

INDEX TO APPENDICES

APPENDIX A- U.S. COURT OF APPEALS FOR THE 3rd Cir.: CASE # 20-2250: 3/29/21 DENIAL OF PETITION FOR PANEL OR ENC BANC REHEARING	1
APPENDIX B- U.S. COURT OF APPEALS FOR THE 3rd CIR.: CASE # 20-2250: 1/8/21 DENIAL OF REQUEST FOR ISSUANCE OF C.O.A.	3
APPENDIX C- U.S. DISTRICT COURT FOR EASTERN DISTRICT, CASE # 18-237: 3/19/21 DENIAL OF RULE 59(e) MOTION	5
APPENDIX D- U.S. DISTRICT COURT FOR EASTERN DISTRICT, CASE # 18-237: 7/15/21 ADOPTION OF R&R	11
APPENDIX E- U.S. DISTRICT COURT FOR EASTERN DISTRICT, CASE # 18-237: MAGISTRATE REPORT AND RECOMMENDATION (R&R)	18
APPENDIX F- PENNSYLVANIA SUPERIOR COURT, CASE 3555 EDA 2018: DENIAL OF APPEAL OF DISMISSAL OF CONSECUTIVE PCRA HEARING WITHOUT HEARING	53
APPENDIX G- NORTHAMPTON COUNTY COURT OF COMMON PLEAS, CASE # 3344-cr-2009: ORDER DISMISSING THIRD PCRA	63
APPENDIX H- NORTHAMPTON COUNTY COURT OF COMMON PLEAS, CASE # 3344-CR-2009: ORDER DISMISSING SECOND PCRA	87
APPENDIX I- PENNSYLVANIA SUPERIOR COURT, CASE # 337 EDA 2017: DENIAL OF APPEAL OF DENIAL OF FIRST PCRA	107
APPENDIX J- NORTHAMPTON COUNTY COURT OF COMMON PLEAS, CASE # 3344-cr-2009: 12/30/16 ORDER DENYING FIRST PCRA	129
APPENDIX K- PA SUPREME CT, CASE # 8 MAP 2014: DENIAL OF APPLICATION FOR REARGUMENT OF ENC BANC REARGUMENT	153
APPENDIX L- PA SUPREME CT, CASE # 8 MAP 2014: AFFIRMANCE OF LOWER COURT DECISION DENYING NEW TRIAL	155
APPENDIX M- SUPERIOR COURT OF PENNSYLVANIA, CASE # 1893 EDA 2011: ORDER AFFIRMING TRIAL COURT ORDER ON ENC BANC REARGUMENT	176
APPENDIX N- SUPERIOR COURT OF PENNSYLVANIA, CASE # 1893 EDA 2011: ORDER VACATING TRIAL COURT ORDER AND GRANTING NEW TRIAL	212
APPENDIX O- NORTHAMPTON COUNTY COURT OF COMMON PLEA, CASE # 3344-CR-2009: ORDER DENYING POST SENTENCE MOTION FOR NEW TRIAL	226

APPENDIX P- 18 Pa. C.S. § 505 (Complete)(2009 Ed.)	241
APPENDIX Q- 42 Pa. C.S. § 5552 (Complete)	244
APPENDIX R- Pa. Standard Suggested Jury Inst. 9.501 (Complete)	251
APPENDIX S- PA R. Evid. 405 (Complete)	258
APPENDIX T- PA R. Evid. 609 (Complete)	260
APPENDIX U- PA R. Evid. 804 (Complete)	262

APPENDIX A

U.S. Ct. of Appeals for the 3rd Cir. Case # 20-2250
3/29/21 Denial of Petition for Panel or Enc Banc Rehearing

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-2250

JACOB CHRISTINE,
Appellant

v.

SUPERINTENDENT ALBION SCI;
THE DISTRICT ATTORNEY OF NORTHHAMPTON COUNTY;
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

(E.D. Pa. No. 5-18-cv-00237)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, and PHIPPS, Circuit Judges

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

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: March 29, 2021

CLW/cc: Mr. Jacob Christine

Joseph E. Hudak, Esq.

Rebecca J. Kulik, Esq.

APPENDIX B

U.S. Ct. Of Appeals for the 3rd Cir. Case # 20-2250
1/8/21 Denial of Request for Issuance of C.O.A.

DLD-051

December 17, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-2250

JACOB CHRISTINE, Appellant

VS.

SUPERINTENDENT ALBION SCI, ET AL.

(E.D. Pa. Civ. No. 5-18-cv-00237)

Present: JORDAN, KRAUSE and PHIPPS, Circuit Judges

Submitted is Appellant's amended application for a certificate of appealability under 28 U.S.C. § 2253(c)(1) (ECF No. 22)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For substantially the reasons given by the District Court, jurists of reason would agree, without debate, that the claims raised in Appellant's application are without merit or are procedurally defaulted, and that Appellant has not shown cause and prejudice or a fundamental miscarriage of justice for consideration of his defaulted claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/ Kent A. Jordan
Circuit Judge



A True Copy.

Patricia S. Dodszeit

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

Dated: January 8, 2021

CLW/cc: Joseph E. Hudak, Esq.
Rebecca J. Kulik, Esq.

APPENDIX C

U.S. Dist. Ct. for Eastern Dist., Case # 18-cv-237
Denial of Rule 59(e) Motion

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

JACOB CHRISTINE,

Petitioner,

v.

MICHAEL CLARK, et al.

Respondents.

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION

NO. 18-0237

ORDER

AND NOW, this 19th day of May, 2020, upon consideration of Petitioner's Rule 59(e) Motion (Doc. Nos. 28, 30, 31, 32, 33, 35), Rule 60(b) Motion (Doc. Nos. 34, 35), the Response in Opposition (Doc. 43), and the additional letters submitted by Petitioner (Doc. Nos. 40, 41, 42, 44, 47, 48, 49, 50), **IT IS HEREBY ORDERED AND DECREED** that each of Petitioner's foregoing motions are **DENIED**.ⁱ

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

I. BACKGROUND

In 2010, a jury in Northampton County Court of Common Pleas convicted Petitioner Jacob Christine ("Petitioner") on charges of aggravated assault and reckless endangerment. Petitioner was sentenced to 9-20 years on the aggravated assault conviction, with a concurrent sentence of one to two years on the reckless endangerment charge. Petitioner filed an appeal to

the Superior Court challenging the pre-trial evidentiary rulings after the Court of Common Pleas denied his post-sentencing motion. An evenly divided court, sitting *en banc*, affirmed Petitioner's sentence. *Commonwealth v. Christine*, 78 A.3d 1 (Pa. Super. Ct. 2013). The Pennsylvania Supreme Court granted allowance of appeal, but ultimately affirmed the conviction on October 27, 2015. *Commonwealth v. Christine*, 125 A.3d 394 (Pa. 2015).

At the conclusion of the direct appeal process, Petitioner filed a pro se petition and memorandum pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"). The PCRA Court denied the petition, and Petitioner appealed the denial. The Superior Court affirmed the denial of the PCRA relief on January 3, 2018. *Commonwealth v. Christine*, No. 337 EDA 2017, 2018 WL 268519 (Pa. Super. Ct. Jan. 3, 2018).

Petitioner filed a federal habeas petition on January 18, 2018. Pet. Habeas Corpus, Doc. 1. This Court denied the petition on July 15, 2019. Order Den. Pet. Habeas Corpus, Doc. 27. Before the Court are Petitioner's Rule 59(e) and 60(b) Motions seeking relief from this Court's denial of his habeas petition.

A. Standard for Relief Under Federal Rule of Civil Procedure 60(b)

Federal Rule of Civil Procedure 60(b) provides that a party may request relief from a final judgment under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. Fed. R. Civ. P. 60(b). Additionally, a party may request relief under the catchall provision of Rule 60(b)(6), which permits relief when a movant shows "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A court may only grant relief under Rule 60(b) in "extraordinary circumstances, where without such relief, an extreme and unexpected hardship would occur." *Satterfield v. District Attorney Phila.*, 872 F.3d 152, 158 (3d. Cir. 2017). If a Rule 60(b) motion raises habeas claims that have previously been denied on the merits or raises

additional grounds for relief, the motion is deemed a second or successive habeas petition. See *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (finding Rule 60(b) motion a successive habeas petition if it “attacks the federal court’s previous resolution of a claim on the merits.”).

B. Standard of Relief Under Federal Rule of Civil Procedure 59(e)

A motion to reconsider under Rule 59(e) should be granted to correct a clear error of law or of fact, and to prevent a manifest injustice. Fed. R. Civ. P. 59(e); *Allah v. Ricci*, 532 F.App’x 48, 51 (3d Cir. 2013) (citing *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)). In *Bylstone*, the Third Circuit Court of Appeals held that “a timely Rule 59(e) motion to amend or alter a judgment is not a second or successive [habeas] petition, whether or not it advances a claim, and therefore such a motion lies outside the reach of the jurisdictional limitations that AEDPA imposes upon multiple collateral attacks.” *Bylstone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). The court reasoned, “the differences between Rules 60(b) and 59(e) are [not] merely technical. To the contrary, . . . it is clear that, unlike a Rule 60(b) motion, a Rule 59(e) motion is part of the one full opportunity for collateral review that AEDPA ensures to each petitioner.” *Id.*

Although not defined as a second or successive petition, “[t]he scope of a motion for reconsideration . . . is extremely limited.” *Id.* As the *Bylstone* court articulated, “[s]uch motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence.” *Id.* (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int’l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). A court may alter or amend a judgment

only if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion [at issue]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Id. New evidence must be evidence that a party could not submit to the court earlier because it was unavailable, and evidence not newly discovered in such a manner “cannot provide the basis for a successful motion for reconsideration.” *Id.* at 415–416.

II. ANALYSIS

A. Petitioner’s Ineffective Assistance of Counsel Claims Cannot be Relitigated Because They Were Decided on The Merits.

In the instant 60(b) Motion, Petitioner alleges that the “[Report and Recommendation] [] made a ruling based on a fraudulent representation by the s[tate] c[ourt]” with respect to his third and fourth grounds for relief because he did not have a duty to retreat from his “dwelling.” 60(b) Mot. 2, Doc. 34. In Petitioner’s third and fourth claims, he argued that counsel performed deficiently by not requesting that the court give a castle doctrine jury instruction and for failing to correct an error in the jury instruction concerning self-defense and aggravated assault. Pet. Habeas Corpus 47–56, Doc. 1. His argument does not have merit.

The Court concluded that the lower courts’ adjudication of Petitioner’s third claim was not “an unreasonable application of *Strickland*’s deficient performance prong” and, therefore, found that “habeas relief is . . . not available . . .” R. & R. 21–22, Doc. 19. The Court also declined to extend habeas relief on Petitioner’s fourth claim, finding that “[b]ecause the underlying issue, if raised by counsel, would have been deemed meritless under both state and federal law, counsel cannot be deemed to have been ineffective for having failed to raise it.” R. & R. 26.

Petitioner’s 60(b) Motion fails because he presents no new evidence to support his claims that counsel performed deficiently and also does not attack the procedures followed by the Court. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Petitioner’s Motion, instead, seeks to relitigate issues that were dismissed by the Court. *See id.* (finding Rule 60(b) motion a

successive habeas petition if it “attacks the federal court’s previous resolution of a claim on the merits.”). Accordingly, Petitioner has not demonstrated any reason for this Court to grant Rule 60(b) relief. Therefore, Petitioner’s 60(b) motion is **DENIED**.

B. Petitioner Has Not Pointed to Any Manifest Legal Error in the Court’s Adoption of the Report and Recommendation.

Petitioner seeks to amend the Court’s judgment to, “correct manifest errors of law and fact.” 59(e) Mot. 1, Doc. 28. However, Petitioner’s 59(e) Motion fails because he does not point to any manifest legal error or injustice in this court’s dismissal of his habeas petition. Instead petitioner advances the same arguments put forth in his habeas petition. Petitioner also asks the court to consider three affidavits in support of his claim that there was prosecutorial misconduct in the form of a *Brady* violation as evidence that has not been addressed. 59(e) Mot. 2, Doc. 33. One of the affidavits was previously submitted in support of Petitioner’s motion to amend his original habeas petition. *See* Am. Pet. Habeas Corpus, Doc. 18. The Court reviewed the affidavit in disposing of the habeas petition, finding that because the state courts adjudicated the claim on the merits, it was bound to, “conduct[] an AEDPA review of the state court determination based upon the factual record established by [Petitioner] in state court.” R. & R. 15. Additionally, Petitioner does not allege that evidence from the affidavits was previously unknown or unavailable to him. *See Blystone v. Horn*, 664 F.3d 397, 415–16 (3d Cir. 2011) (“[N]ew evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available.”). Accordingly, Petitioner’s 59(e) motion is **DENIED**.

APPENDIX D

U.S. Dist. Ct. for Eastern Dist. Case # 18-cv-237
Adoption of "R&R"
3/19/21

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

JACOB CHRISTINE,

Petitioner,

v.

MICHAEL CLARK, et al.

Respondents.

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION

NO. 18-0237

ORDER

AND NOW, this 15th day of July, 2019, upon careful and independent consideration of the petition for Writ of *Habeas Corpus* (Doc. 1), the Report and Recommendation of United States Magistrate Judge David R. Strawbridge ("Report and Recommendation") (Doc. 19), and Petitioner's Objections to the Report and Recommendation (Docs. 23, 25), **IT IS HEREBY ORDERED AND DECREED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for Writ of *Habeas Corpus* is **DENIED** with prejudice;
3. There is no probable cause to issue a certificate of appealability;
4. Petitioner's Motion to Compel the Lower Court to Provide Discovery (Doc. 21) is **DENIED**; and
5. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

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

JACOB CHRISTINE,

Petitioner,

v.

MICHAEL CLARK, et al.

Respondents.

:
:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION

NO. 18-0237

ORDER

AND NOW, this 19th day of May, 2020, upon consideration of Petitioner's Rule 59(e) Motion (Doc. Nos. 28, 30, 31, 32, 33, 35), Rule 60(b) Motion (Doc. Nos. 34, 35), the Response in Opposition (Doc. 43), and the additional letters submitted by Petitioner (Doc. Nos. 40, 41, 42, 44, 47, 48, 49, 50), **IT IS HEREBY ORDERED AND DECREED** that each of Petitioner's foregoing motions are **DENIED**.ⁱ

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

ⁱ

I. BACKGROUND

In 2010, a jury in Northampton County Court of Common Pleas convicted Petitioner Jacob Christine ("Petitioner") on charges of aggravated assault and reckless endangerment. Petitioner was sentenced to 9-20 years on the aggravated assault conviction, with a concurrent sentence of one to two years on the reckless endangerment charge. Petitioner filed an appeal to

the Superior Court challenging the pre-trial evidentiary rulings after the Court of Common Pleas denied his post-sentencing motion. An evenly divided court, sitting *en banc*, affirmed Petitioner's sentence. *Commonwealth v. Christine*, 78 A.3d 1 (Pa. Super. Ct. 2013). The Pennsylvania Supreme Court granted allowance of appeal, but ultimately affirmed the conviction on October 27, 2015. *Commonwealth v. Christine*, 125 A.3d 394 (Pa. 2015).

At the conclusion of the direct appeal process, Petitioner filed a pro se petition and memorandum pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"). The PCRA Court denied the petition, and Petitioner appealed the denial. The Superior Court affirmed the denial of the PCRA relief on January 3, 2018. *Commonwealth v. Christine*, No. 337 EDA 2017, 2018 WL 268519 (Pa. Super. Ct. Jan. 3, 2018).

Petitioner filed a federal habeas petition on January 18, 2018. Pet. Habeas Corpus, Doc. 1. This Court denied the petition on July 15, 2019. Order Den. Pet. Habeas Corpus, Doc. 27. Before the Court are Petitioner's Rule 59(e) and 60(b) Motions seeking relief from this Court's denial of his habeas petition.

A. Standard for Relief Under Federal Rule of Civil Procedure 60(b)

Federal Rule of Civil Procedure 60(b) provides that a party may request relief from a final judgment under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. Fed. R. Civ. P. 60(b). Additionally, a party may request relief under the catchall provision of Rule 60(b)(6), which permits relief when a movant shows "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). A court may only grant relief under Rule 60(b) in "extraordinary circumstances, where without such relief, an extreme and unexpected hardship would occur." *Satterfield v. District Attorney Phila.*, 872 F.3d 152, 158 (3d. Cir. 2017). If a Rule 60(b) motion raises habeas claims that have previously been denied on the merits or raises

additional grounds for relief, the motion is deemed a second or successive habeas petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (finding Rule 60(b) motion a successive habeas petition if it “attacks the federal court’s previous resolution of a claim on the merits.”).

B. Standard of Relief Under Federal Rule of Civil Procedure 59(e)

A motion to reconsider under Rule 59(e) should be granted to correct a clear error of law or of fact, and to prevent a manifest injustice. Fed. R. Civ. P. 59(e); *Allah v. Ricci*, 532 F.App’x 48, 51 (3d Cir. 2013) (citing *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)). In *Bylstone*, the Third Circuit Court of Appeals held that “a timely Rule 59(e) motion to amend or alter a judgment is not a second or successive [habeas] petition, whether or not it advances a claim, and therefore such a motion lies outside the reach of the jurisdictional limitations that AEDPA imposes upon multiple collateral attacks.” *Bylstone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). The court reasoned, “the differences between Rules 60(b) and 59(e) are [not] merely technical. To the contrary, . . . it is clear that, unlike a Rule 60(b) motion, a Rule 59(e) motion is part of the one full opportunity for collateral review that AEDPA ensures to each petitioner.” *Id.*

Although not defined as a second or successive petition, “[t]he scope of a motion for reconsideration . . . is extremely limited.” *Id.* As the *Bylstone* court articulated, “[s]uch motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence.” *Id.* (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int’l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). A court may alter or amend a judgment

only if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion [at issue]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Id. New evidence must be evidence that a party could not submit to the court earlier because it was unavailable, and evidence not newly discovered in such a manner “cannot provide the basis for a successful motion for reconsideration.” *Id.* at 415–416.

II. ANALYSIS

A. Petitioner’s Ineffective Assistance of Counsel Claims Cannot be Relitigated Because They Were Decided on The Merits.

In the instant 60(b) Motion, Petitioner alleges that the “[Report and Recommendation] [] made a ruling based on a fraudulent representation by the s[tate] c[ourt]” with respect to his third and fourth grounds for relief because he did not have a duty to retreat from his “dwelling.” 60(b) Mot. 2, Doc. 34. In Petitioner’s third and fourth claims, he argued that counsel performed deficiently by not requesting that the court give a castle doctrine jury instruction and for failing to correct an error in the jury instruction concerning self-defense and aggravated assault. Pet. Habeas Corpus 47–56, Doc. 1. His argument does not have merit.

The Court concluded that the lower courts’ adjudication of Petitioner’s third claim was not “an unreasonable application of *Strickland*’s deficient performance prong” and, therefore, found that “habeas relief is . . . not available . . .” R. & R. 21–22, Doc. 19. The Court also declined to extend habeas relief on Petitioner’s fourth claim, finding that “[b]ecause the underlying issue, if raised by counsel, would have been deemed meritless under both state and federal law, counsel cannot be deemed to have been ineffective for having failed to raise it.” R. & R. 26.

Petitioner’s 60(b) Motion fails because he presents no new evidence to support his claims that counsel performed deficiently and also does not attack the procedures followed by the Court. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Petitioner’s Motion, instead, seeks to relitigate issues that were dismissed by the Court. *See id.* (finding Rule 60(b) motion a

successive habeas petition if it “attacks the federal court’s previous resolution of a claim on the merits.”). Accordingly, Petitioner has not demonstrated any reason for this Court to grant Rule 60(b) relief. Therefore, Petitioner’s 60(b) motion is **DENIED**.

B. Petitioner Has Not Pointed to Any Manifest Legal Error in the Court’s Adoption of the Report and Recommendation.

Petitioner seeks to amend the Court’s judgment to, “correct manifest errors of law and fact.” 59(e) Mot. 1, Doc. 28. However, Petitioner’s 59(e) Motion fails because he does not point to any manifest legal error or injustice in this court’s dismissal of his habeas petition. Instead petitioner advances the same arguments put forth in his habeas petition. Petitioner also asks the court to consider three affidavits in support of his claim that there was prosecutorial misconduct in the form of a *Brady* violation as evidence that has not been addressed. 59(e) Mot. 2, Doc. 33. One of the affidavits was previously submitted in support of Petitioner’s motion to amend his original habeas petition. *See* Am. Pet. Habeas Corpus, Doc. 18. The Court reviewed the affidavit in disposing of the habeas petition, finding that because the state courts adjudicated the claim on the merits, it was bound to, “conduct[] an AEDPA review of the state court determination based upon the factual record established by [Petitioner] in state court.” R. & R. 15. Additionally, Petitioner does not allege that evidence from the affidavits was previously unknown or unavailable to him. *See Blystone v. Horn*, 664 F.3d 397, 415–16 (3d Cir. 2011) (“[N]ew evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available.”). Accordingly, Petitioner’s 59(e) motion is **DENIED**.

APPENDIX E

U.S. Dist. Ct. for Eastern Dist. Case # 18-cv-237
Magistrate "R&R"

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

JACOB CHRISTINE,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
MICHAEL CLARK, <i>et al.</i> ,	:	NO. 18-237
Respondents	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

April 30, 2019

Before the Court for a Report and Recommendation is the *pro se* petition of Jacob Christine ("Christine" or "Petitioner") for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Christine is currently incarcerated at the State Correctional Institution – Albion serving an aggregate term of nine to twenty years incarceration following his conviction on October 7, 2010 by a jury in the Northampton County Court of Common Pleas for aggravated assault and recklessly endangering another person.¹ For the reasons set out below, we conclude that none of Petitioner's six grounds for habeas relief are meritorious and that relief on some of them is further precluded as they were not properly presented in state court. Accordingly, we recommend that his petition be denied and dismissed.

¹ The court directed that this sentence was to run consecutive to a prison term Petitioner was already serving for unrelated convictions occurring in Lehigh County, Pennsylvania. Those convictions are the subject of a separate federal habeas petition filed in this court, Civil Action No. 17-3635.

I. FACTUAL AND PROCEDURAL BACKGROUND²

Christine's conviction arose out of a stabbing incident that occurred on June 8, 2009 in the Northampton County Prison ("NCP"), where both Christine and the victim, Thomas Missero, were lodged. The Commonwealth adduced evidence at trial that after Missero was called into Christine's cell, which housed eight inmates in four rows of bunk beds, Christine slashed his neck and ear with a razor blade. While a search of the cell did not uncover the razor blade, corrections officers found hidden within Christine's bed a shank, made from an 18"-20" rod from a metal bookshelf. The Commonwealth agreed that the shank was not used in the attack on Missero.

Prior to trial, Christine filed a motion *in limine* to exclude the shank from evidence, arguing it was irrelevant and would cause undue prejudice by confusing the jury. The trial court denied the motion and held that under the "similar-weapon exception" the evidence would be admissible, as it showed that Christine had the ability to fashion a homemade weapon from objects in the prison. Trial Court Opinion, 4/26/11, at 6-7. The court also found the shank's probative value outweighed its prejudicial effect, as it tended to show that Christine "had knowledge and familiarity with prison-made weapons and could conceal them in his prison cell." The court also noted that the presence of the shank in his bedding would rebut Christine's assertion that he was unarmed and acted in self-defense. *Id.* at 8.

Christine also sought a pre-trial ruling to admit into evidence the fact that Missero was convicted in June 2010 of simple assault and reckless endangerment of his girlfriend arising from an incident at a hotel in May 2010, eleven months after this incident at NCP. Christine argued that

² In preparing this Report, we have considered the Petition (Doc. 1), Petitioner's Amended Petition (Doc. 14), the Commonwealth's Response (Doc. 13) and appended documents (Doc. 13-1 – 13-10), Petitioner's Traverse (Doc. 17), Petitioner's "Amendment To Habeas Petition Newly Discovered Evidence" (Doc. 18), as well as the record of the state court proceedings provided by the Court of Common Pleas.

Missero's conviction was relevant to his self-defense claim because Missero was the initial aggressor in that attack and it demonstrated Missero's violent propensities. *Id.* at 11-12. The trial court denied the motion, however, on the grounds that the charges leading to Missero's simple-assault conviction would not demonstrate that Missero had a reputation for violence at the time of the jailhouse attack, as the jailhouse attack occurred first in time. *Id.* at 11-12.

At trial, Christine testified he was reading on his cot when one of his cellmates invited Missero inside the cell, where an argument between the two ensued. Christine testified that he tried to leave the cell but Missero was standing in the doorway. He recounted that Missero threw a cup of hot coffee at him and that a struggle ensued between them, during which punches were thrown. He testified that Missero then produced a razorblade. Christine reported that he disarmed Missero, retrieved the razorblade, and "may" have cut Missero as he left the cell. *Id.* at 46, 49. *See also Commonwealth v. Christine*, 125 A.3d 394, 396-97 (Pa. 2015) (recounting history).

In light of Christine's testimony, the court instructed the jury on self-defense. The court re-instructed on self-defense when the jury asked a question during deliberations. While the jury ultimately found Christine not guilty of the charge of attempted homicide, it returned guilty verdicts on both aggravated assault and reckless endangerment of Missero. The court sentenced Christine to 9-20 years on the aggravated assault conviction, with a concurrent sentence of 1-2 years on the reckless endangerment charge.

After the court denied Christine's post-sentencing motion, he filed an appeal to the Superior Court challenging the pre-trial evidentiary rulings. A divided panel initially vacated the judgment of sentence and remanded the case for a new trial on the grounds that the trial court had abused its discretion when it precluded Christine from introducing evidence of Missero's domestic assault conviction. The Commonwealth petitioned for reargument *en banc* and the panel

memorandum was withdrawn. An evenly divided *en banc* court ultimately affirmed the judgment of sentence. *Commonwealth v. Christine*, 78 A.3d 1 (Pa. Super. Ct. 2013). The Pennsylvania Supreme Court granted allowance of appeal but on October 27, 2015 affirmed the conviction. *Commonwealth v. Christine*, 125 A.3d 394 (Pa. 2015).

Following the conclusion of the direct appeal process, on February 22, 2016, Christine filed a *pro se* petition and memorandum of law pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-46. He asserted a number of claims that trial and appellate counsel were ineffective for: (1) failing to pursue a jury charge for "the castle defense;" (2) failing to investigate and impeach Commonwealth witness testimony about the presence of a particular individual on the cellblock; (3) failing to pursue a claim for violation of Pa. R. Crim. P. 600; (4) failing to challenge the admission of an unrelated weapon on the grounds of Pa. R. Evid. 404; and (5) failing to pursue issues of prosecutorial misconduct. He also alleged a claim of newly discovered evidence. State Ct. Doc. 65. Counsel was appointed and filed a supporting brief that refined some of these claims. State Ct. Doc. 80. An evidentiary hearing was held on July 11, 2016. The PCRA Court denied the petition. (Doc. 13-9.) Christine filed an appeal and was ultimately permitted to pursue it *pro se*. The Superior Court affirmed the denial of PCRA relief on January 3, 2018. *Commonwealth v. Christine*, No. 337 EDA 2017, 2018 WL 268519 (Pa. Super. Ct. Jan. 3, 2018).

Christine filed this federal habeas petition on January 18, 2018 asserting six grounds: (1) prosecutorial misconduct in the form of a *Brady* violation; (2) ineffective assistance of counsel for failing to move for dismissal on Rule 600 grounds, as well as a claim that the trial court violated his Sixth Amendment right to a speedy trial when it did not dismiss the pending criminal charges; (3) ineffective assistance of counsel for failing to request a "castle doctrine" instruction; (4)

ineffective assistance of counsel for failing to correct an error in the jury instructions concerning self defense and aggravated assault; (5) a violation of the *ex post facto* provision under the 5th and 14th Amendments; and (6) a violation by the Commonwealth of the *Mooney* doctrine, where it allegedly elicited false testimony. The Northampton County District Attorney's Office filed a response to the petition on April 16, 2018. (Doc. 13.) Petitioner filed a "Traverse" as a reply on May 7, 2018. (Doc. 17.) He also filed what he characterized as an Amendment to his petition on June 28, 2018, in which he asked the Court to consider an appended affidavit from Daniel Rice concerning the factual background of the *Brady* claim asserted at Ground One. (Doc. 18.)

II. LEGAL STANDARDS

Before we discuss Christine's claims, we describe the obligation of the habeas petitioner to fairly present to the state court any federal claims upon which he later seeks federal review. We also discuss the constraints upon a federal court reviewing claims adjudicated on the merits in the state court and the standard under which ineffective assistance of counsel claims are evaluated.

A. Exhaustion and procedural default

Federal habeas relief may not be granted unless a petitioner "has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). For a claim to be exhausted, "[b]oth the legal theory and facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." *Evans v. Court of Common Pleas, Del. County, Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992). A state prisoner must "fairly present" his federal claims to the state courts before seeking federal habeas relief by invoking "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see also Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) ("Fair presentation' of a claim means that the petitioner must present a federal claim's factual and legal substance to the state courts in a

manner that puts them on notice that a federal claim is being asserted.”). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Waymart*, 579 F.3d 330, 367 (3d Cir. 2009). If the state courts have declined to review the merits of a petitioner’s claim based on his failure to comply with a state rule of procedure, and the state rule of procedure rests upon an independent and adequate state law ground such as failure to comply with the state’s rules for presentation of claims and arguments, the claim will similarly be deemed procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Harris v. Reed*, 489 U.S. 255, 261-62 (1989).

Whether through improper presentation or through omission of a claim during the state limitations period, a habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion, as there are no longer any state remedies “available” to him. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Procedurally defaulted unexhausted claims will not be reviewed by the federal court, however, unless “the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Id.* at 750. To demonstrate a fundamental miscarriage of justice as to overcome the procedural bar, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995). A claim of actual innocence must rely upon “new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.” *House v. Bell*, 547 U.S. 518, 537 (2006).

To demonstrate cause, the petitioner must show some objective factor external to the defense that impeded counsel’s efforts to comply with some state procedural rule. *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

The Supreme Court has held that the ineffectiveness of counsel on collateral review also may constitute “cause” to excuse a petitioner’s default of a claim of trial counsel ineffectiveness. *See Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* reflects a “narrow exception” to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default and is limited to an underlying claim of trial counsel ineffectiveness that is “substantial,” meaning “the claim has some merit[.]” *Id.* at 14. For a claim to have “some merit,” a petitioner “must ‘show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.’” *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 937-38 (3d Cir. 2019) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

B. Standards for state-adjudicated claims

Where the claim presented in the federal habeas petition was adjudicated on the merits in the state courts, the federal court may not grant habeas relief unless the adjudication:

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

28 U.S.C. § 2254(d).

A writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court “unreasonably applies

it to the facts of the particular case.” *Id.* This requires the petitioner to demonstrate that the state court’s analysis was “objectively unreasonable.” *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Where the state court’s resolution of a claim required it to make a factual determination, the statute further provides that the state court’s factual determination “shall be presumed to be correct,” and that the petitioner bears the burden to rebut this presumption with a showing of “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

C. Ineffective assistance of counsel: the *Strickland* standard

A claim for ineffective assistance of counsel is grounded in the Sixth Amendment right to counsel, which exists “in order to protect the fundamental right to a fair trial.” *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). To prevail on a claim for ineffective assistance of counsel, a habeas petitioner must demonstrate both that (1) his attorney’s performance was deficient, *i.e.*, that the representation “fell below an objective standard of reasonableness” as measured against prevailing professional norms, and (2) that he was prejudiced by his attorney’s performance. *Strickland*, 466 U.S. 668, 687-88, 690-92. Counsel’s deficiencies must be “so serious” that he “was not functioning as the ‘counsel’ guaranteed” to the petitioner by the Sixth Amendment. *Id.* at 687. This standard is “highly deferential” to defense counsel, as “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 689-90. It is presumed that “counsel’s conduct might have been part of a sound strategy,” and “if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the ‘weak’ presumption becomes a ‘strong’ presumption, which is ‘virtually unchallengeable.’” *Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690). Prejudice is proven if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have

been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Consequently, counsel cannot be found to be ineffective for failing to pursue a meritless claim. *See United States v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015).

III. DISCUSSION

Christine’s petition challenges his conviction on six grounds. First, he asserts that it was obtained through prosecutorial misconduct and a *Brady* violation in that the prosecutor secretly offered to Commonwealth witness Daniel Rice a benefit in a pending case he had in exchange for inculpatory testimony against Christine. Second, Petitioner contends that his counsel was ineffective prior to trial for failing to move for dismissal on Rule 600 grounds. In this ground he also contends for the first time that the trial court violated his Sixth Amendment right to a speedy trial when it did not dismiss the pending criminal charges. In Ground Three, Christine asserts that counsel performed deficiently in not requesting that the court give a “castle doctrine” instruction, which related to his claim of self-defense. In Ground Four, Christine also chides trial counsel with respect to the jury instructions, in that he believes trial counsel should have corrected an error in the instruction the court gave the jury concerning self-defense and aggravated assault. Ground Five asserts that Christine was subjected to a violation of the 5th and 14th Amendments’ *ex post facto* provision when the Pennsylvania Supreme Court overturned one of its precedents when it reviewed his case on direct review. Finally, he contends that his conviction should be set aside due to what he believes was a violation by the Commonwealth of the *Mooney* doctrine, where it allegedly elicited false testimony from witness Daniel Rice and Thomas Missero.

Respondents contend that each of the claims fails on the merits and that aspects of Christine's claims were not properly presented in state court and thus defaulted.³ As we set out below, we agree. We find no basis upon which we could recommend habeas relief.

A. *Brady* violation

Christine first claims that the Commonwealth committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) when it allegedly failed to disclose evidence favorable to him in the form of a secret deal between the assistant district attorney ("ADA"), Patricia Mulqueen, and a Commonwealth witness, Daniel Rice, which allegedly resulted in the witness changing his testimony. He contends that Rice "was originally an Exculpatory Witness," but that the ADA "met with him in secret" prior to Christine's trial and persuaded him to "change[] his testimony to inculpatory" in exchange for her agreeing to reduce a sentence, from 4-8 to 3-6 years, that Rice faced on an unrelated bank robbery conviction. Pet. ¶ 12, Ground 1. He contends that Rice took the offer, and later received the sentence reduction, but the deal was hidden from the jury that heard Rice testify in Christine's case.⁴

³ Respondents do not challenge the timeliness of the petition, and our review confirms that the petition satisfies 28 U.S.C. § 2244(d).

⁴ Rice testified at Christine's trial pursuant to a subpoena. It was noted at the outset of his testimony on questioning by the Commonwealth that he had been convicted of robbery just three weeks earlier and had been prosecuted by the same ADA handling the prosecution of Christine. The ADA also reviewed various other crimes of which Rice had been convicted, including theft, access device fraud, and receipt of stolen property. N.T. 10/6/10 at 9-10. Rice testified that he observed Missero get up from his dinner table and speak to people outside of the cell in which Christine and others were housed. He testified that Missero "may" have had something in his hand. *Id.* at 13-15. He explained that he then went into the cell himself, as his brother, a fellow inmate with whom he was dining and who was friendly with Missero, was concerned for Missero's safety. He observed a fight in which Missero and Christine had each other in a wrestling hold. He noticed after they separated that Missero was bleeding from the neck. *Id.* at 17.

Christine presented this *Brady* issue to the state court on PCRA review, where it was deemed cognizable. The PCRA Court granted Christine an evidentiary hearing, which it continued to allow Christine to try to arrange for Rice's live testimony. Christine was unable, however, to locate Rice. In lieu of Rice's testimony about the circumstances under which he received a sentence reduction in his bank robbery case and whether it arose from any "secret deal" with the ADA during the prosecution of Christine, the PCRA Court heard testimony from Attorney Michael Corcoran, who represented Rice on PCRA review, when he secured the sentence reduction. The court also added to the record Rice's *pro se* and counseled PCRA petitions that contained allegations about the Commonwealth's position on his sentence reduction request. Ultimately, however, the PCRA Court determined that Christine "presented no evidence to support his allegation of a 'secret deal'" and denied the petition.⁵ See *Christine*, No. 337 EDA 2017, 2018 WL 268519, at *2 (Pa. Super. Ct. Jan. 3, 2018) (describing PCRA Court determination).

The Superior Court devoted much attention to this issue in its opinion resolving Christine's appeal of the PCRA dismissal. The court reviewed the record from the PCRA hearing, noting that the presiding judge on PCRA review "acknowledged that Rice believed that there was a sentence bargain when he filed his PCRA claim" asserting facts to this effect, but that Rice's belief was "all hearsay" and noting that he was not present to testify about it. The Superior Court also described

⁵ One peculiar aspect of the PCRA proceedings bears mention. In the PCRA hearing, Christine sought to question the ADA who had prosecuted him at trial, as he alleged that she entered into this secret deal with Rice to change his testimony. The ADA, however, invoked the Fifth Amendment on the advice of the Northampton County District Attorney, who appeared personally at the evidentiary hearing. The Superior Court commented that it was "particularly troubled" by the Attorney Mulqueen's decision not to testify on Fifth Amendment grounds. *Christine*, No. 337 EDA 2017, 2018 WL 268519, at *3 (Pa. Super. Ct. Jan. 3, 2018). The court went on, however, to demonstrate that Christine failed to present evidence to support his allegation of a deal between Rice and Ms. Mulqueen that was "kept from the jury" in Christine's trial. *Id.* See also *id.* at *3-*6. We describe this lack of evidence below.

at length the testimony of Rice's PCRA counsel, Attorney Corcoran, that was given at Christine's PCRA hearing. Attorney Corcoran explained that in September of 2011, which was *after* Christine's trial for this prison assault on Missero, he appeared with ADA Mulqueen before the PCRA judge assigned to Rice's PCRA petition on his bank robbery case and explained "that the relief sought at that point was to get him the benefit of what he perceived to be a bargain, and [that] was a 3 to 6 year sentence," based on what he believed was due to him in light of the sentence of his co-defendant, who had been more involved in the robbery event. *Id.* at *5. When asked what Ms. Mulqueen's position had been on this effort to secure a sentence reduction for Rice on his robbery case, Attorney Corcoran recalled:

A. I remember approaching her about it after I was assigned the matter, and basically outlined [for] her some of the representations in his PCRA, and asked whether she would be amenable to the sentence reduction. And she indicated that his testimony was helpful in the matter of Commonwealth versus Christine, and that she would work with me to achieve the sentence reduction.

Q: Did she admit or deny that there was a deal between her and Dan Rice?

A: That I don't recall.

Id. (quoting N.T. 7/11/16 at 77-78). The Superior Court then repeated the observations of the PCRA Court at Christine's PCRA hearing that "you would think" that if "at the time that Mr. Rice had some negotiated favorable sentence from Ms. Mulqueen," it would be in the record of his guilty plea hearing in his case. *Id.* (quoting N.T. 7/11/16 at 93-94). The Superior Court continued with a recitation of the comments of the PCRA Court, which was not persuaded by Christine's theory:

So your theory is because Mr. Rice believed that he should get sympathy also after he had been sentenced because he testified in a different trial, and later Ms. Mulqueen relented and agreed that she would have no opposition to a lesser sentence for him, that that is an

indication that the presentation Ms. Mulqueen made at trial with the negotiated plea with regard to his sentence is somehow false?

Id. (quoting N.T. 7/11/16 at 93-94). The Superior Court noted that Christine's PCRA counsel only responded that he believed it was an indication that the jury "was not given the whole story." *Id.* (quoting N.T. 7/11/16 at 94.) The Superior Court disagreed with Christine's argument, explaining:

The fact that Rice alleged in his petition that there was a deal, and the fact that Rice ultimately received his requested PCRA relief, does not prove Christine's allegation. The PCRA court reviewed Rice's PCRA filings, Rice's plea colloquy, and Rice's PCRA counsel's testimony. The PCRA court concluded that all that was established was that Rice *alleged* a prior deal and that Attorney Mulqueen did not oppose Rice's request for a reduced sentence when she was approached, *after Christine's trial*, by Attorney Corcoran [Rice's PCRA counsel]. There was no proof that Attorney Mulqueen misrepresented, at Christine's trial, the fact that no promises were made to Rice prior to Christine's trial.

Id. at *6 (emphasis in original). The Superior Court concluded, therefore, that the record supported the PCRA Court's finding that Christine, who had the burden of proof, failed to present any competent or credible evidence in support of the "bald theory that the ADA lied during the trial."

Id. (quoting PCRA Court Opinion, 12/30/16, at 8).

1. New evidence

Confronted by the problem that he failed to meet his burden of proof before the PCRA Court, Christine has filed with this Court an "Amendment to Habeas Petition Newly Discovered Evidence" (Doc. 18), to which he appended an affidavit from Rice that was purportedly obtained by a privately retained investigator. In the affidavit, Rice asserts that he met with the ADA prior to Christine's trial and she offered him time off on his sentence in exchange for changing his testimony against Christine. Petitioner asks that we not stay his federal petition or remand it to state court for consideration of this new evidence but rather asks that we give him "Federal Review of [his] claims, resolve this case in the Federal Court, and order the lower court to grant [him] a

new trial with a new prelim, or dismiss the case....” *Id.* at 2-3. Christine appears to request this Court conduct an evidentiary hearing, or else accept Rice’s affidavit on its face as part of the record. Preliminarily, therefore, we must consider whether this is an appropriate request.

“Prior to AEDPA, new evidentiary hearings [in habeas cases] were *required* in several circumstances.” *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000) (emphasis in original) (citing *Townsend v. Sain*, 372 U.S. 293, 313 (1963)). However, where AEDPA applies and where a state court has determined a claim on its merits, the United States Supreme Court has held that a federal court’s reasonableness review of that ruling under section 2254(d)(1) is “limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The Court explained that “evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.” *Id.* at 184. Several circuit courts have concluded that, under *Pinholster*, district courts must evaluate a petitioner’s claims under the § 2254(d)(1) standard on the basis of the state record alone, without reliance on evidence developed in federal evidentiary hearings. *See, e.g., Brown v. Wenerowicz*, 663 F.3d 619, 629 (3d Cir. 2011); *Price v. Thurmer*, 637 F.3d 831, 837 (7th Cir. 2011); *Jackson v. Kelly*, 650 F.3d 477, 485 (4th Cir. 2011) (“In light of [*Pinholster*]’s admonition that our review is limited ‘to the record that was before the state court that adjudicated the claim on the merits,’ 131 S.Ct. at 1398, we avoid discussion of the evidence taken in the federal evidentiary hearing.”); *but see Brown*, 663 F.3d at 629 n.4 (3d Cir. 2011) (noting that under *Pinholster*, where claims are not adjudicated on their merits in state courts “our jurisprudence applying § 2254(e)(2) remains applicable”); *Garner v. Lee*, 908 F.3d 845, 860 (2d Cir. 2018) (“*Pinholster* does not bar a federal habeas court from holding an evidentiary hearing and considering evidence beyond the state court record when it engages in this non-§ 2254(d), *de novo* review.”).

Thus, the first question to address is whether the state court reached an “on the merits” determination of whether there was prosecutorial misconduct in the form of a *Brady* violation. If it did, habeas review is governed by § 2254(d) and the only question to ask is whether the adjudication was contrary to or an unreasonable application of federal law based on the record established in the state courts. It is only if there was not an “on the merits” determination or if the state court adjudication fails to pass AEDPA review that we may consider reopening the record. *Pinholster*, 563 U.S. at 185-86 (“Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief.”).

We find that the state courts clearly adjudicated this claim on its merits. The Superior Court relied upon the factual record developed by Christine in the PCRA Court’s evidentiary hearing where he was represented by counsel and applied *Brady* in light of the evidence presented. We are, accordingly, bound by *Pinholster* to conducting an AEDPA review of the state court determination based upon the factual record established by Christine in the state court.

2. Section 2254(d) review

The state courts’ adjudication of this issue passes AEDPA review. First, the Superior Court did not unreasonably determine the facts in light of the record evidence presented in the PCRA hearing where Christine did not provide sufficient evidentiary support for his assertion that Rice received a secret deal. Rice’s PCRA attorney did not corroborate Christine’s allegation that Rice received a secret deal in exchange for his inculpatory testimony at Christine’s trial. *See* N.T. 7/11/16 at 78 (“Q. Did [the ADA] admit or deny that there was a deal between her and Dan Rice? A. That I don’t recall”). Rice’s counsel testified that there were legitimate reasons for the sentencing reduction. Specifically, while hearsay statements in Rice’s *pro se* petition claimed he was entitled to reconsideration of his sentence *because* he had helped the Commonwealth, *id.* at 62, and while Rice’s counsel repeated that assertion in the counseled amended PCRA petition he

later filed for Rice, counsel testified that the primary bases for the later sentencing reduction were that: (1) the co-defendant who carried out the bank robbery received a lower sentence than Rice, who was only the getaway driver, and (2) Rice wanted additional consideration of the assistance he later gave the Commonwealth, *e.g.*, at Christine's trial, which was weeks after he was sentenced in the bank robbery case. *Id.* at 61-62. *See also id.* at 64 (the court's comment at Christine's PCRA hearing clarifying that Rice "pled guilty, got a 4 to 6 year sentence," at some point filed a PCRA and "said he thought he should have gotten 3 to 6 as part of a sentence bargain" and also "wanted additional consideration for helping out in the Christine matter"). The record developed at Christine's PCRA hearing established that Rice's counsel approached Attorney Mulqueen to ask if she would be amenable to a sentencing reduction for Rice, and she responded that she would be amenable because Rice's testimony was helpful in Christine's trial. *Id.* at 77-78. There was no direct or circumstantial evidence, however, that the ADA "secretly agreed" to Rice's sentencing reduction before Rice provided his testimony in Christine's trial.⁶

Given the factual record, the state courts reasonably applied *Brady*. A *Brady* claim has three elements: (1) the prosecution must have suppressed or withheld evidence, (2) which is favorable, and (3) material to the defense. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Moore v. Illinois*, 408 U.S. 786 (1972); *see also Cone v. Bell*, 556 U.S. 449, 469-70 (2009) ("[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the

⁶ To be sure, Christine's insinuation that there were "secret" communications between the ADA and Rice just prior to Christine's July 2010 trial in order to secure particular testimony is refuted by the trial record. When Rice testified at Christine's trial, it emerged that Rice was contacted in April 2010 by both a defense investigator and Attorney Mulqueen, within a few days of each other. This was no secret and it did not involve shaping testimony. The only person who suggested Rice give any particular account of the incident was Christine himself. Rice testified that Christine saw him shortly before he was to meet with the defense investigator and asked him to tell the investigator that he saw Missero with a cup of coffee in his hand when he went into the cell leading up to the altercation. *See N.T.* 10/6/10 at 22-23.

evidence been disclosed, the result of the proceeding would have been different.”). The state court found that Christine had not met his burden to show that any promises were made to Rice prior to Christine’s trial. Therefore, the state court quite reasonably determined that the prosecution did not suppress any evidence. Accordingly, the state court’s legal conclusion that there was no *Brady* violation is a reasonable application of Supreme Court precedents in this area and Section 2254(d)(1) thus bars habeas relief. In this circumstance, the federal court is not permitted to re-open the evidentiary record and consider the constitutional claim *de novo*. See 28 U.S.C. § 2254(e)(2); *Pinholster*, 563 U.S. at 185-86.

B. Failure to move for dismissal based on Rule 600

In Ground Two, Christine contends that he was entitled to have the charges against him dismissed where 448 days elapsed between the date he was charged and the date his criminal trial commenced. He asserts that trial counsel was constitutionally ineffective for failing to move to dismiss his case based upon a violation of Pa. R. Crim. P. 600. Pet. ¶ 12, Ground 2. He also argues that the state courts’ failure to dismiss his case violated his speedy trial rights under the Sixth Amendment of the United States Constitution. (Pet. Mem. at 42.) Neither claim is viable.

1. Rule 600 issue ineffectiveness claim

To the extent that Christine’s habeas claim could be said to repeat the claim that he actually exhausted in the state courts, namely that counsel was ineffective for failing to raise the violation of the state procedural rule, the state court adjudication was not an unreasonable application of *Strickland*.

Rule 600(A)(3) provides a 365-day period by which the Commonwealth must bring a charged defendant to trial (“the mechanical run date”), calculated by adding 365 days to the date on which the criminal complaint is filed. Excluded from that the mechanical run date are periods during which a defendant has expressly waived Rule 600, see Rule 600(C)(2), and any period of

delay at any stage of the proceedings resulting from the unavailability of the defendant or his counsel and any continuance granted at the request of the defendant or his counsel ("the adjusted run date"). See Rule 600(C)(3). Finally, Rule 600(G) provides:

If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. . . . If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges

Pa. R. Crim. P. 600(G).

Christine presented this issue in his PCRA petition. The PCRA Court calculated that the mechanical run-date was July 14, 2010 and recognized that Christine was not tried for another 82 days, until October 5, 2010. The court, however, found 122 days of excludable or excusable delay due to outstanding defense pretrial motions, agreed-upon continuances, and preliminary hearing delays, none of which the court considered to reflect a lack of due diligence on the part of the Commonwealth. (PCRA Court Opin. at 11-15.) Christine pursued this issue on appeal but the Superior Court "agree[d] with the [lower] court's calculation and its finding that there was no Rule 600 violation." *Christine*, 2018 WL 268519 at *8. Accordingly, it found that trial counsel "therefore was not ineffective for failing to raise this claim." *Id.*

The state court's time determinations are deemed presumptively correct factual findings which, as set forth at 28 U.S.C. § 2254(e)(1), cannot be set aside unless Christine rebuts them with clear and convincing evidence. See *Hakeem v. Beyer*, 990 F.2d 750, 767 (3d Cir. 1993) ("Findings on the cause of the [speedy trial] delay are entitled to a § 2254(d) presumption of correctness if petitioner had a fair opportunity to present his version of events and the state's findings on the issue are fairly supported by the record.") The finding that there was no violation of Rule 600 is a ruling on a state law issue that may not be reexamined on habeas review. See *Estelle v. McGuire*,

502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to re-examine state-court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”) On these grounds, the conclusion that trial counsel was not ineffective for failing to raise a Rule 600 issue is not an unreasonable application of *Strickland*’s performance prong, as any such motion, if filed, would have been without merit.

2. Federal speedy trial claim

To the extent Christine’s petition seeks to raise a direct federal constitutional claim based upon his speedy trial rights, the claim is unexhausted and procedurally defaulted with no showing of cause and prejudice or a miscarriage of justice.

In his PCRA petition, Christine asserted only that counsel was deficient for failing to seek dismissal on the basis of the state rule violation. *See* State Court Record Doc. 80 at 6-7. He did not seek to raise a direct violation of his federal speedy trial rights and he did not cite any case law suggesting he was arguing that his federal speedy trial rights had been violated. Rather, Christine cited only Pennsylvania state law cases concerning the application of the state procedural rule to support his assertion that counsel acted deficiently in failing to raise a violation of Rule 600. After his PCRA petition was dismissed, Christine also did not attempt to raise a federal speedy trial rights violation in his Rule 1925(b) Concise Statement of Matters Complained of on Appeal, again asserting only a violation of the state rule and ineffective assistance of counsel due to the failure to request a dismissal of his case on that basis. *See* State Court Record Doc. 99 at 2. As Christine did not fairly present the factual and legal substance of a federal constitutional speedy trial rights violation to the state courts so as to put them on notice of the substance of that claim, he has failed to meet his burden to show such a claim is exhausted. *See Holloway*, 355 F.3d at 714. (3d Cir. 2004).

Further, the same presumptively correct findings eliminate the possibility that Christine can demonstrate prejudice for purposes of excusing the procedural default on the federal speedy trial violation issue since, had the motion been filed, its lack of merit could not have altered the outcome of Christine's case.⁷

C. Failure to request a "castle doctrine" instruction

Christine next claims that trial counsel's performance was constitutionally deficient because he failed to request a "castle doctrine" jury instruction under 18 Pa. Cons. Stat. § 505 to advise the jury that he had no duty as a matter of law to retreat from his prison cell before using force immediately necessary for the purpose of protecting himself against the use of unlawful force by an assailant who had come into his cell.

Christine presented this claim on PCRA review. As the PCRA Court explained in its decision, when the assault occurred in 2009 and at his 2010 trial, the justification defense found at 18 Pa. Cons. Stat. § 505 was one enacted in 1972. It required that the actor was a non-aggressor, possessed reasonable fear of imminent death, and did not violate a duty to retreat. It differed from revisions to 18 Pa. Cons. Stat. § 505 that went into effect after Christine's conviction:

Under the 1972 version, all circumstances of the crime were to be evaluated to determine if the actor seeking the justification defense had a reasonable fear of death or serious bodily injury. However, Pennsylvania also recognizes the "Castle Doctrine" which excused any duty to retreat when the actor was attacked within his dwelling or residence.

⁷ Alternatively, this claim may be denied on the merits notwithstanding the failure to exhaust. See 28 U.S.C. § 2254(b)(2). In addition to the fact that there was no violation of the state rule, the factors to be considered for the federal claim, i.e., lengthy delay, deliberate attempt by the government to hamper the defense by delay, assertion of the right to speedy trial by the defendant, and prejudice to the defendant, *see Barker v. Wingo*, 407 U.S. 514 (1972), are dispelled by the state court factual findings that the delay was caused by outstanding defense pretrial motions, agree-upon continuances, and preliminary hearing delay, none of which amounted to a lack of due diligence on the part of the Commonwealth.

The Law of Justification in effect at the time that this Defendant committed his crime and at the time he was tried, did not provide the new, expanded Castle Doctrine that became law when 18 Pa.C.S.A. § 505 was amended on August 27, 2011, which expanded the definition of "Castle" to include dwelling, residence, occupied vehicle or place of work.

In our 2010 trial, we would not allow this Defendant, alleged to have committed an aggravated assault in 2009, to expand the Castle Doctrine to include his prison cell which he shared with six other inmates and [over] which did not have the authority to secure himself. We firmly believed that the 1972 version did not possess the legislative intent to grant inmates in a penal institution a claim that a multi-bed cell was to be considered the inmate's private, personal dwelling which would immunize the inmate should another inmate enter his open cell door. Therefore, we made no attempt to fashion a new, special jury instruction for inmate Christine which adopted the common-law Castle Doctrine to encompass his assigned prison cell.

12/30/16 PCRA Opin. at 16-17. The PCRA Court held that trial counsel "appropriately requested and received the charge for self-defense" and that he could not be found ineffective "for failing to advance the request for a novel Castle Doctrine charge related to inmates and prison cells." *Id.* at 17. On appeal, the Superior Court reiterated that 18 Pa. Cons. Stat. § 505 was not amended until August 27, 2011 and that the expanded definition of "castle" to include one's dwelling, residence, occupied vehicle or place of work thus was not in effect at the time of Christine's trial. The Superior Court also observed that "there is no precedent for extending this doctrine to a prison cell." *Christine*, 2018 WL 268519, at *9. It found that the PCRA Court properly disposed of this issue in its opinion.

The state courts' adjudication of this claim is not an unreasonable application of *Strickland*'s deficient performance prong. The state courts clearly, and quite reasonably, determined that state law would not permit an inmate to claim that his multi-bed prison cell qualified in 2009 as a private, personal dwelling covered by either the 1972 statutory version of the castle doctrine or its common law antecedent. There was no basis under state law as a defense

to an assault charge to assert that one's prison cell is one's castle. Counsel's failure to raise the castle doctrine could not constitute ineffectiveness since counsel is under no duty to raise meritless legal issues. *Strickland*, 466 U.S. at 691 (failure of counsel to pursue fruitless claims "may not later be challenged as unreasonable"); *Smith v. Murray*, 477 U.S. 527, 536 (1986) (holding that counsel cannot be found ineffective for winnowing out meritless claims and focusing on those most likely to prevail). The state court's adjudication of this ineffectiveness claim was not in any way an unreasonable application of *Strickland*. Habeas relief is thus not available on this claim.

D. Failure to correct erroneous jury instruction

Christine contends in Ground 4 of his petition that trial counsel was ineffective for failing to object to an allegedly erroneous supplemental jury instruction. Pet. ¶ 12, Ground 4, Pet. Mem. at 52-53. We begin our analysis with the context in which this alleged trial court error arose.

On the morning that the jury was to be charged, the court convened a further charging conference to discuss the implication of Christine's testimony that he never intended to harm the victim, which the prosecutor claimed precluded a claim of self-defense. The court recognized that if the jury accepted that testimony, then Christine would not have committed a crime and no defense of justification would be available. The court also recognized, however, that the jury could "accept and reject part of his testimony," and might accept that Missero was the aggressor and brought the weapon in but that Christine felt like he was under an attack and that's when he used the weapon." (N.T. Tr. Vol. III, 10/7/10, at 5.) The court explained that it would give the instruction on justification but would also "give the explanation about the only way it's possibly relevant is if they reject some of this testimony, but not all of it." *Id.* at 9-10. The court explained to defense counsel:

I have to explain to them when it becomes relevant in their deliberations, and if it becomes relevant, this is one way where it doesn't at all become relevant. If they accept your guy's testimony

completely, then there is no need to deal with it. The only time that deals with it is if they reject part of his testimony or all of it. If they reject it, there is no justification. If they reject some of his testimony but not all of it, then he's entitled to the justification charge. You're going to tell me that I have to charge them based on the testimony by your guy, [but] he didn't put justification in his testimony.

Id. at 10.

Following the closing arguments, the court charged the jury regarding the elements of the crimes charged and then addressed the self-defense assertion:

Now, if you believe Thomas Mis[s]ero's testimony, that he came into the cell unarmed and he was attacked by the defendant who had a razor, obviously it's a very easy deliberation for you. If you believe the defendant's testimony, and reject Thomas Mis[s]ero's testimony and believe that Thomas Mis[s]ero came into the cell armed with both hot coffee and a razor and that he engaged in the assault by throwing coffee and then attempting to slash the defendant, then you're going to find also that no crime occurred.

Now, if you accept the defendant's testimony that the injury received by Thomas Mis[s]ero was caused unintentionally, then the defendant is not entitled to the defense known as justification or self-defense. The law of Pennsylvania is very clear. You cannot avail yourself of the defense known as justification or self-defense if your testimony is that the injury was wholly unintentionally caused, because if it is unintentionally caused, it can't be a crime.

Id. at 69-70. The court then explained to the jury that it might accept some aspects of the defendant's testimony and reject other aspects. The court explained that the jury must consider the justification defense if it is not sure whether or not Christine inflicted the injury on Missero intentionally. *Id.* at 71. The court then explained the elements of self-defense. *Id.* at 71-75. Petitioner has not challenged these instructions.

What Petitioner takes issue with is the court's response to a pair of jury questions that were submitted after deliberations had begun. The jury asked for a review of the definitions for attempted homicide and aggravated assault, as well as for self-defense. *Id.* at 78. After re-reading

the definitions of the crimes, *id.* at 79-87, the court continued in the following passage in which the word “the” was incorrectly substituted for the word “no”:

Also, if you accept the defendant’s testimony that he was a person who was innocent in this matter, that he was in his cell, and that the victim came to his cell with hot coffee and a razor, and that the victim, Mr. Mis[s]ero, was the person who provoked the assault, and, in fact, attempted to slash the defendant with the razor. Eventually the defendant disarmed Mr. Mis[s]ero, they disengaged, the defendant walked over, picking up a razor, he was now armed, and the defendant then was under attack by Mr. Mis[s]ero a second time, and that in defending himself, accidentally the victim was slashed, then there is no justification either because the defendant committed *the* crime. He has no intent to injury the victim so you don’t have to consider justification if you believe the defendant’s story.

N.T. 10/07/10, at 88 (emphasis added). The defense made no objection at that time, and the jury ultimately returned with its verdict convicting Petitioner of aggravated assault, thus finding Christine’s actions were intentional and that he did not establish self-defense.

Petitioner presented this issue on PCRA review in the context of counsel’s failure to object to this instruction, which he contended warranted a new trial, while recognizing that “[i]t appears that th[e] Honorable Court merely misspoke.” PCRA Court Opinion, 12/30/16 (State Court Record Doc. 85) at 17 (quoting Br. in Supp. of Def.’s PCRA Pet. at 2). Looking to Pennsylvania precedents about the standard under which jury instructions are reviewed for error, the PCRA Court noted that the charge must be read as a whole and that error “will not be predicated on isolated excerpts, as “it is the general effect of the charge that controls.” PCRA Court Opinion, 12/30/16 (State Court Record Doc. 85) at 18. The PCRA Court explained that it believed it “accurately recited the law and our jury charge with regard to justification,” and noted that after this response to the jury’s question, “the court brought counsel again to side bar and no objections were raised with regard to our instructions.” *Id.* at 19. The PCRA Court continued:

We cannot deny that the transcription of our jury charge on Page 88, Line 13-14, recites the phrase “the Defendant committed the crime.” However, we believe that we did not misspeak, but in fact said “the Defendant committed no crime.” Otherwise, the entire sentence appears to be “logical gibberish.” It makes no sense that the court reporter’s transcription was accurate. We had previously, accurately made the statement to the jury that if the Defendant accidentally slashed the victim (as he reported in his testimony) then the Defendant could not have committed the crime of aggravated assault and the defense of justification would not need to be considered by the jury. We believe that we provided the same instruction in our first charge as we did in our second charge referenced on Page 88 of the Transcript. Other than the apparent error of “the” rather than “no,” the section is consistent with the charge required as well as our discussion with the parties [at the further charging conference] in delineating between a justification defense and a lack of intent.

Id. at 19-20. The PCRA Court noted that it could not account for the scrivener’s error but concluded that such an isolated incident was not a basis to determine error and that “[t]aken as a whole, the jury instruction adequately conveyed the law to the jury.” *Id.* at 29. Inasmuch as the PCRA Court was the last state court to address the merits of this claim,⁸ we measure the reasonableness of the state court adjudication with reference to the PCRA Court’s decision. *See Bond v. Beard*, 539 F.3d 256, 289-90 (3d Cir. 2008).

The state law standard employed by the PCRA Court to adjudicate the instructional error claim was not contrary to federal law. The United States Supreme Court has directed that, in reviewing the adequacy of jury instructions, the instructions must be viewed as a whole and in context. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (assessing whether instruction “taken as a whole” correctly conveyed the concept of reasonable doubt). The Court has often repeated

⁸ The Superior Court opinion identified this issue among those presented. *See* 2018WL 268519, *2. When the court incorporated by reference the PCRA Court’s resolution of the related castle doctrine alleged instructional error, however, it failed to otherwise discuss the issue of this alleged error.

that the instruction “may not be judged in artificial isolation,” but must be considered in the context of the instructions as a whole and the trial record.” *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

We find the standard employed by the PCRA Court to be legally indistinguishable from the federal law standard, and that the PCRA Court’s application of the standard was not unreasonable. Importantly, the incorrect word — whether a mis-transcription or actually spoken by the court — occurred after the court had indisputably instructed the jury correctly on all aspects of the law it had to apply before the deliberations commenced. The error, arising in response to a subsequent jury question, was quite reasonably determined by the PCRA Court to have been the type of isolated error that does not by itself infect an entire trial, resulting in a conviction that violates due process. *See Cupp*, 414 U.S. at 147. Because the underlying issue, if raised by counsel, would have been deemed meritless under both state and federal law, counsel cannot be deemed to have been ineffective for having failed to raise it. Accordingly, the PCRA Court’s adjudication of the instructional error claim provides no basis for habeas relief.

E. *Ex post facto* claim

Christine next asserts an *ex post facto* violation under the Fifth and Fourteenth Amendments. His contentions relate to the fact that, in his direct appeal, the Pennsylvania Supreme Court’s adjudication of a state law evidentiary issue overruled a prior Pennsylvania precedent.⁹ He suggests that this subjected him to an *ex post facto* violation, as he characterizes

⁹ As part of the direct appeal review in Christine’s case, the Pennsylvania Supreme Court overruled a prior case, *Commonwealth v. Beck*, 402 A.2d 1371 (Pa. 1979), insofar as it stood for a bright-line evidentiary rule that “all assault convictions are sufficiently similar to demonstrate the victim’s violent propensities.” *Christine*, 125 A.3d at 400 n.9 (citing *Beck*, 402 A.2d at 1373). The Pennsylvania Supreme Court determined that the proper test was that “trial courts may determine whether the facts are sufficiently similar on a case-by-case basis[.]” *Id.* Applying this case-by-case approach, the Supreme Court agreed that the trial court in Christine’s case did not abuse its discretion by excluding the cellblock stabbing victim’s subsequent assault conviction. While making clear that it did not endorse an opposite bright-line rule that a subsequent conviction can never be probative and admissible, the Supreme Court determined that the trial court had a

that state court as having “changed [an] evidentiary rule[,] overruling precedent[ial] case.” (Pet. at 15.) He contends that the overruling was in error and complains that the court “appl[ied] [the] change ex post facto.” (*Id.*)

Christine never asserted an *ex post facto* claim in his PCRA petition following the conclusion of the direct appeal. The claim is unexhausted and procedurally defaulted, as the Commonwealth noted in its Response. While Christine’s “Traverse” again argued the legal substance of this claim, he did not address the fact that the constitutional claim was never fairly presented to the state courts.¹⁰ *See* Traverse at 17-19. He has failed to meet his burden to show cause to excuse the default, and he has not established that this Court’s failure to review the merits of this claim would constitute a miscarriage of justice.

Notwithstanding the failure to have presented the *ex post facto* claim to the state court, it is subject to denial on the merits as well. *See* 28 U.S.C. § 2254(b)(2). The Pennsylvania Supreme Court’s resolution of Christine’s own direct appeal cannot support an *ex post facto* claim and his claim is therefore without merit. As the United States Supreme Court stated, it “has long been settled by the constitutional text and our own decisions ... that the Ex Post Facto Clause does not apply to judicial decisionmaking.” *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001). This is because

sufficient basis for excluding this evidence where: (1) 11 months elapsed between the cellblock stabbing and the subsequent incident where the cellblock stabbing victim grabbed and pushed his girlfriend, and (2) the subsequent assault involved a “strikingly disparate factual scenario.” *Id.* at 400-401.

¹⁰ Christine appears to have misapprehended the default analysis, as he seeks to explain why he could not have raised this issue in the direct appeal, as it did not arise until the Pennsylvania Supreme Court resolved his direct appeal. *See* Traverse at 19. He also responds that he *did* bring this alleged *ex post facto* violation to the attention of the Pennsylvania Supreme Court when he filed an Application for Reconsideration or En Banc Reargument. That was not the time, however, for the state court to entertain a new constitutional claim. Christine had the opportunity to present this claim to the state court in the PCRA petition but he did not do so.

the common law “presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.” *Id.* at 461. While a change in common law precedent can constitute a due process violation, Christine did not raise and exhaust a due process claim either. Further, a court decision constitutes a due process violation only where the judicial alteration of criminal law “violates the principle of fair warning,” and it does so “only where it is ‘unexpected and indefensible by reference to the law.’” *Id.* at 462 (quoting *Bowie v. City of Columbia*, 378 U.S. 347, 354 (1964)). Here, the Pennsylvania Supreme Court’s decision in Christine’s direct appeal involved a rule of evidence, not substantive law. Its refusal to extend the presumption of admissibility of evidence of an assault to one that occurs subsequent to the victim’s assault by the defendant cannot be considered indefensible “by reference to prior law” since the rules of evidence had always provided that the probative value of evidence must be balanced against unfair prejudice to determine its admissibility. *See* Pa. R. Evid. 403. Thus unexhausted claim of an *ex post facto* violation, which is without merit in any event, may be denied and dismissed.

F. Mooney violation

Finally, Christine argues that he is entitled to habeas relief where the Commonwealth allegedly violated *Mooney v. Holohan*, 294 U.S. 103 (1935), which describes the prohibition on the prosecution from obtaining a conviction through deliberate deception). He asserts that:

During trial both Commonwealth witnesses [the victim Thomas Missero and Daniel Rice] testified that a 3rd individual [Daniel Rice’s brother Jeff Rice] was present to the incident. But Housing records from the prison, and a private investigator’s investigative interview report from [that] individual indicate that he WAS NOT, and that both Commonwealth witnesses lied.

Pet. ¶ 12 Ground 6, Pet. Mem. at 62. Christine alleges that the falsity of this testimony is shown by the fact that Jeff Rice was housed on a different tier and inmates on different tiers were not permitted out together. Pet. Mem. at 62-63.

Petitioner asserted in his *pro se* PCRA petition that the Commonwealth secured his conviction through the use of perjured testimony regarding Jeff Rice's presence at the scene of the assault and that counsel was ineffective for failing to raise this issue. (St. Ct. Rec. Doc. 65 & 66, Mem. at pp. 8-9.) This issue was not raised, however, in the brief subsequently filed by counsel. (St. Ct. Rec. Doc. 80, filed Aug. 10, 2016.) Accordingly, when Christine attempted to raise in his *pro se* PCRA appeal this issue of the ineffectiveness of trial counsel in failing to bring a *Mooney* violation claim against the Commonwealth, the Superior Court found that the issue was waived. *Christine*, 2018 WL 268519 at *9 (noting that issue was not raised in PCRA petition and that argument in appellate brief was undeveloped and unintelligible). Christine contends that his claim should not be rejected as procedurally defaulted because the United States Supreme Court decision in *Martinez* permits the default to be excused. *Traverse* at 20-23.

Martinez does not provide a basis for granting habeas review on the issue for several reasons. First, the federal habeas petition clearly seeks to assert a direct claim of a *Mooney* violation and not an ineffective assistance of counsel claim for failing to assert a *Mooney* violation. *See* Pet. ¶ 12 Ground 6 ("MOONEY VIOLATION WHERE FALSE TESTIMONY WENT UNCORRECTED THAT PROS. KNEW OR SHOULD HAVE KNOWN WAS FALSE"). Nowhere in the habeas petition or the accompanying memorandum does Christine assert anything about a failure of counsel in this regard.

Martinez is relevant only to establish cause for a prisoner's procedural default of a meritorious claim of *ineffective assistance at trial*. *Cox v. Horn*, 757 F.3d 113, 119 (3d Cir. 2014). Christine's current contention that PCRA counsel was ineffective cannot provide cause because the habeas claim he seeks to assert is not one alleging ineffective assistance of trial counsel, but rather a direct *Mooney* claim asserting improper actions by the Commonwealth. Accordingly,

Martinez is facially inapplicable. See *Hawes v. Marsh*, Civ. A. No. 17-0017, 2018 WL 2294216, at *9 (E.D. Pa. Apr. 26, 2018), report and recommendation adopted *sub nom. Hawes v. Ferguson*, 2018 WL 2293940 (E.D. Pa. May 17, 2018) (holding that PCRA counsel's ineffectiveness cannot provide cause for a defaulted *Brady* claim); *Murray v. Diguglielmo*, Civ. A. No. 09-4960, 2016 WL 3476255, at *4 (E.D. Pa. June 27, 2016) (holding that *Martinez* does not apply to defaulted claims of trial court error).

Even if Christine were entitled to review of this claim, or of the related ineffectiveness claim that he raised at various points in the state court proceedings, it is perfectly clear that he has not raised even a colorable federal claim. Accepting as accurate for the purposes of this discussion Christine's factual assertions about the falsity of the two Commonwealth witnesses' testimony about Jeff Rice's presence during the incident, nothing he has provided indicates that this evidence was anything other than superfluous to the other evidence of guilt. There is no allegation that Jeff Rice was involved in the incident or that he even witnessed it occur.¹¹ While the contradictory testimony on this discrete point may have been additional material for cross-examination, the record reflects that counsel attempted to impeach the two witnesses' accounts on far more pertinent grounds. Daniel Rice was cross-examined about his own friendship with the victim, Jeff's friendship with the victim, whether he had a motive to retaliate against Christine by testifying against him, his contacts with the ADA, and his prior criminal record. N.T. 10/6/10 at 26-31.

¹¹ Thomas Missero testified that he ate dinner with Jeff Rice but that Jeff was still at the table when he was called over to Christine's cell by another inmate. N.T. 10/5/10 at 56-58. He also testified that both Daniel Rice and Jeff Rice stopped by after the stabbing for a minute and that one of them told him to go to the medical unit. *Id.* at 62, 66. On cross-examination, Missero again stated that Jeff Rice was sitting at the table during the incident but came over to him after. *Id.* at 94-95. Daniel Rice, who testified that Missero and Jeff were friends, testified that he ate dinner with Jeff but that Missero was at another table. N.T. 10/6/10 at 11-12. The Commonwealth asked him no other questions about his brother.

Counsel attempted to impeach Missero by having him admit that he was suing the prison for civil damages over the incident. N.T. 10/5/10 at 93-94. In addition, to the extent the “*Mooney*” violation claim is couched in terms of trial counsel’s ineffectiveness, Christine does not assert that counsel knew, should have known, or had any reasonable basis to even investigate where Jeff Rice was located during the incident, as there is no indication the Commonwealth was ever going to call him as a witness. Accordingly, any assertion that counsel’s performance was so deficient as to satisfy *Strickland* is entirely speculative. There is no reason to believe that the outcome of the proceeding would have been different had trial counsel pursued questioning about the Commonwealth witnesses’ testimony regarding the presence of Jeff Rice.

IV. CONCLUSION

Christine has not met his burden to show that the adjudication by the state courts of his exhausted claims resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, nor has he demonstrated any basis for the Court to excuse the procedural default of the claims that he did not properly present to the state court.

As to Ground One, which asserted that the conviction was obtained through prosecutorial misconduct and a *Brady* violation involving Commonwealth witness Daniel Rice, we found that the state court reasonably rejected this claim when it was heard and adjudicated on PCRA review. As to Ground Two, we determined that counsel could not be considered ineffective prior to trial for failing to move for dismissal on Rule 600 grounds where the state court determined that the Rule 600 time had not yet expired. We also rejected as procedurally defaulted his related contention that he was deprived of his Sixth Amendment right to a speedy trial. We concluded that habeas relief was not available to Petitioner as to Ground Three, where he asserted that counsel failed to seek a “castle doctrine” instruction relating to his claim of self-defense, as this claim was reasonably adjudicated on PCRA review. As to Ground Four, where Christine further faulted trial

counsel's reaction to jury instructions given by the court concerning self-defense and aggravated assault, we again found that the state court reasonably rejected this claim on PCRA review. We found Ground Five, in which Christine asserted that he was subjected to an *ex post facto* violation when the Pennsylvania Supreme Court overturned one of its precedents, to be procedurally defaulted and without merit in any event. Finally, we found that Christine procedurally defaulted his claim in Ground Six that the Commonwealth violated the *Mooney* doctrine by eliciting false testimony from two witnesses.

Pursuant to Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to determine whether a Certificate of Appealability (COA) should be issued. Under 28 U.S.C. § 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We would not recommend that a COA issue unless we believed that jurists of reason would find it to be debatable whether the petition stated a valid claim for the denial of a constitutional right. As to claims that are dismissed on procedural grounds, the petitioner bears the additional burden of showing that jurists of reason would also debate the correctness of the procedural ruling. *Id.* Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court erred in denying the present petition or that jurists would debate the procedural rulings. Accordingly, we do not believe a COA should be issued. Our recommendation follows.

RECOMMENDATION

AND NOW, this 30th day of April, 2019, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED AND DISMISSED**. It is **FURTHER RECOMMENDED** that a Certificate of Appealability should **NOT ISSUE**, as we do not believe that Petitioner has demonstrated that reasonable jurists would debate the correctness of the procedural disposition or whether his petition states a valid claim.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge, USMJ
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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

JACOB CHRISTINE,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
MICHAEL CLARK, <i>et al.</i> ,	:	NO. 18-237
Respondents	:	

ORDER

AND NOW, this day of , 2019, upon careful and independent consideration of the petition for a writ of habeas corpus, the response, petitioner's reply, and available state court records, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The petition for a writ of habeas corpus is **DENIED AND DISMISSED**;
3. A certificate of appealability **SHALL NOT** issue, in that the Petitioner has not made a substantial showing of the denial of a constitutional right nor demonstrated that reasonable jurists would debate the correctness of the procedural aspects of this ruling. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); and
4. The Clerk of the Court shall mark this case **CLOSED** for statistical purposes.

BY THE COURT:

PETRESE B. TUCKER, J.

APPENDIX F

Pennsylvania Superior Ct., Case # 3555 EDA 2018
Denial of Appeal of Dismissal of consecutive PCRA without hearing

Appendix **NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
JACOB MATTHEW CHRISTINE	:	
	:	
Appellant	:	No. 3555 EDA 2018

Appeal from the PCRA Order Entered November 19, 2018
 In the Court of Common Pleas of Northampton County Criminal Division
 at No(s): CP-48-CR-0003344-2009

BEFORE: STABILE, J., MURRAY, J., and FORD ELLIOTT, P.J.E.

MEMORANDUM BY MURRAY, J.:

FILED APRIL 26, 2019

Jacob Matthew Christine (Appellant) appeals *pro se* from the dismissal of his third petition seeking relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Upon review, we affirm.

The PCRA court detailed the relevant facts and procedural history as follows:

[Appellant] was convicted of Aggravated Assault and Recklessly Endangering Another Person by a jury on October 7, 2010. The conviction resulted from an incident that occurred in Northampton County Prison (NCP) on June 8, 2009. The trial record established that on June 8, 2009, [Appellant] and his victim, Thomas Misero (Misero), were inmates in NCP when a confrontation between the two men occurred in [Appellant's] cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in [Appellant's] cell, [Appellant] was alleged to have slashed Misero's neck and ear with a razor blade. Misero testified that [Appellant's] assault was unprovoked. Another inmate in Northampton County Prison, Daniel Rice, was called by the Commonwealth. Rice testified that he witnessed Misero go into [Appellant's] cell, heard a fight occur and came into the cell as [Appellant] and Misero were being separated. Rice witnessed

Misero's wounds, but did not witness the fight. Rice also testified that [Appellant] told him the fight was over twenty dollars that Misero owed [Appellant]. During his direct and cross, Rice was asked about any deal or consideration that the Commonwealth was giving him in return for his testimony. Rice testified that he was not promised anything in return for his testimony.

[Appellant] pursued post-sentence motions and an appeal through the appellate courts. The Pennsylvania Supreme Court issued an Order affirming [Appellant's] conviction on [October] 27, 2015.

[Appellant's] first PCRA was filed on February 22, 2016. In the first PCRA, [Appellant] raised a series of claims, including ineffective assistance of counsel and the existence of "new evidence" consisting of prosecutorial misconduct alleging that the Assistant District Attorney (ADA) intimidated Rice and suborned Rice's perjured testimony by promising Rice a hidden deal on his criminal charges in exchange for his perjured testimony.

We held our first hearing on the PCRA on July 11, 2016. [Appellant] was represented by PCRA counsel. At the hearing, we heard from Rice's guilty plea counsel, Rice's PCRA counsel, and [Appellant]. We learned that on September 15, 2010, shortly after [Appellant's] trial, Rice was given a 4-8 year sentence as part of a negotiated plea with a sentence bargain for a bank robbery in which he was the getaway driver. At sentencing, Rice acknowledged that he got the benefit of his negotiated bargain. Apparently, Rice's co-defendant was later given a 3 to 6 year sentence. Upon finding that his co-defendant (who actually entered the bank to commit the robbery) got a lesser sentence, Rice filed for PCRA relief asking for reconsideration and/or for the same sentence his co-defendant received. Rice also claimed in his PCRA that he was promised a sentence reduction by the ADA. During the PCRA hearing, both of Rice's attorneys testified that they were not aware that any prior promises were made to Rice for his testimony against [Appellant]. Rice's PCRA attorney testified that he did raise the inequitable sentencing situation with the ADA. Thereafter, the ADA (the same ADA who prosecuted [Appellant]) agreed with his proposal that a fair resolution would be to give Rice the same sentence as the actual robber. Rice agreed to accept the new resolution. On September 30, 2011, as

part of the resolution of Rice's PCRA, the Judge modified Rice's sentence to 3-6 years, with the agreement of the ADA.

[Appellant] also testified at his PCRA hearing. [Appellant] presented the report of a private investigator, John Stahr, a retired Detective from the Bethlehem Police Department who was apparently sent to interview Rice by [Appellant's] Public Defender, prior to [Appellant's] trial. The entirety of Stahr's report as it relates to his hearsay summary of his interview with Rice is as follows:

I asked Rice if he saw Misero approach [Appellant's] cell and he told me that he had. Rice said that Misero had a cup in his hand and that he saw him walk into [Appellant's] cell. Rice said that he saw a scuffle start and then someone yelled that they were fighting. Rice told me that he went to the cell but the fight was over. [Appellant] and Misero were arguing about a dispute on the street but he did not know what it involved. Rice had nothing further to add and the interview was terminated.

Report of John Stahr, April 12, 2010.

[Appellant] argued that Rice's PCRA filing and the Stahr report establish both the secret sentencing deal Rice reached with the ADA and that the ADA suborned perjured testimony from Rice. PCRA Counsel asked to recess the hearing as he considered calling additional witnesses. No other hearings were held, even though we recessed the hearing to allow PCRA Counsel to call possible additional witnesses.

On December 30, 2016, we entered our Order denying [Appellant's] first Petition. Our December 30, 2016 Order was appealed. On January 3, 2018, the Superior Court affirmed our Order denying post-conviction relief. In the Superior Court's decision, the Court discussed the alleged improper "secret deal" between the ADA and Rice in which the ADA allegedly influenced Rice to change his testimony and/or the ADA knowingly proffered perjured testimony of Rice at trial, before concluding that there was no credible evidence of a "secret deal" or that the ADA misrepresented facts or proffered perjured testimony. The Superior Court's detailed analysis can be found in its January 3, 2018 Opinion (pp. 4-12), where the Superior Court finally stated:

56

"We conclude, therefore, that the record supports the PCRA court's finding that [Appellant], who had the burden of proof, presented no competent or credible evidence in support of his bald theory that the ADA lied during the trial." See Superior Court Opinion, No. 337 EDA 2017, January 3, 2018 at page 12.

On May 7, 2018, [Appellant] filed his second PCRA Petition advancing the same theory and based upon the same factual predicate, with additional evidence consisting of a written statement (an affidavit) from Rice which [Appellant] argued constituted "newly discovered evidence" under the PCRA. The Affidavit signed by Rice alleges that the ADA offered Rice reduced time in exchange for his testimony, and that his original statement to the "initial investigator" who visited him in prison was his true statement.

PCRA Court Opinion, 11/19/18, at 1-6.

On May 15, 2018, the PCRA court issued notice of intent to dismiss Appellant's second PCRA petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907. The PCRA court dismissed the petition on June 11, 2018. Appellant did not file an appeal.

On September 24, 2018, Appellant filed the instant PCRA petition, his third. Again, Appellant has claimed that a sworn affidavit from Rice constituted after-discovered evidence which entitles Appellant to a new trial. On October 11, 2018, the PCRA court issued notice of its intent to dismiss Appellant's PCRA petition without a hearing pursuant to Pennsylvania Rule of Criminal Procedure 907. The court dismissed the petition on November 19, 2018 on the basis that it lacked jurisdiction because the petition was untimely. Appellant filed this appeal.

On appeal, Appellant presents a single issue:

- 1) DID THE LOWER COURT ERR IN FAILING TO GRANT A PCRA EVIDENTIARY HEARING WHERE [APPELLANT] PRESENTED A SWORN AFFIDAVIT FROM A COMMONWEALTH WITNESS THAT "ALL [HIS] TRIAL TESTIMONY WAS FALSE," THAT "[APPELLANT] WAS DEFENDING [HIM]SELF FROM [THE VICTIM]," AND THAT THE ONLY REASON [THE WITNESS] TESTIFIED AGAINST [APPELLANT] WAS BECAUSE THE ADA MADE A SECRET DEAL WITH [THE WITNESS] PRIOR TO TRIAL TO CHANGE HIS TESTIMONY FROM EXCULPATORY TO INCULPATORY IN EXCHANGE FOR A SENTENCE REDUCTION ON HIS BANK ROBBERY CONVICTION THAT WAS HIDDEN FROM [THE] JURY.

Appellant's Brief at 4 (underline in original).

"On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." ***Commonwealth v. Williams***, 196 A.3d 1021, 1026-27 (Pa. 2018) (quoting ***Commonwealth v. Washington***, 927 A.2d 586, 593 (Pa. 2007)). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court; however, we apply a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Roney***, 79 A.3d 595, 603 (Pa. 2013).

Instantly, we must first address the timeliness of Appellant's petition, because the PCRA's time limitations implicate our jurisdiction and may not be altered or disregarded in order to address a petition's merits; a petitioner seeking post-conviction relief must file a petition within one year of the petitioner's judgment of sentence becoming final. ***See, e.g.,***

Commonwealth v. Smith, 194 A.3d 126, 132 (Pa. Super. 2018); **see also** 42 Pa.C.S.A. § 9545(b)(1). Section 9545 of the PCRA requires that “[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final.” 42 Pa.C.S.A. § 9545(b)(1). The timeliness requirement of the PCRA is “mandatory and jurisdictional in nature.” **Commonwealth v. McKeever**, 947 A.2d 782, 784-85 (Pa. Super. 2008). Therefore, “no court may disregard, alter, or create equitable exceptions to the timeliness requirement in order to reach the substance of a petitioner’s arguments.” **Id.** at 785.

Appellant’s third PCRA petition is patently untimely. The Pennsylvania Supreme Court affirmed Appellant’s judgment of sentence on October 27, 2015. Appellant sought reargument with the Supreme Court, which was denied on January 26, 2016. Under U.S. Sup. Ct. R. 13, Appellant had 90 days to petition for a writ of certiorari with the United States Supreme Court, but did not do so. A judgment of sentence becomes final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. § 9545(b)(3). Therefore, Appellant’s judgment of sentence became final on April 25, 2016, and he had to file his PCRA petition by April 25, 2017 to meet the PCRA’s time restrictions. The underlying petition was not filed until September 24, 2018.

It is well-settled that a court does not have jurisdiction to entertain a petition filed after the one-year time-bar unless the petitioner pleads and proves one of the time-bar exceptions. The exceptions include:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this Section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

Until recently, a petition invoking an exception had to be filed within 60 days of the date the claim could have been presented. However, effective December 2017, Act 146 of 2018 amended 42 Pa.C.S.A. § 9545(b)(2), and now provides that a PCRA petition invoking a timeliness exception must be filed within **one year** of the date the claim could have been presented. **See** Act 2018, Oct. 24, P.L. 894, No. 146, §2 and §3. Although we note the change in the law from 60 days to one year, and its application to Appellant, the change does not impact our analysis.

Appellant argues that the PCRA court should have held a hearing on his third PCRA petition and vacated his conviction because he presented sworn

affidavits from Rice documenting Rice's "secret deal" with the Commonwealth. **See** Appellant's Brief at 17 (stating that the PCRA court erred by failing to conduct a hearing where the witness, Rice, "confesses" that "all his trial testimony was false," and Appellant "was defending himself from Misero."). Although Appellant recognizes the PCRA's time-bar and asserts that he has presented newly discovered evidence to circumvent the time requirement, this assertion is belied by the record. As noted by the Commonwealth, Appellant "has failed to prove [the newly discovered evidence] exception to the timeliness requirement because he has not shown that these facts were unknown to him and that he exercised due diligence." Commonwealth Brief at 10. Moreover, as the PCRA court recognizes, Appellant may not re-raise issues that were previously litigated. PCRA Court Opinion, 11/19/18, at 17 (citing 42 Pa.C.S.A. § 9544, providing that an issue has been previously litigated where, *inter alia*, "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence."). The PCRA court thoroughly analyzed Appellant's third claim for post-conviction relief, stating:

[Appellant's] third PCRA alleging new evidence . . . is actually a reiteration of [Appellant's] previous assertions addressing whether or not Misero was holding anything in his hand when he entered [Appellant's] cell and claiming that the District Attorney promised Rice some undefined sentencing benefit in return for falsifying his testimony.

PCRA Court Opinion, 11/19/18, at 18.

The PCRA court observed that "rather than constituting new evidence, Rice's affidavits merely regurgitate stale evidence," and thus, Appellant's

evidence "is both repetitive and cumulative." *Id.* at 21. The court accurately explained:

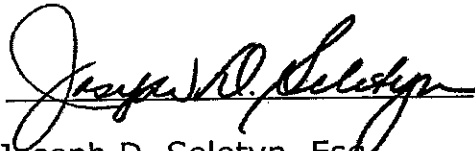
[Appellant's] claim does not qualify as after-discovered evidence under the PCRA, as the claim about the truthfulness or accuracy of Rice's testimony was known (and addressed) at the original trial, nearly ten years ago. Frankly, if anything, Rice continues to be consistent with his uncertain memory in each affidavit. Further, after the expiration of ten years after this issue was first addressed at his trial, [Appellant] cannot meet the due diligence requirement of the PCRA.

Id. at 20. **See also** 42 Pa.C.S.A. § 9545(b)(1)(ii).

For the above reasons, we agree that Appellant has failed to plead and prove an exception to the PCRA's time-bar, and is not entitled to relief. Because the he PCRA court did not abuse its discretion, we affirm its order dismissing Appellant's petition for lack of jurisdiction.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/26/19

APPENDIX G

Northampton County Ct. Of Common Please, Case # 3344-cr-2009
Order dismissing third PCRA

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA) No. 3344-2009
)
 v.)
)
 JACOB CHRISTINE)
)
 Defendant/Petitioner)

FILED
2018 NOV 19 PM 2:39
CLERK OF COURT
NORTHAMPTON COUNTY, PA
COPY

ORDER OF COURT

AND NOW, this 19th day of November, 2018, upon consideration of the September 24, 2018 Petition for Post-Conviction Relief filed by Defendant/Petitioner and after a review of the entire record, we **DISMISS** this third PCRA Petition without a hearing pursuant to Pa.R.Crim.P. 907, as this Court has no jurisdiction to hear this most recent PCRA claim because it is time barred under 42 Pa.C.S.A. §9545(b).

STATEMENT OF REASONS

Factual and Procedural History

Petitioner, Jacob Christine (Christine), was convicted of Aggravated Assault and Recklessly Endangering Another Person by a jury on October 7, 2010. The conviction resulted from an incident that occurred in Northampton County Prison

(NCP) on June 8, 2009. The trial record established that on June 8, 2009, Christine and his victim, Thomas Misero (Misero), were inmates in NCP when a confrontation between the two men occurred in Christine's cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in Christine's cell, Christine was alleged to have slashed Misero's neck and ear with a razor blade. Misero testified that Christine's assault was unprovoked. Another inmate in Northampton County Prison, Daniel Rice, was called by the Commonwealth. Rice testified that he witnessed Misero go into Christine's cell, heard a fight occur and came into the cell as Christine and Misero were being separated. Rice witnessed Misero's wounds, but did not witness the fight. Rice also testified that Christine told him the fight was over twenty dollars that Misero owed Christine. During his direct and cross, Rice was asked about any deal or consideration that the Commonwealth was giving him in return for his testimony. Rice testified that he was not promised anything in return for his testimony.

Christine also testified at trial and claimed that Misero came into his cell holding a cup of coffee and armed with a razor blade when he attacked Christine. Christine claimed that he successfully disarmed Misero, picked up the razor from the floor, and then unintentionally sliced Misero, as Misero continued to advance towards, and fight with Christine.

Christine pursued post-sentence motions and an appeal through the appellate courts. The Pennsylvania Supreme Court issued an Order affirming Christine's conviction on January 27, 2016.

Christine's first PCRA was filed on February 22, 2016. In the first PCRA, Christine raised a series of claims, including ineffective assistance of counsel and the existence of "new evidence" consisting of prosecutorial misconduct alleging that the Assistant District Attorney (ADA) intimidated Rice and suborned Rice's perjured testimony by promising Rice a hidden deal on his criminal charges in exchange for his perjured testimony.

We held scheduled our first hearing on the PCRA, on July 11, 2016. Christine was represented by PCRA counsel. At the hearing, we heard from Rice's guilty plea counsel, Rice's PCRA counsel, and Christine. We learned that on September 15, 2010, shortly after Christine's trial, Rice was given a 4-8 year sentence as part of a negotiated plea with a sentence bargain for a bank robbery in which he was the getaway driver. At sentencing, Rice acknowledged that he got the benefit of his negotiated bargain. Apparently, Rice's co-defendant was later given a 3 to 6 year sentence. Upon finding out that his co-defendant (who actually entered the bank to commit the robbery) got a lesser sentence, Rice filed for PCRA relief asking for reconsideration and/or for the same sentence his co-defendant received. Rice also claimed in his PCRA that he was promised a sentence

*This is
not true* 7/11/18 - 68:25-~~6746~~
80

reduction by the ADA. During the PCRA hearing, both of Rice's attorneys testified that they were not aware that any prior promises were made to Rice for his testimony against Christine. Rice's PCRA attorney testified that he did raise the inequitable sentencing situation with the ADA. Thereafter, the ADA (the same ADA who prosecuted Christine) agreed with his proposal that a fair resolution would be to give Rice the same sentence as the actual robber. Rice agreed to accept the new resolution. On September 30, 2011, as part of the resolution of Rice's PCRA, the Judge modified Rice's sentence to 3 – 6 years, with the agreement of the ADA.

Christine also testified at his PCRA hearing. Christine presented the report of a private investigator, John Stahr, a retired Detective from the Bethlehem Police Department who was apparently sent to interview Rice by Christine's Public Defender, prior to Christine's trial. The entirety of Investigator Stahr's report as it relates to his hearsay summary of his interview with Rice is as follows:

I asked Rice if he saw Misero approach Christine's cell and he told me that he had. Rice said that Misero had a cup in his hand and that he saw him walk into Christine's cell. Rice said that he saw a scuffle start and then someone yelled that they were fighting. Rice told me that he went to the cell but the fight was over. Christine and Misero were arguing about a dispute on the street but he did not know what it involved. Rice had nothing further to add and the interview was terminated.

Report of John Stahr, April 12, 2010.

Christine argued that Rice's PCRA filing and the Stahr report establish both the secret sentencing deal Rice reached with the ADA and that the ADA suborned perjured testimony from Rice. PCRA Counsel asked to recess the hearing as he considered calling additional witnesses. No other hearings were held, even though we recessed the hearing to allow PCRA Counsel to call possible additional witnesses.

On December 30, 2016, we entered on our Order denying Christine's first Petition. Our December 30, 2016 this Order was appealed. On January 3, 2018, the Superior Court affirmed our Order denying post-conviction relief. In the Superior Court's decision, the Court discussed the alleged improper "secret deal" between the ADA and Rice in which the ADA allegedly influenced Rice to change his testimony and/or the ADA knowingly proffered perjured testimony of Rice at trial, before concluding that there was no credible evidence of a "secret deal" or that the ADA misrepresented facts or proffered perjured testimony. The Superior Court's detailed analysis can be found in its January 3, 2018 Opinion (pp. 4 – 12), where the Superior Court finally stated: "We conclude, therefore, that the record supports the PCRA court's finding that Christine, who had the burden of proof, presented no competent or credible evidence in support of his bald theory that the ADA lied during the trial." See Superior Court Opinion, No. 337 EDA 2017, January 3, 2018 at page 12. *quoting lower Ct's opinion.*

Thus, the claim that Rice perjured himself, with the ADA's knowledge or at the ADA's request was fully vetted at Christine's first PCRA and reviewed and affirmed by the Superior Court in its Order of January 3, 2018, affirming the denial of Christine's first PCRA petition.

On May 7, 2018, Christine filed his second PCRA Petition advancing the same theory and based upon the same factual predicate, with additional evidence consisting of a written statement (an affidavit) from Rice which Christine argued constituted "newly discovered evidence" under the PCRA. The Affidavit signed by Rice alleges that the ADA offered Rice reduced time in exchange for his testimony, and that his original statement to the "initial investigator" who visited him in prison was his true statement. In its entirety, Rice's affidavit stated:

Everything in my PCRA was true and I met with District Attorney Patricia Mulqueen prior to Jacob Christine's trial and she offered me time off my sentence in exchange for testimony against Jacob Christine. My original statement was true to the initial investigator who came to see me. Afterwards I agreed to charg [change?] my statement for a reduced sentence.

Rice Affidavit, April 12, 2018

We shall try to reasonably organize the facts and the issues as best we can, so that this makes sense. To summarize Christine's claim, Christine maintains that Rice's testimony at trial was materially false because it contradicted Rice's original statement to the investigator hired by the Public Defender's Office. In his affidavit, Rice said that he lied at trial and that his statement to Stahr was true —

that Misero walked into Christine's cell with cup in his hand. There is nothing else as far as new facts presented by Christine. Further, the "new" evidence is not anything new, as it was fully vetted at trial.

It should also be again noted, Rice was not an eyewitness to the assault, and never claimed to be. Rice was incarcerated in the same tier and at the same time that Christine and Misero were incarcerated in Northampton County Prison. Rice testified that he observed Mr. Misero going into Christine's cell and thereafter responded to the cell after the fight occurred. Rice observed the two fighters pulled apart and then observed the injuries to Misero. Rice observed no weapon. After the fight, Rice testified that he spoke briefly with Christine after the fight.

We again carefully reviewed Rice's trial testimony for purposes of analyzing this PCRA claim. Rice apparently came to the cell after the fight started and saw Misero and Christine being separated, describing what he saw as: "...more like wrestling hold or whatever, but it was real brief, that it was just broke up". (Notes of Testimony October 6, 2010, Vol. II p. 17). Rice then testified that he saw a slice across Misero's neck and a lot of blood. Rice testified that he asked Christine what the fight was about, specifically his testimony was as follows:

Q. What did you say?

A. I said what did you do this for, you know what I mean, and he said he owed him \$20, and I said you going to do this for \$20.

Q. What was his response?

A. Basically he told me to run his sneakers.

Q. Who told you to run his sneakers?

A. Jacob told Tom that he wanted his sneakers, and at that point, I told Misero, listen, your neck is bleeding, you have to go to a nurse.

See Notes of testimony, October 6, 2010 Vol. II at p. 18.

To summarize, based on Stahr's report and his trial testimony, Rice did not see the actual fight start, nor did he see how Misero's neck was cut. Further, Rice did not see a weapon and did not place a weapon in either Misero's or Christine's hand. Rice did testify that Christine told him that the fight was over a \$20 debt as opposed to Rice's purported "original statement" - Investigator Stahr's recollection that Rice told him the alleged motive for the assault was "a dispute on the street."

During his direct testimony, Rice also claimed that Christine had asked him to tell the investigator that Misero had a cup of coffee in his hand when he walked into Christine's cell. Specifically, Rice testified as follows:

Q. So Mr. Christine asked you to tell the investigator that you saw Tom going into his cell?

A. Yeah.

Q. Did he say anything else?

A. And asked if I could say that he had a cup of coffee or something like that.

Q. What was your response to that?

A. I actually agreed to it. I agreed to it.

Q. Why did you agree to tell the investigator that?

A. I mean I was just, I was actually going to try to help him out, you know what I mean.

Q. And that wasn't the truth?

A. That wasn't even the truth. **I mean he might have had a cup in his hand, I don't know.** The guy asked me to help him out and be a witness, I was like all right, I'll go down there and see what the investigator has to say. (Emphasis added)

Trial Transcript October 6, 2010, Vol. II pp. 22-23.

On cross-examination Rice was again asked in detail regarding the presence of a cup in Misero's hand:

Q. Now, you testified here today that you believe you did see a cup of some sort in Tom Misero's hand, correct?

A. I mean I didn't believe it, but it's possible, it was dinnertime. I'm not going to say I did or didn't see a cup in his hand, but it's possible he could have had a cup in his hand.

Q. Now, you're saying that my client told you what to say?

A. Yes.

Q. Even though you testified earlier that you think you could have seen a cup in his hand?

Ms. Mulqueen: Objection, Your Honor.

The Court: Wait, a second sir. I think it's fair game. It's cross-examination. Do you understand the question, sir?

Mr. Rice: Could you ask it again?

BY MS. HUTNIK:

Q. You testified earlier today that you could have seen a cup in his hand?

A. Yeah.

Q. And you didn't say that Jacob Christine told you to say that at that time, right?

A. No.

Q. You believe you did see a cup in his hand, you could have?

A. I could have, yes.

Q. Now, Attorney Mulqueen asked you about the investigator that came from our office?

A. Yeah.

Q. He actually met with you on April 12, 2010, do you remember that?

A. Yes.

Q. His name is John Stair?

A. I don't remember his name.

Q. But you remember meeting him that day?

A. Yeah.

Q. Do you remember telling him that Misero did have a cup in his hand when he walked into Jacob's cell?

A. Yeah, I probably said that.

Q. And you didn't tell him at that time, you didn't say anything about Jacob Christine telling you to say that, did you?

A. No I didn't.

Notes of Testimony Volume II p. 24-26

Any reasonable review of the trial transcript established that Rice's trial testimony was uncertain as to whether Misero had a cup in his hand – saying at several points that Misero “may have had a cup in his hand.” The Stahr report contains Stahr's hearsay statement that “Rice said that Misero had a cup in his hand and that he saw him walk into Chritine's cell.” In our humble opinion, there is not a material divergence or inconsistency between Rice's testimony and Stahr's hearsay summary of his interview with Rice. Further, if there is arguably a contradiction, it was well known by counsel and addressed at trial. The affidavit raises no new facts or new areas of dispute regarding Rice's testimony.

After a careful review of the trial testimony, we determined that there were virtually no new facts or claims proffered in the second PCRA Petition. In fact, the claims regarding the interaction between Rice and the District Attorney with regard to a proffered deal and the content of Rice's testimony were discussed during trial, on appeal, then again in the first PCRA, and now regurgitated in the second PCRA. Further, the claimed perjured testimony of Mr. Rice, was specifically addressed in both Rice's direct examination and cross-examination during the trial. Thus, the new affidavit of Rice offered no new evidence nor was it a recantation of his trial

testimony. Therefore, on June 11, 2018, after providing a Notice of Intent to Dismiss without a Hearing, we issued a Final Order denying the second PCRA Petition without a Hearing, because the Petition was filed beyond the one-year PCRA time bar and on the face of the Petition there was no new evidence which could satisfy the exception to one-year time bar.

No Appeal was filed to our June 11, 2018 denial.

On September 24, 2018, approximately ten (10) weeks after we dismissed the second Petition, Christine filed this third PCRA Petition reiterating the same theory contained in his first two PCRA Petitions. However, this time he filed two "new" Affidavits from Rice. The first one is dated August 18, 2018 and sets forth:

My trial testimony was false I'm not sure if I saw a cup of coffee or not I seen something but not really 100% sure what it was. I witnessed Misero go into Christine's cell and there was a scuffle and Misero was on top.

See Rice Affidavit August 18, 2018.

The second affidavit was dated September 15, 2018, and set forth:

Tom Misero had just came onto the cell block and was selling cigarettes I noticed Misero talking to Jacob Christine at one point and soon after he Tom Misero walked towards his cell with a cup in his hand he entered the cell and what looked like a scuffle occurred I entered the cell shortly and it was all over with. It was a cup of coffee. Years later District Attorney approached me Mulqueen asking why I wrote a statement for Jacob I told her it was the truth. Jacob was defending hisself against Misero who walked into his cell with hot coffee.

See Rice Affidavit September 15, 2018.

Once again Christine asserts that Rice acknowledges that his trial testimony was false and once again, the new Affidavit offers no new evidence, no new facts and no new claims.

Along with his third PCRA, Christine also filed a Memorandum in Support of PCRA Petition, a "Motion for Merciful Consideration" and a request for a video hearing on his PCRA. We review all Christine's filings. On October 11, 2018, we filed and circulated our Notice of Intent to Dismiss without Hearing Pursuant to Pa.R.Crim.P.907. On October 30, 2018 we received Christine's Response to Notice to Dismiss PCRA Petition. We reviewed that as well.¹

Legal Standard

Before we address the merits of Petitioner's claim, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of this Court and the PCRA court. See *Commonwealth v. Davis*, 86 A.3d 883, 887 (Pa.Super.2014). Pennsylvania law makes it clear that when "a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition." *Commonwealth v. Seskey*, 86 A.3d 237, 241 (Pa.Super.2014) (citation omitted).

¹ We have attached to this Order: (1) Rice's "original statement" to Investigator Stahr, (2) Rice's April 12, 2018 affidavit; (3) Rice's August 18, 2018, affidavit (4) Rice's September 15, 2018, affidavit; and (5) The entirety of Daniel Rice's testimony at trial on October 6, 2010 (24 pages, including direct, cross examination, redirect, and re-cross), for the benefit of possible appellate review, as we do not intend to ever address these issues again..

The “period for filing a PCRA petition is not subject to the doctrine of equitable tolling; instead, the time for filing a PCRA petition can be extended only if the PCRA permits it to be extended.” *Commonwealth v. Ali*, 86 A.3d 173, 177 (Pa. 2014) (internal quotation marks and citation omitted). This is to “accord finality to the collateral review process.” (citation omitted). *Commonwealth v. Watts*, 23 A.3d 980, 983 (Pa. 2011). “However, an untimely petition may be received when the petition alleges, and the petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and (iii), are met.” *Commonwealth v. Lawson*, 90 A.3d 1, 5 (Pa.Super.2014)

The PCRA provides, in relevant part:

§ 9545. Jurisdiction and proceedings

....

(b) Timing for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking the exception provided in paragraph (1) shall be filed within 60 days the claim could have been presented.

42 Pa.C.S.A. §9545(b).

A judgment becomes final “at the conclusion of direct review, including discretionary review, in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S.A. §9545(b)(3). Here, Petitioner’s judgement of sentence became final upon the January 27, 2016, Order of the Pennsylvania Supreme Court.

A PCRA petitioner is not automatically entitled to an evidentiary hearing when the court is satisfied “that there are no genuine issues concerning any material fact, the Petitioner is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by further proceedings.” *Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa. 2013) (citation omitted). This concept was similarly stated by the Superior Court in *Commonwealth v. Wah*, 42 A.3d 335, (Pa.Super.2012):

“[T]he right to an evidentiary hearing on a post-conviction petition is not absolute. It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. It is the

responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing.”

Id. at 338 (internal citations omitted).

“[A]n evidentiary hearing is not meant to function as a fishing expedition for any possible evidence that may support some speculative claim of ineffectiveness.”

Roney, supra at 605. (Citation omitted).

In *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988), the Supreme Court expressed its concern that repetitive applications for post-conviction relief ignore the waiver provisions of the Act and render the ‘finally litigated’ concept illusory. *Id.* at 110. Therefore, the *Lawson* Court held that “...we cannot permit our continuing concern for assuring that persons charged with crimes receive competent representation in their defense to be exploited as a ploy to destroy the finality of judgments fairly reached...*a second or any subsequent post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice might have occurred.*” *Id.* at 112 (emphasis added.). In fact *Lawson* restated this concept in the next paragraph, again holding that a “repetitive or serial petition may be entertained only for the purpose of avoiding a demonstrated miscarriage of justice, which no civilized society can tolerate.” *Id.*

Finally, a defendant is not eligible for post-conviction relief if the allegation of error has been previously litigated. 42 Pa.C.S. § 9544 provides:

§ 9544. Previous litigation and waiver

a) Previous litigation—For purposes of this subchapter, an issue has been previously litigated if: (1) Deleted; (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the is-sue; or (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

The legislative intent of the PCRA is not to provide a defendant with a means of re-litigating the merits of issues long since decided on appeal or in prior PCRA petitions. See *Commonwealth v. Buehl*, 658 A.2d 771, 775 (Pa. 1995); *Commonwealth v. Alexander*, 432 A.2d 182 (Pa. 1981); *Commonwealth v. Lawson*, 549 A.2d 107 (Pa. 1988).

In order to be eligible for post-conviction relief, the defendant must establish that the allegation of error has not been waived. See 42 Pa.C.S. § 9543(a)(3) A claim of error is waived if the defendant could have raised the issue at trial, on appeal, or in a prior post-conviction proceeding but failed to do so. See 42 Pa.C.S. § 9544(b); *Commonwealth v. Peterkin*, 649 A.2d 121, 124 (Pa. 1994), cert. denied, 515 U.S. 1137 (1995); *Commonwealth v. Roman*, 730 A.2d 486 (Pa.Super. 1999).

Discussion

Now comes Christine with his third PCRA alleging new evidence which is actually a reiteration of Rice's previous assertions addressing whether or not Misero was holding anything in his hand when he entered Christine's cell and claiming that the District Attorney promised Rice some undefined sentencing benefit in return for falsifying his testimony.

Once again, we note that the Pennsylvania Supreme Court issued a final Order affirming Christine's conviction on January 27, 2016. Under the PCRA, the statute of limitations on PCRA filings, often referred to the PCRA time bar, requires that any PCRA Petition, including second or subsequent Petitions, must be filed within one year of the date the judgment becomes final unless the Petition alleges and can prove one of three exceptions - a newly announced substantive constitutional right, new evidence or facts upon which the claim is predicated which were unknown to Petitioner and could not have been ascertained by the exercise of due diligence, or the failure to timely raise a claim was the result of interference by governmental officials in violation of the Constitution or other law.

Here, Christine's third PCRA Petition was filed over eighteen (18) months after the expiration of the one year time bar (final order upon holding his conviction was filed by the Supreme Court on January 26, 2016). Further,

Christine cannot make out any of the exceptions to the one year time bar. There is no assertion of a new constitutional right, there is no assertion of interference by governmental officials, and there is absolutely no new evidence or facts upon which his claims are based.

Apparently, Christine believes that by simply obtaining a new affidavit, in which Rice again ruminates as to whether he can remember if Misero was holding a cup of coffee in his hand, constitutes new evidence under the PCRA. It does not.

We have located a very recent Superior Court decision addressing a similar PCRA claim regarding “after discover evidence” - *Commonwealth v. Robinson*, No. 3515 EDA 2015 (May 2, 2018). *Robinson* addresses a PCRA petitioner’s claim of uncovering after discovered evidence, which under the fact pattern in *Robinson*, the Court referenced as actually being cumulative evidence.² The *Robinson* Court affirmed the trial court’s dismissal of Robinson’s 8th and 9th PCRA claim without a hearing because it was time barred and that the petitioner was not entitled to a hearing on his PCRA claim because the “failed to establish due diligence.” *Id.* at p. 1.

In discussing the exceptions to the one year time bar found within the PCRA under § 9545(b)(1)(ii), the Robinson Court held that a petitioner must establish

² Robinson’s claim was that his attorney was in the throes of addiction at the time he was induced to plead guilty in 1983. However, the evidence that Robinson relied upon in PCRA filed in 2015, included an allegation that his attorney purchased cocaine in 1982, including a newspaper article from 1982 which mentioned the attorney’s drug use, and his attorney’s eventual guilty plea to a drug offense in 1994 in which the attorney admitted using cocaine since 1979.

both after discovered evidence and due diligence on the petitioner's behalf:

...Our Supreme Court has made plain that the analysis of whether a PCRA petitioner has satisfied the § 9545(b)(1)(ii) time-bar exception is analytically distinct from the merits of any substantive claim seeking relief. As stated in *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007):

The text of the relevant subsection provides that "the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). . . . [T]he plain language of subsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of "after-discovered evidence." Rather, it simply requires petitioner to allege and prove that there were "facts" that were "unknown" to him and that he exercised "due diligence." *Id.* at 1270

Id. at p. 7

This claim does not qualify as after-discovered evidence under the PCRA, as the claim about the truthfulness or accuracy of Rice's testimony was known (and addressed) at the original trial, nearly ten years ago. Frankly, if anything, Rice continues to be consistent with his uncertain memory in each affidavit. Further, after the expiration of ten years after this issue was first addressed at his trial, Christine cannot meet the due diligence requirement of the PCRA.

7/11/16 8285
P.T. looked for Rice!
& couldn't locate

Finally, we look to appellate case law regarding PCRA relief and allegations of recantation testimony - just in case we are wrong and the Rice affidavits can be considered recantation testimony. PCRA case law does recognize that recantation testimony may qualify as newly discovered evidence entitling a petitioner to post-

conviction relief, if it meets the Supreme Court's 4-part standard governing after discovered evidence and the trial court finds the recantation testimony credible. See Commonwealth v. D'Amato, 856 A2d. 806, 823 (Pa. 2004). Specifically, the D'Amato found that in order to obtain PCRA relief based upon newly discovered evidence under the PCRA:

“[the] petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not be used solely to impeach credibility; and (4) it would likely compel a different verdict.”

Id at. p. 823. (Internal citations omitted)

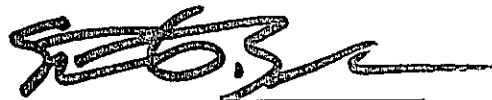
Not one of the four elements can be established in this record. Both the claim of prosecutorial misconduct regarding a secret deal and just what was Misero holding when he went into Christine's cell has been addressed during the trial and within each of Christine's PCRA filings. Rather than constituting new evidence, Rice's affidavits merely regurgitate stale evidence. These issues were previously addressed in final, dispositive orders. Thus, Christine's evidence is both repetitive and cumulative. Under any reasonable definition of due diligence, there is none. Further, the evidence is presented not to impeach Rice's trial testimony nor to change Rice's testimony; it is merely an attempt to clarify Rice's trial testimony. Finally, if the statements in the affidavits were admitted at trial, they would not compel a different result as the disputed testimony does not address what actually

happened during the assault. The jury did not decide this case based upon Rice's testimony that Misero may have had a cup in his hand. This case turned solely on the testimony of Misero and Christine. Christine fully presented his theory of self-defense – he disarmed Misero, picked up Misero's razor and then accidentally sliced Misero's neck as Misero continued to advance to fight with him. Rice's testimony did not contradict Christine's defense.

Finally, we do not find the claim by Christine, that Rice's testimony was somehow perjured to be at all credible. It was fully vetted at the first PCRA, we heard from the ADA, we heard from Rice's guilty plea counsel who negotiated with the ADA regarding Rice's sentence and Rice's PCRA counsel who negotiated the PCRA sentence modification – both asserted that they were not aware of any prior or undeclared sentencing agreement reached with the ADA, and finally Stahr's report, Rice's trial testimony and Rice's three affidavits are eerily consistent. We found then and we continue to find: (1) there is no evidence indicating that the District Attorney's Office engaged in misconduct or suborned perjury, (2) that Rice's trial testimony is not somehow impeached by the "new" evidence, let alone proven to be perjured testimony, and (3) that Rice's testimony was not material to the outcome.

Therefore, because this is a third PCRA Petition, filed 18 months beyond the one year PCRA jurisdictional time bar and none of the exceptions to the time bar are present, we have no jurisdiction to entertain this third PCRA Petition.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'S.G. Baratta', with a long horizontal flourish extending to the right.

STEPHEN G. BARATTA, J.

APPENDIX H

Northampton County Court of Common Pleas, Case # 3344-cr-2009
Order Dismissing second PCRA

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA)

No. 3344-2009

v.)

JACOB CHRISTINE)

Defendant/Petitioner)

COPY

2018 JUN 11 PM 12:20

11:13:30

ORDER OF COURT

AND NOW, this 11th day of June, 2018, upon consideration of the Petition for Post-Conviction Relief Act (PCRA), 42 PA.CON.S.STAT.ANN. §§ 9541-9546 filed on May 8, 2018, and after a review of the entire record, we **DISMISS** this second, subsequent PCRA petition without a hearing pursuant to Pa.R.Crim.P. 907, as this Court has no jurisdiction to hear this most recent PCRA claim because it is time barred under 42 Pa.C.S.A. § 9545(b).

STATEMENT OF REASONS

Factual and procedural history

The Petitioner, Jacob Christine (Christine) attacks his conviction to the charges of aggravated assault and recklessly endangering another person after a jury trial on October 7, 2010. Christine was sentenced on November 24, 2010. The conviction was appealed and eventually affirmed by the Superior Court by its Opinion entered August 30, 2013. The Pennsylvania Supreme Court issued a Final

Order affirming the Christine's conviction on January 27, 2016.

Christine filed his first PCRA on February 22, 2016. A hearing was held in which Christine pursued claims including prosecutorial misconduct related to allegedly proffering perjured testimony from Daniel Rice, along with other claims of ineffective assistance of counsel.

After numerous conferences, a PCRA hearing and the submission of briefs, we entered our Order on December 30, 2016, denying PCRA relief. Our December 30, 2016 Order was appealed. On January 3, 2018, the Superior Court affirmed our Order, denying post-conviction relief. In the Superior Court's decision, they discussed the alleged improper "secret deal" between the Assistant District Attorney (ADA) and Daniel Rice (in which the ADA allegedly influenced Daniel Rice to change his testimony and/or the ADA knowingly proffered perjured testimony of Daniel Rice at trial), the legal theory advanced by Christine, and the relevant case law before concluding that there was no credible evidence of a "secret deal" or that the ADA misrepresented facts or proffered perjured testimony. The Superior Court's detailed analysis can be found in its January 3, 2018 Opinion (pp. 4 – 12), where the Superior Court finally stated: "We conclude, therefore, that the record supports the PCRA court's finding that Christine, who had the burden of proof, presented no competent or credible evidence in support of his bald theory that the ADA lied during the trial." Opinion dated January 3, 2018 at page 12.

On May 7, 2018, Christine filed his second PCRA Petition advancing the same theory, with a new “factual” claim that one Jennifer Cyr has obtained a written statement from Daniel Rice which constitutes “newly discovered evidence”. The affidavit signed by Mr. Rice alleges that the ADA offered Rice reduced time in exchange for his testimony, and that his original statement to the “initial investigator” who visited him in prison, was his true statement. However, nowhere in the affidavit does Rice actually state what testimony was inaccurate, let alone perjured, other than he claimed that the ADA offered him “time off” in exchange for testimony against Christine and “My original Statement was true to the initial investigator.”

The PCRA attached copies of the “original statement” to the investigator and the purported Affidavit signed by Rice.¹ We also note that Christine also filed a “Motion for Video Hearing Resolution of PCRA” contemporaneously with the PCRA, stating that Christine did not want to come in to Northampton County to participate in a PCRA Hearing other than through video conferencing.

We filed and circulated our Notice of Intent to Dismiss Without Hearing Pursuant to Pa.R.Crim.P.907 on May 14, 2018. On that same date, Christine filed a Memorandum in Support of PCRA Petition. Thereafter, Christine also filed a

¹ We have attached to this Order “original statement”, the purported affidavit and the entirety of Daniel Rice’s testimony at trial on October 6, 2010, which in total is 24 pages, including direct, cross examination, redirect, and re-cross.

Response to proposed Dismissal of PCRA without Hearing on May 24, 2018. We have carefully reviewed those documents. Both are a regurgitation of Christine's claims of prosecutorial misconduct regarding the suborning of Rice's perjured testimony by the Assistant District Attorney.

Legal Standard

Before we address the merits of Christine's claim, we must first consider the timeliness of his PCRA petition because it implicates the jurisdiction of this Court to address his PCRA. See *Commonwealth v. Davis*, 86 A.3d 883, 887 (Pa.Super.2014).

Pennsylvania law makes it clear that when "a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition."

Commonwealth v. Seskey, 86 A.3d 237, 241 (Pa.Super.2014) (citation omitted).

The "period for filing a PCRA petition is not subject to the doctrine of equitable tolling; instead, the time for filing a PCRA petition can be extended only if the PCRA permits it to be extended." *Commonwealth v. Ali*, 86 A.3d 173, 177 (Pa. 2014) (internal quotation marks and citation omitted). This is to "accord finality to the collateral review process." *Commonwealth v. Watts*, 23 A.3d 980, 983 (Pa. 2011) (citation omitted). "However, an untimely petition may be received when the petition alleges, and the Petitioner proves, that any of the three limited exceptions to the time for filing the petition, set forth at 42 Pa.C.S.A. § 9545(b)(1)(i), (ii), and

(iii), are met.” *Commonwealth v. Lawson*, 90 A.3d 1, 5 (Pa.Super.2014) (citation omitted).

The PCRA provides, in relevant part:

§ 9545. Jurisdiction and proceedings

....

(b) Timing for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking the exception provided in paragraph (1) shall be filed within 60 days the claim could have been presented.

42 Pa.C.S.A. §9545(b).

A judgment becomes final “at the conclusion of direct review, including discretionary review, in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42

Pa.C.S.A. § 9545(b)(3). Here, Christine's judgment of sentence became final upon the January 27, 2016 Order of the Pennsylvania Supreme Court.

A PCRA petitioner is not automatically entitled to an evidentiary hearing when the court is satisfied "that there are no genuine issues concerning any material fact, the petitioner is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by further proceedings." *Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa. 2013) (citation omitted). This concept was similarly stated by the Superior Court in *Commonwealth v. Wah*, 42 A.3d 335, (Pa.Super.2012):

"[T]he right to an evidentiary hearing on a post-conviction petition is not absolute. It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing."

Id. at 338 (internal citations omitted).

"[A]n evidentiary hearing is not meant to function as a fishing expedition for any possible evidence that may support some speculative claim of ineffectiveness." *Roney, supra* at 605. (Citation omitted).

In *Commonwealth v. Lawson*, 549 A.2d 107, 112 (Pa. 1988), the Supreme Court expressed its concern that repetitive applications for post-conviction relief ignore the waiver provisions of the Act and render the 'finally litigated' concept illusory. *Id.* at 110. Therefore, the *Lawson* Court held that "...we cannot permit our continuing concern for assuring that persons charged with crimes receive competent representation in their defense to be exploited as a ploy to destroy the finality of judgments fairly reached...*a second or any subsequent post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice might have occurred.*" *Id.* at 112 (emphasis added.). In fact *Lawson* restated this concept in the next paragraph, again holding that a "repetitive or serial petition may be entertained only for the purpose of avoiding a demonstrated miscarriage of justice, which no civilized society can tolerate." *Id.*

Regarding the appointment of counsel for a second or subsequent petition, counsel must be appointed only if evidentiary hearing is required. See Pa.R.Crim.P. 904(D).

Discussion

To lift a frequent quote from our political pundits: This is a big nothing burger.

We shall try to reasonably organize the facts and the issues as best we can. To summarize Christine's claim, Christine maintains that Rice's testimony at trial was materially false because it contradicted Rice's original statement. Christine now asserts that he has "new" evidence in the form of a purported affidavit signed by Rice, acknowledging that Rice lied at trial and that the victim walked into Christine's cell with a hot cup of coffee in his hand. There is nothing else as far as new facts presented by Christine. Further, the "new" evidence is not anything new and it was fully vetted at trial.

When Christine references the "original statement" of Rice, he is in fact referencing a summary of an interview written by the private investigator, John Stahr, a retired Detective from the Bethlehem Police Department. Prior to the trial, Christine's public defender sent Stahr to Northampton County Prison to interview Rice. The entirety of Investigator Stahr's report as it relates to his interview with Rice is as follows:

"I asked Rice if he saw Misero approach Christine's cell and he told me that he had. Rice said that Misero had a cup in his hand and that he saw him walk into Christine's cell. Rice said that he saw a scuffle start and then someone yelled that they were fighting. Rice told me that he went to the cell but the fight was over. Christine and Misero were arguing about a dispute on the street but he did not know what it involved. Rice had nothing further to add and the interview as terminated."

Report of John Stahr, April 12, 2010.

The entirety of Christine's new evidence is Rice's purported affidavit which states:

"Everything in my PCRA was true and I met with District Attorney Patricia Mulqueen prior to Jacob Christine's trial and she offered me time off my sentence in exchange for testimony against Jacob Christine. My original statement was true to the initial investigator who came to see me. Afterwards I agreed to chang [change?] my statement for a reduced sentence."

Rice Affidavit, April 12, 2018

After any careful review of the trial testimony regarding the fight between Misero and Christine, there are virtually no new facts offered in this repetitive PCRA Petition.

First we note that Rice was not an eyewitness to the assault, and never claimed to be. Rice was incarcerated in the same tier and at the same time that Christine and his victim, Thomas Misero, were incarcerated in Northampton County Prison. Rice testified that he observed Mr. Misero going into Christine's cell and thereafter responded to the cell after the fight occurred. Rice observed the two fighters pulled apart and then observed the injuries to Misero. Rice observed no weapon. After the fight, Rice alleged that he spoke briefly with Christine after the fight was over.

We again reviewed Rice's trial testimony for purposes of analyzing this PCRA claim. Rice apparently came to the cell after the fight started and saw Misero and Christine engaged in the fight testifying: "more like wrestling hold or whatever,

but it was real brief, that it was just broke up". (Notes of Testimony October 6, 2010, Vol. II p. 17). Rice then testified that he saw a slice across Misero's neck and a lot of blood. Rice testified that he asked Christine what the fight was about, specifically his testimony was as follows:

Q. What did you say?

A. I said what did you do this for, you know what I mean, and he said he owed him \$20, and I said you going to do this for \$20.

Q. What was his response?

A. Basically he told me to run his sneakers.

Q. Who told you to run his sneakers?

A. Jacob told Tom that he wanted his sneakers, and at that point, I told Misero, listen, your neck is bleeding, you have to go to a nurse.

See Notes of testimony, October 6, 2010 Vol. II at p. 18.

To summarize, based on Stahr's report and his trial testimony, Rice did not see the actual fight start, nor did he see how Misero's neck was cut. Further, Rice did not see a weapon and did not place a weapon in either Misero or Christine's hands. Rice did testify that Christine told him that the fight was over a \$20 debt as opposed to Rice's purported "original statement" - Investigator Stahr's recollection that Rice told him the alleged motive for the assault was "a dispute on the street."

During his direct testimony, Rice also claimed that Christine had asked him to tell the investigator that Misero had a cup of coffee in his hand when he walked

into Christine's cell. Specifically, Rice testified as follows:

Q. So Mr. Christine asked you to tell the investigator that you saw Tom going into his cell?

A. Yeah.

Q. Did he say anything else?

A. And asked if I could say that he had a cup of coffee or something like that.

Q. What was your response to that?

A. I actually agreed to it. I agreed to it.

Q. Why did you agree to tell the investigator that?

A. I mean I was just, I was actually going to try to help him out, you know what I mean.

Q. And that wasn't the truth?

A. That wasn't even the truth. **I mean he might have had a cup in his hand, I don't know.** The guy asked me to help him out and be a witness, I was like all right, I'll go down there and see what the investigator has to say. (Emphasis added)

Trial Transcript October 6, 2010, Vol. II pp. 22-23.

On cross-examination Rice was again asked in detail regarding the presence of a cup in Misero's hand:

Q. Now, you testified here today that you believe you did see a cup of some sort in Tom Misero's hand, correct?

A. I mean I didn't believe it, but it's possible, it was dinnertime. I'm not going to say I did or didn't see a cup in his hand, but it's possible he could have had a cup in his hand.

Q. Now, you're saying that my client told you what to say?

A. Yes.

Q. Even though you testified earlier that you think you could have seen a cup in his hand?

Ms. Mulqueen: Objection, Your Honor.

The Court: Wait, a second sir. I think it's fair game. It's cross-examination. Do you understand the question, sir?

Mr. Rice: Could you ask it again?

BY MS. HUTNIK:

Q. You testified earlier today that you could have seen a cup in his hand?

A. Yeah.

Q. And you didn't say that Jacob Christine told you to say that at that time, right?

A. No.

Q. You believe you did see a cup in his hand, you could have?

A. I could have, yes.

Q. Now, Attorney Mulqueen asked you about the investigator that came from our office?

A. Yeah.

Q. He actually met with you on April 12, 2010, do you remember that?

A. Yes.

Q. His name is John Stair?

A. I don't remember his name.

Q. But you remember meeting him that day?

A. Yeah.

Q. Do you remember telling him that Misero did have a cup in his hand when he walked into Jacob's cell?

A. Yeah, I probably said that.

Q. And you didn't tell him at that time, you didn't say anything about Jacob Christine telling you to say that, did you?

A. No I didn't.

Notes of Testimony Volume II p. 24-26

Any reasonable review of the trial transcript established that Rice's testimony was uncertain as to whether Misero had a cup in his hand – saying at several points that Misero “may have had a cup in his hand.” The Stahr report contains Stahr's hearsay statement that “Rice said that Misero had a cup in his hand and that he saw him walk into Chritine's cell.” In our humble opinion, there is not a material divergence or inconsistency between Rice's testimony and Stahr's hearsay summary of his interview with Rice. Further, if there is arguably a contradiction, it was well known by counsel and addressed at trial. The affidavit raises no new facts or new areas of dispute regarding Rice's testimony.

Finally, with regard to Rice's trial testimony, Rice also testified that the ADA did not promise him anything in return for his testimony. Shortly after the Christine trial - September 15, 2010 - Rice was given a 4-8 year sentence as part of a negotiated plea with a sentence bargain for a bank robbery in which he was the getaway driver. At sentencing, Rice acknowledged that he got the benefit of his negotiated bargain. Apparently, Rice's co-defendant and actual robber was eventually given a 3-6 year sentence and as a result, Rice filed for PCRA relief asking reconsideration and/or for the same sentence his co-defendant received, claiming that he was "promised a sentence reduction by the ADA." On September 30, 2011, as part of the resolution of his PCRA, the Judge modified Rice's sentence to 3-6 years, with the agreement of the ADA. At Christine's first PCRA hearing we heard from Rice's guilty plea counsel and Rice's PCRA counsel, both of who testified that there was no prior promises by the Christine ADA, but that the ADA agreed that a fair resolution would be to give Rice the same sentence as the robber. Rice agreed to that resolution. The claim that Rice perjured himself, with the ADA's knowledge or at the ADA's request was fully vetted at Christine's first PCRA and reviewed and affirmed by the Superior Court in its Order of January 3, 2018 affirming the denial of Christine's first PCRA petition.

Regarding the fight itself, Misero and Christine were the only two witnesses to testify. Misero's testimony was that he came into the cell to talk with Christine

and that Christine, without any provocation, attacked him, yelling about a \$20 debt and as a result of the fight, his neck was sliced. Misero claimed that he did not see a weapon. Regarding the motive for the assault, Misero indicated:

Q. When he grabbed you by the shirt, what happened?

A. He pulled me into the cell, I turned around and he began like hitting me. He kept yelling, you owe me \$20, you owe me \$20. Then I looked down and I seen all of this blood and I didn't know what was going on.

Q. You said that Mr. Christine was punching you?

A. Yes.

Q. Was he saying that you owed him \$20 as he was punching you?

A. Yeah.

See Notes of testimony, October 5, 2010 Vol. I at p. 61.

During his trial, Christine testified that Misero came into his cell armed with a razor blade, threw hot coffee at him and then attacked Christine. Christine claimed that he successfully disarmed Misero, picked up the razor from the floor, and then unintentionally sliced Misero, as Misero continued to advance and threaten him. Based on the testimony at trial, including Christine's testimony, Christine was apparently the last person to possess the weapon. However, the weapon was never located.

As stated above, there were only two eye-witnesses to the fight - Misero and Christine. Each testified in detail as to what actually happened and apparently the

jury accepted Misero's version, or at least rejected Christine's claim that he cut Misero's neck in self-defense.

Now Christine claims to have "new" evidence proving that Rice perjured himself or testified falsely, but his proof is merely that Rice's testimony did not mirror the hearsay statement written by Investigator Stahr. Regardless, Rice's testimony and Stahr's hearsay statement summarizing Rice's interview are *not* contradictory regarding any material claim. After careful review of Stahr's report and Rice's testimony, the best one could conclude is that Rice's trial testimony was equivocal or uncertain regarding the possibility that Misero was holding a cup of coffee in his hand, where in Stahr's report the statement is not equivocal.

We have located a very recent Superior Court decision addressing a similar PCRA claim regarding "after discover evidence" - *Commonwealth v. Robinson*, No. 3515 EDA 2015 (May 2, 2018). *Robinson* addresses a PCRA petitioner's claim of uncovering after discovered evidence, which under the fact pattern in *Robinson*, the Court referenced as actually being cumulative evidence.² The *Robinson* Court affirmed the trial court's dismissal of Robinson's 8th and 9th PCRA claim without a hearing because it was time barred and that the petitioner

² Robinson's claim was that his attorney was in the throes of addiction at the time he was induced to plead guilty in 1983. However, the evidence that Robinson relied upon in PCRA filed in 2015, included an allegation that his attorney purchased cocaine in 1982, including a newspaper article from 1982 which mentioned the attorney's drug use, and his attorney's eventual guilty plea to a drug offense in 1994 in which the attorney admitted using cocaine since 1979.

was not entitled to a hearing on his PCRA claim because the “failed to establish due diligence.” *Id.* at p. 1.

In discussing the exceptions to the one year time bar found within the PCRA under § 9545(b)(1)(ii), the Robinson Court held that a petitioner must establish both after discovered evidence and due diligence on the petitioner’s behalf:

...Our Supreme Court has made plain that the analysis of whether a PCRA petitioner has satisfied the § 9545(b)(1)(ii) time-bar exception is analytically distinct from the merits of any substantive claim seeking relief. As stated in *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007):

The text of the relevant subsection provides that “the facts upon which the claim is predicated were unknown to petitioner and could not have been ascertained by due diligence.” 42 Pa.C.S. § 9545(b)(1)(ii). . . . [T]he plain language of subsection (b)(1)(ii) does not require the petitioner to allege and prove a claim of “after-discovered evidence.” Rather, it simply requires petitioner to allege and prove that there were “facts” that were “unknown” to him and that he exercised “due diligence.” *Id.* at 1270

Id. at p. 7

Finally, we look to appellate case law regarding PCRA relief and allegations of recantation testimony, just in case we are wrong and the divergence in Rice’s statements can be considered recantation testimony. PCRA case law does recognize that recantation testimony may qualify as newly discovered evidence entitling a petitioner to post-conviction relief, if it meets the Supreme Court’s 4-part standard governing after discovered evidence and the trial court finds the recantation

testimony credible. See Commonwealth v. D'Amato, 856 A2d. 806, 823 (Pa. 2004).

Specifically, the D'Amato found that in order to obtain PCRA relief based upon newly discovered evidence under the PCRA:

“[the] petitioner must establish that: (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not be used solely to impeach credibility; and (4) it would likely compel a different verdict.”

Id at. p. 823. (Internal citations omitted)

Not one of the four elements can be established in this record. First of all, Christine – prior to trial – obtained the statement by his own investigator, hired by his public defender. Therefore, the statement was available for Rice’s cross-examination to test the credibility of his testimony. Secondly, the evidence is frankly cumulative as Christine testified on the very issue of Misero holding a cup of coffee and Rice also acknowledged that Miero may have been holding a cup when he went into Christine’s cell. Thus, the trust of Christine’s claim is to revisit the trial testimony about whether or not Misero was holding a cup is both repetitive and cumulative; and further, was addressed as part of cross-examination, because the statement was available to Christine prior to trial. Third, the evidence is presented solely to attempt to impeach Rice. Fourth it would not compel a different result as the disputed testimony does not address what actually happened during the assault. The jury did not decide this case based upon Rice’s testimony

that Misero may have had a cup in his hand. This case turned solely on the testimony of the victim and Christine. Christine fully presented his theory of self-defense – he disarmed Misero, picked up Misero's razor and then accidentally sliced Misero's neck as Misero continued to advance to fight with him. Rice's testimony did not contradict Christine's defense.

Finally, we do not find the claim by Christine, that Rice's testimony was somehow perjured to be at all credible. It was fully vetted at the first PCRA, we heard from the ADA, we heard from Mr. Rice's attorney who negotiated with the ADA regarding Rice's sentence, and Christine, who had the Stahr report at the time of the first PCRA hearing and apparently opted not to call Investigator Stahr. We found then and we continue to find: (1) there is no evidence indicating that the District Attorney's Office engaged in misconduct or suborned perjury, (2) that Rice's trial testimony is not somehow impeached by the "new" evidence, let alone proven to be perjured testimony, and (3) that Rice's testimony was not material to the outcome.

Therefore, because this is a second, subsequent PCRA Petition, filed one year after the expiration of the jurisdictional time frame and that there is no newly

APPENDIX I

Pennsylvania Superior Court, Case # 337 EDA 2017
Denial of Appeal of Denial of First PCRA

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

v.

Appendix

JACOB MATTHEW CHRISTINE

Appellant

No. 337 EDA 2017

Appeal from the PCRA Order December 30, 2016
In the Court of Common Pleas of Northampton County Criminal Division
at No(s): CP-48-CR-0003344-2009

BEFORE: LAZARUS, J., PLATT*, J., and STRASSBURGER*, J.

MEMORANDUM BY LAZARUS, J.:

FILED JANUARY 03, 2018

Jacob Matthew Christine appeals from the order, entered in the Court of Common Pleas of Northampton County, denying his petition for relief under the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. After our review, we affirm.

A jury convicted Christine of aggravated assault¹ and recklessly endangering another person.² The convictions resulted from an incident that occurred in Northampton County Prison on June 8, 2009. On that date, Christine and the victim, Thomas Misero, were inmates in the prison when a confrontation between the two men occurred in Christine's cell. While in Christine's cell, Christine cut Misero's neck and ear with a razor blade.

¹ 18 Pa.C.S. § 2702(a)(1).

² 18 Pa.C.S. § 2705.

* Retired Senior Judge assigned to the Superior Court.

Immediately after the attack, corrections officers searched Christine's cell; only one weapon, a shank, was found in the cell, and it was hidden within Christine's bed. **See** Trial Court Opinion, 4/26/11, at 1-2.

At trial, Christine testified he was reading on his cot when one of his cellmates invited Misero inside. N.T. Trial, 10/6/10, at 44-45. Christine testified his cellmate and Misero argued about a debt, and the conversation escalated and became confrontational; Christine tried to leave the cell, but Misero was standing in the doorway. **Id.** at 45. Christine stated Misero threw a cup of hot coffee at him and a struggle ensued. Misero produced a razorblade; Christine stated he disarmed Misero, retrieved the razorblade, and accidentally may have cut Misero as he left the cell. **Id.** at 46, 49. The razorblade was never found.

On November 24, 2010, the court sentenced Christine to nine to 20 years' incarceration. Christine filed post-sentence motions, which were denied; he filed a timely direct appeal on May 5, 2010. On August 30, 2013, this Court affirmed the judgment of sentence, en banc, by an equally divided court.³ **Commonwealth v. Christine**, 78 A.3d 1 (Pa. Super 2013) (en banc). Christine filed a petition for allowance of appeal in the Pennsylvania Supreme

³ Then-President Judge Stevens did not participate in the consideration or decision in that case.

Court and, on October 27, 2015, the Court affirmed Christine's judgment of sentence. **Commonwealth v. Christine**, 125 A.3d 394 (Pa. 2015).

On February 22, 2016, Christine filed a timely PCRA petition. The PCRA court appointed counsel and, following a hearing, denied relief on December 30, 2016. This *pro se* appeal followed.⁴ Christine filed a timely Pa.R.A.P. 1925(b) statement of errors complained of on appeal, and the trial court filed a Rule 1925(a) opinion. Christine raises the following issues for our review:⁵

1. Whether the PCRA court erred in finding no violation of **Brady v. Maryland**, 373 U.S. 83 (1963)?⁶
2. Whether the PCRA court erred in its Pa.R.Crim.P. 600 calculation?
3. Whether trial counsel was ineffective for failing to raise a Pa.R.E. 404(b) objection (Crimes, Wrongs, or Other Acts)?
4. Whether counsel was ineffective for failing to bring a **Mooney**⁷ violation claim against the Commonwealth?

⁴ Following a **Grazier** hearing, the PCRA court entered an order on February 1, 2017, granting Christine's motion to proceed *pro se*. **Commonwealth v. Grazier**, 713 A.2d 81 (Pa. 1998).

⁵ We have reworded the issues for ease of discussion.

⁶ A **Brady** claim is cognizable on collateral appeal under the PCRA. **See Commonwealth v. Tedford**, 960 A.2d 1, 30 n.19 (Pa. 2008); 42 Pa.C.S. § 9543(a)(2)(vi) ("The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.").

⁷ **Mooney v. Holohan**, 294 U.S. 103 (1935), prohibits the prosecution from obtaining a conviction through deliberate deception. In **Brady v. Maryland**, *supra*, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is

5. Whether trial counsel was ineffective for failing to request a "castle doctrine"⁸ jury instruction and for failing to correct jury instructions that indicated he had a duty to retreat?
6. Whether trial counsel was ineffective for failing to submit photographs of Christine's injuries to the jury?

"Our standard of review from the denial of post-conviction relief is limited to examining whether the PCRA court's determination is supported by the evidence of record and whether it is free of legal error." **Commonwealth v. Ousley**, 21 A.3d 1238, 1242 (Pa. Super. 2011). **See Commonwealth v. Blakeney**, 108 A.3d 739 (Pa. 2014).

Christine first argues that the prosecutor, Patricia Mulqueen, Esquire, committed a **Brady** violation by making "a secret deal with [] witness [Dan Rice] to change his testimony from exculpatory to inculpatory in exchange for a sentence reduction [for Rice's bank robbery conviction where Mulqueen was also the prosecutor, which was] hidden from the defense and jury." Appellant's Brief, at 30; Rule 1925(b) Statement, 2/13/17, at 1.

exculpatory, "irrespective of the good faith or bad faith of the prosecution." **Id.** at 87. The good faith, or lack thereof, by the prosecutor is immaterial because the concern is not punishment of society for misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. **Id.**, citing **Mooney supra**. **See Commonwealth v. Strong**, 761 A.2d 1167, 1170 (Pa. 2000). Further, the prosecutor's office is an entity and the knowledge of one member of the office must be attributed to the office of the district attorney as an entity. **Commonwealth v. Hallowell**, 383 A.2d 909, 911 (Pa. 1978).

⁸ **See** 18 Pa.C.S. § 505. The castle doctrine is a component of self-defense, which recognizes that a person has no duty to retreat from his or her home before using deadly force as a means of self-defense. **See Commonwealth v. Johnston**, 263 A.2d 376 (Pa. 1970); Denise M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 St. Mary's L.J. 573, 584 (2008).

The PCRA court determined that Christine presented no evidence to support his allegations of a "secret deal." Christine relies on hearsay statements in Rice's *pro se* PCRA petition and Rice's subsequent amended petition filed by counsel on June 9, 2011, both of which are included in the certified record on appeal. Christine refers to that portion of Rice's *pro se* petition indicating that Investigator Christopher Naugle was present during Rice's meeting with Attorney Mulqueen, at which the sentence reduction deal was discussed. Investigator Naugle testified at Christine's PCRA hearing, at which time he denied having been present during a meeting with Rice and the prosecutor. **See** N.T. PCRA Hearing, 7/11/16, at 4-16. In fact, Investigator Naugle stated that he did not recall meeting any witnesses with Attorney Mulqueen. **Id.** at 16.

At his PCRA hearing, Christine sought to present the testimony of Attorney Mulqueen. Attorney Mulqueen requested a brief recess and brought in District Attorney John Morganelli. When PCRA counsel called Attorney Mulqueen, the District Attorney objected and directed Attorney Mulqueen not to testify and to invoke her Fifth Amendment privilege. This, Christine argues, evidences a **Brady** violation and necessitates an adverse inference.

First, we note that we are particularly troubled by Attorney Mulqueen's decision to invoke the Fifth Amendment and DA Morganelli's advice that she assert it. We recognize, however, that Christine, at his PCRA hearing, did not present evidence to support his allegation of a deal between Rice and Attorney Mulqueen that was kept from the jury in Christine's trial. Rice, who was

sentenced on his bank robbery case prior to Christine's trial, filed for PCRA relief after Christine's trial, alleging that he had agreed to testify based on Attorney Mulqueen's promise that she would "intervene on his behalf and secure a reduced sentence with the Honorable Anthony Beltrami." Rice's Amended PCRA Petition, 7/9/11, at ¶ 9. Rice also alleged, however, that his trial counsel was ineffective in that he

affirmatively represented that [Rice] would receive the same sentence as his co-defendant of 3 to 6 years. [Rice] relied upon counsel's representation and was induced thereby to plead guilty. Trial counsel [] should have informed [Rice] that the Court had the discretion to impose a different or harsher sentence than that given to the co-defendant. [Rice] did receive a harsher sentence than the co-defendant who entered the bank and committed the actual robbery. [Rice's] role was much more limited as the driver of the getaway car. The imposition of the court's sentence of 4 to 8 years rendered petitioner's plea involuntary.

Id. at ¶¶ 12-14.

Our review of the timeline and the testimony of Rice's PCRA counsel, Attorney Michael Corcoran, who testified at Christine's PCRA hearing, indicate that there is no support for Christine's allegation of a "secret deal" or that Attorney Mulqueen misrepresented, at Christine's trial, the fact that no promises were made for Rice's testimony. The relevant testimony follows.

At Christine's trial, Rice testified that he saw Christine and Misero fighting, "[m]ore like a wrestling hold or whatever, but it was real brief, then it was just broke up[.]" N.T. Trial, 10/6/10, at 17. He testified that he saw Misero holding his neck and blood "everywhere[.]" and that when he asked Christine why he did this, Christine's response was "[Misero] owed him \$20."

Id. at 18. Notably, Rice testified that he could not be sure if Christine had anything in his hand, but that Christine asked him, prior to Rice's meeting with the investigator, if he could "say that you [saw Misero] come in to my cell . . . [a]nd asked if I could say that he had a cup of coffee or something like that." **Id.** at 22. He continued, "I actually agreed to it . . . I was actually going to try to help him out." **Id.** at 23.⁹ Attorney Mulqueen questioned Rice further:

Q: And that wasn't the truth?

A: That wasn't even the truth. I mean he might have had a cup in his hand, I don't know. The guy asked me if I could help him out and be a witness, and I was like all right, I'll go down there and see what the investigator has to say.

Q: So why are you testifying now to something different than what you told the investigator?

A: Well, I like [Misero], you know what I mean, and for him to get 50, 60 stitches.

Q: Had any promises been made to you to get you to testify here today by my office or by the Northampton County Prison?

A: **No.**

⁹ Private Investigator John E. Stahr, Jr., who interviewed Rice on behalf of the Public Defender's Office in the instant case, reported that Rice indicated that Misero "had a cup in his hand and that he saw him walk into Christine's cell [] and that he saw a scuffle start and then someone yelled that they were fighting." Investigative Report - Dan Rice Interview, 4/12/10. Christine appears to argue that this was exculpatory evidence, possibly because it corroborated Christine's version of the events with respect to Misero coming into his cell, holding a cup, and that at trial Rice's testimony differed, not necessarily with respect to the cup, but to the issue of whether Christine had asked Rice to tell the investigator that that is what he saw (i.e., Misero coming into Christine's cell holding a cup).

Q: In fact, you don't wish to be here today, do you?

A: No, I don't even care for you. I mean you sent me to prison for 8 years.

Id. at 23-24 (emphasis added).

More than one year after Christine's trial, Rice filed his aforementioned *pro se* PCRA petition and his counseled, amended petition, alleging that there was a deal between Attorney Mulqueen and himself in exchange for his testimony. Christine points to the allegations in Rice's petitions, and claims they suggest Attorney Mulqueen misrepresented on the record the fact that she had not reached a deal with Rice, as explained by the PCRA court in this matter, "that in open court during Mr. Christine's trial she represented [that] did not exist, which does suggest that she committed perjury and misrepresented a material fact in the trial. So it's a very serious allegation, and I understand that." N.T. PCRA Hearing, 5/11/16, at 14. **See** N.T. Trial, **supra** at 23-24. The PCRA court determined that Christine offered no evidence at his PCRA hearing to support this claim and, after our review, we are constrained to agree.

Christine, without making a record or establishing predicate testimony through Rice, sought to cross-examine Attorney Mulqueen. The PCRA court, noting that the burden of proof to prosecute a PCRA petition is on the petitioner, stated that "if the only proof you have is to call the assistant district attorney as of cross, you have no proof." N.T. PCRA Hearing, 5/11/16, at 18. Defense counsel sought to admit Rice's PCRA petition as evidence at

Christine's PCRA hearing. The PCRA court, pointing out that this was hearsay, continued the matter for two months to allow Christine to obtain witnesses, in particular, Rice. *Id.* at 17.

Two months later, at his continued PCRA hearing, Christine failed to present Rice to testify as to the allegations in his PCRA petition with respect to a deal with Attorney Mulqueen.¹⁰ As stated above, Investigator Naugle testified, although *his testimony did not support Christine's allegations*. Christine also called Attorney Corcoran to testify. As noted above, Attorney Corcoran, a former public defender, had represented Rice on his PCRA petition with respect to his bank robbery conviction, in which Rice had driven the getaway car. Rice's PCRA petition alleged that when he entered his guilty plea to that crime, he was under the impression he would receive the same sentence as his co-defendant, who received 3 to 6 years, while Rice was sentenced to 4 to 8 years. Attorney Corcoran also testified that "[i]n his petition, [Rice] also claimed that he was entitled to reconsideration of his sentence because he had helped the Commonwealth out in . . . Commonwealth versus Christine." N.T. PCRA Hearing, 7/11/16, at 62.

The court acknowledged that Rice believed that there was a sentence bargain when he filed his PCRA claim, but "his belief is all hearsay and he's

¹⁰ At the hearing, Christine presented Barry Golezeski, who testified that he was hired by Christine's family to locate Rice. He stated that, after ten to twelve hours of investigative work, he was unable to locate Rice. N.T. PCRA Hearing, 7/11/16, at 82-84. Rice's PCRA petitions are included in the certified record in this case; however, they remain allegations and not proof of Christine's claims.

not present to testify about it." *Id.* at 71. Attorney Corcoran's testimony sheds some light on this:

Q: Mr. Corcoran, what was the eventual outcome of [Rice's] PCRA?

A: In September of 2011, Ms. Mulqueen and I appeared before Judge Beltrami and the relief sought at that point was to get him the benefit of what he perceived to be a bargain, and there was a 3 to 6 year sentence.

THE COURT: That was the understanding. That's exactly what you said, 3 to 6. He wanted a 3 to 6 year sentence because he believed he was due the same sentence as his co-defendant who actually went into the bank and robbed them.

MR. CORCORAN: That was part of it, yes.

THE COURT: Okay. And he got that at the PCRA hearing?

MR. CORCORAN: He did, Your Honor.

THE COURT: And he was satisfied.

MR. CORCORAN: Yes, he wanted it to run concurrent, but Judge Beltrami did not entertain that request, but he was otherwise satisfied with the sentence reduction.

Q: And did Ms. Mulqueen tell you why she was trying to do this sentence reduction?

A: **I remember approaching her about it after I was assigned the matter, and basically outlined her some of the representations in his PCRA, and asked whether she would be amenable to the sentence reduction. And she indicated that his testimony was helpful in the matter of Commonwealth versus Christine, and that she would work with me to achieve the sentence reduction.**

Q: Did she admit or deny that there was a deal between her and Dan Rice?

A: That I don't recall.

Id. at 72-73, 77-78 (emphasis added). Again, without more, we are unable to find that this establishes a prior, secret deal between Rice and Attorney Mulqueen that Attorney Mulqueen misrepresented at Christine's trial.

At the conclusion of the hearing, the court reviewed Rice's guilty plea colloquy on the record, stating:

And on Page 4, it says: "I've also been told that there is a plea as to the sentence in this case. And the sentence that has been negotiated by the Commonwealth and your attorney is 4 to 8 years, is that our understanding of what the sentence is in this case?" Defendant: "Yes." Then the Court said: "Also, now I understand there's going to be a negotiation that there will be no charges against your girlfriend arising in any alleged conduct in relation to your alibi defense?" Defendant: "Yes." "Is that your understanding and part of your belief also?" "Yes." **Are there any other promises?" Defendant said no.** That's on Page 5. Then on Page 20 Judge Beltrami opposed the sentence. Mr. Rice said: "I'm just asking you to take into consideration to make it concurrent." I mean to apologize for my behavior. I have 2 years in prison already. I'm going to serve another 4. I'm just trying to" - and he asks for the 4 to 8 year sentence to run concurrent to what he's serving. Judge Beltrami said no.

If your theory is that at the time that Mr. Rice had some negotiated favorable sentence from Ms. Mulqueen, you would think that it would be there in the record somewhere. . . . So your theory is because Mr. Rice believed that he should get sympathy also after he had been sentenced because he testified in a different trial, and later Ms. Mulqueen relented and agreed that she would have no opposition to a lesser sentence for him, that that is an indication that the presentation Ms. Mulqueen made at trial with the negotiated plea with regard to his sentence is somehow false?

Id. at 93-94 (emphasis added). Christine's PCRA counsel responded that that was an indication that the jury was "not given the whole story." **Id.** at 94. We disagree.

The fact that Rice alleged in his petition that there was a deal, and the fact that Rice ultimately received his requested PCRA relief, does not prove Christine's allegation. The PCRA court reviewed Rice's PCRA filings, Rice's plea colloquy, and Rice's PCRA counsel's testimony. The PCRA court concluded that all that was established was that Rice *alleged* a prior deal and that Attorney Mulqueen did not oppose Rice's request for a reduced sentence when she was approached, *after Christine's trial*, by Attorney Corcoran. There was no proof that Attorney Mulqueen misrepresented, at Christine's trial, the fact that no promises were made to Rice prior to Christine's trial.

We conclude, therefore, that the record supports the PCRA court's finding that Christine, who had the burden of proof, "presented no competent or credible evidence in support of his bald theory that the ADA lied during the trial." PCRA Court Opinion, 12/30/16, at 8. **See Blakeney, supra** (we review ruling by PCRA court to determine whether it is supported by record and free of legal error); **Ousely, supra**; **see also Commonwealth v. Chmiel**, 30 A.3d 1111, 1131 (Pa. 2011) (mere conjecture as to agreement between prosecution and witness is not sufficient to establish **Brady** violation); PCRA Court Opinion, **supra** at 4-8 (no testimony proffered at Christine's PCRA hearing that suggested anything improper or nefarious occurred during trial).

Next, Christine argues that trial counsel was ineffective for failing to seek dismissal under Rule 600. Christine claims the trial court violated Rule 600 because he was not brought to trial until October 5, 2001, 448 days after the July 14, 2009 filing of the information. **See** Pa.R.Crim.P. 600.

Our standard of review when faced with a claim of ineffective assistance of counsel is well settled. First, we note that counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining that no reliable adjudication of guilt or innocence could have taken place. A petitioner must show (1) that the underlying claim has merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. The failure to prove any one of the three prongs results in the failure of petitioner's claim.

Commonwealth v. Rivera, 10 A.3d 1276, 1279 (Pa. Super. 2010) (internal citations omitted). **See also Commonwealth v. Natividad**, 938 A.2d 310, 321 (Pa. 2007); **Commonwealth v. Andrews**, 158 A.3d 1260, 1263 (Pa. Super. 2017).

Rule 600 provides, in relevant part, as follows:

Rule 600. Prompt Trial.

...

(A)(3) Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail,¹¹ shall commence no later than 365 days from the date on which the complaint is filed.

...

(C) In determining the period for commencement of trial, there shall be excluded therefrom:

...

(2) any period of time for which the defendant expressly waives Rule 600;

(3) such period of delay at any stage of the proceedings as results from:

(a) the unavailability of the defendant or the defendant's attorney;

(b) any continuance granted at the request of the defendant or the defendant's attorney.

...

(G) If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. . . . If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and dismiss the defendant.

Pa.R.Crim.P. 600. Pursuant to Rules 600(A) and (C), the mechanical and adjusted run dates are calculated as follows:

¹¹ **See *Commonwealth v. Colon***, 87 A.3d 352, 358 n.4 (Pa. Super. 2014) ("Longstanding case law has interpreted Rule 600(A)(3) to apply in circumstances where a defendant is incarcerated on other charges has not be arrested on the new charges forming the basis of the rule 600 claim, and is therefore, technically, at liberty on those new charges.").

The mechanical run date is the date by which the trial must commence under Rule 600. It is calculated by adding 365 days (the time for commencing trial under Rule 600) to the date on which the criminal complaint is filed. [T]he mechanical run date can be modified or extended by adding to the date any periods of time in which delay is caused by the defendant. Once the mechanical run date is modified accordingly, it then becomes an adjusted run date. If the defendant's trial commences prior to the adjusted run date, we need go no further.

If, however, the defendant's trial takes place outside of the adjusted run date, we must determine, pursuant to Rule 600(G), whether the delay occurred despite the Commonwealth's due diligence. To this end, we have fashioned the "excusable delay" doctrine. Excusable delay is a legal construct that takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence. Our Supreme Court has made clear that the Commonwealth must do everything reasonable within its power to guarantee that a trial begins on time. Moreover, the Commonwealth bears the burden of proving that its efforts were reasonable and diligent.

Due diligence is a fact-specific concept that must be determined on a case-by-case basis. Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth. Due diligence includes, among other things, listing a case for trial prior to the run date, preparedness for trial within the run date, and keeping adequate records to ensure compliance with Rule 600.

A period of delay that is excusable pursuant to Rule 600(G) results in an extension to the adjusted run date.

Commonwealth v. Ramos, 936 A.2d 1097, 1102-03 (Pa. Super. 2007) (en banc) (internal citations, quotation marks, and brackets omitted).

Here, the mechanical run-date is July 14, 2010. Christine was not tried until October 5, 2010, 82 days beyond the run-date. The court, however, found 122 days of excludable or excusable delay: outstanding defense pretrial motions, agreed-upon continuances, and preliminary hearing delay, none of

which amounted to a lack of due diligence on the part of the Commonwealth. Based on our review of the docket, we agree with the court's calculation and its finding that there was no Rule 600 violation. **See** PCRA Opinion, *supra* at 11-15. Trial counsel, therefore, was not ineffective for failing to raise this claim. **Rivera**.

In his third issue, Christine claims trial counsel was ineffective for failing to raise a Pa.R.E. 404(b)¹² objection with respect to admission of the shank at trial. This issue has been previously litigated.

To be eligible for PCRA relief, one must plead and prove that an issue has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). An issue has been previously litigated where the highest appellate court in which review was available as of right has ruled on the merits of the issue. 42 Pa.C.S. §

¹² Rule 404(b) provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character

(2) Permitted Uses. The evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b). We note that Rule 404(b)(2)'s list of permissible uses is not intended to be exhaustive. "[T]he range of relevancy outside the Rule's ban on propensity is almost infinite." *Ohlbaum on Pennsylvania Evidence* (2016 edition), at § 404.24, citing **Commonwealth v. Claypool**, 495 A.2d 176 (Pa. 1985).

9544(a)(2). It is evident from a reading of the Pennsylvania Supreme Court's October 27, 2015 opinion, that this issue was previously litigated within the meaning of the PCRA.

Christine filed a motion *in limine* to exclude the shank from evidence, arguing it was irrelevant and would cause undue prejudice by confusing the jury. **See** N.T. Trial, 10/5/10, at 13. The Commonwealth conceded that the shank was not the instrument used in the attack. **Id.** The trial court ruled the shank admissible under the similar-weapon exception because it showed Christine had "access to a weapon and that he had the ability to fashion a homemade weapon from objects in the prison." Trial Court Opinion, 4/26/11, at 6-7. Additionally, the court found the shank was relevant because it "tend[ed] to show [Christine] had knowledge and familiarity with prison-made weapons and could conceal them in his prison cell[.]" **Id.** at 8. The court found the evidence "relevant and that the probative value outweighed the prejudicial [effect]." **Id.**

As noted above, on direct appeal an equally divided *en banc* panel affirmed the trial court on the issue of the admissibility of the shank. The Supreme Court granted allowance of appeal to determine whether the trial court erred or abused its discretion when it permitted the Commonwealth to admit the shank. Although the Supreme Court determined that the shank was not admissible under the "similar-weapon exception," it ultimately found that the trial court acted within its discretion in admitting the shank to demonstrate defendant's ability to fashion a homemade weapon. The Court stated: "[T]he

Commonwealth laid a foundation of the similarity between the handles on the shank and razorblade, which, as admittedly generic that may be, the trial court found demonstrated [Christine's] familiarity with and ability to fashion jailhouse weapons, which one cannot say is irrelevant." **Christine**, 125 A.3d at 401. The Court concluded that "the trial court did not abuse its discretion or commit reversible error by admitting relevant evidence," and stated that our Court's en banc opinion in support of affirmance properly determined that "the shank was relevant under alternative theories of admissibility." **Id.**

Christine attempts to evade the previously litigated obstacle, claiming trial counsel was ineffective because Justice Saylor's dissent in the Supreme Court decision stated that had a Rule 404(b) objection been made, Christine would have had the benefit of a more "discerning evaluation of probative value versus prejudice[.]" **Id.** at 408. This claim is unavailing. The requirement that a claim for PCRA relief not be previously litigated would be rendered a nullity if this Court could be compelled to revisit every issue decided on direct appeal upon assertion that a dissenting view be applied.

Next, Christine claims counsel was ineffective for failing to bring a **Mooney** violation claim against the Commonwealth. This claim is waived. Christine did not raise this issue in his PCRA petition, 42 Pa.C.S. § 9543(a)(3), 9544(b), and, furthermore, the argument on this issue is undeveloped and unintelligible. **See** Appellant's Brief, 60-63. **See also Commonwealth v. Tedford**, 960 A.2d at 12-13 (claim that has been waived is not cognizable

under the PCRA); **Commonwealth v. Clayton**, 816 A.2d 217, 219-20 (Pa. 2002) (issue waived if not raised in PCRA petition).

In his fifth issue, Christine claims trial counsel was ineffective for failing to request a "castle doctrine" jury instruction, 18 Pa.C.S. § 505, and failing to submit photographs of his injuries to the jury. We note, first, that section 505 was amended on August 27, 2011; this amendment, which expanded the definition of "castle" to include one's dwelling, residence, occupied vehicle or place of work, was not in effect at the time of Christine's trial. Moreover, there is no precedent for extending this doctrine to a prison cell. In any event, we conclude that the PCRA court properly disposed of this issue in its opinion. We rely on that disposition to resolve this claim. **See** PCRA Court Opinion, 12/30/16, at 15-17.

In his final claim, Christine argues that trial counsel was ineffective for failing to present to the jury five black and white photographs of Christine's injuries.¹³ Christine argues these photographs show defensive wounds that he suffered as a result of the victim's attack. Appellant's Brief, at 67. Christine

¹³ Christine presents a layered ineffectiveness claim, stating PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness. Appellant's Brief, at 67. This explains why the PCRA court did not address the issue in its opinion. Christine did, however, present this claim in his Rule 1925(b) statement, but the PCRA court relied on its opinion denying PCRA relief to dispose of Christine's claim. **See** Pa.R.A.P. 1925(a) Statement ("Having received a new fling -- Notice of Appeal -- dated January 19, 2017, and filed January 25, 2017, we once again reaffirm that the support for our Order can be found in our Order denying PCRA relief filed on December 30, 2016.").

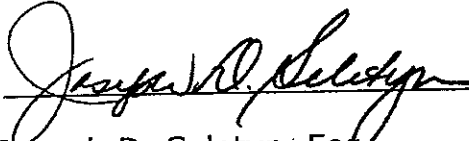
acknowledges that "the injuries are minor," but argues that they corroborate the fact that he was defending himself. **Id.**

We agree with the Commonwealth's assessment that these photographs are fairly indecipherable. **See** Appellant's Exhibits and Appendices, Exhibit A. Moreover, Christine has failed to establish that counsel did not have a tactical reason for not presenting the pictures, not only because they are unclear, but because they would contrast significantly with the victim's life-threatening injuries. **Rivera, supra** (counsel is presumed effective and burden to establish otherwise is on appellant). Further, we are not convinced that Christine was prejudiced by counsel's failure to present the photographs as both parties acknowledged that there was a physical altercation. The photographs would have been of dubious value. Christine has not established that there is a reasonable probability that, but for counsel's failure to present the photographs, the outcome of the proceeding would have been different. **Commonwealth v. Cox**, 863 A.2d 536, 546 (Pa.2004). We conclude, therefore, that this claim is meritless. **See Rivera, supra; see also Commonwealth v. Paddy**, 15 A.3d 431, 443 (Pa. 2011) (if petitioner cannot prove underlying claim of trial counsel ineffectiveness, petitioner's derivative claim of appellate counsel ineffectiveness fails).

We, therefore, affirm the PCRA court's order denying relief, and we direct the parties to attach a copy of the Honorable Stephen G. Baratta's opinion in the event of further proceedings.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/3/2018

APPENDIX J

Northampton County Court of Common Pleas, Case # 3344-cr-2009
12/30/16 Order Denying First PCRA

DA

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

COMMONWEALTH OF PENNSYLVANIA)
)
 v.)
)
 JACOB CHRISTINE,)
)
 Defendant.)

NO. 3344-2009

Appendix

2016 DEC 30 PM 3:35
CLERK OF COMMON PLEAS
CRIMINAL DIVISION
NORTHAMPTON COUNTY, PA

FILED

ORDER OF COURT

AND NOW, this ³⁰~~30~~ day of December 2016, it is hereby ORDERED that Defendant's
Petition for Post Conviction Relief (PCRA) is DENIED.

STATEMENT OF REASONS

Facts and Procedural History

Defendant, Jacob Christine, was convicted of Aggravated Assault and Recklessly Endangering Another Person by a jury on October 7, 2010. However, the jury found Defendant not guilty of Attempted Criminal Homicide. Defendant was sentenced on November 24, 2010, to 108-240 months incarceration on the Aggravated Assault count and 1-2 years incarceration on the Recklessly Endangering Another Person count. The Aggravated Assault sentence runs consecutively to Defendant's Lehigh County sentence and the Recklessly Endangering sentence runs concurrently with the Aggravated Assault sentence.

The convictions resulted from an incident that occurred in Northampton County Prison (NCP) on June 8, 2009. On that date, the Defendant and the victim, Thomas Misero, were inmates in NCP when a confrontation between the two men occurred in the Defendant's cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in the Defendant's cell,

the Defendant was alleged to have slashed Mr. Misero's neck and ear with a razor blade.

Immediately after the attack, corrections officers searched the Defendant's cell. Only one weapon, a shank, was found in the cell. It was hidden within the Defendant's bed.

Interestingly, the Defendant testified at trial that the victim came into his cell armed with a razor blade and attacked the Defendant. The Defendant claimed that he successfully disarmed the victim, picked up the razor from the floor and then unintentionally sliced the victim when the victim continued to threaten the Defendant. Even though the Defendant was the last person to have control of the weapon, it has never been located. We also note that there were no injuries suffered by the Defendant.

The Defendant was convicted after a jury trial on October 7, 2010, of Aggravated Assault and Recklessly Endangering Another Person. Apparently, the jury rejected the Defendant's claim of self-defense.

The Defendant pursued post-sentence motions and an appeal through the appellate courts. The Pennsylvania Supreme Court issued an Order affirming the Defendant's conviction on January 27, 2016.

Defendant's First PCRA was filed on February 22, 2016. Several conferences and hearings were scheduled. The final PCRA hearing was held July 11, 2016.

Thereafter the Defendant and the Commonwealth filed Briefs.

The Defendant's PCRA claims can be summarized as (1) prosecutorial misconduct for failing to disclose a sentencing agreement with an eyewitness to the alleged assault; (2) ineffective assistance of counsel for failing to raise a 404(b) objection; (3) ineffective assistance of counsel for failing to pursue a claim for violation of Pennsylvania Rule of Criminal

Procedure 600; (4) ineffective assistance of counsel for failing to pursue a jury charge for “the castle defense;” and (5) ineffective assistance of counsel for failing to raise an objection to an alleged defective jury charge.

Legal Standard

Counsel is presumed to be effective; the burden of proving otherwise rests with the petitioner. See Commonwealth v. Cox, 983 A.2d 666, 678 (Pa. 2009). Generally, “where matters of strategy and tactics are concerned, counsel’s assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client’s interest.” Commonwealth v. Puksar, 951 A.2d 267, 277 (Pa. 2008). Further, “[c]ounsel’s performance is presumed constitutionally adequate, and will be deemed ineffective only upon a petitioner’s three-pronged showing that counsel’s ineffectiveness was such that, ‘in the circumstances of the particular case, [it] so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.’” Commonwealth v. Dennis, 950 A.2d 945, 954 (Pa. 2008) (quoting Commonwealth v. Rios, 920 A.2d 790, 799 (Pa. 2007)).

In order for a petitioner to prevail on his claims of ineffective assistance of counsel, the petitioner must plead and prove, by the preponderance of the evidence, three elements: “(1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) [the petitioner] suffered prejudice because of counsel’s action or inaction.” Commonwealth v. Hutchison, 25 A.3d 277, 285 (Pa. 2011) (citing Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987)). The failure of a petitioner to satisfy any of the prongs set forth above requires a rejection of the ineffectiveness claim. See Dennis, 950 A.2d at 954.

Under the first prong, if a claim lacks merit, the court's inquiry ceases, as counsel will not be deemed ineffective for failing to pursue a baseless or meritless issue. See Commonwealth v. Johnson, 588 A.2d 1303, 1305 (Pa. 1991). In order to prove the second prong of this test ("the Pierce standard"), the "reasonable basis" prong, a petitioner must prove that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Hutchison, 25 A.3d at 285 (citing Commonwealth v. Williams, 899 A.2d 1060, 1064 (Pa. 2006)). In order to establish the third prong of the test, a petitioner must prove "that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction." Id.

The petitioner's abstract allegations of ineffectiveness will not be considered. See Commonwealth v. DeHart, 650 A.2d 38, 43 (Pa. 1994). Instead, "a petitioner must allege actual prejudice and be able to identify a specific factual predicate that demonstrates how a different course of action by prior counsel would have better served his interest." Id. Further, "an evaluation of counsel's performance is highly deferential, and the reasonableness of counsel's decision cannot be based upon the distorting effects of hindsight." Commonwealth v. Basemore, 744 A.2d 717, 735 (Pa. 2000).

Discussion

1. Prosecutorial Misconduct

Mr. Christine alleges that at trial, the Assistant District Attorney (hereinafter, ADA) misrepresented or lied to the jury when she stated that she had provided no special favor to a witness, Daniel Rice, in return for Rice's favorable testimony. Specifically, Mr. Christine argues that ADA Mulqueen offered Daniel Rice sentencing relief that she denied or failed to

disclose during the trial.

Mr. Christine proffered no evidence whatsoever to support this claim.

The record established that at the time that Daniel Rice testified, he had already pled guilty for participation in an unrelated charge - a bank robbery in which Mr. Rice was the alleged lookout. When Mr. Rice appeared for sentencing before the Honorable Anthony Beltrami on September 15, 2010, Judge Beltrami accepted a negotiated sentence bargain in which Mr. Rice agreed to a 4 to 8 year sentence in return for immunity for his girlfriend for any involvement she may have had with his criminal matter. Judge Beltrami provided Mr. Rice with the sentence bargain on September 15, 2010. At sentencing, Mr. Rice acknowledged that he received the benefit of his negotiated bargain. It should also be noted that Rice's co-defendant, the actual bank robber, received a 3 to 6 year state sentence.

Thereafter, Mr. Rice agreed to testify at Mr. Christine's October 2010 trial on behalf of the Commonwealth. Apparently, Mr. Rice was a witness to the prison assault perpetrated by Mr. Christine. During the trial, Mr. Rice indicated that he spoke with ADA Mulqueen and was hoping for consideration in return for his testimony. However, Mr. Rice also testified that he had not been offered and/or promised anything in return for his testimony.

Thereafter, Mr. Rice filed a PCRA on April 8, 2011, in which he raised three complaints (1) he got a 4 to 8 year sentence when he thought that his sentence bargain should have been 3 to 6 years; (2) ADA Mulqueen promised him a sentence reduction in return for his testimony in the [Christine] trial, but he received no reduction; and (3) Mr. Rice sought the opportunity to have his sentence reconsidered. Mr. Rice's PCRA counsel was Michael Corcoran, Esq.

Mr. Christine called Mr. Corcoran as a witness at this PCRA hearing. Mr. Corcoran

testified that after he was appointed to represent Daniel Rice, he approached ADA Mulqueen with the proposal that Mr. Rice receive PCRA relief in the form of a new sentence of 3 to 6 years (which was the same sentence that his co-defendant received). ADA Mulqueen apparently agreed to Mr. Corcoran's proposal. Counsel presented the agreement to Judge Beltrami, who accepted the resolution at the PCRA proceeding held on September 30, 2011. In return for the reduction, Mr. Rice withdrew all PCRA claims.

There was absolutely no testimony proffered at Mr. Christine's PCRA hearing which suggested that anything improper or nefarious occurred during the Christine trial. In fact, the various inter-related records corroborate the testimony presented during the Christine trial, and the representations made by ADA Mulqueen - that nothing had been offered to Rice in exchange for his testimony.

Interestingly, at the initial PCRA hearing, Mr. Christine's PCRA counsel proffered that ADA Mulqueen lied on the record and also suborned perjury on the record. However, PCRA counsel had no evidence and represented the same. Still, PCRA counsel wanted to call ADA Mulqueen as a witness at Mr. Christine's PCRA hearing.

ADA Mulqueen was rightfully incensed at the bald accusations. She asked for a brief recess in order to get another DA to come into the Courtroom if she was going to be a witness. She returned shortly with the District Attorney, John Morganelli. When PCRA counsel sought to call ADA Mulqueen, Mr. Morganelli objected, indicated that he directed ADA Mulqueen not to testify and to take the Fifth Amendment. ADA Mulqueen also indicated that she was invoking her right under the Fifth Amendment not to testify. As a result, we did not require ADA Mulqueen to testify.

[]

Undeterred and without any legal authority, PCRA counsel requested that we draw an inference that ADA Mulqueen actually committed crimes by falsely presenting assertions that she had not promised specific benefits to Daniel Rice and that she suborned perjury by having Mr. Rice testify falsely that he had not been promised anything in return for his testimony.

We refuse to do so. Frankly, we found the actions of PCRA counsel to be offensive, unsupported by any factual record, and lacking any logic or reasonableness as far as legal strategy.

The Fifth Amendment right against self-incrimination, as applied to the states via the due process clause of the Fourteenth Amendment, precludes the trier of facts from drawing a negative inference from a Defendant's failure to take the stand in his own defense or for exercising his Constitutional privilege against self-incrimination. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).

In this matter, Ms. Mulqueen was not a Defendant facing criminal prosecution; however, we also note that the bald accusations by Defense Counsel accuse the ADA of felony perjury charges. It is a rather hybrid situation, but we have chosen to evaluate this claim under the body of law applied in civil proceedings. Pennsylvania has allowed an adverse inference to be drawn against a party who invokes the privilege against self-incrimination in civil proceedings, such as workers compensation cases. See Frompovicz v. W.C.A. B. (Palsgrove), 642 A.2d 638 (Pa.Cmmlth. 1994). However, Frompovicz indicates that the inference is permissive, rather than mandatory, by the Court's use of the word "may". See Id. at 641. Thus, it is a discretionary determination by the Court. However, secondly and more importantly, when a negative inference is drawn in civil matters from a parties' invocation of the Fifth Amendment privilege,

the inference itself does not constitute substantial, competent evidence to support any finding of fact. See Harmon v. Mifflin County School District, 713 A.2d 620 (Pa. 1998); Petrone v. Unemployment Compensation Board of Review, 557 A.2d 1118 (Pa. Commwlth. 1989). Rather, the Commonwealth Court has held that the negative inference can only go to the credibility of evidence introduced by the party with the burden of proof. See Harring v. Unemployment Compensation Board of Review, 452 A.2d 914 (Pa. Commwlth. 1982). In other words, in this matter, Mr. Christine had the burden of proof. He presented no competent or credible evidence in support of his bald theory that the ADA lied during the trial. He had the opportunity to call witnesses in support of this theory and was unable to present any evidence of improper activity. As a result, Defense Counsel wished to engage in a fishing expedition in an effort to embarrass the ADA by accusing the ADA of lying and committing perjury without one scintilla of evidence.

The claim related to prosecutorial misconduct for the failure to disclose evidence related to the alleged agreement that witness Rice would receive a sentence reduction is analyzed under the standard of Brady v. Maryland, 373 U.S. 83 (1963), which requires that the Court find that under the circumstances of the case, the failure to disclose the evidence undermined the truth determining process which entitles the Defendant to obtain Post-Conviction Relief in the form of a new trial.

This first PCRA claim fails because Mr. Christine and PCRA Counsel had no evidence whatsoever to support the theory absent counsel's bald insult, accusing the ADA of committing a felony by lying on the record and suborning perjury of a witness called during the trial.

2. Trial Counsel failed to raise PA. Rule of Evidence 404(b) Objection

This is a rather interesting legal argument regarding the admission of a shank. After the assault in which Mr. Christine was charged with slashing the victim's neck with a cutting instrument, the correction officers searched his cell in an attempt to locate the weapon or instrument used to cut the victim's neck. During the search of Mr. Christine's cell, the correction officers found a "shank-like" weapon in his mattress. However, the consensus was that the weapon found in Mr. Christine's mattress was not the weapon used to injure the victim. Ultimately, the correction officers were unable to find the weapon used by Christine to slice the victim's neck.

At trial, the Commonwealth sought to introduce the shank located during the search, to demonstrate the Defendant's access to weapons and/or ability to fashion weapons.

Trial counsel objected, arguing that the knife was irrelevant and if relevant, that the probative value did not outweigh the prejudicial value. We overruled the objection and permitted the shank to be introduced as its introduction was probative to the fact that the Defendant did have access to the type of weapon that was used in this attack.

Our evidentiary ruling was affirmed by the Supreme Court as the Supreme Court found that the appellant could not show that we had abused our discretion in admitting the Defendant's shank. See Commonwealth v. Christine, 125 A.3d 394 (Pa. 2015).

Interestingly, there was a dissent authored by then Justice Saylor which discussed the availability of a 404(b) objection to trial counsel and noted that it was not raised of record. No other Justice joined Judge Saylor's dissent. While Justice Saylor discussed the nature of a 404(b) objection, he noted that should a 404(b) objection been raised, the appellant "would have

been entitled to a more discerning evaluation of probative value versus prejudice". Id. at 404 - 405

It is important to note that Justice Saylor did not issue a final conclusion on the admissibility of the shank, noting: "As to the admissibility of the shank found in appellant's cell, I would forego addressing the issue, because I do not believe that the salient questions have been framed and presented adequately." Id.

The claim that trial counsel was ineffective for failing to properly object to the admission of the shank fails because Trial counsel did object to the admission of the shank and argued vociferously that it was not relevant and further that the probative value did not outweigh the prejudicial value. Even though trial counsel did not specifically reference 404(b) as the basis for the objection, counsel and the court did discuss the very specific and discerning evaluation of probative value versus prejudicial. Thus, proper facts and analysis were raised by trial counsel and discussed by the Court prior to the admission of the shank. The record was reviewed by the Supreme Court and the majority of the Court, absent Justice Saylor, agreed that the shank was properly admissible. Therefore, this claim has been previously litigated and finally resolved. Mr. Christine wants another bite at the apple to rehash the same argument of probative versus prejudicial in his PCRA. The Supreme Court's opinion closed the door in this matter. Further, we find that even if the Supreme Court's opinion is not the last word, that trial counsel ably argued the appropriate evidentiary standard in support of her objections. Therefore, there can be no finding of ineffectiveness.

3. Rule 600 claim

Pennsylvania Rule of Criminal procedure 600 provides in pertinent part:

(A) Commencement of Trial; Time for Trial

(1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.

(2) Trial shall commence within the following time periods.

(a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.

(D) Remedies

(1) When a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated.

The Supreme Court provides a detailed analysis of Pa.R.Cr.P. 600 in Commonwealth v.

Bradford, 46 A.3d 693 (Pa. 2012):

To protect the defendant's speedy trial rights, Rule 600 ultimately provides for the dismissal of charges if the Commonwealth fails to bring the defendant to trial within 365 days of the filing of the complaint (the "mechanical run date"), subject to certain exclusions for delays attributable to the defendant. Pa.R.Crim.P. 600(A)(3), (G). Conversely, to protect society's right to effective prosecution prior to dismissal of charges, "rule 600 requires the court to consider whether the commonwealth exercised due diligence, and whether the circumstances occasioning the delay of trial were beyond the Commonwealth's control."

Selenski, 994 A.2d at 1088. If the Commonwealth exercised due diligence and the delay was beyond the Commonwealth's control, "the motion to dismiss shall be denied." Pa.R.Crim.P. 600(G). The Commonwealth, however, has the burden of

demonstrating by a preponderance of the evidence that it exercised due diligence.

See Browne, 584 A.2d at 908. As has been oft stated, "[d]ue diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *Selenski*, 994 A.2d at 1089. "If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant." Pa.R.Crim.P. 600(G).

Id. at 701 -702

Mr. Christine raised a Rule 600 claim in his pro se filing. At the PCRA hearing, PCRA

counsel, on the record, attempted to withdraw the claim. Mr. Christine objected to his counsel's attempt to do so. We did not permit counsel to withdraw the claim. We then allowed Mr. Christine to address his Rule 600 claims in his testimony and acknowledge that Mr. Christine cogently framed an issue worthy of review.

The docket evidences the following pertinent information: The criminal complaint was filed on July 14, 2009. The Defendant was detained on the complaint on July 15, 2009 with bail set by Magisterial District Justice Elwell. The Defendant's trial did not commence until October 5, 2010. By our calculation, the Defendant was not tried until 447 days after his detention on these charges. We then reviewed the docket and the entire file to determine if there are any events that toll the Rule 600 calculation.

We note that the first preliminary hearing date was set for July 24, 2009 at 9:00 a.m. before MDJ Elwell. However, the preliminary hearing was not held until October 20, 2009.

A review of the MDJ's file indicates that the Defendant had his preliminary video arraignment on July 15, 2009, at 2:30 p.m. where bail was set. At the time of the assault, the Defendant was incarcerated in Northampton County Prison. Shortly after the complaint was filed by a Northampton County Correctional Officer, Christopher Nagle, the Defendant was transferred to SCI-Forest. The Defendant was not available for his first scheduled preliminary hearing on July 24, 2009, therefore, it was continued. Additionally, the MDJ's notes indicate that as of July 29, 2009, the Defendant had not applied for a Public Defender, nor had private counsel entered an appearance. The MDJ sent a letter to Northampton County Court Administration requesting that the second preliminary hearing be held at the courthouse and that the Defendant be brought in from SCI-Forest. The new preliminary hearing was set for the

September 9, 2009. That hearing was also cancelled as the Defendant was unable to be delivered to Northampton County. A re-scheduled preliminary hearing was set for October 15, 2009, at the Northampton County Courthouse. The Defendant was brought in from SCI- Forest. The hearing was held without defense counsel for the Defendant, as he failed to apply for a Public Defender and did not hire private counsel. In fact, the Defendant chose to represent himself at the preliminary hearing. At the conclusion of the preliminary hearing, the Defendant's case bound over for trial.

By our calculation, the time frame from the continuance for July 24, 2009 until the Defendant had his preliminary hearing on October 15, 2009, is 83 days. At no point during this period, did the Commonwealth request a continuance or was the Commonwealth unable to proceed for the preliminary hearing. The delay was two-fold. First, that the Defendant did not obtain counsel and, as a result, the MDJ gave the Defendant an opportunity to obtain counsel and second, the Defendant, because of these charges, had been transferred out of the jurisdiction, obviously for prison administrative (safety) reasons and, as a result he was not available to the Magisterial District Court, and therefore arrangements had to be made to reschedule and transport the Defendant back to our jurisdiction.

We note that in Bradford, supra., the Supreme Court found that a breakdown in in the Court process where the Magisterial District Judge failed to forward timely the relevant file as required by Pa.R.Crim.P. 547(B), did not support a dismissal of the charges for a Rule 600 violation, as there was no due diligence violation by the Commonwealth. Here, the prison officials, because of the security concerns presented by inmate Christine, transported Mr. Christine out of the jurisdiction and he was not logistically or immediately available for his

preliminary hearing. We find that this delay tolls Rule 600 for an additional 83 days.

Thereafter, on October 28, 2009, the Defendant filed a "Motion for Dismissal and Quash of Indictment for Judicial Misconduct and Habeas Corpus". In the body of his petition, Mr. Christine attacked the court's jurisdiction, complained that he had no counsel at the preliminary hearing, asserted that he received no notice of the preliminary hearing because he was at SCI-Forest, and he alleged that a prima facie case was not established at the preliminary hearing.

On November 17, 2009, Mr. Christine's Public Defender filed a Motion for a Remand for a Preliminary Hearing. The matter was scheduled for a hearing before Judge Smith on November 25, 2009. The parties appeared before the Honorable Edward G. Smith on November 25, 2009 and entered an agreed order, in which the Defendant's Motion for Remand was "withdrawn by defense with anticipation of filing a Writ of Habeas Corpus. The hearing on the writ of habeas corpus shall take place at 9:00 a.m. on Friday, December 18, 2009." Thereafter, counsel perfected the oral claim for habeas corpus relief by filing a written Petition for Habeas Corpus on December 10, 2009. The docket indicates that the hearing on the habeas corpus petition was not held until January 15, 2010. The transcript of the Habeas Corpus proceeding was filed on February 1, 2010, which indicates that Judge Smith denied the Petition for Habeas Corpus on the record as of January 15, 2010. We find that the period of time between October 28, 2009, until the resolution of the habeas corpus petition on January 15, 2010, is tolled under Rule 600 as outstanding pre-trial motions were filed and unresolved. By our calculation, 79 days were tolled.

Thereafter, several trial dates were scheduled in which no official court activity occurred until a miscellaneous hearing appearance on July 30, 2010 before the Honorable Paula A.

Roscioli. At that time, the District Attorney and defense counsel agreed that the case would be continued and attached for trial on October 4, 2010. The Order was entered by agreement. Apparently, the Defendant was unavailable and detained at SCI-Albion; therefore, the District Attorney presented a writ to transfer the Defendant to Northampton County for his trial. That writ was signed by Senior Judge Lawrence J. Brenner on September 23, 2010. Thereafter, trial commenced. We also note that Judge Roscioli's Order of Court dated July 30, 2010, continued the trial by agreement until October 5, 2010. No record was made at the PCRA hearing indicating that that period was not properly tolled by the court order entered by Judge Roscioli attaching counsel and setting a date certain for trial by agreement of counsel. By our calculation, the period from July 30, 2010 until October 5, 2010 is tolled for a total of an additional 68 days.

Our final calculation is that from the filing of the charges until trial was 447 days, from that figure we subtract the following tolled periods: (1) 83 days - Preliminary Hearing delay, (2) 79 days - Pre-trial motions, and (3) 68 days - agreed trial continuance. Thus, only 217 days expired under Rule 600. There is no Rule 600 violation.

4. Castle Defense - Use of Force to Protect Property

As we understood the factual predicate leading up to the alleged assault, the doors to the cells at Northampton County Prison were open and the inmates on the various tiers were permitted to intermingle with each other. Apparently, a group had gathered outside of the Defendant's cell and the alleged assault began either directly in front of or inside the Defendant's opened cell.

The Defendant claims that even though he asserted a self-defense claim and received the instruction with regard to justification/self-defense at trial, that his trial counsel was ineffective for failing to request that the "Castle Doctrine" be included in the jury charge.

It is important to note that the Defendant's alleged assault occurred in 2009 and his trial was held in 2010. At the time, we were laboring under the justification defense set forth in 18 Pa.C.S. § 505 enacted in 1972. Under the 1972 version of § 505, the self-defense jury instruction required that the actor was a non-aggressor, possessed reasonable fear of imminent death and did not violate a duty to retreat. Under the 1972 version, all circumstances of the crime were to be evaluated to determine if the actor seeking the justification defense had a reasonable fear of death or serious bodily injury. However, Pennsylvania also recognizes the "Castle Doctrine" which excused any duty to retreat when the actor was attacked within his dwelling or residence.

The Law of Justification in effect at the time that this Defendant committed his crime and at the time he was tried, did not provide the new, expanded Castle Doctrine that became law when 18 Pa.C.S.A. § 505 was amended on August 27, 2011, which expanded the definition of "Castle" to include dwelling, residence, occupied vehicle or place of work.

In our 2010 trial, we would not allow this Defendant, alleged to have committed an aggravated assault in 2009, to expand the Castle Doctrine to include his prison cell which he shared with six other inmates and which he did not have the authority to secure himself. We firmly believed that the 1972 version did not possess the legislative intent to grant inmates in a penal institution a claim that a multi-bed prison cell was to be considered the inmate's private, personal dwelling which would immunize the inmate should another inmate enter his open cell

door. Therefore, we made no attempt to fashion a new, special jury instruction for inmate Christine which adopted the common-law Castle Doctrine to encompass his assigned prison cell.

Trial counsel appropriately requested and received the charge for self-defense. We cannot find counsel to be ineffective for failing to advance the request for a novel Castle Doctrine charge related to inmates and prison cells.

5. Jury Charge.

The entirety of the Defendant's argument with regard to the error in the jury instructions is set forth in the following three paragraphs:

Aggravated assault is defined under 18 Pa.C.S.A. § 2702 as follows: "(a) Offense defined. – A person is guilty of aggravated assault if he: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly manifesting extreme indifference to the value of human life." However, this Honorable Court informed the jury that "If you accepted the Defendant's testimony that in defending himself, accidentally the victim was slashed, then there is no justification either because the Defendant committed the crime." N.T. 10/7/10, Pg. 88; Ln. 13-14.

A review of this Honorable Court's comments during discussions in chambers appears to show that the Court meant to say quite the opposite. When this exact topic was broached in chambers, this Honorable Court stated: "If the jury accepts [Christine's] testimony, he committed **no** crime and there is no defense of justification available."¹ N.T. 10/7/10, Pg. 5, Ln. 9-11.

It appears that this Honorable Court merely misspoke. However, this interchange of the words "the" and "no" in the Court's instructions to the jury warrants a new trial. "When reviewing a challenge to a part of the jury instructions, the Court must review the charge as a whole to determine if it is fair and complete." Commonwealth v. Hall, 549 Pa. 269 at 303 (1997). Only where there is an abuse of discretion or an inaccurate statement of law is there reversible error. Id.

¹ During this discussion in chambers the Court discussed Commonwealth v. Harris, 665 A.2d 1172 (Pa. 1995) and its holding that the assertion of a justification defense was mutually exclusive to a defendant's assertion that an injury was a result of an accident and defendant therein was not in fear of injury. Harris has since been distinguished by Commonwealth v. Childs, 2014 WL 10788813 (Pa. Super. 2014)(Non-Precedential Decision) where the defendant therein accidentally caused SBI/Death while defending himself.

See Brief in Support Defendant's PCRA Petition page 2.

The standard of review in a jury charge is to determine whether the trial court committed a clear abuse of discretion or an error of law which controlled the outcome of the case.

Commonwealth v. Brown, 911 A.2d 576, 582-83 (Pa.Super 2006).

"When evaluated jury instructions, the charge must be read as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions... so long as the law is clearly, adequately, and accurately presented to the jury for its consideration."

Commonwealth v. Hawkins, 787 A.2d 292, 301 (Pa. 2001). "Error will not be predicated on isolated excerpts. Rather it is the general effect of the charge that controls." Commonwealth v. Myers, 545 A.2d 309, 314 (Pa. Super. 1988).

First, we must note that we had a jury charge conference with counsel in which we discussed the jury charge for the defense of justification, including the application of the holding in Commonwealth v. Harris, 665 A.2d 1172 (Pa. 1995) and the language that is now at issue. Counsel agreed to the charge that we provided. (See Trial Notes of Testimony Vol III, pp.3 – 11.) During our initial jury charge, no objections were made and the jury was sent out to deliberate. We believe that the charge we gave to the jury reflected the law and our pre-charge conference. Defense Counsel, Appellate Counsel and PCRA Counsel did not raise any complaints regarding our initial charge, including the justification charge. (See Notes of Jury Trial Vol III pp. 44 – 77).

The alleged error raised by PCRA counsel appears at a subsequent charging proceeding after the jury returned a question related to the justification defense and the definition of serious

bodily injury.² We believe that we accurately recited the law and our jury charge with regard to justification. After our second attempt to provide instructions to the jury regarding justification, we brought counsel again to side bar and no objections were raised with regard to our instructions.

The sum total of the alleged error by PCRA counsel is the following quote from his Brief, **"It appears that this Honorable Court merely misspoke. However, this interchange of the word 'the' and 'no' in the Court's instructions to the jury warrants a new trial."**

We believe that it is important to read the entirety of that section of the record to place this claim in perspective. It is as follows:

"Also, if you accept the defendant's testimony that he was a person who was innocent in this matter, that he was in his cell, and that the victim came to his cell with hot coffee and a razor, and that the victim, Mr. Misero, was the person who provoked the assault, and, in fact, attempted to slash the defendant with the razor. Eventually the defendant disarmed Mr. Misero, they disengaged, the defendant walked over, picking up the razor, he was now armed, and the defendant then was under attack again by Mr. Misero a second time, and that in defending himself, accidentally the victim was slashed, then there is no justification either because the defendant committed the crime. He has no intent to injure the victim so you don't have to consider justification if you believe the defendant's story."

N.T. 10/7/10, p.88.

We cannot deny that the transcription of our jury charge on Page 88, Line 13-14, recites the phrase "the Defendant committed the crime." However, we believe that we did not misspeak, but in fact we said "the Defendant committed no crime". Otherwise, the entire sentence appears to be "logical gibberish." It makes no sense that the court reporter's transcription was accurate. We had previously, accurately made the statement to the jury that

² Frankly, this would not have been an issue, if we had the authority to provide the jury with a written copy of our initial charge.

had if the Defendant accidentally slashed the victim (as he reported in his testimony) then the Defendant could not have committed the crime of aggravated assault and the defense of justification would not need to be considered by the jury. We believe that we provided the same instruction in our first charge as we did in our second charge referenced on Page 88 of the Transcript. Other than the apparent error of "the" rather than "no", the section is consistent with the charge required as well as our discussion with the parties regarding the import of Commonwealth v. Harris in delineating between a justification defense and a lack of intent.

We cannot account for the Scribner's error.

However, even if the error did occur, however, it would still be considered an "isolated excerpt" of the transcript which is not a basis to determine error. Commonwealth v. Myers, *supra*. Taken as a whole, the jury instruction adequately conveyed the law to the jury.

We next note that the alleged charging error was also not raised during the appellate process. Obviously, this record was reviewed with a fine tooth comb. There are two Opinions from the Superior Court and eventually, a review and an Opinion by the Supreme Court. Obviously, this issue, if it existed, was waived on appeal.

Therefore, the issue becomes whether or not trial counsel, Susan Hutnik, was ineffective for failing to raise the objection and, if so, the extent of any prejudice, because this claim was waived for post-sentence claims because of the failure to include it in the direct appeal.³

Thus, our next determination is whether or not trial counsel was ineffective for not pursuing this claim. The standard for performance of trial counsel (and appellate counsel) is a three prong performance and prejudice test set out in Commonwealth v. Pierce, 527 A.2d 973

(Pa. 1987), which continues to be the legal standard for evaluating such claims. Under *Pierce*, the PCRA petitioner must demonstrate: (1) the claim of ineffectiveness has arguable merit, (2) that counsel did not have a reasonable basis for the act or omission in question, and (3) petitioner must establish prejudice which demonstrates that "but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." See *Commonwealth v. Pierce*, *Supra*; *Commonwealth v. Douglas*, 645 A.2d 226, 230 (Pa. 1994); *Commonwealth v. Kimball*, 724 A.2d 326, 333 (Pa. 1999).

The Supreme Court in *Commonwealth v. Daniels*, 963 A.2d 409, 430 (Pa. 2009), addressed the legal standard for review of an allegedly defective jury charge. The *Daniels* Court held:

It is well-settled that when reviewing the adequacy of a jury instruction, we must consider the charge in its entirety to determine if it is fair and complete. *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 669 (2007); *Commonwealth v. Murphy*, 559 Pa. 71, 739 A.2d 141, 146 (1999); *Commonwealth v. Stokes*, 532 Pa. 242, 615 A.2d 704, 709 (1992); *Commonwealth v. Prosdocimo*, 525 Pa. 147, 578 A.2d 1273 (1990). The trial court has broad discretion in phrasing the charge and the instruction will not be found in error if, taken as a whole, it adequately and accurately set forth the applicable law. *Prosdocimo, supra*.

Id. at 430.

Upon inquiry by PCRA counsel, Ms. Hutnick had no answer to PCRA counsel's inquiry as to why no objection was raised to our charge. (Notes of Testimony, July 11, 2016 pp. 30 – 33). If our belief is incorrect and we did misread our justification charge on page 88 of the Trial transcript, the trial counsel should have raised an objection.

Still, we note that under *Commonwealth v. Daniels*, given the totality of our entire

³ Also, we note that the PCRA transcript incorrectly references PCRA counsel asking Mr. Lawser to review the defective jury instruction on "page 48." This was clearly another transcription error, as PCRA counsel actually provided Mr. Lawser with page 88 for his review.

charge, any reasonable person would understand that the Defendant had available to him justification – self-defense – in this case. It had been reviewed and discussed by the Defendant in his testimony, by Defense Counsel and the ADA in their closing arguments, and by the Court in its initial charge and then we addressed it again to the jury's satisfaction when we charged the jury a second time after they came back into the courtroom. Thus, the jury had the charge of aggravated assault properly charged on two occasions. There is no reasonable possibility that this jury found that this Defendant accidentally sliced the victim while he was defending himself and then also found that the elements of aggravated assault had been established, because based on our charge there could be no conviction for the intentional crime of aggravated assault for an accidental injury. We further note that our charge for aggravated assault was, at all times, consistent with the suggested standard charge. Our charge made it clear that if justification existed (the Defendant acted in self-defense), there could be no conviction for aggravated assault. To accept the Defendant's argument that based on the one line on page 88, that the jury could have found that the Defendant acted in self-defense and accidentally sliced the victim, but that the court was directing that the jury find that he committed the crime anyway, is not credible given the entire charging record. We cannot find actual prejudice, because the Defendant cannot establish a reasonable probability that the outcome of the proceedings would have been different, absent the one word error in the trial transcript.

In summary, we believe that the entirety of the charging record established that the jury was provided with an accurate summary of the applicable law, that there is no prejudice in the record which warrants relief, and most importantly, based upon the charge of the court, a reasonable determination of guilt was made.

The Defendant is not entitled to PCRA relief.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'S. G. Baratta', written over a horizontal line.

STEPHEN G. BARATTA, J.

APPENDIX K

PA SUPREME CT., Case # 8 MAP 2014
Denial of Application for Reargument or Encl Banc Reargument

[J-77-2014]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, STEVENS, JJ

COMMONWEALTH OF PENNSYLVANIA, : 8 MAP 2014

Appellee

v.

JACOB MATTHEW CHRISTINE,

Appellant

: Praeipie for Withdrawal of Appearance;
: Motion to Proceed *Pro Se* and *In Forma*
: *Pauperis*; Application for Reconsideration
: or *En Banc* Reargument; Motion for
: Appointment of Counsel in the Event of
: Reargument

ORDER

PER CURIAM

AND NOW, this 26th day of January, 2016, the Praeipie for Withdrawal of Appearance, treated as a Motion to Withdraw Appearance, and the Motion to Proceed *Pro Se* and *In Forma Pauperis* are **GRANTED**. Appellant's *pro se* Application for Reconsideration or *En Banc* Reargument, treated as an Application for Reargument, is **DENIED**. Appellant's *pro se* Motion for Appointment of Counsel in the Event of Reargument is **DENIED AS MOOT**.

Former Chief Justice Castille, Justice Eakin, and former Justices McCaffery and Stevens did not participate in the consideration or decision of this matter.

A True Copy Elizabeth E. Zisk
As Of 1/26/2016

Attest: Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

154

APPENDIX L

PA Supreme Ct. Case # 8 MAP 2014
Affirmance of Lower Ct. Order denying New Trial

[J-77-2014]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, STEVENS, JJ.

COMMONWEALTH OF PENNSYLVANIA, : No. 8 MAP 2014

Appellee

v.

JACOB MATTHEW CHRISTINE,

Appellant

: Appeal from the Order of Superior Court at
: No. 1893 EDA 2011 dated August 30,
: 2013 affirming the Judgment of Sentence
: of the Northampton County Court of
: Common Pleas, Criminal Division, at No.
: CP-48-CR-0003344-2009 dated
: November 24, 2010.

: ARGUED: September 9, 2014

OPINION

MR. JUSTICE EAKIN

DECIDED: October 27, 2015

An equally divided en banc panel of the Superior Court¹ resulted in affirmance of appellant's judgment of sentence for aggravated assault, 18 Pa.C.S. § 2702(a)(1), and recklessly endangering another person (REAP), id., § 2705.² The trial court summarized the facts:

The convictions resulted from an incident that occurred in Northampton County Prison (NCP) on June 8, 2009. On that date, [appellant] and the victim, Thomas Mis[s]ero, were inmates in NCP when a confrontation between the two men occurred in [appellant]'s cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in [appellant]'s cell, [appellant] was alleged to have slashed Mr. Mis[s]ero's neck and ear with a razor blade. Immediately after the attack, corrections officers searched

¹ Then-President Judge Stevens did not participate in the consideration or decision of the en banc decision below.

² Appellant was found not guilty of attempted murder, id., §§ 901(a), 2502(a).

[appellant]'s cell. Only one weapon, a shank, was found in the cell.³ It was hidden within [appellant]'s bed.

Trial Court Opinion, 4/26/11, at 1-2.

Appellant filed a motion in limine to exclude the shank from evidence, arguing it was irrelevant and would cause undue prejudice by confusing the jury, because the Commonwealth agreed the shank was not used in the attack. N.T. Trial, 10/5/10, at 13. The trial court ruled the shank admissible under multiple theories. The court first stated the shank was admissible under the similar-weapon exception⁴ because it showed appellant had "access to a weapon and that he had the ability to fashion a homemade weapon from objects in the prison." Trial Court Opinion, 4/26/11, at 7; see also id., at 6-7 (discussing similar-weapon exception). Additionally, the court found the shank was relevant because it "tend[ed] to show [appellant] had knowledge and familiarity with prison-made weapons and could conceal them in his prison cell ... [and] to rebut [appellant]'s assertion that he was unarmed and acted in self-defense." Id., at 8. The court found the shank's probative value outweighed its prejudicial effect and, therefore, admitted it into evidence. Id.

³ The "shank" was an 18- to 20-inch rod from a metal bookshelf, "with a sharp point and a handle wrapped around it, which is a piece of cloth wrapped real tight so they can have a grip on it." N.T. Trial, 10/6/10, at 38. The Commonwealth conceded the shank was not used in the attack. See, e.g., N.T. Trial, 10/5/10, at 13 ("[The shank] was not the weapon used in this incident. ... We believe a razorblade was used, no razorblade was found. Right after the incident they searched the [appellant]'s cell, what they found was a shank. The Commonwealth intends to introduce the shank even though we do not believe that that is the instrument that was used.").

⁴ The similar-weapon exception, discussed infra, permits the introduction of a weapon not "specifically linked" to the crime if the Commonwealth "lay[s] a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." Commonwealth v. Lee, 662 A.2d 645, 652 (Pa. 1995) (citation omitted).

Appellant filed another pre-trial motion seeking to admit into evidence Missero's post-attack simple-assault conviction.⁵ He argued Missero's conviction was relevant to his self-defense claim because the conviction demonstrated Missero's violent propensities and that he was the initial aggressor. The trial court denied the motion because, as the events leading to Missero's simple-assault conviction occurred after the jailhouse attack, "nothing about the timing or nature of the charges [c]ould establish Mis[s]ero's reputation for violence at the time of the [attack]." Id., at 11-12.

At trial, appellant testified he was reading on his cot when one of his cellmates invited Missero inside. N.T. Trial, 10/6/10, at 44-45. Appellant stated the cellmate and Missero argued about a debt, and the conversation escalated and became confrontational; appellant tried to leave the cell, but Missero was standing in the doorway. Id., at 45. Appellant testified Missero threw a cup of hot coffee at him and a struggle ensued, during which punches were exchanged. Missero produced a razorblade; appellant stated he disarmed Missero, retrieved the razorblade, and accidentally may have cut Missero as he left the cell. Id., at 46, 49. The razorblade was never found.

A jury convicted appellant of aggravated assault and REAP. The trial court sentenced appellant to nine to 20 years imprisonment for aggravated assault and a

⁵ Almost 11 months after the attack, Missero, who was released from prison, was arrested for domestic violence. The prosecutor summarized the incident as follows:

[On] May 1st of 2010, Nazareth Police were called to the American Hotel in Nazareth for a report of an assault. Thomas Missero was outside and his girlfriend was there, Melissa Miller. She claimed that [Missero] had grabbed her and had pushed her. She had minor damage to her ear as a result of falling, I guess, from the push, and that he had threatened her.

N.T. Trial, 10/5/10, at 27. On June 24, 2010, Missero pled guilty to simple assault and REAP. Trial Court Opinion, 4/26/11, at 11.

concurrent one- to two-year sentence for REAP, the entire sentence running consecutive to his current sentence.

Appellant appealed, and a divided three-judge panel of the Superior Court reversed, holding the shank was properly admitted but finding error in refusing to allow appellant to question Missero about his post-attack conviction for simple assault. Commonwealth v. Christine, No. 1893 EDA 2011, unpublished memorandum at 6, 10 (Pa. Super. filed April 24, 2012) (withdrawn). The Superior Court granted the Commonwealth's application for reargument en banc. See Pa.R.A.P. 2543. On reargument, an equally divided en banc panel affirmed the trial court. Commonwealth v. Christine, 78 A.3d 1, 2 (Pa. Super. 2013) (en banc) (per curiam). All eight judges agreed, albeit for different reasons, the trial court did not abuse its discretion by excluding the post-trial conviction.⁶ The court was evenly divided regarding admissibility of the shank.

The OISA held that even though it was not used in the attack, the shank demonstrated appellant's familiarity with and ability to fashion a homemade weapon similar to the one used in the attack. The OISA noted the razorblade and the shank both had the "distinctive characteristic" of having "cloth or tape at the end of the instrument in order to have a handle on it." Id., at 8 (Mundy, J., OISA) (citation

⁶ The Opinion in Support of Affirmance (OISA) reasoned Missero's subsequent conviction was inadmissible because that "offense is not 'similar in nature' to the events that [a]ppellant alleged transpired [during the attack]." Id., at 5 (Mundy, J., OISA) (quoting Commonwealth v. Mouzon, 53 A.3d 738, 741 (Pa. 2012)) (citing N.T. Trial, 10/6/10, at 45-47 (stating Missero threw hot cup of coffee on appellant and punched him multiple times)). The Opinion in Support of Reversal (OISR) opined "the only relevant time period for purposes of proving a victim's ... character is the time period up until the occurrence of the confrontation[.]" and therefore, "Missero's subsequent conviction for an event that transpired after the prison incident should not be used 'to retroactively establish [his] character' at the time of the incident." Id., at 11-12 (Ott, J., OISR) (emphasis and alteration in original) (quoting Trial Court Opinion, 4/26/11, at 13).

omitted). The OISA reasoned that while a generic razorblade is not unique, "it is the intentional and specific modification of the razor and the bookcase's metal rod into makeshift weapons[] that makes both of them distinctive ... [, and it tends to show appellant] 'had the ability to fashion a homemade weapon from objects in the prison.'" Id., at 8-9 (emphasis in original) (citations omitted).

The OISR, citing Commonwealth v. Robinson, 721 A.2d 344 (Pa. 1998), and Commonwealth v. Marshall, 743 A.2d 489 (Pa. Super. 1999), believed the shank was irrelevant because "there was no dispute that [it] was not the weapon used in the fight[, there was testimony ... that razor blades were readily available to inmates at the prison[, and] the shank did not corroborate or rebut any testimony." Christine, at 13 (Ott, J., OISR). The OISR also disagreed that appellant's self-defense claim was rebutted by a different weapon having been found in his bed. Id., at 13 & n.6 (citing Commonwealth v. Williams, 58 A.3d 796, 801 (Pa. Super. 2012)). Moreover, because the Commonwealth's case depended largely on credibility determinations, the OISR concluded the error was not harmless. Id., at 15-16.

We granted allowance of appeal to determine:

(1) Is a conviction for assault, which occurs subsequent to the incident at issue in a criminal trial, admissible to prove the allegedly violent propensities of the victim, where self-defense is asserted and where there is an issue raised as to who was the aggressor?

(2) Did the [t]rial [c]ourt commit error of law or abuse its discretion when it permitted the Commonwealth to admit a "shank" as physical evidence, as well as testimony regarding said shank, in the course of the jury trial in the instant matter?

Commonwealth v. Christine, 86 A.3d 831 (Pa. 2014) (per curiam); see also 42 Pa.C.S. § 724(a).

Both issues concern the admissibility of evidence, which rests within the sound discretion of the trial court, and therefore, we "will reverse [the] trial court's decision ...

only if the appellant sustains the 'heavy burden' to show that the trial court has abused its discretion." Commonwealth v. Bryant, 67 A.3d 716, 726 (Pa. 2013) (citations omitted). The following principle leads to our affirmance of the trial court's rulings:

It is not sufficient to persuade the appellate court that it might have reached a different conclusion[;] it is necessary to show an actual abuse of the discretionary power. An abuse of discretion will not be found based on a mere error of judgment, but rather exists where the court has reached a conclusion [that] overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Id. (alteration in original) (citation and internal quotation marks omitted).

Only relevant evidence is admissible at trial. Pa.R.E. 402. Evidence is relevant if it tends to make a material fact more or less probable than it would be without the evidence. Id., 401. Even if relevant, however, evidence may be excluded "if its probative value is outweighed by ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Id., 403. Appellant's claim of inadvertent injury while exercising the right of self-defense is pertinent to both rulings. As to the first issue, when a defendant asserts a claim of self-defense:

[E]vidence of the victim's prior convictions involving aggression may be admitted, if probative, either (1) to corroborate the defendant's alleged knowledge of the victim's violent character, to prove that the defendant was in reasonable fear of danger, or (2) as character/propensity evidence, as indirect evidence that the victim was in fact the aggressor.

Mouzon, at 741 (citation omitted). The defendant need not have knowledge of the victim's prior conviction if it is being offered to prove the victim was the aggressor. Commonwealth v. Amos, 284 A.2d 748, 752 (Pa. 1971). Thus, evidence of the victim's prior conviction is admissible if the trial court determines it is "similar in nature and not too distant in time...." Mouzon, at 741 (citation omitted).

Relying on Commonwealth v. Beck, 402 A.2d 1371 (Pa. 1979),⁷ appellant first argues the lower courts erred in looking to the facts behind the subsequent conviction to determine whether it was "similar in nature" to the jailhouse attack, as "an assault conviction necessarily implies violent propensity." Appellant's Brief, at 13. In regard to the not-too-distant-in-time element, appellant avers the fact that case law refers to a conviction preceding the present incident does not necessarily limit the admissibility of victim's convictions to prior convictions. Id., at 15 ("Nowhere in either [Beck or Amos] did this Court consider whether a conviction must occur before or after the incident on trial in order to be relevant to violent propensity."). He contends that because Beck and Amos were murder cases, where it was tautologically impossible for the victim to commit a subsequent offense, the prior-conviction language in those opinions is dicta, and thus, precedent does not bar subsequent convictions from being admissible. Id., at 15-16. Therefore, according to appellant, the reasoning of those cases logically applies to subsequent convictions and the trial court erred by "categorically refusing" to admit any subsequent conviction. See id., at 16-17. Finally, appellant submits the trial court's error was not harmless because "the only contested issue at trial was which party was the aggressor[.]" Id., at 18.

The Commonwealth responds by arguing any conviction subsequent to the incident at issue can never be probative that the victim was the aggressor during a previous altercation. Commonwealth's Brief, at 8; see also id., at 6-7 (stating no case

* 7 In Beck, this Court held it was error for the trial court to exclude the victim's three-year-old prior convictions for assault and battery. We stated, "When the prior conviction is for assault and battery, there is no need to compare the facts. Any difference is irrelevant. A conviction for assault and battery necessarily implies a character involving aggressive propensities." Id., at 1373.

law supports "position that subsequent convictions of the victim may be admitted to show alleged violent propensities in a prior conflict" and noting this Court's precedent "specifically refers to 'prior convictions' and 'past crimes'" (emphasis in original) (quoting Mouzon, at 741)).⁸ The Commonwealth asserts logic does not warrant extending the rule to subsequent convictions because "numerous intervening factors ... could have affected the victim's character and propensities going forward." Id., at 8-9.

We hold the Superior Court did not err in determining the trial court acted within its discretion by excluding Missero's subsequent simple-assault conviction. The "decision in each case as to similar nature and remoteness ... rests within the sound discretion of the trial judge." Amos, at 752. While we disagree with appellant's position that the trial court abused its discretion, we do not endorse the claim that a subsequent conviction can never be probative and admissible. Proximity in time is a factor, as is similarity of facts. Here we have 11 months between events, but a strikingly disparate factual scenario.⁹ See Weakley, at 1190 (stating, in context of using prior bad acts to identify defendant, "the importance of a temporal nexus between crimes declines as the

⁸ The Commonwealth argues, while there is a dearth of case law dealing with the admission of subsequent offenses "in any context ..., in those cases where courts have allowed [such] evidence ... to be admitted at trial, [it] has come in under the exceptions listed in [Pa.R.E.] 404(b)(2) and it has related to the defendant, not the victim." Id., at 7-8 (citing Commonwealth v. Reid, 626 A.2d 118, 121 (Pa. 1993); Commonwealth v. Weakley, 972 A.2d 1182, 1188 (Pa. Super. 2009); Commonwealth v. Wattley, 880 A.2d 682, 686-87 (Pa. Super. 2005)).

⁹ In this regard, we overrule Beck insofar as it stands for the bright-line rule that all assault convictions are sufficiently similar to demonstrate the victim's violent propensities. See Beck, at 1373. Instead, trial courts may determine whether the facts are sufficiently similar on a case-by-case basis, and the trial court here did not err in doing so.

similarity of the crimes increases"); see also N.T. Trial, 10/6/10, at 46 (appellant testifying Missero started fight by throwing hot cup of coffee). We uphold the ability of the trial court to duly consider all things appropriate, and find the court here did not abuse its discretion in excluding Missero's conviction. We "reaffirm our confidence in our trial judges to oversee the presentation of evidence 'so that overtly passionate, intentionally biased and inflammatory material is kept out of the courtroom.'" Bryant, at 726 (quoting Commonwealth v. Eichinger, 915 A.2d 1122, 1139 (Pa. 2007)).

Appellant's second issue challenges the admission of the shank found hidden in his bed. Appellant first argues the trial court erred by ruling it admissible under the similar-weapon exception because the Commonwealth conceded the shank did not cause Missero's injuries. See Appellant's Brief, at 23 (quoting Lee, at 652). Instead, the Commonwealth contends the shank was admissible "to show that [a]ppellant 'had possession and control of a weapon similar to the one used to commit his crimes.'" Commonwealth's Brief, at 14 (quoting Williams, at 801).

A weapon not "specifically linked" to the crime is generally inadmissible; however, the fact "the accused had a weapon or implement suitable to the commission of the crime charged ... is always a proper ingredient of the case for the prosecution." Robinson, at 351 (alteration in original) (citation and internal quotation marks omitted). "Any uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence." Commonwealth v. Williams, 640 A.2d 1251, 1260 (Pa. 1994) (citing Commonwealth v. Coccioletti, 425 A.2d 387, 390 (Pa. 1981)). "The only burden on the prosecution is to lay a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." Lee, at

652 (citing Commonwealth v. Thomas, 561 A.2d 699, 707 (Pa. 1989) ("If a proper foundation is laid, the weapon is admissible where the circumstances raise an inference of the likelihood that it was used."))).

The cases cited deal with weapons that might have been used. Possession of a handgun may be relevant even if the particular gun possessed cannot be proven to be the one used in the crime. That it was possessed may allow the inference it could have been used. Here, however, the exception is not in play, as the shank was admittedly not used in the pertinent assault. The theory of the exception is that the weapon possessed could have been the weapon used — that simply is not the case here, and admission under the similar-weapon exception was error.¹⁰ To the extent that cases

¹⁰ This Court's entry into the similar-weapon exception was in Commonwealth v. Ford, 301 A.2d 856 (Pa. 1973), where police believed a 12-inch knife found in the defendant's home was the murder weapon. The victims were stabbed with "a kitchen knife about 12 inches long," and the medical examiner testified the victims' "wounds were caused by a knife with a seven to seven and one-half inch blade." Id., at 857. However, the knife at trial was never positively identified as the one used, and the medical examiner was unable to link it to the crime. Id. We held the knife was admissible because there was a foundation to "justify an inference of the likelihood of [the knife] having been used...." Id., at 858 (quoting United States v. Ramey, 414 F.2d 792, 794 (5th Cir. 1969) (*per curiam*)). Accord Commonwealth v. Edwards, 903 A.2d 1139, 1156-57 (Pa. 2006) ("[T]he Commonwealth need only lay a foundation that would justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." (citation omitted)); Lee, at 652 (same); Thomas, at 707 (same); Commonwealth v. Yount, 314 A.2d 242, 249 (Pa. 1974) ("The knife [found on defendant and admitted at trial] was of a kind that could have inflicted the wounds, even though the prosecution was unable conclusively to demonstrate that the particular knife was the weapon used." (emphasis added)); Commonwealth v. Johnson, 615 A.2d 1322, 1334 (Pa. Super. 1992) (citing Commonwealth v. Fromal, 572 A.2d 711, 724 (Pa. Super. 1990)).

Unfortunately, some appellate decisions have omitted language referring to the need for a foundation justifying an inference the weapon was used in the crime. See, e.g., Williams, 640 A.2d at 1260 (stating weapon admissible "if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime"); Williams, 58 A.3d at 801 (stating similar-weapon exception applies "where 'the accused (continued...)")

affirm use of this exception strictly on the basis of similarity, without an inference they were the weapons used, we reject them.

Of course, admission on other grounds remains possible. In that regard, the trial court also found the shank relevant and admissible to demonstrate appellant's ability to fashion a homemade weapon, and to rebut his self-defense claim. Noting razorblades are regularly handed out to inmates, appellant argues "it does not take much ingenuity to put a piece of paper, tape, or cloth on one end of the blade in order to hold it. [His] ability to do so was not at issue." Appellant's Brief, at 27. However, the Commonwealth laid a foundation of the similarity between the handles on the shank and razorblade, which, as admittedly generic that may be, the trial court found demonstrated appellant's familiarity with and ability to fashion jailhouse weapons, which one cannot say is irrelevant.

Appellant claims "the shank does not rebut his assertion of self-defense except by the improper inference of guilt arising from his alleged possession of an unrelated weapon." Id. Even if another judge would have ruled otherwise, it is "not sufficient to persuade the appellate court that it might have reached a different conclusion[;] it is necessary to show an actual abuse of the discretionary power." Bryant, at 726 (alteration in original) (citation omitted). We find the trial court's decision to admit the shank in order to rebut appellant's self-defense claim was not "manifestly unreasonable,

(...continued)

had a weapon or instrument suitable to the commission of the crime charged"); Commonwealth v. Owens, 929 A.2d 1187, 1191 (Pa. Super. 2007) (citation omitted). But see Edwards, at 1156-57 (citation omitted); Lee, at 652; Thomas, at 707; Yount, at 249; Ford, at 858; Johnson, at 1334 (citation omitted). This exception requires evidence sufficient to allow such an inference. It is not present herein.

or the result of partiality, prejudice, bias[,] or ill-will.” Id. (citation omitted). Therefore, the trial court did not abuse its discretion or commit reversible error by admitting relevant evidence, and the OISA did not err by ruling the shank was relevant under alternative theories of admissibility.

Order affirmed; jurisdiction relinquished.

Former Chief Justice Castille and Former Justice McCaffery did not participate in the decision of this case.

Messrs. Justice Baer and Stevens join the opinion.

Madame Justice Todd files a concurring opinion.

Mr. Chief Justice Saylor files a dissenting opinion.

**[J-77-2014] [MO:Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 8 MAP 2014

Appellee

v.

JACOB MATTHEW CHRISTINE,

Appellant

: Appeal from the Order of the Superior
: Court dated August 30, 2013 at No. 1893
: EDA 2011 affirming the Judgment of
: Sentence of the Court of Common Pleas
: of Northampton County, Criminal Division,
: dated November 24, 2010 at No. CP-48-
: CR-0003344-2009
: ARGUED: September 9, 2014

CONCURRING OPINION

MADAME JUSTICE TODD

DECIDED: October 27, 2015

I join the majority in affirming the Superior Court's holding that the trial court did not abuse its discretion in admitting into evidence the shank found in Appellant's cell for the purpose of rebutting Appellant's claim that he was unarmed and acted in self-defense. I also agree that the trial court properly denied Appellant's motion *in limine* to question the victim regarding his conviction for simple assault which occurred after his jailhouse altercation with Appellant; I write separately, however, because my reasoning on this second issue differs from that of the majority.

As noted by the majority, Appellant was charged with, *inter alia*, aggravated assault based on a jailhouse altercation involving the victim in June 2009, during which the victim allegedly threw hot coffee onto Appellant and punched Appellant several times. Appellant filed a pretrial motion seeking to introduce evidence that the victim was convicted of simple assault based on an incident of domestic violence between the victim and his girlfriend which occurred subsequent to the victim's release from prison,

approximately 11 months after the jailhouse altercation involving Appellant. Appellant argued that the victim's simple assault conviction was relevant to Appellant's self-defense claim because it demonstrated the victim's violent propensities and suggested the victim was the initial aggressor.

In denying Appellant's motion to introduce evidence of the victim's simple assault conviction, the trial court first noted that, pursuant to Pa.R.E. 404(b)(1), evidence of other crimes generally is inadmissible to prove the character of a person in order to show conformity therewith. Trial Court Opinion, 4/26/11, at 12. The trial court acknowledged that this Court has held that a defendant who alleges self-defense may use a deceased victim's criminal record either to corroborate his alleged knowledge of the victim's quarrelsome and violent character to show the defendant reasonably believed his life was in danger; or to prove the allegedly violent propensities of the victim to show the victim was the aggressor. See Commonwealth v. Amos, 284 A.2d 748 (Pa. 1971); Commonwealth v. Beck, 402 A.2d 1371 (Pa. 1979). However, the trial court distinguished those cases on the basis that, unlike the present altercation, they involved a deceased victim. The trial court concluded that Appellant was attempting "to use future events to retroactively establish [the victim's] character," and opined:

the law only allows evidence of prior incidents to prove the character or reputation of the victim at the time of the crime in question. A subsequent conviction arising from events that transpired after the incident involving [Appellant] simply has no bearing on whether [the victim] possessed violent propensities on June 8, 2009.

Id. at 13.

On appeal, the Opinion in Support of Affirmance ("OISA") below recognized the principle expressed in Amos that a defendant alleging self-defense may use a deceased victim's criminal record to prove the alleged violent propensities of the victim to show that the victim was the aggressor, and further recognized that, to be admissible, the

victim's crimes must be "similar in nature and not too distant in time" from the underlying incident. Commonwealth v. Christine, 78 A.3d 1, 5 (Pa. Super. 2013) (OISA) (citing Commonwealth v. Mouzon, 53 A.3d 738, 741 (Pa. 2012)). However, without acknowledging, as the trial court did, that Amos was distinguishable because the victim in the instant case is not deceased, the OISA concluded the trial court in the instant case properly excluded evidence of the victim's simple assault conviction because the offense was not "similar in nature" to the jailhouse altercation during which the victim threw hot coffee onto and punched Appellant. Christine, 78 A.3d at 5 (OISA).

Although the Opinion in Support of Reversal ("OISR") below also concluded the trial court properly precluded introduction of the victim's conviction for simple assault, it did so based on its belief that the victim's simple assault conviction did not show a propensity for violence on June 8, 2009, because the conduct underlying the conviction was then a future event. Thus, the OISR would have affirmed the trial court's ruling because the victim's "subsequent conviction for an event that transpired after the prison incident should not be used 'to retroactively establish [his] character' at the time of the incident." Christine, 78 A.3d at 11-12 (OISR) (citation omitted).

The majority concludes that "the Superior Court did not err in determining the trial court acted within its discretion by excluding [the victim's] subsequent simple-assault conviction," but declines to "endorse the claim that a subsequent conviction can **never** be probative and admissible." Majority Opinion at 8 (emphasis original). The majority further opines: "Proximity in time is a factor, as is similarity of facts. Here we have 11 months between events, but a strikingly disparate factual scenario." Id. The majority proceeds to affirm the trial court based on this factual disparity.

While I agree with the majority that the Superior Court did not err in affirming the trial court's holding, I disagree with its premise. Indeed, there is no case law supporting

introduction of evidence of a victim's **subsequent** conviction to demonstrate the victim's character for purposes of proving the victim was the aggressor. Both Amos and Beck involved evidence of a deceased victim's aggressive behavior which occurred **prior** to their fatal altercations, and this Court has continued to limit introduction of evidence of a victim's convictions to those which occurred **prior** to the incident in which the victim is alleged to have been the aggressor:

[A]s an evidentiary matter, this Court has held that when self-defense is properly at issue, evidence of the victim's **prior** convictions involving aggression may be admitted, if probative, either (1) to corroborate the defendant's alleged knowledge of the victim's violent character, to prove that the defendant was in reasonable fear of danger, or (2) as character/propensity evidence, as indirect evidence that the victim was in fact the aggressor.

Mouzon, 53 A.3d at 741 (emphasis added).

Thus, I would hold that the trial court properly precluded Appellant from introducing evidence of the victim's **subsequent** simple assault conviction to support Appellant's claim of self-defense pursuant to Rule 404(b)(1), and would not engage in an analysis of whether the facts underlying the two altercations were sufficiently similar in nature.

[J-77-2014][M.O. – Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 8 MAP 2014
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court at No. 1893 EDA 2011 dated
	:	August 30, 2013, affirming the judgment
v.	:	of sentence of the Northampton County
	:	Court of Common Pleas, Criminal
	:	Division, at No. CP-48-CR-0003344-
	:	2009 dated 11/24/10
JACOB MATTHEW CHRISTINE,	:	
	:	
Appellant	:	ARGUED: September 9, 2014

DISSENTING OPINION

MR. CHIEF JUSTICE SAYLOR

DECIDED: October 27, 2015

The majority relates that it “uphold[s] the ability of the trial court to duly consider all things appropriate” and finds that the trial court did not abuse its discretion in excluding Thomas Missero’s conviction. Majority Opinion, *slip op.* at 9. The difficulty with this position, however, is that the trial court simply did not consider all things appropriate or exercise any discretion whatsoever. Instead, that court implemented a bright-line rule of law – presently disapproved by the majority – permitting the admission of evidence only of “*prior incidents to prove the character or reputation of the victim at the time of the crime in question.*” *Commonwealth v. Christine*, No. 3344-2009, *slip op.* at 13 (C.P. Northampton Apr. 26, 2011) (emphasis added).

Given the majority’s rejection of the *per se* evidentiary rule implemented by the trial court – and in the absence of any other supporting rationale deriving from that

court's opinion -- I fail to see how the court's decision, in any way, can be credited on its own terms or otherwise denominated as an appropriate exercise of discretion.

In light of the above, the majority's *de novo* evaluation of the overall circumstances presented to determine admissibility appears to represent a form of a *de facto* harmless-error assessment. In my view, however, Missero's conviction, entailing assaultive behavior within eleven months of the events giving rise to Appellant's judgment of sentence, is sufficiently probative of violent propensities that the trial court had the discretionary latitude to admit the evidence. See generally Pa.R.E. 405(b) (sanctioning the admission of evidence of specific instances of conduct to prove a character trait of an alleged victim where evidence of such trait is otherwise admissible per the applicable rule).

In effectively holding to the contrary, the majority not only undertakes to disapprove a salient *per se* facet of a previous decision of this Court by way of a footnote, see Majority Opinion, *slip op.* at 8 n.9 (overturning an aspect of *Commonwealth v. Beck*, 485 Pa. 475, 402 A.2d 1371 (1979)), but also appears to implement an entirely countervailing bright-line approach. The majority does so by effectively suggesting that the subject instance of assaultive behavior on Missero's part -- because it reasonably can be couched as less severe than the conduct of the victim alleged by the defendant and since it occurred approximately eleven months after the prison incident -- simply could not have been admitted into evidence within the trial court's discretionary purview, had discretion actually been exercised.¹ Thus, while the

¹ To the degree to which the majority opinion would allow that the trial court actually had discretion to permit the admission of the evidence of Missero's subsequent assaultive behavior, it would be necessary to apply a materially different approach to the question of harmlessness. See *infra*.

majority purports to afford wide latitude to the discretionary evidentiary decisions of the trial courts, I believe that the effect of its decision, in fact, is constrictive.

Rather than implementing a *de novo* appellate-level evidentiary ruling, I believe that an appropriate harmless-error analysis should center on whether the Commonwealth has demonstrated, beyond a reasonable doubt, that there is essentially no possibility that the evidence of Missero's assaultive behavior which was excluded by the trial court for an erroneous reason could have made a difference in terms of the outcome of Appellant's trial. See generally *Commonwealth v. Howard*, 538 Pa. 86, 100, 645 A.2d 1300, 1307 (1994) (setting forth the standard governing harmless-error review) (quoting *Commonwealth v. Story*, 476 Pa. 391, 409, 383 A.2d 155, 164 (1978)). In this regard, I tend toward the view of Judge Strassburger, expressed in his initial memorandum opinion, as follows:

Appellant and Missero were the only witnesses to testify at trial about who did what in Appellant's cell on June 8, 2009. Missero testified that Appellant ambushed him with the razor blade. Appellant testified that Missero initiated the fight by throwing coffee at him and coming after him with the razor blade. Clearly the evidence of Missero's assaultive character could persuade a jury to believe Appellant's version of events. As such, we cannot deem this to be harmless error.

Commonwealth v. Christine, No. 1893 EDA 2011, *slip op.* at 10 (Pa. Super. Apr. 24, 2012) (withdrawn).

As to the admissibility of the shank found in Appellant's cell, I would forego addressing the issue, because I do not believe that the salient questions have been framed and presented adequately. With respect to the admissibility of other-weapons evidence, I find it important to distinguish between legal and *illegal* weapons, since the latter also comprises evidence of other bad acts subject to the restrictions on

admissibility imposed under Pennsylvania Rule of Evidence 404(b). See Pa.R.E. 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). While this rule admits of exceptions, see Pa.R.E. 404(b)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."), such exceptions are subject to the following express and important caveat: "In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice." *Id.*

Accordingly, while I have little difficulty with the majority's assessment that the shank found under Appellant's bed can be deemed relevant under the minimal relevancy requirements set forth in our evidentiary rules, see Pa.R.E. 401 (providing that "[e]vidence is relevant if . . . it has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence"), I find it noteworthy that Appellant would have been entitled to a more discerning evaluation of probative value versus prejudice, had such question been raised and preserved.²

In this regard, I also observe that our written and common-law evidential rules protect against the use of evidence of specific conduct to prove propensity *against* a criminal defendant, see Pa.R.E. 404(b)(1), 405(b), while affording latitude to defendants

² Relevant to such balancing, I have otherwise expressed my belief that "the presentation of other-weapons evidence is attended by a fairly high risk of undue prejudice, and, therefore, courts should refrain from sanctioning admission absent a strong and legitimate probative purpose justifying its introduction." *Commonwealth v. Hitcho*, ___ Pa. ___, ___, ___ A.3d ___, ___, 2015 WL 5691067, at *36 (Sept. 29, 2015) (Saylor, C.J., concurring). Indeed, I believe that such prejudice is the reason underlying the general prohibition in the first instance.

to use specific-conduct evidence of a victim's propensity for violence in furtherance of self-defense claims. See Pa.R.E. 405(b)(2); *Commonwealth v. Mouzon*, 617 Pa. 527, 532, 53 A.3d 738, 741 (2012).³ These principles are out of focus in the present case both since the trial court's decision was erroneous in several material respects, see Majority Opinion, *slip op.* at 10-12, and because its effect was to allow for the admission of specific-conduct-type evidence against the defendant (his constructive possession of a shank) while excluding such evidence relevant to the victim (Missero's assault conviction). In the circumstances, I do not find the other-weapons aspect of the appeal to present a suitable context for adding clarity to the jurisprudence.

In summary, I would reverse the order of the Superior Court, since I agree with the majority that the trial court's actual evidentiary ruling concerning the admissibility of the victim's assault conviction was predicated on an erroneous rationale. Further, to the degree that the question of harmless error resides within the appropriate scope of this appeal, I conclude that the Commonwealth has not satisfied its burden in this regard.

³ Although there is a lack of parity in these principles as between the interests of criminal defendants and the Commonwealth, only the liberty (and, sometimes, the lives) of the former are at stake in criminal proceedings.

Parenthetically, the evidentiary rules do establish some degree of equilibrium when a defendant seeks to prove a character trait of an alleged victim by permitting the Commonwealth to introduce reputation evidence and engage in cross-examination relative to the same trait of the defendant. See Pa.R.E. 404(a)(2)(B)(ii), 405(a). The rules, however, simply do not operate in this fashion relative to evidence of specific instances of conduct. See Pa.R.E. 405(b).

APPENDIX M

Superior Ct. Of Pennsylvania, Case # 1893 EDA 2011
Order Affirming Trial Ct. Order on Enc Banc Reargument
(Evenly divided decision—Op. In Support of Reversal Pg. 198)

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JACOB MATTHEW CHRISTINE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1893 EDA 2011

Appeal from the Judgment of Sentence November 24, 2010
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003344-2009

PER CURIAM ORDER

FILED AUGUST 30, 2013

The Court, being evenly divided, the Order of the Court of Common Pleas is affirmed.

OPINION IN SUPPORT OF AFFIRMANCE BY MUNDY, J. Bowes, J. and Shogan, J. join. Gantman, J. concurs in the result.

OPINION IN SUPPORT OF REVERSAL BY OTT, J. Ford Elliott, P.J.E., Panella, J. and Lazarus, J. join.

Stevens, P.J. did not participate in the consideration or decision of this case.

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JACOB MATTHEW CHRISTINE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1893 EDA 2011

Appeal from the Judgment of Sentence November 24, 2010
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003344-2009

BEFORE: STEVENS, P.J.,* FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J.,
PANELLA, J., SHOGAN, J., LAZARUS, J., MUNDY, J., and OTT, J.

OPINION IN SUPPORT OF AFFIRMANCE BY MUNDY, J.:

Appellant, Jacob Matthew Christine, appeals from the November 24, 2010 aggregate judgment of sentence of nine to 20 years' imprisonment imposed after a jury found him guilty of aggravated assault and recklessly endangering another person (REAP).¹ After careful review, we would affirm.

The trial court summarized the underlying facts of this case as follows.

The convictions resulted from an incident that occurred in Northampton County Prison (NCP) on June 8, 2009. On that date, [Appellant] and the victim, Thomas Missero, were inmates in NCP when a confrontation between the two men occurred in [Appellant]'s cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in [Appellant]'s cell, [Appellant] was alleged to have

* President Judge Stevens did not participate in the consideration or decision of this case.

¹ 18 Pa.C.S.A. §§ 2702(a)(1) and 2705, respectively.

slashed Mr. Missero's neck and ear with a razor blade. Immediately after the attack, corrections officers searched [Appellant]'s cell. Only one weapon, a shank, was found in the cell. It was hidden within [Appellant]'s bed.

Interestingly, [Appellant] testified at trial that the victim came into his cell armed with a razor blade and attacked [Appellant]. [Appellant] claimed that he successfully disarmed the victim, picked up the razor from the floor and then unintentionally sliced the victim when the victim continued to threaten [Appellant]. Even though [Appellant] was the last person to have control of the weapon, it has never been located. [The trial court] also note[d] that there were no injuries suffered by [Appellant].

Trial Court Opinion, 4/26/11, at 1-2.

On July 14, 2009, the Commonwealth charged Appellant with attempted criminal homicide², aggravated assault and REAP. Appellant proceeded to a three-day jury trial. On October 7, 2010, the jury found Appellant guilty of aggravated assault and REAP, but found him not guilty of attempted criminal homicide. On November 24, 2010, the trial court imposed an aggregate sentence of nine to 20 years' imprisonment.³ On December 6, 2010, Appellant filed a timely post-sentence motion.⁴

² 18 Pa.C.S.A. § 901(a) (to commit 18 Pa.C.S.A. § 2501(a)).

³ The trial court sentenced Appellant to nine to 20 years' imprisonment for the aggravated assault charge and a concurrent term of one to two years' imprisonment for REAP. The aggregate sentence was to run consecutively to the prison term Appellant was already serving for unrelated offenses.

⁴ We note the final day for Appellant to timely file his post-sentence motion was December 4, 2010, which fell on a Saturday. *See* Pa.R.Crim.P. 720(A)(1) (stating that "a written post-sentence motion shall be filed no later than 10 days after imposition of sentence[]"). When computing a filing period "[i]f the last day of any such period shall fall on Saturday or Sunday ... such day shall be omitted from the computation." 1 Pa.C.S.A. § 1908.

Appellant's post-sentence motion was denied on April 26, 2011. On May 5, 2011, Appellant filed a timely notice of appeal.⁵

On April 24, 2012, a divided panel of this Court vacated Appellant's judgment of sentence and remanded the case for a new trial, concluding that the trial court abused its discretion in not permitting Appellant to introduce evidence of Missero's subsequent criminal convictions. On May 21, 2012, the Commonwealth filed a petition for reargument en banc. This Court granted the Commonwealth's petition on July 10, 2012, and the previous panel memorandum was withdrawn.

In his substituted brief on reargument, Appellant raises three issues for our review.

1. Did the trial court abuse its discretion when it refused to allow Appellant to present testimony at trial regarding a criminal assault in the alleged victim's criminal record?
2. Did the trial court abuse its discretion when it permitted the Commonwealth to introduce a "shank" as physical evidence as well as testimony regarding said shank in the course of the jury trial in the instant matter?
3. Was the sentence imposed contrary to the norms which underlie the sentencing process and does this case involve circumstances where the application of the sentencing guidelines was clearly unreasonable?

Appellant's Brief at 4.

Therefore, Appellant's deadline to file a timely post-sentence motion was Monday, December 6, 2010.

⁵ Appellant and the trial court have complied with Pa.R.A.P. 1925.

In Appellant's first two issues on appeal, he challenges the trial court's rulings regarding the admission of evidence at trial. We begin by noting our well-settled standard of review over such matters.

Admission of evidence ... rests within the sound discretion of the trial court, which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury. We reaffirm our confidence in our trial judges to oversee the presentation of evidence so that overtly passionate, intentionally biased and inflammatory material is kept out of the courtroom. We will reverse a trial court's decision as to admissibility of evidence only if [Appellant] sustains the heavy burden to show that the trial court has abused its discretion.

Commonwealth v. Bryant, 67 A.3d 716, 726, (Pa. 2013) (citations and internal quotation marks omitted).

First, Appellant avers that the trial court erred in precluding him from "questioning Missero regarding [a] simple assault charge" which "Missero had plead [sic] guilty to, and was sentenced for." Appellant's Brief at 9. Appellant further argues that "[t]his cross examination would have substantially proven the 'alleged violent propensities of the victim to show that the victim was in fact the aggressor.'" ***Id.*** at 10-11, quoting ***Commonwealth v. Carbone***, 707 A.2d 1145, 1154 (Pa. Super. 1998), appeal discontinued, 727 A.2d 1116 (Pa. 1998). The Commonwealth counters, and the trial court concluded, that "[a] subsequent act of violence cannot be considered an indicator of someone's propensity for violence in

the past." Commonwealth's Brief at 16; **see also** Trial Court Opinion, 4/26/11, at 13 (stating, "[a] subsequent conviction arising from events that transpired after the incident involving [Appellant] simply has no bearing on whether Misero [sic] possessed violent propensities on June 8, 2009[.]") (footnote omitted).

Our Supreme Court has held that "as far back as 1884, [Pennsylvania courts have] permitted the introduction of character evidence to prove the decedent's violent propensities, where self-defense is asserted and where there is an issue as to who was the aggressor." **Commonwealth v. Dillon**, 598 A.2d 963, 965 (Pa. 1991), citing **Alexander v. Commonwealth**, 105 Pa. 1, 9 (1884). Further, our Supreme Court has specifically held that the victim's criminal record can be admissible on two distinct grounds.

(1) to corroborate [the defendant's] alleged knowledge of the victim's quarrelsome and violent character to show that the defendant reasonably believed that his life was in danger; or (2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor.

...

Nor do we mean to suggest that our decision here abandons the rule enunciated [sic] in [**Abernethy v. Commonwealth**, 101 Pa. 322 (1882)] that the defendant must first establish a foundation of his knowledge of the victim's convictions before he can introduce the corroboratory record when the defendant is seeking to prove his belief that he was in imminent danger of bodily harm. Here again, the determination whether or not the defendant demonstrates a sufficiently

particular knowledge of the victim's record rests within the sound discretion of the trial court.

Commonwealth v. Amos, 284 A.2d 748, 303, 305 (Pa. 1971). We highlight that our Supreme Court held that a defendant must lay a foundation for his knowledge of the victim's convictions only when he "is seeking to prove his belief that he was in imminent danger of bodily harm." **Id.** at 305. It therefore logically follows that a defendant need not establish knowledge of the victim's record in order "to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor." **Id.** at 303. In every case, the defendant is also required to show that the convictions sought to be introduced "are similar in nature and not too distant in time" from the underlying incident. **Commonwealth v. Mouzon**, 53 A.3d 738, 741 (Pa. 2012). Because Appellant wished to use Missero's subsequent conviction to establish the second **Amos** ground as opposed to the first, Appellant was not required to show specific knowledge of the conviction. **See Amos, supra** at 303, 305.

Applying **Amos** to the case sub judice, we conclude the trial court did not abuse its discretion. The facts stemming from Missero's subsequent conviction were as follows.

[Defense Counsel]: May 1st of 2010, Nazareth Police were called to the American Hotel in Nazareth for a report of an assault. Thomas Missero was outside and his girlfriend was there, Melissa Miller. She claimed that [Missero] had grabbed her and pushed her. She had minor damage to her ear as a

result of falling, I guess, from the push, and that he had threatened her.

N.T., 10/5/10, at 27. As a result, Missero pled guilty to simple assault and REAP. **Id.** at 27-28. The trial court concluded that Missero's subsequent convictions "[do not] really demonstrate violent propensities." **Id.** at 29. We agree. In our view, this offense is not "similar in nature" to the events that Appellant alleged transpired on June 8, 2009. **Mouzon, supra; see also** N.T., 10/6/10, at 45-47 (stating that Missero threw a hot cup of coffee on Appellant and punched him multiple times). As a result, we conclude that the trial court did not abuse its discretion in excluding evidence regarding Missero's subsequent convictions. **See Bryant, supra.** As a result, Appellant's first claim fails.

In his second issue, Appellant avers that the trial court abused its discretion in denying his motion in limine to preclude the Commonwealth from introducing the shank found in Appellant's bed and testimony regarding it. Appellant's Brief at 13. Appellant argues that the shank should have been excluded given the Commonwealth's concession that the shank was not the weapon used in the underlying incident. **Id.** The Commonwealth counters that the shank was relevant to show "that [Appellant] had a weapon similar to the one used in the perpetration of the crime." Commonwealth's Reply Brief at 9.

Pennsylvania Rule of Evidence 401 addresses relevancy and provides as follows.

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Pa.R.E. 401; **see also** Pa.R.E. 402 (stating, "[a]ll relevant evidence is admissible, except as otherwise provided by law ... [but e]vidence that is not relevant is not admissible[']"). In Pennsylvania, a weapon that "cannot be specifically linked to a crime" is generally inadmissible at trial. **Commonwealth v. Robinson**, 721 A.2d 344, 351 (Pa. 1998), cert. denied, **Robinson v. Pennsylvania**, 528 U.S. 1082 (2000). However, this Court has consistently noted an exception to this rule.

A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime.

Commonwealth v. Williams, 58 A.3d 796, 801 (Pa. Super. 2012), quoting **Commonwealth v. Owens**, 929 A.2d 1187, 1191 (Pa. Super. 2007), appeal denied, 940 A.2d 364 (Pa. 2007).

In **Williams**, the appellant was charged and convicted of second-degree murder stemming from a shooting that began outside a bar in Philadelphia. **Id.** at 797. As part of its case, the Commonwealth introduced

into evidence a "photograph they discovered on [the a]ppellant's phone, which showed [the a]ppellant posing with a Walther P-38 9-mm pistol." **Id.** at 801. The photograph was admitted despite the fact that the Commonwealth's ballistics expert testified "upon examining the bullets and casings found at the crime scene, [the Commonwealth's expert] determined that the victim was not killed with a Walther P-38, but more likely, a .380 semi-automatic weapon." **Id.** On appeal, this Court upheld the admission of the photograph, even though the Commonwealth did not believe the gun in the photograph was the murder weapon.

In this case, the photograph of Appellant proudly displaying a P-38 Walther nearly five days before the murder was relevant to show that Appellant had possession and control of a weapon similar to the one used to commit his crimes. Appellant claims that [a friend] gave the P-38 Walther firearm to him "to hold" immediately before the shooting. Admission of the photograph challenges Appellant's claim that this firearm did not belong to him and shows Appellant had access to a firearm similar to the one witnesses claimed he was holding when threatening the victim on the night of the murder.

Id. As a result, we concluded that the trial court did not abuse its discretion in admitting the photograph. **Id.**

In this case, Thomas Missero, the victim, testified about the weapon used to attack him, and claimed that it was not his weapon.

Q: Did you see anything in [Appellant]'s hand?

A: I didn't see nothing in his hand until afterward, I realized I was cut, and it was a modified razorblade lying on the ground covered in blood.

Q: You saw the razorblade on the ground in blood?

A: Yes, I did.

Q: Can you describe that for the jury, please?

A: It was a razor made out of like a regular normal Bic Razor that you get from the dollar store, they issue them in the prison. The blade was taken out, and at the end it had paper or tape wrapped around it with the blade sticking out maybe an inch.

Q: How long was the taped part you saw?

A: Just the taped part was about 2 inches.

Q: And that was attached to the razorblade itself?

A: Yes.

Q: And you only saw this on the ground?

A: Yes.

Q: Did you have a razorblade on you?

A: No, I did not.

N.T., 10/5/10, at 63-64 (emphasis added).

However, Appellant presented a different version of events. At the outset, in her opening statement, defense counsel argued to the jury that Appellant acted in self-defense and claimed that it was actually Missero that had the razorblade and brought it into the cell. *See id.* at 51 (stating to the jury that Appellant "was minding his own business when Thomas Missero

came into his cell, there's a hot cup of coffee thrown on him, punches go, and then he sees a razorblade coming at him, and Tom Missero takes a slice at him, doesn't hit him[']"). Appellant later testified in his own defense as to his version of events.

Q: What happened [when you tried to exit the cell]?

A: I never actually made it outside of the cell. When I saw [Missero], he made eye contact with me, I noticed he had a hot cup of coffee in his hand, a steaming hot cup of coffee. I don't know what was in his other hand, **I don't know if he had a razor in his hand or concealed some other place in his body.**

...

Q: Was [Missero] saying anything to you?

A: He didn't say anything to me. As soon as he saw me, he ran towards me, I took some steps back into the cell, retreating, wondering if he was actually going to enter the cell and attack me. He did. He ran into the cell, he threw the whole cup of coffee at me, luckily he missed me with that, because that probably might have blinded me and I would have really got hurt then. We kind of engaged in a scuffle. I'm scared. I know he means business. I know he's trying to hurt me. I'm afraid for my life. We exchanged some punches, we exchanged some blows. I kind of covered my face ... to protect myself. When I brought my hands down, **I noticed he had a razorblade in his hand and took a swipe at me.** We were probably like in the middle area of the cell by now. I kicked him. Luckily, he fell and dropped the razorblade. I saw the razorblade, like at his side, I got him to the ground and pulled him away from the blade. I ran out and I picked it up. **But he had brought the razorblade** -- he had brought a hot cup of coffee and it was his

intention to throw the hot cup of coffee at me, blind me and cut me.

N.T., 10/6/10, at 45-47 (emphases added).

The Commonwealth provided the testimony of Corrections Officer Nathan Picone. Officer Picone testified that he helped search Appellant's cell immediately after the incident and discovered the shank in question.

Q: What did you do once you got to [Appellant's cell]?

A: Once we noticed all of the bloody towels and blood splattering in the cell, we then took the inmates housed in cell 3 and split them up. We split them up in different rooms around the block. The lieutenant then went and talked to each one individually.

Q: Would that be Lieutenant Lamont?

A: That would be Lieutenant Lamont. I, myself, and a few other officers then proceeded to shake down cell number 3.

Q: And did you find anything?

A: Yes, I did. ... I personally found in what was later identified as [Appellant]'s bed, there was a small rip in the plastic cover of the bed. I ripped it open and I found a large metal object ... with a sharp point and a handle wrapped around it, which is a piece of cloth wrapped real tight so they can have a grip on it. We identified that as a shank.

Q: ... [F]or the record, could you say how long [the shank] was?

A: 18 to 20 inches.

...

Q: ... [W]ere you able to determine how [Appellant] got th[e] metal rod [used in the shank]?

A: Yes, there was a metal bookcase in the, I forget the name of the room. They have a room where they do church services or when they want to watch movies on T.V.

Q: Is that the multipurpose room?

A: That would be the multipurpose room. In that room there is a bookcase, you know several stacks of books on it, that rod was, in particular, one of the many rods that the books go on.

Id. at 37-40.

Appellant avers that the shank and testimony surrounding it were irrelevant and inadmissible because the Commonwealth "specifically indicate[d] ... to [the trial court] on the record that '[i]t was not the weapon used in this incident.'" Appellant's Brief at 15, quoting N.T., 10/5/10, at 12. While the shank was not the weapon used in this case, it does not automatically follow that the shank was not relevant. The Commonwealth avers that although the razor in the fight and the shank had different blade lengths, the two weapons were nevertheless similar. Commonwealth's Reply Brief at 9. Specifically, the Commonwealth argues that "both the razor and the shank had cloth or tape at the end of the instrument in order to have a handle on it." **Id.** Indeed, the testimony at trial does reveal this distinctive characteristic of both weapons. **Compare** N.T., 10/5/10, at 63 (Missero stating, "[the razor] blade ... at the end it **had paper or tape wrapped around it ...**"), **with** N.T., 10/6/10, at 37 (Officer Picone describing the

Q: ... [W]ere you able to determine how [Appellant] got th[e] metal rod [used in the shank]?

A: Yes, there was a metal bookcase in the, I forget the name of the room. They have a room where they do church services or when they want to watch movies on T.V.

Q: Is that the multipurpose room?

A: That would be the multipurpose room. In that room there is a bookcase, you know several stacks of books on it, that rod was, in particular, one of the many rods that the books go on.

Id. at 37-40.

Appellant avers that the shank and testimony surrounding it were irrelevant and inadmissible because the Commonwealth "specifically indicate[d] ... to [the trial court] on the record that '[i]t was not the weapon used in this incident.'" Appellant's Brief at 15, quoting N.T., 10/5/10, at 12. While the shank was not the weapon used in this case, it does not automatically follow that the shank was not relevant. The Commonwealth avers that although the razor in the fight and the shank had different blade lengths, the two weapons were nevertheless similar. Commonwealth's Reply Brief at 9. Specifically, the Commonwealth argues that "both the razor and the shank had cloth or tape at the end of the instrument in order to have a handle on it." **Id.** Indeed, the testimony at trial does reveal this distinctive characteristic of both weapons. **Compare** N.T., 10/5/10, at 63 (Missero stating, "[the razor] blade ... at the end it **had paper or tape wrapped around it ...**"), **with** N.T., 10/6/10, at 37 (Officer Picone describing the

shank as "a sharp point and [having] a handle wrapped around it, which is a **piece of cloth wrapped real tight** so they can have a grip on it[]") (emphases added).

In our view, the distinctive manner in which Appellant created handles on both weapons for easy gripping makes the shank "a weapon similar to the one used in the perpetration of the crime," which is what our cases require. **Williams, supra**. We note that Missero did testify that razor blades were issued to inmates at the prison. **See** N.T., 10/5/10, at 65. While a generic razor blade, the main component of the weapon in this case, is not unique, it is the **intentional and specific modification** of the razor and the bookcase's metal rod into makeshift weapons, that makes both of them distinctive. **See id.** at 64; N.T., 10/6/10, at 39-40.

Additionally, as noted above, Appellant's theory of the case was that the razorblade was not his weapon, but rather was Missero's weapon. **See** N.T., 10/6/10, at 46. Therefore, the possession of the razorblade was also at issue in the trial.⁶ The shank therefore "tend[ed] to make [the] fact more

⁶ Although Appellant relies on our Supreme Court's decision in **Robinson**, we find that case to be distinguishable. In **Robinson**, the Commonwealth introduced a Bulldog 44 SPL revolver even though "there was never any doubt that the murder weapon was a 9 millimeter gun." **Robinson, supra** at 352. The trial court concluded that the revolver was relevant "in order to support the testimony that appellant was carrying the gun in his waistband at the time of the murder." **Id.** Our Supreme Court disagreed and concluded that the revolver did not tend to establish any material fact in the case.

[T]here was never any doubt that the murder weapon was a 9 millimeter gun, thus the introduction of the .44 was not relevant to the inquiry of whether the appellant had a weapon or implement suitable to commit the instant crime. In addition, Tara Hodge testified that appellant pulled a gun out of his

142

... probable" that Appellant "had the ability to fashion a homemade weapon from objects in the prison." Pa.R.E. 401; Trial Court Opinion, 4/26/11, at 7. The fact that the Commonwealth and Appellant agree that the shank was not the weapon used to attack Missero does not suddenly render the shank non-probative. **See Williams, supra; Commonwealth v. Kubis**, 978 A.2d 391, 395 (Pa. Super. 2009) (concluding that knives found in the appellant's car were relevant at trial for robbery to show that the appellant was more likely to have threatened to stab the victim even though "no knife was physically produced during the robbery"); **Commonwealth v. Boaster**, 863 A.2d 588, 591, 592 (Pa. Super. 2004) (permitting admission of a discarded handgun into evidence to show that the appellant "readily obtained handguns of the same caliber used in the murder" even though the "Commonwealth conceded at trial that the discarded gun was not the murder weapon"), appeal denied, 876 A.2d 392 (Pa. 2005).

Based on the aforementioned considerations, we conclude that the shank was relevant and admissible at trial. We further agree with the trial court that the probative value of the shank was not outweighed by its prejudicial effect. **See** Trial Court Opinion, 4/26/11, at 8; Pa.R.E. 403. As a

sweats and shot her; and that the gun that appellant used was black and silver. This testimony was not disputed. We fail to see how testimony regarding where appellant had the gun on his person was of any value to the instant inquiry.

Id. However, in this case, there **was** a factual dispute as to whether or not Appellant had the razorblade on his person. **See** N.T., 10/5/10, at 64; N.T., 10/6/10, at 46-47. Therefore, testimony regarding Appellant's possession of similar makeshift weapons was certainly of "value to the instant inquiry." **Robinson, supra** at 352.

result, the trial court did not abuse its discretion by allowing the Commonwealth to introduce it into evidence. **See Bryant, supra.** Therefore, Appellant is not entitled to relief on this issue.

In his final issue, Appellant avers that the sentence imposed by the trial court was "manifestly excessive" and unreasonable. Appellant's Brief at 18. Our standard of review in assessing whether a trial court has erred in fashioning a sentence is well settled.

[T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. [A]n abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. ... An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous.

Commonwealth v. Provenzano, 50 A.3d 148, 154 (Pa. Super. 2012) (citation omitted). We observe that Appellant does not challenge the legality of his sentence, but rather his argument goes to the discretionary aspects of his sentence. Appeals regarding the discretionary aspects of sentencing are not reviewable as a matter of right. **Commonwealth v. Mastromarino**, 2 A.3d 581, 585 (Pa. Super. 2010) (citation omitted), appeal denied, 14 A.3d 825 (Pa. 2011). In order for this Court to review the discretionary aspects of his sentence, Appellant must comply with the following.

[W]e must ... determine: (1) whether the appeal is timely; (2) whether Appellant preserved his issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code.

Commonwealth v. Carrillo-Díaz, 64 A.3d 722, 725 (Pa. Super. 2013) (citation omitted).

Instantly, Appellant has filed a timely notice of appeal, as well as a timely post-sentence motion, and Appellant has included a Rule 2119(f) statement in his brief. Therefore, the only remaining issue before we may address the merits of Appellant's claim is whether he has raised a substantial question for our review.

"A substantial question will be found where the defendant advances a colorable argument that the sentence imposed is either inconsistent with a specific provision of the [sentencing] code or is contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. Booze***, 953 A.2d 1263, 1278 (Pa. Super. 2008) (citation omitted), appeal denied, 13 A.3d 474 (Pa. 2010); ***see also*** 42 Pa.C.S.A. § 9781(b). "We determine whether a particular case raises a substantial question on a case-by-case basis." ***Commonwealth v. Corley***, 31 A.3d 293, 297 (Pa. Super. 2011) (citation omitted). "Additionally, we cannot look beyond the statement of questions presented and the prefatory 2119(f) statement to determine whether a substantial question exists." ***Provenzano, supra***.

In his Rule 2119(f) statement, Appellant raises the following issue.

Under the circumstances of the instant matter, specifically that a dispute arose in the prison between inmates, that there is significant disagreement as to the circumstances under which the alleged assault occurred, along with numerous other factors, the sentence in the instant matter is manifestly unreasonable and creates a substantial question as to the appropriateness of the sentence imposed to warrant [a]ppellate review.

Appellant's Brief at 8. We note that a generic claim that a sentence is excessive does not raise a substantial question for our review. **See Commonwealth v. Harvard**, 64 A.3d 690, 701 (Pa. Super. 2013) (stating, "a bald assertion that a sentence is excessive does not by itself raise a substantial question justifying this Court's review of the merits of the underlying claim[]"). Additionally, this Court has repeatedly held that an allegation that the trial court failed to consider particular circumstances or factors in an appellant's case go to the weight accorded to various sentencing factors and do not raise a substantial question. **Commonwealth v. Griffin**, 65 A.3d 932, 936 (Pa. Super. 2013); **accord Commonwealth v. Cannon**, 954 A.2d 1222, 1228-1229 (Pa. Super. 2008). Therefore, Appellant has not raised a substantial question for our review. **See Carrillo-Díaz, supra.**

Based on the foregoing, we conclude that the trial court did not abuse its discretion in admitting the shank found in Appellant's bed, nor in refusing to permit evidence regarding Missero's subsequent conviction. We further

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JACOB MATTHEW CHRISTINE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1893 EDA 2011

Appeal from the Judgment of Sentence November 24, 2010
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003344-2009

BEFORE: STEVENS, P.J.,* FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J.,
PANELLA, J., SHOGAN, J., LAZARUS, J., MUNDY, J., and OTT, J.

OPINION IN SUPPORT OF REVERSAL BY OTT, J. **FILED AUGUST 30, 2013**

Although I agree that the trial court properly precluded cross examination questioning of the victim, Thomas Missero, regarding his simple assault conviction, I write separately to express my view that the conviction was not relevant because the conviction and underlying conduct occurred subsequent to the prison incident. Furthermore, I cannot agree that the trial court properly allowed the shank found in Christine's bed into evidence,

* President Judge Stevens did not participate in the consideration or decision of this case.

where there was no dispute that a razor blade was used in the incident and there was evidence that razors were readily available in the prison.¹

In ***Commonwealth v. Amos***, 284 A.2d 748 (Pa. 1971), the Pennsylvania Supreme Court held that when self-defense is properly at issue, the victim's record is admissible "either (1) to corroborate [the defendant's] alleged knowledge of the victim's quarrelsome and violent character to show that the defendant reasonably believed that his life was in danger; or (2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor." ***Id.*** at 751 (footnote omitted). However, whereas ***Amos*** involved evidence of the decedent's **prior** aggressive behavior, at issue in this case is the victim's, Missero's, **subsequent** simple assault conviction for **post-incident** conduct.

I am of the view that a subsequent conviction for post-incident conduct that is offered to prove the character of a victim is irrelevant, since the conviction does not establish either of the two grounds set forth in ***Amos, supra.***

As discussed, Missero's June 24, 2010 simple assault conviction resulted from an incident, occurring on May 1, 2010, in which Missero grabbed and pushed his girlfriend outside of a hotel, and she sustained

¹ Based on my view that the trial court erred in admitting the shank and a new trial is therefore warranted, I do not address Christine's discretionary aspects of sentencing claim.

minor injuries. Since the conviction and underlying offense occurred after the June 8, 2009 prison incident, there would be no basis for Christine to have knowledge of Missero's aggressive behavior. Moreover, Missero's conviction does not show a propensity for violence on June 8, 2009, because Missero's May 1, 2010 conduct was a future event.

In my view, the only relevant time period for purposes of proving a victim's, in this case, Missero's, character is the time period up until the occurrence of the confrontation. Therefore, I would affirm the trial court's ruling on the basis that Missero's subsequent conviction for an event that transpired after the prison incident should not be used "to **retroactively** establish [his] character" at the time of the incident. Trial Court Opinion, 4/26/2011, at 13.

Turning to the second issue, Christine's claim that the trial court improperly allowed introduction of the shank into evidence, I note that Pennsylvania Rule of Evidence 401 defines "relevant evidence" as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. "Evidence that is not relevant is not admissible." Pa.R.E. 402. It merits emphasis that in this case the

Commonwealth conceded that the shank was not the weapon used to injure Missero.²

In ***Commonwealth v. Robinson***, 721 A.2d 344 (Pa. 1998), cert. denied, 528 U.S. 1082 (2000), the Pennsylvania Supreme Court addressed the issue of the admissibility of a weapon that is not the weapon used in the crime, explaining:

The general rule is that where a weapon cannot be specifically linked to a crime, such weapon is not admissible as evidence. However, there is an exception to this general rule where the accused had a weapon or implement suitable to the commission of the crime charged. [This weapon] is always a proper ingredient of the case for the prosecution.

Id., 721 A.2d at 351 (quotations and citations omitted). The ***Robinson*** Court determined that the exception allowing the admission of a weapon of the accused "suitable to the commission of the crime charged" did not apply where the admitted evidence consisted of photographs of the defendant holding a gun that "in no way was implicated as the possible murder

² **See** N.T., 10/5/2010, 45-46 (Commonwealth's opening statement) ("The defendant's cell was searched right after the incident. They did not find the razor that caused this incident or caused the slicing, what they did find was another instrument that had been fashioned by the defendant."). **See also, id.** at 12 (in-chambers discussion regarding Christine's motion in limine) ("THE COURT: ... Was there a shank that was recovered that was alleged to be the weapon in this incident? [COMMONWEALTH'S ATTORNEY]: It was not the weapon used in this incident ... We believe a razorblade was used, no razorblade was found. Right after the incident they searched [Christine's] cell, what they found was a shank. The Commonwealth intends to introduce the shank even though we do not believe that that is the instrument that was used.").

weapon." *Id.* at 351. **Robinson** also found that a .44 caliber revolver was not relevant, as the murder weapon was a 9 millimeter gun. *Id.* at 352.

Later, in **Commonwealth v. Marshall**, 743 A.2d 489 (Pa. Super. 1999), appeal denied, 757 A.2d 930 (Pa. 2000), a panel of this Court considered the admissibility of a weapon that had been in police custody at the time of the crime, and could not have been the weapon the defendant used in the crime. The **Marshall** Court stated: "Herein, appellant's gun was possessed by the police at the time of the homicide. Therefore, it was not relevant to show that appellant possessed the means to commit the murder. Moreover, the gun was clearly prejudicial since it was the same caliber as the murder weapon." *Id.*, 743 A.2d at 493.

In the present case, the shank introduced into evidence at trial was a "large metal object ... with a sharp point and a handle wrapped around it, which [was] a piece of cloth[.]" N.T., 10/6/2010, at 38. It was approximately "18 to 20 inches" long.³ *Id.* However, both Christine and Missero testified that the weapon involved in the confrontation was a razor blade. Missero testified that when he realized he was cut, he saw "a modified razor blade laying on the ground covered in blood." N.T., 10/5/2010 at 63-64. He described the weapon that caused his injuries as

³ The metal rod used to fashion the shank was taken from a metal bookcase in a common room of the prison. N.T., 10/6/2010, at 39.

"a razor made out of like a [] normal Bic Razor that you get from the [D]ollar [S]tore, they issue them in prison. The blade was taken out, and at the end it had paper or tape wrapped around it with the blade sticking out maybe an inch." **Id.** at 64. "[T]he taped part was about 2 inches." **Id.** Christine, in his defense, also claimed the weapon was a razor blade, stating that Missero had attacked him with "a very small razorblade, typical razorblade you find and something you shave your face with, about ... an inch long." N.T., 10/6/2010, at 48.

Guided by **Robinson** and **Marshall**, I am of the view that the shank should not have been admitted into evidence. Here, there was no dispute that the shank was not the weapon used in the fight. Further, there was testimony in this case that razor blades were readily available to inmates at the prison.⁴ Moreover, the shank did not corroborate or rebut any testimony. While the trial court opined that the presence of a shank in Christine's bed "tends to rebut [Christine's] assertion that he was unarmed and acted in self-defense,"⁵ I cannot agree that Christine's self-defense

⁴ **See** N.T., 10/5/2010, at 65 (testimony of Missero that the prison issued razors to new prisoners); N.T., 10/6/2010, at 21 (testimony of Daniel Rice, a fellow inmate, that razors "were given out" by the prison and "you can purchase them.").

⁵ Trial Court Opinion, 4/26/2011, at 8.

claim is rebutted by the fact that a different weapon was found in his bed.⁶ Therefore, I would find merit in Christine's claim that the trial court erred in admitting the shank into evidence.

The question remains, then, whether the erroneously admitted evidence constituted harmless error. An error will be deemed harmless where the appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict. ***Commonwealth v. Story***, 383 A.2d 155, 164 (Pa. 1978).

Harmless error exists where: (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the

⁶ The Opinion in support of affirmance cites ***Commonwealth v. Williams***, 58 A.3d 796, 801 (Pa. Super. 2012), appeal denied, ___ A.3d ___ (Pa. June 7, 2013), in support of its position that the trial court properly admitted the shank into evidence. In ***Williams***, a panel of this Court upheld the trial court's ruling that allowed the admission of a photograph discovered on defendant's phone that showed him posing with a Walther P-38 9-mm pistol, even though the Commonwealth's expert determined that the murder weapon was more likely a .380 semi-automatic weapon. ***Id.*** at 801. The ***Williams*** Court reasoned that the photograph showing appellant with the pistol five days before the murder was relevant to show, inter alia, that he had "access to a firearm similar to the one witnesses claimed he was holding when threatening the victim on the night of the murder." ***Id.***

Williams, however, is distinguishable, since in this case there was evidence that a razor blade — the actual weapon used in the incident — was available to inmates in the prison. Furthermore, the shank and razor blade were not "similar" as were the guns in ***Williams***. A comparison of the descriptions of the shank and razor blade shows that these weapons did not share any unique or distinctive characteristics.

prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Robinson, supra, at 721 A.2d at 350 (citations omitted).

Review of the trial testimony reveals the following accounts of the incident. Missero testified that on June 8, 2009, he had only been in the prison unit for 30 to 45 minutes, following one and one-half days in the intake unit. He had finished eating dinner with inmate Jeffrey Rice, when another inmate, Luis Vega, motioned Missero to come over to him. Missero was assigned to Cell 5, and Vega was standing in front of Cell 3, which was Christine's cell. After Missero approached him, Vega asked Missero if he had any tobacco. Before Missero could answer, he testified Christine came from behind the doorway of Cell 3, and pulled him into the cell by grabbing his shirt. Christine started hitting him and yelling, "[Yo]u owe me \$20."⁷ When Christine eventually stopped, Missero saw blood on his shoe, and inmates were telling him he had "to go to medical" because his neck was "wide open."⁸ While Christine was punching him, Vega "closed the [cell] door and blocked the view of the officer."⁹ Afterward, Missero noticed a razor blade covered in blood laying on the ground. Missero stated he did not know

⁷ N.T., 10/5/2010, at 61.

⁸ **Id.** at 62.

⁹ **Id.** at 63.

Christine. He testified he did not have a razor blade on him. He stated the prison issued razors, but he had not been issued a razor.¹⁰ After Missero was cut, Christine told Missero to give him his sneakers. Missero refused, and walked to the corrections officer, who summoned help. **See** N.T., 10/5/2010, at 57-68.

According to Christine, he was reading in his cell when Missero entered the cell to talk to Christine's cellmate, Luis Vega, about tobacco. When Missero saw Christine, Missero ran towards Christine and threw a hot cup of coffee at him, but missed, and they engaged in a fight. Christine noticed Missero had a razor blade, and he took a swipe at Christine, missing him. Christine kicked Missero, who fell and dropped the razor blade. Christine picked up the razor blade from the ground, and unintentionally cut Missero when Missero continued to threaten him. Christine testified that he knew Missero from past occasions.¹¹ Christine testified that Missero said, "I told you I was going to kill you."¹² He stated Missero "probably tried to put a big

¹⁰ Missero testified he did not "shave that much to this day." **Id.** at 65.

¹¹ Christine testified he and Missero "had hung out on occasion in the City of Easton" and had been together in a juvenile treatment facility when Christine was 16, and Missero was 17. N.T., 10/6/2010, at 47. Christine further stated that "[t]here was an incident ... in Easton where we were talking about ... [a particular] female I just met and it turned out this particular female was his girlfriend. I didn't know that. He told me that if I ever touched her that he would kill me. ... I never heard of it since. If this incident was related to that, I don't know." **Id.**

¹² **Id.** at 48.

(Footnote Continued Next Page)

scar on my face, [but] he missed."¹³ Christine denied telling Missero that Missero owed him \$20.00. Christine did not have any scars on his face. He stated no one was in his cell to ask for help and that Luis Vega let the door close and walked away. **See** N.T., 10/6/2010, at 45-53, 59.

Daniel Rice, an inmate, and brother of Jeffrey Rice, testified that he saw Missero walk over to talk to someone in front of Christine's cell, but he was "not sure" if Missero "did or did not have anything in his hand at that time." **Id.** at 15.¹⁴ When Rice opened the cell door, which was closed, he observed Christine and Missero in a wrestling hold. The fight ended, and Christine was "standing there ... pumped, irritated[.]"¹⁵ Missero was bleeding from his neck, and Rice questioned Christine, who replied that Missero owed him \$20.00. Rice testified Christine then demanded Missero's sneakers, and Rice told Missero to go get medical attention. Rice stated that after the fight, Missero had nothing in his hand except a little ball of tobacco, which Missero offered to Rice if he beat up Christine. Rice could not be completely
(Footnote Continued) _____

¹³ **Id.**

¹⁴ Rice testified that on the day the investigator from the Public Defender's Office came to prison to speak with him about the incident, he saw Christine and Christine asked him to say that he saw Missero coming into Christine's cell with a cup of coffee. Rice stated that it "wasn't ... the truth." N.T., 10/6/2010, at 23. He stated that Missero "might have had a cup in his hand, I don't know." **Id.**

¹⁵ **Id.** at 18.

sure if he saw something in Christine's hand because he has astigmatism. He did not see a weapon on the ground. Razor blades were issued and sold by the prison, and it was possible to flush a razor blade down the toilet in the prison. **See id.** at 17-20.

Corrections Officer Nathan Picone testified that he did not witness the fight, or hear a scuffle while he was positioned in the prison unit at the officer's station. After Missero approached him with a large gash in his neck, he called for back-up and proceeded to lock down the block. He noticed blood leading to Christine's cell, and saw bloody towels and bloody T-shirts that "looked like ... an attempt to clean up what looked to be a large amount of blood."¹⁶ Christine was "obviously shaken, a little nervous [with] a couple of drops of blood on his T-shirt."¹⁷ A search of Christine's cell revealed a shank hidden in Christine's bed. He did not notice any coffee on the floor. There were "40 to 50 cups in the cell."¹⁸ **See id.** at 34-42.

Besides Christine, the defense presented Matthew Garvey, a juvenile probation officer, who testified that Christine and Missero were housed in the same treatment facility from July of 2004 to January 2005. The facility had two separate housing units, and he did not possess the record to determine

¹⁶ **Id.** at 35.

¹⁷ **Id.** at 36.

¹⁸ **Id.** at 41.

"if a specific client was in a unit at a certain time, within a certain timeframe." **Id.** at 73. Christopher Boase, a fellow inmate, also testified for the defense. He stated that he was watching television in the day room outside the pod, and did not see the altercation, but he had seen Missero enter the cell and "he looked like angry, like hostile." **Id.** at 75-76.

This case clearly rested on determinations of credibility by the jury. Here, there were no eyewitnesses who testified regarding the onset of the confrontation, other than Missero and Christine. The prejudicial impact of the erroneously admitted shank is obvious given that the issue before the jury was which party was the aggressor. In my view, this was not a case where "the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict." **Story, supra.** Therefore, I would find that the trial court's ruling, which allowed the shank to be admitted into evidence, was not harmless error. **See Marshall, supra** at 494 ("[W]e are not faced with a record containing overwhelming evidence of appellant's guilt. We find that the error committed by the lower court was not harmless.").

Accordingly, I would vacate the judgment of sentence and remand for a new trial.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen B. Smith", written over a horizontal line.

Prothonotary

Date: 8/30/2013

APPENDIX N

Superior Ct. Of Pennsylvania, Case # 1893 EDA 2011
Order vacating Trial Ct. Order and Granting New Trial

212

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JACOB MATTHEW CHRISTINE,	:	
	:	
Appellant	:	No. 1893 EDA 2011

Appeal from the Judgment of Sentence of November 24, 2010,
in the Court of Common Pleas of Northampton County,
Criminal Division, at No: CP-48-CR-0003344-2009.

BEFORE: SHOGAN, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.:

FILED APRIL 24, 2012

Jacob Matthew Christine (Appellant) appeals from the November 24, 2010 judgment of sentence of 9-to-20 years' incarceration for his conviction for aggravated assault and 1-to-2 years' incarceration for recklessly endangering another person (REAP).¹ We vacate Appellant's judgment of sentence and remand for a new trial.

On June 8, 2009, Appellant slashed the neck and ear of Thomas Missero (Missero), a fellow-inmate at Northampton County Prison, with a razor blade. The incident occurred in Appellant's cell, and a search of the cell immediately afterwards revealed a shank that was hidden in Appellant's bed. Appellant claimed that Missero attacked him with the razor blade, and

¹ 18 Pa.C.S. §§ 2702(a)(1) and 2705, respectively.

*Retired Senior Judge assigned to the Superior Court.

that Missero was unintentionally injured after Appellant disarmed Missero. No razor blade was ever found.

The jury convicted him of aggravated assault and REAP, but acquitted him of attempted homicide. Appellant was sentenced as detailed above on November 24, 2010. Appellant filed timely post-sentence motions which were denied by order of April 26, 2011, following a change of counsel, a continuance of argument, and a hearing. Appellant filed a timely notice of appeal, and both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises four questions on appeal, which we have renumbered for ease of disposition.

- [1]. Did the trial court commit a clear abuse of discretion or error of law which controlled the outcome of the case in failing to instruct the jury [on the elements of the "castle doctrine"] as part of the self[-]defense/justification instruction...?
2. Did the trial court err when it permitted the Commonwealth to introduce a "shank" as physical evidence as well as testimony regarding said shank in the course of the jury trial in the instant matter?
- [3]. Did the trial court err when it refused to allow Appellant to present testimony at trial regarding a criminal assault in the alleged victim's criminal record?
4. Was the sentence imposed contrary to the norms which underlie the sentencing process and does this case involve circumstances where the application of the sentencing guidelines was clearly unreasonable?

Appellant's Brief at 5.²

Appellant first claims that the trial court erred in charging the jury on Appellant's duty to retreat before using deadly force in self-defense without also informing the jury that there is no duty to retreat when one is attacked in his own dwelling (the "castle doctrine").³ Appellant's Brief at 16. Appellant claims that his prison cell qualifies as a dwelling for purposes of this instruction. *Id.* at 17.

The trial court noted that Appellant did not request this charge or object to its absence. Trial Court Opinion (TCO), 4/26/2011, at 14. Appellant does not indicate in his brief how he preserved this issue for appeal.

A specific and timely objection must be made to preserve a challenge to a particular jury instruction. Failure to do so results in waiver. Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary.

Commonwealth v. Charleston, 16 A.3d 505, 527-528 (Pa. Super. 2011) (quoting ***Commonwealth v. Moury***, 992 A.2d 162, 178 (Pa. Super. 2010)).

² We note that the Commonwealth failed to file a brief on appeal.

³ Section 9.501 of the Pennsylvania Suggested Standard Jury Instructions (Criminal) provides as follows in relevant part: "the defendant is not obligated to retreat from [his] [her] own dwelling, that is, any building or structure though movable or temporary, or a portion thereof, including the doorway, that is, at least for the time being, the defendant's home or place of lodging, unless [he] [she] was the initial aggressor in the incident."

We are unable to locate in the certified record a written request from Appellant for the "castle doctrine" instruction. During the charging conference, the trial court indicated that it intended to instruct the jury on justification and the rules for deadly force. N.T., 10/6/2010, at 85. After giving the jury charge without reference to the castle doctrine, the trial court asked counsel if there were any objections or requests for modifications, to which Appellant's counsel answered in the negative. N.T., 10/7/2010, at 93-94. As such, Appellant has waived this issue. **Charleston, supra.**

Appellant's next two questions concern the trial court's evidentiary rulings. "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." **Commonwealth v. Weakley**, 972 A.2d 1182, 1188 (Pa. Super. 2009) (quoting **Commonwealth v. Reid**, 811 A.2d 530, 550 (Pa. 2002)).

Appellant first argues that the trial court erred in allowing into evidence a shank found in Appellant's bed after the incident. Appellant had moved *in limine* to exclude the weapon and references thereto, as the Commonwealth conceded that it was not the weapon used to injure Missero.

A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime. Any uncertainty that the weapon is the actual weapon used in the crime goes to the weight of such evidence.

Commonwealth v. Williams, 640 A.2d 1251, 1260 (Pa. 1994).

The shank that was introduced was an 18-to-20-inch sharpened metal rod, taken from a metal bookcase in a common room of the prison, with a piece of cloth wrapped at the end for a handle.⁴ N.T., 10/6/2010, at 38-39. As for the weapon used to slice Missero, "[i]t was a razor made out of like a normal Bic Razor that you get from the dollar store, they issue them in prison. The blade was taken out, and at the end it had paper or tape wrapped around it with the blade sticking out maybe an inch." N.T., 10/5/2010, at 64.

The trial court explained its ruling as follows:

The evidence suggested that a cutting instrument, similar to a razor blade, was likely used to injure [Missero] in this case. The Commonwealth was unable to locate or identify the cutting weapon that was used to injure [Missero]. The shank was not ruled out as the weapon that caused the injury, however, it was the Commonwealth's theory that a razor-like instrument was likely used to cut [Missero's] neck. The shank was admitted to show that [Appellant] had access to a weapon and that he had the ability to fashion a homemade weapon from objects in the prison.

TCO, 4/26/2011, at 7.

The fact that Appellant had one homemade weapon, fashioned in a similar manner to the weapon used to commit the crime, is clearly relevant.

⁴ Appellant testified that he did not put the weapon in his mattress or use it, but he knew the shank was there for protection "in case somebody came in there and tried to rape somebody or hurt somebody." N.T., 10/6/2010, at 51.

See Commonwealth v. Owens, 929 A.2d 1187, 1191 (Pa. Super. 2007) (holding the trial court did not err in allowing evidence that "defendants had weapons similar to the ones used in the perpetration of the crime."); **Commonwealth v. Broaster**, 863 A.2d 588, 592 (Pa. Super. 2004) (holding there was no error in admitting evidence of guns that the Commonwealth acknowledged were not used in the crime at issue, as the evidence showed, *inter alia*, that the defendant "had readily obtained handguns of the same caliber used in the murder."). Further, the potential prejudice to Appellant of this evidence is not outweighed by the probative value, such that it would "inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." **Owens**, 929 A.2d at 1191 (quoting **Broaster**, 863 A.2d at 592). As such, the trial court did not err in admitting the shank into evidence.

Next, Appellant claims that the trial court erred in ruling that Appellant was not permitted to question Missero about Missero's conviction, following a guilty plea, to a simple assault that occurred less than one year after the incident at issue in Appellant's case. Appellant's Brief at 10; N.T., 10/5/2010, at 27. Appellant argues that, given his claim of self-defense, he was entitled to use Missero's assault conviction to show that Missero had violent, aggressive propensities, as this would support Appellant's testimony that Missero was in fact the aggressor. Appellant's Brief at 11. The trial court held that the assault Missero committed **after** his altercation with

Appellant was not relevant to his character at the time Appellant cut him. We disagree.

As a general rule, evidence of a person's character is not admissible to prove that the person acted in conformity with that character on a particular occasion. Pa.R.E. 404(a). An exception to the general rule in criminal cases provides that "evidence of a pertinent character trait of character of the alleged victim is admissible when offered by the accused...." Pa.R.E. 404(a)(2)(i).

Even when character evidence is admissible, the general rule is that character may not be proved by evidence of "other crimes, wrongs, or acts." Pa.R.E. 404(b)(1). However, when character evidence is admissible under Pa.R.E. 404(a)(2) (allowing evidence of the alleged victim's character in criminal cases), the accused may prove the alleged victim's character by specific instances of conduct. Pa.R.E. 405(b)(2).

[W]here a defendant alleges self-defense, he may use his ... victim's criminal record either (1) to corroborate his alleged knowledge of the victim's quarrelsome and violent character to show that the defendant reasonably believed that his life was in danger; or (2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor.

Commonwealth v. Amos, 284 A.2d 748, 751 (Pa. 1971). "To have probative value, these crimes should be of the same nature, [and] not too distant in time *vis a vis* the alleged aggression."⁵ **Id.** at 752.

In the instant case, the trial court held that the fact that Missero's conviction occurred **after** the incident with Appellant deprived evidence of the conviction of probative value, reasoning as follows.

We believe that the law only allows evidence of prior incidents to prove the character or reputation of the victim at the time of the crime in question. A subsequent conviction arising from events that transpired after the incident involving [Appellant] simply has no bearing on whether [Missero] possessed violent propensities on June 8, 2009. [Missero's] 2010 simple assault conviction is not relevant.

TCO, 4/26/2011, at 13 (footnote omitted).⁶ The rules and the case law discussed above do not support this conclusion.

The applicable rules of evidence cited above do not limit character evidence to **prior** crimes, wrongs, or acts; rather, the rules contemplate

⁵ We have held that "[w]hen the (victim's) prior conviction is for assault and battery, there is no need to compare the facts. Any difference is irrelevant. A conviction for assault and battery necessarily implies a character involving aggressive propensities." **Commonwealth v. Fisher**, 493 A.2d 719, 723-724 (Pa. Super. 1985) (quoting **Commonwealth v. Beck**, 402 A.2d 1371, 1373 (Pa. 1979)).

⁶ We note that the trial court distinguishes cases such as **Amos, supra**, and **Beck, supra**, by noting that those cases each involved a deceased victim's **prior** assaultive behavior. TCO, 4/26/2011, at 12. Obviously, when a defendant is accused of homicide, the victim died as a result of the altercation at issue and thus was incapable of performing any subsequent acts, assaultive or otherwise. We have not found any Pennsylvania cases involving subsequent assaults committed by the victim of an attempted homicide.

evidence of **other** crimes, wrongs, or acts. The only temporal limitation is that the other crime be not too remote from the incident at issue. *See Amos, supra*. If a victim's violent character three years before an incident was not too remote to suggest that the victim was the aggressor, *see Beck, supra*, there is no logical reason why the violent, aggressive behavior of Missero eleven months after his altercation with Appellant does not reasonably allow a jury to infer that he was of that character at the time Appellant cut him.

Our reasoning is supported by our Supreme Court's determination that evidence of "other crimes, wrongs, or acts" that occur subsequent to the crime at issue may be admissible against a criminal defendant under Pa.R.E. 404(b)(2). *See, e.g., Commonwealth v. Collins*, 703 A.2d 418, 423 (Pa. 1998) ("Although evidence of a subsequent offense is usually less probative of intent than evidence of a prior offense, evidence of a subsequent offense can still show the defendant's intent at the time of the prior offense.").⁷

Therefore, we hold that *Amos, supra* and Rules 404(a)(2) and 405(b)(2) require that Appellant be permitted to offer evidence of Missero's

⁷ Further persuasive support for our conclusion can be found in the Ninth Circuit's decision in *United States v. Keiser*, 57 F.3d 847 (9th Cir. 1995), in which the court held that "a victim's 'violent disposition' is exactly the sort of evidence [F.R.E. 404(a)(2)] was intended to encompass." *Id.* at 853. While the court ultimately determined that the specific act offered to evidence the victim's violent character was not admissible under F.R.E. 405 (which differs materially from Pa.R.E. 405), the court found no merit in the government's argument that evidence of the victim's character was irrelevant because it was displayed **after** the defendant shot the victim. *Id.* at 854.

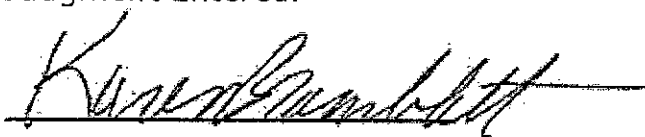
assault conviction. Appellant and Missero were the only witnesses to testify at trial about who did what in Appellant's cell on June 8, 2009. Missero testified that Appellant ambushed him with the razor blade. Appellant testified that Missero initiated the fight by throwing coffee at him and coming after him with the razor blade. Clearly the evidence of Missero's assaultive character could persuade a jury to believe Appellant's version of events. As such, we cannot deem this to be harmless error. Appellant is entitled to a new trial.

Because we vacate Appellant's judgment of sentence and remand for a new trial, Appellant's final question as to the discretionary aspects of his sentence is moot.

Judgment of sentence vacated. Case remanded for a new trial to be conducted in a manner consistent with this memorandum. Jurisdiction relinquished.

Judge Paula Francisco Ott files a Dissenting Statement.

Judgment Entered.



Prothonotary
Date: 4/24/2012

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JACOB MATTHEW CHRISTINE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1893 EDA 2011

Appeal from the Judgment of Sentence of November 24, 2010
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0003344-2009

BEFORE: SHOGAN, J., OTT, J., and STRASSBURGER, J.**

DISSENTING STATEMENT BY OTT, J.:

FILED APRIL 24, 2012

I respectfully disagree with the majority's decision to vacate the judgment of sentence and remand for a new trial on the basis of the trial court's evidentiary ruling that precluded counsel for Jacob Matthew Christine from questioning the complainant, Thomas Missero, about his **subsequent** conviction.

I recognize that "[i]n a criminal case, evidence of a pertinent trait of character of the complainant is admissible when offered by the accused" under Pa.R.E. 404(a)(2)(i), and that "where character or a trait of character is admissible under Pa.R.E. 404(a)(2), the accused may prove the complainant's character or trait of character by specific instances of

** Retired Senior Judge assigned to the Superior Court.

conduct." Pa.R.E. 405(b)(2). Pennsylvania Rules of Evidence 404(a)(2)(i) and 405(b)(5) are consistent with cases holding that the accused in a criminal case may offer evidence of a pertinent trait of character of the complainant by introducing specific instances of conduct. **See *Commonwealth v. Dillon***, 598 A.2d 963 (Pa. 1991); ***Commonwealth v. Amos***, 284 A.2d 748 (Pa. 1971). However, the cited cases involved the **deceased** victim's **prior** conduct.

I agree with the Honorable Stephen G. Barrata that Missero's conviction for simple assault in a domestic dispute that occurred **after** the incident at issue in this case does not retroactively establish Missero's character at the time here in question. In this regard, I would adopt the trial court's rationale to affirm the judgment of sentence. **See** Trial Court Opinion, 4/26/2011, at 11-13.

I simply add that in cases where subsequent bad conduct has been held admissible, the evidence showed intent, **see *Commonwealth v. Collins***, 703 A.2d 418, 423 (Pa. 1997), *cert. denied*, 525 U.S. 1015 (1998), or completed the story about the crime. **See *Commonwealth v. Simmons***, 662 A.2d 621, 635-636 (Pa. 1995), *cert. denied*, 516 U.S. 1128 (1996). **See also *Commonwealth v. Weakley***, 972 A.2d 1182, 1191 (Pa. Super. 2009) (defendants' subsequent crime "admissible to prove identity under the strict criteria of Rule 404(b)"), *appeal denied sub nom *Commonwealth v. Selenski**, 986 A.2d 150 (Pa. 2009); ***Commonwealth***

v. Wattley, 880 A.2d 682 (Pa. Super. 2005) (defendant's conviction for subsequent bad acts admissible to show continuing propensity for illicit sexual contact with same victim), *appeal dismissed as improvidently granted*, 924 A.2d 1203 (Pa. 2007).

No like purpose would be served in this case, and therefore, in my view, the Rules of Evidence do not support the admission of evidence of Missero's **subsequent** conviction.

Accordingly, I dissent.

APPENDIX O

Northampton County Court of Common Pleas, Case # 3344-cr-2009
Order Denying Post Sentence Motion for New Trial

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

COMMONWEALTH OF PENNSYLVANIA) NO. 3344-2009
)
v.)
)
JACOB CHRISTINE,)
)
)
Defendant.)

FILED
2011 APR 26 AM 10:09
CLERK OF COMMON
PLEAS
NORTHAMPTON COUNTY
PENNSYLVANIA

ORDER OF COURT

AND NOW, this 26th day of April, 2011, it is hereby ORDERED that Defendant's
Post-Sentence Motion is DENIED.

STATEMENT OF REASONS

Facts and Procedural History

Defendant, Jacob Christine, was convicted of Aggravated Assault and Recklessly Endangering Another Person by a jury on October 7, 2010. However, the jury found Defendant not guilty of Attempted Criminal Homicide. Defendant was sentenced on November 24, 2010, to 108-240 months incarceration on the Aggravated Assault count and 1-2 years incarceration on the Recklessly Endangering Another Person count. The Aggravated Assault sentence runs consecutively to Defendant's Lehigh County sentence and the Recklessly Endangering sentence runs concurrently with the Aggravated Assault sentence.

The convictions resulted from an incident that occurred in Northampton County Prison (NCP) on June 8, 2009. On that date, the Defendant and the victim, Thomas Misero, were inmates in NCP when a confrontation between the two men occurred in the Defendant's cell in Unit B-2. The cell housed 8 inmates in four rows of bunk beds. While in the Defendant's cell,

the Defendant was alleged to have slashed Mr. Misero's neck and ear with a razor blade. Immediately after the attack, corrections officers searched the Defendant's cell. Only one weapon, a shank, was found in the cell. It was hidden within the Defendant's bed.

Interestingly, the Defendant testified at trial that the victim came into his cell armed with a razor blade and attacked the Defendant. The Defendant claimed that he successfully disarmed the victim, picked up the razor from the floor and then unintentionally sliced the victim when the victim continued to threaten the Defendant. Even though the Defendant was the last person to have control of the weapon, it has never been located. We also note that there were no injuries suffered by the Defendant.

Apparently, the jury rejected the Defendant's claim of self defense.

The procedural record establishes that on July 14, 2009, Investigator Christopher Naugle filed a criminal complaint charging Defendant with Attempt - Criminal Homicide, Aggravated Assault and Recklessly Endangering Another Person. Defendant filed a *pro se* "Motion for Dismissal and Quash of Indictment for Judicial Misconduct and Habeas Corpus" on November 3, 2009. Attorney Susan Hutnik of the Public Defender's Office entered her appearance for Defendant on November 6, 2009. Attorney Hutnik filed a "Motion to Remand for Preliminary Hearing" on November 17, 2009. On November 25, 2009, the Defendant's motion for remand was withdrawn. Attorney Hutnik subsequently filed a "Petition for Writ of Habeas Corpus" on December 10, 2009, and a hearing on the motion was scheduled for December 18, 2009. A second "Petition for Writ of Habeas Corpus" was filed by Attorney Hutnik on January 6, 2010, and the motion was scheduled for a hearing on January 15, 2010. The Honorable Edward G. Smith denied the habeas corpus petition from the bench at the January 15 hearing.

The case was called to trial on October 4, 2010, and Defendant was convicted on October 7, 2010, of Aggravated Assault and Recklessly Endangering Another Person.

Attorney Hutnik filed a timely post-sentence motion on December 6, 2010. Defendant filed a *pro se* "Motion to Amend Post-Sentence Motion to Modify and Add Additional Claims" on December 15, 2010. Defendant's post-sentence motions were scheduled for argument on February 2, 2011, with a conference scheduled for January 7, 2011, prior to argument court. The Defendant's *pro se* post-sentence motion raised issues that arguably could be considered to implicate a denial of effective assistance of counsel. On January 14, 2011, Attorney Hutnik was permitted to withdraw and Attorney Brian Lawser was appointed to represent Defendant, in the prosecution of the post-sentence motions. The matter was removed from the February 2, 2011, Argument List to permit Mr. Lawser to review the claims.

An issue framing conference was held on February 11, 2011 with Attorney Lawser. Mr. Lawser requested the opportunity to create a testimonial record. We listed the matter for a hearing on March 16, 2011.

At the March 16, 2011 hearing, Attorney Lawser, apparently to the dismay of the Defendant, indicated to the Court that several of the claims raised by the Defendant in his *pro se* filing were more appropriate for a PCRA petition. Mr. Lawser indicated that he intended to perfect those claims in a PCRA Petition. At the hearing, trial counsel was called to make a brief record regarding Rule 600.

Legal Standard

A criminal defendant has the right to make a post-sentence motion in writing no later than ten days after the imposition of sentence. Pa.R.Crim.P. 720. Post-sentence motions shall state

the defendant's claims for relief with specificity and particularity. Pa.R.Crim.P. 720(B)(1)(a).

These motions serve a dual function to allow a trial court to address and correct any alleged errors committed at trial, and to frame and clarify issues to be considered should there be an appeal. Com. v. Hutson, 363 A.2d 784 (Pa. Super. 1976).

Discussion

Defendant pursued only a few of those issues raised in the post-sentence motion, and chose to reserve the remaining issues for a collateral appeal. The issues currently pursued by the Defendant are: 1) the Defendant's Rule 600 rights were violated because the trial was held in excess of 365 days after the date of his arrest; 2) the Court erroneously permitted the admission of certain evidence and testimony at trial: a) the shank and testimony about the shank, and b) photographs of the Defendant and the victim's wound; 3) the Court improperly refused to allow testimony about the victim's post-incident criminal record; and, 4) the Court failed to instruct the jury that an individual does not have a duty to retreat from his own dwelling, or as the Defendant couches the argument - the jury should have been charged that "the cell was his castle."

A. Rule 600

Defendant argues the charges on which he was convicted should be dismissed because the Commonwealth allegedly violated his Pa.R.Crim.P. 600 right to a speedy trial.

In order to establish a Rule 600 claim, a defendant must file, prior to trial, either a motion to dismiss under Rule 600 or contest a Commonwealth petition to extend. Com. v. Yancey, 447 A.2d 1041, 1042 n. 1 (Pa. Super. 1982). A right to a speedy trial claim must be raised before trial, otherwise it is waived. Com. v. Hunsinger, 549 A.2d 973, 976 (Pa. Super. 1988).

After a review of the record in this case, we find Defendant failed to raise the issue of the

Commonwealth's alleged violation of his speedy trial right prior to the commencement of the trial on October 4, 2010. He did not file the required motion to dismiss. As a result, Defendant waived the claim that his Rule 600 right to a speedy trial was violated.¹

B. Alleged Improper Admission of Evidence

Defendant alleges this Court committed two errors at trial regarding the admission of certain evidence. First, this Court allegedly erred when it admitted testimony regarding a "shank" found in Defendant's prison bed and admitted the shank as physical evidence. Second, Defendant argues this Court erroneously admitted photographs of Defendant, Luis Vega and the victim's wounds that were prejudicial, inflammatory and/or irrelevant.

1. The "Shank"

Defendant's counsel raised an oral motion in limine prior to jury selection seeking to preclude the Commonwealth from admitting into evidence a shank and related testimony. The Defendant maintained the shank and testimony regarding it were irrelevant and its prejudicial value outweighed its probative value.

The shank was found during a search of the Defendant's cell after the incident. No other weapon was found at the scene. The Commonwealth conceded that the shank was likely not the weapon used to injure Mr. Misero. However, the Commonwealth argued that the shank was relevant to show Defendant had access to a weapon and that the Defendant had the ability to fashion a weapon in prison.

¹We note that there was testimony proffered by the Commonwealth, specifically the Defense Counsel testified regarding her unavailability (as well as the defendant's unavailability) which the Commonwealth asserts would toll rule 600. We need not examine the record at this time as the failure to timely raise this issue prior to trial constitutes a waiver. We also note that this issue may be properly raised in Defendant's anticipated PCRA petition.

The Court denied Defendant's motion, finding the shank was relevant, and permitted the introduction of the shank and testimony regarding the shank into evidence.

Admission of evidence is within the sound discretion of the trial court, and a trial court ruling on the admission of evidence will not be overturned "unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." Com. v. Minich, 4 A.3d 1063, 1068 (Pa. Super. 2010) (citations omitted). When determining whether evidence should be admitted, the threshold inquiry is whether the evidence is relevant. Com. v. Robinson, 721 A.2d 344, 350 (Pa. 1998). Relevant evidence is evidence that "logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact." Com. v. Spiewak, 617 A.2d 696, 699 (Pa. 1992). In order for evidence to be admissible, the probative value must outweigh its prejudicial impact. Com. v. Story, 383 A.2d 155 (Pa. 1978).

As a general rule, a weapon that cannot be specifically linked to a crime is not admissible as evidence. Robinson, 721 A.2d at 351. However, an exception to this general rule is when the "accused had a weapon or implement suitable to the commission of the crime charged." Com. v. Lee, 662 A.2d 645, 652 (Pa. 1995). The prosecution is not required to establish that a particular weapon was actually used to commit a crime in order to admit the weapon into evidence. The only burden on the Commonwealth is to "justify an inference by the finder of fact of the likelihood that the weapon was used in the commission of the crime." Id.

Further, we note that relevant Commonwealth evidence is intended to prejudice a defendant, therefore, relevant evidence will be excluded only when it is "so prejudicial that it

would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case.” Com. v. Serge, 837 A.2d 1255, 1260-61 (Pa. Super. 2003).

The evidence suggested that a cutting instrument, similar to a razor blade, was likely used to injure the victim in this case. The Commonwealth was unable to locate or identify the cutting weapon that was used to injure Mr. Misero. The shank was not ruled out as the weapon that caused the injury, however, it was the Commonwealth’s theory that a razor-like instrument was likely used to cut Misero’s neck. The shank was admitted to show Defendant had access to a weapon and that he had the ability to fashion a homemade weapon from objects in the prison. A weapon may be admitted into evidence, even if the Commonwealth cannot positively identify it as the weapon used in the commission of the crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime. Com. v. Williams, 640 A.2d 1251, 1260 (Pa. 1994).

In Com. v. Broaster, 863 A.2d 588 (Pa. Super. 2004), the Superior Court affirmed a trial court ruling that admitted a .45 caliber hand gun into evidence, even though the Commonwealth conclusively proved it was not the gun used in a murder. The Superior Court found the gun was properly introduced to show the defendant had access to the type of weapon used in the crime, had knowledge and familiarity with those types of guns and the defendant regularly discarded handguns. Broaster supports our decision to admit the shank. It was a cutting weapon found in Defendant’s prison bedding immediately after the slashing of the victim.

In support of his claim that it was an error to admit the shank, the Defendant cites Com. v. Marshall, 743 A.2d 489 (Pa. Super. 1999). We note that in Marshall, the Superior Court quoted from Commonwealth v. Williams:

"A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime." Commonwealth v. Williams, 537 Pa. 1, 20, 640 A.2d 1251, 1260 (1994).

743 A.2d at 492.

Ultimately, the Marshall Court found it was error for a trial court to admit into evidence a handgun that was in police possession at the time of the crime. However, the facts in Marshall are clearly distinguishable from the facts in this case. The district attorney in Marshall could not show that the defendant had access to a handgun, because the very handgun the Commonwealth sought to introduce was in police possession and not available to the defendant at the time the crime was committed.

Here, the shank was found hidden in the Defendant's bed shortly after the crime was committed, therefore Defendant had access to the shank when the crime was committed and it was the only cutting weapon located at the crime scene. Additionally, the admission of the shank tends to show Defendant had knowledge and familiarity with prison-made weapons and could conceal them in his prison cell. We also found that the presence of the shank hidden in the Defendant's bed tends to rebut Defendant's assertion that he was unarmed and acted in self-defense.

We found the evidence relevant and that the probative value outweighed the prejudicial value. We deny Defendant's post-trial motion on these grounds.

2. Photographs of the Defendant, Luis Vega, and the victim's wound

Defendant argues photographs of Luis Vega and Defendant dressed in prison clothing,

Commonwealth Exhibits 9 and 10, were irrelevant and unduly prejudicial. Additionally, Defendant alleges the photographs of the victim's wounds, Commonwealth Exhibits 3, 4, and 7, were inflammatory and unduly prejudicial.

First, we note that Defendant failed to object to the introduction of the complained-of photographs at trial. Generally, a litigant must make a specific objection to an alleged error before the trial court in a timely fashion and at the appropriate stage of the proceedings. See Law Office of Douglas T. Harris, Esquire v. Philadelphia Waterfront Partners, LP, 957 A.2d 1223 (Pa. Super. 2008); Com. v. Brown, 701 A.2d 252, 254 (Pa. Super. 1997). A timely objection occurs at the proper stage during the questioning of a witness or at the proper stage in trial proceedings. Com. v. Garofalo, 563 A.2d 109, 111 (Pa. Super. 1989).

Defendant was obliged to raise any objection to the photographs either in a timely motion in limine or when the Commonwealth moved to admit them into evidence. Because the objection was not preserved during the trial, there is nothing on the record for this Court to review in a post-sentence motion. Defendant's claim regarding the photographs is waived.

However, even if Defendant's objection was properly raised, we still would deny Defendant's motion. The admission of a photograph is within the sound discretion of the trial court. Com. v. Wright, 961 A.2d 119 (Pa. 2008). Like any other piece of evidence, a photograph must be relevant in order to be admissible. However, the essential issue is whether the photographs have evidentiary value that outweighs the possibility of inflaming the minds and passions of the jurors. Com. v. Rush, 646 A.2d 557 (Pa. 1994).

First, we will discuss the relevancy of the photographs of Defendant and Luis Vega. The Commonwealth is required to establish the identity of the offender in every criminal case. The

Commonwealth introduced the photographs of Defendant during the course of Mr. Misero's testimony. Mr. Misero indicated that he identified Defendant as his assailant after being shown the complained-of photograph during the investigation of the incident. The photograph of Luis Vega was introduced while Mr. Misero testified about how he identified the person who called him over to Defendant's prison cell.

Defendant attacks the admissibility of the photographs on the basis that they are unduly prejudicial because they show Defendant and Mr. Vega in prison clothing. However, there was no dispute that the incident occurred in Northampton County Prison, and the Defendant, Mr. Vega and Mr. Misero were inmates at the time of the incident. The status of Defendant and Mr. Vega as prisoners was well established. There is no additional prejudicial effect from showing photographs of Defendant and Mr. Vega in prison clothing because the jury already knew Defendant and Mr. Vega were prisoners at the time of the incident. Therefore, we find there is no merit to Defendant's objection to these two photographs.

Next, we discuss Defendant's objection to the three photographs, Commonwealth Exhibits 3, 4, and 7, depicting Mr. Misero's wounds. The photographs were taken after the victim had his wounds dressed by hospital personnel. The Defendant alleges the photographs were inflammatory, prejudicial, and misrepresented the wounds sustained by the victim.

In order to find the Defendant guilty of Attempted Criminal Homicide, the Commonwealth needed to establish that Defendant intended to kill Mr. Misero. There is no doubt the photographs were relevant to the case because the Defendant may have been convicted of attempted homicide if the jury found that the Defendant's attack on a vital part of the body was evidence of intent to kill. The nature of the wound, where it was located, and how serious it

was, were relevant to a determination of whether Defendant acted with intent to kill. Further, there was nothing inflammatory about the photographs. In fact, Defendant benefitted from having the photographs taken at the hospital. By then, the medical staff was able to clean the wound and begin repairing it. Finally, with regard to the aggravated assault count, the jury was required to find whether Defendant caused or attempted to cause a serious bodily injury. The jury needed to view the wound and its location to determine whether the wound was a serious bodily injury.

The photographs were not inflammatory or unduly prejudicial. Therefore, we deny Defendant's contest to the admission of the photographs.

C. The Prior Record of the Victim

Defendant brought a motion in limine to obtain the Court's permission to question the victim, Mr. Misero, about a conviction for simple assault that occurred after the June 8, 2009 incident. Defendant argues that we erroneously denied Defendant's request to question Mr. Misero about the simple assault conviction.

The record established that Mr. Misero pleaded guilty to simple assault and recklessly endangering another person and was sentenced on June 24, 2010. The incident giving rise to the simple assault and recklessly endangering convictions occurred on May 1, 2010, nearly one year *after* the Defendant's alleged prison assault. Apparently, Misero's conviction involved domestic violence, where Misero grabbed and pushed his girlfriend outside of a hotel. The girlfriend sustained minor injuries. This Court precluded testimony regarding the June 24, 2010 simple assault conviction because it occurred after the incident involving Defendant and Mr. Misero. There was nothing about the timing or nature of the charges that could establish Misero's

reputation for violence at the time of the prison incident.

As a general rule, evidence of other crimes is not admissible to prove the character of a person in order to show action in conformity therewith. Pa. R.E. 404(b)(1). The Defendant argues that prior convictions involving aggression by the victim of a homicide may be admitted by a defendant who puts forth a justification defense for either one of two purposes: 1) to corroborate the defendant's alleged knowledge of the victim's quarrelsome and violent character to show that the defendant reasonably believed that his life was in danger, or 2) to prove the alleged violent propensities of the victim to show that the victim was the aggressor. Defendant cites four decisions to support his contention that Mr. Misero's conviction for simple assault should have been admitted - Com. v. Beck, 402 A.2d 1371 (Pa. 1979); Com. v. Amos, 284 A.2d 748 (Pa. 1971); Com. v. Dillon, 598 A.2d 963 (Pa. 1991) and Com. v. Carbone, 707 A.2d 1145 (Pa. Super. 1998). The four cases cited by Defendant all involved defendants on trial for homicide or manslaughter of the victim where the defendant asserted self-defense. In such cases, the deceased victim's *prior* assaultive behavior is admissible to support a self-defense claim. We also note that the victims in the murder cases are unavailable for cross-examination. In such cases, our Appellate Courts have held that the Defendant is entitled to introduce prior events that tend to prove the victims' character at the time of the incident.

In this case, Defendant sought to introduce Mr. Misero's conviction for domestic violence that occurred *after* Defendant assaulted Mr. Misero. Further, we note that Misero testified at trial and the Defendant had the opportunity to cross-examine the victim and the jury could pass judgment on the victim's credibility.

Defendant argues that there is no requirement that the prior conviction of the victim need

to have occurred *prior* to the incident in question. Here, the Defendant does not seek to establish Misero's existing reputation or character at the time of the incident. Rather, the Defendant seeks to use future events to retroactively establish character.

The case law holds that character and reputation are established by past events. There is no case law or Rule of Evidence that supports the Defendant's argument that, although he cannot prove the victim's reputation or character at the time of the incident, he should be permitted to prove a subsequent act and then argue that the victim's past character is in conformity with his future action.

We believe that the law only allows evidence of prior incidents to prove the character or reputation of the victim at the time of the crime in question. A subsequent conviction arising from events that transpired after the incident involving Defendant simply has no bearing on whether Misero possessed violent propensities on June 8, 2009.² Mr. Misero's 2010 simple assault conviction is not relevant.

Therefore, we deny Defendant's objection on this ground.

D. Self-Defense Instruction Regarding Duty to Retreat from Own Dwelling

Defendant's final complaint in his post-sentence motions raises a failure to instruct the jury that a person has no duty to retreat when he is attacked in his dwelling. Defendant defines the term dwelling to include his prison cell, and he argues that the "castle doctrine" instruction should have been included in the Court's charge to the jury.

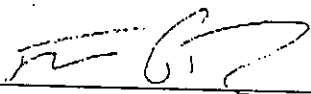
² We envisioned the possibility that Misero could have argued that he suffered PTSD as a result of the Defendant's attack, which resulted in a change in his personality and was a contributing factor in his domestic violence incident. Thus, it would require a "mini-trial" regarding the quality and nature of the victim's character before and after the Defendant's alleged assault.

We note that the Defendant's counsel did not submit a written request for a jury charge invoking the "castle doctrine," she did not ask for the "castle doctrine" instruction during the charging conference, nor did she object at the conclusion of the instructions to the jury when the Court failed to give the jury the "castle doctrine" instruction.³

A defendant generally waives appellate challenges to a jury instruction if the defendant responds in the negative when the court asks whether corrections or additions to the charge are needed. Com. v. Moury, 992 A.2d 162, 178 (Pa. Super. 2010).

Defendant waived any objections to the jury instructions. The Defendant's post-sentence motion on this ground is denied.

BY THE COURT:


STEPHEN G. BARATTA, J.

³ In fairness to trial counsel, we can find no authority for the proposition that an inmate detained in prison has a property or privacy interest in his cell that would permit him to argue the "castle doctrine" to support his claim of self-defense.

APPENDIX P

18 Pa. C.S. § 505, 2009 Ed. (Complete)

bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

§ 504. Execution of public duty.

(a) General rule.—Except as provided in subsection (b) of this section, conduct is justifiable when it is required or authorized by any law of the following:

- (1) The law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties.
- (2) The law governing the execution of legal process.
- (3) The judgment or order of a competent court or tribunal.
- (4) The law governing the armed services or the lawful conduct of war.
- (5) Any other provision of law imposing a public duty.

(b) Exceptions.—The other sections of this chapter apply to:

- (1) The use of force upon or toward the person of another for any of the purposes dealt with in such sections.
- (2) The use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(c) Requisite state of mind.—The justification afforded by subsection (a) of this section applies:

- (1) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and
- (2) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

§ 505. Use of force in self-protection.

(a) Use of force justifiable for protection of the person.—The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(b) Limitations on justifying necessity for use of force.—

(1) The use of force is not justifiable under this section:

- (i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or
- (ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

PROPERTY OF
SCI GREENE LIBRARY

PROPERTY OF
SCI GREENE LIBRARY

This material may be protected by
copyright law (Title 17 U.S. Code)

- (A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest;
 - (B) the actor has been unlawfully dispossessed of the property and is making a reentry or recaption justified by section 507 of this title (relating to use of force for the protection of property); or
 - (C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.
- (2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:
- (i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
 - (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
 - (A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and
 - (B) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.
- (3) Except as required by paragraphs (1) and (2) of this subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.
- (c) Use of confinement as protective force.—The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.
- § 506. Use of force for the protection of other persons.**
- (a) General rule.—The use of force upon or toward the person of another is justifiable to protect a third person when:

APPENDIX Q

42 Pa. C.S. § 5552 (Complete)

§ 5552. Other offenses.

(a) General rule. — Except as otherwise provided in this subchapter, a prosecution for an offense must be commenced within two years after it is committed.

(b) Major offenses. — A prosecution for any of the following offenses must be commenced within five years after it is committed:

(1) Under the following provisions of Title 18 (relating to crimes and offenses):

Section 901 (relating to criminal attempt) involving attempt to commit murder where no murder occurs.

Section 902 (relating to criminal solicitation) involving solicitation to commit murder where no murder occurs.

Section 903 (relating to criminal conspiracy) involving conspiracy to commit murder where no murder occurs.

Section 911 (relating to corrupt organizations).

Section 2702 (relating to aggravated assault).

Section 2706 (relating to terroristic threats).

Section 2713 (relating to neglect of care-dependent person).

Section 2901 (relating to kidnapping).

Section 3301 (relating to arson and related offenses).

Section 3502 (relating to burglary).

Section 3701 (relating to robbery).

Section 3921 (relating to theft by unlawful taking or disposition) through section 3933 (relating to unlawful use of computer).

Section 4101 (relating to forgery).

Section 4107 (relating to deceptive or fraudulent business practices).

Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly).

Section 4109 (relating to rigging publicly exhibited contest).

Section 4117 (relating to insurance fraud).

Section 4701 (relating to bribery in official and political matters) through section 4703 (relating to retaliation for past official action).

Section 4902 (relating to perjury) through section 4912 (relating to impersonating a public servant).

Section 4952 (relating to intimidation of witnesses or victims).

Section 4953 (relating to retaliation against witness, victim or party).

Section 5101 (relating to obstructing administration of law or other governmental function).

Section 5111 (relating to dealing in proceeds of unlawful activities).

Section 5512 (relating to lotteries, etc.) through section 5514 (relating to pool selling and bookmaking).

Section 5902(b) (relating to prostitution and related offenses).

Section 6111(g)(2) and (4) (relating to sale or transfer of firearms).

(2) Any offense punishable under section 13(f) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(3) Any conspiracy to commit any of the offenses set forth in paragraphs (1) and (2) and any solicitation to commit any of the offenses in paragraphs (1) and (2) if the solicitation results in the completed offense.

(4) Under the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code.

(5) Under the act of November 24, 1998 (P.L.874, No.110), known as the Motor Vehicle Chop Shop and Illegally Obtained and Altered Property Act.

(b.1) Major sexual offenses. — Except as provided in section 5551(7) (relating to no limitation applicable), a prosecution for any of the following offenses under Title 18 must be commenced within 12 years after it is committed:

Section 3121 (relating to rape).

Section 3122.1 (relating to statutory sexual assault).

Section 3123 (relating to involuntary deviate sexual intercourse).

Section 3124.1 (relating to sexual assault).

Section 3124.2 (relating to institutional sexual assault).

Section 3125 (relating to aggravated indecent assault).

Section 4302 (relating to incest).

Section 6312 (relating to sexual abuse of children).

(c) Exceptions. — If the period prescribed in subsection (a), (b) or (b.1) has expired, a prosecution may nevertheless be commenced for:

(1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.

(2) Any offense committed by a public officer or employee in the course of or in connection with his office or employment at any time when the defendant is in public office or employment or within five years thereafter, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than eight years.

(3) Any sexual offense committed against a minor who is less than 18 years of age any time up to the later of the period of limitation provided by law after the minor has reached 18 years of age or the date the minor reaches 55 years of age. As used in this paragraph, the term "sexual offense" means a crime under the following provisions of Title 18 or a conspiracy or solicitation to commit an offense under any of the following provisions of Title 18 if the offense results from the conspiracy or solicitation:

Section 3126 (relating to indecent assault).

Section 3127 (relating to indecent exposure).

Section 4304 (relating to endangering welfare of children).

Section 6301 (relating to corruption of minors).

Section 6312(b) (relating to sexual abuse of children).

Section 6320 (relating to sexual exploitation of children).

(3.1) Any sexual offense committed against an individual who is 23 years of age or younger any time up to the later of the period of limitation provided by law after the individual has reached 24 years of age or 20 years after the date of the offense. As used in this paragraph, the term "sexual offense" means a crime under the following provisions of Title 18 or a conspiracy or solicitation to commit an offense under any of the following provisions of Title 18 if the offense results from the conspiracy or solicitation:

Section 3011(a) as it relates to sexual servitude.

Section 3012 as it relates to sexual servitude.

Section 3121(a) and (b).

Section 3123(a).

Section 3124.1.

Section 3124.2(a) and (b).

Section 3125(a).

Section 3126.

Section 3127.

Section 4302(a).

(4) An offense in violation of 18 Pa.C.S. § 6111(c) or (g), within one year of its discovery by State or local law enforcement, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than eight years.

(5) An offense under 18 Pa.C.S. § 3011 or 3012 in which the victim of human trafficking was not a minor any time up to ten years from the date of the last offense under this paragraph committed against the victim.

(6) An offense under section 3012 involving labor servitude while the victim was a minor, any time up to ten years after the victim reaches 18 years of age.

(c.1) *Genetic identification evidence.* — Notwithstanding any provision of law to the contrary, if evidence of a misdemeanor sexual offense set forth in subsection (c)(3) or (3.1) or a felony offense is obtained containing human deoxyribonucleic acid (DNA) which is subsequently used to identify an otherwise unidentified individual as the perpetrator of the offense, the prosecution of the offense may be commenced within the period of limitations provided for the offense or one year after the identity of the individual is determined, whichever is later.

(d) *Commission of offense.* — An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated. Time starts to run on the day after the offense is committed.

(e) *Commencement of prosecution.* — Except as otherwise provided by general rule adopted pursuant to section 5503 (relating to commencement of matters), a prosecution is commenced either when an indictment is found or an information under section 8931(b) (relating to indictment and information) is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay.

HISTORY:

Act 1976-142 (S.B. 935), P.L. 586, § 2, approved July 9, 1976, See section of this act for effective date information; Act 1978-53 (H.B. 825), P.L. 202, § 10, approved Apr. 28, 1978, eff. in 60 days; Act 1978-168 (S.B. 767), P.L. 873, § 1, approved Oct. 4, 1978, eff. in 60 days; Act 1980-142 (H.B. 1873), P.L. 693, § 206, approved Oct. 5, 1980, eff. in 60 days; Act 1982-122

pastat

(S.B. 563), P.L. 417, § 1, approved May 13, 1982, eff. in 60 days; Act 1982-326 (H.B. 1804), P.L. 1409, § 201, approved Dec. 20, 1982, eff. in 60 days; Act 1984-199 (S.B. 680), P.L. 986, § 2, approved Dec. 14, 1984, eff. in 60 days; Act 1984-218 (H.B. 353), P.L. 1089, § 6, approved Dec. 19, 1984, eff. immediately; Act 1990-208 (H.B. 1228), P.L. 1341, § 1, approved Dec. 19, 1990, eff. in 60 days; Act 1995 Special Session-10 (S.B. 2), P.L. 985, § 16, approved Mar. 31, 1995, eff. in 60 days; Act 1996-17 (H.B. 1927), P.L. 51, § 1, approved Mar. 29, 1996, eff. in 60 days; Act 1998-145 (S.B. 1373), P.L. 1086, § 2, approved Dec. 21, 1998, eff. in 60 days; Act 2000-136 (H.B. 58), P.L. 976, § 1, approved Dec. 20, 2000, eff. immediately; Act 2001-86 (H.B. 1541), P.L. 844, § 1, approved Nov. 21, 2001, eff. in 60 days; Act 2002-86 (S.B. 212), P.L. 518, § 2, approved June 28, 2002, eff. in 60 days; Act 2004-185 (H.B. 835), P.L. 1428, § 2, approved Nov. 30, 2004, eff. immediately; Act 2006-81 (H.B. 1746), P.L. 378, § 3, approved July 7, 2006, eff. in 7 days; Act 2006-179 (S.B. 1054), P.L. 1581, § 7, approved Nov. 29, 2006, eff. in 60 days; Act 2008-131 (H.B. 1845), P.L. 1628, § 9, approved Oct. 17, 2008, eff. in 60 days; Act 2014-105 (S.B. 75), § 6, approved July 2, 2014, eff. in 60 days; Act 2019-87 (H.B. 962), § 4, approved November 26, 2019, eff. November 26, 2019.

Editor's Notes

Section 10 of Act 2019-87 provides: "This act shall apply as follows:

(1) The amendment or addition of 42 Pa.C.S. §§ 5533(b), 5551(7) and 5552(b.1), (c)(3) and (3.1) shall not be applied to revive an action which has been barred by an existing statute of limitations on the effective date of this section.

(2) The amendment of 42 Pa.C.S. § 5533(b) (2) shall apply retroactively to civil actions where the limitations period has not expired prior to the effective date of this section.

(3) The addition of 42 Pa.C.S. §§ 5522(c), 8522(b)(10), 8528(d), 8542(b)(9) and 8553(e) shall apply as follows:

(3)(i) Prospectively, to a cause of action which arises on or after the effective date of this section.

(3)(ii) Retroactively, to a cause of action if the cause of action arose before the effective date of this section. Nothing in this subparagraph shall do any of the following:

(3)(ii)(A) Revive a cause of action as to which the limitation period has expired prior to the effective date of this section.

(3)(ii)(B) Permit the application of the addition of 42 Pa.C.S. §§ 5522(c), 8522(b)(10), 8528(d), 8542(b)(9) and 8553(e) to a claim:

(3)(ii)(B)(I) that is subject to a final judgment which, on the effective date of this section, is not subject to appeal; or

(3)(ii)(B)(II) that, on the effective date of this section, has been nonjudicially resolved in its entirety by the parties, in a form which is enforceable."

Amendment Notes

pastat

The 2019 amendment added "Except as provided in section 5551(7) (relating to no limitation applicable)" in the introductory language of (b.1); added "Section 3124.2 (relating to institutional sexual assault)" in (b.1); rewrote (c)(3); added (c)(3.1); and added "or (3.1)" in (c.1).

The 2014 amendment, in (c)(3), added "Section 3011(b) (relating to trafficking in individuals)" and "Section 3012 (relating to involuntary servitude) as it relates to sexual servitude", and added (c)(5) and (c)(6).

The 2008 amendment, in (b)(1), substituted "victim or party" for "or victim" in the line beginning Section 4953 and added "Section 6111(g)(2) and (4) (relating to sale or transfer of firearms)"; and added (c)(4).

The 2006 amendment, in the first sentence of the introductory language of (c)(3), added "the later of" and "or the date the minor reaches 50 years of age" and added "Section 6320 (relating to sexual exploitation of children)" in (c)(3).

The 2006 amendment added "under Title 18" in the introductory language of (b.1).

APPENDIX R

Pa. Standard Suggested Jury Inst. 9.501 (Complete)

IN GENERAL

1. The defendant has raised the issue of whether [he] [she] acted in self-defense when [he] [she] *[description of defendant's conduct]*. Self-defense is called "justification" in the law of Pennsylvania. If the defendant's actions were "justified," you cannot find [him] [her] guilty beyond a reasonable doubt. The issue having been raised, it is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in justifiable self-defense.

RULES WHEN ISSUE RAISED AS TO USE OF DEADLY FORCE

1. The first matter that you must consider in deciding whether the Commonwealth has met its burden in this regard is what kind of force the defendant used in this instance. There are two kinds, deadly and non-deadly. The Commonwealth claims here that deadly force was used by the defendant and it must prove that claim beyond a reasonable doubt.

2. Deadly force is force that, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury. "Serious bodily injury" is bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ. According to this definition, force is not deadly force simply because it happens to kill or seriously injure. For example, a slap in the face that freakishly and unexpectedly leads to death is not deadly force. A defendant uses deadly force when he or she knows that his or her actions, under the circumstances in which he or she commits them, are *readily capable* of causing death or serious bodily injury.

RULES FOR JUSTIFICATION WHEN DEADLY FORCE WAS USED

1. If the Commonwealth proves to you beyond a reasonable doubt that the defendant used deadly force, then to prove that such force was not justifiable in this case, it must prove one of the following elements beyond a reasonable doubt *[give only those supported by facts of record]*:

[a. That the defendant did not reasonably believe that [he] [she] was in immediate danger of death or serious bodily injury [or kidnapping or sexual intercourse compelled by force or threat] from *[name of alleged victim]* at the time [he] [she] used the force and that, therefore, [his] [her] belief that it was necessary for [him] [her] to use deadly force to protect [himself] [herself] was unreasonable. Put another way, the Commonwealth

This is the applicable jury instruction, 9.501, AS IT READ AT THE DATE OF MY TRIAL, 2010.
Please see page 3 of this doc., at the section marked; Judge mis-instructed Jury on this.

must prove either: (i) that the defendant did not actually believe [he] [she] was in danger of death or serious bodily injury such that [he] [she] needed to use deadly force to defend [himself] [herself] at that moment; or, (ii) that while the defendant actually believed [he] [she] needed to use such force, [his] [her] belief was unreasonable in light of all the circumstances known to [him] [her].

Keep this in mind: a person is justified in using deadly force against another not only when they are in actual danger of unlawful attack but also when they mistakenly, but reasonably, believe that they are. A person is entitled to estimate the necessity for the force he or she employs under the circumstances as he or she reasonably believes them to be at the time. In the heat of conflict, a person who has been attacked ordinarily has neither time nor composure to evaluate carefully the danger and make nice judgments about exactly how much force is needed to protect himself or herself. Consider the realities of the situation faced by the defendant here when you assess whether the Commonwealth has proved beyond a reasonable doubt either that [he] [she] did not believe [he] [she] was actually in danger of death or serious bodily injury to the extent that [he] [she] needed to use such force in self-defense, or that, while [he] [she] did believe that, [his] [her] belief was unreasonable; [or]

b. That, (i) in the same encounter with *[name of alleged victim]*, the defendant engaged in conduct that demonstrated [his] [her] intent to cause death or serious bodily injury, and (ii) by that conduct, [he] [she] provoked the use of force against [him] [her]. The conduct by the defendant must be of such a nature that it shows it was [his] [her] conscious object to cause death or serious bodily injury to the alleged victim, *[name of alleged victim]*. Conduct that is not of such a nature does not constitute the kind of provocation upon which the Commonwealth may rely to prove its case. If you find beyond a reasonable doubt that the defendant's acts were of such a nature, you must then ask whether it provoked the similar use of force against [him] [her]. In this assessment, the conduct by the defendant may be the initial provocation of the fight, or it may be an act that continues or escalates it. However, even if the defendant was the initial aggressor, or was the person who escalated the incident to one involving the use of deadly force, if [he] [she] thereafter withdraws in good faith, making it clear that [his] [her] further intentions are peaceable, and the alleged victim pursues [him] [her] and renews the fight, [he] [she] does not forfeit [his] [her] right to claim justifiable self-defense. If, on the other hand, you find beyond a reasonable doubt that the defendant provoked the use of force against [him] [her] by engaging in conduct that showed that [he] [she] intended to cause death or serious bodily injury to the alleged victim, you may find that [his] [her] conduct was not justified.

c. That the defendant knew that [he] [she] could avoid the necessity of using deadly force with complete safety by *[give only those supported by facts of record]*:

(1) retreating, but that [he] [she] failed to do so. [However, the defendant is not obligated to retreat from [his] [her] own dwelling, that is, any building or structure though movable or temporary, or a portion thereof, including the doorway, that is, at least for the time being, the defendant's home or place of lodging, unless [he] [she] was the initial aggressor in the incident.] *[or]* [However, the defendant is not obligated to retreat from [his] [her] place of work unless [he] [she] is attacked there by someone the defendant knows also works in the same place]; *[or]*

(2) surrendering possession of a thing to a person asserting a claim of right to it, and failing to do so; *[or]*

(3) complying with a demand that [he] [she] abstain from any action [he] [she] had no duty to make, and failing to do so.]

[The following exception to the third element should be given only where supported by facts of record:]

[However, if the defendant is:

(a) a public officer using force to perform his or her duties; *[or]*

(b) someone justified in using force to assist a public officer; *[or]*

(c) a person justified in using force to make an arrest or prevent an escape,

he or she is not obligated to stop those efforts because of actual or threatened resistance by or on behalf of the person against whom he or she is directing his or her lawful duty.]

2. If the Commonwealth proves one of these elements beyond a reasonable doubt, the actions of the defendant in using deadly force are not justified. If the Commonwealth fails to prove these elements, the defendant's action was justified and you must find [him] [her] not guilty of the crime of *[crime]*.

RULES FOR JUSTIFICATION WHEN NON-DEADLY FORCE WAS USED

1. If the defendant only used non-deadly force during the incident in question, the Commonwealth may prove that this use of force was not justified if it can show, beyond a reasonable doubt, any of the following elements *[give only those supported by facts of record]*:

Judge
mis-instructed
Jury on this

[a. That the defendant did not reasonably believe that it was immediately necessary for [him] [her] to use force to protect [himself] [herself] against the unlawful use of force by [name of alleged victim]. The Commonwealth must prove either: (i) that the defendant did not actually believe [he] [she] was in danger of becoming the victim of unlawful force such that [he] [she] needed to use force to defend [himself] [herself] at the moment [he] [she] used it; or, (ii) that while the defendant actually believed [he] [she] needed to use such force, [his] [her] belief was unreasonable in light of all the circumstances known to [him] [her].

Keep this in mind: a person is justified in using force against another not only when they are in actual danger of unlawful attack but also when they mistakenly, but reasonably, believe that they are. A person is entitled to estimate the necessity for the force he or she employs under the circumstances as he or she reasonably believes them to be at the time. In the heat of conflict, a person who has been attacked ordinarily has neither time nor composure to evaluate carefully the danger and make nice judgments about exactly how much force is needed to protect himself or herself. Consider the realities of the situation faced by the defendant here when you assess whether the Commonwealth has proved beyond a reasonable doubt either that he or she did not believe he or she was actually in danger of unlawful force to the extent that he or she needed to use such force in self-defense, or that, while he or she did believe that, his or her belief was unreasonable. Unlawful force means any form of force, including confinement, that is employed without the consent of the person against whom it is directed where its use would constitute an offense or actionable tort.]

[b. That, (i) in the same encounter with [name of alleged victim], the defendant engaged in conduct that demonstrated [his] [her] intent to use unlawful force against the alleged victim, and, (ii) by that conduct, [he] [she] provoked the use of force against [himself] [herself]. Conduct that is not itself the unlawful use of force does not constitute the kind of provocation upon which the Commonwealth may rely to prove its case. If you find beyond a reasonable doubt that it is of such a nature, you must then ask whether it provoked the similar use of force against [him] [her]. In this assessment, the conduct by the defendant may be the initial provocation of the fight, or it may be an act that continues or escalates it. However, even if the defendant was the initial aggressor, or was the person who escalated the incident to one involving the use of unlawful force, if [he] [she] thereafter withdraws in good faith, making it clear that [his] [her] further intentions are peaceable, and the alleged victim pursues [him] [her] and renews the fight, [he] [she] does not forfeit [his] [her] right to claim justifiable self-defense. If, on the other hand, you find be-

yond a reasonable doubt that the defendant provoked the use of force against [himself] [herself] by engaging in conduct that showed that [he] [she] intended to cause unlawful force to the alleged victim, you may find that [his] [her] conduct was not justified.]

Note that a defendant who has used only non-deadly force has no duty to [retreat from the incident] [or] [surrender possession of a thing] [do or not do any act he or she has no legal duty to do or refrain from doing], as long as he or she has not provoked the unlawful use of force, as I have explained that matter above:

2. Unless the Commonwealth proves one of these two elements, the use of non-deadly force by the defendant is justified and you must find [him] [her] not guilty of the offense of [of-fense]. If the Commonwealth does prove one of the elements beyond a reasonable doubt, the actions of the defendant are not justified.

RULES REGARDING USE OF FORCE IN SPECIFIC SITUATIONS

[To be used only where made applicable by facts of record:]

1. The Commonwealth may also prove that the use of force by the defendant was not justified if it proves beyond a reasonable doubt:

a. That the defendant used force to resist an arrest when the defendant knows that the arrest is being made by a peace officer, whether or not the arrest is lawful. However, a defendant does not forfeit his or her right to claim that his or her actions were justified if he or she reasonably believed that he or she was protecting himself or herself against unlawful and deadly force by the officer. To prove this element, then, the Commonwealth must prove beyond a reasonable doubt that the defendant did not believe that the arresting officer was using unlawful and deadly force against [him] [her] or, if the defendant did believe that, [his] [her] belief was unreasonable.

b. That the defendant used force to resist force used by the occupier [or possessor of property] [or their agent], where the defendant knew that the person they were resisting was acting under a claim of right to the property, and that [his] [her] resistance was not authorized by law. A defendant is authorized to use force in such a circumstance if (i) he or she is a public officer [or a person assisting a public officer] performing his or her duties, or a person making or assisting in a lawful arrest; (ii) he or she has been unlawfully dispossessed of the property and is making a justified re-entry of it under the law; or (iii) he or she reasonably believes that such force is necessary to protect himself or herself from deadly force by another.

SPECIAL RULE REGARDING CONFINEMENT AS JUSTIFIED FORCE

[To be used only where made applicable by facts of record.]

There is one other way in which the Commonwealth may seek to prove that the defendant's use of confinement was not a justified use of force in this case. The Commonwealth would have to prove, beyond a reasonable doubt, that the defendant failed to take all reasonable measures to end the alleged victim's confinement as soon as the defendant knew [he] [she] could do so in complete safety. Of course, if the alleged victim had been arrested for some offense and confined according to law, the defendant would not be responsible for such period of confinement.

SUBCOMMITTEE NOTE

The present instruction is drawn from Crimes Code sections 501 to 505. It consolidates numerous individual instructions set out in prior editions of this work in an effort to synthesize and organize the material necessary to a proper rendering of the self-defense concept.

NOTE: The court should give only those sections of the instructions appropriate to and raised by the facts of each case. Not all sections may be supported by the provable facts and it is intended that the court should select only those sections necessary to the jury's consideration.

The current approach casts the instruction in terms of the burden of proof, a burden squarely placed upon the Commonwealth once the facts suggest the propriety of the instruction. *Commonwealth v. Christy*, 656 A.2d 877 (Pa. 1995).

Overall, the instruction seeks to remain faithful to the language of section 505 and the teachings of the Supreme Court of Pennsylvania in *Commonwealth v. Christy*, 656 A.2d 877 (Pa. 1995), and *Commonwealth v. Capitulo*, 498 A.2d 806 (Pa. 1985). See also *Commonwealth v. Maners*, 827 A.2d 482 (Pa. Super. 2003). The defendant's belief as to the necessity of the use of force is to be judged by an objective standard, allowing the Commonwealth to meet its burden by showing either that the defendant did not actually believe he or she was in immediate danger or that his or her belief was unreasonable under all attendant circumstances. *Commonwealth v. Fisher*, 493 A.2d 719 (Pa. Super. 1985).

On the nature of the defendant's act of provocation to defeat his or her counter use of force, see *Commonwealth v. Samuel*, 590 A.2d 1245, 1248 (Pa. 1991). The nature of the retreat doctrine is discussed at some length in *Commonwealth v. Serge*, 837 A.2d 1255, 1267 (Pa. Super. 2003), and the continued availability of the justification defense to an arrest in which the defendant perceives that unlawful and deadly force is to be visited upon him or her is discussed in *Commonwealth v. French*, 611 A.2d 175 (Pa. 1992).

APPENDIX S

Pa. Rules Evidence 405 (Complete)

Rule 405. Methods of Proving Character

(a) By Reputation. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible.

(1) On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct probative of the character trait in question.

(2) In a criminal case, on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible.

(b) By Specific Instances of Conduct. Specific instances of conduct are not admissible to prove character or a trait of character, except:

(1) In a civil case, when a person's character or a character trait is an essential element of a claim or defense, character may be proved by specific instances of conduct.

(2) In a criminal case, when character or a character trait of an alleged victim is admissible under Pa.R.E. 404(a)(2)(B) the defendant may prove the character or character trait by specific instances of conduct.

APPENDIX T

PA. Rules Of Evid. 609 (Complete)

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of Pardon or Other Equivalent Procedure. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:

(1) a pardon or other equivalent procedure based on a specific finding of innocence; or

(2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.

(d) Juvenile Adjudications. In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301*et seq.*, may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

APPENDIX U

Pa. Rules of Evid. 804 (Complete)

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter, except as provided in Rule 803.1(4);

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this paragraph (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

NOTES

Comment:

Pa.R.E. 804(a)(3) differs from F.R.E. 804(a)(3) in that it

excepts from this rule instances where a declarant-witness's claim of an inability to remember the subject matter of a prior statement is

parules

not credible, provided the statement meets the requirements found in Pa.R.E. 803.1(4). This rule is otherwise identical to F.R.E. 804(a).

A declarant-witness with credible memory loss about the subject matter of a prior statement may be subject to this rule.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

NOTES

Comment:

Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1).

In criminal cases the Supreme Court has held that former testimony is admissible against the defendant only if the defendant had a "full and fair" opportunity to examine the witness. *See Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992).

Depositions

Depositions are the most common form of former testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

Depositions in criminal matters. The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42

Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa. R.C.P. No. 4020(a)(3) and (5).

A video deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. No. 4017.1(g).

42

Pa.C.S. § 5936 provides that the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness.

(2) *Statement Under Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

NOTES

Comment:

Pa.R.E. 804(b)(2) differs from F.R.E. 804(b)(2) in that the

Federal Rule is applicable in criminal cases only if the defendant is charged with homicide. The Pennsylvania Rule is applicable in all civil and criminal cases, subject to the defendant's right to confrontation in criminal cases.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court interpreted the Confrontation Clause in the Sixth Amendment of the United States Constitution to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made

only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

NOTES

Comment:

This rule is identical to F.R.E. 804(b)(3).

(4) *Statement of Personal or Family History.* A statement made before the controversy arose about:

- (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
- (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

NOTES

Comment:

Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by

parules

requiring that the statement be made before the controversy arose.

See *In re McClain's Estate*, 392 A.2d 1371 (Pa. 1978). This

requirement is not imposed by the Federal Rule.

(5) *Other exceptions (Not Adopted)*

NOTES

Comment:

Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807).

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

NOTES

Comment:

This rule is identical to F.R.E. 804(b)(6).

NOTES

TREATISES AND ANALYTICAL MATERIALS

1. 17 P.L.E. CRIMINAL LAW § 282, Pennsylvania Law Encyclopedia, Declarations by Victims and Third Persons, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

2. 17 P.L.E. CRIMINAL LAW § 291, Pennsylvania Law Encyclopedia, In General, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

3. 18 P.L.E. CRIMINAL LAW § 333, Pennsylvania Law Encyclopedia, -- Confessions, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

4. 24 P.L.E. EVIDENCE § 65, Pennsylvania Law Encyclopedia, Evidence at Former Trial, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

5. 24 P.L.E. EVIDENCE § 131, Pennsylvania Law Encyclopedia, Hearsay in General, Matthew Bender

parules

& Company, Inc., a member of the LexisNexis Group.

6. 24 P.L.E. EVIDENCE § 132, Pennsylvania Law Encyclopedia, Oral Statements by Third Persons, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

7. 24 P.L.E. EVIDENCE § 133, Pennsylvania Law Encyclopedia, Writings Containing Statements by Third Persons, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

8. 24 P.L.E. EVIDENCE § 137, Pennsylvania Law Encyclopedia, Self-Serving Declarations, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

9. 24 P.L.E. EVIDENCE § 139, Pennsylvania Law Encyclopedia, Declarations against Interest, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

10. 53 P.L.E. WITNESSES § 125, Pennsylvania Law Encyclopedia, Stenographic Notes or Transcripts of Testimony or Statements, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

11. 55 P.L.E. WORKERS' COMPENSATION § 484, Pennsylvania Law Encyclopedia, Action by Board, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

12. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 104.06, CHAPTER 104 Preliminary Questions, Rule 104(A) Determinations.

13. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 105.07, CHAPTER 105 Limiting Evidence That is Not Admissible Against Other Parties or for Other Purposes, Limiting Instructions.

14. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 404.29, CHAPTER 404 Character Evidence; Crimes or Other Acts, Crimes, Wrongs and Acts of Persons Other than Accused.

15. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 410.07, CHAPTER 410 Pleas, Plea Discussions, and Related Statements, Guilty and Nolo Contendere Pleas.

16. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 602.02, CHAPTER 602 Need for Personal Knowledge, Official Commentary.

17. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 602.06, CHAPTER 602 Need for Personal Knowledge, When Personal Knowledge Not Required.

18. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 2, Introduction, Defendant's Constitutional Right of Confrontation in Criminal Cases.

19. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 801.15, CHAPTER 801 Definitions That Apply to This Article, Analyzing Hearsay.

20. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 802.02, CHAPTER 802 The Rule Against Hearsay, Official Commentary.

21. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 802.05, CHAPTER 802 The Rule Against Hearsay, Purpose and Use of Rule 802.

22. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 802.06, CHAPTER 802 The Rule Against Hearsay, Relationship Between Hearsay and Confrontation Clause.

parules

23. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 802.08, CHAPTER 802 The Rule Against Hearsay, Admissibility of Hearsay from Nontestifying Declarant.

24. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 803.22, CHAPTER 803 Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness, Judgment of a Previous Conviction--[rule 803(22) Not Adopted].

25. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 803.25, CHAPTER 803 Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness, An Opposing Party's Statement--Rule 803(25).

26. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 803.1.28, CHAPTER 803.1 Exceptions to the Rule Against Hearsay--Testimony of Declarant Necessary, Official Commentary to Rule 803.1(4).

27. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.02, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Introductory Official Commentary to Rule 804.

28. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.05, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(A) with Federal Rule of Evidence.

29. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.12, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Absence of Witness.

30. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.14, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Official Commentary to Rule 804(B)(1).

31. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.15, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(B)(1) with Federal Rule of Evidence.

32. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.18, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Opportunity to Examine, Not Actual Examination, Required.

33. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.20, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Criminal Cases.

34. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.21, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Civil Cases.

35. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.23, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Official Commentary to Rule 804(B)(2).

36. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.24, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(B)(2) with Federal Rule of Evidence.

37. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.33, CHAPTER 804 Exceptions to the

parules

Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(B)(3) with Federal Rule of Evidence.

38. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.40, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Statements Against Penal Interest.

39. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.42, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Official Commentary to Rule 804(B)(4).

40. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.43, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(B)(4) with Federal Rule of Evidence.

41. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.50, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Comparison of Rule 804(B)(6) with Federal Rule of Evidence.

42. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.52, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Purpose and Use of Rule 804(B)(6).

43. 1 Ohlbaum on the Pennsylvania Rules of Evidence § 804.53, CHAPTER 804 Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness, Wrongdoing.

**Additional material
from this filing is
available in the
Clerk's Office.**