No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT GENE REGA,

Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT PHOENIX,

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

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INDEX TO APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

Nos. 18-9002 & 18-9003

_____

ROBERT GENE REGA,
Appellant in No. 18-9002

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,
Appellant in No. 18-9003

_____

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-13-cv-01781)
District Judge: Honorable Joy Flowers Conti

_____

Submitted Under Third Circuit L.A.R. 34.1(a)
August 21, 2024

_____

APPENDIX A

Before: KRAUSE, MCKEE, and SMITH, *Circuit Judges*

(Filed: August 23, 2024)

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_____

OPINION OF THE COURT

_____

KRAUSE, *Circuit Judge*.

Robert Gene Rega was convicted of first-degree murder and sentenced to death in Pennsylvania state court. On habeas review, the District Court denied his guilt-phase claims but granted one of his penalty-phase claims and ordered the Commonwealth of Pennsylvania to either provide him with a new sentencing hearing or resentence him to life imprisonment.[1]

On appeal, Rega raises two claims that his prosecutor withheld evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and one claim that his prosecutor presented false testimony at trial and failed to correct it, in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959). We will affirm the denial of relief on these claims because the evidence and testimony in question were not material to Rega's murder conviction.

I. Factual and Procedural Background

In 2001, the Commonwealth charged Rega with first-degree murder and other crimes for shooting a security guard, Christopher Lauth, during a robbery at the Gateway Lodge in Jefferson County, Pennsylvania. In brief, Rega went to the

[1] We use "the Commonwealth" to refer collectively to the Secretary of the Pennsylvania Department of Corrections, the Superintendent of the State Correctional Institution at Greene, and the Superintendent of the State Correctional Institution at Rockview.

lodge with Shawn Bair, Raymond Fishel, and Stanford (Stan) Jones in order to rob its safe and ATM. Stan Jones's wife, Susan Jones, stayed at Rega's mobile home to watch his children. During the robbery, Lauth was shot and killed.

The Commonwealth tried Rega for murder on the theory that he was the shooter and mastermind of the robbery. To that end, the Commonwealth called three witnesses who identified Rega as the shooter—Bair, Fishel, and Susan Jones. Bair testified that, while he sat in the car with Stan Jones and Fishel after the robbery, he heard gunshots inside the lodge, after which Rega left the lodge, got in the car, and said, "I think I killed him." J.A. 491. Fishel also testified that Rega killed the victim and that when Rega returned to the car, he asked whether he "did the right thing." J.A. 563. Susan Jones was not at the lodge, but she testified that she later asked Rega why he killed the victim and that Rega told her "he had to do what he had to do" because "someone's name was mentioned." J.A. 405. On direct examination, the witnesses each acknowledged that they faced their own criminal charges arising from the incident but maintained that the prosecutor had not made any "promises" about how those charges would be resolved. J.A. 421, 465, 550.

Rega himself called Stan Jones, who also identified Rega as the shooter. Other evidence included a video recording of Rega purchasing ammunition for the gun used to kill Lauth and the testimony of Rega's friend, Michael Sharp, that Rega asked him to give police a false alibi for the night in question. Nevertheless, the only direct evidence that Rega shot

the victim was the testimony of Bair, Fishel, and Stan and Susan Jones.

Unsurprisingly, Rega's defense focused on attacking these witnesses' credibility. During examination and argument, Counsel sought to show that their testimony was inconsistent with prior statements to the police and that their own criminal charges provided them a motive to testify. For example, although Bair denied that the prosecutor had made any "promises" to him, he admitted that he still hoped the prosecutor would treat him favorably in exchange for his testimony. J.A. 501–02. Counsel reminded the jury of that testimony during closing argument and asserted that Bair was testifying to "save [his] own skin." J.A. 669. Counsel also noted Bair's admission that he was guilty of felony murder, suggested that Bair had a deal for felony murder to avoid the death penalty, and argued that "it is clear Mr. Bair had an interest in telling the story that he did." J.A. 670.

And as to all four witnesses, Counsel argued:

> Now, each [witness], I submit to you, has an interest in the outcome of the case. What I mean by that is, each one wants to please the Commonwealth with the testimony that they have offered today. When the time comes these defendants are obviously thinking I want the Commonwealth to give me a favorable plea agreement or treat me in an otherwise favorable way. The witnesses were obviously thinking two

> things; I can please the Commonwealth by offering this testimony, but I can also implicate and put the blame for these events on Robert Rega. They have an obvious interest in this case, and to suggest otherwise I suggest to you is absurd.

J.A. 658. In further support of that argument, Counsel previewed for the jury the "polluted source" instruction that the trial court went on to give. Both Counsel and the court advised the jury that all four of the shooter-identification witnesses were accomplices who faced their own charges, that "an accomplice when caught will often try to place the blame falsely on someone else" and "may testify falsely in the hope of obtaining favorable treatment," and that the jury should view their testimony "with disfavor" for that reason. J.A. 659–60 (closing argument); D. Ct. ECF No. 35 at 232–33 (jury instructions).

The jury nonetheless found Rega guilty of first-degree murder and voted to sentence him to death. Rega unsuccessfully challenged his conviction and sentence on direct appeal and in a proceeding under Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9501 *et seq.*, in which he raised the claims at issue here.

Rega then filed a federal habeas petition. The District Court denied Rega's guilt-phase claims but granted relief from his death sentence. Rega appealed, and we granted a certificate

of appealability (COA) on two issues.[2] First, we agreed to review Rega's claim that his prosecutor violated *Brady* by "failing to disclose (1) that Shawn Bair, Raymond Fishel, Susan Jones and Michael Sharp sought lenient treatment in exchange for their testimony against appellant and that the prosecutor told them that he would or 'probably' would consider their cooperation when considering possible pleas, and (2) evidence that Susan Jones suffered from memory problems." J.A. 1–2. Second, we elected to consider the claim that Rega's prosecutor violated *Giglio* and *Napue* by "failing to correct . . . the testimony of Bair, Fishel and Susan Jones that the prosecutor had not made any 'promises' to them." J.A. 2.[3] Each claim requires Rega to show, among other things, that the alleged violation was material to his conviction. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 285 (3d Cir. 2016) (en banc) (*Brady*); *Haskell v. Superintendent Greene SCI*, 866 F.3d

[2] The Commonwealth simultaneously appealed the order granting Rega relief from his death sentence, but it now asserts that it will not pursue the issue. Thus, the Commonwealth has waived any challenge to that order, *see In re Imerys Talc Am., Inc.*, 38 F.4th 361, 373 n.6 (3d Cir. 2022); *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 n.1 (10th Cir. 2016), and we will affirm it without further discussion.

[3] In that same order, we also granted a COA on two additional *Giglio*/*Napue* claims related to the witnesses' incentives to testify, as well as on Rega's claim that the alleged errors under *Brady* and *Giglio*/*Napue* "cumulatively prejudiced him." J.A. 2. But Rega now asserts that he is not pursuing his claim of cumulative prejudice, and he has not briefed his second and third *Giglio*/*Napue* claims. Thus, we address only his two *Brady* claims and his first *Giglio*/*Napue* claim.

139, 146–47 (3d Cir. 2017) (*Giglio*/*Napue*). We will affirm the denial of all claims on the ground that Rega has not made that showing.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 2254, and we have jurisdiction under 28 U.S.C. § 1291 and § 2253. Our review of the District Court's decision is plenary because the District Court did not hold an evidentiary hearing and instead based its decision on the state court record. *See Haskell*, 866 F.3d at 145. Because this case comes to us on habeas review, we defer to the state court's rulings for claims adjudicated on the merits unless they were (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id*. § 2254(d)(2). *See Rogers v. Superintendent Greene SCI*, 80 F.4th 458, 462 (3d Cir. 2023).

III. Discussion

A. *Brady* Claims

The Supreme Court's decision in *Brady v. Maryland* requires prosecutors to affirmatively disclose evidence that is favorable to a defendant to his counsel. 373 U.S. at 87. But not every failure to disclose warrants relief. We will grant a new trial only if a petitioner demonstrates that (1) the withheld

evidence was favorable to him, either because it was "exculpatory" or "impeaching," (2) the State suppressed the evidence, either "willfully" or "inadvertently," and (3) the evidence was material "such that prejudice resulted from its suppression." *Dennis*, 834 F.3d at 284–85 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Materiality under *Brady* requires "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citation omitted). "A 'reasonable probability' of a different result is . . . shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). In other words, evidence is material when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. And when reviewing *Brady* claims, we assess materiality cumulatively, rather than item-by-item. *See Dennis*, 834 F.3d at 312 (explaining that "[t]he importance of cumulative prejudice cannot be overstated, as it stems from the inherent power held by the prosecution, which motivated *Brady*").

1. *Statements to Witnesses About Leniency*

Rega claims that the prosecutor violated *Brady* by failing to disclose a statement the prosecutor made to witnesses when they asked about leniency in their own criminal cases. According to Rega, the prosecutor told them that, while he would not discuss any specific deals, he would or probably

would consider their testimony when considering pleas after Rega's trial was over.

At the outset, the parties disagree over the witnesses to whom the prosecutor made this statement. Rega argues that the prosecutor made it to Bair, Fishel, Susan Jones, and Sharp. The Commonwealth argues that Rega has shown only that the prosecutor made it to Bair. Having reviewed the issue, we agree with the Commonwealth. Bair's counsel testified at the PCRA hearing that the prosecutor refused to make any promises but told Bair that his assistance "probably . . . would be taken into account" in any future plea deal. J.A. 1248. But the evidence that Rega proffers as to Sharp is at best inconclusive; while Sharp's counsel testified to a general "understanding" with the prosecutor that Sharp's cooperation would be considered in a future plea agreement, he later clarified that he did not remember an "outright conversation" with the district attorney concerning the issue. J.A. 1440, 1444. And Rega has adduced no evidence that the prosecutor made a similar statement to Fishel or Susan Jones.[4] Thus, Rega has shown only that the prosecutor made this statement to Bair.

[4] The only other PCRA witness who testified that the prosecutor made a similar statement was counsel for Stan Jones (as distinct from Susan Jones), who was not a Commonwealth witness and as to whom Rega does not assert this claim. Rega argues that there was other PCRA testimony on this point, but he mischaracterizes the record. For example, Rega argues that Officer Louis Davis testified that the prosecutor made similar statements to Fishel and Susan Jones, but the passage he cites

On PCRA review, the Pennsylvania Supreme Court rejected this *Brady* claim on the ground that the prosecutor's statement to Bair was not favorable to Rega; according to that court, the alleged "promise" was nothing more than "the possibility for later negotiation based on the witness['s] cooperation" and therefore would not serve to impeach Bair's testimony. *Commonwealth v. Rega*, 70 A.3d 777, 781 (Pa. 2013). This determination appears reasonable. But even were it not, the prosecutor's statement clearly was not material.[5] *See Dennis*, 834 F.3d at 285. Bair was one of *four* participating witnesses who knew Rega and who unequivocally testified that he was the shooter. Rega does not argue that Bair's testimony was more important than the others', and our review does not suggest that it was. Nor do we see any other basis to conclude that further impeachment of Bair might have made a difference

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is the prosecutor's characterization of Davis's testimony as to Stan Jones, not Fishel or Susan Jones.

Rega's legal arguments fare no better. Although he contends that the Pennsylvania Supreme Court found that the prosecutor made this statement to all four witnesses, the nature of that court's ruling did not require it to make any finding on this point, and it did not. Rega also argues that the Commonwealth judicially admitted this point in various filings, but none of the statements he cites constitutes an unequivocal or unambiguous concession that the prosecutor made any such statement to Fishel or Susan Jones. *See Bedrosian v. United States*, 42 F.4th 174, 184 (3d Cir. 2022), *cert. denied*, 143 S. Ct. 2636 (2023).

[5] We review materiality de novo and not under 28 U.S.C. § 2254(d)(1) because, as described above, the Pennsylvania Supreme Court rejected the *Brady* claim on other grounds.

under the circumstances presented here. *Cf. Haskell*, 866 F.3d at 146–47 (holding that promises of favorable treatment to one of four eyewitnesses was material under *Napue* and *Giglio* where one of the witnesses recanted the identification at trial and the other two previously denied that they could identify the shooter); *Slutzker v. Johnson*, 393 F.3d 373, 387–88 (3d Cir. 2004) (holding that evidence was material where four eyewitnesses identified the defendant, but one of them was more "credible" than the others, and the *Brady* evidence was that she previously told police that the defendant was not the perpetrator).

In any event, impeaching Bair with the prosecutor's statement would not have significantly undermined even Bair's own testimony. Rega does not claim that the prosecutor offered Bair a specific incentive in exchange for his testimony, but rather that the prosecutor made the wholly noncommittal statement that he would *consider* Bair's testimony—or, in the precise words of Bair's counsel, "[j]ust probably it would be taken into account or at the end we will see how it all shakes out and we will take and deal with that at that point." J.A. 1248. This statement shows that Bair had a general motive to testify in the hope of receiving leniency on his own charges, but the jury already knew that. The jury heard Bair testify that he was hoping for favorable treatment in exchange for his testimony, and Rega's counsel vigorously argued that point at closing. Given Bair's testimony, that impeachment argument had evidentiary support and thus was not merely a "speculative and baseless line of attack," as Rega argues. Opening Br. 41 (quoting *Davis v. Alaska*, 415 U.S. 308, 309 (1974)). Both

Counsel and the court then drove home that point with the "polluted source" instruction. Adding the prosecutor's noncommittal statement to Bair would have added little, if anything, to the mix. *See Bell v. Bell*, 512 F.3d 223, 237 (6th Cir. 2008) (en banc) (holding that evidence of a witness's expectation of favorable treatment was not material where it merely would have bolstered an attack on credibility already made at closing); *McCleskey v. Kemp*, 753 F.2d 877, 884 (11th Cir. 1985) (en banc) (holding that a detective's offer to "speak a word" for the witness was not material under *Giglio* where, among other things, the witness already "admitted that he was testifying to protect himself"), *aff'd on other grounds*, 481 U.S. 279 (1987).

Finally, other trial evidence tied Rega to the murder weapon, thereby corroborating Bair's testimony. For example, Bair's testimony that Rega bought the ammunition for the gun used to kill Lauth is corroborated by the testimony of a Wal-Mart employee and the store's surveillance video recording. This evidence did not directly implicate Rega as the shooter, but it did give the jury additional reason to believe the consistent testimony of all four witnesses. Under these circumstances, introducing the prosecutor's noncommittal statement to Bair would not have "put the whole case in such a

different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

2. *Susan Jones's Memory Problems*

We reach the same conclusion even considering Rega's first *Brady* claim along with his second.[6] Rega contends that his prosecutor failed to disclose evidence that Susan Jones suffered from memory problems, namely, a letter from Susan Jones to the prosecutor in which she asserted that "I have a problem with my head," J.A. 2836, and a conversation she had with a police officer about her memory problems. In support of his claim, Rega also cites Susan Jones's PCRA testimony that police had to "jiggle [her] memory," J.A. 1846, and the PCRA testimony of Dr. Jonathan Mack that Susan Jones has a "brain impairment" called "pseudotumour cerebri" that can cause "memory loss," J.A. 2403–04, 2408–09.

Clearly, evidence of a government witness's memory problems could provide fodder for impeachment and is thus favorable to a defendant. *See United States v. Kohring*, 637 F.3d 895, 907 (9th Cir. 2011); *Conley v. United States*, 415 F.3d 183, 190 (1st Cir. 2005). However, the Pennsylvania Supreme Court ultimately concluded that this evidence was not material, and we agree. In the first place, and as with Bair,

[6] We assess cumulative materiality de novo because the Pennsylvania Supreme Court rejected Rega's first *Brady* claim for lack of favorability, and thus had no occasion to consider the two claims' cumulative materiality. *See Simmons v. Beard*, 590 F.3d 223, 233 (3d Cir. 2009).

Rega has not shown that this evidence would have undermined even Susan Jones's own testimony. Her most important testimony for present purposes was that Rega told her he killed the victim. But Rega has not argued, let alone shown, that this conversation was one of the subjects on which police "jiggled" her memory. Nor has he shown whether or how her condition might have interfered with her "ability to perceive, remember and narrate" either that specific conversation or the relevant events in general. *Wilson v. Beard*, 589 F.3d 651, 666 (3d Cir. 2009) (citation omitted). Susan Jones's testimony was specific and detailed, and it comported with a written statement she submitted to the police in 2001. We think it unlikely that a generalized showing of "memory problems" would have undermined that evidence.

Regardless, Susan Jones was not at the scene, and the three witnesses who were present at the lodge testified that Rega was the shooter. Further impeaching her would thus not have undermined the most damning evidence against Rega. Nor, as explained above, would further impeachment of Bair have undermined his own testimony. Such impeachment also would have left undisturbed the testimony of Fishel and Stan Jones that Rega was the shooter, which both independently implicated Rega and corroborated Bair's and Susan Jones's testimony on that point. Further impeachment of Susan Jones and Bair also would not have undermined other evidence of Rega's orchestration of and participation in the crime, including evidence tying him to the murder weapon. Thus,

even considered cumulatively, Rega's *Brady* evidence does not "undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

B. *Giglio*/*Napue* Claim

Rega's final claim is that Bair, Fishel, and Susan Jones falsely testified that the prosecutor did not make any "promises" to them and that the prosecutor, in violation of *Giglio* and *Napue*, knowingly presented and failed to correct that testimony. J.A. 421, 465, 550. Rega argues that this testimony was false because the prosecutor made a "promise" by uttering the statement underlying the first *Brady* claim—i.e., that he would or probably would consider the witnesses' testimony when offering plea deals in their own cases. But as we explained in the context of his first *Brady* claim, Rega has shown only that the prosecutor made that statement to Bair. And with no showing that the prosecutor made that statement to Fishel or Susan Jones, Rega has provided no basis to conclude that their testimony on this point was false. Thus, we limit our consideration of this claim to Bair, and we will affirm the denial of this claim because Bair's disavowal of any "promises" was not material.[7]

[7] As described above, Rega expressly declined to pursue his claim that we should assess the materiality of this *Giglio*/*Napue* claim cumulatively with his *Brady* claims. Thus, we have no occasion to opine on whether *Brady* and *Giglio*/*Napue* claims should be considered cumulatively as a general matter, though we note that other Courts of Appeals have addressed that issue, *see, e.g.*, *Juniper v. Davis*, 74 F.4th

To establish a constitutional violation under *Giglio* and *Napue*, Rega must show that (1) Bair perjured himself, (2) the Government "knew or should have known of his perjury," (3) Bair's testimony "went uncorrected," and (4) there exists "any reasonable likelihood that the false testimony could have affected the verdict." *Lambert v. Blackwell*, 387 F.3d 210, 242 (3d Cir. 2004). This "reasonable likelihood" standard is "lower, more favorable to the defendant[] and hostile to the prosecution as compared to the standard for a general *Brady* withholding violation." *Haskell*, 866 F.3d at 150 (quoting *United States v. Clay*, 720 F.3d 1021, 1026 (8th Cir. 2013)). It is "equivalent to the harmless-error standard articulated in *Chapman v. California*," under which a constitutional violation is harmless only if it is "harmless beyond a reasonable doubt." *Id.* at 147 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Pennsylvania Supreme Court determined that Bair did not perjure himself when he denied being made any promises because, as described above, Rega offered no evidence that the prosecutor made anything other than a vague statement to Bair that his cooperation might be considered in

196, 212–13 (4th Cir. 2023), and that the Supreme Court granted certiorari to consider it in *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (mem.). In noting this issue, we do not suggest that our decision might be different if we considered all three claims cumulatively.

future plea negotiations. We defer to this reasonable determination under 28 U.S.C. § 2254(d)(1).

Even if we determined that Bair's testimony was "false" for purposes of *Giglio* and *Napue*, we would still deny Rega's claim as immaterial to the jury's verdict.[8] We reach that conclusion largely for the same reasons as above. Bair was merely one of four witnesses who identified Rega as the shooter, the jury already knew that Bair hoped for lenient treatment in exchange for testifying against Rega, the prosecutor's noncommittal statement that he would "consider" Bair's testimony added little to that line of impeachment, and the evidence overall (including evidence corroborating other aspects of Bair's testimony) showed that Rega was the mastermind and tied him to the murder weapon. Rega's counsel used his direct examination of Bair and closing argument to emphasize Bair's potentially selfish motives, and the trial court warned the jury about those motives in its "polluted source" instructions. Thus, no "reasonable likelihood" exists that the challenged testimony affected the

[8] As with Rega's first *Brady* claim, we review materiality de novo and not under 28 U.S.C. § 2254(d)(1) because the Pennsylvania Supreme Court did not reach the issue. *See Dennis*, 834 F.3d at 283–84.

jury's judgment. *Haskell*, 866 F.3d at 152; *see McCleskey*, 753 F.2d at 884.

IV. Conclusion

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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18-9002 & 18-9003

ROBERT GENE REGA,
Appellant in No. 18-9002

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW,
Appellant in No. 18-9003

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-13-cv-01781)
District Judge: Honorable Joy Flowers Conti

Submitted Under Third Circuit L.A.R. 34.1(a)
August 21, 2024

Before: KRAUSE, MCKEE, and SMITH, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted on August 21, 2024.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the orders of the District Court entered on February 15, 2018, and May 1, 2018, be and the same are hereby **AFFIRMED**. Costs shall not be taxed.

All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: August 23, 2024

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

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August 23, 2024

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RE: Robert Rega v. Secretary Pennsylvania Departm, et al
Case Numbers: 18-9002 & 18-9003
District Court Case Number: 2-13-cv-01781

ENTRY OF JUDGMENT

Today, **August 23, 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,

s/ Patricia S. Dodszuweit
Clerk
By: Legal Assistant/nmb/dwb
267-299-4952

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

ROBERT GENE REGA, Petitioner, v. JOHN E. WETZEL, et al., Respondents.	))))))))	No. 2:13-cv-1781

OPINION

Joy Flowers Conti, Chief United States District Judge.

In June 2002, a jury convicted the petitioner, Robert Gene Rega ("Rega"), of first-degree murder, second-degree murder, robbery, burglary and related crimes in a criminal case in the Court of Common Pleas of Jefferson County, Pennsylvania. At the conclusion of the penalty phase of the trial, the jury determined that Rega should be sentenced to death on the first-degree murder conviction. He is serving an aggregate term of 39 ½ to 79 years on his other convictions in this case.[1]

Before this court is Rega's petition for a writ of habeas corpus (ECF No. 6), which he filed pursuant to 28 U.S.C. § 2254. He contends that he is entitled to a new trial or, at a minimum, a new sentencing hearing. For the reasons set forth below, the court grants his petition to the extent that Rega seeks a new sentencing hearing and denies it in all other respects. If the Commonwealth still seeks the death penalty for Rega, it must conduct a new capital sentencing hearing.

[1] The trial court originally imposed a term of life imprisonment on Rega's second-degree murder conviction. It subsequently granted a post-sentence motion filed by Rega to merge that life sentence with his sentence for first-degree murder. (ECF No. 48, Hr'g Tr., 4/5/05, at 93-94.)

I. Relevant Background[2]

On December 21, 2000, Christopher Lauth ("Lauth") was working at the Gateway Lodge as its night watchman. Commonwealth v. Rega, 933 A.2d 997, 1003 (Pa. 2007) ("Rega I"). Around 6:30 a.m. the following morning, another employee discovered his body in a hallway leading to the kitchen area. Id. at 1005. Lauth had been shot three times in the head and back. Id. at 1009. The Gateway Lodge's "office and kitchen were in total disarray, with papers everywhere and tables overturned. The ATM had bullet holes in it." Id. at 1005. Its safe, which had been located in an office near the kitchen and contained approximately $18,000, was missing. Id. Lauth's murder and the other crimes that occurred at the Gateway Lodge that evening are referred to collectively as the "Gateway Lodge crimes."

Because the safe was too heavy for a single person to have moved it, the police suspected that there was more than one individual involved in the Gateway Lodge crimes. Id. The circumstances also indicated that at least one of the perpetrators knew the layout of the premises, and based upon those circumstances, the police obtained the Gateway Lodge employment records in order to interview its current and former employees. Id. (See also ECF No. 30, Trial Tr., 6/14/02, at 173.) Rega and his friend, Shawn Bair ("Bair"), used to work at the Gateway Lodge, and a police investigator first spoke with them on December 22, 2000. Id. at 1016-17. They denied any involvement in, or knowledge of, the Gateway Lodge crimes. Id. (See also ECF No. 30, Trial Tr., 6/14/02, at 174-75.)

In Rega's subsequent interviews with the police in early January 2001, he continued to maintain that he was not involved in the Gateway Lodge crimes. Id. at 1006. Bair's adherence to his initial statement quickly faltered and he soon gave statements to the police in which he

[2] The Commonwealth submitted the original state court record. Following the issuance of this opinion and the final order, the court will enter onto the ECF docket those documents cited herein that the parties did not file electronically.

admitted that he, Rega, and Stanford Jones ("Stan") robbed the Gateway Lodge. Id. Stan admitted his involvement, and implicated Raymond Fishel ("Fishel"), who confessed too. Id. Eventually, Bair, Stan, and Fishel all told the police that Rega was the shooter. Id.

The police arrested Rega, Bair, Stan, and Fishel and charged each of them with criminal homicide, robbery, burglary, criminal conspiracy, and related crimes. Rega, unlike his co-defendants, continued to maintain his innocence. On January 10, 2001, he gave the lead investigator, Trooper Louis Davis ("Trooper Davis"), a statement in which he revealed a "tremendous amount of detail about the homicide and the events surrounding it, but asserted that his role was limited to assisting Bair and Stan after the fact." Id. at 1006-07. Rega said that he knew what happened because Bair, Stan, and Stan's wife, Susan Jones ("Susan"), planned the robbery when they were at Rega's mobile home. Id. He told Trooper Davis that he refused to join them and that they retrieved Fishel from a nearby bar and Fishel agreed to go with them. Rega said that the group came back to his mobile home after they had committed the Gateway Lodge crimes. They shared with him the money from the safe, he said, because he let them use his grinder to open it. Id. He also "described where the gun could be found, which he described in detail, and where the two-way radios were." Id. at 1007.

Rega's six-day jury trial for the Gateway Lodge crimes commenced on Friday, June 14, 2002.[3] Michael K. English, Esq. ("English") and Ronald T. Elliott, Esq. ("Elliott") (collectively, "trial counsel," or "defense counsel"), represented him.

Bair, Fishel, and Susan were key witnesses for the Commonwealth. It did not call Stan to testify for reasons discussed below. English gave the defense's opening statement and he argued

[3] "On December 20, 2000, the day before the Lauth murder, [Rega], Bair, Stan and Susan went to Morgan Jones's residence to steal a gun with which to commit robberies." Rega I, 933 A.2d at 1019. Rega distracted Morgan Jones "while Bair stole the gun[.]" Id. Rega was charged with theft of that handgun, and the criminal case for that theft was consolidated with Rega's June 2002 trial for the Gateway Lodge crimes. Id. The jury convicted him of theft by receiving stolen property for his role in stealing Morgan Jones's gun. (ECF No. 35, Trial Tr., 6/20/02, at 300-01.)

to the jury that Bair's, Fishel's, and Susan's testimony should not be credited because "they're liars…. I'm not asking you to take my word for it. Take their word for it. They're up here…trying to save their own skins. They're up here because they know they're in trouble too." (ECF No. 30, Trial Tr., 6/14/02, at 56-57.) They lied about "big stuff," English said, and "even lied about the little things." (Id. at 58.) English explained that "they've admitted their involvement" and he asserted that they are "looking for consideration" in exchange for their testimony. (Id. at 60.)

The prosecution's theory was that Rega was the leader of the group that committed the Gateway Lodge crimes. Rega I, 933 A.2d at 1003-07. It introduced evidence to establish that Bair, Fishel, Stan and Rega drove to the lodge together in Stan's car, which was easily identifiable because it was in a dilapidated condition.[4] They "intended that during the robbery, nobody would get hurt." Id. at 1003. They assumed that Lauth would be inside the lodge when they arrived and that he would not be able to recognize them because their faces would be masked. Their plan was to enter the lodge, overtake Lauth, and force him to call the assistant innkeeper who resided on the premises, Ann Lipford ("Lipford"). They intended to steal the lodge's safe and the money in the ATM machine and "place Lipford and Lauth inside the kitchen's walk-in freezer with a sign indicating they were in there." Id.

The Pennsylvania Supreme Court explained in Rega I that "from the moment they arrived at the Gateway Lodge the plan went awry." Id. at 1004.[5] The prosecution introduced evidence at the trial to establish:

> [u]pon driving to the parking area, the group noticed that Lauth was not inside as expected, but outside, and, in fact, had watched them drive up, park, and turn off the lights. Because Stan's car was so distinctive and Lauth had watched them pull into the parking lot, the group immediately began to panic. [Rega] decided that

[4] Susan did not go with them. She stayed at Rega's mobile home with his young daughters. Rega I, 933 A.2d at 1004.

[5] In Rega I, the Pennsylvania Supreme Court spelled Fishel's name as "Fishell." The misspelling is corrected in the quotation so that the spelling of his name is consistent throughout this opinion.

everyone should jump out of the car at the same time, because Lauth was approaching the car. All four doors opened at once, and everyone jumped out. Bair walked around the car and got into the driver's seat. [Rega], with his gun drawn, Stan and Fishel approached Lauth and took him into the kitchen of the Gateway Lodge. Bair stayed behind in the car, with a two-way radio to keep in contact with [Rega].

Once they had Lauth in the building, Fishel held Lauth at knifepoint while they directed him to call Ann Lipford…as planned…. Lipford did not answer. Instead, Lauth reached her answering machine, and his voice was captured on her answering machine at 1:48 a.m. [Rega] then used the two-way radio to ask Bair whether he saw Lipford's car in the parking lot. Bair looked around, and informed [Rega] that he did not see her car. Realizing that she was not home, the group gained entry to her apartment and ransacked it, apparently looking for the key to the ATM.

The group proceeded to the room where the safe was kept. After locating it under a desk, Stan and Fishel began to move it while [Rega] held Lauth at gunpoint. [Rega] radioed Bair to tell him to pull Stan's Buick up so they could load the safe into it. As Fishel and Stan carried the safe to the car, [Rega] fired several shots at the ATM in an unsuccessful attempt to break into it. The group also cut various wires in the office because they were concerned about police being notified somehow.

After failing to gain entry to the ATM and then cutting the wires in the office, [Rega] moved Lauth into the kitchen at gunpoint. Fishel and Stan joined [Rega] and Lauth. Upon Fishel and Stan's appearance in the kitchen, [Rega] hit Lauth with his flashlight and then handed it to Fishel, instructing him to hit the victim. Fishel hit Lauth one time. [Rega] then fired the gun at the freezer door in an attempt to open it. To escape any potential ricochet, Fishel returned to the car. At the same time, Stan found Lauth's vehicle in the parking lot and drove it over the hillside down an embankment, and then he returned to the car. Bair was still in the car, acting as a lookout. While Stan, Fishel, and Bair waited in the car, they heard a gunshot, a scream, a gurgling sound, and then another couple of gun shots. [Rega] ran out of the building, got into the car, and directed Bair to drive.

While in the car, [Rega] asked Stan whether he thought [Rega] did the right thing. Stan indicated that he did. On the way back to [Rega's] trailer, [Rega] stated "I think I killed him." After arriving at [Rega's] trailer, they used a grinder to open the safe. The group, along with Susan, separated the items from the safe and split the money four ways, about $ 5000 each. [Rega] then instructed the group to put all credit cards and papers they found in the safe back into it, and took it to the car. They stuffed a kerosene soaked blanket into the safe, lit it on fire, and dumped it down an embankment. They then drove Fishel to his house. The group, minus Fishel, returned to Rega's trailer, where Bair stayed for the night. Stan and his wife returned to their own home. Before Stan and Susan left, [Rega] handed them a bullet and told them it would be for them if they opened their mouths. Later in the day on December 22, 2000, [Rega] gave his gun, wrapped inside a bag, to Stan. Stan put the wrapped gun in his car, drove away with his wife Susan, and threw the gun into a creek.

Id. at 1004-05 (footnotes omitted).

Bair and Fishel both testified that Rega was the one that shot and killed Lauth. (ECF No. 33 at 135-36, Trial Tr., 6/18/02, at 136-37; ECF No. 34, Trial Tr., 6/19/02, at 5.) Each acknowledged that he faced very serious charges because of his involvement in the Gateway Lodge crimes. (Id. at 135, 217, Trial Tr., 6/18/02 at 136, 218; ECF No. 34, Trial Tr., 6/19/02, at 5.) Each admitted that he lied to the police about various matters during the course of the investigation because he was scared or trying to protect themselves or others. (Id. at 169-74, Trial Tr., 6/18/02, at 170-75, 193-218; ECF No. 34, Trial Tr., 6/19/02, at 25.) Each testified that the Commonwealth did not make any promise to him in exchange for his testimony. (Id. at 135, 172, Trial Tr., 6/18/02, at 136, 173; ECF No. 34, Trial Tr., 6/19/02, at 5.)

Susan testified that a few days after Lauth's murder, she had a conversation with Rega about what happened at the Gateway Lodge. (ECF No. 31, Trial Tr., 6/15/02, at 192-93.) During that conversation, she asked Rega why he killed Lauth and "[h]e said he had to do what he had to do" because Lauth might have recognized one or more of them. (Id. at 193.) Like Bair and Fishel, Susan stated that district attorney did not make any promises to her in exchange for her testimony. (Id. at 209, 249.) She admitted she had charges pending against her on the Jefferson County trial list. (Id. at 155.) She also testified that she had not yet been charged with any crime for her involvement in the Gateway Lodge crimes, but that Trooper Davis told her that she probably would be because she had admitted that she handled the money stolen from the lodge. (Id. at 209, 249-50; see id. at 239-40 (Susan admits on cross-examination that she received stolen property.)). She said that she was worried that charges would be filed against her for that conduct. (Id. at 249.) Susan admitted that she lied when the police first interviewed her. (Id. at 192, 214-17.) She said she did so because she "was scared of going to jail and losing my children[,]" and was trying to protect her husband, Stan, at that time. (Id. at 192.)

In addition to the testimony provided by Bair, Fishel, and Susan, the prosecution introduced evidence to establish that Rega, who was lacking cash before the Gateway Lodge crimes, spent a considerable amount of money right after the crimes were committed. Rega I, 933 A.2d at 1006-08. "His purchases after the robbery included $540 towards a bill at a music store, $540 for a car stereo, $162 for car tires, $258 for a ring for his wife, $400 for toys for his children[,]" id, at 1007-08, a car for $1,750, and a new paint job for it that cost $650. Id. at 1006. The Commonwealth also produced evidence that Rega and Bair stole the weapon that Rega later used to kill Lauth from a gun dealer, Morgan Jones, and that Rega bought bullets for that gun at a local Walmart. Id. at 1004 n.2, 1019.

The Commonwealth introduced evidence of Rega's consciousness of guilt; specifically, that Rega attempted to tamper with his jury by planting someone on it favorable to him, and that he also persuaded his friend, Michael Sharp ("Sharp"), to lie to the police and provide him with a false alibi. Id. at 1006-07. Sharp testified that he initially told the police that he was with Rega at his mobile home the night of the Gateway Lodge crimes. Id. "[H]owever, Sharp was unable to keep his story straight, and eventually confessed that [Rega] had asked him to provide an alibi and that he had not, in fact, been with Rega on December 21, 2000." Id. at 1006. Sharp admitted that he faced charges because he lied to the police and that those charges were pending against him. (ECF No. 31, Trial Tr., 6/15/02, at 261.)

After the Commonwealth rested its case-in-chief, the defense called Stan to testify. Stan admitted that he wrote a letter, which the district attorney received on June 26, 2001, in which he confessed to shooting Lauth. (ECF No. 35, Trial Tr., 6/20/02, at 7-9.)[6] In his letter, Stan wrote that Rega, Bair, and Fishel "were all innocent[,]" and that his wife, Susan, "knew everything that

[6] The district attorney provided English with a copy of Stan's letter on June 28, 2001. (6/28/01 letter, ECF No. 10-2 at 1.)

happened" and that is was she who disposed of the murder weapon. (6/26/01 letter, ECF No. 10-2 at 2.) Stan wrote another letter to the district attorney a little less than one month later, on July 19, 2001, in which he retracted his confession and identified Rega as the shooter. (7/19/01 letter, ECF No. 10-1 at 4-5.)

During his examination by the district attorney, Stan testified that he wrote the first letter because he and Susan hated each other by that point in time and he wanted to implicate her in the Gateway Lodge crimes so that she would go to prison too and his mother would have custody of their children.[7] (ECF No. 35, Trial Tr., 6/20/02, at 14-15, 20.) Like Bair and Fishel, Stan testified that Rega was the one that shot Lauth. (Id. at 19-20.)

In order to rebut the prosecution's suggestion that Rega needed money in December 2000 because he wanted to buy Christmas presents for his daughters, the defense called Rega's estranged wife, Renee Rega ("Renee"). She testified that she was paying Rega child support in December 2000 and that it was she, and not Rega, who purchased all the Christmas presents for their daughters that year. (Id. at 67-70.) Renee denied that Rega bought her a ring at the beginning of 2001. (Id. at 70.) Another witness, Ronald Wilson, testified that he purchased a trailer from Rega and that he paid Rega $150.00 per month. (Id. at 78-81.) Rega's sister, Janet Rega ("Janet"), testified that in August and September 2000, she loaned Rega $6,500.00 in cash. (Id. at 116-17.) She testified that in January 2001, she was at Rega's home when Stan and Susan were present. (Id. at 117.) Janet said that Stan told her that Fishel, not Rega, shot Lauth. (Id. at 118-19.)

Elliot, who gave the defense's summation, argued that the Commonwealth did not meet its burden of showing that Rega was guilty of the crimes charged beyond a reasonable doubt.

[7] The district attorney asked Stan: "isn't it true that I told you when you pull shenanigans like that I can't put you on as a witness?" (ECF No. 35, Trial Tr., 6/20/02, at 40.) Stan replied: "Yes." (Id.)

"There are at least four reasonable doubts in this case[,]" Elliott stated, they are "Susan Jones, Stan Jones, Shawn Bair and Raymond Fishel." (Id. at 145.) He pointed out that Stan and Susan, who were married to each other at the time the Gateway Lodge crimes were committed, had a motive to lie to protect each other, as did Bair and Fishel, who were best friends. (Id. at 171.) Rega was "the odd man out," Elliott argued, and that is why his accomplices all turned on him. (Id.) Elliot discussed the special rules that the jury must apply when evaluating an accomplice's testimony,[8] (id. at 150-55), and he explained that the trial court would instruct it that an accomplice "may testify falsely in the hope of obtaining favorable treatment or for some corrupt or wicked motive." (Id. at 152-53.)

Elliot focused the jury on admissions of each of Rega's co-defendants that they were involved in the Gateway Lodge crimes and that they repeatedly lied to the police during the investigation. He utilized poster boards displayed on an easel to highlight the inconsistent statements that Bair, Fishel, Susan, and Stan gave to the police and he argued to the jury that it should not credit any of the testimony they gave. (Id. at 155-71.) Rega, Elliot reminded the jury, was the only one who consistently maintained his innocence. (Id. at 147-48.) Elliot urged the jury not to convict Rega "for the actions of Stan Jones, Shawn Bair and Ray Fishel[,]" (id. at 146), and pointed out that each of them, and Susan, had motive to curry favor with the Commonwealth:

> [E]ach one wants to please the Commonwealth with the testimony that they have offered today. When the time comes these defendants are obviously thinking I want the Commonwealth to give me a favorable plea agreement or treat me in an otherwise favorable way. The witnesses were obviously thinking two things; I can please the Commonwealth by offering this testimony, but I can also implicate and

[8] Susan was considered, along with Bair, Fishel, and Stan, to be an accomplice. Rega I, 933 A.2d at 1014. "The trial court did not consider Sharp to be an accomplice, and therefore did not instruct the jury that Sharp was a corrupt and polluted source whose testimony should be viewed with caution." Id. at 1008. In his direct appeal, Rega argued that that was an error. The Pennsylvania Supreme Court disagreed and denied that claim. Id. at 1014-16.

> put the blame for these events on Robert Rega. They have an obvious interest in this case, and to suggest otherwise I suggest to you is absurd.

(Id. at 151; see id. at 157 (regarding Susan, "[w]hile it may be true that she wanted to protect her husband in this case, I also suggest to you that she wanted to curry favor with the Commonwealth.")). Elliott concluded by asking the jury not to convict Rega "on the word of people who only know how to lie, who sometimes do not know why they lie and who cannot be believed to any degree whatsoever." (Id. at 174.)

In his closing argument, the district attorney conceded that Bair, Fishel, and Stan had all lied to the police during the course of the investigation and were unsavory individuals (id. at 180), but emphasized to the jury that:

> [t]hey were there. They were in. They saw this. And you know what? They have admitted things that would forever alter their lives. Forever. Forever. You heard me ask them, each and every one of you have admitted serious, serious crimes, haven't you? And they all knew they have. They all knew they have. And not a single one of them took the stand up here with a promise from the Commonwealth. They admitted serious crimes in front of you. Serious crimes. That cannot be discounted…. [Rega] picked his accomplices, not us. We are just asking you, ladies and gentlemen, to take the evidence where it leads you…. Can there be any doubt in your minds whatsoever after having seen those three take the stand that the intellectual superiority [sic] of that group was Mr. Rega[?] Ladies and gentlemen, Shawn Bair was not capable of forming this plan. Ray Fishel was not capable of forming a plan. Stanford Jones, you saw what he tried to do. Good grief, he tried to convince me by sending me a letter that he committed the whole robbery all by himself. He tried to tell me that. Ladies and gentlemen, this was a group that could easily be controlled by Robert Rega.

(Id. at 181-82.) The district attorney acknowledged that Susan had lied to the police too, and he argued:

> Susan Jones points the finger at Robert Rega, too…. Susan Jones wasn't even at the Gateway Lodge that night. Susan Jones is not guilty of second degree murder. She's not even close to being guilty of second degree murder. Her involvement in the Gateway Lodge homicide was simply that she was at home babysitting Robert Rega's kids. She can't stand her husband [Stan], so why would she protect him? You have heard that from her and you have heard that from him. They don't like each other. That is abundantly clear. So why did she point the finger at Robert Rega?

(Id. at 184.)

In its final jury charge, the trial court instructed on the special rules that apply to evaluating accomplice testimony. (Id. at 232-34.) Before setting forth those special rules, it stated:

> When a Commonwealth witness was so involved in the crime charged that he was an accomplice his testimony has to be judged by special precautionary rules. Experience shows that an accomplice when caught will often try to place blame falsely on someone else. He or she may testify falsely in hope of obtaining favorable treatment or for some corrupt or wicked motive. On the other hand, an accomplice may be a perfectly truthful witness. The special rules I shall give you are meant to help you distinguish between truthful or false accomplice testimony. In view of the evidence of Bair's, Fishel's, Stanford Jones's, Susan Jones's criminal involvement you must regard them as accomplices in the crimes charged and apply special rules to all of their testimony.

(Id. at 232-33.)

On June 20, 2002, the jury convicted Rega of criminal conspiracy to commit robbery, burglary, unlawful restraint, and theft, first-degree murder, second-degree murder, robbery, burglary, theft by unlawful taking or disposition, aggravated assault, criminal mischief, and unlawful restraint. (Id. at 300-01.) Rega's one-day penalty hearing was held the next day. (ECF No. 36, Sent. Hr'g Tr., 6/21/02.) At the conclusion of it, the jury fixed the punishment at death for the first-degree murder conviction.

In May 2003, Rega was tried on unrelated rape and sexual assault charges. The jury in that case convicted Rega of fifty-one counts, including rape, statutory sexual assault, indecent sexual assault, involuntary deviate sexual intercourse, indecent assault, and selling or furnishing liquor to minors. Susan testified as a prosecution witness in that case too.

In post-sentence proceedings and on direct appeal, Rega was represented by Clifford Schenkemeyer, Jr., Esq. ("Shenkemeyer") and Robbie Taylor, Esq. ("Taylor") (collectively, "appellate counsel"). In his post-sentence motion, Rega raised numerous claims that his trial

attorneys provided him with ineffective assistance in violation of his rights under the Sixth Amendment. In relevant part, Rega claimed that they were ineffective for failing to investigate and present available mitigating evidence at his sentencing hearing. The trial court presided over evidentiary hearings on April 4, 2005 (ECF No. 47) and April 5, 2005 (ECF No. 48.)

On January 13, 2006, the trial court denied Rega's post-sentence motions. (ECF No. 10 at 1-66, Commonwealth v. Rega, CP-33-CR-26 & 524-2001, slip op. (C.P. Jefferson Jan. 13, 2006) ("Post-Sent. Op.")). Appellate counsel filed an appeal with the Pennsylvania Supreme Court. On October 17, 2007, the supreme court issued its decision (Rega I) in which it affirmed Rega's convictions and his sentence of death. The United States Supreme Court denied Rega's writ of certiorari on April 14, 2008. Rega v. Pennsylvania, 552 U.S. 1316 (2008).

Later that same year, Rega filed a *pro se* petition for collateral relief (ECF No. 51) pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"). On January 26, 2009, new counsel filed an amended PCRA petition (ECF No. 10-27), which was later amended and supplemented. (ECF No. 10-28 at 1-37, 73-96, 100-32).

In his PCRA proceeding, Rega raised the same claims that are now before this court in his federal habeas petition. The PCRA court conducted evidentiary hearings on December 14, 2009 (ECF No. 54), December 15, 2009 (ECF No. 55), December 17, 2009 (ECF No. 56), December 18, 2009 (ECF No. 57), January 18, 2010 (ECF No. 58), January 19, 2010 (ECF No. 59), January 21, 2009 (ECF No. 60), January 22, 2010 (ECF No. 61), May 21, 2010 (ECF Nos. 62, 71, 72), and October 20, 2011 (ECF No. 63). On October 27, 2011, it issued a decision and order in which it denied all of Rega's claims for relief. (ECF No. 10-1, Commonwealth v. Rega, CP-33-CR-26 & 524-2001, slip op. (CP Jefferson Co. Oct. 27, 2011) ("PCRA Ct. Op.")). Rega filed an appeal with the Pennsylvania Supreme Court, which affirmed the PCRA court's decision. Commonwealth v. Rega, 70 A.3d 777 (Pa. 2013) ("Rega II").

After the Pennsylvania Supreme Court denied his PCRA claims, Rega filed his federal habeas petition. (ECF No. 6). Thereafter, he filed his brief in support (ECF No. 22), the Commonwealth[9] filed its answer (ECF No. 29), Rega filed a reply (ECF No. 75), and the Commonwealth filed a sur-reply (ECF No. 77).

II. Jurisdiction and Standards of Review

This court has jurisdiction under 28 U.S.C. §§ 2241 and 2254. Section 2254 is the federal habeas statute applicable to state prisoners and it permits a federal court to entertain an application for habeas corpus relief from a state prisoner, in relevant part, "only on the ground that he or she is in custody in violation of the Constitution…of the United States." 28 U.S.C. § 2254(a). It is Rega's burden to prove that he is entitled to the writ. Id.; see, e.g., Vickers v. Superintendent Graterford SCI, 858 F.3d 841, 848-49 (3d Cir. 2017), petition for cert. denied, — S.Ct. — , 2018 WL 311655 (Jan. 8, 2018). There are other prerequisites that he must satisfy before he can receive habeas relief (most relevant here is the burden imposed upon him by the standard of review set forth at 28 U.S.C. § 2254(d) (discussed below)), but ultimately Rega cannot receive federal habeas relief unless he demonstrated that he is in custody in violation of the federal constitution.

In 1996, Congress made significant amendments to § 2254 with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214. AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002) (citing Williams v. Taylor, 529 U.S. 362, 403-04 (2000)). It reflects the view that habeas corpus is a

[9] Going forward, the court also refers to the respondents, who are Rega's custodians, as the "Commonwealth."

"'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

A. Deference To the State Court's Findings Of Facts Under 28 U.S.C. § 2254(e)(1)

A finding of fact made by a state court has always been afforded considerable deference in a federal habeas proceeding. AEDPA continued that deference and mandates that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Rega has the "burden of rebutting the presumption of correctness by clear and convincing evidence." Id.

B. Standard of Review When the State Court Adjudicated a Claim On the Merits

AEDPA also put into place a new standard of review, which is codified at 28 U.S.C. § 2254(d). It applies "to any claim that was adjudicated on the merits" by the state court, § 2254(d), and it prohibits a federal habeas court from granting relief unless the petitioner established that the state court's "adjudication of the claim":

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

28 U.S.C. § 2254(d).

1. Application of 2254(d)(1)

a) "Clearly established Federal law"

The standard of review set forth at § 2254(d)(1) applies to questions of law and mixed questions of law and fact. In applying it, this court's first task is to ascertain what law falls within

the scope of the "clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1). Importantly, "'clearly established federal law' means 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" Dennis v. Sec'y, Pennsylvania Dep't of Corr., 834 F.3d 263, 280 (2016) (en banc) (quoting Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003)). It "includes only 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" White v. Woodall, 134 S.Ct. 1697, 1702 (2014) (quoting Howes v. Fields, 565 U.S. 499, 505 (2012), which quoted Williams, 529 U.S. at 412). The Supreme Court "has repeatedly emphasized" that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court'" under § 2254(d)(1). Glebe v. Frost, 135 S.Ct. 429, 431 (2014) (per curiam) (citing Lopez v. Smith, 135 S.Ct. 1, 4-5 (2014) (per curiam)). See, e.g. Renico v. Lett, 559 U.S. 766, 779 (2010) (state court's failure to apply decision by federal circuit court "cannot independently authorize habeas relief under AEDPA.") Thus, this court is restricted under § 2254(d)(1) to evaluate the state court's decision in light of United States Supreme Court precedent. Additionally, "[c]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced.'" Lopez, 135 S.Ct. at 4 (quoting Marshall v. Rodgers, 133 S.Ct. 1446, 1451 (2013) (per curiam)).

b) The "contrary to" clause

Once the "clearly established Federal law" is ascertained, this court must determine, if Rega makes this argument, whether the Pennsylvania Supreme Court's adjudication of the claim at issue was "contrary to" that law. Williams, 529 U.S. at 404-05 (§ 2254(d)(1)'s "contrary to" and "unreasonable application of" clauses have independent meaning). A state-court adjudication is "contrary to…clearly established Federal law[,]" § 2254(d)(1), "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," Williams, 529 U.S. at

405, or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent," id. at 406.[10] A "run-of-the-mill" state-court decision applying the correct legal rule from Supreme Court decisions to the facts of a particular case does not fit within § 2254(d)(1)'s "contrary to" clause and will be reviewed under the "unreasonable application" clause. Id.

c) The "unreasonable application of" clause

If the Pennsylvania Supreme Court's decision was not "contrary to…clearly established Federal law," then the court next considers whether Rega demonstrated that the state court's decision to deny his claim was an "unreasonable application of[,]" 28 U.S.C. § 2254(d)(1), that law. "A state court decision is an 'unreasonable application of federal law' if the state court 'identifies the correct governing legal principle,' but 'unreasonably applies that principle to the facts of the prisoner's case.'" Dennis, 834 F.3d at 281 (quoting Williams, 529 U.S. at 413). To satisfy his burden here, Rega must do more than convince this court that the state court's decision was incorrect. Id. He must show that it "'was *objectively* unreasonable.'" Id. (quoting Williams, 529 U.S. at 509 (emphasis added by court of appeals). Importantly, this means that Rega must demonstrate that the Pennsylvania Supreme Court's decision "*was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement*." Richter, 562 U.S. at 103 (emphasis added).

> It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. See Lockyer, supra, at 75, 123 S.Ct. 1166.

[10] A state court adjudication is not "contrary to…clearly established Federal law[,]" 28 U.S.C. § 2254(d)(1), merely because it does not cite Supreme Court authority. In fact, the state court "does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); see Bell v. Cone, 543 U.S. 447, 455 (2005) (per curiam) ("Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.").

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. Cf. Felker v. Turpin, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Id. at 102.

> Finally, the court is mindful that:
>
> > [w]hile a determination that a state court's analysis is contrary to or an unreasonable application of clearly established federal law is necessary to grant habeas relief, it is not alone sufficient. That is because, despite applying an improper analysis, the state court still may have reached the correct result, and a federal court can only grant the Great Writ if it is "firmly convinced that a federal constitutional right has been violated," Williams, 529 U.S. at 389, 120 S.Ct. 1495. See also Horn v. Banks, 536 U.S. 266, 272, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) ("[w]hile it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review...none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard"). Thus, when a federal court reviewing a habeas petition concludes that the state court analyzed the petitioner's claim in a manner that contravenes clearly established federal law, it then must proceed to review the merits of the claim de novo to evaluate if a constitutional violation occurred. See Lafler v. Cooper, 566 U.S. 156, 174, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

Vickers, 858 F.3d at 848-49 (footnote omitted); see Dennis, 834 F.3d at 283-84.

2. Application of § 2254(d)(2)

The standard of review set forth at § 2254(d)(2) applies when Rega "challenges the factual basis for" the Pennsylvania Supreme Court's "decision rejecting a claim," Burt v. Titlow, 134 S.Ct. 10, 15 (2013), and, as set forth above, it requires that he prove that its adjudication 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). "[A] state court decision is based on an 'unreasonable determination of the facts' if the state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding,' which requires

review of whether there was sufficient evidence to support the state court's factual findings." Dennis, 834 F.3d at 281 (quoting § 2254(d)(2) and citing Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). "'[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" Titlow, 134 S.Ct. at 15 (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)); see Rice v. Collins, 546 U.S. 333, 342 (2006) (reversing court of appeals's decision because "[t]he panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus."). Thus, "if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede'" the state court's adjudication. Wood, 558 U.S at 301 (quoting Collins, 546 U.S. at 341-42). "[H]owever, '[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" Brumfield v. Cain, 135 S.Ct. 2269, 2277 (2015) (quoting Miller-El, 537 U.S. at 340); see Dennis, 834 F.3d at 281.

Since AEDPA's enactment, federal courts have debated how to harmonize §§ 2254(d)(2) and (e)(1). They "express the same fundamental principle of deference to state court findings[,]" and federal habeas courts "have tended to lump the two provisions together as generally indicative of the deference AEDPA requires of state court factual determinations." Lambert v. Blackwell, 387 F.3d 210, 235 (3d Cir. 2004). The Supreme Court has not yet "defined the precise relationship between" these two provisions of the federal habeas statute. Titlow, 134 S.Ct. at 15. In Lambert, the Court of Appeals for the Third Circuit instructed that § 2254(d)(2), when it applies, provides the "overarching standard" that a petitioner must overcome to receive habeas relief. 387 F.3d at 235. Section 2254(e)(1) applies to "specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision." Id. The court of appeals

declined to adopt a "rigid approach to habeas review of state fact-finding" id. at 236 n.19, and instead provided the following guidance:

> In some circumstances, a federal court may wish to consider subsidiary challenges to individual fact-finding in the first instance applying the presumption of correctness as instructed by (e)(1). Then, after deciding these challenges, the court will view the record under (d)(2) in light of its subsidiary decisions on the individual challenges. In other instances, a federal court could conclude that even if petitioner prevailed on all of his individual factual challenges notwithstanding the (e)(1) presumption of their correctness, the remaining record might still uphold the state court's decision under the overarching standard of (d)(2). In that event, presumably the (d)(2) inquiry would come first.

Id.

III. Guilt-Phase Claims

A. Brady Claims

In Claims 1, 2, and 3, Rega contends that his convictions were obtained in contravention of his constitutional rights because the Commonwealth violated the rule of Brady v. Maryland, 373 U.S. 83 (1963). A Brady violation occurs when the government: (1) knowingly presents or fails to correct false testimony; (2) fails to provide requested exculpatory evidence; or, (3) fails to volunteer exculpatory evidence never requested. Haskell v. Superintendent Greene SCI, 866 F.3d 139, 149 (3d Cir. 2017) (citing United States v. Agurs, 427 U.S. 97 (1976), holding modified by Unites States v. Bagley, 473 U.S. 667 (1985)).

In what the court will refer to as Claim 1(a), Rega asserts that the Commonwealth withheld evidence that it had reached agreements with, or had made promises to, Bair, Fishel, Susan, and Sharp that the Brady rule requires be disclosed. In what the court will refer to as Claim 1(b), Rega contends that the Commonwealth withheld information about Susan's memory impairment. In Claim 2, Rega contends that the prosecution committed additional Brady violations because Bair, Fishel, and Susan testified falsely at trial that no promises had been made to them. In Claim 3, Rega contends that if he is not entitled to habeas relief on any

individual Brady claim, he is entitled to it because of the "cumulative prejudice" he incurred as a result of the suppress-evidence and false-testimony violations.

Rega raised his Brady claims in his PCRA proceeding and a substantial portion of the evidentiary hearings held before the PCRA court dealt with the allegations he made in them.[11] Susan and Fishel testified at the PCRA hearings. So did the following attorneys, who represented the witness named in the parentheses following his name: (1) Timothy Morris, Esq. ("Morris") (Susan); (2) Mark Wheeler, Esq. ("Wheeler") (Fishel); (5) John Ingros, Esq. ("Ingros") (Bair); (3) Fred Hummel, Esq. ("Hummel") (Bair); (4) David Inzana, Esq. ("Inzana") (Sharp); and (5) Matthew Taladay, Esq. ("Taladay") (Stan). Trooper Davis also gave relevant testimony, as did Rega's trial attorneys, English and Elliott.

To prove his suppressed-evidence Brady claims (Claims 1(a) and 1(b)), Rega had to demonstrate to the state court that: (1) the evidence at issue was favorable to the defense, either because it was exculpatory or because it was impeaching; (2) the Commonwealth suppressed the evidence; and (3) the evidence was material. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). To prevail on his false-testimony claim (Claim 2), Rega had to demonstrate to the state court that: (1) the witness at issue committed perjury; (2) the Commonwealth knew or should have known that the witness's testimony was false and did not correct it; and (3) "'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Haskell, 866 F.3d at 146 (quoting Agurs, 427 U.S. at 103); see id. at 146; Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264, 271 (1959).

[11] Rega sought discovery on his Brady claims in this federal habeas proceeding. He did not demonstrate that he was entitled to the requested discovery and the court denied his motion. (ECF Nos. 20 and 21.)

Claim 1(a) and Claim 2

Background

Because the allegations that Rega makes in Claim 1(a) and Claim 2 are related, the court addresses them together, as did the state courts. The PCRA court made numerous findings of fact when it evaluated and rejected these claims. It determined that, prior to Rega's trial, there were no agreements, express or tacit, between the Commonwealth and any of the witnesses at issue. (PCRA Ct. Op., ECF 10-1 at 19-25.) The PCRA court rejected Rega's contention that the district attorney was negotiating plea deals with any of the witnesses prior to his trial. (Id.) "The clear picture that emerged from the testimony" of Hummel, Ingros, Taladay, Morris, and Inzana, the PCRA court determined, was that the district attorney "did not deviate in this case from his established policy that plea deals would be neither offered nor negotiated for co-defendants wishing to cooperate in a fellow co-defendant's prosecution until after the latter's charges had been resolved." (Id. at 20.)

The PCRA court found as fact that "the Commonwealth neither promised nor fostered the expectation of leniency" with any of the witnesses. (Id.) "That is not to say," the PCRA court explained, "that [Susan], Bair, Fishel, and Sharp were not hoping for leniency, perhaps even expecting it in some cases. It means, though, that the Commonwealth had no Brady obligation pertinent to those hopes and expectations." (Id.) "In none of the cases," the PCRA court determined, "did the Commonwealth foster the notion that any of them would receive any level of leniency, let alone a specific deal, in exchange for their cooperation. Rather, [the district attorney] conveyed nothing more than that he would 'probably' take any cooperation into account when later considering plea deals." (Id. at 24 (footnote omitted).) "To the extent that" Bair, Fishel, or Susan "believed they would receive leniency in exchange for their cooperation, then, that expectation stemmed from their attorneys' ill-advised statements or their own subjective

ideas of what their cooperation would get them." (Id.) As for Sharp, the PCRA court explained that "he did not appear to testify at the PCRA hearing. Nor did his attorney [Inzana] say anything even suggesting that his client expected leniency because of something the Commonwealth said or did." (Id. at 24 n.9.)

"Having not fostered any expectations of leniency," the PCRA court continued, "the Commonwealth also did not elicit false testimony or misrepresent the facts at trial." (Id. at 24.) It explained:

> When [the district attorney] questioned Rega's co-defendants and gave his closing argument, he was not privy to their private thoughts or their discussions with defense counsel. He knew, though, that he had never promised or suggested any degree of clemency. When Bair, Sharp, Fishel, and Susan Jones testified that they were not expecting special treatment because of their testimony, therefore, [the district attorney] had no reason to correct them. Entitled to fairly comment on the evidence adduced at trial, moreover, it was appropriate for him to reiterate during his closing statements testimony whose veracity he had no reason to doubt. See Commonwealth v. Rush, 646 A.2d 557, 563 (Pa. 1994) ("It is well established that a prosecutor, in his closing argument, can comment on the evidence introduced at trial as well as the legitimate inferences arising therefrom").

(Id. at 24-25.)

As set forth above, each of the PCRA court's factual determinations are binding on this court unless Rega produced "clear and convincing evidence" that it was wrong. 28 U.S.C. § 2254(e)(1). He did not meet his burden. To understand why, the court sets forth the specific allegations Rega made with respect to each witness and the PCRA court's specific findings regarding those allegations.

Bair

By January 9, 2001, Bair had "implicated himself fully" in the statements he had given to the police. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 42.) See Rega I, 933 A.2d at 1006 (in early January 2001, Bair admitted to Trooper Davis "what transpired at the Gateway Lodge on the night of December 21, 2000.") He had revealed that he was involved in other, unrelated criminal

activity with Rega. By February 2001, the Commonwealth had charged Bair with numerous offenses for his role in the Gateway Lodge crimes, including conspiracy to commit robbery, criminal homicide, robbery, and burglary. It also had charged him with robbery, arson, and burglary for his role in the unrelated criminal activity. (See ECF 10-21 at 107-12, Bair Sent. Hr'g Tr., 6/24/03, 2-7.)

The state trial court appointed Ingros, who was the public defender, and Hummel, to be Bair's attorneys. Ingros filed seven motions to continue Bair's criminal trials prior to Rega's June 2002 Gateway Lodge crimes trial. (Motions to continue, ECF No. 10-2 at 55-61.) The district attorney consented to each motion. (Id.) Ingros explained at a 2009 PCRA hearing that he filed the first few motions because he and Hummel were awaiting discovery, and that thereafter they moved to continue Bair's cases "pending resolution of the case against Mr. Rega who was the main defendant of all of it." (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 28.)

When he testified at Rega's trial, Bair stated that neither the district attorney nor Trooper Davis had made any promises to him in exchange for his testimony. (ECF No. 33 at 135, Trial Tr., 6/18/02, at 136.) During his cross-examination, the follow exchange occurred between English and Bair:

> Q. Mr. Bair, you're the type of individual to lie when it's in your best interest, are you not?
>
> A. Sometimes.
>
> Q. Just like you're lying today hoping the [prosecution] will give you consideration?
>
> A. No.
>
> Q. You're not hoping for consideration in exchange for your testimony?
>
> A. No. I'm not lying to prove anything.
>
> Q. Are you trying to tell us you're not hoping the [Commonwealth] will look favorable on you because of your testimony?

A. I'm hoping they will, but I'm not going to sit up here and lie.

(Id. at 171-72, Trial Tr., 6/18/02, at 172-73.)

On June 19, 2003, approximately one year after he testified against Rega, Bair pleaded guilty to third-degree murder for his role in the Gateway Lodge crimes pursuant to a negotiated plea agreement. On that same date, Bair pleaded guilty to one count each of robbery, burglary, and arson in his unrelated criminal cases. The remaining charges against him were *nolle prossed*. On June 24, 2003, the state trial court sentenced him to a term of 18 to 40 years of imprisonment for third-degree murder, and concurrent terms of imprisonment for his other convictions. (ECF 10-21 at 109-12, Bair Sent. Hr'g Tr., 6/24/03, at 4-7.)

In his amended PCRA petition, Rega alleged that the prosecution suppressed "a deal" it had reached with Bair prior to his June 2002 trial. (Amended PCRA petition, ECF No. 10-27 at 145.) Rega did not call Bair to testify at a PCRA hearing. Bair's attorneys, Ingros and Hummel, did testify. In addition, Trooper Davis provided relevant testimony on all the witnesses at issue, and Stan's attorney, Taladay, gave testimony that was relevant to Rega's claims as well.

Trooper Davis testified that the district attorney told Bair, Fishel, and Susan that the prosecution would not make any deals with them before they testified at Rega's trials. (ECF No. 71 at 117, PCRA Hr'g Tr., 5/21/10, at 115.)[12] He explained that this was in accordance with the policy of the district attorney, who would not make or negotiate plea deals with accomplice witnesses until after he or she testified against the primary defendant. (ECF No. 71 at 156, PCRA Hr'g Tr., 5/21/10, at 154; see ECF No. 72 at 7, 15, 27, PCRA Hr'g Tr., 5/21/10, at 180, 188, 200.) The policy was not limited to formal plea deals, Trooper Davis said. It meant that "there are no deals. We will decide that after the trial, and everybody knows that." (ECF No. 72 at 7, PCRA

[12] Pages 1 through 173 of the transcript of the May 21, 2010 hearing (3:30 p m. session) are filed at ECF No. 71, and pages 175 through 294 are filed at ECF No. 72.

Hr'g Tr., 5/21/10, at 180; see id. at 15, PCRA Hr'g Tr., 5/21/10, at 188 ("I mean nothing.... No verbal, no formal, no anything[.]").) The reason for this policy, Trooper Davis explained, was that "[y]ou never know what a co-defendant is going to do[,]" (id. at 9-10, PCRA Hr'g Tr., 5/21/10, at 182-83), and that "all we have ever asked" is that witnesses testify truthfully. (Id. at 13, PCRA Hr'g Tr., 5/21/10, at 186.)

Stan's attorney, Taladay, confirmed that it was the district attorney's standard policy that, prior to the primary defendant's trial, he would not make any deals with accomplices or even engage in "any discussion about the particulars of what the plea bargain may involve." (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 138; see id. at 144-45, 164-67.)

Trooper Davis acknowledged the obvious point that Rega's accomplices had an "incentive to curry favor" with the prosecution. (ECF No. 72 at 15, PCRA Hr'g Tr., 5/21/10, at 188.) He agreed that Bair and Fishel did get "a break" because they cooperated. (ECF No. 71 at 166-68, PCRA Hr'g Tr., 5/21/10, at 164-66),[13] but said that they cooperated on their own initiative because they knew it was in their best interest:

> What I was trying to say earlier is that you never know what a defendant is going to do. So, I mean, you can't give somebody a deal up front, and we never gave anybody a deal. And these guys had all given me either a written statement, a taped statement, or both prior to ever meeting with an attorney. So they were all on the hook. It wasn't like we were asking these guys for deals or begging them to come talk to us. They were doing the exact opposite. They wanted to come to us. We didn't care. We could have prosecuted any single one of them and convicted them. And they all knew that.

(ECF No. 72 at 11-12; PCRA Hr'g Tr., 5/21/10, at 184-85.)

[13] The PCRA court observed that "it may be fair to assume that" the consideration that Bair and Fishel received after Rega's trial was due "at least in part because of their cooperation through Rega's trial(s)," (PCRA Ct. Op., ECF No. 10-1 at 25), but it stated that "[t]hat is not a foregone conclusion, though, because the sentence Stan Jones ultimately received was comparable to Fishel's and Bair's" even though the Commonwealth had elected not to call Stan as a witness. (Id. at 25 n.10.)

Ingros likewise testified that Bair began cooperating with the prosecution early on in the investigation because it was in his best interest do so, and not because of any deal or promise the prosecution made to him. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 23-24, 32-34, 42-44.) Ingros encouraged Bair to cooperate with the prosecution for that very reason. (Id. at 23.) For example, on February 6, 2002, Ingros wrote to Bair advising him that he had "no problem" with Bair taking investigators "to the location where Rega and others allegedly practiced shooting the stolen weapon[,]" "since your continued cooperation is necessary to ensure that you receive some form of consideration at sentencing." (2/6/02 letter, ECF No. 10-2 at 67.)

Ingros's testimony was consistent with Trooper Davis's and Taladay's testimony in that he said that it was the district attorney's standard practice not to make promises to accomplices testifying against the principal defendant prior to the completion of their cooperation. "No specific deals," Ingros said. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 41.) "There will be your guy can help himself and general claim that if he is helpful we will take that into consideration but there has never been a specific promise for anything since I have been in this county." (Id. at 41-42.)

Bair's other attorney, Hummel, testified that "there was never a time where there was any sort of a deal made, until subsequent to everything on Rega." (ECF No. 60 at 29, PCRA Hr'g Tr., 1/21/10, at 107.) He said: "I never had anybody who was going to testify against someone else be given a deal before the testimony. It does not occur here." (Id.)

Hummel testified that Bair was aware that there would be "no deals" until after Rega's trial was completed. (Id. at 32, PCRA Hr'g Tr., 1/21/10, at 118.) He said that Bair felt remorse for his involvement in the crimes and wanted to cooperate with the prosecution. (Id. at 32-33, PCRA Hr'g Tr., 1/21/10, at 119-24.) When asked whether Bair had to be "nudg[ed]," "cajol[ed]"

or had "to be promised anything in order to fulfill that cooperation[,]" (id. at 33, PCRA Hr'g Tr., 1/21/10, at 123), Hummel replied:

> Actually, the opposite…. He didn't have to be, no. Again, the cooperation came before that was even in the picture. I am sure [Bair] was aware that cooperation might be more beneficial to him than standing a firm line to go to trial and losing. Of course, he was–anybody is going to be aware of that, but there was never a time he came to me and said, hey, I will say this, if they offer me simple assault or anything like that. He had his agenda in cooperating and I never had to remind him of that.

(Id., PCRA Hr'g Tr., 1/21/10, at 123-24.)

Both Ingros and Hummel testified about what the PCRA court subsequently referred to as the "'the realm of possibility' conference." (PCRA Ct. Op., ECF 10-1 at 21.) It likely occurred prior to Rega's trial,[14] and Ingros testified that during it he told the district attorney the "outcome" that he (Ingros) "wanted to see[.]" (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 35.)[15] Specifically, Ingros informed the district attorney that he was "hoping" that the charge of criminal homicide would be dismissed and that Bair would get a sentence between 5 to 20 years for "burglary, maybe theft[.]" (Id. at 36.) Ingros testified that at the conference he "might have" asked the district attorney "is there any chance of that happing[?]" (Id.) According to Ingros, the district attorney "may have" responded that "it is not outside the realm of possibility." (Id.) "I took that as a good sign[,]" Ingros stated at the PCRA hearing, because it was "better than a hell no." (Id.) Ingros testified:

> …I felt if we were not on the same page we were close to being on the same page or at least in the same ballpark. Although, [the district attorney] didn't tell me what we would be getting, nothing was promised, I just took that to mean when he didn't reject that offhand that I wasn't far off base that he was thinking along the lines that I was.

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[14] Ingros was not sure when the "realm of possibility" conference took place, but he believed it occurred prior to Rega's June 2002 trial. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 67.)

[15] Ingros testified that prior to the conference he and Hummel "had been kicking around some ideas for what we had hoped to get out of this case based on what we perceived to be [Bair's] very minimal role in this along with his absence of any criminal history, his guilt[.]" (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 35.)

(Id.)

When Hummel testified about the "realm of possibility" conference, he said that nothing that was discussed during it was used to induce Bair to cooperate, since Bair's "cooperation had been going on long before then." (ECF No. 60 at 34, PCRA Hr'g Tr., 1/21/10, at 125.) Hummel recalled that during the conference, either he or Ingros told the district attorney what sentence they were hoping that Bair would receive and asked if it "was in the realm of possibilities." (Id. at 29, PCRA Hr'g Tr., 1/21/10, at 106-07.) The district attorney might have concurred that it was, but Hummel stressed that "there was never a time where there was any sort of a deal made, until subsequent to everything on Rega." (Id., PCRA Hr'g Tr., 1/21/10, at 107.) Hummel testified that he did not interpret the district attorney's response to their inquiry to be "a committal from [the district attorney] that that's where we would start negotiations or that was where we would end negotiations." (Id. at 34, PCRA Hr'g Tr., 1/21/10, at 127.) In fact, Hummel testified, he left the conference thinking that "[n]othing significant" had happened. (Id., PCRA Hr'g Tr., 1/21/10, at 126.)

To counter Rega's allegation that the prosecution had made any deals with Bair, or promises of leniency to him, the Commonwealth introduced Ingros's and Hummel's memoranda and letters at the PCRA hearings. In a memorandum to their file dated February 14, 2001, Hummel wrote that Bair waived his preliminary hearings and "has been and will cooperate with authorities. Explained to [Bair] his coop[eration] is for consideration later, no deals prior to testimony." (PCRA Commw. Ex. 1 at 1.) In a memorandum to their file dated April 4, 2001, Ingros addressed a criminal conference held on that date. He wrote: "No offer made or even discussed until such time as cases with all co-defendants have been resolved. [District attorney] won't even state whether a plea to robbery only will be within the realm of possibility." (PCRA Commw. Ex. 2 at 7.) On April 4, 2001, Ingros sent a letter to Bair advising him what had

occurred at the criminal conference. He informed Bair that "[n]o offer extended at this time due to the on-going nature of this case and the need to secure your full and complete cooperation in the investigation of the crime and the roles each of the co-defendants played in the crimes. Do not expect discussion of any plea offers until all cases have been resolved through trial or pleas." (Id. at 5.) Later that same month, on April 18, 2001, Ingros authored another memorandum to their file regarding a criminal conference held on that date. In it he wrote: "[d]ue to on-going homicide matter that will likely encompass these charges entirely, and also the need for [Bair] to testify against other co-defendants, no offer extended at this time." (Id. at 8.) On April 20, 2001, Ingros wrote to Bair that "[n]o offer extended at this time due to the on-going homicide investigation." (Id. at 6.)

On July 19, 2002 (approximately one month after Rega's June 2002 trial for the Gateway Lodge crimes), Ingros sent a letter to Bair's stepfather in which he referenced the "realm of possibility" conference. He wrote:

> I will tell you what I believe *should* happen with [Bair's] case. Understand, however, that no offer has yet been made by the DA, and when I attempted to solicit an offer from him a few weeks ago I was told that no discussions in that vein could take place until Rob Rega completed his remaining trials for rape, theft and assorted crimes. [Bair] will be asked to testify against [Rega] in at least some of these cases since he admitted to his own role in several of the thefts.
>
> What I am shooting for, in terms of a plea bargain, is guilty pleas to Burglary and several thefts, with a sentence of 5-15 or 5-20 years. I suggested this to the DA once before and he indicated that such an offer is not entirely out of the realm of possibility, but that [Bair] would have to produce for them. I am still hopeful we can pull this off, but I'm afraid I can't tell you much more right now since all discussions are on hold.

(7/19/02 letter, ECF No. 10-2 at 68.)

On November 7, 2002, Ingros wrote to Bair that there was "no update on your cases at this time. The DA is not prepared to let us know what his offer is until after all of Rega's cases are done." PCRA Commw. Ex. 2 at 1.

On May 21, 2003, not long after the conclusion of Rega's rape and sexual assault trial, the district attorney made a plea offer to Bair. Its terms were much harsher than those that Bair's attorneys had suggested during the "realm of possibility" conference. The district attorney proposed that Bair receive a sentence of 20 to 40 years of incarceration in exchange for a plea of guilty to third-degree murder in his Gateway Lodge crimes case and a plea of guilty to the "top count of all the other informations (i.e. Robbery on Nelson Mini Mart, Burglary on Right Sound, and Arson and Theft on Gateway Lodge Van)[.]" (PCRA Commw. Ex. 3.)

When Ingros informed Bair about the district attorney's offer in a letter dated June 12, 2003, he wrote that it was "well beyond what I had anticipated for your efforts" and "much higher than both of us were expecting[.]" (PCRA Commw. Ex. 2 at 3-4.) Ingros told Bair that he would try to negotiate a lesser sentence. (Id. at 4.) He was ultimately only able to reach a deal that subtracted two years off the proposed minimum end. As set forth above, on June 19, 2003, Bair pleaded guilty pursuant to the negotiated plea agreement and on June 24, 2003, the state trial court imposed a total aggregate sentence of 18 to 40 years of imprisonment. (ECF 10-21 at 109-12, Bair Sent. Hr'g Tr., 6/24/03, 4-7.)

In his post-hearing brief to the PCRA court, Rega argued that although Bair and the Commonwealth had not reached a "formal" or "firm" deal prior to his trial (PCRA Post Hr'g Br. at 125), they had engaged in plea negotiations that were subject to disclosure under Brady. (Id. at 123-27.) He also contended that the Commonwealth allowed Bair to testify falsely at Rega's trial that neither the district attorney nor Trooper Davis had made any promises to him in exchange for his cooperation. (Id.)

As set forth above, the PCRA court found as fact that, prior to Rega's June 2002 trial, the Commonwealth did not make any promise of leniency to Bair, or foster any expectation of leniency that Bair may have had. (PCRA Ct. Op., ECF 10-1 at 19-25.) Therefore, the PCRA

court held, the Commonwealth did not suppress any Brady material and Rega failed to establish that Bair committed perjury at Rega's trial when he testified that neither the district attorney nor Trooper Davis had made any promises to him. (Id. at 24-25.)

The PCRA court also rejected Rega's contention that it was negotiating Bair's plea deal prior to his trial. It held:

> Ingros['s] and Hummel's testimony was likewise consistent with the conclusion that the Commonwealth was not negotiating their client's cases before Rega's trials, both testifying that [the district attorney] did not negotiate or make deals prior to the relevant co-defendant testifying. (12/14/2009, pp. 27, 41-42; id., 01/21/2010, pp. 125-26). According to Ingros, while he obviously wanted as much leniency as possible for his client, [the district attorney] never indicated ahead of time what Bair would get for his cooperation, only that it would "probably" be taken into account. (Id., 12/14/2009, pp. 25-27). Hummel, moreover, repeatedly reminded Shawn Bair that no deals would be made prior to his testimony, also reminding him that consideration was all he could ask for later in exchange for his full and honest cooperation. ([01/21/2010, pp.] at 118, 134-35).

(Id. at 21.)

"The 'realm of possibility' conference," the PCRA court determined, "was not the smoking gun Rega supposed it to be either." (Id.) It noted the "disparities between Ingros['s] and Hummel's renditions of the 'realm of possibility exchange,'" and observed that, although it did not find that Ingros's "recollection was accurate[,]" even if it was "the conversation falls far short of indicating the existence of a formal or informal plea offer." (Id. at 22 n.7.)[16] "Bair…may well have believed that he would ultimately receive a sentence not to exceed 20 years in exchange for his testimony[,]" the PCRA observed. (Id. at 24.) "If so, however, it was because Attorney Ingros

[16] In its answer to Rega's federal habeas petition, the Commonwealth argues that Ingros's PCRA testimony showed that his recollection of the "realm of possibility" conference was "quite sketchy" and "flawed." (ECF No. 29 at 28-29.) Hummel's recollection, the Commonwealth argues, was more credible, and according to him nothing of significance happened during the conference. (Id. at 30-31.) That is why, the Commonwealth points out, there is no evidence that either Ingros or Hummel mentioned the "realm of possibility" conference to the district attorney on any subsequent occasion, including after the district attorney made his plea offer to Bair in May 2003, even though Ingros believed that the offer was too harsh and he was initially upset about it. (Id. at 32 (citing ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 94-95).)

had indiscreetly related the 'realm of possibility' conversation even though he fully understood that [the district attorney] would not in fact negotiate Bair's cases until after he testified." (Id.)

Fishel

In early 2001, Fishel, like Rega, Bair, and Stan, was arrested for his role in the Gateway Lodge crimes, and charged with conspiracy to commit robbery, criminal homicide, robbery, burglary, and related crimes. Prior to Rega's June 2002 trial, Fishel's attorney, Wheeler, filed seven motions to continue Fishel's criminal trial. (Motions to continue, ECF No. 10-3 at 63-69.) The district attorney consented to each motion. (Id.)

At Rega's trial, Fishel testified that no one made any promises to him in exchange for his testimony. (ECF No. 34, Trial Tr., 6/19/02, at 5.) On cross-examination, English asked Fishel about the May 16, 2001, statement that he gave to Trooper Davis during a meeting at which the district attorney and his attorney, Wheeler, were also present. (Id. at 31.) The following exchange occurred between English and Fishel:

> Q. Now, during that–before or after the meeting, did you discuss with your attorney about testifying here today?
>
> A. I talked to my attorney, yes.
>
> Q. As part of this, you're hoping for leniency as part of your testimony?
>
> A. No.
>
> Q. You're not hoping for favorable treatment?
>
> A. No.
>
> Q. Do you anticipate that the [district attorney] will give you favorable treatment?
>
> A. No.
>
> Q. You recall no conversation for the fact that you've taken the stand now?
>
> A. No, I don't.

Q. Did you ever discuss with your attorney whether or not the [district attorney] would give you favorable treatment in exchange for your testimony?

A. No.

Q. Never? Once?

A. No.

Q. You understand you could be on trial for first degree murder?

A. Yes, I do.

(Id. at 32-33.) Towards the end of Fishel's cross-examination, English broached the subject again:

Q. Isn't it true, Mr. Fishel, that from the very beginning, you have told nothing but a pack of lies?

A. No.

Q. You admitted to numerous lies on the stand, isn't that correct?

A. Yes.

Q. And you're testifying today in an attempt to get favorable consideration and save your own skin in this case?

A. No.

Q. You have no expectation of favorable treatment?

A. That's not true.

(Id. at 50.)

On June 19, 2003, Fishel, like Bair, pleaded guilty to third-degree murder for his role in the Gateway Lodge crimes. The remaining charges filed against him were *nolle prossed*. (ECF No. 10-3 at 77-79, 87-88, Fishel Plea Hr'g Tr., 6/19/03, at 3-5, 13-14.) At his plea hearing, the state trial court asked Fishel if there have "been any promises other than your plea bargain to enter this plea?" Fishel replied: "No." (Id. at 85, Fishel Plea Hr'g Tr., 6/19/03, at 11.) On

June 24, 2003, the state trial court sentenced Fishel to the same term that Bair had received: 18 to 40 years of imprisonment.[17]

In his PCRA proceeding, Rega contended that, prior to his June 2002 trial, the district attorney and Wheeler had reached an "undisclosed deal" that Fishel would receive a sentence of no more than 20 years of imprisonment and that the homicide charge would be dropped. (PCRA Post Hr'g Br. at 117.) Rega presented the testimony of Fishel and Wheeler at the PCRA hearings to support his allegations.

Fishel testified that Wheeler advised him that they had to wait until Rega's cases were resolved before his could be, and that he "[w]orking something out with the [district attorney]." (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 233.) He also testified that Wheeler repeatedly told him that he would not receive a sentence of more than 20 years and that the homicide charge would be dismissed. (Id. at 234, 280.) On cross-examination, Fishel, who was still upset with the district attorney because he thought he should have received a more favorable plea deal, admitted that Wheeler advised him that the district attorney would not make any promises to him prior to Rega's trial. (Id. at 255, 280.)

Wheeler testified that at a criminal conference held prior to Rega's June 2002 trial, he asked the district attorney for some form of leniency for Fishel. (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 14.) According to Wheeler, his recollection was that the district attorney replied that if Fishel cooperated in Rega's prosecution, the Commonwealth would "not seek a plea on any of the homicide charges." (Id.) Wheeler testified that although there was "[n]othing in writing[,]" in his view they had reached a mutual understanding. (Id. at 15.) He testified that "[t]here was no

[17] In October 2001, Fishel was charged with unrelated crimes of possession of marijuana and drug paraphernalia. He pleaded guilty to those charges at the same time that he entered his plea in his Gateway Lodge crimes case, and the state trial court sentenced him to 15 to 30 days, with credit for time served. (ECF. No 10-3 at 78-79, 88-89, Fishel Plea Hr'g Tr., 6/19/03, at 4-5, 14-15.)

formal agreement, and [Fishel] was aware of that all the way through." (Id. at 24.) But Wheeler insisted that, although there was no formal agreement, the district attorney had "promised" him. (Id. at 29, 34.) Wheeler also asserted that the district attorney made similar offers to Rega's other co-defendants, Bair and Stan. (Id. at 34, 42.)

On June 25, 2002, less than a week after Rega's trial had concluded, Wheeler sent a letter to the district attorney in which he wrote:

> Congratulations on the excellent result that you were able to obtain on Robert Rega's Murder One Trial. I am sure that you are very pleased with the result. Now that this trial is behind us, I would ask for you to advise me how you would like to handle the homicide charge against my client. As you know, we had a gentleman's agreement that you would dispose of the homicide charge against him as you have no evidence against him in this regard. Would you like for me to file a motion to dismiss this count of the information?
>
> I would also like to have a Criminal Conference on Fishel ASAP so that I can advise my client what he might be looking at and how we are going to proceed.

(6/25/02 letter, ECF No. 10-3 at 74.) Wheeler testified that he wrote this letter because "I felt that after my client had provided his share of the *quid pro quo* that I needed to firm up the receipt of the leniency that was referred to." (ECF No. 55, PCRA Hr'g Tr. at 12/15/09, at 21.) The district attorney did not respond to Wheeler's letter. (Id. at 21-23.)

Wheeler admitted when he testified at the PCRA hearing that his memory of the events in question was impaired because he was ill and receiving dialysis treatment three times a week. (Id. at 16, 29.) He also admitted that he had been present in the courtroom when Fishel testified during Rega's trial that no promises had been made to him in exchange for his testimony. When Wheeler was asked why he, as an officer of the court, did not come forward to correct the record if the district attorney had in fact made a promise to Fishel, Wheeler could not give an adequate explanation. (Id. at 34-40.)

When he testified at the PCRA hearing, Trooper Davis said that he was present during a discussion the district attorney and Wheeler had on a stairway just before Fishel was to take the stand at Rega's trial. He said that Wheeler "was begging the [district attorney] to give him some kind of idea of what was going to happen to [Fishel] before he testified[,]" and asked the district attorney, "can you give me anything?" (ECF No. 71 at 116, PCRA Hr'g Tr., 5/21/10, at 114.) According to Trooper Davis, the district attorney responded: "No, absolutely not, you know, I want your client to be able to take the stand and say that he had no deals[.]" (Id. at 117, PCRA Hr'g Tr., 5/21/10, at 115.)

As set forth above, on June 19, 2003, Fishel entered his plea of third-degree murder. His sentencing was scheduled for June 24, 2003. The day before he was to be sentenced, Fishel wrote to Wheeler that he was "pulling" his "plea of murder." (6/23/03 letter, ECF No. 10-3 at 43.) He informed Wheeler:

> I figured since I helped the Commonwealth I'd be dealt with lenient not rigorous and severe. 18 to 40 is far [too] long…
>
> So be it. Let's go to trial. You always said you could beat murder and always told me this for over 2 years now. Looking forward to seeing you tomorrow.

(Id.)

The next day, on June 24, 2003, the state trial court sentenced Fishel to a term of 18 to 40 years of imprisonment. Rega did not direct this court to any evidence that Wheeler moved to withdraw Fishel's plea. Nor did he produce evidence that Wheeler filed a motion to enforce the agreement that he contended at the PCRA hearing he had reached with the district attorney.

In his post-hearing PCRA brief, Rega insisted that the Commonwealth and Wheeler had reached an undisclosed deal prior to his trial. In support, he relied heavily upon the PCRA testimony of Wheeler and the letter that Wheeler had sent to the district attorney in which he

referenced their alleged "gentleman's agreement" that the homicide charge against Fishel would be dropped. (PCRA Post-Hr'g Br. at 117.)

The PCRA court rejected the testimony and evidence that Rega relied upon. It held:

> Among the attorneys representing Rega's co-defendants, Mark Wheeler was the only one to claim that he and [the district attorney] entered into a "gentleman's agreement," *i.e.*, a plea deal, prior to Rega's trial. Specifically, he testified that [the district attorney] told him that his client, Raymond Fishel, would get leniency if he testified, including that his homicide charges would be dropped. (Id., 12/15/2009, pp. 14-15, 23-24). His testimony, however, was wholly incredible.
>
> As was quickly evident from his testimony and demeanor, Wheeler's animosity toward [the district attorney] overrode his sense of propriety and professionalism, and the Court cannot but believe that his feelings colored his perceptions and testimony. The Court also had to question his commitment to the truth, as well as to his ethical obligations, when he testified on cross-examination about his failure to correct the record when his client allegedly lied during Rega's trial. (See id. at 34-40). Most glaringly, though, in attempting to bolster his testimony about the alleged "gentleman's agreement," Wheeler directly contradicted his colleagues. Responding to [the district attorney's] question concerning Wheeler's statement that the district attorney said he would drop the homicide charges against Fishel, for instance, Wheeler replied, "It wasn't only me; it was all the other co-defendants as well. I talked to the other attorneys. We were all disappointed." (Id. at 34). The other attorneys, however, stated unequivocally that no pre-trial deals or promises had been made. Wheeler insisted, moreover, that all the co-defendants were promised leniency, specifically claiming that "Matt Taladay [Stan's attorney] would not have his client testify if he was not going to get something for it." (Id. at 42). Once again, however[,] the other co-defendants' attorneys, including Taladay, said otherwise. Furthermore, Taladay had testified the previous day that his advice to Stan Jones was based on the fact that [Stan] had already implicated himself in the Gateway Lodge incident and cooperation was his best chance of getting anything better than a life sentence. (Id., 12/14/2009, pp. 141-44).
>
> Additionally, assuming Wheeler was trying to testify truthfully on December 15, 2009, the Court nonetheless deems him not to have been credible. Whether because of his health problems or for some other reason, Wheeler's memory was significantly impaired. By his own testimony, he had difficulty remembering his own children's birthdays. He also could not recall the penalty for second-degree murder. Furthermore, he claimed to remember conversations with the co-defendants' attorneys that, according to their testimony, never occurred. That being the case, the Court does not believe that Wheeler's recollection of his conversations with [the district attorney] even remotely approximated whatever exchange the two may have had, especially when that recollection contradicted Ingros, Hummel, Taladay, and Inzana.

> The Court does not believe, therefore, that [the district attorney] departed from his established policy generally, or from the position he had taken with each of the other co-defendants, when dealing with Raymond Fishel's cases. Rather, without encouragement from the Commonwealth, Wheeler took it upon himself to promise his client a plea that did not include homicide and a sentence not in excess of 20 years. (See id., 12/14/2009, pp. 233-35 (Fishel's testimony regarding Wheeler's representations to that effect)). Wheeler was apparently not adverse to making unfounded promises, either, as when he guaranteed his client that he would not get convicted of murder if he went to trial. (See id. at 244).
>
> - - -
>
> Fishel…may have believed that he would not be pleading to homicide and would spend no more than 20 years in prison. He only could have believed that, however, because Attorney Wheeler misrepresented reality.

(PCRA Ct. Op, ECF No. 10-1 at 22-24.)

The PCRA court likewise found that, since Rega did not produce credible evidence to support his claim that Commonwealth had any type of agreement with Fishel, or had made a promise of leniency to him, his related false-testimony claim had no merit. (Id. at 24-25.)

Susan

When Susan testified against Rega at his June 2002 Gateway Lodge crimes trial, she faced charges of burglary, theft by unlawful taking, receiving stolen property, criminal mischief, and conspiracy to commit burglary that were filed against her in an unrelated case. (Court summary for Susan, ECF No. 10-20 at 115.) These charges were for stealing car audio equipment from Right Sound Audio. She engaged in that criminal conduct on December 19 and 20, 2001, with Rega, Bair, and Stan. (ECF No. 10-4 at 91-92, 97-98, Susan's Plea and Sent. Hr'g Tr., 2/18/04, at 1-2, 7-8.) Susan also faced charges of possession of marijuana and of use/possession of drug paraphernalia. (Court summary for Susan, ECF No. 10-20 at 115.) This court refers to those two cases as Susan's "2001 criminal cases." Prior to Rega's trial, Susan's attorney, Morris, filed two motions to continue the 2001 criminal cases (one in November 2001 and the other in February 2002). (Motions to continue, ECF No. 10-2 at 75-76.) The district attorney consented to both motions. (Id.)

Susan admitted at Rega's trial that she had charges pending against her on the Jefferson County trial list. (ECF No. 31, Trial Tr., 6/15/02, at 155.) She testified that she had not yet been charged for her involvement in the Gateway Lodge crimes, but that Trooper Davis told her that she probably would be because she had admitted that she had handled the money stolen from the lodge. (Id. at 209, 249-50; see id. at 239-40.) She said that she was worried that charges would be filed against her for her conduct. (Id. at 249.)

In early 2003, well after Rega's June 2002 trial, the Commonwealth filed charges against Susan for her role in the Gateway Lodge crimes. Specifically, it charged her with one count each of conspiracy to commit robbery, burglary, and theft by unlawful taking, as well as one count of receiving stolen property.[18] That same year, a charge of welfare fraud was also filed against her. (Court summary for Susan, ECF No. 10-20 at 115-16.)

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[18] Rega makes much of the fact that the Commonwealth did not charge Susan with criminal homicide or conspiracy to commit it. In the district attorney's closing argument to the jury, however, he said that "Susan Jones is not guilty of second degree murder. She's not even close to being guilty of second degree murder." (ECF No. 35, Trial Tr., 6/20/02, at 184.)

Rega insists that Susan was an accomplice to the murder and in support of this argument he asks the court to take judicial notice of statements made by the district attorney at a post-trial hearing held on January 28, 2004, in which Rega challenged his May 2003 convictions for rape and sexual assault. The court will not do so because the district attorney did not say what Rega claims he did. At that hearing, Rega's counsel at the time, George N. Zanic, Esq., ("Zanic") moved for a new trial on the grounds that Susan lied at the May 2003 trial when she said that she had no deal with the Commonwealth. (ECF No. 10-28 at 126-27, Hr'g Tr., 1/28/04, at 12-13.) Zanic said:

> As you know, Your Honor, our entire defense was based on Susan Jones, the informant for the Commonwealth that brought [Rega's rape and sexual assault crimes] to light. Repeatedly, it was our position that Susan Jones was an accomplice in Mr. Rega's previous homicide case. And I repeatedly asked her, "Do you have a deal? What are you sentenced to?" [Susan testified] "No, I don't have a deal; there's none of that".
>
> Again, our position was she had a reason to come in and set Rob Rega up. Yet, over and over, she said no deal, no deal. Here we are-[the] trial was in May [2003]. Here we are in January, and Susan Jones never has gone to court.
>
> [The district attorney] tells me today there's still charges pending. I don't know where they've gone, but I think she was not forthcoming. She's never going to be prosecuted…. I tried to elicit that; yet, she was not forthcoming.

(Id.)

In response to Zanic's argument, the district attorney explained that Susan's charges were still pending (id. at 129-30, Hr'g Tr., 1/28/04, at 15-16), and he said that "she's an accomplice under our rules in this homicide case. Every time she testified, her testimony made it clear she was an accomplice." (Id. at 127, Hr'g Tr., 1/28/04, at 13.) The district attorney did not admit, as Rega asserts, that Susan was an accomplice *to homicide*. When both he and

(footnote continued on the next page)

As noted above, Susan testified against Rega at his May 2003 criminal trial. On February 18, 2004, she entered her pleas in all her criminal cases. In the 2001 criminal cases, she pleaded guilty to theft by unlawful taking and possession of drug paraphernalia. In her Gateway Lodge crimes case, she pleaded guilty to the charge of receiving stolen property, a felony of the third degree. She also pleaded guilty to the charge of welfare fraud. All other charges were *nolle prossed*. The state trial court sentenced her to an aggregate sentence of 15 years of probation. (ECF No. 10-4 at 97-101, Susan's Plea and Sent. Hr'g Tr., 2/18/04, at 7-11.) When it announced its sentence, the state trial court commented to Susan: "You got a break here, you know. I know you know the reasons you got it." (Id. at 101, Susan Plea and Sent. Hr'g Tr. at 11.)

In his PCRA proceeding, Rega alleged that Susan and the Commonwealth had reached the agreement that she would receive probation *before his June 2002 trial* and that the Commonwealth withheld that information. (PCRA Post-Hr'g Br. at 99.) In support of his allegation, Rega introduced at the PCRA hearing a letter that Susan had sent to Morris several months before his June 2002 trial. In that letter, which was dated February 27, 2002, Susan asked why her criminal conference had been continued to the June 2002 term:

> I would like to know the specific reason for this continuance IF I were [sic] to only receive probation? Than why the postponement, is there a change in the verbal conformation [sic] or the words more than likely, which isn't binding such as a verbal agreement? I would like a straight-forward reply.

(2/27/02 letter, ECF 10-2 at 85.)

Rega introduced the letter that Morris sent to Susan in response, which was dated March 6, 2002. In it, Morris wrote:

> The reason your case was continued was because the main defendants have not yet had their case[s] disposed of. The District Attorney apparently feels it is better to wait until these cases are disposed of until your case is completed. As far as I

Zanic spoke about the Gateway Lodge crimes case, they referred to it as "the homicide case" to distinguish it from Rega's May 2003 rape and sexual assault case.

> know there is no change in the "verbal confirmation," which I presume you mean to be the proposed plea agreement. If you wish to withdraw the possibility of a plea agreement, please let me know and I will have your case put on the trial list as soon as possible. However, I think we should meet to discuss the pros and cons of doing this before you make such an important decision.
> …[B]y requesting a continuance, you waived your right for a prompt trial. However, I am sure you could get a trial as soon as possible if that is your desire.

(3/6/02 letter, ECF 10-2 at 86.)

Susan and Morris both testified at the PCRA hearings. During her direct examination by Rega's counsel, Susan explained why she wrote her letter to Morris. She said that Morris attended a criminal conference in her case sometime prior to Rega's Gateway Lodge crimes trial. (ECF No. 56 at 37-39, PCRA Hr'g Tr., 12/17/09, at 139-45.) She sat outside the room where the conference was being held. When it was over, Susan testified, Morris told her there was "possibly a verbal agreement." (Id. at 38, PCRA Hr'g Tr., 12/17/02, at 141.) She clarified that Morris "pretty much didn't say a whole lot, it was just the way he said things and that was the feeling I got, that I was going to end up with just probation." (Id., PCRA Hr'g Tr., 12/17/09, at 142.) Sometime after this conference, Susan explained, Morris filed a motion to continue her 2001 criminal cases. Susan testified that she wrote her February 27, 2002, letter to Morris because she was nervous and frustrated and "[f]rom the way I understood it, I was going to end up with probation. I was wondering, if I am going to jail, my life was on hold until this was all done." (Id., PCRA Hr'g Tr., 12/17/09, at 144.)

During her cross-examination by the Commonwealth, Susan said she testified truthfully at Rega's June 2002 trial when she stated under oath that the prosecution had not made any promises to her. (Id. at 48-49, PCRA Hr'g Tr., 12/17/09, at 183-86.) She testified that the statements she gave under oath at Rega's May 2003 trial, when she said that no promises had been made to her and that she expected to serve time in jail on her pending charges, were also truthful. (Id. at 49-50, PCRA Hr'g Tr., 12/17/09, at 185-91.) When asked to explain the

inconsistency between what she had stated during her PCRA direct examination and what she had said at that trial, Susan replied that "[a]nything I said then was true." (Id. at 50, PCRA Hr'g Tr., 12/17/09, at 190.) She also agreed, after being reminded of how she had testified at Rega's trials, that in fact she was "not expecting probation" when she testified against him. (Id., PCRA Hr'g Tr., 12/17/09, at 191.)

When he testified at the PCRA hearing, Morris said that he did not have a recollection of the criminal conference that Susan referenced during her PCRA testimony. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 179.) In discussing the February 27, 2002, letter that Susan sent to him, he said that in it she used "an odd term called verbal confirmation[.]" (Id. at 188.) Morris explained that in the letter he wrote back to Susan on March 6, 2002, he simply used the same terminology that she had used. (Id.) In response to the question whether the district attorney had asked Morris to file the motions for continuances in Susan's 2001 criminal cases, Morris replied: "I can say I filed them on my own." (Id. at 184.)

During his cross-examination by the Commonwealth, Morris agreed that his file for Susan's case showed no evidence of an alleged verbal agreement prior to Rega's June 2002 Gateway Lodge crimes trial. (Id. at 192-95.) His file indicated, Morris testified, that "the first of any discussion about an offer" was at a criminal conference held on July 16, 2003, two months after Rega's May 2003 trial for rape and sexual assault. (Id. at 195.) At that point in time, the 2001 criminal charges were pending against Susan, as were the 2003 charges filed against her in her Gateway Lodge crimes case. In Morris's notes documenting the July 16, 2003 criminal conference, he wrote that "[the district attorney] will make offer in all 3 cases at next [criminal conference.]" (PCRA Commw. Ex. 4.) Morris also wrote that Susan "will accept house arrest" and he made a note to himself not to forget to "mention her son" and "her 100% cooperation with Commonwealth[.]" (Id. See also ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 193.)

Morris testified that the district attorney made his plea offer to Susan on January 28, 2004. (ECF No. 54, PCRA Hr'g Tr., 12/14/09, at 196-97.) He agreed that the prosecution did not make any promises to Susan prior to any of Rega's trials. (Id. at 197.) If there had been a promise, Morris said, he "would have written it down" in his file. (Id.) He also agreed that "[he] would not have offered house arrest if [he] already thought [he] had probation[.]" (Id. at 199.)

On re-direct examination, Rega's counsel asked Morris if, when he had testified that "the first discussion of an offer was in 2003[,]" he was "referring to discussion of a formal offer[?]" (Id. at 200.) Morris replied: "I guess [the district attorney] only makes one kind of offer. Here is the offer, take it or leave it pretty much." (Id.)

Trooper Davis testified that the Commonwealth made no deals with Susan, or made any promise of leniency to her, prior to Rega's trials. (ECF No. 71 at 117-19, PCRA Hr'g Tr., 5/21/10, at 115-17; ECF No. 72 at 15, PCRA Hr'g Tr., 5/21/10, at 188.) He said that the discussions that he had with the district attorney about what offer should be made to Susan did not occur until after she testified at Rega's May 2003 trial. (Id. at 117-18, PCRA Hr'g Tr., 5/21/10, at 115-16.) Trooper Davis agreed that Susan "got a break" when the district attorney offered her probation. (Id. at 175, PCRA Hr'g Tr., 5/21/10, at 173.) He explained that her cooperation certainly was one of the reasons she got that break. Another reason was that Stan and she had a special needs child and Stan was serving a long prison sentence for his role in the Gateway Lodge crimes. (Id. at 121, PCRA Hr'g Tr., 5/21/10, at 199.)

The PCRA court rejected Rega's allegation that there was a "proposed plea agreement" between Susan and the Commonwealth prior to his trial, or that the Commonwealth promised her that she would get probation or some other type of leniency. (PCRA Ct. Op., ECF 10-1 at 20-21, 24-25.) It further determined that to the extent that Susan had an expectation that she would

receive probation in exchange for her cooperation, it was not because of anything the Commonwealth said or did. Rather, "it was because of something her attorney said or that she errantly inferred." (Id. at 24.) Because Rega failed to establish that the prosecution made a promise to Susan prior to his trial, the PCRA court held that Rega's related claim that she testified falsely at his trial had no merit. (Id. at 24-25.)

The PCRA court was not persuaded by Rega's argument that the statement made by the state trial court at Susan's February 24, 2004, plea and sentencing hearing established that she and the Commonwealth had reached an agreement prior to his June 2002 trial. There is no disputing that Susan ultimately received consideration for her cooperation, and the state trial court's comment is a reflection of that consideration. The PCRA court explained, however, that credible evidence introduced at the PCRA hearings convinced it that the Commonwealth had made no promises of leniency to Susan or reached any type of agreement with her prior to Rega's June 2002 trial. (Id. at 20-21, 24-25.)

Sharp

Because he initially provided Rega with a false alibi, Sharp was charged with hindering apprehension. He also was charged with the unrelated crimes of receiving stolen property and conspiracy. (Court summary for Sharp, ECF No. 10-2 at 87.) Prior to Rega's June 2002 trial, Inzana filed four motions to continue Sharp's criminal cases. (Motions to continue, ECF No. 10-3 at 24-27.) The district attorney consented to these motions. (Id.)

On December 17, 2003, Sharp pleaded guilty to one count of hindering apprehension and the state trial court sentenced him to a term of probation of 5 years. He also pleaded guilty to the charge of receiving stolen property, and for that the state trial court sentenced him to a concurrent term of 5 years of probation. (ECF No. 10-3 at 37-41, Sharp Plea and Sent. Hr'g, 12/17/03, at 2-6.) The state trial court said to Sharp during his hearing: "Do you understand

you're receiving this sentence, in part, because of your cooperation later with the police?" (Id. at 39, Sharp Plea and Sent. Hr'g, 12/17/03, at 4.)

In his amended PCRA petition, Rega contended that, prior to his June 2002 trial, Sharp and the Commonwealth had reached an undisclosed agreement that he would only receive a term of probation if he cooperated. (Amended PCRA petition, ECF No. 10-27 at 148-52.) Inzana's PCRA testimony did not support Rega's allegations. He testified that he advised Sharp that it was in his best interest to cooperate with the prosecution. (ECF No. 54, PCRA Hr'g Tr., 12/14/17, at 218, 224.) He gave that advice to Sharp, he said, because he understood that the prosecution would take Sharp's cooperation into consideration when it came time to formulate a plea agreement. (Id. at 218-21.) Inzana explained:

> Again, I can't say I…said [to Sharp] you are likely to get a lesser sentence. I can say I thought his best bet at anything was going to be [to] cooperate. I have to be careful to say that I said I think he is going to get a lesser sentence. In this case…my theory…behind this was I couldn't go to trial prior to [Rega's trial] because if I went to trial and lost we were going to get hammered. If [Sharp] wasn't going to help in any way then…he had…nothing to put on the table at a later date and quite frankly he was not one of the main players in terms of an actor who cooperated at the scene of the murder so he had more to lose, I think, than anybody in terms of going from a lower degree felony and getting a lot of jail time for something he very well and maybe should have gotten probation even from day one.

(Id. at 227-28.) Inzana stated that he thought the term of probation that Sharp received "was fair and equitable not necessarily because he testified[,] but it could have been worse had he not." (Id. at 228.)

According to Inzana, in his discussions with the district attorney regarding Sharp, "there was never any conversation about my guy is going to plead and in return he's going to get something." (Id. at 223.) The first and only offer that the district attorney made to Sharp, Inzana testified, was the one contained in a letter dated December 11, 2003, almost a year and a half after Rega's trial. (Id. at 225-26.)

The PCRA court found that Inzana's testimony showed that the district attorney did not make any offers or engage in any plea negotiations prior to Rega's trial. (PCRA Ct. Op., 10-1 at 20.) Inzana advised Sharp to cooperate, the PCRA determined, because it was in his best interest to do so, and not because of any express or tacit agreement with the district attorney. (Id.) The decisions that Inzana made and the advice that he gave to Sharp "stemmed from [his] understanding" of Sharp's "potential liability, not from any promises or suggestions coming from the Commonwealth." (Id.) The PCRA court found that in Inzana's discussions with the district attorney, the district attorney "said nothing more than that should Sharp…testify, he would consider [his] cooperation when it came time to assemble a plea deal[.]" (Id.) The PCRA court also noted that Sharp did not testify at a PCRA hearing and Rega did not even establish that he had an expectation of leniency, let alone that his counsel had reached any type of understanding with the prosecution. (Id. at 24 n.9 ("Nor did [Sharp's] attorney say anything even suggesting that his client expected leniency because of something the Commonwealth said or did.").)

Discussion

1. This Court Must Presume That the PCRA Court's Findings Of Fact Are Correct

Rega did not direct this court to the required "clear and convincing" evidence to overcome the presumption of correctness that this court must afford to each of the PCRA court's findings under § 2254(e)(1). He cites to portions of the testimony and documentary evidence introduced at the PCRA hearings that he contends support his allegations, but none of it is sufficient to satisfy the burden imposed upon him by AEDPA.

Some of the documentary evidence that Rega introduced at the PCRA evidentiary hearing supported a finding that both Susan and Fishel had reached at least tacit agreements with the prosecution, particularly Susan's letter to her attorney, Morris, and Wheeler's letter to the district attorney that referenced their "gentleman's agreement" regarding his client, Fishel. But other

evidence summarized above cut against a finding that either had reached any type of agreement, and this court cannot conclude that the PCRA court's findings with respect to them were clearly wrong. Some of Susan's PCRA testimony supported the PCRA court's findings, as did testimony given by Morris, Trooper Davis, and the other attorneys that testified at the PCRA hearings, aside from Wheeler.

As for Wheeler, the PCRA court rejected the entirety of his testimony and, therefore, Rega's reliance upon it does not advance his Brady claims. Although there can be the rare case where "[a] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable [under § 2254(d)(2)] or that the factual premise was incorrect by clear and convincing evidence [under § 2254(e)(1),]" Miller-El, 537 U.S. at 340, there is no basis on the record before this court to disturb the PCRA court's determination that Wheeler's PCRA testimony was not believable. See Vickers, 858 F.3d at 850 (even in pre-AEDPA cases, "'federal habeas courts [had] no license to redetermine credibility of witnesses who demeanor ha[d] been observed by the state trial court, but not by them,'") (quoting Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (bracketed text added by the court of appeals.))

Testimony given by Trooper Davis and the other attorneys provided support for the PCRA court's findings that, contrary to Wheeler's contentions, the Commonwealth had no agreement with, or had made any promise of leniency to, Fishel. Other evidence from the state court record also supported the PCRA court's credibility determination. Wheeler did not speak up when Fishel testified under oath at Rega's trial that no promises had been made to him and that he had no expectation of leniency. As the Commonwealth points out, that Wheeler did not do so supports the PCRA court's conclusion that it was because Wheeler knew at the time that Fishel was truthfully testifying. Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir. 1999) ("If [the witness's attorney] really believed an agreement existed with the district attorney, then his client

committed perjury by testifying that no agreement existed; and [the witness's attorney] would have been required to call upon [the witness] to correct his testimony or withdraw from representation."). Wheeler did not interject when Fishel stated at his June 19, 2003, plea hearing that no promises had been made to him, and this fact provides further evidence to support the PCRA court's findings. (ECF 10-3 at 85, Fishel Plea Hr'g Tr., 6/19/03, at 11.) The significant difference between what Rega alleged the district attorney had promised Fishel (that the homicide charge would be dropped and that he would serve no more than 20 years) and the crime to which Fishel's pled and the sentence he received (third-degree murder and a term of 18 to 40 years), supports the PCRA court's findings that Wheeler and the district attorney had not reached a mutual understanding prior to Rega's trial.[19]

Rega also relies upon the fact that the attorneys for each witness at issue requested, and received, multiple continuances of their client's criminal trials. In some cases, that can be evidence that there was an express or tacit agreement or that the government made a promise of leniency to the witness if he or she cooperated. United States v. Risha, 445 F.3d 298, 302 (3d Cir. 2006). In this case, however, it does not amount to "clear and convincing evidence" that any of the PCRA court's findings were wrong, as such evidence can also tend to show nothing more than that the attorneys understood that it was in their client's best interest to delay the client's criminal trials until after Rega's so that the client could receive consideration in exchange for cooperation. Shabazz v. Artuz, 336 F.3d 154, 163-64 (2d Cir. 2003) (recognizing that the witness and the prosecution had "independent incentives" to delay the resolution of the witness's criminal case until after the petitioner's trial, and refusing to disturb the state court's finding that the

[19] The same is true for Bair. Rega relies upon the "realm of possibility" conference to support his contention that Bair's attorneys were negotiating a plea deal with the district attorney prior to Rega's June 2002 trial. During that conference, Bair's attorneys suggested an outcome (dropping the homicide charge and a sentence of between 5 to 20 years) that was nowhere close to either the eventual offer the district attorney made to Bair in May 2003, or the plea that Bair made and the sentence that he received.

prosecution made no promise of leniency to the witness); id. at 164 (concluding that "the adjournments themselves do not evidence an agreement. This is especially true in light of [the prosecutor's] testimony–which the state court accepted as true–that he would not promise them anything with respect to their pending cases in exchange for their testimony against petitioner.").

Each of the witnesses may have hoped that he or she would receive consideration in exchange for cooperation, but under the circumstances that fact is not sufficient to establish that any of the PCRA court's findings of fact were clearly erroneous. See, e.g., Bell v. Bell, 512 F.3d 223, 233 (6th Cir. 2008) (en banc) ("The fact that [the witness] desired favorable treatment in return for his testimony in [the petitioner's] case does not, standing alone, demonstrate the existence of an implied agreement with [the prosecutor]. A witness's expectation of a future benefit is not determinative of the question of whether a tacit agreement subject to disclosure existed…. Although [the witness] may have been seeking more lenient treatment in his own case, we find no evidence of a corresponding assurance or promise from [the prosecutor]."); Collier v. Davis, 301 F.3d 843, 849 (7th Cir. 2002) (the petitioner did "not show a Brady violation or evidence an understanding as interpreted by Giglio. [The witness's] general and hopeful expectation of leniency is not enough to create an agreement or an understanding."); Shabazz, 336 F.3d at 163-64 (same); Knox v. Johnson, 224 F.3d 470, 482 (5th Cir. 2000) (deferring to the state court's finding that the prosecution "did not make a deal with [the witness] in exchange for his testimony, did not fail to disclose an offer to [the witness], and did not offer false testimony[.]" The record reflected only a "unilateral hope on [the witness's] part rather than a deal, whether implicit or explicit, between [the witness] and the State."); Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000) (state court found that there was no express or implied deal with the witness; holding that evidence in the record that the witness had a subjective belief of an implied

deal did "not come close to rebutting by clear and convincing evidence that we must accord to the state court's findings.")

Finally, the receipt by each witness of more favorable treatment because he or she cooperated with the Commonwealth (a point the state trial court made at both Susan's and Sharp's plea and sentencing hearings) also is not clear and convincing evidence that the PCRA court was wrong. Bell, 512 F.3d at 234 ("although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the government chooses to provide assistance to a witness following trial a court must necessarily infer a preexisting deal subject to disclosure under Brady…. To conclude otherwise would place prosecutors in the untenable position of being obligated to disclose information prior to trial that may not be available to them or to forgo the award of favorable treatment to a participating witness for fear that they will be accused of withholding evidence of an agreement."); Shabazz, 336 F.3d at 165 ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony.") (emphasis in original).

In conclusion, the PCRA court had several hearings on the allegations that Rega makes in Claim 1(a) and Claim 2. He did not convince it that his allegations had merit, and it made specific findings of fact that this court must presume are correct under § 2254(e)(1). Considering the totality of the evidence that the PCRA court had before it, this court cannot conclude that Rega has identified "clear and convincing evidence," § 2254(e), that any of the findings of fact made by the PCRA court were wrong. Therefore, this court proceeds with its analysis with the facts as found by the PCRA court: that the Commonwealth had no express or tacit agreement

with any of the witnesses, that it made no promise of leniency to any of them, and that it was not the source of any expectation of leniency that a witness may have had.

2. The Pennsylvania Supreme Court's Decision Withstands Review Under § 2254(d)

In his appeal to the Pennsylvania Supreme Court, Rega argued that the PCRA court erred in finding that there was no information subject to disclosure under Brady and also in rejecting his claim that the Commonwealth presented false testimony at his trial. (Br. for Appellant, ECF No. 10-25 at 19-30.) In support of these claims, Rega relied upon the United States Supreme Court's decisions in Giglio v. United States, 405 U.S. 150, 155 (1972), and United States v. Bagley, 473 U.S. 667 (1985). He contended that the Commonwealth committed Brady violations with respect to Susan and Fishel because it suppressed at least tacit agreements that it had reached with each prior to his June 2002 trial. (Id. at 19-24.) Rega did not argue to the Pennsylvania Supreme Court that either Bair or Sharp had reached an agreement with the Commonwealth prior to his trial. He argued, as he does in this habeas case, that the discussions that their attorneys had with the Commonwealth should have been disclosed because in them the district attorney indicated that he would take their client's cooperation into account when it was time to resolve their criminal cases. (Id. at 24-27.) Specifically, Rega argued, as he does here, that the Commonwealth "concedes that [the district attorney] led Ingros to believe that if Bair cooperated against Rega the Commonwealth would take it into consideration in disposing of the charges against him." (Appellant's Reply Brief, ECF No. 10-26 at 72.) He made a similar allegation with respect to Sharp. (Id. at 76) ("the Commonwealth does not deny that it suppressed information regarding an offer of consideration in exchange for cooperation.").

The Pennsylvania Supreme Court affirmed the PCRA court's decision. Rega II, 70 A.3d at 780-81. It explained that "[w]hile Rega references conflicting evidence from which contrary inferences might be gleaned…the relevant review at this stage is limited to an examination of the

record to determine whether the material findings of" the PCRA court "are supported by it." Id. at 781 (citation omitted). Given the applicable review, the supreme court "decline[d] [Rega's] invitation, in effect, to reweigh differing portions of the post-conviction evidence." Id. It concluded that "the record plainly supports the PCRA court's finding of no agreements or incentives, other than maintaining the possibility for later negotiation based on the witnesses' cooperation." Id. Rega's trial attorneys "were well aware of this incentive," the supreme court held, "as they questioned various of the Commonwealth's witness[es] about their desires for leniency in their own criminal cases." Id. at 781 n.3.

There is no dispute that the Pennsylvania Supreme Court adjudicated Claim 1(a) (the suppressed-evidence claim) on the merits and that AEDPA's standard of review at § 2254(d) applies to this court's review of it. Rega contends that the Pennsylvania Supreme Court did not adjudicate Claim 2 (his false-testimony claim) because it "did not even mention, much less reach the merits of," it. (ECF 22 at 93.) Therefore, he argues, § 2254(d)'s standard of review does not apply to Claim 2 and this court must review it *de novo*. (Id.) This argument has no merit. The PCRA court expressly denied Rega's false-testimony claim on the merits for the reasons already discussed. (PCRA Ct. Op., ECF 10-1 at 24-25.) In his subsequent appeal to the Pennsylvania Supreme Court, Rega raised his suppressed-evidence and his false-testimony Brady allegations in a single claim that he designated "Claim I." (Br. for Appellant, ECF No. 10-25 at 3, 12, 19-30.) The supreme court denied Rega's false-testimony claims on the merits for the same reason it denied his suppressed-evidence claims: because it found that the PCRA court's factual determinations precluded relief.[20] Rega II, 70 A.3d at 780-81. Thus, the Pennsylvania Supreme

[20] When it set forth the basis for Rega's claim for relief, the Pennsylvania Supreme Court also cited, in addition to Brady and Giglio, the United States Supreme Court's decision in Napue v. Illinois, 360 U.S. 264 (1959), which is one of the seminal cases addressing the prosecution's knowing use of false testimony. Rega II, 70 A.3d at 781.

Court adjudicated Rega's false-testimony claims on the merits and § 2254(d)'s standard of review applies to this court's review of that claim too.

The court has already concluded that all the findings of fact that the PCRA court made when it ruled upon Claims 1(a) and 2 must be presumed to be correct under § 2254(e)(1). The Pennsylvania Supreme Court did not disturb any of the PCRA court's findings because there was support for them in the record. Rega II, 70 A.3d at 781. To overcome the burden imposed upon him by § 2254(d)(2), Rega must prove that the Pennsylvania Supreme Court's 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). Rega did not meet this burden. For all the reasons discussed above, the Pennsylvania Supreme Court had before it the requisite evidence necessary for its determination of the facts to withstand review under § 2254(d)(2)'s deferential standard.

Next, the court considers whether Rega met his burden of establishing that the Pennsylvania Supreme Court's decision to deny Claim 1(a) and Claim 2 was "contrary to…clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Rega contends that the Pennsylvania Supreme Court's decision was "contrary to" United States Supreme Court precedent because the facts of this case are "materially indistinguishable" from the facts of Giglio and Bagley. (ECF No. 22 at 57.) This argument is not persuasive. In Giglio, an assistant United States attorney ("DiPaola"), promised the defendant's co-conspirator, Robert Taliento ("Taliento"), that he would receive immunity if he testified against the defendant. 405 U.S. at 152 (the post-trial evidence "confirm[ed] petitioner's claim that a promise was made to Taliento by one assistant, DiPaola, that if he testified before the grand jury and at trial he would not be prosecuted."); id. at 153 ("The heart of the matter is that one Assistant United States Attorney [DiPaola]–the first one who dealt with

Taliento–now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government."). The government did not disclose that promise to the defense, id., and Taliento testified falsely at the petitioner's trial that "[n]obody told me I wouldn't be prosecuted." Id. The Supreme Court held that "evidence of any understanding or agreement as to a future prosecution [of Taliento] would be relevant to his credibility and the jury was entitled to know of it." Id. at 155. Because the government did not disclose DiPaola's promise to the defense and did not correct Taliento's false testimony, the Supreme Court determined that it violated the defendant's due process rights.

Here, this court is bound by the PCRA court's factual determinations that the Commonwealth did not have an agreement with any of the witnesses, make a promise of leniency to any of them, or foster an expectation of leniency.[21] At most, as the Pennsylvania Supreme Court found and Commonwealth acknowledges, the prosecution conveyed only that there was the "possibility for later negotiation based on the witnesses' cooperation." Rega II, 70 A.3d at 781. That understanding was obvious to Rega's defense, his attorneys pointed it out to the jury in both opening and closing arguments, and it is not comparable to DiPaola's express promise to Taliento that he would not be prosecuted. Thus, the facts of this case are significantly different from Giglio's case and the Pennsylvania Supreme Court's decision was not "contrary to"

[21] Because the PCRA court determined that the Commonwealth made no promise of leniency to any of the witnesses at issue, this case is factually distinguishable from the court of appeals's decisions cited by Rega, including Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), which he argues is "particularly on point here[.]" (ECF No. 75 at 9 n.5.) In Boone, a detective told the witness "that he knew that he [the witness] was involved in the robbery…, that the police department would soon make arrests in the case, and that he better cooperate." 541 F.2d at 449. The witness "did not at once agree to cooperate but later did so upon [the detective's] *promise that he would not arrest him for the Sandler burglary or for any other offenses which he knew [the witness] to have committed, and that he would use his influence with the Commonwealth attorney in order to see that he would not be prosecuted*." Id. (emphasis added.). Nothing stated to any witness in this case is comparable to the specific promises that the detective made to the witness in Boone.

it.[22] Collier, 301 F.3d at 849 ("unlike Giglio, [the petitioner] has proffered no evidence of an explicit promise, agreement, or statement made to [the witness] either by police officers or state's attorneys. We contrast that lack of evidence with the testimony of both [a detective] and the trial prosecutor…that there was no agreement with [the witness].").

Rega likewise did not show that his case is "materially indistinguishable" from Bagley. In that case, the two principal witnesses assisted the Bureau of Alcohol, Tobacco and Firearms ("ATF") in conducting an undercover investigation of the defendant. Bagley, 473 U.S. at 670. Prior to the defendant's trial, the government did not "disclose that any 'deals, promises or inducements' had been made" to those witnesses. Id. The defendant later moved under 28 U.S.C. § 2255 to vacate his conviction on the ground that the government withheld information that established that each witness had signed contracts with the ATF that he would be paid a monetary sum in exchange for his assistance. Id. at 671. The contracts provided that the payment was contingent "upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction [of the government.]" Id. By failing to disclose the contracts, the Supreme Court held, the government deprived the defense of "evidence that the defense might have used to impeach" the two witness "by showing bias or interest." Id. at 676.

[22] In his discussion of Giglio (ECF No. 22 at 23-25, 58), Rega notably failed to mention the key fact of the case, which was DiPaola's express promise to Taliento. Rega focused solely on another piece of post-trial evidence that Supreme Court mentioned, but did not base its decision upon. That evidence was an affidavit from the United States Attorney ("Hoey") in which he attested that he told Taliento "that if he did testify he would be obligated to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted." Giglio, 405 U.S. at 153. The Supreme Court stated that Hoey's affidavit "contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency." Id. at 153 n.4. Rega equates what Hoey communicated to Taliento in Giglio to that which the district attorney conveyed to Bair, Fishel, Susan, and Sharp in this case. The problem with Rega's argument is that the Supreme Court in Giglio found that the government violated the defendant's due process rights because it did not disclose the express promise that DiPaola had given to Taliento. Although Hoey's affidavit was evidence that the Supreme Court concluded tended to support a finding that there existed an understanding of leniency, other evidence (DiPaolo's affidavit) established that DiPaola made an express promise of leniency to Taliento. In this case the PCRA court found, after considering all the evidence introduced at the numerous hearings held before it, that the Commonwealth did not promise or otherwise foster an expectation of leniency. This court is bound by the PCRA court's finding, and for that reason too Giglio is distinguishable.

In contrast to Bagley, in this case Rega did not establish that Commonwealth deprived him of information his defense could have used to show bias or interest. This court is bound by the PCRA court's findings that the Commonwealth did not make an agreement with any witness or promise any witness that he or she would receive any level of leniency. The Commonwealth did convey to them that their cooperation would be taken into account after they testified against Rega, but, once again, it was obvious that they all had a clear incentive to cooperate with the Commonwealth and, as the Pennsylvania Supreme Court held, Rega's trial attorneys "were well aware of this incentive" and emphasized it to the jury. Rega II, 70 A.3d at 781 n.3;[23] see Shabazz, 336 F.3d at 164 ("The existence of pending prosecution against a government witness provides an inherent incentive for cooperation, and this incentive–namely the pending charges against [the two witnesses at issue]–was disclosed to petitioner.").

In an effort to undercut the conclusion that his defense was aware of the incentive his accomplices had to cooperate with the prosecution, Rega alleges that the Commonwealth did not disclose information about Bair's, Fishel's, and Susan's pending charges. (ECF No. 6 ¶¶ 39, 69, 82; ECF No. 22 at 37.) He did not cite any evidence in the record to support these allegations and

[23] For this same reason, Rega's reliance upon Breakiron v. Horn, 642 F.3d 126 (3d Cir. 2011), to support his contention that the Commonwealth violated the Brady rule is not persuasive. In Breakiron, a key Commonwealth witness was a jailhouse informant who testified that the petitioner had confessed to him. 642 F.3d at 130-31. After an evidentiary hearing conducted in the petitioner's federal habeas case, the district court found as fact that the Commonwealth suppressed two categories of evidence that are relevant here: (1) that the jailhouse informant sought benefits for himself when he offered his inculpatory information; and, (2) that the witness was "a suspect in another criminal investigation pending at that time[.]" Id. at 133. The district court granted the petitioner habeas relief on his first-degree murder conviction. In the subsequent appeal, the Commonwealth did not dispute that it suppressed Brady information. The only issue before the Court of Appeals for the Third Circuit was whether the evidence was material to the petitioner's robbery conviction. Id. at 133-34. Whereas in Breakiron the witness at issue was a jailhouse informant and the Commonwealth's withheld evidence that deprived the defense of knowledge about the inducements made to him to provide his testimony against the petitioner, in this case Bair, Fishel, and Susan were Rega's accomplices, defense counsel was aware of the charges Sharp and they faced, and, therefore, defense counsel knew about the incentive that they all had to cooperate with the prosecution. Because Rega failed to demonstrate that the Commonwealth suppressed Brady information, this court does not need to reach the issue whether the alleged suppression was material, which was the only issue that was before the court of appeals in Breakiron. Additionally, in Breakiron, the petitioner's claim was premised on new evidence developed at a federal hearing and, unlike in this case, there was no state court adjudication to which the federal habeas court owed deference under § 2254(d) or (e)(1).

for that reason alone they are rejected. The record also shows that these allegations are without any merit. At the 2005 post-sentence hearing, English testified that the defense received the criminal records on "all the witnesses. I'm pretty sure that came from the DA's office." (ECF No. 47, Post-Sent. Hr'g Tr., 4/4/05 Tr., at 58.) At the PCRA hearing in 2009, English once again testified that defense counsel were aware of the open charges against the witnesses and also stated they knew that they each had an incentive to cooperate with the prosecution so that he or she might receive leniency in their own cases. (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 65-69, 82, 89-91, 315.)[24]

Because Rega failed to demonstrate that the Pennsylvania Supreme Court's decision was "contrary to" Giglio or Bagley, the only remaining inquiry for this court is whether he established that its decision amounted to "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). As the Commonwealth points out, no decision by the United States Supreme Court dealt with a fact pattern similar to that presented by this case where, at most, the prosecution only communicated to the witnesses that there was "the possibility for later negotiation based on" his or her "cooperation." Rega II, 70 A.3d at 782. Rega is also correct that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (quoting Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" Id. (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). Nevertheless, a state court decision may

[24] During his PCRA testimony in 2010, Elliott stated that he was aware of the open charges against Susan. (ECF No. 59, PCRA Hr'g Tr., 1/29/10, at 23-24.)

not be overturned on habeas review merely because the decision conflicts with decisions of any court other than the United States Supreme Court. Decisions from other courts are relevant only to the extent that may be persuasive for purposes of determining whether the state court's decision was an "unreasonable application of" the law of the United States Supreme Court. See Musladin, 549 U.S. at 76-77 ("Given the lack of holdings from this Court[,]" and that "lower courts have diverged widely" on the question presented, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" (quoting 28 U.S.C. § 2254(d)(1), bracketed text added by Supreme Court); Price v. Vincent, 538 U.S. 634, 643 n.2 (2003) (citing lower federal and state court cases to show that the state court's adjudication was not objectively unreasonable).

Rega relies upon United States v. Risha, 445 F.3d 298 (3d Cir. 2006). In that case, an accomplice witness testified at the defendant's federal trial that his cooperation "would not have any impact on the disposition of the state firearm charges against him." Risha, 445 F.3d at 300. The defendant raised a Brady claim in his post-trial motions. At the hearing the district court held on his motion, the defense attorney who had represented the witness in his state criminal case "suggested that he expected [the witness's] federal testimony against [the defendant] to affect the disposition of the state charges." Id. at 301. A state prosecutor testified that he told the witness that he would take his state and federal cooperation "into consideration in resolving the state charges." Id. at 300 (internal quotations omitted). He testified "that he never specifically stated that [the witness] would receive more lenient treatment, and that he did not have authority to make ultimate decisions regarding sentencing recommendations." Id. at 300-01 (internal citations omitted). The district court found as fact that "it is clear that [the witness] understood from [his state defense attorney and the state prosecutor] that testifying against [the defendant] in the federal case would impact the disposition of state charges[,]" id. at 301 n.2, and it granted the

defendant a new trial. In the government's subsequent appeal, the Court of Appeals for the Third Circuit observed that "[t]here can be no dispute that the information in question is favorable to the defense because [the witness's] expectation of leniency in the state proceedings could have been used to impeach him." Id. at 303 n.5. It remanded the case for a determination of whether the federal prosecution had constructive knowledge of the witness's "expected consideration[.]" Id. at 299.

Rega contends that Risha supports a finding that the Commonwealth withheld Brady information because it led Bair, Fishel, Susan, and Sharp to believe that it would take their cooperation into consideration when the time came to resolve their criminal cases. Risha is distinguishable because it was decided on direct review of a federal defendant's conviction. Thus, the federal court in Risha had no state-court findings of fact that had to be presumed to be correct under 28 U.S.C. § 2254(e)(1). In contrast, in this case, this court is bound by PCRA court's findings that there was no express or tacit agreement between the Commonwealth and any of the witnesses, that the Commonwealth neither promised nor fostered any expectation of leniency that a witness may have had, and that, to extent that any witness had such an expectation, it "stemmed from their attorneys' ill-advised statements or their own subjection ideas of what their cooperation would get them." (PCRA Ct. Op., ECF 10-1 at 24.) Because the Pennsylvania Supreme Court adjudicated Rega's Brady claims on the merits, this court is prohibited from granting him habeas relief unless he overcomes § 2254(d)'s standard of review, another provision of AEDPA that did not apply in Risha.

In contrast to Risha, other courts of appeals have held that when the government did not promise the witness that he or she would receive leniency, and when the prosecution is not the source of the witness's expectation of leniency, there is no Brady violation. For example, in Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999), a decision cited by the Commonwealth, the

petitioner argued that the prosecution had reached a pre-trial agreement with an associate of his who testified against him at his trial. The district court found that the petitioner did not establish that the state suppressed information of a pre-trial deal. It concluded that "whatever exchange may have taken place between [the witness's attorney] and the [prosecutor] did not ripen into a sufficiently definite agreement before [the petitioner's] trial[,]" and, therefore, "no disclosure under Giglio was required." Tarver, 169 F.3d at 717.

The prosecutor in Tarver conveyed to the witness in that case no more than the district attorney communicated to Bair, Fishel, Susan, and Sharp in this case–that their cooperation "would be taken into consideration" after the petitioner's trial. Id. at 716. The Court of Appeals for the Eleventh Circuit found that the prosecutor's statement was "too preliminary and ambiguous to demand disclosure." Id. at 717. It explained that "'[t]he [Giglio] rule does not address nor require the disclosure of all factors which may motivate a witness to cooperate. The simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty should he testify against a codefendant is not an agreement within the purview of Giglio.'" Id. (quoting Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir. 1994) (bracketed texted added by court of appeals). It explained:

> We have, however, recognized that a promise in this context is not "a word of art that must be specifically employed." Brown v. Wainwright, 785 F.2d 1457, 1464-65 (11th Cir.1986). And, "[e]ven mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence." Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir. 1985).
>
> But not everything said to a witness or to his lawyer must be disclosed. For example, a promise to "speak a word" on the witness's behalf does not need to be disclosed. See McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985). Likewise, a prosecutor's statement that he would "take care" of the witness does not need to be disclosed. See Depree v. Thomas, 946 F.2d 784, 797-98 (11th Cir. 1991). Some promises, agreements, or understandings do not need to be disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count.

Id.

In Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000), the petitioner claimed "that the district attorney failed to reveal implied understandings of leniency between himself and several witnesses, failed to correct false and misleading testimony, and failed to disclose impeachment evidence." 210 F.3d at 484. The state court rejected his contentions and, after conducting an evidentiary hearing, found "that there were no deals, express, implied or otherwise offered to any witness that were not disclosed to [the petitioner's] trial attorneys." Id. at 486. The district court denied the petitioner's federal habeas petition, and the Court of Appeals for the Fifth Circuit denied a certificate of appealability. It held that the petitioner "neither points to a Supreme Court decision holding that the subjective beliefs of the witnesses regarding the possibility of future favorable treatment are sufficient to trigger the State's duty to disclose under Brady[ ] and Giglio, nor gives us cause to believe that the state court's conclusions involved an unreasonable application of the facts of law existing at the time of its decision." Id. at 486 (footnote omitted); see id. at 487-88 (rejecting the petitioner's claim that the district court erred in deny discovery because "[n]one of the evidence he seeks can transform [his] contention that parties left a meeting with the district attorney entertaining the belief that some unspecified consideration may be forthcoming in the future into a viable claim that the district attorney withheld from [him] and his counsel information regarding a deal for leniency in return for witness testimony.").

In Collier v. Davis, 301 F.3d 843 (7th Cir. 2002), the petitioner argued in his federal habeas proceeding that the state withheld Brady material because the witness at issue "had an informal agreement or understanding that the State would be lenient in exchange for his testimony against [the petitioner.]" Collier, 301 F.3d at 847. After holding evidentiary hearings on the petitioner's claims, the state court found that "that no promise was made to [the witness] in return for his testimony[,]" id., and that the witness did not testify falsely at the petitioner's trial

when he was asked about, but did not reveal the existence of, an agreement. Id. at 846-47. The district court denied the petitioner's Brady claim, and on appeal to the Court of Appeals for the Seventh Circuit the state argued that "only a bilateral understanding of leniency is sufficient to require Brady disclosure, regardless of what [the witness] may have thought." Id. at 849. In affirming the district court's decision, the court of appeals held:

> After a thorough review of the record, we are convinced that [the petitioner's] evidence does not show a Brady violation or evidence of an understanding as interpreted in Giglio. [The witness's] general and hopeful expectation of leniency is not enough to create an agreement or an understanding. See United States v. Baskes, 649 F.2d 471, 477 (7th Cir. 1980) (witness's hopeful expectation that he could avoid criminal proceedings if he testified against the accused did not amount to an undisclosed promise of leniency). Further, unlike in Giglio, [the petitioner] has proffered no evidence of an explicit promise, agreement, or statement made to [the witness]–either by police officers or state's attorneys.
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> Given our deference to the findings of the Indiana state courts, we cannot conclude that their resolution of [the petitioner's] case was contrary to Brady because [the petitioner] has not proved that an understanding actually existed. If there was no understanding, there was no impeachment evidence to disclose.

Id. at 849-50.

These decisions demonstrate the objective reasonableness of the Pennsylvania Supreme Court's resolution of Claim 1(a) and Claim 2, and show that its decision to deny them was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Therefore, Rega did not satisfy the "unreasonable application of" clause of § 2254(d)(1).

In conclusion, because this court is bound by the PCRA court's findings of fact, and because Rega did not overcome the burden imposed upon him by § 2254(d), he is not entitled to habeas relief on either Claims 1(a) and Claim 2. Because jurists of reason would not find it

debatable that these claims lack merit, a certificate of appealability with respect to those claims is denied.[25]

Claim 1(b)

In Claim 1(b), Rega argues that the Commonwealth violated its Brady obligations because it failed to disclose evidence that Susan had a medical condition, a pseudotumor cerebri, that impaired her memory.

Background

When Susan testified at Rega's June 2002 Gateway Lodge crimes trial, the defense cross-examined her extensively about the various version of events that she gave to the police in January 2001, and attempted to portray her as a liar. (ECF No. 31, Trial Tr., 6/15/02, at 214-45, 250-51.) She had mentioned during her direct examination, when the district attorney had presented her with a copy of an interview she had given to the police in order to refresh her recollection, that she had "a health condition," (id. at 212), but defense counsel did not ask her about it. When Susan testified almost a year later at Rega's May 2003 rape and sexual assault trial, she was more specific and stated that she had a condition that affects her memory. (See ECF No. 60 at 51, PCRA Hr'g Tr., 1/21/10, at 193.)

Rega's appellate counsel explored the issue of Susan's health condition on direct appeal, and requested that the Commonwealth produce information it had regarding Susan's "brain tumors or abnormalities, or treatment or surgeries related thereto." (Motion to compel, ECF No. 10-12 at 75.) Rega's appellate counsel, Taylor, later testified at a PCRA hearing that they

[25] AEDPA codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. 28 U.S.C. § 2253 ("A certificate of appealability may issue...only if the applicant has made a substantial showing of the denial of a constitutional right."). Where the district court has rejected a constitutional claim on its merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

asked for this information because his co-counsel, Shenkemeyer, and Rega "had probably gotten together to discuss that particular issue with regard to [Susan]," and he supposed "that [Rega] was familiar with information in her history and the drug abuse, that she had psychological problems and memory problems[.]" (ECF No. 60 at 51, PCRA Hr'g Tr., 1/21/10, at 193.)

When English testified at the post-sentencing hearing on April 4, 2005, he said that Rega gave trial counsel "extensive" information "about [Susan's] character and her history[,]" (ECF No. 47, Post-Sent. Hr'g Tr., 4/4/05, at 58), but they did not know that she had a "brain tumor which might've affected her memory[.]" (Id. at 59.) In response to the question whether the cross-examination of Susan would have changed if the defense had known about her medical condition, English answered: "I don't know whether I would have brought it up or not…. I don't know that the question of her testimony was whether or not she was accurate[,] it was whether or not she was truthful. That was the main issue with her." (Id. at 89.) He explained that there are a number of ways "to attack a witness on cross-examination[,]" and "one of them is to prove they are intentionally misstating that truth, that they are lying." (Id.)

> Another way you might attack a witness depending on the case would be that their perception is not as good as it could be. Say as a witness to an accident they say they saw but they wear glasses and they didn't have their glasses on, so I put memory into the perception category. That her perception of events may be inaccurate. She couldn't see, hear, whatever she's testifying about. That wasn't the nature of [Susan's] testimony. Her testimony was very specific about things that happened and that were said in her presence and I didn't see–my attack on her was not so much with, well, you were not in the room at the time or you couldn't really hear what was said or you don't remember what was said. My attack on her was you're lying. Would I have brought it up? I can't say right now.

(Id. at 89-90.)

On April 12, 2005, the district attorney sent appellate counsel a letter in which he wrote:

> After the hearing last week regarding the above-referenced matter, I endeavored to search the voluminous files in this case to see if anything of value could be found regarding a couple of the issues raised during the questioning at

> said hearing. In that regard, I have enclosed the following items and information for the following reasons:
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> 3. A one-page letter dated March 8, 2002, from Susan Jones to myself which requests a conference in order to discuss the "problem" with her head. I do not recall ever having a conference with her regarding this problem, however, we had a conference with her in preparation for trial and her testimony. I do not recall her ever telling myself or Tpr. Davis that she could not remember any of the details of this case because of a "problem". In fact, I do not recall any discussion at all about this "problem".

(4/12/05 letter, ECF No. 10-12 at 76-77.)

In his PCRA proceeding, Rega claimed that the Commonwealth violated its Brady obligations because it did not disclose information about Susan's medical condition. In support of this claim, he introduced Susan's March 8, 2002 letter to the district attorney. In it, she wrote:

> I would like a conference with you to discuss a matter of great importance. I have a problem with my head. My brain is floating in fluid and it could be caused by the beatings that I've taken from my husband over the years. So could you please schedule a conference to speak to one another?

(3/8/02 letter, ECF No. 10-4 at 67.)

When Susan testified at the PCRA hearing, she said that she also told Trooper Davis about her "memory loss problems" when she gave him a written statement on January 16, 2001. (ECF No. 56 at 41, PCRA Hr'g Tr., 12/17/09, at 153.) She said that Trooper Davis and the other officer who was with him "would ask me questions to help jiggle my memory." (Id., PCRA Hr'g Tr., 12/17/09, at 154.) Rega's counsel asked Susan whether the officers's questions were "open-ended…or did they suggest certain facts to you about details they knew about the case?" (Id.) Susan replied: "There might have been some that suggested certain facts that would help jiggle [my memory] and I would know the answer to whatever the rest of it was." (Id.)

Susan testified that she told the police that she smoked marijuana to relieve the pain of her pseudotumor cerebri. (Id. at 43, PCRA Hr'g Tr., 12/17/09, at 162.) She said that she believed that she had discussed her condition with Rega during the course of their friendship and that her

memory loss issues would have come up during those conversations as well. (Id. at 43-44, PCRA Hr'g Tr., 12/17/09, at 164-67.)

When English testified at the PCRA hearing, he said that the Commonwealth did not disclose Susan's March 8, 2002 letter to the defense prior to Rega's June 2002 trial. (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 312-13.) He testified that if the Commonwealth had disclosed the letter, the defense would have used it when it cross-examined Susan. (Id. at 313-14.) English explained, however, that although the defense would have used the letter to add to "the pile of reasons why you shouldn't trust Susan[,]" (id. at 314), "the gist against Susan Jones wasn't that she didn't remember, it was just that she was a liar." (Id. at 313-14; see id. at 288-89 ("the primary goal was to say that she was lying, I can tell you that. That was our main strategy there.") During his cross-examination of English, the district attorney recited to him the testimony he had given at the April 4, 2005 hearing, in which he had stated that he could not say whether, under the circumstances, the defense would have utilized Susan's memory issues to attack her credibility. (Id. at 289-90.) English said: "I would give you the same answer today…. Her credibility, her honesty was what we were attacking and not as much her reliability in a physical sense, like she didn't see it." (Id. at 290.)

Elliott testified that the Commonwealth did not disclose Susan's March 8, 2002 letter to the defense. (ECF No. 59, PCRA Hr'g Tr., 1/19/10, at 26.) He said that he probably would have used the letter during Susan cross-examination to try and make the point that the police may have coached her or filled in some of the gaps in her memory. (Id. at 27.) In response to the question whether the use of the letter "would have been consistent with your attacks on" Susan that she was a liar, Elliott replied:

> Well, yes and no. I don't know if it was consistent. It appears our position at trial was she was a liar and purposely fabricating information so if we had an

> additional argument she couldn't remember any ways that would have been a different argument. Would we have used it? Probably.

(Id. at 27-28.)

At the PCRA hearing Rega presented the testimony of Dr. Jonathan Mack, who was qualified by the PCRA court as an expert in the field of forensic neuropsychology. He testified that he believed that Susan had a pseudotumor cerebri when she testified at Rega's June 2002 trial, and that that condition can cause "increased intracranial pressure which in itself can cause memory loss." (ECF No. 61, PCRA Hr'g Tr., 1/22/10, at 163.) Dr. Mack stated that "the effects of some of the medications [Susan] was on also would impair or could further impair her memory and attention and overall mental clarity." (Id.)

Dr. Mack testified that a qualified expert such as himself could have made the same diagnosis about Susan based upon information about her that was available at the time of trial. (Id. at 170.) But when asked if he would have been able to assist the defense in developing the argument that Susan "was susceptible to being coached by [the] prosecution in having memory gaps filled in?" Dr. Mack replied: "That's a leap. Without my testing her, that's a leap." (Id.)

On cross-examination, Dr. Mack acknowledged that he was "not current" on the "literature" regarding pseudotumor cerebri. (Id. at 176-77.) He admitted that Susan's pre-2003 medical records do not indicate that she complained of memory loss, even though she outlined other issues that she was experiencing, such as depression, helplessness, and headaches. (Id. at 177-82.)

The PCRA court found that the "Commonwealth failed to disclose…evidence of Susan Jones's memory impairment," and in particular her March 8, 2002, letter to the district attorney and her statements to Trooper Davis. (PCRA Ct. Op., ECF NO. 10-1 at 25.) It denied Rega relief

on Claim 1(b) because it concluded that the impact of the Commonwealth's suppression "was relatively minor" and that Rega failed to satisfy Brady's materiality prong. (Id. at 25-27.)

The Pennsylvania Supreme Court agreed. It found that the PCRA court record showed that Susan "suffered from a health condition causing some degree of memory impairment[,]" Rega II, 70 A.3d at 781, but determined "that an exploration by the defense of the memory impairment concern at trial would not have created a reasonable probability of a different outcome." Id. at 781-82. In support of this conclusion, the supreme court pointed out that Susan "was able to recall significant details at trial which were consistent with her previous statements to law enforcement authorities[.]" Id. at 782. It further observed that there was "a wealth of other incriminating evidence" introduced at the trial that established Rega's guilt, including the testimony of Bair, Fishel, and Stan. Id. Additionally, Rega did not convince the supreme court that there was a reasonable probability that the defense strategy would have changed had the Commonwealth disclosed the information at issue. Id. at 782 n.4. "[A]s the Commonwealth observes," the Pennsylvania Supreme Court noted, Susan "did allude to her health condition at trial in response to the prosecutor's questions directed at her failure to recall specific details[,]" id. (citing ECF No. 31, Trial Tr., 6/15/02, at 212), and there was evidence in the PCRA record that Rega "likely knew of [Susan's] medical condition prior to his trial." Id. (citing to Susan PCRA testimony at ECF No. 56 at 42-44, PCRA Hr'g Tr., 12/17/09, at 160-67.) Trial counsel did not explore the issue with Susan on cross-examination, and "[t]his lends some credence," the supreme court concluded, "to the Commonwealth's suggestion that the pervasive focus of [Rega's] trial attorneys during [Susan's] cross examination (which rested on their successful efforts to stress that [Susan] repeatedly lied to law enforcement officials) was strategic." Id.

Discussion

It was Rega's burden before the Pennsylvania Supreme Court to prove that the Commonwealth's failure to disclose the evidence at issue in Claim 1(b) was material. In United States v. Bagley, 473 U.S. 667 (1985), the United States Supreme Court formulated the standard to be used to determine whether suppressed evidence is material. Evidence is material, it stated, only if it could be shown that "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles v. Whitley, 514 U.S. 419, 433-34 (1995) (quoting Bagley, 473 U.S. at 682 (opinion of Blackmun, J.)).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678, 105 S.Ct., at 3381.

Id. at 434 (additional internal citations omitted). The materiality test "is not a sufficiency of evidence test[,]" id., and the impact of the suppressed evidence must be "considered collectively, not item by item." Id. at 436.

Rega did not demonstrate that the Pennsylvania Supreme Court's decision was "contrary to" Brady's materiality standard as articulated by the United States Supreme Court. It cited to Bagley and set forth the appropriate inquiry a court must make in deciding whether withheld evidence had a material impact on a defendant's trial. Rega II, 70 A.3d at 781-82.

The next question for this court is whether Rega demonstrated that the Pennsylvania Supreme Court's decision was an "unreasonable application of" United States Supreme Court

law. He did not meet that burden either. The Pennsylvania Supreme Court weighed the strength of the suppressed information against the evidence introduced at Rega's trial that established his guilt in order to evaluate the impact of the suppressed evidence, which is a permissible inquiry. See, e.g., Strickler, 527 U.S. at 294 (the petitioner did not establish the suppressed evidence was material because "the record provides strong support for the conclusion that that the petitioner would have been convicted of capital murder…even if [the witness at issue] had been severely impeached."). It also contemplated the impact the nondisclosure had on the defense's strategy, which is another appropriate inquiry. Bagley, 473 U.S. at 676 (materiality must be evaluated in terms of how evidence could have been "used effectively" by the defense); id. at 683 (if the withheld evidence impacted "the course that the defense" pursued, it may be material); see Kyles, 514 U.S. at 441 (materiality must be assessed in light of what "competent counsel" would have done with the suppressed evidence). The Pennsylvania Supreme Court was not persuaded that Rega's trial counsel would have altered their attack on Susan's credibility that much, if at all, had the information at issue been disclosed. There was some testimony from Rega's trial counsel that supported the conclusion that they would have used information of Susan's medical condition during cross-examination, but other testimony from them supported a finding that they would have spent little time exploring the issue with her, since their strategy was to convince the jury that Susan was lying, not that she misremembered things. That trial counsel would have steered clear of asking Susan about her medical condition, or not made it an important part of its cross-examination of her, also has some support in the trial record, which showed that defense counsel did not ask Susan about her health condition even though she expressly referenced it during her direct examination when the district attorney was attempting to refresh her recollection.

Ultimately, this court cannot conclude that Pennsylvania Supreme Court's decision that Rega did not satisfy Brady's materiality prong "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Therefore, its determination withstands review under § 2254(d)(1)'s "unreasonable application of" clause.

The only remaining inquiry for this court is whether Rega established that the Pennsylvania Supreme Court's 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)(2). He did not. To the extent that the Pennsylvania Supreme Court made any factual determination that precluded Rega relief on Claim 1(b), those findings had the necessary evidence in the state court record to survive review under § 2254(d)(2).

Based upon all the foregoing, Claim 1(b) is denied. Because jurists of reason would not find it debatable that this claim lacks merit, a certificate of appealability with respect to that claim is denied.

Claim 3

In Claim 3, Rega argues that his constitutional rights were violated because of the cumulative effect that the suppressed evidence and false testimony had on his trial. This claim does not entitle to him federal habeas relief. The PCRA court and the Pennsylvania Supreme Court found only one category of suppressed evidence (the evidence related to Susan's memory impairment), and it rejected Rega's claim that the Commonwealth introduced or failed to correct false testimony. Therefore, there was no errors to aggregate. For this reason, the PCRA court

denied Rega's "cumulative prejudice" Brady claim[26] (PCRA Ct. Op., ECF No. 10-1 at 27), and the Pennsylvania Supreme Court affirmed the PCRA court's disposition of Rega's Brady claims. Rega II, 70 A.3d at 780-82.

This court already determined that it must review Rega's claims with the facts as found by the PCRA court, 28 U.S.C. § 2254(e)(1), and that the Pennsylvania Supreme Court's adjudication of Rega's Brady claims at Claims 1(a), 1(b), and 2 withstand review under § 2254(d). For those same reasons, Claim 3 is denied. Because jurists of reason would not find it debatable that Claim 3 lacks merit, a certificate of appealability with respect to that claim is denied.

B. Ineffective Assistance of Counsel Claims

In Claims 4 through 9, Rega contends that his trial counsel provided him with ineffective assistance of counsel during the guilt-phase of his trial. The test to evaluate ineffective assistance of counsel claims in both federal courts and the Pennsylvania state courts is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Commonwealth v. Sepulveda, 55 A.3d 1108, 1117-18 (Pa. 2012) ("In order to obtain relief on a claim of ineffectiveness, a PCRA petitioner must satisfy the performance and prejudice test set forth in Strickland[.]"); Commonwealth v. Kimball, 724 A.2d 326, 330-33 (Pa. 1999). Strickland recognized that the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence" entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence.[27] 466 U.S.

[26] Rega's cumulative prejudice claim was Claim IX in his amended PCRA petition (ECF No. 10-27 at 178-81.) In his brief to the Pennsylvania Supreme Court, he raised it as an argument to support Claim I, which is the claim in which he raised all his Brady allegations. (Br. of Appellant, ECF No. 10-25 at 29.)

[27] Rega argues that his appellate counsel provided him with ineffective assistance for failing to raise on direct appeal the claims of trial counsel's ineffectiveness that are at issue in Claims 4 through 9. Since the Fourteenth Amendment guarantees a criminal defendant pursuing a first appeal as of right certain "minimum safeguards

(footnote continued on the next page)

at 685-87. "[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]" Titlow, 134 S.Ct. at 18.

Under Strickland, it is Rega's burden to establish that his "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. The Supreme Court emphasized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment[.]'" Titlow, 134 S.Ct. at 17 (quoting Strickland, 466 U.S. at 690) (emphasis added). "[T]he burden to 'show that counsel's performance was deficient' rests squarely on the defendant." Id. (quoting Strickland, 466 U.S. at 687). The Supreme Court observed in Strickland that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and 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's was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

466 U.S. at 689 (internal citations and quotations omitted); see Richter, 562 U.S. at 104 ("A court considering a claim of ineffective assistance must apply a 'strong presumption' that

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necessary to make that appeal 'adequate and effective,'" Evitts v. Lucey, 469 U.S. 387, 392 (1985) (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956)), including the right to the effective assistance of counsel, id. at 396, the Strickland standard applies to a claim that direct appeal counsel was ineffective. See Smith v. Robbins, 528 U.S. 259, 285 (2000); United States v. Cross, 308 F.3d 308, 315 (3d Cir. 2002). Here, the Pennsylvania Supreme Court in Rega II denied the guilt-phase claims of trial counsel's ineffectiveness that are at issue in Claims 4 through 9, and it did so based upon its review of the extensive record Rega developed during his PCRA hearings. 70 A.3d at 780 n.2; id. at 782-89. Appellate counsel cannot be found to be ineffective for failing to raise a meritless claim. See, e.g., United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999).

counsel's representation was within the 'wide range' of reasonable professional assistance.") (quoting Strickland, 466 U.S. at 689).

The Supreme Court instructed that "[i]t should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" Titlow, 134 S.Ct. at 17 (quoting Strickland, 466 U.S. at 689). It advised:

> "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S.Ct. 2052.

Richter, 562 U.S. at 105.

Strickland also requires that Rega demonstrate that he was prejudiced by his counsel's alleged deficient performance. This places the burden on him to establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

> [The petitioner] "need not show that counsel's deficient performance 'more likely than not altered the outcome of the case'–rather, he must show only 'a probability sufficient to undermine confidence in the outcome.'" Jacobs v. Horn, 395 F.3d 92, 105 (3d Cir. 2005) (quoting Strickland, 466 U.S. at 693-94). On the other hand, it is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." [Richter, 562 U.S. at 104] (citing Strickland, 466 U.S. at 693). Counsel's errors must be "so serious as to deprive the defendant of a

> fair trial." Id. at [104] (citing Strickland, 466 U.S. at 687). The likelihood of a different result must be substantial, not just conceivable. Id.

Brown v. Wenerowicz, 663 F.3d 619, 630 (3d Cir. 2011).

The Supreme Court in Strickland noted that although it had discussed the performance component of an effectiveness claim prior to the prejudice component, there is no reason for an analysis of an ineffectiveness claim to proceed in that order. 466 U.S. at 697. If it is more efficient to dispose of an ineffectiveness claim on the ground that the petitioner failed to meet his burden of showing prejudice, a court need address only that prong of Strickland. Id.

Claim 4

In Claim 4, Rega contends that his trial counsel were ineffective for failing to retain and utilize a crime scene reconstruction expert. To support this claim, Rega relies upon the PCRA testimony of Robert Tressel, a former police officer and an investigator from the Cobb County, Georgia, Medical Examiner's Office, who was qualified at the PCRA hearing as an expert in forensic crime reconstruction. (ECF No. 56 at 3-5, PCRA Hr'g Tr., 12/17/09, at 3-9.) Rega argues that if his trial attorneys had presented testimony from an expert such as Tressel, they could have undermined the Commonwealth's theory that he shot Laugh "from behind, execution-style" (ECF No. 6 ¶ 150), and they also could have created reasonable doubt in the jury's mind that he was the one that shot and killed Lauth.

Background

In his opening statement, the district attorney said that Bair would testify that Rega told Lauth right before he shot him to "say his last prayer[.]" (ECF No. 30, Trial Tr., 6/14/02, at 33.) The district attorney also said that Dr. Eric Vey, the forensic pathologist who performed the autopsy on Lauth, would testify that the bullet wounds indicated that Lauth was "on [his] knees" when he was shot. (Id.)

When he testified at the trial, Bair did not reference Rega's alleged statement to Lauth. During his direct examination of Dr. Vey, the district attorney twice asked if the forensic evidence indicated that Lauth was on his knees when he was shot, and each time English objected because it called for speculation and Dr. Vey did not answer the question. (Id. at 125-28.) Dr. Vey testified that the bullets that entered Lauth followed a downward path through his body from back to front. (Id. at 124-25, 129, 132.) He explained that Lauth was shot either three or four times,[28] the wound to his left scalp indicated that a bullet entered the body at a downward angle, another wound indicated that that bullet entered perpendicular to the skin surface, all the bullets traveled through the body in the downward direction, and Lauth could not have been standing when he was shot. (Id. at 122, 126-29, 142-43.) In his closing argument, the district attorney made no reference to Dr. Vey's testimony, the positioning of Lauth when he was shot and killed, or where the shooter stood when he shot Lauth. (ECF No. 35, Trial Tr., 6/20/02, at 175-218.)

Rega argues that testimony from a crime scene reconstruction expert such as Tressel could have rebutted the prosecution's theory that Rega shot Lauth execution style while on his knees, but the prosecution failed to develop evidence to support that theory and abandoned it. Although Tressel testified at a PCRA hearing that, in in his opinion, Lauth was likely lying facedown on the floor when he was shot (ECF No. 56 at 12, 14-15, 17-18, PCRA Hr'g Tr., 12/17/09, at 37-38, 46-51, 60-62), he acknowledged that it was possible that Lauth was kneeling at the time. (Id. at 15, 23, PCRA Hr'g Tr., 12/17/09, at 51, 81.) Tressel also testified that there was no "scientific way" to determine "the angle of the body" because the three bullets that

[28] Lauth had four gunshot wounds on his body. Dr. Vey testified that one of the wounds was on his left occipital scalp (which would have killed him instantly), one was on his neck, and one was on his left shoulder. (ECF No. 30, Trial Tr., 6/14/02, at 121, 129-32.) He also had a grazing gunshot wound on his right hand. (Id. at 120.) The bullet that made that wound could have been one that grazed his hand and then entered Lauth's body. (Id. at 143.) Therefore, Dr. Vey explained, it is possible that only three bullets were fired at Lauth. (Id.)

entered Lauth did not have exit wounds and two of them were lodged in organs and could have changed position once they were inside the body. (Id. at 14-15, PCRA Hr'g Tr., 12/17/09, at 48-49.) On cross-examination, Tressel admitted that he formed his conclusions without having viewed the autopsy diagram or the exhibits that were used when Dr. Vey testified at the trial. (Id. at 26, PCRA Hr'g Tr., 12/17/09, at 95-96.) As a result, Tressel was not aware of the exact nature of the injury that Lauth had sustained to his hand, which he acknowledged suggested that it was possible that Lauth was holding it up and shielding his head when at least one of the bullets was fired at him. (Id. at 26-27, PCRA Hr'g Tr., 12/17/09, at 95-100.)

Rega argues that testimony from an expert such as Tressel could have supported the theory that Fishel shot Lauth, and that such testimony would have discredited Fishel's and Bair's trial testimony, because they stated that Rega was the shooter. In support of it, Rega cites to a portion of Fishel's trial testimony that he contends shows that "just before Mr. Lauth was shot," Fishel was in "the exact same area from where Mr. Tressel testified the deadly shots were fired." (ECF No. 6 ¶ 162 (citing ECF No. 34, Trial Tr., 6/19/02, at 17).) What Fishel actually stated when he testified was that, when Rega began shooting at the lock on the freezer door, he "[j]umped off to the side of the kitchen" by where the telephone was located "[b]ecause Mr. Rega was firing the gun towards me at the same time" and he was worried a bullet would ricochet and hit him. (ECF No. 34, Trial Tr., 6/19/02, at 17-18.) The telephone was located in the vicinity of laundry area. (Crime scene diagram, ECF 10-4 at 79.)

Tressel testified at the PCRA hearing that in his opinion, when the shooter fired one of the three shots at Lauth, the shooter was standing in the entryway of the kitchen, "near the laundry room area," (ECF No. 56 at 14, PCRA Hr'g Tr., 12/17/09, at 47), but he admitted that he could only identify a "general vicinity[,]" of where the shooter was standing. (Id. at 15, PCRA Hr'g Tr., 12/17/09, at 50; see id. at 20, PCRA Hr'g Tr., 12/17/09, at 70-71.) In fact, according to

Tressel, the shooter could have been standing anywhere from thirty-six inches to ten feet from Lauth. (Id. at 20, 22, 29, PCRA Hr'g Tr., 12/17/09, at 69-72, 78-79, 107.) He also based his opinion that the shooter was standing near the laundry area on the fact that a shell casing was found there, but he admitted on cross-examination that the shell casing would have bounced around before it landed in the laundry room area and that the shooter could have been standing in a range of locations when he fired the bullet at issue. (Id. at 20, 22, PCRA Hr'g Tr., 12/17/09, at 71, 78.) Tressel acknowledged that his opinion "does not establish who the shooter was[.]" (Id. at 28, PCRA Hr'g Tr., 12/17/09, at 101.)

Discussion

The Pennsylvania Supreme Court denied Claim 4 because it determined that Rega failed to show he that was prejudiced by trial counsel's decision not to utilize the services of a crime scene reconstruction expert. Rega II, 70 A.3d at 789. It held that "[e]ven if the PCRA court had credited [Rega's] post-conviction evidence, which it did not, we do not envision that the difference between whether Mr. Lauth was killed while on his knees or prone would have made a material difference in the jurors' culpability assessment." Id.

Rega argues that this court should review Claim 4 *de novo* because the Pennsylvania Supreme Court required him to prove, in establishing prejudice, that counsel's failure to retain an expert such as Tressel "would have" impacted the jury's verdict, not whether, as stated in Strickland, there was a "reasonable probability" that the outcome of his trial "would have been different." 466 U.S. at 694. If the Pennsylvania Supreme Court did in fact apply a more demanding prejudice standard than that required by Strickland, then its adjudication was "contrary to" Strickland under § 2254(d)(1) and Rega is correct that this court must review Claim 4 *de novo*. Williams, 529 U.S. at 405-06.

The United States Supreme Court cautioned, however, that federal courts reviewing a state prisoner's habeas petition should not be too quick to assume that the state court applied the wrong law, even if the state court was imprecise in language it used in evaluating a claim. Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002) (*per curiam*) (finding the Court of Appeals for the Ninth Circuit's "readiness to attribute error [to the state court] is inconsistent with the presumption that state courts know and follow the law," and is "also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state court decisions be given the benefit of the doubt."). This is particularly so when a commonly-applied and well-known inquiry such the Strickland prejudice prong is at issue. Id. Cf. Titlow, 134 S.Ct. at 15 (observing how common ineffective assistance of counsel claims under Strickland are and that it is "a claim state courts have now adjudicated in countless criminal cases for nearly 30 years[.]").

Rega did not convince this court that the Pennsylvania Supreme Court actually applied a more difficult prejudice inquiry than Strickland requires when it denied Claim 4. At the beginning of its decision, it cited opinions that articulated the well-known and appropriate inquiry. Rega II, 70 A.3d at 780 n.2 (citing Commonwealth v. Gibson, 951 A.2d 1110, 1120-21 (Pa. 2008) (setting forth Strickland's elements and articulating the proper prejudice inquiry); Sepulveda, 55 A.3d at 1117-18 (same)). In Visciotti, the United States Supreme Court pointed out that it too has stated imprecisely Strickland's prejudice standard at points in some of its decisions, and noted that the California Supreme Court's shorthand reference to the Strickland standard that was not entirely accurate "can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision." 537 U.S. at 24 (citing Mickens v. Taylor, 535 U.S. 162, 166 (2002); Williams, 529 U.S. at 393).

Because Rega did not demonstrate that the Pennsylvania Supreme Court's decision was "contrary to" Strickland, the appropriate question for this court in evaluating Claim 4 is whether it decision withstands review under § 2254(d)(1)'s "unreasonable application of" clause.[29] Rega did not show that the Pennsylvania Supreme Court's decision that he was not prejudiced "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement[,]" Richter, 562 U.S. at 103, and therefore, he is not entitled to relief on Claim 4.

Alternatively, Claim 4 fails even under a *de novo* review. It fails because this court concludes in its independent judgment that Rega did not establish that he was prejudiced by his trial counsel's decision not to utilize a crime scene reconstruction expert. Rega's argument that there is a reasonable probability that testimony from an expert such as Tressel would have created reasonable doubt in the jury's mind that Rega was not the shooter is unconvincing. It is premised upon Fishel's single comment that, at one point during the chaos of Rega firing the gun, Fishel "[j]umped off to the side of the kitchen" near the laundry area to avoid being hit. For reasons already discussed, Tressel's PCRA testimony did not show that the defense could have made a remotely persuasive argument that Fishel was the shooter.

Because Rega did not demonstrate that this is a case in which there is a reasonable probability that a crime scene reconstruction expert could have aided his defense, this case is distinguishable from Hinton v. Alabama, 134 S.Ct. 1081 (2014) (per curiam), a decision upon which he relies. In Hinton, the defendant argued that his trial counsel's performance was deficient because counsel failed to request funding to hire an expert in order to challenge the

[29] Rega argues that the Pennsylvania Supreme Court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts[,]"28 U.S.C. § 2254(d)(2), but its decision did not turn a factual determination. To the contrary, it answered a question of law or a mixed question of law and fact, and § 2254(d)(1) applies to such questions. In any event, if § 2254(d)(2) review applies to Claim 4, Rega did not overcome it because the Pennsylvania Supreme Court had sufficient evidence in the record to deny Claim 4.

state's evidence that bullets recovered from the crime scenes had been fired from the gun recovered from his home. 134 S.Ct. at 1086-89. To support his claim, the defendant presented at a post-trial hearing the testimony of three experts in toolmark evidence who all stated that the bullets had not been fired from the defendant's gun. Id. at 1086. The Supreme Court agreed that the defendant proved that his trial attorney provided deficient representation and it remanded the case for consideration of Strickland's prejudice prong. Id. at 1986-90. In reaching its holding, the Supreme Court found that "the core of the prosecution's case was the state experts' conclusion that the six bullets had been fired from the [defendant's] revolver[.]" Id. at 1088.

In Siehl v. Grace, 561 F.3d 189 (3d Cir. 2009), another decision relied upon by Rega, the petitioner became a prime suspect in his estranged wife's murder because a fingerprint and blood sample from the crime scene matched his. Id. at 191-92. The forensic expert retained by the petitioner's trial counsel provided the defense with a preliminary analysis in which he agreed that the fingerprint was a match. Id. at 191. In his analysis, the expert pointed out issues with his preliminary conclusion which should have indicated to the petitioner's counsel that further forensic assistance was required. Id. at 191, 196. Counsel did not pursue such assistance, and in fact stipulated that the fingerprint was the petitioner's fingerprint. That evidence was a key piece of evidence relied upon by the Commonwealth at trial to establish the petitioner's guilt. Id. at 191-92. In his PCRA proceeding, the petitioner claimed that his trial counsel were ineffective for stipulating that it was his fingerprint and "for failing to secure the assistance of a competent forensic expert at trial[.]" Id. at 192. The state court denied his request for PCRA relief, and the district court denied his subsequent federal habeas petition. The Court of Appeals for the Third Circuit reversed. It held that the state court's decision was objectively unreasonable because the Commonwealth's forensic evidence was a significant part of its case against the petitioner and because the petitioner, in the limited PCRA record he was able to develop, included a forensic

expert's report that opined that the fingerprint did not come from the petitioner. Id. at 191-93, 196. The court of appeals remanded the case to the district court for *de novo* review and evidentiary hearing. Id. at 196.

In contrast to Hinton and Siehl, the Commonwealth in this case did not rely upon forensic evidence to persuade the jury that the petitioner was the shooter. The expert testimony relied upon by Rega in this case (Tressel's PCRA testimony) is not comparable to the expert evidence proffered by the defendant in those cases to support their ineffective assistance claims.

Based upon all the foregoing, § 2254(d)'s standard of review applies to Claim 4, and Rega did not overcome it. Alternatively, Claim 4 fails even under a *de novo* review. Because jurists of reason would not find it debatable that Claim 4 lacks merit, a certificate of appealability with respect to that claim is denied.

Claim 5

In Claim 5, Rega contends that his trial counsel were ineffective when they did not rely upon Franks v. Delaware, 438 U.S. 154 (1978), to support the motion to suppress the letters seized from his mobile home on June 7, 2002. Under Franks, when a warrant is obtained upon a false statement made in a supporting affidavit, the fruits of the search warrant must be excluded if the remaining material, following the excision of the falsity, is independently insufficient to support a finding of probable cause. 438 U.S. at 155-56. If the suppression court determines that a Franks hearing is required, a defendant must prove by a preponderance of the evidence that: (1) "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit[,]"; and, (2) the "false statement is material to the finding of probable cause[.]" Id. "If the defendant is able to ultimately meet this burden, 'the Fourth Amendment requires that…the fruits of the search [must be] excluded to the same extent as if probable cause was lacking on the face of the affidavit." United States v. Yusuf, 461 F.3d

374, 383 (3d Cir. 2006) (quoting United States v. Frost, 999 F.2d 737, 743 (3d Cir. 1993), which quoted Franks, 438 U.S. at 156) (textual alterations in Yusuf).

Background

On June 7, 2002, shortly before Rega's trial was scheduled to commence, Corporal Jeffrey Lee ("Corporal Lee") swore out an affidavit in support of a warrant to search Rega's mobile home, which was being occupied at the time by his mother, Joan Rega ("Joan"). (Affidavit of probable cause, ECF No. 66 at 1-3.) In it, Corporal Lee detailed efforts on the part of Rega to enlist his mother in a jury-tampering scheme. He explained that the list of prospective jurors had been given to defense counsel, who then shared those documents with Rega. Corporal Lee explained that on May 30, 2002, and on June 2, 2002, Rega, who was confined at SCI Houtzdale, had telephone conversations with his mother that were lawfully recorded. Corporal Lee listened to the recordings of their conversations and attested:

> I am familiar with the voices of both Robert Gene REGA and Joan REGA. [Their recorded conversations] show quite clearly that Joan REGA has received juror list information containing names of prospective jurors. Furthermore, said conversations show that she has disseminated this information to other friends and family members and acquaintances. The conversation on May 30, 2002 shows that Joan REGA was saying that "Betty's sister-in-law" is on the panel. It also shows that Joan is examining the list of juror names and is marking the list as she consults with others. Joan REGA makes mention of the fact that she is going to SCI Houtzdale on Saturday to visit Robert Gene REGA. Then, in the June 2, 2002 conversation, Robert REGA asks Joan REGA if "without saying anything, what did Gram say, will she do it, yes or no". In Joan REGA's reply to that question, she states that "Betty" is willing to talk to her "sister-in-law", but that she just needs to know what questions to ask her about being on "Robert's jury". Robert REGA then silences his mother and severely reprimands her because she "never thinks before she talks". He is quite angry at her and he obviously knows that he is being tape-recorded.

(Id. ¶ 4, ECF No. 66 at 2.)[30] Based upon this information, Corporal Lee alleged that "[t]here is probable cause to believe that juror questionnaires/lists, etc. will be found in the above-referenced mobile home and that there will be markings identifying the targeted juror(s)." (Id. at ¶ 6, ECF No. 66 at 3.)

A magistrate district judge issued the search warrant (the "first search warrant"), and it permitted officers to search Rega's mobile home for "Jefferson County Jury Questionnaires, Jury List *and any or all papers, documents containing names of prospective jurors* for pending criminal case[.]" (ECF No. 66 at 1 (emphasis added).) The police executed the first search warrant on June 7, 2002. They did not find any jury-related documents. During the course of their search, however, the officers found a letter from Rega to his mother in which Rega instructed her to find someone to provide him with an alibi in exchange for $500.00. Later that same day, Trooper Michael Pisarchick applied for another warrant to search the mobile home (the "second search warrant"), which when it was issued permitted the search for "[a]ny or all papers, letter or documents directly attributed to Robert Gene REGA concerning his pending criminal case[.]") (Second search warrant, ECF No. 66 at 4.) The police executed the second search warrant on the evening of June 7, 2002, and they obtained numerous letters that showed that Rega was attempting to tamper with the testimony of witnesses. (ECF No. 34, Trial Tr., 6/19/02, at 172-85.)

The Commonwealth notified defense counsel that it intended to introduce the letters at the upcoming trial. On June 13, 2002, defense counsel made an oral motion to suppress the letters. The court held a hearing on that motion that evening. To support the argument that the letters should be suppressed, defense counsel introduced the transcript of the May 30, 2002,

[30] When Rega and his mother spoke of "Gram" and "Betty," they were referring to Elizabeth Edwards ("Edwards"), who is the grandmother of Rega's ex-wife, Renee. Edwards's sister-in-law, Janet, was on the list of prospective jurors. (Affidavit of probable cause ¶ 5, ECF No. 66 at 3.)

recording of Rega and Joan's phone conversation, in which Joan stated: "I am going to [the] post office [at] exactly 9:00 to mail out the things that you sent to me." (ECF No. 67, Hr'g Tr., 6/13/02, at 31.) Defense counsel argued that this transcript showed that Corporal Lee was aware when he applied for the first search warrant that the jury list and/or questionnaires would not be in the mobile home because Joan had mailed them back to Rega. (Id. at 4-5.) Although defense counsel suggested that Corporal Lee's affidavit of probable cause contained a material falsehood or omission and argued that the letters seized during the execution of the second search warrant were the fruits of that initial illegal search, they did not raise a Frank violation and in fact argued to the court that its review should be limited to the four corners of the affidavit.

When he testified at the suppression hearing, Corporal Lee stated that the police were not searching for only the "jury list," but also "copies or reproductions of that jury list as well as any papers that would contain information about any prospective juror." (Id. at 30.) At the conclusion of the hearing, the trial court denied the suppression motion. (Id. at 60-70.) The Commonwealth introduced the letters at Rega's trial. In his closing argument, the district attorney argued to the jury that that the letters showed Rega's consciousness of guilt. (ECF No. 35, Trial Tr., 6/20/02, at 190-93.)

In his PCRA proceeding, Rega contended, as he does in his federal habeas petition in Claim 5, that his trial counsel were ineffective because they should have raised a Franks violation in the motion to suppress. The Pennsylvania Supreme Court was not persuaded. It observed that the recorded phone conversations between Rega and his mother indicated that she had distributed the jury information "to friends and family" and that "*common sense dictated that in the process, [she] easily could have copied some of that information onto other papers and documents besides the official lists and questionnaires*." Rega II, 70 A.3d at 783 (quoting Rega I,

933 A.2d at 1012) (emphasis added in Rega II).[31] Therefore, it concluded, Rega did not demonstrate that the Franks violation he contended his counsel should have raised had merit. Id. at 783-84; see id. at 780 n.2 ("To the degree any underlying claim is not directly available for review, our assessment of it here is employed solely as a means of determining the viability of extant derivative claims."). For this reason, the Pennsylvania Supreme Court denied Claim 5, as counsel cannot be ineffective for failing to raise a meritless claim. Id.; see id. at 70 A.3d at 780 n.2 (citing Gibson, 951 A.2d at 1120-21 for the proposition that "a derivative claim cannot be sustained where an underlying one is unmeritorious.").

Discussion

Rega acknowledges that § 2254(d)'s standard of review applies to this court's review of Claim 5. He argues that the Pennsylvania Supreme Court's decision was an "unreasonable application of"[32] Franks and Illinois v. Gates, 462 U.S. 213, 238 (1983) (held that the government entity seeking a warrant must establish "a fair probability that the contraband or evidence of a crime will be found in a particular place."). In support, he contends that the Pennsylvania Supreme Court read something into Corporal Lee's affidavit that was not there (that Joan could have copied documents), that probable cause cannot be based upon mere speculation, and that its holding relieved the Commonwealth of its burden of proving probable cause.

[31] Franks dealt with a situation in which it was claimed a "false statement" was set out in the search warrant affidavit. The Pennsylvania Supreme Court commented that, given its disposition of Claim 5, it did not need to decide whether the reasoning of Franks extends to material omissions. Rega II, 70 A.3d at 784 n.7.

[32] Rega does not contend that the Pennsylvania Supreme Court's adjudication was "contrary to" any decision of the United States Supreme Court. (ECF No. 22 at 122.) He does contend that its adjudication was an "unreasonable determination of the facts" under § 2254(d)(2), but he does not present argument to support that contention. (Id.) Nevertheless, if the standard of review at § 2254(d)(2) applies, Rega did not overcome it because the record contained the requisite evidence for the Pennsylvania Supreme Court's decision to withstand review under § 2254(d)(2).

None of Rega's arguments are persuasive. In his affidavit of probable cause to support the first search warrant, Corporal Lee explained that Joan had disseminated the jury information to family and friends and was actively engaged in assisting Rega in his jury-tampering scheme. Probable cause determinations require the issuer to make a "practical, common sense-decision[,]"Gates, 462 U.S. at 238, and the Pennsylvania Supreme Court did not engage in mere speculation when it concluded that the Commonwealth would have established probable cause had a Franks issue been raised by trial counsel. It noted that, "the Commonwealth established probable cause, through Joan Rega's own words, that she had been enlisted to aid [Rega] in very serious misconduct aimed at undermining the justice system." Rega II, 70 A.3d at 783 n.6. The Pennsylvania Supreme Court did not relieve the Commonwealth of any burden. As in this federal habeas case, in the PCRA proceeding it was Rega's burden to show both that his underlying Franks claim had merit and that his trial counsel were ineffective for failing to raise it.

Based upon the forgoing, Rega did not demonstrate that the Pennsylvania Supreme Court's decision to deny Claim 5 was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. Therefore, this court cannot conclude that its decision was "unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States[.]"28 U.S.C. § 2254(d)(1). Because jurists of reason would not find it debatable that Claim 5 lacks merit, a certificate of appealability with respect to that claim is denied.

Claim 6

In Claim 6, Rega contends that his trial counsel were ineffective because on two separate occasions during his trial the courthouse was closed and his counsel failed to object on the basis

that his right to a public trial, as recognized in Waller v. Georgia, 467 U.S. 39 (1984), was violated by the closure.

Background

The first occasion that Rega alleges the courthouse was closed was on Saturday, June 15, 2002. Rega's trial had started the day before, on Friday, June 14, 2002, and on that date the trial court announced:

> For those of you who are spectators, I appreciate your quietness. I just want to make this announcement now, we are going to have a Saturday session starting at 8:30. Since the courthouse is generally not open, the doors will only be open until court starts at 8:30 and again for lunch to leave people out and again at one o'clock and then at the end of the day they'll be locked. So if you want to be here, be here from 8:00 to 8:30.

(ECF No. 30, Trial Tr., 6/14/02, at 109.)

The second occasion that Rega alleges the courthouse was closed was the session that began on Thursday, June 20, 2002, which was the last day of the guilt-phase of his trial. On that day, the court began instructing the jury at 6:00 p.m., and the jury announced its verdict at 1:05 a.m. the following morning. Rega contends that since the courthouse doors were locked and closed to the public at 5:00 p.m. each business day, regardless of whether court remained in session later than 5:00 p.m., he was deprived of his right to a public trial on that occasion too.

Rega raised Claim 6 during his PCRA proceeding. He contended that when the right to a public trial is violated, it is a structural error in which prejudice must be presumed. Therefore, he argued, when litigating the claim that trial counsel were ineffective for failing to object to the alleged court closures, prejudice must be presumed for that claim as well. (Br. for Appellant at 27, ECF No. 10-25 at 38.)

The Pennsylvania Supreme Court rejected Rega's argument. Rega-II, 70 A.3d at 786-87. It acknowledged that "various courts have found a violation of the right to a public trial to be in

the nature of a structural error." Id. at 786 (citations omitted.) It held, however, that because there was no objection, the only claim available to Rega was that his trial counsel were ineffective for failing object to the alleged court closures, and to prevail on that claim he must establish that he was prejudiced, as required by Strickland. Id. at 787 (citing Sepulveda, 55 A.3d at 1117-18, which set forth Strickland's elements).

The Pennsylvania Supreme Court determined that Rega did not demonstrate that he was prejudiced by his trial counsel's decision not to object to the alleged courthouse closures, and it denied Claim 6. It explained:

> The only fact-based argument [Rega] offers concerning the prejudice component of the ineffectiveness inquiry is as follows:
>
> > On the Saturday that the courthouse was closed, [Susan], a key Commonwealth witness, testified falsely and misleadingly that she had no deal with the prosecution and had not been told how she would be treated in her pending criminal cases. See Claim I. Thus, the salutary purpose of conducting public trials was lost when [Susan] testified while the courthouse was closed, undermining confidence in the fairness of [Rega's] trial.
>
> Brief for Appellant at 27. As discussed, however, the PCRA court found as a fact, supported by creditable evidence, that the Commonwealth did not enter into any agreements with its witnesses prior to or during [Rega's] trial. In any event, in line with the Commonwealth's position, [Rega] has failed to demonstrate that there were not spectators in the courtroom in the Saturday session, that any spectators were turned away from the courthouse, or that the presence or absence of a certain number of spectators had any impact whatsoever on [Susan's] testimony. Accord Brief for the Commonwealth at 47 (observing that [Rega] "did not produce a single witness who testified that they were turned away and not able to watch [Rega's] trial at any point in time"). For these reasons, the post-conviction court did not err in denying relief on this claim.

Discussion

The Pennsylvania Supreme Court's decision easily withstands review under § 2254(d). There can be no dispute that, at the time it adjudicated Claim 6, there was no "clearly established Federal law, as determined by the Supreme Court of the United States[,]"28 U.S.C. §2254(d)(1),

pertaining to whether a petitioner who raises a structural error via a claim alleging ineffective assistance of counsel must establish Strickland's prejudice prong. Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017) (collecting cases and setting forth the split among inferior courts on the issue).[33] "[A] state court's resolution of a question that the [United States] Supreme Court has not resolved can be neither contrary to, nor an unreasonable application of, the Court precedent." Rountree v. Balicki, 640 F.3d 530, 537 (3d Cir. 2011) (citing Kane v. Garcia Espitia, 546 U.S. 9 (2005)). For this reason alone, Claim 6 fails.

Although the "clearly established law" for temporal purposes under § 2254(d)(1) is the law as it stood at the time the Pennsylvania Supreme Court made its adjudication in Rega II, it is of course notable that in 2017 the United States Supreme Court granted certiorari in Weaver to resolve the disagreement among the inferior courts. In its June 2017 decision, the Supreme Court held that the violation of the right to a public trial is a structural error that, when not preserved by the defendant's counsel at trial and then on direct review, must be raised within the context of an ineffective assistance of counsel claim and the defendant must show that he was prejudiced by his counsel's error. Weaver, 137 S.Ct. at 1908-14. Therefore, subsequent law from the United States Supreme Court serves only to reinforce that the Pennsylvania Supreme Court did not err in requiring Rega to demonstrate how he was prejudiced by trial counsel's decision not to object to the alleged courtroom closures.

Rega argues that the Pennsylvania Supreme Court erred in the manner in which it evaluated the prejudice component of Claim 6 because it observed that he did not demonstrate

[33] For example, some courts of appeals had held, as the Pennsylvania Supreme Court did, that prejudice must be shown in order to establish a Sixth Amendment ineffective assistance claim, even when counsel failed to object to what the petitioner contended was a structural error. Weaver, 137 S.Ct. at 1907 (citing Purvis v. Crosby, 451 F.3d 734, 738 (11th Cir. 2006), and United States v. Gomez, 705 F.3d 68, 79-80 (2d Cir. 2013)). Other courts of appeals had held that "when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry." Id. (citing Johnson v. Sherry, 586 F.3d 439, 447 (6th Cir. 2009), and Owens v. United States, 483 F.3d 48, 64-65 (1st Cir. 2007)).

that any spectators were turned away from the proceedings due to the alleged court closure on the day that Susan testified. The Pennsylvania Supreme Court made that observation because of the way in which the parties briefed, and the PCRA court evaluated, Claim 6, which focused on whether anyone who wanted to attend that June 15, 2002 trial session was prevented from doing so. The supreme court's point was that Rega did not establish that the closure "had any impact whatsoever on [Susan's] testimony." Rega II, 70 A.3d at 787.

Based upon all the foregoing, Claim 6 is denied. Because jurists of reason would not find it debatable that it lacks merit, a certificate of appealability with respect to that claim is denied.

Claim 7

In Claim 7, Rega contends that his trial counsel were ineffective for failing investigate and discover information to impeach Bair, Fishel, Susan, and Sharp. Specifically, he argues that trial counsel should have impeached them with evidence that they had all been engaged in plea negotiations or had reached deals with the Commonwealth, and that they had a motive to curry favor with the Commonwealth because they had pending criminal charges or, in the case of Susan, faced criminal exposure for her role in the Gateway Lodge case. (ECF No. 22 at 131-32.) He contends that counsel could have impeached Susan and Fishel because they used marijuana. According to Rega, this information "should have been used to impeach [Susan's] and [Fishel's] about their ability to recall and relate events." (Id. at 131-32.)[34] Rega contended that, to the extent that counsel could have discovered information about Susan's pseudotumor cerebri, they should have used that information to impeach her ability to recall and relate events.

[34] In his petition, Rega faulted trial counsel for not impeaching Bair with the alleged incredulity of his testimony that he was able to hear a "gurgling" sound when Rega shot Lauth. (ECF No. 6 at 98-99.) When he briefed Claim 7, Rega did not discuss that allegation. (ECF No. 22 at 129-36.) He did not raise it in his appeal to the Pennsylvania Supreme Court. (Br. for Appellant, ECF No. 10-25 at 42-43.)

Background

In denying this claim, the Pennsylvania Supreme Court held:

> In his brief discussion of this claim, [Rega] fails to acknowledge that a fair amount of the information he claims was available to trial counsel to develop by way of cross-examination was disclosed to the jury on the Commonwealth's direct examination or otherwise. For example, the jurors knew very well that various key Commonwealth witnesses were subject to open charges. See e.g., N.T. June 18, 2002, at 135-36 (reflecting testimony from prosecution witness Shawn Bair that he presently lives at Jefferson County prison, he had criminal charges on the trial list, and he understood he was a co-defendant and his testimony against [Rega] could also be used against him). Moreover, trial counsel capitalized, extensively, on such evidence. For example, in his closing remarks, counsel explained:
>
> > I am going to talk a little bit about Susan Jones, Stan Jones, Shawn Bair and Ray Fishel.... When you look at their testimony, the first thing you do is [consider whether] they have any interest in the outcome of this case? Now, each one, I submit to you, has an interest in the outcome of this case. What I mean by that is, each one wants to please the Commonwealth with the testimony that they have offered today. When the time comes these defendants are obviously thinking I want the Commonwealth to give me a favorable plea agreement or treat me in an otherwise favorable way. The witnesses were obviously thinking two things; I can please the Commonwealth by offering this testimony, but I can also implicate and put the blame for these events on Robert Rega. They have an obvious interest in this case, and to suggest otherwise I suggest to you is absurd.
>
> N.T., June 20, 2002, at 150-51; see also id. at 152-68 (referencing trial counsel's discussion of the relevant Commonwealth witnesses as "co-defendants" and accomplices, in terms of the seriousness of the charges facing them, e.g., felony murder, and in terms of their desire to "curry favor with the Commonwealth").
>
> Lacking such context, [Rega's] discussion of this claim is, at the very least, misleading. At most, the argument provides insufficient basis to negate the postconviction court's central rationale supporting the denial of relief on the claim, as follows:
>
> > By the time [the relevant witnesses] stepped down from the witness stand...,the jurors understood that they were unsavory characters not averse to lying to the authorities or engaging in other criminal acts.... Additional knowledge of their criminal activity or learning that Jones suffered from occasional memory problems would not have likely changed [the] outcome, especially

> when the witnesses' testimony was consistent in all material respects.

Rega II, 70 A.3d at 788-89 (quoting PCRA Ct. Op., ECF No. 10-1 at 38) (bracketed text add by the supreme court.)

Discussion

Rega argues that the Pennsylvania Supreme Court's 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), because it ignored his argument that the Commonwealth had reached "quid pro quo agreements" with the each of the witnesses, and that counsel should have learned of those agreements. (ECF No. 22 at 140.) This court has already explained in its discussion of Claim 1(a) and Claim 2 that the PCRA court rejected Rega's allegation that there was either an express or tacit agreement between the Commonwealth and any of the witnesses, that this court is bound by the PCRA court's findings under § 2254(e)(1), and that the Pennsylvania Supreme Court had sufficient evidence in the record before it to reject any allegation by him that there existed any quid pro quo agreements. Therefore, Rega's argument that the Pennsylvania Supreme Court's adjudication of this claim cannot withstand review under § 2254(d)(2) has no merit.

Rega argues that the Pennsylvania Supreme Court's decision was an "unreasonable application of" Strickland, but he did not demonstrate that its adjudication "was so in lacking justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103. For that reason, the Pennsylvania Supreme Court's withstands review under § 2254(d)(1)'s "unreasonable application of" clause.

Finally, Rega argues, as he did in Claim 4, that the Pennsylvania Supreme Court applied an incorrect and more-demanding prejudice standard than Strickland requires. In support of this argument, he cites to that portion of the Pennsylvania Supreme Court's decision in which it quoted the PCRA court's conclusion that "[a]dditional knowledge of their criminal activity or learning that [Susan] suffered from occasional memory problems *would not have likely* changed [the] outcome" of his trial. (ECF No. 22 at 141 (emphasis added) (quoting Rega II, 70 A.3d at 789, which quoted the PCRA court's opinion)). Rega's argument that the state courts did not apply the appropriate prejudice inquiry is unconvincing. As previously discussed, a federal habeas court should use caution before it concludes that the state court applied the wrong law, particularly when it evaluated a common claim such as an ineffective assistance of counsel claim. Visciotti, 537 U.S. at 23-24. At the beginning of its decision, the Pennsylvania Supreme Court cited to decisions that set forth the proper inquiry under Strickland, Rega II, 70 A.3d at 780 n.2 (citing Sepulveda, 55 A.3d at 1117-18, and Gibson, 951 A.2d at 1120-21), and, the PCRA court in its decision recited the proper prejudice standard when it discussed the elements that Rega was required to prove in order prevail on his claims of ineffective assistance. (PCRA Ct. Op., ECF No. 10-1 at 2.)

If this court were to accepted Rega's argument that the Pennsylvania Supreme Court's adjudication was "contrary to" Strickland, it would still deny Claim 7. Even under a *de novo* review, this court affords the presumption of correctness to all the PCRA court's findings of fact, 28 U.S.C. 2254(e)(1). Under the facts as found by the PCRA court, there were no agreements, plea negotiations, or promises of leniency that trial counsel could have used to impeach the witnesses's testimony. A review of the trial transcript also shows that trial counsel utilized the information that did exist–that Bair, Fishel, and Susan had a motive to lie because of their

involvement in the Gateway Lodge crimes–and urged the jury not to credit their testimony for that reason.

As for Susan's medical condition, Rega did not establish that his trial counsel were deficient for not discovering that she had a pseudotumor cerebri. Therefore, he did not satisfy Strickland's performance prong (that "counsel's representation fell below an objective standard of reasonableness"). 466 U.S. at 688. He also did not demonstrate that he was prejudiced by counsel's failure to impeach Susan with that information. Susan's medical condition may have impacted her memory to some extent. However, in light of all the relevant testimony given at the PCRA hearings, Rega did not demonstrate that the value of that information was such that, if counsel had tried to impeach her testimony with that information, "there is a reasonable probability that" the outcome of his trial would have been different. Strickland, 466 U.S. at 694.

Based upon all the foregoing, § 2254(d)'s standard of review applies to Claim 7, and Rega did not overcome it. Alternatively, Claim 7 fails even under a *de novo* review. Because jurists of reason would not find it debatable that this claim lacks merit, a certificate of appealability is denied with respect to that claim.

Claim 8

In Claim 8, Rega contends that he was denied the effective assistance of trial counsel because English had a conflict of interest that actually affected his representation of Rega.

Background

Commonwealth witness Lea Ann Smader ("Smader") (formerly Lea Ann Gillen) worked at the Gateway Lodge at the time of Lauth's murder. She was friendly with both Rega and Blair and testified at Rega's trial that Bair "did anything [Rega] told him to do[,]" thereby supporting the Commonwealth's theory that Rega controlled Bair and was the ringleader of the Gateway

Lodge robbery.[35] (ECF No. 31, Trial Tr., 6/15/02, at 114.) English cross-examined Smader and attempted to establish that she had more loyalty to Bair than to Rega. She acknowledged that she considered Bair to be a closer friend. (Id. at 118-20.)

After Smader was excused, the following discussion occurred at sidebar:

> Mr. English: I don't think this means anything. I hope it doesn't, but I think I should tell everybody. It just came to me at the end as [Smader] was walking out, I believe I represented her in something. I believe I represented [Smader] in a criminal matter, and I am not sure if it was this county or Clarion County or what it is. It is not–I remembered the name sort of, but I sort of put it together right at the end. Was she ever charged with a crime?
>
> Mr. Burkett: I think you did. It was just some bad checks that she got an ARD for.
>
> Mr. English: It was something real minor. I don't know that it is really an issue.
>
> Mr. Burkett: I think she even mentioned it to me months ago.
>
> Mr. English: It doesn't have anything to do with this case or any confidentiality issue.
>
> Mr. Burkett: As far as I am concerned from what I heard, the most that could have happened is you represented her on bad checks and an ARD.
>
> Mr. English: I just thought–I don't know if we should ask her about it. I just want to put it out there.
>
> The Court: I don't think there is any need to ask her. You didn't ask her anything about the case. Nothing came out about it. I appreciate you coming forward. Now everybody is reporting everything to the Court. I don't have any problem with that. I don't see any legal problem, not just from what I know of the law or conflicts. There is nothing I can see. Did you tell [Rega] for any reason?
>
> Mr. English: I haven't told him that yet.

[35] Rega contends that Smader told the police when she was interviewed on December 23, 2000, "that they should investigate Rega[.]" (ECF No. 22 at 142.) At the trial, she testified that what she told the police was that they should interview *both Rega and Bair* about the Gateway Lodge crimes. (ECF No. 31, Trial Tr., 6/15/02, at 123-24, 129.) Smader was interviewed by the police for a second time on January 4, 2001, "concerning her past and current relationship with Shawn BAIR and Robert REGA." (Smader's statement to the police, ECF No. 10-4 at 17.) She told the interviewing officer that "[i]f Rob is involved in the homicide, Shawn is too, because Shawn will do anything Rob tells him to do." (Id.)

> The Court: He has left anyhow. I don't think it is a problem. If you want to disclose it is probably better that you do it now.
>
> Mr. English: To him, yeah. I don't even recall what it was for.
>
> The Court: All right.

(Id. at 131-33.)

After the sidebar concluded, the court recessed for lunch. (Id. at 133.) When it resumed, the prosecution called its next witness and there is no evidence that the issue regarding Smader was mentioned again during the trial.

In the PCRA proceeding, Rega contended that English had an actual conflict of interest and that he rendered ineffective assistance by representing Rega while operating under that conflict. In support, he argued that English's failure to question Smader about her case "goes to the very heart of the conflict[,]" because that case gave her "a motive to curry favor with the Commonwealth when she spoke with Pennsylvania State troopers" and, therefore, she should have been cross-examined about that case. (PCRA Post-Hr'g Br. at 87.)

Due to this actual conflict of interest, Rega asserted, prejudice must be presumed under the circumstances in accordance with Supreme Court's decisions in Strickland and Cuyler v. Sullivan, 446 U.S. 335 (1980). Strickland identified the very limited categories of ineffective assistance claims in which the court presumes prejudice rather than requiring a defendant to demonstrate it. 466 U.S. at 692. In relevant part, it held:

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, 100 S.Ct., at 1716-1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of

> presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

Id.

In support of his contention that English labored under an actual conflict of interest, Rega introduced at the PCRA hearing evidence that Smader was arrested in Clarion County in December 1999 for a series of theft-related offenses, including two counts of theft by deception, bad checks, and aiding consummation of a crime. (Criminal information, ECF No. 10-4 at 15-16.) English was appointed to represent her on January 10, 2000. (Order of appointment, ECF No. 10-4 at 14.) She entered the Accelerated Rehabilitative Disposition ("ARD") program. (10/15/01 ARD letter, ECF No. 10-4 at 18.) There was no dispute that she was in the ARD program at the time she was interviewed by the police on December 23, 2000, and January 4, 2001. Smader had completed the ADR program near the end of 2001, well before she testified at Rega's trial on June 15, 2002.

During the PCRA hearing, Rega's attorney asked English if there was a reason he did not "inquire as to [Smader's] interest in currying favor from the prosecution at the time she was interviewed by the police in Mr. Rega's case?" (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 151.) He responded: "I can tell you that the fact that I previously represented [Smader]…in no way influenced my conduct of Mr. Rega's defense." (Id.)

In denying this claim, the PCRA court applied Commonwealth v. Small, 980 A.2d 549 (Pa. 2009), which recognized that under Cuyler and Pennsylvania Supreme Court precedent applying that decision, when a defendant failed to object at trial to a conflict, prejudice must be presumed "only if a defendant shows counsel actively represented conflicting interests and the

actual conflict adversely affected counsel's performance." Small, 980 A.2d at 563 (citing Commonwealth v. Spotz, 896 A.2d 1191, 1232 (Pa. 2006), which cited Commonwealth v. Hawkins, 787 A.2d 292, 297-98 (Pa. 2001), and Commonwealth v. Buehl, 508 A.2d 1167, 1175 (Pa. 1986)). The PCRA court found that Rega failed to demonstrate that English's prior representation adversely affected his performance. It determined that the above-quoted sidebar exchange demonstrated that:

> Attorney English was not operating under a conflict of interest when he cross-examined the witness. He did not even remember until she was leaving the witness stand that he may have represented her. And even then, he did not recall the substance of the representation until reminded by the district attorney. Thus, his decision to ask her some questions and not others could not have been motivated by the representation and any continuing obligation he may have felt to a former client.

(PCRA Ct. Op., ECF No. 10-1 at 17.) The court further held that English's PCRA hearing testimony that his prior representation of Smader "in no way influenced" his conduct at Rega's defense counsel, (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 151), "was entirely credible." (PCRA Ct. Op., ECF No. 10-1 at 17-18.)

In his appeal to the Pennsylvania Supreme Court, Rega reiterated his argument that the fact that English did not question Smader about her prior ADR case evidenced that there was an actual conflict. The Pennsylvania Supreme Court was not persuaded. It noted that "[g]iven the caseloads experienced by public defenders and other criminal-law attorneys, the scenario in which a defense attorney forgets that he previously represented a prosecution witness in a different case is not as uncommon as would be desired." Rega II, 70 A.3d at 788 (citation omitted). It held that the PCRA court's finding that English's "did not remember the previous representation prior to the cross-examination, that he adequately raised issues concerning the witness's credibility, and that exploration of the witness's previous experience with the criminal

justice system, even if permissible, would not have impacted the outcome of [Rega's] trial." Id. at 788.

Discussion

Rega contends that that the Pennsylvania Supreme Court's decision was "contrary to" Cuyler because by holding that, even if he had cross-examined Smader about her Clarion County case, it "would not have impacted the outcome of [Rega's] trial[,]" Rega II, 70 A.3d at 788, it was requiring him to prove that he was prejudiced. If this court accepts that argument, it must review Rega's claim *de novo*. Even under that standard of review, however, Claim 8 still fails.

Under Cuyler, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. Thus, it is Rega burden to demonstrate, among other things, that English's prior representation of Smader "actually affected the adequacy of his representation[,]" in order for the court to presume that he was prejudiced by English's alleged ineffectiveness. Id. at 349. He did not meet that burden. The PCRA credited English's testimony that his prior representation of Smader did not impact his representation of Rega and this court is bound by that determination under § 2254(e)(1). Rega's argument that English did not ask Smader about her Clarion County case because he was concerned that he would violate a duty to her is not persuasive. The sidebar discussion about Smader, English's PCRA testimony, and the PCRA court's crediting of that testimony, all establish that English did not recall the details of his prior representation of Smader. There is no evidence in either the trial or PCRA record that would support a finding that English recalled during Rega's trial that Smader had been in the ADR program when she spoke to the police on December 23, 2000, and January 4, 2001, or that he declined to use that information to impeach her because he did not want to violate his duty of loyalty to her.

Rega contends in his petition that he "never waived the conflict. He was never colloquied on the record about the conflict, nor is there any evidence in the record that he was even informed of the conflict, since all of-record discussion about this issue took place outside his presence." (ECF No. 6 ¶ 234.) He did not address that allegation in his brief, however. (ECF No. 22 at 141-48.) Importantly, Rega did not make that allegation to the PCRA court (Amended PCRA Pet., ECF No. 10-27 at 104-11; Post-Hr'g Br. at 83-87, 89-91), thus depriving it of the opportunity to determine whether it was credible.[36] Finally, in a collateral proceeding such as this, it is Rega's burden to produce evidence to support his claims, and the absence of evidence in the record redounds to his detriment. See Higgason v. Clark, 984 F.2d 203, 208 (7th Cir. 1993) ("On collateral attack, a silent record supports the judgment; the state receives the benefit of a presumption of regularity and all reasonable inferences."); cf. Titlow, 134 S.Ct. at 17 ("[i]t should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'") (quoting Strickland, 466 U.S. at 689).)

Based upon all the foregoing, even if the court assumes without deciding that Claim 8 is subject to *de novo* review, it has no merit and is denied. Because jurists of reason would not find it debatable that this claim lacks merit, a certificate of appealability is denied with respect to that claim.

Claim 9

Rega contends that his trial counsel were ineffective because the trial court ordered a plain clothes police officer, Earl Pontius ("Pontius"), to sit at the defense table and counsel did not object to this alleged highly-prejudicial arrangement.

[36] It appears that the first time Rega raised this argument was in his brief to the Pennsylvania Supreme Court. (Br. for Appellant, ECF No. 10-25 at 41.)

Background

In its decision denying this claim, the PCRA court summarized the relevant background:

> [Rega] claims that [Pontius's] presence had a chilling effect on his communication with counsel and signified his dangerousness to the jury. Neither inference, however, can reasonably be extrapolated from the record.
>
> A deputy sheriff from Elk County, Pontius was brought in because of security concerns including Rega's apparent indifference to whether others got hurt or died during an escape attempt and potential threats against members of the jury and his own attorneys. ([PCRA Hr'g Tr.], 12/15/2009, pp. 138-38, 304; id., 01/19/2010, pp. 86-88, 228-29). (See also [jury selection transcript ("JST"] JST, 06/13/2002, pp. 72-73). It was thus not without cause that Pontius was seated at the defense table throughout the trial. It was also with proper precautions designed to safeguard Rega's presumption of innocence. Pontius reviewed the jury list to make sure he would not be recognized, for instance; dressed in plain clothes; forewent any indicia of official position, such as a badge or visible weapon; and sat beside [Rega], who talked to him throughout the trial. (Id.; [PCRA Hr'g Tr.], 12/15/2009, p. 142, 304-05; id., 01/19/2010, pp. 90, 229). It was the Court's intention that Pontius would thus appear to be a family member or part of the defense team (JST, 06/13/2002, p. 74), and except for Rega's speculation, there is nothing to suggest that the jury thought otherwise.
>
> There is also no evidence indicating that Pontius's presence chilled communications between attorneys and client. In front of Rega, Pontius took an oath to be bound by the rules governing attorney/client privilege. (Id. at 72-76). Rega noted that he would feel "a lot more comfortable" with that assurance. (Id. at 74). Michael English clearly and unequivocally testified, moreover, that Pontius's presence did not chill his and Rega's communications:
>
> > Q. I think I know the answer to this, but I'm going to ask it anyway. Did his presence chill your communications between you and Mr. Rega?
> >
> > A. No, it did not.
> >
> > Q. Mr. Rega talked freely to you during the trial?
> >
> > A. Again, I can tell you it did not inhibit me, and I never got any impression that it inhibited [Rega]. It was one more person for [Rega] to talk to.
> >
> > Q. Did [Rega] appear to enjoy his presence there?
> >
> > A. Well, he talked to him. I don't think the feeling was reciprocal. He sat there quietly and did his job most of the time.
>
> (PCRA [Hr'g Tr.], 12/15/2009, p. 305).

> Perhaps, most tellingly, before commencing the first day of trial, the Court asked Rega directly, "Do you have any problems with Mr. Pontius?" ([Trial Tr.], 06/14/2002, p. 5) "No," was his unqualified response. (Id.). The first time Rega purported to have a problem with Pontius, in fact, was in his affidavit in support of his PCRA petition, and because he elected not to testify at the PCRA hearing, that document is not part of the substantive evidence the Court will consider.
>
> As evidenced by the record, then, the Court did not interfere with Rega's ability to freely communicate with counsel or even vaguely suggest to the jury that he was dangerous by inserting Earl Pontius at counsel table during the trial.

(PCRA Ct. Op., ECF No. 10-1 at 13-14) (footnote omitted). For these reasons, the PCRA court held that Rega's counsel were not ineffective for deciding not to object to Pontius being seated at the defense's table beside Rega. (Id.)

The Pennsylvania Supreme Court affirmed the PCRA court's decision. Rega II, 70 A.3d at 785-86. It "agree[d] with the PCRA court that [Rega] has failed to establish either that his communication with his attorneys were impacted, or that the trial court abused its discretion in the form of the increased security fashioned to address [Rega's] expressed proclivity toward violation in response to his criminal prosecution for first degree murder and attendant restraints on his liberty." Id. at 786. It also explained:

> In terms of the assertion of a suggestion of dangerousness, there is a well-developed line of judicial decisions reflecting trial courts' discretionary authority to implement security measures, even where these carry some measure of potential prejudice, when required to further an essential state interest. See, e.g., Hellum v. Warden, U.S. Penitentiary-Leavenworth, 28 F.3d 903, 907-08 (8th Cir. 1994). The United States Supreme Court has explained that courts "have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for alleged criminal conduct." Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986). While [Rega] now contends that there was no evidence of a relevant threat in the first instance, both of his trial attorneys testified, on post-conviction, that they had been apprised of a letter [Rega] had written to his mother in which he proposed a violent escape attempt. See N.T., Dec. 15, 2009, at 138-39; N.T., Jan. 19, 2010, at 229-30. Although [Rega] seems to imply that there was no specific risk relative to the courtroom setting, in the exercise of its discretion, the trial court was not obliged to believe that [Rega's] proclivity toward violence would be limited to the one specific avenue which had already been uncovered. In short, [Rega's] presentation fails to establish an abuse of discretion on the trial court's part in the relevant regards.

Id. at 785 n.8.

Discussion

There is no basis for this Court to grant Rega habeas relief on this claim. In the brief argument that he devotes to the Pennsylvania Supreme Court's adjudication (ECF No. 22 at 153), he contends that it was "contrary to, or involved 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), but he did not meet his burden of proving that contention. He did not overcome the presumption of correctness that this court must afford to any of the findings of fact made by the trial and PCRA court under 28 U.S.C. § 2254(e)(1).

Based upon all the foregoing, Claim 9 is denied. Because jurists of reason would not find it debatable that this claim lacks merit, a certificate of appealability is denied with respect to that claim.

Claim 13

Rega contends that, even if none of his guilt-phase and sentencing-phase claims individually are sufficiently prejudicial to require relief, the cumulative prejudice incurred requires that he be granted relief. The Pennsylvania Supreme Court denied this claim on the merits, concluding "[n]othing in [Rega's] presentation…individually or cumulatively, has persuaded us that he is entitled to post-conviction relief." Rega II, 70 A.3d at 794. Rega admits that § 2254(d)(1) applies to this claim, and he argues that the Pennsylvania Supreme Court's adjudication was "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). (ECF No. 22 at 259.) He did not establish that the supreme court's adjudication of the guilt-phase portion of this claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103.

Based upon all the foregoing, the guilt-phase portion of Claim 13 is denied. Because jurists of reason would not find it debatable that this claim lacks merit, a certificate of appealability is denied with respect to that claim.

IV. Sentencing-Phase Claim

In Claim 10, Rega contends that his trial counsel provided him with ineffective assistance at his capital sentencing hearing because they failed to investigate and present available mitigating evidence, and failed to investigate his prior criminal record in order to rebut one of the aggravating circumstances the Commonwealth presented to the jury. He argues that his appellate counsel were ineffective for failing fully to investigate and to properly present these claims in his direct appeal.

Background

The jury reached its guilty verdicts early in the morning of June 21, 2002. Rega's capital sentencing hearing was held later that afternoon. Under Pennsylvania law, the Commonwealth had the burden of proving at least one statutorily-defined aggravating circumstance accompanied the murder. 42 Pa. Cons. Stat. § 9711(c)(iii), (d). The jury could find an aggravating circumstance to be present only if all members agreed that it was. Id. § 9711(c)(1)(iv). Rega could introduce, and the jury could consider, mitigating evidence. Id. § 9711(e). The Commonwealth had to prove aggravating circumstances beyond a reasonable doubt, but Rega could prove mitigating circumstances by only a preponderance of the evidence. Id. § 9711(c)(1)(iii). Unlike the finding of aggravating circumstances, each juror was free to regard a particular mitigating circumstance as present despite what other jurors believed. The jury could impose the death penalty only if it found that the statutorily-defined aggravating circumstances

proven by the Commonwealth outweighed any mitigating circumstance proven by Rega. Id. § 9711(c)(1)(iv). The verdict had to be a sentence of life imprisonment in all other cases. Id.

The Commonwealth asked the jury to find two aggravating factors. The first was that Rega killed Lauth during the commission of a felony (robbery), 42 Pa. Cons. Stat. § 9711(d)(6). To prove it, the Commonwealth relied upon the evidence that it had entered during the guilt phase of the trial. Since the jury had already found Rega guilty of robbery beyond a reasonable doubt, it was virtually guaranteed that it would find this aggravating circumstance. The second aggravating circumstance was that Rega "has a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. Cons. Stat. § 9711(d)(9). To prove that history, the Commonwealth presented the testimony of an assistant district attorney. He was shown numerous documents that he identified as criminal complaints, informations, and sentencing orders regarding Rega's prior felony convictions. (ECF No. 36, Trial Tr., 6/21/02, at 41-59.) Through his testimony, the Commonwealth established that Rega's prior record consisted of twelve burglary convictions, and one criminal trespass conviction. (Id.) One of these convictions was a burglary Rega committed at his neighbor's house in 1985 when he lived Tulsa, Oklahoma. The other eleven burglary convictions were for crimes that occurred at commercial properties. Rega committed them in New Jersey in 1986 and 1987, and four of them were burglaries of the Terrance Room, a restaurant at which Rega worked and that was owned by his parents. The criminal trespass conviction was for an offense that Rega committed many years later, in June 1992, in Washington Township, Pennsylvania. In that case, he forcibly entered a remote radio site that was owned by WDSN Radio Station. During cross-examination, Rega's trial counsel elicited testimony to demonstrate that the 1992 criminal trespass was "a property crime," of a "commercial place," and that "no assaults or injuries" occurred in that case. (Id. at 61, 67.)

Pennsylvania law lists specific mitigating circumstances that a defendant may present to the jury, including what is referred to as the "catch all," which includes "[a]ny evidence of mitigation concerning the character" of the defendant. 42 Pa. Cons. Stat. § 9711(e)(8). In support of Rega's mitigation case, his "[c]ounsel's strategy…was to appeal to the jury's sentimentality and present [him] 'as a human being whose life had value and who had people who cared about him and loved him deeply and who had a family and two beautiful daughters that would miss him terribly if he was executed.'" Rega I, 933 A.2d at 1026 (quoting English's post-sentence hearing testimony, ECF No. 47, Post-Sent. Hr'g Tr., 4/4/05, at 115.)

> When counsel discussed the mitigation defense with [Rega], he indicated a desire to kill himself if he was convicted, and expressed ambivalence about the penalty phase. [Post-Sent. Hr'g Tr., 4/4/05, at 115.] Despite this general ambivalence, [Rega] was adamant about two things. First, [Rega] did not want his counsel to attack his mother in any way and make her look like a bad parent. Id. at 117. Second, [Rega] was against any kind of psychological testimony, and would not cooperate in this regard. Id. at 118, 155. After discussing their strategy with [Rega], counsel honored his wishes not to pursue any psychological evidence or evidence of his upbringing.

Id.

In support of Rega's mitigation case, defense counsel presented the brief testimony of his mother, Joan, his ex-wife, Renee, her grandmother, Edwards, and Rega's two young daughters. "Each witness consulted with Attorney English for the first and only time shortly before testifying." Id. His mother, Joan, stated that she loved Rega, that he had always treated her well, that his father had neglected him and had been cruel to him, that he was placed in foster care for a time when he was between nine and ten years old, and that he was a loving father and good provider to his two young daughters, over whom he had custody after his separation from his wife. (ECF No. 36, Trial Tr., 6/21/02, at 79-85.)

Renee testified that Rega was a loving and caring father to his daughters. (Id. at 87-88.) Her grandmother, Elizabeth, testified that she loved Rega and that he was a good person. (Id. at

89-91.) Rega's six-year-old daughter, Autumn, and his seven-year-old daughter, Amber, both stated that they loved their father. (Id.)

In the Commonwealth's closing argument, the district attorney reminded the jurors that they had already found that Rega murdered Lauth during the commission of a felony and, therefore, the aggravating circumstance at § 9711(d)(6) was established. (Id. at 112.) In discussing the § 9711(d)(9) aggravating circumstance (that Rega had a significant history of felony convictions involving the use or threat of violence to the person), the district attorney reiterated that Rega had "twelve prior convictions for burglary" and he reminded the jury that one of those convictions was of a residence (the Oklahoma burglary). (Id. at 107.) He also mentioned Rega's criminal trespass conviction, but inaccurately gave the impression that that offense also involved a residence. (Id.) ("You also heard testimony showing a conviction for criminal trespass that's going into someone's residence without consent.") He urged the jury that Rega's "significant prior history" "ought to be a substantial factor in your decision" to impose the sentence of death. (Id. at 108.)

English gave the defense's closing argument. He said that although Rega had an "extensive criminal history" "there has been no allegation…that Mr. Rega committed or threatened to commit any act of violence during any of these crimes[,]" and he also pointed out that those crimes were committed when he was in his "late teens[,]" and many occurred at "a restaurant owned by his own parents." (Id. at 113.) He asked the jury to reject a sentence of death because Rega's "life has value[,]" particularly to his two children. (Id. at 115.)

In its instruction to the jury, the court explained that "[i]n deciding whether the defendant has a significant history the factors you should consider include the number of previous convictions, *the nature of the previous crimes* and their similarity to or relationship with the murder in this case." (Id. at 121 (emphasis added).) It instructed:

> In deciding whether aggravating outweigh mitigating circumstances do not simply count their number, compare the seriousness and importance of the aggravating and mitigating–of the aggravating along with mitigating circumstances…. When voting on the general findings you are to regard a particular aggravating circumstance as present only if you all unanimously agree that it is present. On the other hand each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe. This different treatment of aggravating and mitigating circumstances is one of the law safeguards against unjust death sentences…. Remember the Commonwealth must [prove] any aggravating circumstance beyond a reasonable doubt while the defendant only has to prove any mitigating circumstance by a preponderance of the evidence.

(Id. at 122-23.)

In announcing its verdict, the jury explained that it unanimously found both of the aggravating factors that the Commonwealth urged it to find. The single mitigating factor found by one or more of the jurors was the age of Rega's children. The jury concluded that the aggravating circumstances outweighed the mitigating circumstance and, therefore, it sentenced Rega to death. (Sent. verdict sheet, ECF No. 37.)

In his post-sentence motion, Rega's appellate counsel raised the claim that trial counsel were ineffective for failing to investigate and present available mitigating evidence, "specifically for not obtaining his school and medical records, family social history, a psychiatric evaluation, and other related information[,]" and also for failing to "hire a private mitigation specialist." (Post-Sent. Op., ECF No. 10 at 57.) English, Elliott, and Rega's mother, Joan, provided relevant testimony during the evidentiary hearings held on April 4, 2005, and April 5, 2005. (ECF Nos. 47, 48.) Appellate counsel presented the testimony of Dr. William Long, a clinical psychologist who had reviewed Rega's school records and some information that was contained in a pre-trial investigation report that had been prepared in one of his criminal cases. (ECF No. 47, Post-Sent. Hr'g Tr., 4/4/05, at 65, 78-79.) Dr. Long acknowledged that Rega refused to be interviewed. (Id. at 64, 74.)

> Based on his review of the school records and pre-sentence report, Dr. Long reached three conclusions. First, he concluded that [Rega] may have suffered brain damage due to Scarlet Fever, which led to a temperature over 106 degrees when [Rega] was six years old. He asserted that this diagnosis was consistent with [Rega's] school records indicating developmental delays, difficulty learning, emotional issues, a tendency to engage in inappropriate behavior, and his need for special education. Second, Dr. Long concluded that brain-injured individuals generally may appear to be more intelligent than they really are. Third, Dr. Long concluded that [Rega's] parents and upbringing may have contributed to his learning and behavioral difficulties.

Rega I, 933 A.2d at 1025.

In denying Rega's request for post-sentence relief, the trial court held that Rega did not establish that trial counsel were ineffective "in deciding not to pursue an aggressive mitigation defense." (Post-Sent. Op., ECF No. 10 at 57.) It found that Rega "made an informed decision not to present a more elaborate mitigation case and clearly instructed his counsel to that end. He refused to submit to a psychological assessment and otherwise refused to cooperate with the gathering and presentation of psychological evidence." (Id. at 58) (internal record citations omitted.) "In fact," the trial court explained, "counsel testified that [Rega] was unconcerned with, even opposed to, presenting mitigation evidence." (Id.)

The Pennsylvania Supreme Court affirmed that decision in Rega I. It held that "[a] review of the record, specifically the post-trial testimony, demonstrates, first, that [Rega] instructed counsel not to pursue a mitigation defense based on evidence regarding [his] mental health or abusive upbringing, and, second, that [Rega] knowingly and voluntarily waived his right to have counsel present further mitigation." Rega I, 933 A.2d at 1026. See id. at 1026-27 ("To explain the reason for the limited nature of their investigation, counsel testified that they were complying with [Rega's] wishes, and, additionally, that their decision to attempt to portray [him] as a good father and family man reflected their own professional judgment based on strategic decisions and discussions with [him]."); id. at 1027 ("Counsel specifically testified that [Rega] was opposed to

the idea of presenting psychological evidence and refused to submit to a psychological assessment."); id. (Rega was not "interested in presenting any evidence that would cast his mother in a poor light or indicate that he was poorly parented.")

In his PCRA proceeding, Rega once again contended that his trial counsel were ineffective for failing to investigate and present available mitigating evidence, and he claimed that his appellate counsel were deficient for failing properly to litigate this claim on direct appeal. In support, Rega introduced at the PCRA hearings testimony from his family and friends that he had a "traumatic and brutal childhood" that "was filled with neglect and relentless sexual, physical and emotional abuse[,]" (ECF No. 6 ¶ 266), and that he "was intensely victimized by both a mother and father with vicious tempers." (Id. ¶ 267; see id. ¶¶ 268-301) (summarizing lay witness testimony given at PCRA hearings).) He introduced his educational, medical, and social service records, which he claimed indicated that he had cognitive impairments, organic brain damage, social and emotional problems, and had suffered from parental physical and mental abuse and neglect. (Id. ¶¶ 302-06.) Additionally, he presented testimony from Dr. Mack, the forensic psychologist discussed earlier (who also gave testimony regarding Susan's medical condition), Dr. Faye Sultan, a licensed clinical and forensic psychologist who was qualified by the PCRA court as an expert in the treatment of victims of physical, sexual, and emotional abuse, and Kathleen Kaib, a licensed social worker and mitigation specialist. (Id. ¶¶ 307-32.) Their testimony, Rega argued, represented the type of expert evidence that could have been introduced at his sentencing hearing to persuade the jury that he had organic damage (id. ¶ 309), "suffered at the time of the offense from serious mental and emotional problems resulting from his traumatic childhood," (id. ¶ 312), suffered "severe trauma" and was "reared in a chaotic and abusive family environment[,]" (id. ¶ 318), and that he was uncared for and neglected by his parents. (Id. ¶ 319-20.)

Rega raised the related claim that his trial counsel were ineffective for failing to obtain available information that could have been used to rebut the § 9711(d)(9) aggravating circumstance, which the Commonwealth heavily relied upon to secure a death sentence, and that his appellate counsel were deficient for not litigating and developing evidence to support this claim on direct appeal. To support these claims, Rega introduced at the PCRA hearings evidence to establish that, more than a year before his trial, the Commonwealth provided his trial counsel with notice that it would be seeking to prove the § 9711(d)(9) aggravating circumstance. (Notice of aggravating circumstances, ECF No. 10-4 at 19-20.) It subsequently provided trial counsel with a list of the prior convictions it would be relying upon to support that aggravator. (ECF No. 55, PCRA Hr'g Tr., 12/15/09, at 172-73.) Rega's trial counsel did not obtain any records pertaining to, or do any investigation into, his prior convictions, and they did not ask their investigator to do so either. (Id. at 176-79, 200-01, 219; ECF No. 59, PCRA Hr'g Tr., 1/19/10, at 154-55.) Had they done so, Rega argued, his counsel would have been able to present evidence to establish as a fact that his prior criminal history was non-violent, that he (and his accomplices in them) did not encounter other individuals during the commission of his prior crimes, and that his prior crimes were much less serious than the Commonwealth's summary and argument made them appear to be.

For example, Rega's PCRA evidence showed the following about his 1985 Oklahoma burglary conviction, which was the only one that involved a residential property. It was based on an incident that took place in June 1985, when Rega was nineteen years old. His accomplice was a thirty-eight-year-old acquaintance. They broke into Rega's neighbor's house and took a coin jar. No one was in the home at the time the crime occurred. (ECF No. 57, PCRA Hr'g Tr., 12/18/09, at 91-92; Oklahoma PSI, ECF No. 10-4 at 49-53.) Given the nature of the offense and Rega's age, the writer of the pre-sentence investigation for that case referred to him as "a Non-Violent

Intermediate Offender" and recommended that he receive either a deferred sentence or a term of probation "and be given Court permission to return to his mother's home in New Jersey." (Oklahoma PSI, ECF No. 10-4 at 52.)

As for the other burglaries that he committed in 1986 and 1987, Rega presented additional criminal justice system records that he argued trial counsel could have used to establish that Rega committed them at commercial structures when they were unoccupied. He broke into those structures at hours when the establishments were closed, which was information that his trial counsel could have used to argue that he did so in order to minimize the chance that he would encounter anyone and that violence would occur. Four of Rega's burglaries were of his parents's restaurant and he committed them because his father was not paying him for his work there. (ECF No. 6 ¶ 390 (summarizing evidence); see Jefferson Co. PSI, 10-4 at 54-55, and 10-2 at 25-32; police reports for burglaries at Richies Music Center and the Terrance Room, ECF No. 10-23 at 46-56; police reports for burglaries at D&R Boat World, ECF No. 10-23 at 39-43.) As for his 1992 criminal trespass conviction, it took place after 11:00 p.m. when no one was on the premises, and the sentencing court recommended Rega for the boot camp program. (Jefferson Co. PSI, ECF No. 10-4 at 55, 62.)

In disposing of Rega's claims, the PCRA court first noted that the Pennsylvania Supreme Court had already held in Rega I that Rega "waived a more thorough mitigation defense." (PCRA Ct. Op., ECF No. 10-1 at 49) (citing Rega I, 933 A.2d at 1024-29.) The PCRA court then reviewed the merits of Rega's current allegations. (Id. at 49-58). It "acknowledge[d] that there existed prior to trial a wealth of information that could have been utilized as mitigation evidence at the penalty hearing" and also that trial counsel "*likewise could have more fully ascertained the nature and circumstances of the offenses underlying the (d)(9) aggravating circumstance had they obtained copies of the records pertinent to [Rega's] earlier convictions*." (Id. at 49-50

(emphasis added.)). Nevertheless, the PCRA court concluded, Rega was not entitled to relief on his claims because English's and Elliott's PCRA hearing testimony proved once again that Rega "had repeatedly instructed them to spend their time and resources working on the guilt phase, not the penalty phase[,]" and that Rega "was adamant that he would not submit to any sort of psychological assessment and that his attorneys were not to investigate his past or inquire into his mental health." (Id. at 50.) The PCRA court found that PCRA hearing testimony from one of Rega's appellate attorneys, Schenkemeyer, "also corroborated trial counsels' averments that Rega directed them not to pursue mitigation." (Id. at 52.)

In Rega's subsequent appeal, the Pennsylvania Supreme Court acknowledged, as the PCRA court had, that Rega's counsel made "various missteps" and that both the post-sentence and PCRA records showed that they lacked at least some of the "relevant training and experience" required of an attorney representing a defendant facing a capital sentencing hearing. Rega II, 70 A.3d at 791. Specifically, it observed that *"[i]t cannot reasonably be disputed, for example, that counsel should have reviewed files from the criminal convictions which the Commonwealth offered in support of the aggravating circumstance involving a significant history of prior crimes entailing the use or threat of violence.*" Id. at 791 n.11 (emphasis added) (citing Rompilla v. Beard, 545 U.S. 374, 377 (2005) for the proposition that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial").

The Pennsylvania Supreme Court denied Rega's request for sentencing-phase relief. It did so, it explained, because it had already found in Rega I that Rega had instructed his trial counsel not to pursue mental health or abusive upbringing mitigating evidence. Rega II, 70 A.3d at 790-

92. The supreme court concluded it had previously ruled upon the central matter at issue, which is that Rega "waived mitigation in relevant part."[37] Id. at 792 n.13. As a result, Rega was not entitled to PCRA relief unless there was a "manifest error" in its previous ruling. Id. at 792 (citing Commonwealth v. Uderra, 862 A.2d 74, 93-94 (Pa. 2004) ("[W]here the Court's reasoning and holding on direct appeal encompass the claim sought to be raised on collateral review, and there is no irrefutable, manifest error in the disposition, the previous litigation doctrine should be deemed to apply.").

The Pennsylvania Supreme Court held that Rega did not meet his burden because there was support in the record for the PCRA court's determination that evidence introduced at his post-conviction hearings once again established that Rega's trial counsel were acting in accordance with his instructions and desire not to present mitigating mental health or abusive upbringing evidence. Id. at 790-92. Accordingly, the supreme court held, its holding in Rega I that he "waived mitigation in relevant part," would not be disturbed and it rendered Rega unable to satisfy Strickland's prejudice prong. Id. at 792 n.13 (citing Schriro v. Landrigan, 550 U.S. 465, 475 (2007), and explaining: "In terms of the application of this Court's previous holding on direct appeal that [Rega] waived mitigation in relevant part, we observe that the United States Supreme Court has determined that, in such circumstances, a lawyer's failure to undertake an otherwise adequate mitigation investigation will not be deemed prejudicial.").

[37] The PCRA places the burden on the petitioner to demonstrate "[t]hat the allegation of error has not been previously litigated[.]" 42 Pa. Cons. Stat. § 9543(a)(3). "[A]n 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[.]" Id. § 9544(a)(2). A finding that an issue has been previously litigated "simply relieves Pennsylvania courts of the burden of revisiting issues which are res judicata." Boyd v. Waymart, 579 F.3d 330, 369 (3d Cir. 2009) (en banc) (separate opinion of Hardiman, J.). The Commonwealth expressly states that the Pennsylvania Supreme Court's ruling on Claim 10 is not grounds to argue the claim is procedurally defaulted, and it acknowledges that this court must review Claim 10 on the merits. (ECF No. 29 at 70-71; ECF No. 77 at 10-11.)

Discussion

Rega contends that this court should review Claim 10 *de novo* because, *inter alia*, the Pennsylvania Supreme Court failed to recognize that he was raising in his PCRA proceeding a fundamentally different claim of trial counsel's ineffectiveness from the one he had raised on direct appeal. (ECF No. 22 at 202-17.) As for his related ineffective assistance of appellate counsel claim, Rega contends that it was properly presented during his PCRA proceeding and was not previously litigated on direct appeal as a matter of law and fact. (Id. at 218.) Rega argues in the alternative that, if this court determines that the Pennsylvania Supreme Court adjudicated Claim 10 on the merits, he overcame the burden imposed upon him by § 2254(d)'s deferential standard of review. (Id. at 223-37.)

The Commonwealth's position is that the Pennsylvania Supreme Court adjudicated Claim 10 in Rega I and Rega II and that its decision withstands review under § 2254(d). (ECF No. 29 at 70-71; ECF No. 77 at 10-11). It argues that the record supports the supreme court's holding that Rega waived a more thorough mitigation investigation and that, "[i]f anything, the picture became even more clear during the PCRA proceedings." (Id. at 65.) The Commonwealth argues that this case is analogous to Landrigan because Rega "specifically instructed" his trial attorneys "not to pursue mitigation evidence." (ECF No. 77 at 11.) Significantly, the Commonwealth does not discuss Rega's specific allegation that his trial counsel were ineffective for failing to investigate his prior criminal records in order support the argument that the jury should not find the § 9711(d)(9) aggravating factor or give it little to no weight. It does not dispute Rega's description of both the relevance of those records and the ways in which his trial counsel and his appellate counsel could have utilized them had they conducted a proper investigation.

This court does not need to resolve whether AEDPA's standard of review at § 2254(d) applies to Claim 10 in its entirety, or to some parts of it. If § 2254(d)'s deferential standard of review applies, Rega overcame it for the reason discussed below. Even if this court affords deference under both § 2254(e)(1) and § 2254(d)(2) to the state courts's finding of fact that he instructed his counsel not to investigate mitigating evidence pertaining to his mental health or abusive upbringing and to concentrate their efforts on obtaining an acquittal, that did not relieve trial counsel of their independent duty to investigate and present available evidence to challenge the § 9711(d)(9) aggravating factor, and they were ineffective for failing to do so.

In a capital case, counsel "must make sufficient 'efforts to discover *all reasonably available* mitigating evidence *and evidence to rebut any aggravating evidence that may be introduced by the prosecutor*.'" Blystone v. Horn, 664 F.3d 397, 420 (3d Cir. 2011) (quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003) (emphasis supplied by Wiggins, quotation marks in it omitted by the court of appeals); see Rompilla, 545 U.S. at 383-90. Additionally, "'[t]he investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.'" Id. at 422 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1.(C)). The state court found that Rega gave his counsel reason to believe it would be fruitless for them to investigate mental health and abusive upbringing mitigating evidence because he would not cooperate with the development of that evidence or allow it to be introduced at his sentencing hearing. However, it does not follow that Rega's conduct relieved his counsel of their duty to investigate his prior criminal record in order to rebut the § 9711(d)(9) aggravator and persuade jurors not to find it or, if they did, to give it little or no weight in their deliberations. In fact, investigating and rebutting that aggravating circumstance would have

provided trial counsel with the means of attacking the Commonwealth's case for a death sentence while at the same time steering clear of subject matters Rega insisted they avoid.

The Pennsylvania Supreme Court acknowledged that trial counsel "should have reviewed files from the criminal convictions which the Commonwealth offered in support of the aggravating circumstance involving a significant history or prior crimes entailing the use or threat of violence." Rega II, 70 A.3d at 791 n.11. It denied Rega sentencing-phase relief because it had previously held on direct review that Rega "waived mitigation in relevant part," that Rega's PCRA evidence did not establish that that holding was manifestly erroneous, and that, therefore, Rega did not establish that he was prejudiced. Id. at 792 & n.13. That decision was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Rega challenged the Commonwealth's case for a death sentence. He allowed his counsel to make a limited mitigation case, and even put his young daughters through the ordeal of testifying. That he did not want his counsel to present certain types of mitigating evidence did not mean that he would have interfered with his counsel's ability to investigate his prior criminal record so that they could be prepared to rebut the § 9711(d)(9) aggravator.

The United States Supreme Court's decision in Landrigan does not compel a different result. The petitioner in that case did not allow his counsel to present mitigating evidence[38] and interrupted his counsel when he was responding to the trial court's request to make a proffer of what mitigating evidence counsel would present if the petitioner had permitted him to make a case for his life. Landrigan, 550 U.S. at 469-70. At the conclusion of his sentencing hearing, the petitioner told the sentencing court: "I think if you want to give me the death penalty, just bring it

[38] "Landrigan's counsel attempted to present the testimony of Landrigan's ex-wife and birth mother as mitigating evidence. But at Landrigan's request, both women refused to testify." Landrigan, 550 U.S. at 469.

right on. I'm ready for it." Id. at 470 (internal quotation and citation omitted.) The state court denied the petitioner's subsequent ineffective assistance of counsel claim because the petitioner had instructed his counsel not to offer mitigating evidence. The United States Supreme Court held that the state court's decision was not an "unreasonable determination of the facts" under § 2254(d)(2). Id. at 471, 475-77. In light of that state-court finding, the Court held, the petitioner could not establish Strickland's prejudice prong. Id. at 475 ("If [the petitioner] issued such an instruction, counsel's failure to investigate further could not have been prejudicial under Strickland."); id. at 476 (the petitioner's "behavior confirms what is plain from the transcript of the colloquy: that [he] would have undermined the presentation of any mitigating evidence that his attorney might have uncovered."); id. at 477 ("[B]ecause of his established recalcitrance, [the petitioner] could not demonstrate prejudice under Strickland even if [the district court had] granted an evidentiary hearing.").

Here, Rega did permit his counsel to make a case for a life sentence and did allow them to present some mitigating evidence. In contrast to Landrigan, this court cannot "conclude that regardless of what information counsel might have uncovered in [their] investigation, [Rega] would have interrupted and refused to allow his counsel to present" evidence to challenge the § 9711(d)(9) aggravating circumstance had they prepared to do so. 550 U.S. at 476.

Rega demonstrated to this court that he was prejudiced by his trial counsel's failure to investigate and present evidence to rebut the § 9711(d)(9) aggravating circumstance, and that the Pennsylvania Supreme Court's decision that he suffered no prejudice was an "unreasonable application of" that prong of the Strickland analysis. Had counsel investigated and been properly prepared to support the argument that Rega's prior criminal record was non-violent, it is reasonably probable that they could have diminished the weight the jury gave to the § 9711(d)(9) aggravator, if not entirely rebutted it. It is also reasonably probable that those efforts would have

bolstered a juror's assessment of Rega's mitigation case, since the Commonwealth relied upon Rega's prior convictions to undercut the strength of the mitigating testimony counsel did present.

Importantly, as set forth above, under Pennsylvania law, the jury had to find unanimously an aggravating circumstance, and its sentence of death had to be unanimous. See Blystone, 664 F.3d at 427 (prejudice can be shown if there is a reasonable probability that one juror would not have sentenced the defendant to death); Jermyn v. Horn, 266 F.3d 257, 309 (3d Cir. 2001) (same). Because Rega's trial counsel failed to prepare to rebut the § 9711(d)(9) aggravating circumstance, counsel was unable to present an effective case to persuade a juror to reject it outright, or to give it little to no weight in the deliberations. While the evidence at issue may not have swayed every juror, Rega need only show a reasonable probability that one juror would have found death an inappropriate punishment. He met that burden. To the extent that the Pennsylvania Supreme Court held otherwise, its decision was more than just wrong. It "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 562 U.S. at 103.

Rega demonstrated that his appellate counsel performed deficiently for not presenting or properly arguing on direct appeal that his trial counsel were ineffective for failing to rebut the § 9711(d)(9) aggravating circumstance. If the Pennsylvania Supreme Court ruled upon this claim of appellate counsel's ineffectiveness, it denied it because it rejected the underlying claim pertaining to trial counsel's performance. Rega II, 70 A.3d at 780 n.2. This court already determined that the Pennsylvania Supreme Court's decision in that regard does not survive review under § 2254(d) and that Rega demonstrated that his trial counsel rendered constitutionally ineffective assistance.

Rega convincingly argues that appellate counsel failed to litigate properly the underlying claim of trial counsel's ineffectiveness on direct appeal, even though both English and Elliott

testified at the post-sentence hearings that they did no investigating in order to rebut the § 9711(d)(9) aggravating circumstance despite knowing for more than a year before Rega's trial that the Commonwealth would attempt to prove it at the capital sentencing hearing. Appellate counsel did not obtain all of Rega's prior criminal records, including the records pertaining to his 1985 Oklahoma burglary conviction. These failures are inexplicable, given the importance of the § 9711(d)(9) aggravator to the Commonwealth's case for death.

Rega was prejudiced by his appellate counsel's deficient performance. Had they properly litigated and briefed the issue of trial counsel's ineffectiveness for failing to rebut the § 9711(d)(9) aggravating circumstance, there is a reasonable probability that Rega would have received sentencing-phase relief on direct appeal.

Based upon all the foregoing, Rega met his burden of demonstrating that he is entitled to a new capital sentencing hearing.[39] If the Commonwealth still seeks the death penalty for Rega, it must conduct a new hearing to determine whether he should receive a life or death sentence.

An appropriate order will be entered.

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Court Judge

Dated: February 15, 2018

[39] This court's determination that Claim 10 entitles Rega to sentencing-phase relief renders it unnecessary for the court to address his remaining sentencing-phase claims. Any relief that he could obtain on them would be cumulative.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT GENE REGA,	)	
Petitioner,	)	No. 2:13-cv-1781
	)	
v.	)	Chief Judge Joy Flowers Conti
	)	
JOHN E. WETZEL, et al.,	)	
Respondents.	)	

ORDER

AND NOW, this 15th day of February, 2018, it is hereby ORDERED and DIRECTED that:

1. Petitioner's request for habeas corpus relief from his convictions is DENIED and a certificate of appealability is DENIED with respect to all guilt-phase claims;

2. Petitioner's request for habeas relief from his sentence of death is GRANTED;

3. The execution of the writ of habeas corpus is STAYED for 120 days from the date of this Order, during which time the Commonwealth of Pennsylvania may conduct a new sentencing hearing;

4. After 120 days, should the Commonwealth of Pennsylvania not conduct a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence the Petitioner to life imprisonment without the possibility of parole; and

5. The Clerk of Court shall mark this case CLOSED.

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Court Judge

COMMONWEALTH of Pennsylvania, Appellee

v.

Robert Gene REGA, Appellant.

Supreme Court of Pennsylvania.

Submitted Sept. 5, 2012.

Decided June 17, 2013.

Background: Defendant was convicted in the Court of Common Pleas, Jefferson County, Criminal Division, Nos. CP–33–CR–0000026–2001 and CP–33–CR–0000524–2001, John H. Foradora, President Judge, of first-degree murder and related offenses and sentenced to death. Defendant appealed. The Supreme Court, Nos. 506 & 507 CAP, affirmed. Defendant sought postconviction relief. The Court of Common Pleas, Jefferson County, denied relief. Defendant appealed.

Holdings: The Supreme Court, No. 642 CAP, Saylor, J., held that:

(1) evidence supported finding that there were no agreements or incentives between prosecutor and witnesses who had been charged with crimes until their cooperation had been fully realized;

(2) prosecutor's apparent failure to advise defendant's trial attorneys that prosecution witness suffered from a health condition causing some degree of memory impairment was not material, for *Brady* purposes;

(3) defense counsel did not render ineffective assistance;

(4) trial court's security measure during trial of having a deputy sheriff dressed in plain clothes sit at defense table during trial was justified; and

(5) defense counsel's prior representation of Commonwealth witness in a theft prosecution did not amount to a conflict of interest that would disqualify counsel from representing defendant.

Affirmed.

1. Constitutional Law ⚿4594(5)
Criminal Law ⚿662.7, 1999

Defendant was not denied due process or deprived of effective confrontation, due to failure of Commonwealth to disclose alleged verbal understandings with prosecution witnesses who were co-perpetrators in the robbery and/or its planning; evidence supported finding that there were no agreements or incentives between prosecutor and witnesses who had been charged with crimes until their cooperation had been fully realized as prosecutor enforced a policy that plea agreements would be neither offered nor negotiated with witnesses charged with crimes until their cooperation was fully realized.

2. Criminal Law ⚿1999

Prosecutor's apparent failure to advise capital murder defendant's trial attorneys that prosecution witness suffered from a health condition causing some degree of memory impairment was not material, for *Brady* purposes; defense exploration of the memory impairment concern at trial would not have created a reasonable probability of a different outcome, in that witness was able to recall significant details at trial which were consistent with her previous statements to law enforcement authorities, and the Commonwealth presented a wealth of other incriminating evidence at trial.

3. Criminal Law ⚿1926

Defense counsel's failure to make a *Franks* objection that affiant in support of search warrant for trailer in which capital murder defendant's mother lived made a false statement in connection with whether juror questionnaires would be found in trailer of capital murder defendant's moth-

er was not ineffective assistance, as counsel did advance the argument that nothing in tape recorded conversations suggested that juror questionnaires would be found in the trailer, and common sense dictated that in the process, defendant's mother easily could have copied some of the juror questionnaire information onto other papers and documents besides the official lists and questionnaires. U.S.C.A. Const. Amend. 6.

4. Searches and Seizures ⚿25.1, 124

Citizens generally enjoy protection, under the Fourth Amendment, from general, exploratory searches by government actors. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⚿141

Law enforcement officers, in executing search warrant for trailer of capital murder defendant's mother to search for jury questionnaires, jury list, and other documents containing the names of prospective jurors, were not required to commence their initial cursory review upon execution of warrant for documents by focusing exclusively upon date entries; the only way officers could determine whether a particular piece of paper contained the names of prospective jurors was to look at it. U.S.C.A. Const.Amend. 4.

6. Criminal Law ⚿633.17, 1857

Trial court's security measure during capital murder trial of having a deputy sheriff dressed in plain clothes sit at defense table during trial was justified; defendant claimed that his communications with his attorney were curtailed by deputy sheriff's presence at table, but defendant failed to establish either that his communications with his attorneys were impacted, or that the trial court abused its discretion in the form of the increased security fashioned to address defendant's expressed proclivity toward violence in response to his prosecution.

7. Criminal Law ⚿1035(3)

Supreme Court would review for deficient stewardship only the issue of whether capital murder defendant had been denied a public trial and effective assistance of counsel based on the conducting parts of trial after hours, when courthouse door was allegedly locked, where defendant failed to object to the closing of courtroom. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⚿1937

Defense counsel's failure to object to trial court conducting after-hours trail sessions on two occasions when courthouse doors were locked did not prejudice capital murder defendant, and, thus, was not ineffective assistance; defendant failed to demonstrate that there were not spectators in the courtroom in the closed sessions, that any spectators were turned away from the courthouse, or that the presence or absence of a certain number of spectators had any impact whatsoever on witness's testimony. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⚿1787

Defense counsel's prior representation of Commonwealth witness in a theft prosecution did not amount to a conflict of interest that would disqualify counsel from representing capital murder defendant, as counsel did not remember the previous representation before he cross-examined the witness, counsel adequately raised issues concerning the witness's credibility, and exploration of the witness's previous experience with the criminal justice system, even if permissible, would not have impacted the outcome of defendant's trial.

10. Criminal Law ⚿1935

Defense counsel's alleged failure to impeach key Commonwealth witnesses concerning open criminal charges was not ineffective assistance, in capital murder prosecution, as jurors knew very well that

various key Commonwealth witnesses were subject to open charges, given Commonwealth's direct examination of witnesses. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⚿1924

Defense counsel's failure to proffer an expert witness to rebut Commonwealth's proofs to effect that victim was killed while on his knees and shot from behind and close in was a matter of trial strategy, and, thus, was not ineffective assistance, in capital murder prosecution; counsel pursued a reasonable strategy, insisted upon by his client, of attempting to establish that he simply was not present at crime scene during the robbery and homicide, and counsel testified that it would have diluted this defense to suggest to the jury to find defendant not guilty, but if jury thought that defendant did kill victim, then find that he did not do it in this certain way. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⚿1433(2)

Previous litigation doctrine applied to bar capital murder defendant from raising in petition for postconviction relief the issue of whether trial counsel had rendered ineffective assistance by failing to adequately investigate and present mitigating evidence during penalty phase, where this claim had previously been litigated on defendant's direct appeal. U.S.C.A. Const. Amend. 6; 42 Pa.C.S.A. § 9543(a)(3).

13. Courts ⚿90(1)

Supreme Court would not consider, on capital murder defendant's appeal of his request for postconviction relief, his challenge to the applicability of the aggravating circumstance involving a significant history of violent felonies, by which he argued that this factor should not subsume "non-violent" burglaries or instances of criminal trespass, as defendant's line of argument had been rejected by Supreme Court on many prior occasions. 42 Pa. C.S.A. § 9711(d)(9).

14. Constitutional Law ⚿2815
Sentencing and Punishment ⚿1762

Capital murder defendant had ample notice that his prior criminal acts might be used as evidence of aggravation in his prosecution for first-degree murder, and, thus, no violation of his rights under Ex Post Facto Clause occurred; relevant time period for purposes of a proper ex post facto analysis was the time defendant murdered victim, at which time the case law was settled in the relevant regard. U.S.C.A. Const. Art. 1, § 10, cl. 1.

15. Sentencing and Punishment ⚿1780(3)

Trial court was not required to specifically instruct jury during penalty phase of capital murder prosecution that aggravating circumstance for killing in the perpetration of a felony did not apply to one who did not actually perpetrate the underlying murder, but who was merely the killer's accomplice, as instruction trial court gave tracked statutory language, advising jurors that the aggravator applied when defendant committed a killing while in the perpetration of a felony. 42 Pa.C.S.A. § 9711(d)(6).

16. Sentencing and Punishment ⚿1780(2)

Fact that jury was authorized to find capital murder defendant guilty as an accomplice to various crimes even if jurors did not fully credit the Commonwealth's evidence did not undermine the prosecutor's ability to rely at sentencing on its own guilt-phase theory and evidence, which he reasonably believed the jury had credited through its verdicts; Commonwealth's theory of the case for first-degree murder consistently was that defendant was the leader of the co-perpetrators of the robbery, that he alone shot and killed

the victim, and that he was thus the principal actor in the capital crime, and in addressing sentencing jury, prosecutor was entitled to rely on strength of Commonwealth's case establishing defendant's perpetration of the killing, and weakness of defendant's contrary evidence derived from an indisputably contrived account of the events.

Hunter Stuart Labovitz, Esq., Defender Association of Philadelphia, Eric John Montroy, Esq., Federal Community Defender Office, Eastern District of PA, David M. Osborne, Esq., Federal Public Defender's Office, for Robert Gene Rega.

Amy Zapp, Esq., PA Office of Attorney General, Harrisburg, Jeffrey D. Burkett, Esq., for Commonwealth of Pennsylvania.

BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

OPINION

Justice SAYLOR.

This is a capital post-conviction appeal.

In December 2000, Appellant conspired with others to perpetrate a robbery at the Gateway Lodge in Cooksburg, Jefferson County. In the course of this and other crimes, Appellant shot and killed the night watchman, Christopher Lauth.

Appellant was convicted of first-degree murder and other offenses and sentenced to death in 2002. After a lengthy post-sentence motions process, relief was denied, and Appellant's judgment of sentence was affirmed on direct appeal. *See Commonwealth v. Rega*, 593 Pa. 659, 933 A.2d 997 (2007), *cert. denied*, 552 U.S. 1316, 128 S.Ct. 1879, 170 L.Ed.2d 755 (2008).[1] Appellant acted *pro se* to initiate litigation under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–9546 (the "PCRA"), and, following several procedural turns, a counseled, amended petition was filed. After conducting a series of evidentiary hearings, the PCRA court denied relief.

The present appeal followed, in which Appellant advances eleven claims. In our review, we consider whether the post-conviction court's findings are supported by the record and are free from legal error. *See, e.g., Commonwealth v. Lesko*, 609 Pa. 128, 152, 15 A.3d 345, 358 (2011).[2]

Claim I

[1] First, Appellant contends that he was denied due process and deprived of effective confrontation, because the Commonwealth failed to disclose alleged verbal understandings with prosecution witnesses

1. The underlying factual circumstances are discussed in detail in the decision on direct appeal. *See Rega*, 593 Pa. at 670–79, 933 A.2d at 1003–09.

2. The general, multi-tiered requirements of the PCRA and for litigating claims of deficient attorney stewardship have been discussed in detail in many other opinions of this Court. The recent decision in *Commonwealth v. Sepulveda*, —— Pa. ——, 55 A.3d 1108 (2012), for example, serves as a convenient reference for the governing principles. *See id.* at ——, 55 A.3d at 1117–18.

To the extent that we do not discuss all applicable requisites to relief in our treatment of any particular claim, it is because the aspect in focus is dispositive of overarching and/or derivative claims. *See generally Commonwealth v. Gibson*, 597 Pa. 402, 420, 951 A.2d 1110, 1120–21 (2008). To the degree any underlying claim is not directly available for review, our assessment of it here is employed solely as a means of determining the viability of extant derivative claims. *See, e.g., id.* (explaining that a derivative claim cannot be sustained where an underlying one is unmeritorious).

who were co-perpetrators in the robbery and/or its planning. Centrally, Appellant relies on the United States Supreme Court's seminal decisions in *Brady v. Maryland*, 373 U.S. 83, 87–88, 83 S.Ct. 1194, 1196–97, 10 L.Ed.2d 215 (1963) (holding that due process is offended when the prosecution withholds favorable evidence from an accused that would tend to exculpate him or reduce the penalty imposed), *Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (extending the *Brady* rule to embrace certain impeaching evidence, including that which might demonstrate witness bias), and *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) (explaining that a conviction obtained by the State through the knowing use of false evidence—or upon the prosecution's failure to correct unsolicited evidence known to be false—violates the Fourteenth Amendment).

Factually, however, the post-conviction court determined that, at all relevant times, the district attorney enforced a policy that plea agreements would be neither offered nor negotiated with witnesses charged with crimes until their cooperation was fully realized. *See Commonwealth v. Rega*, Nos. CP–33–CR–26–2001, *et al., slip op.* at 20 (C.P. Jefferson Oct. 27, 2011). This finding is supported by substantial evidence of record. *See, e.g.*, N.T., Dec. 14, 2009, at 138 (reflecting testimony of a defense attorney that "it's [the district attorney's] established policy that he will not make a deal or offer a specific plea bargain until time to do so."), 145 (elaborating that the relevant time for plea offers, per the district attorney's policy, is after the witness's cooperation is completed). The court also inferred from the evidence presented that any suggestion of "possible verbal agreement[s]" derived from defense attorneys' and witnesses' own hopeful predictions, rather than from actual incentives offered by the district attorney. *See Rega*, Nos. CP–33–CR–26–2001, *et al., slip op.* at 21. We agree with the court that this inference is a reasonable one deriving from evidence concerning the district attorney's practices.

While Appellant references conflicting evidence and evidence from which contrary inferences might be gleaned, *see, e.g.*, Brief for Appellant at 15, the relevant review at this stage is limited to an examination of the record to determine whether the material findings of the post-conviction court are supported by it. *See, e.g., Lesko*, 609 Pa. at 152, 15 A.3d at 358. Accordingly, we decline Appellant's invitation, in effect, to reweigh differing portions of the post-conviction evidence. As reflected above, the record plainly supports the PCRA court's finding of no agreements or incentives, other than maintaining the possibility for later negotiation based on the witnesses' cooperation.[3]

[2] Appellant also advances a second claim styled as a *Brady* violation, in that the prosecutor apparently did not advise Appellant's trial attorneys that one prosecution witness, Susan Jones, suffered from a health condition causing some degree of memory impairment. The post-conviction court, however, determined that such failure did not meet the materiality requirement requisite to relief on a *Brady* claim, *see United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), in that an exploration by the defense of the memory impairment concern at trial would not have created a reasonable probability of a different outcome.

3. Certainly, Appellant's attorneys were well aware of this incentive, as they questioned various of the Commonwealth's witness about their desires for leniency in their own criminal cases. *See, e.g.*, N.T., June 18, 2002, at 172–73.

See Rega, Nos. CP–33–CR–26–2001, *et al.*, *slip op.* at 25–26. The court explained, *inter alia*, that Jones was able to recall significant details at trial which were consistent with her previous statements to law enforcement authorities and that the Commonwealth presented a wealth of other incriminating evidence at trial—including the testimony of three direct co-participants in the Gateway Lodge incursion. *See id.* at 26–27.[4] Upon review, we find that the PCRA court's materiality determination is supported by the record and free from legal error.

Claim II

Appellant next asserts that the prosecution was able to adduce damaging evidence secured from a search of his mother's home, because his trial counsel failed to raise meritorious objections.

Appellant explains that, while a prisoner in a state correctional institute awaiting trial, he spoke to his mother, Joan Rega, by telephone. Pursuant to prison protocols, the conversation was audiotaped, and the tapes were secured by law enforcement officials and gave rise to the challenged search warrant. The affidavit of probable cause prepared by an investigating trooper detailed efforts on the part of Appellant to enlist his mother in a jury-tampering scheme impacting his trial.[5] Appellant relates that, based on this affidavit, a district magistrate issued a search warrant authorizing troopers to search Joan Rega's home for "Jefferson County Jury Questionnaires, Jury List and any or all papers, documents containing names of

4. Additionally, as the Commonwealth observes, the witness did allude to her health condition at trial in response to the prosecutor's questions directed at her failure to recall specific details. *See* N.T., June 15, 2002, at 212. This lends some credence, at least, to the Commonwealth's suggestion that the pervasive focus of Appellant's trial attorneys during Jones's cross-examination (which rested on their successful efforts to stress that Jones had repeatedly lied to law enforcement officials) was strategic. Indeed, the Commonwealth also points to post-conviction evidence suggesting that Appellant likely knew of Jones's medical condition prior to his trial. *See* N.T., Dec. 17, 2009, at 160–67.

5. Specifically, the trooper attested as follows:

> [Tape recorded conversations] show quite clearly that Joan REGA has received juror list information containing names of prospective jurors. Furthermore, said conversations show that she has disseminated this information to other friends and family members and acquaintances. The conversation on May 30, 2002, shows Joan REGA saying that ''[E.E.'s] sister-in-law[,]'' [J.T.,] is on the panel. It also shows that Joan is examining the list of juror names and is marking the list as she consults with others.... Then, in the June 2, 2002 conversation, Robert REGA asks Joan REGA if ''without saying anything, what did Gram [a/k/a E.E.] say, will she do it, yes or no.'' In Joan REGA's reply to that question, she states that [E.E.] is willing to talk to [J.T.], but that she just needs to know what questions to ask her about being on ''Robert's jury.'' Robert REGA then silences his mother and severely reprimands her because she ''never thinks before she talks.'' He is quite angry at her and he obviously knows he is being tape-recorded.
>
> It was determined that [E.E.] ... is the grandmother of Renee REGA, the spouse of Robert REGA. [E.E.] was subsequently interviewed ... on June 6, 2002, and she advised that Joan REGA had, in fact, come to her house on Saturday, June 1, 2002, and admitted that Joan REGA had discussed the fact that [J.T.] was, in fact, on the jury panel. She identified this sister-in-law and proposed juror as [J.T.], whose name is found on the list of proposed jurors for June 11, 2002. She also stated that she had heard that Robert REGA had chastised his mother about the talk.
>
> There is probable cause to believe that juror questionnaires/lists, etc. will be found in [Joan Rega's] mobile home and that there will be markings identifying the targeted juror(s).

Affidavit of Probable Cause I, June 7, 2002, at 1–2.

prospective jurors for [Appellant's] pending criminal case[.]" Search Warrant, June 7, 2002, at 1.

Appellant highlights that, upon execution of the search warrant, no jury-related documents were found; however, while reviewing materials in the mobile home, troopers observed other incriminating documents. As related in an ensuing, second affidavit of probable cause:

> A handwritten letter on a legal sized yellow paper was found written by Robert Gene REGA. The contents of the letter indicate that Robert G. REGA requested that Joan REGA att[em]pt to find a person without a criminal record to provide him with an alibi for the night of December 21, 2000, the night of the LAUTH homicide. Robert REGA indicated he would pay the witness $500 for his testimony and the letter contains specific details as to what the witness would testify to.

Affidavit of Probable Cause II, June 7, 2002, at 1. This affidavit was employed as the basis to secure a second search warrant, which yielded incriminating evidence used against Appellant at trial to demonstrate his consciousness of guilt. *See* N.T., Jury Selection, June 19, 2002, at 172–86; N.T., June 20, 2002, at 190–93 & Exs. C–68–C–77.

[3] Appellant recognizes that his trial counsel pursued suppression, *see* N.T., June 13, 2002, at 3–5; however, he criticizes the attorneys for failing to assert a violation of *Franks v. Delaware,* 438 U.S. 154, 155–56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978) (holding that, where a defendant demonstrates that an affiant in a warrant affidavit made a false statement knowingly and intentionally, or with reckless disregard for the truth, the search warrant must be voided, unless the affidavit's remaining content is sufficient to establish probable cause). In this argument, Appellant explains that one of the tape-recorded conversations evidenced that Joan Rega had agreed to send the marked juror lists back to Appellant some seven days before the affidavit of probable cause was signed. It is Appellant's position that the omission of this information from the affidavit of probable cause "violated *Franks,*" and that evidence tainted by the violation should be suppressed. Brief for Appellant at 20.

The Commonwealth acknowledges that trial counsel did not invoke *Franks* in their suppression efforts. It observes, however, that counsel did advance the argument that nothing in the tape recorded conversations suggested that juror questionnaires would be found in the trailer. *See* N.T., Jury Selection, June 13, 2002, at 3–5. Moreover, the Commonwealth relies on the following rationale of this Court from Appellant's direct appeal, applied in passing upon a related issue:

> Appellant had received the jury questionnaires, and the recorded phone conversations with his mother indicated that he had passed them on to her and that she had, in turn, distributed them to friends and family. As the trial court found in rejecting Appellant's contention that the search warrant was unconstitutionally broad, *common sense dictated that in the process, Ms. Rega easily could have copied some of that information onto other papers and documents besides the official lists and questionnaires.*

Rega, 593 Pa. at 686, 933 A.2d at 1012 (emphasis added).[6]

6. According to Appellant, any inference that Joan Rega had copied information amounts to "pure speculation." Brief for Appellant at 20. To the contrary, the Commonwealth established probable cause, through Joan Rega's own words, that she had been enlisted

Based on such reasoning, it is the Commonwealth's position that this Court "has already validated the trial court's common sense assertion that there was probable cause to believe that other papers and documents containing the names of jurors would be found in the home during the search." Brief for the Commonwealth at 44; *accord Rega*, Nos. CP–33–CR–26–2001, *et al.*, *slip op.* at 4 ("Whether or not [the affiant trooper] should have understood the [taped conversation] to mean that the actual list [Appellant] sent to his mother would no longer be found at the trailer, ... the information he had was sufficient to warrant a search for 'other papers and documents besides the official lists and questionnaires' onto which Joan [Rega] may have copied juror information.").

We agree with the Commonwealth and the PCRA court that the dispositive rationale on direct appeal sufficiently resolves the present *Franks*-based claim and that no relief is due on it. *See supra* note 6 and accompanying text.[7]

Appellant further challenges his trial attorneys' stewardship relative to the scope of the first search of his mother's trailer. He explains that the incriminating documents troopers saw in that search—and which were invoked as the basis to establish probable cause for the second search—pre-dated the creation of juror lists for Appellant's trial. According to Appellant, therefore, troopers executing the first warrant lacked any lawful basis for reviewing such documents. In response to the PCRA court's explanation that there is no proof that the troopers were aware of the dates of documents as they looked for juror references, *see Rega*, Nos. CP–33–CR–26–2001, *et al.*, *slip op.* at 4–5, it is Appellant's position that such rationale "strains credulity and is not reasonable." Brief for Appellant at 21.

The Commonwealth again turns to the direct appellate review, emphasizing that, in considering an analogous argument (*i.e.*, that troopers could not justify opening small envelopes because they could not contain bulky juror lists and questionnaires), this Court reasoned as follows:

> ... a lawful search generally extends to the entire area in which the object of the search may be found.
>
> ... the warrant properly authorized a search for papers and documents containing the names of prospective jurors. These documents could conceivably be one page documents. In fact, the only way the executing officers could determine whether a particular piece of paper contained the names of prospective jurors was to look at it. Accordingly, after properly scanning the letters and reaching the conclusion that they were not relevant to the crime of jury tampering, the police officers stopped further search of these documents, and obtained a second search warrant, specifically authorizing them to look for papers related to the separate crime of witness tampering. There was nothing improper in this course of action.

Rega, 593 Pa. at 686–88, 933 A.2d at 1013–14 (footnote omitted). Moreover, the Commonwealth relates that there is no

to aid Appellant in very serious misconduct aimed at undermining the justice system. We remain of the view that there is enough to suggest, more likely than not, that documentary evidence of such crime would be found in her residence.

7. The Commonwealth also observes that *Franks*, on its face, contemplates willful or reckless falsehoods, but that Appellant's claim appears to rest on an asserted omission. *See* Brief for the Commonwealth at 42 n.26. Given our disposition, above, we need not presently consider the import of this observation.

Pennsylvania decisional law standing for the proposition that law enforcement officials cannot look at documentary evidence when they are in a position to be reviewing such papers in the course of a lawful and valid search.

[4] Appellant does not discuss any authority in support of this latter line of his argument. There is no question that citizens generally enjoy protection, under the Fourth Amendment, from general, exploratory searches by government actors. *See United States v. Khanani,* 502 F.3d 1281, 1289 (11th Cir.2007) (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 2038–39, 29 L.Ed.2d 564 (1971)). The United States Supreme Court has both recognized that, "[i]n searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized," *Andresen v. Maryland,* 427 U.S. 463, 482 n. 11, 96 S.Ct. 2737, 2749 n. 11, 49 L.Ed.2d 627 (1976), and cautioned that "responsible officials . . . must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy," *id.*

[5] Here, however, nothing in Appellant's presentation persuades us that law enforcement personnel must commence the initial cursory review upon execution of a search warrant for documents by focusing exclusively upon date entries. Indeed, in many instances there will be other aspects of papers which may draw more immediate attention in the screening process. Furthermore, Appellant cites no evidence that the troopers' review was not reasonably and responsibly directed, in the first instance, toward the determination of whether the subject papers were within the scope of the search authorization. Accordingly, Appellant has failed to establish a basis for relief from his judgment of sentence.

Claim III

Next, Appellant claims that he was denied due process, the presumption of innocence, and effective assistance of counsel when the trial court directed a deputy sheriff dressed in plain clothes to sit at the defense table during trial. Appellant asserts that the trial court made no record of the need for this arrangement, and there was no evidence that he had threatened his counsel or anyone else in the courtroom. As a result, Appellant contends, his ability to communicate freely and openly with counsel during trial was chilled, and jurors were susceptible to the suggestion that Appellant was dangerous.

[6] Appellant, however, does not address the PCRA court's explanation that the deputy sheriff "was brought in because of security concerns, including [Appellant's] apparent indifference to whether others got hurt or died during an escape attempt and potential threats against members of the jury and his own attorneys." *Rega,* Nos. CP33–CR–26–2001, *et al., slip op.* at 13.[8] The court also ob-

8. In terms of the assertion of a suggestion of dangerousness, there is a well-developed line of judicial decisions reflecting trial courts' discretionary authority to implement security measures, even where these carry some measure of potential prejudice, when required to further an essential state interest. *See, e.g., Hellum v. Warden, U.S. Penitentiary–Leavenworth,* 28 F.3d 903, 907–08 (8th Cir.1994). The United States Supreme Court has explained that courts "have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for alleged criminal conduct." *Holbrook v. Flynn,* 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986). While Appellant now contends that

served that Appellant was asked at trial whether he had any issues with the deputy sheriff's presence, and he said that he did not. *See id.* at 14 (citing N.T., June 14, 2002, at 5). Furthermore, the court referenced post-conviction testimony from one of Appellant's trial lawyers indicating that the deputy sheriff's presence did not, in fact, chill the attorney-client communications. *See id.* at 13–14 (quoting N.T., Dec. 15, 2009, at 305). Finally, the PCRA court highlighted that, although Appellant submitted an affidavit in support of his petition indicating that communications were curtailed, he elected not to testify in the post-conviction hearings and, thus, failed to create a creditable evidentiary record in support of his proffer.

For these reasons, we agree with the PCRA court that Appellant has failed to establish either that his communications with his attorneys were impacted, or that the trial court abused its discretion in the form of the increased security fashioned to address Appellant's expressed proclivity toward violence in response to his criminal prosecution for first-degree murder and attendant restraints on his liberty. *See supra* note 8.

Claim IV

Appellant argues that he was denied a public trial and effective assistance of counsel, based on the allegation that the trial court conducted after-hours trial sessions on two occasions when the courthouse doors were locked. Because his trial counsel did not object to such trial arrangements, Appellant alleges deficient stewardship. He invokes *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), and *Commonwealth v. Contakos*, 499 Pa. 340, 453 A.2d 578 (1982), in support of his position that courts must take every reasonable step to accommodate public attendance. Furthermore, according to Appellant, the asserted error is structural and, therefore, not subject to a prejudice requirement. *See generally Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 2082–83, 124 L.Ed.2d 182 (1993) (explaining that harmless-error review does not pertain relative to structural errors).

According to the Commonwealth, review of the record makes it "anything but clear" that the courthouse was ever truly closed, and there is no evidence that a single person was ever denied access during Appellant's trial. Brief for the Commonwealth at 45–47. The Commonwealth also explains that all of the decisions upon which Appellant relies entail circumstances in which it is indisputable that access to proceedings had been denied to citizens. *See, e.g., Contakos*, 499 Pa. at 343, 453 A.2d at 579.

[7] Consistent with Appellant's arguments, various courts have found a violation of the right to a public trial to be in the nature of a structural error. *See, e.g., Owens v. United States*, 483 F.3d 48, 63 (1st Cir.2007). It is well recognized, however, that such violation is a particular

there was no evidence of a relevant threat in the first instance, both of his trial attorneys testified, on post-conviction, that they had been apprised of a letter Appellant had written to his mother in which he proposed a violent escape attempt. *See* N.T., Dec. 15, 2009, at 138–39; N.T., Jan. 19, 2010, at 229–30. Although Appellant seems to imply that there was no specific risk relative to the courtroom setting, in the exercise of its discretion, the trial court was not obliged to believe that Appellant's proclivity toward violence would be limited to the one specific avenue which had already been uncovered. In short, Appellant's presentation fails to establish an abuse of discretion on the trial court's part in the relevant regards.

type of structural error which is waivable. *See, e.g., Peretz v. United States,* 501 U.S. 923, 936, 111 S.Ct. 2661, 2666, 115 L.Ed.2d 808 (1991) (citing *Levine v. United States,* 362 U.S. 610, 619, 80 S.Ct. 1038, 1044, 4 L.Ed.2d 989 (1960), for the proposition that "failure to object to closing of courtroom is [a] waiver of [the] right to [a] public trial").[9] Since Appellant did not object to the after-hours courtroom arrangements, the only cognizable aspect of his claim is that of deficient stewardship, as to which he must establish prejudice. *See Sepulveda,* —— Pa. at ——, 55 A.3d at 1117–18.

[8] The only fact-based argument Appellant offers concerning the prejudice component of the ineffectiveness inquiry is as follows:

> On the Saturday that the courthouse was closed, Sue Jones, a key Commonwealth witness, testified falsely and misleadingly that she had no deal with the prosecution and had not been told how she would be treated in her pending criminal cases. *See* Claim I. Thus, the salutary purpose of conducting public trials was lost when Sue Jones testified while the courthouse was closed, undermining confidence in the fairness of [Appellant's] trial.

Brief for Appellant at 27. As discussed, however, the PCRA court found as a fact, supported by creditable evidence, that the Commonwealth did not enter into any agreements with its witnesses prior to or during Appellant's trial. In any event, in line with the Commonwealth's position, Appellant has failed to demonstrate that there were not spectators in the courtroom in the Saturday session, that any spectators were turned away from the courthouse, or that the presence or absence of a certain number of spectators had any impact whatsoever on Jones's testimony. *Accord* Brief for the Commonwealth at 47 (observing that Appellant "did not produce a single witness who testified that they were turned away and not able to watch [Appellant's] trial at any point in time"). For these reasons, the post-conviction court did not err in denying relief on this claim.

Claim V

Appellant next asserts that one of his trial attorneys labored under a conflict of interest, because he had previously represented a Commonwealth witness in a separate criminal theft prosecution. Appellant claims that this prosecution witness was an important one, because she was an employee of the Gateway Lodge, she had alerted state police that they should investigate Appellant, and she provided testimony supporting the Commonwealth's contention that Appellant was the leader in his relationship with a co-perpetrator. *See* Brief for Appellant at 29. Appellant complains that his trial counsel never cross-examined the witness about her criminal case and associated motivation to curry favor with the prosecution. *See id.* at 29–30.

The Commonwealth relies on the PCRA court's explanation that the relevant trial attorney did not remember that he had previously represented the witness at the time he cross-examined her at trial. *See Rega,* Nos. CP–33–CR–26–2001, *et al., slip op.* at 17–18. Furthermore, the Commonwealth explains, the witness was not convicted of a crime in connection with the salient representation but, rather, received

9. It is beyond the scope of this opinion to consider whether and to what extent other forms of structural error may be subject to issue preservation requirements. *See generally Commonwealth v. Martin,* 607 Pa. 165, 218, 5 A.3d 177, 208–09 (2010) (Saylor, J., concurring) (commenting that there appears to be a division of authority on this subject).

an accelerated rehabilitation disposition ("ARD"). *See generally* Pa.R.Crim.P. Ch. 3. Thus, the Commonwealth questions both the permissibility and potential efficacy of cross-examination on the subject in any event. *See, e.g., Commonwealth v. Brown,* 449 Pa.Super. 346, 354, 673 A.2d 975, 979 (1996), *cited affirmatively in Whalen v. Penn., DOT,* 613 Pa. 64, 71, 32 A.3d 677, 681 (2011).

[9] Given the caseloads experienced by public defenders and other criminal-law attorneys, the scenario in which a defense attorney forgets that he previously represented a prosecution witness in a different case is not as uncommon as would be desired. *See, e.g., State v. Murrell,* 362 N.C. 375, 665 S.E.2d 61, 81 (2008). Here, the PCRA court's supported findings are that counsel did not remember the previous representation prior to the cross-examination, that he adequately raised issues concerning the witness's credibility, and that exploration of the witness's previous experience with the criminal justice system, even if permissible, would not have impacted the outcome of Appellant's trial. Accordingly, the court did not err in denying relief on this claim.

Claim VI

Next, Appellant claims that his trial counsel were ineffective, because they failed to impeach key Commonwealth witnesses concerning open criminal charges and concomitant incentive to curry favor with the government, habitual drug use, and memory condition (for Susan Jones). *See* Brief for Appellant at 31–32.

[10] In his brief discussion of this claim, Appellant fails to acknowledge that a fair amount of the information he claims was available to trial counsel to develop by way of cross-examination was disclosed to the jury on the Commonwealth's direct examination or otherwise. For example, the jurors knew very well that various key Commonwealth witnesses were subject to open charges. *See, e.g.,* N.T., June 18, 2002, at 135–36 (reflecting testimony from prosecution witness Shawn Bair that he presently lives at Jefferson County prison, he had criminal charges on the trial list, and he understood he was a co-defendant and his testimony against Appellant could also be used against him). Moreover, trial counsel capitalized, extensively, on such evidence. For example, in his closing remarks, counsel explained:

> I am going to talk a little bit about Susan Jones, Stan Jones, Shawn Bair and Ray Fishel.... When you look at their testimony, the first thing you do is [consider whether] they have any interest in the outcome of this case? Now, each one, I submit to you, has an interest in the outcome of this case. What I mean by that is, each one wants to please the Commonwealth with the testimony that they have offered today. When the time comes these defendants are obviously thinking I want the Commonwealth to give me a favorable plea agreement or treat me in an otherwise favorable way. The witnesses were obviously thinking two things; I can please the Commonwealth by offering this testimony, but I can also implicate and put the blame for these events on Robert Rega. They have an obvious interest in this case, and to suggest otherwise I suggest to you is absurd.

N.T., June 20, 2002, at 150–51; *see also id.* at 152–68 (referencing trial counsel's discussion of the relevant Commonwealth witnesses as "co-defendants" and accomplices, in terms of the seriousness of the charges facing them, *e.g.,* felony murder, and in terms of their desire to "curry favor with the Commonwealth").

Lacking such context, Appellant's discussion of this claim is, at the very least,

misleading. At most, the argument provides insufficient basis to negate the post-conviction court's central rationale supporting the denial of relief on the claim, as follows:

> By the time [the relevant witnesses] stepped down from the witness stand . . ., the jurors understood that they were unsavory characters not averse to lying to the authorities or engaging in other criminal acts. . . . Additional knowledge of their criminal activity or learning that Jones suffered from occasional memory problems would not have likely changed [the] outcome, especially when the witnesses' testimony was consistent in all material respects.

Rega, Nos. CP–33–CR–26–2001, *et al.*, *slip op.* at 38.

Claim VII

Appellant claims that his trial counsel were ineffective for failing to proffer an expert witness to rebut the Commonwealth's proofs to the effect that Mr. Lauth was killed while on his knees and shot from behind and close in. *See* N.T., June 14, 2002, at 33–34 (reflecting such testimony of a medical examiner). Appellant's post-conviction expert testified that Mr. Lauth was, in fact, shot while lying on the floor, that it could not be shown that he was shot from behind, and that he was shot from at least 36 inches away. *See* N.T., Dec. 17, 2009, at 32, 37, 46–47, 51. According to Appellant, had his trial counsel offered the post-conviction evidence to the jury, he could have demonstrated that the victim may not have been conscious at the time he was killed and, thus, he was not murdered in as cold-blooded a fashion as the Commonwealth made out. Appellant also suggests, without much concrete development, that his postconviction evidence implicates another co-perpetrator in the robbery as the shooter more than it does Appellant. *See* Brief for Appellant at 36 (claiming that one of the co-perpetrators admitted to standing in the vicinity of the position in which Appellant's post-conviction evidence suggests the shooter stood).

[11] In response, the PCRA court explained that trial counsel pursued a reasonable strategy, insisted upon by their client, of attempting to establish that he simply was not present at Gateway Lodge during the robbery-homicide. *See Rega*, Nos. CP–33–CR26–2001, *et al.*, *slip op.* at 27–28. In this regard, the court credited counsel's testimony that it would have diluted this defense to suggest to the jury, "please find my client not guilty, but if you think that he did it don't find that he did it a certain way." *Id.* at 28 (quoting from the post-conviction testimony of one of Appellant's trial attorneys).

In terms of the cold-bloodedness of the killing of Mr. Lauth, whether he was on his knees or prone, his precise distance from the shooter, and the degree of his mobility are not factors which materially alter the appraisal. Notably, trial counsel conceded that Mr. Lauth was killed in cold blood, *see* N.T., June 20, 2002, at 174, apparently because the point was not worth arguing and to maintain counsel's credibility with the jury. Even if the PCRA court had credited Appellant's post-conviction evidence, which it did not, we do not envision that the difference between whether Mr. Lauth was killed while on his knees or prone would have made a material difference in the jurors' culpability assessment.

Claim VIII

Appellant next complains that his trial counsel were ineffective for failing to adequately investigate and present mitigating evidence. Central to his main claim, Appellant challenges this Court's crediting,

on direct appeal, of the trial court's finding, on a developed post-sentence record, that Appellant waived his right to have counsel present further mitigating evidence. *See Rega*, 593 Pa. at 709, 933 A.2d at 1026. Appellant points to various portions of the post-conviction record which, he asserts, undermine this conclusion. *See* Brief for Appellant at 39–62. In connection with this claim, Appellant also develops a line of argument asserting that trial counsel failed adequately to rebut the Commonwealth's evidence of aggravation, in particular, evidence that a series of burglaries and trespasses committed by Appellant qualified as violent felonies for purposes of the aggravating circumstance entailing a significant history of prior felonies involving the use or threat of violence to the person. *See* 42 Pa.C.S. § 9711(d)(9). Further, he challenges the stewardship of his counsel on direct appeal for failing to adduce the evidence presented at post-conviction, in particular, evidence suggesting that Appellant did not waive mitigation.

A principal difficulty with Appellant's claim is that he fails to frame his argument in terms of the applicable standard of review, *i.e.,* whether the PCRA court's findings are supported by the record and free from error. *See, e.g., Lesko,* 609 Pa. at 152, 15 A.3d at 358. Indeed, although that court made extensive findings and conclusion, citing to the post-conviction record, Appellant's approach is to ignore the PCRA court's treatment, and to simply draw from evidence and inferences which support his position.

Although the PCRA court deemed this claim previously litigated, *see Rega*, Nos. CP–33–CR–26–2001, *et al., slip op.* at 49, the court specifically evaluated the post-conviction record nonetheless, and its discussion includes the following recitation:

> The Court acknowledges that there existed prior to trial a wealth of information that could have been utilized as mitigation evidence at the penalty hearing. Even without their client's participation, trial counsel could have interviewed family and friends, obtained school, medical, and other institutional records, and consulted experts who could have evaluated those sources.... They likewise could have more fully ascertained the nature and circumstances of the offenses underlying the (d)(9) aggravating circumstance had they obtained copies of the records pertinent to their client's earlier convictions. While what they could have done might be relevant in a different case, however, what trial counsel actually did was reasonable, non-prejudicial, and thus not ineffective under the circumstances.
>
> [Counsel] were well aware that mitigation-type evidence was out there and had considered personally investigating or having their private investigator look into what mitigation evidence existed. Though their understanding of their client's history was limited, for instance, they knew he had endured what [one attorney] described as a "brutal" upbringing and that they could obtain records, talk with people who knew the defendant, and prepare and present a mitigation defense without his help. From the outset, however, [Appellant] had repeatedly instructed them to spend their time and resources working on the guilt phase, not the penalty phase. It made no difference when counsel explained what mitigation meant or what types of information could be presented, either; [Appellant] was adamant that he would not submit to any sort of psychological assessment and that his attorneys were not to investigate his past or inquire into his mental health. (PCRA 12/15/2009, pp. 195–96, 201–03, 219–20,

234–39, 259–60; *id.*, 01/19/2010, pp. 117, 120–22, 124–25, 148–61; 163–65, 167, 177–78, 187–91, 203–05, 242–43, 253, 264–65).

* * *

It was not a matter of the attorneys misinterpreting their client's wishes and him acquiescing to their developed strategy, either. Rather, as [counsel] testified, [Appellant] had a strong personality, was very involved with his defense, never hesitated to opine about any topic or what direction the case should go, and always made it clear when he did or did not want them to do something.

* * *

Despite their client's express wishes, though, trial counsel did assemble a brief mitigation defense they believed might be effective. Even that, however, was without [Appellant's] cooperation or approval. According to [one of the attorneys], the defendant seemed to be upset that they had even gone as far as they did to introduce personal mitigation evidence.

* * *

The record is ... replete with evidence supporting trial counsels' testimony, and the Court explicitly finds, that from the start of their representation, the defendant had specifically directed [his attorneys] to focus all their efforts on obtaining an acquittal and leave penalty phase investigation and preparation alone. That being the case, [Appellant] cannot succeed upon his claim that counsel were ineffective in handling all penalty phase issues, because the law will not force an unwilling defendant to pursue a mitigation defense or demand that trial counsel overrule his decision.

Rega, Nos. CP–33–CR–26–2001, *et al.*, *slip op.* at 49–54 (footnotes omitted).[10]

There is no question that there are indicia on the post-conviction record, just as there were in the post-sentence record, of a modesty in relevant training and experience on the part of Appellant's counsel, and of various missteps on their part as well.[11] It is also not reasonably subject to debate, however, that various aspects of the evidence in the post-conviction record were in conflict and, thus, that Appellant is presently obliged to address the present findings of the PCRA court on their terms. *See, e.g., Lesko*, 609 Pa. at 152, 15 A.3d at 358.[12]

10. *See also id.* at 52–53 (developing that the testimony of Appellant's counsel on direct appeal corroborated trial counsels' averments that Appellant directed them not to pursue mitigation); *id.* at 53 (referencing a letter written by Appellant to the trial judge indicating, *inter alia*, that "One who is innocent, does not Mitigate why he did not commit the act.").

11. It cannot reasonably be disputed, for example, that counsel should have reviewed files from the criminal convictions which the Commonwealth offered in support of the aggravating circumstance involving a significant history of prior crimes entailing the use or threat of violence. *See Rompilla v. Beard*, 545 U.S. 374, 377, 125 S.Ct. 2456, 2460, 162 L.Ed.2d 360 (2005) (holding that, "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial").

12. A specific example of Appellant's failure in this regard is his repeated references to his post-conviction Exhibit 45, a letter from one of the trial attorneys to Appellant which he contends establishes his own willingness to pursue mitigation. *See* Brief for Appellant at 59–60. In this regard, Appellant simply ignores the PCRA court's specific discussion of such exhibit, in juxtaposition to the balance of the post-conviction record, as follows:

> Defendant's Exhibit 45 does not diminish the strength of the evidence supporting [the

[12] There are instances in which a post-conviction petitioner may obtain a review of a claim previously rejected on direct appeal, for example, by pursuing derivative claims of deficient stewardship in the presentation of the claim. On the other hand, we have explained that, where this Court's reasoning and holding on direct appeal encompass the claim sought to be raised on collateral review, and where there is no irrefutable, manifest error in the disposition, the previous litigation doctrine will be applied. *See Commonwealth v. Uderra*, 580 Pa. 492, 524, 862 A.2d 74, 93–94 (2004). Without addressing the post-conviction court's determination on its terms—which are entirely supportive of this Court's disposition on direct appeal—Appellant cannot establish the type of error necessary to overcome the previous litigation doctrine relative to the controlling reasoning and holding of this Court on direct appeal.[13] Accordingly, we credit the position of the PCRA court and the Commonwealth that this claim is previously litigated. *See* 42 Pa.C.S. § 9543(a)(3) (rendering a petitioner ineligible for post-conviction relief on a claim which has been previously litigated).[14]

finding that he had directed his trial attorneys to ''leave penalty phase investigation and preparation alone'']. As of May 7, 2002, Rega was apparently considering some type of mitigation defense. As [his counsel] testified, however, that was not their last conversation about the issue. (PCRA, 12–15–2002, pp. 248–49). [Direct-appeal counsel], moreover, when explaining the apparent disparity between Rega's refusals to cooperate and his actual cooperation, testified, ''Something I—I concluded after reading the trial transcript and listening to the tapes and several meetings in person with [Appellant], he doesn't mind making inconsistent statements, one to one person, one to another. I found a lot of inconsistency in the things that [he] said, whether that's because of mood or whatever'' (*Id.* 05/21/2010, pp. 17–18). That he was once entertaining the possibility of a mitigation defense thus does not substantiate his claim, particularly in the face of so much countervailing evidence.

Rega, Nos. CP–33–CR–26–2001, *et al., slip op.* at 54 n.24. As related above, our own review confirms that there is a conflicting post-conviction record. Thus, the importance of proceeding under the appropriate standard of review to address the PCRA court's various reconciliations and credibility judgments is manifest.

13. In terms of the application of this Court's previous holding on direct appeal that Appellant waived mitigation in relevant part, we observe that the United States Supreme Court has determined that, in such circumstances, a lawyer's failure to undertake an otherwise adequate mitigation investigation will not be deemed prejudicial. *See Schriro v. Landrigan*, 550 U.S. 465, 475, 127 S.Ct. 1933, 1941, 167 L.Ed.2d 836 (2007).

14. This author believes that, when confronted with a client who is not cooperating in critical aspects of trial preparation in a capital case, trial counsel has an obligation to apprise the trial court at the earliest opportunity to enlist the court's direction and assistance. *See, e.g., Commonwealth v. Marinelli*, 570 Pa. 622, 662, 810 A.2d 1257, 1280 (2002) (Saylor, J., concurring). Majority support has not been garnered, however, to require such appraisal and enlistment. *See, e.g., Commonwealth v. Bomar*, 573 Pa. 426, 474 & n. 19, 826 A.2d 831, 860 & n. 19 (2003). It should be noted, nevertheless, that this Court has indicated that a trial court which has been apprised of a mitigation waiver should conduct a colloquy to confirm that such waiver is knowing, voluntary, and intelligent. *See, e.g., Commonwealth v. Randolph*, 582 Pa. 576, 585, 873 A.2d 1277, 1282 (2005) Appellant, however, has not challenged the absence of such a colloquy in his case.

Claim IX

[13] In Appellant's ninth claim, he raises a challenge to the applicability of the aggravating circumstance involving a significant history of violent felonies, *see* 42 Pa.C.S. § 9711(d)(9), based on the contention that it should not subsume "non-violent" burglaries or instances of criminal

trespass. Appellant recognizes that his line of argument has been rejected by this Court on many previous occasions, but he requests reconsideration and, in the alternative, seeks to preserve the claim for federal review. *See* Brief for Appellant at 63 n.31. Again, we decline to serially reconsider the precedent in this area.

[14] Appellant appends a brief *ex post facto* argument to this claim, contending that at the time of his convictions, he had no notice that they might be used as aggravating circumstances in a death case. *See id.* at 64. In our view, the relevant time for purposes of a proper *ex post facto* analysis is the time Appellant murdered Mr. Lauth.[15] At such time, the case law was settled in the relevant regard and, accordingly, there was ample notice available to Appellant that his previous criminal acts might be used as evidence of aggravation for first-degree murder should he perpetrate such a killing, *see Commonwealth v. King,* 554 Pa. 331, 369–70, 721 A.2d 763, 782–83 (1998), as Appellant proceeded to do.

Claim X

Next, Appellant contends that the trial court improperly failed to specifically instruct the jury that the aggravating circumstance for killing in the perpetration of a felony, *see* 42 Pa.C.S. § 9711(d)(6), does not apply to one who did not actually perpetrate the underlying murder, but who is merely the killer's accomplice. In this regard, Appellant refers to this Court's decision in *Commonwealth v. Lassiter,* 554 Pa. 586, 595, 722 A.2d 657, 662 (1998) (plurality) (explaining that the in-perpetration-of-a-felony aggravator does not extend to mere accomplices to a murder, who did not actually perpetrate the killing).

[15] *Lassiter* brings into question imprecise jury instructions in which trial courts have phrased the in-perpetration-of-a-felony aggravator in the passive voice, for example, by indicating that the aggravator applies whenever the "killing was committed in perpetration of a felony." *See Commonwealth v. Markman,* 591 Pa. 249, 292, 916 A.2d 586, 612 (2007). However, where, as here, the trial court's instruction tracks the language of the statute—advising jurors that the aggravator applies when "*the defendant* committed a killing while in the perpetration of a felony," N.T., June 21, 2002, at 120 (emphasis added), the court has "conveyed the essential information in an understandable form." *Markman,* 591 Pa. at 292, 916 A.2d at 612.

[16] Presumably because the trial court in Appellant's case correctly instructed the jurors as to the (d)(6) aggravator, he invokes *Lassiter* more obliquely, by claiming that the prosecutor misadvised the jurors through his assertion that the evidence presented at the guilt phase (and incorporated into the sentencing proceeding) required the jury to find the (d)(6) aggravator. In this regard, Appellant highlights that the trial court previously had issued an accomplice-liability charge at the guilt phase, and, thus, it was possible that Appellant might have been convicted

15. *Accord United States v. Pitera,* 795 F.Supp. 546, 563–64 (E.D.N.Y.1992) (explaining that use, in aggravation, of convictions predating passage of a statute under which the death penalty was pursued did not violate the Ex Post Facto Clause, because consideration of those crimes neither exposed the defendant to conviction for criminal conduct of which he was not given fair notice nor subjected him to further punishment for earlier crimes); *cf. United States v. Hardeman,* 704 F.3d 1266, 1268 (9th Cir.2013) (explaining that the United States "Supreme Court has long held that recidivism statutes do not violate the Ex Post Facto Clause because the enhanced penalty punishes only the latest crime and is not retrospective additional punishment for the original crimes").

of first-degree murder as an accomplice. To bolster the contention that this might have been the case, Appellant observes that he adduced evidence that another co-perpetrator of the Gateway Lodge robbery—Stanford Jones—had sent a letter to the prosecutor attempting to take sole responsibility for the robbery and killing, albeit both before and after this statement, Jones had identified Appellant as the killer. *See* N.T., June 20, 2002, at 5–46.[16] Under Appellant's theory, the prosecutor was wrong to suggest that the conviction for first-degree murder established that *Appellant* himself perpetrated the killing.

As the Commonwealth relates, however, its theory of the case for first-degree murder consistently was that Appellant was the leader of the co-perpetrators of the Gateway Lodge robbery, that he alone shot and killed the victim, and that he was thus the principal actor in the capital crime. *See, e.g.,* N.T., June 20, 2002, at 182, 184, 195, 218 (reflecting various passages from the prosecutor's closing remarks at the guilty phase of trial). That the jury was authorized to find Appellant guilty as an accomplice to various crimes even if jurors did not fully credit the Commonwealth's evidence did not undermine the prosecutor's ability to rely on its own guilt-phase theory and evidence, which he reasonably believed the jury had credited through its verdicts.[17]

In our view, in addressing the sentencing jury, the prosecutor was entitled to rely on the strength of the Commonwealth's own case establishing Appellant's perpetration of the killing, and the weakness of Appellant's contrary evidence derived from an indisputably contrived account of the events. As such, we reject Appellant's contention that the prosecutor's association between the first-degree murder conviction and Appellant's actual perpetration of the killing in the argumentation was improper in the first instance. Moreover, we conclude that the trial court's issuance of the appropriate charge requiring the jurors to find that the defendant, *i.e.* Appellant, actually perpetrated the killing to implicate the (d)(6) aggravator is sufficient to ameliorate any uncertainty.

Claim XI

In his final claim, Appellant asks us to weigh the cumulative prejudicial effect of all errors. Nothing in Appellant's presentation, however, individually or cumulatively, has persuaded us that he is entitled to post-conviction relief.

The order of the PCRA court is AFFIRMED.

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

16. At trial, Jones explained that, in fabricating his confession to having been the sole perpetrator, he was attempting to implicate his estranged wife as his accomplice in an effort to have custody of his children transferred to his mother. *See* N.T., June 20, 2002, at 20.

17. Moreover, Stanford Jones's short-lived version that he was the sole actor in the robbery-homicide was irreconcilably inconsistent with Appellant's own self-serving account of the night it occurred. In this account, Appellant conceded that Jones and other of the co-perpetrators planned the robbery together at his trailer and met there again after the robbery-homicide to breach a stolen safe and divide the money found in it. *See Rega,* 593 Pa. at 676, 933 A.2d at 1006–07; *see also* N.T., June 19, 2002, at 135 & Ex. C–66. Appellant merely attempted to persuade the investigating trooper that he did not accompany the group to the Gateway Lodge. *See id.*

Labovitz

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

FILED
OCT 27 2011
TONYA S. GEIST
PROTHONOTARY & CLERK OF COURTS

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	**Nos: CP-33-CR-26-2001**
	:	**CP-33-CR-524-2001**
ROBERT GENE REGA,	:	
Defendant	:	

OPINION ON DEFENDANT'S PCRA PETITION

In a timely petition filed pursuant to 42 Pa.C.S.A. § 9541 *et seq.*, the defendant, Robert Gene Rega ("Rega"), raises numerous issues relative to events that occurred pre-trial, at trial, and at his sentencing hearing, and on appeal. In a nine-day hearing, the Court heard many hours of testimony and admitted a plethora of documents introduced in support of his evidentiary claims.[1] The Court subsequently stayed the proceedings, allowed Rega to file an additional claim alleging appellate counsels' ineffectiveness, and entertained testimony on that issue on October 20, 2011.

On June 21, 2002, Rega was convicted of first-degree murder and various other offenses. Upon the sentencing jury's recommendation, the Court sentenced him to death, with an additional term of years. Since that time, Rega has been housed at SCI Greene awaiting execution. He has thus satisfied the requirements to be eligible for relief under § 9543(a)(1) of the Post Conviction Relief Act. Given the nature of his claims, he must also plead and prove by a preponderance of the evidence that his conviction or sentence resulted from

> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, [or]
> (ii) "Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

§ 9543(a)(2). He must further prove that each allegation of error was not waived or previously litigated. § 9543(a)(3).

For PCRA purposes, an issue has been waived if the petitioner could have but failed to raise it prior to trial, at trial, during unitary review, on appeal, or in a prior state postconviction

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[1] Some of Rega's allegations raise pure questions of law and thus were not subjects of evidentiary support at the hearing.

APPENDIX D

proceeding. § 9544(b). It has been fully litigated if it has been decided on its merits by the highest appellate court in which the petitioner has the right of review. § 9544(a). A petitioner cannot avoid a determination that an issue has been fully litigated merely by recasting it in different terms or undergirding it with a different legal argument, however. Rather, "issue" refers to the discrete legal ground that would entitle a defendant to relief, not the alternative theories or allegations that may be advanced to support the underlying issue. *Commonwealth v. Gwynn*, 943 A.2d 940, 944-45 (Pa. 2008) (citing *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005)). *See also Commonwealth v. Small*, 980 A.2d 549, 569 (Pa. 2009) (same).

With respect to waiver, moreover, our Supreme Court determined long ago that the doctrine of "relaxed" waiver in capital cases would no longer apply to PCRA appeals. *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998). According to the Court, application of the doctrine frustrated the need for finality and efficient use of Court resources and contravened the legislature's express exclusion of waived issues as cognizable claims for PCRA relief. *Id.*

The bulk of Rega's claims assert the ineffective assistance of counsel at all stages of the prosecution. To prevail on these issues, therefore, Rega also must show that his underlying claims have merit; that counsel had no reasonable basis for their course of conduct; and that there exists a reasonable probability that the outcome of his trial, sentencing hearing, or appeal would have been different but for counsels' acts or omissions. *Commonwealth v. Rega*, 933 A.2d 997, 1018 (Pa. 2007) (citations omitted).

The Court begins with the presumption that counsel were effective, *Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009), and only if Rega proves that no competent attorney would have chosen the same course of conduct will he be able sustain his ineffectiveness claims. *Rega*, 933 A.2d at 1018. Additionally, counsel will not be deemed ineffective for failing to pursue a meritless claim. *Id.* In fact, failure to satisfy any of the three prongs will result in dismissal of the claim. *Id.*

CLAIMS FOR RELIEF

In **Claim I**, Rega contends that his trial and appellate counsel were ineffective for not raising *Franks v. Delaware*, 438 U.S. 154 (1978), as a basis for suppressing trial exhibits 68 through 77. He argues that the search warrants Corporal Jeffrey Lee obtained to search the

trailer where his mother was living were issued pursuant to information that he knew or should have known was stale but whose staleness was not revealed to the issuing authority.

To the extent Rega continues to argue the first warrant's overbreadth, this Court would refer to the Supreme Court's earlier decision in this case, where it found that the warrant was not overly broad under the circumstances and, therefore, that the second warrant was also valid since it was based on a suspect document discovered during a lawful search. *Rega*, 933 A.2d at 1010-14. One can also determine from that opinion that the *Franks* angle would have been equally unavailing.

In support of his *Franks* claim, Rega excerpts the following conversation between himself and Joan Rega:

> JR: **I'm gonna post office exactly nine o'clock to mail out the things that you sent me.** Renee looks at them and um, Betty looked at them. Now the things they only circled is like passive things like hello and how are you um Betty's sister-in-law's on there and she says she's a good person. She circled the jury that said the sold ah Renee the lemon a few years ago.
> RR: Um hum.
> JR: In Anita and a couple other people that they know. The ones that says no forget them because one works where Renee works and another one that know you um, they put no on **so I'm going to do that this morning.**
>
> . . .
>
> JR: But I'm so glad you called me cause I said Jesus Robert better call me. **I'm going to go nine o'clock and mail out the, the envelopes that you sent cause I only got, Robert**
> RR: Yea.
> JR: Oh, I only got that yesterday, brought it right down to the house, as sick as Betty was.

Def's. Am. Petition, p. 20 (emphasis in original).

That conversation occurred on May 30, 2002, and Lee swore out his affidavit of probable cause on June 7, 2002—eight days later.

Contrary to Rega's claim, it does not matter whether MDJ Chambers knew of Joan's plans to mail back to her son whatever juror list information he had previously sent her, because the permissible scope of the warrant authorized the police to seize more than just that list. As our Supreme Court previously articulated,

> Corporal Lee discovered, from Appellant's attorneys, that Appellant had received the jury questionnaires, and the recorded phone conversations with his mother indicated that he had passed them on to her and that she had, in turn, distributed them to friends and family. As the trial court found in rejecting

> Appellant's contention that the search warrant was unconstitutionally broad, common sense dictated that in the process, Ms. Rega easily could have copied some of that information onto other papers and documents besides the official lists and questionnaires. By limiting the scope to documents related to the juror lists, the issuing authority clearly limited the scope of the search. Moreover, the term "list," for which the police had probable cause to search, could be viewed broadly enough to encompass any document that contained multiple juror's [sic] names.

Rega, 933 A.2d at 1012-13. *See also* Order and Opinion on Defendant's Post-Trial Motions ("Post-Trial Motions Opinion"), 01/13/2006, pp. 5-7 (containing the trial court's disposition of the issue as raised on direct appeal).

Whether or not Lee should have understood the above-quoted excerpt to mean that the actual list Rega sent to his mother would no longer be found at the trailer, therefore, the information he had was sufficient to warrant a search for "other papers and documents besides the official lists and questionnaires" onto which Joan may have copied juror information. Thus, even had Judge Chambers been apprised that the original list was probably mailed back to Rega on May 30, 2002, he still would have possessed a valid legal basis to issue the first search warrant lest Joan had transferred all or some of the juror information onto other papers and documents.

Whereas the search warrant was broad enough to cover the situation at hand, moreover, it does not appear from the record that the executing troopers exceeded its scope by reading a letter dated February 12, 2001, and the document entitled "Dec 21st Dec 22nd Time Line."

While it may be true that the Jefferson County Prospective Juror Lists were only compiled on May 1, 2002, the search warrant, as discussed by the Supreme Court, allowed the troopers to peruse a wide array of papers and documents, including letters, and the Court cannot reasonably conclude from the evidence presented that the trooper who initially read the February 12, 2001, letter was acting outside his authority. Rega bears the burden of proving his own claims, *id.* at 1018, and the only evidence tending to support this one is the date affixed to the letter. The Court does not know, however, whether the trooper even saw that date before reading what appeared to be Rega's offer to pay $500.00 for an alibi witness. The Court can just as easily speculate that he unfolded the letter and, bypassing the date entirely, began reading it in the middle to ascertain whether it evidenced any juror information. Any determination in that

regard would be mere speculation, however, because Rega did not introduce evidence to indicate that the trooper was aware of the letter's date before reading it.

Given Rega's failure to actually prove that the trooper was aware of the letter's date before beginning to read, therefore, the Court can only assume that he was not. It is thus immaterial whether he became aware of it before Trooper Michael Pisarchick applied for the second search warrant, because even had the trooper noticed the date after-the-fact, what he had already read reasonably indicated that evidence of additional criminal activity would be located in the trailer.

As for the documented timeline, it did not evidence a date that the trooper arguably should have noticed. For all he knew, Rega could have created it at the prison and mailed it to his mother only days earlier. Presumably, therefore, Rega supposes that it was beyond the scope of the warrant by virtue of its title. That, however, is an untenable position.

Possessing evidence that Rega and his mother were involved in a jury tampering scheme, the police were searching for "juror questionnaires/lists, etc." that might contain "markings identifying the targeted juror(s)." As the Supreme Court noted, such markings could have appeared on any number of papers or documents. Given the nature of the formal charges then pending against Rega and the additional potential criminal activity they were investigating, moreover, it would have been naïve for the police to have simply assumed that a piece of paper stating "Dec 21st Dec 22nd Time Line" at the top was exactly what it purported to be. The trooper who read it thus was not acting outside his authority when he perused the document for possible juror information.

Because the first warrant was valid even absent Judge Chambers' knowledge about Joan's intention to mail the jury lists on May 30, 2002, and because the entirety of the ensuing search was within the scope of that warrant, the Court can say with certainty that it would not have granted a motion to suppress even had Rega's attorneys proposed an argument based on *Franks*.[2] One can deduce from its discussion relative to the search warrant issue as raised, moreover, that our Supreme Court would have reached the same conclusion. Insofar as the issue

[2] Although trial counsel did suggest at one point that the substance of the recorded conversation between Rega and his mother negated probable cause, it is clear that the thrust of their position was that the Court could not look outside the four corners of the affidavit. It thus will not deem counsel to have previously advanced a *Franks*-type argument.

underlying Claim I lacks merit, therefore, counsel were not ineffective for failing to raise it earlier.

Rega asserts in **Claim II** that the Court errantly denied trial counsels' motion for change of venue, specifically that it "misapplied [the] law by evaluating the pretrial publicity exclusively on the basis of whether it was sensational, inflammatory or slanted, and failed to independently consider whether the publicity concerned Mr. Rega's prior criminal record or had been supplied by law enforcement or the prosecution," and that appellate counsel were ineffective for failing to raise or adequately litigate the issue.

The Court does not now and never did deny that this case was highly publicized in the local media. Having been presented with numerous articles recounting various aspects of the case, however, the Court carefully reviewed the materials in conjunction with the appropriate legal criteria and determined that they were not so prejudicial as to warrant a change of venue or venire, especially in light of how much time had elapsed between the bulk of the reports and trial. *See* Opinion on Motion for Change of Venire/Venue, March 20, 2002, and Post-Trial Motions Opinion at 2-4. Rega's current proposition for why he should have been granted a change of venue or venire does not change that result.

As a general matter, it is the defendant's burden to demonstrate actual prejudice, i.e., the inability to impanel an impartial jury, resulting from pre-trial publicity. *Commonwealth v. Rucci*, 670 A.2d 1129, 1140 (Pa. 1996) (citing *Commonwealth v. Faulkner*, 595 A.2d 28 (Pa. 1991)). The law will presume prejudice only if the defendant proves two points:

> first, either that a) the publicity is sensational, inflammatory, and slanted towards conviction rather than factual or objective; b) the publicity reveals the accused's prior criminal record, if any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; or c) the publicity is derived from police and prosecuting officer reports; *and, secondly, that the publicity was so sustained, extensive, and pervasive without sufficient time between publication and trial for the prejudice to dissipate, that the community must be deemed to have been saturated.*

Rucci, 670 A.2d at 1140-41 (emphasis added). In this case, regardless of whether the media reported portions of his criminal record, and regardless of the source of some of the newspaper reports, Rega has not proven that the community must have been saturated to the point that he did not and could not have selected an unbiased and impartial jury.

As the Court explained in its earlier opinions, not only was the articles' content not as prejudicial as Rega contends, but there was a substantial lapse of time between the majority of the newspaper accounts and the start of Rega's trial—more than enough time to remediate any adverse effects the articles otherwise may have had.

The record also confirms that the Court's denial was not in error. Over four days of jury selection, the Court excused several veniremen who had already formed opinions about Rega's guilt after reading or hearing about the Gateway Lodge incident. As the transcripts attest, however, many others were wholly unfamiliar with the events, and the majority could only vaguely recall certain general facts as they were reported. In any event, none of the seated jurors had more than a passing familiarity with the facts, if any, or had formed an opinion about the defendant's guilt. *See* Jury Selection Transcripts ("JST"), 06/10/2002, pp. 128-74, *id.*, Volume II at 382-99, 412-32, 444-64; 06/11/2002 at 6-44, 294-310, 348-64; 06/12/2002 at 77-95, 149-73, 217-33, 239-58, 278-98, 315-34; 06/13/2002 at 44-67). Given the lengthy delay between the vast majority of the media coverage and the time of *voir dire*, that made sense.

Commonwealth v. Frazier, 369 A.2d 1224 (Pa. 1977), is, therefore, far from controlling. In that case, the jury panel was brought in only four months after the news accounts, which included the defendant's criminal record and his confession. *Id.* at 1228-29. Additionally, of the fourteen jurors empanelled, only one had neither read nor heard about the incident, while only two others said they did not recall. *Id.* at 1229. Accordingly, the defendant was left with eleven jurors who had recently been exposed to and presumably recalled accounts of the crime, recitations of his criminal history, and references to his admissions of guilt. *Id.* In *Commonwealth v. Dougherty*, 426 A.2d 104 (Pa. 1981), too, extensive and prejudicial pre-trial publicity continued through the time the jury was selected, thus resulting in a jury pool where only one prospective juror did not have knowledge of the crime at issue, the defendant's prior trial, and other charges then pending against him. *Id.* at 105-06. In *Commonwealth v. Harkins*, 328 a.2d 156 (Pa. 1974), moreover, the question was not whether pre-trial publicity had irremediably prejudiced the jury, but whether a prospective juror's open declaration that the defendant had stolen his car demanded a reversal of the conviction when the jury ultimately empanelled had heard the statement. *Id.* at 156-57. The Court said yes, observing that the jury was, by necessity, mindful of other criminal conduct revealed extra-judicially. *Id.* at 157.

The cases Rega relies on, then, while generally standing for the principles for which he cites them, are not helpful to him due in large part to the mitigating time factor, which, for purposes of Claim II, means that Rega cannot sustain his burden to establish the second prejudice prong identified in *Rucci*.

In the end, therefore, Rega's second claim is also without merit such that appellate counsels' failure to challenge the Court's denial of his motion for change of venue/venire must fail.

Rega next asserts that trial counsel were ineffective for failing to conduct an adequate *voir dire* and that appellate counsel were ineffective for inadequately litigating trial counsels' ineffectiveness on appeal.

With respect to trial counsels' performance, this issue has already been fully litigated. Before the Supreme Court, appellate counsel raised trial counsels' effectiveness for failing to life quality the jury, and the Court thoroughly addressed the matter. *Commonwealth v. Rega*, 933 A.2d 997, 1019-21 (Pa. 2007). With **Claim III**, Rega recasts the claim, proposing an alternate basis for the underlying issue that trial counsel conducted an inadequate *voir dire*. According to *Commonwealth v. Gwynn*, 943 A.2d 940, 944-45 (Pa. 2008), though, the advancement of an alternate theory, whether legal or factual in nature, does not resurrect an already litigated issue.

Because it appears for the first time as a layered ineffectiveness claim, however, the Court will nonetheless address the issue on its merits.

As reiterated in *Commonwealth v. Montalvo*, 986 A.2d 84 (Pa. 2009), the purpose of *voir dire* is to ensure the empanelling of a fair and impartial jury capable of following the trial court's instructions, *id.* at 93, a jury that will decide the defendant's case based solely on the evidence presented at trial, not on preconceived notions of his guilt. *Commonwealth v. Smith*, 540 A.2d 246, 256 (Pa. 1988). Thus, while the defendant may exercise peremptory challenges, the *voir dire* process itself is not meant to provide a better basis upon which he can exercise them. *Id.* Additionally, a defendant challenging a prospective juror for cause must demonstrate that he or she possesses a "fixed, unalterable opinion" that would preclude the rendering of a verdict based solely on the evidence. *Id.* In fact, "[e]ven a statement by a prospective (or chosen) juror that some evidence might be required from [a] defendant to change an opinion or impression already formed would not be a sufficient basis for challenge for cause if he or she also stated that he or

she could follow the court's instructions and decide the case solely on the evidence presented." *Id.*

Given that legal standard, it is clear that Rega was afforded a fair and impartial jury in this case. Each individual finally seated affirmed that he or she could and would follow the Court's instructions during both phases of trial and that he or she would not automatically impose the death penalty. None indicated an unwillingness to consider the totality of the evidence on both sides, including any mitigating evidence presented by the defendant, before rendering a verdict. While their *voir dire* testimony may not have been "perfect," moreover, the specific jurors whose answers Rega challenges in his petition were no exception.

Rega quotes the following exchange between the district attorney and Ernestine Bullers as evidence that Bullers believed that a first-degree murder conviction would necessarily demand a sentence of death:

> Q. You seem like you [have] a very sweet disposition so I want to ask you this – this is a stuff [sic] question. It is one thing to be able to tell the judge I don't oppose the death penalty, it is one thing to be able to say that. It is another thing to be able to stand up in court and say I am giving it. Do you think you could do it?
> A. The way I feel is he is guilty, you know – I mean, I always told my boys if something happens and they do something wrong **they have to pay for it.** You know what I mean? I belief [sic] that, yes. **If they are guilty.**

Def's. Am. Petition, p. 49 (quoting JST, 06/10/2002, Volume II, p. 430) (emphasis in petition). Rega ignores the succeeding exchange, however, where Bullers conceded that she "would be able to" vote for death *if the Commonwealth proved that the circumstances warranted it.* (*Id.* at 430-31). He likewise ignores her negative response when the Court specifically asked whether she had "any personal, moral, religious, ethical, philosophical or other beliefs that would cause [her to] automatically impose the death penalty in all cases of first degree murder regardless of the facts and law" (*Id.* at 421-22). Those responses, together with the totality of Bullers' answers and her overall demeanor, adequately apprised counsel that she was not someone who would impose the death penalty without first weighing all the evidence. It was thus unnecessary for counsel to further question her about her above-quoted response.

Rega also challenged John Patton as being biased toward believing the police, highlighting the discrepancy between his averments to the Court and defense counsel. Again he quotes from the transcript, first excerpting Patton's exchange with the Court.

> Q. Okay. Would you be more likely to believe the testimony of a police officer or any other law enforcement officer because of his or her job?
> A. That's a good question. **I would say, yes, I probably would because they would be more familiar with the facts or whatever.**
> Q. Well, let me ask you this: Not as far as testifying about their position or expertise, but if you are supposed to treat all witnesses equal, would you be favoring a police officer's testimony and thinking yeah this is truthful before you have heard it just because that person is a police officer?
> A. No. I mean they make mistakes, too. They are only people.
> Q. My next question is, would you be less likely thinking if he is a police officer he is probably lying?
> A. No.
> Q. You would listen and look at the testimony and decide on the basis of what you heard and saw?
> A. Uh-huh.
> Q. Could you follow the Court's instruction, because ultimately I will instruct you that you should treat all witnesses equally and judge their truthfulness and accuracy using your common sense by the same standard. Would you be able to do that?
> A. Yes.

Def's. Am. Petition, pp. 56-57 (quoting JST, 06/10/2002, pp. 154-55). He then recounts another exchange between Patton and defense counsel, along with the Court's follow-up.

> Q. You had stated in your earlier questions from the judge initially you thought you would believe the police more and then sort of the judge asked you some more questions and you said you would follow his instructions on that. If you are evaluating the testimony of two different people and that testimony is not reconcilable, they both can't be accurate and one of them is a police officer, would that go in that person's favor if you are deciding that?
> A. **Well, the way I was brought up the police officer you're supposed to respect them because they are just like the judge.** They are the ones telling you the laws, so you really don't look at them as if they would twist it around or something like that. **As an individual I would probably lean more towards the police officer for the reason of their standing.**
> MR. ENGLISH: Okay. Thank you very. For your answers.
> THE COURT: Let me ask you one more question on that though. You wouldn't go away from your common sense if the police officer said this guy was pink?
> MR. PATTON: No. No.
> THE COURT: Okay.

Def's. Am. Petition, p. 57 (quoting JST, 06/10/2002, pp. 172-73). Rega cites this second exchange as compelling the conclusion that Patton was predisposed to believe the police to the extent that he could not fairly evaluate any contrary testimony tending to demonstrate his innocence. The Court's clarifying question, he contends, did little to overcome that conclusion.

Perhaps Patton's answers, if left unqualified, would have given trial counsel reason to challenge him for cause. Immediately after the Court said "Okay," however, the district attorney requested the opportunity to clarify Patton's position.

> Q. Your Honor, could I ask one more follow up?
> A. Yes.
> Q. Mr. Patton, you were specifically asked questions from the judge about that topic and he told you that the law is that you have to give every witness equal standing and evaluate their testimony on that grounds. Would you be able to follow the law on that regard?
> A. Yes.

(*Id.* at 173-74). In the end, therefore, Patton affirmed that he could fairly weigh all of the testimony, thereby giving effect to the Court's instruction that he must treat police officers' and laywitnesses' testimony alike. Whereas he reaffirmed his commitment to follow the judge's instructions, therefore, and thereby satisfied *Smith*, the Court would not have granted a motion to strike for cause.

Rega also attempts to compare Patton's answers to those given by Mary North, whom the Court struck for cause upon defense counsel's motion. The two are far from analogous, though.

In answering a series of questions, North equivocated on whether she could treat a police officer's testimony the same as anyone else's, affirmatively stating only once that she could. After ascertaining that her son-in-law was a police officer, therefore, the Court engaged her in the following discussion:

> Q. Because he is your son-in-law and because he's a police officer, would that cause you to treat the testimony of a police officer as being more favorable or truthful than any other person?
> A. I don't think so.
> Q. Would you be able to treat his testimony, the police officer, the same as any other person?
> A. Yes. I also have a nephew, Doug Lowman.
>
> . . .
>
> Q. I've ask you [sic], would you treat a police officer the same as any other witness, no more or less?
> A. I think so.
> Q. Let me ask, would you follow the Court's instruction and evaluate the credibility and truthfulness and accuracy by the same standard as any other witness?
> A. You mean, would I believe a police officer over someone else?
> Q. Yes.
> A. Not after hearing testimony, because you get to decide who it is?

Q. But when you're looking at it, there's police officers and another person. Would you automatically believe the police officer?
A. I think I would?
Q. You do?
A. Yeah.
Q. So you would treat their testimony more favorably than any other testimony?
A. I think so, yes.

(*Id.*, 06/11/2002, pp. 371-72). Unlike Patton, therefore, North repeatedly indicated not only that she would be inclined to defer to a police officer's testimony, but that she would "automatically" believe the officer—an averment from which she did not retreat.

The Court would note, moreover, that North's demeanor, unlike Patton's, reflected her uncertainty. Thus, even though she answered "yes" when asked whether she could treat a police officer's testimony the same as another witness's, the Court, not convinced that her tone, facial expression, and body language comported with her answer, returned to that line of questioning, which ultimately revealed a fixed bias toward the police. Patton, on the other hand, clearly conveyed his ability and willingness to set aside the notion that he *should* be able to trust the police and, accordingly, follow the law in judging credibility.[3]

What the record evidences, then, is that Rega was afforded a constitutionally fair and impartial jury that would consider all the evidence presented and render a true verdict untainted by partiality, prejudice, or bias. That was his right, and that right was protected. The Court, as well as the defendant, can only guess whether he would have received a "better" jury had trial counsel hired an expert jury consultant or made further inquiry of the jurors who heard his case. In the absence of supporting evidence, however, speculation is not enough, because it was Rega's burden to prove that his jury was not fair and impartial, *see Commonwealth v. Tedford*, 960 A.2d 1, 20 (Pa. 2008), and whereas he was tried before a fair and impartial jury, it is of no consequence that trial counsel neglected to hire a jury consultant or ask the questions Rega now maintains should have been asked.

Whereas the defendant's underlying issue again lacks merit, therefore, neither trial nor appellate counsel can be charged as having provided ineffective assistance with regard to the

[3] As was testified at Rega's PCRA hearing, trial counsel were basing their selections on more than the prospective jurors' oral responses; they were also assessing a variety of non-verbal clues. Thus, though they could not recall the particulars of each juror's non-verbal cues nearly eight years after-the-fact, they were certain that the overall picture, whether of Patton, North, or any other juror, informed them that each member would judge their client fairly and impartially. From the record and its own recollection about Patton's and North's demeanors, in particular, therefore, the Court deems trial counsel to have acted reasonably throughout the *voir dire* process.

manner in which they handled the issues surrounding jury selection. Accordingly, Claim III fails for purposes of the Post Conviction Relief Act.

Rega's **Claim IV** raises the question whether his rights were violated as a result of Earl Pontius being seated at counsel table. He specifically claims that his presence had a chilling effect on his communications with counsel and signified his dangerousness to the jury. Neither inference, however, can reasonably be extrapolated from the record.[4]

A deputy sheriff from Elk County, Pontius was brought in because of security concerns, including Rega's apparent indifference to whether others got hurt or died during an escape attempt and potential threats against members of the jury and his own attorneys. (PCRA Hearing Transcript ("PCRA"), 12/15/2009, pp. 138-39, 304; *id.*, 01/19/2010, pp. 86-88, 228-29). (*See also* JST, 06/13/2002, pp. 72-73). It was thus not without cause that Pontius was seated at the defense table throughout the trial. It was also with proper precautions designed to safeguard Rega's presumption of innocence. Pontius reviewed the jury list to make sure he would not be recognized, for instance; dressed in plain clothes; forewent any indicia of official position, such as a badge or visible weapon; and sat beside the defendant, who talked to him throughout the trial. (*Id.*; PCRA, 12/15/2009, p. 142, 304-05; *id.*, 01/19/2010, pp. 90, 229). It was the Court's intention that Pontius would thus appear to be a family member or part of the defense team, (JST, 06/13/2002, p. 74), and except for Rega's speculation, there is nothing to suggest that the jury thought otherwise.

There is also no evidence indicating that Pontius's presence chilled communications between attorneys and client. In front of Rega, Pontius took an oath to be bound by the rules governing attorney/client privilege. (*Id.* at 72-76). Rega noted that he would feel "a lot more comfortable" with that assurance. (*Id.* at 74). Michael English clearly and unequivocally testified, moreover, that Pontius's presence did not chill his and Rega's communications:

> Q. I think I know the answer to this, but I'm going to ask it anyway. Did his presence chill your communications between you and Mr. Rega?
> A. No, it did not.
> Q. Mr. Rega talked freely to you during the trial?

[4] Having not previously been raised, this issue is waived with respect to trial counsels' performance. *See Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998) (eliminating the relaxed waiver doctrine in PCRA appeals). The question of appellate counsels' effectiveness in failing to litigate the underlying issue and trial counsels' similar failure nonetheless remains. That being true of other issues raised in this petition, the Court will forego any further waiver analysis since it must nonetheless address the issues because of Rega's claims regarding appellate counsels' ineffectiveness.

A. Again, I can tell you it did not inhibit me, and I never got any impression that it inhibited Rob. It was one more person for Rob to talk to.
Q. Did Rob appear to enjoy his presence there?
A. Well, he talked to him. I don't think the feeling was reciprocal. He sat there quietly and did his job most of the time.

(PCRA, 12/15/2009, p. 305).

Perhaps most tellingly, before commencing the first day of trial, the Court asked Rega directly, "Do you have any problems with Mr. Pontius?" (TT, 06/14/2002, p. 5). "No," was his unqualified response. (*Id.*). The first time Rega purported to have a problem with Pontius, in fact, was in his affidavit in support of his PCRA petition, and because he elected not to testify at the PCRA hearing, that document is not part of the substantive evidence the Court will consider.

As evidenced by the record, then, the Court did not interfere with Rega's ability to freely communicate with counsel or even vaguely suggest to the jury that he was dangerous by inserting Earl Pontius at counsel table during the trial. Thus, Claim IV's underlying issue lacks merit, and as stated above, appellate counsel cannot be deemed ineffective for failing to litigate a meritless claim.

Rega contends in **Claim V** that he was denied his right a public trial because the courthouse doors were locked during part of it.

"In Pennsylvania, it is *specifically* and constitutionally mandated that courts shall be open. In other words, the public shall not be excluded from trials, the courts shall not be closed." *Commonwealth v. Contakos*, 453 A.2d 578, 580 (Pa. 1982) (emphasis in original). That means that the media and the public must be afforded access to criminal trials, because "[e]xclusion of the public would strike at the essence and meaning of our mandate for an open court, for the public counterbalances what might otherwise become a tyranny of the media, and the public and the media together counterbalance the possible emergence of a corrupt or biased judiciary." *Id* Those words were written after a trial judge excluded members of the public, including the defendant's family, from the courtroom while the Commonwealth's chief witness testified. *Id.* at 579.

In *Contakos*, the courtroom was open and numerous spectators present until right before the Commonwealth's chief witness took the stand on the second day of trial, at which time the prosecutor requested a recess and divulged to the judge his understanding that an attempt might be made on the witness's life. *Id.* at 584 (Roberts, J., concurring). The judge then ordered that

the courtroom be cleared of all but a few members of the media. *Id.* Trial resumed immediately thereafter, and with the spectators conspicuously absent, the jury heard the Commonwealth's chief witness testify about his own and the defendant's involvement in the alleged homicide. *Id.* Full public access was re-established before the next witness testified and throughout the rest of the three-day trial. *Id.*

Contakos was decided against the historical backdrop of William Penn's trial, where the judges, uninhibited by public oversight, made overt and egregious attempts to bully and threaten Penn during his trial and coerce the jury into finding him guilty after the evidence was concluded. *Id.* at 580-81. Having rehearsed, *inter alia*, the supervisory, checks-and-balances function of a public presence at trial, therefore, the Court observed that our assurance of fairness derived in part from the knowledge that our courts were open. *Id.* at 582. "Closed trials," it cautioned, "are the mechanics of tyranny." *Id.* Because the defendant's trial was wholly closed to the public during perhaps the most critical testimony, therefore, thus eliminating the protective layer that public oversight provides, the *Contakos* Court found that the trial court had failed to preserve the defendant's constitutional right to an impartial public trial. *Id.*

The situation in this case is hardly analogous. After the jury recessed for lunch the first day of trial, the Court made the following announcement:

> For those of you who are spectators, I appreciate your quietness. I just want to make this announcement now, we are going to have a Saturday session starting at 8:30. Since the courthouse is generally not open, the doors will only be open until court starts at 8:30 and again for lunch to leave people out and again at one o'clock and then at the end of the day they'll be locked. So if you want to be here, be here from 8:00 to 8:30.

(Trial Transcript ("TT"), 06/14/2002, p. 109). All who had been in attendance, both media staff and lay-spectators, heard the announcement and were free to attend on Saturday. And many did. Indeed, when Commonwealth witness Linda Muster arrived sometime between 8:00 and 9:00 Saturday morning, her entrance into the courthouse was unimpeded. (PCRA, 05/21/2010, pp. 207-12). As she proceeded from the basement entrance to the courtroom on the second floor, gave her testimony, and returned to exit through the door she had entered, moreover, Muster observed "people moving around all over the place." (*Id.* at 212-14).

Of course the Court cannot say for certain that others may not have watched part of the proceedings had they been free to arrive at any point during the day. Rega, on the other hand, cannot say that anyone else would have. He did not present any witnesses who claimed to have been denied access to his trial, and of those witnesses who did testify about this issue, none could say for certain whether the doors were or were not locked for much of Saturday; they could only attest to the general courthouse practices at that time.

What the Court can determine from the record, however, is that those in attendance Friday understood that they were welcome Saturday provided they arrived during the specified times. More pertinently, enough people did attend on Saturday to protect the interests inherent to a defendant's right to a public trial. *See Commonwealth v. Berrigan*, 502 A.2d 226, 232 (Pa. 1985) ("The right to a public trial, as guaranteed in our state and federal constitutions, serves two purposes. An accused cannot be subject to a star chamber proceeding and the public is assured that standards of fairness are being observed").[5]

Because the fundamental protections afforded by the right to a public trial were not violated when the courthouse closed during Rega's trial, therefore, counsel were not ineffective for failing to raise the issue.

In **Claim VI**, Rega posits that his rights were violated due to his attorneys' actual and perceived conflicts of interest at the time of the trial, including Attorney English's former representation of a Commonwealth witness, counsels' agreement to having Earl Pontius sit at the defense table, and counsels' participation in the search of his jail cell.

Commonwealth v. Small, 980 A.2d 549 (Pa. 2009), articulates the appropriate legal standard when considering a conflict claim not first raised at trial, saying that it cannot function as a source of relief absent a showing of actual prejudice resulting from the conflict. *Id.* at 563. Actual prejudice occurs, says the Court, "only if a defendant shows counsel actively represented conflicting interests and the actual conflict adversely

[5] *Commonwealth v. Murray*, 502 A.2d 624 (Pa. Super. 1985), does not help Rega, either, because even though the defendant's preliminary hearing, held at SCI Holmesburg, was perhaps technically opened to the public, the Court deemed it to be a closed hearing due to the fact that the public was not aware of it and may not have been granted admittance in any event. *Id.* at 625-26. The situation in *Murray* was thus akin to that in *Contakos*. In the latter, the public was excluded by order of court, and in the former, the public was excluded by virtue of its ignorance resulting from the court's decision to hold the hearing at the prison. As discussed above, however, the public was not actually excluded in this case.

affected counsel's performance." *Id.* That did not occur under any of Rega's proposed conflict scenarios.

1. After Lea Ann Smader testified the second day of trial, Attorney English requested a sidebar to discuss a matter he had just realized:

> THE COURT: Now, what issue do you have with the last witness?
> MR. ENGLISH: I don't think this means anything. I hope it doesn't, but I think I should tell everybody. It just came to me at the end as she was walking out, I believe I represented her in something. I believe I represented Miss Gillen in a criminal matter, and I am not sure if it was this county or Clarion County or what it is. It is not – I remember the name sort of, but I sort of put it together right at the end. Was she ever charged with a crime?
> MR. BURKETT: I think you did. It was just some bad checks that she got an ARD for.
> MR. ENGLISH: It was something real minor. I don't know that it is really an issue.
> MR. BURKETT: I think she even mentioned it to me months ago.
> MR. ENGLISH: It doesn't have anything to do with this case or any confidentiality issue.
> THE COURT: As far as I am concerned from what I heard, the most that could have happened is you represented her on bad checks
> MR. BURKETT: You don't have any particular knowledge about it?
> MR. ENGLISH: I just thought – I just don't know if we should ask her about it. I just want to put it out there.
> THE COURT: I don't think there is any need to ask her. You didn't ask her anything about the case. Nothing came out about it. I appreciate you coming forward. Now everybody is reporting everything to the Court. I don't have any problem with that. I don't see any legal problem, not just from what I know of the law or conflicts. There is nothing I can see. Did you tell Rob for any reason?
> MR. ENGLISH: I haven't told him that yet.
> THE COURT: He has left anyway. I don't think it is a problem. If you want to disclose it it is probably better that you do it now.
> MR. ENGLISH: To him, yeah. I don't even recall what it was for.
> THE COURT: All right.

(TT, 06/15/2002, pp. 132-33).

The Court can conclude from that exchange alone that Attorney English was not operating under a conflict of interest when he cross-examined the witness. He did not even remember until she was leaving the witness stand that he may have represented her. And even then, he did not recall the substance of the representation until reminded by the district attorney. Thus, his decision to ask her some questions and not others could not have been motivated by the representation and any continuing obligation he may have felt to a former client. English was

entirely credible, therefore, when he testified, "I can tell you that the fact that I previously represented Lea Ann Gillen Schmader to Mr. Rega's trial in no way influenced my conduct of Mr. Rega's defense." (PCRA, 12/15/2009, p. 151). He confirmed, moreover, that he would not have asked different questions or otherwise taken a different approach had she never been his client. (*Id.* at 305-06).[6]

In the end, therefore, even were the Court to analyze English's former representation and conclude that he was indeed functioning under a conflict of interest when he cross-examined Lea Ann Smader, it would be of no moment since Rega was not prejudiced as a result, which also means that he was not prejudiced by appellate counsels' failure to raise the issue.

2. As for the contention that "[t]rial counsel's agreement to [Earl Pontius' placement at counsel table] created a conflict because trial counsel put their own unfounded concerns about safety above their duty to their client," Def's. Am. Petition, p. 84, Rega gives the Court no reason to believe that the situation amounted to a conflict or in any way affected trail counsels' duty to zealously advocate on his behalf. English testified, in fact, that Pontius' presence did not inhibit his representation of his client. (PCRA, 12/15/2009, p. 305). Attorney Elliott likewise testified that it did not affect his work or the defense. (*Id.*, 01/19/2010, p. 87).

Despite his current argument, the record lacks any indication that Rega understood Pontius' placement as a sign that his attorneys did not trust him. In fact, there is no evidence to indicate that he even knew why Pontius was there except that the Court had ordered it. Trial counsel knew, of course, as did the district attorney. (*Id.* at 86; *id.*, 12/15/2009, pp. 138-39). Rega was not introduced to Pontius, however, until after the Court had already informed counsel of his role and the seating arrangement. (*See* JST, 06/13/2002, pp. 72-73). Rega thus did not hear the references from which he may have derived the impression that his attorneys were concerned for their safety. Instead, all he knew, according to the record, was that Pontius would be sitting at counsel table dressed in plain clothes "because there is a lot of stress and pressure, just in case you would get stressed out." (*Id.* at 73-74). He was then informed that Pontius would take an oath to protect confidentiality. (*Id.* at 74-75). No reference was made, however, to specific concerns for counsels' safety. Nor can one infer from the record Rega's awareness that

[6] Rega suggests that English should have and would have questioned Schmader about her theft charges but for the alleged conflict. That he chose not to, however, is not proof that a conflict of interest compromised his advocacy on Rega's behalf. Cross-examining a witness about her criminal conduct is but one avenue of impeachment, and as the trial transcript demonstrates, English's goal during Smader's cross-examination was to discredit her by showing that she was generally biased against Rega and toward his co-defendant, Shawn Bair. (*See* TT, 06/15/2002, pp. 117-20).

his attorneys had assented to Pontius being there, and having elected not to testify at his PCRA hearing, the defendant did not offer any evidence from which the Court might draw a different conclusion.

3. Nor does the record support the notion that Rega lost confidence in his attorneys after the Court conscripted English to participate in the search of his client's cell. The search occurred the night before trial began, and before proceedings commenced the next day, the Court made the search a matter of record. (TT, 06/14/2002, pp. 4-5). Before the *in camera* session concluded, and in Rega's presence, Attorney English spoke up: "Your Honor, I would like to make it clear for purposes of the record, the activities last night at the jail was a specific direction and Order of the Court." (*Id.* at 5-6). The Court acknowledged that English had not agreed to the situation. (*Id.*). It thus would have been fanciful for Rega to have interpreted his attorney's compliance as an act of disloyalty. The Court would also note that Rega, never reticent to make his opinion known, did not object or express any concern about his attorneys' loyalty either then or throughout trial. Nor did he testify to that impression at his PCRA hearing.

In any event, the body of law addressing attorney conflicts seeks to guarantee that defendants will not be harmed by less-than-zealous advocacy stemming from their attorneys' knowledge of or involvement with other matters that would or could conflict with their current clients' interests. Such a conflict simply does not exist where, as here, the attorney accedes to a court's directive and, at the first opportunity, clarifies on the record that his compliance was not voluntary.

In the end, therefore, the defendant would not have prevailed had he raised these alleged conflicts earlier. Accordingly, former counsel were not ineffective for not addressing them.

In **Claims VII-IX**, Rega argues that his rights were violated and a new trial warranted because of the Commonwealth's alleged *Brady* violations. Specifically, he contends that the Commonwealth suppressed evidence of plea negotiations with Susan Jones, Shawn Bair, Raymond Fishel, and Michael Sharp, as well as evidence that Jones suffered from memory problems and that she and Sharp had additional criminal charges not related to the homicide; that it further violated his rights by eliciting false and misleading testimony, which the district attorney then emphasized during his closing argument; and that the cumulative effect of the violations deprived him of his right to a fair trial.

As for the Commonwealth's failure to disclose the existence of Jones's and Sharp's other cases, the same was not a *Brady* violation. Those cases were open and of public record long before Rega's trial. Accordingly, Rega had as much access to them as did the Commonwealth, and as stated in *Commonwealth v. Spotz*, 896 A.2d 1191 (Pa. 2006), "It is well established that 'no *Brady* violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence'" (quoting *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003)).

Because the Commonwealth neither promised nor fostered the expectation of leniency, moreover, it had nothing to disclose in that regard. Additionally, because any such expectations were promoted by other sources and would not have been within the district attorney's knowledge, the Commonwealth cannot be charged with eliciting or capitalizing on false or misleading testimony.

The clear picture that emerged from the testimony of Fred Hummel, John Ingros, Matthew Taladay, Timothy Morris, and David Inzana was that District Attorney Jeffrey Burkett did not deviate in this case from his established policy that plea deals would be neither offered nor negotiated for co-defendants wishing to cooperate in a fellow co-defendant's prosecution until after the latter's charges had been resolved. That is not to say that Jones, Bair, Fishel, and Sharp were not hoping for leniency, perhaps even expecting it in some cases. It means, though, that the Commonwealth had no *Brady* obligation pertinent to those hopes and expectations.

Representing Sharp and Stan Jones, respectively, Taladay and Inzana retained the clearest memories of Rega's co-defendant representations, and both testified unequivocally that Burkett did not offer pleas or negotiate their clients' cases prior to Rega's trial. (PCRA, 12/14/2009, pp. 137-38, 140-45, 217, 223-24). Having practiced criminal law in Jefferson County, however, Taladay and Inzana believed independent of any discussions with Burkett that it was in their clients' best interests to cooperate, knowing that they could only hope for favorable consideration should that occur. (*Id.* at 141-44, 221-222). Burkett, though, said nothing more than that should Sharp and Stan Jones testify, he would consider their cooperation when it came time to assemble a plea deal, and the attorneys conveyed that to their clients. (*Id.* at 137, 159, 218, 222). In both instances, the attorneys' advice to cooperate and testify against Rega stemmed from their understanding of their clients' potential liability, not from any promises or suggestions coming from the Commonwealth. (*See generally id.* at 131-68, 203-28).

Morris also testified with certainty that plea negotiations surrounding Susan Jones's cases did not commence until 2003, (*id.* at 193-95), while no offer was made until 2004. (*Id.* at 192). Though uncertain regarding many of the details of the representation, of that Morris was sure, answering the suggestion that informal offers may have preceded Burkett's formal offer by stating, "I guess he only makes one kind of offer. Here is the offer, take it or leave it pretty much." (*Id.* at 200).

As for Jones's understanding that she would receive probation, the record does not support the proposition that the Commonwealth was responsible for her belief. According to Jones, Morris emerged from an early criminal conference with the news that they had a "possible verbal agreement" for probation if she testified against Rega. (*Id.*, 12/17,2009, pp. 139-141). She quickly noted, however, that Morris in fact did not say a whole lot, but that she got the impression from the way he talked that probation was a real possibility. (*Id.* at 142). The Court knows from Morris's testimony, however—testimony that coincided with Taladay and Inzana's statements regarding Burkett's policy—that Burkett was not negotiating Jones's cases at that point in time. The Court can reasonably conclude, therefore, that Morris's indication of a "possible verbal agreement" developed from his own hopes and expectations rather than from an actual discussion with Burkett.

Ingros and Hummel's testimony was likewise consistent with the conclusion that the Commonwealth was not negotiating their client's cases before Rega's trials, both testifying that Burkett did not negotiate or make deals prior to the relevant co-defendant testifying. (*Id*, 12/14/2009, pp. 27, 41-42; *id.*, 01/21/2010, pp. 125-26). According to Ingros, while he obviously wanted as much leniency as possible for his client, Burkett never indicated ahead of time what Bair would get for his cooperation, only that it would "probably" be taken into account. (*Id.*, 12/14/2009, pp. 25-27). Hummel, moreover, repeatedly reminded Shawn Bair that no deals would be made prior to his testimony, also reminding him that consideration was all he could ask for later in exchange for his full and honest cooperation. (*Id.* at 118, 134-35).

The "realm of possibility" conference was not the smoking gun Rega supposed it to be, either. Ingros outlined the conference scenario in his direct testimony:

> Mr. Hummel and I, I believe, prior to that had been kicking around some ideas for what we had hoped to get out of this case based on what we perceived to be Shawn's very minimal role in this along with his absence of any criminal history, his guilt, just seemed like all the intangibles were working for him and at

> the conclusion of the conference – it was toward the end because I believe Mr. Hummel and I left as that discussion trailed off, but I had said I was thinking somewhere five to 15, five to 20 and I believe I through [sic] burglary, maybe theft, you know some other charges in there somewhere along the criminal homicide. I said this is what we were hoping for I might have said is there any chance of that happening and/or something along those lines. Mr. Burkett may have said it is not outside the realm of possibility. I took that as a good sign. It is better than a hell no. So I felt if we were not on the same page we were close to being on the same or at least in the same ballpark. Although, he didn't tell me what we would be getting, nothing was promised, I just took that to mean when he didn't reject that offhand that I wasn't far off base that he was thinking along the lines that I was.

(*Id.*, 12/14/2009, pp. 35-36).[7] Ingros left the conference with the impression that "maybe we were all on the same page." (*Id.* at 70). He recognized that Burkett's response was noncommittal, though, (*id.* at 74), and was merely assuming from his non-rejection of the proposal that such a deal was possible. (*Id.* at 71, 116-20).

As he left the conference, Hummel also understood that Burkett's response was noncommittal and did not represent a deal "of any kind." (*Id.*, 01/21/2010, pp. 111-13, 125-27). (*See generally id.* at 100-42; *id.*, 12/14/2009, pp. 16-131). Ingros nonetheless conveyed the exchange to Bair's stepfather, thereby intimating that a sentence of 5-15 or 20 years was a real possibility. (*Id.* at 35-36). Though Ingros did not recall also relaying the "realm of possibility" exchange to Bair, (*id.* at 36-37), it appears from the record that Bair became aware of it at some time prior to Rega's trial, as well.

Among the attorneys representing Rega's co-defendants, Mark Wheeler was the only one to claim that he and Burkett had entered into a "gentleman's agreement," i.e., a plea deal, prior to Rega's trial. Specifically, he testified that Burkett told him that his client, Raymond Fishel, would get leniency if he testified, including that his homicide charges would be dropped. (*Id.*, 12/15/2009, pp. 14-15, 23-24). His testimony, however, was wholly incredible.

As was quickly evident from his testimony and demeanor, Wheeler's animosity toward Burkett overrode his sense of propriety and professionalism, and the Court cannot but believe that his feelings colored his perceptions and testimony. The Court also had to question his commitment to the truth, as well as to his ethical obligations, when he testified on cross-

[7] Given the disparities between Ingros and Hummel's renditions of the "realm of possibility" exchange, the Court is not hereby finding that Ingros' recollection was accurate. It is nonetheless useful to repeat Ingros' version for purposes of this opinion to demonstrate why, even if it were assumed to be wholly accurate, the conversation falls far short of indicating the existence of a formal or informal plea offer.

examination about his failure to correct the record when his client allegedly lied during Rega's trial. (*See id.* at 34-40). Most glaringly, though, in attempting to bolster his testimony about the alleged "gentleman's agreement," Wheeler directly contradicted his colleagues. Responding to Burkett's question concerning Wheeler's statement that the district attorney said he would drop the homicide charges against Fishel, for instance, Wheeler replied, "It wasn't only me; it was all the other co-defendants as well. I talked to the other attorneys. We were all disappointed." (*Id.* at 34). The other attorneys, however, stated unequivocally that no pre-trial deals or promises had been made. Wheeler insisted, moreover, that all the co-defendants were promised leniency, specifically claiming that "Matt Taladay would not have his client testify if he was not going to get something for it." (*Id.* at 42). Once again, however the other co-defendants' attorneys, including Taladay, said otherwise. Furthermore, Taladay had testified the previous day that his advice to Stan Jones was based on the fact that Jones had already implicated himself in the Gateway Lodge incident and cooperation was his best chance of getting anything better than a life sentence. (*Id.*, 12/14/2009, pp. 141-44).

Additionally, assuming Wheeler was trying to testify truthfully on December 15, 2009, the Court nonetheless deems him not to have been credible. Whether because of his health problems or for some other reason, Wheeler's memory was significantly impaired. By his own testimony, he had difficulty remembering his own children's birthdays. He also could not recall the penalty for second-degree murder. Furthermore, he claimed to remember conversations with the co-defendants' attorneys that, according to their testimony, never occurred. That being the case, the Court does not believe that Wheeler's recollection of his conversation with Burkett even remotely approximated whatever exchange the two may have had, especially when that recollection contradicted Ingros, Hummel, Taladay, and Inzana.

The Court does not believe, therefore, that Burkett departed from his established policy generally, or from the position he had taken with each of the other co-defendants, when dealing with Raymond Fishel's cases. Rather, without encouragement from the Commonwealth, Wheeler took it upon himself to promise his client a plea that did not include homicide and a sentence not in excess of 20 years. (*See id.*, 12/14/2009, pp. 233-35 (Fishel's testimony regarding Wheeler's representations to that effect)). Wheeler was apparently not adverse to making

unfounded promises, either, as when he guaranteed his client that he would not get convicted of murder if he went to trial. (*See id.* at 244).[8]

To the extent that any of Rega's co-defendants believed they would receive leniency in exchange for their cooperation, then, that expectation stemmed from their attorneys' ill-advised statements or their own subjective ideas of what their cooperation would get them. Bair, for instance, may well have believed that he would ultimately receive a sentence not to exceed 20 years in exchange for his testimony. If so, however, it was because Attorney Ingros had indiscreetly relayed the "realm of possibility" conversation even though he fully understood that Burkett would not in fact negotiate Bair's cases until after he testified. Fishel, too, may have believed that he would not be pleading to homicide and would spend no more than 20 years in prison. He only could have believed that, however, because Attorney Wheeler misrepresented reality. Likewise with Susan Jones: if at some point in time she was fully expecting to receive a probation sentence, it was because of something her attorney said or that she errantly inferred. In none of the cases, though, did the Commonwealth foster the notion that any of them would receive any level of leniency, let alone a specific deal, in exchange for their cooperation.[9] Rather, Burkett conveyed nothing more than that he would "probably" take any cooperation into account when later considering plea deals.

Having not fostered any expectations of leniency, the Commonwealth also did not elicit false testimony or misrepresent the facts at trial. When Burkett questioned Rega's co-defendants and gave his closing argument, he was not privy to their private thoughts or their discussions with defense counsel. He knew, though, that he had never promised or suggested any degree of clemency. When Bair, Sharp, Fishel, and Susan Jones testified that they were not expecting special treatment because of their testimony, therefore, Burkett had no reason to correct them. Entitled to fairly comment on the evidence adduced at trial, moreover, it was appropriate for him to reiterate during his closing statements testimony whose veracity he had no reason to doubt. *See Commonwealth v. Rush*, 646 A.2d 557, 563 (Pa. 1994) ("It is well established that a

[8] Considering Wheeler's testimony, the Court easily believes that Wheeler misrepresented to his client that Burkett was unofficially guaranteeing a sentence not in excess of 20 years. Fishel's animosity toward Burkett being obvious, however, and given his inability to remember the details of the incident, which surely would have been a significant event to him had it actually occurred, the Court gives no credit to his statement that Burkett told him he only wanted Rega and did not care who had actually shot the victim. (*See id.*, 12/14/2009, pp. 235-37, 254-56).

[9] The Court need not comment about Michael Sharp's expectation of leniency. He did not appear to testify at the PCRA hearing. Nor did his attorney say anything even suggesting that his client expected leniency because of something the Commonwealth said or did.

prosecutor, in his closing argument, can comment on the evidence introduced at trial as well as the legitimate inferences arising therefrom").

The co-defendants' sentencing transcripts do not provide persuasive evidence of a *Brady* violation, either. As it noted when orally responding to Rega's renewed recusal motion, the Court expects as a general matter that defendants who accept plea deals know why the district attorney ultimately gave them consideration. (PCRA, 12/14/2009, pp. 10-11). That does not mean the Court knows why in any given case. More importantly, though, it does not mean the defendants in this case knew ahead of time that or why the Commonwealth was extending mercy. The transcripts indicate only that Rega's co-defendants ultimately received consideration, and under the circumstances, it may be fair to assume that they received it at least in part because of their cooperation through Rega's trial(s).[10] Given the facts to the contrary, however, it would not be reasonable to conclude from what was said at their sentencing hearings that the Commonwealth had indicated before trial that or why they were getting better deals than the charges alone warranted.[11]

The only *Brady* material the Commonwealth failed to disclose, therefore, was evidence of Susan Jones's memory impairment, which included her statements to Corporal Louis Davis and her letter to Burkett. While that evidence—particularly the letter—should have been divulged pursuant to the Commonwealth's continuing discovery obligations, however, that it was withheld does not amount to cause for a new trial.

As reflected in our Supreme Court's recent pronouncement on the *Brady* issue, "the Supreme Court [of the United States] concluded that 'impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule,' and held that, regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Commonwealth v. Weiss*, 986 A.2d 808, 814-15 (Pa.

[10] That is not a foregone conclusion, though, because the sentence Stan Jones ultimately received was comparable to Fishel's and Bair's. Yet in the end, the Commonwealth had elected not to solicit Jones's testimony because of a letter he had written indicating that he, not Rega, was the shooter.

[11] Notably, there is no evidence that Rega's co-defendants fabricated their testimony based on their expectations, either. Rather, Susan Jones testified that she did not lie during her testimony, (PCRA, 12/17/2009), and even though Fishel claimed to have perjured himself when he testified that he was not expecting leniency, he admitted at the PCRA hearing that the substance of his testimony about what had occurred at the Gateway Lodge was truthful. (*Id.*, 12/14/2009, pp. 256-59). Whereas that testimony occurred several years after Rega's conviction, when his co-defendants had no reason to lie about what occurred the night of the homicide, the Court is also not concerned that they conspired to lie about Rega's guilt in the first place.

2009) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In this context, though, the standard is not equivalent to the "reasonable likelihood" criterion applicable to ineffective assistance of counsel claims. Rather,

> [i]n determining whether a reasonable probability of a different outcome has been demonstrated, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitely*, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is shown when the government's suppression of evidence "undermines confidence in the outcome of the trial." *Bagley*, *supra* at 678. The United States Supreme Court has made clear that *Bagley*'s materiality standard is not a sufficiency of the evidence test. *Kyles*, *supra* at 434. A *Brady* violation is established "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, *supra* at 435. Importantly, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *Commonwealth v. McGill*, 832 A.2d 1014, 1019 (Pa. 2003) (emphasis added). "[I]n order to be entitled to a new trial for failure to disclose evidence affecting a witness'[s] credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence." *Commonwealth v. Johnson*, 727 A.2d 1089, 1094 (Pa. 1999). In assessing the significance of the evidence withheld, a reviewing court must bear in mind that not every item of the prosecution's case would necessarily have been directly undercut had the *Brady* evidence been disclosed. *Kyles*, *supra* at 451.

Weiss, 986 A.2d at 815.

Regardless of Jones's memory problems, the record indicates that her trial testimony was an accurate rendition of what occurred. It was, in fact, materially consistent with a written statement she had authored on June 20, 2001. (*See* PCRA, 12/17/2009, pp. 194-97). That document reflected her actual memory of events that day. (*Id.* at 195-96). Though she had also been interviewed by the police and asked questions to jog her memory, what she ultimately told them, and what she finally testified to at trial, came from her own recollection. (*Id.*at 154-55). Even had Susan Jones been the only co-defendant testifying against Rega, therefore, the Court could not reasonably conclude that the Commonwealth's failure to apprise the defense of her memory problems undermined confidence in the verdict.

Hers was not the only testimony, though. The jury also heard from Stan Jones, Raymond Fishel, and Shawn Bair, all of whom admitted to being part of the Gateway Lodge incident and

all of whom clearly implicated Rega as the shooter. Certainly that was not all the evidence of Rega's guilt, either, which included evidence about the gun and ammunition used in the shooting, Rega's knowledge of the Gateway Lodge and the employees' schedules and habits, his large expenditures in the days immediately following the homicide, and his own damaging interviews with then Trooper Davis. Even had the jurors known that Susan Jones at times struggled with her memory, therefore, it is highly improbable that they would have disregarded her averments as the products of a compromised memory.

Because the only actual *Brady* violation in this case was relatively minor and could not have affected the verdict, therefore, Claims VII, VIII, and IX also are not grounds for PCRA relief.

Returning to his ineffective assistance claims, Rega posits in **Claim X** that trial counsel were ineffective for failing to call a crime scene reconstruction expert to rebut Dr. Eric Vey's testimony about the relative positions of the victim and shooter and the Commonwealth's suggestion that he was shot "execution-style". As with his other ineffectiveness claims, he also claims that appellate counsel were ineffective for failing to raise or adequately litigate trial counsels' alleged ineffectiveness.

Trial counsel were well aware that they could have hired a medical doctor or crime scene reconstructionist to rebut Dr. Vey's testimony but made a strategic and reasonable decision not to. Rega had insisted that he was not even at the Gateway Lodge when the victim was shot and wanted nothing less than a full acquittal. Accordingly, trial counsel developed a strategy designed to convince the jury not only that Rega was not the killer, but that he was not even present when the murder occurred. They were thus unconcerned with where the actors were located or how they were situated, because if their client was not there, it made no difference where the actual shooter stood. They proposed instead to discredit the Commonwealth's witnesses, particularly Rega's co-defendants, to essentially show that the Commonwealth's entire case was founded on lies perpetuated by the co-defendants. (*See generally id.*, 12/15/2009, pp. 105-13; *id.*, 01/19/2010, pp. 53-57, 223-25).

Trial counsel further reasoned that rebutting Dr. Vey with other experts would be inconsistent with their innocence defense, suggesting to the jury that Rega actually was at the Gateway Lodge. In the words of Michael English,

> It didn't seem to me – I mean, that wasn't the gravamen of our defense. You know, we weren't there to argue whether he was sitting or standing, anything like that. It sounds like you're in the room or you might have been in the room, or you're looking for some reason to explain why you were there or it didn't go down that way. I mean, this was an all or nothing Hail Mary pass all the way. We just weren't there; we didn't have anything to do with it. That was the case.

(*Id.*, 12/15/2009, p. 106). Ronald Elliott expressed a similar sentiment:

> Our defense was Mr. Rega wasn't there, he wasn't there and involved in the killing so it is almost an inconsistent position to suggest to the jury, please find my client not guilty, but if you think that he did it don't find that he did it a certain way. Our strategy was to seek an acquittal.

(*Id.*, 01/19/2010, pp. 53-54).

The Court agrees that trial counsel employed a reasonable strategy designed to effectuate Rega's interests in that regard. Whatever limited impeachment value a rebuttal expert's testimony may have had very well could have been outweighed by the implicit and inconsistent suggestion that the defendant was indeed at the crime scene. That is especially true since neither Dr. Vey nor any of Rega's co-defendants even came close to pinpointing how shooter and victim were positioned at the relevant time, thereby attenuating any exculpatory effect it could have had to inform the jury that the shooter did not "execute" his victim. Trial counsel recognized the potential pitfalls of calling an expert and decided not to dilute their "Rega was never there" defense strategy. That was a reasonable strategic decision, and for that reason, Claim X fails with respect to all counsel.

Rega states in **Claim XI** that trial counsel were ineffective for failing to investigate, develop, and present a diminished capacity defense. The issue lacks merit.

Trial counsel did not pursue a diminished capacity or any similar defense because Rega immediately and repeatedly foreclosed the possibility of any defense other than factual innocence, and "'[a] defense of diminished capacity is only available to a defendant who admits criminal liability but contests the degree of guilt.'" *Commonwealth v. Spotz*, 896 A.2d 1191, 1218 (Pa. 2006) (quoting *Commonwealth v. Laird*, 726 A.2d 346, 353 (Pa. 1999)).

Rega conveyed to his attorneys that he was innocent, and that was precisely what he wanted them to convey to the jury. Any defense that would have merely mitigated his involvement was simply not an option to Rega. (*See generally id.* at 58-62, 225-26; *id.*, 12/15/2009, pp. 102-05, 113-17, 292-93), and when asked why he did not have in-depth

discussions with Rega about the benefits of a diminished capacity defense, Attorney English summarized his client's attitude and mindset this way:

> Well, we discussed – I mean, I'm not – we discussed options.
>
> . . .
>
> And whenever we would discuss anything like insanity defense or diminished capacity defense, Rob frankly would get very animated and insistent and upset with us. Because, to him, it seemed like that meant we didn't believe him; that we were trying to sell him out, lack of a better way to put it. This was, "I didn't do this". He was adamant from the very, very beginning and to the point of not even – I mean, you just couldn't get very far with these discussions.

(*Id.* at 116).

The Court would also note that even had trial counsel wanted to pursue a diminished capacity defense against their client's express wishes, they could not have successfully done so without competent evidence that Rega in fact suffered from a diminished capacity at the time of the murder, and Rega was not about to cooperate in helping them to acquire such evidence. Attorney English made that clear when discussing why he and Attorney Elliott did not pursue a psychological mitigation defense.

> Q. If there was a way to present evidence about Mr. Rega's mental health that would not constitute an admission of guilt, would you have had a reason not to pursue that?
> A. He wouldn't have been a part of that. I can say that. Just not something that he wanted to participate in.
> Q. When you say "he would not participate", what do you mean?
> A. Well, he wasn't going to be examined. We would have to do it not only without his cooperation, but against his will. He directed us not to do those things.
> Q. An examination?
> A. An examination or any defense in any phase that was based on his status, mental status, he was against.
>
> . . .
>
> Q. Did you explain to him the different roles that a psychologist –
> A. There was no different roles for him. He wasn't going to any shrinks, period. That's the way it was. I mean, I understand what you're saying, and we discussed that this is different than the guilt phase and that there were different issues, involved, but he was not – that was just a nonstarter.

(*Id.* at 234-35, 238).

Where it was Rega's express directive and desire that trial counsel not pursue a diminished capacity defense, then, they can hardly be deemed ineffective for failing to advance

that theory, especially when not doing so was consistent with their overall strategy to prove that their client was factually innocent of the alleged crimes. Appellate counsel, moreover, was again not ineffective for not pursuing a meritless claim.

Rega contends in **Claim XII** that trial counsel were ineffective for failing to object or comment on what he characterizes as the Commonwealth's false promises during its guilt phase opening and evidence mischaracterization in its guilt phase closing.

The first related opening "promises" to which Rega refers were comments District Attorney Jeffrey Burkett made about testimony the jury could expect to hear from Shawn Bair and Dr. Eric Vey but that ultimately did not materialize. Excerpting the statements at issue, Rega quotes from the trial transcript:

> One of the things [Dr. Vey] will testify to is that the shooting of Christopher Lauth is consistent with somebody being on their knees, because of the angle of entry of the bullet. And there were three that went into his body.
>
> . . .
>
> Robert Rega said that he had killed the night watchman. Shawn Bair will tell you the way he described it to him. He told him to say his last prayer, and then he shot him.

Def's. Am. Petition, pp. 172-73 (quoting TT, 06/14/2002, pp. 33-34). Those statements, he claims, were intended to inflame the jury, and because the prosecutor surely had prepared both witnesses ahead of time, he asserts, "[t]he only conclusion possible is that the prosecutor went over the line in an effort to make Mr. Rega appear to the jury as a cold-blooded killer." *Id.* at 174. The record tells a different story.

Throughout his opening statement, Burkett consistently made references to what the jury would hear, what the witnesses would say, what the Commonwealth would prove, etc. So it was relative to Bair and Dr. Vey. Burkett had begun a few pages earlier telling the jury about Bair's involvement in the Gateway Lodge incident and how he anticipated Bair would testify. "I'm going to tell you their involvement," he started. (TT, 06/14/2002, p. 30). "Shawn Bair said we went there that night and he'll tell you that he was the reluctant one at first." (*Id.* at 30). He then continued to convey Bair's rendition of events, reminding the jury as he went that he was only relating Bair's story. (*See id.* at 30-33). As he neared the end of that portion of his narrative, Burkett stated,

> In some point in time, Stanford Jones and Ray Fishel came out with the safe and put it in the car. *And then he [Bair] will tell you* that at some point after

> that, he heard gun fire, and Robert Rega exited Gateway Lodge, got into the car, and took off.
>
> Robert Rega said that he had killed the night watchman. *Shawn Bair will tell you the way he described it to him.* He told him to say his last prayer, and then he shot him.

(*Id.* at 32-33) (emphasis added).

At that point, Burkett interrupted his rendition of Bair's account to describe related and corroborative testimony he believed would be forthcoming from another witness:

> Now, this also will jive with other testimony. You are going to hear the testimony probably today of a forensic pathologist. He does autopsies. They determine the cause of death. They determine the manner of death and the injuries sustained. His name is Dr. Eric Vey. He's going to explain to you the injuries and explain to you what he conducted [sic] from those injuries.
>
> One of the things he will testify to is that the shooting of Christopher Lauth is consistent with somebody being on their knees, because of the angle of entry of the bullet. And there were three that went into his body.

(*Id.* at 33-34). Immediately thereafter, Burkett finished outlining Bair's upcoming testimony. (*Id.* at 34).

As the testimony unfolded, neither witness confirmed those allegedly false promises. That does not mean, however, that their utterance either prejudiced the defendant or denied him due process of law.

Opening statements are not evidence; their purpose is simply to apprise the jury of the case's background, how it will develop, and what the parties intend to prove. *Commonwealth v. Parker*, 919 A.2d 943, 950 (Pa. 2007). The prosecutor's statements, which may not be purposefully inflammatory, may refer to facts he *reasonably believes* will be established at trial, i.e., evidence he actually plans to produce. The prosecutor need not conclusively prove all the statements made during his opening, as long as he has a good faith and reasonable basis to believe that a certain fact will be established. *Commonwealth v. Pursell*, 724 A.2d 293, 309 (Pa. 1999). "Even if an opening statement is somehow improper," moreover, "relief will be granted only where the unavoidable effect is so to prejudice the finders of fact as to render them incapable of objective judgment." *Id. See also Commonwealth v. Begley*, 780 A.2d 605, 626 (Pa. 2001) (saying that the prosecutor's improper remarks must have formed a "fixed bias" in the jurors' minds that impeded their ability to objectively weigh the evidence and render a true verdict).

With respect to Bair's unfulfilled testimony, the record clearly reveals that Burkett's opening statement was entirely permissible, as it flowed from his good faith and reasonable belief that Bair would testify accordingly.

On the final day of Rega's PCRA hearing, the following exchange occurred between Burkett and Corporal Louis Davis, the lead investigator in this case:

> Q. Did Mr. Bair talk to you about saying a last – about Mr. Rega saying that he told Mr. Loft [sic] to say his last prayer?
> A. Yes, he told me that.
> Q. And is that, in fact, found in these interviews?
> A. Yes.
>
> MR. BURKETT: Your Honor, can I approach here?
> THE COURT: Sure
>
> BY MR. BURKETT:
>
> Q. I'm showing you now the transcript of the January 9th, 2001, interview with Shawn Bair, and I'm asking you to take a look. And is there any reference on that page to that say a last prayer statement?
> A. Yes.
> Q. And what is the specific statement made by Shawn Bair there?
> A. Yeah. He was awake as far as I know – this is Shawn Bair talking. Yeah, he was awake as far as I know. He said he didn't want to die. He told him – unintelligible – was – told him he could have a last prayer. After he gave him his last prayer, he shot him.
> Q. And then in your January 11th interview on the transcript at page 15, did Shawn Bair reiterate a statement about the last prayer?
> A. Yes.
> Q. What did he say specifically?
> A. He says, you know, Rob said he gave him his last prayers, and that was it. And then he shot him.

(PCRA, 05/21/2010, pp. 110-11). From the evidence adduced at trial and the PCRA hearing, it is clear that Burkett fully expected that Bair would repeat that information at trial. Having presented no evidence to support his assumption to the contrary, Rega can only speculate that Burkett "prepared" Bair to testify and knew he would not produce the last prayer testimony. And in fact, one can reasonably infer that Burkett was specifically trying to elicit that statement when he asked, "Mr. Bair, I think I forgot to ask you something. Can you tell the jury if there was any talk in the car about what happened inside the lodge on the way back to the trailer?"

While the record does not explicitly disclose the rationale for Burkett's comments about Dr. Vey's corroboration, the Court can nonetheless deduce from the trial transcript that the district attorney anticipated that testimony, as well. As he had with Bair, Burkett asked Dr. Vey

a question obviously intended to extract a statement consistent with his opening comments: "Now, tell me this, Dr. Vey, the path in the trajectory of entry of this bullet wound, is that consist[ent] with someone on their knees with their head bent slightly forward being shot?" (TT, 06/14/2002, p. 125). Burkett abandoned the question after Attorney English objected that it called for speculation and was beyond the scope of testimony, and thus Dr. Vey did not answer it. As Dr. Vey continued, however, Burkett again attempted, albeit unsuccessfully, to link the anatomical findings with Bair's interview testimony that the victim was on his knees. (*See id.* at 127-28). One can reasonably assume, then, that he thought the link could and would be made.

That Dr. Vey did not confirm the Commonwealth's opening statement on that point did not necessarily mean Burkett had no reasonable basis for the averment. Rather, he was still anticipating Bair's testimony not only when he made the statement, but also when he questioned Dr. Vey. Moreover, having read the autopsy report, Burkett may have envisioned and interpreted Dr. Vey's findings about the deadly bullet as consistent with Bair's statements and thus expected the doctor to testify accordingly.

Even assuming, *arguendo*, that Burkett did not have a good faith or reasonable basis for the statement about Dr. Vey's testimony, Rega did not suffer prejudice, because regardless of Burkett's pre-summary of the expert's testimony, Dr. Vey confirmed that he could not determine the position of the victim's body when the gunshot wounds were inflicted. (*Id.* at 142-43). Additionally, the Court instructed the jury that the speeches of counsel were not evidence and should only provide guidance, if at all, to the extent they were supported by the evidence and helped the jurors apply their own reason and common sense. (*Id.*, 06/20/2002, pp. 228-29).

Nor was the jury impermissibly tainted by the statements, "Now, very recently we have come into possession of information that shows clearly that Robert Rega was conspiring with his mother to try to reach a possible prospective juror .... We are going to show you he entered a conspiracy with his own mother about approaching a possible juror." *See* Def's. Am. Petition, p.174-75 (quoting TT, 06/14/2002, p. 46, 51).

At the outset of trial, the Court briefly enumerated the specific offenses with which Rega was charged. (*Id.* at 7). Conspiracy to tamper with jurors was not among them. The Court later instructed the jury on the elements of each offense charged, (*id.*, 06/20/2002), and conspiracy to tamper with jurors was again not included. No such charge appeared on the verdict slip, either. Furthermore, commensurate with the Commonwealth's stated purpose for utilizing the jury

tampering evidence, the Court also instructed the jurors three times that they could only consider the evidence for the limited purpose of deciding whether it suggested consciousness of guilt. (*Id.* at 229-31; *id.*, 06/19/2002, pp. 140-41, 147-48). From the record, therefore, there is no reasonable basis to conclude that two sentences referring to an uncharged conspiracy—a word that people commonly employ in everyday speech without referring to a criminal act—misled the jury to believe that Rega was guilty of an additional unproven offense.

In the next segment of Claim XII, the defendant challenges the following statement, made during the Commonwealth's closing argument:

> They told you at the beginning of this case that there would be no physical evidence linking Robert Rega to the scene. They told you that. What about the metal shavings from the safe? That safe is pretty connected to that scene, isn't it? That's what they took out of the Gateway Lodge that night. Metal shavings. The metal shavings, just like Susan Jones told you. Just like Susan Jones told you.

Def's. Am. Petition, p. 175 (quoting TT, 06/20/2002, p. 201). According to Rega, there was no evidence linking the metal shavings exhibited at trial to the stolen safe, thus making Burkett's statement a mischaracterization of such magnitude that the defendant was denied due process. *Id.* at 175-76. The record and the law disagree.

Shawn Bair, Ray Fishel, and Stan Jones were all at the Gateway Lodge the night of the homicide. Each placed Rega at the scene. Bair and Fishel also talked about a safe the group had heisted and described carrying it directly into Rega's computer room and using a grinder to open it after returning to his trailer. (*Id.*, 06/18/2002, pp. 155-59; *id.*, 06/19/2002, pp. 14-20). Susan Jones, who was at the trailer when they returned, confirmed that testimony. (*Id.*, 06/15/2002, pp. 180-82). She also identified the vacuum cleaner she had used to sweep the shavings from the carpet, (*id.* at 189-90), which was one of the vacuum cleaners later seized from the trailer and which contained metal shavings. (*Id.*, 06/17/2002, pp. 172-73). Metal shavings were also detected in a carpet sample removed from the computer room. (*Id.*).

As the trial transcripts disclose, therefore, Burkett's closing comments were entirely appropriate, as they were reasonable deductions derived from the evidence the jury had seen and heard. It was thus not prosecutorial misconduct for Burkett to make them or ineffective assistance of counsel for trial counsel not to object to them.

In the end, then, Burkett did not mischaracterize evidence in his closing and did not falsely promise to prove that Rega was guilty of the criminal act of conspiring to tamper with the

jury. Of the three, therefore, the only point trial counsel reasonably could have raised to attack the overall credibility of the Commonwealth's case was its failure to elicit two specific statements, one from Shawn Bair and one from Dr. Eric Vey. The omission, however, did not amount to ineffectiveness. Considering the overwhelming evidence of Rega's guilt, and especially when Bair and Dr. Vey's testimony were substantially as outlined by the Commonwealth, the Court has no doubt that the jurors would not have been swayed to not guilty verdicts had it been brought to their attention that the witnesses had not testified precisely as Burkett had predicted on one particular point.

In a related claim, **Claim XXIV**, the defendant challenges counsels' effective for failing to raise what he characterizes as "improper prosecutorial argument in the guilt stage closing argument, which was designed to deny petitioner a fair trial."[12]

Rega takes exception to the following statement by Burkett:

> Oh, one other point, **I don't want to skip this**. Susan Jones points the finger at Robert Rega, too. Isn't that interesting. You know what? Susan Jones wasn't even at the Gateway Lodge that night. **Susan Jones is not guilty of second degree murder. She's not even close to being guilty of second degree murder.** Her involvement in the Gateway Lodge homicide was simply that she was at home baby-sitting Robert Rega's kids.

Def's. Supp. Am. Petition, p. 5 (emphasis in original)(quoting TT, 06/20/2002, p. 184). According to Rega, Jones was in fact guilty of second-degree murder as an accomplice and Burkett's argument to the contrary undermined the defense since it tended to bolster Jones's credibility as a disinterested witness with nothing to gain. *Id.* at 5-8.

It is unnecessary to determine whether Jones could have been prosecuted for second degree murder for two reasons: first, assuming Burkett's statements were legally inaccurate, the Court's instructions, together with Jones's testimony, disabused the jury of any misconception it may have had about the witness's potential culpability; and second, the statements did not prejudice the defendant.

The jurors heard Jones's testimony and were perfectly aware of the specifics of her involvement the night of the homicide. They knew she had stayed at Rega's trailer and babysat his children, had helped to sober Raymond Fishel, and had later shared the proceeds from the safe. They further knew from her testimony that while she did not expect anyone to get hurt, she

[12] Not appearing in the original amended petition, this issue was raised in a Supplement and Amendment to Amended Petition, filed May 19, 2009. For purposes of congruity, the Court will address it here.

knew the group was going out to rob the Gateway Lodge. The jury was thus aware as a factual matter that Susan Jones was not just an innocent bystander in the events of that night, and the Court subsequently dispelled any notion that she was innocent as a legal matter.

In its final charge, the Court issued a general instruction on accomplice liability and how one could be found guilty as an accomplice. (*Id.* at 231-32). It then identified Susan Jones as an accomplice "in the crimes charged" and cautioned the jurors that they should, as a result, treat her testimony differently than they would a truly disinterested witness. (*Id.* at 233-34). The jury likewise heard the Court's second-degree murder instruction, and specifically that an accomplice could be found guilty of second-degree murder. (*See id.* at 288-92). Understanding that Jones had plied Fishel with coffee and watched Rega's daughters so that he and the other co-defendants could rob the Gateway Lodge, therefore, the jury also understood that Burkett's statements were not entirely accurate.[13] Considering Jones's testimony and the Court's final charge, therefore, it is wholly unlikely that Burkett's comments led twelve jurors to conclude that Susan Jones's testimony was credible precisely because she bore no criminal liability for the events of December 21, 2000, particularly for second-degree murder.

Additionally, even assuming the jury did believe Burkett's statements, and further assuming that it would have discredited Jones's testimony but for those statements, the Court is not persuaded that an acquittal would have followed, because there was ample evidence of Rega's guilt besides Jones's testimony. The jury also heard Bair and Fishel testify not only about Rega's involvement in the Gateway Lodge incident, but also their own. Likewise with Stan Jones, who testified as a defense witness.[14] And Burkett never claimed that they were not liable for second-degree murder or any of the other crimes with which Rega was charged. He thus gave the jury no reason to believe that they were disinterested witnesses who should be afforded credibility on that basis. Yet the jury apparently accepted their testimony.

Furthermore, the jury was made privy to the details of Rega's interview with Trooper Davis, as well as the evidence of jury/witness tampering.

With so much other evidence of the defendant's guilt, therefore, the fact that Burkett may have improperly bolstered Susan Jones's testimony, even were the underlying issue meritorious,

[13] And thus the Court instructs juries, as it did here, that the arguments of counsel are not evidence, are designed to present the evidence as favorable to their respective clients, and should only affect their decisions insofar as they are supported by the evidence. (TT, 06/20/2002, p. 228).

[14] Though he did not detail his involvement in the same manner Bair and Fishel had on direct, Jones fully acknowledged his participation in the events in question. (*See id.* at 5-45).

could not reasonably be said to have prejudiced him such that the jury would have acquitted him had the suggestion of Jones's innocence of second-degree murder not been made. He was thus not prejudiced by trial counsels' failure to object or appellate counsels' failure to litigate the issue on appeal.

Claim XIII, wherein Rega asserts that trial counsel were ineffective for failing to discover and use additional impeachment evidence against key Commonwealth witnesses, is also unavailing.

Although failure to impeach the Commonwealth's sole and otherwise unimpeached eyewitness with his extensive prior criminal history has been deemed to be ineffective, *Commonwealth v. Grove*, 324 A.2d 405 (Pa. Super. 1974), our courts have declined to make the same finding when introduction of the convictions for impeachment purposes would have been merely cumulative. *Commonwealth v. Davis*, 526 A.2d 1205 (Pa. Super. 1987), *appeal denied*, 541 A.2d 1135 (Pa. 1988). In this case, the suggested impeachment evidence, which included Susan Jones's memory problems, her and Ray Fishel's drug use, and her, Fishel's, Shawn Bair's, and Michael Sharp's other open criminal cases, would have been merely cumulative.

Attorney Elliott cross-examined Susan Jones extensively, focusing primarily on the multiple lies she had told and the versions of events she had given since the Gateway Lodge investigation had begun. He even suggested that because of her many lies, she could not actually remember what was true at the time she testified, specifically identifying points on which her stories differed and obtaining her admission that she did not in fact remember all of the stories she had told. (*See generally* TT, 06/15/2002, pp. 214-45, 250-51). Additionally, although Jones testified that she had not been charged with theft-related crimes as a result of the Gateway Lodge incident, the jury was well aware of her factual involvement with the events surrounding the homicide.

The jury was likewise aware of Bair's and Fishel's participation in the incident and knew that both had been charged because of it; that both had lied to the police, Bair repeatedly;[15] that their trial testimony was not entirely consistent with earlier statements they had made but did not admit were lies; that Fishel drank a lot and was intoxicated the night of the murder; and, although trial counsel did not specifically focus on it, that Fishel was a marijuana supplier and had some in

[15] Bair plainly admitted, in fact, that he would sometimes lie when it was in his best interests, that he was hoping the Commonwealth would look favorably on him because of his testimony, and that he was testifying to try to save his own skin. (*Id.* at 172-73, 218).

his possession when he was arrested. (*Id.*, 06/18/2002, pp.172-212; *id.*, 06/19/2002, pp. 28-50, 56).

By the time Jones, Bair, and Fishel stepped down from the witness stand, therefore, the jurors understood that they were unsavory characters not averse to lying to the authorities or engaging in other criminal acts. They nonetheless decided to believe the co-defendants' direct testimony about Rega's actions on the night in question. Additional knowledge of their criminal activity or learning that Jones suffered from occasional memory problems would not have likely changed that outcome, especially when the witnesses' testimony was consistent in all material respects.

Nor would Rega likely have benefited had trial counsel impeached Michael Sharp with his outstanding criminal charges. Sharp's testimony was brief. He added only that Rega had asked him to provide an alibi for December 21, 2000. (*Id.*, 06/15/2002, pp. 252-60). In the process, he informed the jury not only that he had lied in giving that false alibi, but also that he was charged with a crime and had spent time in jail because of it. (*Id.* at 260-61). By the time Attorney Elliott began cross-examination, therefore, Sharp had already given the jury reason to doubt his credibility. As with Jones, Bair, and Fishel, therefore, delving further into the witness's pending criminal charges would have been merely cumulative.

The potentially prejudicial effect of not cross-examining Sharp about his other charges, moreover, was further mitigated by the fact that Sharp contributed little to the case. Other witnesses—witnesses the jury obviously found to be credible—identified Rega as the Gateway Lodge shooter and testified about the money he had received out of the safe. Other witnesses also detailed several of the purchases the defendant made in the days following the murder, including the acquisition of Christmas gifts for his daughters. Additionally, the Commonwealth presented more than Sharp's testimony to suggest consciousness of guilt, including the alleged jury tampering scheme and the substance of Rega's interviews with Corporal (then Trooper) Louis Davis. When taken in context, therefore, even had the jury been completely unaware of any criminal conduct, Sharp's testimony can hardly be deemed to have been so damaging as to warrant the conclusion that the jury likely would have found Rega not guilty had they disregarded the witness's testimony.

In **Claim XIV**, the defendant faults trial counsel for not objecting to the Court's charge on accomplice liability, contending that it relieved the Commonwealth of its burden to prove that

he possessed a specific intent to kill. The underlying issue lacks merit, however, and thus does not provide grounds for PCRA relief.

"[W]hen reviewing *Huffman*-type challenges," our Supreme Court recently said, "courts must follow the well-settled requirement that the challenged jury charge is to be examined in its entirety. Such an examination includes reviewing the charge to determine whether the jury was adequately apprised of the elements of first-degree murder and the related concept of specific intent to kill." *Commonwealth v. Daniels*, 963 A.2d 409, 430 (Pa. 2009). If such a review reveals that the trial judge properly instructed the jury on the requisite elements of first-degree murder and accomplice liability, generally, an isolated charge, though improperly worded and potentially conveying an incorrect legal standard, will not be grounds for granting a new trial. *Id.* at 430-31, *relying on*, *Commonwealth v. Speight*, 854 A.2d 450 (Pa. 2004).

Applying *Daniels*, the Court concludes that its instructions were not legally deficient.

Charging the jury on the general rules of accomplice liability, the Court instructed,

> Liability for the conduct of an accomplice: You have heard testimony about the accomplices in this case. You may find the defendant guilty of a crime without finding that he personally engaged in the conduct required for commission of that crime or even that he was personally present when the crime was committed. 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 or facilitating the commission of a crime* he solicits, commands, encourages or requests the other person to commit it or aid, agrees to aid or attempts to aid the other person in planning or committing it. You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it. It does not matter whether the person you believe committed the crime has not been prosecuted or convicted.

(TT, 06/20/2002, pp. 231-32)(emphasis added). The Court later defined first-, second-, and third-degree homicide, observing at the outset that first-degree murder required a specific intent to kill. (*Id.* at 242). The Court then defined first-degree murder specifically:

> First degree murder is murder in which the killer has a specific intent to kill. You may find the defendant guilty of first degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt: First, that Christopher Lauth is dead; second that the defendant killed him; and third, that the defendant did so with the specific intent to kill and with malice. *A person has the specific intent to kill if he has fully formed the intent to kill and is*

> *conscious of his own intention.* As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is killing with malice provided that it is also without circumstances reducing the killing to any other degrees or any lawful justification or excuse. *Stated differently, a killing is with specific intent to kill if it is willful, deliberate and premeditated.* The specific intent to kill includes the premeditation needed for first degree murder does not require planning or previous thought for any particular length of time. It can occur quickly. *All that is necessary is there be enough time so that the defendant can and does fully form an intent to kill and is conscious of that intention.*

(*Id.* at 244-45)(emphasis added).

Even standing alone, the accomplice liability charge apprised the jurors that Rega had to intend to promote or facilitate the commission of a crime before accomplice liability could attach. In application, then, the jury was told that it could not find him guilty of first-degree homicide on an accomplice liability theory unless it found that he actually intended to promote or facilitate the homicide. That charge was not given in isolation, however. Rather, the jurors were also instructed on the specific intent element of first-degree homicide and what specific intent entailed. Commensurate with *Daniels*, therefore, the charge in its entirety correctly stated the law and did not permit the jury to conclude that Rega was guilty of first-degree murder without first having developed specific intent to kill.

Because the charge itself was not erroneous, trial counsel were not ineffective for failing to challenge it, *see Daniels*, 963 A.2d at 432, and because trial counsel were not ineffective for failing to challenge the instruction in the first place, appellate counsel were not ineffective for failing to litigate the claim on direct appeal.[16]

Rega argues in **Claim XV** that his rights were violated when the Commonwealth used non-violent burglary and trespass convictions to prove the 42 Pa.C.S.A. § 9711(d)(9) aggravator and that counsel were ineffective for failing to object.

The defendant recognizes our Supreme Court's definition of burglary as a *per se* crime of violence, thereby implicitly recognizing that it was not error as a matter of Pennsylvania law either for the Commonwealth to introduce his burglary convictions for purposes of proving

[16] The Court would also refer to its discussion of Claim XVII. Here it responded directly to the defendant's *Huffman* challenge via reference to case law addressing those challenges and an exigesis of why the overall charge, even if errant with respect to the accomplice liability portion, did not permit the jury to convict Rega of first-degree murder without finding that he bore the specific intent to kill. In fact, though, it appears that no *Huffman* issue actually exists, because as the Court will explain below, the charge did not give the jury the option of applying accomplice liability to its verdict on first degree murder.

(d)(9) or for trial counsel not to object to their introduction. He challenges the Supreme Court's precedent as constitutionally unsound and out of step with United States Supreme Court precedent, however, contending that appellate counsel should have raised the issue on direct appeal.

Because this challenge, though raised in the initial petition, is in fact directed to a legal history propounded by our Supreme Court, therefore, and not to a specific error committed at the trial court level, this Court will defer discussion of the issue to our high court should Rega elect to raise the issue on appeal.[17]

Rega's next issue, **Claim XVI**, is likewise best addressed in the first instance by our Supreme Court. Here he challenges subsection (d)(9) as void for vagueness while acknowledging the Supreme Court's rejection of similar vagueness challenges. Def's. Am. Petition, p. 222. He claims that the Court's analysis is flawed, however, and that the statutory provision must be deemed unconstitutionally vague under federal law. As with the previous issue, therefore, this Court shall decline response and allow the Supreme Court to further clarify its earlier decisions, if necessary.

The defendant asserts in **Claim XVII** that he was denied due process, reliable sentencing, and the effective assistance of counsel because the Commonwealth made allegedly improper comments during its penalty phase closing argument without comment or objection from trial counsel.

At a capital sentencing hearing, a prosecutor's closing remarks do not constitute reversible error unless their unavoidable effect was to prejudice the jury so that it could not objectively weigh the evidence and render a true verdict. *Commonwealth v. Smith*, 985 A.2d 886, 907 (Pa. 2009). That standard applies in capital and non-capital cases alike. In capital cases, in fact, the prosecutor enjoys wide latitude in employing oratorical flair and impassioned argument at the penalty hearing, as the defendant no longer enjoys the presumption of innocence. *Commonwealth v. Williams*, 896 A.2d 523, 545 (Pa. 2006).

With that standard in mind, the Court concludes that none of the prosecutor's challenged remarks constituted reversible error. Thus, trial counsel were not ineffective for failing to object or comment at trial, and appellate counsel were not ineffective for failing to litigate the claim.

[17] The Court would suggest that this and the next issue are waived in any event. Neither is raised in terms of ineffective assistance of counsel, and yet neither was raised at an earlier stage of this litigation.

1. In discussing the (d)(6) aggravator at the sentencing hearing, District Attorney Burkett provided the statutory definition, apprised the jury that Pennsylvania law defined burglary and criminal trespass as crimes of violence by their very nature, and reminded the panel that Rega had twelve prior burglary convictions. Eleven, he noted, were non-residential. He then argued,

> Now, you have heard a significant prior history of the defendant, a significant prior history. He was not rehabilitated after committing those crimes. I didn't cross examine any of the defendant's witnesses. I feel for them, too. But you heard various testimony saying he is a good person, he's a good person. Ladies and gentlemen, you heard the convictions. He has not been rehabilitated. It is that simple. He has a significant history. He has a significant history.

(Sentencing Transcript ("ST"), 06/21/2002, pp. 107-08). Rega claims that was an impermissible argument for future dangerousness. Not only is that a fanciful interpretation, however, but the law does not absolutely preclude references to future dangerousness at a capital sentencing hearing.

As Burkett noted, certain defense witnesses at the penalty hearing had attempted to characterize Rega as a good person, and the district attorney was asking the jurors to consider his prior criminal history and discount that characterization. He wanted them to conclude with him that the defendant had not reformed and become a good person subsequent to his multiple felony convictions and that, therefore, his prior record did indeed function to aggravate the homicide. Considered objectively, that is entirely different than saying that Rega posed a continuing threat to society if allowed to live; it instead suggested that given his felony history and the crime of which the jury had found him guilty only the day before, Rega was not deserving of mercy based on being "a good person"—a characterization, he argued, that did not comport with the evidence.

Even were one to interpret Burkett's remarks as an argument for future dangerousness, though, our Supreme Court has stated that it is not *per se* error for a prosecutor to argue a defendant's future dangerousness. *Commonwealth v. Trivigno*, 750 A.2d 243, 254 (Pa. 2000). Such argument, it noted, should nonetheless be accompanied by an instruction explaining the meaning of life imprisonment. *Id.* A court's failure to issue that instruction upon request, said the Court, does constitute reversible error, *id.* at 254-55, and trial counsel's failure to request a "life means life" instruction in the face of a prosecutor's argument for future dangerousness constitutes ineffective assistance of counsel. *Commonwealth v. Chandler*, 721 A.2d 1040 (Pa. 1998).

In this case, the Court did instruct the jury, right before sending its members out to deliberate, that "if you vote for life imprisonment, life means life imprisonment. There is no possibility of parole, no possibility of good time, no possibility of early release." (ST, 06/21/2002, p. 129). Thus, even had any or all of the jurors inexplicably understood Burkett to be arguing that Rega was a continuing threat to society, they were clearly informed that a sentence of life imprisonment would prevent any further menace just as well as a death verdict.

2. Rega further contends that Burkett diminished the jurors' sense of accountability for its decision to impose the death penalty by implying that he was required to seek the death penalty and that he, not they, was responsible for determining the appropriateness of a death sentence. The defendant bases his argument on the following excerpt:

> When I took office as District Attorney I placed my hand on the Bible and I took an oath to do my job and to do it to the best of my ability. I took an oath and as part of that oath I have the duty to pursue the death penalty when there are aggravating circumstances. I'm not here telling you today that I relish this duty. Sometimes the things that are your duty are not things that are pleasant. We are not here today for a pleasant task. I am not going to try and tell you we are. I know that you all feel the gravity of this, as I do. I know that you do.

Def's. Am. Petition, pp. 226-27 (quoting ST, 06/21/2002, pp. 104-05).

The Court agrees that Burkett's remarks, taken in isolation, could have conveyed the idea not only that he personally believed this homicide entailed aggravating circumstances, but also that he was duty bound to pursue the death penalty as a result. Taken in its entirety, however, his closing argument did not tend to minimize the jury's responsibility for its sentencing decision. (*See id.* at 104-10). The Court's charge, moreover, resolved any doubts the jurors may have had in that regard, reminding them that the arguments of counsel were not evidence, that *they* must decide whether to sentence the defendant to death or life imprisonment, and that *they* had to consider the evidence and determine whether the Commonwealth had proven the aggravating circumstances beyond a reasonable doubt. (*Id.* at 117-23). As a whole, in fact, the charge plainly conveyed to the jurors that they, individually and as a group, were responsible to carefully weigh the evidence and reach an appropriate verdict. (*See id.* at 117-29). Rega thus suffered no prejudice, because even if the jurors inferred from Burkett's beginning remarks that the onus of the sentencing verdict ultimately fell on him, the remainder of his closing and the Court's instructions corrected any such impression.

3. Rega's third challenge to Burkett's closing is to his remark that "you have already found the defendant guilty of felony murder, so that has been established" in support of the (d)(6) aggravator. That statement, he claims, was a misstatement of the law insofar as it allowed the jury to find the aggravator if it concluded that the shooting occurred during the perpetration of a felony without a companion finding that Rega was the actual shooter. He relies on *Commonwealth v. Lassiter*, 722 A.2d 657 (Pa. 1998) (plurality opinion), which held that 42 Pa.C.S.A. § 9711(d)(6) could not be applied to an accomplice who had not "committed" the killing in the sense of bringing it to completion. *Id.* at 662.

Lassiter, though, does not apply here, because the trial record refutes the proposition that the jury may have concluded that Rega was not the actual shooter.

To begin with, the Commonwealth advanced only one theory about the homicide: that Robert Rega shot and killed Christopher Lauth. That was what Burkett proposed in his opening and argued in his closing, and that was the nature of the testimony he elicited from the Commonwealth's witnesses, as well as from defense witness Stanford Jones. Throughout the trial, not once did he suggest that someone else may hove shot the victim and that Rega was acting as an accomplice. Because their theory of the case revolved around their client's absence from the scene, moreover, trial counsel did not actively attempt to identify a different specific shooter.

The charge also did not suggest that the jurors might find the defendant guilty of homicide as an accomplice. After reading the general definition of accomplice liability, as quoted above (Claim XIV), the Court continued to discuss its elements and its application to this case:

> When a Commonwealth witness was so involved in the crime charged that he was an accomplice his testimony has to be judged by special precautionary rules. Experience shows that an accomplice when caught will often try to place blame falsely on someone else. He or she may testify falsely in hope of obtaining favorable treatment or for some corrupt or wicked motive. On the other hand, an accomplice may be a perfectly truthful witness. The special rules I shall give you are meant to help you distinguish between truthful or false accomplice testimony. In view of the evidence of Bair's, Fishel's, Stanford Jones's, Susan Jones's criminal involvement you must regard them as accomplices in the crimes charged and apply special rules to all of their testimony: First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source. Second, you should examine the testimony of an accomplice closely and accept it only with care and caution. Third, you should consider

> whether the testimony of an accomplice is supported in whole or in part by other evidence. Accomplice testimony is more dependable if supported by other evidence. The testimony of an accomplice may not be used to corroborate the testimony of another accomplice; however, even though – even if there is no independent supporting evidence you may still find the defendant guilty solely on the basis of an accomplice's testimony. *If after using the special rules I just told you about you are satisfied beyond a reasonable doubt that the accomplice testified truthfully, the defendant is guilty.* But remember you have to consider each of their testimony separately, the testimony of one accomplice may not be used to corroborate the testimony of another accomplice. So, you have to look at the other evidence.

(TT, 06/20/2002, pp. 233-34) (emphasis added).

At the outset, then, the Court identified the co-defendants as Rega's accomplices, not him as theirs. The only exception was its instruction that the jurors could find Rega guilty of second-degree murder if they found that he and the co-defendants were accomplices in the crime(s) of rubbery or burglary. (*Id.* at 246-49).

Lassiter thus might be relevant had the jury only convicted the defendant of second-degree murder. That was not the case, however; it also found him guilty of first-degree murder—a degree of homicide for which the Court's instruction, commensurate with the Commonwealth's theory and presentation of the case, did not allow a finding of accomplice liability, but required the specific finding that Rega had actually killed the victim. (*See id.* at 244-45).

Because neither the developments at trial nor the Court's instructions, considered as a whole, permitted the jury to convict Rega of first-degree murder as an accomplice, therefore, counsel had no reason to object to or litigate Burkett's observation that "you have already found the defendant guilty of felony murder, so that has been established" and were thus not ineffective for failing to do so.[18]

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[18] Even were the Court to accept the virtually unsupportable proposition that the jury believed that one of the co-defendants was the actual shooter when it found the (d)(6) aggravator, the fact that he was also found guilty of first-degree murder and to have a significant history of felony convictions involving the use or threat of violence means that imposition of the death penalty in this case was not in violation of *Lassiter*. 722 A.2d at 662 ("It is important to note that our holding [that § 9711(d)(6) does not apply to an accomplice who did not "commit" the killing] should not be construed as a categorical prohibition against the Commonwealth's seeking the death penalty for accomplices. If an accomplice is found guilty of first-degree murder, the Commonwealth may still seek the death penalty if it can prove that an aggravated circumstance other than Section 9711(d)(6) applies").

Claim XVIII appears as a continuation of Part 3 of the last claim, asserting that Rega's rights were violated because the sentencing jury improperly found the aggravating circumstance that he committed the murder during the perpetration of a felony. Arguing that the evidence supported the notion that someone else had shot the victim and that the Court errantly neglected to instruct the jurors that they could not aggravate the homicide pursuant to (d)(6) without first finding that he was the shooter, Rega contends that counsel were ineffective for failing to object to or litigate that error on appeal.

In response to the assertions made at pages 231-246 of the Defendant's Amended Petition, the Court would refer to the immediately preceding discussion and would emphasize that only a tortured interpretation of the evidence would allow one to conclude that Rega was found to be only an accomplice to the homicide. Once again, the Commonwealth's unwavering theory of the case, as supported by its own witnesses and Stanford Jones, placed the gun in Rega's hands and did not admit another possibility, and the Court's instructions did not allow the jury to find the defendant guilty of first-degree murder unless it found that he had actually killed the victim.

That does not answer the defendant's contention that the alleged misstatement of law, i.e., that Rega could be guilty as only an accomplice to murder for purposes of the (d)(6), engendered the idea that mere existence of the felony was sufficient in and of itself to warrant finding the (d)(6) aggravator without considering the overall circumstances and weighing the mitigating circumstances conjunctively. The Court will thus address this particular concern, which is lacking in merit.

Whatever impression the Commonwealth's argument may have fostered about whether the (d)(6) aggravator had been proven and was sufficient for imposition of the death penalty, the Court instructed the jury clearly and repeatedly that the Commonwealth had to prove the aggravating circumstances beyond a reasonable doubt, that the defendant could prove mitigating circumstances and needed only to prove them by a preponderance of the evidence, and that the jury then had to weigh the two and decide for itself whether one outweighed the other. (ST, 06/21/2002, pp. 119-28). The Court specifically directed the jurors not to merely count the numbers of aggravating and mitigating circumstances, but to compare their seriousness and importance, (*id.* at 122-23), and that their deliberations should encompass the evidence they had heard at trial. (*Id.* at 129).

The jury was thus properly instructed to consider and weigh the aggravating circumstances as presented by the Commonwealth, including the particulars of the felony or felonies as developed at trial, and the mitigating circumstances as presented by the defense, as well as any mitigators they individually or collectively found from the evidence. It is implausible, therefore, that the jury found that the (d)(6) aggravator existed and warranted death simply because the homicide occurred during the perpetration of a felony and without giving consideration to the circumstances of the felony or the mitigation evidence.

Claim XIX is also without merit. Here Rega claims that the Court erroneously instructed the jurors on the nature and use of mitigating evidence without objection, leaving them with the impression that the circumstances of the offense itself, not the defendant's background, character, and circumstances, was all they could consider. He quotes from the Court's opening remarks at the sentencing hearing:

> Loosely speaking, aggravating circumstances are things about the killing *and killer* which make first degree murder cases more terrible and deserving of the death penalty while mitigating circumstances are those things which makes the case less terrible and less deserving of death.

Def's. Am. Petition, p. 253 (emphasis added)(quoting ST, 06/21/2002, pp. 36-37). Rega ignores the closing instructions, however, where the Court clarified the meaning of mitigating circumstances and what sorts of things the jury should consider:

> In this case under the sentencing code the following matters if proven to your satisfaction by preponder[a]nce of the evidence can be mitigating circumstances. The age of the defendant at the time of the crime and any other mitigating matters *concerning the character and record of the defendant or circumstances of his offense*. In this case under that catchall phrase would be the children and family of the defendant, but that doesn't mean that is the only thing. Any of you who find a mitigating circumstance which I have not laid out can list it.

(*Id.* at 121)(emphasis added). The Court thereby informed the jurors that they could consider as mitigating evidence anything they knew about the defendant himself. They understood, therefore, that what they had just heard the defense witnesses testify about Rega was within their realm of consideration. They apparently concluded, however, that what Joan Rega, Renee Rega, Elizabeth Edwards, Autumn Rega, and Amber Rega said about the defendant did not amount to mitigating evidence. Be that as it may, they nonetheless knew from the Court's instructions that

it could, and the Court thus did not err when it instructed the jury on the nature and use of mitigation evidence. Consequently, counsel were not ineffective for not raising the issue.

Rega then contends in **Claim XX** that his rights were violated when the Court, by incorporating the trial record into the penalty phase, thereby incorporated irrelevant and prejudicial guilt phase evidence, specifically the juror tampering, solicitation of witness perjury, and manner of death evidence. In fact, though, the issue lacks merit under the circumstances.

Commonwealth v. Williams, 896 A.2d 523 (Pa. 2006), also dealt with a challenge to the incorporation of non-statutory guilt phase information into the penalty phase of a defendant's trial. *Id.* at 544. There the evidence in question was evidence of "other crimes." Disagreeing that the incorporation constituted error, the Court noted that the same jury presided over both proceedings and had thus already heard all of the guilt phase evidence. *Id.* The incorporation, it thus concluded, was merely a procedural matter carried out pursuant to 42 Pa.C.S.A. § 9711. *Id.* at 544-45. *Commonwealth v. Wholaver*, 989 A.2d 883, 907 (Pa. 2010), reaffirmed that proposition four years later.

The same situation existed here: the jury receiving the penalty phase evidence had already heard all of the guilt phase testimony and seen all of the guilt phase exhibits. As was the case in *Williams*, therefore, incorporating the guilt phase record was merely a procedural formality that reintroduced some of the evidence necessary to establish the alleged aggravating circumstances. Accordingly, the Court did not err by incorporating the guilt phase record and counsel did not ineffectively represent their client by neglecting to raise the issue.

The Court will not substantively address **Claim XXI**, which was not previously raised and which is a sweeping challenge to Pennsylvania's system of "elected state judicial officers who do not meet constitutional standards of impartiality." It will say, however, that under the United States Constitution, the states retain the right to establish their own courts and decide how judicial positions will be filled. That Rega and certain scholars question the efficacy of a system that elects its judges by popular vote does not mean that defendants do not receive fair trials or impartial appellate review in the Commonwealth, however. Nor has the defendant pled or presented evidence tending to establish that he was denied a fair trial or appellate review due to the fact that this trial judge and our Supreme Court justices were elected.

Rega spent the most time at his PCRA hearing presenting evidence in support of **Claim XXII**, wherein he claims that trial and appellate counsel were ineffective for failing to

adequately investigate, discover, and present readily-available and compelling mitigation evidence.

This claim has already been fully litigated with respect to trial counsels' performance. *See Commonwealth v. Rega*, 933 A.2d 997, 1024-29 (Pa. 2007). Our Supreme Court previously passed on the merits of the claim and determined that trial counsel were not ineffective since Rega waived a more thorough mitigation defense. *Id.* The Supreme Court did not base its opinion on this Court's misstatement about "conversations with" the defendant, either, but made its determination based on a review of the record and this Court's credibility determinations. *Id.* at 1028.[19] While it noted that this Court had based its decision in part on "[its] own off-the-record conversations with [Rega]," *id.* at 1026, therefore, it did not utilize that inaccuracy in rendering its own assessment, but relied solely on the transcribed record and this Court's credibility findings. *See id.* at 1026-28. Consequently, that the Court referenced this Court's "conversations with" Rega does not provide a legitimate basis to revisit the *Rega* findings.

That being said, because this is a capital case, and because the defendant now claims that he never instructed trial counsel not to pursue a mitigation case, the Court will review the claim based on the PCRA record, which reaffirms this Court's and the Supreme Court's earlier determinations.

As they did at the April 2005 hearing on post-sentence motions, Attorneys Michael English and Ronald Elliott, Rega's trial counsel, testified about the course of their representation and, in particular, their strategy with respect to the penalty phase. Their testimony was both independently credible and supported by other evidence.

The Court acknowledges that there existed prior to trial a wealth of information that could have been utilized as mitigation evidence at the penalty hearing. Even without their client's participation, trial counsel could have interviewed family and friends, obtained school, medical, and other institutional records, and consulted experts who could have evaluated those sources and rendered opinions consistent with the § 9711(e)(2) and (e)(3) mitigating circumstances. They likewise could have more fully ascertained the nature and circumstances of the offenses underlying the (d)(9) aggravating circumstance had they obtained copies of the

[19] As it explained at the PCRA hearing, the Court did not actually have any conversations with the defendant about mitigation; it only overheard conversations he had with other people indicating his lack of interest in a mitigation defense and observed his complete disinterest in participating in his own mitigation defense during the penalty phase. As it also said, however, the Court will not incorporate those overheard statements into its PCRA findings. (*See* PCRA, 12/15/2009, pp. 274-80).

records pertinent to their client's earlier convictions. While what they could have done might be relevant in a different case, however, what trial counsel actually did was reasonable, non-prejudicial, and thus not ineffective under the circumstances.

English and Elliott were well aware that mitigation-type evidence was out there and had considered personally investigating or having their private investigator look into what mitigation evidence existed. Though their understanding of their client's history was limited, for instance, they knew he had endured what English described as a "brutal" upbringing and that they could obtain records, talk with people who knew the defendant, and prepare and present a mitigation defense without his help. From the outset, however, Rega had repeatedly instructed them to spend their time and resources working on the guilt phase, not the penalty phase. It made no difference when counsel explained what mitigation meant or what types of information could be presented, either; Rega was adamant that he would not submit to any sort of psychological assessment and that his attorneys were not to investigate his past or inquire into his mental health. (PCRA, 12/15/2009, pp. 195-96, 201-203, 219-20, 234-39, 259-60; *id.*, 01/19/2010, pp. 117, 120-22, 124-25, 148-61; 163-65, 167, 177-78, 187-91, 203-05, 242-43, 253, 264-65).

If indeed Rega's comprehension of the penalty phase and mitigation were incomplete, that was a situation of his own making, as it became apparent from the testimony that English and Elliott had made several attempts to broach the topic of mitigation with their client and were redirected each time to, in effect, forget the penalty phase and invest their energies and resources in the guilt phase. On more than one occasion, in fact, their efforts to discuss mitigation with the defendant were met with expressions of anger and distrust. Well aware of their client's irritation over the limited mitigation discussions they had already initiated, therefore, trial counsel were disinclined to ignore Rega's express wishes to forego a mitigation investigation. (*Id.* at 255-56). Asked whether he believed he had an ethical duty to comply with his client's instructions, moreover, Elliott responded, "Yes. Everything that I saw led me to believe that he knew what he was talking about. He knew what he was asking us to do and we understood it and acted accordingly." (*Id.* at 256).

It was not a matter of the attorneys misinterpreting their client's wishes and him acquiescing to their developed strategy, either. Rather, as English and Elliott testified, Rega had a strong personality, was very involved with his defense, never hesitated to opine about any topic

or what direction the case should go, and always made it clear when he did or did not want them to do something. (*Id.* at 7-8; *id.*, 12/15/2009, p. 55).

Notably, Rega sat at counsels' table not ten feet from Attorney Elliott while he testified at the PCRA hearing. Despite his written assertion that he did not direct his attorneys away from pursuing mitigation, however, he did not take the witness stand to contradict Elliott.

Despite their client's express wishes, though, trial counsel did assemble a brief mitigation defense they believed might be effective. Even that, however, was without Rega's cooperation or approval. According to Elliott, the defendant seemed to be upset that they had even gone as far as they did to introduce personal mitigation evidence. (*See id.* at 230-33).

Clifford Schenkemeyer, one of the attorneys appointed to represent Rega through post-trial motions and direct appeal, shared trial counsels' sentiments about their client's communication style, thus confirming that the defendant would not have been reticent had trial counsels' decision not to pursue mitigation evidence been contrary to his wishes. When asked whether Rega was involved in deciding what claims to raise in post-sentence motions, for instance, Schenkemeyer responded, "I believe he wanted to take on the role of chief counsel." (*Id.*, 05/22/2010, p. 36).[20] He also agreed that the defendant was one to make his feelings known about what issues should be raised, (*id.*), and noted that it was Rega who, despite appellate counsel's contrary preference and advice, insisted that his ineffectiveness issues be raised on direct appeal. (*Id.*, 05/21/2010, pp. 46-47). When asked whether he and Rega had discussed contacting psychologists and psychiatrists he had met with as a child, moreover, Schenkemeyer responded in part, "Rob [Rega] controls the situation or seeks to control the situation." (*Id.* at 17). He thus reinforced the impression that Rega expressed his ideas and opinions forcefully and without reservation—a perception further bolstered by the defendant's numerous motions and letters to the Court, as well as his letters to Attorney Schenkemeyer. *See e.g.,* Defendant's Exhibits 109-16, 123-25, 127.[21]

The Court also cannot ignore the pre-PCRA record on this point. On numerous occasions both pre-trial and post-trial, Rega was present when legal issues were being discussed and readily voiced his thoughts and opinions on the topics at issue. One can glean from those on-the-

[20] The date, mismarked on the transcript, was actually May 21, 2010. Because the record consists of a second transcript from the same date, however, one correctly marked "May 21, 2010," the Court will continue to reference it as "05/22/2010."

[21] These are but a sampling of the letters and motions the defendant drafted on his own behalf. Additional filings appear throughout the record.

record interactions that the defendant was not a man who would stay silent when he wanted something or shy away from conflict, and one can thus infer that trial counsel did not simply misunderstand their client about whether to present or even investigate mitigation evidence.

Schenkemeyer's testimony also corroborated trial counsels' averments that Rega directed them not to pursue mitigation.[22]

Although he had by then been convicted of first-degree murder and sentenced to death, Rega began his relationship with Schenkemeyer by continuing to refuse his attempts to delve into the defendant's past or mental status, (*id.* at 17, 42-45), and while he did eventually consent to and cooperate with obtaining mitigation evidence based on his social history, he persisted in refusing to allow his attorneys to explore his mental health. (*Id.* at 42-45). It was not that Schenkemeyer had failed to explain the difference between having a mental health expert for the guilt phase versus having one for the penalty phase, either; Rega simply was not interested. (*Id.* at 16).

Rega's cooperation with respect to his life history, moreover, was far from immediate. There was a time when he was pointedly telling Schenkemeyer not to seek any records pertaining to his life history, (*id.*, 05/22/2010, pp. 133-34), and would not even discuss the matter further. (*Id.*, 05/21/2010, p. 17 ("I know that when I talked to him about getting the records in person, I mean, he just virtually closed the door to it the same way he did with [private investigator] Jim Ellis")). From his letters to Schenkemeyer, in fact, the first of which was dated April 2003, it appears that Rega only began divulging historical information several months after the attorney's appointment. And not until a few months later did he begin actively investigating his own past before finally acquiescing to his attorney's requests for records. *See* Defendant's Exhibit 110.

As the post-sentence motions hearing was approaching, however, the defendant's cooperation ceased. The reason: Schenkemeyer was not focusing on the guilt phase the way he wanted.

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[22] Attorney Robbie Taylor, Rega's other appellate attorney, also testified, and though he was able to confirm that Rega had insisted on raising the ineffectiveness issues during direct appeal, his testimony was of little value overall. As he testified, Schenkemeyer was the one directing the appeal and the one who communicated with Rega, and Taylor generally just did what Schenkemeyer told him to do. *(See generally* PCRA, 01/21/2010, pp. 142-236). Unlike Schenkemeyer, therefore, Taylor could not confirm or disconfirm Rega's stance relative to a psychological or any other mitigation defense.

Although Schenkemeyer's fortitude and persistence finally resulted in a degree of cooperation toward preparing the mitigation defense he felt should have been presented in June 2002, Rega's true aspiration never shifted from exoneration at the guilt phase. He thus spent a lot of time soliciting Schenkemeyer to pursue guilt phase issues. (*Id.* at 41).[23] Moreover, his own motions and inquiries to the Court pertained almost exclusively to guilt phase issues. So intent was he on getting a new guilt phase trial, in fact, that when Schenkemeyer visited him in prison in February 2005 and tried to explain why he thought it best not to hire a pathologist, Rega dismissed him and had no further contact until the Sheriff's Department transported him to the courthouse for the post-sentence motions hearing. (*Id.* at 53-54; *id.*, 05/22/2010, pp. 128-29, 134-35).

Toward the end of March, though Schenkemeyer had not had any further contact with his client directly, Jim Ellis conveyed to the attorney Rega's "outrage" that resources were being diverted from guilt phase to penalty phase concerns, as well as his refusal to sign any further releases to assist with mitigation. Defendant's Exhibit 133. Approximately a month before that, Rega, too, had written a letter—this one to the Court—expressing anger that funds had been granted to hire a psychologist while his request for funds to hire a pathologist had been denied. Defendant's Exhibit 125. He therein characterized a psychologist as one "who would in part, make concessions, and justify the degree of Guilt which I have unequivocally denied," observing that "One who is innocent, does not Mitigate why he did not commit the act," and stating unambiguously that he would never speak to a psychologist. *Id.* ("[A]nd finally on February 23, 2005 you again granted $3000.00 dollars to hire a Psychologist, which [sic] whom I would never speak to . . .").

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[23] Q. Okay. Now, obviously, Attorney Schenkemeyer, you represented Rob in a different capacity in that he had already been found guilty –
A. Right.
Q. – of first degree murder and other offenses. And now you're looking at it from the other end of the spectrum; is that correct?
(cont . . .)
A. Yes.
Q. And despite that fact, Rob still – did Rob still spend a lot of time imploring you to seek pursuing issues that dealt with a new trial for his guilt phase?
A. Yes.
Q. Would you say that Rob's primary interest with you was to receive a new trial in the guilt phase rather than worrying about mitigation issues as much? Which was one his greater concern?
A. I'd have to say to some extent we're talking about the context in which it was made. However, his concern was new trial and new guilt phase.
(PCRA, 05/21/2010, p. 41).

Attorneys English and Elliott's assertions were further corroborated by two of Rega's PCRA mitigation experts, both of whom were meeting with the defendant six years after he had been convicted of first degree murder and sentenced to death. Specifically, even after spending nearly fifty hours talking face-to-face with Schenkemeyer and seeing firsthand how mitigation evidence could be used at a penalty phase hearing, Rega continued to focus on questions of guilt or innocence when criminal defense investigator Stacie Brown went to see him in 2008, preferring that she work on those issues. (PCRA, 01/21/2010, pp. 27-28). Only after again explaining the purpose and importance of mitigation and assuring him that others were assigned to work on the guilt phase issues did she finally get him to agree that she could go and look for the information she wanted to find, and only after she returned and showed him what she had discovered did he actually become receptive to what she was doing. (*Id.* at 27-28, 54, 65, 68-70). Further evidencing his obsession with the guilt phase, moreover, Rega stated during a subsequent interview with Jonathan H. Mack, Psy.D., "I just want to be exonerated or kill me." Defendant Exhibit 89, p. 27).

Whereas the guilt phase was his focus and position six years after trial, then, the Court can readily imagine the certainty and insistence with which the defendant would have directed trial counsel to filter all their resources into developing issues that could guarantee him an acquittal in the first place.

The record is thus replete with evidence supporting trial counsels' testimony, and the Court explicitly finds, that from the start of their representation, the defendant had specifically directed English and Elliott to focus all their efforts on obtaining an acquittal and leave penalty phase investigation and preparation alone.[24] That being the case, Rega cannot succeed upon his claim that counsel were ineffective in handling all penalty phase issues, because the law will not force an unwilling defendant to pursue a mitigation defense or demand that trial counsel overrule his decision. Accordingly, his reliance on *Rompilla v. Beard*, 545 A.2d 374 (2005), is misplaced,

[24] Defendant's Exhibit 45 does not diminish the strength of the evidence supporting that finding. As of May 7, 2002, Rega was apparently considering some type of mitigation defense. As Elliott testified, however, that was not their last conversation about the issue. (PCRA, 12/15/2002, pp. 248-49). Schenkemeyer, moreover, when explaining the apparent disparity between Rega's refusals to cooperate and his actual cooperation, testified, "Something I – I concluded after reading the trial transcript and listening to the tapes and several meetings in person with Rob, he doesn't mind making inconsistent statements, one to one person, one to another. I found a lot of inconsistency in the things that [he] said, whether that's because of mood or whatever" (*Id.*, 05/21/2010, pp. 17-18). That he was once entertaining the possibility of a mitigation defense thus does not substantiate his claim, particularly in the face of so much countervailing evidence.

because *Rompilla* involved a defendant who, though not active in helping to prepare his mitigation defense, nonetheless wanted one.

Schriro v. Landrigan, 550 U.S. 465 (2007), on the other hand, addressed trial counsels' performance in failing to investigate or present a mitigation defense when their client affirmatively did not want one. There, counsel attempted to have the defendant's ex-wife and birth mother testify at the penalty hearing, but both declined pursuant to the defendant's request. *Id.* at 468. When the court asked why the witnesses had declined to testify, counsel explained that his client wanted it that way. *Id.* Upon being questioned by the sentencing judge, the defendant confirmed his attorney's assertion, and after further limited proceedings, the judge sentenced the defendant to death. *Id.* at 468-70. The defendant later filed an unsuccessful PCRA petition asserting that trial counsel was ineffective for not pursuing additional mitigation evidence. *Id.* at 471. The federal district court subsequently denied the defendant an evidentiary hearing on the same *habeas corpus* claim.

Sitting *en banc*, the Ninth Circuit Court of Appeals reversed, finding that counsel had failed to conduct a search that would have revealed a wealth of mitigation evidence. *Id.* at 472. The Ninth Circuit also deemed the PCRA court's determination that the defendant had refused to permit counsel to present any mitigation evidence to be an unreasonable determination of the facts, concluding that when the defendant stated that he did not want his attorney to present any mitigation evidence, he was referring only to the testimony counsel was prepared to present on the date of the defendant's sentencing hearing. *Id.* Also concluding that trial counsel's decision not to even conduct an adequate investigation into mitigation evidence was unacceptable, the Ninth Circuit remanded the case for an evidentiary hearing. *Id.* at 472-73.

The United States Supreme Court reversed.

Acknowledging *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court observed that neither case addressed a situation wherein the defendant had interfered with counsel's efforts to present mitigation evidence. *Schriro*, 550 U.S. at 477. Distinguishing *Rompilla*, moreover, the Court noted that although that defendant did not assist in developing a mitigation defense, he never informed the court that he did not want mitigation evidence presented. *Id.* at 478. "In short," said the Court, "at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not

establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence." *Id.*

Additionally, the *Schriro* Court criticized the Ninth Circuit for imposing an "informed and knowing" requirement on a defendant's decision not to present mitigation evidence, the Ninth Circuit having concluded that the trial court's dialogue with the defendant said little about his understanding of the consequences of his decision. *Id.* at 478-79. *Schriro* responded, "We have never imposed an "informed and knowing" requirement upon a defendant's decision not to introduce evidence." *Id.*at 479.

In finding that defense counsel had no *Strickland* obligation to investigate or present a mitigation defense that his client had rejected, *Schriro*, in effect, affirmed what our Supreme Court had concluded in *Commonwealth v. Taylor*, 718 A.2d 748 (Pa. 1998), nearly a decade earlier.

As defined by the Court, the issue in *Taylor* was "whether trial counsel was ineffective for permitting [the defendant] to make decisions as to trial strategy and, in particular, the decision not to present mitigation evidence during the penalty phase hearing." *Id.* at 744. The Court said no, reiterating that counsel could not be deemed ineffective for failing to override a client's decisions or following a client's strategy at a penalty phase hearing. *Id.* at 745 (citing *Commonwealth v. Pierce*, 645 A.2d 189, 195 (Pa. 1994), and *Commonwealth v. Beasley*, 678 A.2d 773, 778 (Pa. 1996), *cert. denied*, 520 U.S. 1121 (1997)). *See also Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993) ("A criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf. We will not remove that right and compel admission of such evidence. Defense counsel has no duty to introduce and argue evidence of mitigating circumstances where his client has specifically directed otherwise").

Reviewing the record, the *Taylor* Court agreed with the trial court's finding that the defendant had made the decision not to present mitigation evidence at the penalty phase despite being apprised of the purpose and potential effectiveness of mitigation evidence. 718 A.2d at 744-45.

The *Taylor* defendant later addressed his ineffectiveness claim to the federal courts, where the district and Third Circuit courts concluded that his claim did not merit a writ of *habeas corpus*. *Taylor v. Horn*, 504 F.3d 416, 420 (3d Cir. 2007), *cert. denied*, 129 S.Ct. 92 (2008).

The *Taylor* defendant's claim regarding trial counsel's failure to effectively handle his penalty phase substantially coincided with Rega's current claim. As articulated by the court,

> Taylor's next argument is that trial counsel failed to investigate, present and argue mitigating evidence at the penalty phase, and his deficient performance prejudiced the defense. (Taylor Br. 76-84). Specifically, he argues that counsel failed to: promptly investigate Taylor's mental health; . . .; develop life-history mitigation; . . .; or argue for a life sentence based on the mitigating evidence that was already in the record. Because of counsel's failure to investigate, Taylor argues that his decision not to present mitigation evidence was not knowing and voluntary.

Id. at 540.

As occurred here, Taylor's counsel testified that his client had been adamant about not presenting mitigation witnesses. *Id.* at 451. As was also the case here, Taylor's counsel was aware of mitigating factors related to the defendant's background but was dealing with a client who did not want any of that information presented. *Id.*

Confirming the applicability of *Strickland*, the court noted that counsel's performance must be objectively reasonable under the circumstances; that courts must assess reasonableness based on the facts and timing of the particular case; and that while strategic decisions made after full investigation were "virtually unchallengeable," decisions made pursuant to a truncated investigation were reasonable only to the extent that the limited investigation itself was reasonable. *Id.* at 430. "Moreover," continued the court, aware of the situation it then faced, "courts may look to the defendant's statements or actions in determining the reasonableness of counsel's conduct." *Id.* (citing *Strickland*, 466 U.S. at 694).

The court likewise noted the constitutional standards applicable relative to the penalty phase, specifically, that counsel was obligated to conduct a thorough investigation for mitigation evidence. *Id.* at 453. To that end, efforts must be made to discover all reasonably available mitigation evidence, it noted, including information about medical, educational, employment and training, and family and social histories. *Id.* Whether an investigation was reasonable under *Strickland*, the court further reiterated, would be evaluated according to prevailing professional norms, such as those found in the ABA Standards for Criminal Justice. *Id.*

Noting the United States Supreme Court's application of those standards in *Wiggins* and *Rompilla*, the *Taylor* court deferred to its recent predecessor, *Schriro v. Landrigan*, finding that case to be dispositive under the circumstances. *Taylor*, 504 F.3d at 453-55.

Beginning its *Schriro* analysis, the court assumed *arguendo* that the defendant's newly proffered mitigation evidence would have persuaded the trial court to impose a life sentence. *Id.* at 455. "Nevertheless," it said, "even if the District Court had held a hearing and determined that counsel's failure to uncover this evidence fell below the standards set out in *Wiggins* and *Rompilla*, the Court still could not have granted the writ because, under *Landrigan* [*Schriro*], Taylor cannot show *Strickland* prejudice." *Id.* It did not matter that Taylor was not belligerent and obstructive in court like the *Schriro* defendant, either. *Id.* What mattered, according to the court, was that the record strongly supported the PCRA court's findings that the defendant had refused to allow the presentation of a mitigation defense and was competent to make that decision. *Id.*

Similarly, the record here strongly supports the conclusions not only that Rega plainly and repeatedly instructed trial counsel not to explore his background or mental health and, in fact, not to spend time investigating mitigation evidence at all, but also that he did so knowingly and intelligently. That Rega did not directly state as much on the record notwithstanding, the evidence, as outlined above and more fully apparent upon review of the entire record, was compelling. To find otherwise, the Court would have to ignore trial counsels' straightforward testimony; the defendant's letters to Attorney Schenkemeyer and the Court, as well as his motions and petitions; his persistent fixation on the guilt phase even as late as 2008, after he had already had lengthy discussions with Schenkemeyer and witnessed firsthand the variety and potential of available mitigation evidence; and the fact that the defendant simply was not one to sit by and allow his attorneys to pursue a course he did not approve.

It makes no difference that English and Elliott did in fact present a nominal mitigation defense, because their decision to do that much was merely gratuitous and unwelcome and did not suddenly invoke the duties commensurate with a *Wiggins*- or *Rompilla*-like mitigation defense. Rather, as *Commonwealth v. Taylor*, *Taylor v. Horn*, and *Schriro v. Landrigan* make clear, a client may go beyond merely refusing to have available mitigation evidence presented to the trier of fact; he may just as well direct his attorneys not to even investigate mitigation evidence. In that case, counsels' decision to acquiesce will not be deemed unreasonable or ineffective under *Strickland*. Because trial counsels' decision not to investigative potential mitigation evidence was a decision imposed by their client in this case, therefore, it follows that their failure to do so was not ineffective.

In **Claim XXV**, filed June 28, 2011, Rega faults appellate counsel for failing to investigate and discover his Italian citizenship and procure important additional defense resources to which he was allegedly entitled under the Vienna Convention.[25] For essentially the same reasons that the Court found Issues X, XI, and XXII to be unavailing, he cannot find relief based on this late-raised assertion.

Although the defendant did not present witnesses who could define the outside parameters of the monies that would have been made available for his appeal, the Court will assume from Consul General Luigi Scotto's testimony and the well-known fact of the Italian government's principled opposition to the death penalty that any requests Rega would have made for appellate assistance between February 2003 and January 15, 2008, would have been generously answered. The Court will assume, therefore, that he would have had access to the names of and funding for alternative or supplemental appellate counsel skilled in national and international law; experts trained in crime scene reconstruction; and an array of psychologists, psychiatrists, and/or neurologists. The Court will further assume that the consulate, had it been aware of Rega's case, would have kept his family members apprised of his conditions and sought their assistance in preparing his defense. Even with those assumptions in place, however, the ultimate course of events does not change for the defendant.

As the Court has already found, as late as April 2005—the month of the post-sentencing hearing and his last opportunity prior to appellate review to introduce unexplored mitigation evidence—Rega remained resolutely opposed to any sort of inquiry into his psyche. Even after Attorney Schenkemeyer spent dozens of hours meeting with him and explaining at length the purpose of psychological mitigation evidence, therefore, the defendant firmly refused a face-to-face evaluation with a mental health professional. There is no evidence to suggest that he would have cooperated any better with consular-funded appellate counsel or any of the mental health experts the consulate could have recommended, whether to challenge his level of culpability at the guilt phase or to mitigate his actions at the penalty phase.

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[25] In accordance with its earlier statements and the consul general's testimony that Rome, Washington, and the Philadelphia took the official position that Rega was entitled to consular protection under the Vienna Convention, the Court finds for purposes of this opinion and the discussion to follow that the defendant is an Italian citizen. The Court would nonetheless note that in accordance with *Commonwealth v. Baumhammers*, 960 A.2d 59 (Pa. 2008), while the Italian consulate out of Philadelphia, as well as Rome and Washington, are willing to ascribe citizenship and entitlement to appellate resources, Rega, having been born and raised as a United States citizen, may not actually satisfy the definition of "foreign national" under the language of the Vienna Convention. *See id.* at 97.

Through the time of the post-sentencing hearing, moreover, the defendant continued to be reticent about divulging facts describing his upbringing, particularly where those facts tended to place his mother—clearly the most significant source of the brutality and deprivation he knew growing up—in an unfavorable light.[26] The Court will not presume, therefore, that he would have authorized alternate or supplemental appellate counsel or even officials at the Italian consulate to contact his family for the purpose of investigating his childhood and revealing the details of his violent and deprived upbringing.

To a large extent, though, how Rega would have utilized consular resources for mitigation purposes is merely an academic consideration. Appellate counsels' assignment was to prove that the defendant's sentencing hearing was legally flawed and, at Rega's insistence, that trial counsel were ineffective for failing to prepare and present an adequate mitigation case. Consular-funded appellate counsel would have been charged with the same assignment for the same client and no doubt would have achieved the same result.

At this point, the claims of trial court error that could have been litigated in post-sentencing motions and on direct appeal have now been raised and addressed by PCRA counsel, and the Court has deemed them to be without merit. The Court has likewise concluded that trial counsel, having been definitively instructed not to pursue a penalty phase defense, was not ineffective for failing to investigate and present a full mitigation defense. Our Supreme Court agreed on each issue brought before it, and because the trial record would not have changed had Rega obtained alternative or supplemental appellate counsel, the outcome of his post-sentencing motions and appeal would not have changed, either. Thus, even had the defendant been afforded consular-funded counsel and the best mental health experts for purposes of his direct appeal, the ultimate results of that appeal would have been identical to what they are now.

Similarly, the involvement of a crime scene reconstruction expert beginning in 2003 would not have affected the outcome of Rega's appeal. As discussed above, trial counsel did not simply overlook the issue; they instead made an affirmative and reasonable decision not to delve into a defense that conflicted with their client's unwavering "I was not even there" position. And as with the penalty phase issues, the facts comprising the trial record still would have been the

[26] There is no question that Rega also experienced abuse at the hands of his father. It was undisputed, however, that his father was absent most of his life, leaving his mother to raise their children. It was also undisputed that his mother personally inflicted frequent and often severe physical and emotional abuse. It was she, moreover, who neglected her son, left him and her other children without adequate food and clothing, and, in failing to participate in their lives, allowed Rega to be further abused by his brothers.

same even had additional appellate counsel been retained to assist with the appeal and hired a crime scene reconstructionist after the fact.

To utilize the popular phrase, the trial record is what it is, and no matter how well-versed in national and international law or how well-respected in their respective fields, consular-funded counsel and experts could not have altered it. As appellate counsel, Clifford Schenkemeyer and Robbie Taylor were appointed to a client who had insisted on an all-out innocence defense at trial. As a matter of law, that position did not admit a diminished capacity defense, and by force of reason, it did not warrant a crime scene reconstructionist to tell the jury about the probable positions of the actors at a crime scene where the defendant purportedly was not even present. Because all of the resources available through the consulate would not have resulted in a successful appeal, therefore, appellate counsel were not ineffective for failing to investigate and discover Rega's Italian citizenship and procure any additional defense resources to which he may have been entitled.

The final point of inquiry—**Claim XXIII**—is whether Rega's rights were violated as a result of the cumulative effect of the alleged errors. The Court having found Claims I-XXII and Claims XXIV-XXV to be without merit, the answer is no. According to *Commonwealth v. Williams*, 896 A.2d 523 (Pa. 2006), even in the context of a capital appeal, "'no number of failed claims may collectively attain merit if they could not do so individually.'" *Id.* at 547-48 (quoting *Commonwealth v. Lopez*, 854 A.2d 465, 472 (Pa. 2004) (quoting *Commonwealth v. Williams*, 615 A.2d 716, 722 (Pa. 1992)).

Finally, it is of no legal consequence that Rega asserts his petition first as a claim for *habeas corpus* relief and second as a request for PCRA relief. According to 42 Pa.C.S.A. § 9542, *habeas corpus* relief is not available to a petitioner whose claims can be addressed under the Post Conviction Relief Act. *Id.* ("The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis"). According to *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998), moreover, "the writ continues to exist only in cases in which there is no remedy under the PCRA." *Id.* at 640. In this case, all of the asserted claims may appropriately be addressed under the Act. Thus, *habeas corpus* cannot act as a separate avenue for relief.

Having determined that none of the defendant's twenty-five issues provides grounds for the relief he Rega, therefore, the Court will deny his petition.

IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	**Nos: CP-33-CR-26-2001**
	:	**CP-33-CR-524-2001**
ROBERT GENE REGA,	:	
Defendant	:	

ORDER

AND NOW, this **27th day of October 2011,** for the reasons articulated in the foregoing Opinion, it is hereby **Ordered** and **Decreed** that the defendant's Amended Petition for Habeas Corpus Relief Pursuant to Article I, Section 14 of the Pennsylvania Constitution and Statutory Post-Conviction Relief Under 42 Pa.C.S. §§ 9542 et seq., together with its amendments, is **DENIED.**

BY THE COURT,

Hon. John Henry Foradora, P.J.