

EXHIBIT A

DOCKET OF CODY WUNDER

SENTENCING ORDER

Dkt. No. 4643-12 OTN T227004-1

Date 8/15/13

Defendant CODY D. WUNDER

Judge Reinaker

Offenses CRIM HOM (FI) cc/CRIM HOM

D.A. Brown

G.P. St. Plea Agree. Mod.

Def. Atty. K. Weisenberger

Nolo N/Pros ARD Sentencing X (FI)

Reporter Danyo

Re-Sent Other Sec 17

Clerk Bowder

☐ Bench Warrant Dismissed ☐ Bail Reinstated ☐ Certified Court Interpreter Used ☐ Video

~~Rob (FI) cc/Rob (FI) Bung (FI) cc/Bung (FI)~~

COUNT: 1 OFFENSE Crim Hom FI First Degree Murder Nol Pros Merges with

☐ SIPP Committed: yr mo days hrs To yr mo days

☐ Mandatory Probation/Sect 17/ARD yr mo days SERVE AT LCP SCI X

Sentence Intermediate Punishment Program **see additional sheet

☐ Split Fine/Processing Fee & Cost

CONC (cc)

Sentence Restitution 153,351.84

CONS (cs)

Nol Pros Cost on County

Nol Pros Cost on Defendant

☐ RRRJ*** RRRJ Eligible/Not Eligible

RRRI Ineligibility Not Waived by DA

w/out possibility of parole

COUNT: 2 OFFENSE cc/Crim F3 Nol Pros X Merges with

☐ SIPP Committed: yr mo days hrs To yr mo days

☐ Mandatory Probation/Sect 17/ARD yr mo days SERVE AT LCP SCI

Sentence Intermediate Punishment Program **see additional sheet

☐ Split Fine/Processing Fee & Cost

CONC (cc)

Sentence Restitution

CONS (cs)

Nol Pros Cost on County

Nol Pros Cost on Defendant X

☐ RRRJ*** RRRJ Eligible/Not Eligible

RRRI Ineligibility Not Waived by DA

COUNT: 3 OFFENSE Rob FI Nol Pros Merges with

☐ SIPP Committed: yr mo days hrs To yr mo days

☐ Mandatory Probation/Sect 17/ARD yr mo days SERVE AT LCP SCI

Sentence Intermediate Punishment Program **see additional sheet

☐ Split Fine/Processing Fee & Cost

CONC (cc)

Sentence Restitution

CONS (cs)

Nol Pros Cost on County

Nol Pros Cost on Defendant

☐ RRRJ*** RRRJ Eligible/Not Eligible

RRRI Ineligibility Not Waived by DA

COUNT: 4 OFFENSE cc/Rob FI Nol Pros Merges with

☐ SIPP Committed: 10 yr mo days hrs To 20 yr mo days

☐ Mandatory Probation/Sect 17/ARD yr mo days SERVE AT LCP SCI X

Sentence Intermediate Punishment Program **see additional sheet

☐ Split Fine/Processing Fee & Cost

CONC (cc)

Sentence Restitution

CONS (cs)

Nol Pros Cost on County

Nol Pros Cost on Defendant

☐ RRRJ*** RRRJ Eligible/Not Eligible

RRRI Ineligibility Not Waived by DA

***RRRI Sentence

☐ Aggregate: Committed: to

Sentence

Counts:

☐ RRRJ Committed: yr mo days To

Sentence

By Order of The Court:

Prepared by

Clerk

Judge

Clerk of Common Pleas Court

Clerk of Common Pleas Court

Clerk of Common Pleas Court

Clerk of Common Pleas Court

Clerk of Common Pleas Court

Clerk of Common Pleas Court

Clerk of Common Pleas Court

SENTENCING ORDER

Dkt. No. 4643-12 OTN T 227004-1
 Defendant DOY D. Wunder
 Offenses _____
 G.P. _____ St. _____ Plea Agree. _____ Mod. _____
 Nolo _____ N/Pros _____ ARD _____ Sentencing X
 Re-Sent _____ Other _____ Sec 17 _____

Date 8/15/13
 Judge Reinaker
 D.A. Brown
 Def. Atty. K. Weisenberger
 Reporter Danyo
 Clerk Bard

☐ Bench Warrant Dismissed ☐ Bail Reinstated ☐ Certified Court Interpreter Used ☐ Video

COUNT: 5 OFFENSE Burg^{F1} Nolo Pros _____ Merges with cl. 1
☐ SIPP Committed: 3 yr _____ mo _____ days _____ hrs To 3 yr _____ mo _____ days
☐ Mandatory Probation/Sect 17/ARD _____ yr _____ mo _____ days SERVE AT LCP _____ SCI X
 Sentence Intermediate Punishment Program **see additional sheet
☐ Split Fine/Processing Fee _____ & Cost CONC (cc) to each other + cl. 1
 Sentence Restitution _____ CONS (cs) _____
 Nolo Pros Cost on County _____ Nolo Pros Cost on Defendant _____
☐ RRRI*** _____ RRRI Eligible/Not Eligible _____ RRRI Ineligibility Not Waived by DA

COUNT: 6 OFFENSE cc/Burg^{F1} Nolo Pros _____ Merges with cl. 4
☐ SIPP Committed: 3 yr _____ mo _____ days _____ hrs To 3 yr _____ mo _____ days
☐ Mandatory Probation/Sect 17/ARD _____ yr _____ mo _____ days SERVE AT LCP _____ SCI X
 Sentence Intermediate Punishment Program **see additional sheet
☐ Split Fine/Processing Fee _____ & Cost CONC (cc) to each other + cl. 4
 Sentence Restitution _____ CONS (cs) _____
 Nolo Pros Cost on County _____ Nolo Pros Cost on Defendant _____
☐ RRRI *** _____ RRRI Eligible/Not Eligible _____ RRRI Ineligibility Not Waived by DA

COUNT: OFFENSE _____ Nolo Pros _____ Merges with _____
☐ SIPP Committed: _____ yr _____ mo _____ days _____ hrs To _____ yr _____ mo _____ days
☐ Mandatory Probation/Sect 17/ARD _____ yr _____ mo _____ days SERVE AT LCP _____ SCI _____
 Sentence Intermediate Punishment Program **see additional sheet
☐ Split Fine/Processing Fee _____ & Cost CONC (cc) _____
 Sentence Restitution _____ CONS (cs) _____
 Nolo Pros Cost on County _____ Nolo Pros Cost on Defendant _____
☐ RRRI*** _____ RRRI Eligible/Not Eligible _____ RRRI Ineligibility Not Waived by DA

COUNT: OFFENSE _____ Nolo Pros _____ Merges with _____
☐ SIPP Committed: _____ yr _____ mo _____ days _____ hrs To _____ yr _____ mo _____ days
☐ Mandatory Probation/Sect 17/ARD _____ yr _____ mo _____ days SERVE AT LCP _____ SCI _____
 Sentence Intermediate Punishment Program **see additional sheet
☐ Split Fine/Processing Fee _____ & Cost CONC (cc) _____
 Sentence Restitution _____ CONS (cs) _____
 Nolo Pros Cost on County _____ Nolo Pros Cost on Defendant _____
☐ RRRI*** _____ RRRI Eligible/Not Eligible _____ RRRI Ineligibility Not Waived by DA

***RRRI Sentence

☐ Aggregate: Committed: _____ to _____
 Sentence

Counts: _____

☐ RRRI Committed: _____ yr _____ mo _____ days To _____
 Sentence

By Order of The Court:

Prepared by: J. Barden
 Clerk

[Signature]
 Judge

SENTENCING CONDITIONS ORDER

Page 3 of 3

Dkt No 4643-2012 OTN T227004-1 Date 8/15/13
 Defendant CODY D WUNDER Judge Bruce Reinaker

	CONDITION
	Impaired Driver Program/Highway Safety & pay costs
	Act 24 Treatment / DUI Treatment imposed
	<input type="checkbox"/> CRN Evaluation <input type="checkbox"/> ARD conditions apply
	Received license/ acknowledgment /update on _____
	License Suspended _____ mths _____ yrs
	Eligible for Ignition Interlock Program & pay costs
	Drug and Alcohol Eval and/or Any Treatment treat as deemed necessary by APPS
	No alcohol possession/ consumption @ place of employment/residence
	Evaluation for Special Offender Services
	Psychological Evaluation/Psychiatric Evaluation, in accordance w/Determination Protocol
	Comply w/ Mental Health Treatment
	Take All Prescribed Medication
X	Pay restitution in equal monthly installments. To be paid in full with in the period of supervision. Pay all other financial obligations in accordance with a payment plan established by APPS-CEU.
	1 st payment to be made within _____ days
	Pay within _____ yr _____ mo _____ days
	<input type="checkbox"/> Wage Attachment <input type="checkbox"/> Maintain full time employment
	Supervision may terminate after _____ if fines, costs and / or restitution paid in full
	Unsupervised Probation/Parole
	Supervision transferred to _____ if deemed eligible
	Credit for time served _____ (Subject to verification)
	Sentence deferred to: Date _____ Time _____ 9am or _____ 8pm
	Work release _____ Eligible _____ Granted
	Eligible for Re-Entry Plan
	Parole w/o petition subject to behavior
	Eligible for Parole (must petition)

	Comply w/ PBPP General Conditions of Special Probation PaCode 37 Section 65.4
	Eligible for Boot Camp
X	Eligible for Educational/Vocational Program in SCI
	Eligible for New Values Program
	Comply w/terms of Supervision plan as established by APPS
	Community Service _____ hours
	Pre-release Sex Offender Evaluation
X	DNA Sampling & pay costs <u>\$250</u>
	Attend retail theft school and pay costs
	Evaluation for Anger Management Class/ Attend if deemed necessary
	Assess for Domestic Violence Intervention Group/Attend if deemed necessary
	See attached Domestic Violence Conditions
	No contact with victim(s) & or victim(s) fam
	Megan's Law applies
	Sex Offender Conditions Apply
	Intermediate Punish for _____ mon/ yrs
	LCP for _____ days
	Work Release for _____ days/ months
	House Arrest w/ EM/GPS _____ days/months
	Intensive Supervision _____ days/months
	If Def does not qualify for IP, will serve _____ days/months in LCP

Conditions: _____

Agg. of CS Sent. _____ min _____ max

BY THE COURT:

[Signature]

Judge

L. Barden

PLEA AGREEMENT

The subscribing parties certify the following facts are accurate and the plea agreement to be voluntarily and intelligently executed with full knowledge of the maximum possible sentences:

DEFENDANT: Cody WUNDER

DOCKET NO : 4643-2012

OFFENSES

PLEA (GUILTY/NOL PROS)

1. Criminal Homicide (2nd degree) - F1
2. Criminal Conspiracy (Homicide) - F1
3. Robbery - F1
4. Criminal Conspiracy (Robbery) - F1
5. Burglary - F1
6. Criminal Conspiracy (Burglary) - F1
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____

GUILTY
Nolle Pros
GUILTY
GUILTY
GUILTY
GUILTY

JAIL

PROBATION

CONSECUTIVE

FINE

COSTS

- | | | | | |
|--|-------|-----------|------------|------------|
| 1. <u>Life (w/out possibility of parole)</u> | _____ | _____ | <u>---</u> | <u>yes</u> |
| 2. _____ | _____ | _____ | <u>---</u> | <u>yes</u> |
| 3. <u>merge with count 1</u> | _____ | _____ | <u>---</u> | <u>yes</u> |
| 4. <u>10-20 years</u> | _____ | <u>No</u> | <u>---</u> | <u>yes</u> |
| 5. <u>merge with count 1</u> | _____ | _____ | <u>---</u> | <u>yes</u> |
| 6. <u>merge with count 4</u> | _____ | _____ | <u>---</u> | <u>yes</u> |
| 7. _____ | _____ | _____ | _____ | _____ |
| 8. _____ | _____ | _____ | _____ | _____ |
| 9. _____ | _____ | _____ | _____ | _____ |
| 10. _____ | _____ | _____ | _____ | _____ |
| 11. _____ | _____ | _____ | _____ | _____ |
| 12. _____ | _____ | _____ | _____ | _____ |

• ALL COUNTS ARE CONCURRENT UNLESS OTHERWISE NOTED ABOVE

• NOTES:

• CONDITION(S) OF PROBATION/PAROLE: Defendant must provide complete and truthful testimony regarding the death of Douglas Herr and the circumstances related thereto (ie. before, during and after Herr's death) that are known to him in any and all criminal proceedings in which he appears as a witness

• TOTAL AMOUNT OF RESTITUTION OWED IS \$153,351.84

DEFENDANT Cody Wunder

DATE 7/12/13

DEFENSE COUNSEL [Signature]

DATE 7/12/13

DISTRICT ATTORNEY [Signature] Brown

DATE 7/12/13

PRESENTED TO JUDGE _____ ON _____ ACCEPTED _____ REJECTED _____

No.4643-2012

Guilty Plea

Commonwealth

Vs.

Cody Wunder
Defendant

Offense

Criminal Homicide (F1)

Robbery (F1)

CC/Robbery (F1)

Burglary (F1)

CC/Burglary (F1)

Mandated \$250.00 DNA sampling cost and
mandated sampling must occur.

RESTITUTION OWED: \$153,351.84

I, defendant within named, in the
presence of my counsel, do hereby enter my
plea of guilty to the within information.
Further, being advised of the offense
charged in the information and of my rights,
Hereby (in open court) consent to proceed
on the within information presented by the
attorney for the Commonwealth.

Cody Wunder
Defendant

Date 7/12/13

Counsel [Signature]

SENTENCING GUIDELINES WORKSHEET

COMMONWEALTH V. *Cody Wunder*

No. *4643-2012*

A. COUNT	CHARGE / CITATION	GRADE	OGS	STD. / ENH. RANGE	AGG./MIT.
1	<i>Crim. Homicide - 2nd degree</i>	<i>F1</i>	<i>N/A</i>	<i>N/A</i>	
2	<i>no lte pros (Crim. consp murder)</i>				
3	<i>Robbery</i>	<i>F1</i>	<i>12</i>	<i>48-66</i>	<i>12</i>
4	<i>Crim. Conspiracy - Robbery</i>	<i>F1</i>	<i>11</i>	<i>36-54</i>	<i>12</i>
5	<i>Burglary</i>	<i>F1</i>	<i>9</i>	<i>12-24</i>	<i>12</i>
6	<i>Crim Conspiracy - Burglary</i>	<i>F1</i>	<i>8</i>	<i>9-16</i>	<i>9</i>

B. PRIOR RECORD SCORE

I. FELONY 1 - 4 POINT OFFENSES

MURDER & INCHOATES	_____	ROBBERY	_____
VOL. MANSLAUGHTER	_____	ROB. OF MOTOR VEHICLE	_____
RAPE	_____	AGG. ASSAULT (SBI)	_____
KIDNAPPING	_____	DRUG DEL. DEATH	_____
I.D.S.I.	_____	BURG. (HOUSE/PERSON)	_____
ARSON	_____	ETHNIC INTIM. TO F1	_____
TOTAL: _____		x 4 = _____	

II. OTHER FELONY 1 OFFENSES TOTAL: _____ x 3 = _____

III. OTHER OFFENSES

FELONY 2 OFFENSES	TOTAL: _____	x 2 = _____
FELONY DRUGS >= 50 GRAMS	TOTAL: _____	x 3 = _____
OTHER FELONY DRUGS	TOTAL: _____	x 2 = _____
FELONY 3 OFFENSES	TOTAL: _____	x 1 = _____

M1 - DEATH	_____	M1 - WEAPON	_____
M1 - CHILDREN	_____	M1 - DUI	_____
TOTAL: _____		x 1 = _____	

OTHER MISDEMEANORS _____ 0-1 = 0 4-6 = 2 TOTAL: _____
2-3 = 1 7+ = 3

PRIOR RECORD SCORE (PRS)

If Section I is greater than 8 and OGS greater than 9
Otherwise if Section I + Section II is 6 points or greater

REVOC
RFEL

Otherwise PRS is total of Sections I, II, and III. (Maximum of 5)

C. SENTENCING ENHANCEMENTS

DEADLY WEAPON USED _____ DEADLY WEAPON POSS. _____
(Refer to Deadly Weapon Sentencing Matrix)

DRUG DIST. (YOUTH) _____ DRUG DIST. (SCHOOL) _____
(Add 12 months to the lower limit of the standard range and
36 months to the upper limit of the standard range)

D. MANDATORY MINIMUM SENTENCES

MANDATORY	YEARS
<input type="checkbox"/> DUI - SEE ATTACHED WORKSHEET	
<input type="checkbox"/> DRUGS TO MINORS (18 PA. C.S. § 6314)	
<input type="checkbox"/> DRUG TRAFFICKING (18 PA. C.S. § 7508)	
Drug: _____ Weight/Amount: _____	
<input type="checkbox"/> DRUG FREE SCHOOL ZONE (18 PA. C.S. § 6317)	2
<input type="checkbox"/> DRUG DEL. DEATH (18 PA. C.S. § 2506(b))	5
<input type="checkbox"/> DEL. /PWID w/FIREARM (42 PA. C.S. § 9712.1)	5
<input type="checkbox"/> VISIBLE FIREARM [VIOL. OFF.] (42 PA. C.S. § 9712)	5
<input type="checkbox"/> SECOND STRIKE (42 PA. C.S. § 9714(A))	10
Prior Offense: _____	
<input type="checkbox"/> THIRD STRIKE (42 PA. C.S. § 9714(B))	25
Prior Offenses: _____	
<input type="checkbox"/> ELDERLY VICTIM (42 PA. C.S. § 9717)	
Offense(s): _____	
<input type="checkbox"/> CHILD VICTIM (42 PA. C.S. § 9718)	
Offense(s): _____	
<input type="checkbox"/> SEXUAL OFFENDERS (42 PA. C.S. § 9718.2)	
Prior Offense(s): _____	
<input type="checkbox"/> SEX OFF. FAILURE TO REG. (42 PA. C.S. § 9718.3)	
Prior Offense(s): _____	
<input checked="" type="checkbox"/> OTHER: <i>2nd degree murder</i> <i>LIFE</i> <i>18 Pa.C.S.A. § 1102b</i>	

E. RECIDIVISM RISK REDUCTION INCENTIVE

☐ ELIGIBLE ☐ INAPPLICABLE
(Probation or County Prison Sentence)

☒ INELIGIBLE (SEE ATTACHED WORKSHEET)

DEFENDANT: *Cody Wunder*

DEFENSE COUNSEL: *K*

ASST. DIST. ATTY.: *Brown*

DATE: *7/12/13*

SENTENCING GUIDELINES WORKSHEET
RECIDIVISM RISK REDUCTION INCENTIVE & DUI SUPPLEMENT

COMMONWEALTH V. *Cody Wunder*

No. *4643-2012*

F. BASIS FOR RRRI INELIGIBILITY

- ☐ HISTORY OF PAST/PRESENT VIOLENT BEHAVIOR Explain: _____ ☐ PREVIOUS CONVICTION OR ADJUDICATION FOR DEADLY WEAPON OFFENSE Offense: _____

☒ CURRENT / PRIOR ADJUDICATION OR CONVICTION FOR A CRIME INVOLVING PERSONAL INJURY

- ☒ Homicide ☐ Assault & Related Offenses ☐ Kidnapping & Related Offenses ☐ Sexual Offenses
☐ Arson ☒ Robbery ☐ Intimidation/Retaliation ☐ Vehicle Offenses
☐ Conspiracy ☐ Attempt ☐ Other: _____

☐ CURRENT / PRIOR DRUG MANDATORY

- ☐ 18 Pa. C.S. § 7508(a)(1)(iii) (At least 50 lbs. of Marijuana or 51 Live Plants) ☐ 18 Pa. C.S. § 7508(a)(2)(iii) (At least 100 grams of Sched. I or II)
☐ 18 Pa. C.S. § 7508(a)(3)(iii) (At least 100 grams of Cocaine) ☐ 18 Pa. C.S. § 7508(a)(4)(iii) (At least 100 grams of Methamphetamine)
☐ 18 Pa. C.S. § 7508(a)(7)(iii) (At least 50 grams of Heroin) ☐ 18 Pa. C.S. § 7508(a)(8)(iii) (At least 1,000 tab. or 300 grams of MDMA)

☐ CURRENT / PRIOR ADJUDICATION OR CONVICTION FOR ANY OF THE FOLLOWING

- ☐ Incest ☐ Open Lewdness ☐ Sexual Abuse of Children ☐ Unlawful Contact with a Minor
☐ Sexual Exploitation of Children ☐ Internet Child Pornography ☐ Drug Offense w/ Firearm
☐ Megan's Law Offenses (Including Prostitution and Related Offenses & Obscene/Sexual Materials and Performances)

☐ OTHER: _____

☐ INELIGIBILITY WAIVED

Reason: _____

G. DUI MANDATORY SENTENCE

- OFFENSE: ☐ 1ST ☐ 2ND ☐ 3RD ☐ 4TH + ☐ BAC: _____ % ☐ REFUSAL ☐ DRUGS ☐ CHILDREN
☐ CRASH ☐ INJURIES ☐ DAMAGE

Prior Offense Dates: ____/____/____ ____/____/____ ____/____/____ ____/____/____

☐ Pending DUI Docket Number(s) _____

OFFENSE	FIRST	SECOND	THIRD	FOURTH
<input type="checkbox"/> TIER 1	6 Months Probation \$300 Fine	5 Days / \$300 Fine 12 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	10 Days / \$500 Fine 12 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	10 Days / \$500 Fine 12 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment
<input type="checkbox"/> TIER 2	48 Hours / \$500 Fine 12 Mos. Lic. Suspension	30 Days / \$750 Fine 12 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	90 Days / \$1,500 Fine 18 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	1 Year / \$1,500 Fine 18 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment
<input type="checkbox"/> TIER 3	72 Hours / \$1,000 Fine 12 Mos. Lic. Suspension	90 Days / \$1,500 Fine 18 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	1 Year / \$2,500 Fine 18 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment	1 Year / \$2,500 Fine 18 Mos. Lic. Suspension 12 Mos. Ignition Interlock Act 24 of 2004 Treatment

COURT SHEET

Page 1 of 1

Dkt. No. 4643-12

Date 7.12.13

OTN _____

Judge Reneker

Defendant Cody Wunder

D.A. Brown

Def. Atty. Weissenberger

☐ Bench Warrant Issued ☐ Bench Warrant Dismissed

Reporter Adams

☐ Bail Forfeited ☐ Bail Reinstated

Clerk Hoy

☒ St. Guilty Plea

neg Plea 1/12 Hon Elected #3/ Rob FI 4/12/13 FI 5/13 Burg FI 6/12/13 Burg

☐ St. Guilty Plea/Mentally Ill

☐ Other _____

Accepted _____ Acceptance Held in Abeyance _____ Other _____

☐ Jury Trial: Voir Dire _____ Date _____

Hearing: ☐ Juvenile Certification

Jury Sworn _____ Date _____ Time _____

☐ Waiver of Extradition

Jury Out _____ Date _____ Time _____

☐ Parole Hearing

Verdict _____ Date _____ Time _____

☐ Bail Hearing/Add Conditions

☐ Non-jury Trial Commenced _____ Date _____

☐ Competency

Verdict _____ Date _____

☐ Forfeiture

☒ Presentence Order Ulin 30 days Due Date _____

☐ Suppression

☒ Sentencing Date Set TRD

☐ Other _____

☐ GUILTY OF FOLLOWING OFFENSES:

☐ NOT GUILTY OF FOLLOWING OFFENSES:

☐ Hearing: et 27 To Be np

☐ Hearing: _____

☐ Hearing: _____

☐ Bail Order: Present Amount _____ Remains the same _____ Set at _____

Transport to Barnes Hall _____

To be posted by _____ Date _____ Time _____

LCP _____

BY THE COURT:

Prepared by: MD Hoy

Clerk

J.

INFORMATION

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF
	:	LANCASTER, PENNSYLVANIA
VS.	:	CRIMINAL DIVISION
	:	
CODY D. WUNDER	:	NO. CP-36-CR-0004643-2012
Defendant	:	OTN: T 227004-1

The District Attorney of Lancaster County, Commonwealth of Pennsylvania, by this Information presents that between the 17th day of August, 2012, and the 18th day of August, 2012, Cody D. Wunder (referred to herein as the actor) did the following:

COUNT 1 - CRIMINAL HOMICIDE - 18 PS 2501 (A) - (FELONY 1)

actor intentionally, knowingly, recklessly or negligently caused the death of another human being; To Wit: The actor, acting as a principal and/or accomplice, and/or while engaged as a principal and/or accomplice in the perpetration of a felony, did cause the death of Douglas Herr where the actor and/or one of his accomplices shot Douglas Herr in the head with a shotgun during a robbery and burglary, thereby causing his death. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

COUNT 2 - CRIMINAL CONSPIRACY / CRIMINAL HOMICIDE - 18 PA.C.S.A 903 A1 18 PS 2501 (A) - (FELONY 1)

Did agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; TO WIT: The actor did conspire with Kyle Wunder to commit the crime of Homicide. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

COUNT 3 - ROBBERY-INFLICT SERIOUS BODILY INJURY - 18 PS 3701 (A)(1)(I) - (FELONY 1)

did during the course of committing a theft, inflict serious bodily injury upon another; threaten another with or intentionally put him in fear of immediate serious bodily injury; inflict bodily injury upon another or threaten another with or intentionally put him in fear of immediate bodily injury; to wit: The actor, acting as a principal and/or accomplice, did shoot Douglas Herr in the head during the course of committing a theft and removed US Currency from the residence and/or person of Douglas Herr. During the course of the theft, the actor and/or his co-defendants shot Douglas Herr in the head with a shotgun, thereby causing his death. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

COUNT 4 - CRIMINAL CONSPIRACY / ROBBERY-INFLICT SERIOUS BODILY INJURY - 18 PA.C.S.A 903 A1 18 PS 3701 (A)(1)(I) - (FELONY 1)

Did agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; TO WIT: The actor did conspire with Kyle Wunder and Stephen Harmer to commit the crime of robbery of Douglas Herr at his residence. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

Page 2

Cody D. Wunder

CP-36-CR-0004643-2012

COUNT 5 - BURGLARY - 18 Pa. C.S.A. 3502 (A) - (FELONY 1)

did unlawfully enter a building or occupied structure or separately secured or occupied portion thereof, with the intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter; TO WIT: The actor, acting as a principal and/or accomplice, did enter a residence with the intent to commit crimes therein, including homicide, robbery, and/or theft. After entry, the actor removed US Currency from the residence and/or the person of Douglas Herr. During the course of the burglary, The actor and/or co-defendants shot Douglas Herr in the head with a shotgun, thereby causing his death. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

COUNT 6 - CRIMINAL CONSPIRACY / BURGLARY - 18 PA.C.S.A 903 A1 18 Pa. C.S.A. 3502 (A) - (FELONY 1)

Did agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; TO WIT : The actor did conspire with Kyle Wunder and Stephen Harmer to commit the crime of burglary. Said offense occurred at 1297 Furniss Road, Drumore Township, Lancaster County, Pennsylvania.

CLERK OF COURTS

2012 NOV 28 AM 10:28


LANCASTER COUNTY, PA

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

Affiant: TPR. PHILIP G. STROSSER
PSP LANCASTER BARRACKS

ADA: Todd E. Brown TEB

CRAIG W. STEDMAN
District Attorney



By 28 NOV 12

Date

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF: LANCASTER



POLICE CRIMINAL COMPLAINT
COMMONWEALTH OF PENNSYLVANIA
VS.

Magisterial District Number: 02-3-04
MDJ Name: Hon. STUART J MYLIN
Address: 25 E STATE ST
QUARRYVILLE PA 17566
Telephone: 717-786-7368

DEFENDANT: (NAME and ADDRESS):
CODY D. WUNDER
First Name Middle Name Last Name Gen.
25 BUNTING LANE
ASTON PA 19014

4643-2012

NCIC EXTRADITION CODE TYPE

☒ 1-Felony Full ☐ 4-Felony No Ext. ☐ B-Misdemeanor Limited ☐ E-Misdemeanor Pending
☐ 2-Felony Ltd. ☐ 5-Felony Pend. ☐ C-Misdemeanor Surrounding States Distance:
☐ 3-Felony Surrounding States ☐ A-Misdemeanor Full ☐ D-Misdemeanor No Extradition

DEFENDANT IDENTIFICATION INFORMATION

Docket Number CR-196-12 Date Filed 8/29/12 OTN/LiveScan Number T 227004-1 Complaint/Incident Number J01-1373743 SID: Request Lab Services? ☒ YES ☐ NO
GENDER ☒ Male ☐ Female DOB 03/14/88 POB PA Add'l DOB Co-Defendant(s) ☒
AKA First Name: Middle Name: Last Name: Gen.

RACE ☒ White ☐ Asian ☐ Black ☐ Native American ☐ Unknown

ETHNICITY ☐ Hispanic ☒ Non-Hispanic ☐ Unknown

HAIR COLOR ☐ GRAY (Gray) ☐ RED (Red / Auburn) ☐ SOY (Sandy) ☐ BLU (Blue) ☐ PLE (Purple) ☒ BRO (Brown)
☐ BLK (Black) ☐ ONG (Orange) ☐ WHI (White) ☐ XXX (Unk. / Bald) ☐ GRN (Green) ☐ PNK (Pink)
☐ BLN (Blonde / Strawberry)

EYE COLOR ☐ BLK (Black) ☐ BLU (Blue) ☐ BRO (Brown) ☐ GRN (Green) ☐ GRY (Gray)
☒ HAZ (Hazel) ☐ MAR (Maroon) ☐ PNK (Pink) ☐ MUL (Multicolored) ☐ XXX (Unknown)

Driver License State PA License Number 28108781 Expires: 03/15/2016 WEIGHT (lbs.)

DNA ☐ YES ☒ NO DNA Location 140

FBI Number MNU Number Ft. HEIGHT In.

Defendant Fingerprinted ☐ YES ☒ NO 5 05

Fingerprint Classification

DEFENDANT VEHICLE INFORMATION

Plate #	State	Hazmat <input type="checkbox"/>	Registration Sticker (MM/YY)	Comm'l Veh. Ind. <input type="checkbox"/>	School Veh. <input type="checkbox"/>	Oth. NCIC Veh. Code	Reg. same as Def. <input type="checkbox"/>
VIN	Year	Make	Model	Style	Color		

Office of the Attorney for the Commonwealth ☒ Approved ☐ Disapproved because: (The attorney for the Commonwealth may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing Pa.R.Crim.P.507.)

DA CRAIG STEDMAN
(Name of Attorney for Commonwealth - Please Print or Type)

via email
(Signature of Attorney for Commonwealth)

I, TPR, PHILIP STROSSER
(Name of Affiant - Please Print or Type)

00492938/08267
(PSP/MP/OTC - Assigned Affiant ID Number & Badge #)

of the Pennsylvania State Police, Troop J, Lancaster
(Identify Department or Agency Represented and Political Subdivision)

PAPSP4700
(Police Agency ORI Number)

do hereby state: (check appropriate box)

1. ☒ I accuse the above named defendant who lives at the address set forth above
☐ I accuse the defendant whose name is unknown to me but who is described as
☐ I accuse the defendant whose name and popular designation or nickname is unknown to me and whom I have therefore designated as John Doe or Jane Doe.

with violating the penal laws of the Commonwealth of Pennsylvania at: 208 1297 FURNESS ROAD, DRUMORE TWP
(Subdivision Code) (Place-Political Subdivision)

in LANCASTER County (County Code) 36 on or about 17 AUGUST 2012, 2153 HOURS - 18 AUGUST 2012, 0128 HOURS

RECEIVED
AUG 29 2012



POLICE CRIMINAL COMPLAINT

Docket Number CR-196-12	Date Filed 8/29/12	OTN/LiveScan Number T 227004-1	Complaint/Incident Number J01-1373743
Defendant Name	First: CODY	Middle: D.	Last: WUNDER

The acts committed by the accused are described below with each Act of Assembly or statute allegedly violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated. The age of the victim at the time of the offense may be included if known. In addition, social security numbers and financial information (e.g. PINs) should not be listed. If the identity of an account must be established, list only the last four digits. 204 PA Code §§ 213.1 - 213.7.)

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903
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<input checked="" type="checkbox"/> Lead?	1	2501	(a)	of the	Title 18, PA Crimes Code	1	F1		01A
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):

CRIMINAL HOMICIDE

Acts of the accused associated with this Offense:

A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being. To wit; the Defendant, acting as a principal and/or accomplice, and/or while engaged as a principal and/or accomplice in the perpetration of a felony, did cause the death of Douglas C. HERR where Defendant and/or one of his accomplices shot Douglas Herr in the head with a shotgun during a robbery and burglary, thereby causing his death.

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
---------------------	--	---	--

<input type="checkbox"/> Lead?	2	903/2501	(a)(1)/(a)	of the	Title 18, PA Crimes Code	1	F1		01A
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):

CRIMINAL CONSPIRACY/HOMICIDE

Acts of the accused associated with this Offense:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit; the Defendant did conspire with Kyle Wunder to commit the crime of homicide.



POLICE CRIMINAL COMPLAINT

Docket Number CR-196-12	Date Filed 8/29/12	OTN/LiveScan Number T 227004-1	Complaint/Incident Number J01-1373743
Defendant Name	First: CODY	Middle: D.	Last: WUNDER

The acts committed by the accused are described below with each Act of Assembly or statute allegedly violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.
(Set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated. The age of the victim at the time of the offense may be included if known. In addition, social security numbers and financial information (e.g. PINs) should not be listed. If the identity of an account must be established, list only the last four digits. 204 PA Code §§ 213.1 - 213.7.)

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903
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<input type="checkbox"/> Lead?	3	3701	(a)(1)(i)	of the	Title 18 , PA Crimes Code	1	F1		03A
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):
ROBBERY

Acts of the accused associated with this Offense:
A person is guilty of robbery if, in the course of committing a theft he inflicts serious bodily injury upon another. To wit: the Defendant, acting as a principal and/or accomplice, did shoot Douglas C. Herr in the head during the course of committing a theft and removed US currency from the residence and/or person of Douglas C. Herr. During the course of the theft, Defendant and/or his co-Defendant(s) shot Douglas C. Herr in the head with a shotgun, thereby causing his death.

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
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<input type="checkbox"/> Lead?	4	903/3701	(a)(1)(i)	of the	Title 18 , PA Crimes Code	1	F1		04A
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):
CRIMINAL CONSPIRACY/ROBBERY

Acts of the accused associated with this Offense:
A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit: the defendant did conspire with Kyle WUNDER and/or Stephen HARMER to commit the crime of Robbery of Douglas Herr at his residence.



POLICE CRIMINAL COMPLAINT

Docket Number CR-196-12	Date Filed 8/29/12	OTN/LiveScan Number T 227004-1	Complaint/Incident Number J01-1373743
Defendant Name	First: CODY	Middle: D.	Last: WUNDER

The acts committed by the accused are described below with each Act of Assembly or statute allegedly violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a brief summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated. The age of the victim at the time of the offense may be included if known. In addition, social security numbers and financial information (e.g. PINs) should not be listed. If the identity of an account must be established, list only the last four digits. 204 PA.Code §§ 213.1 - 213.7.)

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input type="checkbox"/> Conspiracy 18 903
---------------------	--	---	---

<input type="checkbox"/> Lead?	5	3502	(a)	of the	Title 18 , PA Crimes Code	1	F1		051
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (If applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):

BURGLARY

Acts of the accused associated with this Offense:

A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein. To wit; the Defendant, acting as a principal and/or accomplice, did enter a residence at 1297 Furniss Road, Drumore Township with the intent to commit crimes therein, including homicide, robbery and/or theft. After entry, Defendant removed US currency from the residence and/or the person of Douglas C. Herr. During the course of the burglary, Defendant and/or co-Defendant(s) shot Douglas C. Herr in the head with a shotgun, thereby causing his death.

Inchoate Offense	<input type="checkbox"/> Attempt 18 901 A	<input type="checkbox"/> Solicitation 18 902 A	<input checked="" type="checkbox"/> Conspiracy 18 903
---------------------	--	---	--

<input type="checkbox"/> Lead?	6	903/3502	(a)(1)/(a)	of the	Title 18 , PA Crimes Code	1	F1		051
Offense #	Section	Subsection	PA Statute (Title)			Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (If applicable)	Accident Number		<input type="checkbox"/> Safety Zone	<input type="checkbox"/> Work Zone
---------------------------------	--------------------	--	--------------------------------------	------------------------------------

Statute Description (include the name of statute or ordinance):

CRIMINAL CONSPIRACY/BURGLARY

Acts of the accused associated with this Offense:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. To wit; the defendant did conspire with Kyle WUNDER and/or Stephen HARMER to commit the crime of burglary at 1297 Furniss Road, Drumore Township.



POLICE CRIMINAL COMPLAINT

Docket Number CR-196-12	Date Filed 8/29/12	OTN/LiveScan Number T 227004-1	Complaint/Incident Number J01-1373743
Defendant Name	First: CODY	Middle: D.	Last: WUNDER

2. I ask that a warrant of arrest or a summons be issued and that the defendant be required to answer the charges I have made.
3. I verify that the facts set forth in this complaint are true and correct to the best of my knowledge or information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S.§4904) relating to unsworn falsification to authorities.
4. This complaint consists of the preceding page(s) numbered __ through __

The acts committed by the accused, as listed and hereafter, were against the peace and dignity of the Commonwealth of Pennsylvania and were contrary to the Act(s) of the Assembly, or in violation of the statutes cited.

(Before a warrant of arrest can be issued, an affidavit of probable cause must be completed, sworn to before the issuing authority, and attached.)

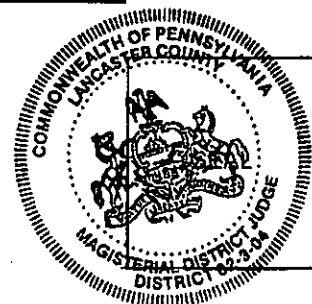
29 AUGUST, 2012
(Date)

JFC TDC
(Signature of Affiant)

AND NOW, on this date, August 29, 2012 I certify that the complaint has been properly completed and verified. An affidavit of probable cause must be completed before a warrant can be issued.

02300
(Magisterial District Court Number)

[Signature]
(Issuing Authority)





POLICE CRIMINAL COMPLAINT

Docket Number: CR-196-12	Date Filed: 8/29/12	OTN/LiveScan Number: T 227004-1	Complaint/Incident Number J01-1373743
Defendant Name:	First: Cody	Middle: D.	Last: WUNDER

AFFIDAVIT of PROBABLE CAUSE

1. Your Affiant is a member of the Pennsylvania State Police, assigned to Troop J, Criminal Investigation Unit.
2. On 08/18/2012, at approximately 0129 hours Trooper William COLVIN and other members of the Troop J Lancaster Patrol Unit were dispatched to 1297 Furniss Road in Drumore Township, Lancaster County Pennsylvania for a report of a deceased male with an apparent head injury.
3. Upon his arrival at the scene, Tpr William COLVIN, PA State Police, observed a deceased male, later identified as Douglas HERR, DOB 08/06/50, lying in the hallway of the residence. Trooper COLVIN observed THAT the rear glass door of the residence was broken. Trooper COLVIN observed broken glass on the floor adjacent to the door and also a discharged shotgun casing on the rear porch approximately six feet from the broken sliding glass door. Trooper COLVIN also observed a discharged shotgun shell on the floor of the kitchen leading into the hallway where the deceased was found. The victim suffered a visible and obvious gunshot wound to the head. A safe was also located in the residence, which showed evidence of forced entry. There were indications of a shotgun discharge in the area of a safe located in the master bedroom of the residence including damage to the wall consistent with a shotgun discharge. A rifle was located in the bedroom and a shotgun was located on the floor of the bedroom.
4. Lisa Marie HERR, daughter of Douglas HERR, of 1297 Furniss Road, Peach Bottom PA 17563, was interviewed at PSP Lancaster on 08/18/2012. She related that she lived with her father, Douglas HERR, and that she left the residence on 08/17/2012 at approximately 2000 hours at which time her father was alive. She reported that when she returned to her residence in the early morning hours of 08/18/2012, she entered the residence at 1297 Furniss Road and located her father's body in the hallway.
5. On August, 20, 2012, Lancaster County Forensic Pathologist Wayne Ross conducted an autopsy on the body of Douglas HERR. Dr. Ross concluded that Mr. Herr's death was caused by a gunshot wound to the head and that the manner of death was homicide.

(CONTINUED)

I, TPR. PHILIP STROSSER, BEING DULY SWORN ACCORDING TO THE LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

TPR. PHILIP STROSSER

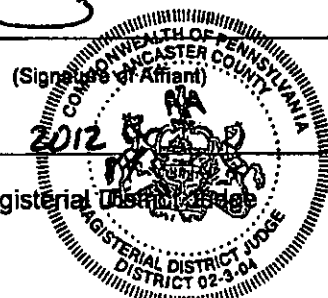
Sworn to me and subscribed before me this 29th day of August 2012

8/29/12 Date

Shirley J. Fisher

, Magisterial District Judge

My commission expires first Monday of January, 2018





**POLICE CRIMINAL COMPLAINT
AFFIDAVIT CONTINUATION PAGE**

Docket Number: CR-196-12 :	Date Filed: 8/29/12	OTN/LiveScan Number: T 227004-1	Complaint/Incident Number: J01-1373743
Defendant Name:	First: Cody	Middle: D.	Last: WUNDER

AFFIDAVIT of PROBABLE CAUSE CONTINUATION

6. On 08/28/12, Cpl. James REINHARD and Tpr. Todd MCCURDY interviewed Stephen MARSCH an adult male of Aston PA, at the Pennsylvania State Police Barracks in Media. Stephen MARSCH related that on 08/23/12 Cody WUNDER told him that he participated in breaking into a residence in Lancaster County with Kyle WUNDER and Stephen HARMER. Cody WUNDER told MARSCH that they entered the residence by shooting the door with a gun. Cody WUNDER told MARSCH that he got into a fight with the occupant and got shot by the occupant of the residence. Cody WUNDER told MARSCH that he then directed his brother Kyle WUNDER to shoot the occupant of the residence. Kyle WUNDER shot the occupant of the residence. Cody WUNDER told MARSCH that they found a safe in the residence and shot the padlock off the safe. Cody WUNDER told MARSCH that they took \$200,000.00 from the safe. He also related that they took pills from the victim's residence. Stephen MARSCH said he overheard Stephen HARMER planning to commit the aforementioned burglary in the weeks prior to 8/17/2012.

7. On 08/29/12, TFC George FORSYTH interviewed Rebecca HENSEL who related that she is the girlfriend of Stephen HARMER. HARMER. She related that Stephen HARMER and Cody WUNDER had been talking about robbing money from Lisa HERR's father about six months or seven months before this crime. She stated that on the night of 08/17/12-08/18/12, she was present with Stephen HARMER who was with Cody WUNDER and Kyle "Chunks" WUNDER at the J&B bar and the three left together late that night. About thirty minutes after the three left, Stephen HARMER called her to come to his house on Long Lane. When she got there, she observed Cody WUNDER had a gunshot wound to his leg. She subsequently learned that Stephen HARMER, Cody WUNDER and Kyle WUNDER had gone to Doug HERR's house to rob him from the conversation she had with the three of them. Stephen HARMER said he waited outside and Cody WUNDER and KYLE WUNDER went in and after a couple of minutes there was a lot of gun fire from inside the house. HARMER told her that when they came out Cody was shot in the leg. Rebecca HENSEL also related that Kyle WUNDER said that he shot the guy in the house, saying "of course I'm gonna shoot the guy, he shot my brother".

8. Based on the aforementioned information, this affiant respectfully requests that the defendant be brought before this court to answer these charges.

(Signature of Affiant)

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 1 of 14

CASE INFORMATION

Cross Court Docket Nos: 365 MAL 2015, 1664 MDA 2014

Judge Assigned: Reinaker, Dennis E.

Date Filed: 10/09/2012

Initiation Date: 08/29/2012

OTN: T 227004-1

LOTN:

Originating Docket No: MJ-02304-CR-0000196-2012

Initial Issuing Authority: Stuart J. Mylin

Final Issuing Authority: Stuart J. Mylin

Arresting Agency: PSP - Lancaster

Arresting Officer: Strosser, Philip G.

Complaint/Incident #: J011373743

Case Local Number Type(s)

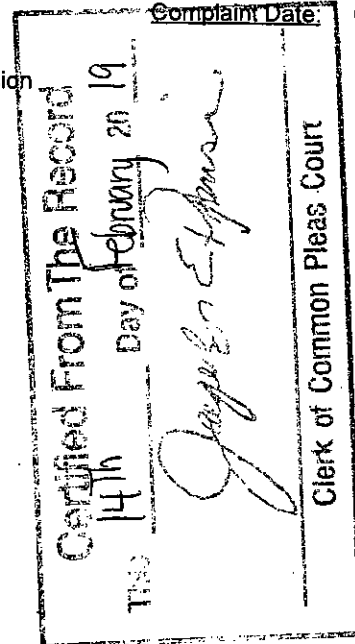
Case Local Number(s)

RELATED CASES

<u>Related Docket No</u>	<u>Related Case Caption</u>	<u>Related Court</u>	<u>Association Reason</u>
Joined Codefendant Cases			
CP-36-CR-0004640-2012	Comm. v. Harmer, Stephen Michael	CP-02-36-Crim	Joined Co-Defendants
CP-36-CR-0004642-2012	Comm. v. Wunder, Kyle Timothy	CP-02-36-Crim	Joined Co-Defendants
CP-36-CR-0004664-2012	Comm. v. Harmer, Stephen Michael	CP-02-36-Crim	Joined Co-Defendants

STATUS INFORMATION

<u>Case Status:</u>	<u>Status Date</u>	<u>Processing Status</u>	<u>Complaint Date:</u>
Closed	01/13/2016	Completed	08/29/2012
	09/30/2014	Awaiting Appellate Court Decision	
	09/25/2014	Completed	
	08/15/2013	Sentenced/Penalty Imposed	
	08/13/2013	Awaiting PSI	
	07/12/2013	Awaiting PSI Completion	
	07/12/2013	Awaiting Sentencing	
	07/11/2013	Awaiting PSI	
	06/24/2013	Awaiting Plea Court	
	12/18/2012	Awaiting Pre-Trial Conference	
	10/09/2012	Awaiting Formal Arraignment	
	10/09/2012	Awaiting Filing of Information	



COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 2 of 14

CALENDAR EVENTS

<u>Case Calendar</u>	<u>Schedule</u>	<u>Start</u>	<u>Room</u>	<u>Judge Name</u>	<u>Schedule</u>
<u>Event Type</u>	<u>Start Date</u>	<u>Time</u>			<u>Status</u>
Formal Arraignment	11/28/2012	9:00 am	Courtroom A		Cancelled
Pretrial Conference	01/22/2013	9:00 am		Judge Howard F. Knisely	Continued
Pretrial Conference	04/17/2013	1:30 pm	Courtroom 5	Judge Jeffery D. Wright	Cancelled
Guilty Plea	07/12/2013	2:00 pm	Courtroom 8	President Judge Dennis E. Reinaker	Scheduled
Sentencing	08/15/2013	11:00 am	Courtroom 8	President Judge Dennis E. Reinaker	Scheduled
Sentencing	08/16/2013	1:30 pm	Courtroom 8	President Judge Dennis E. Reinaker	Moved

CONFINEMENT INFORMATION

<u>Confinement</u>	<u>Confinement</u>	<u>Destination</u>	<u>Confinement</u>	<u>Still in</u>
<u>Known As Of</u>	<u>Type</u>	<u>Location</u>	<u>Reason</u>	<u>Custody</u>
12/31/2013	DOC Confined	SCI Greene		Yes

DEFENDANT INFORMATION

<u>Date Of Birth:</u>	03/14/1988	<u>City/State/Zip:</u>	Aston, PA 19014
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CASE PARTICIPANTS

<u>Participant Type</u>	<u>Name</u>
Defendant	Wunder, Cody D.

BAIL INFORMATION

Wunder, Cody D. Nebbia Status: None

<u>Bail Action</u>	<u>Date</u>	<u>Bail Type</u>	<u>Percentage</u>	<u>Amount</u>	<u>Bail Posting Status</u>	<u>Posting Date</u>
Denied	08/29/2012			\$0.00		

CHARGES

<u>Seq.</u>	<u>Orig Seq.</u>	<u>Grade</u>	<u>Statute</u>	<u>Statute Description</u>	<u>Offense Dt.</u>	<u>OTN</u>
1	7	H2	18 § 2502 §§B	Murder Of The Second Degree	08/17/2012	T 227004-1
2	2	F1	18 § 903	Conspiracy - Criminal Homicide	08/17/2012	T 227004-1
3	3	F1	18 § 3701 §§A11	Robbery-Infect Serious Bodily Injury	08/17/2012	T 227004-1
4	4	F1	18 § 903	Conspiracy - Robbery-Infect Serious Bodily Injury	08/17/2012	T 227004-1
5	5	F1	18 § 3502 §§A	Burglary	08/17/2012	T 227004-1
6	6	F1	18 § 903	Conspiracy - Burglary	08/17/2012	T 227004-1
7	1	F1	18 § 2501 §§A	Criminal Homicide	08/17/2012	T 227004-1

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 3 of 14

DISPOSITION/SENTENCING/PENALTIES

Disposition

<u>Case Event</u>	<u>Disposition Date</u>	<u>Final Disposition</u>	
<u>Sequence/Description</u>	<u>Offense Disposition</u>	<u>Grade</u>	<u>Section</u>
<u>Sentencing Judge</u>	<u>Sentence Date</u>	<u>Credit For Time Served</u>	
<u>Sentence/Diversion Program Type</u>	<u>Incarceration/Diversionary Period</u>	<u>Start Date</u>	
<u>Sentence Conditions</u>			

Waived for Court (Lower Court)

Defendant Was Present

Lower Court Disposition	10/05/2012	Not Final	
2 / Conspiracy - Criminal Homicide	Waived for Court (Lower Court)	F1	18 § 903
3 / Robbery-Infrict Serious Bodily Injury	Waived for Court (Lower Court)	F1	18 § 3701 §§ A1I
4 / Conspiracy - Robbery-Infrict Serious Bodily Injury	Waived for Court (Lower Court)	F1	18 § 903
5 / Burglary	Waived for Court (Lower Court)	F1	18 § 3502 §§ A
6 / Conspiracy - Burglary	Waived for Court (Lower Court)	F1	18 § 903
7 / Criminal Homicide	Waived for Court (Lower Court)	F1	18 § 2501 §§ A

Proceed to Court

Information Filed	11/28/2012	Not Final	
2 / Conspiracy - Criminal Homicide	Proceed to Court	F1	18 § 903
3 / Robbery-Infrict Serious Bodily Injury	Proceed to Court	F1	18 § 3701 §§ A1I
4 / Conspiracy - Robbery-Infrict Serious Bodily Injury	Proceed to Court	F1	18 § 903
5 / Burglary	Proceed to Court	F1	18 § 3502 §§ A
6 / Conspiracy - Burglary	Proceed to Court	F1	18 § 903
7 / Criminal Homicide	Proceed to Court	F1	18 § 2501 §§ A

Guilty Plea - Negotiated

Guilty Plea	07/12/2013	Final Disposition	
1 / Murder Of The Second Degree	Guilty Plea - Negotiated	H2	18 § 2502 §§ B
Reinaker, Dennis E.	08/15/2013	352 Days	
Confinement	Life	08/15/2013	
Pay restitution in equal monthly installments. To be paid in full within the period of supervision.			
Payment plan to be established by P/P Services Collections Enforcement Unit.			
Eligible for Educational/Vocational Program			
DNA Sampling & pay costs.			

2 / Conspiracy - Criminal Homicide	Nolle Prossed	F1	18 § 903
Reinaker, Dennis E.	08/15/2013		
3 / Robbery-Infrict Serious Bodily Injury	Guilty Plea - Negotiated	F1	18 § 3701 §§ A1I
Reinaker, Dennis E.	08/15/2013		
Merged			
4 / Conspiracy - Robbery-Infrict Serious Bodily Injury	Guilty Plea - Negotiated	F1	18 § 903
Reinaker, Dennis E.	08/15/2013	352 Days	

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 4 of 14

DISPOSITION SENTENCING/PENALTIES

Disposition

Case Event

Disposition Date

Final Disposition

Sequence/Description

Offense Disposition

Grade Section

Sentencing Judge

Sentence Date

Credit For Time Served

Sentence/Diversion Program Type

Incarceration/Diversionary Period

Start Date

Sentence Conditions

Confinement

Min of 10.00 Years

08/15/2013

Max of 20.00 Years

10 years to 20 years

Pay restitution in equal monthly installments. To be paid in full within the period of supervision.

Payment plan to be established by P/P Services Collections Enforcement Unit.

Eligible for Educational/Vocational Program

DNA Sampling & pay costs.

5 / Burglary

Guilty Plea - Negotiated

F1

18 § 3502 §§ A

Reinaker, Dennis E.

08/15/2013

Merged

6 / Conspiracy - Burglary

Guilty Plea - Negotiated

F1

18 § 903

Reinaker, Dennis E.

08/15/2013

Merged

7 / Criminal Homicide

Charge Changed

F1

18 § 2501 §§ A

Replaced by 18 § 2502 §§ B, Murder Of The Second Degree

Reinaker, Dennis E.

08/15/2013

LINKED SENTENCES:

Link 1

CP-36-CR-0004643-2012 - Seq. No. 4 (18§ 3701 §§ A1I) - Confinement is Concurrent with

CP-36-CR-0004643-2012 - Seq. No. 1 (18§ 2502 §§ B) - Confinement

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Cody D. Wunder

Page 5 of 14

COMMONWEALTH INFORMATION

Name: Craig William Stedman
District Attorney
Supreme Court No: 063537
Phone Number(s):
717-299-8100 (Phone)
Address:
Lancaster County District Attorney's Office
50 N Duke Street
Lancaster, PA 17602

Name: Todd Everett Brown
District Attorney
Supreme Court No: 083914
Phone Number(s):
717-299-8100 (Phone)
Address:
Lancaster CO Da's Ofc
50 N Duke St
Lancaster, PA 17602-2805

Name: Todd Patrick Kriner
District Attorney
Supreme Court No: 093015
Phone Number(s):
717-299-8100 (Phone)
Address:
Lancaster CO Da's Office
50 N Duke St
Lancaster, PA 17602

ATTORNEY INFORMATION

Name: Vincent J. Quinn
Court Appointed - Private
Supreme Court No: 026113
Rep. Status: Active
Phone Number(s):
717-290-7971 (Phone)
Address:
Eager Stengel Quinn & Sofilka
1347 Fruitville Pike
Lancaster, PA 17601-4001
Representing: Wunder, Cody D.

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	08/29/2012		Mylin, Stuart J.
Order Denying Motion to Set Bail - Wunder, Cody D.			
1	09/13/2012		Lyden, Christopher P.
Order Granting Motion for Appointment of Counsel			
1	10/09/2012		Court of Common Pleas - Lancaster County
Original Papers Received from Lower Court			

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Cody D. Wunder

Page 6 of 14

ENTRIES

<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
<u>Service To</u>	<u>Service By</u>		
<u>Issue Date</u>	<u>Service Type</u>	<u>Status Date</u>	<u>Service Status</u>
1	11/28/2012		Brown, Todd Everett
Information Filed Lyden, Christopher P. 12/06/2012	Attorney Box		
1	12/10/2012		Brown, Todd Everett
Notice of Intent to Consolidate			
1	01/15/2013		Weisenberger, Kristen Leigh
Entry of Appearance			
1	01/22/2013		Knisely, Howard F.
Order - Status, Continued on Defendant			
2	01/22/2013		Weisenberger, Kristen Leigh
Motion for Continuance			
3	01/22/2013		Knisely, Howard F.
Order Granting Motion for Continuance			
1	03/01/2013		Weisenberger, Kristen Leigh
Motion for Continuance			
2	03/01/2013		Reinaker, Dennis E.
Order Granting Motion for Continuance			
1	03/04/2013		Reinaker, Dennis E.
Order Regarding Trial Schedule			
1	06/25/2013		Reinaker, Dennis E.
Order Scheduling Guilty Plea			
1	07/12/2013		Reinaker, Dennis E.
Guilty Plea - Negotiated			
2	07/12/2013		Reinaker, Dennis E.
Pre-Sentence Investigation Ordered			

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 7 of 14

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
1	07/15/2013		Reinaker, Dennis E.
Order Scheduling Sentencing and Adult Prob. is to conduct a pre-sent. investigation within 30 dys			
1	07/26/2013		Lancaster County Adult Probation Unit
Pre-Sentence Investigation Report Filed			
1	07/31/2013		Commonwealth of Pennsylvania
Motion for Defendant to be Released to State Police and Returned on July 31, 2013			
2	07/31/2013		Knisely, Howard F.
Order Granting Motion for Furlough for def. to be released to state police and returned on july 31,			
1	08/15/2013		Reinaker, Dennis E.
Order - Sentence/Penalty Imposed			
1	08/20/2013		Court of Common Pleas - Lancaster County
Penalty Assessed			
2	08/20/2013		Parsons, Joshua G.
Entry of Civil Judgment			
3	08/20/2013		Parsons, Joshua G.
DC300B Prepared			
1	05/23/2014		Wunder, Cody D.
Post-Conviction Collateral Relief Act Motion			
Commonwealth of Pennsylvania			
05/27/2014	Rounds		
Wunder, Cody D.			
05/27/2014	First Class		
1	05/28/2014		Reinaker, Dennis E.
Order Granting In Forma Pauperis			
2	05/28/2014		Reinaker, Dennis E.
Order Appointing Counsel			

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 8 of 14

ENTRIES

<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
3	05/28/2014		Reinaker, Dennis E.
Order Granting Extension of Time to File Amended PCRA			
1	05/30/2014		Reinaker, Dennis E.
Transcript of Guilty Plea			
1	06/11/2014	08/15/2013	Reinaker, Dennis E.
Transcript of Sentencing			
1	07/22/2014		Quinn, Vincent J.
Amended Petition for Post Conviction Collateral Relief			
1	07/25/2014		Kriner, Todd Patrick
Answer to Amended Petition for Post Conviction Relief			
1	08/13/2014		Reinaker, Dennis E.
Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P.907			
1	09/09/2014		Madenspacher, Joseph C.
Order Granting Motion for Appointment of Counsel			
1	09/25/2014		Reinaker, Dennis E.
Order Dismissing Amended PCRA			
1	09/30/2014		Quinn, Vincent J.
Notice of Appeal to the Superior Court - IFP			
1	10/01/2014		Reinaker, Dennis E.
Concise Statement Order			
1	10/08/2014		Superior Court of Pennsylvania - Middle District
Docketing Statement from Superior Court			
1	10/17/2014		Quinn, Vincent J.
Concise Statement of Errors Complained on Appeal			
1	10/31/2014		Kriner, Todd Patrick
Commonwealth's Answer to Concise Statement of Errors Complained on Appeal			

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 9 of 14

ENTRIES

<u>Sequence Number</u>	<u>CP Filed Date</u>	<u>Document Date</u>	<u>Filed By</u>
1	11/24/2014		Reinaker, Dennis E.
Opinion			
1	12/03/2014		Lancaster County Clerk of Courts
Index of Record			
Commonwealth of Pennsylvania			
12/03/2014	Rounds		
Quinn, Vincent J.			
12/03/2014	Office Mailbox		
2	12/03/2014		Superior Court of Pennsylvania - Middle District
Original Record Sent			
1	11/30/2015		Supreme Court of Pennsylvania - Middle District
Petition for Allowance of Appeal Denied - Supreme Court			
1	01/13/2016		Superior Court of Pennsylvania - Middle District
Original Record Returned			
2	01/13/2016		Superior Court of Pennsylvania - Middle District
Affirmed - Superior Court			
1	01/27/2016		Lancaster County Children and Youth
Eastern District Order for Records			
1	02/17/2016		Lancaster County Collections Enforcement Unit
Index of Record - Eastern District			
2	02/17/2016		Lancaster County Clerk of Courts
Original Record Sent to Eastern District			
1	06/19/2016		Commonwealth Court of Pennsylvania
Original Record Returned			

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 10 of 14

PAYMENT PLAN SUMMARY

<u>Payment Plan No</u>	<u>Payment Plan Freq.</u>	<u>Next Due Date</u>	<u>Active</u>	<u>Overdue Amt</u>
<u>Responsible Participant</u>			<u>Suspended</u>	<u>Next Due Amt</u>
36-2018-P000001803	Monthly	06/30/2018	Yes	\$379.39
Wunder, Cody D.			No	\$22.39

Payment Plan History:	<u>Receipt Date</u>		<u>Payer Name</u>	<u>Participant Role</u>	<u>Amount</u>
	12/03/2013	Payment	DEPARTMENT OF CORR	Payor	\$4.55
	01/14/2014	Payment	Department of Corrections	Payor	\$10.22
	02/25/2014	Payment	Department of Corrections	Payor	\$7.81
	04/04/2014	Payment	DEPARTMENT OF CORR	Payor	\$4.00
	04/07/2014	Payment	Department of Corrections	Payor	\$6.51
	05/14/2014	Payment	Department of Corrections	Payor	\$8.37
	05/15/2014	Payment			\$100.00
	06/02/2014	Payment	Department of Corrections	Payor	\$1.51
	06/11/2014	Payment			\$13.02
	07/18/2014	Payment	Department of Corrections	Payor	\$17.03
	07/21/2014	Payment	Department of Corrections	Payor	\$102.88
	08/14/2014	Payment	Department of Corrections	Payor	\$12.74
	09/24/2014	Payment			\$3.02
	10/09/2014	Payment	Department of Corrections	Payor	\$103.46
	11/20/2014	Payment	Department Of Correction:	Payor	\$3.02
	12/10/2014	Payment	Department of Corrections	Payor	\$3.02
	01/16/2015	Payment	Department of Corrections	Payor	\$43.17
	02/22/2015	Payment	DEPARTMENT OF CORR	Payor	\$2.45
	03/23/2015	Payment	Department of Corrections	Payor	\$50.17
	04/17/2015	Payment			\$5.33
	05/08/2015	Payment	Department of Corrections	Payor	\$20.00
	05/29/2015	Payment			\$101.41
	06/26/2015	Payment	Department of Corrections	Payor	\$45.02
	08/14/2015	Payment			\$15.93
	09/10/2015	Payment	DEPARTMENT OF CORR	Payor	\$17.68
	09/30/2015	Payment	Department of Corrections	Payor	\$43.83
	11/18/2015	Payment	Department of Corrections	Payor	\$27.60
	12/15/2015	Payment			\$7.00
	01/13/2016	Payment	DEPARTMENT OF CORR	Payor	\$52.07
	02/11/2016	Payment	Department of Corrections	Payor	\$7.34
	03/09/2016	Payment			\$28.14
	04/13/2016	Payment	Department of Corrections	Payor	\$15.09
	05/12/2016	Payment	Department Of Correction:	Payor	\$11.76
	06/13/2016	Payment			\$72.88
	07/12/2016	Payment			\$12.62
	07/28/2016	Payment	Department of Corrections	Payor	\$23.38
	09/13/2016	Payment			\$29.78

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 11 of 14

PAYMENT PLAN SUMMARY

<u>Payment Plan No</u>	<u>Payment Plan Freq</u>	<u>Next Due Date</u>	<u>Active</u>	<u>Overdue Amt</u>
<u>Responsible Participant</u>			<u>Suspended</u>	<u>Next Due Amt</u>
36-2018-P000001803	Monthly	06/30/2018	Yes	\$379.39
Wunder, Cody D.			No	\$22.39

<u>Payment Plan History:</u>	<u>Receipt Date</u>	<u>Payor Name</u>	<u>Participant Role</u>	<u>Amount</u>
	10/11/2016	Payment		\$14.11
	10/31/2016	Payment		\$28.13
	12/16/2016	Payment		\$12.94
	01/26/2017	Payment		\$12.43
	02/23/2017	Payment		\$36.60
	03/16/2017	Payment		\$12.43
	04/13/2017	Payment		\$12.77
	05/04/2017	Payment		\$21.42
	05/26/2017	Payment		\$12.94
	07/06/2017	Payment		\$24.78
	07/28/2017	Payment		\$15.46
	09/08/2017	Payment	DEPARTMENT OF CORR Payor	\$24.78
	10/05/2017	Payment		\$12.10
	10/30/2017	Payment		\$7.39
	12/06/2017	Payment		\$8.06
	01/08/2018	Payment	Department Of Correction: Payor	\$17.73
	01/31/2018	Payment	Department of Corrections Payor	\$37.39
	03/01/2018	Payment		\$7.06
	03/28/2018	Payment	Department Of Correction: Payor	\$7.06
	04/27/2018	Payment	Department Of Correction: Payor	\$6.38
	05/23/2018	Payment	Department Of Correction: Payor	\$12.77
	05/23/2018	Payment	Department Of Correction: Payor	\$20.00
	06/29/2018	Payment	Department of Corrections Payor	\$7.99
	06/29/2018	Payment	Department of Corrections Payor	\$11.44
	08/09/2018	Payment	DEPARTMENT OF CORR Payor	\$18.17
	08/09/2018	Payment	DEPARTMENT OF CORR Payor	\$24.54
	08/29/2018	Payment	DEPARTMENT OF CORR Payor	\$20.29
	08/29/2018	Payment	DEPARTMENT OF CORR Payor	\$7.12
	10/03/2018	Payment	Department of Corrections Payor	\$27.64
	10/03/2018	Payment	Department of Corrections Payor	\$17.38
	10/31/2018	Payment	Department of Corrections Payor	\$30.27
	10/31/2018	Payment	Department of Corrections Payor	\$8.83
	12/05/2018	Payment	Department of Corrections Payor	\$25.27
	12/05/2018	Payment	Department of Corrections Payor	\$18.06
	01/08/2019	Payment	Department of Corrections Payor	\$29.26
	01/08/2019	Payment	Department of Corrections Payor	\$11.62
	01/31/2019	Payment	Department of Corrections Payor	\$25.80

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 12 of 14

PAYMENT PLAN SUMMARY

<u>Payment Plan No</u>	<u>Payment Plan Freq</u>	<u>Next Due Date</u>	<u>Active</u>	<u>Overdue Amt</u>
<u>Responsible Participant</u>			<u>Suspended</u>	<u>Next Due Amt</u>
36-2018-P000001803	Monthly	06/30/2018	Yes	\$379.39
Wunder, Cody D.			No	\$22.39

<u>Payment Plan History:</u>	<u>Receipt Date</u>	<u>Payor Name</u>	<u>Participant Role</u>	<u>Amount</u>
	01/31/2019	Payment	Department of Corrections	Payor
				\$11.62

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012
CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 13 of 14

CASE FINANCIAL INFORMATION

Last Payment Date: 01/31/2019

Total of Last Payment: -\$1162

Wunder, Cody D. Defendant	Assessment	Payments	Adjustments	Non Monetary Payments	Total
Costs/Fees					
ATJ	\$3.00	\$0.00	\$0.00	\$0.00	\$3.00
CJES	\$2.25	\$0.00	\$0.00	\$0.00	\$2.25
Clerk Cost - 6444AB1211 (Lancaster)	\$120.00	\$0.00	\$0.00	\$0.00	\$120.00
DO NOT USE					
Clerk of Court Auto Fee-Costs 6593AAB1211 (Lan)	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
Commonwealth Cost - HB627 (Act 167 of 1992)	\$19.20	\$0.00	\$0.00	\$0.00	\$19.20
Costs of Prosecution - CJEA	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
County Court Cost (Act 204 of 1976)	\$28.00	\$0.00	\$0.00	\$0.00	\$28.00
Crime Victims Compensation (Act 96 of 1984)	\$35.00	(\$35.00)	\$0.00	\$0.00	\$0.00
DA Administration Fee - 6421AB130019021 (Lan)	\$25.00	\$0.00	\$0.00	\$0.00	\$25.00
DA Cost - Felony- 6411AB1211 (Lancaster)	\$18.00	\$0.00	\$0.00	\$0.00	\$18.00
DNA Detection Fund (Act 185-2004)	\$250.00	\$0.00	\$0.00	\$0.00	\$250.00
Domestic Violence Compensation (Act 44 of 1988)	\$10.00	\$0.00	\$0.00	\$0.00	\$10.00
Firearm Education and Training Fund	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
JCPS	\$10.25	\$0.00	\$0.00	\$0.00	\$10.25
Judicial Computer Project	\$8.00	\$0.00	\$0.00	\$0.00	\$8.00
Sheriff Cost - Felony - 6411AB1211 (Lancaster)	\$4.00	\$0.00	\$0.00	\$0.00	\$4.00
State Court Costs (Act 204 of 1976)	\$12.80	\$0.00	\$0.00	\$0.00	\$12.80
Victim Witness Service (Act 111 of 1998)	\$25.00	(\$25.00)	\$0.00	\$0.00	\$0.00
Sealed Entry on Public Docket	\$4.65	\$0.00	\$0.00	\$0.00	\$4.65
Sealed Entry on Public Docket	\$10.85	\$0.00	\$0.00	\$0.00	\$10.85
Sealed Entry on Public Docket	\$4.65	\$0.00	\$0.00	\$0.00	\$4.65
Sealed Entry on Public Docket	\$10.85	\$0.00	\$0.00	\$0.00	\$10.85
Sealed Entry on Public Docket	\$4.65	\$0.00	\$0.00	\$0.00	\$4.65
Sealed Entry on Public Docket	\$10.85	\$0.00	\$0.00	\$0.00	\$10.85
Sealed Entry on Public Docket	\$4.65	\$0.00	\$0.00	\$0.00	\$4.65
Sealed Entry on Public Docket	\$10.85	\$0.00	\$0.00	\$0.00	\$10.85
Sealed Entry on Public Docket	\$4.65	\$0.00	\$0.00	\$0.00	\$4.65

COURT OF COMMON PLEAS OF LANCASTER COUNTY

DOCKET



Docket Number: CP-36-CR-0004643-2012

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania

v.

Cody D. Wunder

Page 14 of 14

CASE FINANCIAL INFORMATION

Wunder, Cody D. Defendant	<u>Assessment</u>	<u>Payments</u>	<u>Adjustments</u>	<u>Non Monetary Payments</u>	<u>Total</u>
Sealed Entry on Public Docket	\$10.85	\$0.00	\$0.00	\$0.00	\$10.85
Judgement Satisfaction Fee 6436AB1511 (Lancaster)	\$11.75	\$0.00	\$0.00	\$0.00	\$11.75
Sheriff Process Cost - 6411AB1211 (Lancaster)	\$202.35	\$0.00	\$0.00	\$0.00	\$202.35
Constable/Postage - 6411AB1211 (Lancaster)	\$7.82	\$0.00	\$0.00	\$0.00	\$7.82
Constable/Postage - 6411AB1211 (Lancaster)	\$12.78	\$0.00	\$0.00	\$0.00	\$12.78
Constable/Postage - 6411AB1211 (Lancaster)	\$14.55	\$0.00	\$0.00	\$0.00	\$14.55
Costs/Fees Totals:	\$957.25	(\$60.00)	\$0.00	\$0.00	\$897.25
Restitution					
Restitution	\$137,239.20	(\$386.78)	(\$136,852.42)	\$0.00	\$0.00
Insurance Company Restitution	\$16,112.64	\$0.00	\$0.00	\$0.00	\$16,112.64
Restitution**	\$68,426.21	(\$623.53)	\$0.00	\$0.00	\$67,802.68
Restitution**	\$68,426.21	(\$623.53)	\$0.00	\$0.00	\$67,802.68
Restitution Totals:	\$290,204.26	(\$1,633.84)	(\$136,852.42)	\$0.00	\$151,718.00
Grand Totals:	\$291,161.51	(\$1,693.84)	(\$136,852.42)	\$0.00	\$152,615.25

** - Indicates assessment is subrogated

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

..... ♦
STEPHEN HARMER,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI et al
Respondent(s)
..... ♦

JOINT APPENDIX
..... ♦

Appendix A: Third Circuit Court of Appeals decision in Harmer v. Superintendent Fayette SCI et al, No. 19-3146 (3d Cir. 2021) (Smith, McKee and Ambro), denying relief.

Appendix B: The United States District Court for the Eastern District of Pennsylvania Decision. Harmer v. Superintendent Fayette SCI et al, D.C. No. 5-18-cv-00175 (2021), denying habeas relief.

Appendix C: Opinion of Magistrate Judge Timothy R. Rice of the United States District Court in the Eastern District of Pennsylvania. Harmer v. Capozza, issued at No. 18-175 (July 12, 2019), denying habeas relief.

Appendix
"A"

3rd Circuit Court Opinion

**STEPHEN M. HARMER, Appellant v. SUPERINTENDENT FAYETTE SCI; THE DISTRICT ATTORNEY
OF THE COUNTY OF LANCASTER; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF
PENNSYLVANIA**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2021 U.S. App. LEXIS 24009

No. 19-3146

March 12, 2021, Submitted under Third Circuit L.A.R. 34.1(a)

August 12, 2021, Filed

Notice:

**NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE
RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE
COURT. PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1
GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.**

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1} On Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. No. 5-18-cv-00175. District Judge: The Honorable Mark A. Kearney. Harmer v. Capozza, 2019 U.S. Dist. LEXIS 147175, 2019 WL 4083771 (E.D. Pa., Aug. 29, 2019)

Counsel For STEPHEN M. HARMER, Plaintiff - Appellant: Daniel A. Silverman, Esq., Philadelphia, PA.

For SUPERINTENDENT FAYETTE SCI, DISTRICT ATTORNEY LANCASTER COUNTY, Defendants - Appellees: Travis S. Anderson, Esq., Andrew J. Gonzalez, Esq., Amara M. Riley, Esq., Lancaster County Office of District Attorney, Lancaster, PA.

For ATTORNEY GENERAL PENNSYLVANIA, Defendant - Appellee: Travis S. Anderson, Esq., Andrew J. Gonzalez, Esq., Amara M. Riley, Esq., Lancaster County Office of District Attorney, Lancaster, PA; Ronald Eisenberg, Esq., Office of Attorney General of Pennsylvania, Philadelphia, PA.

Judges: Before: SMITH, Chief Judge, McKEE and AMBRO, Circuit Judges.

CASE SUMMARY Defendant's claim his trial counsel's conflict of interest adversely affected counsel's trial performance since counsel failed to secure a plea deal for him to avoid a co-defendant's chances of securing one was without merit because prosecutor told counsel Commonwealth was unwilling to consider any deal for defendant of less than life imprisonment.

OVERVIEW: HOLDINGS: [1]-Defendant's claim his trial counsel's conflict of interest adversely affected the counsel's trial performance since the trial counsel failed to secure a plea deal for him to avoid a co-defendant's, who was a former client, chances of securing a plea deal was without merit because prosecutor made clear to counsel that Commonwealth was unwilling to consider any deal for defendant of less than life imprisonment without parole; [2]-Defendant's claim trial counsel's failure to request an instruction under which jury would discount a co-defendant's testimony since as an accomplice to the crime, he was a polluted source was without merit because the trial counsel undermined the co-defendant's testimony in other ways such as asking the co-defendant of his plea deal and his lying to

CIRHOT

the police and on cross examination sought to adduce co-defendant's bias and untrustworthiness.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > Clear Error Review

The appellate court reviews the district court's legal conclusions de novo. The appellate court reviews the district court's findings of fact for clear error.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof
Legal Ethics > Client Relations > Conflicts of Interest

The standard set out in the case of *Cuyler v. Sullivan* requires a habeas petitioner to prove that: (1) an actual conflict of interest existed, and (2) the conflict adversely affected the adequacy of representation. An actual conflict is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. And adverse effect turns on whether some plausible alternative defense strategy or tactic might have been pursued that was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Legal Ethics > Client Relations > Conflicts of Interest

A defendant alleging that his attorney's conflict of interest prevented the exploration of plea negotiations must demonstrate that the government was willing to extend, or consider, an invitation to commence plea negotiations.

Opinion

Opinion by: SMITH

Opinion

OPINION*

SMITH, *Chief Judge*.

Appellant Stephen Harmer petitioned for a writ of habeas corpus, alleging that his trial counsel labored under a conflict of interest that adversely affected counsel's performance. We will affirm the District Court's denial of habeas relief.

I. Background

In August 2012, Cody and Kyle Wunder broke into the home of a Pennsylvania widower, Douglas Herr, to steal {2021 U.S. App. LEXIS 2} about \$200,000 from his safe. Harmer told the brothers about the cash in the safe, knew the area, drove them to the house, and waited in the getaway car. The crime turned grisly when Herr, who was armed, confronted the brothers. Kyle struck Herr with the butt

of his shotgun, rendering him unconscious. At some point, Cody realized that he had been shot, and Kyle, in turn, shot and killed Herr. The brothers escaped with the cash and were arrested along with Harmer in September 2012. All three were charged with burglary, robbery, and murder as well as conspiracy to commit the same. While Kyle was charged with first-degree murder, Cody and Harmer were charged with second-degree (or felony) murder.

On September 6, 2012, attorney Christopher Lyden was appointed to represent Cody. Lyden billed for ninety dollars' worth of legal work on Cody's case, including 1.5 hours of legal research and phone calls. Lyden did not appear in court on behalf of Cody, nor did Lyden talk to him (by phone or in person). In early October, Cody hired private counsel but Lyden's name continued to appear on the criminal docket as Cody's counsel of record.

In October, Harmer's family contacted Lyden about representing{2021 U.S. App. LEXIS 3} him in the case. Lyden met with Harmer, who went on to hire him to handle the criminal case for a fixed fee of \$15,000. Then, in December 2012, Lyden received a notice copy of the criminal information under which Cody was charged. Lyden instructed a court official to remove his name as Cody's counsel of record.

Both Wunder brothers provided statements about the murder in April 2013 and, in July, entered into plea agreements with the Commonwealth under which they consented to life-without-parole sentences. One condition of Cody's plea was that Kyle, who pleaded to first-degree murder, be spared the death penalty. Another was that Cody testify truthfully for the Commonwealth at Harmer's trial.

Harmer went to trial in August 2013. The defense's theory of the case was that, though guilty of the lesser charges, Harmer could not be convicted of felony murder because Kyle's shooting of Herr was not in furtherance of the agreed-upon robbery.¹ Instead, it was a detour of personal retaliation-committed *after* the brothers had left the house with the cash-and purely because Cody had been shot. In the defense's case in chief, Lyden called Kyle as a witness to establish this factual sequence. After{2021 U.S. App. LEXIS 4} Kyle invoked the Fifth Amendment, Lyden then played for the jury a recorded post-arrest interview in which Kyle stated that he had gone back inside the house and killed Herr after he and Cody had left the house with the money.²

The jury believed Cody. He had testified for the Commonwealth that he told Kyle to shoot Herr *before* they left the house to neutralize him as a threat. Lyden cross-examined his former client Cody briefly, in testimony occupying just five transcript pages. Besides highlighting how Cody's plea deal took the death penalty off the table for his brother, Lyden sought to elicit that Cody was an unreliable narrator of how Herr was killed because Cody had just been shot, his perception distorted by shock and adrenaline. The jury ultimately convicted Harmer of second-degree murder as well as the other crimes he did not contest, and he was thus sentenced to mandatory life without parole.

Lyden handled Harmer's direct appeal, though Harmer's family paid an appellate lawyer \$5,000 essentially to look over Lyden's shoulder. The appellate court affirmed Harmer's conviction and mandatory life sentence, and the Pennsylvania Supreme Court denied review. Harmer then sought relief under the{2021 U.S. App. LEXIS 5} Post-Conviction Relief Act, 42 Pa. C.S.A. §§ 9541-9546 ("PCRA"). In a counseled petition, he argued that Lyden had been ineffective in failing to request an accomplice liability instruction for Cody's testimony and in not moving to exclude other bad acts evidence, including testimony that Harmer had sold and consumed illegal drugs. *See Commonwealth v. Harmer*, 174 A.3d 79, 2017 Pa. Super. Unpub. LEXIS 2332, 2017 WL 2615898, at *1-2 (Pa. Super. Ct. 2017). The PCRA court dismissed Harmer's petition following a hearing, and the appellate court affirmed. *See id.* The Pennsylvania Supreme Court denied Harmer's petition for review.

In January 2018, Harmer filed a pro se habeas petition in the Eastern District of Pennsylvania. Upon

retaining counsel, he filed a supplemental petition arguing for the first time that Lyden had a conflict of interest in representing Harmer after previously representing Cody in the same case.³ The magistrate judge heard testimony at two evidentiary hearings, including from Harmer, his PCRA counsel, Lyden, and the lead prosecutor in Harmer's criminal case. Lyden testified that, because he never had contact with Cody, he did not consider Cody to have been his client. Yet at the same time, Lyden maintained that he disclosed his prior representation of Cody to Harmer before the trial.

The magistrate judge found that Lyden's testimony on {2021 U.S. App. LEXIS 6} these points was not credible but recommended denial of habeas relief because there was no evidence that any conflict adversely affected Lyden's trial performance. The District Court agreed with the bulk of the magistrate judge's Report & Recommendation and denied relief. But the District Court noted that the magistrate judge, in resolving the question of adverse effect, should have independently considered whether there was an inherent conflict between plausible trial strategies that Lyden bypassed and his duties to Cody. It issued a certificate of appealability, which we later clarified by framing the issue as whether the District Court erred in its adjudication of Harmer's Sixth Amendment claim that Lyden labored under a conflict of interest.⁴

II. Discussion⁵

Both sides agree that the standard set out in *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), and *United States v. Gambino*, 864 F.2d 1064, 1070 (3d Cir. 1988), applies here.⁶ That standard requires a habeas petitioner to prove that (1) an actual conflict of interest existed and (2) the conflict adversely affected the adequacy of representation. *Sullivan*; 446 U.S. at 349-50; *Gambino*, 864 F.2d at 1070. An actual conflict "is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action." *Gambino*, 864 F.2d at 1070 (quotation {2021 U.S. App. LEXIS 7} omitted). And adverse effect turns on whether "some plausible alternative defense strategy or tactic might have been pursued" that "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Id.* (quotation omitted).

Harmer argues that Lyden's conflict of interest adversely affected his trial performance because he bypassed three plausible defense strategies that inherently conflicted with his duties to former client Cody.⁷ First, Lyden failed to vigorously pursue more favorable plea terms for Harmer. Second, he opted not to request an accomplice jury instruction that would have discounted Cody's credibility. Third, he decided not to adduce evidence of Harmer's non-violent character. But the first was not a plausible strategy. And the facts show that the second and third neither inherently conflicted with nor were foregone due to Lyden's other loyalties.

Harmer first contends that Lyden failed to secure a plea for him because doing so would have dented Cody's chances of securing his own deal. A defendant "alleging that his attorney's conflict of interest prevented the exploration of plea negotiations" must "demonstrate that the government {2021 U.S. App. LEXIS 8} was willing to extend, or consider, an invitation to commence plea negotiations." *Moss v. United States*, 323 F.3d 445, 465 (6th Cir. 2003); accord *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). But the prosecutor made clear to Lyden that the Commonwealth was unwilling to consider any deal for Harmer of less than life imprisonment without the possibility of parole because Harmer was "the catalyst" for the robbery, was as culpable as the Wunder brothers due to his role in orchestrating it, and had given a self-serving counseled statement to law enforcement. JA389-94, JA423. Undeterred, Harmer argues that Lyden should not have taken that position at face value but, for example, should have gone above the prosecutor's head to the District Attorney or offered Harmer as a cooperating witness against the Wunders before they pleaded guilty.⁸

Yet Lyden testified that he did speak with the prosecutor several times, not just once, about the prospect of a plea deal for Harmer. Corroborating this, the prosecutor "confident[ly]" recollected multiple "discussions" with Lyden about resolving the case. JA400, 423. And Lyden testified, un rebutted, that he floated to Harmer the idea of providing more information about the case to entice the Commonwealth to reconsider its stance. Nothing ever came of it.{2021 U.S. App. LEXIS 9} It would be one thing if Lyden had never tried to plea bargain, particularly if the Commonwealth had been receptive to a plea deal for Harmer. But the record suggests otherwise. Cf. *Burger v. Kemp*, 483 U.S. 776, 785-86, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) ("The notion that the prosecutor would have been receptive to a plea bargain is completely unsupported in the record."). More dogged pursuit of a plea deal for Harmer was thus not "a viable alternative" to going to trial. *Gambino*, 864 F.2d at 1070 (quotation omitted).

Harmer next challenges Lyden's failure to request an instruction under which the jury would discount Cody's testimony because, as an accomplice to the crime, he was a "polluted source." Appellant's Br. 42 (quoting *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9, 13 (Pa. 1994)). Harmer claims that Lyden's former client Cody would have viewed any request for such an instruction as a betrayal. Although requesting that instruction was a plausible defense strategy,⁹ the facts belie Harmer's claim that doing so inherently conflicted with Lyden's duties to Cody. Lyden undermined Cody's credibility in other ways. For example, on cross-examination, Lyden sought to adduce Cody's bias and untrustworthiness, including by asking him about his plea deal and his lying to police. Harmer cannot explain why this questioning did not inherently{2021 U.S. App. LEXIS 10} conflict but failing to request the instruction did. And the same facts defeat any argument that Lyden failed to request the instruction "due to" his other loyalties or interests. *Gambino*, 864 F.2d at 1070.

Harmer finally claims that Lyden chose not to present evidence of Harmer's nonviolent character because doing so would have increased the chances of his acquittal of felony murder, thus jeopardizing Cody's plea deal. But that argument effectively seeks a per se rule for successive representations: Any trial strategy conceivably beneficial to a defendant inherently conflicts with his lawyer's duties to a former client who, as a condition of pleading guilty, testified against him. At least on these facts, we decline to adopt such a rule. Not only was the former representation *de minimis*, but at trial Lyden contrasted Cody and Kyle, whom he called "cold-blooded killers," with Harmer, whom he argued "did not participate in any way in the decision to kill." JA63. Evidence at trial also showed that, when discussing the planned robbery, Harmer expressed a desire that no one be killed. Given Lyden's emphasis at trial on Harmer's non-violent role, Harmer fails to persuade us that the added step of proving his non-violent{2021 U.S. App. LEXIS 11} character was either inherently in conflict with or "not undertaken due to [Lyden's] other loyalties or interests." See *Gambino*, 864 F.2d at 1070 (quotation omitted).

III. Conclusion

For the reasons stated, we will affirm the judgment of the District Court.

Footnotes

*
This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1

Harmer could only be guilty of second-degree (felony) murder if Kyle committed the murder in furtherance of the robbery. See *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472, 476 (Pa. 1958).

2

Kyle apparently also told others in the wake of the murder, "What was I supposed to do? He shot my brother." JA62. (Citations preceded by "JA" refer to the parties' Joint Appendix submitted on appeal.)

3

Given belated discovery of the September 2012 order appointing Lyden to represent Cody, the magistrate judge excused Harmer's default in not raising the conflict claim in his PCRA petition, citing *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

4

We review the District Court's legal conclusions de novo. *Morris v. Beard*, 633 F.3d 185, 193 (3d Cir. 2011). We review the District Court's findings of fact for clear error. *Id.* (citation omitted). The PCRA court did not adjudicate the conflict claim on the merits, so the limitations on relief in 28 U.S.C. § 2254(d) do not apply.

5

The District Court had jurisdiction over Harmer's habeas petition under 28 U.S.C. § 2254. Because the District Court granted a certificate of appealability, we have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253.

6

We therefore assume without deciding that *Sullivan* applies in cases of successive representation.

7

We assume without deciding that Lyden's prior representation of Cody created an actual conflict of interest.

8

Harmer did not contemporaneously ask Lyden to pursue further plea talks.

9

Lyden testified at Harmer's habeas evidentiary hearing that he did not request an accomplice instruction because it did not directly relate to his defense theory that the recorded interview of Kyle, the shooter, was more credible than the trial testimony of Cody, who had been shot, about the sequencing of Herr's murder.

**Appendix
"B"**

Pennsylvania Eastern District Court Decision

STEPHEN M. HARMER v. MARK CAPOZZA, et al.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 147175
CIVIL ACTION NO. 18-175
August 29, 2019, Decided
August 29, 2019, Filed

Editorial Information: Prior History

Harmer v. Capozza, 2019 U.S. Dist. LEXIS 119907 (E.D. Pa., July 12, 2019)

Counsel {2019 U.S. Dist. LEXIS 1} For STEPHEN M. HARMER, Petitioner:
DANIEL ALAN SILVERMAN, LAW OFFICES DANIEL SILVERMAN & ASSOC,
PHILADELPHIA, PA.

For MARK CAPOZZA, THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA, Respondents: AMARA M. RILEY, LANCASTER COUNTY
DISTRICT ATTY OFFICE, LANCASTER, PA; TRAVIS S. ANDERSON, OFFICE OF
DISTRICT ATTORNEY OF LANCASTER COUNTY, LANCASTER, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF
LANCASTER, Respondent: AMARA M. RILEY, LANCASTER COUNTY DISTRICT ATTY
OFFICE, LANCASTER, PA; ANDREW JAMES GONZALEZ, LANCASTER COUNTY
DISTRICT ATTORNEY'S OFFICE, LANCASTER, PA; TRAVIS S. ANDERSON, OFFICE OF
DISTRICT ATTORNEY OF LANCASTER COUNTY, LANCASTER, PA.

Judges: KEARNEY, J.

CASE SUMMARY Felon did not state grounds for habeas relief by challenging trial counsel's undisclosed former representation of co-defendant in same prosecution as, while presenting nonviolent character witness was viable alternative strategy, there was no inherent conflict between not pursuing this strategy and counsel's duty of confidentiality to co-defendant.

OVERVIEW: HOLDINGS: [1]-The convicted felon did not state grounds for habeas relief from a state court life sentence by challenging his trial counsel's undisclosed former representation of a co-defendant almost a year earlier in the same prosecution because, while presenting a nonviolent character witness was a viable alternative strategy, there was no inherent conflict between not pursuing this strategy and counsel's duty of confidentiality to the co-defendant. While an accomplice liability instruction was a viable alternative strategy, counsel's loyalty to the co-defendant did not extend so far to warrant a finding of inherent conflict because the duty of confidentiality would not conflict with counsel's ability to request an accomplice liability instruction.

OUTCOME: Report and recommendation approved in part. Objections overruled in part and granted in part. Petition for a writ of habeas corpus denied and dismissed. Certificate of appealability issued.

LexisNexis Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Tests

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1

Legal Ethics > Client Relations > Conflicts of Interest

The Sixth Amendment guarantees a criminal defendant shall have the Assistance of Counsel for his defense. U.S. Const. amend. VI. This right is accorded not for its own stake, but because of the effect counsel has on the ability of the accused to receive a fair trial. A convicted criminal defendant who feels his counsel failed to preserve the fairness of his trial may challenge his conviction on grounds of ineffective assistance of counsel. To succeed on an ineffective assistance of counsel claim under Strickland, a criminal defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Surmounting Strickland's high bar is never an easy task. The Court has nonetheless developed exceptions to Strickland's high bar. For instance, a criminal defendant claiming his lawyer labored under a conflict of interest is not governed by Strickland and instead is governed by the Court's Sixth Amendment conflict of interest precedent. The type of alleged conflict is an important distinction. Several courts of appeals apply a separate standard for successive, rather than concurrent, representation cases.

Legal Ethics > Client Relations > Conflicts of Interest

Criminal Law & Procedure > Counsel > Joint Representation

In the context of an attorney's conflict of interest, the U.S. Court of Appeals for the Fifth Circuit has observed: in a case of successive representation, both the temporal and substantive relationship between the two representations may be quite remote. The U.S. Supreme Court in Mickens acknowledged both Cuyler and Holloway stressed the high probability of prejudice arising from multiple concurrent representation before directing: not all attorney conflicts present comparable difficulties. The Court in Mickens recognized even the Federal Rules of Criminal Procedure treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney, but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation.

Criminal Law & Procedure > Appeals > Reversible Errors

Legal Ethics > Client Relations > Conflicts of Interest

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

The U.S. Supreme Court has held a conviction obtained after a trial court refuses inquiry into an objection about a lawyer's conflicting representation must be automatically reversed. In reaching this ruling, the Court reaffirmed multiple representation does not per se violate the Sixth Amendment and restricted its automatic reversal rule to when a conflict of interest objection is raised and not adequately heard by the trial judge.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance

Legal Ethics > Client Relations > Conflicts of Interest

A trial court holds no duty to inspect a conflict of interest without objection and a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Instead of presuming ineffective assistance, a criminal defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

Legal Ethics > Client Relations > Conflicts of Interest

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance

It is practice within the U.S. Court of Appeals for the Third Circuit to review any habeas conflict of interest claim under Cuyler. To succeed under Cuyler, the petitioner must prove an actual conflict of interest adversely affected his lawyer's performance. An actual conflict is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. The petitioner must show an actual conflict between his duties to his former client and his duties to the petitioner. The Third Circuit directs a two-part test when determining whether a habeas petitioner is entitled to relief based upon his lawyer's alleged conflict of interest: First, the petitioner must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Criminal Law & Procedure > Habeas Corpus > Evidentiary Hearings

The trial court should conduct a hearing where a habeas applicant has made out a prima facie case for habeas corpus relief that is not procedurally barred.

Legal Ethics > Client Relations > Conflicts of Interest

In the context of an attorney's conflict of interest, a defendant or habeas petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests.

Legal Ethics > Client Relations > Conflicts of Interest

Legal Ethics > Client Relations > Confidentiality of Information

Under Pa. R. Prof. Conduct 1.9, an attorney owes a former client two continuing duties: (1) a duty not to represent a different and materially adverse client in the same or similar action without consent; and, (2) a duty of confidentiality. Obtaining informed consent requires the attorney to make all reasonable and necessary disclosures to the former client and, where appropriate, advise the former client to seek independent legal advice as to whether to provide the requested informed consent or not. The rule is designed to protect the former client.

Legal Ethics > Client Relations > Confidentiality of Information

The Pennsylvania Rules of Professional Conduct instruct courts on an attorney's duty of confidentiality: a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c). Pa. R. Prof. Conduct 1.6.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

Unless a circuit justice or judge issue a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. 28 U.S.C.S. § 2253(c)(1). When a district court rejects constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Opinion

Opinion by: KEARNEY

Opinion

MEMORANDUM

KEARNEY, J.

A felon seeking *habeas* relief from a state court life sentence by challenging his trial counsel's undisclosed former representation of a co-defendant almost a year earlier in the same prosecution must show his trial counsel operated under a conflict of interest constituting ineffective assistance of counsel. While prudent lawyering should disclose an earlier representation of a codefendant arising from charges relating to the same alleged joint conduct, the failure to do so does not automatically render trial{2019 U.S. Dist. LEXIS 2} counsel constitutionally ineffective under the Sixth Amendment. The convicted felon must show his trial counsel who admittedly represented a co-defendant in the same case long before the trial did not pursue a viable alternative defense strategy or tactic and this viable alternative defense either inherently conflicted with, or was not undertaken due to, the trial counsel's other loyalties or interests. By way of one example, a trial counsel failing to adduce testimony which would adversely affect the former client's liberty interests at trial may allow *habeas* relief. But we do not today face this type of inherent conflict. After independent review of the convicted felon's challenges to alleged undisclosed conflicts by his trial counsel affecting five trial strategies, including our study of his counselled Objections to Judge Rice's exhaustive Report and Recommendation issued after two evidentiary hearings, we find the convicted felon does not state grounds for *habeas* relief.

I. Facts adduced from evidentiary hearings and public record.

Stephen Harmer, along with brothers Cody and Kyle Wunder, devised a plan to rob Douglas Herr's Lancaster County home after learning Mr. Herr kept a large sum of money{2019 U.S. Dist. LEXIS 3} in his bedroom safe.¹ On August 17, 2012, the three men left a Lancaster bar and drove to Mr. Herr's home.² They parked near the home; Mr. Harmer stayed in the truck while the Wunder brothers-armed with a shotgun, sledgehammer, and pry bar-broke into the house.³ According to Cody Wunder: once inside Mr. Herr's house, the brothers encountered Mr. Herr in a hallway and Kyle struck him in the head with his shotgun;⁴ the brothers believed this blow knocked Mr. Herr "out cold;"⁵ the brothers then headed for the money in the bedroom safe;⁶ Mr. Herr reemerged with a rifle and shot Cody in the leg;⁷ Cody then directed his brother Kyle to shoot Mr. Herr;⁸ Kyle shot Mr. Herr in the head with his shotgun and killed him;⁹ and the three men left the scene with approximately \$200,000.¹⁰

Initial hearings with counsel.

The police arrested Mr. Harmer and the Wunder brothers and charged them with murder, burglary, robbery, conspiracy, and other offenses.¹¹ On September 6, 2012, the state court appointed Attorney Christopher Lyden to represent Cody Wunder.¹² Mr. Harmer retained Attorney Mark Walmer. Attorney Walmer represented Mr. Harmer during a September 2012 interview with the district attorney. The district attorney{2019 U.S. Dist. LEXIS 4} believed Mr. Harmer provided self-serving statements and decided the only plea offer would involve life sentence without parole.¹³

While Attorney Walmer represented Mr. Harmer, Attorney Lyden billed 1.5 hours to the county for

work on Cody Wunder's case.¹⁴ Attorney Lyden only spent parts of two days working on Cody Wunder's case. On September 10, Attorney Lyden made two calls and reviewed documents and a letter.¹⁵ On September 26, Attorney Lyden made two additional calls and performed research.¹⁶ There is no evidence of time spent talking with any defendant.¹⁷ Attorney Lyden denied contacting Cody Wunder or his family.¹⁸ On or before October 3, 2012, Cody Wunder's family retained Attorney Cory J. Miller to replace Attorney Lyden as his counsel before the October 5, 2012 preliminary hearing.¹⁹ Attorney Lyden did not appear for Cody Wunder at the preliminary hearing.²⁰

Mr. Harmer then retains Attorney Lyden without knowing of his earlier representation.

At some point in October 2012, Mr. Harmer's family contacted Attorney Lyden and then retained him after meeting Mr. Harmer in the prison.²¹ Attorney Lyden visited Mr. Harmer in jail "about a dozen" times in October 2012.²² Mr. Harmer and Attorney Lyden^{2019 U.S. Dist. LEXIS 5} offered conflicting testimony on whether Attorney Lyden ever told Mr. Harmer about his prior representation of Cody Wunder.²³ Mr. Harmer insists Attorney Lyden did not tell him he previously represented Cody Wunder in the same case and would not have hired him had he known.²⁴ Attorney Lyden testified he talked to Mr. Harmer about his prior representation of Cody Wunder in December 2012.²⁵ While the testimony conflicts, Judge Rice did not find Attorney Lyden credible and found Attorney Lyden did not reveal to Mr. Harmer his earlier representation of Cody Wunder.²⁶ Judge Rice explained "Lyden first mentioned his disclosure to Harmer at the February 2019 evidentiary hearing and failed to include this important fact in an earlier sworn declaration describing his representation of Cody. Lyden also failed to take any notes during any of his multiple meetings with Harmer, including the session where he purportedly disclosed his representation of Cody."²⁷

Approximately nine months after Attorney Lyden ended his short-term representation of Cody Wunder, the Wunder brothers, then advised by new counsel, pled guilty in July 2013.²⁸ As it decided after Mr. Harmer's allegedly inaccurate interview, the Commonwealth agreed it would not seek the death penalty for Kyle Wunder.²⁹ Cody Wunder also agreed to cooperate against Mr. Harmer.

Attorney Lyden's trial and appeal strategies.

Mr. Harmer went to trial in August 5-12, 2013 with Attorney Lyden as trial counsel.³⁰ At trial, Attorney Lyden defended Mr. Harmer's innocence on the murder charge by arguing the Wunder brothers^{2019 U.S. Dist. LEXIS 8} did not murder Mr. Herr in furtherance of the robbery or burglary.³¹ The Commonwealth called fifteen witnesses.³² The Commonwealth called Cody Wunder who testified Kyle Wunder killed Mr. Herr while the two were in the home attempting to steal the money.³³ Attorney Lyden impeached Cody Wunder about the Commonwealth offering him a guilty plea of second rather than first degree murder even though he directed his brother to shoot Mr. Herr.³⁴ Attorney Lyden also cross-examined Cody Wunder about his mental state after being shot and lying to police on the cause of his gunshot wound.³⁵

The Commonwealth called Mr. Harmer's neighbor and friend, Montana Leimseider. Ms. Leimseider testified Mr. Harmer told her about the plan to rob Mr. Herr before the robbery took place; she "remember[ed] that [Mr. Harmer] was planning to scare [Mr. Herr] with a gun" but Mr. Harmer "didn't want anyone home" during the robbery.³⁶ Attorney Lyden impeached Ms. Leimseider about her significant drug use and her potential charges for heroin dealing.³⁷ The Commonwealth also called Mr. Harmer's girlfriend, Rebecca Hensel. On direct examination by the Commonwealth, Ms. Hensel testified to observing^{2019 U.S. Dist. LEXIS 9} Mr. Harmer's shock after the incident; Mr. Harmer told her he did not expect anyone to be killed.³⁸ Attorney Lyden did not cross-examine Ms. Hensel and instead called Ms. Hensel as a defense witness where she testified overhearing Kyle Wunder state he "didn't mean for this to happen. What was I supposed to do? He shot my brother."³⁹

Attorney Lyden called Kyle Wunder as the first defense witness.⁴⁰ Kyle Wunder asserted his Fifth Amendment right against self-incrimination and did not testify.⁴¹ Attorney Lyden introduced Kyle Wunder's September 2012 videotaped police statement.⁴² According to Kyle Wunder's statement: Kyle and Cody Wunder left Mr. Herr's home with the lock boxes; Cody Wunder collapsed on Mr. Herr's porch and realized Mr. Herr shot him; Cody Wunder then directed his brother to go back inside to shoot Mr. Herr.⁴³

Attorney Lyden's case strategy "was [not] that some co-defendant was shifting the blame."⁴⁴ In his closing, Attorney Lyden told the jury to believe Kyle's account because he "completed the deadly act himself" and questioned Cody Wunder's ability to accurately recall the event because of the gunshot wound.⁴⁵ Attorney Lyden contended the murder "was an act of retaliation, it{2019 U.S. Dist. LEXIS 10} was done out of anger and totally unnecessary to completing this crime."⁴⁶ Attorney Lyden-relying on Kyle Wunder's statement and other evidence suggesting Mr. Harmer did not intend for Mr. Herr to be murdered-did not present a character witness about Mr. Harmer's nonviolent tendencies. Attorney Lyden also did not request an accomplice credibility instruction about Cody Wunder. Attorney Lyden believed the case ultimately would be decided on whether the jury believed the story of Cody or Kyle Wunder.

The jury found Mr. Harmer guilty of second-degree murder, robbery, criminal conspiracy to commit robbery, burglary, and criminal conspiracy to commit burglary.⁴⁷ The court sentenced Mr. Harmer to life incarceration plus five to ten years, with no possibility of parole.⁴⁸ Attorney Lyden filed an appeal. In July 2014, the Pennsylvania Superior Court affirmed Mr. Harmer's conviction.⁴⁹ Attorney Lyden, along with co-counsel, sought allocatur but the Pennsylvania Supreme Court denied review.⁵⁰

Mr. Harmer seeks post-conviction relief without raising the conflict issue.

On January 7, 2016, Mr. Harmer *pro se* petitioned for collateral review under Pennsylvania's Post-Conviction Relief Act alleging ineffective{2019 U.S. Dist. LEXIS 11} assistance of trial counsel Lyden on five grounds.⁵¹ The court appointed Randall Miller as Mr. Harmer's PCRA counsel on January 11, 2016.⁵² Mr. Harmer did not raise the conflict as Attorney Miller did not discover the conflict. He later testified he found it "so unusual" for a lawyer to represent "one co-defendant in a criminal homicide, robbery, burglary and criminal conspiracy case and then subsequently represent another co-defendant, in that same series of events, as in this case."⁵³ Following a hearing, the PCRA court dismissed Mr. Harmer's petition.⁵⁴ Mr. Harmer appealed the dismissal to the Pennsylvania Superior Court. In June 2017, the Pennsylvania Superior Court affirmed dismissal of the PCRA suit.⁵⁵ The Pennsylvania Supreme Court denied review.⁵⁶

Mr. Harmer petitions for habeas relief

In January 2018, Mr. Harmer *pro se* petitioned for a writ of *habeas corpus* under 28 U.S.C. § 2254.⁵⁷ A month later, Mr. Harmer supplemented his *habeas* petition raising new counselled claims not asserted in his *pro se* PCRA petition.⁵⁸ In a new counselled claim, Mr. Harmer argued his trial counsel, Attorney Lyden, "labored under an actual conflict of interest that was never disclosed to Harmer and adversely{2019 U.S. Dist. LEXIS 12} affected his representation of Harmer" due to "trial counsel's prior representation of original co-defendant and eventual Commonwealth witness Cody Wunder."⁵⁹

We referred Mr. Harmer's petition to Judge Timothy R. Rice for a Report and Recommendation.⁶⁰ Judge Rice held two hearings on Mr. Harmer's new conflict of interest claim.⁶¹ Judge Rice heard testimony from Elizabeth Libby, Randall Miller, Susan Ford, Stephen Harmer, and Christopher Lyden.⁶² Judge Rice then issued a detailed Report and Recommendation recommending we deny Mr. Harmer's *habeas* petition.⁶³

Mr. Harmer now objects to Judge Rice's Report and Recommendation solely based on Judge Rice's findings on his conflict of interest claim.⁶⁴ Mr. Harmer specifically objects to Judge Rice's analysis focusing on one aspect of the governing test based on causation but not considering an inherent conflict. We agree with Judge Rice in denying and dismissing the *habeas* petition but for slightly different reasons; we find no viable alternative strategy on three of the challenged grounds and, even if two of the alternative strategies are viable, Mr. Harmer cannot show either causation or inherent conflict.

II. Analysis.

Mr. Harmer argues Judge Rice erred{2019 U.S. Dist. LEXIS 13} in the Report and Recommendation by requiring Mr. Harmer prove Attorney Lyden bypassed several viable alternative strategies "because of or "due to" loyalties to Cory Wunder when Mr. Harmer must only show these alternatives presented an inherent conflict for Attorney Lyden. We grant the objections in part to the extent Judge Rice limited the analysis to the "because of element without analyzing a possible inherent conflict. After *de novo* review and study of Mr. Harmer's objections, we find no basis for *habeas* relief. We agree with the remainder of Judge Rice's Report and Recommendation. We deny and dismiss Mr. Harmer's Petition but find limited grounds to issue a certificate of appealability.

A. We overrule Mr. Harmer's Objections to Judge Rice's Report and Recommendation.

Mr. Harmer argues Judge Rice incorrectly applied our Court of Appeals' standard for determining whether an actual conflict of interest exists. We first review the legal standard for a conflict of interest allowing *habeas* relief.

The Sixth Amendment guarantees a criminal defendant "shall . . . have the Assistance of Counsel for his defense."⁶⁵ "This right is accorded . . . 'not for its own stake, but because of the effect [counsel] has{2019 U.S. Dist. LEXIS 14} on the ability of the accused to receive a fair trial.'"⁶⁶ A convicted criminal defendant who feels his counsel failed to preserve the fairness of his trial may challenge his conviction on grounds of ineffective assistance of counsel.⁶⁷ To succeed on an ineffective assistance of counsel claim under *Strickland*, a criminal defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁶⁸ "Surmounting *Strickland's* high bar is never an easy task."⁶⁹

The Court has nonetheless developed exceptions to *Strickland's* "high bar."⁷⁰ For instance, a criminal defendant claiming his lawyer labored under a conflict of interest is not governed by *Strickland* and instead is governed by the Court's Sixth Amendment conflict of interest precedent.

The type of alleged conflict is an important distinction. Several courts of appeals apply a separate standard for successive, rather than concurrent, representation cases.⁷¹ Our Court of Appeals does not appear to have faced this issue yet. The Court of Appeals for the Fifth Circuit observed: "in a case of successive representation, both the temporal and substantive relationship between the two{2019 U.S. Dist. LEXIS 15} representations may be quite remote."⁷² The Supreme Court in *Mickens* acknowledged "[b]oth [Cuyler] and *Holloway* stressed the high probability of prejudice arising from multiple concurrent representation" before directing: "[n]ot all attorney conflicts present comparable difficulties."⁷³ The Court in *Mickens* recognized even the Federal Rules of Criminal Procedure "treat concurrent representation and prior representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney, but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation."⁷⁴

As Mr. Harmer argues his conviction should be reversed because of Attorney Lyden's conflict arising

from the undisclosed successive representation in the same criminal prosecution, we now review the Court's conflict of interest precedents for successive representations.

1. What standard applies in successive representations?

In *Holloway v. Arkansas*,⁷⁵ the Supreme Court considered whether a court appointed public defender who the {2019 U.S. Dist. LEXIS 16} court required, over the lawyer's objection, to represent three co-defendants with conflicting interests violated the criminal defendant's Sixth Amendment right to effective counsel. The Supreme Court found the conflict "which [the defendant] and his counsel tried to avoid by timely objections to the joint representation" undermined the adversarial process.⁷⁶ The Court held a conviction obtained after a trial court refuses inquiry into an objection about a lawyer's conflicting representation must be automatically reversed.⁷⁷ In reaching this ruling, the Court reaffirmed multiple representation does not *per se* violate the Sixth Amendment and restricted its automatic reversal rule to when a conflict of interest objection is raised and not adequately heard by the trial judge.

Two years later, in *Cuyler v. Sullivan*,⁷⁸ the Supreme Court considered whether a defendant's knowing and voluntary retention of conflicted counsel violated the Sixth Amendment. The criminal defendant in *Cuyler* knowingly hired the same attorneys as two men charged in his same murder. Neither the defendant nor his counsel objected to the representation. The jury found the defendant guilty. After direct appeal, the defendant filed a writ of *habeas corpus* arguing his {2019 U.S. Dist. LEXIS 17} counsel improperly labored under a conflict of interest due to his representation of the other charged murder defendants. The Supreme Court considered this case different from *Holloway* because the defendant did not raise a formal trial objection to the representation. The Court ruled the trial court held no duty to inspect the conflict without objection and "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."⁷⁹ Instead of presuming ineffective assistance, the Court held a criminal defendant "who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."⁸⁰

About twenty years later, in *Mickens v. Taylor*,⁸¹ the Supreme Court considered whether to grant automatic reversal to a convicted criminal defendant who, like Mr. Harmer, did not know of the conflict arising from his lawyer's earlier representation but the judge should have realized and alerted the defendant to the attorney's conflict. In *Mickens*, the Commonwealth of Virginia charged a criminal defendant with murder of a teenage boy facing criminal assault charges at the time of his death. The Commonwealth {2019 U.S. Dist. LEXIS 18} assigned the criminal murder defendant the same counsel who represented the teenage victim in his criminal assault case. The assigned counsel did not tell his client he represented the teenage victim.⁸² The judge, who oversaw both the murder case and the teenager's assault case, did not alert the criminal defendant of the lawyer's conflict. The jury found the defendant guilty. The defendant did not learn of his trial counsel's earlier representation of the victim until he filed for *habeas* relief.⁸³ The defendant argued for automatic reversal because he had no opportunity to object to his conflicted counsel and the trial judge knew about the lawyer's earlier representation.

The Supreme Court refused to grant automatic reversal to the defendant even when the defendant never had a chance to waive his lawyer's prior conflict of interest.⁸⁴ Justice Scalia, writing for the majority, explained "[p]etitioner's proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the [Cuyler]-mandated inquiry, makes little policy sense."⁸⁵ He reasoned: "the rule applied when the trial judge is not aware of the conflict (and {2019 U.S. Dist. LEXIS 19} thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance-thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown."⁸⁶ The Court held *Cuyler*

applied.⁸⁷ It found the defendant did not meet his burden under *Cuyler*.

The Supreme Court's holding in *Mickens* differs from our analysis because the defense counsel earlier represented the assault victim and not a co-defendant. Mr. Harmer argues Attorney Lyden labored under a conflict of interest based on his earlier representation of Cody Wunder in the same criminal prosecution. Mr. Harmer insists Attorney Lyden did not tell him he previously represented Cody Wunder in the same case and would not have hired him had he known.⁸⁸ Mr. Harmer does not claim he or Attorney Lyden raised an objection to the conflict at trial. Because there is no trial objection, *Holloway* does not apply.

Attorney Lyden's representation of Mr. Harmer after briefly representing Cody Wunder is a successive representation. This conflict is like *Mickens* because Mr. Harmer claims he did not know about the earlier representation during his trial. In *Mickens*,^{2019 U.S. Dist. LEXIS 20} the Supreme Court rejected adopting a new rule of automatic reversal and applied *Cuyler*. This case is unlike *Mickens* because defense counsel earlier represented the victim, not the co-defendant as we have today. It is difficult to predict whether trial counsel would be more likely to protect the interests of an earlier client who is a victim of the present client rather than a co-defendant of the present client. We may find a greater concern with a former client who is the victim. The interests more directly diverge. But even in the victim context, the Supreme Court directs in *Mickens* we should not issue *habeas* relief by finding a conflict automatically requires a new trial or release from the sentence; we also apply *Cuyler*.

2. Is there an inherent conflict?

We now analyze the standard applying to Mr. Harmer's conflict of interest claim arising from the successive representation of two men charged for the same criminal conduct as neither shot Mr. Herr but both are arguably accomplices. It is practice within our Court of Appeals to review any *habeas* conflict of interest claim under *Cuyler*.⁸⁹ To succeed under *Cuyler*, Mr. Harmer must prove "an actual conflict of interest adversely affected^{2019 U.S. Dist. LEXIS 21} his lawyer's performance."⁹⁰ An actual conflict "is evidenced if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action."⁹¹ Mr. Harmer must show an actual conflict between his duties to his former client and his duties to Mr. Harmer.⁹² Our Court of Appeals in *Gambino* directs a two-part test when determining whether a *habeas* petitioner is entitled to relief based upon his lawyer's alleged conflict of interest:

First, [the petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative.

Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.⁹³

Judge Rice found Mr. Harmer made a *prima facie* case of an actual conflict of interest and properly ordered an evidentiary hearing.⁹⁴ After evaluating the credibility of witnesses, Judge Rice then found Mr. Harmer did not meet the *Gambino* standard.^{2019 U.S. Dist. LEXIS 22}⁹⁵ Mr. Harmer agrees Judge Rice properly invoked *Gambino*. He objects to Judge Rice only considering whether Attorney Lyden did not present an alternative defense "due to" or "because of his loyalties or interests to Cody Wunder."⁹⁶ In other words, Mr. Harmer argues Judge Rice unfairly required Mr. Harmer to establish evidence demonstrating Attorney Lyden did not pursue a strategy because he consciously understood a conflict of interest with Cody Wunder.⁹⁷ Mr. Harmer argues the second element of *Gambino* only requires he prove a viable alternative strategy presented an inherent conflict for Attorney Lyden to pursue based upon his continuing obligation to Cody Wunder and does not require a showing of actual causation.⁹⁸ We agree.

To understand Attorney Lyden's inherent conflict argument, we must understand Attorney Lyden's loyalties and interests to Cody Wunder several months after his representation ended. Counsel does not address, and we are not aware of case law, defining actual conflict with former clients. We are instructed by our Court of Appeals and the decisions of other courts of appeals to review the Rules of Professional Conduct to understand Attorney Lyden's loyalties{2019 U.S. Dist. LEXIS 23} and interests to Cody Wunder.⁹⁹ The Pennsylvania Rules of Professional Conduct applying to Attorney Lyden determine a lawyer's continuing obligations to a former client:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

[...]

Comment (1) After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.¹⁰⁰ Under Rule 1.9, Attorney Lyden owes Cody Wunder two continuing duties: (1) a duty not to represent a different and materially adverse client in the same or similar action without consent; and, (2) a duty of confidentiality.

The first of these duties is not relevant. This duty required Attorney Lyden to obtain Cody Wunder's informed consent before accepting the representation of Mr. Harmer. Obtaining informed consent requires Attorney Lyden to{2019 U.S. Dist. LEXIS 24} "mak[e] all reasonable and necessary disclosures to the former client and, where appropriate, advis[e] the former client to seek independent legal advice as to whether to provide the requested informed consent or not."¹⁰¹ The rule is designed to protect the former client. Attorney Lyden's obligation to Cody Wunder regarding consent does not limit Attorney Lyden's trial and appellate strategies while representing Mr. Harmer.

The second of these duties warrants further study. Potential conflicts between Attorney Lyden's elected trial strategies and his duty to Cody Wunder are more fully evaluated by reviewing Attorney Lyden's duty of confidentiality. The Pennsylvania Rules of Professional Conduct instruct us on Attorney Lyden's duty of confidentiality: "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)."¹⁰² Attorney Lyden's duty of confidentiality to Cody Wunder involves protecting the confidentiality of information he received during his one-and-a-half hour representation of Cody Wunder.

Mr. Harmer's{2019 U.S. Dist. LEXIS 25} counselled supplemental petition identifies five potential alternative trial strategies Attorney Lyden could have employed but did not because of an "inherent conflict" between the viable strategies and Attorney Lyden's loyalty to Cody Wunder.¹⁰³ We disagree. We reviewed the five potential strategies and find each fails to meet the *Gambino* test. We overrule Mr. Harmer's Objections and accept Judge Rice's Recommendation to dismiss Mr. Harmer's Petition.

3. Mr. Harmer fails to show pursuit of a plea agreement presented a viable alternative strategy.

Mr. Harmer argues Attorney Lyden's failure to pursue a plea agreement for Mr. Harmer presented an inherent conflict with his loyalty to Cody Wunder. But Judge Rice found pursuing a plea agreement would not have been a viable strategy. As Judge Rice proved after an evidentiary hearing, the Commonwealth would not offer Mr. Harmer anything less than a life sentence without parole: "Harmer fails to establish that Lyden's prior representation of Cody caused him not to actively pursue a plea

agreement for Harmer. Lyden could not have secured a more favorable plea for Harmer because the Commonwealth was uninterested in offering Harmer anything but a {2019 U.S. Dist. LEXIS 26} life sentence without parole."¹⁰⁴

Based upon the Commonwealth's unwillingness to offer a plea to Mr. Harmer, Mr. Harmer fails to show Attorney Lyden could pursue a viable alternative strategy in his negotiating a potential plea for Mr. Harmer.¹⁰⁵ Attorney Lyden could not obtain a plea not considered by the Commonwealth. There is no basis to find the Commonwealth offered a plea. There is no basis to find Attorney Lyden could have offered a plea. This futile strategy is not viable. This argument does not meet the first *Gambino* test.¹⁰⁶ We agree with Judge Rice.

4. A more vigorous pursuit of an appeal did not present a viable alternative.

Mr. Harmer argues Attorney Lyden could have more vigorously pursued his appeal and his failure to do so arises from an inherent conflict with Attorney Lyden's loyalties to Cody Wunder. Attorney Lyden appealed to the Pennsylvania Superior Court and sought allocatur from the Pennsylvania Supreme Court. Neither appellate court found merit in the appeal.

Mr. Harmer still argues if Attorney Lyden vigorously litigated his appeal, and if the Pennsylvania Superior Court reversed his conviction, Cody Wunder may have obtained a commutation of his sentence {2019 U.S. Dist. LEXIS 27} if a court released Mr. Harmer following reversal. This argument is too tenuous. There is no basis to find Attorney Lyden could have done more on the appeal. We cannot find a viable strategy which requires we assume a more vigorous appeal would result in Mr. Harmer's release. Attorney Lyden pursued the appeal. Mr. Harmer does not present a "viable alternative strategy" by stating Attorney Lyden should have more "aggressive[ly]" pursued the appeal.¹⁰⁷ We agree with Judge Rice.¹⁰⁸

5. Mr. Harmer fails to show thorough cross-examination of witnesses is a viable alternative strategy or that Attorney Lyden's loyalty to Cody Wunder is in inherent conflict with this alternative strategy.

Mr. Harmer argues a thorough cross examination of several witnesses would have assisted his defense and this failure highlights an inherent conflict with Attorney Lyden's loyalty to Cody Wunder. Mr. Harmer argues Attorney Lyden only cross-examined four of fifteen Commonwealth witnesses, which Mr. Harmer argues alone confirms adverse effect.¹⁰⁹ But we cannot assess such a broad alternative strategy and determine its viability or whether such a strategy inherently conflicts with Attorney Lyden's continuing obligations {2019 U.S. Dist. LEXIS 28} to Cody Wunder. This argument fails.

Mr. Harmer argues three specific instances where Attorney Lyden should have conducted a more thorough cross-examination. Mr. Harmer cites Attorney Lyden's decision to not cross-examine Commonwealth witness Rebecca Hensel. Judge Rice found Attorney Lyden did not cross-examine Ms. Hensel but instead called Ms. Hensel as a defense witness; on direct examination as a defense witness, Ms. Hensel testified to the information Mr. Harmer sought to adduce on cross examination.¹¹⁰ In other words, Mr. Harmer's proposed alternative strategy of a more vigorous cross-examination did not present a viable alternative strategy because the jury heard the information.¹¹¹ We again agree with Judge Rice. The evidence reached the jury. More cumulative cross-examination on evidence is not viable. Mr. Harmer then argues Attorney Lyden failed to thoroughly cross-examine Commonwealth witness Rebecca Leimseider. Judge Rice found this argument fails because (1) Attorney Lyden extensively impeached Ms. Leimseider about her drug use; and, (2) Ms. Leimseider testified to the requested testimony on direct examination by the Commonwealth.¹¹² We have no basis to find a relationship with Cody {2019 U.S. Dist. LEXIS 29}

Wunder limited Attorney Lyden's examination of these two witnesses.¹¹³ We agree with Judge Rice.

Lastly, Mr. Harmer argues Attorney Lyden's continuing duty to Cody Wunder prevented a more thorough cross-examination of Cody Wunder when called by the prosecution. Mr. Harmer argues we must "conclusively presume" Attorney Lyden "received privileged information during his prior representation of [Cody Wunder] regardless of the length of that representation."¹¹⁴ It is unclear whether we apply this presumption in conducting a *Gambino* analysis. Courts apply this presumption when considering a criminal defendant's waiver of his lawyer's conflict of interest.¹¹⁵ Even if we apply the presumption, Mr. Harmer's argument fails. Reviewing Attorney Lyden's cross-examination of Cody Wunder, we find no viable alternative strategy. Attorney Lyden impeached Cody Wunder about the Commonwealth offering him a guilty plea of second rather than first degree murder even though he directed his brother to shoot Mr. Herr.¹¹⁶ Attorney Lyden also cross-examined Cody Wunder about his mental state after being shot and lying to police about the cause of his gunshot wound.¹¹⁷ We do not see other viable grounds for cross-examination^{2019 U.S. Dist. LEXIS 30} of Cody Wunder. Mr. Harmer offers none. We agree with Judge Rice as to the lack of a viable alternative strategy on the cross-examinations.

6. Failure to present evidence of Mr. Harmer's nonviolent character did not present an inherent conflict with Attorney Lyden's loyalty to Cody Wunder.

Mr. Harmer argues Attorney Lyden's unwillingness to present Mr. Harmer's nonviolent character presented an inherent conflict with his loyalty to Cody Wunder. Presenting evidence of nonviolent character is a viable alternative strategy. We now turn to *Gambino's* second test.

While we find presenting a nonviolent character witness to be a viable alternative strategy, we find no inherent conflict between not pursuing this strategy and Attorney Lyden's duty to Cody Wunder. His loyalty does not extend this far. Attorney Lyden is only limited by his duty of confidentiality to Cody Wunder. We cannot see how this strategy would be evidence of an actual conflict based on confidentiality. Even assuming Cody Wunder discussed Mr. Harmer's violent character during the brief time Attorney Lyden represented him, Attorney Lyden could still have located a different witness to testify to Mr. Harmer's nonviolent^{2019 U.S. Dist. LEXIS 31} character. We see no reason Attorney Lyden would be inherently conflicted from presenting this trial strategy based upon his continuing duty of confidentiality to Cody Wunder.

We also agree with Judge Rice's reasoning Attorney Lyden did not present this evidence "because of his conflicting loyalties."¹¹⁸ Judge Rice explained Attorney Lyden depicted Mr. Harmer as nonviolent throughout the trial: "Lyden consistently emphasized Cody's and Kyle's violent nature, calling them 'a couple cold-blooded killers.' He contrasted them with Harmer, who 'did not participate in any way in the decision to kill [Herr].'"¹¹⁹ This viable alternative strategy fails the *Gambino* second test.

7. Failure to request an accomplice liability instruction did not present an inherent conflict with Attorney Lyden's loyalty to Cody Wunder.

Mr. Harmer argues Attorney Lyden's failure to request an accomplice liability instruction explaining Cody Wunder's involvement in the crime presented an inherent conflict with Attorney Lyden's loyalty to former client. We agree with Mr. Harmer requesting an accomplice liability instruction is a viable alternative strategy. We turn to *Gambino's* second test.

While a viable alternative, we are^{2019 U.S. Dist. LEXIS 32} mindful both Cody Wunder and Mr. Harmer are arguably accomplices. Cody Wunder's brother fatally shot Mr. Herr. There is no conflict in the relative legal culpability of Cody Wunder and Mr. Harmer. Attorney Lyden's loyalty to Cody Wunder does not extend so far to warrant a finding of inherent conflict. Attorney Lyden only owed Cody Wunder a duty of confidentiality. This duty would not conflict with Attorney Lyden's ability to request an

accomplice liability instruction. Weeks before Mr. Harmer's trial, Cody Wunder (represented by his Attorney Miller for the past several months) accepted a plea deal. Attorney Lyden impeached Cody Wunder on accepting the plea for second degree murder when originally charged with first degree murder.¹²⁰ There is no conceivable confidential communication limiting Attorney Lyden's ability to employ this trial strategy of requesting an accomplice instruction. Both of his clients would have enjoyed the accomplice liability instruction. We overrule Mr. Harmer's objection.

B. We incorporate the remainder of Judge Rice's Report and Recommendation.

Mr. Harmer does not object to Judge Rice's findings regarding Mr. Harmer's felony murder instruction due process argument^{2019 U.S. Dist. LEXIS 33} or his cumulative trial counsel error argument.¹²¹ We agree with Judge Rice's findings and recommendation on those challenges.

C. We grant a certificate of appealability.

"Unless a circuit justice or judge issue a certificate of appealability, an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.¹²² When a district court rejects constitutional claims on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."¹²³

After careful consideration of the state court record and two evidentiary hearings in this Court, we find Mr. Harmer has not shown a basis for *habeas* relief after finding we must apply *Cuyler* and *Gambino*. But neither of those cases involved undisclosed successive representation of co-defendants in the same criminal prosecution.¹²⁴ Trial strategies may differ based on whether the earlier client is the victim or a co-defendant. We do not see evidence of ineffective counsel by Attorney Lyden. But we remain bothered by Attorney Lyden's apparent failure to^{2019 U.S. Dist. LEXIS 34} disclose the earlier representation to Mr. Harmer and obtain his consent. We cannot imagine why a lawyer would not disclose this fact. He read the file and knew the case. Mr. Harmer's family contacted Attorney Lyden apparently after he stopped representing Cody Wunder. The testimony conflicts but Judge Rice found Attorney Lyden never mentioned his earlier role.

Under the present actual conflict rule, we find no inherent conflict under *Cuyler v. Sullivan*.¹²⁵ *Cuyler* involved a disclosed earlier representation and effective knowledge of the earlier representation. *Mickens* involved an earlier representation but of a victim and not a codefendant. We are not aware of authority, and counsel offer none, involving successive representation of co-defendants in the same criminal case. While we read *Mickens* to apply *Cuyler* and not automatically find ineffective assistance, we cannot find Mr. Harmer's claims as to Attorney Lyden's conduct are not debatable in this specific context. We grant a certificate of appealability.

III. Conclusion.

In the accompanying Order, we overrule Mr. Harmer's objections in part and grant the objections in part but find granting the objections in part does not warrant^{2019 U.S. Dist. LEXIS 35} granting the petition. We adopt Judge Rice's Report and Recommendation in part. We deny and dismiss Mr. Harmer's Petition for a writ of *habeas corpus*. We issue a certificate of appealability.

ORDER

AND NOW, this 29th day of August 2019, upon careful and independent consideration of the Petition for a writ of *habeas corpus* (ECF Doc. No. 1), Petitioner's first supplemental *habeas* Petition (ECF Doc. No. 5), Petitioner's second supplemental *habeas* Petition (ECF Doc. No. 9), Response (ECF Doc. No. 15), Petitioner's Reply (ECF Doc. No. 16), United States Magistrate Judge Timothy R. Rice's July 12, 2019 Report and Recommendation (ECF Doc. No. 40), Petitioner's Objections (ECF Doc. No.

43), Opposition (ECF Doc. No. 45), Petitioner's Reply (ECF Doc. No. 46), and for reasons in the accompanying Memorandum, it is **ORDERED**:

1. Judge Rice's July 12, 2019 Report and Recommendation (ECF Doc. No. 40) is **APPROVED in part**;
2. We **overrule** Petitioner's Objections (ECF Doc. No. 43) **in part and grant** the Objections **in part** but find the granted Objections do not warrant granting the Petition;
3. We **DENY** and **DISMISS** the Petition for a writ of *habeas corpus* (ECF Doc. No. 1) and first and second supplemental Petitions{2019 U.S. Dist. LEXIS 36} (ECF Doc. Nos. 5, 9) with prejudice;
4. We issue a certificate of appealability as to Petitioner's claim of his trial counsel's inherent conflict automatically requiring a finding of ineffective assistance under the Sixth Amendment based on an undisclosed successive representation of a co-defendant in the same criminal case;¹ and,
5. The Clerk of Court shall **CLOSE** this case.

/s/ Kearney

KEARNEY, J.

US Dist LEXIS 147175">Footnotes

1

Record, Lancaster County Trial, N.T. C. Wunder, Aug. 8, 2013, at 474-82.

2

Id. at 503-05.

3

Id. at 488-89, 493-98.

4

Id. at 521.

5

Id. at 522.

6

Id. at 523-25.

7

Id. at 525-27.

8

Id. at 526-27.

9

Id.

10

Id. at 548-49.

11

ECF Doc. No. 25, p. 1-2 ¶ 2.

12

ECF Doc. No. 34, at 155-56, 175, 177 (N.T. C. Lyden, Feb. 15, 2019).

13

Id. at 63-64 (N.T. R. Miller, Feb. 15, 2019).

14

Id. at 133-38 (N.T. C. Lyden, Feb. 15, 2019).

15

Id. at 137.

16

Id. at 138.

17

Id. at 133-38.

18

Id.

19

ECF Doc. No. 25, p. 5 ¶ 24(d)-(e).

20

Id.

21

ECF Doc. No. 34, at 102-04 (N.T. S. Harmer, Feb. 15, 2019).

22

Id. at 104.

23

Attorney Lyden testified at the February 15, 2019 evidentiary hearing:

Q: So, when you discovered, in December of 2012, while you were representing Mr. Harmer, that you had been appointed counsel for Mr. Wunder, what did you do at that point?

A: I'm sorry. Could you repeat that, please?

Q: In December 2012, when you discovered{2019 U.S. Dist. LEXIS 6} - when you received the information that had been filed in Cody Wunder's case, what did you do at that time, since you were already representing Stephen Harmer?

Q: Well, I - I talked to him about it.

THE COURT: Talked to who?

A: Mr. Harmer, about it.

Q: Can you provide us with a few more details about the context of the conversation?

A: Well, I said that the Court had appointed me, to - to - to his - to the co-defendant in the case. I said that I'd contacted bail and I arranged to have myself removed from the case and have another attorney, you know, another attorney assigned to the case.

A: Well, I said that the Court had appointed me, to - to - to his - to the co-defendant in the case. I

said that I'd contacted bail and I arranged to have myself removed from the case and have another attorney, you know, another attorney assigned to the case.

I did tell him I didn't see any problem with me continuing to represent him, if he wanted me to continue to represent him. I did give him the option to have - to have, you know, to have me removed, if he wanted me to, but I didn't see a problem with me continuing with the case at that time.

Q: Why did you not see a problem with yourself continuing as{2019 U.S. Dist. LEXIS 7} counsel?

A: Well, I hadn't met the - Mr. Wunder. I didn't view him as a - former client. I didn't think there was an attorney-client relationship there. That was just the way I viewed it.

So, there wasn't anything that would prevent me from zealously representing Mr. Harmer, if he wanted me to continue. ECF Doc. No. 35, at 128-29 (N.T. C. Lyden, Feb. 15, 2019). At this same evidentiary hearing, Mr. Harmer testified:

Q: In any of the times that the two of you met, or spoke, did he ever tell you that he had represented Cody Wunder?

A: Not once. That never came up.

Q: Did he ever discuss with you, waiving a conflict of interest?

A: I knew nothing of that. I didn't even know that was something that existed. *Id.* at 104 (N.T. S. Harmer, Feb. 15, 2019).

24

Id. at 102-04 (N.T. S. Harmer, Feb. 15, 2019).

25

Id. at 128 (N.T. C. Lyden, Feb. 15, 2019).

26

See *id.* at 102-04 (N.T. S. Harmer, Feb. 15, 2019); *id.* at 128 (N.T. C. Lyden, Feb. 15, 2019).

27

ECF Doc. No. 40, at p. 4, fn. 1 (citations omitted).

28

ECF Doc. No. 25 at p. 2 ¶ 7.

29

Id. at p. 2-3 ¶ 8.

30

Commonwealth v. Harmer, No. CP-36-CR-4640-2012 (Lancaster C.C.P. Sept. 1, 2016).

31

Id.

32

See *generally* Record, Lancaster County Trial, N.T., Aug. 6, 2013 (calling five witnesses); Record, Lancaster County Trial, N.T. Aug. 6, 2013 (calling four witnesses); Record, Lancaster County Trial, N.T. Aug. 8, 2013 (calling four witnesses); Record, Lancaster County Trial, N.T. Aug. 9, 2013 (calling two witnesses).

33

Record, Lancaster County Trial, N.T. C. Wunder, Aug. 8, 2013, at 474-82.
34

Id. at 560-72.
35

Id. Cody Wunder told police he had been shot in a drug deal when taken to the hospital after being shot by Mr. Herr. *Id.* at 565-67.
36

Record, Lancaster County Trial, N.T. M. Leimseider, Aug. 6, 2013, at 310.
37

Id. at 314-20.
38

Record, Lancaster County Trial, N.T. R. Hensel, Aug. 7, 2013, at 436, 438.
39

Record, Lancaster County Trial, N.T. R. Hensel, Aug. 9, 2013, at 706.
40

Record, Lancaster County Trial, N.T. K. Wunder, Aug. 9, 2013, at 696.
41

Id. at 697.
42

Record, Lancaster County Trial, N.T. P. Strosser, Aug. 9, 2013, at 703.
43

Commonwealth v. Harmer, No. CP-36-CR-4640-2012, 2016 Pa. Dist. & Cnty. Dec. LEXIS 18262 (Lancaster C.C.P. Sept. 1, 2016).
44

Record, PCRA Hearing, N.T. C. Lyden, May 12, 2016, at 18.
45

Record, Lancaster County Trial, N.T. Aug. 12, 2013, at 724-25.
46

Id. at 726.
47

ECF Doc. No. 25, p. 3 lj 9.
48

Id. at p. 3 ¶ 10.
49

Id. at p. 3 ¶ 14-15.
50

Id. at p. 3 ¶ 16-17.
51

Id. at p. 4 ¶ 18; *Commonwealth v. Harmer*, No. CP-36-CR-4640-2012, 2016 Pa. Dist. & Cnty. Dec.

LEXIS 18262 (Lancaster C.C.P. Sept. 1, 2016). Mr. Harmer contended he received ineffective counsel because his counsel failed to: (1) request Jury Instruction (Criminal) 4.01 (the "accomplice credibility" instruction); (2) prevent or otherwise challenge evidence of his bad acts; (3) object to improper bolstering of Cody Wunder; (4) present witnesses to testify to his nonviolent character; and (5) object to hearsay statements made outside the scope of any conspiracy. *Id.* at p. 7.

52

ECF Doc. No. 25, p. 4 ¶ 19.

53

ECF Doc. No. 34, at 57 (N.T. R. Miller, Feb. 15, 2019).

54

ECF Doc. No. 25, p. 4 ¶ 23.

55

Id.

56

Id.

57

ECF Doc. No. 1.

58

ECF Doc. No. 5; ECF Doc. No. 9.

59

ECF Doc. No. 9. While Mr. Harmer failed to raise this claim in his PCRA petition, conceding a procedural default, Mr. Harmer argued Judge Rice should still review his claim because he could show cause for the default and prejudice from the failure to review. Judge Rice found Mr. Harmer showed cause. ECF Doc. No. 40, at p. 11. Mr. Harmer's PCRA counsel, Randall Miller, did not discover Attorney Lyden's conflict. ECF Doc. No. 34, at 57 (N.T. R. Miller, Feb. 15, 2019). Judge Rice also found Mr. Harmer sufficiently proved prejudice to excuse his default "because the [conflict] claim is substantial." ECF Doc. No. 40, at p. 12. We agree with Judge Rice's analysis.

60

ECF Doc. No. 2.

61

ECF Doc. No. 34.

62

Id.

63

ECF Doc. No. 40

64

ECF Doc. No. 43.

65

U.S. Const. amend. VI.

66

Mickens v. Taylor, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (quoting *United*

States v. Cronin, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

67

Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

68

Id.

69

Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

70

Id.

71

See *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir. 1987), *cert. denied*, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 133 (1987) ("(1) [Where] counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of defendant, or (2) [where] counsel actually learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case."); see also *Enoch v. Gramley*, 70 F.3d 1490 (7th Cir. 1995) ("[The Eleventh Circuit's] approach makes sense and we adopt this rationale."); *Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994) (quoting *Mannhalt v. Reed*, 847 F.2d 576, (9th Cir. 1988), *cert. denied*, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (1988)) ("In cases of successive representation, 'conflicts of interests may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties.'").

72

Perillo v. Johnson, 205 F.3d 775, 798 (5th Cir. 2000).

73

Mickens v. Taylor, 535 U.S. 162, 175 (2002).

74

Id. at 175 (citing FRCP 44(c)).

75

435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978).

76

Id. at 490.

77

Id. at 488.

78

446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

79

Id. at 348.

80

Id.

81

535 U.S. 162 (2002).

82

Id. at 165 ("Saunders did not disclose to the court, his counsel, or petition that he had previously represented Hall.").

83

Id. ("[P]etitioner learned about Saunders' prior representation when a clerk mistakenly produced Hall's file to federal habeas counsel.").

84

Id. at 173-74 ("Since this was not a case in which (as in *Holloway*) counsel protested his inability simultaneously to represent multiple defendants; and since the trial court's failure to make the [Cuyler]-mandated inquiry does not reduce the petitioner's burden of proof; it was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance.").

85

Id. at 172-173.

86

Id. at 173.

87

Justice Scalia, writing for the Court, questioned what has become the "expansive application" of *Cuyler* to cases not involving a concurrent active representation case. *Id.* at 175.

88

ECF Doc. No. 34, at 102-04 (N.T. S. Harmer, Feb. 15, 2019).

89

E.g., *Chester v. Comm'r of Pa. Dep't of Corr.*, 598 Fed. Appx. 94 (2015) (applying *Cuyler* to petitioner's claim trial counsel labored under a conflict of interest because trial counsel had a pending DUI in the trial court where he represented the criminal defendant).

90

Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

91

United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988).

92

Wood v. Georgia, 450 U.S. 261, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981).

93

Gambino, 864 F.2d at 1070 (quoting *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985)).

94

Simon v. Government of the Virgin Islands, 929 F.3d 118 (3d Cir. 2019) (quoting *Rivera-Moreno v. Gov't of VI*, 61 V.I. 279, 313 (2014)) ("The trial court should conduct a hearing where a habeas applicant 'has made out a *prima facie* case for *habeas corpus* relief that is not procedurally barred[.]'").

95

ECF Doc. No. 40.

96

ECF Doc. No. 43.

97

Id. at p.3 ("We never contended that there was such a direct cause-and-effect, because the law does not require that . . .").

98

McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004) ("A defendant or habeas petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests.").

99

United States v. Gambino, 864 F.2d 1064, 1082 n.8 (3d Cir. 1988) (Mansmann, J., dissenting); see also *Perillo v. Johnson*, 205 F.3d 775, 798 (5th Cir. 2000). We note our objective here is not to "enforce the Canons of Legal Ethics," but to understand ethical obligations to apply *Cuyler*'s actual conflict test. Our Court of Appeals, in *Gambino*, adopted a *Cuyler* test requiring our review of an attorney's "inherent conflicts." *Gambino*, 864 F.2d at 1070. To review an attorney's "inherent conflicts" we must understand the attorney's continuing obligation to the former client. We consult canons of legal ethics in this pursuit but do not do so to "enforce" the rules to Attorney Lyden.

100

204 Pa. Code Rule 1.9.

101

Dougherty v. Philadelphia Newspapers, LLC, 2014 PA Super 24, 85 A.3d 1082, 1094 (Pa. Super. 2014).

102

204 Pa. Code Rule 1.6.

103

ECF Doc. No. 43.

104

ECF Doc. No. 40, at p. 17; see also *id.* at p.3 ("[Lancaster County Assistant District Attorney Todd Brown] testified that the District Attorney's office decided that they would offer all three defendants only a plea involving life in prison without parole.").

105

Burger v. Kemp, 483 U.S. 776, 785, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (ruling attorney held no viable alternative to pursue plea when "[t]he notion that the prosecutor would have been receptive to a plea bargain is completely unsupported in the record.").

106

Even assuming this strategy meets the first *Gambino* test, Judge Rice found Mr. Harmer "fail[ed] to establish that Lyden's prior representation of Cody caused him not to actively pursue a plea agreement for Harmer." ECF Doc. No. 40, at p. 17. We agree. We also find no inherent conflict between pursuing a plea for Mr. Harmer and Attorney Lyden's loyalties to Cody Wunder.

107

ECF Doc. No. 43, at p. 20.

108

Even assuming a more vigorously pursued appeal is a "viable alternative strategy," this argument does not satisfy *Gambino*'s second test. As Judge Rice found: "Harmer again fails to establish that Lyden's inactions were motivated by his loyalty to Cody." ECF Doc. No. 40, at p. 21. We agree. We also find Attorney Lyden's continuing duty of confidentiality to Cody Wunder does not inherently

conflict with his more vigorous appeal pursuit. Attorney Lyden would be able to actively pursue an appeal for Mr. Harmer notwithstanding a continuing duty of confidentiality to Cody Wunder.
109

ECF Doc. No. 10, at p. 10.
110

ECF Doc. No. 40, at pp. 17-18.
111

United States v. Morelli, 169 F.3d 798 (3d Cir. 1999) ("It also concluded that Porotsky's statements were 'so cumulative and peripheral' that impeaching them would have at best made no difference.").
112

ECF Doc. No. 40, at p. 17.
113

Even if a more thorough cross examination meets the first *Gambino* test, it cannot meet the second test. Attorney Lyden's continuing duty of confidentiality to Cody Wunder does not inherently conflict with a more thorough cross examination of these witnesses. It is impossible here Attorney Lyden could elicit confidential attorney-client communications between himself and Cody Wunder through questioning a third-party.
114

ECF Doc. No. 10, at p. 8 (citing *United States v. Massimino*, 832 F. Supp. 2d 510, 516 (E.D. Pa. 2011)).
115

E.g., *United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980) (applying presumption to criminal defendant's decision to waive effective representation).
116

Record, Lancaster County Trial, N.T.C. Wunder, Aug. 8, 2013, at 560-73.
117

Id.
118

ECF Doc. No. 40, at pp. 19-20.
119

Id. at p.19.
120

Record, Lancaster County Trial, N.T. C. Wunder, Aug. 8, 2013, at 560-67.
121

ECF Doc. No. 40, at pp. 22-29.
122

28 U.S.C. § 2253(c)(1).
123

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).
124

We are unaware of precedent from the Supreme Court or our Court of Appeals where the *habeas*

petitioner claims his lawyer labored under an undisclosed conflict of interest based on an earlier representation of a co-defendant in the same case.

125

446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

1

See 28 U.S.C. § 2253(c)(2),(3).

**Appendix
"C"**

Opinion of Magistrate Judge Timothy R. Rice of the
United States District Court in the Eastern District of
Pennsylvania

STEPHEN HARMER, Petitioner, v. MARK CAPOZZA, et al., Respondents.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
2019 U.S. Dist. LEXIS 119907
CIVIL ACTION No. 18-175
July 12, 2019, Decided
July 12, 2019, Filed

Editorial Information: Subsequent History

Adopted by, in part, Rejected by, in part, Objection overruled by, in part, Objection sustained by, in part, Writ of habeas corpus denied, Dismissed by, Certificate of appealability granted Harmer v. Capozza, 2019 U.S. Dist. LEXIS 147175 (E.D. Pa., Aug. 29, 2019)

Editorial Information: Prior History

Commonwealth v. Harmer, 174 A.3d 79, 2017 Pa. Super. Unpub. LEXIS 2332 (June 16, 2017) Commonwealth v. Harmer, 2014 Pa. Super. Unpub. LEXIS 2890 (July 24, 2014)

Counsel {2019 U.S. Dist. LEXIS 1} For STEPHEN M. HARMER, Petitioner:
DANIEL ALAN SILVERMAN, LAW OFFICES DANIEL SILVERMAN & ASSOC,
PHILADELPHIA, PA.

For MARK CAPOZZA, THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA, Respondents: AMARA M. RILEY, LANCASTER COUNTY
DISTRICT ATTY OFFICE, LANCASTER, PA; TRAVIS S. ANDERSON, OFFICE OF
DISTRICT ATTORNEY OF LANCASTER COUNTY, LANCASTER, PA.

For THE DISTRICT ATTORNEY OF THE COUNTY OF
LANCASTER, Respondent: AMARA M. RILEY, LANCASTER COUNTY DISTRICT ATTY
OFFICE, LANCASTER, PA; ANDREW JAMES GONZALEZ, LANCASTER COUNTY
DISTRICT ATTORNEY'S OFFICE, LANCASTER, PA; TRAVIS S. ANDERSON, OFFICE OF
DISTRICT ATTORNEY OF LANCASTER COUNTY, LANCASTER, PA.

Judges: TIMOTHY R. RICE, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: TIMOTHY R. RICE

Opinion

REPORT AND RECOMMENDATION

TIMOTHY R. RICE U.S. MAGISTRATE JUDGE

Petitioner Stephen Harmer, a prisoner at the State Correctional Institution in Fayette, Pennsylvania, has filed a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging his constitutional rights were violated by: (1) trial counsel's conflict of interest; (2) jury instructions on felony murder; and (3) trial counsel's cumulative errors. Although Harmer's trial counsel previously represented Harmer's co-defendant, {2019 U.S. Dist. LEXIS 2} who later became a key witness in Harmer's trial, Harmer fails to demonstrate that counsel bypassed viable strategies in his case because of his loyalty to his former client. See Duncan v. Morton, 256 F.3d 189, 197 (3d Cir. 2001).

Thus, counsel's representation of Harmer did not violate his Sixth Amendment right to effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). The court's jury instructions on felony murder and counsel's alleged cumulative errors also did not result in a violation of Harmer's constitutional rights.

I respectfully recommend Harmer's habeas claims be denied.

FACTUAL AND PROCEDURAL HISTORY

On August 29, 2012, Harmer and brothers Cody and Kyle Wunder were arrested and charged with murder, burglary, robbery, conspiracy, and other offenses related to the August 17 murder of Douglas Herr in Lancaster County. See N.T. 2/15/2019 Evid. Hrg. at 7-8, Petr. Ex. 1, 2/7/2019 Stip. 1111-2. The following day, the arrests were front page news on the Lancaster Intelligencer Journal. See N.T. 2/15/2019 Evid. Hrg. at 171, Petr. Ex. 17, 8/30/2012 Intelligencer Journal.

On September 6, 2012, attorney Christopher Lyden was appointed to represent Cody Wunder in the murder case. See N.T. 2/15/2019 Evid. Hrg. at 155-56, 175, 177, Petr. Ex. 4, 9/6/2012 Order appointing{2019 U.S. Dist. LEXIS 3} Lyden, Petr. Ex. 3, 9/6/2012 Email to Lyden about appointment. A few weeks later, Lyden billed the court for 1.5 hours of work on behalf of Cody. See N.T. 2/15/2019 Evid. Hrg. at 124, Petr. Ex. 1, 9/30/2012 Invoice. On September 10, Lyden made two calls and reviewed documents and a letter and on September 26, Lyden made two additional calls and performed research. See 9/30/2012 Invoice. Lyden could not recall the specifics of this work, but denied that it involved any contact with Cody or his family. See N.T. 2/15/2019 Evid. Hrg. at 124, 128, 134-36.

The September 10 preliminary hearing for all three defendants was continued until October 5. 2/7/2019 Stip. ¶ 3. On September 12, Lyden received copies of the complaint, affidavit of probable cause, and preliminary hearing notice for Cody. See N.T. 2/15/2019 Evid. Hrg. at 192, 195-97, Petr. Ex. 18, 9/12/2012 Fax Cover Sheet. Lyden testified that on September 26, he likely reviewed those documents, which set forth the charges against all three defendants. See N.T. 2/15/2019 Evid. Hrg. at 200-01, Petr. Ex. 31, Cody Compl. and Aff.

On October 3, 2012, attorney Cory J. Miller notified the court that he had been retained to represent Cody and{2019 U.S. Dist. LEXIS 4} that he would attend the October 5 preliminary hearing on Cody's behalf. Petr. Ex. 6, 10/3/2012 Letter; Petr. Ex. 19, Commonwealth v. Wunder, Magisterial District Judge Dkt. at 4. On October 5, all three defendants separately waived their preliminary hearings. 2/7/2019 Stip. ¶ 4. Lyden did not appear or act on behalf of Cody for that hearing.

After his arrest, Harmer obtained attorney Mark Walmer to represent him. See 8/31/2012 Letter to M.D.J. S. Mylin. A few weeks later, Harmer, while represented by Walmer, provided a recorded statement to the Lancaster County District Attorney's office about his and the Wunder brothers' involvement in Herr's murder. See N.T. 7/12/2019 Evid. Hrg.; 2/15/2019 Evid. Hrg. Ex. 32, 9/14/2012 S. Harmer Statement. Assistant District Attorney Todd Brown, who now is the Lancaster County Chief Public Defender, testified that some of the information in Harmer's statement was inaccurate and self-serving. See N.T. 7/12/2019 Evid. Hrg. Brown testified that the District Attorney's office decided that they would offer all three defendants only a plea involving life in prison without parole. See id.

In October 2012, Harmer's family contacted Lyden about representing Harmer. See N.T. 2/15/2019 Evid. Hrg. at 101-04. After Lyden{2019 U.S. Dist. LEXIS 5} met with Harmer in jail, Harmer and his family retained him. See id. at 83, 102-04. Lyden did not tell Harmer or his family that he had represented Cody in the same case or ask Harmer to waive a conflict of interest. See id. at 89, 104. Harmer testified that he would not have hired Lyden if he had known of his previous representation of Cody. See id. at 105.

On November 7, 2012, Lyden entered his appearance on behalf of Harmer. See 2/7/2019 Stip. ¶ 5. Approximately one month later, Lyden received the charging Information for Cody in his courthouse mailbox. See N.T. 2/15/2019 Evid. Hrg. at 115-18; Pet. Ex. 22 Cody Wunder Crim. Dkt. at 6. Realizing that he was still listed as Cody's attorney despite his representation of co-defendant Harmer, Lyden directed the court to remove him as Cody's attorney. See N.T. 2/15/2019 Evid. Hrg. at 115-18, Pet. Ex. 21, 4/7/2018 Lyden Aff. ¶¶ 19-20.

Around this same time, Lyden said that he informed Harmer about his appointment to represent Cody. See N.T. 2/15/2019 Evid. Hrg. at 128-29. He testified that he advised Harmer that he could withdraw from the case, but also explained that he did not see any problem with continuing because he did not believe he had ever formed an attorney-client relationship{2019 U.S. Dist. LEXIS 6} with Cody.¹ See id. Lyden continued as Harmer's attorney.

In April 2013, Kyle and Cody each provided statements about Hen-'s murder. See N.T. 7/12/2019 Evid. Hrg. In July 2013, Cody pled guilty to second-degree murder, robbery, burglary, and conspiracy to commit robbery and burglary, and agreed to a sentence of life without parole. See 2/7/2019 Stip. ¶ 7; Resp. Br., Ex. I, C. Wunder Plea Agreement. The plea was conditioned on Cody providing complete and truthful testimony "regarding the death of Douglas Herr and the circumstances related thereto . . . in any and all criminal proceedings in which he appears as a witness." C. Wunder Plea Agreement. The same day, Kyle Wunder pled guilty to first-degree murder. 2/7/2019 Stip. ¶ 8. In exchange for the two pleas, the Commonwealth agreed not to seek the death penalty for Kyle, and deferred sentencing for Cody and Kyle. Id.

In August 2013, Lyden represented Harmer at trial where Cody was the Commonwealth's primary witness. During his opening statement, Lyden conceded that Harmer had conspired with Cody and Kyle to rob Herr and should be found guilty for that conduct, but contended that Harmer did not "participate in any way in the decision{2019 U.S. Dist. LEXIS 7} to kill Herr." N.T. 8/6/2013 at 153. Lyden labeled Kyle and Cody "just a couple of cold-blooded killers" who murdered Herr through "an act of retaliation . . . done out of anger and totally unnecessary to completing [the robbery]." Id. Lyden told the jury that the key issue was whether Kyle killed Herr in furtherance of the robbery and Kyle's own statement would show that he shot Herr in retaliation for shooting Cody rather than to complete the robbery.² See id. at 154.

Cody testified that he and Harmer decided to rob Herr after learning Herr kept a large sum of money in a safe in his bedroom. N.T. 8/8/2013 at 474-82. Cody eventually included Kyle in the plan and on August 17, the brothers drove to Harmer's home in Lancaster with a shotgun, pistol, pry bar, sledgehammer, masks, and gloves. Id. at 488-89, 493-98. Later that night, the three men went to a local bar, where Harmer sent text messages to Herr's daughter, Lisa, to determine whether anyone was at Herr's home. Id. at 503-05. After learning that Lisa and others who lived in the house were gone, the three men proceeded to Herr's home. Id. at 507-08. Harmer, however, told the Wunder brothers that Herr was probably home if there was a pickup truck behind the house. Id. at 508-09.

After parking{2019 U.S. Dist. LEXIS 8} in front of Herr's house, Cody and Kyle walked to the house with the shotgun, sledgehammer, pry bar, masks, and gloves. Id. at 514-15. Harmer remained in the truck because his foot was injured. Id. at 515-16. Cody and Kyle observed a pickup truck parked behind the house and realized Herr may be home, but proceeded to enter the house anyway. Id. at 518-19. Cody broke the door with the pry bar and walked to the back bedroom. Id. at 519-21. When Herr approached Cody from a side hall, Kyle knocked him out with the back of his shotgun. Id. at 521-22.

The brothers entered the bedroom and found a safe. Id. at 523. Cody testified that while Kyle fired

shots at the safe lock, he collapsed and realized he had been shot in the leg by Herr. Id. at 523-26. Cody directed Kyle to shoot Herr because he feared being shot again. Id. at 526-27. Kyle killed Herr with a single shot. Id. at 527. The brothers returned to the bedroom, opened the safe, and removed two lock boxes. Id. at 52-29. After leaving the house, Cody collapsed on the deck and Kyle helped him to the street, where Harmer picked them up. Id. at 529-34. Harmer went home and Kyle took Cody to the hospital, where Cody told police he had been shot during a drug deal. Id. 536, 542-44. Kyle found approximately \$200,000 in one of the lock boxes. Id. at 546. He gave approximately \$30,000 to Harmer and kept{2019 U.S. Dist. LEXIS 9} the rest for himself and Cody. Id. at 549-51.

Cody admitted on cross-examination that he was in shock after being shot by Herr. Id. at 560-62. Cody also conceded that he lied to the police about how he had been shot and that Harmer contradicted Cody's story about the drug deal when he spoke to the police. Id. at 564-67. Lyden cross-examined Cody about the money he obtained from the robbery, how he apologized to Kyle for getting him involved, and how Kyle could have obtained the death penalty for killing Herr. Id. at 562-64. Lyden also impeached Cody about pleading guilty to second-degree murder, rather than first-degree murder, even though he had directed Kyle to shoot Herr. Id. at 572-73.

In Harmer's defense, Lyden introduced Kyle's videotaped police statement, in which he said he shot Herr after the brothers had left the house with the lock boxes and Cody had collapsed on the deck, realized he had been shot in the leg by Herr, and told Kyle to return to the house to shoot Herr. N.T. 8/9/2013 at 703-05; 9/1/2016 PCRA Op. at 4.3 This version differed from Cody's version because Cody had said Kyle shot Herr before they obtained the lock boxes and left the house, i.e., during the robbery, not after it. Kyle's version was pivotal to Harmer's defense that{2019 U.S. Dist. LEXIS 10} Herr's murder by Kyle was not in furtherance of the burglary and robbery.

Lyden asked the jury in closing argument to consider why Kyle had murdered Herr. N.T. 8/12/2013 at 723. He noted that although Cody and Kyle gave different accounts of the shooting, Kyle's account was more believable because Cody was in shock during most of the crime and Kyle had "committed the deadly act himself" Id. at 724-25. Based on Kyle's version, Lyden argued, the robbery was "accomplished" once Kyle opened the safe, removed its contents, and left the home. Id. at 723. After that, Lyden contended, Cody collapsed on the deck and Kyle realized Cody had been shot by Herr, causing Kyle to get angry, act "rashly," and go back in the house and murder Herr. Id. at 723, 725-26. Lyden contended the murder "was an act of retaliation, it was done out of anger and totally unnecessary to completing this crime." Id. at 726. As a result, he argued, the Commonwealth could not establish beyond a reasonable doubt that the murder was done in furtherance of the robbery. Id. at 726-28.

The jury convicted Harmer of all charges: second-degree murder, robbery, burglary, and conspiracy to commit robbery and burglary. Id. at 792. In October 2013, Harmer was sentenced to life imprisonment plus five to{2019 U.S. Dist. LEXIS 11} ten years. Crim. Dkt. at 3-4. The Superior Court affirmed in July 2014, and the Pennsylvania Supreme Court denied review on December 26, 2014. 1902 MDA 2013, Dir. App. Dkt. at 3.

In January 2016, Harmer filed a pro se petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. § 9541 et seq. ("PCRA"), but failed to raise the Sixth Amendment conflict of interest claim he now alleges. Crim. Dkt. at 9. Following a hearing, the PCRA court dismissed Harmer's petition in September 2016. 174 A.3d 79, 2017 Pa. Super. Unpub. LEXIS 2332, *1. The Superior Court affirmed in June 2017, id. at 3, 2017 Pa. Super. Unpub. LEXIS 2332 at *3, and the Pennsylvania Supreme Court denied review on November 30, 2017. 472 MAL 2017, S. Ct. PRCA Dkt. at 3.

In January 2018, Harmer timely filed a pro se habeas petition. Hab. Pet. (doc. 1) at 19. Harmer obtained counsel, who timely filed two supplemental petitions, followed by a brief, in which he

withdrew most of Harmer's pro se claims and raised three grounds for relief. Petr. Br. (doc. 10) at 7, 37, 50, 56.

In February 2019, I held an evidentiary hearing and argument on Harmer's conflict of interest claim. I held a second evidentiary hearing in July 2019.

DISCUSSION

Before seeking federal habeas relief, a petitioner must exhaust all available state court remedies, see 28 U.S.C. § 2254(b)(1), "thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights," Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (citations omitted). If a petitioner has failed to exhaust his state court remedies and the state court would now refuse to review a claim on procedural grounds, the claim is procedurally defaulted. See Coleman v. Thompson, 501 U.S. 722, 735 n.1, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); Bey v. Superintendent Greene SCI, 856 F.3d 230, 236 (3d Cir. 2017). I may consider a procedurally defaulted claim only if a petitioner demonstrates (1) a legitimate cause for the default and actual prejudice from the alleged constitutional violation, or (2) a fundamental miscarriage of justice from a failure to review the claim. Coleman, 501 U.S. at 750.

Where a petitioner has exhausted his claim and the state courts have denied it on the merits, I can grant relief only if the state court's decision: (1) "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) "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). This is a "difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011) (internal quotations omitted).

I. Conflict of Interest

Harmer argues Lyden violated his Sixth Amendment right to effective assistance of counsel because{2019 U.S. Dist. LEXIS 13} he had a conflict of interest in representing him based on his prior representation of Cody, a co-defendant and government witness. Petr. Br. at 7. Harmer contends the conflict affected Lyden's representation of him by causing him not to pursue five plausible alternative strategies: (1) to work zealously to seek a plea agreement; (2) to more actively cross-examine Commonwealth witnesses, including Cody; (3) to investigate and present evidence of his nonviolent character; (4) to request an accomplice liability instruction cautioning the jury to be skeptical of Cody's testimony, and (5) to collaborate with a consultant he hired to help on appeal. Id. at 11-15.

Harmer concedes this claim is procedurally defaulted because he failed to raise it in his PCRA petition and no longer has the right to do so. See Petr. Br. at 16; see also Coleman, 501 U.S. at 735 n.1; Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726, 733, 737 (2002) (requiring petitioner to raise ineffective assistance of counsel claims on collateral review); 42 Pa. C.S. § 9545(b)(1) (PCRA petition must be filed within one year of final judgment except in limited circumstances); Glenn v. Wynder, 743 F.3d 402, 409 (3d Cir. 2014) (PCRA time-bar is adequate and independent state ground). Harmer nevertheless contends that his claim should be reviewed because he can show cause for the default and prejudice{2019 U.S. Dist. LEXIS 14} from the failure to review it. Petr. Br. at 16. I agree.

"The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Such a factor may exist where PCRA counsel was ineffective for failing to raise an ineffective

assistance of trial counsel claim, Martinez v. Ryan, 566 U.S. 1, 14, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), or where the factual basis for the claim was not reasonably available to PCRA counsel, see Murray, 477 U.S. at 488. Prejudice may be present to warrant review of a procedurally defaulted claim if the petitioner shows that a defaulted ineffective assistance of counsel claim is substantial or has some merit, meaning reasonable jurists could debate whether the claim was adequate to deserve encouragement to proceed further. See Workman v. Superintendent Albion, 915 F.3d 928, 937-38, 941 (3d Cir. 2019).

Harmer's PCRA counsel testified that he did not raise the conflict of interest issue because he did not know about it.⁴ See N.T. 2/15/2019 Evid. Hrg. at 68, 70 (if he had discovered the conflict issue, he would have raised it as Harmer's first claim in the PCRA petition). He said he made a mistake by not checking the docket in Cody's case and discovering the conflict. Id. at 54-55, 57. PCRA counsel, (2019 U.S. Dist. LEXIS 15) however, also explained that he did not typically review the dockets of co-defendants when working on PCRA cases and he did not expect Lyden to have a conflict of interest because he had never known of an attorney to represent a defendant after having represented a co-defendant in the same case. See N.T. 2/15/2019 Evid. Hrg. at 55-57 (he didn't think to check because attorneys "don't do this").

PCRA counsel could be deemed ineffective for failing to review Cody's docket and raise the conflict of interest issue. See Commonwealth v. Burton, 2015 PA Super 176, 121 A.3d 1063, 1072 (2015) (presumption that public records are knowable by counsel). Even if PCRA counsel was not ineffective because he had no reason to suspect a conflict and check Cody's docket, the lack of a factual basis to alert him to the claim provided cause for the default.⁵ See Murray, 477 U.S. at 488; Tillery v. Horn, 142 Fed. App'x 66, 68 (3d Cir. 2005) (petitioner had cause for procedural default where alleged conflict of interest was not known to him or his appellate counsel at time of direct appeal); Jennings v. Purkett, 7 F.3d 779, 782 (8th Cir. 1993) (petitioner can establish cause if he did not know of and could not reasonably have discovered his attorney's conflict). Harmer also has sufficiently established prejudice to excuse his default of the conflict claim because the claim is substantial, i.e., reasonable (2019 U.S. Dist. LEXIS 16) jurists could debate that the conflict claim was adequate to deserve encouragement to proceed further. See Workman, 915 F.3d at 939

Because the state courts did not consider Harmer's claim that Lyden had a conflict of interest while representing him, I consider it de novo. See Sharrieff v. Cathel, 574 F.3d 225, 227 (3d Cir. 2009). The Sixth Amendment right to effective assistance of counsel features the "right to the attorney's undivided loyalty free of conflict of interest." United States v. Gambino, 864 F.2d 1064, 1069 (3d Cir. 1988); see also Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish a constitutional violation, Harmer must demonstrate that his attorney had "an actual conflict of interest" that adversely affected his performance.⁶ Cuyler, 446 U.S. at 348-50; see also Simon v. Gov't of the Virgin Islands, No. 18-2755, 2019 U.S. App. LEXIS 20308, 2019 WL 2934243, *7 (3d Cir. Apr. 8, 2019).

"An 'actual conflict' exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client."⁷ Perillo v. Johnson, 205 F.3d 775, 781 (5th Cir. 2000); see also Gambino, 864 F.2d at 1071 (there is not a conflict of interest, but rather a coincidence of interests, where attorney does not raise defense on behalf of client because not in that client's interest even though it is also in interest of other client that it not be raised). In determining whether an attorney had an actual conflict, courts consider whether "an attorney has confidential (2019 U.S. Dist. LEXIS 17) information helpful to one client but harmful to another," "the temporal relationship between the prior and subsequent representations," the subject matter of the representations, and "the character and extent of the prior representation." Perillo, 205 F.3d at 798-99; see also Tillery, 142 Fed. App'x at

70-71 (no conflict where attorney's prior representation was "fleeting and minimal" and occurred five years before trial); United States v. Olivares, 786 F.2d 659, 663 (5th Cir. 1986) (no conflict where attorney stopped representing co-defendant and receiving payment of fees long before trial of current clients).

To establish an adverse effect, Harmer must show that Lyden failed to pursue "some plausible alternative defense strategy or tactic" with "sufficient substance to be a viable alternative" that "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." 8 Duncan, 256 F.3d at 197 (quoting Gambino, 864 F.2d at 1070); Simon, 2019 U.S. App. LEXIS 20308, 2019 WL 2934243, *7. If Harmer shows Lyden had an actual conflict that adversely affected his performance, Harmer need not show he was prejudiced by Lyden's conduct, i.e., that the result would have been different if Lyden had pursued the other potential strategies. Cuyler, 446 U.S. at 349-50.

Harmer contends that Lyden is "conclusively presumed" to have obtained confidential{2019 U.S. Dist. LEXIS 18} information from Cody during his representation of him. Petr. Br. at 8-9. Courts have presumed that an attorney obtained confidential information from a prior client that may be relevant to the representation of a current client where, as here, the subject matter in the two cases is substantially related. See United States v. Provenzano, 620 F.2d 985, 1005 (3d Cir. 1980); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir. 1979); United States v. Massimino, 832 F. Supp. 2d 510, 516 (E.D. Pa. 2011); see also Freund v. Butterworth, 165 F.3d 839, 859-60 (11th Cir. 1999) (presumption applies to both motions to disqualify and Sixth Amendment violation cases). The presumption exists because "it is not practical or fair to require a subsequent client [] to prove what specific facts the former client [] disclosed to the lawyer during the prior representation [and] standards of professionalism often prevent the lawyer from disclosing such information without the former client's consent." Freund, 165 F.3d at 859; see also Provenzano, 620 F.2d at 1005. Although courts have held that the presumption applies even where the attorney's representation of the prior client was brief, the attorney had an opportunity to obtain confidential information from the client or other sources. See Duncan, 256 F.3d at 197 (finding no exchange of confidential information where attorney stood in for codefendant's counsel at arraignment that "did not last more than a couple of minutes"); Massimino, 832 F. Supp. 2d at 517 (applying presumption where attorney's representation was{2019 U.S. Dist. LEXIS 19} brief, but involved appearing with client at initial appearance, arraignment, and pretrial detention); Provenzano, 620 F.2d at 1004-05 (applying presumption where attorney represented prior client in murder trial); Kitchin, 592 F.2d at 904 (presumption applied where attorney was "actively involved on behalf of the United States in an early stage of this matter").

Even assuming Lyden's limited representation of Cody provided him with an opportunity to obtain confidential information to create an actual conflict, Harmer fails to show that the conflict adversely affected Lyden's representation of him.

(1) Failure to Pursue a Plea

Harmer argues that Lyden failed to actively secure a plea deal for him because a plea by Harmer would have "undercut Cody's own chances to secure a favorable deal, for if Harmer had already agreed to plead guilty the Commonwealth would not have needed Cody's cooperation against him and the most important thing of value to the Commonwealth would have been lost." Petr. Br. at 11.

Although Harmer testified that Lyden never presented him with a plea offer from the Commonwealth, he conceded that he never asked Lyden to pursue a plea. N.T. 2/15/2019 Evid. Hrg. at 107. Lyden's testimony was consistent. Lyden testified that{2019 U.S. Dist. LEXIS 20} he never presented Harmer with a plea offer because the Commonwealth refused to negotiate a plea after Harmer's unsatisfactory September 2012 statement.⁹ Id. at 220-22, 226. Lyden also said he talked to Harmer about the Commonwealth's unwillingness to negotiate and discussed the possibility of providing more

information to entice the Commonwealth to reconsider, but no further information was provided. Id. at 227.

Prosecutor Brown testified credibly that although he could not recall the dates or duration of his communication with Lyden, he informed Lyden that the Commonwealth would only offer Harmer a plea to second-degree murder and a sentence of life in jail without parole. See N.T. 7/12/2019 Evid. Hrg. Brown did not recall Lyden offering to provide additional information or another statement from Harmer, but stated that it would not have changed the Commonwealth's position because it was insisting that all three defendants serve a life sentence even if they cooperated and testified at trial. See id. Brown explained that the Commonwealth had strong evidence against Harmer and viewed him as "the catalyst" for the crime because it would not have happened if Harmer, a Lancaster County resident, had not told{2019 U.S. Dist. LEXIS 21} the Wunder brothers, both from Delaware County, about Herr and his money. See id.

Harmer fails to establish that Lyden's prior representation of Cody caused him not to actively pursue a plea agreement for Harmer. Lyden could not have secured a more favorable plea for Harmer because the Commonwealth was uninterested in offering Harmer anything but a life sentence without parole. See Burger, 483 U.S. at 785-86 (petitioner failed to show asserted actual conflict affected lawyer's efforts to obtain a plea where evidence showed Commonwealth was not receptive to plea bargain). These facts undermine Harmer's claim that Lyden's motivation to help Cody damaged Harmer's chance to negotiate a more favorable sentence.

(2) Failure to Actively Cross-Examine Commonwealth Witnesses

Harmer argues that Lyden failed to thoroughly cross-examine the Commonwealth's witnesses due to his loyalties to Cody. Harmer provides only two examples. Petr. Br. at 11-12. First, he contends that Lyden should have elicited testimony from Harmer's neighbor and friend, Montana Leimseider, that he did not intend to hurt anyone during the robbery "and that at worst he would only scare Herr into letting him take the money." Id. at 12. Leimseider, however, had{2019 U.S. Dist. LEXIS 22} already provided this information on direct examination. See N.T. 8/6/2013 at 310-11 (Harmer said he did not want anyone home during the robbery and he would use a gun only to scare the victim). Lyden also impeached all of Leimseider's testimony by asking about her significant drug use and the fact that she hoped to avoid being charged by the Commonwealth as a heroin dealer. See id. at 314-20.

Second, Harmer contends Lyden failed to cross-examine his girlfriend, Rebecca Hansel, "when he could have elicited from her additional information - that Harmer had been surprised by the Wunders' decision to even enter the Herr house given the fact that he was at home, that Harmer was unwilling to hurt anyone in the robbery - that could have bolstered Lyden's defense that the killing was outside the scope of the burglary conspiracy." Petr. Br. at 12. Hansel, however, had already provided most of this information on direct examination. See N.T. 8/7/2013 at 436, 438 (Harmer was in shock and hysterically crying after the incident), 445 (Harmer said he did not expect to have anyone killed, he should not have done this, he should have stayed, and everything went wrong). Lyden also re-called Hansel as a defense{2019 U.S. Dist. LEXIS 23} witness to reemphasize that she had heard Kyle say that he "didn't mean for this to happen. What was I supposed to do? He shot my brother." N.T. 8/9/2013 at 706.

Because neither of the cross-examination strategies suggested by Harmer would have meaningfully enhanced the facts already elicited by both witnesses, Harmer has failed to demonstrate that these were viable strategies that were not pursued by Lyden because of his prior representation of Cody. See United States v. Morelli, 169 F.3d 798, 811 (3d Cir. 1999) (defendant failed to show proposed cross-examination was viable alternative where it "would have at best made no difference"); Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987) (where counsel fully and fairly

cross-examined former client, petitioner could not establish adverse effect from conflict as it "had, at best, *de minimis* effect" on counsel's representation of petitioner).

Harmer claims that Lyden avoided the additional cross-examination of Leimseider and Hansel because it "would have impeached Cody's testimony and thereby threatened that aspect of the deal requiring him to testify truthfully." Petr. Br. at 12. Like Leimseider and Hansel, however, Cody acknowledged on direct examination that he and Harmer did not intend to hurt anyone and they discussed bringing weapons only{2019 U.S. Dist. LEXIS 24} to frighten Herr. N.T. 8/8/2013 at 490-91. The cross-examination proposed by Harmer would have bolstered Cody's testimony, not discredited it. Moreover, because Lyden impeached Cody's testimony by showing he was in shock during the burglary and he lied to the police following the incident, *id.* at 564-67, Harmer cannot establish that Lyden avoided the cross-examination strategies proposed by Harmer to protect Cody. *See Olivares*, 786 F.2d at 665-64 (defendants could not establish adverse effect from actual conflict where attorney thoroughly cross-examined former client and exposed him as a liar).

(3) Failure to Investigate and Present Evidence of Harmer's Nonviolent Character

Harmer contends "Lyden failed to investigate and present character testimony that Harmer enjoyed an excellent reputation for being a peaceful, non-violent person." Petr. Br. at 12. Although this was a plausible defense strategy and could have raised a reasonable doubt as to Harmer's guilt, *see Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948), *Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033, 1037 (Pa. 1999), Harmer fails to establish that Lyden did not pursue it because of his loyalties to Cody. Harmer asserts that Lyden elected not to present character evidence because "depicting [him] as non-violent would have . . . highlighted the violent nature of his former client{2019 U.S. Dist. LEXIS 25} (Cody)." *Id.* at 12-13. Such reasoning is speculative and irrational. Lyden consistently emphasized Cody's and Kyle's violent nature, calling them "a couple of cold-blooded killers." N.T. 8/6/2013 at 153. He contrasted them with Harmer, who "did not participate in any way in the decision to kill [Herr]." *Id.* at 152. Harmer cannot establish that Lyden intentionally omitted character evidence because of his loyalty to Cody and desire to minimize Cody's violent character.¹⁰

(4) Failure to Request Accomplice Liability Instruction

Harmer also argues that "Lyden failed to request that the trial court issue the standard instruction directing the jury to consider Cody's testimony with caution in light of the fact that he was an accomplice to the crime." Petr. Br. at 13 (citing *Commonwealth v. Chmiel*, 536 Pa. 244, 639 A.2d 9, 13 (Pa. 1994); Pa. Std. Jury Instr. 4.01). Although requesting such an instruction also was a plausible defense strategy, Harmer cannot establish that Lyden failed to request it because of his loyalty to Cody. Harmer asserts that "Lyden's conflicting loyalties to Cody would have played some role in his failure to request this basic instruction, since any request for this instruction - attacking Cody as a liar - would have been viewed by Cody as a betrayal."{2019 U.S. Dist. LEXIS 26} *Id.* The facts belie this claim. Lyden attacked Cody as a liar while cross-examining him, N.T. 8/8/2013 at 564, undermining Harmer's assertion that Lyden avoided requesting the accomplice liability instruction to protect Cody's credibility or their relationship.¹¹ *See Lightbourne*, 829 F.2d at 1023; *Olivares*, 786 F.2d at 663-64.

(5) Failure to Collaborate with Consultant on Appeal

Harmer also argues that Lyden failed to work with an appellate attorney, Elizabeth Lippy, who was hired by Harmer and his family to assist with the appeal. Petr. Br. at 14-15. Harmer contends "Lyden disregarded his [] wishes, resisted Lippy's suggestions, and advised the courts what issues he would be raising on appeal - thereby precluding any chance of raising additional claims - before Lippy even finished her review of the case." *Id.* at 15. Even assuming Lyden could have made better efforts to

collaborate with Lippy on the appeal, Harmer again fails to establish that Lyden's inactions were motivated by his loyalty to Cody.

Harmer asserts that it was in Cody's interest "for Harmer to stay in jail under the conviction he helped secure [because] Cody's chances at convincing authorities like the Parole Board or governor eventually to commute his sentence were improved{2019 U.S. Dist. LEXIS 27} if he could argue that his testimony helped to put Harmer away for life." *Id.* Cody, however, had already complied with his plea agreement and assisted the Commonwealth by testifying against Harmer. Commutation of a life sentence in Pennsylvania also is a remote possibility. *See* Pa. Bd. of Pardons Website, <https://www.bop.pa.gov/Statistics/Pages/Statistics-by-Year.aspx> (last visited 6/7/2019) (six commutations of life granted since 2008). Harmer cannot establish that Lyden failed to collaborate with Lippy in hopes that Harmer's appeal would be denied and Cody might someday have a better chance of having his life sentence commuted.

Because Harmer has not established that an actual conflict of interest adversely affected Lyden's performance, his conflict claim should be denied as meritless.

II. Felony Murder Instruction

Harmer alleges the trial court's jury instruction on felony murder violated his rights to due process because it "mis[ed] the jury into concluding that if the Commonwealth proved Harmer was guilty of conspiracy to commit burglary, . . . then it was not necessary for the Commonwealth to prove that the killing by Kyle was in furtherance of that intended crime." *Petr. Br. at*{2019 U.S. Dist. LEXIS 28} 37, 43.

Due process is violated only where there is "a reasonable likelihood" the jury applied the challenged instruction in a way that relieves the government of its burden of proving every element beyond a reasonable doubt. *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 285 (3d Cir. 2018) (quoting *Waddington v. Sarausad*, 555 U.S. 179, 190-91, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009)); *see also Estelle v. McGuire*, 502 U.S. 62, 72-73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (question "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process") (citations omitted). In making this determination, the jury instructions must be considered as a whole and in the context of the full trial record. *Estelle*, 502 U.S. at 72.

The trial court instructed:

Second degree murder is often called felony murder because it's a killing connected to a felony. When two people are partners in a successful or unsuccessful attempt to commit a burglary and/or a robbery and one of them kills a third person, both parties may be guilty of felony murder. Neither partner has to intend to kill nor must they anticipate that anyone be killed.

You may find the defendant guilty of second degree murder, that is felony murder, if you're satisfied that the following four elements have been proven beyond a reasonable doubt:

First, that Kyle Wunder caused the death of Douglas Herr; second, that Kyle Wunder did so{2019 U.S. Dist. LEXIS 29} while Kyle Wunder, Cody Wunder, and the defendant were partners in committing a burglary and/or a robbery; third, that Kyle Wunder did the act that killed Douglas Herr in furtherance of the burglary and/or the robbery; and fourth, that the defendant was acting with malice.N.T. 8/12/2013 at 772-73.

After describing the elements of robbery and burglary, *id.* at 773-75, the trial court defined accomplice and co-conspirator liability, *id.* at 775-79, elaborating:

As applied in this case, if it is proved beyond a reasonable doubt that the defendant was indeed a

member of a conspiracy, he may be held responsible for the act or acts of another person or persons if each of the following elements is proved beyond a reasonable doubt:

First, that the other person who committed the specific act was also a member of the same conspiracy; second, that the crime or crimes in question were committed while the conspiracy was in existence; and third, that the crimes in question were committed to further the goals of the conspiracy.

....

The general rule of law pertaining to the culpability of co-conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in{2019 U.S. Dist. LEXIS 30} furtherance of the conspiracy.

....

All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy*Id.* at 776-77.

Finally, the court explained the "in furtherance" element:

A partner's act that kills is not in furtherance of the felony if the partner does the act for his own personal reasons which are independent of a felony.

However, you should keep in mind my earlier instructions regarding the liability of co-conspirators. All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action.

....

It does not matter whether an individual co-conspirator anticipated that the victim would be killed in furtherance of the conspiracy.

Rather, the issue is whether the defendant was involved in an unlawful conspiracy and whether he knew or should have known that the possibility of death accompanied the dangerous undertaking which was the object of the initial conspiracy.

So if a homicide occurs in the furtherance of a felony such as a robbery and/or a burglary, all who participated in the robbery and/or burglary, including{2019 U.S. Dist. LEXIS 31} those physically absent from the scene of the killing, are equally responsible.

A partner's act that kills is in furtherance of the felony if he does the act while fleeing from the scene and if there is no break in the chain of events between the felony and the act.

However, even though the partner's act that kills may seem to meet these requirements, it is not in furtherance of the felony if the partner does the act for his own personal reasons that are independent of the felony and the effort to flee.*Id.* at 779-80.

The trial court rejected Harmer's challenge to this instruction, explaining it "adequately and accurately reflected the applicable law . . . on second degree murder, robbery, burglary, and conspiracy." 2/7/2014 Tr. Ct. Op. at 3. The Superior Court "adopt[ed] the sound reasoning of the trial court," adding: "Harmer argues that the killing of Herr was not in furtherance of the robbery and burglary, as Kyle and Cody had left the house with Herr unconscious, and Kyle returned to the house on Cody's instruction to kill Herr. However, the jury was free to reject Harmer's argument, and ostensibly found that the killing was in furtherance of the robbery and burglary." 7/24/2014 Super. Ct. Op.{2019 U.S.

Dist. LEXIS 32} at 6 (citations omitted).

"A federal court may re-examine a state court's interpretation of its own law only where this interpretation 'appears to be an obvious subterfuge to evade consideration of a federal issue.'" Real v. Shannon, 600 F.3d 302, 310 (3d Cir. 2010) (quoting Hallowell v. Keve, 555 F.2d 103, 107 (3d Cir. 1977)). Because the record contains no such evidence, I must accept the Superior Court's conclusion that the felony murder instruction was consistent with Pennsylvania law. Id.

Harmer argues the trial court "unnecessarily and improperly undercut [his] defense" by burying the "in furtherance" explanation in further description of conspiracy liability. Petr. Br. at 42. Habeas relief is not warranted merely because an instruction is "undesirable, erroneous, or even universally condemned." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977) (citations omitted). The trial court instructed the jury on the elements of felony murder, reiterated that they must find each element beyond a reasonable doubt, and accurately explained the "in furtherance" element. See N.T. 8/12/2013 at 772-73, 779. Harmer fails to demonstrate that the instruction violated his rights to due process because there was a reasonable likelihood that the jury applied the instruction in a way that allowed him to be improperly convicted of felony murder. See {2019 U.S. Dist. LEXIS 33} Bennett, 886 F.3d at 285.

The state courts' determination that the jury instruction was proper was not an unreasonable determination of the facts or contrary to Supreme Court law. See 28 U.S.C. § 2254(d); Woods v. Etherton, 136 S. Ct. 1149, 1151, 194 L. Ed. 2d 333 (2016) (state court determination that claim lacks merit precludes habeas relief unless "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement") (quoting White v. Woodall, 572 U.S. 415, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014)).

III. Cumulative Trial Counsel Errors

Harmer argues the cumulative effect of Lyden's errors deprived him of effective assistance of counsel. Petr. Br. at 50. Harmer bases this claim on the following alleged failures by Lyden: (1) not objecting to evidence about his drug-related activities; (2) not investigating and presenting character witnesses to testify about his nonviolent reputation; and (3) not pursuing the five strategies included in his conflict-of-interest claim. Id. at 52-54.

Although Harmer raised a cumulative error claim in his appeal to the Superior Court from the denial of his PCRA petition, he based that claim on only two alleged errors by Lyden: (1) the failure to object to the drug-related evidence, and (2) the failure to request an accomplice liability instruction.¹² See 6/14/2017 {2019 U.S. Dist. LEXIS 34} Super. Ct. Op. at 1-2. Harmer failed to fully and fairly identify all the bases for his federal cumulative error claim to the state courts and he no longer has the right to raise the claim in state court. See supra at 10. The claim is procedurally defaulted to the extent Harmer relies on alleged ineffectiveness by Lyden beyond what he raised in his Superior Court appeal. See supra at 8-9; Collins v. Sec. of Pennsylvania Dep't of Corr., 742 F.3d 528, 543 (3d Cir. 2014) ("habeas petitioner must present the 'substantial equivalent' of his federal claim to the state courts in order to give the state courts 'an opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim') (citing Picard v. Connor, 404 U.S. 270, 277-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)). Harmer also fails to argue or show that he has cause for his failure to fully raise this claim. I therefore consider only whether Harmer suffered cumulative prejudice as a result of Lyden's failure to object to evidence of his drug-related activity and Lyden's failure to request an accomplice liability instruction.¹³

Where a petitioner claims ineffective assistance of counsel apart from a conflict of interest, he must show: (1) counsel was deficient, meaning he made "errors so serious that [he] was not functioning as

the 'counsel' guaranteed by the Sixth Amendment"; and (2){2019 U.S. Dist. LEXIS 35} prejudice, meaning "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. In determining whether counsel was deficient, I must be "highly deferential" and "indulge a strong presumption" that counsel's challenged actions were strategic. Id. at 689. Unless a petitioner shows "no sound strategy . . . could have supported" counsel's decisions, see Thomas v. Varner, 428 F.3d 491, 500 (3d Cir. 2005), "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," Strickland, 466 U.S. at 690. Even if a petitioner cannot establish that he was prejudiced by a single act of ineffectiveness, he may be entitled to relief if he was prejudiced by his counsel's multiple or cumulative acts of ineffectiveness, i.e., they 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)

If the state court addressed counsel's effectiveness and applied the correct legal standard, Harmer must show its decision was objectively unreasonable. Woodford v. Visciotti, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002). Review of such ineffectiveness claims is "doubly deferential," requiring me to give "both the state court and the defense attorney the benefit of the doubt." Burt v. Titlow, 571 U.S. 12, 15, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013); see also Yarborough v. Gentry, 540 U.S. 1, 6, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). "[I]{2019 U.S. Dist. LEXIS 36} is not enough to convince a federal habeas court that, in its independent judgment," the state court misapplied Strickland. Bell v. Cone, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

At the PCRA hearing, Lyden testified that he believed evidence related to Harmer's drug-related testimony was "pretty minor" compared to the robbery and burglary conspiracy to which Harmer had already admitted. N.T. 5/12/2016 at 27. He thought objecting would distract the jury from his arguments, and a limiting instruction would only highlight the drug activity. Id. at 28-29. Lyden concluded that "the stuff that came in during the trial," some of which would have come in anyway, did not "in any way, shape or form detracting" from his defense theory. Id. at 38.

Lyden said that he did not seek an accomplice liability instruction because it conflicted with his defense strategy. See id. at 19 ("The theory of the cases wasn't that some co-defendant was shifting blame or, you know, claiming that this was the actual perpetrator of the crime or again shifting blame and making this person look more or less culpable."). He explained the instruction likely would have applied to both Cody and Kyle as Harmer's accomplices, but he did not argue that they were liars. See id. at 21. Instead, he argued that most of what they said{2019 U.S. Dist. LEXIS 37} was true, except Cody's version about the timing of the shooting, which he asserted was inaccurate based on Kyle's version. See id. ("I tried to suggest to the jury it was a matter of perception. Okay, Cody had been shot, so maybe he wasn't thinking very clearly. The one that was thinking most clearly was the doer, right, Kyle."). He therefore believed the instruction would have confused the jury about whether to believe any part of what Cody and Kyle had said. See id.

The PCRA court found Lyden's testimony credible and his tactics reasonable, explaining that "counsel's strategy was to give the jury the full story, warts and all, in the hopes of showing [Harmer] had nothing to hide: he may have been guilty of armed robbery and minor drugs offenses, but he was not-and would never have agreed to be-a murderer." 9/1/2016 PCRA Ct. Op. at 10. The court determined Lyden had a "reasonable basis for refraining from requesting [the accomplice liability] instruction" and his decision "was a conscious one, made after careful consideration." Id. at 9. The court also found no prejudice from the drug references, id. at 10, the lack of an accomplice liability instruction, id. at 12, or the cumulative effect of all alleged errors,{2019 U.S. Dist. LEXIS 38} finding Harmer "demonstrated neither arguable merit nor prejudice for any of his claims of ineffectiveness." Id. at 15. The Superior Court adopted the PCRA court's opinion. See 6/16/2017 Super. Ct. Op. at 3-5.

Because the state courts' decisions were not based on an unreasonable determination of the facts or contrary to Supreme Court law, this claim is meritless. See 28 U.S.C. § 2254(d); Strickland, 466 U.S. at 690; see also United States v. Narducci, 18 F. Supp. 2d 481, 502 (E.D. Pa. 1997) (the "cumulative effect of each non-error does not add up to ineffective assistance of counsel: zero plus zero is still zero").

Accordingly, I make the following:

RECOMENDATION

AND NOW, on July 12, 2019, it is respectfully recommended that the petition for writ of habeas corpus be DENIED with prejudice. It is further recommended that there is no probable cause to issue a certificate of appealability.¹⁴ Petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva, 504 F.3d at 364.

BY THE COURT:

/s/ Timothy R. Rice

TIMOTHY R. RICE

U.S. MAGISTRATE JUDGE

Footnotes

1

Lyden's testimony about his disclosure of his representation of Cody to Harmer was not credible. Lyden first mentioned his disclosure to Harmer at the February 2019 evidentiary hearing, and failed to include this important fact in an earlier sworn declaration describing his representation of Cody. See 4/7/2018 Lyden Aff. Lyden also failed to take any notes during any of his multiple meetings with Harmer, including the session where he purportedly disclosed his representation of Cody. See N.T. 2/15/2019 Evid. Hrg. at 133.

Even if Lyden had disclosed his prior representation to Harmer, Harmer never waived that conflict. See Morris v. Beard, 633 F.3d 185, 198 (3d Cir. 2011) ("waiver of Sixth Amendment right to conflict-free counsel 'must be made knowingly, intelligently, and with awareness of the likely consequences of the waiver') (citing United States v. Dolan, 570 F.2d 1177, 1180-81 (3d Cir. 1978)).

2

Harmer could only be guilty of second-degree felony murder if Kyle committed the murder in furtherance of the robbery or burglary of Herr. See Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472, 476 (Pa. 1958).

3

Kyle's videotaped statement was not included in the state court record. However, it is undisputed that Kyle told the police he murdered Herr after the brothers left the house with the lock boxes and Cody collapsed on the porch. See N.T. 2/15/2019 Evid. Hrg. at 144, 266-67.

4

Even the prosecutor, Brown, testified he was unaware that Lyden had once represented Cody. See N.T. 7/12/2019 Evid. Hrg.

Lyden's failure to disclose the conflict also could constitute cause. See supra n.1; Cuyler, 446 U.S. at 346 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); Jamison v. Lockhart, 975 F.2d 1377, 1380 (8th Cir. 1992) (alleged conflict may constitute cause for default of claim because it was an objective factor external to the defense).

This standard does not apply where the conflict issue was raised before or at trial and/or the petitioner waived the conflict. See Cuyler, 446 U.S. at 348. In those cases, the court must decide whether the trial court properly allowed counsel to proceed in the case or whether the waiver was valid. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); Morris, 633 F.3d at 198.

Relying on case law involving pre-trial disqualification motions, Harmer argues that he is entitled to relief because Lyden's prior representation of Cody created a serious potential for a conflict of interest. See Petr. Br. at 8-9 (citing United States v. Stewart, 185 F.3d 112, 121 (3d Cir. 1999)). Although the analysis may overlap in part, conflicts of interests are assessed differently at the motion to disqualify stage than on appeal or habeas review.

Trial courts have "wide latitude" to disqualify attorneys before or at trial to promote fairness and avoid breaches of ethical standards where there is a serious potential for a conflict. United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); see also Wheat v. United States, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Courts reviewing a habeas petition, however, are confined by the Antiterrorism and Effective Death Penalty Act of 1996, and lack such broad discretion. See 28 U.S.C. § 2254; Cuyler, 446 U.S. at 350 ("the possibility of conflict is insufficient to impugn a criminal conviction"). Moreover, Harmer's habeas claim must be rooted in his Sixth Amendment right to counsel, not in Lyden's professional duty to Harmer or Cody. See Mickens, 535 U.S. at 176 ("The purpose of our [conflict-of-interest] exceptions from the ordinary requirements of Strickland . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to ensure vindication of the defendant's Sixth Amendment right to counsel."); cf., e.g., United States v. Moscony, 927 F.2d 742, 750-51 (counsel could not cross-examine former clients without violating professional duty to protect confidential information).

Harmer, therefore, must show more than a serious potential for a conflict. He must establish that Lyden had an actual conflict that affected his representation of Harmer.

Harmer argues that Lyden's subjective appreciation of the conflict is irrelevant in determining whether he had an actual conflict that adversely affected his performance. See Harmer's Pre-Hearing Memo. (doc. 23) at 1-2, 4-7. Nevertheless, I may rely on, and accept, Lyden's explanations for failing to pursue certain strategies if reasonable and credible. See McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004) ("[T]he reasonableness of counsel's choice can be relevant as a factor in proving the choice was caused by the conflict."); see also Burger v. Kemp, 483 U.S. 776, 785-87, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (no actual conflict where district court accepted counsel's non-conflict based reasons for not raising defense); Gambino, 864 F.2d at 1071-72 (accepting counsel's testimony that he failed to pursue defense for strategic reasons unrelated to conflict).

In the statement, Harmer said the burglary was Cody's and Kyle's idea, he did not know the brothers planned to use weapons until he led them to Herr's home, and he did not know how much money was stolen until he was arrested. See 9/14/2012 Harmer Statement at 11-15, 18-19, 22-24, 49. Prosecutor Brown testified that he did not use Harmer's statements at trial because he thought it was self-serving. See N.T. 7/12/2019 Evid. Hrg. Indeed, the evidence presented by the Commonwealth contradicted various portions of Harmer's statement. See N.T. 8/7/2013 at 425-26, N.T. 8/8/2013 at 474-79 (Harmer and Cody planned robbery of Herr); N.T. 8/8/2013 at 500, 502-03 (Cody told Harmer about weapons and stored them in Harmer's room when he arrived at Harmer's house); N.T. 8/8/2013 at 549-50, 609-10, 615 (Kyle gave Harmer \$30,000 from the robbery).

10

During the PCRA evidentiary hearing, Lyden testified that he did not think Harmer's nonviolent character was relevant to his defense that the Wunder brothers acted independently of the conspiracy when Kyle killed Herr. N.T. 5/12/2016 at 52-53. He also explained that "generally speaking, as a tactical matter," he refrained from presenting character witnesses if his client was not testifying because it tended to shift the focus away from the Commonwealth's burden of proof and lead the jury to wonder why the defendant was not taking the stand. Id. at 53-54. The PCRA court accepted Lyden's reasons for not presenting the evidence and also concluded that the omission of such evidence was not prejudicial because "the witnesses were inherently biased and the evidence conflicted with the defense." 9/1/2016 PCRA Ct. Op. at 11-13. This claim is meritless regardless of the PCRA court's findings, which I am bound to accept. See 28 U.S.C. § 2254.

11

Harmer raised this claim as a general ineffectiveness claim, rather than a conflict of interest ineffectiveness claim, in his PCRA Petition. See 9/1/2016 PCRA Ct. Op. at 8-9. The PCRA court denied the claim, finding Lyden had a reasonable basis for not requesting the instruction and Harmer could not show he was prejudiced by the absence of the instruction. See id. The Superior Court affirmed. See 6/16/2017 Super. Ct. Op. at 2-3. The state court decisions were not contrary to Supreme Court law or an unreasonable determination of the facts. See infra at 28-29.

12

Harmer included Lyden's failure to present nonviolent character evidence as a basis for his cumulative error claim in his PCRA petition. See 9/1/2016 PCRA Ct. Op. at 11-16. Harmer, however, failed to include that argument in his appeal to the Superior Court, thereby waiving it in state court and not preserving it for federal review.

13

Even if I were to consider the claims that Harmer failed to raise on appeal to the Superior Court, he would not be entitled to relief because they lack merit. Harmer argued that counsel was ineffective for failing to present character evidence in his PCRA petition and the PCRA denied the claim as meritless. See supra at n.10. The PCRA court's decision was not an unreasonable determination of the facts or contrary to Supreme Court law. For the reasons already discussed, Harmer also was not prejudiced by counsel's failure to: (1) pursue a guilty plea; (2) conduct additional cross-examination; and (3) consult with Elizabeth Lippy on the appeal. See supra at 15-22.

14

Because jurists of reason would not debate my recommended dispositions of the petitioner's claims, no certificate of appealability should be granted. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).