No. ____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ALLEN SATTAZAHN,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SUPERINTENDENT, GREENE SCI; THE DISTRICT ATTORNEY OF BERKS COUNTY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

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

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Dated: November 7, 2023

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2372

DAVID SATTAZAHN,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; THE DISTRICT ATTORNEY OF BERKS COUNTY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 5-17-cv-03240)
District Judge: Honorable John R. Padova

ARGUED: February 24, 2023

Before: CHAGARES, *Chief Judge,* SCIRICA, and SMITH, *Circuit Judges.*

(Filed: May 26, 2023)

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OPINION*

SCIRICA, *Circuit Judge*

David Sattazahn was convicted of first degree murder and related offenses for a robbery that resulted in the death of Richard Boyer, a restaurant manager. Sattazahn's co-conspirator, Jeffrey Hammer, pleaded guilty to third degree murder. In his state habeas proceedings and before the District Court, Sattazahn argued the Government withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and failed to correct a witness' testimony in violation of *Brady*, *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972).[1] The District Court held the Government

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

[1] Under *Brady*, *Napue*, and *Giglio*, the suppression of material evidence favorable to the defendant violates due process. In *Brady,* the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In *Napue*, the Supreme Court held that the "principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." 360 U.S. at 269. In *Giglio*, the Supreme Court held that "whether the

failed to disclose evidence that Hammer disagreed with a witness' account of a conversation between Hammer and Sattazahn but found that this evidence was not material. The District Court further held that the Government had no duty to correct the witness' testimony because there was no evidence of an undisclosed agreement between the Government and the witness. We agree with the District Court that Sattazahn has not made a sufficient showing of a *Brady* or *Napue/Giglio* violation. We will affirm.

I.

The story of this case has three important characters: David Sattazahn, the petitioner, who was convicted of first degree murder for the death of Richard Boyer; Jeffrey Hammer, his co-conspirator, who testified against Sattazahn in exchange for pleading guilty to third degree murder; and Fritz Wanner, a family friend of Hammer's, whose testimony about a conversation he overheard between Sattazahn and Hammer is the focus of Sattazahn's habeas claims.

A.

In 1987, Sattazahn and Hammer spent weeks preparing to rob a local restaurant. From their hiding spot in a copse of pine trees, the two observed that the manager, Richard Boyer, left the restaurant with a bank deposit bag every night. The plan was to get Boyer to hand over the cash and then handcuff him in his truck to give them time to flee the scene.

Sattazahn and Hammer decided to put their plan into action on April 12, a Sunday, after learning that the restaurant was busiest on Sundays. Equipped with ski masks, gloves,

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nondisclosure [of evidence] was the result of negligence or design, it is the responsibility of the prosecutor" to correct testimony known to be false. 405 U.S. at 154.

.22 and .41 caliber handguns with the serial numbers filed off, extra ammunition, flashlights, and handcuffs, the two rode an all-terrain vehicle across railroad tracks to the pine trees behind the restaurant. There they lay in wait for Boyer to leave with the day's cash deposit.

When Boyer left the restaurant and started walking towards his truck, Sattazahn and Hammer emerged from the trees, their guns drawn. Sattazahn moved towards the truck and told Boyer to drop the deposit bag. Boyer instead threw the bag behind him. Sattazahn told Boyer to bring him the bag, but Boyer threw it towards the restaurant's roof and ran. Sattazahn fired the .22 at Boyer. Thinking this was a warning shot, Hammer fired the .41 into the air. Sattazahn then fired two or three more shots at Boyer, who fell.

With Boyer sprawled on the ground but still moving, Sattazahn ran over to Boyer, grabbed the deposit bag that was just out of Boyer's reach, and then fled with Hammer on the all-terrain vehicle back across the railroad tracks.

Boyer's body was discovered with five gunshot wounds in his face, head, shoulder, and back. Two .22 bullets were recovered during his autopsy and five .22 casings were found at the scene. A week after the robbery, Sattazahn and Hammer realized that their duffle bag—which contained their guns and other equipment—was missing. They tried to find it but came up empty handed.

In the summer of 1989, Hammer told the police about the robbery, implicating himself and Sattazahn, and admitted they lost their duffel bag somewhere near the railroad tracks. The bag was subsequently found and turned over to the police. Hammer pled guilty to third degree murder and associated offenses in exchange for testifying against Sattazahn.

In the fall of 1989, Fritz Wanner was in custody for an unrelated burglary when police asked what he knew about the 1987 robbery. Wanner told the police that, a few days after the robbery, he was in a barn that belonged to Hammer's father-in-law when he overheard Sattazahn and Hammer arguing about dropping a bag. According to Wanner, Sattazahn said he grabbed the .22 from Hammer and shot Boyer because Hammer missed. Wanner initially told the police he was with someone called Simmons at the time. Later, Wanner said that he was actually in the barn with a man called Joe Russo, not Simmons, but had been afraid to name Russo out of fear he was in the mafia.

B.

Sattazahn was tried twice for capital murder—first in 1991 and again in 1999 after his conviction was vacated. At Sattazahn's first trial, Hammer testified that Sattazahn shot Boyer with the .22. The Government established that Sattazahn purchased the .22 but had no other witnesses who testified about the identity of the shooter. Wanner refused to testify out of fear for his safety. The jury found Sattazahn guilty of first degree murder. The appeals court held that the trial court gave an erroneous jury instruction and vacated the conviction. *See Commonwealth v. Sattazahn*, 631 A.2d 597, 606 (Pa. Super. Ct. 1993). The appeals court also found, however, that there was sufficient evidence on the record to convict Sattazahn of first degree murder. *Id.* at 602.

At Sattazahn's retrial, the Government called both Hammer and Wanner as witnesses. Hammer's testimony was much the same as it was during Sattazahn's first trial. Sattazahn brought out Hammer's deal with the Government on cross examination and argued Hammer had planned and carried out the robbery on his own. Wanner testified that

he saw Sattazahn and Hammer at the barn and heard them argue about a missing bag. According to Wanner, Sattazahn threatened to kill Hammer and his family if they were caught and complained that he had to grab the gun and shoot Boyer because Hammer missed. Wanner admitted that he had memory problems stemming from drug use and that he had changed his story about who was with him at the time he overheard the conversation. He denied that he was promised anything or expected anything in exchange for his testimony. Sattazahn briefly mentioned Wanner during closing arguments, though not by name. The jury convicted Sattazahn of first degree murder. Sattazahn was then sentenced to death.

C.

Sattazahn sought state post-conviction relief for, *inter alia*, errors during the penalty phase of his retrial as well as *Brady* and *Napue/Giglio* violations. During Sattazahn's evidentiary hearing, Wanner testified—contrary to his trial testimony—that he did not actually see Sattazahn and Hammer and was not sure who was with him when he overheard the conversation. Wanner also testified that he spoke with the prosecutor before Sattazahn's trial, and the prosecutor said that he would not make a deal but would "see what he could do" in Wanner's upcoming case. JA 307 at 87:11–12.

The trial prosecutor[2] testified about his conversation with Wanner as well as about

[2] The trial prosecutor was Mark Baldwin, who was serving as the District Attorney for Berks County at the time of Sattazahn's Post-Conviction Relief Act hearing. In 2020, the Court of Common Pleas for Berks County dismissed homicide charges in an unrelated case after finding that Baldwin intentionally suppressed police reports the defense could have used to impeach the Government's key witness. *See Commonwealth v. Roderick Johnson*, No. 0118-97; 1537-97 (Berks Cty., Oct. 29, 2020). Sattazahn urges us to review his *Brady*

handwritten notes he took on a conversation he had with Hammer in 1990 about Wanner's 1989 statement. The prosecutor recorded that Hammer

> [r]emembers a conversation but not sure when or if Joe from Pizza Shop was there . . . [a]bout a week after shooting discussion in Barn possible that Fritz Wanner was in Barn in another section . . . only ever saw Joe in Pizza shop not in Barn[.] JA 1029.

The prosecutor maintained that the notes were available to Sattazahn's trial counsel, even though they were not turned over during discovery and arguably qualified as work product, because of his office's open file policy. The existence of this policy is not corroborated elsewhere in the record.

Hammer testified that he told the prosecutor that some parts of Wanner's statement were inaccurate: Joe was not at the barn during the conversation and Sattazahn never said he grabbed the .22 from Hammer and shot Boyer. Hammer also testified that he had not

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claim de novo and consider this *Johnson* case as support for his claim. We will review the *Brady* claim de novo, for reasons discussed below. We will not, however, consider *Johnson* in our review.

Assuming arguendo that *Cullen v. Pinholster*, 563 U.S. 170 (2011), is inapplicable and we may consider evidence that was not before the State court, Sattazahn does not explain how Baldwin's misconduct in a separate case—though undoubtedly egregious—supports his *Brady* claim. As *Johnson* is not factually analogous, it cannot help Sattazahn establish a pattern of *Brady* violations making it more likely that Baldwin suppressed evidence in his case. Although "[t]he gravity of the prosecutor's misconduct . . . may shed light on the materiality of the infringement of the defendant['s] rights," there is insufficient support in the record here—unlike in *Johnson*—to infer that Baldwin "resorted to improper tactics because [he was] justifiably fearful that without such tactics the defendant[] might be acquitted." *See United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995); *see also Johnson*, No. 0118-97 at 14–17, 30 (describing how the suppressed police reports would have allowed the defense to show that the Government's key witness, who did not have a record, was a career drug dealer who routinely made deals with the police to avoid charges).

seen Wanner in the barn, which he described as a garage with three sections and a top floor.

The post-conviction court granted Sattazahn a new penalty hearing[3] but denied his *Brady* and *Napue/Giglio* claims. The court found the prosecutor's notes about his conversation with Hammer were not impeachment evidence because the notes may not have accurately reflected Hammer's statements. *Commonwealth v. Sattazahn*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 104, *45–46 ("[I]t is unfair to allow the defense to use statements to impeach a witness which cannot fairly be said to be the witness' own rather than the product of the investigator's selection, interpretation, and recollection."). Even if the notes were impeachment evidence, the court reasoned, the impact on Wanner's credibility would not have been material. *Id.* at *47–48.

As for Sattazahn's *Giglio* claim, the court found the prosecutor's statement to Wanner that he would "see what he could do" about his upcoming case was not evidence of an undisclosed agreement. *Id.* at *40–41. Even if it were, Wanner was of secondary importance to Hammer and was already impeached on multiple grounds, so evidence of an agreement would be unlikely to change the outcome of the trial. *Id.* at *42.

The Pennsylvania Supreme Court affirmed. *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008). The Pennsylvania Supreme Court adopted the post-conviction court's analysis of the alleged tacit agreement between the prosecutor and Wanner in its entirety. *Id.* at 651, 659. In a departure from the post-conviction court, however, the Supreme Court

[3] Sattazahn's penalty phase claims, which are not at issue here, have their own long history. *See Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) (holding that the imposition of the death sentence on retrial does not violate double jeopardy). Sattazahn was eventually resentenced to life imprisonment.

noted there was a "colorable argument" that the prosecutor's notes were impeachment evidence under *Brady*. *Id.* at 658. The Court did not discuss whether the notes accurately reflected Hammer's statements. Instead, the Court asserted that "[n]o *Brady* violation occurs where the defendant knew or could have uncovered the relevant evidence with reasonable diligence." *Id.* (citing Pennsylvania Supreme Court cases). Sattazahn was a participant in the conversation that Wanner overheard and, the Court reasoned, could have told his trial counsel that Wanner's testimony was inaccurate. *Id.* Sattazahn's trial counsel could then have cross-examined Wanner or Hammer on the inaccuracy. *Id.* The Court concluded that Sattazahn "failed to establish a lack of relevant knowledge on his part and/or an inability to obtain such knowledge upon reasonable diligence." *Id.*

D.

As noted, Sattazahn brought a federal habeas petition repeating, *inter alia*, his claims that the prosecutor's undisclosed conversation with Hammer and alleged tacit agreement with Wanner violated *Brady* and the alleged tacit agreement further violated *Napue/Giglio*. Amended Petition for Writ of Habeas Corpus at 19, *Sattazahn v. Wetzel*, No. 17-cv-3240, Doc. No. 15. In a detailed opinion, the District Court adopted the recommendation of the Magistrate Judge that Sattazahn had insufficient evidence to support his claims. *Sattazahn v. Wetzel*, No. 17-cv-3240, 2021 WL 2291334 (E.D. Pa. June 3, 2021). On a motion for reconsideration, the District Court granted a certificate of appealability for Sattazahn's *Brady* and *Napue/Giglio* claims. We will affirm the District Court's denial of Sattazahn's petition.

II.

We exercise plenary review over a district court's habeas determinations. *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009). When a habeas petitioner raises federal constitutional claims that a State court denied on the merits, we examine whether the court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "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). "Clearly established federal law" comprises U.S. Supreme Court decisions issued before the State court decided the petitioner's claim on the merits. *Greene v. Fisher*, 565 U.S. 34, 40 (2011).

A State court decision is "contrary to" clearly established federal law if it contradicts Supreme Court precedent or involves facts "that are materially indistinguishable" from those in a Supreme Court decision but reaches a different result. *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)); *see also Randolph v. Sec'y Pa. Dep't of Corr.*, 5 F.4th 362, 372 (3d Cir. 2021). An application of clearly established federal law is unreasonable if there is no possibility "fairminded jurists could disagree that those arguments or theories are inconsistent with [a prior Supreme Court holding]." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). A determination of the facts is unreasonable if all "[r]easonable minds reviewing the record" would reach a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010) (alteration in original); *see also Randolph*, 5 F.4th at 373 (noting that the State court's factual determination is reviewed for objective unreasonableness).

If we conclude that a State court's merits decision on a particular claim was contrary

to clearly established federal law or unreasonable, we review that claim de novo. *Vickers v. Superintendent Graterford SCI*, 858 F.3d 841, 849 (3d Cir. 2017) (citing *Lafler v. Cooper*, 566 U.S. 156, 174 (2012)).

III.

Evidence the Government fails to disclose qualifies as a violation of *Brady v. Maryland* if it (1) is exculpatory or impeaching; (2) was suppressed by the State; and (3) is prejudicial to the defendant, *i.e.*, material. *Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011); *see also Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) (remarking that a *Brady* violation requires that material evidence is "suppressed by the state," but the suppression need not be willful). "Evidence is material 'if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *see Banks v. Dretke*, 540 U.S. 668, 698 (2004) (emphasizing that "the materiality standard for *Brady* claims is met" when the favorable evidence is sufficient to "'undermine confidence in the verdict'" (quoting *Kyles*, 514 U.S. at 435)).

Sattazahn argues the prosecutor violated *Brady* by failing to disclose (1) the fact that he had a conversation with Hammer before the 1991 trial and notes from that conversation and (2) the alleged tacit agreement he had with Wanner.

The District Court, accepting the Magistrate Judge's recommendation, reviewed Sattazahn's first claim de novo. The District Court read the Pennsylvania Supreme Court's description of the *Brady* standard as "improperly impos[ing] a diligence requirement on Sattazahn." JA13; *Sattazahn*, 952 A.2d at 658 (finding Sattazahn failed to show reasonable

diligence); *see Dennis v. Sec'y. Pa. Dep'. Corr.*, 834 F.3d 263, 293 (3d Cir. 2016) ("Adding due diligence . . . to the well-established three-pronged *Brady* inquiry would similarly be an unreasonable application of, and contrary to, *Brady* and its progeny.").

We agree that de novo review is proper. As noted, the Pennsylvania Supreme Court ended its analysis of the Hammer conversation by concluding that Sattazahn "has failed to establish a lack of relevant knowledge on his part and/or an inability to obtain such knowledge upon reasonable diligence." *Sattazahn*, 952 A.2d at 658. This reasoning is contrary to *Brady*, which is clearly established federal law. *See Dennis*, 834 F.3d at 293.

Sattazahn knew he had an argument with Hammer about the robbery. But he could not have known that the prosecutor spoke with Hammer about Wanner's statement, or that Hammer contradicted Wanner about Sattazahn's confession during that conversation. The impeachment evidence Sattazahn identified is not simply the prosecutor's notes or that Wanner erroneously said Sattazahn confessed to shooting Boyer—it is also that Sattazahn's own co-conspirator pointed out that Sattazahn did not confess.

As discussed below, the value of this impeachment evidence to Sattazahn's defense is questionable. But the Pennsylvania Supreme Court's error goes to the second prong of the *Brady* analysis, suppression by the State, not the third prong, materiality. Sattazahn did not know about the notes or Hammer's response to Wanner's statement. Under *Brady*, it does not matter whether Sattazahn could have discovered either with reasonable diligence.

Although we conclude that the Pennsylvania Supreme Court's analysis is contrary to *Brady*, we reach the same ultimate conclusion. The notes and conversation are *Brady* evidence—that is, impeaching and suppressed by the State—but are not material.

Sattazahn's strategy at both trials was to frame Hammer as incredible and ready to sacrifice Sattazahn, quite literally, to avoid a capital sentence. As the District Court noted, introducing even a portion of the notes and conversation would require Sattazahn to present Hammer as incredible *except* for his recollection of the argument in the barn. Sattazahn would likely have to explain to the jury why Hammer, a man willing to send his innocent friend to death row to secure a plea deal, told the prosecutor that said friend never confessed to shooting Boyer.

Even putting the issue of Hammer's (in)credibility to one side, it is difficult to see how the suppressed evidence could be material when it would, in large part, corroborate rather than undermine Wanner's testimony. Most of the discrepancies between the two accounts of the argument are explained by the barn's character. The uncontroverted evidence in the record is that the barn was large and had multiple areas. It is possible that Wanner, either alone or with someone else, could have overheard the argument without Sattazahn or Hammer noticing.

The major point of disagreement—whether Sattazahn confessed to grabbing the .22 from Hammer and shooting Boyer—is of minor importance when considered in context. The notes and conversation undermine Sattazahn's theory that Hammer acted alone. If Sattazahn had cross-examined Hammer on the suppressed evidence, the jury would likely have heard him agree with Wanner that he fought with Sattazahn over the missing bag and that Sattazahn threatened to kill his family if they were caught. This would have helped rehabilitate Wanner, who admitted that his memory was generally poor and that he changed portions of his statement. It would also have made the absence of testimony from Joe Russo

less conspicuous.

Because the prosecutor's notes and Hammer's statements would likely have a similar impact on Sattazahn's defense as Wanner's uncontradicted testimony that he overheard Sattazahn confess, we find that they are not material. Accordingly, we conclude that there was no *Brady* violation.

IV.

We review Sattazahn's second *Brady* claim, regarding the prosecutor's failure to disclose a tacit agreement with Wanner, under the deferential § 2254(d) standard. This *Brady* claim dovetails with Sattazahn's *Napue/Giglio* claim that the prosecutor failed to correct Wanner's testimony that he had not been promised anything and did not expect anything in exchange for his testimony. The post-conviction court held that Sattazahn did not demonstrate the existence of a tacit agreement and, even if he did, there was not a reasonable likelihood that Wanner's false testimony affected the jury's judgment. Like the District Court, we discern no error in the State post-conviction court's merits determination.

Under *Brady*, impeachment evidence includes tacit agreements made with a witness "so long as the prosecution offers the witness a benefit in exchange for his cooperation." *Akrawi v. Booker*, 572 F.3d 252, 262 (6th Cir. 2009); *see also United States v. Bagley*, 473 U.S. 667, 683 (1985) (noting that informal deals can qualify as *Brady* evidence). An agreement may be tacit, but it must be a true agreement—both the witness and the prosecutor must understand that the witness will receive favorable treatment in exchange for their testimony. *Akrawi*, 572 F.3d at 263. The fact that a witness received favorable

treatment after the trial, without more, is not evidence of a pre-trial agreement. *Lesko v. Sec'y Pa. Dep't of Corr.*, 34 F.4th 211, 234 (3rd Cir. 2022) (citing *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003)).

Under *Giglio v. United States*, 405 U.S. 150, 154 (1972), prosecutors have a duty to correct a witness' testimony when they know it to be false. A falsehood is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Haskell v. Superintendent SCI Greene*, 866 F.3d 139, 149 (3d Cir. 2017). This is a more lenient materiality standard than *Brady*, which requires that suppressed evidence be sufficient to "undermine confidence in the verdict." *Banks*, 540 U.S. at 698.

The prosecutor told Wanner that he would not make a deal but would "see what he could do" in Wanner's upcoming case. Because this statement is ambiguous in context, Sattazahn cannot show that the post-conviction court should have found *Brady* and *Napue/Giglio* violations. *See Harrington*, 562 U.S. at 102 (describing an application of clearly established federal law as unreasonable if "fairminded jurists" would all agree that the application is inconsistent with Supreme Court precedent); *Wood*, 558 U.S. at 301 (describing a determination of the facts as unreasonable if all "[r]easonable minds reviewing the record" would disagree with the determination); *see also Davis v. Ayala*, 576 U.S. 257, 271 (2015) (clarifying that a State court's factual findings are presumed correct unless the petitioner rebuts the presumption with "clear and convincing evidence"). Sattazahn does not offer evidence demonstrating consensus on whether a phrase like "I'll see what I can do" is proof of a tacit agreement under clearly established federal law. We do not think such evidence exists. Our sister courts disagree on what constitutes proof of a

tacit agreement. *See Rega v. Wetzel*, No. 2:13-cv-1781, 2018 WL 897126, at *77–83 (W.D. Pa. Feb. 18, 2018) (comparing cases from various circuits). We have not held that the Supreme Court's precedent constitutes clearly established federal law with respect to this question. *See id.* If "I'll see what I can do" is not proof of a tacit agreement, it is not *Brady* evidence, and accordingly Wanner's testimony did not require correction under *Napue/Giglio*.[4]

Even if the prosecutor's statement to Wanner did qualify as a tacit agreement, the prosecutor's failure to disclose and failure to correct were not material. Wanner was already impeached on multiple grounds, and the jury heard about his criminal convictions. The jury credited Hammer's testimony even though he admitted to a deal on cross-examination. Without evidence that Wanner and Hammer colluded, it is not likely that this additional line of impeachment would undermine confidence in the verdict. Whether information about a deal could have affected the jury's judgment—the more lenient *Giglio* standard—may be a closer call. But our review is deferential. Because fairminded jurists

[4] Sattazahn proposes that, in the context of a *Brady* or *Napue/Giglio* analysis, there is a meaningful difference between an "agreement" and an "inducement." He argues that because the post-conviction court's analysis—expressly approved by the Pennsylvania Supreme Court—only described the prosecutor's statement to Wanner as an "agreement," that analysis rested on an unreasonable factual determination. We are not convinced that the difference Sattazahn perceives is a meaningful one. For there to be an agreement requiring disclosure under *Brady*, there must be an inducement (*i.e.*, an incentive or promise of some benefit). A court may determine that no agreement existed while still finding evidence of an inducement requiring disclosure under *Brady*. Here, however, the main question facing the post-conviction court was whether the prosecutor's statement qualified as a promise or suggestion of leniency. In determining that no agreement existed, the post-conviction court had to conclude that there was no inducement. Accordingly, the court's analysis did not rest on an unreasonable factual determination.

(or reasonable minds) could disagree about the materiality of the agreement under *Giglio*, we find no grounds for disturbing the post-conviction court's conclusion.

V.

We will AFFIRM the District Court's denial of the habeas petition.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2372

DAVID SATTAZAHN,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; THE DISTRICT ATTORNEY OF BERKS COUNTY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

(D.C. Civ. No. 5-17-cv-03240)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, MONTGOMERY-REEVES, CHUNG, SCIRICA* and SMITH*, Circuit Judges

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

*As to panel rehearing only.

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/Anthony J. Scirica
Circuit Judge

Dated: August 9, 2023

APPENDIX C

COMMONWEALTH of Pennsylvania, Appellant

v.

David Allen SATTAZAHN, Appellee.

Commonwealth of Pennsylvania, Appellee

v.

David Allen Sattazahn, Appellant.

Commonwealth of Pennsylvania, Appellee

v.

David Allen Sattazahn, Appellant.

Supreme Court of Pennsylvania.

Submitted April 18, 2007.
Decided July 24, 2008.

Background: After affirmance, 563 Pa. 533, 763 A.2d 359, of defendant's conviction and death sentence upon retrial for first-degree murder, and subsequent affirmance by the Supreme Court of the United States on certiorari, 537 U.S. 101, 123 S.Ct. 732, defendant petitioned for post-conviction relief. The Court of Common Pleas, Criminal Division, Berks County, No. CP–06–CR–0002194–1989, Scott D. Keller, J., granted a new penalty phase hearing but denied guilt-phase relief. Defendant and state appealed.

Holdings: The Supreme Court, Nos. 509 CAP, 510 CAP, 511 CAP, Saylor, J., held that:

(1) evidence supported postconviction court's conclusions in granting new penalty hearing that trial counsel conducted deficient investigation into mitigating evidence, that no reasonable strategy justified the limited investigation, and that defendant was prejudiced thereby;

(2) defendant failed to establish due process *Brady* violation at guilt phase;

(3) defendant failed to establish ineffective assistance of counsel at guilt phase;

(4) defendant failed to show he was prejudiced by his prior attorney's erroneous guarantee that defendant would not be death eligible if he won appeal of his first conviction; and

(5) Supreme Court's failure to conduct proportionality review on direct appeal of death sentence did not violate ex post facto or due process principles.

See also, 869 A.2d 529.

Eakin, J., filed a concurring and dissenting opinion.

1. Criminal Law ⇐1134.90

In addressing the grant or denial of post-conviction relief, Supreme Court considers whether the postconviction court's conclusions are supported by record evidence and are free of legal error.

2. Criminal Law ⇐1881

To prevail on allegations of ineffective assistance, defendant must demonstrate that the underlying claim is of arguable merit; that no reasonable strategic basis existed for counsel's act or omission; and that counsel's error resulted in prejudice, or, in other words, that there is a reasonable probability that the outcome would have been different. U.S.C.A. Const. Amend. 6.

3. Criminal Law ⇐1871

Counsel is presumed to have rendered effective assistance. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⇐1519(4)

If petitioner for postconviction relief fails to satisfy any prong of ineffectiveness inquiry, claim of ineffective assistance of counsel will be rejected. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐1430

Claims of ineffective assistance of trial counsel were not waived merely by virtue of their being raised for the first time in petition for postconviction relief, where defendant was represented by the same counsel at trial and on direct appeal. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9543(a)(3).

6. Criminal Law ⇐1960

Counsel in capital case has the obligation to conduct a thorough investigation for mitigating evidence, or to make reasonable decisions that render particular investigations unnecessary. U.S.C.A. Const. Amend. 6.

7. Criminal Law ⇐1960

Strategic choices made by counsel in capital case following less than complete investigation for mitigating evidence are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐1870

Reviewing courts are to take all reasonable efforts to avoid the distorting effects of hindsight in undertaking the necessary assessment of an ineffective assistance claim. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1870

Courts assessing an ineffective assistance claim must avoid post hoc rationalization of counsel's conduct. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐1960

Evidence supported conclusion of postconviction court in granting new penalty phase hearing that trial counsel in capital murder prosecution conducted deficient pretrial investigation into mitigating evidence; counsel failed to review file relating to defendant's conviction in a separate third-degree murder case that contained "red flags" concerning potential mental-health and/or cognitive impairment, and defendant's failure to pass several grades during early childhood development and subsequent placement in a special class strongly suggested potential mental, cognitive, emotional, and/or social difficulties that would bear investigation in defending against imposition of death penalty. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐1960

Evidence supported conclusion of postconviction court, in granting new penalty phase hearing, that no reasonable strategy justified the limited investigation by trial counsel in capital murder case of evidence mitigating against death penalty; counsel's investigation touched upon only a limited set of sources and yielded a highly truncated mitigation presentation, and the difference in the nature and quality of the evidence adduced at trial versus that put forward at the postconviction stage after a fuller investigation was substantial. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐1960

Judgment of postconviction judge, who was also trial judge and therefore maintained closest point of vantage, that defendant was prejudiced at penalty phase of capital murder case by counsel's deficient investigation into mitigating evidence would not be disturbed on appeal; while substantial aggravation advanced by Commonwealth encompassed defendant's commission of present killing in perpetration of a robbery, as well as his history of violent offenses including two murders, the absence of substantial, relevant, mitigating evidence due to inadequate investigation diminished confidence in outcome of sentencing proceeding, particularly given the

appropriate single-juror frame of reference. U.S.C.A. Const.Amend. 6.

13. Constitutional Law ⇐4594(4)
Criminal Law ⇐1505

Defendant petitioning for postconviction relief from first-degree murder conviction failed to establish due process *Brady* violation based on prosecutor's failure to disclose notes on interview in which accomplice to robbery during which killing occurred, who testified at trial that defendant was the person who shot victim, contradicted part of another state witness's version of overheard conversation in which defendant allegedly complained to accomplice about having to grab gun from accomplice and shoot victim; while notes may have contained impeachment material, content of defendant's statements should have been known to him to same degree as it was known to accomplice. U.S.C.A. Const. Amend. 14; Rules Crim.Proc., Rule 573(B)(1)(a), 42 Pa.C.S.A.

14. Constitutional Law ⇐4594(1)

Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires the prosecution to disclose exculpatory evidence to the defense. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⇐4594(1, 4)

To prevail on a *Brady* claim under Due Process Clause, the proponent must demonstrate that the evidence was favorable to him, because it was exculpatory or impeaches; the evidence was suppressed by the prosecution; and prejudice ensued. U.S.C.A. Const.Amend. 14.

16. Constitutional Law ⇐4594(1)

No *Brady* violation occurs under Due Process Clause based on nondisclosure of exculpatory evidence where the defendant knew or could have uncovered the relevant evidence with reasonable diligence. U.S.C.A. Const.Amend. 14.

17. Criminal Law ⇐1613

It is the defendant's burden, on post-conviction review, to establish a constitutional infraction.

18. Criminal Law ⇐1615

While a post-conviction petitioner is not obligated to testify in support of his claims for relief, it remains the petitioner's burden to introduce such evidence as may be necessary to support his claims for relief, and, thus, to the degree that the petitioner's testimony may be the only evidence of a particular fact, as a practical matter, it may be necessary for him to testify to advance his cause.

19. Criminal Law ⇐1505

Defendant failed in postconviction proceeding to establish, in context of *Brady* claim, that any promise or inducement was made to prosecution witness who testified at guilt phase of murder prosecution to overhearing conversation in which defendant allegedly identified himself as the shooter; while witness contradicted that testimony in postconviction proceeding and further testified that prosecutor had said he would "see what he could do" in an unrelated prosecution against witness, there was no showing that witness benefited in his own case from his testimony in defendant's case, and assistant district attorney handling witness's case had no knowledge of any alleged agreement.

20. Criminal Law ⇐2004

District attorney's alleged statement to defendant's trial counsel that he "would get everything" did not create an obligation in first-degree murder prosecution to assemble all potentially relevant records and transcripts from other criminal proceedings in other counties for the benefit of the defense; many of the out-of-county documents purportedly showing incentive of defendant's accomplice in robbery/kill-

ing to testify for prosecution did not fall within the four corners of defendant's document requests, other than via the catch-all provision requesting all potentially exculpatory evidence. Rules Crim.Proc., Rule 573(B)(1)(a), 42 Pa.C.S.A.

21. Criminal Law ⇐1999

Defendant was not prejudiced, in first-degree murder prosecution in which his accomplice in robbery/killing testified that defendant was the shooter, by prosecutor's failure to disclose as impeachment material a modified plea agreement that deleted some of the crimes to which accomplice had originally said he would plead guilty; penalties concerning deleted charges were to run concurrently with other charges to which accomplice pleaded guilty, and thus, the actual sentence was unaffected. Rules Crim.Proc., Rule 573(B)(1)(a), 42 Pa.C.S.A.

22. Criminal Law ⇐1999

Defendant was not prejudiced, at retrial in first-degree murder prosecution in which his accomplice in robbery/killing testified that defendant was the shooter, by Commonwealth's failure to disclose as potential impeachment material that accomplice had told Commonwealth that he did not want to be incarcerated; accomplice had already entered his plea pursuant to plea agreement by the time of his testimony at retrial, and he had not received what he was seeking in terms of no incarceration. Rules Crim.Proc., Rule 573(B)(1)(a), 42 Pa.C.S.A.

23. Criminal Law ⇐1590

Supreme Court would not, on appeal from denial of postconviction relief as to guilt phase of capital murder prosecution, disturb postconviction court's discretionary determination as to how many pages of prosecutor's notes on pretrial interview with defendant's accomplice Commonwealth was required to furnish to defendant, in absence of evidence that postconviction court's in camera screening of those notes was erroneous. Rules Crim.Proc., Rule 902(E)(2).

24. Criminal Law ⇐1156.11

Appellate courts review the denial of discovery by a postconviction court for abuse of discretion. Rules Crim.Proc., Rule 902(E)(2).

25. Criminal Law ⇐1935

Defendant failed in asserting ineffective assistance claim to establish that trial counsel lacked reasonable basis at guilt phase of capital murder case for failing to cross-examine defendant's accomplice in robbery/killing, who testified that defendant was the person who fatally shot victim, about statements during a polygraph examination in which accomplice initially denied having been present when victim was shot or having knowledge about details of events giving rise to the killing, where trial counsel testified he was concerned that accomplice's failure of a polygraph in giving a different version of events would lend credence to his trial version of events. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⇐1923

Defendant failed to establish ineffective assistance based on trial counsel's failure in first-degree murder prosecution to interview defendant's accomplice in robbery/killing, who testified that defendant was the shooter; while defendant alleged that counsel might have used interview of accomplice to impeach testimony of another prosecution witness who testified to overhearing a conversation in which defendant allegedly complained to accomplice about having to grab gun and shoot victim after accomplice shot and missed, defendant could have provided the same information himself based on having been an

asserted participant in overheard conversation. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⇐1923

Defendant failed to show, as element of ineffective assistance claim, that he was prejudiced at guilt phase of capital murder case by trial counsel's reliance on prosecutor's discovery responses in lieu of an independent investigation; while counsel arguably could have obtained additional documents and information with which to impeach defendant's accomplice in robbery/killing, who testified that defendant was the shooter, counsel adduced accomplice's guilty pleas to several other burglaries and robberies, in addition to his participation in the present offenses, and engaged in extensive questioning concerning benefits he received in exchange for testimony against defendant. U.S.C.A. Const.Amend. 6.

28. Criminal Law ⇐1935

Defendant failed to show, as element of ineffective assistance, that he was prejudiced at retrial in first-degree murder prosecution by trial counsel's alleged failure to pursue helpful lines of cross-examination that were applied at first trial to impeach defendant's accomplice in robbery/killing, who testified at both trials that defendant was the shooter; counsel established at retrial the accomplice's familiarity with pistol and type of ammunition used in the shooting, confirmed that accomplice was present when pistol was purchased, and elicited evidence with which counsel argued that accomplice got out of death penalty by blaming someone else and making plea bargain. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐1948

Defendant failed to establish deficiency or prejudice in ineffective assistance claim based on trial counsel's failure to object to jury instructions prior to guilt-phase deliberations in capital murder case concerning specific punishments available for different degrees of homicide or to request a limiting instruction that jury was not to consider those punishments in its deliberations; availability of capital punishment for first-degree murder had already been discussed with individual jurors at voir dire, and jurors would have violated explicit instructions had they returned a conviction, as defendant theorized, based on a sense of what the appropriate punishment should be. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⇐1967

With respect to deficiency element of ineffective assistance claim, trial counsel in capital murder prosecution in which defendant received life sentence at first trial could not have reasonably relied on a broad reading of caselaw in advising defendant that he would not be eligible for death penalty on retrial if he successfully appealed his conviction, in view of intervening decision that essentially adopted a "clean-slate" approach to capital resentencing unless there was a determination that prosecution has not proved its case. U.S.C.A. Const.Amend. 6.

31. Criminal Law ⇐1967

Defendant who was sentenced to death upon retrial after successfully appealing first-degree conviction for which he had received life sentence failed to establish, as element of ineffective assistance, that he was prejudiced by his prior attorney's erroneous guarantee that defendant would not be death eligible if he won his appeal of first conviction; defendant made no effort to establish, by way of creditable evidence, that he would not have lodged the appeal had his counsel given different advice. U.S.C.A. Const.Amend. 6.

32. **Constitutional Law** ⚖2815, 4774
Sentencing and Punishment ⚖1634, 1788(6)

Supreme Court's failure to conduct proportionality review on direct appeal of death sentence imposed upon retrial in first-degree murder prosecution did not violate ex post facto or due process principles, though capital offense and initial trial occurred prior to effective date of statutory amendments eliminating the requirement of proportionality review, where death sentence was not imposed until after those amendments took effect. U.S.C.A. Const. Art. 1, § 10, cl. 1; U.S.C.A. Const. Amend. 14; 42 Pa.C.S.A. § 9711(h)(3)(iii).

Christopher D. Carusone, Philadelphia, Alisa Rebecca Hobart, Berks County District Attorney's Office, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania.

Robert Brett Dunham, Defender Association of Philadelphia, Philadelphia, for David Allen Sattazahn.

Before CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

OPINION

Justice SAYLOR.

In this capital post-conviction appeal, the Commonwealth, as the designated appellant, challenges the award of a new penalty hearing, and the appellee seeks to overturn his convictions, among other relief.

In April 1987, Appellee shot and killed Richard Boyer, a restaurant manager, during a robbery. Appellee was initially tried and convicted of first-degree murder in 1991, when he received a life sentence on account of sentencing jury impasse. *See* 42 Pa.C.S. § 9711(c)(1)(iv). According to his attorney, Appellee was advised that, if he prevailed in obtaining a new trial on appeal, the Commonwealth would be foreclosed from again seeking the death penalty. Appellee lodged the appeal in the Superior Court and was awarded a new trial.

The retrial ensued in 1999, at which Appellee was represented by new counsel, who was appointed a few months previously. The Commonwealth did, again, pursue imposition of the death penalty. In the guilt phase, among other evidence, the prosecution presented testimony from Appellee's accomplice, Jeffrey Hammer.[1] Hammer explained that he and Appellee hid outside the Heidelberg Family Restaurant after close of business with .41 and .22 caliber weapons, respectively, planning to rob the manager, handcuff him, and leave him in his truck. When the pair confronted the victim but he did not cooperate, Hammer related, Appellee shot Mr. Boyer repeatedly with the .22 caliber pistol. Further, Hammer indicated that the co-conspirators placed the weapons and masks in a black bag and escaped in an all-terrain vehicle, but that the bag was lost during the travel.

Another witness, Fritz Wanner, testified that he overheard a subsequent conversation, conducted in a garage or barn, in which Appellee chastised Hammer for losing the bag and threatened to kill him and/or members of his family if their identities were discovered. According to Wanner's testimony, Appellee also complained that he had to grab the firearm from Hammer and shoot the victim after Hammer

1. Pursuant to a plea agreement, Hammer pled guilty to third-degree murder and received a sentence of incarceration for 19 to 55 years.

had shot and missed. Wanner said that he was able to see the participants in the conversation and that a person named Joe (later identified as Joseph Russo) was also present. Finally, although Wanner was facing sentencing in a pending prosecution, he stated that he did not expect to receive favorable treatment from the Commonwealth in exchange for his testimony.

Another significant item of the Commonwealth's evidence was the bag lost by the coconspirators and its contents, including the .22 caliber handgun used to perpetrate the robbery/killing. Through a recovered serial number and testimony from a firearms dealer, the Commonwealth established that this weapon belonged to Appellee.

At the conclusion of the guilt phase, the trial court issued a charge concerning reasonable doubt utilizing phraseology different from that suggested in standard jury instructions. Rather that indicating that a reasonable doubt is one that would cause a reasonably careful and sensible person to "hesitate" before acting upon a matter of importance in his own affairs, PENNSYLVANIA SUGGESTED STANDARD JURY INSTRUCTIONS § 7.01(3) (1979), the trial court described a reasonable doubt as "a kind of doubt that *refrains* a reasonable person from acting in a manner of importance to himself or herself." N.T., January 21, 1999, at 498 (emphasis added). Further, the court took it upon itself to advise the jurors of the penalties associated with the different degrees of murder. *See id.* at 512.

After Appellee was found guilty of first-degree murder, robbery, and related offenses, a penalty hearing ensued, at which the Commonwealth advanced the aggravating circumstances entailing the commission of a killing during the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6), and the accumulation of a significant history of violent felony convictions, 42 Pa.C.S. § 9711(d)(9). Of particular relevance to one of Appellee's present claims, the convictions relied upon by the Commonwealth in support of the (d)(9) aggravator, including one for third-degree murder, occurred after his initial trial in this case. Appellee offered brief testimony from his mother and a former employer in support of the catchall mitigator, 42 Pa.C.S. § 9711(e)(8). The jurors found that the Commonwealth had established the aggravators beyond a reasonable doubt and that their weight exceeded that of the mitigation found by any juror.

On direct appeal, still represented by his trial counsel, Appellee challenged, *inter alia*, the constitutionality of permitting the Commonwealth to seek the death penalty on retrial, after he had received a life sentence at his initial trial. This Court rejected such challenge, *see Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000),[2] and this decision was sustained by the United States Supreme Court, *see Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

In June 2003, Appellee filed a *pro se* petition seeking relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–9546 (the "PCRA"). The PCRA court appointed counsel, and an amended petition was filed, with supplements ensuing. Appellee asserted, *inter alia*, that: the Common-

2. This author dissented, albeit while recognizing the validity of the majority's holding as a matter of constitutional law. *See Sattazahn*, 563 Pa. at 552, 763 A.2d at 369 (Saylor, J., dissenting) ("In my view, the ends of justice would be better served if, in our supervisory role respecting the administration of capital cases in Pennsylvania, we were to require that such a defendant, if convicted upon retrial, must receive the life sentence originally imposed. Such a requirement would be consistent with the legislative intent that if even a single juror decides against the death penalty, the penalty will not be imposed.").

wealth suppressed exculpatory evidence and knowingly failed to correct false trial testimony; trial counsel was ineffective at the guilt phase of trial for failing to gather available impeachment materials and adequately cross-examine Commonwealth witnesses; the trial court improperly instructed the jury concerning comparative penalties for the different degrees of murder; the court provided a constitutionally defective charge concerning reasonable doubt; trial counsel was derelict in assuring Appellee that the Commonwealth was foreclosed from seeking the death penalty upon retrial; and trial counsel inappropriately failed to investigate and present an adequate case of mitigation in the penalty phase.

In the post-conviction hearings, as concerns the asserted discovery violations, Appellee developed that, in a March 1991 prison interview with Hammer conducted by the district attorney, Hammer had contradicted aspects of Wanner's version of the overheard conversation, at least to the extent Wanner had said Russo was present. At some point, the district attorney prepared notes concerning this meeting; however, the post-conviction evidence was in conflict concerning the timing of the preparation of these notes and the entire content of the underlying interview. On the one hand, the prosecutor testified that his notes were prepared one or two weeks after the meeting, and thus, did not reflect contemporaneous, verbatim responses from Hammer. The district attorney also related that he did not show Wanner's statement to Hammer or specifically discuss the contents with him. According to the prosecutor, Hammer said he was unsure whether someone else besides himself and Appellee was present. Hammer, on the other hand, indicated that notes generally were taken during interviews with him. Further, he testified that the prosecutor did show him Wanner's statement, and he expressed a belief that he had marked the portions of the statement that he claimed were false, including Wanner's statements that Russo was present and that Appellee said that he had grabbed the murder weapon from Hammer. The post-conviction evidence strongly suggested that the prosecutor did not make his notes from the interview available to the defense.[3]

Wanner also testified in the post-conviction proceedings. Contrary to his trial testimony, Wanner said that he could not see Appellee and Hammer during the disputed conversation, and he disclaimed his prior assertion that Russo was present. Instead, Wanner indicated that someone pulled up in a car, but he did not know the person's identity. Further, Wanner testified that he did not remember anyone talking about firing shots. Finally, although he reiterated that the Commonwealth had made no "deal" concerning his own sentencing in the unrelated prosecution against him, Wanner said that the prosecutor had said he would "see what he could do" in that case. Appellee bolstered this evidence by introducing a representation of an assistant district attorney upon Wanner's sentencing that, "I have no doubt that that sounds exactly like the kind of thing that [the district attorney] would say. That's our general policy with regards to cooperation. I simply have no knowledge of it."

3. When asked whether his notes were ever disclosed to the defense, the district attorney initially stated that his notes were in the case file, and that his office maintains an open-file policy. *See* N.T., July 13, 2006, at 26. When pressed, however, the prosecutor admitted that he did not disclose work product and that his position was that his notes concerning the conversation with Hammer represented work product. *See id.* at 26–33.

Finally, Appellee highlighted that the district attorney had committed to provide broad discovery but he did not furnish various documents that Appellee deems relevant, particularly for impeachment purposes.[4]

As concerns the penalty-phase claim of deficient stewardship in the investigation and presentation of mitigating evidence, at the outset, Appellee proffered evidence of his markedly poor performance in school, including his demonstration of poor attention and concentration; difficulty functioning; poor grades and ranking in the bottom ten percent of his classes; repeating of three grades (kindergarten, second, and seventh grades); eventual placement in a special class; disengagement from ordinary social activities; and departure from school at age seventeen, while in the ninth grade. According to Appellee's two mental-health professionals, a neuropsychologist and a psychiatrist, such record reflected a long history of learning disabilities and abnormal social development, thus presenting many "red flags" suggesting cognitive impairment or organic brain defect. Both experts testified that Appellee suffered from such impairments, including cognitive disorder; moderate to severe attention deficit hyperactivity disorder; chronic brain dysfunction; Aspergers syndrome or an Aspergers-like condition; and pervasive developmental and schizotypal personality disorders. Elaborating on his finding of "extreme evidence of chronic brain damage," the neuropsychologist explained that:

> [Appellee's] overall brain dysfunction is significant enough to have major impacts on his ability to function and how he comports himself within the community, and ... such impacts [and] effects from this brain damage [are] of great significance [in] understanding this person's behavior and how he functions in life.

N.T., January 21, 2005, at 149. Both professionals explained the impact in terms of impaired impulse control, susceptibility to influence of others, and disorganized behavior in times of stress. Both also related their findings to the mitigating circumstances entailing severe mental or emotional disturbance and lack of capacity to understand the criminality of conduct and conform one's behavior to requirements of the law. *See* 42 Pa.C.S. § 9711(e)(2), (3).

Appellee's trial counsel also testified, indicating that he was appointed three months prior to trial; he received no cooperation from Appellee's prior attorney; in his investigation, he hired an investigator and obtained school and Department of Corrections records and spoke with Appellee's mother, a Department of Corrections'

4. These include: copies of the plea agreement showing that some of the crimes to which Hammer had originally committed to plead guilty were subsequently deleted from the final agreement; transcripts and court documents showing that, in 1993 in Lebanon County, Hammer had a sentence modified from 19 to 45 years to 12 to 32 years after a proceeding in which his attorney stressed his cooperation in Appellee's prosecution; a court order from Schuylkill County ordering Hammer to cooperate with the Commonwealth "with any cases against Mr. Sattazahn"; a preliminary hearing transcript in Schuylkill County in which Hammer testified that, when he gave a statement to state police in July 1989, they told him they would do whatever they could do to help him; Hammer's testimony at trial in Schuylkill County that, in exchange for his statement, a state trooper promised Hammer he would talk to the district attorneys and "do the best he could" for Hammer; and information that, in the course of negotiating a plea agreement in return for testifying against Appellee, Hammer, through his attorney, told a Berks County prosecutor that he wanted to serve no jail time.

representative, and perhaps a school teacher; he was aware that Appellee had not advanced regularly in several grades; he knew that Appellee had been placed in a special class; and he knew of blows to the head suffered by Appellee. Nevertheless, counsel did not arrange for a mental-health examination. He noted, at various points in his testimony, that Appellee's mother gave him no indication of a psychiatric history, and that there were indications in Appellee's prison records that he had no mental illnesses. Counsel also indicated, however, that he did not know signs of cognitive disorder, *see* N.T., January 20, 2005, at 96 (reflecting counsel's response to a question concerning his knowledge of "No, I am not a psychiatrist"). Further, he confirmed his awareness that, consistent with 1980 American Bar Association guidelines pertaining to representation of capital defendants, he had an obligation to conduct a thorough penalty phase investigation. *See* N.T., January 20, 2005, at 28.

The PCRA court credited Appellee's claim of deficient stewardship in the investigation and presentation of mitigating circumstances and awarded a new sentencing hearing. Referencing *Commonwealth v. Malloy*, 579 Pa. 425, 856 A.2d 767 (2004), the PCRA court explained that capital counsel's duty to investigate and prepare mitigation evidence "encompasses pursuit of all statutory mitigators of which he is aware or reasonably should be aware, unless there is some objective, reasonable ground not to pursue the circumstance (such as when it might open the door to harmful evidence)." *Commonwealth v. Sattazahn*, No. 2194–89, *slip op.* at 44 (C.P. Berks June 16, 2006) (quoting *Malloy*, 579 Pa. at 458, 856 A.2d at 787). Applying this principle, the court explained:

> Here, [Appellee's] counsel failed to adequately investigate substantial mitigating factors, even though the record was replete with "red flags" of brain damage that indicated the need for neuropsychological evaluations. In light of the extensive medical and scientific evidence presented in the PCRA petition, and subsequent testimony at hearings regarding [Appellee's] neglectful parenting, social isolation and impaired social development, significant educational impairments and learning disabilities, odd risk-taking behaviors, organic brain damage, mental illness and other potential statutory mitigators, we find that [Appellee's] counsel, notwithstanding his late entry into the case, failed to fulfill his obligation to explore all avenues that might lead to mitigating circumstances. During the sentencing phase, counsel presented testimony from just two witnesses—Leroy Renninger and [Appellee's] mother, Betty Sattazahn—in pursuit of one mitigating circumstance: any evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. This evidence clearly established that trial counsel did not conduct a thorough investigation of his client's background to determine if more statutory mitigators existed, and there was no tactical or strategic reason for the deficiencies.

Sattazahn, No. 2194–89, *slip op.* at 45 (citations omitted); *see also id.* at 43–44 (explaining that trial counsel rendered deficient stewardship "in failing to interview family and other lay witnesses who were readily identifiable and reasonably available to testify; for presenting only eight pages of direct testimony in [Appellee's] case for life; for failing to obtain available institutional records; for failing to conduct any investigation into [Appellee's] psychiatric condition and mental impairments, despite obvious signs of brain damage that clearly pointed to the need to obtain the assistance of mental health experts"). Ac-

cording to the PCRA court, these unjustified omissions on trial counsel's part clearly prejudiced Appellee. *See id.* at 44 ("This Court found that substantial and available mitigation evidence was not presented at trial, and that this evidence was reasonably likely to have persuaded one or more jurors to find a mitigating circumstance that had not been presented.").

The court also determined, however, that Appellee's prior counsel was not ineffective in advising him that the Commonwealth could not seek the death penalty on retrial if he successfully appealed his conviction for first-degree murder. The court recognized that this Court had reached the contrary legal conclusion in *Commonwealth v. Martorano,* 535 Pa. 178, 194–95, 634 A.2d 1063, 1070–71 (1993) (applying a "clean slate" approach to capital resentencing situations, other than those in which the sentencing authority has decided that the prosecution has not proved its case, to conclude that jury deadlock does not preclude imposition of a death penalty upon retrial). Referencing *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and *Arizona v. Rumsey,* 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the court reasoned that, prior to *Martorano,* and at the time the advice was rendered to Appellee, the law did appear to create an entitlement to a life sentence. *Sattazahn,* No. 2194–89, *slip. op.* at 11–12. Thus, the court determined that counsel did not render deficient stewardship.

While awarding a new penalty hearing, the PCRA court denied guilt-phase relief. Concerning the allegation of non-disclosure by the Commonwealth of the prosecutor's notes of his interview with Hammer, the court explained that, even if Appellee had known the substance of the conversation, he would have been in the "very difficult position" of arguing to the jury that Hammer was truthful in various assertions, but that the jury should not believe the remainder of his testimony. *See Sattazahn,* No. 2194–89, *slip op.* at 14. Further, the court highlighted that the Commonwealth presented other evidence corroborating various aspects of Hammer's testimony and had obtained a conviction in the first trial without it. Thus, the court opined that Appellee could not establish that any information allegedly withheld by the Commonwealth would have changed the outcome of the trial if it had been provided to him. *See id.* at 14–15. Finally, the court found no fault on the part of the Commonwealth in presenting inconsistent testimony from Hammer and Wanner, reasoning that:

> [T]he mere presentation of inconsistent testimony does not rise to this level [of a due process violation].... The Commonwealth argued, and this Court agreed, that they [sic] simply presented the testimony of Wanner and Hammer as they recollected what took place, without judging whose version of the events was correct. It must be noted that trial counsel did not cross-examine Fritz Wanner regarding the contents of this conversation in the barn, even though [Appellee] was an actual participant in the conversation. As a[d]efendant has a duty to participate in his own defense, one can logically infer that if the content of the conversation was different than what Wanner testified to, then [Appellee] would have informed his counsel, prompting him to vigorously cross-examine him on that subject. No information in the record for these PCRA proceedings indicates that [Appellee] did so.

Sattazahn, No. 2194–89, *slip op.* at 20.

As concerns Appellee's claims concerning an undisclosed inducement to Wanner to testify, the PCRA court determined that

Appellee failed to satisfy his burden of establishing that an agreement, promise, or inducement in fact existed. *See Sattazahn*, No. 2194–89, *slip op.* at 24–25. While the court recognized that the district attorney's office may have maintained some general policy, it explained that the statements made on the record by Commonwealth agents did not specifically discuss whether that policy was employed in the case against Wanner. Further, the court highlighted that the assistant district attorney prosecuting Wanner's case had no knowledge of any agreement. The PCRA court concluded that "[t]he Commonwealth cannot be found to have failed to disclose an agreement which has not been proven to exist or for failing to correct testimony which has not been proven to be false." *Id.*

With regard to documents pertaining to Hammer's criminal proceedings in Schuylkill and Lebanon counties, the PCRA court regarded the materials as collateral impeachment information governed by Rule of Criminal Procedure 573(B)(2) (regulating the discretionary disclosure of information relative to witnesses). Moreover, the court reasoned that Berks County was not responsible for gathering public information from other counties to furnish to Appellee. *See Sattazahn*, No. 2194–89, *slip op.* at 15–16 (explaining that "[i]t is well settled that there is no *Brady* violation where the parties had equal access to information or if the [a]ppellant knew or could have uncovered the evidence with reasonable diligence."). As to the associated ineffectiveness claim, charging deficient stewardship for relying solely on the discovery provided by the prosecution, the Court reasoned:

> [Appellee's] second trial counsel entered into the case a few short weeks before the trial commenced and was unable to even speak to [Appellee's] former counsel regarding the case file. Furthermore, as set forth above, we found that none of [Appellee's] PCRA claims regarding ineffective assistance of counsel entitled him to relief because he did not prove that, had other evidence and/or defenses been introduced, the outcome of his trial would have likely been different. Because [Appellee] could not establish the prejudice prong of his ineffectiveness claims, this Court declined to find his counsel ineffective on any of [Appelleee's] guilt phase claims.

Sattazahn, No. 2194–89, *slip op.* at 31; *accord id.* at 17 ("Jeffrey Hammer was subject to cross-examination and impeachment on several issues and it is unlikely that any additional impeachment evidence that was allegedly withheld by the Commonwealth would have changed the outcome of trial.").

The PCRA court more specifically addressed Appellee's claim that his trial counsel was ineffective in failing to cross-examine Hammer concerning his responses to questions in a polygraph examination by state police, in which he had denied participation in the robbery/killing of Mr. Boyer, and for failing to better develop the theory that, although Appellee technically owned the .22 weapon used to kill Mr. Boyer, he had purchased it for Hammer, because Hammer was underage. As concerns the polygraph examination, the court determined that counsel was precluded under applicable cases from referencing the results of such an examination. *See Sattazahn*, No. 2194–89, *slip op.* at 19–20. *See generally Commonwealth v. Brockington*, 500 Pa. 216, 220, 455 A.2d 627, 629 (1983); *Commonwealth v. Gee*, 467 Pa. 123, 142–43, 354 A.2d 875, 883–84 (1976) (plurality). Regarding the handgun purchase, the court referenced portions of the record in which trial counsel did, in fact, cross-examine Hammer concerning the purchase. *See Sattazahn*, No. 2194–89, *slip op.* at 20–

21 (explaining that "[c]ounsel specifically asked Hammer if he told Harold Houser, with whom Hammer was incarcerated, that Defendant had purchased the .22 handgun for him, and Hammer twice denied this assertion.").

In response to Appellee's claim that counsel was ineffective for failing to develop that Hammer's plea agreement was modified and he had anticipated being paroled after nineteen years in prison, the court determined:

> [Appellee] has not shown how counsel's failure to impeach Hammer in the retrial regarding these statements has prejudiced him. A review of Hammer's Memorandum of Cooperation and Plea Agreement indicates that any modifications were not done to give Hammer a better "bargain" in exchange for his testimony. The charges to which Hammer was going to plead but which were later deleted were scheduled to run concurrently with the charges to which he did plead. Jeffrey Hammer may have asked for no jail time, but in reality he did receive a rather lengthy jail sentence of 19 to 55 years in Docket No. 2190/89 and 6 to 20 years in Docket No. 1976/89. What he asked for in exchange for his testimony, no matter how unreasonable, was not what he received. Hammer pleaded to these crimes after the first trial, so his [sic] any "benefit" he received came well before the second trial in which he testified. Thus, any potential impeachment information that [Appellee] refers to would be speculative and questionable and certainly would not have been determinative of [Appellee's] guilt or innocence. [Appellee] has not proven how counsel's alleged failure to impeach the Commonwealth's witness Jeffrey Hammer on these matters has prejudiced him to the point that the outcome of the trial would have been different if not for counsel's omissions.

Sattazahn, No. 2194–89, *slip op.* at 21.

Finally, the PCRA court rejected Appellee's claims pertaining to the trial court's instructions concerning comparative penalties and reasonable doubt based upon precedent from this Court. *See Sattazahn*, No. 2194–89, *slip op.* at 32–34; *see, e.g., Commonwealth v. Brown*, 470 Pa. 274, 289, 368 A.2d 626, 634 (1976).

[1–4] In addressing the grant or denial of post-conviction relief, we consider whether the PCRA court's conclusions are supported by record evidence and are free of legal error. *See Commonwealth v. Jones*, 590 Pa. 202, 216, 912 A.2d 268, 276 (2006) (citing *Commonwealth v. Travaglia*, 541 Pa. 108, 117 n. 4, 661 A.2d 352, 356 n. 4 (1995)). Consistent with the eligibility requirements for PCRA relief, Appellee frames the majority of his claims as involving violations of the United States or Pennsylvania Constitutions, including the denial of effective assistance of counsel. *See* 42 Pa.C.S. § 9543(a)(2)(i), (ii). To prevail on his ineffectiveness allegations, Appellee must demonstrate that the underlying claim is of arguable merit; that no reasonable strategic basis existed for counsel's act or omission; and that counsel's error resulted in prejudice, or, in other words, that there is a reasonable probability that the outcome would have been different. *See Commonwealth v. Pierce*, 567 Pa. 186, 203, 786 A.2d 203, 213 (2001); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) (explaining that, to establish an ineffective assistance claim, a defendant must show that counsel's performance was deficient and that such deficiencies prejudiced the defense). Counsel is presumed to have rendered effective assistance, *see Commonwealth v. Basemore*, 560 Pa. 258, 277 n. 10, 744 A.2d 717, 728 n. 10 (2000)

(citing *Commonwealth v. Copenhefer*, 553 Pa. 285, 301, 719 A.2d 242, 250 (1998)), and, if the petitioner fails to satisfy any prong of the ineffectiveness inquiry, his claim will be rejected. *See Commonwealth v. Malloy*, 579 Pa. 425, 448, 856 A.2d 767, 781 (2004) (citing *Pierce*, 567 Pa. at 217, 786 A.2d at 221–22).

[5] In addition, on the broader point of eligibility for relief, Appellee is required to establish that his claims have not been previously litigated or waived. *See* 42 Pa. C.S. § 9543(a)(3). In the latter regard, although direct appeal in this case predated *Commonwealth v. Grant*, 572 Pa. 48, 67, 813 A.2d 726, 738 (2002) (implementing a general rule of deferral of ineffectiveness claims to post-conviction review), since Appellee was represented by the same counsel at trial and on direct appeal, his claims of ineffective assistance of trial counsel are not waived merely by virtue of their being raised for the first time in the PCRA petition. *See Commonwealth v. Williams*, 566 Pa. 553, 782 A.2d 517, 523 (2001) (explaining in the context of a pre-*Grant* case that, where there is an intervening substitution of counsel after trial, the post-conviction setting may be regarded as the petitioner's first opportunity to raise claims of deficient stewardship on the part of his trial counsel).

I. The Commonwealth's Appeal

The Commonwealth opens its present argument by highlighting the presumption that counsel are effective, the burden on a post-conviction petitioner to prove otherwise, and the obligation of a defendant to participate in the defense, *see Commonwealth v. Fears*, 575 Pa. 281, 316, 836 A.2d 52, 72 (2003) (explaining that "reasonableness in this context [of a penalty-phase investigation] depends, in critical part, upon the information supplied by the defendant" (citation omitted)). The Commonwealth observes that, in a substantial number of cases, this Court has rejected ineffectiveness claims pertaining to the failure to present mental-health mitigation. *See* Brief for Appellant at 12–13 (citing, *inter alia*, *Commonwealth v. Williams*, 577 Pa. 473, 486–87, 846 A.2d 105, 114 (2004), and *Commonwealth v. Busanet*, 572 Pa. 535, 554–57, 817 A.2d 1060, 1072 (2002)). Further, it extensively criticizes the PCRA court for its reliance upon a 1992 Department of Corrections report as containing "red flags" concerning potential mental health issues, since there is no evidence that Appellee revealed to trial counsel that he participated in a mental health evaluation while incarcerated. The Commonwealth also develops that trial counsel did subpoena and receive records from the Department of Corrections and argues that counsel should not be faulted where the report was not supplied by the agency in response to the subpoena. According to the Commonwealth, the report also does not readily reveal that further testing would be implicated, since it indicates that Appellee was "devoid of gross psychopathology." The Commonwealth also asserts that Appellee's own expert testified that only a neuropsychologist would have apprehended that the results of this report suggested further testing.

The Commonwealth further contends that Appellee did not prove that trial counsel was ineffective for failing to present other mitigating evidence, including life-history mitigation. Although the Commonwealth recognizes Appellee's portrayal of his background as entailing substantial neglect, it highlights that his mother testified in the penalty phase that Appellee was a normal, helpful child, who worked steadily and avoided trouble. The Commonwealth indicates that Appellee failed to provide any names of potential witnesses to trial counsel and discouraged further

investigation into his background by indicating to trial counsel that he had been a troublemaker, which counsel confirmed through other sources. Considering the brutal testimony heard by the jury concerning Appellee's present and other crimes,[5] it is the Commonwealth's position that it is unlikely that the outcome of the penalty hearing would have differed had trial counsel presented the evidence developed on post-conviction review.

Appellee, on the other hand, argues that the PCRA court's determination that trial counsel rendered ineffective assistance in failing to investigate and present mitigating evidence is overwhelmingly supported by the record. Referencing *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Malloy*, 579 Pa. at 425, 856 A.2d at 767, Appellee stresses counsel's obligation to thoroughly investigate a defendant's background and discover all reasonably available mitigation. *See Williams*, 529 U.S. at 396, 120 S.Ct. at 1514–15; *Malloy*, 579 Pa. at 458, 856 A.2d at 787. In response to the Commonwealth's recitation of Pennsylvania cases rejecting claims of ineffective assistance in the failure to investigate and present mental-health mitigation, Appellee provides his own summary of cases in which this Court reached the opposite conclusion. *See* Initial Brief for Appellee at 21 (citing, *inter alia*, *Commonwealth v. Gorby*, 589 Pa. 364, 390–92, 909 A.2d 775, 790–91 (2006); *Malloy*, 579 Pa. at 459–61, 856 A.2d at 787–88; *Commonwealth v. Smith*, 544 Pa. 219, 245–46, 675 A.2d 1221, 1234 (1996)).

Appellee asserts that uncontradicted, record evidence demonstrates that, upon his entry into the case a relatively short period before trial, counsel conducted a truncated mitigation investigation, and as a result, he presented a paltry case for life. According to Appellee, even the limited information that counsel elicited, including Appellee's failure to advance in three grades, contained obvious indicators of potential cognitive or mental-health issues that should have been reviewed by a mental-health professional.

With regard to the 1992 Department of Corrections psychological report referenced by the PCRA court, Appellee highlights various statements reflecting Appellee's impaired educational background and abilities; his affect including a fear of losing control over his impulses; and his amenability to benefitting from counseling. Appellee stresses the PCRA court's conclusion that the report was replete with " 'red flags' of brain damage that indicated the need for neurop[sy]chological evaluations." *Sattazahn*, No. 2194–89, *slip op.* at 45; *accord* N.T., January 20, 2005, at 185 (testimony of a clinical psychologist confirming that "there were a lot of red flags of brain damage in this case"). Appellee acknowledges the Commonwealth's position that the record was not provided in response to a subpoena secured by trial counsel; however, he observes that it was otherwise available in court records from the Schuylkill County third-degree murder conviction, which the Commonwealth used to support an aggravating circumstance. *See generally Rompilla v. Beard*, 545 U.S. 374, 389–90, 125 S.Ct. 2456, 2467, 162 L.Ed.2d 360 (2005) (holding that where the prosecution gives notice that it will rely in aggravation on facts relating to a prior conviction, capital defense counsel has an obligation to make a reasonable effort to review the court file pertaining to that

5. The victim in the Schuylkill County third-degree murder case died from a shotgun blast to the face. *See* N.T., January 22, 1999, at 572.

conviction).[6] Moreover, Appellee emphasizes that the PCRA court's finding of "red flags" transcended the Department of Corrections report, and included direct and available evidence of Appellee's failure to advance in kindergarten, second, and seventh grades; dropping out of school after completing only the eighth grade; his obvious attention deficits; head injuries; odd behavior, including risk-taking; social isolation and parental neglect; and other behavioral manifestations of symptoms of mental health disorders (such as attention deficit disorder, hyperactivity disorder, pervasive developmental disorder, and learning disorder) having organic components. Appellee also references unchallenged post-conviction testimony from a psychiatrist that simply obtaining a mental-health evaluation of Appellee would have been sufficient to disclose indicia of brain damage requiring neuropsychological evaluation. *See, e.g.,* N.T., January 21, 2005, at 258, 261.[7]

Appellee contrasts the evidence advanced at the post-conviction hearings with the defense penalty-phase evidence, adduced by trial counsel from only two character witnesses and encompassing only eight pages of the transcript. Appellee notes that the first defense witness was a prior employer who had no contact with Appellee for twelve years, and the other was Appellee's mother, who furnished an exceptionally modest amount of information concerning Appellee's life history and character. *Cf. Commonwealth v. O'Donnell,* 559 Pa. 320, 347 n. 13, 740 A.2d 198, 214 n. 13 (1999) ("[I]t is difficult to disagree with [the appellant] that a defense which amasses only four pages of transcript simply does not reflect adequate preparation or development of mitigating evidence by counsel representing a capital defendant in a penalty phase hearing."). Appellee maintains that the PCRA court's findings that counsel performed deficiently in "presenting only eight pages of direct testimony in [Appellee's] case for life" and "did not conduct a thorough investigation of his client's background to determine if more statutory mitigators existed," *Sattazahn,* No. 2194–89, *slip op.* at 44–45, are supported by the record and free from error.

[6–9] As Appellee develops, it is well settled that capital counsel has the obligation to conduct a thorough investigation for mitigating evidence, or to make reasonable decisions that render particular investigations unnecessary. *See Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Strategic choices made following less than complete investigation are reasonable precisely to the extent that reasonable professional

6. The Commonwealth asserts that the report was not in the file for the third-degree murder offense. However, the copy of the document produced in the PCRA hearings bears an August 17, 1992, date stamp from the Schuylkill County Clerk of Courts. *See* N.T., January 20, 2005, at 47–48 & D–15. Appellee also submitted to the court a certified copy of the entire file for the third-degree murder case containing a copy of the report, which was admitted into evidence without objection by the Commonwealth. *See* N.T., February 16, 2005, at 73 & D–62.

7. Appellee also refutes the Commonwealth's contention that a defense expert had confirmed that only a neuropsychologist would have appreciated the significance of the Department of Corrections report as an indicator of the need for further mental-health investigation. He develops that, in the portion of the clinical psychologist's testimony on which the Commonwealth relies, the expert in fact references the report as evidence that a psychologist who did not have neuropsychological training would have had evidence of a number of the psychological diagnoses even without neuropsychological testing, and that with the other available background information, the usefulness of further examination would have been "hard to miss." N.T., January 21, 2005, at 211–12.

judgment supports the limitation of the investigation. *See id.* at 690–91, 104 S.Ct. at 2066. In undertaking the necessary assessment, reviewing courts are to take all reasonable efforts to avoid the distorting effects of hindsight. *See Commonwealth v. Basemore*, 560 Pa. 258, 289, 744 A.2d 717, 735 (2000). Nevertheless, courts must also avoid "*post hoc* rationalization of counsel's conduct." *Wiggins*, 539 U.S. at 526–27, 123 S.Ct. at 2538.

[10] Here, the credited evidence supports the conclusion that a deficient pretrial investigation was undertaken. For example, under the principles applied in *Rompilla*, 545 U.S. at 374, 125 S.Ct. at 2456, counsel should have reviewed the file from the Schuylkill County third-degree murder case, including the Department of Corrections report which the PCRA court, as a factual matter supported by expert testimony of record, found contained red flags concerning potential mental-health and/or cognitive impairment. *See Rompilla*, 545 U.S. at 389, 125 S.Ct. at 2467. As another example, the evidence supports the conclusion that the failure to pass several grades during early childhood development, and the subsequent placement in a special class, strongly suggests potential mental, cognitive, emotional, and/or social difficulties which would bear investigation in defending against the imposition of the death penalty. *See* N.T., January 21, 2005, at 185 (reflecting the clinical psychologist's testimony that such circumstance "absolutely suggests problems").

[11] The PCRA court's conclusion that no reasonable strategy justified the limited investigation is also supported by the record. As discussed above, counsel's investigation touched upon only a limited set of sources and yielded a highly truncated mitigation presentation.[8] The difference in the nature and quality of the evidence adduced at trial versus that put forward at the post-conviction stage after a fuller investigation is substantial. *See generally Commonwealth v. Perry*, 537 Pa. 385, 392, 644 A.2d 705, 709 (1994) ("[I]t is not possible to provide a reasonable justification for appearing in front of a death penalty jury without thorough preparation.").

[12] Finally, in terms of prejudice, we recognize that the substantial aggravation advanced by the Commonwealth encompassed Appellee's commission of the present killing in the perpetration of a robbery, as well as his history of violent offenses including two murders. Nevertheless, the presentation at trial of the credited post-conviction evidence would have provided support for the finding of several statutory mitigators, which also bore upon the degree of Appellee's culpability in terms of selecting between capital punishment and a life sentence.[9] *See Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106

8. Of the two witnesses presented, in substance, Appellee's former employer merely testified to his recollection that Appellee was faithful to his job during the two years of the employment. *See* N.T., January 22, 1999, at 593–94. On direct examination, Appellee's mother testified that Appellee was her only child and was a good child who did not get into a lot of trouble, advanced to the ninth grade, worked at several jobs, and treated her and her husband well. She also related that her husband traveled during Appellee's upbringing and had had a heart attack. Finally, at trial counsel's instance, she asked the jury to spare Appellee's life. *See id.* at 597–601.

9. As previously noted, these include the Section 9711(e)(2) mitigator, *see* 42 Pa.C.S. § 9711(e)(2) ("The defendant was under the influence of extreme mental or emotional disturbance."), and the mitigating circumstance under Section 9711(e)(3) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.").

L.Ed.2d 256 (1989) (explaining that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring))). The absence, due to an inadequate investigation, of substantial, relevant, mitigating evidence diminishes confidence in the outcome of the sentencing proceeding, particularly given the appropriate single-juror frame of reference. *See Wiggins*, 539 U.S. at 537, 123 S.Ct. at 2543 (articulating the prevailing standard for assessing prejudice from deficient stewardship in the presentation of mitigation evidence in terms of whether "there is a reasonable probability that at least one juror would have struck a different balance"). In terms of the degree of impact, we decline to disturb the judgment of the PCRA judge, who was also the trial judge, and therefore, maintains the closest point of vantage.[10]

For the above reasons, the award of a new penalty hearing will be sustained.[11]

II. Appellee's Appeals

A. Alleged Suppression of Evidence, Failure to Correct False Testimony, and Discovery Violations

1. Asserted Discovery, *Brady* Violations and Failure to Correct Pertaining to the Notes of the Hammer Interview

[13–15] Appellee first argues that the prosecutor's notes concerning his March 1991 interview with Hammer should have been provided to the defense under the Pennsylvania Rule of Criminal Procedure 573(B)(2)(a)(ii), as substantially verbatim statements of an eyewitness. Moreover, Appellee argues that the notes were subject to mandatory disclosure, because they were exculpatory in that they could be used to impeach Wanner. *See* Pa. R.Crim.P. 573(B)(1)(a) (implementing a policy of mandatory disclosure for "[a]ny evidence favorable to the accused that is

10. In *Commonwealth v. Rios*, 591 Pa. 583, 920 A.2d 790 (2007), a majority of the Court adopted a de novo review standard for the mixed question of law and fact concerning whether capital counsel's performance fell beneath the constitutionally floor. *See id.* at 619–20, 920 A.2d at 810. This position derived from former Chief Justice Cappy's concurring opinion in *Commonwealth v. Gorby*, 589 Pa. 364, 909 A.2d 775 (2006), in which he elaborated that "this is no way alters the principle that 'the trial court is in the best position to review claims related to trial counsel's error in the first instance as that is the court that observed firsthand counsel's allegedly deficient performance.' " *Id.* at 395, 909 A.2d at 794 (quoting *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 737 (2002)). Indeed, the former Chief Justice stressed that he "would continue to accept the factual findings and credibility determinations of the PCRA court that are supported by the record." *Id.*

11. This case is distinguishable from *Commonwealth v. Gibson*, — Pa. —, 951 A.2d 1110 (2008) [J–139–2002], in which we remanded for further proceedings concerning the prejudice inquiry, *inter alia*, because the present PCRA court made its findings and conclusions upon a full record.

Appellee raises many additional claims pertaining to sentencing, which, in light of the award of a new penalty hearing, presently will be regarded as moot. The exceptions are a claim that prior counsel was ineffective in advising Appellee that he would not be exposed to capital sentencing on retrial (to which Appellee has attached a specific request for a distinct form of relief in the form of re-imposition of a life sentence), and claims seeking reinstatement of direct-appeal rights. These are addressed below, in connection with the treatment of Appellee's appeals.

material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth"). Appellee stresses Wanner's critical role at trial, as he was the only witness to provide evidence corroborating Hammer's version that it was Appellee, and not Hammer, who actually shot the victim. Appellee also highlights testimony by trial counsel indicating that he would have made use of the notes if he had had them. *See* N.T., July 13, 2005, at 68, 69–70. Appellee invokes the due process clause of the Fourteenth Amendment to the United States Constitution, which requires the prosecution to disclose exculpatory evidence to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215 (1963);[12] *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). In terms of prejudice, Appellee references *Commonwealth v. Grayson*, 466 Pa. 427, 353 A.2d 428 (1976), in which this Court explained:

> "The question of credibility sometimes depends on the slightest inclinations of scale. Where the jury is in doubt as to whether or not to believe a witness, the smallest feather of a palpable exaggeration or an inconsistency in a witness's statement on a minor point may be the very item to tip the scales and discredit the witness on his main testimony."

Id. at 429, 353 A.2d at 430 (quoting *Commonwealth v. Smith*, 417 Pa. 321, 334, 208 A.2d 219, 226 (1965)).

Appellee presents a colorable argument that the prosecutor's notes contained potential *Brady* material of the impeachment variety. However, according to uncontradicted trial and post-conviction testimony, Appellee was a participant in the conversation which the notes concerned. Therefore, the presence or absence of Wanner and/or Rizzo and the content of Appellee's own statements should have been known to Appellee, to the same degree as it was known to Hammer. To the extent that Wanner may have misrepresented aspects of the conversation or the associated circumstances, Appellee should have understood that Hammer could potentially confirm the misrepresentations. Indeed, in other passages of his brief, Appellee complains, at length, that his counsel was remiss in failing to interview Hammer before trial. *See, e.g.*, Initial Brief for Appellee at 37, 41.

[16, 17] No *Brady* violation occurs where the defendant knew or could have uncovered the relevant evidence with reasonable diligence. *See Commonwealth v. Morris*, 573 Pa. 157, 178, 822 A.2d 684, 696 (2003); *Commonwealth v. Johnson*, 580 Pa. 594, 599, 863 A.2d 423, 426 (2004). Moreover, it is the petitioner's burden, on post-conviction review, to establish a constitutional infraction, such as a *Brady* violation. *See Commonwealth v. Copenhefer*, 553 Pa. 285, 321, 719 A.2d 242, 260 (1998).

[18] Here, Appellee has failed to establish a lack of relevant knowledge on his part and/or an inability to obtain such knowledge upon reasonable diligence.[13]

12. To prevail on a *Brady* claim, the proponent must demonstrate that the evidence was favorable to him, because it is exculpatory or impeaches; the evidence was suppressed by the prosecution; and prejudice ensued. *Commonwealth v. Burke*, 566 Pa. 402, 411, 781 A.2d 1136, 1141 (2001).

13. Certainly, a post-conviction petitioner is not obligated to testify in support of his claims for relief. It remains the petitioner's burden, however, to introduce such evidence as may be necessary to support his claims for relief. Thus, to the degree that the petitioner's testimony may be the only evidence of a particular fact, as a practical matter, it may be necessary for him to testify to advance his cause.

Thus, he has not met his burden of proof concerning this asserted *Brady* violation, and the only potentially extant claim is that of deficient stewardship on the part of his counsel, addressed below.

2. Alleged Suppression and Failure to Correct False Testimony—Incentive to Wanner

[19] Relying upon the evidence that the prosecutor told Wanner that he would "see what he could do" concerning the outcome of sentencing in a prosecution against him, Appellee maintains that the Commonwealth committed another *Brady* violation by suppressing evidence which would have undermined Wanner's credibility as a key prosecution witness. Appellee also claims that the Commonwealth exacerbated the violation by failing to correct Wanner's false trial testimony that no promises were made to him. *See generally Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (reaffirming that the government has an obligation to redress the elicitation of testimony which the prosecutor knows to be false).

The United States Supreme Court has not provided definitive guidance concerning what constitutes a "promise, reward or inducement" for purposes of *Brady/Giglio*. *See McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir.1985). In collecting relevant decisions of other federal and state courts, one commentator notes an apparent split, as some courts have interpreted *Giglio* narrowly to encompass only express agreements, whereas others have applied a broader interpretation encompassing any communication suggesting preferential treatment in return for testimony. *See* R. Michael Cassidy, *"Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U.L.Rev. 1129, 1152–56 (2004) (citing cases). While the Superior Court has taken the narrower approach, *see Commonwealth v. Burkhardt*, 833 A.2d 233, 243 (Pa.Super.2003), it has been argued that *Giglio* supports the broader one in which "the relevant inquiry is whether the government has said or done anything that might reasonably lead the informant to believe that his interests are aligned with that of the state." *"Soft Words of Hope"*, 98 Nw. U.L.Rev. at 1157; *see also id.* at 1156.

We need not address this controversy here, however, since the PCRA court determined that Appellee failed to satisfy his burden of establishing that any form of promise or inducement existed in the first instance. *See Sattazahn*, No. 2194–89, *slip op.* at 24–25. While the court recognized that the district attorney's office may have maintained some general policy, it explained that the statements made on the record by Commonwealth agents

> do not specifically discuss whether that policy was employed in Fritz Wanner's case following his testimony against [Appellee]. Furthermore, the Assistant District Attorney handling Fritz Wanner's case had no knowledge of any alleged agreement. The Commonwealth cannot be found to have failed to disclose an agreement which has not been proven to exist or for failing to correct testimony which has not been proven to be false.

Id. Thus, it is reasonably clear that the court rejected Wanner's post-conviction testimony.[14]

14. Appellee asserts, to the contrary, that the PCRA court actually accepted Wanner's post-conviction testimony, since the court recited the representation by the prosecutor in Wanner's case concerning the general policy of the district attorney's office. *See* Initial Brief for Appellee at 31 (citing *Sattazahn*, No. 2194–89, *slip op.* at 24–25). While it is not

Wanner's post-conviction testimony was in conflict with his trial testimony, exemplifying that there were reasonable grounds to question its credibility. Since the PCRA court's factual determination carries sufficient support in the evidence and is free from legal error, the present claim does not give rise to a basis for relief.

3. Claimed Violation of Discovery Agreement

[20, 21] Appellee next claims that the district attorney violated his discovery obligation after telling trial counsel he "would get everything." [15] *See* N.T., December 29, 1998, at 2; N.T., October 25, 2004, at 153–154. Appellee complains that, despite this agreement, the prosecutor failed to provide trial counsel with: transcripts and court documents showing that, in Lebanon County, Hammer had his sentence modified from 19 to 45 years to 12 to 32 years; a Court Order from Schuylkill County ordering Hammer to cooperate with the Commonwealth "with any cases against [Appellee]"; a plea agreement that Hammer entered into with the Commonwealth which deleted some of the crimes to which Hammer had originally said he would plead guilty; a preliminary hearing transcript in Schuylkill County in which Hammer testified that, when he gave a statement to the state police in July 1989, they told him they would do whatever they could do to help him; Hammer's trial testimony in Schuylkill County in which he stated that, in exchange for his statement, a state trooper promised Hammer he would talk to the district attorneys and "do the best he could" for Hammer; and information that, in the course of negotiating a plea agreement in return for testifying against Appellee, Hammer, through his attorney, told a Berks County Assistant District Attorney that he wanted to serve no jail time. Appellee asserts that he was prejudiced by the Commonwealth's failure in this regard, as he was denied substantial impeachment material, which would have afforded the jurors a fuller understanding of Hammer's incentive to testify for the prosecution, thus undermining his accusations.

[22] The Commonwealth, on the other hand, relies on the public character of the documents and transcripts in issue and notes that the out-of-county documents were not within the possession of the Berks County prosecutor. *See* Brief for Appellant at 25 ("According to the plain language of [Rule of Criminal Procedure 573], there is simply no authority to indi-

entirely clear from the opinion, however, this reference appears to be in the context of an alternate analysis that the asserted representation, even if it applied to Wanner's case, did not rise to the level of a "promise, reward, or inducement" for purposes of *Giglio*. *Accord Sattazahn*, No. 2194–89, *slip op.* at 25 (prefacing a second alternative disposition regarding materiality as follows: "Furthermore, even if we would have found that an agreement existed ..."). We do not read these additional and alternative dispositions as undercutting the PCRA court's central finding, based upon its evaluation concerning the post-conviction evidence including witness credibility, that Appellee failed to establish that a promise, reward, or inducement actually existed.

15. Such asserted promise was in response to defense requests for: evidence favorable to Appellee as to guilt or punishment; written, recorded, and/or substantially verbatim oral statements of eyewitnesses, co-defendants, co-conspirators, and accomplices: information about the terms of the plea agreement with Hammer; the complete record of all plea agreements entered into with Hammer in Berks, Schuylkill, Northumberland, and Lebanon Counties; and information in the possession of police and/or investigative agencies regarding any statements, letters, or promises given to Hammer. *See* Nov. 6, 1998 Request for Discovery; Dec. 15, 1998, Omnibus Pretrial Motion.

cate that Berks County was responsible for gathering information from other counties and providing that information to [Appellee]."). The Commonwealth also notes that Appellee's challenge was raised in his appeals from his robbery and burglary convictions and was recently decided by the Superior Court in the Commonwealth's favor. *See Commonwealth v. Sattazahn*, 869 A.2d 529, 534 (Pa.Super.2005) (explaining that "there is no *Brady* violation where the parties had equal access to information or if the [a]ppellant knew of or could have uncovered the evidence with reasonable diligence." (citing *Grant*, 572 Pa. at 55, 813 A.2d at 730)). As to information within the Berks County prosecutor's immediate possession and control, the Commonwealth refutes Appellee's claim of materiality. With regard to previous drafts of the memorandum of cooperation and plea agreement with Hammer, the Commonwealth explains that changes were not made to afford Hammer a more favorable bargain, since the penalties concerning deleted charges were to run concurrently with other charges to which Hammer pleaded, and thus, the actual sentence was unaffected. The Commonwealth further notes that trial counsel conceded that he would not have altered his cross-examination of Hammer based upon this modified agreement. *See* N.T., January 20, 2005, at 63. Similarly, the Commonwealth contends that Appellee cannot demonstrate that the outcome of trial would have been different if he had been aware that Hammer told the Commonwealth that he did not want to be incarcerated. According to the Commonwealth, Hammer's personal wishes, however unreasonable, were not relevant, particularly since he already had entered his plea after the first trial. *See* N.T., January 15, 1999, at 265. Moreover, because Hammer did not receive what he was seeking, the Commonwealth contends that the impeachment value of this information is questionable.

We agree with the Commonwealth's arguments concerning this claim. Notably, many of the out-of-county documents do not fall within the four corners of Appellee's document requests, other than via the catch-all provision requesting all potentially exculpatory evidence. We do not regard the acquiescence of a county district attorney to such a request as creating an obligation to assemble all potentially relevant records and transcripts from other criminal proceedings in other counties for the benefit of the defense. With regard to the information within the Berks County prosecutor's possession and control, our own assessment concerning materiality/prejudice is in line with that of the Commonwealth.

4. Entitlement to discovery

[23] Appellee develops that, before the PCRA court directed the Commonwealth to furnish a copy of the notes from prosecutor's pre-trial interview with Hammer, the Commonwealth provided the court with twenty-nine pages of documents for *in camera* review. *See* N.T., February 16, 2005, at 10–12. He argues that the PCRA court erred by failing to require production of twenty-eight of these pages. Appellee explains that the Commonwealth has indicated that at least five pages concerned meetings about plea negotiations with Hammer's counsel, the state police, and other members of the district attorney's office. Since the notes describe plea agreement discussions with others, Appellee asserts, they are not work product. Moreover, he contends, even prosecutorial work-product is discoverable when the mental impressions of the prosecutor themselves disclose or embody a constitutional violation.

[24] Under Rule of Criminal Procedure 902(E)(2), no discovery is permitted at any stage of the post-conviction proceedings on a first, counseled petition in a capital case, except upon leave of court after a showing of good cause. Pa. R.Crim.P. 902(E)(2). Appellate courts review the denial of discovery by a PCRA court for abuse of discretion. *See Commonwealth v. Bryant*, 579 Pa. 119, 159, 855 A.2d 726, 749–50 (2004). Here, Appellee presents no evidence that the PCRA court's *in camera* screening was erroneous, and, accordingly, we decline to disturb its discretionary determination. *See generally id.* at 159–60, 855 A.2d at 750–51 (explaining that a showing of good cause under Rule 902(E)(2) requires more than just a generic demand for potentially exculpatory evidence that might be discovered if the petitioner is permitted to review requested materials).

B. Alleged Deficient Stewardship of Trial Counsel in the Investigation and Cross–Examination of Commonwealth Witnesses

1. Lies by Hammer

[25] Appellee next argues that his trial counsel was ineffective for failing to demonstrate to the jury that Hammer lied in pre-trial statements and testimony at Appellee's trial. While this claim is stated very generally, the development in Appellee's brief is centered upon a July 1989 polygraph examination conducted by state police, in which Hammer initially denied having been physically present when the victim was shot or having knowledge concerning the details of the events giving rise to the killing. Further, Appellee contends that his trial counsel was derelict in his failure to interview Hammer, which Appellee asserts would have revealed additional inconsistencies and yielded avenues for the impeachment of other witnesses. Appellee stresses that, at the post-conviction hearing, trial counsel could identify no strategic reason for failing to cross-examine Hammer with the inconsistent statements given to state troopers. *See* N.T., November 22, 2004, at 216. According to Appellee, if the jurors had heard these lies about the events which formed the foundation of the Commonwealth's case, they would have had an insight into the self-interested motivation for his trial testimony. *See Berryman v. Morton*, 100 F.3d 1089, 1098–99 (3d Cir.1996) (holding that counsel was ineffective for, *inter alia*, failing to impeach a witness with prior inconsistent statements). While Appellee recognizes that trial counsel elicited an admission from Hammer that he had lied in connection with another prosecution, he contends that there is a critical distinction between such falsehood and those involving material facts underlying the present case.

Appellee fails, however, to address material aspects of counsel's post-conviction testimony. Counsel testified that he was reticent to raise the substance of Hammer's interview with state police, because he was concerned that Hammer's failure of the polygraph relative to a different version of the events would lend credence to Hammer's trial version of the events. *See, e.g.*, N.T., November 22, 2004, at 219. In failing to acknowledge counsel's stated concerns, Appellee's present argument does nothing to discount it. Thus, he has failed to meet his burden on post-conviction review of establishing that counsel lacked a reasonable basis supporting his actions.

2. Failure to cross-examine Hammer concerning polygraph examination

Appellee also argues that trial counsel unreasonably failed to cross-examine Hammer by questioning him concerning his

failure of the initial polygraph examination and his refusal to submit to a further examination after having given a statement implicating Appellee. Appellee invokes the legal principle that a witness may be cross-examined as to any matter tending to show the interest or bias of that witness. *See Commonwealth v. Nolen*, 535 Pa. 77, 83, 634 A.2d 192, 195 (1993). He develops that state police found Hammer to be "*DECEPTIVE*" when he denied having shot or helped to shoot Mr. Boyer, and denied having been physically present during the robbery/killing.[16] According to Appellee, the information need not have been introduced for its truth, but rather, could have been offered to demonstrate the extent of Hammer's incentive to curry favor with the authorities. Appellee observes that, at the PCRA hearing, trial counsel admitted, "[i]f I could have got the fact that he took a lie detector test and the results of those lie detector tests into evidence, of course I would have done that." N.T., November 22, 2004, at 236.

In *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), the United States Supreme Court upheld a *per se* ban on the admission of polygraph results in court martial proceedings based upon their inherent unreliability. *See id.* at 310–12, 118 S.Ct. at 1265–66. *Scheffer* has been applied more broadly to support the exclusion of polygraph evidence, even in the capital context. *See, e.g., United States v. Fulks*, 454 F.3d 410, 434 (4th Cir.2006) (" '*Scheffer*, with its emphasis on the unreliability of polygraph evidence and the interest of courts in excluding such unreliable evidence, certainly suggests that exclusion of polygraph results would pass constitutional muster in th[e capital] context, as well.' " (citation omitted)). Particularly in light of the federal authority, Appellee has provided no basis to undermine this Court's holdings precluding the admission of polygraph evidence. *See, e.g., Brockington*, 500 Pa. at 220, 455 A.2d at 629.

3. Failure to interview Hammer and impeach Wanner

[26] Appellee next complains that, despite the key role Hammer played in the prosecution, trial counsel failed to even interview him. Appellee emphasizes that Hammer and Russo were the only witnesses who could expose asserted fabrications by Wanner concerning the overheard conversation between Hammer and Appellee. Appellee acknowledges that counsel tried to locate Russo but faults counsel for failing to even consider the potential that Hammer might impeach Wanner's testimony. According to Appellee, had counsel made the modest effort of interviewing Hammer, he could have learned that Wanner invented the account that Appellee claimed to have taken the gun from Hammer in order to shoot Boyer; and Wanner lied concerning who was present when he purportedly overheard the conversation. In light of counsel's asserted dereliction, Appellee contends, Wanner's testimony went virtually unchallenged.

Appellee also challenges the PCRA court's characterization of Wanner's testimony as reflecting only a "collateral conversation," *Sattazahn*, No. 2194–89, *slip op.* at 26. In this regard, Appellee develops that Wanner was the only person oth-

16. The state police report concerning the polygraph examination indicates:

> The opinions concerning the polygraph charts of this Examinee were made known to the Examinee and he was afforded an opportunity to explain his physiological reactions to the Relevant Crime Questions. The Examinee was unable to do so. Shortly, thereafter, the Examinee admitted his participation in this crime.

N.T., November 22, 2004, Ex. D–25, at 6.

er than Hammer (who, as an accomplice to the robbery, was a corrupt and polluted source) to provide evidence supporting the Commonwealth's critical contention that Appellee shot the victim. Indeed, Appellee highlights, the district attorney specifically relied on Wanner's testimony in closing to gain a first-degree murder conviction. *See* N.T., January 21, 1999, at 489–90.

The Commonwealth responds with the observation that Appellee, as an actual (or at least asserted) participant in the overheard conversation with Hammer, could have provided the same information Appellee now asserts Hammer would have disclosed in any interview concerning the truth or falsity of Wanner's testimony.

The Commonwealth's argument carries controlling force in the absence of any contrary evidence, and Appellee's failure to answer it undermines his claim for relief. *See supra* note 13.

4. Reliance on discovery from the prosecutor

[27] Appellee's next assertion of deficient stewardship on the part of his trial counsel centers on counsel's reliance on the prosecutor's discovery responses in lieu of an independent investigation. *See Commonwealth v. Mabie*, 467 Pa. 464, 474, 359 A.2d 369, 374 (1976) (explaining that reliance on "the prosecution's file is not a substitute for an independent investigation by defense counsel"); *cf. Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986). According to Appellee, he was prejudiced, because he was denied the use of valuable impeachment evidence against Hammer, *see supra* note 4 (cataloguing the asserted evidence), and there is a reasonable probability that the outcome of the trial would have been different. Appellee also criticizes the PCRA court to the degree that it relied upon counsel's entry into the case shortly before trial, *see Sattazahn*, No. 2194–89, *slip op.* at 31, particularly since the record reflects that counsel did not seek a continuance to prepare properly for trial. According to Appellee, the PCRA court has not directly refuted that a better-informed cross-examination and defense would have resulted if counsel had gathered the available information to impeach Hammer and Wanner.

In response, the Commonwealth acknowledges, at least arguably, that trial counsel could have obtained the noted documents and information prior to trial. It contends, however, that the information would have done nothing more than to further impeach Hammer, whose credibility was drawn into question from the beginning. The Commonwealth observes that, on Hammer's cross-examination, trial counsel adduced the witness's guilty pleas to several other burglaries and robberies, in addition to his participation in the present offenses, and engaged in extensive questioning concerning the benefits he received in exchange for his testimony against Appellee. The Commonwealth also references trial counsel's post-conviction testimony that he was careful not to cross-examine Hammer too closely regarding his convictions in Lebanon and Schuylkill Counties, as to do so may have risked the exposure of Appellee's identity as Hammer's coconspirator in those crimes as well. Thus, it may have opened the door to the introduction of otherwise inadmissible inculpatory evidence. Accordingly, the Commonwealth characterizes the information Appellee argues should have been admitted as merely corroborative and cumulative of other evidence.

On this claim, we find colorable merit to Appellee's claims regarding the arguable merit and reasonable strategy prongs of the ineffectiveness inquiry. Additionally,

we find the PCRA court's stated reasoning concerning this claim to be somewhat underdeveloped. *See Sattazahn*, No. 2194–89, *slip op.* at 17 ("Jeffrey Hammer was subject to cross-examination and impeachment on several issues and it is unlikely that any additional impeachment evidence that was allegedly withheld by the Commonwealth would have changed the outcome of trial."). Nevertheless, we note that trial counsel established powerful motivation on the part of Hammer to curry favor with authorities, in the form of his exposure to capital punishment or sentences aggregating up to 240 years on a host of criminal charges, and his entry into a plea bargain centered on his cooperation in the prosecution of Appellee. *See* N.T., January 20, 1999, at 327–333. In light of the evidence and argument that was adduced, upon our independent review of the record, we differ with Appellee's assessment concerning the potential impact of the additional impeachment evidence and decline to disturb the court's holding regarding prejudice.

5. Failure to pursue lines of helpful cross-examination from Appellee's first trial

[28] Appellee next asserts that trial counsel failed to pursue helpful lines of cross-examination that were applied to impeach Hammer at the first trial, including developing Hammer's: denial that the .22 caliber pistol used to kill the victim had been purchased from him; initial uncertainty about the caliber of the larger weapon; knowledge concerning how many shells loaded into the clip of the smaller caliber pistol; and earlier-expressed anticipation of parole after nineteen years. According to Appellee, trial counsel offered no reason for not asking Hammer many of these questions at the retrial of Appellee's case. *See* N.T., November 22, 2004, at 227–29, 232. Although Appellee acknowledges the PCRA court's observation that trial counsel did ask Hammer whether he had told someone else that Appellee had bought the .22 for Hammer, which Hammer denied, he claims that this is far less than what was achieved at the first trial.

The Commonwealth's responsive argument is that Appellee has failed to establish sufficient prejudice to warrant relief.

With regard to the line of questioning concerning the handgun, Appellee's argument on this claim does not acknowledge that, on cross-examination, trial counsel established Hammer's familiarity with the .22 caliber pistol and the type of ammunition used in the robbery/killing and confirmed Hammer's presence when the pistol was purchased. *See* N.T., January 20, 1999, at 323–325.[17] Counsel further presented a witness to contradict Hammer's testimony that Appellee had not purchased a small-caliber handgun for him (Hammer). *See* N.T., January 21, 1999, at 438. In terms of Hammer's expectation concerning punishment, again, counsel aggressively pursued parallel lines of evidentiary development. As to both the circumstances under which the handgun was used and Hammer's cooperation with authorities, the evidence gave rise to counsel's arguments to the jurors, *inter alia*, as follows:

> Jeffrey Hammer was responsible for the murder and you heard his testimony

17. Indeed, in a different passage of his brief, Appellee acknowledges that the evidence pursued by counsel in this regard was considerable. *See* Initial Brief for Appellee at 51 ("Considerable evidence pointed to Hammer as the shooter. Hammer was present when the murder weapon was purchased, had fired the gun in the past, and knew where the gun was hidden before the incident. He admitted his participation in the robbery and even to firing a gun—though he claimed a different one—during the incident.").

that he pled guilty to third degree murder.

. . . You heard testimony regarding the position of [sic] Jeffrey Hammer was in in 1989. He was jammed up so he found a scapegoat. My client.

* * *

Now the gun. You heard a lot of testimony about this gun .22 caliber pistol, the gun. Let's assume for argument sake that [Appellee] purchased this gun. The evidence is that he did and that came from people who don't have credibility problems but the purchase of this gun is bought [sic] with evidence that it was purchased for Jeffrey Hammer. You'll recall that [the firearms dealer] remembered that Jeffrey Hammer was along when this gun was purchased. He didn't remember [Appellee] but he remembered Mr. Hammer and as you will recall [the dealer] told you that Mr. Hammer frequented the gun shop. Purchasing the gun proves absolutely nothing. Just one other very interesting part of Mr. Hammer's testimony. I asked Jeffrey Hammer do you know what kind of ammunition was used in the gun on April 12, 1987 in this gun, the murder weapon and he said without hesitation CCI. Eleven years later and he knows what type of ammunition was in the gun that caused the death of Richard Boyer. He was very familiar with that gun. He told you everything he could about this gun without admitting that he was the shooter. . . .

Now, in 1989, Jeffrey Hammer was jammed up. He was facing ten burglaries, two robberies, one murder and he was also told that the Commonwealth was seeking the death penalty. . . . I don't think anyone could be as jammed up as Mr. Hammer was in 1989 so he did what any smart person would, he blamed someone else and he got a deal. He got a plea bargain for 19 years to 55 years in jail and he got out of the death penalty. . . .

N.T., January 21, 1999, at 464–65. Again, in line with the Commonwealth's argument and the PCRA court's conclusion, we conclude that Appellee has failed to establish the requisite prejudice.

C. Assertion of Improper Instructions Concerning Comparative Penalties

[29] Appellee next contends that he was denied due process and the effective assistance of counsel when the trial court advised the jurors, prior to their guilt-phase deliberations, concerning the specific punishments Appellee could receive for each degree of criminal homicide for which he was charged.[18] According to Appellee, the instruction infused the deliberative process with extraneous and prejudicial concerns, thus creating an unacceptably

18. The court instructed the jurors as follows:

> Our law requires that prior to your deliberation[,] I inform you as to the penalty of murder offenses[. Y]ou are aware that the penalty for first-degree murder carries two possible penalties, death or life imprisonment; the penalty for second degree, life imprisonment; penalty for murder third degree, maximum sentence of not less than 20 years nor more than 40 years in an appropriate state correctional institution. In second degree murder, the Court has no discretion and must impose a sentence of life imprisonment and in third degree the Court may impose a maximum sentence or any lesser sentence which in its discretion the Court deems appropriate.

N.T., January 21, 1999, at 512. Appellee's direct claims of trial court error pertaining to this instruction, and the reasonable-doubt charge are waived, since no objections were lodged at trial. Thus, our discussion of the merits of these challenges is limited to an assessment of the arguable merit of the derivative ineffectiveness claims.

high risk that the jurors would return a verdict based, not on the facts, but rather, on their visceral sense of what the appropriate punishment should be. Appellee contends that the impact the instruction had on the sentencing deliberations was just as harmful, since, having learned that a lesser offense (second-degree murder) carried a life sentence, there was an unacceptable risk that the jury would feel pressured to return a death verdict so as to reflect the greater culpability attendant to a premeditated murder. Appellee claims that trial counsel was ineffective for failing to object to the instructions or insist upon a limiting instruction that the jury was not to consider these punishments in deliberating guilt or innocence.

In support of these arguments, Appellee develops that information as to the consequences of a particular verdict is irrelevant to the jury's task of determining guilt or innocence. *See Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424, 129 L.Ed.2d 459 (1994) (explaining that providing jurors with sentencing information "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion").[19] Further, Appellee invokes his "right to a verdict based solely upon the evidence and the relevant law." *Chandler v. Florida*, 449 U.S. 560, 574, 101 S.Ct. 802, 809, 66 L.Ed.2d 740 (1981). Appellee distinguishes the decision in *Commonwealth v. Yarris*, 519 Pa. 571, 549 A.2d 513 (1988), relied upon by the PCRA court and the Commonwealth, on the basis that the trial court in *Yarris* had issued a limiting instruction, *see id.* at 597, 549 A.2d at 526, whereas, none was given here. *See generally Commonwealth v. Covil*, 474 Pa. 375, 383, 378 A.2d 841, 845 (1977) (explaining that, whenever potentially prejudicial information "is admissible for a limited purpose, a defendant is entitled to a limiting instruction.").

Although Appellee is correct that a limiting instruction was issued in *Yarris*, the Court's disposition centered on the absence of prejudice. *See Yarris*, 519 Pa. at 598, 549 A.2d at 526 ("Since there is no indication that informing the jury of the various murder conviction penalties was unduly prejudicial, and because, to the contrary, knowledge of the severity of the penalties could serve only to caution a jury as to the seriousness of a conviction, the instruction was permissible."). We recognize that the logic of *Shannon* would be in tension with the application of *Yarris's* holding to a non-capital case. Invocation of *Shannon* would have been to little avail in Appellee's case, however, since the general federal rule discussed there disfavoring the dissemination of sentencing information to jurors is expressly limited to circumstances in which "a jury has no sentencing function." *Shannon*, 512 U.S. at 579, 114 S.Ct. at 2424; *see also id.* n. 4 ("noting that, particularly in capital trials, juries may be given sentencing responsibilities"). Thus the High Court implicitly recognized the realities associated with capital trials, for example, that the process of selecting jurors qualified to discharge the sentencing function will necessarily entail some frank discussion of penalty. Indeed, the specific association between the offense of first-degree murder and the availability of capital punishment was discussed with individual jurors on voir dire at Appellee's trial, *see, e.g.*, N.T., January 12, 1999, at 89, and Appellee has made no claim of trial court error or deficient stewardship associated with such discussion.

19. *Shannon* concerned a defense request for penalty information related to a verdict of not guilty only by reason of insanity. *See Shannon*, 512 U.S. at 577–78, 114 S.Ct. at 2423.

Finally, for the jurors to have acted along the lines of any of Appellee's theories, they would have been proceeding contrary to the trial court's explicit instructions concerning the elements of the various offenses and the jurors' duty to find Appellee not guilty of each offense upon a finding that any element was not established beyond a reasonable doubt by the Commonwealth. *See, e.g.*, N.T., January 21, 1999, at 526 (reflecting the trial court's admonition that, "[i]f you do not find that the Commonwealth has proven this offense beyond a reasonable doubt, your verdict then on the first degree murder is not guilty."). Thus in addition to there being an absence of deficient stewardship, we also find a lack of material prejudice.

D. Reasonable Doubt Instruction

Appellee next complains that the instruction provided to the jury in the guilt-phase charge in this case materially deviated from Pennsylvania's standard jury instructions and misdefined reasonable doubt in violation of the Sixth and Fourteenth Amendments and Article I, Sections 6 and 9 of the Pennsylvania Constitution. Appellee develops that, when defining "reasonable doubt," the trial court told the jury: "A reasonable doubt is a kind of doubt that *refrains* a reasonable person from acting in a matter of importance to himself or herself." N.T., January 21, 1998, at 498 (emphasis added). Appellee also suggests that trial counsel was ineffective for failing to object.

While, as Appellee develops, this Court has expressed a preference for a different formulation of reasonable doubt charge, *see Commonwealth v. Uderra*, 580 Pa. 492, 522, 862 A.2d 74, 92 (2004), it has found no basis for reversal upon the issuance of instructions similar to that issued at Appellee's trial. *See, e.g., Commonwealth v. Rios*, 591 Pa. 583, 611, 920 A.2d 790, 806 (2007); *Commonwealth v. Young*, 456 Pa. 102, 110, 317 A.2d 258, 262 (1974); *Commonwealth v. Brown*, 470 Pa. 274, 289, 368 A.2d 626, 634 (1976). The federal courts have similarly not found constitutional error upon the issuance of similar instructions.[20]

E. Asserted Ineffectiveness in the Advice that the Commonwealth Was Foreclosed From Seeking the Death Penalty on Retrial

[30, 31] Appellee claims that his initial direct appeal must be voided and the life sentence imposed in his original trial restored, because that appeal was induced by his prior attorney's guarantee that "there was no way the Commonwealth could seek the death penalty if he won his appeal." N.T., January 20, 2005, at 103. According to Appellee, counsel's erroneous guarantee that Appellee could not be death eligible on retrial constituted ineffective assistance of counsel, in violation of the Sixth and Fourteenth Amendments. Further, Ap-

20. *See, e.g., Thomas v. Beard*, 388 F.Supp.2d 489, 531–33 (E.D.Pa.2005) ("Given the absence of specific, constitutionally mandated language, the wide latitude given to judges in crafting their instructions, and the fact that both federal and state courts have upheld charges using identical, or substantially similar, language, [the petitioner's] claim of constitutional error [in the trial court's issuance of a reasonable-doubt instruction using the term 'restrain'] is unpersuasive."); *Peterkin v. Horn*, 176 F.Supp.2d 342, 381 (E.D.Pa.2001) ("Although we would agree with [the petitioner] that the word 'restrain' implies a slightly higher level of doubt than does the word 'hesitate,' we do not find that the trial court's use of the word 'restrain' in its reasonable doubt instruction operated to raise the level of doubt so high as to constitute constitutional error. Rather, our review of the instruction as a whole reveals that the trial court adequately defined the meaning and outlined the proper implementation of the concept of reasonable doubt to the jury.").

pellee contends that his trial counsel was ineffective for failing to raise the issue.[21]

As previously developed, the PCRA court's substantive disposition of this claim was based on the issuance, after the relevant advice was given to Appellee, of this Court's decision in *Martorano*, 535 Pa. at 178, 634 A.2d at 1063 (applying a "clean-slate" approach to capital resentencing scenarios in Pennsylvania unless a determination was rendered that the prosecution has not proved its case). Prior to *Martorano*, the court believed that counsel was justified in relying upon prior decisions of the United States Supreme Court such as *Bullington*, 451 U.S. at 430, 101 S.Ct. at 1852, and *Rumsey*, 467 U.S. at 203, 104 S.Ct. at 2305, which reflected exceptions to the clean-slate approach. *Sattazahn*, No. 2194–89, *slip op.* at 11–12. The difficulty with the PCRA court's analysis, however, is that there was an intervening decision, *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), reflecting a narrow reading of *Bullington* and *Rumsey* and adopting essentially the same understanding of the clean-slate approach later applied in *Martorano*. Indeed, *Poland* was referenced extensively in *Martorano*. *See Martorano*, 535 Pa. at 192–93, 634 A.2d at 1070 (explaining that, in *Poland*, "the Supreme Court reaffirmed the 'clean slate' rule ... and declined to extend *Bullington* further."). In light of *Poland's* existence in the time frame in which counsel's advice was rendered, the PCRA court's conclusion that he could reasonably have relied upon a broad reading of *Bullington* is unjustified.

Despite the difficulty with the PCRA court's legal reasoning, a primary weakness in Appellee's contention is that he makes no effort to establish, by way of creditable evidence, that he would not have lodged the appeal had his counsel given different advice. While Appellee appears to believe that it can be assumed that a defendant or post-conviction petitioner would not risk imposition of the death penalty in order to gain a chance at freedom, we do not find such assumption warranted, as it is contrary to experience.

It is a post-conviction petitioner's burden to prove all elements of his claims, including prejudice. While certainly the petitioner is not required to testify in support of his claims, again, relief may be unavailable in the absence of such evidence or some reasonable substitute.

F. Claims of Entitlement to Restoration of Direct–Appeal Rights

[32] Appellee claims entitlement to restoration of his direct-appeal rights in order for this Court to conduct proportionality review and assess the record to determine whether his sentence was the result of passion, prejudice, or any other arbitrary factor. *See* Initial Brief for Appellee at 96–99 (citing 42 Pa.C.S. § 9711(h)(3)(i)). Appellee notes that the PCRA court failed to address such claims.

In terms of proportionality review, Appellee claims a protected liberty interest in meaningful proportionality review. He explains that, from the time of his offenses until June 25, 1997, the Pennsylvania death-penalty statute required this Court to conduct a review to determine whether the sentence of death imposed in his case

21. This underlying claim may be waived; however, Appellee presents an extensive argument that it is not, *see* Initial Brief for Appellee at 56–58; moreover, he advances a layered ineffectiveness claim. Since we find, below, that the underlying claim otherwise does not present a basis for relief, further discussion of the waiver issue is unnecessary. *See Commonwealth v. Hughes*, 581 Pa. 274, 305–310, nn. 13 & 20, 865 A.2d 761, 779–782, nn. 13 & 20 (2004).

was "excessive or disproportionate to the penalty imposed in similar cases." 42 Pa. C.S. § 9711(h)(3)(iii) (repealed).[22] Appellee invokes *Gribble*, which determined that 1997 amendments eliminating the requirement to conduct proportionality review could not be applied to death sentences issued prior to its effective date. *See id.* at 90–91, 703 A.2d at 439–40. According to Appellee, since his capital offense and initial trial occurred prior to that date, he has a vested right to proportionality review, and this Court's failure to recognize that right on direct appeal violated the *ex post facto* prohibition against adverse retroactive criminal legislation contained in Article I, Section 10 of the United States Constitution, as well as due process requirements.

We differ with Appellee's arguments. As *Gribble* explains, former Section 9711(h)(3)(iii) applied to all death sentences issued while it was effective. *See Gribble*, 550 Pa. at 89, 703 A.2d at 439 ("*When Gribble was sentenced to death* on October 11, 1994, he became statutorily entitled to review in this Court, 42 Pa.C.S. § 9711(h)(1), which at that time gave him the legislatively created right to proportionality review[.]" (emphasis added)). The controlling fact here, however, is that Appellee did not receive a death sentence until after the repeal of the statutory prescription. Appellee does not develop a focused challenge to the understanding, reflected in *Gribble*, that the operative event which triggered the entitlement to proportionality review was the imposition of a sentence of death.[23] In short, his argument does not give rise to a basis for relief.

Appellee's second point concerns the continuing statutory requirement that this Court affirm a death sentence unless it is determined, among other things, that "the sentence of death was the product of passion, prejudice or any other arbitrary factor." 42 Pa.C.S. § 9711(h)(3)(i). He points out, correctly, that this Court's opinion on direct appeal did not expressly address this portion of the statute. According to Appellee, this omission violated his statutory and due process rights, as well as his Eighth Amendment right to meaningful appellate review of his death sentence, and he is entitled to reinstatement of his right to a direct appeal.

It is traditional for this Court to specifically discuss the review under Section 9711(h)(3)(i) in our opinions on direct appeal, and we acknowledge that it would have been preferable for us to do so in Appellee's case. Since, however, Appellee has been awarded a new sentencing hearing, the final review in this regard as it pertains to penalty, if necessary, may be accomplished at a later stage. At this juncture, we confirm that we have now twice reviewed the full record concerning Appellee's convictions and conclude that they were not the result of passion, prejudice, or any other arbitrary factor.

G. Cumulative Effects of Alleged Errors and Ineffectiveness

Finally, Appellee offers several permutations of arguments resting on the cumu-

22. The history and nature of proportionality review are developed further in *Commonwealth v. Gribble*, 550 Pa. 62, 86–90, 703 A.2d 426, 438–39 (1997).

23. Parenthetically, a more developed constitutional challenge along the lines of that presented by Appellee has been rejected in the federal courts. *See Hatch v. Oklahoma*, 58 F.3d 1447, 1463–64 (10th Cir.1995) (explaining that "the [Ex Post Facto] Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts,' " and is not implicated by alterations to proportionality review (citations omitted)).

lative effects of asserted errors and ineffectiveness. To the degree that Appellee's claims failed on merit or arguable merit, there is no basis for an accumulation claim. To the extent that individual dispositions have centered on the absence of sufficient prejudice to give rise to relief on an individual basis, we are also satisfied that prejudice would be lacking on a collective basis relative to those claims as well.

The order of the PCRA court is affirmed.

Justice GREENSPAN did not participate in the consideration or decision of this case.

Chief Justice CASTILLE, Justice BAER, Justice TODD and Justice McCAFFERY join the opinion.

Justice EAKIN files a concurring and dissenting opinion.

Justice EAKIN, Concurring and Dissenting.

I dissent from the portion of the majority's decision affirming the PCRA court's grant of a new penalty hearing based on trial counsel's ineffectiveness for failing to present mental health mitigation evidence. For the same reasons expressed in *Commonwealth v. Romero*, 595 Pa. 275, 938 A.2d 362, 387 (2007) (at time of trial, *Williams* and *Wiggins* had not been decided, and degree of investigation required for capital counsel to not be deemed ineffective had not evolved to extent currently required), I believe counsel's stewardship should be evaluated by the standards in effect at the time of trial. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." *Romero*, at 387 (citations omitted); *see also Commonwealth v. Williams*, 950 A.2d 294 (Pa.2008), Concurring Op., at 324 (Eakin, J., concurring) ("Any other standard would require counsel to predict changes in the law and turn representation into prognostication....").

Although *Romero* was a plurality, my view remains "that counsel's performance regarding mitigating evidence should be critiqued according to the law existing at the time of trial, not according to later-announced standards." *Williams*, at 324 (citing *Commonwealth v. Hughes*, 581 Pa. 274, 865 A.2d 761, 825 (2004) (Castille, J., concurring and dissenting, joined by Eakin, J.)). Here, counsel testified Appellee's mother gave no indication of appellee's psychiatric history, Appellee's prison records gave no indication of any mental illness, and Appellee failed to provide counsel with names of potential witnesses and discouraged further investigation into his background, indicating he had been a troublemaker. *Cf. Romero*, at 388 (appellant showed no signs of mental illness, never gave counsel any useful information about his childhood or family when asked, and prison records contained no indication of psychiatric problems, although counsel was aware appellant had done poorly in school and dropped out). Given these circumstances, counsel's decision not to pursue evidence of mental health mitigation was not unreasonable. *See Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 266 (2006) (in evaluating reasonableness of counsel's investigation, court must remember counsel's decisions may depend heavily on information his client provides to him). I would instead assess counsel's stewardship under the law at the time of Appellee's trial, by which standard one must conclude counsel was effective; accordingly, I would reverse the grant of a new penalty phase hearing.

In all other respects, I join the majority opinion.

APPENDIX D

Federal Defenders' Office Phila., PA

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION**
vs.	:	**No. 2194-89**
DAVID ALLEN SATTAZAHN	:	**KELLER, Judge**

Alisa R. Hobart, Esquire
Attorney for the Commonwealth

Robert Brett Dunham, Esquire
David Zuckerman, Esquire
Attorneys for Defendant

MEMORANDUM OPINION, S.D. KELLER, JUDGE June 16, 2006 SDK

On Sunday, April 12, 1987, at approximately 10:00 p.m., Petitioner David Sattazahn and his co-defendant Jeffrey Hammer hid in a wooded area behind Heidelberg Family Restaurant. They hid in the same area several times before in order to determine what time the manager came out at night with the bag of money collected that particular day and on which day the restaurant did the most business. Preparing to rob the manger, Petitioner carried a .22 caliber Ruger semi-automatic pistol and Hammer carried a .41 caliber Magnum revolver. When Richard Boyer, the manager, closed the restaurant and began walking to his car with the deposit full of the day's receipts, Petitioner and Hammer, with guns drawn, demanded the money.

When confronted by Petitioner and Hammer, Mr. Boyer raised his hands but threw the bag of money over his head. Petitioner ordered him to retrieve the bag and bring it back to him but when Mr. Boyer walked over to pick up the bag, he once again threw it, this time towards the roof of the restaurant. The bag went over the corner of the roof, landing on the parking lot next to the building. Mr. Boyer turned and ran towards

the same corner of the building, and Hammer heard a shot fired so he also fired a warning shot in the air. Defendant fired his .22 five times and Mr. Boyer fell to the ground. Defendant and Hammer grabbed the bank deposit bag and retreated back to the woods where they had left their three-wheeler. Mr. Boyer died as a result of his injuries – two gunshot wounds in the lower back and one each in the left shoulder, the lower face and the back of the head. The two slugs that were recovered from Mr. Boyer's body, as well as the five discharged cartridge cases collected from the crime scene were identified as being fired from the .22 caliber Ruger semi-automatic gun purchased by Defendant.

Following a trial, a jury convicted Defendant of first, second, and third degree murder[1], robbery[2], two counts of aggravated assault[3], possession of an instrument of crime[4], carrying a firearm without a license[5], criminal conspiracy[6] to commit third degree murder, robbery, aggravated assault and possession of an instrument of crime. The Honorable Scott D. Keller presided over the trial. On May 10, 1991, because the jury deliberated for three and one-half hours and was unable to reach a unanimous decision on death or life in the sentencing aspect of the trial, this Court dismissed the jury as hung and imposed a statutorily mandated sentence of life imprisonment without possibility of parole.

On September 19, 1991, Defendant pled guilty to a plethora of burglary and robbery charges in Berks County, for which he was sentenced on February 14, 1992. On that same date, Defendant was sentenced to life imprisonment on the first degree murder

[1] 18 Pa.C.S.A. § 2502(a), (b), (c), respectively.
[2] 18 Pa.C.S.A. § 2701(a)(1)(i).
[3] 18 Pa.C.S.A. § 2702(a)(1) and (4).
[4] 18 Pa.C.S.A. § 907(a).
[5] 18 Pa.C.S.A. § 6106(a).
[6] 18 Pa.C.S.A. § 903(a)(1)(2).

conviction along with the remaining charges from the trial which had not merged. On March 12, 1992, Defendant appealed his homicide conviction to the Pennsylvania Superior Court. Shortly thereafter, on March 17, 1992, Defendant pled guilty to third degree murder in Schuylkill County for a murder he committed in 1987. He also pled guilty for burglary charges in Lebanon County on April 1, 1992.

A new trial was granted by the Superior Court on July 30, 1993 due to an error in the trial court's jury instructions. The Commonwealth filed for allowance of appeal and the Defendant filed for cross-appeal. The Supreme Court of Pennsylvania initially granted the Commonwealth's motion for allowance of appeal on April 15, 1994 and denied Defendant's cross-appeals on that same date. However, on December 30, 1994, the Supreme Court dismissed the Commonwealth's appeal as improvidently granted.

On March 9, 1995, the Commonwealth filed a Notice of Intent to Seek the Death Penalty in the retrial and gave notice of a new aggravating circumstance. This was attributable to the fact that Defendant now had a significant history of felony convictions involving the use or threat of violence to the person, based on the guilty pleas entered during his sentencing in the instant case and while his direct appeal was pending. After briefs and arguments by the parties, this Court denied the motion filed by Defendant's attorney, John S. Elder, Esquire to Prevent the Commonwealth from Seeking the Death Penalty and from Adding an Additional Factor in his retrial. Defendant appealed this denial on June 26, 1995 and on April 18, 1996 a panel of the Pennsylvania Superior Court affirmed this Court's judgment. The Supreme Court of Pennsylvania denied Defendant's petition for allowance of appeal. Defendant's second trial was scheduled

when the Supreme Court of the United States denied his Petition for *Writ of Certiorari* on October 6, 1997.

At his retrial on January 22, 1999, Defendant was found guilty on all charges and, this time, during the penalty phase hearing the jury found the two aggravating circumstances outweighed the mitigating circumstances and therefore returned a verdict of death. Defendnat was sentenced to death on February 16, 1999 and ten days later he filed his appeal to the Supreme Court of Pennsylvania, which affirmed the sentence on November 27, 2000. Certiorari to the Supreme Court of the United States was granted on March 18, 2002, to review the question of whether the Commonwealth had the right to seek the death penalty in his retrial for first degree murder. The decision of the Supreme Court of Pennsylvania was affirmed on January 14, 2003.

Defendant then filed a *pro se* petition seeking relief under the Post Conviction Relief Act, 42 Pa.C.S.A. § 9541, *et seq.* ("PCRA") on June 6, 2003. A counseled amended petition was subsequently filed and supplemented two times. The Commonwealth responded and hearings were held on October 25, 2004, November 22, 2004, January 20-21, 2005, February 16, 2005, and July 13, 2005. Briefs were submitted by the Defendant, represented by the Federal Defender's Association, and the Commonwealth of Pennsylvania. Arguments on the briefs were heard by this Court on March 8, 2006. On March 31, 2006, this Court issued an Order denying the Defendant the relief of a new trial based upon allegations in his Amended PCRA of trial error and/or ineffective assistance of counsel. This Court found that all alleged trial errors were either previously litigated, waived or did not so undermine the truth determining process that no reliable adjudication of guilt or innocence could have taken place. This Court also found

that all allegations of ineffective assistance of trial counsel were meritless or did not so undermine the truth determining process that no reliable adjudication of guilt or innocence could have taken place. This Court did, however, find that the allegations as to trial counsel's ineffectiveness to investigate and present an adequate mitigation case in the penalty phase of the trial had merit, and granted the Defendant relief in the form of a new penalty phase hearing.

Both the Commonwealth and the Defendant filed timely appeals to this Order and the Defendant also filed a cross-appeal to the Commonwealth's appeal of the portion of the Order granting new penalty phase relief. Orders for Concise Statements of Matters Complained of on Appeal were issued and subsequently filed by the Commonwealth on April 18, 2006 and the Defendant on April 28, 2006.

The Defendant raises the following 20 issues in his Concise Statement of Matters Complained of on Appeal:

1. This Court erroneously denied Petitioner/Appellant's PCRA claims that his death sentence must be vacated and a life sentence imposed because his original direct appeal counsel was ineffective, in violation of the Fourteenth Amendment, in advising Petitioner/Appellant that there was "no way" the Commonwealth could seek the death penalty on retrial if he successfully appealed his conviction for first-degree murder, and this claim was not waived because retrial counsel could not have known about this claim in the exercise of due diligence.

2. Alternatively, this Court erroneously denied Petitioner/Appellant's PCRA claims that his death sentence must be vacated and a life sentence imposed because retrial/appeal counsel was ineffective for failing to raise the claim that his death sentence must be vacated and a life sentence imposed because his original direct appeal counsel was ineffective, in violation of the Fourteenth Amendment, in advising Petitioner/Appellant that there was "no way" the Commonwealth could seek the death penalty on retrial if he successfully appealed his conviction for first-degree murder.

3. David Sattazahn's convictions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments and international law and treaties binding on the

Commonwealth through Article VI of the United States Constitution and were a product of ineffective assistance of counsel under the Sixth and Fourteenth Amendments.

4. The Commonwealth failed, in violation of due process and Article I, § 9 and the heightened procedural safeguards required in capital cases, to disclose a wide range of material, exculpatory evidence that demonstrates the unreliability of the Commonwealth's case against Petitioner/Appellant; knowingly presented false testimony; and/or failed to correct testimony that turned out to be false; and counsel was ineffective under the Sixth Amendment for failing to adequately investigate and cross-examine the Commonwealth's witnesses with this evidence and under the Fourteenth Amendment for failing to present these issues on appeal.

5. The Commonwealth failed, in violation of due process and Article I, § 9 and the heightened procedural safeguards required in capital cases, to disclose both the falsity of the testimony of prosecution witness Jeffrey Hammer and available impeachment evidence that would have discredited Hammer's testimony against Petitioner/Appellant, including *inter alia*
    a. failing to disclose impeachment evidence concerning Hammer's ongoing and successful efforts to plead to fewer crimes and receive lesser sentences for offenses in each of Berks, Lebanon, and Schuylkill Counties, including failing to disclose modifications in written plea agreements that had been disclosed to the defense in their misleading pre-modified form and failing to provide defense counsel with copies of court records on Hammer's plea proceedings;
    b. failing to disclose impeachment evidence concerning promises the state police made to Hammer to obtain leniency in the prosecutions against him;
    c. failing to disclose impeachment evidence concerning Jeffrey Hammer's numerous lies to the defense and failing to disclose the fact and substance of the lies to the jury; and
    d. notwithstanding his late entry into the case, counsel was ineffective under the Sixth Amendment for failing to adequately investigate this information, for relying upon the deficient discovery provided by the prosecution, and for failing to fully impeach Hammer based upon the available impeachment information, and under the Fourteenth Amendment for failing to raise these issues on direct appeal.

6. The trial court improperly curtailed defense cross-examination of Jeffrey Hammer concerning some of the lies he had told to authorities in violation of Pa. R. Evid. 613, his state and federal rights to due process, and the state and federal right to confront witnesses, as well as the Eighth Amendment and Article I, § 13 heightened procedural safeguards in capital cases; and counsel

was ineffective under the Fourteenth Amendment for failing to raise this issue on appeal.

7. Counsel was ineffective under the Sixth Amendment for failing to adequately investigate Hammer's lies, failing to present to the Court all the available legal theories supporting the use of these lies in impeachment (including his lies on the polygraph examination in denying that he was the shooter or that he was involved in the shooting), and failing to impeach Hammer with these prior statements; and under the Fourteenth Amendment for failing to raise these issues on appeal.

8. Counsel was ineffective under the Sixth Amendment for failing to impeach Hammer in the retrial with questions that had cast doubt on Hammer's credibility in the first trial, including *inter alia*, questions that cast doubt on the credibility of Hammer's denial that the .22 gun that killed the victim had been purchased for him; a line of questions that strongly suggested that Hammer was holding and using the .22 when the victim was killed; and questions concerning his prior testimony that he anticipated being paroled after 19 years in prison, instead of facing the death penalty plus close to 500 years incarceration.

9. Counsel was ineffective in failing to investigate and present testimony from available witnesses concerning the explosive anger and violent history of codefendant Jeffrey Hammer, as circumstantial evidence relating to the identity of the shooter in this case.

10. Counsel was ineffective under the Fourteenth Amendment for failing to raise on appeal the preserved objection to the trial court's refusal to permit the defense to cross-examine Hammer on his guilty plea to third-degree murder in this case; the trial court's ruling violated Petitioner/Appellant's state and federal rights to confrontation and due process and his right to heightened procedural safeguards in capital cases under the Eighth Amendment and Article I, § 13

11. The Commonwealth failed, in violation of the due process and Article 1, § 9 and the heightened procedural safeguards required in capital cases, to disclose both the falsity of the testimony of prosecution witness Fritz Wanner and available impeachment evidence that would have discredited Wanner's testimony against Petitioner/Appellant, including *inter alia*:
    a. the existence of an implied deal and an expectation of favorable treatment on a range of open criminal charges and a parole violation in exchange for Wanner's provision of testimony favorable to the prosecution, and counsel was ineffective in failing to investigate this deal and raise it as an issue at trial and on appeal;

b. the record of a plea colloquy indicating, *inter alia*, that Wanner had a history of mental illness that predated the trial and was admissible at trial; and

c. notwithstanding his late entry into the case, counsel was ineffective under the Sixth Amendment for failing to adequately investigate this information, for relying upon the deficient discovery provided by the prosecution, and for failing to fully impeach Wanner based upon the available impeachment information, and under the Fourteenth Amendment for failing to raise these issues on direct appeal.

12. The Commonwealth violated due process and *Brady v. Maryland* by failing to disclose both the fact of and notes from an interview it conducted with its principal witness, Jeffrey Hammer prior to Petitioner/Appellant's first trial, in which Hammer informed the prosecution of the falsity of Fritz Wanner's statements about Sattazahn, including that Sattazahn had allegedly said that he (Sattazahn) had grabbed a weapon from Hammer and shot the decedent.

13. The Commonwealth secured this conviction in violation of due process and Article 1, § 9 and the heightened procedural safeguards required in capital cases, through the knowing presentation of false testimony, and failed to correct false testimony once it was presented at trial.

14. Counsel's reliance on the discovery provided by the prosecution in lieu of an independent investigation into this case, even though resulting from his late entry into this case shortly before trial, and the resulting failure to present all of the evidence and defenses set forth above, constituted ineffective assistance of counsel.

15. This Court's instructions on the comparative penalties for first, second, and third degree murder violated Pennsylvania law and the Sixth, Eighth, and Fourteenth Amendments; counsel was ineffective under the Sixth Amendment for failing to object to this instruction and for failing to seek to cure its prejudicial effects in the penalty phase, and under the Fourteenth Amendment for failing to raise this issue on appeal.

16. The reasonable doubt instruction provided at trial impermissibly reduced the Commonwealth's burden of proof, in violation of due process and Petitioner/Appellant's Sixth Amendment right to a jury determination of every element of guilt or innocence beyond a reasonable doubt.

17. Even if these errors may have been deemed harmless at the guilt phase of trial, they were prejudicial at the penalty phase and require reversal of Petitioner/Appellant's death sentence.

18. Counsel was ineffective for failing to object to each and all of these errors at trial and filing to raise each and all of these errors on direct appeal.

19. The cumulative prejudicial effect of all the errors in this case entitles Petitioner/Appellant to a new trial.

20. This Court's denial of PCRA relief was erroneous and contrary to applicable constitutional and statutory standards; this Court erred in its factual and legal conclusions, its evidentiary and collateral rulings, and rulings on objections; and such errors constituted an abuse of discretion.

(Concise Statement of Matters Complained of on Appeal, 04/28/06

The 1st and 2nd claims raised in the Defendant's Appeal allege that this Court erroneously denied his PCRA guilt-phase claims because his original direct appeal counsel was ineffective in advising Defendant that there was "no way" the Commonwealth could seek the death penalty on retrial if he successfully appealed his conviction for first-degree murder. A major tenet of the Post Conviction Relief Act dictates that any allegation of error contained within the petition must not have been previously waived. 42 Pa. C.S.A. §9543(a)(3). A waiver of an allegation occurs "if the Petitioner could have raised it but failed to do so before the trial, at trial, during unitary review, on appeal, or in a prior state postconviction proceeding." 42 Pa. C.S.A. § 9544(b). This issue was not raised in Defendant's second trial, or on direct appeal and, under the rules of the PCRA, is deemed waived and this Court is precluded from reviewing it. Yet, the Defendant argues that this claim is not waived because retrial counsel could not have known about this claim in the exercise of due diligence.

However, Defendant is not entitled to relief on his claims of ineffectiveness of trial counsel, as these claims could have been raised in prior proceedings but were not. In the seminal case regarding ineffectiveness of counsel claims, Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002), the Supreme Court of Pennsylvania recognized the

inherent problems in requiring an appellant to raise an ineffectiveness claim at the first opportunity to do so after obtaining new counsel, and held that these types of claims are more properly raised upon collateral review in the form of a PCRA petition. That decision overruled the principle of Commonwealth v. Hubbard, 372 A.2d 687, 695 (Pa. 1977), which previously mandated that Petitioners raise claims of ineffectiveness of trial counsel at the first opportunity to do so in order to avoid the waiver issue. In Commonwealth v. Grant, the Court further stated that the rule would be applied to "cases on direct appeal where the issue of ineffectiveness was properly raised and preserved." 813 A.2d at 738. Here, however, Defendant did not raise claims of trial counsel's ineffectiveness in his direct appeal, even though it was the earliest opportunity to do so because he was represented by John Adams, Esquire on appeal and no claims of the ineffectiveness of John Elder, Esquire, were raised. Therefore, the issue was not properly preserved on appeal as was necessary at the time under Commonwealth v. Hubbard, in order for it to be later considered in a PCRA as per Commonwealth v. Grant. Defendant's argument that this claim was not waived because retrial counsel could not have known about this claim in the exercise of due diligence is simply without merit, as the Defendant was well aware of the advice of his previous counsel and could and should have advised his retrial counsel of those statements. While this Court in no way means to give the impression that the Defendant should be charged with the legal knowledge of a lawyer, we believe it is logical to assume that, knowing the advice his first attorney gave him, and subsequently finding himself facing the death penalty again on his second trial, Defendant could and should have discussed the matter with his new attorney, thus giving rise to a reason to challenge the effectiveness of his first counsel. We therefore found that

any of the claims of ineffectiveness of counsel regarding the advice given by trial counsel that there was no possibility the Commonwealth could pursue the death penalty on retrial that were not properly raised and preserved in Defendant's prior proceedings had been waived and were barred from review by this PCRA court.

Defendant's 2nd claim on appeal alternatively alleges that this Court erroneously denied his PCRA claims that his death sentence must be vacated and a life sentence imposed because retrial/appeal counsel was ineffective for failing to raise the claim that his original direct appeal counsel was ineffective, in violation of the Fourteenth Amendment, in advising him that there was "no way" the Commonwealth could seek the death penalty on retrial if he successfully appealed his conviction for first-degree murder. This claim, however, ignores the state of the law at the time this advice was given to the Defendant by John Elder, Esquire. In February 1992, when Defendant was initially sentenced, Commonwealth v. Martorano, 634 A.2d 1063 (Pa. 1993), had not yet been decided, and in fact, was not even pending on direct appeal. At that time, the leading case on the subject was North Carolina v. Pearce, which held that a defendant may be retried if he is successful in getting his conviction overturned, essentially wiping the slate clean and permitting a harsher penalty upon a subsequent conviction. 395 U.S. 711, 720-21 (1969). An exception to this general rule was outlined in Bullington v. Missouri, when the sentencing proceeding closely resembles a jury trial, mandating that the death penalty cannot be sought on retrial when the jury returns a unanimous verdict of life imprisonment. 451 U.S. 430, 443-445 (1981). "Thus, the 'clean slate' rationale recognized in Pearce is inapplicable *whenever a jury agrees or an appellate court decides that the prosecution has not proved its case. . .*" See Martorano, supra, at 1069 (citing

Bullington, supra, at 443-445). Another case, Arizona v. Rumsey, cast further doubt on the rule in Pearce, as the Supreme Court forbade seeking the death penalty upon retrial where the trial judge imposed a life sentence, after a finding of guilty by the jury and a penalty phase where evidence was presented. 467 U.S. 203, 211 (1984).

Based upon the decisions in Bullington and Rumsey, the state of the law at the time Attorney Elder told the Defendant the Commonwealth could not pursue the death penalty if he was successful in overturning his conviction appeared to create an entitlement to a life sentence. One of the requirements for prevailing on a PCRA claim due to the ineffectiveness of trial counsel is that counsel's conduct was without a reasonable basis designed to effectuate his client's best interests. Commonwealth v. Douglas, 645 A.2d 226, 230 (Pa. 1994). We examine counsel's stewardship under the standards as they existed at the time of his action. Commonwealth v. Triplett, 381 A.2d 877, 881. At that time, it was reasonable for Attorney Elder to advise his client that he could not be subject to the death penalty upon retrial. As the case law appeared to dictate that the Defendant could receive no greater than a life sentence, it was in his best interest to advance all possible issues on direct appeal. Although the law may have changed since then, counsel will not be deemed ineffective for failing to predict future developments in the law. Id. Thus, the Defendant failed to prove that his counsel was ineffective for advising him that he would not be subject to the death penalty upon retrial and his PCRA claim was denied by this Court.

The 3rd claim raised by the Defendant on appeal alleges that his convictions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments and international law and treaties binding on the Commonwealth through Article VI of the United States

Constitution and were a product of ineffective assistance of counsel under the Sixth and Fourteenth Amendments. To prevail on a claim based on ineffective assistance of counsel under the PCRA, the defendant must prove that the acts or omissions of counsel rise to the above stated level of error. The standard for determining ineffective assistance of counsel is well settled and requires that a petitioner show the following: (1) that the underlying claim is of arguable merit; (2) that the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3) that counsel's ineffectiveness prejudiced him. Commonwealth v. Cappello, 823 A.2d 936 (Pa. Super. 2003), citing Commonwealth v. Bess, 789 A.2d 757 (Pa. Super. 2002). However, in reviewing any particular claim of ineffectiveness, the Court need not determine whether the first two prongs are met if the record evinces that the Defendant has not met the prejudice prong. Commonwealth v. Jones, 683 A.2d 1181, 1188 (Pa. 1996). "Prejudice. . . has been defined to mean that the Appellant must establish that but for the arguably ineffective act or omission there is a reasonable probability that the result would have been different." Commonwealth v. Crawley, 663 A.2d 676, 679 (Pa. 1995). For the reasons set forth in this Opinion, this Court determined that the Defendant's convictions were not the product of ineffective assistance of counsel. We found that all of the claims of ineffectiveness were either waived, without merit or insufficient to meet the burden of establishing that without counsel's acts or omissions the result of the trial would have been different.

Defendant's 4th and 5th claims relate to the Commonwealth's alleged failure to disclose certain materials. The 4th claim alleges that the Commonwealth failed, in violation of due process and Article I, § 9 and the heightened procedural safeguards

required in capital cases, to disclose a wide range of material, exculpatory evidence that demonstrates the unreliability of the Commonwealth's case against the Defendant; that the Commonwealth knowingly presented false testimony; and/or failed to correct testimony that turned out to be false; and further alleges that counsel was ineffective under the Sixth Amendment for failing to adequately investigate and cross-examine the Commonwealth's witnesses with this evidence and under the Fourteenth Amendment for failing to present these issues on appeal. With regards to the testimony of Fritz Wanner concerning the alleged conversation in the barn, which Jeffrey Hammer orally contradicted in an interview with Assistant District Attorney Mark Baldwin, the Defendant argues that "with that alleged exculpatory evidence and it's impeachment evidence to a key witness's exculpatory evidence, which is clearly material, that the jury could have well rejected Wanner's testimony completely, which would have left the corrupted and polluted source who admitted complicity in every possible way except - - " (PCRA Hearing, 3/8/06, pg. 13-14). However, neither the Commonwealth nor the defense questioned Jeffrey Hammer in the second trial about a conversation with the Defendant in the barn. We found that, even if Defendant had knowledge of this information to bring out through cross-examination of Jeffrey Hammer, he would be in the very difficult position of arguing to the jury that Hammer was truthful in his assertion that Sattazahn never mentioned grabbing the .22 from Hammer and shooting Richard Boyer, but the jury should not believe every single other aspect of Hammer's testimony because he is a corrupted and polluted source who was only trying save himself. We further found that the Commonwealth obtained a conviction in the first trial without the use of Fritz Wanner's testimony. Thus, we found that no Brady violation occurred and

Defendant could not establish that any information allegedly withheld by the Commonwealth would not have changed the outcome of the trial if it had been provided to the Defendant and used at trial.

The 5th claim alleges that the Commonwealth failed, in violation of due process and Article I, § 9 and the heightened procedural safeguards required in capital cases, to disclose both the falsity of the testimony of prosecution witness Jeffrey Hammer and available impeachment evidence that would have discredited Hammer's testimony against the Defendant. The Defendant first argues that the Commonwealth failed to disclose impeachment evidence concerning Hammer's ongoing and successful efforts to plead to fewer crimes and receive lesser sentences for offenses in each of Berks, Lebanon, and Schuylkill Counties, including failing to disclose modifications in written plea agreements that had been disclosed to the defense in their misleading pre-modified form and for failing to provide defense counsel with copies of court records on Hammer's pleadings. He argues that the Berks County District Attorney's office violated proper discovery procedures by failing to provide trial counsel with documents and transcripts relevant to Hammer's criminal proceedings in Schuylkill and Lebanon counties. The information in question is collateral impeachment information sought to be introduced against a Commonwealth witness and is thus neither inculpatory nor exculpatory to the Defendant directly. Therefore, this information is governed by Pa. R. Crim. P. 573(B)(2), regarding the discretionary disclosure of information relative to witnesses. However, these provisions control the disclosure of verbal and written statements of witnesses and co-defendants, not sentencing transcripts and documents of other collateral criminal proceedings. This Court agreed with the Commonwealth's assertion that, according to

the plain language of the rule, there was simply no authority to indicate that Berks County was responsible for gathering information from other counties and providing that information to the Defendant. It is well settled that there is no Brady violation where the parties had equal access to information or if the Appellant knew or could have uncovered the evidence with reasonable diligence. Commonwealth v. Grant, 813 at 730. The Commonwealth committed no discovery violation by failing to turn over documents of public records not within its possession and therefore we denied Defendant's PCRA claims as being without merit.

Defendant next argues that the Commonwealth failed to disclose impeachment evidence concerning promises the state police made to Hammer to obtain leniency in the prosecutions against him. This claim, however, is similarly without merit. This information was contained in a transcript of Defendant's preliminary hearing held on July 20, 1989. On cross-examination, Defendant's attorney asked Jeffrey Hammer, a witness for the prosecution, "They said that they will – they'll tell the D.A. that you're a good guy and you really helped them out here. And that they will do whatever they can and try to get the D.A. to do whatever he can to help you in this matter, is that right?" (N.T. 10/24/04, Def. Exh. 20., pg. 63.). Jeffrey Hammer affirmed this, however, the record is devoid of any indication that any such conversation took place between the state police officers and the D.A.'s office in Berks County or that Hammer was actually granted leniency in exchange for his testimony. Furthermore, this information is again neither inculpatory nor exculpatory to the Defendant himself, but rather collateral impeachment information sought to be introduced against a Commonwealth witness. This Court

declined to find that a Brady violation occurred, as this information was equally obtainable to the Defendant with the exercise of due diligence.

Defendant next argues that the Commonwealth failed to disclose impeachment evidence concerning Jeffrey Hammer's numerous lies to the defense and failed to disclose the fact and substance of the lies to the jury. We agreed with the Commonwealth that any alleged failure to disclose would not have caused the outcome of the trial to be different. Jeffrey Hammer was subject to cross-examination and impeachment on several issues and it is unlikely that any additional impeachment evidence that was allegedly withheld by the Commonwealth would have changed the outcome of the trial.

The 6th claim raised by the Defendant on appeal alleges that this Court improperly curtailed defense cross-examination of Jeffrey Hammer concerning some of the lies he had told to authorities, in violation of Pa. R. Evid. 613, his state and federal rights to due process, and the state and federal right to confront witnesses, as well as the Eighth Amendment and Article I § 13 heightened procedural safeguards in capital cases. Rule 613 states:

> A witness may be examined concerning a prior inconsistent statement made by the witness, whether written or not, and the statement need not be shown in its contents disclosed to the witness at the time.

This Court refused to permit trial counsel to elicit testimony about Hammer's alleged lies to state troopers. Trial counsel wanted Hammer to admit that he told the state police in June 1989 that he did not admit his involvement in the Service Merchandise Robbery. (N.T. 1/20/99, pg. 339). Counsel sought to do this through a three-page statement of Jeffrey Hammer to two state troopers in which one sentence states, "Hammer would not

admit to an armed robbery which occurred on 10/4/88 at the same Service Merchandise store." (N.T. 1/20/99, Def. Exh. 3, pg. 2). This Court determined that "[w]hat has been marked here is although it says it's a statement, it's not. It's not a question and answer form with an initial or signed space at all. It doesn't appear that Mr. Hammer signed this or adopted it in any fashion." (N.T. 1/20/99, pg. 340). Rather, it was a conclusion as to Hammer's statements by the writer of the document and not a verbatim or even close to verbatim statement from Hammer. Thus, this Court determined that it was not a prior inconsistent statement and curtailed further cross-examination on this subject.

This claim was fully addressed on direct appeal, and the Supreme Court of Pennsylvania found that "[w]hile the trial court did sustain an objection to showing the witness one police report, ultimately defense counsel was successful in showing Hammer another police report after which Hammer testified that he had lied to police." Commonwealth v. Sattazahn, 763 A.2d 359, 364 (Pa. 2000). Moreover, any alleged error did not prejudice Sattazahn given that the jury heard ample evidence that Hammer lied to police regarding his involvement with several burglaries. Id. at 365. This issue was previously litigated and therefore not subject to this Court's further review. It is well settled that a PCRA petitioner cannot obtain review of claims that were previously litigated by presenting new theories of relief, including couching the same claim in terms of ineffectiveness of counsel. Commonwealth v. Jones, 811 A.2d 994, 1000 (Pa. 2002).

Defendant's 7th claim on appeal relates to this Court's denial of relief based upon the allegation that counsel was ineffective under the Sixth Amendment for failing to adequately investigate Hammer's lies, failing to present to the Court all the available legal theories supporting the use of these lies in impeachment (including his lies on the

polygraph examination in denying that he was the shooter or that he was involved in the shooting), and failing to impeach Hammer with these prior statements. The Defendant argues that the jury was entitled to know – but counsel failed to show – how Hammer was deceptive before he inculpated the Defendant (as the shooter) and himself (as also present) because this finding could have been presented to show that Hammer had a bias or motive to provide a statement that could be used to curry favor with the authorities. The Defendant asserts that there is at least a reasonable probability that the jury's perception of the case would have been changed if it had learned: (1) that Hammer gave to the state police wildly inconsistent statements denying knowledge about the crime in this case and (2) that he only inculpated the Defendant after the state police found him deceptive on a polygraph examination. (Petitioner's Post Hearing Memorandum, 8/30/05, pg. 26). He further asserts that trial counsel should have cross examined Hammer about the results of the polygraph test because "a witness may be cross examined as to any matter tending to show the interest or bias of that witness." Commonwealth v. Nolen, 634 A.2d 192, 195 (1993).

In order to be successful in a claim for relief under the PCRA, the petitioner must demonstrate that his counsel's alleged ineffectiveness, in the circumstances of the case, so undermined the truth-determining process to such a degree that no reliable determination of guilt or innocence could have taken place. 42 Pa. C.S.A. §9543(a). Defendant's claims regarding the polygraph examination are without merit, as long-standing precedent dictates that the results of polygraph tests are inadmissible and trial counsel was properly prevented from making any reference to the results of a polygraph examination conducted upon Jeffrey Hammer. Counsel was not found ineffective for

failing to cross-examine Hammer because this Court found that the line of questioning regarding the results of the polygraph examination was impermissible. This Court subsequently declined to find counsel ineffective for failing to raise this issue on appeal, as it was determined to be without merit.

The 8th claim raised by Defendant on Appeal alleges that Counsel was ineffective under the Sixth Amendment for failing to impeach Hammer in the retrial with questions that had cast doubt on Hammer's credibility in the first trial, including *inter alia*, questions that cast doubt on the credibility of Hammer's denial that the .22 gun that killed the victim had been purchased for him; a line of questions that strongly suggested that Hammer was holding and using the .22 when the victim was killed; and questions concerning his prior testimony that he anticipated being paroled after 19 years in prison, instead of facing the death penalty plus close to 500 years incarceration.

The Defendant argues that retrial counsel should have impeached Hammer with questions that cast doubt on the credibility of Hammer's denial that the .22 gun that killed the victim had been purchased for him and with questions that strongly suggest that Hammer was holding and using the .22 when the victim was killed. Defendant asserts that counsel could not have had any reasonable tactical or strategic basis for failing to use these reports and to bring to the jury's attention Hammer's deceptive responses when interviewed by the police. However, a review of the record of Defendant's retrial indicates that defense counsel did indeed cross examine Hammer regarding the Defendant's purchase of the .22 handgun. (N.T. 1/20/99, pg. 323-325). Counsel specifically asked Hammer if he told Harold Houser, with whom Hammer was incarcerated, that Defendant had purchased the .22 handgun for him, and Hammer twice

denied that assertion. (Id.). Therefore, this aspect of Defendant's claim was without merit, as defense counsel did question Hammer regarding the handgun but Hammer's responses revealed no incriminating responses that would have benefited the Defendant.

Regarding Hammer's prior testimony that he anticipated being paroled after 19 years in prison, the Defendant has not shown how counsel's failure to impeach Hammer in the retrial regarding these statements has prejudiced him. A review of Hammer's Memorandum of Cooperation and Plea Agreement indicates that any modifications were not done to give Hammer a better "bargain" in exchange for his testimony. The charges to which Hammer was going to plead but which were later deleted were scheduled to run concurrently with the charges to which he did plead. Jeffrey Hammer may have asked for no jail time, but in reality he did receive a rather lengthy jail sentence of 19 to 55 years in Docket No. 2190/89 and 6 to 20 years in Docket N. 1976/89. What he asked for in exchange for his testimony, no matter how unreasonable, was not what he received. Hammer pleaded to these crimes after the first trial, so his any "benefit" he received came well before the second trial in which he testified. Thus, any potential impeachment information that the Defendant refers to would be speculative and questionable and certainly would not have been determinative of the Defendant's guilt or innocence. The Defendant has not proven how counsel's alleged failure to impeach the Commonwealth's witness Jeffrey Hammer on these matters has prejudiced him to the point that the outcome of the trial would have been different if not for counsel's omissions.

Defendant's 9th claim on Appeal alleges that counsel was ineffective in failing to investigate and present testimony from available witnesses concerning the explosive anger and violent history of co-defendant Jeffrey Hammer, as circumstantial evidence

relating to the identity of the shooter in this case. Again, this claim is without merit, as the Commonwealth's theory throughout the entire case was that the Defendant was the shooter. The jury was instructed to find whether or not the Defendant was the shooter. From the verdict, it is clear that the jury believed that the Defendant killed Richard Boyer, not Jeffrey Hammer. The Supreme Court of Pennsylvania reviewed the sufficiency of the evidence on direct review and determined that there was enough evidence to support the verdict that the Defendant was the shooter in this case. The Defendant has not established that this collateral evidence regarding one of the Commonwealth's witnesses would have likely changed the outcome of the trial, when the Commonwealth never advanced any theory other than that the Defendant was the actual shooter.

Defendant's 10th claim on appeal alleges that counsel was ineffective under the Fourteenth Amendment for failing to raise on appeal the preserved objection to the trial court's refusal to permit the defense to cross-examine Hammer on his guilty plea to third-degree murder in this case. This Court sustained the objection, indicating to the jury that there are certain legal propositions involved with the entry of a guilty plea to any particular offense. (N.T. 1/20/99, pg. 346). This Court informed the jury that a Court must determine whether or not there's a sufficient basis for the entry of a guilty plea. (Id.). The Defendant argues that this court's ruling violated his state and federal rights to confrontation and due process and his right to heightened procedural safeguards in capital cases under the Eighth Amendment and Article I, § 13 and that counsel had no strategic reason for not making the argument on appeal. Although Defendant argues that he was prejudiced by counsel's omission because the outcome of the appeal was adverse to him

and because this Court denied him relevant cross-examination, we declined to find that his counsel was ineffective. The Defendant's conviction was affirmed because there was sufficient evidence to support the verdict of guilty. Defendant has not shown that, had defense counsel been permitted to thoroughly cross-examine Jeffery Hammer on his plea to 3rd degree murder, the outcome of the trial would have been different.

The 11th claim raised by the Defendant on Appeal alleges that the Commonwealth failed, in violation of due process and Article I, § 9 and the heightened procedural safeguards required in capital cases, to disclose both the falsity of the testimony of prosecution witness Fritz Wanner and available impeachment evidence that would have discredited his testimony against the Defendant. Defendant first alleges that the Commonwealth failed to disclose the existence of an implied deal and an expectation of favorable treatment on a range of open criminal charges and a parole violation in exchange for Wanner's provision of testimony favorable to the prosecution and that trial counsel was ineffective for failing to investigate this deal and raise it as an issue at trial and on appeal. The Defendant argues that while Fritz Wanner testified that he had an open charge and was facing a lot of jail time, he denied at trial that he had any understanding that he would benefit from his testimony, but that in reality he did "think" the testimony was "going to help" and Attorney Baldwin permitted Wanner's trial testimony to go uncontested.

Due process requires that any potential understanding between the prosecution and a witness be revealed to the jury. Giglio v. U.S., 405 U.S. 150, 155 (1972). However, the disclosure rules only apply when an actual agreement exists and mere conjecture is insufficient to prove a Brady violation for Commonwealth's alleged failure

to disclose the full extent of an agreement with a witness. See, Commonwealth v. Morales, 701 A.2d 516, 522-23 (Pa. 1997). At Defendant's PCRA hearing, Fritz Wanner explained the extent of his understanding with Attorney Baldwin: "When I testified against David Sattazahn, I was facing prosecution on some criminal charges. When I talked to the Berks County District Attorney about my testifying against Sattazahn, he said he would not make any deal – a deal but said he would see what he could do in my upcoming case." (N.T. PCRA Hearing, 10/24/04, pg. 70). Assistant District Attorney Dennis Skayhan, the prosecutor in Wanner's case, echoed Wanner's assertion that there were no deals made in exchange for his testimony in the Defendant's case: "Your Honor, I have no doubt that that sounds exactly like the kind of thing that Mr. Baldwin would say. That's our general policy with regards to cooperation. I simply have no knowledge of it." (N.T. PCRA Hearing, 10/24/04, Def. Exh. 7, pg. 5). For a District Attorney to indicate that truthful testimony and cooperation would be considered in future proceedings falls far short of any promise of leniency and represents nothing more than the type of general response that D.A.'s have been uttering for decades. Commonwealth v. Burkhardt, 833 A.2d 233, 243 (Pa.Super. 2003). Moreover, a defendant's subjective hope and even expectation of more lenient treatment is not something the Commonwealth is required, or even able, to disclose. Id. at 244.

The Defendant has failed to disclose that any agreement between the District Attorney and Fritz Wanner actually existed. Defendant' argues that, in keeping with their expressed intent, the Berks County District Attorney's Office dismissed two of the pending charges less than a month after Wanner testified against him, and Wanner pled guilty to the lone remaining charge of conspiracy to commit burglary, receiving a

sentence of 16 months to 4 years and a fine of $100, this does not confirm the existence of any agreement. The statements made on the record indicate the office's policy regarding cooperating witnesses, but they do not specifically discuss whether that policy was employed in Fritz Wanner's case following his testimony against the Defendant. Furthermore, the Assistant District Attorney handling Fritz Wanner's case had no knowledge of any alleged agreement. The Commonwealth cannot be found to have failed to disclose an agreement which has not been proven to exist or for failing to correct testimony which has not been proven to be false.

Furthermore, even if we would have found that an agreement existed, the Defendant still would not be entitled to a new trial because he has not established that the failure to disclose this alleged agreement would have raised a reasonable probability that the outcome of the trial would have been different if it had been produced. Fritz Wanner was one of only several witnesses who provided testimony to corroborate Jeffrey Hammer's testimony. Wanner was subject to multiple avenues of impeachment, raised on direct and cross examination, including previous false statements to the police, the basis of his pending charges, his extensive criminal history and juvenile criminal records, and especially his faulty memory due to years of drug and alcohol abuse. (N.T. Trial, 1/15/99, pg. 370-71, 377, 379, 382-383, 384, 387-394, 395, 396). The jury was made aware of many reasons why his testimony may not have been credible, yet they still convicted the Defendant. Any additional impeachment evidence would not have changed the outcome of the trial.

The Defendant also argues that, notwithstanding his late entry into the case, trial counsel was ineffective for failing to adequately investigate this information, for relying

on the deficient discovery provided by the prosecution, and for failing to fully impeach Wanner based upon the available impeachment information, and for failing to raise these issues on appeal. However, as discussed above, Fritz Wanner was subject to multiple avenues of impeachment on both direct and cross examination. It is a basic tenet of our system of jurisprudence that issues are properly left to the trier of fact for resolution. Commonwealth v. Guest, 456 A.2d 1345, 1347 (Pa. 1983). The factfinder is free to believe all, part, or none of the evidence. Id. The testimony provided by Fritz Wanner had no relevance to the actual commission of the crime, but rather related to a collateral conversation he overheard several days later between the Defendant and Jeffrey Hammer. Any additional impeachment evidence, beyond that presented by counsel at trial, would not likely have changed the outcome of the trial, and therefore counsel cannot be found ineffective for failing to further impeach Fritz Wanner or for failing to raise this issue on direct appeal.

The 12th claim raised by the Defendant on Appeal alleges that the Commonwealth violated due process and Brady v. Maryland for failing to disclose both the fact of and notes from an interview it conducted with its principal witness, Jeffrey Hammer prior to Petitioner/Appellant's first trial, in which Hammer allegedly informed the prosecution of the falsity of Fritz Wanner's statements about Sattazahn, including that Sattazahn had allegedly said that he (Sattazahn) had grabbed a weapon from Hammer and shot the decedent. The Due Process Clause of the 14th Amendment to the United States Constitution requires the prosecution to disclose exculpatory evidence to the defense. Brady v. Maryland, 373 U.S. 83, 87 (1963). The obligation to disclose under Brady includes impeachment evidence as well as exculpatory evidence. United States v.

Bagley, 473 U.S. 667, 676 (1985). The notes that are the subject of Defendant's claim under Brady were written shortly before the Defendant's first trial.

While it is true that the prosecution has an obligation to disclose potential impeachment evidence, the "discovery of any written recording of an interview conducted of a Commonwealth witness by the prosecution is compelled when the interview notes are extensive and constitute a substantially complete recording of the interview conducted of the witness." Commonwealth v. Alston, 864 A.2d 539, 547 (Pa. Super. 2004). It is also true that statements made by a witness prior to trial are subject to disclosure only when they are signed, adopted or otherwise shown to be substantially verbatim statements of that witness. Commonwealth v. Brinkley, 480 A.2d 980, 984 (Pa. 1984). The distinction between a report that is a verbatim, signed, or adopted recordation of a witness' statement and an imprecise summary of what another understood him to say has been recognized in both federal and state cases. Commonwealth v. Cain, 369 A.2d 1234, 1240 (Pa. 1977). The rationale behind this distinction is that it is unfair to allow the defense to use statements to impeach a witness which cannot fairly be said to be the witness' own rather than the product of the investigator's selection, interpretation, and recollection. Id. at 1241.

The March 6, 1990 notes of the prison interview between Assistant District Attorney Mark Baldwin and Jeffrey Hammer represented only a small portion of a large number of issues discussed in preparation for Hammer's testimony in Sattazahn's first trial. Attorney Baldwin testified that he did not take a paper and pencil to the Lebanon County prison and the notes were not made contemporaneous to the meeting with Mr. Hammer. (Pretrial Hearing, 7/13/05, pg. 37). Attorney Baldwin testified that these notes

were reduced to writing within a week or two after the meeting to refresh his recollection of the meeting and assist him in preparing for the trial. (Id. at 38). It is also important to note that the notes were written in past tense. As such, it is logical to conclude that the single page of handwritten notes was the result of a later recordation and not a verbatim statement that was signed and/or adopted by the witness Jeffrey Hammer. Therefore, the Commonwealth did not commit a Brady violation when it refused to disclose the notes, and the Defendant was properly denied relief on this PCRA claim.

Further, even if we would have found that the notes should have been disclosed to trial counsel, the failure to do so was not sufficiently material to qualify as a violation of Giglio v. U.S., which extended the violation of due process to favorable impeachment evidence that is not disclosed upon request. The impeachment evidence in question must be material, in that it does not superficially attack the credibility of a collateral witness. In order to be entitled to a new trial for failure to disclose evidence affecting a witness' credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence. Commonwealth v. Johnson, 727 A.2d 1089, 1094 (Pa. 1999).

As Jeffrey Hammer was directly involved in the robbery and murder, the primary portion of evidence regarding the events and details of the acts were elicited through his testimony. The Commonwealth used Fritz Wanner as only one of many sources to corroborate Hammer's testimony. The trial transcripts reflect a litany of other witnesses who corroborated Hammer's testimony by describing the date, location and position of Mr. Boyer's body and his truck; the pine trees and railroad tracks behind the restaurant; the black gym bag containing two handguns, gloves, a mask and loose ammunition; the

autopsy report confirming that Mr. Boyer was shot from behind, that the shots were not immediately fatal, and that he had abrasions on his hands and knees consistent with crawling away from the shooters. (See, N.T. 1/15/99). These witnesses and the testimony they presented corroborated Jeffrey Hammer's testimony, and the Defendant falls short of proving that any allegedly withheld evidence that would impeach Fritz Wanner's testimony would have been determinative of his guilt or innocence. Thus, the Defendant has also failed to demonstrate that the Commonwealth committed a Giglio violation regarding the March 6, 1990 notes.

Defendant's next claim, 13th in his Concise Statement of Matters Complained of on Appeal, alleges that the Commonwealth secured this conviction, in violation of due process and Article I, § 9 and the heightened procedural safeguards required in capital cases, through the knowing presentation of false testimony and failed to correct false testimony once it was presented at trial. A violation of the due process occurs when a state obtains a criminal conviction through the knowing use of false testimony, however, the mere presentation of inconsistent testimony does not rise to this level. The Defendant argues that the Commonwealth presented false testimony by Fritz Wanner when it elicited testimony which was inconsistent with information provided by Jeffrey Hammer several years earlier. Although Jeffrey Hammer and Fritz Wanner remember the events at Phil Long's barn, cases often involve a difference between witnesses in the recollection of events. This does not automatically mean that the Commonwealth knowingly presented false testimony.

The Commonwealth argued, and this Court agreed, that they simply presented the testimony of Wanner and Hammer as they recollected what took place, without judging

whose version of the events was correct. It must be noted that trial counsel did not cross-examine Fritz Wanner regarding the contents of this conversation in the barn, even though the Defendant was an actual participant in the conversation. As a Defendant has a duty to participate in his own defense, one can logically infer that if the content of the conversation was different than what Wanner testified to, then the Defendant would have informed his counsel, prompting him to vigorously cross-examine him on that subject. No information in the record for these PCRA proceedings indicates that the Defendant did so.

Furthermore, even the Defendant had established that the Commonwealth had knowingly presented false testimony and knowingly failed to correct testimony which was later been found to be false, he did not prove that his conviction was obtained by the use of this testimony. As mentioned several times throughout this opinion, Fritz Wanner was one of many witnesses called to corroborate the testimony of Jeffrey Hammer, and the jury was given plenty of reasons to disbelieve his testimony. Notably, the Commonwealth obtained a conviction in Defendant's first trial without Wanner's testimony. Therefore, even if we found that the Commonwealth had presented false testimony, which we declined to do, the Defendant failed to prove that his conviction was obtained by this testimony.

Defendant's 14th claim raised on appeal alleges that counsel's reliance on the discovery provided by the prosecution in lieu of an independent investigation into this case, even though resulting from his late entry into this case shortly before trial, and the resulting failure to present all of the evidence and defenses set forth above, constituted ineffective assistance of counsel. As discussed above, in order to prevail on a claim of

ineffective assistance of counsel, the Defendant must establish (1) that the underlying claim is of arguable merit; (2) that the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3) that counsel's ineffectiveness prejudiced him. Commonwealth v. Murphy, 739 A.2d 141, 145 (Pa. 1999). The law presumes that counsel was effective, so that the burden of establishing ineffectiveness rests squarely upon the Defendant. Commonwealth v. Hudgens, 582 A.2d 1352, 1362 (Pa.Super 1990). This Court found that the Defendant had not satisfied his burden of proving ineffective assistance of counsel on any of his guilt phase claims.

Defendant argues that his counsel relied solely on the discovery provided by the prosecution and failed to present all the evidence and defenses set forth above. However, one cannot judge the effectiveness of trial counsel in hindsight. Commonwealth v. Moore, 633 A.2d 1119, 1133 (Pa. 1993). Such judgment must be based on the circumstances at trial, and must be looked at from the perspective of trial counsel. Id. Defendant's second trial counsel entered the case a few short weeks before the trial commenced and was unable to even speak to Defendant's former counsel regarding the case file. Furthermore, as set forth above, we found that none of Defendant's PCRA claims regarding ineffective assistance of counsel entitled him to relief because he did not prove that, had other evidence and/or defenses been introduced, the outcome of his trial would have likely been different. Because Defendant could not establish the prejudice prong of his ineffectiveness claims, this Court declined to find his counsel ineffective on any of Defendant's guilt phase claims.

The 15th claim raised on Appeal alleges that this Court's instructions on the comparative penalties for first, second, and third degree murder violated Pennsylvania

law and the Sixth, Eighth, and Fourteenth Amendments; and that counsel was ineffective under the Sixth Amendment for failing to object to this instruction and for failing to seek to cure its prejudicial effects in the penalty phase. This issue was not raised on direct appeal and is therefore waived; the Defendant further argues that counsel was ineffective under the Fourteenth Amendment for failing to raise this issue on direct appeal. Nonetheless, we find that this claim is without merit.

Defendant argues that he was denied due process and the effective assistance of counsel when the Court instructed the jury prior to its guilt-phase deliberations on the specific punishments he could receive for each degree of criminal homicide for which he was charged. Defendant further argues that counsel was ineffective in failing to object to the instructions or insist upon a limiting instruction that the jury was not to consider these punishments in deliberating guilt or innocence. In its instructions, this Court described the different penalties for the three degrees of murder, and the levels of discretion in sentencing relative to the different degrees. (N.T. 1/21/99, pg. 512). Defendant maintains that his counsel could offer no reasonable strategy for failing to object to this instruction.

This issue has been previously decided by the Supreme Court of Pennsylvania. The 1978 death penalty statute, 42 Pa. C.S.A. §9711, does not require that the jury be informed of the penalties for the various degrees of murder, as the earlier death penalty statute had, but it also does not prohibit such an instruction. Commonwealth v. Yarris, 549 A.2d 513, 526 (Pa. 1988). Since there is no indication that informing the jury of the various murder conviction penalties was unduly prejudicial, and because, to the contrary, knowledge of the severity of the penalties could serve only to caution a jury as to the seriousness of a conviction, the instruction was permissible. Id. Having the jury know

the various penalties for each degree of murder could only have been advantageous to the Defendant, as the jurors were well aware of the severity of a conviction for first degree murder, as well as the potential sentences for second and third degree murder convictions. Based on the controlling precedent in Yarris, this Court found that Defendant's claim was without merit and denied the relief in the form of a new trial requested in his PCRA petition. Furthermore, we refused to find Defendant's counsel ineffective for failing to object to the instructions and raising the issue on appeal, as it was meritless.

Defendant's 16th claim, regarding the reasonable doubt instruction provided at trial, is meritless. Petitioner claims that the instruction provided to the jury in the guilt-phase instructions in this case materially deviated from Pennsylvania's standard jury instructions and misdefined reasonable doubt, in violation of Pennsylvania law; the Sixth and Fourteenth Amendments; Article I, Sections 6 and 9 of the Pennsylvania Constitution; and United States human rights treaty obligations, customary international law, and peremptory international human rights norms, as binding on the Commonwealth of Pennsylvania through Article VI of the United States Constitution. (Amended PCRA Petition, 1/14/04, pg. 89). He further alleges that trial counsel was ineffective for failing to object to the improper instruction and to request the accurate instruction contained in Pennsylvania's standard jury instructions. (Id.)

At the center of Petitioner's claim lies the court's definition of "reasonable doubt," in which the trial court instructed the jury: "A reasonable doubt is a kind of doubt that *refrains* a reasonable person from acting in a manner of importance to himself or herself." (N.T. 1/21/99, pg. 498). This instruction deviated from the standard jury

instruction in Pennsylvania, which provides: "A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to *hesitate* before acting upon a matter of importance in his own affairs."[7] In the penalty phase instructions this court provided to the jury, the word "hesitate" was used in place of "refrains." (N.T. at 621). Petitioner is thus arguing that the words have material and significantly different definitions insomuch as they create different burdens of proof for the Commonwealth.

In a multitude of decisions, the Supreme Court of Pennsylvania has ruled that in evaluating the correctness of instructions to a trial jury, the charge must be read and considered as a whole, and it is the general effect of the charge that controls. Commonwealth v. Rodgers, 327 A.2d 118, 120 (Pa. 1974). The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for its consideration. Commonwealth v. Hawkins, 787 A.2d 292, 301 (Pa, 2001). At the time of Petitioner's retrial in 1999, the state of the law was clear and the term "restrain" was an accepted substitute for the term "hesitate" suggested by the Standard Jury Instructions. The distinction between "hesitate before acting" and "restrain before acting" is *de minimis* and clearly such a subtle variation in phrasing would not be an abuse of the trial court's discretion. Commonwealth v. Porter, 728 A.2d 890, 899 (Pa. 1999). The Superior Court of Pennsylvania found that, "as between 'refraining from action' and 'being restrained from acting' there is no distinction that would support reversal." Commonwealth v. Barkesdale, 281 A.2d 703, 704 (Pa. Super. 1971). After reading and considering the charge in its entirety, we are satisfied that the jury was not misled as to where the burden

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[7] Pennsylvania Bar Institute, Pennsylvania Standard Jury Instructions: Criminal Section, § 7.01(3) (1979).

of proof of guilt rested and therefore this claim is without merit. Although the trial judge deviated from the Pennsylvania Standard Jury Instructions, as a whole the instructions were adequate and the semantic technicality is not sufficient to merit a new trial.

We note also, that no objection or exception of any nature was entered to the charge, indicating defense counsel was satisfied the court had made it clear to the jury that the burden of proving guilt of the charges was upon the Commonwealth beyond a reasonable doubt. Nor was this issue raised on direct appeal by current counsel. It is therefore deemed waived and Petitioner's claim cannot be salvaged by Commonwealth v. Uderra, 862 A.2d 74, 92 (Pa. 2004), in which the Supreme Court of Pennsylvania notes that the "restraint" language in reasonable doubt instructions had been subject to criticism. However, in conformity with Pennsylvania law, the timing of the announcement of the new rule of law is essential. Our courts have consistently held that the new rule will apply if it is announced at any time up to and including direct appeal of the case. Commonwealth v. Carr, 535 A.2d 1120, 1129 (Pa. Super. 1987). Conversely, "a new rule of law to which we give full retroactive effect will not be applied to any case on collateral review unless that decision was handed down during the pendency of appellant's direct appeal and the issue was properly preserved there." Id. Here, although the new rule in Uderra was announced after the direct appeal was completed and while the instant PCRA petition was pending, it is inapplicable because this issue was not objected to at the time of trial nor was it properly preserved by being raised on appeal.

Further, the new rule in the Uderra decision cannot be considered substantive and therefore it cannot be applied retroactively. Substantive rules are:

> Decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional

> determinations that place particular conduct or persons
> covered by the statute beyond the State's power to punish.

Commonwealth v. Moss, 871 A.2d 853, 858 (Pa.Super. 2005). The Commonwealth, in its Brief in Support of Dismissal of Post-Conviction Relief Act, correctly notes that because the rule pronounced by the Supreme Court in 2004 in Uderra effects the language of the jury instruction regarding reasonable doubt, not the scope of a criminal statute, this new rule is procedural and not substantive in nature. Thus, it carries a prospective application only. Therefore, because the challenge to the jury instruction regarding reasonable doubt was not preserved on direct appeal this Court's instructions, when read as a whole, clearly, adequately and accurately presented to the jury the Commonwealth's burden in proving murder in the first degree. That is all that is required. The mere fact that the Defendant thinks that the word 'restrain' would have been more beneficial to him does not render the charges defective, nor does it violate due process or the Defendant's Sixth Amendment rights.

The 17th claim raised in Defendant's appeal alleges that, even if the errors may have been deemed harmless in the guilt phase of the trial, they were prejudicial at the penalty phase and require a reversal of Defendant's death sentence. This claim, too, is without merit, as this Court found that the only claim which merited relief in the penalty phase was Defendant's allegation that counsel was ineffective in his investigation and presentation of mitigation evidence. Each additional individual penalty phase claim was denied and the reasons for said denials are more fully discussed below. This Court did not find that any of the alleged errors in the guilt phase were prejudicial to the Defendant in the penalty phase to the extent that they would entitle him to relief under the PCRA.

The18th claim raised by Defendant in his Concise Statement of Matters Complained of on Appeal alleges that Counsel was ineffective for failing to raise each and all of these issues at trial and on direct appeal. The standard for prevailing on a claim based on ineffective assistance of counsel under the PCRA is well settled and has been thoroughly set forth above. It requires that a petitioner show the following: (1) that the underlying claim is of arguable merit; (2) that the particular course chosen by counsel did not have some reasonable basis designed to effectuate his interests; and (3) that counsel's ineffectiveness prejudiced him. Commonwealth v. Cappello, 823 A.2d 936 (Pa. Super. 2003.) The Defendant must also demonstrate that this alleged ineffectiveness undermined the truth-determining process to such a degree that a reliable determination of guilt or innocence could not have occurred. 42 Pa. C.S. §9543(a)(ii). We believe we adequately addressed in each individual claim why, even though many claims were deemed to be waived as a result of counsel's failure to object to them at trial and/or raise them on direct appeal, we declined to find counsel ineffective and therefore incorporate each individual analysis into Defendant's 18th claim.

The 19th claim Defendant raises on Appeal invites us to grant him a new trial because the cumulative prejudicial effect of all the errors in this case entitles him to one. In our Order of March 31, 2006, and subsequent clarification on April 10, 2006, we denied each of Defendant's claims in his PCRA except the claim alleging counsel's ineffectiveness with regard to the investigation and presentation of mitigation evidence. It is well established that no number of *failed* claims may collectively attain merit if they could not do so individually. Commonwealth v. Williams, 615 A.2d 716, 722 (Pa. 1992). Therefore, relief was granted on the single claim that we found to be meritorious.

Because we found that the Defendant failed to establish his entitlement to relief on each of the remaining claims, he cannot now bootstrap them together and expect their cumulative effects to warrant relief.

The final claim raised by the Defendant on appeal alleges that this Court's denial of PCRA relief was erroneous and contrary to applicable constitutional and statutory standards; that this Court erred in its factual and legal conclusions, its evidentiary and collateral rulings, and rulings on objections; and that such errors constituted an abuse of discretion. The standard in reviewing a PCRA court order is abuse of discretion. Commonwealth v. Rathfon, --- A.2d --- (Pa. Super. 2006). The reviewing court grants great deference to the findings of the PCRA court, and will not disturb those findings merely because the record could support a contrary holding. Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002). An appellate court cannot find an abuse of discretion merely for an error of judgment unless, in reaching a conclusion, the trial court overrides or misapplies the law, or its judgment is manifestly unreasonable, or the evidence of record shows that the court's judgment exercised is manifestly unreasonable or lacking in reason. Commonwealth v. Baker, 766 A.2d 328, 331 (Pa. 2001). The findings of a post conviction court will not be disturbed unless they have no support in the record. Commonwealth v. Hickman, 799 A.3d at 140. After exhaustively reviewing the PCRA petition, the transcripts of the numerous hearings, the briefs of the Defendant and the Commonwealth, and hearing oral arguments, this Court believes that no abuse of discretion occurred because there is ample evidence in the record to support its findings that the Defendant is not entitled to relief on his guilt phase claims because they were either waived or without merit. We further believe that these rulings, and our findings

that trial counsel was not ineffective in the guilt phase of Defendant's trial, were not contrary to constitutional and statutory standards.

The Commonwealth raises only one matter in its Concise Statement of Matters Complained of on Appeal, namely:

> 1. The PCRA Court erred in granting PCRA relief in the form of a new penalty phase hearing.
>
> (Concise Statement of Matters Complained of on Appeal, 4/18/06)

The Defendant also filed a Concise Statement of Matters Complained of on Cross-Appeal, raising the following 19 issues:

1. This Court, while correctly granting penalty-phase relief for counsel's failure to adequately investigate and present mitigating evidence, erroneously and unconstitutionally denied all other penalty-phase claims presented by Petitioner/Cross-Appellant in these PCRA proceedings.

2. The Commonwealth withheld significant exculpatory and impeachment material relating to the statements made by and deals provided to prosecution witnesses Jeffrey Hammer and Fritz Wanner that were material and prejudicial in the sentencing phase of trial; to the extent that this information was discoverable by trial counsel, trial counsel was ineffective for failing to investigate and cross-examine these witnesses with this evidence; counsel also was ineffective for failing to present this issue on appeal.

3. The evidence establishes reasonable doubt as to the identity of the shooter; Petitioner/Cross-Appellant is actually innocent of the aggravating circumstance that he committed the killing during the perpetration of a felony and the (d)(6) aggravating circumstance does not apply and could not appropriately be found against Petitioner/Cross-Appellant and prior counsel was ineffective for failing to raise this issue at trial and on appeal.

4. The trial court improperly instructed the jury on the comparative penalties for first, second, and third-degree murder and these guilt-phase instructions prejudicially affected the jury's penalty-phase verdict; counsel was ineffective for failing to object to this instruction or seek a curative penalty-phase instruction and for failing to raise this issue on appeal.

5. The Commonwealth's use of offenses and convictions that post-dated this offense as aggravating circumstances, even though these aggravating elements of the offense of capital murder were never charged at any stage of the initial

trial, violated Double Jeopardy and retroactively increased Petitioner/Cross-Appellant's criminal liability for this homicide, in violation of the *ex post facto* clause, due process, and the Eighth Amendment; counsel was ineffective in failing to raise this issue at trial and on appeal.

6. The sentencing jury improperly found the aggravating circumstance that the defendant committed the killing during the perpetration of a felony, including that:
    a. the jury mistakenly equated 42 Pa. C.S. §9711(d)(6) with felony-murder and relied upon and weighed in aggravation irrelevant and inaccurate information from the unrelated Schuylkill County third-degree murder case;
    b. the Commonwealth and the Court misstated the law in equating the (d)(6) aggravating circumstance with felony-murder;
    c. the trial court's failure to instruct the jury on the "committed the killing," element of the (d)(6) aggravating circumstance improperly relieved the Commonwealth of its burden of proving, and denied Petitioner/Cross-Appellant a jury determination beyond a reasonable doubt of, the (d)(6) element that the defendant was the actual shooter;
    d. the jury's consideration of an improper aggravating circumstance violated the Pennsylvania sentencing code and the Eighth Amendment; and
    e. counsel was ineffective for failing to raise these issues at trial and on appeal.

7. This Court provided a materially deficient instruction and the prosecution made improper argument on the 42 Pa. C.S. §9711(d)(6) aggravating circumstance, and the single prior conviction credited by the jury as sufficiently similar to constitute a history of felony convictions was legally insufficient to support its finding of this aggravating circumstance; counsel was ineffective for failing to object to this instruction or move to vacate the sentencing verdict and for failing to raise this issue on appeal.

8. This Court's failure to instruct the jury that its life-sentencing option was statutorily defined as life without possibility of parole violated *Simmons v. South Carolina*; and irrespective of whether future dangerousness was placed at issue in this case, the failure to provide a life without possibility of parole instruction also violated the Sixth, Eighth, and Fourteenth Amendments under numerous legal theories and United States international human rights treaty obligations against arbitrary deprivation of life and cruel, inhuman, or degrading treatment or punishment; counsel was ineffective for failing to request a life without parole instruction under all of the applicable legal theories, failing to object to the materially inaccurate instruction actually given, and failing to raise all aspects of this issue on appeal.

9. Counsel was ineffective for failing to present available evidence that no capitally prosecuted defendant who has been convicted of first-degree murder in the history of Pennsylvania's death penalty statute has ever become eligible for release or parole through pardon, commutation, or clemency and for failing to raise this on appeal.

10. The penalty instructions materially impaired the jury's consideration of mitigating evidence by, *inter alia*, shifting the sentencing-stage burden of persuasion from the Commonwealth to the defendant, violating the presumption of life afforded defendants in capital sentencing proceedings, and improperly requiring that mitigating evidence make the case "less terrible"; counsel was ineffective in failing to object to these instructions, offer correct instructions in their place, and failing to raise all aspects of this issue on appeal.

11. The Commonwealth presented as aggravating evidence myriad irrelevant and inaccurate facts about Petitioner/Cross-Appellant's prior murder conviction, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the Pennsylvania capital sentencing statute; counsel was ineffective in failing to object to the presentation of this evidence under all applicable legal theories, and failing to raise all aspects of this issue on appeal.

12. The Commonwealth's presentation of improper evidence and argument for the death penalty denied Petitioner/Cross-Appellant a fair and reliable capital sentencing hearing, including that the prosecution:
    a. presented inflammatory, false, and misleading evidence and descriptions of fact beyond the scope of Petitioner/Cross-Appellant's plea agreements; speculative and unreliable evidence of undisclosed other crimes; argument bolstering its witnesses; vouched for the prior cooperation of prosecution witness Jeffrey Hammer; impermissibly attempted to use religion as a basis for death; and presented non-statutory aggravating evidence and argument in violation of Pennsylvania law and the state and federal constitutions;
    b. improperly denigrated and distorted mitigating evidence;
    c. improperly suggested to the jury that "their" law required imposing the death penalty and that the ultimate responsibility for Petitioner/Cross-Appellant's death would lie elsewhere; and
    d. counsel was ineffective for failing to object to all of these errors under all applicable legal theories and for failing to raise these issues on appeal..

13. The Pennsylvania Department of Corrections violated due process and the Sixth and Eighth Amendments when it failed, in response to a defense subpoena, to produce institutional records containing mental health mitigating evidence.

14. The Commonwealth used two invalid guilty pleas as evidence of aggravating circumstances; counsel was ineffective for failing to appropriately challenge the use of these pleas in aggravation and for failing to raise all available challenges to this evidence on appeal.

15. The Pennsylvania Supreme Court failed to conduct the statutorily mandated independent review of the record for passion, prejudice, or other arbitrary factors, also necessitating *nunc pro tunc* restorating of Petitioner/Cross-Appellant's right to direct appeal.

16. Petitioner/Cross-Appellant is entitled to restoration of his right to direct appeal for purposes of proportionality review because the legislative repeal of proportionality review in 1997 denied him the substantive proportionality review he would have been afforded but for the fact that he was not provided a fair trial in 1991.

17. The combined prejudicial effects of the cumulative errors in this case, including prejudice arising out of counsel's ineffectiveness in failing to adequately investigate and present mitigating evidence, require reversal of Petitioner/Cross-Appellant's death sentence.

18. Counsel was ineffective for failing to raise each and all of these issues at trial and on direct appeal.

19. Apart from its ruling on counsel's ineffectiveness for failing to investigate and present mitigating evidence, this Court's denial of penalty-phase relief was erroneous and contrary to applicable constitutional and statutory standards; this Court erred in its factual and legal conclusions concerning Petitioner/Cross-Appellant's entitlement to a new penalty-phase hearing, its evidentiary and collateral rulings; and its rulings on objections; and such errors constituted an abuse of discretion.

Regarding this Court's rulings on the penalty phase aspect of Defendant's trial, we shall first address the subject of the Commonwealth's appeal – why we granted relief on Defendant's claim of ineffective assistance of counsel relative to the investigation and presentation of mitigating evidence – and then we shall address the subject of the Defendant's Cross-Appeal – why we denied PCRA relief for the Defendant's remaining penalty-phase claims.

Supreme Court review is limited to the PCRA Court's findings and the evidence on the record of the PCRA Court's hearing, viewed in the light most favorable to the prevailing party. *See,* Commonwealth v. Meadius, 870 A.2d 802 (Pa. 2005). The question of whether the PCRA court erred in its determination that trial counsel was ineffective for failing to investigate and present mitigating circumstances depends on a myriad of factors including the mitigation evidence that was actually presented, the reasonableness of counsel's investigation, and the mitigation evidence that could have been presented. Commonwealth v. Collins, 888 A.2d 564, 580 (2005). None of these factors, however, is in and of itself dispositive of the question presented, since even if the investigation by counsel was unreasonable, such a fact alone will not result in relief if the claimant cannot demonstrate that he was prejudiced by counsel's conduct. Id. In order to establish prejudice, "a defendant is required to show that counsel's ineffectiveness was of such a magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness." Commonwealth v. Washington, 692 A.2d 1018 (Pa. 1997); Commonwealth v. Petroski, 695 A.2d 844 (Pa. Super. 1997). After exhaustive review of the record, briefs submitted by Defendant and the Commonwealth, and oral argument, this Court found that Defendant was prejudiced by his counsel's failure to properly investigate and present his background and his very significant organic brain impairment.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction.[8] In Commonwealth v. Malloy, the Supreme Court of Pennsylvania held that counsel's duty to investigate and prepare mitigation

[8] ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1980) (The Defense Function; Investigation and Preparation).

evidence "encompasses pursuit of all statutory mitigators of which he is aware or reasonably should be aware, unless there is some objective, reasonable ground not to pursue the circumstance (such as when it might open the door to harmful evidence)." 856 A.2d 767, 787 (PA 2004). The Supreme Court recognized that counsel's effectiveness is seriously in question where counsel either fails to realize, or realizes but fails to pursue, a course of investigation objectively dictated by the Sixth Amendment. Id. This Court found that Defendant's counsel was ineffective in failing to interview family and other lay witnesses who were readily identifiable and reasonably available to testify; for presenting only eight pages of direct testimony in Defendant's case for life; for failing to obtain available institutional records; for failing to conduct any investigation into Defendant's psychiatric condition and mental impairments, despite obvious signs of brain damage that clearly pointed to the need to obtain the assistance of mental health experts. These omissions on the part of counsel clearly prejudiced Defendant and resulted in this Court decision to grant the Defendant a new penalty phase hearing.

This Court found that substantial and available mitigation evidence was not presented at trial, and that this evidence was reasonably likely to have persuaded one or more jurors to find a mitigating circumstance that had not been presented. Any one juror finding a mitigating circumstance can compel a sentence of life imprisonment by finding that the mitigating circumstance outweighs the aggravating circumstances. Commonwealth v. Blount, 647 A.2d 199, 210 (Pa. 1994).

In reviewing counsel's stewardship, we do not employ a hindsight evaluation of the record to determine whether other alternatives were more reasonable. Commonwealth v. Zook, 887 A.2d 1218, 1227 (PA 2005). Rather, counsel will be

deemed to be effective so long as the course chosen by counsel had some reasonable basis designed to effectuate his or her client's interests. Id. Here, Defendant's counsel failed to adequately investigate substantial mitigating factors, even though the record was replete with "red flags" of brain damage that indicated the need for neurophyschological evaluations. (N.T. 1/20/05, pg. 185). In light of the extensive medical and scientific evidence presented in the PCRA petition and subsequent testimony at hearings regarding Defendant's neglectful parenting, social isolation and impaired social development, significant educational impairments and learning disabilities, odd risk-taking behaviors, organic brain damage, mental illness and other potential statutory mitigators, we find that Defendant's counsel, notwithstanding his late entry into the case, failed to fulfill his obligation to explore all avenues that might lead to mitigating circumstances. During the sentencing phase, counsel presented testimony from just two witnesses – Leroy Renninger and Defendant's mother, Betty Sattazahn – in pursuit of one mitigating circumstance: any evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. This evidence clearly established that trial counsel did not conduct a thorough investigation of his client's background to determine if more statutory mitigators existed, and there was no tactical or strategic reason for these deficiencies. For these reasons, we granted Defendant relief on his PCRA claim alleging his counsel's ineffectiveness in investigating and presenting mitigating evidence. Based on the prejudicial effect of his counsel's ineffectiveness, we deemed Defendant was entitled to a new penalty-phase hearing.

Defendant, in his 1st claim in his Concise Statement of Matters Complained of on Cross-Appeal, alleges that this Court correctly granted penalty-phase relief for counsel's

failure to adequately investigate and present mitigating evidence, but erroneously and unconstitutionally denied all other penalty-phase claims presented by him during the PCRA proceedings. Each of the claims that were denied, and subsequently appealed, will be discussed in turn below.

The 2nd claim asserted by Defendant on Cross-Appeal alleges that the Commonwealth withheld significant exculpatory and impeachment material relating to statements made by and deals provided to prosecution witnesses Jeffrey Hammer and Fritz Wanner that were material and prejudicial in the sentencing phase of trial. Defendant further alleges that, to the extent that this information was discoverable by trial counsel, trial counsel was ineffective for failing to investigate and cross-examine these witnesses with this evidence and for failing to raise this issue on appeal. These claims were discussed fully above, and were deemed to be without merit in the guilt phase of Defendant's PCRA. As we found them to be without merit in the guilt phase, we similarly find any alleged errors harmless in the penalty phase because the conviction and the death sentence were procured by the corroboration of multiple witnesses, not just Jeffrey Hammer and Fritz Wanner, and the Defendant failed to demonstrate that the reliability of those witnesses was determinative of his guilt or innocence. Commonwealth v. Johnson, 727 A.2d 1089, 1094 (Pa. 1999). PCRA relief was denied because the Defendant did not satisfy his burden of proving how this allegedly withheld exculpatory and impeachment evidence prejudiced him in the sentencing phase of the trial.

The Defendant's 3rd claim in his Concise Statement on Cross-Appeal alleges that the evidence establishes reasonable doubt as to the identity of the shooter and that

Defendant is actually innocent of the aggravating circumstance that he committed the killing during the perpetration of a felony and the (d)(6) aggravating circumstance does not apply and could not appropriately be found against him. This issue was not raised on direct appeal and is therefore waived pursuant to 42 Pa. C.S.A. §9544(b), and Defendant's Concise Statement on Cross Appeal further alleges that counsel was ineffective for failing to raise this issue on appeal. Notwithstanding this waiver, this Court denied the relief requested in Defendant's PCRA petition because it found this issue to be without merit. While we agree that the execution of an innocent person is the quintessential constitutional violation, this argument must fail. Due to the unreliable nature of polygraph tests, the results of such tests that raise inferences of guilt or innocence are inadmissible at trial. Commonwealth v. Watkins, 750 A.2d 308, 315 (Pa. Super. 2000). Furthermore, although Petitioner argues that the (d)(6) aggravator "may not be applied to accomplices," he fails to realize that even if the polygraph results were admissible and Sattazahn was factually innocent, he would still be equally culpable as an accomplice. 18 Pa. C.S.A. § 306(c),(d) clearly places criminal responsibility on a person who aids another person in the commission of a crime. Commonwealth v. Bridges, 381 A.2d 125, 128 (Pa. 1977). The other person may be the actual perpetrator or murderer, but if a person with intent of promoting or facilitating that person's act aids that person, he is criminally responsible. Id. Therefore, Petitioner's claim that he is factually innocent and that the (d)(6) aggravator are inapplicable to him are without merit and his claim was denied for failure to meet his burden of proving that the violations of his constitutional and legal rights so undermined the truth-determining process that no

reliable adjudication of guilt or innocence could have taken place. 42 Pa. C.S.A. § 9543(a)(2)(I).

Having found that this claim is without merit, this Court also declined to find Defendant's trial counsel ineffective for failing to pursue it on direct appeal, as it is black letter law, requiring no citation, that counsel will not be deemed ineffective for failing to pursue a meritless claim.

Defendant's next claim, 4th on his Concise Statement on Cross Appeal, alleges that this Court improperly instructed the jury on the comparative penalties for first, second, and third degree murder and further alleges that these guilt-phase instructions prejudicially affected the jury's penalty-phase verdict. Once again, this issue has been waived, as no objections were made to this instruction at trial, nor was the issue raised on direct appeal. Notwithstanding this waiver, this issue was addressed above in response to Defendant's appeal of our denial of relief on his identical guilt phase claim. This issue has been previously decided by the Supreme Court of Pennsylvania. The 1978 death penalty statute, 42 Pa. C.S.A. §9711, does not require that the jury be informed of the penalties for the various degrees of murder, but it also does not prohibit such an instruction. Commonwealth v. Yarris, 549 A.2d at 526. Because knowledge of the severity of the penalties could serve only to caution a jury as to the seriousness of a conviction, having the jury know the various penalties for each degree of murder could only have been advantageous to the Defendant, as the jurors were well aware of the severity of a conviction for first degree murder, as well as the potential sentences for second and third degree murder convictions. This Court determined that its instructions did not prejudice the Defendant and were specifically permissible. Based on the

controlling precedent in Yarris, this Court found that Defendant's claim was without merit and denied the relief in the form of a new trial requested in his PCRA petition. Theefore, these instructions would not necessitate relief in the penalty phase. Furthermore, we refused to find Defendant's counsel ineffective for failing to object to the instructions and raising the issue on appeal, as the issue was waived and was also without merit.

Defendant's 5th issue in his Concise Statement alleges that the Commonwealth's use of offenses and convictions that post-dated this offense as aggravating circumstances, even though those aggravatating elements of the offense of capital murder were never charged at any stage of the initial trial, violated Double Jeopardy and retroactively increased Petitioner/Cross Appellant's criminal liability for this homicide, in violation of the *ex post facto* clause, due process, and the Eighth Amendment. It is further alleged by the Defendant that his previous counsel was ineffective for failing to raise this issue on appeal.

This Court agrees with the Commonwealth's assertion that the Defendant failed to raise a proper *ex post facto* claim. Although Pennsylvania appellate courts have held that the Pennsylvania Constitution provides the same *ex post facto* protections as the United States Constitution, there are only four specific areas of legislation which implicate the *ex post facto* clause. In 1798, the United States Supreme Court in Calder v. Bull, 3 U.S. 386, 390 (1798), announced four types of *ex post facto* laws, and these four categories are still recognized today. The categories are:

> 1st, Every law that makes an action done before passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.

> 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th Every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Commonwealth v. Davis, 760 A.2d 406, 410 (Pa.Super. 2000). The *ex post facto* clause is a term of art applying to statutes passed by legislatures, not to the holdings of cases as the Defendant argues in his Cross Appeal. However, the United States Supreme Court has held that: "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Article I § 10 of the Constitution forbids . . . [Thus], if a state legislature is barred by the *Ex Post Facto* clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 353 (1964).

The Defendant, on direct appeal, previously raised issues of Due Process Violations and the Double Jeopardy Clause based upon the Commonwealth's decision to seek the death penalty upon retrial. The Due Process claims on direct appeal were affirmed by the Supreme Court of Pennsylvania in Commonwealth v. Sattazahn, 763 A.2d 359 (Pa. 2000), and the United States Supreme Court upheld Defendant's death sentence against a Double Jeopardy challenge by a vote of 5-4 in Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). One of the critical elements of the PCRA mandates that any allegations of errors that are contained in the petition must not have been previously litigated. 42 Pa.C.S.A. §9543(a)(3). Previously litigated claims include those which have been subject to review by the highest court of the state to which the claimant has the right of appellate review. 42 Pa.C.S.A. §9544. Because the Defendant's claims

of Due Process and Double Jeopardy have already been reviewed and affirmed by both the Pennsylvania and the United States Supreme Courts, they are not properly before this Court and we, the PCRA Court, do not have the jurisdiction to further review them. Furthermore, because Defendant's claims fail to properly implicate the *Ex Post Facto* clause, this claim is without merit, and we declined to find previous counsel ineffective for failing to raise this issue on direct appeal.

Defendant's 6th claim on Cross Appeal alleges that the sentencing jury improperly found the aggravating circumstance that the defendant committed the killing during the perpetration of a felony. In support of his claims that his death sentence must be reversed, Defendant argues that the jury mistakenly equated 42 Pa. C.S. § 9711(d)(6) with felony-murder and relied upon and weighed in aggravation irrelevant and inaccurate information from the unrelated Schuylkill County third-degree murder case. He further alleges that the verdict slip reveals that the jury did not understand the (d)(6) aggravating circumstance could be proven solely by evidence relating to *this* homicide, and relied upon materially false assumptions about an entirely different offense before finding that the (d)(6) aggravating circumstance had been proven. This claim is without merit, as Defendant's challenge to the sufficiency of the evidence supporting the finding of the (d)(6) aggravator was fully litigated on direct review in Commonwealth v. Sattazahn, 763 A.2d 359 (Pa. 2000) and was not properly before the PCRA court for review.

Additionally, the Defendant alleges that the trial court failed to instruct the jury that the aggravating circumstance that "[t]he defendant committed a killing while in the perpetration of a felony," 42 Pa. C.S. § 9711(d)(6), requires as one of its elements that the defendant himself – and not a co-perpetrator- actually committed the killing. He argues

that this improperly relieved the Commonwealth of its burden of proving, and denied him a jury determination beyond a reasonable doubt of, the (d)(6) element that he was the actual shooter. This too, is without merit, because it ignores the verdict. Although the Defendant argues that there was a factual identity as to the shooter, the Commonwealth's theory throughout the case was that the Defendant himself was the shooter. Accomplice liability was not included in the theory of the Commonwealth's case during its guilt phase closing, and the jury was not instructed on the theory of accomplice liability. Therefore, the jury did not consider an improper aggravating circumstance and neither the Pennsylvania sentencing code nor the Eighth Amendment were violated. Furthermore, as this issue has been previously litigated, and subsequently determined meritless, trial counsel cannot be found ineffective for failing to raise it at trial and on appeal.

The Defendant's 7th claim in his Concise Statement on Cross Appeal deals with this Court's instructions to the jury. He alleges that this Court provided a materially deficient instruction and the prosecution made improper argument on the 42 Pa.C.S.A. §9711(d)(6) aggravating circumstance, and the single prior conviction credited by the jury as sufficiently similar to constitute a history of felony convictions was legally insufficient to support its finding of this aggravating circumstance. The Defendant claims that the jury's verdict slip reveals that both of the aggravating circumstances that the jury used as a basis to sentence him to death – "killing in the perpetration of a felony" and "history of felony convictions involving use or threat of violence to the person" - were improperly found. He further claims that the Commonwealth improperly argued that the Schuylkill County homicide plea constituted a "significant history," and that the trial court did not tell the jury how many felonies constitute a significant history of felony

convictions under the (d)(9) factor. Again, this issue was not raised on direct appeal, and is therefore waived. Defendant additionally argues that his counsel was ineffective in failing to object to the instructions and in failing to raise the issue on direct appeal.

Notwithstanding the waiver of this claim for failure to raise it on direct appeal, this Court did not find counsel ineffective because the claim is without merit. The Commonwealth conceded that the jury erred in completing the verdict slip by listing the murder of Mr. Protivak, to which Defendant pled guilty in Schuylkill County to third degree murder, on the line for 42 Pa. C.S. § 9711(d)(6) aggravating factors instead of the line for § 9711(d)(9) aggravating factors. However, the verdict of the jury is clear that they found the existence of the aggravating factors by the simple fact that they listed them on the verdict slip in the place where the jury would record the finding of these aggravating circumstances beyond a reasonable doubt. Therefore, the certified documents regarding the Defendant's guilty pleas for one count of murder in the third degree in Schuylkill County on March 17, 1992, and one count of robbery in Berks County on February 14, 1992 constitute sufficient evidence that the Defendant had a significant history of prior felony convictions involving violence or the threat of violence to the person. (N.T. 1/15/99, pg. 553-554, 557-559). These two crimes, even if there was an error on the verdict slip, satisfied the requirement that the Commonwealth must present evidence of more than one prior conviction for a crime of violence to substantiate the (d)(9) aggravating circumstance. See, Commonwealth v. Wheeler, 541 A.2d 730, 736 (Pa. 1988). The error on the verdict slip does not negate the finding of both aggravating circumstances and was instead harmless error, as the evidence was sufficient to support the finding of both aggravating circumstances.

Furthermore, although the Defendant argues that Assistant District Attorney Mark Baldwin made improper argument on the 42 Pa. C.S. § 9711(d)(6) aggravating circumstance, he fails to prove that any alleged misstatement entitles him to a new penalty phase. It is well settled that a district attorney must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force or vigor. Commonwealth v. Brown, 711 A.2d 444, 454 (Pa. 1998). Defendant contends that a portion of Attorney Baldwin's closing argument insinuated that the murder of Michael Provitak and the murder that is the subject of this appeal constituted a significant history justifying the application of the (d)(9) aggravating circumstance. However, a reviewing court will find reversible error only if the prosecutor has "deliberately attempted to destroy the objectivity of the fact finder" such that the "unavoidable effect" of the inappropriate comments would be to create such bias and hostility toward the defendant that the jury could not render a true verdict. Commonwealth v. Miles, 681 A.2d 1295, 1300 (Pa. 1996), *cert denied*, 520 U.S. 1187 (1997). In evaluating Attorney Baldwin's closing argument as a whole, his alleged misstatement is clearly harmless. He clearly and unambiguously later explained that the Provitak murder and the Service Merchandise robbery are the two events that constitute the significant history of violent felonies that would satisfy the (d)(9) aggravating circumstance requirements:

> But in each case, the defendant admitted responsibility for the armed robbery and the murder. We submit to you that those two items are a significant history of a felony conviction. For the use or threat of violence to the person robbery and murder are felonies.

(N.T. 1/15/99, pg. 611). We found that Attorney Baldwin's alleged misstatement had no effect on the verdict, and that the finding of both aggravating circumstances was adequately supported by evidence in the record. We therefore denied Defendant's PCRA claim, and further declined to find his counsel ineffective for failing to raise a meritless issue.

The 8th claim raised in Defendant's Cross Appeal alleges that this Court's failure to instruct the jury that its life-sentencing option was statutorily defined as life without possibility of parole violated Simmons v. South Carolina. Defendant further alleges that, irrespective of whether future dangerousness was placed at issue in this case, the failure to provide a life without possibility of parole instruction also violated numerous constitutional rights and United States international human rights treaty obligations against arbitrary deprivation of life and cruel, inhuman, or degrading treatment or punishment. In his PCRA petition, Defendant alleged that counsel failed to give a strategic reason for failing to request the instruction, other than his assumption that the charge would be denied based on the state of the law at the time. (N.T. 10/22/05 & 11/22/04, pg. 279-80, 286-87). This claim was not raised on direct appeal and is therefore waived by the Defendant, who further alleges that his counsel was ineffective in failing to object to the instruction and raise the issue on appeal.

Notwithstanding this waiver, we also denied relief because the Supreme Court of the United States in Simmons determined that due process requires that the defendant is entitled to inform the jury that he is ineligible for parole *when the state puts the future dangerousness of the defendant into issue.* 512 U.S. 154, 171 (1994). (emphasis added). The Pennsylvania Supreme Court has stated, "[t]his issue has been before this

Court numerous times. The law of the Commonwealth is that a Simmons instruction is required to be given only in those cases where the future dangerousness of the defendant is placed into issue." Commonwealth v. Johnson, 815 A.2d 563, 589 (Pa. 2002). Here, the record clearly indicates that the Commonwealth did not argue the Defendant's future dangerousness to the jury during the penalty phase and thus, there was no need for a Simmons "life means life without parole" instruction. Counsel will not be deemed ineffective for failing to raise a meritless claim, and therefore PCRA relief was properly denied.

Similarly, the Defendant's 9th claim in his Concise Statement on Cross Appeal alleges that counsel was ineffective for failing to investigate and/or present available evidence that no capitally prosecuted defendant who has been convicted of first-degree murder in the history of Pennsylvania's death penalty statute has ever become eligible for release or parole through pardon, commutation, or clemency. As this issue was not raised in direct appeal, it is waived pursuant to 42 Pa. C.S.A. §9544(b), and Defendant's Concise Statement on Cross Appeal further alleges that counsel was ineffective for failing to raise this issue on appeal. Notwithstanding this waiver, this Court denied the relief the Defendant requested because it found this claim to be without merit. We agreed with the Commonwealth's assertion that the Defendant failed to prove that statistical evidence regarding parole eligibility for inmates sentenced to life imprisonment was relevant in the penalty phase of his case, pursuant to Pa. R.E. 401 and 403. In this case, the Commonwealth did not argue the future dangerousness of Defendant to the jury during the penalty phase. Absent a showing that the Commonwealth argued the Appellant's future dangerousness, a "statistics on commutation" instruction was not

warranted. Commonwealth v. Fletcher, 861 A.2d 898, 913 (Pa. 2004). Therefore, because future dangerousness was not argued by the Commonwealth, any statistical evidence sought to be introduced by trial counsel would have been irrelevant. As this issue is without merit, this Court declined to find trial and appeal counsel ineffective for failing to pursue a meritless claim. Commonwealth v. Pursell, 724 A.2d 293, 304 (Pa. 1999).

The 10th claim raised by Defendant on Cross Appeal alleges that the instructions provided to the jury erroneously erected a presumption of death that shifted the burden of persuasion from the Commonwealth to the Defendant, thus violating the presumption of life afforded defendants in capital sentencing proceedings. This issue was not raised on direct appeal and is therefore waived pursuant to 42 Pa. C.S.A. §9544(b), and Defendant's Concise Statement on Cross Appeal further alleges that counsel was ineffective for failing to object to the instructions, offer correct instructions in their place, and for failing to raise this issue on appeal. Notwithstanding this waiver, this claim is without merit and relief was properly denied.

As noted above in response to Defendant's claim that his guilt phase jury instructions were erroneous, in evaluating the correctness of instructions to a trial jury, the charge must be read and considered as a whole, and it is the general effect of the charge that controls. Commonwealth v. Rodgers, 327 A.2d at 120. The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately and accurately presented to the jury for its consideration. Commonwealth v. Hawkins, 787 A.2d at 301. Any error is reversible only if the instructions as a whole are determined to be prejudicial. In his Cross Appeal, Defendant

challenged the jury instructions in the penalty phase regarding the proper consideration of mitigation evidence.

Although the instructions given after the presentation of evidence in the penalty phase were not identical to the Pennsylvania Suggested Standard Jury Instructions, they were substantially similar and clearly and accurately state the law. The jury was instructed that the Commonwealth must prove any aggravating circumstances beyond a reasonable doubt, and that the Defendant only had to prove any mitigating circumstances by a preponderance of the evidence. (N.T. Trial, 1/15/99, pg. 620-621). The instructions further instructed, not once, but twice:

> "All of you must agree beyond a reasonable doubt as to whether or not one or more aggravating circumstances have been proven by the Commonwealth. But if there is even just only one of you that believes that the defendant has proven a mitigating circumstance by a preponderance of the evidence, than that has been proven sufficiently. Not all of you have to agree. Even if just one agrees that there's a mitigating circumstance, then that has been proven. If you do have a mitigating circumstance, then the only way your verdict could be death is if you find that the aggravating circumstances, proven by the Commonwealth, you all agree on outweigh mitigating circumstances that one or more of you may agree upon." (N.T. Trial, 1/15/99, pg. 624-625).

This Court also explained that a death sentence could only be imposed if one of two conditions were met, namely: either the jury finds the existence of one aggravating and no mitigating circumstances, or the existence of one or more aggravating circumstances which outweigh the mitigating circumstances. (N.T. Trial, 1/15/99, pg. 620). The jury was told that if they did not all agree on one of these two situations, the only verdict that they could return was a sentence of life imprisonment. (N.T. Trial, 1/1/5/99, pg. 620). This Court's instructions on the burden of proof were proper, and there were no

misstatements of the law which would result in reversible error. Therefore, the request for relief in Defendant's PCRA petition was properly denied, and this Court declined to find counsel ineffective for failing to object to the instructions or raise the issue on direct appeal.

Defendant's 11th claim on Cross Appeal alleges that the Commonwealth presented as aggravating evidence myriad irrelevant and inaccurate facts about his prior murder conviction, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and the Pennsylvania capital sentencing statute. Again, it is further alleged that counsel was ineffective in failing to object to the presentation of this evidence under all applicable legal theories, and for failing to raise all aspects of this issue on appeal. The Court in Commonwealth v. Beasley held:

> In this Commonwealth, sentencing has long been regarded as having at its core a function of character analysis, and the central idea of the present sentencing statute is to allow a jury to take into account such relevant information, bearing upon a defendant's character and record, as is applicable to the task of considering the enumerated aggravating circumstances. Consideration of prior "convictions" was not intended to be a meaningless and abstract ritual, but rather a process through which a jury would gain considerable insight into a defendant's character. The nature of an offense, as ascertained through examination of the circumstances concomitant to its commission, has much bearing upon the character of a defendant, and, indeed, without reference to those facts and circumstances, consideration of "convictions" would be a hollow process, yielding far less information about a defendant's character than is relevant.

479 A.2d 460, 465 (Pa. 1984). This exact issue was examined on direct appeal by the Supreme Court of Pennsylvania, in which the Court stated, "From the time that this Court decided Commonwealth v. Beasley, we have consistently held that, in the penalty phase

of the trial, the prosecution is permitted to examine the facts surrounding a defendant's previous felony convictions so that a jury may assess whether these prior crimes involved violence sufficient to support the aggravating circumstance in 42 Pa. C.S.A. §9711(d)(9). Commonwealth v. Sattazahn, 763 A.3d 359, 365 (Pa. 2000). The Supreme Court went on to conclude that the trial court did not err in allowing the Commonwealth to present the facts behind Sattazahn's prior guilty pleas for third degree murder and burglary and the properly admitted evidence amply supported the aggravating factor that Sattazahn had a history of committing violent felonies, including burglary and murder. Id.

As this issue has been fully litigated on direct appeal, and it has previously been decided that the testimony presented by the Commonwealth at the sentencing hearing did not violate any of Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, this issue was not properly before the PCRA court and the relief requested was properly denied. Furthermore, counsel was not ineffective for failing to object to the presentation of this material and/or failing to raise it on direct appeal, as it was properly introduced.

Defendant's 12th issue on Cross Appeal relates to this Court's denial of his PCRA claim regarding the Commonwealth's alleged presentation of improper evidence and argument for the death penalty, which Defendant argued denied him a fair and reliable capital sentencing hearing. The PCRA petition was the first time this issue was raised, as it was not raised on direct appeal, and is therefore waived. Defendant alleges that his trial counsel was ineffective for failing to object to all the alleged errors under all applicable legal theories and for failing to raise these issues on appeal.

Despite this waiver, we declined to find trial counsel ineffective for failing to raise these issues on direct appeal because we found them to be meritless and therefore denied PCRA relief on this claim. Defendant first argues that the Commonwealth presented inflammatory, false, and misleading evidence and descriptions of fact beyond the scope of Petitioner/Cross Appellant's plea agreements; speculative and unreliable evidence of undisclosed other crimes; argument bolstering its witnesses; vouched for the prior cooperation of prosecution witness Jeffrey Hammer; impermissibly attempted to use religion as a basis for death; and presented non-statutory aggravating evidence and argument in violation of Pennsylvania law and the state and federal constitutions. As discussed in response to Defendant's 7th claim on Cross Appeal, it is well settled that a district attorney must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force or vigor. Commonwealth v. Brown, 711 A.2d at 454. A prosecutor's remarks fall within the ambit of fair comment if they are supported by evidence and they contain inferences which are reasonably derived from that evidence. Commonwealth v. Ervin, 766 A.2d 859, 864 (Pa. Super. 2000). A review of the record indicates that the Commonwealth's attorney, Mark Baldwin, based his closing arguments on the facts presented. Both the murder in the instant case and the Provitak murder in Schuylkill County were committed on or close to religious holidays. When the facts presented at trial indicate that the murders occurred on or about religious holidays, the Commonwealth was permitted to argue these facts in its closing arguments. See Commonwealth v. Ogrod, 839 A.2d 294 (Pa. 2003). Furthermore, Provitak was killed with a single shotgun blast to the face, and the term "blast" cannot be considered inflammatory because the Supreme Court of Pennsylvania

has previously used this term in describing the facts of a crime. See Beasley, supra, at 461 (". . . Singleton was fatally wounded by a shotgun blast while riding a bicycle."). The arguments made by Attorney Baldwin in closing were well within the permissible bounds of oratorical flair because they were made based upon the facts presented and reasonable inferences that could be derived therefrom.

The Defendant also alleges that the Commonwealth improperly denigrated and distorted mitigating evidence. This argument ignores the long standing precedent that a prosecutor may urge the jury to disfavor the defense's mitigation evidence in favor of imposing the death penalty. Commonwealth v. Stokes, 839 A.2d 226, 233 (Pa. Super. 2003). As long as the prosecutor confines his comments to the facts presented, the closing argument in favor of the death penalty, taken in totality, will amount to permissible "oratorical flair." Id. Again, what the Defendant argues was a misrepresentation of mitigating evidence and a belittling of the use of mitigating testimony provided by the Defendant's mother was really a permissible argument based upon the facts presented during the sentencing hearing. The same holds true for the Defendant's argument that the Commonwealth improperly insinuated that faithfulness to "our" death penalty law and the jury's oath required that the jury impose "your" death penalty. Taken as a whole, these comments do not amount to prosecutorial misconduct, as they were supported by the facts presented and fall within the permissible range of oratorical flair.

Because this Court denied these claims in Defendant's PCRA petition because we found them to be without merit, we also declined to find Defendant's counsel ineffective

for failing to raise them on appeal, as counsel can never be deemed ineffective for failing to raise a meritless issue.

The 13th Claim raised in Defendant's Concise Statement of Matters Complained of on Cross Appeal alleges that the Pennsylvania Department of Corrections violated due process and the Sixth and Eighth Amendments when it failed, in response to a defense subpoena, to produce institutional records containing mental health mitigating evidence. The Defendant claims that the Department failed to produce a complete set of files, including a psychological report prepared in 1992 by Dr. Katatina Ivanko, which contained statements of Defendant's impaired educational background and found Defendant to be emotionally "guarded" and "unable to form close relationships" as well as one who "could benefit from routine counseling." (N.T. 10/25/04, pg. 166-67 (Def. Exh. 15)). If the Defendant is arguing that his trial counsel was ineffective for failing to get the file and for following up on the information in it that pointed to the need to investigate mental health mitigation, this claim can be incorporated into the claim that his counsel was ineffective for failing to adequately investigate and present mitigating evidence, a claim for which we granted PCRA relief.

If, however, the Defendant is claiming that the Commonwealth committed a violation, the Defendant has not satisfied his burden of proving a Brady violation. In order to be successful in a claimed violation of this rule, the evidence must be (1) favorable to the accused either because it is exculpatory or it impeaches, (2) suppressed by the Commonwealth, either intentionally or inadvertently, and (3) prejudicial to the accused. Commonwealth v. Burke, 781 A.2d 1136, 1141 (Pa. 2001). However, nothing in the rule requires the Commonwealth to provide information which is equally

obtainable by, and known to, the Defendant. Commonwealth v. Pursell, 724 A.2d 293, 305 (Pa. 1999). The Commonwealth did not commit a violation because it was not in possession of the institutional records containing mental health mitigation evidence.

Defendant's 14th Claim on Cross Appeal alleges that the Commonwealth used two invalid guilty pleas as evidence of aggravating circumstances and that counsel was ineffective for failing to appropriately challenge the use of these pleas. It is further alleged that counsel was ineffective for failing to raise all available challenges to this evidence on appeal. Defendant argues in his Post Hearing Memorandum that at the time of his guilty pleas to felony charges that could be used as evidence of a significant history of felony convictions involving the use or threat of violence to the person, he did not know – and had never been advised – that these pleas could be used against him as aggravating factors in any retrial of the present homicide case. (Post Hearing Brief, 8/30/05, pg. 81). Defendant alleges that Attorney Adams was ineffective for not asking him whether his prior counsel had told him that his guilty pleas could be used against him as an aggravating circumstance.

We find that Defendant has failed to prove that he is entitled to relief based upon these two allegedly invalid guilty pleas, as it is not cognizable claim under the terms of the PCRA. The PCRA does not permit a defendant to litigate the validity of other pleas in the context of a PCRA proceeding. 42 Pa. C.S.A. §9543. Even if Defendant wishes to argue that these pleas are invalid based upon the alleged ineffectiveness of prior counsel, we find that any such claims have been waived under 42 Pa. C.S.A. §9543(a)(3) because they were not raised at the first opportunity to do so, pursuant to Commonwealth v. Hubbard, 372 A.3d 687 (Pa. 1977). This is the rule that was applicable at the time,

because Defendant's appeal was pending at the time when Commonwealth v. Grant was decided, but no issues of the ineffectiveness of John Elder, Esquire, were raised and preserved on direct appeal. Thus, Defendant's claim his death sentence must be overturned because the Commonwealth used invalid guilty pleas as evidence of aggravating circumstances is without merit.

In the 15th claim contained in his Concise Statement of Matters Complained of on Cross Appeal, Defendant alleges that the Pennsylvania Supreme Court failed to conduct the statutorily mandated independent review of the record for passion, prejudice, or other arbitrary factors, therefore necessitating *nunc pro tunc* restoration of his right to direct appeal. Each time the death penalty is imposed in Pennsylvania, the state Supreme Court is required to affirm the sentence of death unless they find that: (1) the sentence of death was the product of passion, prejudice or any other arbitrary factor; (2) the evidence fails to support the finding of at least one aggravating circumstance; or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant. Commonwealth v. Williams, 615 A.2d at 728. In order to complete this requirement, the Court must independently review the sufficiency of the evidence presented against the Defendant to determine if the sentence comports with the statute. Commonwealth v. Fiebiger, 81 A.2d 1233 (Pa. 2002).

The Supreme Court of Pennsylvania, in Commonwealth v. Sattazahn, 763 A.2d 359 (Pa. 2000), fully evaluated the sufficiency of the evidence and found that the death sentence did, indeed, comport with the statute. Furthermore, the evidence was sufficient to support both aggravating factors beyond a reasonable doubt. As such, this claim is

without merit and Defendant is not entitled to *nunc pro tunc* restoration of his direct appeal rights.

In his 16th claim presented on Cross Appeal, Defendant argues that he has a protected liberty interest in meaningful appellate review of his conviction and death sentence, including a meaningful proportionality review of his sentence by the Pennsylvania Supreme Court. He further alleges that he is entitled to restoration of his right to direct appeal for purposes of proportionality review because the legislative repeal of proportionality review in 1997 denied him the substantive proportionality review he would have been afforded but for the fact that he was not provided a fair trial in 1991.

Proportionality review was statutorily abrogated by Act of June 25, 1977, No. 28 § 1. Any cases which were pending on direct review on the effective date of the change in the statute were entitled to proportionality review. Commonwealth v. Watkins, 843 A.2d 1203, 1219 fn. 18 (Pa. 2003). Defendant was tried and convicted in the instant case in January 1999, and directly appealed his conviction in February 1999. Because his case was not pending on direct review until 2 years after the effective date of the abrogation, he is not entitled to proportionality review. Therefore, PCRA relief was properly denied and counsel cannot be found ineffective for failing to raise a meritless issue.

The 17th claim raised in Defendant's Cross Appeal is identical in substance to the 19th claim raised in his Appeal, alleging that we must reverse his death sentence because of the alleged combined prejudicial effects of the cumulative errors in this case, including prejudice arising out of counsel's ineffectiveness in failing to adequately investigate and present mitigating evidence. We reiterate that the only PCRA claim that necessitated relief was Defendant's allegations of counsel's ineffectiveness in the investigation and

presentation of mitigation evidence. No number of *failed* claims may collectively attain merit if they could not do so individually. Commonwealth v. Williams, 615 A.2d at 722. As we have addressed why we declined to grant relief on each individual PCRA claim other than counsel's ineffectiveness regarding the mitigation evidence in the penalty phase, Defendant is not entitled to relief by grouping together all of his failed claims and claiming they have a cumulative prejudicial effect.

Defendant's 18th claim in his Concise Statement of Matters Complained of on Cross Appeal alleges that Counsel was ineffective for failing to raise each and all of these issues at trial and on direct appeal. The standard for establishing ineffective assistance of counsel is well settled and was fully discussed above in response to Defendant's 18th claim in his Concise Statement of Matters Complained of on Appeal. We believe we adequately addressed in each individual claim on Cross Appeal the reasons we declined to find counsel ineffective, even though many claims were deemed to be waived as a result of counsel's failure to object to them at trial and/or raise them on direct appeal. With the exception of counsel's ineffectiveness in his investigation and presentation of mitigating evidence, the Defendant failed to meet his burden of proving that the actions or omissions of his counsel prejudiced him.

Defendant's 19th and final claim on cross appeal alleges that, apart from the ruling on counsel's ineffectiveness for failing to investigate and present mitigating evidence, this Court's denial of penalty-phase relief was erroneous and contrary to applicable constitutional and statutory standards; that this Court erred in its factual and legal conclusions concerning Petitioner/Cross Appellant's entitlement to a new penalty-phase hearing, its evidentiary and collateral rulings, and its rulings on objections, and that such

errors constituted an abuse of discretion. As discussed in response to Defendant's identical claim regarding our denial of relief for his guilt phase claims, an appellate court cannot find an abuse of discretion merely for an error of judgment unless, in reaching a conclusion, the trial court overrides or misapplies the law, or its judgment is manifestly unreasonable, or the evidence of record shows that the court's judgment exercised is manifestly unreasonable or lacking in reason. Commonwealth v. Baker, 766 A.2d 328, 331 (Pa. 2001). The findings of a post conviction court will not be disturbed unless they have no support in the record. Commonwealth v. Hickman, 799 A.3d at 140. This Court believes that the extensive record amply supports its findings that the Defendant was entitled to relief only on his PCRA claim regarding his counsel's ineffectiveness in the investigation and preparation of mitigating evidence. As the reasons for denial were fully explained above, this Court further believes that no abuse of discretion occurred in denying Defendant relief on his other PCRA claims, and that these rulings were not contrary to constitutional and statutory standards.

For all of the foregoing reasons, this Court hereby respectfully requests that the Defendant's Appeal, the Commonwealth's Appeal, and the Defendant's Cross Appeal be Denied and the rulings of the PCRA Court be affirmed.