incriminating statements while they were both in prison; (2) impeach Johnson with his pending assault charge; and (3) suggest that much of Johnson's testimony was derived from police statements obtained well before he provided his November 12, 1994 statement. Pet'r Mem. at 23-24.

The Superior Court found that Petitioner waived his ineffective assistance claim concerning Kenneth Johnson, because he failed to include it in his PCRA petition. 2008 Super. Ct. Op. at 17 (citing *Wharton*, 811 A.2d at 987). As explained *supra* Section III(B)(3), the *Wharton* rule is based upon Pennsylvania Supreme Court case law dating to May 28, 1999. Hence, the waiver rule the Superior Court applied to Petitioner was adequate. *See Jacobs*, 395 F.3d at 117. This claim is procedurally defaulted and may not be reviewed on its merits.

7. Michael Segal

a. Procedural Default

Petitioner maintains that trial counsel was ineffective for failing to cross-examine Michael Segal regarding his failure to identify Petitioner at a pre-trial lineup. Pet'r Mem. at 24. The Superior Court concluded that this claim was waived because: (1) Petitioner failed to identify where in the

[30]Notably, Petitioner ignores McLean's trial testimony that, despite his expectation that the police would take care of the warrant, he was subsequently arrested on that warrant, in Maryland. (N.T. 3/9/95 at 244-45).

record trial counsel acknowledged that he forgot to cross-examine Segal on this issue; and (2) Petitioner failed to develop why this omission was significant. 2008 Super. Ct. Op. at 22. The state court deemed this claim was waived, without citing a controlling state procedural rule. *See id.* Moreover, its resolution of the claim suggests that the state court actually found the claim lacked merit based upon the existing record. This court finds that the state court failed to clearly and expressly rely upon a state procedural ground for failing to address the claim on its merits. Hence, the claim is not procedurally defaulted. *See Harris*, 489 U.S. at 266. The court will address the merits of this claim *de novo*.

b. Merits

At trial, Michael Segal could not identify Petitioner as the person he saw struggle with, rob and kill the victim on September 29, 1994. (N.T. 3/8/95 at 72-80). Segal expressly admitted that he could not make a facial identification of Petitioner as the assailant.[31] *Id.* at 80. Inasmuch as Segal failed to identify Petitioner at trial, trial counsel's failure to confront the witness with his inability to identify Petitioner at a pre-trial lineup is not prejudicial. By contrast, if Segal had identified Petitioner at trial, his prior inability to recognize Petitioner in the pre-trial lineup would have been highly relevant and counsel's failure to cross-examine Segal about his prior failure might have been prejudicial. However, the jury knew at trial that Segal could not identify Petitioner. *Cf. Marshall v. Hendricks*, 307 F.3d 36, 88 (3d Cir. 2002) (finding no prejudice from trial counsel's failure to present evidence that, nonetheless, had been presented by co-defendant's counsel and by other witnesses); *Lusick v. Palakovich*, 270 Fed. Appx. 108, 111 (3d Cir. 2008) (non precedential) (declining to fault trial counsel for failing to impeach a witness with a particular piece of evidence

[31] Mr. Segal did testify that Petitioner was similar to the assailant in height, weight, complexion and hair color. (N.T. 3/8/95 at 79).

when the jury was already aware of the inconsistencies in that witness's testimony). The prejudice prong of *Strickland* was not met and this claim fails.

8. Sean Hess

Petitioner maintains that trial counsel was ineffective for failing to impeach Sean Hess' trial testimony that Petitioner referred to the victim as a "white devil" with Hess' police statement and preliminary hearing testimony wherein Hess stated that Petitioner referred to the victim simply as a man or a white man. Pet'r Mem. at 24-25. Petitioner failed to raise this claim on PCRA appeal. *See* 2008 Super. Ct. Op. at 16. This means that the claim is unexhausted. *See Lambert*, 387 F.3d at 233-34. Since the PCRA statute of limitations has expired for this claim,[32] it cannot be exhausted, and is procedurally defaulted and barred from habeas review. *See Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001).

9. Diane Hess

Petitioner maintains that trial counsel was ineffective for failing to interview Diane Hess, Sean Hess' mother, prior to trial. Pet'r Mem. at 25. Had counsel done so, he would have learned that the police knocked down her door to gain access to her son. *Id.*

The Superior Court found that Petitioner waived his ineffective assistance claim concerning Diane Hess because he failed to mention the claim in his PCRA petition. 2008 Super. Ct. Op. at 17 (citing *Wharton*, 811 A.2d at 987). As explained *supra* Section III(B)(3), the *Wharton* rule is itself based upon Pennsylvania Supreme Court case law dating to May 28, 1999. Hence, the waiver rule the Superior Court applied to Petitioner was adequate. *See Jacobs*, 395 F.3d at 117. The claim is procedurally defaulted and may not be reviewed on its merits.

[32] Petitioner's conviction became final on direct review on October 4, 1999, when the U.S. Supreme Court denied *certiorari*. 42 Pa. Cons. Stat. Ann. § 9545(b)(3). The PCRA statute of limitations expired one year later on October 4, 2000. § 9545(b)(1).

10. Glenn Pollard

Petitioner asserts that trial counsel was ineffective for failing to cross-examine Glen Pollard based on a letter Pollard wrote to the prosecutor and which the prosecutor forwarded to trial counsel prior to trial. In the letter, Pollard offered to testify against Petitioner, if the prosecution would drop the criminal charges then pending against him. Pet'r Mem. at 21. In the letter, Pollard further mentioned that he had provided helpful evidence in the Gail Nelms case in 1990-91. *Id.*

The Superior Court resolved this claim on the grounds that Petitioner failed to: (1) demonstrate that trial counsel had no reasonable strategic basis for failing to use Pollard's letter in light of counsel's PCRA testimony that the letter contained information that was damaging to Petitioner and; (2) demonstrate prejudice, since Pollard admitted on direct examination that he had contacted the District Attorney's office and offered to testify against Petitioner in order to help get his pending charges dropped. 2008 Super. Ct. Op. at 19-20. This claim will be reviewed under the AEDPA standard.

The Superior Court's resolution of Petitioner's claim was reasonable. Trial counsel offered a reasonable explanation for why he might have failed to use Pollard's letter, namely that it contained damaging information, that Petitioner was involved in another shooting, (N.T. 4/27/01 at 221); hence, Petitioner's claim fails under the AEDPA standard of review. *See Harrington v. Richter*, 562 U.S. 86, 108 (2011) (holding that it is reasonable to conclude under the AEDPA standard that an attorney acts reasonably when he fails to pursue a course that **might** be harmful to the defense).

Further, Petitioner cannot demonstrate prejudice because the impeachment evidence he faults trial counsel for failing to present was, nevertheless, presented *via* direct examination. *See Marshall*, 307 F.3d at 88 (finding no prejudice from trial counsel's failure to present evidence that, nonetheless,

had been presented by co-defendant's counsel and by other witnesses); *Lusick*, 270 Fed. Appx. at 111 (declining to fault trial counsel for failing to impeach a witness with a particular piece of evidence when the jury was already aware of the inconsistencies in that witness's testimony); *United States v. Smith*, 104 Fed. Appx. 266, 271 (3d Cir. 2004) (non precedential) (finding that defense counsel were not ineffective for failing to present an additional witness to testify concerning evidence that had been presented to the jury through a different witness).

11. Paulinda Moore

Petitioner maintains that trial counsel was ineffective for failing to investigate Paulinda Moore's court files, which would have led him to request health records revealing her severe mental illness. Pet'r Mem. at 22. The Superior Court resolved this claim by concluding that Petitioner had failed to demonstrate that he was prejudiced by counsel's failure to discover Moore's mental illness in light of the extensive cross-examination he had pursued. 2008 Super. Ct. Op. at 20. This claim is subject to the AEDPA standard.

It was reasonable to conclude that Petitioner was not prejudiced by trial counsel's failure to impeach Moore with evidence of her severe mental illness, because Moore was not a crucial witness against Petitioner. Before the crime occurred, Petitioner told one other person that he planned to commit a robbery and, after committing the crime, he confessed to eight other people. *See Gibson*, 720 A.2d at 476-78. Thus, even if trial counsel had totally discredited Moore *via* cross-examination, there is not a reasonable probability – in light of Petitioner's numerous admissions and other extensive evidence of his guilt – that he would have been acquitted. Accordingly, even under *de novo* review, Petitioner could not demonstrate prejudice. *See Strickland*, 466 U.S. at 696 (noting that a strong case of guilt is less likely to be affected by counsel's errors).

C. Fair Cross Section Claim - Claim 3

Petitioner maintains that the Bucks County Jury Selection system denied him a jury drawn from a fair cross section of the community. Pet'r Mem. at 34. The Superior Court declined to review this claim on its merits because Petitioner failed to identify supporting evidence as required by Pa. R. App. P. 2119(c). 2008 Super. Ct. Op. at 24-25. Petitioner has neither argued that the state court's procedural ruling is not adequate and independent, nor sought to excuse the procedural default of this claim.[33] Therefore, the claim is procedurally defaulted and may not be reviewed on its merits.

D. Challenge to the Reasonable Doubt Jury Instructions - Claim 4

1. Due Process Standard

It is well established that due process requires the prosecution to prove every element of a charged offense beyond a reasonable doubt. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citing *In re Winship*, 397 U.S. 358 (1970)). Even so, the Constitution does not require that the trial court define reasonable doubt as a matter of course. *Id.* "Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, . . . , the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citations omitted). Instead, "'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" *Id.* (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).

Considering the jury instructions as a whole, *see Victor*, 511 U.S. at 5, if it appears that a challenged jury instruction is ambiguous, that is, there is a chance that the jury might have applied

[33] Petitioner does not provide evidence of cause and prejudice to excuse the default of his fair cross section claim. Although Petitioner asserts he is innocent, Pet. at 3, Pet'r Reply at 50, he has not provided any new, reliable evidence of his innocence. Hence, Petitioner's fair cross-section claim may not be reviewed on its merits.

the challenged instruction in an unconstitutional manner, the court's inquiry must be whether there is a reasonable likelihood that the jury has applied the challenged instruction in an unconstitutional manner. *See Boyde v. California*, 494 U.S. 370, 380 (1990). The Supreme Court selected the *Boyde* standard of reasonable likelihood because:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, 494 U.S. at 380-81. The *Boyde* standard of reasonable likelihood was reaffirmed in *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991), and has remained the applicable standard. *See Victor*, 511 U.S. at 6.

Due process scrutiny of a jury instruction requires the reviewing court to first determine if there is a reasonable likelihood that the jury applied the challenged reasonable doubt jury instruction in an unconstitutional manner. *Id.* at 6. Consistent with the necessity to read the jury instructions as a whole, even if a portion of the trial court's instruction might lead to a due process violation by reducing the prosecution's burden of proof, if other parts of the court's instruction accurately convey the prosecution's burden of proof, the problematic instruction, read in light of the other instructions, will not violate due process. *See Victor*, 511 U.S. at 14-15.

2. Merits[34]

Petitioner claims that the reasonable doubt jury instructions given at his trial "lightened the state's burden of proof by suggesting a higher degree of doubt than is required for acquittal." Pet'r Mem. at 36. He objects to the following instructions (the highlighted portions are emphasized by

[34]The Commonwealth concedes that this claim is exhausted and ripe for habeas review. Am. Ans. at 9.

Petitioner):

> Now, by the term "reasonable doubt" I mean a doubt which arises from the evidence or lack thereof, which **doubt is well-founded in reason and common sense** and is an honest doubt, being one that springs from a fair, **thoughtful and careful consideration** of the evidence in this case or the lack thereof. It is not merely a passing fancy, members of the jury, that might come into your minds or a doubt conjured up for the purpose of avoiding an unpleasant duty. It should be such a doubt as would cause a reasonable person in the conduct of his own affairs to **stop, hesitate and seriously consider** as to whether or not he or she would do a certain thing before finally acting. It is something different, members of the jury, and more serious than a possible doubt, because in the very nature of human affairs a possible doubt exists in all things. It is **a reasonable doubt, being one that arises from the evidence which is well-founded in reason and common sense**, and is an honest doubt, being one that springs from a fair, **thoughtful and careful consideration** of the evidence in this case.

(N.T. 3/13/95 at 73). Petitioner suggests that the use of the phrase "stop, hesitate and seriously consider" signifies a higher degree of doubt than a reasonable doubt. Pet'r Mem. at 36. He maintains that this level of doubt is at least as high as the "grave uncertainty" and "substantial doubt" found unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Pet'r Mem. at 36-37. Further, Petitioner asserts that the trial court's use of the phrase "stop, hesitate and seriously consider" together with its "repeated" emphasis that a reasonable doubt must be "well-founded in reason and common sense" and arise from "thoughtful and careful consideration" of the evidence "essentially caution[ed] the jury that *doubt* (instead of the evidence of guilt) had to be strong and convincing. Conversely, nowhere did the court attempt to impress upon the jury the level of near-certainty that due process *does require* to prove guilt." *Id.* at 37 (emphasis as in original). Finally, Petitioner asserts that the state supreme court's resolution of his claim on direct appeal was both contrary to and an unreasonable application of U.S.

Supreme Court precedent. Pet'r Mem. at 39.

On direct appeal, the Pennsylvania Supreme Court found that the trial court's use of the phrase "stop, hesitate and seriously consider" was similar to an instruction it had approved previously, *Commonwealth v. Pearson*, 303 A.2d 481 (Pa. 1973), and "fairly conveyed the legal principle at issue, namely, that a reasonable doubt is one that would cause a reasonable person to pause and contemplate the prudence of his action." *Gibson*, 720 A.2d at 482. For this resolution of Petitioner's claim to be contrary to U.S. Supreme Court precedent, the state supreme court would have to directly contravene a U.S. Supreme Court decision holding that the precise instructions given at Petitioner's trial were unconstitutional. *See Williams*, 529 U.S. at 405-06; *see also Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (explaining that the AEDPA standard bars habeas relief if the precise rule the petitioner relies upon has not been established by a U.S. Supreme Court decision). Petitioner has not cited any U.S. Supreme Court decision which found the precise instructions he challenges to be unconstitutional. Hence, the state supreme court's decision was not contrary to U.S. Supreme Court precedent. *Williams*, 529 U.S. at 405-06. Moreover, the trial court's instruction that a reasonable doubt is one that would cause a reasonable person to "stop, hesitate and seriously consider" before acting is one which the U.S. Supreme Court has "repeatedly approved." *Victor*, 511 U.S. at 20 (citing *Holland*, 348 U.S. at 140). Hence, even under *de novo* review, Petitioner's challenge to the use of this phrase fails.

Petitioner further contends that the instructions in his case resemble those invalidated in *Cage* and *Sullivan* and that it was unreasonable for the state supreme court to have failed to recognize the similarity. In *Cage*, the U.S. Supreme Court found that a jury **could have understood**[35] the phrases

[35]The Supreme Court later abandoned the "could have understood" inquiry for whether there is a reasonable likelihood that the jury did apply the instruction in an unconstitutional manner. *See Victor*, 511 U.S. at 6 (citing *Estelle v. McGuire*, 502 U.S. at 72).

"such doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and "moral certainty" to call for a higher degree of doubt than is required for acquittal under due process. 498 U.S. at 41. In *Sullivan*, the challenged instruction was essentially identical to the one in *Cage*; the question in *Sullivan* was whether the deficient instruction could be harmless error. 508 U.S. at 276-77. However, Petitioner's jury instructions do not contain any of the prohibited and problematic phrases found in *Cage* or *Sullivan*. Hence, *Cage* and *Sullivan* do not establish a rule that *per se* invalidates Petitioner's jury instruction; accordingly, under *Knowles*, he cannot prevail based on *Cage* or *Sullivan*. 556 U.S. at 122.

Under *de novo* review, Petitioner's claim still fails. First, the trial court's instruction that a reasonable doubt is one that would cause a reasonable person to "stop, hesitate and seriously consider" before acting is one which the U.S. Supreme Court has "repeatedly approved." *Victor*, 511 U.S. at 20 (citing *Holland*, 348 U.S. at 140). Next, Petitioner's jury was told four times to consider the evidence admitted at trial in order to determine the degree of doubt it had, (N.T. 3/13/95 at 73); this is correct under U.S. Supreme Court precedent. *See Victor*, 511 U.S. at 16. Moreover, Petitioner's jury was told twice that any doubt should be "well-founded in reason," (N.T. 3/13/95 at 73), a proper charge under U.S. Supreme Court precedent. *See Victor*, 511 U.S. at 17 (citing *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)). Hence, the reasonable doubt jury instructions taken as a whole, *see Victor*, 511 U.S. at 5, pass muster under the Due Process Clause.

E. Claim that Trial Counsel Failed to Searchingly Question the Jury Venire - Claim 5

1. Procedural Default

Petitioner maintains that trial counsel was ineffective for failing to conduct a "searching" voir dire of the jury panel to uncover: (1) racial bias, (2) bias in favor of the police and (3) whether pre-

trial publicity would prevent fair consideration of the evidence. Pet'r Mem. at 40-42. The Superior Court resolved this claim by finding that Petitioner had failed to cite any authority to support his claim and had failed to identify where, in the PCRA record, he had attempted to provide factual support for his claim. 2008 Super. Ct. Op. at 34. While it is unclear whether this is a procedural or merits resolution of Petitioner's claim, since the state court failed to clearly identify any state procedural rule that Petitioner violated when presenting his claim, this court finds that the claim is not procedurally defaulted based on the state court's first explanation. *See Harris*, 489 U.S. at 266. The Superior Court also concluded that Petitioner inadequately asserted his belief that trial counsel lacked any strategic basis for conducting the voir dire as he did and had failed to even assert that he was prejudiced by counsel's performance at voir dire. *Id.* The state court's latter conclusions constitute an adjudication of the ineffective assistance claim on the merits. Hence, that result must be evaluated under the AEDPA standard of review. *Cf. Harrington*, 562 U.S. at 98 (holding that the AEDPA standard applies even where the state court provides no explanation for why it denied a claim on the merits).

2. Merits

The Superior Court's resolution of Petitioner's claim was reasonable. Under *Strickland*, counsel's performance is presumed to be effective. 466 U.S. at 689. Further, because of this presumption, a petitioner cannot carry his burden to demonstrate that counsel's performance was deficient without presenting evidence from counsel concerning the reason for the challenged decisions. *See Thomas*, 570 F.3d at 125. At the PCRA hearing, Petitioner asked one trial counsel, John Fioravanti, Jr., whether he tried to "life-qualify" the jury during voir dire, *see* (N.T. 4/27/01 at 95-97); however, he failed to asked Mr. Fioravanti about racial and pro-police bias in the jury, and

whether pre-trial publicity would have prevented the jury from fairly considering the evidence, the precise issues he raises herein. *See* Pet'r Mem. at 40-42. Petitioner asked his other trial counsel, David Knight, whether there were any African-Americans in the jury panel and about life-qualifying the jury, *see* (N.T. 4/27/01 at 244-47); however, as with Mr. Fioravanti, he failed to ask Mr. Knight about the precise issues herein raised. Hence, it was reasonable for the state court to find that Petitioner had failed to carry his burden to prove deficient performance. *See Thomas*, 570 F.3d at 125. Accordingly, his claim fails under the AEDPA standard.

F. Prosecutorial Misconduct When Questioning Alibi Witness Darnell Thompson and Related Ineffective Assistance Claims - Claim 6

1. Procedural Default

Petitioner maintains that the prosecutor committed misconduct because, without a good faith basis for doing so, he asked alibi witness Darnell Thompson if he had told Bucks County Detective Robert E. Gergal that Petitioner had killed Mr. Berger. Pet'r Mem. at 44. He further claims that trial and direct appellate counsel were ineffective for failing to raise this issue in the state courts. *Id.* at 46-47. Petitioner supplements these claims by relying upon the October 13, 1994 report of Detective Gergal's interview of Darnell Thompson, wherein Thompson does not tell Gergal that Petitioner had killed Mr. Berger. Supp. at 26.

The Commonwealth asserts that these claims are procedurally defaulted. Am. Ans. at 62. However, the Superior Court determined on the merits that trial counsel was not ineffective, because Petitioner failed to question trial counsel about why he chose not to object, hence, Petitioner had failed to establish that trial counsel lacked any reasonable strategic basis for failing to object. 2008 Super. Ct. Op. at 24. This determination is subject to review under the AEDPA standard. The state

court did not resolve the prosecutorial misconduct or direct appellate counsel ineffective assistance claims, hence, those claims are subject to *de novo* review.[36] *See Bronshtein*, 404 F.3d at 710 n.4.

2. Merits

a. Prosecutorial Misconduct

A prosecutor's improper conduct during trial may constitute a due process violation if it infects the trial with unfairness. *See Greer v. Miller*, 483 U.S. 756, 765 (1987) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). It is not enough that the conduct be undesirable, or even "universally condemned;" the focus must be on the fairness of the trial, hence, the conduct must be reviewed in the context of the whole trial. *Darden*, 477 U.S. at 181. In making this due process inquiry, whether the conduct occurred in response to a defense argument, *Darden*, 477 U.S. at 182, and the strength of the prosecution's case are relevant considerations. *Greer*, 483 U.S. at 766-67.

Petitioner maintains that the prosecutor committed misconduct when, without a good faith basis for doing so, he asked alibi witness Darnell Thompson whether he had told Detective Gergal that Petitioner had killed the victim. Pet'r Mem. at 44. The Superior Court did not resolve this prosecutorial misconduct claim, hence, it is subject to *de novo* review. *See Bronshtein*, 404 F.3d at 710 n.4.

On direct examination, Darnell Thompson testified that, when he arrived at Sean Hess' mother's home in Bristol Township a little before 3:00 p.m. on September 29, 1994, Petitioner was already there. (N.T. 3/10/95 at 495-96). This constitutes an alibi, because that is the approximate time Mr. Berger was killed in Bristol Borough. *See Gibson*, 720 A.2d at 476-77. However, on

[36] Since the state court did not identify any state rule of procedure that would bar consideration of any of these claims, they are not procedurally defaulted. *See Harris*, 489 U.S. at 266.

cross-examination, Thompson admitted that he may actually have arrived at Hess' residence as late as 3:30 p.m. (N.T. 3/10/95 at 501). This undermines Petitioner's alibi, because he could have killed Mr. Berger in Bristol Borough at approximately 3:00 p.m. and returned to Hess' mother's home by 3:30 p.m. The prosecutor attempted *via* cross-examination to discredit Thompson's alibi testimony. *Id.* at 501-05. One of the last questions the prosecutor asked Thompson was the one Petitioner finds objectionable. *Id.* at 505.

In this court's view, even assuming that the prosecutor's question was improper, it did not infect the trial with such unfairness as to violate due process. First, Thompson denied telling Detective Gergal that Petitioner had committed the crime. (N.T. 3/10/95 at 505). Second, once the prosecutor received Thompson's answer, he did not pursue that line of questioning any further. *Cf. Greer*, 483 U.S. at 766 (finding that the fact the that prosecutor asked only one improper question supported the conclusion that there was no due process violation). Third, the prosecutor did not exploit this question in his closing argument. *Cf. Greer*, 483 U.S. at 766 (finding no due process violation, in part, because the prosecutor did not exploit an improper question during his closing argument). Finally, despite Petitioner's assertions to the contrary, the prosecution had a very strong case against him, fueled, primarily, by his own admission communicated to eight different people, that he had committed the crime. *See Greer*, 483 U.S. at 767 & n.9 (noting that the strength of the prosecution's case is relevant to the due process inquiry).

b. Trial Counsel Ineffectiveness

The state court found that Petitioner could not prevail on his trial counsel ineffective assistance claim because he had failed to question trial counsel about why he chose not to object. 2008 Super. Ct. Op. at 24. This is a reasonable application of *Strickland*. First, under *Strickland*,

counsel's performance is presumed to be effective. 466 U.S. at 689. Further, because of this presumption, a petitioner cannot carry his burden to demonstrate that counsel's performance was deficient without presenting evidence from counsel concerning the reason(s) for the challenged decisions. *See Thomas*, 570 F.3d at 125. Since Petitioner failed to obtain that evidence when he questioned trial counsel at the PCRA evidentiary hearing,[37] it was reasonable for the state court to find that Petitioner had failed to prove his claim. *See id.* Accordingly, this trial counsel claim fails under the AEDPA standard. Moreover, the underlying prosecutorial misconduct claim lacks merit. *See Parrish*, 150 F.3d at 328-29.

c. Direct Appellate Counsel Ineffectiveness

Petitioner claims that direct appellate counsel was ineffective for failing to raise the prosecutorial misconduct claim. Pet'r Mem. at 46-47. Direct appellate counsel, Mr. Fioravanti, testified at the PCRA evidentiary hearing. (N.T. 4/27/01 at 62-126). Petitioner did not ask counsel why he had failed to raise a prosecutorial misconduct claim concerning the questioning of Darnell Thompson.[38] Hence, Petitioner failed to produce evidence to rebut the presumption that direct appellate counsel's performance was effective. *See Thomas*, 570 F.3d at 125. Accordingly, his direct appellate counsel claim fails under *de novo* review. The claim also fails because the omitted prosecutorial misconduct claim itself lacks merit. *See Parrish*, 150 F.3d at 328-29.

G. Prosecutorial Misconduct Concerning Michael Segal and Related Ineffective Assistance Claims - Claim 7

Petitioner alleges that the prosecutor presented false testimony *via* prosecution witness

[37] The Superior Court's finding of fact that Petitioner did not question trial counsel in this area is presumed correct. 28 U.S.C. § 2254(e)(1); *Affinito*, 366 F.3d at 256.

[38] Direct appellate counsel was also penalty phase counsel at trial. (N.T. 4/27/01 at 62-63). The bulk of Petitioner's questioning concerned Mr. Fioravanti's penalty phase performance. The only questions Petitioner asked him about omitted appellate issues concerned Mr. Fioravanti's failure to raise a claim that the trial court did not instruct the jury that a life sentence in Pennsylvania meant life without parole. *Id.* at 122-23, 124-26.

Michael Segal, because the prosecutor coached Segal to refine his testimony during the six month period that elapsed from the offense to trial. Pet'r Mem. at 48-49. The Commonwealth concedes that this claim is properly exhausted and ripe for habeas review. Am. Ans. at 9.

A prosecutor violates due process if he knowingly presents false evidence or permits it to go uncorrected when it appears at trial. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This principle applies with equal force when the false evidence does not relate directly to guilt or innocence but applies to the credibility of a witness. *Id.*

The Superior Court found Petitioner's *Napue* claim meritless, because the fact that a prosecution witness' trial testimony varies from his previous statements does not necessarily mean that the prosecution knowingly presented false testimony. 2008 Super. Ct. Op. at 26. This is a reasonable resolution of Petitioner's claim. The *Napue* line of cases requires that the prosecutor present or fail to correct testimony he (or someone from his office) knows to be false. *See Giglio v. United States*, 405 U.S. 150, 151-52 (1972); *Napue*, 360 U.S. at 267-68; *Mooney v. Holohan*, 294 U.S. 103, 110-13 (1935) (*per curiam*). Petitioner herein has presented no evidence that Segal's testimony was false or that the prosecutor coached him to present false testimony. Absent such proof, Petitioner's *Napue* claim fails under AEDPA or *de novo* review.[39]

H. Prosecutorial Misconduct for Repeatedly Eliciting "White Devil" Testimony and Related Ineffective Assistance Claims - Claim 8

1. Procedural Default

Petitioner contends that the prosecutor committed misconduct when he elicited testimony from five witnesses that Petitioner – an African-American – had referred to Mr. Berger – a Caucasian

[39] Petitioner also claims that trial and direct appellate counsel were ineffective because they failed to pursue his *Napue* claim. The Superior Court found that trial counsel was effective because he did cross examine Segal with his prior inconsistent statements. 2008 Super. Ct. Op. at 26. Regardless, since the *Napue* claim lacks merit, neither trial nor direct appellate counsel were ineffective for failing to pursue the claim. *See Parrish*, 150 F.3d at 328-29.

– as a "white devil."' Pet'r Mem. at 51-54. In doing so, he relies upon *Dawson v. Delaware*, 503 U.S. 159 (1992). *See* Pet'r Mem. at 53. Further, Petitioner maintains that trial and direct appellate counsel were ineffective for failing to challenge the prosecutor's actions in this regard. *Id.* at 55. The Commonwealth responds that these claims are procedurally defaulted. Am. Ans. at 65.

The Superior Court concluded that Petitioner had failed to develop adequately why *Dawson* applied to his case. 2008 Super. Ct. Op. at 23. The state court also determined that Petitioner had failed to question trial counsel at the PCRA evidentiary hearing about why he had not objected to the prosecutor's "white devil" line of questioning, hence, Petitioner had failed to demonstrate that trial counsel did not have a reasonable strategic basis for his inaction. *Id.* The Superior Court did not rely upon any procedural default, *see Harris*, 489 U.S. at 266, but, rather, resolved those claims on their merits allowing full AEDPA review. However, the Superior Court did not expressly resolve the merits of Petitioner's ineffective assistance of direct appellate counsel claim, hence, *de novo* review is appropriate for that claim. *See Bronshtein*, 404 F.3d at 710 n.4.

2. Merits

a. Prosecutorial Misconduct Claim

Petitioner contends that the prosecutor improperly elicited testimony from five witnesses that Petitioner had referred to the victim as a "white devil." Pet'r Mem. at 51-54. In doing so, he relies upon *Dawson v. Delaware*, 503 U.S. 159 (1992). *See* Pet'r Mem. at 53. The Superior Court found that Petitioner had failed to develop adequately why *Dawson* applied to his case. 2008 Super. Ct. Op. at 23. As noted above, this is a merits determination to which the AEDPA standard of review applies.

To prevail under AEDPA provisions, Petitioner must identify a U.S. Supreme Court case that

establishes a specific rule that the state court violated. *See Knowles*, 556 U.S. at 122. Petitioner relies upon *Dawson*; however, that case is inapposite. *Dawson* involved a white defendant who was a member of the Aryan Brotherhood. 503 U.S. at 162. During the penalty phase of Dawson's capital trial, the parties entered a stipulation concerning the origin and existence of the Aryan Brotherhood;[40] the prosecution introduced evidence that Dawson had tattooed the words "Aryan Brotherhood" on his hand. *Id.* The U.S. Supreme Court noted that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs, *id.* at 163, and held that the prosecution was unable to establish that Dawson's membership in the Aryan Brotherhood was relevant to any sentencing issue. *Id.* at 165-67. Hence, the prosecution's use of the Aryan Brotherhood evidence, which proved nothing more than Dawson's abstract beliefs, violated his First Amendment rights. *Id.* at 167.

For *Dawson* to be helpful to Petitioner under the AEDPA standard, his claim would have to be that the "white devil" evidence established his membership in some group of like-minded individuals, that the group's beliefs were not relevant to any guilt phase issue[41] such that the prosecution's reference to the term established nothing more than Petitioner's abstract beliefs. *See Knowles*, 556 U.S. at 122. However, Petitioner does not argue that his use of the term "white devil" establishes membership in any group implicating his First Amendment rights. Hence, under the AEDPA standard, he cannot prevail based upon *Dawson*. *See Knowles*, 556 U.S. at 122.

Petitioner also raises a Fourteenth Amendment due process challenge to the prosecutor's use of the term "white devil." *See* Pet'r Mem. at 53-54. *Dawson*, a First Amendment case, under the

[40] The parties agreed that the Aryan Brotherhood was a white racist prison gang formed in California in the 1960's, which had spread to many state prisons, including Delaware, where Dawson was tried. 503 U.S. at 162.

[41] *Dawson* arose in the context of a capital sentencing proceeding. 503 U.S. at 160. Petitioner's claim concerns the guilt phase of his trial.

AEDPA standard, lends no support to Petitioner's Fourteenth Amendment due process claim. *See Knowles*, 556 U.S. at 122.

b. Ineffective Assistance of Trial Counsel Claim

The Superior Court found that Petitioner could not prevail on his ineffective assistance of trial counsel claim, because he had failed to question trial counsel about why he had failed to object to the "white devil" testimony. 2008 Super. Ct. Op. at 23. This is a reasonable application of *Strickland*. Because, under *Strickland*, counsel's performance is presumed to be effective, 466 U.S. at 689, a petitioner cannot carry his burden to demonstrate that counsel's performance was deficient without eliciting evidence from counsel to rebut the presumption. *See Thomas*, 570 F.3d at 125. Petitioner herein failed to obtain necessary evidence when he questioned trial counsel at the PCRA evidentiary hearing,[42] therefore, it was reasonable for the state court to find that he had failed to carry his burden. *See id.* Accordingly, his trial counsel claim fails under the AEDPA standard.

c. Ineffective Assistance of Direct Appellate Counsel Claim

Petitioner claims that direct appellate counsel was ineffective for failing to challenge the prosecutor's "white devil" line of questioning on appeal. Pet'r Mem. at 55. Although direct appellate counsel testified at the PCRA evidentiary hearing, (N.T. 4/27/01 at 62-126), Petitioner did not ask why he had failed to raise a prosecutorial misconduct claim concerning the "white devil" line of questioning.[43] Hence, Petitioner failed to elicit essential testimony to rebut the presumption that direct appellate counsel's performance was effective. *See Thomas*, 570 F.3d at 125. Accordingly,

[42] The state appellate court's finding of fact that Petitioner did not question trial counsel in this area is presumed correct. 28 U.S.C. § 2254(e)(1); *Affinito*, 366 F.3d at 256.

[43] Most of Petitioner's questioning of direct appellate counsel concerned his penalty phase performance. The only questions Petitioner asked him about omitted direct appellate issues concerned Mr. Fioravanti's failure to raise a claim that the trial court did not instruct the jury that a life sentence in Pennsylvania meant life without parole. (N.T. 4/27/01at 122-23, 124-26).

his direct appellate counsel claim fails under *de novo* review.

I. Prosecutorial Misconduct for Eliciting Testimony that Petitioner had Asked the Police an Incriminating Hypothetical Question and Related Ineffective Assistance Claims - Claim 9

1. Procedural Default and Applicable Standard of Review

Petitioner maintains that the prosecutor committed misconduct when he elicited testimony from Detective Randy Morris that Petitioner had asked an incriminating hypothetical question.[44] Pet'r Mem. at 56-58. He also claims that the prosecutor failed to provide trial counsel with Detective Morris' notes, which recorded Petitioner's alleged hypothetical question. *Id.* Petitioner further claims that trial counsel was ineffective for failing to request Morris' notes and that direct appellate counsel was ineffective for failing to litigate the preceding issues. *Id.* at 58-59. The Commonwealth maintains that the prosecutorial misconduct claim is procedurally defaulted. Am. Ans. at 13.

The Superior Court found, on the merits, that Petitioner had inadequately developed his claim that the prosecutor's failure to turn over Detective Morris' notes violated his rights, 2008 Super. Ct. Op. at 27-28, and that Petitioner did not establish prejudice, with respect to his trial counsel ineffective assistance claim. *Id.* at 28-29. The AEDPA standard of review applies to both of these determinations. Finally, the state court did not expressly resolve the direct appellate counsel ineffective assistance claim, hence, it is subject to *de novo* review. *See e.g., Bronshtein*, 404 F.3d at 710 n.4.

[44] Detective Morris testified that, after he had searched Petitioner's car on October 2, 1994, he overheard Petitioner ask Detective Stephen Battershell the following hypothetical question: "if you go in and rob someone and shoot, or if he pulls a gun on you and you shoot him, what can you get if the fellow lies on the floor and dies?' (N.T. 3/10/95 at 419). Detective Battershell also testified about the hypothetical question Petitioner posed to him as follows: "what would happen if a guy puts a gun on you and you get into a fight and the gun goes off and he falls to the floor and dies?" (N.T. 3/10/95 at 453).

2. Merits

a. Prosecutorial Misconduct Claim

Under the AEDPA standard, this court must review the result the state court reached, even when it is unaccompanied by detailed reasoning – or any reasoning – to explain the result. *See Harrington*, 562 U.S. at 98. Petitioner claims that the prosecutor committed misconduct by eliciting Detective Morris' testimony about the alleged hypothetical question and that the prosecutor should have provided Detective Morris' notes to the defense.

The claim that the prosecutor committed misconduct by eliciting the testimony from Detective Morris is without merit. Detective Battershell confirmed that, on October 2, 1994, Petitioner posed the hypothetical question to him that Detective Morris had identified. (N.T. 3/10/95 at 453). While a prosecutor may not knowingly present false testimony, *Napue*, 360 U.S. at 269, Petitioner has no proof that Detective Morris' testimony, which was corroborated by Detective Battershell, was false. Hence, *Napue* does not apply and there is no basis to fault the prosecutor for eliciting the testimony in question from Detective Morris.

Petitioner also claims that the prosecutor should have produced Detective Morris' notes to allow for cross-examination. Under the *Brady* line of cases, Petitioner would have to demonstrate that the absent notes were: (1) favorable (exculpatory or impeaching); (2) withheld by the prosecutor; and (3) material to guilt or punishment. *See Strickler*, 527 U.S. at 281-82. Petitioner maintains that the notes were favorable, because they would have allowed impeachment of Detective Morris. Pet'r Mem. at 58. However, Detective Morris' notes do not exist and Petitioner is unable to prove their contents. Further, as explained below, the notes might have corroborated Detective Morris' testimony, in that event, they would be damaging, not favorable. Hence, the state court

could reasonably conclude that the notes were not favorable, meaning there was no *Brady* violation.[45]

b. Ineffective Assistance of Trial Counsel Claim

Petitioner claims that trial counsel was ineffective for failing to request Morris' notes that contain the hypothetical question Petitioner had posed. Pet'r Mem. at 56-58. The Superior Court determined that this claim lacked merit, because Petitioner could not demonstrate that prejudice resulted from the lack of Detective Morris' notes. 2008 Super. Ct. Op. at 28-29. Moreover, the state court also found that trial counsel had adequately cross-examined Detective Morris about the purported hypothetical question, inasmuch as trial counsel called into question whether, in fact, Petitioner had even posed the damaging question. *Id.* at 28.

Under the AEDPA standard, the salient issue is not whether the state court's resolution of Petitioner's claim was correct but, rather, whether its resolution of the claim was reasonable. *See Harrington*, 562 U.S. at 101. The more general the rule to be applied, the more leeway courts have in reaching reasonable outcomes. *Id.* The *Strickland* rule is a general one, hence, the state court had "even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 556 U.S. at 123; *see also Harrington*, 562 U.S. at 105 ("The *Strickland* standard is a general one, so the range of reasonable applications is substantial.").

Bound by the AEDPA standard, which is deferential to the state court, and the *Strickland* standard, which is deferential to trial counsel's performance, *see Harrington*, 562 U.S. at 105, this court finds that the Superior Court's conclusion that Petitioner was not prejudiced was reasonable. First, Detective Morris' notes have not survived and Petitioner has never seen them. Hence,

[45] Petitioner also suggests that the prosecution's failure to produce Detective Morris' notes violated his Confrontation Clause rights. Pet'r Mem. at 58. However, Petitioner does not identify any U.S. Supreme Court Confrontation Clause cases to support his assertion that the state court's resolution of his claim was unreasonable. Absent such precedent, Petitioner cannot prevail under the AEDPA standard. *See Kane v. Garcia*, 546 U.S. 9, 10 (2005) (*per curiam*).

Petitioner is unable to prove whether or not those notes contained the alleged hypothetical question. However, if they did contain it, those notes would harm Petitioner without providing an additional basis to cross-examine Detective Morris. Hence, no prejudice stemmed from trial counsel's failure to request those notes. The chance that the notes would prove useless to the defense strongly suggests it is reasonable to conclude there is no prejudice, because it is Petitioner's burden to prove prejudice. *See Strickland*, 466 U.S. at 687. Second, the Superior Court reasonably determined that trial counsel effectively cross-examined Detective Morris to suggest strongly that the detective's hypothetical question testimony was false, since neither he nor Detective Battershell made any effort to question Petitioner about why he had posed the alleged hypothetical question. Reasonable jurists could conclude that trial counsel's cross-examination was sufficiently strong that Petitioner was not prejudiced by the failure to obtain Detective Morris' notes. Finally, although Petitioner misleadingly asserts otherwise, the evidence of his guilt was strong. *See Gibson*, 720 A.2d at 476-78. The strength of the prosecution's case – independent of the alleged hypothetical question – would allow a reasonable jurist to find Petitioner was not prejudiced. *See Harrington*, 562 U.S. at 113.

c. Ineffective Assistance of Direct Appellate Counsel Claim

Petitioner claims that direct appellate counsel was ineffective for failing to argue on appeal that: (1) the prosecutor committed misconduct by failing to turn over Detective Morris' notes, and (2) trial counsel was ineffective for failing to request the notes. Pet'r Mem. at 59. The Superior Court did not expressly resolve the appellate counsel ineffective assistance claim, thus, it is subject to *de novo* review. *See Bronshtein*, 404 F.3d at 710 n.4.

Petitioner initially asserts that direct appellate counsel was ineffective for failing to argue, on appeal, that the prosecutor committed misconduct by failing to turn over Detective Morris' notes.

Pet'r Mem. at 59. Under the *Brady* line of cases, Petitioner would have to demonstrate that the absent notes were favorable (exculpatory or impeaching), were withheld by the prosecutor, and were material to guilt or punishment. *See Strickler*, 527 U.S. at 281-82. Petitioner maintains that the notes were favorable because they could have allowed impeachment of Detective Morris. Pet'r Mem. at 58. However, Detective Morris' notes do not exist and Petitioner is unable to prove their contents. As explained above, the notes might have corroborated Detective Morris' testimony, in that event, they would be damaging, not favorable. Because Petitioner cannot demonstrate that the missing notes were helpful, he cannot prove a *Brady* violation. Further, since the *Brady* claim lacks merit, direct appellate counsel was not ineffective for failing to pursue it. *See Parrish*, 150 F.3d at 328-29 (counsel is not ineffective for failing to raise an unmeritorious claim). Assuming *ad arguendo* that Detective Morris' notes would have assisted the defense, other, overwhelming evidence of Petitioner's guilt, *see Gibson* 720 A.2d at 476-78,[46] ensures that he was not prejudiced by the prosecution's failure to produce the notes. *See Strickler*, 527 U.S. at 292-95 (explaining that Strickler was not prejudiced by the prosecution's failure to produce favorable evidence because there was an abundance of untainted evidence that supported his guilt).

Next, Petitioner claims that direct appellate counsel was ineffective for failing to argue, on appeal, that trial counsel was ineffective for failing to request the notes. Pet'r Mem. at 59. This court finds that direct appellate counsel was not ineffective in that the claim that trial counsel was ineffective lacks merit. *See Parrish*, 150 F.3d at 328-29 (counsel is not ineffective for failing to raise an unmeritorious claim). Since Detective Morris' notes do not exist, Petitioner cannot demonstrate that they would have been useful. Since it is Petitioner's burden to prove prejudice, *see Strickland*,

[46] Another basis for Petitioner's culpability, which he ignores, is the fact that he admitted lying to the police about substantive matters related to the crime. Under Pennsylvania law, the jury was allowed to infer he was guilty based on these lies. (N.T. 3/13/95 at 65).

466 U.S. at 687, his claim fails. Even if Detective Morris' notes discredited the assertion that Petitioner posed a damaging hypothetical question, the other, overwhelming evidence of Petitioner's guilt ensures that he was not prejudiced by trial counsel's failure to obtain the notes. *See Strickland*, 466 U.S. at 695-96.

J. Cumulative *Strickland* Prejudice

The U.S. Supreme Court has instructed that, when evaluating prejudice, it is important to consider the cumulative effect all of counsel's unprofessional errors (that is, the errors that satisfy the first part of the *Strickland* test) had on the verdict. *See Strickland*, 466 U.S. at 694-96. In this case, the court resolved the claims concerning trial counsel's performance with respect to Edward Jones, Paulinda Moore, Michael Segal and the failure to obtain Detective Morris' notes to impeach him on the grounds of insufficient prejudice.

This court concludes that Edward Jones should be removed from the "cumulative prejudice" inquiry, because the PCRA court found that his trial testimony was truthful. PCRA Ct. Op. at 15. *Strickland* teaches that some of the jury's fact findings will be unaffected by counsel's unprofessional errors. 466 U.S. at 695. Where a witness has testified truthfully, it is not possible to conclude that trial counsel's unprofessional failure to cross-examine that witness more fully had a detrimental effect on the verdict. To hold otherwise would suggest that truth is irrelevant. This court is not prepared to so hold.

This court believes that, even if the jury would have completely discredited the incriminating testimony provided by Paulinda Moore, Michael Segal and Detective Morris, there is not a reasonable probability of an acquittal. The other evidence of Petitioner's guilt, untainted by trial counsel's unprofessional errors, was overwhelming. *See Gibson*, 720 A.2d at 476-78. Furthermore,

as the jury was instructed, because Petitioner had admitted lying to the police about substantive matters related to the crime, the jury could use that admission as evidence of his guilt. (N.T. 3/13/95 at 65). This must be considered in order to evaluate properly the question of prejudice under the governing substantive law concerning guilt. *Strickland*, 466 U.S. at 695. Hence, the court is confident in the verdict the jury reached in this case despite trial counsel's unprofessional errors.

K. Cumulative Error - Ground 10

Finally, Petitioner asserts that the cumulative effect of all the errors he has identified entitles him to habeas relief. Pet'r Mem. at 60. The Superior Court resolved this claim by noting that it had deemed none of Petitioner's claims meritorious, hence, there could be no cumulative error. 2008 Super. Ct. Op. at 35. This is a merits determination, subject to the AEDPA standard of review.

Petitioner cites *Williams v. Taylor*, 529 U.S. 362, 397 (2000), *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995), and *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) as the U.S. Supreme Court cases that support his assertion that the state court unreasonably decided his cumulative error claim.[47] Pet'r Mem. at 60 n.43. However, none of these cases supports his assertion that courts must evaluate all the constitutional errors the habeas petitioner asserts and then aggregate them in some fashion in order to determine whether the petitioner is entitled to habeas relief. Instead, *Williams* and *Kyles* establish that, when the petitioner raises several ineffective assistance and *Brady* claims, the combined detrimental effect resulting from all of the proven unprofessional errors (ineffective assistance) or favorable evidence withheld by the prosecution (*Brady*) must be considered in order to determine whether there is prejudice and, hence, whether a constitutional violation has been

[47] Petitioner also relies upon *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991) and *Peterkin v. Horn*, 176 F. Supp. 2d 342 (E.D. Pa. 2001). However, those lower court cases cannot support a conclusion that the state court unreasonably applied U.S. Supreme Court precedent. *See Renico*, 559 U.S. at 778-79. Hence, this court has considered only whether the U.S. Supreme Court cases Petitioner relies upon establish the rule he requires.

proven.[48] *See Williams*, 529 U.S. at 397 (explaining that, once it is determined that counsel's performance was deficient, all evidence in the record, including that which counsel's deficient performance failed to uncover, must be evaluated to determine whether there is prejudice); *Kyles*, 514 U.S. at 436-37 (explaining that, once it is determined that the prosecution withheld favorable evidence from the defendant, the suppressed evidence is assessed collectively to determine whether it was material, *i.e.,* prejudicial). Petitioner has failed to identify any clearly established United States Supreme Court precedent which would require the type of analysis he asserts the state court failed to perform.[49] Accordingly, this claim must fail under the AEDPA standard. *See Kane v. Garcia*, 546 U.S. 9, 10 (2005) (*per curiam*).

IV. CONCLUSION

All of Petitioner's claims are either time-barred, procedurally defaulted or lack merit. Reasonable jurists would not debate the appropriateness of this court's procedural and substantive dispositions of his claims; therefore, a certificate of appealability should not issue. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, I make the following:

[48] This court has performed the cumulative materiality and prejudice analysis required for Petitioner's *Brady* and *Strickland* claims. *See supra* Sections III(A)(12) (*Brady*) and III(J) (*Strickland*).

[49] Although Petitioner characterizes *Taylor v. Kentucky* as a prosecutorial misconduct case, Pet'r Mem. at 60, n.43, the question presented in that case was whether, upon a timely defense request, due process required that a jury be instructed: (1) on the presumption of innocence, and (2) the indictment's lack of evidentiary value. *Taylor*, 436 U.S. at 479. Since Petitioner has misstated the constitutional issue presented in *Taylor*, this court declines to address it further.

RECOMMENDATION

AND NOW, this 28th day of July, 2015, for the reasons contained in the preceding report, it is hereby **RECOMMENDED** that all of Petitioner's claims be **DISMISSED** or **DENIED**, without an evidentiary hearing. Petitioner has neither demonstrated that any reasonable jurist could find this court's procedural rulings debatable, nor shown denial of any Constitutional right; hence, there is no probable cause to issue a certificate of appealability.

It be so **ORDERED**.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS
Chief United States Magistrate Judge

APP-H

corresponding responsibilities under *Brady*. As noted above, the Government's obligation to disclose exculpatory materials extends only to information about which the Government has actual or constructive knowledge. By definition, whatever review is conducted for purposes of Jencks Act production will provide the Government with such knowledge, and I am confident that it will disclose any information it is required to disclose.

It bears emphasis that this case involves a targeted request from defense counsel for readily identifiable information in the possession of the prosecution. Nothing in this memorandum should be interpreted to suggest that the Government has any affirmative obligation to seek out and preserve information from the BOP or any other agency of the United States. *Merlino* squarely holds to the contrary. Where, however, the Government takes possession of materials not out of an abundance of caution that they might perhaps be discoverable, as was the case in *Merlino*, but for purposes related to the aims of the prosecution, the requirements of the Jencks Act must be met.

Jerome GIBSON

v.

Jeffrey BEARD, et al.

CIVIL ACTION NO. 10-445

United States District Court,
E.D. Pennsylvania.

Signed February 29, 2016

Background: Following affirmance of his conviction in state court for first-degree murder, robbery, and possession of instruments of crime, and his death sentence, 553 Pa. 648, petitioner filed federal petition for writ of habeas corpus.

Holdings: The District Court, Dalzell, J., adopted report and recommendation of Carol Sandra Moore Wells, United States Magistrate Judge, 2015 WL 10381753, and held that:

(1) evidence purportedly withheld by prosecution was not material for purposes of *Brady*;

(2) defense counsel's alleged deficiency in failing to cross-examine government witness on his status as informant did not prejudice defendant;

(3) counsel was not deficient in failing to cross-examine witness's preliminary hearing testimony;

(4) counsel's decision not to use letter to cross-examine inmate who testified as witness was reasonable trial strategy;

(5) reasonable doubt instruction accurately stated the law; and

(6) prosecution's non-disclosure of detective's notes did not violate *Brady*.

Petition dismissed with prejudice.

1. Habeas Corpus ⚿765.1, 767

Antiterrorism and Effective Death Penalty Act (AEDPA) permits one in state custody to file a petition in federal court seeking a writ of habeas corpus, but mandates great deference to the state court's factual findings and legal determinations. 28 U.S.C.A. §§ 2254(a), (d).

2. Habeas Corpus ⚿768

Factual determinations by state courts are presumed correct under Antiterrorism and Effective Death Penalty Act (AEDPA) absent clear and convincing evidence to the contrary. 28 U.S.C.A. § 2254(d).

3. Habeas Corpus ⚿767

Under Antiterrorism and Effective Death Penalty Act (AEDPA), deference to state court's determination of facts does not imply abandonment or abdication of judicial review or by definition preclude relief. 28 U.S.C.A. § 2254(d).

4. Habeas Corpus ⚿366

In Pennsylvania, an inmate exhausts his state court remedies, for federal habeas purposes, by fairly presenting his claims to the state court and then the Pennsylvania Superior Court, and he need not seek allocatur from the Pennsylvania Supreme Court. 28 U.S.C.A. § 2254(b)(1)(A).

5. Habeas Corpus ⚿422

If a petitioner fairly presented his claim to the state court, but the state court declined to review the claim on the merits because of a failure to comply with a state procedural rule, then the claim is procedurally defaulted on federal habeas review. 28 U.S.C.A. § 2254(b)(1)(A).

6. Habeas Corpus ⚿431

If a lower state court has declined to review a claim based on a procedural default, and the claim is not later addressed on the merits by a higher state court, then a federal habeas court must presume that the higher state court's decision was founded upon a procedural default identified by the lower state court. 28 U.S.C.A. § 2254(b)(1)(A).

7. Habeas Corpus ⚿314

If a petitioner fails to exhaust a claim and it is clear that the state court did not consider the claim because of a state procedural rule, then the claim is procedurally defaulted on federal habeas review. 28 U.S.C.A. § 2254(b)(1)(A).

8. Habeas Corpus ⚿401, 404

Federal habeas court may not review procedurally defaulted claims unless the petitioner can demonstrate a requisite cause for the default and that actual prejudice exists as a result of the alleged violation of federal law, or that failure to consider the claims will result in a fundamental miscarriage of justice. 28 U.S.C.A. § 2254(b)(1)(A).

9. Habeas Corpus ⚿405.1

To demonstrate the requisite "cause" for a petitioner's default of a federal habeas claim, he must show that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. 28 U.S.C.A. § 2254(b)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

10. Habeas Corpus ⚿405.1

Cause excusing procedural default of federal habeas claim may include showing that (1) the factual or legal basis for a claim was not reasonably available, (2) some interference by state officials made compliance with the state procedural rules impracticable, or (3) there was ineffective assistance of counsel from attorney error. 28 U.S.C.A. § 2254(b)(1)(A).

11. Constitutional Law ⚿4594(1)

Failure to disclose favorable evidence alone is not sufficient to establish a due process violation within meaning of *Brady*. U.S. Const. Amend. 14.

12. Habeas Corpus ⚿480

Federal habeas petitioner is only entitled to relief on *Brady* claim when: (1) the evidence at issue is favorable to the accused, (2) the evidence was suppressed by the state, and (3) the evidence is material. 28 U.S.C.A. § 2254.

13. Criminal Law ⚿1991

Prosecutors have an affirmative duty under *Brady* to disclose evidence favorable to the accused, even if the accused makes no disclosure request.

14. Criminal Law ⚿2005

Prosecutor's affirmative duty under *Brady* to disclose evidence favorable to the accused extends to any favorable evidence known to the others acting on the government's behalf, including the police.

15. Criminal Law ⚿2005

Those working on government's behalf who have affirmative duty to disclose evidence favorable to accused under *Brady* include the police officers and police departments working on the specific case in question, but do not include other government agencies that have no involvement in the investigation or prosecution at issue.

16. Criminal Law ⚿1992

Evidence is "material" under *Brady* when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

See publication Words and Phrases for other judicial constructions and definitions.

17. Criminal Law ⚿1992

"Reasonable probability" that, had evidence been disclosed to defense, result of proceeding would have been different, as would render evidence material under *Brady,* is a probability sufficient to undermine confidence in the outcome.

See publication Words and Phrases for other judicial constructions and definitions.

18. Criminal Law ⚿1992

Brady materiality is relative, as it depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.

19. Criminal Law ⚿1999

Suppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material, for *Brady* purposes; however, undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material.

20. Habeas Corpus ⚿480

In a federal habeas case where there are potentially multiple *Brady* violations, the effect of those violations must be considered collectively, not item by item. 28 U.S.C.A. § 2254.

21. Constitutional Law ⚿4633
Criminal Law ⚿2033

Defendant failed to establish that government witness committed perjury when he testified at trial, in capital murder prosecution, that police said they would assist him with his outstanding warrants if he provided statement against defendant, thus precluding defendant's *Napue* claim that prosecution violated due process when it failed to correct testimony it knew to be false. U.S. Const. Amend. 14.

22. Criminal Law ⚿1999

Evidence that government witness used false name in interview with police officers for different murder would not have helped defense counsel impeach witness in capital murder prosecution, as would support defendant's claim that prosecution's failure to disclose that evidence violated *Brady*.

23. Criminal Law ⚿1999

Evidence withheld by prosecution, in prosecution for capital murder, including evidence that government witness was informant, that fellow inmate who testified that defendant confessed to murder frequently testified on behalf of state, and that witness who testified that defendant had told her he was going to rob someone and showed her gun suffered from mental health issues, was not material, and thus prosecution's failure to disclose that evi-

dence did not violate *Brady*; even if nondisclosed evidence would have completely discredited each witness, there were corroborating witnesses for all but one item of testimony in question, and case against defendant was very strong, even when completely discounting all testimony from witnesses who could have been impeached with *Brady* material.

24. Criminal Law ⚿1880

Assistance of counsel guaranteed under Sixth Amendment must not only be perfunctory, but effective. U.S. Const. Amend. 6.

25. Criminal Law ⚿1870

Sixth Amendment right to effective assistance of counsel protects the fundamental right to a fair trial afforded to criminal defendants. U.S. Const. Amend. 6.

26. Habeas Corpus ⚿486(1)

A federal habeas petitioner asserting ineffective assistance of counsel claim must first show that his counsel's performance was "deficient," meaning that the representation failed to meet an objective standard of reasonableness as defined by prevailing professional norms. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

27. Habeas Corpus ⚿486(1)

In analyzing deficiency prong of ineffective assistance of counsel claim, federal habeas court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, reviewed as of the time of counsel's conduct; however, court must be highly deferential to counsel's performance and not second-guess counsel's assistance after conviction. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

28. Habeas Corpus ⚿486(1)

Prejudice standard for ineffective assistance claims does not require a federal habeas petitioner to prove that the evidence presented against him would have been insufficient if not for counsel's errors, nor must the petitioner show that counsel's deficient conduct more likely than not altered the outcome; but it does require the petitioner to go further than simply demonstrating that the errors had some conceivable effect on the outcome of the proceeding. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

29. Criminal Law ⚿1935

Defense counsel's alleged deficiency in failing to cross-examine government witness on his status as Drug Enforcement Administration (DEA) informant did not prejudice defendant, in capital murder prosecution, and thus could not amount to ineffective assistance. U.S. Const. Amend. 6.

30. Habeas Corpus ⚿486(1)

Ineffective assistance of counsel claims must be reviewed cumulatively on federal habeas review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

31. Criminal Law ⚿1935

Defense counsel was not deficient, as element of ineffective assistance claim, in failing to cross-examine government witness's preliminary hearing testimony, in capital murder prosecution, where he stated that prosecutor had offered to help him with criminal matter in exchange for his testimony. U.S. Const. Amend. 6.

32. Criminal Law ⚿1935

Trial counsel's alleged deficiency in failing to cross-examine government witness's preliminary hearing testimony, in capital murder prosecution, where he stated that prosecutor had offered to help him with criminal matter in exchange for his

testimony, did not prejudice defendant, and thus could not amount to ineffective assistance. U.S. Const. Amend. 6.

33. Habeas Corpus ⚿365

Petitioner failed to exhaust on federal habeas review his claim that trial counsel was ineffective in failing to impeach government witness based on witness's differing testimony at trial and preliminary hearing, in capital murder prosecution, where petitioner did not raise that claim on his post-conviction appeal in state court. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(b)(1).

34. Criminal Law ⚿1935

Trial counsel's decision not to use letter inmate wrote to prosecutor, that was then forwarded to counsel, to cross-examine inmate, who testified as witness in defendant's capital murder prosecution, was reasonable trial strategy, and thus did not amount to ineffective assistance; letter contained information about defendant's involvement in another shooting. U.S. Const. Amend. 6.

35. Criminal Law ⚿789(7, 12)

Trial court's reasonable doubt instruction in capital murder prosecution, in which court defined reasonable doubt as "well-founded in reason and common sense," not merely a passing fancy, and such doubt as would cause reasonable person in conduct of his or her own affairs to stop, hesitate, and seriously consider as to whether or not he or she would do certain thing before finally acting, accurately stated the law.

36. Criminal Law ⚿2033

Under *Napue*, prosecution may not knowingly use false evidence, including false testimony, in its case against a criminal defendant.

37. Habeas Corpus ⚿491

If federal habeas petitioner asserting *Napue* claim proves that prosecution knowingly used false evidence when it failed to correct a witness's testimony, federal court must then determine whether this error was material. 28 U.S.C.A. § 2254.

38. Criminal Law ⚿2034

Fact that statements of eyewitness who testified for prosecution in capital murder prosecution changed over course of investigation and trial did not suffice to show that witness committed perjury, or that state should have known he might be doing so, thus precluding *Napue* claim that prosecution used false testimony to convict him.

39. Criminal Law ⚿2033

In context of *Napue* claim, there are many reasons testimony may be inconsistent; perjury is only one possible reason.

40. Criminal Law ⚿2033

There was no evidence that detective perjured himself when he testified at trial in capital murder prosecution regarding hypothetical question defendant asked another detective during interview at police station about shooting someone in self-defense, thus precluding defendant's *Napue* claim that prosecutor knowingly used false testimony to convict him.

41. Criminal Law ⚿2000

Notes detective relied on to testify at trial regarding hypothetical question defendant asked another detective during interview at police station about shooting someone in self-defense were not favorable to defendant, and thus prosecution's nondisclosure of notes did not violate *Brady*, in capital murder prosecution; contents of notes may have corroborated testifying detective's story.

42. Criminal Law ⚿1905

Trial counsel's deficiency in failing to inquire about, and eventually acquire, notes detective relied on to testify at trial regarding hypothetical question defendant asked another detective during interview at police station about shooting someone in self-defense did not prejudice defendant, in capital murder prosecution, and thus could not amount to ineffective assistance. U.S. Const. Amend. 6.

43. Habeas Corpus ⚿461

Cumulative errors warrant federal habeas relief if they had a substantial and injurious effect or influence in determining the jury's verdict. 28 U.S.C.A. § 2254.

44. Habeas Corpus ⚿461

When performing a cumulative error analysis, a federal habeas court aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. 28 U.S.C.A. § 2254.

45. Habeas Corpus ⚿461

Cumulative effect of alleged errors arising from prosecution's *Brady* violations and ineffective assistance of trial counsel did not have substantial or injurious effect on jury's verdict in capital murder prosecution, thus precluding grant of federal habeas relief under cumulative error analysis; nearly all of the evidence tainted by errors was either corroborated in some way or supported by other, untainted evidence, and case against petitioner was strong. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

46. Habeas Corpus ⚿688

Federal habeas petitioner needs to show good cause for requested discovery on habeas review. 28 U.S.C.A. § 2254.

47. Habeas Corpus ⚿688

Petitioner shows "good cause" for discovery on federal habeas review when specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

48. Habeas Corpus ⚿688

Petitioner, who was convicted of capital murder, failed to show good cause for discovery on federal habeas review of his ineffective assistance of counsel and *Brady* claims; facts were fully developed, and there was no reason to believe that petitioner would be able to demonstrate that he was entitled to relief had he obtained requested discovery. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

49. Habeas Corpus ⚿818

Federal habeas petitioner seeking certificate of appealability (COA) need not demonstrate that the appeal will succeed. 28 U.S.C.A. § 2253; Fed. R. App. P. 22(b).

50. Habeas Corpus ⚿818

Reasonable jurists could not debate whether federal habeas petition raising ineffective assistance of counsel and *Brady* claims should have been resolved in different manner, or that issues presented were adequate to deserve encouragement to proceed further, and thus issuance of certificate of appealability (COA) was not warranted. U.S. Const. Amend. 6; 28 U.S.C.A. § 2253; Fed. R. App. P. 22(b).

Helen A. Marino, Samuel J.B. Angell, Federal Defender Office of Philadelphia, Philadelphia, PA, for Jerome Gibson.

Karen A. Diaz, Office of the District Attorney, Doylestown, PA, for Jeffrey Beard, et al.

MEMORANDUM

Dalzell, District Judge.

I. Introduction

We consider here petitioner's objections to the Report and Recommendation ("R & R") issued by the Honorable Carol Sandra Moore Wells.

Jerome Gibson filed this counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 against Jeffrey Beard, the former Secretary of the Pennsylvania Department of Corrections, and Louis Folino, the Superintendent of the State Correctional Institution at Greene. Judge Wells found Gibson's claims to lack merit. Gibson now objects to the R & R, stating that Judge Wells erred when analyzing his Brady claims, ineffective assistance of counsel claims, challenge to the reasonable doubt instructions, prosecutorial misconduct claims relating to the testimony of Michael Segal, claims related to testimony regarding Gibson's hypothetical question to police, and cumulative error claim.

Gibson also objects to Judge Wells's denial of his final motion for discovery and requests an evidentiary hearing to develop facts in support of his claims. Finally, he asks in the alternative that we grant a certificate of appealability even if we approve and adopt the R & R.

For the reasons set forth below, we will overrule Gibson's objections to the R & R, deny his request for an evidentiary hearing, and decline to issue a certificate of appealability.

II. Standard of Review

Gibson objects to the R & R pursuant to Local R. Civ. P. 72.1 IV(b), which provides that "[a]ny party may object to a magistrate judge's proposed findings, recommendations or report under 28 U.S.C. § 636(b)(1)(B) ... within fourteen (14) days after being served with a copy thereof" by filing "written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections." We make de novo determinations on those portions of the R & R and specific proposed findings or recommendations to which the petitioner objects. See 28 U.S.C. § 636.

III. Factual and Procedural History

We recite the facts and procedural history as evidenced by the record and Judge Wells's R & R.[1]

> On the morning of September 29, 1994, Gibson sought to obtain an automobile, as his car had recently broken down. He asked a friend, Sean Hess, for $200 so that he could purchase a new vehicle. When Hess refused, Gibson spoke of "making a move," meaning that he would commit a robbery.
>
> At approximately noon on that same day, Gibson went to an automobile dealership in Bristol Township to look for a replacement vehicle. Although he expressed an interest in purchasing a vehicle that was shown to him by salesman Glen Kashdan, he did not have the necessary funds. He told Kashdan, however, that his mother maintained sufficient funds in a bank account in Bristol Borough to pay for the vehicle. After Kash-

1. We may properly reference Judge Wells's factual and procedural history because Gibson did not object to this portion of the R & R. Moreover, our thorough review of the record confirms that Judge Wells's recitation of the factual and procedural history in this case is accurate.

dan drove Gibson to the bank in a fruitless effort to withdraw the non-existent funds, he dropped Gibson off at a shopping center in Bristol Township, about one mile from the eventual scene of the crime. Gibson was wearing a dark hooded sweatshirt and jeans. Melissa Paolini, who worked at the bank where Kashdan had taken Gibson, observed the two men enter the bank at approximately 1:15 p.m. Gibson's picture was taken by the bank's monitor camera and was later identified by Paolini at trial. The picture clearly depicted Gibson wearing a dark hooded sweatshirt.

Shortly before 2:00 p.m., Gibson met Paulinda Moore, a long-time acquaintance, in the shopping center. Gibson showed Moore a handgun that was tucked into the waistband of his pants and stated that he needed money and was going to rob somebody. He added that if his prospective victim saw his face, he would shoot him. Gibson and Moore then parted company and Gibson continued on foot to Bristol Borough.

Kevin Jones, another acquaintance, encountered Gibson a little while later. Gibson informed Jones that he knew "a guy that had money," whom he was going to rob, killing him if necessary. At approximately 2:00 p.m., Vera DuBois, Gibson's aunt, saw Gibson on foot in Bristol Borough and noticed that he was wearing a dark hooded sweatshirt. At 2:20 p.m., Gibson entered a jewelry store. Leonard Wilson, the store's proprietor, became suspicious of Gibson when he noticed that Gibson appeared to be observing the store itself, rather than looking at jewelry. After a brief conversation with Wilson, Gibson left the store.

Between 2:30 and 3:00 p.m., Kimberly Rankins, another acquaintance, nearly hit Gibson with her car as he was crossing Mill Street in the direction of the Ascher Health Care Center ("Ascher Health") in Bristol Borough. The last time that Rankins observed Gibson that day, he was wearing a dark blue sweatshirt and was approximately twenty-five feet away from the entrance of Ascher Health, walking towards it.

Shortly before 3:00 p.m., Michael Segal, a shopkeeper at a store directly across the street from Ascher Health, heard a gunshot from inside Ascher Health. Segal looked across the street and saw Robert Berger, the proprietor of Ascher Health, struggling with an assailant behind the store counter. When Segal observed that the assailant had a gun, he dialed "911." While on the telephone, he heard two more gunshots. He looked across the street and saw Berger lying on the floor while the assailant rifled through the cash register drawers. Segal then observed the assailant leave the store, stuffing items into his pants, and walk up Mill Street towards an apartment building. Segal was unable to see the assailant's face, but he did observe that the man was wearing a dark blue hooded sweatshirt. Segal later testified at trial that the man's size, build and complexion matched those of Gibson.

Alfonso Colon, who was in a second floor apartment above Ascher Health that afternoon, walked downstairs and went outside after hearing the three gunshots. He saw Gibson, whom he positively identified at trial, leaving Ascher Health and walking toward him while stuffing an object that appeared to be a handgun into his pants. Upon seeing Colon, Gibson crossed Mill Street and headed in a different direction.

At 2:58 p.m., the police responded to Segal's call. They entered Ascher Health and found Berger lying dead on the floor from gunshot wounds. A cash drawer was open and there was an empty gun holster on the floor. Berger was pro-

nounced dead upon arrival at the hospital at approximately 3:45 p.m. An autopsy revealed that he had suffered three gunshot wounds: a fatal wound to the left chest, a wound to the upper right chest, and a wound to the upper left arm. Two. 32 caliber projectiles were removed from the body. It was later determined that approximately $1,400 in cash had been stolen during the robbery, along with a. 38 caliber handgun belonging to Berger. There was no evidence that Berger's gun had been fired during the robbery.

Shortly after 3:00 p.m. on the day of the shooting, Gibson arrived at the home of his cousin, Pamela Harrison. When Harrison responded to Gibson's knock on her door, she observed that he was wearing a dark hooded sweatshirt and was sweating. Harrison also heard police sirens. Gibson asked to come into the house and Harrison admitted him, noticing that he was carrying a handgun. After hiding his sweatshirt in Harrison's basement, Gibson left the house. He returned later that evening and retrieved the sweatshirt without Harrison's permission.

After leaving Harrison's house, Gibson met his friend, Sean Hess, in the shopping center where Gibson had been earlier that day. Gibson told Hess that he had shot a man three times and taken his money. Gibson also stated that the victim had a gun, but that he had used his own gun.

The following day, while at a bar, Gibson admitted to Bernard McClean that he had shot the old man in Bristol three times, explaining that he had been broke and needed the man's money. He later told his friends, Herman Carroll and Eddie Jones, that he had robbed and killed the victim. He also told Edward Gilbert, another friend, that he had killed the victim to obtain money with which to purchase a vehicle. He gave Gilbert the. 32 caliber handgun, along with Berger's. 38 caliber handgun, to keep for him. Berger's gun was later recovered at a motel in Bristol Township, but Gibson's gun was never located.

On October 2, 1994, three days after the murder, two detectives from the Bucks County District Attorney's Office, who had received information implicating Gibson in the murder, went to the apartment where Gibson was staying and waited outside in their car. Shortly thereafter, Gibson and some other individuals came out of the apartment. Gibson approached the detectives and asked them if they wished to speak with him. In response to Gibson's inquiry, the detectives told him that they wished to talk to him about a murder that had occurred on Mill Street on September 29, 1994. Gibson asked if he was under arrest and the officers replied that he was not. They suggested, however, that Gibson speak with them at the Bristol Borough Police Station, since there were other people nearby. The detectives made it clear that Gibson could proceed to the station by his own transportation, that he would be free to leave the station at any time, and that he could terminate the conversation whenever he wished. Gibson acquiesced and followed them to the police station in his own vehicle, which he had purchased the day after the shooting.

Upon arriving at the police station, the detectives led Gibson to an interview room, where another detective and a Bristol Borough police officer joined them. Gibson was again advised that he was not under arrest and could leave the station at any time. When the detectives told Gibson that they wanted to discuss the robbery and murder of Berger, he

indicated that he wanted to clear the matter up and would speak with them. The interview lasted for a little over two hours, during which Gibson not only denied any culpability for the shooting, but also denied having been in Bristol Borough at any time after August 2, 1994. Following the interview, Gibson agreed to a search of his vehicle and signed a consent form. During the search, Gibson initiated a conversation with one of the detectives, asking him a hypothetical question regarding what would happen if someone were attacked by a man with a gun and shot and killed his attacker. Gibson then left the police station in his vehicle.

On October 6, 1994, Gibson was arrested and charged with the robbery and murder of Berger, as well as possession of instruments of crime. Bail was denied, and while Gibson was incarcerated pending trial, he admitted to inmates Glenn Pollard, Kenneth Johnson and Kevin Jones that he had committed the crimes. Prior to trial, Gibson moved to suppress his statements to the police during the October 2, 1994 interview, as well as the statement that he made to the detective during the search of his car. The motion was denied following a hearing, and the case proceeded to trial. During the guilt phase of trial, the Commonwealth presented the testimony of the numerous witnesses who had seen or spoken with Gibson either immediately before or after the shooting, including the testimony of those witnesses to whom Gibson had inculpated himself. Additionally, several detectives and police officers testified for the Commonwealth concerning their observations of the crime scene, the collection of evidence, and the statements that Gibson made during the course of his interview, as well as his hypothetical question concerning the shooting.

Gibson presented five witnesses whose testimony supported his alibi defense and contradicted the testimony of certain inmates who had testified concerning his inculpatory statements. Gibson also took the stand and testified that he was not on Mill Street on the afternoon of the murder, but did admit that he had been with Kashdan, the car salesman, at the bank in Bristol Borough earlier that day. Gibson further admitted that he had lied to the police concerning his whereabouts on the day of the murder. At the conclusion of the guilt phase, the jury found Gibson guilty of first-degree murder, robbery and possession of instruments of crime.

Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473, 476–79 (1998).

At the penalty phase, the jury determined that Gibson should be sentenced to death. Id. at 478. The Pennsylvania Supreme Court affirmed the verdict and sentence after Gibson appealed. Id. at 485. The Supreme Court of the United States denied certiorari in 1999. Gibson v. Pennsylvania, 528 U.S. 852, 120 S.Ct. 132, 145 L.Ed.2d 111 (1999).

Gibson then sought relief under the Post Conviction Relief Act ("PCRA") 42 Pa. C.S.A. § 9541 et seq. The PCRA court denied guilt-phase relief but awarded a new sentencing hearing. Commonwealth v. Gibson, 592 Pa. 411, 925 A.2d 167, 169 (2007). The Pennsylvania Supreme Court affirmed this conclusion and transferred Gibson's appeal to the Superior Court for appellate review of the trial court's guilt-phase rulings. Id. at 171. The Pennsylvania Superior Court found Gibson's claims to be either waived or without merit. Commonwealth v. Gibson, Nos. 1778 & 1779 EDA 2007, slip op. at 1–35, 959 A.2d 962 (Pa.Super.Ct. July 8, 2008). The Pennsylvania Supreme Court denied allowance of appeal in February of 2009.

Gibson filed the petition before us on January 29, 2010. Judge Wells issued her R & R on July 28, 2015, and Gibson timely filed his objections on October 27, 2015. We consider those objections here.

IV. Discussion

Gibson objects to Judge Wells's findings on his Brady claims, ineffective assistance of counsel claims, challenge to the reasonable doubt instructions, prosecutorial misconduct claims relating to the testimony of Michael Segal, claims related to testimony regarding Petitioner's hypothetical question to police, and cumulative error claim. We will analyze each objection separately and pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

A. AEDPA Standard

[1] The standards from AEDPA govern our de novo review. AEDPA permits one in state custody to file a petition in federal court seeking a writ of habeas corpus, 28 U.S.C. § 2254(a), but mandates great deference to the state court's factual findings and legal determinations. See Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (explaining Section 2254(d)'s highly deferential standard for evaluating state court rulings); see also Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir.2000) (explaining that AEDPA increased the deference federal courts must give to the state court's factual findings and legal determinations). In fact, AEDPA only permits a federal court to grant habeas relief when it finds that a state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or that the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Moreover, we must presume that the findings of fact made by the state court are correct, and the petitioner bears the burden of rebutting that presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

A state court's finding is "contrary to" Supreme Court precedent if the state court "arrives at a conclusion opposite to that reached by this Court on a question of law," or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." Williams v. Taylor, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision can be considered an "unreasonable application" in two circumstances. First, a state court decision is unreasonable when a court "identifies the correct governing legal rule…but unreasonably applies it to the facts" of a particular case. Id. at 407, 120 S.Ct. 1495. Second, a decision can be considered unreasonable when a state court extends a legal principle espoused by the Supreme Court to a new context or, conversely, refuses to extend that principle to a new context where it should indeed apply. Id.

[2, 3] A state court decision is considered an unreasonable determination of the facts only when the factual findings are "objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller–El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." Id. But, "deference does not imply abandonment or abdication of judicial review [or]…by definition preclude relief." Id.

[4] A petitioner must exhaust his state court remedies before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). In Pennsyl-

vania, an inmate exhausts his state court remedies by fairly presenting his claims to the state court and then the Pennsylvania Superior Court, and he need not seek allocatur from the Pennsylvania Supreme Court. Lambert v. Blackwell, 387 F.3d 210, 233–34 (3d Cir.2004) (examining the effect of the Pennsylvania Supreme Court's May 9, 2009 Order regarding appeals from criminal convictions and post-conviction relief matters).

[5–7] If a petitioner fairly presented his claim to the state court, but the state court declined to review the claim on the merits because of a failure to comply with a state procedural rule, then the claim is procedurally defaulted. Harris v. Reed, 489 U.S. 255, 262–63, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). If a lower state court has declined to review a claim based on a procedural default, and the claim is not later addressed on the merits by a higher state court, then a federal habeas court must presume that the higher state court's decision was founded upon a procedural default identified by the lower state court. Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (explaining also that if a lower state court comes to a reasoned judgment rejecting a federal claim and a higher court upholds that judgment without explanation, then the habeas court must assume that the higher court rested upon the same grounds as the lower state court). If a petitioner fails to exhaust a claim and it is clear that the state court did not consider the claim because of a state procedural rule, then the claim is procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 735, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). For example, a state court might not review a claim that had not been previously presented because of a state rule establishing a statute of limitations for state collateral review of a conviction. See, e.g., Keller v. Larkin, 251 F.3d 408, 415 (3d Cir.2001) (citing 42 Pa.C.S. § 9545(b)(1), Pennsylvania's statute of limitations for filing PCRA petitions).

[8–10] We also may not review procedurally defaulted claims unless the petitioner can demonstrate a requisite cause for the default and that actual prejudice exists as a result of the alleged violation of federal law, or that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750, 111 S.Ct. 2546. To demonstrate the requisite cause for a petitioner's default, he must show that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. Id. at 753, 111 S.Ct. 2546. Such cause may include showing that (1) the factual or legal basis for a claim was not reasonably available, (2) some interference by state officials made compliance with the state procedural rules impracticable, or (3) there was ineffective assistance of counsel from attorney error. Id.

B. *Brady* Claims

[11, 12] Gibson first objects to the R & R's disposition of his Brady claims. The Supreme Court held in Brady v. Maryland that a prosecutor's suppression of material evidence that was favorable to the accused violated due process. 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). It later clarified that the Brady rule applied to both exculpatory evidence and evidence that could be used to impeach witnesses. See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The failure to disclose favorable evidence alone is not sufficient to establish a constitutional violation. See Johnson v. Folino, 705 F.3d 117, 128 (3d Cir.2013). A habeas petitioner is only entitled to relief when: "(1) the evidence at issue is favorable to the accused; (2) the evidence was sup-

pressed by the state; and (3) the evidence is material." Id.

[13–15] Prosecutors have an affirmative duty to disclose evidence favorable to the accused, even if the accused makes no disclosure request. See Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). This duty extends to "any favorable evidence known to the others acting on the government's behalf…including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Those working on the government's behalf include the police officers and police departments working on the specific case in question, but do not include "other government agencies that have no involvement in the investigation or prosecution at issue." United States v. Merlino, 349 F.3d 144, 154 (3d Cir.2003) (quoting United States v. Morris, 80 F.3d 1151, 1169 (7th Cir.1996)).

[16–20] Evidence is material under Brady when 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." Simmons v. Beard, 590 F.3d 223, 234 (3d Cir.2009) (quoting Bagley, 473 U.S. at 682, 105 S.Ct. 3375). Brady materiality is relative, as it "depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." Johnson, 705 F.3d at 129 (quoting Rocha v. Thaler, 619 F.3d 387, 396 (5th Cir.2010)). As our Court of Appeals has noted, "[s]uppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material…however, undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material." Id. (internal citations omitted). In a case, such as this one, where there are potentially multiple Brady violations, the effect of those violations must be "considered collectively, not item by item." Kyles, 514 U.S. at 436, 115 S.Ct. 1555. We must therefore review each Brady claim brought by the petitioner, identify which claims are actual examples of the prosecution suppressing favorable evidence, and then analyze the cumulative effect of those identified violations on the trial. See Simmons, 590 F.3d at 234 (stating that a court must "first review each individual Brady claim, and then discuss their collective effect on [the petitioner's] trial").

1. Edward Jones

Gibson first brings a Brady claim with regard to Edward Jones, claiming that the Commonwealth failed to disclose that Jones was an informant who was provided cash, auto repairs, and an apartment by the Drug Enforcement Administration ("DEA") and the Bristol Township Police Department.

At Gibson's trial, Jones testified that Gibson had spoken to him about committing robberies and recruited him to commit further robberies. Notes of Testimony ("N.T."), March 9, 1995 at 346-348. Jones further stated that Gibson told him that he was going to rob a store in Bristol Borough, and then later told Jones that he had killed a storekeeper in Bristol Borough. Id. Finally, Jones testified that Gibson called the victim a "white devil," or "cracker." Id.

During the course of the post-conviction proceedings it was revealed that Jones had been a paid informant for the DEA after being recruited by Detective R.J. Miles of the Bristol Township Police. See N.T. April 7, 2001 at 264-265. Specifically, Jones received nearly $10,000 in payments from the DEA, including $1,500 the day after he gave his statement against Gibson. See PCRA1 Ex. D-69 (Jones Decl.) and

PCRAR1 Ex. D-66B. Jones was also provided with an apartment and payment for auto repairs. N.T. May 29, 2001 at 38-61.

Moreover, Jones retracted his trial testimony before the PCRA court, and testified in 2001 that Detective Mills had provided him with the story he gave during his initial interview with the prosecution team working on Gibson's case. Id. at 268, 119 S.Ct. 1936. Notably, Detective Mills and two DEA agents were in the room when Jones gave his initial statement incriminating Gibson to Detective Robert Gergal, the lead Bucks County detective on the case.

We find that the evidence proffered by Gibson satisfies the first two prongs of Brady with respect to the payments and favors provided to Jones. The defense team could easily have used evidence that Jones was a paid informant to impeach his credibility, and thus this evidence was favorable to Gibson. Further, we disagree with Judge Wells's finding that the prosecution did not suppress this evidence because the DEA and Bristol Township Police were not part of the prosecution team. Agents from both entities were not only in the room while Jones gave his initial statement, but they brought him to the meeting with Gergal. The Commonwealth's argument that the DEA and Bristol Township Police were not part of the prosecution team because Gergal never asked Detective Mills or the DEA agents whether Jones was a paid informant is unpersuasive. If we accept the idea that the lead detective on a case can simply turn his head when a potential witness comes in accompanied by other law enforcement personnel, we would set a terrible precedent that would incentivize active ignorance on the part of investigative and prosecution teams. Gergal cannot in good faith claim that he had no idea or was not in the least curious as to whether Jones was a paid informant. Moreover, Mills admitted that he worked on the case, as he "prepared a report and referred it to the people who had jurisdiction." N.T. May 29, 2001, at 47.

We find that the evidence surrounding Jones's status as a paid informant was "known… to others acting on the government's behalf." Kyles, 514 U.S. at 437, 115 S.Ct. 1555. We find it impossible that a Detective who wrote reports for the prosecution team and personally accompanied a witness to give his statement in a homicide case can be considered to be working for another government agency that has "no involvement in the investigation or prosecution at issue." Merlino, 349 F.3d at 154. We will consider this claim when we cumulatively analyze the violations for materiality.

2. Glenn Pollard

Gibson next brings a Brady claim on evidence as to Glenn Pollard. Pollard testified at trial that Gibson had confessed to the murder of Berger when he overheard him talking to another person. N.T. March 10, 1997 at 398. But the prosecution did not disclose that Pollard frequently testified on behalf of the Commonwealth or that Pollard wrote to the Bucks County District Attorney's Office offering to testify in a separate case. N.T. May 29, 2001 at 89. Pollard also wrote a letter to Bucks County Detective John Mullin requesting assistance in his criminal matter from Mullin and the prosecutor, something that Gibson claims could have been used to impeach Pollard on cross-examination. Id. Finally, Pollard provided a statement concerning drug dealings in a separate matter to the Bristol Township Police Department in 1991. Id.

Judge Wells found that the letter to the Bucks County District Attorney and the letter to Detective Mullin satisfied the first two prongs of Brady, and thus considered

them in her materiality analysis. But, she found that Pollard's statement to the Bristol Township Police in 1991 did not satisfy the first two prongs of Brady since the Bristol Township Police were not on the prosecution team in Gibson's case. Gibson objects to this finding and we overrule his objection. While we have found that Detective Mills of the Bristol Township Police was part of the investigation team, and thus the prosecution had the duty to disclose information known to the Bristol Township Police, providing a statement in a different case does not by itself create impeachment evidence favorable to Gibson. We will consider only Pollard's letters to Detective Mullin and the Bucks County District Attorney in our materiality analysis.

3. Cyril Thomas

Gibson also brings Brady claims regarding evidence allegedly suppressed relating to Cyril Thomas, who testified at trial that he had received a gun from Eddie Gilbert, who in turn testified that he received said gun from Gibson. N.T. March 9, 1995, 303. Gibson avers that the prosecution suppressed evidence that Thomas possessed crack cocaine and a weapon when he was arrested in 1994, and that he was threatened with prosecution in order to secure his trial testimony. Obj. at 23. Judge Wells found that the claim relating to Thomas having crack cocaine and a weapon in his possession was time barred, and that there was no evidence that Thomas was actually threatened with prosecution to secure his testimony. Gibson objects and we will overrule his objection.

Gibson had actual possession of these documents since 2001 and yet never raised a claim regarding them in the PCRA Court or his original habeas petition. N.T. April 27, 2001 at 27-28, N.T. May 29, 2001 at 33. Gibson maintains that his challenge is timely, as it relates back to the averments in the Petition that the Commonwealth was using charges against Thomas in order to gain his cooperation. But, this claim is, in fact, different from the ones in Gibson's original Petition, and thus the claim is untimely under AEDPA's one-year statute of limitations. See 28 U.S.C. § 2244(d)(1)(D).

We agree with Judge Wells's finding that there is no evidence that the prosecution offered Thomas a deal concerning his pending charges in exchange for his testimony against Gibson. The only evidence Gibson points to is a notation in Thomas's Juvenile Probation file that Detective Mullin said he was going to threaten Thomas with prosecution if he did not cooperate, something Detective Mullin denied. See Petition ¶¶ 42-45 and N.T. May 29, 2001 at 83-88. This does not suffice to show that this evidence exists, let alone that it was suppressed. The Brady claims Gibson brought in relation to Cyril Thomas will not factor in our materiality analysis.

4. Paulinda Moore

Gibson next claims that the prosecution withheld evidence of Paulinda Moore's mental health. Moore testified at trial that Gibson had told her he was going to Bristol Borough to rob someone and that he showed her a gun. N.T. March 9, 1995 at 253-54. Judge Wells found that evidence of Moore's mental health issues, most notably an Order for Moore to undergo a mental health evaluation, see Order for Mental Evaluation, November 11, 1994, did not constitute Brady material because the prosecution team was not aware of her medical records or the court order (for that matter). Gibson objects to this finding. But the prosecution should have known of the Order for Moore to undergo a mental health evaluation because it had prosecuted her in the criminal matter. This evidence further could have been used to impeach Moore on cross examination, and

therefore it satisfies the first two prongs of Brady. We will consider this order in our materiality analysis.

5. Kevin Jones

Gibson next asserts a Brady claim based upon the testimony of Kevin Jones, who at trial testified that Gibson had said he was going to rob "an old guy" with a "lot of money" in Bristol Borough, and then later confessed to the killing while the two were in jail together. N.T. March 9, 1995 at 267-72. Gibson avers that the prosecution withheld evidence favorable to his case when it failed to disclose a report showing that Kevin's twin brother, Eric Jones, had spoken with police looking for help in two robbery cases in return for information on the Berger homicide, Mot. to Expand, Ex. B, and that Kevin was allowed to avoid prison even though he was not reporting to his parole agent. PCRA1 Ex. D-60. Judge Wells found that this evidence was not favorable to Gibson, as it is not indicative of Jones striking a deal with the prosecution in order to secure his testimony at trial, and Gibson objects to this finding. We agree with Judge Wells that a conversation with Jones's brother, Eric, and evidence that Jones was not reporting to his parole officer would not have been useful to the defense in its cross-examination of Jones. We therefore overrule Gibson's objection, and the Brady claims brought by Gibson in relation to Kevin Jones will not be considered in our materiality analysis.

6. Eddie Gilbert

Gibson further adds a Brady claim on evidence relating to Eddie Gilbert's testimony. Gilbert testified at trial that Gibson had given him two handguns after the Berger shooting— one of which was Berger's. 38 caliber handgun. N.T. March 9, 1995 at 291. Gibson asserts that the prosecution withheld evidence that Gilbert participated in a September 15, 1994 drug sale and September 23, 1994 drug sale, Pet. App'x Vol. III at 628-30, withheld documentary evidence showing that Gilbert failed to appear as requested for an interview during an investigation into a separate homicide, Mot. to Expand, Ex. B; PCRA2 Ex. D19, and withheld evidence that Gilbert had lied to police when he denied dealing drugs in 1995. PCRA2 Ex. D20. Gibson objects to Judge Wells's findings that none of the evidence related to Gilbert was Brady material. We will sustain the objection relating to the evidence that Gilbert participated in drug sales only in the sense that we will consider it as part of our materiality analysis. But we will overrule Gibson's objection in regards to the evidence of Gilbert allegedly lying to police about drug sales and refusing to cooperate in a separate murder trial.

We have found that Judge Wells erred when she held that the Bristol Township Police were not involved in the prosecution of Gibson. Therefore, the prosecution should have known about Gilbert's participation in drug sales in 1994. This would have been helpful to Gibson when cross-examining Gilbert, even if Gibson was present at one of the drug sales. We therefore find that this evidence satisfies the first two prongs of Brady, and we will consider it in our materiality analysis.

The same cannot be said for the evidence Gilbert allegedly lied to police about dealing drugs or failing to appear for an interview during an investigation into a separate homicide. The latter item of evidence is not helpful in any way to Gibson's case, as simply failing to appear for an interview with police does not impact Gilbert's credibility. The document containing Gilbert's statement where he allegedly lied about past drug sales did not exist at the time of trial, so the prosecution could not have suppressed it. This evidence thus will not weigh in our materiality analysis.

7. Sean Hess

Gibson also avers that evidence related to Sean Hess's testimony constitutes Brady material. Hess testified at trial that Gibson told him that he was going to rob a store, and Gibson later told Hess that he had completed the act. N.T. March 8, 1995 at 209-214. Gibson maintains that the prosecution withheld evidence that Hess was pressured by the police to testify against Gibson, and prior to trial police had kicked in the door of Hess's mother's home and caused damage to the house, something that Detective Gergal was aware of. N.T. May 29, 2001 at 164. Hess testified at a hearing in front of the PCRA court that he had fabricated his testimony after the police threatened him in many ways. See, e.g., N.T. April 27, 2001 at 130-136. The PCRA court did not believe Hess's testimony. 2002 PCRA Ct. Op. at 15.

We agree with Judge Wells's conclusion that Gibson has failed to rebut the PCRA court's finding that Hess's PCRA testimony was untruthful— as AEDPA requires. See 28 U.S.C. § 2254(e)(1). But, we find that the prosecution did withhold evidence of coercion when it failed to disclose that police had broken into the home of Hess's mother, causing extensive damage, since Detective Gergal of the prosecution team was aware of this incident. Further, a jury could have interpreted this act as intimidation, and thus the evidence would have been useful to Gibson's case. We therefore find that the evidence of damage to Hess's mother's home meets the first two prongs of Brady, and we will consider them in our materiality analysis.

8. Corey Jones

Gibson additionally adds a Brady claim regarding Corey Jones. Jones did not testify at Gibson's trial, but he testified at Gibson's 2001 PCRA hearing that he had been harassed and pressured by police to make a statement against Gibson in the Berger murder. N.T. April 27, 2001 at 189-210. Jones claimed that police questioned him for five hours without food or drink, told him he was not free to leave the police station, and threatened to charge him as an accessory to murder without his cooperation. Id. at 193–198. Judge Wells found that the evidence related to Jones's interrogation was not Brady material and Gibson objects. We will overrule Gibson's objection.

Jones did not testify at trial, so the evidence cited by Gibson would not have been helpful as impeachment evidence. It also would not be exculpatory since nothing Jones testified to at the PCRA hearing was materially related to the evidence which served as the basis for Gibson's conviction. Finally, the PCRA court found that Jones was not credible, 2002 PCRA Ct. Op. at 15, and Gibson has failed to rebut the statutory presumption of that finding by clear and convincing evidence, and we will thus not consider it in our materiality analysis.

9. Hermann Carroll

Gibson next claims that evidence relating to Hermann Carroll's testimony also constitutes Brady material. Carroll testified that Gibson had confessed to Berger's murder. N.T. March 9, 1995 at 371. But the prosecution did not disclose evidence that Detective Gergal had offered to testify at Carroll's sentencing hearing if Carroll assisted with the Gibson case, N.T. May 29, 2001 at 125-26, or that Bucks County Detective John L. Ziemba told Carroll to contact the prosecutor to come to an arrangement when Carroll approached Ziemba and said that he was hesitant to testify against Gibson. Mot. to Expand at Ex. B25. Judge Wells found that both of these items met the first two prongs of Brady, and we will consider this evidence as part of our materiality analysis.

10. Bernard McLean

Lastly, Gibson asserts both Brady and Napue claims regarding Bernard McLean. McLean testified at trial that Gibson had confessed to the murder. N.T. March 9, 1995 at 232-33. Gibson states that the prosecution failed to correct McLean's testimony at trial relating to assistance he received regarding his outstanding warrants in exchange for McLean's testimony against Gibson. Gibson also avers that the Commonwealth suppressed evidence that Bernard McLean had used a false name when speaking to Bristol Township Police. See Mot. to Expand at Ex. B; see also PCRA2 Ex. D22. Judge Wells found both the Brady and Napue claims without merit, and Gibson objects.

[21, 22] Our thorough review of the record leads us to agree with Judge Wells. As to the Napue claim, McLean testified at trial that the police said they would assist him with his outstanding warrants if he provided a statement against Gibson. N.T. March 9, 1995 at 244.[2] Gibson has not provided evidence that McLean committed perjury, and without such proof it cannot be claimed that the prosecutor had a duty to correct McLean's statement. The Brady claims similarly lack merit. The prosecution team did have two reports, one from September 1994 and one from April 1995 in its possession. But neither item of evidence meet the first two prongs of Brady. The April 1995 report did not exist at the time of trial, so it could not have been suppressed. As for the September 1994 report, McLean had already been cross-examined about his criminal past and cooperation with the prosecution. The fact that he had used a false name in an interview with Bristol Township Police for a different murder would not have helped the defense impeach him in this matter. We will overrule Gibson's objections with regard to Bernard McLean and will not consider this evidence in our materiality analysis.

11. Materiality Analysis

[23] We must now evaluate the items of evidence that were favorable to Gibson and that the prosecution suppressed and determine whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," with 'reasonable probability' defined as "a probability sufficient to undermine confidence in the outcome." Simmons, 590 F.3d at 234. The evidence we must evaluate includes: (1) Edward Jones being a paid informant for the DEA and Bristol Township Police, see PCRA1 Ex. D-69 (Jones Decl.) and PCRAR1 Ex. D-66B; (2) Glenn Pollard's letter to Detective Mullin requesting assistance, N.T. May 29, 2001 at 89; (3) Pollard's letter to the Bucks County District Attorney's Office requesting the same, id.; (4) the court order for Moore to undergo a mental health evaluation, see Order for Mental Evaluation, November 11, 1994; (5) Eddie Gilbert's involvement in a September, 1994 drug sale, see Pet. App'x Vol. III at 628-30; (6) police damaging the home of Sean Hess's mother while searching for him, see N.T. May 29, 2001 at 164; (7) Hermann Carroll's discussions with Detective Gergal who offered to testify at Carroll's sentencing, see N.T. May 29, 2001 at 125-26; and (8) Carroll's letter to Detective Ziemba requesting assistance,

2. The Supreme Court held in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) that the prosecution violated due process when it failed to correct testimony it knew to be false. See also Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). We undertake a much deeper discussion of Napue later in our Opinion.

see Mot. to Expand Ex. B25. We conclude that these eight items of evidence, considered cumulatively, are not material since there is no reasonable probability that the result of Gibson's trial would have been different if this evidence had been turned over to his defense team.

First, even if the suppressed evidence would have completely discredited each of the witnesses above, there were corroborating witnesses for all but one item of the testimony now in question. Edward Jones testified that Gibson told him that he was going to rob a store and then later admitted to the crime. Kevin Jones, whose testimony is not affected by the Brady claims, testified Gibson told him the same thing. Glenn Pollard's testimony that Gibson confessed to the murder while in jail was similarly corroborated by the testimony of Kevin Jones and Kenneth Johnson. Likewise, Paulinda Moore's testimony was largely congruent with Kevin Jones's, who testified that he encountered Gibson a short time after Gibson spoke with Moore and that Gibson informed him that he was going to rob and possibly kill a man. Hermann Carroll testified that Gibson had confessed to the killing, something echoed by Bernard McLean. Sean Hess testified to both Gibson's motive and eventual confession to the crime. The confession, as we've stated, was corroborated by Kevin Jones, Kenneth Johnson, and Bernard McLean, among others. And, while Gibson did not ask anyone else for money to buy a car, as he did with Hess, that day he visited an automobile dealership and tried to purchase a car, as evidenced by Glen Kashdan's testimony.

Second, the only testimony affected by Brady material and not corroborated by other evidence is Eddie Gilbert's testimony about receiving the guns from Gibson. But the only impeachment evidence the prosecution suppressed relating to Gilbert was the fact that he participated in a drug sale in 1994. Given that Gilbert testified at trial about a prior conviction for drugs, we find that the suppressed evidence would not have impacted the jury's assessment of Gilbert's credibility.

Third, and most importantly, the case against Gibson was very strong, even when completely discounting all of the testimony from witnesses who could have been impeached with the Brady material. Multiple people, including Gibson's aunt, testified to seeing Gibson that day, before the murder, wearing a dark hooded sweatshirt. Security footage at a bank Gibson visited that day confirmed he was wearing this apparel. Michael Segal, a shopkeeper across the street from the building where Berger was killed, saw Berger struggling with an assailant in a dark hooded sweatshirt who matched Gibson's size, build, and complexion. Alfonso Colon, who lived above the store where Berger was shot, heard gunshots and saw Gibson leaving the scene while stuffing what appeared to be a handgun into his waistband. Gibson's cousin, Pamela Harrison, saw Gibson later that day after he visited her home. She said he was wearing a dark hooded sweatshirt and carrying a handgun. Finally, Gibson confessed to the murder to Bernard McLean, Kenneth Johnson, and Kevin Jones, among others. The evidence overwhelmingly supported the conclusion that it was Gibson who killed Berger.

The corroboration of the testimony affected by the Brady material, coupled with the mountain of other evidence against Gibson, makes clear that the evidence suppressed by the prosecution was not material. We will overrule Gibson's objection to Judge Wells's finding that the suppressed evidence was not material.

C. Ineffective Assistance of Counsel Claims

[24, 25] Gibson next objects to the R & R's disposition of his ineffective assistance

of counsel claims, but we will overrule his objections. The Sixth Amendment guarantees every criminal defendant the assistance of counsel. U.S. CONST. amend. VI. This assistance must not only be perfunctory, but effective. See Saranchak v. Sec'y Pa. Dep't of Corr., 802 F.3d 579, 588 (3d Cir.2015) (stating that defendants are entitled to the effective assistance of counsel). The right to effective assistance of counsel protects the fundamental right to a fair trial afforded to criminal defendants. Id. (quoting Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The Supreme Court has laid out a two-prong test for determining whether a criminal defendant has suffered a violation of his constitutional rights by having ineffective assistance of counsel.

[26, 27] First, a habeas petitioner must show that his counsel's performance was deficient, meaning that the representation failed to meet an objective standard of reasonableness "as defined by prevailing professional norms." Id. (quoting Outten v. Kearney, 464 F.3d 401, 414 (3d Cir.2006)) (internal quotations omitted). More specifically, "we must 'judge the reasonableness of counsel's challenged conduct on the facts of the particular case, reviewed as of the time of counsel's conduct.'" Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir.1998) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). But, we must be highly deferential to counsel's performance and not "second-guess counsel's assistance after conviction." Id. (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052).

[28] Second, a petitioner must show prejudice, meaning that he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. This standard does not require the petitioner to prove that the evidence presented against him would have been insufficient if not for counsel's errors, nor must the petitioner show "that counsel's deficient conduct more likely than not altered the outcome." Id. at 693, 104 S.Ct. 2052. But it does require the petitioner to go further than simply demonstrating "that the errors had some conceivable effect on the outcome of the proceeding." Id.; see also Saranchak, 802 F.3d at 588.

1. Edward Jones

[29] Gibson first claims that his counsel was ineffective for failing to cross-examine Edward Jones on his status as a DEA informant. Judge Wells found that Gibson had not rebutted the PCRA court's finding that Jones's recantation of his account was untruthful and, by extension, that Jones's trial testimony must have therefore been truthful. Gibson objects to this finding. We agree with Gibson insofar as we believe Judge Wells erred when she made the aforementioned inference about the truthfulness of Jones's trial testimony and concluded that the ineffective assistance of counsel claim was without merit for that reason alone. Trial counsel still had the responsibility to cross-examine Jones to the fullest extent possible, and it appears this did not happen.

[30] But, we do not find any prejudice for the same reasons we articulated when analyzing Gibson's Brady claim as to Jones. Like the materiality standard in Brady, a petitioner under Strickland must show prejudice, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. Jones's testimony was corroborated by Kevin Jones, among others, and many other witnesses testified to Gibson's motive for

committing the crime and his subsequent confessions. There is no reasonable probability that the proceeding would have been different had Jones been effectively cross-examined. While we do not find any prejudice when analyzing Gibson's claim against Jones individually, we will consider it in our cumulative error analysis.[3]

2. Bernard McLean

[31] Gibson also asserts an ineffective assistance of counsel claim related to the testimony of Bernard McLean. Gibson maintains that trial counsel failed to adequately impeach McLean, since McLean was not questioned about his preliminary hearing testimony where he stated that the prosecutor had offered to help him with a criminal matter in exchange for his testimony. But trial counsel did impeach McLean by getting him to admit that the police told him they would "take care" of his outstanding warrants. N.T. March 9, 1995 at 244. This fact undermines Gibson's claim under both prongs of Strickland.

[32] First, trial counsel's decision not to pursue on cross-examination McLean's preliminary hearing testimony regarding the prosecutor was reasonable given McLean had already admitted that the police had offered to help him in exchange for his testimony. Second, there is no prejudice since McLean had already been impeached on cross-examination when discussing his conversation with the police, and thus there is no reasonable probability that the outcome of the case would have been different had counsel cross-examined McLean on his preliminary hearing testimony. While failing only one of the Strickland prongs would have defeated this claim, it is illustrative of this claim's weakness that it fails each prong. We will overrule Gibson's objection.

3. Michael Segal

Gibson next avers an ineffective assistance of counsel claim related to the testimony of Michael Segal. Trial counsel failed to impeach Segal by having him reiterate that he could not identify Gibson's face or pick him out in a pre-trial lineup. N.T. March 8, 1995 at 80. Instead, Segal could only testify that Gibson had the same height, weight, build, complexion, and hair color as the assailant. Id. at 79. Judge Wells found that trial counsel's failure was not prejudicial. Gibson objects, but we will overrule his objection.

We disagree with Gibson's assertion that it was unreasonable for trial counsel to have Segal reiterate that he could not identify Gibson in a pre-trial lineup. First, Segal never testified that he could identify Gibson; he simply stated that the perpetrator matched many of Gibson's characteristics. The jury knew Segal could not identify Gibson by his face. Second, Segal was thoroughly cross-examined on the inconsistencies of his identifications to police. Id. at 90–98. It could easily be construed as a tactical choice for counsel to have focused on the inconsistencies of his identification to keep the jury's attention instead of highlighting the fact that Segal could not identify Gibson by his face —something the jury already knew. Gibson's objection therefore lacks merit and we will overrule it.

4. Sean Hess

[33] Gibson asserts that trial counsel was ineffective for failing to impeach Sean

3. We are well aware that ineffective assistance of counsel claims must be reviewed cumulatively. We will analyze Gibson's ineffective assistance of counsel claims cumulatively with his Brady claims, as it stands to reason that if these claims are not found to be prejudicial in conjunction with Brady errors they cannot be found to have prejudiced Gibson on their own.

Hess based on Hess's differing testimony at the trial and preliminary hearing as to whether Gibson had referred to Berger as a "white devil" or simply a white man. Judge Wells found that this claim was procedurally defaulted because Gibson failed to raise the claim in his PCRA appeal, and we agree. It is a requirement of AEDPA that a petitioner exhaust his claim in state court before seeking federal relief. 28 U.S.C. § 2254(b)(1). Moreover, the PCRA statute of limitations has expired for this claim and thus it cannot be exhausted, precluding habeas review. See Lines v. Larkins, 208 F.3d 153, 165. We will overrule Gibson's objection on this claim.

5. Glenn Pollard

[34] Gibson next claims that counsel was ineffective for failing to impeach Glenn Pollard with a letter Pollard wrote to the prosecutor that was then forwarded to defense counsel. Both the Superior Court and Judge Wells found counsel's decision not to use the letter for cross-examination purposes was reasonable given that the letter contained damaging information about Gibson. We agree and will overrule Gibson's objection.

Trial counsel testified that he decided not to use the letter to cross-examine Pollard because the letter contained information about Gibson's involvement in another shooting. N.T. April 27, 2001 at 221. Gibson counters that trial counsel did not even ask that the letter be redacted, and thus the assistance was ineffective, and that counsel could have cross-examined Pollard with the information in the letter without showing the letter to Pollard. This argument fails on both counts. First, we cannot believe that the trial court would have allowed the letter to be redacted when defense counsel would have been the one trying to use the letter as evidence, thereby opening up the contents of the letter to the prosecution. Second, it also stresses credulity to believe that the prosecution would have failed to notice defense counsel cross-examining Pollard on the contents of the letter, which likewise could have opened up the possibility of the prosecution trying to admit the contents of the whole letter. We find it eminently reasonable that defense counsel would choose not to use this letter during Pollard's cross-examination and thus will overrule Gibson's objection.

6. Paulinda Moore

Gibson also contends that trial counsel was ineffective for failing to cross-examine Paulinda Moore on her mental illness and that both Judge Wells and the Superior Court erred when finding that the actions of trial counsel did not prejudice Gibson. Gibson objects to these findings. We agree with Gibson that prejudice is established by considering claims cumulatively. But, we also agree with the finding of Judge Wells that Moore was a minor witness whose testimony was corroborated by other witnesses. We will thus sustain Gibson's objection only in the sense that we will consider trial counsel's ineffective assistance with relation to Moore when we analyze the cumulative effects of all errors as part of our decision on Gibson's final claim.

7. Cyril Thomas, Kevin Jones, Kenneth Johnson, and Diane Hess

Finally, Gibson asserts ineffective assistance of counsel claims relating to the testimony of Cyril Thomas, Kevin Jones, Kenneth Johnson, and Diane Hess. Judge Wells found that Gibson's claims relating to these witnesses were procedurally defaulted since he failed to include them in his PCRA petition. Gibson objects, noting that the evidence supporting these claims was admitted to the PCRA court, the parties briefed the merits, and the Commonwealth never asserted that the claims were

waived when before the PCRA court. The law does not support Gibson's objection. The Pennsylvania Supreme Court in Commonwealth v. Kenney, 557 Pa. 195, 732 A.2d 1161, 1164 (1999), amongst other cases, found that, "[i]n order to preserve claims of ineffectiveness of counsel under the PCRA, the claims must be raised at the earliest stage in the proceedings at which the allegedly ineffective counsel is no longer representing the claimant." Id. (quoting Commonwealth v. Griffin, 537 Pa. 447, 644 A.2d 1167, 1170 (1994)). The ineffective assistance of counsel claims were not included in his PCRA petition, and therefore are procedurally defaulted.

D. Reasonable Doubt Jury Instruction Claims

Gibson next objects to Judge Wells's finding that the trial court's jury instructions correctly conveyed the concept of reasonable doubt, alleging that the instructions "suggested a higher degree of doubt than is actually required for acquittal." Obj. at 43. The Supreme Court has found that jury instructions, "taken as a whole…[must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Moreover, the Supreme Court has approved jury instructions defining reasonable doubt as "a doubt that would cause a reasonable person to hesitate to act." Victor v. Nebraska, 511 U.S. 1, 20, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing Holland, 348 U.S. at 140, 75 S.Ct. 127). The Court in Victor further found that jury instructions describing reasonable doubt as "substantial doubt" were constitutional since the trial court had explicitly laid out a distinction between "substantial" doubt and "doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." 511 U.S. at 19–20, 114 S.Ct. 1239 (internal citations and quotations omitted).

Here, the trial court defined reasonable doubt as:

> [W]ell-founded in reason and common sense…being one that springs from a fair, thoughtful and careful consideration of the evidence in this case or the lack thereof. It is not merely a passing fancy… that might come into your minds or a doubt conjured up for the purpose of avoiding an unpleasant duty. It should be such a doubt as would cause a reasonable person in the conduct of his or her own affairs to stop, hesitate and seriously consider as to whether or not he or she would do a certain thing before finally acting.

N.T. March 13, 1995 at 73.

[35] We find these instructions almost perfectly analogous to the ones the Court upheld in Victor. The trial judge here described reasonable doubt as one that would make a reasonable person "stop, hesitate and seriously consider" whether the person should be found guilty, and also gave the jury an explicit instruction as to the distinction between reasonable doubt and "a passing fancy,"—all but identical to the difference between substantial doubt and fanciful conjecture approved by the Court in Victor. We find that the jury instructions comport with the standards set by the Supreme Court and thus will overrule Gibson's objection on this claim.

E. Prosecution's Failure to Correct the Testimony of Michael Segal and The Related Ineffective Assistance of Counsel Claim

Gibson next brings a Napue claim stating that the prosecution violated his constitutional rights when it failed to correct the

testimony of Michael Segal.[4] Both the Superior Court and Judge Wells both found Gibson's Napue and ineffective assistance of counsel claims meritless, with Judge Wells stating "the fact that a prosecution witness' trial testimony varies from his previous statements does not necessarily mean that the prosecution knowingly presented false testimony." R & R at 70. Gibson objects to these findings, but we overrule his objections.

[36, 37] As rehearsed, the Supreme Court held in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) that the prosecution violated due process when it failed to correct testimony it knew to be false. See also Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Simply put, the prosecution may not knowingly use false evidence, including false testimony, in its case against a criminal defendant. If the petitioner proves that the prosecution knowingly used false evidence when it failed to correct a witness's testimony, a court must then determine whether this error was material. The standard for this materiality analysis is set out in United States v. Bagley, 473 U.S. 667, 680, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), where the Court held that "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id. Our Court of Appeals has held that, in order to prove a constitutional violation relating to false testimony under Napue, a petitioner must show that: (1) the witness in question committed perjury; (2) the Government knew or should have known the witness committed perjury; (3) the testimony went uncorrected; and (4) there is any reasonable likelihood that the false testimony could have affected the verdict. Lambert v. Blackwell, 387 F.3d 210, 242 (3d Cir.2004). Of particular import to the first prong of this test, our Court of Appeals has noted that, even if the witness's testimony is made in good faith, the Government has an obligation to correct the statement when it should be obvious that the testimony is untrue. See United States v. Harris, 498 F.2d 1164, 1169 (3d Cir.1974).

[38] Here, Gibson fails to sustain his claim because he has not shown that Segal committed perjury or that the Commonwealth should have known he might be doing so. The only evidence to support this claim is that Segal's statements changed over the course of the investigation and trial. In each subsequent statement after his original one, Segal's description of the attacker came to more closely resemble Gibson. Obj. at 45 (citing N.T. March 8, 1995 at 91, id. at 78–79). Moreover, Segal changed his testimony significantly when he first stated that he had not seen a gun and later testified at trial that the attacker was in fact holding a gun. Compare N.T. November 18, 1994, with N.T. March 8, 1995 at 73. But, these significant changes alone do not suffice to show that Segal committed perjury or that the Commonwealth should have known he might be doing so.

[39] As our Court of Appeals has held, "[t]here are many reasons testimony may be inconsistent; perjury is only one possible reason." Lambert, 387 F.3d at 249. This case is analogous to Lambert. There, our Court of Appeals held that "[d]iscrepancy is not enough to prove perjury," and that a factual determination by the PCRA Court that the petitioner had failed to prove a witness perjured himself with inconsistent testimony alone was reasonable. Id. Here, the PCRA Court similarly found

4. Gibson also brings an ineffective assistance of counsel claim, stating that trial counsel failed to effectively cross examine Michael Segal.

no proof that Segal perjured himself, as the only evidence offered by Gibson is the discrepancy between Segal's statements and his testimony. Further, because we find no merit in Gibson's Napue claim, and since counsel did cross-examine Segal about his prior inconsistent statements, we similarly reject Gibson's ineffective assistance of counsel claim as it relates to Segal. We will overrule Gibson's objections as to both of his claims related to Segal's testimony.

F. Prosecutorial Misconduct, Brady, and Ineffective Assistance of Counsel Claims Related to Detective Morris's Notes

Gibson also asserts claims related to Detective Randy Morris's notes, which he relied on when testifying at trial regarding a hypothetical question Gibson asked Detective Stephen Battershell about shooting someone in self-defense. First, Gibson brings a claim for prosecutorial misconduct, stating that the prosecution improperly elicited this testimony. Second, Gibson avers that the prosecution's failure to provide defense counsel with Detective Morris's notes constituted a Brady violation. Third, Gibson argues that counsel was ineffective for failing to obtain Detective Morris's notes from the prosecution. Judge Wells resolved each claim in favor of the Commonwealth, and Gibson objects. We will overrule his objections on the prosecutorial misconduct and Brady claims, but will consider his ineffective assistance of counsel claim cumulatively as part of his final claim.

1. Prosecutorial Misconduct

[40] We interpret Gibson's prosecutorial misconduct claim related to Detective Morris as a Napue claim and will analyze it accordingly. The Napue line of cases holds that a prosecutor may not knowingly use false evidence, including false testimony, in its case against a criminal defendant. 360 U.S. at 269, 79 S.Ct. 1173. Here, Gibson has presented no evidence that the prosecutor committed a Napue violation when eliciting this testimony from Detective Morris because he cannot show that Detective Morris perjured himself at trial. Moreover, Detective Morris's testimony was echoed by Detective Battershell, providing further evidence that it was true. We will overrule Gibson's objection to the R & R's resolution of this claim.

2. *Brady* Claim

Gibson next asserts a Brady claim in relation to Detective Morris's notes. The prosecution failed to provide defense counsel with a copy of the notes Detective Morris used when he testified at trial. The Supreme Court held in Brady that a prosecution's suppression of material evidence favorable to the accused violates due process. 373 U.S. at 87, 83 S.Ct. 1194. It later clarified that Brady applied to both exculpatory evidence and evidence that could be used to impeach witnesses. See Bagley, 473 U.S. at 676, 105 S.Ct. 3375. The failure to disclose favorable evidence alone is not sufficient to establish a constitutional violation. See Johnson, 705 F.3d at 128. A habeas petitioner is only entitled to relief when: "(1) the evidence at issue is favorable to the accused; (2) the evidence was suppressed by the state; and (3) the evidence is material." Id.

[41] Here, Gibson has not shown that Detective Morris's notes would have helped him at trial, and thus his Brady claims necessarily fail. The discrepancies between Detective Morris's different descriptions of what exactly constituted his "notes" that he used during trial — ranging from his own personal notes taken during the questioning of Gibson to a report authored by Detective Battershell — do not establish that the contents of the

notes themselves were favorable. As Judge Wells accurately noted, the contents of the notes may have corroborated Detective Morris's story, and thus would have been unfavorable to Gibson. We will overrule Gibson's objection to Judge Wells's finding on this claim.

3. Ineffective Assistance of Counsel Claim

Finally, we turn to Gibson's ineffective assistance of counsel claim. As earlier rehearsed, the right to effective assistance of counsel protects the fundamental right to a fair trial afforded to criminal defendants. Strickland, 466 U.S. at 685, 104 S.Ct. 2052. The Supreme Court has laid out a two-prong test for determining whether a criminal defendant suffered a violation of his constitutional rights by having ineffective counsel. First, a habeas petitioner must show that his counsel's performance was deficient, meaning that the representation failed to meet an objective standard of reasonableness as defined by "prevailing professional norms." Id. at 688, 104 S.Ct. 2052. But, we must be highly deferential to counsel's performance and not "second-guess counsel's assistance after conviction." Id. at 689, 104 S.Ct. 2052.

Second, a petitioner must show prejudice, meaning that he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. This standard does not require the petitioner to prove that the evidence presented against him would have been insufficient if not for counsel's errors, nor must the petitioner show "that counsel's deficient conduct more likely than not altered the outcome." Id. at 693, 104 S.Ct. 2052. But it does require the petitioner to go further than simply demonstrating "that the errors had some conceivable effect on the outcome of the proceeding." Id.; see also Saranchak, 802 F.3d at 588.

[42] We agree with Gibson that it was objectively unreasonable for trial counsel in a capital case to fail to inquire about, and eventually acquire, Detective Morris's notes. Had the notes contained information corroborating Morris's testimony, counsel would have been free not to use them on cross-examination. But, if they were helpful, counsel could have used them to more effectively impeach Morris. The fact that the Superior Court and Judge Wells found that trial counsel did attempt to impeach Morris does not excuse counsel's failure with regard to the notes. We do not find this failure to be prejudicial on its own, as Detective Battershell also testified that Gibson asked a hypothetical question about shooting someone during questioning. We will, however, include this claim in our cumulative analysis.

G. Cumulative Error

Finally, Gibson brings a claim for cumulative error, stating that the many errors taken individually may not warrant habeas relief but, when considered together, can be found to have affected the trial in a way that would undermine the verdict. Judge Wells found Gibson's cumulative error claim to have no merit, and Gibson objects. While we have disagreed with some of Judge Wells's analysis, we will overrule Gibson's objection because the cumulative effect of the errors Gibson identified did not prejudice him at his trial.

[43, 44] Our Court of Appeals has stated that the cumulative error doctrine "allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process." Collins v. Sec'y of Pa. Dep't of Corr., 742 F.3d 528, 542 (3d Cir.2014). The Third Circuit has

also recognized that "errors that individually do not warrant habeas relief may do so when combined." Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir.2007) (citing Marshall v. Hendricks, 307 F.3d 36, 94 (3d Cir.2002)). Cumulative errors warrant habeas relief "if they had a substantial and injurious effect or influence in determining the jury's verdict." Id. (citing Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). When performing a cumulative error analysis, a court "aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." Id. (quoting Darks v. Mullin, 327 F.3d 1001, 1018 (10th Cir.2003)). While we understand that our Court of Appeals has not resolved whether cumulative error claims "constitute clearly established federal law as determined by the Supreme Court for the purposes of deference under AEDPA," Saranchak, 802 F.3d at 590, we will perform a de novo analysis of Gibson's claim in an effort to fully resolve his objections.

[45] We have previously found that the following items constitute harmless error that did not prejudice Gibson at his trial: (1) evidence the Edward Jones was a paid informant for the DEA and the Bristol Township Police Department, see PCRA1 Ex. D-69 (Jones Decl.) and PCRAR1 Ex. D-66B; (2) Glenn Pollard's letter to Detective Mullin requesting assistance, N.T. May 29, 2001 at 89; (3) Pollard's letter to the Bucks County District Attorney's Office requesting the same, id.; (4) the court order for Moore to undergo a mental health evaluation, see Order for Mental Evaluation, November 11, 1994; (5) evidence of Eddie Gilbert's involvement in a September 1994 drug sale, see Pet. App'x Vol. III at 628-30; (6) evidence that police damaged the home of Sean Hess's mother while searching for him, see N.T. May 29, 2001 at 164; (7) Hermann Carroll's letter to Detective Gergal offering to testify, see N.T. May 29, 2001 at 125-26; (8) Carroll's letter to Detective Ziemba stating the same, see Mot. to Expand Ex. B25; (9) trial counsel's failure to cross-examine Edward Jones on his status as a DEA informant; (10) trial counsel's failure to cross-examine Paulinda Moore regarding her mental illness; and (11) trial counsel's failure to obtain Detective Morris's notes used to refresh his memory during his trial testimony.

We find that the cumulative effect of the errors did not have a substantial or injurious effect on the jury's verdict. First, nearly all of the evidence tainted by errors was either corroborated in some way or supported by other, untainted evidence. Edward Jones testified that Gibson first told him that he was going to rob a store and then later admitted to committing the crime. Kevin Jones, whose testimony is not affected by the Brady claims, testified to the same thing. Glenn Pollard's testimony that Gibson confessed to the murder while in jail was similarly corroborated by the testimony of Kevin Jones and Kenneth Johnson. Likewise, Paulinda Moore's testimony was substantially matched by Kevin Jones, who testified that he encountered Gibson a short time after Gibson spoke with Moore and that Gibson informed him that Gibson was going to rob and possibly kill a man. Hermann Carroll testified that Gibson had confessed to the killing, something echoed by Bernard McLean. Sean Hess testified to both Gibson's motive and eventual confession to the crime. The confession, as we've stated, was corroborated by Kevin Jones, Kenneth Johnson, and Bernard McLean, among others. And, while Gibson did not ask anyone else for money to get a new car, as he did with

Hess, that day he visited an automobile dealership and tried to purchase a car, as evidenced by Glen Kashdan's testimony. Finally, Detective Morris's testimony regarding Gibson's hypothetical question posed to police during questioning was matched by the testimony of Detective Battershell, to whom Gibson was actually speaking. As we stated earlier, the sole exception to this pattern of corroboration was Eddie Gilbert, who testified to receiving the guns involved in the murder from Gibson. But, Gilbert was cross-examined extensively at trial and his testimony in no way affected the evidence related to Gibson's motive, the eye-witness accounts of the murder and its aftermath, and the numerous confessions made by Gibson.

On this last point, it is clear that the cumulative effect of the errors did not substantially affect the jury's verdict because the case against Gibson was strong. The prosecution presented evidence establishing motive, illustrating Gibson's plans to rob Ascher Health, placed Gibson at the scene of the crime, and showed that he confessed the murder to numerous associates. Before the murder, multiple people, including Gibson's aunt, testified to seeing Gibson that day wearing a dark hooded sweatshirt. Security footage at a bank Gibson visited that same day confirmed he was wearing this apparel. Michael Segal, a shopkeeper across the street from the building where Berger was killed, saw Berger struggling with an assailant in a dark hooded sweatshirt who matched Gibson's size, build, and complexion. Alfonso Colon, who lived above the store where Berger was shot, heard gunshots and saw Gibson leaving the scene while stuffing what appeared to be a handgun into his waistband. Gibson's cousin, Pamela Harrison, saw Gibson later that day when he visited her home. She said he was wearing a dark hooded sweatshirt and carrying a handgun. Finally, Gibson confessed to the murder to Bernard McLean, Kenneth Johnson, and Kevin Jones, among others. The evidence overwhelmingly supported the conclusion that it was Gibson who killed Berger.

We do not take lightly Gibson's argument that the jury may have seen the evidence presented at trial differently had the prosecution not suppressed evidence favorable to the defense and had defense counsel not committed several unreasonable errors. It is certainly possible that in a case where evidence tainted by errors is not corroborated by other evidence, and where the prosecution's case is not so overwhelming that these errors would constitute a constitutional violation, would warrant a grant of habeas relief. But that hypothetical case is not before us here. Instead, much of the testimony Gibson claims to be tainted by constitutional violations is corroborated by untainted evidence, and the overall case the Commonwealth presented was quite strong. Gibson's cumulative error claim fails even on de novo review and we will overrule his objection to the R & R.

H. Request for Discovery

[46, 47] Gibson also objects to Judge Wells's decision denying his supplemental motion for discovery. See docket entries nos. 69 and 72. We do not find that Judge Wells abused her discretion when denying this motion. A habeas petitioner needs to show good cause for requested discovery. See Rules Governing Section 2254 Cases in the United States District Courts 6(a). A petitioner shows good cause when "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief." Bracy v. Gramley, 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (internal citations and quotations omitted).

[48] Gibson's objection fails for two reasons. First, the facts are fully developed. This case has been ongoing in the state and federal court systems for twenty years. Judge Wells allowed for extensive discovery in this matter, and this discovery yielded information that was the basis for many of the claims discussed in this petition. Additional discovery into case files within three separate government entities in the nineteenth year of proceedings is the very definition of a fishing expedition. Second, even if the facts were not fully developed, there is no reason to believe that Gibson would have been able to demonstrate that he was entitled to relief had he obtained those files. As we have demonstrated with our analysis of the errors committed at Gibson's trial, even if discovery had yielded evidence that would have further impeached the witnesses listed in Gibson's objections, the remaining evidence overwhelmingly supported a guilty verdict. We will thus deny Gibson's objection to Judge Wells's denial of his supplemental motion for discovery.

I. Request for Hearing

Gibson next requests an evidentiary hearing to more fully develop the facts in this case. As we previously stated, we find that it risks understatement to note the facts in this case are fully developed. Moreover, the record does not support Gibson's assertion that he was denied a full and fair hearing in the state courts. We will deny Gibson's request for an evidentiary hearing.

J. Certificate of Appealability

[49] Finally, Gibson requests that we issue a certificate of appealability even if we approve and adopt the R & R. We decline to do so. A petitioner who seeks to appeal a final order of a district court must obtain a certificate of appealability for each claim he wishes to present to the Court of Appeals, see 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), and the petitioner must make "a substantial showing of the denial of a constitutional right" to obtain a COA. 28 U.S.C. § 2253(c)(2). The Supreme Court has held that a certificate of appealability should be granted only when jurists of reason could debate procedural or substantive dispositions of a petitioner's claims. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). It further summarized this standard in Miller–El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), stating that a petitioner must show that "reasonable jurists could debate whether…the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." (quoting Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)) (internal citations omitted). A petitioner need not, however, demonstrate that the appeal will succeed. Id.

[50] We find that reasonable jurists could not debate whether this petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. This is highlighted by the fact that, when performing our cumulative Brady and error analyses, we did so de novo without giving any deference to the decisions made by the state courts. Of course, AEDPA mandates that we uphold the state court's resolution of any claims so long as the resolution is reasonable. Since we came to the same conclusion as the state court without any hesitation, it is obvious that its disposition of the case was reasonable. Reasonable jurists could not disagree with our resolution of this matter, and we will therefore decline to issue a certificate of appealability.

V. Conclusion

We find that Gibson's objections to the substantive findings of Judge Wells's R & R lack merit. Moreover, Judge Wells did not abuse her discretion when denying Gibson's motion for supplemental discovery. We will therefore approve and adopt Judge Wells's R & R, dismiss Gibson's petition with prejudice and without holding an evidentiary hearing, and decline to issue a certificate of appealability.

James HAMILTON, Plaintiff

v.

William L. PALLOZZI, et al., Defendants.

CIVIL NO. JKB-15-2142

United States District Court, D. Maryland.

Signed 02/18/2016

Background: Citizen, previously convicted of three felony offenses, brought § 1983 action against superintendent of state police department, and against state attorney general, in their official capacity, asserting claim that enforcement of Maryland statute, which prohibited a person who had been convicted of a "disqualifying crime" from possessing a regulated firearm, violated his Second and Fourteenth Amendment rights, seeking declaratory and injunctive relief. Superintendent and attorney general moved to dismiss, and citizen moved for summary judgment.

Holdings: The District Court, James K. Bredar, J., held that:

(1) citizen had standing to bring § 1983 action, and

(2) Maryland statute did not violate Second Amendment as applied to citizen.

Ordered accordingly.

1. Weapons ⚿182

In Maryland, a gubernatorial pardon of a felony conviction is necessary to restore firearm possession rights.

2. Federal Civil Procedure ⚿1772, 1835

To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

3. Federal Civil Procedure ⚿1772

In analyzing a motion to dismiss for failure to state a claim, although a district court views all well-pleaded allegations in the light most favorable to the plaintiff, the factual allegations must nevertheless be enough to raise a right to relief above the speculative level. Fed. R. Civ. P. 12(b)(6).

4. Federal Civil Procedure ⚿1835

In conducting its analysis into whether the factual allegations in a complaint raise a right to relief above the speculative level, as required to survive a motion to dismiss for failure to state a claim, a district court need not accept legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments. Fed. R. Civ. P. 12(b)(6).

5. Federal Courts ⚿2194, 2196

Ripeness is a jurisdictional matter that may be raised at any point during the proceedings and may be raised sua sponte by the court.

APP-I

BLD-109 **January 26, 2017**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **16-1729**

JEROME GIBSON, Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.

(E.D. Pa. Civ. No. 2-10-cv-00445)

Present: AMBRO, GREENAWAY, JR., and SCIRICA, Circuit Judges

Submitted are:

(1) Appellant's motion for leave to file oversized application for a certificate of appealability;

(2) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(3) Appellee's response; and

(4) Appellant's reply

in the above-captioned case.

Respectfully,

Clerk

MMW/AJG/tyw

O R D E R

We grant Appellant's motion for leave to file an oversized application for a certificate of appealability. We grant Appellant's application for a certificate of appealability as to his claims that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose:

(1) Evidence that Eddie Jones was a paid informant, receiving over $9,800 in payments from the DEA, including a $1,500 payment the day after providing the statement inculpating Gibson to Mullin and Gergal;

(Continued)

O R D E R

(2) Six Bristol Township Police reports concerning contact with Eddie Jones, as described on pages 21 and 22 of the Magistrate Judge's Report and Recommendation;

(3) Detective Mullin's knowledge that, prior to Gibson's trial, Glenn Pollard repeatedly contacted Mullin, offering to testify in Gibson's case and others, and Mullin's opinion of Pollard as untrustworthy;

(4) A November 1991 inmate request form authored by Pollard offering to make drug purchases for the Commonwealth from a known drug dealer, Gail Nelms;

(5) A November 1994 letter from Pollard to Mullin asking about arrangements to be moved from the BCCF to a rehabilitation facility;

(6) A November 1994 letter from Pollard to Ted Fritsch, the lead prosecutor on the Berger homicide, asking about arrangements to be moved from the BCCF to a rehabilitation facility;

(7) Pollard's November 20, 1991, statement to the Bristol Township Police narcotics unit admitting that he sold $5,000 worth of crack cocaine for Gail Nelms;

(8) An October 21, 1994, note from Cyril Thomas' juvenile probation file, in which his probation officer indicates that he spoke with Detective Mullin that day, and that "Mullin stated if he (Thomas) is not cooperative, then he (Mullin), in all probability, will be charging him with possession of the particular weapon";

(9) Several October 18, 1994, Bristol Township police reports indicating that Cyril Thomas had, on his person, 80 packages of crack cocaine when he was arrested in connection with the Eddie Jones shooting;

(10) Records related to Paulinda Moore's mental health status, including: (a) a November 16, 1994, order in a criminal case for Moore to undergo a mental health evaluation; (b) a September 22, 1994, document from Moore's Bucks County

(Continued)

O R D E R

Department of Corrections medical records indicating that Moore was admitted to the Lower Bucks Hospital psychiatric "because of voices"; and (c) a November 16, 1994, note from her DOC medical records indicating that she was seen that day for a psychiatric evaluation, after complaining of "auditory hallucinations";

(11) A November 2, 1994, report authored by Detective Gergal concerning his interview of Eric Jones;

(12) DEA records indicating that Detective Mills, in a joint investigation with the DEA, was investigating Edward Gilbert for drug sales and that, on September 15, 1994, and September 23, 1994, Gilbert sold crack cocaine to a confidential informant;

(13) Evidence that police forcibly kicked down the front door to the home of Sean Hess' mother, to arrest Hess before Gibson's trial; and

(14) A February 27, 1995, report authored by Bucks County Detective John Ziemba in connection with his issuance of a subpoena to Herman Carrol.

Jurists of reason could debate whether these items constituted favorable impeachment evidence improperly suppressed by the Commonwealth, and whether the cumulative effect of the suppressions would have "put the whole case in such a different light as to undermine confidence in the verdict." Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 295 (3d Cir. 2016) (en banc) (quotation marks, alteration omitted). We also grant appellant's application as to his cumulative error claim, encompassing the 14 Brady items identified above, in addition to his claim that counsel was ineffective for failing to bring to the jury's attention that Michael Segal could not identify Appellant in a pre-trial lineup. Jurists of reason could debate whether counsel performed unreasonably by failing to bring this to the jury's attention, and whether this error, combined with the Brady violations, "had a substantial and injurious effect or influence in determining the jury's verdict." Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir. 2007). Jurists of reason would not debate the District Court's resolution of his remaining claims, and thus his application is otherwise denied. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: March 23, 2017

tyw/cc: Samuel J.B. Angell, Esq.
Arianna J. Freeman, Esq.
Karen A. Diaz, Esq.

APP-J

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 16-1729

_____

JEROME GIBSON,

Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY BUCKS COUNTY

_____

On Appeal from the United States District Court for the
Eastern District of Pennsylvania
(D.C. No. 2:10-cv-00445)
District Judge: Hon. Stewart Dalzell

Argued: December 12, 2017

Before: CHAGARES, RESTREPO, and FISHER, Circuit Judges.

(Filed: December 22, 2017)

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OPINION*

CHAGARES, Circuit Judge.

Defendant Jerome Gibson appeals from the District Court's dismissal of his petition for a writ of habeas corpus, brought under 28 U.S.C. § 2254, seeking relief from his conviction after a jury trial in Pennsylvania state court. Gibson raises claims under Brady v. Maryland, 373 U.S. 83 (1963), asserting that the prosecution withheld impeachment evidence concerning numerous witnesses; a claim of ineffective assistance of counsel based on trial counsel's failure to cross-examine a witness about his inability to identify Gibson at a pre-trial lineup; and a cumulative error claim asserting that the combination of all the errors was prejudicial. Because none of these claims have merit, we will affirm.

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

I.

We write for the parties and so recount only the facts necessary to our decision. On September 29, 1994, shortly before 3:00 p.m., an assailant robbed and murdered Robert Berger, the owner of Ascher Health Care Center, located on Mill Street in Bristol Borough, Bucks County, Pennsylvania. Berger was shot three times — two .32 caliber projectiles were found in his body — and approximately $1,400 and Berger's .38 caliber handgun were stolen. Two witnesses saw the robbery or its aftermath. Michael Segal, who worked across the street from Ascher Health, saw the assailant struggle with Berger, heard gunshots, and saw the assailant rifle through the cash register. Although unable to see the assailant's face, Segal observed his size and clothing, and testified that Gibson matched that description. The other eyewitness — Alfonso Colon — lived above Ascher Health and testified that after hearing gunshots, he went downstairs and saw Gibson leaving Ascher Health while stuffing what appeared to be a handgun into his pants.

Three days after the murder, detectives from the Bucks County District Attorney's Office interviewed Gibson, who denied that he had been in Bristol Borough on the day of the murder. The detectives, however, had a surveillance photo showing that Gibson had been in a bank in Bristol Borough that morning. On October 6, 1994, Gibson was arrested and charged with the robbery and murder of Berger, a capital offense.

The Commonwealth's theory at trial was that Gibson needed money to buy a new car and so decided to commit a robbery. Various witnesses testified that they saw Gibson on the day of the murder in Bristol Borough and in the vicinity of Ascher Health with a gun and wearing the hooded sweatshirt and baggy pants of the assailant; that Gibson had

told them that he planned to commit a robbery and would kill the victim if needed; and that Gibson confessed that he had committed the murder. The jury found Gibson guilty of first-degree murder, robbery, and possession of instruments of crime.

Gibson was sentenced to death, but during his first state post-conviction proceeding under the Pennsylvania Post Conviction Relief Act, ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541–46, his sentence was modified to life in prison in light of the trial court's finding that Gibson was mentally disabled. The remainder of his PCRA petition was denied. Gibson filed his initial habeas petition on January 29, 2010, which he supplemented on November 23, 2011 after uncovering new Brady material. The case was then stayed as Gibson filed a second PCRA petition to exhaust his newly discovered claims. This second petition was denied as untimely, the case returned to federal court, and the Magistrate Judge issued a Report and Recommendation recommending dismissal of the habeas petition. Gibson filed objections, and on February 29, 2016, the District Court dismissed the petition. The court found that the Brady evidence was not cumulatively material and that counsel's assistance was not ineffective. The court also declined to issue a Certificate of Appealability ("COA"). Gibson timely appealed, and we granted a COA on fourteen of his Brady claims, an ineffective assistance of counsel claim, and a cumulative error claim.

II.[1]

We first address Gibson's Brady claims, which relate to eight of the Commonwealth's witnesses: Eddie Jones, Glenn Pollard, Cyril Thomas, Paulinda Moore, Kevin Jones, Eddie Gilbert, Sean Hess, and Herman Carrol.[2] The District Court did not conduct an evidentiary hearing, so our review of its Order denying habeas relief is plenary as to both questions of law and fact. Slutzker v. Johnson, 393 F.3d 373, 378 (3d Cir. 2004).[3] To establish a Brady claim entitling him to relief, Gibson must show that (1) the "evidence at issue [was] favorable" to him (that is, was exculpatory or impeaching), (2) the "evidence [was] suppressed by the State, either willfully or inadvertently," and (3) he was prejudiced because the suppressed evidence was "material." Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Kyles v. Whitley, 514 U.S. 419, 432–34 (1995).

Under Brady, the prosecution bears an affirmative duty to "to learn of any favorable evidence known to the others acting on the government's behalf in the case,

[1] The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have appellate jurisdiction to review the certified issues under 28 U.S.C. § 2253.

[2] Gibson discusses a Brady violation concerning a ninth witness — Bernard McLean — which the District Court rejected and which was not included in the COA. Gibson asks us to consider it anyway, but has offered no reasoning beyond what he argued when seeking a COA for why we were wrong to exclude McLean, and we find none in the record. Cf. Gattis v. Snyder, 278 F.3d 222, 225 (3d Cir. 2002).

[3] Normally, when we review a District Court's resolution of a habeas petition that followed a state post-conviction relief process, our de novo review of the petition is constrained by the standards established under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for review of state court merits decisions. However, the District Court did not apply AEDPA to the Brady claims and neither party asserts that the District Court erred in failing to do so. Although parties cannot waive the application of AEDPA deference, see, e.g., Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009) (collecting cases), we need not undertake the AEDPA analysis in the first instance, because we agree that Gibson's claims fail even under the more exacting de novo review.

including the police," and to provide it to the defense. Kyles, 514 U.S. at 437. Brady and its progeny do not, however, impose a duty upon the prosecutor to uncover and disclose "information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." United States v. Pelullo, 399 F.3d 197, 216 (3d Cir. 2005) (quoting United States v. Merlino, 349 F.3d 144, 154 (3d Cir. 2003)). The question of materiality is assessed in two parts. First, a court must "evaluate the tendency and force of the undisclosed evidence item by item" in order to determine whether it should be considered as part of the materiality analysis. Kyles, 514 U.S. at 436 n.10. Second, it must consider the cumulative effect of all the suppressed evidence to determine whether it together is material. Id. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. The materiality inquiry is not a sufficiency of the evidence test and the fact that enough evidence remains to convict after excluding the tainted evidence is not a reason to deny relief. Kyles, 514 U.S. at 434–35.

The District Court found that the evidence concerning Cyril Thomas and Kevin Jones was not favorable to Gibson and, although concluding that the Commonwealth had suppressed evidence concerning the other six witnesses, determined that those violations were not cumulatively material. Gibson challenges the District Court's determinations regarding Cyril Thomas and Kevin Jones, as well as its cumulative analysis determination. Thus, even though the Commonwealth contests the District Court's

determinations regarding the other six witnesses, we need not decide whether the District Court correctly assessed the evidence pertaining to them because — with the exception of the Gilbert material, which we address separately along with the Cyril Thomas and Kevin Jones evidence — we agree that the evidence was not cumulatively material.

A.

1.

Thomas testified at trial that he received a .38 caliber revolver from Gilbert, who in turn had received it from Gibson. Gibson argues that the prosecution withheld (1) a note in Thomas' juvenile probation file indicating that Bucks County Detective John Mullin told the probation officer that if Thomas did not cooperate, then Mullin would charge Thomas with possession of the weapon and (2) evidence that when Thomas was arrested, police found 80 packets of cocaine on him. Gibson says that he could have used this evidence to impeach Thomas' motivations for testifying and to show that the Commonwealth used threats of prosecution to gain cooperation.

The District Court found no evidence suggesting that Thomas was threatened with a weapons charge, and thus rejected Gibson's assertion that the withheld evidence could have impeached Thomas. It further concluded that Gibson's claim based on the cocaine report was untimely under AEDPA because Gibson knew about it in 2001 but failed to raise it in his initial habeas petition, and it did not relate back to the initial petition. We conclude that the District Court did not err in refusing to consider the evidence.

Given no evidence that Thomas himself was threatened with prosecution for possession of a weapon, there is no reason to believe that he was coerced to testify based

on that uncommunicated threat, and so it would not be relevant information for impeachment purposes. Moreover, it is unlikely that such evidence would be admissible at trial, given that it relates to uncharged conduct. See Pa. R. Evid. 608(b). Although inadmissible evidence can still be Brady material where it could lead to admissible evidence, Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 309–10 (3d Cir. 2016) (en banc), Gibson has failed to make such a connection. Mere speculation that the suppressed evidence might have led to admissible evidence is insufficient to render otherwise inadmissible evidence into Brady material. See United States v. Agurs, 427 U.S. 97, 109 (1976); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) ("We think it unwise to infer the existence of Brady material based upon speculation alone.").

With regard to the evidence concerning the cocaine, we agree that its suppression did not violate Brady, but for a reason other than that relied upon by the District Court. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) ("We . . . may affirm the District Court's judgment on any basis supported by the record."). Whether or not the claim relates back to Gibson's initial petition, the evidence is cumulative and thus immaterial under Brady. Gibson argues that the evidence could have been used to impeach Thomas and show that he testified in order to avoid facing charges. At trial, the prosecution elicited testimony that Thomas had pending charges of aggravated assault and attempted homicide stemming from the arrest during which the cocaine was found, and Gibson's counsel cross-examined Thomas regarding his cooperation with police while in custody on those charges to "help [himself] out of a bad situation." Appendix ("App.") 704–06. Thomas' substantial motive to cooperate in the face of these serious

charges was apparent; that he also might have faced drug charges would not have given him a meaningfully greater incentive to cooperate. Such cumulative impeachment evidence is "superfluous and therefore has little, if any, probative value" and is not to be accorded any weight in our materiality analysis. Lambert v. Beard, 633 F.3d 126, 133 (3d Cir. 2011) (quoting Conley v. United States, 415 F.3d 183, 189 (1st Cir. 2005)), vacated on other grounds, Wetzel v. Lambert, 565 U.S. 520 (2012).

2.

Kevin Jones testified at trial that in the Spring of 1994, Gibson told him that he planned to commit a robbery in Bristol Borough and was prepared to kill the victim. He added that he saw Gibson in Bristol Borough on the day of the murder and that, while in prison a month before Gibson's trial, Gibson confessed to the crime. Gibson claims that the prosecution withheld a report authored by Bucks County Detective Robert Gergal concerning his interview of Eric Jones (Kevin's brother), which notes that Eric spoke to police at Kevin's behest and that Eric sought assistance with robbery charges in exchange for his cooperation on the Gibson case. Gergal refused to offer a deal but noted that if Eric's information was helpful, the prosecutor could write to the sentencing judge. Gibson says that this report could have been used to impeach Kevin (Eric did not testify) because the fact that Kevin sent Eric to seek a deal suggests that Kevin had one, too.

The District Court rejected the claim, finding no evidence that Eric reached any deal and thus that the information would not have been useful in cross-examining Kevin. We agree. The report is not relevant to whether Kevin got a deal; if anything, it suggests that the prosecution was hesitant to strike deals in exchange for information. Gibson's

speculation about the implications of the document does not make this otherwise irrelevant document "favorable" under Brady. See Ramos, 27 F.3d at 71.

3.

Gilbert testified that on the day of the murder, he saw Gibson with a substantial amount of money and that Gibson explained that "he had to make a move, he needed money." App. 681. A few days later, Gibson told him that he had robbed "an old white guy" in Bristol Borough, killed him after the man saw his face, and had used the money to buy a car. App. 683–84, 686. Gilbert added that Gibson gave him two guns — one of which was Gibson's, and the other was Berger's. Gibson claims that the prosecution withheld evidence that Detective R.J. Mills of the Bristol Township Police and the DEA were investigating Gilbert for drug sales and that weeks before the murder, Gilbert twice sold crack cocaine to a confidential informant. Gibson argues that this could have been used to impeach Gilbert because it showed an incentive to cooperate with the prosecutors.

Based in part on its conclusion that the Bristol Township police were part of the prosecution team because Detective Mills had brought witness Eddie Jones to the attention of the prosecutors and had personally accompanied Jones to the interview, the District Court found that police reports were suppressed and that the evidence was favorable to Gibson because he could have used it to impeach Gilbert. We disagree.

Even assuming that Detective Mills' assistance in securing Eddie Jones' testimony renders the Bristol Township Police part of the Gibson prosecution team for all other witnesses, these documents do not constitute Brady material because they could not have been used to impeach Gilbert. For Gibson's theory to succeed, Gilbert would have had to

know that he was under investigation or that he had been caught selling drugs; otherwise, he would have had no incentive to cooperate to avoid punishment on a crime he thought he had perpetrated without detection. But nothing in the record indicates that Gilbert had such knowledge. It is thus implausible that Gilbert was cooperating with the prosecution to avoid criminal charges that he did not know he was facing, and he could not be impeached on that basis. Gibson cites various cases that he says establish that failure to disclose information about a pending investigation would violate Brady. However, none of those cases involved a situation where the witness was unaware of the investigation.

B.

Gibson was not prejudiced by the suppressed evidence. To begin with, none of the five impacted witnesses were particularly central to the prosecution's case. For instance, Eddie Jones, Moore, and Hess testified that Gibson told them that he planned to commit a robbery, but so did untainted witness Kevin Jones. Similarly, Eddie Jones, Pollard, Hess, and Carrol testified that Gibson admitted to them that he had committed the murder, but so did untainted witnesses Kevin Jones, Gilbert, Bernard McLean, and Kenneth Johnson.

Moreover, although the Court does not minimize the gravity of suppressing evidence — especially evidence of a highly probative nature such as that concerning Moore's mental health and Pollard's status as a serial informant who had reached a deal to testify — both Moore and Pollard's testimonies were already so thoroughly impeached that the jury was in any event unlikely to have credited them. Pollard's testimony was that he overheard Gibson confessing to the murder to David Margerum and that he "wanted to help [himself] out" by reporting it to authorities. App. 793. However,

Margerum — who had no apparent bias — testified that this conversation never took place. Moore's testimony revealed a history of unremitting drug and alcohol abuse, that she had given police inconsistent statements about her conversation with Gibson, and that she had an incentive to testify in order "to get out of jail" after she was arrested on a robbery charge. App. 653–55. It is simply not conceivable that whatever modicum of credibility they retained was what the jury relied upon in finding Gibson guilty. See, e.g., Landano v. Rafferty, 856 F.2d 569, 574 (3d Cir. 1988) (considering impeachment evidence immaterial under Brady where the "marginal effect in diminishing [the witness's] perceived credibility would have been negligible").

The suppressed evidence relating to Herman Carrol, concerning the possibility that he had arranged a deal in exchange for his testimony, was not so different in kind than the testimony actually elicited at trial which raised a serious implication that such a deal had been arranged. Cf. Dennis, 834 F.3d at 300 ("[W]e have granted habeas relief on the basis of a 'significant difference' between the suppressed impeachment and other types of impeachment evidence used at trial." (quoting Slutzker, 393 F.3d at 387)). The final pieces of evidence — that Eddie Jones was a paid police informant and that police forcibly kicked in Hess's mother's door when they arrested Hess — suggest that Jones and Hess had reason to testify in favor of the prosecution. But the Hess evidence was not particularly powerful, in that it required a number of inferential leaps to get from the

manner in which the police entered his mother's house to the conclusion that Hess only testified because of police coercion.[4]

Finally, aside from the limited impact that the suppressed impeachment evidence would have had on the relevant witness's credibility, the Commonwealth adduced substantial independent evidence establishing Gibson's guilt. Pamela Harrison — Gibson's cousin — testified that Gibson arrived at her house just after the murder occurred wearing a hooded sweatshirt and sweating heavily. Harrison said that Gibson asked to use her bathroom to wash up, took off his sweatshirt to wash it, and was carrying a gun. She added that he left the sweatshirt with her and returned later that night to pick it up.[5] Added to this, Gibson lied to police about being in Bristol Borough on that day, and two untainted witnesses placed Gibson on Ascher Health's block at the time of the murder. Lastly, Segal testified that he saw Berger struggling with an assailant in a dark hooded sweatshirt who matched Gibson's size, build, and complexion, and Colon testified that after he heard the gunshots, he saw Gibson leave the murder scene.

In light of the weight of the testimony showing that Gibson was at the scene of the crime; had a motive; had said he planned to commit a robbery; had lied to police about

[4] As to Jones, the Commonwealth asserts that they had disclosed prior to trial that Jones was an informant, but not that he was a paid informant. Gibson counters that the Commonwealth fails to cite to record evidence supporting this disclosure, but does not expressly deny that such information was provided.

[5] Gibson attempted to undercut Harrison's testimony by implying that the police coerced her by threatening to investigate her brother's involvement in the murder or by prosecuting her and her mother for accepting proceeds from the robbery. However, no evidence supports these allegations aside from Gibson's own testimony and Harrison denies them.

his whereabouts; was seen just after the murder carrying a gun, sweating, and trying to get rid of the clothing that the suspect was wearing; had admitted to numerous individuals that he committed the murder; and was identified in possession of a gun matching the murder weapon as well as Berger's weapon, there is no reasonable probability that the jury would have come to a different verdict based on the further impeachment of two already incredible witnesses and the minor impeachment of three others, whose testimony was amply corroborated by other untainted accounts. Because the evidence does not "put the whole case in such a different light as to undermine confidence in the verdict," we agree that there was no Brady violation.[6] Kyles, 514 U.S. at 435

III.

Gibson next argues that counsel's assistance was ineffective because he failed to cross-examine Segal on his inability to identify Gibson in a pre-trial lineup. We disagree.

We review ineffective assistance of counsel claims based on the test set forth in Strickland v. Washington, 466 U.S. 668 (1984), which has two requirements: that "counsel's representation fell below an objective standard of reasonableness," id. at 688, and that but for the deficient representation, it was reasonably probable that "the result of

[6] Although we find that in this case the multiple items of suppressed evidence were not cumulatively material, we emphasize that "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure," Kyles, 514 U.S. at 439 (quoting Agurs, 427 U.S. at 108), and "[s]uch disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,'" id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

the proceeding would have been different," id. at 694. We may decide a Strickland claim based on either prong of the analysis. See id. at 697.

Segal never claimed to have been able to identify the assailant positively; on direct examination, he forthrightly said that he could not make a facial identification. Indeed, when delivering his jury instructions, the judge reiterated that:

> Now, with respect to Mr. Segal, of course, he didn't really make an identification. As you will recall, here in court he was unable to identify the defendant as the person he says he saw engaged in the robbery in the store, and the person he saw leaving. . . . All he did was give a description, the police a description, and maybe he gave a couple different descriptions.

App. 1008–09. The jury was thus well aware that Segal could not identify Gibson and that his descriptions of the assailant had shifted. Gibson bears the burden of establishing prejudice, Strickland, 466 U.S. at 696, and, having failed to do so, his claim fails.

IV.

Gibson finally argues that all of these alleged errors cumulatively prejudiced him. "The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process." Collins v. Sec'y of Pa. Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014). Neither Gibson's Brady nor Strickland claims resulted in any prejudice, and they no more do so when considered together. Each witness who was impacted by a Brady violation was either already incredible or else unnecessary to the jury's determination. The addition of counsel's failure to cross-examine Segal does not move the needle because it did not plausibly have any effect on the jury's decision, let alone a significant one. There is no likelihood that the cumulative impact of the errors

"had a substantial and injurious effect or influence" on the jury's verdict, id., and so Gibson's claim fails.

V.

For the foregoing reasons, we will affirm the District Court's order.

APP-K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 16-1729

_____

JEROME GIBSON,

Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY BUCKS COUNTY

_____

Present: SMITH, Chief Judge, McKEE, AMBRO,
CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE,
SHWARTZ, KRAUSE, RESTREPO, and BIBAS Circuit Judges,
and FISHER, Senior Circuit Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

*Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fisher's vote is limited to panel rehearing.

BY THE COURT,

s/ Michael A. Chagares
Circuit Judge

Dated: February 12, 2018
MB/cc: Samuel J.B. Angell, Esq.
Arianna J. Freeman, Esq.
Karen A. Diaz, Esq.
Stephen B. Harris, Esq.
Karen A. Diaz, Esq.