No. 21-

IN THE

Supreme Court of the United States

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; AND SUPERINTENDENT ROCKVIEW SCI,

Petitioners,

v.

SAMUEL RANDOLPH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Honorable Court should grant review to decide an important question of federal law—whether a criminal defendant can forfeit or waive his or her Sixth Amendment right to counsel of choice by not alerting the trial court of his or her intention to retain new counsel until shortly before trial begins after repeated defense continuances—that has not been, but should be, settled by this Honorable Court?

STATEMENT OF RELATED CASES

- *Randolph v. Secretary Pennsylvania Department of Corrections*, No. 20-9003, U.S. Court of Appeals for the Third Circuit. Judgment entered July 20, 2021.

- *Randolph v. Wetzel*, No. 1:06-cv-901, U.S. District Court for the Middle District of Pennsylvania. Judgment entered May 27, 2020.

- *Randolph v. Pennsylvania*, No. 05-8984, U.S. Supreme Court. Judgment entered April 3, 2006.

- *Commonwealth v. Randolph*, 432 CAP, Pennsylvania Supreme Court. Judgment entered May 16, 2005.

- *Commonwealth v. Randolph*, Nos. CP-22-CR-0001220-2002, CP-22-CR-0001374-2002, and CP-22-CR-0001746-2002. Judgment entered July 10, 2003.

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STATUTES

PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Pennsylvania respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Memorandum of the United States District Court for the Middle District of Pennsylvania was an Unpublished Decision, ***Randolph v. Wetzel,*** 2020 WL 2745722 (M.D. Pa. 2020), and is found at Appendix B, page 33a.

The Judgment of the United States Court of Appeals for the Third Circuit of Pennsylvania, ***Randolph v. Secretary Pennsylvania Department of Corrections,*** 5 F.4th 362 (3rd. Cir. 2021), is found at Appendix A, page 1a.

JURISDICTION

The published decision of the Court of Appeals was issued on July 20, 2021. On September 27, 2021, the Court of Appeals denied Petitioner's application for rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

> In the early morning hours of September 1, 2001, at Roebuck's Bar in Harrisburg, an argument began between [Randolph] and Alister Campbell, which led to a fight involving [Randolph], Gary Waters, and Thomas Easter; [Randolph] was thrown out of the bar. Early the following morning, [Randolph] drove past the bar, exchanged words with Campbell, Waters, and Easter, drove away, and then returned in a different vehicle. [Randolph] opened fire in the direction of Campbell and Easter, grazing Waters' hand. Ronald Roebuck, the owner of the bar, identified [Randolph] as the shooter. In the late evening of September 2, while Campbell, Easter, and Waters were parked on Maclay Street in Harrisburg, [Randolph] pulled up beside them and opened fire, striking Waters' back and grazing his head, thigh, and buttocks. Waters and his girlfriend, Syretta Clayton, were able to identify [Randolph]. On September 19, at Todd and Pat's Bar in Harrisburg, [Randolph] opened fire, striking Campbell in the chest, arm, and leg. He seriously injured several others and killed Easter and another individual, Anthony Burton. Several witnesses identified [Randolph] as the shooter.

> Following a jury trial, [Randolph] was found guilty of all charges and sentenced to death on two counts of first degree murder.

Commonwealth v. Randolph, 873 A.2d 1277, 1280 (Pa. 2005). On May 16, 2005, the Pennsylvania Supreme Court affirmed Randolph's judgment of sentence. ***Id***. On May 27, 2005, Randolph filed an Application for Reargument and Reconsideration, which the Pennsylvania Supreme Court denied on September 6, 2005.

On October 2, 2006, Randolph filed a petition under Pennsylvania's Post-Conviction Relief Act.[1] On February 5, 2007, while his state PCRA petition was pending, Randolph filed the Petition for Writ of *Habeas Corpus* at issue in this appeal and a Motion to Stay Federal Proceedings pending the exhaustion of his state claims. On February 8, 2007, the District Court stayed federal proceedings pending Randolph's exhaustion of state court claims. On November 7, 2012, Randolph moved to withdraw his PCRA petition, and the Dauphin County Court of Common Pleas granted Randolph's request on February 13, 2013.

On July 29, 2019, the District Court held a hearing pursuant to Randolph's habeas petition. On May 27, 2020, the District Court granted Randolph's petition with respect to Claim III regarding the unlawful denial of Randolph's Sixth Amendment right to counsel of his choice. The District Court vacated Randolph's convictions and sentences, including his capital convictions and sentences, in the Dauphin County Court of Common

1. 42 Pa.C.S.A. § 9541, *et seq.*

Pleas. The District Court stayed the execution of the writ for ninety days during which time the Commonwealth of Pennsylvania may afford Petitioner a new trial.

Respondents filed a notice of appeal on June 23, 2020. On July 20, 2021, the United States Court of Appeals for the Third Circuit affirmed the District Court's May 27, 2020, order. The Commonwealth of Pennsylvania files this petition for writ of *certiorari* in response.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS HONORABLE COURT SHOULD GRANT REVIEW TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW—WHETHER A CRIMINAL DEFENDANT CAN FORFEIT OR WAIVE HIS OR HER SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE BY NOT ALERTING THE TRIAL COURT OF HIS OR HER INTENTION TO RETAIN NEW COUNSEL UNTIL SHORTLY BEFORE TRIAL BEGINS AFTER REPEATED DEFENSE CONTINUANCES—THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS HONORABLE COURT.

This Honorable Court has established that, in selecting an attorney, a criminal defendant cannot interfere with the fair and proper administration of justice, subvert judicial proceedings or cause undue delay by designating a certain lawyer, make a belated request not in good faith but as a transparent ploy for delay, or insist on representation by an attorney he or she cannot afford or who for other reasons declines to represent the defendant. ***Morris v.***

Slappy, 461 U.S. 1 (1983), ***Wheat v. United States***, 486 U.S. 153, 159 (1988), ***Caplin & Drysdale, Chartered v. United States***, 491 U.S. 617, 624-25 (1989), and ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 151 (2006).

The qualified right of choice of counsel applies only to persons who can afford to retain counsel. ***See Caplin & Drysdale, Chartered v. United States***, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) ("Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.")

Instantly, Attorney Stretton acceded to Attorney Welch's competence and qualifications during the hearing held in the lower court. Thus, Randolph was adequately represented by his appointed attorney where he has heretofore failed to establish that Attorney Welch was ineffective in any manner. Randolph's request was made for the sole purpose of delay. Randolph continued his trial for a year without alerting the trial court that he intended to retain Attorney Stretton even though he decided to retain Attorney Stretton as early as his preliminary hearings in this matter and refused to assist Attorney Welch, his appointed attorney, in investigating his defense. Further, Attorney Stretton was not prepared to proceed to trial without unreasonable delay and Randolph did not have the funds to hire Attorney Stretton.

Based on the holding below, there is an apparent split of authorities amongst the federal circuits regarding whether a defendant must establish that he or she is able to afford the attorney he or she wishes to retain, and whether a defendant may malinger and maliciously delay his or her case without justification. Randolph was unable to afford Attorney Stretton, and Attorney Stretton admitted this at the hearing held in the lower court. Further, Randolph purportedly intended to retain Attorney Stretton as early as his preliminary hearings but unjustifiably failed to do so, or, at the very least, unjustifiably failed to alert the trial court to his intentions in a reasonable manner. Yet, his choice of counsel claim prevailed.

In ***United States v. Rewald***, 889 F.2d 836, 856 (9th Cir. 1989), the Ninth Circuit recognized that the right to choice of counsel is limited to defendants who can retain counsel. ***Accord. United States v. Ray***, 731 F.2d 1361, 1365 (9th Cir. 1984) ("This court has recognized that *individuals who can afford to retain counsel* have a qualified right to obtain counsel of their choice.") (emphasis added). In ***United States v. Graham***, 91 F.3d 213, 221 (D.C. Cir. 1996), the District of Columbia Circuit held, "One of the express limitations upon the right to choose one's own attorney is that the criminal defendant be 'financially able' to retain counsel of his choice[,]" quoting ***United States v. Friedman***, 849 F.2d 1488, 1490 (D.C. Cir. 1988). In ***United States v. Mendoza–Salgado***, 964 F.2d 993, 1014 n. 12 (10th Cir. 1992), the Tenth Circuit held, "A defendant's right to secure counsel of choice is cognizable only to the extent defendant can retain counsel with private funds."

In ***United States v. Garey***, 540 F.3d 1253, 1264-65 (11th Cir. 2008), the Eleventh Circuit held that an

uncooperative defendant who rejects the only counsel to which he is constitutionally entitled may result in a valid waiver of counsel. In ***Sampley v. Attorney General of North Carolina***, 786 F.2d 610, 612-13 (4th Cir. 1986), the Fourth Circuit held that a defendant who waives appointed counsel cannot delay the trial indefinitely while attempting to hire his or her own lawyer; the defendant need only be afforded a "fair opportunity" to employ counsel. ***Id.***, ***citing Powell v. Alabama***, 287 U.S. 45, 53 (1932); ***accord. United States v. Attar***, 38 F.3d 727 (4th Cir. 1994) (trial court did not violate the defendant's right to counsel by denying a continuance to allow the defendant additional time to secure counsel; the court should consider whether the continuance request results from the lack of a fair opportunity to secure counsel or rather from the defendant's unjustifiable failure to avail himself of an opportunity fairly given).

In ***United States v. Bauer***, 956 F.2d 693, 694-95 (7th Cir. 1992), the Seventh Circuit held that a defendant could waive his or her right to court appointed counsel where he or she claims to have money to pay for counsel of choice. In ***United States v. Kelm***, 827 F.2d 1319 (9th Cir. 1987), *overruled on other grounds in* ***United States v. Heredia***, 483 F.3d 913 (9th Cir. 2007), the Ninth Circuit held that the defendant waived his right to counsel of his choice where he failed to timely retain counsel despite his claims that he could do so. There are many cases out of the Fifth Circuit holding that a defendant can waive his right to counsel of choice through dilatory tactics, *videlicet*, ***United States v. Fowler***, 605 F.2d 181, 183 (5th Cir. 1979) (non-indigent defendant's failure to timely retain counsel was deemed waiver of right to counsel of choice), ***United States v. Terry***, 449 F.2d 727, 728 (5th Cir. 1971) (same).

In ***Richardson v. Lucas***, 741 F.2d 753 (5th Cir. 1984), the defendant refused to let court-appointed counsel assist in his defense and demanded that the court appoint him a specific attorney of his choosing. The court repeatedly directed the defendant to permit his court-appointed attorney to assist in his defense and discussed the advantages of having an attorney. ***Id***. In ***United States v. Goldberg***, 67 F.3d 1092, 1101 (3d Cir. 1995), the Third Circuit announced that the defendant waived his right to counsel by manipulating that right to delay trial.

For the reasons stated above, Petitioners respectfully request that this Honorable Court grant *certiorari* to resolve a circuit split as to whether a defendant waives his right to counsel of choice by waiting until just before trial to assert that he will have funds to hire a private lawyer.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 20, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-9003

SAMUEL RANDOLPH,

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; and SUPERINTENDENT ROCKVIEW SCI,

Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No. 1:06-cv-00901)
District Judge: Honorable Christopher C. Conner

April 26, 2021, Argued;
July 20, 2021, Filed

Before: CHAGARES, KRAUSE, and RESTREPO,
Circuit Judges.

OPINION OF THE COURT

RESTREPO, *Circuit Judge.*

Appendix A

The week before his state capital trial, Samuel Randolph hired Samuel Stretton, his counsel of choice, to replace Allen Welch, his court-appointed lawyer. Once he was hired, Stretton, on the Thursday before Monday's jury selection, entered his appearance and asked the trial court if it could delay the start of trial until the following month. Citing previous delays and the proximity to trial, the trial court denied that request. Stretton next asked if the trial court could delay the start of trial by just a couple of days. But the court denied that request, too. Finally, Stretton asked if the trial court could push back Monday morning's jury selection by just three hours so that he could attend a previously scheduled, mandatory engagement in the morning and then pick Randolph's jury in the afternoon. As it had twice before, the trial court denied Stretton's request and set jury selection for Monday morning. Then, when Stretton did not appear for jury selection, the court denied Stretton's motion for a continuance and rejected his entry of appearance. Randolph therefore had no choice but to proceed to trial represented by his court-appointed lawyer. The trial ended in convictions on all counts, including two counts of first-degree murder, and the trial court sentenced Randolph to death.

On direct appeal, the Pennsylvania Supreme Court upheld Randolph's convictions and sentence, and rejected Randolph's claim that the trial court violated his Sixth Amendment right to the counsel of his choice. Years later, on federal habeas review, the District Court determined that the Pennsylvania Supreme Court's decision unreasonably applied clearly established federal law, warranting *de novo* review of Randolph's Sixth Amendment claim.

Conducting that review, the District Court concluded that Randolph suffered a Sixth Amendment violation, a structural error not subject to harmless error analysis. The Court therefore granted Randolph's petition for a writ of habeas corpus and gave the state ninety days to retry Randolph or release him, pending the resolution of any appeal. The Commonwealth now appeals and, for the reasons that follow, we will affirm.[1]

I. Background

Although this case has a long procedural history, we recount here only the handful of events in the months leading up to Randolph's trial that are relevant to his Sixth Amendment choice-of-counsel claim. Those facts include the trial court's appointment of counsel; the degradation of the relationship between Randolph and his court-appointed counsel; Randolph's consideration of proceeding pro se; the attempt by Randolph's counsel of choice to continue the trial to allow him to represent Randolph; and the trial court's decision not to delay the start of jury selection, which had the effect of preventing Randolph from being represented by the counsel of his choice.

A. The state trial court appoints counsel for Randolph

In July 2002, in the Court of Common Pleas of Dauphin County, Pennsylvania, Randolph was arraigned

1. Throughout the opinion we refer to the appellants—the Secretary of the Pennsylvania Department of Corrections, the Superintendent of SCI Greene, and the Superintendent of SCI Rockview—collectively as the Commonwealth.

on two counts of first-degree murder, one count each of attempted murder and conspiracy to commit murder, five counts of aggravated assault causing serious bodily injury, and several other lesser charges. In line with Pennsylvania law governing punishment for first-degree murder, the government informed Randolph that it would seek the death penalty.

Two attorneys, Anthony Thomas and Roger Laguna, were present at Randolph's July 2002 arraignment. But neither was willing or able to represent Randolph on the capital charges. Thomas attended at the request of Randolph's family but did not enter a formal appearance. He had been a member of the bar for just two years and had never tried a homicide case, let alone a capital one. Roger Laguna had been handling Randolph's less serious charges. But he too felt unprepared to try the capital case. So he asked the trial court to appoint substitute counsel. The trial court obliged. The following month, the trial court appointed Allen Welch to lead Randolph's defense, and set trial for February 2003.

B. Randolph's trial is delayed and his relationship with appointed counsel deteriorates

Randolph's relationship with Welch began to deteriorate soon after Welch's appointment. At a January 3, 2003, pretrial conference, Randolph told the court that he and Welch were at odds about trial strategy. Welch wanted Randolph to submit to psychological evaluations—perhaps to pursue an insanity defense, *see* App. 614, or at least to gather evidence of circumstances

mitigating capital punishment—but Randolph staunchly refused. Additionally, Randolph wanted to press certain arguments (relating, it seems, to prosecutorial misconduct and constitutional violations) that he claimed Welch was not even entertaining.

Randolph also expressed to the court his dissatisfaction with Welch's commitment to his case. Randolph told the court that Welch had visited him just once in the five months since Welch's appointment, App. 614, and that Welch had told him he only took the appointment as a "favor" to the county's court administrators, App. 615. Welch assured the court that he was committed to Randolph's defense. He reminded the court that Randolph's criminal case was complex and claimed he had only recently received the bulk of Randolph's case file from Randolph's previous counsel and still had not received portions of Randolph's grand jury transcripts from the Commonwealth.

Despite Welch's assurances, Randolph was convinced Welch did not have his best interests at hand. Indeed, Randolph's relationship with Welch had deteriorated to such a degree that Randolph asked the court whether he could represent himself pro se. App. 618 ("Your Honor, you did say that I did have an option . . . to go pro se if I would want to, right?"). The court confirmed that "[t]hat's a right you have" but "would just strongly, strongly tell you not to do that." App. 618. Welch agreed, acknowledging that Randolph "has an absolute right to proceed pro se," but "plead[ed] with him with every fiber of my being not to do that." *Id.* Sensing that proceeding pro se would be unwise, Randolph then asked if Thomas could represent him, as

well. After a brief sidebar, Thomas agreed to participate in Randolph's defense. App. 617-18.

By the end of the hearing, Randolph, Welch, and the court appear to have reached a tenuous compromise. With Thomas assisting Welch, Randolph begrudgingly accepted Welch as lead counsel, and Welch agreed to focus more of his energy on Randolph's case. *See* App. 613. But because Welch was nowhere near prepared to try the case, the court agreed to delay the start of trial until March 10, 2003.

C. Another delay, further acrimony, and Randolph again requests to proceed pro se

Trial did not take place in March, however. Welch's mother became critically ill and was hospitalized. Welch therefore moved for another continuance. The trial court granted that request and reset trial for May 5, 2003.

With the trial delayed, the trial court, later in March, held another conference to dispose of various pretrial motions filed by the parties. The hearing marked a further deterioration in Randolph's relationship with Welch. For example, near the end of the conference, Randolph asked the court what his speedy trial rights were and whether and how he could effectuate them. As part of its response, the trial court pointed out that Randolph already had filed his pretrial motions. Randolph claimed he had no idea what motions had been filed on his behalf or what those motions contained, and again complained that Welch refused to visit him. App. 763 ("I don't even know what motion was

filed on my [behalf]—[Welch] won't come see me. He won't tell me or give me a copy of nothing. I don't even know what's going on, Your Honor."). Welch conceded that he did not share the motions with Randolph prior to their filing and that he had only visited Randolph in prison once. *See id.* Randolph again asked to represent himself pro se. *Id.* ("To settle all this, I would like to go pro se on the record right now."). The trial court refused to grant Randolph's request then-and-there, and instead told Randolph to contemplate his decision and, if he wished, to file a motion articulating the reasons supporting his request.

The following week, the trial court held another pretrial conference to consider Randolph's request to proceed pro se. At the conference, Randolph complained of "multiple deficiencies concerning Mr. Welch's performance," and "ma[d]e an oral motion to change [his] appointed counsel." App. 765. The trial court denied Randolph's motion, telling Randolph that "[t]he Court appoints counsel for you," and that it "[did not] see anything in [Welch's] performance that would even merit that request or for me to grant that request." *Id.*

Randolph and the trial court then discussed Randolph's request to proceed pro se. Randolph asked the court whether, if he were to proceed pro se, he could have daily access to the prison's law library. (The trial court said it would ask the prison's warden to grant Randolph more time in the library, but that it could not guarantee any result.) Randolph then asked who would serve as standby counsel should he proceed pro se. The court told Randolph that it would invite Thomas to be standby counsel but, if

Thomas declined, Welch would serve in the role. Randolph protested, but the court made clear that Randolph had only two options: "Do you want to proceed pro se with standby counsel as I've described or do you want Mr. Welch to continue to represent you?" App. 769. With those as his choices, Randolph decided against proceeding pro se and Welch continued as Randolph's counsel.

D. Randolph hires Samuel Stretton, and Stretton enters his appearance and moves to continue the trial

Randolph's fortunes changed the week before trial. That week, through the sale or impending sale of a family asset, Randolph secured the funds necessary to replace Welch with his choice of counsel, Samuel Stretton. Randolph had first contacted Stretton in January 2003 but could not afford to hire him. With Stretton convinced that Randolph had secured the requisite funds, Stretton, on the Wednesday before Monday's start of trial, entered his appearance and moved to continue the trial until the following month.

The next day, the court convened a conference call with the parties to discuss Stretton's entry of appearance and continuance motion. On the call, Stretton explained the bases for his continuance request. First, he observed that he had just been hired and would need at least some time to become familiar with the case. Second, he explained that throughout the next week (the first week of the trial) he had numerous conflicts, including an inescapable one Monday morning, the morning of jury selection.

Stretton also outlined the services he could offer Randolph that Welch could not. Stretton emphasized that he "could[] hire the experts or the investigators that are needed in a capital case: . . . the mitigation expert, the psychiatrist, the school records and people, everything else you need when you try these cases," App. 627, whereas Welch, facing significant financial limitations as a court-appointed attorney, likely could not, *see* App. 628 (Welch noting that "[t]here also could be no denying that the restrictions being economically placed on me by the court with the fight we had over just getting some investigative money, to say nothing about not being able to . . . [get] the money for the types of experts Mr. Stretton will be able to get involved in the thing.").

Welch supported Randolph's desire to switch lawyers. Welch said that he would "hate" to see the case proceed to trial "as unhappy as [Randolph] is with what I'm doing for him and with another attorney waiting to jump into the case." App. 626. Welch also "urge[d] [the court] to proceed carefully," since "the right to counsel of your choice is pretty darn well etched in stone." App. 626. Welch was concerned that, "if we hastily take this to trial, . . . [we] will go through it all again at some point down the road." *Id.*

The state opposed Stretton's continuance motion. It claimed that Randolph "tarried a great deal" in his attempt to hire Stretton. App. 627. The state's lawyer also claimed that witnesses he was planning on calling had been "bribed not to testify by Mr. Randolph or his representatives," *id.*, and he thought further delay would allow Randolph more time to carry out that scheme.

The trial court said its "inclination" was to deny Stretton's continuance and proceed with jury selection on the morning of Monday, May 5. App. 627. The court noted that the case "got continued once before" and that "[t]his is the second time we have brought in a special jury panel for this case." *Id.* And while the court appeared receptive to delaying the penalty portion of the trial so that Stretton could retain and deploy experts, it appeared unwilling to delay the start of jury selection. App. 627 (Court: "[M]y inclination is not to continue the case in terms of selecting the jury on Monday, Tuesday, Wednesday, however long that takes. The plan has always been to go into the trial stage at that point.").

Welch then jumped in. He suggested that the court's reason for not delaying the start of jury selection was easily fixed—the summoned jurors "could be called with a phone call and called off." App 628. Welch also thought the court's proposal to allow him to pick the jury and try the guilt phase and then let Stretton try the penalty phase was not a "viable and wise way to proceed." App. 628. And Welch again raised the constitutional issue. He asked the trial court what the state appellate courts would think about the trial court's reasons for denying Stretton's motion for a continuance or Randolph the counsel of his choice. *See id.*

The court was not moved. It resisted Welch's characterization that its tentative decision to deny the continuance "was based on economics and the jury panel." App. 628. It claimed it was "weighing very weighty matters on behalf of Mr. Randolph," including his right to counsel,

against countervailing interests of the state, including the prompt resolution of the case. *Id.* The court noted that Randolph's case was "old" and had "been around," and that "we have dealt with all the pretrial matters, and we are ready to go to trial." App. 629.

Stretton tried one last time to convince the court to delay Monday's jury selection. He asked the court whether it had "any flexibility," even "like a day or two." *Id.* The trial court refused to budge. It said the "[jury] selection process is pretty much etched in stone." *Id.* But it said it "certainly would consider" including time between the end of jury selection and the beginning of trial so that Stretton had some time to prepare. *Id.* The conference ended soon thereafter with jury selection still scheduled for the morning of Monday, May 5.

E. The trial begins, and begins without Stretton

The parties convened in court Monday morning before jury selection to clarify Randolph's representation. The on-the-record conversation began at 10:37 a.m. App. 636. The court recounted an off-the-record conversation it had with the parties the previous Friday. In that conversation, Stretton had modified his continuance request, asking for Monday's 9:00 a.m. jury selection to be postponed only until 12:00 p.m. That way, Stretton could pick Randolph's jury and still attend his previously scheduled engagement in the morning.

The court noted that it had instead agreed to move jury selection back one hour, from 9:00 a.m. to 10:00

a.m. App. 637. It also noted that it "fully expected to see" Stretton or someone on his behalf that morning "to begin the jury selection process." *Id.* When Stretton did not appear by 10:00 a.m., the trial court formally denied Stretton's continuance motion, App. 637, and his entry of appearance, App. 638, indicating only that it would entertain Stretton's participation if he refiled his entry of appearance at a later date.

Welch tried once more to persuade the court to delay jury selection so that Stretton could pick the jury and try the case. He told the court the continuance request was "an appropriate request given the fact that I'm court-appointed, that I have at this point absolutely a complete breakdown of communication with my client, which is largely why Mr. Thomas is here, . . . he acts as a translator." App. 638.

The trial court held firm, denied Welch's last overture, and called for the jury panel. The prospective jurors entered the courtroom at 11:10 a.m., App. 640, fifty minutes before the time that Stretton would have been available.

* * *

After two days of jury selection and a four-day trial, the jury convicted Randolph on all counts, including the capital murder charges. The court permitted Randolph to proceed pro se during the penalty phase. Randolph refused, however, to testify or present any mitigation evidence. The jury found two aggravating circumstances

and no mitigating ones and returned a verdict of death on both capital counts.

Stretton represented Randolph at the formal sentencing proceeding. Stretton moved for a new trial and asked that Randolph's sentences be vacated based, respectively, on the trial court's failure to grant a continuance and its alleged error in allowing Randolph to represent himself at the penalty phase and present no mitigating evidence. Stretton argued that the trial court's denial of the continuance he requested violated Randolph's Sixth Amendment right to choice of counsel and his Fourteenth Amendment right to due process, as well as similar protections under the Pennsylvania Constitution. The trial court denied Stretton's motions for relief and sentenced Randolph to death.

F. The Pennsylvania Supreme Court rejects Randolph's Sixth Amendment claim on direct appeal

Because Randolph had been sentenced to death, his appeal went directly to the Pennsylvania Supreme Court. Among other claims, Randolph argued that the trial court's denial of Stretton's motion for a continuance had violated his Sixth Amendment rights. The Pennsylvania Supreme Court addressed and rejected that claim, as follows:

> [Randolph] argues the trial court erred in denying him the right to have private counsel represent him during trial and in denying a continuance to enable private counsel to

represent him. He contends he sought private counsels [sic] representation because there was a major breakdown in communication between him and court-appointed counsel and because court-appointed counsel was unprepared, rather than for purposes of delay.

. . .

We have held, however, that the constitutional right to counsel of one's own choice is not absolute. Rather, "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." Thus, this Court has explained that while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably "clog the machinery of justice" or hamper and delay the state's efforts to effectively administer justice.

. . .

[Randolph's] case had already been continued twice at the request of court-appointed counsel. [Randolph] waited until May 1, 2003, two business days before trial was scheduled to commence, to apprise the trial court of his desire to have private counsel represent him, even though he had first contacted private

> counsel about representation in January, 2003. The trial court denied [Randolph's] request for a continuance but gave private counsel the opportunity to participate and was willing to accommodate his schedule and allow him time to prepare following jury selection. However, private counsel never showed up at trial or during sentencing. In considering the motion for continuance, the trial court weighed [Randolph's] right to counsel of his choice against the state's interest in the efficient administration of justice. We find no abuse of discretion in the trial court's refusal to grant [Randolph's] request for a continuance.

Commonwealth v. Randolph, 582 Pa. 576, 873 A.2d 1277, 1282 (Pa. 2005) (all citations omitted).

The United States Supreme Court denied Randolph's petition for certiorari. *Randolph v. Pennsylvania*, 547 U.S. 1058, 126 S. Ct. 1659, 164 L. Ed. 2d 402 (2006). Through counsel, Randolph then initiated federal habeas proceedings in the District Court.[2] As amended, Randolph's habeas petition advanced fifteen claims, including the Sixth Amendment choice-of-counsel claim rejected by the Pennsylvania Supreme Court. The District Court held an evidentiary hearing at which multiple witnesses testified,

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2. Randolph also initiated proceedings in state court under Pennsylvania's Post Conviction Relief Act. Those proceedings ended in withdrawal of all claims and are otherwise irrelevant to the issues on appeal here. So we do not discuss them further. And there is no dispute that Randolph exhausted this claim. *See* 28 U.S.C. § 2254(b).

including Stretton and Thomas. Afterward, the parties briefed their positions.

The District Court's decision followed. In it, the District Court addressed only the choice-of-counsel claim, as the disposition of that claim obviated the need to address any others. The District Court determined that while the Pennsylvania Supreme Court did not misstate the governing law, its application of that law was objectively unreasonable given the facts of Randolph's case; that its decision, therefore, was not entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); and that Randolph's Sixth Amendment claim must be reviewed *de novo*.

Reviewing the claim *de novo*, the District Court concluded that the state trial court violated Randolph's Sixth Amendment right to choice of counsel. And it held that such a violation constituted structural error, that is, error immune from harmless error analysis. Consequently, the District Court granted Randolph a writ of habeas corpus, vacated Randolph's convictions and sentence, directed the Commonwealth to retry or release Randolph within ninety days, and stayed the execution of the writ until thirty days after final disposition of any appeal. This timely appeal by the Commonwealth followed.

II. Commonwealth's Appeal

The Commonwealth appeals the District Court's grant of habeas corpus on Randolph's convictions and sentence based on his Sixth Amendment choice-of-counsel claim.

For the reasons set forth below, we will affirm the District Court.

A. Jurisdiction and Standard of Review

The District Court had jurisdiction over Randolph's petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254, and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Our review of the District Court's order granting Randolph habeas relief is two-fold: We review its legal conclu-sions and any factual inferences it drew from the state court record *de novo* and, because it conducted an evidentiary hearing, its new factual findings for clear error. *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 475 (3d Cir. 2017); *Albrecht v. Horn*, 485 F.3d 103, 114 (3d Cir. 2007); *Hakeem v. Beyer*, 990 F.2d 750, 758 (3d Cir. 1993). The Commonwealth was not required to obtain a certificate of appealability prior to seeking review of the District Court's decision to grant Randolph's habeas petition. *See* Fed. R. App. P. 22(b)(3); *Slutzker v. Johnson*, 393 F.3d 373, 375 n.1 (3d Cir. 2004).

Under AEDPA, Randolph, to prevail on his habeas petition, carried the burden of demonstrating that the Pennsylvania Supreme Court's decision was "'contrary to' federal law then clearly established in the holdings of [the Supreme] Court," "'involved an unreasonable application of' such law," or "'was based on an unreasonable determination of the facts' in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting 28 U.S.C. § 2254(d)(1), (2)).

"A state court decision is 'contrary to' clearly established federal law if it 'applies a rule that contradicts the governing law set forth' in Supreme Court precedent, or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different' from that reached by the Supreme Court." *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)) (citation omitted) (alteration in original); *see also Travillion v. Superintendent Rockview SCI*, 982 F.3d 896, 901 (3d Cir. 2020).

By contrast, a state court decision reflects an "unreasonable application of such law" only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents," a standard the Supreme Court has advised is "difficult to meet" because it was "meant to be." *Richter*, 562 U.S. at 100, 102. As the Supreme Court has cautioned, an "*unreasonable* application of federal law is different from an *incorrect* application of federal law," *id.* at 101 (quoting *Williams*, 529 U.S. at 410), and whether we "conclude[] in [our] independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly" is irrelevant, as AEDPA sets the bar higher. *Williams*, 529 U.S. at 411.

Finally, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the

state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *see also Lambert v. Blackwell*, 387 F.3d 210, 234-35 (3d Cir. 2004). In conducting this inquiry, we may not deem state-court factual determinations unreasonable "merely because [we] would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313-14, 135 S. Ct. 2269, 192 L. Ed. 2d 356 (2015) (quoting *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010)). Instead, § 2254(d)(2) demands we accord the state trial court substantial deference. So if "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341-42, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)). Yet "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El*, 537 U.S. at 340.

Here, as previously described, the District Court declined to apply AEDPA deference in reviewing the Pennsylvania Supreme Court's decision to reject Randolph's Sixth Amendment choice-of-counsel claim, concluding "that the state court's application of federal law was objectively unreasonable." *Randolph v. Wetzel*, No. 1:06-cv-901, 2020 U.S. Dist. LEXIS 92043, 2020 WL 2745722, at *9 (M.D. Pa. May 27, 2020). The District Court therefore reviewed Randolph's claim *de novo*. It found that the state trial court violated Randolph's Sixth Amendment rights, and that the Pennsylvania Supreme

Court's rejection of Randolph's Sixth Amendment claim on direct appeal "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." 2020 U.S. Dist. LEXIS 92043, [WL] at *7 (quoting *Richter*, 562 U.S. at 103). For the following reasons, we agree with the District Court and will affirm its order and opinion.

B. Sixth Amendment Claim

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Although the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime, *Gideon v. Wainwright*, 372 U.S. 335, 342-43, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), the Supreme Court has long recognized that the Sixth Amendment also ensures the right of a defendant to retain his preferred counsel, *see Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.").

To be sure, the right to one's counsel of choice "is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). A defendant may not, for example, demand to be represented by an attorney who is not a member of the bar of the relevant jurisdiction or court, or by one that would create a serious risk of conflict of interest. *Id.* Nor

can a defendant "insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Id.* And the right to counsel of one's choice does not even extend to defendants who require counsel to be appointed for them. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *see also Wheat*, 486 U.S. at 159. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the state's legitimate interest in the efficient and effective dispensation of criminal justice.

In previous cases, the Supreme Court has explained how to weigh that state interest against a defendant's Sixth Amendment right to choice of counsel. For instance, the Court has recognized that a trial court must have "wide latitude in balancing the right to counsel of choice against the needs of fairness." *Gonzalez-Lopez*, 548 U.S. at 152 (internal citation omitted); *see also Morris v. Slappy*, 461 U.S. 1, 11, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). The Court also has recognized that trial judges must have certain discretion over what we might call the exigencies of court administration. So on occasion a defendant's right to counsel of choice may be moderated by a trial court's schedule, or the court's need to "assembl[e] the witnesses, lawyers, and jurors at the same place at the same time." *Morris*, 461 U.S. at 11. But the Sixth Amendment entails a "presumption in favor of counsel of choice," *Wheat*, 486 U.S. at 160, and a trial court's "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of

counsel," *Morris*, 461 U.S. at 11-12 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)).

On direct appeal, the Pennsylvania Supreme Court held that the trial court did not violate Randolph's right to the counsel of his choice. *Randolph*, 873 A.2d at 1281-82. In doing so, it discussed only Pennsylvania law. In and of itself, so long as "neither the reasoning nor the result" contradicts clearly established federal law, that would not be a problem. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

Here, the legal standard articulated by the state supreme court does not contradict clearly established federal law. To the contrary, the court's discussion makes clear Pennsylvania law is consonant with federal law. The Pennsylvania Supreme Court, tracking *Wheat* and *Morris*, noted that the right to counsel of choice is not absolute. *Randolph*, 873 A.2d at 1282; *see also Wheat*, 486 U.S. at 159; *Morris*, 461 U.S. at 11. Further, the Pennsylvania Supreme Court reasonably observed that "the right of the accused to choose his own counsel . . . must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Randolph*, 873 A.2d at 1282 (quoting *Commonwealth v. Robinson*, 468 Pa. 575, 364 A.2d 665, 674 (Pa. 1976)).

However, whether the Pennsylvania Supreme Court articulated the appropriate law is only part of the equation. Under AEDPA, we must next ask if

the state court's application of that law was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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)(1), (2). And in this case, the Pennsylvania Supreme Court's decision involved an unreasonable application of clearly established Sixth Amendment law.

The Pennsylvania Supreme Court's analysis of Randolph's choice-of-counsel claim runs just six sentences, which, as above, we reproduce in full:

> This case had already been continued twice at the request of court-appointed counsel. [Randolph] waited until May 1, 2003, two business days before trial was scheduled to commence, to apprise the trial court of his desire to have private counsel represent him, even though he had first contacted private counsel about representation in January, 2003. The trial court denied [Randolph's] request for a continuance but gave [Stretton] the opportunity to participate and was willing to accommodate his schedule and allow him time to prepare following jury selection. However, [Stretton] never showed up at trial or during sentencing. In considering the motion for continuance, the trial court weighed [Randolph's] right to counsel of his choice against the state's interest in the efficient administration of justice. We find no

> abuse of discretion in the trial court's refusal to grant [Randolph's] request for a continuance.

Randolph, 873 A.2d at 1282. Plainly, the state supreme court's description of the state trial court's denial of Stretton's motion for a continuance mischaracterizes crucial details and omits others.

First, the case having "been continued twice" had nothing to do with Randolph or Stretton. *See id.* Welch moved to continue the trial in December 2002 because he struggled to receive discovery material from Randolph's prior counsel and grand jury material from the Commonwealth. Then, in February 2003, Welch moved to continue the trial again because his mother was ill and hospitalized. Up until the point he secured the funds to hire Stretton, Randolph more-or-less was the only party eager to proceed to trial. *See* App. 616 (January pretrial hearing) (Randolph asking "[w]hat's wrong with February" when Welch sought to delay the trial from January until March); App. 622 (April pretrial hearing) (Randolph noting that he "do[es] want [the start of trial] to be [as] prompt as possible."); App. 626 (May 1 pretrial telephone call) (Stretton noting that "[Randolph] said he only wanted a short continuance").

Second, Randolph did not "wait[] until May 1, 2003, . . . to apprise the trial court of his desire to have private counsel represent him." *See Randolph*, 873 A.2d at 1282. At the January 3, 2003, pretrial conference, for example, Randolph not only expressed to the trial court his dissatisfaction with Welch, *see* App. 614-17 ("Mr. Welch

just doesn't have my best interest."), he also asked the court whether he could "hir[e] a second chair counsel." App. 617. The court declined, but the prosecutor made clear to Randolph that he *could* retain private counsel if he "could afford to come to an arrangement" with that counsel. *Id.* At that point, Randolph reminded the court that he could not hire private counsel because he was indigent. *Id.* Thus, no later than January 2003, Randolph made clear to the court that he wanted to replace his court-appointed counsel with another counsel (whether court-appointed or private), and that the only thing holding him back from hiring private counsel was money. To the extent the Commonwealth argues that Randolph should have informed the trial court earlier that he planned to retain Stretton, there was nothing to report to the trial court because Randolph did not secure the funds to hire Stretton until the week before trial. Indeed, the day after Randolph informed Stretton that he could pay his retainer, Stretton attempted to enter his appearance and moved to continue the trial.

Third, the trial court did not give Stretton "the opportunity to participate" in Randolph's trial, nor was it "willing to accommodate his schedule." *See Randolph*, 873 A.2d at 1282. The day Stretton entered his appearance, he requested a one-month continuance. When the trial court refused, Stretton counteroffered with a request to delay trial by just a few days. When the trial court refused again, Stretton then requested a delay of just three hours. The trial court refused to grant even that modest accommodation. The court's obstinance is all the more striking considering that pretrial discussions that

day took until 11:10 a.m.—just fifty minutes before the time Stretton had requested. The Pennsylvania Supreme Court's decision does not acknowledge this sequence or even mention the length of the continuance that Stretton ultimately sought.

Fourth, the trial court's willingness to "allow [Stretton] time to prepare following jury selection" could not have cured a Sixth Amendment violation. *See id.* Jury selection is a critical stage of a defendant's criminal proceeding. *See Lewis v. United States*, 146 U.S. 370, 374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the indictment is for a felony, the trial commences at least from the time when the work of impanelling the jury begins." (quotation omitted)); *see also Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) (noting that because voir dire allows for peremptory challenges, it is "a necessary part of trial by jury"), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 100 n.25, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Further, jury selection is the primary means by which a defendant's counsel (and the trial court) may enforce the defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2238-43, 204 L. Ed. 2d 638 (2019). Finally, jury selection in a death penalty case is particularly important. To select a death-qualified jury, a defendant's counsel must ascertain additional information not relevant in a typical criminal case, like whether a potential juror would automatically impose the death penalty upon a qualifying conviction. *See Morgan v. Illinois*, 504 U.S. 719, 731-32, 112 S. Ct. 2222,

119 L. Ed. 2d 492 (1992); *see also Witherspoon v. Illinois*, 391 U.S. 510, 519-23, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

Fifth, the state supreme court failed to mention that the attorney-client relationship between Randolph and Welch had eroded well before Stretton entered his appearance. Randolph raised his dissatisfaction with Welch at each pretrial conference available in the record, including the one on the morning of jury selection. By trial, the breakdown had become so severe that Thomas had to act as an intermediary between Randolph and Welch. The trial court was not unconcerned by Randolph's protestations, but it refused to entertain Randolph's requests for substitute appointed counsel, and never provided Randolph a full opportunity to present the reasons underlying the breakdown. *See Martel v. Clair*, 565 U.S. 648, 664, 132 S. Ct. 1276, 182 L. Ed. 2d 135 (2012); *see also McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987) (concluding that "when a defendant requests substitution of counsel on the eve of trial," the trial court "must engage in at least some inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney" (quoting *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982))).

As the District Court concluded, "[o]nce the full panoply of relevant facts is articulated, the Sixth Amendment counsel-of-choice balancing becomes elementary." *Randolph*, 2020 U.S. Dist. LEXIS 92043, 2020 WL 2745722, at *10. We agree. The decision by the state trial court to deny Stretton's motion for a continuance prevented Randolph from being represented by Stretton,

his choice of counsel. Because the state trial court offered no justification for denying the continuance motion in this case, its decision violated Randolph's Sixth Amendment right to counsel of choice.

The Sixth Amendment counsel-of-choice balancing test weighs the defendant's right to counsel of choice against sufficiently countervailing reasons, like considerations of judicial administration. Neither the state supreme court in its decision nor the Commonwealth on appeal offers one such reason. The state supreme court concluded that Randolph "wait-ed" until the eve of trial "to apprise the trial court of his desire to have private counsel represent him." *See Randolph*, 873 A.2d at 1282. We already have discussed why this mischarac-terizes the record. If the state supreme court meant to imply that Randolph dallied to gain a strategic advantage, as the Commonwealth suggests on appeal, *see* Appellant Br. 15 (arguing that "Randolph was playing games with scheduling"), we disagree. Throughout the pretrial months, Randolph was eager to get to trial and resisted each delay. Randolph announced his hiring of Stretton as soon as he had the money to hire him, and Stretton's final request for a delay was modest—he sought to postpone the beginning of jury selection by only *three hours*.

The Pennsylvania Supreme Court also concluded that it gave Stretton the "opportunity to participate" in the trial, *Randolph*, 873 A.2d at 1282, suggesting that the trial court did not violate Randolph's Sixth Amendment rights at all. That is not so. It is true that the Sixth Amendment affords a criminal defendant only the "fair opportunity

to secure counsel of his own choice." *Powell*, 287 U.S. at 53. Here, however, the state trial court's ruling prevented Stretton from picking Randolph's jury, a critical stage of the criminal proceeding, and the court was unwilling to be even minimally accommodating to Stretton's reasonable request for a minor delay.

The Commonwealth's remaining arguments are not persuasive. Given the short delay Stretton requested, the Commonwealth cannot seriously claim that "Stretton would have had to build Randolph's defense from the ground up which would require an unreasonable delay." Appellant Br. at 14-15. And, for two reasons, it fares no better in contending that the source of funds that were to pay for Stretton evaporated following Stretton's entry of appearance. Appellant Br. at 19.

For one, the District Court concluded otherwise, *see Randolph*, 2020 U.S. Dist. LEXIS 92043, 2020 WL 2745722, at *9-10 ("We set forth the following additional facts indispensable to evaluating the constitutional claim at issue[:] . . . . [T]he funds to hire [Stretton] did not become available until April 29."), and we must accept that finding unless it is clearly erroneous. On this record, it is not. So even if the Randolphs did not sell the family business, Thomas testified that the family still was able to sell an asset related to that business to raise the funds to pay for Stretton. App. 596.

For another, whether Randolph secured the funding *to eventually pay* Stretton is largely irrelevant. By May 1, 2003, Stretton had agreed to represent Randolph and had entered his appearance to do just that. Even if he wanted

to withdraw representation, he would have needed the leave of the trial court. Pa. R. Crim. P. 120(C) (Dec. 2002); *see also Commonwealth v. Magee*, 2017 PA Super 414, 177 A.3d 315, 325-26 (Pa. Super. Ct. 2017); *Commonwealth v. Ford*, 715 A.2d 1141, 1145-46 (Pa. Super. Ct. 1998). More practically, a subsequent development concerning a sale of a business or business asset could not have influenced the trial court's decision to deny Stretton's motion for a continuance.

For these reasons, we are satisfied that the decision of the Pennsylvania Supreme Court involved an unreasonable application of clearly established Sixth Amendment law. Said another way, we are satisfied that no fairminded jurist could disagree that the Pennsylvania Supreme Court's decision conflicts with the Supreme Court's Sixth Amendment jurisprudence. We acknowledge that those precedents grant trial courts "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." *Gonzalez-Lopez*, 548 U.S. at 152 (internal citation omitted). But neither of those limitations on the right to choice of counsel is relevant here. Granting Stretton's three-hour continuance would not have been unfair to the prosecution, nor would it have strained the state's interest in the "swift and efficient administration of criminal justice" or permitted Randolph "to unreasonably clog the machinery of justice or hamper and delay the state's efforts to effectively administer justice." *Randolph*, 873 A.2d at 1282 (citations and quotation marks omitted). It was just three hours.

We also acknowledge that the standards imbedded in AEDPA are designed to be "difficult to meet." *Richter*,

562 U.S. at 102. The grant of a writ of habeas corpus is strong medicine, and it implicates concerns of federalism, comity, and finality. But if the Sixth Amendment's guarantee to one's counsel of choice is to mean anything, it must mean that a criminal defendant may select and retain the counsel of his choice, and the trial court must make every reasonable accommodation to facilitate that representation, provided that the selection and retention of that counsel will not substantially prejudice the prosecution or significantly impair the trial court's ability to dispense criminal justice.[3]

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3. The Commonwealth makes two additional arguments. Neither is persuasive. *First*, it argues that the District Court's habeas analysis erroneously relied on *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), a case not decided until after the Pennsylvania Supreme Court affirmed Randolph's convictions on direct appeal. Appellant Br. 24-27. Not so. In its opinion, the District Court discussed *Gonzalez-Lopez* but made clear that the case "was decided in 2006 and thus does not inform the 'clearly established' federal law existing at the time of Randolph's trial." *Randolph*, 2020 U.S. Dist. LEXIS 92043, 2020 WL 2745722, at *9 n.7. Instead, the District Court "rel[ied] on *Gonzalez-Lopez* merely for its affirmation of prior, clearly held Supreme Court jurisprudence." *Id.* That is correct. The right to counsel of one's choice has been firmly embedded in our constitutional structure for nearly a century, *see, e.g.*, *Powell*, 287 U.S. at 53, and the District Court's citations to more recent decisions served only to call attention to the continued vitality of that principle. *Second*, the Commonwealth argues that Randolph waived (or forfeited) any Sixth Amendment right he is now claiming. Appellant Br. 27-34. Once again, we disagree. Any Sixth Amendment waiver must be knowing, voluntary, and intelligent, or preceded by conduct that clearly implies that the defendant wishes to waive a particular component of the right. Moreover, to effect a Sixth Amendment waiver, a trial court must ensure—typically through a colloquy with the defendant—that

III. Conclusion

Few would dispute that "the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979). For those able to secure representation in a criminal case independent of a court appointment, a fair opportunity to select and retain one's choice of counsel is not just a boon, it is a right protected by the Sixth Amendment. *Powell*, 287 U.S. at 53. One's right to choice of counsel is not without limits. Trial courts retain certain discretion to balance that right with the exigencies of administering criminal justice. But however broad a court's discretion may be, it is not broad enough to excuse the Sixth Amendment violation that occurred here. We hold that the state trial court's error violated Randolph's Sixth Amendment right to counsel of choice, that the Pennsylvania Supreme Court's decision holding otherwise was unreasonable under AEDPA, and that this violation is not subject to harmless-error analysis. *Gonzalez-Lopez*, 548 U.S. at 152. Further, because the Pennsylvania Supreme Court's decision was unreasonable in its application of federal law, we need not reach whether its decision was based on an unreasonable determination of the facts.

The judgment of the District Court therefore will be affirmed, and the case will be remanded for the District Court to issue a writ of habeas corpus.

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the decision by the defendant "is intelligently and competently made." *Welty*, 674 F.2d at 187. Neither of those prerequisites were met here.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED MAY 27, 2020

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

CIVIL ACTION NO. 1:06-CV-901

SAMUEL RANDOLPH,

Petitioner,

v.

JOHN E. WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JAMIE SORBER, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT PHOENIX; AND MARK GARMAN, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,[1]

Respondents.

May 27, 2020, Decided
May 27, 2020, Filed

1. Over the course of this habeas litigation, the appropriate respondents have varied due to changes in petitioner's place of confinement and appointment of new state officials. Pursuant to Federal Rule of Civil Procedure 25, we substitute the proper respondents as of today's date. *See* FED. R. CIV. P. 25(d).

Appendix B

(Chief Judge Conner)

THIS IS A CAPITAL CASE

MEMORANDUM

Petitioner Samuel Randolph, an inmate currently confined at the State Correctional Institution at Phoenix in Collegeville, Pennsylvania, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter is proceeding via an amended habeas petition. (Doc. 182). Randolph challenges his capital convictions and sentence from the Court of Common Pleas of Dauphin County, Pennsylvania. Because Randolph was unlawfully denied his Sixth Amendment right to counsel of choice, we are compelled to grant Randolph's amended habeas petition, vacate his convictions and sentence, and provide the Commonwealth of Pennsylvania 90 days in which to conduct a new trial.

I. Factual Background and Procedural History

Randolph's Sixth Amendment counsel-of-choice claim primarily involves the circumstances leading up to and surrounding his trial. Thus, to understand the constitutional infringement at issue, it is only necessary to recount a limited set of facts. They include appointment of counsel, Randolph's attempts to retain private counsel prior to trial, and the ultimate effect of the trial court's inelastic scheduling decisions on Randolph's right to be represented by his attorney of choice.

Appendix B

A. Trial Court Proceedings

In July 2002, Randolph was arraigned on 12 charges in the Court of Common Pleas of Dauphin County, Pennsylvania. (Doc. 82-1 at 26-29). Those charges related to two shooting deaths and included, *inter alia*, two counts of first-degree murder, one count each of attempted murder and conspiracy to commit murder, and five counts of aggravated assault causing serious bodily injury.[2] (*Id.*) The government informed Randolph that it would seek the death penalty and outlined the alleged aggravating factors supporting its decision. (*Id.* at 34-35).

Anthony N. Thomas, Esquire, was present at Randolph's arraignment but did not formally enter his appearance as he was not prepared to be lead counsel in a capital case. (*Id.* at 26). At the time, Roger Laguna, Esquire, was representing Randolph on less serious offenses that the Commonwealth eventually sought to join with the first-degree murder charges. (*Id.* at 26, 41). Attorney Laguna requested that alternate counsel be appointed in light of the gravity of the new capital charges. (*Id.* at 26).

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2. Randolph's exhaustive list of charges from two different shooting incidents in September 2001 are set forth in three separate dockets in the Court of Common Pleas of Dauphin County: CP-22-CR-1220-2002, CP-22-CR-1374-2002, and CP-22-CR-1746-2002. The July 2002 arraignment concerned the most serious offenses, including capital first-degree murder, which are found at CP-22-CR-1746-2002. (*See* Doc. 82-1 at 26-29).

Appendix B

On August 27, 2002, the county court appointed Allen C. Welch, Esquire, as lead counsel to represent Randolph in his capital case. (*Id.* at 117; Doc. 86-1 at 18). Attorney Thomas was later appointed as assistant counsel. (*See* Doc. 86-1 at 54 ¶ 8). At a pretrial hearing in December 2002, Attorney Welch indicated that he was still awaiting important discovery materials and had only just received Randolph's case file from Attorney Laguna and had not yet had time to review it. (Doc. 82-1 at 39-40). Attorney Welch explained that he had encountered substantial difficulty in obtaining Randolph's file from Attorney Laguna, eventually having to resort to intervention by the court administrator. (*Id.* at 46, 55). The lead prosecutor also offered that additional delay had been caused by the appointment process: a conflict of interest prohibited the participation of the county public defender, and there had been logistical difficulties securing Attorney Welch's appointment. (*Id.* at 34, 39, 45-46). Accordingly, Attorney Welch—with the government's concurrence—sought his first trial continuance, which the court granted. (*Id.* at 39-41). Trial was rescheduled for February 2003. (*Id.* at 41).

The court held a pretrial conference on January 3, 2003. (*Id.* at 44). The record reflects that Randolph was anxious to go trial, but Attorney Welch was simply not prepared. (*Id.* at 45). He had just recently received a significant amount of discovery material and was still waiting for transcripts of Randolph's grand jury testimony. (*Id.* at 45-47, 55). In addition, he wanted to ensure sufficient time to file and receive rulings on pretrial motions, which would undoubtedly inform his trial strategy. (*Id.* at 57). Moreover, the record demonstrates that Attorney Welch

and Randolph were at odds regarding trial strategy, with Randolph expressing concern that his appointed counsel did "not have [his] best interest" in mind. (*Id.* at 49-50). As a result of these circumstances, the court concluded, *sua sponte*, that trial would have to be continued until March 2003. (*Id.* at 57, 67-68).

Trial did not take place in March, however. Attorney Welch moved for a second continuance in February because his mother was hospitalized and critically ill. (Doc. 82 at 11; Doc. 82-2 at 21). The court granted Attorney Welch's motion and reset trial for May 5, 2003. (Doc. 82 at 12; Doc. 82-2 at 21).

During several pretrial hearings, Randolph repeatedly expressed his dissatisfaction with Attorney Welch and requested substitute appointed counsel. (*See* Doc. 82-1 at 49-50, 59, 63, 132, 138, 143, 145, 146). On numerous occasions, Randolph complained that he and Attorney Welch had irreconcilable differences regarding pretrial and trial strategy, and that he did not believe that Attorney Welch was pursuing his "best interest." (*Id.* at 50, 51, 59, 63, 121-23, 128, 162). Randolph had so little confidence in Attorney Welch that he even opposed Attorney Welch remaining as standby counsel when addressing the possibility of self-representation. (*Id.* at 136, 145, 146). The trial court steadfastly refused to entertain Randolph's requests for substitute appointed counsel, informing Randolph that his only choices were to proceed with appointed counsel (Attorney Welch), hire private counsel, or represent himself. (*Id.* at 53, 60-61, 68, 132-33, 142, 146, 148). Randolph chose to continue with court-appointed

representation, explaining that he could not afford private counsel and could not adequately represent himself with limited access to legal materials while incarcerated. (*Id.* at 61, 63, 66, 68, 69, 136, 143, 147-48).

Randolph's financial circumstances changed several days before trial. Through sale of a family asset that had been pending for some time, Randolph was finally able to secure the funds necessary to retain his choice of private counsel, Samuel C. Stretton, Esquire. (*Id.* at 158-59; Doc. 86-1 at 53 ¶¶ 3-5). Randolph had been in contact with Attorney Stretton since January 2003 but had previously been unable to afford to hire him. (Doc. 82-1 at 157, 167; Doc. 86-1 at 53 ¶¶ 3-4; Doc. 86-1 at 123¶ 3). With funding secured, Attorney Stretton entered his appearance on Thursday, May 1, 2003—four days before the start of trial. (Doc. 82 at 13; Doc. 86-1 at 7-9). He contemporaneously moved to continue trial to the court's next trial term. (Doc. 82 at 13; Doc. 86-1 at 12-15). Attorney Stretton recalled that he had been contacted about his retention by Attorney Thomas on April 29 and had sent both his entry of appearance and the motion to continue trial via overnight mail the next day. (*See* Doc. 86-1 at 7-9, 12-15; Doc. 255, July 29, 2019 Hearing Transcript 10:7-14 [hereinafter "7/29/19 Hr'g Tr."]).

On May 1, the court convened a conference call with the parties, during which Attorney Stretton explained that he needed a short trial continuance for multiple reasons. (*See* Doc. 82-1 at 150-58). First, during the upcoming week—the week of Randolph's trial—Attorney Stretton was already scheduled for numerous court proceedings. (*Id.*

at 152-53). On May 5 and 7, he had attorney disciplinary trials. (*Id.* at 152). Attorney Stretton had argument in Commonwealth Court on May 6, (*id.*; Doc. 182-1 at 400), and was also scheduled for trial on May 8 and 9, (Doc. 82-1 at 153). The following week he was under subpoena for hearings in Philadelphia in a capital post-conviction case and was also slated for Pennsylvania Supreme Court argument. (*Id.*) Attorney Stretton emphasized that he had yet to receive Randolph's file, and further noted that there had been a complete breakdown between Randolph and Attorney Welch—the primary driver of his entry of appearance. (*Id.* at 152-53, 155, 158; Doc. 86-1 at 123-24 ¶¶ 5, 7).

Randolph, who had previously been averse to delays, likewise requested a short postponement of trial so that Attorney Stretton could try the case. (Doc. 82-1 at 155-56, 162, 167). The government opposed the continuance, arguing that this was the second special session of court scheduled and that 80 potential jurors[3] were noticed for May 1 and 2. (*Id.* at 156). Attorney Welch implored the court to grant the continuance, reiterating the breakdown in his relationship with Randolph and emphasizing the importance of a defendant's right to counsel of choice. (*Id.* at 164). He also highlighted the financial limitations he faced as appointed counsel when compared to private representation by Attorney Stretton, who could afford to hire various guilt-phase and mitigation experts for a more thorough capital defense. (*Id.* at 165).

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3. There is some discrepancy in the record regarding whether the number of potential jurors called for the special session was 80 or 120. We use 80 simply because this is the number argued by the government at the continuance hearing. (*See id.* at 156).

The court indicated that its "inclination" was to deny the continuance and proceed with jury selection on the morning of Monday, May 5. (*Id.* at 162-63). Attorney Stretton countered with a request to have jury selection delayed for "several days" or even just "a day or two" so that he could familiarize himself with the record and try the case. (*Id.* at 163, 168). The court responded that "the selection process is pretty much etched in stone" but that it was possible there could be a brief delay between jury selection and the start of trial, although no decision was made at that time. (*Id.* at 168, 169).

On the morning of May 5, the parties convened before jury selection to clarify Randolph's representation. (*See generally* Doc. 82-2 at 7-26). During the on-the-record discussion, the court recounted that on Friday (May 2), Attorney Stretton had again modified his continuance request, *this time asking for jury selection to be postponed only until 12:00 p.m. on May 5* so that he could pick Randolph's jury but still attend the previously scheduled attorney disciplinary trial. (*Id.* at 12). The court noted that it had instead agreed to move jury selection back one hour, from 9:00 a.m. to 10:00 a.m. (*Id.*)

The court stated that it "fully expected to see" Attorney Stretton or someone on his behalf that morning at the 10:00 a.m. start time "to begin the jury selection process." (*Id.* at 12-13). It then formally denied Attorney Stretton's motion to continue (with reasons to be placed "on the record at the appropriate time") and moved forward with Attorney Welch as Randolph's attorney of record. (*Id.* at 13, 15). Attorney Thomas renewed the request to

delay jury selection for just "a few hours" so that Attorney Stretton could select the jury. (*Id.* at 15). The court once more denied the request, stating, "[Attorney Stretton] is not going to be counsel of record at this moment. If he chooses to appear at some point later, we can deal with that at that time." (*Id.*) The court then issued a verbal order rejecting Attorney Stretton's entry of appearance. (*Id.* at 15-16).

Attorney Welch made one final attempt to change the court's mind. He emphasized, among other things, the "absolute[,] complete breakdown of communication" with his client, which was so severe that Attorney Thomas had to act as a "translator." (*Id.* at 16-17). Attorney Thomas reiterated that the only reason Attorney Stretton had not entered his appearance earlier was due to funds only becoming available "last week." (*Id.* at 17). Randolph, for his part, averred that Attorney Stretton was the attorney he wanted to defend him, that he finally had the money to afford him, and that his relationship with Attorney Welch was irreparably damaged. (*Id.* at 23-24). The court was unmoved, and counsel proceeded immediately to jury selection. (*Id.* at 24-25).

Attorney Welch represented Randolph at jury selection and at the guilt phase of trial. Following two days of jury selection and a four-day trial, the jury convicted Randolph on all counts, including the capital murder charges. (Doc. 82-5 at 189-93); *see Commonwealth v. Randolph*, 582 Pa. 576, 873 A.2d 1277, 1280 (Pa. 2005).

Appendix B

After the verdict but before the penalty phase, Randolph informed the court that he did not wish to testify or present mitigating evidence at the sentencing phase of trial. (Doc. 82-5 at 210). Randolph explained that he was "not concerned" if the death penalty was imposed because he fervently believed that, among other perceived wrongs, he had been denied his right to counsel of choice and deserved a new trial. (*See id.* at 211-12). Following an overnight recess, Randolph reiterated his desire to waive presentation of mitigating evidence or argument. (Doc. 82-6 at 12-16). The court informed Randolph that it was denying his request to forgo counseled argument against imposition of the death penalty, and Randolph responded by moving to proceed *pro se*. (*Id.* at 18-19).

Randolph was colloquied about representing himself and, after a brief recess, the court granted Randolph's request to proceed *pro se*. (*Id.* at 19-25). The court further directed that Attorney Welch or Attorney Thomas act as standby counsel. (*Id.* at 25). Randolph, acting *pro se*, refused to present any testimony, evidence, or argument during the penalty phase. (*Id.* at 34-35, 42). The jury found two aggravating circumstances and no mitigating circumstances and returned a verdict of death on both capital counts. (*Id.* at 60-61).

Attorney Stretton represented Randolph at the formal sentencing proceeding held in July. (*See id.* at 65, 66, 68). Attorney Stretton initially moved for a new trial and a new sentencing hearing based, respectively, on the trial court's failure to grant a continuance and its alleged error in allowing Randolph to represent himself at the penalty

phase and present no mitigating evidence. (*Id.* at 69-75). Attorney Stretton argued that denial of the requested continuance implicated both the Sixth Amendment right to counsel of choice and the Fourteenth Amendment's due process guarantees, as well as similar protections under the Pennsylvania Constitution. (*Id.* at 69-70). The trial court denied Attorney Stretton's motions for extraordinary relief, formally imposed death sentences for the first-degree murder convictions, and sentenced Randolph to a term of years on the remaining counts. (*Id.* at 78, 87-91).

Following sentencing, Attorney Stretton filed additional motions for a new trial based on newly discovered evidence and the prosecution's alleged failure to disclose material exculpatory evidence. (*See* Doc. 182 at 6 ¶ 11); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Those motions were likewise denied. (Doc. 82-6 at 249).

B. Direct Appeal

Randolph, through Attorney Stretton, filed a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). (Doc. 82-6 at 251; Doc. 82-7 at 1). Randolph raised five issues on appeal, including the claim pertinent to the instant habeas petition: whether the trial court's denial of a continuance violated Randolph's Sixth Amendment right to counsel of choice. (Doc. 82-6 at 251). By opinion dated March 16, 2004, the trial court denied all claims of error raised. (Doc. 82-7 at 24-71, *Commonwealth v. Randolph*, Nos. 1220 CR 2002,

1374 CR 2002, 1746 CR 2002 (Pa. Ct. Com. Pl. Dauphin Cty. Mar. 16, 2004) [hereinafter "Trial Court Op."]).

In accordance with 42 Pa. Cons. Stat. § 9546(d), Randolph appealed his conviction and death sentence directly to the Supreme Court of Pennsylvania. *See Randolph*, 582 Pa. 576, 873 A.2d 1277. He asserted three issues, including—as characterized by the state supreme court—"[w]hether the trial court erred in denying [his] request to have his counsel of choice, Samuel C. Stretton, represent him and in denying a continuance to allow Attorney Stretton to represent him." *Id.* at 1280-81. The Pennsylvania Supreme Court rejected Randolph's claims and affirmed his convictions and sentence. *Id.* at 1284. The Supreme Court of the United States subsequently denied *certiorari*. *Randolph v. Pennsylvania*, 547 U.S. 1058, 126 S. Ct. 1659, 164 L. Ed. 2d 402 (2006) (mem.).

C. Post-Conviction Proceedings

Randolph's pursuit of post-conviction relief has been both protracted and circuitous. In April 2006, the federal public defenders for the Eastern and Middle Districts of Pennsylvania initiated the instant federal habeas proceedings on Randolph's behalf. Following their formal appointment, the federal defenders filed this Section 2254 petition in February 2007 along with a motion to stay the federal proceedings while Randolph exhausted state post-conviction relief. We stayed the federal habeas case and directed Randolph to file his application for relief in state court if he had not already done so.

Randolph, in fact, had already filed a *pro se* petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 PA. CONS. STAT. § 9541 *et seq.*, the state's corollary to federal habeas relief. (*See* Doc. 182 at 7 ¶ 13). Randolph had filed that petition in September 2006, shortly after the instant federal habeas proceedings were initiated. (*See id.*) Consequently, the federal public defenders amended Randolph's *pro se* PCRA petition, eventually filing a fourth amended petition. (*See* Doc. 86-1 at 101-04).

Randolph's PCRA claims were never ruled on. Following a series of events, including Randolph being severely injured during an altercation with correctional officers, Randolph sought to waive PCRA review and to pursue only federal habeas relief. (*See* Doc. 14; Doc. 82-8 at 63-64). Years of litigation ensued regarding Randolph's prison injuries and records, attorney-client visitation rights, discovery, Randolph's proposed waiver of potential actual innocence claims, and his capacity to make such a decision. (*See* Doc. 182 at 8 ¶¶ 16-17; *id.* at 9-10 ¶ 21).

The PCRA court eventually permitted Randolph to withdraw his PCRA petition in February 2013. (*See* Doc. 203-1 at 30). Counsel filed a status report in this court soon afterward, recounting Randolph's PCRA withdrawal and requesting reactivation of his federal habeas proceedings. (Doc. 73). The parties engaged in additional discovery and, in April 2017, Randolph filed a counseled 300-page amended habeas petition, raising 15 claims for relief and requesting an evidentiary hearing. (*See generally* Doc. 182). Of note, Randolph's third ground for relief involves his claim that he was denied his right to counsel of choice in violation of the Sixth Amendment. (*Id.* at 107).

We granted Randolph's request for an evidentiary hearing as to exhausted and partially exhausted Claims I, III, and VIII of his amended habeas petition. We also directed that, at the hearing, the parties address questions of procedural default and whether Randolph can overcome any such default through proof that his convictions and death sentence represent a miscarriage of justice. (Doc. 218).

The evidentiary hearing was held on July 29, 2019. (*See generally* 7/29/19 Hr'g Tr.). Prior to the hearing, Randolph submitted *pro se* correspondence indicating that he unequivocally desired to waive Claim VIII of his habeas petition. (*See* Doc. 232). We addressed, *ex parte*, Randolph's waiver request. (7/29/19 Hr'g Tr. 4:5-6:16). After conducting a thorough colloquy of Randolph, we concluded that Randolph had made a knowing, voluntary, and intelligent waiver of Claim VIII, and we proceeded on the remaining Claims I and III. (*See id.* at 6:17-21). The parties submitted post-hearing briefing, and Randolph's Section 2254 petition is now ripe for disposition.

II. Standards of Review

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody derives from 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.* A habeas corpus petition pursuant to Section 2254 is the proper mechanism for a prisoner to challenge the "fact or duration" of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99, 93 S. Ct. 1827, 36 L.

Ed. 2d 439 (1973). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Rather, federal habeas review is restricted to claims based "on the ground that [petitioner] is in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a); *Estelle*, 502 U.S. at 68.

A. Exhaustion and Procedural Default

The AEDPA requires that petitioners demonstrate that they have "exhausted the remedies available in the courts of the State" before seeking federal habeas corpus relief. 28 U.S.C. § 2254(b)(1)(A). Therefore, habeas relief cannot be granted unless all available state remedies have been exhausted, or there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant. *See* 28 U.S.C. § 2254(b)(1). The exhaustion requirement is grounded in principles of comity to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

A prisoner exhausts state remedies when he "fairly present[s]" the claims in question to the state courts by giving them "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845,

119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). To "fairly present" a claim, a petitioner must proffer the claim's "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (claim is fairly presented when petitioner presents the same factual and legal basis for the claim to state courts). Although the petitioner need not cite "book and verse" of the United States Constitution, *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971), he must "give the State 'the opportunity to pass upon and correct' alleged violations of its prisoners' federal rights" before presenting those claims to a federal court, *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (quoting *Picard*, 404 U.S. at 275).

B. Merits Standard

When a claim is properly exhausted in state court and then raised on federal habeas review, the level of deference afforded to the state-court decision is substantial. *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017), *cert.* denied *sub nom.*, *Gilmore v. Bey*, 138 S. Ct. 740, 199 L. Ed. 2d 617 (2018) (mem.). The AEDPA "does not 'permit federal judges to . . . casually second-guess the decisions of their state-court colleagues or defense attorneys.'" *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 543 (3d Cir. 2014) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 15, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013)). Accordingly, under Section 2254(d), federal habeas relief is unavailable for exhausted claims unless

the state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). An "unreasonable application" of Supreme Court precedent includes situations where "the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state prisoner's case." *White v. Woodall*, 572 U.S. 415, 425, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)).

This standard is exacting by design. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Section 2254(d) "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" clearly established Supreme Court precedent. *Id.* Thus, to obtain federal habeas relief on an exhausted claim, a state prisoner must demonstrate that the state court's ruling on the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Id.* at 103.

Finally, when examining an exhausted claim, the federal court must review a state court's "last reasoned decision." *Simmons v. Beard*, 590 F.3d 223, 231-32 (3d Cir. 2009) (citing *Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008)). Hence, "[w]e review the appellate court decision,

not the trial court decision, as long as the appellate court 'issued a judgment, with explanation, binding on the parties before it.'" *Burnside v. Wenerowicz*, 525 F. App'x 135, 138 (3d Cir. 2013) (nonprecedential) (quoting *Simmons*, 590 F.3d at 232). But when the highest state court that considered the claim does not issue a reasoned opinion, we "look through" that decision to the last reasoned opinion, applying a rebuttable presumption that the higher court adopted the same reasoning as that set forth by the lower court. *Wilson v. Sellers*, 584 U.S. , 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018).

The highly deferential standard of Section 2254(d) applies only to claims that have been "adjudicated on the merits" in state court. *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012). "[I]f the state court did not reach the merits of the federal claims, then they are reviewed *de novo*." *Id.* But the habeas court must still presume that the state court's factual determinations are correct, and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Further, even if a habeas petitioner overcomes Section 2254(d)'s hurdle on an exhausted claim, the habeas court then considers that claim *de novo*. *See Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) (when Section 2254(d) is satisfied, "[a] federal court must then resolve the claim without the deference AEDPA otherwise requires").

III. Discussion

Randolph contends that there were myriad constitutional violations in his state-court prosecution.

We need not resolve the bulk of Randolph's grievances,[4] however, because there is one claim that unequivocally demands habeas relief. After careful consideration, we hold that Randolph was unconstitutionally denied his Sixth Amendment right to counsel of choice.[5] This structural defect requires that Randolph be afforded a new trial.

A. Right to Counsel of Choice

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to assistance of counsel. U.S. CONST. amend. VI. Part of that fundamental guarantee is the accused's right to counsel of choice if appointed counsel is not required. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). Specifically, the Sixth Amendment guarantees the accused "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

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4. This includes Claim I, which was a focal point of the July 2019 evidentiary hearing. The exculpatory evidence outlined in this claim, if admissible, can be advanced at Randolph's retrial.

5. It is indisputable that Randolph properly exhausted his counsel-of-choice claim, as it was presented to, and adjudicated by, the Pennsylvania Supreme Court on direct appeal. *See Randolph*, 873 A.2d at 1280-82.

Appendix B

The right to counsel of choice "has been regarded as the root meaning" of the Sixth Amendment's right to assistance of counsel. *Gonzalez-Lopez*, 548 U.S. at 151. Nearly a century ago, the Supreme Court recognized that "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). The Third Circuit has long acknowledged that "the most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1986) (quoting *United States v. Laura*, 607 F.2d 52, 55 (3d Cir. 1979)). "Attorneys are not fungible, and the ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence." *Id.* (citations and internal quotation marks omitted).

Nevertheless, this right is not without limitation. *Gonzalez-Lopez*, 548 U.S. at 144. Obviously, it does not extend to defendants who require appointed counsel because they cannot afford to hire a private attorney. *Id.* at 151 (citing *Wheat*, 486 U.S. at 159 ("[A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant.")). The right is also circumscribed when the desired attorney has a nonwaivable conflict of interest. *Wheat*, 486 U.S. at 159, 163. And it must be balanced against the needs of fairness and the demands of the trial court's calendar. *Gonzalez-Lopez*, 548 U.S. at 152 (citing *Wheat*, 486 U.S. at 159; *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)). The presumption

nonetheless remains "in favor of counsel of choice." *Wheat*, 486 U.S. at 160.

When a criminal defendant is erroneously deprived of his right to counsel of choice, the deprivation is considered a structural defect not subject to "harmless error" analysis. *Gonzalez-Lopez*, 548 U.S. at 150. Such structural errors require automatic reversal because of their "potential to 'infect the entire trial process'" and the "difficulty of assessing the effect of the error[s]" on the defendant's case. *Palmer v. Hendricks*, 592 F.3d 386, 397 (3d Cir. 2010) (alteration in original) (quoting, *inter alia, Gonzalez-Lopez*, 548 U.S. at 148-49 & n.4). Thus, because an unlawful denial of the right to counsel of choice "affect[s] the framework in which the trial proceeds," it is unnecessary to conduct a prejudice inquiry. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *see Gonzalez-Lopez*, 548 U.S. at 150-51. "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Gonzalez-Lopez*, 548 U.S. at 148.

B. State Court Application of Federal Law

On direct appeal, Randolph invoked both the Sixth Amendment to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution in his counsel-of-choice claim. (*See* Doc. 182-1 at 364, 371, 379). The Supreme Court of Pennsylvania, however, discussed only Pennsylvania law in its analysis. *See Randolph*, 873

A.2d at 1281-82. This approach is entirely acceptable when "neither the reasoning nor the result" contradicts clearly established federal law. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002); *Priester v. Vaughn*, 382 F.3d 394, 398 (3d Cir. 2004); *see, e.g., Werts*, 228 F.3d at 203-04 (explaining that Pennsylvania's standard for ineffective assistance of counsel comports with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and thus is not "contrary to" federal law).

The Pennsylvania Supreme Court first addressed standards for determining whether a trial court abuses its discretion by refusing to grant a continuance. *See Randolph*, 873 A.2d at 1281. This state law issue, however, is not within the purview of a federal habeas court.[6] *Estelle*, 502 U.S. at 67-68. The court then set forth the law regarding a criminal defendant's right to counsel of choice. *Randolph*, 873 A.2d at 1282. It correctly noted that the right to counsel of choice is not absolute, *see id.*, and provided two statements of law from prior decisions concerning limitations on the right, *id.* The court stated that "the right of the accused to choose his own counsel . . . must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Id.* (quoting *Commonwealth v. Robinson*, 468 Pa. 575, 364 A.2d 665, 674 (Pa. 1976)). The court further explained that "while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably 'clog the

6. Nor was it the gravamen of Randolph's counsel-of-choice claim. (*See* Doc. 182-1 at 364-79).

machinery of justice' or hamper and delay the state's efforts to effectively administer justice." *Id.* (quoting *Commonwealth v. Baines*, 480 Pa. 26, 389 A.2d 68, 70 (Pa. 1978)).

These statements of law regarding a criminal defendant's right to counsel of choice are consonant with clearly established federal law, *i.e.*, precedent from the United States Supreme Court. In *Morris*, the Court recognized that a defendant's right to counsel of choice must, at times, give way to other weighty considerations, including the demands of the trial court's calendar, the rights of victims, and the effective administration of justice. *See Morris*, 461 U.S. at 11, 14-15. Courts face many issues when trying to assemble witnesses, lawyers, and jurors for trial, the burden of which "counsels against continuances except for compelling reasons." *Id.* at 11. In *Gonzalez-Lopez*, the Court reiterated that the right to counsel of choice must be weighed against concerns of "fairness" and the efficient administration of criminal justice. *Gonzalez-Lopez*, 548 U.S. at 152.[7]

C. Reasonableness of State Court Application of Federal Law

Whether the state supreme court identified the correct law is only half the equation. Its application of the law must also have been reasonable. 28 U.S.C. § 2254(d)(1); *White*,

7. *Gonzalez-Lopez* was decided in 2006 and thus does not inform the "clearly established" federal law existing at the time of Randolph's trial. We rely on *Gonzalez-Lopez* merely for its affirmation of prior, clearly held Supreme Court jurisprudence.

572 U.S. at 425. The facts and circumstances in this case leave no doubt that the state court's application of federal law was objectively unreasonable.

The Pennsylvania Supreme Court's analysis of Randolph's counsel-of-choice claim consists of one paragraph, which we reproduce in full:

> This case had already been continued twice at the request of court-appointed counsel. [Randolph] waited until May 1, 2003, two business days before trial was scheduled to commence, to apprise the trial court of his desire to have private counsel represent him, even though he had first contacted private counsel about representation in January, 2003. The trial court denied [Randolph]'s request for a continuance but gave private counsel the opportunity to participate and was willing to accommodate his schedule and allow him time to prepare following jury selection. However, private counsel never showed up at trial or during sentencing. In considering the motion for continuance, the trial court weighed [Randolph]'s right to counsel of his choice against the state's interest in the efficient administration of justice. We find no abuse of discretion in the trial court's refusal to grant [Randolph]'s request for a continuance.

Randolph, 873 A.2d at 1282. This abbreviated and selective recitation of facts excludes numerous critical details

surrounding the trial court's denial of the requested continuance and its rejection of Attorney Stretton's entry of appearance. It also focuses on matters largely irrelevant to the choice-of-counsel question and presents a skewed impression of Attorney Stretton's actions. We set forth the following additional facts indispensable to evaluating the constitutional claim at issue. *See Williams*, 529 U.S. at 397-98 (finding that state court unreasonably applied federal law when it "failed to evaluate the totality of the . . . evidence" in its determination on *Strickland* claim).

This case was not a run-of-the-mill criminal prosecution. Randolph was facing the death penalty for not one, but two counts of first-degree murder. His case was further complicated by the fact that he was charged with numerous other serious offenses—some stemming from separate events—which appeared on multiple different dockets.

At the time of his arraignment, and for most of the time leading up to trial, Randolph could not afford to hire a private attorney. Due to the court's difficulties in finding qualified capital counsel, Attorney Welch was not appointed to represent Randolph until August 27, 2002, nearly two months after Randolph's arraignment. Even after his appointment, administrative issues and difficulties communicating with prior counsel hindered Attorney Welch's trial preparation. Attorney Welch accordingly moved for his first continuance in December 2002 with the full concurrence of the prosecution.

Appendix B

Additional issues beyond the control of Randolph and Attorney Welch prevented trial from taking place in February 2003. The trial court *sua sponte* continued trial to March, recognizing the obvious need for defense counsel to have copies of Randolph's grand jury testimony—which the government had yet to produce—as well as time for Attorney Welch to obtain funds for an investigator and to properly prepare for trial. The second and *only other* continuance Attorney Welch sought was in February 2003 because his mother was critically ill and hospitalized, circumstances again outside the control of Randolph and his counsel.

The attorney-client relationship between Randolph and Attorney Welch had eroded well before the start of trial, a fact the Pennsylvania Supreme Court failed to even mention. This issue was brought to the attention of the trial court on numerous occasions, including on the morning of May 5. The breakdown had become so severe that Attorney Thomas had to act as an intermediary between Randolph and Attorney Welch. The trial court staunchly refused to entertain Randolph's requests for substitute appointed counsel, even going so far as to deny Randolph an opportunity to formally present the reasons underlying the breakdown.[8] (*See* Doc. 82-1 at 146-47).

8. Refusal to consider substitute appointed counsel when there is a potentially irreparable conflict between an indigent defendant and his appointed attorney raises its own constitutional concerns. *See McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987). "When a defendant requests substitution of counsel on the eve of trial," the trial court "must engage in at least some inquiry as to the reasons for the defendant's dissatisfaction with his existing attorney." *Id.*

Although it is true that Randolph had first contacted Attorney Stretton in January 2003, the funds to hire him did not become available until April 29. The very next day, Attorney Stretton overnight-mailed his entry of appearance and a motion to continue trial. There was no delay whatsoever on the part of Attorney Stretton once he was notified that his retainer could be paid. Randolph, Attorney Welch, Attorney Thomas, and Attorney Stretton all explained to the trial court—on multiple occasions—that this was the reason why hiring private counsel was not discussed until May 1.

Finally, and most compellingly, Attorney Stretton sought to delay trial by only *three hours*. He had initially requested a one-month continuance, which seems entirely reasonable for someone taking over a capital murder case. But Attorney Stretton was willing to negotiate. When the trial court noted that it was inclined to deny the continuance, he counteroffered with a postponement of only several days, and then just "a day or two" so that he could review discovery and still attend the previously scheduled disciplinary trial. Finding no purchase with the court, Attorney Stretton then requested a delay of just three hours so that he could select the jury.

Once the full panoply of relevant facts is articulated, the Sixth Amendment counsel-of-choice balancing becomes

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(quoting *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982)). Although the right to counsel of choice is not absolute, "the trial court still has the duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known." *Id.* (citation and internal quotation marks omitted).

elementary. On one side of the scales sits a multitude of good-faith, compelling reasons for permitting Attorney Stretton to represent Randolph and for delaying trial by just a few hours so that he could select a jury. Further tipping the scales in Randolph's favor is the fundamental nature of a criminal defendant's Sixth Amendment right to counsel of choice.

On the other side there is, quite literally, not a single countervailing reason for denying the continuance, a denial which effectively precluded Randolph from being represented by his counsel of choice.[9] Any potentially legitimate basis to deny the continuance evaporated when Attorney Stretton modified his request and asked for a mere three-hour delay: the jury pool would not need to be sent home and recalled on a different day; no other criminal or civil matters would be affected or delayed; the prosecution would not be materially prejudiced by having to reschedule witnesses; the victims' families would not be facing significant delays in trial. Quite simply, no objectively valid reason for denying the continuance remained.

Hence, we are constrained to hold that the state court's rejection of Randolph's Sixth Amendment counsel-of-choice claim was unreasonable. *See Harrington*, 562 U.S. at 102. Put differently, the state court's ruling on this claim "was so lacking in justification that there was an error well understood and comprehended in existing

9. The trial court itself acknowledged that its denial of the continuance, "in effect, left [Attorney Stretton] out." (Doc. 82-6 at 76).

law beyond any possibility of fairminded disagreement." *Id.* at 103.

Our conclusion does not change even if we were to "look through" the state supreme court's decision to the reasoning provided by the trial court in its Rule 1925 opinion. *See Wilson*, 138 S. Ct. at 1192. The trial court proffered that Randolph "failed to timely apprise the court of his efforts to obtain private counsel, a continuance would have impeded the efficient administration of justice, and private counsel waived reasonable scheduling accommodations which would have allowed him to participate in the trial." Trial Court Op. at 23-24. None of these proffered justifications withstands even superficial scrutiny.

It is doubtful that the timing of Randolph's notice to the court of his efforts to hire a private attorney has any relevance to the counsel-of-choice calculus in this case. Randolph informed the court about his desire to retain Attorney Stretton as soon as retaining him was possible, *i.e.*, when funds became available. And this notice was provided four days before trial—plenty of time in which to continue trial, reschedule jurors, notify witnesses, *etc.* We fail to see how knowing that Randolph wanted to hire private counsel since January 2003 but was unable to afford to do so would have provided a more compelling basis to grant the continuance.[10] This is especially true when the trial court had known for months that Randolph

10. Presumably, most—if not all—indigent criminal defendants would prefer to hire private counsel but for their lack of financial resources.

was ardently opposed to being represented by Attorney Welch. In fact, Randolph had seriously considered proceeding *pro se* rather than continuing with Attorney Welch but ultimately decided against this option because he knew he could not adequately prepare his own defense while incarcerated.

More importantly, as discussed above, a three-hour continuance would have in no way "impeded the efficient administration of justice." Trial would have commenced only a few hours later than originally scheduled. In point of fact, it was *the court*—not Attorney Stretton—that declined "reasonable scheduling accommodations" which would have permitted Attorney Stretton to select a jury and try Randolph's case.[11] The trial court's conclusory observation that it had "offered ample accommodations which would have allowed [Attorney Stretton]'s representation during jury selection," Trial Court Op. at 28-29, is rebutted by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1). *Per contra*, the court refused even the most meager accommodation that would have allowed Attorney Stretton to select the jury: moving selection back a few hours so that Attorney Stretton could attend the previously scheduled disciplinary trial and pick a jury in the afternoon.

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11. It is well settled that jury selection is a "critical stage" of a felony trial. *See Gomez v. United States*, 490 U.S. 858, 872-73, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); *see also Gonzalez-Lopez*, 548 U.S. at 150; *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981).

D. Federal Habeas De Novo Review

Normally, once a petitioner has satisfied Section 2254(d)(1) by showing that the state court's application of federal law was unreasonable, the federal habeas court must review the claim *de novo*. *See Johnson v. Williams*, 568 U.S. 289, 303, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013) (citing *Panetti*, 551 U.S. at 953); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 311-12 (3d Cir. 2016) (*en banc*). Such a step would be mere formality here. As the foregoing discussion squarely demonstrates, there is but one conclusion a reasonable jurist could reach when confronted with the facts of this case: Randolph was unlawfully denied his Sixth Amendment right to counsel of choice. Indeed, the constitutional balancing permits no other result. This structural defect requires that Randolph be granted a new trial.

IV. Conclusion

The Sixth Amendment to the United States Constitution protects a criminal defendant's right to counsel of choice. Although this right is not absolute, it is not to be lightly abrogated. In the instant case, the trial court's "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violated Randolph's constitutional right to counsel of choice. *Morris*, 461 U.S. at 11-12. Accordingly, we will conditionally grant Randolph's Section 2254 petition, vacate his Pennsylvania convictions and death sentence, and direct the Commonwealth to retry him within 90 days or to provide for his release. An appropriate order shall issue.

Appendix B

/s/ Christopher C. Conner
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: May 27, 2020

APPENDIX C — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, DATED MAY 16, 2005

SUPREME COURT OF PENNSYLVANIA

582 Pa. 576

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

SAMUEL B. RANDOLPH, IV,

Appellant.

December 1, 2004, Argued;
May 16, 2005, Decided

Reargument and Reconsideration
Denied September 6, 2005.

BEFORE: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and BAER, JJ. Messrs. Justice Nigro and Saylor concur in the result.

OPINION

Justice EAKIN

Samuel B. Randolph, IV has filed a direct appeal from the judgment of sentence of death following his convictions

for two counts of first degree murder, two counts of criminal attempt, three counts of aggravated assault, two counts of firearms violations, and reckless endangerment.[1] The convictions stem from three shootings in September, 2001. We affirm.

In the early morning hours of September 1, 2001, at Roebuck's Bar in Harrisburg, an argument began between appellant and Alister Campbell, which led to a fight involving appellant, Gary Waters, and Thomas Easter; appellant was thrown out of the bar. Early the following morning, appellant drove past the bar, exchanged words with Campbell, Waters, and Easter, drove away, and then returned in a different vehicle. Appellant opened fire in the direction of Campbell and Easter, grazing Waters' hand. Ronald Roebuck, the owner of the bar, identified appellant as the shooter. In the late evening of September 2, while Campbell, Easter, and Waters were parked on Maclay Street in Harrisburg, appellant pulled up beside them and opened fire, striking Waters' back and grazing his head, thigh, and buttocks. Waters and his girlfriend, Syretta Clayton, were able to identify appellant. On September 19, at Todd and Pat's Bar in Harrisburg, appellant opened fire, striking Campbell in the chest, arm, and leg. He seriously injured several others and killed Easter and another individual, Anthony Burton. Several witnesses identified appellant as the shooter.

Following a jury trial, appellant was found guilty of all charges and sentenced to death on two counts of first degree murder. Appellant now raises the following issues:

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1. 18 Pa.C.S. § 2502(a); *id.*, § 901; *id.*, § 2702(a)(1); *id.*, § 6105; *id.*, § 6106(a)(1); and *id.*, § 2705, respectively.

1. Whether the trial court erred in denying appellant's request to have his counsel of choice, Samuel C. Stretton, represent him and in denying a continuance to allow Mr. Stretton to represent him.

2. Whether the trial court erred in allowing appellant to represent himself during the penalty phase and in allowing appellant the right not to make argument or present any mitigating evidence.

3. Whether the trial court erred in denying appellant a new trial based on newly discovered evidence.

Although appellant does not challenge the sufficiency of the evidence, we begin by independently reviewing the evidence to determine whether it was sufficient to sustain appellant's first degree murder convictions. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937, 942 (Pa. 1982), *cert. denied*, 461 U.S. 970, 77 L. Ed. 2d 1327, 103 S. Ct. 2444 (1983), *reh'g. denied*, 463 U.S. 1236, 77 L. Ed. 2d 1452, 104 S. Ct. 31 (1983). In reviewing the sufficiency of the evidence, this Court will consider whether the evidence, and all reasonable inferences therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, would permit a jury to find all of the elements of the crime proven beyond a reasonable doubt. *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728, 732 (Pa. 1987), *cert. denied*, 484 U.S. 928, 98 L. Ed. 2d 253, 108 S. Ct. 293 (1987). Section 2502(a) of the Crimes Code

states, "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S. § 2502(a). Intentional killing is "killing by means of … willful, deliberate and premeditated killing." *Id.*, § 2502(d). A "willful, deliberate and premeditated killing" occurs where the actor has manifested the specific intent to end the life of the victim. *Nelson*, at 732 (citation omitted). The use of a deadly weapon on a vital part of the human body is sufficient to establish the specific intent to kill. *Commonwealth v. Walker*, 540 Pa. 80, 656 A.2d 90, 95 (Pa. 1995).

At trial, the evidence established that appellant shot Easter, who died from a gunshot wound to the head, and Burton, who died from a gunshot wound that entered his upper left back and passed through his heart. Appellant's use of a deadly weapon on a vital part of each victim's body is sufficient to establish specific intent to kill. *Id.*, at 95. Based on the evidence presented, the jury could have concluded appellant acted with specific intent to kill Easter and Burton. Accordingly, the evidence was sufficient to sustain appellant's convictions for first degree murder.

Appellant argues the trial court erred in denying him the right to have private counsel represent him during trial and in denying a continuance to enable private counsel to represent him. He contends he sought private counsel's representation because there was a major breakdown in communication between him and court-appointed counsel and because court-appointed counsel was unprepared, rather than for purposes of delay.

Appendix C

> The grant or denial of a motion for a continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion. *Commonwealth v. Ross*, 465 Pa. 421, 422 n.2, 350 A.2d 836, 837 n.2 (1976). As we have consistently stated, an abuse of discretion is not merely an error of judgment. *Mielcuszny v. Rosol*, 317 Pa. 91, 93-94, 176 A. 236, 237 (1934). Rather, discretion is abused when "the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record . . . ." *Commonwealth v. Chambers*, 546 Pa. 370, 387, 685 A.2d 96, 104 (1996) (quoting *Mielcuszny*, 317 Pa. at 93-94, 176 A. at 236).

Commonwealth v. McAleer, 561 Pa. 129, 748 A.2d 670, 673 (Pa. 2000).

> We have held, however, that the constitutional right to counsel of one's own choice is not absolute. *Commonwealth v. Robinson*, 468 Pa. 575, 592-93, 364 A.2d 665, 674 & n.13 (1976). Rather, "the right of the accused to choose his own counsel, as well as the lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by the state's interest in the swift and efficient administration of criminal justice." *Id.*, at 592, 364 A.2d at 674 (internal quotations omitted). Thus, this

> Court has explained that while defendants are entitled to choose their own counsel, they should not be permitted to unreasonably "clog the machinery of justice" or hamper and delay the state's efforts to effectively administer justice. *Commonwealth v. Baines*, 480 Pa. 26, 30, 389 A.2d 68, 70 (1978).

Id., at 673-74.

This case had already been continued twice at the request of court-appointed counsel. Appellant waited until May 1, 2003, two business days before trial was scheduled to commence, to apprise the trial court of his desire to have private counsel represent him, even though he had first contacted private counsel about representation in January, 2003. The trial court denied appellant's request for a continuance but gave private counsel the opportunity to participate and was willing to accommodate his schedule and allow him time to prepare following jury selection. However, private counsel never showed up at trial or during sentencing. In considering the motion for continuance, the trial court weighed appellant's right to counsel of his choice against the state's interest in the efficient administration of justice. We find no abuse of discretion in the trial court's refusal to grant appellant's request for a continuance.

Appellant next asserts the trial court erred in permitting him to waive his right to present mitigating evidence and his right to counsel during the penalty phase. "A criminal defendant has the right to decide whether

mitigating evidence will be presented on his behalf." *Commonwealth v. Reid*, 571 Pa. 1, 811 A.2d 530, 553 (Pa. 2002) (quoting *Commonwealth v. Sam*, 535 Pa. 350, 635 A.2d 603, 611 (Pa. 1993)). "[A] capital defendant may waive the right to present mitigating evidence, so long as the waiver was knowing, intelligent, and voluntary." *Commonwealth v. Davido*, 582 Pa. 52, 868 A.2d 431, 2005 Pa. LEXIS 361, *27 (citing *Commonwealth v. Marinelli*, 570 Pa. 622, 810 A.2d 1257, 1275-76 (Pa. 2002)). "In order for such a waiver to be valid, the trial court should conduct a thorough on the record colloquy regarding the waiver of mitigating evidence given the consequences of such a decision." *Id.*, at *28 (citing *Commonwealth v. Wilson*, [580 Pa. 439, 861 A.2d 919, 935 n.20 (Pa. 2004)] (citing *Commonwealth v. Crawley*, 514 Pa. 539, 526 A.2d 334, 340 n.1 (Pa. 1987))).

Here, a colloquy was conducted during which appellant indicated his understanding of the Commonwealth's burden of proving aggravating circumstances, his burden of proving mitigating circumstances, the weighing of aggravating and mitigating circumstances, the significance of mitigating evidence, and his right to present mitigating circumstances. *See* N.T., Vol. VII, 5/14/03, at 24-27, 29. Appellant was given the opportunity to present mitigating evidence, with a full understanding of the consequences of not presenting such evidence, but chose not to do so.

Rule 121 of the Pennsylvania Rules of Criminal Procedure provides, "when the defendant seeks to waive the right to counsel after the preliminary hearing, the

judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel." Pa.R.Crim.P. 121(c). The trial court must ensure the following inquiries are made to determine whether the waiver is knowing, voluntary, and intelligent:

> (1) whether the defendant understands that he has a right to be represented by counsel and the right to free counsel if he is indigent, (2) whether the defendant understands the nature of the charges against him and the elements of each of those charges, (3) whether the defendant is aware of the permissible range of sentences and/or fines for the offenses charged, (4) whether the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules, (5) whether the defendant understands that there are possible defenses to these charges to which counsel might be aware, and if these defenses are not raised they may be lost permanently, and (6) whether the defendant understands that, in addition to defenses, the defendant has other rights that, if not timely asserted, may be lost permanently and that if errors occur and are not objected to or otherwise timely raised by the defendant, the objection to these errors may be lost permanently.

Commonwealth v. McDonough, 571 Pa. 232, 812 A.2d 504, 506-07 (Pa. 2002) (citing *Commonwealth v. Starr*,

541 Pa. 564, 664 A.2d 1326, 1335 (Pa. 1995); Pa.R.Crim.P. 121 cmt.).

The court held a thorough colloquy evidencing appellant's understanding that an attorney, unlike appellant, is aware of the rules of evidence and procedure, appellant would be bound by the same rules as an attorney, appellant was facing the death penalty, appellant as an indigent was entitled to free counsel, and appellant would be waiving any issues not raised. *See* N.T., Vol. VIII, 5/15/03, at 12-16. Appellant's understanding of the significance of the penalty phase is also evidenced by the earlier colloquy on the waiver of mitigating evidence. Appellant, aware of his right to counsel and the consequences of waiving such right, indicated his desire to proceed *pro se*. Thus, appellant knowingly, intelligently, and voluntarily waived both his right to present mitigating evidence and his right to be represented by counsel during the penalty phase.

In his final claim, appellant contends he should have been granted a new trial on the basis of after-discovered evidence in the form of witness testimony from Shannon Taylor, Sean Sellars, Heath Wells, and Donald Roebuck which would refute Ronald Roebuck's testimony identifying appellant as the September 2 shooter. Specifically, appellant argues these witnesses would testify Ronald Roebuck was not outside the bar at the time of the shooting and did not see the shooting. In order to be granted a new trial based on after-discovered evidence, appellant must show the evidence:

> 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence;
>
> 2) is not merely corroborative or cumulative;
>
> 3) will not be used solely to impeach the credibility of a witness; and
>
> 4) is of such nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. McCracken, 540 Pa. 541, 659 A.2d 541, 545 (Pa. 1995) (citation omitted). The trial court concluded these statements did not constitute after-discovered evidence, but related only to credibility. Appellant has failed to meet his burden of showing the statements of Taylor, Sellars, Wells, and Donald Roebuck would not be used for the sole purpose of impeaching the credibility of Ronald Roebuck.

Appellant also contends a statement by a Mr. Stanko, containing an admission by a Mr. Bush that Bush was the killer, was after-discovered evidence warranting a new trial. According to Stanko's statement, Bush was in possession of the Harrisburg newspaper, which reported the killings of Easter and Burton; Stanko asked Bush if he had any involvement with the killings and Bush smiled. The trial court found Stanko's statement was so unreliable that it would have been inadmissible; the court concluded

the statement constituted inadmissible hearsay with no applicable exception. Appellant argues this evidence was a statement against penal interest. A statement against interest is only admissible if the declarant is unavailable as a witness. Pa.R.Evid. 804(b)(3). Rule 804(b)(3) defines a statement against interest as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Id.

The trial court found the statement failed to meet the requirements of the statement against interest exception to the hearsay rule because Bush was not unavailable and the statement lacked credibility. Stanko was uncertain as to what information he obtained from the newspaper article and what he learned from Bush. Further, Bush made no statement; he only smiled in response to Stanko's question. Stanko rated Bush's credibility a "2" on a scale from 1 to 10 and believed the information was "puffing."

See N.T., 9/5/03, at 58, 86, 92-93, 101, 103. We find no abuse of discretion in the trial court's refusal to grant a new trial where the statement would not have been admissible.

Our review of the record establishes the sentence imposed was not the product of passion, prejudice, or any other arbitrary factor. 42 Pa.C.S. § 9711(h)(3). We further find the evidence was sufficient to establish the two aggravating factors found by the jury, specifically: (1) appellant has been convicted of another federal or state offense, committed either before or at the same time as the offense at issue, for which a sentence of life imprisonment or death could be imposed, 42 Pa.C.S. § 9711(d)(10); and (2) appellant knowingly created a grave risk of death to another person other than the victim of the murder, *id.*, § 9711(d)(7). Accordingly, we affirm the verdict and the sentence of death.

The Prothonotary of this Court is directed to transmit the complete record of this case to the Governor. *Id.*, § 9711(i).

Judgment of sentence affirmed.

Justices Nigro and Saylor concur in the result.

APPENDIX D — OPINION OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA, DATED MARCH 16, 2004

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 1220 CR 2002
1374 CR 2002
1746 CR 2002

COMMONWEALTH OF PENNSYLVANIA

v.

SAMUEL B. RANDOLPH, IV

1925 OPINION IN SUPPORT OF ORDER

The Appellant, Samuel Randolph, (hereinafter, "Defendant") appeals from the sentences imposed by this court on July 10, 2003. For the reasons set forth herein, the judgment of sentence should be affirmed.

I. BRIEF PROCEDURAL HISTORY[1]

This matter comes before the Court on appeal of the judgment of sentences imposed on July 10, 2003. The Defendant was tried before a jury and found guilty on two counts Murder, two counts of Criminal Attempt,

1. The specific, detailed procedural history relevant to each appeal issue is set forth in full, *infra.*, in connection with each issue.

Murder, three courts of Aggravated Assault, two counts of firearms violations, and Reckless Endangerment. Following jury selection, the guilt or innocence phase of the trial began on Thursday May 8, 2003, and concluded on Wednesday May 14, 2003. The trial court conducted the sentencing phase of the trial on Thursday May 15, 2003. The jury found as follows:

THE COURT: In the case of the Commonwealth of Pennsylvania versus Samuel B. Randolph, IV, on the question of first degree murder of Anthony Burton, question A, we the jury unanimously sentence the Defendant, which one was checked, death or life imprisonment?

THE FOREPERSON: Death

THE COURT: And your finding in paragraph B, the finding was what with paragraph B? Did you find that one or more aggravating circumstances and no mitigating circumstances existed?

THE FOREPERSON: That's correct.

THE COURT: Did you find that both aggravating circumstances existed in this case?

THE FOREPERSON: That's correct.

THE COURT: And found no mitigating circumstances existed?

THE FOREPERSON: No.

THE COURT: All right.

In the case of the Commonwealth of Pennsylvania versus Samuel B. Randolph, IV, on the first degree murder of Thomas Easter, question A, we the jury unanimously sentence the Defendant, and which one was checked?

THE FOREPERSON: Death.

THE COURT: Under the finding in paragraph B, did you check at least one aggravating circumstance and no mitigating circumstances existed in this case?

THE FOREPERSON: Right.

THE COURT: The same in both cases, the aggravating circumstances?

THE FOREPERSON: That's correct.

(Notes of Testimony,[2] Vol. VIIT, pp. 54-55).

The trial court deferred imposition of the sentence designated by the jury until July 10, 2003.

At that time, private defense counsel Samuel Stretton, Esq., appeared on behalf of the defendant, and appointed trial counsel was permitted to withdraw. Defense counsel made an oral request for extraordinary relief and a request to delay sentencing. The court denied those

2. Hereinafter cited as "N.T.".

requests. (Transcript of Proceedings, Sentencing, July 10, 2003, pp. 4-14). The court sentenced the defendant as follows:

THE COURT: At Count 1, at 1746 CD 2002, the jury having reached a verdict to impose the death sentence, the court imposes the death sentence. You're to be clothed, housed and fed by the Department of Corrections to the appointed hour to carry out the sentence. We'll impose the costs of prosecution and no fine.

At Count 2, at 1746 CD 2002, the jury having reached and entered a verdict of death in the case, the Court imposes that sentence. No fine. We'll impose the costs of prosecution.

Those two sentences are to run concurrently with each other.

(Transcript of Proceedings, July 10, 2003, pp. 23-24).

The court also sentenced the defendant on the additional crimes for which he was convicted.

(Transcript of Proceedings, July 10, 2003, pp. 24-29).

Thereafter, on July 16,2003, counsel filed a Petition/ Motion of the Defendant, Samuel Randolph, to Modify and Reconsider Sentence, to which the Commonwealth filed an Answer on July 18, 2003. Counsel subsequently filed motions for a new trial on the basis of after-discovered evidence. The court denied those motions by Order dated November 18, 2003.

Appendix D

Defendant filed a Notice of Appeal on December 5, 2003. Upon Defendant's request, the Supreme Court allowed until March 17, 2004 to transmit the record on appeal and the Opinion of the trial court.

II. FACTUAL BACKGROUND

The Commonwealth accurately recites the facts of the case, and Defendant presents no Counterstatement of Facts. Therefore, we incorporate the Commonwealth's Statement of The Case as follows:

The factual basis for the charges relate to incidents that occurred in September 2001. In the early morning hours of September 1, 2001, Gary Waters was in Roebuck's Bar in the City of Harrisburg with Thomas Easter and Alister Campbell. (Notes of Testimony, Vol. III, 54). Inside the bar, an argument began between Alister Campbell and Samuel Randolph. (N.T., Vol. III, 54-55). Waters went to break up the argument. At that point, either Gary Waters or Thomas Easter struck the defendant over the head with a bottle. (N.T., Vol. III, 55-126.). Randolph and Waters began to fight. (N.T., Vol. III, 126). After Randolph beat up Waters and Easter, a bouncer threw the defendant out of the bar. (N.T., Vol. ill, 126). To avoid further conflict, the bar owner, Ron Roebuck, would not let Waters or Easter leave the bar. (N.T., Vol. III, 126).

On the night of September 1-2,2001, Waters, Easter, and Campbell returned to Roebuck's bar. (N.T., Vol. III, 57,127). Ron Roebuck refused them admittance to the bar, so they went across the street. (N.T., Vol. III, 58, 127).

Appendix D

In the early morning hours of September 2, 2001, the defendant drove past the bar in a large car and exchanged words, with Campbell, Waters and Easter. (N.T., Vol. III, 129). The defendant drove off, but returned 10 to 15 minutes later in a different vehicle. (N.T., Vol. III, 129). When he returned, Randolph was in the backseat of the other vehicle. (N.T., Vol. III, 130). Randolph made eye contact with Ron Roebuck who was outside the bar and then turned and opened fire in the direction of Campbell and Easter. (N.T., Vol. III, 130-132). During this gunfire, a bullet grazed Waters' hand. (N.T., Vol. III, 61). After Randolph fired on them, Easter and Campbell returned fire. (N.T. Vol. III, 130-132). Ron Roebuck identified the defendant as the person who opened fire from the car with one hundred percent certainty. (N.T., Vol. III, 133).

Several days after the shooting, Roebuck saw the defendant at a beer distributor. (N.T., Vol. III, 133). Upon informing Randolph that his bouncer's car had been damaged by the shooting, the defendant indicated that he would take care of it. (N.T., Vol. III, 133-134).

Approximately 22 hours after the shooting in front of Roebuck's bar, during the late evening of September 2, 2001, Waters was traveling by car with Campbell and Easter. (N.T., Vol. III, 61-62). Campbell was driving, Easter was in the front passenger seat, and Waters was in the rear seat. (N.T., Vol. III, 63). Campbell parked in front of 538 Maclay Street, Harrisburg, several doors down from Waters' home. (N.T., Vol. III, 62): While the three spoke to an individual on the street, a station wagon pulled next to them. (N.T., Vol. III, 63-64). The station

wagon contained two people; the passenger in the station wagon was between two and two and a half feet away from Waters. (N.T., Vol. III, 65). Waters identified Samuel Randolph as the passenger with one hundred percent certainty. (N.T., Vol. III, 68). Upon pulling next to them, Randolph opened fire with two handguns. (N.T., Vol. III, 65-66). Syretta Clayton, Gary Waters' girlfriend, watched the shooting from the second floor of 544 Maclay Street. (N.T., Vol. III, 148). Clayton also identified the defendant as the person firing from the passenger seat of the station wagon. (N.T., Vol. III, 145). The gunfire struck Waters in the back and grazed his head, thigh and buttocks. (N.T., Vol. III, 66). As a result of the shooting, Waters suffered serious bodily injury. (N.T. Vol. III, 173-174).

On September 19,2001, Alister Campbell was at Todd and Pat's Bar, 1939 North Sixth Street, Harrisburg. (Commonwealth's Exhibit 73,[3] p. 16-17).[4] Campbell arrived at the bar at around 9:30 or 10:00 in the evening with Anthony Burton and Thomas Easter. (CX-73, p. 17). Campbell stood at the bar near a videogame. (CX-73, p. 18). Easter was by the jukebox and Burton was near the pool table. (CX-73, p.18). Samuel Randolph entered the bar wearing a fatigue jacket, a black hoodie, and a mask. (CX-73, p. 19). The mask only covered half of his face. (CX-73, p.19). Upon entry to the bar, each of the defendant's hands

3. Hereinafter cited as "CX-73".

4. Alister Campbell refused to testify and was found in criminal contempt. (N.T., Vol. IV, 42). As stich, he was unavailable as a witness and his former testimony at the preliminary hearing was read into the record. (N.T., Vol. IV, 49).

was concealed underneath his opposite arm. (CX-73, p. 19). The defendant pulled two firearms from underneath his arms and opened fire. (CX-73, p. 21). Randolph shot Campbell in the chest, arm, and leg. (CX-73, p. 21). While the defendant was shooting, the mask came off his face revealing approximately ninety-five percent of his face. (CX-73, p. 22).

Campbell identified the shooter as Samuel Randolph with one hundred percent certainty. (CX-73, p. 22-23). He described the shooter as 5 foot 8 inches to 5 foot *9* inches in height and stocky. (CX-73, p.19). This is consistent with the defendant's height. (N.T. Vol. IV, 89). At the time of the shooting, the bar was well lit. (CX-73, p. 18).

As a result of the shooting, Thomas Easter and Anthony Burton died of gunshot wounds. (N.T., Vol. III, 34-36). The bullet that killed Easter entered the left top of his head and lodged beneath his jaw after passing through the brain. (N.T., Vol. III, 34). The bullet that killed Burton entered his upper back and passed through his left lung, pulmonary artery and heart. (N.T., Vol. III, 36). Easter's wound was a close gunshot wound, meaning it was fired from within three feet. (N.T. Vol. III, 38). The bullets that killed Easter and Burton and the bullet removed from Campbell's chest were all fired from within the same firearm. (N.T., Vol. IV. 26-27). In addition to Campbell, Easter, and Burton, Lakisha P. Warren, John Brown, Latoya Jackson, and Reginald Gillespie suffered serious bodily injury in the shooting. (N.T., Vol., 173-174).

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Lateta Green had been in Todd and Pat's Bar for approximately 15 to 20 minutes prior to the shooting. (N. T., Vol. IV, 9). Approximately five minutes prior to the shooting, Sharif Layton entered the bar. (N.T. Vol. IV, 9). Although he is known never to have taken a drink, Layton bought a 40 ounce bottle of beer and then left the bar. (N.T., Vol. IV, 10; Vol. V, 43-44). Green observed the shooter once he entered the bar. Green had known the defendant for over 15 years. (N.T., Vol. IV, 8). Green testified that the height, build, and mannerisms of the shooter were similar to Samuel Randolph. (N.T., Vol. IV, 13).

Amahl Scott was also in Todd and Pat's Bar on September 19, 2001. (N.T., Vol. IV, 65-66). Scott had known the defendant for approximately twelve years and had seen him more than a hundred times over the years. (N.T., Vol. IV, 65). Scott saw Layton enter the bar, purchase beer, and leave within two minutes. (N.T., Vol. IV, 67). After Layton left the bar, Scott went outside the bar and stood. (N.T., Vol. IV, 67). Approximately ten minutes after Layton left, the shooter entered the bar. (N.T., Vol. IV, 67-68). Scott did not see the shooter's face when he entered. (N.T., Vol. IV, 69). He described the shooter as short and husky. (N.T., Vol. IV, 70). Scott looked through the window of the bar and saw the perpetrator shoot Easter. (N.T., Vol. IV, 70). Scott started to run up the street but then turned and returned towards the bar. (N.T., Vol. IV, 70). Scott saw the shooter exit the building with his mask in hand. (N.T., Vol. IV, 71-72). Scott identified the defendant as the shooter with one hundred percent certainty. (N.T., Vol. IV, 72).

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By stipulation, the Commonwealth established that as of September 19, 2001, Kimberly M. Monk was the subscriber of mobile 717-903-3780. (N.T., Vol. IV, 54). Monk entered into the service contract with AT&T Wireless on August 13, 2001. (N.T. Vol. IV, 54). Monk testified that she never used the telephone but immediately gave it to the defendant upon acquiring it. Police seized the same cellular telephone from the front seat of a blue Ford truck from which the defendant fled on October 24, 2001. (N.T., Vol. IV, 94; Vol. III, 109).

Sasha Garnes acquired mobile 717-623-2668 from PCS One in August, 2001. (N.T., Vol. IV, 55,58). Within one day of acquiring this phone, she gave it to Sharif Layton. (N.T., Vol. IV, 56). After giving the phone to Layton, Garnes did not possess the phone again. (N.T., Vol. IV, 56).

The Harrisburg Bureau of Police received the 911 call reporting the shooting at Todd and Pat's Bar on September 19,2001, at 10:52 p.m. (N.T., Vol. IV, 60). The Commonwealth introduced the call detail records of AT&T Wireless relating to mobile 717-903-3780 for September 18-20, 2001. (N.T., Vol. IV, 58-59). The records reflected a call from 717-903-3780 to 717-623-2668 made in the Harrisburg area beginning at 10:27:57 p.m. and lasting one minute. (N.T., Vol. IV, 58). The records reflect an incoming call received at 10:32:35 p.m., lasting seven minutes. (N.T., Vol. IV, 58). The records reflect an outgoing call from 717-903-3780 in the Harrisburg area to 717-623-2668 beginning at 10: 54:56 p.m., lasting two minutes. (N.T., Vol. IV, 58-59).

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Investigator Timothy Carter of the Harrisburg Bureau of Police came into contact with the defendant on the afternoon of October 24, 2001, at approximately 4:30. (N.T., Vol. IV, 89). While traveling in an unmarked police vehicle with other detectives, Carter observed Randolph driving a blue Ford truck in the area of Sixth and Maclay Streets, Harrisburg. (N.T., Vol. IV, 89). As the officers followed the defendant without lights or siren, Randolph pulled into a car wash parking lot at Seventh and Muench Streets and stopped his vehicle. (N.T., Vol. IV, 91). The detectives announced their identity, indicated they had a warrant for his arrest, and ordered the defendant to exit his vehicle. (N.T., Vol. IV, 92). When the defendant reached towards the floor of the vehicle, the detectives drew their weapons. (N.T., Vol. IV, 92). The defendant shouted to the detectives, "shoot me, shoot me, shoot me." (N.T., Vol. IV, 93). At Fifth and Curtin streets in the City of Harrisburg, Randolph abandoned his vehicle and fled on foot. (N.T., Vol. IV, 93). After running through an occupied residence, Randolph was able to escape. (N.T., Vol. IV, 94). The Commonwealth later obtained his extradition from Virginia. (N.T., Vol. IV, 94). A later search of the vehicle yielded a black half mask with Velcro and the cellular telephone registered in Kimberly Mock's name. (N.T., Vol. III, 106, 109).

The defendant testified in his own defense at trial. The defendant claimed that he was at the place of his employment, Big J's Bar, at the time of the murders. (N.T., Vol. V, 88). He further testified that at the time of the murders, the following other persons were present at the bar: his mother, Beverly Watt; his sister, Sarah

Randolph; Brenda; Bobby; Sweat; Wanda; and Christian Woodson.[5] (N.T., Vol. V, 102-103). The defendant was impeached with his grand jury testimony in which he testified under oath that he did not remember who was in the bar at the time of the murders. (N.T., Vol. V, 105-106). On rebuttal, the Commonwealth established that at the time of the murders, September 19, 2001, Christian Woodson was incarcerated at the Dauphin County Prison, without work release privileges. (N.T., Vol. VI, 55). Based on this evidence, the jury convicted the defendant of all charges and sentenced him to death on two counts of first degree murder. (Commonwealth's Brief in Opposition to Defendant's Post-Sentence Motions, pp. l-9).

III. ISSUES PRESENTED[6]

A. DID THE TRIAL COURT PROPERLY EXERCISE ITS DISCRETION IN DENYING DEFENDANT'S LATE REQUEST FOR A CONTINUANCE?

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5. The defendant did not know the last names of many of these people.

6. The defendant did not raise or brief the issue of sufficiency of the evidence before this court; accordingly we do not address that issue. We are cognizant that, "[a]lthough not specifically raised in this appeal, our Supreme Court will always review the sufficiency of the evidence to sustain a conviction of murder in the first degree in capital punishment cases." *Commonwealth v. Szuchon,* 506 Pa. 228, 238, 484 A.2d 1365,1370 n.3 (Pa. 1984), *citing Commonwealth v. Zettlemoyer,* 500 Pa. 16, 26 n.3,454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970,103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

Following formal arraignment of the defendant on the various charges, during the summer of 2002, the court appointed Allen C. Welch, Esq., on August 27, 2002, to represent Defendant, based upon Mr. Welch's experience

in handing capital cases. On December 9, 2002, Mr. Welch sought a continuance to enable him to obtain complete discovery materials. (N.T., Continuance, December 9, 2002). The court set the trial date for February 10, 2003. At a pre-trial conference hearing on January 3, 2003, the court re-set the trial date for March 10, 2003, a special term of court for which a separate jury panel would be summoned for jury selection on March 6 and 7, 2003.

Thereafter, on February 19, 2003, Mr. Welch filed a Motion for Continuance because of the serious illness of his mother. The court granted a continuance to May 5, 2003.

On March 27, 2003, the court conducted a pre-trial hearing at which it heard argument on Defendant's Motion to Sever. Near the conclusion of that hearing, during which the court discussed with counsel Defendant's argument regarding Pa.R. Crim.P. 600, Defendant asserted that he had opposed any of the continuances, and in fact, wished to proceed *pro se.* (N.T. March 27, 2003, pp. 28-35). The court denied Defendant's request; Defendant then asserted both that he was being "forced" to proceed *pro se,* and that he wished to proceed *pro se.* The court addressed the defendant as follows:

THE COURT: Here's what I don't want, I'm not going to do. You've made your request. But I'm either going to direct you to file something and give the Court some basis and then schedule something to see whether he's going to go pro se or not.

THE DEFENDANT: I want to go pro se. I'm telling you that now.

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THE COURT: I understand that. You made your request today. I'm prepared for the pretrial motions in this matter. I have some decisions to make on those matters and decisions regarding appointment of an investigator pretty promptly. So at this point I'm not denying you the opportunity to proceed pro se, but for today's purposes, I'm not in this kind of case going to deal with that right now on the record. Mr. Randolph, if you want to request to proceed pro se, you made your request I would like to see your reasons for that. You have the right to do that. I would schedule something pretty promptly to deal with that. I'm just not now going to without some basis. You have a constitutional right to do so, Mr. Randolph.

THE DEFENDANT: Right.

THE COURT: I want to see your request, your reasons. I want to see the implications from the Court's perspective if we grant that, you can exercise your right in this case, scheduling, the timing, all of that gets impacted, so I just don't want to deal with that now. It's very important for you to have that opportunity to do that if you want, but I want you to know all the pitfalls. I want to be able to explain to you the timing of this case, whether its going to impact on that.

(N.T., Pre-Trial Motions, March 27, 2003, pp. 35-36).

The court then directed the defendant to file a statement in writing with the Clerk of Courts as to his reasons why he wished to proceed *pro se.* (N.T., Pre-Trial Motions, March 27, 2003, pp. 38-39).

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Although Defendant did not file a written request as directed, one week later, on April 3, 2003, the court held a hearing on the issue of Defendant's request to proceed *pro se.* The defendant acknowledged that at the previous hearing, he stated an intention to proceed *pro se.* However, at the April hearing, Defendant stated that he wished to ''make an oral motion to change my appointed counsel because I really didn't want to--I didn't want to waive my rights to counsel, but I did want to change my appointed counsel." (N.T., Pre-Trial Motions, April 3, 2003, p. 3). The court apprised Defendant that it would not, at that time, entertain Defendant's oral request to remove counsel. (N.T., Pre-Trial Motions, April 3, 2003, p. 3.) The court apprised the defendant as follows:

THE COURT: Mr. Randolph, last time we were here you had told me what you—its on the record, but you wanted to represent yourself. I'll be frank with you. I thought your response was a reaction to what you heard in the courtroom. And I didn't think you had thought out that request to go pro se in this case where the death penalty is involved. I wanted to give you some time to sort of reflect and think about things, bring you back here as promptly as we could with our schedule and put some matters on the record now to see if you had some time to think about it, if you had any questions about it, to deal with them now on the record. So that's why we're back here today, for that purpose.

THE DEFENDANT: Okay.

THE COURT: Go ahead.

THE DEFENDANT: Yes, sir. You exactly right. That is what happened. But what I did want to ask for, I wanted to. make an oral motion to change my appointed counsel because I really didn't want to—I didn't want to waive my rights to counsel; but I did want to change my appointed counsel.

THE COURT: That's not--I'm going to be real frank with you. That's not your question in terms of appointed counsel. The Court appoints counsel for you. And Mr. Welch has been appointed. I don't see anything in his performance that would even merit that request or for me to grant that request. By the same token, at this point, I wouldn't even consider that request. You don't have the right to say here's my appointed counsel. You get counsel from our list who have experience in these kind of cases. And so that's who--I'm not going to consider that request. If would, I would deny the request for the reasons I just said.

THE DEFENDANT: Your Honor, there's multiple deficiencies concerning Mr. Welch's performance.

THE COURT: I've denied that request. So you can raise those matters if you feel your court-appointed attorney has been ineffective or has not performed. I'm telling you in my view of his performance in the handling of the case, the pre-trial motions, the briefs, I have not seen that. So this isn't the time or place set for a hearing to remove him, because I'm not going to remove him based

on what I know. It's not your decision or your request to change appointed counsel. That's not your bailiwick to do that. That's the Court's.

(N.T. Pre-Trial Motions, April 5, 2003, pp. 2-4)

As part of his consideration as to whether he would indeed proceed *pro se,* defendant sought assurance that he would have daily access to the prison law library. The court apprised Mr. Randolph that it would inquire of the warden as to whether he could obtain increased access to the law library, and that the court would appoint standby counsel. (N.T., Pre-Trial Motions, April 3, 2003, pp. 7-8). Defendant informed the court that if he could not obtain additional time in the law library, he did not wish to represent himself. (N.T., Pre-Trial Motions, April 3, 2003, p. 14). Following a recess, during which the court conferred with the prison warden, the court advised Defendant that the prison would allow two hours of library time three days per week. (N.T., Pre-Trial Motions, April 3, 2003, p. 16). The court again explained to the Defendant his option to represent himself, with standby counsel. Defendant declined that option. (N.T., Pre-Trial Motions, April 3, 2003, pp. 18-19). At no time did Defendant inform the court that either he or his family was attempting to obtain private counsel, that he wanted a continuance, or additional time to seek other counsel.

For the specially set term of court for this case to begin May 5, 2003, 120 citizens of Dauphin County were summoned as jurors. (N.T., Vol. I, pp.12-13).

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On May 1, 2003, a private attorney, Samuel B. Stretton, Esq., filed a Motion for Continuance. On the same day, the court conducted a conference call with the First Assistant District Attorney, Mr. Chardo, along with appointed defense counsel Mr. Welch, Mr. Stretton, and Mr. Randolph, to address the request for continuance. At the outset of the conference, Mr. Stretton set forth for the court his schedule for the upcoming week, and his availability should he be ordered by this court to appear. (N.T., Conference Call, May 1, 2003, pp. 3-4). Appointed counsel represented that he would be prepared on Monday to do whatever the court would require. (N.T., Conference Call, May 1, 2003, p. 5). The court also allowed Mr. Randolph to set forth his position. Through Mr. Stretton, Mr. Randolph represented that he would want only a "short continuance", and that he "would like to get to trial as soon as possible". (N.T., Conference Call, May 1, 2003, p. 6).

On behalf of the Commonwealth, in support of his objection to the continuance, Mr. Chardo reminded the court that prospective jurors would arrive Monday and Tuesday, having been apprised for the second time to appear for a special session of jury selection in this matter, the first having been continued at the request of the defense. (N.T., Conference Call, May 1, 2003, p. 7). The Commonwealth and the defense confirmed that subpoenas were issued, or were being issued, for the appearance of witnesses immediately following jury selection. (N.T., Conference Call, May 1, 2003, p. 7). The Commonwealth also expressed concern about influences upon trial witnesses. (N.T., Conference Call, May 1, 2003, p. 11).

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The record of the conference call reflects that the defendant's family first contacted Mr. Stretton on January 26, 2003, more than three months prior to the filing of the Request for Continuance. (N.T., Conference Call, May 1, 2003, p. 8). At some point thereafter, Mr. Stretton agreed to enter his appearance on behalf of Mr. Randolph, upon demonstration of the Randolph family's ability to pay counsel fees. (N.T., Conference Call, May 1, 2003, p. 9). Mr. Stretton represented that he attempted to counsel Mr. Randolph as to proceeding with appointed counsel rather than expending funds for private counsel. (N.T., Conference Can, May 1, 2003, pp.10-11). Mr. Stretton received assurance only the afternoon before the conference can that the funds were in place for private counsel fees and expert costs, at which time he filed a praecipe to enter his appearance in the case. (N.T., Conference Call, May 1, 2003, p. 10).

During the course of the discussion with counsel and the defendant, the court proposed several alternatives which would balance the defendant's desire to proceed with Mr. Stretton as counsel, and the Commonwealth's interest in commencing with the trial as scheduled. The court discussed the potential option of bifurcating the guilt and innocence phase from the penalty phase. The Court stated:

THE COURT: My inclination would be not to continue the trial portion of this case in terms—it's set for Monday. This is the second time we have brought in a special jury panel for this case. It got continued once before. Mr. Randolph has been in court–in other proceedings in

connection with the case. I have been crystal clear on the record in terms of this particular date. It's now Thursday before Monday when the trial is- at least the jury selection I should say is ready to begin. My inclination is not to continue the case in terms of selecting the jury on Monday, Tuesday, Wednesday, however long that takes. The plan has always been to go into the trial stage at that point. And then, Mr. Stretton, as I listen to you, perhaps there could be some separation, if it's even necessary, as far as you addressed with the penalty phase, if we get that far.

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This is the second time for a special jury to be brought in, and I don't believe I'm abusing my discretion to deny the continuance for the jury selection on Monday, proceed with the guilt or innocence phase of the proceeding and then-- given what happens in that proceeding, *then I a very much open to what Mr. Stretton has proposed, if we get that far. So that's my inclination.*

(N.T., Conference Call, May 1, 2003, pp. 12, 13)(emphasis added).

In opposition to the court's consideration of bifurcating the case, appointed counsel suggested that issues relating to funds for investigation somehow played a role in denial of the request for a continuance. (N.T., Conference Call, May 1, 2003, p. 16). The court responded:

THE COURT: If you believe that this discretion was based on economics and the jury panel, you're wrong

because this case has been out there. It's over a year old and then the earlier cases. So it's not that. It's the whole tenure of, you know, we are set for trial, we are ready for trial and here we are two days—well two business days before trial and we are asking for a continuance in a case that's a year old that there was notice or some inquiry back in January. This isn't economics. I view this as the Court weighing very weighty matters on behalf of Mr. Randolph, but I am not inclined to push this case off at this juncture at this point in time given what I know about the case and the history of this case. So I'm looking at it like any other matter. It's old. It's been around. It's been—we have dealt with all the pretrial matters and we're ready to go to trial.

(N.T., Conference Call, May 1, 2003, p. 17).

The court also demonstrated a willingness to afford private counsel accommodations as to the start of the trial following jury selection.

THE COURT: Mr. Stretton, anything else you wanted to add for the record at all?

MR. STRETTON: I think the grounds were covered. Just one point, if I could. If I can -- if I were to try this case, would there be any flexibility -- like a day or two time period -- in terms of the selection process or is the selection process --

THE COURT: The selection process is pretty much etched in stone. *I certainly would consider perhaps doing something between the selection process and the time to begin. I'd certainly consider that.*

MR. STRETTON: If so and I'm able to come and pick the jury, if you might give me a couple of days after the jury is picked.

THE COURT: To get prepared.

STRETTON: Like the following week to get up to snuff.

THE COURT: Right. I don't have to make that decision now, Mr. Stretton. I will be available tomorrow to finalize that, but the jury selection is sort of etched in stone.

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MR. STRETTON: I think to get to the Wednesday hearing—I can't get out Monday morning. That's the whole disciplinary board and everyone else.

THE COURT: *I'm willing to work around something like that.*

MR. STRETTON: Tuesday I believe, Judge, the court is only for half an hour to finish an audit case involving three quick witnesses.

THE COURT: *I can work around that.*

(N.T., Conference Call, May 1, 2003, pp.19-21)(emphasis added).

The conference call then concluded, with appointed counsel and private counsel to discuss the case, and the filing of a motion regarding alibi witnesses. (N.T., May 1, 2003, pp. 20-22).

The case was called to trial Monday May 5, 2003 at 10:37 a.m. Mr. Randolph's court-appointed counsel sought clarification from the court as to whether or not the court accepted the entry of appearance filed by Mr. Stretton, such that Mr. Stretton would then be counsel of record. Counsel and the court then reviewed the events which followed the on-the-record telephone conference of Thursday, May 1. Mr. Chardo represented to the court, on the record, the nature of communications received from Mr. Stretton on Friday afternoon May 2, 2003. Mr. Chardo stated that Mr. Stretton left a message indicating that he had not had the opportunity to review discovery, that Mr. Welch would need those materials, and that Mr. Stretton would not be in a position to try the case Monday. (N.T., Monday May 5, 2003, pp. 2-3; 7-8).

The court further placed on the record a recitation of events of Friday, May 3. The court indicated that the court conducted a conference with a private counsel, Anthony Thomas[7] on behalf of Mr. Stretton, in chambers with Mr. Chardo via cellular telephone, during which the court confirmed that the jury selection would begin Monday, but expressed a continued willingness to work with Mr. Stretton regarding his involvement in the case, including

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7. Mr. Thomas represented Defendant at the preliminary hearing in this matter. (N.T. Volume I- Jury Selection, May 5, 2003).

a willingness to delay the commencement of evidence a day or two to allow Mr. Stretton time to prepare. (N.T., Vol I, pp. 4-5).

The summary on the record of those communications further reflects that the court received a phone request from Mr. Thomas' office, made on behalf of Mr. Stretton, communicating Mr. Stretton's position that he wished to be involved in the case as long as he retained discovery and jury selection was postponed until 12:00 noon Monday. (N.T., Vol. I, p. 6). The court responded that it would postpone jury selection until 10:00 a.m. (N.T., Vol. I, p. 6).

At the time the court called the case to trial, Mr. Stretton was not present. Mr. Thomas then represented to the court as follows:

MR. THOMAS: I did have a discussion with Mr. Stretton late last evening and we discussed the housekeeping things we would be doing right now, discussing the continuance. *And Mr. Stretton expressed to me or communicated to me that he would still be willing to enter appearance–or to try the case if he were permitted to pick the jury himself. Again, we understand that he would not be able to do that this morning, but he can still come this afternoon if a few hours delay is acceptable.*

(N.T., Vol I., p. 9)(emphasis added).

The court then ruled that it would not, at that time, accept Mr. Stretton's praecipe for entry of appearance, but that it would consider the issue at a later time should

Mr. Stretton re-file a praecipe to be involved in the case. (N.T., Vol. I, pp.9-10).

Mr. Randolph's court appointed counsel then renewed the motion for a continuance. (N.T., Vol I. p 11). The court reiterated its denial of the motion for continuance as follows:

THE COURT: All right. On the continuance matter? Just for the record, and again it's all there, I mean the time of filing the criminal complaints, in these matters the previous trials that were scheduled, the previous proceedings back in January, this case was scheduled for trial and then continued till March. Eighty notices—well 120 notices went out to jurors, they were summoned the beginning of March and the matter continued at that point. Then we had pretrial motions in February and other matters. And Mr. Randolph has been very clear that he wanted his case to proceed even back in March and January. He was ready to proceed to trial. And we've had proceedings from the time this got continued in March. This May date was set where Mr. Randolph wanted to go pro se. Also communicated to the Court that he had alibi witnesses that he wanted talked to and presented that to the Court. And I asked him to provide names and addresses, identifying information about these alibi witnesses, and he hadn't done that.

THE DEFENDANT: Your Honor--

THE COURT: Mr. Randolph, just wait. And so I am certainly aware of Mr. Randolph's feelings about Mr.

Welch and that this breakdown I do not believe is not what I have seen Mr. Welch do in this case. The pretrial motions, the voluminous discovery, it's not a lack of effort or work on Mr. Welch's behalf. Mr. Randolph was dissatisfied with what he perceived as his work on his behalf. And I understand that. But I guess what is significant to the Court is as well is I hadn't—the Court was never informed from January till May 1st when this petition was filed, Mr. Randolph had expressed just he was not satisfied with Mr. Welch and he's expressed that repeatedly and a number of times. He even wanted to go *pro se.* All those other matters. We were never told—the Court was never told that there was Mr. Stretton or any other counsel waiting out there, it was just matter of getting the finances. This is the first time I've heard this in terms of the finances. And I guess the reason I say that is, you know, we make our decisions based on the record and what's before us. And here for the first time, May 1st, after all this history, then we're told, well, we now have the money. If the Court would have been informed February, March, April, saying here's our situation, Judge, are you willing to work with us, are you willing to do these things.

But this Supreme Court case as I read it says the Court—it's an abuse of discretion standard and we're to consider not only the Defendant's right to counsel of his choosing, that is so crystal clear, and also the Court is to consider the state's right to a prompt disposition and a prosecution of the offense. The case also talks about the state's interest in the swift and efficient administration of criminal justice. So we've considered some of the things that the Commonwealth put on the record as well

about the issues from their perspective. And the Court administration is something for us to consider as well.

So when we weighed all that, we just believe it's not an abuse of our discretion at this time to deny the continuance where we're at right now.

All right.

(N.T., Vol. I., pp. 12-17).

The Court apprised the defendant that Mr. Welch and Mr. Thomas were present to begin the jury selection, and that it would address the matter of Mr. Stretton's participation on the record that afternoon or the following day, when he arrived. (N.T., Vol. I, pp 18-19). The prospective jury panel entered the courtroom at 11:10 a.m. on Monday May 5, 2003.

Jury selection continued throughout the day until 4:34 p.m. Although it was represented that Mr. Stretton required a only a few hours delay in order to participate in the jury selection, the record reflects no appearance by or communication from Mr. Stretton for the remainder of the day. Jury selection resumed on Tuesday May 6, at approximately 9:00 a.m. and continued throughout the day until 4:21 p.m., with the jury having been selected. The Court instructed the jury to report back to begin hearing the case on Thursday May 8, 2003, with no proceedings to occur on Wednesday May 7, 2003. The court received no communication from Mr. Stretton during that time.

Appendix D

On Thursday May 8, 2003, the Court placed on the record further discussion of the issue of the request for continuance. The court stated as follows:

THE COURT: I want the record to reflect that I met with counsel. The case was ready to proceed at 9 o'clock. It's now 9:05. All counsel were here at 8:45; Mr. Thomas, Mr. Welch and Mr. Chardo. And Mr. Thomas wanted to place -- wanted the Court to reconsider our denial of the continuance earlier. And I indicated to him that we stopped jury selection Tuesday around 4 p.m., had all day yesterday and this morning. And he wanted to make an oral motion on the record which the court denied and directed him to file a written petition with his reasons that he believes we should reconsider our decision earlier to deny the continuance. And also set forth specifically the relief that he would request regarding the continuance. And also the District Attorney wanted to place—not wanted to place, but wanted to place on the record I guess the fact that he has information that as late as April 10th, 2003, that Mr. Randolph made phone calls from prison in an attempt to hire Terry McGowan, Esquire. He wanted that placed on the record to indicate that Mr. Randolph was looking for another attorney as late as April 10th 2003. I further want the record to reflect that we have not, the Court has not, heard anything from Mr. Stretton at all, don't know and am completely unaware—at least I've been informed, I don't have any first-hand knowledge—that Mr. Stretton contacted the Court's office or the Court in any fashion requesting that he participate in the trial that is about to proceed. We'll just direct that that be transcribed and made part of the record.

(The proceedings concluded in chambers at 9:10 a.m.)

(N.T. Volume III, pp. 5-6).

Mr. Stretton never contacted the court nor appeared during the entire course of the trial.

2. Legal Discussion

The court's denial of the defendant's request for a continuance made on the eve of trial, to allow him to proceed with private counsel, rather than appointed counsel, did not deny the right to counsel. The defendant failed to timely apprise the court of his intentions or efforts to obtain private counsel, a continuance would have impeded the efficient administration of justice, and private counsel waived reasonable scheduling accommodations which would have allowed him to participate in the trial.

While a criminal defendant enjoys a constitutional right to counsel, the court may exercise its discretion and weigh the defendant's right to particular counsel of his choice against the state's interest in efficient administration of justice. The court may properly deny a request for continuance where allowing a defendant to create delay by proceeding only with particular counsel of his choice would impede swift and efficient administration of criminal justice. "It is clear that a defendant has the constitutionally guaranteed right to be represented by counsel of his own choosing. U. S. Const. Amend. VI and PA. Const Art. I, § 9; *Commonwealth v. Robinson,* 468 Pa. 575, 592, 364 A.2d 665 (1976); *United States ex. rel.*

Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969), cert. denied 397 U.S. 946, 90 S.Ct. 964, 25 L.Ed. 2d 127 (1970). It is equally clear, however,

> that a person's right to be represented by the counsel of his choice is not absolute. *See,* e.g. *Pirillo v. Takiff,* 462 Pa. 511, 341 A.2d 896 (1975). In *Moore v. Jamieson,* 451 Pa. 299, 308, 306 A.2d 283, 288 (1973), this Court specifically held that the right of the accused to choose his own counsel, as well as a lawyer's right to choose his clients, must be weighed against and may be reasonably restricted by "the state's interest in the swift and efficient administration of criminal justice." Although the accused may personally elect to waive his right to a speedy trial, he clearly cannot be permitted to utilize his right to choose his own counsel to clog the machinery of justice and hamper and delay the state in its efforts to do justice with regard both to him and to others whose rights to a speedy trial might thereby be affected." (citations omitted). The question then becomes one of due process, and in the words of one court:
>
> > Due process demands that the defendant be afforded a fair opportunity to obtain the assistance of counsel of his own choice to prepare and conduct his defense. The constitutional mandate is satisfied so long as the accused is afforded

> a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel. The conclusion becomes inescapable, therefore, that although the right to counsel is absolute, there is no absolute right to a particular counsel. *United States ex rel. Carey v. Rundle,* 409 F.2d 1210, 1215 (3d Cir. 1969), *cert denied* 397 U.S. 946, 90 S. Ct. 964, 25 L. Ed.2d 127 (1970).

Commonwealth v. Robinson, 468 Pa. 575, 592-593, 364 A.2d 665,674 (Pa. 1976). *Accord,* "The right to assistance of counsel includes a reasonable opportunity to obtain counsel of defendant's own choice." *Commonwealth v. Kittrell,* 285 Pa.Super. 464, 467, 427 A.2d 1380, 1381(1981); *Commonwealth v. Andrews,* 282 Pa.Super 115,122,422 A.2d 855,858 (1980)).

In determining the reasonableness of the opportunity allowed a defendant to a particular attorney,

> [t]he desirability of permitting a defendant with additional time to obtain private counsel of his choice must be weighed against the public need for the efficient and effective administration. The matter of a continuance is traditionally one within the discretion of the judge, and no prophylactic rule exists for determining when a denial of a continuance amounts to a violation

> of due process. Each case must be decided by balancing competing interests, giving due regard to the facts presented. '[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of continuance is so arbitrary as to violate due process. The answer must be found in the circumstances, present in every case, particularly in the reasons presented to the judge at the time the request is denied.'

Commonwealth v. McCool, 311 Pa. Super. 536,541-542,457 A.2d 1312, 1314 (1983). *Citing Commonwealth v. Atkins,* 233 Pa. Super. 202, 207-08,336 A.2d 368, 371-72 (1975)

Further, a defendant is not *per se* denied the right effective assistance of counsel where he is unreasonably dissatisfied with competent court-appointed counsel, and waits until virtually the eve of trial to obtain private counsel who lacks the time to adequately prepare. Our Superior Court has stated,

> An indigent defendant has a right to court appointed counsel. However, the court's duty is to furnish an able and willing counsel who has the qualifications to lend effective representation,

> that is, one who would reasonably be expected to inspire the defendant's confidence. It is not the court's duty to denominate a series of attorneys for the defendant in the hope of stimulating a confidence unreasonably withheld or to furnish an advocate in strict conformity with the defendant's stylized notions of acceptable forensic skills.

Commonwealth v. McCool, 311 Pa. Super. 536, 541, 457 A.2d 1312, 1314 (Pa. Super 1983).

In *McCool,* the Superior Court held that the trial court properly exercised its discretion in denying a defendant's request for a continuance sought on the first day of trial, in order to obtain private counsel, because of his dissatisfaction with appointed counsel. Although the trial court had earlier conducted hearings regarding the defendant's dissatisfaction with appointed counsel, the defendant waited until the night before the trial to contact private counsel. The trial court in *McCool* allowed the defendant time to substantiate his claim that his brother would pay for private counsel. In finding that the trial court properly exercised its discretion in denying the request for continuance to proceed with private counsel, the Superior Court reminded that "[it] has repeatedly condemned the practice of waiting until the day of trial to request such a continuance". *McCool,* at 311 Pa.Super. 536, 541, 457 A.2d 1312, 1314 (1982).

Just as the defendant in *McCool,* Mr. Randolph, while purportedly dissatisfied with his appointed counsel,

failed to apprise the court until the eve of trial that he wished to be represented by private counsel. The record demonstrates that this court made clear to Mr. Randolph the necessity of setting forth specifically, in writing, the reasons for his dissatisfaction with court-appointed counsel. Although Mr. Randolph did not do so, the court nevertheless held a hearing one month in advance of the trial to address his request to proceed *pro se.* At no time during that or any earlier proceeding did Mr. Randolph raise the issue of representation by private counsel, although the record suggests that Mr. Randolph's family first sought private representation as early as January 2003. At the March and April 2003 hearings, the defendant asserted his opposition to any continuance, and sought to persuade the court that he should be allowed to proceed *pro se.*

Similarly, in *Commonwealth v. Robinson,* 468 Pa. 575,364 A.2d 665 (1976) the Pennsylvania Supreme Court considered the question of whether the trial court deprived Robinson the constitutional right to counsel when it required Robinson to be tried with court-appointed counsel rather than the counsel of his choice. In *Robinson,* the Defendant was convicted of first degree murder and various assault and battery charges arising out of a shooting in a bar, and asserted on appeal that the trial court erred in refusing to grant him a continuance because of the unavailability of his privately retained counsel. *Id.,* at 468 Pa. 588, 364 A.2d 673. Robinson, like Mr. Randolph, insisted upon representation by his private counsel, who was unavailable. The Supreme Court in *Robinson* found that the trial did not arbitrarily prohibit

Robinson's effective use of counsel, and that court-appointed counsel provided a "spirited defense, subject only to the limitations deliberately imposed by Robinson himself". *Id.,* at 468 Pa. 595, 364 A.2d 676. In the instant matter, Mr. Randolph expressed dissatisfaction with his court-appointed counsel, but failed to present any specific reasons in support thereof, or timely apprise the court of his attempts to obtain private representation. Accordingly, as in *Robinson,* responsibility for the inability of private counsel to participate, having been retained on the eve of trial, rested with Mr. Randolph, rather than the court.

Where a defendant is represented by qualified appointed counsel, his insistence upon representation by private counsel who lacks time to prepare does not *per se* violate the right to counsel. In *Commonwealth v. Szuchon,* 506 Pa. 228, 484 A.2d 1365 (Pa. 1984), our Supreme Court upheld a murder conviction where the trial court denied a continuance following a course of the defendant's failure to cooperate with counsel, and a late insistence upon proceeding to trial with private counsel. In *Szuchon* the defendant refused to waive his right to a speedy trial, and refused to cooperate with appointed counsel after the withdrawal of private counsel, although the court appointed experienced counsel. The Supreme Court rejected the defendant's argument on appeal that the short period of time available for counsel to prepare (one week) *per se* violated his right to effective representation of counsel. The Court stated, "Just as a criminal defendant may knowingly and intelligently choose to waive his right to counsel, so too may a defendant knowingly and intelligently choose to proceed to trial represented by

counsel who has little or no time for preparation. In the latter case, the defendant must accept the consequences of counsel's lack of preparation." *Commonwealth v. Szuchon,* 506 Pa. 228, 247, 484 A.2d 1365, 1375 (1984). The court further reasoned, "[b]y insisting on a particular counsel who is unavailable or by insisting on private counsel but failing to take any steps to retain an attorney, a defendant may be deemed to have waived his right to have counsel of his choice." *Szuchon,* at 1376, *citations omitted.*

The record in this matter makes clear that the trial court took every step to ensure that the defendant was apprised of his rights and responsibilities regarding readiness for trial. The actions of the defendant, not the trial court, resulted in Mr. Randolph proceeding to trial with a counsel not of his choosing. The court did not arbitrarily refuse to allow representation by private counsel, but carefully balanced the defendant's right to counsel with the Commonwealth's interests in bringing to trial the murder of two people, for which witnesses and jurors had been summoned, and the court's interest in the efficient administration of justice.

Further, in exercise of its discretion, the trial court carefully considered the scheduling concerns of private counsel to attempt to facilitate his participation in the case. The court offered ample accommodations which would have allowed private counsel's representation during jury selection the guilt or innocence phase, and the sentencing phase, but which opportunities counsel waived.

Appendix D

During the pre-trial telephone conference on the Motion for Continuance, and into the commencement of the trial, the court remained wiling to attempt to accommodate private counsel's scheduling conflicts. On Monday May *5,* 2003, private co-counsel Mr. Thomas represented that Mr. Stretton remained willing to enter his appearance if he could conduct jury selection in the afternoon. The court proceeded with jury selection at 11:10, only an hour or two earlier than Mr. Stretton's requested time. Jury selection continued through the entire day, on Monday May 5, and Tuesday May 6, 2003. Mr. Stretton did not appear at any time during jury selection, or contact the court to apprise of his intention to appear. The case was in recess the entire day of Wednesday May 7, 2003. The record reflects no further communications from Mr. Stretton with the court as to his intentions as the trial proceeded. Further, in spite of the court's willingness to address the proposal of bifurcation, Mr. Stretton did not contact the court to renew that request, nor did he appear during the sentencing phase. At no time during pre-trial discussions or anytime thereafter did Mr. Stretton represent to the court that he could not represent Mr. Randolph because he lacked the time to adequately prepare. Counsel's election not to appear, for reasons not apparent on the record, rather than the court's denial of the request for continuance, resulted in the defendant proceeding without private counsel of his choosing.

Accordingly, in considering the defendant's late request for private representation, the court trial court properly balanced the defendant's right to counsel with the Commonwealth's interest in bringing the matter

to a conclusion, and the court's concerns for efficient administration of justice. Private counsel was afforded opportunities to participate, but which opportunities were waived. The court's denial of a request for continuance was a proper, not arbitrary, exercise of discretion which did not deny the defendant due process.

B. THE COURT DID NOT ERR IN THE PENALTY PHASE WHERE, AFTER COMPLETE AND CAREFUL COLLOQUY, THE DEFENDANT EXERCISED HIS RIGHT TO PRESENT NO MITIGATING EVIDENCE AND TO PROCEED *PRO SE*.

The trial court properly denied Defendant's request for extraordinary relief, in that no error occurred which violated the death penalty statute.

The jury's imposition of the death penalty must be upheld unless it is determined that "the sentence was the product of passion, prejudice or any other arbitrary factor, or the evidence fails to support the finding of at least one aggravating factor." 42 Pa. C.S. §9711 (h)(3). The record herein reflects that the defendant was fully apprised of his opportunity to present mitigation evidence during the penalty phase, but chose not to do so. The defendant knowingly and intelligently waived his right to counsel during the penalty phase. The jury found, based upon evidence properly admitted, that aggravating factors outweighed the record devoid of mitigating factors.

Appendix D

Under the death penalty statute, "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance ... and no mitigating circumstance." 42 Pa. C.S. § 9711(c). The Pennsylvania Supreme Court has explained,

> Under 42 Pa. C.S. § 9711 (c), the Commonwealth, by proving guilt beyond a reasonable doubt of murder in the first degree and of the existence of one or more aggravating circumstances, has demonstrated that all that is constitutionally required of it. In meeting this burden, the Commonwealth must prove every element necessary to establish murder of the first degree and every element necessary to establish one or more aggravating circumstances which the legislature has determined is of sufficiently heinous nature as to require the imposition of the death penalty. The accused is then given the opportunity to prove, by a preponderance of the evidence, that there are mitigating circumstances that might convince a jury that the sentence should nevertheless be set at life imprisonment. Such an allocation is not offensive to due process.

Commonwealth v. Zettlemoyer, 500 Pa. 16, 72, 454 A.2d 937, 963 (1982).

Further, "a criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf." *Commonwealth v. Reid,* 571 Pa. l, 811 A.2d 530,

553 (2002), *certiorari denied by Reid v. Pennsylvania*, 157 L.Ed. 2d 92, 124 S.Ct. 131, 2003 U.S. LEXIS 6647 (U.S. 2003).

The record demonstrates that the defendant, with full understanding of the potential consequences, refused the opportunity to present mitigating evidence. Following the jury's finding of guilt on May 14, 2003, the trial court addressed the matter of the defendant's position on presentation of mitigation evidence. The Commonwealth's attorney conducted the following colloquy:

MR. CHARDO: That's why we're here. You told your lawyers we understood that you didn't want to present any mitigating circumstances to the jury. In order for the judge to permit that to happen, he would have to hear from you and be satisfied you understood the ramifications of doing that, which is why we're explaining this to you now. Would you like to tell the judge what your intentions are as far as the sentencing phase goes?

THE DEFENDANT: Finish this and do whatever you have to do.

MR. THOMAS: Your Honor, could we have a moment with him?

THE COURT: Sure. Go ahead.

(Pause)

MR. CHARDO: Do you wish me to explain it to you further?

THE DEFENDANT: I'll finish listening to it.

MR. CHARDO: You indicated earlier that you understood the burden of proving aggravating circumstances and what aggravating circumstances were; is that correct?

THE DEFENDANT: Did I say that to you?

MR. CHARDO: Yes, you did.

THE DEFENDANT: Yes.

MR. CHARDO: You indicated that you understood the burden of proof of mitigating circumstances and what those were; is that correct?

THE DEFENDANT: Yes.

MR. CHARDO: Where you cut me off was when I talked about the weighing between aggravating circumstances and mitigating circumstances and what the results would be if the jury found certain things. Did you understand that when I explained it to you?

THE DEFENDANT: Yes.

MR. CHARDO: And do you understand that the jury's verdict of either life imprisonment or the death penalty has to be unanimous?

THE DEFENDANT: Yes.

MR. CHARDO: And that even if one juror, he or she did not vote for the death penalty could save your life, and the Judge in the event of a hung jury would have to impose a sentence of life imprisonment? Do you understand that?

THE DEFENDANT: I understand that.

MR. CHARDO: Is there anything that I explained to you today that you didn't understand?

THE DEFENDANT: No.

MR. CHARDO: Do you understand that you have the right to testify in the sentencing hearing yourself and you also have the right to present mitigating circumstances to the jury for their consideration?

THE DEFENDANT: Okay.

MR. CHARDO: Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: Knowing that's your right, do you wish to testify and/or to present evidence of mitigation to this jury?

THE DEFENDANT: No.

MR. CHARDO: Is that no both or one or ten other?

THE DEFENDANT: No to everything.

MR. CHARDO: You don't wish to present mitigating circumstances?

THE DEFENDANT: No.

MR. CHARDO: Do you understand, sir, if the jury finds no mitigating circumstances, if you prove the existence of no mitigating circumstances, and the jury finds the existence of at least one aggravating circumstance, that they would sentence you to death?

THE DEFENDANT: Yes.

MR. CHARDO: And do you understand that the jury by finding you guilty of two murders has already basically found beyond a reasonable doubt that one aggravating circumstance, No. 11, exists. And so if you sat on your hands in this sentencing hearing, potentially you might be binding the jury into a situation where they have to impose the death penalty. Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: Do you understand that-- basically, the Judge in chambers indicated to us that he would allow you to sleep on this overnight and to give us your final decision tomorrow. Do you understand that?

THE DEFENDANT: You can sentence me right now.

***

MR. CHARDO: Mr. Randolph, has anyone threatened you in any way to get you to make this decision?

THE DEFENDANT: No.

MR. CHARDO: Are you doing this of your own free will?

THE DEFENDANT: You don't got to go through all this. I just want to put my appeal in. That's all.

(N.T., Vol. VII, pp. 24-27, 29).

Before adjourning for the day, the court conducted further colloquy:

THE COURT: Regardless of what -- Mr. Randolph, you have the opportunity to change your mind tomorrow or stick with this decision. But it's now 1:45, and we're going to reconvene tomorrow at 9 o'clock. And we'll see where we proceed from there. I want to be clear, too, Mr. Randolph, as I think Mr. Chardo outlined, you'll have the opportunity to present any witnesses that you would want in favor of the mitigating circumstances that have already been outlined to you, in particular, catchall provision No. 8 concerning the character of you through other members of the community or your family, the circumstances of the offense are already before this jury and certainly there is your testimony before this jury as well concerning your work and your family. So some of that is already before the jury in terms of mitigation. So that is something that if you choose not to present any additional items, that's still

something that the jury would consider or can consider, I should say, in mitigation of the case as well. But tomorrow will be your opportunity to present any other evidence or testimony regarding those mitigating factors. You have already indicated earlier that you do not want--you didn't want a psychologist or psychiatrist to examine you. Do you still feel that way right now, Mr. Randolph?

THE DEFENDANT: The only witnesses that I wanted to present was the witnesses that—for my alibi that the Commonwealth buried. They buried all the witnesses, intentionally buried the witnesses that would have came forward for me. And I was rushed into trial unprepared. That's the witnesses that I wanted to present.

THE COURT: I'll take that as a no answer, that you do not want, as you indicate before on the record, you didn't want a psychologist or psychiatrist to examine you related to some of the mitigating factors concerning your capacity to appreciate the criminality of your conduct or any extreme mental or emotional disturbance that you had. You didn't want any of that. You've said that before. And I'm going to ask you again, do you want an opportunity to do that right now?

THE DEFENDANT: For him to speak about how I was feeling or acting while I was at work, is that what you're asking me?

THE COURT: No. I'm asking you, you had the opportunity many months ago, counsel wanted to appoint--or have the Court appoint a psychologist or psychiatrist to examine you to see if you--

THE DEFENDANT: For what?

THE COURT: For these mitigating circumstances that would weigh in favor of life sentence, to show that you were under the influence of an extreme mental or emotional disturbance, that you lacked the capacity to appreciate the criminality of your conduct or to conform your conduct to the requirements of the law, that they were substantially impaired. You were going to have a psychiatrist or psychologist appointed to do that. You declined that. Months ago, and now I'm asking you again do you want to have a psychologist or psychiatrist appointed to you for that purpose?

THE DEFENDANT: No.

THE COURT: All right.

(N.T., Vol. VII, pp. 29-32).

Contrary to Defendant's argument that that the colloquy was "grossly deficient", the record demonstrates that the court carefully and repeatedly explained to the defendant the significance of mitigation evidence, the opportunity to present such evidence, and the option of obtaining an expert, even at that stage of the proceeding. Further, at no time prior to or during the penalty phase did the defendant request that private counsel be permitted to participate, nor did private counsel contact the court or renew the issue of entry of his appearance or bifurcation of the case, although the sentencing phase began fourteen days after the court and counsel first discussed that option.

Appendix D

The record demonstrates that the defendant's conduct is attributable not to any lack of understanding, but to his own defiance, which continued into the following day, when he refused to change out of prison garb and into street clothes for his trial appearance. (N.T., Vol. VIII, pp. 2-5). While the court allowed the Public Defenders' office to attempt to locate street clothes different from those the defendant previously wore, it conducted additional colloquy on the matter of mitigation evidence. The court inquired as to whether the defendant changed his mind regarding retaining a psychologist. The defendant responded that he had not. (N.T., Vol. VIII, p. 6).

The trial court next addressed the defendant's right to testify on his own behalf, call witnesses who could offer relevant mitigating circumstances, and present the argument of counsel on mitigation evidence. (N.T., Vol. VIII, pp. 7-8). The defendant reiterated his complaint that he had been "railroaded", and apprised the court that he did not want his attorneys to make any mitigation argument on his behalf.

THE COURT: So your decision is--and I'm not sure I heard that. I heard you say something to Mr. Thomas but I didn't hear it.

THE DEFENDANT: I told him I didn't want to argue nothing.

THE COURT: You didn't want your attorney to argue for you, is that what you're saying?

THE DEFENDANT: That's correct.

MR. THOMAS: Your Honor, I just explained to my client that the argument would simply be why he should not receive the death penalty to the jury.

THE COURT: All right. Well, at this point that's what you have -- what your attorneys have told me is that that was a decision that you had-- not a decision but that was something that you had said to them beforehand. You're saying it now for the record.

Do you understand if there is not argument made on your behalf that the jury really is left just to consider the facts presented by the Commonwealth and the arguments by the counsel?

THE DEFENDANT: Yes.

(N.T., Vol. VIII, pp. 9-10).

The record is devoid of support for defendant's position that the trial court "failed to recognize that what Mr. Randolph was really saying was "'I want the counsel of my choice', rather than ' [I do not want] mitigation [evidence]'". (Defendant's Brief in Support of 1925 (B) Statement, p. 15). At no time during the two days of discussion and colloquy on the issue of mitigation evidence did the defendant request that he be represented by private counsel, or that the court delay the proceedings to allow him to contact Mr. Stretton.

Appendix D

The trial court did not err in allowing the defendant to proceed *pro se.* Following the court's refusal to allow the defendant to direct his trial counsel to present no mitigation argument, Mr. Randolph insisted that that he would represent himself. The court heard a complete waiver colloquy conducted by the Commonwealth's attorney which adequately explained the defendant's rights and evidenced a knowing, voluntary and intelligent waiver of counsel.

As we have addressed in this Opinion, the right to counsel in a criminal proceeding is a fundamental right guaranteed by the Constitutions of the United States and Pennsylvania, subject to certain limitations. *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed. 2d 562 (1975); *Commonwealth v. Szuchon,* 506 Pa. 228, 484 A.2d 1365(Pa. 1984). "A defendant may waive this fundamental right and proceed with his defense *pro se.*" *Commonwealth v. McDonough,* 571 Pa. 232, 235, 812 A.2d 504, 506 (Pa. 2002). When the request for self-representation is asserted after "meaningful trial proceedings have begun," the granting of the right rests within the trial judge's discretion. *Commonwealth v. Vaglica,* 449 Pa. Super. 188, 192, 673 A.2d 371, 373 (1996), citing *U.S. v. Lawrence,* 605 F.2d 1321 (4th Cir. 1979).

Pursuant to Pennsylvania Rule of Criminal Procedure 121, "when a defendant seeks to waive the right to counsel after the preliminary hearing, the judge shall ascertain from the defendant, on the record whether there is a knowing, voluntary and intelligent waiver of counsel." Pa.R.Crim.P. 121(c). Our Supreme Court has rejected

the contention, asserted by this defendant, that the *court* rather than the prosecution must conduct the colloquy. In *Commonwealth v. McDonough, supra,* the Court disagreed that a knowing and intelligent waiver conducted by the prosecution rather than the court was invalid. The Court explained therein that Rule 121(c) places with the judge the ultimate responsibility to determine whether the defendant is making an informed and independent decision to waive counsel, but "does not...require the judge to be the one to literally pose the questions to the defendant. In fact, the Comment to Rule 121 specifically states that the prosecutor or defense counsel may examine the defendant at the judge's discretion." *McDonough,* at 238.

In order to assess whether the waiver is voluntary, knowing, and intelligent, the following inquiry must take place: (1) whether the defendant understands that he has a right to be represented by counsel and the right to free counsel if he is indigent, (2) whether the defendant understands the nature of the charges against him and the elements of each of those charges, (3) whether the defendant is aware of the permissible range of sentences/ and or fines for the offenses charged, (4) whether the defendant understands that if he waives the right to counsel he will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules, (5) whether the defendant understands that there are possible defenses to these charges of which counsel might be aware, and if these defense are not raised they may be lost permanently, and (6) whether the defendant understands that, in addition to defenses, the defendant has other rights that, if not timely asserted, may be

lost permanently and that if errors occur and are not objected to or otherwise timely raised by the defendant, the objection to these errors may be lost permanently. *McDonough, Id., citing Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326,1335 (Pa. 1995) and Pa.R.Crim. P. 121.

Prior to commencement of the penalty phase, the defendant asserted that he chose to proceed *pro se* rather than allow his counsel to make mitigation argument.

THE COURT: Mr. Randolph, before the jury is brought down, do you want to change into your other clothes?

THE DEFENDANT: No. What are you saying as far as the mitigating--

THE COURT: Mr. Randolph, I'm denying your request to have no closing arguments made on your behalf by counsel. I'm denying that request.

THE DEFENDANT: So you forcing me to proceed pro se?

THE COURT: I'm not forcing you to proceed pro se at all. It was indicated that you didn't want your attorneys to make closing argument for you. You made that request. I didn't know that until I was told that. I don't know that until I hear it from you. I've heard it from you, that's your request. And I've denied that request. I'm going to allow Mr. Welch to make closing statements for you.

THE DEFENDANT: I'm going to proceed pro se then.

THE COURT: Knowing the Court--

THE DEFENDANT: I'm prepared to proceed pro se.

THE COURT: For this particular proceeding?

THE DEFENDANT: That's just what I said.

THE COURT: So at this point you are telling the Court that you want to discharge your attorneys?

THE COURT: Yeah. Yes.

(N.T., Vol. VIII, pp. 12-13).

The following colloquy occurred:

MR. CHARDO: Mr. Randolph, is it your desire to represent yourself in these sentencing proceedings?

THE DEFENDANT: Yes.

MR. CHARDO: You understand that your counsel, Mr. Thomas and Mr. Welch, are lawyers and they are aware of the rules of evidence and procedure that would apply to your case and you wouldn't be in the same position to do that, to know that?

THE DEFENDANT: Repeat that again.

MR. CHARDO: You wouldn't have the same knowledge of the rules of evidence and procedure and of substantive law that your attorneys would have. Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: And you would be bound by the same rules as an attorney would be as far as the rules of evidence and the like if you represented yourself. Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: Do you understand you're facing the death penalty on these charges?

THE DEFENDANT: Yes.

MR. CHARDO: Do you understand if you didn't make an objection to any evidence or part of the proceeding that would be waived forever?

THE DEFENDANT: Yes.

MR. CHARDO: Has anybody threatened you to get you to waive this right?

THE DEFENDANT: No.

MR. CHARDO: You couldn't raise any issue on appeal at any stage, any mistake or error, allegation of error if it wasn't timely objected to in this proceeding and you may not be aware of those objections? Do you understand that?

THE DEFENDANT: Well, objections to the penalty phase or to the trial or--

MR. CHARDO: Just as to the part, the penalty phase, any future proceeding in this part where you were representing yourself, for instance, evidence I might offer, instructions the Court might give to the jury, that sort of thing.

MR. WELCH: Your Honor, could I have a—.

CHARDO: Do you understand that?

THE DEFENDANT: Yeah.

MR. WELCH: Could I have one minute to speak with my client? I need to make him aware of one or two things, if I could.

THE COURT: All right.

(Pause.)

***

MR. CHARDO: Your Honor, the law used to be that the Court had to conduct that inquiry. As of December 2002, the Court has said--Supreme Court has said that is not necessary.

One last question Mr. Randolph. You understand you have the right to free counsel since you are an indigent. Do you understand that?

THE DEFENDANT: No.

MR. CHARDO: If you don't have money, you have the right to counsel appointed by the Court free of charge. Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: Is it your desire of this Court [sic] to represent yourself in the sentencing hearing and waive your right to counsel?

THE DEFENDANT: Yes.

(N.T. Vol VII, pp. 12-16).

Following a recess, colloquy of the defendant continued:

MR. CHARDO: Mr. Randolph, why don't you come right up here. Mr. Randolph, there's one other aspect. Do you understand that the jury has only two choices in the sentencing hearing, that is life imprisonment or the death penalty? Do you understand that?

THE DEFENDANT: Yes.

MR. CHARDO: I outlined for you yesterday the procedure that follows. Do you have any questions about that?

THE DEFENDANT: What procedure?

MR. CHARDO: About aggravating circumstances and mitigating circumstances, do you have any questions about that?

THE DEFENDANT: No.

MR. CHARDO: Is it still your desire to represent yourself in this hearing?

THE DEFENDANT: Yes.

THE COURT: All right. I see just for the record you're still dressed in your orange suit from Dauphin County Prison. You don't want to change now?

THE DEFENDANT: No sir.

THE COURT: Okay. We have considered the case at least that was provided to us by counsel. It cites 449 Pa. Super 188.[8] It talked about the meaningful stage of the proceedings. And we considered that case and considered what was significant in that case was that [sic] the delay of the trial. I don't believe you're asking to proceed and exercise your constitutional right pro se to delay the trial. That was a big consideration in this particular case. you have participated in a very active way. I think you've been fully informed about the nature of the proceedings, what stage of the proceedings this case is at.

---

8. In *Commonwealth v. Vaglica,* 449 Pa. Super. 188, 673 A.2d 371 (1996), the Superior Court held that the trial court properly denied the defendant's late request to represent himself, made as a last minute attempt to obtain a continuance.

And as much as I would disagree and encourage you not to make the decisions you have made, you have a constitutional right, not unfettered, to make that decision, so it's the Court's judgment that you be allowed to proceed pro se in this particular matter.

All right. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right.

THE DEFENDANT: Thank you.

THE COURT: That's still your request even right now?

THE DEFENDANT: I just said thank you. Yeah.

MR. CHARDO: Will the Court appoint standby counsel?

THE COURT: Well, Mr. Welch and Mr. Thomas have been here. I direct that they act, either Mr. Thomas or Mr. Welch, as standby counsel. All right.

MR. WELCH: Was that an either?

THE COURT: That's either of you. I'll let you decide that. I want standby counsel. All right, Mr. Randolph, are you ready to proceed?

(N.T. Vol. VIII, pp. 17-19).

Appling the standards outlined in *McDonough* and *Starr* to the record herein, the Commonwealth's attorney conducted a thorough colloquy which complied with Pa.R.Crim.P. 121, and evidenced the defendant's understanding of the significance of his decision to waive counsel.[9] The trial court properly concluded that the defendant voluntarily, knowingly and intelligently exercised his right to waive counsel.

C. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUESTS FOR A NEW TRIAL BASED UPON ALLEGED AFTER-DISCOVERED EVIDENCE.

1. Defendant's Motion For A New Trial Based on Newly Discovered Evidence Filed August 12, 2003 (Alleged Statements of Bush/Stanko)

Procedural and Factual Background

Subsequent to the sentencing, the Commonwealth's attorney apprised the defendant's private attorney of the discovery of a police report given to the Johnstown Police Department in October 2001 by a Mr. Stanko, which purportedly related admissions by an Alex Bush as to commission of the murders. On August 12, 2003, Defendant filed a Motion for New Trial Based on Newly

9. The defendant's full understanding of the significance of the penalty phase is also evidenced by the colloquy on the waiver of presentation of mitigation evidence, which occurred on the same morning as the colloquy on waiver of counsel.

Appendix D

Discovered Evidence That the Police Withheld and Did Not Timely Turn Over. The defendant asserted that this information should have been presented to the jury, and had a reasonable probability of affecting the outcome of the trial. The Commonwealth filed a Memorandum of Law in Opposition.

The trial court conducted a hearing on September 5, 2003. At the hearing, the Commonwealth and defense stipulated that the Commonwealth's attorney first became aware of the statement in the course of a detective's review of documents pertaining to an unrelated matter. (N.T., September 5, 2003, pp. 55-57). The Commonwealth apprised Defendant's counsel of the document on August 1, 2003, and on August 7, 2003, provided him with the statement. (N.T., September 5, 2003, p. 57).

At the hearing, the defense called Alex Bush, Andrew Stanko, and defendant's trial counsel Mr. Welch. Mr. Bush was on parole at the time of the hearing for an underlying charge of possession of marijuana. (N.T., September 5, 2003, p. 58). Mr. Bush testified that in October 2001, he had occasion to see a Mr. Stanko, while in Johnstown. (N.T., September 5, 2003, p. 62). At that time, Mr. Bush possessed an article from a Harrisburg paper sent to him by his sister, which may have been about the shooting of two people. (N.T., September 5, 2003, p. 64). Bush testified that he first became aware in July 2002 that Mr. Stanko made a statement that Bush allegedly admitted to killing two people and participating in a homicide at a bar in Harrisburg. (N.T., September 5, 2003, p. 67).

At the hearing, Mr. Bush denied any involvement with the shooting. (N.T., September 5, 2003, p. 71). Mr. Bush testified that while in the company of Mr. Stanko, the article was lying on a table where they were seated. Mr. Bush testified that the only conversation they had regarding the murders consisted of whether they new the people, which they did not. (N.T., September 5, 2003, p. 72).

The defense also called Andrew Stanko, who made a statement to the Johnstown Police. Mr. Stanko testified that he suffers from severe depression and anxiety, for which he has been under treatment, including during the early fall of 2001. (N.T., September 2003, p. 77). He knows Mr. Bush, who is friends with Mr. Stanko's half brother. (N.T., September 5, 2003, p. 78). During the fall of 2001, Mr. Stanko lived in Johnstown. (N.T., September 5, 2003, p. 78).

Mr. Stanko testified that he picked up Mr. Bush at the train station in Johnstown in the fall of 2001. At that time, Mr. Bush showed Mr. Stanko the front page of a Harrisburg paper, which reported a shooting. (N.T., September 5, 2003, p. 79). At some point after picking up Mr. Bush from the train station, Mr. Stanko asked Mr. Bush if he had any involvement in the subject of the newspaper article, to which Mr. Bush smiled. (N.T., September 5, 2003, pp. 86, 101).

Mr. Stanko testified that he went to the Johnstown Police Department regarding Mr. Bush's alleged involvement with the homicide which appeared in the paper. (N.T., September 5, 2003, p. 87). Mr. Stanko testified that

at some time after showing him the newspaper, Mr. Bush made various statements about a "Scream" mask, the caliber of a gun, and waiting for a person whom Mr. Bush thought shot his grandmother's car. (N.T., September 5, 2003, pp. 90-92). Mr. Stanko testified that he went to the police because he was angry with Mr. Bush for having caused minor damage to his car, and "wondered" about Mr. Bush's talk about the shootings. (N.T., September 5, 2003, p. 93). Mr. Stanko testified that on a scale of 1 to 10, he would rank Mr. Bush's credibility as a 2. (N.T., September 5, 2003, pp. 92-93).

Mr. Stanko testified that Mr. Bush was not specific as to the area of Harrisburg where the shooting in an alley occurred, nor as to the bar, the victims, or the incident involving the mask. (N.T. September 5, 2003, pp. 102-103). Mr. Stank felt that Mr. Bush was "puffing", and did not take him seriously. (N.T., September 5, 2003, p. 58). Mr. Stanko testified that Mr. Bush was often drinking during the course of these conversations, and that he, Mr. Stanko, may be somewhat mixed up in his recollection of the comments and the contents of the newspaper article; some things he read in the newspaper article he may be attributing to Mr. Bush. (N.T. September 5, 2003, p.103).

The defense also called Attorney Allen Welch, the defendant's trial counsel. Mr. Welch testified that he did not have Mr. Bush's statement at the time of trial, nor was he aware of it, and therefore did not utilize it at trial. (N.T., September 5, 2003, p. 21). He testified that he sent the Commonwealth a standard discovery request. (N.T., September 5, 2003, p. 25). Mr. Welch testified that the

statement would have fit into a theory that the defendant did not commit the crimes.(N.T., September 5, 2003, p. 22). He testified that he would have used the statement to cross-examine police on the thoroughness of their investigation. (N.T., September 5, 2003, p. 21).

The trial court denied Defendant's Request for a New Trial Based on After Discovered Evidence And/Or Evidence That The Police Failed to Turn Over by Order dated November 18, 2003.

Legal Discussion

The trial court properly denied the defendant's request for a new trial based upon the late discovery of Mr. Stanko's statement containing the purported admission of Mr. Bush. The statement so lacked reliability that it would have been inadmissible, and there exists no reasonable probability that the verdict of the trial would have been different had it been disclosed.

Pursuant to *Kyles v. Whitely,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the prosecution's obligation under *Brady v. Maryland* extends to exculpatory evidence possessed by the police but unknown to the prosecutor. *See, Commonwealth v. Burke,* 566 Pa. 402, 781 A.2d 1136 (2001). In this matter, the Commonwealth apparently does not dispute that the statement warranted disclosure.

Nevertheless, based upon evidentiary standards, the trial court would have properly precluded its admission at trial in that it constituted admissible hearsay to which no exception applied. "Evidentiary rulings are committed

to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion". *Commonwealth v. Cohen*, 529 Pa. 552,563, 605 A.2d 1212 (1992). Pursuant to Pa.R.E. 804:

> Hearsay Exceptions; Declarant Unavailable
>
> ***
>
> (b) Hearsay Exceptions.
>
> The following statements, as herein defined, are not excluded by the hearsay rule the declarant is unavailable as a witness:
>
> ***
>
> (3) Statements against Interest.
>
> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Pa.R.E. 804 (b)(3).

Appendix D

Applying the Statement Against Interest Exception analysis, we find that the statement remains inadmissible because it completely lacks any indicia of credibility and because the declarant, Bush, is not unavailable. *See, Commonwealth v. Bracero,* 515 Pa. 355, 528 A.2d 936 (1987)("Declarations against penal interest are admissible as an exception to the hearsay rule only where there are existing circumstances that provide clear assurances that such declarations are trustworthy and reliable."). First, the testimony of the receiver of the purported statement, Stanko, lacks reliability. Stanko was uncertain as to what information he learned from the newspaper article and what information came from Bush. Second, we do not find that a clear statement was made, but rather, according to Stanko, Bush merely smiled when asked if he was involved in the shooting. Further, Bush's statements were fragmented references to scenarios which did not comport with the facts of the murder at issue. In addition, the receiver of the statement, Stanko, rated Bush's credibility as a 2 on a scale of 10, and believed that the information related was merely "puffing". Finally, the declarant is not unavailable, as is required for the exception to apply. Accordingly, the trial court would have properly excluded the testimony of Stanko as to the statements of Bush.

Even had the defense possessed the statement, it would not have affected the outcome of the trial because of its inadmissibility, and therefore the trial court properly denied the defendant's request for a new trial. Pursuant to *Commonwealth v. Johnson,* 556 Pa. 216, 727 A.2d 1089 (1999), the defendant would only be entitled to a new trial if the omitted evidence creates a reasonable doubt that did

not otherwise exist. *Id.,* 556 Pa. 226, 727 A.2d at 1094. Nor do we find any reasonable probability of a different result had the defense made veiled reference to the statement in cross examination of the police.

Therefore, the disclosure of the statements of Stanko and Bush does not require the grant of a new trial.

2. Defendant's Motion For A New Trial Based Upon Statements of Donald Roebuck and Three Other Alleged Witnesses

Thereafter, on November 5, 2003, counsel filed Defendant's Motion For a New Trial Based On the Fact That False Testimony Was Presented. The defendant claimed that subsequent to his October 29, 2003, Motion, private counsel obtained a statement from the bar maid, Shannon Taylor, which purportedly demonstrated that the Commonwealth witness Ronald Roebuck presented false testimony. The defendant's counsel further asserted that he was in the process of obtaining a statement from Heath Wells. In his Motion, the defendant also alleged that Attorney Anthony Thomas, one of defendant's trial counsel, wrote a letter to Mr. Stretton days before the filing of the Motion relating information that Commonwealth witness Ronald Roebuck advised that he did not witness the shooting.

On November 6, 2003, the defendant filed Defendant's Supplemental Motion for a New Trial Based on Evidence That False Testimony Was Presented, and provided therein statements of Sean Sellars and Donald Roebuck.

Appendix D

By Order dated November 18, 2003, the trial court denied Defendant's Post Trial Motions. In his Brief in Support of 1925(B) Statement, counsel for Defendant appears to acknowledge that the matter of after-discovered evidence pertaining to Ronald Roebuck's testimony and the other three witnesses are more appropriately raised in the context of a claim for ineffective assistance of counsel.

Legal Discussion

The trial court properly denied the defendant's Post trail Motions regarding the alleged statements of Donald Roebuck, Heath Wells, Shannon Taylor and Sean Sellars in that they did not constitute after-discovered evidence, but rather related purely to matters of credibility, more properly addressed in the context of a claim for collateral relief.

We find no support for the defendant's assertion that information regarding Donald Roebuck was not, in fact turned over to the defense. The Commonwealth effectively refuted this assertion in its Answer to Motion For After Discovered Evidence, and demonstrated that the statement was provided. Accordingly, no basis exists for the grant of a new trial or evidentiary hearing as to credibility issues pertaining to the testimony of Ronald and Donald Roebuck.

Further, the court properly denied without evidentiary hearing the request for a new trial regarding the statements of the alleged witnesses Sean Sellars, Attorney Anthony Thomas and Shannon Taylor. "Unless the trial

court has clearly abused its discretion in denying a new trial on the basis of after discovered evidence, its order will not be disturbed on appeal." *Commonwealth v. Cull,* 455 Pa. 469,688 A.2d 1191,1198 (Pa. Super. 1997). Defendant's Motions regarding these alleged witnesses fails to plead any factual basis to demonstrate that the information could not have been obtained earlier. "After discovered evidence can be the basis for a new trial if it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely to impeach the credibility of a witness; and 4) is of such nature and character that a different verdict will likely result if a new trial is granted. *Commonwealth v. Williams,* 537 Pa. 1, 26, 640 A.2d 1251, 1263 (1994), *citing, Commonwealth v. Mosteller,* 446 Pa. 83, 284 A.2d 786 (1971).

The defendant's claim that the evidence was after-discovered cannot satisfy these criteria. The trial court viewed the proposed testimony of these witnesses as matters pertaining to the credibility of Ronald Roebuck, and related to investigation prior to trial. As such, claims based upon the identification of these witnesses are more properly considered in the context of collateral review. See, *Commonwealth v. Kohan,* 825 A. 2d 702 (Pa. 2003).

IV. CONCLUSION

For all of the forgoing reasons, the judgment of sentence should be affirmed.

Appendix D

BY THE COURT:

/s/_____
TODD A. HOOVER, JUDGE
March 16, 2004

APPENDIX E — EXCERPT OF TRIAL TRANSCRIPT IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA, DATED MAY 5, 2003

[1]IN THE COURT OF COMMON PLEAS OF
DAUPHIN COUNTY, PENNSYLVANIA

Nos. 1220, 1374
1746 CD 2002

COMMONWEALTH OF PENNSYLVANIA

v.

SAMUEL B. RANDOLPH, IV

TRANSCRIPT OF PROCEEDINGS
VOLUME I - JURY SELECTION

BEFORE: HONORABLE TODD A. HOOVER

DATE: MONDAY, MAY 5, 2003

PLACE: COURTROOM NO. 5
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

[2](On Monday, May 5, 2003, beginning at 10:37 a. m., the following proceedings occurred:)

MR. CHARDO: Good morning, Your Honor. May it please the Court, this is the time and place set for trial in

the Commonwealth versus Samuel B. Randolph at docket Nos. 1220, 1374 and 1746 CR 2002. The Defendant is present with counsel and the Commonwealth is prepared to proceed.

THE COURT: All right. Mr. Welch, you're ready to proceed?

MR. WELCH: Well, I think there are a couple of matters that need to be addressed.

THE COURT: Okay.

MR. WELCH: First of all, we have an appearance form that was sent to this Court and I believe it was received on Thursday or Friday -- Thursday, I guess it was.

MR. CHARDO: It was docketed Thursday at 10 a.m.

MR. WELCH: From Samuel Stretton, Esquire, of West Chester. If my recollection is correct, the rules require that any appearances be accepted by the Court only when the Court deems it appropriate. And certainly I believe any entry of appearance and withdrawal of appearance, any change of counsel, by rule has to be done with the approval of the Court.

I think it's important for this record to be clear [3]as to whether or not Mr. Stretton is attorney of record on this case since his appearance has been entered. Because if he is, he's not here and I think that needs to be made

clear. And if he's not, then I think the Court has to state so, so that we know that the Court has not accepted his appearance form.

MR. CHARDO: Your Honor, I think that from the record we have so far, the Court made it clear from our telephone conference on the record that Mr. Stretton was free to enter his appearance and to appear and represent the Defendant.

Mr. Stretton left me a message on Friday. I was not in the office on Friday afternoon due to an engagement outside, longstanding engagement outside the office. I got his message and I wasn't able to return it because I didn't get it until Saturday, indicating that he had not had the opportunity to review discovery, that obviously Mr. Welch would need his copies of the discovery, and so he was not in a position to try this case today.

THE COURT: All right. And that's what he stated to you?

MR. CHARDO: Yes.

THE COURT: For the record, I mean everything Mr. Welch has said is true, that there was a motion requesting a continuance filed on May 1st at 10 o'clock. And I didn't see [4]-- at least I have not been provided -- I was just provided a copy of that request. I didn't see the entry of appearance at that time or the precipe to enter appearance. So I trust that's been done.

MR. CHARDO: Yes. That was done contemporaneously.

THE COURT: I guess it was -- the record will speak for itself, we got that. That was filed. The Court became aware of that. This was in the middle of our civil trial and we scheduled a phone conference that same day. I think it was 3 or 4: 00 in the afternoon with Mr. Stretton, Mr. Welch, Mr. Chardo. It's all on the record.

And at that point that discussion is all preserved for the record but it was -- the way we left it on Thursday was that the Court was not inclined to continue the case that was scheduled for today. But we were inclined to let Mr. Stretton participate in the case, and that at the end of that conversation Mr. Stretton had indicated that he was a quick study and he could be brought -- hopefully be brought up to speed.

Then it was to be a conversation that the Court was not involved with, with you, Mr. Welch and Mr. Stretton and Mr. Chardo, so that's the way it was left with the Court on Thursday. I was not inclined to grant the continuance but see if Mr. Stretton could be brought up to speed to feel comfortable to try the case.

[5]And then counsel was to get back to the Court on Friday.

Then on Friday, Mr. Thomas, Anthony Thomas, who has been here and has been here at previous proceedings and I believe initially represented Mr. Randolph at the preliminary hearing. So Mr. Thomas, whose name was

even mentioned on Thursday, that Mr. Stretton had already talked with him as well. So the Court heard from Mr. Thomas on Friday, who appeared in chambers with Mr. Chardo's permission and on behalf of Mr. Stretton.

And Mr. Thomas, you're here and hearing all this, and correct me if I'm wrong, but had -- and then at that point I got Mr. Chardo on the phone in a conference call in my chambers. At that point there was some discussion about Mr. Stretton even being involved in the case. And I know I had indicated to Mr. Thomas on Friday and even on the record that bringing Mr. Stretton up to speed would take some time and effort on his part, that the Court would be willing to work with him in terms of maybe taking -- I think Wednesday was the day that he was clearly unavailable, but to work with him. But the jury was coming Monday, we were going to start on Monday selecting.

At that point I indicated to Mr. Thomas that I would work with Mr. Stretton on that. And there were some other issues I believe we discussed. I'm not capturing the whole [6]conversation. That was not on the record. That was the conference call that we had. But when we left that conference call on Friday, later that day -- again, my impression was that Mr. Stretton -- we were going to work with him to let him enter his appearance, give him some time to be brought up to speed. Still select this jury and proceed with the case, maybe just pushing it off a day or two so he could have some time to prepare.

I got a phone call from Tammy from Mr. Thomas's office. I didn't speak to her. But the message was that Mr.

Stretton wants to be in on the case as long as he retains discovery and that we postpone the jury selection until 12 o'clock today because he has a schedule conflict. That was· the phone message that I got.

I had someone from our office call -- I think, Mr. Thomas, call you back. And you were calling on behalf of Mr. Stretton.

MR. THOMAS: Yes.

THE COURT: We indicated that we would, because we knew we wouldn't just get started at 9 o'clock this morning, that we would postpone the jury selection until 10 o'clock if he could work that out to be here. That was the way I left it with everyone on Friday.

When I appeared here this morning, I fully expected to see someone on Mr. Stretton's behalf or someone to begin [7]the jury selection process at least and that I fully expected Mr. Stretton would be involved in some fashion. I want to put all that on the record. And I do agree at this point with you, Mr. Welch, that we have to make some decision. But you're counsel of record right now. Mr. Stretton has filed a motion for a continuance, which the Court has denied, and we'll place our reasons on the record at the appropriate time.

In terms of Mr. Stretton's involvement in the case, whether his precipe is entered or not, I am still in some fashion if he wants to be involved in the case to allow his participation. But you're counsel of record. You're ready.

You have looked at the discovery. You have filed pretrial. motions and so I'm not --

MR. THOMAS: Your Honor --

MR. WELCH: If he's going to be attorney of record, I'm going to ask to withdraw.

THE COURT: So you want the Court to make a decision whether he is or is not? I mean, he filed his precipe.

MR. WELCH: I know he's filed his precipe.

MR. CHARDO: Maybe I can elaborate for the record. Your Honor, as you indicated, I wasn't in my office most of the day on Friday. You reached me by cellular phone so we could have the conference with Mr. Thomas.

Late -- I don't recall if it was Friday afternoon -- [8] Friday evening, I don't recall whether it was Friday evening or Saturday morning, but I recovered the messages in my office. And Mr. Stretton said, I don't have the discovery because I -- there's over, I think, 12 or 1300 pages worth of discovery, plus transcripts and photographs and physical evidence. I can't be prepared to go to trial. And I haven't been able to get ahold of you because I was out of the office. And Mr. Welch needs his discovery because he's got to presume that he's going forward. So I just want to make that clear.

Now, Mr. Thomas has filled out a precipe to enter his appearance, but it's my understanding he wants to do that in a supporting role to Mr. Welch.

THE COURT: Mr. Welch, you don't have any objection to that?

MR. WELCH: No. In fact, I -- to be perfectly honest, I'm unsure as to why we even want an appearance from Mr. Thomas. But Mr. Chardo, as I understand it, is demanding it and that's fine. Mr. Thomas clearly does not feel that he's qualified to try a capital case. We certainly would ask that given this that he be introduced to the jurors either by the Court, or I will as they come in, and have it made clear to them, he's here simply to assist me and hopefully better· his own qualifications.

THE COURT: He's been involved in this case?

[9]MR. WELCH: He has.

THE COURT: All right. At this point then, at least Mr. Stretton's precipe is made part of the record but he will not be counsel of record.

MR. THOMAS : Your Honor, may I?

THE COURT: Go ahead.

MR. THOMAS: I did have a discussion with Mr. Stretton late last evening and we discussed the housekeeping things that we would be doing right now,

discussing the continuance. And Mr. Stretton expressed to me or communicated to me that he would still be willing to enter his appearance -- or to try the case if he were permitted to pick the jury himself. Again, we understand that he would not be able to do that this morning, but he can still come this afternoon if a few hours delay is acceptable.

THE COURT: Well, at this point for the record, he is not going to be counsel of record at this moment. If he chooses to appear at some point later, we can deal with that at that time. But for now, I do agree as I look at the rules that Mr. Welch is counsel of record. He is lead counsel. You're very appropriately seated as second seat. You've been involved in the case and can be of great assistance to Mr. Welch.

But for now we'll enter an order.

AND NOW, this 5th day of May, 2003, counsel of [10] record, counsel Sam Stretton who has filed a praecipe to enter his appearance, that the Court finding that at this time that we will not accept his precipe to enter his appearance. If he appears at a later time to refile, to be involved in the case, the Court will make a decision at that time.

MR. CHARDO: I guess the reason for that is because he's not here.

THE COURT: Well, he's not here. It's obvious he's not here.

MR. WELCH: Your Honor --

THE COURT: We'll accept you filed your precipe, Mr. Thomas. All right.

MR. WELCH: I would like to impose upon the Court just once more to reconsider this continuance. I had not seen the case that the Court was relying on this morning, but having now read the case I note in this particular instance -- and I refer to Rucker which is 563 Pa. 347, 761 A. 2nd 541, this particular case, although the Supreme Court granted this gentleman a continuance after the jury had been selected. And I'm well aware that it also was a situation where new counsel, private counsel attorney, was up to speed and ready to proceed with the case.

But this case was in excess of two years old at the time that that occurred. I would once again ask the Court [11]before we get into the jury selection procedure to consider the request for a continuance which has been made. I think -- as I told you privately this morning, I think it's an appropriate request given the fact that I'm court-appointed, that I have at this point absolutely a complete breakdown of communication with my client, which is largely why Mr. Thomas is here, so somebody can -- he acts as a translator for us I guess is the best way to put it. It's a very difficult situation.

And I think having Mr. Stretton there weighing any delay that would accrue, I just think it's a mistake on the part of the Court.

THE COURT: Okay. All right.

MR. THOMAS: Your Honor, also the reason for the delay again for the record, the reason for the delay in retaining private counsel up until this point has just simply been a money matter. I had personally worked to exhaustion to assist the family in the sale of a particular asset in order to make those funds available. Those funds only became available last week. It was the very next day that Mr. Stretton did enter his appearance, and that was the only reason for the delay. There was no bad faith on the part of the Defendant at all. And it would appear that the interest of justice so requires.

MR. CHARDO: I hate to complicate the matters but [12]what Mr. Welch just said, I'm compelled to ask for an elaboration when he said about a break down. I believe from our discussions and from prior appearances that Mr. Welch has diligently attempted to represent this Defendant. And if there's a breakdown, it's because of the unwillingness of Mr. Randolph to work with Mr. Welch and not because of any fault of Mr. Welch.

MR. WELCH: I can tell you this much. Sammy Randolph, since the Court has denied what he thinks is a clear right on his part, right or wrong that's his perception.

THE COURT: It's not unfettered, but he certainly has the opportunity.

MR. WELCH: At this point feels very, very much wronged, and for whatever reason I suspect I'm a part

of that. I would ask the Court to hear him personally at this time before we proceed, simply because I'm not sure what I can say on his behalf safely.

THE COURT: All right. On the continuance matter? Just for the record, and again it's all there, I mean, the time of the filing of the criminal complaints in these matters, the previous trials that were scheduled, the previous proceedings back in January, this case was scheduled for trial and then continued till March. Eighty notices well, 120 notices went out to jurors, they were summoned the [13]beginning of March and the matter was continued at that point.

Then we had pretrial motions in February and other matters. And Mr. Randolph has been very clear that he wanted his case to proceed even back in March and January. He was ready to proceed to trial. And we've had proceedings from the time this got continued in March. This May date was set where Mr. Randolph wanted to go pro se. Also communicated to the Court that he had alibi witnesses that he wanted talked to and discussed and presented that to the Court. And I asked him to provide names and addresses, identifying information about these alibi witnesses, and he hadn't done that.

THE DEFENDANT: Your Honor --

THE COURT: Mr. Randolph, just wait. And so I certainly am aware of Mr. Randolph's feelings about Mr. Welch and that this breakdown I do believe is not what I have seen Mr. Welch do in the case. The pretrial motions,

the voluminous discovery, it's not a lack of effort or work on Mr. Welch's behalf.

Mr. Randolph was dissatisfied with what he perceived as his work on his behalf. And I understand that.

But I guess what is significant to the Court is as well is I hadn't -- the Court was never informed from January till May 1st when this petition was filed, Mr. Randolph had [14]expressed just he was not satisfied with Mr. Welch and he's expressed that repeatedly and a number of times. He even wanted to go pro se. All those other matters. We were never told that -- the Court was never told that there was Mr. Stretton or any other counsel waiting out there, it was just a matter of getting the finances. This is the first time I've heard this in terms of the finances.

And I guess the reason I say that is, you know, we make our decision based on the record and what's before us. And here for the very first time, May 1st, after all this history, then we're told, well, we now have the money. If the Court would have been informed February, March, April, saying here's our situation, Judge, are you willing to work with us, are you willing to do these things.

But this Supreme Court case as I read it says the Court -- it's an abuse of discretion standard and we're to consider not only the Defendant's right to counsel of his choosing, that is so crystal clear, and also the Court is to consider the state's right to a prompt disposition and a prosecution of the offense. This case also talks about the state's interest in the swift and efficient administration

of criminal justice. So we've considered some of the things that the Commonwealth put on the record as well about the issues from their perspective. And the Court administration is something for us to consider as well.

[15]So when we weighed all that, we just believe it's not an abuse of our discretion at this time to deny the continuance where we're at right now.

All right.

MR. WELCH: I would ask just very briefly so that there's no confusion, the March continuance was not --

THE COURT: It was clearly your --

MR. WELCH: My personal request because my mother was critically ill and hospitalized at the time.

THE COURT: I understand that. I think that is very clear.

MR. CHARDO: The record doesn't always reflect this because when things are rescheduled in Dauphin County operation, automatically to the next term of court. So the record doesn't really reflect this, but there have probably been ten trial dates that have come and gone I suspect because in Dauphin County, I don't know when it was arraigned into, but this case -- some of the cases were filed in March. The murder was filed April 25th. But following arraignment, it was automatically scheduled into the first trial date that was more than 30 days away.

If it wasn't reached, it was automatically advanced to the next month. And every single month with the exception of July, there is a court term. So there have been a great number of trial dates that have passed.

[16]MR. WELCH: And that, too, though becomes a bit illusory because there was great difficulty finding counsel. There have been a couple different people appointed at one time or another. I believe the Public Defender's Office, another time Mr. Laguna. I had great difficulty getting all the discovery from Mr. Laguna. It took the intervention of Mr. Hawley to get it. And then discovery that I was dealing with, literally well over a thousand pages of discovery.

MR. THOMAS: Your Honor, also for the purposes of further explaining the breakdown in communication, I believe it's important for the Court to know that one of the reasons why and probably one of the main reasons is that Mr. Randolph had the full expectation that the funds would be there for the counsel. And that's the reason that, you know, there was some conflict. And it's also the reason all the way through, and I will tell you again, because I personally handled and worked with the family to secure the sale of this asset, that it took over a year to do that. There was a host of problems which is not proper to discuss right now.

But at each -- at various points along that year period or excess of a year period, different times we thought the moneys would be there this month or the next month or the next month. And I think that may explain the reason why Mr. Randolph was so insistent on having Mr. Welch

removed and even to go pro se, so that then he could have his own counsel [17]of his choosing step in at that point.

THE COURT: I wish the Court would have been -- all right. Mr. Randolph, on the issue of the continuance, anything you want to add to the record?

THE DEFENDANT: Yes. That for the record --

MR. CHARDO: May I have the Defendant sworn, Your Honor?

THE COURT: Sure.

(The Defendant was sworn.)

THE COURT: Go ahead.

THE DEFENDANT: Mr. Stretton was, in fact, counsel of my choice before. I just didn't simply have no money.

THE COURT: I understand that. I wish I would have been informed of that.

THE DEFENDANT: Before?

THE COURT: Yes.

THE DEFENDANT: Because --

THE COURT: I understand your dilemma. I think Mr. Thomas --

THE DEFENDANT: Right. Not just that, me and Mr. Welch, we just simply can't agree on how we're going to proceed to trial.

THE COURT: And you know, Mr. Randolph, you've told [18]me that over the course of this case. You have. You have articulated that to me.

THE DEFENDANT: Our differences just can't be settled. Our relationship is just too damaged. And I feel comfortable with Mr. Stretton. He said that he's ready to come in if he could just -- the Court --

THE COURT: Just for now he's not. What he chooses to do after this, we'll go from there.

THE DEFENDANT: So is it -- the Sixth Amendment, is that my right to counsel? That's what I don't understand.

THE COURT: You have the right -- you certainly have the right to counsel.

THE DEFENDANT: Of my choice.

THE COURT: Of your choice, but it's not unfettered, it's not unlimited, and it's not absolute. I think this case speaks for itself about what the Court is to weigh, whether we grant or deny the continuance, Mr. Randolph. What we're going to do now is begin the jury selection process. That's all we're beginning right now.

THE DEFENDANT: But is Mr. Stretton, he can be a part of that?

THE COURT: Well, Mr. Stretton for now is not part of this case. What happens this afternoon, tomorrow, the Court will deal with that when we have the record and he's here and we'll know more. But for now that's where we're at. [19]All right.

THE DEFENDANT: So Mr. Welch is?

THE COURT: Mr. Welch and Mr. Thomas are here to begin the jury selection process. All right.

THE DEFENDANT: What about the motions that have to do with the jury that Mr. Stretton may have been preparing to file?

THE COURT: He's not counsel of record right now. So the only motions the Court will consider is anything filed by counsel of record.

All right. I think we're ready to begin the proceeding. All right. You may bring down the panel.

Ladies and gentlemen in the courtroom, the jury is ready to be brought down for the proceeding. I just want to point out that I am sure there are strong feelings on both sides of this case. I would ask that once the jury is brought into the courtroom that there be no outbursts or no statements made from anyone in the courtroom. And that if you feel you can't restrain yourself, I would just give you the opportunity to leave now. If you stay, I trust that you have examined your own heart and you can sit here and participate in the proceedings without disrupting

them in any way or conveying anything to the jury panel when they're brought down. I'm going to thank you in advance that you're able to do that. All right.

APPENDIX F — EXCERPTS OF TRIAL TRANSCRIPT THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA, DATED MAY 1, 2003

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

NO. 1220 CR 2002
1374 CR 2002
1746 CR 2002

COMMONWEALTH OF PENNSYLVANIA

v.

SAMUEL B. RANDOLPH, IV

TRANSCRIPT OF PROCEEDINGS

CONFERENCE CALL

BEFORE: HONORABLE TODD A. HOOVER
(via telephone)

DATE: MAY 1, 2003

FRANCIS T. CHARDO, ESQUIRE
Office of the District Attorney

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[12]cases is I have one or two persons I use as a mitigation expert because I -- to fast forward then, I have one or two psychologists who I've often used in these matters.

I bring them right in. It usually takes them a couple weeks. Maybe we could think about bifurcating the guilt phase first and see what happens.

THE COURT: You know, my inclination --

MR. STRETTON: Then in a week or two proceed to the penalty phase.

THE COURT: My inclination would be not to continue the trial portion of this case in terms -- it's set for Monday. This is the second time we have brought in a special jury panel for this case. It got continued once before.

Mr. Randolph has been in court on -- in other proceedings in connection with the case. I have been crystal clear on the record in terms of this particular date. It's now Thursday before Monday when the trial is -- at least the jury selection I should say is ready to begin.

And my inclination is not to continue the case in terms of selecting the jury on Monday, Tuesday, Wednesday, however long that takes. The plan has always been to go into the trial stage at that point.

And then, Mr. Stretton, as I listen to you, perhaps there could be some separation, if it's even necessary, as you addressed with the penalty phase, if we get that far.

[13]THE DEFENDANT : This is Mr. Randolph . I just wanted to say that I never refused to submit to the - - Mr. Welch attempted -- he tried to give me some wrong advice to mislead the jury. That's what I refused to submit to.

And as far as the continuance -- the continuance go, I said before that I wasn't pleased with Mr. Welch on his performance. And I did I think want to have a continuance there because I trust Mr. Stretton. I feel comfortable with him.

I want to give him an opportunity to come in and prepare for this case also. But Mr. Welch -- we have irreconcilable differences.

THE COURT: I understand that. And you've mentioned that before on the record as well, Mr. Randolph. But, you know, I think from my perspective in either granting or denying the continuance, I don't it's an abuse of discretion or any discretionary standard. And I think the record will speak for itself the conversations we had previously on the record.

This is the second time for the special jury to be brought in, and I don't believe I'm abusing my discretion to deny the continuance for the jury selection on Monday, proceed with the guilt or innocence phase of the proceeding and then -- given what happens in that proceeding, then I am very much open to what Mr. Stretton had proposed, if we get [14]that far. So that's my inclination now.

MR. STRETTON: I'm sorry to interrupt. Sam Stretton. I don't want to -- I know I'm Johnny-come-lately, but if you're inclined, could you delay by a couple days or for several days and jury selection and all that? I assume I'm going to jump in this case and try it.

But for no other reason than because Mr. Randolph, you know, rightly or wrongly doesn't feel comfortable with his current attorney and, you know, wants to get a new one. I'll have to get all the material Mr. Welch has for me to get up to snuff. I'm a pretty quick study on these kind of cases.

I'm assuming an alibi notice has been filed and witnesses for the alibi have been noticed.

MR. WELCH: They have not.

MR. STRETTON: The alibi has not been filed?

MR. WELCH: No one from Sam's family will help me.

THE DEFENDANT: I told him months and months ago about my alibi defense.

MR. WELCH: That's correct. A month ago I spoke with his mother and Mr. Thomas. She was advised I needed the names and addresses and phone numbers, and nobody's gotten me anything. I spoke to his sister the other day, and she indicated that she's been too busy to do it.

THE COURT: We had this conversation on the record [15]as well about alibi witnesses in the courtroom, so I'm familiar with this.

But, Mr. Stretton, as I look at this we probably even to select a jury is going to take three days I would suspect.

So are you able to get up to speed, the quick study that you are, by Thursday or Friday to begin the case?

MR. STRETTON: I'm sure I could. I mean, you know, it's not ideal but, yeah, I have done that before.

MR. WELCH: If I could interrupt on that. Allen Welch. I think what's clearly happening here is that if Mr. Stretton's in this case -- Sam, I going to be far more cooperative with him than he's been with me.

And I think it would be extremely unfair to Mr. Stretton to have him go in and try the case in the posture that it's in from my preparations. As I 1ook at this, I 1ook at in my own mind I say, what's the Superior Court going to be looking at is the reason for you not granting him this change of counsel and his continuance.

If we are doing it because we have already summoned 80 jurors who could be called with a phone call and called off and have some inconvenience to everybody involved in this and some subpoenaed witnesses, it seems to me that might not be the type of thing that really sways the Superior Court in weighing against his right to counsel of his choice and a full scale cooperative defense.

[16]There also could be no denying that the restrictions being economically placed on me by the court with the fight we had over just getting some investigative money, to say nothing about not being able to -- the president judge would never give me the money for the types of experts Mr. Stretton will be able to get involved in the thing.

Appendix F

It's certainly a great concern to me that it sounds like you ' re suggesting that I pick the jury, try the guilt phase of the case and then Mr. Stretton comes in at some later date to try the penalty phase. I don't think -- I just don't think that's a viable and wise way to proceed.

THE COURT: If you believe that this decision was based on economics and the jury panel, you're wrong because this case has been out there. It's over a year old and then the earlier cases. So it's not that.

It's the whole history of this, the whole tenure of, you know, we are set for trial, we are ready for trial and here we are two days -- well, two business days before trial and we are asking for a continuance in a case that's a year old that there was notice or some inquiry back in January. This isn't economics.

I view this as the Court weighing very weighty matters on behalf of Mr. Randolph, but I just am not inclined to push this case off at this juncture at this point at this time given what I know about the case and the history of this [17]case.

So I'm looking at it like any other matter. It's old. It's been around. It's been-- we have dealt with all the pretrial matters, and we are ready to go to trial.

MR. STRETTON: Judge, may I ask a question? Will you allow him to present an alibi even though the notice wasn't filed, even though apparently Mr. Welch tried to file it because there is an alibi defense here?

MR. CHARDO: You weren't privy, Mr. Stretton --

MR. WELCH: It was placed on the record probably a month ago. Sam, I spoke in open court and said to the Judge I wanted to file an alibi. He was told that time by the Judge himself that he had to provide me with some names and addresses and phone numbers of these alibi witnesses.

I made attempts to get other family members to help me to get them. No one has gotten me anything. Absolutely nothing.

THE DEFENDANT: Your Honor --

MR. WELCH: Perhaps that is part of what Sammy perceives as our inability to communicate and work with me. I never quite sensed that. I do sense that he hasn't wanted to do much with me, and there is an -- I stand 100 percent by my statement that he absolutely refused to see any psychiatrist or psychologist.

That's the first thing I said the first day I talked [18]to him. He said explicitly there's nothing wrong with me, I'm not going to see any psychologist or psychiatrist.

THE DEFENDANT: That's because of your ill advice to plead me insanity to try to confuse the jurors.

MR. WELCH: I never said that.

THE DEFENDANT: Yes, you did. That's the reason I didn't --

MR. WELCH: That was never said.

THE DEFENDANT: The whole thing is I have money now. I have money to hire -- I was never satisfied. It was a money issue. I've been trying to get the money. Now the money is here.

The reason before it was continued, I never wanted Mr. Welch. The whole thing was money. The money wasn't in place, but now the money is. I want to hire Mr. Stretton who I believe will fight aggressively. He has my best interests.

THE COURT: All right. Anything else for today?

Mr. Chardo, anything you want to add? Your position on the continuance is you're opposed to the continuance I assume?

MR. CHARDO: Yes, Judge. But I would say that I think it would be to your - - what Mr. Stretton has suggested about bifurcating the trial, frankly I'm not sure Mr. Stratton could get up to speed.

I know of his great ability. I think he could in a [19]lot of cases. There is a great volume of material in this case, and I 'm not sure he could plow through it so quickly. I'm not crazy about bifurcating it.

I'd like to do the penalty phase while the jury has it fresh in their minds. I waul d want to go right into it. That's just my observation.

THE COURT: Mr. Stretton, anything else you wanted to add for the record at all?

MR. STRETTON: I think the grounds were covered. Just one point, if I could. If I can -- if I were to try this case, would there be any flexibility -- like a day or two time period -- in terms of the selection process or is the selection process

THE COURT: The selection process is pretty much etched in stone. I certainly would consider perhaps doing something between the selection process and the time to begin. I'd certainly consider that.

MR. STRETTON: If so and I'm able to come and pick the jury, if you might give me a couple days after the jury is picked.

THE COURT: To get prepared.

MR. STRETTON: Like the following week to get up to snuff.

THE COURT: Right. I don't have to make that decision now, Mr. Stretton. I will be available tomorrow to [20]finalize that, but the jury selection is sort of etched in stone.

MR. STRETTON: That would be 9:30 Monday morning.

THE COURT: Right. All right. Let me think about that.

MR. STRETTON: Mr. Welch is such a good attorney I'm afraid -- I don't want to take someone who is prepared from him, if I'm not fully prepared.

THE COURT: I don't know if you've talked to Mr. Chardo about this in the nature of, you know, all that's involved in discovery. I'll certainly give all of you until tomorrow to deal with that.

MR. WELCH: Let me suggest maybe the first place to start would be for Mr. Stretton and I to discuss it. And to that end I will stay here in my office. He can call me before 5:00 at 221-0900.

MR. STRETTON: 221-0900.

MR. WELCH: My cell phone after 5:00 is 351-1002.

MR. STRETTON: I will call as soon as we are done this conversation. One other thing. If we did pick the jury Monday and you did decide to come in -- I might be pushing the envelope a little here.

THE COURT: No.

MR. STRETTON: I think to get to the Wednesday hearing -- I can't get out Monday morning. That's the whole [21]disciplinary board and everyone else.

THE COURT: I'm willing to work around something like that.

MR. STRETTON: Tuesday I believe, Judge, court is only for a half hour to finish an audit case involving three quick witnesses.

THE COURT: I can work around that.

MR. STRETTON: I'm going to talk to Mr. Welch. Another thing. If Mr. Welch stayed in and did provide the alibi witnesses and we filed something even Monday morning or Friday afternoon, would -- and sent the district attorney as I guess he should all this, would you let us present them?

THE COURT: At this point I don't know if I can make that prophetic decision. I think I need to know more. Are they available to the DA to interview them, those kind of things. I really just don't know what's out there now.

I'm not saying no. I'm not saying yes. I know that doesn't help you at all. I wouldn't want to make a decision like that right now.

MR. STRETTON: You have an open mind. You haven't said no.

MR. CHARDO: Mr. Stretton, I would object – that would depend. Some alibi testimony already has been presented, and so to a certain extent some of it I'm aware of. I may be prepared, but it really depends on whether or [22]not it tracks with what was presented before.

MR. STRETTON: All right. I thank you, Judge, for doing this.

THE COURT: I'll wait to hear from you folks tomorrow.

MR. STRETTON: I will call Allen as soon as we are done with this conversation.

MR. WELCH: Are we done?

MR. STRETTON: Mr. Randolph, call me collect tonight. That would be appreciated.

THE DEFENDANT: I'll try. I don't know if I can. I'm going to try all I can unless Mr. Chardo or somebody calls and arranges it to let me use the phone.

MR. STRETTON: I want to talk to Mr. Welch first. I'll say that in front of everyone. Thank you.

THE COURT: Thank you.

(The conference call was concluded at 4:46 p.m.)

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APPENDIX G — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED SEPTEMBER 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-9003

SAMUEL RANDOLPH

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; SUPERINTENDENT ROCKVIEW SCI,

Appellants

D.C. No. 1-06-cv-00901

SUR PETITION FOR REHEARING

Before: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Dated: September 27, 2021