CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

Sheldon Hannibal
***Petitioner*,**

v.

Secretary, Pennsylvania Department of Corrections, et al.,
***Respondents*.**

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

---

*SHAWN NOLAN
Chief, Capital Habeas Unit
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Shawn_Nolan@fd.org
(215) 928-0520

Counsel for Petitioner Sheldon Hannibal
**Member of the Supreme Court Bar*

Index to Appendix

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 21-3075

_____

SHELDON HANNIBAL,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI; SUPERINTENDENT ROCKVIEW SCI;
DISTRICT ATTORNEY PHILADELPHIA

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-13-cv-00619)
District Judge: Honorable Gerald A. McHugh

_____

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 17, 2023

_____

Before: CHAGARES, *Chief Judge*, PHIPPS, and CHUNG, *Circuit Judges*.

(Filed: January 17, 2024)
(Amended: April 2, 2024)

_____

OPINION[*]

_____

PHIPPS, *Circuit Judge*.

In this appeal, a Pennsylvania inmate serving a life sentence for first-degree murder and conspiracy to commit murder challenges the denial of his petition for a writ of habeas

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

corpus on four grounds. He claims that he was denied *Brady* materials, had evidence of another crime introduced against him in violation of due process, and was convicted based on erroneous jury instructions. He also argues that those errors, even if not independently prejudicial, were in aggregate enough to deny him a fair trial. For the reasons below, we will affirm the District Court's denial of habeas relief.

I. FACTUAL BACKGROUND

At about 1:30 in the morning on October 25, 1992, Peter LaCourt and his friend, Barbara Halley, were walking up an interior stairwell in the Cambridge Mall public housing high-rise in North Philadelphia. LaCourt encountered Sheldon Hannibal and a fifteen-year-old girl, Tanesha Robinson, who were sitting on the steps between the second and third floors having a conversation. LaCourt offered to sell Hannibal a gold chain. Hannibal asked to see the chain, and LaCourt handed it to him. But after examining the chain, Hannibal concluded that it was fake and began punching LaCourt.

Both LaCourt and Halley tried to get away. Halley was successful: she ran down the stairs to the guard booth in search of help. LaCourt was not. As he started to run away down the hallway of the building, Hannibal pulled out a gun and threatened to kill him, so he quit running. Hannibal then approached LaCourt and began hitting him with the gun.

During this conflict, Larry Gregory emerged from one of the apartments on the floor with his own gun. He joined Hannibal in beating LaCourt. LaCourt pleaded for his life – offering the chain and all his money.

Those offers were not enough. Robinson, who had observed the events from near the stairwell, at that point turned to run upstairs to her cousin's sixth-floor apartment. As she was doing so, she "heard a lot of gunshots." Trial Tr. at 90:15–16 (Mar. 4, 1994) (A-1234). And once she reached her cousin's apartment, she looked out the window to see

Hannibal and Gregory fleeing in a gray car. From the guard station, Halley heard the gunshots, and she returned to find that LaCourt had been shot.

LaCourt died from the gunshot wounds, and the Commonwealth charged Hannibal and Gregory with first-degree murder and conspiracy to commit murder. Hannibal was held in pretrial detention and Gregory was released on bond. At two preliminary hearings in the Common Pleas Court of Philadelphia County, Robinson provided her account of the events surrounding LaCourt's death.

By the time of the joint trial for both Hannibal and Gregory, however, Robinson had been killed. Her preliminary hearing testimony was read into the record at trial. Other law enforcement witnesses corroborated portions of her testimony by testifying about recovering pieces of a gold chain in the stairwell and finding LaCourt's dead body on the stairway with a total of six gunshot wounds, including wounds to his head and back. Also, Halley testified to what she had seen and heard. But no one testified to seeing Hannibal actually shoot LaCourt.

The Commonwealth, however, had more to its case. It also had Hannibal's alleged jailhouse confession. According to the testimony of an inmate, James Buigi, during Hannibal's pretrial detention between late October and November 1993, he and Hannibal shared Cell 50 at the Philadelphia Industrial Corrections Center, referred to as the 'PICC.' Buigi testified that after a few days, Hannibal was "comfortable" enough with Buigi to ask him if he knew anything about the law. Trial Tr. at 22:19 (Mar. 1, 1994) (A-896). Buigi responded, "somewhat," Trial Tr. at 107:15 (Feb. 28, 1994) (A-854), and then Hannibal asked if he could be convicted of first-degree murder without a witness, since "his witness was one of the girls that got killed in the Cambridge Mall." Trial Tr. at 107:21–22 (Feb. 28, 1994) (A-854). Hannibal told Buigi that Robinson "ain't see me when I shot [LaCourt],

all she seen was when I pistol-whipped him." Trial Tr. at 113:9–11 (Feb. 28, 1994) (A-860). Still, Hannibal considered Robinson to be "the only witness that can hurt [him] in the trial," Trial Tr. at 122:8–9 (Feb. 28, 1994) (A-869), so "he told one of his friends that he needed [her] out of the way," and he heard later that it was taken care of. Trial Tr. at 122:6–8 (Feb. 28, 1994) (A-869). In sharing that information with Buigi, Hannibal did not know that Buigi and LaCourt had been friends. And the day after that conversation, Buigi reported Hannibal's statements to law enforcement.

In partial corroboration of Buigi's testimony, the Commonwealth called two corrections officers as witnesses. One testified that he was "positive" that Hannibal and Buigi shared Cell 50 at the PICC, for a few weeks starting in late October or early November of 1993. Trial Tr. at 22:5 (Mar. 8, 1994) (A-1420). Another officer gave a similar account, testifying that he remembered Hannibal and Buigi sharing Cell 50 in late October and early November because Hannibal "was annoying." Trial Tr. at 32:18 (Mar. 8, 1994) (A-1430).

Also, in corroboration of Hannibal's alleged confession that he had a friend who "took care of" Robinson, Trial Tr. at 122:21 (Feb. 28, 1994) (A-869), the Commonwealth called two additional witnesses. One of them, twenty-one-year-old Terrence Richardson, who resided in Cambridge Mall in 1992 and 1993, testified that he asked Hannibal's co-defendant, Gregory, about his case, and Gregory responded, in reference to Robinson, "[t]hat snitch ass bitch got to die." Trial Tr. at 76:25–77:1 (Mar. 3, 1994) (A-1133–34).[1] Richardson further relayed that he was in Gregory's apartment on August 3, 1993, the day before Robinson's death, with a few other men as they planned to kill her. The second

[1] Hannibal argues that Richardson recanted during post-trial motions in Gregory's case, but the Pennsylvania Supreme Court determined that the recantation was unreliable. *Commonwealth v. Hannibal*, 156 A.3d 197, 222 (Pa. 2016).

witness was the detective who found Robinson's body on August 4, in her cousin's sixth-floor apartment under some clothing with a close-range gunshot wound through her head. The detective also testified that he found the bodies of two other young women who happened to be with Robinson in the apartment: twenty-year-old Jean Robinson, who was found in a bedroom with the back of her head blown off, and seventeen-year-old Latoya Cook, who was found on a sofa with a gunshot wound to the head. Two feet from Cook's body was her six-month-old baby, who was crying but otherwise uninjured.

In allowing the admission of this evidence over Hannibal's objection, the trial court issued limiting instructions to the jury. At the outset of the jury charge, the trial court acknowledged the evidence connecting Hannibal with the deaths of the three girls but stated that that evidence was for the "limited purpose . . . of tending to show a consciousness of guilt." Trial Tr. at 127:14–15 (Mar. 9, 1994) (A-1585). The trial court admonished the jury that it "must not regard this evidence as showing that these defendants are persons of bad character or criminal tendencies from which [it] might be inclined to infer guilt in this case." Trial Tr. at 127:17–20 (Mar. 9, 1994) (A-1585). And it reiterated that the jury must not "consider the evidence concerning the witness' killing as evidence that the defendants killed the victim in this case. The only thing it is for is to be used as a possible consciousness of guilt." Trial Tr. at 128:18–22 (Mar. 9, 1994) (A-1586).

After the Commonwealth rested, Hannibal testified. He denied having an altercation with LaCourt, taking LaCourt's chain, possessing a gun, and shooting LaCourt. He also disputed that Buigi was his cellmate. Instead, although he recounted that he was in Cell 50 from the end of October through November 1993, he testified that his cellmate was a "Puerto Rican guy named June." Trial Tr. at 32:17 (Mar. 7, 1994) (A-1314).

At the time of trial, Hannibal did not know that the prosecutor had access to additional prison-housing information. Records from the PICC reported that in October and November of 1993, multiple prisoners – including Buigi (under an alias), but not Hannibal – occupied Cell 50. Those same records indicated that during that time, multiple occupants were assigned to the same bed, while the other bed went unassigned.

Later, while the case was pending on appeal, the prosecutor obtained more prison housing information. In response to the prosecutor's letter asking if Hannibal and Buigi had shared a cell in October and November of 1993, the Director of Classification, Movement, and Registration for the Philadelphia Prison System responded that the two men were in the same cellblock at a different institution (not the PICC) between August and mid-October 1993.

At the close of trial, the judge instructed the jury about the charges for conspiracy to commit murder and for first-degree murder. For conspiracy, the judge explained the requirement that a defendant have the specific intent to commit a crime:

> [T]o find a defendant guilty of conspiracy to commit a crime, you must be satisfied initially that the following two elements of conspiracy have been proven beyond a reasonable doubt: First, that a defendant has agreed with another person or persons that they or one of them would engage in conduct which constitutes the crime in this case, or that they have agreed to aid another person in the planning or commission of the crime. Second, that the defendant, a defendant, his co-conspirator or accomplice did so *with the intent of promoting or facilitating commission of the crime*.
>
> * * *
>
> You may find a defendant guilty of a crime as a conspirator if you are satisfied beyond a reasonable doubt first that the defendant agreed with the others to commit the crime . . . and *that the defendant agreed with the intent* of promoting or facilitating [its] commission . . . .

Trial Tr. at 144:16 – 145:3, 146:2–8 (Mar. 9, 1994) (A-1602–04) (emphasis added).[2] As far as the mental state required for a conviction on the murder charge, the judge instructed that the jury must be satisfied that "the defendant, his accomplice *or co-conspirator* did so with the specific intent to kill and with malice." Trial Tr. at 135:24 – 136:1 (Mar. 9, 1994) (A-1593–94) (emphasis added). The conjunction 'or' suggested that Hannibal could be convicted regardless of his own mental state if his co-conspirator had the specific intent to kill with malice, and the jury requested clarification. In response, the judge modified the mental state instruction so that the jury had to be satisfied "that he, *the person who is being evaluated*, did so with [the] specific intent to kill and with malice." Trial Tr. at 6:1–3 (Mar. 10, 1994) (A-1620) (emphasis added).

The jury found both Hannibal and Gregory guilty of conspiracy and first-degree murder for the killing of Peter LaCourt. On March 11, 1994, the jury sentenced Hannibal to death and Gregory to life in prison.

By way of postscript, the Commonwealth, after introducing evidence associating Hannibal and Gregory with Robinson's death and securing guilty verdicts against both men for LaCourt's murder, prosecuted two other men for murdering Robinson and the other women in the sixth-floor apartment. One of the two men convicted of those murders was the man identified by Richardson as being in Gregory's apartment during the planning.

---

[2] The trial judge also instructed that:

> A defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He is an accomplice if *with the intent of promotion or facilitating a commission of the crime* he encourages, requests, solicits or commands the other person to commit it or he aids, agrees to aid or attempts to aid the other person in planning or committing it.

Trial Tr. at 133:3–10 (Mar. 9, 1994) (A-1591) (emphasis added).

II. PROCEDURAL HISTORY

After receiving a death sentence for first-degree murder, Hannibal took an automatic appeal to the Supreme Court of Pennsylvania. *See* 42 Pa. Cons. Stat. §§ 722(4), 9711(h)(1); Pa. R. App. P. 702(b), 1941. He made five arguments, three of which are relevant to this case. First, he asserted that the jury instructions were erroneous under Pennsylvania law. Second, he contended that trial counsel was ineffective for failing to subpoena prison housing records. And third, he argued that it was fundamentally unfair for the Commonwealth to introduce evidence connecting him to Robinson's murder. The Pennsylvania Supreme Court independently reviewed the sufficiency of the evidence for the first-degree murder conviction, and then rejected each of Hannibal's arguments. *Commonwealth v. Hannibal*, 753 A.2d 1265, 1271, 1272 n.11 (Pa. 2000).

Hannibal then filed a separate civil action to collaterally challenge his conviction and sentence under the Pennsylvania Post Conviction Relief Act. *See* 42 Pa. Cons. Stat. §§ 9541, 9542. In addition to reiterating several of his previous arguments, including the three identified above, Hannibal claimed that the Commonwealth violated its duty to disclose exculpatory materials under *Brady v. Maryland*, 373 U.S. 83 (1963), by not producing the correspondence between the prosecutor and the prison director as well as the prison housing records for Cell 50 at the PICC. The Court of Common Pleas denied that petition. Hannibal appealed that ruling to the Pennsylvania Supreme Court without any success. *See Commonwealth v. Hannibal*, 156 A.3d 197, 203 (Pa. 2016).

In July 2017, Hannibal sought relief in federal court. In his habeas petition under 28 U.S.C. § 2254(a), in the Eastern District of Pennsylvania, he raised eight claims. Some of those challenged exclusively his death sentence. Although it had defended Hannibal's death sentence for over twenty-five years, in February 2020, the Philadelphia District Attorney's Office stipulated that Hannibal was deprived of effective assistance of counsel

at the sentencing phase of trial. In response, the District Court vacated the death penalty, but on the Report and Recommendation from the Magistrate Judge, it denied all of Hannibal's challenges to his conviction. Through a timely appeal, Hannibal now invokes the appellate jurisdiction of this Court to contest that final decision. *See id.* §§ 1291, 2253(a); Fed. R. App. P. 4(a).

III. DISCUSSION

On appeal, Hannibal raises four collateral challenges to his conviction. He argues that under *Brady*, the Commonwealth should have disclosed two sets of exculpatory materials: the prison housing records for Cell 50 at the PICC and the correspondence between the prosecutor and the prison director regarding Hannibal and Buigi's cell assignments. Hannibal also contends that the trial court committed a due process error by admitting evidence connecting him to Robinson's death. Hannibal further asserts that at the close of trial, the court violated his due process rights by giving improper instructions to the jury about the mental state requirement for first-degree murder. Finally, Hannibal argues that these errors compound so that their cumulative effect compels habeas relief.

As codified in statute, the Anti-Terrorism and Effective Death Penalty Act of 1996, commonly abbreviated as 'AEDPA,' supplies the standard of review for a habeas petition brought by a person held in custody pursuant to a state-court judgment. *See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, § 104 (codified in relevant part at 28 U.S.C. § 2254). That standard, which may be referred to as 'AEDPA deference,' constrains the scope of federal court review of "any claim that was adjudicated on the merits in the State court proceedings." 28 U.S.C. § 2254(d); *see also Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (characterizing federal-court review of a state-court ruling on the merits as "highly circumscribed"). As to the

facts, a federal court will grant relief only if the state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). With respect to the law and its application, a federal court cannot grant relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). If, however, the claimed violations of federal law were not adjudicated on the merits by a state court, and review in federal court is not otherwise foreclosed (such as by a failure to exhaust or procedural default), then AEDPA deference does not apply, and a federal court reviews the claim *de novo*. *See Cone v. Bell*, 556 U.S. 449, 472 (2009).

A. The *Brady* Claims

Hannibal leads with the contention that exculpatory documents regarding the prison housing arrangements were withheld from him in violation of *Brady*. Specifically, he claims that he was owed the prison housing records about Cell 50 and the correspondence between the prosecutor and the prison director. The common premise for both *Brady* claims is that the documents would have been material to Hannibal's case by allowing him to undermine Buigi's testimony that he and Hannibal were cellmates at the PICC in late October and early November 1993. *See generally Giglio v. United States*, 405 U.S. 150, 154 (1972) (explaining that the duty under *Brady* to disclose exculpatory evidence includes impeachment evidence); *Simmons v. Beard*, 590 F.3d 223, 234 (3d Cir. 2009).

In ruling on Hannibal's PCRA petition, the Pennsylvania Supreme Court did not consider the merits of his *Brady* claims.[3] But it did consider and reject Hannibal's

[3] The Pennsylvania Supreme Court held on collateral review that Hannibal waived his *Brady* claims by not raising them on direct appeal. *Hannibal*, 156 A.3d at 210; *see* 42 Pa. Cons. Stat. § 9544(b). But Hannibal filed his direct appeal in 1997, before the 1998 decision in *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (1998). Pre-*Albrecht*, waiver

ineffective assistance claim premised on counsel failing to subpoena the Cell 50 records. It determined that those records were "inaccurate on their face, containing several obvious errors" – including showing multiple prisoners occupying one bed while the other bed went unused. *Hannibal*, 156 A.3d at 210. Thus, the Pennsylvania Supreme Court concluded that the records would have had no impeachment value. *Id.*

That conclusion qualifies as an on-the-merits ruling on the materiality element of the *Brady* claim. That is so because both claims have a common legal requirement – a reasonable probability that the outcome would have been different if Hannibal would have had access to the records. *Compare Lewis v. Horn*, 581 F.3d 92, 107 (3d Cir. 2009) (explaining that the prejudice prong of an ineffective-assistance-of-counsel claim requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)), *with Strickler v. Greene*, 527 U.S. 263, 280 (1999) (explaining the materiality element of a *Brady* claim requires a showing of a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985))). And in this instance, both claims turned on the same factual issue – the impact of not having the Cell 50 records to impeach Buigi on Hannibal's trial. Based on the legal congruence of the claims and the common underlying factual premise, the Pennsylvania Supreme Court's resolution of the ineffective-assistance-of-counsel issue qualifies as an on-the-merits ruling with respect to the materiality element of Hannibal's *Brady* claim. *See Albrecht v. Horn*, 485 F.3d 103, 116 (3d Cir. 2007) (applying AEDPA deference when the state court did not

---

under Pennsylvania law was "not an adequate basis for a finding of procedural default." *Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009).

address the merits of the claim "in the ordinary sense" but instead "examined the merits in the context of the prejudice prong of an ineffective assistance" claim).

Thus, under AEDPA deference, the question narrows to whether the Pennsylvania Supreme Court reasonably concluded that the Cell 50 records would not have altered the outcome of the trial. It did. The Cell 50 records are facially inaccurate and would have minimal, if any, impeachment value. The court also considered the contrary testimony of the guards, who both remembered Hannibal and Buigi sharing Cell 50 during the relevant timeframe. It also recognized Hannibal's testimony – in contradiction to the prison housing records – that he was housed in Cell 50 (although he disputed sharing it with Buigi). So, it was reasonable for the Pennsylvania Supreme Court to conclude that any attempted impeachment efforts using the inconclusive Cell 50 records would likely not have changed the jury's mind.[4]

The portion of Hannibal's *Brady* claim premised on not receiving the correspondence between the prosecutor and the prisoner director also fails. On *de novo* review (because the Pennsylvania courts did not consider this issue), *see Cone*, 556 U.S. at 472, the correspondence was not material. It related to Hannibal and Buigi's incarceration at a different penal institution at a different time (August through early October of 1993, not late October through November of 1993), so it provided no credible basis for impeaching Buigi. Thus, Hannibal's lack of that information did not alter the outcome of his trial or appeal.

[4] The Pennsylvania Supreme Court also included an 'even if' argument – even if the Cell 50 records had some impeachment value, their withholding was not consequential because they would have provided a basis for impeaching Hannibal's own testimony. That is an uncertain proposition because it assumes that Hannibal would still have testified if he had the Cell 50 records. But given its determination that the Cell 50 records provided no meaningful basis for impeachment, it is not necessary to evaluate the reasonableness of that secondary basis for the Pennsylvania Supreme Court's determination.

B. The Introduction of Evidence Associating Hannibal with the Murder of Tanesha Robinson

Hannibal also argues that the trial court violated his due process rights by allowing the introduction of evidence linking him to Robinson's murder. On direct appeal, the Pennsylvania Supreme Court addressed that challenge and upheld the admission of the evidence. *Hannibal*, 753 A.2d at 1272 n.11 (A-560). That ruling therefore receives AEDPA deference.[5]

Under that standard, the Pennsylvania Supreme Court's ruling was not "contrary to" or "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). After reviewing Hannibal's claim that his "trial was unfair" based on the introduction of evidence associating him with Robinson's murder, the Pennsylvania Supreme Court upheld the trial court's ruling, reasoning that the evidence was properly admitted as part of the history of the case and to show consciousness of guilt. *Hannibal*, 753 A.2d at 1272 n.11 (A-560); *see also id.* (explaining that counsel was not ineffective for failing to object to the introduction of this evidence because there was "no basis to object . . . ."). And according to the United States

[5] On collateral review, the Pennsylvania Supreme Court divided on the question of whether the due process issue concerning the admission of this evidence had been previously litigated on the merits. *Hannibal*, 156 A.3d at 203, 234, 236 (A-703, A-730, A-731). Despite the fractured reasoning, that court ultimately affirmed the PCRA court's ruling that the issue had been litigated on direct appeal and was therefore not cognizable on PCRA review. *See* 42 Pa. Cons. Stat. § 9544(a)(2); *see also In re Int. of O.A.*, 717 A.2d 490, 496 n.4 (1998) (explaining that, "[w]hile the ultimate order of a plurality opinion . . . is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority"); A-670–71 (PCRA opinion). So, although the Pennsylvania Supreme Court's decision on collateral review was later than its ruling on direct appeal, it is not the relevant decision for purposes of AEDPA deference. *See Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008) (holding that federal courts should look to "the state courts' last reasoned opinion on" an issue if a higher state court either does not address or does not "supplement[] in a meaningful way" the reasoning relevant to that issue).

Supreme Court, the admission of evidence of another crime is not "so extremely unfair" as to violate "fundamental conceptions of justice" where it was "at least circumstantially valuable in proving petitioner's guilt" and the judge provided a limiting instruction. *Dowling v. United States*, 493 U.S. 342, 352–53 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). In this case, the admission of evidence regarding Hannibal's involvement in Robinson's murder was important to corroborating Buigi's testimony that at Hannibal's direction, his "boys" "took care of" the witness, and it evidenced Hannibal's consciousness of guilt. Trial Tr. at 122:24–25 (Feb. 28, 1994) (A-869). Thus, it was at least circumstantially valuable in proving Hannibal's guilt. The more prudent course may well have been for the trial court to have excluded evidence of the other two victims and the presence of an infant. But under AEDPA deference, with the two limiting instructions from the trial judge that the information should be considered only for consciousness-of-guilt purposes, the Pennsylvania Supreme Court's rejection of this challenge was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court.

C. The Jury Instructions on Specific Intent for First-Degree Murder

Hannibal argues that the jury instructions violated his right to due process by minimizing the Commonwealth's burden of proof, specifically by allowing a finding that he was guilty of first-degree murder based on the intent of his codefendant, Gregory. *See Smith v. Horn*, 120 F.3d 400, 416 (3d Cir. 1997) (explaining that jury instructions that "relieve[] the Commonwealth of the burden of proving beyond a reasonable doubt . . . every element of the offense" violate due process); *see also Williams v. Beard*, 637 F.3d 195, 223 (3d Cir. 2011). On collateral review, the Pennsylvania Supreme Court upheld the jury instructions, which would normally implicate AEDPA deference

considerations. But when a state court's rationale is less than clarion, it is permissible to sidestep AEDPA deference if the claim would fail under *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review." (citation omitted)). And here, that path of *de novo* review is appropriate.

At the time of Hannibal's trial, a requirement for first-degree murder under Pennsylvania law was that "each co-conspirator must individually be found to possess the mental state necessary to establish first degree murder—the specific intent to kill." *Commonwealth v. Wayne*, 720 A.2d 456, 464 (1998) (emphasis omitted); *see also Commonwealth v. Bachert*, 453 A.2d 931, 935 (1982). And Hannibal's contention that the initial jury instruction and the follow-up clarification did not clearly instruct the jury on that point of law is non-trivial.[6]

Still, any error in the instructions on first-degree murder would have been harmless because in convicting Hannibal of conspiracy to commit murder, the jury had to find that he acted with the specific intent to kill. *See Bronshtein v. Horn*, 404 F.3d 700, 712 (3d Cir. 2005) (explaining that an error in a jury instruction is harmless unless "the error had substantial and injurious effect or influence in determining the jury's verdict" (quoting

[6] The initial instructions could have conveyed to the jury that Hannibal could be guilty of first-degree murder even if only co-defendant Gregory had the specific intent to kill. Trial Tr. at 135:18–136:1 (Mar. 9, 1994) (A-1593–94) (setting forth the third element of first-degree murder by listing the subjects disjunctively, as the defendant, "his accomplice *or* co-conspirator" who must have killed the deceased "with the specific intent to kill and with malice" (emphasis added)). The clarifying instruction, which stated that the mental state was required of "the person who is being evaluated," although seemingly curative, did not specify whether 'the person being evaluated' referred to Hannibal or his co-defendant, Gregory. Trial Tr. at 5:19–6:3 (Mar. 10, 1994) (A-1619–20).

Smith, 120 F.3d at 417)). The trial court's instruction for conspiracy to commit murder expressly stated that guilt depended on a specific intent to kill: "to find a defendant guilty of conspiracy to commit a crime, you must be satisfied initially that . . . the defendant, a defendant, his co-conspirator or accomplice [conspired] with the intent of promoting or facilitating commission of the crime." Trial Tr. at 144:16–145:3 (Mar. 9, 1994) (A-1602–03). Although that instruction was also in the disjunctive, the trial court later made clear that co-conspirators and accomplices must act with specific intent. It explained that the jury could find guilt as a conspirator if it was "satisfied beyond a reasonable doubt first that the defendant agreed with the others to commit the crime . . . and *that the defendant agreed with the intent* of promoting or facilitating [its] commission . . . ." Trial Tr. at 146:3–8 (Mar. 9, 1994) (A-1604) (emphasis added). And for guilt as an accomplice, the trial court further explained that a defendant "is an accomplice if *with the intent of promotion or facilitating a commission of the crime* he encourages, requests, solicits or commands the other person to commit it or he aids, agrees to aid or attempts to aid the other person in planning or committing it." Trial Tr. at 133:5–10 (Mar. 9, 1994) (A-1591) (emphasis added). So, under any scenario, to find Hannibal guilty of conspiracy to commit murder, the jury had to conclude that he had the specific intent to kill LaCourt.

Thus, even if the instructions on first-degree murder were deficient as to the need for Hannibal to have the specific intent to kill LaCourt, the instructions viewed in their entirety reveal that, in finding Hannibal guilty of conspiracy, the jury must have found that Hannibal had acted with a specific intent to kill. Any error in the instruction for first-degree murder would therefore not have had "a substantial and injurious effect or influence in determining the jury's verdict." *Bronshtein*, 404 F.3d at 712 (quoting *Smith*, 120 F.3d at 417); *see also id.* at 710 (holding that even in the presence of misleading jury instructions

on the specific intent requirement for first-degree murder, a guilty verdict on a charge of conspiracy to commit murder, for which the jury was required to find a specific intent to kill, sufficed to render the error harmless).[7]

D. Cumulative Error

Finally, Hannibal invokes the cumulative error doctrine to argue that the combined effect of the trial court's errors – even if independently harmless – deprived him of a fair trial. Under the cumulative error doctrine, "errors that are not individually reversible can become so cumulatively," *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019), if they "so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." *Id.* (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993)). Errors can accumulate either by virtue of their relatedness, such that they "amplify each other in relation to a key contested issue in the case" or by virtue of their combined magnitude such that, when aggregated, "unrelated errors sufficiently undermine[] confidence in the outcome of the trial." *Id.* (first quoting *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2013), then quoting *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir.

[7] The holding in *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005), does not alter this outcome. In that case, the instruction informed the jury that it could convict the defendant of a substantive offense, including first-degree murder, if that "particular crime, *while it may differ from the agreed crime*, was committed by the coconspirator in furtherance of his and the defendant's common design." *Id.* at 428 (emphasis added). Those instructions, even when taken as a whole, did not ensure that the jury had found the requisite specific intent to kill because the instructions allowed the jury to convict of first-degree murder based on the accomplice's intent to commit a different crime. But here, as in *Bronshtein*, there was no such possibility. The jury instructions in both cases referenced the need for the specific intent to commit the agreed upon crime, which was first-degree murder. And *Laird* cannot alter the holding in *Bronshtein*, which was decided first. *Compare Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. Apr. 14, 2005), *with Laird v. Horn*, 414 F.3d 419, 428 (3d Cir. July 19, 2005); *see also Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 471 (3d Cir. 2017) ("[W]here two precedential opinions are in 'unavoidable conflict,' the earlier opinion controls[.]" (citation omitted)).

2013)). Either way, cumulative errors do not warrant reversal where the "remaining evidence of guilt [is] overwhelming." *Id.* (cleaned up) (quoting *United States v. Copple*, 24 F.3d 535, 547 n.17 (3d Cir. 1994)).

Here, the Pennsylvania Supreme Court rejected Hannibal's claim of cumulative error, *Hannibal*, 156 A.3d at 234, and so AEDPA deference applies. That conclusion was not unreasonable in light of the ample evidence supporting Hannibal's responsibility for LaCourt's death.

De novo review confirms that result. The only potential error relates to the jury instructions. Yet, with only an isolated instance of potential error, and without any combination of errors, there is no basis to compound errors, and principles of cumulative error – under either the relatedness or the combined magnitude methods – do not apply here.

IV. CONCLUSION

For the foregoing reasons, we will affirm the District Court judgment denying habeas relief on the grounds challenged herein.

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

SHELDON HANNIBAL	:	
	:	
v.	:	**CIVIL ACTION NO. 13-cv-619**
	:	
ROBERT GILMORE, et al.	:	

ORDER

This 6th day of October, 2021, following careful and independent consideration of the petition filed pursuant to 28 U.S.C.§ 2254 by Sheldon Hannibal, Petitioner, the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, and the objections raised by Petitioner's counsel, it is hereby **ORDERED** that:

1) The Report and Recommendation is **APPROVED** and **ADOPTED**;
2) The petition for habeas corpus filed pursuant to 28 U.S.C.§ 2254 is **DENIED**;
3) A certificate of appealability is issued pursuant to 28 U.S.C. §2253 as to two issues raised by Petitioner where he made a substantial showing of the denial of a constitutional right, and reasonable minds could differ about how to resolve the claims. *See* 28 U.S.C. §2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). These include:
    1. Whether there is a reasonable probability that evidence suppressed in violation of *Brady v. Maryland*, 363 U.S. 83 (1963) would have materially impeached the credibility of the main witness, and;
    2. Whether the trial was fundamentally unfair such that Petitioner was denied his right to due process, when the Commonwealth was permitted to introduce evidence of the murder of Tanesha Robinson, a witness against Petitioner, allegedly at Petitioner's behest.

/s/ Gerald Austin McHugh
United States District Judge

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

SHELDON HANNIBAL,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 13-cv-619**
	:	
ROBERT GILMORE, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **February 22, 2021**

Before the Court is a counseled Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by Sheldon Hannibal (Petitioner), an individual currently incarcerated at the State Correctional Institution – Phoenix in Collegeville, Pennsylvania. This matter has been referred to me for a Report and Recommendation. For the following reasons, I respectfully recommend that the petition for habeas corpus be **DENIED**.

I. FACTUAL AND PROCEDURAL HISTORY

In its June 20, 2000 opinion, the Pennsylvania Supreme Court summarized the facts as follows:

> At trial, the evidence established that in the early morning hours of October 25, 1992, Peter LaCourt and his friend, Barbara Halley, encountered [Petitioner] and Tanesha Robinson, who were sitting in a stairway at the Cambridge Mall housing project. LaCourt tried to sell [Petitioner] a gold chain. After looking at the chain, [Petitioner] started an argument with LaCourt, pulled out a gun, and began to beat LaCourt with it. [Petitioner] then knocked on the door of Larry Gregory, who joined in the beating, using his own gun to pistolwhip LaCourt. As LaCourt pled for the beating to stop, Ms. Robinson ran up the stairway. Seconds after she left the scene of the beating, she heard approximately ten gunshots. Barbara Halley,

> meanwhile, had gone to the guard's station in the lobby to seek help and, thus, was not present when the shots were fired.
>
> A Philadelphia Housing Authority police officer found LaCourt lying on the stairway and observed gunshot wounds to his head and back. Police found eleven 9 mm shell casings at the crime scene. Portions of the gold chain were also recovered from the stairway.
>
> An autopsy revealed that LaCourt had suffered blunt force trauma injuries to the right front and top of his head, as well as injuries from falling. Six bullets struck LaCourt's body; two hit him in the front, resulting in a perforated gunshot wound of the lower left arm and a grazing gunshot wound to his fingers which were characterized as defensive wounds. The remaining four bullets struck LaCourt as he lay on the floor. The cause of death was ruled to be severance of LaCourt's brain stem by one of the bullets which struck him.
>
> Ms. Robinson subsequently gave statements to police concerning the murder and testified on behalf of the Commonwealth at the preliminary hearings regarding appellant and Gregory. Following that testimony, she and two of her female friends were killed in Ms. Robinson's apartment in the presence of a six-month-old baby.

Commonwealth v. Hannibal, 753 A.2d 1265, 1268 (Pa. 2000).

Petitioner was arrested and charged with the murder of LaCourt. The Commonwealth tried Petitioner as the primary shooter, and tried co-defendant Gregory as an accomplice to the shooting. At trial, the Commonwealth presented the testimony of James Buigi, who testified that he had shared a cell with Petitioner at the Philadelphia Industrial Corrections Center (PICC). Buigi testified that Petitioner had confessed to him that he had shot LaCourt, and that he had instructed one of his friends to murder Tanesha Robinson. (N.T. 2/28/94, 106–08, 112–13, 116–17, 122–24). Petitioner testified at trial that he had been housed at PICC in cell 50, which was the cell number that Buigi claimed they'd shared. However, Petitioner denied sharing a cell with Buigi, instead claiming that his cellmate was a man named "June." In response to this, the

Commonwealth presented the testimony of two Correctional Officers, who testified that Petitioner and Buigi were cellmates at PICC. (N.T. 3/8/94, 18–22, 28–30).

Following the trial, Petitioner was found guilty of first-degree murder, criminal conspiracy, and possessing instruments of crime (PIC). (Crim. Docket at 6). After his penalty-phase hearing, he was sentenced to death for the first-degree murder conviction, and confinement for the remaining convictions. *Id.*

Petitioner timely filed a direct appeal, and the Pennsylvania Supreme Court affirmed his convictions on June 20, 2000. *Hannibal*, 753 A.2d 1265. The United States Supreme Court denied certiorari on May 21, 2001. *Hannibal v. Pennsylvania*, 536 U.S. 907 (2001).

On August 23, 2001, Petitioner filed a timely Post-Conviction Relief Act (PCRA) petition. (Crim. Docket at 7). The PCRA court dismissed the petition on January 9, 2015, and the Pennsylvania Supreme Court affirmed the dismissal on November 22, 2016. (Crim. Docket at 18; *Commonwealth v. Hannibal*, 156 A.3d 197 (Pa. 2016)).

Petitioner filed a motion for appointment of federal habeas counsel on February 6, 2013 (ECF No. 1), and the Federal Community Defender Association for the Eastern District of Pennsylvania was appointed. (ECF No. 2). Thereafter, Petitioner filed the instant Petition for Writ of Habeas Corpus on July 28, 2017. (Hab. Pet., ECF No. 5).

On September 22, 2017, Petitioner filed a Motion for Extension of Time to File a Memorandum of Law, which was granted. (ECF No. 6; Order, ECF No. 7). Petitioner then filed a Motion for Discovery and Consolidated Memorandum of Law on November 2, 2017. (ECF No. 8). On November 10, 2017, the Commonwealth filed Motion for Extension of Time to File a Response to Petitioner's Motion for Discovery, which was granted. (ECF No. 12; Order, ECF No. 13). The Commonwealth then filed several more unopposed Motions for Extension of Time

to File related to Petitioner's Motion for Discovery, and all were granted. (ECF No. 16; Order, ECF No. 17; ECF No. 18; Order, ECF No. 19; ECF No. 10; Order, ECF No. 21; ECF No. 22; Order, ECF No. 23; ECF No. 24; Order, ECF No. 25; ECF No. 28; Order, ECF No. 29; ECF No. 30; Order, ECF No. 31). On October 4, 2019, Petitioner filed a Motion to Withdraw his motion for discovery, which was granted without prejudice. (ECF No. 32; Order, ECF No. 33).

On February 4, 2020, both parties stipulated that Petitioner was entitled to partial relief due to trial counsel's ineffective assistance at the sentencing phase of his trial.[1] (ECF No. 40). The district court accepted the stipulation on February 7, 2020. (Order, ECF No. 41). On February 13, 2020, the Honorable Gerald A. McHugh referred this matter to me for a Report and Recommendation. (Order, ECF No. 45).

Petitioner filed a Memorandum of Law addressing the guilt phase of his trial on April 6, 2020. (Mem. of Law, ECF No. 48). Petitioner, through counsel, raises the following claims for relief (recited verbatim):

> (1) The prosecution violated Mr. Hannibal's due process rights under *Brady v. Maryland* by suppressing evidence that would have materially impeached the credibility of its linchpin witness.
>
> (2) Petitioner was denied due process and the effective assistance of counsel because the Commonwealth failed to disclose material impeachment evidence, and counsel failed to investigate, obtain, and present such evidence.
>
> (3) Petitioner was denied his constitutional rights where the Commonwealth introduced evidence of Petitioner's alleged involvement in another homicide, and counsel were ineffective to litigate this issue. The Commonwealth failed to disclose material, exculpatory evidence [of] the crime, and

[1] The Commonwealth originally filed its Notice of Concession of Penalty Phase relief on August 5, 2019. (ECF No. 30). Petitioner then filed two Motions for Extension of Time to File a Joint Stipulation Regarding Penalty Phase Relief, which were both granted. (ECF No. 34; Order, ECF No. 35; ECF No. 28; Order, ECF No. 39).

counsel failed to investigate, obtain, and present such evidence.

(4) The trial court erroneously instructed the jury that it could find Petitioner guilty of first degree murder if it found that he or his co-defendant possessed the specific intent to kill. Counsel were ineffective for failing to litigate this issue.

(5) Petitioner's rights under the Sixth and Fourteenth Amendments were violated when a jailhouse informant working as an agent for law enforcement interrogated him in the absence of counsel.

(6) Counsel was ineffective for calling character witnesses during trial, opening the door to the introduction of Petitioner's prior criminal record, in violation of Petitioner's rights under the Fifth and Sixth Amendments.

(7) Pennsylvania violated the Vienna Convention on Consular Relations by failing to inform the government of the Republic of Trinidad and Tobago of Petitioner's arrest, detention, conviction, and condemnation and by failing to inform Petitioner of his right to contact the Trinidadian Embassy.

(8) The numerous constitutional violations that led to Petitioner's convictions cumulatively require habeas relief.

(Mem. of Law, ECF No. 48).

The Commonwealth filed a Motion for Extension of Time to File an Answer to the Petition for Writ of Habeas Corpus on May 20, 2020, and this Court granted the motion. (ECF No. 49; Order, ECF No. 50). The Commonwealth then filed a Response to Petitioner's habeas petition on June 18, 2020. (Resp., ECF No. 51). Petitioner filed a Motion for Extension of Time to File a Response/Reply in Support of the Petitioner for Writ of Habeas Corpus on July 13, 2020, and this Court granted the motion. (ECF No. 52; Order, ECF No. 53). Petitioner then filed a Reply Memorandum of Law on August 19, 2020. (Reply, ECF No. 54). Petitioner also filed a Notice of Supplemental Authority on October 21, 2020. (ECF No. 56).

II. LEGAL STANDARD

A. Exhaustion and Procedural Default

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) grants to persons in state or federal custody the right to file a petition in a federal court seeking the issuance of a writ of habeas corpus. *See* 28 U.S.C. § 2254. Pursuant to the AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> > (B)(i) there is an absence of available State corrective process; or
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The exhaustion requirement is rooted in considerations of comity, to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Leyva v. Williams*, 504 F.3d 357, 365 (3d Cir. 2007); *Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

Respect for the state court system requires that the habeas petitioner demonstrate that the claims in question have been "fairly presented to the state courts." *Castille*, 489 U.S. at 351. To "fairly present" a claim, a petitioner must present its "factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *see also Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007) (recognizing that a claim is fairly presented when a petitioner presents the same factual and legal basis for the claim to the state courts). A state prisoner exhausts state remedies by giving the "state courts one full opportunity to resolve any constitutional issues by invoking one

complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In Pennsylvania, one complete round includes presenting the federal claim through the Superior Court on direct or collateral review. *See Lambert v. Blackwell*, 387 F.3d 210, 233-34 (3d Cir. 2004). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Walmart*, 579 F.3d 330, 367 (3d Cir. 2009).

If a habeas petition contains unexhausted claims, the federal district court must ordinarily dismiss the petition without prejudice so that the petitioner can return to state court to exhaust his remedies. *Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004). However, if state law would clearly foreclose review of the claims, the exhaustion requirement is technically satisfied because there is an absence of state corrective process. *See Carpenter v. Vaughn*, 296 F.3d 138, 146 (3d Cir. 2002); *Lines v. Larkin*, 208 F.3d 153, 160 (3d Cir. 2000). The failure to properly present claims to the state court generally results in a procedural default. *Lines*, 208 F.3d at 683. The doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "'a state law ground that is independent of the federal question and adequate to support the judgment'" to foreclose review of the federal claim. *Nolan v. Wynder*, 363 F. App'x 868, 871 (3d Cir. 2010) (not precedential) (quoting *Beard v. Kindler*, 558 U.S. 53, 53 (2009)); *see also Taylor v. Horn*, 504 F.3d 416, 427-28 (3d Cir. 2007) (citing *Coleman*, 501 U.S. at 730).

The requirements of "independence" and "adequacy" are distinct. *Johnson v. Pinchak*, 392 F.3d 551, 557–59 (3d Cir. 2004). State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40. A state rule is "adequate" for procedural default purposes if it is "firmly established and regularly followed." *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802, 1804 (2016) (*per curiam*)

(citation omitted); *see also Kellam v. Kerestes*, No. 13-6392, 2015 WL 2399302, at *4 (E.D. Pa. May 18, 2015) (citations omitted). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005), and that "review is foreclosed by what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Id.* at 708.

Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

Federal habeas review is not available to a petitioner whose constitutional claims have not been addressed on the merits by the state courts due to procedural default, unless such petitioner can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. *Id.* at 451; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker*, 393 F.3d at 381 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

B. Merits Review

The AEDPA increased the deference federal courts must give to the factual findings and legal determinations of the state courts. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may be granted only if: (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of United States;" or (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has explained that, "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ 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." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *see also Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Hameen*, 212 F.3d at 235 (citing *Williams*, 529 U.S. at 388-89). "In further delineating the 'unreasonable

application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citation omitted).

III. DISCUSSION

A. Ground One – Suppression of Prison Housing Records and Letters Between Ms. Porto and Mr. Durison, Ineffective Assistance of Counsel for Failing to Investigate and Obtain Prison Records

In his first ground for relief, Petitioner argues that the Commonwealth violated *Brady v. Maryland*, 363 U.S. 83 (1963), by suppressing evidence that would have impeached the credibility of Buigi; specifically, prison housing records showing that Buigi and Petitioner did not share a cell, and correspondence between Assistant District Attorney Mary Porto and Robert Durison, then Director of the Classification, Movement, and Registration Office of the Philadelphia Prison System, in which Durison states that Petitioner and Buigi were never housed in the same cell. (Mem. of Law, ECF No. 48, at 13–15). Petitioner also argues that he was denied the effective assistance of counsel at trial and on appeal, because prior counsel failed to investigate and obtain the prison housing records that could have been used to impeach Buigi's trial testimony. (Mem. of Law, ECF No. 48, at 13). The Commonwealth responds that Petitioner's *Brady* claim is procedurally defaulted, because the Pennsylvania Supreme Court found that it had been waived. (Resp., ECF No. 51, at 15–16). The Commonwealth also argues that Petitioner's freestanding *Brady* claim and his ineffective assistance of counsel claim are both meritless, because the Pennsylvania Supreme Court reasonably determined that the prison

records were not credible, and because the correspondence between ADA Porto and Robert Durison in fact referred to a period before the time when Buigi claimed he shared a cell with Petitioner. *Id.* at 16, 27.

1. Procedural Default

A claim for habeas corpus relief is procedurally defaulted when a state court relies upon an independent and adequate state ground to foreclose review of the federal claim. *Beard*, 558 U.S. at 53. State procedural grounds are not independent, and will not bar federal habeas relief, if the state law ground is so "interwoven with federal law" that it cannot be said to be independent of the merits of a petitioner's federal claims. *Coleman*, 501 U.S. at 739–40.

Here, the Pennsylvania Supreme Court found that Petitioner waived his *Brady* claim by failing to raise it at trial or on direct appeal. *Hannibal*, 156 A.3d at 210. Petitioner argues that the waiver rule is not an independent ground in this case, because the state court's finding that Petitioner's *Brady* claim was defaulted depends on when it was raised; Petitioner argues that this begs the question of whether and when the Commonwealth suppressed the evidence, which is a core element of a *Brady* claim. (Mem. of Law, ECF No. 48, at 33–34). However, this argument is unpersuasive. The Pennsylvania Supreme Court explicitly found Petitioner's *Brady* claim to be waived based purely on the fact that Petitioner had not raised it at trial or on direct appeal. *Hannibal*, 156 A.3d at 210. This is in accordance with the PCRA waiver doctrine, which is entirely a product of state law. *See Williams v. Sauers*, 2015 WL 787275, at *14 (E.D. Pa. 2015); *Catanch v. Larkins*, 1999 WL 529036, at *8 (E.D. Pa. 1999). The state court's decision here did not depend on whether or when the Commonwealth may have suppressed evidence, but merely on the fact that Petitioner did not raise a *Brady* claim at trial or on direct appeal; therefore, it did not depend on any federal constitutional ruling. For this reason, the waiver rule

constituted an independent state ground.[2]

However, Petitioner argues persuasively that the waiver doctrine was not an adequate state ground in this case. A state ground is not considered "adequate" unless it is "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348–51 (1984)). Whether such a rule is firmly established is determined as of the date when the default occurred. *Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009) (citing *Albrecht v. Horn*, 485 F.3d 103, 115 (3d Cir. 2007)).

Here, the Pennsylvania Supreme Court determined that Petitioner's *Brady* claim was waived because he failed to raise it on direct appeal, which he filed in 1997. Before the Pennsylvania Supreme Court decided *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), it applied the "relaxed waiver doctrine," under which the court, at its discretion, could decline to apply the ordinary waiver principles in capital cases. *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005). In *Albrecht*, the Pennsylvania Supreme Court discontinued this practice. 720 A.2d 693. The Third Circuit has since held on numerous occasions that, "in capital cases where the waiver occurred before the Pennsylvania Supreme Court made it clear that it would no longer apply the relaxed waiver rule, the waiver rule was not 'firmly established and regularly followed' and, therefore, the waiver is not an adequate basis for a finding of procedural default." *Wilson v.*

---

[2] Petitioner also argues that, when the Pennsylvania Supreme Court reasoned that the prison housing records were not suppressed because defense counsel could have subpoenaed them from the prison records custodian, it was intertwining its reasoning with the federal rule that there is no due diligence requirement under *Brady*. (Mem. of Law, ECF No. 48, at 34). However, this reasoning does not indicate that the Pennsylvania Supreme Court relied on federal law in dismissing Petitioner's *Brady* claim; rather, it is an alternative discussion of the merits following the court's ruling that Petitioner's *Brady* claim was waived. *See Hannibal*, 156 A.3d at 210. As previously discussed, the state court clearly and expressly relied on waiver as an independent ground for rejecting Petitioner's *Brady* claim.

Beard, 589 F.3d 651, 658 (3d Cir. 2009) (citing *Laird v. Horn*, 414 F.3d 419, 425 & n. 7 (3d Cir. 2005); *Jacobs*, 395 F.3d at 117–18; *Szuchon v. Lehman*, 273 F.3d 299, 326–27 (3d Cir. 2001)).[3] Based on this precedent, it is clear that the waiver rule was not "firmly established and regularly followed" when Petitioner filed his direct appeal in this case; therefore, it does not constitute an adequate state ground. For this reason, Petitioner's *Brady* claim is not procedurally defaulted, leaving this Court free to consider the merits.

2. Merits Review

A petitioner alleging a *Brady* violation must establish that: (1) evidence was suppressed by the prosecution, either willfully or inadvertently; (2) the evidence was favorable to the defense, because it was either exculpatory or impeaching; and (3) the evidence was material, *i.e.*, the omission was prejudicial. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Brady*, 373 U.S. at 87. Here, Petitioner argues that the Commonwealth violated *Brady* by suppressing the prison records, which could have been used to impeach Buigi's testimony about sharing a cell with Petitioner. Petitioner also argues that the Commonwealth suppressed the correspondence between ADA Porto and Durison during Petitioner's direct appeal, and that this correspondence could have been used to impeach Buigi.

[3] Respondents submit that this precedent was wrongly decided, on the basis that the waiver doctrine was followed before *Albrecht*, if only on a discretionary basis. (ECF No. 51, at 19). This argument asks this Court to rule against substantial Third Circuit precedent simply because "a discretionary rule **can** be 'firmly established' and 'regularly followed'–even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009) (emphasis added). In *Kindler*, the United States Supreme Court recognized that discretionary rules are not automatically inadequate in order to allow states the flexibility to decide for themselves whether to apply discretionary or mandatory rules in various situations. *Id.* at 61–62. Pennsylvania explicitly chose to remove the discretionary aspect from the relaxed waiver doctrine in *Albrecht*. Therefore, the Third Circuit correctly recognized that the waiver rule was not firmly established before *Albrecht* was decided.

The Pennsylvania Supreme Court briefly addressed the merits of Petitioner's freestanding *Brady* claim with regards to the prison housing records when it stated that the records were not suppressed by the Commonwealth if they were accessible to the defense via subpoena. *Hannibal*, 156 A.3d at 210. This finding is contrary to clearly established Third Circuit case law, which has held that there is no due diligence requirement as part of *Brady* even when the material in question is part of the public record, and that only when the government is aware that defense counsel already has the material in its possession should it be held to not have "suppressed" it in not turning it over to the defense. *Dennis v. Secretary, Pa. Dept. of Corrections*, 834 F.3d 263, 292 (3d Cir. 2016); *William Bracey v. Superintendent Rockview SCI*, No. 17-1064, p. 26–27 (3d Cir. 2021).

Nonetheless, Petitioner's *Brady* claim regarding these records is without merit because the records are not material. Evidence is material for *Brady* purposes when there is a reasonable probability that the result of the proceedings would have been different if the evidence had been disclosed. *See U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). In its discussion of Petitioner's ineffective assistance of counsel claims, the Pennsylvania Supreme Court found that the computer-generated prison housing records were "inaccurate on their face" because they contained "several obvious errors," such as indicating that four prisoners simultaneously occupied a single bunk of a two-bed cell for several weeks. *Hannibal*, 156 A.3d at 210. This factual finding is presumed to be correct, absent a showing of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); *Appel*, 250 F.3d at 210. Furthermore, at trial, the Commonwealth presented the testimony of two correctional officers who testified that Petitioner and Buigi had shared a cell at PICC. And Petitioner himself testified to having been housed in Cell 50, the cell that Buigi claimed he and Petitioner had shared,

though Petitioner denied that Buigi was his cellmate. Petitioner's unsupported argument that the housing records are not inaccurate and merely indicate overcrowding is not clear and convincing enough to override the Pennsylvania Supreme Court's finding that the records exhibited errors. *See Appel*, 250 F.3d at 210. Therefore, I cannot conclude that the disclosure of these records would have altered the course of the proceedings. *See Bagley*, 473 U.S. at 682. Because the prison housing records are not material, Petitioner's freestanding *Brady* claim on this ground is without merit.

The Pennsylvania Supreme Court did not address the merits of Petitioner's freestanding *Brady* claim regarding the correspondence between ADA Porto and Mr. Durison. Where a state court has not reached the merits of a claim, the deferential standards of the AEDPA do not apply and the federal habeas court must review the claim *de novo*. *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999) (declining to apply § 2254(d)'s deferential standards because the state courts had dismissed petitioner's claim on procedural grounds rather than on its merits). For purposes of *Brady*, evidence favorable to the defense includes impeachment evidence as well as exculpatory evidence. *Bagley*, 473 U.S. at 676.

Petitioner argues that, in his letter to ADA Porto, Durison states that Petitioner and Buigi never shared a cell, and that this makes the letter exculpatory and impeaching. At trial, Buigi testified that he and Petitioner were housed together at PICC as of October 29, 1993. (N.T. 2/28/94, 106–07). Durison's letter concerns only the time when Petitioner and Buigi were housed on the same cell block at Holmesburg prison, from August 31 to October 14, 1993, and does not include any information at all as to whether or not Petitioner and Buigi were cellmates at PICC as of October 29, 1993. (Mem. of Law, ECF No. 48, Appx., at A285). The letter does

not include information relevant to this operative date, so it neither bolsters nor harms Buigi's credibility. Because of this, the letter would not have been effective as impeachment evidence, and it would not have influenced the result of Petitioner's direct appeal. Therefore, it is not material, and Petitioner's *Brady* claim based on the correspondence between ADA Porto and Durison is without merit.

Petitioner also claims that trial counsel and appellate counsel were both ineffective for failing to subpoena the prison housing records. The Pennsylvania Supreme Court found that Petitioner's claim of trial counsel's ineffectiveness was barred by the prior litigation provision of the PCRA, because the court dismissed that claim as undeveloped on direct appeal. *Hannibal*, 156 A.3d at 210. Regarding appellate counsel's ineffectiveness, the court found that Petitioner's claim lacked merit under the *Strickland* test because the records contained obvious errors and would not have been effective in impeaching Buigi's testimony. *Id.*

Petitioner argues that the Pennsylvania Supreme Court's "previously litigated" ruling regarding his ineffective assistance of trial counsel claim does not preclude the claim from federal merits review. In support of this assertion, Petitioner cites to *Cone v. Bell*, which held that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." 556 U.S. 449, 466 (2009). However, appellate counsel failed to introduce the prison records on direct appeal. Therefore, the Commonwealth responds that the state court's decision was reasonable because this evidence was not in the record until after the court rejected Petitioner's claim. *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). Petitioner argues that *Pinholster* does not apply here because Petitioner was denied a fair opportunity to develop the facts in the state court; however, it was appellate counsel's own failure to subpoena the prison records that precluded him from

developing Petitioner's ineffective assistance of trial counsel claim. Regardless, Petitioner's ineffectiveness claim against trial counsel fails for the same reasons as his appellate counsel ineffectiveness claim, because he was not prejudiced by trial counsel's failure to subpoena the prison records. *See infra* p. 17–18.

A claim for ineffective assistance of counsel is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court established the following two-pronged test to obtain habeas relief on the basis of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Thus . . . a defendant must overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, "[t]he defendant 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." *Strickland*, 466 U.S. at 694.

It is well settled that *Strickland* is "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams*, 529 U.S. at 391. Thus, Petitioner is entitled to

relief if the Pennsylvania court's rejection of his claims was: (1) "contrary to, or involved an unreasonable application of," that clearly established law; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

Regarding the "contrary to" clause, the Pennsylvania Supreme Court addressed Petitioner's ineffective assistance of appellate counsel claim using Pennsylvania's three-pronged test for ineffective assistance of counsel claims. *See Hannibal*, 156 at 210 (citing *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987)). This test requires the petitioner to establish: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his or her action; and (3) the petitioner was prejudiced by the ineffectiveness. *See, e.g.*, *Commonwealth v. Ali*, 10 A.3d 282, 291 (Pa. 2010). The Third Circuit has found the Pennsylvania ineffectiveness test is not contrary to the Supreme Court's *Strickland* standard, *see Werts*, 228 F.3d at 204. Because the Pennsylvania Supreme Court did not apply law contrary to clearly established precedent, Petitioner is entitled to relief only if he can demonstrate that its adjudication involved an unreasonable application of *Strickland* or was based on an unreasonable determination of the facts in light of the evidence.

Here, the Pennsylvania Supreme Court found Petitioner's ineffective assistance of counsel claim to lack arguable merit because the errors in the prison housing records mean that they would not have been effective in impeaching Buigi's testimony. The court thus found that appellate counsel did not perform deficiently by failing to subpoena inaccurate records.

Petitioner asserts that the testimony of Mr. Durison could be used to rebut the Pennsylvania Supreme Court's findings as to the inaccuracy of the records. However, as previously discussed, the correspondence between ADA Porto and Mr. Durison does not concern

the same timeframe as the records in question, and any further testimony from Durison on this point would lie outside the scope of habeas review, which is limited to the record that was before the state court that adjudicated the claim on the merits. *See Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). The evidence here shows that the prison housing records exhibited "obvious errors," such as four prisoners simultaneously occupying a single bunk and omitting the inmate assigned to bed two of the cell. *Hannibal*, 156 A.3d at 210. Petitioner asserts that the state court should have interpreted these irregularities as examples of prison overcrowding rather than as errors (Memo. of Law, ECF No. 48, at 41); however, overcrowding does not explain why no prisoner was assigned to bed two. On one occasion, the cell record indicated that five men were assigned to one bed, while no one was assigned to the other. (Resp., ECF No. 51, Ex. A). One of the correctional officers who testified at trial stated that only two men occupied Cell 50 at a time. (N.T. 3/8/94, 30). Additionally, Petitioner's own testimony that he was housed in several cells at PICC, including Cell 50, contradicts the information contained in his housing card, which states that he was assigned only to Cell 19; this means that Petitioner either perjured himself at trial, or his housing card was inaccurate or incomplete. (Hab. Pet. App'x, 282). Based on this, the Pennsylvania Supreme Court reasonably found that the records were facially inaccurate, and that prior counsel's failure to subpoena them did not constitute deficient performance under *Strickland*.

Even assuming, *arguendo*, that prior counsel's failure to obtain the prison housing records was unreasonable, Petitioner has not shown that this failure caused him prejudice. As previously discussed, the prison housing records contained several errors and would not have effectively impeached Buigi's testimony. At trial, two correctional officers testified that Petitioner and Buigi shared a cell, and Petitioner himself testified to having been housed in Cell

50. Furthermore, the rest of the evidence introduced at trial, including the testimony of Robinson and Halley who witnessed Petitioner in an altercation with the victim shortly before the shooting, strongly tied Petitioner to the murder. *See Saranchak v. Beard*, 616 F.3d 292, 311 (3d Cir. 2010) ("It is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied.") (quoting *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999)). Thus, Petitioner has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 104. Therefore, I recommend that relief on this claim be denied.

B. Ground Two – Suppression of Impeachment Evidence Against Buigi, Ineffective Assistance of Counsel for Failing to Obtain Impeachment Evidence

In his second ground for relief, Petitioner argues that the Commonwealth violated *Brady* by failing to disclose Buigi's criminal and juvenile record, which included multiple *crimen falsi* adjudications. (Mem. of Law, ECF No. 48, at 42). Petitioner also argues that prior counsel were ineffective for failing to raise this claim. *Id.* at 45.

1. Procedural Default

The Pennsylvania Supreme Court found that Petitioner waived his *Brady* and ineffective assistance claims regarding Buigi's adult criminal record and use of aliases because he made no specific reference to these claims in his Rule 1925(b) statement. *Hannibal*, 156 A.3d at 211, n.11. The court found that Petitioner's 1925(b) statement was deficient because he claimed only that the Commonwealth violated *Brady* by failing to disclose Buigi's *juvenile* record, and did not mention Buigi's adult criminal record or his use of aliases. *Id.*

The Pennsylvania Supreme Court's waiver finding precludes habeas review of this claim. State court findings of waiver due to a deficient 1925(b) statement have been found to be

independent and adequate state grounds, precluding habeas review. *See, e.g.*, *Pugh v. Overmyer*, No. 15-364, 2017 WL 3701824, at *10 (M.D. Pa. Aug. 28, 2017) (collecting cases); *Manley v. Gilmore*, No. 15-2624, 2016 WL 9280154, at *9 (E.D. Pa. Feb. 24, 2016), *report and recommendation adopted*, No. 1502624, 2017 WL 2903050 (E.D. Pa. July 7, 2017); *Miles v. Tomaszewski*, No. 04-3157, 2004 WL 2203726, at *3 (E.D. Pa. Sept. 14, 2004), *report and recommendation adopte*d, No. 04-3157, 2004 WL 2457732 (E.D. Pa. Oct. 27, 2004). This Court similarly concludes that the Pennsylvania Supreme Court relied on an independent and adequate state rule that existed at the time of Petitioner's default.

Because the Pennsylvania Supreme Court invoked independent and adequate state law grounds in finding waiver, Petitioner's claims regarding Buigi's adult criminal convictions and use of aliases are procedurally defaulted. The Court cannot review the merits of this claim unless Petitioner establishes cause and prejudice or a fundamental miscarriage of justice. Petitioner does not attempt to argue cause, so his default cannot be excused. *Teague v. Lane*, 489 U.S. 288, 298 (1989).

Because Petitioner has not established cause and prejudice or a fundamental miscarriage of justice, I respectfully recommend that Petitioner's Ground Two claims regarding Buigi's adult criminal record and use of aliases be dismissed as procedurally defaulted.

2. Merits Review

The Pennsylvania Supreme Court addressed Petitioner's claims regarding Buigi's juvenile record on their merits. The court found that juvenile records were inadmissible for impeachment purposes at the time of Petitioner's trial, and that therefore Petitioner's *Brady* claim lacked merit. *Hannibal*, 156 A.3d at 211. The court also found that Petitioner's ineffective assistance of counsel claim lacked merit because counsel could not be faulted for

failing to raise a meritless claim or to predict changes in the law. *Id.*

The Pennsylvania Supreme Court reasonably decided that Petitioner's *Brady* claim lacked merit. A petitioner alleging a *Brady* violation must establish that the suppressed evidence was material. *Brady*, 373 U.S. at 87. Evidence that would not have been admissible at trial is not material unless it could have led to the discovery of admissible evidence, or could have been used effectively to impeach witnesses during cross-examination. *See Johnson v. Folino*, 705 F.3d 117, 129–30 (3d Cir. 2013) (citing *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir.1991)).

As the Pennsylvania Supreme Court found, at the time of Petitioner's trial, evidence of juvenile adjudications was not admissible, even for impeachment purposes. *Commonwealth v. McKeever*, 455 Pa. Super. 604, 689 A.2d 272, 274 (1997) (citing *Commonwealth v. Katchmer*, 453 Pa. 461, 309 A.2d 591, 594 (1973)). Petitioner argues that evidence need not be admissible to be material under *Brady*, citing *Dennis*, 834 F.3d at 310–11, and *Livingston v. Att'y Gen. N.J.*, 797 F.App'x. 719, 720 (3d Cir. 2020) (non-precedential). In those cases, the court found that admissibility is not a separate, independent prong of the *Brady* analysis. *Dennis*, 834 F.3d at 310–11 ("The Supreme Court has never added a fourth 'admissibility' prong to the *Brady* analysis."); *Livingston*, 797 F.App'x. at 720. However, those cases merely prohibit courts from relying exclusively on admissibility to determine that evidence is not *Brady* material; admissibility remains an important aspect of the third, materiality prong of the *Brady* analysis.

Here, the evidence of Buigi's juvenile adjudications would not have been material to Petitioner's case. As previously described, Buigi's juvenile record would have had no use as

impeachment evidence because of its inadmissibility at the time of Petitioner's trial.[4] Furthermore, trial counsel extensively cross-examined Buigi about his incarceration, open felony cases, and the possibility that he would receive leniency at his own sentencing hearings in exchange for his cooperation. (N.T. 3/1/94, 27–41). Because of this, additional evidence of Buigi's prior juvenile convictions would merely be cumulative of the other evidence elicited on cross-examination, and would not have created a reasonable probability of a different result in Petitioner's case. *See Johnson*, 705 F.3d at 129 (citing *Rocha v. Thaler*, 619 F.3d 387, 396–97 (5th Cir. 2010)). Therefore, Buigi's juvenile record would not have been material, and Petitioner's *Brady* claim is meritless. As a result, Petitioner's ineffective assistance of counsel claim is also meritless, because counsel cannot be faulted for failing to raise a meritless claim. *See U.S. v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) (citing *U.S. v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

Accordingly, I respectfully recommend that relief on Petitioner's Ground Two be denied.

C. Ground Three – Other Crimes Evidence, Ineffective Assistance of Counsel for Failing to Object

In his third ground for relief, Petitioner argues that he was denied his rights to due process and a fair trial when the Commonwealth improperly introduced evidence of the murder

[4] Petitioner argues that Buigi's juvenile record would have been admissible under *Davis v. Alaska*, 415 U.S. 308 (1974) and *Commonwealth v. Slaughter*, 394 A.2d 453 (Pa. 1978), which both found that evidence of a juvenile's probationary status could be admissible to show bias. The Pennsylvania Supreme Court found that *Slaughter* did not apply to this case because *Slaughter* only recognized the exception in that specific set of circumstances, i.e. juveniles on probationary status. *See also United States v. McGuire*, 200 F.3d 668, 678 (10th Cir. 1999) ("*Davis* did not hold that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.") (citation and internal quotation marks omitted). Because Buigi was not on probationary status with regards to his juvenile adjudications at the time of Petitioner's trial, the Pennsylvania Supreme Court was reasonable in finding that *Slaughter* and *Davis* do not apply, and his juvenile convictions would not have been admissible for impeachment purposes.

of Tanesha Robinson, who was killed after she testified at Petitioner's preliminary hearing, at the guilt phase of Petitioner's trial. (Mem. of Law, ECF No. 48, at 49). Petitioner also argues that prior counsel was ineffective for failing to object or otherwise litigate the admission of this evidence. *Id.*

1. Standard of Review

On direct appeal, the Pennsylvania Supreme Court rejected this claim, finding that the trial court did not err in admitting the evidence of Robinson's murder because it formed part of the history of the case. *Hannibal*, 753 A.2d at 1272 n.11. The court also found that Petitioner had failed to set out the three-pronged test for ineffective assistance of counsel, and that there was no basis to object to the evidence because it was admissible to show Petitioner's guilt. *Id.* The court found that defense counsel was not ineffective for failing to object to the admission of this evidence. *Id.*

Petitioner argues that this claim was not reviewed on the merits in state court. He asserts that the Pennsylvania Supreme Court did not address Petitioner's claims as he raised them on direct appeal; specifically, that the court mischaracterized his claim as averring that counsel failed to object entirely, when in reality he had argued that counsel failed to object that the probative value of the evidence was outweighed by its prejudicial impact. (Mem. of Law, ECF No. 48, at 57–58). As a result, Petitioner argues that the state court never adjudicated this claim on the merits, and that this Court's review should be *de novo*.

In its review of Petitioner's PCRA claim, a majority of the Pennsylvania Supreme Court held that this claim had been previously litigated on direct appeal, and found that the court had in fact addressed the merits of the claim. *Hannibal*, 156 A.3d at 220, n. 14. The court asserted that its discussion of the issue on direct appeal, while brief, nonetheless properly stated that the

substantive issue was whether Petitioner received a fair trial, and rejected that claim on the basis that the trial court's evidentiary rulings were not in error. *Id.* The court also noted that it had explicitly rejected Petitioner's ineffectiveness arguments because they were not supported by the necessary *Strickland* analysis. *Id.*

I agree with the majority opinion of the Pennsylvania Supreme Court. In its discussion on direct appeal, the state court addressed both Petitioner's unfair trial claim and his ineffective assistance of counsel claim on the merits. Though the court did not specifically mention whether trial counsel should have objected as to probative value versus prejudicial effect, the court's finding that there was "no basis to object" necessarily includes this claim. *See Hannibal*, 753 A.2d at 1272 n.11. Despite the relative brevity of its discussion, the state court did discuss the merits of Petitioner's claim on direct appeal. Therefore, this Court's review of this claim is subject to the deferential standard of the AEDPA.

2. Merits Review

On habeas review, a federal court may not reverse a petitioner's conviction based on a trial court's evidentiary ruling unless the admission of the evidence was so extremely unfair that its admission violated "fundamental fairness." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *Dowling v. U.S.*, 493 U.S. 342, 352 (1990). The category of "fundamental fairness" violations is defined very narrowly to include only actions that violate those "'fundamental conceptions of justice which lie at the base of our civil and political institutions' … and which define 'the community's sense of fair play and decency.'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (internal citations omitted).

Here, the Pennsylvania Supreme Court reasonably found that the evidence of Robinson's murder was properly admitted as part of the history of the case and to show consciousness of

guilt. In Pennsylvania, evidence of other crimes may be admissible where such evidence was part of the chain or sequence of events which became part of the history of the case and formed the natural development of the facts. *Commonwealth v. Murphy*, 540 Pa. 318, 328 (Pa. 1995) (citing *Commonwealth v. Lark*, 518 Pa. 290 (1988)). Because Robinson witnessed Petitioner's altercation with the victim, testified at his preliminary hearing, and afterwards was murdered, the evidence of her murder was introduced to explain why she was unable to testify at trial. This sequence of events caused Robinson's murder to become intertwined with the facts of this case to the point where it was admissible as part of the case's history. Furthermore, the Pennsylvania Supreme Court reasonably found that this evidence was admissible to show Petitioner's consciousness of guilt. Buigi testified at trial that Petitioner had confessed to him that he'd orchestrated Robinson's murder in order to prevent her from testifying against him. (N.T. 2/28/94, 107–08, 122–23). It is well-established in Pennsylvania law that "any attempt by a defendant to interfere with a witness' testimony is admissible to show a defendant's consciousness of guilt." *Com. v. Rega*, 933 A.3d 997, 1009 (Pa. 2007); *Com. v. Johnson*, 838 A.2d 663, 680 (Pa. 2003); *Com. v. Goldblum*, 447 A.2d 234, 243 (Pa. 1982). Petitioner argues that the Commonwealth relied on Buigi's unreliable testimony to tie Petitioner to Robinson's murder, and that therefore the introduction of this evidence as consciousness of guilt was improper. However, the credibility of witnesses is an issue reserved for the jury, not the reviewing court. *Delaware & Hudson Co. v. Stankus*, 81 F.2d 396 (3d Cir. 1936); *Com. v. DeJesus*, 860 A.2d 102, 107 (Pa. 2004). Therefore, the Pennsylvania Supreme Court reasonably found the evidence of Robinson's murder admissible as part of the history of the case and to show Petitioner's consciousness of guilt.

Petitioner argues that his right to a fair trial was violated because the prejudice caused by

the admission of this evidence outweighed its probative value. Indeed, the nature of this crime, as an execution-style murder of three young women while in the presence of an infant, undeniably has the potential to become highly prejudicial. However, in this case, the prejudice that could have resulted from the introduction of this evidence was mitigated by the trial court's limiting instructions to the jury. The trial court expressly instructed the jury that they were to consider the evidence of Robinson's murder only as showing consciousness of guilt, and twice made clear that the jury could not consider it as evidence that Petitioner killed LaCourt. (N.T. 3/9/94, 127–29). It is well-established that the jury is presumed to have followed these instructions. *Govt. of Virgin Islands v. Mills*, 821 F.3d 448, 463 (3d Cir. 2016); *Com. v. Laird*, 988 A.2d 618, 629 (Pa. 2010); *Com. v. Robinson*, 864 A.2d 460, 519 (Pa. 2004). Because the prejudice was cured by the trial court's limiting instructions, Petitioner cannot show that the introduction of evidence of Robinson's murder was so fundamentally unfair as to require reversal of the trial court's evidentiary ruling. *See Estelle*, 502 U.S. at 67–68; *Dowling*, 493 U.S. at 352.

Petitioner argues that the Commonwealth relied on Buigi's unreliable testimony to tie Petitioner to Robinson's murder, and that therefore this evidence was also unfairly unreliable and should not have been introduced. Petitioner asserts that Buigi's testimony was unreliable because he lied about sharing a cell with Petitioner. Petitioner's only support of this claim is the prison housing records, which, as discussed above, the state court found to be inaccurate. Since the evidence actually presented at trial, namely the testimony of the two correctional officers and Petitioner's own testimony, tended to corroborate Buigi's testimony, it was not so plainly unreliable that the trial court violated fundamental fairness by admitting it.

Petitioner also supports this unreliability argument by pointing to after-discovered

evidence consisting of two affidavits written in 2005 by Frederick Daughtry, who was convicted of Robinson's murder. In his second affidavit, Daughtry claims that Petitioner was not involved in Robinson's murder, and that the killing occurred as part of a robbery gone wrong rather than an attempt to silence a witness. (Pet. App'x, 292, 289). Petitioner also points to the recantation of Terrence Richardson, who testified at trial that Petitioner's co-defendant Gregory had engaged a man to carry out Robinson's murder. During post-trial motions in Gregory's case, Richardson testified that his trial testimony was false. *Com. v. Gregory*, No. CP-51-CR-0534061-1993, N.T. 10/14/94, 15.

Neither of these pieces of evidence existed at the time of Petitioner's trial. Accordingly, they can have no bearing on whether the trial court's admission of the evidence of Robinson's murder was fundamentally unfair. *See Lisenba v. Peoples*, 314 U.S. 219, 290 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."). Additionally, the Pennsylvania Supreme Court found both Daughtry's and Richardson's statements to be unreliable as recantation evidence involving the admission of perjury. *Hannibal*, 156 A.3d at 222; *Com. v. Henry*, 706 A.2d 313, 321 (1997); *Com. v. Clark*, 961 A.2d 80, 87 n. 6 (2008). Petitioner has not shown that the trial court's admission of the evidence of the murder of Robinson was so fundamentally unfair as to deprive him of his due process right to a fair trial.

Accordingly, I respectfully recommend that relief on this ground be denied.

D. Ground Four – Erroneous Jury Instruction, Ineffective Assistance of Counsel for Failing to Object

In his fourth ground for relief, Petitioner argues that he was denied due process by the trial court's instruction to the jury that it could find Petitioner guilty of first-degree murder if either he, his accomplice *or* co-conspirator possessed the specific intent to kill. Petitioner argues

that this instruction was erroneous because it permitted the jury to find him guilty even if it determined that only his co-defendant had the specific intent to kill, and that therefore his rights to a fair trial were violated. Petitioner also argues that prior counsel were ineffective for failing to litigate this issue.

The Pennsylvania Supreme Court rejected this claim on direct appeal. *Hannibal*, 753 A.2d at 1269. The court disagreed with Petitioner's reading of the phrase, "the defendant, his accomplice or co-conspirator did so with the specific intent to kill and with malice." (N.T. 3/9/94, 135–36). The court found:

> When a series of nouns is separated by a comma and the last two elements of a series are the same entity (accomplice or co-conspirator), the sentence is properly understood to consist of a series of two nouns, not three. Thus, the sentence may be read to say, "the jury may find the accomplice guilty if it finds that the defendant *and* his accomplice (or you may think of him as a co-conspirator) acted with specific intent to kill and malice."

Id. Based on this, the court found that the instruction was not in error.

Pennsylvania law requires that the principal and any accomplices to a first-degree murder each individually possess the specific intent to kill. *Com. v. Speight*, 854 A.2d 450, 460 (Pa. 2004); *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) ("Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed."). A federal habeas court may review state trial jury instructions to determine whether they violate specific constitutional standards imposed on the states through the Due Process Clause. *Hallowell v. Keve*, 555 F.2d 103, 106 (3d Cir. 1977); *Harris v. Kerestes*, No. 11-3093, 2014 WL 7232358, at *16 (E.D. Pa. Dec. 17, 2014). In reviewing an allegedly ambiguous instruction, the proper inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates

the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also Williams v. Beard*, 637 F.3d 195, 223 (3d Cir. 2011). The jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instruction as a whole and the trial record." *Estelle*, 502 U.S. at 702 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *see also Williams*, 637 F.3d at 223 (due process analysis of a jury charge "requires careful consideration of each trial's unique facts, the narratives presented by the parties, the arguments counsel delivered to the jurors before they retired to deliberate, and the charge as a whole").

Upon *de novo* review, Petitioner's claim on this ground fails, because any error caused by the instruction was cured by later jury instructions.[5] Here, the state court's finding that the jury instruction was correct hinges upon a creative interpretation of the language of the instruction. The "and" that is all-important to the state court's reading is not present in the instruction itself, requiring the jury to infer its existence. Additionally, the state court's interpretation of the instruction as a list containing two items rather than three requires the jury to conclude that

[5] Petitioner argues that this claim was not adjudicated on the merits in state court because the Pennsylvania Supreme Court rejected it as previously litigated on collateral review. *Hannibal*, 156 A.3d at 214–15. On direct appeal, Petitioner argued that the jury instruction was erroneous, and on collateral review he added the due process aspect of his claim. Petitioner therefore argues that the state court did not address due process on direct appeal, and that because it did not reach the merits on collateral review, it did not discuss the merits of his due process claim.

It is unnecessary to determine whether this claim was "adjudicated on the merits" for purposes of determining whether Section 2254's standard of review applies. Even if Section 2254(d) deference does not apply, Petitioner cannot show he is entitled to relief under "the more favorable" *de novo* review. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010); *see also id.* ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review[.]") (citing 28 U.S.C. § 2254(a)); *Waller v. Varano*, 562 F. App'x 91, 93 (3d Cir. 2014) (not precedential).

"accomplice" and "co-conspirator" are the same thing; otherwise, the instruction appears as a list of three items. Viewing the instruction with a "commonsense understanding," there is a reasonable possibility that the jury could have interpreted it to mean that either the defendant, the accomplice, or a co-conspirator must have possessed the necessary intent to kill. *See Boyde v. California*, 494 U.S. 370, 380–81 (1990).

However, even if this instruction was in error, the error was cured by the trial court's later instruction which clarified the specific intent to kill requirement. The day after giving the challenged instruction, the trial court told the jury:

> You may find a defendant guilty of first degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt:
>
> First, that Mr. LaCourt is dead.
>
> Second, that the defendant, his co-conspirator or accomplice killed him.
>
> And third, that *he, the person who is being evaluated*, did so with a specific intent to kill and with malice.

(N.T. 3/10/94, 5–6) (emphasis added). The trial court also emphasized that the jury was required to consider the guilt of each defendant individually. (N.T. 3/10/94, 4). Based on this, the Pennsylvania Supreme Court found that the jury instructions as a whole were not in error. *Hannibal*, 753 A.2d at 1271 ("[T]he court consistently and in understandable language referred to the need to consider whether each individual in the case possessed the requisite specific intent to kill."). These additional instructions did not "contradict" the earlier instruction, as Petitioner argues; rather, they served to clarify any ambiguity that may have originally been present. Given that the ambiguity in the challenged instruction was slight, the trial court's later clarifications were more than enough to cure any confusion that may have resulted in the minds of the jury.

Therefore, in the context of the jury instructions and trial record as a whole, Petitioner has not shown any reasonable likelihood that the jury interpreted its instructions in a way that violated the Constitution. *Estelle*, 502 U.S. at 702. Additionally, because Petitioner's due process claim on this ground is meritless, prior counsel was not ineffective for failing to litigate it. *See U.S. v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) (citing *U.S. v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

Accordingly, I respectfully recommend that relief on Petitioner's Ground Four be denied.

E. Ground Five – Sixth Amendment Violation by Jailhouse Informant Working as an Agent for Law Enforcement

In his fifth ground for relief, Petitioner argues that his Sixth Amendment rights were violated because Buigi was acting as a government agent when he deliberately sought to elicit incriminating information from Petitioner after Petitioner's right to counsel had attached. (Mem. of Law, ECF No. 48, at 68). Petitioner also argues that trial counsel was ineffective for failing to move to suppress Buigi's statements after learning that Buigi had acted as a government agent, and that appellate counsel was ineffective for failing to raise a Sixth Amendment claim. *Id.* at 68, 72.

1. Procedural Default

The Commonwealth argues that Petitioner's freestanding Sixth Amendment claim and his ineffective assistance of trial counsel claim are procedurally defaulted because the Pennsylvania Supreme Court found both claims to be waived. (Resp., ECF No. 51, at 59). On collateral review, the court found that Petitioner had waived these claims by failing to raise them at trial or on direct appeal. *Hannibal*, 156 A.3d at 214.

Petitioner asserts that, just as in his Ground One, the waiver doctrine here was not an adequate state ground because the Pennsylvania courts followed the relaxed waiver doctrine at

the time of Petitioner's appeal. *See supra* Part III.A.1. For the same reasons as those detailed above, waiver does not constitute an adequate state ground here, and therefore Petitioner's claims are not procedurally defaulted and this Court may address them on the merits. *See Wilson*, 589 F.3d at 658.

2. Merits Review

On collateral review, the Pennsylvania Supreme Court found that Buigi was not a government agent for purposes of the Sixth Amendment. *Hannibal*, 156 A.3d at 212. The court found that there was no evidence that the government had enlisted or directed Buigi to initiate contact with Petitioner, but rather the evidence showed that it was Petitioner who had approached Buigi seeking his advice. *Id.* The court also noted that Buigi did not have any expectation of leniency from the government until after his contact with Petitioner, and that whatever promises he may have received at that time do not operate retroactively to make him an agent of the government. *Id.*

The Sixth Amendment right to counsel attaches at the initiation of formal judicial proceedings against an individual, and after that point any statement deliberately elicited from that individual by police, absent a waiver of the right to counsel, constitutes a violation. *See Massiah v. United States*, 377 U.S. 201, 203–06 (1964); *Maine v. Moulton*, 474 U.S. 159, 170–74 (1985); *Com. v. Briggs*, 12 A.3d 291, 324 (2011). For a Sixth Amendment violation to arise, the informant eliciting the statement must have been acting as a government agent. *See Massiah*, 377 U.S. at 203–06; *Moulton*, 474 U.S. at 170–74.

Here, the Pennsylvania Supreme Court reasonably concluded that Buigi was not acting as a government agent when Petitioner made his statements. There is no evidence that Buigi was instructed by the government to obtain statements from Petitioner, or that Buigi had any kind of

tacit agreement with the government to act as an informer. *U.S. v. Brink*, 39 F.3d 419, 423 (3d Cir. 1994) ("An inmate who voluntarily furnishes information without instruction from the government is not a government agent, even if the informant had been an agent in the past."); *U.S. v. Van Scoy*, 654 F.2d 257, 260 (3d Cir. 1981). While Petitioner argues that Buigi's meeting with a detective one month prior to Petitioner's statements evidences such an agreement, this argument is unpersuasive, as that interview concerned an unrelated investigation. (N.T. 3/1/94, at 26–27). Furthermore, Buigi testified that he'd chosen to contact the police about Petitioner's statements after he realized that LaCourt was an acquaintance of his, and there was no evidence of the government promising him leniency in exchange for his testimony. Because there was no evidence that Buigi was acting under the instructions of the government, the Pennsylvania Supreme Court reasonably concluded that he was not a government agent, and that Petitioner's Sixth Amendment right to counsel had not been violated. Additionally, because Petitioner's Sixth Amendment claim is meritless, prior counsel cannot be faulted for failing to litigate a meritless claim. *See U.S. v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) (citing *U.S. v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

Accordingly, I respectfully recommend that relief on this ground be denied.

F. Ground Six – Ineffective Assistance of Counsel for Calling Character Witnesses & Opening Door to Introduction of Petitioner's Criminal Record

In his sixth ground for relief, Petitioner argues that trial counsel was ineffective for presenting character witnesses to the jury, and thus opening the door to the Commonwealth's impeachment of those witnesses with Petitioner's otherwise inadmissible criminal record. (Mem. of Law, ECF No. 48, at 74).[6]

[6] The Commonwealth argues that this claim is procedurally defaulted because the Pennsylvania Supreme Court found it to be waived on collateral review. *Hannibal*, 156 A.3d at

The Pennsylvania Supreme Court found that the record was ambiguous as to whether counsel's performance was deficient.[7] *Hannibal*, 156 A.3d at 216. However, the court found that no prejudice resulted from trial counsel's actions, because the trial court specifically instructed the jury not to consider Petitioner's prior convictions for purposes of deciding guilt. *Id.* at 217.

Under *Strickland*, a petitioner alleging ineffective assistance of counsel is required to show "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." *Strickland*, 466 U.S. at 694. Here, while trial counsel arguably should have undertaken the relatively simple matter of investigating Petitioner's prior record, the Pennsylvania Supreme Court reasonably concluded that Petitioner was not prejudiced by this error. It is well-established that jurors are presumed to follow instructions; therefore, it was reasonable for the Pennsylvania Supreme Court to find that any prejudice caused to Petitioner was cured by the trial court's limiting instructions. *Mills*, 821 F.3d at 463; *Laird*, 988 A.2d at 629; *Robinson*, 864 A.2d at 519. Additionally, Petitioner claims that trial counsel's error

---

216. For the same reasons as those detailed in my previous discussion of Petitioner's Grounds One and Five, waiver does not constitute an adequate state ground here, and therefore Petitioner's claims are not procedurally defaulted and this Court may address them on the merits. *See supra* Part III.A.1, E.1; *Wilson*, 589 F.3d at 658.

[7] The discovery provided in this case included a sheet of charges against Petitioner, which did not indicate the formal dispositions of those charges. *Hannibal*, 156 A.3d at 216. The Pennsylvania Supreme Court found that, because at the time of Petitioner's trial character witnesses could not be cross-examined about a defendant's prior arrests which did not result in convictions, trial counsel could have reasonably accepted Petitioner's insistence that he had only one prior conviction. *Id.* The court ultimately noted that trial counsel is deceased and that little could be gained from an evidentiary hearing to determine what Petitioner told him, but that the record provided "some support" for appellate counsel to have raised this claim on direct appeal. *Id.*

opened the door to the introduction of Petitioner's convictions; however, Petitioner testified on his own behalf at trial. Petitioner's criminal record at the time of trial contained four convictions for drug-related offenses as well as convictions for burglary, conspiracy to commit burglary, and theft. (N.T. 3/8/94, 7). Since Petitioner testified at trial, the Commonwealth was entitled under Pennsylvania state law to introduce his prior *crimen falsi* burglary and theft convictions to impeach his credibility. Pa.R.E. 609(a). Because the door was already opened to the admission of serious convictions contained in Petitioner's prior record, the result of the proceedings would not have been different regardless of trial counsel's decision to call character witnesses. *See Strickland*, 466 U.S. at 694. Therefore, Petitioner's claim of ineffective assistance is without merit.

Accordingly, I respectfully recommend that relief on this ground be denied.

G. Ground Seven – Vienna Convention Violation, Ineffective Assistance of Counsel

In his Ground Seven, Petitioner alleges that Pennsylvania violated his rights by failing to follow the Vienna Convention, and that prior counsel was ineffective for failing to litigate this issue. He argues that, because of his status as a national of the Republic of Trinidad and Tobago, the Trinidadian embassy should have been notified of his arrest in accordance with Article 36 of the Convention, and that he should have been informed of his right to contact the Trinidadian embassy. (Mem. of Law, ECF No. 48 at 80).

Whether Article 36 provides for individually enforceable rights has not been firmly decided by the U.S. Supreme Court. *See Breard v. Greene*, 523 U.S. 371, 376 (Apr. 14, 1998). Several courts of appeals have explicitly held that it does not. *See, e.g. United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir. 2001); *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *Mora v. New York*,

524 F.3d 183 (2nd Cir. 2008); *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007). The Seventh Circuit has held that the treaty does create individual rights. *See Osagiede v. U.S.*, 543 F.3d 399 (7th Cir. 2008); *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007). A number of courts have avoided deciding the issue by finding that, regardless of whether the treaty creates a private right, the various remedies sought by defendants, such as quashing an indictment, the exclusionary rule, or overturning a conviction, are not appropriate cures for a violation. *See, e.g. United States v. Santos*, 235 F.3d 1105, 1108 (8th Cir.2000); *U.S. v. Lombera–Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000); *U.S. v. Li*, 206 F.3d 56, 66 (1st Cir. 2000). Other courts have held that a defendant must show prejudice to establish a violation of the Convention. *See, e.g. Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *U.S. v. Ademaj*, 170 F.3d 58, 67 (1st Cir. 1999). The Third Circuit followed a blend of these last two approaches in *United States v. Castillo*, where it "assume[d], without deciding," that Article 36 granted the defendant individually enforceable rights, but found that dismissal of the indictment or suppression of the evidence was not an appropriate remedy, and that the defendant had not shown how the failure to notify the consulate prejudiced him. 742 Fed.Appx. 610, 614–15 (3d Cir. 2018).

Here, the Pennsylvania Supreme Court rejected Petitioner's ineffective assistance claim by finding that counsel could not be faulted for failing to raise a Vienna Convention claim that has "no factual or legal support." *Hannibal*, 156 A.3d at 233. The state court's decision was reasonable, and there is no basis to conclude that Petitioner's claim of a Vienna Convention violation would have succeeded.

While it may not be definitively settled as to whether Article 36 grants individually enforceable rights, several jurisdictions have found that it does not, and only one has found that it does. Even assuming the Vienna Convention grants individual rights, the Third Circuit ruled in

Castillo that a showing of prejudice is necessary to successfully invoke Article 36. Here, Petitioner has not shown that the Commonwealth's or trial counsel's failure to invoke the Vienna Convention had any prejudicial effect on his case. He merely makes the broad assertion that, if he had been able to contact the Trinidadian embassy, he would have "received assistance," without asserting precisely what assistance he could have received or how such assistance would have made any meaningful impact on his case. (Mem. of Law, ECF No. 48, at 81). This makes any claim based on the Article 36 violation meritless, and counsel is not obligated under *Strickland* to raise a meritless argument. *See Bui*, 795 F.3d at 366-67.

Because Petitioner does not explain how contacting the Trinidadian consulate could have changed the results of his trial, he has not satisfied *Strickland*, and this claim is meritless.

H. Ground Eight – Cumulative Constitutional Violations

In his final ground for relief, Petitioner argues that the constitutional errors committed by the trial court and prosecutor, as well as trial counsel's ineffective assistance, cumulatively undermined the fairness of Petitioner's trial. (Mem. of Law, ECF No. 48 at 82).

On collateral review, the Pennsylvania Supreme Court rejected this claim on the merits. *Hannibal*, 156 A.3d at 234. The court found that, to the extent that it found some of Petitioner's claims to be meritless based on lack of prejudice, the cumulative effect of any resulting prejudice would still not entitle Petitioner to relief. *Id.*

The cumulative error analysis aggregates the errors that individually have been found to be harmless and "analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (citation and quotation marks 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 based on cumulative errors unless he can establish 'actual prejudice.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

The cumulative error analysis does not apply without errors by counsel to aggregate. *Stokes v. Giroux*, No. 15-0412, 2015 WL 9915957, at *25 (E.D. Pa. Aug 11, 2015), *report and recommendation adopted*, No. 15-412, 2016 WL 316812 (E.D. Pa. Jan. 25, 2016). Thus, ineffectiveness allegations resolved under *Strickland*'s first prong need not be considered in the cumulative error analysis. *See, e.g.*, *Saget v. Bickell*, No. 12-2047, 2014 WL 4992572, at *25 (E.D. Pa. Oct. 6, 2014) (when counsel's performance was not deficient under *Strickland*'s first prong, there is no need to look to prejudice in the aggregate); *Brown v. Bickell*, No. 10-428, 2012 WL 2018020, at *16 (E.D. Pa. Mar. 27, 2012), *report and recommendation adopted sub nom. Brown v. Lawler*, No. 10-428, 2012 WL 2130881 (E.D. Pa. June 4, 2012). If counsel has performed deficiently under *Strickland*'s first prong, however, the court must determine whether the cumulative effect of counsel's errors prejudiced the defendant. *See, e.g.*, *Dobson v. Balicki*, No. 11-2924, 2014 WL 1404577, at *5 (D.N.J. Apr. 10, 2014); *Pursell v. Horn*, 187 F. Supp. 2d 260, 363 (W.D. Pa. 2002) (citing *Berryman v. Morton*, 100 F.3d 1089, 1101-02 (3d Cir. 1996)).

Here, this Court concluded that some of Petitioner's claims—that counsel failed to obtain prison housing records, that counsel failed to properly object to the introduction of evidence of Robinson's murder, that the trial court's jury instruction was erroneous, and that counsel was ineffective for calling character witnesses—failed because Petitioner had not adequately established prejudice resulting from these alleged omissions. Thus, the Court will assume without deciding that counsel performed deficiently and consider the issue of prejudice in the aggregate. *See Saget*, 2014 WL 4992572, at *25 (assuming without deciding that counsel's performance was deficient when the court lacked "the foundation of a finding on each

ineffectiveness claim under the performance prong of *Strickland*").

Considering these claims of error in the aggregate, Petitioner is not entitled to relief. In light of the evidence presented at trial, there is not a reasonable probability that the result of the trial court would have been different, even aggregating the prejudice of the alleged errors. As discussed above, there was ample evidence typing Petitioner to the shooting. Two eyewitnesses testified that Petitioner was involved in a physical confrontation with the victim mere moments before the shooting, and another witness testified that Petitioner confessed to him and was able to describe in detail how the crime occurred. Under the circumstances, counsel's alleged failures did not prejudice the defense. *Cf. Washington v. Kauffman*, No. 13-5251, 2015 WL 12555863, at *19 (E.D. Pa. Jan. 15, 2015), *report and recommendation adopted*, No. 13-5251, 2016 WL 4943375 (E.D. Pa. Sept. 16, 2016) (cumulative error claim lacked merit when petitioner confessed and an eyewitness described the murder to police and the jury). Thus, the verdict was not unreliable. *See Albrecht,* 485 F.3d at 139.

Accordingly, I respectfully recommend that relief on this claim be denied.

I. Evidentiary Hearing

Petitioner requests that the Court grant an evidentiary hearing to the extent it deems additional factual development to be appropriate, or in order to address questions of procedural default. (Mem. of Law, ECF No. 48, at 12). The Commonwealth opposes this request. (Resp., ECF No. 51, at 75).

If a petitioner fails to develop the factual basis for his claim in state court, AEDPA prohibits a federal court from holding an evidentiary hearing unless certain requirements are satisfied. *See* 28 U.S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or

the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). In the usual case, diligence requires that the petitioner "at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. If an evidentiary hearing is not barred by § 2254(e)(2), the decision to grant an evidentiary hearing is within the discretion of the district court. *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007)) (quotation marks omitted). In determining whether to hold an evidentiary hearing, the 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." *Landrigan*, 550 U.S. at 474. The Third Circuit has interpreted this "to require a petitioner to make a '*prima facie* showing' that 'would enable [him] to prevail on the merits of the asserted claim.'" *Morris v. Beard*, 633 F.3d 185, 196 (3d Cir. 2011) (citation and quotation marks omitted). However, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief," no evidentiary hearing is required. *Landrigan*, 550 U.S. at 474.

Here, Petitioner sought and was granted a PCRA evidentiary hearing, which was limited to one of Petitioner's claims regarding the ineffective assistance of counsel at sentencing. Five months after the hearing, the PCRA court dismissed Petitioner's petition as meritless. (Crim. Docket at 18). Because Petitioner exercised diligence in seeking an evidentiary hearing in state court, his current request is not limited by the restrictions of § 2254(e)(2).

Nonetheless, I recommend discretionarily denying Petitioner's request for an evidentiary hearing. In addressing the claims in the instant habeas petition, the Court has thoroughly reviewed the voluminous evidentiary record before the state court, which includes records from the limited PCRA evidentiary hearing and numerous exhibits attached to Petitioner's PCRA filings. As the issues in Petitioner's present petition can be fully resolved by reference to the

state court record, an evidentiary hearing would not be helpful. *Cf. Walker v. Pennsylvania*, No. 11-0300, 2015 WL 4770664, at *34 (E.D. Pa. Aug. 12, 2015), *certificate of appealability denied* (Apr. 8, 2016). Additionally, while Petitioner claims that an evidentiary hearing would allow him to attempt to overcome the presumption of correctness as to the Pennsylvania Supreme Court's findings of fact regarding the accuracy of the prison housing records (*see supra* Part III.A.2) by presenting additional evidence including the testimony of Mr. Durison, he does not specify what additional evidence he wishes to present, or how Mr. Durison's testimony would be different from the correspondence and affidavit already in the record. (Reply, ECF No. 54 at 20–21). Petitioner has failed to "'explain how his claim would be advanced by an evidentiary hearing.'" *Horton v. Lamas*, No. 10-4728, 2013 WL 4663404, at *23 (E.D. Pa. Aug. 30, 2013) (quoting *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000)). In fact, Petitioner avers that he "is entitled to relief on the current record . . ." (Mem. of Law, ECF No. 48 at 12). Thus, I respectfully recommend that his request for an evidentiary hearing be denied.

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that Petitioner's petition for writ of habeas corpus be denied.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW, this 22ND day of February, 2021, I respectfully **RECOMMEND** that the petition for writ of habeas corpus be **DENIED**.

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
United States Magistrate Judge

638 Pa. 336
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Sheldon HANNIBAL, Appellant

No. 705 CAP
|
SUBMITTED: January 20, 2016
|
DECIDED: November 22, 2016

Synopsis

Background: Defendant petitioned for post conviction relief after his murder conviction and death sentence were affirmed on appeal, 562 Pa. 132, 753 A.2d 1265. The Court of Common Pleas, Philadelphia County, Criminal Division, No. CP–51–CR–0428351–1993, Glenn B. Bronson, J., denied the petition. Defendant appealed.

Holdings: The Supreme Court, No. 705 CAP, Dougherty, J., held that:

[1] Commonwealth did not commit *Brady* violation with regard to prison housing records or informant's crimen falsi adjudications;

[2] prison informant was not acting as government agent when discussing defendant's alleged crime;

[3] trial counsel's alleged failure to review defendant's criminal history did not prejudice defendant;

[4] Commonwealth's use of defendant's criminal record was not admission of non-statutory aggravating circumstance;

[5] claims regarding admission of evidence of involvement in murder witness's killing was previously litigated;

[6] defendant was not denied reliable sentencing determination in violation of Eighth Amendment; and

[7] counsel's failure to present mental health mitigating evidence did not amount to ineffective assistance.

Affirmed.

Todd, J., filed concurring opinion in which Wecht, J., joined.

Saylor, C.J., filed dissenting opinion in which Donohue, J., joined.

West Headnotes (43)

[1] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions
Criminal Law Post-conviction relief
A ruling by the Post Conviction Relief Act (PCRA) court is reviewed to determine whether it is supported by the record and is free of legal error. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

6 Cases that cite this headnote

[2] **Criminal Law** Review De Novo
The standard of review of a Post Conviction Relief Act (PCRA) court's legal conclusions is de novo. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

2 Cases that cite this headnote

[3] **Criminal Law** Post-conviction relief and error coram nobis
In analyzing ineffective assistance of counsel claims, courts begin with the presumption counsel is effective. U.S. Const. Amend. 6.

[4] **Criminal Law** Deficient representation and prejudice in general
Criminal Law Determination
To prevail on an ineffectiveness claim, defendant must satisfy, by a preponderance of the evidence, the performance and prejudice standard set forth in *Strickland*. U.S. Const. Amend. 6.

[5] **Criminal Law** Appeal
Respecting an appellant's "layered" ineffectiveness claims, alleging ineffectiveness by both trial counsel and appellate counsel, appellant must demonstrate not only that trial counsel was ineffective under the *Strickland* test, but that appellate counsel also was ineffective. U.S. Const. Amend. 6.

5 Cases that cite this headnote

[6] **Criminal Law** Determination
A court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; if a claim fails under any necessary element of the Strickland test, the court may proceed to that element first. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[7] **Criminal Law** Raising issues on appeal; briefs

For purposes of efficiency, a court may begin to address an ineffectiveness claim by assessing the merits of a defaulted underlying claim because, if it deems the claim meritless, neither trial nor appellate counsel could be found ineffective. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[8] **Criminal Law** Necessity for Hearing

The Post Conviction Relief Act (PCRA) court has discretion to dismiss a petition without a hearing when the court is satisfied there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by further proceedings. 42 Pa. Cons. Stat. Ann. § 9541 et seq.; Pa. R. Crim. P. 909(B)(2).

2 Cases that cite this headnote

[9] **Criminal Law** Post-conviction relief

To obtain reversal of a Post Conviction Relief Act (PCRA) court's decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing. 42 Pa. Cons. Stat. Ann. § 9541 et seq.; Pa. R. Crim. P. 909(B)(2).

3 Cases that cite this headnote

[10] **Criminal Law** Post-conviction proceeding not a substitute for appeal

Capital defendant waived for post-conviction relief his claim that Commonwealth committed *Brady* violation with regard to records showing he and prison informant were housed in different cells, allegedly contradicting informant's trial testimony; defendant claimed ineffective assistance on direct appeal based on trial counsel's failure to subpoena housing records, and defendant raised no *Brady* claim at trial or on direct appeal, even though it was apparent appellate counsel, at least, had identified underlying issue. U.S. Const. Amend. 6.

[11] **Criminal Law** Constitutional obligations regarding disclosure

To succeed on a *Brady* claim, the defendant must show: (1) evidence was suppressed by the prosecution, (2) the evidence, whether exculpatory or impeaching, was favorable to the defendant, and (3) prejudice resulted.

3 Cases that cite this headnote

[12] **Criminal Law** Materiality and probable effect of information in general

A *Brady* violation exists only where the suppressed evidence is material to guilt or punishment, for instance, where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

2 Cases that cite this headnote

[13] **Criminal Law** Request for disclosure; procedure

Brady claims may be subject to waiver.

[14] **Criminal Law** Diligence on part of accused; availability of information

Commonwealth did not suppress records showing capital defendant and prison informant were housed in different cells, allegedly contradicting informant's trial testimony, and therefore Commonwealth did not commit *Brady* violation, where records were allegedly available by serving subpoena on prison records custodian, making records accessible to defense.

[15] **Criminal Law** Affirmance of conviction

Post Conviction Relief Act's (PCRA) prior litigation provision barred capital defendant's claim that trial counsel was ineffective for failing to procure records showing defendant and prison informant were housed in different cells, allegedly contradicting informant's trial testimony, where Supreme Court, on direct appeal, dismissed defendant's claim of trial counsel's ineffectiveness for failing to subpoena the records. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(3).

1 Cases that cite this headnote

[16] **Criminal Law** Appeal

Capital defendant's claim that had appellate counsel obtained records showing defendant and prison informant were housed in different cells, allegedly contradicting informant's trial testimony, appellate counsel could have shown trial counsel was ineffective for failing to obtain and use such records to impeach informant lacked arguable merit, and therefore appellate counsel did not provide ineffective assistance; records were inaccurate on their face, and records and prison guard testimony contradicted defendant's own testimony about where he was housed. U.S. Const. Amend. 6.

[17] **Criminal Law** Other particular issues

Juvenile adjudications were inadmissible at time of capital murder trial, and therefore Commonwealth did not commit *Brady* violation with regard to prison informant's record for crimen falsi juvenile adjudications and his use of aliases, even though juvenile adjudications were subsequently permitted to be used for impeachment purposes. 42 Pa. Cons. Stat. Ann. § 6354(b)(4).

1 Cases that cite this headnote

[18] **Criminal Law** Specification of errors

Supreme Court would confine review of capital defendant's *Brady* violation claim, regarding prison informant's record for crimen falsi and his use of aliases, to claims resting on informant's juvenile adjudications and juvenile use of aliases, where defendant's statement of errors complained of on appeal made no specific reference to informant's adult use of aliases or to his adult criminal record. Pa. R. App. P. 1925(b)(4)(vii).

[19] **Criminal Law** Informants; inmates

Prison informant was not acting as government agent when discussing capital defendant's alleged crime, and therefore defendant's Sixth Amendment right to counsel was not violated when defendant incriminated himself regarding murder and plan to kill witness; defendant approached informant seeking advice and opinions on case, informant

only contacted police after defendant confided in him, and informant was not promised leniency in his own cases in exchange for testimony. U.S. Const. Amend. 6.

[20] **Criminal Law** Absence or denial of counsel

Criminal Law Adversary or judicial proceedings

The Sixth Amendment right to the assistance of counsel attaches at the initiation of formal judicial proceedings against an individual by way of formal charge, preliminary hearing, indictment, information, or arraignment; any statement made by the individual thereafter which is deliberately elicited by police, without the individual making a valid waiver of the right to counsel, is deemed a contravention of this right. U.S. Const. Amend. 6.

[21] **Criminal Law** Absence or denial of counsel

Criminal Law Informants; inmates

A statement may be deliberately elicited by police, and thus be a contravention of the Sixth Amendment right to the assistance of counsel, through use of an informant. U.S. Const. Amend. 6.

[22] **Criminal Law** Absence or denial of counsel

Criminal Law Informants; inmates

Information secured by an informant acting as an agent of the government must be suppressed where the informant acts under instructions as an informant for the government, where he presents himself as no more than a fellow inmate rather than a governmental agent, and where the suspect is in custody and under indictment at the time of the questioning by the informant because such questioning outside the presence of the accused's counsel violates the accused's Sixth Amendment right to counsel. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[23] **Criminal Law** Absence or denial of counsel

Criminal Law Informants; inmates

In order to prove a violation of the Sixth Amendment right to the assistance of counsel by use of an informant, the defendant must demonstrate the police and the informant took some action, beyond mere listening, designed deliberately to elicit incriminating remarks. U.S. Const. Amend. 6.

[24] **Criminal Law** Absence or denial of counsel

Criminal Law Informants; inmates

In order to prove a violation of the Sixth Amendment right to the assistance of counsel by use of an informant, the defendant must show the informant was acting as a government agent; individual acts do not become governmental action merely because they are later relied upon and used by the government in furtherance of governmental objectives. U.S. Const. Amend. 6.

[25] **Criminal Law** Affirmance of conviction

Issue regarding propriety of jury instruction regarding capital defendant's intent to kill victim was barred as previously litigated on direct appeal, despite contention that appellate counsel failed to argue instructions violated defendant's

due process rights; due process overlay would not have led to different result on merits, and law relied on in appellate decision included due process element or was derived from due process precepts. U.S. Const. Amend. 14; 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544(a)(2).

[26] **Criminal Law** Examination of witnesses

Criminal Law Raising issues on appeal; briefs

Trial counsel's alleged failure to review capital defendant's criminal history, which allegedly left counsel unprepared when Commonwealth cross-examined defendant's character witnesses regarding his criminal history during guilt phase, did not prejudice defendant, and therefore appellate counsel did not provide ineffective assistance by failing to raise trial counsel's alleged failure on direct appeal; trial court instructed jury that cross-examination was only to be used to judge whether character witnesses were really familiar with defendant's reputation. U.S. Const. Amend. 6.

[27] **Criminal Law** Post-conviction proceeding not a substitute for appeal

Capital defendant waived for post-conviction relief his claim that trial counsel was ineffective for failing to review defendant's criminal history, where claim was record-based, and claim could have been raised on direct appeal. U.S. Const. Amend. 6.

[28] **Criminal Law** Objections and disposition thereof

Juries are presumed to follow instructions.

2 Cases that cite this headnote

[29] **Sentencing and Punishment** Other offenses, charges, or misconduct

Sentencing and Punishment Instructions

Commonwealth's use of capital defendant's criminal record for burglary and drug offenses, incorporated into penalty phase from guilt phase, did not amount to admission of non-statutory aggravating circumstance, where trial court instructed jurors that there was only one applicable aggravating circumstance to consider, which was whether defendant committed killing while in perpetration of robbery, and instructed jury regarding parties' relative burdens of proof and need for unanimity to impose death sentence.

[30] **Criminal Law** Post-conviction proceeding not a substitute for appeal

Capital defendant's claim of trial counsel's ineffectiveness in failing to object to incorporation of guilt phase evidence into penalty phase was waived under the Post Conviction Relief Act (PCRA), where claim could have been raised on direct appeal, but was not. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544(b).

[31] **Criminal Law** Affirmance of conviction

Post Conviction Relief Act's (PCRA) prior litigation provision barred capital defendant's claims that admission of evidence concerning his involvement in killing a witness to underlying murder denied him his rights to due process and fair trial, and that prior counsel were ineffective for failing to litigate issue; there was no material difference between claim of due process violation resulting in unfair trial and substantive claim raised and rejected on direct

appeal. (Per Dougherty, J., with two justices concurring and two justices concurring separately.) U.S. Const. Amends. 6, 14; 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544(a)(2).

[32] **Sentencing and Punishment** Other offenses, charges, or misconduct

Sentencing and Punishment Instructions

Capital defendant was not denied reliable sentencing determination in violation of Eighth Amendment based on jury being free to consider defendant's alleged involvement in killing a witness to underlying murder as non-statutory aggravating circumstance; even if prior testimony implicating defendant's involvement in witness's killing was recanted, trial court properly instructed jury it could consider evidence of witness's killing only for limited purpose of showing defendant's consciousness of guilt in underlying murder, and recantations, which involved admissions of lying under oath, would not have compelled different verdict. (Per Dougherty, J., with two justices concurring and two justices concurring separately.) U.S. Const. Amend. 8.

[33] **Criminal Law** Newly discovered evidence

To establish a newly discovered evidence claim under the Post Conviction Relief Act (PCRA), it must be shown the evidence: (1) was discovered after trial and could not have been obtained at or prior to trial through reasonable diligence, (2) is not cumulative, (3) is not being used solely to impeach credibility, and (4) would likely compel a different verdict. (Per Dougherty, J., with two justices concurring and two justices concurring separately.) 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(vi).

1 Cases that cite this headnote

[34] **Criminal Law** Newly discovered evidence

Newly discovered evidence must be producible and admissible to entitle a petitioner to post-conviction relief. (Per Dougherty, J., with two justices concurring and two justices concurring separately.) 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(vi).

[35] **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

Trial counsel's failure to investigate and present mental health mitigating evidence at penalty proceeding did not prejudice capital defendant, and therefore did not amount to ineffective assistance; expert witnesses presented conflicting testimony, with Post Conviction Relief Act (PCRA) court determining that Commonwealth's expert was credible, that defendant's experts were not credible, and that it was not reasonably probable that at least one juror would have found catch-all mitigator applied and outweighed aggravator. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. §§ 9541 et seq., 9711(e)(8).

1 Cases that cite this headnote

[36] **Criminal Law** Post-conviction relief

The Supreme Court is bound by a Post Conviction Relief Act (PCRA) court's credibility determinations when there is record support for them. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

5 Cases that cite this headnote

[37] **Sentencing and Punishment** Sufficiency

Evidence was sufficient to support application of aggravating circumstance that capital defendant killed victim during perpetration of felony, despite contention that circumstance did not apply to defendant as accomplice; even though circumstance no longer applied to accomplices, defendant admitted to prison informant that he shot and killed victim during robbery. 42 Pa. Cons. Stat. Ann. § 9711(d)(6).

[38] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

The aggravating circumstance of killing committed during perpetration of felony applies only to principals, not accomplices. 42 Pa. Cons. Stat. Ann. § 9711(d)(6).

[39] **Sentencing and Punishment** Proceedings

Capital defendant was not denied individualized sentencing determination based on penalty phase proceeding being joined with that of codefendant, where neither defendant nor codefendant sought severance as to guilt phase, which required same jury to determine their penalties, and trial court instructed jury to make individualized penalty determinations for both. 42 Pa. Cons. Stat. Ann. § 9711(a)(1).

[40] **Criminal Law** Discretion in general

Decisions on severance of codefendants' trials are generally within the discretion of the trial court.

[41] **Criminal Law** Offering instructions

Counsel's failure to anticipate change in law that entitled certain defendants to jury instruction explaining life imprisonment meant life without parole, and failure to request such instruction, was not deficient performance, and therefore did not amount to ineffective assistance; even though case changing law had been argued and decision was pending, case was not decided until after defendant's trial. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[42] **Criminal Law** Declarations, confessions, and admissions

Counsel's failure to assert foreign capital defendant's alleged rights to notify embassy regarding his arrest and detention under Vienna Convention on Consular Relations was not deficient performance, and therefore did not amount to ineffective assistance; Convention did not guarantee assistance from consulate and did not require suppression of evidence when notification right was allegedly violated. U.S. Const. Amend. 6.

[43] **Criminal Law** Points and authorities

Capital defendant waived for purposes of appeal from denial of postconviction relief his nonspecific, overarching claim that counsel was ineffective, where defendant provided no clarification regarding substance of his claim, did not identify or articulate any focused claim of error or ineffectiveness apart from other, specific ineffectiveness claims

raised, and did not provide developed argument or citation to supporting authorities and the record. U.S. Const. Amend. 6.

**202 Appeal from the Order dated January 9, 2015 in the Court of Common Pleas, Philadelphia County, Criminal Division at No. CP–51–CR–0428351–1993.

Attorneys and Law Firms

Shawn Nolan, Defender Association of Philadelphia, Alan J. Tauber, Philadelphia, PA, for Appellant.

Hugh J. Burns, Jr., Peter Carr, Barbara Rae Paul, Philadelphia District Attorney's Office, Philadelphia, PA, Amy Zapp, PA Office of Attorney General, Harrisburg, PA, for Appellee.

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

Justice Dougherty delivers the Opinion of the Court, except with respect to Part VI. Justices Baer and Mundy join the opinion in full. Justices Todd and Wecht join the opinion, except with respect to the reasoning contained in Part VI, and Justice Todd files a concurring opinion in which Justice Wecht joins. Chief Justice Saylor files a dissenting opinion, joined by Justice Donohue.

OPINION

JUSTICE DOUGHERTY

*347 Sheldon Hannibal appeals from the order of the Court of Common Pleas of **203 Philadelphia County denying his petition for relief from his death sentence, filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541–9546, following an evidentiary hearing limited to one issue. For the reasons set forth below, we affirm.

We summarized the underlying facts in our opinion on direct appeal affirming appellant's sentence of death. *Commonwealth v. Hannibal*, 562 Pa. 132, 753 A.2d 1265 (2000). The facts pertinent to the current appeal are that on October 25, 1992, appellant and codefendant, Larry Gregory, following an argument with the victim, Peter LaCourt, about the authenticity of a gold chain, took the chain and pistol-whipped LaCourt. LaCourt attempted to flee but stopped when appellant threatened to shoot him. LaCourt dropped to his knees, put his hands behind his head and appellant shot him six times, killing him. Fifteen-year-old Tanesha Robinson witnessed the robbery and beating, heard the gunshots as she fled the scene, and later gave a statement to police implicating appellant and codefendant. She also testified at their preliminary hearings. On August 4, 1993, however, she and two of her *348 female friends were murdered execution-style (via close-range gunshots to the head) in an apartment located in the same housing development where LaCourt was murdered.

Appellant and codefendant were charged with the murder of LaCourt and were tried together. At trial, two witnesses testified concerning a plot to murder Robinson to prevent her from testifying at trial. Terrence Richardson testified he was present when codefendant and his brother gave two other men a .357 revolver and paid them $2,000 to kill Robinson, directing them to "be fast about it" and "don't leave [any] witnesses." N.T. 3/3/94 at 73. James Buigi testified he shared a prison cell with appellant in the fall of 1993 and appellant confided to him he shot and killed LaCourt during a robbery. Appellant additionally confided to Buigi he told "his friends" he needed Robinson "out of the way" because she was "the only witness that can hurt me in the trial." N.T. 2/28/94 at 122. Appellant told Buigi "my boys are loyal to me. They took care of that for me." *Id.* Appellant explained to Buigi his boys "found [Robinson] and shot her," and they killed the other females in the apartment because "they [were] not going to leave two witnesses behind[.]" *Id.* at 123.

Appellant testified at trial he did not know LaCourt or remember where he was on the night LaCourt was murdered; he did not have an altercation with LaCourt; he did not take a chain from him; he did not own a gun or shoot LaCourt; he never shared a cell with Buigi and never discussed anything with him. Appellant also presented three character witnesses who testified to his reputation as a peaceful, law-abiding citizen. The witnesses were cross-examined regarding their knowledge of appellant's criminal record.

The jury convicted appellant and codefendant of first-degree murder. At the ensuing joint penalty phase proceedings, the guilt phase evidence was incorporated. Appellant testified and also presented the testimony of his aunt and his girlfriend who described him as patient, hard-working and a good father to his children. The jury found one statutory aggravating circumstance, 42 Pa.C.S. § 9711(d)(6) (killing committed during perpetration of felony), and no statutory mitigating circumstances, ***349** rejecting appellant's assertion of the applicability of the age and catch-all mitigators, 42 Pa.C.S. § 9711(e)(4), (e)(8), and thus, the jury sentenced appellant to death. [1]

1 The jury convicted codefendant of first-degree murder as well; he was sentenced to life imprisonment and the Superior Court affirmed the judgment of sentence. There are no issues in this appeal regarding codefendant.

****204** On appellant's direct appeal, which preceded *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), appellant was represented by new counsel, and this Court afforded appellant unitary review of claims of trial court error as well as claims of trial counsel's ineffectiveness during the guilt and penalty phases. [2] Ultimately, we affirmed the judgment of sentence. Relevant to the issues on this appeal, we rejected appellant's substantive claim of the denial of a fair trial based on the introduction of evidence linking him to the murder of Tanesha Robinson, finding her murder was part of the history of the case and was admissible to show appellant's consciousness of guilt. For the same reason, we rejected his derivative claim of trial counsel's ineffectiveness for failing to object to the evidence about Robinson's murder. We additionally rejected appellant's claim of counsel's ineffectiveness for failing to subpoena prison records, which allegedly would have shown Buigi and appellant had not been cellmates, because we determined appellant failed to show such records existed. We also determined the trial court did not err in its instruction to the jury regarding the element of specific intent to kill as it related to first-degree murder and accomplice liability. *Hannibal*, 753 A.2d at 1269–71. Finally, we dismissed appellant's claim of trial counsel's ineffectiveness for failing to "obtain psychiatric assistance at the penalty phase" because appellant failed to ***350** indicate "what a psychiatric witness would have stated if one had been called." *Id.* at 1272 n.11.

2 Before *Grant*, this Court required new counsel to raise claims of previous counsel's ineffectiveness at the first opportunity after new counsel entered the case, which was often on direct appeal. *See* *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977). This rule was subsequently abrogated in *Grant*, which held claims of ineffective assistance of counsel generally should be deferred until collateral review. *Grant*, 813 A.2d at 738 (overruling *Hubbard*). Thus, in direct appeals decided prior to *Grant*, such as this, new counsel on appeal was obligated to raise claims of trial counsel's ineffectiveness or risk having them later be deemed waived on PCRA review.

Appellant filed a timely *pro se* PCRA petition in 2001, which was assigned to former Judge Willis Berry, Jr. for disposition as the trial judge, the Honorable Eugene H. Clarke, Jr. (now deceased), had retired. Unfortunately, considerable delay ensued. An amended petition was filed by counsel in 2005, the Commonwealth filed a motion to dismiss in 2010, and a number of additional pleadings were filed by both sides. In all, Judge Berry oversaw appellant's PCRA litigation for about eleven years, but retired from the bench without scheduling a hearing or issuing a decision. In 2012, the matter was reassigned to the Honorable Glenn B. Bronson who reviewed the amended petition, which contained sixteen issues, the motion to dismiss and the supplemental pleadings. The court determined the claims were without merit and issued notice of its intent to dismiss the petition without a hearing, to which appellant filed a response and the Commonwealth filed an answer. The parties then agreed to an evidentiary

hearing on the layered issue of trial counsel's alleged ineffectiveness for failing to present penalty phase mitigation evidence regarding appellant's cognitive functioning, and appellate counsel's failure to properly litigate the claim on appeal.

On July 18, 2014, Shawn Nolan, Esquire, Chief of the Capital Habeas Corpus Unit of the Federal Community Defender Office, entered his appearance for appellant and a three-day hearing was conducted shortly thereafter, on July 28, 29, and 31. ****205** Appellant presented neuropsychologists Dr. Carol Armstrong and Dr. Barry Crown, both of whom offered expert testimony, based on their tests and examinations of appellant, that he suffered from organic brain damage, most likely originating in his early developmental period, resulting in cognitive dysfunction and disability. Moreover, both experts testified they reviewed school, work and forensic records existing at the time of appellant's trial which, in their opinions, raised red flags indicating a neuropsychological exam should have been performed. Among other things, the records revealed ***351** appellant, who lived in Trinidad until his early teenage years, was illiterate upon entering his first year of schooling in the United States (ninth-grade in Philadelphia), and read at only the third-grade level two years later.

In response, the Commonwealth presented neuropsychologist Dr. Thomas Swirsky–Sacchetti, who offered expert testimony that his testing and examination revealed appellant was of low-average intelligence but had no brain damage of any kind. Dr. Swirsky–Sacchetti criticized the opinions of appellant's experts based upon their methodologies and test interpretations, and specifically criticized their opinions that appellant's inability to read at an appropriate age level was indicative of brain damage or anything other than his low-average intelligence combined with a lack of education.

Trial counsel, Thomas Q. Ciccone, Esquire, was deceased when the hearing was conducted, and direct appeal counsel, David M. McGlaughlin, also did not testify. [3] The PCRA court determined appellant's forensic, school and Job Corps work records were readily available to trial counsel who should have been reasonably alerted by the reports to pursue neuropsychological testing. [4] However, the court concluded appellant failed to show prejudice. As will be discussed in more detail below, the PCRA court credited Dr. Swirsky–Sachetti's testimony opining appellant had no brain damage and did not deem credible the contrary testimony of Drs. Armstrong and Crown. The court dismissed the petition. Appellant appealed to this Court raising fourteen principal claims. The PCRA court prepared a Pa.R.A.P. 1925(a) opinion addressing the ***352** claims. The issues raised in appellant's brief to this Court correspond with the claims he raised in his Pa.R.A.P. 1925(b) statement of matters complained of on appeal. [5]

3 Attorney Ciccone died in 2006. Attorney McGlaughlin apparently was not subpoenaed to appear at the PCRA hearing and there is no affidavit in the record reflecting what his testimony would have been had he been called as a witness respecting direct appeal strategy.

4 Appellant dropped out of school in the tenth grade to attend a Job Corps program in West Virginia where he learned bricklaying. He had good reports regarding his work skills, but it was noted he read only at a third-grade level. A mental health evaluation conducted in January 1994 listed an Axis II assessment of Personality Disorder with paranoid and anti-social features.

5 Appellant's issues on appeal are ordered as follows: (1) the PCRA court erred in denying the petition without granting an evidentiary hearing on all claims; (2) the Commonwealth suppressed material impeachment evidence showing appellant and Buigi were not cellmates and counsel were derivatively ineffective; (3) the Commonwealth failed to disclose material impeachment evidence regarding Buigi's juvenile record for *crimen falsi* and use of aliases, and counsel were derivatively ineffective; (4) Buigi was an agent for law enforcement and interrogated appellant in the absence of counsel, violating appellant's rights, and counsel were derivatively ineffective; (5) the trial court erroneously instructed the jury it could find appellant guilty of first-degree murder if it found he or codefendant possessed the specific intent to kill, and appellate counsel was ineffective for failing to properly litigate this issue; (6) trial counsel was ineffective for opening the door to admission of appellant's prior criminal record and for failing to object to the use of that record during the penalty phase; (7) the Commonwealth introduced evidence of appellant's alleged involvement in Robinson's murder; counsel were ineffective for failing to litigate this issue; the Commonwealth failed to disclose material exculpatory

evidence showing appellant had not been involved in that homicide; and counsel were derivatively ineffective; (8) trial counsel was ineffective for failing to investigate, develop and present mitigating evidence of appellant's background, brain damage and mental health impairments at the penalty phase, and appellate counsel was derivatively ineffective; (9) the sole aggravating circumstance is invalid under Pennsylvania law and the United States Constitution; (10) the trial court erroneously failed to instruct the jury that life imprisonment is without possibility of parole, and counsel were derivatively ineffective; (11) appellant's rights to a fair sentencing proceeding and individualized consideration of aggravation and mitigation were violated by the joint proceeding with codefendant, and counsel were derivatively ineffective; (12) Pennsylvania violated the Vienna Convention of Consular Relations by failing to inform the Republic of Trinidad and Tobago of appellant's case, and by failing to inform appellant of his right to contact the Trinidadian embassy, and counsel were derivatively ineffective; (13) trial and appellate counsel were ineffective to the extent they failed to raise the above issues; and (14) cumulative prejudice.

****206 I. Review Standards**

[1] **[2]** We review a ruling by the PCRA court to determine whether it is supported by the record and is free of legal error. *Commonwealth v. Blakeney*, 631 Pa. 1, 108 A.3d 739, 748–49 (2014), *citing* *Commonwealth v. Spotz*, 616 Pa. 164, 47 A.3d 63, 75 (2012). Our standard of review of a PCRA court's legal conclusions is *de novo*. *Id.* at 749.

***353** To be entitled to PCRA relief, appellant must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S. § 9543(a)(2). These errors include a constitutional violation or ineffectiveness of counsel, which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id.* Additionally, appellant must show 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 postconviction proceeding." 42 Pa.C.S. § 9544(b).

[3] **[4]** Most of appellant's issues are cognizable only as ineffective assistance of counsel claims. In analyzing such claims, we begin with the presumption counsel is effective. *Commonwealth v. Robinson*, 623 Pa. 345, 82 A.3d 998, 1005 (2013). To prevail on an ineffectiveness claim, appellant must satisfy, by a preponderance of the evidence, the performance and prejudice standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Pennsylvania, we have applied *Strickland* by looking to three elements an appellant must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) appellant suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *See* ****207** *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (1987). [6]

6 Appellant, who is represented by federal counsel, makes clear he is raising federal Sixth Amendment claims under *Strickland*, obviously with an eye toward federal *habeas corpus* review if relief is denied here. This Court has made clear the Pennsylvania standard for ineffectiveness is the same as *Strickland*, albeit we divide the performance element into two sub-components. *See, e.g.*, *Commonwealth v. Laird*, 119 A.3d 972, 978 (Pa. 2015).

***354** **[5]** Given the timing of appellant's direct appeal and the fact new counsel litigated claims of trial counsel's ineffectiveness on that appeal, his present claims sounding in trial counsel's ineffectiveness may implicate PCRA waiver, albeit the claims are cognizable as claims of appellate counsel's ineffectiveness, to the extent appellant has "layered" the claims to account for both levels of prior representation. Respecting such layered claims, appellant must demonstrate not only that trial counsel was

ineffective under the *Strickland* test, but that appellate counsel also was ineffective. *See* *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014, 1023 (2003). *See also* *Commonwealth v. Ali*, 608 Pa. 71, 10 A.3d 282, 292 (2010). To the extent appellant faults direct appeal counsel for the manner in which he briefed preserved claims or claims of trial level ineffectiveness, those claims are not "layered," but focus directly on appellate counsel's performance under *Strickland* and its relevant progeny.

[6] **[7]** A court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; if a claim fails under any necessary element of the *Strickland* test, the court may proceed to that element first. *Robinson*, 82 A.3d at 1005, *citing* *Strickland*, *supra*; *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 701 (1998). In addition, for purposes of efficiency, we may begin by assessing the merits of a defaulted underlying claim because, if we deem the claim meritless, neither trial nor appellate counsel could be found ineffective.

II. Failure to conduct evidentiary hearing on all claims

[8] **[9]** Although appellant sets forth this claim in his questions presented as a stand-alone issue, he includes no stand-alone discussion of the issue, but instead weaves the issue into the arguments presented for a number of his underlying claims. Accordingly, we will address the propriety of the ***355** court's dismissal of claims without a hearing as necessary when they arise in the context of the discrete claims presented. We preliminarily note the PCRA court has discretion to dismiss a petition without a hearing when the court is satisfied " 'there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by further proceedings.' " *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 604 (2013), *quoting Commonwealth v. Paddy*, 609 Pa. 272, 15 A.3d 431, 442 (2011), *quoting* Pa.R.Crim.P. 909(B)(2). "To obtain reversal of a PCRA court's decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing." *Roney*, 79 A.3d at 604–05, *quoting* *Commonwealth v. D'Amato*, 579 Pa. 490, 856 A.2d 806, 820 (2004).

III. Claims regarding testimony of James Buigi

****208** A. *Brady*[7] Claims (and ineffectiveness overlay)

7 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

– 1 –

[10] Appellant disputes the veracity of Buigi's testimony claiming he and appellant were cellmates housed together in Cell 50 at the Philadelphia Industrial Correctional Center (PICC). At trial, appellant testified and claimed they were not cellmates at PICC; on cross-examination, appellant testified he was housed in Cell 50 during the relevant period, but his cellmate was someone named June. In rebuttal, the Commonwealth presented two prison guards who testified appellant and Buigi had been cellmates.

Appellant now claims PICC housing records attached to his amended PCRA petition show he was in Cell 19 while Buigi was housed in Cell 50; he also asserts the Commonwealth's failure to disclose these records was a *Brady* violation. Appellant insists the records were material, exculpatory "and/or" impeachment evidence, Appellant's Brief at 30, and he maintains ***356**

the Commonwealth deliberately failed to disclose the records at trial and on direct appeal.[8] Appellant argues that had the prison records been disclosed to the jury, the veracity of Buigi's testimony would have been undermined. He further asserts it is "reasonably likely" the guilt and penalty phases of the trial would have had different outcomes because Buigi's testimony was the only evidence tying appellant to the murder of LaCourt and involvement in the plot to murder Robinson. *Id.* at 31. Appellant argues, "Given the Commonwealth's reliance on Mr. Buigi, had Mr. Buigi's testimony been impeached, it is reasonably likely that one juror would have had a reasonable doubt of [a]ppellant's guilt or would have voted for life at [the] penalty [phase]." *Id.* In the alternative, appellant alleges trial and appellate counsel were ineffective for failing to investigate the records and subpoena them. Appellant also maintains, at a minimum, he is entitled to a hearing on the claim.

8 Appellant alleges the Assistant District Attorney (ADA) assigned the case on direct appeal corresponded with a Philadelphia Prisons official asking whether appellant and Buigi had ever shared a cell and received a reply the two had been housed on the same cellblock but not in the same cell. Copies of the correspondence are attached to the PCRA petition. Appellant alleges this correspondence was deliberately withheld.

Initially, contrary to appellant's assertion, the record shows Buigi's testimony was not the only evidence tying appellant to the killing of LaCourt. At trial, Barbara Halley, who was with LaCourt when he was accosted by appellant and codefendant, identified appellant as the person who took Lacourt's gold chain, refused to return it, and began beating LaCourt. Halley further testified she ran to a security station in the building to report a robbery and then heard gunshots. When she, the security guard, and police officers returned to the scene, appellant was gone and LaCourt was dead.

Moreover, Tanesha Robinson's preliminary hearing testimony was read into the record at appellant's trial. Robinson had testified appellant had a gun, robbed LaCourt, beat LaCourt with the gun and threatened to shoot him if he fled. Robinson saw LaCourt kneel and place his hands on his head. She also ***357** testified codefendant was armed and present at the scene, and she heard gunshots as she fled. She ran to her cousin's apartment, looked out the window, and saw appellant and codefendant put something in the trunk of a car before driving off.

****209** In response, addressing the alleged failure to disclose the PICC prison housing records at trial, the Commonwealth asserts the claim is waived to the extent it was not presented on direct appeal and is previously litigated to the extent it was presented on direct appeal. Moreover, the Commonwealth asserts the claim is meritless because appellant proffered no evidence the Commonwealth possessed the records; the records were equally available to the defense; the records were not exculpatory; and there was no reasonable probability of a different outcome at trial had the records been introduced.

With respect to the alleged failure to disclose the correspondence between the ADA and the prison official on direct appeal, the Commonwealth asserts the letter from the ADA merely requesting the information was in no way exculpatory. The Commonwealth further stresses the reply received from the prison official addressed a period of time **before** appellant and Buigi were housed in PICC. Thus, the information provided showed the men were housed in the same cellblock but in different cells at Holmesburg Prison from August 31, 1993 to October 14, 1993, and says nothing about their circumstances during the relevant time period at PICC.[9] With regard to the claims of ineffectiveness based on the prison records, the Commonwealth asserts they do not satisfy the arguable merit prong of the ineffectiveness analysis.

9 Subsequently, on May 14, 2013, a Philadelphia Prisons official prepared an affidavit stating his review of the records, which were incomplete, indicated appellant was never housed in Cell 50 while at PICC.

The PCRA court determined appellant could have raised his *Brady*-based theories on direct appeal but did not; thus, they are waived. The court further explained, on direct appeal, appellant raised a claim of trial counsel's ineffectiveness for "failing to subpoena prison records that would have shown that Buigi and [appellant] were never actually cellmates ***358** ...[but t]hat claim was rejected by the Supreme Court on the ground that [appellant] failed to prove the records exist." PCRA Court Op. at 8. The court further reasoned, if the records existed and showed appellant was not in Cell 50, the records would have contradicted appellant's testimony at trial indicating he had been in Cell 50, but shared the cell with someone other than Buigi. Ultimately, the

court reasoned the records were not material under *Brady* because, had they been introduced, they would not have affected the outcome of trial.

[11] **[12]** **[13]** To succeed on a *Brady* claim, the defendant must show: (1) evidence was suppressed by the prosecution; (2) the evidence, whether exculpatory or impeaching, was favorable to the defendant; and (3) prejudice resulted. A *Brady* violation exists only where the suppressed evidence is material to guilt or punishment, *i.e.*, where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Commonwealth v. Daniels*, 628 Pa. 193, 104 A.3d 267, 284 (2014), *citing* *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 30 (2008). Importantly, *Brady* claims may be subject to waiver. *See* *Roney*, 79 A.3d at 609–12 (several *Brady* claims deemed waived on PCRA appeal for failure to raise them at trial or on direct appeal), *citing* *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1129–30 (2011).

Here, the claim regarding the housing records from PICC raised on direct appeal sounded in trial counsel's ineffectiveness for failing to subpoena the records from prison authorities, a claim rejected as unsubstantiated ****210** by this Court. Appellant raised no *Brady* claim at trial or on direct appeal, even though it is apparent appellate counsel, at least, had identified the underlying issue. Accordingly, the iteration of the present claim sounding in *Brady* is waived.

[14] Furthermore, and relatedly, appellant's delineation of the *Brady* claim undermines its viability—if the records were available by serving a subpoena on the prison records custodian, as appellant asserts, then the records obviously were ***359** accessible to the defense and were not suppressed by the Commonwealth. *See* *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 245 (2006) ("No *Brady* violation can occur where the evidence is available to the defense through non-governmental sources, or, with reasonable diligence, the defendant could have discovered the evidence."). [10]

10 Notably, the trial in this case predated the decision in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which extended the *Brady* duty to disclose information in the possession of police agencies; this further undermines appellant's *Brady* claim. *See* *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001).

[15] Turning to appellant's ineffectiveness theory, on direct appeal, this Court dismissed appellant's claim of trial counsel's ineffectiveness for failing to subpoena the records. Accordingly, the present assertion of trial counsel's ineffectiveness for failing to procure the records is barred by the PCRA's prior litigation provision.

[16] Appellant's stand-alone claim of appellate counsel's ineffectiveness also fails. Appellant claims direct appeal counsel was ineffective for failing to show the records existed, *i.e.*, by failing to obtain the records via subpoena. Had counsel done so, appellant claims, he could have shown trial counsel was ineffective for failing to obtain and use the records to impeach Buigi's testimony. However, as the Commonwealth points out, the records in question are inaccurate on their face, containing several obvious errors. For example, the print-out for movement in Cell 50 during the relevant period appears to indicate four prisoners simultaneously occupied a single bunk of a two-bed cell for several weeks. Moreover, appellant's trial testimony indicating he was in Cell 50, when the records indicate he was not, and the contrary testimony of the guards who indicated he shared the cell with Buigi during the relevant time, significantly undermine the assertion the records could have been effective and difference-making tools to impeach Buigi's testimony. Appellant, in short, fails to show the claim of appellate counsel's ineffectiveness based on a failure to obtain the records has arguable merit under the ***360** *Strickland*/*Pierce* test, and there is no issue of material fact warranting an evidentiary hearing on the question.

– 2 –

[17] Appellant next alleges the Commonwealth failed to "disclose material exculpatory information" regarding Buigi's allegedly extensive and substantial record for *crimen falsi* juvenile adjudications and adult criminal convictions, and that Buigi used a number of aliases, including Tim Burgess and Brian Gilmore, as reflected not only in Buigi's juvenile record, but in his adult criminal record, and in the prison housing records discussed above. Appellant's Brief at 34, 35. Specifically, appellant argues confidence in the verdict is undermined because had the Commonwealth disclosed Buigi's record for *crimen falsi* and his use of aliases, trial counsel could have effectively impeached him, raising doubts about his veracity and making it "reasonably ****211** likely" the jury would have viewed his testimony with suspicion and returned a different verdict. *Id.* at 35. Alternatively, appellant alleges derivative ineffectiveness of trial and appellate counsel for failing to discover these records.

[18] The Commonwealth maintains appellant failed to raise this claim of error in his concise statement of matters complained of on appeal. Our review of the certified record confirms appellant made no specific reference to Buigi's adult use of aliases or to his adult criminal record in his Rule 1925(b) statement. [11] Accordingly, we will confine our review only to the claims resting on Buigi's juvenile adjudications and juvenile use of aliases. *See* Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."); ***361** *Commonwealth v. Castillo*, 585 Pa. 395, 888 A.2d 775, 780 (2005) ("Any issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived."), *quoting* *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306, 309 (1998). *See also* *Commonwealth v. Mason*, 130 A.3d 601, 635–36 (Pa. 2015) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.") (*citing* Pa.R.A.P. 302(a)).

11 The issue in appellant's concise statement apparently corresponding to the present claim on appeal alleges "Mr. Hannibal was denied due process and the effective assistance of counsel because the Commonwealth failed to disclose material impeachment evidence regarding the juvenile record of James Buigi, and counsel failed to investigate, obtain, and present such evidence." Appellant's Pa.R.A.P. 1925(b) Statement at ¶ (B)(2).

With respect to Buigi's juvenile record, the PCRA court noted that, prior to July 12, 1995, "juvenile adjudications were inadmissible for impeachment purposes." PCRA Court Op. at 11, *citing Commonwealth v. McKeever*, 455 Pa.Super. 604, 689 A.2d 272, 274 (1997), *citing* *Commonwealth v. Katchmer*, 453 Pa. 461, 309 A.2d 591, 594 (1973). Because the juvenile adjudications were inadmissible at the time of trial, the court determined the underlying claim of the Commonwealth's alleged failure to disclose them lacked merit, and counsel could not be faulted for failing to raise a meritless claim. We note, although the General Assembly subsequently amended 42 Pa.C.S. § 6354(b)(4) to permit juvenile adjudications to be used for impeachment purposes, counsel cannot be deemed ineffective for failing to predict changes in the law. *See* *Commonwealth v. Fletcher*, 604 Pa. 493, 986 A.2d 759, 801 (2009), *citing Commonwealth v. Gribble*, 580 Pa. 647, 863 A.2d 455, 464 (2004).

Nevertheless, appellant claims the PCRA court erroneously overlooked *Commonwealth v. Slaughter*, 482 Pa. 538, 394 A.2d 453, 458–59 (1978), which recognized the propriety of the limited use of a witness's probationary status as a juvenile delinquent to probe the witness's possible bias on cross-examination. *Id.*, *citing* *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (right of confrontation requires defendant in state criminal case be permitted to cross-examine witness to probe possible bias deriving from witness's probationary status as juvenile delinquent, notwithstanding testimony would conflict with state's asserted interest in preserving confidentiality of juvenile delinquency proceedings). Appellant's reliance on *Slaughter* is misplaced as the decision in fact reiterates the former general rule prohibiting the use of juvenile adjudications for *crimen falsi* offenses to impeach a ***362** witness's credibility, but recognizes the High Court's exception, applicable to the states, permitting cross-examination regarding a witness's probationary status as a juvenile delinquent to ****212** show potential bias, presumably the witness's hope for favorable treatment by the state in exchange for his or her testimony. Accordingly,

appellant's derivative claims of ineffectiveness based on the failure to attempt to impeach Buigi with his juvenile record for *crimen falsi* adjudications and the use of aliases, to impeach his credibility, must fail. *See Gribble*, 863 A.2d at 464.

B. Sixth Amendment right to counsel during prison interrogation (ineffectiveness overlay)

[19] Appellant claims his right to counsel during government interrogation was violated when Buigi allegedly agreed to act as an informant before he then deliberately initiated the prison conversation in which appellant incriminated himself. Appellant claims trial counsel was ineffective for not challenging the admissibility of Buigi's testimony on that basis, and appellate counsel was ineffective for failing to raise the ineffectiveness claim on appeal. Specifically, appellant claims although Buigi testified that he did not initiate contact with police until after appellant incriminated himself, prison records show Buigi met with police a month before the incriminating conversation "for the purpose of being interviewed in regards to a homicide." Appellant's Brief at 39. Appellant additionally claims Buigi was not merely a passive listener, but elicited appellant's confessions by urging "if you want me to help you with your case, you got to tell me a little bit more about it." *Id.* at 40, *quoting* N.T. 2/28/94 at 112. Appellant alleges Buigi "then relayed the information [appellant disclosed] to Detective Rheinhold and the prosecution in exchange for leniency in his open cases." *Id.* at 42.

The Commonwealth responds the issue is waived because appellant did not adequately develop the claim Buigi was a government agent in any meaningful fashion before the PCRA court or cite relevant authority to support the claim. Alternatively, the Commonwealth asserts the claim is meritless as the ***363** record shows Buigi was not acting as a government informant or agent at the time of the conversation and did not initiate the conversation to elicit incriminating information. Instead, the Commonwealth maintains the record shows appellant sought Buigi's opinion regarding appellant's chances for a good outcome at trial. Thus, the Commonwealth asserts appellant failed to show merit in his ineffectiveness claim based on the alleged Sixth Amendment violation.

The PCRA court determined the underlying claim of a violation of the right to counsel was not raised below and thus is waived. The court also determined the averment Buigi was a government agent was conclusory and unsupported by the record and thus dismissed the ineffectiveness claims based on lack of arguable merit. Moreover, the court determined the claim raised no material fact warranting an evidentiary hearing.

[20] **[21]** **[22]** The Sixth Amendment right to the assistance of counsel attaches at the initiation of formal judicial proceedings against an individual by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 324 (2011). Any statement made by the individual thereafter which is "deliberately elicited" by police, without the individual making a valid waiver of the right to counsel, is deemed a contravention of this right. *Id.* A statement may be "deliberately elicited" by police through use of an informant. *Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492, 505 (1997). "Information secured by an informant acting as an agent of the government must be suppressed where the informant acts under instructions as an informant for the government, ****213** where he presents himself as no more than a fellow inmate rather than a governmental agent, and where the suspect is in custody and under indictment at the time of the questioning by the informant because such questioning outside the presence of the accused's counsel violates the accused's Sixth Amendment right to counsel." *Id.*, *citing Commonwealth v. Berkheimer*, 501 Pa. 85, 460 A.2d 233, 234 (1983).

***364** **[23]** **[24]** In order to prove such a violation, the defendant must demonstrate the police and the informant took some action, beyond mere listening, designed deliberately to elicit incriminating remarks. *Hawkins,* 701 A.2d at 505, *citing* *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Additionally, the defendant must show the informant was acting as a government agent. Individual acts do not become governmental action merely because they are later relied upon and used by the government in furtherance of governmental objectives. *Id.*, *citing* *Commonwealth v. Corley*, 507 Pa. 540, 491 A.2d 829, 832 (1985).

The record supports the PCRA court's denial of this claim. Buigi testified at trial he initially learned of Peter LaCourt's killing in October 1992 from LaCourt's brother Harry Calindez (Harry). Buigi and Harry had been working together in the prison kitchen at SCI–Camp Hill when Harry was called away by the chaplain. When Harry returned, he informed Buigi his brother had been murdered. Buigi testified he had known Peter LaCourt as Pete Calindez since junior high school, but had not seen him since 1987. Buigi further testified he was transferred to PICC in late October 1993, and had been interviewed by Detective Rheinhold as a potential witness in an unrelated murder investigation approximately a month before the transfer.

According to Buigi, following the transfer, he became cellmates with appellant who, after four days, began asking Buigi for his advice and opinions. Appellant subsequently confided he had killed Peter LaCourt and plotted to have Tanesha Robinson murdered. Buigi testified when he realized appellant's reference to Peter LaCourt was to Buigi's friend Pete Calindez, he called Detective Rheinhold to tell him he had information about the killing. The day after he made the call, Detective Rheinhold transported Buigi to Police Administration and took his statement.

Buigi also testified he was not expecting any leniency in his open felony matters in exchange for his testimony in this case. After Buigi finished testifying, the prosecutor informed the court that, although "the Commonwealth has absolutely no ***365** deals or agreements with respect to any of Mr. Buigi's open cases, I want the court to know, and I want it to be a matter of record that in the event Mr. Buigi is convicted on any of his open cases and I am subpoenaed to testify at his sentencing proceeding, that I will testify that he cooperated in this matter." N.T. 3/2/94 at 5. The court then granted the defense request to recall Buigi on cross-examination, where he testified if he was convicted on an open case, "[the prosecutor] would tell the judge I cooperated in this case." N.T. 3/3/94 at 37. He denied he was promised or expected sentencing leniency in that event, and the import of the prosecutor's involvement would be to show Buigi "t[old] the truth of what I knew about the case." *Id.*

In light of this record, the PCRA court did not err in determining appellant's claim Buigi was a government agent was unsupported and conclusory. The fact Buigi met with Detective Rheinhold before he was housed with appellant at PICC was uncontested, but the uncontradicted evidence showed the subject of that meeting ****214** was Buigi's knowledge respecting an unrelated homicide. There was no evidence the government enlisted or directed Buigi to initiate contact with appellant and elicit details about the murder of LaCourt and the plot to murder Robinson.

In the absence of direct evidence, appellant posits the record evidence raised a "reasonable inference" Buigi acted as a Commonwealth agent because he allegedly initiated questions designed to elicit incriminating information from appellant and relayed that information to the prosecution in exchange for leniency in his open cases. Appellant's Brief at 42. However, this is more than an inference: it is speculation premised on rejecting the actual trial evidence that appellant approached Buigi seeking his advice and opinions and later confided he committed the murder and was involved in killing an eyewitness. It was only after Buigi realized the murder victim was an acquaintance that he contacted police; and, although he obviously may have hoped his cooperation might result in consideration in his own cases, there was no promise of leniency in exchange for his testimony. Moreover, whatever ***366** promises or expectations arose after Buigi came forward do not operate retroactively to make him an interrogating agent of the police. In short, the unsupported inference appellant poses does not make this a factual situation implicating Sixth Amendment guarantees. *See* *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) (Sixth Amendment not violated whenever government by happenstance obtains incriminating statements from accused after right to counsel has attached; violation occurs when government obtains incriminating statements by knowingly circumventing accused's right to have counsel present in a confrontation between accused and state agent).

Appellant's claim of a Sixth Amendment violation is waived for failure to raise it at trial or on direct appeal, as is his claim of trial counsel's ineffectiveness. Appellant's derivative claim of appellate counsel's ineffectiveness fails as the underlying claim of trial counsel's ineffectiveness lacks arguable merit. The claim also raises no issue of material fact warranting an evidentiary hearing.

IV. Jury instruction regarding specific intent to kill

[25] Appellant claims the trial court erroneously instructed the jury it could find him guilty of first-degree murder if the Commonwealth showed appellant, his accomplice or codefendant shot the victim with the specific intent to kill. Appellant claims the instruction was erroneous because it permitted the jury to find him guilty even if it determined only appellant's codefendant had the specific intent to kill. Appellant acknowledges trial counsel challenged the instruction during trial and appellate counsel raised the issue on direct appeal. Appellant further acknowledges this Court engaged and rejected the claim on direct appeal, determining the jury charge, as a whole, conformed to *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994), governing instructions on accomplice liability in first-degree murder prosecutions.

Appellant now claims appellate counsel was ineffective in litigating the issue because "he only argued that the court's instructions violated *Huffman* and failed to argue the instructions ***367** violated appellant's due process rights by impermissibly relieving the Commonwealth of its burden of proof." Appellant's Brief at 45. Appellant presents no targeted argument or legal analysis to support this gloss on the previously litigated theory other than a fleeting one-sentence assertion that "instructions that lessen the Commonwealth's burden of ****215** proof violate due process. *See* *Osborne v. Ohio*, 495 U.S. 103, 122–25, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *Francis v. Franklin*, 471 U.S. 307, [321] n.7, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)." *Id.* at 44.

The Commonwealth responds that on direct appeal this Court held, "[t]he instruction was not in error and the court consistently and in understandable language referred to the need to consider whether **each individual** in the case possessed the specific intent to kill." Appellee's Brief at 57, *citing* *Hannibal*, 753 A.2d at 1271 (emphasis added). Thus, the Commonwealth posits appellate counsel challenged the instruction in part on the basis it reduced the Commonwealth's burden of proof, and the present issue therefore "requires no extended response." *Id.* at 55. Similarly, the PCRA court determined "all prior counsel litigated the issue, and the issue was resolved on the merits against [appellant] by Pennsylvania's highest appellate court. No relief is due." PCRA Court Op. at 13.

Appellant has not explained how an undeveloped due process overlay, other than perhaps more specifically seeking to federalize the very same claim already posed, would have led to a different result on the merits on direct appeal. Nor does appellant explain why our decisional law in this area, including our resolution on direct appeal, includes no due process element, or is not derived from due process precepts. In light of this presentation, the PCRA court did not err in finding the underlying issue regarding the propriety of the instruction previously litigated and meritless. *See* 42 Pa.C.S. § 9544(a)(2). The claim of trial counsel's ineffectiveness for failing to challenge the instruction has been previously litigated as well; and the claim appellate counsel failed to "properly" litigate the ***368** issue is unsupported by meaningful argument; thus, no relief is due.

V. Opening the door to criminal record through character witnesses

A. Guilt phase

[26] Appellant alleges trial counsel failed to review the discovery provided by the Commonwealth regarding appellant's criminal history, and was thus unprepared when the Commonwealth cross-examined appellant's character witnesses regarding his criminal history during the guilt phase. Specifically, after each character witness testified to appellant's reputation as a peaceful, law-abiding citizen, the prosecutor posed questions on cross-examination regarding the witness's knowledge of appellant's prior criminal record for disorderly conduct, drug offenses, theft, burglary, conspiracy and contempt of court. Trial counsel objected and a side-bar was conducted during which counsel stated, "My client informs me that he has one conviction.

I don't know anything about this record. That was not furnished to me. And I discussed it with my client." N.T. 3/8/94 at 8. Counsel further stated the "drug case is not *crimen falsi*." *Id.*

Appellant now claims counsel never met with him regarding his criminal history, did not review the discovery, which included a form listing all charges brought against him in the period from 1990 through 1992, and apparently did not realize non-*crimen falsi* offenses can be used to impeach reputation testimony. Appellant argues trial counsel was ineffective on these bases and appellate counsel was ineffective for failing to raise this meritorious, record-based claim of trial counsel's ineffectiveness on appeal.

The Commonwealth responds counsel discussed appellant's criminal history with him before trial and appellant does not show counsel acted unreasonably in presenting the character witnesses because ****216** his decision was based on appellant's false representation regarding the nature and extent of his criminal history. Further, appellant opened the door to the admissibility of much of his criminal history because he testified in his ***369** own defense, and thus, the Commonwealth could, if it chose, proffer any of appellant's *crimen falsi* convictions for impeachment purposes. Moreover, the Commonwealth asserts, the trial court unambiguously instructed the jury it was not to consider appellant's prior convictions in deciding his guilt, except to the extent those convictions affected the weight to afford the reputation evidence he presented.

The PCRA court determined the claim of trial counsel's ineffectiveness could have been raised on direct appeal, but was not, and thus it was waived. The court further determined that underlying claim was meritless. Because appellant chose to testify on his own behalf, any of his *crimen falsi* convictions over the prior ten years would have been admissible in the Commonwealth's rebuttal case regardless of whether appellant presented character witnesses. *See* 42 Pa.C.S. § 5918; Pa.R.E. 609(a), (b). Thus, the court reasoned, counsel was required to weigh the benefit of the character evidence against only the non-*crimen falsi* offenses of disorderly conduct, contempt and drug offenses. The court concluded "it is inconceivable the incremental revelation of these additional offenses would have caused a reasonable juror to change his or her opinion regarding [appellant's] culpability." PCRA Court Op. at 14.

[27] Since the underlying claim of trial counsel's ineffectiveness is record-based, it could have been raised on appeal, and that iteration of the present claim is waived. In addition, in assessing trial counsel's conduct for the derivative claim of appellate counsel's ineffectiveness, we initially note the discovery provided in this case included a sheet of charges which did not indicate the formal dispositions on those charges. At the time of appellant's trial, character witnesses could not be cross-examined about a defendant's prior arrests which did not result in convictions. *See Commonwealth v. Keaton*, 615 Pa. 675, 45 A.3d 1050, 1073 (2012), *citing* *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Thus, contrary to appellant's claim, review of the discovery material would not necessarily have been a dispositive factor in trial counsel's decision whether or not to proffer the witnesses, and counsel may have deemed that reason enough to accept appellant's ***370** averment he only had one prior conviction. *See* *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). When the facts supporting a strategy or defense are known to counsel primarily based on his client's representations, "the need for further investigation may be considerably diminished or eliminated altogether." *Id.*

On the other hand, it is a relatively simple matter to investigate further and determine the precise circumstances of appellant's prior record. Here, counsel is deceased and little, if anything, could be accomplished by remand for an evidentiary hearing to determine what appellant told him. For present purposes, it is enough that the record provides some support for counsel on appeal to have included this in his claims of trial counsel's ineffectiveness. Notably, as to this iteration of his claim, appellant simply declares appellate counsel "could have no reasonable basis for not including this claim" on appeal, Appellant's Brief at 50, and no proffer was made below respecting appellate counsel's strategic decisions in preparing the appeal.

****217** **[28]** In any event, even assuming counsel had no strategic reason not to include this claim in addition to, or instead of, other claims pursued, we are aligned with the PCRA court's conclusion no *Strickland*/*Pierce* prejudice resulted from

trial counsel's lapse and that in turn suggests the issue was not worth pursuing. As appellate counsel no doubt realized, the law recognizes juries are presumed to follow instructions. *See Commonwealth v. Hoover*, 630 Pa. 599, 107 A.3d 723, 731–32 (2014) (jury specifically instructed prior conviction was not evidence of guilt and jury was required to consider evidence for limited purpose of judging credibility and weight of witness's testimony; juries are presumed to follow instructions). The trial court instructed the jury as follows:

> Now, you will recall that as to [appellant] the District Attorney was permitted to cross-examine [the witnesses] for one purpose only, and that was for the purpose of providing evidence which might help you judge whether [appellant's] ***371** character witnesses are really familiar with his reputation and whether in their testimony they gave you an accurate description of his reputation. You will recall those questions dealt with some offenses that [appellant] has been convicted of, and that's part of my recollection. It's your recollection that controls.
>
> The evidence brought out by the District Attorney's cross-examination must not be considered by you in deciding whether [appellant] is guilty or not guilty in any way other than for the one purpose that I have just stated. In particular, I caution you that you must not consider the evidence as proof that [appellant] is a person of bad character or has committed the crimes charged or any other offense.

N.T. 3/9/94 at 132. In our view, the PCRA court did not err in determining that appellant failed to prove trial level prejudice; consequently, appellant's derivative claim of appellate counsel's ineffectiveness must fail as counsel cannot be deemed ineffective for failing to raise a meritless claim. *See Commonwealth v. Treiber*, 121 A.3d 435, 445 (Pa. 2015).

B. Penalty phase

[29] The guilt phase evidence was incorporated into the penalty phase at trial and appellant testified in his own defense at the penalty hearing. Among other things, he testified his criminal record for burglary and drug offenses occurred when he was young and impressionable, and he pleaded guilty to those offenses and received probationary sentences. He testified he was a bricklayer and continued to maintain his innocence, telling the jury, "y'all convicted two innocent young men." N.T. 3/11/94 at 56. Appellant also presented two witnesses at the penalty hearing who testified he was hard-working, a good father and did not have a drug problem; the prosecutor cross-examined appellant's witnesses regarding their knowledge of his criminal history and drug use.

Appellant alleges trial counsel was ineffective for failing to object to incorporation of the guilt phase evidence, as the other-crimes evidence amounted to the admission of a non-statutory ***372** aggravating circumstance. Appellant asserts the introduction of evidence of his general criminal history and drug use prejudiced him because the Commonwealth could not directly seek the 42 Pa.C.S. § 9711(d)(9) aggravating circumstance as appellant did not have an extensive history of violent felonies. Appellant argues the evidence against him "was not overwhelming" and "[t]hus, it was critical for the jury to find [a]ppellant credible when he testified on his own behalf at guilt and penalty." Appellant's Brief ****218** at 49. The introduction of his criminal history prejudiced him, he asserts, as it impeached his credibility and "made it easy for the jury to believe [appellant] fired the shots instead of [codefendant], who did not have an extensive criminal history." *Id.* Appellant additionally claims appellate counsel was ineffective for failing to raise these record-based issues on direct appeal. Appellant cites no Pennsylvania decisional precedent to support his claim the evidence amounted to the admission of a non-statutory aggravating circumstance.

The Commonwealth responds the trial court's sentencing instructions made clear to the jury the only applicable aggravating circumstance was a killing committed during the perpetration of a felony (here, robbery). The PCRA court determined it was proper for the prosecutor to impeach appellant regarding his criminal history and drug use as those areas were probed on direct examination. The court also determined it was proper for the prosecutor to impeach appellant's mitigation witnesses about his drug use because both testified he had no drug problem. The court further held "there was no improper attempt to use

[appellant's] record as a non-statutory aggravator," and thus, "any objection made on that ground would have been meritless." PCRA Court Op. at 15.

We discern no error in the PCRA court's resolution. The trial court instructed the jurors there was only one applicable aggravating circumstance for them to consider: whether "[appellant] committed a killing while in the perpetration of a felony. ...[T]he felony referred to is the robbery." N.T. 3/11/94 at 89. The court also instructed the jury regarding the parties' relative burdens of proof and the need for juror ***373** unanimity to impose a death sentence. There was no claim on direct appeal (or now) alleging the court's charge to the jury in this respect was erroneous.

[30] A claim of trial counsel's ineffectiveness in failing to object to the incorporation of the guilt phase evidence into the penalty phase could have been raised on direct appeal, but was not, and is thus waived under the PCRA. Moreover, even absent the default, given the court's proper instructions, which made clear only one aggravating circumstance was at issue, and appellant's failure to support his present claim by citation to any relevant cases, the claim of trial counsel's ineffectiveness has not been substantiated.

Furthermore, appellant's claim he was prejudiced in both phases of the trial because his criminal history impeached his credibility in a close case is undermined by the substantial evidence of his guilt, and the court's instruction to the jury the evidence was not to be used to determine guilt or innocence or to determine the penalty. Thus, appellant's derivative claim of appellate counsel's ineffectiveness fails.

VI. Evidence connecting appellant to the plot to murder Tanesha Robinson (and ineffectiveness overlay) [12]

12 Although this claim is presented as issue 6 in appellant's "Statement of Questions Involved," the argument in support of the claim is the first argument presented in appellant's brief.

Trial counsel's motion for a mistrial, made when the prosecutor referenced the triple-killing in his opening statement at trial, was denied by the court. The court also overruled counsel's hearsay objection to Buigi's testimony stating appellant admitted he had a role in the triple-killing.

On direct appeal, appellant claimed admission of the evidence of the triple-killing rendered his trial fundamentally unfair and counsel was ineffective for failing to make objections on grounds of undue prejudice ****219** and insufficient proof. In support thereof, appellant argued the prejudicial impact of the evidence outweighed its probative value, and maintained Buigi's testimony was incredible and should have been excluded. On direct appeal, appellant conceded counsel made a motion ***374** for mistrial and posed a number of objections respecting the evidence, but argued counsel was ineffective for failing to make "appropriate objections." Brief for Appellant on Direct Appeal at 29, *Hannibal*, 562 Pa. 132, 753 A.2d 1265 (2000), *available at* 1997 WL 33544659. Appellant did not present an analysis of counsel's performance by specific reference to the *Strickland*/*Pierce* prongs on direct appeal, but baldly asserted it was incumbent on trial counsel to renew his motion for a mistrial, and counsel had no possible strategic basis for failing to press every available objection to the challenged evidence; appellant further claimed counsel's lack of reasonable basis for his actions or inactions was obvious, as was the prejudice flowing therefrom. *Id.* at 28–29. In a footnote, this Court rejected the claims because appellant failed to set forth or meaningfully discuss the three-pronged ineffectiveness standard, and because the challenged evidence was relevant and admissible to show the history of the case and to prove consciousness of guilt in any event. [13]

13 This Court specifically stated:
Hannibal claims his trial was unfair because evidence of the murder of Tanesha Robinson, a witness, was admitted into evidence and that trial counsel was ineffective for failing to object to the introduction of evidence that Hannibal was linked to the murder of Tanesha Robinson.

> This claim [also] fails for a number of reasons. First the trial court did not err in admitting this evidence since it is part of the history of the case. Second the claim of ineffectiveness fails because Hannibal again fails to set out the three pronged test for ineffectiveness of counsel. Third, there was no basis to object to the evidence because it was admissible to show Hannibal's consciousness of guilt. *Commonwealth v. Goldblum*, 498 Pa. 455, [447 A.2d 234 (1982)] (evidence that appellant agreed to pay undercover operative to kill witness is admissible to show consciousness of guilt). Therefore, the trial court did not err in admitting this evidence, and defense counsel was not ineffective for failing to object to the admission of this evidence.
>
> *Hannibal*, 753 A.2d at 1272, n.11.

[31] Appellant now claims admission of the evidence concerning his involvement in Robinson's murder denied him his rights to due process and a fair trial, and prior counsel were ineffective to the extent they failed to litigate the issue. Appellant's Brief at 13, 16–23, 24–26. Appellant alleges the evidence, which was primarily based on Buigi's testimony, should have been excluded because Buigi was an unreliable ***375** witness, and counsel should have objected to the evidence on that basis. The PCRA court determined the guilt phase claims challenging the admissibility of evidence regarding the Robinson murder and counsel's alleged ineffectiveness for failing to object to that evidence are not cognizable under the PCRA because they were previously litigated and resolved against appellant on the merits by this Court on direct appeal. We agree the claim is subject to the statutory prior litigation bar. Appellant has failed to articulate any material difference between the instant claim of a due process violation resulting in an unfair trial and the substantive claim raised and rejected on direct appeal. On direct appeal, this Court dismissed appellant's substantive claim of unfairness resulting from alleged trial court error in its evidentiary rulings, and his derivative ineffectiveness claim for failure to challenge the admissibility of the challenged evidence on particular grounds, including Buigi's alleged lack of veracity. The gravamen of appellant's claim then and now is, in part, the same—Buigi was such an unreliable witness his ****220** testimony linking appellant to the triple-killing should have been precluded and counsel was ineffective for failing to raise that claim. Thus, we dismiss the present iteration of the claim as previously litigated. *See* 42 Pa.C.S. § 9544(a)(2). [14]

14 In her concurring opinion, Justice Todd disagrees the issue has been previously litigated, because although the claim was raised on direct appeal, this Court misapprehended the issue to such an extent there was no merits ruling. In our view, this Court's brief discussion of the issue on direct appeal was, nevertheless, a merits disposition and holding. The Court properly stated the substantive issue was whether appellant received a fair trial. Although the Court did not set forth appellant's arguments in detail, it nevertheless clearly identified and implicitly rejected the substantive claim of an unfair trial based on the court's allegedly erroneous evidentiary rulings with respect to the triple-killing, and it explicitly rejected appellant's arguments with respect to counsel's ineffectiveness because they were not supported by the necessary legal analysis. *Hannibal*, 753 A.2d at 1272, n.11. This Court's analysis of the issue on direct appeal, while perhaps less than extensive, was nevertheless certain in its dispositive effect, and we reject appellant's current iteration of the claim as previously litigated. In his dissenting opinion, Chief Justice Saylor states he would remand for a new trial because, in his considered judgment, trial counsel was ineffective for failing to secure from the trial court a determination the probative value of the evidence of the triple killing was outweighed by its prejudicial impact. Dissenting Op. at 238. Notably, appellant has not raised that issue in this appeal.

***376** **[32]** Appellant further claims counsel were ineffective during the penalty phase for failing to challenge the evidence of Robinson's murder on grounds it violated the Eighth Amendment, denying him a reliable sentencing determination. Appellant's Brief at 20–23. Specifically, appellant claims the sentencing determination was not reliable because the jury was free to consider his involvement in Robinson's murder, which the prosecutor commented upon in summation, as a non-statutory aggravating circumstance. To further support his claim, appellant challenges what he says was the trial court's confusing penalty phase instruction regarding the jury's consideration of the evidence of Robinson's murder. The court instructed the jury:

> In considering the evidence that was presented at the earlier trial, you will recall that the concern of the three young ladies was limited in your consideration to an effort to show consciousness of guilt. These

> defendants are not on trial for anything that happened to those three young ladies. Your decision as to sentence must be based on the evidence that was presented concerning the death of Mr. LaCourt.

N.T. 3/11/94 at 92–93.

The Commonwealth and the PCRA court posit appellant's claim based on the penalty phase instruction is waived as it could have been challenged at trial and raised on direct appeal. As for appellant's derivative claims of counsel ineffectiveness, appellant's reading of the jury charge as inviting consideration of an extra-statutory aggravator is unpersuasive. We see nothing so obviously confusing about the instruction regarding the jury's consideration of the evidence of the triple killing that counsel were required to discern an Eighth Amendment objection. The court properly instructed the jury it could consider the evidence only for the limited purpose of showing appellant's consciousness of guilt. *See Commonwealth v. Hairston*, 624 Pa. 143, 84 A.3d 657, 664 (2014) (defendant not charged with arson but evidence he intentionally set fire to ***377** house after murdering people inside admissible to show consciousness of guilt).

In further support of his claims, appellant asserts Terrence Richardson later recanted his testimony he was with individuals ****221** who received money to murder Robinson in order to silence her. Appellant also argues Frederick Daughtry (codefendant Gregory's coconspirator in the murder of Robinson, who pleaded guilty to murder in 1997) provided an affidavit in 2000 stating her murder had not been motivated by a desire to prevent her testimony. In a later affidavit, Daughtry averred appellant had nothing to do with Robinson's murder. Appellant now alleges he was denied due process because Daughtry's initial affidavit was allegedly withheld by the prosecution at the time of his direct appeal, violating the Commonwealth's continuing *Brady* obligation. Appellant asserts, at the least, he is entitled to a hearing on this issue.

The Commonwealth responds that, to the extent appellant claims evidence discovered after his trial raises doubts about the strength of the trial evidence, the claim is waived because appellant did not present any argument to the PCRA court to satisfy the demanding standards governing a claim of newly discovered evidence (discussed below). The PCRA court noted the claims regarding Daughtry's affidavit and Richardson's recantation were not raised in the PCRA court and cannot be raised for the first time on appeal from the denial of PCRA relief. Moreover, even had the claims been properly raised, the court found them meritless: Daughtry stated in his affidavit he would refuse to testify if called as a witness in any further proceedings and, although Richardson recanted his testimony in a post-trial hearing in codefendant's case, the judge in that case, who also presided over this trial (Judge Clarke) found the recantation to be incredible. *See* PCRA Court Op. at 18. The PCRA court concluded the new evidence was not of a nature or character to warrant relief and dismissed the related claims without a hearing.

[33] **[34]** Our review of the record shows claims regarding Daughtry's affidavit and Richardson's recantation in fact were ***378** raised in the amended petition filed in 2005. *See* Appellant's Amended PCRA Petition, 9/7/05 at 27–28. The PCRA provides relief for a petitioner who demonstrates his conviction or sentence resulted from "[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. § 9543(a)(2)(vi). To establish a newly discovered evidence claim under the PCRA, it must be shown the evidence: (1) was discovered after trial and could not have been obtained at or prior to trial through reasonable diligence; (2) is not cumulative; (3) is not being used solely to impeach credibility; and (4) would likely compel a different verdict. *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 595–96 (2007). Newly discovered evidence must be producible and admissible to entitle a petitioner to relief. *Commonwealth v. Castro*, 625 Pa. 582, 93 A.3d 818, 825 (2014).

Daughtry executed two affidavits; the first dated February 8, 2000, the second dated September 2, 2005. In the first, he averred he lied at codefendant Gregory's separate trial for the murders of the three females. He stated that, in exchange for his perjured testimony implicating his codefendants, he "received 15 to 30 years for a charge of third degree murder" for his involvement as a "look out man" in the crime. Daughtry Affidavit, 2/8/00. He further asserted the murder of Tanesha Robinson "was not in

retaliation for witnessing another murder[.]" *Id.* Notably, however, he also averred he did "not wish to give further testimony[,]" and if called as a witness, he "will invoke [his] Fifth Amendment right to not testify." *Id.* In his second affidavit, Daughtry averred "Sheldon Hannibal ****222** had nothing to do with ... the killings of Tanesha Robinson, LaToya Cook and Jeanie Robinson[,]" and the murders "had nothing to do with anybody being a witness in another case or anything like that. It was just a burglary that went really wrong." Daughtry Affidavit, 9/2/05.

With respect to Richardson, the record contains no documentation to support the allegation he recanted his testimony against appellant in a post-trial hearing related to codefendant's separate charges for the murder of the three females, ***379** other than the PCRA court's acknowledgement the recantation took place. Thus, Richardson apparently recanted his trial testimony in codefendant's separate trial, not in a proceeding pertaining directly to appellant, and Richardson's recantation is not contained in the certified record on appeal. Similarly, Daughtry's first affidavit does not mention appellant at all, and it is clear it was presented in proceedings pertaining to appellant's codefendant.

Significantly, both Richardson's and Daughtry's statements, upon which appellant now relies to support his claims he did not receive a fair trial, sentencing proceeding or appeal, involve admissions of lying under oath in court proceedings. It is well-settled recantation evidence is notoriously unreliable, and where it involves an admission of perjury, it is the least reliable source of proof. *Commonwealth v. Henry*, 550 Pa. 346, 706 A.2d 313, 321 (1997). *See also Commonwealth v. Clark*, 599 Pa. 204, 961 A.2d 80, 87 n.6 (2008) (noting inherent unreliability of recantation evidence and reasonableness of strategic decision by counsel to forego its presentation). Notably, appellant has not cited to, or presented argument regarding, the requirements to establish PCRA relief on a claim of newly discovered evidence, including that the new evidence would be admissible (as opposed, for example, to Daughtry's declaration he would assert a privilege not to testify). Nor has he explained how the new evidence here was such that it would likely compel a different verdict if presented. Appellant's suggestion of a *Brady* violation is also unsupported by pertinent argument or authority and lacks any substantiated showing the recantations were suppressed, were exculpatory and their non-disclosure resulted in prejudice.

For these reasons, we determine the PCRA court did not err in denying, without an evidentiary hearing, the underlying claims of a constitutional violation and the derivative claims of counsel's ineffectiveness.

VII. Mitigating mental health evidence (and ineffectiveness overlay)

[35] Appellant claims trial counsel was ineffective for failing to investigate and present significant mental health mitigating ***380** evidence at the penalty proceeding. He also alleges appellate counsel was ineffective for failing to investigate and discover such evidence to "properly raise the issue of trial counsel's ineffectiveness" in this regard on appeal. Appellant's Brief at 52. Appellant's underlying claim, in essence, is premised on the belief he has borderline intelligence and suffers from organic brain damage; he says if those facts had been presented to the jury during the penalty phase, "at least one juror would have voted for life." *Id.* at 59.

As noted, the PCRA court conducted a hearing on this claim at which three expert witnesses in neuropsychology testified, Dr. Armstrong and Dr. Crown for appellant, and Dr. Swirsky–Sacchetti for the Commonwealth. All three experts agreed the records existing at the time of appellant's trial reasonably showed further neuropsychological testing was indicated, and the PCRA court consequently determined ****223** there was arguable merit in the underlying claim of trial counsel's ineffectiveness for failing to further investigate appellant's mental health as a potential mitigating factor.

At the hearing, the focus was whether appellant suffered from a cognitive disability that might be seen as mitigating under the "catch-all" category of mitigating circumstances. *See* 42 Pa.C.S. § 9711(e)(8) ("any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense"). No expert witness opined appellant had a substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to requirements of the law, or

was under extreme mental or emotional disturbance at the time he committed the crime, so as to implicate specific mental health mitigators. *See* 42 Pa.C.S. § 9711(e)(2), (e)(3). The experts' opinions differed sharply as to whether appellant suffered from any cognitive disability, calling for the court to make a factual determination.

Dr. Armstrong evaluated appellant on January 14, 2008, conducting a battery of tests to determine whether he suffered from neuropsychological impairments. The tests were broadly categorized into seven domains of mental functioning: motor functioning, processing speed, attention, verbal memory, language, ***381** visuospatial processing and memory, and intellectual processes and executive functions. She testified to her opinion appellant had "impairments in all of the domains[,]" some of which were "severe," which "raised the possibility [appellant] had intellectual disability." N.T. 7/28/14 at 87, 90. She did not conduct a full-scale IQ test, but was aware Drs. Crown and Swirsky–Sacchetti had conducted IQ tests; appellant received a full-scale IQ of 79 on the test administered by Dr. Crown and a full-scale IQ of 74 on the test administered by Dr. Swirsky–Sacchetti. Dr. Armstrong testified "intellectual disability ... which we used to call mental retardation, but no longer do[,] ... is now defined as an IQ around 70 or 75." *Id.* at 91.

Dr. Armstrong further suggested appellant may suffer from brain damage:

> Q. [By appellant's attorney]: Okay. And so your overall conclusions from all these testings, the tests you did, do you make an actual diagnosis of brain damage?
>
> A. Well, in a sense, yes. I make maybe not a medical diagnosis, but I'm making the diagnosis that he has enough signs of brain dysfunction that it's real, that there is a disturbance of the brain[.]

Id. at 106–07.

On cross-examination, Dr. Armstrong clarified she "inferred" the existence of a "brain injury," which she characterized as "poor development of the brain," the cause of which was unknown, but could be due to "a genetic code" or "something he acquired, something in the environment, we don't know." *Id.* at 239. She further opined appellant's organic brain impairments were long-standing because he could not read as a child and into his teenage years, and the failure to learn to read at an early age can cause permanent detrimental effects on the brain. Dr. Armstrong also opined appellant suffers from an unspecified "learning difficulty." *Id.* at 136.

She further testified she has consulted on sixty capital cases, all for the defense, is familiar with the "statute on mitigations scheme in Pennsylvania[,]" and she believed appellant's ***382** unspecified learning disability "would be a very important potential mitigator." *Id.* at 136–37. Specifically, Dr. Armstrong opined the mitigating aspects of appellant's mental condition under the catch-all section (e)(8) were as follows:

> ****224** So having neuropsychological impairments that are severe and significant and low intellectual ability combined together to affect a person in everyday life, because there are many situations that they don't understand the full aspects of and don't remember—and that's important—affects how much they can learn from their experiences, that it affects their ability to understand a consequence of something that they do. They can't reason kind of beyond their experience at the time and it will cause them to make incorrect judgments. They'll also not understand how to interact with authority figures sometimes and because they won't understand kind of the consequences of answering, you know. They just want to please and will just want to give an answer that's either most automatic for them or that they think might be expected. They have a high risk of being misinterpreted by others because they're not understanding and so they're giving answers that may not fit in and they may not be remembering things that you thought that they remembered. And they can be difficult to work with by counsel, certainly, but other people will have difficulty understanding them as well. And so they're often misrepresented in that sense, in that

> sense of not being able to represent themselves clearly. They can be taken advantage of easily by others because of their psychological impairments, and they generally need a very well structured environment and a lot of, you know, well-meaning adult guidance in order to be able to find a stable lifestyle and to live as independently as possible.

Id. at 137–39.

Dr. Crown testified he tested appellant's IQ in March 2009. After noting "[mental] retardation technically begins at below 70," he testified appellant's IQ score of 79 placed him at the eighth percentile of intelligence, meaning 92% of persons have a greater IQ score. N.T. 7/29/14 at 19. He also testified IQ ***383** remains relatively stable throughout life, and appellant's IQ at the time of the crime would have been roughly the same, absent some intervening injury, of which there was no evidence. [15] He testified there is a 95% probability appellant's IQ lies somewhere between 74 and 79, and, in sum opined "this is a gentleman who has a low IQ and it would be classified as borderline. It's not going to move below that 70 marker." *Id.* at 26.

15 Dr. Crown interviewed appellant in January 2013 to determine whether there had been an intervening illness or trauma, and found none.

Dr. Crown testified he has been retained as a consultant in a number of capital cases in which intellectual disability was at issue, is familiar with the *Atkins* and *Hall* cases, and appellant does not have an "intellectual disability" in terms of diagnosis and definition. *See* *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Eighth Amendment to United States Constitution prohibits imposition of the death penalty upon "mentally retarded criminals"); *see also* *Hall v. Florida*, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014) (phrase "mentally retarded" no longer widely used professionally; "intellectual disability" is preferred phrase to describe same constellation of symptoms). He noted he did not conduct any neuropsychological testing of appellant, but reviewed the tests and summaries conducted by the other expert witnesses in this case. He opined those results demonstrated appellant suffers from a "neuropsychological impairment that's likely to have had its origins in the developmental period." N.T. 7/29/14 at 35. He testified the neuropsychological impairment was not the result of a traumatic head injury, but was likely in ****225** the nature of organic brain damage of unknown etiology "related to metabolic changes, possible problems in neonatal development, possible fetal development problems, possible problems with nutrition or food absorption particularly during the first three years of life, possible earaches, possible high fevers during that period, and I'm talking about up to the time that we begin to use language. So it would be pre[-]language." *Id.* at 39. There were no records or tests showing any of the ***384** possible causal circumstances actually existed in appellant's neo-natal and early developmental years, and the testing included no imaging studies of appellant's brain such as CT scans or MRIs.

Dr. Crown explained that a neuropsychological examination is a measure of the functional capacities to perform various tasks, as opposed to an IQ test which relates to cognition, *i.e.*, the ability to process knowledge and information. He testified that neonatal and early organic brain injury, unrelated to traumatic head injury, present early in life and can result in a person having functional strengths and weaknesses. Here, the testing showed appellant demonstrated problems with "reading going back to his days entering the schools in Philadelphia and in the Job Corps. He's reading at the third grade level. But he is relatively good in contrast with mathematical manipulations, operating at the seventh grade level[.]" *Id.* at 40. He opined that appellant's illiteracy as an adolescent raises red flags indicating the need for neuropsychological testing to answer the question "why can't this person read?" *Id.* at 45. Ultimately, Dr. Crown opined that appellant's combination of low IQ affecting cognitive abilities, and his organic brain damage affecting functional abilities, were mitigating circumstances. [16]

16 Specifically, Dr. Crown testified the cognitive deficits of persons with a "low IQ" were mitigating as follows:

> They tend to be more concrete. They tend not to be able to make critical analyses. They have difficulties with what I refer to as language-based critical thinking, those if-then consequential statements that you make to yourself. And

> you have more difficulty in making meaning out of the experience of your environment. You have greater difficulties in, by the very nature of intelligence, thinking rationally and also in dealing purposefully with situations. And that's the nature of intelligence. That's Wechsler's definition of intelligence. So those are the underlying characteristics.

N.T. 7/29/14 at 104. With respect to mitigating aspects of organic brain damage, Dr. Crown testified:

> They ... include things like concentration, attention, memory, self-assessment, the ability to read facial expressions, the ability to modulate the tone of your voice to someone else's voice, the ability to see things in temporal space, the ability to act and associate seeing something with words to explain it and vice-versa, shifts between the right and left hemispheres of the brain, and the ability to modulate and control impulsivity.

Id. at 107.

***385** On cross-examination, Dr. Crown testified he read appellant's Job Corps report from the U.S. Department of Labor indicating appellant completed the brick masonry program, received above average evaluations and completed job assignments with little supervision. He also testified appellant told him he reads the Bible, and Dr. Crown admitted, "his reading has significantly improved, yes." *Id.* at 130.

In rebuttal, Dr. Swirsky–Sacchetti testified he performed a neuropsychological examination (which included a full-scale IQ test) of appellant and reviewed the raw data and results of Dr. Armstrong's neuropsychological examination and Dr. Crown's test of appellant's IQ. Asked to give his professional opinion of Dr. Armstrong's conclusion appellant suffered from ****226** an organic brain injury, he disagreed with that conclusion, testifying there is "nothing to support it both in terms of history and in terms of the test data." N.T. 7/31/14 at 25. He also disagreed with Dr. Armstrong's conclusion the failure to learn to read at an early age has permanent effects on the brain. He agreed preliminary research indicates non-exposure to reading at an early age can result in structural changes in the brain, specifically in an area known as the angular gyrus. However, "in the very articles Dr. Armstrong quoted, she failed to say that those physical or structural changes in the brain can be reversed[.]" *Id.* at 26. Thus, he "disagree[d] with her use of the word permanent" because the research upon which she relied to reach that conclusion does not support it. *Id.* at 27.

Dr. Swirsky–Sacchetti also criticized Dr. Armstrong's failure to conduct a full-scale IQ test at the time she conducted her neuropsychological examination of appellant "as a very dangerous shortcut in a case like this" because the examiner "runs the risk of over-interpreting the weak findings." *Id.* at 27, 28. This risk is because cognitive functionality is related to IQ: in someone with a superior IQ, an examiner would expect to see superior results in areas such as memory, problem solving, motor speed and language, while the expected results in those categories would be diminished in someone with a lower IQ. Dr. Swirsky–Sacchetti testified the full scale IQ test ***386** is "very important to measure any kind of organic brain dysfunction." *Id.* at 29.

Dr. Swirsky–Sacchetti further criticized Dr. Armstrong's administration of a number of the individual components of the neuropsychological test she conducted. For example, he criticized the way she administered the Wisconsin Card Sorting Test, which is designed to measure abstract reasoning and mental flexibility using a deck of 128 cards from which the subject is instructed to deduce patterns or categorical similarities. The test is one in which the examiner would expect better results the longer the test goes on. Dr. Swirsky–Sacchetti criticized Dr. Armstrong for using only 64 cards to conduct the test:

> This is another area where I thought Dr. Armstrong was seriously cutting corners because this is a very complicated test of executive functioning. It's been demonstrated that people who are of lower average intelligence often have difficulty with this test without any brain damage. Normal community-residing adults with lower IQs can fail this test. And what she does is she cuts it in half.

Id. at 46.

Dr. Swirsky–Sacchetti added that Dr. Crown made several scoring errors when computing appellant's IQ at 79, which when corrected, would adjust appellant's IQ to 80. He further testified a subject's best performance is most reflective of true IQ absent

wide variations in results. He testified the change in score from 79 to 80 is "not a big difference" but is notable because it changes appellant's category of intellectual functioning from the borderline range to low average intelligence range. *Id.* at 50. In sum, Dr. Swirsky–Sacchetti testified he disagreed with Dr. Crown's opinion appellant had borderline intelligence and brain damage.

Dr. Swirsky–Sacchetti instead opined appellant has no brain damage. He noted appellant may have some level of dyslexia characterized by trouble with reading, but that condition was unrelated to problems with overall intelligence or brain damage. He further explained there was no indication any alleged ***387** malformation of the angular gyrus, the area of the brain associated with reading and writing, occurred in appellant's early developmental years. Moreover, ****227** he testified appellant's lowest scores in the IQ test he administered were in areas that tested fund of information, knowledge base and vocabulary, all of which correspond very highly with a person's level of education. Thus, in his view, the results were not surprising given appellant's lack of education.

Faced with these opposing expert views, the PCRA court credited Dr. Swirsky–Sacchetti's testimony, noting it was persuasive and supported by the record, while the testimony of Dr. Armstrong and Dr. Crown was not credible. The court determined that had the evidence at the PCRA hearing been presented to the jury during the penalty phase, along with the other mitigation evidence actually offered, "it is not reasonably probable that at least one juror would have found the ([e])(8) catch-all mitigator" applied. PCRA Court Op. at 26. The court further opined, "[a]ssuming arguendo, that one or more jurors would have found the (e)(8) mitigator, ...it is not reasonably probable that at least one juror would have assigned weight to that mitigator equal to, or greater than, the aggravator found by the sentencing jury." *Id.* Thus, the court determined appellant "was not prejudiced by trial counsel's failure to investigate and elicit additional testimony regarding [appellant's] mental health impairments." *Id.* The court therefore dismissed the ineffectiveness claim, concluding no relief was due.

We see no error in the PCRA court's determination. Preliminarily, we note, despite Dr. Armstrong's opinion that appellant may be "intellectually disabled," no claim is made that appellant's sentence of death violates constitutional proscriptions against execution of the intellectually disabled as set forth in *Atkins*, *Hall*, and *Commonwealth v. Miller*, 585 Pa. 144, 888 A.2d 624 (2005). Nor did appellant attempt to establish, through his expert witnesses at the PCRA hearing, he suffers from intellectual disability as those conditions are diagnosed under the standards set forth in the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1992) (DSM–IV) or the American Association of Mental Retardation ***388** (AAMR), now the American Association on Intellectual and Developmental Difficulties (AAIDD). *See Commonwealth v. Vandivner*, 130 A.3d 676, 681 (Pa. 2015) (PCRA petitioner may establish his or her mental retardation under either classification system). Instead, he questions whether the jury would have returned a different penalty verdict if it had heard testimony along the lines of what was produced at the PCRA proceeding.

With respect to appellant's alleged organic brain damage, there was no medical history or other documentation to show any of the possible causal circumstances testified to by Drs. Armstrong and Crown actually existed in appellant's neo-natal and early developmental years; moreover, there were no imaging studies of appellant's brain. There was no evidence appellant had ever complained of or been treated for any brain injury. He had never been diagnosed with brain damage prior to the results of the instant neuropsychological testing. All experts agreed it did not appear appellant ever suffered any traumatic external blow to the head resulting in brain damage. Moreover, the history included reports showing appellant followed work instructions and completed brick-laying projects or assignments satisfactorily. In short, the evidence of a long-standing significant organic brain injury, or any other brain injury, was not substantial. Importantly, Dr. Swirsky–Sacchetti criticized the conclusions of appellant's experts and opined appellant had no brain damage, an opinion the PCRA court ultimately credited.

****228** **[36]** To the extent resolution of this issue depends upon the quality of the competing evidence, this Court is bound by a PCRA court's credibility determinations when there is record support for them. *See Commonwealth v. Williams*, 577 Pa. 473, 846 A.2d 105, 112 (2004). In *Williams*, on appeal from the denial of PCRA relief in a capital case, we determined the appellant's claim of trial counsel's ineffectiveness for failing to present significant mental health mitigation evidence had arguable merit and counsel had no reasonable basis for failing to investigate and present the evidence. Nevertheless, we dismissed the claim

on the basis appellant could not establish *389 prejudice, noting "[i]t is evident from the [PCRA] court's opinion that it made credibility determinations as to the testimony of the mental health experts, and resolved the issue against [a]ppellant." *Id.* at 113.

The situation here is similar to *Williams* in that the PCRA court made credibility determinations regarding the testimony of the expert witnesses, which are supported by the record (particularly insofar as the Commonwealth's expert explained his reasons for disagreeing with appellant's experts). Moreover, the existence of a mitigating mental health condition (organic brain damage) was somewhat speculative here; even its expert proponents admitted its existence was inferential.

Of course, we recognize appellant would have presented his mental health expert evidence to a jury, notwithstanding its strength or issues of credibility, leaving the question for the jury. Nevertheless, in the collateral attack scenario, where a *Strickland* assessment of prejudice is at issue, the PCRA court's credibility findings are consequential, as *Williams* recognized. For purposes of assessing *Strickland* prejudice here, the question is whether appellant has shown a reasonable probability, had the mitigation evidence adduced at the PCRA hearing also been presented at the penalty phase, the outcome of the proceedings would have been different because at least one juror would have found the catch-all mitigating circumstance and would have proceeded to conclude it outweighed, or was as weighty as, the aggravating circumstance, so as to convince a juror to find the overall quality of the case in mitigation warranted a sentence of life in prison. *See Daniels*, 104 A.3d at 303–04. The PCRA court, which heard the new case in mitigation, and had the trial record before it, answered this question in the negative based in part on an assessment of the credibility and strength of appellant's new evidence. The court's assessment of prejudice is supported by the record.

Accordingly, while the record shows that trial counsel's performance in failing to investigate and present mental health evidence was deficient, appellant's layered claims of counsel's ineffectiveness were properly dismissed by the *390 PCRA court on *Strickland*/*Pierce* analysis grounds, in that it is not reasonably probable the outcome of the penalty proceeding would have been different had the contradictory expert evidence been presented to the jury.

VIII. Aggravating circumstance

[37] Appellant asserts the Commonwealth did not prove the single aggravating circumstance—42 Pa.C.S. § 9711(d)(6) (killing committed during perpetration of felony)—beyond a reasonable doubt because it did not present sufficient evidence to show he was the shooter. Appellant argues the Commonwealth proceeded on a theory of accomplice liability and the trial evidence "left open the real possibility that [a]ppellant was at most an accomplice rather than the actual killer, and consequently, that the (d)(6) aggravating circumstance was invalid." Appellant cites **229 *Commonwealth v. Lassiter*, 554 Pa. 586, 722 A.2d 657, 662 (1998) (Opinion Announcing Judgment of Court (OAJC), for the proposition that, "Section 9711(d)(6) may not be applied to an accomplice." Appellant's Brief at 63. [17] Appellant claims trial counsel was ineffective for failing to challenge application of the aggravating circumstance on this basis and appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness.

17 Although the lead opinion in *Lassiter* was a plurality, with a fourth Justice concurring in the result, the three-Justice dissenting opinion by then-Justice, now-Chief Justice Saylor, agreed a prosecution for murder based on accomplice liability cannot support the (d)(6) aggravating circumstance. *Lassiter*, 722 A.2d at 664 (Saylor, J., concurring, joined by Flaherty, C.J., and Zappala, J.). The issue presented itself in *Lassiter* in a non-capital guise: Lassiter waived her right to a jury trial in exchange for the Commonwealth's promise not to seek the death penalty; she was convicted of second-degree murder and her life sentence was affirmed on direct appeal; and she later claimed on PCRA review that trial counsel was ineffective because the Commonwealth's promise not to pursue the death penalty was illusory

consideration given the strong argument that the aggravator did not apply to accomplices. The *Lassiter* Court agreed on the scope of the aggravator, with the division on the Court centering on the question of prejudice.

The Commonwealth responds *Lassiter* was decided four years after appellant's trial and this Court has held counsel cannot be deemed ineffective for failing to anticipate *Lassiter's* holding. Appellee's Brief at 68–69 (citing cases). Moreover, the ***391** Commonwealth maintains *Lassiter* "would have been inapplicable in any event because [appellant] was tried and sentenced as the principal killer, not as an accomplice." *Id.* at 68. The PCRA court echoes the Commonwealth's response and adds that, on direct appeal, this Court determined the evidence was sufficient to prove appellant killed the victim.

[38] *Lassiter* makes clear the pertinent aggravating circumstance applies only to principals, not accomplices. The Commonwealth is correct that this Court has repeatedly held counsel cannot be deemed ineffective for not anticipating *Lassiter*. *See, e.g.*, *Commonwealth v. Cox*, 603 Pa. 223, 983 A.2d 666, 702 (2009); *Com. v. Spotz*, 587 Pa. 1, 896 A.2d 1191, 1238 (2006) (same). Moreover, the evidence at trial, including appellant's statements to Buigi admitting he shot and killed LaCourt during a robbery, was sufficient to support application of this aggravating circumstance, and so prior counsel cannot be faulted for failing to challenge it on this theory. There was no error in the PCRA court's dismissal of appellant's layered claim of counsel's ineffectiveness.

IX. Joint penalty proceedings

[39] Appellant claims he was denied an individualized sentencing determination because his penalty phase proceeding was joined with that of his codefendant, and the joint proceeding "injected irrelevant, non-statutory aggravation into the case in violation of [a]ppellant's rights to due process and a fair sentencing proceeding." Appellant's Brief at 68. Appellant correctly notes codefendant presented evidence of four mitigating circumstances while appellant presented only two. [18] Appellant argues this difference allowed the jury to compare and decide the penalty based on which defendant presented more mitigation evidence. He then claims this circumstance helped to lessen the impact of appellant's ****230** presentation because codefendant had no criminal record, while appellant had numerous ***392** arrests and convictions; codefendant was seventeen-years-old at the time of the murder while appellant was twenty-years-old; codefendant's evidence at trial, if believed, tended to show his participation in the killing was relatively minor; and codefendant presented a greater number of character witnesses.

18 Codefendant presented evidence of the following statutory mitigating circumstances under Section 9711: (e)(1) (no significant history of prior criminal convictions); (e)(4) (age at the time of the crime); (e)(7) (participation in homicidal act was relatively minor); and (e)(8) (catch-all).

Appellant also argues "the penalty phase defenses" of appellant and codefendant "were irreconcilable and antagonistic" based on codefendant's claimed applicability of the (e)(7) mitigating circumstance that his participation was relatively minor. *Id.* at 69. Appellant posits, "The jury was implicitly told that [appellant's] role [in the murder] was major. This constituted non-statutory aggravation." *Id.* Appellant then speculates the jury simply "ranked" appellant and codefendant rather than making individualized determinations as to penalty. *Id.* at 71. Appellant claims trial counsel was ineffective for failing to develop this line of argument and to seek severance of the penalty proceedings; he then states appellate counsel likewise should have developed the theory and alleged trial counsel was ineffective on this ground.

The Commonwealth responds the layered claim does not warrant PCRA relief because appellant did not develop legal argument to support the claim; did not proffer evidence to overcome the presumption of reasonable performance; the joinder of proceedings was statutorily required and constitutionally permissible; and appellant was not prejudiced by the joint hearing. The PCRA court noted "Pennsylvania's death penalty statute requires that the same jury which rendered the verdict as to guilt

is to determine the penalty." PCRA Court Op. at 32, *citing* 42 Pa.C.S. § 9711(a)(1). The court further noted this Court has held a defendant's constitutional right to individualized sentencing does not require separate penalty hearings. *Id.*, *citing* *Commonwealth v. Bond*, 604 Pa. 1, 985 A.2d 810, 824 (2009). The court consequently determined the layered ineffectiveness claim lacked arguable merit.

Again we discern no reversible error. First, the statutory provision cited by the trial court provides, "After a verdict of murder of the first degree is recorded and **before the jury is** ***393** **discharged**, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa.C.S. § 9711(a)(1) (emphasis added). Neither appellant nor codefendant sought severance as to the guilt phase portion of the trial, and the jury convicted them both of first-degree murder. Thus, before the jury was discharged, it was obligated under the statute to determine the penalty for both defendants. The same jury would necessarily be required to hear the mitigating evidence for both, regardless of whether the penalty proceedings were conducted separately or as one.

[40] Of course, counsel could have sought severance of the entire trial, posing the current argument in support. But there are recognized countervailing reasons why related cases, and related defendants, are tried together. Such decisions on severance are generally within the discretion of the trial court. *See* *Commonwealth v. Travers*, 564 Pa. 362, 768 A.2d 845, 846 (2001); *Commonwealth v. Lopez*, 559 Pa. 131, 739 A.2d 485, 501 (1999). Notably, appellant does not account for these cases. Given this reality, it is difficult to fault trial counsel for not formulating the argument present counsel has now mustered.

Moreover, this Court has recently reiterated there is no constitutional right to a ****231** separate sentencing hearing, so long as each defendant receives an individualized sentence and the jury is free to consider the mitigation evidence. *Daniels*, 104 A.3d at 317. [19] Additionally, in holding there is no constitutional right to individualized sentencing proceedings, this Court has rejected virtually the same claims forwarded here. *See* *Commonwealth v. Simpson,* 620 Pa. 60, 66 A.3d 253, 275 n.27 (2013) (rejecting claim of prejudice in joint penalty proceeding where evidence allegedly cast codefendant in more sympathetic light given codefendant's pursuit of greater number of mitigating circumstances). Here, despite appellant's assertions ***394** and speculations to the contrary, the jury was free to consider the relevant mitigating evidence for each defendant and to make individualized penalty determinations for both based on the merits. Moreover, juries are presumed to follow a court's instructions. *Commonwealth v. Poplawski*, 130 A.3d 697, 717 (Pa. 2015). In relevant part, the trial court instructed this jury as follows:

> I need not tell you again that although these defendants are being tried at the same time, they are here on the penalty phase the same as they were in the guilt or innocence phase, and that is separately. You are to consider the evidence against each one separately and apply the law to each one separately.

N.T. 3/11/94 at 88. Accordingly, the PCRA court did not err in dismissing this layered claim of counsel's ineffectiveness.

19 Appellant does not suggest the United States Supreme Court has ever recognized a due process right to separate sentencing proceedings for capital codefendants. It would be unusual to devise such a new constitutional rule through the guise of finding counsel ineffective.

X. *Simmons* claim

[41] During the penalty phase, defense counsel argued to the jury "life imprisonment is [an] onerous punishment in and of itself," N.T. 3/13/94 at 77, but counsel did not ask the court to instruct the jury that life imprisonment in Pennsylvania means a life term without possibility of parole. Appellant claims trial counsel was ineffective for failing to seek such an instruction, and appellate counsel was ineffective for failing to raise a claim of trial counsel's ineffectiveness, because the prosecutor, during closing argument, put appellant's future dangerousness at issue.

The Commonwealth and the PCRA court respond the seminal case in this domain, *Simmons v. South Carolina*, 512 U.S. 154, 161–62, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality), which held defendants are entitled, in appropriate circumstances, to an instruction explaining life imprisonment means life without parole, was not decided until after appellant's trial. Moreover, under Pennsylvania law at the time of appellant's trial, a jury was expressly prohibited from being informed that life meant life without parole. *See Commonwealth v. Travaglia*, 792 A.2d 1261, 1265 (Pa. Super. 2002) (explaining prior to United States Supreme Court's decision in *Simmons*, the law ***395** in Pennsylvania expressly prohibited juries from being informed life meant life without parole), *citing Commonwealth v. Thompson,* 559 Pa. 229, 739 A.2d 1023, 1032 (1999).

Nevertheless, appellant argues *Simmons* had been argued before the High Court by the time of his trial, a decision was pending in the case, and he claims "reasonably competent counsel should have requested the instruction, in an abundance of caution, to protect his client's interests[.]" Appellant's Brief at 75. We disagree that counsel can be so faulted. Indeed, this Court has repeatedly held trial counsel cannot be deemed ineffective for ****232** failing to anticipate *Simmons* would change the law in this Commonwealth. *Thompson*, 739 A.2d at 1032 (collecting cases) (rejecting argument counsel should have anticipated *Simmons* decision based on High Court's grant of *certiorari* in that case prior to start of Thompson's trial). Accordingly, the PCRA court did not err in denying relief on this layered ineffectiveness claim.

XI. Vienna Convention

[42] Appellant is a citizen of Trinidad and Tobago, and argues pursuant to Article 36 of the Vienna Convention on Consular Relations (Vienna Convention),[20] the United States and the Commonwealth of Pennsylvania were required to inform him he had an absolute right to contact the Trinidadian embassy regarding his arrest, detention, conviction and condemnation. Appellant's Brief at 75–76. He claims, had he been properly informed, "the consulate could have provided substantial assistance" to "ensur[e] that he received a fair trial and avoided the death penalty." *Id.* at 76. He speculates "consular officials would have provided [him] with legal and financial assistance for investigation and mitigation development and presentation of relevant mitigating evidence about his background in Trinidad." *Id.* at 76–77. Appellant then claims prior counsel were ineffective for failing to raise this claim. He makes no developed presentation as to why his ***396** layered ineffectiveness claim has arguable merit, but asserts counsel could have had no reasonable basis for failing to assert his rights under the Vienna Convention and he maintains he was prejudiced.

20 The Vienna Convention, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No 6820, was ratified by the United States upon the advice and consent of the Senate in 1969. *See Medellin v. Texas*, 552 U.S. 491, 499, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008).

The Commonwealth responds the underlying claim lacks merit because the Vienna Convention, and federal case law interpreting it, does not confer individually enforceable rights or provide a judicial remedy for its violation. *See* Vienna Convention (Preamble) (purpose of Vienna Convention "is not to benefit individuals" but "to contribute to the development of friendly relations among nations"); *Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005) ("Vienna Convention does not confer individually enforceable rights"); *United States v. Ademaj*, 170 F.3d 58, 67 (1st Cir. 1999) (Vienna Convention itself

prescribes no judicial remedy or other recourse for its violation). *Cf.* *Sanchez–Llamas v. Oregon*, 548 U.S. 331, 337, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) (High Court declined to decide whether Vienna Convention grants enforceable rights to individuals).

The PCRA court determined because appellant could have raised the underlying claim at trial or on direct appeal, but did not, it is waived, as is his claim of trial counsel's ineffectiveness. The court concluded the claim of appellate counsel's ineffectiveness was not properly layered, and is meritless in any event.

In *Sanchez–Llamas*, the United States Supreme Court consolidated and decided two cases concerning the availability of judicial relief for violations of the Vienna Convention. Both defendants were foreign nationals who were arrested for serious crimes, but were not informed they could request the consulates of their home countries be notified of their detentions. The High Court began by noting Article 36 of the Vienna Convention "addresses communication between an individual and his consular officers when the individual is detained by authorities in a foreign country." *Id.* While declining to decide whether Article 36 conferred enforceable individual ****233** rights, the High Court stated "Article 36 does not guarantee defendants **any** assistance at all. The provision secures only a ***397** right of foreign nationals to have their consulate **informed** of their arrest or detention—not to have their consulate intervene[.]" *Id.* at 349, 126 S.Ct. 2669 (emphasis in original).

In the first *Sanchez–Llamas* case, among other things, the High Court determined Act 36 did not require suppression of evidence because the defendant had not been informed of the right to notify his consulate. *Id.* at 350, 126 S.Ct. 2669. In the second case, a state court had dismissed the defendant's Article 36 claim because he failed to raise the claim at trial or on direct appeal and thus he was barred, pursuant to state procedural rules, from raising it on collateral review. *Id.* The High Court held claims under Article 36 can be subject to state procedural default rules. *Id.* at 358–60, 126 S.Ct. 2669.

In *Commonwealth v. Padilla*, 622 Pa. 449, 80 A.3d 1238 (2013), this Court applied the holdings of *Llamas–Sanchez* in a direct capital appeal. We declined the appellant's invitation there to "fashion an appropriate remedy" for alleged violations of Act 36, determined there was no support for his expansive interpretation of the Vienna Convention, and dismissed his claims of trial court error, in part because "his view is supported neither by the text of the treaty nor the United States Supreme Court." *Padilla,* 80 A.3d at 1262, *citing* *Sanchez–Llamas*, 548 U.S. at 349, 126 S.Ct. 2669.

In light of the actual terms of the Convention, and this case law, counsel can hardly be faulted in the early 1990s for failing to forward the claim appellant has devised here. There remains no factual or legal support for this layered claim of counsel's ineffectiveness.

XII. Overarching Ineffective Assistance

[43] In his amended PCRA petition, appellant included the following claim for relief:

> To the extent that trial/appellate counsel failed to raise and reasonably litigate the issues described throughout this Petition, counsel was ineffective in violation of the Sixth and Fourteenth Amendments, and the corresponding provisions of the Pennsylvania Constitution. Petitioner has layered each of his ineffectiveness claims, where appropriate, to ***398** include both trial and appellate counsel. Petitioner requests a hearing with respect to each claim and asserts that he can prove each issue has arguable merit,

> that counsel had no reasonable basis for his actions or inactions and that Petitioner was prejudiced by counsel's deficient performance.

Appellant's Amended PCRA Petition at 56.

The PCRA court denied this claim (and all others except the claim regarding mental health mitigating evidence) without a hearing. In appellant's Rule 1925(b) statement of matters complained of on appeal, he set forth the following claim of error: "[t]rial and appellate counsel were ineffective for failing to raise the issues presented in the PCRA petition at trial, and in post-trial motions and for failing to litigate these issues on direct appeal to the Pennsylvania Supreme Court." Concise Statement of Matters Complained of on Appeal at 3. In its responsive Rule 1925(a) opinion, the court noted appellant "fails to specify the claims to which he is referring and whether they are in any manner different from the other claims asserted in his Statement of Errors." PCRA Court Op. at 33. The court concluded the claim was too vague to permit a response and deemed it waived. *Id.*

****234** Appellant now argues he "was not obliged to describe in detail his claims of ineffectiveness in a 1925(b) statement[,]" citing the Rule itself for the proposition the statement must be concise. Appellant's Brief at 78. Aside from alleging the concise nature of his statement "cannot be held against [him]" appellant again provides no clarification regarding the substance of his claim, and significantly, he does not identify or articulate any focused claim of error or ineffectiveness apart from the "concise" claims already raised. Accordingly, to the extent appellant's claim fails to contain developed argument or citation to supporting authorities and the record, it is waived. *See Commonwealth v. Perez*, 625 Pa. 601, 93 A.3d 829, 838 (2014). In any event, the **specific** claims of error and ineffectiveness raised in appellant's appeal have been addressed above and rejected.

*399 XIII. Cumulative Prejudice

Finally, appellant contends, even if this Court finds he is not entitled to relief on any particular claim, he is nevertheless entitled to relief because the cumulative effect of those errors denied him a fair trial, fair sentencing proceeding, and the heightened procedural safeguards in capital cases. He notes the PCRA court rejected one of his guilt phase claims and one of his penalty phase claims on the ground he failed to show resulting prejudice.

While this Court has emphasized that "no number of failed claims may collectively warrant relief i[f] they fail to do so individually," *Commonwealth v. Sepulveda*, 618 Pa. 262, 55 A.3d 1108, 1150 (2012), *quoting* *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 245 (2007), we have also recognized that "if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation." *Sepulveda*, 55 A.3d at 1150, *quoting* *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 532 (2009). To the extent we have adverted to prejudice principles in disposing of appellant's cognizable claims of trial or appellate counsel's ineffectiveness, we are satisfied that, even if cumulated, appellant is entitled to no relief.

Conclusion

For the foregoing reasons, we hold the PCRA court properly dismissed appellant's petition for PCRA relief following a hearing limited to one issue. Accordingly, we affirm the order denying relief.

Justices Baer and Mundy join the opinion in full. Justices Todd and Wecht join the opinion, except with respect to the reasoning contained in Part VI.

Justice Todd files a concurring opinion in which Justice Wecht joins.

Chief Justice Saylor files a dissenting opinion in which Justice Donohue joins.

JUSTICE TODD, concurring

***400** I join the Majority Opinion except for its analysis of Issue VI, and specifically its treatment of Appellant's claim that prior counsel were ineffective for failing to challenge the admission of evidence of Appellant's involvement in the murder of Tanesha Robinson and two others as violative of his rights to due process. [1] The majority finds this issue to have been previously litigated, see Majority Opinion at 218–20; however, I cannot join its analysis in this regard.

1 I join the majority's rejection of Appellant's related claim under the Eighth Amendment.

On direct appeal, Appellant raised two related issues regarding this evidence: he asserted that it should not have been admitted because it was more prejudicial than probative under Pa.R.E. 403, and ****235** because there was an insufficient nexus offered connecting him to the murders because the only such evidence was the allegedly suspect testimony of his cellmate, James Buigi. Brief for Appellant in Commonwealth v. Hannibal, 562 Pa. 132, 753 A.2d 1265 (2000), at 29–33, *available at* 1997 WL 33544659. In his present appeal, Appellant asserts that introduction of evidence of these other crimes violated his due process rights because of the unreliable and incredible nature of Buigi's testimony.

The majority mistakenly dismisses this claim as previously litigated, in my view. As the majority notes, one of the underlying claims Appellant *raised* on direct appeal—that Buigi's incredible testimony could not properly serve to link him to the prior murders—is essentially the same as the one he now raises, implicating a previously litigated assessment. I emphasize *raised*, however, because, while Appellant raised this issue (along with the Rule 403 prejudice-probative claim) on direct appeal, in my view, Chief Justice Saylor is quite correct in observing that, in that appeal, this Court utterly misapprehended the issue and related record. See Dissenting Opinion (Saylor, C.J.) at 236–37. As a result, and contrary to the majority, I would conclude that, while the issue was raised, we did not address it, and thus it ***401** cannot be deemed to have been "previously litigated." [2] See 42 Pa.C.S. § 9544(a) ("For purposes of this subchapter, an issue has been previously litigated if ... (2) the highest appellate court in which the petitioner could have had review as a matter of right *has ruled on the merits of the issue.*" (emphasis added)); see also Commonwealth v. Jones, 932 A.2d 179, 182 (Pa. Super. 2007) (claim rejected on direct appeal as insufficiently developed was not "previously litigated" under Post Conviction Relief Act). Thus, I would proceed to review his due process claim.

2 I cannot join Chief Justice Saylor's merits analysis, which would grant relief regarding Appellant's ineffectiveness claim, also raised on direct appeal, that the other crimes evidence should not have been admitted because it was more prejudicial than probative under Pa.R.E. 403. In his present appeal, Appellant does not raise Rule 403 as a basis for relief, and thus, in my view, we may not reach it.

Here, Appellant argues that Buigi's testimony—the sole evidence linking Appellant to the triple murders—was unreliable because Buigi had lied when he testified he was a cellmate of Appellant, and because he was acting as a government agent. [3] Appellant contends that Buigi's testimony was so unreliable and speculative that its admission (and thus the admission of evidence linking him to the triple murders) was a denial of due process. I cannot agree.

3 Contrary to the Commonwealth's claims, see Commonwealth's Brief at 19–20, Appellant did raise this claim in his PCRA petition. See Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post–Conviction Relief Under the Post–Conviction Relief Act, 9/7/05, at ¶ 67.

The admission of evidence violates due process only where "the introduction of this type of evidence is so extremely unfair that its admission violates 'fundamental conceptions of justice.' " Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (quoting United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)).

Further, with respect to challenges to veracity, as the Commonwealth notes, the United States Supreme Court has specifically rejected the notion that the admission of testimony from a government's witness with substantial reason to lie was a violation of due process. See **236 Hoffa v. United States, 385 U.S. 293, 311, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Rather, allegedly *402 incredible testimony must be tested by the tool of cross-examination. Id. Accordingly, while I am sympathetic to the view that evidence of this triple murder may have been inadmissible on other grounds for the reasons Chief Justice Saylor expresses in his Dissenting Opinion, on the narrow basis Appellant now offers—that it was improperly founded on the testimony of his purported cellmate in violation of due process—I cannot conclude that such admission violated Appellant's right to a fair trial. Accordingly, on this alternative basis, I concur in the result reached by the majority on this issue.

Justice Wecht joins this concurring opinion.

CHIEF JUSTICE SAYLOR, dissenting

I agree with Appellant's position that errors and attorney derelictions occurred in connection with the admission of evidence, at his trial, of a triple murder for which Appellant was never charged or tried. Although the majority finds the relevant claim to have been previously litigated, *see* Majority Opinion at 219–20, it is significant, from my point of view, that this Court has never addressed the main contention that Appellant sought to raise on direct appeal. [1]

1 I note that, although my name is listed as within the Court complement in published versions of the direct-appeal disposition, I did not participate in the decision, since I was ineligible to vote given that the case was argued prior to my tenure on the Supreme Court. For this reason, my name is not included in the voting summary set forth at the conclusion of the opinion. *See* *Commonwealth v. Hannibal*, 562 Pa. 132, 146, 753 A.2d 1265, 1272–73 (2000) (Opinion Announcing the Judgment of the Court).

At the direct appeal stage, Appellant presented a substantially developed argument that his trial counsel was ineffective in failing to assert that the prejudicial impact of evidence of the collateral triple murder greatly outweighed its probative value. [2] *See* Brief for Appellant in *Hannibal*, 562 Pa. 132, 753 A.2d 1265, 1997 WL 33544659, at *29–33. In addressing this *403 claim, however, this Court's lead opinion relegated the treatment, along with the disposition of numerous of other claims, to a superficial and conglomerated footnote. *See* *Hannibal*, 562 Pa. at 144 n.11, 753 A.2d at 1272 n.11. For example, the lead opinion mischaracterized the claim that Appellant was attempting to raise as involving only the murder of a single individual, *see* *id.* (indicating that "[Appellant] claims that his trial was unfair because evidence of the murder of Tanesha Robinson, a witness, was admitted into evidence[.]"), whereas, the claim encompassed the admission of evidence of a collateral *triple* murder. *See, e.g.*, Brief for Appellant in *Hannibal*, 562 Pa. 132, 753 A.2d 1265, 1997 WL 33544659, at *29 ("[T]he prosecution deliberately, meticulously and relentlessly infected the trial of the murder of Mr. LaCort with another, shadow trial concerning the uncharged but particularly inflammatory crime, the murder of Tanesha Robinson *and her two young companions*, in the presence of a six month old baby." (emphasis added)).

2 *See, e.g.*, *Commonwealth v. Newman*, 528 Pa. 393, 399, 598 A.2d 275, 278 (1991); *accord* Pa.R.E. 404(b)(2) (explaining that evidence of other bad acts is admissible, in a criminal case, "only if the probative value of the evidence outweighs its potential for unfair prejudice").

The lead opinion also treated Appellant's claim as entailing an assertion that trial counsel failed to object to the admission of such evidence, when, in point of fact, Appellant's brief had related that **237 counsel repeatedly objected and moved for a mistrial. *See id.* at *32–33 ("[T]rial counsel made a number of objections and an initial motion for mistrial with respect to this evidence and the lack of notice given."). Finally, and most significantly, the lead opinion wholly overlooked the actual point of Appellant's argument, *i.e.*, the contention that trial counsel's stewardship was deficient in his failure to trigger the essential

balancing inquiry concerning probative value versus prejudicial impact. *Compare* *Hannibal*, 562 Pa. at 144 n.11, 753 A.2d at 1272 n.11 ("[T]here was no basis to object to the evidence because it was admissible to show [Appellant's] consciousness of guilt."), *with* Brief for Appellant in *Hannibal*, 562 Pa. 132, 753 A.2d 1265, 1997 WL 33544659, at *29–30 ("It is a fundamental principle of law in this Commonwealth that *even relevant evidence* must at times be excluded if the potential for prejudice exceeds the probative value of the evidence." (emphasis in original)). [3]

3 The lead opinion additionally criticized Appellant's brief on direct appeal for failing to set forth the three-part test governing claims of deficient attorney stewardship. *See* *Hannibal*, 562 Pa. at 144 n.11, 753 A.2d at 1272 n.11. However, Appellant's brief had substantively covered all three facets of the test, in that he straightforwardly asserted that trial counsel committed a material dereliction by failing to advance the balancing inquiry; that the lawyer had "no possible strategic reason" for failing to do so; and that material prejudice ensued. Brief for Appellant in *Hannibal*, 562 Pa. 132, 753 A.2d 1265, 1997 WL 33544659, at *32–33.
To the extent that the lead opinion's truncated disposition was based on Appellant's failure to include mere boilerplate, I do not regard this as a fair approach to claims resolution. Moreover, to the degree that the Court requires boilerplate, counsel on direct appeal should be deemed ineffective for failing to set it forth.
Parenthetically, I note that this Court is suffering pointed criticisms from the federal courts pertaining to other instances of superficial treatment of claims for relief in the capital litigation arena. *See, e.g.*, *Dennis v. Secretary, Pa. DOC*, 834 F.3d 263, 285 (3d Cir. 2016) ("[T]he Pennsylvania Supreme Court's decisions ... rested on unreasonable conclusions of fact and unreasonable applications of clearly established law[.]"); *id.* at 346 (Jordan, J., concurring) (characterizing the relevant disposition by this Court as a three-sentence "drive-by discussion," reflecting a "lack of analytical rigor and attention to detail [that is] painful to contemplate" and which is "so obviously wrong" that "any fairminded jurist must disagree"); *Miller v. Beard*, 214 F.Supp.3d 304, 338–40, 2016 WL 5848728, at *21–22 (E.D. Pa. 2016) (highlighting the paucity in the treatment by the Court of a claim for relief asserted by a capital appellant on direct appellate review; observing that the Court's review proceeded "without any basis or substantial reference to the trial or PCRA court record"; and concluding that that such review manifested "an unreasonable application of clearly established federal law").

***404** In the circumstances—where lapses in judicial review have occurred and the fault rather plainly lies with this Court—I believe that we should presently review the claim which Appellant has been attempting to raise for more than fifteen years without interposing additional hurdles. Notably, in this regard, the majority finds no material difference between the claim asserted on direct appeal and the one that Appellant advances at present. *See* Majority Opinion at 219–20. Furthermore, I find a fundamental inconsistency in the majority's simultaneous assertion that a claim is previously litigated on the ground that it is *the same claim* disposed on direct appeal, *see id.*, but that the newly-asserted claim must ***405** also be regarded as *a different claim*, when confronted with the question of whether the Court should remedy its own patent failure to fairly address it in the first instance. *Compare* Majority Opinion at 219 (indicating that "Appellant has failed to articulate any material difference ****238** between the instant claim of a due process violation resulting in an unfair trial and the substantive claim raised and rejected on direct appeal."), *with id.* at 32 n.14 (asserting that, in his present brief, appellant presently "has not raised" the claim asserted on direct appeal). [4]

4 This Court has obviously had difficulty with a fair and just application of the previous litigation doctrine, which too frequently has been administered in a rote fashion, rather than with evaluative judgment. *See, e.g.*, *Commonwealth v. Collins*, 585 Pa. 45, 56–58, 888 A.2d 564, 570–71 (2005) (discussing such lapses in the context of permutations of the previous litigation doctrine deemed to encompass claims of ineffective assistance of counsel asserted at the post-conviction stage). From my point of view, application of the doctrine should be better grounded in fundamental fairness. Notably, had Appellant's present brief straightforwardly asserted the claim raised on direct appeal, this would have invited a dismissive application of the previous litigation doctrine. Nevertheless, viewed substantively and without

> compartmentalization, Appellant's present arguments encompass precisely the same concerns as were raised on direct appeal about low probative value, *see, e.g.*, Brief for Appellant at 20 (discussing the "unreliability and incredulity" of the source of the evidence that Appellant had been involved in the triple murder), and high prejudicial effect, *see, e.g.*, *id.* at 16 (explaining that "the prosecutor was permitted to introduce evidence and argument of the execution style killing of three young women" and "that an infant was abandoned at the scene"); *id.* at 24 ("Courts have long recognized the prejudicial effect of allegations that a defendant committed other criminal acts."). It is also significant, from my point of view, that application of our state evidentiary rules requiring a balancing of probative value and prejudice (the overlay of the direct appeal) serves to protect defendants' due process right to a fair trial (which is the theme of the present post-conviction presentation). *Accord* *United States v. Enjady*, 134 F.3d 1427, 1432–33 (10th Cir. 1998).

The Commonwealth's contention that Appellant was involved in the collateral triple murder rested largely on the testimony of jailhouse informant James Buigi. This, in my view, lessens its probative value substantially. [5] Moreover, given ***406** that the Commonwealth had the use of admissible testimony from two eyewitnesses who placed Appellant at the crime scene in the role of an armed aggressor at the time of the killing for which Appellant was on trial, as well as Buigi's testimony to Appellant's confession to having perpetrated this killing, I question the necessity for the Commonwealth to adduce highly prejudicial other-bad-acts evidence to demonstrate a consciousness of guilt.

5 Although the courts generally have allowed the prosecution's use of jailhouse informants in criminal cases, it is an attenuation to authorize the admission of evidence of collateral, uncharged crimes based on such evidence. In this regard, my thoughts are in line with those jurisdictions regarding this strain of evidence as being inherently suspect. *See, e.g.*, *State v. Marshall*, 882 N.W.2d 68, 81–83 (Iowa 2016) (explaining that "[t]he problem of proof, along with questions of reliability, have given rise to requiring some corroboration of jailhouse informant testimony to support a conviction in at least eighteen states").

In terms of prejudicial impact, it would be difficult to overstate the inherent inflammatory power of evidence of the killing of a fifteen-year-old girl and two young women in the presence of a baby. *Cf. Commonwealth v. Robinson*, 623 Pa. 345, 375, 82 A.3d 998, 1016 (2013) (commenting on the impact of multiple murders upon lay jurors in capital sentencing). Indeed, one cannot review the present record without apprehending the degree to which the collateral triple murder pervaded the guilt and penalty phases of trial. For example, the prosecutor overtly (and, in my view, improperly) capitalized on this effect, including in his closing argument to the jury at the penalty stage, as follows:

> And there are three young women, teenagers. They all have families who come ****239** here and cry; mothers, fathers, sisters, brothers. They would cry an ocean along with the [victim's] family. You would have tears filling this room. But none of those tears affect those two. All of the tears in the world don't put a dent in those cold, feelingless hearts.
>
> That snitch-ass bitch got to die. The others in the room. They all die. It's got to be done in front of a little crying baby. There is someone crying, a baby crying while his mother is executed[,] while the gun is placed against her head so it doesn't make too much noise and her brains are blown out. The little baby is crying. But that doesn't put a dent in those cold hearts. But they want mercy. They don't deserve it.
>
> ***407** Ladies and Gentlemen, any person, or persons, who can do these terrible things so long as they breathe the same air that you and I breathe are a danger to us all.

N.T., Mar. 11, 1994, at 68–69.

In summary, in my considered judgment trial counsel was ineffective for failing to pursue a determination by the trial court that the probative value of the evidence of the collateral triple murder was substantially outweighed by the inflammatory impact.

Accordingly, I would award a new trial and respectfully dissent.

Justice Donohue joins this dissenting opinion.

All Citations

638 Pa. 336, 156 A.3d 197

KeyCite Yellow Flag - Negative Treatment
Distinguished by Everett v. Beard, 3rd Cir.(Pa.), May 2, 2002

562 Pa. 132
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,
v.
Sheldon HANNIBAL, Appellant.

Argued Oct. 20, 1997.
|
Decided June 20, 2000.
|
Reargument Denied Sept. 1, 2000.

Synopsis
Defendant was convicted in a jury trial in the Court of Common Pleas, Philadelphia County, Criminal Division, Nos. 93-04-2835 through 93-04-2839, Eugene Clarke, Jr., J., of first-degree murder arising from killing during a robbery, and was sentenced to death. Defendant appealed. The Supreme Court, No. 81 Capital Appeal Docket, Flaherty, C.J., held that: (1) evidence was sufficient to support conviction; (2) instruction did not impermissibly allow first-degree murder conviction without a finding of specific intent on defendant's part; (3) death sentence was appropriate sentence; and (4) counsel rendered effective assistance of counsel.

Affirmed.

Castille, J., concurred and filed opinion.

Nigro, J., concurred in result and filed opinion.

Cappy, J., dissented and filed opinion in which Zappala, J., joined.

West Headnotes (17)

[1] **Homicide** Predicate offenses or conduct

Defendant's conviction for first-degree murder was supported by evidence that defendant beat and shot victim and robbed him of gold chain, that two female witnesses fled beating, and that one witness and two of her companions were later killed pursuant to apparent plot to prevent witness's testimony. 18 Pa.C.S.A. § 2502(a).

2 Cases that cite this headnote

[2] **Criminal Law** Construction and Effect of Charge as a Whole

When evaluating jury instruction, court must read instruction as a whole to determine whether it was fair or prejudicial.

2 Cases that cite this headnote

[3] **Criminal Law** Form and Language in General

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 jury for its consideration.

4 Cases that cite this headnote

[4] **Criminal Law** Instructions in general

Supreme Court will not rigidly inspect jury instruction, finding reversible error for every technical inaccuracy; rather, Court will evaluate whether instruction sufficiently and accurately apprises a lay jury of law it must consider in rendering its decision.

3 Cases that cite this headnote

[5] **Homicide** Intent or mens rea; malice

Before conviction for first-degree murder can be sustained, it must be shown that defendant possessed a fully formed intent to take a life. 18 Pa.C.S.A. § 2502(a).

[6] **Homicide** Intent or Mens Rea

First-degree murder instruction containing phrase that "the defendant, his accomplice or co-conspirator did so with the specific intent to kill and with malice" did not impermissibly allow jury to find defendant guilty of first-degree murder without a finding that defendant himself possessed requisite specific intent to kill. 18 Pa.C.S.A. § 2502(a).

12 Cases that cite this headnote

[7] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

Death sentence was appropriate sentence for first-degree murder conviction arising from killing during robbery. 18 Pa.C.S.A. § 2502(a); 42 Pa.C.S.A. § 9711(h)(3) (1997).

1 Cases that cite this headnote

[8] **Criminal Law** Deficient representation and prejudice in general

Defendant claiming ineffective assistance of counsel must prove: (1) issue which counsel did not address had arguable merit; (2) counsel's course of action had no reasonable basis; (3) counsel's action prejudicially affected outcome of case. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** Presentation of witnesses

Counsel's failure to call two alleged alibi witnesses was not ineffective assistance of counsel, where defendant testified that he did not remember where he was on night of murder. U.S.C.A. Const.Amend. 6.

[10] **Criminal Law** Preparation for trial

Counsel's alleged failure to meet with defendant more than once did not in itself establish that counsel was unprepared and that counsel rendered ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Other particular issues in death penalty cases

Counsel's failure to obtain psychiatric assistance at penalty phase of capital murder prosecution was not ineffective assistance of counsel, in absence of showing of what a psychiatric witness would have stated if one had been called. U.S.C.A. Const.Amend. 6.

[12] **Criminal Law** Discovery

Counsel's failure to subpoena prison records as to defendant's location in prison, which would have been offered to show that defendant was not in a cell with inmate and could not, therefore, have confessed to inmate, was not ineffective assistance of counsel, in absence of showing of existence of such records. U.S.C.A. Const.Amend. 6.

[13] **Criminal Law** Procedure in general; timeliness

Counsel's alleged filing of appellate brief after it was due was not ineffective assistance of counsel, where defendant stated to court that he wanted a new attorney. U.S.C.A. Const.Amend. 6.

[14] **Criminal Law** Homicide, mayhem, and assault with intent to kill

Evidence of murder of witness who fled beating that preceded fatal shooting of victim was admissible to show consciousness of guilt, in prosecution for first-degree murder of victim. 18 Pa.C.S.A. § 2502(a).

[15] **Criminal Law** Death or disability of witness

Preliminary hearing testimony of witness who was later murdered was admissible pursuant to statute, in prosecution for first-degree murder of victim. 18 Pa.C.S.A. § 2502(a); 42 Pa.C.S.A. § 5917.

[16] **Criminal Law** Particular evidence or prosecutions

Any error in admission of testimony that a murdered witness previously gave at preliminary hearing for co-perpetrator with respect to murder of victim was harmless, in prosecution for first-degree murder of victim, where testimony was substantially similar to witness's testimony at preliminary hearing for defendant, which testimony was also admitted. 18 Pa.C.S.A. § 2502(a); 42 Pa.C.S.A. § 5917.

[17] **Criminal Law** List or Disclosure of Prosecution Witnesses

Order prohibiting disclosure of identity of two witnesses and prohibiting disclosure of contents of their expected testimony was properly entered to protect lives of witnesses, where murder defendant was already suspected of killing a witness.

Attorneys and Law Firms

**1267 *135 David M. McGlaughlin, Philadelphia, for S. Hannibal.

Catherine Marshall, Mary L. Porto, Philadelphia, for Com.

Robert A. Graci, Harrisburg, for Attorney General's Office.

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

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

FLAHERTY, Chief Justice.

This is an automatic direct appeal from the judgment of sentence of death imposed on appellant, Sheldon Hannibal, for first degree murder by the Court of Common Pleas of Philadelphia County. [1] , [2]

1 *See,* 42 Pa.C.S. §§ 722(4), 9711(h)(1); Pa.R.A.P. Rule 702(b) and Rule 1941.

2 The jury also convicted appellant of criminal conspiracy and possession of instruments of crime. In addition to the sentence of death for first degree murder, appellant was sentenced to consecutive terms of eleven and one-half (11 1/2) to sixty (60) months on the possession charge and sixty-six (66) to one-hundred-thirty-two (132) months for criminal conspiracy.

Appellant was charged in connection with the killing of Peter LaCourt. Following a jury trial, appellant was found guilty of criminal homicide (first degree murder); [3] criminal conspiracy; [4] and possessing instruments of crime. [5] Appellant was tried jointly with his co-defendant, Larry Gregory. [6]

3 18 Pa.C.S. § 2502(a).

4 18 Pa.C.S. § 903.

5 18 Pa.C.S. § 907(a).

6 Gregory was also convicted of first degree murder; he was sentenced to life imprisonment. The Superior Court, in a memorandum decision issued April 3, 1997, affirmed Gregory's judgment of sentence.

**1268 At trial, the evidence established that in the early morning hours of October 25, 1992, Peter. LaCourt and his friend, Barbara Halley, encountered appellant and Tanesha Robinson, who were sitting in a stairway at the Cambridge Mall housing project. LaCourt tried to sell appellant a gold chain. After looking at the chain, appellant started an argument with LaCourt concerning whether the chain was genuine. Appellant refused to return the chain to LaCourt, pulled out a gun, and began to beat LaCourt with it. Appellant then knocked on the door of Larry Gregory, who joined in the beating, using *137 his own gun to pistolwhip LaCourt. As LaCourt pled for the beating to stop, Ms. Robinson ran up the stairway. Seconds after she left the scene of the beating, she heard approximately ten gunshots. Barbara Halley, meanwhile, had gone to the guard's station in the lobby to seek help and, thus, was not present when the shots were fired.

A Philadelphia Housing Authority police officer found LaCourt lying on the stairway and observed gunshot wounds to his head and back. Police found eleven 9 mm shell casings at the crime scene. Portions of the gold chain were also recovered from the stairway.

An autopsy revealed that LaCourt had suffered blunt force trauma injuries to the right front and top of his head, as well as injuries from falling. Six bullets struck LaCourt's body; two hit him from the front, resulting in a perforated gunshot wound of the lower left arm and a grazing gunshot wound to his fingers which were characterized as defensive wounds. The remaining four bullets struck LaCourt as he lay on the floor. The cause of death was ruled to be severance of LaCourt's brain stem by one of the bullets which struck him.

Ms. Robinson subsequently gave statements to police concerning the murder and testified on behalf of the Commonwealth at the preliminary hearings regarding appellant and Gregory. Following that testimony, she and two of her female friends were killed in Ms. Robinson's apartment in the presence of a six-month-old baby.

Appellant testified at trial that he did not know where he was on the night LaCourt was killed. Appellant further testified that he did not have an altercation with LaCourt; that he did not take LaCourt's chain; that he did not have a gun; and that he did not shoot LaCourt.

After the penalty phase hearing, the jury returned a sentence of death on appellant's first degree murder conviction. The jury concluded that there was one aggravating circumstance [7] and no mitigating circumstances. [8]

7 42 Pa.C.S. § 9711(d)(6) (appellant committed the killing while in the perpetration of a felony).

8 Appellant had presented evidence of mitigation under 42 Pa.C.S. § 9711(e)(4), the age of the defendant at the time of the crime, and § 9711(e)(8), any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

***138** Pursuant to *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 454 A.2d 937 (1982), we are required to review all death penalty cases for the sufficiency of evidence to sustain the conviction for murder of the first degree.

In *Commonwealth v. Koehler,* 558 Pa. 334, 737 A.2d 225, 233–34 (1999) we held:

> To sustain a conviction for first degree murder, the Commonwealth must prove that the defendant acted with a specific intent to kill, that a human being was unlawfully killed, that the accused did the killing, and that the killing was done with deliberation. It is the specific intent to kill which distinguishes murder in the first degree from lesser grades of murder. We have held that the use of a deadly weapon on a vital part of a human body is sufficient to establish the specific intent to kill. Finally, the Commonwealth ****1269** can prove the specific intent to kill through circumstantial evidence.

[1] The evidence presented at trial was that appellant and Greggory beat and shot LaCourt and robbed him of a gold chain. Two female witnesses fled the beating. Robinson heard shots seconds after she left the scene of the beating, where appellant and Greggory were pistol whipping LaCourt. Robinson ran to her cousin's apartment on the sixth floor, where she looked from a window and saw appellant and Greggory fleeing in a gray car moments after the shooting. Two other witnesses testified concerning a plot to murder Robinson in order to prevent her from testifying at trial. Terrance Richardson testified that he was present when he heard Greggory and his brother give two other men a .357 revolver and $2,000 in cash and the directions to "be fast about it" and to "leave no witnesses." The next day fifteen year old Robinson and two of Robinson's friends were shot to death in Robinson's apartment. James Buigi, a cellmate of appellant, testified that appellant told him that he had ordered a "couple ***139** of his boys" to kill Robinson. [9] Appellant also admitted to Buigi that he killed LaCourt and indicated that the

only way he could escape conviction was to kill Robinson. This evidence is sufficient to prove that appellant intentionally and unlawfully killed LaCourt.

9 Buigi testified that after having smoked a "few marijuana sticks" he and appellant began discussing why they were both in jail. It was Buigi's testimony that it was during this conversation that appellant admitted to having shot the victim. According to Buigi, appellant asked him whether he knew much about the law and more specifically, whether appellant could be found guilty of first degree murder if the key witness against him was not there to testify against him. According to Buigi, appellant then told him about the incident with the gold chain, the pistol-whipping and the fact that girl who had been sitting with appellant on the stairwell saw the pistol-whipping, but did not see him actually shoot the victim. Buigi testified that appellant also told him that he had arranged to have this particular girl murdered so as to prevent her testimony at his trial. Buigi testified that he told the police the very next day about his conversation with appellant. He testified that his decision to go to the police was a result of his having known the victim and his family.

Appellant contends that the trial court's instruction to the jury violated this court's holding in *Commonwealth v. Huffman,* 536 Pa. 196, 638 A.2d 961 (1994). Specifically, appellant submits that the trial court erroneously instructed the jury regarding the element of specific intent by stating that a defendant could be found guilty of first degree murder where either he, his accomplice *or* co-conspirator possessed the requisite specific intent.

[2] **[3]** **[4]** The standard by which this court reviews a challenge to a jury instruction is as follows:

> When evaluating jury instructions 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.
>
> * * * *
>
> We will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy, but rather evaluate ***140** whether the charge sufficiently and accurately apprises a lay jury of the law it must consider in rendering its decision. *Commonwealth v. Prosdocimo,* 525 Pa. 147, 578 A.2d 1273, 1274, 1276 (1990).

In *Huffman,* we addressed the propriety of the trial court's instruction on the issue of accomplice liability in a first degree murder case. That instruction provided as follows:

> [I]n order to find a Defendant guilty of murder in the first degree, you must find that the Defendant caused the death of another person, or that an accomplice or co-conspirator caused the death of another person. That is, you must find that the Defendant's act or ****1270** the act of an accomplice or co-conspirator is the legal cause of death of [the victim], and thereafter you must determine if the killing was intentional.

Huffman, 638 A.2d at 962.

[5] This court found the charge in *Huffman* to be patently erroneous because it allowed the jury to reach a first degree murder verdict without a finding that the accomplice/appellant himself possessed the requisite specific intent to kill. We stated:

> [t]o determine the kind of homicide of which the accomplice is guilty, it is necessary to look to *his* state of mind; the requisite mental state must be proved beyond a reasonable doubt to be one *which the accomplice harbored and cannot depend upon proof of the intent to kill only in the principal.*

Huffman, 638 A.2d at 962 (emphasis in original) (quoting *Commonwealth v. Bachert,* 499 Pa. 398, 453 A.2d 931, 935 (1982)). We recently reaffirmed the this critical rule of law in *Commonwealth v. Wayne,* 553 Pa. 614, 720 A.2d 456 (1998), *cert. denied* 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999) noting specifically that first degree murder is distinguished from all other degrees of murder by the existence of a specific premeditated intent to kill that is harbored by the accused. Before a conviction for first degree murder can be sustained, it must be shown that the accused possessed a fully formed intent to take a life. *Id.*

***141** With this standard in mind, we now turn to the charge given in the instant matter. In relevant part, the trial court first charged the jury as follows:

> You may find a defendant guilty of a crime without finding that he personally engaged in conduct required for committing that crime. A defendant is guilty of a crime if he is an accomplice of another person who commits that crime. A defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He is an accomplice if with the intent of promotion [sic] or facilitating a commission of the crime he encourages, requests, solicits or commands the other person to commit it or he aids, agrees to aid or attempts to aid the other person in planning or committing it.
>
> In considering accomplice, the least degree of concert or collusion is sufficient to sustain a finding of responsibility as an accomplice.

(N.T. 3/9/94 (Vol.11) at 132–133). The court then instructed on first degree murder stating the following:

> First degree murder is murder in which the killer has the specific intent to kill. You may find a defendant guilty of first degree murder if you are satisfied of the following three elements:
>
> That he, his accomplice or co-conspirator killed the deceased.
>
> Two, that LaCourt is dead.
>
> And three, that the defendant, his accomplice or co-conspirator did so with the specific intent to kill and with malice.

(N.T. 3/9/94 (Vol.11) at 135–36). Immediately thereafter, the trial court provided the following definition of specific intent:

> A person has the specific intent to kill if he has a fully formed intent to kill and is conscious of his own intention. As a definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice provided that it is also without certain circumstances. Stated differently, a killing is a specific intent to kill if it is willful and deliberate. The specific intent to kill, including premeditation ***142** needed for first degree murder does not require planning or previous thought or any particular length of time. In can occur quickly. All that is necessary is that there be time enough so that a defendant can and does fully form an intent to kill and is conscious of that intention. When deciding whether a defendant had the specific intent to kill, you should consider all of the evidence regarding his or his accomplice or co-conspirators words and ****1271** conduct and the attending circumstances that may show his state of mind at that time.
>
> If you believe that a defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant, his accomplice or co-conspirator had the specific intent to kill.

(N.T. 3/9/94 (Vol. II) at 136–137).

[6] Appellant's claim, in essence is that the trial court informed the jury that it could find "a defendant" guilty of first degree murder if either defendant possessed the requisite specific intent to kill. The operative words with which the appellant is concerned are:

> ... the defendant, his accomplice or co-conspirator did so with the specific intent to kill and with malice.

Appellant interprets these words to mean that the accomplice may be convicted if either the accomplice or the principal had specific intent to kill. This misreads the instruction. When a series of nouns is separated by a comma and the last two elements of a series are the same entity (accomplice or co-conspirator), the sentence is properly understood to consist of a series of two nouns, not three. Thus, the sentence may be read to say, "the jury may find the accomplice guilty if it finds that the defendant *and* his accomplice (or you may think of him as a co-conspirator) acted with specific intent to kill and malice."

Further, when the court clarified the various degrees of murder, it stated:

> ***143** First, in order to clarify, I remind you that you are to consider the evidence and the law separately as to each individual in this case. Although this trial is based on a single incident, each defendant is on trial before you individually and is to be found guilty or not guilty based on the evidence or lack of evidence as to him alone.

The instruction was not in error and the court consistently and in understandable language referred to the need to consider whether each individual in the case possessed the requisite specific intent to kill.

[7] Having concluded that Hannibal's conviction was proper, we are required to perform an automatic review of the sentence of death pursuant to 42 Pa.C.S. § 9711(h)(3), as follows: we are required to affirm the sentence of death unless we determine that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

The jury found one aggravating circumstance in the case, that the killing was committed while in the perpetration of a felony, and no mitigating circumstances. Our review of the record establishes beyond any reasonable doubt that the killing was carried out during a robbery, and therefore that the murder was committed during the commission of a felony; that the sentence was not the product of passion, prejudice or any arbitrary factor; and that the sentence was not disproportionate to the penalty imposed in similar cases. [10]

10 Although the General Assembly removed proportionality review from the death penalty statute effective June 25, 1997, proportionality review remains a requirement for all death penalty convictions before that date. Since Hannibal's sentence

was imposed before June 25, 1994, we are required to conduct a proportionality review. See *Commonwealth v. Gribble,* 550 Pa. 62, 703 A.2d 426, 440 (1997).

**1272 [8] [9] [10] [11] [12] [13] [14] [15] [16] [17] *144 The judgment of sentence of death is affirmed. [11] , [12]

11 Hannibal raises a number of additional claims, all of which we have carefully examined, but none of which merit extended discussion. First, Hannibal claims that trial counsel was unprepared for trial and, therefore, that he was ineffective in several respects. He claims that counsel was ineffective in failing to call two alibi witnesses; that counsel met with him only once; that counsel failed to obtain psychiatric assistance at the penalty phase of the trial; that counsel was ineffective for failing to subpoena certain documents (records of where Hannibal was imprisoned); and that counsel failed to file an appellate brief until after it was due.

These claims are without merit for a number of reasons. First, Hannibal does not set out the ineffectiveness analysis required by Pennsylvania law. See, *Commonwealth v. Balodis,* 560 Pa. 567, 747 A.2d 341, 2000 Pa. LEXIS 419 (2000). Pursuant to this analysis, an appellant must prove (1) the issue which counsel did not address had arguable merit; (2) counsel's course of action had no reasonable basis; (3) counsel's action prejudicially affected the outcome of the case. Further, Hannibal testified that he did not remember where he was on the night of the murder, which moots the importance of his claimed alibi witnesses. Next, even if counsel met him only once, that in itself does not mean that counsel was unprepared. Next, Hannibal does not state what a psychiatric witness would have stated if one had been called. Next, the failure to subpoena prison records as to Hannibal's location in prison—which would have been offered to show that Hannibal was not in a cell with Buigi and could not, therefore, have confessed to Buigi—fails because he fails to show that such records exist. Finally, the fact that counsel filed a brief after it was due, if true, does not tend to prove ineffectiveness because counsel explained that Hannibal stated to the court that he wanted a new attorney.

Next, Hannibal claims that his trial was unfair because evidence of the murder of Tanesha Robinson, a witness, was admitted into evidence and that trial counsel was ineffective in failing to object to the introduction of evidence that Hannibal was linked to the murder of Tanesha Robinson.

This claim too fails for a number of reasons. First, the trial court did not err in admitting this evidence since it is part of the history of the case. Second, the claim of ineffectiveness fails because Hannibal again fails to set out the three pronged test for ineffectiveness of counsel. Third, there was no basis to object to the evidence because it was admissible to show Hannibal's consciousness of guilt. *Commonwealth v. Goldblum,* 498 Pa. 455, 447 A.2d 234 (1982)(evidence that appellant agreed to pay undercover operative to kill witness is admissible to show consciousness of guilt). Therefore, the trial court did not err in admitting this evidence, and defense counsel was not ineffective for failing to object to the admission of this evidence.

Next, Hannibal claims that the trial court erred in permitting the preliminary hearing testimony of Tanesha Robinson and her statements to police to be introduced into evidence. Robinson had testified at the preliminary hearings of Hannibal on April 13, 1993 and of Greggory on May 4, 1993. According to Hannibal's statement to his cellmate, Robinson was murdered on his orders, in order to silence her testimony.

Hannibal's first claim is that the admission of this testimony is violative of the confrontation clause. This claim is without merit because there is statutory authority to admit the evidence in question:

> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross examine, if such witness ... is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found ... notes of his examination shall be competent evidence upon a subsequent trial on the same criminal issue.

42 Pa.C.S. § 5917.

Hannibal objects, however, that the testimony about which he is complaining was from the May 4, 1993 hearing, to which Hannibal was not a party, for it was the preliminary hearing for Greggory. Since he was not a party, he was not

able to cross examine, and in any event, it was error to admit the May 4 testimony against Hannibal, for the evidence at preliminary hearing concerned Greggory.

This argument fails because Hannibal himself admits that Robinson's April 13, 1993 testimony was substantially the same as Robinson's May 4 testimony, and both were admitted into evidence. Any error in admitting the May 4 transcript into evidence was, therefore, harmless error, for the content of both preliminary hearing statements was substantially the same as to Hannibal and both statements were before the jury. Similarly, Robinson's police statements, which were given two days after LaCourt's murder and were given at great risk to the witness, were virtually identical to the preliminary hearing statements. Thus, the police statements were made under circumstances which guaranteed their trustworthiness and, in any event, the police statements were merely cumulative. There was no error in admitting either the preliminary hearing transcripts or the statements to police.

Finally, Hannibal claims that it was error for the trial court to enter an order prohibiting the disclosure of the identity of the witnesses Buigi and Richardson and prohibiting the disclosure of the contents of their expected testimony. The court entered this order because Hannibal was already suspected of killing a witness.

Buigi testified on the first day of trial and the trial court told Hannibal that he could have a reasonable time to prepare for cross-examination. Richardson testified on the third day of trial and the court allowed Hannibal to question Richardson out of the presence of the jury as to an alleged disability which might have had a bearing on his ability to see, hear and report accurately what he had seen. Under questioning, Richardson indicated that he received social security for a tendency to express anger inappropriately, and the court ruled that this disability was unrelated to his ability to see, hear and to report what he had seen and heard. The court also gave defense counsel reasonable time to prepare for additional cross-examination. In fact, defense counsel vigorously questioned both witnesses about their motives for testifying and questioned both at great length. Buigi's cross-examination was nearly 30 pages and Richardson's was 40 pages long.

Thus, the protective order was properly entered to protect the lives of the witnesses; defense counsel was given time to prepare for cross-examination; defense counsel conducted a vigorous cross-examination; and in any event, Hannibal does not specify how he was prejudiced by the protective order. Even if the trial court improperly failed to grant adequate time to prepare for cross examination—which it did not—unless we are told what Hannibal would have discovered had he had more time to prepare for cross-examination of these witnesses, his claim fails.

12 We direct the Prothonotary of the Supreme Court of Pennsylvania to transmit the complete record of this case to the Governor of Pennsylvania. 42 Pa.C.S. § 9711(i).

***146** Justice CASTILLE joins the Opinion Announcing the Judgment of the Court and files a concurring opinion.

****1273** Justice NIGRO concurs in the result and files a concurring opinion.

Justice CAPPY files a dissenting opinion in which Justice ZAPPALA joins.

CASTILLE, Justice, concurring.

I join the majority opinion, but write separately to address the following points.

I agree with the majority that the jury charge here, considered as a whole, conformed to the rule announced in *Commonwealth v. Huffman,* 536 Pa. 196, 638 A.2d 961 (1994), governing instructions on accomplice liability in first degree murder cases. The disapproved charge quoted in *Huffman* contained no elaboration on the basis for finding accomplice liability. *Id.* at 198–99, 638 A.2d at 962. Here, in contrast, as the majority has correctly noted, the trial court separately and thoroughly charged the jury on accomplice liability—indeed, it did so in an instruction that mirrors the language in the Crimes Code defining accomplice liability. *See* 18 Pa.C.S. § 306(c). I would also add that the *Huffman* issue here is not even applicable for several reasons: first, the evidence, including appellant's confession to a cellmate, amply proved appellant's guilt as the principal (*i.e.,* the actual shooter), not as an accomplice, *see* *Commonwealth v. Wayne,* 553 Pa. 614, 633, 720 A.2d 456, 465 (1998), ***147** *cert. denied, Wayne v. Pennsylvania,* 528 U.S. 834, 120 S.Ct. 94, 145 L.Ed.2d 80 (1999); second, the circumstantial evidence

alone proved the shared criminal intent of appellant and his co-defendant Gregory, who jointly pistol-whipped the victim before appellant shot him; and third, appellant was convicted of conspiracy.

The last point is worthy of elaboration. Criminal conduct involving multiple perpetrators often, but not always, involves multiple theories of vicarious liability, *i.e.,* conspiracy liability (which requires an agreement) and accomplice liability (which does not). The theories serve different purposes and have different contours. *Commonwealth v. Bachert,* 499 Pa. 398, 453 A.2d 931 (1982), *cert. denied, Bachert v. Pennsylvania,* 460 U.S. 1043, 103 S.Ct. 1440, 75 L.Ed.2d 797 (1983), was a sufficiency of the evidence case which discussed **1274 only the level of proof necessary to prove guilt of first degree murder on a theory of accomplice liability. *Bachert* 's holding that the accomplice himself, and not merely a confederate, must possess the necessary mental state was thoroughly consistent with the Crimes Code's definition of accomplice liability. *See* 18 Pa.C.S. § 306(c)(1) (person is an accomplice if, *with the intent of promoting or facilitating the commission of the offense,* he solicits another to commit it, or aids, agrees, or attempts to aid another in committing the offense) (emphasis added). *Huffman* was a non-sufficiency case involving a challenge to the propriety of the court's accomplice liability charge. Relying upon *Bachert,* the Court disapproved a charge that permitted the jury to convict the accomplice of first degree murder "with no finding of the requisite mental state of 'specific intent to kill' " on the part of the accomplice. 536 Pa. at 199, 638 A.2d at 963.

Two years ago, in *Commonwealth v. Wayne, supra,* this Court extended the *Bachert/Huffman* teachings on *accomplice* liability to first degree murder cases involving *conspiracy* liability. Although I joined in the *Wayne* opinion, upon further careful consideration of this recurring point, I am convinced that the *Wayne* reconfiguration was an erroneous *148 intrusion into the legislature's power to define the substantive criminal law. [1]

1 *Wayne* 's discussion in this regard arguably was *dicta,* since the appellant there was denied relief based on a finding that any error in the conspiracy liability charge was harmless beyond a reasonable doubt.

In *Wayne,* this Court accurately described the general rule of conspiracy liability as follows:

> The general rule of law pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The co-conspirator rule assigns legal culpability equally to all members of the conspiracy. All co-conspirators are responsible for actions undertaken in furtherance of the conspiracy regardless of their individual knowledge of such actions and regardless of which member of the conspiracy undertook the action. The premise of the rule is that the conspirators have formed together for an unlawful purpose, and thus, they share the intent to commit any acts undertaken in order to achieve that purpose, regardless of whether they actually intended any distinct act undertaken in furtherance of the object of the conspiracy. It is the existence of shared criminal intent that 'is the *sine qua non* of a conspiracy.'

Wayne, 553 Pa. at 630, 720 A.2d at 463–64 (citations omitted).

However, the *Wayne* Court fashioned an exception to this general rule, based upon the perception that first degree murder should be treated differently from other offenses because of the severity of the punishment. Importing the accomplice liability principles that animated *Bachert* and *Huffman,* it reconfigured *conspiracy* law, essentially holding that the crime of first degree murder would no longer be susceptible to traditional conspiracy analysis. Under the *Wayne* reconfiguration, a defendant cannot be convicted of first degree murder under a theory of conspiracy liability, even if the killing was in furtherance of the conspiracy, unless the Commonwealth separately proves that the defendant harbored a specific intent to kill. *Id.* at 630–31, 720 A.2d at 464. I *149 disagree with the *Wayne* reconfiguration and would return to the pre-*Wayne* law as it has existed in this Commonwealth. The Crimes Code certainly does not require the *Wayne* exception to conspiracy liability. Generally, there is no requirement that conspirators must specifically contemplate each particular crime that may occur in furtherance of the conspiracy before liability may attach. I certainly see no principled basis for this Court's revision of **1275 the law of conspiracy simply because the charge involved is first degree murder.

There is a synergy that arises from criminal confederations. People who might not have the individual courage, the ability, or the ill judgment to commit a crime on their own become emboldened when they join with confederates to plan and launch a criminal enterprise. In recognition of the distinct dangerousness of this criminal phenomenon, the legislature has codified conspiracy itself as a separate crime—*i.e.,* conspiracy is not just a theory of liability, it is a distinct crime. There is no logical reason to single out first degree murder from other crimes in determining the reach of conspiracy liability.

I would return to the terms of the Crimes Code and the settled pre-*Wayne* law recognizing the long-standing principle that, in a conspiracy, " 'the least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.' " *Commonwealth v. Strantz,* 328 Pa. 33, 40, 195 A. 75, 79 (1937) (*citing* Chief Justice Gibson in *Rogers v. Hall,* 4 Watts 359, 361 (1835)). "No principle of law is more firmly established than that when two or more persons conspire or combine with one another to commit any unlawful act, each is criminally responsible for the acts of his associate or confederate committed in furtherance of the common design." *Strantz,* 328 Pa. at 40, 195 A. at 79. If one actor in a conspiracy acts on a specific intent to kill, and that act furthered the common design, then conspiracy liability should attach to all conspirators. The rule operates to dissuade persons from entering into criminal confederations that have, as a foreseeable consequence, the killing of another.

***150** I see nothing harsh or unfair in this traditional rule. Conspiracy liability will attach only when the prospect of a killing was a foreseeable consequence of the criminal agreement. Furthermore, as a practical matter, the conspirators themselves are in the best position to know and describe the precise contours of the agreement or confederation. If they have a legitimate defense arising from the nature or scope of their confederation, they may forward it and have it assessed by the factfinder.

The traditional rule, moreover, is a practical necessity. The victim is never available in a murder case to testify who, among multiple actors, killed him. In homicides involving multiple actors, there is frequently no doubt at all that the killing was intentional and warrants a first degree conviction (as is indisputably the case here) but (again, as here) there is no independent eyewitness to testify which actor delivered the blow(s) that establish the degree of guilt. [2] It is in precisely such circumstances that traditional principles of vicarious liability are essential. As noted in the Dissenting Opinion in *Huffman,* without such theories,

2 In first degree murder cases involving non-confessing defendants, it is often the nature of the killing that proves specific intent. Specific intent, of course, can be inferred from the use of a deadly weapon upon a vital part of the body. *E.g. Commonwealth v. Puksar,* 559 Pa. 358, 365, 740 A.2d 219, 223 (1999).

> a jury will always be stuck with the broken record of how to attribute specific intent without identifying the particular roles of the perpetrators. So the killers will walk away from first degree murder and the death penalty. So the people will have been deprived of a fair trial.

Huffman, 536 Pa. at 204, 638 A.2d at 965 (Papadakos, J., dissenting). I would return to first principles and permit conspiracy liability to operate as it always had before, with respect to *all* crimes.

In summary, in cases involving theories of accomplice and conspiracy liability for first degree murder, I believe that the jury should be instructed on the elements of first degree murder, as well as what is necessary to prove liability as an ***151** accomplice or conspirator. I would require nothing ****1276** more than that those principles be adequately conveyed.

NIGRO, Justice, concurring.

I concur in the result reached by the majority. In my view, any error which may have occurred in the instructions regarding accomplice liability was harmless. The evidence in this case clearly established that Appellant was the actual shooter, and not the accomplice. Therefore, any irregularity in the trial court's accomplice instruction could not have affected Appellant's verdict and thus, must be viewed as harmless error. Accordingly, I agree with the majority that Appellant is not entitled to a new trial on this basis.

CAPPY, Justice, dissenting.

I respectfully dissent. Specifically, I find the majority's disposition of Appellant's issue raised pursuant to *Commonwealth v. Huffman,* 536 Pa. 196, 638 A.2d 961 (1994) and *Commonwealth v. Bachert,* 499 Pa. 398, 453 A.2d 931 (1982) to be disingenuous.

In *Huffman,* this court stated that in order for a defendant to be found guilty of first degree murder, the Commonwealth must establish that the defendant himself possessed the specific intent to kill, and that a defendant could not be convicted of first degree murder solely because his accomplice or co-conspirator who actually committed the homicidal act possessed the specific intent to kill. *Id.* at 962.

Huffman did not announce a new rule of law. This court's first clear recitation of this principle was delivered in *Commonwealth v. Bachert,* 499 Pa. 398, 453 A.2d 931 (1982). Justice (now Chief Justice) Flaherty delivered the opinion of the court, stating that the trial court must instruct the jury that

> [t]o determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; the ***152** requisite mental state must be proved beyond a reasonable doubt to be one which the accomplice harbored and cannot depend upon proof of the intent to kill only in the principal.

Id. at 935.

This requirement is not one which this court idly imposed on the trial courts. We have stated that such an instruction is mandatory because "[i]t is the unique harboring of malice with willful premeditation that causes first degree murder to be distinctly villainous. It is precisely because of the deliberate nature of first degree murder that this crime carries the most severe penalty the law can impose—death. To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable." *Commonwealth v. Wayne,* 553 Pa. 614, 720 A.2d 456, 464 (1998). [1]

1 In his concurring opinion, Mr. Justice Castille retracts his decision to join the majority opinion in *Wayne.* Mr. Justice Castille now finds that the court in *Wayne* impermissibly intruded into the legislative domain by altering the traditional rule of co-conspirator liability as it relates to first degree murder. I must disagree. The court in *Wayne* did not intrude on the legislative power to define substantive criminal law; rather, it applied the principle that statutes are read in pari materia, thus giving effect to all of the respective elements of conspiracy and first degree murder. The decision in *Wayne* was not motivated by the severity of the punishment for first degree murder, but rather by the recognition that the legislature, in defining first degree murder, delineated that crime from all other degrees of homicide by the element of a specific premeditated intent to kill. Nor do I find that a jury instruction, which explains that each person charged with first degree murder, whether an accomplice or co-conspirator, must possess the specific intent to kill, places an onerous burden on the prosecution.

Appellant claims that the *Huffman* and *Bachert* rule was violated in this matter. Specifically, he points to the trial court's instruction to the jury that Appellant could be convicted of first degree murder if the Commonwealth had established that "the defendant, his accomplice or co-conspirator ****1277** [shot the victim] with the specific intent to kill and with malice." N.T., 3/9/1994, 135–36. Appellant claims that such an instruction gave the jury permission to convict him of first ***153** degree murder even if only his co-conspirator, and not Appellant himself, possessed the specific intent to kill.

The majority rejects this argument by stating that

> [w]hen a series of nouns is separated by a comma and the last two elements of a series are the same entity (accomplice or co-conspirator), the sentence is properly understood to consist of a series of two nouns, not three. Thus, the sentence may be read to say, "the jury may find the accomplice guilty if it finds that the defendant *and* his accomplice (or your may think of him as a co-conspirator) acted with specific intent to kill and malice."

Majority op. at 1271.

Had the instruction been given as the majority rephrases it, I would wholeheartedly agree that it met the *Huffman* and *Bachert* rule. Yet, this is not the instruction that was given. Rather, it is a concoction derived from the majority's hopes that the jury was privy to the same book of grammar that it had at its disposal.

The plain words spoken by the trial court judge informed the jury that they could find the defendant guilty if the Commonwealth showed that the defendant, his accomplice *or* co-conspirator shot the victim with the specific intent to kill. In my opinion, this instruction informed the jury that it could find Appellant guilty of first degree murder even if only his accomplice or co-conspirator, rather than Appellant himself, had the specific intent to kill. Unlike the majority, I am unable to transmogrify this simple statement, which I believe clearly violates the *Huffman* and *Bachert* rule, into a wholly different instruction. As I believe that it would be unconscionable to allow Appellant's conviction to stand where the jury was erroneously instructed that the Commonwealth need not prove that *Appellant* actually harbored the specific intent to kill, I must respectfully dissent.

Justice ZAPPALA joins this dissenting opinion.

All Citations

562 Pa. 132, 753 A.2d 1265

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3075

SHELDON HANNIBAL
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; SUPERINTENDENT ROCKVIEW SCI; DISTRICT ATTORNEY PHILADELPHIA

(M.D. Pa. No. 2-13-cv-00619)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, MONTGOMERY-REEVES, and CHUNG, *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, it is hereby ORDERED that the petition for rehearing by the panel is denied, however, the Clerk is directed to file the amended opinion that adds footnote 7 on page 17 of the opinion. As the revision does not affect the disposition of the appeal, the judgment will remain as filed.

The petition for rehearing filed by Appellant also having been submitted to all the other available circuit judges of the circuit in regular active service and a majority of the judges of the circuit in regular service not having voted for rehearing, it is hereby ORDERED that the petition for rehearing by the Court en banc is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: April 2, 2024
CJG/cc: Joanne M. Heisey, Esq.
Shawn Nolan, Esq.
Katherine E. Ernst, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3075

SHELDON HANNIBAL,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT GREENE SCI; SUPERINTENDENT ROCKVIEW SCI; DISTRICT ATTORNEY PHILADELPHIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-13-cv-00619)
District Judge: Honorable Gerald A. McHugh

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
October 17, 2023

Before: CHAGARES, *Chief Judge*, PHIPPS, and CHUNG, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record on appeal from the United States District Court for the Eastern District of Pennsylvania and was submitted on October 17, 2023. On consideration whereof,

It is now hereby ORDERED and ADJUDGED by this Court that the order of the United States District Court for the Eastern District of Pennsylvania entered on October

6, 2021, be and the same is hereby AFFIRMED. Costs shall not be taxed in this matter.

All of the above in accordance with the Opinion of the Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: January 17, 2024

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

January 17, 2024

Katherine E. Ernst
Philadelphia County Office of District Attorney
3 S Penn Square
Philadelphia, PA 19107

Joanne M. Heisey
Shawn Nolan
Federal Community Defender Office for the Eastern District of Pennsylvania
Capital Habeas Unit
601 Walnut Street
The Curtis Center, Suite 545 West
Philadelphia, PA 19106

RE: Sheldon Hannibal v. Secretary PA Dept Corr, et al
Case Number: 21-3075
District Court Case Number: 2-13-cv-00619

ENTRY OF JUDGMENT

Today, **January 17, 2024** the Court entered its judgment in the above-captioned matter pursuant to 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.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

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: s/ Caitlyn
Case Manager
267-299-4956

SS#: 164-56-9402

DOB: 5-13-67

ID MARKS: NO

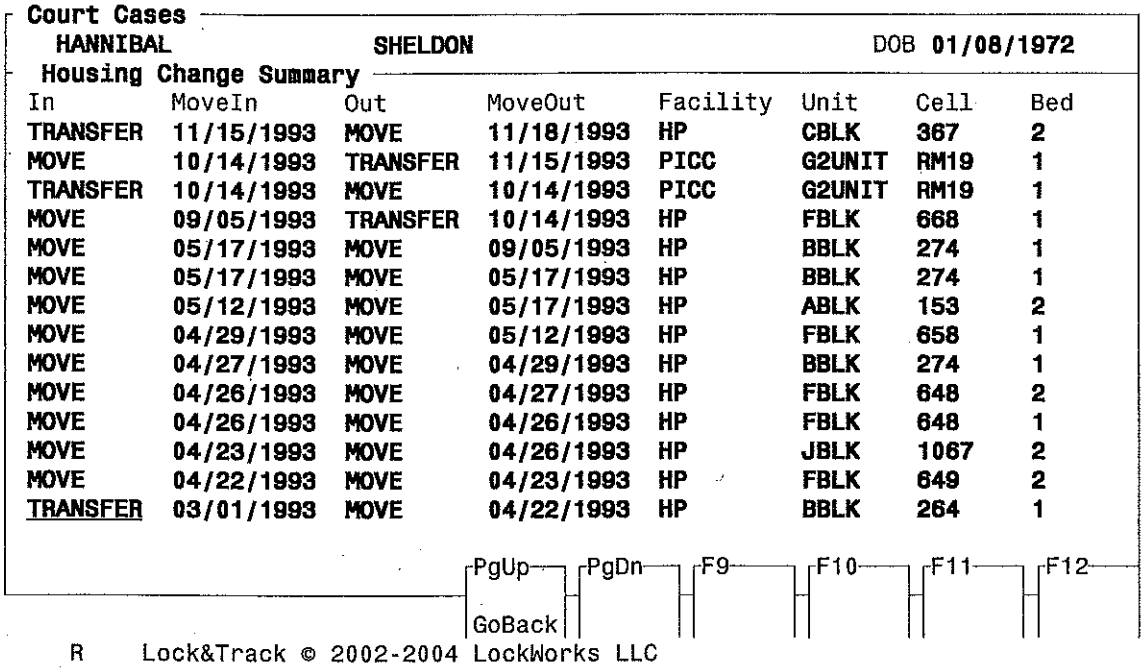
PHOTO

NAME: BUIGI, JAMES		PP#: 661 865	
NO.: D-93-10021		DATE: 8-14-93	
RACE: B/M	AGE: 26	HT.: 511	WT.: 205
RELIGION: ISLAMIC		BAIL: $15,000.00	
ADDRESS: 1840 N.7th ST., PHILA., PA. 19122			
COMMITTED BY: WATSON		CLASS.: PH 8-19 24th DIST	
CHARGE: ROBB, REAP, RSP, THEFT, PIC, SIMPLE ASS			
DETAINER: ~~1 PBP~~ DETAINER			

DATE	REMARKS	INITS.
	10/29/93 TRANS DICC PBPG	
	Discharged	JC
	12/07/93 PBPP	

CLS TRANSFERS

DATE	TO
8-14-93	Q32
8/17	D 109
8/19/93	24TH DIST
8/31	B-222
9-7	24th
	B221
10-5-93	HSB6
10/6/93	CHSW
11-19-93	L-5th
10-29-93	G-50



Court Cases

HANNIBAL SHELDON DOB 01/08/1972

Housing Change Summary

In	MoveIn	Out	MoveOut	Facility	Unit	Cell	Bed
TRANSFER	11/15/1993	MOVE	11/18/1993	HP	CBLK	367	2
MOVE	10/14/1993	TRANSFER	11/15/1993	PICC	G2UNIT	RM19	1
TRANSFER	10/14/1993	MOVE	10/14/1993	PICC	G2UNIT	RM19	1
MOVE	09/05/1993	TRANSFER	10/14/1993	HP	FBLK	668	1
MOVE	05/17/1993	MOVE	09/05/1993	HP	BBLK	274	1
MOVE	05/17/1993	MOVE	05/17/1993	HP	BBLK	274	1
MOVE	05/12/1993	MOVE	05/17/1993	HP	ABLK	153	2
MOVE	04/29/1993	MOVE	05/12/1993	HP	FBLK	658	1
MOVE	04/27/1993	MOVE	04/29/1993	HP	BBLK	274	1
MOVE	04/26/1993	MOVE	04/27/1993	HP	FBLK	648	2
MOVE	04/26/1993	MOVE	04/26/1993	HP	FBLK	648	1
MOVE	04/23/1993	MOVE	04/26/1993	HP	JBLK	1067	2
MOVE	04/22/1993	MOVE	04/23/1993	HP	FBLK	649	2
TRANSFER	03/01/1993	MOVE	04/22/1993	HP	BBLK	264	1

PgUp PgDn F9 F10 F11 F12

GoBack

R Lock&Track © 2002-2004 LockWorks LLC

NAME	PID	FAC	BLOCK	CELL	BED	FROM_DATE	UNTIL_DATE	CURR_INTAKE	CURR_LOCATION
MAYS, KHALIF	718581	PICC	G2UNIT	RM50	1	8/4/1993	10/9/1993		
MCCOY, REGINALD	701914	PICC	G2UNIT	RM50	1	8/12/1993	9/30/1993		
MC BRIDE, LOUIS	644538	PICC	G2UNIT	RM50	1	8/26/1993	9/1/1993		
BERRY, CHARLES	639154	PICC	G2UNIT	RM50	1	8/26/1993	9/2/1993		
CHANDLER, KEVIN	781742	PICC	G2UNIT	RM50	1	9/2/1993	9/29/1993		
ANDERSON, BRYANT	772292	PICC	G2UNIT	RM50	1	9/3/1993	9/22/1993		
ANDERSON, BRYANT	772292	PICC	G2UNIT	RM50	1	9/3/1993	9/3/1993		
MACK, ERIC	607264	PICC	G2UNIT	RM50	1	9/10/1993	9/15/1993	411226	DC EDRM 308 06
HOWELL, CARTER	744508	PICC	G2UNIT	RM50	1	9/20/1993	1/12/1994		
GRANT, ROLAND	714711	PICC	G2UNIT	RM50	1	9/24/1993	9/29/1993		
MOORE, KENNETH	414407	PICC	G2UNIT	RM50	1	9/29/1993	10/6/1993		
SMITH, RONALD	521881	PICC	G2UNIT	RM50	1	9/29/1993	10/4/1993		
SANCHEZ, CARLOS	714860	PICC	G2UNIT	RM50	1	10/7/1993	10/13/1993		
DEJESUS, VICTOR	669809	PICC	G2UNIT	RM50	1	10/8/1993	10/12/1993		
RICHARDSON, JOHN	662218	PICC	G2UNIT	RM50	1	10/12/1993	10/15/1993		
SHEARIN, WAYNE	704516	PICC	G2UNIT	RM50	1	10/13/1993	10/19/1993		
HOAGLAND, BRYANT	665203	PICC	G2UNIT	RM50	1	10/18/1993	10/22/1993		
BURGESS, TIM	661865	PICC	G2UNIT	RM50	1	10/29/1993	12/27/1993		
JOHNSON, EDWARD	642031	PICC	G2UNIT	RM50	1	11/23/1993	12/27/1993		
SQUIRE, SHANNON	765985	PICC	G2UNIT	RM50	1	12/24/1993	12/29/1993		
BELTON, ENOCH	718931	PICC	G2UNIT	RM50	2	12/24/1993	1/3/1994		

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

May 30, 1997

Robert Derrisen, C.M.R.
C.S.C.S
7901 State Road
Philadelphia, PA 19136

Re: Sheldon Hannibal, PP # 732862
James Buigi, a/k/a Brian Gilmore, PP # 661865

Dear Mr. Derrisen:

Pursuant to our telephone conversation, I am writing to request information concerning two inmates -- Sheldon Hannibal (PP # 732862) and James Buigi (PP # 661865) -- who may have shared a cell in the detention center in October or November of 1993. Hannibal was convicted of first degree murder and sentenced to death. He has made his jail-house confession to Buigi an issue in his appeal to the Pennsylvania Supreme Court, claiming that they never met in prison. I would like to know if they shared a cell.

I would appreciate any information you may be able to obtain. If you can locate the prison records, please call me at 686-5742.

Sincerely,

Mary L. Porto

Mary L. Porto
Assistant District Attorney

CITY OF PHILADELPHIA
PHILADELPHIA PRISON SYSTEM
CLASSIFICATION, MOVEMENT & REGISTRATION OFFICE
7901 State Road
Philadelphia, PA 19136-3407
(215) 685 - 8487 + (215) 685 - 8434 + FAX (215) 685 - 8630 + (215) 685 - 8397

~~FRANK A. HALL~~
Commissioner

ROBERT J. DURISON
Director

BRIAN FALLEN, *Captain*
Population Control Unit

~~MICHELE MURPHY, *Lieutenant*~~
Movement Coordinator

~~ROBERT L. BRUNSON, *Sergeant*~~
Chief Registrar

June 10, 1997

Mary L. Porto
Assistant District Attorney
District Attorneys' Office
1421 Arch Street
Philadelphia, PA 19102

RE: Sheldon Hannibal
PID# 732862
James Buigi
PID# 661865

Dear Ms. Porto:

Per your letter of May 30, 1997, I reviewed the inactive file on microfiche of both inmates. The period in question was Mr. Hannibal's incarceration between 2/17/93 and 2/14/94 and Mr. Buigi's incarceration between 8/14/93 and 12/17/93.

I believe Mr. Hannibal has claimed that he and Mr. Buigi never met in prison. From a review of the housing record, Mr. Hannibal was housed in Holmesburg's B-Block cell 274 on 5/17/93 and remained there until his transfer to the Philadelphia Industrial Correctional Center on 10-14-93. Mr. Buigi was transferred from the Detention Center to Holmesburg on 8/31/93. He was then housed in B-Block cell 272. There is no indication Mr. Hannibal changed his cell after he was housed there; even were this case, the record points to these men housing on the same cellblock from 8/31/93 to 10/14/93.

I will have copies made of these cards in the event they are needed for court. I will also see if our MIS Unit can run a housing report for these two men.

Sincerely yours,

Robert J. Durison

Robert J. Durison, Director, CMR

Mr. Robert Durison

4306 Disston Street
Philadelphia, PA 19135

Declaration/Affidavit

1. My name is Robert Durison. I am currently retired. I was the Director of Classification, Movement and Registration (CMR) for the Philadelphia Prison System from September 28, 1992 until my retirement on October 26, 2007.

2. I was asked by attorneys on behalf of Sheldon Hannibal to review prison concerning his movement and also the movement of James Buigi, also known as Tim Burgess, within the Philadelphia prisons. I have reviewed a number of records that were obtained through subpoena from the Philadelphia Prison records room.

3. Additionally, I had previously been contacted by an assistant district attorney, Mary Porto, in relation to this matter. I have recently seen a letter that I received from her and my response written on June 10, 1997. In that letter, I informed her that my review of the records indicated that Mr. Hannibal and Mr. Buigi were in the same cell block at certain times, but I did not indicate that they were ever in the same cell. I also indicated in that letter that I would provide copies of the housing cards. I am sure that I did provide them to the district attorney, as per my letter to her. My review of the records currently confirms my initial finding that Mr. Buigi and Mr. Hannibal were not ever in same cell.

4. I have not currently seen the housing card for the relevant time period for Mr. Hannibal. My understanding is that it is missing from his files. This is curious. There are times when cards have been lost or have gotten mislaid. However, I am certain based on the letter I wrote to the district attorney that I had reviewed it at that time.

5. Additionally, my original finding is consistent with the computer records of Mr.

Hannibal's movement that I have recently reviewed. It is clear that Mr. Hannibal and Mr. Buigi were never in the same cell. Mr. Buigi was moved to the G-2 Unit of PICC on October 29, 1993 and was housed in cell 50. He remained in that cell until his release on December 27, 1993. During some of that time period, Mr. Hannibal was housed in cell 19 of the G-2 Unit of PICC from October 14, 1993 until he was transferred back to Holmesburg prison on November 15, 1993. Mr. Hannibal was never housed in cell 50.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information, and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. section 1746 and 18 PA C.S. section 4904.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
RICHARD RUFFIN, Notary Public
City of Philadelphia, Phila. County
My Commission Expires March 25, 2017

Robert Durison

Date: May 14, 2013