CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL SEPULVEDA,

***Petitioner*,**

v.

LAUREL HARRY,
SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

***Respondent*.**

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

APPENDIX

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APPENDIX CONTENTS

DLD-215

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-1813**

MANUEL SEPULVEDA, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(M.D. Pa. Civ. No. 3-06-cv-00731)

Present: JORDAN, CHUNG, and SCIRICA, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's motion for leave to file his request in excess of the word length limit

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Jurists of reason would not debate the District Court's denial of the claims raised in Sepulveda's request for a certificate of appealability. See Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (describing elements of a claim based on Brady v. Maryland, 373 U.S. 83, 87 (1963)); Strickland v. Washington, 466 U.S. 668, 687-96 (1984) (describing standard for claims of ineffective assistance of counsel); Napue v. Illinois, 360 U.S. 264, 269 (1959). The motion to exceed the word limit is granted.

By the Court,

s/Anthony J. Scirica
Circuit Judge

Dated: September 29, 2023
Tmm/cc: Stuart B. Lev, Esq.
Hayden Nelson-Major, Esq.
Mark S. Matthews, Esq.
Ronald Eisenberg, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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September 29, 2023

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RE: Manuel Sepulveda v. Secretary Pennsylvania Department of Corrections, et al
Case Number: 23-1813
District Court Case Number: 3-06-cv-00731

ENTRY OF JUDGMENT

Today, **September 29, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

cc: Mr.Peter J. Welsh

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1813

MANUEL SEPULVEDA,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI

(M.D. Pa. No. 3-06-cv-00731)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, MONTGOMERY-REEVES, CHUNG, and SCIRICA*, 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, and a majority of the judges of the

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* As to panel rehearing only.

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

Date: January 12, 2024
Tmm/cc: Stuart B. Lev, Esq.
Hayden Nelson-Major, Esq.
Mark S. Matthews, Esq.
Ronald Eisenberg, Esq

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

MANUEL SEPULVEDA,	:	
Petitioner	:	**No. 3:06-cv-00731**
	:	
v.	:	**(Judge Kane)**
	:	
LAUREL HARRY, Acting Secretary, Pennsylvania Department of Corrections, and MICHAEL ZAKEN, Superintendent of the State Correctional Institution at Greene,[1]	:	
Respondents	:	

ORDER

AND NOW, on the 31st day of March 2023, in accordance with the Memorandum issued concurrently with this Order, **IT IS ORDERED THAT**:

1. Petitioner's amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 31) is **DENIED**;

2. A certificate of appealability **SHALL NOT ISSUE**; and

3. The Clerk of Court is directed to **CLOSE** the above-captioned case.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

[1] The Amended Petition for Writ of Habeas Corpus names as respondents John E. Wetzel, Secretary of the Pennsylvania Department Corrections, and Robert Gilmore, Superintendent of the State Correctional Institution at Greene. (Doc. No. 31 ¶¶ 2-3.) Mr. Wetzel has been succeeded by Laurel Harry as Acting Secretary of Corrections. Mr. Gilmore has been succeeded by Michael Zaken as Superintendent of the State Correctional Institution at Greene. Pursuant to Federal Rule of Civil Procedure 25(d), a public officer's successor is automatically substituted as a party in an action brought against the public officer in an official capacity.

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

MANUEL SEPULVEDA,	:	
Petitioner	:	**No. 3:06-cv-00731**
	:	
v.	:	**(Judge Kane)**
	:	
LAUREL HARRY, Acting Secretary, Pennsylvania Department of Corrections, and MICHAEL ZAKEN, Superintendent of the State Correctional Institution at Greene,[1]	:	
Respondents	:	

MEMORANDUM

This matter is before the Court pursuant to Petitioner Manuel Sepulveda ("Sepulveda")'s amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 31.) The § 2254 amended petition is fully briefed and ripe for disposition.

I. BACKGROUND

A. Trial and Direct Appeal

Following a jury trial in the Court of Common Pleas of Monroe County, Sepulveda was found guilty of two counts of first-degree murder and one count of conspiracy to commit homicide and sentenced to death for each of the first-degree murder convictions. See

[1] The Amended Petition for Writ of Habeas Corpus names as respondents John E. Wetzel, Secretary of the Pennsylvania Department Corrections, and Robert Gilmore, Superintendent of the State Correctional Institution at Greene. (Doc. No. 31 ¶¶ 2-3.) Mr. Wetzel has been succeeded by Laurel Harry as Acting Secretary of Corrections. Mr. Gilmore has been succeeded by Michael Zaken as Superintendent of the State Correctional Institution at Greene. Pursuant to Federal Rule of Civil Procedure 25(d), a public officer's successor is automatically substituted as a party in an action brought against the public officer in an official capacity.

Commonwealth v. Sepulveda, 855 A.2d 783, 785-86 (Pa. 2004) ("Sepulveda I"); (Doc. No. 59-12 at 92-93).[2] The Pennsylvania Supreme Court summarized the facts as follows:

> [O]n November 26, 2001, [Sepulveda] was at the home of Daniel Heleva [("Heleva")] and Robyn Otto [("Otto")] in Polk Township, Monroe County, where he resided with the couple and their two children. At approximately 6:30 p.m., John Mendez [("Mendez")] and Ricardo Lopez [("Lopez")] arrived at the house to recover two guns that Mendez claimed belonged to him. [Sepulveda] retrieved the guns from an upstairs bedroom and gave them to Mendez. Mendez and Lopez then left.
>
> Later that night, Heleva returned to the house with Richard Boyko [("Boyko")] and discovered that the guns were missing. After [Sepulveda] explained to Heleva that Mendez had taken the guns, Heleva instructed Boyko to call Mendez and have him come back to the house. At this time, another man, Jimmy Frey [("Frey")], was in the living room watching television.
>
> Mendez and Lopez returned to the house, but Heleva did not permit Lopez to enter. Mendez, however, came inside, where Heleva immediately accused him of stealing his guns and the two men began fighting in the kitchen. When this fight was resolved, [Sepulveda] and Lopez joined Heleva and Mendez in the kitchen, where the four men then sat around the table talking. Boyko left the house. While the men were in the kitchen, another argument erupted. This time, [Sepulveda] grabbed a .12 gauge shotgun and shot Mendez in the stomach. He then turned the gun towards Lopez and shot him in the side. After Lopez collapsed on the floor, [Sepulveda] placed the barrel of the shotgun on Lopez's back and again fired the weapon, killing him. [Sepulveda] then chased Mendez up the stairs to the second floor of the house, where he shot Mendez a second time. Although wounded, Mendez escaped from [Sepulveda] and Heleva and fled to a neighbor's house with [Sepulveda] and Heleva in pursuit. Mendez knocked on the neighbor's front door, but before anyone answered, [Sepulveda] and Heleva grabbed Mendez and dragged him across the lawn back to their house. Frey, who had been watching the incident, retrieved the shotgun that [Sepulveda] had dropped on the lawn and hid it inside a

[2] The Pennsylvania Supreme Court decision indicates that Sepulveda was also convicted of two counts of aggravated assault, criminal conspiracy, unlawful restraint, and tampering with or fabricating evidence. See Sepulveda I, 855 A.2d at 785. Sepulveda's amended petition does not allege that he was convicted of those charges. (Doc. No. 31 ¶ 4.) Based on the Court's review of the record, it appears that Sepulveda was convicted only of two counts of first-degree murder and one count of conspiracy to commit homicide and that the other charges were withdrawn before the case was submitted to the jury. (Doc. Nos. 59-11 at 108-09, 59-12 at 89-90, 92-93.)

sofa in the house. Once the men had dragged Mendez back inside, [Sepulveda] inflicted several blows with a hatchet type of weapon, killing him.

Meanwhile, police received a 911 call from Heleva's neighbor reporting a domestic violence dispute at Heleva's home. In response, Pennsylvania State Troopers Matthew Tretter [("Tretter")] and Joel Rutter [("Rutter")] arrived at the scene and spoke to the neighbor, who told them that she had heard a loud noise and a high-pitched voice screaming "help me" outside of her door and that when she looked outside, she had seen someone being dragged across her front lawn into Heleva's residence. The troopers noticed that there was a smear of blood on the neighbor's front door and that a wooden porch railing had been broken. The troopers then proceeded to Heleva's residence. Along the way, the troopers noticed a bloody jacket on the neighbor's lawn, and they observed blood on Heleva's door when they arrived. When the troopers knocked on the door and announced their presence, [Sepulveda] opened the door and initially denied knowledge of any incident, but then stated that he had been assaulted by two men.

At this time, Trooper Tretter placed [Sepulveda] in the back of the patrol car, handcuffed him, and, still believing that this was a domestic violence incident, asked [Sepulveda] where the woman was. [Sepulveda] responded: "There is no 'she.' They are in the basement. I shot them." Trooper Tretter then called for backup. After additional state troopers arrived on the scene, they entered the residence, set up a perimeter and initiated a crime scene log. The police found the bodies of Lopez and Mendez in the basement of the residence.

The troopers transported [Sepulveda], along with Heleva, Robyn Otto, and their children, to the Lehighton Barracks. Boykin and Frey were also rounded up and brought to the station. Once at the station, Trooper Joseph Sommers [("Sommers")] and Corporal Thomas McAndrew [("McAndrew")] read [Sepulveda] Miranda warnings at approximately 3:45 a.m. [Sepulveda] signed a rights waiver form, and the troopers began to interview him. After about one hour, at approximately 5:04 a.m., [Sepulveda] began to make a tape-recorded statement. In this statement, [Sepulveda] admitted that he shot both Mendez and Lopez twice, but claimed that he only started shooting after he believed Lopez was about to go out to his car to retrieve a gun. [Sepulveda] also admitted that after Mendez ran outside following the shooting, he and Heleva dragged Mendez back inside, at which time [Sepulveda] grabbed the hatchet type weapon and struck Mendez in the head.

After [Sepulveda] made this statement, at approximately 6:00 a.m., the officers took a break from this questioning. Trooper Sommers and Corporal McAndrew conferred with the other investigators involved in the case and returned to [Sepulveda] for further questioning. At approximately 7:10 a.m., [Sepulveda]

> indicated that he wished to speak to Corporal McAndrew alone and proceeded to tell the corporal that he had lied in his original statement. [Sepulveda] then gave a statement which again implicated himself in the murders, but in this statement, [Sepulveda] claimed that he had actually only shot Lopez once, in the kitchen. [Sepulveda] stated that he did not shoot Lopez the second time. Although [Sepulveda] also admitted that he shot Mendez a second time, [Sepulveda] claimed that it was Heleva who eventually struck Mendez in the head with the hatchet type weapon, killing him.
>
> [Sepulveda] also testified at his trial, where he again admitted to shooting both Lopez and Mendez. [Sepulveda] told the jury, however, that he had not intended to kill either Lopez or Mendez. In general, [Sepulveda's] testimony described the events as he had recounted them in his second statement to Corporal McAndrew.

See Sepulveda I, 855 A.2d at 786-88 (footnotes and citations omitted).

Sepulveda was represented at trial by Marshall Anders ("Anders") and on appeal by Anders and his associate, Ellen Schurdak ("Schurdak"). (Doc. 31 ¶ 5.) Sepulveda's timely appeal to the Pennsylvania Supreme Court raised the following issues: (1) the evidence was insufficient to support the first-degree murder convictions; and (2) the trial court erred in denying Sepulveda's motion to suppress his statements to Trooper Tretter and Corporal McAndrew. See Sepulveda I, 855 A.2d at 786-93. The supreme court[3] concluded that the claims lacked merit and affirmed Sepulveda's convictions and death sentences. See id. at 793-94. The United States Supreme Court denied certiorari. See Sepulveda v. Pennsylvania, 546 U.S. 1169 (2006).

B. Post-Conviction Proceedings

Sepulveda initiated the instant federal habeas proceeding by filing a motion to proceed in forma pauperis and for appointment of counsel. (Doc. No. 1.) The Court granted that motion on April 7, 2006 and appointed as co-counsel the Capital Habeas Units of the Public Defender

[3] For the sake of brevity, the Court will at times refer to the Pennsylvania Supreme Court as the "supreme court" and refer to the United States Supreme Court as the "Supreme Court."

Office for the Middle District of Pennsylvania and the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO"). (Doc. No. 2.) Sepulveda filed his habeas petition on December 4, 2006. (Doc. No. 7.) On December 6, 2004, the Court entered an order staying the proceedings to permit Sepulveda to exhaust his state remedies. (Doc. No. 9.)

Sepulveda had already filed a pro se petition under the Pennsylvania Post Conviction Relief Act ("PCRA"). (Doc. No. 59-21.) Represented by the FCDO, he filed an amended PCRA petition. (Doc. No. 59-19.) After holding an evidentiary hearing over the course of four days in April and June 2007, the PCRA court denied relief on all claims. (Doc. No. 59-37.)

Sepulveda timely appealed the PCRA court's decision to the Pennsylvania Supreme Court, raising the following issues:

1. Counsel was ineffective in failing to investigate and present mental health evidence to support claims of diminished mental capacity, imperfect defense of others, and mitigating evidence;

2. Counsel was ineffective in failing to challenge the Commonwealth's peremptory challenges of potential jurors;

3. Counsel was ineffective in failing to properly question potential jurors who were excused because they expressed doubts about imposing the death penalty;

4. Counsel was ineffective in challenging Sepulveda's inculpatory statements;

5. The jury was presented with materially false evidence by the Commonwealth and trial counsel was ineffective for failing to present an expert to dispute this evidence;

6. Counsel was ineffective in failing to object to victim impact evidence;

7. Error in the guilt phase jury instructions violated Sepulveda's due process rights;

8. Counsel had a conflict of interest;

9. Sepulveda's rights were violated because no transcript exists of portions of his trial; and

10. The cumulative effect of the alleged errors warranted relief.

See Commonwealth v. Sepulveda, 55 A.3d 1108, 1116-17 (Pa. 2012) ("Sepulveda II"). The supreme court affirmed the PCRA court's decision except insofar as the PCRA court had dismissed the claim of ineffective assistance of counsel at the penalty phase. See id. at 1151. The supreme court concluded that trial counsel performed deficiently by failing to develop and present mitigating evidence in the penalty phase. See id. The supreme court did not address whether counsel's deficient performance prejudiced Sepulveda but instead remanded the case to the PCRA court to address that issue. See id. The supreme court also directed the PCRA court to address on remand whether federal law authorized the FCDO to represent Sepulveda in the PCRA proceedings. See id.

The hearing on remand was delayed while the issue of the FCDO's authority to represent Sepulveda was litigated in federal court. See Commonwealth v. Sepulveda, 144 A.3d 1270, 1274-75 (Pa. 2016) ("Sepulveda III").[4] On October 3, 2014, Sepulveda filed a pro se PCRA petition based on newly discovered evidence, consisting of an affidavit signed by Otto in which she recounted conversations with the prosecutor before she testified at trial. See id. at 1275. On December 3, 2014, Sepulveda filed a pro se motion seeking the removal of counsel and a hearing pursuant to Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998). See Sepulveda III, 144 A.3d at 1275. On February 18, 2015, the PCRA court held a hearing on the Grazier request, at which Sepulveda confirmed his desire to have the FCDO continue to represent him and withdrew his

[4] This issue was ultimately resolved by a Third Circuit Court of Appeals decision holding that federal law preempted any state court proceedings brought to address the FCDO's authority under federal law to represent petitioners in state PCRA proceedings. See Sepulveda III, 144 A.3d at 1274 n.11 (citing In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila., 790 F.3d 457 (3d Cir. 2015)).

request to proceed pro se. See id. The Commonwealth stipulated that the FCDO could represent Sepulveda, and the remand proceedings moved forward. See id. at 1275 & n.13.

On April 20, 2015, the PCRA court held a hearing to address both the issue of prejudice in the penalty phase and the newly discovered evidence claim. See id. at 1275-76. Following that hearing, Sepulveda filed a motion to amend his original PCRA petition to add claims based on the newly discovered evidence of Otto's statements. On August 14, 2015, the PCRA court issued a decision finding that Sepulveda suffered prejudice at the penalty phase due to counsel's deficient representation and ordering a new sentencing hearing. See id. at 1277. The PCRA court also granted Sepulveda's motion to amend his original PCRA petition, but the court found that the newly discovered evidence claims lacked merit and denied relief. See id.

The Commonwealth did not appeal the PCRA court's decision to grant a new penalty hearing. See id. Sepulveda appealed the PCRA court's denial of relief on the newly discovered evidence claims. See id. The Pennsylvania Supreme Court vacated the PCRA court's decision because it concluded that the PCRA court exceeded its authority and the scope of the remand order when it permitted Sepulveda to amend his PCRA petition. See id. at 1280-81. The Commonwealth elected not to pursue the death penalty a second time. (Doc. Nos. 31 ¶ 13, 49 at 10.) On November 29, 2016, Sepulveda was resentenced to two concurrent life terms for the two first-degree murder counts, plus 12 to 24 years imprisonment for conspiracy to commit homicide. (Doc. No. 31 ¶ 13.)

On November 20, 2017, Sepulveda filed the instant amended habeas petition pursuant to 28 U.S.C. § 2254 (Doc. No. 31), alleging ten claims for relief:

I. Ineffective assistance of counsel for failure to develop and present evidence to support defenses to the first-degree murder charges;

II. The Commonwealth's suppression of statements from Robyn Otto violated Sepulveda's right to due process under Brady v. Maryland, 373 U.S. 83 (1963);

III. The trial court's guilt-phase instructions violated due process, and trial and appellate counsel rendered ineffective assistance in failing to litigate these claims;

IV. The Commonwealth's presentation of materially false evidence violated Sepulveda's right to due process, and counsel rendered ineffective assistance in failing to discover the misconduct;

V. Ineffective assistance of counsel for failure to properly challenge the admission and voluntariness of Sepulveda's inculpatory statements;

VI. The prosecution used peremptory challenges in a discriminatory manner against women and minorities, and counsel rendered ineffective assistance in failing to object;

VII. Ineffective assistance of counsel due to defense counsel's undisclosed conflict of interest;

VIII. Ineffective assistance of counsel for failure to object to the admission of improper victim impact evidence at the guilt phase;

IX. The lack of a transcript of significant portions of the trial was a denial of due process and counsel was ineffective in failing to ask that the complete trial be transcribed; and

X. The cumulative prejudicial effect of the errors described in the petition denied Sepulveda due process and the effective assistance of counsel.

(Doc. No. 31 at 3-5). Sepulveda filed a supporting memorandum of law on May 7, 2018. (Doc. No. 42.) Respondents filed their response to the amended petition (Doc. No. 48) and a memorandum of law (Doc. No. 49) on August 3, 2018. Sepulveda filed his reply memorandum of law on October 19, 2018. (Doc. No. 54.) The amended petition is therefore ripe for decision.

II. STANDARDS OF REVIEW

A federal court may entertain an application for a writ of habeas corpus filed by a person in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." See 28 U.S.C. § 2254(a). Federal habeas review "cannot serve

as 'a substitute for ordinary error correction through appeal,'" but instead is "'an 'extraordinary remedy' that guards only against 'extreme malfunctions in the state criminal justice systems.'" See Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) (quoting Harrington v. Richter, 562 U.S. 86, 102-03 (2011)). To ensure that federal habeas corpus retains its "narrow role," both the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and decisions of the United States Supreme Court impose strict limitations on a federal court's authority to grant habeas relief. See Shinn, 142 S. Ct. at 1731.

A. Exhaustion and Procedural Default

A state prisoner may not seek federal habeas relief unless he first exhausts the available state remedies. See 28 U.S.C. § 2254(b)(1)(A). Exhaustion occurs when the prisoner gives the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). If a state court would dismiss a claim for a procedural failure, the claim is "technically exhausted" because, in the habeas context, state remedies are "'exhausted' when they are no longer available, regardless of the reason for their unavailability." See Shinn, 142 S. Ct. at 1732 (quoting Woodford v. Ngo, 548 U.S. 81, 92-93 (2006)). In that case, the doctrine of procedural default precludes the federal court from considering the claim if the state court refused to hear it "based on an adequate and independent state procedural ground." See Davila v. Davis, 137 S. Ct. 2058, 2062 (2017).

A state procedural rule is "'independent' if it is not interwoven with federal law or dependent upon a federal constitutional ruling." See Bey v. Superintendent Greene SCI, 856 F.3d 230, 236 n.18 (3d Cir. 2017) (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)). A state procedural rule is "'adequate' if it was 'firmly established and regularly followed' at the

time of the alleged procedural default." See id. (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)). For a federal habeas claim to be barred by procedural default, the state rule must have been announced prior to its application in the petitioner's case. See Fahy v. Horn, 516 F.3d 169, 187 (3d Cir. 2008); Albrecht v. Horn, 485 F.3d 103, 115 (3d Cir. 2007). Even if a rule appears "'in retrospect to form part of a consistent pattern of procedures,'" it is not adequate to bar federal habeas review if the petitioner "could not be 'deemed to have been apprised of its existence.'" See Ford, 498 U.S. at 423 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958)). The rationale for these requirements is that "a petitioner is entitled to notice of how to present a claim in state court." See Albrecht, 485 F.3d at 115 (citing Ford, 498 U.S. at 423-24). Federal review is not barred "unless a habeas petitioner had fair notice of the need to follow the state procedural rule." See Bronshtein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005).

B. Substantive Standard

If a claim presented in a federal habeas petition has been adjudicated on the merits in state court proceedings, relief cannot be granted unless:

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

See 28 U.S.C. § 2254(d). This "difficult to meet" and "highly deferential" standard demands that state court decisions "be given the benefit of the doubt." See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations and quotation marks omitted).

A state court decision is "contrary to" clearly established federal law under § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a

set of materially indistinguishable facts." See Williams v. Taylor, 529 U.S. 362, 412 (2000). A state court decision involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." See id. at 413. Section 2254(d)(1) authorizes federal habeas relief only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." See Harrington, 562 U.S. at 102.

A state court's factual determination is not "unreasonable" under § 2254(d)(2) "merely because the federal habeas court would have reached a different conclusion in the first instance." See Wood v. Allen, 558 U.S. 290, 301 (2010). A decision "adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." See Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

The highly deferential standard of § 2254(d) applies only to claims that were adjudicated on the merits in state court. See Lee v. Glunt, 667 F.3d 397, 403 (3d Cir. 2012) (citing Cone v. Bell, 556 U.S. 449, 472 (2009)). "[I]f the state court did not reach the merits of the federal claims, then they are reviewed de novo." Id. In that case, the federal habeas court must presume that any factual determinations by the state court are correct, unless the petitioner rebuts that presumption by clear and convincing evidence. See id. (citing 28 U.S.C. § 2254(e)(1)).

C. Standard for Ineffective Assistance of Counsel Claims

A claim for violation of the Sixth Amendment right to effective assistance of counsel requires the petitioner to show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

To establish deficient performance, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness." See id. at 688. The reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." See id. at 689. To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See id. at 694. In deciding whether a petitioner has shown prejudice, the court "must consider the totality of the evidence before the judge or jury." See id. at 695.

III. DISCUSSION

Sepulveda's amended petition asserts ten claims for relief. The Court will first address Claim II because it requires the resolution of issues related to exhaustion and procedural default. The Court will then address the remaining claims in the order in which they appear in the amended petition.

A. Claim II - Brady Claim Based on Suppression of Otto's Statements

Sepulveda claims that the Commonwealth suppressed favorable material evidence in violation of his right to due process under Brady v. Maryland, 373 U.S. 83, 87 (1963). (Doc. No. 31 ¶¶ 80-101.) Respondents contend that Sepulveda has not exhausted this claim in state court because the Pennsylvania Supreme Court declined to address the merits of the claim. (Doc. No. 49 at 10-13); see Sepulveda III, 144 A.3d at 1280-81. The Court will first set forth the relevant

background and address exhaustion and procedural default before turning to the merits of the claim.

1. Factual and Procedural Background

Sepulveda offered a defense at trial that he was only guilty of voluntary manslaughter rather than first-degree murder because the homicides were justified by his subjective, but unreasonable, belief that he was acting in defense of others. See Sepulveda III, 144 A.3d at 1271; 18 Pa. Cons. Stat. §§ 506, 2503(b). According to Sepulveda's trial testimony, just prior to the shootings, he went upstairs and smoked some drugs with Otto, who told him that "she was scared [Mendez] was going to do something to her and the kids." (Doc. No. 59-11 at 19-20.) Sepulveda then went downstairs, where Heleva, Mendez and Lopez were standing in the kitchen. (Id. at 20.) Mendez began "throwing punches at Heleva" and Lopez "jumped in, two to three punches." (Id.) Sepulveda then "got scared" and grabbed the shotgun and shot Lopez and Mendez. (Id.) Sepulveda testified that he shot the two men to stop them from beating up Heleva, out of concern that Mendez or Lopez might get the shotgun and shoot Sepulveda, and to protect Otto's children. (Id. at 21-22, 47, 58.) Otto testified as a prosecution witness, but neither the prosecutor nor Anders asked whether she feared that Mendez would harm her children or whether she had expressed that fear to Sepulveda. See (Doc. No. 59-10 at 133-77).

In his PCRA petition, Sepulveda alleged that Anders was ineffective for failing to develop support for a defense of voluntary intoxication, including by failing to ask Otto about Sepulveda's drug use at the time of the homicides. (Doc. No. 59-19 at 47-49.) At a PCRA court hearing held on June 11, 2007, Otto testified that she and Sepulveda smoked crack cocaine the night of the homicides, that she told police after the incident that Sepulveda "was high to the point of being crazy," and that she would have testified to that effect if asked at trial. (Doc. No.

59-15 at 15-19.) She also testified that following the homicides she was charged with endangering the welfare of her children and that those charges were resolved in an arrangement whereby she agreed to testify against Sepulveda and Heleva. (Id. at 17.) She recounted that before trial Anders asked her to be a character witness for Sepulveda, but she was told by the prosecutors that this was not possible. (Id. at 18.)

Otto also identified an unsigned affidavit prepared by Sepulveda's attorneys and confirmed that it reflected information she had given them. (Id. at 20-22, Doc. No. 64-31.) The draft affidavit stated that, during the summer before the homicides, Mendez threatened to burn the house down with Otto and her children inside. (Doc. No. 64-31 at 3-4.) As a result, both Otto and Sepulveda were scared all the time for themselves and the children. (Id. at 4.) Otto stated that "I know that [Sepulveda] initially participated in the violence with [Mendez] and [Lopez] because he was protecting me and the children." (Id. at 5.) The draft affidavit also recounted that Otto agreed to testify against Sepulveda after the District Attorney presented her with two choices. (Id. at 5-6.) If Otto chose to testify, she would be released from jail, her children would be placed with relatives and kept out of foster care, and there would be a chance that Otto and the children could be reunited. (Id. at 5.) If Otto chose not to testify, she would remain in jail, be fully prosecuted, and the children would be placed with strangers in foster care and ultimately put up for adoption. (Id.) Otto testified that she made and initialed changes to the draft affidavit but chose not to sign it because she was afraid to come back to court and wanted to get her children back. (Doc. No. 59-15 at 21-22.) At the request of Sepulveda's counsel, the PCRA court received the unsigned affidavit into evidence. (Doc. No. 59-17 at 60.)

The PCRA court denied relief on the PCRA petition, which the Pennsylvania Supreme Court affirmed, except with respect to the claim of ineffective assistance of counsel in the

penalty phase. See Sepulveda II, 55 A.3d at 1151. The supreme court found deficient performance due to Anders' failure to investigate and present evidence of Sepulveda's mental illness and traumatic childhood. See id. at 1130-31. The supreme court remanded to the PCRA court to determine whether Sepulveda was prejudiced by Anders' deficient performance and to address the FCDO's authority to represent Sepulveda in the PCRA proceedings. See id. at 1151.

Following remand, Sepulveda filed a pro se PCRA petition based on newly discovered evidence, to which he attached a revised and signed version of Otto's affidavit. (Doc. No. 59-33.) The PCRA court ordered that the pro se petition be docketed and served on Sepulveda's counsel, who formally submitted Otto's signed affidavit. See Sepulveda III, 144 A.3d at 1275. After resolving the issue relating to the FCDO's representation, the PCRA court scheduled a hearing for April 20, 2015 to address the issue of prejudice in the penalty phase and the newly discovered evidence claim. See id.

At the PCRA court hearing, Otto testified that she told Sepulveda prior to and on the night of the homicides that she was afraid that Mendez would hurt her children. (Doc. No. 59-18 at 32-35.) Otto also recounted that, while she was in jail on the charge of endangering the welfare of her children, District Attorney Mark Pazuhanich ("Pazuhanich") told Otto that if she did not cooperate he would keep her in jail and put her children up for adoption. (Id. at 35.) Otto testified that she told Pazuhanich that she used drugs with Sepulveda the night of the homicides and that she was afraid that Mendez would hurt her children. (Id. at 35-36.) Otto explained that when she testified in the PCRA court in 2007 she was not willing to testify to her conversations with Pazuhanich because she did not want to do anything that could hurt her efforts to regain custody of her children. (Id. at 37-38.) She no longer had that concern because her children had become adults. (Id. at 38.)

At the conclusion of the hearing, Sepulveda filed a motion to amend his initial, timely filed PCRA petition to include three claims based on Otto's testimony: (1) newly discovered evidence under state law; (2) violation of Brady based on the prosecutor's nondisclosure of Otto's statements; and (3) ineffective assistance of counsel to the extent that Anders was or should have been aware of the evidence. (Doc. No. 64-2.) As authority for allowing the amendment, Sepulveda relied on Rule 905(A) of the Pennsylvania Rules of Criminal Procedure. (Id. at 3); see Pa. R. Crim. P. 905(A).[5] In a later brief, Sepulveda made the alternative argument that his claims were timely even if the proposed amendment was considered a second or successive PCRA petition. (Doc. No. 59-43 at 5-7); see 42 Pa. Cons. Stat. § 9545(b)(1)(i)-(ii).[6]

Following the hearing, the PCRA court found that Sepulveda suffered prejudice as a result of Anders' deficient performance in the penalty phase and ordered a new capital sentencing hearing. (Doc. No. 59-32 at 16-17.) The PCRA court also granted Sepulveda's

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[5] Rule 905(A) provides: "[t]he judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice." See Pa. R. Crim. P. 905(A).

[6] 42 Pa. Cons. Stat. § 9545(b) provides in relevant part:

> Time for filing petition.– (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that: (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States; (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

motion to amend his initial PCRA petition. (Id. at 17-18.) The PCRA court relied on Rule 905(A), explaining its understanding of the rule as follows:

> [T]he Pennsylvania Supreme Court has expressly stated that a court may grant leave to amend a timely filed petition at any time, even many years after the initial petition, if the court deems it appropriate. Com. v. Flanagan, 854 A.2d 489, 499-500 (Pa. 2004) (allowing amendment of post-conviction petition 11 years after filing of original petition). Moreover, the Pennsylvania Supreme Court held the amendment does not even need to "substantively align with the initial filing." Id.

(Doc. No. 59-32 at 17.) The PCRA court reasoned that it was appropriate to permit Sepulveda to amend his initial PCRA petition because doing so would allow his claims to be resolved and the new capital sentencing hearing to proceed without concern that a second PCRA petition might result in reversal of the conviction at some point in the future. (Id. at 18.) On the merits, the PCRA court concluded that Otto's testimony did not satisfy the PCRA standard for newly discovered evidence claims because it was known to Sepulveda at the time of trial and because it would not likely result in a different verdict if a new trial was granted. (Id. at 20-22.)

On appeal, the Pennsylvania Supreme Court held that the PCRA court had no authority to permit the amendment to Sepulveda's initial PCRA petition because the petition had been fully adjudicated and the PCRA court was required to proceed in conformance with the remand order. See Sepulveda III, 144 A.3d at 1271. The supreme court reached this conclusion by drawing on several sources of Pennsylvania law.

First, the supreme court noted that the PCRA court and Sepulveda had mistakenly relied on Flanagan, 854 A.2d at 495-96, as authority to allow the amendment. See Sepulveda III, 144 A.3d at 1278. The supreme court explained that the key factor in Flanagan was that, at the time the petitioner sought to amend his original PCRA petition, the petition was still pending, unadjudicated, before the PCRA court. See id. (citing Flanagan, 854 A.2d at 495-96). The court

noted that Flanagan contrasted this procedural posture with Commonwealth v. Rienzi, 827 A.2d 369 (Pa. 2003), which held that a PCRA court erred by treating a second PCRA petition as an amendment to an initial petition, because the initial petition had been withdrawn, leaving nothing to "amend." See id. (citing Rienzi, 827 A.2d at 371). The supreme court also noted that, in other decisions holding that PCRA courts properly allowed amendments, the PCRA courts had not yet ruled on the initial PCRA petitions. See id. (citing Commonwealth v. Williams, 828 A.2d 981, 993 (Pa. 2003), and Commonwealth v. Padden, 783 A.2d 299, 308-09 (Pa. Super. 2001)).

Second, the supreme court concluded that the PCRA court and Sepulveda had mistakenly relied on the language of Rule 905(A), without considering its underlying purpose. The court explained that Rule 905(A) "was created 'to provide PCRA petitioners with a legitimate opportunity to present their claims to the PCRA court in a manner sufficient to avoid dismissal due to a correctable defect in the claim pleading or presentation.'" See id. at 1279 (quoting Commonwealth v. McGill, 832 A.2d 1014, 1024 (Pa. 2003)). After a decision on the PCRA petition, "the matter is concluded before the PCRA court, having been fully adjudicated by that court, and the order generated is a final order that is appealable by the losing party." See id. (citations omitted). Thus, "[a]lthough liberal amendment of a PCRA petition is, in some circumstances, permitted beyond the one-year timeframe, see, e.g., Flanagan, 854 A.2d at 499-500, Rule 905(A) cannot be construed as permitting the rejuvenation of a PCRA petition that has been fully adjudicated by the PCRA court." See Sepulveda III, 144 A.3d at 1279.

Third, the supreme court considered four of its prior decisions involving remands, stating that "[w]e have consistently held that in the absence of permission from this Court, a PCRA petitioner is not entitled to raise new claims following our remand for further PCRA proceedings." See id. at 1279. Three of those decisions involved rulings by the supreme court

granting or denying permission for amendments on remand. See Commonwealth v. Spotz, 18 A.3d 244, 328 (Pa. 2011); Commonwealth v. Rainey, 928 A.2d 215, 226 n.9 (Pa. 2007); Commonwealth v. Rush, 838 A.2d 651, 661 (Pa. 2003). In the fourth decision, the supreme court held that the PCRA court correctly determined that a Brady claim first raised on remand was waived and additionally stated: "This Court explicitly limited the subject matter of the remand to the remaining issues already raised by appellees; we neither invited nor authorized appellees to raise additional collateral claims years after expiration of the PCRA time-bar." See Commonwealth v. Daniels, 104 A.3d 267, 285 (Pa. 2014).

Fourth, the supreme court relied on the rule of statutory interpretation that requires a court to "presume that the result was not intended to be 'absurd, impossible of execution or unreasonable.'" See Sepulveda III, 144 A.3d at 1279 (quoting 1 Pa. Cons. Stat. § 1922(1)). The court explained that this rule was relevant because, when it ordered limited proceedings on remand, "[a]bsent an order specifying otherwise, to construe Rule 905(A) as authorizing expansion of a case after thorough appellate review renders an absurd result." See id.

Fifth, the supreme court considered the effect of Pennsylvania Rule of Appellate Procedure 2591.[7] See Sepulveda III, 144 A.3d at 1279-80. The court explained:

> Rule 905(A) cannot be read or interpreted in a vacuum. Pennsylvania Rule of Appellate Procedure 2591 specifically addresses a lower court's authority on

[7] Rule 2591 provides, in relevant part:

> (a) General rule. On remand of the record the court or other government unit below shall proceed in accordance with the judgment or other order of the appellate court and, except as otherwise provided in such order, Rule 1701(a) (effect of appeals generally) shall no longer be applicable to the matter.

See Pa. R. A. P. 2591. Rule 1701(a) provides: "General Rule.—Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." See Pa. R. A. P. 1701(a).

> remand. It provides that upon remand from a higher court, the lower court "shall proceed in accordance with the judgment or other order of the appellate court[.]" Consequently, the breadth of Rule 905(A) is limited by Pa. R.A.P. 2591.

See id. (quoting Pa. R. A. P. 2591(a); citation and footnote omitted).

Finally, synthesizing the above authorities, the supreme court explained the applicable rule as follows:

> While we believe that our case law is clear, to the extent there is any lack of clarity in our prior decisions by their failure to consider Rule 905(A), we specifically hold that a PCRA court does not have discretion to treat new claims raised by a PCRA petitioner as an amended PCRA petition following remand from this Court unless such amendment is expressly authorized in the remand order. Rather, application of the liberal amendment policy of Rule 905(A) requires that the PCRA petition in question is still pending before the PCRA court at the time the request for amendment is made. Following a full and final decision by a PCRA court on a PCRA petition, that court no longer has jurisdiction to make any determinations related to that petition unless, following appeal, the appellate court remands the case for further proceedings in the lower court. In such circumstances, the PCRA court may only act in accordance with the dictates of the remand order. The PCRA court does not have the authority or the discretion to permit a petitioner to raise new claims outside the scope of the remand order and to treat those new claims as an amendment to an adjudicated PCRA petition.

See id. at 1280 (footnotes omitted). Based on this rule, the supreme court vacated the PCRA court's decision, holding that, "[b]y permitting Sepulveda to amend his otherwise finally decided PCRA petition with new, previously unraised claims, the PCRA court exceeded the scope of our remand order and the scope of its authority." See id. at 1280-81.

2. Exhaustion and Procedural Default

The Court will first address Respondents' contention that Sepulveda has not exhausted his Brady claim because he has not completed one full round of the state's established review process. (Doc. No. 49 at 10-13). Sepulveda presented the Brady claim in his appeal from the PCRA court decision following remand and gave the Pennsylvania Supreme Court the opportunity to address it at that time. See Sepulveda III, 144 A.3d at 1277. Respondents do not

contend that Sepulveda has any remaining available state remedies. See (Doc. No. 49 at 10-13). Therefore, the Court concludes that the claim is exhausted but procedurally defaulted. See Shinn, 142 S. Ct. at 1732; Fahy, 516 F.3d at 188 n.18.

The Court will next address Sepulveda's contention that the procedural bar the supreme court relied on to deny review is not adequate to preclude federal review because it was not firmly established and regularly followed before it was applied in his case. (Doc. No. 54 at 13-16.) The Court notes that the supreme court acknowledged that its previous decisions had not specifically addressed a PCRA court's authority under Rule 905(A) in the context of remand proceedings. See Sepulveda III, 144 A.3d at 1280. The text of Rule 905(A) does not address this issue, stating only that a judge may grant leave to amend "at any time" and amendment "shall be freely allowed to achieve substantial justice." See Pa. R. Crim. P. 905(A). In Flanagan, which the PCRA court relied on as authority to allow the amendment, the supreme court instructed that "the prevailing rule remains simply that amendment is to be freely allowed to achieve substantial justice." See Flanagan, 854 A.2d at 500 (citing Pa. R. Crim. P. 905(A)). As noted above, the supreme court explained that the PCRA court had misinterpreted the import of Flanagan by giving insufficient attention to its procedural posture and the other relevant legal authority discussed in Sepulveda III, 144 A.3d at 1278. However, the PCRA court was not the only court to make this mistake before the supreme court clarified the rule.

In Commonwealth v. Gray, No. 1299 MDA 2012, 2013 WL 11252259 (Pa. Super. Nov. 7, 2013), appeal denied, 94 A.3d 1008 (Pa. 2014), the superior court affirmed a PCRA court's decision on remand that allowed the petitioner to amend his PCRA petition to include claims beyond the scope of the remand order. See id. at *4. The superior court noted that Rule 2591 would ordinarily limit the issues addressed on remand to those specified in the remand

order. See id. However, the court did not regard Rule 2591 as overriding Rule 905(A), at least under the particular circumstances of the case.[8] See id. Like the PCRA court in Sepulveda's case, both courts in Gray perceived no jurisdictional bar to granting leave to amend a PCRA petition in remand proceedings if the PCRA court believed that doing so would achieve "substantial justice." See id. (quoting Pa. R. Crim. P. 905(A)).

While the supreme court suggested that the rule precluding amendment of a PCRA petition on remand was apparent from existing caselaw, the supreme court had not previously limited the PCRA court's authority under Rule 905(A) in the explicit manner it did in Sepulveda III, 144 A.3d at 1280. Only one of the decisions cited by the supreme court held that a PCRA court erred by allowing amendment of a PCRA petition, on the basis that the original petition had been withdrawn. See Rienzi, 827 A.2d at 371. The remaining decisions either held that amendments were proper or only that particular claims could not be addressed on remand. See Williams, 828 A.2d at 993; Padden, 783 A.2d at 308-09; Spotz, 18 A.3d at 328; Rainey, 928 A.2d at 226 n.9; Rush, 838 A.2d at 661; Daniels, 104 A.3d at 285. None of these cases purported to apply the general jurisdictional limitation on a PCRA court's authority under Rule 905(A) as that rule was explained in Sepulveda III, 144 A.3d at 1280.

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[8] The concern in Gray related to a possible lack of impartiality on the part of the PCRA judge, who had also served as the trial judge. The petitioner alleged in his pro se PCRA petition that his trial counsel was ineffective for failing to seek recusal of the trial judge based on her personal association with a key witness at trial. See Gray, 2013 WL 11252259, at *1-2. Acting as the PCRA judge, the trial judge appointed PCRA counsel, who did not file an amended petition; the judge then dismissed the petition without addressing the petitioner's pro se request for new counsel. See id. at *2. On appeal, the superior court held that the PCRA court erred by dismissing the petition and remanded for appointment of new counsel and an evidentiary hearing. See id. at *3. On remand, a different PCRA judge appointed new counsel, and granted a motion to amend the petition filed by that counsel. See id.

Following the decision in Sepulveda's case, it is clear that a PCRA court has no authority to grant leave to amend a PCRA petition in remand proceedings without permission from the supreme court. See id. However, the supreme court's explanation of the rule required the synthesis of several sources of legal authority. The Court concludes that Sepulveda cannot be deemed to have been "apprised of the existence" of such a rule when he filed the motion to amend his PCRA petition. See Ford, 498 U.S. at 423 (citation and quotation marks omitted). The Court further concludes that the rule was not firmly established and regularly followed at the time of Sepulveda's alleged default and therefore it is not adequate to bar federal habeas review of Sepulveda's Brady claim. See Fahy, 516 F.3d at 187; Albrecht, 485 F.3d at 115-16. Accordingly, the Court will review the claim de novo. See Fahy, 516 F.3d at 190; Lark v. Sec'y Penn. Dep't of Corr., 645 F.3d 596, 618 (3d Cir. 2011).

3. Legal Standard

"Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 (2012) (citing Brady, 373 U.S. at 87). To prove a Brady violation,

> a defendant must show the evidence at issue meets three critical elements. First, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching." . . . Second, it "must have been suppressed by the State, either willfully or inadvertently." . . . Third, the evidence must have been material such that prejudice resulted from its suppression.

See Dennis v. Sec'y Penn. Dep't of Corr., 834 F.3d 263, 284-85 (3d Cir. 2016) (en banc) (quoting Strickler v. Green, 527 U.S. 263, 281-82 (1999)). Evidence is "material" for Brady purposes "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." See Smith, 565 U.S. at 75 (quoting Cone, 556

U.S. at 469-70). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" Id. (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

4. Analysis

When exercising de novo review, a federal habeas court is bound by a state court's interpretation of state law, including an interpretation announced in the state court's review of the challenged conviction. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991), and Mullaney v. Wilbur, 421 U.S. 684, 691 (1975)). In addressing Sepulveda's ineffective assistance of counsel claim, as discussed in Section III.B, infra, the supreme court held that imperfect defense of others may not rest solely on the existence of a genuine, but unreasonable, belief that others are in danger. See Sepulveda II, 55 A.3d at 1125-26. Instead, the defense also requires "an objective assessment of the facts and circumstances surrounding the murders." See id. at 1126. Under this interpretation of state law, the supreme court concluded that Sepulveda's imperfect defense of others theory "was not particularly strong or plausible, for reasons having to do with circumstances other than [Sepulveda's] supposed mental state." See id. Those circumstances include that Sepulveda shot two unarmed men, who were only throwing punches at Heleva, that the children were upstairs while the altercation was occurring downstairs, that Sepulveda and Heleva chased down and dragged Mendez back to the house, and that Sepulveda's "entire course of conduct suggested that he was not free from fault in continuing, and indeed escalating, the difficulty." See id.

In reviewing Sepulveda's Brady claim de novo, the Court observes that even assuming that Otto's statements were favorable to the defense and withheld in violation of Brady,

Sepulveda fails to demonstrate materiality. The Court concludes that this evidence is not material because in its absence Sepulveda received "a trial resulting in a verdict worthy of confidence." See Kyles, 514 U.S. at 434. At best, defense counsel could have used Otto's statements to corroborate Sepulveda's testimony that Otto told him that she was afraid that Mendez would hurt the children. If the jurors believed Otto, they may have also credited Sepulveda's testimony that he believed Mendez posed a danger to the children. Nonetheless, even assuming that the testimony in question would have produced the desired effect, there remain ample bases for the jury to reject the defense. Sepulveda in fact had little likelihood of satisfying the requirements of the defense under state law, as articulated by the supreme court. Upon review of the totality of the evidence in this case, the Court concludes that it is not reasonably probable that the result at trial would have been different if the statements in Otto's affidavit and her testimony at the PCRA hearing on April 20, 2015 had been disclosed before trial. Accordingly, the Court will deny Sepulveda's second claim for relief.

B. Claim I - Ineffective Assistance of Counsel for Failure to Develop and Present Evidence to Support Defenses to First-Degree Murder Charges

Sepulveda claims that he was denied his right to effective assistance of counsel because his trial counsel failed to investigate his background and mental health, which would have produced evidence to support defenses to first-degree murder and could have resulted in Sepulveda's conviction of a lesser charge rather than first-degree murder. (Doc. No. 31 ¶¶ 27-79.) This claim has been exhausted. See Sepulveda II, 55 A.3d at 1121-27.

1. Factual and Procedural Background

At trial counsel Anders' request, the trial court instructed the jury on voluntary manslaughter based on imperfect defense of others. (Doc. Nos. 59-11 at 107-08, 59-12 at 73-75.) The only evidence offered to support the defense was Sepulveda's testimony that he shot

Lopez and Mendez to protect Heleva and the children, shortly after Otto told him that she feared Mendez would harm the children. (Doc. No. 59-11 at 19-22, 58.) Anders mentioned the defense only in passing in his closing argument. (Doc. No. 59-12 at 25-26.)

In his PCRA petition, Sepulveda claimed that he was denied his right to effective assistance of counsel because Anders failed to investigate Sepulveda's background and mental health. (Doc. No. 59-19 at 43-55.) At an evidentiary hearing in the PCRA court, Anders identified correspondence indicating that before trial he contacted Dr. Eric Fine ("Dr. Fine"), a psychiatrist, in an effort to obtain an expert opinion that Sepulveda was experiencing cocaine-induced psychosis at the time of the homicides. (Doc. Nos. 59-14 at 11-18, 67-2 at 1-2.) After reviewing material relating to Sepulveda's use of cocaine and his inconsistent statements to police, Dr. Fine informed Anders that it did not support a diagnosis of cocaine delirium or cocaine-induced psychotic disorder or a conclusion that Sepulveda would have been unable to form the specific intent to kill the victims. (Doc. No. 67-2 at 6-7.)

Sepulveda presented evidence in the PCRA court that he claimed Anders could have developed if he had conducted a proper investigation. Three of Sepulveda's family members—his mother, Yolanda Maisonet, his cousin, Alex Sepulveda, and his maternal uncle, Juan Ramon Rivera—testified about Sepulveda's background and mental health issues. See Sepulveda II, 55 A.3d at 1118. The information provided by these witnesses included: that Sepulveda grew up in neighborhoods scarred by drugs and violence; that both he and his mother were physically abused by his father, an alcoholic; that Sepulveda had trouble in school; and that mental illness and addiction ran in the family. See id. Four other witnesses—Otto, Heather Mirel, Juan Pena, and Deanna Flowers—testified to Sepulveda's habitual use of crack cocaine, including on the

night of the murders, and that he became agitated, paranoid, and delusional when using crack cocaine. See id. at 1118-19.

Sepulveda also presented the reports and testimony of three mental health experts who met with and evaluated him and reviewed information about his life history, his drug addiction, and his trial and conviction. See id. at 1119-20. Dr. Antonio Puente ("Dr. Puente"), a neuropsychologist, opined that Sepulveda had mild to borderline neuropsychological deficits which, in combination with his history of childhood abuse and dysfunction, impaired his ability to control his impulses and to appreciate the consequences of his conduct. (Doc. No. 67-12 at 10.) According to Dr. Puente, these impairments became substantial when Sepulveda was under the influence of crack cocaine, and even more pronounced when he was under significant stress. (Id.) Based on what he knew of Sepulveda's background and drug use, Dr. Puente concluded that Sepulveda's deficits, combined with the circumstances on the night of the homicides, diminished his ability to premeditate and deliberate but did not entirely deprive him of that ability. (Doc. No. 59-16 at 63-65.)

Dr. Pablo Stewart ("Dr. Stewart"), a psychiatric consultant, concluded that Sepulveda suffered from Posttraumatic Stress Disorder ("PTSD"), Cognitive Disorder Not Otherwise Specified ("NOS"), polysubstance dependence, and Cocaine-Induced Psychotic Disorder. (Doc. Nos. 67-12 at 53-56, 59-15 at 38-39.) Dr. Stewart opined that Sepulveda's ability to formulate specific intent at the time of the homicides was significantly impaired by the combined impact of his PTSD and cognitive impairments and the psychotic symptoms he suffered at the time of the offense. (Doc. Nos. 67-12 at 55-57, 59-15 at 85-86.)

Dr. Richard Dudley ("Dr. Dudley"), a psychiatrist, concluded that Sepulveda suffered from Anxiety Disorder NOS with significant symptoms of PTSD, Cocaine Dependence and

Cocaine-Induced Psychotic Disorder, and Organic Brain Damage of a type that impaired his decision-making. (Doc. No. 67-12 at 88.) Dr. Dudley opined that, on the night of the homicides, Sepulveda's impulsiveness and diminished ability to make judgments and understand the consequences of his actions was triggered by a perceived threat against the children, which was a particularly potent trigger and reminder of his own childhood abuse. (Id.) Dr. Dudley also concluded that Sepulveda's capacity to form specific intent to commit the crimes was diminished because of his paranoid, irrational and hyper-reactive state brought on by the combination of his major psychiatric difficulties, the triggering events, and his abuse of crack cocaine. (Doc. Nos. 67-12 at 89, 59-17 at 54.)

The PCRA court denied relief on Sepulveda's ineffective assistance of counsel claim. (Doc. 59-37 at 21-27.) The PCRA court found that Anders had a reasonable basis for not developing and presenting evidence of Sepulveda's cocaine use, given his apparent strategy of steering the jury's attention away from Sepulveda's drug activities. (Id. at 25.) The PCRA court also found that Sepulveda failed to show that the outcome of the guilt phase of his trial would have been different had Anders presented an intoxication defense, based on the court's assessment that the witnesses who testified regarding Sepulveda's drug use were not credible and therefore he had not shown that he was suffering from cocaine-induced psychosis. (Id. at 24-26.) The court also found that Anders had a reasonable basis for his strategic decision to pursue imperfect self-defense rather than a diminished capacity defense. (Id. at 27.)

On appeal, the Pennsylvania Supreme Court affirmed the PCRA court's denial of relief, although it based its decision on different reasoning. See Sepulveda II, 55 A.3d at 1121-27. With respect to diminished capacity, the supreme court stated that "we do not doubt that trial counsel could have uncovered some mental health evidence if he had conducted a more thorough

pre-trial investigation." See id. at 1123. However, the court found that Anders was not ineffective for two reasons. First, the court viewed the defense as weak even considering the expert evidence Sepulveda presented in the PCRA court:

> [A]s a practical matter, the notion that a diminished capacity defense might succeed with a jury, in the face of the circumstances of the murders here—including chasing the second victim down and bringing him back to the crime scene to finish him off, hiding and humiliating the corpses, speaking to police—relatively far-fetched. Moreover, the expert opinions below primarily focused on PTSD and hypervigilance, with the experts claiming that [Sepulveda] lacked the ability to control his actions or that he acted impulsively. . . . It is not clear whether such mental health opinion evidence would have been admissible to support a diminished capacity defense or, if admissible, would have been particularly strong or helpful. We have stressed the limited nature of a diminished capacity defense; at best, [Sepulveda]'s proffer strains the outer bounds of evidence that would be admissible to support the defense.

See id. at 1123. Second, the court explained that a successful diminished capacity defense would have required Sepulveda to concede his guilt to third-degree murder, which would have been inconsistent with his written statement to the police and his trial testimony. See id. The court then concluded: "In this case, given [Sepulveda]'s existing accounts of his actions, the physical evidence, and the weakness of the now-proffered evidence as support for diminished capacity, we conclude that [Sepulveda] has failed to prove that counsel was ineffective for not pursuing a diminished capacity defense." See id. at 1124.

With respect to imperfect defense of others, the supreme court found that there was nothing unreasonable in Anders' decision regarding cocaine-induced psychosis because he pursued this line of investigation with Dr. Fine before trial but ultimately found it unfruitful. See id. at 1125. The court also concluded that Sepulveda failed to demonstrate a reasonable probability that the outcome of his trial would have been different if the expert evidence presented in the PCRA court had been offered at trial. See id. at 1126-27. To support this

conclusion, the supreme court first described the two components of an imperfect self-defense voluntary manslaughter theory: "the defendant's subjectively-held belief of danger posed by the victim, as to which expert testimony [is] admissible, and the objective measurement of that belief, i.e., the reasonableness of that held belief, as to which expert testimony [is] inadmissible." See id. at 1125 (citing Commonwealth v. Sheppard, 648 A.2d 563, 568 (Pa. Super. 1994)). The supreme court further stated that "a viable claim of self-defense voluntary manslaughter cannot be based solely on the subjective state of mind of the defendant." See id. at 1126 (citing Sheppard, 648 A.2d at 569) The supreme court then reasoned as follows:

> We have no doubt that expert mental health testimony would have been admissible and relevant to the imperfect defense of others defense that the trial court determined was adequately supported by the facts so as to allow counsel to pursue the defense. However, [Sepulveda] has not shown that the addition of such testimony, concerning one of the two central aspects of a claim of imperfect belief of defense of others, creates a reasonable probability that the jury would have returned verdicts of involuntary [sic] manslaughter. As we noted at the outset, this defense was not particularly strong or plausible, for reasons having to do with circumstances other than [Sepulveda]'s supposed mental state. [Sepulveda] shot two unarmed men, who were doing no more than throwing punches at Heleva. By [Sepulveda]'s own testimony, the victims were "beating up" Heleva and he "just got scared and grabbed the shotgun" and fired two shots. NT 11/21/2002 at 634. Furthermore, the facts also demonstrate that Heleva's children were upstairs at the time of the incident, while the initial altercation—into which [Sepulveda] introduced the firearm—was occurring downstairs. Most damning is the fact that [Sepulveda] and Heleva chased down and dragged the wounded Mendez back to the house before killing him with a hatchet; any self-defense-related claim as to Mendez was clearly doomed by this fact. Certainly, at the time [Sepulveda] and Heleva chased down Mendez, any belief that others were in imminent danger was objectively unreasonable. Moreover, [Sepulveda]'s entire course of conduct suggested that he was not free from fault in continuing, and indeed escalating, the difficulty. Under such circumstances, we conclude that [Sepulveda] has not demonstrated a reasonable probability that, if only counsel would have introduced supporting expert testimony on the subjective half of his imperfect defense of others claim, the jury would have credited that his perceptions, if genuinely held, were objectively reasonable. Accordingly, [Sepulveda] has failed to establish that trial

> counsel was ineffective for failing to proffer mental health evidence in support of his imperfect belief of defense of others claim.

See id. at 1126-27 (footnote and citation omitted).

2. Analysis

The Court will first address the claim that Anders was ineffective because he failed to pursue a diminished capacity defense. Sepulveda contends that the supreme court's decision on this aspect of the claim is based on two unreasonable factual determinations: (1) that Sepulveda's expert testimony may not have been admissible to support a diminished capacity defense; and (2) that a diminished capacity defense would have been inconsistent with Sepulveda's trial testimony. (Doc. No. 42 at 45-49.) As explained below, both of these determinations are based in part on the supreme court's interpretation of state law concerning the diminished capacity defense, which is binding on this Court in federal habeas review. See Bradshaw, 546 U.S. at 76.

The supreme court's assessment that Sepulveda's expert evidence "strains the outer bounds of evidence that would be admissible to support the defense" is based on Pennsylvania caselaw specifying that "evidence showing that the defendant lacked the ability to control his actions or acted impulsively is irrelevant to intent to kill and thus is not admissible to support a diminished capacity defense." See Sepulveda II, 55 A.3d at 1122 (citing Commonwealth v. Hutchinson, 25 A.3d 277, 312 (Pa. 2011)). Although Sepulveda's experts opined that his ability to form specific intent was impaired, those opinions depended in part on conclusions that Sepulveda suffered from PTSD, which impaired his ability to control his actions and caused him to act impulsively. Under Pennsylvania law, at least some portion of this evidence may have been inadmissible. See Saranchak v. Beard, 616 F.3d 292, 313 (3d Cir. 2010) (noting that expert testimony concerning petitioner's auditory hallucinations, delusion, paranoia, and tenuous ability to apprehend reality would not be admissible under Pennsylvania law to support diminished

capacity defense). Accordingly, the Court concludes that the supreme court did not base its decision on an unreasonable factual determination in considering the potential inadmissibility of portions of Sepulveda's expert evidence as one factor in its assessment of the probability of a different result at trial. See Sepulveda II, 55 A.3d at 1123-24.

The supreme court's conclusion that a diminished capacity defense would have been inconsistent with Sepulveda's trial testimony is also based on an interpretation of state law. See id. at 1123. Sepulveda contends that the supreme court's conclusion is unreasonable because he could have been convicted as an accomplice. (Doc. Nos. 42 at 47, 54 at 10-11.) However, this position is inconsistent with Pennsylvania decisions suggesting that a diminished capacity defense is not available to a defendant who claims that an accomplice killed the victim. See Commonwealth v. Sanchez, 82 A.3d 943, 977-78 & n.14 (Pa. 2013); Commonwealth v. Johnson, 815 A.2d 563, 578-79 (Pa. 2002); Commonwealth v. Laird, 726 A.2d 346, 353 (Pa. 1999).

While Sepulveda admitted at trial that he shot both Lopez and Mendez, he also maintained that it was Heleva who shot Lopez the second time and attacked Mendez with the hatchet and killed him. (Doc. No. 59-11 at 22-25.) Consistent with this testimony, Anders argued in closing that it was Heleva, not Sepulveda, who caused the deaths of both Lopez and Mendez. (Doc. No. 59-12 at 6-7, 24-25.) The Court concludes that the supreme court did not base its decision on an unreasonable determination of the facts by applying state law to find that a diminished capacity defense would have been inconsistent with Sepulveda's trial testimony and statement to the police. See Sepulveda II, 55 A.3d at 1123.

The Court will next address Sepulveda's ineffective assistance of counsel claim based on Anders' failure to develop evidence to support the imperfect defense of others theory that he presented at trial. Sepulveda contends that the supreme court's decision is contrary to Strickland

because it applied the wrong legal standard by referring to "a reasonable probability that the jury would have returned verdicts of involuntary manslaughter." (Doc. No. 42 at 43) (citing Sepulveda II, 55 A.3d at 1126) (emphasis added)). The Court notes that elsewhere in its discussion of this issue the supreme court consistently describes the relevant charge as voluntary manslaughter. See Sepulveda II, 55 A.3d at 1124-26. Viewed in context, the Court concludes that the single reference to involuntary manslaughter is a typographical error and does not indicate that the supreme court applied the wrong legal standard in assessing the reasonable probability of a different result at trial.

The Court further concludes that the supreme court reasonably applied Strickland to deny relief on Sepulveda's ineffective assistance of counsel claim. The Court finds that it is unnecessary to address deficient performance because the claim can be disposed of based on the Strickland prejudice prong. See Strickland, 466 U.S. at 697. The supreme court correctly identified that standard and reasonably applied it to conclude that it was not reasonably probable that the jury would have reached a different result if the defense had offered the new evidence presented in the PCRA proceedings. See Sepulveda II, 55 A.3d at 1126-27. Sepulveda contends this prejudice determination is an unreasonable application of Strickland because the court virtually ignored the subjective component of imperfect defense of others and omitted from its analysis the "totality of the circumstances" standard that would have applied to the defense. (Doc. No. 42 at 43-44.) The Court notes that the supreme court's analysis is based on its view that, under Pennsylvania law, imperfect defense of others requires more than an honestly held, subjective belief that others are in danger. See Sepulveda II, 55 A.3d at 1125-26. "Federal courts reviewing habeas claims cannot 'reexamine state court determinations on state-law questions.'" Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir. 2004) (quoting Estelle, 502 U.S. at

67-68). Based on the supreme court's interpretation of the requirements of imperfect defense of others under state law, which is binding on this Court, the Court concludes that the supreme court did not unreasonably apply the Strickland prejudice standard.

Finally, the Court concludes that it is unnecessary to address Sepulveda's contention that the supreme court made an unreasonable factual determination by finding that Anders fully explored the possibility that Sepulveda suffered from cocaine-induced psychosis but was told by Dr. Fine that he could not offer a supporting opinion. (Doc. No. 42 at 44-45.) This finding appears in the supreme court's analysis of deficient performance. See Sepulveda II, 55 A.3d at 1125. As already discussed, the Court finds that it is unnecessary to address deficient performance because it has concluded that the supreme court's prejudice determination reflects a reasonable application of the Strickland standard.

For the foregoing reasons, the Court concludes that the supreme court's disposition of Sepulveda's claim did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's first claim for relief.

C. Claim III - Guilt Phase Instructions

Sepulveda claims that errors in the jury instructions violated his right to due process and that the failure of trial and appellate counsel to challenge those errors violated his right to effective assistance of counsel. (Doc. No. 31 ¶¶ 102-130.) These claims have been exhausted. See Sepulveda II, 55 A.3d at 1140-45.

1. Factual and Procedural Background

Sepulveda's claims concern three aspects of the jury instructions. First, he contends that the trial court inaccurately described imperfect defense of others by mistakenly using the terms "involuntary manslaughter" and "unmistaken belief" in the following instruction:

> I've been asked to charge on involuntary manslaughter. As I said to you previously when I defined malice, there can be no malice when certain reducing circumstances might be present. When these circumstances are present, a killing may be voluntary manslaughter but not murder. And this is true when the Defendant kills in the heat of passion or following a serious provocation. Or kills under an unmistaken belief in justifying circumstances.

(Doc. No. 31 ¶ 108) (quoting Doc. No. 59-12 at 67-68) (emphases added)). Second, Sepulveda contends that the trial court failed to instruct, as required by Commonwealth v. Heatherington, 385 A.2d 338, 341 (Pa. 1978), that the prosecution had to disprove imperfect defense of others beyond a reasonable doubt in order to meet its burden of proof on the element of malice. (Doc. No. 31 ¶¶ 115-119.) Third, Sepulveda contends that the instruction on accomplice liability did not include the required element of specific intent. (Doc. Nos. 31 ¶¶ 120-125, 59-12 at 75-76.)

Sepulveda raised claims concerning these alleged instructional errors for the first time in his PCRA petition, where he claimed that the flawed instructions violated his right to due process and that his trial and appellate counsel were ineffective by failing to challenge the instructions at trial or on direct appeal. (Doc. No. 59-19 at 56-68.) In his testimony at the PCRA hearing, Anders agreed that it appeared from the transcript that the trial court misspoke in stating that one who kills under the "unmistaken belief" in justifying circumstances would be guilty of voluntary manslaughter. (Doc. No. 59-14 at 41-42.) However, he did not recall if he heard that misstatement when the instruction was given at trial. (Id. at 42.) When asked whether in retrospect he would consider the apparent error to be worthy of appellate review in a capital case, he responded: "Is it worthy? Take a shot. Does it have merit? That is another story." (Id. at 43.)

The PCRA court found that the due process claims were waived because they were not raised at trial or on direct appeal but nonetheless reviewed the claims to determine whether Anders was ineffective for failing to preserve and litigate them. (Doc. No. 59-37 at 28.) The PCRA court concluded that the instructions, read in their entirety, accurately reflected the applicable law and therefore Anders was not ineffective for failing to object to the instructions. (Id. at 29-34.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1140-45. First, the supreme court noted that it had no doubt that counsel could have objected to the trial court's "isolated misstatements" regarding "involuntary manslaughter" and "unmistaken" belief. See id. at 1142. However, the supreme court stated that the issue was whether counsel "was obliged to do so, and if so, whether the failure to object led to actual prejudice." See id. In considering whether counsel was obliged to object, the court concluded that "the charge, considered as a whole, accurately conveyed the law," because the instructions that preceded and followed the trial court's misstatements correctly referred to voluntary manslaughter and "correctly stated the elements of the offense" by stating that "an unreasonable belief in justifying circumstances" could support a finding of voluntary manslaughter. See id. The court also noted that Sepulveda did not "suggest that his defense was argued to the jury, in counsel's closing, other than according to the governing law." See id. Based on this analysis, the court concluded that "the charge taken as a whole, and considered on the context of the trial as a whole, appropriately instructed the jury on imperfect belief of defense of others and [Sepulveda] has not established that counsel was obliged to object and that the failure to do so caused the first-degree murder verdict." See id.

Second, the supreme court found that, although the trial court never specifically identified malice as the element that defense of others would negate, the trial court adequately instructed the jury concerning the prosecution's burden of disproving the defense. See id. at 1143. Finding the instruction on this point to be adequate, the supreme court concluded that Anders could not be deemed ineffective for failing to object to the instruction. See id. (citing Commonwealth v. Natividad, 938 A.2d 310, 328 (2007)).

Third, the supreme court did not appear to dispute that the accomplice liability instruction did not include the element of specific intent to kill. See id. at 1143-45. However, the court found that Sepulveda failed to establish deficient performance due to inadequate briefing of the issue on appeal and because he did not ask Anders to explain why he did not object to the instruction. See id. at 1144. The court also found that Sepulveda had not shown prejudice. See id. at 1144-45. Regarding the murder of Mendez, the court reasoned that the jury must have found specific intent because it convicted Sepulveda of conspiracy to murder Mendez, which required a finding that Sepulveda intended to promote or facilitate the killing of Mendez. See id. at 1145. The court also concluded that Sepulveda could not show prejudice based on his conviction for the murder of Lopez, given that he admitted at trial to shooting Lopez and the jury was instructed that it could not find him guilty of murder without finding that his conduct was the direct cause of the victim's death. See id. at 1145 n.32.

2. Legal Standard

The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove each element of an offense beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970). If an instruction contains some "ambiguity, inconsistency or deficiency," such that it creates a "reasonable likelihood" that the jury misapplied the law and relieved the prosecution of

its burden of proving each element beyond a reasonable doubt, the resulting conviction violates the defendant's right to due process. See Tyson v. Superintendent Houtzdale SCI, 976 F.3d 382, 392 (3d Cir. 2020) (citations and internal quotation marks omitted). An instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." See Waddington v. Sarausad, 555 U.S. 179, 191 (2009) (quoting Estelle, 502 U.S. at 72). To obtain federal habeas relief, the petitioner must show that the erroneous instruction had a "substantial and injurious effect or influence in determining the jury's verdict." See Whitney v. Horn, 280 F.3d 240, 258 (3d Cir. 2002) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). If a petitioner satisfies the Brecht standard, he has also established prejudice under Strickland. See id. (citing Strickland, 466 U.S. at 694).

3. Analysis

The Court will first address Sepulveda's claims concerning the imperfect defense of others instruction. Sepulveda contends that the supreme court unreasonably determined the facts because it characterized the trial court's erroneous use of the terms "involuntary manslaughter" and "unmistaken belief" as an "isolated misstatement" in a charge that as a whole correctly informed the jury of the law. (Doc. No. 42 at 66-68) (quoting Sepulveda II, 55 A.3d at 1142). Sepulveda also contends that the supreme court unreasonably applied Winship and its progeny in concluding that the instruction did not impermissibly relieve the prosecution of its burden of proving each element of the crime. (Doc. No. 42 at 67-68.) The Court concludes that neither contention has merit.

The supreme court used the term "isolated misstatement" to describe the trial court's mistaken references to "involuntary manslaughter" and "unmistaken belief." See Sepulveda II, 55 A.3d at 1142. The trial court referred to "involuntary" manslaughter only once. (Doc. No.

59-12 at 67-68.) The remainder of the instruction and the verdict sheet given to the jury correctly described the pertinent charge as "voluntary" manslaughter. (Doc. Nos. 59-12 at 62, 64, 68, 69, 90, 59-71 at 4-5.) Likewise, the trial court referred to "unmistaken belief" only once. (Doc. No. 59-12 at 68.) The trial court immediately thereafter instructed that the jury could not find Sepulveda guilty of murder if he was under the "unreasonable belief that the circumstances were such that if they existed would have justified killing," which Sepulveda acknowledges is a correct statement of the standard. (Doc. No. 31 ¶ 112) (quoting Doc. No. 59-12 at 68). Thus, the Court concludes that the supreme court's use of the term "isolated" did not inaccurately describe the two times that the trial court misspoke.

The Court also concludes that the supreme court did not unreasonably apply Winship and its progeny in rejecting Sepulveda's ineffective assistance of counsel claim. The supreme court reasonably concluded that, despite the trial court's two misstatements, the instruction, "taken as a whole, and considered in the context of the trial as a whole, appropriately instructed the jury on imperfect belief of defense of others." See Sepulveda II, 55 A.3d at 1142. As described above, the trial court's other instructions accurately referred to voluntary manslaughter and an unreasonable belief in justifying circumstances. Moreover, as the supreme court noted, Sepulveda does not suggest that his defense was argued to the jury other than according to the governing law. See id. In addressing imperfect defense of others in closing argument, the prosecutor argued: "If it was an unreasonable belief, it could make it voluntary manslaughter. This is not even an unreasonable belief." (Doc. No. 59-12 at 55-56); see Middleton v. McNeil, 541 U.S. 433, 438 (2004) (per curiam) (noting that state court may assume that counsel's arguments clarified an ambiguous jury charge, particularly where it is the prosecutor's argument that resolves an ambiguity in favor of the defendant). For these reasons, the Court concludes that

the supreme court did not unreasonably apply Winship and its progeny in concluding that Sepulveda failed to establish ineffective assistance of counsel with respect to the imperfect defense of others instruction.

The Court will next address Sepulveda's claims concerning the instruction on malice. Sepulveda claims that the supreme court unreasonably applied Winship and its progeny in holding that the trial court adequately instructed on the prosecution's burden to disprove defense of others beyond a reasonable doubt. (Doc. No. 42 at 68-69.) He relies on Heatherington, 385 A.2d at 341, for his claim that Winship requires an instruction on the specific relationship between malice and self-defense. (Doc. Nos. 31 ¶¶ 115-117, 42 at 59-61.) Sepulveda has cited no clearly established federal law as determined by the Supreme Court that requires the Heatherington instruction. See (Doc. Nos. 31 ¶¶ 115-119, 42 at 59-61, 68-69, 54 at 17-18). Therefore, the Court concludes that the supreme court did not unreasonably apply Winship and its progeny in concluding that the jury was adequately instructed on the prosecution's burden of proof and for that reason that Anders was not ineffective for failing to object to the relevant instruction.

The Court will next address Sepulveda's claims concerning the accomplice liability instruction. The Court will begin with Sepulveda's contention that de novo review is required because the supreme court did not adjudicate the federal due process claim but instead solely addressed the claim under state law. (Doc. No. 42 at 69-70.) The Court does not agree with Sepulveda's view of the supreme court's decision. The supreme court concluded that Sepulveda failed to show prejudice as a result of any error in the accomplice liability instruction. See Sepulveda II, 55 A.3d at 1144-45. Deference under AEDPA is required so long as the state court identifies and applies the correct governing legal principle. See Albrecht, 485 F.3d at 116;

Priester, 382 F.3d at 397-98. The Court concludes that the supreme court did so here because it relied on two decisions to support its analysis, Commonwealth v. Wayne, 720 A.2d 456 (Pa. 1998), and Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005), both of which reflect the correct governing legal principles. See Sepulveda II, 55 A.3d at 1144.

In Wayne, the supreme court held that the defendant was not prejudiced by counsel's failure to object to an instruction on co-conspirator liability for first-degree murder that did not include the element of specific intent. See Wayne, 720 A.2d at 465. To reach that conclusion, the supreme court applied the state law standard which the Third Circuit Court of Appeals has held is equivalent to the Strickland standard. See id. at 462; Tyson, 976 F.3d at 391. The supreme court reasoned that, because the jury had convicted the defendant of conspiracy, and the sole object of the conspiracy was "the deliberate decision to take a life," "the only logical conclusion" was that the jury also determined beyond a reasonable doubt that the defendant possessed the specific intent to kill. See Wayne, 720 A.2d at 465.

In Bronshtein, the Third Circuit Court of Appeals held that the jury was improperly instructed on co-conspirator liability because the jury could have believed that a finding of specific intent to kill was not needed in order to convict the petitioner of first-degree murder on the theory of co-conspirator liability. See Brohnstein, 404 F.3d at 712. However, the Third Circuit concluded that the error was harmless, citing Wayne as support for its reasoning that, by finding the petitioner guilty of conspiracy to commit murder, the jury must have found that he had the specific intent to kill. See id. at 714 (stating that "[w]e agree with this analysis and hold that the error in the instructions on co-conspirator liability was harmless under the standard applicable in a federal habeas proceeding") (citing Wayne, 720 A.2d at 465).

The Court concludes that the supreme court's reliance on these two decisions to support its prejudice analysis indicates that it adjudicated the instructional claims under the applicable federal constitutional standards. The ultimate issue under either the Brecht harmless error standard or the Strickland prejudice standard "reduces to determining what effect, if any, the erroneous instruction had on the jury's verdict." See Whitney, 280 F.3d at 258. The supreme court analyzed that issue and concluded that Sepulveda was not prejudiced by any alleged error in the accomplice liability instruction. See Sepulveda II, 55 A.3d at 1145 & n.32. That prejudice analysis is an adjudication on the merits that applies equally to Sepulveda's due process and ineffective assistance of counsel claims. Therefore, the Court concludes that AEDPA review applies to both claims.

The Court further concludes that the supreme court's conclusion that Sepulveda failed to show prejudice based on the jury's verdict and the prosecution's theory at trial reflects a reasonable application of the Strickland and Brecht standards. See Sepulveda II, 55 A.3d at 1144-45. The prosecutor argued in closing that Sepulveda shot both victims and directly caused their deaths and that the jury could infer the specific intent to kill required to find him guilty of first-degree murder based on his use of a deadly weapon on vital parts of the victims' bodies. (Doc. No. 59-12 at 43-48.) The prosecutor's only reference to accomplice liability was a brief argument that Sepulveda could be held responsible if it was Heleva who hit Mendez with the hatchet after he was forced back into the house. (Id. at 53.) The prosecutor ended that portion of his argument by telling the jury: "Do not get hung up on the ax. The shots are sufficient for murder in the first degree." (Id. at 54.) The jury convicted Sepulveda of conspiracy to murder Mendez, based on instructions that required the jury to find that Sepulveda had the intent to promote or facilitate the crime of homicide or killing of Mendez. (Id. at 72.) Based on these

considerations, the Court concludes that the supreme court did not unreasonably conclude that Sepulveda was not prejudiced by any alleged error in the accomplice liability instruction. Cf. Brohnstein, 404 F.3d at 714 (concluding that guilty verdict on conspiracy to commit murder indicated that jury found defendant had specific intent to commit murder); Muhammad v. Superintendent Fayette SCI, No. 19-1905, 2021 WL 3662308, at *3 n.3 (3d Cir. Aug. 18, 2021) (unpublished) (concluding that state court's finding of no prejudice was not unreasonable under either Brecht or Strickland standard because there was a quantum of strong evidence at trial from which a jury could conclude that the petitioner had the intent to kill and from which a court could reasonably find that no different result would have occurred).

Finally, the Court will address Sepulveda's claim that the supreme court failed to analyze the cumulative effect of the instructional errors on his right to a fair trial. (Doc. No. 42 at 70.) As already discussed, the supreme court concluded that the trial court's instructions on imperfect defense of others and malice were adequate and that any error in the accomplice liability instruction was not prejudicial. In view of these conclusions, the Court concludes that it was not unreasonable for the supreme court to conduct no analysis of the cumulative effect of the claimed instructional errors on Sepulveda's right to a fair trial.

For the foregoing reasons, the Court concludes that the supreme court's disposition of these claims did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's third ground for relief.

D. Claim IV - Commonwealth's Presentation of Materially False Evidence and Ineffective Assistance of Counsel for Failing to Correct the False Evidence

Sepulveda claims that the prosecution violated his right to due process by presenting false evidence concerning his recorded statement to police. (Doc. No. 31 ¶¶ 131-145.) He also claims ineffective assistance of counsel based on trial counsel's failure to have the recording reviewed by an expert for the purpose of undermining the false evidence. (Id. ¶¶ 146-151.) These claims have been exhausted. See Sepulveda II, 55 A.3d at 1137-39.

1. Factual and Procedural Background

At trial, Trooper McAndrew testified that he recorded one of the statements Sepulveda made during his interrogation. (Doc. No. 59-8 at 111-112.) Clerical staff prepared a transcript of the recording, which McAndrew reviewed and corrected based on listening to the recording and his own recollection of the interview. (Id. at 112-114, Doc. No. 64-22.) Each juror was given a copy of the transcript to read as the recorded statement was played in court. (Doc. 59-9 at 3-5.) On cross-examination, Anders directed McAndrew's attention to the following section of the transcript:

> Sommers: Okay, in fact he was bleeding on you right?
>
> Sepulveda: At that moment yeah, yeah.
>
> Sommers: Is that how the blood got on your clothes?
>
> Sepulveda: On my pants. I didn't see my shirt (not audible) when I finished playin' with him and stuff inside the house, that I look at my pants and started to feel that, that, that nausea stuff.

(Doc. No. 64-22 at 29) (emphasis added). Anders asked whether McAndrew had "filled in the blanks" in this portion of the transcript, to which McAndrew responded, "I have no idea what I would have changed or not changed." (Doc. No. 59-9 at 27.) When Anders asked whether Sepulveda actually said, "when we finished pulling him," McAndrew responded, "whatever I

heard on the tape is what is in this transcript." (Id. at 27-28) (emphasis added). On redirect examination, McAndrew testified that, at the request of the prosecutor, he had listened to this portion of the tape again the previous day and confirmed that the transcript reflected what he believed was said on the tape. (Id. at 47.) The trial court subsequently admitted the transcript into evidence, with no objection by Anders. (Id. at 53.)

Aside from his cross-examination of McAndrew, Anders contested the accuracy of the transcript in two other ways during the defense case. First, Sepulveda testified that he did not say that he "played with" Lopez or Mendez. (Doc. No. 59-11 at 12.) Second, Anders' secretary, Mary Jezierski, testified that she had listened to the tape and heard "when I finished pulling him," rather than "when I finished playin' with him." (Id. at 91-93) (emphasis added).

In his PCRA petition, Sepulveda alleged that the prosecution violated his right to due process by presenting false evidence and that Anders rendered ineffective assistance of counsel by failing to obtain a forensic evaluation of the tape to present an accurate version of what Sepulveda said. (Doc. No. 59-19 at 73-80.) Before the PCRA court, Sepulveda presented an enhanced version of the original recording, prepared by a forensic audio expert, along with a transcript which indicated that the disputed phrase was "when I finished fighting with him." (Doc. Nos. 67-16, 67-17 at 4-5) (emphasis added).

The PCRA court denied relief on both claims. (Doc. No. 59-37 at 34-39.) The PCRA court found that Sepulveda waived the due process claim by failing to raise it at trial or on direct appeal. (Id. at 34-35.) The PCRA court found that the ineffective assistance of counsel claim lacked merit because Anders made the jury aware of the possible discrepancy in the transcript, the jury heard the recorded statement itself, and Sepulveda had not shown that he was prejudiced by Anders' failure to submit the recording for forensic analysis. (Id. at 38-39.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1137-39. The supreme court agreed with the PCRA court that the due process claim "is not cognizable to the extent it sounds in a claim of prosecutorial misconduct." See id. at 1138. The court noted that the recording and transcription were available to Sepulveda, and he could have objected based on his own memory of the interrogation and his ability to decipher his own speech. See id. The supreme court concluded that "[t]he fact that [Sepulveda], with the help of an expert, now has a new interpretation of what he said on the audio recording that was disclosed to him does not prove that the Commonwealth committed 'misconduct.'" See id.

The supreme court also affirmed the PCRA court's denial of relief on the ineffective assistance of counsel claim. The supreme court first found that the underlying due process claim lacked merit, reasoning as follows:

> [T]he record supports the PCRA court's determination that there was simply no indication that the Commonwealth presented "false" evidence, much less that it did so intentionally. [Sepulveda]'s expert's opinion does not establish what [Sepulveda] said as a mathematical certainty, or even as a fact; and even if it did, that opinion does not prove that the Commonwealth deliberately falsified the transcript or knowingly introduced false evidence.

See id. at 1138. Next, the supreme court concluded that Anders was not ineffective for failing to secure a forensic analysis of the recording when "the recording itself was played for the jury and the jury had the firsthand opportunity to determine what [Sepulveda] actually said or whether the word in question was clear enough on the tape to raise some doubt regarding the transcription." See id. at 1139. Finally, the court found that "there is no reasonable probability that uncertainty related to this single word could outweigh [Sepulveda]'s three other confessions and the forensic evidence against him and produce a different verdict." See id.

2. Legal Standard

A state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding. See Haskell v. Superintendent Greene SCI, 866 F.3d 139, 145-46 (3d Cir. 2017) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959), and Giglio v. United States, 405 U.S. 150, 153 (1972)). The elements of a due process claim are: (1) the witness committed perjury; (2) the prosecution knew or should have known that the testimony was false; (3) the false testimony was not corrected; and (4) there is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury. See id. at 146 (citing Lambert v. Blackwell, 387 F.3d 210, 242 (3d Cir. 2004)). A petitioner who establishes these elements is entitled to federal habeas relief without any additional showing of prejudice. See id. at 152.

3. Analysis

The Court will first address the due process claim. Sepulveda argues that the supreme court's decision is based on an unreasonable application of Napue and its progeny to the extent that it considered that Sepulveda himself could determine what he said on the recording. (Doc. No. 42 at 77-78.) The Court notes that the supreme court offered this consideration as a reason for its agreement with the PCRA court's conclusion that Sepulveda waived the due process claim. See Sepulveda II, 55 A.3d at 1138. To the extent that the supreme court considered the merits of the due process claim in connection with the ineffective assistance of counsel claim, that analysis was based on the conclusion that Sepulveda did not prove that the prosecution knowingly presented false testimony. See id. In view of the fact that the only evidence Sepulveda offered on this point was the enhanced recording, the Court concludes that the supreme court did not unreasonably apply Napue and its progeny in reaching this conclusion.

The Court will next address the ineffective assistance of counsel claim. The Court finds that it is unnecessary to address deficient performance because the claim can be disposed of based on the Strickland prejudice prong. See Strickland, 466 U.S. at 697. Sepulveda claims that the allegedly false evidence undermined his defense that he acted out of a genuine fear for the safety of others and provided ammunition for the prosecution's argument that he acted with malice and specific intent to kill. (Doc. No. 31 ¶ 142.) As already discussed supra, the imperfect defense of others theory had little likelihood of success in view of the circumstances of the murders. In addition, there was strong evidence at trial supporting malice and specific intent, including Sepulveda's admissions that he shot both victims and pushed Mendez back into the house after he fled. The jurors were made aware of the potential inaccuracy in the transcript and heard the recording itself, as well as Sepulveda's testimony that the transcript was inaccurate. Upon review of the totality of the evidence, the Court concludes that the supreme court reasonably applied Strickland by finding that there was no reasonable probability of a different verdict if the jury had heard forensic evidence indicating that Sepulveda said he was "fighting" with Mendez rather than "playing" with him. See Sepulveda II, 55 A.3d at 1139.

For the foregoing reasons, the Court concludes that the supreme court's disposition of these claims did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's fourth ground for relief.

E. Claim V - Trial Counsel's Failure to Challenge the Admission and Voluntariness of Sepulveda's Inculpatory Statements

Sepulveda makes a claim of ineffective assistance of counsel based on trial counsel's failure to develop evidence that Sepulveda's waiver of his Miranda rights was not knowing,

intelligent and voluntary and that his inculpatory statements were involuntary. (Doc. No. 31 ¶¶ 152-181); see Miranda v. Arizona, 384 U.S. 436, 479 (1966). This claim has been exhausted. See Sepulveda II, 55 A.3d at 1135-37.

1. Factual and Procedural Background

Sepulveda was taken into custody after police responded to the crime scene at approximately 12:20 a.m. on November 26, 2001. (Doc. No. 59-7 at 76-79.) Trooper Tretter handcuffed Sepulveda and placed him in the back of a patrol car. (Id. at 79.) Believing there was a domestic violence incident in progress, Tretter asked where the woman was, to which Sepulveda responded: "[T]here is no she. They are in the basement. I shot them." (Id. at 80.) Sepulveda remained in the patrol car until he was transported to the Lehighton Barracks at approximately 3:00 a.m. (Id. at 110-11.)

At approximately 3:50 a.m., Trooper Sommers and Corporal McAndrew gave Sepulveda Miranda warnings. (Doc. No. 59-45 at 51-52.) Sepulveda signed a rights waiver form, and Sommers and McAndrew began to interview him. (Id. at 52-53.) At approximately 5:04 a.m., Sepulveda began a tape-recorded statement, which lasted until 6:00 a.m. (Id. at 53-55.) In this statement, Sepulveda admitted that he shot both Mendez and Lopez twice and that he and Heleva dragged Mendez back inside the house, where Sepulveda struck Mendez in the head with an ax handle. (Doc. No. 64-26 at 9-15.)

After making the recorded statement, Sepulveda was asked if he needed anything and was given coffee and a blanket because he indicated that he was cold. (Doc. No. 59-45 at 43-44, 56-57.) A break in the questioning occurred for about an hour while Sommers and McAndrew conferred with other investigators. (Id. at 57-58.) When they returned, McAndrew told Sepulveda that he did not believe he was being truthful due to conflicting information from other

witnesses. (Id. at 58.) At approximately 7:10 a.m., Sepulveda asked to speak to McAndrew alone. (Id. at 58-59.) Sepulveda then recounted a different version of the events, which McAndrew asked him to reduce to writing. (Id. at 59-60.) After McAndrew reexplained his Miranda rights, Sepulveda prepared a written statement from 7:55 a.m. to 8:50 a.m. (Id. at 61-62, Doc. No. 64-28.) In this statement, Sepulveda claimed that he shot Lopez only once and that it was Heleva who struck Mendez in the head with the ax handle. (Doc. No. 64-28 at 4-5.)

Before trial, Anders filed a motion to suppress, claiming that the statements Sepulveda made after he asked to speak to McAndrew alone were elicited in violation of Commonwealth v. Davenport, 370 A.2d 301, 306 (Pa. 1977), which held that any statements obtained after arrest but before arraignment would not be admissible at trial if the accused was not arraigned within six hours of arrest. (Doc. No. 59-44 at 2-3.) Following an evidentiary hearing, the trial court denied the motion. (Doc. No. 59-46 at 12-17.)

On direct appeal, Sepulveda claimed that the trial court erred by denying the motion to suppress. See Sepulveda I, 855 A.2d at 789.[9] The Pennsylvania Supreme Court held that Sepulveda failed to demonstrate prejudice, given that his testimony at trial was similar to his statement to McAndrew in all material respects. See id. at 789. The supreme court also concluded that the statement was properly admitted at trial. See id. at 790. The court noted that it had recently abandoned the six-hour rule of Davenport, 370 A.2d at 306, holding instead that courts should look to the totality of the circumstances to determine whether a pre-arraignment statement was freely and voluntarily made and therefore admissible. See id. at 792-93 (citing

[9] Anders had also moved to suppress the statement Sepulveda made in the patrol car before he was given Miranda warnings and pursued that claim on direct appeal. See Sepulveda I, 855 A.2d at 789. Sepulveda has made no claim regarding the statement in the patrol car in the instant amended petition.

Commonwealth v. Perez, 845 A.2d 779, 787 (Pa. 2004)). Applying that test, the supreme court concluded that the totality of the circumstances demonstrated that Sepulveda's statement to McAndrew was voluntarily given and therefore properly admitted at trial:

> In the first instance, there is nothing in the record to indicate that the delay in [Sepulveda]'s arraignment was aimed at overcoming [his] will, or that the police utilized any coercive tactics to persuade him to give a statement. At trial, Corporal McAndrew testified to the circumstances surrounding [Sepulveda]'s confession and indicated that [Sepulveda] was informed of his constitutional rights before he spoke to the officers, was permitted to use the bathroom and was given coffee and a blanket during the interview, and was not injured or under the influence of drugs or alcohol when he made the confession. Moreover, the record shows that [Sepulveda] himself was responsible for part of the delay as he spent the first hours of the interview providing a statement that he later partially recanted in the follow-up statement at issue here. Under these circumstances, we find that [Sepulveda]'s statement to Corporal McAndrew was voluntarily given and therefore admissible[.]

See id. at 793 (citations omitted).

In his PCRA petition, Sepulveda claimed that Anders was ineffective in three respects: (1) he failed to investigate, develop and present evidence that Sepulveda was incapable of making a knowing, intelligent and voluntary waiver of his Miranda rights; (2) he failed to develop or argue evidence of police coercion; and (3) he failed to present evidence of voluntariness at trial and failed to request that the jury be instructed to decide whether Sepulveda's statements should be disregarded because they were involuntary. (Doc. 59-19 at 80-87.) Sepulveda alleged that a proper investigation would have produced evidence that he suffered from intellectual and cognitive impairments of a type that impact the ability to make a valid waiver of Miranda rights, which were further exacerbated by drug intoxication or withdrawal and extreme paranoia and delusion resulting from cocaine-induced psychosis. (Id. at 83-86.) Sepulveda also alleged that Anders could have shown that the statements were not voluntary because the conditions of the interrogation combined with his cognitive and emotional

impairments and drug use and withdrawal rendered him incapable of resisting police coercion. (Id. at 86-87.)

At the PCRA court hearing, Anders testified that he did not argue the voluntariness of Sepulveda's statement to the jury because Sepulveda was going to testify that he shot the two victims, which was consistent with his statements. (Doc. No. 59-14 at 52-53.) Sepulveda also presented evidence concerning his intellectual and cognitive deficits and his drug use, including on the night of the homicides, as already described in Section III.B.1, supra.

The PCRA court denied relief, concluding that Anders was not ineffective because the underlying claims lacked merit. (Doc. 59-37 at 46.) The PCRA court found that Sepulveda "failed to establish that he was under the influence of drugs or alcohol, or that he was suffering from any cognitive mental deficits, that affected his ability to knowingly, intelligently and voluntarily waive his Miranda rights or affect the voluntariness of his statements." (Id. at 45.) The PCRA court based this finding in part on McAndrew's testimony that Sepulveda stated that he was not under the influence of any drugs or alcohol when the statements were made. (Id. at 43-44.) The PCRA court also relied on a Monroe County Correctional Facility ("MCCF") report prepared when Sepulveda was first incarcerated, which indicated that he was not under the influence of or withdrawing from drugs or alcohol or taking medication, and an MCCF report of observation of Sepulveda over the next four days, which reflected no signs of drug or alcohol withdrawal. (Id. at 44.) The PCRA court also found that Sepulveda "was not subject to police coercion prior to making his statements to the police," based on McAndrew's testimony that he gave Sepulveda bathroom breaks and coffee and removed his handcuffs. (Id. at 45-46.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1135-37. The supreme court first stated that it understood Sepulveda's

Miranda claim as having two components: (1) the waiver was not voluntary because the conditions of Sepulveda's custody and his mental status rendered the waiver coercive as a matter of law; and (2) the waiver was not knowing and intelligent because Sepulveda's mental status or diminished capacity "interfered with his ability to have a full understanding of the nature of the right being abandoned and the consequence of the choice." See id. at 1136 (citation omitted). With respect to the voluntariness of both the waiver and Sepulveda's confession, the supreme court concluded that the PCRA court's finding that there was no evidence of police coercion was supported by the record and the supreme court's prior determination on direct appeal. See id. at 1137 (citing Sepulveda I, 855 A.2d at 793). With respect to the claim that the Miranda waiver was not knowing and intelligent, the supreme court reasoned as follows:

> We also discern no error in the PCRA court's finding that there was no obvious objective indication to counsel, state police, or the trial court that [Sepulveda] suffered from any mental illness at the time he confessed his crimes, such that the police conduct can be viewed as unconstitutional manipulation warranting suppression. As in [Commonwealth v. Mitchell, 902 A.2d 430 (Pa. 2006)] and [Commonwealth v. Logan, 549 A.2d 531 (1988)], the facts surrounding the confession do not suggest that [Sepulveda]'s alleged mental status interfered with the important, but simple (all he needs say is "no") choice of whether to waive his constitutional rights. Furthermore, Dr. Puente testified that there was nothing to suggest that the crime was a result of cocaine-induced psychosis and the confessions took place immediately following the crimes. Thus, counsel had no reason to believe that [Sepulveda] suffered from a mental defect at the time of his confession that was or should have been obvious to police, nor, for that matter, does the evidence suggest that [Sepulveda]'s alleged mental health issues interfered with his waiver. Accordingly, [Sepulveda] is not entitled to relief on this claim.

See id. at 1137.

2. Legal Standard

The admission at trial of an involuntary confession violates the defendant's right to due process. See Miller v. Fenton, 474 U.S. 104, 109-10 (1985). A confession is not voluntary if police obtained it through coercive means. See Colorado v. Connelly, 479 U.S. 157, 167 (1986).

The assessment of voluntariness requires courts to consider the "totality of circumstances," including not only "the crucial element of police coercion," but also the length, location, and continuity of the interrogation, as well as the defendant's maturity, education, physical condition, and mental health. See Withrow v. Williams, 507 U.S. 680, 693 (1993) (citations omitted).

Statements made by a defendant during a custodial interrogation are admissible at trial only if the prosecution proves, by a preponderance of the evidence, that the defendant validly waived his Miranda rights. See Connelly, 479 U.S. at 168. A valid Miranda waiver has two distinct dimensions:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

See Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)). "[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" Edwards v. Arizona, 451 U.S. 477, 483 (1981) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

3. Analysis

Sepulveda contends that the supreme court unreasonably applied Edwards, 451 U.S. at 483, because it only addressed whether his Miranda waiver was voluntary and failed to separately assess whether it was knowing and intelligent. (Doc. No. 42 at 90.) The Court concludes that this contention is without merit. In its decision affirming the PCRA court's denial

of relief, the supreme court identified the separate components of Sepulveda's claim, as well as the "two-prong analysis" required to assess the validity of a defendant's waiver of his Miranda rights. See Sepulveda II, 55 A.3d at 1136 (citing Commonwealth v. Mitchell, 902 A.2d 430, 451 (2006)). The supreme court thereafter addressed both components in analyzing Sepulveda's ineffective assistance of counsel claim. See id. at 1137. Therefore, the Court concludes that the supreme court did not unreasonably apply Edwards, 451 U.S. at 483.

Sepulveda also contends that the supreme court unreasonably applied Wiggins v. Smith, 539 U.S. 510, 527 (2003), by finding that Anders was not ineffective without considering his obligation to conduct a reasonable investigation. (Doc. No. 42 at 88-89) (citing Sepulveda II, 55 A.3d at 1137). The statement at issue appears in a discussion that seems intended to explain why the supreme court finds that the evidence did not show either police coercion or that Sepulveda's mental health issues prevented a knowing and intelligent waiver of his Miranda rights. See Sepulveda II, 55 A.3d at 1137. In the course of that discussion, the supreme court cites Dr. Puente's testimony in the PCRA court and twice refers to the absence of evidence that Sepulveda's alleged mental status or mental health issues interfered with his waiver. See id. In addition, the supreme court compares the facts of Sepulveda's case to those in Logan, 549 A.2d 531, which rejected a claim "that counsel was ineffective for failing to employ psychiatric testimony at the suppression hearing to demonstrate that his mental illness prevented a proper waiver." See id. at 537-38. In view of the supreme court's explicit reliance on the expert evidence Sepulveda presented in the PCRA court and its focus on the effect of Sepulveda's mental status on his waiver, the Court concludes that the supreme court considered the evidence that would have been produced if Anders had conducted a reasonable investigation. Therefore,

the Court concludes that the supreme court's decision is not based on an unreasonable application of Wiggins, 539 U.S. at 527.

For the foregoing reasons, the Court concludes that the supreme court's disposition of this claim did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's fifth ground for relief.

F. Claim VI - Prosecution's Discriminatory Use of Peremptory Challenges and Counsel's Failure to Properly Litigate Batson and J.E.B. Claims

Sepulveda claims that the prosecution used peremptory challenges in a discriminatory manner against the only prospective juror with a Latino surname and against female prospective jurors, in violation of Batson v. Kentucky, 476 U.S. 79 (1986), and J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). (Doc. No. 31 ¶¶ 182-196.) He also makes a claim of ineffective assistance of counsel based on the failure of his trial and appellate counsel to properly litigate the Batson and J.E.B. claims. (Id. ¶¶ 197-203.) These claims have been exhausted. See Sepulveda II, 55 A.3d at 1131-34.

1. Factual and Procedural Background

Sepulveda claims that he established a prima facie case of racial discrimination by showing that the prosecutor used a peremptory challenge to strike the only prospective juror with a Latino surname who survived cause challenges, with no apparent race-neutral reason for the strike. (Doc. No. 31 ¶¶ 193-196.) Sepulveda claims that he established a prima facie case of gender discrimination by showing that the prosecutor used peremptory challenges to exclude nine (9) of the fifteen (15) women he had a chance to strike, for a strike rate of sixty (60) percent, while excluding only four (4) of the twenty (20) men he had the chance to strike, for a strike rate

of twenty (20) percent. (Id. ¶¶ 187-189.) Sepulveda claims that he proved violations of Batson and J.E.B. because the prosecutor failed to articulate race-neutral or gender-neutral explanations in response to the prima facie case. (Id. ¶¶ 191, 196.)

Sepulveda did not object at trial to the prosecutor's use of peremptory challenges or raise his Batson or J.E.B. claims on direct appeal. See Sepulveda II, 55 A.3d at 1133. Sepulveda made those claims for the first time in his PCRA petition, where he also claimed that his trial and appellate counsel were ineffective for failing to litigate the Batson and J.E.B. claims at trial and on direct appeal. (Doc. 59-19 at 96-102.) Sepulveda sought discovery of documents regarding jury selection in his case and in other cases prosecuted by the Monroe County District Attorney's office, which the PCRA court denied. (Doc. Nos. 59-51 at 10-11, 59-24 at 6-7.) At the conclusion of the PCRA court hearing, Sepulveda's counsel stated that they would not be calling witnesses regarding the Batson claim because they could not do so without the requested discovery. (Doc. No. 59-17 at 60.)

The PCRA court found that Sepulveda waived the substantive Batson and J.E.B. claims by failing to raise them at trial or on direct appeal but addressed the merits of the claims for the purpose of deciding the ineffective assistance of counsel claim. (Doc. No. 59-37 at 12-13.) The PCRA court concluded that Sepulveda had not established a prima facie case of purposeful discrimination against the prospective juror with a Latino surname, based on the absence of any supporting record from the trial court at the time of jury selection and the court's conclusion that nothing in the prosecutor's questions to the prospective juror indicated any type of racial bias. (Id. at 15.) The court found that the prosecutor's exercise of peremptory challenges against the female prospective jurors was gender-neutral because the voir dire transcript revealed no apparent gender bias against the excluded prospective jurors and showed gender-neutral reasons

upon which the prosecutor could have based his strikes. (Id. at 16 & n.6.) Having found that the underlying Batson and J.E.B. claims lacked merit, the PCRA court concluded that Sepulveda could not establish ineffective assistance of counsel for failure to pursue the claims. (Id.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1131-34. The supreme court first concluded that Sepulveda waived the substantive Batson and J.E.B. claims because he did not raise them at trial. See id. at 1131. The court then analyzed the merits of the claims under Commonwealth Uderra, 862 A.2d 74 (Pa. 2004), for the purpose of addressing the ineffective assistance of counsel claim. See Sepulveda II, 55 A.3d at 1132-33. In Uderra, the supreme court held that a PCRA petitioner who makes no Batson objection during jury selection may not rely on a prima facie case under Batson, but instead "must prove actual, purposeful discrimination by a preponderance of the evidence . . . in addition to all other requirements essential to overcome the waiver of the underlying claim." See id. at 1132 (citing Uderra, 862 A.2d at 87). Applying this standard, the supreme court held that the record supported the PCRA court's conclusion that there was no indication of purposeful discrimination. See Sepulveda II, 55 A.3d at 1132-33.

2. Legal Standard

A prosecutor's use of peremptory challenges to discriminate on the basis of race or gender violates the Equal Protection Clause of the Fourteenth Amendment. See Batson, 476 U.S. at 89; J.E.B., 511 U.S. at 146. Batson claims are analyzed under a three-part burden shifting framework:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the

> trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.

See Johnson v. California, 545 U.S. 162, 168 (2005) (citation, quotation marks, and brackets omitted). A defendant "satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." See id. at 170. The Third Circuit Court of Appeals has identified five factors that are generally relevant to this inquiry: (1) the number of racial group members in the panel; (2) the nature of the crime; (3) the race of the defendant; (4) a pattern of strikes against racial group members; and (5) the questions and statements during the voir dire. See Holloway v. Horn, 355 F.3d 707, 722 (3d Cir. 2004) (citation omitted). In cases involving claims of gender discrimination under J.E.B., these same factors are relevant, considering gender in place of race. See Copenhefer v. Horn, 696 F.3d 377, 391 (3d Cir. 2012) (citation omitted).

A timely objection to a prosecutor's use of peremptory challenges during jury selection is a prerequisite to raising a Batson claim. See Clausell v. Sherrer, 594 F.3d 191, 194-95 (3d Cir. 2010); Lewis, 581 F.3d at 101-02; Abu-Jamal v. Horn, 520 F.3d 272, 284 (3d Cir. 2008), vacated on other grounds sub nom. Beard v. Abu-Jamal, 558 U.S. 1143 (2010). A defendant who fails to make a timely objection has forfeited federal habeas review of a Batson claim. See Clausell, 594 F.3d at 194-95; Lewis, 581 F.3d at 102; Abu-Jamal, 520 F.3d at 284.

3. Analysis

The Court will first address Sepulveda's substantive Batson and J.E.B. claims. The Third Circuit Court of Appeals has held that "the existence of a timely objection to the use of peremptory challenges is not merely a matter of state procedural law," but instead is required to preserve a Batson claim for federal habeas review. See Lewis, 581 F.3d at 102 (citing Abu-Jamal, 520 F.3d at 284). Because Sepulveda did not make a timely objection, the Court

concludes that he has forfeited federal habeas review of his substantive Batson and J.E.B. claims. For that reason, the Court will deny relief on those claims.

The Court will next address Sepulveda's claim that his counsel was ineffective for failing to raise the Batson and J.E.B. claims at trial and on direct appeal. Sepulveda argues that the supreme court's denial of relief under Uderra, 862 A.2d at 87, is contrary to clearly established federal law because it imposed a more exacting standard than the Batson framework. (Doc. No. 42 at 97-98.) The Third Circuit recently addressed a similar claim in Hutchinson v. Superintendent Greene SCI, 860 F. App'x 246 (3d Cir. 2021) (unpublished). The petitioner in that case claimed that his trial and direct appeal counsel were ineffective for failing to challenge the prosecutor's discriminatory use of peremptory strikes. See id. at 248. The Pennsylvania Supreme Court denied relief based on Uderra, 862 A.2d at 87, because the petitioner failed to prove actual, purposeful discrimination, which the petitioner claimed was an unreasonable application of Batson. See id. (citing Commonwealth v. Hutchinson, 25 A.3d 277, 287 (Pa. 2011)). The Third Circuit concluded that it was unnecessary to address the Uderra rule because, even assuming that the supreme court's decision involved an unreasonable application of Batson, the petitioner's claim failed under de novo review because he failed to demonstrate Strickland prejudice. See id. at 248-49. The Third Circuit found no merit in the petitioner's contention that he was not required to show Strickland prejudice because a successful Batson claim would establish structural error. See id. at 249. The Third Circuit then concluded that, given the overwhelming evidence of guilt, the alleged deficient performance of counsel did not have a reasonable probability of affecting the outcome. See id.

The Court concludes that it is unnecessary to address whether the supreme court's denial of relief based on Uderra, 862 A.2d at 87, is contrary to or an unreasonable application of

Batson. Instead, as in Hutchinson, 860 F. App'x 246, the Court finds on de novo review that Sepulveda's ineffective assistance of counsel claim fails because he has not established prejudice. See Strickland, 466 U.S. at 697. Sepulveda asserts that he was prejudiced because it is reasonably likely that he would have been acquitted had counsel performed effectively. (Doc. No. 42 at 96.) The Court does not agree. Sepulveda admitted to shooting both victims and to helping Heleva push Mendez back into the house after he had fled and sought help from a neighboring house. Sepulveda's imperfect defense of others theory had little likelihood of success given the circumstances of the homicides and his role in continuing and escalating the confrontation. Upon review of the totality of the evidence in this case, the Court concludes Sepulveda has not demonstrated a reasonable probability that the result of his trial would have been different had his trial counsel objected to the prosecutor's peremptory challenges. Therefore, his ineffective assistance of trial counsel claim fails on de novo review. The Court also concludes that Sepulveda has failed to show ineffective assistance of appellate counsel because he has not demonstrated that, despite the absence of an objection at trial, there is a reasonable probability that the Batson and J.E.B. claims would have succeeded on direct appeal.

The Court will also deny Sepulveda's request for an evidentiary hearing to further develop his Batson and J.E.B. claims. (Doc. 42 at 100-01.) In deciding whether to grant an evidentiary hearing, "a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." See Schriro v. Landrigan, 550 U.S. 465, 474 (2007). A district court is not required to hold an evidentiary hearing "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief." See id. For the reasons already discussed, the Court has concluded that habeas relief is precluded because Sepulveda forfeited federal habeas

review of his substantive Batson and J.E.B. claims and failed to establish Strickland prejudice. Based on this disposition of the claims, the Court concludes that an evidentiary hearing could not enable Sepulveda to prove factual allegations that, if true, would entitle him to relief. See id. at 474. Accordingly, the Court will deny Sepulveda's request for an evidentiary hearing.

For the foregoing reasons, the Court will deny Sepulveda's sixth ground for relief.

G. Claim VII - Defense Counsel's Undisclosed Conflict of Interest

Sepulveda claims that he was denied his right to effective assistance of counsel because his counsel represented the trial prosecutor in Sepulveda's case while also representing Sepulveda on direct appeal. (Doc. No. 31 ¶¶ 204-218.) This claim has been exhausted. See Sepulveda II, 55 A.3d at 1145-48.

1. Factual and Procedural Background

Sepulveda was represented by Anders and Schurdak on direct appeal. See Sepulveda I, 855 A.2d at 785. They filed Sepulveda's opening appellate brief on May 5, 2003, followed by his reply brief on June 18, 2003. (Doc. No. 64-4 at 2.) Schurdak argued the appeal on December 4, 2003. (Id.) On August 19, 2004, the Pennsylvania Supreme Court issued its decision affirming Sepulveda's convictions and death sentences. See Sepulveda I, 855 A.2d at 783.

In early November 2003, Monroe County District Attorney Pazuhanich, the trial prosecutor in Sepulveda's case, was elected to the Court of Common Pleas of Monroe County. See Sepulveda II, 55 A.3d at 1145. On November 29, 2003, he was arrested in Luzerne County on charges unrelated to his duties as a prosecutor involving the indecent assault of a child. See id. Anders and Schurdak undertook the representation of Pazuhanich five days before the argument in Sepulveda's direct appeal. See id. at 1145, 1147 n.34; (Doc. No. 59-14 at 34-35). Anders and Schurdak met with Pazuhanich and conducted some preliminary investigation before

being replaced by other counsel until a later point in the case. See Sepulveda II, 55 A.3d at 1145; (Doc. No. 59-14 at 34-35).

On January 5, 2004, Pazuhanich was sworn in by a notary public as Judge of the Court of Common Pleas of Monroe County and was placed on administrative suspension shortly thereafter. See Sepulveda II, 55 A.3d at 1145. On July 12, 2004, Pazuhanich pleaded nolo contendere in the Luzerne County Court of Common Pleas to several charges and was sentenced to ten years' probation and directed to register pursuant to Megan's Law. See id. (citing Pa. Cons. Stat. § 9791 et seq.). On October 1, 2004, Pazuhanich was removed from the bench by the Court of Judicial Discipline. See id. Anders returned to represent Pazuhanich in the guilty plea process and in the judicial disciplinary proceedings. See id. Anders did not at any point advise Sepulveda that he was representing Pazuhanich. See id. at 1145-46; (Doc. No. 59-14 at 35-36).

In his PCRA petition, Sepulveda claimed that he was denied his right to effective assistance of counsel due to Anders' undisclosed conflict of interest. (Doc. No. 59-19 at 68-73.) The PCRA court denied relief on the claim, finding that no conflict of interest existed because Anders' simultaneous representation of Pazuhanich and Sepulveda "involved totally unrelated matters and the representation of one did not adversely affect the representation of the other" and that "there was no significant risk that the representation of Pazuhanich would materially limit Anders' responsibilities to [Sepulveda] in his direct appeal." (Doc. No. 59-37 at 65-66.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1145-48. The supreme court first identified the applicable standard, stating that prejudice is presumed if counsel is burdened by an "actual" conflict, which requires a petitioner to demonstrate that: (1) counsel actively represented conflicting interests; and (2) those conflicting interests adversely affected his lawyer's performance. See id. at 1147 (citation and

quotation marks omitted). The supreme court noted that Anders' representation of Pazuhanich did not begin until after Sepulveda's direct appeal issues were already determined and briefed. See id. at 1147. While recognizing that Anders' representation of Pazuhanich was "troubling" and should have been disclosed to Sepulveda, the court concluded that the mere existence of the overlap in representation did not prove that Anders' representation of Pazuhanich adversely affected Sepulveda's interests, as required to establish an actual conflict of interest. See id. The court further concluded that Sepulveda had not shown an adverse effect on the basis that Anders could have used information about Pazuhanich's arrest in Sepulveda's direct appeal to show that Pazuhanich was biased against female jurors or biased against Sepulveda because he was a drug dealer. See id. at 1147-48.

2. Legal Standard

A criminal defendant is denied his Sixth Amendment right to effective assistance of counsel if his lawyer "actively represented conflicting interests" and "an actual conflict of interest adversely affected his lawyer's performance." See Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). If a defendant makes that showing, prejudice is presumed. See Strickland, 466 U.S. at 692. To establish that a conflict of interest adversely affected his lawyer's performance, a defendant must show that "some plausible alternative defense strategy or tactic might have been pursued" that "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." See United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988) (citation and quotation marks omitted). The Supreme Court has recognized a limited automatic reversal rule, which does not require the defendant to show that his counsel's performance was adversely affected, in cases where the trial court improperly required joint representation over

objection. See Mickens v. Taylor, 535 U.S. 162, 173-74 (2002) (citing Holloway v. Alabama, 435 U.S. 475, 487-91 (1978)).

3. Analysis

Sepulveda contends that, due to Anders' failure to disclose the conflict, he was not required to show an actual effect on the defense in order to receive relief and therefore the supreme court's decision was both contrary to and an unreasonable application of Strickland, Cuyler, and Holloway. (Doc. No. 42 at 106-07.) Sepulveda does not identify a Supreme Court decision holding that the automatic reversal rule applies in these circumstances. See (Doc. No. 42 at 102-107). In Holloway, the Court held that automatic reversal is required when a trial court improperly requires joint representation over timely objection. See Holloway, 435 U.S. at 488. However, the Court has declined to extend this rule beyond cases "in which (as in Holloway) counsel protested his ability to simultaneously represent multiple defendants." See Mickens, 535 U.S. at 173. Absent objection at trial, a defendant is entitled to reversal only if he demonstrates that "an actual conflict of interest adversely affected his lawyer's performance." See Cuyler, 446 U.S. at 348-49. The Court concludes that the supreme court's holding that Sepulveda was not entitled to relief without showing that an actual conflict of interest adversely affected his counsel's performance is not contrary to this clearly established federal law.

The Court further concludes that the supreme court did not unreasonably apply clearly established federal law by finding that Sepulveda failed to show the required adverse effect. Sepulveda does not specify how any information about the circumstances underlying Pazuhanich's arrest could have been used at the point Anders began to represent Pazuhanich, five days before oral argument in Sepulveda's appeal and after the appeal had been fully briefed. See (Doc. No. 42 at 106-07). Accordingly, the Court concludes that it was reasonable for the

supreme court to deny relief on the ground that Sepulveda did not identify any plausible alternative defense strategy that Anders could have pursued that was inherently in conflict with or not undertaken due to Anders' loyalty to Pazuhanich. See Sepulveda II, 55 A.3d at 1147-48.

For the foregoing reasons, the Court concludes that the supreme court's disposition of this claim did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's seventh ground for relief.

H. Claim VIII – Trial Counsel's Failure to Object to Victim Impact Evidence

Sepulveda claims ineffective assistance of counsel based on Anders' failure to object to victim impact evidence or to request a curative instruction concerning that evidence. (Doc. No. 31 ¶¶ 219-235.) This claim has been exhausted. See Sepulveda II, 55 A.3d at 1139-40.

1. Factual and Procedural Background

Sepulveda alleges that Anders failed to object to two instances in which the jury was invited to base its decision on sympathy for the victims. First, he claims that Anders failed to object or request a curative instruction when Dawn Mendez, the sister of victim John Mendez, testified that her brother had a gold cross and guardian angel keychain in his possession when she last saw him, after which those items were admitted into evidence. (Doc. Nos. 31 ¶¶ 223-225, 59-7 at 55-57.) Second, Sepulveda claims that Anders failed to object when members of the victims' families carried photographs of the victims into the courtroom. (Doc. No. 31 ¶¶ 229-230.) To establish that this occurred, he relies on a local newspaper article, which he claims featured a photograph with the following caption:

> Relatives of murder victims John Joseph Mendez, 19, and Ricardo "Cano" Lopez Jr. of New York City carried pictures of their loved [ ] into court. At right is

> Deborah Murphy, mother of Mendez with a picture of her son. At left is Daisy Hidalgo, Lopez' aunt with a picture of Lopez. Pictured at left rear is Elbin Flores with a picture of his nephew, Ricardo Lopez.

(Id. ¶ 230) (citing William Doolittle, "Sepulveda Jury Decides Quickly: He's Guilty," *The Pocono Record* (Nov. 23, 2002)).

Sepulveda raised these ineffective assistance of counsel claims in his PCRA petition. (Doc. No. 59-19 at 111-13, 116-17.) The PCRA court concluded that Anders was not ineffective for failing to object to the evidence offered through Dawn Mendez because it "was relevant for purposes of identifying the decedent through personal items found at the scene," and, even if irrelevant to the issue of guilt, "its probative value was not outweighed by its prejudicial effect." (Doc. No. 59-37 at 48-49.) The PCRA court further concluded that, even if the claim was meritorious, Sepulveda did not demonstrate that he was prejudiced. (Id. at 49-50.) With respect to the victims' photographs, the PCRA court found that Sepulveda had not established the factual predicate of the claim. (Id. at 49.) The court noted that Sepulveda did not produce the newspaper article he relied on or point to any evidence in the record showing that the photographs were present in the courtroom. (Id.) In addition, the PCRA court judge (who was also the trial court judge) relied on his own recollection of the trial: "This court clearly recalls that no such extra-record victim impact evidence was present in the courtroom during either phase of [Sepulveda]'s trial and such evidence would not have been permitted. Had a family member attempted to bring such evidence into the courtroom, it would have immediately been removed." (Id.)

The Pennsylvania Supreme Court affirmed the PCRA court's denial of relief. See Sepulveda II, 55 A.3d at 1140. The court held that the cross and keychain were properly admitted to establish identity and also noted that Sepulveda did not suggest that the evidence

introduced for this purpose was actually argued as victim impact evidence. See id. Because the underlying claim lacked a factual predicate, the court concluded that the claim of ineffectiveness was necessarily frivolous. See id. The court found that Sepulveda failed to prove the photographs of the victims were ever brought into the courtroom, noting that the newspaper article he relied on was hearsay and in any event was contradicted by the trial judge's recollection. See id. Because the underlying claim was baseless, the court concluded that counsel could not be deemed ineffective. See id.

2. Analysis

The Court will first address the claim based on Anders' failure to object to the testimony of Dawn Mendez at trial. The Court finds that it is unnecessary to address deficient performance because the claim can be disposed of based on the Strickland prejudice prong. See Strickland, 466 U.S. at 697. Although the Pennsylvania Supreme Court did not explicitly discuss prejudice, the issue was addressed by the PCRA court. See Sepulveda II, 55 A.3d at 1139-40; (Doc. No. 59-37 at 49-50). "Section 2254(d) deference applies to any claim that has been adjudicated on the merits in any state court proceeding, which 'can occur at any level of state court' as long as the state court's resolution has preclusive effect." Collins v. Sec'y of Penn. Dep't of Corr., 742 F.3d 528, 545 (3d Cir. 2014) (quoting Thomas v. Horn, 570 F.3d 105, 117 (3d Cir. 2009)). Where, as here, the supreme court did not question or undermine a PCRA court's finding of no Strickland prejudice, AEDPA requires deference to that finding. See id. at 546.

The Court concludes that the PCRA court reasonably applied the Strickland standard by finding that Sepulveda was not prejudiced by Anders' failure to object to the testimony of Dawn Mendez regarding the gold cross and guardian angel keychain. (Doc. No. 59-37 at 49-50.) Upon review of the totality of the evidence in this case, the Court concludes that there is no reasonable

probability that the result of Sepulveda's trial would have been different had Anders objected to that testimony. As already discussed, Sepulveda admitted to shooting both victims and to helping Heleva push Mendez back into the house after he had fled. Sepulveda's imperfect defense of others theory had little likelihood of success given the circumstances of the homicides and his role in continuing and escalating the confrontation. Accordingly, the Court finds that the PCRA court reasonably concluded that Sepulveda failed to establish Strickland prejudice.

The Court will next address Sepulveda's claim concerning the display of the victims' photographs. Sepulveda contends that the supreme court's decision is based on an unreasonable determination of the facts, but he does not offer any supporting analysis or identify any evidence in the record that refutes the trial judge's recollection that the victims' photographs were not brought into the courtroom or seen by the jury. See (Doc. No. 42 at 111). Consequently, the Court concludes that the supreme court did not unreasonably determine that Sepulveda failed to prove that the photographs were displayed in the courtroom. See Sepulveda II, 55 A.3d at 1140.

For the foregoing reasons, the Court concludes that the state courts' disposition of this claim did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's eighth ground for relief.

I. Claim IX - Lack of Transcript of Portions of Trial

Sepulveda has withdrawn this claim, which concerns the failure to transcribe side-bar discussions. (Doc. Nos. 31 ¶¶ 236-244, 42 at 107.) Therefore, it is unnecessary for the Court to address the ninth claim for relief.

J. Claim X - Cumulative Prejudicial Effect of All Errors

Sepulveda claims that, even if he is not entitled to relief on any individual claim, the cumulative effect of all the errors alleged in his petition denied him a fair trial. (Doc. No. 31 ¶¶ 245-248.) This claim has been exhausted. See Sepulveda II, 55 A.3d at 1150-51.

The Pennsylvania Supreme Court denied relief on the basis of cumulative error, noting that it had cited a lack of prejudice in rejecting only two of Sepulveda's ineffective assistance of counsel claims: (1) for failure to present evidence in support of the imperfect defense of others theory; (2) as an alternative ground for denying the claim relating to the self-defense jury instruction. See id. The court concluded that the cumulative error claim did not warrant relief because the two claims "involve entirely disparate inquiries" and, even cumulating the claims, "we have no doubt that the outcome of the guilt phase proceedings would have been the same given the overwhelming evidence of guilt, including [Sepulveda]'s several confessions to the police." See id. at 1151.

"Individual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." Fahy, 516 F.3d at 205 (citation omitted). "Cumulative errors are not harmless if they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief unless he can establish 'actual prejudice.'" Albrecht, 485 F.3d at 139 (quoting Brecht, 507 U.S. at 637).

Sepulveda contends that the supreme court unreasonably applied Strickland and its progeny by considering evidence of his guilt in denying relief on his cumulative error claim. (Doc. No. 42 at 115.) The Court concludes that this contention is without merit. A claim that a petitioner was denied a fair trial by reason of the cumulative effect of errors at trial is addressed

under the Brecht harmless error standard. See Albrecht, 485 F.3d at 139 (quoting Brecht, 507 U.S. at 637). That standard considers whether the cumulative prejudice of identified errors undermined the reliability of the verdict, which requires an assessment of the evidence of guilt at trial. See Albrecht, 485 F.3d at 139; Fahy, 516 F.3d at 205.

The Court concludes that the supreme court's disposition of this claim did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law and did not result in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d). Accordingly, the Court will deny Sepulveda's tenth ground for relief.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a final order in a proceeding initiated pursuant to 28 U.S.C. § 2254 unless a circuit justice or judge issues a certificate of appealability ("COA"). A COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327. In the instant case, jurists of reason could not disagree with the Court's resolution of Sepulveda's constitutional claims or conclude that the issues presented are adequate to deserve encouragement to proceed further. Accordingly, the Court will not issue a COA in this case.

V. CONCLUSION

For the foregoing reasons, the Court will deny Sepulveda's amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 31) and the Court will not issue a COA. An appropriate Order follows.

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 402 CAP
Appellee	:	Appeal from the Judgment of Sentence entered on January 27, 2003 in the Court of Common Pleas of Monroe County.
v.	:	
MANUEL SEPULVEDA,	:	ARGUED: December 4, 2003
Appellant	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. JUSTICE NIGRO **DECIDED: August 19, 2004**

In this capital case, Appellant Manuel Sepulveda appeals from the sentences of death imposed by the Court of Common Pleas of Monroe County. A jury found Appellant guilty of two counts of murder in the first degree, two counts of aggravated assault, criminal conspiracy, unlawful restraint, and tampering with or fabricating evidence. Following a penalty hearing, the jury determined that the one aggravating circumstance it found with respect to each murder[1] outweighed the two mitigating circumstances it also found with respect to each murder.[2] Accordingly, the jury returned a sentence of death for each of the

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[1] Specifically, the aggravating circumstance found by the jury was that Appellant had been convicted of another murder committed either before or at the time of the offense at issue, 42 Pa.C.S. § 9711(d)(11).

[2] The two mitigating circumstances found by the jury were that Appellant had no significant history of prior criminal convictions, 42 Pa.C.S. § 9711(e)(1), and that he was only twenty-two years-old when he committed the murders, 42 Pa.C.S. § 9711(e)(4).

murder convictions,[3] and on January 27, 2003, the trial court formally imposed two death sentences against Appellant. After the trial court denied Appellant's post-sentence motion, Appellant filed this direct appeal.[4] For the reasons that follow, we affirm the judgments of sentence.

Appellant first contends that the jury's verdict convicting him of two counts of murder in the first degree was not supported by the evidence. As in all cases in which the death penalty has been imposed, this Court is required to determine whether the evidence is sufficient to sustain the verdict for first-degree murder. See Commonwealth v. Spotz, 716 A.2d 580, 583 (Pa. 1998); Commonwealth v. Zettlemoyer, 454 A.2d 937, 942 n.3 (Pa. 1982), *cert. denied*, 461 U.S. 970 (1983). In conducting such a review, we must view the evidence admitted at trial, and all reasonable inferences drawn therefrom, in the light most favorable to the Commonwealth as verdict winner, and determine whether the jury could find every element of the crime beyond a reasonable doubt. See Spotz, 716 A.2d at 583; Commonwealth v. Keaton, 729 A.2d 529, 536 (Pa. 1999). Circumstantial evidence alone is sufficient to convict a defendant of a crime. See Commonwealth v. Rios, 684 A.2d 1025, 1028 (Pa. 1996), *cert. denied*, 520 U.S. 1231 (1997).

Evidence is sufficient to sustain a conviction for first-degree murder where the Commonwealth establishes that the defendant unlawfully killed another human being with the specific intent to do so.[5] See 18 Pa.C.S. § 2502(d); Rios, 684 A.2d at 1030. The use of a deadly weapon on a vital part of the body is sufficient to establish the specific intent to kill.

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3 42 Pa.C.S. § 9711(c)(4).

4 Pursuant to 42 Pa.C.S. § 9711(h), this Court has automatic jurisdiction to review the trial court's judgment of a sentence of death.

5 A defendant intentionally kills another human being if the killing was willful, deliberate, and premeditated. See 18 Pa.C.S. § 2502(d).

See Commonwealth v. Rivera, 773 A.2d 131, 135 (Pa. 2001); Commonwealth v. Jones, 668 A.2d 491, 500 (Pa. 1995).

Here, the evidence adduced at trial establishes that on November 26, 2001, Appellant was at the home of Daniel Heleva and Robyn Otto in Polk Township, Monroe County, where he resided with the couple and their two children. At approximately 6:30 p.m., John Mendez and Ricardo Lopez arrived at the house to recover two guns that Mendez claimed belonged to him. Appellant retrieved the guns from an upstairs bedroom and gave them to Mendez. Mendez and Lopez then left.

Later that night, Heleva returned to the house with Richard Boyko and discovered that the guns were missing. After Appellant explained to Heleva that Mendez had taken the guns, Heleva instructed Boyko to call Mendez and have him come back to the house. At this time, another man, Jimmy Frey, was in the living room watching television.

Mendez and Lopez returned to the house, but Heleva did not permit Lopez to enter. Mendez, however, came inside, where Heleva immediately accused him of stealing his guns and the two men began fighting in the kitchen. When this fight was resolved, Appellant and Lopez joined Heleva and Mendez in the kitchen, where the four men then sat around the table talking. Boyko left the house. While the men were in the kitchen, another argument erupted. This time, Appellant grabbed a .12 gauge shotgun and shot Mendez in the stomach. He then turned the gun towards Lopez and shot him in the side. After Lopez collapsed on the floor, Appellant placed the barrel of the shotgun on Lopez's back and again fired the weapon, killing him. Appellant then chased Mendez up the stairs to the second floor of the house, where he shot Mendez a second time. Although wounded, Mendez escaped from Appellant and Heleva and fled to a neighbor's house with Appellant and Heleva in pursuit. Mendez knocked on the neighbor's front door, but before anyone answered, Appellant and Heleva grabbed Mendez and dragged him across the lawn back to their house. Frey, who had been watching the incident, retrieved the shotgun that

Appellant had dropped on the lawn, and hid it inside a sofa in the house. Once the men had dragged Mendez back inside, Appellant inflicted several blows with a hatchet type of weapon, killing him.

Meanwhile, police received a 911 call from Heleva's neighbor reporting a domestic violence dispute at Heleva's home. In response, Pennsylvania State Troopers Matthew Tretter and Joel Rutter arrived at the scene and spoke to the neighbor, who told them that she had heard a loud noise and a high-pitched voice screaming "help me" outside of her door and that when she looked outside, she had seen someone being dragged across her front lawn into Heleva's residence. The troopers noticed that there was a smear of blood on the neighbor's front door and that a wooden porch railing had been broken. The troopers then proceeded to Heleva's residence. Along the way, the troopers noticed a bloody jacket on the neighbor's lawn, and they observed blood on Heleva's door when they arrived. When the troopers knocked on the door and announced their presence, Appellant opened the door and initially denied knowledge of any incident, but then stated that he had been assaulted by two men.

At this time, Trooper Tretter placed Appellant in the back of the patrol car, handcuffed him, and, still believing that this was a domestic violence incident, asked Appellant where the woman was. Appellant responded: "There is no 'she.' They are in the basement. I shot them." See N.T., 11/15/2002, at 80. Trooper Tretter then called for backup. After additional state troopers arrived on the scene, they entered the residence, set up a perimeter and initiated a crime scene log. The police found the bodies of Lopez and Mendez in the basement of the residence.[6]

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[6] Lopez was found beneath slabs of insulation and dry wall material, with his pants pulled to his ankles, and Mendez was found beneath a pile of laundry, stripped naked with his thumb in his mouth and with a rubber bungee cord wrapped tightly around his neck.

The troopers transported Appellant, along with Heleva, Robyn Otto, and their children, to the Lehighton Barracks. Boyko and Frey were also rounded up and brought to the station. Once at the station, Trooper Joseph Sommers and Corporal Thomas McAndrew read Appellant Miranda warnings at approximately 3:45 a.m. Appellant signed a rights waiver form, and the troopers began to interview him. After about one hour, at approximately 5:04 a.m., Appellant began to make a tape-recorded statement. In this statement, Appellant admitted that he shot both Mendez and Lopez twice, but claimed that he only started shooting after he believed Lopez was about to go out to his car to retrieve a gun. See N.T., 11/18/2002, at 270-71. Appellant also admitted that after Mendez ran outside following the shooting, he and Heleva dragged Mendez back inside, at which time Appellant grabbed the hatchet type weapon and struck Mendez in the head. See id. at 272-73.

After Appellant made this statement, at approximately 6:00 a.m., the officers took a break from this questioning. Trooper Sommers and Corporal McAndrew conferred with the other investigators involved in the case and returned to Appellant for further questioning. At approximately 7:10 a.m., Appellant indicated that he wished to speak to Corporal McAndrew alone and proceeded to tell the corporal that he had lied in his original statement. Appellant then gave a statement which again implicated himself in the murders, but in this statement, Appellant claimed that he had actually only shot Lopez once, in the kitchen. See N.T., 11/19/2002, at 290. Appellant stated that he did not shoot Lopez the second time. see id. at 291.[7] Although Appellant also admitted that he shot Mendez a

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[7] Instead, Appellant indicated that Heleva shot Lopez the second time. According to Appellant's statement to Corporal McAndrew, after he shot Lopez and Mendez in the kitchen, he chased Mendez up the stairs, where the two engaged in a struggle. During that struggle, Appellant claimed that he heard shots fired from the kitchen where he had left Heleva with the gun. See N.T., 11/19/2002, at 291.

second time, Appellant claimed that it was Heleva who eventually struck Mendez in the head with the hatchet type weapon, killing him. See id. at 292-93.

Appellant also testified at his trial, where he again admitted to shooting both Lopez and Mendez. Appellant told the jury, however, that he had not intended to kill either Lopez or Mendez. See N.T., 11/21/2002, at 635-38. In general, Appellant's testimony described the events as he had recounted them in his second statement to Corporal McAndrew.[8] See id.

Dr. Samuel Land, who performed the autopsies on Mendez and Lopez, also took the stand at Appellant's trial. Dr. Land testified that, to a reasonable degree of medical certainty, the cause of Lopez's death was shotgun wounds to the chest and abdomen, and that each wound was to a vital part of the body and independently fatal. See N.T., 11/19/2002, at 343, 348-49. Dr. Land further testified that, to a reasonable degree of medical certainty, the cause of Mendez's death was gunshot wounds to the abdomen[9] and

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[8] Although there were a few inconsistencies between Appellant's trial testimony and his statement to Corporal McAndrew at the police station, only two of the inconsistencies are worth noting. In his statement to Corporal McAndrew, as noted above, Appellant indicated that he had only heard Heleva shoot Lopez the second time. See infra, note 7. However, at trial, Appellant told the jury that after he shot Lopez and Mendez in the kitchen, he actually saw Heleva grab the gun and fire a second shot into Lopez's back. N.T., 11/21/2002, at 636. Second, although Appellant admitted to shooting Mendez a second time in both his statement to Corporal McAndrew and at trial, stating both times that the shooting occurred amidst a struggle between Heleva and Mendez, he described the circumstances of this particular shooting differently at trial than in his statement to Corporal McAndrew. See N.T., 11/19/2002, at 292;1/21/2002, at 637. In his statement to Corporal McAndrew, Appellant merely stated that he grabbed the gun away from Heleva and Mendez as they struggled, turned the gun toward Mendez, and shot him in the arm. See N.T., 11/19/2002, at 292. Meanwhile, at trial, Appellant testified that when he shot Mendez in the arm, he did so accidentally in an attempt to wrestle the gun away from Mendez and Heleva. See N.T., 11/21/2002, at 637.

[9] Dr. Land explained that there were two shots fired at Mendez: one shot that penetrated Mendez's lower right abdomen, and one shot that passed through Mendez's left forearm before striking his upper abdomen. See N.T., 11/19/2002, at 353-54.

sharp force wounds to the head. Id. at 358-61. Dr. Land stated that each of the gunshot wounds to Mendez's abdomen was to a vital part of his body. Id.

Based on this evidence, we agree with the trial court that there was clearly sufficient evidence to convict Appellant of the murders of Lopez and Mendez. Although Appellant now argues, without much elaboration, that there was not sufficient evidence to convict him because the Commonwealth failed to establish that he had the specific intent to kill anyone, the evidence shows just the opposite. As detailed above, Appellant shot both Mendez and Lopez in vital parts of the body, which alone is sufficient to establish Appellant's specific intent to kill. See Rivera, 773 A.2d at 135.[10]

In his next claim, Appellant argues that the trial court erred in denying the motion to suppress that he filed prior to his trial. Specifically, Appellant argues that the trial court should have suppressed: (1) his statement to Trooper Tretter in the patrol car, because he made it during the course of a custodial interrogation but before he was given Miranda warnings; and (2) the statement he made to Corporal McAndrew after he asked to speak with the corporal alone, as that statement was elicited after he had been in custody for over six hours, in violation of Commonwealth v. Davenport, 370 A.2d 301 (Pa. 1977). For the reasons set forth below, we find that the trial court did not err in refusing to suppress these statements.

In evaluating the denial of a suppression motion, our initial task is to determine whether the trial court's factual findings are supported by the record. See Commonwealth v. Bridges, 757 A.2d 859, 868 (Pa. 2000). In making this determination, we must "consider

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[10] Even assuming *arguendo* that Appellant only shot Lopez once and shot Mendez a second time only accidentally, as he claimed at trial, Dr. Land testified, as noted above, that both of the gunshot wounds suffered by Lopez were to vital parts of his body and that the first shot to Mendez's abdomen, which Appellant concedes he fired, was to a vital part of the body. Thus, even under Appellant's own version of the events at trial, the jury was entitled to infer that Appellant had the specific intent to kill both Mendez and Lopez.

only the evidence of the prosecution's witnesses, and so much evidence of the defense that remains uncontradicted when fairly read in the context of the record as a whole." Id. When the evidence supports the factual findings, we are bound by such findings and may only reverse the suppression court if the legal conclusions drawn therefrom are erroneous. Id.

In the first instance, Appellant completely fails to explain how he was unduly prejudiced by the admission of either of the statements he now argues the trial court should have suppressed. Appellant took the stand at his trial and admitted that he did indeed shoot Lopez and Mendez, and this testimony was, in all material respects, similar to the second statement he gave to Corporal McAndrew at the police station. Likewise, Appellant's admission to Trooper Tretter in the patrol car that he had shot people is in no way inconsistent with his testimony at trial that he had shot Mendez and Lopez. Thus, we fail to see, and Appellant fails to demonstrate, how he was prejudiced by the admission of the two statements he now says the trial court improperly refused to suppress.[11] In any event, as discussed below, we agree with the trial court that each of the statements Appellant now complains of was properly admitted at trial.

Appellant first argues that the trial court erred in refusing to suppress his statement to Trooper Tretter in the patrol car because it was obtained while he was in police custody but before he was read his Miranda rights. We disagree.

Whether a person is in custody for Miranda purposes depends on whether the person is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted. See Commonwealth v. Williams, 650 A.2d 420, 427 (Pa. 1994). The test for

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[11] Appellant makes no argument, for example, that his trial testimony was not substantially cumulative of the allegedly improperly admitted statements or that he only took the stand in an attempt to explain the two inculpatory statements that the trial court refused to suppress.

custodial interrogation does not depend upon the subjective intent of the law enforcement officer, but rather, focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted. See id.; Commonwealth v. Brown, 375 A.2d 1260 (Pa. 1977). Once in custody, and prior to interrogation, a person must be provided with Miranda warnings before any statement he makes will be deemed admissible. See id. Miranda warnings, however, are not required in certain situations where the police ask questions to ensure public safety and not to elicit incriminating responses. New York v. Quarles, 467 U.S. 649, 655-57 (1984); Commonwealth v. Stewart, 740 A.2d 712, 719-20 (Pa. Super. 1999), aff'd on other grounds sub nom. Commonwealth v. Perry, 798 A.2d 697 (Pa. 2002) (plurality).

Here, Appellant was clearly deprived of his freedom of action when Trooper Tretter handcuffed him, placed him in the back of the patrol car, and locked the door. See Williams, 650 A.2d at 427. Therefore, we agree with Appellant that he was indeed in custody for Miranda purposes at that time.[12] However, we also agree with the trial court

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[12] In Commonwealth v. Gwynn, 723 A.2d 143, 149 (Pa. 1999), a plurality of this Court, in an Opinion Announcing the Judgment of the Court ("OAJC"), concluded that the police officer's placement of the defendant in a patrol car, and subsequent handcuffing of the defendant, did not rise to the level of an arrest under the circumstances presented in that case. There, an officer stopped the defendant after the defendant repeatedly walked away from the officer in an area where a burglary had been reported. The officer asked the defendant for identification, but because the officer feared the defendant might flee after he kept moving his head, the officer placed the defendant in his patrol car. After a backup officer arrived, the officers thought they saw the defendant trying to escape, and as a result, they placed him in handcuffs. On appeal, the OAJC rejected the defendant's claim that these actions by the police constituted an illegal arrest, instead concluding that the actions were all part of a legitimate investigative detention. In reaching this conclusion, the OAJC found that the officers had reasonable suspicion to stop the defendant initially and then stated:

> The remaining actions during the *Terry* stop constituted permissible preservation of the status quo while the officer confirmed or dissipated his suspicions. The preservation of the status quo occurred: while the officer

(continued...)

that overriding considerations of public safety justified Trooper Tretter's failure to provide Appellant with Miranda warnings before asking him the limited question regarding the woman's whereabouts while Appellant was in the patrol car. Based on the call from Appellant's neighbor, Trooper Tretter and Trooper Rutter believed that they were responding to a violent domestic dispute. When they arrived at the scene, the troopers not only observed damaged property, but also saw blood on the neighbor's front door, on a jacket left in the yard, and on the door of Appellant's residence. The troopers then received a confusing account of events from Appellant. Given these circumstances, the troopers could not be certain of the extent of danger before them nor could they be sure of the safety of the alleged woman involved in the reported domestic violence incident. In addition, once Appellant was placed in the patrol car, Trooper Tretter asked Appellant a

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(...continued)

> retrieved [Appellant's] identification to confirm the identity of the appellant; by placing appellant in the police car during this nighttime street encounter in a high-crime area while his identification was checked; and when appellant was handcuffed after he tried to escape before the check on identification was completed.

Id. at 149. The OAJC then apparently applied this analysis in rejecting Appellant's subsequent claim that his statements made in the patrol car before he was given Miranda warnings should have been suppressed, stating that "the record reflects that [the statements] did not occur as the result of custodial interrogation." Id. at 150.

Gwynn does not control our inquiry here. In the first instance, Gwynn is only an opinion announcing the judgment of the Court, and its reasoning is therefore not binding on this Court. See C&M Developers v. Bedminster Twp. ZHB, 820 A.2d 143, 152 (Pa. 2002) (opinion announcing judgment of court is not binding precedent). Second, the standard for determining whether a person has been placed in custody is based on the particular circumstances of each case, see Commonwealth v. Ziegler, 470 A.2d 56, 58 (Pa. 1983), and there can be no doubt that the circumstances in Gwynn are completely different than those in the instant case. In any event, even if Gwynn were to control our inquiry here, in that it could somehow be read as establishing the broad proposition that an individual who is handcuffed and placed in a patrol car is not in "custody" for any purpose, this Court has clearly taken a contrary position in this opinion today.

very focused question, aimed at discovering the whereabouts of the alleged woman. Based on these circumstances, we conclude that the troopers were not attempting to elicit an incriminating response from Appellant when they placed him in the patrol car and asked him about the woman's location, but rather, were motivated soley by a concern for their own safety and the safety of the alleged woman. See Quarles, 467 U.S. at 657 (concluding that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); see also Commonwealth v. Bowers, 583 A.2d 1165, 1171 (Pa. Super. 1990) (recognizing the reasoning in Quarles). Accordingly, Appellant's statements to Trooper Tretter were admissible under the public safety exception and thus were properly admitted by the trial court. See Quarles, 467 U.S. at 655-57; Stewart, 740 A.2d at 719-20.

Appellant also claims that the trial court erred in refusing to suppress a portion of his statement to the police because it was elicited in violation of the "six-hour rule" set forth in Commonwealth v. Davenport, 370 A.2d 301 (Pa. 1977). Specifically, Appellant argues that because he was taken into police custody at approximately 12:35 a.m., the statement he made to Corporal McAndrew more than six hours later, at approximately 7:10 a.m., should have been suppressed. However, in light of the fact that a majority of this Court recently abandoned the six-hour rule in Commonwealth v. Perez, 2004 WL 576101 (Pa. 2004), Appellant's claim fails.

The Pennsylvania Rules of Criminal Procedure require that an individual who has been arrested "shall be afforded a preliminary arraignment by the proper issuing authority without unnecessary delay." Pa.R.Crim.P. 516(A). While this requirement is not constitutionally mandated, it ensures that a defendant is afforded the constitutional rights embodied in Pennsylvania Rule of Criminal Procedure 540, which requires the issuing authority to: (1) read the complaint to a defendant to inform him of the nature of the charges

against him, Pa. Const. art. I, § 9; (2) inform him of his right to counsel, U.S. Const. Amends. VI, XIV, Pa. Const. art. I, § 9; and (3) inform him of his right to reasonable bail, Pa. Const. art. I, § 14. Pa.R.Crim.P. 540; Perez, 2004 WL 576101, at *3.

Prior to our decision in Perez, this Court's approach to the prompt arraignment requirement was governed by our decisions in Davenport and Commonwealth v. Duncan, 525 A.2d 1177 (Pa. 1987). First, in Davenport, this Court established a rule under which the admissibility of any statement taken while the defendant was in custody, but before his preliminary arraignment, depended on the length of the delay between the defendant's arrest and his arraignment. We stated:

> If the [defendant] is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial. If the accused is arraigned within six hours of arrest, pre-arraignment delay shall not be grounds for suppression of such statements except as the delay may be relevant to constitutional standards of admissibility.

Davenport, 370 A.2d at 306. The Court adopted this bright-line approach in order to "assure more certain and even-handed application of the prompt arraignment requirement, and [to] provide greater guidance to trial courts, the bar and law enforcement authorities." Id.

However, a decade later, in Duncan, this Court explained that although the Court's adoption of the six-hour rule was meant to provide a workable rule with which law enforcement could readily comply, "our experience with the *per se* application of the rule has proven to the contrary." Duncan, 525 A.2d at 1182. The Duncan Court recognized that the Davenport rule had "been applied on a mechanical basis to violations which bear no relationship to the statement obtained and has shielded the guilty for no reason relevant to the individual circumstances of their case." Id. at 1182. In response, the Court held that to better achieve the goals of Davenport "to guard against the coercive influence of custodial interrogation, [and] to ensure that the rights to which an accused is entitled at

preliminary arraignment are afforded without unnecessary delay," the focus when determining whether to suppress an incriminating statement, "should be on *when* the statement was obtained, *i.e.*, within or beyond the six-hour period." Id. (emphasis in original). Thus, the Davenport rule was modified to allow admission of statements that were made by the accused within six hours of his arrest, regardless of when the arraignment occurred. Id.

This Court recently reconsidered the Davenport-Duncan rule in Commonwealth v. Perez, 2004 WL 576101, where a majority of the Court concluded that the "application of a stringent bright-line rule to the vastly different sets of circumstances that may be involved in arrest, investigation, and arraignment has yielded perplexing results . . . ." Id. at *4. Thus, the majority abandoned the six-hour rule and held that "voluntary statements by an accused, given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible *per se*." Id. at *6. Instead, the majority in Perez concluded that courts should look to the totality of the circumstances to determine whether a pre-arraignment statement was freely and voluntarily made, and therefore admissible.[13] Id. The

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[13] This author dissented from the Perez majority's decision to abandon the Duncan-Davenport rule, stating:

> In the absence of reasonable and clear time restraints in which police officers are allowed to question suspects, suspects are much more likely to be exposed to the coercive effect of prolonged police interrogation, which in turn, will yield a greater pool of unreliable confessions. By using time restrictions to curb police officers' potential abuse of the interrogation process, the Duncan-Davenport rule, in my view, better safeguards the constitutional rights of defendants than the new 'totality of the circumstances' approach adopted by the majority today and thus, should not be abandoned.

See Perez, 2004 WL 576101 *11 (Nigro, J., concurring and dissenting). However, given that a majority of this Court abandoned the six-hour rule in favor of the approach delineated in Perez, that holding applies to the instant case.

majority explained that, in making this determination, courts should consider factors such as the attitude exhibited by the police during the interrogation, whether the defendant was advised of his constitutional rights, whether he was injured, ill, drugged or intoxicated when he confessed, and whether he was deprived of food, sleep, or medical attention during the detention.[14] Id. at 5-6.

Applying Perez to the instant case,[15] we find that the totality of the circumstances demonstrates that Appellant's statement to Corporal McAndrew was voluntarily given and therefore properly admitted at trial. In the first instance, there is nothing in the record to indicate that the delay in Appellant's arraignment was aimed at overcoming Appellant's will, or that the police utilized any coercive tactics to persuade him to give a statement. At trial, Corporal McAndrew testified to the circumstances surrounding Appellant's confession and indicated that Appellant was informed of his constitutional rights before he spoke to the officers, was permitted to use the bathroom and was given coffee and a blanket during the interview, and was not injured or under the influence of drugs or alcohol when he made the confession. See N.T., 11/19/2002, at 261-301. Moreover, the record shows that Appellant himself was responsible for part of the delay as he spent the first hours of the interview providing a statement that he later partially recanted in the follow-up statement at issue here. See Perez, 2004 WL 576101, at *7-8 (noting that the appellant's deception to the police about his identity and his age contributed to the delay in processing his case).

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[14] Additional factors to be considered include the age of the accused, his level of education and intelligence, the extent of his previous experience with the police, the repeated and prolonged nature of the questioning, and the length of detention prior to the confession. See Perez, 2004 WL 576101, at *5-6 (citing People v. Cipriano, 429 N.W.2d 781, 790 (Mich. 1988)).

[15] This Court explicitly stated in Perez that the new totality of the circumstances standard would apply to "all pending cases where the issue has properly been raised." Id. at *7.

Under these circumstances, we find that Appellant's statement to Corporal McAndrew was voluntarily given and therefore admissible pursuant to Perez.

As we find that Appellant's claims for relief are without merit, we must, in compliance with our statutory duty pursuant to 42 Pa.C.S. § 9711(h)(3), affirm his sentences of death unless we determine that (1) the sentences were the product of passion, prejudice or any other arbitrary factor or (2) the evidence fails to support the finding of at least one aggravating factor with respect to each murder. 42 Pa.C.S. § 9711(h)(3). Based upon our review of the record, we conclude that the sentences of death were not the product of passion, prejudice or any other arbitrary factor, but rather, were based on evidence properly admitted at trial. We also conclude that the evidence was sufficient to support the finding of at least one aggravating factor with respect to each murder. Specifically, regarding the murder of Mendez, the evidence showed that Appellant was convicted of the first-degree murder of Lopez, which was committed at the time of the murder of Mendez. See 42 Pa.C.S. § 9711(d)(11). Likewise, regarding the murder of Lopez, the evidence showed that Appellant was convicted of the first-degree murder of Mendez, which was committed at the time of the murder of Lopez. See id.

Accordingly, we affirm Appellant's convictions and the sentences of death.[16]

Former Justice Lamb did not participate in the decision of this case.

Mr. Chief Justice Cappy files a concurring opinion.

Mr. Justice Castille files a concurring opinion which joins the majority opinion in part.

Madame Justice Newman files a concurring opinion.

Mr. Justice Eakin files a concurring opinion.

Mr. Justice Saylor files a dissenting opinion.

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[16] The Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor of Pennsylvania. See 42 Pa.C.S. § 9711(i) (Supp. 1997).

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 402 CAP
Appellee	Appeal from the Judgment of Sentence entered on January 27, 2003 in the Court of Common Pleas of Monroe County
V.	
MANUEL SEPULVEDA,	ARGUED: December 4, 2003
Appellant	

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: August 19, 2004**

Appellant asserts that the statements elicited without benefit of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) should have been suppressed. Insofar as the majority disposes of this claim under federal law, I am compelled to join as I recognize that New York v. Quarles, 467 U.S. 649 (1984), requires that result. Although Appellant makes a perfunctory statement that this claim is raised under the Pennsylvania Constitution, beyond that boilerplate assertion he offers no independent argument under our state constitution. Accordingly, the question of the viability of Quarles, and the public safety exception to the right against self-incrimination, under our state constitution is left for another day.

Additionally, I note my disagreement with the majority's depiction of this claim as one being considered under a prejudice analysis. (Majority slip opinion at p.8). As the assertion of error presents a claim of trial error, I believe that it is subject to a harmless error analysis. Commonwealth v. Howard, 645 A.2d 1300, 1307 (Pa. 1994) (discussing the difference between a harmless error analysis and a prejudice analysis); see also Commonwealth v. Baez, 720 A.2d 711, 720 (Pa. 1998) (denial of pre-trial motion to suppress subject to harmless error analysis). However, as I agree with the majority that there is no error, any discussion of the standard for assessing the consequences of that error is unnecessary.

In all other respects I join the lead opinion.

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 402 CAP
Appellee,	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Monroe County, dated January 27, 2003.
v.	:	
MANUEL SEPULVEDA,	:	ARGUED: December 4, 2003
Appellant.	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: August 19, 2004**

I join the lead opinion except in the following respects, all of which concern the admissibility of the inculpatory statement appellant made in the patrol car.

This case does not pose the more common "custody" and "interrogation" questions seen in cases involving Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The case does not involve the classic formal arrest, transport to police headquarters, and extended incommunicado interrogation which gave rise to the Supreme Court's adoption of a requirement of prophylactic warnings. Ultimately, I believe that we need not determine how the case would fit within the classic Miranda paradigm because, for the reasons well-expressed by the lead opinion, the question of the admissibility of appellant's statement is

controlled by the public safety exception to Miranda which was established in New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626 (1984). Along the way to its conclusion that Quarles controls, however, the lead opinion makes some findings and statements concerning the status of the law under Miranda with which I am in sufficient disagreement as to occasion this concurrence.

First, I disagree with the lead opinion's analysis of the contours of the federal constitutional test for determining "custody" for purposes of Miranda. The lead opinion states that "appellant was clearly deprived of his freedom of action," and therefore, was in "custody" for purposes of Miranda. Slip op. at 9. This is not the proper federal test. As I noted in my Dissenting Opinion in In Re R.H., 791 A.2d 331 (Pa. 2002):

> An individual is not in custody for Miranda purposes simply because his freedom of action has been restricted in a significant way or he reasonably believes that his freedom of action or movement has been restricted by the questioning. The U.S. Supreme Court--which is the ultimate authority on the interpretation of Miranda questions--has held that, in determining whether an individual was in custody, "the ultimate inquiry is ... whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." See Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed.2d 293 (1994) (citations omitted). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Id. at 323, 114 S.Ct. at 1529. Thus, not every mere deprivation of an individual's freedom of action triggers Miranda's constitutional protections, and the subjective sentiments of the person being interrogated are wholly irrelevant to the objective custody inquiry.
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> In Berkemer v. McCarty, 468 U.S. 420, 440; 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984), for example, the Supreme Court held that Miranda warnings were not required prior to the roadside questioning of a motorist detained in a traffic stop. Although the Supreme Court recognized that "a traffic stop significantly curtails the 'freedom of action' of the driver," and that, under the law of most states, it is in fact a crime to drive away without permission, it emphasized that this was not the end of the Miranda custody inquiry. "Fidelity to the doctrine announced in Miranda requires that it be enforced ... only in those types of situations in which the concerns that

> powered the decision are implicated." Id. at 437, 104 S.Ct. at 3148-49. The Supreme Court found that the fact that traffic stops are typically temporary and brief, are conducted in public, and usually involve only one or at most two policemen "mitigate[d] the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.'" Id. at 437, 104 S.Ct. at 3149 (quoting Miranda, 384 U.S. at 467, 86 S.Ct. at 1624).

Id. at 338 (Castille, J. dissenting); accord Quarles, 467 U.S. at 655, 104 S.Ct. at 2631 ("the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest") (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983) (*per curiam*) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977) (*per curiam*))). Because I believe that the lead opinion misconstrues the controlling test, I also believe that the lead opinion is mistaken in its extended criticism of the plurality decision in Commonwealth v. Gwynn, 723 A.2d 143 (Pa. 1999), and I necessarily disagree with the broad and contrary custody holding the lead opinion would announce to supplant the non-precedential decision in Gwynn. See slip op. at 9-10 n.12.[1]

In my view, the question of custody for Miranda purposes under the proper test in these unusual circumstances is a close one, but ultimately, it is a question this Court need not resolve. This is so because even if it is assumed that appellant was in custody when police temporarily placed him in the patrol car so that they could "freeze the situation" while they investigated this late-night report of an incident of domestic violence -- a report corroborated by the on-scene cooperation of the reporting witness and the presence of blood on the doors of the two neighboring homes, as well as on a jacket found between the homes -- the Quarles public safety exception obviated the necessity for police to recite

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[1] In any event, discussion of Gwynn is unnecessary to the decision of this case because (1) as the lead opinion notes, Gwynn is a plurality opinion with no precedential value; and (2) it is not apparent that, in the portion of the plurality opinion to which the lead opinion takes exception, the Gwynn Court was speaking of "custody" rather than "interrogation."

Miranda warnings before asking appellant the single question they posed, a question which was designed to locate and thereby secure the safety of the woman police had reason to believe was a victim of domestic violence.

I also write to highlight the importance of undertaking the appropriate constitutional analysis when determining whether or not "interrogation" has occurred in a given case. As the United States Supreme Court articulated in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980):

> [T]he term interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. ... But, **since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.**

Id. at 301-02, 100 S.Ct. at 689-90 (bold emphasis added). Thus, the absence of Miranda warnings does not require suppression of a suspect's custodial statement if, for example, the suspect spontaneously "blurts out" the statement, Commonwealth v. Baez, 720 A.2d 711, 720-21 (Pa. 1998); or makes an incriminating statement in the course of "small talk" with authorities, Commonwealth v. Abdul-Salaam, 678 A.2d 342, 351 (Pa. 1996); or is merely responding to biographical questioning, Commonwealth v. Daniels, 644 A.2d 1175, 1181 (Pa. 1994); or makes an incriminating statement after voluntarily initiating communication with the authorities, Commonwealth v. Yarris, 549 A.2d 513, 523-24 (Pa. 1988); or makes an incriminating statement in response to a declaration, rather than an inquiry, on the part of the authorities, Commonwealth v. Brantner, 406 A.2d 1011, 1015-16 (Pa. 1979). In addition, even a statement elicited in direct violation of Miranda may be

admissible for impeachment purposes. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971). Moreover, a concern for thorough examination of the question of interrogation is particularly appropriate in a close case, such as that *sub judice*, where, as the lead opinion aptly notes: "[T]he troopers were not attempting to elicit an incriminating response from Appellant when they placed him in the patrol car and asked him about the woman's location." Slip op. at 11.

Finally, I do not join in the lead opinion's preliminary finding that appellant's failure to demonstrate "undue prejudice" from the admission into evidence of the statement in question would defeat his claim if it otherwise had merit. Presumably, if the statement were obtained in violation of Miranda, the burden would be on the Commonwealth to prove that its admission was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-28 (1967). However, because the statement was properly admitted, and more importantly, because the Commonwealth has not argued harmless error, there is no reason to address the question of the effect of a non-existent error. See Berkemer, 468 U.S. at 443-445, 104 S.Ct. at 3152-54 (citing Chapman and refusing to apply harmless error standard, or even decide whether harmless error standard could apply to Miranda violation, where state did not argue harmless error).

With the exception of the foregoing concerns, I join the lead opinion.

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 402 CAP
Appellee	: Appeal from the Judgment of Sentence entered on January 27, 2003 in the Court of Common Pleas of Monroe County
V.	
MANUEL SEPULVEDA,	: ARGUED: December 4, 2003
Appellant	

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: August 19, 2004**

I join the lead Opinion in affirming appellant's convictions and sentences of death. However, with respect to the admissibility of appellant's statement made in the patrol car, I do not believe we need to reach the public safety exception to Miranda to resolve the issue, as no interrogation occurred. Miranda warnings are necessary only when a defendant is subject to custodial interrogation. I agree that appellant, in handcuffs in a patrol car, was in custody. I do not agree that he was interrogated.

Interrogation of course "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v. DeJesus, 787 A.2d 394, 402 (Pa. 2001)

(citing Rhode Island v. Innis, 446 U.S. 291 (1980)). The likelihood of an incriminating response to this single non-accusatory question of the woman's whereabouts was slim. Such was not the design of the inquiry, and hence Miranda warnings were not required.

Trooper Tretter's question was based on his logical belief that he had responded to a domestic dispute. Seeing blood, he was understandably anxious to define what he faced, and asked one question about the location of another potential party. He did not ask appellant what he had done, how he had done it, why he had done it; he didn't even ask "what happened here?" He did nothing at all designed to elicit incriminating information; the fact that the answer he got was incriminating is not the measure of the question itself. As it was not designed to elicit an incriminating response, the question itself simply did not rise to the level of interrogation. There being no interrogation, Miranda warnings were not necessary, and we need not address whether an exception to Miranda is implicated - Miranda itself is not implicated.

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 402 CAP
Appellee	Appeal from the Judgment of Sentence entered on January 27, 2003 in the Court of Common Pleas of Monroe County
V.	
MANUEL SEPULVEDA,	ARGUED: December 4, 2003
Appellant	

CONCURRING OPINION

MADAME JUSTICE NEWMAN **DECIDED: August 19, 2004**

Although I agree with the decision to affirm the convictions and sentences, I do not agree with the determination that the "public safety exception" applies to the statement Appellant made in the police car.

As the Opinion Announcing the Judgment of the Court correctly concludes, the interrogation leading to Appellant's confession in the police car, while he was handcuffed and in the back seat, was custodial in nature and presumptively required Miranda

warnings.[1] Commonwealth v. Williams, 650 A.2d 420 (Pa. 1994). Nevertheless, "Miranda warnings . . . are not required in certain situations where the police ask questions to ensure public safety and not to elicit incriminating responses." Opinion Announcing the Judgment of the Court at 9 (citing Quarles, 467 U.S. at 655-57; Commonwealth v. Stewart, 740 A.2d 712, 719-20 (Pa. Super. 1999)). The Opinion Announcing the Judgment of the Court determines that the instant matter presents one of these situations, in which "overriding considerations of public safety justified Trooper Tretter's failure to provide Appellant with Miranda warnings before asking him the limited question regarding the woman's whereabouts . . . ." Opinion Announcing the Judgment of the Court at 10. The public safety concerns considered included: (1) the troopers thought that they were responding to a violent domestic dispute; (2) they saw blood on the front door; and (3) Appellant gave a "confusing account" of the events that had transpired.

I do not find these circumstances to be ones that justify the "narrow exception" that the Supreme Court articulated in New York v. Quarles, 467 U.S. 649 (1984), which involved a real and immediate threat to public safety, consisting of circumstances far more exigent than the ones here. Id. at 650. In that case, a woman approached two police officers and told them she had just been raped, described her assailant, and informed them that the man had just entered a nearby supermarket and was carrying a gun. One officer entered the store, saw a man who matched the description, witnessed the suspect run, ordered him to stop, frisked him, and discovered he was wearing an empty holster. After handcuffing the suspect, the officer asked him where the gun was, and the suspect gestured and said

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

"over there." The officer retrieved the gun, arrested the suspect, and then read him his rights. The Supreme Court stated that:

> **The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.** So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might come upon it.

Quarles, 467 U.S. at 657 (emphasis added).

The situation in the instant matter stands in stark contrast to the one in Quarles. When police took Appellant into custody, they were responding first to a report of domestic violence and then to an inconsistent claim by Appellant that he was the victim of an attack by two men. Unlike Quarles, there was no identified victim, no report of a gun at the scene, and no contemporaneous crime being witnessed. Further, Appellant was already handcuffed and placed in the back seat of the patrol car when he was questioned and blurted out his confession. Clearly, Appellant did not pose a threat to public safety, and, while police knew that something bad had happened, Appellant himself was a self-described crime victim, and there were no weapons or armed suspects known to be present. It strains credulity in these circumstances to hold that the "narrow exception" based on public safety articulated in Quarles applies.

Although I believe that the police car confession was not admissible, I agree with the result and would not reverse the determination on guilt because there is sufficient evidence of record, including a second confession and Appellant's inculpatory testimony,[2] to support the conviction even in the absence of the first statement.[3]

[2] Appellant testified that he shot the two victims. The pathologist who performed the autopsies testified that each victim had been shot in a vital part of the body. Specific intent can be inferred where a defendant uses a deadly weapon upon a vital part of the victim's body. Commonwealth v. Washington, 692 A.2d 1024 (Pa. 1997).

[3] Appellant has not raised any issue based on the fruit of the poisonous tree doctrine, regarding evidence obtained as a result of the police car confession.

[J-170-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNYSLVANIA,	:	No. 402 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on 11/25/02 in the Court of
v.	:	Common Pleas of Monroe County at No.
	:	1522 CR 2001
	:	
MANUEL MARCUS SEPULVEDA,	:	
	:	
Appellant	:	ARGUED: December 4, 2003

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 19, 2004**

Recently, I supported the abandonment of the Court's former, prophylactic, bright-line six-hour rule constraining custodial, police interrogation in the absence of prompt arraignment, because I believed that the pattern of continually expanding and evolving exceptions engrafted onto the rule had left it in such an impaired condition that it had the potential to do more harm than good. See Commonwealth v. Perez, ___ Pa. ___, ___, 845 A.2d 779, 792-93 (2004) (Saylor, J., concurring and dissenting); accord Commonwealth v. Bridges, 563 Pa. 1, 47, 757 A.2d 859, 883 (2000) (Saylor, J., concurring) (expressing the view that "continuation of a rule so readily capable of avoidance as to function as no rule at all . . . carries with it the potential for diminishing respect for the courts' authority in the eyes of those subject to their lawful mandates"). I also took the position, however, that the change should be implemented prospectively, as this approach would best serve the orderly administration of justice and maintain

essential fairness. See Perez, ___ Pa. at ___, 845 A.2d at 792 (Saylor, J., concurring and dissenting).

A substantial disadvantage of the Perez Court's decision retroactively to replace the Davenport/Duncan six-hour rule with a totality-of-the-circumstances approach is made apparent by this case. The focus of the parties' efforts below was on developing a record concerning the six-hour rule that represented the prevailing law of the Commonwealth as of the time of the interrogation at issue.[1] Thus, there does not appear to have been a directed attempt to build a full and complete record regarding this issue of the knowing, voluntary, and intelligent character of Appellant's statements, which Perez has retrospectively converted into the exclusive inquiry of the case, or any decision on the part of the trial court pertaining to the now-central question. Furthermore, the majority's present effort to perform the necessary assessment for the first time on appellate review on the cold and at least potentially incomplete record before it is inconsistent with its own pronouncements concerning the character of its appellate function.[2]

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[1] Although Appellant could have presented a totality approach as an alternative basis for his claim, he certainly was entitled to style his claim according to other prevailing law as established by this Court, i.e., the Davenport/Duncan six-hour rule.

[2] See, e.g., Commonwealth v. Jackson, 464 Pa. 292, 297-98, 346 A.2d 746, 748 (1975) ("The record before us contains no findings of fact or conclusions of law, only a statement of the suppression court's conclusion that there was no coercion[;] . . . [t]his court does not in the first instance make findings of fact and conclusions of law."); accord Commonwealth v. Grundza, 819 A.2d 66, 68 (Pa.Super.), appeal denied, 574 Pa. 764, 832 A.2d 435 (2003) (same); cf. Thompson v. City of Philadelphia, 507 Pa. 592, 599, 493 A.2d 669, 672-73 (1985) ("An appellate court by its nature stands on a different plane than a trial court. Whereas a trial court's decision to grant or deny a new trial is aided by an on-the-scene evaluation of the evidence, an appellate court's review rests solely upon a cold record. Because of this disparity in vantage points an appellate court is not empowered to merely substitute its opinion concerning the weight of the evidence for that of the trial judge."). Notably, the Court has recently based substantial (continued . . .)

Although I recognize that I am bound by Perez in terms of the retroactive elimination of the Davenport/Duncan six-hour rule, I would defer the present matter, in the first instance, to the post-conviction setting. There, at least the parties may be afforded the opportunity to complete the record concerning the totality of the circumstances surrounding Appellant's interrogation, and the necessary fact finding can be accomplished in a more appropriate forum.

(...continued)
alterations to the review process on the distinction between the roles of appellate versus original jurisdiction courts in terms of their respective abilities relative to fact finding. See, e.g., Commonwealth v. Grant, 572 Pa. 48, 66, 813 A.2d 726, 737 (2002); see also Commonwealth v. Freeman, 573 Pa. 532, 543-44, 827 A.2d 385, 392 (2003)

[J-135-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	: No. 553 CAP
Appellee	: Appeal From the Order entered on 10/11/2007 denying PCRA relief in the Court of Common Pleas of Monroe
v.	: County, Criminal Division, at No. CP-45-CR-0001522-2001
MANUEL MARCUS SEPULVEDA,	:
Appellant	: SUBMITTED: July 25, 2008

OPINION

CHIEF JUSTICE CASTILLE[1] **DECIDED: November 28, 2012**

This is a capital appeal from the order of the Court of Common Pleas of Monroe County denying appellant Manuel Marcus Sepulveda's petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. For the reasons that follow, we remand for further, limited proceedings before the PCRA court.

A. BACKGROUND

The facts underlying appellant's sentences of death are discussed more fully in appellant's direct appeal, Commonwealth v. Sepulveda, 855 A.2d 783, 786-89 (Pa. 2004) (plurality), cert. denied, 546 U.S. 1169 (2006). However, in order to adequately review appellant's claims herein, some background is required.

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[1] This matter was reassigned to this author.

Judgment Entered 11/28/2012

John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

The evidence adduced at trial and summarized in Sepulveda established that on November 26, 2001, appellant was at the home of Daniel Heleva and Robyn Otto in Polk Township, Monroe County, where he resided with the couple and their two children. At approximately 6:30 p.m., John Mendez and Ricardo Lopez arrived at the house to recover two guns that Mendez claimed belonged to him. Appellant retrieved the guns and gave them to Mendez. Mendez and Lopez then left.

Later that night, Heleva returned to the house with Richard Boyko and discovered that the guns were missing. Another man, Jimmy Frey, was sitting in the living room watching television. Appellant explained to Heleva what happened with the guns and Heleva instructed Boyko to call Mendez. Mendez and Lopez returned to the house, but Heleva did not initially permit Lopez to enter. Heleva and Mendez had words and the two men began fighting in the kitchen. The fight was resolved and Lopez and appellant joined Mendez and Heleva in the kitchen. Boyko left the house to run an errand for Robyn Otto. Robyn Otto was upstairs in the house with her two children.

As the four men were sitting around the kitchen table, another argument erupted, at which point appellant grabbed a .12 gauge shotgun and shot Mendez in the stomach. He then shot Lopez in the side. Lopez collapsed on the floor. Appellant then placed the gun on Lopez's back and fired, killing him. Mendez escaped from the kitchen and ran upstairs. Appellant then chased him upstairs where he shot him a second time. Mendez was able to exit the house and flee to a neighbor's house. Appellant and Heleva followed him, entered the neighbor's property, seized Mendez, and dragged him back to Heleva's house. Meanwhile, Frey, who had been watching the incident, hid the shotgun in a sofa. After the men dragged Mendez back to the house, appellant struck him with a hatchet type of weapon, killing him. There was no evidence that either victim had, or displayed, a firearm when appellant murdered them.

In the interim, police received a 911 call from Heleva's neighbor, reporting a domestic disturbance. When the police arrived at Heleva's home, appellant initially denied knowledge of the incident, but then said he was assaulted by two men. The police placed appellant in the back of a police car, handcuffed him, and asked him where the woman was, since they still believed it was a domestic disturbance. Appellant responded: "There is no she. They are in the basement. I shot them." Police found the dead bodies of Lopez and Mendez in the basement. The police found Lopez beneath slabs of insulation and dry wall material, with his pants pulled to his ankles. They found Mendez beneath a pile of laundry, stripped naked with his thumb in his mouth and with a rubber bungee cord wrapped tightly around his neck. See Sepulveda, 825 A.2d at 787, n.6.

Police brought appellant to the State Police Barracks in Lehighton, at which time appellant gave multiple statements. The statements were inconsistent. Appellant initially accepted responsibility for the killings, but in a written statement he admitted to shooting Lopez only one time, placing blame for the second shot on Heleva. Appellant also admitted to shooting Mendez, but again placed the blame for the blows to Mendez's head on Heleva. These statements will be discussed in more detail *infra*, as they are relevant to one of appellant's PCRA issues.

At trial, appellant took the stand and testified to a version of events that was mostly consistent with his written police statement, with two notable exceptions.[2]

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[2] First, in his written statement appellant represented that he heard the second shot that killed Lopez as appellant was chasing Mendez through the upstairs of the house. At trial, however, appellant testified that he saw Heleva shoot Lopez the second time. Second, in his written statement appellant stated that he grabbed the gun away from Mendez and Heleva as they struggled, turned the gun toward Mendez, and shot him in the arm. At trial, appellant testified that when he shot Mendez in the arm, he did so accidentally in an attempt to wrestle the gun away from the two men. See Sepulveda, supra.
(continued...)

Appellant also presented evidence supporting the lesser offense of voluntary manslaughter, suggesting that he was acting in defense of Heleva and Heleva's children at the time of the killings.

After the close of the guilt phase of appellant's capital trial, a jury sitting before the Honorable Ronald E. Vican convicted appellant of two counts of first-degree murder for the shooting deaths of Ricardo Lopez and John Mendez.[3] Following a penalty hearing, the jury found one aggravating circumstance at each count, which it determined outweighed the two mitigating circumstances it found at each count, and returned two sentences of death.[4] See 42 Pa.C.S. § 9711(c)(1)(iv) ("[T]he verdict must be a sentence of death ... if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances."). This Court affirmed on direct appeal. Sepulveda, 855 A.2d at 794.

Appellant filed a *pro se* PCRA petition on August 9, 2006, and President Judge Vican appointed new counsel. This appointment was rescinded after the Philadelphia-based Federal Community Defender Office ("FCDO"), Capital Habeas Unit unilaterally entered its appearance.[5] Federal counsel then filed a lengthy amended petition,

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(...continued)

[3] The jury also convicted appellant of two counts of aggravated assault, criminal conspiracy, unlawful restraint, and tampering or fabricating evidence.

[4] The aggravating circumstance found by the jury was that appellant was convicted of another murder committed "before or at the time of the offense at issue," 42 Pa.C.S. § 9711(d)(11). The mitigating circumstances found by one or more jurors were that appellant had "no significant history of prior criminal convictions," id., § 9711(e)(1), and his age (22) when he committed the murders. Id., § 9711(e)(4).

[5] The issue arising from the FCDO's actions in this case is addressed later in this Opinion, in Part C.

alleging numerous claims of trial court error and ineffective assistance of counsel. The PCRA court conducted an evidentiary hearing over four separate days. Following the hearing, the court denied relief. Appellant appealed to this Court.[6]

We summarize appellant's prolix issues as follows: (1) whether counsel was ineffective in failing to investigate and present mental health evidence to support claims of diminished mental capacity, imperfect belief of defense of others, and mitigating evidence; (2) whether counsel was ineffective in failing to challenge the Commonwealth's peremptory challenges of potential jurors; (3) whether counsel was ineffective in failing to properly question potential jurors who were excused because they expressed doubts about imposing the death penalty; (4) whether counsel was ineffective in challenging appellant's inculpatory statements; (5) whether the jury was presented with materially false evidence by the Commonwealth and whether trial counsel was ineffective for failing to present an expert to dispute this evidence; (6) whether counsel was ineffective in failing to object to victim impact evidence; (7) whether error in the guilt phase jury instructions violated appellant's due process rights; (8) whether counsel had a conflict of interest; (9) whether appellant's rights were violated because no transcript exists of portions of his trial; and (10) whether the cumulative effect of the alleged errors warrants relief.[7]

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[6] The appeal of the PCRA court's order in a capital matter is directly reviewable by this Court pursuant to 42 Pa.C.S. § 9546(d).

[7] Appellant also alleges, as a separate claim and incorporated throughout his other claims, that all prior counsel were ineffective in failing to raise the claims he now raises, thus attempting to layer his ineffectiveness claims. However, Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), abrogated the rule that ineffectiveness claims must be raised at the first opportunity where a defendant has new counsel. In any event, even under the pre-Grant rule, appellant was not required to raise ineffectiveness claims until he obtained new counsel, see Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977). In this case, appellant was represented by Marshall Anders, Esquire, who was joined by (continued...)

In reviewing the denial of PCRA relief, we examine whether the PCRA court's determination "is supported by the record and free of legal error." Commonwealth v. Rainey, 928 A.2d 215, 223 (Pa. 2007). To be entitled to PCRA relief, appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S. § 9543(a)(2), his claims have not been previously litigated or waived, and "the failure to litigate the issue prior to or during trial ... or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa.C.S. § 9543(a)(3), (a)(4). An issue is previously litigated if "the highest appellate court in which [appellant] could have had review as a matter of right has ruled on the merits of the issue." 42 Pa.C.S. § 9544(a)(2). An issue is waived if appellant "could have raised it but failed to do so before trial, at trial, ... on appeal or in a prior state post conviction proceeding." 42 Pa.C.S. § 9544(b).

In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). In Pennsylvania, we have applied the Strickland test by looking to three elements: the petitioner must establish that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987).

(...continued)
another lawyer (hereafter "co-counsel") from his firm for purposes of the direct appeal. Because the same counsel represented appellant at trial and on direct appeal, collateral review is appellant's first opportunity to raise claims sounding in trial counsel's ineffectiveness.

Additionally, we note, the Sixth Amendment right to counsel is recognized "not for its own sake," but because of the effect it has on the accused's right to a fair trial. See Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); see also Strickland, 466 U.S. at 689. For these reasons, counsel is presumed to have rendered effective assistance. Finally, both the U.S. Supreme Court and this Court have made clear that a court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element of the Strickland test, the court may proceed to that element first. Strickland, supra; Commonwealth v. Albrecht, 720 A.2d 693, 701 (Pa. 1998). Counsel cannot be deemed ineffective for failing to raise a meritless claim. Commonwealth v. Jones, 912 A.2d 268, 278 (Pa. 2006).

We now address appellant's claims.

B. APPELLANT'S CLAIMS

1. INEFFECTIVE INVESTIGATION AND PRESENTATION OF MENTAL HEALTH EVIDENCE

Appellant first claims that he suffered from severe mental and emotional disorders, and that counsel was ineffective in failing to investigate and present evidence concerning his mental health issues at both phases of his trial. Appellant alleges that counsel should have spoken with people familiar with his childhood and obtained his background records. Appellant faults counsel for waiting until two weeks before trial to consult a mental health expert, and for not having any mental health expert personally examine him. Appellant further contends that counsel should have reviewed appellant's pre-trial prison records, as they would have indicated that he had mental health issues. Specifically, appellant contends that records from the Monroe County Correctional

Facility of his pre-trial detention indicate that he requested mental health treatment and complained of trouble sleeping and hallucinations.[8]

At the PCRA hearing, federal counsel produced numerous witnesses who testified concerning appellant's mental health, and concerning counsel's performance in developing mental health-related claims. The Commonwealth did not present any witnesses, but cross-examined appellant's witnesses.

Yolanda Maisonet, appellant's mother, Alex Sepulveda, appellant's cousin, and Juan Ramon Rivera, appellant's maternal uncle, testified that appellant grew up in a poorly maintained apartment building in a drug-infested and violent neighborhood in New York City. Maisonet and Rivera recounted that appellant's father was an alcoholic, who frequently gambled and physically abused both appellant's mother and appellant. When appellant was eight or nine years old, Maisonet moved with her children to Puerto Rico, to a neighborhood scarred by violence and illicit drugs. Maisonet testified that appellant had trouble concentrating on his school work, falling one class short of graduating from high school. On cross-examination, Maisonet stated that appellant corresponded with her prior to trial, but did not inform her that he was facing a potential death sentence. Nor did appellant ask for her assistance in his defense. On cross-examination, Rivera also testified that appellant never asked him to assist in his defense. Alex Sepulveda testified that mental illness and addiction ran in his family. Sepulveda testified that appellant never contacted him before trial, although Sepulveda

[8] The issue related to the pre-trial detention records was not raised in appellant's initial or amended petition. Appellant filed a Motion to Amend his amended petition, seeking to include a claim of trial counsel's ineffectiveness related to the pre-trial prison records. The PCRA court granted the Motion to Amend pursuant to Pa.R.Crim.P. 905(A) in its opinion denying appellant's PCRA petition. See PCRA Court Opinion, 10/11/2007, at 3-5.

was an attorney, and family members often sought his legal assistance. See N.T., 6/11/07, at 122-143; id. at 144-58; N.T., 6/12/07, at 6-22.

Robyn Otto was with appellant prior to and during the murders. At the PCRA hearing, Otto testified to appellant's habitual cocaine use, including on the night of the murders. See N.T., 6/11/07, at 12-15.

Heather Mirel testified at the PCRA hearing that appellant used crack cocaine on a daily basis. She said that appellant became agitated and paranoid when he used crack cocaine, and that his drug use cost him his job. However, Mirel related that appellant never became violent while using drugs. See N.T., 6/12/07, at 85-92.

Juan Pena, appellant's friend, testified that after living in Puerto Rico, appellant returned to New York and lived with his father, during which time appellant regularly smoked marijuana. After moving to Pennsylvania, appellant continued using marijuana and began to abuse crack cocaine. Pena said that appellant became paranoid while using crack cocaine. On cross-examination, Pena admitted that he never attempted to contact appellant or his counsel after the murders. See id. at 93-106.

Deanna Flowers testified that appellant became paranoid and delusional while on crack cocaine, but also stated that he was never violent. See id. at 112-20.

Federal counsel also produced testimony from a number of mental health experts at the PCRA hearing. Dr. Antonio Puente, a neuropsychologist, interviewed and performed neuropsychological testing on appellant. Dr. Puente also talked with Alex Sepulveda and reviewed records from appellant's childhood. Dr. Puente described how, in his opinion, appellant's upbringing impaired his brain development and academic and intellectual capacity. He concluded that appellant suffered neuropsychological deficits which impaired his ability to reason, solve problems, make judgments, premeditate, and deliberate. Looking back in time, Dr. Puente also opined

that appellant suffered from extreme mental or emotional disturbance at the time of the murders, and that his ability to conform his conduct to the requirements of the law was substantially impaired. Dr. Puente testified that information regarding the domestic violence that appellant experienced, including that appellant's father hit the children, indicated that further psychiatric evaluation was appropriate. Likewise, he testified that appellant's school records, prison records, and information regarding the domestic violence appellant experienced were indicators of a need for further psychiatric evaluation. See id. at 29-65. However, on cross-examination, Dr. Puente also acknowledged that the information that trial counsel actually possessed regarding appellant's upbringing "would not have been enough to raise red flags." Id. at 75.

Dr. Pablo Stewart, a psychiatric consultant, conducted a forensic psychiatric examination of appellant, reviewed appellant's prison records, and met with appellant. Dr. Stewart also reviewed affidavits from, and met with, Maisonet, Rivera, and Rivera's wife. Dr. Stewart opined that appellant suffered from post-traumatic stress disorder (PTSD) caused by his troubled upbringing. Dr. Stewart noted that hypervigilance is a PTSD symptom; in his view, such a symptom would cause a PTSD sufferer to be more likely to react against perceived threats. Dr. Stewart also noted that PTSD includes "avoidance," a symptom he believed was reflected in appellant's case by his refusal to discuss the traumatic events in his life. Furthermore, Dr. Stewart opined that PTSD limited appellant's social and occupational development. Dr. Stewart admitted that appellant was not forthcoming, and that it was his training and experience in psychiatry that enabled him to notice appellant's indicia of PTSD. Dr. Stewart opined that the fact that a criminal defendant experienced a history of abuse, but did not want his family involved in his defense, was an indicator for PTSD. Dr. Stewart further diagnosed appellant with polysubstance dependence and substance-induced psychotic disorder,

which manifests as auditory hallucinations, visual hallucinations, and paranoia. Dr. Stewart also opined that appellant suffered cognitive disorder not otherwise specified ("NOS"), also known as organic brain damage. Ultimately, Dr. Stewart opined that appellant suffered from extreme mental or emotional disturbance, and, looking backward, that "the combination of these conditions did, in fact, cloud his mind to the extent he was unable to deliberate and premeditate" and impaired his ability to form a specific intent to kill. See N.T., 6/11/07, at 85-86; see also id. at 36-97.

A third FCDO-secured mental health expert, Dr. Richard Dudley, a psychiatrist, met with appellant for a cumulative period of twenty hours, and reviewed records and affidavits from appellant's family. Dr. Dudley diagnosed appellant with chronic PTSD, cognitive disorder NOS, polysubstance abuse, and cocaine-induced psychotic disorder. Dr. Dudley opined that appellant suffered from avoidance and hypervigilance, as well as extreme mental or emotional disturbance. Looking backward, Dr. Dudley concluded that appellant lacked the ability to deliberate or premeditate on the night of the murder. See N.T., 6/13/07, at 5-43, 54.

Dr. Eric Fine, a psychiatrist, testified that trial counsel had consulted him immediately prior to appellant's trial to render an opinion regarding appellant's state of mind at the time of the offense. Dr. Fine saw counsel's request as "being a very specific request for information regarding the effect of cocaine. It was not requested that I evaluate [appellant] in terms of his past medical and psychiatric history and everything else that would have gone into a comprehensive psychiatric evaluation." N.T., 6/11/07, at 109. Dr. Fine testified that he believed that an in-person evaluation was unnecessary. He concluded that, "while [appellant] might have had impairment of judgment, and possibly some degree of confusion, the material reviewed does not support a conclusion, within a reasonable degree of medical certainty, that he would

have been unable to form the specific intent to kill the victims." Dr. Fine noted that it would have been helpful for him to review additional materials, and appellant's pre-trial prison records could have indicated whether appellant was then displaying psychotic symptoms. See id. at 115-19.

Trial counsel's paralegal testified that she interviewed appellant before trial and asked him for information regarding his upbringing. The paralegal drafted a memorandum for counsel dated November 4, 2002, recounting her October 30, 2002 meeting with appellant. At that time, appellant provided the paralegal with general background information related to when and where he was born, where he resided, and his schooling.[9] The paralegal recalled that appellant was forthcoming with the information, but she also noted that appellant was "adamant" that counsel not contact his mother. See N.T., 6/12/07, at 132-36.

Finally, appellant's trial counsel testified, noting that he was appointed to represent appellant eight months before trial. Appellant informed counsel that his father was abusive, but counsel did not consider this fact to be mitigating evidence because appellant never indicated that he (appellant) had been abused. Counsel further testified that he would have contacted appellant's family, but appellant instructed him not to do so. See N.T., 3/7/07, at 18-21. Indeed, counsel observed that appellant had specifically asked him not to contact his family and refused to facilitate such contact:

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[9] The paralegal's memorandum also indicated that there was some family dysfunction, indicating that appellant's father was abusive towards his mother and sister. See also N.T., 3/7/07, at 20 (counsel's testimony acknowledging that paralegal's memorandum stated that appellant's father "did hit the children occasionally; once the father hit [appellant's] sister so hard that he broke her tooth and she had to go to the hospital. Due to that incident, her mother hit [the father] over the head with a baseball bat."). The memorandum further stated that appellant's father was still residing in the same house in which appellant was raised.

> [H]e wanted to keep his family out of court, out of the situation. He would not provide me with any information as to where I could locate his family or otherwise obtain background records. I asked [him] on more than one occasion to provide me with ... names and addresses of family. I wanted family here. He didn't want them involved.

Id. at 18.

a. Guilt Phase Mental Health Evidence

Appellant claims that counsel's alleged deficient investigation and presentation of mental health evidence damaged his guilt-phase case in two distinct respects. First, appellant contends that counsel was ineffective in failing to present evidence of his cocaine-induced psychosis,[10] as well as his mental health and emotional impairments, including PTSD and hypervigilance, arguing that these factors impaired his judgment and would have provided further support for the imperfect belief of defense of others theory that counsel argued to the jury.[11] In the alternative, appellant argues that counsel was ineffective for failing to present a diminished capacity defense to the jury.

The Commonwealth argues that appellant admitted guilt, and at trial did not display signs of suffering from any mental health problems. The Commonwealth further

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[10] At trial, appellant testified that he smoked crack cocaine with Robyn Otto prior to the murders. N.T., 11/21/02, at 633.

[11] Appellant's imperfect belief of defense of others theory was an amalgam of defense of others, 18 Pa.C.S. § 506(a) ("Use of force for the protection of other persons") and voluntary manslaughter, 18 Pa.C.S. § 2503(b). Section 2503(b) provides that "a person who intentionally and knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable." Combining these two criminal sections, appellant's contention was that he shot Mendez and Lopez because he believed Heleva and Heleva's children were in danger. But, he acknowledged that his alleged belief was "unreasonable" and alternatively pursued a reduction in his first-degree murder charge to voluntary manslaughter.

contends that counsel's strategic decision to argue imperfect belief of defense of others, instead of a diminished capacity defense, was reasonable.

The PCRA court rejected appellant's guilt phase, mental health-based claims of counsel ineffectiveness. The court found that appellant had not presented sufficient evidence to establish that he was so overwhelmed by the effects of cocaine that he was incapable of forming the specific intent to kill. Moreover, the court reasoned that counsel had a reasonable basis for not developing and presenting evidence related to appellant's drug use, as such evidence "could easily have prejudiced the jury against [appellant], portraying him as a drug dealer and addict who was living and conducting business in a known crack house." PCRA Court Opinion, 10/11/07, at 25. The court also found that counsel had a reasonable basis for asserting imperfect belief of defense of others instead of diminished capacity. The court noted that appellant did not inform counsel about his mental health problems, nor did he demonstrate outward signs of diminished capacity or mental defects. In addition, appellant's initial prison classification form recorded no signs of hallucinations, depression, suicidal tendencies, or any other mental health condition. Thus, the PCRA court determined that counsel had no reason to believe appellant suffered from mental health problems.

Regarding appellant's pre-trial prison records, the court determined that the records contained no "red flags," and suggested that appellant's reported symptoms could be attributed to his guilt. The PCRA court also opined that, "the symptoms reported by [appellant] are the type of symptoms ... consistent with long-term confinement, especially for [someone] facing the death penalty." Id. at 27. Thus, the court concluded that, even if counsel had obtained these records pre-trial, they would not have given counsel cause to further investigate appellant's mental health to either

support the diminished capacity defense not pursued, or to bolster the imperfect belief of defense of others theory that was pursued.

As in many capital cases, the task facing trial counsel here was daunting. The case involved the murder of two unarmed men. Each victim, moreover, suffered multiple wounds: appellant shot Lopez twice; he shot Mendez twice and then hatcheted him to death. Furthermore, the killing of Mendez involved time, coordination, and complexity: after killing Lopez, appellant and his co-defendant chased Mendez down to a neighbor's house and brought him back to finish him off, in a particularly gruesome manner. In addition, the victim's bodies were quickly moved to and hidden in Heleva's basement, and time was taken to pose their corpses in positions of humiliation. Appellant had the awareness and presence of mind to confess to the murders immediately after police arrived; although appellant did not act entirely alone, there was no question of identity. These facts made the prospect of any successful defense against first-degree murder extremely challenging. Strategic choices made by trial counsel must be viewed in light of these limiting facts. As in all matters where counsel's ineffectiveness is being raised, this Court must be careful to assess trial counsel's performance without the distortion of hindsight, and must instead review the circumstances under which counsel's decisions were made. Commonwealth v. Birdsong, 24 A.3d 319, 333 (Pa. 2011).

With the above in mind, we first address appellant's claim that counsel was ineffective for not presenting a diminished capacity defense. A diminished capacity defense "does not exculpate the defendant from criminal liability entirely, but negates the element of specific intent." Commonwealth v. Hutchinson, 25 A.3d 277, 312 (Pa. 2011). Thus, if the jury accepts a diminished capacity defense, a charge of first-degree murder is mitigated to third-degree murder. To establish diminished capacity, a

defendant must prove that his cognitive abilities of deliberation and premeditation were so compromised, by mental defect or voluntary intoxication, that he was unable to formulate the specific intent to kill. The mere fact of intoxication does not give rise to a diminished capacity defense. Likewise, evidence that the defendant lacked the ability to control his actions or acted impulsively is irrelevant to specific intent to kill, and thus is not admissible to support a diminished capacity defense. Id.

Here, the PCRA court determined that counsel was not ineffective in presenting an imperfect belief of defense of others claim; had counsel succeeded, the PCRA court reasoned, appellant would have been convicted of no more than voluntary manslaughter, which is a more positive outcome than a finding of guilt of third-degree murder via diminished capacity. This point is true enough, but it is not entirely responsive. The PCRA court's analysis fails to account for the fact that counsel did not consider the possibility of presenting a diminished capacity defense because he was not aware that there may have been relevant mental health evidence to support such a theory; if he had, a strategic choice might then have been made which would factor in, not only the fact that a manslaughter verdict is better than a third-degree murder verdict, but also, the relative strengths of the two defenses, if both were viable. Thus, we cannot simply conclude that counsel's decision to pursue an imperfect belief of defense of others theory alone operates as a reasonable explanation for not considering and pursuing a diminished capacity defense.[12]

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[12] Prior case law from this Court also suggests that pursuing a self-defense theory is not necessarily exclusive of also pursuing a diminished capacity defense, in an appropriate case. In the plurality decision of Commonwealth v. Moore, 805 A.2d 1212, 1218 (Pa. 2002), this Court indicated that the theories of self-defense and diminished capacity are not mutually exclusive. We reiterated this understanding in our more recent Hutchinson decision. Of course, the practicality of such a course is a different question than the theoretical concurrent availability of the defenses.

Instead, we find that the claim fails for different reasons. As we will address at further length in deciding the penalty phase aspect of this claim, we do not doubt that trial counsel could have uncovered some mental health evidence if he had conducted a more thorough pre-trial investigation. Nevertheless, even assuming that counsel could have discovered and developed some degree of opinion testimony along the lines of that offered by the multiple and overlapping experts hired by federal counsel, appellant has not proven that counsel was ineffective.

Although federal counsel secured experts to offer opinions on the matter to the contrary, as a practical matter, the notion that a diminished capacity defense might succeed with a jury, in the face of the circumstances of the murders here – including chasing the second victim down and bringing him back to the crime scene to finish him off, hiding and humiliating the corpses, speaking to police – relatively far-fetched. Moreover, the expert opinions below primarily focused on PTSD and hypervigilance, with the experts claiming that appellant lacked the ability to control his actions or that he acted impulsively. See, e.g., Testimony of Dr. Stewart discussed supra (indicating that a PTSD sufferer would be more likely to react against perceived threats). It is not clear whether such mental health opinion evidence would have been admissible to support a diminished capacity defense or, if admissible, would have been particularly strong or helpful. We have stressed the limited nature of a diminished capacity defense; at best, appellant's proffer strains the outer bounds of evidence that would be admissible to support the defense.

Second, even accepting that appellant's expert mental health evidence could tend to demonstrate more than mere lack of control or impulsivity, a diminished capacity defense would have been inconsistent with appellant's sworn trial testimony. As explained previously, in his final statement to police and at trial, appellant attempted to

shift the blame for the fatal blows onto Daniel Heleva. In order to forward a successful diminished capacity defense, appellant would have had to concede his guilt to third-degree murder. Forwarding a diminished capacity defense would have been inconsistent with appellant's written statement to the police, as well as his trial testimony.

In this case, given appellant's existing accounts of his actions, the physical evidence, and the weakness of the now-proffered evidence as support for diminished capacity, we conclude that appellant has failed to prove that counsel was ineffective for not pursuing a diminished capacity defense.

Next, we consider appellant's claim that counsel should have presented expert testimony related to appellant's supposed cocaine-induced psychosis, PTSD and impaired judgment in support of the imperfect belief of defense of others theory that counsel actually pursued. Given the factual circumstances facing counsel, we are not under the illusion that the theory of defense chosen by counsel, however presented -- *i.e.*, as counsel presented it, or as appellant now says it should have been supplemented -- was particularly strong; but those overriding circumstances were a function of appellant's conduct and the proof against him. Only those who are naive concerning the realities of criminal trials succumb to the notion that all crimes present colorable or promising defenses. Trial counsel's pursuit of an imperfect belief of defense of others claim was understandable given the facts and circumstances surrounding the crimes, and the obvious unavailability of more plausible defenses. Weak as it may have been, counsel pursued the defense, appellant testified consistently with it, and the trial court was ultimately persuaded that jury instructions were warranted on mistaken belief voluntary manslaughter. It is well-settled that the

mere fact that a strategy proved unsuccessful does not render it unreasonable. Commonwealth v. Spotz, 896 A.2d 1191, 1235 (Pa. 2006).

To prevail on a justification defense, there must be evidence that the defendant "(a) ... reasonably believed that he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm; (b) that the defendant was free from fault in provoking the difficulty which culminated in the slaying; and (c) that the [defendant] did not violate any duty to retreat." Commonwealth v. Samuel, 590 A.2d 1245, 1247-48 (Pa. 1991); see 18 Pa.C.S. § 505; see also Commonwealth v. Harris, 703 A.2d 441, 449 (Pa. 1997). "The Commonwealth sustains its burden [of disproving self-defense] if it proves any of the following: that the slayer was not free from fault in provoking or continuing the difficulty which resulted in the slaying; that the slayer did not reasonably believe that [he] was in imminent danger of death or great bodily harm, and that it was necessary to kill in order to save [him]self therefrom; or that the slayer violated a duty to retreat or avoid the danger." Commonwealth v. Burns, 416 A.2d 506, 507 (Pa. 1980).[13]

The derivative and lesser defense of imperfect belief self-defense "'is imperfect in only one respect — an unreasonable rather than a reasonable belief that deadly force was required to save the actor's life. All other principles of justification under 18 Pa.C.S. § 505 must [be satisfied to prove] unreasonable belief voluntary manslaughter.'" Bracey, 795 A.2d at 947 (quoting Commonwealth v. Tilley, 595 A.2d 575, 582 (Pa.

[13] Although the defendant has no burden to prove a claim of self-defense, before such a defense is properly in issue, "there must be some evidence, from whatever source, to justify such a finding." Once the question is properly raised, the burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense. Commonwealth v. Black, 376 A.2d 627, 630 (Pa. 1977).

1991)). Thus, for example, if the defendant was not free from fault, neither self-defense nor imperfect self-defense is a viable defense.

Briefly addressing the cocaine-induced psychosis aspect of appellant's claim, we note that counsel contacted Dr. Fine at the time of trial, asking whether he could provide testimony related to the effects of cocaine. At the PCRA proceedings, Dr. Fine testified that based upon the material he reviewed at the time of trial, he did not believe that appellant would have been unable to form the specific intent to kill the victims. Thus, trial counsel in fact pursued this line of investigation at the time of trial, but ultimately found it unfruitful. There was nothing unreasonable in this decision; hence, this aspect of appellant's current ineffectiveness claim fails.

Appellant's proffer is premised upon counsel's failure to investigate and uncover mental health evidence to support appellant's imperfect belief of defense of others theory. The main thrust of appellant's current argument is that such evidence would have bolstered his position at trial that he honestly, but unreasonably, believed that deadly force was necessary to protect Heleva and Heleva's children. According to appellant, information in prison records not secured by trial counsel, if reviewed, would have led counsel to seek further information regarding appellant's mental health, and that information in turn would have led to testimony similar to that presented at the PCRA proceedings. Appellant then posits that this mental health information would have corroborated the defense theory that appellant genuinely, but unreasonably, believed that deadly force was necessary to protect others when he shot Lopez twice; then shot Mendez, chased him through the house and shot him a second time, tracked him down at a neighbor's house, brought him back, and hacked him to death; then hid the bodies after displaying them in humiliating poses.

Decisional law supports that expert testimony may be admissible to establish the defendant's subjective state of mind – whether the defendant had an "honest, bona fide belief that he was in imminent danger" -- for purposes of presenting a theory of self-defense. See, e.g., Commonwealth v. Light, 326 A.2d 288, 292 (Pa. 1974). However, a defendant's subjective state of mind does not establish the objective factor of the reasonableness of his belief, *i.e.*, the belief of the need to defend oneself (or others) that he genuinely held must be reasonable in light of the facts as they appeared. Id.

The Superior Court explained the interplay between expert testimony and mistaken belief voluntary manslaughter in Commonwealth v. Sheppard, 648 A.2d 563 (Pa. Super. 1994), appeal denied, 655 A.2d 987 (Pa. 1995). In Sheppard, the appellant argued that trial counsel was ineffective for failing to object to the trial court's exclusion of psychiatric testimony as to his impaired mental functioning, based on paranoid ideation and his heavy use of alcohol, in order to establish, among other defenses, imperfect belief self-defense. In essence, the appellant's theory was that a diagnosis of paranoid personality in conjunction with his heavy use of alcohol made him not guilty of any charge of homicide greater than voluntary manslaughter based on the manner in which the mental defect affected his perception of the events surrounding the crime.

The panel first explained that an imperfect self-defense voluntary manslaughter theory has two components: the defendant's subjectively-held belief of danger posed by the victim, as to which expert testimony was admissible, and the objective measurement of that belief, *i.e.*, the reasonableness of that held belief, as to which expert testimony was inadmissible. Id. at 568; see also Light, 326 A.2d at 292; Commonwealth v. Pitts, 740 A.2d 726, 733-34 (Pa. Super. 1999) (evidence of PTSD is relevant and probative to appellee's state of mind on issue of self-defense).

The Sheppard Court stressed that a viable claim of imperfect self-defense voluntary manslaughter cannot be based solely on the subjective state of mind of the defendant. "It is not the appellant who determines what is a reasonable belief. There must be some standard by which it is measured." Id. at 569. The Sheppard panel further explained that Section 2503(b) did not contemplate diagnosed mental disorders as a shield for a defendant when an imperfect self-defense theory is pursued, "but rather speaks to a misperception of the factual circumstances surrounding the event." Id. at 569. The panel indicated that the appellant's theory sought to extend imperfect self-defense beyond its intended purpose and "would open the flood gates to imperfect self-defense claims based entirely on a subjective state of mind when the objective component is not present." Id.

Appellant's argument in this case is similar to the argument rejected by the Superior Court in Sheppard. Appellant appears to believe that his alleged mental defects can justify his actions in killing two people regardless of an objective assessment of the facts and circumstances surrounding the murders. Notably, current counsel entirely ignore the facts and circumstances surrounding the murders, concentrating solely on trial counsel's failure to present mental health evidence to bolster appellant's alleged "honest" belief that Heleva and Heleva's children were in danger unless he killed Lopez and Mendez.

We have no doubt that expert mental health testimony would have been admissible and relevant to the imperfect defense of others defense that the trial court determined was adequately supported by the facts so as to allow counsel to pursue the defense. However, appellant has not shown that the addition of such testimony, concerning one of the two central aspects of a claim of imperfect belief of defense of others, creates a reasonable probability that the jury would have returned verdicts of

involuntary manslaughter. As we noted at the outset, this defense was not particularly strong or plausible, for reasons having to do with circumstances other than appellant's supposed mental state. Appellant shot two unarmed men, who were doing no more than throwing punches at Heleva. By appellant's own testimony, the victims were "beating up" Heleva and he "just got scared and grabbed the shotgun" and fired two shots. N.T., 11/21/2002, at 634. Furthermore, the facts also demonstrated that Heleva's children were upstairs at the time of the incident, while the initial altercation – into which appellant introduced the firearm -- was occurring downstairs. Most damning is the fact that appellant and Heleva chased down and dragged the wounded Mendez back to the house before killing him with a hatchet; any self-defense-related claim as to Mendez was clearly doomed by this fact. Certainly, at the time appellant and Heleva chased down Mendez, any belief that others were in imminent danger was objectively unreasonable. Moreover, appellant's entire course of conduct suggested that he was not free from fault in continuing, and indeed escalating, the difficulty. Under such circumstances, we conclude that appellant has not demonstrated a reasonable probability that, if only counsel would have introduced supporting expert testimony on the subjective half of his imperfect defense of others claim, the jury would have credited that his perceptions, if genuinely held, were objectively reasonable. See Light, supra.[14]

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[14] Appellant appends an assertion to his guilt phase claim that "in assessing prejudice, this Court should draw appropriate adverse inferences from the fact that Appellant's post-conviction mental health presentation was not even rebutted by the Commonwealth who called no expert witnesses of its own." Brief of Appellant at 44-45. This argument is frivolous. Appellant cites to a workers' compensation case and WIGMORE ON EVIDENCE in support of his "adverse inference" theory rather than governing case law involving a collateral attack on a criminal conviction, premised upon a standard – Strickland – that establishes a presumption of counsel's competence. Moreover, the legal principles cited by appellant do not support his theory, but, instead, say only that an "adverse inference" may be appropriate when a workers' compensation **claimant** (the party with the burden) fails to produce evidence in support of his claims. (continued...)

Accordingly, appellant has failed to establish that trial counsel was ineffective for failing to proffer mental health evidence in support of his imperfect belief of defense of others claim.

b. Penalty Phase Mental Health Mitigation Evidence

The next argument is similar to the one advanced for purposes of guilt phase proceedings, but pertains to the investigation and presentation of mitigation evidence during the penalty phase of appellant's trial.[15] Appellant alleges that the mental health

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(...continued)
Here, appellant is the claimant and it is his burden to prove his claims of ineffectiveness, including presenting evidence in support of his mental health claims. The Commonwealth has no such burden. The Commonwealth properly disputed appellant's hired experts' testimony through cross-examination.

Moreover, although counter-expert evidence can certainly make the Commonwealth's task on collateral attack easier – in this Court's experience, mental health expert testimony in capital PCRA matters very frequently is contradictory – the Commonwealth is not obliged to go to the expense of procuring expert opinion rebuttal merely because the FCDO apparently is so flush with financial resources that it secures multiple and overlapping experts to support its theories.

[15] As part of his argument, appellant claims that counsel fell short of the American Bar Association ("ABA") Guidelines. However, this Court has "never endorsed or adopted the ABA [G]uidelines in full." Commonwealth v. Wright, 961 A.2d 119, 132 (Pa. 2008). Constitutional claims of ineffective assistance are measured by Strickland and its progeny; the High Court has not assigned the task to any private group. Rather, that Court has noted that the ABA Guidelines "can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." Bobby v. Van Hook, 130 S.Ct. 13, 16 (2009) (per curiam) (citing Strickland, 466 U.S. at 688). Notably, although appellant was tried in 2002, he relies almost exclusively on the 2003 ABA Guidelines in criticizing counsel. Counsel obviously cannot be expected to conform to ABA Guidelines which did not exist at the time of trial. Appellant does note that earlier versions of the ABA Guidelines exist and he cites, once, to the 1989 ABA Guidelines. However, this one citation is mere boilerplate, and does not prove that counsel deviated from the opinions and recommendations in the 1989 ABA Guidelines, much less that the 1989 ABA (continued...)

evidence he produced on collateral attack could have established the catch-all mitigator,[16] the extreme mental or emotional disturbance mitigator,[17] and the defendant's inability to conform his conduct to the law mitigator.[18] Appellant claims that, at the very least, counsel should have had Dr. Fine testify as a mitigation witness.

The Commonwealth fails to develop a helpful responsive argument on this issue.

In explaining its denial of the claim, the PCRA court noted that counsel provided Dr. Fine with all relevant information available to him. Dr. Fine then informed counsel that appellant's use of cocaine could not be shown to have caused cocaine delirium or cocaine-induced psychotic disorder at the time of the murders. The court found that the only records counsel failed to review were the pre-trial prison records, but counsel was not ineffective in failing to review these records as they did not contain any "red flags" indicative of mental illness. The PCRA court further found that counsel could not be

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(...continued)
Guidelines reflected the prevailing professional norms in Pennsylvania at the time of appellant's trial. As presented, then, appellant's reliance on ABA standards is frivolous.

[16] The catch-all mitigator permits a defendant, in the penalty phase, to introduce as a mitigating circumstance "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8).

Appellant separately alleges that counsel's failure to request a jury instruction on the catch-all mitigator evidences deficient performance. Brief of Appellant, at 46. Appellant inexplicably ignores that the trial court in fact instructed the jury on the catch-all mitigator. See N.T., 11/25/02, 898-99.

[17] The jury may find as a mitigating circumstance that, at the time of the offense, "[t]he defendant was under the influence of extreme mental or emotional disturbance." 42 Pa.C.S. § 9711(e)(2).

[18] The jury may find as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa.C.S. § 9711(e)(3).

faulted for not investigating appellant's background, as appellant indicated that he did not want his family to be contacted and refused to provide contact information. Further, the court determined that counsel had no reason to investigate appellant's mental health because appellant did not display any symptoms of mental illness before or during trial. Accordingly, the court determined that counsel had a reasonable basis for not conducting additional investigation into appellant's mental health status and background.

In challenging these findings, appellant relies on Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), wherein the U.S. Supreme Court generally recognized that capital counsel has an obligation to thoroughly investigate and prepare mental health and other mitigating evidence, Williams, 529 U.S. at 396; counsel cannot meet this requirement by relying on "only rudimentary knowledge of [the defendant's] history from a narrow set of sources." Wiggins, 539 U.S. at 524. This Court has noted:

> Under prevailing constitutional norms as explicated by the United States Supreme Court, capital counsel has an obligation to pursue all reasonable avenues for developing mitigating evidence. Counsel must conduct a thorough pre-trial investigation, or make reasonable decisions rendering particular investigations unnecessary. Strategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. In undertaking the necessary assessment, courts are to make all reasonable efforts to avoid distorting effects of hindsight. Nevertheless, courts must also avoid "post hoc rationalization of counsel's conduct."

Commonwealth v. Williams, 950 A.2d 294, 303-04 (Pa. 2008) (citations and footnote omitted); see also Strickland, 466 U.S. at 689 ("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.").

The reasonableness of capital defense counsel's investigation and presentation of mitigation evidence may depend in large part on the extent to which the defendant assisted counsel's investigation and presentation. See, e.g., Commonwealth v. Rega, 933 A.2d 997, 1026 (Pa. 2007) (reasonableness can depend on information supplied by defendant); Commonwealth v. Rios, 920 A.2d 790, 810-11 (Pa. 2007) (counsel not ineffective for not providing testimony of defendant's family members when defendant instructed counsel not to present their testimony). In considering a claim related to counsel's alleged deficient performance in failing to investigate and present mitigating evidence, this Court considers a number of factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the additional or different mitigation evidence that could have been presented. Commonwealth v. Collins, 888 A.2d 564, 580 (Pa. 2005). None of these factors is, by itself, dispositive, because even if the investigation conducted by counsel was unreasonable, this fact alone will not result in relief if the defendant cannot demonstrate that he was prejudiced by counsel's conduct. Id.

Here, the PCRA court found that appellant opposed any investigation into his background. However, the PCRA court spoke too broadly. It is true that appellant told counsel that he did not wish to involve his family members, and in certain cases an effective case in mitigation may involve the testimony of family members. But, there are other ways to build a case in mitigation, and appellant's directive did not absolve counsel of the duty to gather meaningful information concerning appellant's life history, such as school records or records related to his incarceration. Nor, by its terms, did appellant's directive not to involve family members equate to a directive not to

investigate and present a case in mitigation through other means. Notably, counsel possessed at least rudimentary knowledge of appellant's background via counsel's paralegal; there was nothing to prevent counsel from seeking school records to augment that knowledge. Furthermore, there were indicia from the paralegal's interview of appellant of domestic violence and child abuse during appellant's upbringing which counsel never investigated. At the PCRA hearing, counsel explained that he did not follow up on the information contained in his paralegal's report because they did not involve appellant – in counsel's words, the statement that appellant gave to the defense paralegal may have reflected abuse in appellant's childhood household, but it did "not indicate any abuse towards the client." N.T., 3/7/07, at 21. But, this position is unresponsive; absent some follow-up or further investigation counsel could not, with confidence, say whether there was helpful information to be gleaned from appellant's family background.[19]

We are also concerned that the PCRA court gave little weight to the fact that counsel did not begin preparing for the penalty phase until two weeks prior to trial. Obviously, belated preparation is not ineffectiveness by itself.[20] Nevertheless, such delay can be an indicator of deficient stewardship when there appears to be information

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[19] The Concurring and Dissenting Opinion by Mr. Justice Eakin ("CO/DO") accepts the PCRA court's determination that appellant opposed any investigation into his background as a basis for rejecting appellant's ineffectiveness argument. As explained in the text, that conclusion does not account for other ways in which counsel can and should develop a case in mitigation, including gathering basic information, such as school records or pre-trial incarceration records.

[20] Like the PCRA court's opinion, the CO/DO also does not confront the belatedness of counsel's preparation. Additionally, the CO/DO notes that trial counsel consulted a mental health expert, but does not address the fact, discussed below, that Dr. Fine's task was limited to the development of guilt phase evidence and did not include any inquiry or investigation into the possibility of mitigating evidence.

that counsel could have uncovered if he had given himself sufficient time to diligently investigate and prepare a case in mitigation. In this matter, there was such other evidence. The record confirms that counsel consulted with no mental health expert regarding possible mitigating evidence. Indeed, counsel did not contact Dr. Fine until November 15, 2002, the same day that the Commonwealth presented its first witness at trial. The record further shows that counsel's interaction with Dr. Fine did not encompass potential mitigation evidence, but instead, was specifically limited to determining whether appellant's use of cocaine interfered with his ability to form the specific intent to kill required for capital murder. We have concluded in a similar situation that counsel's singular focus on cocaine-induced psychosis as the key to the guilt phase, coupled with a disregard for other forms of mental health mitigating evidence which would have been useful at the penalty phase, cannot be said to have been a reasonable strategy. Commonwealth v. Smith, 995 A.2d 1143, 1172 (Pa. 2010).

Additionally, the record demonstrates that counsel did not obtain appellant's school records or his pre-trial prison records. Appellant's school records showed that he was a poor performer in school with a borderline intelligence. He never graduated from high school. The pre-trial prison records indicated that appellant had reported having trouble sleeping and hearing voices, and requested a psychiatric evaluation. These records would have prompted further investigation by counsel. On the record presented here, we cannot conclude that counsel conducted a reasonable investigation into possible mitigating evidence.

Further, and by comparison, counsel's penalty phase presentation was modest, consisting of presenting appellant's minor criminal record (two prior misdemeanors for possession of marijuana) and four mitigating witnesses, including appellant, who testified generally to appellant's good and caring nature, and appellant's own

expressions of remorse. The sum of the defense mitigation testimony encompassed ten pages of penalty phase transcript and counsel's closing remarks were commensurately brief, given the minimal case in mitigation. Accordingly, considering the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, the additional or different mitigation evidence that could have been discovered and presented, and the Commonwealth's failure to muster any relevant argument in defense of counsel's performance, we hold that counsel's performance related to the development and presentation of mitigating evidence was constitutionally deficient.

Our inquiry does not end here, since appellant's claim fails if he is unable to establish that counsel's deficient performance actually prejudiced him. Notably, the PCRA court did not address Strickland prejudice in any meaningful way – the court's two-sentence analysis is conclusory and fails to account for the specific conduct (or lack thereof) of counsel or the context of the case itself.[21] Nor does the Commonwealth address Strickland prejudice.

Strickland actual prejudice requires the defendant to prove a reasonable probability that, but for counsel's lapse, the result of the penalty proceeding would have

[21] The PCRA court also framed its prejudice conclusion as finding that the proffered mitigation evidence was "not so overwhelmingly persuasive as to result in a different outcome." See PCRA court opinion, 10/11/2007, at 55. Strickland does not require the evidence to be "overwhelmingly persuasive" and instead, frames the inquiry as requiring the defendant to prove a "reasonable probability" that the outcome of the proceeding would have differed. In this case, as the jury found one aggravating circumstance and two mitigating circumstances, the prejudice inquiry considers "whether there is a reasonable probability that, had the PCRA evidence been adduced at the penalty phase, [appellant] would have been able to prove at least one additional mitigating circumstance, and at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones." Commonwealth v. Gibson, 19 A.3d 512, 526 (Pa. 2011).

been different. Additionally, prejudice must be analyzed in the context of the case, taking into account the developed penalty phase facts. Commonwealth v. Lesko, 15 A.3d 345, 383-85 (Pa. 2011) (citing, in relevant part, Strickland, 466 U.S. at 694).

This case involves the murder of two individuals nearly simultaneously. Additionally, appellant confessed to the crimes almost immediately after they were committed. We have recognized that a defendant convicted of multiple murders has a difficult task in establishing that he was prejudiced by counsel's failure to adequately investigate and present evidence in mitigation. See Lesko, 15 A.3d at 383-85 (citing, in relevant part, Strickland, 466 U.S. at 694); see also Commonwealth v. Gibson, 951 A.2d 1110, 1151 (Pa. 2008) (Castille, C.J., concurring). In instances where the result concerning prejudice is not self-evident, but instead requires careful analysis of prejudice in the specific factual context of the case, we have remanded for the PCRA court to conduct the prejudice inquiry in the first instance. Gibson, supra. As the evidence of the experts offered at the PCRA hearing established the possibility of additional mitigating circumstances, we conclude that the better course is to have the PCRA court conduct the prejudice inquiry in the first instance, assisted by relevant advocacy from both sides. Accordingly, we will remand this claim to the PCRA court for an appropriate Strickland inquiry into prejudice.

2. PEREMPTORY CHALLENGES

Appellant next argues that the Commonwealth used peremptory challenges to unconstitutionally exclude female and Latino jurors. Appellant notes that the jury pool consisted of sixteen women and twenty-four men. He then observes that nine of the thirteen jurors the prosecutor peremptorily challenged were female, while he peremptorily challenged only four of twenty-four men. Thus, appellant argues that the prosecutor struck females at a rate of three times more than he struck males. Likewise,

appellant states that the prosecutor struck the only prospective juror with a Latino surname. For these reasons, he argues that he has established a Batson[22] *prima facie* case of discrimination. Appellant further alleges that the neutral explanations for the strikes offered by the Commonwealth, which the PCRA court credited, were "inherently susp[ect] or pretextual." Brief of Appellant, at 84. Recognizing that he waived any Batson claim at trial, appellant argues that counsel was ineffective for failing to raise this issue during jury selection.

The Commonwealth contends that appellant cannot establish a *prima facie* Batson violation because nothing in the jury selection transcript indicates any purposeful discrimination based on race, ethnicity, or gender.

The PCRA court noted that, as appellant had failed to raise a Batson objection at trial, there was no record upon which it could assess whether a *prima facie* case for a Batson claim was met. The judge, who also presided at trial, then reviewed the transcript and found nothing in the prosecutor's questions that indicated any racial or gender bias. Furthermore, the court found that the record reflected gender-neutral and race-neutral reasons for the prosecutor to strike each of the jurors he peremptorily challenged, and there was no indication of unconstitutional bias. As appellant's underlying Batson claim was meritless, the court found that counsel was not ineffective.

Defaulted Batson claims argued through the derivative guise of ineffectiveness are not, indeed cannot, be treated the same as properly preserved Batson objections. See Commonwealth v. Uderra, 862 A.2d 74, 86 (Pa. 2004). When there is no Batson

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[22] Batson v. Kentucky, 476 U.S. 79 (1986). Batson held that peremptory challenges may not be used in a racially discriminatory manner. In J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), the U.S. Supreme Court extended Batson to prohibit purposeful gender discrimination through the use of peremptory challenges. For ease of discussion, we will refer to claims of either racial or gender discrimination in the use of peremptory challenges as Batson claims.

objection during jury selection, "a post-conviction petitioner may not rely on a *prima facie* case under Batson, but must prove actual, purposeful discrimination by a preponderance of the evidence ... in addition to all other requirements essential to overcome the waiver of the underlying claim." Id. at 87.[23] In the absence of such a showing, the petitioner cannot meet the Strickland standard. Furthermore, "[a] finding by the trial court as to an absence of discriminatory intent must be given great deference on appeal." Commonwealth v. Spotz, 896 A.2d 1191, 1212 (Pa. 2006) (quoting Commonwealth v. Jones, 668 A.2d 491, 518 (Pa. 1995)).

It is notable that appellant does not acknowledge or even cite Uderra in his argument to this Court. Appellant's argument instead relies heavily upon bare statistical evidence, focusing on the Commonwealth's strikes in isolation, with no account of the effect that his own peremptory challenges had upon the jury pool. But a raw lack of racial or gender equivalency in a party's use of peremptory challenges alone does prove purposeful discrimination in jury selection, much less discrimination so overt that trial counsel was obliged to object. See Ligons, 971 A.2d at 1144 (racially disproportionate number of peremptory challenges "in and of itself, is insufficient to demonstrate

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[23] This Court has also required a party asserting a Batson violation to provide a full and complete record demonstrating the alleged violation. Uderra, 862 A.2d at 84 (citing Commonwealth v. Holloway, 739 A.2d 1039, 1045 (Pa. 1999)). Specifically, we have required information about the race or gender of potential jurors peremptorily challenged by the Commonwealth, the race and gender of potential jurors acceptable to the Commonwealth but peremptorily challenged by the defense, and the composition of the jury selected. Commonwealth v. Spence, 627 A.2d 1176, 1182-83 (Pa. 1993). This requirement gives the reviewing court "'account[s of] the composition of the panel as a whole, and the conduct of other lawyers exercising strikes.'" Commonwealth v. Ligons, 971 A.2d 1125, 1170 (Pa. 2009) (Castille, C.J., concurring) (quoting Commonwealth v. Hackett, 956 A.2d 978, 991 (Pa. 2008) (Castille, C.J., concurring)). Some members of the Court have criticized the Spence requirement, indicating a preference to eliminate it altogether. See Hackett, at 991-92 (Pa. 2008) (Saylor, J., concurring). Our decision today is not based on this requirement.

purposeful discrimination when considering the totality of the circumstances."). Moreover, the record supports the PCRA court's conclusion that there was no indication of purposeful discrimination here. Indeed, the prosecutor accepted seven females as jurors -- even though he did not use seven of his peremptory challenges -- three of whom appellant peremptorily challenged, and four of whom served on the jury. Further, nothing in the transcript indicates any gender-based bias or animus. In a case involving a similar Batson/Strickland claim premised upon raw data and hindsight, we held that there was no gender-based purposeful discrimination when the prosecutor removed nine female potential jurors, four women served on the jury, and the prosecutor accepted four women who were later struck by the defense. Spotz, 896 A.2d at 1212-13. Thus, the PCRA court properly concluded that appellant did not prove that the Commonwealth purposefully discriminated on the basis of gender in its use of peremptory challenges, and counsel cannot be deemed ineffective for failing to raise the speculative claim appellant now faults him for failing to pursue.

Appellant's claim of ineffectiveness for failing to allege racial discrimination in the use of peremptory challenges is similarly baseless. Appellant focuses on the prosecutor's peremptory challenge of a prospective juror who he claims was the sole Latino venireperson. The PCRA court determined that the potential juror's indication of a strong belief that a life sentence was worse than death provided a proper basis for the prosecutor to remove her. PCRA Court Opinion, 10/11/07, at 16 n.6. After reviewing the record, we find support for the PCRA court's determination, as the prosecutor challenged this potential juror shortly after she said she thought a life sentence was worse than death. See N.T. Voir Dire, 11/14/02, at 16. Further, there is no other indication in the record of racial or ethnic discrimination on the prosecutor's part. Nor does appellant point to any other objective factor that should have indicated to trial

counsel that the Commonwealth's challenge was for the nefarious reason appellant now imagines and alleges, rather than the obvious one.

Additionally, as noted, appellant inexplicably fails to acknowledge the Uderra "actual, purposeful discrimination" standard and instead repeatedly cites to the Batson *prima facie* case standard in support of his position – even though he is pursuing his defaulted claim via collateral attack, and under the guise of ineffective assistance of counsel. Because appellant fails to even attempt to satisfy his burden on collateral attack, his claim is frivolous: he has not overcome the deference owed to the PCRA court's finding, Spotz supra; and he has failed to prove that the Commonwealth actually and purposefully discriminated in its peremptory challenges. Counsel cannot be considered ineffective for failing to pursue a frivolous claim.

Appellant also claims that the PCRA court improperly denied him an evidentiary hearing on this claim. In the 35th footnote in his 99-page brief, appellant offhandedly declares that the "Court denied Appellant's request for discovery on this claim, including the Prosecutor's notes regarding jury selection, which precluded Appellant from having a full and fair hearing on this claim." See Brief of Appellant at 84, n.35.

The PCRA court considered the claim and reasoned that appellant did not show good cause for discovery of jury selection information. See PCRA Court Opinion, 4/30/07, at 6-7. Appellant does not develop his discovery argument; it is waived both because it is not comprised within his statement of questions presented, and because its lack of development makes it frivolous.

For purposes of post-conviction proceedings an evidentiary hearing is not required when "there are no genuine issues concerning any material fact...." Pa.R.Crim.P. 909(B)(2). Furthermore, the decision whether to grant an evidentiary hearing is within the discretion of the PCRA court and will not be overturned absent an

abuse of that discretion. Commonwealth v. Harris, 852 A.2d 1168, 1180 (Pa. 2004). As explained above, appellant's Batson proffer is frivolous and unresponsive to the governing collateral review standard. Accordingly, appellant cannot demonstrate that the PCRA court abused its discretion by denying him an evidentiary hearing on his claim that counsel was ineffective for failing to raise a Batson claim.

3. WITHERSPOON-RELATED CLAIMS

Appellant next contends that the trial court violated Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (juror in capital case may not be excluded merely because of general moral, personal, or religious reservation regarding death penalty) by removing, for cause, four potential jurors because they expressed doubts about imposing the death penalty. Appellant argues that counsel was ineffective in failing to object to the removal of these potential jurors and for failing to demonstrate that they were suitable jurors.[24]

The PCRA court found appellant's claim of ineffective assistance of counsel unreviewable because it was a mere boilerplate assertion. Alternatively, the court determined that there were legitimate reasons to excuse the four potential jurors.[25]

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[24] In response to appellant's Witherspoon claim, the Commonwealth argues that appellant's claim "that Monroe County's jury selection process systematically under-represents minorities" fails because appellant's boilerplate claims of ineffectiveness are insufficient. Brief of the Commonwealth, at 14. The Commonwealth has apparently confused this claim with a claim appellant pursued in the PCRA court but has now abandoned by not raising it on appeal.

[25] At the conclusion of jury selection, appellant indicated that he was consulting with and instructing counsel during jury selection. The PCRA court, in an apparent alternative holding, determined that appellant waived any challenge to counsel's performance during jury selection because of his active participation. Appellant baldly asserts that the PCRA court erred because his participation did not relieve counsel of his obligation to perform effectively in jury selection. Given our disposition below, we will not address this ground for decision.

The decision to disqualify a juror is within the trial court's discretion, and, where an objection is made and pursued on appeal, the decision will only be reversed for an abuse of that discretion. Commonwealth v. Steele, 961 A.2d 786, 804 (Pa. 2008) (citing Commonwealth v. Carson, 913 A.2d 220, 262 (Pa. 2006)). This Court has noted that, "a trial court is within its discretion to exclude jurors who expressed reservations about imposing the death penalty, and ... trial counsel has no constitutional obligation to attempt to change the jurors' views." Id. However, a potential juror in a capital trial may not be excluded merely because of a general moral, personal, or religious reservation about the death penalty. Id. at 803 (citing Witherspoon, 391 U.S. at 522).

Here, the record supports the PCRA court's determination that two of the four jurors in question were properly removed because they indicated that they would not be able to impose the death penalty. See N.T. Voir Dire, 11/12/02, at 80 ("I just don't think I could [vote for the death penalty]."); N.T. Voir Dire, 11/13/02, at 137 (potential juror indicated that his feelings would "more or less" affect his "ability to evaluate the evidence"). The third potential juror, who expressed doubts about the death penalty, was excused because she lacked sufficient transportation to attend trial. N.T. Voir Dire, 11/12/02, at 180. The final potential juror, who had reservations about the death penalty, was excused after it became apparent that she was having extensive difficulty in understanding legal concepts. See N.T. Voir Dire, 11/13/02, at 67 (potential juror expressed fear "I would not understand and I [would] do the wrong thing").

On this record, appellant's hindsight speculations do not prove that counsel was constitutionally obliged to try to convince these jurors to alter their stated views. Carson, supra. Some lawyers and organizations may encourage or pursue strategies to make capital case jury selection a tedious, weeks-long process; indeed, since a single juror can negate the death penalty, there no doubt is an incentive to try to seat jurors

who may have difficulty following their oaths. But, nothing in the Sixth Amendment requires this sort of practice. Appellant has not established that any of the four excused jurors were improperly excluded as a matter of law because of a general moral, personal, or religious reservation about the death penalty, such that counsel was constitutionally required to object or attempt to "rehabilitate" the jurors. The record supports the PCRA court's determination that the jurors were removed for cause because they expressed reservations about their ability to impose the death penalty or for reasons unrelated to their views on the death penalty. Accordingly, this claim is meritless, and counsel was not ineffective for failing to object to the exclusion of these jurors.

4. APPELLANT'S INCULPATORY STATEMENTS

Appellant next challenges counsel's stewardship as it related to the admission of his inculpatory statements. In brief, the circumstances surrounding appellant's confessions were as follows. A neighbor noticed the commotion from the murders, reported it to authorities as a domestic violence incident, and the state police responded. A trooper handcuffed appellant and placed him in the back of a patrol car, and, still believing that he was investigating a domestic violence incident, asked appellant where the women were. Appellant replied, "There is no 'she.' They are in the basement. I shot them." N.T. Trial, 11/15/02, at 80. Appellant was then transported to state police barracks, where a state trooper read him Miranda[26] warnings; appellant then gave two inculpatory statements, the latter recorded, admitting to shooting both victims. After a 70-minute break, appellant asked to speak with the trooper and recounted a different version of the murders. He still admitted to shooting both victims, but also placed blame on Daniel Heleva for the killings.

[26] Miranda v. Arizona, 384 U.S. 436 (1966).

Appellant now argues that counsel was ineffective in the manner in which he challenged the admission of his confessions in a pre-trial suppression motion. He claims that the two-hour delay before he was transported to the state police barracks, and his being kept for approximately eight hours in cold and inhospitable conditions, was coercive, and that counsel was ineffective for not developing evidence of this police coercion to support suppression. Separately, appellant reprises his claim that counsel was ineffective for not investigating appellant's mental health status, including evidence of his cocaine use, in support of the suppression motion, claiming his diminished mental capacity impaired his ability to voluntarily waive his Miranda rights and rendered him susceptible to police coercion.

The Commonwealth notes that appellant challenged the admissibility of his pre-trial statements on direct appeal. The Commonwealth claims that appellant's incarceration records show he was not under the influence of, or withdrawing from, any drugs when he was initially incarcerated; thus, he cannot show that he was under the influence when he confessed.

The PCRA court concluded that this claim was previously litigated because, on direct appeal, counsel unsuccessfully challenged the admissibility of appellant's inculpatory statements. Alternatively, the PCRA court found that the claim was meritless because appellant's incarceration records indicated that he was not under the influence of, or withdrawing from, any drug, nor was there any indication that appellant suffered from any mental health problem during police questioning. Furthermore, the state police afforded appellant bathroom breaks and coffee, and moved him to an office where they removed his handcuffs. Under the circumstances, the court found, appellant did not prove that his statements were involuntary.

Although counsel moved to suppress these inculpatory statements, and raised the denial of the suppression motion on direct appeal,[27] appellant now claims that counsel was ineffective in the manner in which he litigated the suppression issue. This Court has recognized that a Sixth Amendment claim of ineffectiveness raises a distinct ground for relief and thus this manner of presenting new theories on collateral attack is not *per se* precluded by the PCRA's previous litigation restriction. See Collins, 888 A.2d at 571 (ineffectiveness claims distinct from claims raised on direct appeal). Accordingly, the PCRA court erred to the extent that it concluded that appellant's ineffectiveness claim necessarily was previously litigated. Nevertheless, our review of the record shows that appellant's "new" claim, sounding in counsel ineffectiveness, is meritless.

Appellant is arguing that his explicit and informed Miranda waiver was not voluntary because the conditions of his custody and his mental status rendered the waiver coercive as a matter of law. Appellant also appears to assert that his waiver was not knowing and intelligent because his mental status or diminished capacity interfered with his ability to have a full understanding of the nature of the right being abandoned and the consequence of the choice. See Commonwealth v. Mitchell, 902 A.2d 430, 451 (Pa. 2006) (explaining two-prong analysis for purposes of Miranda).

In Pennsylvania, there is no *per se* rule that there can be no voluntary waiver when a person is mentally ill. Commonwealth v. Logan, 549 A.2d 531, 537 (Pa. 1988); Commonwealth v. Bracey, 461 A.2d 775, 782 (Pa. 1983). Nor does appellant cite any federal authority for the proposition. Similarly, appellant cites to no governing cases, in

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[27] On direct appeal, appellant argued that the statement he made in the patrol car should have been suppressed because it occurred prior to Miranda warnings and while he was in custody. Appellant also argued that the written statement was obtained while he was in custody for more than six hours in violation of Commonwealth v. Davenport, 370 A.2d 301 (Pa. 1977), overruled by Commonwealth v. Perez, 845 A.2d 779 (Pa. 2004).

existence at the time of appellant's trial, approving or suggesting that mental health issues, not made apparent to police conducting an interrogation, can vitiate a Miranda waiver. Instead, appellant's sole citation in support of his argument is a University of Chicago Law Review article published in 2002. See Brief of Appellant at 79.

Under Miranda, probative evidence, such as a confession, may be suppressed to "punish" and "deter" police misconduct, and thereby enforce constitutional protections. Thus, in the suppression realm, the focus is upon police conduct and whether a knowing, intelligent, and voluntary waiver was effected based on a totality of the circumstances, which may include consideration of a defendant's mental age and condition, low IQ, limited education, and general condition. Commonwealth v. Cox, 686 A.2d 1279, 1287 (Pa. 1996). When a defendant alleges that his waiver or confession was involuntary, the question "is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess." Commonwealth v. Templin, 795 A.2d 959, 966 (Pa. 2002) (quoting Commonwealth v. Nester, 709 A.2d 879, 882 (Pa. 1998)).

The PCRA court found that there was no evidence of police coercion. This finding is supported by the record, as well as this Court's determination on direct appeal. See Sepulveda, 855 A.2d at 793. Appellant initiated the conversation in which he made his final confession. Further, the state police provided appellant with a blanket and coffee when he asked for them. Under these facts, appellant fails to show that the police interrogation was so manipulative or coercive as to deprive him of his ability to make a free and unconstrained decision to confess. Thus, counsel cannot be faulted for failing to pursue this theory in support of suppression.

We also discern no error in the PCRA court's finding that there was no obvious objective indication to counsel, state police, or the trial court that appellant suffered from any mental illness at the time he confessed his crimes, such that the police conduct can be viewed as unconstitutional manipulation warranting suppression. As in Mitchell and Logan, the facts surrounding the confession do not suggest that appellant's alleged mental status interfered with the important, but simple (all he needs say is "no") choice of whether to waive his constitutional rights. Furthermore, Dr. Puente testified that there was nothing to suggest that the crime was a result of cocaine-induced psychosis and the confessions took place immediately following the crimes. Thus, counsel had no reason to believe that appellant suffered from a mental defect at the time of his confession that was or should have been obvious to police, nor, for that matter, does the evidence suggest that appellant's alleged mental health issues interfered with his waiver. Accordingly, appellant is not entitled to relief on this claim.

5. "FALSE" EVIDENCE INTRODUCED BY COMMONWEALTH

Appellant next declares that the Commonwealth introduced "false" evidence, and that counsel was ineffective for failing to discover and object to this "misconduct." The claim is frivolous.

The background for the claim is as follows. A recording of appellant's third confession was played for the jury. In the recording, appellant said that he did not notice blood on his pants until he finished disposing of victim Mendez's body. The state police transcript of the confession indicated that appellant said he did not notice blood on his pants until "I finished playin' him." N.T. Trial, 11/21/02, at 281. Trial counsel presented evidence that appellant in fact said, "I finished pulling him." Id., at 707. Appellant now claims that a forensic audio examiner hired by the FCDO has examined

the recording, and in his opinion, appellant actually said "I finished fighting with him." Brief of Appellant, at 72.

Appellant argues that evidence that he in fact told the police he was fighting with one of the victims would have bolstered his imperfect belief of defense of others claim. Noting the general proposition that a conviction cannot be based upon false evidence,[28] appellant rather recklessly accuses the Commonwealth of prosecutorial misconduct by allegedly withholding that he actually said "fighting." With no factual basis for the accusation, appellant further alleges that the trooper who interrogated him knew and remembered that he actually said "fighting," but nefariously declined to correct the transcript. Appellant then contends that the Commonwealth knowingly used this purported false evidence to argue that he mistreated the victims' bodies. Alternatively, appellant alleges that counsel was ineffective in failing to secure a forensic analysis of the recording, which would have revealed what appellant actually said.

The Commonwealth reviews the post-trial procedural history and contends that the record does not support appellant's claim. The PCRA court found that appellant's prosecutorial misconduct claim was waived because he failed to raise it at trial or on direct appeal. Further, the PCRA court found that the trooper could not recall what appellant actually said, but reviewed the transcript, correcting it only when it was inconsistent with the recording and his notes. Thus, the trooper never understood appellant to have used the word "fighting." The PCRA court found that appellant's claim of ineffective assistance of counsel was meritless, further noting that, because counsel offered an alternative interpretation of the recording, the jury was well aware that the content of the transcript was in question. The court also noted that the jury heard the

[28] See Napue v. Illinois, 360 U.S. 264, 269 (1959).

recording for itself. Thus, the PCRA court determined that counsel was not ineffective for not seeking a third, "forensic," interpretation of the recording.

We agree with the PCRA court that appellant's claim is not cognizable to the extent it sounds in a claim of prosecutorial misconduct. The recording and transcription were made available to appellant, and he could have raised any appropriate objection. Notably, appellant, like the trooper, was at the interrogation, and he was optimally positioned to determine whether the transcription accurately reflected what he said then compared to what he heard on the tape. Indeed, it is safe to assume that appellant can better decipher his own speech than any expert, particularly since he has the benefit of his memory of the interrogation. The fact that appellant, with the help of an expert, now has a new interpretation of what he said on the audio recording that was disclosed to him does not prove that the Commonwealth committed "misconduct," and FCDO counsel should be mindful of their own ethical duties before leveling such baseless accusations.

To the extent that appellant appends an allegation of ineffectiveness to this waived claim, the record supports the PCRA court's determination that there was simply no indication that the Commonwealth presented "false" evidence, much less that it did so intentionally. Appellant's expert's opinion does not establish what appellant said as a mathematical certainty, or even as a fact; and even if it did, that opinion does not prove that the Commonwealth deliberately falsified the transcript or knowingly introduced false evidence. See Commonwealth v. Henry, 706 A.2d 313, 321 (Pa. 1997) ("Simply because Henry's experts disagree with the Commonwealth's experts does not mean that the Commonwealth knowingly presented false evidence in violation of Henry's due process rights."). Again, the audio tape itself was made available to the defense; and appellant, who made the statement recorded on the tape, could have argued that the

transcript was inaccurate. Indeed, trial counsel argued so, with appellant sitting at his side to assist. Thus, counsel called his secretary, who stated that she believed that the disputed word was "pulling," thereby apprising the jury that the Commonwealth's transcription was in doubt. Moreover, on cross-examination, counsel specifically asked the state trooper whether the written transcript accurately reflected what was on the tape. In response, the trooper indicated that "whatever I heard on the tape is what is in this transcript." N.T., 11/19/02, at 305. Appellant, and his counsel, were no worse positioned than the trooper to assess and argue the accuracy of the transcription.

Appellant also avers that counsel was ineffective because he was required to secure a forensic analysis of the recording for purposes of trial, in order to discover that appellant said something different than what he himself, apparently, thought he had said. There is nothing in Strickland jurisprudence that requires counsel to go to such lengths. Again, the recording itself was played for the jury and the jury had the firsthand opportunity to determine what appellant actually said or whether the word in question was clear enough on the tape to raise some doubt regarding the transcription. The jury would not have been obliged to believe an expert, rather than their own hearing. Appellant's current proffer merely offers a third interpretation of the word in question; it is the essence of hindsight, and based upon the opinion of a particular proffered expert. Finally, there is no reasonable probability that uncertainty related to this single word could outweigh appellant's three other confessions and the forensic evidence against him and produce a different verdict.

6. VICTIM IMPACT EVIDENCE

Appellant next argues that counsel was ineffective for failing to object to victim impact evidence that he says was improperly introduced at trial. Appellant claims that, during the guilt phase, victim Mendez's sister improperly testified that Mendez

possessed a guardian angel keychain and gold cross. Further, appellant claims that the victims' families carried photographs of the victims into court which, he says, amounted to introducing improper extra-record victim impact evidence into the guilt and penalty phases.[29]

In response, the Commonwealth summarizes the procedural history of appellant's direct appeal, which is not helpful to deciding this issue. The PCRA court concluded that Mendez's sister's testimony was not introduced or used as victim impact evidence, but was relevant to establish Mendez's identity as one of the victims. The PCRA court further determined that there was no indication that the victims' families displayed the victims' photographs at trial. In fact, the PCRA court noted that it "clearly recall[ed] that no such extra-record victim impact evidence was present in the courtroom during either phase of [appellant's] trial and such evidence would not have been permitted. Had a family member attempted to bring such evidence into the courtroom, it would have immediately been removed." PCRA court opinion, 10/11/2007, at 49.

Our independent review of the record corroborates that Mendez's keychain and gold cross were admitted, and properly so, to identify Mendez as a victim.[30] The record

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[29] Appellant also argues that the Commonwealth introduced improper victim impact evidence during the penalty phase because Mendez's sister's guilt phase testimony was incorporated into that proceeding. He then baldly states, "[o]ther improper impact evidence was also introduced." His development of this statement is limited to an assertion that the testimony of the sentencing phase witnesses "went beyond the constitutionally acceptable 'quick glimpse'" in violation of his federal constitutional rights. Appellant nowhere directs this Court's attention to specific penalty phase testimony or even cites to the transcript that allegedly reveals this violation of the U.S. Constitution. This sub-claim is waived and frivolous.

[30] Appellant alleges that this identification testimony was unnecessary because it was undisputed that Mendez was a victim. However, generally, "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Old Chief v. United States, 519 U.S. 172, 186-87 (continued...)

shows that the Commonwealth had Mendez's sister identify the items Mendez was wearing on the night appellant murdered him. See N.T. Trial, 11/15/02, at 55-58 (identifying multiple articles of clothing). State police found these items strewn across the murder scene. See id., at 72-74. This evidence was relevant and admissible to show Mendez was one of the victims. Moreover, appellant does not argue or suggest that the evidence, introduced for this purpose, was actually argued as victim impact evidence. Because this evidence was properly admitted to establish identity, appellant's underlying claim lacks a factual predicate, and his derivative claim of counsel ineffectiveness necessarily is frivolous.

Appellant further argues that the victims' families displayed photographs of the victims in court, constituting extra-record victim impact evidence. Appellant's sole evidence in support of this claim is a citation to, and purported quotation from, a newspaper article. This hearsay is simply insufficient to meet appellant's burden of proof to show that the photographs were ever brought into court -- especially given the trial court's specific rejection of the accuracy of this claim. Moreover, appellant's bald claim does not establish that any such photographs were displayed to the jury in a fashion that conveyed that the photographs were of the victims, much less that they were prejudicial. And, of course, even if appellant's claim had a valid factual predicate, his claim that this amounted to "evidence" is mistaken. Because appellant's improper victim impact evidence claim is baseless, counsel cannot be deemed ineffective.

7. JURY INSTRUCTIONS

(...continued)
(1997). Victims are not mere props in homicide trials, and the government is permitted to prove their lives in being and individuality. See Commonwealth v. Freeman, 827 A.2d 385, 415 (Pa. 2003) ("[M]urder victims are not simply props or irrelevancies in a murder prosecution, and innocuous references to victims and their families are not necessarily prejudicial.").

Appellant next claims that trial counsel was ineffective for not objecting to three purported errors in the trial court's guilt phase jury instructions. First, appellant asserts that the trial court erroneously stated that imperfect belief of defense of others required an "unmistaken belief" that deadly force was necessary, and counsel was obliged to object. Appellant argues that the instruction confused the jury, preventing it from properly deciding his imperfect belief of defense of others claim. Next, appellant alleges that counsel was required to object after the trial court failed to properly instruct the jury that the Commonwealth must disprove, beyond a reasonable doubt, appellant's imperfect belief of defense of others claim, if it is to prove malice, and thus murder. Finally, appellant claims that counsel should have objected after the trial court's accomplice liability instructions supposedly failed to inform the jury that it had to conclude that appellant specifically intended to kill before it could convict him of first-degree murder.

The Commonwealth responds that the trial court has broad discretion in phrasing its instructions, and argues that the jury instructions, when read in their entirety, clearly, adequately, and accurately instructed the jury on the law.

The PCRA court likewise noted that jury instructions must be reviewed as a whole. Respecting the imperfect belief of defense of others instruction, the court found that appellant's attack on counsel focused on limited excerpts from the instructions, but when taken as a whole, "the jury charge on voluntary manslaughter clearly, adequately and accurately reflects the law on 'imperfect self-defense' (a defendant's unreasonable belief that the killings were justified)." PCRA Court Opinion, 10/11/07, at 30. Regarding malice, the court found that the jury instructions as a whole informed the jury that it had to find malice to convict appellant of murder. The PCRA court noted that the instruction used multiple examples which made it clear that the jury could only find malice if it was

convinced beyond a reasonable doubt that appellant was not acting in defense of others. Finally, the PCRA court found that the accomplice liability instruction was proper, noting that it conformed to the Pennsylvania Suggested Standard Criminal Jury Instructions. The PCRA court further determined that appellant's ineffectiveness claims were mere boilerplate assertions, and thus were insufficient to carry appellant's burden to actually prove that he was denied effective assistance of counsel.

At the PCRA hearing, counsel testified regarding the imperfect belief of defense of others charge and the malice instructions, offering that he could not recall whether he had any reason for failing to object. He was not asked about the accomplice liability charge. See N.T., 3/7/07, at 40-45.

In considering the points underlying appellant's attack on counsel, we keep in mind that, when reviewing jury instructions for error, the charge must be read as a whole to determine whether it was fair or prejudicial. "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. Washington, 927 A.2d 586, 603 (Pa. 2007).

a. Imperfect Belief of Defense of Others

As discussed previously, counsel requested that the jury be charged on voluntary manslaughter (imperfect belief) and justification (defense of others) and the trial court granted the request. Appellant accurately notes that the transcript indicates that the trial court mistakenly used the phrase "involuntary manslaughter" and "unmistaken" in a portion of its charge on imperfect belief of defense of others, as follows:

> I've been asked to charge on **involuntary** manslaughter. As I said to you previously when I defined malice, there can be no malice when certain reducing circumstances are present, a killing may be voluntary manslaughter but not murder. And this is true when the Defendant kills in

> the heat of passion or following a serious provocation. Or kills under the **unmistaken** belief in justifying circumstances.

N.T., 11/22/02, at 795 (emphases added). However, the reference to "involuntary manslaughter" was clarified almost immediately thereafter when the court correctly referred to the offense as voluntary manslaughter. Moreover, earlier in its charge, the court was clear that there were six possible verdicts, not guilty or guilty of first-degree murder, third-degree murder, or voluntary manslaughter. The court also stated, at that point, that it would be instructing the jury on voluntary manslaughter later in the charge. See id. at 789, 791. The court followed through on this promise when it instructed the jury on justification, explaining that justification would be a defense "if a Defendant reasonably believed his actions were necessary to avoid harm to someone else ... in this case the fistfight which occurred in the kitchen area involving Mr. Lopez and Mr. Mendez and Mr. Heleva." Id. at 800.

Related to the "unmistaken" belief reference, appellant acknowledges that the next instruction informed the jury that an "unreasonable" belief could support a finding of voluntary manslaughter as follows:

> You can find malice and murder only if you are satisfied beyond a reasonable doubt that the Defendant was not acting under sudden or intense passion, from serious provocation by the victims **or was under the unreasonable belief** that the circumstances were such that if they existed would have justified [sic] killing.

Id. at 795 (emphasis added). Nevertheless, appellant contends that the jury was never informed that this circumstance would warrant a verdict of voluntary manslaughter – "[i]t simply told the jury that if such an unrealistic belief existed, the jury could not find malice and murder." Appellant then declares that, "Contrasted with the earlier and erroneous instruction, the jury would have believed such a finding would result in either conviction of murder or acquittal." Brief of Appellant at 55. Appellant also asserts that the court never defined "unreasonable belief" and further offers that the later instruction on

justification compounded this absence by its repeated reference (correctly) to "reasonable belief."

There is no doubt that counsel could have objected to the court's isolated misstatements; but the question is whether he was obliged to do so, and if so, whether the failure to object led to actual prejudice. The jury charge was delivered orally, not by written transmission to be pored over by scholars; it was delivered to ordinary citizens, not to lawyers aware of other forms of manslaughter not at issue; and counsel was there to hear the charge as a whole. We are satisfied that the charge, considered as a whole, accurately conveyed the law. Contrary to appellant's assertions, the jury was informed that this portion of the instruction related to voluntary manslaughter as it followed immediately after the introductory paragraph. Indeed, the next four paragraphs, in substance, clearly related to the charge of voluntary manslaughter. Furthermore, the follow-up instruction correctly stated the elements of the offense. An isolated misstatement does not necessarily taint the charge, so long as the charge as a whole correctly informed the jury of the law. Moreover, appellant does not suggest that his defense was argued to the jury, in counsel's closing, other than according to the governing law on imperfect belief of defense of others. In this case, the charge, taken as a whole, and considered on the context of the trial as a whole, appropriately instructed the jury on imperfect belief of defense of others and appellant has not established that counsel was obliged to object and that the failure to do so caused the first-degree murder verdict.

b. Malice and Defense of Others

Appellant next argues that the trial court failed to inform the jury that a finding of justification (defense of others) negates the element of malice. According to appellant, the prosecution must exclude justification beyond a reasonable doubt, and the jury must

be fully aware that the finding of malice requires the exclusion of the defense of justification. See Brief of Appellant at 59-60 (citing Commonwealth v. Heatherington, 385 A.2d 338 (Pa. 1978)).

In Heatherington, this Court concluded that, to properly inform a jury of the relationship between malice and self-defense, a trial court must instruct as to three points:

> (1) That in order to prove murder, the prosecution must prove beyond a reasonable doubt that the killing was malicious; (2) That evidence of self-defense, from whatever source, tends to negate the malice required for murder; (3) That in order to meet its burden of proof on the element of malice, the prosecution must exclude self-defense beyond a reasonable doubt.

Id. at 341. This Court further noted that a trial court is free to use its own language, but must accurately explain the relationship so that the jury understands that the finding of malice requires the exclusion of the defense of self-defense. Id.

In this case, the defense forwarded by appellant was not (imperfect) self-defense, but defense of others. Nevertheless, the trial court instructed the jury consistently with Heatherington. First, the court repeatedly informed the jury that malice must be proven by the Commonwealth beyond a reasonable doubt in order to return a murder verdict. See N.T., 11/22/02, at 791-92, 793. When instructing the jury regarding defense of others, the court first stated that justification is a defense to the charge. The court then made clear that the Commonwealth had the burden to disprove the defense of justification beyond a reasonable doubt: "You may find the Defendant guilty only if you are satisfied beyond a reasonable doubt that his conduct was not justified under the principle set forth for you." Id. at 800. The court then reiterated this idea at the end of its charge on defense of others when it said, "Because the Commonwealth has the burden to disprove the defense of justification, you may find the Defendant guilty only if

you are satisfied beyond a reasonable doubt that he did not reasonably believe that the use of deadly force was necessary to protect [the accomplice] against death or serious injury to be inflicted by [sic] him on [sic] [the victims]." Id. at 802.

While the trial court never specifically identified malice as the element that defense of others would negate, we have concluded under analogous circumstances that the defendant cannot establish a claim of ineffectiveness so long as the trial court clearly instructed the jury that it could not find the defendant guilty of murder unless the Commonwealth met its burden to prove beyond a reasonable doubt that appellant's actions were not in self-defense. See Commonwealth v. Natividad, 938 A.2d 310, 328 (Pa. 2007) ("It is true that these instructions did not specifically identify malice as that element which self-defense would specifically negate. Nonetheless, it defies logic that Appellant could have incurred prejudice when the trial court instructed that the Commonwealth must disprove Appellant's claim of self-defense beyond a reasonable doubt, and further that self-defense is a complete defense to the overall charge of murder.") In this case, the trial court's instructions adequately conveyed this concept to the jury and counsel cannot be deemed ineffective for failing to object.

c. Accomplice Liability

Appellant next claims that the trial court erred in instructing the jury regarding accomplice liability. Appellant contends that the accomplice liability instruction relieved the Commonwealth of its burden to establish that he possessed the specific intent to kill beyond a reasonable doubt in order to be convicted of first-degree murder. However, appellant never asked counsel why he did not object to the trial court's accomplice liability instruction during the PCRA hearings; thus, appellant deprived counsel of an opportunity to explain his conduct. This Court has held that bald assertions and boilerplate allegations of the lack of a reasonable basis for trial decisions cannot satisfy

the appellant's burden to establish ineffectiveness. See Commonwealth v. Puksar, 951 A.2d 267, 293-94 (Pa. 2008). In his brief on appeal, appellant offers two sentences, simply declaring that counsel had no reasonable basis for not objecting to the jury instruction.[31] When this scant argument is coupled with the failure to inquire into counsel's strategy at the PCRA hearing, we conclude that appellant's ineffectiveness claim relating to the accomplice liability instruction fails as appellant has not established that counsel's performance was deficient. See id. at 278.

Furthermore, even assuming that appellant sufficiently developed his ineffectiveness claim, this claim fails because appellant cannot establish that he was prejudiced by trial counsel's inaction. This Court has made clear that where the only object of the conspiracy is a conspiracy to kill, an appellant cannot establish that he was prejudiced by a jury instruction that was erroneous under Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994). Commonwealth v. Wayne, 720 A.2d 456 (Pa. 1998).

Wayne involved a collateral attack on a sentence of death and a claim of ineffectiveness of trial counsel for failing to object to the jury instructions under Huffman.

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[31] Appellant also baldly declares "all prior counsel's ineffectiveness" with regard to his jury instruction claims. Current counsel asserts that "[w]here as here, counsel fails to raise or litigate an obvious record-based error, both deficient performance and prejudice – and therefore constitutional ineffectiveness of counsel -- are established." Brief of Appellant, at 65 (citing Claudio v. Scully, 982 F.2d 798, 799 (2d Cir. 1992)).

Appellant apparently believes that where the defendant feels he has identified an obvious record-based error, he is absolved of his burden to actually prove that counsel acted unreasonably and that actual prejudice resulted. This is not the law. Indeed, in a series of decisions counsel neglects to acknowledge, this Court has repeatedly rejected such an approach to the ineffectiveness inquiry. Commonwealth v. Colavita, 993 A.2d 874, 895-96 (Pa. 2010). In any event, as we have discussed each of the jury instruction claims individually and found current counsel's complaints wanting, this misapprehension of governing law merits no further attention.

The objected-to instruction related to co-conspirator liability for first degree murder. We found arguable merit to the petitioner's claim, but concluded that the petitioner could not establish that he was prejudiced by counsel's inaction. We explained the harm that Huffman sought to cure -- whether the jury verdict as to the conspirators was reached through speculation as to the nature of the conspiracy and the role of the conspirators -- was not present where the only object of the conspiracy was one to kill. "Once this jury determined that appellant was guilty of conspiracy, given the sole object of the conspiracy, the only logical conclusion to reach is that this jury also determined, beyond a reasonable doubt, that appellant possessed the specific intent to kill." Id. at 465; see also Bronshtein v. Horn, 404 F.3d 700, 713-14 (3d Cir. 2005) (finding error in jury instruction harmless where jury was informed that in order to find defendant guilty of conspiracy to commit murder, it had to find that he did so with intent of promoting or facilitating crime of murder).

In this case, the trial court instructed the jury regarding the specific intent to kill, which is necessary for a first-degree murder conviction. N.T., 11/22/02, at 791-92. The trial court also instructed the jury that the sole object of the conspiracy was to "cause the death" of Mendez. Id. at 799. The trial court further instructed the jury that it could only find appellant guilty of conspiracy if he did so with the intent to promote or facilitate the commission of the crime of homicide or killing of Mendez. Like the jury in Wayne, the jury here convicted appellant of conspiracy. And, given the sole object of the conspiracy, the only logical conclusion is that the jury also determined that appellant possessed the specific intent to kill Mendez. Furthermore, even though the objected-to instruction here related to accomplice liability, and not co-conspirator liability, that difference does not command a different prejudice analysis from the one performed in Wayne, since the harm that Huffman sought to avoid, a first-degree murder conviction

premised upon speculation respecting specific intent, is not present because of the jury's conclusion that appellant was guilty of conspiracy to kill and the necessary determination that he did so with the intent to promote or facilitate that murder.[32]

8. CONFLICT OF INTEREST

Appellant next claims that his trial counsel was ineffective in failing to disclose to appellant that he had a conflict of interest. The facts relating to the claim are as follows. The trial prosecutor was the District Attorney of Monroe County, Mark Pazuhanich, Esquire. In early November of 2003, after the direct appeal briefs were filed, and soon before this Court heard oral argument in appellant's direct appeal, Pazuhanich was elected to the Court of Common Pleas of Monroe County. On November 29, 2003, five days before the direct appeal was argued in this Court, Judge-elect Pazuhanich was arrested in Luzerne County on charges unrelated to his duties as a prosecutor involving the indecent assault of a child. On July 12, 2004, Pazuhanich pleaded *nolo contendere* in the Luzerne County Court of Common Pleas to two counts of indecent assault, one count of endangering the welfare of children, one count of corruption of minors, and the summary offense of public drunkenness. The court sentenced him to ten years' probation and directed him to comply with and register pursuant to Megan's Law II (42 Pa.C.S. § 9791 *et seq.*).

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[32] The conspiracy charge did not extend to the Lopez murder, presumably because appellant admitted to shooting Lopez although he disputed that he fired the fatal shot. Instead, the trial court instructed the jury that it could not find that appellant killed Mendez or Lopez unless he was the direct cause of their deaths. The court also stated that "there can be more than one direct cause.... A defendant's conduct may be a direct cause of death even though his conduct was not the last or immediate cause of death.... if it initiates an unbroken chain of events leading to the death of the victims." Id. at 797. Thus, given the facts and circumstances surrounding the death of Lopez and the trial court's "direct cause" charge, appellant cannot establish that he was prejudiced by any alleged error in the accomplice liability charge as it relates to the murder of Lopez.

In the interim, Pazuhanich was sworn in by a notary public as Judge of the Court of Common Pleas of Monroe County on January 5, 2004; however, he was placed on administrative suspension shortly thereafter, and was later removed from the common pleas bench by the Court of Judicial Discipline on October 1, 2004.

Appellant's trial counsel represented Pazuhanich at his initial arraignment, was then replaced by other counsel, but then returned to represent Pazuhanich in the guilty plea process, as well as representing Pazuhanich for purposes of his disciplinary proceedings. Attorney Anders did not disclose to appellant that he was representing Pazuhanich.

Appellant now argues that trial counsel's subsequent representation of the former prosecutor constituted an undisclosed conflict of interest. Appellant claims that this supposed conflict was so severe that we must presume that it operated retroactively at trial to prejudice him. According to appellant, trial counsel's representation of Pazuhanich divided his loyalties, such that he could not fulfill his duties to both clients.

While appellant claims that prejudice should be presumed under these circumstances, in the alternative he also offers that the conflict adversely affected trial counsel's performance. The reasoning is convoluted. Specifically, appellant speculates that this alleged post-trial conflict must have caused counsel not to use information from Pazuhanich's subsequent arrest to show that Pazuhanich was biased against female jurors, in support of the jury selection claims – even though those claims did not exist until current counsel raised them at the PCRA level. Appellant also offers that, through his representation, counsel learned of Pazuhanich's alcohol and drug addiction problems, as Pazuhanich was immediately placed in a rehabilitation facility after his arrest; appellant then says that this information could have been used to demonstrate that Pazuhanich was biased against drug dealers, such as appellant.

Appellant also complains that the PCRA court erroneously denied his discovery request relating to the Pazuhanich prosecution once appellant established that trial counsel represented appellant and Pazuhanich simultaneously. According to appellant, the PCRA court's denial of discovery precluded him from discovering, developing and presenting facts that could have supported his conflict claim. More specifically, during the PCRA proceedings, appellant requested discovery of all records regarding the arrest and prosecution of Pazuhanich. The PCRA court denied the request on the basis that the arrest and conviction of Pazuhanich did not occur until one year after appellant's trial and conviction and that prosecution was "totally unrelated" to appellant's case. The court also stated that appellant failed to establish that the information was exculpatory or relevant to his PCRA claims. PCRA Court Opinion, at 65.

Appellant pursued this claim in his questioning of trial counsel Anders at the PCRA hearing. Attorney Anders testified that he conducted some preparatory investigation on the Pazuhanich case, but that counsel from Philadelphia entered the matter soon after and he was off the case until "a week before his trial when he [Pazuhanich] came to me and wanted me to review the case...." Trial counsel then negotiated the plea for Pazuhanich. Counsel stated unequivocally that his involvement was only "in the very beginning and at the end." Counsel testified that he never advised appellant of his representation of Pazuhanich. The PCRA court also clarified when Pazuhanich's term as District Attorney ended, stating that "from the public records it was December 31st of that year" and that trial counsel appeared on Pazuhanich's behalf in Luzerne County (for purposes of entering the plea) the following year (in July). N.T., 3/7/07, at 35-37.

The PCRA court held that the overlapping representation of Pazuhanich and appellant involved totally unrelated matters and that the representation of one client did

not adversely affect the representation of the other. As to appellant's claim that Pazuhanich's substance abuse may have affected the prosecution of appellant and somehow could have been explored on direct appeal, the PCRA court concluded that appellant did not provide any factual basis for his claim.

This Court has held that an appellant cannot prevail on a preserved conflict of interest claim absent a showing of actual prejudice. We presume prejudice when the appellant shows that trial counsel was burdened by an "actual"—rather than mere "potential"—conflict of interest. To show an actual conflict of interest, the appellant must demonstrate that: (1) counsel "actively represented conflicting interests"; and (2) those conflicting interests "adversely affected his lawyer's performance." Commonwealth v. Collins, 957 A.2d 237, 251 (Pa. 2008). Clients' interests actually conflict when "during the course of representation" they "diverge with respect to a material factual or legal issue or to a course of action." Id. Additionally, in Commonwealth v. Carpenter, 725 A.2d 154, 167 (Pa. 1999), this Court concluded that an appellant could not establish an actual conflict of interest where his direct appeal counsel accepted a position with the district attorney's office after the appeal had been briefed and the case was argued to this Court.

In this case, Attorney Anders' overlapping representation of Pazuhanich and appellant occurred during a very limited time, although the time was more significant than in Carpenter, since counsel undertook representation of Pazuhanich just before appellant's case was orally argued to this Court.[33] However, the overlap did not occur during trial or even when counsel prepared the direct appeal brief. Rather, it occurred

[33] Notably, Anders did not orally argue appellant's direct appeal to this Court. Instead, oral argument was by co-counsel, Ellen Schurdak, Esquire. It appears that Ms. Schurdak was also involved in the Pazuhanich case. See N.T., 3/7/07 at 34.

after that brief was filed and during the five days before the case was to be orally argued before this Court. Thus, appellant's claim is frivolous to the extent he alleges that the overlapping representation affected his trial, or even the written presentation of his claims on direct appeal. Any viable claim must be directed at counsel's actions or omissions after he began his representation of Pazuhanich. Obviously, it is troubling that counsel represented Pazuhanich at all while he was still representing appellant, and counsel, at the very least, should have disclosed this fact to appellant.[34] However, the mere existence of an overlap in representation does not prove that counsel's representation of Pazuhanich adversely affected appellant's interest.

Significantly, at the time counsel undertook representation of Pazuhanich, the direct appeal issues to be pursued were already determined and briefed. Counsel raised no Batson issue at trial or in the direct appeal brief and a Batson issue could not have been raised after Pazuhanich was arrested even if counsel had made an abstract leap, connecting the accusations against Pazuhanich with his use of peremptory strikes against female jurors. Moreover, as discussed previously, there was no indication other than mere (select) numbers that Pazuhanich employed peremptory challenges in a gender-biased manner. And, finally, despite appellant's speculations, it is not self-

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[34] Appellant also cites this Court's Rules of Professional Conduct as further evidence of counsel's conflict. Pa.R.P.C. 1.7 defines conflict of interest for purposes of defining a lawyer's responsibilities, and prohibits a lawyer from representing a client if the representation will be directly adverse to another client. Subsection (b)(4) excuses a conflict of interest where each client gives informed consent to the representation. As noted herein, appellant was never informed of counsel's representation of Pazuhanich.

The Rules of Professional Conduct are most often employed in attorney disciplinary proceedings. While they can be used to demonstrate that counsel's conduct fell below some well-established standard, in this case, we need not turn to the Rules as our conflict of interest case law is well developed and is nearly identical to the conflict provision contained in the Rules.

evident that the crimes with which Pazuhanich was charged establish that the person would unconstitutionally discriminate against adult female jurors.

Appellant's speculative claim based on Pazuhanich's substance abuse – which amounts to a claim that counsel was obliged to violate Pazuhanich's confidence to construct a claim -- is similarly unavailing. Appellant declares that Pazuhanich's substance abuse problems "could well have affected his handling of the prosecution of appellant" because appellant was a drug dealer. See Brief of Appellant at 66. Setting aside that this is another leap in logic that is not at all self-evident, appellant points to nothing in his prosecution that demonstrates Pazuhanich's anti-drug dealer bias. Moreover, there is no requirement that prosecutors must like drug dealers before they prosecute them for murder. In any event, long before Pazuhanich prosecuted appellant, he had confessed to the killings; and a jury then found him guilty, following sworn testimony in which he again admitted his role. Irrespective of their personal beliefs about drug dealers, most if not all prosecutors faced with a double homicide and a confession will bring charges.

We turn briefly to appellant's assertion that the PCRA court improperly denied discovery of files relating to Pazuhanich's arrest and prosecution, so that he could better develop his ineffective assistance claim arising from the supposed conflict of interest. The PCRA court found such information, from an unrelated criminal case, was unlikely to contain any exculpatory or otherwise relevant information. Our review of the record indicates that appellant has not demonstrated that this discovery request was anything other than a fishing expedition – there is no indication that anything in these files, from an unrelated prosecution, in another county, a year after appellant's trial, would be exculpatory or otherwise relevant to this matter, which had already been briefed on appeal by the time of Pazuhanich's arrest. Moreover, the prosecution of Pazuhanich in

Luzerne County was unrelated to his prosecutorial duties in Monroe County. Thus, the PCRA court did not abuse its discretion in denying appellant's request for discovery of these files.

9. INCOMPLETE TRANSCRIPT

Appellant, noting that the sidebars at trial were not transcribed, claims that this fact deprived him of his right to an adequate review of his trial on direct appeal. Appellant states that a deprivation of the full transcript abridges the right of appeal and rendered his direct appeal meaningless. Appellant also notes that the death penalty statute mandates that this Court review the complete proceedings of a capital case to correct errors. According to appellant, the absence of transcribed sidebars deprived the Court of the ability to discharge its obligation to independently review the sentences of death. Similarly, appellant contends that the absence of a "full" transcript deprived him of his right to an independent review of his sentencing to determine whether the verdict was arbitrary. Appellant argues that the substance of the various sidebars is essential to evaluate counsel's conduct and the soundness of the trial court's rulings. Appellant also contends that trial counsel was ineffective because he believed that he could not request the transcription when the lower court did not wish to have it done and avers that counsel did not have a strategic reason for failing to preserve this issue at trial and pursue it on direct appeal.

The Commonwealth argues that the Pennsylvania Rules of Criminal Procedure do not prohibit sidebar proceedings from being held off the record.[35] Further, the

[35] Rule 115 provides that, "[i]n court cases, after a defendant has been held for court, proceedings in open court shall be recorded." Pa.R.Crim.P. 115(A). However, both the Commonwealth and the PCRA court rely on the Superior Court's decision in Commonwealth v. Montalvo, 641 A.2d 1176 (Pa. Super. 1994), which held that "nothing in [Pa.R.Crim.P. 115(A)] prohibits the trial court from conducting off-the-record sidebar discussions." Id. at 1185.

Commonwealth contends that appellant does not identify any potentially meritorious challenge which he was unable to pursue because of the supposedly incomplete transcript.

During the PCRA proceedings, counsel was asked about the alleged "large number of instances" where sidebar conferences were not transcribed. Counsel responded, "I don't know if it was th[is] trial or the last one where I asked for the court stenographer to come up at sidebar and I was told I could not do that." The Court then interjected, "not by this judge; you were not told." To which counsel responded, ""Yes, I was." When asked by the PCRA court, "which trial?," counsel then stated, "It was -- Powell." Counsel further added that it was not his practice to seek to have all sidebars transcribed; rather, "it depends on what is being discussed." N.T., 3/7/07, at 47-49.

The PCRA court found that "off-the-record and sidebar conferences were either of an administrative nature or were not relevant to matters of record." PCRA Court Opinion, 10/11/07, at 68. The court also observed that counsel could have placed any objections into the record, and there was no indication that the court had ever denied counsel the opportunity to place any argument or objections that were raised at sidebar on the record. Finally, the court had previously noted at the PCRA hearing that "if it had been matters of consequence it would have been transcribed. If it was a matter of court record, it was put on the record. Side conferences between counsel were not." N.T., 3/7/07, at 48.

Insofar as appellant raises a claim of trial court error in failing to transcribe sidebar conferences, it is waived because appellant failed to raise this issue at trial and on direct appeal. See Commonwealth v. Marshall, 812 A.2d 539, 551 n.14 (Pa. 2002) (incomplete transcript claim must be raised on direct appeal). To the extent appellant

raises this claim as one of trial counsel's ineffectiveness, he has failed to establish the merit of the claim.

The U.S. Supreme Court has recognized that adequate and effective appellate review is impossible without a trial transcript or adequate substitute and has held that the States must provide trial records to indigent inmates. See Bounds v. Smith, 430 U.S. 817, 822 (1977) (citing Griffin v. Illinois, 351 U.S. 12 (1956)). This Court has similarly concluded that a criminal defendant is entitled to "a full transcript or other equivalent picture of the trial proceedings" in order to engage in meaningful appellate review. Id. at 551 (quoting Commonwealth v. Shields, 383 A.2d 844, 846 (Pa. 1978)). However, in order to "establish entitlement to relief based on the incompleteness of the trial record, [appellant] must first make some potentially meritorious challenge which cannot be adequately reviewed due to the deficiency in the transcript." Id.

Appellant spends much time developing his claim in terms of federal law in order to establish his right of appeal and his right to independent appellate review of his sentence. Appellant also stresses that federal law requires a "full and accurate" record of the proceedings. This Court does not disagree with these well-settled precepts. Indeed, they are mirrored in our case law. See Shields, supra. Yet, it is clear that the federal case law appellant invokes is inapposite: it is directed at guaranteeing an indigent defendant with a full transcript, an argument not raised herein. Appellant goes too far when he extrapolates that a "full and accurate" record includes all sidebars, regardless of their substance. Appellant has cited to no controlling federal or state authority, in existence at the time of trial, which required the court to transcribe all sidebar conferences.

Both the PCRA court and counsel believed that not all sidebars require transcription. Both appeared to agree that where the matter concerned a matter of

consequence, it would be transcribed. Existing decisional law from the Superior Court supported this view. During the PCRA proceedings, appellant touched upon the transcription issue, but when counsel responded that a request for transcription depended upon "what is being discussed," appellant did not follow up on counsel's response by pointing to instances in the trial record where counsel could have or should have requested transcription. Again, appellant cites no authority from this Court or any other court for his absolutist proposition that counsel is constitutionally required to request transcription of each and every sidebar. Nothing in the federal constitution or governing law requires states to needlessly waste money to transcribe the inconsequential.

Moreover, this Court has recently rejected a similar broad-based challenge to appellate review of capital sentencing based on the absence of *voir dire* transcripts, explaining that "to be entitled to relief due to the incompleteness of the trial record the defendant must make some potentially meritorious challenge which cannot be adequately reviewed due to the deficiency in the transcript." See Commonwealth v. Lesko, 15 A.3d 345, 411 (Pa. 2011) (citing Commonwealth v. Marinelli, 910 A.2d 672, 688 (Pa. 2006)).

In this case, appellant fails to specify any potentially meritorious claim which cannot be adequately developed or reviewed because the sidebars were not transcribed. Nor has appellant identified, through indications in the of-record proceedings – including the actual evidence, rulings, and the jury charge -- issues that were of substance that were resolved at sidebar. Instead, he simply declares that "significant portions" of the trial proceedings were not transcribed. That assertion lacks any factual predicate. Accordingly, appellant has failed to prove that counsel was ineffective for failing to pursue this objection.

10. CUMULATIVE ERROR

Appellant last argues that the cumulative effect of errors in his case entitles him to relief. This Court has repeatedly emphasized "no number of failed claims may collectively warrant relief i[f] they fail to do so individually." Rainey, 928 A.2d 215, 245 (Pa. 2007). However, we have more recently recognized that "if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation." Commonwealth v. Johnson, 966 A.2d 523, 532 (Pa. 2009) (citing Commonwealth v. Perry, 644 A.2d 705, 709 (Pa. 1994)). We cited lack of prejudice in addressing appellant's claim of trial counsel ineffectiveness for failing to present evidence in support of his imperfect defense claim as well as an alternative ground for denying appellant's claim of trial counsel ineffectiveness related to the self-defense jury instruction. We are confident that there is no cumulative error claim warranting relief as these claims involve entirely disparate inquiries. Additionally, even cumulating these claims, we have no doubt that the outcome of the guilt phase proceedings would have been the same given the overwhelming evidence of guilt, including appellant's several confessions to the police. Furthermore, while we are remanding for the PCRA court to consider the prejudice inquiry related to appellant's mitigating evidence claim, this claim relates only to the penalty phase of appellant's trial and we do not need to consider the cumulative effect of the errors from the separate phases of appellant's trial.

C. MANDATE AND PROCEEDINGS UPON LIMITED REMAND

One further administrative matter remains. As we have noted above, the FCDO simply entered its appearance in this case to represent appellant in his state post-conviction challenge. The FCDO filed a petition for a writ of *habeas corpus* on appellant's behalf in the U.S. District Court for the Middle District of Pennsylvania on

December 4, 2006. The PCRA court notes in its opinion that federal counsel were appointed by a federal district court judge to file a federal *habeas corpus* petition; instead, the FCDO proceeded to Pennsylvania state court. The federal proceedings have been stayed pending resolution of appellant's PCRA claims.

Appellant is represented by three FCDO lawyers: Michael Wiseman, Esquire, Keisha Hudson, Esquire, and Elizabeth Larin, Esquire. Attorney Wiseman is lead counsel and he signed the brief. Recently, in another capital matter, Commonwealth v. Abdul-Salaam, -- A.3d –, 2011 WL 7648405 (Pa. 4/5/12), the FCDO withdrew its appearance and advised that Attorney Wiseman, lead counsel there too, would be representing Abdul-Salaam on a *pro bono* basis, listing a private address for Wiseman. No such notice has been entered here. It is unclear whether Attorney Wiseman remains a member of the FCDO for some cases, while acting as "*pro bono*" counsel in other cases. If federal funds were used to litigate the PCRA below – and the number of FCDO lawyers and witnesses involved, and the extent of the pleadings, suggest the undertaking was managed with federal funds -- the participation of the FCDO in the case may well be unauthorized by federal court order or federal law. Accordingly, on remand, the PCRA court is directed to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the FCDO may or should lawfully represent appellant in this state capital PCRA proceeding. See 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal *habeas corpus* relief from death sentence).

Based on the above review of the claims raised on appeal, the order of the PCRA court is affirmed insofar as it dismissed all claims other than that of ineffective assistance of counsel associated with the investigation, development, and presentation

of mitigation evidence. With respect to this claim, the PCRA court's order is vacated, and the matter is remanded for further consideration consistent with this Opinion.

Jurisdiction is relinquished.

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

Messrs. Justice Baer and McCaffery join the opinion.

Mr. Justice Saylor files a concurring opinion in which Madame Justice Todd joins.

Mr. Justice Eakin files a concurring and dissenting opinion.

[J-135-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 553 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on
	:	10/11/07 denying PCRA relief in the Court
v.	:	of Common Pleas, Criminal Division of
	:	Monroe County at No. CP-45-CR-
	:	0001522-2001
MANUEL MARCUS SEPULVEDA,	:	
	:	
Appellant	:	SUBMITTED: July 25, 2008

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: November 28, 2012**

I join the substantive analysis and holdings in Parts A, B(1)(a), B(2)-(6), B(7)(a)-(b), and B(8)-(10) of the majority opinion, albeit I do not fully support some of the collateral characterizations and commentary. I concur in the result as to the balance of the opinion and offer the following explanations concerning my reasoning.

A. The Remand Determination

Regarding Part B(1)(b), left to my own devices, I would simply award a new penalty hearing at this stage based on trial counsel's deficient stewardship in failing to conduct an adequate penalty investigation. I acknowledge that the majority's approach of remanding for an appropriate determination by the post-conviction court in the first instance is a reasonable one. In my judgment, however, in light of the age of this capital litigation – and in the hemisphere of the many others similarly situated -- justice

would be better served by a present resolution per the applicable de novo review standard. See Commonwealth v. Sattazahn, 597 Pa. 648, 677 & n.10, 952 A.2d 640, 657 & n.10 (2008).

I recognize that this de novo review standard is tempered by deference accorded to PCRA court factual findings, particularly where, as here, the PCRA judge also presided at trial. See id. Indeed, it was partly in light of the presences of material, disputed issues of fact that the Court remanded in the case cited by the majority, namely, Commonwealth v. Gibson, 597 Pa. 402, 951 A.2d 1110 (2008).

Presently, however, I do not see that there are particular, material factual matters needing to be resolved at this stage. Compare, e.g., Gibson, 597 Pa. at 422, 951 A.2d at 1122 (identifying deficiencies in the development of the factual record and credibility matters in need of resolution). Additionally, as amply reflected in the majority opinion, to date the PCRA court has not performed adequately in its review of the present case; rather, in a number of material respects, such review has been cursory. See, e.g., Majority Opinion, slip op. at 27-30. Furthermore, it is now established that trial counsel's deficient performance resulted in the omission of material and weighty mitigation from the review of Appellant's capital sentencing jury. See, e.g., Majority Opinion, slip op. at 29 (reflecting that "Appellant's school records show that he was a poor performer in school with a borderline intelligence," or, in other words, that he is borderline mentally retarded). See generally See Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947 (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 (1987) (O'Connor, J., concurring))); accord Williams v. Taylor, 529 U.S. 362, 398, 120 S. Ct. 1495, 1515 (2002) (commenting that "the reality that [the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability.").

Again, while I do not criticize the majority's preference for a remand, in light of the above, I would render a dispositive judgment at this juncture. My concurrence in the result here is along the lines of the approach taken by Mr. Chief Justice Castille in Gibson, 597 Pa. at 465-66, 951 A.2d at 1148 (Castille, C.J., concurring) ("In my view, it is a close question whether the claim of Strickland prejudice warrants further hearing, as opposed to summary rejection. My joinder in the remand follows largely out of respect for the care and prudence in the Majority's explanation of the deficiencies in the PCRA court's analysis; the importance of emphasizing to the courts below their duties of precision in capital appeals; and the necessity for a dispositive order where this Court might otherwise be deadlocked in a capital case.").

B. Response to the Dissent

Next, I wish to respond to the dissenting perspective on this matter, including its assertions that: trial counsel performed reasonably in the penalty phase; there were no "red flags" suggesting investigation of Appellant's mental health; and the majority's reasoning reflects a hindsight-based second-guessing of counsel's performance.

As the majority explains, it appears to be undisputed that the mitigation investigation in this case, such as it was, began two weeks before trial. See, e.g., N.T., Mar. 7, 2007, at 28. At this late stage in the trial preparations, a contract paralegal contacted a clearinghouse for experts, apparently ultimately focusing on psychiatrists Eric M. Fine, M.D. and Paul Gross, M.D. See N.T., Mar. 7, 2007, at Ex. D-4. Although time entries indicate some desire to obtain a "mitigation expert," trial counsel's eve-of-

trial letters to the identified professionals relate more closely to the guilt phase, as they concern the attempt to negate the element of specific intent to kill. See N.T., Mar. 7, 2007, at Exs. D-1, D-2. This was consistent with Dr. Fine's letter-response, which reflects an identical focus. See id.[1] Dr. Gross provided an affidavit, admitted into evidence at the PCRA hearings, affirming that "[i]t is highly unlikely that I could have

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[1] In light of this record, I differ with the dissent's apparent suggestion that there was some mitigation-related consultation with Dr. Fine suggesting against a mental-health evaluation. See Dissenting Opinion, slip op. at 4 (indicating that "counsel did consult a mental health expert, Dr. Fine, who reviewed appellant's confession and concluded an in-person evaluation was unnecessary"). Indeed, the post-conviction record confirms the more limited focus of the defense correspondence with this psychiatrist. For example, at the PCRA hearings, the following interchange occurred with Dr. Fine:

> Q. . . . [W]hat was [trial counsel's] purpose in contacting you?
>
> A. Well, he contacted me because I am defined as an addiction psychiatry expert witness. . . . [H]e wanted me, if I could, [to] provide an opinion regarding the state of mind of [Appellant] at the time of the offense.
>
> Q. And did he ask you, if you recall, to conduct a person to person evaluation, clinical evaluation, of [Appellant] at that time?
>
> A. There was no request that I see [Appellant]. It was specifically to deal with [the] material provided to me referred to in terms of [Appellant's] use of cocaine.
>
> Q. And is it your normal practice to render psychiatric opinions or diagnoses without conducting an actual evaluation of the subject?
>
> A. If I am requested to do a psychiatric evaluation I insist on seeing the patient in order to arrive at a diagnosis.

N.T., Jun. 11, 2007, at 108.

conducted a proper evaluation of [Appellant] in the time required by [trial counsel]." N.T., Jun. 12, 2007, at Ex. D-14.

The result of counsel's eleventh-hour attempt was a mitigation case consisting only of Appellant's modest criminal record; brief interchanges with two acquaintances who frequented a house in which illicit drugs were sold and used, attesting to Appellant's good and caring nature (especially with the children he watched); and Appellant's own expression of his remorse. See N.T., Nov. 25, 2002, at 861-71. As counsel's closing remarks concerned the mitigation case, in their entirety, they were as follows:

> My client has had two misdemeanors for, I believe, it was possession of marijuana. That is a lot different than selling cocaine, selling heroin and selling marijuana to people who are addicted to the use of those drugs for financial gain.
>
> Two individuals came here today and told you what my client's character was like. He was an individual who took care -- he didn't sit around the house -- these people didn't say he sat around the house all day. They said he took care of the children. [One witness] even had him go to her house to take care of the children.
>
> We are told today and told before that [Appellant] worked until he was fired. And after he was, he contributed rent until he was fired to the household. And after that he was the caretaker for the children during the day and at night. Children that he loved.
>
> The testimony about the argument about him going up, if he really loved children, why did he take the weapon and go upstairs. I think that testimony was contradicted by [a trial witness] who told you that it was Mr. Heleva who chased Mr. Mendez upstairs with the gun and my client followed.
>
> Ladies and Gentlemen, based upon the testimony of the witnesses today, my client acted out of character that night. He acted rashly; he acted imprudently; and, in fact, reacted

> when he should not have reacted in that manner. That has been established.
>
> But I would submit to you based upon the testimony of the two witnesses today, justice requires that you return a verdict of life imprisonment.

N.T., Nov. 25, 2002, at 893-94.

I maintain grave concerns with the quality of the stewardship we have seen in a number of the capital post-conviction cases, including the present one. As otherwise related, in addition to Axis I mental-health disorders, there is uncontradicted post-conviction evidence that Appellant has very limited intellectual functioning or -- in other words -- is borderline mentally retarded. See N.T., Jun. 11, 2007, at 63 (testimony of psychiatrist Pablo Stewart, M.D.); N.T., Jun. 12, 2007, at 49, 57 (testimony of neuropsychologist Antonio Puente, Ph.D.). Indicators were apparent from the face of Appellant's school records, which counsel never obtained. See id. at 51; N.T., June 13, 2007, at 39 (reflecting the testimony of psychiatrist Richard Dudley, M.D., that "given the deficits that were evidenced in the school records and also the behavioral symptoms evidenced in the school records[,] a full mental health evaluation, to find out what is going on, would be warranted"). Again, the United States Supreme Court has recognized that this type of information can be critical to a reasoned moral judgment by a capital sentencing jury. See Penry v. Lynaugh, 492 U.S. at 319, 109 S. Ct. at 2947; accord Williams, 529 U.S. at 398, 120 S. Ct. at 1515. However, because trial counsel did not know of it, it never entered into his strategic calculus.

The dissent offers a different portrayal of the record in this case, downplaying the timing of counsel's efforts; stressing Appellant's resistance to burdening family members with attendance at his trial; and concluding that there simply was no basis for further inquiry of a mental-health professional, or, in other words, there were no "red flags." See Dissenting Opinion, slip op. at 3-5.

In terms of the belatedness issue, I believe that decisions of the United States Supreme Court and of this Court reflect that the failure to prepare in a timely fashion is a strong indicator of deficient stewardship. See, e.g., Williams v. Taylor, 529 U.S. at 395, 120 S. Ct. at 1514 (commenting on late preparation -- beginning a week before trial -- as a factor in finding penalty-phase ineffectiveness); Commonwealth v. Perry, 537 Pa. 385, 392, 644 A.2d 705, 709 (1994) ("It is not possible to provide a reasonable justification for appearing in front of a death penalty jury without thorough preparation."). As such, I do not agree that it should play no role in evaluating the merits of Appellant's claim of deficient stewardship here.

As to the attribution of fault to Appellant, I do not appreciate how his instinct not to burden family members prevented counsel from obtaining a single document relevant to Appellant's life history or mental-health condition, such as Appellant's school records or the records concerning Appellant's incarceration.[2] Indeed, once the mitigation inquiry

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[2] The dissent opines that trial counsel had no reason to review Appellant's prison records and such review was contrary to Appellant's wishes. See Dissenting Opinion, slip op. at 5. The former reason relates to the absence of "red flags," which I address in the text below. Moreover, as Appellant observes, favorable adjustment to the prison environment is a well-known mitigating factor. See Skipper v. South Carolina, 476 U.S. 1, 7 & n.2, 106 S. Ct. 1669, 1672 & n.2 (1986) (explaining that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination" (quoting Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 874 (1982) (emphasis in original)). Thus, a purported absence of mental-health "red flags" should not obviate a capital defense attorney's review of available prison records.

The latter reason (Appellant's purported refusal to condone any investigation into his background) apparently is extrapolated from counsel's discussion of Appellant's desire not to involve his family in the trial proceedings. See Dissenting Opinion, slip op. at 3. Appellant's concerns about his family, however, have nothing to do with prison records. Moreover, counsel's attestation that because of Appellant's wishes he had no "information as to where I could locate . . . background records," N.T., Mar. 7, 2007, at 18, certainly cannot extend to the records of Appellant's confinement on pending charges.

finally commenced, a contract paralegal was able to elicit basic historical information from Appellant including the locations of his upbringing. See N.T., Mar. 7, 2007, at Ex. D-3. It was left unexplained, in the post-conviction hearings, why trial counsel himself had such greater difficulty.[3]

In terms of the absence of "red flags," the dissent refers to a selected passage from the cross-examination of Dr. Puente in the post-conviction hearings. See Dissenting Opinion, slip op. at 4. This passage is in strong tension with the overall purport of Dr. Puente's testimony, related to a specific hypothetical previously posed on direct examination, and appears to reflect some confusion on the doctor's part. Such confusion was addressed on redirect examination as follows:

> Q. I am not sure I understood one of the answers you gave [on cross-examination]. Just so we are clear, I want to read you a paragraph that has been read before since there's some confusion in the responses. There is a memo from the trial lawyer's paralegal [that] says quote "[Appellant] was eight years old when his mom and dad split up. His mother took off with the children because of the violence from his father, who was an alcoholic.
>
> His father smacked his mom around a lot and in retaliation apparently the mother smacked the father around. He did hit the children occasionally; once the father hit [Appellant's] sister so hard he broke her tooth and she had to go to the hospital. Due to that incident, her mother hit him over the head with a baseball bat. . . .
>
> Now, if that is the information [Appellant] apparently gave to his trial lawyer through the paralegal. If you had that information and knew nothing else about [Appellant's] background and that information was presented to you as a

[3] Counsel's time records show limited interaction (two three-quarter hour and two hour-long conferences with Appellant) in the eight months preceding the meeting with the contract paralegal. It is unclear from the records how much of this time was in person.

forensic mental health professional, what suggestions would you have for the lawyer.

A. I would say [Appellant] needed to hire a psychiatrist as soon as possible.

Q. And why?

A. Because you need to examine the potential impact that this report has been provided to us or to you, what impact they may have. What impact or eventual conduct, personality and ability to think.

Q. And if Mr. Hypothetical lawyer said in response but my client won't tell me anything more about his childhood, what would you say?

A. Okay. Bring in someone who speaks Spanish. Bring in someone with a different cultural background and talk about black beans and salsa music for a few hours and eventually you will get there.

Q. And how about bringing in someone with a mental health background?

A. Well, obviously. I mean that is just an understatement.

N.T., Jun. 12, 2007, at 79-80. Appellant's other post-conviction experts testified consistently. See, e.g., N.T., Jun. 11, 2007, at 54 (reflecting Dr. Stewart's testimony that the same hypothetical represented a clinically significant level of family dysfunction and childhood abuse).[4]

[4] The dissent's assertion that Dr. Stewart "admitted someone without mental health training would not be able to notice appellant's indicia of PTSD," Dissenting Opinion, slip op. at 4, seems to me to be a loose extrapolation from the record. Furthermore, the observation is of very limited relevance to the salient question whether counsel was presented with sufficient information to suggest a mitigation-related evaluation by a qualified mental-health professional. In this regard, contrary to the tenor of the dissent, Dr. Stewart consistently testified that records available to counsel presented "huge red flags." N.T., Jun. 11, 2007, at 83.

As of the time of Appellant's trial in 2002, it was well understood in the training readily available to capital defense attorneys that potential mental-health issues are essentially ubiquitous in capital cases, and that childhood abuse and deprivations may substantially impact personality, cognition, and behavior. Moreover, the bizarre circumstances of Appellant's crimes (in which one of the victims was hacked to death with a weapon fashioned from an axe handle and a metal disk, and where the bodies of both victims appear to have been arranged in positions of humiliation) are alone enough to suggest the involvement of a mental-health professional. Cf. Commonwealth v. Gorby, 589 Pa. 364, 391, 909 A.2d 775, 791 (2006) (commenting on a defendant's irrational behavior after his crimes as an indicator of possible mental-health involvement). Furthermore, defense time records evidence that retention of a "mitigation expert" was being pursed, and trial counsel contemporaneously hypothesized to Dr. Fine that his client may have been psychotic. Accord Brief for Appellant at 42 ("That counsel did not have a strategic reason for failing to conduct this type of mitigation investigation is borne out by the fact that **he embarked upon it**, albeit, too little, too late." (emphasis in original)). On this record, I find very little support for the perspective that there were no "red flags" suggesting the involvement of a mental-health professional.

This and records from other capital cases also amply reflect what is necessary to conduct an effective penalty-phase investigation entailing the collection and examination of sensitive, personal information. The interviewer obviously needs to develop some level of rapport and trust, and the expenditure of time and a degree of persistence is required. See N.T., Jun. 12, 2007 (testimony of Dr. Puente). Particularly in light of potential intellectual, mental, and emotional barriers, which may be exacerbated by an impoverished upbringing and childhood abuse, it may be that the

necessary inroads should be made via the timely involvement of a mental-health professional. Plainly, in the absence of extraordinary circumstances, the investigation needs to begin earlier than two weeks before trial.

Additionally, I believe the presumption of effectiveness of counsel should not be applied with such blunt force as to obliterate these sorts of basic realities of capital representation.[5] Notably, the United States Supreme Court has expressed "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings, 455 U.S. at 112, 102 S. Ct. at 875. I do not see how consistency can be achieved by tolerating such a wide range of disparate performance on the part of capital counsel, so that some may assiduously apply existing and well-developed professional guidelines for the investigation and presentation of mitigating evidence; whereas others may simply do nothing in the face of an initial reluctance on the part of the client to support some facet of the necessary investigation, or simply wait so long to begin that effective preparations are foreclosed.

In the present case, it is my position that 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 v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543 (2003) (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").

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[5] In this regard, I also reiterate my concern that some of the problems we are seeing may be a result of systemic issues, such as underfunding. See Commonwealth v. Martin, 607 Pa. 165, 217, 5 A.3d 177, 208 (2010) (Saylor, J., concurring and dissenting); cf. Commonwealth v. Ly, 605 Pa. 261, 262-65, 989 A.2d 2, 2-5 (2010) (Saylor, J., dissenting).

C. The Huffman Issue

Concerning Part B(7)(c) of the majority opinion, the majority finds Appellant's claim of a defective accomplice liability instruction to be defaulted based inadequacies in factual development and presentation in the appellate briefing. See Majority Opinion, slip op. at 53-54. As of the time of Appellant's trial in 2002, however, the decision in Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994), governed.[6] Huffman concerned accomplice liability instructions failing to specifically convey the requirement that, to be convicted of first-degree murder as an accomplice, the defendant must be found to have had the specific intent to kill. See id. at 198-99, 638 A.2d at 962. The Court deemed such an unqualified instruction to be a "patently erroneous statement of the law" resulting in a "miscarriage of justice." Id. at 198-99, 201, 638 A.2d at 962-63. Prior to Huffman's effective overruling, I do not see that there would be any reasonable strategic basis for a trial attorney defending against a potential death sentence to fail to insist on closely qualified accomplice liability instructions. Accordingly, I find counsel's present argumentation and the record to be sufficient to implicate merits review.

I have no wish to resurrect the Huffman debates, which have spanned the better part of a decade of this Court's jurisprudence. My own thoughts concerning the substantive law are set forth in my dissents in Commonwealth v. Cox, 581 Pa. 107, 146-51, 863 A.2d 536, 558-62 (2004) (Saylor, J., dissenting), and elsewhere. For present purposes, I recognize that, as a matter of state law, Huffman effectively has been overruled, such that instructions such as those given in this case are now deemed by this Court to be entirely proper ones.

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[6] At least to my reading, Huffman was effectively overruled by a majority of the Court as of the 2004 decision in Commonwealth v. Speight, 578 Pa. 520, 536-39, 854 A.2d 450, 459-61 (2004). See generally id. at 543-45, 854 A.2d at 463-65 (Saylor, J., concurring).

The difficulty, however, is that the Third Circuit Court of Appeals appears to take an entirely different view as a matter of federal due process law. See Laird v. Horn, 414 F.3d 419, 425-30 (3d Cir. 2005). Thus, unless and until the relevant state/federal divide is addressed by the United States Supreme Court, the issuance of unqualified accomplice liability instructions in first-degree murder cases in the Pennsylvania courts risks a needless waste of untold resources on the part of the Commonwealth, defense attorneys, and the courts.[7]

Accordingly, when issuing an accomplice liability charge in a first-degree murder case, trial courts should be admonished to clarify -- very specifically -- that to be convicted of first-degree murder under accomplice theory, as a co-conspirator, or otherwise, a defendant must be found to possess the requisite specific intent to kill.[8] I believe the Court should require issuance of such instructions under its supervisory power, and that they should be integrated comprehensively into mandatory jury instructions.

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[7] I do note that there are some nuanced differences between the instructions issued in Appellant's case and those at issue in Laird which may impact the federal due process analysis. Additionally, even if the instruction in this case was erroneous per the Third Circuit's approach, I agree with the majority that the error should be deemed non-prejudicial for the reasons which it outlines. See Majority Opinion, slip op. at 54-56.

Nevertheless, my present point is that all of the nuances, difficulties, risks, uncertainties, and resources expenditures can be obviated through the issuance of more straightforward instructions specifically clarifying that the requirement of specific intent to kill for first-degree murder extends across the range of accomplice, conspiracy, accessorial liability theories.

[8] While this concern pertains in the capital litigation arena, applicable mens rea requirements should be conveyed in clear terms to the jury relative to any and all theories of criminal liability across the range of offenses. See, e.g., 18 Pa.C.S. §306(d) (providing that, to support accomplice liability for offenses where a particular result is an element, the defendant must have acted with the kind of culpability with respect to that result that is sufficient for the commission of the offense).

Madame Justice Todd joins this concurring opinion.

[J-135-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 553 CAP
Appellee	:	Appeal from the Order entered on 10/11/2007 denying PCRA relief in the Court of Common Pleas, Criminal
v.	:	Division of Monroe County at No. CP-45-CR-0001522-2001.
MANUEL MARCUS SEPULVEDA,	:	
Appellant	:	SUBMITTED: July 25, 2008

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: November 28, 2012**

I respectfully disagree with the majority's decision to vacate and remand to the PCRA court for inquiry into prejudice with respect to appellant's claim of ineffective assistance of counsel concerning the investigation, development, and presentation of mitigation evidence in the penalty phase. In all other aspects, I join the majority.

The majority finds counsel's performance deficient, "considering the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, the additional or different mitigation evidence that could have been discovered and presented, and the Commonwealth's failure to muster any relevant argument in defense of counsel's performance[.]" Majority Slip Op., at 29. Further, the majority holds the result concerning prejudice is not self-evident in this case; thus, a remand is required for the PCRA court to conduct a prejudice inquiry. Id., at 31. As I believe appellant's ineffectiveness claims associated with the investigation, development, and presentation of mitigation evidence in the penalty phase must fail, I

cannot join the majority's decision regarding counsel's deficient performance, and thus, cannot join the decision to remand.

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court held capital counsel has an obligation to thoroughly investigate and prepare mental health and other mitigating evidence. Id., at 395-96. Counsel cannot meet this requirement by relying on "only rudimentary knowledge of [the defendant's] history from a narrow set of sources." Wiggins v. Smith, 539 U.S. 510, 524 (2003). Further, this Court has previously noted:

> Under prevailing constitutional norms as explicated by the United States Supreme Court, capital counsel has an obligation to pursue all reasonable avenues for developing mitigating evidence. Counsel must conduct a thorough pre-trial investigation, or make reasonable decisions rendering particular investigations unnecessary. Strategic choices made following a less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. In undertaking the necessary assessment, courts are to make all reasonable efforts to avoid distorting effects of hindsight. Nevertheless, courts must also avoid "post hoc rationalization of counsel's conduct."

Commonwealth v. Williams, 950 A.2d 294, 303-04 (Pa. 2008) (citations and footnote omitted). The United States Supreme Court has further clarified what Strickland requires concerning investigation and preparation of penalty phase mitigating evidence:

> The Sixth Amendment entitles criminal defendants to ... representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one. ... Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (quoting Strickland v. Washington, 466 U.S. 668, 686, 688 (1984)). Thus, the Court noted the standard Williams and Wiggins

applied is flexible enough to account for the prevailing professional norms at the time of counsel's performance. See Strickland, at 689 ("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.").

Additionally, the reasonableness of counsel's investigation and the presentation of mitigating evidence depend, in large part, on the extent to which appellant assisted counsel's investigation and presentation of mitigating evidence. See, e.g., Commonwealth v. Tedford, 960 A.2d 1, 44 (Pa. 2008) ("'[C]ounsel has no duty to introduce and argue evidence of mitigating circumstances where his client has specifically directed otherwise.'") (quoting Commonwealth v. Sam, 635 A.2d 603, 612 (Pa. 1993)); Commonwealth v. Rega, 933 A.2d 997, 1026 (Pa. 2007) ("reasonableness ... depends ... [on] ... information supplied by ... defendant"); Commonwealth v. Rios, 920 A.2d 790, 811 (Pa. 2007) (counsel not ineffective for not providing testimony of defendant's family members when defendant instructed counsel not to present their testimony); Commonwealth v. Uderra, 706 A.2d 334, 340 (Pa. 1998) ("Appellant's own failure to cooperate with counsel in order to apprise him of allegedly relevant information cannot now provide a basis for ineffectiveness claims.").

Here, the PCRA court found appellant opposed any investigation into his background. This finding is supported by the record. Counsel noted appellant did not wish to involve his family members. Appellant's family members consistently testified appellant did not ask for their assistance, or even inform them of the seriousness of the charges, until after he was sentenced to death. Had appellant wanted counsel to investigate evidence from his background, including the alleged domestic abuse he suffered, it is unlikely he would have instructed counsel not to contact his family while

downplaying the severity of the charges against him to his family members. Further, even though Alex Sepulveda, appellant's relative, is an attorney whose family members frequently asked for help with their legal problems, appellant did not once contact him before sentencing. Thus, where appellant consistently opposed investigating his background, I do not believe he has proven counsel was unreasonable in not investigating that background.

Further, the PCRA court concluded counsel had no reason to believe appellant suffered from mental health issues. I would find this conclusion is supported by the record, as Dr. Puente noted the information appellant provided about his background was "not enough to put up a red flag." N.T. PCRA Hearing, 6/12/07, at 74. Further, Dr. Stewart admitted someone without mental health training would not be able to notice appellant's indicia of Post Traumatic Stress Disorder. See N.T. PCRA Hearing, 6/11/07, at 93. Thus, it was not obvious to counsel that appellant was suffering from a mental health problem. Further, counsel did consult a mental health expert, Dr. Fine, who reviewed appellant's confession and concluded an in-person evaluation was unnecessary. Accordingly, pursuant to the prevailing professional norms at the time of counsel's performance, I would conclude counsel's "'decision not to seek more' mitigating evidence from [appellant]'s background, ... fell 'well within the range of professionally reasonable judgments.'" Bobby, at 19 (quoting Strickland, at 699).

As to the issue of appellant's pre-trial prison records, the PCRA court concluded these records did not contain any "red flags" because stress from facing trial on capital charges could have caused appellant's symptoms. Although Dr. Stewart noted guilt could have caused appellant's symptoms, appellant's experts consistently testified neither stress nor guilt could have caused appellant's hallucinations. Thus, I would

hold the record does not support the PCRA court's conclusion that stress could have caused the symptoms recorded in appellant's pre-trial prison records.

Nonetheless, I do not believe appellant has proven counsel acted unreasonably in not reviewing these records. The PCRA court determined appellant did not demonstrate any obvious signs of mental illness, and Dr. Fine did not inform counsel that appellant had mental health issues. As counsel had no indication appellant suffered from any mental illness, he acted reasonably in not reviewing prison records for signs of an illness he had no cause to believe existed. Additionally, appellant opposed any investigation into his background. Thus, counsel did not have any reason to ignore his own observations of appellant, Dr. Fine's advice, and his client's wishes, by reviewing appellant's prison records in hopes of uncovering signs of mental illness. Accordingly, I would hold appellant has failed to establish counsel was ineffective in not reviewing his prison records.

As a result, I cannot agree counsel's performance was deficient, thus requiring a remand for the PCRA court to conduct a prejudice inquiry. While hindsight always provides this Court with a clear view of the most prudent path counsel could have taken, that path here was blurred for counsel by appellant's lack of cooperation and desire to keep his background and family out of the courtroom. The lack of red flags and reasons to further investigate appellant's pre-trial prison records distorted matters even further. Although we now have a 20-20 view of a better path counsel could have taken, our governing case law instructs us not to be swayed by this view, but rather by the reasonableness of the chosen path. Because I find counsel's pursuit to have been reasonable, I must respectfully disagree with the majority's decision to remand to the PCRA court.

[J-55-2016]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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

COMMONWEALTH OF PENNSYLVANIA,	:	No. 712 CAP
	:	
Appellee	:	Appeal from the Order of the Court of Common Pleas, Monroe County, Criminal Division entered on August 14, 2015 at No. CP-45-CR-0001522-2001.
	:	
v.	:	
	:	
	:	SUBMITTED: March 24, 2016
MANUEL SEPULVEDA,	:	
	:	
Appellant	:	

OPINION

JUSTICE DONOHUE **DECIDED: August 15, 2016**

This capital appeal, filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"), returns following our remand of the case to the Monroe County Court of Common Pleas ("PCRA court").[1] At issue in this appeal is whether, following remand from an appellate court with specific instructions, a PCRA court may treat new claims raised by the petitioner, which are outside the scope of the remand order, as amending the petitioner's first, timely PCRA petition. We conclude that because the PCRA petition has been fully adjudicated, and because the PCRA court is required to proceed in conformance with the remand order, the PCRA court is without authority to permit amendment.

[1] We have jurisdiction over this case pursuant to 42 Pa.C.S.A. § 9546(d).

To properly frame our discussion, a summary of the relevant facts and procedural history is necessary.[2] On November 22, 2002, a jury convicted Manuel Sepulveda ("Sepulveda") of two counts of first-degree murder and related charges for the deaths of John Mendez ("Mendez") and Ricardo Lopez ("Lopez").[3] The jury sentenced Sepulveda to death for each of the murders.[4]

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[2] The background of the case is set forth in greater detail in the two opinions previously issued by this Court in this matter. *See* Commonwealth v. Sepulveda, 855 A.2d 783, 786-89 (Pa. 2004) (plurality) ("Sepulveda I"), *cert. denied*, 546 U.S. 1169 (2006); Commonwealth v. Sepulveda, 55 A.3d 1108, 1115-16 (Pa. 2012) ("Sepulveda II").

[3] The evidence presented at trial of how the murders occurred was as follows:

> As the four men were sitting around the kitchen table, another argument erupted, at which point [Sepulveda] grabbed a .12 gauge shotgun and shot Mendez in the stomach. He then shot Lopez in the side. Lopez collapsed on the floor. [Sepulveda] then placed the gun on Lopez's back and fired, killing him. Mendez escaped from the kitchen and ran upstairs. [Sepulveda] then chased him upstairs where he shot him a second time. Mendez was able to exit the house and flee to a neighbor's house. [Sepulveda] and Heleva followed him, entered the neighbor's property, seized Mendez, and dragged him back to Heleva's house. ... After the men dragged Mendez back to the house, [Sepulveda] struck him with a hatchet type of weapon, killing him. There was no evidence that either victim had, or displayed, a firearm when [Sepulveda] murdered them.
>
> * * *
>
> Police found the dead bodies of Lopez and Mendez in the basement. The police found Lopez beneath slabs of insulation and dry wall material, with his pants pulled to his ankles. They found Mendez beneath a pile of laundry, stripped naked with his thumb in his mouth and with a rubber bungee cord wrapped tightly around his neck.

Sepulveda II, 55 A.3d at 1115; *see also* Sepulveda I, 855 A.2d at 787.

[4] For each count of murder, the jury found one aggravating circumstance (Sepulveda committed another murder prior to or at the time of the murder) and two mitigating (continued...)

Sepulveda's defense at trial was that the double homicide was justified based on his subjective, but unreasonable, belief that he was acting in the defense of others. Pursuant to this defense, Sepulveda claimed that he was only guilty of voluntary manslaughter. *See* Sepulveda II, 55 A.3d at 1121 & n.11; 18 Pa.C.S.A. §§ 506, 2503(b). At the time of the murders, Sepulveda resided in the home of Daniel Heleva ("Heleva") and Robyn Otto ("Otto") with, inter alia, their two minor children.[5] Sepulveda was responsible for watching the children while Heleva and Otto worked.

According to Sepulveda's testimony at trial, just prior to the murders, Otto told Sepulveda that "she was scared [Mendez] was going to do something to her and the kids." N.T., 11/21/2002, at 634. Sepulveda then joined Heleva, Mendez and Lopez in the kitchen. The men got into an argument and, per Sepulveda, Mendez began "throwing punches at Heleva" and Lopez "jumped in." Id. Sepulveda testified that he shot Lopez and Mendez to protect Heleva and the children. Id. at 635-36, 672. Although Otto testified, as a witness for the Commonwealth, at Sepulveda's trial, trial

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(...continued)
circumstances (Sepulveda's age -- twenty-two -- at the time of the murders and that he did not have a significant history of criminal convictions). *See* 42 Pa.C.S.A. § 9711(d)(11), (e)(1), (4). The jury unanimously found that the aggravating circumstance outweighed the mitigating circumstances and returned two sentences of death. *See* 42 Pa.C.S.A. § 9711(c)(1)(vi).

[5] The house was a drug den, with drug use and sales occurring therein night and day. The record reflects that others also lived there and that numerous people (approximately twenty-five to thirty people per day) came and went from the house at all hours. Sepulveda began using drugs prior to moving in with Heleva and Otto, but his crack-cocaine addiction escalated while living in the house. At the time of the murders, Sepulveda was reportedly smoking the drug throughout the day and night, using between a quarter and a half a gram at a time.

counsel did not cross-examine her about her alleged fear of Mendez or the threats Sepulveda testified that Mendez made. *See generally* N.T., 11/20/2002, at 598-615.

Following sentencing, Sepulveda filed a direct appeal to this Court. On August 19, 2004, we affirmed his judgment of sentence. The United States Supreme Court denied his request for certiorari on February 21, 2006.

Sepulveda thereafter filed a timely pro se PCRA petition. Three attorneys from the Federal Community Defender Office ("FCDO") entered their appearances on Sepulveda's behalf and filed an amended PCRA petition on January 2, 2007, raising fourteen claims in 386 averments spanning nearly 150 pages. Prior to the hearings held on this petition, one of Sepulveda's FCDO attorneys (Keisha Hudson, Esquire) drafted an affidavit detailing two in-person interviews she had with Otto.[6] The affidavit detailed Sepulveda's drug use at the time of the murders, as well as her acknowledgment that prior to the murders, she told Sepulveda that Mendez had previously threatened to burn down the house with her and her children inside; Sepulveda knew that Otto feared Mendez; that, like Otto, Sepulveda was also "convinced ... that something bad was going to happen and that the kids were going to get hurt"; and that he participated in the murders to protect Otto and her children.[7]

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[6] The affidavit is not dated, and Attorney Hudson did not indicate on the cover page when the in-person interviews with Otto occurred. *See* PCRA Exhibit D-11. We therefore only know that the FCDO obtained this information and drafted the unsigned affidavit sometime prior to Otto testifying at the June 11, 2007 PCRA hearing.

[7] This is in stark contrast to the testimony Otto provided at Sepulveda's trial, at which time she stated that Mendez was her friend -- he referred to her as "ma," and her kids referred to him as "Uncle Johnny" -- and that she tried to help him and protect and save him from Heleva and Sepulveda on the night Mendez was murdered. N.T., 11/20/2002, at 575, 591-92. She also stated at that time that she feared Heleva and Sepulveda, not Mendez. Id. at 596.

PCRA Exhibit D-11, 6/11/2007, ¶¶ 9, 11, 13. In the same unsigned affidavit, Otto also indicated that she had made a deal with the District Attorney to testify against Sepulveda and Heleva and in exchange, she could plead guilty only to child endangerment and she was assured that her children would be placed in the care of family members; otherwise, the District Attorney told her she would be prosecuted to the full extent of the law, her children would be placed in foster care and her parental rights would be terminated in fifteen months.[8] Id., ¶ 16. Otto did not sign the affidavit, but made several alterations to its content, initialing each change that she made.

Despite having this information prior to the 2007 PCRA hearings, the FCDO did not raise any PCRA claims pertaining to Otto's belief that Sepulveda committed the killings to protect her children or the Commonwealth's pretrial knowledge of her belief. Further, at the 2007 PCRA hearings, the FCDO limited its questioning of Otto to her knowledge of Sepulveda's drug use and his behavior when he was high. N.T., 6/11/2007, at 14-17. Although the FCDO confronted Otto with her unsigned affidavit, counsel asked no questions about the substance of it. Counsel only asked Otto why she did not sign the affidavit, and she explained that she was afraid; she had lost custody of her children as a result of this ordeal and she wanted to reunify with them. N.T., 6/11/2007, at 22. She stated that she nonetheless "wanted to help" Sepulveda. Id.

The 2007 PCRA hearings proceeded over four days, during which the court heard from fifteen witnesses, three of whom testified as experts, and all of whom were

[8] Otto's children were in foster care, in the custody of Monroe County Children and Youth, until August 15, 2002, at which time Heleva's parents became the children's legal custodians. N.T., 4/20/2015, at 48. .

called to testify on Sepulveda's behalf. Following the hearing, the PCRA court granted the FCDO permission to file another amended PCRA petition, which, once again, did not include the claims at issue in this appeal. Thereafter, in a seventy-page written opinion, the PCRA court addressed each of the arguments raised, and ultimately denied Sepulveda's request for relief.

Sepulveda, with the continued assistance of his FCDO counsel, appealed the decision to this Court, raising fourteen issues and sub-issues. In a fifty-three-page opinion, we detailed the facts of record and addressed each of the arguments raised. *See* Sepulveda II, 55 A.3d at 1118-51. We agreed with the PCRA court's denial of relief on all but one issue -- whether trial counsel was ineffective[9] for failing to investigate and present at Sepulveda's penalty hearing evidence of his mental health diagnoses and traumatic childhood.[10] We found that the claim had arguable merit, as Sepulveda's trial counsel did not conduct a reasonable investigation into his background to discern the existence of possible mitigating evidence, and that counsel lacked a reasonable basis

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[9] For a court to find that counsel provided ineffective assistance, a PCRA petitioner must plead and prove, by a preponderance of the evidence, that (1) the claim has arguable merit; (2) counsel had no reasonable basis designed to advance the petitioner's interest for his/her act or omission; and (3) the petitioner suffered prejudice as a result, which, for PCRA purposes, means but for counsel's act or omission, there is a reasonable probability that the result of the proceeding would have been different. Commonwealth v. Treiber, 121 A.3d 435, 445 (Pa. 2015) (citations omitted).

[10] The record reflects that as a child, Sepulveda regularly observed violence, both in his home and in the neighborhoods in which he lived, and was also the victim of physical abuse at his father's hands. N.T., 6/11/2007, at 41-42, 45-46; N.T., 6/13/2007, at 13. Mental health professionals who assessed Sepulveda prior to the 2007 PCRA hearings diagnosed him with chronic posttraumatic stress disorder, cognitive disorder not otherwise specified, polysubstance abuse, and cocaine induced psychosis, and further concluded that he suffered from "mild neuropsychological deficits." N.T., 6/11/2007, at 38-39; N.T., 6/12/2007, at 60; N.T., 6/13/2007, at 12.

for his deficient performance. Id. at 1130. Because the question of whether trial counsel's performance prejudiced Sepulveda was not "self-evident," and "require[d] careful analysis of prejudice in the specific factual context of the case," we remanded the prejudice determination to the PCRA court, which could be "assisted by relevant advocacy from both sides." Id. at 1131.

This Court, sua sponte, also instructed the PCRA court on remand to address an "administrative matter":

> If federal funds were used to litigate the PCRA below—and the number of FCDO lawyers and witnesses involved, and the extent of the pleadings, suggest the undertaking was managed with federal funds—the participation of the FCDO in the case may well be unauthorized by federal court order or federal law. Accordingly, on remand, the PCRA court is directed to determine whether to formally appoint appropriate post-conviction counsel and to consider whether the FCDO may or should lawfully represent appellant in this state capital PCRA proceeding. *See* 18 U.S.C. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants actively pursuing federal habeas corpus relief from death sentence).

Id. (italicization omitted).

On February 21, 2013, the FCDO removed the proceedings related to the propriety of its representation of Sepulveda to the federal district court pursuant to 28 U.S.C. § 1442(a). On August 16, 2013, the federal district court granted the Commonwealth's motion to remand the proceeding for decision on the issue by the state court. The FCDO appealed that ruling, and the question of the propriety of the FCDO's representation of Sepulveda was consolidated for decision before the United States Court of Appeals for the Third Circuit with various other Pennsylvania cases raising the same concern, as the district courts in these cases "split on the jurisdictional question." In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def.

Ass'n of Phila., 790 F.3d 457, 461 (3d Cir. 2015) ("In re FCDO"), *as amended* (June 16, 2015), *cert. denied sub nom.* Pennsylvania v. Def. Ass'n of Phila., 136 S. Ct. 980 (2016), and *cert. denied sub nom.* Pennsylvania v. Fed. Cmty. Def. Org. of Philadelphia, 136 S.Ct. 994 (2016).[11]

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[11] On June 12, 2015, the United States Court of Appeals, Third Circuit, issued its decision. It held that the FCDO's removal of this question to federal court was proper. In re FCDO, 790 F.3d at 474-75. On the merits of the question of whether the Commonwealth could seek the FCDO's disqualification from representing criminal defendants in state PCRA matters, the court granted the FCDO's motion to dismiss. *See* F.R.C.P. 12(b)(6) ("failure to state a claim upon which relief can be granted"). The court found that, to the extent the Commonwealth brought the disqualification actions under federal law (18 U.S.C. §§ 3006A, 3599), the Commonwealth lacked a private right of action. In re FCDO, 790 F.3d at 475. In the alternative, if the Commonwealth brought the disqualification proceedings pursuant to Article V, Section 10(c) of the Pennsylvania Constitution (relating to the Pennsylvania Supreme Court's power to proscribe and enforce rules of procedure and the conduct of the Pennsylvania courts), the court concluded that they conflict with federal law and are thus preempted:

> ... Congress has authorized grants to Community Defender Organizations [of which the FCDO is one] and tasked the [Administrative Office of the United States Courts ("AO")] with supervising grant payments. The disqualification proceedings, however, seek to supplant the AO by allowing the Commonwealth's courts to determine whether a Community Defender Organization has complied with the terms of its federal grants and to attach consequences to noncompliance.
>
> Significantly, the disqualification proceedings are preempted whether or not federal law authorizes the [FCDO] to use grant funds for certain purposes in PCRA cases. If the [FCDO] is authorized to use grant funds, the Commonwealth plainly cannot disqualify it for doing so without undermining congressional objectives. But even if the [FCDO] is not authorized to use grant funds, the disqualification proceedings interfere with the regulatory scheme that Congress has created.

Id. at 476-77 (internal citation omitted).

The PCRA court held its own proceedings in abeyance while awaiting the decision on this issue. During this interim, Sepulveda filed a pro se PCRA petition on October 3, 2014, sounding in "newly discovered evidence," and appended thereto an amended affidavit signed by Otto. The substance of the affidavit was, in large part, the same as Otto's unsigned affidavit presented at the June 11, 2007 PCRA hearing, with only minor deletions regarding details of Sepulveda's and Otto's drug use and some additional details about their shared fear of Mendez and the Commonwealth's pretrial knowledge of that fear. In the penultimate paragraph of the affidavit, Otto explained that she did not sign the affidavit in 2007 or testify to the entirety of its contents because she was then attempting to regain custody of her children and she was concerned there would be "repercussions" if she testified to this information. Pro Se PCRA Petition, 10/3/2014, Exhibit A, ¶ 18. Otto stated that she was no longer so restrained, as her youngest child had since turned eighteen. Id. Otto concluded this paragraph by stating: "I also want to be absolutely clear about why this happened. [Sepulveda] did what he did because I told him I was afraid that [Mendez] would follow through on his threats and hurt my children." Id.

The PCRA court entered an order requiring the clerk of courts to forward Sepulveda's pro se filing to his counsel pursuant to Rule 576(A)(4) of the Pennsylvania Rules of Criminal Procedure. *See* Pa.R.Crim.P. 576(A)(4); Commonwealth v. Jette, 23 A.3d 1032, 1044 (Pa. 2011) (holding that if a criminal defendant is represented by counsel, "the proper response to any pro se pleading is [for the court] to refer the pleading to counsel, and to take no further action on the pro se pleading unless counsel forwards a motion"). On December 8, 2014, Sepulveda filed a pro se motion seeking

the removal of counsel and a Grazier[12] hearing. On December 22, 2014, the FCDO filed a motion to withdraw Sepulveda's request for a Grazier hearing and concomitantly filed in the PCRA court Otto's amended affidavit that Sepulveda had appended to his October 3, 2014 pro se petition. The PCRA court held a hearing on the Grazier request on February 18, 2015.[13] At that time, Sepulveda confirmed his desire to have the FCDO continue representing him and withdrew his request to proceed pro se. N.T., 2/18/2015, at 21-22. Regarding the new claims implicated by Otto's amended affidavit the PCRA court stated it would address it along with the question of prejudice remanded from this Court "in one fell swoop," and scheduled a hearing in the matter for April 20, 2015. Id. at 15, 31-33; PCRA Court Order, 2/20/2015, ¶ 4.

At the April 20 hearing, the PCRA court heard argument on the question remanded by this Court regarding whether Sepulveda was prejudiced by his trial counsel's failure to investigate or present mental health mitigation evidence at his penalty hearing. Id. at 6-24. No further evidence was presented by either party on this issue, with the parties agreeing instead to brief their respective positions.

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[12] Commonwealth v. Grazier, 713 A.2d 81 (Pa. 1998) ("When a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one.").

[13] Also at the February 18, 2015 proceeding, the Commonwealth stipulated that the FCDO could represent Sepulveda. Despite the fact that decision on this question was a mandate by this Court sua sponte, and not an issue raised by the Commonwealth, the PCRA court found that the Commonwealth's stipulation somehow mooted the question and permitted it to move its PCRA proceedings forward with the FCDO continuing to represent Sepulveda. Nonetheless, our consideration of the propriety of the PCRA court's conclusion is unnecessary given the Third Circuit's resolution of the matter. *See* supra, note 11.

Thereafter, regarding the new claims, Otto testified in conformance with her amended affidavit. Id. at 32, 34-35, 37-38. Otto further testified that she told the District Attorney that she had been afraid of Mendez and feared for her children's safety, but that neither the Commonwealth nor defense counsel asked her questions about this at trial. Id. at 36-37.

Following the PCRA hearing, Sepulveda filed a counseled motion seeking leave to amend his first, timely PCRA petition "to conform his claims to the evidence presented." Motion for Leave to Amend PCRA Petition, 4/20/2015, ¶ 10 (citing Pa.R.Crim.P. 905(A)). Appended thereto was a PCRA petition raising claims of after discovered evidence,[14] a Brady[15] violation, and ineffective assistance of trial counsel. His after discovered evidence claim consisted, in relevant part, of the statements contained in Otto's amended affidavit regarding Sepulveda's knowledge that Otto feared Mendez would harm her children "would have bolstered the credibility of his statement that he sincerely believed he needed to use deadly force against the victims to prevent them from hurting others." Amended PCRA Petition, 4/20/2015, ¶ 25. Sepulveda

[14] The "after discovered evidence" provision of section 9543 grants relief to a PCRA petitioner who successfully proves "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S.A. § 9543(a)(2)(vi); *see* PCRA Opinion, 8/14/2015, at 18-22. For a claim of after discovered evidence, the petitioner must prove that "(1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict." Commonwealth v. Washington, 927 A.2d 586, 595-96 (Pa. 2007).

[15] Brady v. Maryland, 373 U.S. 83 (1963) ("[T]he 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.").

contended that this information was "newly discovered" because Otto stated she would not have previously provided this testimony based upon her concerns that it would negatively impact her ability to regain custody of her children. Id., ¶ 29. His Brady claim centered upon the Commonwealth's failure to disclose to trial counsel Otto's statement to the District Attorney that she feared Mendez and that Sepulveda was aware of her fear when he committed the killings. Id., ¶¶ 35-41. To the extent his trial counsel was aware of this information, or failed to exercise reasonable diligence to discover it, Sepulveda also claimed that this constituted ineffective assistance of counsel in failing to discover the evidence or present it at trial. Id., ¶¶ 44-52.

The Commonwealth responded, arguing that the PCRA court should not treat the new filing as an amended PCRA petition, but as a second, untimely PCRA petition that failed to satisfy any of the exceptions to the PCRA's timeliness requirements. *See* 42 Pa.C.S.A. § 9545(b)(1) (subject to certain, delineated exceptions, the PCRA requires that a petition, "including a second or subsequent petition, be filed within one year of the date the judgment becomes final"). Sepulveda filed a counseled reply, asserting that his new claims should be considered as amendments to his first, timely PCRA petition. In the alternative, he argued that he satisfied the newly discovered fact exception to the timeliness requirement (42 Pa.C.S.A. § 9545(b)(1)(ii)), as "[n]o amount of effort by Mr. Sepulveda or his counsel could have made Ms. Otto's children turn 18 any earlier." Petitioner's Consolidated Reply Brief in Support of Post-Conviction Relief, 6/3/2015, at 6. He further claimed that he satisfied the government interference exception to the one-year time bar (42 Pa.C.S.A. § 9545(b)(1)(i)) because "[t]he Commonwealth's failure to disclose Ms. Otto's prior statements about her and Mr. Sepulveda's fear of Mr.

Mendez prevented Mr. Sepulveda from raising the claim as well." Id. Otto signed her affidavit on August 12, 2014, which counsel for Sepulveda argued was the first time the new claims could have been presented, and Sepulveda raised these claims within sixty days thereof in his pro se PCRA petition on October 3, 2014, thus providing the PCRA court jurisdiction to determine the merits of the issues raised. Id. at 6-7; *see* 42 Pa.C.S.A. § 9545(b)(2) (stating that any petition raising an exception to the PCRA's time bar must be filed within sixty days of the date the petitioner could have first presented the claim.).

On August 14, 2015, the PCRA court entered an order and opinion granting Sepulveda's request to amend his first, timely PCRA petition, but denying relief on the merits of the claims raised. In the same order, the PCRA court granted Sepulveda a new penalty hearing based on its conclusion that trial counsel's failure to investigate and present mental health mitigation evidence prejudiced Sepulveda.[16] The Commonwealth has not challenged the latter determination.

Sepulveda appealed from the PCRA court's dismissal of his newly raised claims. On appeal before this Court, he asserts that he is entitled to a new guilt-phase trial because "(1) [Sepulveda] presented newly discovered exculpatory evidence that 'would have changed the outcome of the trial if it had been introduced,' requiring a new trial under both the PCRA and the Due Process Clause, and (2) the Commonwealth

[16] To prove prejudice based upon counsel's failure to present mitigation evidence in a capital penalty-phase trial where the jury found at least one mitigating circumstance, as in the case at bar, "the question is whether there is a reasonable probability that, had the PCRA evidence been adduced at the penalty phase, [the petitioner] would have been able to prove at least one additional mitigating circumstance, and at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones." Commonwealth v. Gibson, 19 A.3d 512, 526 (Pa. 2011).

suppressed material, exculpatory evidence, in violation of [Sepulveda]'s right to due process[.]" Sepulveda's Brief at 1. As it did below, the Commonwealth contends that this was not a proper amendment, and the PCRA court should not have treated the new claims as amending Sepulveda's first, timely PCRA petition. Commonwealth's Brief at 24-25. As agreement with this argument would obviate review of the merits of the new claims raised, we begin our analysis here.

In support of its decision to treat the new claims as an amended petition, the PCRA court stated that both the Rules of Criminal Procedure and case law from this Court state that a PCRA court may, in its discretion, permit a defendant to file an amended PCRA petition with previously unraised claims years after the initial, timely filing. PCRA Court Opinion, 8/14/2015, at 17 (citing Pa.R.Crim.P. 905(A);[17] Commonwealth v. Flanagan, 854 A.2d 489, 495-500 (Pa. 2004)). The PCRA court further found that these circumstances implicate "the efficient administration of justice," as "it would waste scarce judicial resources" to hold a second sentencing hearing "while a 'second' PCRA [petition] based on after discovered evidence would be filed at some future time." Id. at 18.

Sepulveda agrees, asserting that it was within the PCRA court's discretion to permit him to amend his first, timely PCRA petition. Sepulveda's Reply Brief at 4-5 (citing cases and Pa.R.Crim.P. 905(A)). As Rule 905(A) requires the PCRA court to permit the filing of an amended petition "freely ... to achieve substantial justice," and

[17] Rule 905(A) of the Pennsylvania Rules of Criminal Procedure provides: "The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A).

there is no stated time limit, Sepulveda contends that the Commonwealth failed to provide this Court with a basis to find that the PCRA court abused its discretion by granting Sepulveda leave to amend his first, timely PCRA petition. Id. at 5-6.

In Flanagan, a case relied upon by the PCRA court and Sepulveda, we found no abuse of discretion in a PCRA court's decision to permit a defendant to amend his PCRA petition and raise new claims eleven years after he filed his initial, timely petition. Flanagan, 854 A.2d at 495-96, 499-500. In Flanagan, however, the defendant's PCRA claims had never been ruled upon by the PCRA court, let alone any appellate court. At the time Flanagan sought to amend his original, timely PCRA petition, that petition was still pending, unadjudicated, before the PCRA court. In fact, the Flanagan Court specifically identified this as a factor affecting its assessment of whether the petition could properly be treated as an amendment. We contrasted the procedural posture of Flanagan from those present in Commonwealth v. Rienzi, 827 A.2d 369 (Pa. 2003), wherein we concluded that amendment was not proper. *See* id. at 371 (finding that the Superior Court erred by treating petitioner's second filing as an amendment to his first PCRA petition, as petitioner had withdrawn his first PCRA petition before the PCRA court, only filing the petition at issue ten months later, at which point there was nothing to "amend"); Flanagan, 854 A.2d at 500 n.7 (distinguishing Flanagan from Rienzi because "Flanagan's original petition for collateral relief was never withdrawn or dismissed"). Flanagan, therefore, is inapposite to the case at bar.

So too are the other cases relied upon by Sepulveda in his reply brief. *See* Sepulveda's Reply Brief at 5 (citing Commonwealth v. Williams, 828 A.2d 981, 993 (Pa. 2003) (holding that because the defendant attempted to withdraw his first, timely pro se

PCRA petition without the advice of counsel, and the PCRA court never ruled upon that motion and treated the filing as active, the subsequent petitions filed must be treated as amendments to his first, timely petition); Commonwealth v. Padden, 783 A.2d 299, 308-09 (Pa. Super. 2001) (finding an amended PCRA petition filed by appointed counsel following the initial pro se PCRA petition filed by the defendant was not an untimely, second petition "because the [t]rial [c]ourt did not at any time prior to the filing of the amended petition rule on the merits of the claims contained in the initial petition")).

The PCRA court and Sepulveda are correct that Rule 905(A) gives the PCRA court discretion to "grant leave to amend or withdraw a petition for [PCRA] relief at any time," and states that "[a]mendment shall be freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A). Rule 905(A) was created "to provide PCRA petitioners with a legitimate opportunity to present their claims to the PCRA court in a manner sufficient to avoid dismissal due to a correctable defect in claim pleading or presentation." Commonwealth v. McGill, 832 A.2d 1014, 1024 (Pa. 2003) (citing Commonwealth v. Williams, 782 A.2d 517, 526-27 (Pa. 2001)).

Once the PCRA court renders a decision on a PCRA petition, however, that matter is concluded before the PCRA court, having been fully adjudicated by that court, and the order generated is a final order that is appealable by the losing party. *See* Pa.R.Crim.P. 910 ("An order granting, denying, dismissing, or otherwise finally disposing of a petition for post-conviction collateral relief shall constitute a final order for purposes of appeal."); Commonwealth v. Bryant, 780 A.2d 646, 648 (Pa. 2001). Although liberal amendment of a PCRA petition is, in some circumstances, permitted beyond the one-year timeframe, *see, e.g.,* Flanagan, 854 A.2d at 499-500, Rule 905(A)

cannot be construed as permitting the rejuvenation of a PCRA petition that has been fully adjudicated by the PCRA court. We have consistently held that in the absence of permission from this Court, a PCRA petitioner is not entitled to raise new claims following our remand for further PCRA proceedings. *See, e.g.*, Commonwealth v. Daniels, 104 A.3d 267, 285 (Pa. 2014) (finding a new PCRA claim raised post-remand from this Court to have been waived, as "[t]his Court explicitly limited the subject matter of the remand to the remaining issues already raised by appellees; we neither invited nor authorized appellees to raise additional collateral claims years after expiration of the PCRA time-bar"); Commonwealth v. Spotz, 18 A.3d 244, 328 (Pa. 2011) (denying the appellant's request for remand for the PCRA court to consider issues first raised in a motion for reconsideration, as this would amount to the PCRA court's consideration of a second, untimely PCRA petition); Commonwealth v. Rainey, 928 A.2d 215, 226 n.9 (Pa. 2007) (stating that because this Court expressly permitted the appellant to raise one new PCRA claim on remand, raising any additional issues post-remand was improper); Commonwealth v. Rush, 838 A.2d 651, 661 (Pa. 2003) (remanding the case for further proceedings before the PCRA court, but instructing that this did not open the door for the appellant to raise new PCRA claims on remand).

Our mandate in Sepulveda II did not bestow upon the PCRA court jurisdiction over the entirety of the PCRA petition. Following our complete review on appeal from the denial of PCRA relief, we winnowed down the issues raised by Sepulveda to one identifiable subpart of one claim, which we ordered the PCRA court to consider in "proceedings upon **limited remand**." Sepulveda II, 55 A.3d at 1151 (emphasis added). Absent an order specifying otherwise, to construe Rule 905(A) as authorizing expansion

of a case after thorough appellate review renders an absurd result. *See* 1 Pa.C.S.A. § 1922(1) (in ascertaining the intent of this Court in enacting a procedural rule, we must presume that the result was not intended to be "absurd, impossible of execution or unreasonable").[18]

Moreover, Rule 905(A) cannot be read or interpreted in a vacuum. Pennsylvania Rule of Appellate Procedure 2591 specifically addresses a lower court's authority on remand. It provides that upon remand from a higher court, the lower court "shall proceed in accordance with the judgment or other order of the appellate court[.]" Pa.R.A.P. 2591.[19] Consequently, the breadth of Rule 905(A) is limited by Pa.R.A.P. 2591. *See* 1 Pa.C.S.A. § 1933 (stating that if two provisions conflict, they shall be construed, if possible, so that both may be given effect; if the conflict is irreconcilable, the specific provision prevails and is to be construed as an exception to the general provision).

Our remand order specifically instructed the PCRA court to consider (1) the propriety of the FCDO's representation of Sepulveda in this matter and (2) whether Sepulveda suffered prejudice by trial counsel's failure to investigate and present mental

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[18] When construing a Rule of Criminal Procedure, we utilize the Statutory Construction Act when possible. Pa.R.Crim.P. 101(C). The object of any rule interpretation "is to ascertain and effectuate the intention of" this Court. 1 Pa.C.S.A. § 1921(a).

[19] Indeed, it has long been the law in Pennsylvania that following remand, a lower court is permitted to proceed only in accordance with the remand order. *See, e.g.*, Quaker State Oil Ref. Co. v. Talbot, 185 A. 586, 588 (Pa. 1936); *see also* Levy v. Senate of Pa., 94 A.3d 436, 442 (Pa. Commw. 2014) (recognizing "[w]here a case is remanded for a specific and limited purpose, issues not encompassed within the remand order may not be decided on remand," as "[a] remand does not permit a litigant a proverbial second bite at the apple") (internal citations and quotation marks omitted), *appeal denied*, 106 A.3d 727 (Pa. 2014).

health mitigation evidence at the penalty phase. Nonetheless, the PCRA court in this case permitted Sepulveda, on remand, to raise new claims in what it considered to be an amendment to his timely-filed first PCRA petition. While we believe that our case law is clear, to the extent there is any lack of clarity in our prior decisions by their failure to consider Rule 905(A), we specifically hold that a PCRA court does not have discretion to treat new claims raised by a PCRA petitioner as an amended PCRA petition following remand from this Court unless such amendment is expressly authorized in the remand order. Rather, application of the liberal amendment policy of Rule 905(A) requires that the PCRA petition in question is still pending before the PCRA court at the time the request for amendment is made. Following a full and final decision by a PCRA court on a PCRA petition, that court no longer has jurisdiction to make any determinations related to that petition[20] unless, following appeal, the appellate court remands the case for further proceedings in the lower court. In such circumstances, the PCRA court may only act in accordance with the dictates of the remand order. The PCRA court does not have the authority or the discretion to permit a petitioner to raise new claims outside the scope of the remand order and to treat those new claims as an amendment to an adjudicated PCRA petition.[21]

In the case at bar, the PCRA fully addressed the issues raised in Sepulveda's first, timely PCRA petition (which included several amendments) and rendered a final

[20] This decision does not affect a PCRA court's authority to "modify or rescind" its order within thirty days of its entry if neither party has appealed its decision. 42 Pa.C.S.A. § 5505.

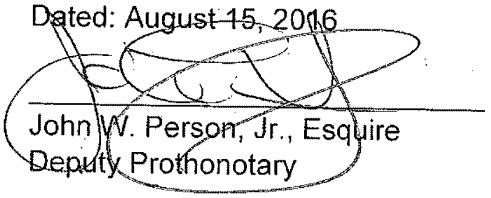
[21] To hold otherwise would allow "an extra round of collateral attack for certain defendants, unauthorized by the General Assembly," which this Court has expressly condemned. *See* Commonwealth v. Holmes, 79 A.3d 562, 576 (Pa. 2013).

decision on that petition in 2007. Sepulveda appealed from the final order disposing of his first PCRA petition to this Court. After thoroughly considering all of the issues presented on appeal, this Court issued an order remanding the case to the PCRA court for its consideration of two specific and discrete issues. By permitting Sepulveda to amend his otherwise finally decided PCRA petition with new, previously unraised claims, the PCRA court exceeded the scope of our remand order and the scope of its authority. We therefore vacate the portion of the August 14, 2015 PCRA court order granting Sepulveda permission to amend his PCRA petition and deciding the merits of the claims raised.

Order vacated in part. Jurisdiction relinquished.

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

Judgment entered
Dated: August 15, 2016



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Deputy Prothonotary