

CASE NO. _____ (CAPITAL CASE)
OCTOBER TERM 2024

In The
Supreme Court of the United States

ROBERT WHARTON,

Petitioner,

v.

SUPERINTENDENT, S.C.I. PHOENIX,

Respondent.

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

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95 F.4th 113

United States Court of Appeals, Third
Circuit.

Robert WHARTON, Appellant

v.

SUPERINTENDENT GRATERFORD
SCI

No. 22-9001

|
Argued on October 11, 2023

|
(Filed: March 8, 2024)

Synopsis

Background: After affirmation of petitioner's conviction for capital murder on direct appeal, [530 Pa. 127, 607 A.2d 710](#), affirmation of death sentence on second appeal following remand, [542 Pa. 83, 665 A.2d 458](#), and denial of state post-conviction relief under Pennsylvania Post Conviction Relief Act (PCRA), [571 Pa. 85](#), petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, No. 2:01-cv-06049, [Mitchell S. Goldberg](#), J., [2012 WL 3535868](#), denied petition, and granted a certificate of appealability. The United States Court of Appeals for the Third Circuit, [722 Fed.Appx. 268](#), affirmed in part, vacated in part, and remanded. On remand, the District Court, [2022 WL 1488038](#), denied petition. Petitioner appealed.

Holdings: The Court of Appeals, [Hardiman](#), Circuit Judge, held that:

[1] petitioner failed to establish prejudice under [Strickland](#), as would support finding that petitioner was not denied effective assistance of counsel, such that habeas relief was unwarranted;

[2] District Court permissibly rejected proposed stipulation of testimony for one defense expert;

[3] Pennsylvania Office of the Attorney General's (OAG) extraordinary level of participation as an amicus curiae did not create an appearance of partiality;

[4] District Court was not improperly influenced by testimony of victims' family;

[5] District Court did not create an appearance of unfairness or partiality by expressing frustration, if any, with concession of habeas relief from Philadelphia District Attorney's Office (DAO); and

[6] District Court did not create an appearance of unfairness or partiality by evaluating federal habeas petition while also considering imposition of sanctions against DAO for conceding habeas relief.

Affirmed.

Procedural Posture(s): Appellate Review;
Petition for Writ of Habeas Corpus.

West Headnotes (26)

[1] Habeas Corpus—Review de novo
Habeas Corpus—Clear error

Court of Appeals reviews the district court's legal conclusions in ruling on habeas corpus petition de novo and its factual findings for clear error.

[2] Criminal Law—Deficient representation and prejudice in general

A petitioner claiming ineffective assistance of counsel must show that: (1) his lawyer's performance was unreasonable under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

[3] Criminal Law—Determination

Courts should dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice when it is the easier of the two issues. U.S. Const. Amend. 6.

[4] Criminal Law—Prejudice in general

A “reasonable probability,” for purposes of ineffective assistance test pursuant to *Strickland*, that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, means one sufficient to undermine confidence in the outcome of the proceeding. U.S. Const. Amend. 6.

[5] Criminal Law—Prejudice in general

For purposes of ineffective assistance test pursuant to *Strickland*, that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, the reasonable probability

standard is a lower standard than a preponderance of the evidence, but that distinction matters only in the rarest case. [U.S. Const. Amend. 6.](#)

whether the new evidence would have convinced even one juror to find that the mitigating factors outweighed the aggravating factors. [U.S. Const. Amend. 6.](#)

1 Case that cites this headnote

[6] [Criminal Law](#)—Presentation of evidence regarding sentencing

When assessing an ineffective assistance claim pursuant to *Strickland* as to whether the result of a proceeding would have been different but for counsel's unprofessional errors, courts reweigh the aggravating factors against the totality of available mitigating evidence; this includes any rebuttal evidence the prosecution would have introduced, as well as any new evidence presented during the post-conviction review. [U.S. Const. Amend. 6.](#)

[8] [Habeas Corpus](#)—Post-trial proceedings; sentencing, appeal, etc

There was not a reasonable probability that federal habeas petitioner's prison records would have caused a juror to change his or her vote to impose death sentence for capital murder conviction, and thus petitioner failed to establish prejudice under *Strickland* from counsel's failure to present at resentencing mitigation evidence of positive prison adjustment, such as efforts to continue his education and expand access to academic testing for capital inmates, as would support finding that petitioner was not denied effective assistance of counsel, and therefore that habeas relief was unwarranted; most of the behavior characterized as positive was the minimum expectation for inmates, prison records contained strong evidence adverse to petitioner, including evidence of attempted escape shortly after murder conviction and that petitioner had escape tools in his cell three years

[7] [Criminal Law](#)—Presentation of evidence in sentencing phase

In assessing whether counsel was ineffective under *Strickland* in a capital case, the court must decide

later, and repeated escape attempts undermined argument that petitioner would die in prison if jury were to give him a life sentence. *U.S. Const. Amend. 6.*

Const. Amend. 6.

[9] **Criminal Law**→Presentation of evidence in sentencing phase

There was no reasonable probability that expert testimony would have changed jurors' decision to impose death sentence for capital murder conviction, and thus petitioner failed to establish prejudice under *Strickland* from counsel's failure to present at sentencing expert testimony relating to mitigation evidence of positive prison adjustment, as would support finding that federal habeas petitioner was not denied effective assistance of counsel, thus warranting denial of habeas relief; experts on both sides had acknowledged severity of petitioner's escape attempts, jurors would have distrusted experts on both sides, and even if jurors had credited defense's expert testimony that rash behavior diminished with age, they would not likely have attributed defendant's creation of a makeshift handcuff key to youthful impulsivity given that handcuff keys were uncommon and petitioner's key was unusually well constructed. *U.S.*

[10] **Criminal Law**→Prejudice in general

Length of jury deliberations may be one consideration in assessing the strength of the prosecution's case, which can inform the likelihood that mitigating evidence could have affected the outcome, in assessing an ineffective assistance of counsel claim under *Strickland*. *U.S. Const. Amend. 6.*

[11] **Criminal Law**→Presentation of evidence in sentencing phase

There was not a reasonable probability that evidence of escape attempt from county prison might not have been admitted at resentencing trial for capital murder conviction, as would support finding that federal habeas petitioner was not prejudiced under *Strickland* by counsel's failure to present at sentencing mitigation evidence of positive prison adjustment, and therefore petitioner was not denied effective assistance of counsel, such

that petitioner was not entitled to habeas relief; state prison intake form directly mentioned escape attempt, and sentencing judge would not have excluded rebuttal evidence from just one month before petitioner's transition from county to state custody where doing so would have misled the jury about the mitigation evidence. [U.S. Const. Amend. 6.](#)

[12] Habeas Corpus -Post-trial proceedings; sentencing, appeal, etc

District court did not impermissibly rely on a subjective rather than objective view of the evidence when court used phrase "I agree with" two times while describing testimony from experts from Pennsylvania Office of the Attorney General (OAG) when determining that federal habeas petitioner failed to establish prejudice under *Strickland* from counsel's failure to present at sentencing mitigation evidence of positive prison adjustment, as would support finding that petitioner was not denied effective assistance of counsel in capital murder prosecution, such that habeas relief from death sentence was unwarranted; court's statements in context showed that such phrases were shorthand for crediting the

evidence as persuasive and explaining how the court believed jurors would view the evidence. [U.S. Const. Amend. 6.](#)

[13] Habeas Corpus -Admissibility

District court permissibly rejected proposed stipulation of testimony for one defense expert who was unavailable to testify based on objections from Pennsylvania Office of the Attorney General (OAG), which court had appointed as *amicus curiae*, when deciding that counsel was not ineffective in capital murder prosecution, as would support finding that federal habeas petitioner was not prejudiced under *Strickland*, and thus that petitioner was not entitled to habeas relief from death sentence; adversarial process had broken down after Philadelphia District Attorney's Office conceded ineffective assistance of counsel and imposition of death penalty, so court had reason to be skeptical of a proposed stipulation that would have prevented cross-examination of an expert and impaired court's ability to review evidence. [U.S. Const. Amend. 6.](#)

positive behaviors. U.S. Const. Amend. 6.

[14] **Stipulations** Court

Consistent with its role as the evidentiary gatekeeper, a district court need not accept stipulations between parties.

[15] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

Jury's question on whether it could consider at sentencing mitigating evidence that occurred after murders did not increase likelihood that one juror would have changed his or her vote to impose death sentence for capital murder conviction in response to prison records of federal habeas petitioner, as would support finding that petitioner had failed to establish ineffective assistance of counsel from counsel's failure to present mitigation evidence of positive prison adjustment, and thus that petitioner was not prejudiced under *Strickland*, such that petitioner was not entitled to habeas relief; jury would have been presented with all of petitioner's post-conviction behavior, including his violent first escape attempt and his continuing efforts to escape years later, both of which would have outweighed his

[16] **Judges** Bias and Prejudice

An appearance of impropriety exists if a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned.

[17] **Judges** Bias and Prejudice

A party's displeasure with legal rulings does not form an adequate basis for recusal.

[18] **Judges** Bias and Prejudice

An adverse ruling is not by itself evidence of partiality or unfairness warranting recusal of a judge, even if the ruling is erroneous.

[19] **Judges**—Bias and Prejudice

Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.

murder conviction did not create an appearance of partiality; OAG's involvement was necessary for court both to account for government's interests and to make an informed ruling on the issues following decision of Philadelphia District Attorney's Office (DAO) to yield to petitioner by conceding death penalty after decades of opposition. [U.S. Const. Amend. 6](#).

[20] **Judges**—Bias and Prejudice

Evidence of judicial bias normally stems from an extrajudicial source rather than facts introduced or events occurring in the course of the current proceedings, or of prior proceedings.

[22] **Judges**—Objections to Judge, and Proceedings Thereon

Federal habeas petitioner who had been sentenced to death for capital murder conviction was required to provide evidence of partiality that went beyond mere disagreement with a legal ruling, but instead offered no extrajudicial evidence to support claim that by rejecting stipulation involving testimony from a defense expert district court had appeared to act with partiality in evidentiary hearing for resentencing relating to petitioner's ineffective assistance of counsel claim. [U.S. Const. Amend. 6](#).

[21] **Judges**—Bias and Prejudice

Pennsylvania Office of the Attorney General's (OAG) extraordinary level of participation as an amicus curiae in evidentiary hearing relating to resentencing and question of ineffective assistance of counsel on federal habeas petition concerning death sentence imposed for capital

[23] **Judges**→ Bias and Prejudice

District court was not improperly influenced by testimony of victims' family at evidentiary hearing involving resentencing of federal habeas petitioner, who had been sentenced to death for capital murder conviction, due to concession of Philadelphia District Attorney's Office (DAO) that it would not seek the death penalty again, and thus court did not create an appearance of unfairness or partiality related to testimony of victims' family when deciding petitioner's ineffective assistance of counsel claim; court had questions about whether DAO had obtained input from family members on sentencing decision, and court had acknowledged that testimony of victims' family had no bearing on merits of petitioner's Sixth Amendment ineffective assistance claim. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 3771(a)(4), 3771(b)(2)(A).

[25] **Judges**→ Statements and expressions of opinion by judge

District court did not create an appearance of unfairness or partiality by expressing frustration, if any, with concession of habeas relief from Philadelphia District Attorney's Office (DAO) on the merits of federal habeas petitioner's case claiming ineffective assistance of counsel in capital murder prosecution resulting in death sentence; a reasonable person would have understood any frustration to have been directed at DAO rather than at petitioner or the merits of his case given that DAO had abruptly changed course, without explanation, on a position it had staunchly defended for over 30 years, and under Pennsylvania Supreme Court precedent, DAO lacked authority to concede relief on a jury-imposed death sentence absent a finding of legal error. U.S. Const. Amend. 6.

[24] **Criminal Law**→ Knowledge of law

Trial judges are presumed to know the law and to apply it in making their decisions.

[26] **Judges**→ Bias and Prejudice

District court did not create an appearance of unfairness or partiality

in evidentiary hearing by evaluating federal habeas petition and claim of ineffective assistance of counsel in capital murder prosecution while also considering imposition of sanctions against Philadelphia District Attorney's Office (DAO) for conceding habeas relief and that it would not seek the death penalty again; court could have found for petitioner on habeas petition while also concluding that DAO, despite being correct on the merits, made misrepresentations to court, and a reasonable person would not have questioned judge's impartiality or fairness given that issues were connected yet distinct in that the outcome of one did not dictate the outcome of the other. [U.S. Const. Amend. 6.](#)

***118** On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 2-01-cv-06049)
District Judge: Honorable [Mitchell S. Goldberg](#)

Attorneys and Law Firms

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Before: [HARDIMAN](#), [BIBAS](#), and [PHIPPS](#), Circuit Judges.

OPINION OF THE COURT

[HARDIMAN](#), Circuit Judge.

A Philadelphia jury convicted Robert Wharton of murder in 1985. The jury found that the crime's aggravating factors outweighed the mitigating factors, so the court sentenced Wharton to death. After exhausting his state court options, in 2003 Wharton petitioned for a writ of habeas corpus in the District Court. He claimed his lawyer was ineffective for failing to

introduce Wharton's prison records as mitigation evidence during the penalty phase. The District Court held an evidentiary hearing and denied Wharton's petition. The Court found that Wharton did not suffer any prejudice from his counsel's failure to introduce the prison records because evidence of Wharton's positive adjustment to prison would have opened the door to negative behavior while in custody, most notably his repeated escape attempts.

***119** Because we perceive no error in the District Court's judgment, we will affirm.

I

A

Wharton and his co-defendant Eric Mason were convicted of murdering Bradley and Ferne Hart after the couple refused to pay for unsatisfactory construction work. In the six months before the murders, Wharton and Mason terrorized the Harts, burglarizing their home twice. During the second burglary, they vandalized the home so severely that it was temporarily uninhabitable. As they ransacked the house, Wharton and Mason urinated and defecated on the floor, slashed furniture, defaced family pictures, wrote a threatening note on the wall, and left a doll hanging with a rope tied around its neck. They also burglarized a church founded by Bradley's father, stabbing a photo of Bradley to the wall with a letter opener.

In January 1984, Wharton and Mason forced their way into the Harts' home at knifepoint while the Harts were home with their infant daughter, Lisa. They forced Bradley to write them a check and then tied up the couple. After watching television for several hours, Wharton and Mason decided to murder the couple to avoid being identified. Wharton covered Ferne's eyes and mouth with duct tape before strangling her with a necktie and forcing her head underwater in a bathtub until she drowned. Mason placed his foot on Bradley's back as he strangled him with an electrical cord and pressed his face into a shallow pan of water. Both men stole silverware, jewelry, cameras, wallets, and even Lisa's crib. They also turned off the heat and left Lisa alone in the house in the dead of winter. Bradley's father discovered the gruesome scene three days later. Although Lisa was severely dehydrated and suffered respiratory arrest on the way to the hospital, she survived.

Wharton was arrested about one week later and confessed. Wharton and Mason were convicted in a joint trial, and the jury sentenced Wharton to death while returning a verdict of life in prison for Mason. The Pennsylvania Supreme Court affirmed Wharton's conviction but vacated his sentence because of an erroneous jury instruction on the aggravating factor of torture.

B

Wharton was resentenced in 1992. At that hearing, the prosecution highlighted the

prolonged terror campaign against the victims and recounted the gruesome details of the murders, portraying Wharton as a brutal killer who callously left Lisa Hart to freeze to death after torturing and killing her parents. In response, the defense “presented testimony from numerous members of [Wharton’s] family regarding his positive attributes as a child and as an adult ... as well as his positive behavior towards family while incarcerated between his two penalty phase hearings.” Amicus Supp. App. 260. The jury heard that Wharton was “very kind,” and a “good human,” App. 191, 197, as well as “loving” and “very protective” of his mother and sister, App. 142. The jury also learned that Wharton’s father suffered a stroke when Wharton was in his late teens, prompting Wharton to tell his mother he would stay and take care of them after his brother left for the military. Wharton’s mother testified that he pursued construction work to help build a home for her. She also explained that he stayed in touch with his family and became religious after going to prison. Lamenting that her “son [would] never be free,” she broke down in tears and implored the jury to spare his life so they *120 could at least “talk or write to each other.” App. 216–18.

Testimony from the defense witnesses contained frequent references to religion, forgiveness, and the value of life. Some of Wharton’s family members asked the jury to spare his life for the sake of his family, and because executing him would not take away “the pain that everybody’s been going through.” App. 168. In closing, the defense tried to undermine the prosecution’s list of aggravating factors, arguing that Wharton did not torture the Harts or create a grave

risk of death to their infant daughter. Counsel “emphasized to the jury that, if [Wharton] was sentenced to life imprisonment, he ... would stay there for the rest of his life.” Amicus Supp. App. 261. Although the defense briefly raised Wharton’s age as a mitigating factor, its general strategy was to plead for mercy based on Wharton’s positive character traits and his family’s anguish.

During its deliberations, the jury asked whether “evidence of mitigation concerning the character and record of the defendant ha[d] to be present *at [the] time of the offense.*” App. 330 (emphasis added). The judge instructed the jury that it could consider mitigation evidence since the murders. The jury also requested that testimony from Wharton’s sister-in-law, who had testified to his spiritual growth in prison, be read back to them. After about seven hours of deliberations, the jury declared itself deadlocked. But the judge determined that the jurors had “not deliberated nearly long enough,” so he instructed them to continue. In total, the jury deliberated for a little under thirteen hours spread across three days before deciding that Wharton deserved the death penalty.

C

After the Pennsylvania Supreme Court affirmed his death sentence, Wharton sought collateral relief under Pennsylvania’s Post Conviction Relief Act (PCRA). Wharton asserted ineffective assistance of counsel at his resentencing hearing based on his

counsel's failure to obtain or introduce into evidence prison records purportedly showing that Wharton made a positive adjustment to prison after his first death sentence was imposed. After the PCRA court denied Wharton relief, the Pennsylvania Supreme Court affirmed.

Wharton then filed a federal habeas petition. The District Court denied relief but granted a certificate of appealability on one of Wharton's ineffective assistance of counsel claims. This Court expanded the certificate to include defense counsel's failure to investigate or raise evidence of positive prison adjustment, after concluding that Wharton had made a *prima facie* showing that there was "a reasonable probability that at least one juror would have changed his or her vote if presented with this evidence." *Wharton v. Vaughn*, 722 F. App'x 268, 283 (3d Cir. 2018). So this Court vacated the District Court's order denying Wharton's habeas petition and remanded for the District Court to hold an evidentiary hearing on that ineffective assistance of counsel claim.

D

On remand, the Philadelphia District Attorney's Office (DAO), which had pursued the death penalty against Wharton for decades, reversed course and conceded Wharton's habeas claim. It also said that it would not pursue the death penalty on resentencing. The District Court rejected this concession and appointed the Pennsylvania Office of the Attorney General (OAG) as

amicus curiae to investigate the evidence. A multiday evidentiary hearing followed, at which the Court heard evidence of Wharton's behavior in prison during *121 the approximately seven years between his two sentencing hearings.

The first significant event occurred on April 21, 1986, while Wharton was still in the custody of Philadelphia County. While at the Philadelphia County Courthouse for sentencing on an unrelated robbery conviction, Wharton tried to escape as deputies escorted him from the courtroom. Wharton unlocked his handcuffs with a key he was hiding. He then pushed a deputy and fled the building, stopping only when the deputy shot Wharton in the thigh. Wharton later pleaded guilty to the escape attempt.

When he entered death row at SCI-Huntingdon on September 25, 1986, Wharton's prison intake assessment noted that he "used a good deal of denial and rationalization" during his interview and "minimized the few transgressions he admitted to." App. 1554. It also described Wharton "as a sociopath with dependent features and [dis]social attitudes" and characterized him as "an extremely high public risk," both because of his murder convictions and his escape attempt. App. 1550, 1554.

The prison's Program Review Committee (PRC) expressed positive views of Wharton's adjustment. Examples of PRC comments include: "Mr. Wharton has exhibited no adjustment problems," App. 1593; "[t]he attending psychiatrist found Mr. Wharton to be pleasant and cheerful," App. 1600; and "[a]ccording to the counselor, Mr.

Wharton has completed another month of positive adjustment.... He is pleasant and polite in his counselor contacts." App. 1616. Wharton continued his education in prison by receiving materials in his cell and participating in an education program. He successfully used the prison grievance system to request access to the General Education Degree (GED) test, leading prison officials to commend him for his interest in taking the test. Wharton also played chess, learned Spanish, and participated in a poetry competition.

Wharton exhibited negative behaviors in prison as well, accruing six misconduct violations. The two most serious incidents occurred days apart in May 1989. First, a corrections officer found two pieces of a metal antenna hidden behind the toilet in Wharton's cell, one of which was fashioned into a handcuff key. A corrections officer testified that it was the only time in his 28-year career that he had found a makeshift handcuff key he "thought would work." App. 962. Several days later, prison officials conducted a random search of Wharton's cell and found another unmodified piece of antenna hidden in his legal papers. This uncommon offense—possessing implements of escape—was one of the most serious offenses an inmate could commit at SCI-Huntingdon. A prison official who oversaw misconduct hearings for the Pennsylvania Department of Corrections testified that he had encountered only about a dozen homemade keys in the thousands of disciplinary cases he had handled.

Wharton "was less than truthful with [the] PRC and denied having anything to do with the ... handcuff key." App. 1614. He received

the maximum punishment of 90 days in disciplinary custody for the infractions. Wharton behaved well in disciplinary custody and the prison returned him to administrative custody three weeks early. Yet when Wharton asked the PRC to reinstate his television privileges several months later, he "refused to even discuss why he had ... two lengths of antenna" because "[h]e did the time." App. 1618.

Wharton also had four other less serious misconducts. In 1986, Wharton refused to submit to a strip search, claiming a back injury. In 1988, he and other inmates refused to leave the exercise yard when ordered to do so by prison officials. In 1989, he broke the rules by circulating a petition *122 related to phone privileges. Finally, in 1992, Wharton and another inmate disobeyed orders to stop practicing martial arts in the exercise yard.

Wharton's defense counsel testified at the evidentiary hearing and confirmed that he did not obtain or review Wharton's prison records as part of the 1992 resentencing. He conceded that "[t]here was no strategy involved"; he simply did not know he could introduce prison adjustment records as mitigation evidence under *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). App. 534, 571.

After assessing this evidence, defense experts testified that Wharton's prison adjustment was positive, concluding that Wharton was unlikely to present a danger in the future because he was older and had no major mental illnesses, sociopathic behaviors, or violent misconduct while in prison. The defense experts also concluded

that Wharton's frequent use of the grievance system "demonstrat[ed] a relative acceptance of his incarceration." Amicus Supp. App. 335. And although they acknowledged the seriousness of the escape attempts, they argued that prison records contemporaneous with the 1989 makeshift key incident "did not indicate that Mr. Wharton [posed] an imminent threat of escape." Dist. Ct. Dkt. No. 219, Ex. 13, at 3; *see also* App. 1411 ("[T]here was no indication that he tried to use the handcuff key[,] and he certainly had opportunity to do so.").

Contrary to that testimony, experts called by the OAG emphasized Wharton's "longstanding" "pattern of antisocial behavior" and expressed concerns about his "future intentions" given his escape attempts and "[h]is continued failure ... to accept responsibility" for them. Amicus Supp. App. 24, 32 (cleaned up). They stated that the positive behaviors Wharton exhibited in his interactions with others were shallow and that his use of the grievance system "reflect[ed] a certain impulsivity" "because a lot of what he grieved could have been handled without a grievance." Amicus Supp. App. 39–40. The OAG experts concluded that presenting evidence of Wharton's adjustment to prison would have made the jury more likely to sentence him to death.

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), from his counsel's failure to present evidence of positive prison adjustment. On appeal, Wharton makes two arguments: (1) the District Court erred in finding that he failed to establish prejudice; and (2) the case should "be remanded for a new hearing before a different judge" because the District Court's actions "created an appearance of unfairness and partiality." Wharton Br. 1.

II

^[1]The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. The District Court considered Wharton's *Strickland* claim de novo on remand because we had found that the Pennsylvania Supreme Court's application of *Strickland* in Wharton's post-conviction proceedings was unreasonable and not entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996. We review the District Court's legal conclusions de novo and its factual findings for clear error. *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 589 (3d Cir. 2015); *Lambert v. Blackwell*, 134 F.3d 506, 512 (3d Cir. 1997).

E

After the evidentiary hearing, the District Court held that Wharton had not shown prejudice under *Strickland v. Washington*,

*123 III

A

^[2] ^[3] ^[4] ^[5]A petitioner claiming ineffective assistance of counsel must show that: (1) his lawyer's performance was unreasonable under "prevailing professional norms"; and (2) 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 688, 694, 104 S.Ct. 2052. Courts should, as we will here, "dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice" when it is the easier of the two issues. *Id.* at 697, 104 S.Ct. 2052. A "reasonable probability" means one "sufficient to undermine confidence in the outcome" of the proceeding. *Id.* at 694, 104 S.Ct. 2052. It is a lower standard than a preponderance of the evidence, but that distinction matters "only in the rarest case." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

^[6] ^[7]When assessing whether the result of the proceeding would have been different, courts reweigh the aggravating factors "against the *totality* of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis added). This includes any rebuttal evidence the prosecution would have introduced, as well as any new evidence presented during the post-conviction review. See *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011). In a capital case, the court must decide whether the new evidence "would have convinced [even] one juror" to find that the mitigating factors outweighed the aggravating factors. See *Blystone v. Horn*, 664 F.3d 397, 427 (3d Cir. 2011) (cleaned up). We agree with the District Court that there is not a "reasonable probability" that Wharton's prison records

would have caused a juror to change his or her sentencing vote given the compelling rebuttal evidence the prosecution would have presented.

1

^[8]Wharton's prison records show that he complied generally with prison behavioral standards, but he was disciplined multiple times for various infractions. His behavior improved over time, especially during the second half of his incarceration. He was non-violent during his incarceration on death row, but he shoved a deputy during his 1986 escape attempt while in county custody. Though Wharton sometimes demonstrated positive behaviors, such as his efforts to continue his education and expand GED testing access to capital inmates, the District Court did not clearly err in finding that most of "the behavior Wharton characterized as positive [was] the 'minimum' expectation" for inmates. *Wharton v. Vaughn*, 2022 WL 1488038, at *14 (E.D. Pa. May 11, 2022).

At the same time, the prison records contained strong evidence adverse to Wharton. The jurors would have learned that Wharton tried to escape shortly after his murder conviction and was caught with escape tools in his cell three years later. This serious misconduct would have suggested to jurors that life imprisonment was inadequate because Wharton posed a risk of future danger. The prosecution also could have framed Wharton's actions as evidence of ongoing manipulative behavior and his

pattern of engaging in superficially positive behaviors while planning his next escape. In fact, the new evidence may have strengthened the prosecution's sentencing case because Wharton's repeated escape attempts undermined one of the defense's strongest arguments: that Wharton would die in prison if the jury gave him a life sentence. So while the prison records provide some evidence that Wharton *124 was reforming himself, his escape attempts during this same period negate any reasonable probability that a juror would have changed his or her vote during Wharton's resentencing hearing.

2

^[19]Expert testimony would not have altered this outcome. Experts on both sides acknowledged the severity of Wharton's escape attempts. Though Wharton's experts sought to portray his overall prison adjustment as positive, jurors would have been skeptical of their conclusions. For instance, it strains credulity to claim, as one defense expert did, that though Wharton crafted and concealed a makeshift handcuff key three years after his first escape attempt, the fact that he never used the key demonstrates "a positive adjustment to his confinement." App. 460. The same expert wrote in his report that Wharton "ha[d] not displayed any problematic behavior," Dist. Ct. Dkt. No. 219, Ex. 13, at 4, but then acknowledged on cross-examination that he ignored all of Wharton's prison misconduct in reaching this conclusion.

The DAO nevertheless argues that jurors may have found the defense experts more credible than the OAG's experts because one of the latter showed an "unwillingness to concede the positive aspects of [Wharton's] prison record." DAO Br. 31. Fair enough. But one of Wharton's experts expressed a similarly biased viewpoint by ignoring Wharton's misconduct when forming an opinion about his behavior in prison. The most likely result is that jurors would have distrusted the experts on both sides.

Even if jurors had credited the defense's expert testimony that rash behavior diminishes with age, they would not likely have attributed Wharton's creation of a makeshift handcuff key to youthful impulsivity. Handcuff keys were uncommon and, as a corrections officer testified, Wharton's key was unusually well constructed. This testimony, coupled with Wharton's prior escape attempt and his concealment of the key, suggests Wharton was preparing for a second escape attempt, not acting on impulse. At best, expert testimony on the role of brain development might have led jurors to discount the significance of Wharton's less-serious prison misconduct from the early years of his incarceration. But there is no reasonable probability it would have changed the jurors' sentencing decision given Wharton's more serious misconduct.

B

Wharton and the DAO raise several other

arguments on the ineffective assistance of counsel claim. None is persuasive.

[10] First, Wharton asserts that the jury's deadlock note shows that this was a close case, making it more likely that evidence of his prison adjustment, if viewed as positive, would have swayed one juror. It is true that "the length of jury deliberations may be one consideration in assessing the strength of the prosecution's case," which can inform the likelihood that mitigating evidence could have affected the outcome. *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 805 (3d Cir. 2020). But the jurors declared themselves deadlocked after just over seven hours of deliberation, and they reached a verdict after about six additional hours of deliberation. The jury could not likely have worked through its disagreements so quickly had this truly been a deadlock. So the probative value of the deadlock note is minimal in view of the total length of deliberations.

[11] Second, Wharton argues that there is a "reasonable probability" that evidence of his April 1986 county escape attempt "might not have been admitted at *125 the resentencing trial" because it "does not necessarily rebut the evidence of his behavior once he was sent to *state* custody." Wharton Br. 36 (emphasis added). We reject this argument because: (1) his state prison intake form directly mentioned Wharton's 1986 escape attempt; and (2) the sentencing judge would not have excluded rebuttal evidence from just one month before Wharton's transition from county to state custody where doing so would have misled the jury about the mitigation evidence.

[12] Third, Wharton contends that the District Court improperly relied on a subjective rather than objective view of the evidence. Wharton bases this argument mainly on the Court's use, in two instances, of the phrase "I agree with ..." while describing testimony from OAG experts. Reading the Court's statements in context shows that such phrases were shorthand for crediting the evidence as persuasive and explaining how the Court believed jurors would view the evidence. This does not reflect a substantive analytical problem.

[13] [14] Finally, Wharton contends that the District Court erred by rejecting his proposed stipulation of testimony for one of his experts who was unavailable to testify. The District Court did so based on objections from the OAG, which the Court had appointed as *amicus curiae*. Consistent with its role as the evidentiary gatekeeper, a district court need not accept stipulations between parties. See *United States v. Barnes*, 602 F.3d 790, 796 (7th Cir. 2010); *see also* 83 C.J.S. *Stipulations* § 18. Because the adversarial process broke down after the DAO's about-face, the District Court had reason to be skeptical of a proposed stipulation that would have prevented cross-examination of an expert and impaired the Court's ability to review evidence.

[15] The DAO's arguments are unpersuasive as well. The DAO contends that the jury's question on whether it could consider mitigating evidence that occurred after the murders increases the likelihood that one juror would have changed his or her vote in response to Wharton's prison records. But this argument ignores the fact that the jury would have been presented with *all* of

Wharton's post-conviction behavior, including his violent first escape attempt and his continuing efforts to escape years later, both of which would have outweighed his positive behaviors. The DAO also claims that the negative behavioral assessments by OAG experts were inaccurate because, contrary to their predictions, Wharton has been well-behaved since 1992. But the sentencing jury in 1992 would have known none of that when making its decision.

* * *

For all of these reasons, the District Court did not err when it held that Wharton's ineffective assistance of counsel claim failed for want of prejudice.

IV

On top of his ineffective assistance of counsel claim, Wharton accuses the District Court of "creat[ing] an appearance of unfairness and partiality," Wharton Br. 47, by: (1) allowing an amicus curiae to participate extensively in the evidentiary hearing; (2) rejecting a stipulation involving one of Wharton's experts; (3) allowing the victims' family members to testify at the evidentiary hearing; (4) expressing frustration with the concession from the DAO on the merits of Wharton's case; and (5) considering the imposition of sanctions against the DAO during the evidentiary hearing.

[16] [17] [18] [19] [20] An appearance of impropriety exists if "a reasonable person,

with knowledge *126 of all the facts, would conclude that the judge's impartiality might reasonably be questioned." *United States v. Kennedy*, 682 F.3d 244, 258 (3d Cir. 2012) (cleaned up). But "a party's displeasure with legal rulings does not form an adequate basis for recusal." *Securacomm Consulting, Inc. v. Securacomm Inc.*, 224 F.3d 273, 278 (3d Cir. 2000). After all, an adverse ruling is not by itself evidence of partiality or unfairness even if the ruling is erroneous. *Arrowpoint Cap. Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 330 (3d Cir. 2015). And "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Rather, evidence of bias normally stems from an "extrajudicial source" rather than "facts introduced or events occurring in the course of the current proceedings, or of prior proceedings." *Id.* None of the District Court's actions that Wharton identifies constitute evidence of partiality.

[21] First, the OAG's "extraordinary level of participation in the hearing" as an amicus curiae did not create an appearance of partiality. Wharton Br. 52. Because the DAO yielded to Wharton after decades of opposition, the OAG's involvement was necessary for the Court both to account for the Commonwealth's interests and to make an informed ruling on the issues. See *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130, 146 (2018) ("After trial and the entry of a capital verdict ... [t]he community now has an interest in the verdict, which may ... be disrupted only if a court finds legal error.").

[22] Second, Wharton offers no extrajudicial evidence to support his claim that the District Court appeared to act with partiality by rejecting the stipulation involving testimony from a defense expert. Under *Securacomm*, Wharton must provide evidence of partiality that goes beyond mere disagreement with a legal ruling. But he failed to do so.

[23] [24] Third, federal law affords the families of murder victims “[t]he right to be reasonably heard at any public proceeding ... involving ... sentencing.” 18 U.S.C. § 3771(a)(4). That right includes “[f]ederal habeas corpus proceeding[s] arising out of a State conviction.” § 3771(b)(2)(A). The proceeding here involved sentencing because the DAO announced it would not seek the death penalty again, and the Court had questions about whether the DAO had obtained input from family members on this sentencing decision. The District Court also acknowledged that “the victims’ family’s testimony has no bearing on the merits of Wharton’s Sixth Amendment claim,” *Wharton*, 2022 WL 1488038, at *4 n.3, so we have no reason to believe that the District Court was improperly influenced by the family’s testimony. After all, “[t]rial judges are presumed to know the law and to apply it in making their decisions.” *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[25] Fourth, Wharton offers no examples of how “the [C]ourt appeared increasingly frustrated” with the DAO. Wharton Br. 55. Even if the District Court had expressed

frustration, a reasonable person would understand it to be directed at the DAO rather than at Wharton or the merits of his case. The DAO abruptly changed course, without explanation, on a position it had staunchly defended for over 30 years. Moreover, under Pennsylvania Supreme Court precedent, the DAO lacked authority to concede relief on a jury-imposed death sentence absent a finding of *127 legal error. *Brown*, 196 A.3d at 144–46. So even had the District Court expressed frustration with the DAO, it would hardly make a reasonable person question the Court’s impartiality.

[26] Finally, Wharton argues that the Court “assumed the [conflicting] roles of both adjudicator and inquisitor” by evaluating his habeas petition while also considering the imposition of sanctions against the DAO. Reply Br. 20. Wharton says that these functions conflict “because a determination that the ineffective assistance claim had merit would demonstrate that the DAO had acted properly in conceding the merits of the claim.” *Id.* at 19–20. Not so. The Court could have found for Wharton on his habeas petition while also concluding that the DAO, despite being correct on the merits, made misrepresentations to the Court.

Wharton tries to analogize his case to the situation in *In re Murchison*, 349 U.S. 133, 133–35, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where a judge served as a “one-man grand jury” as permitted by state law and charged two of the grand jury witnesses with contempt. The same judge then improperly presided over the witnesses’ public contempt trial and convicted both. *Id.* at 135, 75 S.Ct. 623. That case is inapt. While

Murchison held that criminal trials cannot have the same accuser and adjudicator, it acknowledged that “contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge.” *Id.* at 137, 75 S.Ct. 623. The Court also said in *Murchison* that the judge could not be both the accuser and adjudicator in the *same* dispute. *See id.* But the DAO’s conduct and Wharton’s habeas petition are distinct issues; they are connected, but the outcome of one does not dictate the outcome of the other. Discussing both issues in the evidentiary hearing would not lead a reasonable person to question the judge’s impartiality or fairness.

* * *

For all of these reasons, the District Court did not create an appearance of unfairness or partiality.

V

Wharton cannot show that he suffered prejudice from his counsel’s failure to offer his prison records as mitigation evidence at sentencing. If the jury had seen the prison records, there is not a reasonable probability one of the jurors would have found that the mitigation evidence in Wharton’s case outweighed the aggravating factors such that his sentence would have been different. And Wharton’s arguments that the District Court acted with an appearance of unfairness and partiality are unpersuasive because they are based on the District Court’s legal rulings rather than evidence of unfairness or partiality. We will affirm.

All Citations

95 F.4th 113

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22-9001

ROBERT WHARTON
Appellant

v.

SUPERINTENDENT GRATERFORD SCI et al.

D.C. Civ No: 2-01-cv-006049

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Dated: June 19, 2024

cc: Steven B. Lev, Esq.
Paul M. George, Esq.
Carl L Mahler, Esq.

Ronald Eisenberg, Esq.
James P. Barker, Esq.

722 Fed.Appx. 268

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure

32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

Robert **WHARTON**, Appellant

v.

Donald T. VAUGHN

No. 13-9002

Submitted Pursuant to Third Circuit
LAR 34.1(a) January 4, 2018

(Opinion filed January 11, 2018)

Synopsis

Background: After petitioner's conviction for capital murder was affirmed on direct appeal,  530 Pa. 127, 607 A.2d 710, and death sentence was affirmed on second appeal following remand, 542 Pa. 83, 665 A.2d 458, petitioner filed federal petition for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, No. 2:01-cv-06049, **Mitchell S. Goldberg, J.**, 2012 WL 3535868, denied petition. Petitioner appealed.

Holdings: The Court of Appeals held that:

[1] defense counsel's alleged deficiency in failing to call witnesses to refute lead detective's suppression hearing testimony did not prejudice petitioner;

[2] counsel's alleged deficiency in failing to impeach lead detective at trial did not prejudice petitioner;

[3] any violation of petitioner's Confrontation Clause rights arising from admission of co-defendant's confession was harmless under *Brecht* standard;

[4] state court's rejection of claim that counsel's alleged deficiency in failing to obtain and present evidence reflecting petitioner's positive adjustment to prison life was unreasonable application of  **Strickland**;

[5] petitioner made *prima facie* showing required to hold evidentiary hearing on **ineffective** assistance claim; and

[6] due diligence requirement for evidentiary hearing was satisfied.

Affirmed in part, vacated in part, and remanded.

West Headnotes (6)

[1] **Criminal Law**—Declarations, confessions, and admissions

Defense counsel's alleged deficiency in failing to call witnesses to refute lead detective's suppression hearing testimony about circumstances of defendant's arrest at his home and his subsequent confession at police station, which, according to defendant, would have supported conclusion that he had not been tackled during arrest, but instead had suffered injury to his head while police beat him into confessing, did not prejudice defendant, in capital murder prosecution, as would support **ineffective** assistance claim. [U.S. Const. Amend. 6.](#)

[2] [Criminal Law](#)  [Impeachment or contradiction of witnesses](#)

Defense counsel's alleged deficiency in failing to impeach lead detective, who testified at trial about circumstances of defendant's arrest at his home and subsequent confession at police station, with police documents, suppression hearing testimonies of two other detectives, and camera "data back," which was among property stolen from victims, did not prejudice defendant, in capital murder prosecution, as would support **ineffective** assistance claim. [U.S. Const. Amend. 6.](#)

[3] [Habeas Corpus](#)  [Conduct of trial, in general](#)

Any violation of petitioner's Confrontation Clause rights arising from admission, in capital murder prosecution, of co-defendant's confession inculpating petitioner was harmless under *Brecht* standard, and thus habeas relief was not warranted; impact of any error was not substantial and injurious because it was dwarfed by weighty evidence demonstrating petitioner's guilt for murders of both victims. [U.S. Const. Amend. 6](#);  [28 U.S.C.A. § 2254](#).

1 Cases that cite this headnote

[4] [Habeas Corpus](#)  [Post-trial proceedings; sentencing, appeal, etc](#)

State court's rejection of petitioner's claim that defense counsel's alleged deficiency, at second penalty hearing in capital murder prosecution, in failing to obtain and present evidence reflecting petitioner's positive adjustment to prison life during the seven years between his two penalty hearings did not prejudice petitioner was unreasonable application of  [Strickland](#), as supported grant of

federal habeas relief. U.S. Const. Amend. 6;  28 U.S.C.A. § 2254(d);  42 Pa. Cons. Stat. Ann. § 9711(c)(iii), (iv).

2 Cases that cite this headnote

[5] Habeas Corpus—Counsel

Petitioner made prima facie showing that defense counsel was **ineffective** in failing to investigate and/or present petitioner's prison adjustment evidence at second penalty hearing in capital murder prosecution, and thus federal habeas court was required to hold evidentiary hearing on **ineffective** assistance claim; petitioner alleged that counsel failed to obtain his prison records, and nothing in habeas record contradicted that allegation, and petitioner showed there was reasonable probability that at least one juror would have changed his or her vote if presented with that evidence. U.S.C.A. Const. Amend. 6;  28 U.S.C.A. §§ 2254(d),  2254(e)(2).

5 Cases that cite this headnote

[6] Habeas Corpus—Counsel

Petitioner was diligent in his attempt to develop, in state court proceedings, factual basis for his claim that defense counsel was **ineffective** in failing to investigate and/or present prison adjustment evidence, at second penalty hearing in capital murder prosecution, as required for federal habeas court to hold evidentiary hearing on **ineffective** assistance claim; timely, counseled, post-conviction petition explicitly requested evidentiary hearing, and when post-conviction court denied that petition without hearing, petitioner appealed and also filed motion to reargue. U.S. Const. Amend. 6;  28 U.S.C.A. § 2254(e)(2).

2 Cases that cite this headnote

***269** On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 2:01-cv-06049), District Judge: Honorable **Mitchell S. Goldberg**

Attorneys and Law Firms

Victor J. Abreu, Jr., Esq., Claudia Van Wyk, Esq., Federal Community Defender Office for the Eastern District of Pennsylvania, Philadelphia, PA, for Plaintiff-Appellant

Susan E. Affronti, Esq., Philadelphia County Office of District Attorney, Philadelphia, PA, for Defendant-Appellee

Before: **VANASKIE, SHWARTZ, and GREENBERG**, Circuit Judges

OPINION*

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

PER CURIAM

***270** Pennsylvania prisoner Robert Wharton appeals from the District Court's denial of his capital habeas petition. The District Court granted a certificate of appealability ("COA") with respect to two of Wharton's guilt-phase claims, and we later expanded the COA to include one of his sentencing-phase claims. For the reasons that follow, we will affirm the District Court's order denying relief on the two guilt-phase claims, vacate its order denying Wharton's sentencing-phase claim, and remand for an evidentiary hearing on that surviving claim.

I. Background

In 1985, a jury in the Philadelphia County Court of Common Pleas found both Wharton and co-defendant Eric Mason

guilty of two counts of first-degree murder and related offenses in connection with the deaths of Bradley and Ferne Hart.¹ The evidence at trial, viewed in the light most favorable to the Commonwealth, showed that the killings were the culmination of a series of crimes committed by Wharton and his cohorts against the Harts in retribution for Bradley's criticisms of, and refusal to pay for, construction work Wharton performed in the summer of 1983. In August 1983, Wharton and co-worker Larue Owens burglarized the Harts' home twice. During the second burglary, in which Mason also participated, the intruders extensively vandalized the Harts' home and left a note taunting Bradley's failed efforts to safeguard his family. The following month, Wharton and Mason burglarized the church founded by Bradley's father, Dr. Samuel Hart, leaving a defaced photograph of Bradley pinned to the wall with a letter opener.

¹ For ease of identification, we will refer to the victims by their first names.

In January 1984, Wharton, Mason, and Thomas Nixon went to the Harts' home, armed and intending to rob them. However, the plan was abandoned that day when it was discovered that the Harts had a visitor in the house. Later that month, Wharton and Mason returned to the house when only the Harts and their seven-month-old daughter, Lisa, were present. When Bradley answered the door, Wharton pulled out a knife and told Bradley and Ferne to go sit on the couch. After Wharton and Mason entered the house, Wharton forced Bradley to write a check in the amount that Wharton believed

he was owed. The adult Harts were then tied up and forced to sit on the couch while Wharton and Mason were “messing around” and watching television. (App. at 1820.)

The two intruders eventually decided to separate the couple. Bradley was taken to the basement, while Ferne was taken to the second floor. Lisa was left on a bed on the second floor. The adult Harts’ faces were then covered with duct tape. Wharton took Ferne into the bathroom and bound her hands and feet with neckties. Wharton then strangled her with a necktie, filled the bathtub with water, and held her head under the water “until the bubbles stopped.” (*Id.* at 1821.) Wharton left her body draped over the bathtub, with her pants pulled down and her shirt pulled up, exposing her breasts. As for Bradley, he “was forced to lie face down in a pan of water while one of the intruders stood with one foot on his back, as shown by a footprint on this victim’s shirt, pulling on an electrical cord tied around his neck.”

Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710, 714 (1992) [hereinafter *271 Wharton I]. Wharton and Mason then turned off the heat in the house, locked the door, and left Lisa to fend for herself. The two men took with them various items from the house, including a camera and Bradley’s coat.

Three days after the murders, Dr. Hart, concerned that he had not heard from Bradley or Ferne, went to the house. After forcing the door open, Dr. Hart heard Lisa’s cries and found her upstairs, where she was suffering from dehydration and *hypothermia*. Dr. Hart also found the bodies of Bradley and Ferne. Lisa went into respiratory arrest on the way to the hospital;

fortunately, she recovered and survived.

An investigation into the killings quickly led the police to suspect Wharton. Acting on a statement from the mother of Wharton’s girlfriend, Tywana Wilson—Wilson’s mother told police that Wharton had given Wilson a camera—the police executed a search warrant on Wilson’s residence and found the Harts’ camera and several other items stolen from them. Shortly thereafter, the police arrested Wharton. A search of his residence uncovered additional items stolen from the Harts during the January 1984 home invasion, as well as the knife that had been used to gain entry into their house. Wharton waived his *Miranda* rights and confessed to his involvement in the January 1984 home invasion and to killing Ferne.² Wharton named Mason as his accomplice and claimed that Bradley had been left downstairs with Mason, who put Bradley’s head in a bucket of water.

² Wharton later confessed to participating in the two earlier burglaries of the Harts’ home. Although Wharton never confessed to burglarizing the church, Larue Owens testified at trial that Wharton had admitted to his involvement in that burglary.

The police arrested Mason on the same day as Wharton. A search of Mason’s residence uncovered Bradley’s coat and other items stolen from the Harts during the January 1984 home invasion. One of Mason’s sneakers matched the imprint found on Bradley’s shirt. After Mason’s arrest, he waived his *Miranda* rights and confessed to

participating in the January 1984 home invasion. His account was similar to Wharton's; the main difference was that Mason indicated that Wharton had killed Bradley (because Mason could not go through with it).

Before trial, Wharton moved to suppress his confession as involuntary and sever his trial from Mason's. The trial court denied those motions. At the joint trial, both defendants' confessions were admitted into evidence. The confessions were redacted so that the phrase "the other guy" replaced references to the co-defendant's name, and the trial court instructed the jury that each confession was to be considered against only the defendant who made it. One of the Commonwealth's many witnesses at trial was Nixon (who had been involved in the abandoned attempt to enter the Harts' home). Nixon testified that, after the murders, he called Wharton to ask if he (Wharton) and Mason were responsible for those crimes. Wharton answered in the negative, but Nixon then said, "[I]f [you] were going to kill the mother and the father, [you] should have killed the baby also." (App. at 2217.) Wharton replied, "We couldn't do it." (Id.)

Neither defendant testified at trial. Wharton's defense revolved around his claim that he had confessed involuntarily. The jury found both defendants guilty of two counts of first-degree murder and related offenses. At the penalty phase, the jury returned a verdict of death against Wharton and a verdict of life in prison against Mason.

In 1992, the Pennsylvania Supreme Court

("the PSC") affirmed Wharton's ***272** conviction but vacated his sentence and remanded for a new penalty hearing because of a defect in the penalty-phase jury charge. See  [Wharton I](#), 607 A.2d at 723-24. Later that year, a new penalty hearing was held. As before, the jury returned a verdict of death. Wharton once again appealed, but this time the PSC affirmed his sentence. See [Commonwealth v. Wharton](#), 542 Pa. 83, 665 A.2d 458, 459 (1995). After the United States Supreme Court ("the Supreme Court") denied certiorari, Wharton petitioned for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"). The PCRA court denied that petition without a hearing in 1997, and the PSC affirmed that denial in 2002. See  [Commonwealth v. Wharton](#), 571 Pa. 85, 811 A.2d 978, 981 (2002) [hereinafter  [Wharton III](#)].

Wharton then timely filed a counseled habeas petition in the District Court under  [28 U.S.C. § 2254](#), raising numerous claims. In 2012, after holding an evidentiary hearing on two of those claims, the District Court issued a 157-page opinion and an accompanying order that denied habeas relief but granted a COA with respect to two guilt-phase claims: (1) Wharton's trial counsel, William T. Cannon, was **ineffective** at both the suppression hearing and at trial for failing to present certain evidence that would have shown that Wharton's confession was made involuntarily; and (2) Wharton's rights under the Confrontation Clause were violated when (a) a prosecution witness testified at trial that Wharton had been implicated in Mason's confession, and (b) Mason's redacted confession was admitted at trial.

After the District Court denied Wharton's motion to alter or amend its denial of habeas relief, he filed this appeal and asked us to expand the COA to include more claims. We granted that request in part, expanding the COA to include one sentencing-phase claim: Cannon was **ineffective** for not investigating Wharton's adjustment to prison or presenting evidence of that adjustment at the second penalty hearing. The three claims covered by the COA are now ripe for disposition.³

³ The District Court had jurisdiction over Wharton's habeas case pursuant to  28 U.S.C. § 2254, and we have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. See [Robinson v. Beard](#), 762 F.3d 316, 323 (3d Cir. 2014). We exercise plenary review over the District Court's legal conclusions and review its factual findings for clear error. See  [Lambert v. Blackwell](#), 134 F.3d 506, 512 (3d Cir. 1997).

II. Wharton's Claim that Cannon was **Ineffective** at the Suppression Hearing and at Trial

We begin our analysis with Wharton's claim that Cannon was **ineffective** at both the suppression hearing and at trial for not presenting certain evidence to support the contention that Wharton's confession was made involuntarily. The PSC denied this claim as unreviewable because Wharton had not raised it in his PCRA petition. See

 [Wharton III](#), 811 A.2d at 987. The District Court, after determining that the PSC had relied on an inadequate state law ground, reviewed the claim *de novo*. The District Court held an evidentiary hearing on this claim and ultimately denied the claim on its merits. Although the Commonwealth argues on appeal that aspects of this claim are procedurally barred for various reasons, we need not reach those issues. As explained below, even if we assume that every aspect of this claim that is discussed in Wharton's appellate briefing is properly before us, the claim fails on the merits.

A. Claim Background

To decide this claim, we must examine not only Wharton's confession, but also his arrest. At both the suppression hearing *273 and at trial, the lead detective in the case, Charles Brown, gave detailed testimony about the circumstances of Wharton's arrest (at his home) and his subsequent confession (at the police station). The parties are well acquainted with that testimony, so we may briefly summarize it here. Brown testified that, to effectuate the arrest, he broke down the front door of Wharton's home and tackled Wharton because Wharton had been attempting to flee up the stairs. Before Wharton was taken to the police station, Brown noticed redness on Wharton's head in the form of a cut or bruise, but it was not an open **wound** and there was no bleeding. Brown testified that the injury may have occurred when he tackled Wharton. After Wharton arrived at the police station later that morning, he waived his Miranda rights

and gave a detailed confession in question-and-answer format. When Brown's partner had finished typing Wharton's answers, Wharton was given the opportunity to review them and make changes. Wharton then signed the confession.

At the end of the suppression hearing, Cannon conceded that Wharton's confession was "obtained in a voluntary manner." (App. at 998.) Despite this concession, Cannon challenged the confession's voluntariness at trial. After the Commonwealth rested its case, Cannon called Wharton's sister, Beverly Young, to dispute Brown's statement that Wharton had been tackled during the arrest.⁴ Cannon also presented Wharton's medical records from the Philadelphia Detention Center ("PDC"), where Wharton had been transferred after he was arrested and confessed. These records, which were dated the same day as the arrest and confession, indicated that he had a "[s]mall laceration" on his scalp without "gaping" or bleeding, "[a]brasions" on the right side of his neck, and complaints of a headache. (*Id.* at 2431-32.)

⁴ Immediately after Young testified, the trial court explained to the jury that, although a sequestration order was in place during the trial, Young had been in the courtroom during the first day of Brown's testimony. The trial court instructed the jury to "take that factor into consideration in evaluating [Young's] credibility." (App. at 2429.)

On habeas review, Wharton alleges that Cannon should have presented a plethora of documentary and testimonial evidence at the

suppression hearing and at trial to impeach Brown's testimony. Wharton contends that this evidence would have supported the conclusion that he had not been tackled during his arrest but instead had suffered the *injury to his head* (and the *abrasions to his neck*) while the police beat him into confessing. The District Court assumed for the sake of argument that Cannon's failure to present this evidence was objectively unreasonable, but it nevertheless concluded that this claim lacked merit because he could not show prejudice under [Strickland v. Washington](#), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). For the reasons that follow, we agree with that conclusion.

To prevail on this claim, Wharton must show that Cannon's performance fell below an objective standard of reasonableness, and that he (Wharton) suffered prejudice as a result of that performance. See [id.](#) at 687-88, 104 S.Ct. 2052. Prejudice under [Strickland](#) is not established unless "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Id.](#) at 694, 104 S.Ct. 2052. "[T]he difference between [Strickland](#)'s [reasonable probability] standard and a more-probable-than-not standard is slight and matters only in the rarest case." [Harrington v. Richter](#), 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (internal quotation marks omitted). To the extent that *274 Wharton alleges that Cannon was **ineffective** at the suppression hearing, [Strickland](#)'s prejudice analysis is a two-step process. That is, Wharton must prove that (1) his suppression claim is meritorious, *and* (2) "there is a reasonable

probability that the verdict [at trial] would have been different absent the excludable evidence.”  [Kimmelman v. Morrison](#), 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

5

Wilson testified that, when the police permitted her to visit with Wharton at the station, she noticed that his ears were purple, that he had “a scratch, ash kind of mark” on his neck, and that there were “smudges” or “dirt marks” on the thigh area of his pants. (See App. at 4274-76.)

B. Cannon’s Alleged Ineffectiveness at the Suppression Hearing

[1] Wharton claims that Cannon should have called Young, Wilson, and Wharton’s mother (“Mrs. Wharton”) to refute Brown’s suppression hearing testimony. These proposed witnesses testified at the federal evidentiary hearing about Wharton’s arrest (each of these witnesses was in the house when he was arrested), and Wilson’s testimony also implied that Wharton had been mistreated at the police station.⁵ The District Court carefully considered these witness testimonies and compared them with prior accounts given by these witnesses.⁶ As discussed in the District Court’s thorough and cogent opinion, each of these comparisons revealed material inconsistencies between the witness’s evidentiary hearing testimony and her prior account. Additionally, as the District Court explained, Wilson’s testimony about the events at the police station was materially inconsistent with “objective evidence of record.” (App. at 61.)⁷ These material inconsistencies, along with the witnesses’ bias in favor of Wharton, significantly undermined their credibility. As a result, these flawed testimonies would have carried little, if any, impeachment value at the suppression hearing.

6

Young, of course, had testified at trial. As for Wilson and Mrs. Wharton, they had submitted written declarations in Wharton’s PCRA case.

7

That record evidence consisted of a “Chronology of Interrogation” prepared by the police and three photographs that the police took of Wharton after his interrogation. Two of the photographs are typical mug shots (in one shot he is facing forward; the other is a profile view), while the third photograph shows him from the knees up, facing forward. “[T]he area of [Wharton’s] head [laceration] is not specifically depicted” in the photographs, but they “nevertheless show no signs of physical injury or trauma on his face and ears, or ‘smudges’ on his pants.” (App. at 62.)

Wharton further claims that Cannon should have presented four police documents at the suppression hearing because none of them indicated that Wharton was injured during

his arrest. Contrary to Wharton's assertion, presenting this evidence would have done little, if anything, to impeach Brown's hearing testimony. Two of the documents in question—Form 75-229 and a police "Activity Sheet"—did not specifically request information about whether Wharton was injured. Meanwhile, the other two documents—Form 75-49/52 and Form 75-48—were not necessarily inconsistent with Brown's testimony.⁸

⁸ Form 75-49/52 was a lengthy report that Brown prepared at some point after Wharton's arrest. Although the report briefly noted that Wharton "had no apparent injuries" at the time of his arrest, (App. at 5175), this notation is not surprising in light of Brown's testimony that the moment he noticed the cut/bruise on Wharton's head "was the last time [he] ever thought of it," (*id.* at 951). Form 75-48 was a one-page document completed by Officer Thomas Duffy, who was a member of the unit that transported Wharton to the police station after his arrest. One of the many boxes on this form is labeled "Nature of Injury," (*id.* at 5196); that box is blank. At the federal hearing, Duffy testified that if an arrestee was suffering from an "obvious" or "visible" injury, (*id.* at 4244), the policy in 1984 was to take the arrestee to the hospital (or otherwise have medical personnel attend to him) before taking him to the police station. But Duffy also testified that it had *not* been his practice to closely examine arrestees for injuries before taking them to the police station. We agree with the District

Court that, "[g]iven the minimal nature of [Wharton's] injury and Duffy's testimony, the absence of an 'Injury' notation on the 75-48 Form is unsurprising and would [hold] little impeachment value [against Brown]."
(*Id.* at 50-51.)

*275 At a suppression hearing, the prosecution must prove, by a preponderance of the evidence, that the defendant confessed voluntarily. [Commonwealth v. Nester, 551 Pa. 157, 709 A.2d 879, 882 \(1998\)](#). Given this relatively low standard, the limited impact of Wharton's proffered evidence, and Brown's detailed hearing testimony, Wharton has failed to show that his motion to suppress would have been meritorious if Cannon had presented the proffered evidence. See [P. Morrison, 477 U.S. at 375, 106 S.Ct. 2574](#). Therefore, we will affirm the District Court's denial of Wharton's suppression hearing claim.

C. Cannon's Alleged Ineffectiveness at Trial

[2] Wharton alleges that Cannon was **ineffective** at trial for not impeaching Brown with the following: (1) the aforementioned police documents; (2) the testimonies of Wilson and Mrs. Wharton; (3) the suppression hearing testimonies of two other detectives regarding how the police entered Wharton's home to effectuate his arrest; (4) Brown's inconsistent testimony about whether Wharton was

handcuffed when Brown entered the interrogation room; and (5) documentary evidence regarding a camera “data back,” one of the many items stolen from the Harts. Wharton further alleges that Cannon should have interviewed Young before trial.

As indicated above, the four police documents and the testimonies of Wilson and Mrs. Wharton would have provided little, if any, impeachment value. The suppression hearing testimonies of the other two detectives also would have done little, if anything, to impeach Brown’s testimony. Although Detective James Alexander initially testified at the hearing that Mrs. Wharton had opened the door for the police, he clarified that he had been along the side of the house when entry was made, that he had only assumed that Mrs. Wharton had opened the door, and that the other detectives had later informed him that forced entry had been made. Detective Francis Ansel’s hearing testimony, meanwhile, was hardly a definitive account,⁹ and he testified at trial that he, too, had been along the side of the house when entry was made. Further limiting the impact of Alexander’s and Ansel’s hearing testimonies is the fact that Young and Mrs. Wharton—Wharton’s own witnesses—agree with Brown that forced entry was made.

⁹ Ansel testified at the hearing that he “believe[d]” that Brown and another detective had been admitted into the house by “[s]omeone ... possibly the mother of Mr. Wharton,” (App. at 794); Ansel did not “recall” anyone having to break down the front door. (Id.)

Wharton’s prospects at trial would not have improved by highlighting Brown’s inconsistent testimony about whether Wharton was handcuffed when Brown entered the interrogation room. Brown’s hearing testimony was that Wharton was handcuffed at that time, while Brown’s trial testimony stated the opposite. But this inconsistency is not material. Brown consistently testified that Wharton was not wearing handcuffs when Wharton’s Miranda rights were administered or when he gave his confession, and there is no evidence that the possible presence of *276 handcuffs when Wharton was first placed in the interrogation room affected the voluntariness of his confession.

Nor would Wharton have benefited from Cannon impeaching Brown about a camera “data back” (a camera attachment that imprints the date on the negative of a photograph), which was among the property stolen from the Harts. Brown testified at trial that this item was found in Wharton’s bedroom, while a police form indicated that this item was recovered in Wilson’s house. But this inconsistency is not significant. Given that numerous items stolen from the Harts’ home during the January 1984 home invasion were discovered in the homes of Wharton, Mason, and Wilson, the fact that Brown may have been mistaken about where one particular item was found hardly seems to undercut his detailed testimony about Wharton’s arrest and interrogation.

Lastly, there is Wharton’s allegation that Cannon should have interviewed Young before trial. Had Cannon done so, Young presumably would have complied with the

trial court's sequestration order, and that court would not have needed to instruct the jury that her presence in the courtroom during Brown's testimony was a "factor" that should be taken "into consideration in evaluating [her] credibility." (App. at 2429.) But given Brown's detailed account and Young's obvious bias in favor of Wharton, it is highly unlikely that the jury's verdict hinged on that brief (and relatively innocuous) instruction.

We cannot conclude that, had Cannon done all of the above, there is a reasonable probability that the jury would have found Wharton's confession to be involuntary. Furthermore, as the District Court observed, the Commonwealth's case-in-chief at trial "was comprised of significantly more than [Wharton's] confession." (*Id.* at 63-64.) The Commonwealth's other evidence established Wharton's ill-will toward the Harts (particularly Bradley), Wharton's history of escalating crimes against them, his possession of items stolen from the Harts during the January 1984 home invasion (including the check from Bradley for the money that Wharton believed that he was owed), and Wharton's conversation with Nixon indicating that Wharton and Mason could not go through with killing Lisa. Because there is no reasonable probability that the outcome of Wharton's trial would have been different had Cannon done everything outlined here, we will affirm the District Court's denial of this claim.

III. Wharton's Confrontation Clause

Claim

We next consider Wharton's claim that his Confrontation Clause rights were violated. As noted above, Mason's confession inculpated Wharton, and vice versa. The trial court admitted a redacted version of each confession, with the phrase "the other guy" replacing references to the name of the co-defendant in question.

During Brown's redirect examination at trial, he was asked why Larue Owens (a participant in two of the burglaries) had not been a suspect in the murder case. Brown answered: "Because the two defendants implicated each other in their statements." (*Id.* at 2046.) Both defense counsel immediately objected and moved to strike this testimony. The trial court granted that motion and then held a sidebar, where both defense counsel moved for a mistrial. The trial court denied a mistrial, instead opting to instruct the jury as follows: "Ladies and gentlemen, as to the last question and answer, you will strike that from your memory. It has absolutely no relevance in deciding this case. Do not consider that in any way in your verdict or arriving at your verdict." (*Id.* at 2050.)

*277 On direct appeal, Wharton challenged the denial of a mistrial, as well as the admission of Mason's confession. The PSC rejected this claim, determining that any violation of Wharton's Confrontation Clause rights was harmless in light of the trial court's cautionary instruction and the overwhelming evidence of his guilt. See  [Wharton I](#), 607 A.2d at 718-19. On habeas review, the District Court, applying  28 U.S.C. § 2254(d)'s deferential standard of review, concluded that the PSC's

harmlessness determination was not unreasonable.

“The test for whether a federal constitutional error was harmless depends on the procedural posture of the case.” [Davis v. Ayala](#), — U.S. —, 135 S.Ct. 2187, 2197, 192 L.Ed.2d 323 (2015). On habeas review, the proper test is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” [Brecht v. Abrahamson](#), 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting [Kotteakos v. United States](#), 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The Supreme Court has explained that the [Brecht](#) standard “subsumes” [§ 2254\(d\)](#)’s requirements for reviewing state court merits decisions, and that a habeas court need not conduct a formal analysis under both [Brecht](#) and [§ 2254\(d\)](#). See [Davis](#), 135 S.Ct. at 2198. Thus, although the District Court reviewed Wharton’s Confrontation Clause claim under [§ 2254\(d\)](#), our review here will focus on whether he has met the [Brecht](#) standard. See [id.](#) at 2199 (explaining that “a prisoner who seeks federal habeas corpus relief must satisfy [Brecht](#)”).

To satisfy [Brecht](#), “[t]here must be more than a ‘reasonable possibility’ that the error was harmful.” [Id.](#) at 2198 (quoting [Brecht](#), 507 U.S. at 637, 113 S.Ct. 1710). However, if the habeas court is in “grave doubt” as to whether an error had a substantial and injurious effect or influence in determining the jury’s verdict, the error cannot be deemed harmless. See [O’Neal v. McAninch](#), 513 U.S. 432, 445, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). Wharton

argues that, for four reasons, the alleged Confrontation Clause violations were not harmless under [Brecht](#). We consider these arguments in turn.

¹³First, Wharton contends that the admission of Mason’s confession undermined his (Wharton’s) attack on the voluntariness of his own confession. To be sure, the admission of Mason’s confession did not bolster that attack.¹⁰ However, for the reasons previously discussed in Section II, the attack would have failed regardless of whether Mason’s confession was admitted.

¹⁰ Wharton’s confession largely overlapped—or “interlocked”—with Mason’s confession. “[I]nterlocking” bears a positively inverse relationship to devastation. A codefendant’s confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant’s alleged confession.” [Cruz v. New York](#), 481 U.S. 186, 192, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). Nevertheless, the admission of a codefendant’s interlocking confession can still amount to harmless error. See [id.](#) at 193-94, 107 S.Ct. 1714.

Second, Wharton asserts that he was prejudiced by Mason’s confession because it indicated that it was his (Wharton’s) idea to kill the Harts. But it does not matter, from a legal standpoint, with whom the idea to kill the Harts originated. The jury found that

both Wharton and Mason possessed the specific intent to kill each victim.

Third, Wharton claims that without Mason's confession (which identified Wharton as Bradley's killer), there was no evidence *278 that Wharton possessed the specific intent to kill Bradley. Wharton is mistaken. During Wharton's custodial interrogation, he was asked, "[W]hy did you kill them?" (App. at 5247.) He responded: "Cause they knew me and would turn us in." (*Id.*)¹¹ He also admitted that, after separating the Harts, he helped Mason put duct tape around Bradley's face and neck. Although Wharton may not have been the one to actually kill Bradley, that did not prevent the jury from finding that Wharton possessed the specific intent to kill him. See  [Commonwealth v. Montalvo](#), 598 Pa. 263, 956 A.2d 926, 930 n.2 (2008) ("Criminal liability for first-degree murder can be imposed where the jury finds that a defendant, with the requisite specific intent to kill, committed the crime either as a principal or as an accomplice."). The Commonwealth argued at closing that Mason killed Bradley and that Wharton was Mason's accomplice in this crime, and the evidence at trial (aside from Mason's confession) supported that position.

¹¹ At trial, Brown read Wharton's confession into the record. Although Brown did not recite the above-noted question verbatim—Brown said, "[W]hy did you kill her?" (App. at 1828)—Brown did recite Wharton's corresponding answer verbatim, and it is apparent from this answer that Wharton was referring to both victims.

Lastly, Wharton argues that Mason's confession prejudiced him at his second penalty hearing.¹² One of the aggravating factors that the jury found against Wharton was that he had been convicted of another offense punishable by life in prison or death. In other words, the fact that he had been convicted of two murders in this case weighed against him at sentencing. He now claims that this aggravating factor would not have come into play in this case absent Mason's confession, for that confession was the only evidence that he (Wharton) killed Bradley. This argument is meritless; as just discussed, Wharton himself did not need to kill Bradley to be convicted of Bradley's murder.

¹² Contrary to the Commonwealth's contention, Wharton did raise this argument in the District Court. (See App. at 4197.)

In sum, Wharton's  [Brecht](#) arguments do not give us grave doubt as to whether the alleged Confrontation Clause errors had a substantial and injurious effect or influence in determining the jury's verdict in this case. Assuming for the sake of argument that his Confrontation Clause rights were indeed violated, we conclude that the impact of that error was not substantial and injurious because it was dwarfed by the weighty evidence demonstrating his guilt for the murders of both Bradley and Ferne. Because any violation of Wharton's Confrontation Clause rights was harmless under  [Brecht](#), we will affirm the District Court's denial of this claim.¹³

¹³ To the extent that Wharton argues that he should be granted habeas relief based on the cumulative effect of the errors alleged in his two guilt-phase claims, we find this argument unpersuasive. He has not met the standard for prevailing on a cumulative-effect claim. See  [Collins v. Sec'y of Pa. Dep't of Corr.](#), 742 F.3d 528, 542 (3d Cir. 2014) (explaining that, to prevail on such a claim, the errors in question, when considered together, must have “had a substantial and injurious effect or influence in determining the jury’s verdict”) (quoting  [Fahy v. Horn](#), 516 F.3d 169, 205 (3d Cir. 2008)).

IV. Wharton’s Claim that Cannon was Ineffective at the Second Penalty Hearing

A. Claim Background

Pennsylvania is a “weighing state” for purposes of penalty hearings in capital cases. See  [Jermyn v. Horn](#), 266 F.3d 257, 309 (3d Cir. 2001). In other words, the jury “determine[s] which statutorily defined aggravating *279 factors have been proven beyond a reasonable doubt and weigh[s] those factors against the mitigating factors the defendant has proven by a preponderance of the evidence.”  [Id.](#) (citing  [42 Pa. Cons. Stat. Ann. § 9711\(c\)\(iii\), \(iv\)](#)). “The jury’s decision on

the penalty must be unanimous.”  [Id.](#)

At Wharton’s second penalty hearing (which was held about seven years after the first penalty hearing), several of his family members testified on his behalf. The takeaways from that testimony were that Wharton’s childhood was unremarkable, that he had good qualities, and that his family cared about him. The Commonwealth, meanwhile, presented evidence of the history between Wharton and the Harts, as well as “the grisly evidence regarding [his] involvement in the murders.” (App. at 110.)

The jury started deliberating in the late afternoon on December 21, 1992. Less than an hour later, the trial court recessed for the day. Toward the end of the next day, the jury submitted a note indicating that it was unable to reach a unanimous verdict. The trial court told the jury that “you have not deliberated nearly long enough,” and instructed the jury to resume its deliberations at 9:30 the following morning. ([Id.](#) at 3992.) At 3 p.m. the next day, the jury returned a verdict of death on both murder counts. For each count, the jury found two aggravating factors (the murder was committed while perpetrating a felony, see  [42 Pa. Cons. Stat. Ann. § 9711\(d\)\(6\)](#), and Wharton was convicted of another offense punishable by life in prison or death, see  [42 Pa. Cons. Stat. Ann. § 9711\(d\)\(10\)](#)) and one mitigating factor (Pennsylvania’s “catch-all” mitigating factor, see  [42 Pa. Cons. Stat. Ann. § 9711\(e\)\(8\)¹⁴](#)), and concluded that those two aggravating factors outweighed the lone mitigating factor.

¹⁴ This mitigating factor gives weight to

“[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.”  42 Pa. Cons. Stat. Ann. § 9711(e)(8). In finding this factor, the jury in Wharton’s second penalty hearing noted that he had not killed Lisa, that he “was a good family member,” and that he “cooperated fully with the police department concerning the crime.” (App. at 4002-03.) The jury was able to make this finding about cooperation because no evidence about the circumstances of Wharton’s arrest was presented at the second penalty hearing.

At the PCRA stage, Wharton alleged that Cannon was **ineffective** at the second penalty hearing for failing to obtain and present evidence reflecting Wharton’s positive adjustment to prison life during the seven years between his two penalty hearings. In support of this claim, Wharton provided his prison records for that time period, as well as a declaration from Harry Krop, Ph.D., a licensed psychologist who, at some point after the second penalty hearing, interviewed Wharton and reviewed the prison records. Dr. Krop’s opinion was that (1) Wharton’s crimes were “anomalous and out-of-character,” (2) “Wharton made a positive adjustment to prison life” during the time between his two penalty hearings, (3) “he would be a prime candidate for constructive rehabilitation in the general prison population,” and (4) “he would not pose a future danger to the prison community in the event he were to serve a [life] sentence.” (App. at 4655, 4657.)

The PCRA court dismissed this claim without a hearing. The PSC then upheld that dismissal on appeal, indicating that this claim failed on the merits because Wharton had not demonstrated that Cannon had acted unreasonably or that Wharton had suffered prejudice. See  [Wharton III](#), 811 A.2d at 988-89. On habeas review, the District Court focused solely on  *280 [Strickland](#)’s prejudice prong, concluding that this claim failed because the PSC’s prejudice determination was not unreasonable under  § 2254(d).

As explained below, we disagree with the District Court’s resolution of this claim. We hold that both of the PSC’s bases for rejecting this claim represent an unreasonable application of  [Strickland](#), and our de novo review of this claim reveals that it is appropriate to remand the claim to the District Court for an evidentiary hearing.

B. Analysis of the PSC’s Decision

^[4]In concluding that this claim failed under  [Strickland](#)’s performance prong, the PSC appeared to rely on the following: (a) Wharton’s prison records “cut both ways”; and (b) Cannon presented other evidence that led the jury to find the catch-all mitigating factor. See  [id.](#) But these points do not necessarily render Cannon’s performance reasonable. If, for example, Cannon simply neglected to seek out the prison records, his conduct could be deemed unreasonable regardless of whether the records were particularly helpful or whether

he presented other mitigating evidence to the jury. See  [Williams v. Taylor](#), 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (explaining that counsel has an “obligation to conduct a thorough investigation of the defendant’s background”); see also  [Strickland](#), 466 U.S. at 690-91, 104 S.Ct. 2052 (“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”). Without knowing whether Cannon even considered obtaining the prison records, neither the content of those records, nor the presence of other evidence, could serve as the basis for rejecting Wharton’s claim on  [Strickland](#)’s performance prong.¹⁵ Accordingly, we conclude that the PSC’s application of that prong was unreasonable.

¹⁵ In its discussion of  [Strickland](#)’s performance prong, the PSC also stated, parenthetically, that Wharton had not made a proffer as to what Cannon would say in response to the allegations of ineffectiveness. See  [Wharton III](#), 811 A.2d at 988. We do not read that brief parenthetical as constituting a freestanding basis for the PSC’s conclusion that Wharton failed to satisfy  [Strickland](#)’s performance prong. The PSC also mentioned, in a footnote, Wharton’s failure to comply with [Pennsylvania Rule of Criminal Procedure 902\(A\)\(15\)](#)’s requirement that a request for an evidentiary hearing be accompanied by a signed certification providing the substance of each witness’s testimony. See  [id.](#) at 989

[n.12](#). But that rule, which was formerly numbered 1502(A)(15), was not enacted until after the PCRA court denied Wharton’s petition. Given that timeline of events, Wharton could hardly be faulted for not complying with that rule. The Commonwealth now argues that Wharton failed to comply with a rule that was in place when he filed his PCRA petition. Specifically, the Commonwealth points to [Rule 902\(D\)](#) (formerly numbered Rule 1502(D)), which states that a prisoner shall attach to his petition affidavits or other evidence that supports his claims (or explain why that evidence is not attached). But because the PSC did not base its  [Strickland](#) performance analysis on [Rule 902\(D\)](#), that rule is irrelevant here.

The PSC’s application of  [Strickland](#)’s prejudice prong fares no better. The PSC’s analysis of this prong was brief:

[I]t is notable that the equivocal prison record evidence, had it been introduced, would have sounded under the catch-all mitigating circumstance, which the jury in fact found.... [Wharton] has not demonstrated that he was prejudiced by [Cannon’s] failure to introduce this equivocal prison record

evidence as additional proof of this mitigating circumstance found by the jury.

 [Wharton III, 811 A.2d at 989.](#)

The PSC's prejudice analysis seems to suggest that any prison record evidence would have been cumulative because the *281 jury had already found the catch-all mitigating factor. Such a suggestion would be persuasive if the weighing of aggravating and mitigating factors involved simply counting those two sets of factors to see which set was greater in number. But that is not the process in Pennsylvania, for the PSC itself has explained that the weighing process "involves a qualitative, not quantitative, analysis." [Commonwealth v. Peoples, 536 Pa. 326, 639 A.2d 448, 451 \(1994\)](#) (emphasis omitted). In other words, a jury need not give the same amount of weight to each factor that it finds, and it is certainly possible that a jury's receipt of additional evidence regarding a particular factor would cause one or more jurors to assign more weight to that factor. Therefore, the PSC's analysis here is fundamentally flawed and cannot serve as the basis for rejecting a claim under  [Strickland](#). Indeed, the PSC itself has recently held as much, overruling its prior decisions in  [Commonwealth v. Rios, 591 Pa. 583, 920 A.2d 790, 812-13 \(2007\)](#), and  [Commonwealth v. Marshall, 571 Pa. 289, 812 A.2d 539, 548-49 \(2002\)](#), which had held "that counsel cannot be deemed **ineffective** for failing to present additional catchall mitigating evidence where the jury

found the catchall mitigator based on other evidence presented by counsel during the penalty hearing."  [Commonwealth v. Tharp, 627 Pa. 673, 101 A.3d 736, 773 n.28 \(2014\)](#).¹⁶ Accordingly, we conclude that the PSC's prejudice analysis constitutes an unreasonable application of  [Strickland](#).¹⁷ In light of this conclusion, we must now examine this claim *de novo* to determine whether Wharton is entitled to habeas relief. See  [Breakiron v. Horn, 642 F.3d 126, 138 \(3d Cir. 2011\)](#).

¹⁶ In  [Tharp](#), four of the seven justices voted to overrule  [Rios](#) and  [Marshall](#), and they did so in concurring opinions. See  [101 A.3d at 775](#) (Castille, C.J., concurring, joined by Eakin, J.);  [id. at 777](#) (Saylor, J., concurring, joined by Eakin, J., and Todd, J.).

¹⁷ As indicated earlier, the District Court concluded that the PSC's decision was not an unreasonable application of  [Strickland's](#) prejudice prong. However, in reaching that conclusion, the District Court did not actually rely on the PSC's prejudice analysis. Instead, the District Court looked to the PSC's discussion of  [Strickland's](#) performance prong, specifically the PSC's determination that the prison records "cut both ways." The District Court's approach was error, for it effectively deferred to the PSC based on a rationale that was different than the reason actually given by the PSC. See  [Richter, 562 U.S. at 102, 131 S.Ct. 770](#) ("Under

¶ § 2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."); see also Hittson v. Chatman, — U.S. —, 135 S.Ct. 2126, 2127-28, 192 L.Ed.2d 887 (2015) (Ginsburg, J., joined by Kagan, J., concurring in the denial of certiorari) ("¶ Richter makes clear that where the state court's real reasons can be ascertained, the ¶ § 2254(d) analysis can and should be based on the actual 'arguments or theories [that] supported ... the state court's decision.'") (quoting ¶ Richter, 562 U.S. at 102, 131 S.Ct. 770); ¶ Dennis v. Sec'y Pa. Dep't of Corr., 834 F.3d 263, 281-82 (3d Cir. 2016) (en banc) ("While we must give state court decisions the benefit of the doubt ..., federal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided....") (internal quotation marks omitted).

failing to investigate and/or present Wharton's prison-adjustment evidence, and (2) had Cannon presented that evidence at the second penalty hearing, there is a reasonable probability that at least one juror would have voted against imposing the death penalty. See ¶ *282 Blystone v. Horn, 664 F.3d 397, 426-27 (3d Cir. 2011). To help make this showing, Wharton asked the District Court for an evidentiary hearing. The District Court denied this request, stating that (1) a hearing on this claim was barred by ¶ Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and (2) even if ¶ Pinholster did not apply here, it would still deny a hearing as to this claim because he failed to make a *prima facie* showing of a constitutional violation. As explained below, we disagree with both of these determinations, and we conclude that an evidentiary hearing is warranted on this claim.¹⁸

¹⁸ Although "[w]e review the District Court's denial of an evidentiary hearing in a *habeas* case for abuse of discretion," ¶ United States v. Lilly, 536 F.3d 190, 195 (3d Cir. 2008), "our consideration of the District Court's legal conclusions [undergirding that decision] is plenary," ¶ Morris v. Beard, 633 F.3d 185, 193 (3d Cir. 2011).

^[5]In ¶ Pinholster, the Supreme Court held that a habeas court's review of a claim under ¶ § 2254(d) "is limited to the record that was before the state court that adjudicated the claim on the merits." ¶ Id. at 181, 131 S.Ct. 1388. But when, as here, the state court's decision is unreasonable under ¶ §

C. De Novo Review of Wharton's Penalty-Phase Claim

To prevail on this claim, Wharton must show that (1) Cannon acted unreasonably by

2254(d), [Pinholster](#) does not prevent a federal habeas court from holding an evidentiary hearing as part of its de novo review. See [Brumfield v. Cain](#), — U.S. —, 135 S.Ct. 2269, 2276, 192 L.Ed.2d 356 (2015) (noting that “federal habeas courts may ‘take new evidence in an evidentiary hearing’ when § 2254(d) does not bar relief”) (quoting [Pinholster](#), 563 U.S. at 185, 131 S.Ct. 1388). In deciding whether to hold such a hearing, a federal habeas court must consider (1) “whether the petition presents a *prima facie* showing which, if proven, would enable the petitioner to prevail on the merits of the asserted claim,” and (2) “whether the relevant factual allegations to be proven at the evidentiary hearing are ‘contravened by the existing record’ or the record ‘otherwise precludes habeas relief[.]’” [Lee v. Glunt](#), 667 F.3d 397, 406-07 (3d Cir. 2012) (alteration in original) (quoting [Palmer v. Hendricks](#), 592 F.3d 386, 393 (3d Cir. 2010)). For the reasons that follow, we conclude that Wharton has made this *prima facie* showing, and the record does not preclude granting habeas relief on this claim.

“[A] defendant’s disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.” [Skipper v. South Carolina](#), 476 U.S. 1, 7, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). As a result, a defense attorney has a duty to obtain a capital defendant’s prison records “as part of the ‘obligation to conduct a thorough investigation of the defendant’s background,’” [Blystone](#), 664 F.3d at 422-23 (quoting [Williams](#), 529 U.S. at

396, 120 S.Ct. 1495). Wharton alleges that Cannon failed to obtain those records in this case, and nothing in the habeas record contradicts that allegation. If Wharton is given an opportunity to question Cannon in an evidentiary hearing—Cannon has yet to testify about this evidence—Wharton may be able to show that Cannon acted unreasonably. See [id.](#) at 420 (“[I]f counsel has failed to conduct a reasonable investigation to *prepare* for sentencing, then he cannot possibly be said to have made a reasonable decision as to what to *present* at sentencing.”). Accordingly, we conclude that Wharton has made a *prima facie* showing under [Strickland](#)’s performance prong.

As for [Strickland](#)’s prejudice prong, to determine whether Wharton’s proffered evidence had a reasonable probability of changing at least one juror’s vote, “we must reconstruct the record and assess it anew. In so doing, we cannot merely consider *283 the mitigation evidence that went unmentioned in the first instance; we must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner’s mitigation testimony.” [Williams v. Beard](#), 637 F.3d 195, 227 (3d Cir. 2011).

Wharton’s prison records for the time between his two penalty hearings consist primarily of (1) his prison grievances and the prison’s responses to them, and (2) one-page monthly evaluations prepared by the prison’s Program Review Committee (“PRC”).¹⁹ Wharton submitted a number of grievances, some of which were trivial.²⁰ At first, one might very well conclude that these grievances would not help his case for

mitigation. However, Dr. Krop's declaration suggests otherwise, for he averred that “[t]hese grievances exhibit concern over the day-to-day details of his incarceration, which, from a psychological perspective, is significant as demonstrating a relative acceptance of [Wharton's] incarceration. Such acceptance is an important element of his adjustment and shows that he will likely not be a future danger.” (App. at 4656.)

¹⁹ The prison records also include periodic reports prepared by a psychiatrist, but those reports are very short (a few sentences or less) and really do nothing more than indicate that Wharton “has no evidence of a treatable mental disorder.” (App. at 4911.)

²⁰ Wharton's grievances included, *inter alia*, “complaints that a corrections officer's morning wake-up call was too loud; that he did not receive jelly with his toast; that corrections officers were ‘whistling ... early in the morning[;]’ and that he did not receive his ‘daily newspaper’ on two occasions.” (App. at 112 (alteration in original) (quoting Wharton's prison records).)

As for the monthly PRC evaluations, a few of them contain negative information about Wharton.²¹ Most of those evaluations, however, were positive. Although they were brief and did not provide much in the way of specifics, they indicated that Wharton was adjusting well to prison life and that his

behavior was generally satisfactory. Of course, had Wharton presented the testimony of Dr. Krop (or a similar expert witness), the Commonwealth might have countered with other evidence, including an expert holding a contrary opinion. To date, though, the Commonwealth has yet to proffer any such testimony.

²¹ In its June 1988 evaluation, the PRC noted that Wharton had been given a “reprimand and warning” for an unspecified misconduct. (App. at 4831.) In April 1989, the PRC noted that he had recently received a misconduct for circulating a petition about phone call privileges. In September 1989, the PRC reviewed “very serious misconducts,” noting that he was “less than truthful ... and denied having anything to do with the confiscated weapon or handcuff key.” (*Id.* at 4845.) In December 1989, the PRC noted “past misconducts for abusing/modifying his antennas.” (*Id.* at 4848.) In January 1990, the PRC stated that Wharton “refused to even discuss why he had pieces of aerial and two lengths of antenna. He said he didn't have to. He did the time.” (*Id.* at 4849.) It appears that Wharton was placed in “D.C. Close” custody for about five months as a result of one or more of these misconducts. (*See id.* at 4844.)

We recognize that Wharton's proffered evidence does, at least to a degree, “cut both ways.” But in light of the positive elements of that evidence and the fact that the jury at the second penalty hearing was deadlocked

at one point, we conclude that Wharton has made a prima facie showing under [Strickland's](#) prejudice prong. That is, he has made a prima facie showing that there is a reasonable probability that at least one juror would have changed his or her vote if presented with this evidence.

^[6]Wharton must clear one more hurdle before he would be entitled to an evidentiary hearing on this claim. [Section 2254\(e\)\(2\)](#) “bars a federal habeas court *284 from holding an evidentiary hearing unless the petitioner was diligent in his attempt to develop a factual basis for his claim in the state court proceedings.” [Lee](#), 667 F.3d at 405-06 (internal quotation marks omitted).²² This diligence requirement “asks only whether ‘the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.’” [Lark v. Sec'y Pa. Dep't of Corr.](#), 645 F.3d 596, 614 (3d Cir. 2011) (quoting [Williams v. Taylor](#), 529 U.S. 420, 435, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). In this case, Wharton’s timely, counseled PCRA petition explicitly requested an evidentiary hearing. When the PCRA court denied that petition without a hearing, he appealed and also filed a motion to reargue. These efforts are sufficient to satisfy [§ 2254\(e\)\(2\)](#)’s diligence requirement. See [Thomas v. Varner](#), 428 F.3d 491, 498 (3d Cir. 2005) (“Thomas requested an evidentiary hearing before the Commonwealth PCR court.... The hearing was denied, and therefore Thomas is not at fault for failing to develop the factual basis for his claim.”); see also [Williams](#), 529 U.S. at 437, 120 S.Ct. 1479 (“Diligence will require in the usual case that the prisoner, at

a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.”).²³ Accordingly, [§ 2254\(e\)\(2\)](#) does not bar an evidentiary hearing in this case.

²² “[O]ur jurisprudence applying [§ 2254\(e\)\(2\)](#) remains applicable ‘where [§ 2254\(d\)\(1\)](#) does not bar federal habeas relief.’” [Brown v. Wenerowicz](#), 663 F.3d 619, 629 n.4 (3d Cir. 2011) (quoting [Pinholster](#), 563 U.S. at 185, 131 S.Ct. 1388).

²³ Although Wharton did not submit his documentary evidence on this claim until after the PCRA court issued its notice of intent to dismiss his PCRA petition, “[t]he state courts allowed this revision, and the Commonwealth has not challenged it.” (Commonwealth’s Br. 150.)

In sum, because Wharton has made a prima facie showing under [Strickland](#) and there is no bar to an evidentiary hearing in this case, we conclude that the District Court erred in denying his request for a hearing. Therefore, we will vacate the District Court’s denial of habeas relief on this claim and remand for a hearing.

V. Conclusion

Based on the foregoing, we will affirm in part and vacate in part the District Court’s denial of Wharton’s habeas petition, and we

will remand this matter for further proceedings consistent with this opinion.²⁴

²⁴ Although Wharton's notice of appeal included a challenge to the District Court's denial of his motion to alter or amend its habeas decision, he has waived that challenge by failing to raise it in his appellate briefing. See  [Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.](#), 26 F.3d 375, 398 (3d Cir. 1994). Even if Wharton had preserved this challenge, it would not have changed our

resolution of the three claims at issue here.

All Citations

722 Fed.Appx. 268

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

ROBERT WHARTON,

Petitioner,

v.

DONALD T. VAUGHN,

Respondent.

Civil Action

No. 01-cv-6049

GOLDBERG, J.

May 11, 2022

MEMORANDUM OPINION

In this ongoing federal death penalty habeas matter, Petitioner Robert Wharton, now joined by the Philadelphia District Attorney's Office, advocates that I vacate a jury's sentence of death, affirmed decades ago by the Pennsylvania Supreme Court. Both Wharton and the District Attorney assert that such relief should be granted because trial counsel was ineffective for failing to offer positive prison adjustment evidence during the death penalty phase of Wharton's trial. Both Wharton and the District Attorney take this position despite the fact that had trial counsel presented such mitigation evidence, Wharton's premeditated escape from a City Hall courtroom and his subsequent fashioning of escape tools in prison would also have been presented in rebuttal to the sentencing jury.

After considering the record developed during hearings on Wharton's habeas petition, and having reviewed the matter's entire history, I conclude that there is no reasonable probability that, but for counsel's alleged deficient performance, one juror would have voted to impose a life, rather than a death sentence.

This Opinion sets forth the basis for my denial of Wharton's ineffective assistance of counsel claim and also addresses an issue of possible lack of candor to the Court on the part of the Philadelphia District Attorney's Office.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Overview

Wharton received the death penalty in 1985 after he and his co-defendant forced their way into the home of Bradley and Ferne Hart at knifepoint and strangled the Harts to death. Wharton and his co-defendant then turned off the heat and abandoned the Harts' infant, Lisa, to freeze to death. Lisa was found two days later suffering from dehydration but miraculously survived.

Before me on remand from the United States Court of Appeals for the Third Circuit is Wharton's single, remaining ineffective assistance of counsel claim for death penalty habeas corpus relief. Wharton seeks to vacate his two death sentences because his trial counsel was allegedly ineffective for failing to present evidence of Wharton's alleged positive adjustment to prison at the penalty phase of his state court proceeding. I had previously decided that a hearing on this claim was unnecessary because Wharton had failed to make a *prima facie* showing of a Sixth Amendment violation. The Third Circuit disagreed and remanded the matter, directing that I hold an evidentiary hearing.

After I attempted to schedule this hearing, the District Attorney's Office, which had zealously defended Wharton's death sentence for decades, changed its position and advised that it now believed a Sixth Amendment violation had occurred and that it joined with Wharton in his requested relief. For reasons explained below, I invited the Pennsylvania Office of the Attorney General to participate in the evidentiary hearings so that I would have the benefit of a developed

factual record. These hearings were held on February 25, 2021, March 8, 2021, March 16, 2021, May 11, 2021, and August 5, 2021.

B. Wharton's Penalty Hearing and Death Sentence

Wharton was first sentenced to death on July 5, 1985, but that sentence was vacated due to a jury instruction error. See Commonwealth v. Wharton, 607 A.2d 710, 721-24 (Pa. 1992). At Wharton's second penalty hearing in 1992, held seven years after the first, the Commonwealth presented evidence of the history between Wharton and the Hart family, including his participation in burglaries of the Hart home on August 14, 1983 and August 22, 1983 and a September 6, 1983 burglary of the Germantown Christian Assembly Church, where Bradley Hart worked. (See Aug. 16, 2012 Mem. Opinion, ECF No. 126, at 107.) The jury also heard the grisly evidence regarding Wharton's involvement in the murders of Bradley and Ferne Hart. (See id.)

In support of life imprisonment, Wharton's trial counsel, William Cannon, offered evidence of his character from his family members, including the testimony of his mother, brother, sister, aunt, cousin, and brother-in-law. They testified that Wharton was a good family member and community member; that he was kind, humble, athletic, loving, loveable, and "good with his hands"; and that he had accepted religion into his life. (See ECF No. 126 at 107; N.T., 02/25/21, 123:7-15, 125:4-126:16.)

Based upon this evidence, the jury found two aggravating circumstances: that Wharton committed a killing while perpetrating a felony (a robbery), 42 Pa. Con. Stat. § 9711(d)(6), and that Wharton had been convicted of another offense punishable by life imprisonment or death (that is, Wharton committed two homicides), 42 Pa. Con. Stat. § 9711(d)(10). The jury also found certain mitigating circumstances under the Pennsylvania statute's "catch-all" provision, 42 Pa. Con. Stat. § 9711(e)(8), including that Wharton "did not murder Lisa Hart," was a good family

member, and cooperated with police.¹ (N.T., 02/25/21, 121:7-13.) The jury concluded that the aggravating circumstances outweighed the mitigating circumstances and, on December 23, 1992, returned a verdict of death on each murder count.

C. PCRA Proceedings

Following an unsuccessful direct appeal, Wharton petitioned for relief under Pennsylvania's Post Conviction Relief Act (PCRA). Among other arguments, Wharton contended that his trial counsel was ineffective at the second penalty hearing for failing to obtain and present evidence reflecting Wharton's positive adjustment to prison life during the seven years between the two penalty hearings.

The PCRA court rejected Wharton's petition and the Pennsylvania Supreme Court affirmed, finding that Wharton had not shown either that counsel's performance was deficient or that Wharton was prejudiced by the failure to offer prison adjustment evidence. Commonwealth v. Wharton, 811 A.2d 978, 981 (Pa. 2002). Regarding deficient performance, the Pennsylvania Supreme Court decided that counsel did not act unreasonably by failing to present evidence of prison adjustment because the evidence was not "sterling" and "cut both ways." Id. at 988-89. Regarding prejudice, the court found that prison adjustment evidence could not have aided Wharton's case for life imprisonment because the evidence supported only the "catch-all" mitigating factor that the jury in fact found. Id. at 989. As explained below, the Court of Appeals for the Third Circuit later found this analysis to be an unreasonable application of federal law. Wharton v. Vaughn, 722 F. App'x 268, 281-84 (3d Cir. 2018).

¹ "Mitigating circumstances shall include ... [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. Con. Stat. § 9711(e)(8).

D. Wharton's Federal Habeas Petition

Following the conclusion of the PCRA proceedings, Wharton filed federal habeas claims under 28 U.S.C. § 2254. On August 16, 2012, I issued an extensive opinion denying each of Wharton's twenty-three claims.

Wharton appealed, and in January 2018, the Court of Appeals for the Third Circuit affirmed twenty-two of those rulings and remanded for an evidentiary hearing on a single issue: Whether, under Strickland v. Washington, 466 U.S. 668 (1984), Wharton can establish that: (1) his counsel acted unreasonably by failing to investigate and/or present prison adjustment evidence; and (2) if so, there was a reasonable probability that at least one juror would have changed his or her vote if presented with prison records from the time between Wharton's death penalty hearings. Wharton v. Vaughn, 722 F. App'x 268, 281-84 (3d Cir. 2018).

The Third Circuit determined that the Pennsylvania Supreme Court used an “unreasonable application of Strickland” in affirming the denial of Wharton's PCRA petition and that Wharton was entitled to de novo review of the claim of counsel's failure to present prison records. Id. at 281. In considering whether Wharton had made a *prima facie* showing of a Sixth Amendment violation, the Third Circuit explained that Wharton's prison records from the time between his two penalty hearings could establish that he was adjusting well to prison life, and this may have affected the jury's sentence. The Third Circuit also noted that the prison records could “cut both ways” because “the Commonwealth might have countered with other evidence, including an expert holding a contrary opinion.” Id. The Third Circuit thus determined that a hearing before me was necessary to resolve this remaining Strickland claim. Id. at 284.

Soon after remand, I scheduled a status conference with Wharton's counsel and the District Attorney to discuss the remand hearing process. On February 6, 2019, with little explanation, the District Attorney responded by filing a “Notice of Concession of Penalty Phase Relief,” which in

pertinent part stated that the decision to concede was made “[f]ollowing review of this case by the Capital Case Review Committee of the Philadelphia District Attorney’s Office, communication with the victims’ family, and notice to [Wharton’s] counsel.” (Notice of Concession, ECF No. 155, ¶ 9.) This concession also advised that the District Attorney would not “seek new death sentences in state court” and that “the grant of sentencing relief on [Wharton’s] penalty phase ineffectiveness claim in accordance with [the District Attorney’s] concession would end the litigation of this case … and eliminate the need for … [further] proceedings in this Court.” (Id. at ¶ 10-11.) The Notice provided no factual or legal analysis as to the District Attorney’s basis for this complete about-face, and no explanation as to why, after decades of advocating for the death penalty, the District Attorney had now reached the conclusion that a Sixth Amendment violation had occurred due to a failure on trial counsel’s part to introduce positive prison adjustment evidence. And as will be explained infra, this concession notice was filed five months after the Pennsylvania Supreme Court had explicitly found, in a death penalty matter on collateral review, that the District Attorney does not maintain prosecutorial discretion to alter a capital jury’s verdict via an agreement or by concession and that vacating a jury’s death sentence should only occur after careful and independent judicial review. Commonwealth v. Brown, 196 A.3d 130, 144-46 (Pa. 2018)

The District Attorney’s concession notice was followed by a draft order, submitted two days later, by Wharton’s counsel and the District Attorney. This Order proposed that the death penalty sentence be vacated and suggested that I had undertaken a “careful and independent review of the parties’ submissions and all prior proceedings in this matter,” and had thus concluded that a Sixth Amendment violation had in fact occurred. (Proposed Order, ECF No. 156.) Because I had

received no facts or analysis which would allow me to undertake a “careful independent review” and grant such extraordinary relief, I declined to sign this proposed order.

Rather, given the Third Circuit’s directive to hold a hearing and the District Attorney’s unwillingness to fully explain its concession, and based upon my obligation to independently examine the remaining issue in this case that necessarily required a full exploration of facts,² I ordered the parties to provide a fulsome explanation justifying the relief requested. (March 4, 2019 Order, ECF No. 160.) The District Attorney responded that the jury’s verdict and the Pennsylvania Supreme Court’s affirmation of that verdict should be overturned because: de novo review was ordered by the Third Circuit; trial counsel had submitted a declaration “that he had no strategy for not presenting adjustment evidence”; and at one point the jury had been deadlocked. (ECF No. 162.) The District Attorney thus continued to decline or refused to provide me with any evidence of Wharton’s positive prison adjustment, the crux of the matter before me, nor did it advise that there was any evidence to the contrary I should consider—e.g., negative prison adjustment.

Given the District Attorney’s continued reluctance to provide me with a meaningful analysis regarding its concession, and my inability to properly explore this highly factual issue, I appointed the Pennsylvania Attorney General to investigate and provide, if available, evidence of Wharton’s prison adjustment, including contrary facts. As will be detailed infra, the Attorney

² In Sibron v. New York, 392 U.S. 40 (1968), the United States Supreme Court reasoned that “[i]t is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained.” Id. at 58. Other precedent, including a recent pronouncement by the Pennsylvania Supreme Court, supports this conclusion. See Young v. United States, 315 U.S. 257, 258-59 (1942) (“[O]ur judicial obligations compel us to examine independently the errors confessed.”); Commonwealth v. Brown, 196 A.3d 130, 141-49 (Pa. 2018) (“[I]f the ‘power’ of a court amounts to nothing more than the power ‘to do exactly what the parties tell it to do, simply because they said so and without any actual merits review, it is not judicial power at all. It is a restriction on power.’”).

General's investigation revealed significant negative prison adjustment evidence, including an attempted, planned escape from a City Hall courtroom and subsequent efforts to manufacture escape tools while in prison.

In addition, because the District Attorney cited communications with the victims' family members as a reason for its concession of death penalty relief, and because I have a statutory obligation in 28 U.S.C. § 2254 proceedings to afford victims an opportunity to be heard where sentencing or release is involved, I allowed that the parties and the Attorney General could introduce evidence of the District Attorney's communication with the victims' family members and the family's view on the proposed concession of relief. (Notice of Concession, ECF No. 155, ¶ 9.)

II. EVIDENCE PRESENTED AT THE HABEAS EVIDENTIARY HEARINGS

Hearings in this matter took place over the course of five days. During these proceedings, I heard testimony from multiple prison and psychiatric experts, Wharton's trial counsel, a former corrections officer assigned to Wharton's housing unit, a former Department of Corrections ("DOC") hearing examiner who reviewed one of Wharton's misconducts, and a former Philadelphia Assistant District Attorney who was present on the day of Wharton's escape from a Philadelphia Court of Common Pleas courtroom in 1986. I also heard testimony regarding the District Attorney's communications with the victims' family.³

I have considered the following facts in conjunction with Wharton's remaining Sixth Amendment claim. These facts cover Wharton's prison adjustment between the two jury verdicts sentencing Wharton to death, which is the relevant time period for purposes of Wharton's Sixth

³ As the victims' family's testimony has no bearing on the merits of Wharton's Sixth Amendment claim, it is discussed later in this opinion.

Amendment Claim. See Wharton, 722 F. App'x at 283 (analyzing “Wharton’s prison records for the time between his two penalty hearings”).⁴

A. Trial Counsel’s Investigation into Prison Adjustment

1. Wharton’s trial counsel, William Cannon, acknowledged that he did not investigate Wharton’s prison adjustment in preparation for the penalty hearing. Cannon admitted there was no strategy involved in his decision not to request prison records and that it was “pure ignorance.” (N.T., 02/25/21, 129:2-14.)

2. Cannon had worked on four or five prior cases where his client faced a possible death penalty, but Wharton’s case was the first time he had represented a client at the penalty phase of such a proceeding. (N.T., 02/25/21, 106-07.)

B. Wharton’s Adjustment to Incarceration: The 1986 Escape Attempt

3. On April 21, 1986, less than a year after he was first sentenced to death (but before judgment of death was formally entered), Wharton was transported to City Hall in Philadelphia County to attend a sentencing hearing in an unrelated robbery case. (OAG Ex. 6.)

4. When given an opportunity to address the court, Wharton stated:

... I believe I did lose sight of reality and caused a lot of people pain and suffering. As you said, something went wrong somewhere. Unfortunately the family isn’t here to accept my apology, but I’m sorry and any time I serve I will use to better myself.

(N.T., 04/21/1986, 36.)

5. Shortly after making this statement, and while being transported from the second-floor City Hall courtroom to the seventh-floor “cell room,” Wharton pushed the deputy sheriff transporting him into a closing elevator door and ran down the courthouse stairs from the second

⁴ The Attorney General investigated and presented all of the evidence regarding Wharton’s negative prison conduct and adjustment.

to the first floor. (OAG Ex. 7.) To effectuate this escape, Wharton had used a key to open his handcuffs. (Id.) While Wharton was fleeing down a public stairwell toward the exit leading to the street, a deputy sheriff was forced to fire two shots at Wharton to prevent his escape, wounding Wharton in the left thigh. (Id.)⁵

6. On December 3, 1986, as a result of this incident, Wharton pled guilty to escape. (OAG Exs. 11-12.)

C. Wharton's 1986 Classification Assessment

7. In July 1986, the Pennsylvania Department of Corrections ("DOC") performed a classification assessment for Wharton. The DOC's Classification Summary includes Wharton's account of the Hart murders:

"In 1/84, two other guys and I burglarized a house in S. Phila. and robbed the owners. We took their car and were later arrested after one of the guys left his identification in the car. Police found the guy's cards. One guy got arrested, implicated me and I was arrested about 2 months later."

(OAG Ex. 39 at 4.)

8. The Summary included a psychiatric report, which, consistent with the above, noted that Wharton "used a great deal of denial and rationalization." (OAG Ex. 39 at 8.) The report stated:

[Wharton] impresses as a sociopath with dependent features and dissocial attitudes. He does not cope well with rejection and tends to cling to important

⁵ In a prior written order, I overruled Wharton's objection to admission of the facts underlying his escape as reflected in the 1986 arrest report. (ECF No. 227 ¶¶ 11-14.) When Wharton pleaded guilty to escape, he signed an acknowledgement that the "facts" of the crime had been read to him. (Id. ¶ 13.) I therefore ruled that, in 1992, the Commonwealth could have sought to introduce these facts as Wharton's adoptive admission. (Id. ¶ 14.)

Other details pertaining to Wharton's 1986 escape are set out in newspaper articles. As to these, I found that the articles were not admissible to prove the truth of the facts described therein. (Id. ¶ 20.) Rather, the newspaper articles were accepted only to show that the parties would have been aware of the facts contained in them when preparing for the 1992 sentencing hearing.

others. He does not trust authority figures and will not seek their help. He found acceptance among a group of his peers and was easily led by them.

(Id.)

9. The Summary determined that Wharton was “an extremely high public risk because of his Murder detainer and because he admits attempting to escape from Sheriff’s on 4/21/86.” (OAG Ex. 39 at 4 (emphasis added).) The Summary also determined that Wharton was a “moderate institutional risk.” (Id.)

D. Wharton’s Prison Adjustment at SCI Huntington

10. In September 1986, Wharton was placed at the Restricted Housing Unit (“RHU”) at State Correctional Institution Huntington (“SCI Huntington”). (N.T., 02/25/21, 18:11; N.T., 02/25/21, 20:25-21:2.)

1. Misconduct Findings

11. While incarcerated at SCI Huntington, Wharton received six misconducts, the last occurring in 1992. (N.T., 02/25/21, 22:12-14; N.T., 05/11/21, 18:16-24.) None of Wharton’s misconducts involved violence, and four were relatively minor. (N.T., 02/25/21, 22:14-23:10; N.T., 05/11/21, 19:2-5; N.T., 08/05/21, 42:2-11, 62:4-16.) However, two of Wharton’s misconducts, described below, were considered by Huntington to be serious, involving implements of escape. (N.T., 02/25/21, 22:15-23:8; N.T., 03/16/21, 10:19-20; N.T., 05/11/21, 19:5-23; N.T., 08/05/21, 65:3-9.)

12. On May 15, 1989, Daniel Hayes, a Corrections Officer assigned to the RHU, found two pieces of broken antenna in one of the holes in the wall behind Wharton’s toilet where there was a bolt securing the toilet to the wall. (N.T., 03/16/21, 156:6-158:15; N.T., 03/16/21, 165:1-19.) The smaller piece of antenna was fashioned into the shape of a handcuff key. (Id.; OAG Ex. 17A.)

13. Hayes had been employed at SCI Huntington for about five years and had used handcuffs and handcuff keys every day. (N.T., 03/16/21, 150:18-153:20.) The makeshift handcuff key found in Wharton's cell was the only time in Hayes's 28-year career that he had found a makeshift handcuff key that he thought "would work." (N.T., 03/16/21, 163:21-24.) Wharton's cell was a single cell that had been occupied only by him when Hayes found the makeshift handcuff key. (N.T., 03/16/21, 199:19-200:3; OAG Ex. 17C.)

14. Hayes filed a misconduct report against Wharton for possessing implements of escape. (OAG Ex. 17A.) Hayes's report was reviewed and approved by the ranking corrections officer on duty, "C. Kyle." (*Id.*; N.T., 03/16/21, 160:15-161:8.) Hayes showed Kyle the pieces of antenna that he had found before Kyle "signed off" on the report. (N.T., 03/16/21, 160:15-161:8.) Kyle did not conduct an additional investigation of the incident. (N.T., 03/16/21, 172:19-23.) There is no evidence that Wharton had used or attempted to use the handcuff key. (N.T., 02/25/21, 27:2-7.)

15. Wharton pled not guilty to the misconduct, arguing that another inmate in the cell before him must have hidden the antenna behind the toilet. (OAG Ex. 17B.)

16. George Conrad was the hearing examiner with the Pennsylvania Department of Corrections in 1989 who presided over Wharton's misconduct hearing stemming from the makeshift handcuff key. (N.T., 03/16/21, 185, 190-91.) As reflected in the Disciplinary Hearing Report on Wharton's misconduct, Conrad found that the physical evidence "clearly represents a handcuff key. Conrad stated the key was found in a single cell occupied by Wharton for several months. It is more likely than not that the key was possessed and under the control of Wharton." (OAG Ex. 17C.) Conrad found Wharton guilty. (N.T., 03/16/21, 196.)

17. Conrad admitted that inmates can sometimes be taken out of their cells unexpectedly with no time to gather any contraband, and, at the time of the hearing, there was no evidence presented regarding when the toilet mounting in Wharton's cell had been searched prior to May 15, 1989. (N.T., 03/16/21, 209:15-210:9; N.T., 03/16/21, 211:18-212:2.) However, as the Attorney General's corrections expert, Jeffrey Beard, testified, each RHU cell is searched before a new inmate is moved into it. (N.T., 05/11/21, 40:8-41:14.)

18. Four days after the May 15, 1989 search of Wharton's cell and finding of a handcuff key, Wharton's cell was searched again, and an additional four-inch piece of antenna was found hidden in the binding of Wharton's legal material. (OAG Ex. 19A.) Wharton was again found guilty of possessing implements of escape. (OAG Ex. 19C.) The hearing examiner at Wharton's second misconduct hearing in 1989 noted that Wharton, again, denied that the piece of antenna was his, stating that he had "no idea" where the corrections officer found it. (OAG Ex. 19B.) The hearing examiner explained: "[T]he reporting officer specifically found the piece of antenna in [Wharton's] legal material binding. Wharton is in a single cell and has sole control over his possessions. ... Also noted that a handcuff key was fashioned out of such a piece [of] material in the past by Wharton." (OAG Ex. 19B.)

19. According to the Department of Correction's Policy Statement on Inmate Disciplinary and Restricted Housing Procedures, possession of contraband/implements of escape is a Class 1, Category B misconduct. (OAG Ex. 27; N.T., 05/11/21, 43:5-44:2.) The only misconducts more serious than implements of escape, which are in Category A of the Class 1 misconducts, are murder, rape, arson, and robbery. (Id.) Conrad explained that possessing implements of escape is a significant misconduct because it presents "a serious threat to a prison system" and the outside community. (N.T., 03/16/21, 194.)

20. Wharton was sentenced to 90 days in Disciplinary Custody, the maximum sanction for a Class 1 misconduct, for each of his 1989 implements of escape misconducts. (OAG Exs. 17C, 19C; N.T., 05/11/21, 39:21-24.) Wharton was released from Disciplinary Custody three weeks early for good behavior. (N.T., 05/11/21, 64:1-15.)

21. Conrad testified that in his experience, approximately ten to twelve of the more than a thousand hearings in which he participated during the ten years that he was a Hearing Examiner involved a makeshift handcuff key. (N.T., 03/16/21, 206:5-17.) He explained that such a misconduct was uncommon. (Id.)

22. As late as 1990, Wharton denied the possession of the antenna material, telling the Program Review Committee (“PRC”) that he had served his time and did not want to discuss it. As a result of his refusal to accept responsibility for these misconducts, Wharton’s radio and television privileges were not reinstated until March 1990. (N.T., 05/11/21, 54:20-56:3; OAG Ex. 37C.)

2. Wharton’s Participation in Prison Life

23. While incarcerated at SCI Huntington, Wharton had the opportunity to attend monthly meetings with the PRC to review his conduct and prison adjustment. (N.T., 03/08/21 (Part 2), 24:25-25:20, 55:5-10, 56:17-57:4; see also Wharton Ex. 4 at 919-990; OAG Exs. 37A-C.) Inmates were not required to attend these meetings and could decline to do so. (Id.; N.T., 08/05/21, 50:25-51:10.) Wharton attended approximately forty percent of the PRC meetings available to him during the relevant period. (Id.)

24. The PRC noted in various reviews that Wharton was polite, cordial, well-mannered, well-behaved, and had regular contacts with his counselor. (N.T., 02/25/21, 132:2-140:19; see Wharton Ex. 4 at 919-990; OAG Ex. 37A-C; N.T., 08/05/21, 39:6-14.) Wharton did not exhibit any signs of assaultive, predatory, or violent behavior while incarcerated at SCI Huntington during

the relevant time period. (N.T., 08/05/21, 42:6-11.) According to Wharton's corrections expert, Baird, the PRC repeatedly noted that Wharton was adjusting well. (N.T., 08/05/21, 48:20-24.)

25. DOC records for Wharton also include Prescriptive Program Plans ("PPP"). (OAG Exs. 31A-D.) In various PPP reports, DOC staff notes that Wharton "maintain[s] misconduct free behavior," "sustain[s] positive housing reports," "exercise[s] routinely," "maintain[s] counselor contacts," and "continue[s] with educational development." (N.T., 05/11/21, 117:8-10.)

26. Wharton also participated in a poetry project while incarcerated. (N.T., 02/25/21, 138:10-17; N.T., 05/11/21, 65:1-7; N.T., 08/05/21, 40:15-22.) He made efforts to improve his education by seeking to earn his high school equivalency diploma, playing chess, and learning Spanish. (N.T., 02/25/21, 32:4-16, 139:3-139:14; N.T., 05/11/21, 65:8-19; see also OAG Ex. 39; N.T., 08/05/21, 40:15-22.)

27. The 1986 Classification Assessment noted that Wharton "expressed an interest in both academic and vocational programs." (OAG Ex. 39 at 3.)

28. Wharton made multiple requests to study for his GED while at SCI Huntington. (Wharton Ex. 4 at PE0965-66, 0972.) When these requests were denied, Wharton filed a grievance. (Id. at PE0867.) In response to the grievance, prison staff "arranged" for capital inmates such as Wharton to be given GED tests. (Id.) The response also "commend[ed] [Wharton] for [his] interest in taking the test." (Id.)

29. The 1986 Classification Assessment noted that Wharton had an interest in "Bible Study and Chapel services while incarcerated." (OAG Ex. 39 at 3.)

30. Wharton was visited by family members during the relevant period of incarceration and regularly attended chapel services. (N.T., 02/25/21, 139:18-23; N.T., 05/11/21, 65:13-16, 84:1-4; see also OAG Ex. 39; N.T., 08/05/21, 40:13-22.)

31. Wharton received no negative housing reports or negative psychiatric reports. (N.T., 05/11/21, 116:23-117:5; see also Wharton Ex. 4 at 992-1019.)

32. Wharton utilized the grievance system at SCI Huntington. (N.T., 02/25/21, 31:15-32:3; 143:16-144:24; Wharton's Ex. 4 at 768-918.) "When [Wharton] felt that he was not being treated fairly or that the conditions with his confinement were not appropriate, he would file a complaint." (N.T., 02/25/21, 31:18-20.)

E. Trial Counsel's Later Assessment of Wharton's Adjustment After He Had an Opportunity to Review Prison Adjustment Information

33. Wharton's Trial Counsel, William Cannon, acknowledged that the prosecution's case at the second penalty hearing was "extremely strong." (N.T., 02/25/2021, 128:2-3.)

34. Cannon felt that the mitigation evidence he offered at the penalty hearing, which consisted of testimony from Wharton's family members, "wasn't strong." (N.T., 02/25/2021, 128:4-16.)

35. Cannon first reviewed Wharton's prison records in connection with the present federal proceedings, roughly six months before the evidentiary hearing. After this review, Cannon believed Wharton's adjustment to prison was "extremely favorable, extremely," and "all positive." (N.T., 02/25/2021, 131-34.)

36. Cannon testified that he would have wanted to present Wharton's prison records to the jury and regretted "so much" that he did not do so in 1992. (N.T., 02/25/2021, 138-39.)

37. Cannon said he would have argued from the prison records that Wharton was a person who ha[d] accepted his then situation in life. He is either going to serve ... the rest of his life in prison or he's going to face the death penalty, but rather than hang his head, he pursues things that [allow] him to be a semi-vibrant member of the prison community by seeking educational opportunities, doing writings, doing drawings and participating to the extent that he can in prison life in a meaningful way.

(N.T., 02/25/2021, 139.)

38. Cannon felt this evidence would have corroborated the positive testimony of Wharton's family members. Cannon also believed that records of Wharton's grievance filings helped Wharton's image by showing he was "living within the system." (N.T., 02/25/2021, 140, 144.)

39. Cannon acknowledged that presenting evidence of positive prison adjustment would have opened the door to rebuttal evidence. (N.T., 02/25/2021, 174.)

40. Cannon did not consider the misconducts for possessing makeshift handcuff keys a problem because the keys were never used. (N.T., 02/25/2021, 148, 191.)

41. When Cannon represented Wharton at the 1992 sentencing hearing, he was aware of Wharton's 1986 escape. (N.T., 03/08/2021, 35.) Had the prosecution sought to introduce Wharton's escape conviction to rebut evidence of Wharton's adjustment to prison, Cannon would have sought to exclude the escape charge on the ground that it happened while Wharton was in County, rather than State, custody. Alternatively, Cannon would have sought to exclude the facts surrounding the escape. (N.T., 02/25/2021, 161-62.)

42. Even if the escape charge could not be excluded at the penalty phase, Cannon testified that he would still have presented prison adjustment evidence to the jury. Cannon conceded that he could have "done without" evidence of the escape charge, but explained that the facts related to Wharton's escape efforts were minor compared to the "very grisly and bad" facts of the murders that the jury would have heard anyway. (N.T., 02/25/2021, 33, 163, 200.)

F. Expert Opinions on Wharton's Adjustment

43. Corrections officers Hayes and Conrad, as well as the Attorney General's corrections expert, Jeffrey Beard,⁶ all testified that an inmate, especially one housed in the RHU, in the possession of a handcuff key is a serious threat to a prison system, to staff at the facility, the inmate, other inmates at the facility, and the community outside of the prison. (N.T., 03/16/21, 159:3-160:14, 194:1-25, 204:13-206:4; N.T., 05/11/21, 38:2-15, 46:4-47:3; N.T., 08/05/21, 103:7-12.) Hayes, Conrad, Beard, and Wharton's own corrections expert, Maureen Baird,⁷ all confirmed that an implements of escape charge constitutes a very serious misconduct. (Id.)

44. Wharton's corrections expert Baird acknowledged that in her experience, escape is a "greatest security level prohibited act." (N.T., 08/05/21, 96:15-19.)

45. Baird considered Wharton's use of PRC meetings "appropriate." (N.T., 08/05/21, 47:24-48:19.) Baird explained that one of the reasons why a prison system conducts reviews for a capital inmate is so that the inmate can discuss problems they are having or make requests of the Committee. (Id.) The PRC meetings are a forum for the inmate to voice his concerns. (Id.)

46. Baird opined that Wharton's use of the grievance process was "appropriate," "constructive," and "pro-social" or, in other words, that he used this process "the way it was intended." (N.T., 08/05/21, 61:20-24.) Baird explained that Wharton often attempted to resolve issues informally with prison staff first, but, if they were not resolved, he would file a grievance. (Id.) Baird stated that Wharton was, in fact, often granted relief by the institution after filing a

⁶ Jeffrey Beard is the former Secretary of Corrections of both the State of California and the Commonwealth of Pennsylvania. He has been working in corrections since 1971. Beard currently works as a consultant on correctional issues. (OAG Ex. 5.)

⁷ Maureen Baird has been employed as a warden and other executive roles in various federal prisons since 1989. Baird also currently works as a consultant on correctional issues. (Wharton's Ex. 41.)

grievance. (N.T., 08/05/21, 57:14-59:23; Wharton's Ex. 4 at 780-81 (food tray grievance).) She characterized Wharton's tone in these grievances as "not demanding," "polite," and "well-mannered." (N.T., 08/05/21, 59:24-60:7.)

47. According to Baird, Wharton's records showed that the impression of Wharton from his counselor and the members of the PRC was "overly positive." (N.T., 08/05/21, 46:15-21.) Baird said Wharton had a rapport with and the respect of prison staff. (N.T., 08/05/21, 67:17-23.)

48. Baird explained that "strong ties" to family are important to an inmate's adjustment. According to Baird, family visits demonstrate to an inmate that "somebody really cares about [him]," which is significant because a lack of family connection while incarcerated can lead to feelings of "hopelessness" and a negative adjustment. (N.T., 08/05/21, 40:23-42:5.)

49. Baird noted that, in the isolation of the RHU, an inmate's mental health can decline rapidly. (N.T., 08/05/21, 55:20-25.) "Everything becomes ... overly depressive," including "feelings of hopelessness," and "inmates will start acting out after ... a long period of restricted housing." (N.T., 08/05/21, 56:3-17.) Baird testified that there was no evidence of this kind of mental deterioration and no evidence of a mental health issue that could affect institutional safety or institutional adjustment in Wharton's psychiatric records. (N.T., 08/05/21, 56:18-57:5.) Baird expressed surprise that Wharton handled restrictive housing "so well." (Id.)

50. Wharton's psychiatric expert, Neil Blumberg,⁸ testified that when Wharton tortured and murdered the Harts, he was 21 years old, and his brain was not fully developed. (N.T.,

⁸ Neil Blumberg is a medical doctor and licensed psychiatrist who has provided expert consulting services in various roles in the criminal justice system, including in capital sentencing. (Wharton's Ex. 14; N.T., 02/25/21, 15-17.)

02/25/21, 25:2-10.) In Blumberg's opinion, Wharton's prison psychiatric records reflect a more mature brain with a reduced tendency to engage in impulsive behavior. (Id.)

51. In particular, Blumberg noted that Wharton met regularly with a counselor and never received a negative report. (N.T., 02/25/21, 21:12-25:24; see also N.T., 05/11/21, 116:23-117:7; N.T., 08/05/21, 52:16-22, 120:12-24.)

52. Experts on both sides agreed that Wharton did not meet the criteria for antisocial personality disorder. (N.T., 02/25/21, 20:5-8; N.T., 03/08/21 (Part 2), 14:11-25.)

53. The Attorney General's psychiatric expert, Dr. John O'Brien,⁹ opined that Wharton did exhibit some antisocial traits, including that Wharton "can present himself as behaving in a certain way when ... evidence suggests that he's actually thinking and preparing to behave differently." (N.T., 03/08/21 (Part 2), 32:2-5.) Wharton's corrections expert, Baird, disagreed, noting that prison staff are trained to identify inmates who are "[phonies]" or "manipulators" and that there was no indication in the records demonstrating that Wharton possessed these character traits. (N.T., 08/05/21, 47:11-23.)

54. The Attorney General's corrections expert, Jeffrey Beard, testified that being polite to staff, attending PRC meetings, meeting with a counselor, and exhibiting no negative housing or psychiatric reports reflects the "minimum" expectation for an inmate in the RHU population. (N.T., 05/11/2021, 56.)

55. Beard characterized elements of Wharton's 1986 escape as suggesting a "premeditated" plan. Specifically, Wharton came into City Hall with a concealed handcuff key,

⁹ John O'Brien is a medical doctor and former licensed psychiatrist who has been employed as a staff psychiatrist at various hospitals. (OAG Ex. 2.)

and may have been feigning an arm injury so that he could keep one arm unrestrained in a sling. (N.T., 05/11/2021, 27-28.)

56. Beard stressed that Wharton's repeated effort to escape "throws into question" all the positive reports from Wharton's counselors and other prison staff. Beard described how Wharton appeared "very contrite" at his 1986 plea allocution in City Hall, while, at the same time, Wharton was carrying a concealed handcuff key and planning to escape. Beard compared this behavior to Wharton's politeness with staff at SCI Huntington while Wharton was simultaneously in possession of makeshift handcuff keys. Beard stated that such behavior fit his experience with inmates who appear polite while waiting for staff to let "their guard down." (N.T., 05/11/2021, 48-49.)

57. Ultimately, Beard considered Wharton's 1986 escape and two misconducts for possessing implements of escape to "form the greater part of [his] opinion that [Wharton] had negative adjustment" to prison. (N.T., 05/11/2021, 46.) These incidents were most significant to Beard because they "put the community at risk." (Id.)

III. DISCUSSION: STRICKLAND ANALYSIS

Wharton asserts that his Sixth Amendment rights were violated during the second penalty hearing when his counsel failed to obtain and introduce mitigating evidence contained in his prison files for the seven years following Wharton's 1985 murder convictions. Wharton claims that his prison files from that period provided counsel with significant mitigating circumstances to explore and present to the jury as evidence that he "made a positive adjustment to prison life; [would not be] a future danger should he remain incarcerated for life; and [was] amenable to rehabilitation." (Pet. at 55.)

Ordinarily, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts owe substantial deference to the decisions of state courts. Weeks v. Snyder, 219 F.3d 245, 258 (3d Cir. 2000). Here, the Third Circuit has previously determined that the Pennsylvania Supreme Court's reasoning in denying Wharton's Sixth Amendment claim constituted an unreasonable application of federal law and that Wharton was entitled to a de novo review of this claim in federal court.¹⁰ Wharton, 722 F. App'x at 280-81. I therefore consider de novo whether Wharton has satisfied the requirements of Strickland v. Washington, 466 U.S. 668 (1984).

Under Strickland, Wharton must "show that counsel's performance was deficient" and that this performance caused him prejudice. Strickland, 466 U.S. at 687. A court may approach the analysis in either order, and, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." Id. at 697. Because the prejudice element of Wharton's Strickland claim is more straightforward, I begin my analysis there.

To establish prejudice, Wharton "must show 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. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Id. Because Wharton is challenging the sentence imposed at a penalty hearing,

¹⁰ The Third Circuit found that the Pennsylvania Supreme Court misapplied both the deficient performance and prejudice elements of Strickland. As to deficient performance, the Third Circuit decided that Cannon's decision not to obtain prison records could not be defended on the ground that the records "cut both ways" since Cannon was unaware of the records' contents. Wharton, 722 F. App'x at 280. As to prejudice, the Third Circuit found it unreasonable to assume that additional evidence going to the "catchall" mitigating factor was superfluous merely because the penalty jury already found that factor. Id. at 280-81. Rather, since the jury must weigh the aggravating and mitigating factors, additional evidence to support the "catchall" factor had the potential to tip the balance, and thus a hearing in federal court was necessary to develop that evidence. Id.

prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, "one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty." Bond v. Beard, 539 F.3d 256, 285 (3d Cir. 2008).

In considering prejudice, I must review the evidence that was before the sentencing jury; the mitigating evidence that counsel failed to present; and "the anti-mitigation evidence that the Commonwealth would have presented to rebut" that evidence. Williams v. Beard, 637 F.3d 195, 227 (3d Cir. 2011). Once the record is "reconstructed," I must "reweigh the evidence in aggravation against the totality of available mitigation evidence" and determine whether there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's error. Id. (internal quotation marks omitted).

A. The Evidence Presented at the Penalty Hearing

During Wharton's 1992 penalty hearing, the Commonwealth presented evidence of the history between Wharton and the Hart family, including the burglaries of their home and Bradley Hart's father's church. Because those facts were important in establishing the aggravating factors underlying Wharton's death sentence, and are therefore important in my Strickland analysis, I recount those here.

Angry that he had not been paid what he believed was a debt owed for construction work, in early August, 1983, Wharton and Larue Owens went to the Harts' home at a time when they knew the family would be at church. Wharton entered the house through an unlocked basement window, and he and Owens stole numerous items. (N.T., 12/15/92, 95-99.)

On August 22, 1983, the next Sunday, Wharton and Owens, joined by co-defendant Eric Mason, again burglarized the Harts' home. This time, in addition to stealing property, they committed multiple acts of vandalism that resulted in the house being temporarily uninhabitable. Wharton and his cohorts smeared pancake batter, mustard, and tomato sauce on the walls, slashed

the sofa and sliced its cushions, defaced family pictures by blotting paint on the faces of Bradley, Ferne, and their baby daughter Lisa Hart, left a child's doll hanging with a rope tied around its neck, left the refrigerator door open, piled food inside the oven and turned it on, dumped the contents of cabinets and drawers all over the kitchen, urinated in the second floor hallway and defecated on the bathroom floor, heaped clothes on the bed and splattered them with paint and turpentine, flipped over the bassinet and slashed the baby's mattress in the form of an "X," threw books and papers all over the floor of the office, and turned up the thermostat causing the smell of urine and rotten eggs to permeate the home. (N.T., 12/14/92, 79-84, 83-86, 98; N.T., 12/16/92, 99-101.)

On September 4, 1983, Wharton and Mason burglarized the Germantown Christian Assembly, a church founded by Bradley Hart's father. Wharton and Mr. Mason stabbed a picture of Bradley Hart on the wall with a letter opener and stole a computer and petty cash. (N.T., 12/15/92, 17-18.)

Finally, on January 30, 1984 at 10:00 p.m., Wharton confronted Bradley Hart at knifepoint and forced his way into the Harts' home. Once inside, Wharton let Mason in and ordered Bradley Hart to write him a check for \$935.00. Wharton and Mason then tied up Bradley and his wife, Ferne, holding them and their seven-month-old daughter Lisa. After watching television for several hours, Wharton decided to kill the victims to avoid being identified. He and Mason separated Bradley and Ferne. Wharton took Ferne Hart and her daughter to the second floor, and Mason took Bradley Hart to the basement. Wharton taped Ferne's face with duct tape covering her eyes and mouth and tied her hands and feet. They similarly taped and bound Bradley Hart. They also wrapped electrical cords around Bradley's neck. (N.T., 12/14/92, 123-25; N.T., 12/17/92, 8-9.)

Wharton and Mason removed various items from the house, including silverware, cameras, jewelry, and the victims' wallets, and placed them in Bradley's car. Wharton returned to the second floor, moved Ferne to the bathroom, strangled her with one of her husband's ties, then filled the bathtub and forced her head under water. Mason forced Bradley Hart to lie on the floor of the basement with his face in a shallow pan of water. He then stood on Bradley's back and pulled the cords around his neck, strangling him to death. (N.T., 12/17/92, 9-10.) Wharton and Mason removed additional property from the house, including the baby's crib, then turned off the heat and drove away in Bradley's car, leaving seven-month-old Lisa, in the dead of winter, with her dead parents. (N.T., 12/17/92, 10.) Lisa was found two days later suffering from severe dehydration, and on the way to the hospital, suffered respiratory arrest, but survived. (N.T., 12/15/92, 34-36, 47.)

In seeking life imprisonment at the second penalty hearing, Wharton countered those facts with evidence of his character from his family members. (See infra Section I.B.)

It is important to consider the strength of the evidence already offered in support of Wharton's death sentence because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696. Here, the vicious nature of Wharton's offenses and the aggravating circumstances found by the jury cannot be understated. The brutality exhibited by Wharton and his co-defendant as they terrorized Bradley and Ferne Hart for months before murdering them and leaving their infant daughter to freeze to death would surely have weighed heavily in the minds of the jury.¹¹

¹¹ The District Attorney points to the fact that: (1) deliberations lasted two or three days (depending on how it is counted); and (2) at the end of the second day, the jury submitted a note stating, "We the Jury at this point in time are unable to reach a unanimous verdict." (N.T.,

B. Mitigating Evidence Not Presented and Rebuttal Anti-Mitigation Evidence

I must now decide whether, had evidence of Wharton's adjustment to prison been added to the above presentation, there is a reasonable probability that the outcome would have been different. This analysis must be done in conjunction with considering anti-mitigation evidence that would have been offered in rebuttal. In so doing, the question is not whether Wharton's adjustment was positive or negative. Rather, I must determine whether there is a reasonable probability that one juror would have found that Wharton's evidence of mitigation, including his prison adjustment, outweighed evidence in aggravation.

Wharton proposes that his counsel could have offered evidence of his positive behavior while in prison. To recap, Wharton's positive behavior was that he attended PRC meetings, actively pursued his education, took part in a poetry activity, attended chapel services, was polite to staff, and handled disagreements through the proper grievance process rather than acting out. (Supra ¶¶ 23-32.) In addition, Wharton amassed only two serious misconducts during his six years in prison, and could have offered an expert to characterize his behavior as positive. (Supra ¶¶ 11, 48-55.)

Again, under Strickland, I cannot consider these facts in isolation but rather must do so as part of "the totality of the evidence before the ... jury," including the prosecution's case for

12/22/92, at 12-13.) According to the District Attorney, these facts establish a reasonable probability that, had the jury been presented with positive prison adjustment evidence, one juror would have voted for a life sentence.

In some cases, the length of a jury's deliberations can be relevant in assessing whether an error during trial was harmless. See Johnson v. Superintendent, SCI Fayette, 949 F.3d 791, 805 (3d Cir. 2020). Johnson is the most recent Third Circuit case to consider this issue. In Johnson, the jury deliberated for six full days (longer than the trial itself), and the Third Circuit viewed the trial evidence to be "not overwhelming." Id. at 805. Johnson also involved a significant Confrontation Clause violation. Here, the jury heard overwhelming evidence of aggravating factors. A three-day deliberation over whether to impose a death sentence provides little insight into what form the jury's deliberations took before the jury was ultimately convinced of its conclusion.

aggravation. Strickland, 466 U.S. at 695. In so doing, and after careful review of all the prison conduct evidence, I agree with corrections expert Jeffrey Beard, who explained that the behavior Wharton characterized as positive is the “minimum” expectation for an inmate in the RHU population. (N.T., 05/11/2021, 56.)

Wharton also offered expert testimony that, at the time of the murders, he was just 21 years old and his brain was not fully formed. While I agree that Wharton’s age should be considered, his deliberate method of murdering the Harts reflects much more than youthful impulsivity. And in any event, the positive aspects of Wharton’s adjustment to SCI Huntington were unremarkable, and would not have convinced the jury that Wharton had grown into a less dangerous person while incarcerated.

This conclusion is significantly strengthened by the fact that Wharton’s “adjustment” in prison was marred by multiple efforts to escape. Wharton’s escape conviction and surrounding facts, wherein he fled from a courthouse and had to be shot by Philadelphia Sheriffs to prevent him from entering into the public, would greatly undermine any positive prison adjustment evidence. It is difficult to fathom how any juror would have found Wharton’s positive adjustment evidence more significant than this premeditated escape from a City Hall courtroom followed by two subsequent misconducts, received days apart, for possessing a makeshift handcuff key and other implements of escape. This particular evidence would be most significant in the minds of the sentencing jury, especially when viewed in conjunction with the facts of Wharton’s murder of Bradley and Ferne Hart.

Wharton and the District Attorney emphasize that Wharton’s trial counsel, William Cannon, did not view Wharton’s attempts to escape as sufficiently serious to outweigh the mitigating effect of Wharton’s prison adjustment evidence. While Mr. Cannon’s assessment of his

own effectiveness may be relevant, I find his testimony unconvincing. At Wharton's 1992 penalty hearing, Cannon called Wharton's mother, as a witness, to ask for mercy, who acknowledged, tearfully, that her "son will never be free." (N.T., 12/21/1992, 37.) Cannon then recalled the mother's testimony in closing to remind the jury that Wharton "is never coming out of jail," an argument that would have had little value had the jury heard the escape evidence. (*Id.* at 89.)¹²

Similarly, I agree with Beard's assessment that Wharton's 1986 escape and subsequent misconducts for possessing implements of escape reflect calculated planning and undermine Wharton's superficially good prison behavior. While Wharton promised the sentencing judge in 1986 that he would seek to better himself while in prison, he simultaneously possessed a handcuff key that he used to nearly escape from City Hall. And while Wharton acted politely toward prison staff at SCI Huntington, he continued his efforts to make yet another handcuff key. These facts would have greatly undermined, rather than corroborated, Wharton's family members' testimony as to his character. In particular, the jury would be left with the distinct impression that Wharton's positive attributes could not be trusted.¹³

¹² Cannon also testified that he would have sought to exclude evidence of the escape. Such effort would not have succeeded. In a death penalty hearing, the prosecution may offer evidence to rebut the defendant's evidence in mitigation, even if the rebuttal evidence does not itself constitute an aggravating factor. See Commonwealth v. Basemore, 582 A.2d 861, 870 (Pa. 1990); see also Wharton, 722 F. App'x at 283 ("[W]e must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony....").

¹³ I also note that had the penalty hearing included evidence of positive prison adjustment, the jury would also likely have heard, in rebuttal, of Wharton's repeated failure to accept responsibility for his misconducts. Wharton refused to admit that the makeshift handcuff key and additional pieces of antenna found in his single cell belonged to him. He claimed that he had no idea where the second piece of antenna came from, even though it was recovered from the binding of his own legal material. This is consistent with the psychological evaluation performed at the time of his classification assessment in which Wharton was described as using "a good deal of denial and rationalization" and minimizing "the few transgressions he admitted to doing." (OAG Ex. 39.)

C. Expert Testimony

The expert opinions offered during the hearing support my conclusion that the mitigation evidence that could have been offered would not have changed any juror's mind. According to Baird, while the two implements of escape "incidents" were serious, Wharton's adjustment was positive overall. Baird testified that Wharton used PRC meetings and the grievance process appropriately, had a positive rapport with prison staff, maintained strong ties with his family, and kept a positive outlook despite the bleakness of his situation. (Supra ¶¶ 48-52.) Baird also noted that "other than the incident in 1986" (i.e., escaping), Wharton's behavior while incarcerated was "uneventful." (N.T., 08/05/21, 42:12-20.)

But even if the penalty phase jury accepted Baird's assessment, its effect on the overall impression of Wharton's positive adjustment would have been small compared to the overwhelming evidence of aggravation. Baird minimized Wharton's implements of escape misconducts on the ground that the makeshift keys were not actually used to escape. This reasoning would have been unconvincing to a jury that would also hear evidence that Wharton did, in fact, come alarmingly close to escaping from City Hall. Wharton's psychiatric expert, Dr. Blumberg, similarly discounted Wharton's escape conviction by focusing solely on Wharton's time at SCI Huntington. Had Wharton's trial counsel called experts such as these to testify at the second penalty hearing, they would not have been able to undo the substantial negative impression left by Wharton's multiple attempts to escape.

Countering this testimony would have been Beard's opinions prioritizing threats to the safety of the prison and the outside community over other aspects of Wharton's adjustment. Beard would have told the jury that Wharton's "premeditated attempt" to escape from City Hall using a concealed handcuff key "put the public at great risk." (N.T., 05/11/21, 27-28.) And Beard would have explained that Wharton's pleasant behavior toward prison staff was "superficial" given that

Wharton was simultaneously fashioning implements in an effort to escape yet again, thus “throw[ing] into question everything that you see going on with Mr. Wharton during that six-year period of time while he was in the Pennsylvania Department of Corrections.” (N.T., 15/11/21, 48-49.)

Considering this testimony as a whole, as I must under Strickland, the opinions of these experts would not have altered the penalty jury’s impression that Wharton’s behavior from 1986 to 1992 was not sufficiently mitigating to tip the balance in favor of life imprisonment.

D. Conclusion—Strickland Analysis

Given “the overwhelming aggravating factors,” and the fact that Wharton’s multiple efforts to escape would have rebutted any mitigation based on Wharton’s adjustment to prison, “there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.” Strickland, 466 U.S. at 700. In light of the weight of the evidence in aggravation as compared to the weight of the mitigation evidence that was presented at Wharton’s second penalty hearing and the hearings before me, I decline to grant relief on Wharton’s remaining Sixth Amendment claim. It was Wharton’s burden to demonstrate that because of the mitigation his counsel did not present, there is a reasonable probability that one juror would have voted to impose a sentence of life imprisonment rather than the death penalty. Wharton has not met that burden. For the reasons set forth above, Wharton’s petition for a writ of habeas corpus is denied.

IV. THE DISTRICT ATTORNEY’S POSSIBLE BREACH OF THE DUTY OF CANDOR

While every case is important, determining whether a defendant’s sentence of death should be vacated due an alleged Sixth Amendment violation necessitates meticulous scrutiny, utmost

care, and diligence from all involved—the presiding judge and the attorneys. This process must include transparency from the attorneys and complete candor to the court so that all material facts can be considered.

That said, I preliminarily conclude that on two critical issues in this case, it appears that the District Attorney was less than candid with this Court. The first issue pertains to facts known to the District Attorney, but withheld, regarding Wharton’s premeditated escape from a Philadelphia courtroom. This escape was not disclosed to me when the District Attorney requested that I blindly vacate Wharton’s death sentence on the ground that his trial counsel had ineffectively failed to offer positive prison adjustment evidence, and was only brought to my attention after I appointed the Attorney General’s Office.

The second possible instance of lack of candor involves the District Attorney’s representation to me that in reaching its decision to concede the death penalty, and asking that I vacate Wharton’s death sentence, the District Attorney had consulted with the victims’ family. Yet the fully developed record before me reflects that no communication occurred between the District Attorney and the only surviving victim, Lisa Hart-Newman, and that minimal and woefully deficient communication took place with the siblings of the deceased, Bradley and Ferne Hart.

“[A]n attorney, as an officer of the Court, has an overarching duty of candor to the Court.” Eagan by Keith v. Jackson, 855 F. Supp. 765, 790 (E.D. Pa. 1994). That duty requires that a “lawyer shall not knowingly … make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer....” Pa. Rule of Professional Conduct 3.3(a)(1).

The duty of candor “takes its shape from the larger object of preserving the integrity of the judicial system.” United States v. Shaffer Equipment Co., 11 F.3d 450, 458 (4th Cir. 1993); Pa.

Rule of Professional Conduct 3.3 cmt. 2. In matters of criminal justice, in particular, “[t]he need to develop all relevant facts in the adversary system” and to avoid “judgments … founded on a partial or speculative presentation of the facts” is “fundamental and comprehensive.” United States v. Nixon, 418 U.S. 683, 709 (1974). The attorneys who represent the government in such matters therefore have “special responsibilities to both [the] court and the public at large” and a concomitant obligation to “ensure that the tribunal is aware of … significant events that may bear directly on the outcome of litigation.” Douglas v. Donovan, 704 F.2d 1276, 1279 (D.C. Cir. 1983); see also United States v. Tocur Int’l, Inc., 35 F. Supp. 2d 1172, 1188 (N.D. Cal. 1998); Brewer v. District of Columbia, 891 F. Supp. 2d 128, 133 n.7 (D.D.C. 2012); Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, J., concurring). These lawyers must be “minister[s] of justice and not simply … advocate[s].” Pa. Rule of Professional Conduct 3.8 cmt. 1; American Bar Association, Standards for the Prosecution Function § 3-1.4, “The Prosecutor’s Heightened Duty of Candor” (“In light of the prosecutor’s public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts....”).

The duty of attorneys to be especially forthcoming with the court is further heightened where the proceeding lacks the “balance of presentation by opposing advocates.” See Pa. Rule of Professional Conduct 3.3 cmt. 14. This was exactly the dynamic at play here, where Wharton’s counsel and the District Attorney joined to advocate that the death sentence be vacated. “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Pa. Rule of Professional Conduct 3.3(d). But a proceeding may be in effect ex parte where, although others are “technically parties to [it], they ha[ve] no adversarial interest in opposing [the movant’s] request.” Eagan by Keith v. Jackson, 855 F. Supp. 765, 790 (E.D. Pa. 1994). The heightened duty

of candor that applies in ex parte proceedings is therefore “equally applicable when the parties make a joint request to the Court because, in this situation also, the Court is denied the benefit of adversarial advocacy.” Pa. Env’t Def. Found. v. U.S. Dep’t of Navy, No. 94-cv-1486, 1995 WL 56602, at *2 (E.D. Pa. Feb. 3, 1995).

Lastly, the duty of candor in this case has special significance to constitutional matters of federalism and Article III jurisdiction, given that these proceedings involve a federal court being asked to interfere with a state criminal prosecution. Federal courts must exercise habeas jurisdiction in “light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States....” Rose v. Lundy, 455 U.S. 509, 515 (1982). And “the jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of” federal law. Matters v. Ryan, 249 U.S. 375, 377 (1919).

Viewed through this lens, the timing of the District Attorney’s presentation of its concession is troubling. Shortly before the District Attorney asked me to vacate Wharton’s sentence, the Pennsylvania Supreme Court had ruled, in a separate but similar death penalty matter, that was also on collateral review, that the District Attorney does not have the authority to stipulate to such relief on behalf of the state. See Commonwealth v. Brown, 196 A.3d 130, 144-46 (Pa. 2018). Thus, the District Attorney was well aware that state law did not afford that Office the discretion to decide that a death sentence should be removed without a further independent review by a court. Id. at 144. Yet this is exactly what the District Attorney attempted to do in federal court.

In Brown, the same prosecutor’s office sought the power to stipulate to death penalty relief and was denied that right by the Pennsylvania Supreme Court. The court stated that at the collateral review stage of a case, “the prosecutor’s discretion … is limited to attempts, through the exercise

of effective advocacy, to persuade the courts to agree that error occurred as a matter of law. Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review.” Brown, 196 A.3d at 146 (emphasis added). The court went on to proclaim that “[a]fter the jury … reached its decision to enter a verdict recommending a death sentence, the district attorney lost any prosecutorial discretion to alter that verdict.” Id. at 149.

Four months after Brown was decided, the District Attorney filed a stipulation of death penalty relief in this case, without substantial explanation and despite having zealously defended Wharton’s death sentence for twenty-six years. Complete candor was thus imperative to ensure that this was not a collusive misuse of federal jurisdiction to alter state policy in a manner not required by federal law. Cf. Leyva v. Williams 504 F.3d 357, 362 (3d Cir. 2007) (“A federal court has jurisdiction to entertain a habeas petition under 28 U.S.C. § 2254(a) only if a petitioner is in custody in violation of the constitution or federal law.” (alterations and quotation marks omitted)).¹⁴

Applying all of these principles, it is likely that the District Attorney’s Office failed to disclose all relevant information and provided other information that was misleading, and thus was not candid with this Court. When the District Attorney notified me that it was conceding Wharton’s habeas petition and asked that I grant the requested relief, I was unaware of the most important

¹⁴ This is not the first time the District Attorney has attempted to use this Court to evade the strictures of the state judicial system, while providing incomplete information and asking that I grant relief before hearing evidence, based on its concession alone. In Martinez v. DelBalso, No. 19-cv-5606, 2021 WL 510276 (E.D. Pa. 2021), the assigned Assistant District Attorney affirmatively advised me that the District Attorney’s Office was waiving the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) despite the existence of a long-pending petition in state court seeking identical relief. Id. at *1. Then, without advising me that any facts related to exhaustion had changed, the District Attorney litigated and obtained the relief it was seeking in the state court while a hearing was scheduled on the federal petition. Id. at *1-2.

facts bearing on the merits of the habeas petition: Wharton’s 1986 escape attempt that nearly succeeded and his continued propensity to fashion implements of escape while in prison. These facts were known to the District Attorney and bore directly on the issue on remand—yet that Office decided to withhold this information. (N.T., 5/11/21, 66:16-19.) Instead, in asking me to grant relief, the District Attorney chose only to represent that it had reached its decision after having “carefully reviewed the facts and law and determined that Wharton’s ineffectiveness claim fulfills the criteria articulated in Strickland v. Washington, 466 U.S. 668 (1984).” (ECF No. 162 at 4.) And when pressed for an explanation, the District Attorney relied on a declaration of trial counsel that Wharton’s prison records could have shown that Wharton “posed no danger to inmates or staff if he were sentenced to life,” a statement that was entirely misleading without also disclosing Wharton’s 1986 escape attempt.

The District Attorney’s Office may well have concluded that Wharton’s escape conduct would not tip the scales in favor of maintaining the death penalty. But surely, these incidents would be crucial information to provide to a judge who had been asked to vacate a death penalty sentence. This lapse on the part of the District Attorney also ignores the public’s right to know the position taken by the District Attorney and to understand the basis for a court’s decision as to whether a significant penalty imposed by a jury thirty years ago for a horrific crime would be preserved or set aside. As one commentator aptly stated, “prosecutors are expected to volunteer relevant factual and legal information in various situations where other lawyers … might legitimately remain reticent.” Bruce A. Green, Candor in Criminal Advocacy, 44 Hofstra L. Rev. 1105, 1116 (2016).

A second possible critical lapse of candor on the part of the District Attorney pertains to that Office’s purported communication with the victims’ family. When the District Attorney filed its notice conceding that Wharton’s death sentences should be vacated, it cited “communications

with the victims' family" as a basis for that change of course. (Notice of Concession, ECF No. 155, ¶ 9.) "[A]n assertion purporting to be on the lawyer's own knowledge ... may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Pa. Rule of Professional Conduct 3.3 cmt. 3 (emphasis added). Having provided no details regarding the victims' family's position on this significant concession, where the facts were so heinous and the most serious penalty—death—had been imposed, the unmistakable impression conveyed by the District Attorney's concession was that the victims' family had agreed with the District Attorney's change of position. But this was not the case.

Lisa Hart-Newman, now age thirty-seven, the infant left to die by Wharton, is a surviving victim but was never contacted by the District Attorney. In her June 6, 2019 letter to this Court, Lisa Hart-Newman stated that she was "extremely disappointed to learn of the District Attorney's stance [to seek to vacate the death penalty] and very troubled that the District Attorney implied that the family approved of his viewpoint." (ECF No. 117-5, Ex. F.) She stressed:

At no point was I contacted by the District Attorney or anyone in his office to ascertain what my views are. Seeing as I was also a victim in this tragedy, my opinion should have been sought and should carry weight. At seven months old, after my parents had been murdered, I was left in a house where the heat had been intentionally turned off in hopes that I would die. I am the sole survivor of this tragedy and I am alive despite his efforts.

(Id.)

During the hearing, Lisa Hart-Newman testified that, when she did find out about the District Attorney's concession, "it was as though, well, it's already done, and there's nothing you can do about it. ... [Y]ou don't matter, essentially." (N.T., 03/16/21, 90:3-14.) Hart-Newman explained that if the District Attorney had contacted her about its concession, she would have said "Please don't do this. I don't in any way agree with the position that you've taken in this matter, and as a victim I feel like that should matter." (N.T., 03/16/21, 90:23-91:9.)

Both of the deceased parents, Bradley and Ferne Hart, had siblings, but as confirmed by the District Attorney's Victim Witness Coordinator, only one member of the entire Hart family was contacted, Dr. David "Tony" Hart, Bradley Hart's brother. While the Victim Witness Coordinator testified that she eventually informed Tony Hart that a "committee" had decided to concede Wharton's death sentence, Tony Hart's testimony at the evidentiary hearing reflects that either this message was not conveyed or it was not clearly understood. (See N.T., 05/11/21, 185.) But in any event, the District Attorney's Office made this concession without the input of Lisa Hart-Newman or the other siblings of the deceased.

While Tony Hart had difficulty recalling the specifics of his conversation with the District Attorney's Victim Witness Coordinator, he remembered being "left with the impression that she would get back to us, that they were considering ... what they were going to do with regard to the case[,] that Wharton had ... won the right to an appeal, and that they weren't sure ... what they were going to do, what their position was going to be, and so ... she was going to get back to me and let me know, keep me informed." (N.T., 05/11/21, 145:21-146:3.) Tony Hart explained that his impression was that Wharton "had won the right to be heard again." (N.T., 05/11/21, 153:22-154:8.) In short, even after subsequent contact with the District Attorney's representative, it was Tony Hart's belief that the District Attorney's Office never provided "any detail" and never "clearly communicated" to him that the Office had decided to concede the death penalty. (N.T., 05/11/21, 146, 160.)¹⁵

¹⁵ In his letter submitted to the Court, Tony Hart stated that he was told by the District Attorney that "in order to avoid a new trial, a plea deal was offered and accepted." (OAG's Amicus Br., Ex. F.) If this information was in fact relayed by the District Attorney's representative, it would have been entirely misleading in that a "new trial," which could have retraumatized the family, had never been an option or even remotely contemplated by the Third Circuit. (N.T., 05/11/21, 146:16-147:15.)

Tony Hart explained that it was not until the Attorney General's Office contacted him in May or June 2019 that he fully understood what was happening, i.e. that the District Attorney had conceded the death penalty. (N.T., 05/11/21, 156:22-157:9.) Tony Hart recalled being "taken [a]back" by the conversation with the Attorney General's Office. (N.T., 05/11/21, 160:13-161:15.) He explained that had he fully understood that the District Attorney's Office was considering conceding the death penalty, he would have immediately informed Lisa Hart-Newman and his other family members, which he did after speaking with the Attorney General's Office. In fact, only after the Attorney General's Office spoke to the victims' family members was it learned that none of the family agreed that the jury's sentence of death should be vacated. (See N.T., 05/11/21, 164-65; ECF No. 117-5, Ex. F.)

Bradley and Ferne Hart's other siblings also expressed outrage regarding the District Attorney's failure to contact their family. In his letter to the Court, dated June 7, 2019, Ferne Hart's brother, Michael Allen, stated:

I understand that the DA's office has gone on record to say that they communicated with the family of Wharton's victims. I understand that they have represented either expressly or impliedly that the family agrees with this outrageous position they have taken to seek to vacate Wharton's death penalty. The position of the DA's office is nothing less than an egregious insult to injury and an affront to the sensibilities of a responsible community which holds its members accountable for their acts.

(ECF No. 117-5, Ex. F.) Michael Allen added that "it would appear that there was a substantially deficient briefing by the DA's office regarding the significance and implications for vacating Wharton's death penalty." (Id.)

The District Attorney responds to all of this by positing that Tony Hart, a family member, was in fact contacted and that the Victim Witness Coordinator believed Tony Hart would pass her contact information along to his siblings and niece. (DAO Ex. 1.) But the Victim Witness Coordinator did not ask Tony Hart to act as the family's liaison, and Tony Hart believed she never

asked him to pass on that a concession of the death penalty was being considered. (N.T., 05/11/21, 148-49, 167-68, 203.) Nor did the Coordinator confirm whether Tony Hart had conveyed any information she had provided him to his family, nor did she inquire as to whether the other family members might have a different view regarding concession of death penalty relief. (N.T., 08/05/21, 5:5-18, 6:5-12, 20:5-21:4.) In fact, Tony Hart was left with the impression that the family's views would not "make any difference" to the Office's decision making. (N.T., 05/11/21, 158.) And, as noted above, the Victim Witness Coordinator never contacted the only surviving victim, Lisa Hart-Newman. (N.T., 05/11/21, 202.) Tellingly, the District Attorney acknowledges that "[e]mploying 20/20 hindsight, one could say that [the Victim Witness Coordinator] should have taken additional steps." (District Attorney's Post-Hearing Brief at 23.)¹⁶

I recount all of this background on the District Attorney's contacts with the victims to assess whether the District Attorney's representation to me that its concession was based, in part, on "communications with the victims' family" lacked candor. I conclude that, before making such a representation, the District Attorney should have delved much deeper, where it would have easily learned, as the Attorney General did, that the victims' family and the only surviving victim were vehemently opposed to vacating the death sentence. See Pa. Rule of Professional Conduct 3.3 cmt. 3 ("[A]n assertion purporting to be on the lawyer's own knowledge ... may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonable diligent inquiry." (emphasis added)) Had these facts, readily obtainable, been known to me, they could have been material to my decision regarding what weight to give the District Attorney's

¹⁶ The District Attorney also argues that it had no "reason to assume that other family members were opposed to death penalty relief" because "it is not uncommon for survivors to be indifferent to or even against the death penalty." (District Attorney's Brief at 23.) But the District Attorney stated that its concession was based on "communication with the victims' family" not speculation that the family would agree with its decision. (ECF No. 155 ¶ 9 (emphasis added).)

concession of Wharton's habeas petition. The thoroughness of the District Attorney's assessment of its case is a factor in evaluating whether its concession reflects an application of "considered judgment" as opposed to merely the "differing views of the current office holder." See Young v. United States, 315 U.S. 257, 258 (1942); Brown, 196 A.3d at 149.

And finally, in asking me to sign a stipulated order based upon insufficient information, the District Attorney ignored the fact that there is a statutory obligation to ensure that victims are provided an opportunity to be heard at proceedings involving sentencing or release and are "treated with fairness and with respect for [their] dignity and privacy." 18 U.S.C. § 3771(b)(2)(A). To carry out this obligation, I must depend on truthful information from the lawyers who practice before me.

The District Attorney's Office should be given an opportunity to explain or challenge my preliminary conclusion that there has been a breach of their duty of candor. And facts may need to be developed as to who made decisions regarding communications with this Court.¹⁷

An order to show cause will follow.

¹⁷ The February 6, 2019 concession and proposed order asking me to vacate the jury's verdict was submitted by the Supervisor of the District Attorney's Federal Litigation Unit who represented that members of a "Capital Case Review Committee" had reviewed this matter.