OCTOBER TERM 2017

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DENNIS MILLER,

Petitioner,

v.

SECRETARY OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, SUPERINTENDENT SCI-GREENE AND SUPERINTENDENT SCI-ROCKVIEW,

Respondents.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Dated: June 11, 2018

APPENDIX TABLE OF CONTENTS

EXHIBIT “A”

controlled by ERISA. *Id. Dukes* concluded that "[q]uality control of benefits, such as the health care benefits provided here, is a field traditionally occupied by state regulation and we interpret the silence of Congress as reflecting an intent that it remain such." *Id.* I would adopt the rationale of the *Smith* and *Dukes* decisions and find that the negligence action against U.S. Healthcare is not preempted.

Therefore, I believe the overall purpose for the enactment of ERISA, as well as subsequent case law, would indicate that the negligence claim against U.S. Healthcare does not fall under the aegis of the preemption clause. It is for these reasons that I find state negligence laws have "only a tenuous, remote, or peripheral connection with [ERISA] covered plans . . . ." *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company et al.*, 514 U.S. 645, 661, 115 S.Ct. 1671, 1679, 131 L.Ed.2d 695, —— (1995)(citing *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 n. 1, 113 S.Ct. 580, 583, n. 1, 121 L.Ed.2d 513 (1992)).

COMMONWEALTH of Pennsylvania, Appellee,

v.

Dennis MILLER, Appellant.

Supreme Court of Pennsylvania.

Argued Nov. 18, 1998.

Decided Jan. 20, 1999.

Defendant was convicted in the Court of Common Pleas, Chester County, No. 61–96, Howard F. Riley, Jr., J., of first-degree murder, rape, indecent assault, recklessly endangering another person, possession of instruments of crime, and flight to avoid apprehension. Defendant appealed. The Supreme Court, No. 204 Capital Appeal Docket, Saylor, J., held that: (1) evidence was sufficient to support murder conviction; (2) initial entry into defendant's home was justified based on officers' reasonable belief that defendant and wife might have been within home and in need of aid; (3) evidence was sufficient to support rape conviction; and (4) court did not rely on lack of remorse as nonstatutory aggravating factor in death penalty determination.

Affirmed.

1. Criminal Law ⇐1134(3)

In all cases in which death penalty has been imposed, Supreme Court is required to review sufficiency of evidence.

2. Homicide ⇐9, 14(1)

To establish murder in the first degree, the Commonwealth must prove that the defendant specifically intended to kill, which is established by proof of premeditation and deliberation.

3. Homicide ⇐230

Specific intent to kill necessary for first-degree murder conviction may be proven by circumstantial evidence.

4. Homicide ⇐145

Specific intent to kill necessary for first-degree murder conviction can be inferred from defendant's use of deadly weapon upon vital part of victim's body.

5. Homicide ⇐9

Where defendant knowingly applies deadly force to victim, his specific intent to kill necessary for first-degree murder conviction is as evident as if he expressed intent to kill at time force was applied.

6. Homicide ⇐14(2)

No particular period of premeditation is required to form requisite intent for first-degree murder conviction.

7. Homicide ⇐253(2, 4)

Defendant's conviction for first-degree murder of wife was supported by evidence that defendant was last seen with wife shortly before they left bar, that defendant's

blood-stained handprints, footprints, and fingerprints were found throughout crime scene, that scientific testing established existence of defendant's seminal fluid in wife's vaginal area, that murder weapon contained partial thumbprint, that officers found inculpatory note in defendant's handwriting in house, and that killing was brutal.

8. Criminal Law ⚿1158(4)

In reviewing suppression ruling, Supreme Court determines whether record supports suppression court's factual findings and whether legal conclusions drawn from such findings are free of error.

9. Searches and Seizures ⚿42.1

As general rule, only a limited number of circumstances, including police officers' reasonable belief that someone within residence is in need of immediate aid, will excuse police from compliance with warrant and probable cause requirements of Fourth Amendment. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures ⚿42.1

Initial entry into defendant's home was justified based on officers' reasonable belief that defendant and wife might have been within home and in need of aid, where defendant's family urged entry into home based on defendant and wife's history of drug use, defendant's history of spousal abuse, and prolonged absence of defendant and wife. U.S.C.A. Const.Amend. 4.

11. Rape ⚿51(1)

Where victim of rape is dead, circumstantial evidence may be used to prove the offense. 18 Pa.C.S.A. § 3121(a)(1, 2).

12. Rape ⚿51(3, 4, 7)

Defendant's rape conviction was supported by forensic pathologist's testimony, deoxyribonucleic acid (DNA) evidence of defendant's seminal material, and evidence of position of victim's body, broken box spring and bent bed frame, pattern of blood spatter around victim's vaginal area, and defense wounds on victim's arms and hands. 18 Pa. C.S.A. § 3121(a)(1, 2).

13. Criminal Law ⚿260.11(4)

To extent that defendant's argument against rape conviction implicated attack on weight of evidence, it was directed to sound discretion of trial court, and review of claim entailed review of trial court's exercise of its discretion. 18 Pa.C.S.A. § 3121(a)(1, 2).

14. Criminal Law ⚿255.3

As fact finder, trial court is free to believe all, some, or none of evidence presented.

15. Criminal Law ⚿1159.2(2)

New trial should only be awarded when verdict is so contrary to evidence as to shock one's sense of justice.

16. Criminal Law ⚿1159.5

Fact that contradictory evidence exists as to particular issue does not, by itself, render verdict so contrary to evidence that one's sense of justice is shocked, so as to warrant new trial.

17. Criminal Law ⚿1208.1(5)

Weighing of aggravating and mitigating circumstances with respect to death penalty determination is subjective process, not merely a quantitative procedure, and consequently, task is sole prerogative of sentencing authority, which may assign determinative weight to particular circumstance or circumstances.

18. Homicide ⚿357(4)

Trial court's statement, during sentencing for rape conviction, that court was troubled by defendant's lack of remorse "in connection with this crime," did not establish that court relied on lack of remorse as nonstatutory aggravating factor in court's death penalty determination with respect to murder conviction arising from stabbing death of same victim.

19. Criminal Law ⚿986.2(6)

Demeanor of a convicted defendant, including his apparent lack of remorse, is proper consideration in fixing sentence for noncapital offense.

Robert Kerry Kalmbach, Kennett, SQ, for D. Miller.

Robert Louis Miller, West Chester, Robert A. Graci, Harrisburg, Nicholas J. Casenta, Jr., for Commonwealth.

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

OPINION

SAYLOR, Justice.

Appellant, Dennis L. Miller ("Miller"), appeals from the sentence of death imposed following his convictions for murder in the first degree, rape, indecent assault, recklessly endangering another person, possession of instruments of crime, and flight to avoid apprehension. The convictions stemmed from the killing of Miller's wife. We affirm.

Miller resided with his wife, Sherry, and their two children, Barbara and Dennis, who at the time were twelve and four, at 301 Church Alley, Londongrove Township, Chester County. Miller's marital relationship was, however, strained as a consequence of drug use, as well as jealousy and physical abuse directed toward his wife. Notably, in July of 1994, Miller pled guilty to harassment and disorderly conduct arising from an altercation with Sherry, and, in April of 1995, he pled guilty to aggravated assault in connection with an incident in which he held a gun to Sherry's head. As a result of the latter conviction, Miller was imprisoned for a term of nine to twenty-three months.

While in prison, Miller professed a desire to kill Sherry, and on the day of his release in September of 1995, he told his cellmate, "I'll be back for killing my wife." Following his release from prison, Miller resumed living with his wife and children.

On November 18, 1995, Miller made arrangements with his mother, Agnes Miller, to supervise his children while he and Sherry visited a local tavern, Trib's Waystation. At the bar, Miller and his wife drank beer and, at one point, ingested methamphetamine. Although Miller did not appear to be intoxicated, during the course of the evening he became angry whenever his wife either spoke to another man or used the telephone.[1] At approximately 12:30 a.m. Miller and his wife left the bar.

On Sunday, November 19, Agnes Miller was surprised when Miller and his wife did not arrive during the breakfast hour as planned to retrieve their children. As the day progressed, she became increasingly concerned. Miller's daughter, Barbara, repeatedly telephoned the family residence, but no one answered. In addition, Agnes Miller drove to Miller's home on two or more occasions. On each occasion, she observed that the house was locked, no one answered the door, and Sherry's vehicle was missing. Initially, Agnes Miller was concerned because Barbara was asthmatic and her medicine was located in Miller's home. Indeed, later that day, Barbara was taken to the hospital for treatment of an asthmatic attack. Ultimately, on Monday, November 20, Agnes Miller contacted Sherry's mother, Mary Folk, to determine whether she had heard from her daughter. As Ms. Folk had not, she filed a missing persons report with the Pennsylvania State Police.

In response to this report, the investigating trooper contacted the employers for Miller and his wife, checked with the local prisons and hospitals, and interviewed family members. Both Agnes Miller and Ms. Folk related to the police that Miller and his wife had used illicit drugs and speculated that they might have traveled to Philadelphia to purchase drugs. The police also went to the Miller home, knocked on the door, and after receiving no response, checked the doors, finding them locked. When these efforts failed, the troopers asked Agnes Miller to meet them at the residence. Once there, Agnes Miller again expressed concern that something may have happened to her son and daughter-in-law because of their history of drug abuse. The troopers who met Agnes Miller were familiar with Miller's drug problem and were aware of Miller's history of spousal abuse. At Agnes Miller's request, and after receiving an assurance from her

1. Sherry used the telephone at the bar to page Sean Smith, a man she dated during Miller's incarceration. Smith then telephoned Sherry in response to the page.

that she would be responsible for the property, the troopers agreed to forcibly enter the residence.

The troopers gained access through a basement window, checked the basement area, climbed a set of stairs to the kitchen, and briefly surveyed the kitchen. Upon hearing a fan on the second story, the troopers announced themselves and proceeded upstairs. In the master bedroom, the troopers observed the contents of a purse strewn about the floor, an open suitcase, and the naked, blood-spattered body of Sherry Miller lying on a bed with her legs spread, knees bent, and with a bloody pillow over her face. After confirming that Miller was not also in the bedroom, the troopers left, secured the house, and waited until investigators arrived with a search warrant.

An autopsy of Sherry Miller revealed that she died as a result of more than thirty stab wounds to her head, neck, chest, arms, and hands. The murder weapon, a knife, was found in a trash can; the tip had been broken off and was recovered from the shoulder of Sherry Miller. In addition to determining the cause of death, the forensic pathologist conducting the autopsy concluded that Sherry Miller had been subjected to forcible intercourse at the time of her death. This finding was premised, in part, upon the position in which her body was found, the defensive wounds on her hands and arms, the seminal material recovered from her vaginal vault, the absence of such material outside her vagina, and the absence of blood spatter in the area just above her vagina and between her legs.

From the crime scene, the police recovered Miller's bloody handprints on the pillow that was used to cover Sherry Miller's face. Furthermore, the police discovered a bloody footprint of Miller and a bandage with Miller's bloody fingerprint in the bathroom area. In addition, the police obtained a partial thumbprint from the murder weapon.[2] The police noted that the box spring from the bed where Sherry Miller was found was broken, and the bed frame was bent. On the kitchen table, the police found a partially empty cup of coffee next to a vengeful note in Miller's handwriting.[3]

The police continued to search for Miller, contacting his friends and family members in an effort to locate him. Although their efforts were unsuccessful, the police were able to trace Miller's flight from the crime scene to Maryland from his use of his wife's automatic teller machine card, and the police found Sherry's vehicle in Maryland; the vehicle contained a baseball cap belonging to Miller and a number of ATM receipts. Miller was ultimately apprehended six months later in Florida, after a tip following a description of the unsolved crime on the America's Most Wanted television program.

Prior to trial, Miller sought to suppress the evidence seized from his residence, alleging that the initial entry of the police was illegal as it was not authorized by a warrant or supported by probable cause. The trial court denied the suppression motion, finding that the actions of the police were justified in response to the concerns, expressed by Agnes Miller and Ms. Folk, that either Miller or his wife may have been in need of immediate aid.

After an extensive colloquy, Miller elected to proceed with a non-jury trial. At trial, the Commonwealth presented testimony from a forensic pathologist, Richard Callery, M.D., regarding the cause of and circumstances

2. Although this print contained several characteristics consistent with Miller's right thumb, the partial print was insufficient for a positive identification.

3. In his note, Miller stated:

> Now I hope some of Sherry's whore friends learn something from this. I didn't want for it to go this far, but you people don't understand what she put me through. Some know, but they don't want to say something about her. Everybody told her everything I did, but me, I had to find out for myself what she did. All of my so-called friends f—— me one way or another. I had no friends. And I wish I had more time to get even with some of you assholes. I just want to say that you, Larry Brown, I would have killed you, and you, Sean Smith, I told Donny one time before to tell you to leave her alone. I don't know if he did. And if he did, the next time somebody tells you something, you better do what they say. I would have got you too. I hope somebody in my family takes care of Barb, Dennis. I do love you all. I will see some of you in hell.

surrounding Sherry Miller's death. Dr. Callery opined that she died from massive internal bleeding resulting from multiple stab wounds, and that she had been subjected to forcible intercourse during the homicide. The Commonwealth also presented testimony from Agnes Miller, as well as a number of witnesses who had seen Miller and his wife at Trib's Waystation on the evening of November 18. In addition, Miller's cellmate during his incarceration for aggravated assault testified to incriminating statements made by Miller. Finally, both sides stipulated to a number of forensic findings, namely, fingerprints, footprints, blood tests, and the results of DNA testing, which linked Miller to the murder.

The defense presented one witness, who testified that Miller's cellmate fabricated the statements he had attributed to Miller. The trial court found Miller guilty of all offenses.

In the penalty phase, the Commonwealth alleged as aggravating circumstances that Miller committed the murder during the perpetration of a felony, rape, 42 Pa.C.S. § 711(d)(6), and that the murder was committed by means of torture, 42 Pa.C.S. § 711(d)(8). After the Commonwealth incorporated the record from the guilt phase, the defense sought to establish mitigating circumstances by presenting psychological testimony regarding Miller's background, upbringing, and psychological profile, as well as testimony from his family members. The trial court found one aggravating circumstance, the Section 9711(d)(6) aggravator, and one mitigating circumstance, that Miller lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, *see* 42 Pa.C.S. § 711(e)(3). However, the trial court concluded that the aggravating circumstance outweighed the mitigating circumstance. On October 27, 1997, the trial court formally imposed the death sentence with a consecutive term of incarceration of ten to twenty years related to the rape conviction.

[1–6] Although Miller has not raised a challenge to the sufficiency of the evidence underlying his first degree murder conviction, in all cases in which the death penalty has been imposed, we are required to review the sufficiency of such evidence. *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 26 n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). To establish murder in the first degree, the Commonwealth must prove that the defendant specifically intended to kill, which is established by proof of premeditation and deliberation. *See Commonwealth v. Weinstein,* 499 Pa. 106, 115, 451 A.2d 1344, 1348 (1982). A specific intent to kill may be proven by circumstantial evidence, *see Commonwealth v. Williams,* 455 Pa. 539, 546–47, 316 A.2d 888, 891 (1974), and can be inferred from the defendant's use of a deadly weapon upon a vital part of the victim's body. *Commonwealth v. Hall,* 549 Pa. 269, 282, 701 A.2d 190, 196 (1997), *cert. denied,* —— U.S. ——, 118 S.Ct. 1534, 140 L.Ed.2d 684 (1998). Where a defendant knowingly applies deadly force to the victim, his specific intent to kill is as evident as if he expressed the intent to kill at the time the force was applied. *Commonwealth v. Auker,* 545 Pa. 521, 539, 681 A.2d 1305, 1315 (1996). Furthermore, no particular period of premeditation is required to form the requisite intent. *See Williams,* 455 Pa. at 547, 316 A.2d at 891.

[7] In this case, the Commonwealth established that Miller was last seen with the victim shortly before they left Trib's Waystation. Miller's blood-stained handprints, footprints, and fingerprints were found throughout the crime scene; both DNA and biological testing established the existence of his seminal fluid in the victim's vaginal area; a partial thumbprint was found on the murder weapon; and an inculpatory note in Miller's handwriting was also found downstairs. Together with the Commonwealth's expert opinion testimony establishing the brutal manner of death, this evidence amply supported the conclusion that Miller committed the crime with the specific intent to kill.

Miller raises three claims of trial error. He argues that the trial court erred in denying his motion to suppress evidence; that the evidence supportive of his convictions for rape and indecent assault was insufficient; and finally, that the aggravating circumstance found in support of the death sentence

did not outweigh the mitigating circumstance found by the court.

Miller's challenge to the suppression ruling is premised upon the failure of the police to obtain a search warrant prior to their initial entry of Miller's residence and the asserted absence of probable cause to conduct a search. The Commonwealth argues that the initial entry into Miller's home was justified based upon the troopers' reasonable belief that the Millers may have been within the home and in need of aid. Alternatively, the Commonwealth argues that the evidence seized from Miller's home should not be suppressed based upon the inevitable discovery doctrine.

[8] In reviewing a suppression ruling, we determine whether the record supports the suppression court's factual findings and whether the legal conclusions drawn from such findings are free of error. *Commonwealth v. O'Shea*, 523 Pa. 384, 395, 567 A.2d 1023, 1028 (1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 225, 112 L.Ed.2d 180 (1990).

[9] As a general rule, only a limited number of circumstances will excuse the police from compliance with the warrant and probable cause requirements of the Fourth Amendment.[4] One such circumstance occurs when the police reasonably believe that someone within a residence is in need of immediate aid. *See Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978); *Commonwealth v. Norris*, 498 Pa. 308, 313, 446 A.2d 246, 248 (1982). Here, the trial court found that the police were not investigating a crime, but rather, were responding to requests from concerned family members regarding the safety of Miller and his wife. The trial court noted that such concerns were grounded upon the history of drug use on the part of both individuals, Miller's history of spousal abuse, and the prolonged absence of the Millers, particularly in light of the fact that they had not returned for their children. Miller's children, of course, had the right to gain entry to their own home. Moreover, Barbara Miller was in need of her asthma medication, which was located inside the house.

[10] Thus, contrary to Miller's assertion, this was not a case in which the police created their own exigency and acted upon it, *see, e.g., Commonwealth v. Melendez*, 544 Pa. 323, 330, 676 A.2d 226, 229 (1996); rather, the police acted in response to the urging of Miller's family and based upon a reasonable belief that the Millers were inside the residence and in need of assistance. Hence, the trial court's finding of exigent circumstances is supported by the record. *Cf. Commonwealth v. Silo*, 509 Pa. 406, 410, 502 A.2d 173, 176 (1985)(concluding that police entry into a home was justified when the victim was last observed arguing with the defendant, and the neighbors and the victim's employer reported her missing and urged the police to investigate); *Commonwealth v. Maxwell*, 505 Pa. 152, 164, 477 A.2d 1309, 1315, *cert. denied*, 469 U.S. 971, 105 S.Ct. 370, 83 L.Ed.2d 306 (1984).[5]

Miller labels his next claim as a challenge to the sufficiency of the evidence underlying his convictions for rape and indecent assault, although his argument implicates the weight of the evidence. *See generally Commonwealth v. Goldblum*, 498 Pa. 455, 466–67, 447 A.2d 234, 240 (1982). His contention in this regard is premised upon the testimony of Dr. Callery. While Miller acknowledges that Dr. Callery opined that the victim was subject to forcible sexual intercourse "concomitant" with the homicide, Miller maintains that there was record evidence to contradict this opinion. In particular, Miller's argument focuses upon the following exchange, which occurred during his counsel's cross-examination of Dr. Callery:

> [Defense Counsel]: What I'm asking you, Doctor, is it's not inconceivable, is it, that there could have been sexual intercourse, the victim not get up off the bed and walk

4. Although Miller has framed his claim under both the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution, he does not contend that the analysis of this issue is different under the Pennsylvania Constitution.

5. We also note that as a matter of Fourth Amendment jurisprudence, the evidence seized from Miller's house would also have been admissible because it inevitably would have been discovered. *See Nix v. Williams*, 467 U.S. 431, 449–50, 104 S.Ct. 2501, 2512, 81 L.Ed.2d 377 (1984).

about, and then an attack took place, and that the sexual intercourse was not then related to the attack?

[Dr. Callery]: I testified before that I thought that this was a typical rape/homicide, but the way you phrased the question, that it is not inconceivable, is there a scenario that could be conceived of that, going along with what you say, I would have to say it is conceivable.

Miller implicitly suggests that the evidence is not inconsistent with the possibility that the intercourse was, in fact, consensual rather than forcibly compelled.

[11, 12] To the extent that this argument can be construed as a sufficiency challenge, the crime of rape requires, in relevant part, that the Commonwealth prove that the accused engaged in sexual intercourse by forcible compulsion or by threat thereof. 18 Pa.C.S. § 121(a)(1), (2); *Commonwealth v. Berkowitz,* 537 Pa. 143, 147–48, 641 A.2d 1161, 1163 (1994). Where, as here, the victim of the rape is dead, circumstantial evidence may be used to prove the offense. *See, e.g., Commonwealth v. Thomas,* 522 Pa. 256, 271, 561 A.2d 699, 706 (1989); *Commonwealth v. Holcomb,* 508 Pa. 425, 453, 498 A.2d 833, 847 (1985), *cert. denied,* 475 U.S. 1150, 106 S.Ct. 1804, 90 L.Ed.2d 349 (1986). Here, the Commonwealth established sexual intercourse through the testimony of Dr. Callery, the position of Sherry Miller's body, and DNA evidence of Miller's seminal material. Similarly, the element of forcible compulsion was proven through Dr. Callery's opinion testimony, as well as evidence of the broken box spring, bent bed frame, the position of Sherry Miller's body, the pattern of blood spatter around her vaginal area, and the defense wounds on her arms and hands. Based upon this evidence, the element of forcible compulsion was constituent to the force employed to commit the murder.[6] As sufficient evidence existed to find Miller guilty of rape, his sufficiency challenge is without merit.[7]

[13–15] To the extent that Miller's argument implicates an attack on the weight of the evidence, it is directed to the sound discretion of the trial court, and a review of this claim entails a review of the trial court's exercise of its discretion. *See Commonwealth v. Brown,* 538 Pa. 410, 435–36, 648 A.2d 1177, 1189 (1994). As the fact finder, the trial court is free to believe all, some, or none of the evidence presented. *See Commonwealth v. Shaver,* 501 Pa. 167, 173, 460 A.2d 742, 745 (1983). A new trial should only be awarded when the verdict is so contrary to the evidence as to shock one's sense of justice. *See Brown,* 538 Pa. at 435, 648 A.2d at 1189.

[16] Miller argues that Dr. Callery's concession in the above-quoted exchange constitutes contradictory evidence. Even assuming such a dubious proposition, the fact that contradictory evidence exists as to a particular issue does not, by itself, render the verdict so contrary to the evidence that one's sense of justice is shocked. *See Commonwealth v. Pronkoskie,* 498 Pa. 245, 252, 445 A.2d 1203, 1206 (1982). Moreover, the trial court's conclusion that Miller engaged in non-consensual sexual intercourse by forcible compulsion was not opposed to the evidence, but rather, was consistent with it. Under such circumstances, there is nothing about the trial court's conclusions that would provide a basis for disturbing the verdict.

6. Although not cited by Miller, the decision in *Commonwealth v. Sudler,* 496 Pa. 295, 436 A.2d 1376 (1981), would appear, at first blush, to lend support to his argument. In *Sudler,* this Court held that the crime of rape pertains only to an assault against a living person. *Id.* at 303, 436 A.2d at 1379. However, Miller did not argue at trial or contend on appeal that the evidence established that the intercourse occurred after the homicide. Moreover, unlike the prosecution in *Sudler,* the Commonwealth presented expert opinion evidence that Miller committed the rape "concomitant" with the homicide.

7. As previously noted, Miller also challenges the sufficiency of the evidence to establish the offense of indecent assault. Preliminarily, we note that Miller's conviction for this offense does not implicate the aggravating circumstance alleged by the Commonwealth under Section 9711(d)(6) of the Judicial Code. 42 Pa.C.S. § 711(d)(6). The offense of indecent assault requires, in pertinent part, proof of indecent contact without the consent of the other person. *See* 18 Pa.C.S. § 3126. In this case, the facts supportive of the rape conviction more than adequately establish this separate offense.

In his final claim, Miller challenges the trial court's holding that the existing aggravating circumstance outweighed the mitigating circumstance that was found. Miller also contends that in setting the penalty at death, the trial court relied upon a consideration extraneous to the statutory aggravating circumstances.

[17] Miller's attack on the trial court's weighing of the aggravating and mitigating circumstances is wholly without merit. The weighing of aggravating and mitigating circumstances is a subjective process, not merely a quantitative procedure. *See Brown*, 538 Pa. at 428–29, 648 A.2d at 1186. Consequently, this task is the sole prerogative of the sentencing authority, which may assign determinative weight to a particular circumstance or circumstances. *Commonwealth v. Gribble*, 550 Pa. 62, 85, 703 A.2d 426, 437–38 (1997), *cert. denied*, —— U.S. ——, 119 S.Ct. 519, 142 L.Ed.2d 430 (1998). For this reason, and based upon our review, we find no legal error in the trial court's decision attaching greater weight to the aggravating circumstance than the mitigating circumstance.

[18, 19] Miller's final argument, that the trial court entertained an inappropriate consideration in its capital sentencing decision, is based upon the trial court's statement that "it troubles me that the defendant has expressed no remorse whatsoever in connection with this crime." This statement, however, was not made during the trial court's pronouncement respecting its weighing of the aggravating and mitigating circumstances associated with the sentence of death; rather, it occurred during the sentencing for the rape conviction. Miller points to nothing in the record to otherwise suggest that the trial court relied upon his lack of remorse as a non-statutory aggravating factor in its death penalty determination. Moreover, the demeanor of a convicted defendant, including his apparent lack of remorse, is a proper consideration in fixing the sentence for a non-capital offense. *See generally Commonwealth v. Travaglia*, 502 Pa. 474, 499, 467 A.2d 288, 301 (1983), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984).[8]

Having concluded that Miller's claims are without merit, we are required to affirm the judgment of sentence unless we determine that:

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

(ii) the evidence fails to support the finding of at least one aggravating circumstance specified in Subsection (d).

42 Pa.C.S. § 711(h)(3).[9]

After reviewing the record, we conclude that the sentence of death imposed in this case was not the product of passion, prejudice or any other factor, but rather, was based upon evidence that Miller killed his wife with specific intent. In addition, we conclude that the aggravating circumstance found by the trial court was supported by the evidence. The Commonwealth presented evidence that Miller killed his wife while committing a rape, thus establishing that the homicide was committed during the perpetration of a felony. *See* 42 Pa.C.S. § 711(d)(6).

Accordingly, we affirm the verdict and the sentence of death imposed upon Dennis Miller by the Court of Common Pleas of Chester County.[10]

8. It is noteworthy that the Court in *Travaglia* stated that the sentencing authority in a capital case may consider a defendant's apparent lack of remorse. *See id.*

9. By legislation enacted June 25, 1997, Subsection (h)(3)(iii), which provided for proportionality review, and a portion of Subsection (h)(4) that references such review, were stricken from Section 9711(h). *See* Act of June 25, 1997, No. 28, Section 1 (Act 28, effective immediately). As Miller's sentence of death was imposed after June 25, 1997, a proportionality review of his sentence is not required. *See Gribble*, 550 Pa. at 91, 703 A.2d at 440.

10. Pursuant to Section 9711(i) of the Judicial Code, 42 Pa.C.S. § 9711(i), the Prothonotary of the Supreme Court is directed to transmit the

EXHIBIT “B”

ORDER

PER CURIAM.

AND NOW, this 17th day of December, 2009, the Petition for Allowance of Appeal is **GRANTED, LIMITED TO** the issue set forth below. Allocatur is **DENIED** as to all remaining issues. The issue, as stated by petitioner, is:

> Whether the Supersedeas Fund may deny reimbursement of medical treatment rendered before an insurer requested supersedeas, where the Workers' Compensation Act only permits reimbursement of amounts paid as a result of a denial of supersedeas?

1

Ronald GONTARCHICK, Susan Ann Gontarchick, his Wife; Marlin Reed, Mary Jane Reed, his Wife; and Matthew Reed, their Son, Petitioners

v.

CITY OF POTTSVILLE, Respondent.

Supreme Court of Pennsylvania.

Dec. 17, 2009.

Petition for Allowance of Appeal, No. 18 MAL 2009, from the Order of the Commonwealth Court at 176 CD 2008, dated December 12, 2008, reversing and remanding the Order of the Court of Common Pleas of Schuylkill County at S–1049–03, dated January 4, 2008.

Prior report: Pa.Cmwlth., 962 A.2d 703.

ORDER

PER CURIAM.

AND NOW, this 17th day of December, 2009, the Petition for Allowance of Appeal is **GRANTED.** The issue, as stated by Petitioner, is:

> Whether the Commonwealth Court opinion and order departs from the accepted and usual course of judicial proceedings in matters of statutory construction?

2

COMMONWEALTH of Pennsylvania, Appellee

v.

Dennis MILLER, Appellant.

Supreme Court of Pennsylvania.

Submitted Oct. 30, 2008.

Decided Dec. 28, 2009.

Background: Defendant was convicted in the Court of Common Pleas, Chester County, No. 61-96, Howard F. Riley, Jr., J., of first-degree murder and rape, and sentenced to death. Defendant appealed. The Supreme Court, 555 Pa. 354, 724 A.2d 895, affirmed. Subsequently, defendant filed motion for postconviction collateral relief. The Court of Common Pleas, Chester County, Criminal Division, CP-15-CR-0000061-1996, Howard F. Riley, Jr., J., denied the petition, and defendant appealed.

Holdings: The Supreme Court, No. 539 CAP, Greenspan, J., held that:

(1) defense counsel was not ineffective by failing to present witnesses to support heat-of-passion defense;

(2) counsel's failure to present expert witnesses to rebut commonwealth expert on issue of whether a defendant raped victim was reasonable trial strategy;

(3) counsel at murder trial was not ineffective for failing to investigate mental illness of commonwealth witness;

(4) commonwealth's failure to disclose presentence report on witness was not a *Brady* violation; and

(5) counsel was not ineffective for failing to present childhood circumstances, marital relationship, and drug abuse evidence in sentencing phase of trial.

Affirmed.

Castille, C.J., filed a concurring opinion.

Saylor, J., filed a dissenting opinion.

1. Criminal Law ⚿1134.90, 1158.36

The standard of review applicable to appeals from the denial of relief under the Post Conviction Relief Act (PCRA) requires an appellate court to ascertain whether the PCRA court's rulings are supported by the record and free of legal error. 42 Pa.C.S.A. § 9541 et seq.

2. Criminal Law ⚿1615

In order to be eligible for relief under the Post Conviction Relief Act (PCRA), a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more statutorily-enumerated circumstances. 42 Pa. C.S.A. § 9543(a)(2).

3. Criminal Law ⚿1881

In order to be eligible for relief on a claim alleging ineffective assistance of counsel, a defendant must establish that counsels representation fell below accepted standards of advocacy and that as a result thereof, prejudice resulted. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⚿1884

A defense attorney's chosen strategy will not be found to have been unreasonable, so as to constitute deficient representation, as an element of ineffective assistance of counsel, unless it is proven that the path not chosen offered a potential for success substantially greater than the course actually pursued. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⚿1883

To prove prejudice, as an element of a claim of ineffective assistance of counsel, a defendant must show that but for counsel's error, there is a reasonable probability, or a probability that undermines confidence in the result, that the outcome of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⚿1924

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing to present witnesses at murder trial to support heat-of-passion defense, since witnesses' testimony would not have established that victim provoked defendant at time of murder, as required to support defense; testimony of witnesses that victim, defendant's wife, had cheated on defendant and that victim and defendant had a tumultuous relationship that was fueled by drug and alcohol abuse did not show that at time of murder victim had done anything to provoke defendant. U.S.C.A. Const.Amend. 6.

7. Homicide ⚿667, 673

A person is guilty of "heat of passion" voluntary manslaughter if at the time of the killing he or she reacted under a sudden and intense passion resulting from serious provocation by the victim.

8. Homicide ⚿668

"Heat of passion," as will provide a partial defense to a murder charge, in-

cludes emotions such as anger, rage, sudden resentment or terror which renders the mind incapable of reason.

See publication Words and Phrases for other judicial constructions and definitions.

9. Homicide ⚿673

An objective standard is applied to determine whether a victim's provocation of a murder defendant was sufficient to support the defense of heat of passion voluntary manslaughter.

10. Homicide ⚿673

The ultimate test for whether a victim's actions towards a murder defendant constituted adequate provocation, as required for defendant to prove a partial "heat of passion" defense, remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection.

11. Criminal Law ⚿474, 474.4(5)

Expert opinions, on whether murder defendant's personality makeup made it difficult for defendant to handle his marital problems with victim, and that manner of killing of victim was typical of an angry, emotionally-charged assailant, were irrelevant on issue of defendant's heat of passion defense to murder charge, absent any evidence on whether victim had provoked defendant at time of murder.

12. Criminal Law ⚿1931

Defense counsel's failure at first-degree murder trial to present expert witnesses to rebut commonwealth expert on issue of whether defendant raped victim was reasonable trial strategy, and thus could not have amounted to ineffective assistance of counsel, where counsel believed that evidence was clear that no rape had occurred and that cross-examination of commonwealth expert would be sufficient to rebut expert's testimony. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⚿1882

For purposes of ruling on a claim of ineffective assistance of counsel, trial counsel will be deemed to have acted reasonably if the course chosen by trial counsel had some reasonable basis designed to effectuate his client's interests. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⚿1884

A claim of ineffectiveness will not succeed by comparing, in hindsight, the trial strategy trial counsel actually employed with the alternatives foregone. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⚿1882

For purposes of ruling on a claim of ineffective assistance of counsel, although a court does not disregard completely the reasonableness of other alternatives available to counsel, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⚿1923

Defense counsel at murder trial was not deficient, as an element of ineffective assistance of counsel, by failing to investigate the mental illness of commonwealth witness, defendant's former cellmate who testified that defendant had threatened to kill victim, since counsel had no reason to believe that witness suffered from mental illness; witness had never told defendant that he suffered from mental illness or acted in any manner that suggested that he suffered from mental illness. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⚿1922

Defendant at murder trial was not prejudiced, as an element of ineffective

assistance of counsel, by trial counsel's failure to investigate alleged mental illness suffered by witness, defendant's former cellmate who testified that defendant had threatened to kill victim, since other evidence showed that defendant acted with specific intent to kill victim, including facts that defendant used a deadly weapon on vital parts of victim's body and that defendant left a note at crime scene admitting that he had killed victim willfully. U.S.C.A. Const.Amend. 6.

18. Homicide ⚿908

Specific intent to kill may be inferred from the use of a deadly weapon on a vital part of another person's body.

19. Criminal Law ⚿1618(10)

Recantation of testimony of witness at murder trial did not support defendant's post-conviction claim that counsel was ineffective for failing to investigate witness' alleged mental illness; witness' claim that he could no longer remember whether he had actually heard defendant, his former cellmate, threaten to kill victim, or whether the threats had been aural hallucinations, was not credible, since witness had received threats from other prisoners and had admitted to another prisoner that he was going to lie about what defendant may have said in order to help himself. U.S.C.A. Const.Amend. 6.

20. Criminal Law ⚿1992, 1999

In order to succeed on a *Brady* claim, a defendant must establish that the evidence withheld was favorable to him, i.e., that it was exculpatory or had impeachment value; the evidence was suppressed by the prosecution; and prejudice resulted. U.S.C.A. Const.Amend. 14.

21. Criminal Law ⚿1992

In order to establish prejudice, as an element of a claimed *Brady* violation, a defendant is obliged to show that the evidence withheld by the commonwealth was material to guilt or punishment, and that there is a reasonable probability that the result of the proceeding would have been different but for the alleged suppression of the evidence. U.S.C.A. Const.Amend. 14.

22. Criminal Law ⚿1992

The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality of the evidence, as required to show prejudice, as an element of a claimed *Brady* violation. U.S.C.A. Const.Amend. 14.

23. Criminal Law ⚿1995

A *Brady* violation will not afford a defendant relief if the defendant either knew of the existence of the evidence in dispute or could have discovered it by exercising reasonable diligence. U.S.C.A. Const.Amend. 14.

24. Criminal Law ⚿1999

Commonwealth's failure to disclose presentence report indicating that witness, defendant's former cellmate who testified that defendant had threatened to kill victim, suffered from mental illness, did not prejudice defendant, as an element of alleged *Brady* violation, since other evidence showed that defendant acted with specific intent to kill victim, including facts that defendant used a deadly weapon on vital parts of victim's body and that defendant left a note at crime scene admitting that he had killed victim willfully. U.S.C.A. Const. Amend. 14.

25. Criminal Law ⚿2005

Commonwealth had no obligation at murder trial to disclose presentence report indicating that witness, defendant's former cellmate who testified that defendant had threatened to kill victim, suffered from mental illness, and thus failure to disclose

report was not a *Brady* violation, since agency that possessed report was not involved in defendant's prosecution. U.S.C.A. Const.Amend. 14.

26. Criminal Law ⚿1931

Defense counsel's failure at murder trial to object to testimony of commonwealth's expert, on grounds that expert failed to state that he believed to a reasonable degree of medical certainty that victim had been raped, was reasonable trial strategy, and thus did not amount to ineffective assistance of counsel; counsel made tactical decision not to object and give commonwealth the opportunity to elicit words "reasonable degree of medical certainty," so as to use the omission to argue that no rape had occurred. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⚿483

"Magic words" need not be uttered by an expert in order for his or her testimony to be admissible; rather, the substance of the testimony presented by the expert must be reviewed to determine whether the opinion rendered was based on the requisite degree of certainty and not on mere speculation.

28. Criminal Law ⚿1433(1)

Issue of whether evidence was sufficient to show that murder victim had been raped had been litigated at trial, and thus defendant was not entitled, in post-conviction proceedings, to re-litigate issue using affidavit of medical examiner who had testified on behalf of commonwealth at trial, stating that he could not opine to a reasonable degree of medical certainty that the victim had been raped; insofar as defendant sought to introduce the affidavit to demonstrate that the evidence was insufficient to sustain a rape conviction, the post-conviction court was precluded from addressing the issue. 42 Pa.C.S.A. § 9544(a)(2).

29. Criminal Law ⚿1931

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing to elicit testimony from commonwealth expert at murder trial that he could not opine to a reasonable degree of medical certainty that the victim had been raped, since claim that expert would have so testified was speculative; expert had testified in pretrial hearings that it was his opinion that a rape occurred despite vigorous cross-examination by trial counsel. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⚿1580(1)

Defendant failed to allege or prove that absent defense counsel's alleged deficient pretrial investigation, he would not have waived his right to a jury at guilt phase of murder trial, and thus defendant could not show prejudice, as an element of his postconviction ineffective-assistance-of-counsel claim arising from alleged invalid jury waiver. U.S.C.A. Const.Amend. 6.

31. Jury ⚿29(6)

Defendant validly waived his right to a jury trial at guilt phase of murder prosecution; defendant signed a written jury waiver colloquy form that set forth the essential elements of a jury trial and explained all of the rights defendant was waiving by deciding to be tried by a judge and not a jury, trial court questioned defendant twice on the record regarding his decision to waive his right to a jury trial, and on both occasions, defendant averred that he understood the rights associated with the right to a jury and that he was waiving them knowingly, intelligently, and voluntarily. U.S.C.A. Const.Amend. 6.

32. Jury ⚿29(6)

A valid waiver of the right to a jury trial must contain evidence that the accused understood the fundamental essentials of a jury trial which are: (1) that the

jury be chosen from members of the community, i.e., a jury of one's peers, (2) that the accused be allowed to participate in the selection of the jury panel, and (3) that the verdict be unanimous. U.S.C.A. Const. Amend. 6.

33. Criminal Law ⚿1618(10)

Defendant failed to show that absent trial counsel's allegedly deficient investigation he would not have waive his right to testify on his own behalf, and thus defendant could not show prejudice, as an element of his postconviction ineffective-assistance-of-counsel claim arising from alleged invalid waiver of right to testify; trial counsel testified at postconviction hearing that he had asked defendant to testify both at trial and during the penalty hearing and defendant had refused. U.S.C.A. Const. Amend. 6.

34. Criminal Law ⚿1936

Claims alleging ineffectiveness of counsel premised on allegations that trial counsel's actions interfered with an accused's right to testify require a defendant to prove either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf. U.S.C.A. Const. Amend. 6.

35. Criminal Law ⚿1580(1)

Defendant failed to allege or prove that absent defense counsel's alleged deficient pretrial investigation, he would not have waived his right to a jury trial at penalty phase of murder trial, and thus defendant could not show prejudice, as an element of his postconviction ineffective-assistance-of-counsel claim arising from alleged invalid jury waiver. U.S.C.A. Const. Amend. 6.

36. Criminal Law ⚿1429(1)

Defendant could have challenged validity of his waiver of jury trial in penalty phase of murder prosecution and thus defendant waived right to litigate issue in postconviction proceeding; defendant raised no objection to allegedly inadequate jury-waiver colloquies either after colloquies or on direct appeal of conviction. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9544(b).

37. Criminal Law ⚿1891

Reasonableness of a defense counsel's particular investigation, for purposes of ruling on a claim of ineffective assistance of counsel, depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation. U.S.C.A. Const. Amend. 6.

38. Criminal Law ⚿1961

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing at penalty phase of first-degree murder trial to present testimony of witness regarding defendant's childhood circumstances, marital relationship, and drug abuse, since evidence would have been cumulative of other evidence presented on issues, including expert testimony of psychologist who had examined defendant. U.S.C.A. Const.Amend. 6.

39. Criminal Law ⚿1961

Defendant was not prejudiced, as an element of ineffective assistance of counsel, by defense counsel's failure, at penalty phase of first-degree murder trial, to present cumulative testimony of witnesses on issues of defendant's childhood circumstances, marital relationship, and drug abuse; defendant presented nothing that established that the trial court would have imposed a life sentence, rather than death penalty, if only it had heard additional evidence of appellants childhood, drug de-

pendence, and dysfunctional marital relationship. U.S.C.A. Const.Amend. 6.

40. Criminal Law ⚿1960

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing at penalty phase of first-degree murder trial to obtain defendant's school records, allegedly showing that defendant was borderline mentally retarded, since other evidence showed that defendant was not retarded, including psychological examination of defendant and fact that defendant had been able to hold jobs requiring a modicum of skill. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⚿1960

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing at penalty phase of first-degree murder trial to obtain defendant's medical records showing that defendant had suffered brain injuries, since counsel had no reason to believe that defendant was cognitively impaired; counsel had received no information from defendant or defendant's family member s that defendant had suffered any injury or had medical problems affecting cognition, and defendant denied having any significant medical history when examined by defense psychologist. U.S.C.A. Const.Amend. 6.

42. Criminal Law ⚿1960

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing at penalty phase of first-degree murder trial to obtain defendant's drug records, since evidence was cumulative of other evidence of defendant's substance abuse problem. U.S.C.A. Const. Amend. 6.

43. Criminal Law ⚿1961

Defendant failed to show that he had been aware at time of murder that victim had obtained a child support order against him, and thus defense counsel was not deficient, at penalty phase of first-degree murder trial, by failing to introduce a copy of the order. U.S.C.A. Const.Amend. 6.

44. Criminal Law ⚿1960

Defense counsel was not deficient, as an element of ineffective assistance of counsel, by failing at penalty phase of first-degree murder trial to have defendant tested by a neuropsychologist to determine whether defendant suffered from cognitive impairment, since counsel had defendant examined by a psychologist and had discovered no reason to believe that defendant was impaired. U.S.C.A. Const. Amend. 6.

45. Sentencing and Punishment ⚿1789(9)

Defendant was not prejudiced, in penalty phase of first-degree murder bench trial, by admission of alleged victim impact testimony, victim's daughter showing a picture of victim to trial court and prosecutor stating that other family members had declined a request that they testify because doing so would be too emotional; actions and comments of the prosecutor were innocuous insofar as they were fleeting and did not dwell on the victim, and trial court stated that it was not influenced by the victim's photograph or the prosecutor's comments and that neither the photograph nor the comments had any effect on the verdict it ultimately rendered.

46. Criminal Law ⚿1614

Medical records indicating that victim had had an abortion five years prior to date of murder were inadmissible in post-conviction proceedings on defendant's claim that trial counsel had been ineffective for failing to present a heat of passion defense; records contained information remote in time from the date of murder and contained no information indicating that defendant was aware that the abortion

took place or his reaction to that information. U.S.C.A. Const.Amend. 6.

47. Criminal Law ⚿1177.7(2)

Any error by court in postconviction proceedings, in excluding testimony of trial defense counsel on whether defendant had told trial counsel that victim had had an abortion after getting pregnant by a man other than defendant, her husband, was harmless, since other witnesses later testified at the postconviction hearing that the victim had an abortion after being impregnated by another man.

48. Criminal Law ⚿1590

Trial court, in postconviction proceedings on defendant's ineffective-assistance-of-counsel claims arising from alleged errors in first-degree murder trial, did not abuse its discretion in refusing to order commonwealth to provide defendant with a computer disc containing high-resolution digitized scans of the negatives of the crime scene photographs; agency possession the photographs lacked equipment to scan the negatives, and commonwealth provided defendant with copies of the crime scene photographs, first generation prints of the photographs, and a contact sheet containing copies of the negatives, which were of a quality on a par with digital scans. Rules Crim.Proc., Rule 902(E)(2), 42 Pa.C.S.A.

49. Criminal Law ⚿1148

The denial of a defense request seeking discovery materials is reviewed on appeal under an abuse of discretion standard. Rules Crim.Proc., Rule 902(E)(2), 42 Pa. C.S.A.

50. Criminal Law ⚿1186.1

No number of failed claims may collectively warrant relief on appeal if they fail to do so individually.

Mary Elizabeth Hanssens, Samuel J.B. Angell, Defender Association of Philadelphia, for Dennis Miller.

Gerald P. Morano, Stuart B. Suss, Kelley Lynn Nelson, PA Office of Attorney General, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania.

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

OPINION

Justice GREENSPAN.

This is a capital appeal from an order entered by the Court of Common Pleas of Chester County denying Appellant Dennis Miller's request for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541–9546. Appellant was sentenced to death following his convictions for first-degree murder, rape, indecent assault, recklessly endangering another person, possessing an instrument of crime, and flight to avoid apprehension. These charges arose out of the stabbing murder of Appellant's wife in November of 1995. We affirm.

Briefly, the facts underlying appellant's convictions are as follows. On November 18, 1995, Appellant and his wife, Sherry, left their two children, Barbara and Dennis, with Appellant's mother, Agnes Miller, and went to a local bar called Trib's Waystation where they drank some beer and ingested methamphetamine. During the course of the evening Appellant became visibly upset and angry when his wife spoke to other men or used her cell phone.[1] The couple left the bar at about

1. This was not the first time Appellant had exhibited jealousy with respect to his wife. In

1:20 a.m.[2]

The next day, when Appellant and Sherry did not appear at Agnes Miller's home as planned, Ms. Miller became concerned, especially after no one answered the telephone at Appellant's residence. Ms. Miller twice drove to Appellant's home and observed that the doors to the residence were locked, no one answered the door, and that Sherry's car was not there. On November 20, 1995, after speaking to Sherry's mother and learning that she had not heard from Sherry, Ms. Miller filed a missing persons report with the Pennsylvania State Police. After the investigating trooper was unable to locate Appellant or his wife, he and other troopers went to their residence. Once there, they received permission from Ms. Miller to break into the residence. Upon doing so, they discovered the naked body of Sherry Miller lying on a bed in an upstairs bedroom. Her body was covered in blood, her legs were spread, her knees were bent, and there was a blood-covered pillow over her face. Upon discovering the body, the troopers left the residence to wait for a search warrant.

An autopsy of Sherry Miller's body indicated that she had died because she was stabbed over thirty times in her head, chest, arms, and hands. During the autopsy, the tip of a knife was retrieved from her shoulder. The knife from which the tip originated was found in a trash can. The forensic pathologist who performed the autopsy concluded from the position of the body, defensive wounds on the victim's hands, the lack of blood below her waist, and the lack of seminal material outside her vagina that she had been subjected to intercourse at the time of her death.[3]

An investigation of the residence resulted in the seizure of evidence tying Appellant to the crime including Appellant's bloody palm print on the pillow found covering the victim's face, Appellant's bloody fingerprint on a bandage, and a bloody footprint belonging to Appellant. In addition, investigators noted that the box spring from the bed on which the victim was found was broken and that the murder weapon had a bloody thumbprint on it. While the thumbprint had several characteristics consistent with Appellant's thumbprint, it contained insufficient identifying markers to be positively identified as having been placed on the knife by Appellant. Police also found a note in the kitchen, in Appellant's handwriting, that read:

> Now I hope some of Sherry's whore friends learn something from this. I didn't want for it to go this far, but you people don't understand what she put me through. Some know, but they don't want to say something about her. Everybody told her everything I did, but me, I had to find out for myself what she did. All of my so-called friends f—— me one way or another. I had no friends. And I wish I had more time to get even with some of you assholes. I just want to say that you, Larry Brown, I would

July 1994 and April 1995 Appellant pleaded guilty to various crimes arising out of incidents involving Sherry Miller. During the second incident, Appellant held a gun to his wife's head. He pleaded guilty to aggravated assault and received a sentence of nine to twenty-three months incarceration. He resumed living with his wife following his release from jail.

2. Before leaving, Sherry used the telephone in the bar to page a man named Sean Smith. Mr. Smith, who dated Sherry while Appellant was previously incarcerated, shortly thereafter called the bar telephone in response to the page.

3. It was explained that had the victim moved following the incident, such movement would have caused bodily fluids to be spread to various other parts of her body.

have killed you, and you, Sean Smith, I told Donny one time before to tell you to leave her alone. I don't know if he did. And if he did, the next time somebody tells you something, you better do what they say. I would have got you too. I hope somebody in my family takes care of Barb, Dennis. I do love you all. I will see some of you in hell.

Appellant fled the area following the crime. He was apprehended six months later in Florida because of a tip authorities received following a report about the crime on the television show "America's Most Wanted."

Following the denial of a motion to suppress and the waiver of his right to a jury trial, Appellant's capital murder trial commenced in September of 1997. At trial, the Commonwealth presented, *inter alia*, the testimony of Michael Torres who for a time was Appellant's cellmate while he was incarcerated on the aggravated assault charge. Torres testified that Appellant often spoke of killing his wife and that on the day Appellant was released from prison he stated, "I'll be back for killing my wife." The Commonwealth also presented the testimony of forensic pathologist, Richard Callery, M.D., who testified that the victim died because of the numerous stab wounds she sustained, which caused severe internal bleeding. The doctor also opined that the victim died while being subjected to forcible intercourse. In his defense, Appellant presented the testimony of a witness who stated that Torres had fabricated his testimony. At the conclusion of the trial, the trial court found Appellant guilty of the above enumerated offenses.

After Appellant waived his right to a jury trial, a penalty hearing was held before the trial court. At the penalty hearing the Commonwealth presented evidence on two aggravating circumstances, namely, that Appellant committed the murder during the perpetration of a felony, in this case rape, 42 Pa.C.S. § 9711(d)(6), and by means of torture, 42 Pa.C.S. § 9711(d)(8). Appellant thereafter asserted that two mitigating circumstances applied: Appellant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, 42 Pa.C.S. § 9711(e)(3), and the "catch-all provision," 42 Pa.C.S. § 9711(e)(8). At the conclusion of the penalty hearing, the trial court found one aggravating circumstance, Section 9711(d)(6), and one mitigating circumstance, Section 9711(e)(3). Upon weighing the aggravating and mitigating circumstances, the trial court fixed the penalty at death. The court formally imposed that sentence on October 27, 1997, together with a consecutive sentence of ten to twenty years incarceration on the rape conviction.

Appellant appealed to this Court arguing that the trial court erred in denying his motion to suppress, the evidence was insufficient to support his convictions for rape and indecent assault, and the aggravating circumstance did not outweigh the mitigating circumstance. This Court affirmed the judgment of sentence on January 20, 1999. *Commonwealth v. Dennis Miller,* 555 Pa. 354, 724 A.2d 895 (1999). Appellant was represented by the same attorney at trial and on appeal.

On October 29, 1999, Appellant filed a *pro se* PCRA petition.[4] The PCRA court entered an order on November 8, 1999, granting Appellant an emergency stay of his death sentence pending disposition of his request for relief under the PCRA. The PCRA court also appointed two attorneys to represent Appellant. On June 7, 2000, Appellant filed an amended petition. He

4. The matter was assigned administratively to the trial court for disposition (PCRA Court).

thereafter filed several supplemental petitions and requests for discovery, which included a request for high-resolution scans of the negatives of the photographs of the crime scene. The PCRA court denied Appellant's request for the high-resolution scan of the negatives on July 19, 2002.

On October 17, 2003, the Commonwealth filed its answer and a pre-hearing memorandum requesting that the PCRA court dismiss some of Appellant's claims because they had been previously litigated. On December 31, 2004, the PCRA court, in a written opinion and order, granted in part and denied in part the Commonwealth's request.

An evidentiary hearing was conducted in late October 2003. In the months following the hearing, Appellant filed several motions asking permission to supplement the record with the victim's medical records and documents relating to Michael Torres. The PCRA court denied both requests in written orders filed January 19, 2005, and November 30, 2005. The Appellant also sought permission to present the testimony of Dr. Callery, the forensic pathologist who testified at trial. Appellant sought to present the doctor's testimony to clarify his trial testimony with respect to whether the victim had been raped. Following a hearing, Appellant's request was denied. On June 30, 2007, the PCRA court issued an opinion and order denying Appellant post-conviction collateral relief (PCRA Court Opinion, 6/30/07). Appellant thereafter timely filed the instant appeal.[5] The PCRA Court requested a Pa.R.A.P. 1925(b) Statement, and on November 2, 2007, the court issued a Rule 1925(a) Opinion (PCRA Court Opinion, 11/2/07).

[1, 2] The standard of review applicable to appeals from the denial of PCRA relief requires this Court to ascertain whether the PCRA court's rulings are supported by the record and free of legal error. *Commonwealth v. Fahy,* 598 Pa. 584, 959 A.2d 312, 316 (2008); *Commonwealth v. Stokes,* 598 Pa. 574, 959 A.2d 306, 309 (2008). "In order to be eligible for PCRA relief, [a petitioner] must prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found at 42 Pa.C.S. § 9543(a)(2)." *Commonwealth v. Steele,* 599 Pa. 341, 961 A.2d 786, 796 (2008).

[3–5] Appellant raises thirteen issues on appeal including claims that prior counsel failed to provide effective assistance of counsel. In order to be eligible for relief on a claim alleging ineffective assistance of counsel, a defendant must establish that counsels representation fell below accepted standards of advocacy and that as a result thereof, prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice results when "there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 975 (1987), this Court interpreted the *Strickland* standard as requiring proof that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. *Commonwealth v. Collins,* 598 Pa. 397, 957 A.2d 237, 244 (2008). A chosen strategy will not be found to have been unreasonable unless it is proven that the path not chosen " 'offered a potential for success substantially

5. Jurisdiction is vested in this Court by 42 Pa.C.S. § 9546(d) which mandates that review of the denial of post-conviction relief be conducted by this Court.

greater than the course actually pursued.' " *Commonwealth v. Williams*, 587 Pa. 304, 899 A.2d 1060, 1064 (2006) (quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (1998)). Finally, to prove prejudice, a defendant must show that but for counsel's error, there is a reasonable probability, *i.e.*, a probability that undermines confidence in the result, that the outcome of the proceeding would have been different. *Commonwealth v. Sneed*, 587 Pa. 318, 899 A.2d 1067, 1084 (2006) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). A defendant's failure to satisfy even one of the three requirements results in the denial of relief. *Commonwealth v. Cook*, 597 Pa. 572, 952 A.2d 594, 614 (2008).

Having articulated the standards applicable to appeals from the denial of PCRA relief and claims alleging ineffective assistance of counsel, we turn to a review of the issues raised by Appellant. We have reordered Appellant's issues for ease of review in accordance with their relation to the guilt, penalty, or PCRA phases of the proceeding.

GUILT PHASE ISSUES

1. A New Trial Is Warranted Because Trial Counsel Failed to Investigate and Present Evidence Showing that the Victim Was Killed in the Heat of Passion.

[6] Appellant asserts that he should have been granted a new trial because trial counsel failed to investigate and present evidence demonstrating that Appellant killed his wife in the heat of passion. In support of this claim, Appellant faults trial counsel for not calling during trial Dr. Gerald Cooke, a psychologist who had been retained by the defense for the penalty phase. Appellant claims Dr. Cooke would have opined that the killing was consistent with an explosive rage premised on Appellant's "personality makeup, his drug use and everything he told [Dr. Cooke] about the incident". Appellant's Brief, 18 (citing N.T. 10/29/03, 440). Appellant also contends that trial counsel's representation was deficient because he did not interview or call as witnesses several of Appellant's family members. According to Appellant, these witnesses would have testified that Appellant and the victim had a tumultuous relationship that was fueled by drug and alcohol abuse, that the victim saw other men, that she was impregnated by another man and had an abortion, that knives were kept in the bedroom where the murder occurred, and that the bed was broken prior to the day of the murder. Finally, Appellant states that trial counsel should have presented expert testimony demonstrating that the manner in which the victim was killed (multiple stab wounds) was typical of a "very angry assailant, an emotionally charged assailant," as well as testimony opining that the killing was committed in the heat of passion and that Appellant suffered from brain damage that affected his ability to appreciate the consequences of his actions.[6] Appellant's Brief, 21–22.

[7–10] Appellant is entitled to no relief on this claim. A person is guilty of "heat of passion" voluntary manslaughter "if at the time of the killing [he or she] reacted under a sudden and intense passion resulting from serious provocation by the victim." *Commonwealth v. Ragan*, 560 Pa.

6. At the PCRA evidentiary hearing, Appellant presented the testimony of Julie Kessel, M.D., a psychiatrist, and Charles Wetli, M.D., a medical pathologist. Dr. Kessel testified that it was her opinion that the killing occurred in the heat of passion. Dr. Wetli testified that the manner of killing demonstrated that the killer was angry and emotionally charged. N.T. 10/28/03, 334; N.T. 10/29/03, 531, 546–47.

106, 743 A.2d 390, 396 (1999). " 'Heat of passion' includes emotions such as anger, rage, sudden resentment or terror which renders the mind incapable of reason." *Commonwealth v. Mason*, 559 Pa. 500, 741 A.2d 708, 713 (1999). An objective standard is applied to determine whether the provocation was sufficient to support the defense of "heat of passion" voluntary manslaughter. *Commonwealth v. Laich*, 566 Pa. 19, 777 A.2d 1057, 1066 (2001). "The ultimate test for adequate provocation remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection." *Commonwealth v. Thornton*, 494 Pa. 260, 431 A.2d 248, 252 (1981).

The PCRA court's opinion indicates that trial counsel not only did an "exceptional" job in attempting to establish that the killing was committed in the "heat of passion," but also that the refusal of Appellant to testify handicapped trial counsel because he was unable, without Appellant's testimony, to establish Appellant's state of mind at the time of the killing. The PCRA court wrote:

> Based on the totality of the circumstances, the court finds that trial counsel was not ineffective for failing to establish a heat of passion defense. To the contrary, counsel did an exceptional job of getting evidence and argument regarding heat of passion into the record despite the defendant's refusal to take the stand. Further the testimony of the other alleged witnesses would either have been not admissible or irrelevant and/or not helpful. Thus, trial counsel was not ineffective for failing to call said witnesses during the trial.

PCRA Court Opinion, 6/30/07, 25. The PCRA Court's reasons for rejecting this claim were correct as they indicate that the court had considered and rejected the evidence submitted at trial by Appellant regarding his claim that the killing was committed in the heat of passion and that the additional evidence would have resulted in a different outcome. The reason for this is clear, namely, the additional evidence fails to establish that the killing resulted from a sudden and intense passion resulting from serious provocation caused by the victim contemporaneously with the killing. Once Appellant refused to testify about the events surrounding the killing, he made it virtually impossible for counsel to convince the trial court that the killing was committed in the "heat of passion" insofar as the record lacked any evidence that the killing was the result of some provocative act committed by the victim or that Appellant killed the victim in the "heat of passion" as a consequence of the victim's provocation of him. Under the circumstances, the PCRA did not err in denying relief on this claim.

Even were we to consider the additional evidence and testimony Appellant claims trial counsel was ineffective for not presenting at trial, which concerns his wife's alleged infidelity and their stormy relationship, it is clear that the evidence still was insufficient to conclude that the killing was committed in the heat of passion as the record is devoid of evidence that at the time the victim was murdered, Appellant was acting under a sudden or intense passion brought on by the victim. While Appellant claims that the victim's apparent infidelity and flirtatiousness, when coupled with his own mental state, were sufficient to cause him to act with sudden and intense passion, we note Appellant was well aware of his wife's proclivities prior to the day of the killing and trial counsel introduced evidence establishing this. Thus, the evidence Appellant claims should have been introduced on this issue was merely cumulative of evidence already presented at trial. Moreover, the evidence shows

that although Appellant and his wife argued while together at the bar, he calmed down and appeared to be in control of his faculties following the argument. N.T. 9/30/97, 213, 220. Also the note Appellant left at the scene evinces that he had not acted in the "heat of passion" but rather in a calculating manner.

In numerous cases, evidence showing a history of minor disputes and allegations of past infidelity has been held not to be sufficiently provocative to reduce murder to manslaughter. *See Commonwealth v. Frederick,* 508 Pa. 527, 498 A.2d 1322 (1985) (holding that evidence of a stormy relationship and of an argument between the defendant and his victim earlier on the day of the killing was not sufficient evidence of provocation to require a heat of passion jury instruction); *Commonwealth v. Pirela,* 510 Pa. 43, 507 A.2d 23 (1986) (holding that defendant, who killed a man defendant believed killed his brother twenty-four hours prior thereto, was not acting under sudden passion); *Commonwealth v. Whitfield,* 475 Pa. 297, 380 A.2d 362 (1977) (holding argument between defendant and her mother's husband over black-eyed peas and leaving door open, which occurred approximately one half-hour to an hour before fatal stabbing of husband, was not adequate legal provocation to reduce murder to voluntary manslaughter); *Commonwealth v. Walter Brown,* 436 Pa. 423, 260 A.2d 742 (1970) (holding refusal of wife to return home, which caused husband to lose control and stab her, was not sufficient provocation to justify finding of voluntary manslaughter). In *Commonwealth v. Collins,* 440 Pa. 368, 269 A.2d 882 (1970), the defendant, who claimed that he was provoked to kill his wife because his wife may have seen another man while he himself was incarcerated, argued that it was error to refuse a request that the jury be instructed on heat of passion voluntary manslaughter. This Court found no merit to the claim, stating:

> Unfortunately, this evidence, even if true, does not come close to establishing the prerequisites of voluntary manslaughter as set forth in *Commonwealth v. Barnosky,* 436 Pa. 59, 64, 258 A.2d 512, 515:
>
> > "To reduce an intentional blow, stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation and a state or rage or passion without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting-if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder. *Commonwealth v. Drum,* 58 Pa. 9(17)'[sic]; *Commonwealth v. Paese,* 220 Pa. 371, 373, 69 A. 891, 892 (1908), *cited in Commonwealth v. Drum,* 58 Pa. 9[(]17).'[sic] Com–2d 757, 762 (1968).[sic] *See Commonwealth v. Palermo,* 368 Pa. 28, 81 A.2d 540 (1951); *Commonwealth v. Cargill,* 357 Pa. 510, 55 A.2d 373 (1947)."

Collins, 269 A.2d at 885–86.

The foregoing cases make clear that the acts of provocation relied upon by Appellant were simply not acts which society is prepared to recognize as providing sufficient provocation to reduce the crime of murder to manslaughter. Thus, trial counsel was correctly deemed not to have been ineffective for failing to present such evidence.

[11] Appellant further argues, however, that when this evidence is coupled with the proposed testimony of the expert witnesses identified above, it establishes that the killing was committed in the "heat of

passion." In the absence of evidence about what precipitated the killing, one simply cannot draw the conclusion that Appellant killed his wife in a fit of rage after she provoked him. While Appellant's psychological makeup may have rendered him unable to handle his wife's infidelity and the couple's marital difficulties, absent some evidence that his wife committed an act sufficiently provocative at the time of or very shortly before the killing, the testimony of the expert witnesses was irrelevant. *See Commonwealth v. McCusker,* 448 Pa. 382, 292 A.2d 286 (1972) (indicating that before a defendant's state of mind becomes relevant as to whether there was sufficient provocation, a defendant must first present evidence of provocation). Thus, trial counsel cannot be faulted for failing to introduce the identified expert testimony at trial. In view of the foregoing, we affirm the PCRA court's ruling that trial counsel was not ineffective for failing to investigate and introduce at trial the suggested additional evidence pertaining to whether the killing was committed in the heat of passion.

2. Trial Counsel Was Ineffective for Failing to Investigate and Present Expert Testimony to Rebut the Commonwealth's Assertion that the Victim Was Raped.

[12] Appellant accuses trial counsel of providing him with ineffective assistance of counsel for not investigating and presenting evidence to rebut the Commonwealth's claim that Appellant raped the victim. Appellant submits that had such evidence been presented, the trial court would have ruled that the evidence was insufficient to support the rape charge.

During the PCRA evidentiary hearing, Appellant presented the testimony of two expert witnesses, Dr. Peter R. DeForest, a professor of criminalistics at John Jay College of Criminal Justice, and Dr. Charles Wetli, Chief Medical Examiner for Suffolk County. Dr. DeForest testified that his examination of the physical evidence in the case led him to the conclusion that the victim had not been raped. In reaching this conclusion, Dr. DeForest opined that the grounds relied upon by Dr. Callery in finding that a rape occurred, namely, the lack of blood below her stomach, the volume of fluid in her vagina, and the position in which her body was found, were insufficient to prove that a rape occurred, due either to more plausible explanations or the lack of adequate testing. N.T. 10/28/03, 285–91. Dr. DeForest further testified that trial counsel's cross-examination of Dr. Callery was grossly inadequate. N.T. 10/28/03, 292–96. Dr. DeForest indicated that his examination of the evidence and the opinions he rendered were based on scientific principles that were available in 1997 prior to the commencement of trial in this case. N.T. 10/28/03, 300.

Dr. Wetli also testified that there was no evidence of forcible rape. He based his conclusion on the lack of trauma to the victim's genital region and the fact that there was no evidence of strangulation or asphyxiation, which he opined almost always occurs during a forcible sexual assault. N.T. 10/28/03, 330–31. According to Dr. Wetli, the victim's defensive injuries were more consistent with her assailant straddling her chest than with his having intercourse with her at the time. N.T. 10/28/03, 333.

Both Dr. DeForest and Dr. Wetli conceded that they could not rule out that the victim had been forcibly raped. N.T. 10/28/03, 320, 352. During cross-examination, Dr. DeForest qualified his opinion that the position of the victim's body made it unlikely that a rape occurred by admitting that intercourse could have occurred in the position in which the victim was

found. N.T. 10/28/03, 307. He also conceded that the defensive wounds found on the victim's body demonstrated that she was resisting the attack. N.T. 10/28/03, 315–16.

Trial counsel testified that based on his experience, he believed that it was not necessary to consult an expert to rebut the evidence that a rape occurred because he did not think that Dr. Callery would be found credible. N.T. 10/27/03, 85–87. Although counsel could not recall what he did in preparing to cross-examine Dr. Callery, he recalled he did take steps to discredit his testimony.

The PCRA court found this claim lacked merit for several reasons, the most salient one being that Appellant failed to prove that trial counsel's actions lacked a reasonable basis. PCRA Court Opinion, 6/30/07, 9.[7] Trial counsel testified that he did not seek out and retain an expert because his review of the evidence made it pellucidly clear to him that no rape occurred and that it was his belief that anyone who reviewed the evidence would draw the same conclusion he did. N.T. 10/27/03, 85–86. Trial counsel also related that it was his belief that he could rebut and undermine the testimony of Dr. Callery, the Commonwealth's expert witness, with respect to whether a rape occurred without the assistance of an expert witness through skillful cross-examination of Dr. Callery. N.T. 10/27/03, 87. Counsel drew this conclusion from his cross-examination of Dr. Callery at a pre-trial hearing during which he extensively cross-examined the doctor and elicited from him several inconsistencies with respect to whether the doctor was of the opinion, to a reasonable degree of medical certainty, that the murder and the sexual intercourse occurred simultaneously. Thus, the PCRA court concluded that "counsel reasonably thought that he did not need to retain additional experts in this case." PCRA Court Opinion, 6/30/07, 9.

[13–15] On the basis of trial counsel's testimony, we cannot say that the PCRA court erred in concluding that trial counsel had a reasonable basis for not seeking out an expert witness to rebut Dr. Callery's testimony. This Court's review of matters involving trial strategy is deferential. Trial counsel will be deemed to have acted reasonably if the course chosen by trial counsel had some reasonable basis designed to effectuate his client's interests. *Commonwealth v. Puksar*, 597 Pa. 240, 951 A.2d 267, 277 (2008). Moreover, a claim of ineffectiveness will not succeed by comparing, in hindsight, the trial strategy trial counsel actually employed with the alternatives foregone. *Id.* Finally, "[a]lthough we do not disregard completely the reasonableness of other alternatives available to counsel, 'the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.'" *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655 (2007) (quoting *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (1987)).

Since the record supports the PCRA court's finding that trial counsel had a reasonable basis for not consulting with an expert witness, Appellant is denied relief with respect to this claim.

7. The PCRA court also noted that both Dr. DeForest and Dr. Wetli testified that they could not rule out the possibility that a rape occurred. PCRA Court Opinion, 6/30/07, 10–11. Finally, the PCRA court determined that Dr. Wetli's testimony was not entirely inconsistent with Dr. Callery's insofar as Dr. Wetli testified, "the attack and the assault to the vaginal area were concomitant or occurring within the same general time frame." *Id.* at 12. The PCRA court's conclusion, in light of the evidence, is correct.

3. Trial Counsel Was Ineffective for Failing to Investigate, Develop, and Present Evidence at Trial Showing that Commonwealth Witness Michael Torres Suffered from a Mental Illness. Relatedly, the Commonwealth Violated *Brady v. Maryland* by Withholding Evidence Related to Michael Torres.

[16] In this claim, Appellant complains that trial counsel was ineffective because he did not conduct any investigation with respect to Commonwealth witness Michael Torres, Appellant's former cellmate, who testified at trial that Appellant said he would be back in prison for killing the victim. N.T. 9/30/97, 180–81. According to Appellant, at the time he allegedly heard Appellant utter the threat, Torres was manic-depressive and bi-polar, was suffering from auditory hallucinations, and was being treated with psychotropic medication. Such information, Appellant maintains, was contained in various prison records and reports and in a pre-sentence report prepared by Northampton County officials after Torres had been convicted on drug and robbery charges. Appellant submits that trial counsel had an obligation to obtain these documents and could have obtained them had he simply conducted an investigation of Torres. Appellant argues that trial counsel's failure to investigate Torres entitles him to a new trial because Torres provided the only direct testimony that Appellant acted with premeditation when he killed the victim.

In a related claim, Appellant accuses the Commonwealth of violating the holding of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), because it failed to provide the defense with a copy of Torres's pre-sentence report. According to Appellant, the Commonwealth had an obligation under *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001), to obtain the pre-sentence report from Northampton County authorities because it contained exculpatory information and was under the control of another governmental agency.

Neither claim entitles Appellant to relief. First, Appellant's attack on trial counsel's stewardship affords him no relief because trial counsel had no reason to believe that Torres was suffering from mental health problems. Although Torres was Appellant's cellmate for two months and spent significant time with Appellant in prison, Torres never told Appellant about his mental problems or acted in a manner suggesting that he had any. In fact, Torres never advised the prosecutor or the police involved in the instant matter about any mental problems. Torres admitted this at the evidentiary hearing held in this matter. N.T. 10/28/03, 224, 227, 235–36, 244.[8]

[17, 18] In addition, the claim does not entitle Appellant to relief because he has not met his burden of establishing that he suffered prejudice because of trial counsel's alleged nonfeasance. According to Appellant, he was prejudiced by trial counsel's failure to investigate Torres because Torres's testimony "was critical to establishing the specific intent element of first-degree murder as [t]here was little else in the case that pointed to any kind of deliberation or premeditation of any kind." Appellant's Brief, 38. Appellant is mistaken. In addition to the use of a deadly weapon on vital parts of the victim's body,[9]

8. Torres testified that he became unsure that Appellant threatened to kill his wife after he believed he heard other inmates threaten to kill their wives. Torres stated that he could not tell whether the threats were actually uttered by Appellant and the other inmates or whether they emanated from the voices in his head. N.T. 10/28/03, 225–26.

9. The law is clear that specific intent to kill may be inferred from the use of a deadly

Appellant left the incriminating note wherein he admitted that he killed the victim willfully. Thus, Torres's testimony was not as critical as Appellant claims it was with respect to proof that he acted with specific intent to kill.

[19] Additionally, the PCRA court found Torres's recantation and Appellant's ignorance of Torres's mental health problems, including Torres's claim that he was hearing voices while incarcerated with Appellant, incredible because Appellant and Torres were cellmates and spent significant time together. PCRA Court Opinion, 6/30/07, 6–7. The PCRA court also noted that Torres had been threatened while in prison, which prompted prison authorities to move him on two occasions to other facilities after he testified against Appellant. The PCRA court attributed Torres's change of testimony to the threats and a desire to assist a friend and former co-prisoner. Finally, the PCRA court held that trial counsel effectively undermined Torres's testimony by presenting the testimony of a witness who stated that Torres admitted he was going to lie about what Appellant may have said to him in order to help himself. PCRA Court Opinion, 6/30/07, 7. We find that the reasons proffered by the PCRA court support its decision. Accordingly, Appellant has failed to establish that he was prejudiced by trial counsel's failure to conduct an investigation of Torres, and therefore, Appellant is not entitled to relief with respect to this claim of ineffectiveness. *See Commonwealth v. Abu–Jamal,* 553 Pa. 485, 720 A.2d 79, 93 (1998) (holding that where there is support in the record for a PCRA court's credibility determinations, this Court is bound by those determinations).

[20–23] Appellant's claim that the Commonwealth violated the holding of *Brady v. Maryland, supra,* by failing to provide a copy of Torres's pre-sentence report to the defense lacks merit as well. In order to succeed on a *Brady* claim, a defendant must establish that the evidence withheld was favorable to him, *i.e.,* that it was exculpatory or had impeachment value; the evidence was suppressed by the prosecution; and prejudice resulted. *Commonwealth v. Sattazahn,* 597 Pa. 648, 952 A.2d 640, 658 n. 12 (2008). In order to establish prejudice, a defendant is obliged to show that "the evidence in question was material to guilt or punishment, and that there is a reasonable probability that the result of the proceeding would have been different but for the alleged suppression of the evidence." *Commonwealth v. James Dennis,* 597 Pa. 159, 950 A.2d 945, 966 (2008) (citing *Brady,* 373 U.S. at 87, 83 S.Ct. 1194; *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). On this point, this Court has stated, "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Commonwealth v. Green,* 536 Pa. 599, 640 A.2d 1242, 1245 (1994) (quoting *United States v. Agurs,* 427 U.S. 97, 112–13, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Further, "[t]he mere *possibility* that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." *Commonwealth v. Chambers,* 570 Pa. 3, 807 A.2d 872, 887 (2002) (emphasis added). Finally, a *Brady* violation will not afford a defendant relief if the defendant either knew of the existence of the evidence in dispute or could have discovered it by exercising reasonable diligence. *Commonwealth v. Morris,* 573 Pa. 157, 822 A.2d 684, 696 (2003).

weapon on a vital part of another person's body. *Commonwealth v. Wright,* 599 Pa. 270, 961 A.2d 119, 130 (2008); *Commonwealth v. Kennedy,* 598 Pa. 621, 959 A.2d 916, 921 (2008).

[24] Instantly, Appellant's claim fails for myriad reasons. First, Appellant has failed to establish that the result of the proceedings would have been different had the pre-sentence report been provided to the defense. As noted above, the record was replete with evidence establishing that Appellant was guilty of the crimes he was convicted of committing, including first-degree murder. Thus, Torres's testimony was not crucial to the verdict rendered by the trial court and the verdict would not have been different had the pre-sentence report been provided to the defense.

[25] In addition, the Commonwealth was not required to obtain the pre-sentence report and provide it to the defense because the governmental agency that possessed it was not involved in the prosecution of Appellant. In *Commonwealth v. Burke, supra,* this Court first applied the rule laid down by the United States Supreme Court in *Kyles v. Whitley, supra,* wherein the Supreme Court held that the prosecution has a duty to provide the defense with exculpatory evidence contained in the files of police agencies of the same government bringing the prosecution, even though the prosecution was unaware of the existence of the evidence. The United States Supreme Court, however, limited its holding to those agencies that were involved in the prosecution of the accused. *Whitley,* 514 U.S. at 437, 115 S.Ct. 1555 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Here, Appellant has failed to establish that the government agency or agencies having possession of the pre-sentence report were involved in the prosecution of Appellant. Consequently, the prosecution herein had no obligation to acquire or provide the report to the defense. Accordingly, we hold Appellant's claim of ineffectiveness and his allegation that the *Brady* rule was violated are meritless and entitle him to no relief.

4. Trial Counsel Was Ineffective for Failing to Object to the Testimony of Dr. Richard Callery about the Occurrence of Rape Because Dr. Callery's Opinion Fell Below the Standard of Proof Required in the Commonwealth.

[26] Appellant contends that he is entitled to a new trial because of trial counsel's failure to object to the testimony of Dr. Richard Callery, the Commonwealth's medical expert, regarding whether the victim had been raped. Appellant asserts that trial counsel should have objected to Dr. Callery's testimony on the ground that Dr. Callery failed to state that a rape occurred to a reasonable degree of medical certainty.

[27] A review of the applicable law indicates that "magic words" need not be uttered by an expert in order for his or her testimony to be admissible. *Commonwealth v. Baez,* 554 Pa. 66, 720 A.2d 711, 728 (1998); *Commonwealth v. Spotz,* 562 Pa. 498, 756 A.2d 1139, 1160 (2000). Rather, the substance of the testimony presented by the expert must be reviewed to determine whether the opinion rendered was based on the requisite degree of certainty and not on mere speculation. *Spotz,* 756 A.2d at 1160.

Trial counsel testified that he did not proffer an objection to Dr. Callery's testimony because three weeks prior to Dr. Callery's taking of the witness stand, Dr. Callery testified during a pre-trial hearing that it was his opinion that a rape occurred and that if he proffered an objection, the Commonwealth would have been permitted to elicit the necessary testimony from the doctor. In addition, trial counsel testified that he did not object, and give the Commonwealth an opportunity to elicit from

Dr. Callery the "magic words" because he made the tactical decision to use that omission to argue to the trial court that no rape occurred.

The PCRA Court ruled that this ineffectiveness claim lacked merit because trial counsel had a reasonable basis for failing to object. PCRA Court's Opinion, 11/2/07, 30–31. We agree. Counsel was correct in surmising that an objection likely would have resulted in the Commonwealth seeking and being granted permission to elicit from Dr. Callery his opinion that a rape had occurred herein given that the doctor had offered that opinion prior to trial. Thus, had trial counsel proffered an objection, his strategy to use the omission to argue that there had been no rape would have been negated by the anticipated opinion testimony of Dr. Callery that the victim had been raped. Trial counsel's strategy was reasonable given that had the trial court determined that Dr. Callery's opinion testimony was insufficient to establish a rape because the doctor did not utter the "magic words," as trial counsel argued, the Commonwealth would have been without a viable aggravating circumstance. Accordingly, because trial counsel had a reasonable basis for not objecting here, Appellant's claim with respect to this issue was properly denied by the PCRA court.

5. The PCRA Court Committed an Abuse of Discretion in Refusing to Permit the Defense to Amend Appellant's PCRA Petition Two Years after the Evidentiary Hearing Was Conducted.

[28] Almost two years after the evidentiary hearing, Appellant filed a petition with the PCRA court requesting permission to supplement the record with an affidavit signed by Dr. Callery.[10] Appellant also requested that Dr. Callery be permitted to testify that he could not opine to a reasonable degree of medical certainty that the victim had been raped. In an order dated July 27, 2006, the PCRA court denied the petition. Appellant contends that the PCRA court committed an abuse of discretion in denying his petition because the contents of Dr. Callery's affidavit and his proposed testimony directly refute the finding that Appellant raped the victim. In addition, Appellant complains that the petition should have been granted in the interests of justice given that Appellant's rape conviction served as the only basis for finding the aggravating circumstance set forth at 42 Pa.C.S. § 9711(d)(6). Finally, Appellant asserts that he is entitled to relief because of the ineffectiveness of trial counsel who, Appellant claims, failed to conduct an investigation into whether the victim had been raped.

The PCRA court, in addressing this claim in its Rule 1925(a) opinion, declared that no relief was due because Appellant was seeking to introduce Dr. Callery's affidavit and testimony solely to re-litigate the issue of whether the evidence was sufficient to support the rape conviction, a claim this Court rejected on direct appeal. *Miller*, 724 A.2d at 901. Thus, the PCRA court ruled that the claim was not cognizable under the PCRA.[11] PCRA Court Opinion, 11/2/07, 9–10. The PCRA court further indicated that Dr. Callery's apparent retraction of his trial testimony does not

10. In the affidavit Dr. Callery avers in part, "I cannot state to a reasonable degree of medical and scientific certainty that Ms. Miller was raped at or around the time she was killed. To the extent that my testimony in this case appears to conflict with any of these conclusions, my actual opinion at the time of trial is stated in this affidavit." Appendix to Appellant's Brief, Exhibit 7, paragraph 4.

11. An issue has been previously litigated if "the highest appellate court in which the peti-

establish that trial counsel was ineffective and that the record, even without Dr. Callery's testimony, supported the finding that Appellant had raped the victim. PCRA Court Opinion, 11/2/07, 10–11.

Before we may review any of Appellant's arguments, we must determine whether the PCRA court was correct in holding that the claim was previously litigated. If we determine the PCRA court properly held the claim was previously litigated, we are precluded by the PCRA from reviewing it. *See Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 617 (2007) (holding that previously litigated claim is not cognizable under the PCRA); *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 708 (1998) (same). The difficulty here is that Appellant has raised two claims that do not allege ineffective assistance of counsel: he alleges that the PCRA court committed an abuse of discretion in denying his petition and that the court should have granted his petition in the interests of justice. To further complicate matters, Appellant's claim of ineffective assistance of counsel contains no discussion of these issues and states that trial counsel was ineffective for failing to interview Dr. Callery and investigate whether a rape had occurred. Appellant's Brief, 48–49.

A review of the two claims not alleging ineffective assistance of counsel leads ineluctably to the conclusion that they comprise an issue that was previously litigated, namely, whether the evidence was sufficient to support Appellant's rape conviction. This becomes readily clear upon reviewing Appellant's brief and the material he sought to introduce. For example, Appellant argues that the PCRA court abused its discretion because it denied Appellant the opportunity "to demonstrate that the prosecution was without any competent evidence of the commission of rape." Appellant's Brief, 45. He also claims that the interests of justice demand that he be granted relief with respect to "this issue" so that he may be given an opportunity to rebut the testimony of the medical examiner. Appellant's Brief, 47.

In *Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564 (2005), this Court defined the term "issue" for purposes of the PCRA as follows:

> That term, as used in "pleading and practice," is understood to mean "a single, certain, and material point, deduced by the allegations and pleadings of the parties, which is affirmed on the one side and denied on the other." Black's Law Dictionary, 6th ed. 831. Thus, "issue" refers to the discrete legal ground that was forwarded on direct appeal and would have entitled the defendant to relief. *See, e.g., Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) (defining "grounds" as "a sufficient legal basis for granting the relief sought by the applicant"). The theories or allegations in support of the ground are simply a subset of the issue presented. Stated another way, there can be many theories or allegations in support of a single issue, but ultimately, § 9544(a)(2) refers to the discrete legal ground raised and decided on direct review. Thus, at the most basic level, this section prevents the relitigation of the same legal ground under alternative theories or allegations. *See, e.g., Commonwealth v. Wilson*, 452 Pa. 376, 305 A.2d 9 (1973) (concluding that a new theory in support of the same claim of trial counsel ineffectiveness was unavailing since the claim was decided ad-

tioner was entitled to review as a matter of right has ruled on the merits of the issue."

42 Pa.C.S. § 9544(a)(2).

versely to petitioner in his previous direct appeal); *Commonwealth v. Slavik*, 449 Pa. 424, 297 A.2d 920 (1972) ("A defendant is not entitled to relitigate the validity of his plea every time he offers a new theory or argument which he had not previously advanced.").

888 A.2d at 570. Here, insofar as Appellant sought to introduce the material in question to demonstrate that the evidence was insufficient to sustain Appellant's rape conviction, the PCRA court was correct in finding that it was precluded from addressing the issue because it had been previously litigated. *See Miller*, 724 A.2d at 901. Thus, no error was committed by the PCRA court in denying relief with respect to Appellant's first two claims.[12]

[29] Although Appellant's first two claims are not cognizable because they concern issues previously litigated, the same is not true with respect to Appellant's ineffectiveness claim. In *Collins*, *supra*, we ruled that claims of ineffective assistance of counsel constitute separate and distinct issues that may be raised in a collateral proceeding attacking the verdict. *Collins*, 888 A.2d at 570. Such claims are to be analyzed pursuant to the three-prong ineffectiveness test generally applicable to such claims. *Id.* at 573.

An application of that test to the instant claim indicates that Appellant is not entitled to any relief. Appellant argues that the claim has arguable merit based on an assertion that had trial counsel sought out experts or "interviewed Dr. Callery, there is a reasonable probability that Dr. Callery would have given him the same information he provided to undersigned counsel, and counsel could have moved to exclude his testimony on rape as not competent, due to an insufficient level of certainty." Appellant's Brief, 48. However, Appellant's argument amounts to nothing more than mere speculation. There is no indication in the record that Dr. Callery would have advised trial counsel before the trial commenced that it was his belief that no rape occurred if only trial counsel had interviewed him. In fact, according to the PCRA court, Dr. Callery twice affirmed at two previous hearings that it was his opinion that a rape occurred despite vigorous cross-examination by trial counsel. PCRA Court Opinion, 10. Thus, Appellant is not entitled to relief as he has failed to establish that trial counsel was ineffective for the reasons stated.

6. A New Trial Should Be Granted Because Appellant's Waiver of His Right to a Jury Trial and His Right To Testify Were Inadequate.

[30] It is Appellant's position that a new trial should be awarded because the ineffectiveness of trial counsel rendered his waiver of his right to a jury trial and his waiver of his right to testify unknowing and unintelligent and thus invalid. According to Appellant, he "could not knowingly and intelligently waive a jury trial [or his right to testify] given [trial] counsel's dearth of investigation and the wealth of information that was available to counsel but of which counsel was unaware."[13] Ap-

12. Appellant claims that these issues have not been previously litigated because the "issue of Dr. Callery's testimony reaching 'reasonable medical certainty' was never raised." Appellant's Brief, 47. It is clear from reviewing Appellant's Brief, together with the evidence he argues was erroneously excluded, that these claims concern the sufficiency of the evidence.

13. Appellant's claim that trial counsel's ineffectiveness vitiated his waiver of the right to a jury trial and to testify are premised on the claims of ineffectiveness raised in Appellant's previous issues, including trial counsel's failure to investigate expert and lay testimony supporting a heat of passion defense, expert and lay testimony indicating that a rape did not occur, and expert and lay testimony indi-

pellant's Brief, 50. In addition, Appellant submits that because trial counsel's pretrial investigation was inadequate, counsel "could not have properly advised Appellant to waive his right to a jury trial." Appellant's Brief, 50.

Appellant is entitled to no relief with respect to this issue because we have held that trial counsel was not ineffective for the reasons stated by Appellant. Moreover, Appellant has failed to meet the prejudice prong of the ineffectiveness test here since he never alleged or proved that but for counsel's alleged ineffectiveness he would not have waived a jury trial. *See Commonwealth v. Mallory,* 596 Pa. 172, 941 A.2d 686, 697 (2008) (holding that in order to meet the prejudice prong of the ineffectiveness test, a defendant alleging that a jury waiver colloquy was deficient must establish that the outcome would have been different, *i.e.,* that but for counsel's ineffectiveness he would not have waived a jury trial); *Commonwealth v. Lassiter,* 554 Pa. 586, 722 A.2d 657, 663 (1998) (Opinion Announcing the Judgment of the Court) (stating that this Court cannot presume that a defendant would have chosen a jury trial; burden is on defendant to set forth a factual predicate establishing same before relief may be granted).

[31, 32] Notably, a review of the record of the jury waiver hearing demonstrates that Appellant's waiver comported with the law. A valid waiver of the right to a jury trial must contain evidence that the accused understood the fundamental essentials of a jury trial which are: "1) that the jury be chosen from members of the community (*i.e.,* a jury of one's peers), 2) that the accused be allowed to participate in the selection of the jury panel, and 3) that the verdict be unanimous." *Commonwealth v. Houck,* 596 Pa. 683, 948 A.2d 780, 787 (2008); *see also Mallory, supra.* Instantly, the record demonstrates that Appellant signed a written jury waiver colloquy form that set forth the essential elements of a jury trial and explained all of the rights Appellant was waiving by deciding to be tried by a judge and not a jury. In addition, the trial court questioned Appellant twice on the record regarding his decision to waive his right to a jury trial. N.T. 9/24/97, 2–20; N.T. 9/29/97, 9–12. On both occasions, Appellant averred that he understood the rights associated with the right to a jury and that he was waiving them knowingly, intelligently, and voluntarily. In this regard, Appellant's waiver of his right to a jury trial appears to be unassailable.

[33, 34] Appellant's contention that his waiver of his right to testify was invalid lacks merit for the same reason that the foregoing claim did, namely, Appellant has failed to prove that but for trial counsel's ineffectiveness, he would have testified. Claims alleging ineffectiveness of counsel premised on allegations that trial counsel's actions interfered with an accused's right to testify require a defendant to prove either that "counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." *Commonwealth v. Nieves,* 560 Pa. 529, 746 A.2d 1102, 1104 (2000). *See also Commonwealth v. Uderra,* 550 Pa. 389, 706 A.2d 334 (1998).

By not testifying at the evidentiary hearing, Appellant has placed this Court in the position of having to guess whether counsel's ineffectiveness interfered with his right to testify. Furthermore, trial counsel testified at the evidentiary hearing that he asked Appellant to testify both at trial and during the penalty hearing and

cating that Appellant suffered from brain damage. Appellant's Brief, 50.

Appellant refused. N.T. 10/27/03, 77–78, 80. We may not engage in speculation on this issue and thus Appellant's claim is meritless.

PENALTY PHASE ISSUES

7. Appellant's Waiver of a Jury for the Penalty Phase Was Invalid; Trial Counsel Was Ineffective for Not Objecting to the Waiver Colloquy and for Not Raising the Issue on Appeal.

[35] Appellant argues that he is entitled to the reversal of his death sentence and a remand for a new penalty hearing because the jury waiver colloquy was insufficient and did not adequately and comprehensively advise him of the rights he was waiving and the salient differences between the guilt and penalty phases of a capital case. Appellant complains that in questioning him, the trial court did not advise him that if the jury could not agree upon a penalty verdict, a sentence of life imprisonment would be recorded and also that mitigating circumstances could be found individually by each of the jurors. Appellant's Brief, 59–60. Thus, he claims that his waiver was unknowing and unintelligent. In addition, Appellant accuses trial counsel of providing ineffective assistance of counsel for not objecting to the allegedly defective colloquy and for not arguing on appeal that that a new penalty was warranted because the waiver colloquy was incomplete.

[36] The record of Appellant's trial indicates that the trial court conducted three separate colloquies of Appellant, one on September 24, 1997, one on September 29, 1997, and one on October 2, 1997. The final colloquy occurred immediately prior to the commencement of the penalty hearing. N.T. 10/2/97, 284–86. No objection was made as to the inadequacy of the colloquies at any time nor was the issue raised on appeal. Thus, for purposes of the PCRA, the claim was waived because it could have been raised previously. *See* 42 Pa.C.S. § 9544(b). Consequently, in order to obtain relief on this claim Appellant was obliged to establish that trial counsel was ineffective for not proffering an objection asserting that the colloquies were legally insufficient for the reasons stated by Appellant.[14] *Commonwealth v. Gribble,* 580 Pa. 647, 863 A.2d 455 (2004). *See also Commonwealth v. Rainey,* 593 Pa. 67, 928 A.2d 215, 228 (2007). A review of the record indicates that Appellant has failed to meet his burden of proving that trial counsel was ineffective because he has failed to establish that he was prejudiced by counsel's alleged ineffectiveness.

In the discussion of the previous issue, we referred to *Mallory, supra.* In *Mallory,* this Court held that in order to establish prejudice in a matter alleging that a jury waiver colloquy was deficient, a defendant must establish that, but for counsel's ineffectiveness, he or she would not have waived the right to a jury trial. As we have already stated, the record is devoid of evidence demonstrating that Appellant would have elected to have a jury decide his sentence had trial counsel not been ineffective. Since the failure to establish even one of the three requirements of the ineffectiveness standard undermines an ineffective assistance of counsel claim, it is clear that Appellant is entitled to no relief on this issue. *Cook, supra.*[15]

14. As noted above, trial counsel represented Appellant on appeal. Thus, Appellant is excused from having to "layer" his claims of ineffectiveness, *i.e.,* assert that both trial counsel and appellate counsel were ineffective for failing to raise and preserve this issue.

15. Having ruled that Appellant has failed to establish prejudice, we need not consider the

8. Trial Counsel Was Ineffective for Failing to Investigate and Present All Available Mitigating Evidence During the Penalty Hearing

Appellant contends that trial counsel was ineffective because he failed to investigate and present readily available evidence of Appellant's child abuse, family dysfunction, mental health deficits, brain impairment, problems while in school, and "complex and tragic" relationship with the victim.[16] Appellant's Brief, 65, 77. Appellant also asserts that trial counsel should have introduced evidence showing that Appellant had a brain lesion removed in 1984, attended drug treatment programs, had a history of drug abuse, and the victim obtained an "order of Attachment of Income" against Appellant just prior to the slaying. Appellant's Brief, 77. Appellant also faults trial counsel for not interviewing and/or calling as witnesses during the penalty hearing his mother Agnes Miller, his sisters, Glenna Saganich, Linda Drew, and Brenda Sue Pennington, his brother Kenneth Miller, his daughter Barbara Miller, and the victim's sister Helen Pennington. Through these witnesses, Appellant claims, trial counsel could have convinced the trial court, sitting as factfinder, to enter a sentence of life imprisonment.

During the penalty hearing, after the Commonwealth presented evidence that Appellant had been convicted of rape and victim-impact testimony from Appellant's daughter, Barbara Miller, Appellant presented the testimony of four witnesses, Dr. Gerald Cooke, Kenneth Miller, Deborah Miller, and Agnes Miller. Dr. Cooke, a clinical and forensic psychologist, testified that he examined and interviewed Appellant on August 14, 1997, taking from him a personal history and administering a battery of tests. During the interview, Appellant related that he was the youngest of eight children and that his father was an alcoholic who was abusive to his mother. Appellant often attempted to protect his mother from his father, which, according to the doctor, caused Appellant to have problems in school and with anger management. N.T. 10/2/97, 297. Regarding school, Appellant told the doctor that he dropped out in eighth grade because of trouble with his behavior. Appellant also indicated that he had a good work history having worked mainly as a heavy machine operator and a truck driver. Appellant admitted that he had a substance abuse problem that involved both drugs and alcohol that began in his teens. *Id.* at 298–99. Although Appellant stated that he underwent both drug and alcohol rehabilitation, Appellant told the doctor that he again took up both habits some months after undergoing treatment. Appellant admitted to Dr. Cooke that at the time of the incident he was injecting heroin daily and using methamphetamine occasionally. *Id.* at 299. Appellant denied having any significant medical history. *Id.* at 300.

Appellant also related to the doctor that he had been arrested for assault on two occasions because of incidents involving his wife. One of the incidents, which resulted in Appellant's incarceration, arose when Appellant became angry because the victim reneged on a promise to seek help for her own drug and emotional problems. *Id.*

adequacy of the waiver colloquy at issue. Moreover, we reject Appellant's additional claim that the prejudice stemming from trial counsel's failure to object was that at least one juror may have voted to impose a life sentence. Appellant's Brief, 63. *See Mallory, supra.*

16. Appellant also asserts that trial counsel was ineffective for not investigating and presenting expert testimony to rebut that a rape occurred. This claim mirrors that raised in Issue 2 above. Consequently, there is no need to discuss it a second time here.

Based on the testing he performed, Dr. Cooke estimated that Appellant's intelligence quotient ranged between 81 and 89. *Id.* at 303. Testing also revealed that Appellant had low self-esteem and a need to be accepted which led him to seek constant attention. *Id.* at 304. Dr. Cooke diagnosed Appellant as having a paranoid personality disorder with antisocial and explosive features. *Id.* at 305. He also added second and third diagnoses of drug dependence and alcohol abuse. *Id.* With regard to mitigating circumstances, Dr. Cooke opined that Appellant was incapable of conforming his behavior to the requirements of the law and that his use of drugs and alcohol [17] on the day of the incident played a role in the murder. *Id.* at 306–07. He also stated that Appellant could make an adequate adjustment in prison. *Id.* at 303. Finally, Dr. Cooke testified that he found no evidence that Appellant "suffered from a thinking disorder or psychosis or any kind of major affective disorders such as major depression or manic disorder." *Id.* at 296.

Kenneth Miller, Appellant's brother, testified that he often observed Appellant and the victim together and they seemed to be happy. Appellant also appeared to have a good relationship with his children. *Id.* at 319–20. Kenneth Miller stated that if Appellant were sentenced to death, it would greatly affect him and his family.

Deborah Miller, Appellant's sister, testified that it appeared to her that Appellant and the victim appeared to be happy and that their relationship was good. *Id.* at 321. She also stated that when Appellant was released from prison, he appeared to be happy and relieved that he could reunite with his family. *Id.* at 322.

Agnes Miller, Appellant's mother, told the trial court that Appellant was hard working and a loving father. *Id.* at 323. She stated that Appellant's children were having problems because of the incident and that if Appellant were sentenced to death, it would exacerbate those problems. *Id.* at 324. In addition, Agnes Miller's trial testimony was incorporated into the record for purposes of the penalty hearing. *Id.* at 286–87. At trial, she testified that Appellant's marriage to the victim was good at its inception but that it deteriorated because of drug and alcohol use. N.T. 9/29/97, 30. Agnes Miller denied having any knowledge that Appellant and the victim were violent toward one another. *Id.* at 33.

At the evidentiary hearing, Appellant presented the testimony of several family members as well as that of various experts. Agnes Miller testified about the violence inflicted on her by her husband and Appellant's attempts to intervene. She also testified that there were problems in Appellant's marriage to the victim. She stated that Appellant's trial attorney did not ask her about her relationship with her husband or about the state of Appellant's marriage and that if counsel had done so, she would have agreed to speak to him. N.T. 10/28/03, 355–69. Agnes Miller conceded that the only time she saw Appellant act abnormally was usually when he was using drugs. *Id.* at 373.

Barbara Miller, Appellant's daughter, testified about her parents and their relationship. She stated that they often fought because her mother complained about not having enough money to support the family because Appellant spent it on drugs. Although she was angry with her father, Barbara indicated that she would have testified for him at the penalty hearing had she been asked to do so. *Id.* at 376–93; N.T. 10/29/03, 397–414.

17. Appellant allegedly consumed twelve beers and ingested a gram of methamphetamine.

Kenneth Miller testified that Appellant grew up in a household headed by a violent alcoholic father who took little interest in Appellant. The family was poor which further stigmatized them in the eyes of their schoolmates. According to Kenneth, Appellant began drinking at age nine and quickly graduated to using drugs. Kenneth also testified about Appellant's marriage. He stated that Appellant and the victim had a history of breaking up and reconciling, that they both used drugs, and that they grew apart from the Miller family as their marriage progressed. N.T. 10/29/03, 482–501. Kenneth stated that Appellant was able to hold a job and never exhibited any behavior indicating that he had mental limitations. *Id.* at 503–05.

Appellant's sisters, Glenna Saganich, Brenda Sue Pennington, and Linda Drew each reiterated much of what Kenneth testified to concerning Appellant's home life. They all testified that they were never interviewed about Appellant's background and that had they been asked to testify about it, they would have been available to do so. Helen Pennington, the victim's sister, testified about the state of Appellant's marriage and stated that Appellant worked double shifts so that the victim could stay home, that Appellant and the victim sold drugs, that the victim had relationships with other men, and had an abortion after she was impregnated by another man. All of these witnesses testified that they were not interviewed and that they would have testified for Appellant if asked to do so.

Appellant called two experts to the stand during the evidentiary hearing for purposes of establishing that trial counsel was ineffective in preparing for the penalty hearing. Dr. Carol Armstrong, a neuropsychologist, testified that she conducted neuropsychological testing of Appellant and found evidence that he suffered from brain impairment in the areas of motor control, verbal ability, and reasoning skills, among others. N.T. 10/27/03, 121–22. These deficits, according to the doctor, had an impact on his reasoning and judgment skills and affected cognition and behavior. *Id.* at 124. The doctor opined, to a reasonable degree of psychological certainty, that Appellant's brain deficits constituted an extreme mental or emotional disturbance and substantially impaired his ability to conform his conduct to the law. *Id.* at 129. Dr. Armstrong further testified that because Appellant was the product of a violent home, an abuser of drugs and alcohol, had a low I.Q. score, had trouble in school, had a motorcycle accident in his teens, and had a scalp lesion removed in 1984, trial counsel should have had Appellant undergo neuropsychological testing. *Id.* at 115–17.

Dr. Julie Kessel, a board certified psychiatrist, substantiated what Dr. Armstrong stated, namely that Appellant suffered from a substantially impaired capacity to conform his conduct to the requirements of the law and that he was under the influence of extreme mental or emotional distress. N.T. 10/29/03, 548. She based her finding on Appellant's upbringing, substance abuse problem, brain impairment, and relationship with the victim, which according to the doctor, affected his impulse control on the night of the slaying. *Id.* at 535–37, 548.

Trial counsel also testified at the evidentiary hearing. He indicated that he had no strategic reason for not seeking Appellant's school or drug treatment records. N.T. 10/27/03, 23, 25. He stated that he did not speak to Barbara Miller (Appellant's daughter) prior to trial because she was a young child and because he ascertained from other family members that she did not possess any useful information. *Id.* at

25. Regarding Appellant's medical records, trial counsel testified that after speaking to Appellant and other members of his family, he believed that he had been fully apprised of Appellant's history and thus had all of the information he needed. *Id.* at 30.

When asked why he did not have Appellant tested by a neuropsychologist for brain damage when he was aware that Appellant was a drug user, trial counsel replied that he saw no evidence that would cause him to suspect that Appellant suffered from brain damage or mental infirmity. *Id.* at 40, 61. He based his decision on his interaction with Appellant, who was able to converse intelligently with him, on speaking with members of Appellant's family, and the contents of the report prepared by Dr. Cooke, who found Appellant did not suffer from any thinking disorder, psychosis, or any major affective disorders. *Id.* at 43, 56, 62–63. He also stated that he decided not to present a diminished capacity or intoxication defense based on his conversations with Appellant who provided details of the crime and his reasons for committing it. *Id.* at 45–47. Trial counsel stated that he had no reason for not seeking out and interviewing other members of Appellant's and the victim's family other than that he believed he had received sufficient information from Appellant and the family members to whom he spoke. *Id.* at 30. Finally, he testified that he decided that it would not be in Appellant's best interests to argue that Appellant killed his wife because Appellant grew up in a dysfunctional home and his father had abused his mother. *Id.* at 67–69.

After considering the testimony presented by Appellant and his arguments in favor of the grant of a new penalty hearing, the PCRA court denied Appellant relief on his claim that trial counsel had been ineffective with respect to the penalty phase of the proceedings. The PCRA court determined that there was nothing of record, either from Appellant or from his family, that established that "trial counsel knew or should have known about the [Appellant's] possible brain damage." PCRA Court Opinion, 6/30/07, 13. The PCRA court also concluded that Appellant had not been prejudiced by trial counsel's failure to investigate and present evidence that Appellant suffered from brain damage because the record is devoid of any evidence demonstrating that a mental impairment affected his judgment at the time of the incident. *Id.* at 13–14.

Regarding the allegation that trial counsel had been ineffective for not interviewing members of Appellant's family and the victim's sister, the PCRA court declared that trial counsel had not been ineffective because the anticipated testimony of these witnesses would have been cumulative of testimony presented by Dr. Cooke. *Id.* at 30. The PCRA court further stated that trial counsel had acted reasonably in not premising Appellant's defense on the evidence relating to Appellant's abusive childhood and family history. The PCRA court noted that trial counsel did present such evidence and that counsel correctly surmised that such evidence would not have swayed the court to find that Appellant killed his wife because he grew up in a dysfunctional household and had been abused as a child. *Id.* at 30–31.

With respect to the allegation that trial counsel should have interviewed Appellant's daughter and called her as a witness, the PCRA court ruled that trial counsel had not been ineffective for not interviewing and calling her to testify. The court held that she would not have been a helpful witness for the defense because she was very angry about her mother's death, appeared during the penalty hearing to disagree with trial counsel's argument that

Appellant should not receive the death penalty, and testified for the Commonwealth during the penalty hearing. *Id.* at 32–33.

The PCRA court further stated that trial counsel was not ineffective for failing to obtain and introduce Appellant's school, medical, and drug treatment records or the record of the support order. Counsel was not ineffective, according to the court, because Dr. Cooke testified to Appellant's low I.Q. and trial counsel knew about and introduced evidence of Appellant's drug problems. *Id.* at 31. It was not derelict of trial counsel not to obtain Appellant's medical records, according to the PCRA court, because there was no indication that Appellant suffered from a mental illness. *Id.* Finally, the PCRA court proclaimed that the failure to introduce evidence pertaining to the support order did not constitute ineffectiveness because there was no evidence of record establishing that Appellant knew of the issuance of the order. *Id.*

The standards applicable to claims alleging that counsel was ineffective for failing to investigate and present mitigating evidence was recently set forth in *Commonwealth v. Natividad,* 595 Pa. 188, 938 A.2d 310, 331 (2007), as follows:

> As this Court has observed, the United States Supreme Court has held that the Sixth Amendment requires capital counsel "to pursue all reasonably available avenues of developing mitigation evidence." *Commonwealth v. Gorby,* 589 Pa. 364, 909 A.2d 775, 790 (2006) (*citing Wiggins v. Smith,* 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Counsel must exercise reasonable professional judgment, and in examining counsel's conduct, "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Commonwealth v. Malloy,* 579 Pa. 425, 856 A.2d 767, 784 (2004) (*quoting Wiggins,* 539 U.S. at 523, 123 S.Ct. 2527, 156 L.Ed.2d 471).

938 A.2d at 331. In addition, this Court has stated:

> Strategic choices made following less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. In undertaking the necessary assessment, reviewing courts are to take all reasonable efforts to avoid the distorting effects of hindsight. *See Commonwealth v. Basemore,* 560 Pa. 258, 289, 744 A.2d 717, 735 (2000). Nevertheless, courts must also avoid "*post hoc* rationalization of counsel's conduct." *Wiggins,* 539 U.S. at 526–27, 123 S.Ct. at 2538.

Sattazahn, 952 A.2d at 655–56 (citation omitted).

[37] Finally, the "reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation." *Steele, supra; see also Commonwealth v. Malloy,* 579 Pa. 425, 856 A.2d 767 (2004) (holding that while counsel has a duty to conduct a reasonable investigation, reasonableness of investigation may be dependent on information supplied by the defendant).

[38] Appellant has not shown that trial counsel acted unreasonably by not interviewing and presenting the testimony of the witnesses identified above. Trial counsel did investigate evidence of Appellants childhood circumstances, marital relationship, and drug abuse, and introduced evidence pertaining thereto during the penalty hearing. In addition, trial counsel introduced through Dr. Cooke the witnesses who testified during the penalty hearing, and Appellants written back-

ground history and statement concerning Appellants life history, the abuse Appellant observed and was subject to while growing up, as well as evidence of his drug use. This Court has consistently held that trial counsel cannot be deemed ineffective for failing to present mitigating evidence that merely would have been cumulative of evidence that was presented during a penalty hearing. *Commonwealth v. Whitney,* 550 Pa. 618, 708 A.2d 471, 477 (1998); *see also Commonwealth v. Abdul–Salaam,* 570 Pa. 79, 808 A.2d 558, 562 n. 5 (2001). Consequently, Appellant cannot meet the arguable merit requirement of the ineffectiveness test.[18]

[39] In addition, Appellant has failed to establish that had trial counsel interviewed these witnesses and presented their testimony, a different outcome likely would have resulted. Appellant presented nothing that established that the trial court would have imposed a life sentence if only it had heard additional evidence of appellants childhood, drug dependence, and dysfunctional marital relationship.

[40] Appellant also cannot establish that trial counsels failure to obtain and review the various records identified above constituted ineffective assistance of counsel or that the PCRA court committed an error of law in ruling that trial counsel was not ineffective for failing to obtain that material. According to Appellant, trial counsel should have obtained Appellants school records because it showed that Appellant had an I.Q. in the high seventies to low eighties and thus was borderline mentally retarded. Appellants Brief, 81. Appellant ignores Dr. Cooke's testimony that he measured Appellants I.Q. in a range from 81 to 89, thereby demonstrating that Appellant, though of limited mental ability, was clearly not mentally retarded. Moreover, the fact that Appellant was able to hold jobs that required at least a modicum of skills demonstrated that Appellants school records would not have resulted in a different outcome had counsel obtained them and introduced them during the penalty hearing.[19] In view of the foregoing, Appellant has failed to establish that trial counsel acted unreasonably by not obtaining these records.

[41] Next, trial counsel cannot be faulted for failing to obtain Appellants medical records. Trial counsel testified that he received no information from Appellant or members of his family alerting him to the fact that Appellant had suffered any injury or had medical problems affecting cognition. In addition, Appellant denied having any significant medical history when examined by Dr. Cooke. N.T. 9/30/97, 300. It is therefore clear that trial counsel cannot be faulted for failing to obtain evidence of which he had no reason to be aware. *See Commonwealth v. Bond,* 572 Pa. 588, 819 A.2d 33, 45–46 (2002) (holding that counsel cannot be deemed ineffective for failing to obtain records "uniquely" in possession of defendant and his family); *see also Commonwealth v. Johnson,* 572 Pa. 283, 815 A.2d 563, 581 (2002) (plurality) (this Court refuse[s] to deem trial counsel ineffective for failing to present mitigation evidence that he did not know existed); *Commonwealth v. Basemore,* 560 Pa. 258, 744 A.2d

18. Although Appellant claims that the mitigation evidence presented during the penalty hearing amounted to a "hollow shell" of the available evidence, and therefore, counsel should be declared to have been ineffective for failing to gather it, Appellant ignores the lower court's finding that the additional evidence would not have resulted in a different verdict.

19. Appellant's brother Kenneth testified that he never observed anything suggesting that Appellant was mentally challenged. N.T. 10/29/03, 503–05.

717, 735 (2000) (same); *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373, 383 (1986) (same).

[42] With respect to Appellants drug records, trial counsel was not ineffective for failing to obtain them because Appellant has failed to establish that had counsel obtained them, the outcome of the penalty hearing would have been different. This is the case because Appellant has failed to show that these records contained any substantial information different from that already presented to the trial court. Moreover, trial counsel was aware of Appellants substance abuse problem and introduced evidence about it to the trial court. As noted above, counsel cannot be found ineffective for failing to introduce evidence that is merely cumulative of evidence already introduced into the record.

[43] Finally, Appellant failed to establish that he had knowledge that a support order had been issued against him. Without such proof, Appellant cannot demonstrate that the issuance of the support order influenced his behavior on the night of the incident. Thus, Appellant cannot establish that trial counsel was ineffective for failing to obtain the order or introduce proof of its issuance during the penalty phase. *See Commonwealth v. Bryant*, 579 Pa. 119, 855 A.2d 726 (2004) (holding that claims of ineffectiveness cannot be sustained in a vacuum).

[44] Appellants claim that trial counsel was ineffective for failing to have him tested by a neuropsychologist also lacks merit. The record herein indicates that trial counsel had Appellant examined by a psychologist (Dr. Cooke) whose examination of Appellant failed to uncover any mental disabilities. As noted above, Dr. Cooke testified that he found no evidence that Appellant "suffered from a thinking disorder or psychosis or any kind of major affective disorders such as major depression or manic disorder." N.T. 10/2/97, 296. In addition, neither Appellant nor any member of his family advised trial counsel that Appellant suffered from neurological or mental deficits. Given these circumstances, trial counsel cannot be faulted for not securing additional testing of Appellant.

In *Commonwealth v. Stevens*, 559 Pa. 171, 739 A.2d 507 (1999), trial counsel was accused of having been ineffective because he failed to provide all available records to his expert witness. According to the defendant, had trial counsel provided the additional records to his expert witness, it may have resulted in a "more thoroughly developed mental health mitigation case." 739 A.2d at 519. This court rejected the defendant's assertion that trial counsel had been ineffective and stated:

> We agree with the trial court that Appellant has failed to prove, by a preponderance of the evidence, that the preparation and presentation by trial counsel of the mental health expert testimony was constitutionally ineffective. Appellant relies on the benefit of hindsight and downplays the diagnoses available to his counsel at the time his case was tried. Counsel testified that he provided Dr. Altman, who was his primary mental health expert, with as much information as he had, including substantial information concerning Appellant's social history and prior mental health problems. He relied on Dr. Altman to present the most favorable mental health mitigation case available, and he attempted to present this and the other expert testimony in a manner that would be understandable to, and believed by, the jury. Indeed, Appellant's counsel succeeded insofar as the jury found the Section 9711(e)(2) mitigator. This is not an instance where counsel failed to present a mental health mitigation case despite the presence of evidence to support such a case. *Compare*

Commonwealth v. Smith, 544 Pa. 219, 675 A.2d 1221 (1996), *cert. denied*, 519 U.S. 1153, 117 S.Ct. 1090, 137 L.Ed.2d 223 (1997). Rather, this is a case where a more competent evaluation by the professionals retained by Appellant may have resulted in a more thoroughly developed mental health mitigation case. However, our review of the PCRA hearing indicates that such failures, if any occurred, do not rest at the feet of Appellant's counsel, and that the court properly denied Appellant's claim of trial counsel's ineffectiveness.

Id.

Instantly, as in *Stevens*, Appellant is arguing that trial counsel should have done more even though he had no tangible reason for doing so. Trial counsel testified that in his dealings with Appellant and Appellants family, he failed to discern anything that would have caused him to believe that Appellant had brain deficits. This belief was confirmed by Dr. Cookes examination of Appellant.[20] Given these circumstances, trial counsel cannot be faulted for not having Appellant examined by additional experts because the investigation he conducted was reasonable and failed to reveal any evidence showing that Appellant suffered from a mental disease or defect requiring further investigation. *See Commonwealth v. John Wesley Brown*, 582 Pa. 461, 872 A.2d 1139, 1150 (2005) (holding that where record at time of trial indicates that accused was not suffering from mental illness, counsel has no duty to investigate issue further); *Uderra*, 706 A.2d at 339–40 (holding that trial counsel was not ineffective for not introducing in mitigation evidence regarding defendants psychological problems because defendant failed to disclose them prior to trial). Accordingly, we conclude that the PCRA Court did not err in finding no merit to Appellants claim that trial counsel was ineffective during the penalty phase of the proceedings.

9. Trial Counsel Was Ineffective for Failing to Object to the Introduction of Victim Impact Evidence During the Penalty Hearing

[45] Appellant complains that trial counsel was ineffective for not objecting to the presentation of victim impact testimony during the penalty phase of the trial.[21] Appellant asserts such testimony was inadmissible and should not have been presented because the comments of the prosecutor were inflammatory. In addition, Appellant claims that because the offense herein occurred prior to the effective date of relevant amendments to 42 Pa.C.S. § 9711, he is entitled to a new penalty hearing. *See Commonwealth v. McNeil*, 545 Pa. 42, 679 A.2d 1253 (1996) (holding that victim impact testimony was inadmissible in cases originating prior to the 1995 amendment to 42 Pa.C.S. § 9711).

No relief is due on this claim because Appellant failed to meet his burden of

20. Appellant's brother Kenneth denied that Appellant suffered from mental deficits. N.T. 10/29/03, 503–05.

21. "Generally, only those statements which describe qualities of the victim and are designed to show the victim's uniqueness as an individual fall within the rubric of 'victim impact evidence.'" *Commonwealth v. Hall*, 582 Pa. 526, 872 A.2d 1177, 1185 (2005); *see also Commonwealth v. McNeil*, 545 Pa. 42, 679 A.2d 1253, 1259 n. 11 (1996). During the penalty hearing, Barbara Miller, the daughter of Appellant and the victim, held a picture of the victim as she testified and showed it to the trial judge when asked to do so by the prosecutor. N.T. 10/2/97, 289–90. In addition, the prosecutor commented that other family members declined a request that they testify because doing so would be too emotional. The prosecutor also stated that the victim's death had a "tremendous and terrible impact on [the victim's] family." N.T. 10/2/97, 291.

proving that trial counsels failure to object to the prosecutors actions prejudiced him. First, the actions and comments of the prosecutor were innocuous insofar as they were fleeting and did not dwell on the victim. In numerous cases, this Court has refused to find prejudice under similar circumstances. *See Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385, 414 (2003) (holding that brief victim impact testimony indicating that victim was "peaceful" and "nice" was not prejudicial); *see also Commonwealth v. Rollins*, 558 Pa. 532, 738 A.2d 435, 447 (1999) (same).

Appellant cannot prove prejudice for a second reason. The PCRA court, sitting as factfinder, indicated that it was not influenced by the victim's photograph or the prosecutor's comments and that neither the photograph nor the comments had any effect on the verdict it ultimately rendered. PCRA Court Opinion, 6/30/07, 37–38. It is presumed that a trial court, sitting as factfinder, can and will disregard prejudicial evidence. *See Commonwealth v. Davis*, 491 Pa. 363, 421 A.2d 179, 183 (1980); *Commonwealth v. David Brown*, 886 A.2d 256 (Pa.Super.2005). Thus, because Appellant has failed to prove that the outcome of the proceedings would have been different had trial counsel lodged an objection, he is not entitled to relief with respect to this claim.[22]

PCRA COURT ERRORS

10. The PCRA Court Committed an Abuse of Discretion in Refusing to Allow Appellant to Introduce into Evidence or Even Marking as an Exhibit Certain Records During the PCRA Hearing.

[46] Appellant argues that the PCRA court committed reversible error by refusing to permit the defense to mark as an exhibit and introduce into evidence medical records pertaining to the victim, which indicated that she had undergone an abortion five years prior to the date of the slaying and that someone other than Appellant impregnated her. According to Appellant, the records should have been admitted because Appellant believed that his wife had been unfaithful and the evidence was relevant with respect to whether the killing was committed in the heat of passion. Appellant's Brief, 93.

The PCRA court declared that it committed no error in refusing to permit the defense to introduce the records because they were irrelevant; they contained information remote in time from the date of the incident and contained no information indicating that Appellant was aware that the abortion took place or his reaction to that information. PCRA Court Opinion, 11/2/07, 6–7. The PCRA court refused to allow the defense to mark the records as an exhibit to protect the victim's privacy. *Id.* at 5. The PCRA court also noted that the defense did introduce testimony during the PCRA hearing indicating that the victim had an abortion and told others that Appellant had not fathered the child. N.T. 10/29/03, 512–17, 540–43, 594–97. We find no error in the rationale employed by the PCRA court, and we therefore hold this claim is meritless.

11. The PCRA Court Erred in Applying the Rape Shield Law to Exclude Testimony that the Victim Was Impregnated by Someone Other than Appellant.

During the evidentiary hearing Appellant's counsel asked trial counsel whether

22. We note that a review of the prosecutor's closing argument during the penalty phase indicates that the prosecutor did not comment upon the evidence he presented during the penalty hearing. N.T. 10/2/97, 325–29.

Appellant told him that the victim had had an abortion after getting pregnant by another man. The Commonwealth objected arguing that the Rape Shield Law, 18 Pa. C.S. § 3104, prohibited the dissemination of such information and that the information the defense was seeking to elicit was irrelevant because the alleged abortion occurred five years prior to the slaying. The PCRA court sustained the objection. N.T. 10/27/03, 28–30. Appellant asserts that the PCRA court erred by sustaining the Commonwealth's objection because it relied upon the Rape Shield Law to do so.

[47] This claim is meritless. The PCRA court explained in its Pa.R.A.P. 1925(a) opinion that it did not sustain the Commonwealth's objection based on the application of the Rape Shield Law but rather on relevancy and hearsay grounds. PCRA Court Opinion, 11/2/07, 5. Moreover, during the PCRA hearing the PCRA court later acknowledged that the Rape Shield Law did not apply and could not be used to exclude evidence relating to the victim's medical history. N.T. 10/29/03, 426–27. In addition, since other witnesses later testified at the PCRA hearing that the victim had an abortion after being impregnated by another man, any error resulting from the PCRA court's ruling constituted harmless error. Accordingly, Appellant is entitled to no relief on this claim.

12. The PCRA Court Abused Its Discretion in Refusing to Provide the Defense with Certain Evidence Including the Negatives of the Crime Scene Photographs.

[48] Appellant submits that the PCRA court committed an abuse of discretion when it refused to order the Commonwealth to provide the defense with a computer disc containing high-resolution digitized scans of the negatives of the crime scene photographs. Appellant asserts that he requested the negatives be digitally scanned onto a disc because the negatives contain detail that may not appear in a photograph and the scanned negatives can be more closely examined. Appellant's Brief, 95–96. According to Appellant, by denying this request, the PCRA court hindered him in his attempt to prove that the victim was not raped, when rape served as the basis for the sole aggravating circumstance found by the trial court.

The PCRA court denied Appellant's request because the Commonwealth provided the defense with copies of the crime scene photographs, "first generation" prints of the photographs, and a contact sheet containing copies of the negatives. PCRA Court Opinion, 11/2/07, 7. The PCRA court also relied on the fact that the Pennsylvania State Police, the governmental agency having possession of the negatives, did not have equipment to scan the negatives onto a disc and the contact sheet containing the negatives were of a quality on a par with digital scans. *Id.* We find no error in the rationale employed by the PCRA court to deny this claim and therefore hold that the trial court did not commit an abuse of discretion.

[49] Rule 902(E)(2) of the Pennsylvania Rules of Criminal Procedure provides:

> (E) Requests for Discovery
>
> (2) On the first counseled petition in a death penalty case, no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause.

Pa.R.Crim.P. 902(E)(2). The denial of a defense request seeking discovery materials is reviewed under an abuse of discretion standard. *Sattazahn,* 952 A.2d at 662; *Commonwealth v. Carson,* 590 Pa. 501, 913 A.2d 220, 261 (2006). In *Commonwealth v. Baumhammers,* 599 Pa. 1, 960 A.2d 59, 86

(2008), this Court recently discussed "abuse of discretion," stating:

> In *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745 (2000), we reiterated the well-known definition of "abuse of discretion" as follows:
>
> > The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

960 A.2d at 86 (citation omitted). The application of this definition to the instant matter leads us to conclude that the PCRA court did not commit an abuse of discretion in refusing to provide the digitized negatives to the Appellant. According to the trial court, the defense was provided with whatever photographic evidence the Commonwealth had in its possession. Moreover, the Commonwealth did not have the equipment needed to comply with Appellant's request. Under the circumstances, Appellant's claim is meritless.

CUMULATIVE EFFECT OF THE ERRORS

13. The Cumulative Effect of the Errors in This Case Entitles Appellant to Relief.

[50] In his final claim, Appellant argues that he is entitled to relief because of the cumulative prejudicial effect of the errors he alleged and raised in this appeal. This Court has repeatedly stated that "no number of failed claims may collectively warrant relief if they fail to do so individually." *Washington*, 927 A.2d at 617; *see also Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 56 (2008). Therefore, this issue is without merit.

CONCLUSION

Accordingly, we affirm the ruling issued by the PCRA court denying Appellant's request for post-conviction collateral relief.[23]

Justices BAER, TODD, and McCAFFERY join the opinion.

Chief Justice CASTILLE files a concurring opinion in which Justice EAKIN joins.

Justice SAYLOR files a dissenting opinion.

Chief Justice CASTILLE, concurring.

I join the Majority Opinion, with the exception of the points addressed below. I write separately to express my minor disagreement with the Majority's analysis of two of appellant's claims and to address a recurring and important point raised in Mr. Justice Saylor's dissenting opinion. My reasoning follows:

Claim V

Claim V faults the PCRA court on procedural grounds, for refusing to permit appellant to amend his PCRA petition in order to present testimony from Dr. Callery at the PCRA hearing related to his changed opinion as to whether a rape occurred.

23. The Prothonotary of the Supreme Court is directed to transmit the entire record in this case to the Governor in accordance with 42 Pa.C.S. § 9711(i).

Like Justice Saylor, I disagree with the Majority's resolution of this claim grounded upon the sufficiency of the evidence and the Majority's related conclusion that the claim has been previously litigated. Appellant's claim clearly challenges the PCRA court's procedural ruling and the related claim of trial counsel ineffectiveness for failing to challenge the competency of Dr. Callery's testimony, rather than the sufficiency of the evidence supporting the rape conviction.

Nevertheless, I concur in the result. I disagree with the Majority's characterization of the claim as previously litigated, since the substance of appellant's challenge is to the PCRA court's ruling that denied his late request to supplement the PCRA petition with Dr. Callery's changed testimony. This claim has not been previously litigated as it relates to a procedural ruling by the court immediately below. However, I see no abuse of discretion in denying the belated request to supplement the petition, and I do not see why Dr. Callery's alleged changed opinion (or "elaboration" as appellant would have it) was necessary to the substantive claims which sound in ineffective assistance of counsel.[1]

Claim VI

In this claim, appellant alleges that trial counsel's ineffectiveness rendered invalid his waiver of his right to a jury trial and his right to testify. Appellant develops this claim primarily in terms of the jury waiver, faulting counsel's advice to waive, and then, respecting the right to testify, merely states that "[t]he exact same [sic] reasoning applies to his waiver of the right to testify." Brief of Appellant, 50. Although I join the Majority Opinion concerning this dual claim, I would also briefly note that in ruling on appellant's claim of ineffectiveness related to his right to testify, the PCRA court concluded that the claim was without merit, since appellant opted not to testify despite counsel's advice to the contrary. While the Majority notes this fact in passing, it intimates that we would have to "guess whether counsel's ineffectiveness interfered with [appellant's] right to testify" and that we will not engage in such speculation. Respectfully, I see no need to go that far, given that the PCRA court aptly pointed out that counsel cannot be deemed ineffective, since he encouraged appellant to testify, only to have appellant refuse. Thus, in this instance, any complaint regarding appellant's decision not to testify is placed squarely on appellant's shoulders and cannot support a claim of trial counsel ineffectiveness. Appellant inexplicably fails to account for this dispositive fact in asserting that his twin claims depend on the same reasoning.

Claim VIII

I join the Majority on this claim and write only to address two points raised by Justice Saylor's Dissenting Opinion. First is the role of recent decisions from the U.S. Supreme Court rendered on federal *habeas* review of state court convictions, such as *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (1999), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). I have explicated in much greater detail elsewhere that, by definition, these decisions cannot be inter-

1. I am also convinced by the PCRA court's alternative rationale that there was sufficient circumstantial evidence supporting the rape, as explained by the PCRA court earlier in the opinion, when it states that even without the testimony of Dr. Callery, the evidence was sufficient. Thus, I agree with the Majority's observation that appellant cannot establish that he was prejudiced by trial counsel's alleged ineffectiveness. *See* Majority Op. at 657–58.

preted as establishing any new federal constitutional rule or standard. *See Commonwealth v. Gibson*, 597 Pa. 402, 951 A.2d 1110, 1148 (2008) (Castille, C.J., concurring). Rather, the High Court in these decisions merely "applied" the governing ineffectiveness standard that was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to the facts of cases tried after *Strickland* became the law of the land. Indeed, the High Court most recently confirmed that this was the case in a unanimous *per curiam* opinion rendered in *Bobby v. Van Hook*, 558 U.S. ——, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), when it applied the *Strickland* "effective assistance of counsel" standard in reviewing an ineffectiveness claim based upon counsel's alleged failure to prepare adequately for the penalty phase. Notably, the Court emphasized both the flexibility of the *Strickland* standard as well as *Strickland*'s teaching that counsel's conduct must be judged according to standards in place at the time counsel acted:

> The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Van Hook, 558 U.S. at ——, 130 S.Ct. at 16.[2] Furthermore, the *Van Hook* opinion stressed that reasonableness can only be assessed in light of the **prevailing professional norms at the time of trial** by making clear that a court should not look to ABA guidelines that were announced eighteen years after the trial. Indeed, the Court made it abundantly clear that ABA guidelines should not be treated as "inexorable commands" with which all capital defense counsel must fully comply, but are " 'only guides' to what reasonableness means, not its definition." *Id.* at ——, 130 S.Ct. at 17.

Additionally, the Court's review in *Wiggins*, *Williams* and *Rompilla* was specifically circumscribed by the terms of the Antiterrorism and Effective Death Penalty Act (AEDPA), which authorizes federal courts to upset final state judgments only if the state court analysis of a federal claim is contrary to, or involves an unreasonable application of, existing, binding precedent from the High Court. Observers can and do debate whether the court majorities in *Wiggins*, *Williams* and *Rompilla* were faithful to AEDPA's deference standard—notably all of these decisions, involving a controlling question of whether a state court judgment was objectively reasonable, were sharply divided. What cannot be debated is that: (1) the cases did not purport to break new constitutional ground; and (2) the decisions bind us, and they are important because those cases,

2. Although Justice Alito wrote a separate concurring opinion in one case, he began the responsive opinion by stating, "I join the Court's *per curiam* opinion. . . ." Justice Alito would give no "special relevance" to the 2003 ABA Guidelines in determining whether an attorney's performance meets the standard for effective representation required by the Sixth Amendment. *Van Hook,* 558 U.S. at ——, 130 S.Ct. at 20.

like the more recent pre-AEDPA decision in *Van Hook*, stand as the High Court's directive as to what was commanded by *Strickland* itself. *See also Porter v. McCollum*, 558 U.S. ——, ——, 130 S.Ct. 447, 452, —— L.Ed.2d ——, —— (2009) (confirming capital defendant only entitled to relief if he can establish that the state court's rejection of his ineffectiveness claim was "contrary to or involved an unreasonable application of" *Strickland*).

Obviously, any court addressing a case posing materially identical circumstances would be hard-pressed to deviate from the holding in a *Strickland*-application case decided under AEDPA. *See Porter*, *supra* (explaining that relief was warranted because the case was similar to *Wiggins* as "counsel did not even take the first step of interviewing witnesses or requesting records"). But, quite frankly, there is no easy answer to the question of what to do with good faith decisions rendered by courts in the long years between when the Court announced *Strickland* in 1984, and then announced what it necessarily meant in cases such as *Wiggins*, *Williams*, *Rompilla*, and now *Van Hook* and *Porter*. In that long interregnum, courts operating in perfectly good faith may have rendered decisions that now seem to be in tension with some of the Court's later *Strickland*-application decisions.

Theoretically, since the *Strickland*-application decisions by definition purport to establish no new law, the continuing validity of a pre-*Wiggins* decision should be measurable by comparison to *Strickland* itself. In point of fact, the High Court signaled as much when commenting on its *Wiggins* and *Rompilla* decisions in light of the *Strickland* standard in *Van Hook* by stating:

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, *cf. Wiggins*, 539 U.S., at 525, 123 S.Ct. 2527, or would have been apparent from documents any reasonable attorney would have obtained, *cf. Rompilla v. Beard*, 545 U.S. 374, 389–93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than already was in hand" fell "well within the range of professionally reasonable judgments."

Van Hook, 558 U.S. at ——, 130 S.Ct. at 19. Similarly, in *Porter*, the Court was clear that the inquiry was guided by whether the Florida Supreme Court "**unreasonably applied** *Strickland*." *Porter*, 558 U.S. at ——, 130 S.Ct. at 453 (emphasis added). Thus, the most recent jurisprudence confirms that *Strickland* remains the ultimate test by which we as a court must measure claims of ineffectiveness.

For my part and consistently with the High Court's most recent pronouncements, I do not believe that we are required to jettison past approaches, analyses, or holdings in this Court's *Strickland* cases, unless: (1) they are squarely precluded by a decision from the U.S. Supreme Court, such as *Strickland*, which existed when we rendered our decision; or (2) it is beyond reasonable debate that our decision is both materially identical to, and contrary to, one of the later *Strickland*-application decisions. In this case, I have no difficulty with the Majority's application of our precedent.

Second, the Dissenting Opinion expresses concern with appellant's argument that the admission of appellant's written "background history and statement" was materially prejudicial, and suggests that trial counsel's strategy in proffering the statement was "seriously misguided." Dissenting Op. at 679. Although ultimately the

admission of the statement may not have advanced appellant's cause, I would merely add that trial counsel's statements at the PCRA hearing reveal that he was struggling with the manner in which he could proffer appellant's version of the events leading up to and on the night in question, since appellant had refused to testify. N.T., 10/27/03, at 78. Counsel believed that the best way to do this was to urge appellant just to "[tell] things as it was [sic]" by writing a statement in his own words, explaining the events leading up to and on the night in question. *Id.* at 66. Based on the circumstances facing counsel, I would not find counsel ineffective with respect to this decision.

Justice EAKIN joins this concurring opinion.

Justice SAYLOR, dissenting.

I dissent, since it appears to me that the majority opinion does not sufficiently address material arguments or conform to prevailing law in a number of areas.

Guilt Phase

Claim I—The majority first rejects Appellant's claim of deficient stewardship in the investigation and presentation of evidence that the victim was killed in the heat of passion, reasoning that, even if Appellant's additional evidence were credited, "it is clear that the evidence still was insufficient to conclude that the killing was committed in the heat of passion as the record is devoid of evidence that at the time the victim was murdered, Appellant was acting under a sudden or intense passion brought on by the victim." Majority Opinion, at 650. The majority's rationale, however, conflicts with the PCRA court's (and fact finder's) reasoning in addressing Appellant's ineffectiveness claims, in which that court praised trial counsel for doing "an exceptional job of getting evidence and argument regarding heat of passion into the record." PCRA Court Opinion, *slip op.* at 29.

In this regard, the majority's substantive analysis concerning the unavailability of a heat-of-passion defense also does not take into account: whether there is any role for individual characteristics of the defendant in the analysis (such as whether a defendant is mentally retarded or brain damaged); the extent to which the cumulative impact of a series of events may be considered in assessing provocation, *see Commonwealth v. McCusker*, 448 Pa. 382, 389 & n. 8, 292 A.2d 286, 289 & n. 8 (1972); or various of the actual events alleged by Appellant and, to one degree or another, reflected in evidence of record. These include Appellant's release from incarceration a short time before the killing; his initial residence with his mother; Appellant's daughter's, the victim's, and her sister's alleged efforts to entreat him back into a relationship with the victim; Appellant's emotional uncertainty but eventual acquiescence; the service of a support order on Appellant on the day of the killing; the allegation that the victim previously had aborted another man's child during the marriage; and/or the number and nature of the victim's wounds, which tend to support his theory that he lost control.[1] I also differ with the majority's characterization of the above circumstances, to the degree they might be accepted by a fact

1. In the statement presented to the trial judge at the penalty hearing, and in his conversations with the penalty-phase and post-conviction experts, Appellant also related that the event immediately precipitating the killing was the victim's indication—just after having engaged in sexual relations with Appellant—that he was to leave the marital residence and that another man would be moving in with her. *See* N.T., October 2, 1997, Ex. D–4; N.T., October 29, 2003, at 446.

finder, as being analogous to "a history of minor disputes and allegations of past infidelity." Majority Opinion, at 651.

For the above reasons, and in the absence of a more directed assessment of Appellant's arguments as summarized above, I am unable to join the majority's disposition of the first claim.

Claim 2—The majority next rejects the claim that trial counsel was ineffective for failing to investigate and present expert testimony to rebut the Commonwealth's assertion that the victim was raped, crediting trial counsel's belief that "the evidence made it pellucidly clear to him that no rape occurred and ... his belief that anyone who reviewed the evidence would draw the same conclusion he did." Majority Opinion, at 653. The difficulty with trial counsel's, and the majority's, position is that counsel's beliefs proved to be demonstrably erroneous, as a Commonwealth expert witness described the killing as a "classic rape-homicide" and the fact finder correctly found "ample evidence to prove that a rape occurred even without Dr. Callery's testimony," PCRA Court Opinion, *slip op.* at 10, with this Court confirming on direct appeal that the verdict on the offense of rape was consistent with the evidence. *See Commonwealth v. Miller*, 555 Pa. 354, 367–68, 724 A.2d 895, 901 (1999). Moreover, hindsight is not required to question counsel's confidence, as well as his corresponding decision to forego further preparation, in light of the circumstances surrounding Appellant's crimes, where there was undisputed evidence of intercourse and substantial circumstantial evidence of forcible compulsion. Indeed, at least in the absence of the assessments provided by Appellant's post-conviction experts, it is difficult to consider trial counsel's belief that no fact finder would render a verdict of guilt on the rape charge to be rational, let alone reasonable.

Claim 5—Claim 5 concerns Appellant's challenge to the PCRA court's refusal to permit Dr. Callery to testify in the post-conviction proceedings that he did not hold the opinion that a rape had occurred to a reasonable degree of scientific certainty. The majority indicates that "[t]here is no indication in the record that Dr. Callery would have advised trial counsel before the trial commenced that it was his belief that no rape occurred if only trial counsel had interviewed him." Majority Opinion, at 659. The majority's reasoning, however, is unresponsive to the argument presented. Appellant's argument is that trial counsel failed to adduce that Dr. Callery did not hold his opinions to the requisite degree of scientific certainty to justify their admission into evidence. *See* Brief for Appellant at 39–42. Appellant supports his contention, *inter alia*, with the testimony of post-conviction experts and Dr. Callery's own declaration indicating:

> 3. In my view, the evidence in this case that I reviewed, and was aware of, is plainly consistent with any of the following scenarios: that intercourse occurred before Ms. Miller was killed and then she was killed; that intercourse occurred while she was being stabbed; or that intercourse occurred after she had been killed.
>
> 4. Because of the number of plausible scenarios, I do not hold the opinion to a reasonable degree of medical and scientific certainty that Ms. Miller was killed while the assailant was engaging in sexual intercourse with her. I cannot state to a reasonable degree of medical and scientific certainty that Ms. Miller was raped at or around the time she was killed. To the extent that my testimony in this case appears to conflict with any of these conclusions, my actual opinion at the time of trial is stated in this affidavit.

* * *

7. Mr. Miller's trial attorney did not interview me before I testified in Mr. Miller's case. If he had, I would have told him the things I say in this affidavit and testified to them on the witness stand.

Declaration of Richard T. Callery, M.D., dated January 26, 2005. I cannot support a disposition based on an inaccurate characterization of a claim.

Penalty Phase

Claim 8—In resolving Appellant's claim that his trial counsel was ineffective for failing to investigate and present available mitigating evidence during the penalty hearing, the majority initially appears to approve trial counsel's investigation. *See* Majority Opinion, at 666–67. Trial counsel testified, however, that he did not obtain various available life history records; he interviewed only two family members prior to trial; he interviewed another for the first time in the courthouse prior to his testimony; he did not obtain a copy of the file for the domestic relations case involving Appellant and the victim; and he did not consider investigating the psychiatric significance of his client's claim to having suffered a blackout during the course of the killing. N.T., October 27, 2003, at 22–32, 100. It therefore seems apparent to me from the record that counsel acquired a rudimentary knowledge from a narrow set of sources, a practice disapproved by the United States Supreme Court. *See Wiggins v. Smith,* 539 U.S. 510, 524, 123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003).

The majority next couches the post-conviction evidence as merely cumulative of the evidence presented at trial. *See* Majority Opinion, at 666–67. I believe, however, there are qualitative differences in the evidence which should be recognized. In my view, the post-conviction evidence presented a better case for life than that which was presented at trial, particularly in terms of the depth of the explanatory-type mitigation presented through the experts.[2]

The majority also credits trial counsel for presenting Appellant's written "background history and statement" concerning Appellant's life history, the abuse Appellant observed and was subject to while growing up, as well as evidence of his drug use. *See* Majority Opinion, at 666–67. The majority, however, ignores Appellant's substantial argument, as follows, that the document, in fact, was materially prejudicial:

> [T]rial counsel affirmatively *harmed* Appellant by presenting to the Court a "statement" hand-written by Appellant which could not possibly have aided Appellant in his case for life. The statement ... contained numerous profanities and was interpreted by the trial court in its sentencing deliberations as shifting the responsibility for the incident to the deceased. Such a statement, presented in a vacuum and without any psychiatric explanation for the paranoia and rage that developed in Appellant during his formative years, could easily have been construed by the court as both disrespectful and void of remorse.[fn] In fact, in its sentencing decision, the lower court stated "I also take note of the total lack of remorse of the defendant in connection with the homicide ... [I]t troubles me that the defendant has expressed no remorse whatsoever in connection with this crime. And in fact, that in the penalty phase of the hearing, the letter that was handed up

2. It is a separate question, discussed below, whether the degree of difference is enough to justify a finding of prejudice. Presently, my focus is on the majority's cumulativeness determination.

basically implied that most of the fault belonged on the victim in connection with this matter." NT 10/27/97, at 10–11.

[fn] The presentation of this letter is so tactically harmful that one wonders if counsel read it before handing it over to the judge.

Brief for Appellant at 86–87 (emphasis in original).

In line with Appellant's argument, a review of Appellant's statement confirms that the strategy of presenting it to a fact finder was seriously misguided, because the statement contains a multitude of inflammatory remarks. For example, it is replete with blame cast upon the victim, which the trial judge conveyed both at sentencing and in the post-conviction proceedings was offensive. *See, e.g.,* N.T., October 28, 2003, at 383 (reflecting the trial/PCRA judge's comment, "I'm not going to sit here and listen to this woman be trashed just to present this heat of passion defense mitigated testimony."). Further, although trial counsel was attempting at the penalty hearing to portray the killing as having occurred in the heat of passion, the statement starkly reflects a far deeper and more entrenched disregard, on Appellant's part, for the victim's life. *See, e.g.,* N.T., October 2, 1997, Ex. D–4 (reflecting Appellant's description of a prior assault upon the victim, stating, "This is when I put the gun to Sherry's head and she was lucky she didn't die that day cause I was pissed."). Similarly, in addressing an incident at a bar, Appellant indicates he told a man "if you yell anymore at the women I'm going to ram my pool stick down your throat." *Id.* Particularly when considered in light of the note Appellant penned in the aftermath of the killing, the "background history and statement" suggests deep-seated violent, volatile qualities, in substantial tension with the defense theory of an isolated, sudden, uncontrollable rage experienced by an otherwise non-violent individual.[3] It is difficult to envision why any competent attorney would put such a statement before the fact finder in the form in which it was presented.

With regard to the distinct matter of trial counsel's failure to obtain a copy of the support order during his penalty investigation, the majority indicates, "Appellant failed to establish that he had knowledge that a support order had been issued against him." Majority Opinion, at 668. I believe it should at least be acknowledged, however, that Appellant discussed the support order and its impact upon him in his handwritten statement presented to the trial judge at the penalty hearing. *See* N.T., October 2, 1997, Ex. D–4. Thus, there was some evidence (albeit of questionable quality) of knowledge on Appellant's part.

The majority also relies substantially on *Commonwealth v. Stevens,* 559 Pa. 171, 739 A.2d 507 (1999). *See* Majority Opinion, at 668–669. *Stevens,* however, predated the United States Supreme Court's decisions in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and *Wiggins,* 539 U.S. at 510, 123 S.Ct. at 2527, which a number of Justices have indicated reflect a different set of standards than were (and perhaps are) being applied in at least some of our decisions, such as *Stevens.* This implicates the divide concerning the application of *Williams* and *Wiggins* in Pennsylvania, as reflected in *Commonwealth v. Romero,* 595 Pa. 275, 938 A.2d 362 (2007) (plurality in relevant regard). *Compare id.* at 318–19, 938 A.2d at 387–88 (indicating that "[p]rior to *Williams* and its progeny, case law regarding what is required of counsel during the penalty phase was not as exact-

3. The statement also reflects that Appellant was an apparently unrepentant drug dealer.

ing as today" and declining to apply *Williams* and *Wiggins* to cases litigated prior to their issuance), *with id.* at 335–37, 938 A.2d at 398–99 (Saylor, J., concurring and dissenting) (advancing the position that *Williams* and *Wiggins* apply to prior cases, as the decisions were rendered in the post-conviction context and the United States Supreme Court explained in *Wiggins* that it made no new law).

In summary, I do not agree with many of the reasons presented by the majority in support of its decision to affirm the penalty verdict. Moreover, although the PCRA court's analysis may implicitly suggest it would not have rendered a different verdict had the post-conviction evidence been presented to the court at the penalty hearing, I do not agree with the majority that such a finding is explicit in the opinion. *See* Majority Opinion, at 667 n. 18.

Furthermore, the PCRA court's opinion embodies a looseness which is inconsistent with our requirements in capital post-conviction cases. For instance, in its finding that Dr. Armstrong's post-conviction testimony was merely cumulative of the testimony of Dr. Cooke, which was presented at the penalty hearing, the PCRA court indicates that the testimony of both experts reflected the same mitigating circumstance, which it described as a lack of capacity to appreciate criminality and conform conduct to the requirements of the law, 42 Pa.C.S. § 9711(e)(3). *See* PCRA Court Opinion, *slip op.* at 38.[4] The material passage of the opinion, however, fails to recognize that the testimony given by Julie B. Kessel, M.D., psychiatrist, lends support to Appellant's claim of an additional mitigator, namely, that he was under the influence of extreme mental or emotional disturbance at the time of his crimes, 42 Pa.C.S. § 9711(e)(2). *See, e.g.,* N.T., October 29, 2003, at 548. Therefore, the basis for the PCRA court's conclusion on the matter is erroneous. *See generally Commonwealth v. Beasley,* 600 Pa. 458, 489–90, 967 A.2d 376, 395 (2009) (commenting on material imprecision in the decision-making of a capital post-conviction court in connection with a remand, indicating, "We intend to provide an orderly system of post-conviction adjudication that produces fair and just results, anchored upon governing law and rational reasoning.").

4. The actual formulation of the mitigator is: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law *was substantially impaired.*" 42 Pa.C.S. § 9711(e)(3) (emphasis added).

Cassandra OLIVER, Petitioner

v.

CITY OF PITTSBURGH, Respondent.

Supreme Court of Pennsylvania.

Dec. 29, 2009.

Petition for Allowance of Appeal from the Order of the Commonwealth Court, No. 363 WAL 2009.

Prior report: Pa.Cmwlth., 977 A.2d 1232.

ORDER

PER CURIAM.

AND NOW, this 29th day of December, 2009, the Petition for Allowance of Appeal is **GRANTED, LIMITED TO** the issues set forth below. Allocatur is **DENIED** as to all remaining issues. The issues, rephrased for clarity, are:

EXHIBIT “C”

upon Plaintiff's termination as required by paragraph 14(d) of the 2013 PEA.

IV. Conclusion

For all of the foregoing reasons, the court will deny Defendants' motion for reconsideration (Doc. 57) and grant Plaintiff's motion for reconsideration (Doc. 59). The court will vacate its previous order (Doc. 54) that granted in part and denied in part Plaintiff's motion for summary judgment. Furthermore, the court will grant Plaintiff's motion for summary judgment (Doc. 35) in full.

Thus, the court holds as a matter of law that (1) Defendants breached the 2013 Physician Employment Agreement by suspending Plaintiff without pay and by terminating Plaintiff without cause and without making the contractually required severance payments; and (2) Defendants violated Pennsylvania's Wage Payment and Compensation Law by failing to pay Plaintiff the severance due upon termination as required by the 2013 employment contract. Trial will be held on the issue of damages only. An appropriate order will follow.

Dennis MILLER, Petitioner,

v.

Jeffrey BEARD, Commissioner, Pennsylvania Department of Corrections, et al., Respondents.

CIVIL ACTION No. 10–3469

United States District Court,
E.D. Pennsylvania.

Signed 10/05/2016

Background: After state Supreme Court affirmed bench trial verdict convicting petitioner of raping and murdering his wife, and sentencing him to death, petitioner sought federal habeas relief.

Holdings: The District Court, Goldberg, J., held that:

(1) there was no procedural bar precluding federal habeas court from considering petitioner's claim that counsel was ineffective for failing to discover criminal history and mental illness of cellmate who testified against him;

(2) petitioner was procedurally barred from asserting habeas claim that his waiver of right to jury at sentencing phase was invalid due to deficient oral and written colloquies;

(3) petitioner was not entitled to habeas relief on claim that defense counsel was deficient for failing to investigate evidence that petitioner acted in the heat of passion;

(4) petitioner was entitled to habeas relief on his claim that defense counsel was deficient for failing to consult with expert to prepare cross-examination of state's expert witness or to present witness to rebut state's expert's testimony;

(5) petitioner was not entitled to habeas relief on claim that counsel was deficient for failing to object to state's expert witness's testimony; and

(6) petitioner was not entitled to habeas relief on claim that state's failure to provide petitioner's counsel with criminal or medical records of petitioner's cellmate, who testified against petitioner, violated *Brady*.

Petition granted in part; denied in part.

1. Habeas Corpus ⚿366

In order to exhaust remedies available in courts of the state, as required for

a petitioner to be entitled to federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner must have fairly presented the merits of his federal claims during one complete round of the established appellate review process. 28 U.S.C.A. § 2254(b)(1)(A).

2. Habeas Corpus ⚿382

A federal claim is fairly presented to the state court, as required to fulfill Antiterrorism and Effective Death Penalty Act's (AEDPA) exhaustion of remedies requirement for federal habeas relief, where the petitioner has raised the same factual and legal basis for the claim to the state courts. 28 U.S.C.A. § 2254(b)(1)(A).

3. Habeas Corpus ⚿453

If a habeas petitioner fairly presents a claim to the state courts, but it was denied on a state law ground that is independent of the federal question and adequate to support the judgment, the claim is procedurally defaulted, and is not subject to federal habeas review under Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2254(b)(1)(A).

4. Habeas Corpus ⚿403

For a federal habeas claim to be barred by procedural default, the state procedural rule that was violated must have been firmly established and regularly followed at the time of the alleged default.

5. Habeas Corpus ⚿403

A federal habeas court is not bound to enforce a state procedural rule when the state itself has not done so, even if the procedural rule could have properly been applied.

6. Habeas Corpus ⚿422

Under the "plain statement test" used to determine whether the state court resolved a claim on the merits or pursuant to a procedural bar, for purposes of determining whether federal habeas review is barred by procedural default, when the state court opinion appears to consider the application of a federal law, federal courts should assume that the case was determined on the merits absent a plain statement by the state court that its decision relied on an independent and adequate state rule.

See publication Words and Phrases for other judicial constructions and definitions.

7. Habeas Corpus ⚿401, 404

Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice.

8. Habeas Corpus ⚿423

State court's prior consideration of ineffective assistance of counsel claims relating to rape conviction of petitioner, convicted in state court of rape and murder of his wife and sentenced to death, did not preclude federal habeas review of those claims; fact that state court gave full consideration to petitioner's claims made them ripe for federal adjudication, and even if the prior litigation could act as a procedural bar, state court removed that bar by choosing to hear petitioner's claims on appeal under the Pennsylvania Post-Conviction Relief Act (PCRA). U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9541.

9. Habeas Corpus ⚿423

There was no procedural bar to federal habeas court considering claim of petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that his defense counsel was ineffective for failing to discover criminal history

and mental illness of his cellmate who testified, for the state, that petitioner told him that he intended to kill his wife; state court opinion on claim rested primarily on federal law because it relied on application of the ineffectiveness of counsel standard and court made no mention of petitioner's failure to object at trial or to raise the issue on direct appeal, and thus there was no plain statement that state court resolved the claim on the basis of an independent procedural rule. U.S. Const. Amend. 6.

10. Habeas Corpus ⚿423

Procedural bar did not preclude federal habeas court from considering claim of petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that state violated *Brady* by failing to turn over criminal and medical records of cellmate who testified that petitioner told him that he intended to kill his wife; state court opinion on claim rested primarily on federal law because it relied on application of *Brady*, and court made no mention of petitioner's failure to object at trial or to raise the issue on direct appeal, and thus there was no plain statement that state court resolved the claim on the basis of an independent procedural rule.

11. Habeas Corpus ⚿423

Procedural bar did not preclude federal habeas court from consider claim of petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that his counsel was ineffective for failing to object to colloquy and raise issue of whether petitioner's waiver of right to jury at sentencing was invalid because the oral and written colloquies failed to inform him of the relevant burdens of proof for aggravating and mitigating factors; on direct appeal, state Supreme Court considered claim on the merits, finding petitioner made no showing that he would not have waived his right at sentencing but for counsel's ineffectiveness, the determination rested primarily on federal law, and thus there was no plain statement that state court resolved claim on basis of independent procedural rule. U.S. Const. Amend. 6.

12. Habeas Corpus ⚿422

Habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was procedurally barred from asserting federal habeas claim that his waiver of the right to jury at sentencing was invalid because the oral and written colloquies failed to inform him of the relevant burdens of proof for aggravating and mitigating factors or about the role of a jury in a capital sentencing; state court's statement that no objection was made as to the inadequacy of the colloquies at any time, and its determination that the claim was waived because it could have been previously raised, constituted explicit statement that the substantive constitutional claim was waived. U.S. Const. Amend. 7.

13. Habeas Corpus ⚿403

A disposition of a claim in state court, pursuant to a state procedural rule, prevents federal habeas review of the claim only where the procedural rule in question is firmly established, readily ascertainable, and regularly followed; the procedural rule must be firmly established and regularly followed as of the date the default occurred, not the date the state court relied on it, because a petitioner is entitled to notice of how to present a claim in state court.

14. Habeas Corpus ⚿403

Pennsylvania's "relaxed waiver rule," which allowed habeas petitioners in capital cases to bring claims on the merits which were not raised in the lower court, until Pennsylvania Supreme Court stopped ap-

plying the rule to capital cases in 1998, applied to claim asserted by habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that his waiver of the right to jury at sentencing was invalid; procedural default occurred when trial counsel failed to object to the jury waiver colloquy in October, 1997, and when petitioner failed to raise the issue on direct appeal, in August, 1998, which were before Pennsylvania's waiver rule was firmly established.

See publication Words and Phrases for other judicial constructions and definitions.

15. Habeas Corpus ⚿423

Procedural bar did not preclude federal habeas court from considering claim of petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that his counsel was ineffective for not objecting to prosecutor's allegedly improper offer of victim impact evidence at sentencing; state Supreme Court's dismissal of claim based on finding that prosecutor's comments were innocuous and thus did not prejudice petitioner rested primarily on federal law because the court performed ineffective assistance of counsel analysis, and there was no counteracting plain statement that court resolved claim on the basis of an independent procedural rule. U.S. Const. Amend. 6.

16. Habeas Corpus ⚿363, 385

For a federal habeas petitioner's claim to be exhausted in state court, as required for federal habeas court to consider claim, the claim need only be presented to the state courts; they need not have been considered or discussed by those courts. 28 U.S.C.A. § 2254(b).

17. Habeas Corpus ⚿385

In determining whether a state court ruled on a federal habeas petitioner's substantive claim for purpose of determining whether procedural bar precludes federal habeas court from hearing the claim, where the state's highest court is silent on whether the disposition of the issue rests on the merits or an independent procedural rule, habeas courts look through the highest court's ruling to the decision of the lower court; where the upper court fails to address an issue, the "look through doctrine" assumes agreement with the lower court's disposition of the claim.

See publication Words and Phrases for other judicial constructions and definitions.

18. Habeas Corpus ⚿380.1

Ordinarily, issues are not fairly presented to a state court for purposes of exhausting available state remedies prior to seeking federal habeas relief if the court must read beyond a petitioner's brief, petition, or similar submission to discover a federal claim. 28 U.S.C.A. § 2254(b)(1).

19. Habeas Corpus ⚿385

State Supreme Court's failure to address claim asserted by federal habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that prosecutor improperly offered victim impact evidence at sentencing, did not render claim procedurally defaulted; Supreme Court resolved substantive issue on the merits of claim through its analysis of petitioner's claim that his counsel was ineffective for not objecting to prosecutor's allegedly improper offer of the evidence, and the state Supreme Court determined that there was no prejudice resulting from the prosecutor's actions because the prosecutor's comments were "innocuous," and because the trial court did not consider the victim impact evidence in reaching the verdict. U.S. Const. Amend. 6; 28 U.S.C.A. § 2244(d)(1).

20. Constitutional Law ⚿4629

Prosecutorial misconduct claims require a showing that the prosecution so infects the trial with unfairness as to make the resulting conviction a denial of due process. U.S. Const. Amend. 14.

21. Habeas Corpus ⚿422

Underlying purpose of the "procedural default doctrine," under which, if a federal habeas petitioner fairly presents a claim to the state courts but it was denied on a state law ground that was independent of the federal question and adequate to support the judgment, the claim is not subject to federal review, is to allow state courts the opportunity to address alleged violations of federal law. 28 U.S.C.A. § 2244(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

22. Habeas Corpus ⚿486(2, 4)

There was no procedural bar precluding federal habeas court from considering claim of federal habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, that his counsel's failure to investigate and develop his case made petitioner's waiver of the right to a jury trial and to testify in his own defense the product of ineffective assistance of counsel; state Supreme Court's denial of the claim on direct appeal rested primarily on federal law because court applied the ineffective assistance of counsel standard and found two separate flaws with petitioner's claims. U.S. Const. Amend. 6; 28 U.S.C.A. § 2244(d)(1).

23. Habeas Corpus ⚿768

Under Antiterrorism and Effective Death Penalty Act (AEDPA), where a federal habeas court reviews a petitioner's claim that has been adjudicated on the merits by the state court, factual determinations made by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C.A. § 2254(e)(1).

24. Habeas Corpus ⚿450.1

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may grant habeas writ based on a state court's adjudication of a petitioner's claim resulting in a decision that was unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. 28 U.S.C.A. § 2254(d)(1).

25. Habeas Corpus ⚿450.1

Inquiry into whether a state court's application of clearly established federal law was unreasonable, as would warranted federal habeas relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), requires the habeas court to ask whether the state court's application of clearly established federal law was objectively unreasonable. 28 U.S.C.A. § 2254(d)(1).

26. Habeas Corpus ⚿766

Where the state court decision does not constitute an adjudication on the merits, but a habeas petitioner's claim is ripe for habeas review, the Antiterrorism and Effective Death Penalty Act (AEDPA) does not apply and instead the federal court applies the pre–AEDPA standard, reviewing pure legal questions and mixed question of law and fact de novo. 28 U.S.C.A. § 2254.

27. Criminal Law ⚿1870

In assessing whether counsel performed deficiently, as required to support an ineffective assistance of counsel claim, a court must reconstruct the circumstances

of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. U.S. Const. Amend. 6.

28. Criminal Law ⇐1888

Because the ultimate focus of the ineffective assistance of counsel inquiry is on the fundamental fairness of the proceeding whose result is being challenged, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, and thus, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. U.S. Const. Amend. 6.

29. Habeas Corpus ⇐486(4)

State Supreme Court did not unreasonably ignore opinion of expert witnesses, a psychologist and psychiatrist, who testified at Pennsylvania Post–Conviction Relief Act (PCRA) hearing that habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was in an "explosive rage" and would have met the requirements for Pennsylvania heat of passion defense, in its ruling that defense counsel was not deficient for failing to effectively investigate, prepare, and present evidence that petitioner acted in the heat of passion, and thus petitioner was not entitled to habeas relief; petitioner did not testify at trial, and petitioner's statements to experts in his out-of-court evaluation was what informed experts' opinions that petitioner killed victim while in a rage. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); 18 Pa. Cons. Stat. Ann. § 2503(a).

30. Habeas Corpus ⇐486(4)

State Supreme Court was not unreasonable in asserting that post-conviction evidence was cumulative of what was presented at trial, in its decision that habeas petitioner's trial counsel was not deficient for failing to effectively investigate, prepare, and present evidence that petitioner, convicted in state court for rape and murder of his wife and sentenced to death, acted in the heat of passion as would reduce first-degree murder to voluntary manslaughter under Pennsylvania law, and thus petitioner was not entitled to habeas relief; post-conviction evidence simply elaborated upon trial evidence of petitioner's and victim's unstable relationship and drug use, and did not shed any light on what occurred immediately before the murder. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

31. Habeas Corpus ⇐486(4)

State Supreme Court's determination that habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not prejudiced by trial counsel's failure to present additional evidence pertaining to Pennsylvania heat of passion defense at trial, was reasonable, and thus petitioner was not entitled to habeas relief on that claim; petitioner did not present any meaningful evidence at post-conviction hearing regarding what actually occurred in the time period immediately preceding the murder, and evidence at trial indicated that petitioner and victim argued while they were at bar on evening of murder and petitioner calmed down before they left, and left note at scene recounting how petitioner perceived that victim and others had wronged him. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); 18 Pa. Cons. Stat. Ann. § 2503(a).

32. Criminal Law ⇐1909

State Supreme court did not unreasonably apply *Strickland* in finding that trial counsel for petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not deficient for failing to effectively investigate, prepare, and present evidence that petitioner

acted in the heat of passion under Pennsylvania law, as would reduce homicide from first-degree murder to voluntary manslaughter, and thus petitioner was not entitled to habeas relief on that basis; before considering any of petitioner's ineffective assistance claims, the court identified the appropriate standard, stating that, "to prove prejudice, a defendant must show that but for counsel's error, there is a reasonable probability, i.e., a probability that undermines confidence in the result, that the outcome of the proceeding would have been different." U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1); 18 Pa. Cons. Stat. Ann. § 2503(a).

33. Criminal Law ⚿1931

Proper examination in determining whether defense counsel exercised reasonable professional judgment in failing to consult an expert before cross-examining an opposing party's expert witness, for purposes of ineffective assistance of counsel claim, is not whether trial counsel should have consulted with an expert before cross examination, but whether the considerations that went into his decision not to consult an expert were themselves reasonable. U.S. Const. Amend. 6.

34. Criminal Law ⚿1931

Trial counsel for habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was deficient for failing to consult with expert to either prepare for cross-examination of state's expert witness, or to present as a witness to rebut state's expert's testimony that rape occurred during homicide, where state's expert's testimony was scientific and technical in nature and outside of counsel's expertise, the testimony formed sole basis of petitioner's rape conviction, which was the sole aggravating factor leading to his death sentence, experts were available for counsel to consult with, and consultation with experts would have, at a minimum, aided counsel in cross examination preparation. U.S. Const. Amend. 6.

35. Habeas Corpus ⚿450.1

A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision.

36. Criminal Law ⚿1931

Habeas Corpus ⚿486(4)

State Supreme Court's finding that trial counsel for petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not ineffective for failing to investigate and present expert testimony to rebut the government's assertion that the victim was raped, was unreasonable application of federal law clearly established in *Strickland*, and petitioner was thus entitled to federal habeas relief on ineffective assistance of counsel claim; Supreme Court simply stated that counsel's performance was reasonable, but there was no reason, strategic or otherwise, to support counsel's failure to consult an expert. U.S. Const. Amend. 6.

37. Criminal Law ⚿1883

On a claim of ineffective assistance of counsel, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. U.S. Const. Amend. 6.

38. Criminal Law ⚿1883

Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance. U.S. Const. Amend. 6.

39. Criminal Law ⚿1883

In order to succeed on an ineffective assistance of counsel claim, a defendant must show that there is a "reasonable

probability," which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

40. Criminal Law ⚿1883

For a counsel's errors to prejudice a defendant, as required to support ineffective assistance of counsel claim, the errors must be so serious as to deprive the defendant of a "fair trial," i.e., a trial whose result is reliable. U.S. Const. Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

41. Criminal Law ⚿1883

A court addressing an ineffective assistance claim should examine the totality of evidence at trial, noting that 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; this standard is not a stringent one and is less demanding than the preponderance standard. U.S. Const. Amend. 6.

42. Criminal Law ⚿1931

Habeas Corpus ⚿486(4)

Failure by trial counsel of federal habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, to consult with any expert either to prepare for cross-examination of state's expert witness or to present as a witness to rebut allegation that rape occurred during homicide, prejudiced petitioner, as would entitle petitioner to habeas relief on his ineffective assistance of counsel claim; experts who were available for the defense offered sound opinions which undermined the basis of government's expert's testimony that petitioner raped victim during murder, and had counsel raised questions about the government expert's theory there was a reasonable probability that the rape result would have been different and petitioner would not have been sentenced to death. U.S. Const. Amend. 6.

43. Criminal Law ⚿494

In Pennsylvania, a medical opinion is sufficient to support a finding when given with a reasonable degree of medical certainty.

44. Habeas Corpus ⚿486(4)

State Supreme Court's conclusion that trial counsel for petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not deficient for failing to object to government expert witness's testimony that petitioner raped victim even though expert did not testify that it was his opinion to a reasonable degree of medical certainty, was not unreasonable application of federal law clearly established in *Strickland*, and thus petitioner was not entitled to habeas relief based on ineffective assistance of counsel for failure to object; counsel was fully aware that the expert did not testify to the occurrence of rape to a reasonable degree of medical certainty and tactically took advantage of the omission by arguing in closing that the expert's opinion was entitled to less weight, and there was no reasonable probability that the expert's testimony would have been excluded had counsel objected. U.S. Const. Amend. 6.

45. Constitutional Law ⚿4594(1)

The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. U.S. Const. Amend. 14.

46. Constitutional Law ⚿4594(1)

For state's suppression of evidence to violate a defendant's due process rights, the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, the evidence must be suppressed by the state, either willfully or inadvertently, and prejudice must have ensued. U.S. Const. Amend. 14.

47. Criminal Law ⚿1883, 1992

The materiality standard under *Brady* and the prejudice standard under *Strickland* are essentially the same.

48. Habeas Corpus ⚿480

Pennsylvania Supreme Court's decision that federal habeas petitioner, convicted in state court of rape and murder of his wife and sentenced to death, was not prejudiced by prosecution's failure to provide petitioner's counsel with criminal or medical records of petitioner's cellmate, who testified that petitioner told him that he intended to kill his wife, was not unreasonable application of law clearly established in *Brady,* which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, and thus petitioner was not entitled to habeas relief on his *Brady* claim; given weight of physical evidence against petitioner, including evidence that victim died as a result of more than 30 stab wounds to her head, neck, and chest, it was reasonable for court to conclude that cellmate's testimony was not critical to finding that petitioner's crime met the elements of first degree murder. U.S. Const. Amend. 14.

49. Habeas Corpus ⚿486(4)

State Supreme Court's decision that trial counsel for habeas petitioner, convicted in state court of rape and murder of his wife and sentenced to death, was not deficient for failing to locate and use criminal and medical records of petitioner's cellmate, who testified that petitioner told him that he intended to kill his wife, to impeach him, was not unreasonable application of law clearly established in *Strickland*, and thus petitioner was not entitled to habeas relief on ineffective assistance of counsel claim; cellmate's testimony was not critical to the first degree murder conviction and trial counsel undermined cellmate's testimony by presenting testimony of witness who stated the petitioner's cellmate told him that he was going to use the petitioner to get out of jail. U.S. Const. Amend. 6.

50. Homicide ⚿908

Under Pennsylvania law, specific intent to kill, as well as malice, may be inferred from the use of a deadly weapon upon a vital part of the victim's body.

51. Habeas Corpus ⚿486(5)

State Supreme Court's finding that trial counsel for petitioner, convicted of rape and murder in state court and sentenced to death, was not ineffective for his alleged failure to investigate and prepare mitigation evidence, was not unreasonable application of law clearly established in *Strickland*, and thus petitioner was not entitled to federal habeas relief on his ineffective assistance of counsel claim; penalty phase hearing included testimony from petitioner's family members who spoke about petitioner's drug and relationship problems and from a doctor who examined petitioner and concluded that he had a low IQ, and there was no reasonable probability that the outcome of the sentencing would have been different had petitioner presented evidence at sentencing that he presented later at Pennsylvania Post–Conviction Relief Act (PCRA) hearing. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9541.

52. Jury ⚿24

Under Pennsylvania law, a capital defendant tried without a jury in the guilt phase retains the right to a jury in the penalty phase of the trial unless he specifically waives that right without objection by the Commonwealth. 42 Pa. Cons. Stat. Ann. § 9711(b).

53. Constitutional Law ⚿947
Habeas Corpus ⚿496
Jury ⚿29(6)

Waiver of a jury at penalty phase of capital case, by habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not knowing and voluntary under Pennsylvania law, as would entitle petitioner to federal habeas relief on claim that waiver violated his due process rights; trial judge failed to inform petitioner of unique procedures of jury sentencing, he did not explain that jury would be required to consider and weigh mitigating factor even if found by only one jury member, and he told petitioner that he was as likely to be sentenced to death by a judge as by a jury. U.S. Const. Amend. 14.

54. Constitutional Law ⚿4500

Not every error of state law affecting the outcome of a state criminal proceeding is cognizable as a due process claim; in order for a defendant to prove a violation of his federal due process rights, he must show not only that he was prejudiced by the violation of state law, but that he was prejudiced in a very particular way. U.S. Const. Amend. 14.

55. Habeas Corpus ⚿496

Habeas petitioner, convicted of rape and murder of his wife in state court and sentenced to death, was prejudiced by his waiver of jury at penalty phase of capital case, which was not knowing and voluntary under Pennsylvania law, and thus petitioner was entitled to federal habeas relief on claim that waiver violated his due process rights; it was more likely that one of 12 jurors, as opposed to one judge, could have found that evidence that petitioner was impaired at the time of the murder, was a loving father who worked hard to support his family, and that the death sentence would harm his two children, constituted catch-all mitigating circumstances or that petitioner's alleged incapacity to conform his conduct to requirements of law outweighed the aggravating factor. U.S. Const. Amend. 14; 42 Pa. Cons. Stat. Ann. §§ 9711(e)(3), 9711(e)(8).

56. Criminal Law ⚿1961

Trial counsel for petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was deficient for failing to object, at penalty phase, to testimony of daughter of victim, who was 13 at the time, about the impact her mother's death had on her, introduction of photograph of victim with daughter, and prosecutor's statements regarding impact of crime on victim's daughter, as required for petitioner to be entitled to federal habeas relief on his ineffective assistance of counsel claim; at time of murder, Pennsylvania law prohibited victim impact testimony at sentencing hearings. U.S. Const. Amend. 6.

57. Habeas Corpus ⚿486(5)

State Supreme Court's conclusion that failure, by trial counsel for habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, to object at penalty phase of capital case to testimony of victim's daughter, who was 13 years old, regarding impact of victim's death, prosecutor's introduction of photograph of victim with daughter, and prosecutor's statements that family was "emotional" and murder had a "terrible impact," was innocuous, was not unreasonable determination of the facts as would

entitle petitioner to federal habeas relief on his ineffective assistance of counsel claim; comments were brief and prosecutor did not dwell upon comments or any of the other victim impact evidence during his closing argument at penalty phase. U.S. Const. Amend. 6.

58. Habeas Corpus ⚿486(5)

State Supreme Court's conclusion that habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not prejudiced by trial counsel's failure to object to testimony of victim's daughter who was 13 year old about impact of victim's death, introduction of photograph of victim with daughter, and prosecutor's statements regarding impact of crime on victim's daughter, at penalty phase of capital case, was not unreasonable application of law established under *Strickland*, and thus petitioner was not entitled to federal habeas relief on his ineffective assistance of counsel claim; petitioner presented no evidence to rebut presumption that trial court, sitting as factfinder, could and did disregard prejudicial evidence in imposing death sentence, and trial court judge stated that only aggravating circumstance was that the defendant committed a killing while perpetrating felony. U.S. Const. Amend. 6.

59. Criminal Law ⚿1901

For counsel's advice relating to the waiver of a jury trial to rise to the level of constitutional ineffectiveness, the decision to waive a jury trial must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy. U.S. Const. Amend. 6.

60. Habeas Corpus ⚿486(2)

State Supreme Court's decision that trial counsel for federal habeas petitioner, convicted in state court of rape and murder of his wife and sentenced to death, was not ineffective for advising petitioner to waive jury trial, was not unreasonable application of clearly established federal law, and thus petitioner was not entitled to habeas relief on his ineffective assistance of counsel claim; evidence supporting the premeditation and specific intent to sustain a first degree murder conviction, including victim's stab wounds, was strong and convincing, and thus counsel's advice that petitioner should waive a jury trial, which was based on his belief that a jury would be more likely than a judge to convict, was well within the bounds of reasonable professional judgment. U.S. Const. Amend. 6.

61. Criminal Law ⚿1936

A defendant cannot show that he was prejudiced by counsel's deficient performance, as required to prevail on ineffective assistance of counsel claim, by the defendant's failure to testify, without informing a court of the facts to which he would have testified at trial. U.S. Const. Amend. 6.

62. Habeas Corpus ⚿721(2)

Habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not entitled to federal habeas relief based on his claim that his waiver of the right to testify at bench trial was invalid on account of his trial counsel's ineffectiveness; petitioner did not inform state appellate court of the facts to which he would have testified to. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9541.

63. Habeas Corpus ⚿461

Cumulative errors will be deemed harmful, as required for a petitioner to be entitled to federal habeas relief, only where they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on

cumulative errors unless he can establish actual prejudice; to satisfy this standard, a petitioner must show that the errors complained of worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.

64. Habeas Corpus ⚿461

Habeas petitioner, convicted in state court for rape and murder of his wife and sentenced to death, was not entitled to federal habeas relief on claim of cumulative errors as it related to his conviction for first degree murder; evidence presented during guilt phase of trial, including victim's stab wounds and petitioner's incriminating note left at murder scene, strongly supported finding that petitioner acted with the malice and specific intent necessary to support a first degree murder conviction.

Mary E. Hanssens, Samuel J.B. Angell, Defender Association of Philadelphia, Philadelphia, PA, for Petitioner.

Christopher J. Schmidt, Office of Attorney General, Harrisburg, PA, for Respondents.

MEMORANDUM OPINION

Goldberg, District Judge

On October 1, 1997, following a bench trial in the Chester County Court of Common Pleas, Dennis Miller (hereinafter "Petitioner") was convicted of raping and murdering his wife, and was subsequently sentenced to death. The Pennsylvania Supreme Court affirmed the conviction and sentence on direct appeal, and also affirmed the denial of Petitioner's claims for post-conviction collateral relief. Petitioner has now filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, seeking relief from his convictions and death sentence. He raises nine claims for relief, challenging the constitutionality of both his trial and sentencing hearing. For the reasons set forth below, I will deny the habeas petition as to the first degree murder conviction, but will grant habeas relief on the rape conviction and death sentence.

I. FACTUAL AND PROCEDURAL HISTORY

In its direct appeal opinion, the Pennsylvania Supreme Court set out the facts underlying Petitioner's conviction as follows:

> Miller resided with his wife, Sherry, and their two children, Barbara and Dennis, who at the time were twelve and four, at 301 Church Alley, Londongrove Township, Chester County. Miller's marital relationship was, however, strained as a consequence of drug use, as well as jealousy and physical abuse directed toward his wife. Notably, in July of 1994, Miller pled guilty to harassment and disorderly conduct arising from an altercation with Sherry, and, in April of 1995, he pled guilty to aggravated assault in connection with an incident in which he held a gun to Sherry's head. As a result of the later conviction, Miller was imprisoned for a term of nine to twenty-three months.
>
> While in prison, Miller professed a desire to kill Sherry, and on the day of his release in September 1995, he told his cellmate, "I'll be back for killing my wife." Following his release from prison, Miller resumed living with his wife and children.
>
> On November 18, 1995, Miller made arrangements with his mother, Agnes Miller, to supervise his children while he and Sherry visited a local tavern, Trib's

Waystation. At the bar, Miller and his wife drank beer and, at one point, ingested methamphetamine. Although Miller did not appear to be intoxicated, during the course of the evening he became angry whenever his wife either spoke to another man or used the telephone. [FN1: Sherry used the telephone at the bar to page Sean Smith, a man she dated during Miller's incarceration. Smith then telephoned Sherry in response to the page.] At approximately 12:30 a.m. Miller and his wife left the bar.

On Sunday, November 19, Agnes Miller was surprised when Miller and his wife did not arrive during the breakfast hour as planned to retrieve their children. As the day progressed, she became increasingly concerned. Miller's daughter, Barbara, repeatedly telephoned the family residence, but no one answered. In addition, Agnes Miller drove to Miller's home on two or more occasions. On each occasion, she observed that the house was locked, no one answered the door, and Sherry's vehicle was missing. Initially, Agnes Miller was concerned because Barbara was asthmatic and the medicine was located in Miller's home. Indeed, later that day, Barbara was taken to the hospital for treatment of an asthmatic attack. Ultimately, on Monday, November 20, Agnes Miller contacted Sherry's mother, Mary Folk, to determine whether she had heard from her daughter. As Ms. Folk had not, she filed a missing persons report with the Pennsylvania State Police.

In response to the report, the investigating trooper contacted the employers for Miller and his wife, checked with local prisons and hospitals, and interviewed family members. Both Agnes Miller and Ms. Folk related to the police that Miller and his wife had used illicit drugs and speculated that they might have traveled to Philadelphia to purchase drugs. The police also went to the Miller home, knocked on the door, and after receiving no response, checked the doors, finding them locked. When these efforts failed, the troopers asked Agnes Miller to meet them at the residence. Once there, Agnes Miller again expressed concern that something may have happened to her son and daughter-in-law because of their history of drug abuse. The troopers who met Agnes Miller were familiar with Miller's drug problem and were aware of Miller's history of spousal abuse. At Agnes Miller's request, and after receiving assurance from her that she would be responsible for the property, the troopers agreed to forcibly enter the residence.

The troopers gained access through a basement window, checked the basement area, climbed a set of stairs to the kitchen, and briefly surveyed the kitchen. Upon hearing a fan on the second story, the troopers announced themselves and proceeded upstairs. In the master bedroom, the troopers observed the contents of a purse strewn about the floor, an open suitcase, and the naked, blood-spattered body of Sherry Miller lying on a bed with her legs spread, knees bent, and with a bloody pillow over her face. After confirming that Miller was not also in the bedroom, the troopers left, secured the house, and waited until investigators arrived with a search warrant.

An autopsy of Sherry Miller revealed that she died as a result of more than thirty stab wounds to her head, neck, chest, arms, and hands. The murder weapon, a knife, was found in a trash can; the tip had been broken off and was recovered from the shoulder of Sherry Miller. In addition to determining the cause of death, the forensic pathologist

conducting the autopsy concluded that Sherry Miller had been subjected to forcible intercourse at the time of her death. This finding was premised, in part, upon the position in which her body was found, the defensive wounds on her hands and arms, the seminal material recovered from her vaginal vault, the absence of such material outside her vagina, and the absence of blood spatter in the area just above her vagina and between her legs.

From the crime scene, the police recovered Miller's bloody handprints on the pillow that was used to cover Sherry Miller's face. Furthermore, the police discovered a bloody footprint of Miller and a bandage with Miller's bloody fingerprint in the bathroom area. In addition, the police obtained a partial thumbprint from the murder weapon. [FN2: Although the print contained several characteristics consistent with Miller's right thumb, the partial print was insufficient for a positive identification.] The police noted that the box spring from the bed where Sherry Miller was found was broken, and the bed frame was bent. On the kitchen table, the police found a partially empty cup of coffee next to a vengeful note in Miller's handwriting. [FN3: In his note, Miller stated:

> Now I hope some of Sherry's whore friends learn something from this. I didn't want it to go this far, but you people don't understand what she put me through. Some know, but they don't want to say something about her. Everybody told her everything I did, but me, I had to find out for myself what she did. All of my so-called friends f--- me one way or another. I had no friends. And I wish I had more time to get even with some of you assholes. I just want to say that you, Larry Brown, I would have killed you, and you, Sean Smith, I told Donny one time before to tell you to leave her alone. I don't know if he did. And if he did, the next time somebody tells you something, you better do what they say. I would have got you too. I hope somebody in my family takes care of Barb, Dennis. I do love you all. I will see some of you in hell.]

The police continued to search for Miller, contacting his friends and family members in an effort to locate him. Although their efforts were unsuccessful, the police were able to trace Miller's flight from the crime scene to Maryland from his use of his wife's automated teller machine card, and the police found Sherry's vehicle in Maryland; the vehicle contained a baseball cap belonging to Miller and a number of ATM receipts. Miller was ultimately apprehended six months later in Florida, after a tip following a description of the unsolved crime on the America's Most Wanted television program.

Commonwealth v. Miller (Miller I), 555 Pa. 354, 724 A.2d 895, 897–98 (1999).

Trial commenced on September 29, 1997, following the denial of a motion to suppress and a waiver of Petitioner's right to a jury trial. At the conclusion of the trial, the court found Petitioner guilty of first degree murder, rape, indecent assault, recklessly endangering another person, possessing an instrument of crime, and flight to avoid apprehension. After the penalty phase, the court, sitting as fact-finder, issued a sentence of death, which was formally imposed on October 27, 1997. The court considered the aggravating circumstance of committing the murder while perpetrating a felony, the rape, and the mitigating circumstance of the Defendant's substantially impaired capacity to confirm his conduct to the requirements of law. The court found the aggravating circumstance to outweigh the mitigating circum-

stance and thus imposed the sentence of death.[1]

Petitioner filed a direct appeal to the Pennsylvania Supreme Court, challenging his conviction and sentence. That court affirmed both the verdict and the death sentence. Miller I, 724 A.2d 895. Petitioner's writ of certiorari to the Supreme Court of the United States was denied on October 4, 1999. Miller v. Pennsylvania, 528 U.S. 903, 120 S.Ct. 242, 145 L.Ed.2d 204 (1999).

On October 29, 1999 Petitioner filed a pro se petition under the Pennsylvania Post–Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541–9546. An emergency stay of execution was entered pending the PCRA proceedings and counsel was appointed. On June 7, 2000, Petitioner filed an amended PCRA petition, and thereafter filed several supplemental petitions and requests for discovery. A hearing was held from October 27–29, 2003.

On June 30, 2007, the PCRA court issued an opinion and order denying relief. Petitioner appealed this ruling to the Pennsylvania Supreme Court, and on December 28, 2009, that court affirmed the PCRA court's ruling, with Justice Thomas G. Saylor dissenting. Commonwealth v. Miller (Miller II), 605 Pa. 1, 987 A.2d 638 (2009).

On June 25, 2010, then Pennsylvania Governor Edward G. Rendell issued a death warrant, scheduling Petitioner's execution for August 19, 2010. On July 15, 2010, I issued an Order staying Petitioner's execution; granting Petitioner in forma pauperis status; appointing the Federal Community Defender Office for the Eastern District of Pennsylvania, Capital Habeas Unit; and directing Petitioner to file his habeas petition within 120 days. Petitioner filed the federal habeas petition presently under consideration on December 2, 2010, raising nine claims for review.

Petitioner claims that (1) trial counsel was ineffective for failing to effectively investigate, prepare, and present evidence that he acted in the heat of passion; (2) trial counsel was ineffective for failing to effectively investigate, prepare, and present testimony to rebut the Commonwealth's allegations that the victim was raped; (3) trial counsel was ineffective for failing to object to the testimony of Dr. Richard Callery about the occurrence of rape because this opinion fell below the required standard of proof, and for failing to raise this issue on appeal; (4) the Commonwealth withheld favorable and exculpatory evidence relating to Commonwealth witness Michael Torres in violation of Brady v. Maryland, and trial counsel was ineffective for failing to properly investigate, develop, and present evidence discrediting this witness; (5) counsel was ineffective at capital sentencing for failing to conduct a meaningful investigation for mitigation evidence; (6) Petitioner's waiver of a jury at sentencing was invalid, and counsel was ineffective for failing to object to the waiver and for failing to raise this issue on appeal; (7) the prosecutor introduced inadmissible victim impact evidence in violation of Petitioner's constitutional rights, and counsel was ineffective for failing to raise and litigate this claim; (8) Petitioner's waiver of a jury trial and to testify in his own defense were invalid because they were the product of ineffective assistance of counsel; and (9) the cumulative effect of the errors in this case entitles Petitioner to habeas relief.

1. The trial court also imposed a consecutive sentence of ten to twenty years for the rape conviction.

II. EXHAUSTION

A. Legal Standard for the Exhaustion of State Remedies and Procedural Default

[1, 2] Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prerequisite to the issuance of a writ of habeas corpus on behalf of a person in state custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State."[2] 28 U.S.C. § 2254(b)(1)(A). In order to satisfy this requirement, a petitioner must have "fairly presented" the merits of his federal claims during "one complete round of the established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). A federal claim is fairly presented to the state courts where the petitioner has raised "the same factual and legal basis for the claim to the state courts." Nara v. Frank, 488 F.3d 187, 198–99 (3d Cir. 2007).

[3] If, however, a petitioner fairly presents a claim to the state courts, but it was denied on a state law ground that is "independent of the federal question and adequate to support the judgment," the claim is procedurally defaulted, and is not subject to federal review. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This includes instances where a state court refuses to hear the petitioner's federal claim on the grounds that the petitioner violated a state procedural rule. Gray v. Netherland, 518 U.S. 152, 162, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); Coleman, 501 U.S. at 750, 111 S.Ct. 2546; Taylor, 504 F.3d at 427. In this regard, the state court must actually rely on the procedural rule as an independent basis for disposing of the claim. Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Where the last state court's decision "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law," no procedural bar will apply to the claim. Coleman, 501 U.S. at 735, 111 S.Ct. 2546; see also Campbell v. Burris, 515 F.3d 172, 177–78 (3d Cir. 2008); Johnson v. Pinchak, 392 F.3d 551, 557 (3d Cir. 2004).

[4, 5] Nevertheless, the violation of a state procedural rule does not automatically prevent federal review of the habeas claim. The state procedural rule must have been "firmly established and regularly followed" at the time for the claim to be defaulted. Taylor, 504 F.3d at 427 (quoting Ford v. Georgia, 498 U.S. 411, 423–24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)). Additionally, a federal habeas court is "not bound to enforce a state procedural rule when the state itself has not done so," even if the procedural rule could have properly been applied. Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004) (quoting Smith v. Freeman, 892 F.2d 331, 337 (3d Cir. 1989)); see also Cone v. Bell, 556 U.S. 449, 468, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (finding that federal courts should not review a state court's decision not to apply its own procedural bar).

[6] In some instances, it may be difficult to determine whether the state court resolved a claim on the merits or pursuant to a procedural bar. See Coleman, 501 U.S. at 732, 111 S.Ct. 2546 (noting that state court decisions will often "discuss federal questions at length and mention a state law basis for decision only briefly"). To

2. AEDPA additionally imposes a one-year period of limitations for filing an application for the issuance of a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Here, Respondents agree that the habeas petition was timely filed.

remedy this problem, the Supreme Court developed the "plain statement" test. Michigan v. Long, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Under the plain statement test, when the state court opinion appears to consider the application of a federal law, federal courts should assume that the case was determined on the merits absent a plain statement by the state court that its decisions relied on an independent and adequate state rule. Id.; see also Harris v. Reed, 489 U.S. 255, 262–63, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (applying the plain statement rule to habeas review).

[7] Where a claim is procedurally defaulted, it cannot provide a basis for federal habeas relief unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S.Ct. 2546.

B. Have Any of Petitioner's Claims Been Procedurally Defaulted?

[8] Respondents assert that claims four, six, seven, and eight of Petitioner's habeas petition have been procedurally defaulted because Petitioner did not raise them at trial or on direct appeal.[3] (Resp. at 17–22.) I will discuss the issue of default regarding these claims in turn.

1. Claim IV: Did the Commonwealth Violate Brady v. Maryland by Failing to Turn Over Impeachment Evidence, and Was Counsel Ineffective for Failing to Discover and Present Evidence to Discredit This Witness?

Petitioner's fourth claim is that the Commonwealth violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to turn over the criminal and medical records of his former cellmate, Michael Torres, who testified that Petitioner told him that he intended to kill his wife. These records allegedly contained evidence of mental illness and hallucinations, which, according to Petitioner, could have been used to discredit Torres's testimony. (Br. at 45–49.) Petitioner relatedly claims that defense counsel was ineffective for failing to discover Torres's criminal history and mental illness. (Br. at 56.)

On PCRA appeal, the Pennsylvania Supreme Court denied this ineffectiveness

3. Additionally, in two footnotes which are embedded in their discussion of the merits of Petitioner's claims, Respondents argue that the PCRA court should not have considered the ineffectiveness of counsel claims relating to the rape conviction (claims two and three) because they were previously litigated before the Pennsylvania Supreme Court, that court having considered, on direct appeal, the sufficiency of the evidence for the rape conviction. (Resp. at 36 n.1, 41 n.3.) Insofar as Respondents assert that these claims have been procedurally defaulted, their argument is without merit for two reasons. First, complete consideration of these issues in state court cannot cause Petitioner's claims to be defaulted. To the contrary, evidence that a claim "has already been given full consideration by the state courts [makes it] ripe for federal adjudication." Cone v. Bell, 556 U.S. 449, 467, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (emphasis in original) (citing 28 U.S.C. § 2254(b)(1)(A) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remedies available in the courts of the State")). Second, even if the prior litigation could act as a procedural bar, the Pennsylvania Supreme Court removed that bar by choosing to hear Petitioner's claims on PCRA appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available."). As such, the prior consideration of claims two and three do not prevent federal review.

claim because defense counsel had "no reason to believe" that Torres suffered from mental health problems and because counsel "effectively undermined" Torres's testimony at trial by presenting his own witness. Miller II, 987 A.2d at 654–55. The court further found that there was no prejudice because Petitioner would have been convicted even if trial counsel had acquired the information about Torres. Id. Additionally, the court found Petitioner's Brady claim to be "meritless" because the government agency in control of the documents in question was not involved in Petitioner's prosecution. Id. at 656.

[9, 10] The Pennsylvania Supreme Court's opinion on this claim "rest[s] primarily on federal law" because it relied on the application of the Brady case and the ineffectiveness of counsel standard. Coleman, 501 U.S. at 735, 111 S.Ct. 2546. Moreover, the court made no mention of Petitioner's failure to object at trial or raise this issue on direct appeal. See Miller II, 987 A.2d at 654–66 (discussing Petitioner's Brady claim, but making no reference to a procedural bar). Since there is no "plain statement" that the state court resolved this claim on the basis of an independent procedural rule, there is no procedural bar, and consequently, I will consider this claim on the merits. Harris, 489 U.S. at 262–63, 109 S.Ct. 1038.

2. Claim VI: Was Petitioner's Waiver of a Jury for Sentencing Invalid, and Was Counsel Ineffective for Failing to Object to the Trial Court's Colloquy and to Raise This Issue on Appeal?

Petitioner's sixth claim is that his waiver of the right to a jury at sentencing was invalid because the oral and written colloquies failed to inform him of the relevant burdens of proof for aggravating and mitigating factors or about the role of a jury in a capital sentencing. Petitioner relatedly argues that trial counsel was ineffective for failing to object to the colloquy and raise this issue on appeal. (Br. at 92–93.)

[11] On PCRA appeal, the Pennsylvania Supreme Court considered the ineffectiveness of counsel claim on the merits, finding that Petitioner made no showing that he would not have waived his right to a jury at sentencing "but for counsel's ineffectiveness." Miller II, 987 A.2d at 661. This determination "rest[s] primarily on federal law" because it relied on the actual application of the ineffectiveness of counsel standard. Coleman, 501 U.S. at 735, 111 S.Ct. 2546. Because there is no "plain statement" that the state court resolved this claim on the basis of an independent procedural rule, there is no procedural bar to addressing this claim on the merits. Harris, 489 U.S. at 262–63, 109 S.Ct. 1038.

[12] The Pennsylvania Supreme Court did, however, apply a procedural bar in dismissing the underlying constitutional claim that the jury waiver colloquy was deficient. The court stated that "[n]o objection was made as to the inadequacy of the colloquies at any time nor was the issue raised on appeal." The court thus determined that the claim was "waived" because it could have been previously raised. Miller II, 987 A.2d at 661. By explicitly stating that the substantive constitutional claim was waived, the court made a "plain statement" that this claim was procedurally barred. Harris, 489 U.S. at 262–63, 109 S.Ct. 1038.

[13] As noted above, a disposition pursuant to a state procedural rule prevents federal review only where the procedural rule in question is "firmly established, readily ascertainable, and regularly followed." Szuchon v. Lehman, 273 F.3d 299, 325 (3d Cir. 2001); see also Ford v. Georgia, 498 U.S. 411, 424–25, 111 S.Ct. 850,

112 L.Ed.2d 935 (1991) (finding a rule not announced at the time of the default is not firmly established). The procedural rule must be firmly established and regularly followed "as of the date the default occurred, not the date the state court relied on it, because a petitioner is entitled to notice of how to present a claim in state court." Fahy v. Horn, 516 F.3d 169, 188 (3d Cir. 2008) (citing Taylor, 504 F.3d at 428).

Historically, Pennsylvania applied a "relaxed waiver rule" which allowed petitioners in capital cases to bring claims on the merits which were not raised in the lower courts. See Commonwealth v. McKenna, 476 Pa. 428, 439, 383 A.2d 174 (1978); Fahy, 516 F.3d at 188; Taylor, 504 F.3d at 428. Citing concerns of judicial efficiency and finality, the Pennsylvania Supreme Court stopped applying the relaxed waiver rule to capital cases in 1998. Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693, 699–701 (1998). As a result, Respondents contend that the relaxed waiver rule does not apply to Petitioner's claim that the jury waiver colloquy was defective. (Resp. at 17–21.) Petitioner counters that his direct appeal went before the Pennsylvania Supreme Court on November 18, 1998, five days before the court announced its rejection of the relaxed waiver rule in Albrecht, and, accordingly, the change in waiver rule was not firmly established and regularly followed at the time of the supposed waiver. (Reply at 5–6.)

[14] Federal courts on habeas review have encountered Pennsylvania's change in waiver rules before, and have consistently found that claims argued before the Albrecht decision are not procedurally barred by the change in waiver rules. See, e.g., Morris v. Beard, 633 F.3d 185,190–91, 195–96 (3d Cir. 2011) (applying the relaxed waiver rule to statute of limitations for PCRA appeals because the default occurred in 1996); Laird v. Horn, 414 F.3d 419, 425 (3d Cir. 2005) (affirming the district court's decision that the petitioner's failure to raise his claim on direct appeal did not procedurally bar his federal claim because Pennsylvania used the relaxed waiver rule at the time he filed the appeal); Bronshtein v. Horn, 404 F.3d 700, 709 (3d Cir. 2005) (holding that the relaxed waiver rule applied to procedural default occurring October 20, 1998); Jermyn v. Horn, 266 F.3d 257, 279 (3d Cir. 2001) (finding no procedural default despite the state court finding that the claim was waived because, at the time of default, the Pennsylvania Supreme Court routinely reached the merits on such claims in capital cases). Here, the procedural default occurred when trial counsel failed to object to the jury waiver colloquy on October 2, 1997, and when he failed to raise the issue on direct appeal on August 7, 1998. See Fahy, 516 F.3d at 188. Because these events occurred before Pennsylvania's waiver rule was firmly established and regularly followed, the application of the waiver rule is not an adequate ground to prevent federal review. Laird, 414 F.3d at 425. Consequently, Petitioner's claim that his sentencing colloquy was constitutionally deficient is not procedurally defaulted, and I will examine this claim on the merits. Id.

3. Claim VII: Did the Prosecutor Improperly Offer Victim Impact Evidence at Sentencing, and Was Counsel Ineffective for Failing to Object and Raise This Issue on Appeal?

Petitioner's seventh claim is that the prosecutor committed misconduct in offering inadmissible victim impact testimony during the penalty phase. There, Petitioner's daughter, Barbara Miller, held up a picture of her deceased mother and testi-

fied how her life had gone "downhill" after her death. The prosecutor urged the court to consider the effect of Petitioner's crime on the victim's family after having stated that other members of the victim's family declined to testify because it would be "too emotional." In the same claim, Petitioner relatedly asserts that counsel was ineffective for not objecting at the time or raising the issue on direct appeal. (Br. at 101–02.)

[15] On PCRA appeal, the Pennsylvania Supreme Court dismissed the ineffectiveness claim because Petitioner failed to show prejudice because the prosecutor's comments were "innocuous" and the PCRA court had found that the victim impact evidence had no effect on the verdict ultimately rendered. Miller II, 987 A.2d at 669–70. This determination "rests primarily on federal law" because the court performed an ineffectiveness analysis. Coleman, 501 U.S. at 735, 111 S.Ct. 2546. Since there is no counteracting "plain statement" that the state court resolved this claim on the basis of an independent procedural rule, there is no procedural bar. Harris, 489 U.S. at 262–63, 109 S.Ct. 1038; see Miller II, 987 A.2d at 669–70 (discussing petitioner's victim impact claim, but making no reference to a procedural bar).

While the Pennsylvania Supreme Court clearly reached the merits of this ineffectiveness of counsel claim, Respondents argue that the underlying substantive claim of prosecutorial misconduct is procedurally defaulted because Petitioner failed to raise it on direct appeal. (Resp. at 62.) Respondents are correct that the Pennsylvania Supreme Court did not address the underlying claim of prosecutorial misconduct. See Miller II, 987 A.2d at 669–70 (determining only that counsel's failure to object did not prejudice Petitioner). This stands in contrast to the court's handling of claim six, where it explicitly noted a distinction between counsel's allegedly ineffective failure to object to a waiver colloquy and the underlying claim that the colloquy was deficient. See id. at 661 (finding that "for purposes of the PCRA, the claim was waived because it could have been raised previously" and "[c]onsequently, in order to obtain relief on this claim Appellant was obliged to establish that trial counsel was ineffective").

[16] The Pennsylvania Supreme Court's failure to address the substance of claim seven does not render it procedurally defaulted. Indeed, "[i]t is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." Castille v. Peoples, 489 U.S. 346, 350, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) (quoting Smith v. Digmon, 434 U.S. 332, 333, 98 S.Ct. 597, 54 L.Ed.2d 582 (1978)). Petitioner's claims need only be "presented to the state courts; they need not have been considered or discussed by those courts." Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984) (emphasis in original).

[17] Additionally, mere silence on this issue cannot imply a procedural bar. Ylst, 501 U.S. at 805, 111 S.Ct. 2590. Where the highest court is silent on whether the disposition of an issue rests on the merits or an independent procedural rule, courts "look through" the highest court's ruling to the decision of the lower court. Id. Where the upper court fails to address an issue, the "look through" doctrine assumes agreement with the lower court's disposition of the claim. Id. at 804, 111 S.Ct. 2590.

Here, the PCRA trial court clearly ruled on the substantive claim of prosecutorial misconduct. Commonwealth v. Miller, No.

61–96, 2007 WL 7299000, at *36–38 (Pa. Ct. Com. Pl. July 2, 2007) (finding that "there was nothing improper about" asking the witness to show a picture to the court, and comments made during closing arguments "were neither improper nor prejudicial"). In fact, the lower court never once mentioned ineffective assistance of counsel when discussing the alleged misconduct during sentencing.

[18] Nonetheless, there is some ambiguity as to whether Petitioner presented the substantive prosecutorial misconduct claim to the Pennsylvania Supreme Court on PCRA appeal. (Pet'r's Supreme Court Br. at 90–92.) On one hand, Petitioner's brief dedicates two pages to discussing the ways in which the prosecution's victim impact evidence violated applicable law, and a mere two sentences to addressing defense counsel's alleged failures. (Id.) On the other hand, Petitioner stated, in reference to Commonwealth v. McNeil, 679 A.2d 1253, 1259–60, that "[t]here, as here, the issue was whether counsel was ineffective for failing to object to the victim impact evidence." (Pet'r's Supreme Court Br. at 92 (emphasis added.)) Ordinarily, issues are not fairly presented if the court must read beyond Petitioner's brief, petition, or similar submission to discover a federal claim. Baldwin v. Reese, 541 U.S. 27, 32, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004).

[19–21] Ultimately, I will treat the claim of prosecutorial misconduct as presented because the Pennsylvania Supreme Court effectively resolved this substantive issue on the merits through their analysis of the ineffectiveness claim. Prosecutorial misconduct claims require a showing that the prosecution "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." Moore v. Morton, 255 F.3d 95, 105 (3d Cir. 2001). Much like an ineffectiveness claim, courts must consider the extent to which the prosecution's conduct prejudiced Petitioner. Id. at 107. In considering the ineffectiveness claim, the Pennsylvania Supreme Court determined there was no prejudice resulting from the prosecutor's actions because the prosecutor's comments were "innocuous," and because the lower PCRA court did not consider the victim impact evidence in reaching its verdict. Miller II, 987 A.2d at 669–70. In its finding of no prejudice, the court effectively determined the prosecutorial misconduct claim as well. Moore, 255 F.3d at 105. Because the underlying purpose of the procedural default doctrine is to allow state courts the opportunity to address alleged violations of federal law, the basic purpose of the procedural default doctrine is not undermined by federal review of this claim. Coleman, 501 U.S. at 731–32, 111 S.Ct. 2546.

4. Claim VIII: Were Petitioner's Waivers of Both the Right to a Jury Trial and to Testify in His Defense at the Guilt Phase Invalid Because They Were the Result of Unreasonable Advice from Counsel?

[22] Petitioner's eighth claim is that defense counsel's failure to investigate and develop his case made Petitioner's waiver of the right to a jury trial and to testify in his own defense the product of ineffective assistance of counsel. (Br. at 109.) The Pennsylvania Supreme Court denied this ineffectiveness claim for two reasons. First, the court found that trial counsel's investigation and preparation were adequate. Miller II, 987 A.2d at 660. Second, the court concluded that Petitioner failed to show prejudice because he made no showing that he would not have waived these rights "but for counsel's alleged ineffectiveness." Id. This effectiveness determination "rests primarily on federal law" because the court applied the ineffectiveness standard and found two separate

flaws with Petitioner's claim. Coleman, 501 U.S. at 735, 111 S.Ct. 2546. Since there is no "plain statement" that the state court resolved this claim on the basis of an independent procedural rule, there is no procedural bar. Harris, 489 U.S. at 262–63, 109 S.Ct. 1038; see Miller II, 987 A.2d at 659–61 (discussing Petitioner's waivers at trial, but making no reference to a procedural bar to these claims).

Respondents do not appear to dispute that there is no procedural bar to this claim of ineffectiveness, but argue that "the substantive issue of whether Miller lawfully waived his right to a jury trial and his right to testify is procedurally defaulted." (Resp. at 65.) In his reply, Petitioner clarifies that this claim is "only raised as an ineffective assistance of counsel claim," and he did not intend to bring the substantive claim of whether the waivers were constitutionally defective. (Reply at 48.) Thus, Respondents' argument as to the procedural default of the underlying substantive claim is irrelevant, and I will address only the ineffectiveness claim on the merits.

III. THE MERITS OF PETITIONER'S CLAIMS

I now turn to the merits of Petitioner's claims. I will first set out the legal standard for the issuance of the writ of habeas corpus, and the Strickland standard, which applies to Petitioner's various claims of counsel's ineffectiveness.

A. Legal Standard for Issuance of the Writ of Habeas Corpus

[23] Where the federal court reviews a claim that has been adjudicated on the merits by the state court, § 2254(d) permits the granting of a petition for habeas corpus only if (1) the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2); see Parker v. Matthews, 567 U.S. 37, 132 S.Ct. 2148, 2151–53, 183 L.Ed.2d 32 (2012) (reiterating that the standard under § 2254(d)(1) is highly deferential to state court decisions and overturning the Sixth Circuit's decision granting habeas relief because the state courts decision denying relief was not objectively unreasonable). Factual determinations made by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Palmer v. Hendricks, 592 F.3d 386, 392 (3d Cir. 2010) (citing 28 U.S.C. § 2254(e)(1)); Simmons v. Beard, 590 F.3d 223, 231 (3d Cir. 2009) (same).

[24, 25] Interpreting this statutory language, the Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413, 120 S.Ct. 1495. The "unreasonable application" inquiry thus requires the habeas court to "ask whether the state court's application of clearly es-

tablished federal law was objectively unreasonable." Id. at 409, 120 S.Ct. 1495. As the United States Court of Appeals for the Third Circuit stressed, "[A]n unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts v. Vaughn, 228 F.3d 178, 196 (3d Cir. 2000) (citing Williams, 529 U.S. at 411, 120 S.Ct. 1495).

[26] Where the state court decision does not constitute an "adjudication on the merits," but the petitioner's claim is ripe for habeas review, § 2254 does not apply and instead the federal court applies the pre–AEDPA standard, reviewing pure legal questions and mixed question of law and fact de novo. Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001). The state court's factual determinations, however, are still presumed correct pursuant to § 2254(e)(1).

B. The Strickland Standard

[27, 28] Several of Petitioner's claims implicate alleged ineffective assistance of counsel as a basis for a claim of relief under the Sixth Amendment. My discussion of these claims is thus guided by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). According to Strickland, counsel is presumed to have acted effectively unless the petitioner can demonstrate both that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686–88, 693–94, 104 S.Ct. 2052. In assessing whether counsel performed deficiently, the court must " 'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.' " Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 779, 178 L.Ed.2d 624 (2011) (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052). Nonetheless, because the "ultimate focus of the inquiry [is] on the fundamental fairness of the proceeding whose result is being challenged . . . a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 696–97, 104 S.Ct. 2052. In fact, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." Id. at 697, 104 S.Ct. 2052.

C. Petitioner's Claims

1. Claim I: Was Petitioner's Counsel Ineffective for Failing to Effectively Investigate, Prepare, and Present Evidence that the Petitioner Acted in the Heat of Passion?

The heat of passion defense reduces a homicide from first-degree murder to voluntary manslaughter when, "at the time of the killing, [the defendant] is acting under a sudden and intense passion resulting from serious provocation by . . . the individual killed." 18 Pa. C.S. § 2503(a). While trial counsel relied on this defense at trial, Petitioner contends that counsel was ineffective for failing to investigate, prepare, and present additional evidence that he acted in the heat of passion. Petitioner faults counsel for failing to call Dr. Gerald Cooke, a psychologist, who testified at the PCRA hearing that he would have opined that "Petitioner killed his wife 'consistent with explosive rage.' " Petitioner further faults counsel for failing "to obtain records showing that two days before the victim was killed, Petitioner was served with an

Order of child support, even though they were living together," and for failing to interview family members who had information that was helpful to this defense. (Br. at 7–27.)

a. Trial Evidence

In his closing argument, Petitioner's trial counsel argued "that this was a crime of rage[,] that there was no malice in Dennis Miller towards Sherry Miller [and that] [t]he killing was done as a result of an uncontrollable act." Counsel urged the judge to "look to the subtle testimony here a little bit and the testimony that came out about their relationship, the testimony that came out about what occurred at Trib's Waystation [the bar where Petitioner and the victim were] that night and how one witness told you that Dennis seemed to snap into a rage and then he was able to calm himself down." (N.T. 10/01/97 at 267–68.)

The testimony referred to above about Petitioner's relationship with the victim came from Agnes Miller, Petitioner's mother. She testified that her son's relationship with the victim was rocky and riddled with substance abuse, and that while they "ha[d] a good marriage [ ] at the start," the marriage deteriorated because "both of them had a problem with drugs . . . and drinking." (N.T. 09/29/97 at 30.) Additionally, one of the state troopers who investigated the missing person's report, and ultimately found the victim's body, testified that he was familiar with Petitioner's history of drug use and that during the missing person's investigation, the victim's mother and Petitioner's sister had expressed concerns to him about the couple's drug use. (Id. at 43–44.)

The witness who discussed how Petitioner snapped into a rage at the bar on the night of the murder was the bartender, Lisa Folk. Ms. Folk testified that at around 11 p.m., when another man at the bar was talking to the victim, "[Petitioner] just got a real angry, evil look on his face [ ]. Yelled across the bar, I don't need this shit . . . He was like in a rage." She continued, stating that Petitioner then went over to talk to the victim, "they like worked it out," and Petitioner calmed down. Later in the night, at around midnight, the victim asked Ms. Folk to beep Sean Smith (who was mentioned in the note that Petitioner left at the scene), and the victim then spoke to Smith when he called the bar back. Shortly thereafter, the victim asked Ms. Folk if she could go into the bathroom with Petitioner so that they could do a "line" of methamphetamine together. Ms. Folk saw them go into the bathroom, and then she saw them leave the bar sometime after 12:30 a.m. (N.T. 09/30/97 at 213–19.)

b. The PCRA Hearing

i. Expert Testimony

At the PCRA hearing, Petitioner presented the testimony of Dr. Gerald Cooke, a clinical and forensic psychologist who evaluated Petitioner before trial and testified at the penalty phase hearing, and Dr. Julia Kessel, a psychiatrist who examined Petitioner before the PCRA hearing. At the penalty phase hearing, Dr. Cooke testified that Petitioner told him that, on the night of the murder, after he and the victim had sex, "he went into a rage and grabbed a knife that was by the side of the bed" after the victim told him "that she wanted him to move out the next day and was moving her boyfriend Sean in." Although Dr. Cooke had been aware of Petitioner's drug use, and further testified at the penalty phase hearing that Petitioner "is an angry man" who "can go into rages particularly when he's disinhibited by alcohol and drugs," trial counsel did not call him to testify in support of the heat of passion defense during the guilt phase of the trial. (N.T. 10/02/97 at 293–302.)

At the PCRA hearing, Dr. Cooke testified about additional evidence and information that he had learned after trial and sentencing. Dr. Cooke relayed that he learned the victim had a support order issued against Petitioner two days before the murder, and that Barbara Miller, the daughter of Petitioner and the victim, believed that a knife was kept in the night stand in the room where the homicide occurred. Dr. Cooke also testified that he had not been aware that, under Pennsylvania law, a series of cumulative events would be relevant to whether there was sufficient provocation. With the benefit of this additional information, Dr. Cooke stated that, "[i]n [his] opinion, [Petitioner] was in an explosive rage . . . [and] would have met the heat of passion defense." (N.T. 10/23/03 at 445.) Dr. Cooke elaborated as follows:

> There are a number of factors. It starts with the diagnosis itself. And that is, we have somebody who is, by virtue of his personality makeup, can be easily provoked to become angry, to see himself as being slighted, mistreated, rejected and to react with an intent to rage to that kind of perception.
>
> Secondly, assuming that there is substantial evidence of drug and alcohol use during the period prior to that, that the drugs and alcohol would have contributed by disinhibiting him, as I explained before. Thirdly, I now know about the child support order, which I was not aware of before. Fourth, would have been Sherry Miller's affair with Sean Smith and the telephone calls to him that night, and I was aware of those. Fifth would have been her demand to move out and Sean move in as they lay there in bed, and I was aware of that. But, finally, Barbara Miller's statement that her mother kept a knife in the bedroom where she was stabbed, and I was not aware of that piece of information and now that plays a factor as well.

(Id. at 445–46.) At the PCRA hearing, Dr. Kessel testified similarly to Dr. Cooke, stating:

> My opinion is that at the time that [Petitioner stabbed the victim], he had experienced a sequential number of stressors in their relationship that were provocative. And on the evening that this occurred, he experienced, in response to discussion and a series of events, a sudden and intense rage that cause him to lose control of his behavior, to put it simply, on that evening.

(Id. at 544.) Dr. Kessel explained that she based this opinion on a variety of factors. She testified that between 1991 and 1995, the victim was involved with two other men, which "caused [Petitioner] to feel very betrayed and hurt, and yet also did not interrupt the cycle that had become their pattern, which was to break up, get back together, break up, get back together, and become violent in between." She testified that Petitioner "became increasingly violent[,] . . . spen[ding] 10 months in jail for violating a protection from abuse order," and that after he got out of jail (two months before the murder) the couple's drug use escalated. Though there was still a protection from abuse order, the couple lived together, and on the week prior to the murder Petitioner learned that the electric and phone bill in their home was in another man's name, which only escalated his "sense of betrayal, his anger, his feeling of hurt." (Id. at 544–46.)

Dr. Kessel testified that on the morning of the murder, Petitioner "had been served with [child support] papers suggesting that [the victim] actually was going to ask him to leave." At the bar, on the evening of the murder, the victim talked on the phone and in person with other men, which made Petitioner "very angry, suspicious, and

jealous." After the couple went home, according to the account which Petitioner gave to Dr. Kessel, he and the victim "danced and had sex, but as they went upstairs to go to bed [ ] he began to accuse her of who was this man that she was talking to at the bar, and was she having a relationship with him, and who was on the phone." Dr. Kessel continued that "they began to argue about the sincerity of her wanting to come back to him, and his feeling distrustful of her. And in the escalation of that discussion she acknowledged that she had been on the phone with this man." Dr. Kessel concluded that "those are some of the events that precipitated this sudden and intense rage." (Id. at 546–47.)

ii. Family Testimony

Petitioner presented the testimony of several family members at the PCRA hearing, including his mother, Agnes Miller (who also testified during trial), one of his sisters, Brenda Miller, the victim's sister, Helen Pennington, and his daughter, Barbara Miller. Agnes Miller testified that her son and the victim used drugs, fought a lot, and broke up several times. After he was released from jail, about two months before the murder, Petitioner came to live with her. Petitioner then moved back in with the victim, but soon returned to his mother's house. Petitioner's mother further testified that, shortly before the murder, the victim came and begged Petitioner to come back with her. Petitioner then told his mother that he loved the victim and was getting back with her. (N.T. 10/28/03 at 364–66.)

Helen Pennington, the victim's sister, testified that she took her sister to get an abortion. The victim told Ms. Pennington that Petitioner was not the father, but rather Larry Brown. (Id. at 513, 517.) (Larry Brown's name was also mentioned in the note which Petitioner left at the scene of the crime.) In this regard, Petitioner's sister, Brenda Miller, testified that in 1993 or 1994 Petitioner told her that the victim had an abortion of another man's child, and that she could see, at the time, that Petitioner was upset by this. (N.T. 10/29/03 at 428.)

Barbara Miller, the couple's daughter, testified that while her early childhood was a "normal, nice life," her parents started having problems as she got older. She testified that they would fight about money and drugs, and that her parents broke up a few times. She stated that while her father was in jail before the murder, another man, Sean Smith, stayed at their house. In addition, Barbara testified that two knives were kept in the bedroom where her mother was killed, and that the bed was already broken before the murder. Barbara stated that she would have been willing to testify about this at trial. (N.T. 10/28/03 at 378–89.)

iii. The Pennsylvania Supreme Court Opinion

On PCRA appeal, the Pennsylvania Supreme Court addressed whether counsel was ineffective for failing to investigate, prepare, and present evidence that Petitioner acted in the heat of passion. In so doing, the court focused primarily on the prejudice prong of Strickland, beginning its analysis by laying out the legal framework for the heat of passion defense.

> A person is guilty of "heat of passion" voluntary manslaughter "if at the time of the killing [he or she] reacted under a sudden and intense passion resulting from serious provocation by the victim." Commonwealth v. Ragan, [ ] 560 Pa. 106, 743 A.2d 390, 396 (1999). " 'Heat of passion' includes emotions such as anger, rage, sudden resentment or terror which renders the mind incapable of reason." Commonwealth v. Mason, [ ] 559 Pa. 500, 741 A.2d 708, 713 (1999). An objective standard is applied to determine whether the provocation was sufficient to sup-

> port the defense of "heat of passion" voluntary manslaughter. Commonwealth v. Laich, [ ] 566 Pa. 19, 777 A.2d 1057, 1066 (2001). "The ultimate test for adequate provocation remains whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection." Commonwealth v. Thornton, [ ] 494 Pa. 260, 431 A.2d 248, 252 (1981).

Miller II, 987 A.2d at 649–50.

The court then noted that the PCRA court had stressed that "the refusal of Appellant to testify handicapped trial counsel because he was unable, without Appellant's testimony, to establish Appellant's state of mind at the time of the killing." Id. at 650. The Supreme Court concurred with the assessment of the PCRA court, stating that, without Appellant's testimony, "the additional evidence fails to establish that the killing resulted from a sudden and intense passion resulting from serious provocation caused by the victim contemporaneously with the killing." Id. The court elaborated on this point:

> [W]ere we to consider the additional evidence and testimony Appellant claims trial counsel was ineffective for not presenting at trial, which concerns his wife's alleged infidelity and their stormy relationship, it is clear that the evidence still was insufficient to conclude that the killing was committed in the heat of passion as the record is devoid of evidence that at the time the victim was murdered, Appellant was acting under a sudden or intense passion brought on by the victim. While Appellant claims that the victim's apparent infidelity and flirtatiousness, when coupled with his own mental state, were sufficient to cause him to act with sudden and intense passion, we note Appellant was well aware of his wife's proclivities prior to the day of the killing and trial counsel introduced evidence establishing this. Thus, the evidence Appellant claims should have been introduced on this issue was merely cumulative of evidence already presented at trial. Moreover, the evidence shows that although Appellant and his wife argued while together at the bar, he calmed down and appeared to be in control of his faculties following the argument. N.T. 9/30/97, 213, 220. Also the note Appellant left at the scene evinces that he had not acted in the "heat of passion" but rather in a calculating manner.

Id. at 650–51. In light of having concluded that there was an "absence of evidence about what precipitated the killing," the court found "the testimony of the expert witnesses was irrelevant," in that there must be evidence of provocation before inquiring into the defendant's state of mind at the time of killing. Id. at 652 (citing Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286 (1972)).

c. Petitioner's Arguments

Petitioner urges that his trial counsel was ineffective on the heat of passion issue and singles out three aspects of the Pennsylvania Supreme Court's PCRA appeal opinion as being an unreasonable determination of the facts.[4] First, he points to trial counsel's alleged deficient investigation regarding heat of passion. He stresses that the court unreasonably ignored evidence that, on the evening of the homicide, the victim demanded that Petitioner move out since her boyfriend Sean Smith was moving in with her. (Br. at 20.)

[29] As the Supreme Court noted, Petitioner did not testify at trial, nor did he testify at the PCRA hearing. Instead, evi-

4. For sake of clarity, I will address Petitioner's arguments in a different order from which they were presented in his memorandum.

dence that the victim demanded on the night of the murder that Petitioner move out was presented at the PCRA hearing through the testimony of Dr. Cooke and Dr. Kessel, who testified that Petitioner told them of the victim's demand in their out-of-court evaluations of him. This information was important to Dr. Cooke and Dr. Kessel because it informed their opinions that Petitioner killed the victim while in a "rage." Nevertheless, in the absence of Petitioner's testimony, it was entirely reasonable for the Pennsylvania Supreme Court to choose not to rely on the experts' secondhand, and after-the-fact, account of what happened before the murder. This argument therefore fails.

[30] Second, Petitioner contends that, because "hardly any evidence of provocation was presented" at trial, the "Supreme Court's assertion that the post-conviction evidence was 'cumulative' of what was presented at trial was unreasonable." (Br. at 21.) As noted above, Petitioner's mother testified during the trial that the relationship between Petitioner and the victim was riddled with instability and substance abuse, and Lisa Folk, the bartender, testified about Petitioner's "rage" and the couple's drug use at the bar on the evening of the murder. At the PCRA hearing, Petitioner's mother testified about the couple's drug use and how they broke up and got back together prior to the murder. Petitioner's daughter testified that another man was living at the house when Petitioner was in jail, and that two knives were kept in the bedroom where the victim was killed. Between the testimony of Petitioner's sister and the victim's sister there was evidence presented that the victim had an abortion in 1993 or 1994, that another man was the father, and that Petitioner knew about the pregnancy and was upset by it. The expert witnesses concluded that, in light of this and other information, Petitioner killed the victim while in an "explosive" or "sudden and intense rage."

While I agree that the post-conviction evidence from the family members and Dr. Cooke and Dr. Kessel was more expansive than that which was presented at trial, I do not find the Pennsylvania Supreme Court's characterization of this evidence as "cumulative" to be unreasonable. The post-conviction evidence simply elaborated upon the trial evidence of the couple's unstable relationship and drug use, and did not shed any light on what occurred immediately before the murder. Significantly, the post-conviction evidence did not include Petitioner's testimony, nor did it include the testimony of any witnesses who saw Petitioner and the victim after they left the bar. Because the Supreme Court's determination of the facts here was reasonable, this argument also fails.

[31] Petitioner's third argument is closely related his second argument. He asserts that the court unreasonably concluded that "evidence showing a history of minor disputes and allegations of past infidelity has not been held to be sufficiently provocative." Petitioner contends that the decisions the court cited to in support of this proposition "did not involve the level of provocation in Petitioner's case." (Br. at 21.) Respondents reply that although this is presented as an unreasonable factual determination, it is better understood as an "argument that the [court] did not follow state law, which is not a ground for federal habeas relief." (Resp. at 27–28.)

I need not delve into this issue of whether this claim is cognizable. Rather, I view Petitioner's argument here as going directly to the ultimate prejudice inquiry of Strickland, i.e., whether there was a reasonable probability that an objective fact-finder would have concluded, with the benefit of the additional evidence presented at the PCRA hearing, that Petitioner acted in the heat of passion. Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

[32] The answer to this question is "no." As explained above, Petitioner did not present any meaningful evidence at the PCRA hearing regarding what actually occurred in the time period immediately preceding the murder. Instead, and as the Supreme Court noted, the evidence at trial indicated that Petitioner and the victim argued while they were at the bar on the evening of the murder, and Petitioner calmed down before they left. Additionally, the note which Petitioner left at the scene recounted how he perceived the victim and others to have wronged him, and did not lend support to a heat of passion defense. Because Petitioner was not prejudiced by trial counsel's failure to present the additional evidence pertaining to the heat of passion defense at trial—and the Pennsylvania Supreme Court's conclusion in this regard was reasonable—Petitioner is due no relief on this claim.[5]

2. Claim II: Was Petitioner's Counsel Ineffective for Failing to Adequately Investigate, Prepare, and Present Testimony to Rebut the Commonwealth's Allegations that the Victim Was Raped?

Petitioner next argues that trial counsel was ineffective within the meaning of Strickland for failing to adequately investigate, prepare or present testimony to rebut the Commonwealth's rape allegation. He specifically takes issue with counsel's failure to consult with an expert before trial regarding the Commonwealth's rape evidence, which he describes as forensic and circumstantial. Petitioner urges that but for the ineffective assistance of counsel, there is a reasonable probability that he would not have been convicted of rape. Because the finding of rape during the commission of the homicide was the sole aggravating factor leading to the death sentence, Petitioner contends that he is entitled to habeas relief both with respect to his rape conviction and his death sentence. (Br. at 27–39.)

a. Dr. Callery's Testimony and Expert Opinion

The testimony of Dr. Richard T. Callery, the medical examiner who conducted the autopsy of the victim, established the basis for the rape conviction and death sentence. Dr. Callery first testified three weeks before the trial, at a pretrial hearing. There, he explained that, in addition to the autopsy, he reviewed both photos and a videotape of the crime scene. He stated that the

5. Petitioner also contends that the Pennsylvania Supreme Court's decision was an unreasonable application of the law because the court did not apply the correct standard when addressing the prejudice prong of Strickland. As Strickland sets out, in order to prove prejudice the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. 2052. The court, however, at one point, referenced an outcome-determinative test, stating that "[t]he PCRA Court's reasons for rejecting this claim were correct as they indicate that the court had considered and rejected the evidence submitted at trial by Appellant regarding his claim that the killing was committed in the heat of passion and that the additional evidence would have resulted in a different outcome." Miller II, 987 A.2d at 650. Despite this reference, I find that the state court did not unreasonably apply Strickland. Indeed, before considering any of Petitioner's claims, the court identified the appropriate Strickland standard, stating that, "to prove prejudice, a defendant must show that but for counsel's error, there is a reasonable probability, i.e., a probability that undermines confidence in the result, that the outcome of the proceeding would have been different." Miller II, 987 A.2d at 649 (citing Commonwealth v. Sneed, 587 Pa. 318, 899 A.2d 1067, 1084 (2006)) (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052)).

cause of death was "as a result of massive external and internal bleeding due to multiple stab wounds to the head, neck, chest and upper extremities," and that the evidence was "consistent with sexual activity going on during the assault." (N.T. 09/08/97 at 28.) Dr. Callery based this opinion on four main pieces of evidence: (1) the position of the decedent's body (she was on her back and her legs were spread apart); (2) a "full volume" of seminal fluid in the decedent's vagina; (3) decedent's defensive wounds on both her left and right hand; and (4) the blood spatter patterns at the crime scene. (Id. at 10–30.)

Trial counsel was then given an opportunity to cross examine Dr. Callery. Dr. Callery admitted that he did not find blood in the decedent's vagina, and that he was unable to draw a distinction between whether a rape occurred during or after the murder. Dr. Callery stated that he nonetheless believed that this was a "classic rape-homicide." (Id. at 30–43.)

At trial, and consistent with his pretrial hearing testimony, Dr. Callery testified that, at the time of death, the victim was on the bed with her legs spread apart in the female missionary position, and that "several tablespoons" of semen were found in her vaginal vault. (N.T. 09/30/97 at 153.) Dr. Callery testified that this amount of semen was significant in determining when intercourse occurred because

> if the semen were put there before the attack began, [and] the decedent was up and about and walking about and moving about, one would expect to find the semen less focused in the vault. It would be distributed in a wider pattern, for example, maybe in the bed sheets beneath the body, maybe in another room, whatever, maybe in some other area. But the abundant bolus or focal amount that I saw there would argue that there was less, rather than more, movement of that portion of the body.

(Id. at 154–55.) Dr. Callery further testified that "[the evidence] is consistent with the stab wounds being inflicted with the decedent in the female missionary position with the assailant in the male superior missionary position," and that "[it] appears from the scene, from the autopsy findings and the blood pattern that the attack and the assault to the vaginal area were concomitant or occurring within the same general time frame." (Id. at 155–56). It is important to stress that this testimony formed the sole basis for the aggravating factor that led to the imposition of death.

Trial counsel then conducted an exceedingly brief cross examination of Dr. Callery. While the direct examination comprises fifty pages of the trial transcript, the cross examination was limited to only eight pages, which is about half as long as counsel's cross examination of Dr. Callery at the pretrial hearing. (Id. at 158–66.)

I am cognizant that the length of a cross examination is not a reliable indicator of counsel's preparation, but an examination of counsel's cross examination reflects that he did nothing more than allow Dr. Callery to reiterate his direct examination and clarify his opinion. Careful review of the cross examination reveals only one instance where counsel attempted to undermine Dr. Callery's theory. This came when Dr. Callery acknowledged that it was "conceivable" that the sexual intercourse did not occur during the commission of the homicide.

> Q: [ ] What I'm asking you, Doctor, is it's not inconceivable, is it, that there could have been sexual intercourse, the victim not get up off the bed and walk about, and then an attack took place, and that the sexual intercourse was not then related to the attack?

> A: I testified before that I thought this was a typical rape/homicide, but the way you phrased the question, that it is not inconceivable, is there a scenario that could be conceived of that, going along with what you say, I would have to say that it is conceivable.

(Id. at 165–66.) In short, trial counsel's only strategic point made with Dr. Callery was that it was "conceivable" that the intercourse occurred before the killing. Other than this obvious concession, one that experts routinely make, counsel had no apparent theory to undermine this crucial witness. Nor did counsel consult with or call a witness to rebut this testimony.

Based on Dr. Callery's opinion, the trial judge found Petitioner guilty of rape by forcible compulsion, concluded that Petitioner "committed a killing while in the perpetration of a felony, in this case the rape," and ordered that Petitioner be executed. (N.T. 10/02/97 at 341.) This was the sole aggravating factor which resulted in the death sentence.

b. The PCRA Proceeding

In his PCRA petition, Petitioner argued, as he does here, that trial counsel was ineffective for failing to consult with an expert before determining that the cross examination of Dr. Callery would be sufficient to rebut the Commonwealth's allegation of rape. Petitioner retained two experts who supported this argument and who, along with trial counsel, testified at the PCRA evidentiary hearing.

i. Trial Counsel's PCRA Testimony

At the PCRA hearing, trial counsel was extensively questioned about his strategy to defeat the rape charge. He testified that his "initial goal was to save [Petitioner's] life, was to somehow get rid of the death penalty." (N.T. 10/27/03 at 18.) To this end, counsel explained that he "primarily focused on the rape," because he "didn't believe the Commonwealth could prove rape." (Id. at 19–20.) Regarding Dr. Callery's testimony, counsel stated that he "didn't believe their doctor and [ ] was shocked that anybody did. I think anybody who looked at the evidence and looked at what the doctor said could clearly see that the doctor was not being truthful." (Id. at 20.) Trial counsel explained that when Dr. Callery said on cross examination that "this is a classic rape case," he "didn't believe a word he said." Counsel acknowledged that his cross examination of Dr. Callery "must not have been very good" because "Judge Riley believed [Dr. Callery]." (Id. at 20–21, 85.)

Trial counsel then acknowledged that he had never consulted with any expert regarding the rape charge or Dr. Callery's theory. (Id. at 22.) Strikingly, and as it pertains to the first prong of the Strickland standard of counsel's performance, when asked whether he "ha[d] any tactical or strategic reason" for not consulting with an expert, counsel answered "[n]o." (Id. at 23.) When asked to explain his approach in defending the rape charge, counsel testified:

> I don't know if it was that I had tunnel vision. It was just so obvious to me that there was not a rape in this case. And I truly felt anybody who looked at it would see that. And my recollection is that the doctor, when he testified, contradicted himself in certain areas that made it obvious that he was there because he had something he wanted to say, but what he had to say made no sense as to the facts of how this thing occurred. And I don't know, somehow I don't know what I missed. I missed something somewhere. And I still have missed it. I don't get it.

(Id. at 85–86.) (emphasis added.)

Trial counsel then went on to state that he had a chance to cross examine Dr.

Callery at the pretrial hearing, and reviewed the doctor's report, a crime scene video, photographs, and other physical evidence that was found at the crime scene. (Id. at 86.) When asked whether this review informed his "belief that cross-examining [Dr. Callery] would be sufficient to demonstrate what you articulated as the deficiencies," counsel stated "I believe so." (Id. at 86.) However, when pressed as to why he did not consider it necessary to consult with an expert, counsel testified:

> It's difficult for me to answer that. It just goes back to something I saw, that to me it was evident that everyone would see it, but apparently they didn't. There just wasn't a rape in this case. I guess I shouldn't have relied upon my belief to that, but that belief was based upon my experience.

(Id. at 87.)

Finally, counsel indicated that while he did not remember what he did to rebut the rape evidence, he knew he "did something." He stated that he had a tendency over the years to "collect things" in files during his cases. He could not, however, recall if he did something similar with the rape issue in this case. Counsel also testified that he occasionally "r[a]n things by" his personal doctor, though again he could not say whether he had done so in this case. He stated that he knew through preparation that he consulted materials he had or ran it by someone but he could not remember what it was he actually did in this case. (Id. at 100, 104.)

ii. Expert Testimony Regarding the Rape Evidence Presented at the PCRA Hearing

At the PCRA hearing, Petitioner presented the testimony of two expert witnesses. The first expert was Dr. Peter R. De Forest, a professor of criminalistics at John Jay College of Criminal Justice. Dr. De Forest testified that after having reviewed Dr. Callery's testimony, laboratory reports, crime scene photographs, video, and physical evidence such as the bedding and the rape kit, it was his opinion that while there was evidence of both a homicide and sexual intercourse having occurred "at some point," there was no evidence of a rape. (N.T. 10/28/03 at 285.)

Dr. De Forest then opined about the evidence Dr. Callery relied upon in determining that a rape occurred during the homicide. Dr. De Forest explained that the blood spatter patterns were inconsistent with Dr. Callery's theory that the victim was in the female missionary position when she was killed. Rather, it was Dr. De Forest's opinion that the patterns were "consistent with either an inclusion or blocking the thigh of the assailant when he was straddling the victim, or some other object high on the abdomen that protected the lower portion from being stained." (Id. at 286.) In this regard, Dr. De Forest explained that the decedent's defensive wounds did not indicate rape, only that the assailant was poised above her. He further opined that the body may have been moved after the stabbing occurred because it had diluted blood marks on it, run marks on the legs, and areas of the comforter had extensive airborne blood staining "[t]hat would not have been accessible . . . as the bedding is viewed in the crime scenes and videotape." (Id. at 288.)

With respect to the fluid found in the victim's vagina, Dr. De Forest called attention to the fact that Dr. Callery had not measured or tested the fluid, and thus the presence of the fluid "could not be relied upon" since there was no way to discern how much of it was seminal. (Id.) Dr. De Forest further testified that as part of his work, he is often called upon by defense attorneys to advise them on how to cross examine an expert witness, and he could have provided those services to trial coun-

sel had counsel consulted him before the trial.

The second expert to testify about the rape was Dr. Charles Wetli, Chief Medical Examiner for Suffolk County, New York. Dr. Wetli similarly concluded that while "there was evidence of recent sexual intercourse[,] [t]here was no evidence of forcible rape." (Id. at 330.) Dr. Wetli based his conclusion on several factors. He noted the lack of any trauma "whatsoever" to the decedent's genital region, or evidence of strangulation or asphyxiation which he opined "almost invariably accompanies a forcible sexual assault." (Id. at 330–31.) He stated that the amount of fluid found in the vagina indicated sexual intercourse but not necessarily rape. (Id. at 335.) Dr. Wetli further opined that the defensive wounds were more consistent with the perpetrator straddling her chest as opposed to having intercourse with her. (Id. at 333.)

c. Application of Strickland

[33] Having carefully reviewed both the trial and PCRA record I will next consider whether Petitioner's trial counsel exercised reasonable professional judgment when he failed to consult an expert about the rape evidence and in choosing to rely solely on cross examination to undermine Dr. Callery's opinions. See Strickland, 466 U.S. at 691, 104 S.Ct. 2052 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). In examining counsel's choice, I will "focus on whether the investigation supporting counsel's decision not to introduce . . . evidence . . . was itself reasonable," Wiggins v. Smith, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), while "applying a heavy measure of deference to counsel's judgments." Id. at 521–22, 123 S.Ct. 2527 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). I recognize that the proper examination is not whether trial counsel should have consulted with an expert before cross examination, but whether the considerations that went into his decision not to consult an expert were themselves reasonable. See Rompilla v. Beard, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (defense counsel has duty to investigate facts which are relevant to the merits).

As noted above, trial counsel was able to cross examine Dr. Callery, the Commonwealth's sole witness regarding the rape charge, during a pretrial hearing held three weeks before trial. Thus, counsel was well aware that the Commonwealth's rape evidence relied almost exclusively on forensic testimony, and that Dr. Callery based his opinion that a rape occurred during the homicide on the position of the decedent's body, the amount of seminal fluid found in the decedent's vagina, the nature of the decedent's defensive wounds, and the blood spatter pattern at the crime scene. Despite knowing all of this, counsel chose not to consult an expert and relied solely on his own experience and cross examination, and did so without any expert assistance to prepare that cross examination.

When asked to explain this tactic at the PCRA hearing, counsel stated that other than relying on his intuition that "there was not a rape in this case," he could not articulate with any specificity what considerations went into his decision not to consult with an expert. Trial counsel's stated tactical reasons rested solely on his "belief," "experience," "something he saw," and his insistence that Dr. Callery was lying. It is worth repeating that when asked whether he had a tactical or strategic reason for not consulting with an expert on the aggravating circumstance that supported the death penalty, trial counsel

simply stated "no."[6]

[34] The United States Supreme Court has noted that there are "[c]riminal cases . . . where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." Harrington, 131 S.Ct. at 788. The Third Circuit has similarly stated that the retention of an expert witness is necessary "depend[ing] on the specific circumstances of the case." Showers v. Beard, 635 F.3d 625, 633 (2011). Given the scientific and technical nature of Dr. Callery's forensic testimony—and in light of the fact that this testimony formed the sole basis of the rape conviction and death sentence—I am left to conclude that consultation with an expert would necessarily be part of a reasonable defense strategy. And these experts were available. Dr. Callery's opinions involved anatomy, crime scene forensics, blood spatter patterns, and reproductive knowledge, all areas outside of a lawyer's expertise. Because trial counsel did not consult with an expert to either prepare for cross examination or to present as a witness to rebut the allegation that a rape occurred during the homicide, I find that his performance was constitutionally deficient.

Trial counsel's cross examination of Dr. Callery supports this conclusion. As noted previously, the only identifiable strategy displayed by counsel was to have Dr. Callery concede that it was "conceivable" that a rape did not occur during the commission of the homicide. Having an expert admit that an opposite conclusion is "conceivable" hardly qualifies as adequate Sixth Amendment representation.

Trial counsel's failure to consult with an expert before cross examination is exacerbated when viewed in conjunction with the opinions provided at the PCRA hearing by Dr. De Forest and Dr. Wetli. The PCRA court accepted both Dr. De Forest and Dr. Wetli as experts at the PCRA hearing, and for good reasons. Dr. De Forest is a professor of criminalistics at John Jay College of Criminal Justice. (N.T. 10/28/03 at 265.) He has a bachelor of science degree in criminalistics from the University of California at Berkeley and a doctorate in criminology degree in criminalistics from the University of California at Berkeley. (Id. at 265–66.) Before becoming a professor, Dr. De Forest worked in a sheriff's crime lab in California. (Id. at 266.) As of 2003, Dr. De Forest had consulted in his capacity as a criminalist on "over a thousand" cases and had testified as an expert "well over a hundred times." (Id. at 267.)

Dr. Wetli is the Chief Medical Examiner for Suffolk County, New York. (Id. at 328). As of 2003, he held that position for eight-and-a-half years. (Id.) Before that, he was the deputy chief medical examiner in Dade County, Florida for fifteen years. (Id.) He is certified by the American Board of Pathology, Anatomical and Clinical and Forensic Pathology. (Id.)

As noted above, Dr. De Forest explained that the blood spatter patterns indicated that the victim's body may have been moved before it was found, and that the patterns were inconsistent with the perpetrator being in the male missionary position and raping the victim at the time of the attack. Dr. De Forest further explained that both the defensive wounds and the fluid which was found in the victim's vaginal vault were inconclusive as to whether a rape, as opposed to consensual sex, had occurred, and he called attention to Dr. Callery's failure to measure or test the purported seminal fluid found in the

6. In again referencing counsel's complete lack of explanation for not consulting with an expert, I reiterate that the Strickland standard is objective.

victim's vagina. Dr. Wetli pointed out that the lack of evidence of strangulation and trauma to the genital area were also indicators that there was no rape. Consultation with experts of similar ilk would have undoubtedly, at a minimum, aided trial counsel in cross examination preparation.

[35] In short, given the availability and potential effectiveness of forensic experts, trial counsel did not have a reasonable basis when he chose not to investigate the rape charge or consult with an expert. This omission is particularly egregious considering that this issue established the sole aggravating factor leading to Petitioner's death sentence. Nevertheless, the Pennsylvania Supreme Court's determination that counsel's performance was reasonable will stand so long as its decision was not "contrary to" or an "unreasonable application" of Strickland and its progeny. Indeed, a state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. Harrington, 131 S.Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)).

d. The Pennsylvania Supreme Court PCRA Opinion

In its PCRA opinion, the Pennsylvania Supreme Court addressed the question of whether "trial counsel was ineffective for failing to investigate and present expert testimony to rebut the Commonwealth's assertion that the victim was raped." Miller II, 987 A.2d at 652. While the court did note how the testimony of Drs. De Forest and Wetli undermined the testimony of Dr. Callery, it never addressed the prejudice prong of Strickland. Rather, the court focused on the performance prong of Strickland, basing its decision on the content of trial counsel's testimony at the PCRA hearing. The court summarized trial counsel's testimony as follows:

> Trial counsel testified that based on his experience, he believed that it was not necessary to consult an expert to rebut the evidence that a rape occurred because he did not think that Dr. Callery would be found credible. N.T. 10/27/03, 85–87. Although counsel could not recall what he did in preparing to cross-examine Dr. Callery, he recalled he did take steps to discredit his testimony.
>
> [ ]Trial counsel testified that he did not seek out and retain an expert because his review of the evidence made it pellucidly clear to him that no rape occurred and that it was his belief that anyone who reviewed the evidence would draw the same conclusion he did. N.T. 10/27/03, 85–86. Trial counsel also related that it was his belief that he could rebut and undermine the testimony of Dr. Callery, the Commonwealth's expert witness, with respect to whether a rape occurred without the assistance of an expert witness through skillful cross-examination of Dr. Callery. N.T. 10/27/03, 87. Counsel drew this conclusion from his cross-examination of Dr. Callery at a pre-trial hearing during which he extensively cross-examined the doctor and elicited from him several inconsistencies with respect to whether the doctor was of the opinion, to a reasonable degree of medical certainty, that the murder and the sexual intercourse occurred simultaneously.

Id. at 653.

The court then moved to its legal conclusion. The entire portion of the opinion analyzing counsel's choice not to seek out an expert witness is reprinted in full below.

> On the basis of trial counsel's testimony, we cannot say that the PCRA court erred in concluding that trial counsel

had a reasonable basis for not seeking out an expert witness to rebut Dr. Callery's testimony. This Court's review of matters involving trial strategy is deferential. Trial counsel will be deemed to have acted reasonably if the course chosen by trial counsel had some reasonable basis designed to effectuate his client's interests. Commonwealth v. Puksar, 597 Pa. 240, 951 A.2d 267, 277 (2008). Moreover, a claim of ineffectiveness will not succeed by comparing, in hindsight, the trial strategy trial counsel actually employed with the alternatives foregone. Id. Finally, "[a]lthough we do not disregard completely the reasonableness of other alternatives available to counsel, 'the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.'" Commonwealth v. Cooper, 596 Pa. 119, 941 A.2d 655 (2007) (quoting Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975 (1987)).

Since the record supports the PCRA court's finding that trial counsel had a reasonable basis for not consulting with an expert witness, Appellant is denied relief with respect to this claim.

Id.

e. The Unreasonable Application of Strickland

[36] Even applying the greatest deference, I cannot find any support for the Pennsylvania Supreme Court's conclusions. As set forth above, the court notes that counsel believed Dr. Callery would not be found credible, but cites not one reason why this conclusion is reasonable. The court points to the fact that counsel indicated that he did take steps to discredit Dr. Callery's opinion, yet no "steps" are mentioned. The court also cites to counsel's belief that he could discredit Dr. Callery "through skillful cross examination," yet a review of that cross examination belies that conclusion. The court refers to opportunities noted by counsel to create inconsistencies in Dr. Callery's testimony, but counsel never attempted to establish these inconsistencies at trial.

In short, without any basis or substantial reference to the trial or PCRA record, the court simply states that counsel's performance was reasonable. After careful consideration, I can find no reason—strategic or otherwise—to support trial counsel's failure to consult an expert about Petitioner's rape charge. I therefore conclude that the Pennsylvania Supreme Court's decision was an unreasonable application of clearly established federal law.

Because I conclude that the court's application of federal law was unreasonable, I must also evaluate the prejudice prong of Strickland. In its opinion on PCRA appeal, the Pennsylvania Supreme Court limited its analysis to the deficient performance prong and did not address prejudice. My review of the prejudice prong of Strickland is therefore de novo. Appel, 250 F.3d at 210.

[37–40] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691–92, 104 S.Ct. 2052. Thus, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance." Id. In order to succeed on an ineffective assistance of counsel claim "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a

trial whose result is reliable." Id. at 687, 104 S.Ct. 2052.

[41] A court addressing an ineffective assistance claim should examine the "totality of evidence at trial" noting that "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." Id. at 695–96, 104 S.Ct. 2052. This standard is not "a stringent one" and is "less demanding than the preponderance standard." Jermyn v. Horn, 266 F.3d 257, 282 (3d Cir. 2001). Thus, the question before me is whether there was a reasonable probability that consulting with and possibly presenting a forensic expert would have altered the outcome in Petitioner's trial as it relates to the rape conviction and the finding that the rape was the aggravating factor which supported the death sentence.

[42] Dr. Callery's testimony was the only evidence establishing the aggravating factor that resulted in the death sentence. As such, this appears to be a situation where the "totality of the evidence" was "weakly supported by the record," and thus the resulting sentence was more likely attributable to counsel's errors. As noted several times now, both Dr. De Forest and Dr. Wetli offered sound opinions which undermined the basis of Dr. Callery's testimony. Had counsel performed competently and consulted with a forensic expert before trial, he would have raised questions about Dr. Callery's theory. Counsel could have also presented the testimony of an expert at trial to directly rebut Dr. Callery's opinion.

Had these glaring deficiencies been addressed, there is a reasonable probability that the rape result would have been different, and Petitioner would not have been sentenced to death. Petitioner is therefore entitled to habeas relief on his rape conviction and death sentence.

3. Claim III: Was Petitioner's Counsel Ineffective for Failing to Object to the Testimony of Dr. Callery About the Occurrence of Rape on the Grounds That This Opinion Fell Below the Required Standard of Proof, and for Failing to Raise This Issue on Appeal?

Petitioner also contends that counsel's performance was deficient for failing to object to the testimony of Dr. Callery because his opinion fell below the required level of certainty, and for failing to raise this issue on appeal. Petitioner argues that, had counsel objected, there is a reasonable probability that Dr. Callery's testimony would have been excluded, he would not have been convicted of rape, and in the absence of a rape conviction—the sole aggravating factor leading to the death sentence—he would have been ineligible for a sentence of death. (Br. at 40–45.)

[43] In Pennsylvania, "[a] medical opinion is sufficient to support a finding when given with a reasonable degree of medical certainty." Commonwealth v. Edmiston, 535 Pa. 210, 634 A.2d 1078, 1084 (1993) (citing Commonwealth v. Stoltzfus, 462 Pa. 43, 337 A.2d 873 (1975)). At the pretrial hearing, Dr. Callery testified that it was his "opinion to [a] reasonable degree of medical certainty that intercourse was taking place while [the victim] was being stabbed." (N.T. 09/08/97 at 39.) At trial, however, Dr. Callery did not testify to the occurrence of rape to a reasonable degree of medical certainty. While trial counsel did not object to the testimony, he did indirectly reference Dr. Callery's omission in his closing argument, stating that "[Dr. Callery's] opinion was not testified to beyond a reasonable degree of medical certainty and I think that lessens his testimony." (N.T. 10/01/97 at 269.)

In its opinion on PCRA appeal, the Pennsylvania Supreme Court concluded that it was a reasonable trial strategy not

to object to Dr. Callery's opinion on the grounds that the opinion fell below the required level of certainty so that counsel could argue in closing argument that the testimony was entitled to less weight. The court stated:

> Trial counsel testified [at the PCRA evidentiary hearing] that he did not proffer an objection to Dr. Callery's testimony because three weeks prior to Dr. Callery's taking of the witness stand, Dr. Callery testified during a pre-trial hearing that it was his opinion that a rape occurred and that if he proffered an objection, the Commonwealth would have been permitted to elicit the necessary testimony from the doctor. In addition, trial counsel testified that he did not object, and give the Commonwealth an opportunity to elicit from Dr. Callery the "magic words" because he made the tactical decision to use that omission to argue to the trial court that no rape occurred.
>
> The PCRA Court ruled that this ineffectiveness claim lacked merit because trial counsel had a reasonable basis for failing to object. PCRA Court's Opinion, 11/2/07, 30–31. We agree. Counsel was correct in surmising that an objection likely would have resulted in the Commonwealth seeking and being granted permission to elicit from Dr. Callery his opinion that a rape had occurred herein given that the doctor had offered that opinion prior to trial. Thus, had trial counsel proffered an objection, his strategy to use the omission to argue that there had been no rape would have been negated by the anticipated opinion testimony of Dr. Callery that the victim had been raped. Trial counsel's strategy was reasonable given that had the trial court determined that Dr. Callery's opinion testimony was insufficient to establish a rape because the doctor did not utter the "magic words," as trial counsel argued, the Commonwealth would have been without a viable aggravating circumstance. Accordingly, because trial counsel had a reasonable basis for not objecting here, Appellant's claim with respect to this issue was properly denied by the PCRA court.

Miller II, 987 A.2d at 656–57.

Petitioner contends that the court's conclusion that this strategy was constitutionally competent was an unreasonable application of federal law. Like the previous claim, this argument is premised on counsel's failure to undertake a sufficient investigation into the rape charge and consult with any forensic experts, including Dr. Callery. Petitioner posits that, given the lack of investigation, counsel's strategic decision not to object to Dr. Callery's testimony is not entitled to deference, and had counsel consulted with Dr. Callery or other experts, he would have known that he could have objected to the testimony as failing to rise to the required level of certainty.

[44] Though I found that trial counsel's effectiveness regarding Dr. Callery was constitutionally deficient, I do not agree with Petitioner that this conclusion is dispositive of counsel's alleged ineffectiveness for failing to object to Dr. Callery's testimony regarding the "magic words." While counsel's lack of preparation regarding Callery was indeed troubling, Petitioner has not made the connection between that lack of preparation and counsel's failure to object to Callery's opinions. As the Pennsylvania Supreme Court noted, trial counsel was fully aware that Dr. Callery did not testify to the occurrence of rape to a "reasonable degree of medical certainty," and tactically took advantage of this omission by arguing in closing argument that Dr. Callery's opinion should be entitled to less weight. As such, the Supreme Court's conclusion that counsel's strategy here was constitutionally competent was a reasonable application of Strickland.

Even if I were to have found that the Supreme Court unreasonably applied Strickland as it relates to the performance prong of this claim, in order to warrant relief, Petitioner would still have to show that he was prejudiced by counsel's performance. Specifically, Petitioner would have to establish that there was a reasonable probability that Dr. Callery's testimony would have been excluded had trial counsel objected to his testimony as falling below the required standard of proof.

In this regard, Petitioner points to an affidavit signed by Dr. Callery on January 26, 2005, seven years after the trial, where he stated that the evidence was "plainly consistent with any of the following scenarios: that intercourse occurred before Ms. Miller was killed and then she was killed; that intercourse occurred while she was being stabbed; or that intercourse occurred after she had been killed." Callery continued that "[b]ecause of the number of plausible scenarios, I do not hold the opinion to a reasonable degree of medical certainty that [the victim] was killed while the assailant was engaging in sexual intercourse with her. To the extent that my testimony in this case appears to conflict with any of these conclusions, my actual opinion at the time of the trial is stated in the affidavit." Dr. Callery concluded his affidavit by stating that if trial counsel had interviewed him before he testified, he would have "told him the things I say in this affidavit and testified to them on the witness stand." (App. to Br. at A18–19.)

The Pennsylvania Supreme Court considered Petitioner's arguments about the effect of Dr. Callery's affidavit. The court concluded that Petitioner was not prejudiced by counsel's failure to object to Dr. Callery's testimony because Petitioner's "argument amounts to nothing more than mere speculation. There is no indication in the record that Dr. Callery would have advised trial counsel before the trial commenced that it was his belief that no rape occurred if only trial counsel had interviewed him." Miller II, 987 A.2d at 659. Petitioner argues that this amounts to an unreasonable factual determination since "Dr. Callery's own words [in the affidavit] directly contradict this statement." (Reply at 26.)

Petitioner's focus on the inconsistency between Dr. Callery's affidavit and his trial testimony is certainly understandable, and Dr. Callery's complete about-face regarding his opinions is curious to say the least. I do not, however, find the Pennsylvania Supreme Court's characterization of this claim as being based on "speculation" to be unreasonable. Dr. Callery's affidavit, signed seven years after the trial, does not address in any detail the evidence he considered (or reconsidered) and more significantly does not adequately explain his change of opinion from the pretrial hearing (where he testified to a reasonable degree of medical certainty that a rape occurred during the commission of the homicide), the trial, and the affidavit. Thus, even if counsel's representation was objectively unreasonable, Petitioner cannot show that there was a reasonable probability that Dr. Callery's testimony would have been excluded had counsel objected. Consequently, Petitioner is due no relief on this claim.[7]

7. Notwithstanding this conclusion, I note that Dr. Callery's affidavit serves only to bolster my previous finding that counsel was ineffective for failing to adequately investigate, prepare, or present testimony to rebut the Commonwealth's rape allegation. Dr. Callery's trial testimony that the rape was committed during the commission of the homicide formed the sole basis for the death sentence. His concession in the affidavit that the evidence was also consistent with sexual intercourse having occurred either before or after the homicide—both of which would not constitute an aggravating circumstance for purposes of Pennsylvania's death penalty

4. Claim IV: Did the Commonwealth Withhold Favorable and Exculpatory Evidence Relating to Commonwealth Witness Michael Torres in Violation of Brady v. Maryland, and Was Petitioner's Counsel Ineffective for Failing to Properly Investigate, Develop, and Present Evidence Discrediting This Witness?

Petitioner contends that his right to due process was violated under Brady v. Maryland when the Commonwealth failed to disclose the full background of Commonwealth witness Michael Torres, which contained indications of mental illness. Petitioner relatedly argues that counsel was ineffective for failing to investigate, develop, and present this exculpatory impeachment evidence of Torres's mental illness. (Br. at 45–63.)

a. Torres's Trial Testimony

Michael Torres was Petitioner's cellmate in 1995 for about two months at Chester County Prison when Petitioner was imprisoned for aggravated assault against his wife. (N.T. 09/30/97 at 179). At trial, Torres testified regarding statements that Petitioner made while they were cellmates.

> PROSECUTOR: Can you recall any specific statements [Petitioner] made while you were cellmates concerning his wife?
>
> TORRES: We was talking a couple times and he would like get in a daze and just, you know, say, I'm going to kill my wife.

(Id. at 180–81.) Torres testified that Petitioner said this statement "numerous times," (id. at 181), including on the day he was released from prison.

> PROSECUTOR: Can you recall having any conversations with him on the day that he left?
>
> TORRES: Yeah.
>
> PROSECUTOR: Tell us about that.
>
> TORRES: Well, we was just talking about what he had to do when he got out and, you know, right before he left out the cell he looked at me and he said, I'll be back for killing my wife.

(Id. at 183.) In his closing argument, the prosecutor stressed the importance of this testimony.

> It's important that Your Honor should consider the testimony of Michael Torres, that the defendant obsesses about his wife when he was in prison; that the defendant was aware of his anger and his rage and all of the feelings that he had within him which made him want to kill her.

(N.T. 10/01/97 at 273.)

On cross examination, which is set forth below in full, trial counsel questioned Torres on the convictions for which he was serving time when he was Petitioner's cellmate.

> TRIAL COUNSEL: Mr. Torres, you were in prison that time for terroristic threats and dealing heroin?
>
> TORRES: Yeah.
>
> TRIAL COUNSEL: What are you in jail for now?
>
> TORRES: The same thing. I never got out.
>
> TRIAL COUNSEL: Now, you said that [Petitioner] told you numerous times that he was going to kill his wife when you were at the prison. Who else was around when he said this?
>
> TORRES: I can't recall.
>
> TRIAL COUNSEL: Other people?
>
> TORRES: There might have been.

statute—underscores the egregiousness of counsel's failure to consult with and possibly present an expert to rebut Dr. Callery's testimony.

> TRIAL COUNSEL: I have nothing [ ] else.

(Id. at 184.)

In addition to this cross examination, trial counsel called Eric Blevins to discredit Torres's testimony. Blevins was also serving a sentence at the Chester County Prison and met Petitioner and Torres while working in the prison laundry. (N.T. 10/01/97 at 233.) Blevins's testimony centered around a conversation that he had with Torres after Petitioner was released from prison and the murder occurred. Blevins testified:

> Michael Torres told me he wanted to know a way to get out of prison. And then he remembered about reading something about Dennis Miller in the paper about killing somebody or something like that. So he said he was going to use Dennis to get out of prison. He told Officer Lattanzio to call the detectives' agency or the state police where he could talk to them.

(Id. at 234.) Blevins then continued that "[Torres] was trying to use Dennis to get out of jail. [Torres] was looking at a state sentence or something like that. And he wanted to get out and he's using Dennis like a scapegoat." (Id.)

b. Torres's Criminal and Medical Records

Torres's criminal and incarceration records contain indications of both mental illness and criminal convictions beyond those for which he was imprisoned while he was Petitioner's cellmate. With respect to mental illness, Torres's Northampton County docket contains a March 7, 1994 entry noting that he was "in Norristown State Hospital and Unavailable for Trial," and a June 15, 1994 Presentence Report for Northampton County states that "[i]t should also be noted that [Torres] has spent time at the Norristown State Hospital." (Appx. to Br. at A49, A97.) His Norristown State Hospital records—which are included in his Chester Country Prison records—contain a April 11, 1994 notation by a staff psychiatrist that "[Torres] admitted hearing voices telling him to kill himself; stated he sees the shadow of 'people moving around him'. . .[and] admitted to both visual/auditory hallucinations." (Id. at A130–31.) Medical notes from Chester County Prison relate similar symptoms. An August 1, 1995 progress note states Torres was "still [experiencing] episodic voices of his girlfriend telling [him] to kill himself + others"; an October 3, 1995 note states Torres "still c[omplains] o[f] hearing voices"; and a November 8, 1995 note states Torres "[a]dmits to voices telling him to harm himself; he told us his celly killed his wife; he was interrogated by the police + feels very confused + overwhelmed." (Id. at A114.)

With respect to his criminal convictions, Torres's docket from Northampton County includes convictions for a theft charge and an unsworn falsification to authorities charge, for which he was sentenced on September 28, 1990. (Id. at A76, A80.)

c. PCRA Hearing

At the PCRA hearing, Petitioner's PCRA counsel questioned trial counsel about his strategy to discredit Torres's testimony. Trial counsel testified that he neither interviewed Torres nor tried to obtain his prison records, and did not have any tactical or strategic reason for not doing so. Trial counsel, however, defended his trial strategy by saying that he "had a witness who said [Torres] was lying. . .[and] felt that was sufficient." (N.T. 10/27/03 at 23–24.)

Torres also testified at the PCRA hearing, and stated that he had psychiatric problems his whole life and hears voices. He confirmed that during the time he was Petitioner's cellmate he was hearing voices, was taking anti-psychotic medications, but did not tell Petitioner of his

psychiatric problems. Torres stated that it was not until after the trial that he began to wonder about whether Petitioner really told him that he was going to kill his wife. He said that "I don't know if [Petitioner] told me that he was going to kill his wife . . . [b]ecause I hear it in my head, and so many people say it all the time in prison and out of prison." (N.T. 10/28/03 at 219–26.)

d. The Brady and Ineffectiveness Claim

[45, 46] It is well established "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To meet the Brady standard, "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting Strickler v. Greene, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

[47] Here, the prosecution did not provide trial counsel with Torres's criminal or medical records, and it is uncontroverted that these records could have been used to impeach his testimony and are thus favorable to Petitioner. For purposes of the Brady claim, the issue is whether these records were material insofar as Petitioner was prejudiced by the nondisclosure. As for the related ineffectiveness claim, the parties dispute whether Petitioner was prejudiced by counsel's failure to locate and use the records at issue to impeach Torres. Because the materiality standard under Brady and the prejudice standard under Strickland are essentially the same, I will address both of these related claims together. United States v. Bagley, 473 U.S. 667, 682–83, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (adopting the Strickland "reasonable probability" that "the result of the proceeding would have been different" as the appropriate standard for Brady materiality).

The Pennsylvania Supreme Court addressed the issue of whether Petitioner was prejudiced by counsel's failure to use Torres's criminal and incarceration records to impeach him. The court first stated:

> [T]he claim does not entitle Appellant to relief because he has not met his burden of establishing that he suffered prejudice because of trial counsel's alleged nonfeasance. According to Appellant, he was prejudiced by trial counsel's failure to investigate Torres because Torres's testimony "was critical to establishing the specific intent element of first-degree murder as [t]here was little else in the case that pointed to any kind of deliberation or premeditation of any kind." Appellant is mistaken. In addition to the use of a deadly weapon on vital parts of the victim's body, [FN9] Appellant left the incriminating note wherein he admitted that he killed the victim willfully. Thus, Torres's testimony was not as critical as Appellant claims it was with respect to proof that he acted with specific intent to kill.
>
> FN9: The law is clear that specific intent to kill may be inferred from the use of a deadly weapon on a vital part of another person's body. Commonwealth v. Wright, 599 Pa. 270, 961 A.2d 119, 130 (2008); Commonwealth v. Kennedy, 598 Pa. 621, 959 A.2d 916, 921 (2008).

Miller II, 987 A.2d at 654–55.

[48, 49] Petitioner contends that the court's analysis "of the prejudice prong is an unreasonable determination of the facts, as well as an unreasonable application of federal law, because it confuses evidence of specific intent and premeditation." He stresses that because "counsel's

theory of defense was that Petitioner committed voluntary manslaughter, which supposes specific intent, but not malice or premeditation," the critical inquiry is not, as the state court framed it, whether the use of a deadly weapon and an incriminating note was critical to establishing specific intent, but rather whether it was critical to establishing malice or premeditation for the purposes of first degree murder. (Br. at 62.)

[50] Petitioner is correct that the Pennsylvania Supreme Court decision does not clearly delineate between specific intent and malice. The state court did, however, correctly characterize Petitioner's use of a deadly weapon, and it is undisputed that the autopsy revealed that the victim died as a result of more than thirty stab wounds to her head, neck, chest, arms, and hands. Under Pennsylvania law, "[i]t is well settled that specific intent to kill, as well as malice, may be inferred from the use of a deadly weapon upon a vital part of the victim's body." Commonwealth v. Gardner, 490 Pa. 421, 416 A.2d 1007, 1008 (Pa. 1980). Given the weight of the physical evidence against Petitioner, it was certainly reasonable for the court to conclude that Torres's testimony was not critical to finding that Petitioner's crime met the elements of first degree murder. Petitioner's ineffectiveness argument here therefore fails.

In addition to finding that Torres's testimony was not critical to the first degree murder conviction, the Pennsylvania Supreme Court also found that Petitioner was not prejudiced by his counsel's failure to uncover and use Torres's criminal and medical records. The court held that "trial counsel effectively undermined Torres's testimony by presenting the testimony of a witness who stated that Torres admitted he was going to lie about what Appellant may have said to him in order to help himself." Miller II, 987 A.2d at 655. Petitioner contends that this analysis was unreasonable because the court "failed to consider the effect of the totality of the impeachment of Torres—that conducted at trial through Blevins, *plus* the available impeachment through his *crimen falsi* convictions and mental health impairments." (Br. at 62–63) (emphasis in original.)

The court's analysis here was not unreasonable. Blevins indeed testified that Torres told him simply that "he was going to use [Petitioner] to get out of jail." (N.T. 10/01/97 at 234.) While the use of Torres's criminal and medical records may have further undermined Torres's testimony, it was not unreasonable for the court to characterize Blevins's testimony as rebutting Torres's testimony.

Because the court reasonably concluded that Torres's testimony was not critical to the first degree murder conviction and, in any event, was effectively undermined by Blevins's testimony, Petitioner was not prejudiced within the meaning of Strickland by his counsel's failure to use the criminal and medical records to impeach Torres, nor were those records "material" within the meaning of Brady.[8] Accordingly, Petitioner is due no relief on this Brady and related ineffectiveness claim.

5. Claim V: Was Petitioner's Counsel Ineffective at Capital Sentencing for Failing to Conduct Any Meaningful Investigation Regarding Mitigation Evidence?

Petitioner contends that counsel was ineffective for failing to investigate, develop,

8. Having found that the state court's determination that Petitioner was not prejudiced by the nondisclosure of the criminal and medical records at issue was reasonable, I need not discuss the issue of whether the prosecution had a duty under Brady to provide these records to trial counsel.

and present additional mitigating evidence regarding his childhood, family relationships, mental health, drug abuse, and brain damage during the penalty phase of the trial. He claims that had this evidence been presented, a reasonable factfinder would have accorded more weight to the Section 9711(e)(3) mitigating factor that the trial judge did find ("the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired"), and would also have found that the catch-all mitigating circumstance under Section 9711(e)(8) was present. Petitioner argues that with this additional evidence there is a reasonable probability that he would have been sentenced to life imprisonment because the mitigating circumstances would have outweighed the aggravating circumstance of rape during the commission of the homicide. (Br. at 64–89.)

a. The Penalty Hearing

The prosecutor began the penalty hearing stating that the Commonwealth intended to "present evidence regarding both of the aggravating circumstances [torture and rape] which [it] had set forth originally in the criminal information." To that end, and "in order to establish a factual basis for the finding of torture . . . as an aggravating circumstance," the Commonwealth moved to incorporate the trial testimony into the penalty phase proceeding. "With respect to the other charge, that this was murder committed during the perpetration of another felony, [the Commonwealth] rest[ed] on [the court's] verdict of guilty on the charge of rape." After the trial testimony and the rape verdict were incorporated into the penalty phase proceeding, the prosecutor presented brief victim impact testimony from Barbara Miller, the daughter of Petitioner and the victim.[9] (N.T. 10/02/97 at 286–90.)

Petitioner then presented the testimony of four witnesses: Dr. Gerald Cooke, a clinical and forensic psychologist; Kenneth Miller, Petitioner's brother; Deborah Miller, Petitioner's sister; and Agnes Miller, Petitioner's mother. (Id. at 292–324.)

Dr. Cooke testified that he evaluated Petitioner on August 14, 1997, starting with a personal history, and performed a battery of tests. Dr. Cooke also reviewed the criminal complaint, the affidavit of probable cause, the autopsy and toxicology reports on the victim, and the police investigation reports. Petitioner described to Dr. Cooke how "his father was an alcoholic and abusive to his mother," and how "he would often try to get between them to protect his mother." Petitioner chronicled his substance abuse history, relating that by the age of 15, he was drinking alcohol and injecting methamphetamine regularly, and "except for the times in jail or rehabs, since 1994 he had been injecting heroin regularly and snorting methamphetamine occasionally." With respect to the crime itself, Dr. Cooke stated that Petitioner told him that "he went into a rage and grabbed a knife that was by the side of the bed" after the victim told him, just after they had sex, "that she wanted him to move out the next day and was moving her boyfriend Sean in." Dr. Cooke also went through Petitioner's criminal history with him and stated that Petitioner was sentenced to prison twice for having" put a gun to his wife's head," and that he had gotten out of jail just two months before the murder. (Id. at 293–302.)

Dr. Cooke estimated that Petitioner's IQ score was "between 81 and 89, which is low average." The doctor testified that tests indicated that Petitioner "is an angry man and when frustrated he can explode," and that "he can go into rages particularly when he's disinhibited by alcohol and

9. The admissibility of that testimony will be discussed in Claim VII.

drugs." Dr. Cooke stated that he found no evidence of a psychotic or thinking disorder, and diagnosed Petitioner with (1) paranoid personality disorder with antisocial and explosive features; (2) a history of drug dependence; and (3) a history of alcohol dependence. (Id. at 303–05.) When asked by defense counsel about the conclusions he reached as to mitigating circumstances, Dr. Cooke stated:

> I think his personality dynamics are consistent with the fact that this is a man, who particularly when he is rejected by someone important to him as his wife, that this would be something that would trigger an explosive rage. And it's my opinion in the context of such an explosive rage he would show a significant impairment in his ability to conform his behavior to the requirements of law. And it's my opinion that those diagnoses and his history and the personality dynamics would be consistent with that kind of problem, which, my understanding, is part of the mitigating factors.

(Id. at 306.)

Kenneth Miller, Petitioner's brother, Deborah Miller, Petitioner's sister, and Agnes Miller, Petitioner's mother, all testified briefly and were asked to speak about Petitioner's good qualities. Kenneth Miller testified that there were good times between Petitioner and the victim, that Petitioner "was [l]ike a typical father" to his children, and that if Petitioner were sentenced to death, it would negatively affect his family. (Id. at 317–20.) Deborah Miller testified that Petitioner was "a family oriented person," that the relationship between Petitioner, the victim, and their children seemed good, and that, when Petitioner had been released from prison, "[h]e wanted that closeness and that loving, loving and caring as a family again." (Id. at 321–22.) Agnes Miller relayed that Petitioner was a hard working person, that he loved his children, and that it would not help the problems the children were having after their mother died for their father to be sentenced to death. (Id. at 323–24.) In addition, Agnes Miller's trial testimony was incorporated into the penalty phase hearing. At trial, Agnes Miller testified that while Petitioner and the victim "ha[d] a good marriage [ ] at the start," the marriage deteriorated because "both of them had a problem with drugs . . . and drinking." (N.T. 09/29/97 at 30.)

At the end of the penalty phase hearing, the trial judge sentenced Petitioner to death. (N.T. 10/02/97 at 341.) With respect to the aggravating and mitigating circumstances, the trial judge explained:

> The findings on which the sentence of death is based are, one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance is that the defendant committed a killing while in perpetration of a felony, in this case the rape. The mitigating circumstance that I found was the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired.
>
> However, I found that the aggravating circumstance, after a very careful deliberation, outweighed the mitigating circumstance, and, therefore, felt obligated to impose the sentence of death.

(Id.)

b. PCRA Hearing

i. Family Members' Testimony

At the PCRA evidentiary hearing, Petitioner presented the testimony of several family members and experts. The family members included his mother, Agnes Miller, his brother Kenneth Miller, and his daughter, Barbara Miller, all of whom had testified during the penalty phase of the trial. In addition, Brenda Miller, Linda Drew, and Glenna Saganich, Petitioner's

sisters, and Helen Pennington, the victim's sister, testified.

The family members' testimony centered around Petitioner's childhood and his relationship with the victim. Agnes Miller explained that her husband, Petitioner's father, was an alcoholic and used to beat her "about every time he was drunk." She stated that the beatings became worse when Petitioner was about seven or eight years old, and when Petitioner was about nine or ten, he started getting in between her and her husband to try to stop him from hitting her. Agnes Miller stated that Petitioner became "angry about it because he wanted him to quit beating on me." She said that her husband would also hit Petitioner, and that her husband once threw a cinderblock at Petitioner. She also said that there were problems with the marriage between Petitioner and the victim, but that trial counsel did not ask her about any of the childhood abuse or the marital problems before she testified at the penalty phase. (N.T. 10/28/03 at 355–75.)

Kenneth Miller, Petitioner's older brother, testified that Petitioner and he grew up in poverty in a home headed by a "raging alcoholic that was both mentally and physically abusive." He stated that he saw "black eyes, split lips, bruises" on his mother as a result of his father's beatings, but that the police were unresponsive, he and Petitioner "couldn't stop it," and that their father would hit them with a "closed fist" when they "tried to get in the middle." Kenneth Miller stated that he and Petitioner started doing drugs with each other, when he was 15 and Petitioner was 13, starting with marijuana and alcohol, then moving to LSD and methamphetamine. By the time Petitioner was 15 and he was 17, they were staying up all weekend using methamphetamine. With respect to Petitioner's marriage with the victim, Kenneth Miller explained that they started selling drugs so they could do drugs themselves, and that, because of the drug use, "[t]hey grew away from the family." Kenneth Miller further stated that, prior to testifying at the penalty phase, trial counsel did not ask him about Petitioner's childhood or drug use, but that he would have been willing to testify to that if asked. He stated that trial counsel did not even interview him, but instead spoke with him "[o]nly right outside the courtroom, right before he asked anyone who wanted to go in who could say something positive." (Id. at 482–501.)

Petitioner's sisters, Glenna Saganich, Brenda Miller, and Linda Drew each reiterated much of what Kenneth and Agnes Miller testified to about the abusive home in which Petitioner grew up. They also stated that Petitioner's lawyer never interviewed them about Petitioner's childhood, but had they been asked, they would have testified about it. (N.T. 10/29/03 at 415–33, 470–80, 586–90.) Helen Pennington, the victim's sister, testified to the relationship between Petitioner and the victim. She stated that Petitioner and the victim both used and sold drugs, and that she took her sister to get an abortion after she was impregnated by Larry Brown.[10] She also stated that she would have been willing to testify to all of this had she been asked to do so at the time of trial. (Id. at 508–20.)

Barbara Miller, the daughter of Petitioner and the victim, testified about her parents and their relationship. She stated that while her early childhood was a "normal, nice life," her parents started having problems as she got older. She testified that they would fight about money and drugs, and that her parents broke up a few times.

10. Larry Brown was mentioned in the note which was recovered at the house after the murder.

She further stated that while she was angry at her father at the time of trial, she would have testified at the penalty phase on Petitioner's behalf had she been asked to do so. (N.T. 10/28/03 at 376–93; N.T. 10/29/03 at 397–41.)

ii. Expert Testimony

Petitioner called two experts at the PCRA hearing for purposes of establishing that trial counsel was ineffective in preparing for the penalty hearing. Dr. Carol Armstrong, a neuropsychologist, testified that she examined Petitioner. She stated that the neuropsychological tests she performed, which were available at the time of the trial, revealed that Petitioner was brain damaged and "did not have normal brain function in some areas," particularly in the areas of motor control, visual attention, and verbal fluency. She explained that these impairments affected Petitioner's abilities, cognitivity, reasoning, and judgment. Dr. Armstrong also examined Dr. Cooke's report from the penalty phase, and was asked whether anything in the report "would have raised a red flag [ ] as to the possibility of brain damage of something that would have been consistent with brain damage." Dr. Armstrong pointed to the "chronically abusive situation in the home," the "flat, semi-skilled occupational history," the "extensive drug and alcohol use," the references to "poorly controlled anger and his tendency to decompensate under stress and drug use," and "[Petitioner's] IQ being at the low end of normal." Dr. Armstrong then concluded, to a reasonable degree of neuropsychological certainty, that Petitioner's impairment constituted an extreme mental or emotional disturbance and that he had a substantially impaired capacity to conform his conduct to the requirements of the law. (N.T. 10/27/03 at 121–29.)

Dr. Julie Kessel, a psychiatrist who also examined Petitioner, reinforced Dr. Armstrong's testimony. She stated that she reviewed Petitioner's school records, court documents, protection from abuse documents, drug rehabilitation records, Dr. Cooke's report for the penalty phase, and Dr. Armstrong's report for the PCRA hearing. Dr. Kessel opined that Petitioner's family background, substance abuse, and medical records regarding a motorcycle accident he was in as a teenager were all indications that Petitioner suffered from organic brain damage. (N.T. 10/29/03 at 521–50.)

iii. Trial Counsel's Testimony

At the PCRA hearing, trial counsel was questioned about his preparation for the penalty phase hearing. He testified that, before the hearing, he "had a lot of conversations" with Petitioner's sister Kay and his mother Agnes Miller, and, while he could not recall exactly what he interviewed them about, he knew "that one of the things [he] specifically focused with them on was the initial entry into the home when the body was discovered." Counsel testified that he also spoke with Petitioner's brother, Kenneth Miller, before he called him as a witness at the penalty phase hearing, but "[p]robably [did so] in the courthouse before he testified." He stated that he did not try to get Petitioner's medical records because, based on the fact that he "knew the history[,]. . . knew the family," and had a "good relationship" with Petitioner, he believed that he had "everything that [he] needed." He testified that he did not call Barbara Miller (the couple's daughter) since she was a young child and because he did not believe, after talking with family members, that she would provide any beneficial information. (Id. at 25–30.) With respect to the other family member witnesses who testified at the PCRA hearing, trial counsel did not give any other reason for not seeking out and interviewing them besides for the fact

that he felt as though he had sufficient information. (Id.)

Regarding why he did not have Petitioner tested by a neuropsychologist for brain damage when he was aware Petitioner had abused drugs, trial counsel stated he "had nothing that would have given [him] any indication that Petitioner had any organic brain damage." Trial counsel stated that he based this decision upon his conversations and interactions with Petitioner and his conversations with the family, along with Dr. Cooke's report which found that Petitioner did not suffer from a thinking disorder, psychoses, or other affective disorders. (Id. at 40–63.)

c. Pennsylvania Supreme Court PCRA Decision

In considering counsel's alleged ineffectiveness in the investigation and preparation of mitigation evidence, the Pennsylvania Supreme Court separately addressed counsel's failure to interview witnesses, obtain Petitioner's school records, medical records, drug use records, and the support order, and have him tested by a neuropsychologist. Before so doing, the court laid out "[t]he standards applicable to claims alleging that counsel was ineffective for failing to investigate and present mitigating evidence," relying on both Pennsylvania and U.S. Supreme Court cases:

> As this Court has observed, the United States Supreme Court has held that the Sixth Amendment requires capital counsel "to pursue all reasonably available avenues of developing mitigation evidence." Commonwealth v. Gorby, [ ] 589 Pa. 364, 909 A.2d 775, 790 (2006) (citing Wiggins v. Smith, 539 U.S. 510, 521 [ ] 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Counsel must exercise reasonable professional judgment, and in examining counsel's conduct, "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence... was itself reasonable." Commonwealth v. Malloy, [ ] 579 Pa. 425, 856 A.2d 767, 784 (2004) (quoting Wiggins, 539 U.S. at 523 [ ] 123 S.Ct. 2527).
>
> ...
>
> Strategic choices made following less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation of the investigation. In undertaking the necessary assessment, reviewing courts are to take all reasonable efforts to avoid the distorting effects of hindsight. See Commonwealth v. Basemore, [ ] 560 Pa. 258, 744 A.2d 717, 735 (2000). Nevertheless, courts must also avoid "*post hoc* rationalization of counsel's conduct." Wiggins, 539 U.S. at 526–27 [ ] 123 S.Ct. 2527.

Miller II, 987 A.2d at 666 (2009) (first quoting Commonwealth v. Natividad, 595 Pa. 188, 938 A.2d 310, 331 (2007)) (then quoting Commonwealth v. Sattazahn, 597 Pa. 648, 952 A.2d 640, 655–56 (2008)). The court clarified this point, stating:

> Finally, the "reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation." [Commonwealth v.] Steele, supra [599 Pa. 341, 961 A.2d 786 (2008)]; see also Commonwealth v. Malloy, [ ] 579 Pa. 425, 856 A.2d 767 (2004) (holding that while counsel has a duty to conduct a reasonable investigation, reasonableness of investigation may be dependent on information supplied by the defendant).

Id.

With respect to counsel's failure to interview and present the testimony of the witnesses who testified at the PCRA hearing, the court concluded that counsel's performance was not deficient because the testimony "merely would have been cumulative of evidence that was presented dur-

ing a penalty hearing." Id. at 667 (citing Commonwealth v. Whitney, 550 Pa. 618, 708 A.2d 471, 477 (1988); Commonwealth v. Abdul–Salaam, 570 Pa. 79, 808 A.2d 558, 562 n.5 (2001)). The Court explained that "[t]rial counsel did investigate evidence of Appellants [sic] childhood circumstances, marital relationship, and drug abuse, and introduced evidence pertaining thereto during the penalty hearing." Specifically, the court noted that "trial counsel introduced through Dr. Cooke the witnesses who testified during the penalty hearing, and appellants written background history and statement concerning Appellant's life history, the abuse Appellant observed and was subject to while growing up, as well as evidence of his drug use." Id. at 666–67. With respect to the prejudice prong of the ineffectiveness standard, the court found that Petitioner was not prejudiced since "he presented nothing that established that the trial court would have imposed a life sentence if only it had heard additional evidence of [his] childhood, drug dependence, and dysfunctional marital relationship." Id. at 667.

The Pennsylvania Supreme Court then addressed the claim that trial counsel was ineffective for failing to obtain and review the various records. With respect to the school records which "showed that Appellant had an I.Q. in the high seventies to low eighties and thus was borderline mentally retarded," the court concluded that Dr. Cooke's testimony that Appellant's IQ was in the 81 to 89 range, and the fact that "Appellant was able to hold jobs that required at least a modicum of skills[,] demonstrated that Appellant[']s school records would not have resulted in a different outcome had counsel obtained them and introduced them during the penalty hearing." Id. at 667. As such, the court concluded that "Appellant has failed to establish that trial counsel acted unreasonably by not obtaining these records. Id.

Regarding medical records relating to the motorcycle accident, the court credited trial counsel's testimony that "he received no information from Appellant or members of his family alerting him to the fact that Appellant had suffered any injury or had medical problems affecting cognition," and also pointed out that "Appellant denied having any significant medical history when examined by Dr. Cooke." Id. The court accordingly found that counsel's performance could not be deemed deficient in that counsel "cannot be faulted for failing to obtain evidence of which he had no reason to be aware." Id. at 667–68 (collecting cases).

With respect to the records which concerned Petitioner's drug abuse history, the Pennsylvania Supreme Court focused on the cumulative nature of those records, stating that "trial counsel was aware of Appellants substance abuse problem and introduced evidence about it" at the sentencing phase. Id. at 668. Focusing on the prejudice prong, the court concluded that Petitioner was not prejudiced, and that counsel could not be "found ineffective for failing to introduce [cumulative] evidence," the introduction of which would not have changed the outcome of the penalty hearing. Id. Regarding the support order, the Supreme Court found that Petitioner had failed to establish that trial counsel even had knowledge of such an order and therefore could not be deemed ineffective for failing to pursue and present it during the penalty phase. Id.

Lastly, the court addressed the issue of whether trial counsel was ineffective for failing to have Petitioner tested by a neuropsychologist. The Court noted that Dr. Cooke's examination "found no evidence that Appellant 'suffered from a thinking disorder or psychosis or any kind of major affective disorder[ ] such as major depression or manic disorder,' " and "neither Ap-

pellant nor any member of his family advised trial counsel that Appellant suffered from neurological or mental deficits." Consequently, the court concluded that trial counsel could not be "faulted for not securing additional testing of Appellant." Id. at 668.

d. The Ineffectiveness Claim

As recounted above, the Pennsylvania Supreme Court divided its review of this ineffective assistance claim among the various types of mitigation evidence which Petitioner contends trial counsel should have uncovered and presented during sentencing. The court, however, addressed only the prejudice prong of Strickland as it relates to some but not all the pieces of evidence at issue. Petitioner contends that this analysis was unreasonable since the United States Supreme Court requires a court to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." Williams v. Taylor, 529 U.S. 362, 397–98, 120 S.Ct. 1495. In light of the fact that the state court failed to properly follow this procedure, Petitioner argues that my review of the prejudice prong of Strickland should be de novo. Appel, 250 F.3d 203, 210 (3d Cir. 2001). Respondents do not respond to this argument, instead choosing to focus solely on the reasonableness of the state court's determination on the deficient performance prong of Strickland.

[51] Bearing in mind that the ultimate focus of the ineffectiveness "inquiry [is] on the fundamental fairness of the proceeding whose result is being challenged," I need address only the prejudice prong of Strickland. Id. at 696–97. Accepting Petitioner's argument that my review of the prejudice prong is de novo because the state court did not consider the mitigation evidence in its totality, I conclude that there was not a reasonable probability that the outcome of the sentencing would have been different had Petitioner presented the evidence at sentencing that he presented at the PCRA hearing. Indeed, the penalty phase hearing included testimony from Petitioner's family members who spoke about his drug and relationship problems, and from a doctor who examined Petitioner and concluded that he had a low IQ, paranoid personality disorder, and a history of drug and alcohol abuse. The further lay and expert witness testimony, as well as the support order and the school and drug records which were introduced at the PCRA hearing, were cumulative insofar as this evidence provided further proof of Petitioner's drug, psychological, and marital problems, as opposed to uncovering issues which were not introduced during the penalty phase of the trial. Accordingly, Petitioner is due no relief on this claim.

6. Claim VI: Was Petitioner's Waiver of a Jury at Sentencing Invalid, and Was Counsel Ineffective for Failing to Object to the Waiver and for Failing to Raise This Issue on Appeal?

Petitioner next claims that his death sentence should be vacated and a new sentencing hearing awarded because his waiver of the right to have a jury decide the penalty phase was neither knowing nor intelligent and violated his federal due process rights. He argues that the trial court's colloquy was deficient because it failed to inform him of the unique procedures of capital jury sentencing, including that a jury's failure to unanimously agree that a death sentence is appropriate would result in a life sentence. Petitioner also contends that the trial judge misled him when he told him that "you stand the same chance of being sentenced to death or sentenced to life in prison in front of me as you do in front of a jury, as far as I'll decide the matter exactly the same way that a jury

will." Relatedly, Petitioner claims that his counsel was ineffective for failing to object to the inadequate waiver and for failing to raise this issue on appeal. (Br. at 89–100.)

a. The Penalty Phase Jury Waiver Colloquy

The trial court conducted three colloquies with Petitioner concerning the waiver of a jury for the sentencing hearing. The first colloquy occurred on September 24, 1997, five days before the guilt phase of the trial began.

> THE COURT: Do you understand whether you go with a jury trial or whether you go with a non-jury trial if you are found guilty of the criminal homicide charge, then because of the notice with regard to the aggravating circumstances, then there would be a second phase to the trial? And in the second phase of the trial, the Commonwealth would then seek to prove an aggravating circumstance or circumstances, and if they were able to prove an aggravating circumstance or circumstances that would then make you eligible for the death penalty. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And in that phase of the trial you would have the opportunity to prove mitigating circumstances. And if there were any mitigating circumstances that were offered, then the fact finder, be it either the jury or the trial judge sitting alone, would have to balance whether the aggravating circumstances outweigh the mitigating circumstances before the death penalty could be imposed?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you understand, obviously, the difference between a non-jury and a jury trial, again, as similar to the guilt phase of the trial, that the Commonwealth need only convince one person of the existence of the aggravating circumstance or that the aggravating circumstances outweigh the mitigating circumstances, as opposed to having to convince twelve jurors unanimously of those facts?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Just so we're clear, you understand that the penalties that are available if you are found guilty of the criminal homicide, obviously, if it went to the second phase and there was an aggravating circumstance or circumstances that were proven, and if there were mitigating circumstances, and those aggravating circumstances outweighed the mitigating circumstances, that you face the possible imposition of the death penalty?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You understand if you were found guilty and there were not sufficient aggravating circumstances, or the finder of fact decided, either myself sitting at a non-jury trial or a jury, that the mitigating circumstances outweighed the aggravating circumstances, or that there were not aggravating circumstances, that then you would be subject to life without parole?
>
> THE DEFENDANT: Yes.

(N.T. 09/24/97 at 13–15.) Five days later, on September 29, 1997, right before the trial began, the trial court revisited the jury waiver issue as it related to the sentencing phase.

> THE COURT: And do you understand that if you are convicted of murder in the first degree, and if there is an aggravating circumstance proven, and the two that are alleged here, either a finding of torture or a finding that the killing was committed in the perpetration of a felony, and here rape, then I would decide in the same manner as a jury would if you should be sentenced

to life in prison without parole or a death penalty imposed; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand if you are convicted of murder in the first degree that you stand the same chance of being sentenced to life in prison or death in a trial before me as you would in a trial by jury?

THE DEFENDANT: Yes.

THE COURT: And has anyone promised or told you that you are less likely to receive a death sentence by having the case tried before me as a bench trial than a jury trial?

THE DEFENDANT: No.

(N.T. 09/29/97 at 11–12.)

The third and last colloquy regarding the waiver of a jury for the penalty phase was then conducted after the trial court rendered its verdict and right before the penalty phase began.

THE COURT: Mr. Miller, the Wednesday before the start of this trial, and again immediately before the start of this trial, we discussed with you and went through the colloquy with regard to your right to a jury trial. And, obviously, you have the right to a jury trial in connection with the guilt phase of the trial. And you still also have the right to a jury trial with regard to the sentencing phase.

Obviously, with a conviction of first degree murder, the two choices for sentencing in that matter are life in prison and the death sentence. And when we reviewed that waiver of your jury trial, did you understand you were also waiving your right to a jury trial in connection with this phase of the proceeding, that is the sentencing phase?

THE DEFENDANT: Yes.

THE COURT: Just out of an abundance of caution, I ask you again, has anyone promised you anything in order to get you to do that?

THE DEFENDANT: No.

THE COURT: And you understand, as I think I told you at the outset of the trial itself, that you stand the same chance of being sentenced to death or sentenced to life in prison in front of me as you do in front of a jury, as far as I'll decide the matter exactly the same way that a jury will, and that is in accordance with the law as I find the law to be and the facts as I determine them to be?

THE DEFENDANT: Yes.

THE COURT: And I can state for both sides' benefit, I start this hearing without any preconceived notion of how it's going to end up. And I just wanted to reaffirm that you are waiving your right to a jury trial with regard to the sentencing phase, which I believe you previously waived, but I just want to make sure you haven't changed your mind.

THE DEFENDANT: No.

(N.T. 10/02/97 at 285–86.)

b. Constitutionally Deficient Waiver of a Penalty Phase Jury Claim

Petitioner presented the defective colloquy issue on PCRA appeal based on the fact that the colloquies failed to include critical information about the role of a jury during a capital sentencing. Petitioner also alleged that his counsel was ineffective for failing to object to the inadequate waiver and for failing to raise this issue on appeal. While the Pennsylvania Supreme Court addressed and rejected the ineffectiveness claim, it did not reach the merits of the due process claim. The court declined to address the claim on procedural grounds because "[n]o objection was made as to the inadequacy of the colloquies at any time nor was the issue raised on [direct] ap-

peal." Miller II, 987 A.2d at 661. However, as noted in my discussion of exhaustion and procedural default issues, because the waiver rule as applied to capital cases was not firmly established and regularly followed at the time of the trial and direct appeal, this is not an adequate ground to prevent federal review over this claim. As such, I will review the due process claim de novo. Appel, 250 F.3d 203, 210 (3d Cir. 2001).

[52] Section 9711(b) of Pennsylvania's death penalty statute governs a capital defendant's waiver of a jury at sentencing, and provides that

> If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty...

42 Pa. C.S. § 9711(b). In other words, "[u]nder Pennsylvania law, a capital defendant tried without a jury in the guilt phase retains the right to a jury in the penalty phase of the trial unless he specifically waives that right without objection by the Commonwealth." Commonwealth v. Fears, 575 Pa. 281, 836 A.2d 52, 70 (2003) (citing 42 Pa.C.S. § 9711(b)). Pennsylvania law requires that the waiver be guided by the following principles:

> Before a voluntary waiver may be accepted as knowing and intelligent, the on-record colloquy must show that the defendant fully comprehended the significance of the right being waived and must indicate that, at a minimum, the defendant knew the essential protections inherent in a jury trial as well as the consequences attendant upon a relinquishment of those safeguards.

Id. (quoting Commonwealth v. O'Donnell, 559 Pa. 320, 740 A.2d 198, 212 (1999)).

Petitioner contends that the penalty phase jury waiver colloquy was deficient because it failed to inform him of the unique procedures of capital jury sentencing. He points out that the trial court did not explain "the requirement under 42 Pa. C.S. § 9711(c)(1)(iii) that, when a jury is the finder-of-fact at a capital sentencing proceeding, the Commonwealth has the burden of proving each and every aggravator *beyond a reasonable doubt*, while the defense need only prove the existence of a mitigator by *a preponderance of the evidence*." He further argues that the trial court failed to explain that "unanimity is required for the finding of an aggravator...that the entire jury must consider and weigh a mitigator, even if found by only one of the jurors," and that, "in accordance with § 9711(c)(1)(v), [ ] the court *shall* sentence him to life imprisonment if it decides that further deliberations will not result in a unanimous verdict."

Petitioner contends that the trial judge not only failed to explain that "a single juror failing to vote for death would result in a life sentence, not a hung jury," but that "the colloquies actually suggested the opposite conclusion because the court explained that Petitioner would be tried all over again if the jury could not reach a unanimous verdict at trial, yet failed to point out that this was not true for the penalty phase." In light of this, Petitioner contends that the judge's statement that "you stand the same chance of being sentenced to death or sentenced to life in prison in front of me as you do in front of a jury, as far as I'll decide the matter in exactly the same way that a jury will," was "misleading and incorrect." (Br. at 91–92.)

[53] After careful review of the colloquies, I agree with Petitioner that the trial judge both failed to inform and misinformed Petitioner of the unique procedures of jury sentencing. The trial judge

did not explain that while the entire jury must unanimously find an aggravating factor, the entire jury would be required to consider and weigh a mitigating factor even if found by only one member of the jury. The judge did not explain the crucial difference between a trial jury and a sentencing jury, in that a hung sentencing jury would automatically result in a life sentence as opposed to a new sentencing proceeding. The trial judge's declaration that Petitioner was as likely to be sentenced to death by a judge as by a jury—which requires that twelve individuals as opposed to one conclude that a death sentence is appropriate—was also misleading. I therefore conclude that Petitioner's waiver of a penalty phase jury was not knowing and voluntary under Pennsylvania law.

[54] However, "[not] every error of state law affecting the outcome of a state criminal proceeding [is] cognizable as a due process claim." Johnson v. Rosemeyer, 117 F.3d 104, 112 (3d Cir. 1997). In order for Petitioner to prove a violation of his federal due process rights, he must show not only that he was prejudiced by the violation of state law, but that he was "prejudiced in a very particular way." Smith v. Horn, 120 F.3d 400, 416 (3d Cir. 1997) (internal quotations omitted). In Smith, the Third Circuit found that the defendant was prejudiced in such a way that violated his federal due process rights because a jury instruction, which "erroneously informed the jury that Smith could be convicted of first-degree murder even if he did not have the specific intent to kill[,]...operated to lift the burden of proof of an essential element of an offense as defined by state law." Id. at 409, 416.

The Third Circuit has applied the Smith prejudice standard to a habeas claim such as this which challenges the propriety of the waiver of a penalty phase jury. In Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007), the petitioner pled guilty to five counts of first degree murder and then waived his right to a penalty phase jury. At sentencing, Taylor prohibited his counsel from presenting mitigating evidence, and the judge sentenced him to death. In his habeas petition, Taylor argued that the waiver of his penalty phase jury right was not knowing and voluntary under Pennsylvania law, and was furthermore a federal due process violation. The Third Circuit rejected Taylor's claim, concluding that even if the jury waiver violated state law, Taylor could not establish that he was "prejudiced in a way that implicated his federal constitutional rights." Id. at 450. The court explained that "[c]ritically, Taylor does not argue that having a judge determine his sentence prejudiced him any way that implicates his federal rights. Indeed, there were substantial strategic reasons not to elect a penalty-phase jury in this case, and Taylor has never asserted that he would have elected one, had he known of the option....Accordingly, we cannot hold on this record that the alleged state law error violated the Due Process Clause of the federal Constitution." Id.

This case is distinguishable from Taylor in two crucial aspects. First, Petitioner presented mitigation evidence at the sentencing hearing, and actively sought a life sentence as opposed to a death sentence. He presented evidence that he was impaired at the time of the murder, that he was a loving father who worked hard to support his family, and that a death sentence would harm his two children. While the trial judge did not find a catch-all mitigating circumstance under Section 9711(e)(8), he did find that the Section 9711(e)(3) mitigating factor was met, i.e., that "the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired."

Second, Petitioner argues extensively that there were strategic reasons for him

to prefer a jury sentencing over bench sentencing, and that having a judge determine his sentence prejudiced him. These arguments are closely related to Petitioner's arguments that the penalty phase jury waiver colloquy was deficient under state law, and are summed up by Petitioner's contention that "it is highly likely that the Commonwealth would not have been able to persuade all twelve jurors to vote for death." (Br. at 93.)

[55] While I do not and need not weigh in on whether a jury would not have reached a unanimous death sentence, I do accept Petitioner's position that it is more likely that one of twelve jurors (as opposed to one judge) could have found that the evidence constituted a catch-all mitigating circumstance under Section 9711(e)(8) or that the Section 9711(e)(3) mitigator outweighed the aggravating factor. This stands in stark contrast to Taylor, where no mitigation evidence was presented. Accordingly, I conclude that Petitioner was prejudiced by the deficient penalty phase jury waiver colloquy in a way so as to violate his federal right to due process. I will therefore grant relief on this claim, for which a new sentencing hearing is the proper remedy.[11]

7. Claim VII: Was the Prosecutor–Introduced Inadmissible Victim Impact Evidence in Violation of Petitioner's Constitutional Rights, and Was Petitioner's Counsel Ineffective for Failing to Raise and Litigate This Claim?

Petitioner next argues that the prosecutor committed misconduct by introducing inadmissible victim impact evidence during the penalty phase of the hearing. Petitioner posits that this misconduct violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair sentencing proceeding in that the trial judge, sitting as factfinder, considered nonstatutory aggravating factors in sentencing him to death. Petitioner points specifically to the testimony of his daughter, Barbara Miller, who held up a picture of her deceased mother and testified how her life had deteriorated since her death, and to certain comments that the prosecutor made after Barbara testified that urged the court to consider the effect of Petitioner's crime on the victim's family. Petitioner relatedly contends that counsel was constitutionally ineffective for failing to object to this evidence and raise this issue on appeal. (Br. at 100–01.)

a. The Introduction of the Victim Impact Evidence

The prosecutor began the penalty phase hearing by stating that "the Commonwealth has two purposes in presenting the matter for sentencing pursuant to the death penalty. The first is that we wish to present evidence regarding both of the aggravating circumstances . . . .[and the second is] information concerning the impact the death of the victim has had on the family of the victim." With respect to this second purpose, the prosecutor continued that "at Section 9711 (a) (2) of the Sentencing Code the rules indicate that evidence shall include information concerning the victim and the impact the death of the victim has had on the family of the victim." The prosecutor then called Barbara Miller, the daughter of Petitioner and the victim, who was 13 at the time, to testify about the impact her mother's death had on her. (N.T. 10/02/97 at 285–89.) Barbara Miller testified as follows:

> PROSECUTOR: Barbara, I notice that you have with you a photograph.

11. Having granted relief on the due process claim, I need not discuss the related claim that counsel was ineffective for having failed to object to the waiver colloquy and for failing to raise that issue on appeal.

Would you like to show that to the judge?

BARBARA: (Witness complies.)

PROSECUTOR: Barbara, who is in that photograph?

BARBARA: My mom and me.

. . .

PROSECUTOR: Now that your mother is gone, can you tell us how that has affected you and how that affects your life and your brother's life?

BARBARA: Well, I'm going to have to grow up without a mom. And my brother, it's going to be hard for him to understand, because he never knew her. So he'll never get to know her. Like I always thought my mom would be there for me and she can't be now. And it's just like in school I kind of went downhill, but I think I'm getting better now. It's just really hard because I think about her every day.

PROSECUTOR: How many different people have you lived with since your mother's death?

BARBARA: This will be the fourth move.

PROSECUTOR: And, in fact, is the question of your ultimate custody still up in the air?

BARBARA: Yes.

(Id. at 289–90.)

After Barbara Miller testified, the prosecutor addressed the court, stating:

I've spoken with other members of the family, and I think most of them have indicated it would be too emotional for them to get up and address the Court at this time. I think there really doesn't need to be much elaboration by the Commonwealth to your Honor about how this has affected a number of people. You've seen the people come to court. You've heard the reactions during the testimony and during the trial. And I think I speak for all of them when I say it has had a tremendous and terrible impact on this family. And we hope that Your Honor will take that into consideration in forming your sentence in this matter. And that's all we would present at this time.

(Id. at 291.)

b. Counsel's Performance Was Deficient for Failing to Object to the Introduction of the Victim Impact Evidence

[56] Respondents do not dispute that trial counsel's performance was deficient for having failed to object to the presentation of the photograph, the testimony of Barbara Miller, and the prosecutor's remarks about the emotional effect of the death on the victim's family. This is because while 42 Pa. C.S.A. § 9711(a)(2) provides that "evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible" at the penalty phase hearing, that amendment to the statute did not take effect until December 10, 1995. See Commonwealth v. McNeil, 545 Pa. 42, 679 A.2d 1253, 1259 (1996) (stating that the amendment to 42 Pa. C.S.A. § 9711(a)(2) which made victim impact testimony admissible "shall only apply to sentences imposed for offenses which take place on or after the [December 10, 1995] effective date of the Act"). Because the murder occurred on November 19, 1995, the victim impact testimony presented at the sentencing hearing was *per se* inadmissible under Pennsylvania law. Id. The Pennsylvania Supreme Court recognized that this was the case in its PCRA appeal opinion, and I agree that counsel's performance was deficient for having failed to object to the introduction of the victim impact evidence. Miller II, 987 A.2d at 669; see also Everett v. Beard, 290 F.3d 500, 513 (3d Cir. 2002) (explaining that "[a] reasonably competent attorney patently is required to know the state of the applicable law").

c. Petitioner Was Not Prejudiced by the Introduction of the Victim Impact Evidence

Petitioner argues that he was prejudiced by counsel's failure to object to the introduction of the victim impact evidence because the trial court was able to hear and consider emotionally powerful nonstatutory aggravating factors in imposing the death penalty.[12] The Pennsylvania Supreme Court dismissed this claim on the following basis:

> No relief is due on this claim because Appellant failed to meet his burden of proving that trial counsels failure to object to the prosecutors actions prejudiced him. First, the actions and comments of the prosecutor were innocuous insofar as they were fleeting and did not dwell on the victim. In numerous cases, this Court has refused to find prejudice under similar circumstances. See Commonwealth v. Freeman, [ ] 573 Pa. 532, 827 A.2d 385, 414 (2003) (holding that brief victim impact testimony indicating that victim was "peaceful" and "nice" was not prejudicial); see also Commonwealth v. Rollins, [ ] 558 Pa. 532, 738 A.2d 435, 447 (1999) (same).
>
> Appellant cannot prove prejudice for a second reason. The PCRA court, sitting as factfinder, indicated that it was not influenced by the victim's photograph or the prosecutor's comments and that neither the photograph nor the comments had any effect on the verdict it ultimately rendered. PCRA Court Opinion, 6/30/07, 37–38. It is presumed that a trial court, sitting as factfinder, can and will disregard prejudicial evidence. See Commonwealth v. Davis, [ ] 491 Pa. 363, 421 A.2d 179, 183 (1980); Commonwealth v. David Brown, 886 A.2d 256 (Pa. Super. 2005). Thus, because Appellant has failed to prove that the outcome of the proceedings would have been different had trial counsel lodged an objection, he is not entitled to relief with respect to this claim. [FN22]
>
> FN22: We note that a review of the prosecutor's closing argument during the penalty phase indicates that the prosecutor did not comment upon the evidence he presented during the penalty hearing. N.T. 10/2/97, 325–29.

Miller II, 987 A.2d at 669–70.

[57] Petitioner contends that the Supreme Court's conclusion here was both an unreasonable determination of the facts and an unreasonable application of Strickland. With respect to the factual determination, Petitioner takes issue with the court's characterization of the prosecutor's actions and comments as "innocuous." I do not find this to be an unreasonable factual determination. Rather, the court's characterization of these comments as "innocuous insofar as they were fleeting and did not dwell on the victim" was accurate. The comments were indeed brief, and the prosecutor, who stated simply that the family was "emotional" and that the murder had a "terrible impact," spoke in general and obvious terms about how the victim's death had affected the family. Further, the pros-

12. As noted previously in my discussion of the exhaustion issues related to this claim, the Pennsylvania Supreme Court, while it reached the merits of the ineffectiveness claim, did not address the underlying claim that the prosecutor committed misconduct for having introduced the victim impact evidence. Nevertheless, I concluded that the prosecutorial misconduct claim was properly exhausted since the court effectively resolved the issue through its analysis of the prejudice prong of the ineffective assistance claim. Moore v. Morton, 255 F.3d 95, 107 (3d Cir. 2001) (explaining that, where considering a prosecutorial misconduct claim, a court must consider the extent to which the prosecution's conduct prejudiced Petitioner). I will therefore consider the prosecutorial misconduct claim here as I consider the prejudice prong of the ineffectiveness claim.

ecutor did not dwell upon these comments or any of the other victim impact evidence during his closing argument at the penalty phase. (N.T. 10/29/03 at 325–29.)

As for the state court's legal determination, Petitioner argues that the assessment of the prejudice prong of Strickland was unreasonable in that it focused on whether the judge actually and subjectively relied upon the victim impact testimony in sentencing Petitioner to death. Instead, Petitioner asserts that the proper Strickland analysis is whether the admission of the victim impact testimony would have affected the determination reached by an objectively reasonable factfinder. See Strickland, 466 U.S. at 695, 104 S.Ct. 2052 ("The assessment of prejudice . . . should not depend on the idiosyncracies [sic] of the particular decisionmaker.").

[58] While I agree with Petitioner that the court's emphasis on the PCRA court's declaration that the victim impact evidence did not actually have an effect on the death sentence ultimately rendered was misplaced, it was not unreasonable. Rather, it was entirely relevant to the court's finding that Petitioner was not prejudiced since he had failed to put forth any evidence to rebut the objective presumption "that a trial court, sitting as factfinder, can and will disregard prejudicial evidence." Miller II, 987 A.2d at 669–70 (citing state law); see also Harris v. Rivera, 454 U.S. 339, 346–47, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (observing that a judge, sitting as a factfinder, routinely hears inadmissible information, and that it is presumed, under federal law, that the judge will ignore such information when making decisions). In this regard, Strickland instructs that a habeas court "should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695, 104 S.Ct. 2052. Applying these presumptions here, I presume that the trial judge acted reasonably and did not rely on inadmissible victim impact testimony in sentencing Petitioner to death.

Petitioner has presented no evidence to rebut this presumption. In imposing the death sentence, the judge stated that the only aggravating circumstance was that "the defendant committed a killing while in the perpetration of a felony," and he did not make any reference to the victim impact testimony. (N.T. 10/23/97 at 341.) As such, Petitioner's assertion that he was prejudiced by the inadmissible victim impact testimony and that the prosecutor committed misconduct by presenting such evidence is unsupported by the record. He is due no relief on this claim.

8. Claim VIII: Were Petitioner's Waiver of a Jury Trial and Waiver of His Right to Testify in His Own Defense at the Guilt Phase Invalid Because They Were the Product of the Ineffective Assistance of Counsel?

Petitioner next claims that defense counsel's failure to investigate, develop, and present defenses to first degree murder made his waiver of the right to a jury trial and waiver of his right to testify in his own defense invalid because counsel's advice was the product of ineffective assistance of counsel.[13] Petitioner incorporates the ineffectiveness arguments he made in Claims I–IV, where he alleged that trial counsel failed to investigate and present evidence to support the heat of passion defense, to rebut the allegation of rape, and to discredit prosecution witness Michael Torres. Petitioner argues that counsel's unreasonable advice prejudiced him since "[i]t is reasonably probable that a jury, after hearing details of the stormy relationship

13. Petitioner does not allege that the waivers themselves were substantively and constitutionally defective. As such, I need not discuss the content of the waivers here.

between petitioner and the decedent, would have had a reasonable doubt that this was first degree murder." (Br. at 109–12.)

[59] There is little precedential guidance regarding allegations of ineffectiveness relating to the waiver of a jury trial. Other circuits have observed that "[a]n attorney's decision to waive his client's right to a jury is a classic example of a strategic trial judgment, 'the type of act for which Strickland requires that judicial scrutiny be highly deferential.' " Hatch v. State of Oklahoma, 58 F.3d 1447, 1459 (10th Cir. 1995) (quoting Green v. Lynaugh, 868 F.2d 176, 178 (5th Cir. 1989)). While "[m]ost claims of ineffective assistance relate to alleged negligent omissions by attorneys," the decision of whether or not to waive a jury trial is merely a "choice between alternatives, a tactical judgment [which] will almost never be overturned on habeas corpus." Carter v. Holt, 817 F.2d 699, 701 (11th Cir. 1987). In this regard, "[f]or counsel's advice to rise to the level of constitutional ineffectiveness, the decision to waive a jury trial must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.' " Hatch, 58 F.3d at 1459 (quoting United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)).

At the PCRA hearing, trial counsel was asked about the advice he gave Petitioner with respect to waiving a jury trial. Counsel stated that, after having considered the "entire circumstances and the information surrounding [the case]," he advised Petitioner that he would be better served by a bench as opposed to a jury trial since "[he] thought that the circumstances were [such] that a jury would have given [Petitioner] the death penalty." [14] (N.T. 10/27/03 at 53–56.)

On PCRA appeal, the Pennsylvania Supreme Court considered whether Petitioner's waiver of a jury trial was defective on account of counsel's ineffectiveness. As for the deficient performance prong of Strickland, the court concluded that "[a]ppellant is entitled to no relief with respect to this issue because we have [already] held that trial counsel was not ineffective for the reasons stated." Miller II, 987 A.2d at 660. Petitioner argues that because the court's application of Strickland was unreasonable throughout its opinion it was also unreasonable here.

[60] I acknowledge that my conclusion with respect to the question of whether counsel was ineffective in rebutting the allegation of rape differs from that of the Pennsylvania Supreme Court, and that could bear on my analysis here. Nonetheless, I find the court's conclusion that counsel's advice to waive a jury trial was effective to be reasonable. This is because, as I have explained throughout this opinion including in my discussion of the heat of passion defense, I agree with the state court that the evidence supporting the premeditation and specific intent to sustain a first degree murder conviction—the note left at the scene, the stab wounds, the lack of information as to what occurred immediately before the murder—was strong and convincing. As such, counsel's advice that Petitioner should waive a jury trial, which was based on his belief that a jury would be more likely than a judge to convict, was

14. In Pennsylvania, once a capital defendant is found guilty of first degree murder by a jury, he does not have the opportunity to then waive a jury for the penalty phase. See 42 Pa. C.S. § 9711(a)(1) ("After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.") (emphasis added). As such, I take counsel's comments to also mean that he believed that a jury would be more likely than a judge to convict him of first degree murder.

well within the bounds of reasonable professional judgment, and this claim fails. Hatch, 58 F.3d at 1459.

Petitioner's next and related claim is that his waiver of the right to testify at trial was invalid on account of counsel's ineffectiveness. In addressing this claim, the Pennsylvania Supreme Court explained that "[c]laims alleging ineffectiveness of counsel premised on allegations that trial counsel's actions interfered with an accused's right to testify require a defendant to prove that 'counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.'" Miller II, 987 A.2d at 660 (quoting Commonwealth v. Nieves, 560 Pa. 529, 746 A.2d 1102, 1104 (2000)) (citing Commonwealth v. Uderra, 550 Pa. 389, 706 A.2d 334 (1998)). The court then rejected the claim as "meritless," noting that while "trial counsel testified at the evidentiary hearing that he asked Appellant to testify both at trial and during the penalty hearing," Petitioner did not testify at the PCRA hearing, which "has placed this Court in the position of having to guess whether counsel's ineffectiveness interfered with his right to testify." Id. at 661.

[61, 62] Petitioner is due no relief on this claim. In the absence of Petitioner's testimony, it was indeed reasonable for the state court to conclude that counsel's advice or actions did not undermine his waiver of his right to testify. Furthermore, a petitioner cannot show that he was prejudiced within the meaning of Strickland by his failure to testify without informing a court of the facts to which he would have testified at trial. See Palmer v. Hendricks, 592 F.3d 386, 394 (3d Cir. 2010) (rejecting a claim that the defense attorney was ineffective for interfering with his right to testify where the petitioner did not inform the court of any of the facts to which he would have testified, but merely stated that he wanted to "explain [his] side"). In his habeas petition, and without further detail, Petitioner contends simply that he would have described the "stormy relationship" between himself and the victim. (Br. at 109.) Accordingly, this claim fails on the prejudice prong of Strickland as being insufficiently pled.

9. Claim IX: Does the Cumulative Effect of the Errors in This Case Entitle Petitioner to Habeas Relief?

[63] Lastly, Petitioner contends that he is entitled to relief from his convictions and sentence because the cumulative effect of the errors in this case "render[ed] the verdict in this case inherently unreliable" thereby violating his constitutional right to due process. (Br. at 114–17.) The Third Circuit has held that "[i]ndividual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermine the fundamental fairness of his trial and denied him his constitutional right to due process." Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008). Cumulative errors will be deemed harmful only where "they had a substantial and injurious effect or influence in determining the jury's verdict, which means that a habeas petitioner is not entitled to relief based on cumulative errors unless he can establish actual prejudice." Id. (internal quotation marks omitted). To satisfy this standard, a petitioner must show that the errors complained of "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). In this regard, the Third Circuit "read[s] United States Supreme Court precedent as establishing the principle that the stronger the evidence against the defendant, the more likely that improper arguments or conduct

have not rendered the trial unfair." Marshall v. Hendricks, 307 F.3d 36, 69 (3d Cir. 2002).

Petitioner brings this allegation of cumulative error as a direct claim, as opposed to an attack on the Pennsylvania Supreme Court's factual and legal determination.[15] The Pennsylvania Supreme Court did, however, address this claim on PCRA appeal, citing only to Pennsylvania precedent and denying relief on the grounds that "[t]his Court has repeatedly stated that 'no number of failed claims may collectively warrant relief if they fail to do so individually.' " Miller II, 987 A.2d at 672 (citing to Commonwealth v. Washington, 592 Pa. 698, 927 A.2d 586, 617 (2007); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 56 (2008)). In this regard, there is a disparity between Pennsylvania precedent and the federal standard of constitutional error regarding claims of cumulative prejudice, as federal law permits a claim of cumulative prejudice even where the individual claims fail. See, e.g., Fahy, 516 F.3d at 205. Accordingly, since the Pennsylvania Supreme Court did not examine this claim "in light of federal law as established by the Supreme Court of the United States . . . the pre–AEDPA standards of review apply." Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2002). Under those standards, I "owe[ ] no dereference to [the] state court's resolution of mixed questions of constitutional law and fact, whereas the state court's factual findings are presumed to be correct unless [ ] the state court's findings are not fairly supported by the record." Id. (citations and quotations omitted).

[64] Petitioner is due no relief on this claim of cumulative error as it relates to his conviction for first degree murder. As noted throughout this opinion, the evidence presented during the guilt phase of trial, particularly of the stab wounds and the incriminating note left at the scene, strongly supports the finding that Petitioner acted with the malice and specific intent necessary to support a first degree murder conviction. See Marshall, 307 F.3d at 69 ("[T]he stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair.").

With respect to Petitioner's conviction for rape and the death sentence, I will grant habeas relief based on trial counsel's failure to adequately investigate, prepare, and present testimony to rebut the Commonwealth's allegations that the victim was raped during the commission of the homicide, and will separately grant Petitioner relief from his death sentence on account of the constitutionally deficient penalty phase jury waiver colloquy. (See Claims II and VI.) I conclude that Petitioner is not entitled to relief on his other penalty phase claims. (See Claims III, V, and VII.) Because I have granted Petitioner relief from the rape conviction and death sentence on individual claims—and the claims which I denied taken together did not render his sentencing proceeding any more unfair—Petitioner's claim of cumulative prejudice is denied.

IV. CONCLUSION

For the reasons stated herein, Petitioner is granted habeas relief from his rape conviction and death sentence based on trial

15. While Respondents do not take issue with this approach, they argue that I should reject this claim on the basis that it is "a boilerplate, bald assertion, essentially consisting of a few bullet points in his memorandum." (Resp. at 72.) While this claim is not as thoroughly developed as his other claims, Petitioner has set forth the legal standard which applies to a cumulative prejudice claim, and, through footnotes, has incorporated his discussion of the other eight claims into this claim. This is sufficient.

counsel's failure to adequately investigate, prepare, and present testimony to rebut the Commonwealth's allegations that the victim was raped during the commission of the homicide (Claim II). Petitioner is also granted habeas relief from his death sentence on account of the constitutionally deficient penalty phase jury waiver colloquy (Claim VI). Petitioner is due no relief on the guilt phase claims as they relate to his first degree murder conviction.

An appropriate Order follows.

TABLE OF CONTENTS

Greg PFEIFER and Andrew Dorley, Plaintiffs,

v.

WAWA, INC., et al., Defendants.

Civ. No. 16-497

United States District Court,
E.D. Pennsylvania.

Filed 10/06/2016

Background: Terminated employee participants in employee stock ownership plan (ESOP) brought putative class action against employer, plan trustees, and plan administrators, for allegedly violating the Employee Retirement Income Security Act (ERISA) by amending the plan to

EXHIBIT “D”

ELD-012 November 17, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **16-9002**

DENNIS MILLER, Appellant

VS.

COMMISSIONER PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(E.D. Pa. Civ. No. 2:10-cv-03469)

Present: CHAGARES, GREENAWAY, JR., and RENDELL, Circuit Judges

Submitted are:

(1) Appellant's motion to file a request for a certificate of appealability ("COA") that exceeds 20 pages;

(2) Appellant's request for a COA under 28 U.S.C. § 2253(c)(1);

(3) Appellees' response to Appellant's request for a COA; and

(4) Appellant's reply in further support of his request for a COA

in the above-captioned case.

Respectfully,

Clerk

MMW/TWC/mb

(continued)

RE: Miller v. Comm'r Pa. Dep't of Corr.
C.A. No. 16-9002
Page 2

ORDER

Appellant's motion for leave to file an application for a certificate of appealability ("COA") that exceeds 20 pages is granted. Appellant's COA application raises the following claims: (1) Appellant's trial counsel, R. Kerry Kalmbach, was ineffective for failing to sufficiently investigate, prepare, and present a heat-of-passion defense; (2) the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose evidence that would have impeached prosecution witness Michael Torres, and Kalmbach was ineffective for failing to investigate Torres's background, interview him, and present this impeachment evidence; and (3) the cumulative effect of the aforementioned errors violated Appellant's due process rights. We hereby deny Appellant's COA application, for he has failed to show that reasonable jurists would debate the District Court's denial of these three claims or conclude that any of these claims is adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). With respect to Appellant's first claim, reasonable jurists would not debate that, in light of his decision not to testify at trial, he could not show that he was prejudiced by Kalmbach's alleged failure to sufficiently investigate, prepare, and present a heat-of-passion defense. See Strickland v. Washington, 466 U.S. 668, 694 (1984). As for Appellant's second claim, reasonable jurists would not debate (a) that Appellant failed to show that the alleged Brady evidence was "material," see United States v. Bagley, 473 U.S. 667, 682 (1985), or (b) that Kalmbach's alleged failures concerning Torres prejudiced Appellant, see Strickland, 466 U.S. at 694. That is, even if the proffered impeachment evidence would have effectively negated Torres's trial testimony, reasonable jurists would not debate the conclusion that there is not a reasonable probability that the trial judge would have found Appellant guilty of heat-of-passion voluntary manslaughter instead of first-degree murder. See id.; see also Bagley, 473 U.S. at 682. Lastly, reasonable jurists would not debate that Appellant's third claim fails because the alleged errors mentioned above, even when considered in the aggregate, did not have "a substantial and injurious effect or influence in determining the . . . verdict." Collins v. Sec'y of Pa. Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014) (quoting Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008)).

By the Court,

s/ Michael A. Chagares
Circuit Judge

Dated: December 6, 2017
MB/cc: Samuel J.B. Angell, Esq.
Christopher J. Schmidt, Esq.

EXHIBIT “E”

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

16-9002

DENNIS MILLER,
Appellant

v.

COMMISSIONER PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI;
SUPERINTENDENT ROCKVIEW SCI

(E.D. Pa. No. 10-cv-03469)

SUR PETITION FOR REHEARING

Present: CHAGARES, GREENAWAY, Jr., and RENDELL, Circuit Judges

The petition for panel rehearing filed by appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

s/ Michael A. Chagares
Circuit Judge

Dated: January 30, 2018
sb/cc: Samuel J.B. Angell, Esq.
Christopher J. Schmidt, Esq.

EXHIBIT “F”

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12627-P

RAY JEFFERSON CROMARTIE,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before ED CARNES, Chief Judge, MARTIN, and JULIE CARNES, Circuit Judges.

ORDER:

Ray Jefferson Cromartie, a Georgia prisoner, moved for a certificate of appealability on two claims, and this Court denied his motion in its entirety. He now moves this Court to reconsider its order denying his motion for a COA.

I.

The Georgia Supreme Court summarized the facts of Cromartie's case as follows:

The evidence adduced at trial shows that Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid artery. The following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."

In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12-packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12-packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.

Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice.

> Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12-pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 514 S.E.2d 205, 209–10 (Ga. 1999). He was convicted of malice murder, armed robbery, aggravated battery, aggravated assault, and four counts of possession of a firearm during the commission of a crime, and was sentenced to death. Id. at 209. The Georgia Supreme Court affirmed his convictions and sentence on direct appeal. Id. at 215.

Cromartie filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, and he later filed an amended petition. The court held an evidentiary hearing, and Cromartie presented two witnesses, Terrell Cochran and Keith Reddick. They testified that, when interviewed by law enforcement officers about the Madison Street Deli shooting, they told the officers that they saw Gary Young — not Cromartie — running from the scene of the shooting. Cochran and Reddick also stated that they "would have told Mr. Cromartie's lawyers or investigators about seeing Gary Young had they asked about the Madison Street Deli shooting."

The state habeas court denied relief, and the Georgia Supreme Court summarily denied Cromartie's application for a certificate of probable cause to appeal the state habeas court's denial of his petition. He then filed a 28 U.S.C. § 2254 petition in federal district court. Over a year later, after § 2244(d)(1)'s one-year statute of limitations had expired, Cromartie moved to amend his § 2254 petition, and the district court granted his motion. The court, in an 86-page order, later denied his amended § 2254 petition and declined to issue a COA on any of his 24 claims.

II.

In determining whether to grant a COA on a particular claim, "[w]e look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). We may issue a COA "only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," we may issue a COA only if the petitioner shows both (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). In assessing the district court's application of AEDPA, § 2254(d) precludes habeas relief so long as "it is possible fairminded jurists could disagree that" the state court's decision is "inconsistent with the holding in a prior decision of [the Supreme] Court." Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

III.

Cromartie seeks a COA on (1) "the district court's ruling that his claim of ineffective assistance of counsel for failing to present mitigating evidence at the penalty phase [was] untimely" and (2) the district court's denial of his Brady claim that the State "suppressed material, exculpatory evidence that an alternate suspect committed the Madison Street Deli shooting."

A.

Cromartie first contends that reasonable jurists could debate the correctness of the district court's ruling that his ineffective assistance of counsel claim was untimely. He argues that Claim X in his amended § 2254 petition, which was filed after § 2244(d)(1)'s one-year statute of limitations expired, relates back to Claim II in his original § 2254 petition, which was timely.

Claim X in the amended § 2254 petition alleged that Cromartie's "trial counsel were ineffective in the investigation and presentation of mitigating evidence at the penalty phase." It specified that the mitigating evidence counsel

allegedly failed to investigate and present at sentencing was testimony about Cromartie's life history of "trauma, abuse, and neglect" and his mental health. Claim II in Cromartie's original § 2254 petition raised an ineffective assistance of counsel claim and alleged 15 different ways trial counsel were ineffective. Cromartie contends that Claim X relates back to Claim II in the original petition based on "[t]hree separate statements," "individually and in combination," within Claim II: its heading;[1] the general allegation of ineffective assistance of counsel and citation to five Supreme Court decisions involving ineffective assistance of counsel;[2] and the specific allegation in paragraph 38(b), which stated that trial counsel was ineffective by "[f]ail[ing] to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment."

---

[1] The heading of Claim II, in its entirety, stated:

> Petitioner Was Deprived Of His Right To The Effective Assistance Of Counsel At Trial And On Appeal, In Violation Of His Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Strickland v. Washington, 466 U.S. 668 (1984), Williams v. Taylor, 529 U.S. 362 (2000), Rompilla v. Beard, 545 U.S. 374 (2005), and Related Precedent.

[2] The general allegation and the five citations came from paragraph 37, which stated in its entirety:

> Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §1, ¶¶ 1, 2, 11, 12, 14, and 17 of the Constitution of the State of Georgia. See also Strickland v. Washington, 466 U.S. 688 (1984); Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); Porter v. McCollum, 558 U.S. 30 (2009); Sears v. Upton, 130 S. Ct. 3259 (2010).

Cromartie asks too much of the relation back doctrine. As the Supreme Court and this Court have explained, a new claim relates back to a previous claim only when the two claims share a "common core of operative facts." Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574 (2005); see Dean v. United States, 278 F.3d 1218, 1222–23 (11th Cir. 2002).

In this Court's Dean decision, we addressed whether claims from a petitioner's amended habeas petition, which was filed after § 2244(d)(1)'s one-year statute of limitations, related back to claims in his original habeas petition, which was timely. 278 F.3d at 1222–23. In discussing the relation back doctrine from Federal Rule of Civil Procedure 15(c),[3] we explained that:

> Congress intended Rule 15(c) to be used for a relatively narrow purpose. . . . Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts. Thus, while Rule 15(c) contemplates that parties may correct technical deficiencies or expand facts alleged in the original pleading, it does not permit an entirely different transaction to be alleged by amendment.

Id. at 1221 (citation omitted). We stated that the "key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based." Id. at 1222.

[3] Federal Rule of Civil Procedure 15(c) provides, in relevant part, that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading . . . ." Fed. R. Civ. P. 15(c)(1)(B). Rule 12 of the Rules Governing Section 2254 and 2255 Proceedings provides for the application of the Federal Rules of Civil Procedure in habeas cases as long as the civil procedure rules are not inconsistent with the habeas rules. See Farris v. United States, 333 F.3d 1211, 1215 (11th Cir. 2003).

Applying those principles, we held in Dean that three claims from that petitioner's amended petition were timely because they related back to claims from the original petition.[4] Id. at 1222–23. As for the first claim from the amended petition, we stated that it "arose out of the same conduct or occurrence set forth in [ground one of] the original pleading, i.e., perjured testimony at trial. The amended ground one serves to add facts and specificity to the original claim; it specifies the exact witnesses that he alleges presented perjured testimony." Id. at 1222. We explained that the second claim from the amended petition was "a more carefully drafted version of the original claim," and that the original claim's reference to a particular section of the sentencing guidelines was "sufficient to put the government on notice of the nature of [the] claim." Id. at 1223. And finally, we reasoned that the amended petition's third claim related back because it "arose out of the same conduct or occurrence set forth in [ground H of] the original pleading, i.e., the district court's allowing the government to enter allegedly inadmissible evidence of uncharged misconduct at trial. The original claim gave notice that [the petitioner] believed that there was inadmissible evidence used against him at trial." Id. As a result, we held that the three claims related back to original claims because they "serve[d] to expand facts or cure deficiencies in the original claims." Id.

[4] We held that one claim from the amended petition did not relate back because the petitioner "did not make th[e] claim at all in his original petition." Dean, 278 F.3d at 1223.

The Supreme Court's Mayle decision clarified the contours of the relation back doctrine in the habeas context. In Mayle, the Ninth Circuit had held that the petitioner's claim in his untimely, amended habeas petition — which alleged that the police's coercive tactics to obtain pretrial statements from him violated his Fifth Amendment right against self-incrimination — related back to the claim in his original petition that the prosecution improperly showed the jury a witness's videotaped statements and, as a result, violated the petitioner's Sixth Amendment right to confront the witness. 545 U.S. at 648–50, 125 S. Ct. at 2566–67. The Supreme Court reversed, reasoning that under the Ninth Circuit's broad approach a "miscellany of claims for relief could be raised later rather than sooner and relate back" because "'conduct, transaction, or occurrence' would be defined to encompass any pretrial, trial, or post-trial error that could provide a basis for challenging the conviction." Id. at 661, 125 S. Ct. at 2573. It held that an "amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650, 125 S. Ct. at 2566. The Court explained that "relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims." Id. at 659, 125 S. Ct. at 2572 (quotation marks omitted). It concluded: "So long as the original and amended petitions state claims that are

tied to a common core of operative facts, relation back will be in order." Id. at 664, 125 S. Ct. at 2574.

The Mayle and Dean decisions illustrate how closely related a new claim in an untimely, amended habeas petition must be to a claim in a timely habeas petition — the claims must arise from a "common core of operative facts" so that the government is on notice of the nature of the petitioner's claim. Id.; see Dean, 278 F.3d at 1223.[5] Based on those decisions and the facts of this case, no reasonable jurist would find the correctness of the district court's procedural ruling debatable. The new, untimely claim that Cromartie raised in his amended petition (Claim X) does not share a "common core of operative facts" with any of the claims in his original petition, nor was there any claim in the original petition that would have put the government on notice that Cromartie was alleging that his trial counsel was ineffective for failing to investigate and present evidence of his mental health or life history. Mayle, 545 U.S. at 659, 125 S. Ct. at 2572. And although in Claim II of the original petition Cromartie alleged 15 different ways trial counsel

[5] See also Davenport v. United States, 217 F.3d 1341, 1346 (11th Cir. 2000) (holding that a petitioner's new, untimely claims that his counsel was ineffective for "(1) allowing [the petitioner] to be sentenced based on three grams of cocaine that were not part of the same course of conduct as the other forty-nine grams of cocaine, (2) relying on a summary lab report instead of requesting the complete lab report, and (3) failing to advise him that a plea agreement might be possible" did not relate back to the petitioner's original claims that his counsel was ineffective for (1) "not objecting that the drugs [he] had were not crack cocaine[ ] because they lacked sodium bicarbonate," (2) "not objecting to the drug weight as improperly including certain moisture content," and (3) "not asserting that the government allowed its witness to perjure himself by claiming he expected no benefit") (quotation marks omitted).

were ineffective, not one of those ways, including the allegation involving the Junior Food Store incident, has anything to do with trial counsel's failure to investigate and present mitigating evidence of Cromartie's mental health or his life history of abuse, trauma, and neglect.

The specific allegation in his original petition that Cromartie points to is the specification in paragraph 38(b), which stated that trial counsel's ineffectiveness included counsel's "[f]ailure to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment." But paragraph 38(b) does not allege that trial counsel were ineffective for failing to investigate and present evidence of Cromartie's background in mitigation at sentencing. Instead, it alleges that trial counsel failed to investigate the Junior Food Store incident and present evidence about that particular crime "that would exculpate [him at the guilt phase] or mitigate punishment" at the sentencing phase. That allegation, like the other allegations in Claim II, is tied to a specific factual event — the Junior Food Store incident — and trial counsel's alleged ineffectiveness for failing to investigate and present evidence about that event at the guilt and penalty phases. That allegation, like the 14 other allegations of ineffective assistance of counsel, does not share a "common core of operative facts" with Claim X, which focuses solely on trial counsel's failure to investigate and present at the penalty phase evidence of

Cromartie's mental health and life history of trauma, abuse, and neglect. See id. Claim X is "supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650, 125 S. Ct. at 2566.

He also points to his general allegation from paragraph 37 in his original petition that he was "denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments." That can't be enough. If it were, all a petitioner would have to do is include in his original petition a generalized allegation that trial counsel failed to adequately investigate and present evidence at the guilt and sentence stages. That would be enough for a petitioner to circumvent the statute of limitations and raise any conceivable ineffective assistance claim in an amendment filed months or even years after the limitations period ran. See id. at 661, 125 S. Ct. at 2573. The statute of limitations contained in 22 U.S.C. § 2244(d)(1) would be pretty much pointless.

Nor can it be enough for a petitioner to simply cite some Supreme Court decisions (without any pincites to specific pages of them). If that were enough, all a petitioner would have to do is cite some ineffective assistance of counsel decisions and withhold disclosure of his specific ineffective assistance claims and allegations until long after the limitations period ran. That is not how the relation back doctrine works. If it did, one of AEDPA's main goals — "to advance the

finality of criminal convictions" — would be thwarted. Id. at 662, 125 S. Ct. at 2573.

For those reasons, reasonable jurists would not find it debatable whether the district court correctly determined that Claim X in Cromartie's amended § 2254 petition does not relate back to any claim, including Claim II, in his original § 2254 petition and is, as a result, untimely. Because Cromartie cannot show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," we need not consider his argument that reasonable jurists could debate whether he stated a valid ineffective assistance of counsel claim. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604.

B.

Cromartie also seeks a COA on his Brady claim, which alleges that the State suppressed Cochran's and Reddick's statements that they saw Young running away from the scene of the Madison Street Deli shooting. The state habeas court found that Cromartie had procedurally defaulted his Brady claim and also that the claim was meritless. The district court concluded that the record supported both determinations. That conclusion is not debatable by reasonable jurists.

To prevail on a Brady claim, a petitioner must show that (1) the State possessed evidence favorable to the defendant; (2) the petitioner does not possess the evidence nor could he obtain it with any reasonable diligence; (3) the State

suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002); United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989) (same).

Brady claims can be procedurally defaulted. Bishop v. Warden, GDCP, 726 F.3d 1243, 1258–59 (11th Cir. 2013). To overcome a procedural default, "a petitioner [must] show cause for the failure to properly present the claim and actual prejudice . . . ." Conner v. Hall, 645 F.3d 1277, 1287 (11th Cir. 2011).[6] In many cases "cause and prejudice . . . parallel two of the [four] components of the alleged Brady violation . . . ." Banks v. Dretke, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272 (2004) (alteration and citation omitted). The Supreme Court has explained that:

> Corresponding to the [third] Brady component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the [fourth] Brady component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is 'material' for Brady purposes.

Id.

Cromartie contends that the Thomasville police had "four statements" from Cochran and Reddick that they "saw Gary Young running from the Madison Street

[6] To overcome a procedural default, a petitioner can alternatively show "that the failure to consider the claim would result in a fundamental miscarriage of justice." Conner, 645 F.3d at 1287. Cromartie does not contend that the district court erred in ruling that he failed to make that showing.

Deli just after the shooting," and that the State suppressed those four statements. He bases those assertions on Cochran's and Reddick's testimony at the state habeas hearing that they told the Thomasville police that they saw Young running from the scene, along with a police file stating that the detectives "re interviewed Terrell Cochran and Keith Reddick." (Because the detectives "re interviewed" the two witnesses, Cromartie says there are "four statements.") He argues that the evidence likely "would have convinced at least one juror to spare his life." For the same reasons, Cromartie contends that he showed cause and prejudice to overcome his procedural default.

Cromartie cannot show cause or prejudice to overcome his procedural default, or suppression for Brady purposes, because there was no credible evidence for the State to suppress. There is no evidence at all that Cochran and Reddick told the police — or anyone, for that matter — that they saw Young running from the Madison Street Deli except for their testimony at the state habeas evidentiary hearing that they did. For a number of reasons, the state habeas court found that Cochran and Reddick were not credible witnesses, and Cromartie does not contend that they were. Because Cromartie points to no evidence, much less clear and convincing evidence, to rebut the state habeas court's credibility determination, we cannot review or revisit it. See Nejad v. Att'y Gen., Ga., 830 F.3d 1280, 1292 (11th Cir. 2016) ("Unless there is clear and convincing evidence in the record to

rebut [a state trial court's] credibility judgment, we are powerless to revisit it on federal habeas review."); Bishop, 726 F.3d at 1259 ("In the absence of clear and convincing evidence, we have no power on federal habeas review to revisit the state court's credibility determinations."). And because we cannot revisit that credibility determination, there was no favorable evidence for the State to suppress, meaning that Cromartie cannot show cause or prejudice to overcome his procedural default, or suppression under Brady.

Even if we could revisit the state court's credibility determination and we assume that Cochran's and Reddick's "statements" did exist, there was no suppression because Cromartie's trial counsel could have obtained the information from the "statements" by asking Cochran and Reddick about the Madison Street Deli incident. Trial counsel had access to the police file and to those two witnesses before trial. Indeed, the record shows that trial counsel marked up their copy of the police file on the page that mentions Cochran and Reddick, and both witnesses stated in their affidavits that they would have told Cromartie's trial counsel that they saw Young running from the Madison Street Deli had counsel asked them. Because trial counsel could have obtained the same information from the allegedly suppressed "statements" by exercising reasonable diligence, binding precedent precludes relief under Brady. LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir. 2005) ("To establish that he suffered a Brady violation, the

defendant must prove that . . . [he] did not possess the evidence and could not have obtained it with reasonable diligence . . . ."); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) ("Where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged Brady material, there is no suppression by the government."). And because binding precedent forecloses relief, Cromartie cannot show that reasonable jurists would find the district court's ruling on his Brady claim debatable or wrong, so a COA must be denied. See Gordon v. Sec'y, Dep't of Corr., 479 F.3d 1299, 1301 (11th Cir. 2007).

IV.

For those reasons, Cromartie's motion for reconsideration of the denial of his motion for a COA is **DENIED**.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Mr. Cromartie tells us his trial counsel failed to investigate and present substantial mitigating evidence to the jury that sentenced him to death. He says this evidence could have swayed a jury that demonstrated difficulty in deciding whether to sentence Mr. Cromartie to death, even with only the scant evidence his lawyer did present.

No judge has thoroughly considered the merits of Mr. Cromartie's claim that his death sentence resulted from a violation of his fundamental right to effective representation. There was no hearing, briefing, or argument in state court on this Strickland[1] claim. Neither was this claim argued, briefed, or heard in federal district court. And, because the majority has denied Mr. Cromartie any opportunity to present his case here, there will be no full briefing or oral argument before this Court. That means, unless the Supreme Court intervenes—an unlikely event—Mr. Cromartie's claim will never be fully evaluated before the State of Georgia takes his life.

The majority has not refused to allow Mr. Cromartie's appeal because it believes his Strickland claim is frivolous. Instead, Mr. Cromartie's claim will not be heard here because the first lawyer who represented him in federal court did not include enough specifics in the original habeas corpus petition he filed for Mr.

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Cromartie. As a result of this insufficiently pled petition, the majority says Mr. Cromartie's Strickland claim is not timely and can't be heard. I do not understand the majority's decision to be compelled by the rules or by our precedent. Neither is it compelled by Supreme Court precedent. I therefore dissent from the majority's decision to deny him a certificate of appealability ("COA").[2]

The only question now before this panel is whether we will allow Mr. Cromartie a COA. The grant of a COA would give Mr. Cromartie a chance to have his arguments heard and decided here after full briefing and oral argument.

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[2] I do agree, however, with the majority's conclusion that Mr. Cromartie is not entitled to a COA on his Brady claim. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The state habeas court did not believe the testimony of Mr. Terrell Cochran and Mr. Keith Reddick, the only evidence Mr. Cromartie offered to prove the state was in possession of exculpatory evidence. Cromartie v. GDCP Warden, No. 7:14-CV-39, 2017 WL 1234139, at *15 (M.D. Ga. Mar. 31, 2017). Eleventh Circuit precedent makes clear that we are powerless to revisit a state habeas court's credibility findings, absent clear and convincing evidence that those findings were incorrect. Bishop v. Warden, GDCP, 726 F.3d 1243, 1259 (11th Cir. 2013).

I agree that, based on our precedent, Mr. Cromartie has not offered enough evidence to undercut these credibility findings. But I do not reach this conclusion without concern. Mr. Cromartie tells us that the state habeas court adopted the State of Georgia's proposed findings of fact nearly verbatim. For that reason, I am reluctant to defer to that court's factual findings. See Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510–11 (1985) ("We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties . . . ."). At the same time, I am aware that Eleventh Circuit precedent holds that adopting facts from an order written by the prosecutor does not rebut the presumption of correctness accorded to state habeas courts' factual findings. See, e.g., Jones v. GDCP Warden, 753 F.3d 1171, 1182–83 (11th Cir. 2014).

Mr. Cromartie's additional observations—i.e., the consistency of Mr. Cochran and Mr. Reddick's testimony and police corroboration that they had been interviewed twice and were witnesses to the shooting they testified about—may undermine the state court's credibility finding, but they do not indicate that "the state court's findings lacked even fair support in the record." Turner v. Crosby, 339 F.3d 1247, 1273 (11th Cir. 2003) (quotation omitted); see also Cromartie v. GDCP Warden, 2017 WL 1234139, at *15 (citing five reasons the state habeas court found Mr. Cochran and Mr. Reddick's testimony unreliable based on various parts of the record, and not just the prosecutor's proposed order).

When, as here, the District Court denied Mr. Cromartie's constitutional claim on procedural grounds, our only job on review is to decide whether jurists of reason would debate "whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). The Supreme Court has clearly told us that the inquiry at the COA stage is a limited, threshold inquiry. Buck v. Davis, 580 U.S. __, 137 S. Ct. 759, 773 (2017). As a result, our decision need not, and indeed must not, be approached like a decision on the merits. Id.

A reasonable judge could understand Mr. Cromartie's original and amended Strickland claims to be "tied to a common core of operative facts." See Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574 (2005). On this view, Mr. Cromartie's amended Strickland claim is "not entirely new," but rather "serves to expand facts or cure deficiencies in the original claim[]." See Dean v. United States, 278 F.3d 1218, 1223 (11th Cir. 2002) (per curiam). It is for that reason that I would grant Mr. Cromartie a chance to thoroughly brief and argue the timeliness of his Strickland claim.

I.

First I will examine whether, as this process requires, Mr. Cromartie has stated a claim that his constitutional rights were violated. Slack, 529 U.S. at 484,

120 S. Ct. at 1604. In my view, reasonable judges could debate whether Mr. Cromartie's trial counsel violated his Sixth Amendment right to effective assistance of counsel.

Georgia's case for seeking a sentence of death for Mr. Cromartie apparently left some room for debate. Before Mr. Cromartie's murder trial began, Georgia offered to allow him to plead guilty, with a sentence of life with the possibility of parole after seven years. This does not indicate to me that Georgia saw Mr. Cromartie as an extremely culpable offender deserving of execution. See Roper v. Simmons, 543 U.S. 551, 568–69, 125 S. Ct. 1183, 1194–95 (2005) (reiterating the long-held constitutional principle that "[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution") (quotation omitted). Or perhaps, Georgia did not believe its case against Mr. Cromartie was strong enough to test it before a jury. See Missouri v. Frye, 566 U.S. 134, 150, 132 S. Ct. 1399, 1411 (2012) (recognizing that the "strength of the prosecution's case" may affect the plea offered).

Then the jury demonstrated significant difficulty in deciding whether to sentence Mr. Cromartie to death. Only three hours into their deliberations, the jury asked the trial judge what would happen if they did not reach a unanimous vote about whether Mr. Cromartie should be executed. Cromartie v. State, 514 S.E.2d 205, 214 (Ga. 1999). Ultimately, it took the jury three days to recommend that Mr.

Cromartie be sentenced to death.[3] Thus, Mr. Cromartie's case appears to have compelled considerable debate among the jurors about whether a sentence of death was appropriate. Cf. Porter v. McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 453–54 (2009) (per curiam) (reiterating that reweighing the aggravating evidence against all available mitigating evidence is an essential part of the Strickland analysis).

In 2018, we now know of significant mitigating evidence that Mr. Cromartie's jury never heard back in 1997. His jury did not hear that his mother would binge drink for days on end while she was pregnant with him. His jury did not hear that, as a result, Mr. Cromartie suffers from Alcohol-Related Neurodevelopmental Disorder, which made it more likely that he would experience disruptions in his schooling; get into trouble with the law; and abuse drugs and/or alcohol. His jury never heard that Mr. Cromartie had a history of post-traumatic stress disorder and depression, as well as problems with language, memory, learning ability, and auditory attention. Despite the fact that a psychologist retained by Mr. Cromartie's trial lawyer began to identify a number of significant challenges Mr. Cromartie endured, the jury was never the wiser. Rather, the jury got just a glimpse of Mr. Cromartie's childhood trauma from the scattered testimony of five of his family members over a mere three hours. This is so, even though we now know that others were willing to testify who would have provided

[3] If the jury had not been able to reach a unanimous decision, Georgia law would have required the judge to sentence Mr. Cromartie to life. See O.C.G.A. § 17-10-31 (2002).

a more complete picture of the abuse Mr. Cromartie suffered. Also, the jury heard this limited testimony during Mr. Cromartie's defense case without expert testimony that would have conveyed the ways in which Mr. Cromartie's complex trauma made it more likely for him to act impulsively and react extremely to minor stimuli. Again here, the jury was deprived of this expert assistance despite the awareness of Mr. Cromartie's defense team that an expert's guidance would have made the mitigating nature of complex trauma apparent to the jury.

This record shows that the jurors who decided Mr. Cromartie would be put to death heard barely any of the evidence that would have humanized him or allowed the jury "to accurately gauge his moral culpability." See Porter, 558 U.S. at 41, 130 S. Ct. at 454; Williams v. Taylor, 529 U.S. 362, 398, 120 S. Ct. 1495, 1516 (2000). And even with this slim evidentiary record, the jury took three days to reach a unanimous decision on Mr. Cromartie's fate. Apparently the jurors knew very early in their deliberations that reaching unanimity on a sentence of death was not going to come easily, as they raised this possibility within three hours of beginning their deliberations. This record could certainly cause reasonable judges to debate the merits of Mr. Cromartie's claim of a violation of his Sixth Amendment right to effective assistance of counsel under Strickland and its progeny. Miller-El v. Cockrell, 537 U.S. 322, 342, 123 S. Ct. 1029, 1042 (2003). Thus, the merits of Mr. Cromartie's claim deserve encouragement to

proceed further. Slack, 529 U.S. at 483–84, 120 S. Ct. at 1603–04 (quotation omitted).

II.

Now for the procedural question. Again, the question for this panel is whether reasonable judges could debate the correctness of the District Court's procedural ruling, which here related to the timeliness of Mr. Cromartie's claim.

The District Court found that Mr. Cromartie's Strickland claim, which he developed further in an amended § 2254 petition filed after AEDPA's one-year statute of limitations, did not relate back to any of the Strickland claims he made in his original petition. Cromartie v. GDCP Warden, 2017 WL 1234139, at *36–37. It was for this reason, according to the District Court, that Mr. Cromartie's amended Strickland claim was untimely. Id.

Reasonable jurists could debate this finding by the District Court, and Mr. Cromartie's argument that his amended claim relates back to his original claim deserves encouragement to proceed further. Claim X in Mr. Cromartie's amended § 2254 petition could be read as an elaboration and specification of Claim Two, Paragraph 37 in his original § 2254 petition. See Dean, 278 F.3d at 1222.

In his original § 2254 petition, Mr. Cromartie laid out the framework for his Strickland claim by saying in "Claim Two" that he "was deprived of his right to the effective assistance of counsel at trial and on appeal, in violation of his rights

under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Strickland v. Washington, 466 U.S. 668 (1984), Williams v. Taylor, 529 U.S. 362 (2000), Rompilla v. Beard, 545 U.S. 374 (2005), and related precedent." Later in the same petition, Mr. Cromartie specifically alleged he "was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." Following this allegation were citations to: Strickland, Williams, Rompilla, Porter, and Sears.[4] Then in Claim X of his amended petition, Mr. Cromartie alleged that "trial counsel were ineffective in the investigation and presentation of mitigating evidence at the penalty phase" and then went on to elaborate (over sixteen pages) Mr. Cromartie's history of childhood trauma and significant cognitive and mental health impairments.

Consistent with Mayle and Eleventh Circuit precedent cited and described by the majority, a reasonable jurist could hold that Claim X (in the amended petition) relates back to Claim Two (in the original petition), because Claim X just added specifics to Claim Two. See Dean, 278 F.3d at 1222; see also Mandacina v. United States, 328 F.3d 995, 1000–01 (8th Cir. 2003); Panel. Op. 7–9. Claim Two, Paragraph 37 of Mr. Cromartie's original petition alleged that he received ineffective assistance of counsel at his capital trial. In support of this allegation,

[4] Sears v. Upton, 561 U.S. 945,130 S. Ct. 3259 (2010) (per curiam)

Mr. Cromartie cited cases that establish the scope of Strickland violations for failing to investigate and present proper mitigating evidence at the penalty phase.

These are not, as the majority says, just "some Supreme Court decisions." Panel Op. 12–13. They are the seminal cases outlining trial counsel's constitutional duty to investigate mitigating evidence about the troubled background of a capital defendant and present it to a penalty phase jury. In Williams, the Supreme Court held that Mr. Williams' right to effective assistance of counsel was violated where trial counsel failed to investigate and present evidence of, e.g., "Williams' nightmarish childhood." Williams, 529 U.S. at 390–91, 395–99, 120 S. Ct. at 1511–12, 1514–16. In Rompilla, the Court held that Mr. Rompilla's right to effective assistance of counsel was violated where his lawyers failed to look into the file of a prior conviction that "would have [revealed] a range of mitigation leads that no other source had opened up," including a history of serious mental health issues, cognitive difficulties, and childhood trauma. Rompilla, 545 U.S. at 377, 390–93, 125 S. Ct. at 2460, 2467–69. In Porter, the Court held that Mr. Porter's right to effective assistance of counsel was violated where trial counsel "failed to uncover and present evidence of Porter's mental health or mental impairment, his family background, or his military service." Porter, 558 U.S. at 38–43, 130 S. Ct. at 452–56. And, finally, in Sears, the Court held that Mr. Sears' right to effective assistance of counsel was violated where trial

counsel failed to investigate and present the childhood abuse Mr. Sears endured, his challenges in school, and his learning and cognitive difficulties. Sears, 561 U.S. at 945–51, 956, 130 S. Ct. at 3261–64, 3267.

Therefore, a reasonable judge could interpret Mr. Cromartie's case citations to reference or describe the constitutional violation he alleged. That being so, Claim Two asserted that trial counsel was unconstitutionally ineffective for failing to appropriately investigate and convey Mr. Cromartie's troubled background to the penalty-phase jury. And, with the facts it set forth, Claim X can reasonably be read to have "fill[ed] in facts missing from the original claim." See Dean, 278 F.3d at 1222 ("When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it."); see also Mandacina, 328 F.3d at 1000–01. And of course the evidence referred to in Mr. Cromartie's original petition, then elaborated on in his amended petition, is precisely the type of capital penalty-phase mitigation evidence that Georgia expects to see presented in most every one of its death cases.

Eleventh Circuit precedent supports the idea that a reasonable judge could conclude that Mr. Cromartie's amended Strickland claim relates back to his first. For example, in Dean, this Court held that a claim that a district court erred in admitting evidence of uncharged misconduct relates back to the more general

claim that the court erred in allowing inadmissible evidence. See Dean, 278 F.3d at 1223. Mr. Dean's initial petition merely asserted that the district court erroneously admitted some unspecified evidence during trial, but referenced no legal theory, case citations, or additional facts. See id. This Court nonetheless decided that the original claim sufficiently put the government on notice of the amended claim by giving "notice that Dean believed that there was inadmissible evidence used against him at trial." See id. And the Dean panel concluded that both the original and amended claims "arose out of the same conduct or occurrence." See id.

This precedent—which the majority cites, describes, but does not appear to rely on—certainly supports as reasonable the conclusion that Mr. Cromartie's Claim X in his amended petition relates back to Claim Two from his original petition. Panel Op. 7–13. Mr. Cromartie's original claim gave even more detail than Mr. Dean's, by not alleging just the relevant legal theory, but also by citing cases that would put any reasonable litigant on notice of the theory and at least some of the facts underlying Mr. Cromartie's Strickland claim. If Mr. Dean's sparse original pleading broadly complaining about the erroneous admission of evidence at trial and his amended pleading highlighting a particular type of inadmissible evidence "arise[] from the same conduct and occurrences," then a reasonable judge could surely conclude the same about Mr. Cromartie's Claim X

and Claim Two. See Dean, 278 F.3d at 1222–23. This conclusion is not foreclosed by Mayle. Indeed, recognizing that Dean and Mayle are consistent, our Court—including the majority here—has continued to apply Dean after Mayle. See Panel Op. 7–11; see also Ciccotto v. United States, 613 F. App'x 855, 858–59 (11th Cir. 2015) (per curiam) (citing Dean and Mayle); Mabry v. United States, 336 F. App'x 961, 963 (11th Cir. 2009) (per curiam) (same).

The paragraphs following Paragraph 37 in Claim Two of Mr. Cromartie's original § 2254 petition do not change my thinking. Paragraph 38 notes that Mr. Cromartie's allegations of ineffectiveness "include, but are not limited to the following." Thus, I read sub-paragraphs 38a[5] and 38b[6] the same way I do the remaining sub-paragraphs. They are illustrative examples of paragraph 37's primary claim that trial counsel was ineffective in a manner similar to trial counsel in Williams, Rompilla, Porter, and Sears. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132–33 (2012) (explaining that "to include" introduces an illustrative list).

The question we have here is different from the question the Supreme Court answered in Mayle. Mayle was about claims involving two different constitutional

[5] Paragraph 38a reads: "Failure to adequately investigate the Madison Street Deli shooting incident and present evidence at both phases of trial that would exculpate Petitioner or mitigate punishment."

[6] Paragraph 38b reads: "Failure to adequately investigate the Junior Food Store incident and to present evidence at both phases of trial that would exculpate Petitioner or mitigate punishment."

provisions and "target[ing] separate episodes." Mayle, 545 U.S. at 660, 125 S. Ct. at 2572–73. In contrast, the claims in Mr. Cromartie's original and amended claim arise from the same constitutional provision and target the same episode or "core of operative facts." See id. at 664, 125 S. Ct. at 2574. That is, trial counsel's ineffectiveness in failing to investigate and present mitigating evidence about Mr. Cromartie's background during the penalty phase of his trial.

Beyond that, in Mayle, the Court recognized the propriety of relation back under similar circumstances by citing favorably to Mandacina, which the Court deemed consistent with the rule it espoused. See id. at 664 n.7, 125 S. Ct. at 2574 n.7. The Mayle Court observed that in Mandacina, "the original petition alleged violations of Brady . . . while the amended petition alleged the Government's failure to disclose a particular report," and "[t]he Court of Appeals approved relation back." Id. Here, the original petition alleged violations not just of Strickland (equivalent to Brady in this context), but also Williams, Rompilla, Porter, and Sears, while the amended petition gave more facts showing how trial counsel was ineffective in ways similar to counsel in Williams, Rompilla, Porter, and Sears. See id. On this record, a judge could reasonably read precedent to support the conclusion that Claim X of Mr. Cromartie's amended petition relates back to Claim Two of his original petition.

III.

The majority says Mr. Cromartie asks too much of the relation back doctrine. Panel Op. 7. But the majority seems to me to ask too much of Mr. Cromartie, especially in light of our precedent. Mr. Cromartie merely asks for a chance to brief and argue the timeliness of his amended Strickland claim. In denying that reasonable request, the majority elevates finalizing Mr. Cromartie's case over this Court's precedent that allows inmates to refine their pleadings in similar circumstances. See, e.g., Dean, 278 F.3d at 1221–23.

The consequences of the majority's error of judgment are not academic. Indeed, the majority's denial of a COA to Mr. Cromartie on his Strickland claim renders it a virtual certainty that no court or jury will ever consider his troubled past. This means, of course, that no court or jury will ever thoroughly weigh whether, or how, Mr. Cromartie's "troubled history" affected his "moral culpability" for the crime for which he will be executed. Wiggins v. Smith, 539 U.S. 510, 535, 123 S. Ct. 2527, 2542 (2003). The Supreme Court has said that this consideration is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976). Now without a COA, Mr. Cromartie will face his sentence without the benefit of this process. This is important, because in my view a thorough assessment of Mr. Cromartie's background may well have caused his

jury, which already appeared to struggle with whether he should die for his crime, to spare his life.

Reasonable jurists could debate whether Mr. Cromartie's amended Strickland claim relates back to his original, timely-filed petition, and reasonable jurists could debate the merits of his Strickland claim. I would grant the COA, and I dissent from the majority's unwillingness to do so.