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## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (SEPTEMBER 24, 2020)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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AARON EDMONDS TYSON,

*Appellant,*

v.

SUPERINTENDENT HOUTZDALE SCI;
ATTORNEY GENERAL PENNSYLVANIA,

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No. 19-1391

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No.: 3-13-cv-02609)
District Judge: Honorable James M. Munley

Before: JORDAN, RESTREPO and
GREENBERG, Circuit Judges.

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RESTREPO, Circuit Judge

Aaron Edmonds Tyson handed his gun to Otis Powell and waited in the getaway car while Powell shot and killed two men in a stopped van. A jury in Monroe County, Pennsylvania, convicted Tyson of two counts of first-degree murder as an accomplice. In seeking post-conviction relief in state court, Tyson claimed his trial counsel was ineffective for not

objecting to the court's erroneous instruction, which he argued allowed the jury to find him guilty without finding he possessed the requisite intent to kill. After the state court deemed the claim meritless, Tyson pursued a habeas petition. The District Court held the state court reasonably applied federal law in finding his trial counsel was not ineffective and denied relief. For the reasons set forth below, we disagree and will reverse the District Court.

## I. Factual and Procedural Background

The Pennsylvania Superior Court summarized the facts of this case as follows:

> On April 24, 2002, [Tyson], [Powell] and Kasine George ("George") were riding in a vehicle. At some point, [Tyson] exited the car and, when he returned, stated that two white boys had just pulled a gun on him. George described [Tyson] as angry at that time. [Tyson], who was at that point a passenger in the car, took a 9 millimeter handgun from the center console. He racked the slide of the gun, thus arming it. [Tyson] told Powell, who was driving, to pull out from the location where the vehicle was parked.
>
> [Tyson] pointed to a van and indicated it was being driven by the two who had pulled a gun on him. With Powell driving, the three followed the van to a club. When the two white men entered that club, Powell gave George a knife, directing him to puncture the tires on the van. George did so to at least one of the tires. When George returned to the car, [Tyson] was in the driver's seat. Powell

> was now a passenger and he asked [Tyson] for the gun. After five or ten minutes, the two white men exited the bar, entered the van and left the location.
>
> With [Tyson] now driving, the three again followed the van. It eventually stopped due to the flat tire. At that point, [Tyson] and his two companions were going to exit the car, but Powell told the other two to wait. Powell then walked to the van. As he did so, [Tyson] backed the car to a point where he and George could see what was transpiring at the van. At that point, Powell shot its two occupants, Daniel and Keith Fotiathis . . . . He then ran back to the car. Powell, George and [Tyson] left the scene. [Tyson] drove the vehicle. The three discussed whether they should go to New York but eventually decided to return to their nearby home.

*Commonwealth v. Tyson*, 947 A.2d 834 (Pa. Super. 2008) (unpublished memorandum) at 6-8, *appeal denied*, 605 Pa. 686, 989 A.2d 917 (Pa. 2009).

Brothers Daniel and Keith Fotiathis died from the gunshot wounds inflicted by Powell. Tyson was charged with being an accomplice to two counts of first and third-degree murder and tried by jury in May of 2006. Kasine George, who was later arrested on unrelated drug charges, provided information to the police and testified for the Commonwealth at trial. Tyson was found guilty as an accomplice to the first-degree murders of the Fotiathis brothers. In July 2006, the trial court sentenced him to the mandatory term of life imprisonment without parole.

Under Pennsylvania law, the specific intent to kill is an element of first-degree murder. *Commonwealth v. Thomas*, 194 A.3d 159, 167 (Pa. Sup. Ct. 2018). To be guilty as an accomplice in Pennsylvania, a person must act with the same intention of promoting or facilitating the crime as the principal. 18 Pa. C.S. § 306(c), (d). Thus, to be guilty as an accomplice to first-degree murder, the state must prove the accused possessed the specific intent to kill. *Commonwealth v. Speight*, 854 A.2d 450, 460 (Pa. 2004). *See also Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) ("Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, she must have intended that the victim be killed.") (abrogated on other grounds, *Porter v. McCollum*, 558 U.S. 30, 130 (2009)).

At trial, the Commonwealth's theory of the case was that Tyson was guilty because he assisted the principal, Powell. In his closing argument, the prosecutor stated that the "rule" in Pennsylvania is "if you help a shooter kill, you are as guilty as a shooter." A-885. He expounded on this statement with an analogy:

> So in a bank robbery, when there's a look out sitting outside the bank and he tells his friends who are armed now, don't go shooting any bank guards. Go and get the money and come back out. And I am going to stay in the car and we will drive off and live happily ever after. And the two friends go in a shoot a bank guard. Guess what? He is as guilty as they are even though he told them not to shoot because the law can sometimes be sensible, especially with a criminal.

A-885-86. The prosecutor concluded the explanation by stating that "anyone who is with the shooter . . . either helped to drive a vehicle, providing the vehicle, handing the gun over, slashing the tire, any of those acts make those people equally guilty of the criminal offense as a helper, as an accomplice. That is beyond any doubt whatsoever." A-886.

The Commonwealth's explanation of accomplice liability was a misstatement of Pennsylvania law. The court's jury instruction reinforced this misstatement and similarly failed to convey that an accomplice to first-degree murder must possess the intent to kill. After emphasizing that Tyson was charged as an accomplice, not the principal, the court defined both first and third-degree murder by focusing entirely on the mental state of "the killer." A-926. In explaining the elements of first-degree murder, the court mistakenly identified Powell as the accomplice and told the jury he committed an intentional killing, stating that "in this case–not this Defendant–but Otis Powell killed them as an accomplice with the Defendant, Aaron Tyson. And this was done with the specific intent to kill." A-927. The instruction was further marred by the court mistakenly naming the elements of first-degree murder as the elements of third-degree murder.

The court's instruction for accomplice liability was general and not tied to either murder charge. Instead, the court explained that Tyson "is an accomplice if with the intent to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, committing it." A-930 (emphasis added). The court finished its explanation with a

circular statement: "You may find [Tyson] guilty on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed; that [Tyson] was an accomplice of the person who actually committed the crime." A-930. The court failed to mention that, under Pennsylvania law, an accomplice to first-degree murder must intend to promote or facilitate a killing.

After the instruction concluded, the court entertained the jury's request for clarification on the degrees of murder. It reiterated the elements of first and third-degree murder, this time correctly, but again focused entirely on the intent of the "killer" without citing the requisite *mens rea* of the accomplice. A-948. It then practically directed the jury to find for first-degree murder because, "in this particular case," the charge of being an accomplice "almost by definition . . . encompasses the concept of first degree murder," while the charge of accomplice to third-degree murder is "offered as another possibility even though it does not fit as well within the confines of the explanation because counsel agreed you may consider that as a possibility." A-950-51.[1]

Tyson appealed to the Pennsylvania Superior Court, raising numerous claims not relevant to this appeal, and the court affirmed his conviction of two counts of accomplice to first-degree murder. In November 2010, Tyson filed a timely *pro se* petition and accompanying brief in accordance with the Post-Conviction Relief Act (PCRA) before the trial court.

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[1] The jury was instructed on third-degree murder after the court suggested to defense counsel that such an instruction would be appropriate. A-916-17.

In his petition, Tyson stated he was "deprived of his Constitutional Rights to Due Process and right to effective assistance of counsel." A-172. In the accompanying brief, Tyson articulated that Pennsylvania law requires proof that an accomplice to first-degree murder possess the specific intent to the kill. A-178. He alleged that the trial court's instruction did not convey this burden of proof to the jury, in violation of his due process rights under federal law. A-179.

Counsel was appointed and filed an amended PCRA petition, which expounded upon Tyson's claim that, based on federal law, trial counsel was ineffective for failing to object to the trial court's instruction. PCRA counsel argued an objection was warranted because "[t]he instruction as given could easily have confused the jury as to what kind of intent must be shown beyond a reasonable doubt." A-182.

A PCRA hearing was held before the trial court in October 2011. Tyson's post-conviction counsel questioned trial counsel about his failure to object to the accomplice instruction; trial counsel responded that he did not remember the charge. A-973. In subsequent briefing, post-conviction counsel reiterated the ineffective assistance claim, arguing that trial counsel's failure to request an instruction on the *mens rea* required for accomplice liability "is a tremendously important point" because the intent to kill "means the difference between murder in the first degree and murder in the third degree." A-188.

The trial court denied Tyson's PCRA petition finding that, *inter alia*, counsel was not ineffective for failing to object to the jury instruction because it provided a definition of accomplice liability and the elements of first-degree murder. Citing portions of

the instruction, the court concluded that, on the whole, it conveyed the Commonwealth's burden to prove beyond a reasonable doubt that Tyson possessed "the shared specific intent to kill the Fotiathis brothers." A-151. The court bolstered the denial of the ineffectiveness claim by stating that the evidence presented to the jury "revealed that [Tyson's] conduct was willful, deliberate and premeditated and that he actively participated in the murders by aiding the shooter." A-151.

Tyson appealed to the Pennsylvania Superior Court, which affirmed the findings of the trial court and denied post-conviction relief. Adopting the "cogent" reasoning of the lower court, the Superior Court agreed that the ineffective assistance claim was meritless because the instruction sufficiently conveyed the requisite *mens rea* for an accomplice to first-degree murder. A-052. It affirmed the trial court's denial of PCRA relief.

In October 2013, Tyson filed a *pro se* writ of habeas corpus in the Middle District of Pennsylvania raising four claims of ineffective assistance of counsel.[2] In deciding the instant claim regarding counsel's failure to object to the accomplice liability instruction, the District Court found that the Pennsylvania Superior Court assessed the claim on its merits and it had therefore been exhausted in state courts. Accordingly, the District Court applied the standard of review of

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[2] The District Court stayed Tyson's habeas petition so that he could pursue his second and third PCRA petitions in state court, both of which were denied by the PCRA court as untimely. The Superior Court affirmed both denials. After the denial of the third petition, the Pennsylvania Supreme Court denied leave to appeal.

the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), and concluded that the Superior Court reasonably applied clearly established federal law in determining that Tyson's trial counsel was not ineffective for failing to object to the accomplice liability instruction. A-12-13.

Tyson appealed to this Court, which granted a certificate of appealability limited to "his jury instructions claim under both the Fourteenth Amendment's Due Process Clause, *see Estelle v. McGuire*, 502 U.S. 62, 72 (1991), and the Sixth Amendment, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984)." A-23. As per the certificate's instruction, the parties addressed the District Court's determination that the ineffective assistance of counsel claim had been exhausted in state court and was not procedurally defaulted. A-22-23.

## II. Exhaustion and Procedural Default

Under AEDPA, a federal court may grant habeas corpus relief if it concludes the petitioner is in custody in violation "of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioners in state custody may bring a habeas petition only if they have properly exhausted the remedies available in state court, assuming such remedies are available and can effectively redress the petitioner's rights. 28 U.S.C. § 2254(b)(1)(A). Exhaustion requires a petitioner to "fairly present" their 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." *Robinson v. Beard*, 762 F.3d 316, 328 (3d Cir. 2014). Because Pennsylvania law prevents a defendant from raising an ineffective

assistance of counsel claim on direct appeal, *Commonwealth v. Grant*, 813 A.2d 726, 738 (Pa. 2002), a defendant exhausts an ineffective assistance of counsel claim in the Commonwealth by raising it in the first petition for collateral relief under the PCRA, *see Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236-37 (3d Cir. 2017).

In his *pro se* PCRA petition, Tyson asserted that his counsel was ineffective for failing to object to the trial court's erroneous instruction, which violated his due process rights under the Fourteenth Amendment. He cited both this Court's decision in *Laird v. Horn*, 414 F.3d 419, 430 (3d Cir. 2004), which held that an instruction that failed to explain that an accomplice to first-degree murder must possess the intent to kill violated the accused's due process rights, and the Pennsylvania Supreme Court's decision in *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994), which held that the specific intent to kill is an element of the crime of accomplice to first-degree murder that must be proven beyond a reasonable doubt in accordance with the Supreme Court's decision *In re Winship*, 397 U.S. 358 (1970).

Tyson's *pro se* pleading, which was later utilized in his counseled petition, was sufficient to fairly present his federal ineffective assistance of counsel claim to the state court. *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) ("To 'fairly present' a claim, a 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. . . . Yet, the petitioner need not have cited 'book and verse' of the federal constitution.")[3]

The Commonwealth contests this conclusion, arguing that both the underlying due process claim and the ineffective assistance claim must be exhausted before this Court can conduct habeas review.[4] It maintains that Tyson's due process challenge was not fairly presented to the state court because it was not raised on direct appeal. Because the claim would be deemed waived under Pennsylvania law, the Commonwealth argues the doctrine of procedural default prohibits this Court from addressing the alleged due process violation on habeas review.

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[3] Upon denial of his claim by the Superior Court, Tyson was not required to seek review in the Pennsylvania Supreme Court in order to exhaust his claim. *See Pennsylvania Bulletin: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 30 Pa. Bull. 2582 (2000) (stating effective immediately, following adverse order from Superior Court or Supreme Court of Pennsylvania, petition for rehearing or allowance of appeal no longer required in post-conviction relief matters to exhaust state court remedies for purposes of federal habeas proceedings).

[4] "The doctrine of procedural default prohibits federal courts from reviewing a state court decision involving a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment." *Fahy v. Horn*, 516 F.3d 169, 187 (3d Cir. 2008). "A state procedural rule is 'adequate' if it was firmly established and regularly followed' at the time of the alleged procedural default." Bey, 856 F.3d at 236 n.18 (quoting *Ford v. George*, 498 U.S. 411, 424 (1991)). Here, the Commonwealth argues the due process claim was procedurally defaulted because a rule of Pennsylvania law would deem it waived on post-conviction review. For the reasons explained above, this argument is unpersuasive because the due process claim was raised within the ineffective assistance claim, which a rule of Pennsylvania law found cognizable.

We disagree that the due process claim can be regarded as separate and distinct from the ineffective assistance of counsel claim. Addressing the claims independently of one another would require us to disregard the analysis conducted by the state court. Moreover, because Tyson did not raise the due process claim on direct appeal, it is only cognizable under Pennsylvania law through the lens of an ineffective assistance claim on post-conviction review. The Superior Court held Tyson's trial counsel was not ineffective for failing to object to the court's instruction because the instruction did not violate Tyson's due process rights. Applying the proper standard of review under AEDPA, the District Court concluded the Superior Court's determination constituted a reasonable application of clearly established federal law as announced in *Strickland v. Washington*, 466 U.S. 668 (1984). It is this conclusion we now review on appeal.

## III. Standard of Review

In denying habeas relief, the District Court did not hold an evidentiary hearing nor engage in independent fact-finding. Accordingly, "we apply de novo review to its factual inferences drawn from the state court record and its legal conclusions." *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 475 (3d Cir. 2017).

Because we have concluded the state court decided Tyson's ineffective assistance claim on its merits, we review it in accordance 28 U.S.C. § 2254, as amended by AEPDA.[5] Section 2254(d) provides this Court with

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[5] We recognize, in affirming this finding by the District Court, that there is a presumption that the state court adjudicated a claim on the merits "in the absence of any indication or state-law

the statutory authority to grant habeas corpus relief for petitioners in state custody, stating:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

We are concerned here with whether the Pennsylvania courts' application of clearly established federal law was unreasonable. That is an objective inquiry. *Williams v. Taylor*, 529 U.S. 362, 409 (2000) ("a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable"). Under AEDPA review, "a

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procedural principals to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). The presumption holds even if the state court did not analyze or even cite Supreme Court decisions in reaching its conclusion. Even "[w]here a state court's decision is unaccompanied by an explanation," the habeas petitioner has the burden of proving the state court's denial of relief was the result of an unreasonable legal or factual conclusion. *Id.* at 98.

habeas court must determine what arguments or theories supported or, . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington*, 562 U.S. at 102.

Here, the Superior Court found that Tyson's trial counsel was not ineffective. In so doing, it applied Pennsylvania Supreme Court law that counsel is presumed effective unless the appellant proves: 1) the underlying claim has arguable merit; 2) counsel's course of conduct "did not have some reasonable basis designed to effectuate [the appellant's] interests;" and, 3) "but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different." *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003); A-48.

This Court has repeatedly recognized that Pennsylvania's test for ineffective assistance of counsel is consistent with the Supreme Court's decision in *Strickland* because it requires "findings as to both deficient performance and actual prejudice." Mathias, 876 F.3d at 476. *See also Jacobs v. Horn*, 395 F.3d 92, 106 n.9 (3d Cir. 2005); *Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000). Here, the Superior Court found the court's jury instruction sufficiently conveyed the Commonwealth's burden to prove Tyson possessed the intent to kill. Because the underlying due process claim was deemed to have no arguable merit, the court held counsel could not be ineffective for not objecting to the instruction. The District Court found this decision constituted a reasonable application of *Strickland*. We disagree.

## IV. Ineffective Assistance of Counsel.

### A. Counsel's Performance

We begin our analysis with the first prong of *Strickland*, examining whether the Superior Court's decision that counsel acted reasonably was contrary to clearly established federal law. "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 688). To obtain relief, Tyson must prove the alleged errors were "so serious that counsel was not functioning as the 'counsel' guaranteed [to him] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "Generally, trial counsel's stewardship is constitutionally deficient if he or she 'neglect[s] to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority' unless the failure is a strategic choice." *Bey*, 856 F.3d at 238 (quoting *Everett*, 290 F.3d at 514).

We recognize that "[e]ven under de novo review, the standard for judging counsel's representation is a most deferential one" and that, under AEDPA review, that deference is heightened. *Harrington*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* *See Burt v. Titlow*, 571 U.S. 12, 15 (2013) ("When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel . . . , our cases require that the federal court use a 'doubly deferential' standard of review that gives both the

state court and the defense attorney the benefit of the doubt." (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

Tyson argues that counsel's inaction permitted the court to instruct the jury that they could convict him of first-degree murder as an accomplice without finding he possessed a specific intent to kill—in effect, allowing the Commonwealth to not prove an element of the crime. The Due Process Clause of the Fourteenth Amendment requires the government to prove each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). "This bedrock, 'axiomatic and elementary' principle" prohibits a jury instruction that lessens the prosecution's burden of proof. *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. at 363). If the instruction contains "some 'ambiguity, inconsistency, or deficiency,'" such that it creates a "reasonable likelihood" the jury misapplied the law and relieved the government of its burden of proving each element beyond a reasonable doubt, the resulting criminal conviction violates the defendant's Constitutional right to due process. *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 285 (3d Cir. 2018) (citing *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (internal citations omitted)).

When a habeas petitioner claims the jury instruction was unconstitutional, "we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue." *Smith v. Horn*, 120 F.3d 400, 413 (3d Cir. 1997) (citing *Francis*, 471 U.S. at 315-16). We exercise this duty by "focus-[ing] initially on the specific language challenged," *Francis*, 471 U.S. at 315, and then considering the

"allegedly constitutionally infirm language . . . in the context of the charge as a whole" to determine whether there is a reasonable likelihood the jury applied the instructions in a manner violative of the accused's due process rights. *Smith*, 120 F.3d at 411.

Reading the instant instruction through this lens, we find a strong likelihood the jury convicted Tyson as an accomplice to first-degree murder without finding he possessed the specific intent to kill. Indeed, we could find no language in the instruction that would lead the jury to connect the requisite intent to kill to the role of an accomplice.

The instruction began with the court's definition of malice, the *mens rea* element for murder, as encompassing "one of three possible mental states which the law regards as being bad enough to make a killing a murder." A-926. It instructed the jury to find malice "if the killer acts with the intent to kill, or secondly, with an intent to inflict serious bodily harm, or third, [with] that wickedness of disposition . . . ." A-926 (emphasis added). The instruction therefore conveyed to the jury that the only relevant mental state was that of the killer; it neither referenced nor explained the requisite mental state of an accomplice.

The court next provided confusing definitions of the different degrees of murder, initially identifying the elements of first-degree as third-degree murder. From there, the instruction affirmatively informed the jury that Powell—whom it mistakenly identified as an accomplice—possessed the intent to kill:

> With third degree murder the elements of the offense . . . that the Commonwealth must

> prove is that Daniel and Keith Fotiathis are dead—and I think there's not a question that they are dead. . . . Secondly, that in this case–not this Defendant—but Otis Powell killed them as an accomplice with the Defendant, Aaron Tyson. And this was done with [the] specific intent to kill. Malice. Specifically, specific intent to kill is a fully-formed intent to kill. And one who does so is conscious of having that intention. But also a killing with specific intent is killing with malice. If someone kills in that manner that is willful, deliberate [and] premeditated like in this case stalking or lying in wait or ambush, that would establish specific intent.

A-927 (emphasis added). Defense counsel did not object to the court's mistake as to the degree of murder, which likely confused the jury but arguably did not prejudice Tyson. The absence of an objection to the court's explanation of the *mens rea* element of first-degree murder, however, is indefensible. The court inadvertently identified the actual shooter as an accomplice, and then informed the jury the facts of record established the killings were intentional. The instruction comes close to identifying Tyson, who the court had already identified as the alleged accomplice, as presumptively guilty of first-degree murder. The court in no way conveyed the Commonwealth's burden to prove that Tyson acted with the specific intent to kill. It instead conveyed to the jury that Powell's presumed intent to kill would render Tyson guilty as an accomplice to first-degree murder.

The court's instruction on third-degree murder led the jury further astray:

> In third degree murder the killer must again act in such a manner that there is malice [and] that the person who is the victim must be dead. And, again, the connection with the person who did the killing is such that there has to be a direct connection. Remember what I said about malice? . . . It is a shorthand way of referring to three different possible mental states that the killer may have that the law would regard making a killing a murder.

A-927 (emphasis added). As with the instruction on first-degree murder, the court identified the requisite intent of "the killer" without mentioning the *mens rea* of the accomplice. The circuitous reference to an accomplice as someone with a "connection with the person who did the killing" implies guilt so long as the connection is "direct." But a "direct connection" does nothing to convey that Tyson and "the killer" must each have had a specific intent to commit murder. Instead both instructions imply the jury must only determine Powell's state of mind in determining Tyson's guilt as an accomplice.

The court's instruction on accomplice liability only made it more likely that a reasonable juror would misapprehend the law. Rather than convey the crucial point that an accomplice must intend to kill to be guilty of first-degree murder, the court's explanation was general and defined an accomplice as one who intends to promote or facilitate "a crime:"

> You may find the defendant guilty of the crime without finding that he personally performed the acts required for the commission of that crime. The Defendant is guilty

> of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, committing it.
>
> You may find the Defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed; that the Defendant was an accomplice of the person who actually committed the crime.

A-930 (emphasis added).[6] Tyson argues that this general instruction on accomplice liability directs the

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6 This instruction is substantially different than the current Pennsylvania Suggested Standard Criminal Jury Instructions for accomplice liability for the crime of first-degree murder, which reads:

> A person can also be guilty of first-degree murder when he or she did not cause the death personally when the Commonwealth proves beyond a reasonable doubt that he or she was an accomplice in the murder. To be an accomplice in a murder, the defendant must have himself or herself intended that a first-degree murder occur and the defendant then [[solicits] [commands] [encourages] [[[[[[[[requests] the other person to commit it] [or] [[aids] [agrees to aid] [[[[or] [[[[[attempts to aid] the other person in planning or committing it].

PA-JICRIM 8.306(B)(4). In the accompanying note, the committee recognizes that accomplice liability "is offense specific," meaning that guilt attaches to the charge if the accomplice had the intent

jury to find him guilty of first-degree murder if he intended to assist with the commission of any crime. He contends a reasonable juror could have interpreted this instruction to mean Tyson was guilty as an accomplice if he intended to confront the victims, but not kill them, or intended to enable a separate crime, such as Powell's illegal possession of a firearm or threatening the victims with a crime of violence.

We agree. This Court has previously held that, when a specific intent instruction is required, a general accomplice instruction lessens the state's burden of proof and is therefore violative of due process. *Smith*, 120 F.3d at 412-14. As with the instruction in Smith, the trial court here did not identify the crime to which accomplice liability should attach; nothing in the charge tied the mental state of an accomplice to that of a murderer. The result was an implication that if Tyson was an accomplice to "a" crime, he was an accomplice to any crime also committed, including first-degree murder. *Smith*, 120 F.3d at 414 (instruction violative of due process because it was reasonably likely jurors convicted Smith of first-degree murder based on the finding that he was an accomplice to robbery).[7]

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to assist in the commission of the specific offense. *See note*, PA-JICRIM 8.306(a).

[7] Tyson argues the instruction created a "strong likelihood" that the jury believed "his life as a drug dealer" constituted "a crime" with regard to his accomplice liability. Appellant's Br., 26. However, the court instructed the jury not to infer guilt from evidence of his drug dealing. It directed jurors to find Tyson guilty if they believe "he did, in fact, act as accomplice in the death of Keith and Daniel Fotiathis and not because [they] believe he is convicted [of] or committed these drug offenses." A-

After the instruction concluded, the jury understandably requested the court to clarify the difference between first and third-degree murder. In response to this request, the court reinforced the inference that Tyson's *mens rea* was not relevant in deciding his guilt:

> First degree murder is when a killer has a specific intent to kill. And there are three elements. The first is that Keith and Daniel Fotiathis are dead. . . . And the second is that the killer actually killed them. That would not be Mr. Tyson. But the killer actually killed these people. Mr. Tyson is an accomplice, is what the Commonwealth charges. And, thirdly, that these killings were accomplished with a specific intent to kill and with malice.

A-948-49 (emphasis added). The court distinguished Tyson's role from that of "the killer" but omitted the requirement that the jury find beyond a reasonable doubt that Tyson intended for the Fotiathis brothers to be killed. The instruction repeatedly and consistently instructed that the only relevant inquiry is whether "the killer" acted with specific intent. It stated that "[a]ll that is necessary is they have enough time so the killer does actually form the intent to kill;" and "[y]ou can infer [the specific intent to kill] from the evidence if you find the killer used a deadly weapon in this case." A-950. The instruction altogether

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944. The jury is presumed to follow a court's instruction and we therefore conclude the jury did not find him guilty due to evidence of his drug dealing. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

eliminated the *mens rea* element of accomplice liability for first-degree murder.

Finally, the trial court ended its clarification by discouraging the jury against finding that the double shooting constituted the lesser offense of third-degree murder:

> In this particular case because there is a charge of an accomplice almost by definition it encompasses the concept of first-degree murder by its very definition, an accomplice with the planning and the coordination if you, in fact, found to be so indicate [sic] that was first degree murder. But third-degree murder offered as another possibility even does not fit well within the confines of the explanation because counsel agreed you may consider that a possibility.

A-950-51 (emphasis added). There is a reasonable likelihood the jury understood this passage as a strong suggestion by the court to convict Tyson of first-degree murder, and that finding him guilty of third-degree murder would be inappropriate. The court ostensibly urged the jury to find Tyson guilty as an accomplice to first-degree murder because it believed the facts supported such a verdict.

We have not found, and the Commonwealth has not provided, a portion of the charge that corrects these consistent misrepresentations of the law. The instruction conveyed that Tyson's guilt as an accomplice hinged upon the principal's mental state until it finally "removed the discretion that the jury could have otherwise exercised" and directed it to find Tyson guilty as an accomplice to first-degree murder. *Bey*,

856 F.3d at 239. Because the instruction eradicated the prosecution's burden to prove the *mens rea* element of an intentional killing, it plainly violated Tyson's due process rights.

In light of the instruction's profound impropriety, we conclude that trial counsel acted unreasonably in failing to object. The failure to object was particularly glaring given that the prosecutor's closing argument contained the same erroneous interpretation of Pennsylvania law. The prosecutor told the jury that "whoever was involved in this shooting is a murderer. Either the shooter, or any helper, who under Pennsylvania law, is an accomplice." A-885. Through the analogy of the look-out who told his co-conspirators not to shoot the bank guards but was still guilty of the bank guard's murder, the prosecutor informed the jury that a "helper" who plainly did not possess the intent to kill was guilty of murder as an accomplice. Although the counsel's arguments "'carry less weight with the jury' than the trial court's instructions," the Commonwealth's blatant misstatement of the law certainly "increased the likelihood that the jury interpreted the charge so as to relieve the Commonwealth of its burden of proof." *Bennett*, 886 F.3d at 287-88 (citing *Sarausad*, 555 U.S. at 195) (internal citations omitted).[8]

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[8] The prosecutor's argument confounded general conspiracy liability with accomplice liability. To be guilty as an accomplice under Pennsylvania law, there must be evidence that the defendant intended to aid or promote the underlying offense, and that the defendant actively participated in the crime by "soliciting, aiding, or agreeing to aid the principal." *Commonwealth v. Murphy*, 844 A.2d 1228, 1234 (Pa. 2004). To be guilty as a co-conspirator, a defendant must enter into an agreement with another to engage in the crime, and he or a co-conspirator

Despite the absence of any instruction directing the jury to find an essential element of an offense defined by Pennsylvania law, the Superior Court held the trial court's charge did not warrant counsel's objection. We conclude that this holding constitutes an unreasonable application of *Strickland*. While we recognize there are "countless ways to provide effective assistance in any given case," we cannot fathom a strategic reason for counsel's failure to object to an instruction that eliminates the state's burden to prove an element of a crime that carries a mandatory sentence of life imprisonment. *Strickland*, 466 U.S. at 689. Even if we "evaluate the conduct from counsel's perspective at the time," we hold his inaction constituted a serious enough error that his representation fell outside the "'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). Given the nature and circumstances of this particular instruction, the state court's finding to the contrary constitutes an unreasonable application of clearly established law.

### B. Prejudice

We now turn to *Strickland*'s prejudice prong. To establish prejudice, Tyson must prove "a reasonable probability that, but for counsel's unprofessional errors,

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must commit an "overt act" in furtherance of the crime. *Id.* at 1238 (citing 18 Pa. C.S. § 903). If a different crime is committed in furtherance of the agreed-upon crime—for example, if a bank guard is killed while the agreed-upon bank robbery is underway—a co-conspirator is liable for the murder. *See Commonwealth v. Strantz*, 195 A. 75, 79 (1937). An accomplice in the same circumstance, however, is guilty of murder only if he intended to aid or promote the shooting of the bank guard and had the same kind of culpability as the principal. *See* 18 Pa. C.S. § 306(c)(1) & (d).

the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112.

Here, the Pennsylvania Superior Court did not assess whether Tyson suffered prejudice because it found counsel's performance reasonable. Tyson, as a habeas petitioner, must nonetheless meet his burden under AEDPA review of "showing there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98; *see also id.* (AEDPA review "applies when a 'claim,' not a component of one, has been adjudicated."). The question is not whether a finding of no prejudice would have been incorrect, it is whether such a decision would have been unreasonable, which is "a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

We have already concluded that counsel's failure to object to the court's instruction led to the likelihood that the jury interpreted the law in a way that lessened the Commonwealth's burden of proof. Tyson appears to argue that reaching this conclusion is enough to establish prejudice. But AEDPA review demands a more comprehensive analysis to determine whether it would be unreasonable to find the instruction did not render Tyson's conviction unfair. *Harrington*, 562 U.S. at 111-12. We therefore look to the record to determine whether the instruction interfered with the jury's assessment of the evidence

to the extent that, but for the incorrect statements of law, there is a substantial likelihood that a different verdict would have been reached. *Id.* at 112.

In denying relief, the Superior Court adopted the PCRA court's characterization of the evidence as "reveal[ing] that [Tyson's] conduct was willful, deliberate and premeditated and that he actively participated in the murders by aiding the shooter." A-51. While the state courts correctly recognized Tyson's intent to kill could be proven through circumstantial evidence, they ignored circumstantial evidence that could have supported the opposite conclusion. Kasine George, the only eyewitness to testify, stated that Tyson handed his gun to Powell at Powell's request as they followed the Fotiathis brothers' van. Once the van stopped, Tyson stopped the car in a nearby alley and Powell exited the car with the gun. When George and Tyson started to join him, Powell stopped them and told them to wait in the car. Rather than accompany Powell, George and Tyson stayed behind while Powell went alone and shot the victims. George testified that he anticipated a confrontation, but that neither Tyson nor Powell discussed any intention to kill the Fotiathis brothers. George stated that, while following behind the disabled van, they never discussed a plan for when they eventually caught up with and encountered the victims. From this account, a jury could have reasonably concluded that Tyson, like George, anticipated a confrontation of some kind but that Powell alone possessed the intent to kill.[9]

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[9] The lead detective on the case, Detective Richard Wolbert, stated that Kasine George provided the "best information" regarding Tyson's role in the shooting. A-823.

At trial, counsel recognized the absence of any concrete evidence of Tyson's intention to commit murder. In moving for a judgment of acquittal on the accomplice to first-degree murder charge, counsel argued that George's testimony failed to establish "any express or real implied agreement" that the men were "going to, in fact, kill the Fotiathis brothers." A-849. The trial court denied the motion, finding that an intent to kill could be inferred by the circumstances.[10] In light of this exchange, counsel's failure to object to the instruction, which did not require the jury to find any agreement to kill, is inexplicable. Had counsel requested the court include the *mens rea* element of accomplice liability in its instruction, there is a substantial probability that the jury could have found that Tyson lacked the intent to kill. *Strickland*, 466 U.S. at 693-6. Because the deficient instruction hindered the jury's assessment of important circumstantial evidence, it would be unreasonable to conclude that Tyson was not prejudiced by counsel's failure to object. *See, e.g.*, *Bey*, 856 F.3d at 244 (finding that Bey was prejudiced by counsel's failure to object to a deficient instruction).

This case is distinguishable from our decision in Mathias, which held a state court's denial of an ineffective assistance claim arising from an alleged erroneous instruction was reasonable under AEDPA review. The instruction in Mathias, which the petitioner claimed allowed him to be convicted of first-degree

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[10] In denying the motion, the court acknowledged George's testimony that Tyson gave his gun to Powell prior to the shooting. The trial court, in rejecting counsel's argument that there was no agreement as to what to do with the gun, replied, "[t]hey were not deer hunting." A-0850.

murder without a finding of specific intent, made inconsistent statements regarding accomplice liability, with some portions properly instructing jurors to find shared intent and others incorrectly implying the principal's intent to kill was grounds for convicting the accomplice. *Mathias*, 876 F.3d at 467, 478. Reading the instruction as a whole, the state court concluded that Mathias' due process claim would not have succeeded on appeal because portions of the instruction "properly articulated the specific intent requirement." *Id.* at 478-79. In reviewing this decision under AEDPA, the *Mathias* Court found that "tension between" Supreme Court decisions addressing "ambiguous" jury instructions meant the denial of the ineffective assistance claim did not constitute an unreasonable application of *Strickland. Id.* at 478-9.

Here, we find no such tension in federal law that would allow the Superior Court's denial of Tyson's claim to withstand even AEDPA's deferential review. The instruction was not ambiguous. It instead provided a consistently incorrect statement of the law that in effect absolved the prosecution from having to prove a key element of the status of an accomplice to first-degree murder. Unlike the instruction in *Mathias*, no portion of the instruction articulated the correct *mens rea*. The Commonwealth cited the instruction at length and stated that accomplice liability instruction was rooted "within [the] context of the actual charge of first-degree murder." Br. Appellee, 14. The plain text of the instruction, however, shows that the charge of first-degree murder did not articulate the intent requirement of the accomplice. Given the likelihood that the jury here convicted Tyson on the mistaken belief that the *mens rea* for first-degree murder did not

apply to him, we cannot find the conclusory reasoning of the state court amounted to a reasonable application of *Strickland*.

## IV. Conclusion

Because the court's instruction did not require the Commonwealth to meet its burden of proof, we find counsel's failure to object constituted deficient representation. Tyson established prejudice because there is a reasonable probability that, but for his counsel's inaction, he would not have been convicted as an accomplice to first-degree murder and sentenced to life in prison. The profound errors in the instruction were compounded by the prosecutor's misguided closing argument and the inconclusive circumstantial evidence presented to the jury, rendering the state court's finding that counsel was not ineffective to be an unreasonable application of *Strickland*.

We will therefore reverse the District Court's order denying habeas corpus relief and remand with instructions to grant a conditional writ of habeas corpus regarding Tyson's conviction for accomplice to first-degree murder so that the matter may be remanded to state court for further proceedings consistent with this opinion.

## MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (FEBRUARY 6, 2019)

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

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AARON EDMONDS TYSON,

*Petitioner,*

v.

BARRY SMITH, ET AL.,

*Respondents.*

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Civil No. 3:13-cv-2609

Before: James M. MUNLEY,
United States District Court Judge.

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Petitioner Aaron Edmonds Tyson ("Petitioner" or "Tyson"), a state inmate currently confined at the State Correctional Institution at Houtzdale, Pennsylvania, files the instant petition (Doc. 1) for writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking relief from two convictions of murder in the first degree, as an accomplice, obtained in criminal case 45-CR-817-2003, in the Court of Common Pleas of Monroe County, Pennsylvania. The petition is presently ripe for disposition. For the reasons set forth below, the petition will be denied.

## I. Federal Court Procedural History

Tyson accompanied his petition, initially filed on October 22, 2013, with a motion to stay and hold his petition in abeyance so that he may complete exhaustion of his available state court remedies. (Doc. 2). Respondents were directed to respond to the petition and to Tyson's motion to stay. Following full briefing on the matter, on February 28, 2014, the Court issued an Order (Doc. 15) granting the stay and administratively closing the case. The case was reopened in 2014 (Doc. 19) only to be closed again at Tyson's request to present new evidence to the state court. (Docs. 28, 31). In October 2017, Tyson, through counsel, sought to "reactivate" his petition and to afford him additional time to amend his petition. (Doc. 34). Tyson did not amend the petition but, rather, submitted a brief (Doc. 39) in support of the petition on January 30, 2018. Following several extensions of time, on May 8, 2018, Respondents filed a Response (Doc. 45) and Exhibits (Docs. 45-1–45-30). Tyson filed a reply brief (Doc. 47) on May 25, 2018.

## II. State Court Background

The facts underlying Tyson's murder convictions are contained in the February 1, 2013 decision of the Superior Court of Pennsylvania affirming the denial of his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 PA.C.S.A. §§ 9541-9546. (Doc. 45-10). The facts are as follows:

> On April 24, 2002, [Tyson], Otis Powell ("Powell") and Kasine George ("George") [drove to a Stroudsburg, Pennsylvania crack house that they controlled. [Tyson] left the car in order to resupply the house with

drugs. When [Tyson] returned to the vehicle, Tyson] stated that two white boys had just pulled a gun on him. George described Tyson as angry at that time. [Tyson], who was at that point a passenger in the car, took a [nine-millimeter] handgun from the center console. [[Tyson] then] racked the slide of the gun, thus arming it. [Tyson] told Powell, who was driving, to pull out from the location where the vehicle was parked.

[Tyson] pointed to a van and indicated [that] it was being driven by the two who had pulled a gun on him. With Powell driving, the three followed the van to a club. When the two white men entered that club, Powell gave George a knife [and directed] him to puncture the tires on the van. George did so to at least one of the tires. When George returned to the car, [Tyson] was in the driver's seat. Powell was now a passenger and he asked [Tyson] for the gun. After five or ten minutes, the two white men exited the bar, entered the van and left the location.

With [Tyson] now driving, the three again followed the van. [The van] eventually stopped due to the flat tire. At that point, [Tyson] and his two companions were going to exit the car, but Powell told the other two to wait. Powell then walked to the van. As he did so, [Tyson] backed the car to a point where he and George could see what was transpiring [around] the van. At that point, Powell shot [the] two occupants [of the van], Danial and Keith Fotiathis. . . . [Powell] then

> ran back to the car. Powell, George[,] and [Tyson] left the scene [with [Tyson] driving] the vehicle. The three discussed whether they should go to New York[,] but eventually decided to return to their nearby home.
>
> [Daniel Fotiathis] was shot in the neck, the lower right chest[,] and the lower right back. Gunshots struck [Keith Fotiathis] in the lower right back, [the] right elbow[, and the] right wrist. Trial testimony established multiple gunshot wounds as the causes of death for the victims. The manner of each death was homicide. Police found eight shell casings from a [nine-millimeter handgun] at the scene.
>
> George was later arrested on drug charges. Thereafter, [George] provided information to authorities regarding the instant case. [Tyson] was eventually arrested and charged with the homicide of both victims.
>
> *Commonwealth v. Tyson*, 947 A.2d 834 (Pa. Super. 2008)(unpublished memorandum) at 6-8, appeal denied, 989 A.2d 917 (Pa. 2009).

(Doc. 45-10, pp. 1, 2) ("Appellant" in original substituted with "Tyson").

Tyson, represented by trial counsel, Attorney Brian Gaglione, proceed to a jury trial on May 3, 2006. (*Id.* at 3). The trial concluded on May 9, 2006. (*Id.*) The jury found him guilty of two counts of murder in the first degree, as an accomplice, in the murders of Daniel and Keith Fotiathis; on July 17, 2006, the trial court sentenced him to the mandatory

term of life in prison without the possibility of parole. (*Id.*)

He filed a timely post-sentence motion and raised a number of claims, including claims that his trial counsel rendered ineffective assistance of counsel. (*Id.*) "Following [Tyson's] trial, [his] trial counsel resigned from his position as a special public defender. As a result, prior to [ ] sentencing, [he] received new appointed counsel [,David W. Skutnik]. *See* Trial Court Order, 6/15/06, at 1." (*Id.* at 3, n 1). After the trial court considered, and rejected, all of Tyson's claims on the merits, he filed a timely notice of appeal to the Pennsylvania Superior Court raising the following issues: "(1) whether there was sufficient evidence to support the convictions for first degree murder; (2) whether the trial court erred by allowing the Commonwealth to introduce evidence showing that [Tyson's] coactor shot the victims even though the cofactor had been acquitted of the shootings; (3) whether the trial court erred in refusing to allow [Tyson] to introduce evidence that his coactor had been acquitted; (4) whether the trial court erred in not granting a mistrial or in not dismissing a certain juror after the juror had contact with a victim's wife; (5) whether the trial court erred in not recusing itself after presiding over the acquittal of the coactor; (6) whether the Commonwealth committed prosecutorial misconduct during its closing argument; and (7) whether trial counsel was ineffective in numerous ways." (Doc. 12-4, pp. 1, 2). The Superior Court found no merit to Tyson's assertions of error. (Doc. 12-4). Further, "in accordance with *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), [the court] dismissed [Tyson's] ineffective assistance of counsel claims without pre-

judice so that [he] could raise the issues within the context of a post-conviction collateral relief proceeding." (Doc. 45-10, p. 3). The court affirmed Tyson's judgment of sentence and, on February 23, 2010, the Supreme Court of Pennsylvania denied his petition for allowance of appeal. (*Id.* at 3, 4, citing *Commonwealth v. Tyson*, 947 A.2d 834 (Pa. Super. 2008) (unpublished memorandum) at 8-18, *appeal denied*, 989 A.2d 917 (Pa. 2009)).

As detailed below, Tyson then pursued state court collateral relief:

> On November 19, 2010, [Tyson] filed a timely, *pro se* PCRA petition. Following the appointment of counsel, [Michael A. Ventrella] counsel filed an amended PCRA petition and claimed that [Tyson's] trial counsel was ineffective for, among other things: 1) "fail[ing] to request a jury instruction which specifically instructed the jury that[, in order to find [him] guilty of being an accomplice to first-degree murder, the jury must find that [he]] had [the] specific intent to commit first [-] degree murder;" 2) failing to object to "the Commonwealth's purported [trial] theory[,] that the motive for the shooting of the Fotiathis brothers was because they 'interrupted' the alleged 'drug ring;'" 3) failing to timely and properly present "the alibi witnesses;" 4) failing to present Omar Powell as a witness; 5) failing to object to the jury array; 6) failing to object to the Commonwealth's closing argument; and 7) failing to object to "the introduction of a photograph of the victim and his daughter."

[Tyson's] Amended PCRA Petition, 3/31/11, at 1-4.

The PCRA court conducted an evidentiary hearing and heard testimony from [Tyson], [Tyson's] trial counsel, [Tyson's] direct appeal counsel, and a purported witness named Omar Powell. N.T. PCRA Hearing, 10/4/11, at 1-55.

On February 1, 2012, the PCRA court entered an order denying [Tyson's] PCRA petition and, on March 22, 2012, the PCRA court issued a comprehensive 62-page opinion, discussing the reasons why it denied [Tyson] post-conviction collateral relief. PCRA Court Opinion, 3/22/12, at 1-62. Moreover, after receiving [Tyson's] court-ordered statement of errors complained of on appeal. The PCRA Court authored another 18-page opinion, further discussing why [Tyson's] claims were meritless. [footnote omitted]. PCRA Court Opinion, 4/17/12, at 1-18.

[Tyson], [represented by Attorney Bradley Warren Weidenbaum] filed a timely notice of appeal and now raises the following claims to this Court:

[1.] It was ineffective assistance of counsel to fail to request a jury instruction concerning intent to commit first[-]degree murder.

[2.] It was ineffective assistance of counsel to allow the Commonwealth to introduce evidence of drug dealing when such evidence was irrelevant and highly prejudicial.

> [3.] It was ineffective assistance of counsel to fail to timely and properly present, serve notice of, and investigate alibi witnesses.
>
> [4.] It was ineffective assistance of counsel to not present the witness whose testimony provided a key reason why [Tyson's] codefendant was acquitted.
>
> [5.] It was ineffective assistance to fail to object to the jury array.
>
> [6.] It was ineffective assistance of counsel to fail to object to the Commonwealth's closing argument which attributed a statement to [Tyson] that he never made.
>
> [7.] It was ineffective assistance of counsel to fail to object to prejudicial photographs as evidence.
>
> [Tyson's] Brief at 3.

(Doc. 45-10, pp. 4-6 (content of footnotes 2, 3 omitted); Doc. 12-6; Doc. 12-9). On February 1, 2013, in affirming the denial of PCRA relief, the Superior Court addressed the first, second and fourth claims on the merits, but deemed the third, fifth, sixth and seventh claims waived. (*Id.* at pp. 8-16).

As set forth *supra*, on October 22, 2013, Tyson filed his habeas petition in federal court, which this Court stayed to afford Tyson the opportunity to pursue his second PCRA petition, which he had filed in state court on September 26, 2013. (Doc. 39, p. 14). The PCRA court denied the second PCRA as untimely. (*Id.* at 15). The Superior Court affirmed that decision. (*Id.* citing *Commonwealth v. Tyson*, 3176 EDA 2013 (Pa. Super. Ct., July 16, 2014).

Tyson filed a third PCRA in May 2016, which the PCRA court also denied as untimely. (*Id.* at 15). The Superior Court affirmed the denial. (*Id.* citing *Commonwealth v. Tyson*, 2188 EDA 2016 (Pa. Super. Ct., Mar. 22, 2017)). Thereafter, the Pennsylvania Supreme Court denied leave to appeal. (*Id.* citing *Commonwealth v. Tyson*, 317 MAL 2017 (Pa. Aug. 28, 2017)).

## III. Issues Presented for Federal Review

Tyson presents the following issues for our review:

I. The trial court violated the due process clause of the Fourteenth Amendment when it failed to instruct the jury that in order to convict Mr. Tyson of First Degree Murder as an accomplice, the Commonwealth was required to prove beyond a reasonable doubt that he had specific intent to kill; trial counsel ineffectively failed to object or correct this plainly erroneous instruction.

II. Trial counsel ineffectively failed to object to the admission of overwhelming amounts of propensity evidence showing that Petitioner was a violent drug dealer; some of the evidence was objected to, [h]owever, the trial court permitted it. In toto, Petitioner [sic] right to due process of law was violated.

III. Counsel ineffectively failed to present the testimony of witnesses that were presented in the Otis Powell trial; said witnesses would have established that Otis Powell was not present at the scene of the crime and would

therefore have challenged the veracity of Kasine's [sic] George's testimony that Petitioner and Powell were involved in the murders.

IV. Trial counsel ineffectively failed to present the testimony of two witnesses who would have presented evidence the Kasine George admitted that he committed the murders.

V. Trial counsel ineffectively failed to investigate and present Petitioner's alibi, and other exculpatory witnesses, and failed to file a proper notice of alibi, that resulted in the trial court striking it.

(Doc. 39, pp. 27-72).

## IV. Discussion

A habeas corpus petition pursuant to 28 U.S.C. § 2254 is the proper mechanism for a prisoner to challenge the "fact or duration" of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1973). Tyson's case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214, April 24, 1996 ("AEDPA"). 28 U.S.C. § 2254, provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)

> (1) an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> [ . . . ]
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Section 2254 clearly sets limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner. *Cullen v. Pinholster*, 536 U.S. 170, 181 (2011); *Glenn v. Wynder*, 743 F.3d 402, 406 (3d Cir. 2014). A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the

United States," § 2254 places a high threshold on the courts. Additionally, relief cannot be granted unless all available state remedies have been exhausted, or there is an absence of available state corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant. *See* 28 U.S.C. § 2254(b)(1).

### A. Exhaustion and Procedural Default

Habeas relief "shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State," meaning a state prisoner must "fairly present" his claims in "one complete round of the state's established appellate review process," before bringing them in federal court. 28 U.S.C. § 2254(b)(1)(A); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (stating "[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, . . . state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established review process."); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997). The exhaustion requirement is grounded on principles of comity in order to ensure that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *See Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

A petitioner has exhausted a federal claim only if he or she presented the "substantial equivalent" of

the claim to the state court. Picard, 404 U.S. at 278. To satisfy this requirement, a petitioner must "fairly present" his 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." *Robinson v. Beard*, 762 F.3d 316, 328 (3d Cir. 2014); *see Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *see McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

### 1. Due Process Claims

In Ground I, Tyson includes a claim that the trial court violated the due process clause of the Fourteenth Amendment when it failed to instruct the jury that in order to convict Tyson of first-degree murder as an accomplice, the Commonwealth was required to prove beyond a reasonable doubt that he had a specific intent to kill. (Doc. 39, p. 27). Tyson argues that the claim is fully exhausted because the state court considered the propriety of the jury instruction in the context of his ineffective assistance of trial counsel claim in his initial PCRA proceedings. Respondents disagree and argue that the state courts' consideration of the jury instructions in the context of an ineffective assistance of counsel claim does not constitute fair presentation of the due process claim. They urge the Court to conclude that the claim is procedurally defaulted. (Doc. 45, pp. 7-9).

The case of *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 479 (3d Cir. 2017), *cert. denied* sub nom. *Mathias v. Brittain*, 138 S. Ct. 1707 (2018), is keenly instructive. In considering whether Mathias's due process claim challenging a first-degree murder instruction was fairly presented for purposes of exhaustion, the Third Circuit stated as follows:

> Here, although [Mathias's] pro se brief mentioned only a claim of ineffective assistance in the headers to this argument, Mathias expressly argued in the text of his brief before the Superior Court that the first-degree murder instruction itself violated the Due Process Clause and cited to the Fourteenth Amendment of the United States Constitution and to relevant United States Supreme Court cases, including *Francis [v. Franklin*, 471 U.S. 307 (1985)], to support that argument. Under these circumstances, and recognizing, as we must, that pro se petitions are to be construed liberally, *Rainey v. Varner*, 603 F.3d 189, 198 (3d Cir. 2010); *Commonwealth v. Eller*, 569 Pa. 622, 807 A.2d 838, 845 (Pa. 2002), we are satisfied that Mathias did fairly present his due process claim to the Superior Court and that the Superior Court rejected that claim on the merits—albeit within its discussion of the ineffective-assistance-of-counsel claim and based on state cases that incorporated the federal standard, *See Picard v. Connor*, 404 U.S. 270, 277-78, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).

*Mathias* 876 F.3d at 480 (footnote omitted).[1]

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[1] In a footnote clarifying the limited nature of this holding, the Third Circuit states: "To be clear, we do not hold today that, simply because a petitioner brings a claim of ineffective assistance of counsel or a state court adjudicates that claim, every claim counsel is allegedly deficient for failing to raise necessarily has been fairly presented to the state court as a federal claim.

Similarly, in his initial PCRA proceedings and his PCRA appellate brief, Tyson argued that the defective nature of the jury instructions denied him his right to a fair trial as guaranteed under the Fourteenth Amendment and cites to the case of *Baker v. Horn*, 383 F. Supp. 2d 720, 771 (2005). (Doc. 12-9, pp. 5, 23; Doc. 45-6, p. 2). And, in considering the PCRA appeal, the Superior Court discussed the jury instructions at length, albeit in the context of its discussion of the ineffective assistance of counsel claim. Thus, the Court is satisfied that Tyson, like Mathias, fairly presented his due process claim to the Superior Court and that the Superior Court rejected the claim on the merits. Consequently, we will consider the merits of the claim in accordance with the deferential AEDPA standard.

In Ground II, Tyson asserts that the trial court's admission of prior bad act evidence violated his due process rights. Respondents also argue that this claim is procedurally defaulted. Unlike Ground I, Tyson concedes that the due process argument in this ground is, in fact, procedurally defaulted because it was not presented to the state courts. (Doc. 39, pp. 54-57; Doc. 47, p. 10). He argues, however, that "he can overcome the default of all or portions of each of those claims via *Martinez v. Ryan*." (Doc. 48, p. 3). Specifically, he argues that "[a]s to the arguably

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Indeed, that would effect a novel, gaping, and unwarranted expansion of federal habeas review, particularly as petitioners may discuss and state courts may analyze the alleged deficiency exclusively in terms of state law . . . We hold only that where, as here, a pro se petitioner has expressly identified the claim that counsel allegedly failed to raise as a federal constitutional claim and has briefed the merits of that claim by citing to federal cases, the claim has been properly exhausted." *Id.*

defaulted grounds in this litigation, owing to the ineffective assistance of initial post-conviction counsel, Mr. Tyson has pled "cause" to overcome the default of these claims . . . ." (*Id.* at 5).

"When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, [as is the case here,] the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.' 28 U.S.C. § 2254(b). In such cases, however, applicants are considered to have procedurally defaulted their claims and federal courts may not consider the merits of such claims unless the applicant establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse his or her default. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L.Ed.2d 640 (1991)." *McCandless*, 172 F.3d at 260.

To demonstrate "cause" for a procedural default, a petitioner must point to some objective external factor which impeded his efforts to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). "Prejudice" will be satisfied only if he can demonstrate that the outcome of the state proceeding was "unreliable or fundamentally unfair" as a result of a violation of federal law. *See Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993).

The *Martinez v. Ryan*, 566 U.S. 1 (2010) case recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default. Specifically, *Martinez* holds that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural

default of a claim of ineffective assistance at trial." 566 U.S. at 9, 132 S. Ct. 1309. To successfully invoke the *Martinez* exception, a petitioner must satisfy two factors: that the underlying, otherwise defaulted, claim of ineffective assistance of trial counsel is "substantial," meaning that it has "some merit," *id.* at 14, 132 S. Ct. 1309; and that petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding. *Id.* at 17, 132 S. Ct. 1309; *see also Glenn v. Wynder*, 743 F.3d 402, 410 (3d Cir. 2014).

With respect to the due process claim contained in Ground II, because *Martinez* applies only to defaulted claims of ineffective assistance of trial counsel, Tyson's argument that PCRA counsel's failure to raise a due process claim due to trial court error fails. *See Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* to defaulted claims of ineffective assistance of appellate counsel); *Murray v. Diguglielmo*, No. 09-4960, 2016 WL 3476255, at *4 (E.D. Pa. June 27, 2016) ("These claims do not involve ineffective assistance of [trial] counsel. *Martinez* does not apply."). The procedural default of this claim renders federal review unavailable.

### 2. Ineffective Assistance of Counsel Claims

In Ground II, Tyson also seeks to excuse the procedural default of the portion of his ineffective assistance of counsel claim concerning the admission of evidence through means other than the testimony of Detective Wolbert. Review of the Superior Court opinion reveals that the state court considered the whole of the introduction of evidence of drug dealing and did not limit its analysis to Detective Wolbert's

testimony. Consequently, we consider the issue of counsel's ineffective assistance of counsel with regard to allowing the Commonwealth to introduce evidence of drug dealing when the evidence was irrelevant and highly prejudicial, to be fairly presented and exhausted. We will review this issue, *infra*, as presented to the state courts and adjudicated on the merits, to wit, "trial counsel rendered ineffective assistance by 'allow[ing] the Commonwealth to introduce evidence of [Tyson's] drug dealing.'" (Doc. 45-10, quoting Tyson's appellate brief).

In his Third, Fourth, and Fifth Grounds, Tyson contends that trial counsel was ineffective for failing to present testimony of various exculpatory and alibi witnesses, including Omar Powell, and for filing an untimely notice of alibi witnesses. (Doc. 39, pp. 62-72). Tyson claims that "[a] claim of ineffectiveness related to trial counsel's failure to call Otis Powell and his 'clan' was raised in his initial PCRA proceedings." (Doc. 39, p. 64). He indicates that trial counsel testified as to this issue at the PCRA hearing, but there was no ruling and that that "[i]nitial PCRA counsel ineffectively failed to correct this testimony and point out the absence of a court ruling on this point." (*Id.*) Tyson argues that, to the extent that there is any procedural default, it is due to the ineffectiveness of PCRA counsel, Attorney Ventrella, and, therefore, he "overcomes the ostensible default via *Martinez*." (Doc. 39, pp. 64-68, 71; Doc. 47, pp. 12, 13).

The Superior Court stated as follows:

> Within [Tyson's] brief to this Court, [Tyson] listed a number of other "possible and important witnesses" that, [Tyson] contends, could have been called at trial. [Tyson's]

> Brief at 27. Yet, with the exception of Omar Powell, [Tyson] has not explained why counsel was ineffective for failing to call the listed witness. *See id.* Therefore, [Tyson] has only preserved the claim that counsel was ineffective for failing to call Omar Powell as a witness. *See Commonwealth v. Clayton*, 816 A.2d 217, 221 (Pa. 2002) ("it is a well-settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal"). Further, under this heading, [Tyson] claims—in passing—that trial counsel was ineffective for filing an untimely notice of alibi witnesses. [Tyson's] Brief at 26. This claim is completely undeveloped and, thus, waived. *Clayton*, 816 A.2d at 221.

(Doc. 45-10, p 15, n 5). With the exception of the claim raised in Ground IV, that counsel was ineffective for failing to call Omar Powell as a witness, all of the claims contained in Grounds III, IV and V were deemed waived pursuant to a state rule governing appellate jurisprudence. A state rule is "adequate" for procedural default purposes if it was "firmly established, readily ascertainable, and regularly followed at the time of the purported default." *Szuchon v. Lehman*, 273 F.3d 299, 327 (3d Cir. 2001). These requirements ensure that "federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule," and that review is foreclosed by "what may honestly be called 'rules' . . . of general applicability[,] rather than by whim or prejudice against a claim or claimant." *Leyva v. Williams*, 504 F.3d 357, 366 (3d Cir. 2007)

(quoting *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005)).

There is no dispute that the waiver rule was firmly established, readily ascertainable, and regularly followed at the time of the default. The record demonstrates that Attorney Ventrella presented these issues in the initial PCRA proceedings. Contrary to Tyson's assertion, the procedural default of these claims is not attributable to PCRA counsel. Rather, it is directly attributable to the failure of PCRA appellate counsel, Attorney Weidenbaum, to adequately develop and preserve the issues for appellate review. Because *Martinez* only applies when the petitioner had "no counsel" or "ineffective" counsel during the initial phase of the state collateral review proceeding, it does not provide cause to overcome the default of Grounds III, IV and V. Consequently, there is no basis on which to excuse his procedural default of these claims. With the exception of the ineffective assistance claim asserting the failure to call Omar Powell as a witness in Ground IV, which will be addressed below, federal review is precluded as to Grounds III, IV and V.

### B. Claims Adjudicated on the Merits by the State Courts

Under the AEDPA, federal courts reviewing a state prisoner's application for a writ of habeas corpus may not grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2)

"resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"[B]ecause the purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction," *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (internal quotations and citations omitted), "[t]his is a difficult to meet and highly deferential standard . . . which demands that state-court decisions be given the benefit of the doubt." *Cullen*, 563 U.S. at 181(internal quotation marks and citation omitted). The burden is on Tyson to prove entitlement to the writ. *Id.*

A decision is "contrary to" federal law if "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). "[A] state court decision reflects an 'unreasonable application of such law' only 'where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents,' a standard the Supreme Court has advised is 'difficult to meet' because it was 'meant to be.' [*Harrison v.*] *Richter*, 562 U.S. 86, [ ] 102, 131 S. Ct. 770. As the Supreme Court has cautioned, an 'unreasonable application of federal law is different from an incorrect application of federal law,' *Richter*, 562 U.S. at 101, 131 S. Ct. 770 (quoting *Williams*, 529 U.S. at 410, 120 S. Ct. 1495),

and whether we 'conclude[ ] in [our] independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly' is irrelevant, as AEDPA sets a higher bar. *Williams*, 529 U.S. at 411, 120 S. Ct. 1495." *Mathias*, 876 F.3d at 476. A decision is based on an "unreasonable determination of the facts" if the state court's factual findings are objectively unreasonable in light of the evidence presented to the state court. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

Finally, Section 2254(e) provides that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

### 1. Ground I

Tyson raises two separate challenges to the jury instructions in Ground I. He first argues that the trial court violated the due process clause of the Fourteenth Amendment when it failed to instruct the jury, in the original instructions and in the supplemental instructions in response to the jury's question, that in order to convict him of first degree murder as an accomplice, the Commonwealth was required to prove beyond a reasonable doubt that he had to share with Powell a specific intent to kill. (Doc. 39, pp. 27, 34, 35, 38-40). It is his position that the instructions "permitted a finding that Mr. Tyson had a specific intent to kill if he had an intent to commit 'a' crime—any crime—and his alleged accomplice (Powell) had a specific intent

to kill. This violated due process of law because in this case, Petitioner could reasonably have been found to have intent to commit multiple offenses other than murder in the first degree." (*Id.* at 30, 34). In his second argument, he contends that trial counsel's failure to object to the jury instructions constituted ineffective assistance of counsel in violation of the Sixth Amendment. (*Id.* at 27, 38-40). He seeks relief on the grounds that the Superior Court's decisions on these claims were contrary to, and involved an unreasonable application of, Supreme Court precedent. (*Id.* at 43).

The Superior Court addressed the claim as follows:

> First, [Tyson] claims that trial counsel was ineffective for failing to object to the trial court's "accomplice liability" jury instruction. According to [Tyson] the trial court failed to instruct the jury that, "[i]n order to [convict [Tyson]] of murder in the first degree as an accomplice, the Commonwealth [was] required to show that [Tyson] had the specific intent to commit first[-]degree murder." [Tyson's] Brief at 8. [Tyson] claims that our Supreme Court's opinion in *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994) [content of footnote follows] is "exactly on point" and demands that he receive a new trial. [Tyson's] Brief at 8. We disagree. [Our Supreme Court has since partially overruled *Huffman*. Within both *Commonwealth v. Daniels*, 963 A.2d 409, 429 (Pa. 2009) and *Commonwealth v. Maisonet*, 31 A.3d 689, 694 n.2 (Pa. 2011), our Supreme Court recognized that *Huffman* erroneously failed to view the trial court's jury instruction as a whole. *See Maisonet*,

> 31 A.3d at 694 n. 2 (citing *Daniels* for the proposition that the high Court "has since effectively overruled *Huffman*").]
>
> Our Supreme Court has 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. 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.

*Daniels*, 963 A.2d at 430 (internal citation omitted).

Before a jury may find a defendant guilty of first-degree murder as an accomplice, the jury must find–beyond a reasonable doubt–that the defendant possessed a specific intent to kill. 18 Pa. C.S.A. § 306(d); 18 Pa. C.S.A. § 2502(a); *Commonwealth v. Koehler*, 36 A.3d 121, 155 (Pa. 2012). Thus, in *Huffman*, our Supreme Court held that it was erroneous for a trial court to instruct the jury "that they may find an accomplice guilty of murder in the first degree even if he did not have the specific intent to kill." *Huffman*, 638 A.2d at 962. As the PCRA court has thoroughly explained, however, the trial court's jury instructions in this case—when considered as a whole—"adequately and accurately set forth the applicable law" regarding accomplice liability. *Daniels*, 963 A.2d at 430. Moreover, the instructions indeed informed the jury that, to convict [Tyson] of first-degree murder as an accomplice, the jury was required to find that [Tyson] independently possessed the specific intent to kill. As the PCRA court explained:

The record reflects that the trial [court] instructed the jury on murder [in] the first degree . . . [and that this instruction] included a definition of specific intent. The trial [court] also instructed the jury on accomplice liability as follows:

> You may find [Tyson] guilty of the crime without finding that he personally performed the acts required for the commission of that crime. [Tyson] is guilty of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent to promote or facilitate the commission of the crime[,] he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, [or] committing it.
>
> You may find [Tyson] guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed [and] that [Tyson] was an accomplice of the person who actually committed the crime. And it does not matter whether the person who you believe committed the crime has been convicted of a different crime or different degree of the crime or has immunity from prosecution or conviction.

[N.T. Trial, 5/9/06, at 694.]

The trial transcript further reflects that during deliberations, the jury returned to the courtroom and asked for clarification on the difference between first and third degree murder. The trial [court] responded by restating the elements that must be established for first degree murder, third degree murder and accomplice liability. After restating the elements of first degree murder, the [trial court repeated and clarified] the definition [ ] of specific intent. . . . The [trial court] also instructed the jury that: "in this particular case because there is a charge of an accomplice almost by definition it encompasses the concept of first degree murder by its very definition, an accomplice with the planning and the coordination if you, in fact, found to be so indicate that was first degree murder."

[After reviewing these] jury instructions, as a whole, [it is apparent] that the instructions were sufficient to inform the jury that in order to find [Tyson] guilty of first degree murder as an accomplice, the Commonwealth must [have] establish[ed] beyond a reasonable doubt that [Tyson] had the shared specific intent to kill the Fotiathis [b]rothers. Furthermore, the evidence presented to the jury during the trial revealed that [Tyson's] conduct was willful, deliberate[,] and premeditated and that he actively participated in the murders by aiding the

> shooter, Otis Powell. [Tyson] identified the intended victims to Otis Powell and Kasine George; he told Powell to drive the car in pursuit of the victims and later drove the car himself while still following the victims; he produced the murder weapon, which he gave to Powell who used it to inflict fatal wounds to vital areas of the victims' bodies; and [,] after the shooting, he aided Powell in fleeing the scene. The actions of [Tyson] were overt and clearly showed [that [Tyson] intended to murder the victims].
>
> PCRA Court Opinion, 4/17/12, at 6-7 (internal citations omitted).
>
> We agree with the cogent analysis of the PCRA court and conclude that, since [Tyson's] underlying claim has no merit, [Tyson's] first ineffective assistance of counsel claim fails.

(Doc. 45-10, pp. 8-11).

We first consider the due process claim. Due process is violated when a jury instruction relieves the government of its burden of proving every element beyond a reasonable doubt. *See Waddington v. Sarausad*, 555 U.S. 179, 190–91 (2009); *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 (1979). Due process review is governed by the following standards:

> Even if there is some "ambiguity, inconsistency, or deficiency" in the instruction, such an error does not necessarily constitute a due process violation. *Middleton*, *supra*, at 437, 124 S. Ct. 1830. Rather, the defendant must show both that the instruction was ambiguous

> and that there was "'a reasonable likelihood'" that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. *Estelle*, *supra*, at 72, 112 S. Ct. 475 (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990)). In making this determination, the jury 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." *Estelle*, *supra*, at 72, 112 S. Ct. 475 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L.Ed.2d 368 (1973)).

*Waddington*, 555 U.S. at 190–91 (rejecting a habeas petitioner's claim that an accomplice liability instruction violated due process).

In accordance with applicable Pennsylvania criminal statutes and caselaw, the Superior Court stated that "[b]efore a jury may find a defendant guilty of first-degree murder as an accomplice, the jury must find—beyond a reasonable doubt—that the defendant possessed the specific intent to kill." (Doc. 45-10, p. 8). The Superior Court evaluated the jury instructions as a whole and determined that they adequately and accurately set forth the applicable law regarding accomplice liability, and "indeed informed the jury that to convict [Tyson] of first-degree murder as an accomplice, the jury was required to find that [Tyson] independently possessed the specific intent to kill." (*Id.* at 9, 10). The Superior Court adopted the PCRA court's recitation of the evidence presented to the jury and concurred with the PCRA court's conclu-

sion that "the instructions were sufficient to inform the jury that in order to find [Tyson] guilty of first degree murder as an accomplice, the Commonwealth must have establish[ed] beyond a reasonable doubt that [Tyson] had the shared specific intent to kill the Fotiathis [b]rothers." (*Id.* at 10). The manner in which the Superior Court conducted its review is congruous with, and a proper and reasonable application of, the clearly established Supreme Court due process test applicable to an analysis of the constitutionality of jury instructions. *See Estelle*, 502 U.S. at 72. Tyson is not entitled to relief on this claim.

Nor is he entitled to relief on the ineffective assistance of counsel claim. The Superior Court applied the following standard of review to its analysis of Tyson's ineffective assistance of trial counsel claims:

> To be eligible for relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from "one or more" of the seven, specifically enumerated circumstances listed in 42 Pa.C.S.A. § 9543(a)(2). One of these statutorily enumerated circumstances is the "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. C.S.A. § 9543(a)(2)(ii).
>
> Counsel is, however, presumed to be effective and "the burden of demonstrating ineffectiveness rests on [A]ppellant." [*Commonwealth v.*] *Rivera*, 10 A.3d [1276] at 1279. To satisfy

> this burden Appellant must plead and prove by a preponderance of evidence that:
>
> > (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceedings would have been different.
>
> *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." *Id.*

(Doc. 45-10, p. 7).

The clearly established Federal law governing ineffective assistance of counsel claims, as determined by the Supreme Court of the United States is as follows:

> Ineffective assistance of counsel claims are "governed by the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)." *Shelton v. Carroll*, 464 F.3d 423, 438 (3d Cir. 2006) (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003)). For AEDPA purposes, the *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court." *Williams*, 529 U.S. at 391, 120 S. Ct. 1495. Under *Strickland*, a habeas petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of rea-

sonableness; and (2) there is a reasonable probability that, but for counsel's error, the result would have been different. 466 U.S. at 687, 104 S. Ct. 2052. For the deficient performance prong, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688, 104 S. Ct. 2052. This review is deferential:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . .

*Id.* at 689, 104 S. Ct. 2052

Not every "error by counsel, even if professionally unreasonable, . . . warrant[s] setting aside the judgment of a criminal proceeding." *Id.* at 691, 104 S. Ct. 2052. "Even if a defendant shows that particular errors of counsel were unreasonable, . . . the defendant must show that they actually had an adverse effect on the defense"; in other words, the habeas petitioner must show that he was prejudiced by counsel's deficient performance. *Id.* at 693, 104 S. Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. 2052.
>
> In assessing an ineffective assistance of counsel claim, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding. . . . In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696, 104 S. Ct. 2052.

*Rainey v. Varner*, 603 F.3d 189, 197–98 (3d Cir. 2010). The Third Circuit has specifically held that the very ineffectiveness assistance of counsel test relied upon by the Superior Court in this matter is not contrary to the Supreme Court's Strickland standard. *See Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000).

When the state court has decided the claim on the merits, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.*

Tyson contends that trial counsel was ineffective for failing to object to the trial court's "plainly

erroneous" accomplice liability jury instruction. (Doc. 39, p. 27). It is evident from the above due process analysis that the Superior Court reasonably concluded that the underlying claim challenging the constitutionality of the jury instructions had no merit. Because "counsel cannot be deemed ineffective for failing to raise a meritless claim," the Superior Court's determination that Tyson was not entitled to relief on the ineffective assistance of counsel claim was neither contrary to, nor an unreasonable application of *Strickland*. *See Werts*, 228 F.3d at 203.

### 2. Ground II

The Superior Court also concluded that Tyson was not entitled to relief on his second ineffective assistance of counsel claim because the underlying claim, "that his trial counsel rendered ineffective assistance by 'allow[ing] the Commonwealth to introduce evidence of [Tyson's] drug dealing.' [Tyson's] Brief at 24[,]" had no merit. (Doc. 45-10, pp. 6, 11). In citing to state law, the Superior Court recognized the broad latitude and discretion afforded trial judges in determining the admissibility of evidence and observed that such determinations would not be disturbed absent an abuse of discretion. (*Id.* at 11). The court opined that under Rule 404(b) of the Pennsylvania Rules of Evidence, and according to Pennsylvania case law, the other act evidence was admissible because, as explained by the trial court, it was "not used to show his propensity for committing bad acts, but rather the bad acts (*i.e.* his drug dealing) were part of a chain or sequence of events that formed the history of the case and were part of its natural development." (*Id.* at 12, 13, citing Trial Court Opinion, 2/15/07, at 19 (internal citations omitted)"). The

court further noted "that evidence of Tyson's drug dealing was also highly relevant to explain the motive behind the shootings." (*Id.* at 13).

This Court cannot review the Superior Court's determination that the other act evidence was admissible as a matter of Pennsylvania law as "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Further, when the state court finds the underlying state law claim meritless and thus, concludes that the petitioner's counsel was not ineffective, the federal habeas court is bound by that ruling. *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004).

### 3. Ground IV

In his fourth ground, Tyson claims that trial counsel was ineffective for failing to present Omar Powell as a witness. Omar Powell, the brother of the alleged shooter, Otis Powell, testified at his brother's trial that, while they were incarcerated at the Pike County Jail, Kasine George admitted that he killed the Fotiathis brothers. (Doc. 39, p. 66). He testified that during the course of an argument, Kasine George told him that Otis Powell "was going for my bodies," which indicates that Kasine George was the actual killer. (*Id.*) Tyson claims that trial counsel was aware that Omar Powell provided this testimony because he was in possession of Otis Powell's trial transcripts and, that his failure to present Omar Powell as a witness, constituted ineffective assistance of counsel. (*Id.*) He argues that "[i]n any event the state court finding that counsel was unaware of the existence of Omar Powell and could not have known of him, was

patently unsupported by the state court record and relief is available per 28 U.S.C. § 2254(d)(2)." (*Id.* at 68).

In considering the claim the Superior Court relied on Pennsylvania Supreme Court precedent which dictates that, in order "[t]o prevail on a claim of ineffectiveness for failure to call a witness, the appellant must demonstrate that: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness' existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant. *Commonwealth v. Malloy*, 856 A.2d 767, 782 (Pa. 2004)." (Doc. 45-10, p. 13). In rejecting the ineffectiveness claim the court stated as follows:

> At the PCRA hearing, the PCRA court heard the testimony of Appellant, Appellant's trial counsel, and Omar Powell and concluded that trial counsel neither knew nor could have known of Omar Powell's purported testimony. Indeed, during the PCRA hearing, Appellant's trial counsel testified that he did not remember ever hearing the name of Omar Powell. N.T. PCRA Hearing, 10/4/11, at 16. Moreover, Omar Powell testified: "I don't think that [Appellant's trial counsel] ever knew [about my existence] because nobody never told him as far as anything that came out of [Otis Powell's] case." *Id.* at 52. Given this testimony, we agree with the PCRA court and conclude that Appellant's ineffectiveness claim fails, as counsel neither

> knew nor could have known of Omar Powell's purported testimony. *Malloy*, 856 A.2d at 782.

(Doc. 45-10, pp. 13, 14).

The Superior Court found support on the record for the PCRA Court's determination that trial counsel and Omar Powell, both of whom testified at the PCRA hearing, were credible and it adopted that determination of the PCRA Court on that basis. After concluding that "counsel neither knew nor could have known of Omar Powell's purported testimony" the Superior Court denied the ineffective assistance of counsel claim under *Commonwealth v. Malloy*, 856 A.2d 767, 782 (Pa. 2004). (Doc. 45-10, p. 13).

PCRA counsel, Attorney Ventrella, elicited the following testimony from Attorney Gaglione at the PCRA hearing:

> Q. Speaking of witnesses and the scene and things like that, the other jury actually was brought to the scene of the crime to see how dark it was. And how far the alley went down and whether the witness could see everything he said he could see. Why did you decide not to do that?
>
> A. I don't have an answer to that. I felt the focus of the case was more on the witness who placed my client there. You know. If the witness placed my client at the scene is somebody who was familiar with my client he was, according to his own testimony, in the same car as my client. According to this testimony he discussed the situation with my client prior to the actual homicide. So I mean it really was not an issue for me as to

whether or not, you know, somebody was going to believe that, you know, that they saw what they saw.

If they believed this witness for the prosecution and they bought his word and they didn't just discredit him because of the fact that he was a drug dealer trying to extricate himself from his own problem, if they believed him I considered my client was probably going to go down. And if they didn't believe him that is where I was, you know, where I was basing my trial strategy.

I figured that was the best way to get my client out of this. Just to try and discredit the testimony of the many witnesses of the prosecution, the rollover of the prosecution. That is the reason.

Q. Do you believe Omar Powell would have helped you in that regard with his testimony?

A. Well, I actually had him subpoenaed and brought him to the trial. I was thinking possibly of putting him up there but there was really nothing of any relevance that I could not put him up there and say he was acquitted. You know, it really was not relevant. And I couldn't say that he—

Q. Okay.

A. —he had indicated that he was at a party at the time. I just—I didn't think that was going to work. The judge was going to exclude it anyway.

Q. You are talking about Otis not Omar. Otis.

A. Whatever his name is. Yeah. I don't know.

Q. It is Otis Powell. Otis was the one who was acquitted.

A. Okay. That is the guy I am talking about.

Q. And you—

A. Is that the one you are talking about?

Q. Not originally but we can talk about him first. You didn't call Otis for the reasons just stated, correct?

A. Correct.

Q. Omar. Do you remember Omar Powell?

A. No.

Q. Omar had testified that Kasine George had admitted to the homicides and was a witness in Otis' trial helping to get the acquittal; do you remember that?

A. I can't remember who Kasine George is. Was he the same individual who had testified against my client?

Q. Yes.

A. Yes?

Q. Yes.

A. So can you repeat the question? I am not exactly sure—I didn't quite follow that.

Q. Do you remember who Omar Powell was first of all?

A. No.

Q. And you didn't call him as a witness obviously?

A. No.

Q. Did you call the corrections officer from Pike County who also testified in Otis' case?

A. I didn't call any witnesses.

Q. Did you call my client as a witness?

A. I didn't call any witnesses.

Q. Okay. And you did not call Louis Davenport as well?

A. I think I answered. I didn't call any witnesses.

(Doc. 45-16, pp. 13-16).

Additionally, Attorney Gaglione testified to the following when cross-examined by the assistant district attorney:

Q. At the time of your investigation to represent Mr. Tyson did you know who Omar Powell was?

A. Omar or Otis?

Q. Omar.

A. I can't remember. I only remember one person named Powell involved in the case. Again, we are going back six years. I don't have the file in front of me. I can't remember anybody other than the one Powell. The name that sticks out in my head. And that was the gentleman who was one of the alleged co-conspirators in the case. That was the only Powell that I remember.

(*Id.* at 23, 24).

And Omar Powell testified at the hearing as follows:

> Q. Were you ever called to testify in Mr. Tyson's case?
>
> A. No.
>
> Q. Were you subpoenaed?
>
> A. No.
>
> Q. So you were not brought in?
>
> A. I don't think that Mr. Gaglione ever knew because nobody never told him as far as anything that came out of my brother's case. I don't think the prosecutor handed him over that information.
>
> Q. So you don't know if Mr. Gaglione even was aware of this?
>
> A. No.

(*Id.* at 52, 53).

The pertinent testimony at the PCRA hearing, which included the testimony of trial counsel, Attorney Gaglione, and Omar Powell, supports the state courts' interpretation of the PCRA hearing testimony. "The federal habeas statute provides us 'no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by [us].'" *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir. 2000) (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S. Ct. 843, 74 L.Ed.2d 646 (1983)). Given counsel's credited testimony at the PCRA hearing that nobody informed him of the potential testimony

of Omar Powell—and the absence of any evidence, apart from Tyson's conclusory statement that trial counsel possessed the trial transcript and therefore knew of Omar Powell—the finding that trial counsel neither knew nor should have known of Omar Powell was not "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* § 2254(d)(2). Federal habeas relief is not available because the Pennsylvania courts denied a claim on the basis that counsel cannot be ineffective for failing to call a witness that counsel neither knew nor should have known of. *See* § 2254(d)(1); *Werts*, 228 F.3d at 204. There is no basis for relief on Tyson's ineffective assistance of counsel claim for failure to call Omar Powell.

## V. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability ("COA"), an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Tyson fails to demonstrate that a COA should issue.

The denial of a certificate of appealability does not prevent Tyson from appealing the order denying his petition so long as he seeks, and obtains, a certifi-

cate of appealability from the Third Circuit Court of Appeals. *See* Fed. R. App. P. 22(b)(1).

## VI. Conclusion

For the reasons set forth above, the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 will be denied.

A separate Order will enter.

BY THE COURT:

/s/ James M. Munley
United States District Court Judge

Dated: February 6, 2019

## MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA (JANUARY 11, 2008)

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

*Appellee,*

v.

AARON TYSON,

*Appellant,*

No. 730 EDA 2007

Appeal from the Judgment of Sentence of July 17, 2006, in the Court of Common Pleas of Monroe County, Criminal Division at No. CP-45-CR-0000817-2003

Before: STEVENS, ORIE MELVIN and COLVILLE*, JJ.

This case is a direct appeal from judgment of sentence. The issues are: (1) whether there was sufficient evidence to support the convictions for first degree murder; (2) whether the trial court erred by allowing the Commonwealth to introduce evidence showing that Appellant's coactor shot the victims

* Retired Senior Judge assigned to the Superior Court.

even though the coactor had been acquitted of the shootings; (3) whether the trial court erred in refusing to allow Appellant to introduce evidence that his coactor had been acquitted; (4) whether the court erred in not granting a mistrial or in not dismissing a certain juror after the juror had contact with a victim's wife; (5) whether the trial court erred in not recusing itself after presiding over the acquittal of the coactor; (6) whether the Commonwealth committed prosecutorial misconduct during its closing argument; and (7) whether trial counsel was ineffective in numerous ways. We dismiss Appellant's ineffectiveness claims without prejudice to bring them in a petition under the Post Conviction Relief Act (PCRA), deny him relief on his remaining claims, and affirm the judgment of sentence.

## Timeliness

We first must consider whether this appeal is timely as that matter affects our jurisdiction. *Commonwealth v. Wrecks*, 931 A.2d 717, 720 (Pa. Super. 2007) (*Wrecks I*) (stating that this Court has no jurisdiction to entertain a late appeal). After the imposition of sentence, a defendant has ten days to file a post-sentence motion and thirty days to appeal. Pa. R. Crim. P. 720(A)(1), (A)(3). If the defendant does file a timely post-sentence motion, the court has one hundred twenty days to render a decision. Pa. R. Crim. P. 720 (B)(3)(a). The one-hundred-twenty-day period may be extended for good cause on motion of the defendant. *Id.* at (B)(3)(b).

The filing of a timely post-sentence motion extends the deadline for appealing. *Id.* at (A)(2). Specifically, the thirty-day appeal period runs not from the

imposition of sentence but from the entry of the order denying the post-sentence motion. *Id.* By contrast, a late post-sentence motion does not extend the appeal period, even if the court entertains the motion. *Commonwealth v. Dreves*, 839 A.2d 1122, 1126, 1127-29 (Pa. Super. 2003). Thus, in the case of an untimely motion, the defendant's thirty days starts to run upon the imposition of sentence, just as if no post-sentence motion had been filed. *Id.*

Even still, a defendant who does not file a timely post-sentence motion may, in some circumstances, secure permission to file such a motion *nunc pro tunc*. *Id.* 839 A.2d at 1128. In particular, such a defendant must, within thirty days after sentence is imposed, request *nunc pro tunc* rights from the sentencing court. *Id.* The defendant must show sufficient cause to excuse the late filing. *Id.* Thereafter, the court must consider the request and, if the court chooses to grant *nunc pro tunc* rights, must do so expressly. *Id.* Absent an explicit order allowing a *nunc pro tunc* post-sentence motion, the time for filing an appeal is not tolled. *Id.* Additionally, the court must render its decision within thirty days of the imposition of sentence. *Id.* Within the foregoing parameters, the decision to allow a *nunc pro tunc* motion rests within the sentencing court's discretion. *Id.* Where permission to file an otherwise late post-sentence motion is properly granted and such a motion is filed, the thirty-day appeal period runs from the denial of the post-sentence request. Pa. R. Crim. P. 720(A)(2).

Normally, if an appeal is filed beyond the thirty-day deadline, this Court will quash it for lack of jurisdiction. *Commonwealth v. Wrecks*, 934 A.2d at

1287, 1289 (Pa. Super. 2007) (*Wrecks II*). However, this Court may consider an otherwise late appeal to be timely, and exercise jurisdiction over that appeal, if the untimeliness resulted from a breakdown in the processes of the court system. *Commonwealth v. Coolbaugh*, 770 A.2d 788, 791 (Pa. Super. 2001) (entertaining otherwise late appeal where sentencing court misstated appeal period); *Commonwealth v. Braykovich*, 664 A.2d 133, 138 (Pa. Super. 1995) (entertaining otherwise late appeal *where* defendant was not served with order denying post-sentence motion).

The foregoing principles inform our analysis of the events in this case. Appellant was sentenced on July 17, 2006. On July 26, 2006, he filed a motion to extend the ten-day deadline for filing post-sentence motions. The notion averred, *inter alia*, that sentencing counsel did not represent Appellant at trial, that counsel needed the trial transcript to file post-sentence motions, that counsel had ordered the trial transcript from the court reporter, and that the transcript was being prepared. The sentencing court considered the motion and, on July 27, 2006, expressly granted Appellant permission to file post-sentence motions within thirty days after the filing of the trial transcript. The trial transcript was filed on September 19, 2006. Appellant filed his post-sentence motion on October 19, 2006.

We observe that, although a request to file post-sentence motions beyond the ten-day limit is usually filed after that limit has already passed, there is no reason why Appellant should be penalized for anticipating the problem in meeting his deadline and in filing his request within the ten-day limit. Indeed, it would be silly to deem his motion a nullity because it

was filed nine days after sentencing when that same motion would have been appropriate if he waited two more days. Moreover, Appellant's motion set forth sufficient cause to excuse the otherwise late (eventual) filing of his post-sentence motion. Additionally, before the initial thirty-day appeal period expired, the sentencing court considered that motion and expressly granted him permission to file his post-sentence motion beyond the ten-day limit. Appellant then filed his motion pursuant to the court's order—specifically, within thirty days of when the transcript was filed. Accordingly, we find Appellant's post-sentence motion to be timely. Similarly, the filing of that post-sentence motion then extended his appeal period to a point thirty days beyond the eventual denial of that motion.

The court did, in fact, deny Appellant's motion on February 15, 2007, within the one-hundred-twenty-day time limit. He filed his appeal on March 19, 2007, facially beyond his thirty-day deadline. For the following reasons, however, we will not consider this appeal to be untimely.

Pursuant to Pa. R. Crim. P. 114(B)(1), the clerk of courts was required to serve the denial order of February 15, 2007, on Appellant's counsel. The docket contains a verbatim reproduction of the court's order but does not indicate that the order was served by the clerk on counsel. We recognize that the order itself, and the reproduction on the docket, seem to indicate that a copy was sent by the court, not the clerk, to Appellant's counsel. As we see no evidence of a Monroe County local rule designating service to be by the court itself rather than the clerk, service by the court would not satisfy Pa. R. Crim. P. 114(B)(2).

We are also aware that the court order directed that the clerk serve Appellant himself. Service on Appellant directly, rather than his counsel, does not comply with Pa. R. Crim. P. 114(B)(1) because he was represented at the time the order was issued.

Accordingly, we see no evidence that Appellant was properly served—that is, served in accordance with Pa. R. Crim. P. 114—with the order denying his post-sentence motion. This circumstance represents a breakdown in the processes of the court, and we find Appellant is not to be held to the thirty-day deadline under these facts. Therefore, we properly have jurisdiction over this matter and will not quash it as being untimely.

**Facts**

The trial revealed the following facts. On April 24, 2002, Appellant, Otis Powell ("Powell") and Kasine George ("George") were riding in a vehicle. At some point, Appellant exited the car and, when he returned, stated that two white boys had just pulled a gun on him. George described Appellant as angry at that time. Appellant, who was at that point a passenger in the car, took a 9 millimeter handgun from the center console. He racked the slide of the gun, thus arming it. Appellant told Powell, who was driving, to pull out from the location where the vehicle was parked.

Appellant pointed to a van and indicated it was being driven by the two who had pulled a gun on him. With Powell driving, the three followed the van to a club. When the two white men entered that club, Powell gave George a knife, directing him to puncture the tires on the van. George did so to at least one of

the tires. When George returned to the car, Appellant was in the driver's seat. Powell was now a passenger and he asked Appellant for the gun. After five or ten minutes, the two white men exited the bar, entered the van and left the location.

With Appellant now driving, the three again followed the van. It eventually stopped due to the flat tire. At that point, Appellant and his two companions were going to exit the car, but Powell told the other two to wait. Powell then walked to the van. As he did so, Appellant backed the car to a point where he and George could see what was transpiring at the van. At that point, Powell shot its two occupants, Daniel and Keith Fotiathis ("Victim 1" and "Victim 2"). He then ran back to the car. Powell, George and Appellant left the scene. Appellant drove the vehicle. The three discussed whether they should go to New York but eventually decided to return to their nearby home.

Victim 1 was shot in the neck, the lower right chest and the lower right back. Gunshots struck Victim 2 in the lower right back, right elbow and right wrist. Trial testimony established multiple gunshot wounds as the causes of death for the victims. The manner of each death was homicide. Police Found eight shell casings from a 9 millimeter at the scene.

George was later arrested on drug charges. Thereafter, he provided information to authorities regarding the instant case. Appellant was eventually arrested and charged with the homicide of both victims. He proceeded to a jury trial wherein the Commonwealth's theory was that Appellant was an accomplice to the shootings. The court charged the jury on accomplice liability, and Appellant was con-

victed of first degree murder on both counts. He now appeals.

## Sufficiency

Appellant first argues there was insufficient evidence to sustain his convictions. In particular, he claims the evidence did not prove he had the intent required to establish a first degree murder conviction.

Several legal principles are important to our resolution of this matter. The statute defining first degree murder provides, in pertinent part, the following:

> **§ 2502. Murder**
>
> (a) Murder of the first degree.—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.
>
> [* * * ]
>
> (d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:
>
> [* * * ]
>
> "Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.
>
> [* * * ]

**18 Pa. C.S.A. § 2502(a), (d).**

The following statutory provisions address accomplice liability:

§ 306. Liability for conduct of another; complicity

(a) General rule.—A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(b) Conduct of another.—A person is legally accountable for conduct of another person when:

[ * * * ]

3) he is an accomplice of such other person in the commission of the offense.

(c) Accomplice defined.—A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; . . . .

[ * * * ]

(d) Culpability of accomplice.—When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any,

> with respect to that result that is sufficient for the commission of the offense.
>
> [ * * * ]
>
> 18 Pa. C.S.A. § 306(a), (b), (c), (d).

Additionally, this Court discussed accomplice liability in *Commonwealth v. Schoff*, 911 A.2d 147, 161 (Pa. Super. 2006). Therein, we stated:

> [T]wo prongs must be satisfied for a defendant to be found guilty as an 'accomplice.'
>
> First, there must be evidence that the defendant intended to aid or promote the underlying offense, Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principal. While these two requirements may be established by circumstantial evidence, a defendant cannot be an accomplice simply based on evidence that he knew about the crime or was present at the crime scene. There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so. With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime.

*Id.* (internal citations omitted).

As to our review of sufficiency claims, we recently opined as follows:

> When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

*Commonwealth v. Habay*, 934 A.2d 732, 735 (Pa. Super. 2007) (internal citations omitted).

We also keep in mind that a jury is free to believe all, some or none of the evidence presented. *Id.* at 737. Furthermore, even if no single item of evidence conclusively establishes guilt, this Court will affirm a judgment of sentence where the totality of the evidence supports the guilty verdict. *Commonwealth v. Lee*, 626 A.2d 1238, 1240 (Pa. Super. 1993).

With the foregoing principles in mind, we turn to the instant matter. The evidence showed that Appellant, who was angry because two men had pulled a gun on him, identified the van carrying those men. He then directed Powell to drive, and later drove the car himself, thus pursuing the victims. Appellant produced the murder weapon and supplied it to the shooter. The shooter then intentionally fired the gun at both victims, striking them in vital areas and

causing their deaths. Appellant drove his companions from the scene, the three of them discussing where they should go.

We cannot say that the foregoing evidence is so weak and inconclusive that no probability of fact can be drawn therefrom. To the contrary, when viewed most favorably to the Commonwealth, this evidence and its reasonable inferences could lead a factfinder to conclude beyond a reasonable doubt that Appellant intended to promote the murder of the victims and that he actively participated in that murder by aiding the principal (*i.e.*, the shooter) when he (Appellant) identified the intended victims, told the principal to drive, drove himself in pursuit of the victims, produced the murder weapon, supplied it to the principal, and then helped the principal flee the scene. Thus, there was evidence that Appellant intended to cause the shooting death of the victims and that he aided in the commission of that crime. Accordingly, the evidence was sufficient to support the convictions for first degree murder of both victims under an accomplice theory of liability. Appellant's sufficiency claim fails.

## Evidence of Shooter's Identity

Appellant raises the question of whether it was appropriate for the trial court to allow the Commonwealth to introduce evidence that Powell was the shooter after he had been acquitted of murdering the instant victims.[1] First, we note Appellant could law-

[1] Appellant lists this issue in his statement of questions but does not develop it in his brief. In fact, in his brief he seems to concede the Commonwealth was allowed to introduce the evidence of Powell's acquittal. Therefore, because Appellant does not develop this issue, we would normally consider it to be waived.

fully be convicted for being an accomplice in the instant murders even though the principal was acquitted. 18 Pa. C.S,A. § 306(g). Additionally, to prove Appellant was an accomplice, the Commonwealth quite plainly needed to prove there was a principal. Moreover, the acquittal of the principal did not prevent the relitigation, in Appellant's trial, of the issue of who did the shooting. *See Commonwealth v. Brown*, 375 A.2d 331, 334-36 (Pa. Super. 1977) (holding acquittal of one criminal defendant does not preclude relitigation of an issue or controversy in the prosecution of another defendant even though the same transaction is involved). Accordingly, the Commonwealth was properly permitted to introduce evidence on the issue of who acted as the principal in the crimes in this case. Any claim by Appellant to the contrary has no merit.

**Preclusion of Evidence re: Powell's Acquittal**

Appellant argues that, because the Commonwealth was allowed to show that Powell was the shooter, Appellant should have been able to introduce Powell's acquittal into evidence. Appellant is incorrect. A criminal defendant may not introduce evidence of the acquittal of another person in connection with the same episode to create an impression that the defendant is innocent. *Commonwealth v. Holloway*, 739 A.2d 1039, 1044 *supra*. 1999).

Appellant briefly contends his claim is somehow one of first impression in that he bases it on due

---

*Commonwealth v. Hardy*, 918 A.2d 766, 771 (Pa. Super, 2007). Nevertheless, this issue is a simple matter and it relates, to some extent, to the next claim we will discuss in this memorandum. Therefore, we will consider and decide the question of the admissibility of evidence regarding the identity of the shooter.

process and equal protection concerns. However, he does not elaborate on this particular contention and he has simply not persuaded us the trial court committed error. Accordingly, he is entitled to relief.

**Juror's Contact with Victim 1's Wife**

One of the jurors worked at a store in a shopping mall during the course of the trial. Victim 1's wife entered the store to purchase something. The wife began talking to the juror about the stressful day she (the wife) had been having. The juror interrupted the wife, telling her that she (the juror) was on the jury, and the two women did not discuss the facts of the case. The juror reported this incident to the court.

When questioned by the court, the juror indicated the encounter would not cause her to have a fixed opinion as to whether Appellant was guilty or innocent. Also, when the court asked her if the incident would "interrupt [her] decision to judge [the case] solely on the evidence," the juror responded, "No, sir." N.T., 05/05/06, at 375, 376.

The refusal to grant relief based on juror misconduct is within the discretion of the trial court. *Commonwealth v. Russell*, 665 A.2d 1239, 1243 (Pa. Super. 1995). Also, the court's factual findings regarding alleged misconduct will be upheld absent an abuse of its discretion. *Id.* An abuse of discretion is not a mere error in judgment but, rather, involves bias, prejudice, partiality, or manifest unreasonableness. *Hardy*, 918 A.2d at 766.

Here, the court questioned the juror and determined the contact between the wife and the juror did not result in prejudice to Appellant. The court found

the juror interrupted the wife, revealed she was a juror, reported the incident to the court, and indicated she would not be influenced by the wife's limited contact. We find no evidence of bias, partiality, prejudice, ill-will, manifest unreasonableness or misapplication of law in the court's determinations. Accordingly, there was no abuse of discretion in failing to order a mistrial and, similarly, Appellant has not shown there was any reason to excuse the juror. Appellant's claim fails.

## Recusal

Appellant points to no place in the record showing he made a motion for the trial court to recuse itself, and we have found no such motion. In fact, Appellant argues his trial counsel was ineffective in not making such a motion. Because this matter was not preserved, it is waived. *See* Pa. R.A.P. 302(a) (stating matters not raised in the trial court are normally waived).

## Prosecutorial Misconduct

Appellant claims he is entitled to a new trial based on certain comments made by the Commonwealth during closing argument. He did not object to those comments prior to this appeal. (Once again, Appellant argues his counsel was ineffective for not raising objections on this issue.) Accordingly, Appellant waived this claim. *Commonwealth v. Sasse*, 921 A.2d 1229, 1238 (Pa. Super. 2006) (holding that an appellant waives claim of prosecutorial misconduct committed during closing argument by not objecting during the argument).

Ineffectiveness of Counsel

Appellant contends trial counsel was ineffective in failing to move that the trial court recuse itself, in failing to object to portions of the Commonwealth's closing argument, in failing to object to the introduction of a photograph of Victim 1 and his young daughter, in failing to object to the Commonwealth's portrayal of Appellant as a drug dealer, in failing to file a timely alibi notice, in failing to interview certain witnesses, and in failing to review Appellant's cell phone records.

Normally, claims of ineffective counsel are to be heard in proceedings under the PCRA rather than on direct appeal. *Hardy*, 918 A.2d at 773. However, this Court may entertain such issues on direct appeal where the appellant preserved them in the trial court, the court held an evidentiary hearing at which those claims were developed, and the court subsequently issued an opinion on those claims. *Id.*

Here, Appellant filed a post-sentence motion raising, *inter alia*, the claims of ineffectiveness that he now pursues on appeal. The trial court issued an order stating that the trial testimony had been transcribed, that the issues raised in the post-sentence motion required no additional testimony, and that the parties were to brief the post-sentence issues.

The court later directed the transcription of a certain pretrial hearing that had involved Appellant's alibi notice. At that hearing, which had been precipitated by the Commonwealth's request for a more specific alibi notice, Appellant's trial counsel stated on the record, and at some length, his efforts relating to alibi witnesses. He did not testify but, rather, merely related his efforts to the court. Thus,

counsel was not subject to cross-examination at that hearing and, in any event, the hearing was simply not devoted to an ineffectiveness claim.

Eventually, the court denied Appellant's post-sentence motion, including the ineffectiveness claims. The court did write an opinion addressing the ineffectiveness claims, but it appears there was no evidentiary hearing at which Appellant's ineffectiveness claims were developed. There having been no such hearing, we dismiss Appellant's ineffectiveness claims without prejudice to raise them in a PCRA petition.

For the foregoing reasons, we dismiss Appellant's claims of ineffectiveness without prejudice to raise them in a PCRA petition. Appellant's remaining claims raised on this appeal fail. Accordingly, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judge Orie Melvin concurs in the result.

## OPINION OF THE COURT OF COMMON PLEAS OF MONROE COUNTY (MAY 9, 2006)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

AARON TYSON,

*Defendant,*

No. 817 CRIMINAL 2003

P.C.R.A.

On May 9, 2006, following a jury trial, Aaron Tyson [hereinafter Defendant] was found guilty of murder in the first degree as an accomplice in the death of Keith Fotiathis, and murder in the first degree as an accomplice in the death of Daniel Fotiathis. On July 17, 2006, Defendant was sentenced to a state correctional institution, as provided by statute, for the term of his natural life without the possibility of parole.

On July 26, 2006, Attorney David Skutnik filed a Motion for an Extension to File Post Sentence Motions on the basis that he needed to obtain the trial transcripts in order to prepare the motion. This court granted the request and ordered that Defendant

file any post sentence motions within thirty (30) days of the filing of the trial transcripts. On October 19, 2006, Defendant filed a Post Sentence Motion seeking acquittal or, in the alternative, a new trial. By Opinion and Order dated February 15, 2007, this court denied Defendant's Post Sentence Motions. Defendant filed a direct appeal with the Superior Court on March 19, 2007; and the Superior Court denied Defendant's appeal and affirmed the judgment of sentence on January 11, 2008. On February 19, 2009, Defendant filed a *pro se* Petition for Allowance of Appeal *Nunc Pro Tunc*, alleging that Attorney Skutnik abandoned him during his direct appeal. On April 28, 2009, the Supreme Court granted Defendant's Petition and directed Attorney Skutnik to file a Petition for Allowance of Appeal within thirty (30) days. Attorney Skutnik filed a Petition for Allowance of Appeal on May 27, 2009, which was denied by the Supreme Court on February 23, 2010.

On November 19, 2010, Defendant filed a *Pro Se* Motion for Post Conviction Collateral Relief, together with a Brief in Support of the Motion (hereafter "Deft.'s *Pro Se* Brief, 11/19/10, p. ___"). By Order dated November 29, 2010, this court appointed Jason Leon, Esquire, to represent Defendant in this PCRA proceeding and granted counsel leave to file an amended petition and a brief by December 29, 2010. Attorney Leon filed two separate Motions for Extension of Time to File an Amended Petition, which this court granted thereby extending the time to file an Amended Petition to March 31, 2011. Defendant filed a Supplemental PCRA Petition and Motion for Evidentiary Hearing on March 31, 2011 (hereafter "Supplemental PCRA, 3/31/11, ¶ ___, p. ___"). The Commonwealth

filed an Answer to Defendant's PCRA Petition on April 29, 2011. A hearing was scheduled for July 21, 2011; however, due to the delay in transporting Defendant from a federal prison in California, as well as a witness from a prison in New Jersey, the hearing was rescheduled to October 4, 2011. Following the evidentiary hearing on October 4, 2011, the matter was taken under advisement. Defendant filed a Supplemental Brief in Support of his PCRA Petition on November 14, 2011 (hereafter "Supplemental Brief, 11/14/11, p. ___"), and the Commonwealth filed a Brief in Opposition on November 30, 2011 (hereafter "Com.'s Brief, 11/30/11, p. ___").

In his Motion and Supplemental Motion for Post Conviction Collateral Relief Defendant raises numerous issues of trial court error, trial counsel ineffectiveness and appellate counsel ineffectiveness with respect to his trial and direct appeal. Specifically, Defendant raises four (4) issues of trial court error and 12 issues of trial counsel ineffectiveness. In addition, Defendant raises seven (7) claims of ineffectiveness against appellate counsel. We are now ready to dispose of this matter and will address each issue more specifically below, combining similar issues where appropriate.

## DISCUSSION

Defendant asserts generally that he is innocent of murder in the first degree as an accomplice and, therefore, he is entitled to have his conviction vacated. [Deft.'s *Pro Se* Brief, 11/19/10, p,55.] In support of this assertion, Defendant claims that due to trial counsel incompetence and ineffectiveness, he was not able to present subpoenaed witnesses who would have refuted the Commonwealth's theory of who

committed the crime and why it was committed. He further claims that the trial judge took out of the hands of the jury the ability to determine the facts and credibility of the witnesses. [Deft.'s *Pro Se* Brief, 11/19/10, p.56.] Defendant concludes by arguing that his trial counsel, Attorney Brian Gaglione, failed to perform his duties to the best of his ability; that when you take all of the errors as a whole, the combination proves that Defendant was denied effective assistance of counsel, especially when a co-conspirator—the actual shooter—was acquitted in a separate trial using the same evidence that was available to Attorney Gaglione. [Supplemental Brief, 11/14/11, p.8.]

The Commonwealth argues that "Defendant has failed to demonstrate that he has suffered prejudice" as a result of the alleged acts or omissions of trial counsel. [Com.'s Brief in Opposition to Defendant's Motion for Post-Conviction Relief, 11/30/11, p.4 (hereinafter "Com.'s Brief, 11/30/11, p. ___").] The Commonwealth further argues that the evidence presented at trial "established that the defendant acted in concert with two others to kill both Keith and Daniel Fotiathis." [Com.'s Brief, 11/30/11, p.4.] Finally, the Commonwealth argues that in the present case "the actions of each conspirator individually reflect the elements of premedication (sic) and deliberation necessary to prove murder of the first degree and as such the defendant's claim of ineffective assistance of counsel should be dismissed." [Com.'s Brief, 11/30/11, p.5.]

In order for a defendant to be eligible for post-conviction relief under 42 Pa. C.S.A. § 9543, a defendant must be able to prove all of the following:

(1) That [defendant] has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime.

(2) That the conviction or sentence resulted from one of the following:

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

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(3) That the allegation of error has not been previously litigated or waived.

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa. C.S.A. § 9543(a)(1)(i), (2)(i)-(ii), (3) and (4).

Pursuant to 42 Pa. C.S. § 9543(a)(3), "[t]o be eligible for relief under [the PCRA], the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been previ-

ously litigated or waived." "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state post conviction proceeding." 42 Pa. C.S. § 9544(b), *Com. v. Marinelli*, 810 A.2d 1257, 1264 (Pa. 2002). "[A]n issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.]" 42 Pa. C.S. § 9544(a)(2), *Id.* at 1266.

With regard to paragraph (a)(1), Defendant is currently serving a life sentence without the possibility of parole in a state correctional institution for the offense of murder in the first degree as an accomplice in the death of Keith Fotiathis and Daniel Fotiathis. Therefore, he has met the eligibility requirement of 42 Pa. C.S.A. § 9545(1)(i). However, as will be discussed below, Defendant has failed to prove that the alleged errors of the trial court and the alleged ineffectiveness of trial and appellate counsel, under the circumstances of his particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. Several of the issues raised in Defendant's PCRA Motions have been previously litigated or waived. Thus, with respect to claims of ineffective assistance of trial counsel (Issue Nos. 3, 5, 6, 8, 9, 10, 11, and 12), which are identified more specifically later in this discussion, we find that Defendant has failed to meet the eligibility requirement set forth in 42 Pa. C.S.A. § 9543(3). We also find that Defendant has failed to meet the eligibility requirement set forth in 42 Pa. C.S.A. § 9543(4), in that he has failed to prove that trial or appellate counsel failed to preserve, raise and litigate the issues raised in this PCRA Motion in post-trial pro-

ceedings, during unitary review or on direct appeal or that counsel did not have any rational, strategic or tactical decision for failing to do so. Moreover, a defendant is only allowed relief under the Post Conviction Relief Act where ineffective assistance of counsel leads to a conviction or sentence where it is unclear whether the defendant is guilty. 42 Pa. C.S.A. § 9543 (2)(ii). Furthermore, we find that Defendant is likewise unable to establish that the alleged ineffectiveness lead to his conviction or sentence where it is unclear whether he is guilty. Therefore, we conclude that Defendant is not entitled to post-conviction relief based on the reasoning set forth below. Accordingly, Defendant's *pro se* Motion and Supplemental Motion for Post-Conviction Collateral Relief are DENIED. After a careful review of the record and the briefs submitted by the parties, we offer the following analysis in support of this decision.

Defendant asserts for the first time that the trial court erred in failing to give the proper jury instruction on "shared specific intent to kill," which he claims is required on a charge of first degree murder as an accomplice. [Deft.'s *Pro Se* Brief, 11/19/10, p.6.] He also claims, for the first time, that trial counsel was ineffective for failing: (1) to object to prejudicial hearsay testimony offered by Detective Wolbert; (2) to object to prosecutorial misconduct when the prosecutor "vouched" for the credibility of a witness during closing arguments; (3) to object to prosecutorial misconduct when the prosecutor made "improper comments" about Defendant's whereabouts during closing arguments; (4) to file a proper Motion to Quash the Array; and (5) to present Defendant's subpoenaed witnesses to the jury, including Omar Powell. [Deft.'s *Pro Se*

Brief, 11/19/10; Supplemental PCRA, 3/31/11, ¶ 6.] We find that Defendant has waived these issues.

The Pennsylvania Supreme Court in *Commonwealth v. Tedford*, sets forth the law with respect to claims that have been waived. The Court held that:

> A claim that has been waived is not cognizable under the PCRA. The pre-amendment PCRA stated that "an issue is waived if the petitioner failed to raise it and if it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter." 42 Pa. C.S. § 9544(b) (amended 1995).
>
> Because appellant was represented by new counsel on direct appeal at a time when counsel could (and did) raise claims of trial counsel ineffectiveness, any claim that appellant would now make sounding in trial court error or ineffective assistance of trial counsel is waived under the PCRA. *See* 42 Pa. C.S. § 9543(a)(3) (amended 1995). Any such defaulted claim could be an aspect of a cognizable claim under the PCRA only to the extent it is posed and developed as a "layered" claim of ineffectiveness focusing on appellate counsel. In *Commonwealth v. McGill*, 574 Pa. 574, 832 A. 2d 1014 (2003), this Court set forth a framework for consideration of layered ineffectiveness claims, as follows:
>
> > [A] petitioner must plead in his PCRA petition that his prior counsel, whose

> alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that the counsel who preceded him was ineffective in taking or omitting some action. In addition, a petitioner must present argument . . . on the three prongs of the Pierce test as to each relevant layer of representation.

*Tedford*, *supra* at 13; *McGill*, *supra.*

"[T]he inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's purported ineffectiveness alone will be fatal to his layered ineffectiveness claim." *Id.* (citation omitted). On the other hand, "with layered claims, establishing trial counsel's ineffective assistance will demonstrate that prior appellate counsel's failure to raise the former's ineffectiveness suggests a claim possessing arguable merit." *Id.*

Defendant was represented by new counsel on direct appeal at a time when counsel could (and did) raise claims of trial counsel ineffectiveness. However, direct appellate counsel failed to raise the following claims as trial court error or trial counsel ineffectiveness. Consequently, we find as follows:

(1) Defendant's claim sounding in trial court error for failing to give the proper jury instruction on "shared specific intent to kill" is waived under the PCRA.

(2) Defendant's claim sounding in ineffective assistance of trial counsel for failing to object to prejudicial hearsay testimony offered by Detective Wolbert is waived under the PCRA;

(3) Defendant's claim sounding in ineffective assistance of trial counsel for failing to object to prosecutorial misconduct when the prosecutor "vouched" for the credibility of a witness during closing arguments is waived under the PCRA;

(4) Defendant's claim sounding in ineffective assistance of trial counsel for failing to object to prosecutorial misconduct when the prosecutor made "improper comments" about Defendant's whereabouts during closing arguments is waived under the PCRA;

(5) Defendant's claim sounding in ineffective assistance of trial counsel for failing to file a proper Motion to Quash the Array is waived under the PCRA; and

(6) Defendant's claim sounding in ineffective assistance of trial counsel for failing to present Defendant's subpoenaed witnesses to the jury, including Omar Powell, is waived under the PCRA.

However, the defaulted claims could be an aspect of a cognizable claim under the PCRA to the extent that they are posed and developed as "layered" claims of ineffectiveness focusing on appellate counsel. Thus, we will revisit these claims later in this Opinion under the section dealing with trial counsel ineffectiveness or as a "layered claim" under appellate counsel ineffectiveness.

We will now address the claims that have not been waived.

## TRIAL COURT ERROR

Defendant's remaining claims of trial court error, *i.e.*, trial court erred in overlooking conclusive evidence that supports a claim of "insufficient evidence" to sustain a conviction; and trial court error in allowing prejudicial hearsay testimony will be addressed *in seriatim.*

### Trial Court Erred in Overlooking Conclusive Evidence

Defendant claims that the trial court erred in overlooking conclusive evidence that supports a claim of "insufficiency of the evidence" to sustain a conviction of first degree murder. [Deft.'s *Pro Se* Brief, 11/19/10, p.4.] Defendant asserts that the evidence presented at trial clearly supports third degree murder. He argues that the evidence shows that heated words were possibly exchanged, that a gun was drawn by the victims, and that the shooter "not aiming" recklessly fired shots while fleeing. [Deft.'s *Pro Se* Brief, 11/19/10, p.4.]

The trial court previously addressed this issue in its Opinion denying Defendant's Post-Sentence Motions. At that time, the trial court found "that the evidence presented by the Commonwealth was sufficient to enable the fact finder to find that all of the elements of first degree murder and accomplice culpability were established beyond a reasonable doubt to support a conviction of first degree murder as an accomplice." [Trial Ct. Opinion, 2/15/07, p.6.]

Defendant raised the same issue on direct appeal wherein he argued that "the evidence did not prove he had the intent required to establish a first degree murder conviction." [Superior Ct. Memorandum,

1/11/08, p.8.] After reviewing the evidence presented at trial, the Superior Court found that "there was evidence that Appellant intended to cause the shooting death of the victims and that he aided in the commission of that crime." [Superior Ct. Memorandum, 1/11 /08, p.12.] The Superior Court concluded that "the evidence was sufficient to support the convictions for first degree murder of both victims under an accomplice theory of liability" and therefore, "Appellant's sufficiency claim fails." [Superior Ct. Memorandum, 1/11/08, p.12.]

Presently, Defendant raises the same "insufficient evidence" claim by asserting a new theory of relief under the guise of trial court error. Specifically, he asserts that the trial court erred when it overlooked conclusive evidence that supports his "insufficient evidence" claim. In *Marinelli*, the Pennsylvania Supreme Court held that "[A] PCRA petitioner 'cannot obtain post-conviction relief of claims that were previously litigated by presenting new theories of relief to support a previously litigated claim.'" *Marinelli*, *supra* at 1264. "[A]n issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue[.]" 42 Pa. C.S. § 9544(a)(2), *Marinelli*, *supra* at 1266.

Inasmuch as the Pennsylvania Superior Court, the highest court in which Defendant could have had review as a matter of right, has ruled on the merits of Defendant's "insufficient evidence" claim, we find that this claim has been previously litigated and found to be without merit. Moreover, Defendant cannot obtain post-conviction relief of this previously litigated claim by presenting it again under the new theory of "trial

court error". Accordingly, Defendant's claim of trial court error for overlooking conclusive evidence that supports a claim of insufficient evidence to sustain a conviction of first degree murder is dismissed.

**Trial Court Erred in Failing to Give Proper Jury Instruction**

Defendant claims, for the first time, that the trial court erred when it failed to give the proper jury instruction on "shared specific intent to kill" which he claims is required on a charge of first degree murder as an accomplice. [Deft.'s *Pro Se* Brief, 11/19/10, p.6.] Defendant asserts that "the trial court failed to instruct them (the jury) as to why they can find the Petitioner guilty of the charged offense, also only to focus on the Petitioner as an accomplice; neglecting the essential elements of the primary charge of murder in the first degree as relates to the shared specific intent for the accomplice." [Deft.'s *Pro Se* Brief, 11/19/10, p.6. (Clarification added).]

Pursuant to 42 Pa. C.S. § 9543(a)(3), "[t]o be eligible for relief under [the PCRA], the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been previously litigated or waived." "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding." 42 Pa. C.S. § 9544(b), *Marinelli*, *supra.* A review of the record reveals that Defendant raises this issue for the first time in the present PCRA petition. Therefore, because this issue was not raised before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding, it is waived.

**Trial Court Erred in Allowing Prejudicial Hearsay Testimony**

In his third allegation of trial court error, Defendant claims that the court erred in allowing prejudicial hearsay testimony to be presented through the testimony of Detective Wolbert. [Deft.'s *Pro Se* Brief, 11/19/10, p.9.] Specifically, Defendant asserts that the trial court erred in allowing Detective Wolbert's testimony regarding statements made by Kasine George and Eve Sherel Mayo, a/k/a Bam, because "the third party statements was used for identification and motive, making the Petitioner a desired suspect in a murder." [Deft.'s *Pro Se* Brief, 11/19/10, p.12.] Defendant also asserts that trial counsel objected to the hearsay testimony and requested a mistrial; however, the trial judge denied the request for a mistrial stating: " . . . as far as hearsay goes not one statement by the officer is a statement which is attributing to your client in any capacity made by a third party. So hearsay does not apply." [Deft.'s *Pro Se* Brief, 11/19/10, p. 10, *citing* N.T., Vol. III, 5/5/06, pg. 492, Line(s) 12-15.]

Defendant argues that "'[T]he statements were clearly testimonial in nature, as it was used to establish essential elements of the offense.'" [Deft.'s *Pro Se* Brief, 11/19/10, p.11.] He further argues that as a result of the trial court's ruling, "[H]is Constitutional rights to confront his accuser and cross examine witnesses were stripped." [Deft.'s *Pro Se* Brief, 11/19/10, p.11.]

"The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." *Com. v. Hernandez*, ___ A.3d ___ (Pa. Super. 2012), 2012

WL 549827, *citing Com. v. Herb*, 852 A.2d 356, 363 (Pa. Super. 2004) (Citations omitted). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, or partiality, as shown by the evidence of record." *Id.*

During the direct testimony of Commonwealth witness, Detective Wolbert, defense counsel raised an objection based on hearsay. Following an on-the-record sidebar discussion (N.T., Vol. III, 5/5/06, pp. 489-493), the trial judge made the following ruling:

> THE COURT: All right. Gentlemen, as far as hearsay goes not one statement by the officer is a statement which is attributing to your client in any capacity made by a third party. So the hearsay does not apply.
>
> Secondly, the challenge was raised by virtue of your cross-examination of Mr. George and in turn the subject matter why and if it was reasonable for him, any reason for him to testify in this proceeding. And you described some ulterior motive that was both nefarious and self-serving. The question is and the testimony has been oriented around how this officer put together an investigation and how he did decide to focus on someone or others. And why that in and of itself concerns avenues of approach and those whom he may have spoken to, I don't see that as being hearsay compilation. It is not offered for the truth of your client's conduct. It shows how he came to do what he did. It does not fall within those ranks. And I am not going to grant a motion for mistrial at this time.

[N.T., Vol. III, 5/5/06, pp.489-493.]

We have reviewed the testimony of Detective Wolbert and we agree with the trial judge that it was not testimonial in nature and was not offered for the truth about Defendant's conduct. Detective Wolbert was merely testifying as to how he came by certain information during his investigation, who he spoke to, and how certain information he received lead him to other persons who might have information related to the double homicide; therefore, we find that the trial court did not commit error when it determined that the testimony of Detective Wolbert did not constitute hearsay. Moreover, we find that Defendant has failed to show that the trial court misapplied the law, or exercised judgment that was manifestly unreasonable, or that the ruling was the result of bias, prejudice, ill-will or partiality on the part of the trial judge. Therefore, Defendant's claim that the trial court erred when it overruled the hearsay objection fails.

Next, we will address defense counsel's motion for a mistrial based on the alleged hearsay testimony of Detective Wolbert. Defendant alleges that his constitutional rights to confront his accusers and cross-examine witnesses were violated, and as a result, he as was entitled to a mistrial.

The Pennsylvania Supreme Court has held that "[A] mistrial may be granted only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." *Com. v. Simpson*, 754 A.2d 1264, 1272 (PA.2000) (citations omitted). Having concluded that the testimony of Detective Wolbert was not hearsay, we find that the motion for mistrial

was properly denied. Defendant has failed to prove that Detective Wolbert's testimony, upon which the motion for mistrial was based was of such a nature that its unavoidable effect was to deprive him of a fair trial by preventing the jury from weighing and rendering a true verdict. Consequently, Defendant's claim that the denial of his motion for mistrial stripped him of his constitutional rights to confront his accusers and confront witnesses is without merit.

For the foregoing reasons, Defendant's allegation that the trial court erred in allowing prejudicial hearsay testimony to be represented through the testimony of Detective Wolbert is dismissed.

## TRIAL COUNSEL INEFFECTIVENESS

Defendant's remaining claims of ineffective assistance of trial counsel will be discussed in the following order: (1) failing to interview eyewitnesses; (2) failing to review cell phone records of Defendant; (3) failing to adequate investigate alibi witnesses and for not filing the proper Notice of Alibi Defense; (4) failing to object to trial court error in allowing prosecution to portray Defendant as a drug dealer; (5) failing to file motion to recuse trial judge; (6) failing to request evidentiary hearing regarding contact between Juror No. 2 and Commonwealth witness; and (7) failing to object to introduction of photograph of victim and daughter. As will be discussed below many of these claims were raised by Defendant in post-trial motions and on direct appeal.

The standard of review for ineffective assistance of counsel is the same under the PCRA. as it is for direct appeals. *Com. v. Kimball*, 724 A.2d 326, 330 (Pa. 1999). In order to make out a claim for ineffective

assistance of counsel, Defendant must prove: "(1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, *i.e.*, that there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different." *Com. v. Ford*, 809 A.2d 325, 330-331 (Pa. 2002), *cut*, *denied* 540 U.S. 1150 (S. Ct. 2002) (citation omitted.). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." *Com. v. Miller*, 868 A.2d 578, 581 (Pa. Super. 2005). A claim is of arguable merit where there was an act or omission of "questionable legal soundness." *Com. v. Hickman*, 799 A.2d 136, 140 (Pa. Super. 2002), *quoting Com. v. Davis*, 541 A.2d 315, 318 (Pa. 1988). "A PCRA petitioner 'cannot obtain post-conviction review of claims that were previously litigated by alleging ineffectiveness of prior counsel and presenting new theories of relief to support a previously litigated claim.'" *Marinelli*, *supra* at 1264 (Pa. 2002). "A post-conviction claim of ineffective assistance of counsel raises a distinct legal ground, rather than an alternative theory in support of the same underlying issue that was raised on direct appeal, and, thus, ineffectiveness claims are distinct from previously litigated issues and may be brought in post-conviction proceedings." *Com. v. Collins*, 888 A.2d 564, 585 (Pa. 2005).

**Trial Counsel was Ineffective for Failing to Interview Eyewitnesses**

Defendant claims that trial counsel was ineffective for failing to interview eyewitnesses at the scene of the crime. [Deft.'s *Pro Se* Brief, 11/19/10, p.25; Supple-

mental PCRA, 3/31/11, ¶ 6(e)(5), p.2.] Defendant asserts that trial counsel "failed to obtain vital information that could have been exculpatory" for him. [Deft.'s *Pro Se* Brief, 11/19/10, p.25.]

This issue was previously and thoroughly addressed in the trial court's Opinion denying Defendant's Post-Sentence Motions. At that time, the court found Defendant's claim to be without merit. Although defense counsel may not have interviewed the eyewitnesses prior to trial, he did cross-examine them at trial. Accordingly, the trial court found that Defendant "failed to establish that he was prejudiced by counsel's failure to interview these witnesses." [Trial Ct. Opinion, 2/15/07, p.24.]

The Defendant raised the same issue on direct appeal; however, the Superior Court found that although the trial court had addressed this issue in its Opinion denying Defendant's post-sentence motion, it had not conducted an evidentiary hearing to allow Defendant to develop his claim. Therefore, the Superior Court dismissed this ineffectiveness claim without prejudice to raise it later in a PCRA petition. [Superior Ct. Memorandum, 1/11/08, p.18.] Inasmuch as the Superior Court, the highest court in which Defendant could have had review as of right, did not rule on the merits of this issue, it has not been previously litigated. 42 Pa. C.S. § 9544(a)(2), *Marinelli*, *supra* at 1266. Therefore, we must proceed to address it at this time.

Defendant first argues that since there was more than one person in the group of people on Main Street at the time of the crime, if counsel had interviewed them, he would have obtained information that "was vital and pertinent" to his defense because

such information "dealt with the identification of the Petitioner's vehicle, which was the cause of the Petitioner being a suspect." [Deft.'s *Pro Se* Brief, 11/19/10, p.26.]

The failure to call a particular witness does not establish ineffectiveness unless there is proof that the witness would have been beneficial in establishing the asserted defense. *Commonwealth v. Wheatley*, 998 Criminal 2000 (Monroe Co. 2005, p.10) (O'Brien, J.), *citing Commonwealth v. Durst*, 552 Pa. 2, 559 A.2d 504 (1989); *Commonwealth v. Drass*, 718 A.2d 816 (Pa. Super. 1998).

The trial court previously noted that "there were only two groups of witnesses: (1) those in Defendant's car, and (2) the group of people on Main Street." [Trial Ct. Opinion, 2/15/07, p.24.] The court also noted that the Commonwealth had offered the testimony of Kasine George, an occupant in Defendant's car, and that of Ahmed Osman, one of the pedestrians on Main Street and that each of these witnesses were cross-examined by trial counsel. [Trial Ct. Opinion, 2/15/07, p.24.] Trial counsel, Attorney Brian Gaglione, testified at the PCRA hearing that he had provided information to Detective Wilson Miller of the Public Defender's Office regarding certain people and he asked him to try and track them down. Attorney Gaglione stated that Detective Miller was unsuccessful in locating, these people because many of those involved in this case had "sort of dispersed into the four winds"—they were no longer in Monroe Count. He further testified that he had the transcript from the Powell case, plus all of the witnesses' statements, but he couldn't recall specifically talking to anybody prior to trial." [PCRA, N.T., 10/4/11, p.20.]

Other than the bald assertion that trial counsel would have obtained information that "was vital and pertinent" to his defense because such information "dealt with the identification of the Petitioner's vehicle, Defendant has not offered any evidence to support his claim that the eyewitnesses, whom he does not identify by name, would have been beneficial in establishing the asserted defense.

Next, Defendant contends that "[I]t is vital and pertinent to determine if the group of people can actually see the make and model of the car from its side doors at night in an alley with no lights, and the fact that they stood over 200 feet or 60 yards away." Defendant claims that it would be "almost impossible to identify a car from the side at that distance in the daytime." [Deft.'s *Pro Se* Brief, 11/19/10, pp.26-28.] When asked why he decided not to take the jury to the scene to "see how dark it was"; "how far the alley went down"; and "whether the witness could see everything he said he could see", Attorney Gaglione did not have an answer. He stated that his focus was on the witness who placed Defendant at the scene. Attorney Gaglione testified that "If the witness that placed my client at the scene is somebody who was familiar with my client he was, according to his own testimony, in the same car as my client." He further testified that his trial strategy was "to try and discredit the testimony of the many witnesses of the prosecution." [PCRA, 10/14/11, p.14.]

As the trial court noted, although counsel may not have interviewed the eyewitnesses prior to trial, he did cross-examine them at trial. Furthermore, we believe that Attorney Gaglione's trial strategy regarding the eyewitnesses was based on sound legal reasoning.

Consequently, we find that Defendant has failed show that the underlying claim has arguable merit, that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest, or that there is a reasonable probability that the outcome of his trial would have been any different had trial counsel interviewed the eyewitnesses prior to trial or taken them to the scene of the crime. Accordingly, Defendant's claim that trial counsel was ineffective for failing to interview eyewitnesses lacks merit and is, therefore, dismissed.

**Trial Counsel was Ineffective for Failing to Review Cell Phone Records**

In his next claim of ineffective assistance of counsel, Defendant asserts that trial counsel was ineffective for failing to review his cell phone records. [Deft.'s *Pro Se* Brief, 11/19/10, p.25; Supplemental PCRA, 3/31/11, ¶ 6(e)(4), p.2.] Defendant alleges that had Attorney Gaglione researched his cell phone records it would have led him to the identity of another alibi witness.

The trial court previously addressed this issue in its Opinion denying Defendant's Post-Sentence Motions. At that time, the court noted that Defendant had failed to provide the name of any witness that would have been identified from his cell phone records or how their testimony would have been beneficial to his defense. Therefore, the court determined "that no viable alibi witness could possibly be derived from a review of Defendant's cell phone records; thus this claim also lacks merit." [Trial Ct. Opinion, 2/15/07, p.24-25.]

The same issue was raised on direct appeal; however, like the previous claim of ineffective assistance of trial counsel, the Superior Court found that although the trial court had addressed this issue in its Opinion denying Defendant's post-sentence motion, it had not conducted an evidentiary hearing to allow Defendant to develop his claim. Therefore, the Superior Court dismissed this ineffectiveness claim without prejudice to raise it later in a PCRA petition. [Superior Ct. Memorandum, 1/11/08, p.18.] Inasmuch as the Superior Court, the highest court in which Defendant could have had review as of right, did not rule on the merits of this issue, it has not been previously litigated. 42 Pa. C.S. § 9544(a)(2), *Marinelli*, *supra* at 1266. Therefore, we must proceed to address it at this time.

Defendant argues that "[T]he significance of the Petitioner's cell phone records as to his defense: it proves that the Petitioner was in another state at or around the time of the offense, and it refutes the Commonwealth's principal witness that the Petitioner was with him in Pennsylvania committing a crime." [Deft.'s *Pro Se* Brief, 11/19/10, p.30.] Defendant also argues that the cell phone records would have undoubtedly and unequivocally placed him in New Jersey at or around the time of the crime; therefore, "[I]t was pertinent as it clearly refuted the cooperating witness testimony that he along with the Petitioner and another codefendant committed the offense and stayed in Pennsylvania." [Deft.'s *Pro Se* Brief, 11/19/10, p.31.]

When questioned about cell phone records at the PCRA hearing, Attorney Gaglione stated that he didn't remember a conversation with Defendant wherein he allegedly told him that "the cell phone records showed

that he was in New Jersey but the last phone call was about 10 minutes away" and that "you didn't want to use it because he could have gotten there in 10 minutes." [PCRA, N.T., 10/4/11, p.22.] He stated that he couldn't "remember one way or the other if there were cell phone records that indicated that he was in New Jersey." He further stated:

> I guess it would depend on whether it was—whether or not that telephone conversation took place before or after the alleged time slot. If it took place afterwards certainly, you know, Stroudsburg is no more than a matter of about 10 minutes away from New Jersey. So that would not necessarily help us. If it was before, it may have. I really don't know. I don't remember, like I said, one way or the other whether there was even any issue with regard to cell phone records.

[PCRA, N.T., 10/4/11, pp.22-23.]

Defendant has once again failed to assert the identity of any witnesses with whom he may have had conversations with at the time of the murders. He merely asserts that the records prove that the he was in another state at or around the time of the offense, and that would refute the testimony of Kasine George, the Commonwealth's principal witness, who testified that Defendant was with him in Pennsylvania committing the crime. As trial counsel correctly stated, New Jersey is only about 10 minutes away from the scene of the crime, so such information would not necessarily be helpful to the defense. The trial court noted in its post-sentence Opinion: "a person on the other end of a call made from a cell phone would illustrate nothing more than that they

were not with the Defendant." [Trial Ct. Opinion, 2/15/07, p. 24.] The trial court also determined that a person on the other end of a cell phone call "would not be able to provide credible testimony as to the whereabouts of Defendant at the time of the murders." [Trial Ct. Opinion, 2/15/07, p.24-25.] Based on the foregoing, we adopt the prior findings of the trial court that "no viable alibi witness could possibly be derived from a review of Defendant's cell phone records; thus this claim also lacks merit.

Accordingly, we find that Defendant has failed show that the underlying claim has arguable merit, that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest, or that there is a reasonable probability that the outcome of his trial would have been any different had trial counsel reviewed his cell phone records. Failure to satisfy any one of the prongs of the test for ineffective assistance of counsel requires dismissal. Accordingly, Defendant's claim that trial counsel was ineffective for failing to review his cell phone records lacks merit and is, therefore, dismissed.

**Failure to Adequately Investigate Alibi Witnesses**

Defendant claims that trial counsel was ineffective for failing to properly investigate Defendant's alibi witnesses and for not filing the proper Notice of Alibi Defense (Deft.'s *Pro Se* Brief, 11/19/11, p.33; Supplemental PCRA, 3/31/11, ¶ 6(c), (e)(5), p.2). Defendant alleges that trial counsel's failure to properly investigate his alibi witnesses whose testimonies "would have proved that the Petitioner could not have committed the offense for the reason that he was somewhere else

other than the scene of the crime." [Deft.'s *Pro Se* Brief, 11/19/11, p.34.]

The trial court thoroughly addressed this issue in its Opinion denying Defendant's Post-Sentence Motions. At that time, the court noted that "[T]he contact-information provided to counsel was outdated and/or insufficient" and that the alleged alibi witness, Latascha Green, supplied counsel "with two different versions of the events." [Trial Ct. Opinion, 2/15/07, p.23.] The court noted that if counsel had called Ms. Green to testify at trial, he "would have to knowingly provide information which he knew was not corroborated by the very witness he was seeking to offer." Therefore, the court determined that Defendant had "failed to show that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest or that he was prejudiced by counsel's actions regarding the Notice of Alibi. [Trial Ct. Opinion, 2/15/07, p.24.]

Defendant raised this same issue again on direct appeal to the Superior Court; however, the Superior Court found that although the trial court had addressed this issue in its Opinion denying Defendant's post-sentence motion, it had not conducted an evidentiary hearing to allow Defendant to develop his claim. Therefore, the Superior Court dismissed this ineffectiveness claim without prejudice to raise it later in a PCRA petition. [Superior Ct. Memorandum, 1/11/08, p.18.] Inasmuch as the Superior Court, the highest court in which Defendant could have had review as of right, did not rule on the merits of this issue, it has not been previously litigated. 42 Pa. C.S. § 9544 (a)(2), *Marinelli*, *supra* at 1266. Therefore, we must proceed to address it at this time.

The first part of Defendant's claim relates to his allegation that counsel failed to properly investigate alibi witnesses. Defendant argues that the trial judge accused him of "attempting to fabricate an alibi that involves a woman whom he was allegedly engaging in sex at a particular location which, unfortunately for the defendant, was not supported when the woman in question failed to confirm his version of events" and therefore, "[T]he alibi provided by Latascha Green was both amorphous and evolving at best." [Deft.'s *Pro Se* Brief, 11/19/10, p.34, *citing* Trial Ct. Opinion, 2/15/07, p.24.] Defendant asserts that he could not challenge or refute the Trial Judge's accusation because he never received or saw any statement by Ms. Green that did not confirm his version of the events. He argues that this is due to defense counsel's failure to properly investigate alibi witnesses. [Deft.'s *Pro Se* Brief, 11/19/10, p.34.]

Attorney Gaglione testified that as soon as Defendant gave him Latascha Green's name, whereabouts and telephone number, he proceeded to investigate the alibi witness. He stated that after speaking with Mr. Tyson at length about where he was on the day in question and what he was doing, all the specifics surrounding that, he spoke with Ms. Green. Attorney Gaglione also stated that he asked Ms. Green open-ended questions to allow her to explain to him "exactly where she was and how she knew she was there and how she knew the timeframe and all those things." Attorney Gaglione stated that "essentially all of what she said was diametrically opposed to what he had told me." He testified that he did a memo to the file outlining all of the inconsistencies between her version of events and Mr. Tyson's version of events. He

recalled that "the inconsistencies were so blaring (sic) that it was evident that either one or both of them was not telling me the complete truth." [PCRA, N.T., 10/4/11, pp.5-7.]

On cross-examination, Attorney Gaglione testified that Defendant did not provide him with any other alibi witnesses other than Ms. Green. He stated that "[T]he only indication that he gave me was that he was having sex alone in the car with a woman"; thus that there would not have been any other alibi witnesses because "it was a sexual encounter between him and another woman in the car. It would not have been seen by other witnesses that he would have been aware of." [PCRA, 10/4/11, p.24.]

Based on the foregoing testimony, we find that Attorney Gaglione's reasons for not calling Ms. Green as an alibi witness for Defendant were based on sound legal reasoning. Inasmuch as her version of events differed from Defendants, he would have been suborning perjury if he had called her to the stand. Furthermore, Defendant did not provide counsel with the names of any other prospective alibi witnesses and, as Attorney Gaglione noted, it is unlikely that there would have been any other persons who could alibi Defendant for the time of the murders since he was supposedly engaged in a sexual encounter with Ms. Green in a car. Therefore, Defendant's claim that trial counsel was ineffective for failing to adequately investigate alibi witnesses lacks merit.

The second part of this claim relates to the filing of a proper Notice of Alibi Defense. Defendant asserts that Attorney Gaglione "readily admits he filed the notice late but stated that he 'didn't really think that the District Attorney's Office would give me a hard

time with regard to filing the alibi a little bit late." Defendant contends that this is *per se* ineffectiveness. [Supplemental Brief, 11/14/11, p.5, *citing* T.T., p.6.]

Attorney Gaglione testified that he filed the Notice of Alibi Defense as soon as Defendant provided him with the name and whereabouts of Ms. Green. Attorney Gaglione testified that at the time he met with Defendant, he was being held on federal charges and because Ms. Green was apparently named as a possible co-conspirator in that case, he not "want to potentially harm her with regard to retaliation by the feds, if she were to come forward and provide an alibi in his murder case." [PCRA, N.T., 10/4/11, p.6.] Attorney Gaglione stated that Defendant did not provide him with Ms. Green's contact information until after the federal investigation was concluded. [PCRA, N.T., 10/4/11, p.7.] As a result, the Notice of Alibi Defense was filed late. Attorney Gaglione testified that he did not believe the District Attorney's Office would have a problem with the late filing so long as it complied with all the other requirements of the rules relating to adequacy of alibi notices. [PCRA, N.T., 10/4/11, p.6.]

The record reflects that the Commonwealth filed a Motion to Quash the Notice of Alibi Defense and following oral argument, the court granted the Commonwealth's Motion and quashed the Notice of Alibi Defense. Consequently, we find that Attorney Gaglione was precluded from calling any of the witnesses named in the Amended and Second Amended Notice of Alibi. Furthermore, we have reviewed the trial court's post-sentence Opinion in light of the testimony offered by Attorney Gaglione and find that the court has presented a very thorough and well-

reasoned analysis on this issue. [*See* Trial Ct, Opinion, 2/15/07, pp.19-24.] Therefore, for the reasons stated by the trial court and based on the PCRA testimony of Attorney Gaglione, we find that Defendant has failed to meet his burden of establishing that trial counsel was ineffective for failing to file the proper Notice of Alibi Defense. Consequently, this claim lacks merit.

In accordance with the above, we conclude that Defendant is not entitled to post-conviction relief because he has failed to establish that this claim has arguable merit, that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest, or that there is a reasonable probability that the outcome of his trial would have been any different had trial counsel conducted a more thorough investigation into the alibi witness or filed the Notice of Alibi Defense on time. Accordingly, Defendant's claim that trial counsel was ineffective for failing to adequately investigate alibi witnesses and for not filing the proper Notice of Alibi Defense is dismissed.

**Failure of Trial Counsel to Object to Trial Court Error in Allowing Prosecution to Portray Defendant as a Drug Dealer**

Defendant asserts that trial counsel was ineffective for failing to object to trial court's error in allowing Prosecution to portray Defendant as a drug dealer throughout the entire trial. [Deft.'s *Pro Se* Brief, 11/19/10, p.36.] Defendant claims that defense counsel allowed him "to be portrayed as a drug dealer through his entire trial when it was prejudicial and irrelevant, as the trial was for a non-drug related homicide." [Deft.'s *Pro Se* Brief, 11/19/10, p.36.]

A review of the record reveals that Defendant raised a similar issue in his post-sentence motions wherein he claimed that trial counsel was ineffective for failing to object to the Commonwealth's continued portrayal of the Defendant as a drug dealer. [Trial Ct. Opinion, 2/15/07, p.17.] The trial court determined that the Defendant's allegation of trial counsel ineffectiveness for failing to object to the portrayal of Defendant as a drug dealer was without merit. The court further opined that "pursuant to Rule 404(b)(2), such references are permissible for the purpose of establishing the chain or sequence of events that formed the history and were part of the natural development of the case." [Trial Ct. Opinion, 2/15/07, p.19.] In reaching this decision, the court noted that the Commonwealth's theory of the case was that "Daniel and Keith Fotiathis were murdered out of fear of disturbing Defendant's drug ring." [Trial Ct. Opinion, 2/15/07, p.19.]

Again, this same claim was raised by Defendant on direct appeal and the Superior Court dismissed the claim without prejudice to be raised in a PCRA petition. [Superior Ct. Memorandum, 1/11/08, p.18.] In his PCRA Petition, however, Defendant states his claim differently. Here, he is asserting an alternative theory in support of the same underlying issue. Both the prior claim and the present claim assert allegations of ineffective assistance of trial counsel that are related to the Commonwealth's portrayal of Defendant as a drug dealer. However, the issued raised in post-sentence motions and on direct appeal asserts that counsel was ineffective for failing to object to the "Commonwealth's portrayal" of Defendant as a drug dealer. In the current claim, Defendant asserts the

alternate theory that counsel was ineffective for failing to object to "trial court error" in allowing the Commonwealth to portray him as a drug dealer. The Superior Court, the highest court in which Defendant could have had review, did not address the merits of the underlying claim; therefore, we cannot find that it was previously litigated. Therefore, we must proceed to address the issue at this time.

In this claim of trial counsel ineffectiveness, Defendant's underlying allegation is one of trial court error. Thus, before we can determine whether counsel was ineffective for failing to object, we must determine whether the underlying claim of trial court error is of arguable merit. Defendant contends that the trial court believes "that the Commonwealth's case revolved around the 'Theory' that the victims death 'was done so in the furtherance of an illegal drug selling ring.'" [Deft.'s *Pro Se* Brief, 11/19/10, pp.36-37, *citing* Trial Ct. Opinion, 2/15/07, p. 18.] He argues that such evidence portraying him as a drug dealer was prejudicial and irrelevant since the trial was for a non-drug related homicide. [Deft.'s *Pro Se* Brief, 11/19/10, p.36.] Defendant's claim of trial court error is based on rulings made by the trial court on post-sentence motions. Specifically, Defendant asserts that the trial court erred " . . . when it asserted that the portrayal of the Petitioner as a violent drug dealer was 'part of the case and were part of the natural development.'" [Deft.'s *Pro Se* Brief, 11/19/10, p.36, *citing* Trial Ct. Opinion, 2/15/07, p.19.] Although Defendant claims that the trial court erred in its' ruling, he did not raise a separate claim of trial court error on this issue.

Defendant argues that the purported theory of the Commonwealth that the motive for the shooting of the Fotiathis Brothers was that they 'interrupted' the alleged 'drug ring' is not shown by the evidence. He contends that this theory "was simply a ruse for the Commonwealth the (sic) introduce impermissible evidence of prior bad acts of the defendant in an effort to prejudice the jury." [Supplemental PCRA, 3/31/11, ¶ 6(f), p.3.] Defendant also argues that the probative value of such evidence did not outweigh its potential prejudice, and that "[T]here is no reasonable basis to determine that allowing such irrelevant and prejudicial testimony was in the best interest of the Petitioner." Defendant asserts that "[N]othing prevented defense counsel from objecting or challenging the violation with a motion to suppress the portrayal of the Petitioner as a violent drug dealer" (Deft.'s *Pro Se* Brief, 11/19/10, p.38); and there is no nexus between the alleged facts and the motive for the shootings. [Supplemental PCRA, 3131/11, ¶ 6(f), p.3.]

The Commonwealth argues that "Attorney Gaglione's actions were based on a valid trial strategy that was also reviewed by his client"; therefore, his present claim of ineffective assistance of counsel should be dismissed. [Com.'s Brief, 11/30/11, p.9.]

Attorney Gaglione testified at the PCRA hearing that he recalls the Commonwealth's theory of the case being either an "anger situation that occurred sort of at the spur of the moment at a station prior to the actual homicide" or "there was also possibly an overlay where these people may have, the assailants, may have recognized the victims as potential, . . . drug dealers that would be honing in on their turf" and "As a result, they took matters into their own hand

(sic) to take care of that," [PCRA, N.T., 10/4/11, p.10.] When asked if he thought that evidence of drugs on either side might have prejudiced the jury, Attorney Gaglione admitted that it might have, although his thought process on the whole thing was that he knew there was going to be a witness "who was going to admit his own involvement in the crime and was going to point the finger at my client" and so he had to explain the relationship between them. [PCRA, N.T., 10/4/11, p.11.] Attorney Gaglione testified that he "felt that it would behove (sic) us to actually bring out evidence of the fact that my client was a drug dealer and was not a good guy. But so was the witness who was testifying against him." He stated that he believed it was best to show the jury that because the witness was aware of the drug lifestyle and how to get himself out of trouble, "[I]t could give him a reason to fabricate a story against my client." [PCRA, N.T., 10/4/11, p.11.]

After reviewing the trial record and considering trial counsel's PCRA testimony regarding his trial strategy, we find, as did the trial court, that the underlying claim that the Commonwealth's portrayal of Defendant as a drug dealer was prejudicial and irrelevant has no merit. Likewise, the claim that the trial court committed error by allowing the Commonwealth to present evidence of Defendant's relationship to the drug world is without merit. Therefore, Defendant has failed to meet the first prong of the test for ineffectiveness. Failure to satisfy any prong of the test requires rejection of the claim. Accordingly, Defendant's claim that trial counsel was ineffective for failing to object to trial court error in

allowing prosecution to portray Defendant as a drug dealer is dismissed.

**Failure of Trial Counsel to File Motion to Recuse Trial Judge**

Defendant claims that trial counsel was ineffective for failing to file a Motion to Recuse Trial Judge based on bias. [Deft.'s *Pro Se* Brief, 11/19/10, p.39; Supplemental PCRA, 3/31/11, ¶ 6(e)(1), p.2.] Defendant asserts that the trial judge's biasness toward him was evident. [Deft.' s *Pro Se* Brief, 11/19/10, ¶¶ 1-11, pp.39-41.] In general, he claims that " . . . the Trial Judge granted every request and motion made on behalf of the Commonwealth and denied every request and motion of the Petitioner's that would have proven his innocence. The Trial Judge clearly showed his personal biasness towards the Petitioner." [Deft.'s *Pro Se* Brief, 11/19/10, ¶ 11, pp.40-41, *citing* N.T., Sentencing, 7/17/06.]

The underlying claim regarding recusal of the trial judge was previously raised in post-trial motions. The trial court initially found that the issue is deemed waived for failure to move for recusal at the earliest possible moment (Trial Ct. Opinion, 2/15/07, p.11); however, the trial court went on to address the claim. The court ultimately denied the claim stating that "Defendant has failed to allege any facts in support of his claim, and there is nothing on the record that would indicate any bias, prejudice or any other disqualifying factors on the part of this judge." Thus, the trial court found that "Defendant's claim of trial court error based on the failure of the trial judge to recuse himself is without merit." [Trial Ct. Opinion, 2/15/07, p.12.]

On direct appeal, Defendant raised the issue of "whether the trial court erred in not recusing itself after presiding over the acquittal of the coactor." [Superior Ct. Memorandum, 1/11/08, p.1.] He also asserted a claim of trial counsel ineffectiveness for failing to "move that the trial court recuse itself." [Superior Ct. Memorandum, 1/11/08, p.16.] With respect to the claim of trial court error, the Superior Court determined that the claim had been waived. Specifically, the Court stated that "Appellant points to no place in the record showing he made a motion for the trial court to recuse itself, and we have found no such motion. In fact, Appellant argues his trial counsel was ineffective in not making such a motion. Because the matter was not preserved, it is waived." [Superior Ct. Memorandum, 1/11/08, p.16, citing Pa. R.A.P. 302(a).]

Because the claim of trial court error has been waived, we are precluded from addressing that issue in this PCRA. However, because Defendant's claim of trial counsel ineffectiveness for failing to move for recusal was raised on direct appeal, but was not addressed on its merits, we must address that claim at this time.

Defendant asserts that "where alleged facts tend to show bias, interests or other disqualifying factors, it is proper for the Trial Judge to recuse himself." [Deft.'s *Pro Se* Brief, 11/19/10, p.39.] Defendant argues that: "defense counsel lacked the good-faith to protect and defend the Petitioner, . . . ; [h]is neglect to investigate the personal displeasure of the Trial Judge and file the motion to recuse did not effectuate the Petitioner's interest for a fair trial; [r]esults of the cumulative prejudice that derived from the Trial

Judge's biasness, Petitioner was helpless at defending himself and was found guilty; [h]ad the defense counsel raised the motion for the Trial Judge to recuse himself; the Petitioner stands a strong probability at defending himself in a fair and impartial tribunal where the Trial Judge does not have any personal feelings or opinions on the guilt of the Petitioner." [Deft.'s *Pro Se* Brief, 11/19/10, p.42.]

In support of his claim, Defendant lists, ten (10) disqualifying factors[1] which appear to be the same or similar allegations which he has asserted in support of other claims raised in his post-sentence motions, on direct appeal, and in the present PCRA petition. Each of the asserted factors was considered with respect to prior claims of trial court error, prosecutorial misconduct or ineffective assistance of trial counsel, and they have been deemed meritless. As the trial court stated previously, "there is nothing on the record that would indicate any bias, prejudice or any other disqualifying factors on the part of this judge." [Trial Ct. Opinion, 2/15/07, p.12.] Therefore, we find that Defendant has failed to show that any of the underlying claims relating to recusal are of arguable merit.

We have also reviewed the factors again in the context of Defendant's claim that trial counsel was ineffective for failing to move for recusal and find that Defendant has failed to establish that there is a reasonable probability that but for the act or omission in question the outcome of his trial would have been different. Thus, Defendant has failed to establish the

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[1] The alleged disqualifying factors are listed in detail in Defendant's *Pro Se* Brief at pages 39-40.

"arguable merit" prong and the "prejudice" prong of the ineffectiveness standard in connection with this claim. Failure to satisfy any prong of the test requires rejection of the claim. Accordingly, Defendant's claim that trial counsel was ineffective for failing to file a motion to recuse trial judge is dismissed.

**Failure to Request an Evidentiary Hearing Regarding Contact Between Juror No. 2 and Commonwealth Witness**

Defendant alleges that trial counsel was ineffective for failing to request an evidentiary hearing to determine the actual contact that was exchanged between a Commonwealth witness (wife of one of the victims) and Juror No. 2. [Deft.' s *Pro Se* Brief, 11/19/10, p.42.] Defendant asserts that "defense counsel should have requested an evidentiary hearing for the reason to query the Commonwealth's witness and juror No. 2 to retrieve the entire conversation of the two." [Deft.'s *Pro Se* Brief, 11/19/10, p.42.] He argues that "[T]he conclusive fact that the Commonwealth's witness made any type of comment to a juror demanded some course of action to protect the Petitioner's Right to a Fair and Impartial trial by jury." [Deft.'s *Pro Se* Brief, 11/19/10, p.42.]

Defendant raised this same issue in post-sentence motions wherein he claimed that "the trial court erred in not granting a mistrial, or in the alternative, dismissing Juror No. 2 after it was brought to the court's attention that there was incidental contact between the wife of Daniel Fotiathis and Juror No. 2." The trial court thoroughly addressed this issue and determined that "no abuse of discretion or trial court error with respect to Juror No. 2" had occurred

and Defendant's request for a mistrial was denied. [Trial Ct. Opinion, 2/15/07, p.10.]

On direct appeal, Defendant raised the same claim asserting that the trial court erred in not granting a mistrial or in not dismissing a certain juror after the juror had contact with a victim's wife. [Superior Ct. Memorandum, 1/11/08, p.8.] The Superior Court thoroughly addressed the claim and determined that there was "no evidence of bias, partiality, prejudice, ill-will, manifest unreasonableness or misapplication of law in the court's determinations" and, therefore, "there was no abuse of discretion in failing to order a mistrial and, similarly, Appellant has not shown there was any reason to excuse the juror." "Appellant's claim fails." [Superior Ct. Memorandum, 1/11/08, p.8.]

Presently, Defendant raises the same underlying claim by asserting a new theory of relief under the guise of ineffective assistance of trial counsel for failing to request an evidentiary hearing regarding the contact between Juror No. 2 and the victim's wife. However, inasmuch as the Pennsylvania Superior Court, the highest court in which Defendant could have had review as a matter of right, has ruled on the merits of the underlying claim regarding the contact between Juror No. 2 and the victim's wife, we find that this claim has been previously litigated. Nevertheless, "a post-conviction claim of ineffective assistance of counsel raises a distinct legal ground, rather than an alternative theory in support of the same underlying issue that was raised on direct appeal. Thus, ineffectiveness claims are distinct from previously litigated issues and may be brought in post-conviction proceedings." *Collins*, *supra.* Even so, Defendant must still present prove each prong of the

test for ineffective assistance of counsel. Since the trial court and Superior Court have both found Defendant's claim to be meritless, Defendant cannot establish that the underlying claim is of arguable merit. Therefore, he has failed to satisfy the first prong of the test for ineffective assistance of counsel. Failure to satisfy any prong of the test requires rejection of the claim. Accordingly, Defendant's claim that trial counsel was ineffective for failing to request an evidentiary hearing regarding the contact between Juror No. 2 and the victim's wife is dismissed.

**Failure to Object to Introduction of Photograph of Victim and Daughter**

Defendant asserts that counsel was ineffective for failing to object to the introduction of a photograph of the victim, Keith Fotiathis and his daughter, *i.e.*, Commonwealth's Exhibit No. 4. [Supplemental PCRA, 3/31/11, ¶ 6(e)(3), p.3.] Defendant asserts that the photograph of victim, Keith Fotiathis, and his daughter "served no purpose other than to elicit undue emotion from the jury." [Deft.'s Supplemental Brief, 11/14/11, p.8.] Defendant claims that trial counsel failed to object to the introduction of the picture and "as such, it prejudiced the jury." [Deft.' s Supplemental Brief, 11/14/11, p.8.]

The identical claim of ineffective assistance of trial counsel was previously addressed by the trial court in its' Opinion denying Defendant's Post-Sentence Motions. The court found that the admission of the photograph, Commonwealth No. 4, was not done so in error. [Trial Ct. Opinion, 2/15/07, p.15.] The trial court reviewed the testimony of April Fotiathis regarding the photograph of the victim, Daniel Fotiathis,

and his daughter and found that "the admission of this photograph was not accompanied by the highly irrelevant and emotional testimony about the life the victims led, their character, reputation, or the loss that surviving relatives suffered." [Trial Ct. Opinion, 2/15/07, p.16.] The court stated that "while this testimony may have been mildly irrelevant and emotional, it does not rise to the level of testimony designed to inflame the minds and passions of the jurors. Thus, its admission was not prejudicial." [Trial Ct. Opinion, 2/15/07, p.17.] The court also stated that "there is no reasonable probability that the outcome of Defendant's trial would have been any different had trial counsel-objected to the admission of Commonwealth's Exhibit No. 4." [Trial Ct. Opinion, 2/15/07, p.17.]

The same issue was raised again on direct appeal; however, the Superior Court dismissed it without prejudice to raise in a PCRA petition. [Superior Ct. Memorandum, 1/11/08, p.18.] Inasmuch as the Superior Court, the highest court in which Defendant could have had review, did not address the merits of this claim, we cannot find that it was previously litigated. Therefore, we will address the merits of the claim in the context of a PCRA claim.

Defendant's only argument in support of this claim is a self-serving statement that introduction of the photograph of the victim with his daughter "served no purpose other than to elicit undue emotion from the jury." [Deft.'s Supplemental Brief, 11/14/11, p.8.] Defendant argues that "[E]vidence introduced to result in sympathy to the victim's family, while having no direct relationship to the facts and circumstances of the crime, is impermissible during the guilt phase of trial." [Deft.'s Supplemental Brief,

11/14/11, p.8, *citing Com. v. May*, 898 A.2d 559 (Pa. 2006); *Com. v. Story*, 383 A.2d 155 (Pa. 1978). The Commonwealth, on the other hand, argues that the photograph was introduced "for the very limited purpose of establishing the identity of the victim, it was not used in a greater attempt to inflame the passions and prejudice of the jury." [Deft.'s Supplemental Brief, 11/30/11, p.10.] Attorney Gaglione testified that he did not remember the introduction of the picture of the victim and his daughter, although he did not doubt that it happened. [PCRA, N.T., 10/4/11, p.17.]

We have reviewed the testimony of April Fotiathis regarding the photograph and, like the trial court; we do not believe that the admission of this photograph was accompanied by any highly irrelevant and emotional testimony about the lives that the victims led, their character, reputation, or the loss that their surviving relatives suffered. [Trial Ct. Opinion, 2/15/07, p.16.] Therefore, we find that that Defendant has failed to prove that the introduction of the photograph was prejudicial. Thus, Defendant failed to satisfy both the "arguable merit" and the "prejudice" prongs of the test for ineffective assistance of counsel. Accordingly, Defendant's assertion that trial counsel was ineffective for failing to object to the introduction of the photograph of the victim and his daughter, Commonwealth No. 4, is dismissed.

## APPELLATE COUNSEL INEFFECTIVENESS

Defendant raises an additional eight claims of ineffective assistance by Appellate Counsel, Attorney David Skutnik. Following the summary of claims, we will address each one *in seriatim* below. Defendant asserts that appellate counsel was ineffective for: (1)

failing to adequately investigate and argue ineffective assistance of trial counsel on direct appeal; (2) failing to investigate and properly argue trial court's failure to instruct jury on specific intent of accomplice; (3) failing to properly argue insufficiency of the evidence in post-sentence motions and on direct appeal; (4) failing to research and properly argue trial court error for allowing prejudicial hearsay testimony; (5) failing to argue prosecutorial misconduct; (6) failing to research and raise a claim of trial counsel ineffectiveness for failing to file a proper Motion to Quash Array; (7) failing to raise a claim of trial counsel ineffectiveness for making an agreement, without the consent or knowledge of Defendant, allowing prosecutor to use prejudicial hearsay testimony; and (8) failing to adequately argue undeveloped issues on post-sentence motions and direct appeal.

The Commonwealth has failed to provide any specific argument in opposition to Defendant's claims of ineffectiveness against appellate counsel, but rather its arguments focus on Defendant's claims against trial counsel.

**Appellate Counsel was Ineffective for Failing to Adequately Investigate and Argue Ineffective Assistance of Trial Counsel on Direct Appeal**

Although Defendant titles this claim as "appellate counsel ineffectiveness for failing to adequate investigate and argue trial counsel ineffectiveness on direct appeal," it is actually stated in his Brief as "appellate counsel ineffectiveness for failing to 'effectively and vigorously raise United States Constitutional violations, Pennsylvania State Constitutional violations and non-frivolous claims in Petitioner's

appeal. He also claims that appellate counsel failed to investigate and adequately argue ineffectiveness of trial counsel on direct appeal. [Deft.'s *Pro Se* Brief, 11/19/10, p.45.]

Defendant argues that appellate counsel raised invalid and weak arguments and ignored other issues that are constitutional violations that would change the outcome of the proceedings. [Deft.' s *Pro Se* Brief, 11/19/10, p.45.] However, Defendant fails to identify specifically which arguments were invalid, which ones were weak and which constitutional violations were ignored. He simply makes a general assertion of ineffectiveness which he has failed to fully develop. "Arguments which are not sufficiently developed are waived." *Irby*, *supra* at 464. "Issues which are not supported by citation to appropriate legal authority are waived." *Treasure Lake POA*, *supra* 480. After reviewing this claim and Defendant's arguments, we find that it is too vague and capricious to merit a response. Because Defendant has failed to fully develop this issue and has failed to cite to appropriate legal authority, we find that the issue is waived.

**Appellate Counsel Was Ineffective for Failing to Investigate and Properly Argue Trial Court's Failure to Instruct Jury on Specific Intent of Accomplice**

In his second claim of ineffectiveness against appellate counsel, Defendant claims that appellate counsel was ineffective for failing to investigate and properly argue trial court's failure to instruct the jury as to "shared specific intent" as a prerequisite for accomplice liability for murder in the first degree. [Deft.'s *Pro Se* Brief, 11/19/10, p.46.]

The underlying claim of trial court error for failing to give the proper jury instruction on "shared specific intent to kill" is waived under the PCRA because it was not raised before trial, at trial, or on appeal. 42 Pa. C.S. § 9544(b) (amended 1995). A defaulted claim may be an aspect of a cognizable claim under the PCRA only to the extent it is posed and developed as a "layered" claim of "ineffectiveness" focusing on appellate counsel. In *Tedford*, the Court restated the framework for consideration of a layered ineffectiveness claim as follows:

> [A] petitioner must plead in his PCRA petition that his prior counsel, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that the counsel who preceded him was ineffective in taking or omitting some action. In addition, a petitioner must present argument . . . on the three prongs of the Pierce test as to each relevant layer of representation.

*Tedford*, *supra* at 13; *McGill*, *supra.*

Thus, in order for this claim to be cognizable, Defendant must plead in his PCRA petition that his prior appellate counsel, Attorney David Skutnik, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that trial counsel, Attorney Gaglione, who preceded him, was ineffective in failing to raise a claim of trial court error for failing to give the proper jury instruction on "shared specific intent to kill." Additionally, Defendant must present argument on the three prongs of the Pierce test (test for ineffective assistance of counsel) as to each relevant layer of representation. "[T]he inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's

purported ineffectiveness alone will be fatal to his layered ineffectiveness claim." *Id.* (citation omitted).

Defendant has not plead a claim that Attorney Skutnik was ineffective for failing to raise the claim that trial counsel, Attorney Gaglione, who preceded him, was ineffective in failing to raise a claim of trial court error for failing to give the proper jury instruction on "shared specific intent to kill." Therefore, we find that the current claim of appellate counsel ineffectiveness is not cognizable under the PCRA. Accordingly, Defendant's claim that appellate counsel was ineffective for failing to investigate and properly argue trial court's failure to instruct jury on specific intent of accomplice is dismissed.

**Appellate Counsel was Ineffective for Failing to Properly Argue Insufficiency of the Evidence in Post-Sentence Motions and on Direct Appeal**

Defendant's third allegation of appellate counsel ineffectiveness states that counsel was ineffective for failing to properly argue, in post-sentence motions and on direct appeal, insufficiency of the evidence to support a conviction for murder in the first degree. [Deft.'s *Pro Se* Brief, 11/19/10, p.46.] Defendant argues that "Appellate attorney did not research and argue specifically the conclusive facts and evidence that the shooter in the case did not have specific intent to kill. The shooter did not aid, nor did he approach the victims for any reason other than to QUESTION them." [Deft.'s *Pro Se* Brief, 11/19/10, p.46.]

The trial court addressed the underlying claim of "insufficient evidence" in its Opinion denying Defendant's post-sentence motions. The court found that "the evidence presented by the Commonwealth

was sufficient to enable the fact finder to find that all of the elements of first degree murder and accomplice culpability were established beyond a reasonable doubt to support a conviction of first degree murder as an accomplice." [Trial Ct. Opinion, 2/15/07, p.6.]

On direct appeal, the Superior Court also addressed the merits of Defendant's sufficiency claim. After reviewing the evidence, the Court concluded that "when viewed most favorably to the Commonwealth, this evidence and its reasonable inferences could lead a factfinder to conclude beyond a reasonable doubt that Appellant intended to promote the murder of the victims and that he actively participated in that murder by aiding the principal (*i.e.*, the shooter) when he (Appellant) identified the intended victims, told the principal to drive, drove himself in pursuit of the victims, produced the murder weapon, supplied it to the principal, and then helped the principal flee the scene." [Superior Ct. Memorandum, 1/11/08, p.12.] Thus, the Court determined that there was sufficient evidence that Defendant "intended to cause the shooting death of the victims and that he aided in the commission of that crime." Finally, the Court found that "the evidence was sufficient to support the convictions for first degree murder of both victims under an accomplice theory of liability. Appellant's sufficiency claim fails." [Superior Ct. Memorandum, 1/11/08, p.12.]

Since the highest appellate court in which petitioner could have had review as a matter of right, *i.e.* the Superior Court, has ruled on the merits of the underlying issue and found it to be without merit, appellate counsel cannot be ineffective for failing to raise and argue such claims. Because this claim lacks

merit, Defendant is unable to satisfy the first prong of the test for ineffective assistance of counsel. Accordingly, Defendant's claim that appellate counsel was ineffective for failing to research and properly argue insufficiency of the evidence in post-sentence motions and on direct appeal is dismissed.

**Appellate Counsel Was Ineffective for Failing to Research and Properly Argue Trial Court Error for Allowing Prejudicial Hearsay Testimony**

In his fourth claim of ineffective assistance of appellate counsel, Defendant asserts that appellate counsel was ineffective for failing to research and properly argue on direct appeal the trial court's error in allowing prejudicial hearsay testimony. [Deft.'s *Pro Se* Brief, 11/19/10, p.48.] Defendant argues that "appellate counsel violated his Due Process on appeal, when he failed to argue the Trial Court error in the Petitioner's direct appeal." [Deft.'s *Pro Se* Brief, 11/19/10, p.48.]

The underlying claim for this issue is one of trial court error for allowing prejudicial hearsay testimony. The claim of trial court error has been addressed previously in this Opinion and has been found to be without merit. [PCRA Opinion, *supra*, pp.12-15.]

In order to make out a claim for ineffective assistance of counsel, Defendant must prove: "(1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." *Ford*, *supra.* Failure to satisfy any prong of the test for ineffectiveness requires rejection of the claim. *Miller*, *supra.* Inasmuch as we have determined that

the underlying claim of trial court error lacks merit, Defendant is unable to satisfy the first prong of the ineffectiveness test. Counsel cannot be ineffective for failing to raise a claim that lacks merit; likewise, counsel cannot be ineffective for failing to research and properly argue a meritless claim.

Accordingly, Defendant's claim that appellate counsel was ineffective for failing to research and properly argue trial court's error for allowing prejudicial hearsay testimony is dismissed.

**Appellate Counsel was Ineffective for Failing to Argue Prosecutorial Misconduct**

Defendant's fifth claim of appellate counsel ineffectiveness states that appellate counsel was ineffective for failing to argue Prosecutorial Misconduct when the prosecutor "vouched" for the credibility of a witness and made "improper comments" during closing arguments. [Deft.' s *Pro Se* Brief, 11/19/10, p.50.] Defendant claims that "appellate counsel failed to adequately investigate and properly develop the argument in Petitioner's direct appeal; prosecutorial misconduct as it relates to vouching for the credibility of a witness and improper comments at closing arguments of trial." [Deft.'s *Pro Se* Brief, 11/19/10, p.50.]

The underlying claim of trial counsel ineffectiveness for failing to object to prosecutorial misconduct when the prosecutor "vouched" for the credibility of a witness during closing arguments is waived under the PCRA because it was not raised before trial, at trial, or on appeal. 42 Pa. C.S. § 9544(b) (amended 1995). Likewise, the Defendant's claim that trial counsel was ineffective for failing to object to prosecutorial misconduct when the prosecutor made "improper comments"

about Defendant's whereabouts during closing arguments is waived under the PCRA because it was not raised before trial, at trial or on appeal. *Id.* However, a defaulted claim may be an aspect of a cognizable claim under the PCRA only to the extent it is posed and developed as a "layered" claim of "ineffectiveness" focusing on appellate counsel. In *Tedford*, the Court restated the framework for consideration of a layered ineffectiveness claim as follows:

> [A] petitioner must plead in his PCRA petition that his prior counsel, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that the counsel who preceded him was ineffective in taking or omitting some action. In addition, a petitioner must present argument . . . on the three prongs of the Pierce test as to each relevant layer of representation.

*Tedford*, *supra* at 13; *McGill*, *supra.*

Thus, in order for this claim to be cognizable, Defendant must plead in his PCRA petition that his prior appellate counsel, Attorney David Skutnik, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that trial counsel, Attorney Gaglione, who preceded him, was ineffective in failing to object to prosecutorial misconduct when the prosecutor "vouched" for the credibility of a witness and made "improper comments" about Defendant's whereabouts during closing arguments. Additionally, Defendant must present argument on the three prongs of the Pierce test (test for ineffective assistance of counsel) as to each relevant layer of representation. "[T]he inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's purported

ineffectiveness alone will be fatal to his layered ineffectiveness claim." *Id.* (citation omitted).

Defendant fails to plead that appellate counsel was ineffective for failing to "raise the claim that trial counsel, who preceded him, was ineffective for failing to object to the prosecutor's vouching and improper comments during closing arguments. Instead, he pleads ineffective assistance of appellate counsel for failing "to argue prosecutorial misconduct." Nevertheless, we believe that the issues are so closely related that warrant discussion. Therefore, we find that Defendant has plead a layered claim of ineffective assistance of trial counsel and appellate counsel with regard to the issue of prosecutorial misconduct related to "vouching" and "improper comments" during closing arguments. Consequently, we find that the defaulted claims of trial counsel ineffectiveness are cognizable under the PCRA. Accordingly, we will review the merits of the underlying claims of trial counsel ineffectiveness as they relate to the ineffectiveness claim against appellate counsel.

Initially, we note that these claims of prosecutorial misconduct are different than the claim that was previously raised in post-trial motions and on direct appeal. In post-trial motions, Defendant based his claim on a specifically identified comment made by the District Attorney during closing argument, *i.e.*, " . . . I was not there; I didn't have the car. It was stolen. I don't know what you are talking about." [Post-Trial Opinion, 2/14/07, p.12, citing N.T. Vol. IV, 5/8/06, p.677.] The trial court determined that there was "no reasonable inference that can be made that the statement could prejudice Defendant because he had an absolute right not to testify." [Post-Trial Opinion,

2/14/07, p.13.] Defendant also raised a claim of prosecutorial misconduct on direct appeal. The Court determined that Defendant's claim of prosecutorial misconduct was waived because "[h]e did not object to those comments prior to this appeal." [Superior Ct. Memorandum, 1/11/08, p.16.] The Court went on to say that "an appellant waives claim of prosecutorial misconduct committed during closing argument by not objecting during the argument." [Superior Ct. Memorandum, 1/11/08, p.16, *citing Com. v. Sasse*, 921 A.2d 1229, 1238 (Pa. Super. 2006).] Presently, Defendant raises the new claims under ineffective assistance of trial counsel rather than as a claim of prosecutorial misconduct. Therefore, we will address them in the context of a PCRA claim of ineffective assistance of trial counsel.

Unlike his prior claim wherein Defendant asserted that he was entitled to a new trial based upon prosecutorial misconduct, Defendant now asserts that trial counsel was ineffective for failing to object to the closing arguments made by the District Attorney who committed prosecutorial misconduct when he "vouched" for the Commonwealth's cooperating witness, Kasine George. [Deft.'s *Pro Se* Brief, 11/19/10, p.14-15.] He contends that "[T]he prosecutor's vouching 'undermined fundamental fairness of the trial and contributed to a miscarriage of justice.'" [Deft.'s *Pro Se* Brief, 11/19/10, p.16.]

Defendant contends that when the District Attorney stated to the jury: "Remember believe all of his testimony obviously he was there"; he was "assuring the jury that the witness testimony is credible." [Deft.'s *Pro Se* Brief, 11/19/10, p.16; Supplemental PCRA, 3/31/11, ¶ 6(e)(2), p.2.] Specifically, Defendant

claims that the following comments by the District Attorney constitute "vouching":

1) The agreement says that if he cooperates, which includes telling the truth, . . . He is up on the stand knowing when he is testifying that if he lies, if his testimony is not consistent with what he believes happened, that he remains at risk because Judge Vican has not yet sentenced him . . . It is not like this guy gives some swan song bull you know what story to Detective Wolbert just to get out from some charges. And is stupid enough to think the Commonwealth is just going to throw him up on the stand with no consequences whatsoever and expect you to believe him because I got better things to do with my time.

2) Remember believe all of his testimony obviously he was there.

3) So you have to at (sic) whether or not and to what extent there is leverage on Mr. George when he is testifying because if there is leverage then it's more than likely that he is telling the truth.

[Deft.'s *Pro Se* Brief, 11/19/10, p.15, *citing* N.T., Vol. IV, 5/8/06, pp.658, 663, 665.]

Defendant argues that these statements imply that the "prosecutor has extra record knowledge and the capacity to monitor the witness truthfulness." [Deft.'s *Pro Se* Brief, 11/19/10, p.16.] However, the Commonwealth argues that if a prosecutor's remarks are supported by evidence or contain an inference that is reasonably derived from that evidence, then

the remarks are fair. [Com.'s Brief, 11/30/11, p.8, *citing Com. v. Robinson*, 877 A.2d 433, 442 (Pa. 2005).] The Commonwealth further argues that unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thereby impeding their ability to weigh the evidence objectively and render a true verdict, prosecutorial misconduct does not occur. [Com.'s Brief, 11/30/11, p.8, *citing Com. v. Paddy*, 800 A.2d 294, 316 (Pa. 2002).]

Before we can determine whether trial counsel was ineffective for failing to object to the prosecutor's closing argument, we must first determine whether the underlying claim has merit, *i.e.* whether the prosecutor committed prosecutorial misconduct during his closing argument to the jury. "The prejudicial effect of a district attorney's remarks must be evaluated in the context in which they occurred." *Commonwealth v. McNeil*, 679 A.2d 1253, 1258 (Pa. 1996), *citing Commonwealth v. Smith*, 416 A.2d 986 (Pa. 1980). It is well-settled that a district attorney must have reasonable latitude in fairly presenting a case to the jury and must be free to present his or her arguments with logical force and vigor. *Id.*

Attorney Gaglione testified at the PCRA hearing that he did not remember whether the District Attorney "vouched" for the credibility of any witness during his closing argument to the jury. [PCRA, N.T., 10/4/11, p.21.] He further testified that he doubted that he would have objected to anything during the closing itself, stating that "I may have raised a point after the closing but I would not have interrupted Mr. Christine." [PCRA, N.T., 10/4/11, p.22.]

We have thoroughly reviewed the closing argument of the District Attorney and conclude that he did not "vouch" for Kasine George's credibility. Instead he asked the jury to consider: Mr. George's agreement to tell the truth, the fact that Mr. George was present at the time of the murders, and to weigh these factors in determining whether or not to believe the witness. The mention of the plea agreement gives the jury another factor to consider in determining the credibility of this witness. The District Attorney did not ask the jury to believe the witness without question. He asked them to consider these factors in reaching their determination on credibility. Therefore, he did not "vouch" for the witness' credibility; but rather, he cautioned the jury to use their common sense, but be very cautious. Remember that these guys are self-interested and that they only want something that's going to offer them sort of benefit. He described the witnesses, just as Attorney Gaglione had done, as corrupt and polluted sources and asked them to look at the testimony, judge it, look at Kasine George with suspicion and distrust, and be suspicious, be cautious when you regard the testimony of Mr. George. [N.T., Vol. IV, 5/8/06, pp.656-657.]

Based on the foregoing, we find that the prosecutor did not "vouch" for the credibility of Kasine George during closing arguments. Consequently, the first part of Defendant's claim of regarding ineffective assistance of trial counsel for failing to object to prosecutorial misconduct is without merit. Accordingly, trial counsel cannot be found ineffective for failing to object to the alleged "vouching" by the District Attorney.

Next, Defendant asserts that trial counsel was ineffective for failing to object to prosecutorial mis-

conduct with respect to the Prosecutor's "improper comments" about Defendant's whereabouts during closing arguments. [Deft.'s *Pro Se* Brief, 11/19/10, pp.14, 17; Supplemental PCRA, 3/31/11, ¶ 6(e)(2), p.2.] This claim relates to comments allegedly made by the District Attorney concerning Defendant's whereabouts at the time of the crime. Defendant claims that "[t]he prejudicial effect of the prosecutor's remark "Magically Mr. Tyson is not there. No one knows where he is." was overwhelming, more importantly when it was not supported by evidence on the record." [Deft.'*s Pro Se* Brief, 11/19/10, p.18.] Defendant asserts that "after being barred from presenting his alibi testimonies, it was improper to infer to the jury about the where-abouts (sic) of the Petitioner; violating his Equal Protection Rights. The prosecutor explicitly lead (sic) the jury to believe that the Petitioner would not have been anywhere else other than participating in the crime." [Deft.'s *Pro Se* Brief, 11/19/10, p.17-18.] Defendant asserts that defense counsel's failure "to act or object; to cure or preserve a non-frivolous issue for the Petitioner" was "insufficient, any competent attorney should not ignore the professional responsibility to protect their client from prejudicial misconduct." [Deft.'s *Pro Se* Brief, 11/19/10, p.18, *citing Durn v. Rozum*, 630 F.Supp. 2d 479 (3rd Cir. 2007); *Com. v. Treadwell*, 981 A.2d 987 (Pa. Super. 2006).]

We have thoroughly evaluated the District Attorney's closing argument in the context in which it occurred and find that the comments made by the District Attorney were not improper. Furthermore, we find that no prejudicial effect resulted from the District Attorney's remark during closing argument. Therefore, this claim lacks merit. Accordingly, counsel

cannot be found ineffective for failing to raise a non-meritorious claim.

Finally, Defendant asserts that the District Attorney "read a quote that was allegedly from the Defendant that had not previously been entered into evidence and which r violated the Defendant's right to remain silent." [Supplemental Brief, 11/14/11, p.7.] Defendant argues that while this may have been unintentional, the "statement substantially prejudiced the Defendant" and "[a]s such, it should have been objected to by Attorney Gaglione, and a mistrial should have been requested." [Supplemental Brief, 11/14/11, p.7.] Defendant argues that trial counsel's failure to object to the reading of a quote allegedly from the Defendant demonstrates inefficient representation that demands a new trial. [Supplemental Brief, 11/14/11, p.7.]

Defendant fails to identify the quoted statement he is referring to and fails to identify where in the transcript the alleged quote appears. Arguments which are not sufficiently developed are waived. *Irby*, *supra.* "Issues which are not supported by citation to appropriate legal authority are waived." *Treasure Lake Property Owners Association*, *Inc. v. Meyer*, 832 A.2d 477-480, (Pa. Super. 2003).

For the foregoing reasons, we find that the underlying claims of ineffective assistance of trial counsel for failing to object to prosecutorial misconduct when the prosecutor "vouched" for the credibility of a witness and made "improper comments" during closing arguments are without merit. Furthermore, Defendant has failed to establish that there is a reasonable probability that but for the act or omission in question the outcome of his trial would have been different. Therefore, we

find that Defendant has failed to establish "arguable merit" and "prejudice" prongs of the ineffectiveness standard in connection with this claim. Accordingly, Defendant's layered claim of appellate counsel ineffectiveness for failing to argue prosecutorial misconduct fails and is, therefore, dismissed.

**Appellate Counsel Was Ineffective for Failing to Research and Raise a Claim of Trial Counsel Ineffectiveness for Failing to File a Proper Motion to Quash Array**

In his sixth claim, Defendant asserts that appellate counsel was ineffective for failing to research and raise, in post-sentence motions and on direct appeal, an ineffective assistance of counsel claim against trial counsel for failing to file a proper Motion to Quash the Array, instead of objecting to the improprieties in the jury selection process. [Deft.'s *Pro Se* Brief, 11/19 /10, p.52.] Defendant asserts that appellate counsel "failed to adequately investigate and thoroughly review the trial transcripts, and argue this issue in Petitioner's Post Sentence and Direct Appeal." [Deft.'s *Pro Se* Brief, 11/19/10, p.52.]

The underlying claim of trial counsel ineffectiveness for failing to file a proper Motion to Quash the Array is waived under the PCRA because it was not raised before trial, at trial, or on appeal. 42 Pa. C.S. § 9544(b) (amended 1995). However, a defaulted claim may be an aspect of a cognizable claim under the PCRA only to the extent it is posed and developed as a "layered" claim of "ineffectiveness" focusing on appellate counsel. After reviewing Defendant's PCRA Petition, we find that he has plead a layered claim of ineffectiveness focusing on appellate counsel. *Tedford*,

*supra.* Specifically, he asserts that his prior appellate counsel, Attorney Skutnik, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that trial counsel, Attorney Gaglione, who preceded him, was ineffective in failing to file a proper Motion to Quash Array; therefore, this claim is cognizable under the. PCRA. Since the underlying claim of trial counsel ineffectiveness is cognizable, we will proceed to address the claim on its merits.

In addition to pleading a "layered" claim of "ineffectiveness", Defendant must present argument on the three prongs of the Pierce test (test for ineffective assistance of counsel) as to each relevant layer of representation. "[T]he inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's purported ineffectiveness alone will be fatal to his layered ineffectiveness claim." *Id.* (citation omitted).

Defendant alleges that because he is a black man accused of shooting two white men, "it was imperative that the jury not be overwhelmingly one race or the other. However, Defendant asserts that he ended up with a jury containing only one black person, which is statistically significant in a county which has a minority population of approximately 30%." [Supplemental Brief, 11/14/11, p.7.] Defendant argues that he is entitled to a new trial because during *voir dire*, trial counsel "raised an objection to the cultural descent of the array, when he feared the Petition (sic) faced an inherent biasness"; however, an oral objection is not the proper method to challenge the array of the jury. [Deft.'s *Pro Se* Brief, 11/19/10, pp.19.] Defendant argues further that trial counsel "explicitly used an invalid objection as opposed to the proper vehicle of Motion to Quash the Array"; thus, trial counsel

was "not only ineffective, incompetent but (sic) 'questionable legal soundness'." [Deft.'s *Pro Se* Brief, 11/19/10, p.21.] Defendant contends that the proper method to object to the racial makeup of the jury array is "by written objection or petition; however, Attorney Gaglione did neither." [Supplemental Brief, 11/14/11, p.7.]

At the start of *voir dire*, Attorney Gaglione raised an objection to the cultural descent of the jury array. He stated that after having "had an opportunity to look over the array of people that have been chosen for purposes of *voir dire* and ultimately picking the jury," he noted that "there's only one person of African American descent on the array." He further noted that "every other person that is in the array is white." [N.T., *Voir Dire*, 5/2/06, p.2.] Attorney Gaglione argued that he believed "there's an inherent bias in this case that is going to be held against my client. He is black. The two people who were allegedly shot and killed in the case by him are white. And my concern could raise a prejudicial problem." [N.T., *Voir Dire*, 5/2/06, p.2-3.] The Commonwealth argued that because the computer picked the names of the prospective jurors, it is a random pattern and "[T]he fairness of the jury pool is obvious." [N.T., *Voir Dire*, 5/2/06, p.3.]

The trial court agreed with the Commonwealth that the jury array was randomly selected by computer. The initial jury venire consisted of more than 200 individuals representing diverse ethnic, racial and socio-economic backgrounds, including many of African American descent. The selection process was not " . . . initiated by virtue of any aspect of race, gender, or the marital status, et cetera"; therefore, the court

denied counsel's objection. [N.T., *Voir Dire*, 5/3/06, p.3.] Consequently, the claim that the subsequent jury array consisting of only one African American would be inherently biased toward Defendant lacks merit.

However, the issue before us is whether or not trial counsel was ineffective for failing to file a proper Motion to Quash the Array. It is clear from the record that counsel waited until the beginning of jury selection to raise an objection to the jury array; thus, one could say that this constituted ineffective assistance of counsel. Even so, the record reveals that during *voir dire* trial counsel questioned the prospective jurors regarding possible racial bias. Attorney Gaglione questioned the jurors as follows:

> MR. GAGLIONE: Now, Mr. Christine has given you a synopsis of the allegations in this case and told you that two brothers, Daniel and Keith Fotiathis, were killed on South 6th Street here. And he told you that it is his hope to prove my client's involvement. And they also charged two other individuals with regard to their involvement in this case. But I not (sic) not sure he mentioned that the two brothers, Daniel and Keith, were both white. And as you can see my client is black as were the other two individuals that were charged in this case.
>
> Is there anyone here who has any difficulty-and I will just put it that way at this point in time-is there any person here having difficulty sitting in judgment on this case by virtue of the fact that the victims were white and the alleged perpetrators were black?

(No response.)

[N.T., *Voir Dire*, 5/3/06, p.45.]

Inasmuch as the jury array was selected at random by a computer and since Attorney Gaglione questioned the prospective jurors about possible racial bias and received a negative (non) response, we find that the claim is meritless. Counsel cannot be deemed ineffective for failing to file a motion that would be denied for lack of merit. Consequently, we find that the underlying claim of trial counsel ineffectiveness for failing to file a proper Motion to Quash Array lacks merit. Furthermore, Defendant has failed to establish that there is a reasonable probability that but for the act or omission in question the outcome of his trial would have been different. Therefore, we find that Defendant has failed to establish the "arguable merit" and "prejudice" prongs of the ineffectiveness standard in connection with this claim. Accordingly, Defendant's claim that appellate counsel was ineffective for failing to research and raise a claim of trial counsel ineffectiveness for failing to file a proper motion to quash array is dismissed.

**Appellate Counsel Was Ineffective for Failing to Raise a Claim of Trial Counsel Ineffectiveness for Making an Agreement, Without the Consent or Knowledge of Defendant, Allowing Prosecutor to Use Prejudicial Hearsay Testimony**

Defendant's seventh claim alleges that appellate counsel was ineffective for failing to raise, in post-sentence motions and on direct appeal, an ineffective assistance of counsel claim against trial counsel for making an agreement, without the consent or knowledge of Defendant, allowing the Prosecutor to use pre-

judicial hearsay testimony against Defendant. [Deft.'s *Pro Se* Brief, 11/19/10, p.54.]

The underlying merits of trial counsel's ineffectiveness for allegedly making an agreement without the consent or knowledge of Defendant, allowing the prosecutor to use prejudicial hearsay testimony against Defendant, has been addressed above. [PCRA Opinion, *supra*, p.12-15.] Inasmuch as we have determined that trial counsel was not ineffective for allegedly making an agreement without the consent or knowledge of Defendant, appellate counsel cannot be ineffective for failing to raise this non-meritorious claim. Consequently, Defendant's claim that appellate counsel was ineffective for failing to raise a claim of trial counsel ineffectiveness relating to the allegation of prejudicial hearsay also lacks merit. Accordingly, Defendant's claim of appellate counsel ineffectiveness for failing to raise a claim of trial counsel ineffectiveness for making an agreement, without the consent or knowledge of Defendant, allowing the prosecutor to use prejudicial hearsay testimony is dismissed.

**Appellate Counsel Was Ineffective for Failing to Adequately Argue Undeveloped Issues on Post-Sentence Motions and Direct Appeal**

In his eighth claim of ineffective assistance of appellate counsel, Defendant asserts that counsel was ineffective for failing to adequately argue undeveloped issues on post-sentence motions and direct appeal. [Deft.'s *Pro Se* Brief, 11/19/10, p.55.] Defendant argues that counsel must show that the violation of any issue is of arguable merit, then he must show the prejudice and how absent the ineffectiveness that there is a reasonable probability that the proceedings

would have been different. Defendant claims that "appellate counsel briefly and inadequately touch (sic) on certain arguments that are really and very undeveloped." [Deft.'s *Pro Se* Brief, 11/19/10, p.55.]

Defendant fails to identify what "undeveloped issues" he is referring to. "Arguments which are not sufficiently developed are waived." *Irby*, *supra* at 464. "Issues which are not supported by citation to appropriate legal authority are waived." *Treasure Lake POA*, *supra* at 480. Because Defendant has failed to identify the "undeveloped issues" and has failed to fully develop his argument with respect to this claim, we find that this issue is waived.

**Cumulative Error**

Although Defendant does not state a separate claim of cumulative error, he does raise this issue in the Conclusion to his Supplemental Brief in Support of Defendant's PCRA. [Supplemental Brief, 11/14/11, p.8.] Specifically, Defendant states: "[T]his court may find that any one of these, or even all of these, were mere 'drops in the bucket' and that any individual one constitutes 'harmless error'; [H]owever, when taken as a whole, these drops add up. The bucket is full. The combination of a number of serious lapses on the part of the attorney in the aggregate proves that Defendant was denied effective assistance of counsel. [Supplemental Brief, 11/14/11, p.8.] Defendant argues that "[T]his is especially significant when Defendant's codefendant—the man actually accused of doing the shooting—was acquitted with the same evidence available to Attorney Gaglione." [Supplemental Brief, 11/14/11, p.8.]

Generally, claims of cumulative error have been rejected in favor of an individualized assessment of the merits of claimed trial errors. *Com. v. Jones*, 876 A.2d 380, 387 (Pa. 2005); *citing Com. v. Williams*, 732 A.2d 1167, 1191 (Pa. 1999). In *Com. v. Wilson*, 861 A.2d 919, 924 (Pa. 2004), the appellant also asserted a claim that the "cumulative effect of each of the asserted errors denied appellant a fair trial." In *Wilson*, the Court held that where no individual claim has merit, a defendant is not entitled to relief based upon alleged cumulative effect. *Id.* at 935. In *Com. v. Rollins*, the Pennsylvania Supreme Court held that "no quantity of meritless issues can aggregate to form a denial of due process." *Rollins*, 738 A.2d 435-452 (Pa. 1999); *citing Com. v. Travaglia*, 661 A.2d 352, 367 (Pa. 1995).

With respect to the individual claims that we have determined to be meritless, we find that Defendant is not entitled to relief based on the cumulative effect of the asserted claims. Accordingly, we find that Defendant is not entitled to relief based upon alleged cumulative effect.

## CONCLUSION

We note for the record that Attorney Gaglione's testimony at the PCRA hearing is supported by the trial transcripts which clearly show that Attorney Gaglione provided Defendant with the best possible defense given the information and evidence that he had to work with.

Finally, following the evidentiary hearing on October 4, 2011, this court became aware of a possible conflict of interest with respect to current appellate counsel, Michael A. Ventrella, Esq. On January 30,

2012, a letter written by Defendant's cousin, Candida Martin, dated December 13, 2011, was brought to the court's attention. In her letter, Ms. Martin states:

> . . . I found out some information regarding Aaron's current attorney Michael A. Ventrella. There is a conflict of interest with Mr. Ventrella as Aaron's attorney because on May 29, 1999 Mr. Michael A. Ventrella was Daniel Fotiathis lawyer. Daniel Fotiahis (sic) is one of the victims in Aaron's case. Mr. Ventrella may not be in Aaron's best interest. I am requesting that if possible can Aaron be appointed a new attorney so that he could have a fair chance in his case. . . .

[Letter to Judge Vican from Mrs. Candida Martin, 12/13/11.]

Upon being made aware of this possible conflict, we determined *sua sponte* to address this issue without further proceedings at this time. A review of the Monroe County Docket entries for Daniel Fotiathis revealed that Attorney Ventrella did, in fact, represent Mr. Fotiathis on simple assault and harassment charges for an incident occurring on May 29, 1999. [*See Com. v. Daniel Kenneth Fotiathis*, Monroe County Docket No. 14 Criminal 2000.] Attorney Ventrella confirmed that, in his capacity as a Public Defender, he represented Daniel Fotiathis in connection with a Protection from Abuse Petition and the assault/harassment charges filed by Mr. Fotiathis' wife. However, he assured the court that the charges were not the result of any drug activity, nor did they have any relationship with Defendant, Aaron Tyson, or any of his co-conspirators in the present case. Moreover, a period of nine (9) years had elapsed from the time of

Mr. Fotiathis' murder in 2002 and the appointment of Attorney Ventrella as Defendant's P.C.R.A. counsel. For these reasons, Attorney Ventrella did not perceive a conflict of interest when he accepted the present court-appointment. Nevertheless, while we believe that Attorney Ventrella has effectively represented Defendant in regard to this P.C.R.A. proceeding, we feel it is prudent to dismiss Attorney Ventrella at this time and appoint new counsel to represent Defendant in any appeal that may be taken from this Order. Accordingly, Bradley W. Weidenbaum, Esquire, is hereby appointed to act as conflict counsel for Defendant with respect to any future proceedings in connection with this first P.C.R.A. Petition.

**TRIAL TRANSCRIPT VOLUME IV**
**RELEVANT EXCERPTS**
**(MAY 8, 2006)**

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COURT OF COMMON PLEAS OF MONROE
COUNTY 43rd JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA,

v.

AARON TYSON,

*Defendant,*

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No. 817 CRIMINAL 2003

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*[May 8, 2006 Transcript, p. 613]*

THE COURT: All right. Just for the jury's information, when there is a stipulation of facts, such as what was now read before you, you are to consider that as a fact if proven in the case which does not require a witness come and tell you the same thing. Whatever you decide to do with that fact, how you choose to put it into the scheme of your deliberations, is up to you. But it is a fact among other facts in the case which you will find so you don't have to deliberate to the point of finding it as a fact that has already been determined to be so.

MR. MANCUSO: Your Honor, the Commonwealth rests at this time.

MR. GAGLIONE: May we approach briefly, Judge?

(Sidebar discussion held on the record.)

MR. GAGLIONE: At this time I would like to put a motion for judgment of acquittal on behalf of my client with regard specifically to the count of homicide. The open count of homicide, the conspiracy to commit homicide and accomplice liability. I believe there's been no testimony, direct testimony, that there was any agreement either implicit or expressed between any of the parties who were alleged to have been involved in this homicide. The fact that the testimony that Kasine George gave on that issue was that there was no discussion in the car; that there was no agreement that was reached between them as to what was going to happen later on. I believe he did indicate that there was a plan, they planned a confrontation; that he believed that there was going to be one. Again, he didn't say there was even any discussion on that issue as to whether there would be a confrontation but he believed there would be one based on what had taken place and what he knew prior to getting into that car. But with the absence of any express or real implied agreement on the issue of whether or not these people are going to, in fact, kill the Fotiathis brothers I don't think that this court can send out conspiracy to commit the first degree murder charge on accomplice liability.

So my motion for judgment is essential to the charge of conspiracy to commit first degree murder

and also to find my client guilty as an accomplice to first degree murder.

MR. CHRISTINE: Judge, the conspiracy can be inferred by action without oral or written agreement. There are many cases on this point. Obviously you are looking at the facts presented by the Commonwealth that can easily infer that the three of them embarked upon a violent course of conduct which resulted in the two innocent victims.

THE COURT: That is correct. Conspiracy can be inferred. It can be established by circumstance, evidence, if such evidence in its entirety beyond a reasonable doubt establishes that there was a conspiracy and that one at least one of the members of the conspiracy acted to further that conspiracy. And the same would be true with respect to accomplice liability if they acted in concert to cause the death of these two individuals. But I thought there was testimony—and of one of the things I thought there was testimony was that Tyson's gun was used. I remember hearing that.

MR. CHRISTINE: That is correct, Judge.

THE COURT: And that was delivered by one of them. Tyson gave that gun, I thought, to Powell.

MR. GAGLIONE: That is what Kasine George has indicated. But, again, he did not indicate what was to be done with that firearm.

THE COURT: Yes.

MR. GAGLIONE: Even if there is, there's no testimony—

THE COURT: They were not deer hunting. Considering what happened here that certainly is more than enough evidence to establish by circumstantial evidence in the weight of that circumstantial evidence that there was a conspiracy and they acted in concert with each other to do that. Denied.

(Sidebar discussion concluded.)

(Back on the record.)

MR. GAGLIONE: The defense rests.

THE COURT: All right. Members of the jury, we are going to take the lunch recess at this time. When you come back, we will hear closing arguments from counsel. Our plan is at this stage since I didn't know to warn you to bring your clothing for an overnight stay, we will do the charge of the court tomorrow morning. So what I want you to do now is go to lunch.

Remember the cautions of the court not to discuss the case among yourself or with anyone else. Don't let anyone discuss anything about this case with you or in your presence. Don't read about it. And don't listen to any media such as TV or radio.

We will start this at 2:00 today so the lawyers have time to get their closing arguments together. We will do the closing this afternoon. And when they are done, we will adjourn for the day. Topple morning you will hear the charge of the court at 9:30. Bring your overnight bags tomorrow. All right. We will see you at 2:00 p.m.

(Lunch recess taken.)

(Back on the record.)

MR. CHRISTINE: Good afternoon, Your Honor.

THE COURT: Good afternoon. Are you ready to close?

MR. GAGLIONE: Thank you, Your Honor. May it please the court and counsel.

MR. CHRISTINE: Mr. Gaglione.

MR. GAGLIONE: Ladies and gentlemen, good afternoon. It has been a long trial, and I am sure that I can speak for the court and for opposing counsel in thanking you for your attention during the course of this past week. We understand that these things not only are time consuming and take a lot of time, but sometimes they can be a little emotionally draining as well. So I thank you. And my client thanks you. And I am certain that the Commonwealth and the court thanks you as well.

You have now had an opportunity to listen to all of the evidence that has been presented in this case. And you now have the only information that you are going to get. The part of the case that we are now embarking upon is known as the closing arguments. There is not going to be anymore evidence going to be presented. This is going to be my last opportunity to address you about the facts of this case and what was actually presented to you in the course of the past week and going to be the Commonwealth's last opportunity to do the same.

Now, you may have noticed that something has changed here since the beginning of this case. I am now going first. Throughout this case from the beginning of it has always been the Commonwealth that is going first. And I have gone second

or was asking the questions of the witnesses second.

There's a reason for that. It is because the Commonwealth continues to bear the burden of proof in this case. That has not changed throughout this trial. And indeed as we sit here now, the Commonwealth still bears the burden of proof in this case to you beyond a reasonable doubt. And because they continue to have the burden our rules of procedure allow them the last crack at you essentially.

They get to come in and speak to you last because it is their burden. They get the last opportunity to try to convince you that they did their job. And Mr. Christine I believe is going to be the one closing for the Commonwealth. And he is a very eloquent man. I've known him for a number of years, for over a decade, and I can speak from experience. He would make a great used car salesman if he ever wants to change his profession. He is going to do a wonderful job of coming in here and summing up his side of the case. But, ladies and gentlemen, while he is talking to you, while he is giving his closing argument, want you to be mindful of the things I tell you now. Because, ladies and gentlemen, in this case, you cannot buy what he is selling you. You just can't do it.

This case is too important for to you allow the state to give them a free pass, if you will, on this case, on these facts. Don't let them. Don't let them sell you this lemon, ladies and gentlemen. They need to provide proof to you. That was their job. That has never changed. They need to

convince you beyond a reasonable doubt. That is their burden. It is not our burden to come in here and prove anything to you.

There is no requirement under the law. And Judge Vican will explain to you at the end of our closing. He will provide you with the law in this case. And he will tell you that it *'is* not our burden, it is not Aaron Tyson's responsibility to come in here and to prove his innocence to you. That it is his right to not have to come in here and be compelled to testify or be compelled to provide any evidence to you; that right is deeply founded upon the Constitution. And Judge Vican will explain that to you.

You cannot draw any inference of guilt; in fact, if we did not present any it is not our job to do so. And you cannot hold that against my client. And Judge Vican will explain that to you.

You all took an oath in the beginning of this case when you all stood up and raised your hands as jurors. You took an oath to follow the rules that the judge is going to hand down for you at the end of this case tomorrow morning when he reads you what is essentially the law in this case. You took an oath to follow that. And that is a very important aspect of the law in this case. You cannot hold my client responsible in anyway for not providing you any information. It is the state's job to provide the information. And they have to provide to you enough information to convince you beyond a reasonable doubt.

Now, what is a reasonable doubt? Judge Vican is going to explain that to you as well tomorrow. He

is going to define that for you and his reading of the law to you in what actually is going to control your deliberation in this matter. But listen to what he says. Essentially what he is going to tell you is that a reasonable doubt is the kind of doubt that would make a reasonable person pause or hesitate before acting upon matters of importance in their own affairs.

Now, that is a nice definition, but what does it mean? I am certain that very few, if any, of you have ever been on a criminal jury before. And because of that those are just words right now. Judge Vican will explain them to you hopefully in a little more detail. But I have found through my 12 plus years trying only criminal cases here in Monroe County that it is often easier for a jury such as yourselves to understand what reasonable doubt is and what it is not through the use of an analogy. So I am going to try that now, hopefully, to get you to better understand what kind of a burden the state actually has in this case.

Again, reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate or pause before acting in matters of importance in their own affairs Imagine you are planning on spending a nice weekend out with your spouse or boyfriend or girlfriend. And imagine you need to find a babysitter for your children. Now, there is no question that your children are a matter of great importance to you. So you are going to want to make sure that before you hire a babysitter, you have no hesitation about the person who you are going to hire.

Now, imagine that you put an ad in the newspaper looking for a babysitter. And in response to your ad Mr. Christine, Mr. Mancuso, and Detective Wolbert and Mr. Snell, they all appear at your door and they say here we are. We saw your ad. We would like to be your babysitter. And you take a look at them and they are all dressed nicely and they all speak well. And you initially think to yourself this would be okay. I would probably trust these people with my children. But this is a matter of importance to you, great importance. It is your children. So before you just go ahead and hire them you are going to ask them some questions. You are going to find out about their qualifications. And when you do that, you are going to find out that one is a police officer, the other someone is an investigator, two are prosecutors. And they are sworn to uphold the law. You will find out about their background a little bit. And in doing so you will realize that none of them have ever been convicted of selling drugs, let alone doing them. They have no prior record of any kind. They seem to be genuinely decent people. And you may say to yourself, okay, I will hire these people without hesitation.

I want to kick it up a little bit now. Imagine if you will instead of them showing up to your door, imagine Kasine George, the man that came in and testified for you last week. Imagine he came to your door and he said I am here to be your babysitter. And he is also dressed well like he was last week when he came in. He is a soft spoken young man. And you may even think to yourself upon first meeting him, okay, maybe

this will work. Maybe this guy wouldn't be such a bad babysitter for me. But, again, this is a matter of importance to you.

You are reasonable people and reasonable people in matters of importance are going to ask questions before they just go ahead and hire this person. So you start questioning Kasine George. And during the course of your questioning you come to find out that he has been dealing drugs since the age 13. And not just drugs, not just marijuana. He has been dealing crack cocaine since the age of 13. For over a decade.

You come to realize that he has been carrying guns for virtually his entire life. He is familiar not only with handguns but I believe he indicated that he was familiar with an assault rifle of some kind from a very young age. You come to find out that he has a lengthy record. You come to find out that he is not really there just because he wants to be the babysitter. He is there because somebody else told him to come. They said you go there and you be their babysitter and we will give you something in exchange for it.

Now, I ask you, ladies and gentlemen, are you going to hesitate before you hire Kasine George under those circumstances to babysit your children? Are you going to hesitate before you act in a matter of importance in your own affairs? Would any reasonable person do so? If the answer is yes, if the answer is yes, Kasine George causes me to hesitate before I would act in a matter of importance in my affairs, that is reasonable doubt. That is what it is. It is the kind of doubt that would cause a reasonable person to hesitate

or pause before they act in a matter of importance together.

Now, this case is a matter of great importance to my client. The rest of his life is quite literally on the line here based on your decision in this matter. And the question here, ladies and gentlemen, is whether the evidence that was presented or more accurately the lack of evidence that was presented proved to you without hesitation that my client is guilty. That is the question that you have got to answer. Did they prove their case to you without hesitation? I submit to you, ladies and gentlemen, that you cannot accept the word of Kasine George without hesitation, ladies and gentlemen. And the only way you can convict my client is if you do. The only way you can remove the presumption of innocence, the belief that my client is, in fact, innocent, which is something you must have at this point in time, you must presume him to be innocent, that is the law. The only way you can remove that is if you believe Kasine George without hesitation.

Now, let's examine what the evidence showed or more accurately didn't show in this case. Now, we have to start with the understanding that there is no physical evidence tying my client to this crime. None. Trooper Phil Barletto came in, and he testified for you last week. He was the, for lack of better term, the CSI guy. The State Police Forensic Investigator. He testified that he went out to the scene of this crime and he was very thorough and he described for you what he did. He was basically trying to hunt down any and all possible leads thinking any shred of evi-

dence that he could find in anyway could tie any individual to this case. That is what he was looking for, and he was very exhaustive. And he described what he did for you.

He testified that after this exhaustive search for evidence he found nothing that in anyway would tie anyone to this crime. He told you that. There's no blood evidence that can be tied back to any particular perpetrator. There's no DNA evidence, no hair samples fibers, nothing along those lines. There's no fingerprints. There's no footprints. There is no nothing. Nothing about the guns, the forensics regarding guns that may have been used in this crime. Nothing can be tied back to anybody. They never found a gun. They don't have one to match it against any particular person. So they have no physical evidence. And Trooper Barletta admitted that. And I believe Detective Wolbert during the course of his testimony also acknowledged there's no physical evidence tying anybody to this crime.

The only other possible evidence that the Commonwealth is going to try to convince you is there is the fact that my client's car, this black Maxima may have been the car that was, in fact, at the scene of the shooting. That is the only other evidence that they have. But, ladies and gentlemen, let's think about that evidence for a minute. Kasine George told you that there were a number of people in his drug dealing operation that had equal and unfettered access to that car. Remember what he said.

He said that their drug operation was quite large. They were dealing to as many as thousands of

customers each and every single week. They had many "spots" as he called them that they had to reup on a regular basis. And he said "we" meaning himself and my client and others.

And I believe you heard a lot of testimony about a lot of other people with crazy street names—Bam-Bam and Rowe and Heat and Murder and Phenom—lots of different people were involved in the distribution of these narcotics. And in order to get this crack cocaine from its source to the various spots Kasine George told you that both he and the others involved in the drug operation would routinely use each other's cars. That is what he said, and it makes sense.

He described, I believe, at least four different vehicles: an Acura, this Maxima, and at least two others, three others he described as being cars that were being used by these principals in this drug operation. And he even told you that he himself would go out on runs by himself in the Maxima, in the black Maxima. So simply because a black Maxima was at the scene of the crime does not in and of itself prove that my client was there.

It is equally possible and plausible that Kasine George was there either by himself or with others but not my client. There's nothing else that puts him in that car other than Kasine George's testimony. Simply because the Maxima was there and was his is not evidence of my client's presence. So no one else saw him there. If you recall the first witness that you saw was the young man on the street the night of this shooting and only one came up. Not all of them up. And you

have to ask yourself why. Because there's something going on drug related in regard to them. And you heard a little bit about that. Why only one? But even that gentleman they put up on the stand said it was not my client. He actually looked at him and said that is not the guy who I saw. He told you that. So there's nothing tying my client to that scene. There was nothing else putting him in that car other than Kasine George. Just because he owns the car is not evidence that he was there on that night.

Now, in my opening and throughout this case, I have been trying to impart to you the context of this story because if you understand the context of this story and where the story came from it really does begin to make this story sound suspect. I also told you that the Commonwealth is going to try to deflect attention away from Kasine George. And that is what they tried to do with the testimony of Detective Wolbert. Detective Wolbert told you about his investigation. He told it to you in great detail. He told you a story, a sordid story, about a world of drugs and sex and violence. And the Commonwealth has tried to connect my client to that world and that is successful in large measure because my client was part that of world. He was part of the drug dealing; he was part of the sex; he was on that sex tape that they introduced. He was part of that world. But if you notice they were not able to connect him to any of the violence.

They talk a lot about a lot of shootings that had been taking place over the years down in Allentown, and here in the Poconos that led to

people's arrests, people whose street names were things like Murder. They told you that Murder got shot here in the Poconos back in 2001, I believe. And he was found with crack cocaine stuffed up his own rectum. He was convicted of possessing that.

They told you about shootings that took place in Allentown, but I asked Detective Wolbert was my client tied to any of that violence, to any of those shootings? He told you no. They want you to convict my client based on these connections. By you can't do that, ladies and gentlemen, because his connection, my client's connection, to drug dealing is not evidence of his involvement in this crime.

They are going to try to argue that his connection to these people, people like Kasine George, makes it more likely than not that he was involved in these killings. They are going to try to suggest that he was even with these people after the fact, after the homicides took place, he still continued to hang out with them. He still was seen in pictures with them. He even made this sex tape with Kasine George shortly after these homicides took place. But think about that. Think about that connection. Ask yourselves does it really follow that their connection equals my client's guilt in this case? No. As a matter of fact, if anything, it points out a larger problem in their case. And think about it. I'll explain that to you.

We know that Kasine George was involved in this shooting. We know that. This is an uncontradicted fact. And it is a verifiable fact. We know that because he knows the circumstances surrounding

the killing. Not only did he admit his own involvement by pleading guilty, but he was able to describe the circumstances surrounding the killings. He was able to describe puncturing the tire. And he was able to describe the interior of the van accurately. So he quite clearly was involved in the killing. Simply because he knows the circumstances of the killing, of the crime, doesn't mean that my client was there. Just because they continue to hang out after Kasine George commits these crimes doesn't prove anything beyond their association.

It is simply proof that they were associates, long-time associates. There would be no reason for them to no longer hang out together simply because Kasine George was involved in the killing. By their own accounts these guys probably were involved in a lot of violent stuff. Kasine George told you about that as did Detective Wolbert. But simply because they were involved in violence does not mean that my client all of a sudden is going to say I am not going to hang out with you guys anymore.

My client was a part of that life to a certain extent. They can prove that he was a part of that drug culture. And he admitted to his involvement in that. Even if my client was aware of the fact that Kasine George was involved in this double killing doesn't mean that all of a sudden he is going to say oh, you are a bad guy, Kasine George. I am not going to hang out with you anymore. It doesn't make sense that he would just stop hanging out with him.

Now, they introduced this sex tape. They introduced the tape that has my client and Kasine George on it in a locality just across the river into New Jersey about four miles and having sex with three different girls. Now, what does that show to you or what does that tell you beyond merely their association? It tells you nothing about the crime of homicide. It does not in anyway connect my client to the crime of homicide. But what it does do is sheds some light on credibility of Kasine George and credibility of the Commonwealth's case. Because remember Kasine George testified that immediately after the homicides he said that Aaron Tyson and Otis Powell both hightailed it back to New York. They came back to the house in the West End for a period of time. And Kasine says I fell asleep. And when he woke up the next morning they were gone. And he says they were gone for a couple or three weeks, two, three, weeks and they were laying low in New York. And he says I didn't see the black Maxima after that. I didn't see the gun after that. I just know that they were gone. And they called me. I think he indicated that Aaron Tyson called them and said bring the newspaper and my girlfriend into New York with me. And he indicated he is going to be staying there for a while.

Detective Wolbert tried to suggest that his investigation confirmed that. He says we didn't see the black Maxima around. We didn't see Aaron Tyson around. For at least a couple of weeks, three weeks after these shootings.

Ladies and gentlemen, their own evidence connects that. The sex tapes connect that. Their evidence shows that my client was only about four or five or six miles way from the scene of the homicide as few as three days after it happened. Remember, the homicides in this case supposedly took place, took place on April 24th, 2002. And they provided evidence to you to suggest that my client was in that hotel room four miles into New Jersey on April 27th, 2002. Does that sound like he is laying low in New York City as per the word of Kasine George? Does it make' any sense to you that if he was laying low in New York City that he would travel all the way back towards the Poconos to have sex with three girls? They could have done that in New York if they were laying low there. But, no, according to their records, the verifiable proof, that they have their records contradict their own witnesses statement.

Ladies and gentlemen, I submit to you it would be more strange if my client and Kasine George were not any longer tight together after this homicide. That would be even more strange. That would even lead one to conclude more positively that maybe he was involved in this case. The fact that they continued to hang out after the homicides does not in anyway show that he was involved. If anything, my client's connection to Kasine George and Dimitrius Smith and these others makes it more likely that they would finger him falsely because it makes more sense for them to finger him falsely. And it fits more neatly into the police's theory of the case.

Think about it. If Kasine George had come in here and tried to suggest that I, myself, Brian Gaglione, was the one involved in the homicides the police would never have believed him. There's no connection between me and him. Nothing. If he tried to finger somebody that he has got no connection to, then he is useless to them. Because they would know definitely that he is lying and he would not have gotten a deal.

So instead of doing something like that, you would have to have fingered someone he is close to. It makes more sense. Think about how this case started. Think about what got this whole ball of wax rolling.

You have the shooting that takes place and the police acknowledge they have no leads on the shooting save this car. Just this black Maxima. And then you all of a sudden another police officer arrives on the scene and says hey, I got some information about that black Maxima. I stopped the black Maxima a couple of days before and there is even a guy that was in it. And I got his name because wrote him the ticket.

So all they have from the inception of this case is the black Maxima and the name Aaron Tyson. That is all they got. And that is the only lead that the police ever pursue; they never try to pursue any other. The Maxima and Aaron Tyson. And within about one week after that you heard testimony from Detective Wolbert that he came upon the woman named Tiffany Brower and he asked Tiffany Brower does Aaron Tyson or Antiwan Tyson have permission to be driving the Acura Legend, I believe it was, because they

stopped Antiwan Tyson driving an Acura Legend. And he asks this Tiffany Brower does he have permission to do that? And she said yes. And then he took it one step further. Detective Wolbert took the step, the difficult step, of telling this Tiffany Brower wait a moment. The reason why I am asking you this, Miss Brower, is because we want to know about if Aaron Tyson or Antiwan Tyson was involved in a double homicide. He told her that. And he even told you why he told her that. He wanted that information to filter its way back into this drug operation. He wanted to plant that seed. And that is what he did. He planted that seed in the devil's garden, ladies and gentlemen. And he led it through its black vines. That is what he did.

The next thing that happens after he does that May 24th, one month after the homicides, the police arrest this woman named Bam-Bam. That is the next break, so to speak, in the case. And they arrest this Bam-Bam woman, who was described as one of the drug pushers who was at one of the spots on Second Street; she was a seller for this drug operation. They arrest her with a lot of crack cocaine. And you heard testimony that the amount of crack cocaine that she had on her would have gotten her a lot of time, especially in federal court. They capture her. And keep in mind Detective Wolbert had already planted that seed. We are looking for Aaron Tyson on a homicide, and they start asking Bam-Bam questions now about her knowledge about this homicide.

Now, again the only way that she can give them any information that in any way can help her is if the information can somehow be confirmed or checked out or got at least to be consistent with information they are looking for. So Bam-Bam gives them information consistent with what they are looking for it, turns out. And they acknowledge that Bam-Bam is a liar. She is so much of a liar they didn't even want to put her up on the witness stand. They acknowledge to you that they sent me a letter and they said we are not going to put Bam-Bam up because we are concerned she is going to commit perjury. This is the first person who actually connected Kasine George and Aaron Tyson and maybe Otis Powell to this double homicide. And they are concerned she is going to commit perjury, so they don't bring her in here to show her to you. But he is writing it down what she has got to say. They write it all down.

Then what happens after that? They find this guy named Rogelio Brown, another person they conveniently did not bring in here to have you hear from. They arrest him in September, I believe, was the testimony, somewhere in that range. And he is also found with a substantial amount of crack cocaine on his person and also in the house where he is operating out of. So he has also got big problems. And Detective Wolbert told you that when he found this Rogelio Brown he was nervous because he knew that he was looking at big time. And Rogelio Brown starts to tell them also some information which may have sounded consistent with the theory they were

laboring under that Kasine George and maybe Aaron Tyson and maybe Otis Powell were involved in this crime.

They question Rogelio Brown four different times and get essentially four different stories. One of the stories they get is that he knows nothing about any of these homicides. He actually told them I know nothing about it. That is after he told them what he told them initially was that he had overheard Aaron Tyson bragging to some girls in New York City about his involvement in this double homicide.

Did they provide any girls to you from New York City? Did they bring anybody in who also supposedly heard my client brag about his involvement? No. Could they find those girls? Detective Wolbert told you no. They don't exist. But that is what Rogelio Brown told them. And they wrote it down. And then he changed his story and said in a later version he said he was not in New York when heard this. I was actually in the Poconos when I heard it. Aaron Tyson told me himself.

And then in a later version he said no, I was actually in the house on Second Street just before these people or just after these people were murdered, the Defendant and other people. Aaron Tyson and other people come back to the house and they told me they did it. He is always all over the map, and they know that. And Detective Wolbert acknowledged we couldn't really believe him either, so we left him home, too. We didn't provide him to you, either. But we wrote down what he had do say.

That information was taken down and ultimately all that information is provided to Kasine George because, remember, Kasine George was also arrested in September. He was arrested then, too, for his involvement in the drug case. After he is implicated in a drug case he is given discovery.

They talked about it; they told you about it. They give him discovery on the federal drug case. And in that discovery was included the statements from the people that I have just mentioned, the statements saying that Kasine George was himself implicated in a homicide; and, in fact, he was involved in the homicide. Again, we know that. That is confirmed. He himself was involved. So now not only does Kasine George know that he committed the crime, but he also knows that the cops are onto him. He has got that information. Remember, the only charge initially with his involvement with the drugs, was his involvement with the drugs. The charge on homicide does not come until much later. But he gets that information. And when the police question him about his knowledge about the homicide, before they question him they say by the way here is the stuff these other people have been saying just, you know, so you understand what it is we are talking about this. This is what Rogelio Brown and Bam-Bam and others have said about your involvement in this homicide.

So what does Kasine George do? What does he say? Well, that is interesting, isn't it? He does not immediately spill the beans so to speak. He does not immediately confess to his involvement,

does he? No. Instead what he says is what can you do for me?

Now, he tried to come in here and suggest to you that the only reason why he has come forward, the only reason why he has said that my client was involved and Otis Powell was involved and tried to suggest to you that he is only doing that because it is the right thing to do. That simply does not comport with the facts and does not comport with logic. And, ladies and gentlemen, you do not check your common sense at the door when you become a juror. Does that make any sense to you that he is only coming in here and telling you what he is telling you because it is the right thing to do? No. He thinks about what he should say and gets a lawyer up in there in federal court and gets himself a deal. He gets immunity. He gets less time in federal court for his involvement in the drug case. And he gets concurrent time here for the homicide.

Those are the only circumstances under which he spoke to the authorities. That is it. Think about that. He has already been caught with the drugs. He knows that he has been identified as one of the ringleaders of this drug operation. He knows he is in trouble before the other one. How is he going to get out? The cops give him a way out.

Ladies and gentlemen, he ended up—at the end of the day—Kasine George has ended up better off for having been implicated in this homicide than if he had never been involved in it. He was looking at serious time in federal court. And unless he had something to give to the feds and the state officials, he was looking at 20 to life.

And they had him. They had him. And he knew it. Everybody ended up taking pleas in the federal case because the feds had him. What did he end up with? The least amount of time of any of the higher ups. He got less time than everybody else because of his cooperation. And he is getting no time on the homicide. Not only does he get two free killings, he is going to be out in about six years.

By this time, ladies and gentlemen, by the time Kasine George started telling Detective Wolbert the story in February of 2003, by that time that seed that Detective Wolbert had planted in that garden of evil has turned into a big tree full of lies. That is what has happened by February of 2003. That was the context in which this case emanates. Their whole case is based solely and completely on the testimony of corrupt and polluted sources.

Judge Vican is going to define for you there is another aspect of the law and he is going tell you about it. He will define what a corrupt and polluted source is. It is an actual term of art within the law, and he will tell you how you are to view the testimony of corrupt and polluted sources. He is going to tell you that you must receive the testimony of people like this with disfavor. You have to question their motivation for their testimony. He is going to tell you that. He will tell you can only accept their testimony with caring, with care and caution. And you must be mindful of the source of the information that you receive. And you have to determine whether

their testimony is supported in anyway by any independent actual evidence.

Now, think about Kasine George as a corrupt and polluted source and ask yourself some questions about him and you will find the answer is simple. He has been convicted and not just of drugs. He is a convict of many things. He has been charged with tampering or fabricating physical evidence. He essentially has been charged with covering things up to the police in the past. And he has been convicted based on that charge. That is what tampering or fabricating physical evidence is. Trying to cover up one's own involvement in something.

He has been convicted in conjunction with that in the past. And I am certain that his involvement in that case was not nearly as involved or as important to him as his involvement in this double homicide. He has been convicted of a firearms weapon; he has been convicted of that. And what was the weapon? It was a .9 mm handgun. Kasine George has been convicted of possessing a .9 mm handgun. The same caliber handgun that was used in this case.

Now, he tells you I didn't shoot anybody here. It wasn't me. It was Otis Powell. But of all of the people you heard testimony about he is the only one who we can prove actually has possessed the very type of firearm that was used in this case.

Now, he tried to suggest to you, ladies and gentlemen, he says I don't carry guns anymore. When I took off from a halfway house and I came up to the Poconos, yeah, I got right back

into the drug business. But I didn't carry guns anymore. I never touched them after that. Does that make any sense to you whatsoever? That is absurd. You heard him testify about the dangers involved with drug dealing. And you also heard him testify that the further along and higher up you get in the food chain in the drug trade the more dangerous it gets. And that makes sense.

So somebody who has access to firearms and has a need for them because of the involvement in drugs. He comes in and tells you it is not me. I don't carry a .9 mm anymore. I don't carry any guns anymore. Does that make sense? No. It is absurd.

Now, what else did he tell us? He told us that Dimitrius Smith—and you remember him. Dimitrius Smith was the one that goes by the name "Murder". He tells us Murder's sister had gotten into it with some local drug dealers out at the "Outer Limits". That is what Kasine George tells us. And he also told you if Murder told him to do something he would do it.

We also know, because Detective Wolbert told us, that Murder, the ringleader of this operation, was mad at my client, Aaron Tyson. Because while Murder was in jail serving the sentence for having been shot and having been found with drugs, while that is happening supposedly Aaron Tyson is not keeping good books, I suppose. The drug profits are not as good as they should be. And Murder is mad at him.

Now, we know that Kasine George is looking for a deal and you know he got a great one. And we

also know that Kasine George and Murder spent time together in jail before Kasine made his statement to the cops because they told you, these are the verifiable facts, the only facts that are verifiable, the only ones that we know were true, they all call into question the veracity of Kasine George's testimony. We know that he was talking to Dimitrius Smith because he told us he was talking to Dimitrius Smith. He told you that. I asked him. Mr. George, isn't it true that you spoke to Dimitrius Smith during this three or four months you were in jail together about the homicide? Answer: He said yes. Question: Detective Wolbert told you I believe it was today he said that he himself asked Kasine George whether George and Smith had spoken in the jail. And George told him no.

Ladies and gentlemen, what Kasine George told the police was what the police wanted to hear. The stuff they didn't want to hear, the stuff that does not fit with the theory of their case they just put aside. They didn't present it here to you. They tried to bury it. They tried to deflect attention away from it because if you look at any of those other things, it makes you hesitate. It makes you pause before you can accept Kasine George's word. Kasine George came in here. He was all dressed up in his nice suit with his soft voice. He is a wolf in sheep's clothing, ladies and gentlemen. That is what he is. I guarantee you that the Kasine George anyone would have encountered on the street was not the person who they paraded in front of you last week.

Judge Vican will tell you that if you believe that Kasine George testified falsely about any one thing, any material fact in this case, if you believe that he testified falsely to you about anything, you can for that reason and that reason alone choose to disregard everything that he has got to say. That is the law. Judge Vican will explain that to you. There was simply too many inconsistencies in this story. Too many things that were unverifiable, and the things that were verifiable contradicted his story.

Finally, ladies and gentlemen, there is another person that the Commonwealth could have brought in here. Ladies and gentlemen, you heard some testimony about him. His name was Louis Davenport. Louis Davenport was the gentleman who Detective Wolbert spoke to in the jail. And Detective Wolbert used Louis Davenport's words in order to get a search warrant. He testified he told you I put down what Louis Davenport said to me in an application for a search warrant. And when I did that, I swore out an affidavit saying all this stuff was true and correct to the best of my knowledge and information and belief. So Detective Wolbert essentially vouched for the credibility of one Louis Davenport when he was applying for the search warrant. Remember, he was applying for a search warrant before he had an opportunity to speak to Kasine George. So he was still in the investigative period at this point in time. He didn't yet have Kasine George coming in and fingering my client. So he puts in these words from Louis Davenport. he says these words are true.

And what does Louis Davenport say? Louis Davenport told Detective Wolbert that Kasine George knew of the whereabouts of the gun. The gun. This is information that only someone who is, in fact, familiar with the case would have known; that there was only one gun involved. Louis Davenport told Detective Wolbert I spoke to Kasine George. He tried to get me to give a note to Murder in the jail to tell him where the gun is.

If you remember, Kasine George says I don't know where the gun is. But supposedly he is in the jail telling a guy named Louis Davenport I know where it is and I need to get word to Murder for when Murder gets out he can go take care of this. Okay.

That is the inference that you can draw from that statement. And Detective Wolbert believed that at least one point in time because he put it in the affidavit. What else did Louis Davenport tell Detective Wolbert? He told him that while in jail Kasine George and Louis Davenport got into a wrestling match with one another. And during the course of that wrestling match Kasine George told Louis Davenport I am going to kill you just like I killed those two white guys. Doesn't say I am going to kill you like Otis Powell killed them or going to kill you like Aaron Tyson killed them. I am going to kill you like I killed them. And Detective Wolbert puts that in an application for a search warrant, and he says this is all true.

Did he put Louis Davenport up here? No. In fact, they came in here and said we don't now believe Louis Davenport. Why? Because it does not fit with their theory of the case. Because it calls

into question the testimony of Kasine George. Instead of bringing in all these other people and having to base your decision on what was really said out in the street, they only put Kasine George up. And they ask you to believe them without hesitation.

Don't do that, ladies and gentlemen, for God's sake, don't do that. This case is too important. Apply the law as Judge Vican is going to read it to you in this case. Hold the District Attorney's Office responsible for providing you with evidence not just the tainted words of the lies of the likes of Kasine George. Hold them to their burden. If you do that, and I am convinced that you can draw only one conclusion from this evidence or the lack thereof, is that my client is not guilty. Thank you.

MR. CHRISTINE: May we approach, Your Honor?

(Sidebar discussion held off the record.)

(Back on the record.)

MR. CHRISTINE: I appreciate Mr. Gaglione's kind words, ladies and gentlemen. But I just turned 49 years old. I may not be as eloquent as I used to be. Like Judge Vican I am in my 25th year as a lawyer. And he is celebrating 25 years as a judge. So I became a lawyer just about the time he became a judge. And I will try to hold myself up to Mr. Gaglione's high standards.

First of all, I want you to remember to be calm and focused. And you have been very attentive. I have, as Mr. Gaglione also observed, we both looked at you to try and figure out what you are

thinking and doing. We really will never know anything until your verdict comes in ultimately. It is so frustrating to know that the most important thing about the trial has yet to happen.

But although you been very active in watching what was going on, things really get very important soon because after a while when I am done talking tomorrow morning the judge will give you the charge. And then everything is in your hands. And I know some of you, very understandably, may be nervous. This is not a typical decision to just sit in judgment of a person charged with a murder. It is the most serious offense known anywhere, including the Commonwealth of Pennsylvania.

But look at the courtroom. It has been here a long time. My dad was a DA back in 1953. And although the juries that he presented the Commonwealth's case in front of were far different than you, they had party lines in '53, he had no murders in his time. And he did chicken stealing cases often as the District Attorney in Monroe County.

Times have changed. Monroe County is not the quiet, little, rural area that it used to be. And now we have drugs where no drugs used to be; murders where there weren't murders. But you are no different than the jurors who meted out justice, whether the verdict was guilty or innocent, in 1953; no more so than looking at the faces of these judges peering down at you. They go back as far as the 1840s and 1850s when Monroe County jurors could not read or write. And yet they meted out justice.

So if you remain calm and act as the judge or act as Mike Mancuso told you to, as persons of conviction and persons of real beliefs, whatever verdict you reach will be fair and appropriate. Don't let the nervousness or your duty to render a decision, which is important to both the Commonwealth and the defense to allow you to raise in your mines a reasonable doubt if it does not exist. If it does exist, you must find the Defendant not guilty.

The judge will tell you do not find a reasonable doubt out of thin air merely to avoid an unpleasant duty and convict only if the evidence supports a conviction. So keep that in mind when you go out and you will find that when you conscientiously review the evidence that whatever verdict you reach will feel sensible to you and will be fair and just regardless of what it will be.

As you remember what Mr. Mancuso told you in his opening on behalf of the Commonwealth about the tools of the trade you bring to the jury deliberation room with you the most important of which is your common sense, your beliefs, your attitudes, the things you have learned over the course of your individual lives, all diversions and differences. This is an area you bring to bear in this important issue in deciding what to believe and what not to believe. And you know, both as persons of common sense and as attentive jurors, it has been proven beyond any doubt—and I am not going to show you but these sad and tragic pictures—and if you looked at the pictures alone you would realize without being a forensic scientist or forensic pathologist that the

Fotiathis brothers died a horrible tragic death. They were gunned down.

There is no question about that from your common sense. And the evidence you have heard, beyond any doubt, there's no question that the killer, the shooter, wanted them dead. Multiple gunshot wounds. They didn't have a chance. Somewhere in the vehicle in the trash they located a BB gun. One was able to get to the curb a little way from the shooting but that was Keith. He passed away. Dan, as you know, couldn't barely get out of the car, fell after the shots hit him. So we know it is a shooting. We know it is a murder. And it was senselessly done in a dark place on a dark night, 11:30 or so. So that has all been proven to you.

You know whoever was involved in this shooting is a murderer. Either the shooter, or any helper, who under Pennsylvania law, is an accomplice. Because we have the system of justice for over 200 years. There's a rule for everything ladies and gentlemen, human nature refined over time. In all of the juries that have sat in Pennsylvania in over 200 plus years. They have given us rules for every situation. Common sense rules you even without the judge telling you when he gets a chance to tomorrow morning. And one of the those rules is if you help a shooter kill, you are as guilty as the shooter. So in a bank robbery, when there's a look out sitting outside the bank and he tells his friends who are armed now, don't go shooting any bank guards. Go and get the money and come back out. And I am going to stay in the car and we will drive off and live

happily ever after. And the two friends go in and shoot a bank guard. Guess what? He is as guilty as they are even though he told them not to shoot because the law can sometimes be sensible, especially with a criminal. Over 200 years of evolution. So anyone who is with the shooter on South 6th Street either helped to drive a vehicle, providing the vehicle, handing the gun over, slashing the tire, any of those acts make those people equally guilty of the criminal offense as a helper, as an accomplice. That is beyond any doubt whatsoever.

So a lot of what you have to do will come to you as a matter of common sense even without the judge telling you anything about it. By the way, ladies and gentlemen, I am so glad we have a brand new rule. You are the first jurors that can use notes because the rule just changed. And I always was guilty about having to have to use notes, but now I feel no different than you. You get to take notes, too. Please forgive me if I have to refer to my notes, but I want to make sure I get every one of the points said together for you.

There is something else you know that has been proven beyond all doubt before you got here. And a lot goes to the common sense just how evil the drug world is. I bet none of you last Tuesday ever thought when you got here to the courthouse you were going to get a crash course in the world of drugs in Monroe County.

We all try to live our lives and deal with our families and be happy, and yet it is amazing there's another world out there with machine guns, weaponry, evil, people turning against each other,

trying to intimidate, trying to control territory, intimidation, raking in $50,000.00 a week, tax free. Bringing drugs in from Harlem. They can't even stay there. They have to come here and do it after a test run in Allentown Pennsylvania.

It is amazing, isn't it? I bet you never thought that would be part of your exposure as a jury. But, you know, all these things you knew them before you got here, didn't you? That drugs involve violence. That when you are out on the street dealing drugs you may not have a weapon on you but you have got to be tough. What did Mr. George tell you? Keep the wolves at bay he said.

Even the names of some of these people are there to suggest risk to anyone who would interfere with the operation. Murder, Damage. Interestingly, Mr. George has somewhat of a benign nickname. Casino. It is probably a result of his first name of Kasine. And the Defendant has a benign nickname Q. Maybe the more you pick a nasty name the more likely you are to commit violence. But you know with your own common sense that all of these things—violence, intimidation, risk, retaliation, extradition—are a part of the drug world. You also got an excellent lesson in the trial and how to bring down a drug organization. How to destroy it by using state, federal, and local resources. Listening to phone conversations from the jail. Getting cell phone records. Having snitches roam, trying to find targets in the organization. Arresting people, squeezing them and putting the screws to them until they reveal what they know. Moving up the ladder as both Detective Wolbert 16-month investigation and

the use of the best hammer known to man, the Federal Government, who with their power and their resources, can sweep away for years those who commit these kind of offenses with far more ability than the humble resources of Monroe County. You heard Special Agent Wevodau testify to that.

That is what brought down this drug ring. That type of old fashioned detective work. It does not stop there, ladies and gentlemen. This is the same way Rich Wolbert also pierced the veil of these shootings. Another thing you learned in this trial once again which maybe even comes from your common sense is what you saw; that luck plays a role in criminal investigation. No matter how diligent the investigator, no matter how committed, it is all about luck. If those kids had not been on the street—I don't care what they were doing there. I wonder myself what they were doing there at 11:30 at night. I live four blocks from Main Street. I don't know why they were there, but they were there. And you heard one of them testify. If they had not been—and you also heard on the 911 tape about a black Maxima on tape. If it was not just one person that it was on the 911 tape. There would be no crime to solve in terms of getting that evidence. There would be no one who saw that black Maxima. Because that is the only connection to this event. The only connection.

It is amazing that you can walk up to someone, shoot them dead. And if you take the gun away with you, you get rid of it. And are not found quick enough to see if you have DNA or GSR on

you and weeks and months go by, you can get away with murder. But there was bad luck for these guys because that black Nissan Maxima was seen with the tints. And we know there were at least two people involved because the kid saw the person come up the street, look both ways, go down and heard the shots, get into the passenger side. And that is the one lead the police used to try and break the murder, using the same techniques that you saw with your own eyes that solved the drug ring. They were tried and they are all in jail now, 11 years, 12 years, 17 years.

So with your own eyes you can see how turning people against each other, putting the hammer to them, using snitches, listening to phone calls, surveilling, following, can destroy the drug ring. Keep an open mind to determine whether or not the police investigation concerning the murders are worthy of acceptance by you and, indeed, do or do not prove the case beyond a reasonable doubt. We will be getting to that right now.

I told you there's a rule for everything. We have been doing this for over 200 years as well. As Mr. Gaglione told you, there's a rule for accomplices about how you treat their testimony, the co-Defendants. There is no question that Mr. George is an accomplice and a co-Defendant of Mr. Tyson because they are accused of the same criminal event as helpers.

Now, remember in this county not in one state is there a rule which says, ladies and gentlemen of the jury, you can disregard and treat as a lie all that flows from the lips of an accomplice as part of your acceptance. Remember, you won't hear

Judge Vican say that. Why? Because think of how many crimes could not be solved if you could not use someone who was involved in the crime.

What do you know about your common sense? Criminals don't like to be caught. If possible, they prefer to commit their criminal offenses and further their evil in secret. A veil of secrecy at night somewhere where no one is seeing them just like this event occurred. You got the kids on the street. That was the risk the shooter and his friends took. But criminals don't like to be caught. So if you have a case just like this where there is no DNA, no fingerprints, no footprints, no cigarettes, no fire or matches, no video camera at the minimart like you see on the television. So many robbers come in without a mask on and are right on the video camera. Nothing like that. Nothing that makes the Commonwealth's job easy.

There is only one type of evidence you can resort to, not just in this case but as to crimes everywhere. Using an inside person. So we don't have in this county that rule that you must disregard what an accomplice says because it is an obvious lie. And the opposite is also true with your common sense. That, thank God, in our country, a free country, a great country, ladies and gentlemen, you must accept as true what a co-Defendant says. That would be a crazy rule, wouldn't it? Because I agree with Mr. Gaglione. What do you think Kasine George said that this is the right thing to do. He meant the right thing to do for him.

These guys—and you know that by using your common sense—are self-interested. They only want something that gets them some sort of

benefit. So you can use them and you can listen to them as a juror but you have, as the judge will tell you, to be very cautious. Mr. Gaglione used the right words. Corrupt and polluted source. Think about it when you hear that term because we want to believe the opinions if there's witness testimony—that is the term. Look upon the testimony. Judge it. Look at Kasine George with suspicion and distrust. But it does not stop. He will also tell you that although you must be very cautious in regarding the testimony of an accomplice to tell the truth, they may be telling the truth. And therefore the rule as it exists is just and reflected in the good common sense between those two poles, believing everything a witness says as an accomplice and believing nothing of what they say—it is somewhere in between. So be suspicious, be cautious when you regard the testimony of Mr. George.

But how do you value or regard the way his testimony was based upon that rule? You have to answer two questions. And your answer to those questions will reveal to you the verdict you should reach, whether it be guilty or not guilty. The first is what, ladies and gentlemen, is there against Mr. George since these guys do nothing unless you got your hand around their throat. Know that these people when they are out on the street did turn on each other like that; that they will shoot. Could you keep track of the number of shootings these guys were involved in Smitty in Stroudsburg shot; you got a guy in a shooting down in Allentown; Mr. Powell is the shooter in this case and getting shot in North

Carolina, and then shooting one or two guys in Allentown. It seems like gun play violence is an occupational hazard in the drug business. So you have to look at whether or not and to what extent there is leverage on Mr. George when he was testifying because if there is leverage then it is more likely that he is telling the truth. And ask yourselves what is that leverage? It comes in several parts.

First of all, this is not a case where the police walked up to a suspect, say come over here. Sit down. See this video. We know you are at the AM/PM minimarket and we know you robbed it. You didn't wear a mask. We saw you on the tape, so you better sit down now and tell us what you know and who was involved or are you going to do it alone, sit in jail alone for 10 years or sit for five minutes and give up your friends.

This is not that case. And why is it not that case? Because you heard and know beyond any doubt that there is no physical evidence that connects anybody to this offense except for the Maxima that one saw a black Maxima with tints leave the area. We know the caliber of the weapon. We know how the Fotiathis brothers meet their tragic fate but don't know from the scene who did it because no one actually can place a specific person. Except Mr. Osman says that whoever was looking up and down Main Street before going back down 6th Street was not Mr. Tyson. That is not the case.

Mr. Kasine George convicted himself when he gives his proffer. And, yes, he only gave his proffer when he was going to get a deal because of what the other things you know from common sense

in these guys are not going to do anything unless they are going to get something from it. And that is the sad and unfortunate aspect of trying to deal with people and in turn them and pressure them to try and give up what they know about crime and otherwise would not be solved and deaths that will never otherwise be corrected and those responsible brought to justice. This is not that case.

The police knew that Kasine George might be involved because he was a part of the crew that used that black Maxima that was making all that money in the area. But they had no fingerprints, no DNA. No one was sitting at the table saying to Kasine George here are the fingerprints of the screen; here are footprints; here are the hairs. DNA match, nothing. He knew that they were suspicious of him. But they didn't have enough to arrest him. And yet he puts himself right in the middle of the murder as an accomplice because you know from your common sense when the police are trying to figure out and interview someone how involved they are. They are going to try and minimize their involvement if they can. And he did not admit he was the shooter. He admitted he was an accomplice and therefore is equally guilty. Had he not stabbed that tire; had he not disabled that vehicle, they would never have stopped in the dark side street and the Fotiathis boys might be alive today.

Kasine George is a murderer because he is an accomplice. He is a murderer. And yet he didn't tell the police—as you can imagine with your common sense—he, knowing they don't have more

than suspicions against him, yes, Mr. Wolbert, Detective Wolbert, I am a part of the crew. But I want you to know that I was with my girlfriend that night; I was at another spot that night. I was whatever that night. I don't know what they did. It is Tyson's black Maxima. He was in this probably with Powell. I don't know but they told me about it. And they came back wherever they came from. And they admitted to me they shot these two white boys.

Wouldn't that have gotten almost as far if he just said they confessed but kept himself out of it? And that is not typical leverage. He did not minimize it—other than not being the shooter—he did not minimize his role. He convicted himself before the police had any evidence.

Suspicion is not enough to convict in Pennsylvania. It is not even enough to charge. You have to have more than that. He convicted himself and did not minimize the behavior but put himself right in the middle of the homicide. And that is something you have to consider when you decide whether or not his testimony is worthy of belief.

One other thing which is interesting which is a real hammer on him is, you know—and this is not coming from my extrapolation of the facts. It is right here in the record. Somewhere in here is the order of court where he entered a plea of guilty to murder in the third degree. And you will see when you get the paperwork he entered a plea to murder in the third degree in front of Judge Vican. The guy sitting right up there. And you also know from the testimony he has not been sentenced yet.

Now, you know that Kasine George told you that it is his hope—we all have hopes in this world—it is his hope that he serve no more time than he is serving already in the federal level because as you know from the evidence the agreement the Commonwealth made—yes, the deal was made—and a deal will be made in any case where you have to reach in behind the veil and find someone to turn against those who committed a crime with that person. The deal he was offered is you cooperate. You sign a proffer agreement with the feds and the DA's Office which, of course, includes that you have to tell the truth and the Commonwealth will recommend to the court here for sentencing that your time runs concurrent, which means the same time.

Well, this now—this is the official plea agreement that Mr. George signed. The original of this is sitting right in the judge's file or the Clerk's Office. I don't know if the judge has the whole file. But it is right here. This is a copy. And in here it correctly indicates that he pled guilty to third degree murder with a maximum sentence of 40 years in jail. That is the maximum found in murder in the third degree. We are talking about heavy potential time here. And then it says terms of the plea agreement, see attached guilty plea No. 3. Right on the back is the official agreement. Not what I think it is. Not what Mr. Gaglione may have thought it was. Not the hopes of Mr. George because that is his hope that he is not going to serve. He told you that. Here is the plea in black and white. What does it say? I will read it to you. In return for the guilty plea the

Commonwealth has agreed to the following. That the Defendant's sentence in this matter run concurrent with the sentence he is serving in the federal drug case against him. And it lists the docket number up in federal court. I won't read that. This agreement is conditioned upon the Defendant complying with the Commonwealth's proffer agreement entered into by the Monroe County District Attorney and the Defendant order on or about February 12th, 2003, which specifically incorporated the proffer entered by the US Attorney, Monroe County District attorney and the Defendant dated December 16th, 2002. That is it.

The agreement says that if he cooperates, which includes telling the truth, his time will run concurrent. It does not have a cap. It does not say how much time he is going to serve. And his signature. He is up on this stand knowing when he is testifying that if he lies, if his testimony is not consistent with what he believes happened, that he remains at risk because Judge Vican has not yet sentenced him. And that is important for you to know. It is not like this guy gives some swan song bull you know what story to Detective Wolbert just to get out from some charges. And he is stupid enough to think the Commonwealth is just going to throw him up on the stand with no consequence whatsoever and expect you to believe him because I have more important things to do with my time. And you have more important things to do with your time.

This is not rocket science, ladies and gentlemen. People all of the time are turning against others

when they are trying to hide what they are doing. You will decide on your own whether to believe them or not. And that is your job. No one decides the credibility other than the jury. But remember well when you review this document. I expect the judge will allow you to get some documents. And statements of a Defendant are not allowed to go with the jury. They may not see it. That is why I read it to you. But that is where it is. There it is. There's no cap with a 40 year maximum sentence hanging down his head while he testifies.

So the first of these two questions I ask you to ask yourselves, is there a hammer; is there leverage? The answer to that is yes. But we don't stop there. The second question you have to ask yourself is what corroborative evidence is there that supports the version given to you by Mr. George? Because that corrupt and polluted source says one of the things you should do in whether to believe an accomplice is whether or not there is corroborative evidence.

Now, we know—and I submit that Mr. Gaglione has agreed there's no question that George was involved; no one could have all about the details of the shooting. Only a madman would admit to a murder he or she had not been involved in. He knew the caliber of the weapon; he knew the Fotiathis brothers had gone into "Kay's Tavern". That was confirmed by the bartender's interview with the police. He knew about the "Outer Limits"; he knew all that stuff and how the shooting occurred; that the person shooting at the van was pulling back.

He got confused about the details and couldn't remember whether Powell got out before they backed up on 6th Street before he got out and shot the Fotiathis brothers or whether it was before they backed up. There were some other details he couldn't remember. He screwed up whether this was a week before the murder or two weeks before the murder they were out at the jail waving at Smitty. It couldn't have been two weeks before the murder because he doesn't have the damn Maxima yet.

So there are inconsistencies which are not of major detail. And we all know that he was involved in the shootings. And, indeed, other people could not remember accurately what the shots were, too. You heard the 911 tape. One of the persons said they heard three shots. We know there were eight shots because, of course, we saw the little cartridges. One for each of the empty rounds. There were eight all together. So the fact that you could not remember exactly is not about whether you can believe his testimony obviously this and part of this tragic event.

Remember, believe all of his testimony. Obviously he was there. You also know that his testimony is completely corroborative with the drug world, which I thought was fascinating. You may not think it was, but I thought it was fascinating to have a drug dealer tell you about the inner world of drug dealing. I will never forget it. But I never sat there and spent an hour asking someone like when they started it and use of the weapon; how much money they said they made. And T still don't know what they did with all of the money,

making $50,000.00 a week. Who knows? Maybe they have a stash somewhere.

But anyway he told you all about not only his involvement with the drug ring but how close he was to Mr. Tyson; how much he was involved in the drug ring. And that testimony is corroborated not only because Mr. Kasine basically admitted he was involved with drugs. But the judge will tell you lawyers only argue the case. We give you facts. You have to decide based on the witness stand.

But rather than accept my extrapolation or Mr. Gaglione's extrapolation, let's look at the facts. Suzanne Kasteleba, court reporter, took word for word transcription of Mr. Tyson's plea in federal court. And it was taken in front of Judge Kosik on November 25, 2003.

Transcripts are great because—I feel sorry for her because I am going real fast—but transcripts are great because they take down everything that is said. And Mr. Tyson pled guilty. And before you plead guilty the government says what you are pleading guilty to and what the factual basis of the plea is; what would be proven that is just your plea. And it is only a couple of paragraphs. I want to read because it is important the cooperation is all about this case and there case is all about corroboration.

This is the United States attorney telling Mr. Tyson what he is pleading guilty to, the factual basis. "Your Honor, the Government would present approximately 15 cooperating witnesses that would link this Defendant to a crack cocaine trafficking operation that was headed by an

individual named Dimitrius Smith, who had a street name of Murder.

This operation was ongoing from approximately 1999 until September-October of 2002. The witnesses would indicate that Dimitrius Smith was the top man in this operation, and that he and Kasine George were running the operation, and then in early 2002, this Defendant, who had known Dimitrius Smith and Kasine George from a time in Allentown and even before that in New York joined, that operation, joined that conspiracy, and that he began working with Dimitrius Smith and Kasine George to supply street-level dealers that were recruited from New York to distribute crack cocaine to customers in the Stroudsburg area of Monroe County.

In addition to those cooperating witnesses, Your Honor, agents from the FBI and local police Made approximately eight controlled buys of crack cocaine from members of this organization.

For example, on May 7th of 2002, a confidential informant made a phone call to a cell phone number that he was given by members of this group, and in this particular case, the Defendant, Mr. Tyson, answered that cell phone and directed the confidential informant to go to a hotel room in Monroe County where another associate distributed a quantity tea of crack cocaine to the informant." So it is May 7th, 2002. This is business as usual with the crew.

"The informant subsequently that substance over to the police. It was testified by a lab positive for crack cocaine.

In another instance on July 25, 2002, a confidential informant went to an individual named John Henry Smith, another one of the street-level dealers in this operation, who during this transaction made a phone call and had to get the okay from Mr. Tyson to sell to the confidential informant, which happened."

And then it goes onto one May 24th. "One of the street-level dealers, who identified the Defendant as being associated with Kasine George and others, was seized in a motel in possession of approximately 10 grams of crack cocaine, and on September the 12th, 2002, a search warrant was served at the residence of Christopher Foster any Niasha Smith. police and agents seized approximately 75 grams of crack cocaine, along with two weapons in a Nike sneaker case that was located in that residence that witnesses linked to Dimitrius Smith and the operation."

And finally the United States Attorney says "The Defendant himself, Your Honor, after his arrest was brought in and Mirandized, signed a written Miranda waiver and gave a full confession to the FBI regarding his involvement in this conspiracy."

So there is no question out of the lips of the Defendant when he admitted to the statement of facts that there was a longstanding drug conspiracy between these guys. And that is important. Very important. Mr. Gaglione is correct just because you are a drug dealer does not mean you are a murderer. But if you are close together the way you act when trouble comes might reveal to you whether or not you should believe Mr. George in this connection. Look to

see if Kasine George's testimony seems to fit based on your common sense; does it seem to agree with other facts in the case or does it not. Because if it seems consistent with your knowledge of how these drug dealers based upon common sense and what you heard from the witness stand then his testimony is worthy of belief. And if the pieces of the puzzle don't fit, there is not conspiracy or a deal that what he is saying is something believable based upon your common sense, then he is unworthy of belief and you should determine that a reasonable doubt now exists and the Defendant should be found not guilty.

Listen to these factors in assessing and even the nagging question about corroboration that I told you about. Kasine George says he stays here and that both Powell and Tyson are gone the next day after the homicides and are back in New York. And there is some discrepancy between Mr. Gaglione and I about when he came back or when Detective Wolbert thought he came back or when Kasine George said he came back. Your recollection is in control not lawyers.

I will rely on you rather than arguing back and forth with Mr. Gaglione about whether what he had said about that particular point. But we know that the Maxima never is back in Monroe County. That is pretty sensible, isn't it? You know this is the only thing for sure. You don't want it around Monroe County for the police to try and track you down with it. So that was sensible, wasn't it? And these people are wiley. You know that. The drug dealers they are risk assessors and takers but also as risk assessors.

They try to minimize whether shooting someone they will then keep the wolves at bay, trying to get in that case a hot piece of evidence out and away from the hands of the police.

But the fact that he is the one that stays behind at least for a while before Tyson comes back is sensible, isn't it, ladies and gentlemen? And why is it sensible? Because he is the least connected to the homicide. He is an accomplice and guilty of it. Remember the altercation which occurred out around the Exxon Station. It did not involve Mr. George. He was in the car at the time. He, according to his testimony, was not the shooter. And he didn't drive the vehicle. And it was—he was in the back the whole time. The only role he played which links him as an accomplice but was the least open and observable motive was slashing that tire. So wouldn't it seem consistent with his version that the two people who leave are the shooter, the owner of the vehicle, the person who supplied the gun to Mr. Powell, also being Mr. Tyson? Doesn't that seem more consistent? Why would Mr. George leave? Doesn't it seem consistent that he would stay, and they leave? Another big one is this point. And I think it is a big one. I am a drug dealer and been one for many years. My good friend—I am Mr. Tyson. My good friend, Kasine George, if I am indeed innocent, decides to use my vehicle to blow way some people.

Now, think about this. These guys as I told you they are risk assessors. They try and hide their evil doing in the world of drugs. They have—and Mr. Gaglione agrees with me—a number of cars

they can use to go to the spots to reup their street leveler dealers. And there is only one car they have tied to one of the main crew members. Every other one is a girlfriend's or some disconnected person.

There is only one car in the testimony that you have heard in this trial, one car and only one car that is in the name of Aaron Tyson. And that is the car they use to shoot up two white guys when they are making all this money and pushing their, drugs throughout Monroe County to thousands of customers.

What do you think Mr. Tyson is going to think if as Mr. Gaglione would have you believe, he is not involved in the murder and someone else, obviously Kasine George is definitely involved in the shootings by his own. Admission how do you think he is going to react to his car being used? The only thing that can link him to the shooting? What you think he is going to do? What would you do in that situation? What would a person of common sense do? Wouldn't you distance yourself from anything that could bring further risk to you until you could figure out whether the police were on your trail? Because remember, ladies and gentlemen, drug dealing is bad but getting involved in a murder is a whole different ballgame.

You saw from the paperwork that murder three can add up to 40 years in prison. You can imagine—the judge will tell you about the law at the appropriate time—but you can imagine how a higher level of murder can bring even more serious consequences. So if you are a drug dealer making good money and you are not involved in

a homicide and your bud, your friend, your crew member uses your vehicle, the only one reason they can implicate you, what are you going to do? You are going to disengage from the operation until you can determine what the police know or whether or not you are at risk.

Now, the one smart thing is they got the vehicle out. And as you know it was stolen in New York. And Mr. George told you it was. It was stolen in New York. And then you heard from Detective Kuhno and the SOS guy that the vehicle was at the tow yard and they went to get it. And that is a point I want to bring up right now.

This file was brought in the other day from the M&R Motors people. And there is something in here that is not in our file. I never saw this file until him, the other day. It shows—sometimes facts comes in odd ways—looking here there's a letter from Antiwan Tyson in there to M&R saying the car was stolen in New York. I think this will go out with you. It was stolen in New York, and he would like copies of his paperwork because he is trying to get control of that vehicle.

Now, what does that tell you? If you are a crew member making $50,000.00 a week and your idiot friend, high school or grade school friend, decides to blow away someone in your car, it is in the newspaper and people are looking for a Maxima, do you want anything to do with that car again? And if it was stolen in New York because then the cops come to you are you going to say, hey, yeah you are right. The car is registered to me. But, hey, a friend drove it and said someone stole it. And, you know, here is the paperwork. It

was stolen in New York. I don't know where it is. Wouldn't you want to disassociate yourself with that if you were not involved in the murder and someone without your permission used the vehicle to blow some people away and now you are linked in it because it is your black Maxima? He doesn't do that, does he? He does the opposite. With Aaron Tyson it is business as usual, isn't it.

You heard from Detective Kuhno that the SOS people were so afraid from the way they were ill treated the day before when Tyson and others were there to get the vehicle they actually called the detective to come there because they knew they were coming back the next day. And who is there? Antiwan Tyson, Mr. Powell, and some third guy that Detective Kuhno could not identify. They were belligerent like they wanted the car back.

Does that sound logical to you? If you are not a part of the murder, if you have nothing to do with it and are livid that your crew member used it and exposed you and you want to get as far from anything that will bring you down—because like I said drug dealing is one thing. 14 years, 15 years, 18 years. Murder is something different. 40 years maximum sentence for murder in the third degree from the Commonwealth of Pennsylvania. And Mr. Tyson acted just like anyone would act if they wanted that car and wanted business to be as usual. He did everything he could do to get the car back, including writing M&R Motors because he needed the paperwork to prove ownership to the SOS people in New York. He wants the car. And it was his car and he wants it back.

What other things were business as usual, which Mr. Tyson certainly would not want to be involved in if his friend implicated him in the murder? He was not—he is back three days later. There's a vicious murder, a senseless murder in Monroe County, and he is having sex with his friend on tape of all things. And where is the tape found? It is found in the Acura. Guess who is driving the Acura? Mr. Tyson. May 3, 2002. Tape was April 27th, 2002 at the Days Inn in New Jersey. It is in the car. And on May 3, Mr. Tyson, the driver, is stopped and if you remember they take the car.

They are trying to drill in to these people, and here are the licenses. These have been brought before you. There is Kasine George, copy of his license. That was taken on May 3. There are two females. And there's Mr. Tyson, driver of the vehicle. Also known as the driver of the vehicle on April 22, but this time the black Maxima, two days before the murder, driving with two African Americans, one of whom is identified by Mr. George as himself.

Police, they don't care. They were not worried about processing the tickets on the driver. Business as usual. Detective Wolbert will tell you that this was the only time Mr. Tyson was stopped in the Acura, pulled over on 3/12/2002, 4/15 in 2002. And what I told you, 5/3 of 2002.

As a matter of fact, has anyone else, from the objective evidence you have been given, been driving these vehicles other than Mr. Tyson? And yet if he is not involved in this homicide and is linked to it through no fault of his own because of the idiot, Kasine George, using the car used to

tie him why would he come back days later and resume the operation as if nothing was wrong? Think about it. Because it is much easier to accept that extrapolation of the facts in measuring the credibility of Kasine George. Use your common sense rather than the version that Mr. Gaglione would have you believe because in that version basically Kasine George and Aaron Tyson are buds for years, dealing drugs in Allentown and dealing drugs here. Tyson goes to a halfway house and gets him out in January of 2002 after a two year and eight month sentence. He does not want to stay in the halfway house. They are making money; they have guns; they are driving cars together. They have sex together with girls and are dumb enough to put it on video. They do all these thing. But if you believe the version given to you by the defense magically in one narrow window of time, 20—20 minutes I believe Detective Wolbert estimated probably took from the altercation and murder or actually more time than that—but that very narrow window of time that magically Mr. Tyson is not there. No one know where he is. He is not there; he is gone. He is part of the operation.

He acts like he is part of the action, acts like nothing is wrong. But in his own proffer that he pled guilty to on July 15, he is dealing. He is dealing all the way up until the arrest; he is in the area as well as out of the area. He wants to have contact with the car, something which would not want to have if he does not use it and disassociate himself from the cops. I was not

there; I didn't have the car. It was stolen. I don't know what you are talking about.

Does that seem logical to you that Tyson is in another time space continuum in that narrow time. In every other respect he is a drug dealer, crew member, a friend, comrade. You have to decide and I think when I look at that, and answer those two questions when you are assessing the credibility of Kasine George. Is there a lever on this man; is there a screw; is there a hammer over his head? Yes. And is his testimony corroborated by other evidence in the case and from what you know from your own common sense.

The Commonwealth admits to you that you can accept his testimony even though it has got to gall you. It galls me. I would love to wave a magic wand and have a man or a woman of the cloth come in here or have a prominent citizen of Monroe County saying they were walking by and saw Kasine George and Aaron Tyson and Mr. Powell shoot these poor boys. That is not—you don't convict someone because police have no other way to get it done. You don't disregard a witness either when your common sense tells you, as bad as he may be as a dealer—they may be Kasine George—the facts as given by him are corroborative and corroborated by other evidence in the case. For that reason I am going to ask you to find the Defendant guilty of being a helper in these shootings and to be convicted of homicide. Thank you, ladies and gentlemen.

THE COURT: All right. Members of the jury, we are going to adjourn for today. Tomorrow morning at 9:30 when you come in you will have the closing

as we call the charge of the court. And you will go out to deliberate.

Bring your overnight bags in case we need them. We will feed you, of course. Once you are here you will be sequestered. We will feed you and house you until we come to a decision in this case.

Remember—I say it again now because it is important. Don't read about this case in the newspaper; don't listen to radio or television broadcasts; do not talk to anyone about this case. Let no one speak with you or in your presence so you may hear what is being said. Learn nothing about this case other than what you hear in the courtroom.

Does anybody have any questions? No? We will see you tomorrow morning at 9:30.

(Sidebar discussion held on the record.)

THE COURT: Okay. We want to indicate that Commonwealth agrees and that the defense agrees that there will be two charges in each case; one being murder in the first degree and one being murder in the third degree.

(Sidebar discussion concluded.)

(The proceedings concluded in the above-captioned matter.)

**JURY INSTRUCTION TRANSCRIPT**
**RELEVANT EXCERPTS**
**(MAY 9, 2006)**

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COURT OF COMMON PLEAS OF MONROE
COUNTY 43rd JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA,

v.

AARON TYSON,

*Defendant,*

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No. 817 CRIMINAL 2003

Trial Volume V

Before: Ronald E. VICAN, President Judge.

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*[May 9, 2006 Transcript, p. 680]*

(Tuesday, May 9, 2006 at 9:00 a.m.,
Courtroom No. 1)

[ * * * ]

THE COURT: Good morning. Let the record reflect that the court has reconvened outside of the presence of the jury. Present are the Defendant present with counsel as well as the Commonwealth.

MR. GAGLIONE: Your Honor, there was some discussion at the close of the evidence yesterday regarding whether or not we would agree to allow the court to charge the jury on accomplice liability with respect to murder of the third degree. After discussion with my client we would ask the court not to include an instruction on murder in the third degree. Not only does it logically not flow from the evidence, I think legally speaking accomplice liability cannot flow towards murder in the third degree. It has to be a specific intent crime. I have explained to my client that without that charge this is essentially an all or nothing proposition. And he understands that if the jury were to come back with a conviction that the court would have no option in this matter but to impose a sentence of life imprisonment. And obviously if they come back with not guilty then that is not—he is free on this case.

Do you understand that, Mr. Tyson?

THE DEFENDANT: Yes.

THE COURT: Mr. Tyson, I want to say this to you. I agree with your analysis that certainly—in fact, I explained to the lawyers yesterday I don't think third degree murder is a part of this case; however, I have been trying—a defense lawyer will always ask for the lesser charge, include the lesser charge because the prospect of the chance of a jury coming in and finding a conviction on the first degree. They need something imposed to be lesser. And a lawyer would be remiss if he did not ask the court to have a third degree charge in a case like this. I don't think it fits.

Frankly, I agree with you. But from a defense standpoint it is not a wise thing to do. And most lawyers will, nine out of ten times, would say exactly this. It is not what you should be doing. You should be having third degree simply because it is beneficial for the defense not the Commonwealth.

Do you understand that?

MR. GAGLIONE: I explained yesterday, Judge, that I thought it should be in there and I still think it should be in there.

Mr. Tyson, do you think it should be?

THE DEFENDANT: If this is what you want to do.

THE COURT: I mean you say it is tactical but I said you would be remiss if you did not ask for it. He would have been criticized if he didn't ask for that. And if you were convicted of third degree or first degree he would have been remiss.

THE DEFENDANT: I feel I am not guilty of none of the crimes. I don't feel I should be charged with it.

THE COURT: I am just telling you the common defense that would be by most of the defense lawyers. I have tried a lot of these cases over the years and always the defense asks for every possible lesser charge that would fit within the scope of the evidence. It does not fit. Third, it does not fit really but the Commonwealth or at least they will not have to test that issue. If you want it out we will take it out. I don't have any problem with that, thankfully.

MR. GAGLIONE: Judge, we prefer to have it as per my conversation yesterday. And, Mr. Tyson, are you okay with that.

THE DEFENDANT: Yes.

MR. GAGLIONE: We prefer to have it in.

THE COURT: I note the defense lawyer wanted it, but I don't want him to feel he has to after he agreed. It is his choice. I will take it out if he wants that.

MR. GAGLIONE: I prefer to have it in.

THE COURT: He does not want it. It is his choice. We will take it out.

MR. GAGLIONE: We would like to have it in.

THE COURT: Are you sure?

THE DEFENDANT: Yes.

THE COURT: All right.

MR. MANCUSO: Satisfactory, Judge.

THE COURT: It does not fit in the evidence. Once you do it you cannot change your mind. If it goes in, it is in.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: That is what is going to be in.

MR. GAGLIONE: Yes.

THE COURT: Bring in the jury.

(Jury seated.)

THE COURT: All right. Let the record reflect that the jury has now been brought into the courtroom and the Defendant is present along with defense counsel. The Commonwealth and the prosecutor are also present.

Good morning. Well, now you have reached the point in the trial which has been previously referred to. You are going to get the instructions of the court as to how you go about your business of deliberations and come to a decision or a verdict.

As you know, this is a case involving criminal homicide. And there are special rules that apply. I first want to start off by giving some general background instructions. And then I am going to talk about the specific offenses that have been charged by the Commonwealth and talk about the rules that go into how you evaluate evidence and ultimately what you should do in terms of approaching a decision making verdict in this case.

Remember that this case opened by the Commonwealth and the District Attorney telling you what they intend to prove to you during the course of the trial and testimony that was offered. And then the defense had an opportunity to address you, also. And they told you what it was that they intended to show during the course of the presentation of testimony. Then yesterday morning it concluded with arguments of counsel. And I want to draw your attention to that first of all.

One, when a lawyer stands before you and makes a presentation he is not testifying. A lawyer is not a witness in this proceeding in this nature. And they are drawing your attention by, virtue

of argument to the particular piece of testimony in the case which they want you to accept or to adopt as being factual. And then they are asking you or suggesting to you that the combination of a certain series and sets of facts should allow you to conclude a particular result.

If the argument makes sense and it is based on a factual scenario which you find you can accept, then the argument has some weight to you as to how you should deliberate and come to an agreement. But you notice I said that the argument should have a basis in fact which you accept. And that is the crux of the matter because the argument, if you will, will have a road sign of sorts.

It is a guidance system to help lead you in a certain direction. But if the signs are not signs which you will accept and are willing to follow, then the argument may be in a direction which makes no sense to you. But remember that in the process the lawyers make arguments and drawing your attention to testimony what they believe to be facts elicited by their testimony which they want you to accept and to adopt. And in that process if they have been mistaken in what a witness may have said or documents and physical evidence that was introduced during the course of the trial, then as the trier of facts you must resolve any discrepancies or inconsistencies in favor of how you remember the testimony as having been rendered during the course of the trial here in the courtroom.

As the finders of fact, you are the sole judges of the facts and no one may interfere in that process. It is yours and yours alone to decide. And I say

that to you also with respect to one other aspect of the case as to the introduction of the law. It is my obligation as the trial judge to explain to you the law as it is regarding these charges. And you may not like the law and you may be feeling that it is not fair, or maybe you do think it is. But whatever your personal feelings are about the law you are bound to follow it because you took an oath and said you would.

So you follow the law as I give it to you. If I make a mistake or am incorrect on how I explained it then appellate courts will make any remedial changes that will be necessary in the course of the appellate review.

I want to also make a reference to one other aspect of this before we go into this. You asked in the beginning if you could take notes, and we allowed you to do that. And you should also know that there are some—I don't want to say binding instructions—but there are some suggestions I can make in that regard. Some may have taken notes, some maybe extensive note taking, some may not have taken any notes maybe less extensively in the taking. You are entitled to do that but it is just as easy and you should remember this. It is just as easy to write something incorrectly as it is to write from memory. And while you are entitled to use your notes as you deliberate it is known to you that you have a certain memory and may recollect what was said just as well as someone who may have written it down and maybe someone wrote it down incorrectly.

The point of it is that you have an independent memory and an independent recollection. And

when you are referring to your notes as you deliberate, give it no more or no less weight to the view of a fellow juror because that juror did or did not take notes. You can use your notes as you deliberate but remember the person next to you may not have taken notes and may remember just as well. I don't want you to go there and have a fight over the notetaking process and basically say, well, my notes are better than yours and therefore my opinion is worth more than yours and try to get away from that.

This is an experienced process in Pennsylvania, and the Supreme Court allows the taking of notes. But it is going to be reviewed at some point in the future as to whether it is the way it should be. Historically it was not allowed because the Supreme Court was of the opinion exactly as what I have told you. And try to avoid something which would have happen normally in the court-room, in the deliberation room where someone is taking good notes and someone may say my opinion is more worthy. And that is not the way it works.

You have an independent memory and recollection of what happened in the courtroom collectively. You will find that 12 of you sitting as you deliberate will probably have almost total recall of everything that happened during the course of this trial. And it may seem strange to you now as you sit here as you start to deliberate. But I think you will find that to be true. So just keep that in mind with respect to the notetaking process as you go about the deliberations.

The Commonwealth has brought criminal charges in this matter, which is why we are here today. And they filed basically what amounts to two counts in the criminal information charging Aaron Tyson as an accomplice in the murder of Daniel Fotiathis and Keith Fotiathis. You are going to get a verdict slip at the end of the trial, and it basically encompasses these two separate events because we design them separately.

That is why it is a two-count information. And each essentially will have two charges that will be laid out for you. By agreement of counsel you will be considering charges in murder in the first degree and third degree with respect to the death of Keith Fotiathis; and first and third degree murder with respect to the death of Daniel Fotiathis.

The Criminal Information says in this language that the Defendant agreed with Otis Powell and Kasine George to kill Daniel and Keith Fotiathis; that he supplied a firearm to Otis Powell who did the actual shooting; that he operated a vehicle or drove Powell and George from the scene of the crime. So there's these matters of events which took place they claim and filed this information which connects this Defendant, Aaron Tyson, to the murder of Keith and Daniel Fotiathis. And he is charged as an accomplice—not as a shooter—but as an accomplice. We are going to talk about the rules which govern all this conduct and which go about during the course of the presentation this morning.

Now, before you can understand how one can be an accomplice I think it is incumbent upon me to

explain what criminal homicide in this particular venue actually means. So we are going to talk a few minutes about criminal homicide itself and how this plays out under the law so you have some recognition of what it is that you are looking for. But in the charge of criminal homicide which in this case the Defendant is charged with being an accomplice, taking the life of Keith and Daniel Fotiathis by criminal homicide, there's actually four possible verdicts in this case.

You can find either not guilty or guilty with respect to first degree murder and third degree murder in the same for each of the two Defendants. So you are not, charged, you are not here to analyze whether he is actually a killer in this case or not; that is not the question. The question is he an accomplice to the killing in the commission of the murder.

There are special elements which you should know about and have a particular use in the law. And that is called malice. You may have heard of malice somewhere in your travels throughout life, the term "malice." It is not necessarily what you might think it is. There's a technical definition in the law. But malice essentially means the state of mind. And it does not mean simply hatred, spite or ill-will.

Malice can be any one of three possible mental states which the law regards as being bad enough to make a killing a murder. The killing is with malice if the killer acts first with the intent to kill or, secondly, with an intent to inflict serious bodily harm or, third—and this is the language that dates back from the 19th century—that wick-

edness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and indicating an unjustified disregard for the probability of death or great bodily harm or extreme indifference to the value of human life.

So malice is an element that exists in first degree murder and third degree murder. And it is what makes murder something other than just a killing. So you have to find the existence of malice.

With third degree murder the elements of the offense that will be required that the Commonwealth must prove is that Daniel and Keith Fotiathis are dead—and I think there's not any question that they are dead. And you see evidence to that, so there's not much of an issue to concern yourselves. Secondly, that in this case—not this Defendant—but Otis Powell killed them as an accomplice with the Defendant, Aaron Tyson. And this was done with specific intent to kill. Malice. Specifically, specific intent to kill is a fully-formed intent to kill. And one who does so is conscious of having that intention. But also a killing with specific intent is killing with malice. If someone kills in that manner that is willful, deliberate premeditated like in this case stalking or lying in wait or ambush, that would establish specific intent.

In third degree murder the killer must again act in such a manner that there is malice that the person who is the victim must be dead. And, again, the connection with the person who did the killing is such that there has to be that direct connection. Remember what I said about malice?

I will go over it again with you. It is a shorthand way of referring to three different possible mental states that the killer may have that the law would regard making a killing a murder. Again, we are talking about intent to kill. First, an intent to kill or, secondly, an intent to inflict serious bodily harm or, third, a wickedness of disposition, a hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty indicating an unjustified disregard for the probability of death or bodily harm and an extreme indifference to the value of human life.

If you find that the killer in this case used a deadly weapon, in this case, a handgun or .9 mm handgun, to a vital part of the human body, then from that evidence you may, if you choose to infer, that the killer acted with malice in this case.

Now, Mr. Tyson is not charged with being the one who did the killing. He is charged with being an accomplice. And that, in other words, Kasine George testified here and tells you that he and the Defendant and Otis Powell acted in concert in this matter which has been laid out to police about the killings of Keith and Daniel Fotiathis.

Now, experience shows that after having been caught in the commission of a crime the person may be polluted because of some corrupt and wicked motive. But on the other hand, such a person may also tell the truth about what he and others did in the commission of a crime together.

In deciding whether or not you are going to believe Kasine George, should be guided by these principles which you should use in view in his

testimony. The testimony of Kasine George as an accomplice, because of what he admitted to having done should be looked upon with disfavor because it comes from a corrupt and polluted source. Examine Kasine George's testimony closely. Accept it only with caution and care. You should consider whether with Kasine George's testimony that the Defendant committed this crime in such a manner as I have described to you in the information by the Commonwealth whether that is supported by, in whole or part, or contradicted by other evidence in whole or part anything you heard during the course of the trial. Because if this is supported by independent evidence then this becomes more dependable.

You have the right to, if you choose, find the Defendant guilty as an accomplice based on Kasine George's testimony alone even though you choose to find maybe it is not supported by any independent evidence. Even though you decide that Aaron Tyson is an accomplice. And Kasine George has given you testimony to that effect, that testimony standing alone is sufficient evidence on which to find the Defendant guilty, if, after the foregoing principles, you are convinced beyond a reasonable doubt that Kasine George testified truthfully and the Defendant committed the crime as an accomplice.

You may find the Defendant guilty of the crime without finding that he personally performed the acts required for the commission of that crime. The Defendant is guilty of a crime if he is an accomplice of another person who commits the crime. He is an accomplice if with the intent

to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing, committing it.

You may find the Defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed; that the Defendant was an accomplice of the person who actually committed the crime. And it does not matter whether the person who you believe committed the crime has been convicted of a different crime or different degree of the crime or has immunity from prosecution or conviction.

Now, there's two kinds of evidence in a case of this nature. There's what we call direct evidence, which is testimony from a witness who from his own personal knowledge describes something which he or she may have seen or heard. Let me give you an example of this. If you look out the window on a February day and you see snow falling from the sky, you turn to your spouse who may be in the other room and say it is snowing outside. What you have basically done is recite something that you personally saw and observed. It is direct testimony.

If you are standing on a corner and see an accident with two automobiles as they collide, you are called later to testify in a proceeding in court at which time you say what you have seen, you are a direct witness. You tell what you saw. It is something that took place in your presence. And you can observe that and talk about it because

you saw it and you can talk about the position of the cars that were there and the speed. And the first example you can talk about the intensity of the snow and the time of day, and all of these things because you are a witness that is contemporaneous in time with your observations. That is direct evidence. Direct testimony.

But there's another aspect of testimony and evidence in the law which we call circumstantial evidence. And there is a lot of misunderstanding about this term, a lot of confusion. I want to provide another way of looking at this because it is recognized in the law as an appropriate way to prove a particular point in fact or issue.

Circumstantial evidence is testimony about facts which point to the existence of other facts which are in question. For example, suppose again we go back to February and it is 1:00 before you retire. You are outside and you are walking the dog. It is a bright, moon-lit night. The ground is clear, and you go inside and go to bed. But when you wake up at 6:00 the next morning you look outside and there is a foot of snow on the ground. You can say that between 11:00 and 6:00 a foot of snow fell on the ground. And you would be absolutely right. And you have slept through the entire event and not witnessed a snowflake fall. You can say with absolute certainty that event happened. You didn't watch it and see it and don't know how it came to be, but you do know from your background experience and common sense that certain events do take place because you live in Northeastern Pennsylvania in February, and it snows. So your common background

and life experience allows you to draw certain conclusions from observations which you did not witness but can still say with great accuracy how, in fact, that happened.

Now, these are simple examples. But I want to illustrate the point I am trying to make. There are two kinds of evidence. There's direct and circumstantial evidence. Whether or not circumstantial evidence is proof of other facts in question depends in part on the application of common sense and human experience. You should recognize that it is sometimes necessary to rely upon certain circumstantial evidence and criminal cases specifically when the crime is committed in secret.

In deciding whether or not to accept circumstantial evidence of proof of the facts in question you must be satisfied, first, that testimony of the witness is truthful and accurate. And, second, that the existence of the facts which the witness testified to leads to the conclusion that the facts in question actually happened.

Circumstantial evidence standing alone may be sufficient to prove that the Defendant is guilty. If there are several pieces that are separate of circumstantial evidence it is not necessary that each piece standing alone separately must convince you of the Defendant's guilt beyond a reasonable doubt. Instead, before you may find the Defendant guilty all of the pieces of circumstantial evidence when considered in their entirety must reasonably and naturally lead to the conclusion that the Defendant is guilty and convince you of that guilt beyond a reasonable doubt. In other words, you may find the Defendant guilty by circumstan-

tial evidence alone, but only if the total amount of evidence convinces you of his guilt beyond a reasonable doubt.

Now, Mr. Tyson did not testify in this proceeding which is something which you are all aware. And you should know this. It is entirely up to him at a criminal trial to decide whether he wishes to testify or not. He has an absolute right which is founded in the Constitution to remain silent. And I instruct you that you may not draw any inference of guilt from the fact he did not testify.

In the preceding part of these instructions I have given you a legal definition of the crime charged for your consideration. And if you notice, motive is not part of that definition. The Commonwealth does not have to prove motive for the commission of the crimes charged. That does not mean that you are to reject without thought or discussion the evidence which relates to motive. Knowledge of human nature tells you that an ordinary person is more likely to commit a crime if he has a motive than if he does not. And you should weigh and consider the evidence tending to show motive or an absence of motive along with other all evidence in the case in deciding whether the Defendant is guilty or not guilty of this offense. It is entirely up to you to determine which weight should be given to the evidence concerning motive.

Now, it is a fundamental principle of our system of criminal law that a Defendant before the court is presumed to be innocent. And the mere fact that he is arrested and is accused of a crime is not evidence against him. Furthermore, the Defendant is presumed innocent throughout this trial and

unless and until you conclude, based on careful and impartial consideration of the evidence, that the Commonwealth has proven him to be guilty beyond a reasonable doubt.

It is not the Defendant's burden to prove to you that he is innocent or not guilty. Instead, it is the Commonwealth that always has the burden to prove each and every element of the crime charged, and that the Defendant is guilty of that crime beyond a reasonable doubt. The person accused of a crime is not required to present evidence or prove anything in his own defense. But if the Commonwealth fails to meet its burden of proof, your verdict should be not guilty. It must be not guilty if that is the case.

On the other hand, if the Commonwealth's evidence does prove beyond a reasonable doubt that the Defendant is guilty, then your verdict should be guilty. When I say to you the Commonwealth has the burden to prove that the Defendant is guilty, it does not mean that the Commonwealth must prove its case beyond all doubt or to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence.

Now, we are talking about a term in the law which is called reasonable doubt. Reasonable doubt is the kind of doubt that would cause a reasonably careful and sensible person to hesitate before embarking upon matters of importance in their own affairs.

A reasonable doubt must fairly arise out of the evidence that was presented or out of a lack of evidence presented with respect to some element

of the crime charged. Reasonable doubt must be a real doubt; it is not imaginary. And it is not the kind of doubt that you may manufacture in your mind to avoid carrying out an unpleasant responsibility such as a conviction if the evidence warrants it.

You may not convict Mr. Tyson based on suspicion of guilt. The Commonwealth has the burden of proof to prove that he is guilty beyond a reasonable doubt. If it meets that burden he is no longer presumed to be innocent, and you should find him guilty. If the Commonwealth does not meet its burden then you must find him not guilty.

Now, I said to you during the first part of this instruction that you are the sole judges of the facts. That is a critical function in this case because you have to assess the credibility of witnesses and decide what you are going to believe and not to believe. And as judges of the facts that means you are the sole judges of credibility of the witnesses and their testimony. That means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of that testimony.

These are some factors that you may and should consider when you decide credibility and whether or not to believe testimony. Was the witness able to see, hear and know the things about which he testified? How well did the witness remember and describe those things about which he testified? Does the witness have the ability to see, hear and know and remember or describe those things affected by youth or old age or by any physical, mental or intellectual deficiency? Was the witness

convincing? Did he testify in a convincing matter? How did he look and act while speaking and testifying? Was his testimony uncertain, self-contradictory or evasive? Does the witness have an interest in the outcome of the case, bias, prejudice or other motive that might affect his testimony? And how well does the testimony of the witness square with the other evidence in the case, including testimony of other witnesses? Was it contradicted or supported by other testimony and evidence in the case? Does it make sense?

If you believe that some part of the testimony of a witness may be inaccurate, consider whether that inaccuracy casts doubt on what else was testified to. This may depend on whether he has been inaccurate in an important matter or a minor detail and on any possible explanation. Does the witness make an honest mistake, forget, or was it deliberately falsified in trying to mislead you?

When you are judging the credibility of each witness you are likely to be judges of the credibility of other witnesses or evidence. And if there becomes a real or irreconcilable conflict, then it is up to you to decide which of the conflicting testimony to believe or disbelieve.

Remember as the sole judges of the credibility and fact, you are, as the jury, responsible to give the testimony of each witness such credibility and all other evidence such credibility whatever weight you think it deserves.

Now, if and when there's conflict in testimony then you have the duty to decide which to believe and which to reject. But first try to reconcile, and by

that I mean fit together, any conflicts in testimony if you can fairly do so. Discrepancies and conflicts between the testimony of different witnesses may or may not cause you to disbelieve some or all of their testimony.

Remember that two or more persons who witness the same incident may see or hear it happen differently; it is not uncommon for a witness to be innocently mistaken in their recollection of how something happened. If you cannot reconcile conflicts of testimony it is up to you to decide which testimony, if any, to believe and which to reject as untrue or inaccurate.

In making this decision consider whether the conflict involves a matter of importance or merely details; whether the conflicts are brought by innocent mistake or intentional falsehood. And be mindful of the other factors which we have already discussed which go into deciding whether or not to believe what the witness says.

In deciding which of the conflicting testimony to believe, you should not necessarily be swayed by the numbers of witnesses on either side. You may find the testimony of a few witnesses, even just one witness, is perhaps more believable than the opposing testimony of a greater number of witnesses. On the other hand, you should consider the extent to which conflicting testimony is supported by other evidence in the case.

If you conclude that a witness testified falsely and intentionally about any fact necessary to your decision in this case, then for that reason alone you may, if you wish, disregard everything that

the witness said. However, you are not required to disregard everything that the witness said for this reason. It is entirely possible the witness testified falsely and intentionally in one respect but truthfully about everything else. If that is the situation, you may accept part of this testimony which is truthful and which you believe and reject the part which you find false and unworthy of belief.

Do not decide this case based on which side presented the greater number of witnesses or the greater amounts of evidence. Instead you should decide which witnesses to believe and which evidence to accept on the basis of whether or not the testimony or evidence is believable.

In deciding which of several witnesses to believe, it is proper for you to consider whether or not the testimony of each witness is supported by other evidence in the case. However, you should recognize it is entirely possible for a single witness to give truthful and accurate testimony and that his testimony may be believed, even though a greater number of witnesses of apparently equal reliability contradicted him. The question for you to decide, based on all the considerations I am discussing with you, is not which side produced the most evidence but, instead, which evidence you believe.

Before you retire to decide this case, I want to give you some final guidelines as to how you may go about your deliberations and properly reach your verdict. Remember, it is a decision of the court to instruct you on the law and the obligations to decide how to instruct you and to pro-

vide rulings on questions of law. You must accept the rulings of the court. Follow the instructions of the law.

I don't judge the facts. It is not for me to tell you what the true facts are concerning these charges against the Defendant. As jurors you are the sole judges of the facts. It is your responsibility to consider the evidence, find the facts and analyze those facts as you find them to be and decide whether the Defendant has been proven guilty beyond a reasonable doubt.

Your decision in this case as in every case that you hear is a matter of considerable importance. Remember that it is your responsibility as jurors to perform your duties in making your verdict based on evidence as it is presented in the trial and deciding by applying your common sense and drawing from your every day, practical knowledge of life as each of you has experienced it. Both the Commonwealth and the Defendant have a right to expect that you will consider the evidence conscientiously and apply the law as I have outlined it for you.

In reaching your verdict, do not concern yourselves with any possible future consequences of that verdict including the penalty that may be assessed if you should find the Defendant guilty. The question of guilt and the question of penalty are separately decided.

As you retire to deliberate, your first order of business is to elect among yourselves a presiding officer. He or she is the one who will announce the verdict in the courtroom at the conclusion of

the deliberations. That person, whoever it is, shall govern over the deliberative process to keep it orderly with a view to reaching an agreement.

Your verdict must be unanimous. That means in order to return your verdict you all must agree. You have the duty to consult with each other and to deliberate with a view of reaching an agreement that can be done without doing any violence to your individual judgment. Each of you must decide the case for him or herself, but only after there has been impartial consideration with your fellow jurors.

In the course of deliberations each juror should not hesitate to re-examine his or her view and change his or her opinion if convinced it is erroneous. However, no juror should surrender an honest conviction as to the weight or effect of the evidence solely because that opinion is not shared by your fellow jurors. Or for the mere purpose of returning a verdict.

Treat each other with courtesy and respect as you go about the deliberative process as you would with any other persons who you would be in contact with in the ordinary, everyday activities.

Do you have the verdict slip?

THE CLERK OF COURTS: Yes.

THE COURT: I tried to break these down which would make it easier for you to know what you have to address. You are going to have four slip. And each of these charges you have to render the decision of guilty or not guilty.

The way we broke them down for you is murder in the first degree as an accomplice for the death of Daniel Fotiathis; murder in the third degree as an accomplice for the death of Keith Fotiathis; murder in the third degree as an accomplice for Daniel Fotiathis; and murder in the first degree as an accomplice for Keith Fotiathis. So you need to render a decision of guilty or not guilty on each slip.

You will notice that there are 12 signature lines. Each of you must sign your verdict slip. And there's a separate line at the very bottom of this for the foreperson. That person will sign also as presiding officer of the jury panel. Even though that person will sign twice that person does not get an extra vote. Everybody gets one vote. You must be unanimous in your decision-making process.

Any corrections or additions?

MR. GAGLIONE: Yes, Your Honor. May we approach?

(Sidebar discussion held off the record.)

(Back on the record.)

THE COURT: I missed one point here. I want to bring this to your attention. There was evidence that Mr. Tyson is guilty of drug dealing. And actually there is a transcript of that somewhere in the testimony. And it was read to you yesterday, I believe, indicating the fact he admitted to that. And he was convicted in federal court. He is not on trial for that. The evidence before you is for a limited purpose. And that purpose is tending to show that there was a relationship between him and Kasine George and the drug dealing oper-

ation, which there was substantial discussion heard during the course of the proceeding as you just sat through.

This evidence must not be considered by you for any other purpose than that which I have just stated. It is not to be regarded as evidence showing that the Defendant is a person of bad criminal characteristic tendencies, which you may be inclined to infer guilt.

If you find he is guilty you must be convinced that the evidence that he committed the crime charged was enough to convince you beyond a reasonable doubt that he did, in fact, act as an accomplice in the death of Keith and Daniel Fotiathis and not because you believe he is convicted or committed these drug offenses. Okay. Any other corrections or additions?

MR. MANCUSO: No, Your Honor.

THE COURT: Are you satisfied?

MR. GAGLIONE: Yes.

MR. MANCUSO: Yes.

THE COURT: Swear the Tipstaves, please.

(Tipstaves sworn.)

THE COURT: You are going to get certain pieces of evidence. Have you gone over that?

MR. MANCUSO: Not yet.

THE COURT: We will do that. Maybe the first order of business is to get your lunch order together. Have they done that yet? You already got the lunch order together?

THE TIPSTAFF: Yes.

THE COURT: So lunch will be brought to you about noon or thereabout. I don't want the alternates in the jury deliberation room. I don't want them dismissed. We will separate the two alternates for the time being. We will keep you somewhere separate in the event there's some reason we have to substitute. We will do that. All right.

Do you want to come to sidebar with the evidence?

(Jury removed to deliberation room.)

(Sidebar discussion held on the record.)

THE COURT: What is not going out?

MR. MANCUSO: We believe that Mr. Tyson's guilty plea colloquy transcript is an admission because he adopts the factual findings of the prosecutor. So that doesn't go out. Beyond that, there's a couple of defense exhibits.

MR. GAGLIONE: I know one is a search warrant application. What was the other one? I don't think I admitted the other one. I just had only No. 2, which was a search warrant. And I don't see any reason to have that go out unless you want it to.

MR. CHRISTINE: No. It talks about the investigation other than from the lips of a witness, so I don't think it should go out, either.

THE COURT: So what are we excluding then?

MR. CHRISTINE: Just two things.

THE COURT: Exhibit 2 and the transcript of the guilty plea.

MR. CHRISTINE: I have to think the tape should go out so they can see it. If they ask we would agree they should not view it. But I think in terms of seeing that it was in the car.

THE COURT: There is no way they can view it. There's no machinery for that.

MR. GAGLIONE: And because of that I have no objection to them seeing the actual tape itself but not seeing the contents. Not actually being able to play it. That is fine with me.

THE COURT: If they come and ask for it, we will have an explanation for it.

MR. GAGLIONE: If they want to see it.

MR. MANCUSO: They have to articulate a good faith basis.

THE COURT: This is not the kind of tape—I have not seen it but I am assuming it—

MR. CHRISTINE: We all agree about what was on the tape.

THE COURT: All right. We will take our recess.

(Jury retires to jury deliberation room.)

(Back on the record.)

THE COURT: Let the record reflect that the Defendant is in the courtroom with his attorney. The District Attorney and the prosecutors are also here. And the jury has returned to ask a question. Who is the presiding officer of the panel?

THE FOREPERSON: I am.

THE COURT: I understand that you have a question, sir. Tell us what it is.

THE FOREPERSON: Am I permitted to ask it?

THE COURT: You have to ask the question so I can answer.

THE FOREPERSON: I want a clarification on the difference between homicide in the first degree as opposed to homicide in the third degree.

THE COURT: As you recall, the court gave you two definitions of criminal homicide as to murder in the first degree and murder in the third degree. In murder of the third degree there's three specific elements. And these refer to the killer who actually committed the crime, the shootings that we are here about. Mr. Tyson is not the shooter. He is not charged with being the shooter. He is only charged with being an accomplice to the shooter. But you have to understand what homicide is. You have to understand what third degree and first degree murder is.

First degree murder is when a killer has a specific intent to kill. And there are three elements. The first is that Keith and Daniel Fotiathis are dead. These are two separate charges, one for Keith and one for Daniel. But I am going to use the two in the same sense. And the second is that the killer actually killed them. That would not be Mr. Tyson. But the killer actually killed these people. Mr. Tyson is an accomplice, is what the Commonwealth charges. And, thirdly, that these killings were accomplished with a specific intent to kill and with malice.

A person has a specific intent to kill if he has actually formed an intent to kill and is conscious of his own intentions.

Malice is a state of mind that the killer has when this is going on. The state of mind, malice, has three possible components. They don't all have to exist. One can exist or they could exist for that matter. But malice has a specific definition. I am going to give that to you because this is a part of the element of first degree murder.

Malice is a state of mind. If a killer acts with an intent to kill—and I didn't say specific intent. I said an intent to kill—it is part of malice or, secondly, an intent to inflict serious bodily harm or, third—and this is that archaic language of the 19th century—a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life.

Those are the three elements which must exist and how you find the killing to have occurred in order for there to be first degree murder. Specific intent to kill is also accomplished by willful, deliberate and premeditated conduct or by laying in wait or by ambush. That is also—it is not an element, but it is way to describe specific intent to kill. And you are thinking what specific intent means. It can be accomplished in a fashion.

Specific intent to kill including premeditation does not have to happen over a long period of time. It can actually be very quick, almost without any

lengthy passage of time at all. All that is necessary is they have enough time so the killer does actually form an intent to kill and is conscious of that intention. But remember this is one other thing about specific intent to kill. You can infer that from the evidence if you find that the killer used a deadly weapon in this case—the Commonwealth says it was a .9 mm firearm on a vital part of the victims' body—you can infer that was also evidence of a specific intent to kill. So that is it. I put that in a compartmentalized explanation the first degree murder.

Third degree murder is a lesser degree because it does not require proof on the part of the Commonwealth that the killer acted with a specific intent to kill but requires that the Commonwealth show that the killer acted with malice. Same term again. Malice being what I referred to in the previous definition.

In this particular case because there is a charge of an accomplice almost by definition it encompasses the concept of first degree murder by its very definition, an accomplice with the planning and the coordination if you, in fact, found to be so indicate that was first degree murder. But third degree murder offered as another possibility even does not fit as well within the confines of the explanation because counsel agreed you may consider that as a possibility.

Again, there are three elements to third degree murder. And the brothers are dead; that the killer actually was responsible for killing them and the killing took place with malice. Does this

explanation assist you with the analysis of the deliberation process?

THE FOREPERSON: Yes.

THE COURT: Okay.

MR. MANCUSO: Satisfactory, yes.

(Jury resumes deliberations.)

(Back on the record.)

THE COURT: Let the record reflect that the jury has returned to render a verdict; that the Defendant is present along with defense counsel and the prosecutor and the District Attorney are also present.

Mr. Foreman, have you reached a verdict in this case?

THE FOREPERSON: Yes, we have, Your Honor.

THE CLERK OF COURTS: Members of the jury, rise, please. Ladies and gentlemen of the jury have you agreed upon your verdict?

THE JURY: Yes.

THE CLERK OF COURTS: To the charge of criminal homicide murder in the first degree as accomplice for Daniel Fotiathis, how say you guilty or not guilty?

THE FOREPERSON: Guilty.

THE CLERK OF COURTS: To the charge of criminal homicide murder in the first degree as accomplice for Keith Fotiathis, how say you guilty or not guilty?

THE FOREPERSON: Guilty.

THE CLERK OF COURTS: To the charge of criminal homicide murder in the third degree as accomplice for Daniel Fotiathis, how say you guilty or not guilty?

THE FOREPERSON: Not guilty.

THE CLERK OF COURTS: To the charge of criminal homicide murder in the third degree as accomplice for Keith Fotiathis, how say you guilty or not guilty?

THE FOREPERSON: Not guilty.

THE COURT: Record the verdict.

THE CLERK OF COURTS: Ladies and gentlemen of the jury, harken to your verdict as the court has recorded it. In the issue joined between the Commonwealth of Pennsylvania v. Aaron Tyson, you say you find the Defendant guilty to the charge of criminal homicide murder in the first degree as accomplice for Keith Fotiathis; criminal homicide murder in the first degree as accomplice for Daniel Fotiathis; not guilty to the charge of criminal homicide murder if the third degree as accomplice for Daniel Fotiathis; and not guilty to the charge of criminal homicide murder in the third degree as accomplice for Keith Fotiathis. So say you all and are all of you content?

THE JURY: Yes.

THE COURT: All right. Members of the jury, I want to thank you for your service. I know when you walked in here a few days ago you didn't know what you were getting into. And now you ever seen the presentation of what happens to be the most serious type of case that can be presented

by the Commonwealth. I can tell by some of the looks on your faces you are duly appreciative of what you had to do.

I want to thank you for your service. You are free to go about your business. You don't have to speak to the press or anybody else that you choose not to. You don't have to be accosted by anybody. If you want some assistance in getting out here, the sheriff's department will provide that to you.

You are now excused. You may go about your business with the thanks of the court.

(Jury dismissed.)

THE COURT: Mr. Tyson, rise please.

## ORDER

AND NOW, this 9th day of May 2006, the Defendant having been convicted after trial by jury of Murder in the First Degree in the death of Keith Fotiathis, imposition of sentence is deferred pending a presentence investigation report. Defendant is remanded to the custody of the sheriff in lieu of bail. Defendant shall appear for sentencing on July 17, 2006, at 2:00 p.m., Courtroom No. 1, Monroe County Courthouse, Stroudsburg, Pennsylvania.

By the Court:

Ronald E. Vican
President Judge

## ORDER

AND NOW, this 9th day of May 2006, the Defendant having been convicted after trial by jury of Murder in the First Degree in the death of Daniel Fotiathis, imposition of sentence is deferred pending a presentence investigation report. Defendant is remanded to the custody of the sheriff in lieu of bail. Defendant shall appear for sentencing on July 17, 2006, at 2:00 p.m., Courtroom No. 1, Monroe County Courthouse, Stroudsburg, Pennsylvania.

By the Court:

Ronald E. Vican
President Judge

(The proceedings in the
above-captioned matter adjourned.)