OCTOBER TERM, 2024

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Harvey Miguel Robinson,
Petitioner,

v.

Secretary, Pennsylvania Department of Corrections;
Superintendent, Phoenix SCI;
Superintendent, Rockview SCI;
Lehigh County District Attorney,
Respondents.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

— CAPITAL CASE —

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-9001

HARVEY MIGUEL ROBINSON,
Appellant

v.

SECRETARY, PENNSYLVANIA
DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT, GREENE SCI;
SUPERINTENDENT, ROCKVIEW SCI

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:06-cv-00829)
District Judge: Honorable Joseph F. Leeson, Jr.

Argued: November 28, 2023

Before: JORDAN, HARDIMAN, and BIBAS, *Circuit Judges*

(Filed: April 4, 2024)

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OPINION OF THE COURT

BIBAS, *Circuit Judge*.

In weighing life and death, a jury must understand its options. It may not sentence a defendant to die because it falsely fears that he might one day be paroled. If the prosecution raises the specter of the defendant's future dangerousness and clarification is needed, the judge must make sure the jury understands the law.

The judge here did that. Harvey Robinson was not eligible for parole. Yet at his capital sentencing, the judge first speculated that parole law might change. He then retracted that speculation and correctly told the jury: "There won't be any parole. Life is life." Because that correction cured any error, we will affirm the District Court's denial of habeas.

I. The Murder Conviction and Death Sentence

Three decades ago, Robinson stalked, raped, and killed three women. He also raped another woman and repeatedly tried to kill her. A Pennsylvania jury convicted him of one count of rape and multiple counts of burglary and other crimes, plus three counts of first-degree murder.

For each murder, the prosecution sought the death penalty. To persuade the jury, the prosecution repeatedly warned that Robinson was a dangerous predator who would continue to commit crimes if he ever got out of prison. After hearing these arguments, a juror asked the judge: "On the life in prison, is that without parole, just so we're sure? Would there be a chance of parole if [we sentence Robinson to] life in prison?" App. 209. The judge responded, "that's the present law, [b]ut … the legislature [might] change[ ] the law." App. 210. After the prosecution asked for a sidebar, the judge realized he "ha[d] misspoken." *Id.* He then changed his instruction to retract his prior speculation: "I'm to tell you, and it's accurate, 'Life is life.' There won't be any parole. Life is life." App. 211. The jury then sentenced Robinson to death.

On appeal, the Pennsylvania Supreme Court affirmed. *Commonwealth v. Robinson*, 864 A.2d 460, 520 (Pa. 2004). It held that (1) the prosecution had not made an issue of Robinson's future dangerousness; and (2) in any event, there was no error in the instruction given by the trial court. *See id.* at 515–16. State courts then denied him collateral relief, as did the federal district court. *Commonwealth v. Robinson*, 82 A.3d 998, 1000 (Pa. 2013); App. 3, 22. We granted him a certificate of appealability to consider whether the trial court's instructions on parole ineligibility violated *Simmons v. South Carolina*, 512 U.S. 154 (1994).

We review deferentially. Because no facts are disputed, we can grant habeas only if the Pennsylvania Supreme Court's ruling on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It was not. The state court's second rationale—that the sentencing judge answered the juror's question properly—was not just reasonable, but right.

II. THE JURY INSTRUCTIONS SATISFIED *SIMMONS*

Jurors sometimes sentence defendants to death out of fear for public safety. And prosecutors sometimes play on this fear by emphasizing a defendant's dangerousness. A defendant's best response may be that he will never get out of prison. *Simmons*, 512 U.S. at 163–64 (plurality opinion); *see id.* at 176 (O'Connor, J., concurring in the judgment). So when a prosecutor suggests that a capital defendant will be dangerous, "due process entitles the defendant to inform the jury of his parole ineligibility." *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001) (cleaned up). Either the judge or defense counsel must then tell the jury that the defendant is not eligible for parole, despite the prosecution's contrary suggestion. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment).

Robinson would not have been eligible for parole. And though the prosecution did argue that he was dangerous, the judge instructed the jury that he was not eligible for parole. That was enough.

A. The prosecution put future dangerousness at issue

The prosecution raised "the clear implication of future dangerousness … and placed the case within the four corners of *Simmons*." *Kelly v. South Carolina*, 534 U.S. 246, 255 (2002). First, it called Robinson "a territorial predator," "somebody who goes out and commits crimes." App. 136, 179. Then it went further, warning: "*when* he gets out, ladies and gentlemen, watch out." App. 179 (emphasis added). That statement implied not only that he *could* get out, but that he *would*. Any one of these statements could have triggered a *Simmons* instruction. Collectively, they certainly do. So on this point, the state court's contrary holding was unreasonable under any standard.

B. The court explained that Robinson could not get parole

But the Pennsylvania Supreme Court got the other merits issue right. An effective *Simmons* instruction must clarify that the defendant cannot get parole. *Simmons*, 512 U.S. at 177–78 (O'Connor, J., concurring in the judgment). It is not enough to say that the defendant will "die in prison after spending his natural life there" or that "life imprisonment means until the death of the defendant." *Kelly*, 534 U.S. at 257 (cleaned up) (quoting *Shafer*, 532 U.S. at 52). True, the jury may hear "truthful information regarding the availability of commutation, pardon, and the like." *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment). Yet it must also hear that, apart from those exceptions, the defendant will not be eligible for parole, at least under current law. *Id.* at 178.

Here, both sides agree that the judge's first statement was problematic. When asked about parole, he speculated about possible changes to the law, suggesting that the law was unsettled. Even if that speculation did not violate *Simmons*, the wiser course would have been to state current law without speculating.

But we need not decide whether this speculation violated *Simmons* because the judge promptly fixed it. After the prosecution objected, the judge stated, "I must have misspoken somewhere." App. 210. And after the sidebar, he told the jury, "I'm to tell you, and it's accurate, 'Life is life.' There won't be any parole. Life is life." App. 211. That answer cleared up any doubt. These final words rang in the jurors' ears as they went to deliberate. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow [the court's] instructions … [and] to understand a judge's answer to its question." (citation omitted)). So even if the judge's first statement was wrong, he quickly retracted it, curing any error. Thus, under any standard of review, the Pennsylvania Supreme Court properly rejected Robinson's claim.

* * * * *

When the prosecution indicates that a capital defendant who is ineligible for parole will be dangerous to society, the defendant has a right to inform the jury of the law. The trial judge did that: He retracted his speculation and gave a clear *Simmons* instruction. Because there was ultimately no error, we will affirm the District Court's denial of habeas corpus.

ELD-014

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-9001**

HARVEY MIGUEL ROBINSON, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(E.D. Pa. Civ. No. 2:06-cv-00829)

Present: HARDIMAN, GREENAWAY, JR. and BIBAS, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellant's motion for leave to exceed the word limit imposed by 3d Cir. L.A.R. 22.1(a) and Fed. R. App. P. 27(d)(2)(A); and

(3) Commonwealth's April 18, 2022 letter to the Court

in the above-captioned case.

Respectfully,

Clerk

ORDER

Harvey Miguel Robinson filed a counseled request for a certificate of appealability (COA) to appeal from the District Court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254 and the merged denial of his motion under Fed. R. Civ. P. 59(e). See Banister v. Davis, 140 S. Ct. 1698, 1703 (2020). Robinson's uncontested motion for leave to exceed the word-count prescribed for his COA request, see 3d Cir. L.A.R. 22.1(a); Fed. R. App. P. 27(d)(2)(A); cf. 3d Cir. L.A.R. 27.3 (2011), is granted.

To obtain a COA, Robinson was tasked with making "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), meaning 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." Buck v. Davis, 137 S. Ct. 759, 773 (2017) (citation omitted). Robinson satisfies that standard for his claim under the Due Process Clause of the Fourteenth Amendment: i.e., his claim that the Supreme Court of Pennsylvania's determination that the trial court was under no obligation to instruct the jury on Robinson's parole ineligibility was contrary to or an unreasonable application of Simmons v. South Carolina, 512 U.S. 154 (1994), and Kelly v. South Carolina, 534 U.S. 246 (2002), or reflected an unreasonable determination of the facts. Cf. 28 U.S.C. § 2254(d)(1)-(2). In particular, jurists of reason could debate whether the prosecutor placed Robinson's future dangerousness at issue, see, e.g., Doc. 27-22 at 145-47, 153; Doc. 27-17 at 150, thereby triggering the need for the Simmons instruction. See Simmons, 512 U.S. at 176-77 (O'Connor, J., concurring in the judgment); see also Bronshtein v. Horn, 404 F.3d 700, 716, 719 (3d Cir. 2005). The COA request is granted to that extent. Notably, the claim we have certified for appeal is rooted in the Fourteenth Amendment; it does not concern the Sixth or Eighth Amendment, in the manner advocated by Robinson or otherwise. Cf. Eizember v. Trammell, 803 F.3d 1129, 1144 n.6 (10th Cir. 2015). The COA request is denied in all other respects, for substantially the reasons given in the District Court's memorandum opinion denying habeas relief.

In addition to any other issues the parties wish to pursue within the scope of the COA, they are directed to address in their briefs whether, if no deference to the Supreme Court of Pennsylvania's rejection of the Simmons claim is due under § 2254(d), and de novo review of the claim is thus appropriate, any failure by the trial court to provide a proper Simmons instruction constitutes harmless error under Brecht v. Abrahamson, 507 U.S. 619 (1993). Compare Mollett v. Mullin, 348 F.3d 902, 921 n.6 (10th Cir. 2003) with Richmond v. Polk, 375 F.3d 309, 334-35 (4th Cir. 2004). And, in addressing that issue, the parties may wish to discuss whether the trial court's reformulated response to a jury question ("I'm to tell you [the jury], and it's accurate, 'Life is life.' There won't be any parole. Life is life.") cured any prior lack of a Simmons instruction. Finally, we observe that, as Robinson is represented by counsel, a briefing schedule should issue forthwith.

By the Court,

s/ Thomas M. Hardiman
Circuit Judge

Dated: August 30, 2022
DWB/arr/cc: EJM; RE; HFG

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HARVEY MIGUEL ROBINSON, Petitioner, v. JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; DAVID DIGUGLIELMO, Superintendent of the State Correctional Institution at Graterford; FRANK TENNIS, Superintendent of the State Correctional Institution at Rockview; and LEHIGH COUNTY DISTRICT ATTORNEY, Respondents.	:	No. 2:06-cv-00829

ORDER

AND NOW, this 10th day of June, 2021, upon consideration of Petitioner's Motion to Alter Judgment Pursuant to Rule 59(e), ECF No. 84, the Lehigh County District Attorney's response thereto, ECF No. 86, and for the reasons set forth in the Court's Opinion issued this date, **IT IS ORDERED THAT:**

Petitioner's Motion to Alter Judgment Pursuant to Rule 59(e), ECF No. 84, is **DENIED**.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HARVEY MIGUEL ROBINSON, Petitioner, v. JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; DAVID DIGUGLIELMO, Superintendent of the State Correctional Institution at Graterford; FRANK TENNIS, Superintendent of the State Correctional Institution at Rockview; and LEHIGH COUNTY DISTRICT ATTORNEY, Respondents.	:	No. 2:06-cv-00829

O P I N I O N
Motion to Alter Judgment Pursuant to Rule 59(e), ECF No. 84 — Denied

Joseph F. Leeson, Jr. **June 10, 2021**
United States District Judge

I. INTRODUCTION

This matter involves Petitioner Harvey Robinson, a prisoner under sentence of death in Pennsylvania, who seeks a writ of habeas corpus from this Court. In his petition, Robinson challenged his sentence of death as to the murder of Jessica Jean Fortney. In an Opinion dated September 8, 2020, this Court fully reviewed Robinson's petition and denied it in its entirety. Robinson now files the present Motion to Alter Judgment Pursuant to Rule 59(e). Therein, Robinson alleges error in this Court's analysis of three of the claims in his petition.

After review of Robinson's motion, this Court's Opinion dated September 8, 2020, and the underlying record in this case, this Court denies Robinson's motion to alter judgment.

II. BACKGROUND

As the facts are set out in full in this Court's Opinion dated September 8, 2020, only a brief summary is provided here. *See Robinson v. Beard*, No. 06-cv-829, 2020 WL 5362133, at *1-6 (E.D. Pa. Sept. 8, 2020), ECF No. 82. Robinson was charged with the first-degree murders of Joan Burghardt, Charlotte Schmoyer, and Jessica Jean Fortney, as well as other crimes that accompanied those murders. *See id.* at *5. Following a trial by jury in the Lehigh County Court of Common Pleas, Robinson was found guilty of three murders of the first degree and all of the other offenses related to the murders of Burghardt, Schmoyer, and Fortney. *See id.* In the penalty phase, the jury returned a sentence of death for each of the three murder convictions.[1] *See id.*

Robinson filed a direct appeal to the Pennsylvania Supreme Court, raising issues related to the pretrial phase, guilt phase, and penalty phase. *See id.* at *6-7. The Supreme Court rejected Robinson's claims and affirmed the judgment of sentence. *See id.* at *7. Thereafter, Robinson filed a petition for a writ of habeas corpus pursuant to the Pennsylvania Post Conviction Relief Act (PCRA). *See id.* The PCRA court denied his petition in its entirety, and the Pennsylvania Supreme Court affirmed. *See id.*

Robinson timely filed a federal habeas petition, asserting fourteen claims that included trial court error, ineffective assistance of counsel, and prosecutorial misconduct. *See id.* at *7-8. On September 8, 2020, this Court addressed the petition, denying it in its entirety. *See id.* at *1.

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[1] Robinson was later resentenced for the murders of Burghardt and Schmoyer. *See Robinson*, 2020 WL 5362133, at *6. He was resentenced to life without parole for each of those two murders. *See id.* Robinson remains under a sentence of death for the murder of Fortney. *See id.*

Robinson timely filed the present Motion to Alter Judgment Pursuant to Rule 59(e). *See* Mot., ECF No. 84. Therein, Robinson asks this Court to reconsider its review of Claims IV,[2] VI,[3] and XIII[4] from his petition. *See id.* The Lehigh County District Attorney responded in opposition to the motion. *See* Resp., ECF No. 86.

III. LEGAL STANDARD

Motion to Alter Judgment under Rule 59(e) – Review of Applicable Law

The purpose of a motion to alter judgment under Rule 59(e) of the Federal Rules of Civil Procedure is to "correct manifest errors of law or fact, or to present newly discovered evidence." *See Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985); *see also* FED. R. CIV. P. 59(e). A party seeking alteration of a judgment must show at least one of the following grounds:

"(1) an intervening change in the controlling law;"

"(2) the availability of new evidence that was not available when the court granted the motion . . . ;" or

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[2] In Claim IV, Robinson asserted that

> [t]he Commonwealth's failure to timely disclose that a key Commonwealth witness had been hypnotized prior to her testimony and initially identified someone else as her attacker violated Petitioner's right to due process, right to a fair trial, and right to be free from cruel and unusual punishment; trial counsel rendered ineffective assistance.

See Robinson, 2020 WL 5362133, at *8.

[3] In Claim VI, Robinson asserted that

> [p]etitioner was denied his right to a fair trial, to a fair and impartial jury and to due process in violation of his rights under the Sixth and Fourteenth Amendments because the jury pool from Lehigh County was saturated with highly prejudicial pretrial publicity. All prior counsel were ineffective for failing to properly litigate this issue at trial and on direct appeal.

See Robinson, 2020 WL 5362133, at *8.

[4] In Claim XIII, Robinson asserted that "[t]he trial court violated Petitioner's right to compulsory due process, a fair trial and his right to be free from cruel and unusual punishment by failing to grant a short continuance to allow a critical mitigation witness to arrive in court." *See Robinson*, 2020 WL 5362133, at *8.

"(3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

"Motions under Rule 59(e) should be granted sparingly because of the interests in finality and conservation of scarce judicial resources." *Ruscavage v. Zuratt*, 831 F. Supp. 417, 418 (E.D. Pa. 1993). "It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through--rightly or wrongly." *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (internal quotations omitted).

IV. DISCUSSION

Robinson does not allege that a change in the controlling law or new evidence warrants reconsideration of his claims. Rather, Robinson exclusively alleges that clear errors of law or fact made by this Court would cause manifest injustice if left uncorrected. Robinson alleges multiple errors of law and fact in this Court's review of Claims IV, VI, and XIII in his petition. Each of the alleged errors are addressed in turn below. In summary, Robinson fails to present any error of law or fact that warrants alteration of this Court's judgment. Accordingly, Robinson's motion is denied.

A. Claim IV: Testimony of Denise Sam-Cali

In Claim IV of his petition, Robinson asserted that the Commonwealth failed to disclose the fact that prosecution witness Denise Sam-Cali had been hypnotized and that she initially suggested a different individual, Sal Rosado, as the perpetrator of the attack against her. *See Robinson*, 2020 WL 5362133, at *25. In the September 8, 2020 Opinion, this Court reviewed Claim IV and determined that the Commonwealth had not violated *Brady* in its handling of Sam-Cali and her hypnosis and otherwise found that counsel was not ineffective in failing to object to the testimony. *See id.* at *26-27.

Robinson now challenges this Court's disposition of Claim IV. Robinson alleges four points of error in this Court's analysis. First, Robinson asserts that this Court misapprehended his argument in Claim IV. *See* Mot. 4. Second, Robinson argues that this Court improperly limited its review of the *Brady* violation. *See id.* at 6. Third, Robinson claims that this Court inappropriately placed a burden on him to inform his counsel about the hypnosis. *See id.* at 4-5. Fourth, Robinson asserts that this Court misapplied the law in determining materiality or prejudice under *Brady*.[5] *See id.* at 6. After review, Robinson fails to allege error that would warrant alteration of this Court's judgment as to Claim IV.

1. The Court did not misapprehend Robinson's argument in Claim IV.

Robinson first asserts that this Court misapprehended his argument with respect to Claim IV. *See id.* at 4. In his motion, Robinson suggests that this Court incorrectly focused on the Government's disclosure of the *fact* of Sam-Cali's hypnosis rather than disclosure of the *statements* made under hypnosis. *See id.* Notwithstanding, Robinson fails to show clear error that, if left uncorrected, would cause a manifest injustice.

In reviewing Claim IV, this Court responded directly to the claim in Robinson's petition. Therein, Robinson clearly states that the Commonwealth "fail[ed] to timely disclose that a key Commonwealth witness, Ms. Denise Sam-Cali, had been hypnotized and interviewed prior to her trial testimony . . . ." *See* Pet. 61. That allegation strikes directly at the *fact* of Sam-Cali's hypnosis. Accordingly, this Court did not misconstrue Robinson's claim in finding that a letter from the Commonwealth had placed Robinson on notice of the hypnosis.

Moreover, as discussed in Section IV.A.2, *infra*, this Court did review the possibility that the Commonwealth's failure to turn over certain statements from Sam-Cali's hypnosis

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5 *Brady v. Maryland*, 373 U.S. 83 (1963).

represented a *Brady* violation. Accordingly, this ground does not warrant alteration of this Court's judgment as to Claim IV.

2. The Court appropriately addressed Robinson's *Brady* violation claim, and the Court declines to review other claims not fairly presented to the state courts.

Robinson asserts that this Court improperly limited its review of his *Brady* claim to only Sam-Cali's statements regarding Sal Rosado as a potential assailant. *See* Mot. 6. He claims that this court ignored his allegations of additional factual inconsistencies between Sam-Cali's statement and her trial testimony. Notwithstanding, this Court appropriately curtailed its review of Robinson's claims to those that were fairly presented to the state courts.

In his jurisdictional statement to the Pennsylvania Supreme Court, Robinson presented the relevant question for review as follows:

> [w]hether the trial [c]ourt erred in failing to grant a new trial based on [1] after-discovered evidence because the evidence of hypnosis was not available to counsel until after the trial, [2] the Brady violation resulting from the Commonwealth's failure to disclose the evidence of hypnosis fully and to defense counsel, and [3] the Brady violation resulting from the failure to disclose the fact that Sam-Cali had tentatively identified another individual as her assailant.

See Appellant's Jurisdictional Stmt. ¶ 5(G).

Thus, Robinson only raised a single factual inconsistency—that Sam-Cali had tentatively identified another individual—before the Pennsylvania Supreme Court. Robinson now claims that there are additional factual inconsistencies between Sam-Cali's original statement, statement under hypnosis, and her trial testimony that this Court did not address. *See id.*

On appeal, the Pennsylvania Supreme Court exclusively addressed the three grounds provided in Robinson's jurisdictional statement. *See Pennsylvania v. Robinson (Robinson I)*, 581 Pa. 154, 217, 219-223 (2004). The Pennsylvania Supreme Court did not address the possibility of additional inconsistencies between Sam-Cali's testimony and her prior statements because Robinson did not raise the issue. Moreover, because the issue of Sam-Cali's hypnosis was not raised before the PCRA court or the Pennsylvania Supreme Court on PCRA review, neither addressed that issue in their review of Robinson's PCRA petition. *See Pennsylvania v. Robinson (Robinson II)*, 623 Pa. 345 (2013); *Pennsylvania v. Robinson*, No. CP-39-CR-0058-1994, 2012 WL 10028332 (Pa. Ct. Com. Pl. June 21, 2012).

Consistent with the law governing federal habeas review, this Court addressed those claims that were fairly presented to the state courts. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (state prisoner must "fairly present" federal claims to state courts). Failure to fairly present a claim to a state court results in the procedural default of that claim, absent a showing of cause and prejudice or actual innocence to excuse the default. *See Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004).

Here, Robinson attempts to introduce claims regarding Sam-Cali that were not fairly presented to the state courts. Because the state courts were not afforded an occasion to opine on the possibility of other inconsistencies in Sam-Cali's testimony, beyond the single Rosado matter enumerated by Robinson, that claim is procedurally defaulted. Robinson does not provide any showing of cause and prejudice or actual innocence to excuse the default. Accordingly, this Court did not err in limiting its review of Robinson's claims with respect to Sam-Cali to those claims that were fairly presented to the state courts.

Moreover, even if this Court were to review the defaulted claim, Robinson fails to establish a *Brady* violation. To establish a *Brady* violation, a petitioner must show:

"(1) the evidence at issue is favorable to the accused, because either exculpatory or impeaching;"

"(2) the prosecution withheld it;" and

"(3) the defendant was prejudiced because the evidence was 'material.'" *Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011).

With respect to the first element, the inconsistencies at issue here are not exculpatory, nor do they hold impeachment value. As the Pennsylvania Supreme Court noted, Sam-Cali's suggestion of Rosado as a suspect is irrelevant for impeachment purposes. *See Robinson I*, 581 Pa. at 217-18. The same is true with any minor discrepancies in Sam-Cali's recount of the attack. Prior to trial, Robinson plead guilty to charges of burglary, aggravated assault, and attempted homicide with respect to Sam-Cali. *See id.* Pennsylvania law indicates that a defendant's plea of guilty is his acknowledgement to both the facts and the intent required to commit the charged offense. *See Commonwealth v. Anthony*, 504 Pa. 551, 475 A.2d 1303 (1984). Thus, as part of his guilty plea to the offenses involving Sam-Cali, Robinson admitted to all of the salient facts. Accordingly, any minor discrepancies in Sam-Cali's description of the assailant or the details of the attack against her would not exculpate Robinson or serve as impeachment material because (1) Robinson admitted to being the assailant and (2) Robinson admitted to the salient details of the attack. *See Robinson I*, 581 Pa. at 217-218.

Moreover, even if this Court were to assume *arguendo* that the statements could be used for impeachment purposes and that the government failed to turn them over, Robinson fails to show the requisite materiality. Notably, because Robinson had already pled guilty to charges with respect to Sam-Cali, these charges were not before the jury in the trial at issue. Rather, her testimony was put on by the government to "establish the identity of the perpetrator, his motive, intent, and a common criminal scheme." *See Robinson I*, 581 Pa. at 215. Thus, Sam-Cali's testimony was not put on for the purpose of establishing Robinson's guilt with respect to the three homicides at issue.

Justice Nigro, concurring in *Robinson I*, noted that "the evidence of [Robinson's] guilt was clearly overwhelming." *See id.* at 257 (Nigro, J., concurring). Because Sam-Cali's testimony did not involve Robinson's guilt and because the evidence of guilt was "clearly overwhelming," Robinson has not shown a reasonable probability that the outcome of the trial would have been different if the jury had heard the few discrepancies in Sam-Cali's testimony. Therefore, any minor discrepancies in Sam-Cali's testimony are immaterial and Robinson was not prejudiced by any absence of those discrepancies from the trial. Accordingly, this ground does not warrant alteration of this Court's judgment on Claim IV of Robinson's Petition.

3. The Court did not place any unwarranted burden on Robinson.

Next, Robinson asserts that this Court improperly placed a burden on Robinson with respect to *Brady* material. By way of background, the Commonwealth delivered a letter directly to Robinson that notified him of Sam-Cali's hypnosis. Robinson asserts that the letter should have instead been provided to his counsel, and he asserts that direct delivery to Robinson himself was contrary to Supreme Court precedent. *See* Mot. 4-5 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). Notwithstanding, Robinson fails to allege any error that warrants alteration of this Court's judgment.

In reviewing Claim IV, this Court noted that the Commonwealth personally provided Robinson with a letter stating that Sam-Cali had been hypnotized. *See Robinson*, 2020 WL 5362133, at *26. In footnote two of the September 8, 2020 Opinion, this Court explained why the Commonwealth provided the letter to Robinson directly. *See id.* at 26 n.2. The letter was drafted and provided to Robinson the same day that Robinson was interviewed by the police, and Robinson was not yet represented by counsel in the matter. *See id.* Accordingly, in the absence of counsel, the Commonwealth provided the letter to Robinson directly.

Robinson asserts that the Commonwealth's provision of the letter directly to him violated Supreme Court precedent by placing the burden on Robinson to inform his counsel of the letter. *See* Mot. 4-5. Notwithstanding, the case law that Robinson cites is inapposite. Robinson cites case law that indicates "[t]he Commonwealth has a continuing obligation to disclose *Brady* material even if there is no request by the defense." *See id.* (citing *Agurs*, 427 U.S. at 107). However, *Agurs* does *not* indicate that the Commonwealth fails to discharge that ongoing obligation if it provides *Brady* material directly to an unrepresented defendant. Robinson does not assert that he had to request the letter, and accordingly, the Commonwealth complied with the requirements of *Agurs*.

Robinson also suggests that provision of the letter directly to him enforces a system where the "prosecutor may hide, [and] defendant must seek." *See id.* (citing *Banks v. Dretke*, 540 U.S. 668. 696 (2004)). The facts belie this assertion. Far from having to seek out the information himself, the Commonwealth provided the letter directly to Robinson. *See Robinson*, 2020 WL 5362133, at *26. Accordingly, the case law cited by Robinson does not illuminate any clear error of law in this Court's analysis of the Commonwealth's provision of the letter directly to Robinson. Therefore, this ground does not warrant alteration of this Court's judgment on Claim IV.

4. Robinson misconstrues this Court's discussion of prejudice.

Last, Robinson now claims that this Court inappropriately suggested that any failure by the Commonwealth to disclose Sam-Cali's statement was without prejudice to Robinson. *See* Mot. 6. Robinson suggests that, in reviewing the *Brady* claim in his Petition, this Court improperly determined that the inconsistencies in Sam-Cali's statements were "not material/prejudicial." *See id.* Moreover, Robinson asserts that this Court should not have weighed Sam-Cali's statements against other evidence put forth at trial, including DNA evidence. *See id.* However, Robinson's reading of this Court's Opinion misconstrues its discussion of prejudice.

This Court's discussion of the prejudice in its September 8, 2020 Opinion, with respect to Claim IV, was not conducted in the context of a possible *Brady* violation. Rather, a prejudice analysis was conducted in the context of this Court's review of Robinson's ineffective assistance of counsel claim. *See Robinson*, 2020 WL 5362133, at *27. After noting that counsel made a strategic decision to avoid discussing the hypnosis of Sam-Cali in front of the jury, this Court determined that, even if counsel's decision was objectively unreasonable, it did not result in prejudice. *See Strickland*, 466 U.S. at 494 (defining prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). The *Strickland* prejudice standard required this Court to balance Sam-Cali's statements against the other evidence presented at trial. Accordingly, there was no error of law in this Court's approach to prejudice as it related to Robinson's ineffective assistance of counsel claim on Claim IV.

Moreover, even assuming *arguendo* that this Court engaged in evidence balancing to determine *Brady* materiality, such an analysis was warranted by the governing standards. *Brady*'s materiality analysis, like *Strickland*'s prejudice analysis, provides that evidence is "material if there is a reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different." *See Wilson v. Beard*, 589 F.3d 651, 665 (3d Cir. 2009). Accordingly, in determining whether a *Brady* statement is material, a court must necessarily assess the probability that the introduction of that evidence into the trial would have resulted in a different outcome. In doing so, it would be wholly appropriate for a court to weigh the alleged *Brady* material against the other evidence presented at trial. Accordingly, Robinson asserts no cognizable error, and this ground does not warrant alteration of this Court's judgment on Claim IV.

Having reviewed all of the proposed grounds for alteration of this Court's judgment on Claim IV and finding none that warrant alteration of this Court's disposition of Claim IV, Robinson's motion to alter judgment is denied with respect to Claim IV.

B. Claim VI: Effect of Pretrial Publicity

In Claim VI, Robinson asserted that he was denied his due process rights, right to a fair trial, and right to effective counsel as a result of the pretrial publicity of his case. *See Robinson*, 2020 WL 5362133, at *30-33. In its September 8, 2020 Opinion, this Court concluded that Robinson had not stated a violation of any of those rights. Accordingly, the claim was denied.

Robinson now seeks reconsideration of this Court's disposition of Claim VI. In his motion, Robinson asserts three grounds for reconsideration. First, Robinson asserts that this Court misconstrued his argument in Claim VI related to trial counsel's ineffectiveness in drafting a sufficient motion to transfer venue. *See* Mot. 8-9. Second, Robinson argues that this Court misread the facts of the record by discounting the prejudicial nature of the publicity. *See id.* at 9-10. Third, Robinson claims that the venire pool was prejudiced by the pretrial publicity of his case. *See id.* at 10-11. After review of each of these grounds, none of them warrant alteration of the Court's judgment as to Claim VI.

1. The Court did not misconstrue Robinson's argument regarding trial counsel's ineffectiveness in drafting a motion to transfer.

First, Robinson asserts that this Court misunderstood his argument regarding his counsel's effort to move for a transfer of venue. Robinson focuses on a single sentence in this

Court's Opinion where it stated that it did not believe "Robinson's argument that, had the brief of the motion been larger, the trial court would have granted the motion to transfer." *See Robinson*, 2020 WL 5362133, at *33. Although this description is an oversimplification of Robinson's underlying concerns with the motion and brief, this Court did not misconstrue, or otherwise fail to address, Robinson's concerns regarding the publicity surrounding his case and the accompanying motion to transfer. Quite the opposite, this Court undertook a thorough review of the publicity, separating out the factual coverage and highlighting articles with inflammatory rhetoric. *See id.* at *32.

Thereafter, this Court noted that, in light of the publicity, the motion that counsel filed was not objectively unreasonable. *See id.* at *33. Moreover, this Court, assuming *arguendo* that the filing was unreasonable, also discussed whether Robinson was prejudiced by any ineffectiveness, finding no such prejudice existed. *See id.* This Court thoroughly and appropriately reviewed Robinson's ineffective assistance of counsel claim with respect to Claim VI and found that trial counsel was not ineffective. Therefore, this ground does not warrant alteration of this Court's judgment as to Claim VI.

2. The Court's review of Claim VI accurately reflected the facts in the record before it.

Next, Robinson asserts that this Court "misread the trial record when addressing the prejudicial impact of the pretrial publicity." *See* Mot. 9. Specifically, Robinson asserts that this Court inappropriately discounted that a factual article regarding the crimes may still have an inflammatory and prejudicial effect on a venire pool. *See id.* Notwithstanding, this Court's thorough review of the factual record in its Opinion dated September 8, 2020 belies the claim that there is any clear error of fact in this Court's analysis of Claim VI.

Contrary to Robinson's contention, this Court did not discount the effect of pretrial publicity. Rather, as the law requires, this Court sorted publicity from which prejudice may be presumed from that from which prejudice may not be presumed. *See Robinson*, 2020 WL 5362133, at *31-32 (citing, e.g., *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (finding no presumption of prejudice where publicity is "factual in nature, but prejudicial and inflammatory only to the extent arising from the normal and natural reaction to any purely factual news item about a very serious crime")). As this Court noted in quoting the relevant standards, severe and extensive reporting does not necessarily give rise to prejudice. *See id.* at *31 (citing *Pursell v. Horn*, 187 F. Supp. 2d 260, 302 (W.D. Pa. 2002) (noting "lapse in time" between severe and extensive publicity and trial can dissipate prejudicial effect)).

Moreover, this Court performed a detailed review of instances of pretrial reporting in which inflammatory, non-factual language was used. *See id.* at *32. Robinson takes issue with this Court's conclusion that there was a sufficient cool-down period between those instances of inflammatory reporting and the eventual trial so as to quell any concern regarding prejudice. *See* Mot. 9. Despite Robinson's objection, inquiry into the cool-down period is required by the governing standards. *See Pursell*, 187 F. Supp. 2d at 302. In determining the prejudicial value of those reports, this Court was required to review the probability that sufficient time had lapsed between the reporting and the trial so as to dissipate any prejudicial effect. *See id.* Accordingly, this Court's review of the pretrial reporting was consistent with the law and the factual record before it. Therefore, this ground does not warrant alteration of this Court's judgment on Claim VI.

3. Robinson is estopped from relitigating the effect of the publicity on the venire pool.

Robinson next claims that many prospective jurors indicated during voir dire that they had seen, read, or heard about the matters in Robinson's case prior to appearing for jury selection. However, Robinson does not raise any error of law or fact with respect to this ground. Rather, it appears that Robinson wishes to relitigate a matter that has already been decided without pointing to any clear error that would warrant such reconsideration. This Court thoroughly reviewed the standards for prejudice as a result of pretrial publicity. *See id.* at *31-33. In applying those standards to the factual record, this Court determined that the relevant factors indicated a low likelihood of prejudice in the venire pool and therefore weighed against a transfer of venue. *See id.* Robinson is not permitted to seek unbridled reconsideration of an unfavorable conclusion—that is otherwise appropriate in light of the law and facts—simply because it is unfavorable. *See Glendon Energy*, 836 F. Supp. At 1122. Accordingly, this ground does not warrant alteration of the Court's judgment on Claim VI.

Having reviewed all of the proposed grounds for alteration of Claim VI and finding none that warrant alteration of this Court's disposition of Claim VI, Robinson's motion is denied with respect to Claim VI.

C. Claim XIII: Life without Parole Instruction

In Claim XIII of his petition, Robinson claimed that his Eighth and Fourteenth Amendment rights were violated when the trial court failed to instruct the jury that life imprisonment meant life without parole. *See Robinson*, 2020 WL 5362133, at *59. This instruction is otherwise known as a "*Simmons*" instruction. *See Simmons v. South Carolina*, 512 U.S. 154 (1994). After reviewing Claim XIII in light of the governing standards, this Court determined (1) that a *Simmons* instruction was not warranted in Robinson's case, and (2) assuming that it was, the trial court provided a clear and sufficient instruction. *See id.* at *59-61.

In his present motion, Robinson seeks reconsideration of this Court's disposition of Claim XIII. Therein, Robinson presents two grounds for reconsideration. First, Robinson asserts that this Court applied an incorrect standard for determining whether a *Simmons* instruction was necessary. *See* Mot. 13. Second, Robinson asserts that this Court erred in finding the trial court's instruction sufficient to satisfy the requirements of *Simmons*. *See id.* at 13-14. After review of both of these grounds, neither warrants alteration of the Court's judgment as to Claim XIII.

1. The Court applied the appropriate standard for determining whether a *Simmons* instruction was required.

Robinson first claims that this Court erred in selecting a standard for determining whether a *Simmons* instruction is required. However, a review of this Court's Opinion belies this claim. As this Court noted, a *Simmons* instruction is required when the government places a defendant's future dangerousness at issue. *See Robinson*, 2020 WL 5362133, at *59 (citing *Simmons*, 512 U.S. at 156). Robinson seems to suggest that this Court overlooked the Supreme Court's opinion in *Kelly v. South Carolina*, 534 U.S. 246 (2002). *See* Mot. 13. Therein, the Supreme Court noted that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *See Robinson*, 2020 WL 5362133, at *60 (citing *Kelly*, 534 U.S. at 254). However, this Court quoted precisely that language in describing the standard that it was required to follow. *See id.* Accordingly, despite

Robinson's contention, this Court applied the correct legal standard for determining whether a *Simmons* instruction was required.

After reviewing the factual record in light of the standards set forth in *Simmons* and *Kelly*, this Court concluded that the Commonwealth did not place Robinson's future dangerousness at issue. As instructed by *Kelly*, this Court reviewed the transcript not only for statements that explicitly mentioned future dangerousness but also for statements that addressed future dangerousness by other terms. In his motion, Robinson fails to point to any statements made by the Commonwealth that the Court misread in applying the relevant legal standards to the factual record. Accordingly, this ground does not warrant alteration of this Court's judgment on Claim XIII.

2. The Court did not err in finding the trial court's resultant instruction sufficient under *Simmons*.

Next, Robinson argues that this Court erred in finding that the trial court's *Simmons* instruction was sufficient. *See* Mot. 13-14. Robinson asserts that the trial court's eventual instruction of "[l]ife is life" only served to contradict its prior instruction, thereby leaving the jury confused. *See id.* at 14. However, this Court's review of the matter illuminates the opposite. At no time did the trial court say that parole was available. In fact, in its first statement after the jury asked if life meant life without parole, the trial court stated, in part, "that's the present law." *See Robinson*, 2020 WL 5362133, at *59. After a brief sidebar with counsel, the trial court then stated, "[l]ife is life. There won't be any parole. Life is life." *See id.* The trial court's eventual instruction was a clarification of its prior statement, not a contradiction. Moreover, the trial court's eventual instruction was crystal clear regarding the availability of parole. Accordingly, this Court was not in error in finding that the trial court's eventual instruction to the jury was a clear statement of the law in Pennsylvania regarding life without parole. Therefore, this ground does not warrant alteration of this Court's judgment as to Claim XIII.

Having reviewed the two proposed grounds for alteration of Claim XIII and finding neither warrants alteration of this Court's judgment as to Claim XIII, Robinson's motion is denied with respect to Claim XIII.

V. CONCLUSION

Robinson seeks reconsideration of three claims that were reviewed and decided in this Court's Opinion dated September 8, 2020. Robinson claims that errors of law or fact warrant reconsideration of those three claims. However, after a review of all of the proposed grounds for reconsideration, this Court finds no clear error of law or fact that, if left uncorrected, would work a manifest injustice. Therefore, Robinson's arguments do not warrant an alteration of this Court's judgment as to any of the three claims raised in the motion. Accordingly, Robinson's motion is denied.

A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HARVEY MIGUEL ROBINSON, Petitioner, v. JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; DAVID DIGUGLIELMO, Superintendent of the State Correctional Institution at Graterford; FRANK TENNIS, Superintendent of the State Correctional Institution at Rockview; and LEHIGH COUNTY DISTRICT ATTORNEY, Respondents.	:	No. 06-cv-00829

O P I N I O N

Joseph F. Leeson, Jr.
United States District Judge

September 8, 2020

I. INTRODUCTION

Harvey Miguel Robinson, a prisoner under sentence of death in the Commonwealth of Pennsylvania, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Robinson alleges due process violations, ineffective assistance of counsel, trial court error, and prosecutorial misconduct. The petition challenges the sentence of death in No. 58, only, for the murder of Jessica Jean Fortney. As for the other two murders, in judgment No. 55, Robinson was resentenced to a term of thirty-five years to life because he was a minor at the time of the offense, and in judgment No. 56, Robinson was resentenced to life without the possibility of parole. Having reviewed the extensive pleadings and the voluminous state court record, the Court denies the petition.

II. FACTS – TRIAL EVIDENCE OF THE CRIMES OF CONVICTION

Robinson elected to go to trial. The decision of the Pennsylvania Supreme Court (PSC) affirming Robinson's convictions on direct appeal recited the factual basis of his convictions as follows:

> At about 12:35 a.m. on Wednesday, August 5, 1992, Allentown police were dispatched to a reported burglary at the residence of Joan Burghardt (Burghardt) at 1430 East Gordon Street, on the East Side of the City of Allentown. Burghardt, a twenty-nine-year-old white female, weighing 225 to 240 pounds, resided alone at that address, a one-bedroom, first-floor apartment in a residential neighborhood. She told the police that someone had entered her apartment between 11:00 p.m. Tuesday and 12:30 a.m. Wednesday, when she returned from taking a friend home. Burghardt noticed that a fan, which she left on before leaving the apartment, had been turned off, the patio door she had left open was closed, and the screen on the door, which was locked, had been ripped about six to eight inches, just enough to get a hand through, near the locking mechanism. Burghardt also reported that $40 to $50 was missing from a bank bag in her dresser drawer. In all other respects, Burghardt reported her apartment appeared to have been undisturbed.
>
> At approximately 11:30 a.m. on Sunday, August 9, 1992, Burghardt's neighbor telephoned the police to complain that: (1) Burghardt's stereo had been on for three days and nights; (2) no one answered the doorbell; (3) the screen had been out of the window for three nights; and (4) during one of those nights it had sounded like somebody was beating Burghardt up, hitting the walls, and screaming. When the police arrived at Burghardt's apartment they noticed the screen for the front of the apartment was on the ground leaning upright next to the front window, the window was open, and the screen for the rear window was pushed out and lying on the ground beneath that window, which was also open. The screen on the patio door was cut about six inches long next to the door handle. The television was blaring loudly and the front door and the patio door were locked. The patio screen door was closed but not locked.
>
> Upon entering the apartment, the police found Burghardt dead, lying on her stomach on the living room floor in front of her couch. There was a large amount of blood on the couch, walls, and floor. She was beaten severely about the head. Aside from where the body was found, the apartment appeared to be neat and orderly. With the exception of the screens, there were no pry marks on the doors or windows or other evidence of forced entry. The police concluded that the perpetrator entered the residence through the front window and exited through the rear window.
>
> At the time of her death, Burghardt was wearing a sleep shirt and a pair of jockey shorts that were ripped at the crotch and pulled up. She was unclothed from her hips

down. A dresser drawer in the bedroom was open and a pair of black shorts was on the floor. There were blood spots and white stains on the back of the shorts. A peach-colored shirt was located on the closet door. It contained a lot of blood in distinctive patterns that appeared to have been made by swipe marks from whatever was used as the murder weapon.

The subsequent autopsy revealed that Burghardt had been sexually assaulted and bludgeoned to death by thirty-seven individual blunt force injuries to her scalp, causing extensive skull fractures and damage to the brain. The weapon was a circular, cylindrical instrument about one-half to three-quarter inches in diameter with a smooth surface and about ten to twenty inches long. The force of the blows was so deliberate and tremendous that, as the instrument came down, it embedded hair between the fracture and skull.

Burghardt also had defensive injuries on both hands, evidencing that she was alive and attempting to protect herself from her assailant. Serology tests established that all of the blood and hair found at the scene, including those samples found on the black shorts and peach colored shirt, were consistent with those of the victim. However, the shorts had seminal stains on the outside, as though someone had ejaculated onto them. Tests of the semen stains on the shorts showed the deoxyribonucleic (DNA) profiles that were later matched to the DNA profiles obtained from Appellant's blood. An analysis of the blood spattering at the crime scene indicated the perpetrator was approximately 5’10” tall and stood over the victim during the attack.

Approximately ten months later, at about 6:45 a.m. on Wednesday, June 9, 1993, Allentown police responded to a call of a reported missing person at 1058 East Gordon Street, a residential neighborhood, also on the East Side of Allentown. A resident became suspicious when the normally punctual newspaper delivery girl, Charlotte Schmoyer (Schmoyer), failed to deliver the newspaper. Her newspaper cart was left unattended for approximately thirty minutes in front of a neighbor’s house and the newspaper had been delivered to another neighbor. Upon their arrival, the police found the unattended newspaper cart half-filled with the day’s newspapers in front of the house; a separate copy of the newspaper; a Walkman radio and its headset separated from each other on the ground between two houses; and finger streaks on the windowpane of the door to the nearby garage of one of the houses. Police concluded that a struggle had ensued and Schmoyer, a fifteen-year-old white female, weighing 180 pounds, had been abducted.

Later that day, while searching a heavily wooded area at Allentown’s nearby East Side Reservoir (Reservoir), the police found a bloody trail that led them to the body of Schmoyer, which was buried beneath some logs. Her sweatshirt was slightly pulled up; her sweatpants and underpants had been pulled down toward her knees. She had a large, gaping wound in her throat, separate stab wounds below that gash, multiple stab wounds on her back, and a patterned bruise on the right side of her cheek. An autopsy revealed twenty-two stab wounds, sixteen in the back (including seven that were fatal), and six in the front area of the neck (of which any combination of one or three would have been fatal). In addition, there were cutting and scraping wounds in the neck area, indicating they were inflicted while the victim was conscious and her neck bent down as a protective measure, and seven more cuts to the back of the sweatshirt, indicating that some struggle occurred in that the sweatshirt was cut but the body was not penetrated. The weapon was a single-edged knife about four inches long. At least two of the wounds were up to the hilt of the blade.

Subsequent serology and DNA tests indicated that Schmoyer had intercourse shortly before death. Appellant's DNA was found on her vaginal swab and blood consistent with that of Appellant and inconsistent with that of Schmoyer's blood, was found on her sweatshirt and sweatpants, along the trail leading to her body, and on leaves at the crime scene near her head. All of the blood found on or about Schmoyer was consistent with that of either Schmoyer or Appellant; none of the blood was inconsistent with one of their profiles. A comparison of a hair found on the right knee of Schmoyer was consistent with hair from Appellant's head and inconsistent with Schmoyer's own hair; and a comparison of a hair found on the sweatshirt of Schmoyer was consistent with Appellant's pubic hair and, again, inconsistent with Schmoyer's own hair.

On June 28, 1993, Denise Sam–Cali (Sam–Cali), a thirty-eight-year-old white female weighing 160 to 165 pounds, and her husband resided at 1141 East Highland Street, on Allentown's East Side. That evening she was home alone; her husband was out of town. She awoke during the night to noises from within a walk-in closet near her bedroom door. As Sam–Cali attempted to flee the house, an assailant grabbed her. She exited the house, but the assailant grabbed her again on the front walk, flipped her on her back, and got on top of her using his knees to hold her down.

As Sam–Cali and the assailant began to fight, he pushed down on her mouth, choked her, and punched her face at least four times. She tried to punch him and bit him on the inside of his upper right arm. He raped her and then ran through the house to escape by way of the back patio-door. Afterwards, Sam–Cali called the police. She had been beaten severely about the head, her neck had strangulation marks, and her lip was slashed. A large butcher knife wrapped in a paper napkin from her kitchen was found lying on the floor outside of her bathroom door. Following this incident, Sam–Cali and her husband left their East Allentown residence for a few days.

Approximately two weeks later, shortly after 7:00 a.m. on July 14, 1993, Jessica Jean Fortney (Fortney), a forty-seven-year-old white female, weighing 235 pounds, who resided with other members of her family at 407 North Bryan Street, on Allentown's East Side, was found dead in her bed. Fortney was half-naked; her shorts and underpants were pulled down mid-way between her knee and groin area and around only one thigh. Her face was swollen and black. She had dried blood about her lips, eye, nose, nostrils, and neck. There was blood spatter on the wall directly behind the sofa and on the lampshade next to the sofa. The window on the first floor was open; there was no screen in it.

The autopsy revealed that Fortney died in the early morning hours as a result of suffocation by strangulation (probably manual) and blunt trauma. There were in excess of fifty different injury patterns, many of them compatible with being beaten by a closed fist about the face. Some of them indicated an object, such as a ring, on her assailant's hands. Other injury patterns revealed that Fortney's attacker placed his knees on her during the beating, causing her blood to spatter on the wall, lampshade, and him. Serology tests established that Fortney had sexual intercourse within a few hours of her death. It was later determined that Fortney and Appellant had different blood profiles. Blood and body fluids from Fortney's vaginal swabs were consistent with Appellant's profile and seminal fluid from Fortney's vaginal swabs matched Appellant's DNA.

Four days after the Fortney homicide, on the evening of July 18, 1993, Sam–Cali and her husband returned home. At about 4:00 a.m. the next morning, Sam–Cali heard a noise in the house and then the back door opened. Thereafter, the alarm went off. The intruder apparently fled. From that night on, an Allentown police officer stayed at the Sam–Cali residence.

At approximately 1:25 a.m. on July 31, 1993, Officer Brian Lewis (Officer Lewis), who was at the Sam–Cali home, heard the doors being jarred and noticed someone at the front window. The officer saw the fingertips of a black-gloved hand removing the screen to the window. He then saw a head, and then the rest of the body, enter the home. When the intruder was fully inside the home, the officer challenged him. The intruder went to the kitchen and shots were exchanged. The officer retreated to the bedroom, where he heard banging and ripping at the kitchen door. Upon returning to the kitchen, the officer found the kitchen empty. The intruder escaped by breaking through several glass panels on a wooden door and pushing out the rear storm door.

At about 3:30 or 3:45 a.m., Officer Lewis was called to a local hospital where he identified Appellant as the intruder at the Sam–Cali home earlier that evening. Appellant had fresh, bleeding wounds to both of his arms and legs. He also had a healing scar of a bite mark several weeks old on his upper right arm. Later that day, the police obtained blood and hair samples from Appellant and searched his residence, where they found: (1) a black ski mask and a pair of gloves under the sofa cushions; (2) several drops of blood and a soaked, green-and-purple striped rugby-type shirt in the laundry; (3) additional blood in the bathroom; (4) additional pairs of gloves, including a pair of large black rubber gloves; (5) blood stained shorts and socks; (6) a pair of black high-tech sneakers in Appellant's bedroom; and (7) a loaded .380 semi-automatic handgun in the bedroom closet, which used to belong to the Sam–Calis prior to its disappearance some time before July 31, 1993.

The head stamp on the upper most cartridge in the handgun was identical with that on the empty cartridge casings found at the Sam–Cali house earlier that morning. Officer Lewis identified the horizontal striped shirt, shorts, sneakers, black knit cap, and rubber gloves found at Appellant's house, as those worn by the intruder at the Sam–Cali residence. Further, Sam–Cali identified Appellant as the person who assaulted and raped her.

It was later established that the patterned design of the bruise on Schmoyer's cheek was consistent with the size, design, and wear characteristics of the high-tech sneaker seized from Appellant's bedroom. There was no evidence found to exclude the possibility that the injury on her face was caused by Appellant's sneaker. Similarly, chevron patterns found on the Walkman radio that belonged to Schmoyer and found at the scene of her disappearance corresponded with the shape and spacing of Appellant's sneaker.

The police interviewed Appellant on August 4, 1993. At that time, Appellant told the officers that he drove his two-door Chrysler Laser automobile, and that he never drove his mother's four-door blue Ford Tempo automobile, license plate number ZGP260, except to look for jobs. In fact, at approximately 3:45 a.m. on September 7, 1992, a little less than one month after Burghardt's death, an Allentown police officer made a traffic stop of the blue Ford Tempo that Appellant was operating. On June 3, 1993, another Allentown police officer stopped the blue Ford Tempo at 2:40 a.m. and Appellant, its operator, was cited for driving the wrong way on a one-way street. At about 6:25 a.m. on the day of Schmoyer's abduction and death, June 9, 1993, James Stengel, an Allentown City employee at the Reservoir, saw a blue, four-door automobile (which he later identified as a Ford Tempo) with damage to its right side in the Reservoir parking lot. At about 6:40 a.m. on that day, a carpenter on his way to work identified Appellant as operating a blue automobile and acting strangely only three blocks from the Reservoir. Finally, at about 3:30 a.m. on July 31, 1993, when he sought treatment at the hospital after the last Sam–Cali incident, Appellant was in possession of the blue Ford Tempo automobile, license plate ZGP260, with right side body damage. This automobile was owned by Appellant's mother and was registered to 709 North Kearney Street. Blood patterns subsequently found in the vehicle were later determined to be from Appellant.

Additional evidence also established that Appellant resided at 709 North Kearney Street, Allentown, in August of 1992, when Joan Burghardt was murdered, until September 23, 1992, and again from May 14, 1993, until his arrest on July 31, 1993, during which time Schmoyer and Fortney were murdered and Sam–Cali assaulted. Appellant did not reside in, or visit, Lehigh County between September 23, 1992, and May 14, 1993, because, during this period of time, he was detained in a juvenile placement facility on an unrelated charge. Appellant's residence at 709 North Kearney Street is about: (1) four blocks from 1057 East Gordon Street, where Schmoyer was abducted, and about one mile from the Reservoir where her body was found; (2) five blocks from 1430 East Gordon Street, where Burghardt lived and was murdered; (3) five or six blocks from 1141 East Highland Street, where Sam–Cali resided and was assaulted; and (4) two miles from 407 North Bryan Street, where Fortney lived and was murdered. It was also established that from 1984 until 1986, Appellant resided at 310 North Second Street, in Allentown, which is less than one block from the place of Fortney's murder.

On October 12, 1993, relating to the three incidents involving Sam–Cali, Appellant was charged with Information Nos. 2450/1993, 2451/1993, and 2452/1993, which included three counts of burglary and related offenses, two counts of attempted homicide, one count of rape and related offenses, multiple counts of aggravated indecent assault, and one count of firearms not to be carried without a license. On the same day, the Commonwealth informed Appellant that it intended to try these Informations together. Subsequently, on February 8, 1994, the Commonwealth filed additional Informations against Appellant in the following order: (1) as related to the Schmoyer homicide, No. 0055/1994, which included charges of criminal homicide, kidnapping, rape, aggravated indecent assault, and indecent assault; (2) as related to the Burghardt homicide, No. 0056/1994, which included charges of criminal homicide, burglary, criminal trespass, rape, aggravated indecent assault, and indecent assault; and (3) as related to the Fortney homicide, No. 0058/1994, which included charges of criminal homicide, burglary, criminal trespass, rape, aggravated indecent assault, and indecent assault. Similar to the charges filed on October 12, 1993, the Commonwealth notified Appellant that it intended to try Information Nos. 0055/1994, 0056/1994, and 0058/1994 together.

On February 28, 1994, Appellant entered guilty pleas to: (1) burglary, attempted criminal homicide, and firearms not to be carried without a license in Information No. 2450/1993, in relation to the attack on Sam–Cali on June 29, 1993; (2) burglary in Information No. 2451/1993, in relation to the break-in at the Sam–Cali residence on July 19, 1993; and (3) burglary, attempted criminal homicide, and firearms not to be carried without a license in Information No. 2452/1993, in relation to the events at the Sam–Cali residence on July 31, 1993. Subsequently, the trial court sentenced Appellant to a forty-and-one-half to eighty-one year prison sentence in connection with his guilty pleas.

The parties proceeded on Information Nos. 0055/1994, 0056/1994, and 0058/1994, and, after a trial that lasted from October 10 through November 8, 1994, a jury found Appellant guilty of three murders of the first degree and all of the other offenses relating to the Burghardt, Schmoyer, and Fortney homicides. Following the penalty phase of the trial, on November 10, 1994, the jury sentenced Appellant to death for each of the three first-degree murder convictions. The jury found the following aggravating circumstances in each case: (1) the killing was committed during the perpetration of a felony; (2) Appellant had a significant history of felony convictions involving the use or threat of violence; and (3) Appellant "has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue." The jury found the additional aggravating circumstance of "torture" in the Burghardt and Schmoyer homicides.

> The jury also found the following as mitigating circumstances pursuant to the "catch-all" provision of 42 Pa.C.S. § 9711: (1) "family background and environment;" (2) "use of alcohol and drugs;" and (3) "school history." *See* Sentencing Verdict Sheets. On November 29, 1994, the trial court imposed additional sentences for the non-capital offenses.
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> Thereafter, Appellant filed a post-sentence motion on December 8, 1994, alleging various pre-trial and trial errors. On March 28, 1996, he filed a pro se "Clarification Motion for the Appointment of New Counsel," expressing his preference to raise trial counsel's ineffectiveness on direct appeal. On May 6, 1996, Appellant filed a pro se "Motion for Notes of Testimony and for Post Trial Discovery." By order dated May 17, 1996, and filed on May 21, 1996, the trial court relieved Appellant's trial counsel of further representation and appointed new counsel.
>
> Appellant was given until December 9, 1996, to amend his post-sentence motions or file new post-sentence motions. On April 23, 1997, Appellant filed a pro se Supplemental Motion for Relief pursuant to Pa.R.Crim.P. 720, which was dismissed without prejudice to Appellant's right to incorporate it into motions filed by appointed counsel. Thereafter, counsel filed amended post-sentence motions on July 28, 1997, supplemental post-sentence motions on September 15, 1997, and second supplemental post-sentence motions on September 10, 1999. Several evidentiary hearings were held before the trial court during 1998 and 1999. By Order of June 29, 2001, the trial court denied the motions in all respects, except that Appellant's sentences of death for murder of the first degree in the Burghardt and Schmoyer homicides were vacated and a re-sentence proceeding was ordered in accordance with 42 Pa.C.S. § 9711.

Commonwealth v. Robinson (Robinson I), 581 Pa. 154, 174-85 (Pa. 2004).

As the trial court ordered Robinson be resentenced in No. 55, for the murder of Schmoyer and No. 56, for the murder of Burghardt, the trial court resentenced Robinson to a term of thirty-five years to life because he was a minor at the time of the offense in No. 55, and in judgment No. 56, Robinson was resentenced to life without the possibility of parole. Thus, only Robinson's sentence of death for the murder of Fortney, in No. 58, remains.

III. DIRECT APPEAL PROCEEDINGS

Following his conviction, Robinson filed a direct appeal to the PSC in which he raised approximately sixty substantively independent issues. The PSC separated its opinion into four sections: Pre-trial, Guilt Phase, Penalty Phase, and Prosecutorial Misconduct.

In his Pre-trial Phase, Robinson raised the following issues for review: (1) failure of the trial court to sever the charges involving the different victims, (2) failure of the trial court to grant his motion for change of venue, (3) ineffective assistance of counsel for failure to ask the trial court to modify the procedures employed in Lehigh County to select members of the pool of jurors available to try this case, and (4) ineffective assistance of counsel for failing to pose "life qualification" questions to potential jurors.

In his Guilt Phase, Robinson raised the following issues for review: (1) ineffective assistance of counsel with respect to the DNA testimony of Commonwealth experts by not introducing evidence or cross-examining them with respect to the existence and acceptance of alternative statistical models; (2) that the trial court erred by permitting Denise Sam-Cali to testify because it allowed evidence of prior bad acts and uncharged criminal conduct to be heard by the jury; (3) ineffective assistance of counsel with regard to alleged hypnosis of witnesses Sam–Cali and James Stengel; (4) ineffective assistance of counsel and trial court error for the admission of select photographic, audio, video, and physical evidence at trial; (5) trial court error for the testimony of Karen Schmoyer when she discussed her feelings and thoughts regarding her missing daughter; (6) trial court error for the testimony of Jean Vas describing the scene of the murders; (7) trial court error for the testimony of Lieutenant Dennis Steckel describing that he was familiar with Robinson, knew what school Robinson attended, and where Robinson resided in 1984 and 1986; and (8) the trial court's statements in front of the jury regarding the testimony of potential witness Latanio Fraticeli.

In his Penalty Phase, Robinson raised the following issues for review: (1) ineffective assistance of counsel for failing to introduce mitigation evidence during the penalty phase of the proceedings; (2) trial court error for allowing the jurors to see photographs of the victims for thirty seconds; (3) trial court error by not granting a continuance to permit Robert Burns to testify; (4) ineffective assistance of counsel for failing to call Robinson as a witness; (5) the jury's determination that the killings of Burghardt and Schmoyer implicated the aggravating circumstance of "torture"; (6) the trial court, the Commonwealth, and both defense attorneys incorrectly referenced to the aggravator expressed in 42 Pa.C.S. § 9711(d)(11), as the "multiple victim" or "multiple killings" aggravating circumstance; (7) the trial court improperly instructed the jury in relation to the aggravator embodied in 42 Pa.C.S. § 9711(d)(11); (8) the trial court erred in response to a jury question regarding the possibility of a life sentence without parole; and (9) ineffective assistance of counsel for failing to move to bar Commonwealth from seeking the death penalty in this case pursuant to various provisions of the United States and Pennsylvania Constitutions.

Lastly, for Prosecutorial Misconduct, Robinson raised the following issues for review: (1) the Commonwealth called Robinson a "predator" in its opening statement, (2) the Commonwealth called Robinson a "territorial predator" in its closing argument, and (3) ineffective assistance of counsel for failing to object to the Commonwealth's statement in its closing argument that Robinson had not expressed remorse for his crimes.

The PSC rejected Robinson's direct appeal issues and affirmed the judgment of sentence.

IV. POST-CONVICTION PROCEEDINGS

Robinson filed his Amended Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction pursuant to the Post Conviction Relief Act (PCRA) on August 2, 2010. The Amended Petition raised the following issues:

> I. Trial counsel rendered ineffective assistance by failing to adequately investigate and prepare for Petitioner's capital sentencing hearing.
>
> II. Because of the Petitioner's profound brain damage and young age at the time of the offense, his execution would violate the Eighth Amendment.
>
> III. Petitioner was denied his right to a fair trial, effective assistance of counsel, and due process in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I Sections 1, 6, 9, 13, and 26 of the Pennsylvania Constitution because of the cumulative effect of the errors described in this amended petition.

After three evidentiary hearings, the PCRA court denied Robinson's petition on June 21, 2012. Following the PCRA court's denial, Robinson appealed to the PSC and presented three issues for review:

> I. Trial counsel rendered ineffective assistance by failing to investigate and present evidence of Mr. Robinson's severe brain damage, and post-sentence/appellate counsel were ineffective for failing to investigate and raise this issue.
>
> II. Counsel rendered ineffective assistance by presenting a diagnosis of anti-social personality disorder, supporting the Commonwealth's case for death, and post-sentence/appellate counsel were also ineffective for failing to raise the issue on post-sentence motion and appeal.
>
> III. Because of Appellant's profound brain damage, his execution would violate the Eighth Amendment.

The PSC rejected these claims. Robinson now brings forth this federal habeas petition, filed on March 24, 2014. In his federal habeas petition, Robinson presents the following issues for review:

I. Trial counsel rendered ineffective assistance by failing to adequately investigate and prepare for Petitioner's capital sentencing hearing; post-verdict counsel rendered ineffective assistance by failing to adequately investigate and raise the issue.

II. Counsel rendered ineffective assistance by presenting a diagnosis of antisocial personality disorder, supporting the Commonwealth's case for death, and post-sentence/appellate counsel were also ineffective for failing to raise this issue on post-sentence motion and appeal.

III. Because of Petitioner's profound brain damage, his execution would violate the Eighth Amendment.

IV. The Commonwealth's failure to timely disclose that a key Commonwealth witness had been hypnotized prior to her testimony and initially identified someone else as her attacker violated Petitioner's right to due process, right to a fair trial, and right to be free from cruel and unusual punishment; trial counsel rendered ineffective assistance.

V. The Court's failure to hold a hearing on the impact of hypnosis on the testimony of Ms. Sam-Cali and Mr. Stengel violated Petitioner's right to due process and a fair trial; trial counsel rendered ineffective assistance.

VI. The trial court erred in denying Petitioner's motion to sever; prior counsel ineffectively failed to litigate this claim at trial and on appeal.

VII. Petitioner was denied his right to a fair trial, to a fair and impartial jury and to due process in violation of his rights under the Sixth and Fourteenth Amendments because the jury pool from Lehigh County was saturated with highly prejudicial pretrial publicity. All prior counsel were ineffective for failing to properly litigate this issue at trial and on direct appeal.

VIII. Petitioner should be granted relief from his death sentence because he was deprived of his Sixth, Eighth, and Fourteenth Amendment rights as the result of multiple errors during the voir dire proceedings.

IX. Petitioner is entitled to relief because the trial court's failure to remove several jurors for cause deprived Petitioner of his rights to due process and a fair and impartial jury.

X. Petitioner was denied a fair and impartial jury in violation of his Sixth, Eighth, and Fourteenth Amendment rights where Lehigh County jury selection procedures systematically excluded minorities; prior counsel were ineffective.

XI. Petitioner was denied his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution where the Commonwealth introduced evidence of other bad acts allegedly committed by Petitioner as well as evidence of Petitioner's propensity for violence and bad character.

XII. Petitioner was denied his right to due process and the effective assistance of counsel because the Commonwealth repeatedly engaged in prosecutorial misconduct during both the guilty and penalty phases of the trial without objection by trial counsel. The trial court erred by permitting the introduction of this inadmissible and prejudicial evidence.

XIII. The trial court violated Petitioner's right to compulsory due process, a fair trial and his right to be free from cruel and unusual punishment by failing to grant a short continuance to allow a critical mitigation witness to arrive in court.

XIV. The trial court's instructions on the meaning of life imprisonment violated the due process clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution. Prior counsel were ineffective.

V. STANDARDS OF REVIEW

A. Habeas Standards

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) "'limits the power of a federal court to grant habeas relief to a person in custody pursuant to a state court judgment' to when the person's custody is 'in violation of the Constitution or laws or treaties of the United States.'" *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 265 (3d Cir. 2018) (quoting *Han Tak Lee v. Glunt*, 667 F.3d 397, 402 (3d Cir. 2012) quoting 28 U.S.C. § 2254(a)). Where a state court adjudicates the merits of a federal claim, a district court may grant habeas relief on that claim only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court explained the two components of § 2254(d)(1) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13. To determine whether a state court's application of federal law is "unreasonable," the Court must apply an objective standard, such that the relevant application "may be incorrect but still not unreasonable." *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (citing *Williams*, 529 U.S. at 409-10). The test is whether the state court decision "resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) (en banc).

With respect to § 2254(d)(2), "[f]actual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence." *Dellavecchia v. Sec'y Pa. Dep't of Corr.*, 819 F.3d 682, 692 (3d Cir. 2016) (alteration in original) (quoting *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000)). State court factual determinations are not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citing *Williams*, 529 U.S. at 411). Rather, "§ 2254(d)(2) requires that we accord the state trial court substantial deference." *Brumfield v. Cain*, 135 S .Ct. 2269, 2277 (2015). If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (alteration in original)).

However, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Brumfield*, 135 S .Ct. at 2277 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

If the state court did not address the merits of a federal claim, "'the deferential standards provided by AEDPA . . . do not apply,' and the Court 'must conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA.'" *Johnson v. Folino*, 705 F.3d 117, 127 (3d Cir. 2013) (quoting *Taylor v. Horn*, 504 F.3d 416, 429 (3d Cir. 2007); and *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001)). A state court decision is "an unreasonable application" of Supreme Court case law only "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Abdul-Salaam*, 895 F.3d at 265-66 (quoting *Williams*, 529 U.S. at 413). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id*. (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))).

B. Exhaustion of Remedies and Procedural Default

A habeas petitioner must "exhaust [] the remedies available in the courts of the State" before obtaining habeas relief. 28 U.S.C. § 2254(b)(1)(A). If the state courts have declined to review the merits of a petitioner's claim based on his failure to comply with an independent and adequate state rule of procedure, the claim is procedurally defaulted. *See Harris v. Reed*, 489 U.S. 255, 262-63 (1989). Although "[a] habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion[, as] there are no state remedies any longer 'available' to him," *Coleman v. Thompson*, 501 U.S. 722, 732 (1991), procedurally defaulted claims cannot be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id*. at 750.

For a claim to be exhausted, "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." *Tome v. Stickman*, 167 F. App'x 320, 322-23 (3d Cir. 2006) (quoting *Evans v. Court of Common Pleas, De. Cty., Pa.*, 959 F.2d 1227, 1231 (3d Cir. 1992)). A state prisoner must "fairly present" his federal claims to the state courts before seeking federal habeas relief by invoking "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) ("'Fair presentation' of a claim means that the petitioner 'must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.'")). The habeas petitioner bears the burden of proving exhaustion of all state remedies. *Boyd v. Waymart*, 579 F.3d 330, 367 (3d Cir. 2009) (quoting *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)).

"Exhaustion is not a jurisdictional requirement, but rather a rule of comity, and a federal court may in certain circumstances decide the merits of a claim despite non-exhaustion." *Evans*, 959 F.2d at 1231. A district court may deny a claim on its merits despite non-exhaustion "if it is perfectly clear that the applicant does not raise even a colorable federal claim." *Id*. (quoting *Granberry v. Greer*, 481 U.S. 129, 135 (1987)). Like the exhaustion requirement, the doctrine of procedural default is grounded in principles of comity and federalism. As the Supreme Court has explained:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (quoting *Coleman*, 501 U.S. at 732). To demonstrate cause and prejudice, the petitioner must show some objective factor external to the defense that impeded counsel's efforts to comply with some state procedural rule. *Slutzker v. Johnson*, 393 F.3d 373, 381 (3d Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To demonstrate a fundamental miscarriage of justice, a habeas petitioner must typically demonstrate actual innocence. *Schlup v. Delo*, 513 U.S. 298, 324-26 (1995).

C. Ineffective Assistance of Counsel Standards

A claim for ineffective assistance of counsel is grounded in the Sixth Amendment right to counsel, which exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). To prevail on a claim for ineffective assistance of counsel, a habeas petitioner must demonstrate both that (1) his attorney's performance was deficient, i.e., that the performance was unreasonable under prevailing professional standards, and (2) that he was prejudiced by his attorney's performance. *Strickland*, 466 U.S. 668, 687-88, 690-92. Counsel's deficiencies must be "so serious" that he "was not functioning as the 'counsel' guaranteed" to petitioner by the Sixth Amendment. *Id*. at 687. This standard is "highly deferential" to defense counsel, as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 689-90. It is presumed that "counsel's conduct might have been part of a sound strategy," and "if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the 'weak' presumption becomes a 'strong' presumption, which is 'virtually unchallengeable.'" *Thomas v. Varner*, 428 F.3d 491, 499-500 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 690).

The Court "may address the prejudice prong first '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.'" *United States v. Travillion*, 759 F.3d 281, 289 (3d Cir. 2014) (alteration in original) (quoting *Strickland*, 466 U.S. at 697). Prejudice is proven if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Consequently, counsel cannot be found to be ineffective for failing to pursue a meritless claim. *See United States v. Bui*, 795 F.3d 363, 366-67 (3d Cir. 2015) ("[T]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument.") (quoting *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999)).

In reviewing Robinson's ineffective assistance of counsel claims for post-conviction relief, the PSC applied Pennsylvania's ineffectiveness standard, *see Commonwealth v. Pierce*, 527 A.2d 973, 974-75 (Pa. 1987), which requires a defendant to establish that: (1) his underlying claim has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) resulting prejudice. The United States Court of Appeals for the Third Circuit has held that the *Pierce* standard comports with the clearly established federal *Strickland* standard. *Werts*, 228 F.3d at 203-04. As a result, Robinson must establish that the Pennsylvania courts' application of *Pierce* was "not only erroneous, but objectively unreasonable." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citations omitted). However, the Supreme Court has instructed that "[s]urmounting *Strickland*'s high bar is never an easy task." *Nguyen v. Attorney Gen. of N.J.*, 832 F.3d 455, 465

(3d Cir. 2016) (alteration in original) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Thus, the *Strickland* standard must be applied "'with scrupulous care,'" which makes it "all the more difficult" to "[e]stablish[ ] that a state court's application of *Strickland* was unreasonable under § 2254(d)." *Id*. (quoting *Premo v. Moore*, 562 U.S. 115, 122 (2011)).

V. ANALYSIS

A. Issue One

In Issue One, Robinson argues both his trial counsel and PCRA counsel were ineffective by failing to produce evidence of his brain damage throughout his life. Robinson argues his trial counsel was ineffective for failing to provide evidence of his brain damage to the jury during the penalty phase, which potentially could have mitigated his sentence. Additionally, Robinson objects to the factual determination issued by the PSC in light of the conflicting testimony regarding the records production. Furthermore, Robinson avers his post-verdict counsel was ineffective for failing to conduct an investigation into failure to investigation Robinson's juvenile records for evidence of neurological impairment. Lastly, Robinson asserts the PSA ruling was incorrect based upon the evidence presented of his brain damage throughout the PCRA litigation.

The United States Supreme Court's application of the *Strickland* standard with regard to defense counsel's duty to investigate mitigating evidence provides relevant guidance in this case. In *Williams v. Taylor*, 529 U.S. 362 (2000), the United States Supreme Court concluded that trial counsel was ineffective because his representation of the petitioner during the penalty phase of the trial did not meet professional standards and prejudiced the petitioner. *Williams*, 529 U.S. at 395–97.

The record in *Williams* established that trial counsel did not begin to prepare for the penalty phase until a week before the trial. *Id.* at 395. The record also demonstrated that trial counsel presented the testimony of three witnesses during the penalty phase: petitioner's mother, two neighbors who briefly described the petitioner as a "nice boy" and not violent, and a taped excerpt of a psychiatrist who explained that, during an earlier robbery, the petitioner removed the bullets from a gun to ensure no one was physically injured. *Id.* at 369.

However, the United States Supreme Court held that trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [petitioner's] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395. The Court also explained that trial counsel failed to introduce available evidence that petitioner was "borderline mentally retarded" or to seek prison records, which demonstrated petitioner's commendable acts and nonviolent behavior. *Id.* at 396.

Furthermore, the United States Supreme Court in *Williams* explained that although not all of the additional evidence was favorable, "the failure to introduce the comparatively voluminous amount of evidence that did speak in [petitioner's] favor was not justified by a tactical decision to focus on [petitioner's] voluntary confession." *Id.* The Supreme Court held that these omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the [petitioner's] background." *Id.*

Finally, the Supreme Court determined that the state supreme court's determination that petitioner was not prejudiced was unreasonable because it failed to evaluate all of the mitigation evidence available to trial defense counsel. *Id.* at 397–98.

In *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), the United States Supreme Court emphasized that the focus of the inquiry regarding whether counsel exercised reasonable professional judgment, "is not whether counsel should have presented a mitigation case," but, rather, "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [petitioner's] background was itself reasonable." The Court further explained that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Wiggins*, 539 U.S. at 527.

Based on this rationale, the United States Supreme Court in *Wiggins* concluded that trial counsel were ineffective for "abandon[ing] their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources" and "in light of what counsel actually discovered" in the records they did obtain. *Id*. at 524–25.

Specifically, the record in *Wiggins* demonstrated that trial counsels' investigation drew from three sources: (1) the results of a psychological testing, which revealed that petitioner had difficulty coping with demanding situations and exhibited features of personality disorder; (2) the presentence investigation report; and (3) records from Baltimore County Department of Social Services detailing petitioner's placements in multiple foster homes. *Id.* at 523.

Finally, after reweighing the evidence in aggravation against the totality of available mitigating evidence, the United States Supreme Court concluded that the petitioner was prejudiced by counsel's ineffectiveness. The Supreme Court reasoned that the petitioner's sentencing jury only heard one significant mitigating factor, and "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a difference [sic] balance." *Id.* at 537.

Furthermore, counsel's duty to investigate mitigating evidence persists even in the absence of support from petitioner. In *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), the United States Supreme Court held "that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."

Similarly, in *Porter v. McCollum*, 558 U.S. 30 (2009), the United States Supreme Court held that although the petitioner was fatalistic and uncooperative in trial counsel's investigation, counsel still must "conduct some sort of mitigation investigation." *Id*. at 40.

In *Rompilla*, trial counsel interviewed petitioner and five family members and consulted with three mental health experts in an effort to uncover mitigation evidence. *Rompilla*, 545 U.S. at 381–82. The petitioner's contributions were minimal and he "was even actively obstructive by sending counsel on false leads." *Id*. at 381. The state postconviction court characterized trial counsel's interviews of family members as "detailed." *Id*. at 381–82.

Defense trial counsel in *Rompilla* did not seek petitioner's education records, medical records, records of his adult and juvenile incarcerations, or the record of petitioner's prior conviction. *Id.* at 382. However, had trial counsel obtained the record of petitioner's prior conviction, "[t]he accumulated entries would have destroyed the benign conception of [petitioner's] upbringing and mental capacity" that trial counsel gleaned from only talking with the petitioner and his family members. *Id.* at 391.

The United States Supreme Court in *Rompilla* held that this ineffective assistance of trial counsel prejudiced the petitioner because "the undiscovered evidence, taken as a whole, might well have influenced the jury's appraisal' of [petitioner's] culpability." *Id.* at 393.

The United States Supreme Court has subsequently confirmed that *Williams*, *Wiggins*, and *Rompilla* present the appropriate standards for evaluating whether counsel's performance was deficient at the penalty phase. *Cullen v. Pinholster*, 532 U.S. 170 (2011). The Supreme

Court additionally confirmed that *Strickland* requires a case-by-case analysis of the evidence available and the circumstances faced by defense counsel when evaluating the reasonableness of counsel's investigation into mitigating circumstances. *Cullen*, 563 U.S. at 194-96.

In *Cullen*, the United States Supreme Court concluded that defense counsel was not ineffective in presenting sparse mitigating evidence because his client was so unsympathetic that counsel's decision to only call his client's mother at the penalty phase, in an attempt to create sympathy for his client's family, was a reasonable strategy in light of the circumstances. *Id*. at 195-96.

The Supreme Court in *Cullen* held that because of defendant's extensive criminal past and lack of remorse, counsel's reasonable decision to focus on creating sympathy for defendant's family made "particular investigations unnecessary," such as seeking mitigating evidence to "humaniz[e] the defendant." *Id*. Further, the Supreme Court explained that the state court reasoning that defendant was not prejudiced was entitled to deference because the additional available mitigation evidence largely duplicated the evidence already presented during the proceedings and, further, was of questionable mitigating value. *Id.* at 200.

The basis of Robinson's argument is premised upon the allegedly inconsistent testimony submitted by the parties during the PCRA phase of the litigation and the PCRA and PSA courts determination of those factual disputes. The Commonwealth asserts the school records were provided to Robinson while Robinson asserts he did not receive the records.

"When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015). Where a petitioner challenges an allegedly erroneous factual determination of the state courts, "a determination of a factual issue made by a State court shall be presumed to be correct [and the] applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Furthermore, "[w]hen a state court arrives at a factual finding based on credibility determinations; the habeas court must determine whether that credibility determination was unreasonable." *See Keith v. Pennsylvania*, 484 F. App'x 694, 697 (3d Cir. 2012) (citing *Rice v. Collins*, 546 U.S. 333, 339 (2006)).

i. Failure to provide records

Robinson first argues his trial attorneys, Carmen Marinelli and James Burke, failed to provide his school records to the defense expert, Dr. Robert Sadoff, which could have established brain damage evidence to be presented to the jury as mitigating evidence. The Commonwealth counters on the basis that the PCRA and PSA court correctly determined the factual dispute in favor of the Commonwealth because Burke testified he crossed the street from the Lehigh County Court of Common Pleas to the Allentown School District building to procure Robinson's records for expert review. The PSC credited trial counsel's testimony over Dr. Sadoff as follows:

> This case is unlike many other capital PCRA matters involving allegations of an ineffective failure to investigate, because here there is no doubt that penalty phase counsel obtained the school records. Counsel so testified at the PCRA hearing, and his account was consistent with his post-trial testimony more than ten years earlier. Counsel specifically remembered walking across the street to obtain the Allentown School District records and expressed a similarly clear recollection with regard to obtaining the other school records, including the records from Harbor Creek. N.T., 11/13/98, at 7–8. The critical factual inquiry before the PCRA court was whether counsel provided the records to Dr. Sadoff.
>
> The PCRA court, which had the opportunity to hear both penalty phase counsel and Dr. Sadoff testify, and observe their respective demeanors, specifically credited the testimony of penalty phase counsel over that of Dr. Sadoff. The PCRA court further explained that counsel's recollection was more specific and was supported by his testimony regarding his strategy at the penalty phase. The PCRA court noted that counsel's belief that Dr. Sadoff's role as an impartial expert was critical to

> mitigation lent credibility to counsel's statement that there was no reason why he would have obtained the records and not provided them to Dr. Sadoff. The PCRA court also found that penalty phase counsel "convincingly" testified that if Dr. Sadoff had suggested further testing, he would have pursued it since this was precisely the type of guidance he was seeking from his expert. But, no person, including Dr. Sadoff, ever suggested that further testing was warranted. In contrast to counsel's testimony, the PCRA court noted that Dr. Sadoff "had no independent recollection" of whether he had received the school records, but instead relied solely on the absence of a reference to school records in his report. The PCRA court also emphasized that Dr. Sadoff's report stated that he had reviewed records, "including the following," which left open the possibility that he had reviewed additional records that were not listed in his report. Although Dr. Sadoff attempted to explain that notation, the PCRA court was not obliged to credit the explanation. Finally, the PCRA court noted that Dr. Sadoff testified that he normally requested all relevant records and it seemed likely "that he would have requested" the school records at issue here, "or at least made a note regarding any gaps or omissions." PCRA court opinion at 10. To the PCRA court's specific explanation may be added the fact that guilt phase counsel corroborated that the defense had given all of the records they had to Dr. Sadoff.

Commonwealth v. Robinson (*Robinson II*), 623 Pa. 345, 368-70 (Pa. 2013).

Here, after review of the relevant transcripts, the PCRA and PSA courts did not issue an unreasonable credibility determination regarding the conflicting testimony of Burke and Dr. Sadoff. Robinson failed to establish the PCRA and PSA courts issued an unreasonable credibility determination by clear and convincing evidence. Indeed, the testimony by Burke, shows his specific testimony compared to Dr. Sadoff as follows:

> And when I say I served the subpoenas, too, I actually personally picked up the documentation, whether it was at St. Gabe's Hall, and driving down to Audubon, or whether it was walking across the street, which as I said was the most convenient of all, to the Allentown School District, but physically, physically, went out of my way to acquire these documents.

N.T. 12/17/2020, at 56. Conversely, Dr. Sadoff, testified he did not remember the facts of the case other than what his reports stated. N.T. 12/20/2010, at 30-31. The PCRA and PSA courts were faced with the arduous task of compiling testimony of an event that occurred approximately sixteen years prior. In this arduous task, they elected to support the testimony of the more specific Burke rather than the generalized Dr. Sadoff. This was not an unreasonable decision.

Robinson attempts to argue the alleged inconsistent testimony of Burke should warrant a reversal of the ruling of the PCRA and PSC courts. The PSC court addressed the alleged inconsistency as follows:

> As with his first argument, this theory was one for appellant to pose to the PCRA court, in the hope that the court would credit Dr. Sadoff's account over that of trial counsel, an account which itself was corroborated by co-counsel. It is no basis upon which this Court can set aside the PCRA court's credibility determination. Moreover, we are disinclined to credit the suggestion that a member of the bar should be deemed to have misrepresented the facts, under oath, when the accusation, as here, is based entirely upon speculation. The fact that penalty phase counsel wanted to limit the damaging information that was presented to the penalty phase jury does not ineluctably mean that he limited Dr. Sadoff's access to this information, much less that he falsified testimony under oath by testifying that he had provided the records.

Robinson II, 623 Pa. at 371. The PSC court's analysis on this alleged inconsistent testimony is not unreasonable. Both the PCRA and PSC courts needed to make a credibility determination. It is unlikely Burke and Marinelli would perjure themselves, and risk disbarment, by lying. As discussed, the courts elected for the more specific testimony. Robinson has merely restated this argument at all three levels. After review, the credibility determination was not unreasonable, and Robinson failed to meet his burden of clear and convincing evidence.

ii. Burke's alleged failure to review Robinson's school records

Robinson argues Burke was ineffective because he failed to properly review the school records, assuming he provided the school records to Dr. Sadoff, and inquire of Dr. Sadoff about potential "red flags" in the documents. The Commonwealth counters that Burke did review the records, did not notice any "red flags," and presented such documents to Dr. Sadoff for expert review. The PSC addressed this issue as follows:

> Appellant's alternative argument that trial counsel was ineffective for failing to independently recognize possible mental health issues arising from the decrease in appellant's scores on the two IQ tests, as well as the competency evaluation by Dr. Gross also fails. In light of the PCRA court's supported credibility determination that the records were provided to Dr. Sadoff, and Dr. Sadoff's unquestioned expertise, the Court would be hard pressed to fault trial counsel for failing to perceive a mental health "red flag" when the same information did not raise a red flag with the expert hired specifically for that purpose. This Court has made clear that in applying *Strickland*, courts must be careful not to conflate the roles and professional obligations of lawyers and experts, and cannot demand that counsel, who otherwise act reasonably (as, for example, by hiring a mental health expert), recognize psychological "red flags." *See* [*Commonwealth v. Lesko*, 15 A.3d 345, 382 (Pa. 2011)]. Appellant makes a bald assertion that counsel should have pointed out the decrease in the childhood IQ scores to his expert, but never explains why this should have raised a "red flag" to a lawyer, who is unschooled in mental health matters.

Robinson II, 623 Pa. at 373.

Indeed, Burke's own testimony supports that he analyzed all of Robinson's documents, including school and juvenile placements. N.T. 12/17/10, at 60. However, Robinson asserts this is insufficient and cites to *Winston v. Kelly*, 784 F. Supp. 2d 623 (W.D. Va. 2011) to support his theory. *Winston* was a capital case in which the defendant presented evidence that he was mentally retarded, a fact not presented to his state's post-conviction relief court. *Winston*, 784 F. Supp. 2d at 625-26. The defendant's counsel did not review his records which could show mental retardation; rather, he submitted those documents to an expert for review. *Id*. at 628. Consequently, the defendant's counsel failed to argue the defendant is mentally retarded and not subject to a sentence of death. *Id*. at 632. Thus, the court found the defendant's performance insufficient because:

> Winston's trial counsel essentially testified that had they seen Winston's 1997 mental retardation classification, evidence that they had gathered, they would have claimed that Winston was mentally retarded and not eligible for the death penalty under *Atkins* and that they had no strategic reason not to pursue such a defense. But they did not review the records because they simply shipped them to their expert, Dr. Nelson, and expected him to tell them what they needed to know. As the court views it, Dr. Nelson was not responsible for telling counsel what they needed to

> know. Rather, they were responsible for knowing what evidence they had and for asking him searching questions raised by that evidence.

Id. Here, the Court finds *Winston* inapposite because in *Winston*, counsel admitted to not reviewing his client's records. In this instance, Burke testified, and the PCRA and PSA courts credited, that Burke reviewed the records of Robinson. As Dr. Sadoff did not recognize any "red flags," Dr. Sadoff and Burke appear to have an implicit agreement that there are no "red flags" in the record of Robinson. Burke did not blindly send the documents to Dr. Sadoff for review like the counsel in *Winston*. Rather, he reviewed them as well.

Thus, the PCRA and PSA did not unreasonably rule that Burke reviewed the records of Robinson. Similar to issuing a credibility determination regarding whether Burke acquired Robinson's school records, the PCRA and PSA needed to issue a determination on the review of records. The determination that Burke reviewed the records was not unreasonable. Accordingly, the PCRA and PSA courts did not unreasonably rule Burke reviewed Robinson's school records.

iii. Evidence of brain damage

Robinson asserts his trial counsel should have presented evidence of brain damage as mitigating evidence. He asserts this evidence would have explained his conduct, showing he was incapable of making his own decisions and help further explain his anti-social personality disorder. Lastly, he asserts this evidence would have persuaded at least one juror not to find for the death penalty. The PSC addressed the issue as follows:

> In this case, even assuming that the evidence of brain damage (whether mild or severe) that appellant marshaled for PCRA review would have led his jury to find a second mitigating circumstance, *see* 42 Pa.C.S. § 9711(e)(3) (ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired), appellant must still establish, within a reasonable probability, that at least one juror would have found that the mitigating circumstances outweighed the aggravating circumstances. We agree with the PCRA court that appellant has not proven Strickland prejudice.

> This was an extremely difficult case for any attorney. Appellant brutally raped and murdered three women. The jury also heard from the surviving fourth victim, Denise Sam–Cali, who identified appellant as the man who raped and attempted to kill her in the month-long period between appellant's second and third rapes and murders. All of the crimes occurred within a year, and in the same general area of Allentown. One of the murders involved a fifteen-year-old girl. The jury found appellant guilty of all charges, including the three murders. Thus, before the penalty phase began, the jury knew that appellant was a serial rapist and killer, a member of one of the most dreaded and notorious classes of killers in today's society.
>
> During the penalty phase that followed, the jury had available to it not only the grisly facts surrounding the serial rapes and murders and the assault on Denise Sam–Cali, but was also presented with evidence related to appellant's assault on a school teacher, which was introduced to establish the separate significant felony history aggravator. Thus, the evidence of the murders of Ms. Burghardt and Ms. Schmoyer, as well as the two assaults, provided evidence supporting the jury's determination that appellant had a significant history of violent felonies. Additionally, the jury was presented with evidence, and ultimately found, that two of the murders involved the aggravating circumstance of torture.
>
> On the other side of the equation is the mitigator the jury already found, while still returning three death sentences, now supplemented by appellant's proffer respecting brain damage. Notably, however, any defense expert testimony as to brain damage would have been subject to cross-examination and rebuttal, which may have undermined or diminished the force of the mitigation, as demonstrated by the counter-testimony offered by the Commonwealth at the PCRA hearing. Within this context, we see no error in the PCRA court's finding that there was not a reasonable probability that expert opinion evidence respecting appellant's brain damage would have resulted in a different weighing and a different penalty verdict. The aggravating circumstances related to the murder of Jessica Jean Fortney were grievously serious, and embraced the other two rapes and murders and the attack on Ms. Sam–Cali. *See*, *e.g.*, *Lesko*, 15 A.3d at 383–84 (discussing *Smith v. Spisak*, 558 U.S. 139, 154–55 (2010) and expressing that where there is substantial aggravating evidence it may be particularly difficult to prove *Strickland* prejudice based on potential mitigation evidence submitted on collateral review); *see also Gibson*, 19 A.3d at 531. This is not a case where a verdict of death was only sufficiently supported by the record; the death sentence for murdering Ms. Fortney was imposed with "overwhelming record support." *See Lesko*, *supra*. Accordingly, appellant has not established that he was prejudiced by any alleged failure of trial counsel in this regard. For this independent reason, his derivative Sixth Amendment claim as to appellate counsel also fails.

Robinson II, 623 Pa. at 375-76.

Here, the PSC did not unreasonably apply clearly established federal law in determining the status of Robinson's brain damage evidence. Robinson asserts this evidence would convince at least one juror to not seek the death penalty because he could not control his emotions; however, the evidence produced at trial shows Robinson possessed the ability to plan, stalk, and murder numerous victims. As the PSC correctly noted, the jurors heard strong evidence of Robinson's actions, and found in favor of the aggravating circumstances. Moreover, Dr. Sadoff, the person who personally analyzed Robinson at the time of trial, did not see Robinson's IQ or mental health as an issue. *See* PCRA Opinion, p. 17. Moreover, Robinson's own expert, Dr. Martell, admitted Robinson was still capable of performing some very complex tasks and his impairments did not directly mitigate the offenses for which he was convicted. Thus, the jury would have seen this whole picture, and Robinson's assertion that this evidence would have been a cure-all would have been belied by the record, especially when his own experts admit he was capable of making his own decisions.

Furthermore, Robinson's reliance on cases such as *Winston* are inapposite. Unlike in *Winston*, Robinson's defense counsel did argue Robinson's mental handicap of anti-social personality disorder. The attorneys in *Winston* failed to broach the subject of their client's mental illness. Robinson's own expert stated he did not notice any mental health issues. The PSC correctly credited such testimony. Accordingly, the PSC did not unreasonably apply federal law in determining Robinson's brain health evidence.

iv. Finding regarding neurological testing

Robinson asserts because his trial counsel did not provide his school records to Dr. Sadoff that Dr. Sadoff did not see the twenty-six-point drop in Robinson's IQ score. Robinson's IQ score dropped from 126 to 100. Robinson argues if Dr. Sadoff saw this drop, he would have recommended neurological testing. However, this Court previously stated that it was not unreasonable for the PSC to rule that Robinson's trial counsel did provide the relevant documents to Dr. Sadoff for review. This was a credibility determination made by the PSC and it was not unreasonable. Nonetheless, the PSC addressed the issue of neurological testing as follows:

> The PCRA court's tangential observation respecting the availability of neuroimaging in 1994 indeed did not consider whether neuropsychological testing was available, as appellant notes. Given that the court's primary finding respecting the delivery of the records to Dr. Sadoff was supported, however, that error is of no moment.
>
> In any event, we note that, as frequently seems to be the case with mental health experts, the experts expressed disagreement over the significance of a decrease in IQ testing scores as a "red flag" that would have placed an expert on notice that further neuropsychological testing was warranted. Drs. Sadoff and Martell suggested that the decrease in performance in the second IQ test would have indicated further testing, but the Commonwealth's experts explained that such a decrease could be attributed to external factors, such as appellant's educational experience, given that he was inattentive in school and placed in special classes because of his behavior, and his desire to perform on the test. Additionally, all of the experts generally agreed that IQ is not necessarily an indicator of brain damage. Given its mistaken focus on neuroimaging, the court below did not resolve this dispute; but, as noted, that error is of no moment given that the predicate fact necessary to make this second step relevant was not established.

Robinson II, 623 Pa. at 374, n. 8.

Here, the PSC did not unreasonably apply federal law. Though Robinson's IQ dropped from 126 to 100, but both of these scores are within the normal range. While Robinson focuses on the drop, he avoids the argument that it is still within the normal range. Additionally, the PSC needed to make a determination amongst competing experts. Dr. Sadoff, who Robinson relies upon heavily in his argument, did not remember analyzing Robinson at the time of his trial; thus, he needed to utilize his records from the years prior at Robinson's trial. However, the PSC correctly noted all of the experts generally agreed that IQ is not necessarily an indicator of brain damage. In any event, Robinson's IQ is normal. Moreover, this Court noted earlier that Robinson's brain damage would not be cure-all because there was strong evidence that Robinson planned and performed numerous murders. The jurors heard this evidence and elected for aggravating factors as a result. Accordingly, the PSC did not unreasonably apply federal law in its ruling regarding the neurological testing of Robinson.

v. Natural drop in IQ

Robinson asserts the PSC incorrectly ruled his IQ drop was due to external factors. The PSC addressed the issue as follows:

> Furthermore, the PCRA court explained there was some dispute among the proffered experts as to whether the drop in IQ reflected in the two test scores was indicative of possible brain damage, or whether the decrease was attributable to external factors other than brain damage. In any event, the PCRA court was ultimately persuaded that appellant could not establish that the outcome of the penalty proceeding would have been altered given the magnitude of his crimes. The PCRA court summarized its rejection of this ineffectiveness issue as follows:
>
> In sum, [appellant]'s claim for relief hinges on the drop in his IQ scores between 1981, when he was six years old, and 1989, when he was fourteen years old. Although all experts agree to some extent that this diminution is "significant," the "low" score of 100 may have been caused by external factors, such as a poor education, during the intervening period as opposed to some cognitive impairment of [appellant]'s brain. In any event, even the score of 100 indicates a "normal" brain. Under those circumstances, it cannot be said that Dr. Sadoff, an experienced clinical psychiatrist, should have referred [appellant] for additional testing, much less that trial counsel was somehow ineffective for relying on Dr. Sadoff. Nor has it been established that the brain imaging studies subsequently used by [appellant's expert] in his evaluation of [appellant], would have been available to test and diagnose [appellant] in 1994 even if a consensus regarding a diagnosis does exist under present day standards. More to the point, in view of the overwhelming weight of the aggravating circumstances in this case, in the form of brutal serial rape and murder, and in light of the credible expert witness testimony presented by the Commonwealth regarding [appellant]'s manifest ability to utilize executive brain function to carefully plan and execute these crimes, there is no probability that the calculus of any reasonable juror would have been altered by the claims of front lobe impairment upon which [appellant] now bottoms his argument.
>
> PCRA court opinion, 6/21/12, at 17–18.

Robinson II, 623 Pa. at 355-56.

Here, the PSC did not unreasonably rule on Robinson's IQ score, which is in the normal range. The PSC utilized the term "may," not "shall." The PSC issued this determination because the of inconclusive expert testimony and legal arguments regarding this IQ drop. Nonetheless, this drop in IQ is 100, a normal score. This is indicative of a normal brain. As the experts were inconclusive, the PSC could not issue a firm decision on the IQ drop. But, the drop is not as catastrophic as Robinson asserts. His IQ level still remained at normal levels. The expert testimony showed he was capable of making his own decisions. This was established as Robinson planned the multiple murders of which he was accused. Furthermore, in light of the strong aggravating testimony, the jurors would have heard a drop in IQ, then realize through rebuttal evidence that the score was still in the normal range. Robinson's theory relies upon the hypothetical that his counsel should have further inquired as to the status of Robinson's brain and that status update would have persuaded the jury. This hypothetical is belied by the record, and Robinson's own expert Dr. Sadoff. Accordingly, the PSC correctly ruled regarding the drop of Robinson's IQ score, which remained in the normal range.

vi. The testimony of Dr. Martell and Dr. Gur

Robinson asserts the PSC incorrectly credited the testimony of the Commonwealth's experts over his experts, Dr. Martell and Dr. Gur merely because the Commonwealth presented contrary testimony. However, it is squarely within the role of the PCRA court and PSC to rectify conflicting testimony and issue a determination. Issue One is laden with factual determinations the PCRA court and PSC needed to determine; this issue is no different. Robinson's brain damage is not as egregious as he claims, and his IQ score is within the normal range as the expert who analyzed him at the time of trial found no issues worthy of his brain damage. Accordingly, the PSC did not unreasonably rule by crediting the testimony of the Commonwealth's expert over Dr. Martell and Dr. Gur.

vii. Ineffectiveness of post-verdict counsel

Robinson asserts that post-verdict counsel was also ineffective for: (1) failing to conduct an investigation into Robinson's mental health, (2) failing to speak with Dr. Sadoff, (3) failing to gather Robinson's records besides his probation documents, (4) being unaware of Robinson's IQ drop, and (5) failing to present mitigating evidence contained in the Allentown School District and Harbor Creek records during the post-verdict evidentiary hearings. Robinson argues that but for these omissions, post-verdict counsel would have argued that trial counsel was ineffective for failing to investigate and present evidence of Robinson's alleged brain damage.

As is discussed above, the Court agrees with the state court's decision that there was no merit to Robinson's argument that trial counsel was ineffective for failing to pursue this course. Post-verdict counsel cannot be ineffective for failing to pursue this meritless claim. Given the conclusion that trial counsel provided Dr. Sadoff with the records indicating the IQ drop discussed above, Robinson's own expert, Dr. Sadoff, failed to identify "red flags," thus creating an implicit agreement amongst Dr. Sadoff, trial counsel, and post-verdict counsel that there were not any "red flags." Besides a conclusory remark on this claim, Robinson presents no additional evidence to support his claim against post-verdict counsel. The state court's ruling was not unreasonable in light of the facts presented.

B. Issue Two

In Issue Two, Robinson argues his trial counsel rendered ineffective assistance of counsel by introducing evidence of his antisocial personality disorder (APSD) because this type of evidence actually contains aggravating value and not mitigating value. The Commonwealth argues Robinson's trial counsel pursued every option, including APSD, because the Commonwealth would have used it against Robinson. The PSC addressed the issued as follows:

> Appellant's argument, conveniently enough, completely ignores penalty phase counsel's explanation for presenting Dr. Sadoff's testimony. Counsel was aware of the potentially damaging nature of the testimony, but counsel also believed that if he did not provide Dr. Sadoff's diagnosis to the jury, the Commonwealth would have. Counsel further explained that he wanted Dr. Sadoff to testify so the jury would hear an "outside, impartial voice:" "[Dr. Sadoff] was going to synthesize much of the background of [appellant]'s life, and also explain it to the jury." Additionally, counsel believed the diagnosis would explain appellant's life circumstances and his reaction to those circumstances, which made it one part of the broader picture that was appellant's life. In counsel's view, the diagnosis was only one facet of appellant's life history, which also included his impoverished background, his lack of appropriate role models, and his drug and alcohol abuse. N.T., 12/17/10, at 36, 42, 46–47.
>
> The PCRA court, which did not address the claim at length, credited counsel's explanation, noting that trial counsel was aware that the diagnosis would be revealed on cross-examination, and so he determined to deal with it "proactively in the full context of Dr. Sadoff's professional medical explanation," and attempt to use it as best he could. *See* PCRA court opinion, 6/21/12, at 7–8.
>
> As in all matters where counsel's effectiveness is being challenged, this Court must be careful to assess counsel's performance without the distortion of hindsight, and must instead reconstruct the actual circumstances under which counsel's decisions were made. *Commonwealth v. Birdsong*, 24 A.3d 319, 333 (2011).
>
> Penalty phase counsel offered reasoned explanations for his strategy, which are supported by the record, and were credited by the PCRA court. Counsel believed that Dr. Sadoff's testimony would give jurors a perspective that appellant's family members and friends could not offer. However, he also knew that if he presented Dr. Sadoff's affirmatively helpful testimony, he necessarily had to address the antisocial personality disorder diagnosis. This was not a circumstance created by counsel, but a practical reality arising from the truth of the type of being his client is. Thus, counsel was left with a difficult choice of presenting no "impartial and objective" expert evidence through the testimony of Dr. Sadoff, and therefore limiting the jury's understanding of the family and historical testimony that was presented, or presenting Dr. Sadoff's testimony, including the diagnosis, to present a full human picture of his client, while attempting to make use of the antisocial personality disorder diagnosis as best he could. He chose the latter course of action, which falls in the realm of strategy.
>
> Now, with the aid of hindsight, appellant suggests that trial counsel was constitutionally obliged to proceed differently, and pursue a half-truth and an

> incomplete picture. That is indeed one possible strategy. But, in assailing penalty phase counsel, appellant proceeds upon the questionable and simplistic assumption that mental health diagnoses may, indeed must, be categorized as a matter of law: they either provide aggravating evidence or mitigating evidence. The reality obviously is more complex, and counsel was not precluded from assessing the situation in light of the complexity. The Commonwealth in the penalty phase seeks death; a strategy that seeks to secure life in prison by presenting a full picture of the subject of the proceeding, with an explanation for his behavior, is not inherently unreasonable.
>
> Appellant complains that the evidence was prejudicial because a person with antisocial personality disorder commits crimes, and the evidence may have reinforced in the minds of the jurors that appellant was an out of control individual who was dangerous. But, surely the jury had enough before it from the facts presented to them concerning appellant's three rapes and murders, and his fourth rape and attempted murder, to already draw that conclusion.
>
> In any event, even with the aid of hindsight, any court would be hard pressed to find counsel ineffective based upon his chosen course of action in these circumstances, and no reasonable court could suggest that counsel's chosen course establishes Strickland prejudice. Without the testimony of Dr. Sadoff, appellant's case in mitigation would have been paltry, especially in the face of the mountain of aggravating circumstances. Had counsel acted as appellant now says he should have, counsel no doubt would be faulted for failing to present Dr. Sadoff's expert testimony. Penalty phase counsel appreciated, and best expressed, the dilemma himself when he said, "We didn't retain [Dr. Sadoff] for purposes of having him opining [sic] that he was an anti-social personality disorder, thanks for the diagnosis, I can't wait to run with this to the jury," but the diagnosis "came out. It had to be explained." N.T., 12/17/13, at 51–52. Accordingly, appellant has not established that counsel was ineffective for presenting the testimony of Dr. Sadoff, which necessarily included the antisocial personality disorder diagnosis.

Robinson II, 623 Pa. at 378-81.

Here, counsel was not ineffective in presenting testimony of Robinson's APSD. Burke's expert, Dr, Sadoff, testified at Robinson's PCRA hearing as follows addressing APSD as a potential mitigating factor at the time of Robinson's trial: "Usually today, however, it's not. Although people are still writing about it as a mitigating factor in death penalty cases." N.T. 12/20/10, at 29-30. Burke testified on his strategy at Robinson's PCRA hearing for discussing the APSD as follows:

> I had to address it, it was coming out. And I felt that I could – I could ameliorate it, and I could explain it better by broaching it . . . . [Dr. Sadoff], found [the APSD], by the way, and it's in the initial report, as a mitigating factor . . . . I was clear to say statutorily, it's not an aggravator, and you have to take it for what it's being offered.

N.T. 12/17/10, at 36-38. Thus, Burke was not ineffective for electing to broach the subject of Robinson's APSD in order to lessen the Commonwealth's attack. The Commonwealth would have utilized Robinson's APSD against him, and it would be incumbent upon Burke to counter the Commonwealth's attack. He countered their attack by electing to discuss the APSD with Dr. Sadoff.

Moreover, an attorney who discusses their client's potentially negative information is not ineffective. It is a trial strategy utilized to lessen the damage of opposing counsel's argument using that information. Law schools throughout the country teach this tactic to trial advocacy students. By discussing the client's potentially negative information, an attorney helps to control the narrative of that information and shows to the jury that no information is being concealed. Accordingly, Burke was not ineffective by discussing Robinson's APSD nor were the PCRA and PSA courts unreasonable in ruling Burke was not ineffective.

C. Issue Three

In Issue Three, Robinson asserts he cannot be sentenced to death because of his brain damage. Robinson acknowledges that he is not mentally retarded, and thus ineligible for the death penalty under *Atkins v.* Virginia, 536 U.S. 304 (2002), and that he was not under the age of 18, and thus ineligible under *Roper v. Simmons*, 543 U.S. 551 (2005). However, he urges the Court to extend the reasoning of these cases to him because he belongs to a class of individuals who suffer from severe brain damage. The PSC addressed the issue as follows:

> This Court has broadly stated that questions relating to the legality of sentencing are not waivable. *Commonwealth v. Aponte*, 855 A.2d 800, 802 n. 1 (2004).

Additionally, the *Atkins* Court explained that "the [United States] Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender," 536 U.S. at 321, 122 S.Ct. 2242, leaving little doubt that actual *Atkins* claims implicate the legality of sentencing. The fallacy of appellant's argument, of course, is that he does not have an *Atkins* claim or a *Roper* claim. Appellant acknowledges that the U.S. Supreme Court has not expanded the decision in *Atkins* to encompass, as a class, murderers proven to be brain damaged by a preponderance of the evidence, and exempt them from the death penalty. Nor has there been a trending consensus in state legislatures to exempt murderers like him from capital punishment. The right he speaks of is not embraced by *Atkins*, and indeed, has not been recognized by any governing authority. Thus, under the current state of Eighth Amendment jurisprudence; appellant's judgment of sentence was not illegal on the ground he specifies.

Atkins is a controlling decision of the U.S. Supreme Court on a federal question. This Court has rejected requests to extend the reach of *Atkins* beyond the necessary commands of the decision. For example, in *Commonwealth v. Baumhammers*, 599 Pa. 1, (2008), the defendant asked this Court on direct appeal to expand the *Atkins* decision to encompass mentally ill defendants. The Court rejected the request, noting that we had twice before rejected similar arguments, *see Commonwealth v. Faulkner*, 595 A.2d 28, 38 (1991) and *Commonwealth v. Fahy*, 516 A.2d 689 (1986), and that *Baumhammers* did not advance a "compelling argument" to reconsider those decisions. *Id*. at 96–97. We have also declined to extend other aspects of *Atkins* beyond the necessary commands of the decision, when presented with preserved claims on direct appeal. *See Commonwealth v. Sanchez*, 36 A.3d 24, 54–59 (2011) (nothing in *Atkins* requires mental retardation determination to be made pre-trial by judge and Court will not implement such requirement). Likewise, in passing upon corollary questions arising from the retroactive application of *Atkins* on PCRA review, we have declined to recognize derivative, cognate federal constitutional rights. *Commonwealth v. Bracey*, 986 A.2d 128, 145 (2009) (no right to jury trial on *Atkins* claim presented on post-conviction review); *accord Commonwealth v. Cunningham*, —— Pa. ——, 81 A.3d 1, 10–11 (2013) (PCRA appeal; holding that U.S. Supreme Court's decision in *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) does not apply retroactively to defendants whose judgments of sentence were final at time of *Miller* decision; noting this Court's practice of proceeding no farther than required by extant, governing federal precedent).

Appellant's argument in this case goes beyond the argument made in *Faulkner* and *Baumhammers* because this is a collateral attack upon his conviction. In essence, appellant asks that his collateral appeal be made the vehicle by which to establish a new federal constitutional right that retroactively makes his sentencing claim both viable and non-waivable.

In general, the proper way to seek to secure innovations in constitutional law is upon direct review, not via the PCRA. At any time before he was tried or on post-

> verdict motions, appellant could have claimed that the Eighth Amendment should be expanded to exempt murderers in his particular circumstances from capital punishment. That would raise and preserve a federal claim he could seek to litigate through this Court as of right, and to the U.S. Supreme Court, in its discretion. He did not do so.
>
> Instead, appellant is left with raising the issue on collateral review under the PCRA. But, the PCRA's eligibility provisions provide no easy harbor for the recognition, or creation, of new constitutional rights. The PCRA provides a mechanism for vindicating existing constitutional rights, and it also provides a mechanism for implementing new constitutional rules of retroactive application, no matter when the new rule is established. See 42 Pa.C.S. § 9545. But, the new rule has to exist already. Simply stated, by its terms, the PCRA does not deem cognizable claims such as appellant's that seek to innovate the new substantive federal constitutional rule that the prisoner would then have applied to himself retroactively. In short, his claim, even if deemed nonwaivable, is not cognizable under the PCRA. Appellant's theory never comes to terms with the requirements of the PCRA.
>
> Accordingly, we conclude that this Court has no authority under the PCRA to create and apply the new federal constitutional right appellant seeks to innovate and have retroactively applied to him to undo his lawful, statutory penalty. If such a right is someday recognized and made retroactive, and appellant's death sentence has yet to be executed, he can file a serial PCRA petition and avail himself of Section 9545 of the Act, as defendants actually affected by the new death eligibility rules in *Atkins* and *Roper* have done.

Robinson II, 623 Pa. at 381-85.

No legitimate penological purpose is served by executing a person with an intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 317, 320 (2002). To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Rehabilitation, it is evident, is not an applicable rationale for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Those with an intellectual disability have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . .

[which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. *See id*., at 319, 122 S.Ct. 2242 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution").

In *Atkins*, the Supreme Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70. That is not the issue here, contrary to what Robinson asserts. Nonetheless, *Atkins* first cited the definition provided in the DSM–IV: "'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70." *Atkins*, 536 U.S., at 308, n. 3 (citing Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)). The Supreme Court later noted that "'an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'" *Atkins,* 536 U.S., at 309, n. 5. Furthermore, immediately after the Court declared that it left "to the States the task of developing appropriate ways to enforce the constitutional restriction," *id*., at 317, the Court stated in an accompanying footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions." *Id.*

Atkins further states, those persons who meet the "clinical definitions" of intellectual disability "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. at 318. Thus, they bear "diminish[ed] . . . personal culpability." *Id*. The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM. *See* Diagnostic and Statistical Manual of Mental Disorders 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior").

Here, though Robinson has argued extensively about the 26 point drop in is IQ, from 126 to 100, does not place him in the class of individuals captured under *Atkins*. This drop, while unfortunate, is still within the normal range. The Supreme Court in *Atkins* addressed IQ scores of the mild mental retardation stage. Robinson's score of 100 does not come close to this stage. If Robinson's score was close to the beginning of being considered mild mental retardation, then his argument citing to *Atkins* could contain merit; however, it does not. Thus, Robinson's reliance upon *Atkins* is inapposite as his IQ is normal.

Similarly, the Supreme Court's holding in *Roper*, which barred the execution of juveniles, does not apply to Robinson. Robinson was over eighteen when he murdered Jessica Jean Fortney. Indeed, Robinson already received the benefit of *Roper*. Robinson was under eighteen when he murdered Joan Burghardt. Though he was initially sentenced to death for the murder of Burghardt, that sentence was vacated and the state court resentenced him to life in prison.

Robinson acknowledges, as he must, that none of these cases is directly on point. Rather he asks this Court to extend the reasoning of those cases to apply to him, relying on a 2006 statement from the American Bar Association:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

Even if we were to apply this standard, Robinson has not persuaded us that the reasoning should apply to him. The expert testimony presented establishes Robinson was still capable of performing very complex tasks. Indeed, the testimony at trial establishes that, Robinson stalked numerous victims before murdering them. This shows the ability to put a plan into action. Accordingly, Robinson has not established he has sufficient brain damage to warrant the relief he seeks.

D. Issue Four

In Issue Four, Robinson argues the Commonwealth's failure to timely disclose that Commonwealth witness Sam-Cali had been hypnotized and provided inconsistent statements is a *Brady*[1] violation and Robinson's counsel was ineffective for failing to object to this testimony.

i. Alleged *Brady* violation

Under *Brady v. Maryland*, the prosecution must produce to the defendant evidence that is material to either guilt or punishment, irrespective of good or bad faith. 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 676 (1985) (extending *Brady* to impeachment and exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 154 (1972). "A *Brady* violation occurs if: (1) the evidence at issue is favorable to the accused, because either

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

exculpatory or impeaching; (2) the prosecution withheld it; and (3) the defendant was prejudiced because the evidence was 'material.'" *Breakiron v. Horn*, 642 F.3d 126, 133 (3d Cir. 2011).

"Evidence is material if there is a reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different." *Wilson v. Beard*, 589 F.3d 651, 665 (3d Cir. 2009). "A 'reasonable probability' of a different result is shown when the government's suppression of evidence 'undermines confidence in the outcome of the trial.'" *Id*. (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The Third Circuit has further explained that "evidence may be material if it could have been used effectively to impeach or corral witnesses during cross-examination." *Johnson v. Folino*, 705 F.3d 117, 129-30 (3d Cir. 2013). To that end, the Third Circuit has instructed district courts to consider not only the content of the evidence at issue but also "where it might have led the defense in its efforts to undermine [a particular witness]" when determining whether evidence is "material." *Id*. at 131.

Once a court has determined that the evidence is *Brady* material, the next inquiry in assessing whether there is a *Brady* violation is "whether suppression of that evidence undermines confidence in the outcome of a criminal trial, i.e., whether the evidentiary suppression constitutes a *Brady* violation." *Smith v. Holtz*, 210 F.3d 186, 196 (3d Cir. 2000); *see also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (explaining that nondisclosure of *Brady* material only evolves into a *Brady* violation where the nondisclosure is "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). The Third Circuit has explained that "[t]o constitute a *Brady* violation, the nondisclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984).

As a general matter, *Brady* material must be disclosed in time for its effective use by the defendant at trial. *See United States v. Higgs*, 713 F.2d 39, 43-44 (3d Cir. 1983). To that end, the Third Circuit has explained that "[w]here the government makes Brady evidence available during the course of a trial in such a way that a defendant is able to effectively use it, due process is not violated and *Brady* is not contravened." *United States v. Johnson*, 816 F.2d 918, 924 (3d Cir. 1987).

In *Higgs*, the Third Circuit addressed when *Brady* material used for impeachment purposes must be provided to the defendant. There, the district court ordered the government to provide the defendant with information before trial about any witnesses who had received immunity or leniency in exchange for their cooperation with the government. *Id*. at 40. The government objected, citing threats to the witnesses' lives. *Id*. In determining when this material had to be disclosed, the Third Circuit focused its inquiry on "what information ha[d] been requested and how it [would] be used by [the defendant]." *Id*. at 43-44. The Third Circuit held that there is "[n]o denial of due process . . . if *Brady* material is disclosed to [the defendant] in time for its effective use at trial." *Id*. at 44. For impeachment purposes, the Third Circuit held that a defendant's "right to a fair trial will be fully protected if disclosure is made the day that the witness testifies." *Id*.

More recently, the Third Circuit found that there was no *Brady* violation where the jury had heard additional cross-examination in light of belatedly disclosed evidence. *United States v. Claxton*, 766 F.3d 280, 304 (3d Cir. 2014). There, the Government did not disclose certain letters that allegedly constituted *Brady* material to the defendant until trial. *Id*. at 303-04. In that case, the district court had allowed additional cross-examination of the relevant witnesses and provided defense counsel with extra time to prepare for additional cross-examination. *Id*. at 304.

Under those circumstances, the Third Circuit concluded that due process had not been contravened. *Id*.

The PSC addressed the alleged *Brady* violation as follows:

> Moreover, prior to this trial, Appellant had already pled guilty to multiple crimes (including burglary, aggravated assault, and attempted homicide) in relation to the incidents at the Sam–Cali residence in June and July of 1993. Accordingly, Appellant admitted to perpetrating these crimes. *See, e.g., Commonwealth v. Anthony*, 504 Pa. 551 (1984) (observing that "[a] guilty plea is an acknowledgement by a defendant that he participated in the commission of certain acts with a criminal intent . . . [and, thus, h]e acknowledges the existence of the facts and the intent"); *Commonwealth v. Papy*, 436 Pa. 560 (1970) (noting that the circumstances of the case fell within a rule of law that "a [defendant's] plea constitutes an admission of his guilt and all of the facts averred in the indictment"); *see also Commonwealth ex rel. Walls v. Rundle*, 198 A.2d 528, 529 n. 1 (1964). Therefore, Appellant could not impeach Sam–Cali on the basis that she gave the police the name of another possible suspect during her initial interviews. Hence, because the evidence at issue was neither exculpatory nor tended to impeach another, there was no *Brady* violation.
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> . . . .
>
> We will initially address the Commonwealth's purported failure to disclose the hypnosis of the witnesses at issue. Following his arrest, on August 4, 1993, a letter from the Commonwealth notified Appellant that Sam–Cali underwent hypnosis during the investigation. Appellant signed for the letter and admitted receiving it. 49 N.T., 11/24/98, pp. 76–77. As it relates to the hypnosis of Stengel, during the post-sentencing hearing, Appellant's counsel, Carmen Marinelli, explicitly testified that during the pre-trial stages of this case, he was informed that Stengel was hypnotized. N.T., 11/13/1998, pp. 36–37. Given these facts, it is clear that, prior to trial, the Commonwealth indeed disclosed to the defense that two of its potential witnesses were hypnotized and there was no *Brady* violation.

Robinson I, 581 Pa. at 220-23.

Here, no *Brady* violation occurred. Robinson received, and acknowledged, receipt of the Commonwealth's document regarding the hypnosis. It was incumbent upon Robinson to provide documents to his counsel for his defense. At the time the document was produced, Robinson was unrepresented.[2] Notwithstanding the proper production of the document, and before Sam-Cali testified, the Commonwealth notified Robinson of her testimony and offered to provide transcripts. Thus, Robinson should have had ample opportunity to cross-examine Sam-Cali. The Commonwealth offered such transcripts before Sam-Cali took the stand. The Third Circuit has noted due process is not violated if disclosure is made the day the witness testifies. *Higgs*, 713 F.2d at 44. The Commonwealth disclosed such evidence before Sam-Cali took the stand.

Robinson further argues that the Commonwealth withheld Sam-Cali's statement to police that named Sal Rosado as a person of interest. The evidence presented at trial shows, however, that Sam-Cali notified police Sal Rosado could be her attacker, but it was determined Rosado could not be her attacker because he did not fit the description. As the Commonwealth explained in their response, "Sam-Cali never identified Mr. Rosado as her attacker. In fact, she identified him as *not* being the attacker. She merely suggested his name to the police." *See* ECF No. 44 at 32. Additionally, the jury would have seen physical evidence of Robinson's DNA at the scene at the crime. Accordingly, the PSC correctly ruled no *Brady* violation occurred as Robinson received the document and he had an opportunity to cross-examine Sam-Cali.

ii. Ineffective assistance for failing to object

Robinson argues that if counsel was aware of this information, then he was ineffective for failing to object to the admission of the hypnotized testimony without demanding that the

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[2] In the present pleadings, Robinson asserts that he was represented at the time that this letter was sent. *See* ECF No. 33 at 99-100. The Commonwealth has specifically explained that Robinson was not represented at the time that the letter was sent. *See* ECF No. 31. If Robinson had wanted to challenge this point, the time for such challenge was during direct appeal when he presented this claim. But he made no effort to raise this argument at the time, preferring instead to argue that it did not matter if he was represented. The Court must evaluate the state court's determination based on the record before it. *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011).

Commonwealth comply with all of the *Smoyer* factors. Upon review, the PSC thoroughly analyzed the *Smoyer* factors in Sam-Cali's testimony and concluded that the prosecutor complied with the state requirements on this point. Additionally, as the state court explained, trial counsel affirmatively did not want Sam-Cali's hypnosis to be brought to the attention of the jury. Counsel's strategic decisions are virtually unchallengeable on appeal. *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009).

Assuming arguendo that Robinson's trial counsel should have objected, the failure to object was not prejudicial. As discussed in the analysis of Robinson's *Brady* claim, Sam-Cali merely suggested Rosado's name to the police. Sam-Cali sought to provide potential attackers to the police so the police could begin their investigation. The police determined that Rosado would not be a suspect because he did not match the description of the attacker. The jury would have seen these facts as well. Moreover, the jury would also have also seen the additional physical evidence of Robinson's DNA linking him to the scene.

Thus, the facts presented to the jury would have outweighed any prejudice. Sam-Cali would have testified and the physical evidence of Robinson's DNA would have been admitted. If Robinson's trial counsel would have objected, Sam-Cali's statements would have been admitted nonetheless, and the statements show she suggested Rosado as a potential suspect. Rosado was then eliminated as a potential suspect after he did not match Robinson's appearance. Then, the jury would have seen Robinson's DNA evidence. This evidence is strong and outweighs any potential prejudice. Accordingly, there was no ineffective assistance of counsel.

E. Issue Five[3]

In Issue Five, Robinson avers the PSC erred by denying his motion to sever the charges of the different victims in his case. The PSC addressed the issue as follows:

> Appellant argues that the trial court erred in denying his motion for severance of the charges involving the different victims.
>
> Pennsylvania Rule of Criminal Procedure 582 provides in relevant part:
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> Offenses charged in separate indictments or informations may be tried together if . . . the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion . . .
>
> Pa.R.Crim.P. 582(A)(1)(a). "Whether or not separate indictments should be consolidated for trial is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant." *Commonwealth v. Newman*, 528 Pa. 393 (1991); *also see Commonwealth v. Morris*, 493 Pa. 164 (1981).
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> [While e]vidence of distinct crimes is inadmissible solely to demonstrate a defendant's criminal tendencies[, s]uch evidence is admissible . . . to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the others. This will be true when there are shared similarities in the details of each crime.
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> *Commonwealth v. Keaton*, 556 Pa. 442 (1999) (internal citations omitted), *cert. denied*, 528 U.S. 1163 (2000); *also see Commonwealth v. Natividad*, 565 Pa. 348 (2001) (stating that "[e]vidence of another crime is admissible where the conduct at issue is so closely related that proof of one criminal act tends to prove the other"), *cert. denied*, 535 U.S. 1099 (2002). "To establish similarity, several factors to be considered are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." *Commonwealth v. Rush*, 538 Pa. 104 (1994).
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> Although Appellant admits that "the offenses consolidated in this case were of the same class," he argues that the crimes were not similar enough to be considered a distinctive modus operandi of a single perpetrator. Specifically, Appellant points out that: (1) Fortney lived two miles away from Burghardt and Schmoyer; (2) the

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[3] From this point on, Robinson's brief incorrectly numbers the issues in his brief. For clarity, the Court continues the opinion with the correct numbering.

crimes were not temporally related, but ranged over a period of eleven months; and (3) there is no "real relationship" in the way the victims were killed.

As in *Morris*, however, "[i]t is difficult to conceive of any situation where the propriety of joinder could be clearer." 425 A.2d at 721. First, all of the attacks took place in the same general locale—the East Side of Allentown, within mere blocks from where Appellant lived or, as in Fortney's case, used to live. As previously described, Appellant's residence at the time of his arrest was about: (1) four blocks from where Schmoyer was abducted, and about one mile from the Reservoir where her body was found; (2) five blocks from where Burghardt lived and was murdered; (3) five or six blocks from where Sam–Cali resided and was assaulted; and (4) two miles from where Fortney lived and was murdered.

Second, in relation to the temporal relationship between the crimes, this Court has held in the past that "remoteness in time between . . . offenses" does not render consolidation improper per se, but is simply another factor to be considered in the analysis. *See Newman*, 598 A.2d at 278 (allowing introduction of evidence of another crime in spite of an eighteen-month gap between the two offenses); *Commonwealth v. Hughes*, 521 Pa. 423 (1989) (holding that a ten-month gap between two crimes was not too remote); *Commonwealth v. Donahue*, 519 Pa. 532 (1988) (plurality opinion) (allowing testimony concerning three-year-old acts of child abuse in a case where the victim's death was caused by alleged child abuse). Presently, the attacks at issue span a period of eleven months, with the longest "idle" period (approximately ten months from August of 1992 through June of 1993) taking place between the Burghardt and Schmoyer homicides. Preliminarily, we note that eleven months is not such a long period of time as to render consolidation improper.

We further point out that, as previously explained, during an extended portion of this "idle" period, Appellant did not reside in, or visit, Lehigh County, because he was detained in a juvenile placement facility. In this respect, the present matter is remarkably similar to Rush, where eight years separated commission of two similar assaults. 646 A.2d at 561. In that case, we observed:

Normally such a lengthy interval would cause the occurrences to be considered too remote; however, for most of [these eight years] (with the exception of eighty-four days) appellant was incarcerated. Excluding this imprisonment, a time span of eighty-four days is within the acceptable remoteness standard.

Id. This rationale is equally applicable to the matter at hand—excluding the period of Appellant's detention at a juvenile placement facility, the crimes spanned approximately four months, which is well within "acceptable remoteness standards" set forth in our decisions. *See Newman, supra*; *Hughes, supra*. In sum, these observations only reinforce the trial court's conclusion with regard to the consolidation of the various Informations.

> Finally, Appellant complains that joinder was improper, because there is no "real relationship" in the way the victims were killed. Nothing can be further from the truth, however. None of the victims knew or had any prior contact with Appellant. All were savagely beaten and raped within two months of Appellant leaving the Allentown area and two and one-half months of his return to that locale. Each of the victims was brutally murdered at close range by hand or a hand-held instrument. In each case, Appellant left behind virtually no incriminating physical evidence, with the exception of what was subsequently discovered through microscopic, scientific examination. In all three cases, samples of Appellant's DNA were recovered from the crime scenes. Each attack was committed at night or in the early morning hours. Finally, all victims shared the same personal characteristics—they were overweight, white females, who lived in and around the East Allentown area.
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> Previously, analogous evidence has been held adequate to establish a sufficient logical connection for consolidation of trials. *See Keaton*, 729 A.2d at 537. We have also held that similar evidence was sufficient to allow testimony of a common scheme or plan in the way the crimes were perpetrated. *See Commonwealth v. Elliott*, 549 Pa. 132 (1997) (evidence that defendant targeted other victims of similar race and gender and raped them was admissible to prove common scheme, plan, or design), *cert. denied*, 524 U.S. 955 (1998); *Commonwealth v. Miller*, 541 Pa. 531 (1995) (evidence that defendant lured other victims of similar race, weight, and gender into his car, took them to remote areas to force sex upon them, beat them in a similar manner, and killed or attempted to kill them was admissible to prove common scheme, plan, or design), *cert. denied*, 516 U.S. 1122 (1996); *Hughes*, 555 A.2d at 1282–83 (finding that testimony concerning a subsequent rape was properly admitted at trial for a preceding rape and murder, where: (1) the crimes were committed at approximately the same time of the day, in a similar geographic location, using similar method of attack; and (2) the victims were familiar with the defendant, and were of the same age, ethnicity, and gender); *Rush*, 646 A.2d at 561 (finding "sufficient similarities to warrant the conclusion that one individual committed both crimes," where, inter alia, the crimes were committed in the same geographic locale and the victims "were black, female, and relatively young, had their underclothing or nightclothes pulled from them"). Moreover, the evidence concerning each incident was readily separable by the jury, as each crime was perpetrated against a different victim and there was no overlap in physical evidence. *See Keaton*, 729 A.2d at 538. For these reasons, we find that the trial court did not abuse its discretion in consolidating for trial the Informations relating to the homicides at issue.

There is no Supreme Court precedent holding that the joinder of criminal indictments against a single defendant could be a violation of due process. *See Ashe v. U.S. ex rel. Valotta*, 270 U.S. 424 (1926) (finding that there was "not the shadow of a ground" for habeas relief where trial court had consolidated two felony indictments); *see also Spencer v. Texas*, 385 U.S. 554, 562 (1967) (stating that the "inherent opportunities for unfairness" where a defendant is tried for multiple offenses is not a violation of due process). In the absence of "clearly established Federal law as determined by the Supreme Court," there can be no basis for overturning the state PSC's adjudication of this claim. *See Carey v. Musladin*, 549 U.S. 70 (2006).

This Court notes that there is Supreme Court dicta suggesting that the joinder of multiple indictments against a single defendant could, in some circumstances, violate due process. *United States v. Lane*, 474 U.S. 438, 446 n. 8 (1986) (noting, in dicta, that misjoinder in a federal criminal case "would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"). However, "clearly established Federal law" refers only to the holdings, not dicta, of the Supreme Court. *Musladin*, 549 U.S. at 74 (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Here, in the absence of clearly established federal law, Robinson's severance claim cannot proceed. A district court may grant habeas relief if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "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). Supreme Court dicta is insufficient to rise to the level of clearly established federal law. With there being no clearly established federal law to analyze Robinson's severance claim, his claim fails.

F. Issue Six

In Issue Six, Robinson alleges the pretrial publicity, citing to local newspaper articles, prejudiced the jurors and that his trial counsel was ineffective for failing to properly file a motion to transfer venue based upon the pretrial publicity. The Commonwealth avers there was a sufficient "cooling off" period between the pretrial publicity and the trial.

i. Pretrial publicity

A criminal defendant has a right to "a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Jurors are not required, however, to be totally unaware of the facts and issues involved in a case. *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). "It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." *Id*. (quoting *Irvin*, 366 U.S. at 723). A defendant can establish actual prejudice by presenting evidence to show that "those who actually served on his [or her] jury lacked a capacity to reach a fair and impartial verdict based solely on the evidence they heard in the courtroom." *Rock v. Zimmerman*, 959 F.2d 1237, 1253 (3d Cir. 1992), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 619 (1993). However, "[w]here media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process, a court reviewing for constitutional error will presume prejudice to the defendant without reference to an examination of the attitudes of those who served as the defendant's jurors." *Id*. In such cases, a change of venue is required and the failure to grant it deprives the defendant of due process. *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Commonwealth v. Casper*, 392 A.2d 287, 292 (Pa. 1978). However, "[s]uch cases are exceedingly rare." *Rock*, 959 F.2d at 1253. As the United States Supreme Court explained in *Skilling v. United States*, "[i]n each of [the prior] cases, [where the Court applied a presumption of prejudice,] we overturned a 'conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage'; our decisions, however, 'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.'" *Skilling v. United States*, 561 U.S. 358, 381 (2010) (quoting *Murphy*, 421 U.S. at 798-99). For a court to presume prejudice based on pretrial publicity, "[t]he community and media reaction . . . must have been so hostile and so pervasive as to make it apparent that even the most careful voir dire process would be unable to assure an impartial jury." *Rock*, 959 F.2d at 1252.

To determine whether pretrial publicity meets that standard, courts consider the following factors:

> (i) the size and characteristics of the community;
>
> (ii) the general content of the news coverage (including facts such as whether the stories referenced the defendant's confession or other similarly blatantly prejudicial information, whether the news account was factual and objective versus sensational, inflammatory, or slanted toward the prosecution, and whether the stories focus on the defendant personally as opposed to the crime itself);
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> (iii) the timing of the media coverage relative to the commencement of the trial; and
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> (iv) whether there was any media interference with actual courtroom proceedings.

United States v. Savage, No. 07-550-03, 2012 WL 2376680, at *3-4 (E.D. Pa. June 25, 2012) (quoting *United States v. Diehl–Armstrong*, 739 F. Supp. 2d 786, 793 (W.D. Pa. 2010)).

Publicity that is accurate and factual in nature does not justify a finding that prejudice may be presumed. *Hetzel v. Lamas*, 372 F. App'x 280, 284 (3d Cir. 2010). Even when pretrial publicity is "factual in nature, but prejudicial and inflammatory only to the extent arising from the normal and natural reaction to any purely factual news item about a very serious crime," it does not create a presumption of prejudice. *Flamer v. State of Del.*, 68 F.3d 736, 754 (3d Cir. 1995); *see also Diehl-Armstrong*, 739 F. Supp. 2d at 789 (prejudice not presumed where publicity "ha[s] focused on factual, albeit salacious, information derived from official sources, court documents and proceedings, or other publicly available records rather than on conjecture, innuendo, or editorial content."). *See*, *e.g.*, *Laird v. Wetzel*, No. CV 11-1916, 2016 WL 4417258, at *9-10 (E.D. Pa. Aug. 19, 2016) (prejudice not presumed despite article prior to retrial mentioning prior conviction and death sentence); *Savage*, 2012 WL 2376680, at *5 (prejudice not presumed despite extensive pretrial publicity containing "disturbing" quotations from telephone intercepts of defendant and descriptions of prior convictions because the reporting was "highly factual"). Moreover, "even when pretrial publicity is extensive and severe, a lapse in time between the publicity and the trial can dissipate any prejudice that may have resulted." *Pursell v. Horn*, 187 F. Supp. 2d 260, 302 (W.D. Pa. 2002) (noting seven-month period between adverse publicity and trial militated against presumption of prejudice); *see also Foy v. Lamas*, No. 2:12-0088, 2013 WL 838191, at *23 (W.D. Pa. Mar. 6, 2013) (extensive media coverage that ended seven months before trial did not justify presumption of prejudice).

Pennsylvania law regarding prejudicial pretrial publicity is consistent with this body of federal law. Pennsylvania law also holds that when pretrial publicity is sufficiently sustained, pervasive, inflammatory and inculpatory, it may present exceptional circumstances under which prejudice will be presumed. *Commonwealth v. Frazier*, 369 A.2d 1224, 1227 (Pa. 1977). To determine whether such exceptional circumstances exist, the Pennsylvania Supreme Court has instructed that the following factors are determinative: "(1) whether the pretrial publicity was inherently prejudicial; (2) whether the pretrial publicity saturated the community; and (3) whether there was a sufficient proximity in time between the publicity and the selection of a jury such that the community from which the jury was drawn did not have an opportunity to 'cool down' from the effects of the publicity, thus making a fair trial in such community impossible." *Commonwealth v. Counterman*, 719 A.2d 284, 293 (Pa. 1998).

Pretrial publicity is inherently prejudicial if: "(1) the publicity is sensational, inflammatory, and slanted towards conviction rather than factual and objective; (2) the publicity reveals the accused's prior criminal record, if any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports." *Commonwealth v. Pursell*, 495 A.2d 183, 187 (Pa. 1985) (post-conviction relief proceeding) (citing *Commonwealth v. Casper*, 392 A.2d 287, 292 (Pa. 1978)). Pennsylvania law, like federal law, holds that even where pretrial publicity would lead to a presumption of prejudice under this standard, the existence of a sufficient "cooling off period" between prejudicial pretrial publicity and trial destroys the presumption of prejudice because it permits the prejudice to dissipate. *Commonwealth v. Paolello*, 665 A.2d 439, 450 (Pa. 1995); *see also Casper*, 392 A.2d at 293 ("The critical factor in the finding of presumptive prejudice . . . is the recent and pervasive presence of 'inherently prejudicial' publicity, the likely effect of which is to render a fair trial impossible."). Pennsylvania law also holds that factual and objective reporting is not inherently prejudicial. *See Commonwealth v. Beasley*, 678 A.2d 773, 782 (Pa. 1996). "It is saturation with 'inherently prejudicial' publicity, and not the possibility of saturation alone, that is important since, as we have noted, '(e)xtensive pretrial publicity . . . does not necessarily preclude a fair trial.'" *Casper*, 392 A.2d at 295 (quoting *Commonwealth v. Powell*, 328 A.2d 507, 510 (Pa. 1974)).

The PSC addressed the issue as follows:

> Furthermore, after thoroughly reviewing the record we are not persuaded by the complaints made by Appellant. Any potential bias on the part of the jurors in relation to the media coverage of the case was sufficiently dealt with during the individually-conducted voir dire when the defense counsel, the prosecutor, and the

> trial court, asked the potential jurors whether they had heard or read anything about the case. Indeed, unless preliminarily excused for other, unrelated reasons, each of the prospective jurors was questioned about their familiarity with the case and their knowledge concerning the incidents from media outlets. Some jurors stated that they knew about the incidents and they were further questioned about whether their ability to decide the case would be affected. The record reveals that of the jurors who were aware of the case, most gained their knowledge through the media reports circulated at the time of Schmoyer's homicide and Appellant's apprehension, which was more than a year before the trial was set to begin. This clearly indicates the presence of a sufficient "cooling off period" that minimized any potential ill effects of the publicity surrounding the events at issue.
>
> Ultimately, the twelve jurors and four alternates selected for trial all stated that they would be fair and impartial when hearing the case. After undertaking an independent review of the entire transcript of the voir dire proceedings, we are convinced that pretrial publicity did not result in the inability to select a fair and impartial jury in Lehigh County. Therefore, the trial court did not abuse its discretion in denying the motion for a change of venue/venire and Appellant is not entitled to any relief on this claim. For this reason, we find that Appellant is similarly not entitled to relief on his allegation of counsel ineffectiveness in relation to the motion to change venue/venire.

Robinson I, 581 Pa. at 196-98.

Here, the PSC did not unreasonably apply federal law by failing to transfer the venue. In addressing the elements for pretrial publicity elicited in *Savage*, as to the first element, the size and characteristics of the community, the estimated population of Lehigh County in 1990 was 291,130. Lehigh County is closely connected with Northampton County, with a population of 247,105 in 1990. Thus, the region contained approximately over 500,000 people at the time of Robinson's murders. As to the second element, the general content of the news coverage, the coverage focused upon the murders, the victims of the murders, and the trial. There are, however, two potential inflammatory remarks contained in the media coverage: (1) an article dated June 13, 1993, in which a parent says the suspect "deserves worse than the death sentence" and a man who states, "the killer should be put to death and a member of Charlotte's family should get to pull the switch," and (2) an article dated April 13, 1994, in which a spectator whispered at

Robinson's sentencing, "I hope he fries, man." As to the third element, the timing of the coverage, there appears to be more intense coverage at the time of the murders which evolves into coverage of the trial. Lastly, the media did not interfere with the trial. While the trial needed to be moved into a bigger courtroom, this is because of the size of the crowd and not because of media interference. Robinson fails to specifically articulate how the media interfered at trial.

Assuming arguendo the two comments are inflammatory, there was a sufficient cooling off period. The first article was dated June 13, 1993. The trial was not until October 1994. Thus, the region had a sixteen-month cooling off period between the remark and the time of trial. Sixteen months is sufficient as a cooling off period. Additionally, the article did not mention Robinson by name, only addressing him generally as he was not arrested yet. The second inflammatory mark was made after the trial, at Robinson's sentencing, which make the remark irrelevant. The remaining articles are not inflammatory and simply inform the public of what occurred, when Robinson was arrested, stories about the victims and survivors, and the trial. Accordingly, the coverage was not of such a nature to require a change of venue.

ii. Ineffective assistance of counsel

Robinson argues his trial counsel was ineffective for failing to adequately brief Robinson's motion to transfer. Upon review, counsel's performance was not ineffective. Counsel filed the motion, per their duty, and the trial court ruled against Robinson. The trial court was aware of the media publicity at the time, and knew of the rationale behind Robinson's motion. The Court does not believe Robinson's argument that, had the brief of the motion been larger, the trial court would have granted the motion to transfer.

Assuming Robinson's trial attorneys were ineffective, there was no prejudice. As discussed, most of the reporting on Robinson was during the commission of the crimes, and afterward, focused upon the victims and his trial. The media coverage satisfied the elements elicited in *Savage*. The one inflammatory remark that occurred on June 13, 1993, was approximately sixteen months before the trial, allowing for a sufficient cooling off period. The other inflammatory remark occurred after Robinson's sentencing, making the remark irrelevant to prejudice the jurors. Thus, assuming Robinson's trial attorneys were ineffective, there was no prejudice.

G. Issue Seven

In Issue Seven, Robinson argues the trial court committed errors and his counsel was ineffective for excluding jurors, such as Lamar Cramsey and Deanna Robinson,[4] without ascertaining their abilities to follow the law. Further, Robinson alleges trial court error because the trial court allegedly did not permit defense counsel to "life qualify" jurors on whether they could return a life sentence, such as Gail Kocher. Robinson then asserts a generalized objection that the jurors were biased. The PSC addressed the issue as follows:

> In relation to the voir dire process, Appellant argues that his counsel were ineffective in failing to pose "life qualification" questions to the potential jurors "in order to prevent the service of a juror who is incapable of returning a verdict of life imprisonment." Brief for Appellant, p. 45.
>
> In the past, this Court has consistently declared that: (1) there is no requirement for trial counsel to ask "life-qualifying" questions; and (2) trial counsel is not ineffective for failing to make such an inquiry. *See, e.g.*, *Commonwealth v. Bond*, 572 Pa. 588, 819 A.2d 33, 50 (2002); *Commonwealth v. Simmons*, 569 Pa. 405, 804 A.2d 625, 638 (2001) (plurality opinion) ("[t]here is no implication or holding that the choice not to life qualify a jury amounts to advocacy so glaringly substandard as to amount to a deprivation of the Sixth Amendment right to counsel") (emphasis in original); *Commonwealth v. Henry*, 706 A.2d 313, 324–25 (1997), *habeas corpus granted in part*, *Henry v. Horn*, 218 F. Supp. 2d 671 (E.D. Pa. 2002); *Commonwealth v. Lark* (*Lark PCRA*), 698 A.2d 43, 48 (1997); *Commonwealth v. Cox*, 686 A.2d 1279, 1290 (1996) (counsel was not ineffective for failing to "life-

[4] As Deanna Robinson shares the same last name as Robinson, this Court will refer to her by her first name.

> qualify" jurors where jurors "assured" the court that they would follow the law and the court's instructions), *cert. denied*, 522 U.S. 999 (1997).
>
> Presently, the notes of testimony are replete with examples where both defense counsel and the prosecutor asked the prospective jurors whether they would be able to be fair and impartial in deciding the case and whether they could follow the trial court's instructions in imposing the proper sentence. Additional questions were posed to ensure that the jurors would not automatically impose the death penalty, but would follow the statutory guidelines as explained to them by the trial court. That is all that is legally required of the jury and, therefore, we reject the argument raised by Appellant.
>
> . . . .
>
> Appellant also argues that he was deprived of a fair trial by the improper exclusion "for cause" of Lamar Cramsey (Cramsey), based upon his views with respect to the death penalty. Appellant maintains that although Cramsey expressed conscientious scruples against the death penalty, he ultimately indicated that he could consider the death penalty in an appropriate case.
>
> As we have often recognized, a prospective juror may be excluded "for cause" when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with the instructions given by the trial judge and the juror's oath. *See Bridges*, 757 A.2d at 873; *Commonwealth v. Stevens*, 739 A.2d 507, 521 (1999). Presently, we do not need to delve into the substantive analysis of the trial court's decision, however, for even assuming arguendo that the trial court erred in excluding Cramsey "for cause," such error was harmless in light of the fact that the Commonwealth had several peremptory challenges left after the jury was selected. If Cramsey had not been struck "for cause," the Commonwealth could have peremptorily removed this juror with its remaining challenges. *See Lewis*, 567 A.2d at 1381. For this reason, Appellant is entitled to no relief on this argument.

The Sixth Amendment right to a jury trial guarantees a criminal defendant the right to a "fair trial by a panel of impartial, indifferent jurors," *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (internal quotation marks omitted), and that right is extended to state criminal trials through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968). "An impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts." *Lockhart v. McCree*, 476 U.S. 162, 163 (1986); *see also United States v. Tindal*, 357 F. App'x 436, 438 (3d Cir. 2009) (explaining that "[j]urors are presumed to be impartial"). Further, the Supreme Court has explained that "[n]o hard-and-fast formula dictates the necessary depth or breadth of voir dire[,]" instead, "[j]ury selection, we have repeatedly emphasized, is particularly within the province of the trial judge." *Skilling*, 561 U.S. at 386 (internal citations and quotations omitted). To violate the Sixth Amendment, it does not suffice that the trial court failed to ask questions during voir dire that "might be useful"; rather, the "trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Id*. at 387 n.20.

The Court held in *Witherspoon* that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." 391 U.S. at 522-23. *Witherspoon*'s holding is grounded in the right to a fair and impartial jury guaranteed to state criminal defendants by the Sixth and Fourteenth Amendments, and thus veniremen can be excluded based on their views on capital punishment only if they would be biased and lack impartiality in hearing the case.

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id*. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The Court explained that:

> this standard . . . does not require that a juror's bias be proved with "unmistakable clarity" . . . because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will

> react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Id. at 424-26 (footnote omitted).

The Court explained in *Witt* that "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 469 U.S. at 423. Thus, when the state wishes to exclude a prospective juror for cause because of his or her views on the death penalty, it must question that juror to make a record of the bias. *See Gray v. Mississippi*, 481 U.S. 648, 652 n. 3 (1987) ("A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve.") (citation omitted).

After the state offers its challenge for cause, "[i]t is then the trial judge's duty to determine whether the challenge is proper." *Witt*, 469 U.S. at 423. Thus, before it can sustain the exclusion, the judge must make a factual determination that the prospective juror would be biased. On federal habeas review, that determination of bias is entitled to the presumption of correctness. *Id*. at 428. As the Court emphasized in *Witt*, a trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id*. at 429; *see also Deputy v. Taylor*, 19 F.3d 1485, 1499 (3d Cir. 1994) ("The trial court is in the best position to observe the demeanor of the prospective jurors.").

The following colloquy was at issue in *Witt*:

> [Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> [A:] I am afraid personally but not-

[Q]: Speak up, please.

[A]: I am afraid of being a little personal, but definitely not religious.

[Q]: Now, would that interfere with you sitting as a juror in this case?

[A]: I am afraid it would.

[Q]: You are afraid it would?

[A]: Yes, Sir.

[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?

[A]: I think so.

[Q]: You think it would.

[A]: I think it would.

[Q]: Your honor, I would move for cause at this point.

[COURT:] All right. Step down.

469 U.S. at 415-16. Based on this exchange, the Supreme Court held that the judge's finding of bias, although not free of ambiguity, was fairly supported and therefore presumptively correct. The Court explained that the judge was not required "to announce for the record that [the prospective juror] was biased, or his reasoning," *id*. at 430, and added that, "[i]n this regard it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to [the] recusal, or attempt rehabilitation." *Id*. at 430-31. The Court noted that counsel's failure to speak was a circumstance that it would consider when assessing respondent's belated claims that the situation was "so rife with ambiguity . . . as to constitute constitutional error." *Id*. at 431 n. 11.

Under *Witt*, therefore, the proper inquiry on pre-AEDPA habeas review of a *Witherspoon* claim is whether there is fair support in the record for the judge's finding that the prospective juror's views on the death penalty would have prevented or substantially impaired the performance of his or her duties as a juror in accordance with the instructions and oath.

With respect to voir dire-related ineffective assistance of counsel claims, specifically, at least one federal circuit court has stated that an "attorney's actions during voir dire are considered to be matters of trial strategy, which cannot be the basis of an ineffective assistance claim unless counsel's decision is so ill chosen that it permeates the entire trial with obvious unfairness." *DeLozier v. Sirmons*, 531 F.3d 1306, 1323 (10th Cir. 2008); *accord Morgan* 504 U.S. at 729 (voir dire proceedings are "subject to the essential demands of fairness.") (internal quotation marks and alterations omitted); *see also Lin v. Bartkowski*, No. 2:10-cv-5489 (DMC), 2012 WL 3124493, at *31 (D.N.J. Aug. 1, 2012) (relying on standard set forth in *DeLozier* to resolve habeas petitioner's voir dire-specific ineffective assistance of counsel claims).

i. Counsel's performance during voir dire

Here, the decisions made by Robinson's counsel are not ineffective, but trial strategy. As discussed above, the jury panel received questioning about their beliefs and whether they can debate, and issue, a sentence of either life or death. Robinson's counsel participated in this questioning. This Court cannot say that Robinson's counsel trial strategy was so ill chosen that it permeates the entire trial with obvious unfairness. Robinson's trial counsel was faced with the arduous task of defending Robinson in a case with a potential penalty of death. Robinson's trial counsel, unlike this Court and Robinson's current habeas counsel, do not have the luxury of witnessing the jury panel's responses live and being able to observe their body language, tone, and demeanor while being questioned.

This Court has reviewed the voir dire transcripts and determined the jurors that were empaneled were not so ill chosen that it permeates the entire trial with obvious unfairness – there was a fair trial and the jurors were fairly chosen. The PSC's determination was not unreasonable or contrary to federal law. Accordingly, Robinson's trial counsel was not ineffective. Nonetheless, the Court will address the specific individuals Robinson identified.

ii. Lamar Cramsey Colloquy

The colloquy of Lamar Cramsey is as follows:

> [Q. Prosecutor:] Okay. And if you reached that point in terms of passing judgment, and you concluded, after listening to the evidence, the defendant was guilty of these murders, would you be able, then, to pass judgment and come into court and say guilty of murder in the first degree?
>
> [A:] Again, I don't know.
>
> [Q:] And the reason you don't know?
>
> [A:] It's just hard to tell somebody -- to kill somebody.
>
> . . . .
>
> [Q:] Do you believe that you can follow the instructions of the Court as to the law and apply the law to the facts, and this means, no matter what your personal beliefs are as to what the law is, or what the law should be, you would have to follow the instructions of the Court. Do you believe that you could do that or would you have difficulty with that?
>
> [A:] No, I wouldn't have any difficulty with it, because he would explain everything, right?
>
> . . . .
>
> [Q:] Do you believe that you could follow the law with respect to the death penalty or do you believe that it would be difficult for you to pass judgment on that?
>
> [A:] It would be difficult to pass judgment on it.
>
> [Q:] And can you explain why you would find it difficult to pass judgment?
>
> [A:] Because I never had to. It's that simple.

[Q:] Do you believe that because you've never had to you don't believe you could?

[A:] That's right.

N.T. 10/17/1994, at 1939-43.

Here, Cramsey was not wrongfully disqualified because of his views on the death penalty. Robinson attempts to cherry pick Cramsey's statements regarding his ability to "look" at Robinson while issuing the death penalty and fails to view Cramsey's statements as a whole. By cherry picking, Robinson fails to analyze the entire colloquy, especially the sections where Cramsey voices his hesitance in rendering the death penalty numerous times. Cramsey stated at least four times his hesitancy to issue the death penalty to Robinson. The Commonwealth attempted to follow up on this hesitancy and Cramsey reaffirmed his hesitancy. These statements do not pertain to "looking" at Robinson while issuing the death penalty, as Robinson asserts. Cramsey failed to rehabilitate his answers with numerous opportunities to do so. Due to his failure to rehabilitate his answers and establish confidence that he could potentially render a penalty of death if need be, the trial court properly exercised its discretion in excusing Cramsey.

Cramsey's colloquy is similar to the colloquy in *Witt*, where the juror in *Witt* expressed concern over rendering a penalty of death twice before being excused. In this instance, Cramsey expressed concern over rendering the death penalty numerous times. Both colloquies express concern and hesitance over rendering a penalty of death, even being offered a chance to rehabilitate their response and voice a less hesitant answer. In excusing a juror, the trial court is entitled to a "presumption of correctness," and in this instance, the Court believes the trial court acted properly as Cramsey voiced his hesitation in rendering a penalty of death numerous times. The trial court had an opportunity to analyze Cramsey's words and body language live, something this Court does not have the luxury to do so. Thus, dismissing Lamar Cramsey from serving on Robinson's jury was proper as his views would prevent or substantially impair the performance of his duties in accordance with his instructions and his oath. The standard is a presumption of correctness, and the trial court was correct.

iii. Deanna Robinson's Colloquy

Deanna's colloquy is as follows:

> [Q. Prosecutor:] Okay. As a juror, you would have to deliberate with other jurors to decide guilt or innocence, and, also, possibly the penalty as well. And let me just move onto that for a moment. Would you, as a juror, and you've indicated some hesitancy about making a decision, would you be able to return a verdict of murder in the first degree if the evidence indicated that that was the appropriate verdict?
>
> [A:] Yes. I think I could do that.
>
> [Q:] Okay. But –
>
> [A:] I don't know if this is another question or not, but the death penalty is something I have a problem with.
>
> [Q:] Okay. Let's explore that for a moment. In Pennsylvania, if a jury returns a verdict of murder in the first degree, they decide the penalty.
>
> [A:] The jury?
>
> [Q:] The jury does.
>
> [A:] All right.
>
> [Q:] Either death or life in prison. Would you be able to do that? And let me just ask it this way.
>
> Do you have any religious, moral or philosophical beliefs that would prevent you from imposing the death penalty?
>
> [A:] Yes.
>
> [Q:] Would you explain what those are?
>
> [A:] From my religious background, I do not believe we, for whatever reason, that we should take a life for a life. However, I believe that something should be done if someone does and there are, I hope, things that you do instead of that.

> [Q:] And trust me, I respect your beliefs. I'm going to ask you some questions about that. Would you state these are religious beliefs on your part?
>
> [A:] Yes.

N.T. 10/17/94, at 1634-36.

Here, Deanna was not wrongfully excused from the jury. Deanna established her views in explicit fashion, revealing her disdain for the death penalty. When the Commonwealth questioned her views on the death penalty, she affirmed her disdain and stated it was because of her religious beliefs. Robinson fails to address Deanna's stance on the death penalty. Similar to Robinson's theory on Cramsey, Robinson's theory of Deanna not being able to "look" at Robinson is belied by the record. Deanna's views against the death penalty were reaffirmed by numerous questions by the Commonwealth. Accordingly, the trial court did not err in excusing Deanna for her beliefs on the death penalty.

Similar to *Witt*, the trial court correctly exercised its discretion and excused Deanna. Deanna's views were more explicit than the colloquy in *Witt*. Additionally, Deanna did not otherwise rehabilitate or change her views when the Commonwealth asked additional questions as to her views. Moreover, the trial court had the opportunity to observe Deanna's body language and tone, something this Court cannot do. Deanna was adamant in her views against the death penalty. The standard is a presumption of correctness, and the trial court correctly exercised its discretion in this instance as her views would prevent or substantially impair the performance of her duties in accordance with the instructions and her oath.

iv. Gail Kocher Colloquy

Robinson utilizes Gail Kocher to argue jurors did not face proper "life qualification" questions. The colloquy of Gail Kocher is as follows:

> [Q. Defense:] The Judge is going to be -- Judge Diefenderfer is going to be instructing you on many different points and facets of the law.
>
> Do you have any moral, religious or other obligations -- strike that -- any other feelings that you feel will get in the way of you following the Judge's instructions?
>
> [A:]: No, I do not.
>
> [Q:] Do you have any preconceived concepts of the innocence or guilt of a person depending on the type of crime they're charged with?
>
> [A:] No.
>
> [Q:] The Judge in this particular instance is going to be instructing you on first degree murder. First degree murder in Pennsylvania carries the possibility of a death sentence or life in prison.
>
> After the fact phase of the trial, you may be required to deliberate regarding life imprisonment or the death of the defendant. Do you feel you will be able to do this?
>
> [A:] Yes, I would.
>
> [Q:] Do you have any moralistic, religious or other feelings regarding the death penalty?
>
> [A:] No, I don't.

N.T. 10/10/1994, at 65-66.

Here, proper "life qualifying" questions were posed to the potential jury members. Robinson attempts to use the following question for Gail Kocher as evidence of improper life qualification questioning, "Do you feel that the death penalty should be imposed in every homicide case?" *Id.* at 66. However, in analyzing the entirety of her questioning, there were questions focused on Kocher's ability to apply the law and render a sentence within the guidelines, which included a life sentence. Specifically, some questions focused on the ability of Kocher to debate and issue either a life sentence or the death penalty. Moreover, in analyzing the colloquies of Cramer and Deanna as well, there were questions regarding the ability to impose a life sentence. The trial court did not exclude questioning on the ability of jurors to debate and issue a sentence of life in prison. The trial court properly excluded jurors who exhibited a potential bias in their decision-making process and this bias was revealed through the questioning. The standard is a presumption of correctness, and the trial court correctly ruled throughout this process. Thus, there were proper life qualification questions posed to the jury and the PSC correctly ruled regarding this issue.

v. The alleged exclusion of a significant percentage of jurors

Here, upon review, there was no significant percentage of jurors excluded for their views as Robinson alleges. The Court has reviewed the jurors Robinson takes issue with, and additionally analyzed the entirety of the voir dire records and finds the records are satisfactory. Proper questioning occurred throughout the voir dire process. Those whose views would prejudice the process were properly excluded, such as Lamar Cramsey or Deanna Robinson. Moreover, given the wide latitude trial courts have in the voir dire process, the trial court is in the best position to make determinations regarding the voir dire process as opposed to the appellate record. Thus, contrary to Robinson's assertion there was no significant percentage of jurors excluded for their views. The standard is a presumption of correctness, and the trial court was correct throughout the voir dire process.

H. Issue Eight

In Issue Eight, Robinson argues the trial court erred by not excusing two jurors, Lynn Furr and Susan Rosen, for cause due to their bias against Robinson conveyed through comments made during the voir dire process. The PSC addressed the matter as follows:

> Appellant additionally maintains that a new trial should be granted because he was forced to use peremptory challenges to strike venire persons, who should have been excused "for cause," and he exhausted his peremptory challenges before the jury was seated. Specifically, Appellant alleges that . . . . Lynn Furr (Furr) was not allowed to be excused "for cause," although she had seen media reports concerning the case; had a child, who was a carrier for the Morning Call (as was Schmoyer);

knew pastors at the church attended by Schmoyer; and doubted her ability to remain impartial; . . . . Susan Rosen (Rosen) was not allowed to be excused "for cause," although she was a therapist treating rape victims and indicated it would be difficult for her to remain impartial[.]

. . . .

Appellant is correct in pointing out that Furr had seen media reports concerning the case; had a child, who was a carrier for the Morning Call (as was Schmoyer); and knew the pastors at the church attended by Schmoyer. However, none of these observations offers much assistance to his cause.

Initially, we note that mere exposure to media reports does not render a prospective venire person unable to sit on the jury. *See Commonwealth v. McGrew*, 100 A.2d 467, 470 (1953) (observing that "[t]he fact that a juror has read or heard about a case and has an impression or an opinion, or a prejudice is not ground for rejection for cause if he testifies and the Court believes that his opinion is not fixed and that he can and will make up his mind solely from the evidence which will be presented at the trial of the case").

Admittedly, Furr stated that she had an "emotional response" to what happened to Schmoyer, who was a Morning Call carrier, because her son was once a carrier for this paper and she worried about him. N.T., 10/12/1994, pp. 871, 881. However, Furr testified that she did not have a fixed opinion about Appellant's guilt or innocence. *Id*. at 872–73, 883. She also later stated: "I don't think that I have reacted differently or with more of a fixed opinion than any other parent" and further characterized her response to the Schmoyer homicide as a "reaction . . . much the same as any parents would be." *Id*. at 883.

Although Furr acknowledged knowing the pastors at the church attended by Schmoyer, who were also involved in Schmoyer's funeral service, she testified to having "no personal involvement" in the matter. N.T., 10/12/1994, p. 884. We fail to see how this association amounts to "a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses" to provide a basis for disqualification "for cause." *Colson*, 490 A.2d at 818.

Finally, citing to the transcript of the voir dire, Appellant argues that Furr questioned her own ability to remain impartial. *See* Brief for Appellant, p. 50. This is simply not the case. Rather, Appellant is mischaracterizing the record— Furr did not express concerns about her ability to remain impartial; she testified that she "would not react favorably to graphic photographs of murdered persons" and "would [likely] have an emotional response to that." N.T., 10/12/1994, p. 893. As the trial court observed, "[Furr also] stated that [despite the graphic photographs] she would . . . try to focus on the information and weigh it fairly and that she could not imagine that a possible 'emotional reaction to graphic details' of the

> photographs would be very uncommon." Trial Court Opinion, p. 24; N.T., 10/12/1994, p. 894.
>
> . . . .
>
> With respect to Rosen, Appellant contends that, because this venire person and her mother worked as therapists, who treated rape victims, she had "situational affinity" that would "cloud her judgment and undermine her impartiality." Brief for Appellant, p. 52. Again, however, Appellant is overly selective in referring to the answers given by Rosen.
>
> It is true that Rosen's immediate reaction to the news accounts was that Appellant was guilty. N.T., 10/18/1994, pp. 1968–70. Rosen also stated that because of her work with women who have been raped and sexually abused, "it might be hard for me to stay impartial." *Id*. at 1972–73 (emphasis supplied). Nonetheless, Rosen also testified that she would be able to follow the judge's instructions regarding burden of proof even through she already had a fixed opinion that Appellant was guilty and that the penalty phase of the trial would not affect her ability to look at and weigh all of the facts and make a determination of guilt or innocence. *Id*. at 1972; 1974–75. After the prosecutor and trial counsel explained the nature of the penalty phase proceedings, Rosen testified that she could impose a life sentence, if the mitigating circumstances outweighed the aggravating circumstances. *Id*. at 1980–81. Finally, when counsel for defense asked Rosen whether she would be able to put aside her fixed opinion about Appellant's guilt and "be able to fair and impartially judge the testimony that's coming in and render a fair and impartial verdict," Rosen responded as follows:
>
> I think in listening to the media, everyone always has a fixed opinion listening to what's on the news. So when we do come in here, I think we would have to realize it would all be different. You would be kind of starting fresh. But, so, see, I think I know what the right thing is to do. So I think I probably would do it. I would do it, I mean.
>
> *Id*. at 1989–90. Hence, a fair reading of the voir dire transcript reveals that Rosen did not indicate a categorical bias as a result of her or her mother's profession and shows that she could put aside her personal views and be an objective juror.

Robinson I, 581 Pa. at 203-10.

The applicable federal law guarantees every criminal defendant "the right to a . . . trial [ ] by an impartial jury." U.S. Const. Amend. VI. Complementing this right are the protections afforded by the Due Process Clause, which require "that, if a jury is to be provided [ ], regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). Voir dire examination serves to protect the right to an impartial jury by providing the parties a means of uncovering juror bias. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994). Bias that emerges in response to voir dire questioning can lead to excusal of a juror for cause or may facilitate the parties' exercise of peremptory strikes. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). Courts have distinguished between two types of challenges for cause: those based on actual bias, and those based on implied bias. *U.S. v. Mitchell*, 690 F.3d 137, 142 (3rd Cir. 2012).

The doctrine of implied bias is rooted in the recognition that certain narrowly-drawn classes of jurors are highly unlikely, on average, to be able to render impartial jury service despite their assurances to the contrary. *Mitchell*, 690 F.3d at 142. Because implied bias deals in categories prescribed by law, the question whether a juror's bias may be implied is a legal question, not a matter of discretion for the trial court. *Id*. For instance, the Third Circuit explained that a victim of a crime might insist that she can serve as an impartial juror in her own assailant's trial, but the law imputes bias to her categorically because the average person in her situation likely would harbor prejudice, consciously or unconsciously, which mandates her excusal for cause. *Id*. Some other examples include a juror being an actual employee of the prosecuting agency, the juror being a close relative of one of the participants in the trial or the criminal transaction, or the juror being a witness or somehow involved in the criminal transaction. *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Notably, in these instances the juror is put in a potentially compromising situation. *Id*. at 217. However, the Supreme Court noted that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. *Id*. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. *Id*.

The test for implied bias focuses on "whether an average person in the position of the juror in controversy would be prejudiced." *Mitchell*, 690 F. 3d at 142. Courts look to the facts underlying the alleged bias to determine if they would create in a juror an inherent risk of substantial emotional involvement. *Id*. at 143. The Third Circuit has affirmed that implied bias remains available, in appropriate circumstances, to disqualify jurors whose connection with the litigation makes it highly unlikely that they can remain impartial adjudicators. *Id*. at 144.

Next, actual bias, also known as bias in fact, is "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Mitchell*, 690 F.3d at 142. To "rebut the presumption of a prospective juror's impartiality," it is not enough for a defendant to point to "the mere existence of any preconceived notion as to the guilt or innocence of the accused." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Rather, a juror is deemed impartial if he can set aside his impression or opinion and render a verdict based on the evidence presented in court. *Id*. A juror's expression of doubt about his own impartiality does not necessarily lead to a finding of actual bias. *United States v. Meehan*, 741 F. App'x 864, 872 (3rd Cir. 2018) (citing *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001)). For instance, the Supreme Court upheld the impaneling of jurors who, during voir dire, expressed doubts, or even disclaimed outright their ability to be impartial. *See Patton v. Yount*, 467 U.S. 1025, 1032 (1984). The Third Circuit gives broad latitude to the impaneling judge to determine whether to excuse a prospective juror based on actual bias because the impaneling judge "possesses a superior capacity to observe the demeanor of prospective jurors and to assess their credibility." *Mitchell*, 690 F.3d at 142. Now, the Court will address the specific individuals Robinson identified.

i. Lynn Furr's Colloquy

The colloquy of Lynn Furr is as follows:

[Q. Defense Attorney:] Okay. Let's leave that. I'm satisfied with that. Now, with regards to what you had indicated to Judge Diefenderfer when he made his introductory remarks and questions, you had stated that you do have a fixed opinion as to Mr. Robinson's guilt or innocence.

[A:] I would not call it an opinion. I would call it an emotional response to the case because I was the parent-- I am still the parent, though the child is no longer a child and no longer delivering the paper -- but I think that there is a reaction among people who have had children out on the streets delivering papers in the early morning hours. It makes one form an opinion.

. . . .

[Q:] With regards to your -- now, you have an emotional response. Does that emotional response in any way interfere with your ability to render a decision in Mr. Robinson's case regarding his guilt or innocence?

[A:] That is a very difficult question to answer.

[THE COURT:] Well, I think she did answer that.

[A:] I have tried to answer it to the best of my ability.

[Defense Counsel:] Yes. I was confused regarding her answer to it because it seemed to me that she –

[THE COURT:] Well, she said that she doesn't have a completely fixed opinion and it would be a difficult thing to surmise or conjecture, I guess. I don't know what word exactly Mrs. Furr used to answer that question, if she were put into that spot; but the point is, she doesn't have a completely fixed opinion relative to the guilt or innocence of the defendant because of that. I don't want to put words in your mouth.

[A.] That's correct. I think my reaction to this is much the same as any parents would be.

[THE COURT:] I think so.

[Defense Counsel:] Okay.

[A:] I don't think that I have reacted differently or with more of a fixed opinion than any other parent.

> [THE COURT:] And that's not an abnormal reaction as to what occurred to the victim.
>
> [A:] um-hum.
>
> [THE COURT:] But as to an opinion as to the guilt or innocence of Mr. Robinson, you're not solid on that?
>
> [A:] No.
>
> [THE COURT:] I think she answered that.

N.T. 10/12/1994, at 881-83

Here, Lynn Furr exhibited neither implied bias or actual bias. As to implied bias, Furr was not the victim of one of the alleged crimes, not a witness, and did not have a family member or close friend testifying. She did not exhibit any category of implied bias. Moreover, Furr did not display actual bias. While Furr hesitated regarding the emotional factor of Robinson's crimes, she stated she had no opinion as to the guilt or innocence of Robinson. Thus, she would have been a juror with an open mind. Her "emotional response" was due to having a child with a newspaper route, similar to one of the victims in this case, but she stated numerous times she would have been a juror without a fixed opinion as to the guilt or innocence of Robinson. Furr's response passes muster under existing Third Circuit precedent. *See Meehan*, 741 F. App'x at 872. The trial court had the ability to analyze Furr's answers, tone, and body language at the time of the responses and felt Furr's answers were not worthy of an excusal. The trial court did not abuse its discretion in doing so as it has wide latitude in analyzing jurors for actual bias. This Court agrees as Furr stated she did not have an opinion as to the guilt or innocence of Robinson numerous times. Accordingly, the trial court did not abuse its discretion as it used its "superior capacity" to analyze Furr's remarks and this determination was not contrary to clearly established federal law.

ii. Susan Rosen's Colloquy

Susan Rosen's colloquy is as follows:

[Q. Defense Counsel:] You indicated in question it would be difficult for you to be objective.

[A:] Um-hum.

[Q:] And could you explain that and elaborate on that a little bit please?

[A:] Okay. I guess, just through my experiences of, you know, living in Philly, sometimes, you know, you hear all this stuff about murders, and my, I don't know, I believe in the death penalty. So I think that if someone is going to take someone else's life, then, I'm a strong believer in the death penalty. So I don't know if that would be a problem here.

. . . . .

[Q:] The Judge is going to instruct you regarding burden of proof, weight of the evidence, and he's going to say something to the effect that the Commonwealth has the burden of proof.

They have to prove their case beyond a reasonable doubt. And he's also going to -- he also may instruct you that the defendant, in a criminal case, does not have to take the witness stand. He doesn't have to say anything and he has no burden at all, meaning, he doesn't have to prove anything.

Will you be able to follow the Judge's instructions regarding the burden of proof?

[A:] Yes.

[Q:] Even though you already have a fixed opinion that Mr. Robinson is guilty?

[A:] (Nodded affirmatively.)

[Q:] Will you be able to put that out of your mind and follow what Judge Young will instruct you?

[A:] I think, until -- actually, I would be able to. I don't know if my subjectivity would come into it. I really can't answer that question.

. . . .

[Q:] If I confused you, let me put it to you-- let me try this way. Knowing that you'll have to deliberate on life or death if you find the individual guilty

> [A:] Um-hum.
>
> [Q:] -- will that in any way affect your ability to look at and weigh all of the facts and make a determination of guilt or innocence?
>
> [A:] No.
>
> . . . .
>
> [Q:] Would you be able to put aside your fixed opinion as to Mr. Robinson's guilt and be able to fair and impartially judge the testimony that's coming in and render a fair and impartial verdict?
>
> [A:] I think in listening to the media, everyone always has a fixed opinion listening to what's on the news. So when we do come in here, I think we would have to realize it would all be different You would be kind of starting fresh. But, so, see, I think I know what the right thing is to do. So I think I probably would do it. I would do it, I mean.

N.T. 10/18/1994, at 1967-89.

Here, Rosen exhibits no issues with implicit bias or actual bias. As to implicit bias, Rosen does not have a family member of close friend working with the Commonwealth or Robinson, did not witness the crime or otherwise be connected to the crimes. Furthermore, as to actual bias, Rosen's statement of Robinson's guilt is insufficient per Supreme Court precedent. Rosen stated, at trial, her views would be starting fresh because it is a different environment. She additionally stated her views would not affect the trial court's instructions to the guilt or innocence of Robinson. These statements are sufficient to rebut any implication of actual bias asserted by Robinson, notwithstanding the fact Rosen stated she is a "strong believer" in the death penalty. See *Irvin*, 366 U.S. at 723. The trial court had the ability to analyze the statements and demeanor of Rosen at the time, this Court does not have the luxury of doing so. Thus, the trial court did not abuse its discretion in this instance as Rosen stated her intention to start fresh and be a juror with an open mind.

I. Issue Nine

In Issue Nine, Robinson alleges he was denied a jury pool that was representative of his community and that his trial counsel were ineffective for failing to object to this lack of representation. Robinson further alleges that PCRA counsel, when presenting this claim on collateral review, was ineffective for failing to obtain evidence showing the racial composition of Lehigh County and of the jury pool.

The Sixth Amendment to the United States Constitution provides criminal defendants with the right to a jury drawn from a fair cross section of the community: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial [ ] by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. Amend. VI. "The American concept of the jury trial contemplates a jury drawn from a fair cross section of the community . . . It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (internal quotation marks omitted).

However, "[t]his requirement is not without substantial limits – it does not guarantee that juries be 'of any particular composition.'" *United States v. Weaver*, 267 F.3d 231, 236 (3d Cir. 2001) (citing *Taylor*, 419 U.S. at 538). What is required is that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor*, 419 U.S. at 538. The purposes of the fair cross section requirement include avoiding "the possibility that the composition of the juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community" and avoiding the "appearance of unfairness" that would result from excluding "large groups of individuals, not on the basis of their ability to serve as jurors, but on the basis of some immutable characteristic such as race, gender or ethnic background." *Weaver*, 267 F.2d at 236 (quoting *Lockhart v. McCree*, 476 U.S. 162, 175 (1986)).

The United States Supreme Court set forth the elements of a fair cross section claim in *Duren v. Missouri*, 439 U.S. 357 (1979). To establish such a claim, the defendant must demonstrate (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in jury venires is not "fair and reasonable" in relation to the number of such persons in the community; and (3) the under representation is caused by the "systematic exclusion of the group in the jury selection process." *Id*. at 364. A defendant need not establish discriminatory intent. *See id*. at 368 n. 26. Once a defendant has made a prima facie showing of a fair cross section claim, the burden shifts to the government to justify "this infringement [of Sixth Amendment rights] by showing attainment of a fair cross section to be incompatible with a significant state interest." *Id*. at 368.

The Court is mindful that the Pennsylvania Supreme Court has rejected various attacks on the basis that African–Americans were under-represented in the racial composition of a jury panel drawn from voter registrations lists. *See Commonwealth v. Bridges*, 757 A.2d 859, 868 (Pa. 2000); *Commonwealth v. Henry*, 569 A.2d 929, 933 (Pa. 1990); *See also Ramseur v. Beyer*, 983 F.2d 1215, 1235 (3d Cir. 1992) (holding that the defendant had not made a prima facie showing that the juror source lists, consisting of the names found on the Department of Motor Vehicles licensed driver list and the voter registration list, used in Essex County violated his rights under the Equal Protection Clause of the Fourteenth Amendment, nor his Sixth Amendment right to trial by a fair cross-section of the community). Likewise, the reasoning and holdings of those cases have been extended to approve the usage of driver's license lists for purposes of jury selection. *See Commonwealth v. Johnson*, 815 A.2d 563, 575 (Pa. 2002) (plurality) ("Absent some showing that driver's license selection procedures are inherently biased, [the defendant] has failed to distinguish jury pool lists derived from voter registration records from those derived from driver's license registration lists."); *See also United States v. Weaver*, 267 F.3d 231, 237 (3d Cir. 2001) (rejecting the defendant's fair-cross section challenge to the plan approved by the Western District of Pennsylvania, which employs voter registration lists as the exclusive source from which it summons potential jurors for service).

The PSC addressed the issue as follows:

> Appellant argues that his trial counsel was ineffective for failing to ask the trial court to modify the procedures employed in Lehigh County to select members of the pool of jurors available to try this case. He points out that in Lehigh County trial jurors are selected from lists purchased from the Pennsylvania Department of Transportation (PennDOT) that contain names of residents of the county, who are registered with PennDOT. Appellant maintains that this procedure is "unlawful, improper, and violates [his] legal and constitutional rights" because: (1) "it is likely to result in juries unrepresentative of a cross section of the community, and . . . ha[s] continuously failed to represent certain identifiable population groups over an extended period of time;" (2) "the process systematically excludes youthful, elderly and disabled citizens, because the percentages of youthful, elderly and disabled voters is substantially smaller than the percentages of youthful, elderly and disabled citizens in the population of the county;" (3) " the process systematically excludes large numbers of non-caucasian population from jury service, because the percentage of non-caucasians driving or otherwise registered with [PennDOT] is substantially smaller than the percentage of non-caucasians in the population of the county;" (4) "the process systematically excludes large numbers of youthful, elderly and disabled citizens from jury service, because the percentage of youthful, elderly and disabled citizens driving or otherwise registered with [PennDOT] is substantially smaller than the percentage of non-caucasians in the population of the county;" and (5) "[t]he system violates the statutory requirements for the selection of trial jurors." Brief for Appellant, pp. 18–19.
>
> The applicable Pennsylvania statute, entitled "Selection of prospective jurors," provides in relevant part:
>
> At least annually the jury selection commission shall prepare a master list of prospective jurors. The list shall contain all voter registration lists for the county, which lists may be incorporated by reference, or names from such other lists which in the opinion of the commission will provide a number of names of prospective

> jurors which is equal to or greater than the number of names contained in the voter registration list.
>
> 42 Pa.C.S. § 4521(a). We have held on numerous occasions that to establish a prima facie violation of the requirement that a jury array fairly represent the community, the defendant must prove that: (1) the group allegedly excluded a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury selection process. *See Commonwealth v. (Raymond) Johnson*, 838 A.2d 663, 682 (2003), *cert. denied*, 543 U.S. 1008 (2004); *Commonwealth v. (Roderick) Johnson*, 815 A.2d 563, 575 (2002). For purposes of this analysis, "'[s]ystematic' means caused by or inherent in the system by which juries were selected." *(Roderick) Johnson*, 815 A.2d at 575.
>
> At the time of Appellant's trial, Lehigh County drew its jury pool from the list of licensed drivers in the county. See N.T., 10/19/1994, pp. 2329–58. Four years ago, in *Commonwealth v. Lopez*, 739 A.2d 485 (1999), *cert. denied*, 530 U.S. 1206 (2000), we addressed this method of jury selection in Lehigh County, finding it "statutorily permissible," *Lopez*, 739 A.2d at 494 n. 13, and see no reason to reconsider our decision. Additionally, despite his complicated argument, Appellant utterly fails to present even a semblance of statistical proof that the jury pool selection procedure utilized in Lehigh County unfairly misrepresents the number of non-caucasians, youthful, elderly, and disabled citizens in the community. Accordingly, Appellant has not established even a prima facie argument for purposes of this analysis, *see Lopez*, 739 A.2d at 495, and his ineffectiveness argument on this issue fails.

Robinson I, 581 Pa. at 198-200.

Robinson cites to cases from California, Arizona, and New York to support his theory that driver's license records systematically exclude African Americans and Latino Americans. However, as was explained to Robinson on appeal, the Pennsylvania Supreme Court has specifically found that Lehigh County's process of drawing its jury pool from the list of licensed drivers in the county does not unfairly misrepresent the community. *See Lopez*, 739 A.2d at 494. The court in *Robinson I* did not make an unreasonable application of state or federal law.

Moreover, Robinson's attempt to distinguish *Lopez* based on statistical evidence is unpersuasive. While Robinson correctly states African Americans and Latino Americans are distinctive groups, he cannot establish the jury array unfairly represents the community. Robinson complains that these groups were significantly underrepresented because African Americans constituted only 1.3% of the panel and Latino Americans constituted less than 3%.[5] However, Robinson ignores his own figures showing that African Americans represented only 2.3% of the total population in Lehigh County and Latino Americans represented 5.2% of the total population. When taking these percentages into account, there is an absolute disparity[6] of a mere 1% for African Americans and only 1.9% for Latino Americans. These percentages are well below the absolute disparities deemed to show substantial underrepresentation. *See Ramseur*, 983 F.2d at 1232 ("Courts addressing the question of whether a given absolute disparity constitutes 'substantial underrepresentation' have held that absolute disparities between 2.0% and 11.5% do not constitute substantial underrepresentation."). Although the comparative disparities,[7] 43.5% and 36.5% respectively, present a closer case, they are still below the percentages courts have found impermissible. *See id.* (determining that while the defendant's evidence of a comparative disparity of about 40% was "borderline," is was "below the percentage of 45.4% condemned in *Preston v. Mandeville* , 428 F.2d 1392 (5th Cir. 1970) and close to the 42% comparative disparity found permissible in *Swain v. Alabama*, 380 U.S. 202 [] (1965)").

5 In reaching the percentage of Latino Americans, Robinson, counting four prospective jurors, apparently does not count the one juror that was selected for another case. In determining whether Lehigh County systematically excluded this group, the prospective juror should not be ignored. Regardless, even if this prospective juror is not considered, the claim fails.

6 "Absolute disparity in the jury selection context is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire." *Ramseur*, 983 F.2d at 1231.

7 "Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group." *Ramseur*, 983 F.2d at 1231.

Additionally, "[w]hen comparative disparity has been used, it has been emphasized that the significance of the figure is directly proportional to the size of the group relative to the general population, and thus is most useful when dealing with a group that comprises a large percentage of the population." *Weaver*, 267 F.3d at 242. Because the population percentages here, even when combined, represent only 7.5% of the population in Lehigh County and because absolute disparity is the "preferred method of analysis," Robinson has not shown that the jury selection process violated his constitutional rights. *See Weaver*, 267 F.3d at 242 (rejecting the defendant's fair cross section challenge despite the comparative disparities of 40.01% for African-Americans and 72.98% for Hispanics because they comprised such a small percentage of the population, and the absolute disparity figures of 1.23% and .71%, respectively, were low). The statistical evidence does not support Robinson's challenge to a fair cross-section of the jury and his claim is denied.

iii. Ineffective assistance of trial and PCRA counsel

Robinson's trial counsel was not ineffective for failing to object to the lack of representation of African Americans and Latino Americans on the jury panel. For the reasons discussed in the preceding section, any objection by trial counsel would have been futile. *See Commonwealth v. Bryant*, 579 A.2d 726, 742 (Pa. 2004) (stating, "[t]rial counsel cannot be held to be ineffective for failing to take futile actions or raise a meritless claim"). Robinson's trial counsel cannot be held to be ineffective for failing to raise a futile objection. Accordingly, trial counsel were not ineffective for failing to raise an objection regarding the diversity of the jury panel.

Next, Robinson asserts his PCRA counsel was ineffective for failing to present statistical evidence to support the fair-cross section claim. However, because the statistical evidence does not support the meritless claim, he was not prejudiced by PCRA counsel's allegedly deficient conduct.

J. Issue Ten

In Issue Ten, Robinson argues that the trial court improperly admitted evidence of prior bad acts. Specifically, Robinson alleges the evidence regarding his attack on Sam-Cali, and his subsequent arrest, was graphic, inflammatory, and unduly prejudicial constituting a violation of his constitutional rights. Robinson asserts this evidence prejudiced him not only at trial, but also at sentencing. He lastly asserts his trial court and PCRA counsel were ineffective.

To the extent that Robinson is raising a state-law evidentiary issue, his claim is not cognizable in a federal habeas proceeding. *See Keller v. Larkins*, 251 F.3d 408, 416 n.2 (3d Cir. 2001). "A federal habeas court is limited to deciding whether the admission of the evidence rose to the level of a due process violation." *Id*. In analyzing this, "a reviewing court must examine the relative probative and prejudicial value of evidence to determine whether its admission violated defendant's right to a fair trial." *Lesko v. Owens*, 881 F.2d 44, 51 (3d Cir. 1989). Robinson has not advanced any basis on which to conclude that the admission of evidence of a prior conviction amounted to a denial of due process. *See Allen v. Superintendent Waymart SCI*, 703 F. App'x 91, 97 (3d Cir. 2017) (citing *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) (recognizing that no clearly-established Supreme Court precedent establishes that admission of prior bad acts evidence violates due process)).[8]

Nonetheless, Pennsylvania state law governs the admissibility of prior bad acts as follows:

(b) Crimes, Wrongs, or Other Acts.

[8] Similarly, in his brief to the PSC on direct appeal, Robinson raised only an allegation of error under state law. *See* Petitioner's Brief at 57-61. Any attempt to present the claim as an allegation of error under the due process clause would be procedurally defaulted and unreviewable.

> (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

Pa.R.E. 404(b)(1)-(2).

With respect to Rule 404(b), courts in Pennsylvania have explained: "[E]vidence of prior crimes is not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes." *Commonwealth v. Melendez–Rodriguez*, 856 A.2d 1278, 1283 (Pa. Super. 2004). Nevertheless, "[e]vidence may be admissible in certain circumstances where it is relevant for some other legitimate purpose and not utilized solely to blacken the defendant's character." *Id*. Specifically, other crimes evidence is admissible if offered for a non-propensity purpose, such as proof of an actor's knowledge, plan, motive, identity, or absence of mistake or accident. *Commonwealth v. Chmiel*, 889 A.2d 501 (Pa. 2005). When offered for a legitimate purpose, evidence of prior crimes is admissible if its probative value outweighs its potential for unfair prejudice. *Commonwealth v. Hairston,* 84 A.3d 657 (Pa. 2014).

The PSC addressed the issue as follows:

> On appeal, Appellant presents a number of claims relating to Denise Sam–Cali, who testified about her assault in the early morning hours of June 29, 1993, the subsequent break-ins at her house, and Appellant's apprehension. Initially, he argues that the trial court erred in allowing Sam–Cali to testify, because this allowed evidence of prior bad acts and uncharged criminal conduct to be introduced to the jury. Appellant maintains that Sam–Cali was not a witness to any of the charged offenses and, yet, provided "lurid and inflammatory" testimony, linking Appellant to these incidents. Brief for Appellant, p. 56. Appellant also claims that his counsel was ineffective for failing to: (1) object to this testimony; and (2) request a limiting instruction in relation to this evidence.

> Initially, we note that Sam–Cali's testimony is admissible under the same principles supporting the joinder of the three homicides, i.e., to establish the identity of the perpetrator, his motive, intent, and a common criminal scheme. *See Elliott*, *supra*; *Miller*, *supra*; *Hughes*, *supra*. Furthermore, such testimony would be allowed under the "res gestae" exception to the rule against admission of evidence of prior crimes. As we explained in *Commonwealth v. Lark* (*Direct Appeal*), 518 Pa. 290 (1988)
>
> Evidence of distinct crimes are not admissible against a defendant being prosecuted for another crime solely to show his bad character and his propensity for committing criminal acts. However, evidence of other crimes and/or violent acts may be admissible in special circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad character. . . . [One such] special circumstance where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special circumstance, sometimes referred to as the res gestae exception to the general proscription against evidence of other crimes, is also known as the complete story rationale, i.e., evidence of other criminal acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.
>
> *Id*. at 497 (emphasis in original, internal citations omitted). In the present case, the incidents at the Sam–Cali residence are intricately interwoven with the three homicides in question. The initial assault on Sam–Cali took place approximately two weeks before the Fortney homicide and Sam–Cali's testimony provided the jury with a "complete story" of Appellant's criminal spree from the Burghardt homicide in August of 1992 to Appellant's capture in July of 1993. In sum, as the trial court explained, "Sam–Cali's testimony was not offered merely to indicate [Appellant]'s propensity to commit similar crimes . . . but to show he committed these crimes charged, how he committed them, why he committed them and the circumstances of his apprehension." Trial Court Opinion, p. 32.
>
> We also reject the ineffectiveness arguments raised by Appellant in relation to this substantive claim. First, Appellant's counsel objected to Sam–Cali's testimony on several occasions, on the basis that it was prejudicial, because it allowed the jury to consider evidence of other crimes perpetrated by Appellant. *See* N.T., 11/3/1994, pp. 1918–21, 1965. Second, while counsel for Appellant did not ask for a limiting instruction in relation to Sam–Cali's testimony, such request would have been (at best) redundant, as it appears that the trial court asked if such an instruction was required and, after receiving an affirmative response from the prosecutor, in fact, instructed the jury as to the limited purpose of this evidence. *See* N.T., 11/3/1994, pp. 1919–21, 1965–66. The trial court again cautioned the jurors about the limited use of Sam–Cali's testimony during the final jury instructions. *Se*e N.T., 11/8/1994, pp. 2279–2280.

Robinson I, 581 Pa. at 215-16.

Here, to the extent Robinson argues the trial court improperly admitted his prior bad acts testimony, it is outside the analysis of this Court. However, if Robinson argues this admission violated his due process, there is no Third Circuit precedent which supports his proposition. Robinson addresses his argument on the prejudicial nature of this admission, focusing on the evidentiary issue rather than the due process issue. Assuming arguendo of the evidentiary issue, this Court must note the substantial similarities between prior bad act evidences at the federal and Pennsylvania level. Nonetheless, no due process violation occurred with the admission of this information. The testimony highlighted the similarity of the allegations against Robinson, such as the identity of Robinson, his motive, intent, and the common criminal scheme. This testimony was not so dissimilar as to be so prejudicial that it denied Robinson's right to a fair trial.

The cases Robinson cites are inapposite in light of Third Circuit precedent. *See*, *e.g.*, *Minett v. Hendricks*, 135 F. App'x 547, 553 (3d Cir. 2005) (rejecting claim that admission of "other crimes" evidence is contrary to or an unreasonable application of clearly established Supreme Court precedent); *see also Charlton v. Franklin*, 503 F.3d 1112, 1115 (10th Cir. 2007) (state court's admission of evidence of petitioner's prior bad acts did not render trial fundamentally unfair or warrant habeas relief). Robinsons case law fails to address this point. He fails to address this because there is no precedent to do so. Notwithstanding Robinson's failure, his claim cannot proceed as there was no due process violation.

i. Ineffective assistance of counsel

Here, Robinson's trial counsel was not ineffective. Contrary to Robinson's argument, his trial counsel did object to the prior bad acts evidence. As the PSC noted, Robinson's trial counsel objected to the testimony numerous times. Therefore, Robinson's trial counsel performed its duty by objecting to the testimony. Moreover, as the PSC correctly notes, the trial court inquired about an instruction regarding the testimony, thus making any request by trial counsel redundant. The request by trial counsel not only would have been redundant, but also futile in light of the trial court's request. Robinson attempts to argue what already occurred at his trial, an objection and a limiting instruction. Accordingly, Robinson's trial counsel was not ineffective during this portion of the trial.

Robinson's argument that appellate counsel was ineffective must also be rejected. As is discussed above, there is no merit to the claim presented here. The trial court admitted the evidence due to the similarities between the issues. As the state court concluded, this decision was in accord with state law. Further, the admission did not violate Robinson's due process rights. Accordingly, Robinson has not demonstrated that prior counsel were ineffective.

K. Issue Eleven

In Issue Eleven, Robinson asserts a variety of statements he alleges are prosecutorial misconduct. He states the Commonwealth inflamed the passions of the jury during trial and sentencing by calling him a predator, the Commonwealth improperly placed the burden of proof on him in their argument, and the Commonwealth violated his Fifth Amendment right to remain silent in their argument.

The PSC addressed the issue as follows:

> Appellant complains that during his opening statement to the jury, the prosecutor referred to Appellant as a "predator," N.T., 10/24/1994, p. 57, and asked the jury not "to lose sight of the ferocity of what was involved here, of the violence, of the intent to kill," N.T., 10/24/1994, p. 59.
>
> The Webster's Third New International Dictionary defines "predator" as, inter alia, "one that prays, destroys, or devours" and "predatory" as, inter alia, "relating to, or practicing plunder, pillage, or rapine[;] using violence or robbery for aggrandizement[;] destructive, harmful, injurious." Webster's Third New International Dictionary of the English Language Unabridged, p. 1785. These

definitions are entirely consistent with the way the Commonwealth portrayed Appellant to the jury—a calculating attacker, who prowled the East Allentown area, and killed his victims with vicious ferocity.

Moreover, the intent of the perpetrator, which the prosecutor's statement emphasized, is an essential element that the Commonwealth must prove to establish first-degree murder. *See* 18 Pa.C.S. § 2502(a) (defining "murder of the first degree" as "[a] criminal homicide . . . committed by an intentional killing") (emphasis supplied); *also see* 18 Pa.C.S. § 2501(a) (stating that "[a] person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being") (emphasis supplied). Thus, it was entirely appropriate for the prosecutor to focus the jury's attention on this aspect of the case.

As reflected above, we believe that these statements were within the context of the evidence presented by the Commonwealth. Therefore, this Court finds no misconduct on the part of the prosecutor and rejects Appellant's claim that his counsel was ineffective for failing to object to these comments.

ii. Closing Statement

Appellant argues that the prosecutor's guilt phase summation was inflammatory because he: (1) referred to Appellant as a "territorial predator," N.T., 11/8/1994, p. 2246; (2) stated that "only four people have seen [Appellant's] behavior and action and only one of them is alive to tell you about her experiences with him," N.T., 11/8/1994, p. 2247; and (3) told the jury that "[i]t's time to put the nightmare on the east side to bed. It's time to do that by returning verdicts of guilty, guilty, guilty." N.T., 11/8/1994, p. 2272. Additionally, Appellant contends that the prosecutor improperly commented upon his failure to produce evidence, when, he stated as follows:

Do you think . . . if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand?

N.T., 11/8/1994, p. 2248; *see also* N.T., 11/8/1994, p. 2265. Appellant asserts that, by way of this comment, the prosecutor suggested that the defense had some burden of proof in the case.

Again, the characterization of Appellant as a "territorial predator" is entirely consistent with the case presented by the prosecutor, who maintained that Appellant targeted a certain type of victims within a specific geographical area. Similarly, the comment that only one of Appellant's victims was still alive was appropriate, in light of the Commonwealth (1) providing testimony that Appellant attacked Burghardt, Schmoyer, Fortney, and Sam–Cali; (2) offering proof that Appellant was responsible for the killings of Burghardt, Schmoyer, and Fortney; and (3) presenting the testimony of Sam–Cali as the only victim who survived her encounter with Appellant. Furthermore, the prosecutor's reference to "the

> nightmare on the east side," falls squarely within the gamut of permissible oratorical flare.
>
> Finally, a reading of the entire guilt phase summation by the prosecutor does not disclose any unfair suggestion that Appellant bore some burden of proof in the case. Indeed, the statement cited by Appellant refers to the fact that the DNA evidence presented by the Commonwealth via testimony of several expert witnesses was uncontradicted by any defense witnesses, which is fully consistent with the case presented to the jurors. Furthermore, the trial court instructed the jury concerning not making an adverse inference because Appellant did not testify and that, as a matter of law, the defendant is not required to produce any evidence to establish his innocence. *See* N.T., 11/8/1994, pp. 2280–82, 2314. Accordingly, we reject the prosecutorial misconduct arguments and the corresponding counsel ineffectiveness claims asserted by Appellant concerning the prosecutor's guilt phase closing statement.

Robinson I, 581 Pa. at 250-53.

i. Statements at trial and sentencing

Robinson asserts the Commonwealth's statements during the trial and guilt phase improperly inflamed the passions of the jurors and violated his due process. During the trial phase, the Commonwealth called Robinson a, "predator," NT 10/24/1994, at 57, instructed the jury to "never lose sight of the ferocity of what was involved here, of the violence. . . ," *id*. at 59, and called Robinson a "territorial predator" with "[w]ickedness, cruelty, evil. Wickedness of heart. Cruelty of disposition. Cruelty of mind. That was his intent. That was his motivation. It's difficult for us to fathom." NT 11/9/94, at 2246. Robinson further argues while the Commonwealth couched their argument in terms of intent, the message to the jury was that he was evil, cruel, and wicked, and was guilty because of his flawed character. He then asserts that the Commonwealth continued this argument by connecting the attack on Sam-Cali with his "predator" theme, with the Commonwealth stating, "[a]nd it also explains to you why, as a predatorial predator, he had to do away with Denise Sam-Cali." *Id*. at 2262.

Moreover, during the guilt phase, Robinson argues the Commonwealth told the jury that he had failed to express remorse, had failed to show sympathy and mercy, and was depraved. *Id*. at 2707-08. Lastly, Robinson asserts the Commonwealth also improperly suggested that he might be a danger to the members of the jury or the general public, stating, "Yes, within his household he may be fine, but when he gets out, ladies and gentlemen, watch out if you are not in his circle of friends, or his circle of family; watch out." *Id*. at 2710.

The prosecutor is entitled to considerable latitude to argue the evidence and reasonable inferences that can be drawn from that evidence. *See United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991) (citing *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982)). Moreover, the prosecution "may employ oratorical flair arguing its version of the case to the jury." *Henry v. Horn*, 218 F. Supp. 2d 671, 705 (E.D. Pa. 2002).

The Supreme Court has held that federal habeas relief may be granted when the "prosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Greer v. Miller*, 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The Court further opined that for due process to have been offended, "the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Id*. (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976))). *See also Ramseur v. Beyer*, 983 F.2d 1215, 1239 (3d Cir. 1992) (our review of a prosecutor's conduct in a state trial in a federal habeas proceeding is limited to determining whether the prosecutor's conduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." (quoting *Greer*, 483 U.S. at 765). This determination will, at times, require the Court to draw a fine line - distinguishing between ordinary trial error on one hand, and "that sort of egregious misconduct which amounts to a denial of constitutional due process" on the other hand. *Ramseur*, 983 F.2d at 1239 (quoting *United States ex rel. Perry v. Mulligan*, 544 F.2d 674, 678 (3d Cir. 1976)).

In evaluating whether the remarks of the prosecutor rise to the level of a constitutional violation, the Court is required to examine those remarks in the context of the whole trial. *Ramseur*, 983 F.2d at 1239 (citing *Greer*, 483 U.S. at 766). The remarks must be sufficiently prejudicial in the context of the entire trial to violate a petitioner's due process rights. *Greer*, 483 U.S. at 766 (citing *Donnell*, 416 U.S. at 639). As the United States Supreme Court has held, "habeas relief is not available simply because the prosecutor's remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 181 (internal quotations omitted).

Here, this Court finds no due process violations for the Commonwealth's remarks during the trial phase or guilt phase. During the trial phase, comments such as "predator" and "territorial predator" were consistent with the Commonwealth's theme. The theme of the Commonwealth's case was that Robinson preyed upon the victims, including Sam-Cali. The Commonwealth needed to prove all of the elements of first-degree murder and felt using words such as "predator" and "territorial predator" were tools to persuade the jury. These statements are within the bounds of permissible oratorical flair.

Assuming arguendo the Commonwealth's remarks were undesirable, habeas relief does not automatically attach as there was no due process violation. Robinson's trial counsel had an opportunity to counter these remarks. To demonstrate a due process violation, Robinson must demonstrate that the misconduct averred so infected the trial with unfairness as to make the resulting conviction a denial of due process. Where, as here, the state court has already reviewed and rejected the claim, the habeas petitioner bears an even higher burden – he must establish that the state court's rejection of the claim was "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 567 U.S. 37, 47 (2012). Here the jurors were exposed to gruesome details of Robinson's actions, and the Commonwealth attempted to use the language to tie his behavior to oral persuasiveness. In the context of the entire trial, these remarks were not sufficiently prejudicial as to violate Robinson's due process. The evidence produced at trial was intense, and the language the Commonwealth utilized to attempt to persuade the jury matched the intensity.

ii. Statements as to burden of proof

Next, Robinson asserts the Commonwealth committed misconduct when the Commonwealth accused him of failing to produce evidence at trial. The statements are as follows:

> Do you think, ladies and gentlemen, if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand?

NT 11/8/94 at 2248.

> And again, do you think, if there was somebody else who would come in and refute Dr. Ferrell or Dr. Deadman we wouldn't have seen them from the witness stand? No.

Id. at 2265.

In delivering a closing argument, counsel "is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence," *United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991)., "[T]he reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001) ("[T]he prosecution is permitted to discuss a defendant's failure to refute its evidence, and defendant's cross–examining technique."); *United States v. Duronio*, No. 02–CR–0933, 2006 U.S. Dist. LEXIS 89303, at *1 (D.N.J. Dec. 8, 2006)

As to the first comment Robinson cites, the Commonwealth was discussing his failure to counter the witnesses the Commonwealth provided. This comment does not shift the burden of proof onto Robinson. The type of comment is permitted as the Commonwealth had wide latitude to argue its case in summation. Similarly, Robinson's second objection relates to the comment about his failure to refute the Commonwealth's expert. This type of statement is also permitted. This statement attacked Robinson's failure to refute, not his burden of proof, and the type of comment is permitted given the wide latitude in summation. *See Werme*, 939 F.2d at 117. Neither of the comments Robinson cites prejudiced him so substantially it violated his due process. These comments were permitted in summation and attacked Robinson's inability to refute the Commonwealth's evidence. Notwithstanding the comments, the trial court apprised the jurors on the burden of proof, thus alleviating any of Robinson's concerns. Accordingly, the Commonwealth's comments did not arise to a due process violation.

iii. Right to silence during guilty phase

Robinson further asserts the Commonwealth attacked his right to remain silent during the penalty phase summation. The statements are as follows:[9]

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[9] Since trial counsel did not object to these comments about Robinson's lack of remorse, any direct challenge to the statement was clearly waived under state law and could only have been brought on direct appeal as a challenge that trial counsel was ineffective for failing to object to these statements. As such, it would appear that the stand-alone prosecutorial misconduct challenge is procedurally defaulted. However, Robinson has also presented an ineffectiveness challenge. Since the Court concludes that the claim is meritless, the Court has reviewed it without discussing the issue of procedural default. 28 U.S.C. 2254(b)(2).

> And as he sits there, ladies and gentlemen, we have not heard any remorse. We have not heard any calling for the victims. He sits there, to some degree like a sphinx and you have to decide whether to impose life or death in this particular case.

NT 11/8/94, at 2707.

> Think about whether or not there was ever any mercy or sympathy shown for any of the victims in this case. Think about whether or not there is any remorse. And don't think as I said to you in my opening, as you would think as good people, because that's not the way this defendant thinks.

Id. The PSC addressed the issue as follows:

> The PSC addressed the issue as follows:
>
> Appellant did not testify during either the guilt phase or the penalty phase of the trial. Hence, the statement cited above appears to be an improper reference to Appellant's valid exercise of his federal constitutional right and should have been objected to by trial counsel. We are convinced, however, that Appellant suffered no prejudice as a result of the prosecutor's comment.
>
> First, we note that at issue is a brief statement that did not contain a direct reference to the fact that Appellant did not testify during the trial. Second, the trial court specifically instructed the jury that "[i]t is entirely up to the defendant whether to testify and you must not draw any adverse inference from his silence."
>
> N.T., 11/10/1994, p. 2740. We feel that this instruction more than adequately cured any ill effect of this fleeting comment that (as we stated before) did not even contain a direct reference to Appellant's exercise of his Fifth Amendment right. *See Baker*, *supra* (the jury is presumed to follow the instructions); *Freeman*, *supra*. For all of the above reasons, Appellant is not entitled to relief on this ground.

Robinson I, 581 Pa. 253-54.

The Fifth Amendment protects criminal defendants from self-incrimination by permitting them to choose not to testify at their trials. The Supreme Court gave further life to this guarantee by holding that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). This prohibition applies equally to both the guilt and penalty phases of capital proceedings. *See Estelle v. Smith*, 451 U.S. 454, 462–63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). It does not mean, however, that prosecutorial comments should not be examined in the broader context of the complete trial. "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (1986) (internal citations omitted); *see also United States v. Hasting*, 461 U.S. 499, 507–09 (1983) (applying the harmless error doctrine to *Griffin*); *Lesko v. Lehman*, 925 F.2d 1527, 1544 (3d Cir. 1991) ("[W]e must examine the challenged prosecutorial remark in its trial context."). Consistent with this overarching fairness standard, the Court has permitted prosecutors to provide a "fair response" to comments made by or on behalf of a defendant regarding his decision not to testify. *United States v. Robinson*, 485 U.S. 25, 32 (1988) (finding that the prosecutor could mention defendant's failure to testify when defense counsel argued that his client had not been given an opportunity to explain himself to the jury).

For example, in *Holland v. Horn*, 150 F. Supp. 2d 706, 771 (E.D. Pa. 2001), *aff'd*, 519 F.3d 107 (3d Cir. 2008, the petitioner challenged the statements made by the prosecutor at the petitioner's capital sentencing proceeding, arguing that they violated the prohibition in *Griffin* against a prosecutor commenting on a defendant's Fifth Amendment decision not to testify. In the Commonwealth's closing argument, the prosecutor asked the jury "has any of you heard any remorse from [Petitioner] in this case? Has any of you seen a tear in his eye? Has he expressed the least bit of remorse for what he did to [the Victim]?" *Id*. The petitioner cited to *Lesko* in support of his argument. *Lesko* involved prosecutorial comments regarding a defendant's choice to testify only in support of mitigation at sentencing. In his closing argument, the prosecutor criticized the defendant for not having the "common decency to say I'm sorry for what I did." *Lesko*, 925 F.2d at 1544. Further, the prosecutor in *Lesko* went on to represent the overall message of the defendant's testimony as "I don't want you to put me to death, but I'm not even going to say that I'm sorry." *Id*. The court determined that "the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him—indeed, to apologize for his crimes—during his penalty phase testimony, and that the jury could and should punish him for his failure to do so." *Id*. The *Lesko* court found the prosecutor's comments particularly damaging in light of the fact that had the defendant testified to those facts the prosecutor was suggesting should have been inferred from defendant's silence, "such testimony would have [clearly] been self-incriminating." *Id*.

The Court in *Holland* rejected this argument, relying upon the reasoning of the PSC. *See Holland I*, 543 A.2d 1068 (Pa. 1988). The PSC in the *Holland* case gave three separate reasons for denying the petitioner's claim. First, the trial court sustained defense counsel's immediate objection to the statements and provided a curative instruction at the end of the penalty phase. *See id*. at 1077. Second, the prosecutor's comments were intended to address the petitioner's general demeanor, a goal that is acceptable under Pennsylvania law and the Fifth Amendment. *See id*. (citing *Commonwealth v. Travaglia*, 502 Pa. 474 (Pa. 1983)). Finally, the Pennsylvania Supreme Court determined that prosecutor's comments constituted a "fair response" to defense counsel's arguments for the petitioner's remorse. *See id*.

Here, the Court agrees with the PSC about the Commonwealth's comments, but the comments do not rise to a due process violation. Nonetheless, Robinson's reliance upon *Lesko* is inapposite. In *Lesko*, the defendant testified in support of his mitigation during sentencing and the Commonwealth attacked that limited testimony by stating, "I don't want you to put me to death, but I'm not even going to say that I'm sorry." *Lesko*, 925 F.2d at 1544. *Lesko* is distinguishable because Robinson did not testify and the Commonwealth's comments toward Robinson could not be interpreted that Robinson had an obligation to testify and apologize like the defendant in *Lesko*. Conversely, the Commonwealth's statements are similar to the Commonwealth's in *Holland*, in which the Commonwealth stated, "has any of you heard any remorse from [Petitioner] in this case? Has any of you seen a tear in his eye? Has he expressed the least bit of remorse for what he did to [the Victim]?" *See Holland*, 150 F. Supp. 2d at 771. Neither the defendant in *Holland* nor Robinson testified. Additionally, the Commonwealth was permitted to address the demeanor of Robinson, just like the Commonwealth in *Holland* was permitted to address the demeanor in that case. Accordingly, given the deferential standard of the AEDPA, the Court defers to the decision of the PSC, and finds the opinion of the PSC was not an unreasonable application of clearly established federal law. The Court issued an instruction, and the instruction cured any ill the Commonwealth's statement may have caused.

iv. Cumulative effect

The cumulative effect of the statements made at trial and sentencing, as to the burden of proof, and as to Robinson's right to remain silent do not warrant relief. In analyzing all of the statements, the Court believes the statements collectively did not so infect the trial as to render the proceeding a denial of due process. The Commonwealth has wide latitude to make and argue its case. Robinson's trial was no different. Nonetheless, as discussed previously, the trial court issued an instruction to the jury regarding Robinson's silence.

v. Ineffective assistance of counsel

At the trial phase, Robinson's trial counsel was not ineffective. As the Court has noted, comments such as predator and territorial predator are within the wide latitude attorneys are granted during summation. If Robinson's trial counsel elected to, they could have countered this language. However, it was not ineffective to fail to counter. The comments the Commonwealth made were part of their theory of the case, and it did not prejudice Robinson.

With respect to the Commonwealth's statement as to why Robinson did not express remorse for his actions, as the PSC observed this is something that should have been objected to by trial counsel, but the failure to object did not result in prejudice. The comment constitutes a brief statement that did not contain a direct reference to the fact that Robinson did not testify during trial. Further, the court instructed the jury that "[i]t is entirely up to the defendant whether to testify and you must not draw any adverse inference from his silence." N.T. 11/10/1994, p. 2740. This instruction more than adequately cured any effect of the prosecutor's comment. Thus, the comments Robinson cites are distinguishable from *Lesko*, did not result in prejudice and do not rise to the level of a due process violation.

L. Issue Twelve

In Issue Twelve, Robinson asserts the trial court improperly denied his request for a continuance to allow witness Robert Burns to testify on his behalf. The PSC addressed the issue as follows:

> The defense began its penalty phase presentation on November 9, 1994. However, because the last three defense witnesses, including Robert Burns (Burns), a principal of St. Gabriel's Hall, where Appellant was placed as a juvenile on prior charges, and a secretary from that facility, were out of town and subpoenaed for the next day, the proceedings ended early (at approximately 4:00 pm) and were continued to November 10, 1994. N.T., 11/10/1994, pp. 2630–31. On that day, starting at around 9:30 a.m., the defense resumed its case with the testimony of William Mocriski. N.T., 11/10/1994, pp. 2641–45. His testimony lasted approximately ten minutes and, at its conclusion, Appellant's counsel informed the trial court that the next witness—Burns—would not be arriving until 10:15 a.m. or 10:30 a.m. N.T., 11/10/1994, pp. 2636, 2649–2651. Later, Appellant's counsel acknowledged that this witness was originally subpoenaed for 9:00 a.m. N.T., 11/10/1994, pp. 2651–52. He also related that Burns and the secretary from St. Gabriel's Hall, who was apparently traveling with Burns, were the last witnesses to

testify on behalf of Appellant. N.T., 11/10/1994, pp. 2650–52. The trial court called for a thirty-minute recess and the jury was taken out of the courtroom at 9:44 a.m. N.T., 11/10/1994, p. 2653.

At 10:23 a.m., Appellant's counsel informed the trial court that: (1) Barbara Brown, Appellant's mother, agreed to testify for the defense; and (2) Burns and the secretary from St. Gabriel's Hall would be called to the witness stand after her testimony. N.T., 11/10/1994, p. 2676. The testimony of Barbara Brown concluded at around 10:45 a.m. N.T., 11/10/1994, p. 2695. However, by that time, although one of Appellant's counsels went to find Mr. Burns and the secretary from St. Gabriel's Hall, they were still not present in the courtroom. N.T., 11/10/1994, p. 2695. At that point, the trial court requested that defense counsel make an offer of proof as to the substance of the expected testimony, which he did, identifying the witnesses and stating that their testimony would reflect on Appellant's academic and personal development at St. Gabriel's Hall. N.T., 11/10/1994, pp. 2696–98. The prosecutor refused to stipulate to this testimony, pointing out that there was conflicting evidence as to the extent of Appellant's progress at that facility. N.T., 11/10/1994, p. 2698.

By 10:50 a.m., counsel for Appellant, who went to retrieve the two witnesses, returned to the courtroom and stated that they still did not arrive. N.T., 11/10/1994, p. 2700. The court then waited until 11:00 a.m., giving the defense another opportunity to locate and present the two remaining witnesses. N.T., 11/10/1994, pp. 2704–05. At that time, because the witnesses still could not be located, over several objections by Appellant's counsel, the trial court ordered the parties to proceed with oral argument, explained to the jury the cause of the delay, and gave them a brief synopsis of the expected testimony that the defense sought to present and the prosecutor's rebuttal to that testimony. N.T., 11/10/1994, pp. 2699, 2703–06. Following the jury charge, the trial court admonished Burns, who, according to Appellant's counsel, arrived at 11:00 a.m., found Burns in contempt, and ordered him to pay a fine in the amount of $500.00. N.T., 11/10/1994, pp. 2770–71.

Presently, Appellant argues that his sentence must be vacated because the trial court "unjustifiably" refused to grant a continuance to allow Burns to testify. He also argues that his counsel was ineffective for failing to obtain such continuance.

"The grant or refusal of a request for a continuance is a matter vested in the sound discretion of the trial court, and its decision, to grant or deny the request, will not be reversed by an appellate court in the absence of an abuse of that authority." *Commonwealth v. Birdsong*, 538 Pa. 587, 650 A.2d 26, 34 (1994). The factors to be considered to determine whether the trial court's discretion was properly exercised are: (1) the necessity of the witness to strengthen the defendant's case; (2) the essentiality of the witness to defendant's defense; (3) the diligence exercised to procure his presence at trial; (4) the facts to which he would testify; and (5) the likelihood that he could be produced at the next term of court. *See id.* at 34;

Commonwealth v. Clayton, 516 Pa. 263, 532 A.2d 385, 395 (1987), *cert. denied*, 485 U.S. 929 (1988); *Commonwealth v. (Eddie) Smith*, 442 Pa. 265 (1971).

> Appellant acknowledges that Burns "was scheduled to appear as the first witness of the day, but was delayed in his arrival." Brief for Appellant, p. 92 (emphasis supplied). Although there is conflicting evidence as to the true extent of the witness' absence, one thing is clear—Burns was inexcusably late for a trial where a man's life stood in jeopardy. Applying the criteria set forth above to the facts at hand, we cannot find that the trial court's actions constituted an abuse of judicial discretion.
>
> Initially, we note that Burns was not an essential witness in that he could only testify about his familiarity with Appellant during a nine-month stay at a juvenile facility. Again, however, the jury ultimately found the presence of the "catch all" mitigator. Therefore, Burns' testimony would have been redundant. Moreover, it is highly doubtful that the testimony of Burns would have strengthened Appellant's case. In fact, it is more than likely that it would have engendered the opposite effect. As demonstrated during the post-sentencing proceedings, although Burns could testify about his experiences with Appellant while he was placed at St. Gabriel's Hall, Burns was not aware of the particulars of Appellant's stay and was thus easily undermined as a witness. More importantly, the testimony of Burns would have allowed the Commonwealth to introduce damning evidence concerning Appellant's juvenile placement at St. Gabriel's Hall. As the trial court observed:
>
> [T]he records at St. Gabriel's Hall reflect that [Appellant]'s initial adjustment was poor and "there has not been a great deal of improvement since then, according to staff . . . he is usually manipulative and slow to cooperate. His peer relationships are typically unsatisfactory." In addition, [Appellant] absconded from the institution, stole a staff member's wallet with $200.00 in it, and violated a variety of rules and regulations.
>
> Trial Court Opinion, pp. 56–57. We observe that the trial court went out of its way in repeatedly giving time to the defense to find its last two witnesses and, ultimately, when the witnesses could not be located, gave the jury the synopsis of their testimony. Ultimately, given the circumstances at hand, such as the length of the trial, the fact that Burns was the last witness to testify, and his unexcused lateness, we find that the trial court's action did not constitute an abuse of judicial discretion. We similarly reject Appellant's claim that his counsel was ineffective in failing to seek a continuance, in light of the transcript that indicates that counsel did everything they could to secure the testimony of Burns.

Robinson I, 581 Pa. at 235-38.

The Court finds the trial court did not abuse its discretion in not granting a continuance for the testimony of Burns. Burns was impermissibly late for such a case of importance. The trial court had already attempted to accommodate the defense. Further, Burns was not merely absent, but defense counsel had been unable to reach the witness, despite efforts. The trial court has the discretion to control the flow of its courtroom, and the refusal to permit Burns to testify was not an abuse of its discretion.

Despite Robinson's argument, the trial court's decision to deny the open-ended continuance did not preclude the defense from considering mitigating factor. The PSC correctly noted this testimony would have been redundant because the jury eventually found the catch all provision. Furthermore, the PSC also correctly noted the potential harmful consequences of Burns' testimony. The decision to call Burns would have opened the door to Robinson's behavior while at St. Gabriel's Hall, which would have provided the Commonwealth with additional evidence that could have been considered as an aggravator. Therefore, the trial court's decision was not contrary to federal law. Accordingly, the trial court did not abuse its discretion.

M. Issue Thirteen

In Issue Thirteen, Robinson argues, the Commonwealth put his future dangerousness at issue during sentencing, and the trial court never instructed the jury that, under Pennsylvania law, Robinson was statutorily ineligible for parole if sentenced to life. Instead Robinson argues, the court erroneously instructed the jury so as to suggest that Robinson, if spared death, would not necessarily be imprisoned for life. Lastly, Robinson asserts his trial counsel were ineffective because they never asked for a life-without-parole instruction even though he was entitled to such an instruction under controlling law. The PSC addressed the issue as follows:

> At one point during the charge, the following exchange took place between the trial court and one of the jurors:
>
> Juror: On the life in prison, is that without parole, just so that we are sure? Would there be a chance of parole if it was life in prison?

> Trial Court: I don’t see how I can guarantee—that's the present law. But what if the legislature changes the law? I can't guarantee that. That's the way the law is now.
>
> Juror: Just so we know, Your Honor.
>
> Trial Court: Who knows two years from now if they’ll change the law. I can't tell you.
>
> N.T., 11/10/1994, pp. 2767–68. At that point, the prosecutor requested a sidebar conference. At the conclusion of the discussion, the trial court gave the jury the following answer: “I am to tell you, and it's accurate, ‘Life is life.’ There won't be any parole. Life is life.” N.T., 11/10/1994, p. 2769.
>
> Presently, Appellant argues that the trial court failed to mention that there was no possibility of parole if Appellant would receive a life sentence. Thus, Appellant maintains that the jury was confused by the instructions and the trial court further compounded their misunderstanding by giving an answer indicative that “life imprisonment” may include the possibility of parole. Ultimately, Appellant contends that “not informing the jury during the sentencing instructions that a life sentence means life without the possibility of parole offends the evolving standards of decency that underlie” the U.S. and Pennsylvania Constitutions. Brief for Appellant, p. 143.
>
> Essentially, Appellant’s contention is that the trial court should have provided the jury with the instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), that a “life sentence” means “life without a possibility of parole.” However, as this Court has repeatedly held, “a *Simmons* instruction is required only where the prosecution makes the future dangerousness of the defendant an issue in the case and the defendant specifically requests such an instruction.” *Commonwealth v. Champney*, 574 Pa. 435 (2003); *see also Commonwealth v. Robinson*, 554 Pa. 293 (1998), *cert. denied*, 528 U.S. 1082 (2000). Here, the Commonwealth did not argue future dangerousness and defense counsel did not request a *Simmons* instruction. Therefore, no instruction was required.
>
> As it relates to the statement made by the trial court in response to the question posed by the juror, it is similar to what this Court faced in *Commonwealth v. Clark*, 551 Pa. 258 (1998), *cert. denied*, 526 U.S. 1070 (1999). Just as in this case, the trial court in *Clark* responded to the jury’s question as to the meaning of “life imprisonment” by acknowledging, inter alia, that, although the present state of the law does not allow parole in the circumstances at hand, it cannot predict whether the legislature will decide to change that in the future. *Id*. at 35. We found that this instruction was not erroneous, *id*. at 36, and believe that *Clark* is directly on point with the circumstances presently before us. Therefore, we find no error in the instruction given by the trial court.

Robinson I, 581 Pa. at 245-47.

In *Simmons*, a plurality of the Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994); *see also Robinson v. Beard*, 762 F.3d 316, 327 (3d Cir. 2014) ("The fundamental takeaway from *Simmons* is that a jury cannot be presented with generalized arguments regarding the defendant's future dangerousness while also being prevented from learning that the defendant will never be released on parole.") Thereafter, the PSC held that under *Simmons* "a jury must be informed that life means life without the possibility of parole only when the prosecutor injects concerns of the defendant's future dangerousness into the case." *Commonwealth v. Speight*, 677 A.2d 317, 326 (Pa. 1996) (emphasis added) (concluding the prosecutor had not made appellant's future dangerousness an issue, and the instruction would not have been required under Simmons).

The United States Supreme Court again addressed the issue in *Kelly v. South Carolina*, 534 U.S. 246 (2002), holding that introducing evidence that only bore "a tendency" to prove dangerousness in the future raised the specter of a defendant's "future dangerousness." *Id*. at 254 ("Evidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms.").

While "[i]t is not per se error for a prosecutor to argue a defendant's future dangerousness," *Commonwealth v. Smith*, 606 Pa. 127 (Pa. 2010), where future dangerousness is at issue and a capital defendant requests a specific instruction that his first degree murder conviction precludes his eligibility for parole, it is a denial of due process to refuse that instruction. *Commonwealth v. Chambers*, 546 Pa. 370, 685 A.2d 96, 106 (Pa. 1996).

Here, the PSC did not unreasonably apply federal law in ruling on this issue as *Simmons* is distinguishable in this instance. Unlike in *Simmons*, the Commonwealth at Robinson's trial made no explicit mention of Robinson's ability to conform to society in the future. The comments made by the Commonwealth pertain to the deterrence factor of Robinson's sentencing. Robinson confuses this with "expressly" implicating the need for the *Simmons* instruction. *See Simmons*, 512 U.S. at 177, (O'Connor, J., concurring) (requiring the trial court to ask whether "the prosecution argues that the defendant will pose a threat to society in the future"). The trial court did not ask whether the defendant will pose a threat to society in the future, it did not need to as the Commonwealth focused on the deterrence factor with their statements. Ultimately, the trial court was clear in its statement to the jury: "'Life is life.' There won't be any parole. Life is life." Even if the prior statement was problematic, this clear, direct and accurate statement of the law, renders the instruction sufficient under *Simmons*. The PSC correctly interpreted *Simmons*; accordingly, it did not unreasonably apply federal law.

i. Ineffective assistance of counsel

Here, Robinson's trial counsel was not ineffective. As the Commonwealth's comments were not explicit enough to warrant a *Simmons* instruction, Robinson's trial counsel did not need to request the instruction. Robinson's trial counsel correctly understood the difference between comments based on deterrence versus comments on future dangerousness. As discussed, the PSC did not unreasonably apply federal law in not issuing a *Simmons* instruction, the Commonwealth's remarks did not warrant a Simmons instruction, and to compel Robinson's counsel to request a *Simmons* instruction would have been nonsensical. Robinson's theory relies upon a hypothetical, not what actually occurred in Court. The facts establish a *Simmons* instruction was not necessary, and this Court must rely upon the factual record, not hypotheticals. Since a *Simmons* instruction was not warranted, a request by trial counsel would have been futile, and Robinson's ineffective assistance of counsel arguments are moot.

N. Certificate of Appealability

To appeal a final order in a habeas corpus proceeding, a prisoner in state custody must first be issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(A). To receive a certificate, the petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253((c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (quoting *Slack*, 529 U.S. at 484).

Having found that no claim raised by Robinson has any merit, the Court also finds that he has failed to make a substantial showing of the denial of a constitutional right and that no reasonable jurist would reach different conclusions. Accordingly, the Court declines to issue a certificate of appealability.

IV. CONCLUSION

The Court finds that the federal habeas claims raised by Harvey Miguel Robinson attacking his sentence of death for the murder of Jessica Jean Fortney are meritless. Accordingly, the Petition for Writ of Habeas Corpus is denied. Because Robinson has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is denied under 28 U.S.C. § 2253(c)(1)(A) with regard to all issues.

A separate Order follows.

BY THE COURT:

/s/ *Joseph F. Leeson, Jr.*_____________
JOSEPH F. LEESON, JR.
United States District Judge

COMMONWEALTH of Pennsylvania, Appellee

v.

Harvey Miguel ROBINSON, Appellant.

Commonwealth of Pennsylvania, Appellee

v.

Harvey Miguel Robinson, Appellant.

Supreme Court of Pennsylvania.

Argued April 8, 2003.

Decided Dec. 30, 2004.

Background: Defendant was convicted, in the Court of Common Pleas, Lehigh County, Criminal Division, at Nos. 55, 56, and 58 of 1994, Edward D. Reibman, J., of first-degree murder and related offenses, and was sentenced to death. Following vacation of two of defendant's three death sentences and denial of all other post-sentence motions, defendant appealed.

Holdings: The Supreme Court, Nos. 348 Capital Appeal Docket, 7 EAP 2002, Newman, J., held that:

(1) evidence was sufficient to support conviction of first-degree murder and other convictions ancillary thereto;

(2) trial court did not abuse its discretion in denying defendant's pre-trial motion for severance;

(3) voir dire of prospective jurors was properly conducted;

(4) defense counsel did not render ineffective assistance;

(5) testimony of victim of uncharged sexual assault and attempted murder was admissible;

(6) any errors in admission of testimony and evidence were harmless;

(7) all requirements for admissibility of hypnotically-refreshed evidence were satisfied;

(8) trial court did not abuse its discretion in refusing to allow continuance to permit defense counsel to locate penalty-phase witnesses;

(9) defendant's convictions in relation to first two murders were properly considered for purposes of "convictions of prior murders" aggravating factor with respect to third murder; and

(10) prosecutor's comments during opening statement, guilt phase summation, and penalty phase summation were not misconduct.

Affirmed.

Nigro, J., concurred in result with opinion.

Saylor, J., concurred in result with opinion.

1. Criminal Law ⚷1134(3)

Supreme Court assesses the sufficiency of the evidence to sustain a conviction of first-degree murder where death penalty has been imposed regardless of whether the defendant explicitly raises a claim of insufficiency of the evidence on appeal.

2. Homicide ⚷540

To sustain a conviction of first-degree murder, the state must prove that: (1) the defendant acted with a specific intent to kill; (2) a human being was unlawfully killed; (3) the defendant did the killing; and (4) the killing was done with deliberation.

3. Homicide ⚷1141, 1143

Evidence, including evidence of specific intent and deliberation, was sufficient to support conviction of first-degree murder, and other convictions ancillary thereto; victim died as result of suffocation by strangulation and blunt trauma, victim bore in excess of 50 different injury patterns, many compatible with being beaten by closed fist about the face, some indicating object on perpetrator's hands and others revealing that perpetrator placed his knees on victim during beating, causing her blood to spatter on the wall, lampshade, and himself, victim had sexual intercourse within few hours of her death, and seminal fluid from victim's vaginal swabs matched defendant's DNA.

4. Criminal Law ⚷1134(3)

Supreme Court would address ineffective assistance of counsel claims raised by capital murder defendant in his direct appeal, where claims were raised before trial court, and trial court conducted extensive evidentiary hearings in relation to such claims and addressed their merits in its opinion. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⚷620(6)

Trial court did not abuse its discretion in denying defendant's pre-trial motion for severance of charges involving three murder victims, despite defendant's contention that crimes were not similar enough to be considered distinctive modus operandi of single perpetrator, in that one murder victim lived two miles from the other two, crimes ranged over 11-month period, and victims were killed in different manners; all attacks took place in same general locale, within blocks of where defendant lived or had once lived, time period did not render consolidation improper, and all but four months thereof was due to defendant's detention in juvenile placement facility, and methods and manners of killings were sufficiently related. Rules Crim. Proc., Rule 582(A)(1)(a), 42 Pa.C.S.A.

6. Criminal Law ⚷619

Two-mile distance between home of one murder victim and homes of other two victims was not so great as to render that victim's murder so distinguishable from the other two murders with which defendant was charged as to render consolidation of informations inappropriate.

7. Criminal Law ⚷620(1)

Identifying characteristics of three separate murders bore sufficient logical connection, and evinced common scheme or plan, sufficient to warrant joinder of charges arising out of all three murders for trial, especially where each crime was perpetrated against different victim and physical evidence did not overlap; all victims were brutally murdered at close range by hand or hand-held instrument, defendant left behind virtually no incriminating physical evidence at any murder scene, defendant's DNA was recovered from each crime scene, each attack was committed at night or in the early morning hours, and all victims were overweight, white females living in same area.

8. Criminal Law ⚷126(2)

Jury ⚷70(1)

Murder defendant's general reference to adverse pre-trial publicity, specifically mentioning only one magazine article unrelated to charges joined for his trial, failed to establish requisite prejudice entitling him to change of venue or venire.

9. Criminal Law ⚷126(2)

Jury ⚷70(1)

Adverse pretrial publicity did not warrant change of venue or of venire in murder prosecution, where any potential bias on part of veniremembers in relation to media coverage was sufficiently dealt with during individual voir dire of each veniremember not excused for other reasons, majority of adverse publicity appeared more than a year prior to trial, and any veniremembers who indicated that they formed uncompromising opinion about defendant, or learned of his guilty plea on other charges, based upon news coverage were excused.

10. Jury ⚷62(3)

County's selection of prospective jurors from list of licensed drivers residing in county was statutorily permissible. 42 Pa.C.S.A. § 4521(a).

11. Jury ⚷33(1.10, 1.15, 1.20)

Murder defendant's unsupported and conclusory assertion that practice of drawing jury pools from list of licensed drivers residing in county resulted in systematic exclusion of youthful, elderly, disabled, and non-caucasian citizens from jury service was insufficient to establish prima facie case of unlawful discrimination in jury selection process.

12. Jury ⚷33(2.15)

"Life qualification" refers to the process in which counsel identifies and excludes those prospective jurors who would be unable to consider a sentence of life imprisonment for a conviction of murder in the first degree.

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

13. Criminal Law ⚷641.13(2.1)

Conduct of counsel for capital murder defendant during voir dire was not deficient with respect to life qualification of prospective jurors, and did not amount to ineffective assistance, where counsel asked prospective jurors whether they would be able to be fair and impartial in deciding case and whether they could follow the trial court's instructions in imposing the proper sentence, additional questions were posed to ensure that jurors would not automatically impose death penalty, but would follow statutory guidelines as explained to them by the trial court, and counsel was not obligated to engage in formal "life qualification" of prospective jurors. U.S.C.A. Const.Amend. 6.

14. Jury ⚷108

Prospective jurors in capital murder prosecution whose voir dire responses indicated that their views on capital punishment would prevent or substantially impair their performance of duties as jurors in accordance with instructions and oaths were properly excluded for cause.

15. Jury ⚷131(8)

Trial court did not abuse its discretion, during voir dire of prospective jurors in capital murder prosecution, in permitting prosecutor to question prospective jurors as to whether defendant's age would prevent them from imposing death penalty, where defense counsel also questioned prospective jurors as to defendant's age and its relation to their feelings about imposition of death penalty.

16. Jury ⚷104.1

Test for determining whether a prospective juror should be disqualified is whether he or she is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence.

17. Criminal Law ⚷1152(2)

Jury ⚷85

Decision as to whether a prospective juror should be disqualified rests within the sound discretion of the trial court, must be based upon the juror's answers and demeanor, and will not be reversed in the absence of a palpable abuse of such discretion.

18. Jury ⚷97(1)

Equivocal responses by some prospective jurors during voir dire in capital murder prosecution did not automatically require their excusal for cause, especially where such jurors indicated ability to follow instructions from trial court in delivering fair and impartial verdict based on evidence of case.

19. Jury ⚷85

Grants and denials of requests for excusals for cause of allegedly similarly situated prospective jurors in capital murder prosecution were within discretionary judgment of trial court.

20. Jury ⚷83(1), 100

Prospective juror in capital murder prosecution who expressed reservations with respect to his ability to serve due to his mother's illness and his business obligations, and who indicated familiarity with case from newspaper accounts, was not subject to excusal for cause, where prospective juror also stated that his mother's illness would not prevent him from rendering fair and impartial verdict and that his ability to concentrate during trial would only "possibly" be affected by his mother's illness, and that despite his familiarity with case from newspaper accounts, he would be able to render a fair and impartial verdict.

21. Jury ⚷90, 100

Prospective juror in capital murder prosecution who had seen media reports concerning case, had a child who was employed by one victim's employer in same capacity as victim had been, and knew pastors at that victim's church who had been involved in victim's funeral service was not subject to excusal for cause, where prospective juror also stated that she had no fixed opinion as to defendant's guilt or innocence and had no personal involvement in matter, and did not question her own ability to be impartial; rather, prospective juror testified that she "would not react favorably to graphic photographs of murdered persons" and "would [likely] have an emotional response to that."

22. Jury ⚷100

Mere exposure to media reports does not render a prospective venire person unable to sit on the jury.

23. Jury ⚷108

Prospective juror in capital murder prosecution who stated during voir dire that if defendant were guilty of a homicide, penalty should only be death, was not subject to excusal for cause, where in subsequent exchanges prospective juror agreed that she would be able to put aside her personal beliefs, listen to aggravating and mitigating circumstances, and balance them, that she would be able to consider sentence of life imprisonment if she found mitigating circumstances to outweigh aggravating circumstances, and that she could put aside her personal beliefs, decide case on evidence, and follow court's instructions with respect to the law.

24. Jury ⚷97(1, 2), 103(14)

Prospective juror in capital murder prosecution who worked as therapist, providing school-based counseling and out-patient therapy, and whose mother was sex therapist who dealt with victims of rape and incest, whose immediate reaction to news accounts was to consider defendant guilty, and who stated that "it might be hard" for her to remain impartial due to her work with women who had been raped and sexually abused, was not subject to excusal for cause, where prospective juror did not indicate categorical bias as result of her or her mother's profession and indicated that she could put aside her personal views and be objective juror.

25. Jury ⚷83(1), 90

Prospective juror in capital murder prosecution who was medical doctor, expressed specific hardship concerns about service as juror, and had trained during his residency under forensic pathologists expected to testify at trial, was not subject to excusal for cause, where prospective juror testified during voir dire that there were no "insurmountable" problems that would prevent him from being juror, that, if selected, he would serve, that his hardship concern involved other physicians in his practice rather than himself, that he would try to remain objective concerning pathologists' testimony, and that he would consider testimony presented by both sides in objective manner.

26. Criminal Law ⚷1166.17

Assuming error in trial court's exclusion for cause, in capital murder prosecution, of prospective juror who expressed conscientious scruples against death penalty, such error was harmless, where state had peremptory challenges left after jury was selected and thus could have removed such juror.

27. Criminal Law ⚷641.13(2.1)

Defense counsel's references, during voir dire of prospective jurors in capital murder prosecution, to fact that state was seeking conviction on charge of first-degree murder and that special penalty proceedings accompanied a conviction thereof, and counsel's subsequent questioning of prospective jurors as to their feelings and potential prejudices concerning capital punishment, were entirely proper within context of case and did not amount to ineffective assistance. U.S.C.A. Const. Amend. 6.

28. Criminal Law ⚷641.13(6)

Defense counsel's handling of testimony of state's expert witnesses, in capital murder prosecution, with respect to application of "ceiling principle" to DNA analysis to account for phenomenon of population substructuring, was not deficient performance and did not amount to ineffective assistance, absent any allegation that witnesses' use and application of such principle generated any results calling into question testimony of any witness for state, where defense counsel extensively cross-examined state's expert witnesses to test validity of their testimony and exploited variance in probability analyses of DNA samples in his closing argument. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⚷365(2), 371(4, 12), 372(4)

Testimony of victim of uncharged sexual assault and attempted murder was admissible in capital murder prosecution to establish identity of perpetrator, his motive, intent, and common criminal scheme, as well as under "res gestae" exception to rule against admission of evidence of prior crimes; incident involving victim at issue occurred between two homicides, and both sexual assault and attempted murder followed pattern similar to that employed by defendant in commission of homicides.

30. Criminal Law ⚷1169.5(3)

Any error in admission, in capital murder prosecution, of testimony of victim of uncharged sexual assault and attempted murder did not prejudice defendant and was harmless, where trial court gave proper limiting instruction with respect to use of such testimony upon request from prosecution, and again instructed jury with respect to limited use of such testimony during final jury instructions.

31. Criminal Law ⚷700(3)

Evidence that victim of sexual assault and attempted murder for which capital murder defendant was not on trial identified someone other than defendant to police as possible perpetrator was not exculpatory evidence required to be disclosed to defense, where such individual was interviewed by police and dismissed as suspect, given that he did not match description of perpetrator that victim gave during her initial interviews and victim said that he was not perpetrator after looking at his picture.

32. Criminal Law ⚷700(4)

Evidence that victim of sexual assault and attempted murder for which capital murder defendant was not on trial identified someone other than defendant to police as possible perpetrator lacked impeachment value, and was not required to be disclosed on that basis to defense, where defendant had already pled guilty to multiple crimes in connection with attack on victim.

33. Criminal Law ⚷700(4)

Evidence that victim of sexual assault and attempted murder for which capital murder defendant was not on trial had given interview to national-circulation magazine concerning crimes committed against her lacked impeachment value, and was not required to be disclosed on that basis to defense, where defendant had already pled guilty to multiple crimes in connection with attack on victim.

34. Homicide ⚷1013

Testimony of victim of sexual assault and attempted murder for which capital murder defendant was not on trial, and of two police officers, concerning circumstances of defendant's arrest following those crimes, was properly admitted as part of integral facts providing basis for defendant's murder convictions.

35. Criminal Law ⚷1169.1(5), 1169.5(2)

Any error in admission, in capital murder prosecution, of testimony of victim of sexual assault and attempted murder for which defendant was not on trial, and of two police officers, concerning circumstances of defendant's arrest following those crimes, did not prejudice defendant and was harmless, where defendant had already pled guilty to multiple crimes in connection with attack on victim, including events surrounding his arrest, and where trial court gave appropriate caution to jurors at time testimony was presented and appropriate limiting instruction with respect thereto during final instructions.

36. Criminal Law ⚷700(3)

Hypnosis performed upon two witnesses for state in capital murder prosecution was adequately disclosed to defense; defendant was directly notified by letter from state following his arrest, which letter he signed for and admitted receiving, that one witness underwent hypnosis during investigation, and defense counsel explicitly stated that he was informed prior to trial that another witness had been hypnotized.

37. Criminal Law ⚷1168(2)

Any error in trial court's failure to hold separate hearing in capital murder prosecution with respect to witnesses for state who underwent hypnosis was harmless, where all requirements for admissibility of hypnotically-refreshed evidence were satisfied; trial court was advised that witnesses had undergone hypnosis and tape recordings of hypnotic sessions were proffered, sexual nature of assault on one witness, recalled by her only after hypnosis, was confirmed by independent physical evidence and other testimony, change in other witness' testimony preceded hypnosis, police detective who hypnotized witnesses qualified as neutral, and defense counsel explicitly objected to any cautionary instruction being given in relation to the hypnosis, despite request therefor by prosecutor.

38. Witnesses ⚷257.10

Capital murder defendant's unsupported and conclusory allegation that police detective who hypnotized two of state's witnesses was not neutral was insufficient to require finding that detective was not "neutral" to parties or issues involved, for purposes of determining admissibility of witnesses' hypnotically refreshed testimony, especially where detective was not related to investigating officers and was from different jurisdictional territory.

39. Criminal Law ⟹438(5.1)

Pictures of a crime victim are not per se inadmissible.

40. Criminal Law ⟹438(6)

Trial court did not abuse its discretion, in capital murder prosecution, in determining that evidentiary value of photographs of victims and crime scenes outweighed any possible prejudicial effect, despite fact that several of state's witnesses testified as to subject matter of photographs, where photographs were relevant, inter alia, to demonstrate positioning of one victim's body at time of arrival of police, to show logs and leaves used to cover body of another victim, indicating intent to conceal victim's body, to demonstrate violent nature of assaults, to illustrate testimony concerning footwear impressions on one victim's face, and to show amount of brutality used in all crimes.

41. Criminal Law ⟹438(6)

Trial court did not abuse its discretion, in capital murder prosecution, in determining that evidentiary value of photographs of defendant's injuries following his arrest outweighed any possible prejudicial effect; photographs bolstered state's account of defendant's cunning and resolve in making his exit from homes of his victims.

42. Criminal Law ⟹438.1

Various audiotape recordings were properly admitted in capital murder prosecution; recordings of call placed by one victim's neighbor to police prior to discovery of victim's body, of police transmissions after victim's body was discovered, of calls to and by police related to another victim's disappearance, and of communications to and by police Department after third victim's body was discovered did not contain any inflammatory screams or impassioned exclamations, and, while possibly somewhat cumulative, were not prejudicial.

43. Criminal Law ⟹438(8)

Trial court did not abuse its discretion, in guilt phase of capital murder prosecution, in admitting videotapes of victim's newspaper delivery route and of murder scene; silent videotape of newspaper delivery route was relevant to show residential neighborhood from which victim was abducted, which neighborhood resembled locales of each other homicide and other uncharged crimes, videotape of crime scene showed blood trails left by defendant, who was injured during attack, and samples taken from such trails were later used in comparative analysis of DNA evidence.

44. Criminal Law ⟹1169.1(3)

Assuming that testimony of murder victim's mother, during guilt phase of capital murder prosecution, concerning her "feelings and thoughts" after she learned victim was believed to be missing was neither material nor relevant, such testimony was limited and did not have unavoidable effect of depriving defendant of fair and impartial verdict, and any error in its admission was harmless.

45. Homicide ⟹1014

Testimony of emergency paramedic who responded to call to murder victim's residence after discovery of victim's body, describing crime scene as "very, very brutal and gruesome, and I've seen a lot of deaths over the years[,]" was admissible as part of description of crime scene and as relevant to establish intent.

46. Homicide ⟹954

Testimony of officer employed by city police department's youth division, in guilt phase of capital murder prosecution, to effect that he was familiar with defendant, and knew what school defendant attended and where defendant resided, did not permit or require jury to infer that defendant had engaged in prior criminal activity as a juvenile, and was thus not unduly prejudicial, where officer did not testify that he was familiar with defendant through performance of his duties or that defendant's name appeared in police files.

47. Criminal Law ⚷1166.22(4.1)

Assuming that trial court's statements to jury, prior to examining child witness outside presence of jury, to effect that court wanted "to talk to the little girl a little bit first, see if I can put her at ease a little bit[]" and that "[s]he is very shy[,]" were unnecessary, any error in such statements did not prejudice defendant and was harmless, where both parties agreed that witness at issue should not be called, and where court's statement did not reveal substance of witness' testimony, provided acceptable explanation for brief intermission in proceedings, and did not draw jury's focus away from considering evidence and testimony actually presented by parties.

48. Jury ⚷149

Trial court's refusal to voir dire jurors, during guilt phase of capital murder prosecution, with respect to their knowledge of newspaper article published during trial was within its discretion, where jurors were instructed during voir dire to avoid media coverage of case, were so reminded on first day of the trial and were invited to reveal if any such exposure had already occurred, and trial court repeated its warning during initial jury address and gave cautionary instruction morning after article at issue was published, instructing jurors that they were required to determine facts of case based upon evidence and testimony that they heard during course of trial.

49. Criminal Law ⚷641.13(7)

Defense counsel's handling of mitigation evidence, during penalty phase of capital murder prosecution, was not deficient performance and did not amount to ineffective assistance, despite defendant's contention that character witnesses and other mitigating evidence tending to establish "catch-all" mitigator were available and were not presented due to counsel's decision not to do so or failure to conduct simple investigation, where penalty phase jury expressly found as mitigating defendant's family background and environment, use of alcohol and drugs, and school history, all within "catch-all" mitigator. U.S.C.A. Const.Amend. 6; 42 Pa.C.S.A. § 9711(e)(8).

50. Sentencing and Punishment ⚷1779(3)

Trial court did not abuse its discretion, in penalty phase of capital murder prosecution, in allowing jurors access to victims' pictures during their deliberations, over strenuous objections of defense counsel, where probative value of photographs outweighed risk of undue prejudice; photographs of two victims were relevant to aggravating circumstance of torture, and photograph of third victim was relevant to aggravating circumstance of commission of murder while in perpetration of another felony. 42 Pa.C.S.A. § 9711(d)(6, 8).

51. Sentencing and Punishment ⚷1780(1)

Trial court did not abuse its discretion, in penalty phase of capital murder prosecution, in refusing to allow continuance to permit defense counsel to locate witnesses, traveling to court together, who had not arrived as of two hours past time one of them had been subpoenaed to appear, where trial court was lenient with defense counsel and ultimately gave jury synopsis of witnesses' expected testimony, witnesses' testimony was not essential and would have been redundant, subject matter of their testimony was in controversy, and witnesses thus would have been cross-examined with respect thereto, using evidence damaging to defendant's case in mitigation.

52. Criminal Law ⚷594(1)

Factors to be considered to determine whether the trial court's discretion with respect to a request for a continuance to obtain the attendance of a witness was properly exercised are: (1) the necessity of the witness to strengthen the defendant's case; (2) the essentiality of the witness to defendant's defense; (3) the diligence exercised to procure his presence at trial; (4) the facts to which he would testify; and (5) the likelihood that he could be produced at the next term of court.

53. Criminal Law ⚷641.13(7)

Defense counsel's failure to call capital murder defendant to testify during penalty phase was not deficient performance and did not amount to ineffective assistance of counsel, where defendant, with knowledge of his constitutional right to testify, unequivocally refused to testify. U.S.C.A. Const.Amend. 5.

54. Criminal Law ⚷1134(3)

Capital murder defendant's challenges to penalty phase jury's findings of aggravators in connection with two of three death sentences originally imposed were rendered moot by vacation of those two death sentences by trial court on unrelated basis.

55. Sentencing and Punishment ⚷1789(9)

Any error in repeated references by court and counsel, during penalty phase of capital murder prosecution, to prior murder convictions aggravator as "multiple victims" aggravator did not prejudice defendant and was harmless, where offenses introduced by state to prove such aggravator were murders of which defendant had been convicted in same proceeding. 42 Pa.C.S.A. § 9711(d)(11).

56. Sentencing and Punishment ⚷1780(2), 1781

References by court and counsel, during penalty phase of capital murder prosecution, to prior murder convictions aggravator as "multiple victims" aggravator, were proper, where during guilt phase, jury found that defendant killed three women, and state asked jurors to consider these determinations, namely, that defendant was responsible for two other murders, in finding existence of prior murder convictions aggravator as it related to third homicide. 42 Pa.C.S.A. § 9711(d)(11).

57. Sentencing and Punishment ⚷1780(2), 1781

References by court and counsel, during penalty phase of capital murder prosecution, to prior murder convictions aggravator as "multiple victims" or "multiple killings" aggravator, did not improperly lessen state's burden of proof, where trial court repeatedly instructed jury as to state's burden of proof, and jury was presumed to have followed those instructions.

58. Sentencing and Punishment ⚷1705

Capital murder defendant's convictions in relation to first two murders of which he was convicted were properly considered by jury for purposes of establishing "convictions of prior murders" aggravating factor with respect to third murder of which he was convicted, where third murder was also last-occurring of the three. 42 Pa.C.S.A. § 9711(d)(11).

59. Sentencing and Punishment ⚷1789(9)

Any error in sentencing court's instruction, in penalty phase of capital murder prosecution, instructing jury that inasmuch as they had convicted defendant of three murders, they were to find aggravating factor of "prior murder convictions" proved beyond reasonable doubt with respect to third such conviction, was cured by court's subsequent statement to jury providing correct account of the law and retracting previous instruction as erroneous. 42 Pa.C.S.A. § 9711(d)(11).

60. Sentencing and Punishment ⚷1780(3)

Capital murder defendant was not entitled to specific penalty phase instruction to effect that sentence of life imprisonment would mean life imprisonment without possibility of parole, where prosecution did not make defendant's future dangerousness an issue and defense counsel did not request such instruction.

61. Sentencing and Punishment ⚷1779(3)

Juror's question to trial court, during jury instructions prior to penalty phase deliberations in capital murder prosecution, asking whether there would be possibility that defendant might someday be paroled should he be sentenced to life imprisonment, without more, did not indicate that jury was engaging in improper premature deliberation.

62. Sentencing and Punishment ⚷1780(3)

Sentencing court did not err in informing juror, in response to question posed during jury instructions prior to penalty phase deliberations in capital murder prosecution, asking whether there would be possibility that defendant might someday be paroled should he be sentenced to life imprisonment, by acknowledging, inter alia, that although present state of law did not allow parole under circumstances at hand, it was unable to predict whether legislature might decide to change law in future.

63. Sentencing and Punishment ⚷1648

Capital murder defendant's conclusory and unsubstantiated claim that substantial risk existed that decision to prosecute him and to seek death penalty was based upon his indigence and race, in violation of Eighth Amendment, was insufficient to warrant reversal of his sentence of death, especially where defendant conceded lack of evidence that district attorney actually employed such improper factors in deciding to seek death penalty against defendant. U.S.C.A. Const.Amend. 8.

64. Criminal Law ⚷722.3

Prosecutor's comments during opening statement in capital murder prosecution, referring to defendant as a "predator," and asking jury not "to lose sight of the ferocity of what was involved here, of the violence, of the intent to kill," did not exceed permissible bounds of vigorous prosecutorial advocacy, and did not amount to misconduct, where prosecution portrayed defendant to jury as calculating attacker who prowled comparatively small area of city and killed his victims with vicious ferocity, and where prosecution was required to prove intent to kill.

65. Criminal Law ⚷722.3, 723(1)

Prosecutor's comments during guilt phase summation in capital murder prosecution, referring to defendant as "territorial predator," stating that "only four people have seen [defendant's] behavior and action and only one of them is alive to tell you about her experiences with him," that "[i]t's time to put the nightmare on the east side to bed," did not exceed permissible bounds of vigorous prosecutorial advocacy, and did not amount to misconduct, where state attempted to establish that defendant targeted specific type of victims within specific geographical area, and evidence established that defendant attacked four women and only one survived.

66. Criminal Law ⚷721.5(2)

Prosecutor's comment during guilt phase summation in capital murder prosecution, questioning whether "if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand?" in context of entire guilt phase summation, did not amount to improper commentary upon defendant's failure to produce evidence and did not amount to misconduct, where comment referred to fact that state's DNA evidence was uncontradicted by any defense witnesses, and where jury was instructed not to draw adverse inference from defendant's failure to testify and that defendant was not required to produce any evidence to establish innocence.

67. Criminal Law ⚷713

Prosecutor's statements are not evidence.

68. Criminal Law ⚷730(1)

Trial court's instruction to jurors, given on first day of capital murder prosecution and again at beginning of jury instructions, that although statements of attorneys were important, they did not amount to facts or evidence, and that jury was only body qualified to find existence of pertinent facts, was sufficient to cure any improper prejudice arising from any comments by prosecutor during opening or closing arguments.

69. Sentencing and Punishment ⚷1780(2)

Prosecutor's comments during penalty phase summation in capital murder prosecution, to effect that jury had heard no remorse during course of trial and that defendant had "[sat] there, to some degree, like a sphinx[,]" amounted to impermissible comments on defendant's failure to testify, where defendant did not testify during either guilt phase or penalty phase of trial. U.S.C.A. Const.Amend. 5.

70. Sentencing and Punishment ⚷1789(9)

Prosecutor's improper comments during penalty phase summation in capital murder prosecution, to effect that jury had heard no remorse during course of trial and that defendant had "[sat] there, to some degree, like a sphinx[,]" did not prejudice defendant and were harmless error; statements were brief and did not directly refer to defendant's failure to testify, and jury was instructed not to draw any adverse influence from defendant's failure to testify. U.S.C.A. Const.Amend. 5.

71. Sentencing and Punishment ⚷1788(5)

Supreme Court is statutorily required to affirm a sentence of death, if the defendant is not entitled to relief on any claims raised on appeal, unless it determines that the death sentence was the product of passion, prejudice, or any other arbitrary factor, or unless it determines that the evidence fails to support the finding of at least one aggravating circumstance. 42 Pa.C.S.A. § 9711(h)(3).

72. Sentencing and Punishment ⚷1647

Capital murder defendant's death sentence was not product of passion, prejudice, or any other arbitrary factor. 42 Pa.C.S.A. § 9711(h)(3).

73. Sentencing and Punishment ⚷1772

Evidence in capital murder prosecution was sufficient to support finding of three aggravating circumstances, namely: (1) that killing was committed during perpetration of a felony; (2) that defendant had significant history of felony convictions involving use or threat of violence; and (3) that defendant had been convicted of another murder committed in any jurisdiction and committed either before or at time of offense at issue. 42 Pa.C.S.A. § 9711(d)(6, 9, 11).

Mary Rebecca Ennis, Broomall, Philip D. Lauer, Easton, for Harvey Miguel Robinson, appellant.

Jacquelyn C. Paradis, Allentown, Jennifer Lynne LeVan, Amy Zapp, Harrisburg, Maria L. Dantos, Allentown, for the Com. of PA, appellee.

Before: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and LAMB, JJ.

OPINION

Justice NEWMAN.

Harvey Miguel Robinson (Appellant) brings this direct appeal [1] from the Judgment of Sentence of the Court of Common Pleas of Lehigh County (trial court) that sentenced him to death following his conviction for first-degree murder. After reviewing the record and the claims raised by Appellant, we affirm.

I. Facts and Procedural History

At about 12:35 a.m. on Wednesday, August 5, 1992, Allentown police were dispatched to a reported burglary at the residence of Joan Burghardt (Burghardt) at 1430 East Gordon Street, on the East Side of the City of Allentown. Burghardt, a twenty-nine-year-old white female, weighing 225 to 240 pounds, resided alone at that address, a one-bedroom, first-floor apartment in a residential neighborhood. She told the police that someone had entered her apartment between 11:00 p.m. Tuesday and 12:30 a.m. Wednesday, when she returned from taking a friend home. Burghardt noticed that a fan, which she left on before leaving the apartment, had been turned off, the patio door she had left open was closed, and the screen on the door, which was locked, had been ripped about six to eight inches, just enough to get a hand through, near the locking mechanism. Burghardt also reported that $40 to $50 was missing from a bank bag in her dresser drawer. In all other respects, Burghardt reported her apartment appeared to have been undisturbed.

At approximately 11:30 a.m. on Sunday, August 9, 1992, Burghardt's neighbor telephoned the police to complain that: (1) Burghardt's stereo had been on for three days and nights; (2) no one answered the doorbell; (3) the screen had been out of the window for three nights; and (4) during one of those nights it had sounded like somebody was beating Burghardt up, hitting the walls, and screaming. When the police arrived at Burghardt's apartment they noticed the screen for the front of the apartment was on the ground leaning upright next to the front window, the window was open, and the screen for the rear window was pushed out and lying on the ground beneath that window, which was also open. The screen on the patio door was cut about six inches long next to the door handle. The television was blaring loudly and the front door and the patio door were locked. The patio screen door was closed but not locked.

Upon entering the apartment, the police found Burghardt dead, lying on her stomach on the living room floor in front of her

1. This Court has jurisdiction of a direct appeal from a judgment of sentence in a case in which the death penalty has been imposed. 42 Pa.C.S. § 9711(h).

couch. There was a large amount of blood on the couch, walls, and floor. She was beaten severely about the head. Aside from where the body was found, the apartment appeared to be neat and orderly. With the exception of the screens, there were no pry marks on the doors or windows or other evidence of forced entry. The police concluded that the perpetrator entered the residence through the front window and exited through the rear window.

At the time of her death, Burghardt was wearing a sleep shirt and a pair of jockey shorts that were ripped at the crotch and pulled up. She was unclothed from her hips down. A dresser drawer in the bedroom was open and a pair of black shorts was on the floor. There were blood spots and white stains on the back of the shorts. A peach-colored shirt was located on the closet door. It contained a lot of blood in distinctive patterns that appeared to have been made by swipe marks from whatever was used as the murder weapon.

The subsequent autopsy revealed that Burghardt had been sexually assaulted and bludgeoned to death by thirty-seven individual blunt force injuries to her scalp, causing extensive skull fractures and damage to the brain. The weapon was a circular, cylindrical instrument about one-half to three-quarter inches in diameter with a smooth surface and about ten to twenty inches long. The force of the blows was so deliberate and tremendous that, as the instrument came down, it embedded hair between the fracture and skull.

Burghardt also had defensive injuries on both hands, evidencing that she was alive and attempting to protect herself from her assailant. Serology tests established that all of the blood and hair found at the scene, including those samples found on the black shorts and peach colored shirt, were consistent with those of the victim. However, the shorts had seminal stains on the outside, as though someone had ejaculated onto them. Tests of the semen stains on the shorts showed the deoxyribonucleic (DNA) profiles that were later matched to the DNA profiles obtained from Appellant's blood.[2] An analysis of the blood spattering at the crime scene indicated the perpetrator was approximately 5′10″ tall and stood over the victim during the attack.[3]

Approximately ten months later, at about 6:45 a.m. on Wednesday, June 9, 1993, Allentown police responded to a call of a reported missing person at 1058 East Gordon Street, a residential neighborhood, also on the East Side of Allentown. A resident became suspicious when the normally punctual newspaper delivery girl, Charlotte Schmoyer (Schmoyer), failed to deliver the newspaper. Her newspaper cart was left unattended for approximately thirty minutes in front of a neighbor's house and the newspaper had been delivered to another neighbor. Upon their arrival, the police found the unattended newspaper cart half-filled with the day's newspapers in front of the house; a separate copy of the newspaper; a Walkman radio and its headset separated from each other on the ground between two houses; and finger streaks on the windowpane of the door to the nearby garage of one of the houses. Police concluded that a struggle had ensued and Schmoyer, a fifteen-year-old white female, weighing 180 pounds, had been abducted.

Later that day, while searching a heavily wooded area at Allentown's nearby East Side Reservoir (Reservoir), the police found a bloody trail that led them to the

2. N.T., 10/31/94, pp. 1258–61.

3. As it turned out, Appellant is 5′9″ tall.

body of Schmoyer, which was buried beneath some logs. Her sweatshirt was slightly pulled up; her sweatpants and underpants had been pulled down toward her knees. She had a large, gaping wound in her throat, separate stab wounds below that gash, multiple stab wounds on her back, and a patterned bruise on the right side of her cheek. An autopsy revealed twenty-two stab wounds, sixteen in the back (including seven that were fatal), and six in the front area of the neck (of which any combination of one or three would have been fatal). In addition, there were cutting and scraping wounds in the neck area, indicating they were inflicted while the victim was conscious and her neck bent down as a protective measure, and seven more cuts to the back of the sweatshirt, indicating that some struggle occurred in that the sweatshirt was cut but the body was not penetrated. The weapon was a single-edged knife about four inches long. At least two of the wounds were up to the hilt of the blade.

Subsequent serology and DNA tests indicated that Schmoyer had intercourse shortly before death. Appellant's DNA was found on her vaginal swab and blood consistent with that of Appellant and inconsistent with that of Schmoyer's blood, was found on her sweatshirt and sweatpants, along the trail leading to her body, and on leaves at the crime scene near her head.[4] All of the blood found on or about Schmoyer was consistent with that of either Schmoyer or Appellant; none of the blood was inconsistent with one of their profiles. A comparison of a hair found on the right knee of Schmoyer was consistent with hair from Appellant's head and inconsistent with Schmoyer's own hair; and a comparison of a hair found on the sweatshirt of Schmoyer was consistent with Appellant's pubic hair and, again, inconsistent with Schmoyer's own hair.

On June 28, 1993, Denise Sam–Cali (Sam–Cali), a thirty-eight-year-old white female weighing 160 to 165 pounds, and her husband resided at 1141 East Highland Street, on Allentown's East Side. That evening she was home alone; her husband was out of town. She awoke during the night to noises from within a walk-in closet near her bedroom door. As Sam–Cali attempted to flee the house, an assailant grabbed her. She exited the house, but the assailant grabbed her again on the front walk, flipped her on her back, and got on top of her using his knees to hold her down.

As Sam–Cali and the assailant began to fight, he pushed down on her mouth, choked her, and punched her face at least four times. She tried to punch him and bit him on the inside of his upper right arm. He raped her and then ran through the house to escape by way of the back patio-door. Afterwards, Sam–Cali called the police. She had been beaten severely about the head, her neck had strangulation marks, and her lip was slashed. A large butcher knife wrapped in a paper napkin from her kitchen was found lying on the floor outside of her bathroom door. Following this incident, Sam–Cali and her husband left their East Allentown residence for a few days.

Approximately two weeks later, shortly after 7:00 a.m. on July 14, 1993, Jessica Jean Fortney (Fortney), a forty-seven-year-old white female, weighing 235 pounds, who resided with other members of her family at 407 North Bryan Street, on Allentown's East Side, was found dead in her bed. Fortney was half-naked; her shorts and underpants were pulled down mid-way between her knee and groin area

4. N.T., 10/31/94, pp. 1261–64.

and around only one thigh. Her face was swollen and black. She had dried blood about her lips, eye, nose, nostrils, and neck. There was blood spatter on the wall directly behind the sofa and on the lampshade next to the sofa. The window on the first floor was open; there was no screen in it.

The autopsy revealed that Fortney died in the early morning hours as a result of suffocation by strangulation (probably manual) and blunt trauma. There were in excess of fifty different injury patterns, many of them compatible with being beaten by a closed fist about the face. Some of them indicated an object, such as a ring, on her assailant's hands. Other injury patterns revealed that Fortney's attacker placed his knees on her during the beating, causing her blood to spatter on the wall, lampshade, and him. Serology tests established that Fortney had sexual intercourse within a few hours of her death. It was later determined that Fortney and Appellant had different blood profiles. Blood and body fluids from Fortney's vaginal swabs were consistent with Appellant's profile and seminal fluid from Fortney's vaginal swabs matched Appellant's DNA.[5]

Four days after the Fortney homicide, on the evening of July 18, 1993, Sam–Cali and her husband returned home. At about 4:00 a.m. the next morning, Sam–Cali heard a noise in the house and then the back door opened. Thereafter, the alarm went off. The intruder apparently fled. From that night on, an Allentown police officer stayed at the Sam–Cali residence.

At approximately 1:25 a.m. on July 31, 1993, Officer Brian Lewis (Officer Lewis), who was at the Sam–Cali home, heard the doors being jarred and noticed someone at the front window. The officer saw the fingertips of a black-gloved hand removing the screen to the window. He then saw a head, and then the rest of the body, enter the home. When the intruder was fully inside the home, the officer challenged him. The intruder went to the kitchen and shots were exchanged. The officer retreated to the bedroom, where he heard banging and ripping at the kitchen door. Upon returning to the kitchen, the officer found the kitchen empty. The intruder escaped by breaking through several glass panels on a wooden door and pushing out the rear storm door.

At about 3:30 or 3:45 a.m., Officer Lewis was called to a local hospital where he identified Appellant as the intruder at the Sam–Cali home earlier that evening. Appellant had fresh, bleeding wounds to both of his arms and legs. He also had a healing scar of a bite mark several weeks old on his upper right arm. Later that day, the police obtained blood and hair samples from Appellant and searched his residence, where they found: (1) a black ski mask and a pair of gloves under the sofa cushions; (2) several drops of blood and a soaked, green-and-purple striped rugby-type shirt in the laundry; (3) additional blood in the bathroom; (4) additional pairs of gloves, including a pair of large black rubber gloves; (5) blood stained shorts and socks; (6) a pair of black high-tech sneakers in Appellant's bedroom; and (7) a loaded .380 semi-automatic handgun in the bedroom closet, which used to belong to the Sam–Calis prior to its disappearance some time before July 31, 1993.

The head stamp on the upper most cartridge in the handgun was identical with that on the empty cartridge casings found at the Sam–Cali house earlier that morning. Officer Lewis identified the horizontal striped shirt, shorts, sneakers, black

5. N.T., 10/31/94, pp. 1263–65.

knit cap, and rubber gloves found at Appellant's house, as those worn by the intruder at the Sam–Cali residence. Further, Sam–Cali identified Appellant as the person who assaulted and raped her.

It was later established that the patterned design of the bruise on Schmoyer's cheek was consistent with the size, design, and wear characteristics of the high-tech sneaker seized from Appellant's bedroom. There was no evidence found to exclude the possibility that the injury on her face was caused by Appellant's sneaker. Similarly, chevron patterns found on the Walkman radio that belonged to Schmoyer and found at the scene of her disappearance corresponded with the shape and spacing of Appellant's sneaker.

The police interviewed Appellant on August 4, 1993. At that time, Appellant told the officers that he drove his two-door Chrysler Laser automobile, and that he never drove his mother's four-door blue Ford Tempo automobile, license plate number ZGP260, except to look for jobs. In fact, at approximately 3:45 a.m. on September 7, 1992, a little less than one month after Burghardt's death, an Allentown police officer made a traffic stop of the blue Ford Tempo that Appellant was operating. On June 3, 1993, another Allentown police officer stopped the blue Ford Tempo at 2:40 a.m. and Appellant, its operator, was cited for driving the wrong way on a one-way street. At about 6:25 a.m. on the day of Schmoyer's abduction and death, June 9, 1993, James Stengel, an Allentown City employee at the Reservoir, saw a blue, four-door automobile (which he later identified as a Ford Tempo) with damage to its right side in the Reservoir parking lot. At about 6:40 a.m. on that day, a carpenter on his way to work identified Appellant as operating a blue automobile and acting strangely only three blocks from the Reservoir. Finally, at about 3:30 a.m. on July 31, 1993, when he sought treatment at the hospital after the last Sam–Cali incident, Appellant was in possession of the blue Ford Tempo automobile, license plate ZGP260, with right side body damage. This automobile was owned by Appellant's mother and was registered to 709 North Kearney Street. Blood patterns subsequently found in the vehicle were later determined to be from Appellant.

Additional evidence also established that Appellant resided at 709 North Kearney Street, Allentown, in August of 1992, when Joan Burghardt was murdered, until September 23, 1992, and again from May 14, 1993, until his arrest on July 31, 1993, during which time Schmoyer and Fortney were murdered and Sam–Cali assaulted. Appellant did not reside in, or visit, Lehigh County between September 23, 1992, and May 14, 1993, because, during this period of time, he was detained in a juvenile placement facility on an unrelated charge. Appellant's residence at 709 North Kearney Street is about: (1) four blocks from 1057 East Gordon Street, where Schmoyer was abducted, and about one mile from the Reservoir where her body was found; (2) five blocks from 1430 East Gordon Street, where Burghardt lived and was murdered; (3) five or six blocks from 1141 East Highland Street, where Sam–Cali resided and was assaulted; and (4) two miles from 407 North Bryan Street, where Fortney lived and was murdered. It was also established that from 1984 until 1986, Appellant resided at 310 North Second Street, in Allentown, which is less than one block from the place of Fortney's murder.

On October 12, 1993, relating to the three incidents involving Sam–Cali, Appellant was charged with Information Nos. 2450/1993, 2451/1993, and 2452/1993, which included three counts of burglary[6] and related offenses, two counts of attempted homicide,[7] one count of rape[8] and related offenses, multiple counts of aggravated indecent assault,[9] and one count of firearms not to be carried without a license.[10] On the same day, the Commonwealth informed Appellant that it intended to try these Informations together.[11] Subsequently, on February 8, 1994, the Commonwealth filed additional Informations against Appellant in the following order: (1) as related to the Schmoyer homicide, No. 0055/1994, which included charges of criminal homicide, kidnapping,[12] rape, aggravated indecent assault, and indecent assault;[13] (2) as related to the Burghardt homicide, No. 0056/1994, which included charges of criminal homicide, burglary, criminal trespass,[14] rape, aggravated indecent assault, and indecent assault; and (3) as related to the Fortney homicide, No. 0058/1994, which included charges of criminal homicide, burglary, criminal trespass, rape, aggravated indecent assault, and indecent assault.[15] Similar to the charges filed on October 12, 1993, the Commonwealth notified Appellant that it intended to try Information Nos. 0055/1994, 0056/1994, and 0058/1994 together.[16]

On February 28, 1994, Appellant entered guilty pleas to: (1) burglary, attempted criminal homicide, and firearms not to be carried without a license in Information No. 2450/1993, in relation to the attack on Sam–Cali on June 29, 1993; (2) burglary in Information No. 2451/1993, in relation to the break-in at the Sam–Cali residence on July 19, 1993; and (3) burglary, attempted criminal homicide, and firearms not to be carried without a license in Information No. 2452/1993, in relation to the events at the Sam–Cali residence on July 31, 1993. Subsequently, the trial court sentenced Appellant to a forty-and-one-half to eighty-one year prison sentence in connection with his guilty pleas.

The parties proceeded on Information Nos. 0055/1994, 0056/1994, and 0058/1994, and, after a trial that lasted from October 10 through November 8, 1994, a jury found Appellant guilty of three murders of the first degree and all of the other offenses relating to the Burghardt, Schmoyer, and Fortney homicides. Following the penalty phase of the trial, on November 10, 1994, the jury sentenced Appellant to death for each of the three first-degree murder convictions. The jury found the following aggravating circumstances in each case: (1) the killing was committed during the

6. 18 Pa.C.S. § 3502.

7. 18 Pa.C.S. § 2501; 18 Pa.C.S. § 901.

8. 18 Pa.C.S. § 3121.

9. 18 Pa.C.S. § 3125.

10. 18 Pa.C.S. § 6106.

11. David Nichols, Esquire, represented Appellant in connection with these charges. *See* Original Record, CS–1 through CS–3.

12. 18 Pa.C.S. § 2901(a)(3).

13. 18 Pa.C.S. § 3126.

14. 18 Pa.C.S. § 3503(a)(1)(i).

15. On the same day, in Information No. 0057/1994, the Commonwealth charged Appellant with additional criminal acts, but the nature of these charges is not related to the disposition of the present appeal.

16. Initially, the Public Defender's Office undertook Appellant's defense in relation to the Informations filed in February of 1994. Shortly thereafter, the Public Defender's Office withdrew from representation, citing a conflict of interest. On April 22, 1994, the trial court appointed Carmen Marinelli, Esquire, to represent Appellant in relation to these charges and, subsequently, on September 9, 1994, also appointed James Burke, Esquire, to assist in Appellant's defense.

perpetration of a felony;[17] (2) Appellant had a significant history of felony convictions involving the use or threat of violence;[18] and (3) Appellant "has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue."[19] The jury found the additional aggravating circumstance of "torture"[20] in the Burghardt and Schmoyer homicides. The jury also found the following as mitigating circumstances pursuant to the "catch-all" provision of 42 Pa.C.S. § 9711:[21] (1) "family background and environment;" (2) "use of alcohol and drugs;" and (3) "school history." *See* Sentencing Verdict Sheets. On November 29, 1994, the trial court imposed additional sentences for the non-capital offenses.

Thereafter, Appellant filed a post-sentence motion on December 8, 1994, alleging various pre-trial and trial errors. On March 28, 1996, he filed a *pro se* "Clarification Motion for the Appointment of New Counsel," expressing his preference to raise trial counsel's ineffectiveness on direct appeal. On May 6, 1996, Appellant filed a *pro se* "Motion for Notes of Testimony and for Post Trial Discovery." By order dated May 17, 1996, and filed on May 21, 1996, the trial court relieved Appellant's trial counsel of further representation and appointed new counsel.[22]

Appellant was given until December 9, 1996, to amend his post-sentence motions or file new post-sentence motions. On April 23, 1997, Appellant filed a *pro se* Supplemental Motion for Relief pursuant to Pa.R.Crim.P. 720,[23] which was dismissed without prejudice to Appellant's right to incorporate it into motions filed by appointed counsel. Thereafter, counsel filed amended post-sentence motions on July 28, 1997, supplemental post-sentence motions on September 15, 1997, and second supplemental post-sentence motions on September 10, 1999. Several evidentiary hearings were held before the trial court during 1998 and 1999. By Order of June 29, 2001, the trial court denied the motions in all respects, except that Appellant's sentences of death for murder of the first degree in the Burghardt and Schmoyer homicides were vacated[24] and a re-sentence proceed-

17. 42 Pa.C.S. § 9711(d)(6).

18. 42 Pa.C.S. § 9711(d)(9).

19. 42 Pa.C.S. § 9711(d)(11).

20. 42 Pa.C.S. § 9711(d)(8).

21. The statute provides in relevant part as follows:

> Mitigating circumstances shall include ... [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

42 Pa.C.S. § 9711(e)(8).

22. Initially, Worth Law Offices were appointed and Appellant was given until September 20, 1996, to amend his post-sentence motions or file new post-sentence motions. However, on July 23, 1996, the trial judge received a letter from Appellant alleging a member of Worth Law Offices had a conflict of interest with him. As a result, by order of July 31, 1996, separate counsel, John J. Waldron, Esquire, was appointed to represent Appellant for the limited purpose of determining the existence of any conflict of interest with his court-appointed counsel, and a hearing was scheduled on August 8, 1996, for that purpose. By order of August 9, 1996, Worth Law Offices were relieved of further representation of Appellant and current counsel was appointed to represent him.

23. At the time, this Rule was codified as Pa. R.Crim.P. 1410.

24. In its opinion, after pointing out that the jury found the aggravator embodied in 42 Pa.C.S. § 9711(d)(11) in relation to all three capital sentences, the trial court observed that: (1) this aggravator is explicitly limited to murders "committed either before or at the time of the offense at issue;" (2) the Burghardt homicide was committed before the Schmoyer and Fortney homicides; and (3)

ing was ordered in accordance with 42 Pa.C.S. § 9711. This statutory appeal followed.[25]

II. Discussion

A. Sufficiency of the Evidence

[1] "This Court is required to review the sufficiency of the evidence to sustain a conviction of first-degree murder in every case where the death penalty has been imposed." *Commonwealth v. Koehler,* 558 Pa. 334, 737 A.2d 225, 233 (1999), *cert. denied,* 531 U.S. 829, 121 S.Ct. 79, 148 L.Ed.2d 41 (2000) (citing *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327, *rehearing denied,* 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983)). We perform this assessment regardless of whether the appellant explicitly raises a claim of insufficiency of the evidence. *Zettlemoyer,* 454 A.2d at 942 n. 3.

[2] We have previously stated that:

> When reviewing a sufficiency of the evidence claim, an appellate court must view all of the evidence and all reasonable inferences arising therefrom in the light most favorable to the Commonwealth as the verdict winner in order to determine whether the evidence was sufficient to enable the fact finder to find that all of the elements of the offenses were established beyond a reasonable doubt.

Commonwealth v. Hall, 549 Pa. 269, 701 A.2d 190, 195 (1997); *cert. denied,* 523 U.S. 1082, 118 S.Ct. 1534, 140 L.Ed.2d 684 (1998). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." *Commonwealth v. Burgos,* 530 Pa. 473, 610 A.2d 11, 13 (1992). To sustain a conviction of first-degree murder, the Commonwealth must prove that: (1) the appellant acted with a specific intent to kill; (2) a human being was unlawfully killed; (3) the appellant did the killing; and (4) the killing was done with deliberation. *See Commonwealth v. Watkins,* 577 Pa. 194, 843 A.2d 1203 (2003), *cert. denied,* —— U.S. ——, 125 S.Ct. 450, 160 L.Ed.2d 324 (2004); *Koehler,* 737 A.2d at 233.

[3] The above-recited facts presented at Appellant's trial, viewed in the light most favorable to the Commonwealth, clearly establish the sufficiency of the first-degree murder conviction in relation to the Fortney homicide.[26] Specifically,

the Schmoyer homicide was committed before the Fortney homicide. In light of this, the trial court concluded that it was improper for the jury to consider the Schmoyer and Fortney homicides in relation to the Burghardt homicide, because they were committed after the Burghardt homicide. Similarly, the Fortney homicide should not have been considered in relation to the Schmoyer homicide, because it was committed after the Schmoyer homicide. Accordingly, the trial court vacated the death sentence for the first-degree murder convictions related to the Burghardt and Fortney homicides.

25. To facilitate appellate review of this case, by Opinion and Order of August 28, 2001, the trial court designated Appellant's convictions pursuant to Information Nos. 0055/1994 (relating to the Burghardt homicide) and 0056/1994 (relating to the Schmoyer homicide), where it vacated the sentence of death, eligible for interlocutory appeal pursuant to 42 Pa.C.S. § 702(b). We granted allowance of appeal in those cases. Thus, in the present matter Appellant challenges: (1) the guilt determinations concerning his convictions in relation to murders of Burghardt, Schmoyer, and Fortney; and (2) the sentence of death for the Fortney homicide.

26. "To properly perform our statutory obligations," this Court reviews the sufficiency of the evidence in all cases where the death penalty is imposed. *See Zettlemoyer,* 454 A.2d at 942 n. 3. Presently, Appellant does not

the evidence presented was abundantly sufficient for the jury to conclude that, in the late night hours of July 13, 1993, and/or early morning hours of July 14, 1993, Appellant, possessing the requisite specific intent and with deliberation, unlawfully killed Fortney.[27]

B. Claims Raised by Appellant

Appellant presents a number of arguments for this Court to consider.[28] Many

explicitly raise this claim and we have undertaken this analysis on our own accord. However, because the capital sentences were vacated in relation to the Burghardt and Schmoyer homicides, at this point in the proceedings, our duty extends to consider the sufficiency of the evidence only in relation to the Fortney homicide.

27. We find that the evidence was equally sufficient to support Appellant's ancillary convictions relating to the Fortney homicide.

28. In the present case, we have identified over sixty substantively independent issues presented by Appellant. This staggering number is only indirectly related to the complexity and variety of the fact patterns involved in this matter. Rather, it appears that present counsel for Appellant has made a deliberate attempt to overwhelm this Court in an elaborate, legal conundrum. We reach this conclusion, because some of the raised claims are boilerplate reincarnations of arguments previously rejected by the courts of this Commonwealth, while others rely on blatant mischaracterizations of the trial record or involve meritless allegations of counsel ineffectiveness.

The approach to appellate advocacy embarked on by present counsel for Appellant brings to mind the words of the Honorable Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit:

> With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors. I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to **any** of them ... [and] it is [this] presumption ... that reduces the effectiveness of appellate advocacy.

Aldisert, "The Appellate Bar: Professional Competence and Professional Responsibility–A View From the Jaundiced Eye of the Appellate Judge," 11 Cap. U.L. Rev. 445, 458 (1982) (emphasis in original).

Though much quoted by members of the judiciary, this passage often "rings hollow," as demonstrated by the present case. While we certainly understand the duty of the attorney to be a zealous advocate, we pose that conduct such as what we presently encounter does not advance the interests of the parties and, if anything, is a disservice to the client. *See, e.g., United States v. Hart,* 693 F.2d 286, 287 (3d Cir.1982) ("[b]ecause of the inordinate number of meritless objections pressed on appeal, spotting the one bona fide issue was like finding a needle in a haystack"); *also Commonwealth v. Ellis,* 534 Pa. 176, 626 A.2d 1137, 1140 (1993) ("[w]hile criminal defendants often believe that the best way to pursue their appeals is by raising the greatest number of issues, actually, the opposite is true: selecting the few most important issues succinctly stated presents the greatest likelihood of success"). As observed by Justice Robert H. Jackson:

> Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one ... [E]xperience on the bench convinces me that **multiplying assignments of error will dilute and weaken a good case** and will not save a bad one."

Jackson, "Advocacy Before the United States Supreme Court," 25 Temple L.Q. 115, 119 (1951) (emphasis supplied). *See also Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) ("Th[e] process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy"); *Jones v. Barnes,* 463 U.S. at 745, 751–52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (observing that "[e]xperienced advocates since time beyond memory emphasized the importance of winnowing out weaker arguments on appeal of them involve allegations of counsel ineffectiveness. In *Commonwealth v. Grant,* 572 Pa. 48, 813 A.2d 726 (2002), this Court announced, as a general rule, that claims of ineffective assistance of counsel should be raised for the first time in a collateral proceeding. *Id.* at 738. The holding of *Grant* was applied retroactively to all cases pending on direct appeal. *Id.* Subsequently, in *Commonwealth v. Freeman,* 573 Pa. 532, 827 A.2d 385 (2003), *cert. denied,* —— U.S. ——, 125 S.Ct. 30, 160 L.Ed.2d 31 (2004), the "Grant rule" was applied to capital cases.

On the same day as *Freeman,* this Court decided *Commonwealth v. Bomar,* 573 Pa. 426, 826 A.2d 831 (2003), *cert. denied,* 540 U.S. 1115, 124 S.Ct. 1053, 157 L.Ed.2d 906 (2004). Although *Bomar* was on direct (capital) appeal at the time we decided *Grant,* this Court ruled that *Grant* would not apply to *Bomar,* where claims of counsel ineffectiveness "were properly raised and preserved in the trial court." 826 A.2d at 853. We reached this conclusion because, in *Bomar,* appellant raised ineffectiveness claims in post-sentence motions, the trial court conducted a series of evidentiary hearings on the claims raised, and, ultimately, addressed them in its opinion. *Id.* at 839, 853–54. Thus, the concerns we articulated in *Grant*—the ability of the defendant to develop his ineffectiveness claims and the ability of the reviewing court to consider them—were not implicated in *Bomar. Id.* By way of these decisions, the "Grant rule" became the staple of capital appellate jurisprudence in the Commonwealth.

[4] Presently, because Appellant raised claims of counsel ineffectiveness before the trial court, the trial court conducted extensive evidentiary hearings in relation to these claims, and addressed their merits in its opinion, this case falls within the narrow exception to the "Grant rule" articulated in *Bomar.* Accordingly, we will address the counsel ineffectiveness claims raised by Appellant through the following standard that this Court has set forth on numerous past occasions:

> As the starting point for our review ... we presume that counsel is effective. To overcome this presumption, appellant must establish three factors. First, he must show that the underlying claim has arguable merit. Second, appellant must prove that counsel had no reasonable basis for his action or inaction. In determining whether counsel's action was reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis. Finally, appellant must establish that he has been prejudiced by counsel's ineffectiveness; in order to meet this burden, he must show that but for the act or omission in question, the outcome of the proceedings would have been different. If it is clear that appellant has not met the prejudice prong of the ineffectiveness standard, the claim may be dismissed on that basis alone and the court need not [initially] determine whether the first and second prongs have been met.

Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435, 441 (1999) (internal citations

and focusing on one central issue if possible, or at most on a few key issues"); *Buehl v. Vaughn,* 166 F.3d 163, 174 (3d Cir.1999) (commenting that "[o]ne element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise"). Though we are mindful of the ramifications of our decisions in capital cases, no circumstance gives *carte blanche* for the borderline abuse of the legal system as represented by the conduct of Appellant's present attorney in this matter.

omitted); *see also Commonwealth v. Miller,* 572 Pa. 623, 819 A.2d 504, 517 (2002), *cert. denied,* 540 U.S. 827, 124 S.Ct. 50, 157 L.Ed.2d 50 (2003); *Commonwealth v. Tilley,* 566 Pa. 312, 780 A.2d 649, 652 (2001).

1. Pre-trial

a. Severance

[5] Appellant argues that the trial court erred in denying his motion for severance of the charges involving the different victims.

Pennsylvania Rule of Criminal Procedure 582 [29] provides in relevant part:

> Offenses charged in separate indictments or informations may be tried together if ... the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion ...

Pa.R.Crim.P. 582(A)(1)(a). "Whether or not separate indictments should be consolidated for trial is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant." *Commonwealth v. Newman,* 528 Pa. 393, 598 A.2d 275, 277 (1991); *also see Commonwealth v. Morris,* 493 Pa. 164, 425 A.2d 715, 718 (1981).

> [While e]vidence of distinct crimes is inadmissible solely to demonstrate a defendant's criminal tendencies[, s]uch evidence is admissible ... to show a common plan, scheme or design embracing commission of multiple crimes, or to establish the identity of the perpetrator, so long as proof of one crime tends to prove the others. This will be true when there are shared similarities in the details of each crime.

Commonwealth v. Keaton, 556 Pa. 442, 729 A.2d 529, 537 (1999) (internal citations omitted), *cert. denied,* 528 U.S. 1163, 120 S.Ct. 1180, 145 L.Ed.2d 1087 (2000); *also see Commonwealth v. Natividad,* 565 Pa. 348, 773 A.2d 167, 174 (2001) (stating that "[e]vidence of another crime is admissible where the conduct at issue is so closely related that proof of one criminal act tends to prove the other"), *cert. denied,* 535 U.S. 1099, 122 S.Ct. 2300, 152 L.Ed.2d 1056 (2002). "To establish similarity, several factors to be considered are the elapsed time between the crimes, the geographical proximity of the crime scenes, and the manner in which the crimes were committed." *Commonwealth v. Rush,* 538 Pa. 104, 646 A.2d 557, 561 (1994).

Although Appellant admits that "the offenses consolidated in this case were of the same class," [30] he argues that the crimes were not similar enough to be considered a distinctive *modus operandi* of a single perpetrator. Specifically, Appellant points out that: (1) Fortney lived two miles away from Burghardt and Schmoyer; (2) the crimes were not temporally related, but ranged over a period of eleven months; and (3) there is no "real relationship" in the way the victims were killed.[31]

[6] As in *Morris,* however, "[i]t is difficult to conceive of any situation where the propriety of joinder could be clearer." 425 A.2d at 721. First, all of the attacks took place in the same general locale—the East Side of Allentown, within mere blocks from where Appellant lived or, as in Fortney's case, used to live. As previously described, Appellant's residence at the time of his arrest was about: (1) four blocks from where Schmoyer was abducted, and about one mile from the Reservoir where

29. At the time of Appellant's trial, this Rule was codified as Pa.R.Crim.P. 1127.

30. Brief for Appellant, p. 12.

31. Brief for Appellant, p. 13.

her body was found; (2) five blocks from where Burghardt lived and was murdered; (3) five or six blocks from where Sam–Cali resided and was assaulted; and (4) two miles from where Fortney lived and was murdered.[32]

Second, in relation to the temporal relationship between the crimes, this Court has held in the past that "remoteness in time between ... offenses" does not render consolidation improper *per se*, but is simply another factor to be considered in the analysis. *See Newman*, 598 A.2d at 278 (allowing introduction of evidence of another crime in spite of an eighteen-month gap between the two offenses); *Commonwealth v. Hughes*, 521 Pa. 423, 555 A.2d 1264, 1282–83 (1989) (holding that a ten-month gap between two crimes was not too remote); *Commonwealth v. Donahue*, 519 Pa. 532, 549 A.2d 121, 127–28 (1988) (plurality opinion) (allowing testimony concerning three-year-old acts of child abuse in a case where the victim's death was caused by alleged child abuse). Presently, the attacks at issue span a period of eleven months, with the longest "idle" period (approximately ten months from August of 1992 through June of 1993) taking place between the Burghardt and Schmoyer homicides. Preliminarily, we note that eleven months is not such a long period of time as to render consolidation improper.

We further point out that, as previously explained, during an extended portion of this "idle" period, Appellant did not reside in, or visit, Lehigh County, because he was detained in a juvenile placement facility. In this respect, the present matter is remarkably similar to *Rush*, where eight years separated commission of two similar assaults. 646 A.2d at 561. In that case, we observed:

> Normally such a lengthy interval would cause the occurrences to be considered too remote; however, for most of [these eight years] (with the exception of eighty-four days) appellant was incarcerated. Excluding this imprisonment, a time span of eighty-four days is within the acceptable remoteness standard.

Id. This rationale is equally applicable to the matter at hand—excluding the period of Appellant's detention at a juvenile placement facility, the crimes spanned approximately four months, which is well within "acceptable remoteness standards" set forth in our decisions. *See Newman*, *supra*; *Hughes*, *supra*. In sum, these observations only reinforce the trial court's conclusion with regard to the consolidation of the various Informations.

[7] Finally, Appellant complains that joinder was improper, because there is no "real relationship" in the way the victims were killed. Nothing can be further from the truth, however. None of the victims knew or had any prior contact with Appellant. All were savagely beaten and raped within two months of Appellant leaving the Allentown area and two and one-half

32. While it is true that Fortney's home appears to be further away from Appellant's residence than the other sites mentioned, we first point out that two miles is not such a long distance as to render this crime so distinguishable from the Schmoyer and Burghardt homicides that a consolidation of Informations would be inappropriate. *See, e.g., Commonwealth v. Wable*, 382 Pa. 80, 114 A.2d 334, 336–37 (1955), which involved a prosecution for murder of a truck driver that took place at a rest stop along the Pennsylvania Turnpike, where this Court, citing similarity in the way the crimes were committed, found no error in allowing testimony concerning: (1) another murder of a truck driver at a rest stop **in the same county** along the Pennsylvania Turnpike; and (2) a shooting of a truck driver on a highway in Ohio approximately **fifteen miles** from the Pennsylvania Turnpike. Second, we also take note that from 1984 until 1986, Appellant resided less than one block from where Fortney lived and was murdered.

months of his return to that locale. Each of the victims was brutally murdered at close range by hand or a hand-held instrument. In each case, Appellant left behind virtually no incriminating physical evidence, with the exception of what was subsequently discovered through microscopic, scientific examination. In all three cases, samples of Appellant's DNA were recovered from the crime scenes. Each attack was committed at night or in the early morning hours. Finally, all victims shared the same personal characteristics—they were overweight, white females, who lived in and around the East Allentown area.

Previously, analogous evidence has been held adequate to establish a sufficient logical connection for consolidation of trials. *See Keaton,* 729 A.2d at 537. We have also held that similar evidence was sufficient to allow testimony of a common scheme or plan in the way the crimes were perpetrated. *See Commonwealth v. Elliott,* 549 Pa. 132, 700 A.2d 1243 (1997) (evidence that defendant targeted other victims of similar race and gender and raped them was admissible to prove common scheme, plan, or design), *cert. denied,* 524 U.S. 955, 118 S.Ct. 2375, 141 L.Ed.2d 742 (1998); *Commonwealth v. Miller,* 541 Pa. 531, 664 A.2d 1310, 1318 (1995) (evidence that defendant lured other victims of similar race, weight, and gender into his car, took them to remote areas to force sex upon them, beat them in a similar manner, and killed or attempted to kill them was admissible to prove common scheme, plan, or design), *cert. denied,* 516 U.S. 1122, 116 S.Ct. 932, 133 L.Ed.2d 859 (1996); *Hughes,* 555 A.2d at 1282–83 (finding that testimony concerning a subsequent rape was properly admitted at trial for a preceding rape and murder, where: (1) the crimes were committed at approximately the same time of the day, in a similar geographic location, using similar method of attack; and (2) the victims were familiar with the defendant, and were of the same age, ethnicity, and gender); *Rush,* 646 A.2d at 561 (finding "sufficient similarities to warrant the conclusion that one individual committed both crimes," where, *inter alia,* the crimes were committed in the same geographic locale and the victims "were black, female, and relatively young, had their underclothing or nightclothes pulled from them"). Moreover, the evidence concerning each incident was readily separable by the jury, as each crime was perpetrated against a different victim and there was no overlap in physical evidence. *See Keaton,* 729 A.2d at 538. For these reasons, we find that the trial court did not abuse its discretion in consolidating for trial the Informations relating to the homicides at issue.[33]

b. Venue/Venire

Appellant next argues that the trial court erred in failing to grant his motion for change of venue/venire. He contends that the publicity surrounding the criminal episode at issue "was endless, incredibly inflammatory, and referred to [Appellant] as a serial killer" and, therefore, "it was impossible to select a fair and impartial jury in [Lehigh County]." Brief for Appellant, p. 16. Appellant specifically points out that one month before the trial, the Ladies' Home Journal printed an article, where Appellant was identified by name, which referred to the facts of the case that was not joined for trial and portrayed the details of Appellant's arrest "in sensational

33. In relation to the severance issue, Appellant also argues that his counsel was ineffective for failing to properly present and argue the severance motion. The record discloses that counsel in fact presented and argued that motion before the trial court. Accordingly, this argument is without merit.

fashion." *Id.* at 16–17.[34] Appellant also claims that his counsel was ineffective for failing to: (1) "properly ... present and argue the motion for [change of venue];" and (2) make a "careful inquiry of the jurors regarding the Ladies' Home Journal article." Brief for Appellant, p. 17.

We have previously stated that:

> The trial court's decision on appellant's motions for change of venue/venire rests within the sound discretion of the trial judge, whose ruling thereon will not be disturbed on appeal absent an abuse of that discretion. In reviewing the trial court's decision, our inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity.
>
> A change in venue becomes necessary when the trial court concludes that a fair and impartial jury cannot be selected in the county in which the crime occurred. Normally, one who claims that he has been denied a fair trial because of pretrial publicity must show actual prejudice in the empanelling of the jury. In certain cases, however, pretrial publicity can be so pervasive or inflammatory that the defendant need not prove actual juror prejudice.
>
> Pretrial prejudice is presumed if: (1) the publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.
>
> Even where pre-trial prejudice is presumed, a change of venue or venire is not warranted unless the defendant also shows that the pre-trial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated. In testing whether there has been a sufficient cooling period, a court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question. This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pre-trial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.

Commonwealth v. Drumheller, 570 Pa. 117, 808 A.2d 893, 902 (2002) (internal citations omitted), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003); *also see Hughes,* 555 A.2d at 1279; *Commonwealth v. Pursell,* 508 Pa. 212, 495 A.2d 183, 187–88 (1985).

[8] Initially, we note that, despite referring to "sensational and highly inculpatory publicity ... in all of the public me-

34. The article described the initial attack on Sam–Cali, the subsequent incidents at her residence, and Appellant's ultimate apprehension. *See* Kathryn Casey, "I Caught My Rapist," LADIES' HOME JOURNAL, September 1994, Vol. CXI, No. 9, pp. 168–71, 225–26.

dia, from the day of the discovery of the incidents to the date of the trial," with the exception of the Ladies' Home Journal article, in his brief, Appellant does not specifically refer to any other publication or media outlet. Brief for Appellant, p. 15. Accordingly, because Appellant fails to make any contention relating to any specific item of pre-trial publicity other than the aforementioned Ladies' Home Journal article, even if we assume the existence of such publicity, we find that his argument fails in relation to those items. *See Commonwealth v. Casper,* 481 Pa. 143, 392 A.2d 287, 291 (1978) (observing that the mere existence of pre-trial publicity does not warrant a presumption of prejudice).

[9] Furthermore, after thoroughly reviewing the record we are not persuaded by the complaints made by Appellant. Any potential bias on the part of the jurors in relation to the media coverage of the case was sufficiently dealt with during the individually-conducted *voir dire* when the defense counsel, the prosecutor, and the trial court, asked the potential jurors whether they had heard or read anything about the case. Indeed, unless preliminarily excused for other, unrelated reasons, **each of the prospective jurors** was questioned about their familiarity with the case and their knowledge concerning the incidents from media outlets. Some jurors stated that they knew about the incidents and they were further questioned about whether their ability to decide the case would be affected. The record reveals that of the jurors who were aware of the case, most gained their knowledge through the media reports circulated at the time of Schmoyer's homicide and Appellant's apprehension, which was more than a year before the trial was set to begin.[35] This clearly indicates the presence of a sufficient "cooling off period" that minimized any potential ill effects of the publicity surrounding the events at issue.[36]

Ultimately, the twelve jurors and four alternates selected for trial all stated that they would be fair and impartial when hearing the case. After undertaking an independent review of the entire transcript of the *voir dire* proceedings, we are convinced that pretrial publicity did not result in the inability to select a fair and impartial jury in Lehigh County. Therefore, the trial court did not abuse its discretion in denying the motion for a change of venue/venire and Appellant is not entitled to any relief on this claim. For this reason,

35. We note that prospective jurors who indicated that they formed an uncompromising opinion about Appellant from the news coverage were excused. *See, e.g.,* N.T., 10/10/1994, pp. 103–06, 168–69; N.T., 10/13/1994, pp. 1041–42; 1087–89, 1155–57; N.T., 10/14/1994, pp. 1265–66, 1406–07; N.T., 10/19/1994, pp. 2441–46. Similarly, potential jurors who learned through the media about Appellant's guilty pleas in relation to the incidents at the Sam-Cali residence were also excused. *See, e.g.,* N.T., 10/18/1994, pp. 2082–85.

36. In this matter, we are particularly guided by the words of the U.S. Supreme Court in *Irvin v. Dowd,* 366 U.S. 717, 722–23, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961),

> It is not required ... that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

we find that Appellant is similarly not entitled to relief on his allegation of counsel ineffectiveness in relation to the motion to change venue/venire.

We also believe that the argument concerning the alleged failure of Appellant's counsel to question the venire persons about the Ladies' Home Journal article is patently unmeritorious. Presently, Appellant specifically argues that, "[a]t a minimum, [trial] counsel should have made a careful inquiry of the jurors regarding the Ladies Home Journal article, and **the record is devoid of any such questions.**" Brief for Appellant, p. 17 (emphasis supplied). Contrary to this declaration, on numerous occasions during *voir dire,* counsel for Appellant asked potential venire persons, two of whom were later accepted as jurors and one as an alternate, whether they subscribed to or read the Ladies' Home Journal. *See* N.T., 10/11/1994, p. 341, 565; N.T., 10/13/1994, pp. 961,[37] 1171; N.T., 10/18/1994, p. 2100; N.T., 10/20/1994, p. 2788. We believe that this clearly indicates that Appellant's counsel were aware of the article in the Ladies' Home Journal and, in fact, questioned the potential venire persons in relation to that publication. Therefore, we reject this claim without reaching its merits, because the record before us contradicts the allegation made by Appellant.

c. Jury Array

[10] Appellant argues that his trial counsel was ineffective for failing to ask the trial court to modify the procedures employed in Lehigh County to select members of the pool of jurors available to try this case. He points out that in Lehigh County trial jurors are selected from lists purchased from the Pennsylvania Department of Transportation (PennDOT) that contain names of residents of the county, who are registered with PennDOT. Appellant maintains that this procedure is "unlawful, improper, and violates [his] legal and constitutional rights" because: (1) "it is likely to result in juries unrepresentative of a cross section of the community, and . . . ha[s] continuously failed to represent certain identifiable population groups over an extended period of time;" (2) "the process systematically excludes youthful, elderly and disabled citizens, because the percentages of youthful, elderly and disabled voters is substantially smaller than the percentages of youthful, elderly and disabled citizens in the population of the county;" (3) "the process systematically excludes large numbers of non-caucasian population from jury service, because the percentage of non-caucasians driving or otherwise registered with [PennDOT] is substantially smaller than the percentage of non-caucasians in the population of the county;" (4) "the process systematically excludes large numbers of youthful, elderly and disabled citizens from jury service, because the percentage of youthful, elderly and disabled citizens driving or otherwise registered with [PennDOT] is substantially smaller than the percentage of non-caucasians in the population of the county;" and (5) "[t]he system violates the statutory requirements for the selection of trial jurors." Brief for Appellant, pp. 18–19.

The applicable Pennsylvania statute, entitled "Selection of prospective jurors," provides in relevant part:

> At least annually the jury selection commission shall prepare a master list of prospective jurors. The list shall con-

37. On October 13, 1994, Attorney Burke specifically questioned a prospective venire person whether she subscribed to the Ladies' Home Journal and, after receiving an affirmative answer, asked whether she remembered reading an article about Appellant. The venire person did not recall reading this article. N.T., 10/13/1994, p. 961.

> tain all voter registration lists for the county, which lists may be incorporated by reference, or names from such other lists which in the opinion of the commission will provide a number of names of prospective jurors which is equal to or greater than the number of names contained in the voter registration list.

42 Pa.C.S. § 4521(a). We have held on numerous occasions that to establish a *prima facie* violation of the requirement that a jury array fairly represent the community, the defendant must prove that: (1) the group allegedly excluded a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury selection process. *See Commonwealth v. (Raymond) Johnson,* 576 Pa. 23, 838 A.2d 663, 682 (2003), *cert. denied,* — U.S. —, 125 S.Ct. 617, 160 L.Ed.2d 471 (2004); *Commonwealth v. (Roderick) Johnson,* 572 Pa.283, 815 A.2d 563, 575 (2002). For purposes of this analysis, " '[s]ystematic' means caused by or inherent in the system by which juries were selected." *(Roderick) Johnson,* 815 A.2d at 575.

[11] At the time of Appellant's trial, Lehigh County drew its jury pool from the list of licensed drivers in the county. *See* N.T., 10/19/1994, pp. 2329–58. Four years ago, in *Commonwealth v. Lopez,* 559 Pa. 131, 739 A.2d 485 (1999), *cert. denied,* 530 U.S. 1206, 120 S.Ct. 2203, 147 L.Ed.2d 237 (2000), we addressed this method of jury selection in Lehigh County, finding it "statutorily permissible," *Lopez,* 739 A.2d at 494 n. 13, and see no reason to reconsider our decision. Additionally, despite his complicated argument, Appellant utterly fails to present even a semblance of statistical proof that the jury pool selection procedure utilized in Lehigh County unfairly misrepresents the number of non-caucasians, youthful, elderly, and disabled citizens in the community. Accordingly, Appellant has not established even a *prima facie* argument for purposes of this analysis, *see Lopez,* 739 A.2d at 495, and his ineffectiveness argument on this issue fails.

d. *Voir Dire*

[12] In relation to the *voir dire* process, Appellant argues that his counsel were ineffective in failing to pose "life qualification" [38] questions to the potential jurors "in order to prevent the service of a juror who is incapable of returning a verdict of life imprisonment." Brief for Appellant, p. 45.

In the past, this Court has consistently declared that: (1) there is no requirement for trial counsel to ask "life-qualifying" questions; and (2) trial counsel is not ineffective for failing to make such an inquiry. *See, e.g., Commonwealth v. Bond,* 572 Pa. 588, 819 A.2d 33, 50 (2002); *Commonwealth v. Simmons,* 569 Pa. 405, 804 A.2d 625, 638 (2001) (plurality opinion) ("[t]here is no implication or holding that the choice **not** to life qualify a jury amounts to advocacy so glaringly substandard as to amount to a deprivation of the Sixth Amendment right to counsel") (emphasis in original); *Commonwealth v. Henry,* 550 Pa. 346, 706 A.2d 313, 324–25 (1997), *habeas corpus granted in part, Henry v. Horn,* 218 F.Supp.2d 671 (E.D.Pa.2002); *Commonwealth v. Lark (Lark PCRA),* 548 Pa.441, 698 A.2d 43, 48 (1997); *Commonwealth v. Cox,* 546 Pa. 515, 686 A.2d 1279,

38. "Life qualification" refers to the process in which counsel identifies and excludes those prospective jurors who would be unable to consider a sentence of life imprisonment for a conviction of murder in the first degree. *See Keaton,* 729 A.2d at 542 n. 9.

1290 (1996) (counsel was not ineffective for failing to "life-qualify" jurors where jurors "assured" the court that they would follow the law and the court's instructions), *cert. denied,* 522 U.S. 999, 118 S.Ct. 567, 139 L.Ed.2d 407 (1997).

[13] Presently, the notes of testimony are replete with examples where both defense counsel and the prosecutor asked the prospective jurors whether they would be able to be fair and impartial in deciding the case and whether they could follow the trial court's instructions in imposing the proper sentence. Additional questions were posed to ensure that the jurors would not automatically impose the death penalty, but would follow the statutory guidelines as explained to them by the trial court. That is all that is legally required of the jury and, therefore, we reject the argument raised by Appellant.

[14] In a related claim, Appellant contends that, by allowing the prosecutor to question prospective jurors about their attitudes towards capital punishment and excluding from the jury, by court-sanctioned "for cause" challenges, all jurors with a fixed opposition to the death penalty, the trial court erroneously permitted the Commonwealth to "death-qualify" the jury. Appellant also annexes an ineffectiveness claim to this argument, citing his counsels' failure to object to this supposed error by the trial court.

This argument, however, lacks merit in light of the repeated holdings by the United States Supreme Court and this Court allowing exclusion from the jury of any persons whose views on capital punishment would prevent or substantially impair their performance of duties as jurors in accordance with instructions and oaths. *See, e.g., Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Commonwealth v. King,* 554 Pa. 331, 721 A.2d 763, 778 (1998) (observing that "[t]his Court repeatedly held that the process of screening prospective jurors to determine whether any has moral, religious, or ethical beliefs that would prevent him or her from voting for the death penalty is consistent with the guarantees of a fair trial"), *cert. denied,* 528 U.S. 1119, 120 S.Ct. 942, 145 L.Ed.2d 819 (2000); *Commonwealth v. Lambert,* 529 Pa. 320, 603 A.2d 568, 575 (1992). Similarly, the ineffectiveness argument fails, because we will not find counsel ineffective for failing to raise a meritless objection.

[15] Appellant also argues that the trial court erred in permitting the prosecutor to question prospective jurors about whether Appellant's age would prevent them from imposing the death penalty. Again, Appellant maintains that trial counsel was ineffective for failing to raise an objection on this ground.

"The scope of the *voir dire* rests in the sound discretion of the trial judge, whose decision will not be reversed unless palpable error is established. The purpose of voir dire is to ensure the empanelling of a fair and impartial jury capable of following the instructions of the trial court." *Commonwealth v. Bridges,* 563 Pa. 1, 757 A.2d 859, 872 (2000) (internal citation omitted), *cert. denied,* 535 U.S. 1102, 122 S.Ct. 2306, 152 L.Ed.2d 1061 (2002); *see also Commonwealth v. Marrero,* 546 Pa. 596, 687 A.2d 1102, 1107 (1996), *cert. denied,* 522 U.S. 977, 118 S.Ct. 434, 139 L.Ed.2d 334 (1997); *Commonwealth v. (James) Smith,* 518 Pa.15, 540 A.2d 246, 256 (1988) (stating that "[t]he purpose of the *voir dire* examination is not to provide a better basis upon which a defendant can exercise his peremptory challenges, but to determine whether any venireman has formed a fixed opinion as to the accused's guilt or innocence").

We note that Appellant fails to acknowledge that, just like the prosecution, defense counsel questioned the potential jury members about Appellant's age and its relation to their feelings about imposition of the death penalty. *See, e.g.,* N.T., 10/17/1994, p. 1920; N.T., 10/18/1974, pp. 1975–76; N.T., 10/19/1994, p. 2414. Given that both the defense and the prosecution questioned the venire persons on this issue, we fail to see any error on the part of the trial court in the present case. In light of these mutual inquiries, any objection that the defense would have raised on this ground before the trial court would have been overruled as meritless. Accordingly, we also reject this allegation of ineffectiveness.

Appellant additionally maintains that a new trial should be granted because he was forced to use peremptory challenges to strike venire persons, who should have been excused "for cause," and he exhausted his peremptory challenges before the jury was seated. Specifically, Appellant alleges that: (1) Ronald Smith (Smith) repeatedly stated that he could not concentrate if selected as a juror, because of his mother's illness and business obligations; (2) Lynn Furr (Furr) was not allowed to be excused "for cause," although she had seen media reports concerning the case; had a child, who was a carrier for the Morning Call (as was Schmoyer); knew pastors at the church attended by Schmoyer; and doubted her ability to remain impartial; (3) Ann Taglang (Taglang) was not allowed to be excused "for cause," although she demonstrated a fixed opinion that a death sentence should be given in the event of a conviction for first-degree murder; (4) Susan Rosen (Rosen) was not allowed to be excused "for cause," although she was a therapist treating rape victims and indicated it would be difficult for her to remain impartial; and (5) Dr. Michael Zager (Zager) was not allowed to be excused "for cause," although he was a medical doctor, who expressed "specific hardship concerns," and was professionally acquainted/associated with the two forensic pathologists, who were expected to (and did) testify at trial.

[16, 17] The test for determining whether a prospective juror should be disqualified is whether he or she is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence. *See Commonwealth v. Lane,* 521 Pa. 390, 555 A.2d 1246, 1249 (1989); *Commonwealth v. Colson,* 507 Pa. 440, 490 A.2d 811, 818 (1985),[39] *cert. denied,* 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). This decision rests within the sound discretion of the trial court, must be based upon the juror's answers and demeanor, and will not be reversed "in the absence of a palpable abuse of this discretion." *Commonwealth v. Lewis,* 523 Pa. 466, 567 A.2d 1376, 1380 (1989); *see also Lane,* 555 A.2d at 1249.

"Jurors should be disqualified for cause when they do not have the ability or willingness to eliminate the influences under which they are operating and therefore cannot render a verdict according to the evidence." *Commonwealth v. Impellizzeri,* 443 Pa.Super. 296, 661 A.2d 422, 427 (1995), *appeal denied,* 543 Pa. 725, 673 A.2d 332 (1996) (citing *Commonwealth v. DeHart,* 512 Pa. 235, 516 A.2d 656, 663 (1986), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987)). Thus, "[a] challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or sit-

39. *Abrogated on other grounds by Commonwealth v. Burke,* 566 Pa. 402, 781 A.2d 1136 (2001).

uational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct and answers to questions." *Colson,* 490 A.2d at 818.

> The challenge of a juror for cause is addressed to the trial judge, and much weight must be given to his judgment in passing upon it. In exercising his discretion as to the fitness of a juror to serve, he has the juror before him, and much latitude must be left to him; and the weight to be given to the answers of a juror when examined on his voir dire is not to be determined exclusively by his words as we read them in the printed record. They are first to be weighed by the trial judge who sees and hears the juror, and, in the exercise of a wide discretion, may conclude that he is not competent to enter the jury box for the purpose of rendering an impartial verdict, notwithstanding his words to the contrary....

Commonwealth v. Sushinskie, 242 Pa. 406, 89 A. 564, 565 (1913). "The burden of proving that a venireman should be excused for cause is on the challenger who must demonstrate that he or she possesses a fixed, unalterable opinion that would prevent him or her from rendering a verdict based solely on the evidence and the law." *(James) Smith,* 540 A.2d at 256.

The defendant in *Colson* argued that a prospective juror should have been excused "for cause" because she "had ties to the victim's and prosecutor's families and prosecution witnesses." 490 A.2d at 818. Indeed, this venire person: (1) knew the victim's mother, who had taught her son in school approximately four years before the trial; (2) was acquainted with a prosecution witness, who discovered the body of the victim; (3) knew the wife of the state trooper, who was the prosecuting officer; and (4) believed that her husband may have been employed by the victim before her marriage. *Id.* Moreover, four years before the trial, an attorney who was associated with the prosecutor's father had settled the estate of her mother. *Id.* Relying on the testimony of the venire person that she did not have close relationships with any of these people, this Court approved a denial of a "for cause" challenge, finding these relationships to be remote in nature. *Id.* at 818–19. We also specifically noted that the venire person testified that these associations would not influence her decision. *Id.* at 818 (stating that "[a] remote relationship to an involved party is not a basis for disqualification where a prospective juror indicates during *voir dire* that he or she will not be prejudiced").

In *Commonwealth v. Patterson,* 488 Pa. 227, 412 A.2d 481 (1980), we found that a mistrial should not have been granted because of a relationship between a juror and a Commonwealth witness. There, on the fourth day of trial, the prosecution introduced the testimony of a police officer concerning the investigation of the crimes at issue. *Id.* at 485. The next morning, one of the jurors informed the trial court that he recognized the officer as someone he had seen at Mass, but did not know the officer's name. *Id.* The juror also told the court that he had never spoken to this officer and that their encounters would in no way influence his ability to reach a fair and impartial verdict. *Id.*

[18, 19] The record reveals that all potential jurors Appellant mentions indicated that they could follow the instructions from the trial court in delivering a fair and impartial verdict based on the evidence of the case. The fact that they may have responded equivocally during some of the questioning does not automatically require them to be excused "for cause." Although

Appellant also complains of "inconsistent" decisions by the trial court because jurors in allegedly similar positions were treated differently,[40] we will not address those arguments. Such contrasting inquiries would have us delve into the discretionary judgment of the trial judge, who, having seen and heard the prospective jurors through the *voir dire* in person, is in the best position to make rulings in such matters. *See Lewis, supra*; *Lane, supra.*

[20] Turning to the specific allegations made by Appellant, Smith indeed expressed difficulty in serving on the jury, because of his mother's illness and business obligations. N.T., 10/10/1994, pp. 301–02. However, Smith also testified that: (1) his mother's illness would not prevent him from rendering a fair and impartial verdict; and (2) his ability to concentrate during the trial would only "possibly" be affected by his mother's illness. N.T., 10/10/1994, p. 298. Smith additionally stated that, despite his familiarity with the case from newspaper accounts, he would be able to render a fair and impartial verdict. N.T., 10/10/1994, pp. 296–97. It appears that the trial court did not feel that Smith expressed a sufficient hardship to be excused from jury duty. N.T., 10/10/1994, pp. 303–04.

[21] Appellant is correct in pointing out that Furr had seen media reports concerning the case; had a child, who was a carrier for the Morning Call (as was Schmoyer); and knew the pastors at the church attended by Schmoyer. However, none of these observations offers much assistance to his cause.

[22] Initially, we note that mere exposure to media reports does not render a prospective venire person unable to sit on the jury. *See Commonwealth v. McGrew,* 375 Pa. 518, 100 A.2d 467, 470 (1953) (observing that "[t]he fact that a juror has read or heard about a case and has an impression or an opinion, or a prejudice is not ground for rejection for cause if he testifies and the Court believes that his opinion is not fixed and that he can and will make up his mind solely from the evidence which will be presented at the trial of the case").

Admittedly, Furr stated that she had an "emotional response" to what happened to Schmoyer, who was a Morning Call carrier, because her son was once a carrier for this paper and she worried about him. N.T., 10/12/1994, pp. 871, 881. However, Furr testified that she did not have a fixed opinion about Appellant's guilt or innocence. *Id.* at 872–73, 883. She also later stated: "I don't think that I have reacted differently or with more of a fixed opinion than any other parent" and further characterized her response to the Schmoyer homicide as a "reaction . . . much the same as any parents would be." *Id.* at 883.

Although Furr acknowledged knowing the pastors at the church attended by Schmoyer, who were also involved in Schmoyer's funeral service, she testified to having "no personal involvement" in the matter. N.T., 10/12/1994, p. 884. We fail to see how this association amounts to "a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses" to provide a basis for dis-

40. For instance, Appellant maintains that the trial court excused several venire persons, who indicated arguably similar or even less onerous hardships than Smith, and dismissed another prospective venire person, whose daughter was a paper carrier for the Morning Call, because of his reaction to the case, while refusing to grant a challenge "for cause" on the same ground in relation to Furr. He also alleges that the trial court refused to strike Dr. Zager "for cause" due to his professional obligations, while automatically excusing another medical doctor from the jury pool, because of the "undue hardship" exception.

qualification "for cause." *Colson,* 490 A.2d at 818.

Finally, citing to the transcript of the *voir dire,* Appellant argues that Furr questioned her own ability to remain impartial. *See* Brief for Appellant, p. 50. This is simply not the case. Rather, Appellant is mischaracterizing the record—Furr did not express concerns about her ability to remain impartial; she testified that she "would not react favorably to graphic photographs of murdered persons" and "would [likely] have an emotional response to that." N.T., 10/12/1994, p. 893. As the trial court observed, "[Furr also] stated that [despite the graphic photographs] she would . . . try to focus on the information and weigh it fairly and that she could not imagine that a possible 'emotional reaction to graphic details' of the photographs would be very uncommon." Trial Court Opinion, p. 24; N.T., 10/12/1994, p. 894.

[23] In relation to Taglang, Appellant maintains that she demonstrated an uncompromising opinion that a death sentence should be given in the event of a conviction for first-degree murder. A review of her entire testimony, however, belies this assertion.

Initially, Taglang stated that she thought she could be fair and impartial in deciding the case and that she had no religious, moral, or philosophical beliefs that might impair her abilities in that regard. N.T., 10/17/1994, p. 1835. Thereafter, Taglang testified that, if Appellant was guilty of a homicide, the penalty should only be death. *Id.* at 1841–42. At one point, in response to the question posed by the trial court—"Do you have a pretty fixed opinion that is somebody kills somebody, that person gets killed?"—Taglang answered, "Yes, I do. Yes, I do." *Id.* at 1842.

However, the following exchanges took place later:

Prosecutor: All we're asking you to do is, can you put aside your personal beliefs and listen to what the aggravating circumstances are, listen to whatever the defense portrays as mitigating circumstances, and balance them? If you come to the conclusion that the aggravating circumstances outweigh the mitigating, then death is appropriate.

Taglang: (Nodded affirmatively.)

Prosecutor: On the other hand, what the defense counsel wants to know is whether or not if you conclude that some of the mitigating circumstances that they may present, including age—and they may present something else, if they so choose—if in fact the mitigating circumstances convince you they outweigh the aggravating, that you would consider life and follow the Court's instructions.

Taglang: (Nodded affirmatively.)

Prosecutor: Do you think—how do you feel your answer to that question would be?

Taglang: I guess I could. I could.

* * *

Prosecutor: Can you put aside your personal beliefs and, one, decide the case on the evidence and, two, follow the Court's instructions with respect to the law?

Taglang: Yes

* * *

The Court: Let me ask you, do you feel more comfortable now about what your role would be in deciding the death penalty or life imprisonment?

Taglang: Yes. Yes.

The Court: Do you think you could handle that, once you heard all the testimony? Could you put aside your idea of a life for a life, a tooth for a tooth? Could you put that aside? That may be okay for your personal views but it isn't the law of Pennsylvania. Could that be set aside?

Taglang: Yes.

N.T., 10/17/1994, pp. 1844–46, 1857–58. From the above transcript, it is clear that Taglang was properly "rehabilitated," as she ultimately testified that she could put aside her personal notions and follow the court's instructions in relation to the law, which is all that is required by law of a juror.

[24] With respect to Rosen, Appellant contends that, because this venire person and her mother worked as therapists, who treated rape victims,[41] she had "situational affinity" that would "cloud her judgment and undermine her impartiality." Brief for Appellant, p. 52. Again, however, Appellant is overly selective in referring to the answers given by Rosen.

It is true that Rosen's immediate reaction to the news accounts was that Appellant was guilty. N.T., 10/18/1994, pp. 1968–70. Rosen also stated that because of her work with women who have been raped and sexually abused, "it **might** be hard for me to stay impartial." *Id.* at 1972–73 (emphasis supplied). Nonetheless, Rosen also testified that she would be able to follow the judge's instructions regarding burden of proof even through she already had a fixed opinion that Appellant was guilty and that the penalty phase of the trial would not affect her ability to look at and weigh all of the facts and make a determination of guilt or innocence. *Id.* at 1972; 1974–75. After the prosecutor and trial counsel explained the nature of the penalty phase proceedings, Rosen testified that she could impose a life sentence, if the mitigating circumstances outweighed the aggravating circumstances. *Id.* at 1980–81. Finally, when counsel for defense asked Rosen whether she would be able to put aside her fixed opinion about Appellant's guilt and "be able to fair and impartially judge the testimony that's coming in and render a fair and impartial verdict," Rosen responded as follows:

I think in listening to the media, everyone always has a fixed opinion listening to what's on the news. So when we do come in here, I think we would have to realize it would all be different. You would be kind of starting fresh. But, so, see, I think I know what the right thing is to do. So I think I probably would do it. I would do it, I mean.

Id. at 1989–90. Hence, a fair reading of the *voir dire* transcript reveals that Rosen did not indicate a categorical bias as a result of her or her mother's profession and shows that she could put aside her personal views and be an objective juror.[42]

41. Rosen indicated that her mother was a sex therapist who dealt with victims of rape and incest. N.T., 10/18/1994, pp. 1996–97. Rosen described her own work in three parts: (1) "school-based counseling dealing with teenagers of sexual abuse, physical abuse, suicide ideation, depression, pregnancy;" (2) assessments for teenagers and children in trouble with the law; and (3) out-patient therapy. *Id.* at 1997–98.

42. In support of his argument relating to Rosen, Appellant cites to *Commonwealth v. Perry,* 441 Pa.Super. 409, 657 A.2d 989 (1995). In that case, a venire person testified that the state trooper, who was characterized by the trial court as "the arresting and accusing police officer," was his best friend with whom he socialized approximately once a week. *Id.* at 990–91. The venire person also stated that: (1) this state trooper was "an honorable man and that he had no doubts whatsoever about [the trooper's] veracity;" and (2) his personal experiences "would possibly" affect the evaluation of this trooper's testimony. *Id.* at 991. The trial court, however, refused the defendant's challenge "for cause," because the prospective juror also stated that he could remain impartial and assess the trooper's credibility "on the same standard as any other witness." *Id.* The Superior Court reversed, finding that the trial court should have "pre-

[25] Appellant also argues that Dr. Zager should have been excused "for cause," because he was a medical doctor, who expressed "specific hardship concerns" about serving as a juror. Appellant contends that his counsel was ineffective for failing to challenge Dr. Zager "for cause," because he was professionally "acquainted and associated" with the two forensic pathologists, who were expected to (and did) testify at trial. Brief for Appellant, p. 52.

During his questioning, Dr. Zager stated that there were no "insurmountable" problems that would prevent him from being a juror and that, if selected, he would serve. N.T., 10/14/1994, pp. 1441, 1454. He also stated that there would be nothing that would keep him from concentrating on the case during the trial. *Id.* at 1454. Later, he added the following:

> I mean, I've been thinking for the last few minutes here, and weighing some of your questions from before about the hardship and that sort of thing, and I'm sort of increasingly hesitant at this point, if I can be honest, about the hardship that would be placed on my—the other physicians in my practice and that sort of thing, if that weighs in.

Id. at 1455. Additionally, Dr. Zager acknowledged that he knew Drs. Isadore Mihalakis and Wayne Ross—forensic pathologists, who were expected to testify during the trial—because he trained under both of them at one point for a brief period of time during his residency at Lehigh Valley Hospital (approximately two years before trial) and intermittently during the course of his practice. *Id.* at 1457–58. Dr. Zager acknowledged that his relationship with Drs. Mihalakis and Ross would make him tend to regard them in a friendlier manner, but he would try to remain objective. *Id.* at 1458–59. He also indicated that he would consider the testimony presented by both sides in an objective manner. *Id.* at 1447–48.

The above-cited testimony shows no evidence that Dr. Zager, his practice, or his patients would have incurred a hardship. Additionally, although Dr. Zager stated that he trained under the expert witnesses expected to testify at trial and interacted with them in his professional capacity, Dr. Zager also related that he could set aside his familiarity with the witnesses, remain objective, and form an opinion based on the evidence presented at trial. In light of these answers, we cannot presume prejudice because of Dr. Zager's connection to Drs. Mihalikis or Ross, especially given the remote nature of their relationship.[43]

In sum, given our deferential view of its decisions in this area of the law and the rationale explained above, we find that the trial court did not abuse its discretion in denying "for cause" challenges to these venire persons. *See Lane, supra*; *Colson, supra*; *Lewis, supra.*

[26] Appellant also argues that he was deprived of a fair trial by the improper exclusion "for cause" of Lamar Cramsey (Cramsey), based upon his views with respect to the death penalty. Appellant maintains that although Cramsey ex-

sumed a likelihood of prejudice" with regards to this venire person. *Id.* Aside from the fact that we are not bound by the decisions of the Superior Court, we note that the present situation does not disclose testimony even remotely similar to *Perry*.

43. In light of this reasoning, Appellant's argument that his counsel was ineffective for failing to challenge Dr. Zager "for cause," because of his relationship with the Commonwealth witnesses, fails. *See Commonwealth v. (James) Johnson*, 527 Pa.118, 588 A.2d 1303, 1305 (1991) (counsel's assistance deemed constitutionally effective once it is determined that the underlying claim is not of arguable merit).

pressed conscientious scruples against the death penalty, he ultimately indicated that he could consider the death penalty in an appropriate case.

As we have often recognized, a prospective juror may be excluded "for cause" when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with the instructions given by the trial judge and the juror's oath. *See Bridges,* 757 A.2d at 873; *Commonwealth v. Stevens,* 559 Pa. 171, 739 A.2d 507, 521 (1999). Presently, we do not need to delve into the substantive analysis of the trial court's decision, however, for even assuming *arguendo* that the trial court erred in excluding Cramsey "for cause," such error was harmless in light of the fact that the Commonwealth had several peremptory challenges left after the jury was selected. If Cramsey not been struck "for cause," the Commonwealth could have peremptorily removed this juror with its remaining challenges. *See Lewis,* 567 A.2d at 1381. For this reason, Appellant is entitled to no relief on this argument.

[27] In his final claim relating to the *voir dire* process, Appellant argues that his counsel was ineffective for "improperly, and without legal justification, conced[ing] on several occasions that the crimes 'quite frankly' were first degree murders." Brief for Appellant, p. 55. Although contending that this supposedly detrimental conduct took place on multiple occasions, in support of his argument, Appellant cites only to "NT 10/19/94, p. 254." This citation is erroneous, however, as the pages of the transcript from October 19, 1994, number from 2316 through 2635. Moreover, the alleged statement made by the defense counsel also does not appear on pages 2354, 2454, 2554, the 254th page of the transcript from October 19th, or the 254th page of the entire *voir dire* record.[44] Thus, we are unable to substantiate Appellant's argument.

Nonetheless, we have discovered that on multiple occasions during *voir dire,* counsel for Appellant made references to the fact that the Commonwealth was seeking a conviction on the charge of first-degree murder and that there were special penalty proceedings associated with such a conviction. *See, e.g.,* N.T., 10/19/1994, pp. 2566–67. By way of these references, counsel for Appellant began questioning prospective jurors about their feelings and potential prejudices concerning capital punishment. We believe that such statements were entirely proper within the context of this case.

2. Guilt Phase

a. DNA Evidence

Appellant contends that his trial counsel was ineffective with respect to the DNA testimony of Commonwealth experts by not introducing evidence or cross-examining them with respect to the existence and acceptance of alternative statistical models. Specifically, Appellant contends that his counsel should have raised specific questions concerning: (1) the witness' reliance on the "product rule" analysis of the DNA evidence; and (2) the impact of population substructuring and the use of the "ceiling principle" in statistical analysis of DNA evidence.

[28] Six years ago, in *Commonwealth v. Blasioli,* 552 Pa. 149, 713 A.2d 1117 (1998), this Court observed that, in relation to the application of the so-called "ceiling principle" to DNA analysis, which accounted for the phenomena of population substructuring, "the controversy over the use of the product rule has been sufficiently

44. Overall, the notes of *voir dire* in this case span over 2800 pages.

resolved," in that "substructuring does not impact significantly upon DNA population frequency estimates." *Id.* at 1126. We recognize that at the time of Appellant's trial, the debate surrounding the effect of population substructuring on DNA statistical analysis was still ongoing. However, we agree with the trial court's analysis and, therefore, find no error in the way it addressed this claim.

First, nothing in Appellant's brief even hints at showing that the use and application of the "ceiling principle" could generate results that would "have thrown into question the testimony of the Commonwealth witnesses." Trial Court Opinion, p. 43. Second, contrary to Appellant's allegations, his trial counsel extensively cross-examined the Commonwealth expert witnesses, testing the validity of their testimony,[45] N.T., 11/1/19944, pp. 1415–58, 1464–68, 1488–93, and, specifically, brought out the existence of the "ceiling principle" method of statistical analysis of DNA samples, N.T., 11/1/1994, p. 1415. Third, counsel for Appellant exploited the variance in the probability analysis of the DNA samples in his closing argument. N.T., 11/8/1994, pp. 2239–40. Accordingly, this ineffectiveness argument fails.

b. Sam–Cali

[29] On appeal, Appellant presents a number of claims relating to Denise Sam–Cali, who testified about her assault in the early morning hours of June 29, 1993, the subsequent break-ins at her house, and Appellant's apprehension. Initially, he argues that the trial court erred in allowing Sam–Cali to testify, because this allowed evidence of prior bad acts and uncharged criminal conduct to be introduced to the jury. Appellant maintains that Sam–Cali was not a witness to any of the charged offenses and, yet, provided "lurid and inflammatory" testimony, linking Appellant to these incidents. Brief for Appellant, p. 56. Appellant also claims that his counsel was ineffective for failing to: (1) object to this testimony; and (2) request a limiting instruction in relation to this evidence.

Initially, we note that Sam–Cali's testimony is admissible under the same principles supporting the joinder of the three homicides, i.e., to establish the identity of the perpetrator, his motive, intent, and a common criminal scheme. *See Elliott, supra; Miller, supra*; *Hughes, supra.* Furthermore, such testimony would be allowed under the "*res gestae*" exception to the rule against admission of evidence of prior crimes. As we explained in *Commonwealth v. Lark (Direct Appeal),* 518 Pa.290, 543 A.2d 491 (1988),

> Evidence of distinct crimes are not admissible against a defendant being prosecuted for another crime **solely** to show his bad character and his propensity for committing criminal acts. However, evidence of other crimes and/or violent acts may be admissible in special circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad character.... [One such] special circumstance where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. This special circumstance, sometimes referred to as the *res gestae* exception to the general proscription against evidence of other crimes, is also known as

45. Similarly, during direct examination, the prosecutor brought out the fact that some scientists criticized the statistical methods used by the FBI laboratory. N.T., 10/31/1994, pp. 1284–89.

the complete story rationale, i.e., evidence of other criminal acts is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.

Id. at 497 (emphasis in original, internal citations omitted). In the present case, the incidents at the Sam–Cali residence are intricately interwoven with the three homicides in question. The initial assault on Sam–Cali took place approximately two weeks before the Fortney homicide and Sam–Cali's testimony provided the jury with a "complete story" of Appellant's criminal spree from the Burghardt homicide in August of 1992 to Appellant's capture in July of 1993. In sum, as the trial court explained, "Sam–Cali's testimony was not offered merely to indicate [Appellant]'s propensity to commit similar crimes ... but to show he committed these crimes charged, how he committed them, why he committed them and the circumstances of his apprehension." Trial Court Opinion, p. 32.

[30] We also reject the ineffectiveness arguments raised by Appellant in relation to this substantive claim. First, Appellant's counsel objected to Sam–Cali's testimony on several occasions, on the basis that it was prejudicial, because it allowed the jury to consider evidence of other crimes perpetrated by Appellant. *See* N.T., 11/3/1994, pp. 1918–21, 1965. Second, while counsel for Appellant did not ask for a limiting instruction in relation to Sam–Cali's testimony, such request would have been (at best) redundant, as it appears that the trial court asked if such an instruction was required and, after receiving an affirmative response from the prosecutor, in fact, instructed the jury as to the limited purpose of this evidence. *See* N.T., 11/3/1994, pp. 1919–21, 1965–66. The trial court again cautioned the jurors about the limited use of Sam–Cali's testimony during the final jury instructions. *See* N.T., 11/8/1994, pp. 2279–2280.

[31] In relation to Sam–Cali, Appellant also argues that, in violation of its duty under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to reveal exculpatory evidence, the Commonwealth failed to disclose that, during her initial interviews with the police, Sam–Cali "told the Allentown police that her assailant ... was Saul Rosado," whom she knew and previously employed for about one month. Brief for Appellant, p. 67.

"A *Brady* violation comprises three elements: (1) suppression by the prosecution (2) of evidence, exculpatory or impeaching, favorable to the defendant, (3) to the prejudice of the defendant." *Commonwealth v. Paddy,* 569 Pa. 47, 800 A.2d 294, 305 (2002). Contrary to Appellant's claim, Sam–Cali did not identify Rosado as her assailant, but merely named him as a possible lead for the police to pursue, because Sam–Cali thought that he might have had a motive to harm her. After Sam–Cali told police about Rosado, he was interviewed and dismissed as a suspect, because: (1) having a full beard, tattoos, and long hair, Rosado did not match the description of the assailant that Sam–Cali gave during her initial interviews; and (2) Sam–Cali said that Rosado was not her assailant after looking at his picture. Simply put, this evidence could not have been exculpatory.

[32] Moreover, prior to this trial, Appellant had already pled guilty to multiple crimes (including burglary, aggravated assault, and attempted homicide) in relation to the incidents at the Sam–Cali residence in June and July of 1993. Accordingly, Appellant admitted to perpetrating these crimes. *See, e.g., Commonwealth v. Anthony,* 504 Pa. 551, 475 A.2d 1303 (1984) (observing that "[a] guilty plea is an acknowledgement by a defendant that he

participated in the commission of certain acts with a criminal intent . . . [and, thus, h]e acknowledges the existence of the facts and the intent"); *Commonwealth v. Papy*, 436 Pa. 560, 261 A.2d 580 (1970) (noting that the circumstances of the case fell within a rule of law that "a [defendant's] plea constitutes an admission of his guilt and all of the facts averred in the indictment"); *see also Commonwealth ex rel. Walls v. Rundle*, 414 Pa. 53, 198 A.2d 528, 529 n. 1 (1964). Therefore, Appellant could not impeach Sam–Cali on the basis that she gave the police the name of another possible suspect during her initial interviews. Hence, because the evidence at issue was neither exculpatory nor tended to impeach another, there was no *Brady* violation.

[33] Additionally, in light of the abovementioned article in the Ladies' Home Journal,[46] Appellant argues that his counsel was ineffective because he failed to cross-examine Sam–Cali "with regard to any financial bias, receipt of financial incentives from the magazine, [and] the existence of any other book or magazine deals." Brief for Appellant, p. 70. As mentioned earlier, prior to the trial, Appellant pled guilty to a slew of criminal charges concerning the incidents at Sam–Cali's residence that took place in the summer of 1993. Therefore, irrespective of any financial gain Sam–Cali may have received from the article in the Ladies' Home Journal, given Appellant's admissions, the veracity of her testimony could not have been undermined in the manner presently suggested by Appellant. If anything, rigorous cross-examination of Sam–Cali on this issue would have been counterproductive to Appellant's cause. Hence, this ineffectiveness claim fails.

[34, 35] Appellant also argues that a new trial should be granted because the Commonwealth was allowed to introduce testimony from Sam–Cali and two police officers concerning Appellant's apprehension. As we noted, Appellant pled guilty to the charges concerning the episodes at Sam–Cali's residence, including the events surrounding his apprehension. As we have also stated, these incidents were an integral part of the facts that provided the basis of Appellant's convictions. Accordingly, this evidence was properly introduced and Appellant is not entitled to any relief.[47]

c. Hypnosis

Appellant presents a number of arguments in relation to the hypnosis of Denise Sam–Cali and James Stengel (Stengel), who testified against him during the trial. The substantive claims relating to these witnesses are similar. First, Appellant contends that his counsel was ineffective by allowing the testimony of these witnesses to be introduced without the requirements regarding the introduction of testimony of a hypnotized witness being met. Second, he alleges that the defense was never told that these witnesses were hypnotized. Finally, Appellant urges that, by failing to disclose that Sam–Cali and Stengel were hypnotized, the Commonwealth violated the dictates of *Brady, supra.*

[36] We will initially address the Commonwealth's purported failure to disclose the hypnosis of the witnesses at issue. Following his arrest, on August 4, 1993, a

46. *See also* note 35, *supra.*

47. Once more, we note that the trial court cautioned the jurors about the limited nature of the testimony concerning Appellant's apprehension at the time the testimony was presented and, again, during its final instructions. *See* N.T., 11/3/1994, pp. 1955–56; N.T., 11/8/1994, pp. 2279–80.

letter from the Commonwealth notified Appellant that Sam–Cali underwent hypnosis during the investigation.[48] Appellant signed for the letter and admitted receiving it.[49] N.T., 11/24/98, pp. 76–77. As it relates to the hypnosis of Stengel, during the post-sentencing hearing, Appellant's counsel, Carmen Marinelli, explicitly testified that during the pre-trial stages of this case, he was informed that Stengel was hypnotized. N.T., 11/13/1998, pp. 36–37. Given these facts, it is clear that, prior to trial, the Commonwealth indeed disclosed to the defense that two of its potential witnesses were hypnotized and there was no *Brady* violation.

[37] As explained above, in a related claim of counsel ineffectiveness, however, Appellant asserts that, even if this Court finds that the Commonwealth gave prior notice to the trial court concerning hypnosis, his counsel was ineffective "for failing to request and require that the trial court follow through with the balance of the [so-called] *Smoyer* requirements." Brief for Appellant, p. 69.

In *Commonwealth v. Smoyer,* 505 Pa. 83, 476 A.2d 1304 (1984), this Court held that where a party seeks to introduce the testimony of a witness, who has previously been hypnotized that party is to: (1) advise the court of the existence of the hypnosis; (2) show that the testimony to be presented was established and existed prior to the hypnosis; and (3) demonstrate that the hypnotist was trained in the process and was neutral. In turn, the court must instruct the jury that the witness had been hypnotized and that they should receive the testimony with caution.

Although it is true that no separate hearing took place in relation to the witnesses, who were hypnotized during the investigation, we are unable to conclude that Appellant is entitled to any relief on this ground, because it appears that all of the *Smoyer* guidelines were satisfied. Initially, the trial transcript reveals that prior to calling Sam–Cali and Stengel to the stand, the Commonwealth advised the court that these witnesses underwent hypnosis, offering to submit the tape recordings of the hypnotic sessions. *See* N.T., 10/31/1994, pp. 1136–1145; N.T., 11/3/1994, pp. 1963–64.[50] Thus, we believe that the first *Smoyer* guideline was unambiguously satisfied in relation to both witnesses.

In relation to the second *Smoyer* guideline, Appellant maintains that Sam–Cali's recollection changed after hypnosis, because, only thereafter was she able to remember being sexually assaulted during the initial attack on June 29, 1993. Thus, Appellant implies that if his counsel would have objected on this ground (which he did not), Sam–Cali's testimony may have been precluded.

Irrespective of whether the assertion made by Appellant is, in fact, accurate, we note that the sexual nature of the attack on Sam–Cali was confirmed by indepen-

48. The letter was sent to the Lehigh County Prison.

49. Appellant claims that he did not understand the contents or significance of the letter and, accordingly, did not discuss it with his attorneys. N.T., 11/24/98, pp. 76–77. However, Appellant's failure to communicate this information to his counsel, due to an alleged misunderstanding of the letter's importance, cannot be imputed to the Commonwealth's duty under *Brady* to disclose evidence favorable to the accused, because, *inter alia,* in the present case they did just that.

50. In his brief to this Court, counsel for Appellant, contends that "[t]he District Attorney did not advise the [c]ourt of the hypnosis" of Sam–Cali. Brief for Appellant, p. 62. This assertion, however, is a falsehood, as it is plainly contradicted by the transcript. N.T., 11/3/1994, pp. 1963–64.

dent, physical evidence. Moreover, by way of other testimony, the jury became aware that Sam–Cali was sexually assaulted on the night in question. Hence, the sexual nature of the attack on Sam–Cali was soundly established, related to the jury by other witnesses, and could not be disputed by Appellant. Thus, even if we assume: (1) counsel ineffectiveness (as suggested by Appellant) in this regard; or (2) error on the part of the trial court in failing to adhere to *Smoyer,* the introduction of this unequivocally truthful testimony was still harmless.

With respect to the second *Smoyer* guideline, Appellant alleges a change in Stengel's memory. As related earlier, Stengel was an employee of the City of Allentown, who worked at the Reservoir, where the body of Charlotte Schmoyer was discovered on June 9, 1993. Shortly after arriving at the Reservoir at 6:25 a.m. on June 9, 1993, he saw a vehicle in the parking area, approximately twelve feet from his own car. Mr. Stengel described this vehicle as a light blue, four-door sedan with damage to its right side. During his initial interview with the investigators, Stengel stated that he thought the vehicle was a "Dodge." N.T., 11/1/1994, pp. 1495–13.

On the basis of this initial interview, on June 13, 1993, Stengel underwent a hypnotic session with Oscar P. Vance, Jr. (Vance), the Chief County Detective of the Montgomery County District Attorney's Office. However, **immediately before undergoing hypnosis,** Mr. Stengel was extensively interviewed. During this interview, he was shown a catalogue, published by the National Auto Theft Bureau that compiled pictures of various automobiles. From this book, Stengel identified a Ford Tempo as the type of vehicle he saw at the Reservoir on the morning of June 9, 1993. *See* N.T., 7/16/1998, pp. 65–72.

Appellant attempts to undermine the testimony of several witnesses, who confirmed the timing of the identification, suggesting that the identification was the result of the hypnotic session. We are unconvinced by these efforts—Stengel recognized the vehicle he saw on June 9, 1993, as a Ford Tempo, prior to his hypnosis.[51] Thus, Appellant's argument fails in its substance.

[38] Turning to the third *Smoyer* guideline, the Commonwealth revealed to the trial court that Detective Vance hypnotized both witnesses. Defense counsel did not dispute the "neutrality" of the hypnotist. Presently, however, while not attacking his professional qualifications, Appellant maintains that Detective Vance was not "neutral" because: (1) he is a law enforcement officer; (2) who offers his services to law enforcement clients; and (3) the interviews in question took place in the offices of the Montgomery County District Attorney's Office.

In *Commonwealth v. Romanelli,* 522 Pa. 222, 560 A.2d 1384 (1989), this Court stated:

> It is perhaps true that a hypnotist employed by the police cannot, by virtue of his employment, give the appearance of being as neutral as a private practitioner. We are, however, unwilling to formulate a *per se* rule that police hypnotists are not neutral, but instead, prefer to examine the facts of each case.

Id. at 1387 (finding the hypnotist neutral although he worked for the police depart-

51. We also note that Stengel correctly identified the model and described other unique characteristics (e.g., color, damage) of the vehicle more than a month before Appellant was apprehended. There is absolutely no evidence that Appellant was even a suspect at that time.

ment investigating the crime at issue). Aside from Appellant's bold (yet woefully unsubstantiated) assertions of bias, there is no evidence that Detective Vance was not "neutral" to the parties or the issues involved. Thus, especially here, where the hypnotist, aside from being a member of law enforcement community, is not related to the investigating officers and is from a different jurisdictional territory altogether, we will not find the presence of bias. Accordingly, we find that the third *Smoyer* guideline was satisfied and that Appellant's claim of counsel ineffectiveness fails because the substantive claim lacks merit.

As it relates to the last *Smoyer* specification, despite a request by the prosecutor and the willingness of the trial court, it appears that defense counsel explicitly objected to any cautionary instruction given to the jurors in relation to the hypnosis. In fact, he did not want the fact that Sam–Cali and Stengel were hypnotized brought to the attention of the jury. The trial court obliged and gave no cautionary instruction in this regard. Given the actions of defense counsel, we cannot find that any trial error occurred.

Moreover, with regard to the ineffectiveness claim, Appellant has failed to explain how the outcome of the proceedings would have been different if trial counsel had not refused the cautionary instruction. Accordingly, Appellant has not established prejudice under the *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973 (1987), standard governing ineffectiveness claims and Appellant will not be granted relief on his claim that trial counsel was ineffective for failing to request a cautionary instruction.

d. Admission of Physical Evidence

Appellant challenges a number of items of physical evidence introduced by the Commonwealth. We will address them by kind.[52]

i. Photographs

[39] It has been a steadfast principle of our jurisprudence that pictures of the victim are not *per se* inadmissible. *See Commonwealth v. King,* 554 Pa. 331, 721 A.2d 763, 773 (1998), *cert. denied,* 528 U.S. 1119, 120 S.Ct. 942, 145 L.Ed.2d 819 (2000); *Commonwealth v. Marinelli,* 547 Pa. 294, 690 A.2d 203, 216 (1997), *cert. denied,* 523 U.S. 1024, 118 S.Ct. 1309, 140 L.Ed.2d 473 (1998); *Commonwealth v. Chester,* 526 Pa. 578, 587 A.2d 1367, 1373, *cert. denied,* 502 U.S. 959, 112 S.Ct. 422, 116 L.Ed.2d 442 (1991). In relation to admissibility of these photographs, we have promulgated the following test:

> [A] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. If an inflammatory photograph is merely cumulative of other evidence, it will not be deemed admissible.

52. We note that, although on many occasions Appellant's trial counsel explicitly objected to the introduction of the physical evidence in question, Appellant makes "boilerplate" counsel ineffectiveness claims in relation to **every** piece of evidence discussed in this section. *See* Brief for Appellant, pp. 74–83. In light of our findings that the trial court did not err in its decisions, Appellant is not entitled to relief on any of his counsel ineffectiveness claims connected to the physical evidence discussed in this section of the opinion. *See (James) Johnson, supra.*

Marinelli, 690 A.2d at 216 (citing *Chester,* 587 A.2d at 1373–74); *also see Freeman,* 827 A.2d at 405; *Commonwealth v. Baez,* 554 Pa. 66, 720 A.2d 711, 726 (1998), *cert. denied,* 528 U.S. 827, 120 S.Ct. 78, 145 L.Ed.2d 66 (1999). "The admissibility of photos of the corpse in a homicide case is a matter within the discretion of the trial court, and only an abuse of discretion will constitute reversible error." *Rush,* 646 A.2d at 560. As we also explained in *Rush:*

> A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to so overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further, the condition of the victim's body provides evidence of the assailant's intent, and, even where the body's condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Id. (citing *Commonwealth v. McCutchen,* 499 Pa. 597, 454 A.2d 547, 549 (1982)).

Presently, Appellant contends that the trial court erred in allowing into evidence: (1) a photograph showing Burghardt's body in the position it was found by the police;[53] (2) various pictures of Schmoyer's body and the surrounding crime scene; (3) a photograph of Schmoyer's neck and cheek area; (4) various color photographs of Fortney's body and the surrounding crime scene; (5) photographs of Sam–Cali, showing her condition after the attack on June 28, 1993; and (6) photographs of injuries sustained by Appellant during his apprehension. Appellant argues that the introduction of these photographs was merely cumulative of the testimony adduced at trial and that the prejudicial effect of these pictures outweighed their probative value.

[40, 41] Having reviewed the photographs at issue, we cannot conclude that the trial court abused its discretion in determining that their evidentiary value outweighed any possible prejudicial effect. Appellant is correct in pointing out that: (1) the victims' wounds and blood splatter were visible on some of the pictures; and (2) several Commonwealth witnesses testified as to the locations of the bodies and the nature of the crime scenes in question. We note, however, that neither this testimony nor the gruesome nature of the pictures is an impediment to the admissibility of photographs of the homicide scene. *See, e.g., Marinelli,* 690 A.2d at 217 (commenting that "[w]hile the presence of blood on the victim depicted in the photographs is unpleasant, it is not in and of itself inflammatory"); *Rush,* 646 A.2d at 559–60 (holding that the pictures of the victim's body at the crime scene were admissible despite testimony from a medical examiner); *Commonwealth v. Gorby,* 527

53. Appellant specifically identifies this picture as "Commonwealth Exhibit # 4." Brief for Appellant, p. 72. Appellant also argues that the trial court erred in allowing the Commonwealth to introduce the various color photographs of Burghardt's body and the surrounding crime scene. However, Appellant does not specifically refer to any such photographs in his brief. We also note that the trial court opinion addresses only the allegedly erroneous admission of "Commonwealth Exhibit # 4."

Pa. 98, 588 A.2d 902, 908 (1991) (finding no abuse of discretion in allowing photographs, "which depicted a large gaping gash on the victim's neck as well as thirteen other knife wounds located on the victim's hands, arms back and chest"); *Chester,* 587 A.2d at 1373–74 (finding no abuse of discretion in allowing photographs of the victim's slashed throat, open eye, and other head injuries as evidence of a specific intent to kill). We also note that the trial court limited the time that the jury was allowed to observe the pictures. *See* Trial Court Opinion, p. 41

Further, we believe that the trial court adequately explained the basis for the introduction of these photographs:

> [A] photograph of Burghardt did not show her face or injuries, only the positioning of the body when the police arrived. The photographs of Schmoyer showed the collection of logs and leaves used to cover her body demonstrating the method, and thus the intent, to cover up the murder. The photographs of her back and top part of her sweatshirt demonstrated the violent, torturous attack upon her, again reflecting the intent of her assailant. The photograph of Schmoyer's cheek portrayed the pattern injury which was later determined to have been caused by a sneaker. It was used in conjunction with the testimony regarding footwear impressions to compare the pattern injury reflected on the photograph with the impression made by the sneaker found at [Appellant]'s home. A photograph was cropped so that the gaping neck wound was not observable. Photographs of the Fortney crime scene demonstrated the intent and malice used to kill her. Finally, the photographs of Sam–Cali again demonstrated the brutality of the assault which could be compared with the brutality used in the other cases, particularly as to Fortney. While none of these photographs was pleasant to view, each of them had a proper role to play in explaining to the jury the common brutality and intent to kill.
>
> Similarly, photographs of [Appellant]'s injuries when he was apprehended were neither prejudicial nor irrelevant. They bolstered the Commonwealth's version of [Appellant]'s cunning and resolve in making his exit from the homes of his victims.

Trial Court Opinion, pp. 40–41 (internal citation omitted).

ii. Audiotapes

[42] Appellant also contends that the trial court erroneously allowed the Commonwealth to introduce various tape recordings of 911 telephone calls and police transmissions.[54] As the trial court observed, these tapes did not contain any inflammatory screams or impassioned exclamations, and, while they may have been somewhat cumulative, were certainly not prejudicial. *See* Trial Court Opinion, p. 41. We find no error in the way the trial court ruled on these issues.

iii. Videotapes

[43] Additionally, Appellant argues that the trial court erred in allowing the Commonwealth to present a videotape of Schmoyer's newspaper delivery route and a videotape of the Schmoyer crime scene.

54. Appellant specifically references: (1) an audiotape recording of the call that Burghardt's neighbor made to the Allentown Police Department on August 9, 1993; (2) audiotape recordings of the police transmissions after Burghardt's body was discovered; (3) audiotape recordings of the calls to and by the Allentown Police Department on June 9, 1993, in relation to Schmoyer's disappearance; and (4) audiotape recordings to and by the Allentown Police Department after Fortney's body was discovered.

Again, however, we find no abuse of discretion in the trial court's rulings. For instance, the silent videotape of the newspaper delivery route was relevant to show the residential neighborhood from which Schmoyer was abducted, because it resembled the locale where each of the other homicides and the attacks on Sam–Cali took place. The videotape of the crime scene was important, because it showed the "blood trails" left by Appellant, who was injured during the attack. The samples taken from these "trails" were later used in the comparative analysis of the DNA evidence.

iv. Evidence Removed from Appellant's Residence

Appellant also contends that the trial court erred in allowing the Commonwealth to introduce physical evidence relating to the assault on Sam–Cali. It appears that the extent of Appellant's argument on this issue is his assertion that the incidents at Sam–Cali's residence were unrelated to the homicides in question. *See* Brief for Appellant, p. 83. Given that we have already rejected this argument, finding that these incidents completed the story of the criminal episode, the present claim fails as well.

e. Testimony of Karen Schmoyer

[44] During her direct testimony as a witness for the Commonwealth, Schmoyer's mother, Karen, was asked to recall what happened after she learned that her daughter was missing. Karen described herself as "[going] into a panic" and "very nervous ... I remember my mouth was very dry ... my hands were shaking." N.T., 10/26/1994, pp. 663–64. Appellant contends it was error for the trial court to have permitted this testimony regarding Karen's "feelings and thoughts" when she learned her daughter was believed to be missing, because it was not relevant or material to this case.

Even presuming that such testimony regarding "feelings and thoughts" was not relevant or material to the case, this testimony was limited and did not have the unavoidable effect of depriving Appellant of a fair and impartial verdict. *See, e.g., Commonwealth v. Begley,* 566 Pa. 239, 780 A.2d 605, 624 (2001); *Commonwealth v. Weiss,* 565 Pa. 504, 776 A.2d 958 (2001), *cert. denied,* 535 U.S. 1101, 122 S.Ct. 2303, 152 L.Ed.2d 1059 (2002). Accordingly, Appellant is not entitled to relief on this claim of trial court error. Additionally, to the extent Appellant attempts to raise a claim of trial counsel ineffectiveness for failure to object to the admission of Karen Schmoyer's testimony, he fails to explain how trial counsel's strategy was unreasonable or how he was prejudiced by counsel's failure. *Pierce, supra.*

f. Testimony of Jean Vas

[45] Jean Vas, an emergency paramedic, who responded to the Fortney residence after the discovery of the victim's body, described the crime scene as "very, very brutal and gruesome, and I've seen a lot of deaths over the years." N.T., 11/2/1994, p. 1684. Appellant contends that this testimony was prejudicial and that his counsel was ineffective for failing to raise an objection to this statement. Again, however, we agree with the trial court reasoning in this regard—the testimony was part of a long description of the crime scene at the Fortney residence and was necessary to establish the element of intent. For this reason, we reject the substantive argument and the counsel ineffectiveness claim raised by Appellant in relation to this testimony.

g. Testimony of Lt. Dennis Steckel

[46] Appellant contends that the testimony of Lt. Dennis Steckel (Steckel), who identified his employer as the Allentown Police Department Youth Division, that he was familiar with Appellant, knew what school Appellant attended, and where Appellant resided in 1984 and 1986, was prejudicial because it would allow the jury to infer that Appellant had engaged in prior criminal activity as a juvenile. Additionally, Appellant argues that his counsel was ineffective for failing to object to this testimony. In support of his argument, Appellant cites to *Commonwealth v. Groce,* 452 Pa. 15, 303 A.2d 917, *cert. denied,* 414 U.S. 975, 94 S.Ct. 290, 38 L.Ed.2d 219 (1973), where this Court found prejudicial error when a police officer, while testifying for the Commonwealth, revealed that he came across defendant's nickname during prior investigations and discovered his last name after searching through the police files. *See* 303 A.2d at 918.

Unlike *Groce,* however, there was no indication that Lt. Steckel was familiar with Appellant through the performance of his duties or that Appellant's name was in the police files. We find the present circumstances more akin to *Commonwealth v. Carpenter,* 511 Pa. 429, 515 A.2d 531 (1986), where a witness, after identifying himself as a parole officer, testified about a conversation he had with the defendant. In *Carpenter,* we reasoned that:

> [A] mistrial was not warranted and that little, if any prejudice accrued to appellant by this witness' passing reference to his occupation as a parole officer.
>
> * * *
>
> [T]he mention of the witness' occupation as a parole officer and the fact that he knew the appellant did not convey to the jury, either expressly or by reasonable implication, the fact of a prior criminal offense or record. Such an inference, while certainly **possible,** was most certainly not conveyed to the jury by the mere mention of the witness' occupation and the fact that he knew appellant, as there are an infinite variety of ways that appellant might otherwise know a person who was a parole officer.

Id. at 534–35 (emphasis in original). This analysis is equally applicable to the instant matter, as we believe that the mere reference to the witness' employment in conjunction with his familiarity with Appellant did not convey to the jury that Appellant had a prior criminal record as a juvenile. *See Carpenter, supra; Commonwealth v. Riggins,* 478 Pa. 222, 386 A.2d 520, 524 (1978) (To conclude that appellant had committed prior crimes from a detective's single statement that he knew where appellant lived, the jury would have to indulge in gross speculation). Therefore, we reject the claims Appellant has asserted in reference to the testimony of Lt. Steckel.

h. Testimony of Latanio Fraticeli

At one point during the trial, the Commonwealth considered calling as a witness an eight-year-old girl, Latanio Fraticeli (Fraticeli). Before she testified, however, the trial judge, without revealing the identity of the witness, called for a recess, explaining in the presence of the jury that he wanted "to talk to the little girl a little bit first, see if I can put her at ease a little bit. She is very shy." N.T., 11/2/1994, p. 1794. Thereafter, a separate proceeding was held, where the prospective witness gave specific identification testimony that would have implicated Appellant as the person who entered the Fortney home the night of the homicide. Ultimately, the Commonwealth decided not to call Fraticeli as its witness, *see* N.T., 11/2/1994, pp. 1810–1811, the parties agreed that the best course of action would be not to offer the jury any explanation for Fraticeli not having been called, and the jurors were dismissed for the day. The next day, an article appeared in the newspaper about Fraticeli and her statements during the hearing. Defense counsel requested that jurors be examined as to whether any of them had read the article. The trial court refused, but, before the start of the proceedings, cautioned the jurors about staying away from the media coverage of the case.[55]

Presently, Appellant asserts that the explanation for the recess, given by the trial court, was unnecessary and unfair, "because it invite[d] ... speculation as to what the witness **may** have said ... drawing the focus away from what was ... being said from the witness stand." Brief for Appellant, p. 89 (emphasis in original). Thus, Appellant argues that the trial court erred in this regard. Further, Appellant contends that a new trial is warranted, because the trial court erred in refusing to inquire whether the jurors read the newspaper article concerning Fraticeli.

[47] Although the trial court's statement may have been unnecessary, we cannot conclude that Appellant was prejudiced—the remark did not reveal the substance of the witness' testimony, such as her identification of Appellant, and provided an acceptable explanation for the brief intermission in the proceedings. We are also not persuaded that this passing statement drew the jury's focus away from considering the evidence and testimony actually presented by the parties.

[48] Appellant is also not entitled to relief with regard to the trial court's refusal to question jurors about their knowledge of the newspaper article. In *Commonwealth v. Bruno*, 466 Pa. 245, 352 A.2d 40 (1976), this Court stated:

> The preferred procedure when highly prejudicial material is publicized during the trial and the jury is not sequestered is to question the jurors individually, out of the presence of the other jurors. However, questioning jurors as a group or giving special precautionary instructions may be sufficient precaution depending on the facts of the particular case.

Id. at 52 (internal citations omitted).

The jurors were individually instructed during *voir dire* to avoid media coverage of the case. On the first day of the trial, the trial court again reminded the jurors to keep away from the media coverage of the trial and invited them to reveal if any such exposure already occurred. *See* N.T., 10/24/1994, p. 24.[56] The trial judge repeated its warning during his initial jury address. *See* N.T., 10/24/1994, pp. 32–33. Moreover, the trial court gave a cautionary instruction the morning after the article about Fraticeli was published, reiterating its earlier statements and instructing the jurors that they were required to determine the facts of the case based upon the evidence and testimony that they heard during the course of the trial. *See* N.T., 11/3/1994, p. 1828. Accordingly, we find that the trial court acted entirely within its discretion in refusing to *voir dire* the jurors, thus avoiding inadvertently notifying the jury of the contents of the article, and giving a sufficient precautionary instruction to secure the integrity of the trial. *Also see Commonwealth v. Crispell*, 530 Pa. 234, 608 A.2d 18, 22–23 (1992).

3. Penalty Phase

a. Mitigation Evidence

Appellant argues that trial counsel was ineffective for failing to introduce mitigation evidence during the penalty phase of

55. N.T., 11/3/1994, p. 1828.

56. We note that the trial court's instruction on that day was prompted by the publishing of an article in the local newspaper about the trial and a TV report concerning DNA evidence. *See* N.T., 10/24/1994, p. 22.

the proceedings. In support of his argument, during the post-sentencing hearing, Appellant presented the testimony of several witnesses, who Appellant maintains could have testified on his behalf during the penalty phase.[57] Appellant alleges that he provided their names to his trial counsel or the witness' identity was easily discoverable by way of a simple investigation. Additionally, Appellant presented over forty exhibits that he claims could have been used during the penalty phase.[58] Appellant argues that, collectively, this evidence would have established the presence of the "catch all" mitigating factor. *See* 42 Pa.C.S. § 9711(e)(8) (stating that "mitigating circumstances shall include ... [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense").

[49] We find that Appellant's argument is without merit. In sentencing Appellant in relation to the Fortney homicide, the jury found "family background and environment," "use of alcohol and drugs," and "school history," as mitigating circumstances. *See* Fortney Sentencing Verdict Sheet, p. 3. Because these factors are not explicitly set forth as mitigators in 42 Pa.C.S. § 9711(e), they fall within the "catch all" provision articulated in 42 Pa. C.S. § 9711(e)(8). Hence, the defense, in fact, established the presence of this mitigating factor. We cannot find trial counsel ineffective for achieving exactly what Appellant alleges that they failed to do—establishing the existence of the "catch all" mitigator. Consequently, the argument presented by Appellant fails.

b. Photographs

During their penalty phase deliberation, the jury requested to see the pictures of the victims that were introduced by the Commonwealth during that phase of the proceedings.[59] N.T., 11/10/1994, p. 2772. Ultimately, over an objection by Appellant's counsel, the trial court allowed the jurors to view these images, displayed on an easel in the courtroom, but for "no more than 30 seconds." N.T., 11/10/1994, pp. 2772, 2778.

[50] Appellant contends that the trial court erred in allowing the jurors access to the victims' pictures during their deliberations because the probative value of these images was outweighed by their prejudice. Further, although Appellant concedes that photographs of Burghardt and Schmoyer were relevant to the issue of the aggravating circumstance of "torture," *see* 42 Pa. C.S. § 9711(d)(8), he also argues that Fortney's photos were irrelevant, since "torture" was not an aggravating circumstance presented in that case. *See* Brief for Appellant, p. 82.

57. Appellant alleges that each of the witnesses he names,

> [C]ould have and would have testified to [his] good character ... the fact that [he] suffered from extreme mental or emotional disturbance, and that [he] had never been ... prone to the type of violence shown. Further, these same witnesses could and would have testified to the extremely difficult upbringing of [Appellant], and the extent to which [Appellant]'s addicted, abusive father caused him severe and disabling emotional disturbance. These same witnesses could have testified that [Appellant]'s step-father, with whom defendant had a close and nurturing relationship, abandoned [Appellant] and his family, as a result of which [Appellant] suffered further emotional disturbance.

Brief for Appellant, p. 22.

58. For the most part, the exhibits are academic and athletic merit certificates Appellant received while in placement at various juvenile facilities.

59. The jurors were allowed to view these pictures for ten seconds during the Commonwealth's presentation of its penalty phase case-in-chief. N.T., 11/10/1994, pp. 2561–62.

Instantly, as admitted by Appellant, images of Burghardt and Schmoyer were clearly relevant to establish the aggravating circumstance of "torture." Furthermore, as explained by the trial court, images of Fortney were admissible to show the existence of another aggravator; namely, that the murder was committed "while in the perpetration of a felony," 42 Pa.C.S. § 9711(d)(6). *See* N.T., 11/10/1994, pp. 2779–80.[60] Having independently reviewed the photographs, we find no error on the part of the trial court in acquiescing to the jury's request. *See Commonwealth v. Brown*, 567 Pa. 272, 786 A.2d 961, 971 (2001) (finding that approximately life-size slides of the victim were "highly probative of [the] intent to inflict unnecessary pain or suffering and that [the killing was done] in a manner or means that are heinous, atrocious, or cruel, or show exceptional depravity"), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003); *also see Commonwealth v. Saranchak*, 544 Pa. 158, 675 A.2d 268, 275–76 (1996), *cert. denied*, 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 617 (1997). Moreover, contrary to Appellant's contention, his counsel strenuously objected to allowing the jury to view the pictures. N.T., 11/9/1994, pp. 2546, 2556–58, 2561–62; N.T., 11/10/1994, pp. 2772–81. Therefore, Appellant's ineffectiveness claim has absolutely no factual basis.

c. Testimony of Robert Burns

The defense began its penalty phase presentation on November 9, 1994. However, because the last three defense witnesses, including Robert Burns (Burns), a principal of St. Gabriel's Hall, where Appellant was placed as a juvenile on prior charges, and a secretary from that facility, were out of town and subpoenaed for the next day,[61] the proceedings ended early (at approximately 4:00 pm) and were continued to November 10, 1994. N.T., 11/10/1994, pp. 2630–31. On that day, starting at around 9:30 a.m., the defense resumed its case with the testimony of William Mocriski. N.T., 11/10/1994, pp. 2641–45. His testimony lasted approximately ten minutes and, at its conclusion, Appellant's counsel informed the trial court that the next witness—Burns—would not be arriving until 10:15 a.m. or 10:30 a.m. N.T., 11/10/1994, pp. 2636, 2649–2651. Later, Appellant's counsel acknowledged that this witness was originally subpoenaed for 9:00 a.m. N.T., 11/10/1994, pp. 2651–52. He also related that Burns and the secretary from St. Gabriel's Hall, who was apparently traveling with Burns, were the last witnesses to testify on behalf of Appellant. N.T., 11/10/1994, pp. 2650–52. The trial court called for a thirty-minute recess and the jury was taken out of the courtroom at 9:44 a.m. N.T., 11/10/1994, p. 2653.

At 10:23 a.m., Appellant's counsel informed the trial court that: (1) Barbara Brown, Appellant's mother, agreed to testify for the defense; and (2) Burns and the secretary from St. Gabriel's Hall would be called to the witness stand after her testimony. N.T., 11/10/1994, p. 2676. The testimony of Barbara Brown concluded at around 10:45 a.m. N.T., 11/10/1994, p. 2695. However, by that time, although one of Appellant's counsels went to find Mr. Burns and the secretary from St. Gabriel's

60. The trial court found that the pictures were relevant to establish that Fortney was raped. N.T., 11/10/1994, pp. 2779–80. We note that Appellant completely ignores (and fails to mention in his brief) the trial court's explanation for its ruling.

61. It appears that Burns was subpoenaed for 9:00 a.m., November 10, 1994. The secretary, who worked at the St. Gabriel's Hall, was coming voluntarily. N.T., 11/10/1994, p. 2698.

Hall, they were still not present in the courtroom. N.T., 11/10/1994, p. 2695. At that point, the trial court requested that defense counsel make an offer of proof as to the substance of the expected testimony, which he did, identifying the witnesses and stating that their testimony would reflect on Appellant's academic and personal development at St. Gabriel's Hall. N.T., 11/10/1994, pp. 2696–98. The prosecutor refused to stipulate to this testimony, pointing out that there was conflicting evidence as to the extent of Appellant's progress at that facility. N.T., 11/10/1994, p. 2698.

By 10:50 a.m., counsel for Appellant, who went to retrieve the two witnesses, returned to the courtroom and stated that they still did not arrive. N.T., 11/10/1994, p. 2700. The court then waited until 11:00 a.m., giving the defense another opportunity to locate and present the two remaining witnesses. N.T., 11/10/1994, pp. 2704–05. At that time, because the witnesses still could not be located, over several objections by Appellant's counsel, the trial court ordered the parties to proceed with oral argument, explained to the jury the cause of the delay, and gave them a brief synopsis of the expected testimony that the defense sought to present and the prosecutor's rebuttal to that testimony. N.T., 11/10/1994, pp. 2699, 2703–06. Following the jury charge, the trial court admonished Burns, who, according to Appellant's counsel, arrived at 11:00 a.m., found Burns in contempt, and ordered him to pay a fine in the amount of $500.00. N.T., 11/10/1994, pp. 2770–71.

[51] Presently, Appellant argues that his sentence must be vacated because the trial court "unjustifiably" refused to grant a continuance to allow Burns to testify.[62] He also argues that his counsel was ineffective for failing to obtain such continuance.

[52] "The grant or refusal of a request for a continuance is a matter vested in the sound discretion of the trial court, and its decision, to grant or deny the request, will not be reversed by an appellate court in the absence of an abuse of that authority." *Commonwealth v. Birdsong,* 538 Pa. 587, 650 A.2d 26, 34 (1994). The factors to be considered to determine whether the trial court's discretion was properly exercised are: (1) the necessity of the witness to strengthen the defendant's case; (2) the essentiality of the witness to defendant's defense; (3) the diligence exercised to procure his presence at trial; (4) the facts to which he would testify; and (5) the likelihood that he could be produced at the next term of court. *See id.* at 34; *Commonwealth v. Clayton,* 516 Pa. 263, 532 A.2d 385, 395 (1987), *cert. denied,* 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988); *Commonwealth v. (Eddie) Smith,* 442 Pa.265, 275 A.2d 98, 101 (1971).

Appellant acknowledges that Burns "was scheduled to appear as the **first** witness of the day, but was delayed in his arrival." Brief for Appellant, p. 92 (emphasis supplied). Although there is conflicting evidence as to the true extent of the witness' absence,[63] one thing is clear—Burns was inexcusably late for a trial

62. Appellant does not make a similar argument with respect to the secretary from St. Gabriel's Hall, who arrived with Mr. Burns. N.T., 8/26/1999, p. 18.

63. It appears that although he was subpoenaed to appear at 9:00 a.m., on November 10, 1994, during a telephone conversation on November 9, 1994, Burns informed Appellant's trial counsel that he would not arrive until 10:10 a.m. to 10:30 a.m. N.T., 11/10/1994, pp. 2649, 2770. However, Burns did not actually arrive until some time at or after 11:00 a.m. Therefore, it is equally arguable that he was late by as much as two hours and as little as thirty minutes.

where a man's life stood in jeopardy. Applying the criteria set forth above to the facts at hand, we cannot find that the trial court's actions constituted an abuse of judicial discretion.

Initially, we note that Burns was not an essential witness in that he could only testify about his familiarity with Appellant during a nine-month stay at a juvenile facility. Again, however, the jury ultimately found the presence of the "catch all" mitigator. Therefore, Burns' testimony would have been redundant. Moreover, it is highly doubtful that the testimony of Burns would have strengthened Appellant's case. In fact, it is more than likely that it would have engendered the opposite effect. As demonstrated during the post-sentencing proceedings, although Burns could testify about his experiences with Appellant while he was placed at St. Gabriel's Hall, Burns was not aware of the particulars of Appellant's stay and was thus easily undermined as a witness.[64] More importantly, the testimony of Burns would have allowed the Commonwealth to introduce damning evidence concerning Appellant's juvenile placement at St. Gabriel's Hall. As the trial court observed:

> [T]he records at St. Gabriel's Hall reflect that [Appellant]'s initial adjustment was poor and "there has not been a great deal of improvement since then, according to staff . . . he is usually manipulative and slow to cooperate. His peer relationships are typically unsatisfactory." In addition, [Appellant] absconded from the institution, stole a staff member's wallet with $200.00 in it, and violated a variety of rules and regulations.

Trial Court Opinion, pp. 56–57. We observe that the trial court went out of its way in repeatedly giving time to the defense to find its last two witnesses and, ultimately, when the witnesses could not be located, gave the jury the synopsis of their testimony. Ultimately, given the circumstances at hand, such as the length of the trial, the fact that Burns was the last witness to testify, and his unexcused lateness, we find that the trial court's action did not constitute an abuse of judicial discretion. We similarly reject Appellant's claim that his counsel was ineffective in failing to seek a continuance, in light of the transcript that indicates that counsel did everything they could to secure the testimony of Burns.

d. Failure to Testify

[53] Appellant argues that his trial counsel were ineffective for failing to call him as a witness during the penalty phase proceedings. As the Commonwealth correctly points out, however, this argument blatantly ignores Appellant's unequivocal refusal to testify, which he articulated to his attorneys at trial and now attempts to justify as a misunderstanding of his constitutional rights (which Appellant also blames on his counsel).

During the post-sentencing hearing, on direct examination by Appellant's present attorney, one of Appellant's trial counsels, Carmen Marinelli, testified as follows:

> **Defense Counsel:** In the mitigation phase of the trial, sir, did either you or Mr. Burke have any discussions with [Appellant] as to whether he should testify in that portion of the case?

64. For example, Burns acknowledged that Appellant escaped from St. Gabriel's Hall during his stay at that facility and stole clothing from others. N.T., 8/26/1999, pp. 21–22. Although he was the principal at St. Gabriel's Hall, Burns was not aware of the reasons for Appellant's placement there, his prior criminal background, did not know whether Appellant "actually improved" by the time of his release, and never read any of the counselors' reports. *Id.* at 22–24.

Attorney Marinelli: We had many conversations with [Appellant]. In the mitigation phase and also in the guilt and innocence phase, [Appellant] absolutely, positively refused to testify. On many occasions, [Appellant] did not even wish to talk to us.

* * *

Defense Counsel: Okay. Did you give [Appellant] any advice with regard to whether he should or should not testify?

Attorney Marinelli: During both phases it was our, I don't want to say request, we almost pleaded with the man to testify. All he could do to help him. He refused to testify.

N.T., 11/13/1998, pp. 60–61. Later, he was called to testify by the Commonwealth and reaffirmed his previous statements:

Prosecutor: [W]ould you please let us know what efforts you made to get [Appellant] to testify on his own behalf?

Attorney Marinelli: Begged, pleaded. On many occasions, we were—Mr. Burke and myself alone told him the only way he has any chance of winning the guilt and innocence, or not having the death penalty, is for him to testify. The people want to hear from the defendant.

Prosecutor: Okay. Did you explain to him that people want to hear him deny this?

Attorney Marinelli: Yes, absolutely.

Prosecutor: Did you ever tell him, either for the guilt or innocence, or for the penalty phase, that if he testified, his prior record would definitely come out?

Attorney Marinelli: No, whether it would definitely come out in or not, nobody is going to know, because we would have objected to any reference to the prior record. It would have been for the Judge to make his decision. You know, his prior record didn't have much to do—As far as I was concerned, the prior record didn't have much to do with the three homicides he was being tried for. What we wanted to do is we wanted to have him get up here; get on the witness stand; look the jury in the eye and tell them, no, I did not do this, they have the wrong person. Mr. Robinson, on many occasions, refused to do this.

N.T., 9/10/1999, pp. 10–11; *see also* N.T., 9/10/1999, p. 25. The other trial counsel, James Burke, who was primarily responsible for preparing the defense during the penalty phase, testified in a similar fashion:

Prosecutor: Okay. Let's start with [Appellant]. Did you discuss with him the importance of him taking the stand in the penalty phase of the case?

Attorney Burke: I begged him.

Prosecutor: And what was his response to you?

Attorney Burke: He was obsessed with his appeal, and I did not voice upon him that he had to testify after he was convicted and we were preparing to go right into the penalty phase. I talked to him long before that about what he was going to have to do in the event that he was found guilty in this case, in his cases. He didn't care.

* * *

Prosecutor: Did you attempt to explain to him the importance of his testimony?

Attorney Burke: We did.

Prosecutor: Did you let him know that the-his testimony would be exclusive to pleading for his life and that was it?

Attorney Burke: In the penalty phase, absolutely.

Prosecutor: Okay. [Appellant] testified today that he didn't know that his testimony could be limited. Is that correct?

Attorney Burke: In the penalty phase?

Prosecutor: Um-hum.

Attorney Burke: No, that's not correct. As a matter of fact, he had denied that he had done these things. It's not uncommon for the person who denies the underlying crimes they are convicted of, to sit before the jury and tell them they made a horrible mistake that, "I didn't do this. I want your sympathy. I want your mercy." . . . He could have continued to deny the offenses.

Prosecutor: And was that your strategy?

Attorney Burke: Of course. He didn't have to . . .

Prosecutor: Did you explain to [Appellant] that he could continue to say to the jury, "Look, you've made a terrible mistake, but please spare my life"?

Attorney Burke: Right, and he wouldn't have to answer questions . . . regarding the offenses if he could just say, "I did not do that."

N.T., 11/24/1998, pp. 193–95; *see also* N.T., 11/13/1998, p. 26; N.T., 11/24/1998, pp. 200, 203–04.

We see no reason to put our faith in Appellant's self-serving proclamations that he did not fully understand his rights and disbelieve the testimony of his two trial counsel. Given the testimony cited above, we reject this claim of counsel ineffectiveness.

e. Torture

[54] Appellant raises multiple issues in relation to the jury's determination that the killings of Burghardt and Schmoyer implicated the aggravating circumstance of "torture," 42 Pa.C.S. § 9711(d)(8).[65] We will not address these arguments, because we consider them moot, in light of the fact the capital sentences in those cases were vacated by the trial court on an unrelated basis.[66]

f. References to Aggravating Circumstance 42 Pa.C.S. § 9711(d)(11)

[55] Appellant alleges that throughout the penalty phase proceedings, the trial court, the prosecutor, and both defense attorneys incorrectly referred to the aggravator expressed in 42 Pa.C.S. § 9711(d)(11), as the "multiple victim" or "multiple killings" aggravating circumstance. Appellant maintains that these misnomers confused the jury and "actually **lessened** the burden of the Commonwealth." Brief for Appellant, p. 130 (emphasis in original). He argues that "[t]his very egregious statutory 'misconstruction' requires that all three sentences of death be vacated." *Id.*

We again note that two of the three capital sentences imposed by the trial court have been vacated. Therefore, we consider issues asserted in relation to these sentences to be moot and, in connec-

65. Appellant contends that: (1) there was insufficient evidence for the jury to find the existence of this aggravator in relation to both homicides; (2) the evidence presented was "irrelevant, unreliable, and lacked proper foundation;" and (3) the jury charge in relation to this aggravator was "inadequate and incomplete." Brief for Appellant, pp. 114–129.

66. Appellant also maintains that the alleged errors he articulated in relation to the "torture" aggravator in the Burghardt and Schmoyer homicides "necessarily infected the jury's deliberations in [the] Fortney" homicide. Brief for Appellant, p. 129 n. 26. Without even considering the merits of these purported errors, we note that "torture" was not an aggravator presented in the Fortney homicide. Therefore, we are not persuaded by Appellant's wholly unsubstantiated claim, especially given the trial court's clear instruction as to what cases in which the jury was to consider this aggravator.

tion with arguments at hand, will consider only claims relating to the remaining death sentence in the Fortney case.

The Sentencing Code, 42 Pa.C.S. §§ 9701, *et seq.,* sets forth the aggravating circumstances that the jury may consider in imposing capital punishment. One of these aggravators is articulated as follows:

> The defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue.

42 Pa.C.S. § 9711(d)(11). Appellant is correct in pointing out that, during the trial, "multiple victims" or "multiple killings" was used by all participants as a shorthand for this aggravator. However, we find that this was not erroneous and Appellant was not prejudiced in this regard.

The offenses introduced by the Commonwealth to establish the presence of this aggravator in relation to the Fortney homicide were the murders of Burghardt and Schmoyer. All three homicides were tried jointly and Burghardt, Schmoyer, and Fortney, were routinely referred to as "victims" during the trial, because, quite simply, they were the victims. Hence, the jury was not led astray by references to unrelated crimes committed by Appellant. Rather, they were asked to refer to evidence concerning the victims of the crimes they were adjudicating. Accordingly, within the confines of this trial, given that the crimes presented to prove this aggravating circumstance were being tried simultaneously, we see no error when the parties referenced 42 Pa.C.S. § 9711(d)(11) as the "multiple victims" aggravator.

[56] Similarly, we see no error when the term "multiple killings" was used in relation to 42 Pa.C.S. § 9711(d)(11). During the guilt phase of the proceedings, the jury found that Appellant killed three women. The Commonwealth asked the jurors to consider these determinations—namely, that Appellant was responsible for murdering Burghardt and Schmoyer—in finding the existence of the aggravator set forth in 42 Pa.C.S. § 9711(d)(11) as it related to the Fortney homicide. There was no error.

[57] Moreover, in rejecting Appellant's contention that the Commonwealth's burden of proof was somehow lessened by these references, we simply point out that the trial court, on multiple occasions, instructed the jury as to the burden of proof carried by the Commonwealth. *See, e.g.,* N.T., 11/10/1994, pp. 2739, 2744, 2746. These instructions could not have been any clearer and we are bound to presume that the jurors followed them.[67] *See Commonwealth v. Baker,* 531 Pa. 541, 614 A.2d 663, 672 (1992) ("The presumption in our law is that the jury has followed instructions [of the trial court]"); *Freeman,* 827 A.2d at 409.

g. Jury Charge in Relation to 42 Pa.C.S. § 9711(d)(11)

[58] Appellant also argues that the trial court improperly instructed the jury in relation to the aggravator embodied in 42 Pa.C.S. § 9711(d)(11). Initially, the trial court gave the following instruction:

> I have gone over the evidence with counsel and these are the aggravating and mitigating circumstances which I charge you are applicable in this case.
>
> The list is long under the law but these are the ones that I have found are relevant and material in your particular case. Sometimes there are few, sometimes there are more.

67. Given that we reject Appellant's substantive assertions of error, his multiple counsel ineffectiveness claims related to these arguments also fail.

> But you will see here, the following aggravating circumstances are submitted to the jury and must be proven by the Commonwealth beyond a reasonable doubt. . . .
>
> Multiple killings. The actual language in the statute is complicated. But we've agreed that multiple killings is more simple, just to say that, than the actual language. That is an aggravating factor. If one killing occurred with others, that's to be considered an aggravating factor. And since you've found three murders happened by this defendant, I would think that that would also have been prove beyond a reasonable doubt.

N.T., 11/10/1994, pp. 2745–46. Later, after a sidebar conference with counsel, the court stated the following:

> Counsel have asked me to read—what we have in the verdict slip is a shorthand version. I think I had told you this isn't the actual language of the Act.
>
> To be safe, they want me to read the actual language of the aggravating circumstances.
>
> * * *
>
> In multiple—I just put down multiple killings. In that one, the defendant has been convicted of another murder committed either before or at the time of the offense at issue. Those are precise words of the law.
>
> * * *
>
> Now, I also indicated that you should find, because of the evidence you heard, numbers one and two [referring to aggravators 42 Pa.C.S. § 9711(d)(6) and 42 Pa.C.S. § 9711(d)(11)]. I really can't direct you to do that. That's your finding to make.
>
> You're on your own as to whether or not multiple killings are a factor and while perpetrating a felony are a factor. Take into account consideration what you've already found but I can't direct you to find that.

N.T., 11/10/1994, pp. 2760–62.[68]

[59] Presently, Appellant's convictions in relation to the Burghardt and Schmoyer homicides were properly considered by the jury for purposes of establishing 42 Pa.C.S. § 9711(d)(11) in relation to the Fortney homicide, because these murders preceded the Fortney murder. While the initial instruction given by the court improperly directed the jurors to find the presence of this aggravator, the subsequent, curative statement provided the correct account of the law and retracted the previous instruction as erroneous. As explained previously, we are bound to presume that the jurors followed the curative instruction. *See Baker, supra*; *Freeman, supra*. Hence, Appellant is not entitled to relief on this claim.

h. Response to a Jury Question

[60] At one point during the charge, the following exchange took place between the trial court and one of the jurors:

> **Juror:** On the life in prison, is that without parole, just so that we are sure? Would there be a chance of parole if it was life in prison?
>
> **Trial Court:** I don't see how I can guarantee—that's the present law. But what if the legislature changes the law? I can't guarantee that. That's the way the law is now.
>
> **Juror:** Just so we know, Your Honor.

68. Again, we feel compelled to note that, in his brief to this Court, Appellant does not mention or cite the last part of the curative instruction given by the trial court that related the jury's task of finding the presence of aggravating circumstances.

Trial Court: Who knows two years from now if they'll change the law. I can't tell you.

N.T., 11/10/1994, pp. 2767–68. At that point, the prosecutor requested a sidebar conference. At the conclusion of the discussion, the trial court gave the jury the following answer: "I am to tell you, and it's accurate, 'Life is life.' There won't be any parole. Life is life." N.T., 11/10/1994, p. 2769.

[61] Presently, Appellant argues that the trial court failed to mention that there was no possibility of parole if Appellant would receive a life sentence. Thus, Appellant maintains that the jury was confused by the instructions and the trial court further compounded their misunderstanding by giving an answer indicative that "life imprisonment" may include the possibility of parole.[69] Ultimately, Appellant contends that "not informing the jury during the sentencing instructions that a life sentence means life without the possibility of parole offends the evolving standards of decency that underlie" the U.S. and Pennsylvania Constitutions. Brief for Appellant, p. 143.

Essentially, Appellant's contention is that the trial court should have provided the jury with the instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), that a "life sentence" means "life without a possibility of parole." However, as this Court has repeatedly held, "a *Simmons* instruction is required only where the prosecution makes the future dangerousness of the defendant an issue in the case and the defendant specifically requests such an instruction." *Commonwealth v. Champney*, 574 Pa. 435, 832 A.2d 403, 417 (2003); *see also Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344, 355 (1998), *cert. denied*, 528 U.S. 1082, 120 S.Ct. 804, 145 L.Ed.2d 677 (2000).[70] Here, the Commonwealth did not argue future dangerousness and defense counsel did not request a *Simmons* instruction. Therefore, no instruction was required.

[62] As it relates to the statement made by the trial court in response to the question posed by the juror, it is similar to what this Court faced in *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31 (1998), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1465, 143 L.Ed.2d 550 (1999). Just as in this case, the trial court in *Clark* responded to the jury's question as to the meaning of "life imprisonment" by acknowledging, *inter alia*, that, although the present state of the law does not allow parole in the circumstances at hand, it cannot predict whether the legislature will decide to change that in the future. *Id.* at 35. We found that this instruction was not erroneous, *id.* at 36, and believe that *Clark* is directly on point with the circumstances presently before us. Therefore, we find no error in the

69. Appellant also alleges that the question asked by the juror indicated that the jury was deliberating prematurely and, therefore, yet another purported impropriety was at hand. *See* Brief for Appellant, p. 138 n. 31. In support of this contention, Appellant cites *Commonwealth v. Kerpan*, 508 Pa. 418, 498 A.2d 829 (1985). But *Kerpan*, where the trial court "essentially encouraged the jurors to hold discussions among themselves" by way of a direct instruction, is entirely distinguishable from the matter at hand, since no such instruction was presently given. *Id.* at 831. Moreover, aside from Appellant's wholly frivolous claim, there is absolutely nothing to indicate that premature discussions among the jurors actually took place.

70. We note that some Justices on this Court have consistently expressed the view that they would require a *Simmons* instruction in all cases. *See, e.g., Robinson, supra* (Flaherty, C.J., dissenting; Zappala, J., concurring; Nigro, J., concurring).

instruction given by the trial court.[71]

i. Constitutionality of the Death Penalty Statute

[63] Appellant contends that his counsel was ineffective for failing to move to bar the Commonwealth from seeking the death penalty in this case pursuant to various provisions of the U.S. and Pennsylvania Constitutions. Initially, Appellant maintains that his trial counsel should have challenged the constitutionality of the death penalty statute because "there is an 'unacceptable risk' that the decision to prosecute Appellant and to seek the death penalty against him was based upon selective factors, in violation of [Appellant]'s protections against cruel and unusual punishment guaranteed by the Eight Amendment to the United States Constitution." Brief for Appellant, p. 158. Appellant identifies these "selective factors" as his indigence and his race; yet, he also concedes that "[t]here is no evidence ... to suggest that the District Attorney actually employed these improper factors in the decision to seek the death penalty." Brief for Appellant, pp. 158–9. Moreover, Appellant presents a number of arguments that the Pennsylvania Death Penalty statute is unconstitutional on its face.

The claims raised by Appellant in regard to the constitutionality of 42 Pa.C.S. §§ 9701, *et seq.*, have been previously addressed by this Court. We simply refer Appellant to the multitude of decisions issued by this Court since we first found the present statute to be constitutional in *Zettlemoyer, supra,* rejecting arguments essentially identical to what Appellant raises now. For this reason, we find that Appellant's claim of counsel ineffectiveness fails, because the substantive arguments that his counsel could have presented lacked merit.

4. Prosecutorial Misconduct

Appellant maintains that the prosecutor made a number of improper comments during the opening statement, the guilt phase summation, and the penalty phase summation. Additionally, Appellant asserts a number of counsel ineffectiveness claims for failing to object to these purportedly improper comments.

"Our Court has held that as long as there is a reasonable basis in the record for the comments, we will permit vigorous prosecutorial advocacy." *Commonwealth v. Miles,* 545 Pa. 500, 681 A.2d 1295, 1302 (1996), *cert. denied,* 520 U.S. 1187, 117 S.Ct. 1472, 137 L.Ed.2d 684 (1997). *See, e.g., id.* at 1301–03 (finding that it was proper for the prosecutor to analogize defendants' actions to the hunting behavior of animals and prey, where the account of the crime supported this description); *Commonwealth v. (William) Johnson,* 542 Pa.384, 668 A.2d 97, 106–07 (1995) (finding no basis for mistrial because of the prosecutor's description of defendants as "henchmen" where this reference was "based on the reasonable inferences drawn from the evidence"), *cert. denied,* 519 U.S. 827, 117 S.Ct. 90, 136 L.Ed.2d 46 (1996); *Commonwealth v. Jones,* 530 Pa. 591, 610 A.2d 931, 943 (1992) (upholding the prosecutor's description of defendants as a "murdering, child-killing, backshooting" trio, "slaughterers," and "executioners," where these statements were reasonably based upon the evidence produced at trial), *habeas corpus granted in part,* 1996 WL

71. Appellant attempts to distinguish *Clark,* because in the present case, "the trial court's comments were in response to a jury question and not a result of counsels' arguments [as in Clark]." Brief for Appellant, p. 141. This differentiation is devoid of merit. *See Clark,* 710 A.2d at 35 (stating that "[t]he jury **inquired** as to the meaning of 'life imprisonment.' The trial court **responded to this question** as follows ...") (emphasis supplied).

296525 (E.D.Pa.1996); *Commonwealth v. D'Amato*, 514 Pa. 471, 526 A.2d 300, 313 (1987) (finding that the prosecutor's characterization of defendant as a "clever, calculating and cunning executioner" did not unavoidably prejudice defendant so that the jury could not weigh the evidence properly and render a true verdict).

"Challenged prosecutor comments must be considered in the context in which they were made." *King*, 721 A.2d at 783. In reviewing the statements made by the prosecutor, we have noted that:

> [A] prosecutor must be free to present his or her arguments with logical force and vigor. Reversible error only exists if the prosecutor has deliberately attempted to destroy the objectivity of the fact finder such that the unavoidable effect of the inappropriate comments would be to create such bias and hostility toward the defendant that the jury could not enter a true verdict.

Miles, 681 A.2d at 1300; *also see Paddy*, 800 A.2d at 316. "Furthermore, during the penalty phase, where the presumption of innocence is no longer applicable, the prosecutor is permitted even greater latitude in presenting argument." *King*, 721 A.2d at 783.

Moreover, even if the alleged statements by the prosecutor may have been improper, we have held that "not every intemperate or uncalled for remark by a prosecutor requires a new trial." *Miles*, 681 A.2d at 1302. Indeed, "where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict, then the error is harmless beyond a reasonable doubt." *Id.* (citing *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155, 166 (1978)). With this standard in mind, we now examine the specific arguments raised by Appellant.

a. Guilt Phase

i. Opening Statement

[64] Appellant complains that during his opening statement to the jury, the prosecutor referred to Appellant as a "predator," N.T., 10/24/1994, p. 57, and asked the jury not "to lose sight of the ferocity of what was involved here, of the violence, of the intent to kill," N.T., 10/24/1994, p. 59.

The Webster's Third New International Dictionary defines "predator" as, *inter alia*, "one that prays, destroys, or devours" and "predatory" as, *inter alia*, "relating to, or practicing plunder, pillage, or rapine[;] using violence or robbery for aggrandizement[;] destructive, harmful, injurious." Webster's Third New International Dictionary of the English Language Unabridged, p. 1785. These definitions are entirely consistent with the way the Commonwealth portrayed Appellant to the jury—a calculating attacker, who prowled the East Allentown area, and killed his victims with vicious ferocity.

Moreover, the intent of the perpetrator, which the prosecutor's statement emphasized, is an essential element that the Commonwealth must prove to establish first-degree murder. *See* 18 Pa.C.S. § 2502(a) (defining "murder of the first degree" as "[a] criminal homicide . . . committed by an **intentional** killing") (emphasis supplied); *also see* 18 Pa.C.S. § 2501(a) (stating that "[a] person is guilty of criminal homicide if he **intentionally,** knowingly, recklessly or negligently causes the death of another human being") (emphasis supplied). Thus, it was entirely appropriate for the prosecutor to focus the jury's attention on this aspect of the case.

As reflected above, we believe that these statements were within the context of the evidence presented by the Commonwealth. Therefore, this Court finds no misconduct on the part of the prosecutor and rejects Appellant's claim that his counsel was ineffective for failing to object to these comments.

ii. Closing Statement

[65, 66] Appellant argues that the prosecutor's guilt phase summation was inflammatory because he: (1) referred to Appellant as a "territorial predator," N.T., 11/8/1994, p. 2246; (2) stated that "only four people have seen [Appellant's] behavior and action and only one of them is alive to tell you about her experiences with him," N.T., 11/8/1994, p. 2247; and (3) told the jury that "[i]t's time to put the nightmare on the east side to bed. It's time to do that by returning verdicts of guilty, guilty, guilty." N.T., 11/8/1994, p. 2272. Additionally, Appellant contends that the prosecutor improperly commented upon his failure to produce evidence, when, he stated as follows:

> Do you think ... if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand?

N.T., 11/8/1994, p. 2248; *see also* N.T., 11/8/1994, p. 2265. Appellant asserts that, by way of this comment, the prosecutor suggested that the defense had some burden of proof in the case.

Again, the characterization of Appellant as a "territorial predator" is entirely consistent with the case presented by the prosecutor, who maintained that Appellant targeted a certain type of victims within a specific geographical area. Similarly, the comment that only one of Appellant's victims was still alive was appropriate, in light of the Commonwealth (1) providing testimony that Appellant attacked Burghardt, Schmoyer, Fortney, and Sam–Cali; (2) offering proof that Appellant was responsible for the killings of Burghardt, Schmoyer, and Fortney; and (3) presenting the testimony of Sam–Cali as the only victim who survived her encounter with Appellant.[72] Furthermore, the prosecutor's reference to "the nightmare on the east side," falls squarely within the gamut of permissible oratorical flare.

Finally, a reading of the entire guilt phase summation by the prosecutor does not disclose any unfair suggestion that Appellant bore some burden of proof in the case. Indeed, the statement cited by Appellant refers to the fact that the DNA evidence presented by the Commonwealth via testimony of several expert witnesses was uncontradicted by any defense witnesses, which is fully consistent with the case presented to the jurors.[73] Further-

72. In relation to this argument, Appellant likens the present case to our decisions in (1) *Commonwealth v. Harvell*, 458 Pa. 406, 327 A.2d 27 (1974), and *Commonwealth v. Lipscomb*, 455 Pa. 525, 317 A.2d 205 (1974), where the prosecutors during their summations speculated what the deceased victims would have said to the jurors; and (2) *Commonwealth v. Gilman*, 470 Pa. 179, 368 A.2d 253 (1977), where the prosecutor appealed to the prejudice of the jury by invoking the memory of the victim in an inappropriate manner. It is plainly evident, however, that the present circumstances are factually distinguishable from these cases.

73. The comment referenced by Appellant appears in the following sequence:

> Again, I would suggest to you that we've met that particular burden which is placed upon us. We welcome that burden and we've proven it through witnesses who we've heard. We've proven it through witnesses, expert witnesses, from the FBI, Dr. Hal Deadman from the FBI, and expert in DNA. And when you hear the DNA testimony and you consider the DNA testimony, what I want you to do is consider, ladies and gentlemen, who is the expert? Dr. Hal Deadman? Dr. Robert Ferrell? Or Carmen Marinelli? Do you think, ladies and

more, the trial court instructed the jury concerning not making an adverse inference because Appellant did not testify and that, as a matter of law, the defendant is not required to produce any evidence to establish his innocence. *See* N.T., 11/8/1994, pp. 2280–82, 2314. Accordingly, we reject the prosecutorial misconduct arguments and the corresponding counsel ineffectiveness claims asserted by Appellant concerning the prosecutor's guilt phase closing statement.

[67, 68] In relation to all of the allegations of prosecutorial misconduct asserted herein, we also note that the prosecutor's statements are not evidence. *See Commonwealth v. Gibson,* 547 Pa. 71, 688 A.2d 1152, 1164(Pa.), *cert. denied,* 522 U.S. 948, 118 S.Ct. 364, 139 L.Ed.2d 284 (1997); *(William) Johnson,* 668 A.2d at 106. Presently, the trial court instructed the jurors, on the first day of the trial and again at the beginning of the jury charge, that: (1) although the statements of the attorneys are important, they do not amount to facts or evidence; and (2) the jury is the only body qualified to find the existence of pertinent facts. *See* N.T., 10/24/1994, pp. 36–37; N.T., 11/8/1994, pp. 2274, 2276–77, 2333. We find that this instruction served as a further cure for any improper prejudice that may have resulted from the prosecutor's comments. *See Commonwealth v. Carter,* 537 Pa. 233, 643 A.2d 61, 77 (1994) (holding that the trial court's instruction to the jury not to consider prosecutor's statements as evidence cured any prejudice which may have been caused by the comments made by the prosecutor), *cert. denied,* 514 U.S. 1005, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995).

b. Penalty Phase

i. Closing Statement

[69] Finally, in relation to the penalty phase summation, Appellant argues that his counsel was ineffective because he failed to object to the following statement:

> And as he sits there, ladies and gentlemen, we have not heard any remorse. We have not heard any calling for the victims. He sits there, to some degree, like a sphinx and you have to decide whether to impose life or death in the particular case.
>
> * * *
>
> Think about whether or not there is any remorse.

N.T., 11/10/1994, pp. 2706–2707. According to Appellant, this constituted an impermissible comment on Appellant's Fifth Amendment right against self-incrimination.

[70] Appellant did not testify during either the guilt phase or the penalty phase of the trial. Hence, the statement cited above appears to be an improper reference to Appellant's valid exercise of his federal constitutional right and should have been objected to by trial counsel. We are convinced, however, that Appellant suffered no prejudice as a result of the prosecutor's comment.

First, we note that at issue is a brief statement that did not contain a direct reference to the fact that Appellant did not testify during the trial. Second, the trial court specifically instructed the jury that "[i]t is entirely up to the defendant wheth-

> gentlemen, if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand? Dr. Hal Deadman? Dr. Robert Ferrell? Who are you going to believe? Them or Carmen Marinelli? That's what it comes down to, because you decide from the witness stand, are they experts in their field? Is Dr. Deadman somebody who you can believe, somebody who you can rely upon?

N.T. 11/8/1994, p. 2248.

er to testify and you must not draw any adverse inference from his silence." N.T., 11/10/1994, p. 2740. We feel that this instruction more than adequately cured any ill effect of this fleeting comment that (as we stated before) did not even contain a direct reference to Appellant's exercise of his Fifth Amendment right. *See Baker, supra* (the jury is presumed to follow the instructions); *Freeman, supra.* For all of the above reasons, Appellant is not entitled to relief on this ground.[74]

C. Statutory Review of the Death Sentence

[71] Having concluded that Appellant is not entitled to relief on any of the claims that he raises, we must affirm Appellant's sentence of death unless we determine that it was the product of passion, prejudice, or any other arbitrary factor or unless we determine that the evidence fails to support the finding of at least one aggravating circumstance. *See* 42 Pa.C.S. § 9711(h)(3).

[72, 73] Upon review of the record, we find that Appellant's death sentence was not the product of passion, prejudice, or any other arbitrary factor. Furthermore, we conclude that the evidence was sufficient to support the finding of three aggravating circumstances in relation to killing of Fortney; namely: (1) the killing was committed during the perpetration of a felony;[75] (2) Appellant had a significant history of felony convictions involving the use or threat of violence;[76] and (3) Appellant "has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue."[77]

Accordingly, we affirm the verdict and the sentence regarding No. 58 of 1994 Lehigh County Court of Common Pleas, Criminal Division.[78] We also affirm the Order of the trial court regarding Nos. 55 and 56 of 1994, Lehigh County Court of Common Pleas, Criminal Division.

Former Justice LAMB did not participate in the decision of this case.

Justice NIGRO files a concurring opinion.

Justice SAYLOR files a concurring opinion.

Justice NIGRO concurring.

I join in the result reached by the majority, as I agree with its ultimate conclusion that Appellant is not entitled to relief. I write separately, however, to address its analysis as it relates to two of Appellant's claims.

In one of his many claims of error regarding the *voir dire* process, Appellant argues that the trial court abused its discretion in refusing to dismiss several venirepersons for cause, thereby forcing him to use his peremptory challenges to strike

74. Appellant also contends that the cumulative effect of all allegedly improper prosecutorial comments during the guilt and penalty phases of the trial undermined the integrity of his convictions and sentences. We do not address this argument in light of our conclusion that, when considered on individual basis, none of the allegations of prosecutorial misconduct entitles Appellant to any relief. *See Freeman,* 827 A.2d at 416 (observing that "[i]t is settled ... that no number of failed claims may collectively attain merit if they could not do so individually").

75. 42 Pa.C.S. § 9711(d)(6).

76. 42 Pa.C.S. § 9711(d)(9).

77. 42 Pa.C.S. § 9711(d)(11).

78. Pursuant to 42 Pa.C.S. § 9711(i), the Prothonotary of this Court is hereby directed to transmit the complete record of this case to the Governor of the Commonwealth of Pennsylvania.

those venirepersons. In analyzing and ultimately rejecting this claim, the majority cites to this Court's decision in *Commonwealth v. Colson,* 507 Pa. 440, 490 A.2d 811, 818 (1985), where the Court held that the trial court did not err in refusing to dismiss a venireperson for cause even though that venireperson, among other things, knew the victim's mother, knew the prosecution witness who discovered the victim's body, knew the wife of the prosecuting officer, and believed that the victim had actually once employed her husband. While I recognize this Court's duty to adhere to the principle of *stare decisis,* I am compelled to note that I simply do not agree with the *Colson* court's conclusion. Rather, it is abundantly clear, at least to me, that the nature of the venireperson's many ties to those involved in that case created a sufficient likelihood of bias so as to warrant the venireperson's disqualification. *Id.* at 818 ("A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses, that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct and answers to question[s]."). Nevertheless, I do not believe that the relevant facts in the instant case are even remotely similar to those in *Colson,* as none of the venirepersons at issue here had the same type of relationship to the case as the venireperson in *Colson* had. Indeed, in my view, the situations of the venirepersons in the instant case are much more akin to the situation of the venireperson in *Commonwealth v. Patterson,* 488 Pa. 227, 412 A.2d 481 (1980), who recognized one of the investigating officers from church services, but could not identify the officer by name. Thus, just as this Court held in *Patterson* that the trial court did not err in refusing to dismiss the juror at issue in that case, I agree with the majority that the trial court below did not err in refusing to dismiss the challenged venirepersons for cause here.

Appellant also argues that the trial court erred when it refused to question jurors about their knowledge of a newspaper article relating to a prospective witness, Latanio Fraticeli. That article, as more fully explained by the majority, was published mid-trial and discussed incriminatory statements Fraticeli made about Appellant during an *in-camera* hearing. Despite the fact that the jury had not been sequestered, the trial court did not question the jurors-either individually or collectively-about the article and instead opted to reiterate its general instructions to the jury that it was to avoid any media coverage of the case and determine the facts of the case based only upon the evidence at trial. *See* N.T., 11/3/1994, at 1828. I question the decision by the court not to ask the jurors about the article, especially in light of this Court's clear pronouncement in *Commonwealth v. Bruno* that "the preferred procedure when highly prejudicial material is publicized during the trial and the jury is not sequestered is to question the jurors individually, out of the presence of the other jurors." 466 Pa. 245, 352 A.2d 40, 52 (1976). In finding that the trial court did not err in failing to do so here, the majority appears to rely on the follow-up language in *Bruno* that "giving special precautionary instructions may be sufficient precaution depending on the facts of the case." *Id.* While the court here did, as noted above, give the jury general cautionary instructions the morning the article appeared in the newspaper, it is not as clear to me as it is to the majority that these instructions were sufficient to ensure that the jury had not been improperly influenced by the article. In the end, however, I believe that any error that resulted from the court's failure to question the jurors about the article was merely harmless as the evidence of Appellant's guilt was clearly overwhelming. Thus, I agree with the majority that Appellant is not entitled to relief on this claim.

Justice SAYLOR concurring.

While I concur in the result reached by the majority, I respectfully differ with its rationale supporting the disposition of several of Appellant's claims, including the following.

First, I view the resolution of Appellant's claim that the trial court abused its discretion in consolidating for trial the charges arising from the three separate homicides as a closer case than does the majority. *See* Majority Opinion at ——, 864 A.2d at 481 ("[I]t is difficult to conceive of any situation where the propriety of joinder could be clearer." (citation omitted)). In dismissing fairly substantial differences between the murders in terms of time, location, method, and victim characteristics, the majority relies on some fairly broad generalizations, for example, categorizing separate killings involving bludgeoning, strangulation, and stabbing under a single category of murder at close range by hand or hand-held instrument. Along similar lines, the majority emphasizes general locale (the east side of Allentown) to the exclusion of any express consideration of the substantial differences in the individual crime scenes; for example, the killing of Ms. Schmoyer involved abduction to a secluded, outside location, whereas, the other victims were killed in their homes.

In *Commonwealth v. Morris,* 493 Pa. 164, 425 A.2d 715 (1981), the Court conditioned consolidation of offenses under an identity justification upon a fairly strict requirement of distinctive *modus operandi,* requiring "such a high correlation in the details of the crimes that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the others." *Id.* at 176, 425 A.2d at 721. *See generally* LEONARD PACKEL AND ANN BOWEN POULIN, PENNSYLVANIA EVIDENCE 404–9(6) (2d ed. 1999) (discussing the "signature" aspect of the use of other acts evidence to prove identity via *modus operandi*). In doing so, the Court specifically rejected an approach that would be limited to a demonstration that the crimes were merely of the same class (here, rape/murder) to support their joinder. *See id.* Although I view the similarities identified by the majority as minimally sufficient to implicate an exercise of discretion on the part of the trial court in consolidating these offenses, it is my position that the case tests the outer boundaries of *Morris.*[1]

1. Also in tension with *Morris* is the majority's reliance on evidence discretely proving each offense individually, for example, the presence of Appellant's DNA at each crime scene, to bolster its consolidation analysis. The presence of semen at each of three rape/murder scenes is not, in and of itself, reflective of a distinct method of operation any more than, for example, a fingerprint would be; rather, it is the discrete process of identification of the individual DNA samples found at each crime scene that creates the compelling comparison. The majority opinion also appears to incorporate a tendency in the decisional law to conflate the "identity" and "common scheme or plan" exceptions to the general rule against consolidation. *See* Majority Opinion at ——, 864 A.2d at 483. My preference, however, would be to preserve the distinctions that arise out of the design and function of the exceptions. *See generally* PACKEL AND POULIN, PENNSYLVANIA EVIDENCE 404–9(5), (6) (explaining the relevant distinctions).
Finally, it should also be noted that the admission of other acts evidence requires an assessment of the probative value of the evidence versus its prejudicial effect. *See Commonwealth v. Billa,* 521 Pa. 168, 177–78, 555 A.2d 835, 840 (1989); *accord* Pa.R.E. 404(b)(3). Applying this analysis, again, I view this as a very close case in terms of the trial court's judgment in permitting the join-

Second, and particularly in light of the trial court's decision to try the crimes jointly, the case was a strong candidate for a change of venue or venire. Of the 159 venirepersons who were questioned, a negative response to questions probing media exposure was the rare exception. The prejudicial character of the publicity is also apparent from voir dire responses.[2] Indeed, the trial judges involved made various acknowledgments concerning the notoriety of the case, *see, e.g.*, N.T., at 1799, and their efforts to diffuse the effect of the coverage were also apparent throughout the voir dire process. *See, e.g.*, N.T. (voir dire), at 1278 ("We cant let people be judged guilty or innocent by what the Morning Call says."); *id.* at 2167 ("You would be tried, and tarred and feathered in the newspaper. And I can tell you from personal experience, the paper is often wrong in not reporting it straight.").

Like the severance question, I therefore view this issue as a close one in terms of whether the trial court exceeded the outer boundaries of its discretion, and would caution that careful consideration should be given, in circumstances involving highly publicized, notorious, alleged serial crimes, to a defense request for a change in venue in order to ensure a fair trial. Ultimately,

der, particularly in a capital case in which it was known that the jurors would be called upon to assess different aggravating circumstances in relation to the separate crimes. Moreover, a demonstration of an evidentiary need is integral to the probative value versus prejudicial effect assessment. *See Billa*, 521 Pa. at 178, 555 A.2d at 840. Here, the joinder was premised, in significant part, as bearing upon the perpetrator's identity. The existence of DNA evidence in relation to each separate offense, however, diminishes the value of, and accordingly the necessity for, joinder (and the admission of other crimes evidence) in this regard.

2. *See, e.g.*, N.T. (voir dire), at 227 ("Well, when you read it and then you see it on T.V., and everybody is condemning a person, you figure he's actually guilty."); *id.* at 356 ("Well, what I've done — from what I've read and everything else, I feel he's guilty right off the bat."); *id.* at 677 (Well, ... based on articles in the newspaper and the television and everything leads up, I thought, to his guilt."); *id.* at 849 (opining that Appellant was guilty "[a]fter reading yesterday's paper, yes, I did"); *id.* at 1042 (expressing the opinion that the venireperson could not be fair and impartial "[b]ecause of the newspaper media, everything I have read and heard"); *id.* at 1088 (expressing the opinion, based on television and newspaper coverage that, "I think he's guilty"); *id.* at 1267 (indicating that the evidence demonstrated Appellant's guilt, based on print media account of DNA evidence); *id.* at 1350 ("I was under the impression that there was a confession to one of the crimes from the newspaper."); *id.* at 1398 (opining as to Appellant's guilt based on newspaper accounts); *id.* at 1808 (indicating that "[t]here's a feeling of guilt there," based on media coverage); *id.* at 1888 (noting that one of the crimes was "really publicized"); *id.* at 1955 ("I do feel he's guilty," based on media coverage); *id.* at 1970 ("He did it. So, I guess, from the news and the media, my immediate reaction was, like, he did it."); *id.* at 2070 (referencing an article indicating that Appellant "was either convicted or admitted to some other crime"); *id.* at 2142 ("I remember hearing about the time of the arrest that they were excited, or the possibility that we had our first serial killer"); *id.* at 2166 ("But I guess its more so the newspapers, the conversations you have at work. You kind of form an opinion. Whether you should nor shouldn't, you do form an opinion."); *id.* at 2190 (from media accounts and personal conversations, indicating "I feel there is some guilt there, yes."); *id.* at 2281 ("It seems that the defendant seems to be guilty, based on the information that seems to have been put out in the public media."); *id.* at 2307 ("I believe I said the newspaper information was leading that way, saying that he had done it."); *id.* at 2407 ("I can say from what I'm reading it appears that he is guilty."); *id.* at 2441–42 (expressing a fixed opinion of guilt based on media accounts); *id.* at 2564 ("In following the case, ... if there's DNA evidence out there that is pointing in that direction, which I think there is, I think there's only one answer for it.").

however, I concur with the majority that the present verdict need not be disturbed on this ground, given the existence of a cooling-off period,[3] and based on the trial court's extensive efforts to screen out venirepersons whose opinions were fixed.[4]

Third, I differ with the majority's characterization that all of the requirements of *Commonwealth v. Smoyer,* 505 Pa. 83, 476 A.2d 1304 (1984), were satisfied in relation to the hypnotically-refreshed testimony of Denise Sam–Cali, *see* Majority Opinion at ——, 864 A.2d at 498, particularly since the analysis that follows this statement assumes that this was not in fact the case. *See* Majority Opinion at —— - ——, 864 A.2d at 499. Indeed, since Ms. Sam–Cali's testimony relating to the sexual nature of her attack was derived solely from the hypnotic session, it was plainly inadmissible under *Smoyer's* second criterion. *See Smoyer,* 505 Pa. at 87, 476 A.2d at 1306. Notably, the trial court acknowledged as much. *See* Opinion on Post–Sentence Motions, *slip op.* at 33 (finding that, aside from the notice requirement, none of the other *Smoyer* requirements were satisfied). I also have difficulty with the majority's finding of neutrality for purposes of *Smoyer* on the part of a hypnotist who is a member of the law enforcement community. *See* Majority Opinion at ——, 864 A.2d at 500–01. I am in agreement, however, with the majority's determination that Appellant has failed to establish sufficient prejudice in relation to the *Smoyer* claims to demonstrate an entitlement to relief. *See id.* at ——, 864 A.2d at 501.

Next, to the extent that the majority's disposition of Appellant's claim of ineffective assistance of counsel in failing to develop mitigating evidence falling under the catch-all mitigator suggests a quantitative analysis, *see* Majority Opinion at ——, 864 A.2d at 507 ("We cannot find trial counsel ineffective for achieving exactly what Appellant alleges that they failed to do—establish the existence of the catch all mitigator."); *see also id.* at ——, 864 A.2d at 510, I disagree with this approach. The weight of the evidence presented, and not the ability to "count" the catch-all mitigator, is the dispositive factor in the death penalty statutes qualitative approach to the selection determination in capital sen-

3. It should be acknowledged, in this regard, that a significant number of venirepersons had read very recent articles concerning Appellant. The tenor of the voir dire, however, suggests that the more sensational coverage occurred contemporaneous with the crimes and Appellant's arrest. *See, e.g.,* N.T., (voir dire) at 2609 (noting that the venireperson learned of Appellant's crimes "when it was a hot item but that it faded.").

4. Also related to *voir dire,* based on a typographical error in Appellant's brief, the majority declines to review his claim that his counsel erroneously conceded in jury selection that the case involved first-degree murders. *See* Majority Opinion at ——, 864 A.2d at 495. Since, however, the transcript reference to counsel's statement is discernable in conjunction with this Court's independent review of the record, *see* N.T. (voir dire), at 2541, I would not deny Appellant merits review of his claim on such basis. On the merits, while counsel's comment was directed to a juror who became seated at Appellant's trial, I believe that its context made it sufficiently ambiguous as to whether counsel was referring to the charges lodged against Appellant to negate Appellant's ability to demonstrate prejudice, particularly in light of the defense presented and the trial court's instructions in the trial that followed.

Finally, as to *voir dire,* I respectfully differ with the majority's characterization of Dr. Zager's relationship with Drs. Mihalakis and Ross, under who he trained during his recent residency and with whom he had interacted in a professional capacity, as a remote one. I agree only that Appellant has failed to show prejudice in relation to this claim, particularly considering the deference due the trial court's determination that the relationship was not so substantial as to warrant a presumption of prejudice.

tencing. *See generally* 42 Pa.C.S. 9711(c)(4). Accordingly, and in light of the broad range of mitigation evidence which may fall under the umbrella of the catch-all circumstance, I believe that the ineffectiveness inquiry pertaining to the asserted failure to present adequate mitigation should generally entail a comparison of the mitigation evidence that was presented in the penalty phase of trial in relation to that which the defendant later claims should have been presented. *Accord Commonwealth v. Williams,* 557 Pa. 207, 248, 732 A.2d 1167, 1189 (1999) (implementing this comparative approach in relation to the reasonable strategy prong of the ineffectiveness inquiry).

Applying this approach, however, I agree with the majority's ultimate determination that Appellant is not entitled to post-sentence relief on this claim. At trial, counsel presented friends and family members who testified that Appellant was loyal, helpful, and companionable. Trial counsel also presented testimony from Appellant's brother, who testified to his conversion to Islam and positive developments arising in his life as a result, and prison authorities who testified to Appellant's positive prison record. Further, trial counsel attempted to demonstrate hardship faced by Appellant affecting his emotional and social development, including testimony from family members concerning his father's alcoholism, aggressiveness, and abusiveness, as well as the history of intervention efforts such as special educational classes and juvenile placements, directed to addressing his disturbance in this regard. Trial counsel also presented testimony from a psychiatrist regarding his difficulties arising from drug and alcohol abuse and an anti-social personality disorder.

Appellant contends that defense counsel was ineffective for failing to present numerous witnesses (including educators, counselors, officials, and friends), who would have attested as to his good character, non-violent propensities, and family background, as well as multiple documents demonstrating his achievements in and connection to the community. A good portion of this evidence, however, is cumulative of what was presented during the penalty phase. To the extent that additional information is supplied, upon review, I do not consider it is as being of such a character or weight that it would have likely affected the penalty verdict, particularly taking into consideration the evidence that was actually presented. Additionally, deference is due to the common pleas court's acceptance of counsel's testimony that there was a strategic decision to curtail the presentation of character-based evidence, in light of substantial rebuttal evidence that was available to the Commonwealth. *See* Opinion on Post–Sentence Motions, *slip op.* at 56–57.

Next, I do not subscribe to the view that Appellant's claim relative to the evidence of torture adduced in the penalty-phase of trial is moot, in light of the vacation of his sentences in relation to the killings of Ms. Burghardt and Ms. Schmoyer. *See* Majority Opinion at ——, 864 A.2d at 512. The problem of potential spillover prejudice implicated by this claim is precisely the reason for the *Morris* Court's careful circumscription of consolidation of criminal offenses, *see Morris,* 493 Pa. at 176, 425 A.2d at 720, and I would not therefore reject out of hand the claim that such prejudice may have ensued in a case in which a defense request for severance has been denied, particularly where the claimed spillover relates to a subject as inherently prejudicial as torture. Moreover, the Court has an independent obligation in capital cases to review the record to ensure that the verdict was not the product of passion, prejudice, or any other arbitrary factor. *See* 42 Pa.C.S. § 9711(h)(3). As this particular claim touches on the Court's statutory obligations in this regard, again, I believe that merits review is implicated. On such review of the record, however, I am satisfied that the jury performed its duties as instructed in relation to Appellant's claim as framed.[5]

Finally, I differ with the majority's analysis of Appellant's claim that his counsel were ineffective for failing to object to the prosecutor's improper references to Appellant's exercise of his Fifth Amendment right to remain silent during its penalty phase summation. In this respect, I do not regard statements that "we have not heard any remorse," N.T., at 2706, "[w]e have not heard any calling for the victims," *id.* at 2706–07, "[h]e sits there, to some degree, like a sphinx," *id.* at 2707, and "[t]hink about whether or not there is any remorse," *id.*, as indirect or fleeting. If repeated, explicit references to a defendant's failure to make himself heard at trial were not sufficient to constitute direct references to his silence, the invocation of the image of a sphinx relative to such failure surely is. Moreover, the Court has recently repudiated its decisions that approved similar commentary (for example, *Commonwealth v. Lester,* 554 Pa. 644, 669–70, 722 A.2d 997, 1009 (1998)), to the extent that such decisions were based on an erroneous position that the Fifth Amendment was inoperative in the penalty phase of a capital trial. *See Commonwealth v. Freeman,* 573 Pa. 532, 573–74, 827 A.2d 385, 410 (2003).[6]

Accordingly, I would hold that the relevant and controlling difference arises out of the burden of establishing prejudice allocable to Appellant (since the issue here arises in the form of an unpreserved claim of prosecutorial misconduct), as compared to the burden on the Commonwealth to

5. In his claim, Appellant focus on the testimony of Dr. Mihalakis concerning the victims' emotional and physical suffering, claiming that it was not a proper subject for expert testimony. *See* Appellant's Brief at 122–26. While the Court has previously stricken a torture aggravator based on similar testimony, *see Commonwealth v. King,* 554 Pa. 331, 336–38, 721 A.2d 763, 781–82 (1998), a majority of the Court has more recently stated that there is nothing prejudicial in brief commentary by Dr. Mihalakis concerning his assessment of a victim's terror. *See Commonwealth v. Lopez,* 578 Pa. 545, 553–55, 854 A.2d 465, 470 (2004). Although I disagreed with this statement in *Lopez, see Lopez,* 578 Pa. at 559, 854 A.2d at 472–73 (Saylor, J., concurring), here, I do not view Dr. Mihalakis's testimony as so prejudicial as to support an inference of undue spillover prejudice.

It seems to me that the far more damaging evidence of torture, as concerns the potential for spillover prejudice, was the trial court's admission in the penalty phase of photographs of the victims that the Court had previously refused to admit in the guilt phase based on their potential to arouse passion. *See* N.T. (trial), at 2562 ("I don't like—I kept these pictures out of the guilt and innocence phase but because we're dealing with aggravating circumstances and the possibility of torture, I'm compelled to let you see these. I hope you'll not be too upset with them."). Appellant, however, does not raise the spillover prejudice claim in relation to these photographs (in a separate argument, Appellant does separately claim that the prejudicial effect of the photographs outweighed their probative value, *see* Appellant's Brief at 82; this claim, however, is not focused on the spillover aspect, but rather, on the threshold admissibility issue in relation to the purpose for which the evidence was offered in the first instance).

6. The decisional law also offers a "demeanor" justification to authorize prosecutorial commentary on a capital defendant's failure to show remorse. *See, e.g., Commonwealth v. Rice,* 568 Pa. 182, 212–13, 795 A.2d 340, 358 (2002). This justification, however, loses force where the prosecutor affirmatively states that the defendant has not been heard from concerning remorse (or any other subject, for that matter).

establish harmlessness beyond a reasonable doubt relative to preserved claims of trial error. *See generally Commonwealth v. Howard,* 538 Pa. 86, 99–100, 645 A.2d 1300, 1307–08 (1994) (distinguishing between prejudice and harmless error review).

Steven A. GALLANT, Jr., Respondent

v.

COMMONWEALTH of Pennsylvania DEPARTMENT OF TRANSPORTATION, BUREAU OF DRIVER LICENSING, Petitioner.

Supreme Court of Pennsylvania.

Jan. 3, 2005.

Petition No. 399 WAL 2002 for Allowance of Appeal from the Order of the Commonwealth Court entered June 26, 2002, at No. 220CD2001, reversing the Order of the Court of Common Pleas of Mercer County entered August 23, 2001 at No. 2000–1744.

Prior report: 805 A.2d 1.

ORDER

PER CURIAM.

AND NOW, this 3rd day of January, 2005, we **GRANT** the Petition for Allowance of Appeal and **REVERSE** the Order of the Commonwealth Court based on our decision in *Siekierda v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,* 860 A.2d 76 (Pa.2004).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-9001

HARVEY MIGUEL ROBINSON,
Appellant

v.

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

(D.C. No. 2:06-cv-00829)

SUR PETITION FOR REHEARING

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

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

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: July 16, 2024
DWB/arr/cc: EJM; EPM; RE; HFG

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

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<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 118-90. Some statute sections may be more current, see credits for details.

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28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Effective: April 24, 1996
Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(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; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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--

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(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.

(e)(1) In 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 made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

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(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 118-90. Some statute sections may be more current, see credits for details.

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	No. 1994/55, 56, 58
v.	:	
	:	
HARVEY MIGUEL ROBINSON	:	
	:	

ORDER

AND NOW, this 29th day of June, 2001, upon consideration of Defendant's Post-Sentencing Motions, and for the reasons set forth in the accompanying Opinion,

IT IS ORDERED:

1.) Defendant's sentence of death for murder of the first degree in Nos. 1994/56 and 1994/55 are vacated, and Defendant shall be re-sentenced in accordance with 42 Pa.C.S.A. § 9711 commencing 9:30 a.m. on Wednesday, August 29, 2001, Courtroom 1 A, Old Lehigh County Courthouse, Allentown, PA; and

2.) In all other respects Defendant's Post-Sentencing Motions in Nos. 1994/56 and 1994/55, and in No. 1994/58 in their entirety, are denied.

BY THE COURT:

EDWARD D. REIBMAN, J.

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

COMMONWEALTH OF PENNSYLVANIA	:
	: No. 1994/55, 56, 58
v.	:
	:
HARVEY MIGUEL ROBINSON	:
	:

* * *

APPEARANCES:

JAMES B. MARTIN, ESQUIRE, DISTRICT ATTORNEY,
JACQUELYN C. PARADIS, ESQUIRE, ASSISTANT DISTRICT ATTORNEY,
For the Commonwealth of Pennsylvania, and

PHILIP D. LAUER, ESQUIRE,
MARY ENNIS, ESQUIRE,
For the Defendant, Harvey Miguel Robinson.

OPINION

EDWARD D. REIBMAN, J.

Before the Court are Defendant's Post-Sentencing Motions in three separate informations which were consolidated for trial by jury and resulted in each case in Defendant being found guilty of murder of the first degree and other offenses, and sentenced to death and various terms of imprisonment.

I. Procedural History

On February 8, 1994, the Commonwealth charged Defendant as follows:

1) No. 1994/55: criminal homicide 1/, kidnapping 2/, rape 3/, aggravated

1/ 18 Pa. C.S.A. § 2501.
2/ 18 Pa. C.S.A. § 2901 (a)(3).
3/ 18 Pa. C.S.A. § 3121 (1).

indecent assault [4]/, and indecent assault [5]/, in connection with Charlotte Schmoyer on or about June 9, 1993.

2) No 1994/56: criminal homicide [6]/, burglary [7]/, criminal trespass [8]/, rape [9]/, aggravated indecent assault [10]/, and indecent assault [11]/ in connection with Joan Burghardt on or about August 9, 1992; and

3) No 1994/58: criminal homicide [12]/, rape [13]/, aggravated indecent assault [14]/, indecent assault [15]/, burglary [16]/, and criminal trespass [17]/ in connection with Jessica Jean Fortney on or about July 14, 1993.

Following a trial by jury from October 10 through November 8. 1994. Defendant was found guilty of murder of the first degree and all of the other offenses charged in each of the three cases [18]/. On November 10, 1994, the jury, pursuant to 42 Pa. C.S.A. § 9711 (a)(1), determined Defendant's sentence for each of the murders of the first degree

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[4]/ 18 Pa. C.S.A. § 3125 (1).
[5]/ 18 Pa. C.S.A. § 3126 (1).
[6]/ 18 Pa. C.S.A. § 2501.
[7]/ 18 Pa. C.S.A. § 3502.
[8]/ 18 Pa. C.S.A. § 3503 (a)(1)(i).
[9]/ 18 Pa. C.S.A. § 3121 (1).
[10]/ 18 Pa. C.S.A. § 3125 (1).
[11]/ 18 Pa. C.S.A. § 3126 (1).
[12]/ 18 Pa. C.S.A. § 2501.
[13]/ 18 Pa. C.S.A. § 3121 (1).
[14]/ 18 Pa. C.S.A. § 3125 (1).
[15]/ 18 Pa. C.S.A. § 3126 (1).
[16]/ 18 Pa. C.S.A. § 3502.
[17]/ 18 Pa. C.S.A. § 3503 (a)(1)(i).
[18]/ The trial commenced before the Honorable James N. Diefenderfer, then President Judge of Lehigh County, now Senior Judge. Mid-way through jury selection, after six (6) jurors had been selected, Judge Diefenderfer became ill. By agreement of all interested

to be death. Sentence was imposed accordingly on November 29, 1994, with additional sentences for the other offenses.

Defendant filed a timely post-sentence motion on December 8, 1994, alleging various pre-trial and trial errors. [19]. On March 28, 1996, he filed pro se a "Clarification Motion for the Appointment of New Counsel," in which Defendant stated his preference to raise trial counsel's ineffectiveness on direct appeal [20]. On May 6, 1996, he filed pro se a "Motion for Notes of Testimony and for Post Trial Discovery".

By order dated May 17, 1996, and filed on May 21, 1996, Defendant's trial counsel were relieved of further representation of Defendant; Worth Law Offices were appointed to succeed them; and Defendant was given until September 20, 1996, to amend his post-sentence motions or file new post-sentence motions. However, on July 23, 1996, the undersigned received a letter from Defendant alleging a member of Worth Law Offices had a conflict of interest with him. As a result, by order of July 31, 1996, separate counsel, John J. Waldron, Esquire, was appointed to represent Defendant for the limited purpose of determining the existence of any conflict of interest with his court-appointed counsel, and a hearing was scheduled on August 8, 1996, for that purpose.

By order of August 9, 1996, Worth Law Offices was relieved of further representation of Defendant and Philip D. Lauer, Esquire, was appointed to represent

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parties, the Honorable Robert K. Young, now retired, resumed the trial and presided over it through sentencing.

[19] By order dated September 26, 1995, and filed on October 5, 1995, the Court (Young, J.) granted Defendant's "Supplemental Motion for Post-Sentence Relief" correcting a typographical error in Defendant's initial motion.

[20] The undersigned was assigned the within cases by order dated April 30, 1996, and filed on May 1, 1996.

him.[21] Defendant was given until December 9, 1996, to amend his post-sentence motions or file new post-sentence motions.

On April 23, 1997, Defendant filed a pro se Supplemental Motion for Relief pursuant to Pa. R. Crim. P. No. 1410, which was dismissed without prejudice to Defendant's right to incorporate it into motions filed by appointed counsel. Thereafter, counsel filed amended post-sentence motions on July 28, 1997, supplemental post-sentence motions on September 15, 1997, and second supplemental post-sentence motions on September 10, 1999.

Hearings were held before the undersigned on July 16 and November 13 and 24, 1998, and May 24 and 25, August 26, and September 10, 1999. Defendant's brief in Support of his Post-Sentence Motions was received on December 1, 1999; the Commonwealth's Brief in Opposition thereto was filed on April 20, 2000; it was amended on August 7, 2000; and Defendant filed an Amended Brief and Reply Brief on November 20, 2000.

II. The Evidence at Trial

A. Joan Burghardt, No. 1994/56

At about 12:35 a.m. on Wednesday, August 5, 1992, Allentown police were dispatched to a reported burglary at the residence of Joan Burghardt at 1430 East Gordon

[21] A number of lawyers declined the Court's request to represent Defendant citing a variety of reasons including the Court's below market rate of compensation of $50.00 per hour, the complexity of the case, and the time required of it. The Court appreciates Attorney Lauer's willingness to accept the appointment in the best tradition of the legal profession and giving the case a thorough review as evidenced by his and Attorney Ennis' comprehensive and scholarly brief.

Street, on Allentown's East Side. Burghardt, a twenty-nine year old white female, weighing 225 to 240 pounds, resided alone at that address, a one-bedroom, first floor apartment in a residential neighborhood. She told the police someone had entered her apartment between 11:00 p.m. Tuesday and 12:30 a.m. Wednesday, when she returned from taking a friend home. She noticed a fan she had left on before she left the apartment had been turned off, the patio door she had left open was closed, and the screen on the door which was locked had been ripped about six to eight inches, just enough to get a hand through, near the locking mechanism. She also reported $40 to $50 was missing from a bank bag in her dresser drawer. In all other respects, she reported her apartment appeared to have been undisturbed.

At about 11:30 a.m. on Sunday, August 9, 1992, Burghardt's neighbor telephoned police to complain that Burghardt's stereo had been on for three days and nights, no one answered the doorbell, the screen had been out of the window for three nights and during one of those nights it had sounded like somebody was beating Burghardt up, hitting the walls and screaming. When the police arrived at Burghardt's apartment they noticed the screen for the front of the apartment was standing on the ground leaning upright next to the front window, and the window was open, and the screen for the rear window was pushed out and lying on the ground beneath that window, which was also open. The screen on the patio door was cut about six inches long next to the door handle. The television was blaring loudly and the front door and the patio door were locked. The patio screen door was closed but not locked. Upon entering the apartment, Burghardt was found dead lying on her stomach on the living room floor in front of her couch. There was a large amount of blood on the couch, walls and floor. She was beaten severely about the head. The apartment was not ransacked. Aside from where the body was found, the apartment appeared to be neat and orderly. Aside from the screens, there were no pry marks on the doors or windows or other evidence of forced entry. The police concluded entry was gained through the front window and exit was made through the rear window.

Burghardt was wearing a sleep shirt and a pair of jockey shorts that were ripped at the crotch and pulled up. She was unclothed from her hips down. A dresser drawer in the bedroom was open and a pair of black shorts were on the floor. There were blood and white stains on the back of the shorts. A peach colored shirt was on the closet door; it had a lot of blood on the middle of the outside of it which was in distinctive patterns appearing to have been made by swipe marks from whatever was used to kill her.

Her autopsy revealed she had been sexually assaulted and bludgeoned to death by thirty-seven individual blunt force injuries to her scalp, causing extensive skull fractures and damage to the brain. The weapon was a circular, cylindrical instrument about one-half to three-quarter inches in diameter with a smooth surface and about ten to twenty inches long. The force of the blows was so deliberate and tremendous that as the instrument came down it took hair within it and embedded the hair between the fracture and skull. She also had defensive injuries on both hands evidencing she was alive and attempting to protect herself from her assailant.

Serology tests established all of the blood and hair found at the scene, including that found on the black shorts and peach colored shirt, were consistent with those of the victim. However, the shorts had seminal stains on the outside of them as through someone had ejaculated onto them. Tests of the semen stains on the shorts showed the

DNA profiles that were developed from them matched the DNA profiles obtained from Defendant's blood. In fact, 99.999% of the population was excluded as being a contributor to the DNA obtained from the stains on the shorts; Defendant's DNA did not exclude him. The likelihood of a random match with respect to the stains on the shorts and Defendant was approximately one in one billion, leaving "no doubt whatsoever" that a match existed between the semen stains and Defendant. [22]/

An analysis of the blood spattering at the crime scene indicated the perpetrator was 5'10", plus or minus two inches, tall, and stood over the victim while he bludgeoned her. Defendant is 5'9" tall.

B. Charlotte Schmoyer, No. 1994/55

At about 6:45 a.m. on Wednesday, June 9, 1993, Allentown police responded to a call of a reported missing person at 1058 East Gordon Street, a quiet residential neighborhood, on Allentown's East Side. A resident became suspicious when the normally punctual newspaper delivery girl, Charlotte Schmoyer, failed to deliver the newspaper; her newspaper cart was unattended for a one-half of an hour in front of a neighbor's house; and the newspaper had been delivered to another neighbor. Upon their arrival, the police found the unattended newspaper cart half-filled with the day's daily newspapers in front of the house; a copy of that day's newspaper, a Walkman radio and its headset separated from each other on the ground between two houses; and finger streaks on the windowpane of the door to the nearby garage of one of the houses. Police

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[22]/ Testimony of FBI Special Agent Harold Deadman, N.T., 11/01/94, at pp. 1410, 1414-15, 1462-64; Dr. Robert Ferrell, N.T., 11/01/94, at p. 1487.

concluded a struggle had ensued and Schmoyer, a fifteen year old, white female, weighting 180 pounds, had been abducted.

Later that day, while searching a heavily wooded area at Allentown's nearby East Side Reservoir, the police found a bloody trail which led them to Schmoyer's body buried beneath some logs. Her sweatshirt was slightly pulled up; her sweatpants and underpants had been pulled down toward her knees. She had a large, gaping wound to her throat, separate stab wounds below that, multiple stab wounds on her back, and a patterned bruise on the right side of her cheek.

Her autopsy revealed twenty-two stab wounds, sixteen in the back, of which seven were fatal, and six in the front area of the neck, of which any combination of one or three were fatal. In addition, there were cutting and scraping wounds of the neck area. indicating they were inflicted while the victim was awake and her neck bent down as a protective measure, and seven more cuts than wounds on the back of the sweatshirt, indicating some struggle occurred in that the sweatshirt was cut but the body was not penetrated. The weapon was a single-edged knife about four inches long. At least two of the wounds were up to the hilt of the blade.

Serology and DNA tests indicated Schmoyer had intercourse shortly before death. Defendant's DNA was on her vaginal swab; and blood consistent with that of Defendant and inconsistent with Schmoyer's blood, was on her sweatshirt and sweatpants, along the trail leading to her body, and on leaves at the body scene near her head. All of the blood found on or about Schmoyer was consistent with that of either Schmoyer or Defendant; none of the blood was inconsistent with both of their profiles.

A comparison of a hair found on Schmoyer's right knee was consistent with hair from Defendant's head and inconsistent with Schmoyer's own hair; and a comparison of a hair found on Schmoyer's sweatshirt was consistent with Defendant's pubic hair and, again, inconsistent with Schmoyer's own hair.

The patterned design of the bruise on Schmoyer's cheek was consistent with the size, design and wear characteristics of a high-tech sneaker seized from Defendant's bedroom at the time of his arrest on July 31, 1993, fifty-two (52) days after Schmoyer's death. Nothing was found to exclude the possibility the injury on her face was caused by Defendant's sneaker.

Similarly, chevron patterns found on the Walkman radio which belonged to Schmoyer and found at the scene of her disappearance corresponded with the shape and spacing of Defendant's sneaker.

C. Jessica Jean Fortney, No. 1994/58

Jessica Jean Fortney, a 47-year-old white female weighing 235 pounds, resided with other members of her family at 407 North Bryan Street, on Allentown's East Side. She usually slept on the downstairs sofa; the other members of her household slept upstairs. Shortly after 7:00 a.m. on July 14, 1993, her daughter awoke, went downstairs and found Fortney dead on the sofa. Fortney was half-naked; her shorts and underpants were pulled down mid-way between her knee and groin area and around only one thigh. Her face was swollen and black. She had dried blood about her lips, eye, nose, nares and neck. There was blood spatter on the wall directly behind the sofa and on the lampshade next to the sofa. The window on the first floor was open; there was no screen in it.

Her autopsy revealed she died in the early morning hours as a result of suffocation by strangulation, probably by hand, and blunt trauma. There were in excess of fifty different injury patterns, many of them compatible with being beaten by a closed fist about the face. Some of them indicated an object, such as a ring, in her assailant's hands. Others indicated her assailant placed his knees on her while he beat her, causing her blood to spatter on the wall, lampshade and himself.

Serology tests established Fortney had sexual intercourse within a few hours of her death. She and Defendant had different blood profiles. Blood and body fluids from Fortney's vaginal swabs were consistent with Defendant's profile. DNA tests of seminal fluid from Fortney's vaginal swabs matched Defendant's DNA. The DNA test excluded 99.999% of the population from having the DNA match; no test excluded Defendant. There was "no doubt whatsoever" of the match between Fortney's vaginal swabs and Defendant. [23]

D. Denise Sam-Cali and Defendant's Arrest

On June 28, 1993, Denise Sam-Cali, a white female weighing 160 to 165 pounds, and her husband resided at 1141 East Highland Street, on Allentown's East Side. That evening she was home alone; her husband was out of town. She awoke during the night to noises from within a walk-in closet near her bedroom door. As she attempted to flee the house, an assailant grabbed her. She exited the house, but the assailant grabbed her again on the front walk, flipped her on her back and got on top of her using his knees to hold her down. They fought. He pushed down on her mouth, choked her and punched her face at least four times. She tried to punch him and bit him on the inside of his upper

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[23] Id.

right arm. He raped her, and then escaped through the house by way of the back patio-door. She called the police. She had been beaten severely about the head, her neck had strangulation marks on it and her lip was slashed. A large butcher knife wrapped in a paper napkin from her kitchen was found lying on the floor outside of her bathroom door.

She and her husband then went away for a few days. They returned on Sunday night, July 18, 1993. At about 4:00 a.m. the next morning she heard a noise in the house and then the back door opened. The alarm went off. The intruder apparently fled. From that night on, an Allentown Police Officer stayed at the Sam-Cali home.

At about 1:25 a.m. on July 31, 1993, the police officer at the Sam-Cali home heard the doors being jarred and then someone at the front window. The officer saw the fingertips of a black gloved hand removing the screen to the window. He then saw a head, and then the rest of the body enter the home. When the intruder was fully inside the home, the officer challenged him. The intruder went to the kitchen. Shots were exchanged. The officer retreated to the bedroom, where he heard banging and ripping at the kitchen door. Upon returning to the kitchen, the officer found the kitchen empty. The intruder had broken through four of six glass panels on a wooden door and pushed out the rear storm door.

At about 3:30 or 3:45 a.m. the officer was called to a local hospital where he identified Defendant as the intruder at the Sam-Cali home earlier that evening. Defendant had fresh wounds and bleeding to both of his arms and legs. He also had a healing scar of a bite mark several weeks old on his upper right arm.

Later that day police obtained blood and hair samples from Defendant and effected a search of his residence. There they found a black ski mask and a pair of gloves under the sofa cushions; several drops of blood and a totally wet green and purple stripped rugby-type shirt in the laundry; additional blood in the bathroom; additional pairs of gloves, including a pair of large black rubber gloves, blood stained shorts and socks, and a pair of black high-tech sneakers in Defendant's bedroom; and a loaded .380 semi-automatic handgun in the bedroom closet. The head stamp on the upper most cartridge in the handgun was identical with that on the empty cartridge casings found at the Sam-Cali house earlier that morning.

The officer who confronted the intruder at the Sam-Cali house earlier that morning identified the horizontal stripped shirt, shorts, sneakers, black knit cap and rubber gloves found at Defendant's house as those worn by the intruder at the Sam-Cali house. Further, Sam-Cali identified Defendant as the person who assaulted and raped her. 24/

E. Defendant

Evidence at trial also established Defendant resided at 709 North Kearney Street, Allentown, in August, 1992, when Burghardt was murdered. until September 23, 1992. and again from May 14, 1993, until his arrest on July 31, 1993, during which time Schmoyer and Fortney were murdered and Sam-Cali assaulted. Defendant's residence at 709 North Kearney Street is: (a) about four blocks from 1057 East Gordon Street, where Schmoyer was abducted, and about one mile from the East Side Reservoir where her

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24/ On February 28, 1994, Defendant pled guilty to aggravated assault, burglary and rape by forcible compulsion in No. 1993/2452 for the June 29, 1993, assault; burglary in No. 1993/2451 for the July 19, 1993, incident; and burglary, attempted criminal homicide and firearm not to be carried without a license in No. 1993/2450 for the July 31, 1993, incident.

body was found; (b) about five blocks from 1430 East Gordon Street, where Burghardt lived and was murdered; (c) about five or six blocks from 1141 East Highland Street, where Sam-Cali resided and was assaulted; and (d) about two miles from 407 North Bryan Street, where Fortney lived and was murdered. From 1984 until 1986, Defendant resided at 310 North Second Street, Allentown, which is less than one block from 407 North Bryan Street, where Fortney lived and was murdered. Defendant did not reside in, or visit, Lehigh County between September 23, 1992, and May 14, 1993. [25]/

The police interviewed Defendant on August 4, 1993. At that time he told them he drove his two-door Chrysler Lazer automobile, and that he never drove his mother's four-door blue Ford Tempo automobile, license place number ZGP260, except to look for jobs. In fact, at approximately 3:45 a.m. on September 7, 1992, a little less than one month after Burghardt's death, an Allentown police officer made a traffic stop of the blue Ford Tempo which Defendant was operating. On June 3, 1993, another Allentown police officer stopped the blue Ford Tempo at 2:40 a.m. and Defendant, its operator, was cited for driving the wrong way on a one-way roadway. At about 6:25 a.m. on the day of Schmoyer's abduction and death, June 9, 1993, an Allentown City employee at the East Side Reservoir saw a blue, four-door automobile with damage to its right side in the Reservoir parking lot. At about 6:40 a.m. on that day a carpenter on his way to work identified Defendant as operating a blue automobile and acting strangely only three blocks from the Reservoir. Finally, at about 3:30 a.m. on July 31, 1993, when Defendant sought treatment at the hospital after the last Sam-Cali incident, Defendant was in

[25]/ During this period of time, Defendant was detained in a juvenile placement facility on an unrelated juvenile charge.

possession of the blue Ford Tempo automobile, license plate ZGP260, with right side body damage. The registered owner of it was Defendant's mother of 709 North Kearney Street, where Defendant resided. Blood found in the vehicle was later determined to be from Defendant.

III. Discussion

Defendant raises a number of challenges to each phase of the proceeding against him. A common thread throughout many of his challenges is his contention that his trial counsel was ineffective.

In order to establish ineffective assistance of counsel, Defendant must establish: First, the underlying claim has arguable merit. An attorney can never be found ineffective for failing to advance a meritless claim; if the claim lacks merit, the inquiry ceases [26]/. Second, counsel's action had no reasonable basis designed to effectuate the interests of the defendant. If the particular course chosen by counsel had some reasonable basis, counsel's assistance is deemed effective and the inquiry ceases [27]/. Finally, if the particular course chosen by counsel had no reasonable basis, Defendant must show such ineffectiveness worked to his prejudice. In other words, Defendant must demonstrate there was a reasonable probability the result would have been different "but for the arguable ineffective act or omission". [28]/ The burden of establishing counsel's

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[26]/ Commonwealth v. Moore, 534 Pa. 527, 633 A.2d 1119 (1993); Commonwealth v. Durst, 522 Pa. 2, 559 A.2d 504 (1989); Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987), cert. denied 484 U.S. 928, 108 S.Ct. 928; Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985).

[27]/ Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987); Comm. ex. rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967).

[28]/ Commonwealth v. Pierce, supra.

ineffectiveness is on the defendant because counsel's stewardship of the trial is presumptively effective [29]/.

A. Pre-Trial Issues

1. Motion for Severance

Ordinarily, separate offenses are tried separately. However, they may be properly consolidated for trial if they demonstrate an unusual or distinctive modus operandi as to bear the "signature" or "handiwork" of the same person. Defendant contends it was error for the trial court to have denied his motion to sever the charges involving each of the three cases.

Here, each of the deceased victims was attacked between the hours of midnight and 6:00 a.m. Each of them was raped and murdered. Each of them was struck multiple times and severely about the head, face, neck or throat area. Each of them was struck repeatedly by a hand or a hand held blunt instrument or knife. Each of them was considered to be "heavy set", weighing no less than 160 lbs. Each of them was found partially unclad with her undershorts in disarray. Each of the offenses occurred in close proximity to one another. Joan Burghardt lived less than a city block from Charlotte Schmoyer. Charlotte Schmoyer was abducted approximately two blocks from where Joan Burghardt lived and was murdered. At the time of those crimes, Defendant resided approximately four blocks from the home of Charlotte Schmoyer and five blocks from the home of Joan Burghardt. Although Jessica Jean Fortney lived approximately two miles from Schmoyer and Burghardt, she resided only one block from where Defendant had previously lived. Each of the offenses occurred in close relation to when Defendant

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[29]/ Commonwealth v. McNeil, 506 Pa. 607, 487 A.2d 802 (1985).

left the Allentown area and returned to it from a commitment as a result of an unrelated juvenile charge. Burghardt was murdered and raped in August, 1992. Defendant was detained from September, 1992, until in May, 1993. Schmoyer was murdered on June 9, 1993, and Fortney was murdered on July 14, 1993. Finally, seminal stains recovered from each of the crime scenes and/or victims matched the Defendant.

The assaults on Sam-Cali, which led to the Defendant's apprehension, were consistent with these characteristics. She lived and was assaulted in her home approximately five blocks from Defendant's home. She was first attacked during the early morning hours of June 29, 1993. Someone attempted to break into her home again at about 4:00 a.m. on July 19, 1993, and again at about 1:25 a.m. on August 1, 1993. She weighed approximately 160 to 165 lbs. and was raped. Her assailant punched her repeatedly about the face. A large knife was found laying on the floor outside of her bathroom door. She survived and identified Defendant as her assailant.

The multiple similarities between these assaults indicate a common plan, scheme or design. They share strikingly similar motives, methods of execution and geographic proximity. They also share DNA consistent with that of Defendant. Finally, the sneakers found at Defendant's residence matched the patterned design of the bruise on Schmoyer's cheek, and the other physical objects found at his residence linked him to the break-in at Sam-Cali's house. Thus, it was not inappropriate for the three separate informations to be consolidated for trial and tried together, nor was it inappropriate for the testimony about the Sam-Cali assaults to have been presented at that time. Commonwealth v. Miller, 541 Pa. 531, 664 A.2d 1310, 1318-1320 (1995) cert. denied ___ U.S. ___ 116 S.Ct. 932, 133

L.Ed.2d 859 (1996); Commonwealth v. Hughes, 521 Pa. 423, 555 A.2d 1264, 1282-1283 (1989); Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835, 840 (1989); Commonwealth v. Clayton, 506 Pa. 24, 483 A.2d 1345, 1347-1350 (1984);

2. Change of Venue and/or Venire

Defendant contends it was error for the trial court to have denied his motion for a change of venue or venire because prior to trial there was "extensive, inflammatory, sensational and highly inculpatory publicity about these offenses and the arrest of the defendant". Brief in Support of Defendant's Post-Sentencing Motions, p. 34.

In order to prevail on this point, Defendant

> ... must demonstrate that the pretrial publicity was inherently prejudicial, that it saturated the community and that the community did not have sufficient time to cool down from the effects of the publicity ... Factors to consider in analyzing whether the pretrial publicity was inherently prejudicial include whether the publicity: was factual and objective or consisted of articles that were sensational, inflammatory and demanded conviction; revealed the existence of the accused's prior criminal record; referred to confessions, admissions or reenactments of the crime by the defendant; or was based on information reported by the police and prosecutorial officers. ...
>
> Assuming inherently prejudicial publicity is established, the next inquiry is whether such publicity has been so extensive, sustained and pervasive that the community must be deemed to have been saturated with it ... And, even so, it must be demonstrated that the community has had no cooling-off period which would significantly dilute the prejudicial effect of the publicity. ... The test of the cooling-off period lies in the voir dire of the potential jurors. Commonwealth v. Breakiron, 524 Pa. 282, 571 A.2d 1035 (1990).

Commonwealth v. Auker, 545 PA. 521, 681 A.2d 1305, 1316 (1996).

Defendant made no effort to demonstrate actual prejudice as a result of any of the pre-trial publicity. Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287, 291 (1978). Furthermore, Defendant has not demonstrated that the pre-trial publicity was so pervasive, sustained, inaccurate or prejudicial as to be "inherently prejudicial" without showing actual prejudice. Id.

Defendant refers, specifically, only to a Ladies Home Journal article printed weeks before the trial in which Defendant was identified by name and referred to by the District Attorney as a "serial murderer". It is speculation to conclude trial counsel's failure to inquire about the Ladies Home Journal article inured to Defendant's prejudice. The Ladies Home Journal is a popular, national publication and, in some circles, respected. There was no basis to believe prospective jurors read it or were aware of it. Furthermore, referring to it might only have heightened a juror's awareness of the magnitude and importance of the case. Thus, there is no reason to believe inquiry of the Ladies Home Journal article would have resulted in a different outcome; on the contrary, reference to it may have worked to Defendant's disadvantage. Thus, it was not ineffective for trial counsel not to pursue the Ladies Home Journal article, and Defendant has failed to demonstrate that the trial court abused its discretion in denying Defendant's request for a change of venue or venire.

3. Procedures to Select Jury Pool

Defendant contends trial counsel should have filed a motion to require modification of procedures used to select members of the jury pool or file a challenge to its array. However, Defendant has failed to demonstrate that any modification of the procedures employed to select members of the pool of jurors would likely have resulted in a more representative cross section of the community.

Lehigh County utilized a list from the Department of Transportation consisting of those persons with a driver's license or non-license photographic identification.[30] There is no basis to believe that any other list, including the voter registration list, would have yielded larger numbers of youthful, elderly, disabled or minority citizens. In fact, the Department of Transportation's list contained approximately 30,000 to 40,000 more names than did the voters' registration list. Thus, it cannot be said Defendant's claim that modification of the jury selection system would have resulted in a more representative cross section of the community has merit. Salameh v. Spossey, 731 A.2d 649, 656 (Pa. Cmwlth. 1999). In fact, the Department of Transportation's list used by Lehigh County to select the jury pool is the most expansive method of obtaining the most representative cross section of the community. See Commonwealth v. Cameron, 445 Pa. Super. 165, 664 A.2d 1364, 1370 (Pa. Super. 1995), appeal denied, 544 Pa. 622, 675 A.2d 1242 (1996).

B. Trial Proceedings and Rulings

1. Death/Life Qualification of Jury

Defendant contends the trial court erred by permitting the Commonwealth to death-qualify the jury by inquiring of prospective jurors their attitudes relating to the death penalty, and excluding from the jury those jurors with a fixed opposition to the death penalty, and that trial counsel was ineffective for not objecting to the Commonwealth death qualifying the jury.

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[30] 42 Pa. C.S.A. § 4521 (a) requires the master list of prospective jurors contain "all voter registration lists for the county . . . or names from such other lists which . . . will

It has been well settled in Pennsylvania that the "death qualification" process is consistent with guarantees of a fair trial, and that challenges to a "death qualified" jury have been repeatedly struck down. See Commonwealth v. Lambert, 529 Pa. 320, 603 A.2d 568, 575-576 (1992). Further, Defendant has failed to establish whether, in this case, the jury, because it was death qualified, was less than neutral with respect to guilt.

Defendant also contends it was error for the trial court to deny defense counsel the opportunity to pursue questions which would have "life-qualified" the jury, and that, alternatively, trial counsel failed to inquire adequately of the prospective jurors in order to determine their ability to return a verdict of life imprisonment. Defendant has not cited specific incidents where the trial court or trial counsel erred with respect to ensuring that the jury would not impose automatically the death penalty. In fact, jurors two, four and six were specifically asked whether they could return a verdict of life rather than death. N.T., 10/11/94, pp. 339-340; 10/12/94, pp. 772-773; and 10/13/94, p. 1069. Trial counsel is not ineffective for failing to life qualify each juror; rather, Defendant must establish that trial counsel's failure to ask life-qualifying questions resulted in the impaneling of one or more jurors who would instinctively impose the death penalty. Commonwealth v. Morris, 546 Pa. 296, 684 A.2d 1037, 1043 (1996). Here, the record reflects that the trial court permitted a thorough voir dire by both the Commonwealth and trial counsel to ensure that the jury could follow the court's instructions and understand the concept of aggravating and mitigating circumstances.

2. Racial Bias of Potential Jurors

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provide a number of names of prospective jurors which is equal to or greater than the number of names contained in the voter registration list . . ."

Defendant contends the trial court refused to allow trial counsel to question the prospective jurors as to their racial bias, and that trial counsel was ineffective for failing to have pursued the existence of prejudice among the prospective jurors.

Defendant has failed to specify where in the record the trial court refused to allow trial counsel to pursue the issue of alleged racial bias. In fact, when examining juror number six, trial counsel noted Defendant was of mixed race and asked whether that fact would prevent him from being fair and impartial. The juror responded in the negative; neither the District Attorney nor the court sought to object or otherwise intervene. See N.T., 10/13/94, p. 1075.

Inquiry into racial prejudice is not required unless the facts of the case suggest a significant likelihood that racial prejudice might infect the trial. Commonwealth v. Gray, 608 A.2d 534, 539 (Pa. Super. 1992). There is no basis in the record to suggest the case was racially sensitive.

3. Improper Questions of Potential Jurors

Defendant alleges the trial court erred in permitting the Commonwealth to question prospective jurors about whether Defendant's age, which was 19 years at the time of trial, would prevent them from returning a verdict of death, and in permitting the Commonwealth to ask prospective jurors if they could "face" and "look at" Defendant to render a verdict of death. Defendant has failed to cite any authority upon which to conclude either these questions were prejudicial or trial counsel's failure to object to them was prejudicial.

Further, Defendant contends the trial court erred in overruling defense challenges to several venirepersons for cause. Specifically, Defendant contends the trial court erred in failing to grant Defendant's challenges for cause of the following persons: Ronald Smith because he stated repeatedly that he could not concentrate because of his mother's illness and business obligations; Lynn Furr because she had a child who was a newspaper carrier for the Morning Call, as was Charlotte Schmoyer, and she knew pastors of the church attended by Schmoyer and expressed doubts about her ability to remain neutral; Ann Tagland because she demonstrated a fixed opinion that a death sentence should be given in the event of a conviction; Susan Rosen because she was a therapist treating rape victims and indicated it would be difficult for her to remain neutral; and Michael Zager because he was professionally acquainted and associated with the Commonwealth's forensic pathologist who testified at trial.

Defendant notes a challenge of a prospective juror should be sustained where, first, the juror indicates by his/her answers that he/she will not be an impartial juror, or, second, the juror has such a close relationship, familial, financial or situational, with the parties, counsel, victims or witness that the court will presume a likelihood of prejudice irrespective of the answers given on voir dire. Commonwealth v. Maxwell, 513 A.2d 1382, 1387 (Pa. Super. 1986).

None of these venirepersons were seated as part of the jury; thus, Defendant can make no claim of direct prejudice to his defense. Ross v. Oklahoma, 487 U.S.81, 108 S. Ct. 2273, 2277, 101 L.Ed.2d 80 (1988). Defendant does claim, however, that he was deprived of his full complement of peremptory challenges when he had to utilize his limited number of peremptory challenges to correct the court's errors in this regard. Commonwealth v. Ingber, 516 Pa. 2, 531 A.2d 1101, 1104-1105 (1987). A new trial is to be granted if Defendant was forced to use a peremptory challenge to excuse a juror who should have been excused for cause, and Defendant exhausts his peremptory challenges before the jury is seated. Commonwealth v. Impellizzeri, 661 A.2d 422, 426, 427 (Pa. Super. 1995) *alloc. denied* 673 A.2d 332. Here, Defendant did utilize all of his peremptory challenges. Therefore, a review of each challenge is required to determine whether the court erred in denying Defendant's challenge.

Mr. Smith testified that although he was familiar with the case from newspaper accounts of it, he believed he would be able to render a fair and impartial verdict. N.T., 10/10/94, p. 297. However, he testified that his mother's health and the demands of his business would present "a serious problem" for him. Id. at p. 300. Specifically, his mother, who was 79 years of age, was scheduled for cataract surgery sometime before Thanksgiving. The trial was scheduled to last four to five weeks. In addition, he was the president of his own business which employed 40 people. It had no vice presidents and he testified that serving as a juror in this case would result in his not being able to function in his capacity as president. Id. at p. 302. Nonetheless, he testified that there was nothing going on in his life that would prevent him from rendering a fair and impartial verdict and that the health of his mother and the demands of his business might "possibly" affect his ability to concentrate during the trial. Id. at p. 298. He testified that he would not be able to function as president of the business and that not being sequestered would alleviate his concerns only "very little". Id. at p. 300. Mr. Smith did not say his business could not function if he served on the jury; only that his concerns about the business would be alleviated only "very little". He did not specify a sufficient enough hardship to be excused from jury duty. Id. at p. 302. Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130, 137 (1996).

Lynn Furr had some familiarity with the case through the news coverage. She had an emotional response to it because she has a son who has been a Morning Call newspaper carrier for many years. She indicated that while she had some "emotional preconceptions" about the case, she was not 100% firm on conviction relative to guilt or innocence. N.T., 10/12/94, p. 872-873. Her son was no longer a child and no longer delivering the newspaper. Id. at p. 881. She testified that she did not have a completely fixed opinion relative to the guilt or innocence of the Defendant, but she expressed her emotional response as that of any parent. "I don't think that I have reacted differently or with more of a fixed opinion than any other parent." Id. at p. 883. Further, she was employed by Phoebe-Devitt Homes, a long term care organization, affiliated with the United Church of Christ. Charlotte Schmoyer was a member of the United Church of Christ and Ms. Furr happened to know the pastors who were involved in Schmoyer's service. Furr did not attend the service and never spoke with the pastors about it or the case. There was no indication that she was even a member of the same individual church to which Schmoyer had belonged. Id. at p. 884. Finally, Ms. Furr did not express concerns about her ability to remain impartial. Rather, she testified that she would not react favorably to graphic photographs of murdered persons and would have "an emotional response" to that. She stated that she would nonetheless try to focus on the information and weigh it fairly and that she could not imagine that a possible "emotional reaction to the graphic details" of the photographs would be very uncommon. Id. at p. 894. She was not referring to guilt or innocence, but merely articulating her reaction to graphic crime photographs to which she, as most members of the community, are rarely exposed. Her impartiality was not at issue.

Ann Tagland testified that she thought she could be fair and impartial if she heard everything and that she had no religious, moral or philosophical beliefs that might impair her from being fair and impartial regarding the facts and the nature of the case. N.T., 10/17/94, p. 1835. She indicated initially that she would not be able to bring back a verdict of life if the mitigating circumstances outweighed the aggravating circumstances. Id. at p. 1837. She indicated that if the Defendant was guilty of a homicide, the penalty should be death. Id. at pp. 1841-1842. To the court's question: "Do you have a pretty fixed opinion that if somebody kills somebody, that person gets killed?" she answered "Yes, I do. Yes, I do". Id. at p. 1842. However, the District Attorney then asked:

* * *

> . . . All we're asking you to do is, can you put aside your personal beliefs and listen to what the aggravating circumstances are, listen to whatever the defense portrays as mitigating circumstances, and balance them? If you come to the conclusion that the aggravating circumstances outweigh the mitigating, then death is appropriate.
>
> Answer [By Ms. Tagland]: (Nodded affirmatively.)
>
> Question: On the other hand, what the defense counsel wants to know is whether or not if you conclude that some of the mitigating circumstances that they may present, including age – and they may present something else, if they so choose – if in fact the mitigating circumstances convince you they outweigh the aggravating, that you would consider life and follow the Court's instructions.
>
> Answer: (Nodded affirmatively.)
>
> Question: Do you think – how do you feel your answer to that question would be?
>
> Answer: I guess I could. I could.

* * *

Id. at pp. 1844-1845.

* * *

> Question: Can you put aside your personal beliefs and, one, decide the case on the evidence and, two, follow the Court's instructions with respect to the law?
>
> Answer: Yes

Id. p. 1846.

Finally, the court asked:

* * *

> Let me ask you, do you feel more comfortable now about what your role would be in deciding the death penalty or life imprisonment?
>
> Answer: Yes. Yes.
>
> The Court: Do you think you could handle that, once you heard all the testimony? Could you put aside your idea of a life for a life, a tooth for a tooth? Could you put that aside? That may be okay for your personal views but it isn't the law of Pennsylvania. Could that be set aside?
>
> Answer: Yes.

* * *

Id. at pp. 1857-1858. She could put aside her personal notion of justice and follow the court's instructions without equivocation.

Susan Rosen worked in the King of Prussia area as a therapist dealing with kids who are suicidal. N.T., 10/18/94, at p. 1958. She believed in the death penalty for someone who took someone else's life. Id. at p. 1967. Her immediate reaction from the news accounts was that Defendant was guilty. Id. at p. 1970. Nonetheless, she testified she would be able to follow the judge's instructions regarding burden of proof even through she already had a fixed opinion that Defendant was guilty. She indicated that she would be able to put her fixed opinion out of her mind and follow the instructions of the trial judge. Id. at p. 1972. She works with women who have been raped and sexually abused. She testified that for that reason "it might be hard for me to stay impartial". Id. at p. 1973. She testified that the penalty phase of the trial would not affect her ability to look at and weigh all of the facts and make a determination of guilt or innocence. Id. at p. 1974-1975. After the District Attorney and trial counsel explained mitigating and aggravating circumstances, she testified that she could see weighing one over the other. Id. at p. 1979.

* * *

> . . . But the question is, if you concluded that there were more mitigating circumstances which outweigh the aggravating circumstances, would you be able to impose life under those circumstances?
>
> Miss Rosen: Yes.

Id. at p. 1981.

Finally, she was asked by trial counsel:

* * *

> Would you be able to put aside your fixed opinion as to Mr. Robinson's guilt and be able to fair and impartially judge the testimony that's coming in and render a fair and impartial verdict?
>
> Answer: I think in listening to the media, everyone always has a fixed opinion listening to what's on the news. So when we do come in here, I think we would have to realize it would all be different. You would be kind of starting fresh. But, so, see, I

> think I know what the right thing is to do. So I think I probably would do it. I would do it, I mean.

* * *

Id. at p. 1989-1990.

Rosen and her mother were therapists. Her mother was a sex therapist and Rosen did school based counseling for teenagers of sexual abuse and other problems, assessments for teenagers and children, and has an out-patient practice. Id. at pp. 1996 and 1998. She indicated no bias as a result of her or her mother's profession and indicated that she, too, put aside her personal views and be objective.

Michael Zager was a doctor specializing in internal medicine. N.T., 10/14/94, at p. 1443. He knew Doctors Isadore Mihalakis and Wayne Ross, both forensic pathologists who testified as witnesses. In fact, he trained under both of them at one point for a brief period of time during his residency at Lehigh Valley Hospital about two years ago and intermittently since as cases arise during the course of his practice. Id. at p. 1457-1458. He acknowledged his relationship with them would make him tend to regard them in a more friendly manner, but he would try to remain objective. Id. at p. 1458-1459. He practices in a group and there was no indication that other then being a physician, he or his practice or its patients would have incurred a hardship. Nor was his relationship to Doctors Mihalikis or Ross such that prejudice should be presumed irrespective of his answers.

In sum, the trial court did not err as a matter of law in denying Defendant's motions for cause of the aforesaid challenged jurors.

Finally, Defendant alleges the court erred in sustaining the Commonwealth's challenge for cause of venireperson Lamar Cramsey. Cramsey testified it would be difficult to pass judgment on Defendant facing the death penalty. The trial court granted the Commonwealth's motion for cause. After a review of the colloquy with Cramsey, it appears his exclusion was improper. Nonetheless, this error does not warrant a new trial because the Commonwealth had not exercised all of its peremptory challenges. See Commonwealth v. Lewis, 523 Pa. 466, 567 A.2d 1376 (1989); Commonwealth v. Banks, 677 A.2d 335 (Pa. Super. 1996).

4. Testimony of Denise Sam-Cali

Defendant assigns a number of errors concerning the testimony of Denise Sam-Cali, who was not a witness to any of the offenses for which Defendant was tried.

Sam-Cali was assaulted around 5 or 6 a.m. on June 29, 1993. She had been raped and beaten severely about the head and face. She had been drinking about four to six hours before the assault. She was interviewed twice by the Allentown Police on June 29, once at around 8:30 a.m. and again at around 3:30 p.m. She was very disoriented and confused when she was interviewed.

According to the police report, during the first interview she described her assailant as a "light skin Hispanic male, 506 [sic] tall, medium built, wearing jeans and a T-shirt". Defendant's Ex. 4, 11/24/98. During the second interview

> . . . she stated the individual who may have done this may have been a ex-employee by the name of Saul Rosado. She stated that this individual was employed by them and that several weeks ago he pulled a knife on another employee. She states that he then quit right after that. She says that he drives a blue car. She believes that it was a Chevrolet Chevette.

Defendant Ex. 5, 11/24/98.

The Commonwealth arranged to have Sam-Cali undergo hypnosis on July 21, 1993, by Oscar Vance, Chief County Detective of Montgomery County, Pennsylvania. Sam-Cali recounted the assault before she underwent hypnosis. She stated she was "eye-to-eye" with her assailant, and described him as having no hair on his chest, brown nipples, white skin, brown eyes, high cheekbones and short hair with perfect curls. Comm. Ex. 3, 11/13/98. She then underwent hypnosis and again described her assailant. She described him as her height; neither good nor bad looking; angular face; high cheekbones; brown eyes; having neither a big nor a square chin, and either light, white or light Hispanic, but definitely light colored skin; thin hips; short, brown hair with a curl in it, styled and square around the edges; regular eyebrows; normal space between the eyes; clean shaven; not hairy; natural build; dark nipples; and having no jewelry, watches, tattoos, marks or scars. Id.

Defendant contends Sam-Cali's testimony should not have been admitted into evidence because the prejudicial impact of it outweighed its probative value; the Commonwealth failed to follow established procedures when introducing the testimony of a witness who was previously hypnotized; and the Commonwealth failed to disclose Sam-Cali's "identification" of Saul Rosado.

(a) Sam-Cali's Testimony of Other Crimes

Although evidence of other crimes committed by a defendant is generally not admissible at trial, such evidence is relevant and admissible to prove

> . . . (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to

> prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.

Comm. v. Morris, 493 Pa. 164, 425 A.2d 715, 720 (1981). See also Comm. v. Sneeringer, 447 Pa. Super. 241, 668 A.2d 1167 (1995). Here, Sam-Cali's testimony, and testimony of the events about which she testified, were relevant to establish the motive, intent, common design of the crimes charged, and the identity of Defendant as the perpetrator of them.

Each of the victims and Sam-Cali were heavy-set, white females. All of the crimes, including those involving Sam-Cali, occurred in close proximity to each other in the East Side of Allentown, and within two months of Defendant leaving the Allentown area and two and one-half months of his return to it. Each of the victims and Sam-Cali were raped; none of them knew or had any prior contact with Defendant. Each of the victims except Sam-Cali was brutally murdered and done so at close range by hand or a hand-held instrument. In Sam-Cali's case, a knife taken from her kitchen was found where she had been raped and successfully fought off her assailant while he attempted to restrain her with his knees and choke her with his hands. In each instance the assailant exhibited extraordinary cunning, stealth and resolve necessary to effect the abduction of Schmoyer from the public street and the surreptitious entry into Burghardt, Fortney and Sam-Cali's homes to assault them while leaving behind no incriminating evidence except that which was ultimately discerned through microscopic, scientific examination.

Sam-Cali's testimony linked Defendant with a practice of using gloves to leave no fingerprints, entering surreptitiously to surprise his victims, and silencing them by death so they could not identify him. In short, Sam-Cali's testimony was not offered merely to indicate Defendant's propensity to commit similar crimes, Comm. v. Miller, 541 Pa. 531, 664 A.2d 1310, 1318 (1995), but to show he committed these crimes charged, how he committed them, why he committed them and the circumstances of his apprehension.

The jury was cautioned not to use the Sam-Cali issue to determine guilt or innocence. The purpose of Sam-Cali's testimony was limited to show Defendant's common plan or scheme; explain why there were no fingerprints in the other cases; demonstrate his intent and resolve to kill his victims by returning to Sam-Cali's home with a handgun after he assaulted her; and to show that Defendant acted with malice in killing his victims. Because the prosecution had only circumstantial evidence in the three cases for which Defendant was tried, the evidence regarding Sam-Cali was necessary to demonstrate that Defendant had the same common design in mind regarding the three murdered victims.

(b) Hypnosis of Sam-Cali

Where a party seeks to introduce the testimony of a witness who has previously been hypnotized,

> . . . the offering party must so advise the court, and show that the testimony to be presented was established and existed previous to any hypnotic process; . . . the person conducting the hypnotic session must be trained in the process and is neutral of any connection with the issue or the parties; and, the trial judge shall instruct the jury that the testimony of a witness previously hypnotized should be carefully scrutinized and received with caution.

Comm. v. Smoyer, 505 Pa. 83, 476 A.2d 1304, 1308 (1984).

Defendant was arrested on July 31, 1993. The Commonwealth informed Defendant in a letter sent to him at the Lehigh County Prison on August 4, 1993, that Sam-Cali had been hypnotized on July 21, 1993, by Chief Montgomery County Detective Vance. Comm. Ex. 2, 11/13/98.

Immediately before Sam-Cali testified, the following colloquy occurred before the Court but outside the presence of the jury:

> BY MR. STEINBERG [DISTRICT ATTORNEY]: Just so the Court is aware, and counsel is aware of this as well, long before Robinson was arrested we were trying to get more information from Denise and she, likewise, had been hypnotized. And there is, likewise, a tape.
>
> However, there, at the time that she was hypnotized, Robinson wasn't even a suspect. She has never identified him under hypnosis on a tape, because she didn't know who he was and we didn't know who he was at the time, but, again, I think it's my obligation to alert the Court of that particular fact before she so testifies.
>
> . . . counsel has taken the position that they don't want to bring that out, and I don't have any intention of bringing it out.
>
> BY MR. MARINELLI [DEFENSE COUNSEL]: I don't want to bring it out.
>
> BY MR. STEINBERG: You don't want to? That's fine. And that's a strategic position on your part. That's fine.

N.T., 11/03/94, at pp. 1963-1964.

Thus, the Commonwealth notified defense counsel and the Court prior to Sam-Cali's testimony that she had been hypnotized; however, it is not disputed the other requirements of Smoyer were not followed.

The trial judge did not instruct the jury that Sam-Cali's testimony should be scrutinized carefully and received with caution because defense counsel told the judge he did not want to bring out the fact Sam-Cali was hypnotized. It is not clear why defense counsel did not want the fact Sam-Cali had been hypnotized disclosed to the jury; the record at trial indicates at the sidebar discussion the District Attorney characterized defense counsel's decision as a "strategic position on your part", and no explanation was offered by defense counsel at the post-trial hearings. [31]/

However, the Supreme Court itself, in Smoyer, offered the strategic reason why defense counsel might elect not to inform the jury a witness had been hypnotized, viz. hypnotism has its followers notwithstanding the fact the Supreme Court refused to hold testimony adduced by hypnotism to be admissible evidence.

* * *

> Hypnotism has had its fashions . . . here, to reconstruct the traumatized memory. To some it is a marvel for resting the conscious mind, allowing the untroubled memory to sort and align impaired sequence.
>
> * * *

476 A.2d at 1306. And:

* * *

> [t]he conscious mind when put to rest, isolated from immediate distractions and led to concentration upon a topic, may put order to information otherwise jumbled and confused. In a state induced by chemicals or concentration one may better remember things received by the senses and put them in their original sequence, however defective was their original reception.

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[31]/ In fact, at the post trial hearing, Mr. Marinelli took the position that he was never aware of Sam-Cali having been hypnotized until after the trial. That position is contradicted by the transcript, which shows Mr. Marinelli was informed prior to Sam Cali's testimony that she had been hypnotized.

> Placidity may indeed freshen the memory, recalling events and connections that might aid in further discovery....
>
> * * *

476 A.2d at 1307. Had the jury known Sam-Cali had been hypnotized, the jury, despite the holding of Smoyer, might have afforded her testimony more rather than less credibility.

Defense counsel apparently decided to let Sam-Cali testify without running the risk that her credibility would be bolstered had the jury known her testimony was somehow induced by hypnosis. Thus, whether defense counsel should have determined Sam-Cali's testimony was established and existed previous to any hypnotic process, and the person conducting the hypnotic session was trained in the process and was neutral of any connection with the issue or parties of the case, was of no consequence; trial counsel decided whatever benefit might be derived from that inquiry was outweighed by the jury knowing Sam-Cali had assistance reconstructing her traumatized memory.

Furthermore, Sam-Cali's description of her assailant under hypnosis was only marginally more detailed than the description she gave prior to undergoing hypnosis. In other words, her testimony was established and existed prior to her undergoing hypnosis. She was "eye-to-eye" with her assailant. Her testimony rested upon actual observation and independent recollection rather than hypnotically induced fantasy. Defendant has failed to demonstrate that anything occurred during the hypnosis session, or as a result of the hypnosis, that would suggest Sam-Cali's recollection was changed in any substantial fashion from what it was before she underwent hypnosis. See Commonwealth v. Romanelli, 485 A.2d 795 (Pa. Super. 1984).

(c) Sam-Cali's "Identification" of Saul Rosado

Defendant contends the Commonwealth failed to disclose at trial that Sam-Cali had initially told Allentown Police that her assailant was Saul Rosado, an individual she knew and had employed for approximately one month, in violation of its duty under Brady v. Maryland, 373 U.S. 83, 835 S.Ct. 1194, 10 L.Ed.2d 215 (1963) to disclose exculpatory evidence.

Sam-Cali did not identify Rosado as her assailant; she merely named him as a possible lead because she thought he may have had a motive to harm her. After she told police about Rosado, the police interviewed him and dismissed him as a suspect. He did not match Sam-Cali's description of her assailant. He had a full beard, tattoos and long hair. Also, after looking at Rosado's picture, Sam-Cali said he was not the assailant. Moreover, by the time of trial, Defendant had already pled guilty to assaulting Sam-Cali. [32]/ Once Defendant admitted to having assaulted Sam-Cali, her reference to Rosado became irrelevant; Defendant could not impeach Sam-Cali on the basis she had mistakenly identified him when he had already admitted to being her assailant.

5. Hypnosis of James Stengel

The Commonwealth presented the testimony of James Stengel, an employee of the City of Allentown who worked at the East Side Reservoir where Schmoyer's body was found. He testified at trial that he arrived at the East Side Reservoir at 6:25 a.m. on

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[32]/ See fn. 24, supra.

June 9, 1993. Shortly thereafter he noticed a vehicle other than his own in the parking area, approximately twelve feet from his vehicle. He entered the building at the reservoir and shortly thereafter exited the building and walked near the vehicle because he was curious about it. He noticed no one was in the vehicle, its four windows were approximately half-way down and the keys were in the ignition. He returned to the building and heard the car door close and saw the vehicle leave the reservoir area with one individual inside it. He could not see the profile of that individual or make an identification of that person. However, he described the vehicle as a light blue four-door sedan with damage to its right side. This description of the vehicle established a link to Defendant since Stengel's description of it matched that of the vehicle owned by Defendant's Mother.

Stengel, too, underwent hypnosis under the direction of Vance. However, before undergoing hypnosis, Stengel identified a Ford Tempo from a book of photographs as that being the type of vehicle he saw at the reservoir. Thus, his testimony was established prior to having undergone hypnosis, and the hypnosis did not contribute to his testimony or affect his credibility at trial.

6. Ladies Home Journal Article

The September, 1994, edition of the Ladies Home Journal, Pl. Ex. 57, 8/27/99, contained a story titled "I Caught My Rapist" detailing Sam-Cali's experience as the victim of a sexual assault and her role in laying a trap for her assailant. Defendant characterized the article as a "glamorized" version of the facts with Sam-Cali as a "central and heroic figure". Defendant claims defense counsel was ineffective for failing to cross exam Sam-Cali at trial with regard to any potential bias, including receipt of financial incentives from the magazine or any other financial arrangements in telling her story.

Defendant's trial took place between October 10 through November 10, 1994, shortly after the article appeared in the magazine. Attempting to cross-examine Sam-Cali on the article would have been futile at best because by then Defendant had already admitted he was the individual who burglarized Sam-Cali's residence, stole her handguns, raped and beat her, and attempted to kill a police officer. He pled guilty to those offenses on February 28, 1994. Furthermore, if Defendant's characterization of the article is accurate, i.e. it presents Sam-Cali as a heroic figure, then cross-examination on the article might further enhance Sam-Cali's credibility in the eyes of the jury. It is reasonable to suspect that defense counsel would have preferred not to generate additional sympathy and credibility for her.

7. The Circumstances of Defendant's Apprehension

Defendant objects to the testimony by Sam-Cali and Officer Brian Lewis regarding the circumstances of Defendant's apprehension. Specifically, they testified that following the break-in of Sam-Cali's home and her sexual assault on June 29, 1993, a subsequent entry into the Sam-Cali home occurred during the early morning hours of July 19, 1993. At that time, entry was through a window and exit was through the back door. One of the items taken from the home was a .380 semi-automatic handgun. As a result of this second entry into the Sam-Cali home, the police concluded her assailant might return to the residence and attempt to kill her. Accordingly, Officer Brian Lewis was detailed to the Sam-Cali home every evening between July 19 and July 31, 1993. On July 31, Lewis attempted to halt an intruder from entering the home. The two of them exchanged shots and the intruder escaped through a glass panel in the kitchen door. Defendant was arrested later that morning when he sought treatment from a local hospital for the wounds he received while attempting to elude Lewis and escape from Sam-Cali's home. After Defendant was apprehended, a search of his home resulted in finding the .380 semi-automatic handgun taken from Sam-Cali's home as well as other evidence linking Defendant with the crimes charged or allowing an explanation as to how they occurred. Such evidence was relevant and admissible to prove motive and intent of the crimes charged, and, specifically, that Defendant was determined to silence Sam-Cali as each of his other victims was silenced.

8. Admission of Inflammatory Physical Evidence

Defendant contends it was error for the court to have admitted into evidence a number of physical objects that, while arguably relevant, were, in his judgment, plainly inflammatory.

First, Defendant questions the admission into evidence of various photographs of the victims. Photographs of a murder victim are not per se inadmissible. Commonwealth v. Lee, 541 Pa. 260, 662 A.2d 645, 654 (1995). They can be helpful to understand the malicious manner in which the murders were committed and demonstrate the specific intent to kill. See Commonwealth v. Rush, 538 Pa. 104, 646 A.2d 557 (1994) (although the medical examiner provided testimony regarding the condition of the victim's body, the photos provided the jury with a better understanding of the crime scene and the "malicious manner" in which the murder was committed); Commonwealth v. Chester, 526 Pa. 578, 587 A.2d 1367 (1991) (photographs of the victim's slashed throat, open eye, and other head injuries were admissible as evidence of the specific intent to kill); Commonwealth v. Garcia, 505 Pa. 304, 479 A.2d 473 (1984) (the photograph was relevant to indicate to the jury the brutality of the defendant's attack which supports an inference of specific intent to kill); Commonwealth v. Gorby, 527 Pa. 98, 588 A.2d 902 (1991) (photographs of victim and crime scene admissible to establish intent to kill even through they depicted a large gaping gash on victim's neck as well as thirteen other knife wounds); Commonwealth v. Osellanie, 408 Pa. Super. 472, 597 A.2d 130 (1991) (admission of photographs depicting the corpse of a homicide victim described as "partially clothed" and "charred" admissible); Commonwealth v. Edwards, 521 Pa. 134, 555 A.2d 818 (1989) (thirteen photographs of the beaten face of the victim, strangulation area of the victim's neck, bite marks of the victim's legs, and explicit photographs of the victims chest and abdomen admissible to show the sexual nature of attack).

Specifically, a photograph of Burghardt did not show her face or injuries, only the positioning of the body when the police arrived. The photographs of Schmoyer showed the collection of logs and leaves used to cover her body demonstrating the method, and thus the intent, to cover up the murder. The photographs of her back and top part of her sweatshirt demonstrated the violent, torturous attack upon her, again reflecting the intent of her assailant. The photograph of Schmoyer's cheek portrayed the pattern injury which was later determined to have been caused by a sneaker. It was used in conjunction with the testimony regarding footwear impressions to compare the pattern injury reflected on the photograph with the impression made by the sneaker found at Defendant's home. A photograph was cropped so that the gaping neck wound was not observable. Photographs of the Fortney crime scene demonstrated the intent and malice used to kill her. Finally, the photographs of Sam-Cali again demonstrated the brutality of the assault which could be compared with the brutality used in the other cases, particularly as to Fortney. While none of these photographs was pleasant to view, each of them had a proper role to play in explaining to the jury the common brutality and intent to kill. Further, the jury's time with the photographs was limited. Commonwealth v. Auker, 545 Pa. 521, 681 A.2d 1305, 1317-1319 (1996).

Similarly, photographs of Defendant's injuries when he was apprehended were neither prejudicial nor irrelevant. They bolstered the Commonwealth's version of Defendant's cunning and resolve in making his exit from the homes of his victims.

Defendant contends various tape recordings of 911 telephone calls and police transmissions were also prejudicial. The tapes contained no inflammatory screams or impassioned exclamations. They may have been cumulative to other testimony, but they were not prejudicial. Any error as to their admission into evidence was harmless. Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987); Commonwealth v. Groff, 514 A.2d 1382 (Pa. Super. 1986).

For the same reason, the videotape of Charlotte Schmoyer's newspaper delivery route was harmless. It was not inflammatory in any respect and was relevant to show the residential neighborhood in which she was abducted. It was the same type of neighborhood in which each of the other offenses and Sam-Cali's assault occurred.

9. Testimony of Karen Schmoyer, Charlotte Schmoyer's Mother

Defendant contends it was error for the trial court to have permitted the testimony of Charlotte Schmoyer's mother, Karen Schmoyer, regarding her "feelings and thoughts" when she learned her daughter was believed to be missing.

Mrs. Schmoyer was asked to identify photographs of the front and back of Charlotte's sweatshirt she wore on the day she was murdered. The sweatshirt was full of blood and Mrs. Schmoyer testified it was not full of blood the last time she saw it. She was then asked how she learned Charlotte was missing and Mrs. Schmoyer testified she was contacted by an individual from the Morning Call, the morning newspaper which Charlotte was delivering when she was abducted. Mrs. Schmoyer was then asked what she did at that point and she proceeded to testify that she went into a panic, called her mother for support and went to Charlotte's room to see if Charlotte was there and, shortly thereafter, to be at the house while a police officer looked for clues. During this testimony, Mrs. Schmoyer described herself as having "kind of went into a panic", "very nervous. I remember my mouth was very dry . . . my hands were shaking". N.T. 10/26/94, at pp. 63-64.

While Mrs. Schmoyer's feelings and thoughts at that moment may not have been relevant, to have objected during her riveting testimony which included identifying the sweatshirt and establishing the time of day Charlotte was missing and the activity in which she was involved in, would have made defense counsel and, by extension, Defendant, appear callous and hard hearted. While certain portions of her testimony may not have been relevant, to have interrupted her, as a matter of strategy, would have been worse than what little prejudicial effect such testimony may have caused Defendant.

Mrs. Schmoyer's testimony was in the context of giving the jury the natural development of the facts.

10. DNA Testimony

The Defendant contends that the trial counsel was ineffective with respect to the DNA testimony by not introducing evidence, or cross-examining the Commonwealth's witnesses, with respect to the existence and acceptance of other statistical models. Defendant acknowledges a Frye hearing was held on the DNA testimony and that the Pennsylvania Supreme Court has subsequently upheld the use of the product rule for statistical analysis of DNA test results. See Commonwealth v. Blasioli, 552 Pa. 149, 713 A.2d 1117 (1998). Still, Defendant contends trial counsel should have contested the Commonwealth's DNA forensic evidence including the statistical expressions based upon other models. Defendant contends that trial counsel's failure to elicit testimony of the existence of other methods of performing the statistical analyses, which would have yielded different results, had the effect of permitting the Commonwealth to prove as an uncontested fact that the odds were overwhelming that the Defendant had deposited the substances at the crime scene. He contends this failure to present any challenge to the DNA evidence left the jury with uncontested proof of the ultimate fact and issue, viz. the identify of the perpetrator of these offenses.

Even now Defendant has failed to establish other methods of performing statistical analysis would have yielded significantly different results so to have thrown into question the testimony of the Commonwealth's witnesses. Moreover, trial counsel did cross-examine the Commonwealth's expert witnesses at length in order to test the validity of their testimony. See N.T. 11/01/94, pp. 1415-1458, 1464-1466, and 1488-

1493. Further, trial counsel attempted to show that other methods, including the ceiling method and/or the floating bin approach, would have yielded different results. N.T. 11/01/94, pp. 1415, 1465. Finally, in his closing argument, trial counsel attempted to cast doubt upon the Commonwealth's DNA evidence particularly with regard to the data bases in an effort to create reasonable doubt in the minds of the jurors. See N.T. 11/09/94, pp. 2237-2240.

11. Testimony of Officer Vas

Defendant contends the testimony of Emergency Paramedic Vas characterizing the scene of the Fortney death as "very, very brutal and gruesome, and I've seen a lot of deaths over the years", N.T., 11/02/94, at p. 1684, was prejudicial. Such testimony was relevant to the issue of malice and murder.

12. Evidence Removed from Defendant's Residence

Testimony with respect to evidence recovered from a search of Defendant's residence was also relevant. The search was undertaken shortly after Defendant was arrested. Earlier that day, someone had attempted to break into Sam-Cali's home, exchanged gunshots with the police officer stationed there, and escaped through the back door which was broken out from the kitchen. Defendant was arrested at the hospital later that morning, when he was observed to have fresh wounds and bleeding to both arms and legs. He also had a healing scar of a bite mark which tied into Sam-Cali's statement of her having bitten her assailant one week earlier. Defendant's home was search pursuant to a warrant. Gloves of the type observed on Defendant when he entered Sam-Cali's home were found as were Sam-Cali's handgun and sneakers that included a patterned imprint as found on Charlotte Schmoyer's face. These items linked Defendant to those crimes and help to explain why there were no fingerprints at any of the crime scenes.

13. Testimony of Lt. Steckel

Defendant contends that the testimony of Lt. Steckel from the Allentown Police Department Youth Division to the effect that he knew Defendant, where he went to school and where he resided in 1984 and 1986, was prejudicial because it would allow the jury to infer reasonably that Defendant had engaged in prior criminal activity. However, the mere fact that Steckel testified he was an officer in the Youth Division and knew the Defendant did not convey the fact of a prior criminal offense or record to the jury. See Commonwealth v. Carpenter, 511 Pa. 429, 515 A.2d 531, 535 (1986). Unlike Commonwealth v. Groce, 452 Pa. 15, 303 A.2d 917 (1973), relied upon by Defendant, there is no suggestion that Defendant's name was in any official files or records of the witness.

14. Latonio Fraticeli

The Commonwealth considered calling as a witness at trial Latonio Fraticeli, an eight-year-old girl. Prior to her anticipated testimony, the trial judge told the jury he wanted "to talk to the little girl a little bit first, see if I can put her at ease a little bit. She is very shy." Thereafter, an in camera proceeding was held at which the prospective witness gave specific identification testimony that would have implicated Defendant as the person who entered the Fortney home the night of the homicide. Nonetheless, on the following day the Commonwealth decided not to call Fraticeli as its witness. Defense counsel agreed the best course of action would be not to offer the jury any explanation for the witness not having been called. There was nothing in the trial judge's comments which prejudiced the jury.

The next day, an article appeared in the newspaper about Fraticeli. Defense counsel requested the jury be examined as to whether any of them had read the article. In response, the trial court simply reinforced its earlier instruction about not reading the newspaper. This precautionary instruction was sufficient to ensure the integrity of the trial. See Commonwealth v. Crispell, 530 Pa. 234, 608 A.2d 18 (1992).

15. The Commonwealth's Opening and Closing Statements to the Jury

Defendant contends the District Attorney resorted to "unnecessary and inflammatory comment" in his opening statement to the jury by referring to Defendant as a "predator" N.T., 10/24/94, p. 57, and asking the jury not "to lose sight of the ferocity of what was involved here, of the violence, of the intent to kill." N.T., 10/24/94, p. 59. He similarly claims the District Attorney's summation to the jury was equally inflammatory by referring to Defendant as a "territorial predator" and stating "It's time to put the nightmare on the east side to bed." Finally, Defendant contends the District Attorney commented improperly upon the defense's failure to produce evidence, thereby suggesting Defendant had some burden of proof in the case, when the District Attorney referred to the fact only four persons witnessed the Defendant's actions,

> . . . and only one of them is alive to tell you about her experiences with him . . . Do you think . . . if they had somebody who could refute the Commonwealth's witnesses, we would not have seen that witness from the witness stand?

Defendant's Brief, p. 121.

The District Attorney's characterizations of the Defendant and the crime were consistent with the Commonwealth's version of the evidence. The remarks did not have the "unavoidable effect" of prejudicing the jury by "forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict". Commonwealth v. Lawson, 519 Pa. 175, 546 A.2d 589, 596 (1988); Commonwealth v. Sattazahn, 631 A.2d 597 (Pa. Super. 1993).

The word "predator" connotes acts of injuring or exploiting others, usually by calculating, clever, or cunning means and upon those less able to defend themselves, for one's own gain. Here, the Commonwealth's theory of these cases, and of the Sam-Cali assault, was that they were linked together by geographic proximity (east side of Allentown), types of victim (heavy-set females), time (within the early morning hours), types of assault (rape and brutal beating with the hand or hand-wielded instrument to silence the victim), audacity (in the victim's own home or from the public street), and near-successful efforts to leave no witnesses or fingerprints, all committed by the same person upon victims with whom he otherwise had no personal connection. The District Attorney's characterization of Defendant as a "predator" was not some word chosen for hyperbolic effect, but an accurate, succinct description of the type of person he contended based upon his theory of the case and its evidence committed these offenses. See Commonwealth v. Johnson, 542 Pa. 384, 668 A.2d 97, 105-106 (1995).

Similarly, the District Attorney's comment that only four persons witnessed the assaults and only one of them is alive to testify about it was accurate; Sam-Cali was the only victim who survived the attacks. The comment immediately following it to the effect the defense did not produce "somebody" who could refute the Commonwealth's witnesses did not draw attention to the Defendant's failure to testify; the comment merely noted the Commonwealth's witnesses were uncontradicted. Commonwealth v. Sattazahn, supra., 631 A.2d at 611. Those witnesses included the criminologists who testified about the blood and semen stains found at the scenes of the assaults or upon the victims and their linking them to Defendant's DNA. The Defendant was not the only one who could have refuted them.

Finally, nor did the District's Attorney's concluding statement to the jury

> It's time to put the nightmare on the east side to bed. It's time to do that by returning verdicts of guilty, guilty, guilty. Thank you.

N.T. 11/08/94, p. 2272, when considered in the context of the entire case, constitute misconduct. It reflected the serial and predatory nature of the crimes. It was an isolated comment; it did not so overwhelm the rest of the District Attorney's summation, or the evidence in the case, to result in the destruction of the objectivity of the jury. Commonwealth v. Marshall, 534 Pa. 488, 633 A.2d 1100, 1106-1107 (1993); Commonwealth v. Blount, 564 A.2d 952, 957 (Pa. Super. 1989), alloc. denied, 575 A.2d 561.

C. Penalty Phase

1. The Constitutionality of the Death Penalty

Defendant contends trial counsel was ineffective for not seeking to bar the Commonwealth from seeking the death penalty on any of the following bases: the Pennsylvania capital punishment statute, 42 Pa. C.S.A. § 9711, permits aggravating factors to be defined by the prosecutor; aggravating factor (d)(6), involving the commission of a killing "while in the perpetration of a felony," fails to narrow significantly the class of murders for which the death penalty may be imposed; aggravating factor (d)(8), which authorizes the death penalty if the defendant commits the offense "by means of torture" is unconstitutional on its face; and the death penalty is unconstitutional because it is under all circumstances cruel and unusual punishment, is racist in its application, leads to the execution of innocent people, vests an unacceptable level of unreviewable discretion in the prosecutor, and is "simply unproductive, unnecessary, wrong and immoral . . ." Defendant's Brief at pp. 17-18.

In Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), the U.S. Supreme Court upheld the constitutionality of the Pennsylvania death penalty statute. See also Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130, 146 (1996). Further, the statute does not permit the prosecutor to define the aggravating factors; the aggravating factors are limited to those specified in the statute. 42 Pa. C.S.A. § 9711 (d).

The argument that aggravating factor (d)(6), involving the commission of a killing "while in the perpetration of a felony", is overbroad or otherwise fails to genuinely narrow the pool of offenders eligible for imposition of the death penalty was rejected in Commonwealth v. Basemore, 525 Pa. 512, 582 A.2d 861 (1990), cert. denied 502 U.S. 1102, 112 S.Ct. 1191, 117 L.Ed.2d 432 (1992). Moreover, Defendant has failed to demonstrate how under the facts of these cases, the term "felony" is vague or overbroad. The killings occurred during a kidnapping and rape in Charlotte Schmoyer's case, a burglary and rape in Joan Burghardt's case, and a burglary and rape in Jessica Jean Fortney's case. Each of those offenses stand on their own as a dangerous felony and is not a lesser-included offense of murder. Thus, Defendant's argument is without merit. See Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473, 482 (1998).

The argument that aggravating factor (d)(8), involving "by means of torture", is also unconstitutional was rejected in Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987), and Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183 (1985). The general meaning of "torture", to wit, "the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity," Pursell, supra, 495 A.2d at 196, was found to be commonly understood and unambiguous in Commonwealth v. Fahy, 537 Pa. 533, 645 A.2d 199, 202-203 (1994).

Finally, Defendant's broadside against the death penalty statute is not supported by any facts in the record of the trial or post-trial proceedings. [33]/ It is abstract in nature and not relevant to the facts in this case. See Commonwealth v. Edmiston, 535 Pa. 210, 634 A.2d 1078 (1993).

None of Defendant's challenges to the constitutionality of the death penalty had any merit at the time of trial or now. Consequently, trial counsel cannot be held

[33]/ In his brief, Defendant asserts ". . . the prosecution of Defendant and the Commonwealth's efforts to seek the death penalty for Defendant may be based, at least in part, upon the fact that the Defendant is indigent and an alcoholic . . ." Defendant's Brief at p. 16. However, Defendant cites to no evidence in the record that his indigency or alcoholism, if indeed he was subject to either condition, played any part in the decision to prosecute Defendant or seek the death penalty. That assertion is completely unsupported by any evidence at all. Defendant has failed to present any proof that the Commonwealth acted with a discriminatory purpose in this case. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed 2d 262 (1987).

ineffective for failing to assert a meritless claim. Commonwealth v. Fahy, supra, 645 A.2d at 202.

2. Trial Counsel's Failure to Develop Evidence in Mitigation

Defendant contends trial counsel was ineffective for failing to have called a number of witnesses from his family, friends, school teachers, coaches, prior places of residence and various schools he had attended, each of whom, Defendant asserts, would have testified to his good character, lack of violent or vicious propensities, and having come from a background which included extreme mental or emotional disturbance.

In order to make a claim of ineffectiveness for failure to interview and/or present a witness, Defendant must prove: (1) the existence and availability of the witness; (2) counsel's awareness of, or duty to know of, the witness; (3) the witness' willingness and ability to cooperate and appear on behalf of Defendant; and (4) the necessity of the proposed testimony in order to avoid prejudice. Commonwealth v. Morris, supra., 684 A.2d at 1044; Commonwealth v. Stanley, 534 Pa. 297, 300, 632 A.2d 871, 872 (1993).

This evidence, Defendant contends, would have been more than sufficient to establish the "catch all" mitigating circumstances of 42 Pa. C.S.A. § 9711 (e)(8) concerning the character and record of the Defendant and the circumstances of his offense, resulting in a jury verdict in favor of life in prisonment rather than death.

Specifically, during the hearings on Defendant's post-trial motions, the following evidence was presented: Defendant himself testified on three occasions as to the information he provided to trial counsel regarding possible guilt and penalty phase witnesses. He contended he identified at least twenty-two persons who could have testified on his behalf. He also testified trial counsel failed to inform him that he could have testified during the penalty phase of the trial for the limited purpose of providing personal background material for mitigation purpose and that had he been so advised, he would have so testified. Defendant also identified forty-five exhibits including honor roll certificates from a juvenile detention facility where he was detained, certificates of recognition in an essay contest and a poster contest, various sports and physical fitness awards or certificates, his high school diploma, photographs of his family and friends, recognition for outstanding scholarship in mathematics and a sample of a wooden frame with the words "pray with me" carved on it which he made. Defendant contends that the failure to produce any of these items at trial left the jury with the impression that he was "nothing more than a lone, heartless and friendless, cold blooded killer, who did not deserve to exist at all, except possibly behind bars for the rest of his life". Defendant's Brief at p. 44.

A number of witnesses testified on Defendant's behalf at the post-sentence hearings. Richard Haire, Defendant's science teacher at Harborcreek, a juvenile placement facility to which Defendant was sent in 1998, testified Defendant was a good student and liked science and that on two or three occasions he had brought Robinson to stay at his home for several days, each time as part of a regular practice of Harborcreek facility and staff to reward those boys who behaved well. During those visits, Haire remembered Defendant as a pleasant boy who stayed at his home for several days at a time and, on at least one occasion, had accompanied his family and two sons when they went Christmas caroling. Finally, Haire testified he had never been contacted by any attorney or investigator on behalf of Defendant at the time of his trial, and that he knew nothing of the homicides until he was contacted by post-trial counsel.

Randy Whittlesey testified he had been Defendant's counselor while at Harborcreek and was in daily contact with Defendant while he was there in residential treatment. He testified that although he was Defendant's primary counselor at Harborcreek, he heard nothing about the homicide trial in Allentown until after the trial in March, 1995. Although he had never been contacted to attend Defendant's trial, he had traveled to Allentown to appear at juvenile status hearings while Defendant was at Harborcreek. He testified that Defendant was an excellent student and athlete who participated in sporting events at the school and in the community, and that he demonstrated significant improvements in his social interactions with peers, staff and authority figures. Finally, Whittlesey testified that as Defendant's counselor, it fell upon him to inform Defendant of his father's death and to counsel him through the grief and mourning process.

Brother Francis Mulligan, a Christian Brother who had been Defendant's mathematics teacher while Defendant was in another juvenile placement facility, St. Gabriel's Hall, recalled Defendant was an excellent math student, and he found him to be very trustworthy. He asked Defendant to assist him in class and to correct other students' tests. He and Defendant took many long walks together on the school's campus, played chess together, went on outings together and shared long conversations. Brother Francis testified he had never observed any violent behavior on Defendant's part. At the time of Defendant's trial, Brother Francis was assigned to a school in New Orleans, Louisiana. He testified he was contacted around that time by trial counsel James Burke, who advised him of the charges against Defendant. Brother Francis testified he reacted with complete "astonishment" because "this was not the same kid I knew". Brother Francis testified that Attorney Burke told him he would have to pay for the airfare from New Orleans to Allentown himself, but that as a member of religious society who had taken a vow of poverty, he did not have the funds to pay for the trip. He testified that he told Attorney Burke that he would have wanted very much to have testified on Defendant's behalf.

Robert Burns was actually scheduled to testify at trial, but arrived approximately one-half of an hour late and, as a result, was precluded from testifying. [34]/ At the post-sentence hearings, Burns testified he had been the principal of St. Gabriel's Hall, a juvenile treatment facility from which Defendant received his diploma. He testified that Defendant had worked in the school office and got along well with the female secretaries. He also testified that he was familiar with Defendant's excellent academic performance as well as his athletic abilities and achievements. He testified that he and Defendant were close enough to have had heart-to-heart talks where Defendant would ask him for advice about problems he was experiencing in placement. He testified that Defendant cried when faced with the prospect of leaving St. Gabriel's when his term of placement was coming to a close, and that Defendant expressed apprehension about returning home to his previous environment and peer group which had gotten him into trouble. He testified that Defendant wanted to remain at St. Gabriel's and that he would

[34]/ Whether to grant a continuance or a delay is up to the sound discretion of the trial judge. When Burns failed to appear, trial counsel was instructed to proceed with his closing argument.

have taken Defendant into his personal custody had he not already done so with another child.

Melvin Riddick was Defendant's high school wrestling coach at Dieruff High School and employed by the Allentown school district as a teacher. He testified that Defendant was on the wrestling team during his junior year of high school, attended about 95% of the team's practices and, during wrestling season, saw Defendant five days each week at practice. He testified that Defendant never acted inappropriately and was never more aggressive than usual for the sport.

Angela Hart was a friend of Defendant's since childhood and were especially close in the summer of 1993. She attended trial on four or five occasions and was prepared to testify but was not called by trial counsel.

Diane Mann was a close friend of Defendant's throughout the summer of 1993, when a number of the alleged offenses occurred. She testified that she saw Defendant almost every day following the last day of school until the end of July, 1993, when he was arrested. She never saw any violent behavior on his part and he never became aggressive or physical with her. Although she was questioned by defense counsel, she was not called to testify on his behalf at either the guilt or penalty phases of the trial.

Barbara Brown, Defendant's mother, testified at the post-trial hearing on November 10, 1994, but allegedly never got the opportunity to present the evidence she thought was relevant as to Defendant's difficult childhood. She discussed Defendant's difficult childhood as a result of her divorce and his father's alcoholism. She testified that Defendant loved his father and wanted to see him, but his father was rarely available. She testified this was a demoralizing experience for Defendant when he was between 7 and 11 years of age. She testified that trial counsel wanted her to testify that Defendant's father had in fact been abusive, but she refused to do so because she did not want to denigrate Defendant's father because it was not true and feared it would be hurtful to Defendant.

Thomas Stoudt was never contacted by trial counsel. He testified that his familiarity with Defendant was as a juvenile probation officer at the time Defendant was at the juvenile detention center. Stoudt was a coach and involved in community and team athletics and invited Defendant to join the baseball team he was coaching once Defendant returned from juvenile placement.

In the face of these prospective witnesses, two things were clear: First, Defendant refused to cooperate with trial counsel in the presentation of his defense. N.T. 11/13/98, pp. 24, 26, 43,60; 09/10/99, pp. 10-12, 20 and 25; and, second, Defendant, who was seventeen at the time of Joan Burghardt's murder, already had an extensive juvenile record which included 13 prior juvenile arrests, at least 6 adjudications and a variety of placements. His record included offenses dating back to when he was nine years old. They include aggravated assault, burglary, terroristic threats and other offenses. He was disruptive in school and often verbally and physically aggressive to others. He assaulted a teacher, and his employment history is virtually non-existent. For example, the records at St. Gabriel's Hall reflect Defendant's initial adjustment was poor and "there has not been a great deal of improvement since then, according to staff . . . he is usually manipulative and slow to cooperate. His peer relationships are typically unsatisfactory". In addition, Defendant absconded from the institution, stole a staff member's wallet with

$200.00 in it, and violated a variety of rules and regulations. It is difficult to imagine how Burn's testimony would have assisted Defendant. See Commonwealth v. Yaris, 519 Pa. 571, 549 A.2d 513 (1988). The introduction of "good character" evidence on behalf of the Defendant would have invited an extensive review of this sordid history. See Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992). Trial counsel testified they did not want the jury to learn of Defendant's extensive criminal history and anti-social behavior. Indeed, Defendant's juvenile records described him as a "sociopath". N.T. 11/13/98 pp. 16-17, 27-28, 30-31. It was not at all unreasonable for trial counsel to avoid having that information disclosed to the jury.

Finally, Defendant contends he did not understand his right to testify at the penalty phase of the trial. However, this position is flatly contradicted by trial counsel who, during the post-sentence hearings, testified he begged Defendant to testify on his own behalf during the penalty phase.

> Trial Counsel: He didn't want to testify in either phase.
>
> Commonwealth: ...Were there other things that you would – you felt were important to convey to the jury in order to get sympathy for him?
>
> Trial Counsel: ... You want to rely then on good old-fashion sympathy which mercy can flow from sympathy if you can put some sympathetic factors in front of the jury. And that was gonna come from his family and from himself.. It was always my intention, and it will always be, that they, they being the jury, want to hear from the Defendant and from the Defendant's mother. You're not gonna save someone's life if the Defendant does not plead for his life and the mother does not plead for the Defendant's life. Its not gonna happen.
>
> Commonwealth: Okay. Let's start with the Defendant. Did you discuss with him the importance of him taking the stand in the penalty phase of the case?
>
> Trial Counsel: I begged him.

* * *

> Commonwealth: Did you attempt to explain to him the importance of his testimony?
>
> Trial Counsel: We did.
>
> Commonwealth: Did you let him know that the – his testimony would be exclusive to pleading for his life and that was it?
>
> Trial Counsel: In the penalty phase, absolutely.
>
> Commonwealth: Okay. He testified today that he didn't know that his testimony could be limited. Is that correct?
>
> Trial Counsel: In the penalty phase?
>
> Commonwealth: Um-hum.
>
> Trial Counsel: No, that's not correct. ...

* * *

N.T., 11/24/98, pp. 192-194. Trial counsel's testimony is consistent with Defendant's lack of cooperation throughout the trial, and begging Defendant to face the jury and plead for his life is sound strategy. Therefore, trial counsel's testimony is more credible that that of Defendant.

3. Aggravating Circumstance of Torture

Defendant contends the trial court's charge concerning the aggravating circumstance of torture, 42 Pa. C.S.A. § 9711 (d)(8), was inadequate and incomplete; and the evidence in support of the aggravating circumstance of torture as to Burghardt and Schmoyer was irrelevant, unreliable and lacked proper foundation, and was insufficient.

(a) The Charge

In order to establish the aggravating circumstance of torture, the Commonwealth must prove more than a mere intent to kill; there must be an indication that the killer was not satisfied with the killing along. Commonwealth v. Auker, 545 Pa. 521, 681 A.2d 1305, 1321 (1996). The Commonwealth must establish a specific intent to inflict pain and suffering separate and apart from the specific intent to kill. Commonwealth v. King, 554 Pa. 331, 721 A.2d 763, 780 (1998). There need not be a "specific intent to torture" instruction to the jury; it may be proven by inference from the nature of the acts themselves. Commonwealth v. Fahy, 537 Pa. 533, 645 A.2d 199, 203 (1994).

The trial judge told the jury the Commonwealth must prove that a defendant had a specific intent to inflict "unnecessary pain or suffering or both pain and suffering in addition to the specific intent to kill" to establish the offense was committed by means of torture. N.T., 11/10/94, p. 2747. He explained that having returned a verdict of murder in the first degree, the jury already determined there was a specific intent to kill. "But to find him guilty of torture you must find not only that specific intent to kill but a specific intent to inflict unnecessary pain or suffering or both pain and suffering". Id.

At sidebar, the District Attorney proposed the court explain torture meant more than pain and suffering and more than an intent to kill, but was pain and suffering which is unnecessarily heinous and cruel. However, trial counsel thought that definition was confusing and objected to a more detailed definition of torture. N.T., 11/10/94, at p. 2757.

The position of the District Attorney at trial, and of Defendant now, that the definition of torture must include a specific intent to inflict pain and suffering "which is unnecessarily heinous, atrocious, or cruel" is based on language to that effect in

Commonwealth v. Rompilla, 539 Pa. 449, 653 A.2d 625, 634 (1993). However, that language is not carried through in the subsequently decided cases of Commonwealth v. King, supra, and Commonwealth v. Auker, supra. Thus, Defendant was not entitled to the "heinous, atrocious, or cruel" language; the charge as given was consistent with the law as it existed both before Rompilla, see Commonwealth v. Crawley, 514 Pa. 539, 526 A.2d 334 (1987), and Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987), and after Rompilla.

(b) The Evidence

Dr. Isadore Mihalikis, a board certified forensic pathologist, who performed the autopsies on Burghardt and Schmoyer, testified at both the guilt and penalty phases of the trial. He opined to a reasonable degree of medical certainly that pain and suffering were inflicted upon Burghardt and Schmoyer during the course of their murders.

He testified Burghardt suffered thirty-seven blunt force wounds to her scalp resulting in skull fractures and her death. Some of the impacts were major in that they caused fractures; the others were severe enough to tear the skin. He concluded she was responsive during some of these assaults because she had defensive wounds to the back of her hands and one of her fingers was broken from a blunt force and split open on the palm side. He stated it takes at least ten or more of these blunt force injuries to become unconscious, so she experienced pain and suffering before she passed out.

He testified Schmoyer suffered twenty-two stab wounds, sixteen in the back, of which seven were fatal, and six in the front area of the neck, of which any combination of one or three were fatal. The wounds to the neck were in pain sensitive areas. Two of the wounds were minor but threatening cuts. They were followed by four more stabs which became cuts as the knife was drawn across her neck. Three of the stabs were on the left; one was on the right. She was alive at that point; if she was conscious, she would have experienced pain. The sweatshirt she was wearing at the time of the attack had a cut in the front that did not correspond to any wound and twenty-three cuts on the back, of which only sixteen corresponded with wounds. He concluded the sweatshirt had been pulled, stretched and distorted, either from the assailant pulling or Schmoyer trying to pull away. She did not have a shoe on her left foot; there was dirt on her left foot; and there was no dripping of blood on her pants. From all of that, he concluded Schmoyer tried to resist and run away while she was wounded. From the nature and direction of the wounds, and the amount and location of her blood on the sweatshirt, he concluded she was, at some point, "awake, alert, responsive, conscious, and she's bending her neck." N.T., 11/09/94, pp. 2477-2478. He concluded she was subdued, threatened and subsequently executed with the wounds to her neck preceding the wounds to her back. Finally, he testified she knew she was being pursued and her assailant had a weapon and she had none and no way to retaliate.

4. Aggravating Circumstance of Multiple Murders

The Sentencing Code, 42 Pa. C.S.A. § 9701 et seq., sets forth the aggravating circumstances which the jury may consider when sentencing for murder of the first degree. 42 Pa. C.S.A. § 9711 (d). One of them is the "multiple murder" circumstance:

> The defendant has been convicted of another murder committed either before or at the time of the offense at issue.

42 Pa. C.S.A. § 9711 (d)(11).

Defendant contends there were a number of errors concerning this circumstance. First, the Commonwealth misrepresented it to the jury as the "multiple victims" circumstance, and, second, the multiple murder circumstance was misapplied in the Burghardt and Schmoyer cases, and the evidence presented by the Commonwealth to establish it was inadmissible and irrelevant.

In his opening statement of the penalty phase of the trial, the District Attorney said:

* * *

> One of the aggravating circumstances is multiple victims. Joan Mary Burghardt, Charlotte Schmoyer, Jessica Jean Fortney. That is an aggravating circumstance in and of itself.
>
> You will hear no additional testimony about that aggravating circumstance. You know that aggravating circumstance and you understand the reason why multiple victims is an aggravating circumstance in the Commonwealth of Pennsylvania.

* * *

N.T., 11/09/94, pp. 2461-2462.

This notion of "multiple victims" was used at various times throughout the trial, and no one objected to it. [35]/ However, § 9711 does not recognize "multiple victims" as an aggravating circumstance. Nonetheless, characterizing it as such here was harmless because by the time the jury considered aggravating circumstances it had already found the Defendant guilty of three homicides. There were, then, three victims.

With respect to § 9711 (d)(11), the court charged the jury as follows:

[35]/ See e.g. N.T., 10/10/94, p. 231; 10/11/94, p. 438; 10/13/94, pp. 953 and 1069; 10/14/94, p. 1530; and 11/09/94, pp. 2474-2475.

* * *

> Multiple killings. The actual language in the statute is complicated. But we've agreed that multiple killings is more simple, just to say that, than the actual language. That is an aggravating factor. If one killing occurred with others, that's to be considered an aggravating factor. And since you've found three murders happened by this defendant, I would think that that would also have been proven beyond a reasonable doubt.

N.T., 11/10/94, p. 2746.

At sidebar, the District Attorney suggested the court not tell the jury the aggravating circumstance was proven, and requested a reading of the statute itself. N.T., 11/10/94, pp. 2754 and 2758. The court thereupon read the actual language of § 9711 (d)(11). Id. at pp. 2761-2762.

The jury found the multiple murder circumstance of § 9711 (d)(11) in each case. [36]/ However, the multiple murder circumstance is limited to other murders "committed either before or at the time of the offense at issue", Commonwealth v. Reid, 537 Pa. 167, 642 A.2d 453, 459 n. 8 (1994), and it is a fundamental principle of statutory construction that penal provisions be construed strictly. 1 Pa.C.S.A. § 1928. Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130, 146 (1996).

Here, the Burghardt homicide was committed on August 5, 1992, before the Schmoyer and Fortney homicides; and the Schmoyer homicide occurred on June 9, 1993, before the Fortney homicide, which was on July 13, 1993. Thus, it was improper for the

[36]/ The jury found the following aggravating circumstances in each case: killing while perpetrating a felony, § 9711 (d)(6); a significant history of felony convictions involving the use or threat of violence, § 9711 (d)(9); and multiple murder, § 9711 (d)(11). It found the additional aggravated circumstance of torture, § 9711 (d)(8) in the Burghardt and Schmoyer cases. N.T. 11/10/94, pp. 2784 and 2786-2789.

Schmoyer and Fortney homicides, which were committed after the Burghardt homicide, to have been considered as "multiple murders" when sentencing for the Burghardt homicide, and it was improper for the Fortney homicide, which was committed after the Schmoyer homicide, to have been considered a "multiple murder" when sentencing for the Schmoyer homicide.

In its brief, the Commonwealth argues such error is not prejudicial because the jury "could have considered those convictions under § 9711(d)(9) (significant history of felony convictions involving the use or threat of violence to the person)." Commonwealth's Brief in Opposition to the Defendant's Post-Sentencing Motions, at p. 65.

The Commonwealth is correct in noting that the § 9711(d)(9) aggravated circumstance of prior convictions for felony convictions involving the use or threat of violence can include crimes committed after the current conviction for which sentence is being imposed. Commonwealth v. Reid, supra. Here, when sentence was determined for the Burghardt murder, Defendant had been convicted of the Schmoyer and Fortney murders, and when sentence was determined for the Schmoyer murder, Defendant had been convicted of the Fortney murder. In fact, the jury did find § 9711(d)(9) as an additional aggravated circumstance in each of the three cases.

The problem here is that in each of the three cases one or more jurors found use of alcohol and drugs, family background and environment, and school history as a mitigating circumstance. N.T., 11/10/94, pp. 2784 and 2786 – 2789. The jury found two aggravated circumstances, killing while perpetrating a felony, § 9711(d)(6), and a significant history of felony convictions involving the use or threat of violence,

§ 4711 (d)(c)(1)(iv). See Commonwealth v. King, 554 Pa. 331, 721 A.2d 763, 784-785 (1998). However, the statute required the jury to have weighed all of the aggravated circumstances against the mitigated circumstances. Id. One cannot suppose or speculate how the jury weighed the flawed multiple murder circumstance in the Burghardt and Schmoyer cases as against the mitigating circumstance. Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130, 146 (1996). Therefore, Defendant is entitled to a new sentencing hearing with respect to the Burghardt and Schmoyer murders. Commonwealth v. Auker, 545 Pa. 521, 681 A.2d 1305, 1321-1322 (1996).

5.Commonwealth's Summation

Defendant contends the Commonwealth commented improperly on his failure to testify during the penalty phase of the trial. Specifically, the District Attorney began his argument as follows:

> And as he sits there, ladies and gentlemen, we have not heard any remorse. We have not heard any calling for the victims. He sits there, to some degree, like a sphinx and you have to decide whether to impose life or death in this particular case.

N.T. 11/10/94, pp. 2706-2707.

This was an impermissible comment on Defendant's Fifth Amendment right against self-incrimination. Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991). The Commonwealth's attempt to distinguish Lesko in light of Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31 (1998), is not persuasive. In Clark, as in Lesko, the defendant testified during the penalty phase of the trial and the prosecutor commented upon his failure to display remorse. Lesko concluded the prosecutor's remarks were intended as a condemnation of the defendant's failure to testify about his role in the underlying death.

In Clark, the Pennsylvania Supreme Court concluded the prosecutor's remarks were a fair comment upon the defendant's demeanor as a witness at the penalty phase. Here, Defendant did not testify at all, so there was no issue as to his demeanor or credibility.

Nonetheless, the trial judge issued adequate instructions informing the jury as to the proper consideration:

> As I previously told you, it is entirely up to the defendant whether to testify and you must not draw any adverse inferences from his silence.

N.T. 11/10/94, p. 2740. The law presumes juries follow the trial court's instructions as to the applicable law. Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663, 672 (1992). Thus, even though the District Attorney's comment was improper, and trial counsel failed to object to it, the trial judge remedied the error by instructing the jury properly as to Defendant's failure to testify.

6. Life Imprisonment

Finally, Defendant contends the court's instruction with regard to life imprisonment was faulty. Specifically, in response to a juror's question as to whether life in prison meant life without the possibility of parole, the court responded that although life in prison meant life without the possibility of parole now, there was no guarantee as to the future. The trial judge indicated he could not guarantee the legislature would not change the law in the future. N.T., 11/10/94, at p. 2767-2768.

At that point, the District Attorney requested a sidebar after which the trial court gave the following curative instruction:

> I'm to tell you, and it's accurate, life is life. There won't be any parole. Life is life.

Id.

The trial judge's initial response to the juror's question was not erroneous. He was merely stating a given fact in a democratic society. Commonwealth v. Clark, 551 Pa. 258, 710 A.2d 31, 37 (1998.). However, even if the response was improper, he corrected it in his last instruction to the jury. Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996).

IV. Conclusion

Of the many errors asserted by Defendant, only one justifies relief, and it affects the sentence imposed in the cases involving Burghardt and Schmoyer, not the underlying convictions. Because the instruction to the jury in those cases did not define properly the aggravated circumstance of "multiple murder," and the jury found and relied upon that circumstance when weighing the aggravated circumstance against the mitigating circumstance it found, those sentences must be vacated and Defendant given a new sentencing hearing in accordance with the clear, unambiguous language of the death penalty statute.

1

546 U.S. 983, 163 L.Ed.2d 470

Harvey Miguel ROBINSON, petitioner, v. PENNSYLVANIA.

No. 05–6000.

Oct. 31, 2005.

Case below, 581 Pa. 154, 864 A.2d 460.

Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied.

2

546 U.S. 983, 163 L.Ed.2d 470

Gerald Carlton PITTS, petitioner, v. GEORGIA, et al.

No. 05–6004.

Oct. 31, 2005.

Rehearing Denied Jan. 9, 2006.

See 546 U.S. 1134, 126 S.Ct. 1129.

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

3

546 U.S. 983, 163 L.Ed.2d 470

Mark A. GLEASON, petitioner, v. Roderick Q. HICKMAN, Secretary, California Department of Corrections and Rehabilitation.

No. 05–6006.

Oct. 31, 2005.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

4

546 U.S. 983, 163 L.Ed.2d 471

Frederick Lamon GRAYSON, petitioner, v. Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 05–6008.

Oct. 31, 2005.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

5

546 U.S. 983, 163 L.Ed.2d 471

Daniel GONZALEZ, petitioner, v. Michael McGINNIS, Superintendent, Southport Correctional Facility.

No. 05–6010.

Oct. 31, 2005.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

6

546 U.S. 983, 163 L.Ed.2d 471

Bruce HILLIARD, petitioner, v. Ronald W. KING, Superintendent, South Mississippi Correctional Facility.

No. 05–6012.

Oct. 31, 2005.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Law Offices
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August 1, 2005

Office of the Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: United States v. Harvey Miguel Robinson, Petitioner
Petition for Writ of Certiorari
Motion to Extend Time for Filing Petition

Ladies/Gentlemen:

I enclose for filing in this matter the following:

1. Original and ten [10] copies of Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

2. Original and ten [10] copies of Appendix to the above Petition.

3. Certificate of Service indicating service of copies of the above documents.

4. Original and ten [10] copies of Motion for Leave to Proceed *in Forma Pauperis*.

5. Certificate of Service indicating service of this motion.

6. U.S. Postal Service Form 3817, Certificate of Mailing, indicating that this correspondence and the enclosures were placed in the U.S. Mail this date.

Please docket and file same.

Very truly yours,
LAUER & SLETVOLD, P.C.

By: ______________________
Philip D. Lauer

cc: Office of District Attorney
Lehigh County Courthouse
5th and Hamilton Streets
Allentown, PA 18101

Mary Ennis, Esq.
Matthew Lawry, Esq.
Harvey Robinson

IN THE
Supreme Court of the United States

Harvey Miguel Robinson,
Petitioner

v.

United States of America

CERTIFICATE OF SERVICE

On Monday, August 1, 2005, Philip D. Lauer, Esq., counsel for Appellant, served one copy of the Petition for Writ of Certiorari and accompanying Appendices on the Attorneys for the Respondent, by First Class U.S. Mail, postage prepaid, addressed as follows:

James Martin, Esq.
Office of the District Attorney
Lehigh County Courthouse
5th and Hamilton Streets
Allentown, PA 18105
Counsel for Appellee

Respectfully Submitted:

Philip D. Lauer, Esq
LAUER & SLETVOLD, P.C.
701 Washington Street
Easton, PA 18042
(610-258-5329)
Counsel for Petitioner

Dated: August 1, 2005

IN THE

Supreme Court of the United States

Harvey Miguel Robinson,
Petitioner

v.

United States of America

CERTIFICATE OF SERVICE

On Monday, August 1, 2005, Philip D. Lauer, Esq., counsel for Appellant, served one copy of the Motion And Affirmation For Leave To Proceed *In Forma Pauperis* on the Attorneys for the Respondent, by First Class U.S. Mail, postage prepaid, addressed as follows:

James Martin, Esq.
Office of the District Attorney
Lehigh County Courthouse
5th and Hamilton Streets
Allentown, PA 18105
Counsel for Appellee

Respectfully Submitted:

Philip D. Lauer, Esq.
LAUER & SLETVOLD, P.C.
701 Washington Street
Easton, PA 18042
(610-258-5329)
Counsel for Petitioner

Dated: August 1, 2005

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO._________

HARVEY MIGUEL ROBINSON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITIONER'S MOTION AND AFFIRMATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Harvey Miguel Robinson, through counsel, respectfully moves for leave to proceed *in forma pauperis* and submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Petitioner, a death-sentenced prisoner, is indigent.

3. Although there has been no grant of *informa pauperis* status in prior proceedings, because of Petitioner's indigence, counsel has been appointed by Lehigh County, Pennsylvania to represent Petitioner at all stages of these proceedings, from trial through appeal in the state courts

4 Undersigned counsel was appointed by the Court of Common Pleas of Lehigh County, Pennsylvania to represent Petitioner in all post-trial, and re-trial, proceedings, and continues to represent Petitioner *pro bono*.

5 Petitioner is incarcerated on death row and is without funds to secure the services necessary to proceed in this Court (*e.g.*, printing fees, etc.) or to pay any fees.

5. Counsel is in the process of obtaining Petitioner's signature on this Court's Affidavit or Declaration in Support of a Motion for Leave to File *In Forma Pauperis* and will provide that completed form expeditiously.

6. Undersigned counsel declares under penalty of perjury that all statements related above are true and correct.

WHEREFORE, Petitioner requests that the Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

PHILIP D. LAUER, ESQ.
LAUER & SLETVOLD, P.C.
701 Washington Street
Easton, PA 18042
[610-258-5329]

Counsel for Petitioner, Harvey Miguel Robinson

Dated: August 1, 2005

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO.__________

HARVEY MIGUEL ROBINSON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PHILIP D. LAUER*
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[610-258-5329]

MARY ENNIS
612 Massachusetts Ave
Aldan, PA 19018

Counsel for Petitioner, Harvey Miguel Robinson

* member of the Bar of this Court

Dated: August 1, 2005

CAPITAL CASE

QUESTION PRESENTED

Did the trial court violate Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments in failing to instruct the capital sentencing jury that, in this first degree murder case, the life-sentence alternative to a death sentence is statutorily defined as life without possibility of parole, where state law does not allow parole from a life sentence, the defendant was being tried for three capital homicides in a single joint trial, the prosecutor argued to the jury the future dangerousness of Petitioner, and the jury made specific inquiry on this point to the sentencing judge?

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PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

Petitioner Harvey Miguel Robinson respectfully prays that this Court issue its Writ of Certiorari to review the decision of the Supreme Court of Pennsylvania rendered December 30, 2004, which affirmed Petitioner's convictions of three homicides, and sentence of death on one of the homicides.

OPINIONS BELOW

The opinion of the trial court on Petitioner's post-sentence motions is attached as Appendix A. The opinion of the Pennsylvania Supreme Court was filed December 30, 2004, and is reported at Commonwealth v. Robinson, 864 A.2d 460 (Pa. 2004), *rearg. den.*, March 4, 2005. The reported majority and concurring opinions are attached hereto as Appendix B, and the denial of reargument is attached as Appendix C.

JURISDICTION

The Pennsylvania Supreme Court rendered its decision on December 30, 2005 and denied Petitioner's timely filed application for reargument on March 4, 2005. Petitioner timely filed a request for extension of time to file this Petition, and this Petition is timely filed as of August 1, 2005.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ;

the Eighth Amendment to the United States Constitution, which provides in relevant part:

> nor [shall] cruel and unusual punishments [be] inflicted[;]

and Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Procedural history

Petitioner Harvey Miguel Robinson was found guilty of three counts of first degree murder and related charges in the Lehigh County Court of Common Pleas. After a capital sentencing proceeding, the jury sentenced Petitioner to death in all three cases.

The Pennsylvania Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. Commonwealth v. Robinson, 864 A.2d 460 (Pa. 2004).

B. Facts related to the questions presented

- In Pennsylvania, a capital sentencing jury is given the choice between "death" and "life imprisonment" 42 Pa. C.S. §§ 9711, 9756.

- In Pennsylvania, "life imprisonment" means life in prison without possibility of parole.

- Robinson was tried for three homicides which occurred at different times and places in Lehigh County, Pennsylvania, in a joint trial, which was permitted by the trial court on the basis that DNA and *modus operandi* evidence established the identity of the perpetrator.

- In his opening to the jury, the District Attorney stated that the victims ". . . were each brutally murdered by the predator who sits behind you, the defendant, Harvey Robinson." [NT 57]. Later, he asked the jury not to "lose sight of the ferocity of what was involved here, of the violence, of the intent to kill". [NT 59].

- In his summation to the jury at the conclusion of the liability phase of the trial, the District Attorney characterized the defendant as a "territorial predator" [NT 2246]; referred to the fact that only four people have seen the defendant's actions, "and only one of them is alive to tell you about her experiences with him" [NT 2247]; and stated: "It's time to put the nightmare on the east side to bed. It's time to do that by returning verdicts of guilty, guilty, guilty." [NT 2272]

- In his closing argument at the penalty phase, the District Attorney argued as follows:

> And as he sits there, ladies and gentlemen, we have not heard any remorse. We have not heard any calling for the victims. He sits there, to some degree, like a sphinx and you have to decide whether to impose life or death in this particular case.

N.T. 11/10/94, pp. 2706-2707. And, further: "[t]hink about whether or not there is any remorse," N.T. at 2707.

- At the end of the Court's charge, a juror inquired: "On the life in prison, is that without parole, just so we're sure? Would there be a chance of parole if it was life in prison?" (N.T. at 2767).

- In responding to the juror's questions, the Court compounded the issue by telling the jury that, although life imprisonment means life without possibility of parole now, there is no "guarantee" as to the future:

> THE COURT: I don't see how I can guarantee -- that's the present law. But

what if the legislature changes the law? I can't guarantee that. That's the way the law is now. .

MR: HAEDRICH [Juror]: Just so we know, Your Honor.

THE COURT: Who knows two years from now if they'll change the law. I can't tell you.

After this exchange, all counsel requested a conference with the Court, after which the judge stated "I'm to tell you, and it's accurate, 'Life is life.' There won't be any parole. Life is life." Id.

On direct appeal, the Pennsylvania Supreme Court held that Simmons v. South Carolina, 114 S.Ct. 2187 (1994) does not apply here because the prosecutor did not specifically argue Petitioner's future dangerousness, and trial counsel did not request a Simmons instruction. The Pennsylvania Supreme Court also held that the trial court's response to the juror was a correct statement of the law. In a footnote, the court observed that three of its Justices believe that a Simmons instruction should be given in all capital cases Id. at 515 n.70. The Pennsylvania Supreme Court affirmed the conviction and sentence of death.

REASONS FOR GRANTING THE WRIT

By statute in Pennsylvania, a convicted capital defendant is entitled to have his punishment fixed by a jury in "a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or *life imprisonment*." 42 Pa. C.S. § 9711(a)(1) (emphasis added). Under the Pennsylvania statutes, the life sentence for first degree murder is life without possibility of parole. 42 Pa. C.S. § 9756(c); Commonwealth v. Yount, 419 Pa. Super. 613, 622, 615 A.2d 1316, 1320 (1992) (42 Pa. C.S. § 9756(c) "unequivocally bars all parole for first degree murders").

On June 17, 1994, this Court decided Simmons v. South Carolina, 512 U.S. 154 (1994), holding that, when a State offered the capital sentencing options of life without possibility of parole or death and placed a defendant's future dangerousness at issue, due process entitled the defendant to an instruction informing the sentencing jury as to the true nature of the life sentencing option. Petitioner's case was tried after the Simmons decision; the jury instructions in Robinson's trial were given on November 10, 1994.

At the time Simmons was decided, only three States had statutory sentencing options of life without parole or death, but refused to instruct capital sentencing juries as to the actual meaning of a life sentence: Pennsylvania, South Carolina and Virginia. 512 U.S. 154, 168 n.8. Now, of the twenty-six states with a life-without-parole alternative to death, only *two*, Pennsylvania and South Carolina, routinely refuse to inform sentencing juries of this fact. Shafer v. South Carolina, 532 U.S. 36, 48 n.4 (2001). This Court has reviewed Simmons claims in three South Carolina cases, *see* Simmons; Shafer; Kelly v. South Carolina, 534 U.S. 246 (2002), but has never reviewed a Simmons claim arising from Pennsylvania, which has the fourth largest death row in the United States.[1]

1 This Court recently granted certiorari in part to review a Simmons claim from Pennsylvania, but decided the case on other grounds without reaching the Simmons question. Rompilla v. Beard, 125S.Ct. 2456, 2461, n.1 (2005).

I. THE COURT'S FAILURE TO GIVE AN ACCURATE LIFE-MEANS-LIFE INSTRUCTION VIOLATED PETITIONER'S DUE PROCESS RIGHTS BECAUSE THE INSTRUCTION LEFT INTACT THE FALSE IMPLICATION THAT PETITIONER WOULD BE ELIGIBLE FOR PAROLE AND, AS A CONSEQUENCE, POSE A FUTURE DANGER TO SOCIETY.

Future Dangerousness Inherent in Process

In the penalty phase of a capital case, due process requires that the trial court instruct the jury that, in reality, "life means life" (that is, life without possibility of parole) in Pennsylvania. Simmons v. South Carolina, 512 U.S. 154 (1994); id. at 175-78 (O'Connor, J., concurring). By the time of trial, this Court and the Pennsylvania Supreme Court had already made clear that the question of future dangerousness was *inherently* at issue in capital sentencing proceedings. See Jurek v. Texas, 428 U.S. 262, 275 (1976) ("any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is . . . inevitable."); see Commonwealth v. Chester, 587 A.2d 1367, 1378 (Pa. 1991) ("An integral part of the jury's determination whether a defendant should be sentenced to death is the threat of danger the defendant poses to the community.").

But Pennsylvania jurors are very likely to have misinformed impressions about the future dangerousness of a person convicted of first degree murder and sentenced to life imprisonment. A relatively recent study performed by the National Jury Project shows that fully half of Pennsylvania's jurors believed a life sentence lasted twelve years or less. This twelve year median estimate means Pennsylvania's jurors are the least informed of all jurors in the life without parole states covered in the study. Bowers & Steiner, Death by Default: An Emprical Demonstration of

False and Forced Choices in Capital Sentencing, 77 Tex. L. Rev. 605, 648 n.200 (1999). Similar results were seen in a more recent study. They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases, Justice Quarterly 20(1):187-211 (2003).

These studies go to the heart of what is wrong with the Pennsylvania Supreme Court's affirmance in this case. Here, the trial court should have provided an accurate life without parole instruction to counteract the patently false impression of Pennsylvania jurors that someone with a life sentence gets out in 12 years. The failure to provide that instruction violated Petitioner's due process rights. Gardner v. Florida, 430 U.S. 349, 362 (1977) (it violates due process to execute a person "on the basis of information which he has no opportunity to deny or explain"); Townsend v. Burke, 334 U.S. 736, 741 (1948) (due process violated when "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue"); United States v. Stewart, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.) (sentence under pending criminal enterprise statute vacated when sentencer "may have acted on mistaken advice from the Government that sentencing defendant to life imprisonment without possibility of parole would not necessarily preclude his eventual parole release").

This Court has taken judicial notice of the substantial risk that jurors who are not informed otherwise believe that "life imprisonment" means life in prison *until* parole. "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." Simmons v. South Carolina, 512 U.S. 154, 169 (1994); see also id. at 177-78 (O'Connor, J., with Rehnquist, C.J. & Kennedy, J., concurring) ("common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole").

The Pennsylvania Supreme Court's decision
is Inconsistent with This Court's Decision
in Kelly v. South Carolina

The Pennsylvania Supreme Court in this case held that no Simmons instruction was required because the Commonwealth "did not argue future dangerousness" at trial. 864 A.2d at 515. In fact, the prosecutor argued, from opening statements through penalty phase closing statements, that Robinson was a remorseless predator. He variously referred to Petitioner as a "territorial predator" and a "sphinx" who was responsible for the "nightmare on the east side", from whom "we have not heard any remorse". Under this Court's decision in Kelly v. South Carolina, this type of argument specifically raises future dangerousness.

In Kelly, this Court held that evidence that Kelly carried a weapon and participated in escape attempts raised future dangerousness because it had a "tendency to prove dangerousness in the future". 534 U.S. at 254. It also held that the prosecutor's characterization of Kelly as "dangerous". "bloody", and "butcher" were "arguments that Kelly would be dangerous down the road." Id. at 255. "Thus was Kelly's jury, like its predecessor in Simmons, invited to infer 'that petition is a vicious predator who would pose a continuing threat to the community.' " Id. at 256 (quoting Simmons, 512 U.S. at 176 (O'Connor, J., concurring)).

Under Kelly, it is crystal clear that the prosecutor's "remorseless predator" argument raised Robinson's future dangerousness, particularly where, as here, the trial jury is deciding penalties for three capital homicides. The Pennsylvania Supreme Court's conclusion to the contrary is inconsistent with this Court's decisions, and this Court should grant certiorari to review this holding, which is inconsistent with Kelly and Simmons itself.

Juror's Inquiry Demonstrates That
Future Dangerousness was in Issue

If nothing else does so, the juror's question was a clear expression of at least that juror's concern about [Petitioner's] future dangerousness. This Court has recognized this logic in Simmons at 170 n.10 (plurality) ("It almost goes without saying that" when jury, interrupts deliberations to ask such a question, the jury does not know "life" means without possibility of parole; otherwise, "there would have been no reason for the jury to inquire"); id. at 178 (O'Connor, J, concurring) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison").

The Trial Court's Response to the Jury
Was Misleading and Inaccurate

The trial court's initial comments in response to the juror's inquiry i.e., that the legislature might "change the law" in a year or two, allowing for parole and release of a life-sentenced defendant, were totally inappropriate, inaccurate, and misleading, and much akin to prosecution comments found to be reversible error in Caldwell v. Mississippi, 472 U.S. 320 (1985), wherein this Court held that a prosecutor violated defendant's Eighth Amendment rights by informing the jury that the ultimate "responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case," Id. at 323. It is the jury, and not the appellate court, who imposes the death sentence, and the jury must not be misled as to the seriousness of its role as sentencer.

The Pennsylvania Supreme Court in this case followed its earlier decision in Commonwealth v. Clark, 710 A.2d 31, 35-37 (Pa. 1998), where it held that since defense counsel, in arguing for a life sentence, had raised the issue of parole, it was not error for the trial court to advise the jury in response to their question on the meaning of "life imprisonment" that, although life imprisonment means life without possibility of parole "this afternoon. . . [w]hat the law will be tomorrow and next week and what it will be next month no one can predict [because] [t]he State legislature can redefine any of those things at any time. . ." Clark, 710 A.2d at 35. The Court's holding was specifically based on the fact that:

> due process requires the court to instruct the jury on the law as it relates to the possibility of parole where that issue clearly arises from the arguments of either counsel in the penalty phase.

Id., at 36 (emphasis added) [citing Commonwealth v. Chambers , 685 A.2d 96, 106 (1996)].2 But see Commonwealth v. Aljoe, 420 Pa. 198, 216 A.2d 50 (1966), where the same Court held that it is extremely prejudicial for a prosecutor to importune a jury to base a death sentence upon the chance that a defendant might receive parole.

It is highly unlikely that the court's subsequent instruction that "life is life" was sufficient to cure the error. The trial judge had already lessened the import of the "life is life" instruction, by prefacing the instruction with the phrase, "I'm to tell you . . . ," making it appear once again that the judge was only "going along" with counsels' obvious sidebar requests. Indeed, this Court has recognized that "on matters of law, arguments of counsel do not effectively substitute for statements by the court," Simmons, 512 U.S. at 174; and "we have often recognized, [instructions from the court] are viewed as definitive and binding statements of the law," id., (Souter, J. and Stevens, J., concurring) [citing Boyde v. California, 494 U.S. 370, 384 (1990)].

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2 In Petitioner's case, however, the trial court's comments were in response to a jury question and not a result of counsels' arguments.

Given the contradictory instructions, the jury must have been confounded as to whose version of the life imprisonment issue was accurate -- the trial judge's or counsel's. If the trial judge's, which version? At the very least, the judge's comments were confusing and planted a seed of doubt in the jurors' minds, giving them yet another very serious issue to consider during their deliberations, i.e., whether some future legislators might vote to allow life-sentenced, capital defendants eligibility for parole. This extra consideration was misleading, unconstitutional and may very well have been the factor that tipped the scales in favor of a death verdict.

Resulting Due Process Violations
Under Fourteenth Amendment

The trial court's failure to provide the jury with a clear and accurate instruction that a life sentence in Pennsylvania means "life without possibility of parole" after a specific request by the jury constituted three distinct and independent violations of Petitioner's due process rights: it violated the due process proscription against sentences imposed by a sentencer acting under a material misapprehension of law or fact relating to the sentencing decision (Townsend v. Burke, United States v. Tucker); it violated Petitioner's due process liberty interest to sentencing by a jury deciding between the choices of life without possibility of parole and death (Hicks v. Oklahoma); and it violated the due process proscription against being sentenced to death based upon information the defendant had no opportunity to rebut or explain (Gardner v. Florida, Skipper v. South Carolina, Simmons v. South Carolina).

A. The Court's Failure to Provide an Accurate Life Without Possibility of Parole Instruction After the Jury's Request Subjected Robinson to a Sentence Imposed on the Basis of Inaccurate Information that was Material to the Sentencing Decision.

This Court has long held that the Fourteenth Amendment to the United States Constitution protects a defendant from a sentence imposed on the basis of inaccurate information that is material to the sentencing decision. Townsend v. Burke, 334 U.S. 736, 741 (1948) (due process violated when "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue"); United States v. Tucker, 404 U.S. 443, 447 (1972); see also United States v. Levy, 865 F.2d 551, 559-60 (3d Cir. 1989) (en banc) (vacating sentence imposed because "sentencing on the basis of materially untrue assumptions violates due process"); United States v. Kerley, 838 F.2d 932, 940 (7th Cir. 1988) (Posner, J.) ("a sentence predicated on misinformation cannot stand"); King v. Hoke, 825 F.2d 720, 724 (2d Cir. 1987) ("It is well established that . . . material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."); United States v. Ruster, 712 F.2d 409, 412 (9th Cir. 1983) (due process violated when sentencer "relies on materially false or unreliable information in sentencing a defendant").

The United States Courts of Appeal, following this Court's clearly established precedent, have consistently held that a sentence violates due process when it may have been imposed under a misapprehension of law concerning a defendant's eligibility for parole or a material misunderstanding concerning the fact of a defendant's parole ineligibility. Levy, 865 F.2d at 560; King v. Hoke, 825 F.2d 720, 724 (2d Cir. 1987); United States v. Stewart, 779 F.2d 538, 541 (9th Cir. 1985) (Kennedy, J.). The defendant need not prove "actual reliance [by the sentencer] on the erroneous information" concerning parole eligibility in order to obtain relief. King v. Hoke, 825 F.2d 720, 724 (2d Cir. 1987). As Judge (now Justice) Kennedy has made clear, a sentence must be reversed whenever the sentencer "may have relied on misinformation" suggesting that the defendant could be eligible for parole. Stewart, 779 F.2d at 541; see also United States v. Levy, 865 F.2d at 560 (3d Cir. 1989) (en banc) (reversal required when there was an "unacceptable risk" that the sentence was "the result of a misconception" that the defendant would be eligible for parole); King, 825 F.2d at 724 (sentence set aside when the sentencer's "reliance on an improper factor [the defendant's supposed parole eligibility] was 'quite probable'").

As noted above, while not deciding the case on these grounds, this Court has taken judicial notice of the substantial risk that jurors who are not informed otherwise believe that "life imprisonment" means life in prison until parole. As the plurality opinion clearly stated, "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." Simmons v. South Carolina, 114 S. Ct. 2187, 2197 (1994); see also id. at 2201 (O'Connor, J., with Rehnquist, C.J. & Kennedy, J., concurring in the judgment) ("common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole").[3] Because life without possibility of parole is a "radically different third alternative" from sentences of "life" and "death," Salazar v. State, 852 P.2d 729,

[3] Commentators and state courts also have been aware of this fact for some time. See, e.g., State v. Henderson, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (noting "misimpression in some jurors' minds that a life sentence means 'five or six' years or some other erroneously conceived period of time"); State v. Smith, 298 S.C. 482, 489-90, 381 S.E.2d 724, 728 (1989) ("the reality, known to the 'reasonable juror' [is] that historically, life-term defendants have been eligible for parole") (opinion concurring and dissenting), cert. denied, 494 U.S. 1060 (1990); see

744 (Okla. 1993) (Johnson, J., specially concurring), a jury's unguided speculation about the meaning of a life sentence leads inexorably to a sentencing determination based on a prejudicially inaccurate view of the jury's sentencing options.

In this case, there is no doubt that the jury sentenced Harvey Robinson to death based upon materially misleading information concerning its sentencing decision. This Court should grant certiorari to make it clear that the trial court's failure to accurately respond to the jury's inquiry violates the Due Process Clause of the Fourteenth Amendment.

a. The Court's Failure to Provide an Accurate Life Without Possibility of Parole Instruction Deprived Petitioner of his Fourteenth Amendment Liberty Interest in Having his Punishment Fixed by a Jury that Would Choose Between the Lawful Sentencing Options of "Life Without Possibility of Parole" and "Death."

The failure to accurately instruct Harvey Robinson's jury that its sentencing options were life without possibility of parole and death also violated due process by denying him his Fourteenth Amendment liberty interest in the jury sentence to which he was entitled under state law. In Hicks v. Oklahoma, 477 U.S. 343 (1980), this Court held that the trial court's failure to instruct the jury that it had the option to impose an alternative sentence violated the defendant's state-created liberty interest in having the jury select his sentence from the full range of alternatives available under state law. The Fifth Circuit has succinctly summarized the holding in Hicks in terms especially applicable here: to establish a valid Hicks claim, the defendant must show "that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law * * * [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of the less severe sentencing options."

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also Simmons, 114 S. Ct. at 2197 n.9 (citing juror surveys).

Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted).

By statute in Pennsylvania, a convicted capital defendant is entitled to have his punishment fixed by the jury in "a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa. C.S. § 9711(a)(1) (emphasis added). The term "life imprisonment" as used in the state's capital sentencing statute means "life without possibility of parole." Had the members of the jury been correctly instructed in this case, they would have had the duty to consider whether the evidence introduced at sentencing or incorporated into the sentencing proceedings was aggravating or mitigating in light of the available sentencing options. The jury then would have the discretion to return a sentence of life without possibility of parole. If only one juror, after weighing the aggravating and mitigating evidence in this case, decided that the defendant should be sentenced to "life without possibility of parole" instead of death, the court would have been required to impose a life sentence. 42 Pa. C.S. § 9711(c)(1)(iv). There is a substantial possibility in these circumstances that at least one juror would have voted for a sentence of life without parole had the jury been accurately instructed as to its sentencing obligations under Pennsylvania law.

Petitioner's absolute right to have a jury exercise its discretion to fix his punishment between life without possibility of parole and death vested in him a constitutionally protected liberty interest in a sentence resulting from the exercise of that discretion. Toney v. Gammon, 79 F.3d 693, 699-700 (8th Cir. 1996) (where state court gave discretion to choose between sentencing options, defendant had "a constitutionally protected liberty interest in the sentence resulting from the exercise of this discretion, and that liberty interest is one that the Fourteenth

Amendment preserves against arbitrary deprivation by the State").[4] Having statutorily mandated a capital sentencing choice between life without possibility of parole and death, and having provided the defendant an absolute right to capital sentencing by a jury that must exercise discretion in choosing between the statutory sentencing options, Pennsylvania must follow the dictates of its own law. Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980); Wolff v. McDonald, 418 U.S. 539, 557 (1974); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993); Foster v. Delo, 39 F.3d 873, 882 (8th Cir. 1994).

Petitioner's liberty interest in the exercise of jury discretion to fix his punishment between life without possibility of parole and death was arbitrarily denied when accurate and material information concerning the jury's sentencing options -- that the life sentence-option carried with it automatic ineligibility for parole -- was misstated to the jury, and the jury instead was forced to choose between confusingly defined options of death and life.

b. The Court's Failure to Provide an Accurate Life Without Possibility of Parole Instruction Deprived Petitioner of his Due Process Protections Against Being Sentenced to Death Based Upon Inaccurate Information he Had No Opportunity To Rebut Or Explain.

The Due Process Clause of the Fourteenth Amendment has long prohibited the execution of a person "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977); see also Simmons v. South Carolina, 114 S. Ct. 2187, 2193 (1994); Skipper v. South Carolina, 476 U.S. 1 (1986). In this case, however, the record discloses that Harvey Robinson was sentenced to death by a jury that was: given

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4 See also Walker v. Deeds, 50 F.3d 670, 673 (9th Cir. 1995); Fetterly v. Paskett, 997 F.2d 1295, 1299-1300 (9th Cir. 1993); Stephany v. Wagner, 835 F.2d 497, 500 (3d Cir. 1987), cert denied, 487 U.S. 1207 (1988).

conflicting and misleading information; may have believed Petitioner could be released on parole; and was never clearly informed by defense counsel or by the court, after its request for more information, that as a matter of law, Petitioner would not be eligible for parole if he was sentenced to life imprisonment. Since the juror's question, and the trial court's answer, occurred during the final jury instructions in the case, Petitioner was prevented from denying or explaining the false implication that, because of his implied parole eligibility, he would pose a future danger to society if sentenced to life in prison.

The Gardner, Skipper due process doctrine that a defendant cannot be sentenced to death based upon information he had no opportunity to rebut or explain was already well-established by the time of Robinson's trial in 1994, and would have compelled relief even before Simmons was decided. E.g., Mak v. Blodgett, 970 F.2d 614, 623 (9th Cir. 1993) (pre-Simmons, relying on Gardner & Skipper: state court erred in excluding testimony concerning the participation of co-perpetrator in offense, which prevented defendant from rebutting or explaining state's theory that defendant was ringleader in massacre of thirteen individuals), cert. denied, 507 U.S. 951 (1993).

In the circumstances of this case, in which the jury specifically requested a definition of life sentence; where the question of Petitioner's future dangerousness was inherently at issue; and where the capital jury received conflicting information from the trial judge's instructions in this regard, Petitioner's death sentence was a product of a sentencing deliberation in which he was denied due process of law.[5]

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[5] The near uniform rejection by other states of Pennsylvania's policy of not informing jurors of a defendant's parole ineligibility suggests that it violates "a principle of justice that is deeply rooted in the traditions and conscience of our people." Cooper v. Oklahoma, --- U.S.---, 116 S. Ct. 1373, 1380, 134 L.Ed.2d 498 (1996) (citing practices of other states to buttress conclusion

II. THE TRIAL COURT'S FAILURE TO PROVIDE AN ACCURATE LIFE WITHOUT POSSIBLITY OF PAROLE INSTRUCTION VIOLATED PETITIONER'S EIGHTH AMENDMENT RIGHTS.

A. The Court's Omission Prevented the Jury From Hearing Relevant Mitigating Evidence.

A capital defendant's ineligibility for parole in and of itself is a mitigating circumstance. E.g., State v. Henderson, 109 N.M. 655, 666, 789 P.2d 603, 606-07, 614 (1990) ("Length of incarceration is a mitigating factor.") (Ransom, J., concurring in pertinent part), overruled on another holding by, Clark v. Taney, 118 N.M. 486, 882 P.2d 527 (1994); see also Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (reversing death sentence where jury could have found ample mitigation including that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole"). As this Court has clearly explained, "there is no question but that . . . inferences [that a life sentenced defendant would not pose a future danger to society] would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (quoting Lockett, 438 U.S. at 604)).

Juries must be permitted to consider and give effect to all mitigating evidence based upon the fundamental "principle that punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). In addition, this Court made clear in Skipper that this principle also applies to mitigating inferences about the defendant's lack of future dangerousness resulting from his incarceration:

Although it is true that any such inferences would not relate specifically to

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that Oklahoma's heightened standard of incompetence violates due process).

> petitioner's culpability for the crime he committed, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death."

Skipper, 476 U.S. at 4-5 (citations omitted).

This Court has explained that evidence concerning the defendant's probable future dangerousness "is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.'" Id. at 5 (quoting Jurek v. Texas, 428 U.S. 262, 275 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)). As a result, the Court permits States to treat "evidence that a defendant would in the future pose a danger to the community if he were not executed . . . as establishing an 'aggravating factor' for purposes of capital sentencing." Id. (citing Jurek and Barefoot v. Estelle, 463 U.S. 880 (1983)).

However, although States have the discretion *not* to admit evidence of future dangerousness in aggravation, they must permit a defendant to present and the jury to consider evidence of the defendant's likely non-dangerousness as a result of incarceration. As the Court has written: "evidence that the defendant would not pose a danger if spared (but incarcerated) *must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.*" Skipper, 476 U.S. at 5 (emphasis added).

In addition, the Court has stressed that the parole ineligibility of a life-sentenced defendant "is indisputably relevant" to whether he will pose a future danger to society. Simmons v. South Carolina, 512 U.S. at 163. "Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." Id. at 163-64. Consequently, the trial court erred when it incorrectly, and inconsistently instructed the jury about Petitioner's ineligibility for parole.

B. The Court's Instruction Presented the Jury with a False Choice of Sentencing Options and Produced an Arbitrary and Capricious Death Sentence.

The trial court's failure to provide an accurate life without possibility of parole instruction produced an arbitrary and capricious sentence by presenting the jury with a materially false and unreliable sentencing option that was more likely to result in a sentence of death. Having been imposed arbitrarily and capriciously, Petitioner's sentence of death was "cruel and unusual" in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153, 189 (1976).

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed. Simmons v. South Carolina, 512 U.S. at 172 (Souter, J. concurring). Because of the unparalleled severity and irreversibility of the death penalty, the Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); see also Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980); Mills v. Maryland, 486 U.S. 367, 383-84 (1988).

This heightened need for reliability requires the provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die," Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion), and invalidates "procedural rules that ten[d] to diminish the reliability of the sentencing determination," Beck v. Alabama, 447 U.S. 625, 638 (1980). As part of the requirement that capital juries must receive accurate sentencing information, the jury must be properly instructed as to all material elements in its sentencing-stage deliberations, including the meaning of legal terms such as "life in prison." Walton v. Arizona, 497 U.S. 639, 647 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process."); see Simmons, 512 U.S. at 172 (Souter, J. concurring) ("That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives.").[6]

Accurate information concerning Pennsylvania's definition of life imprisonment is especially important because "common sense tells us that many jurors might not know" the true meaning of a life sentence. Simmons v. South Carolina, 512 U.S. at 177-78 (O'Connor, J., with Rehnquist, C.J. & Kennedy, J., concurring). When, as here, the actual sentencing options faced by a capital sentencing jury are life without possibility of parole and death, but the jury is informed both that life means "life without possibility of parole" *and* that this could change, the jury is presented with "a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." Simmons v. South Carolina, 512 U.S. at 161.

The trial court's failure to accurately instruct the jury that, in Pennsylvania, "life imprisonment" means "life without possibility of parole," without casting doubt on the veracity of the instruction as the trial court did, denied Petitioner the heightened procedural safeguards required in a capital case. For that alone, his death sentence "should be vacated as having been

[6]See also Russell v. State, 607 So. 2d 1107, 1118 (Miss. 1992) ("The knowledge that the alternative to death is a life sentence, without the possibility of probation or parole is the type of relevant and accurate sentencing information to which our cases speak and which every jury faced with the determination of life or death is entitled to consider.").

'arbitrarily or capriciously' and 'wantonly and . . . freakishly imposed.'" Id. at 173 (quoting Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring); and id. at 310 (Stewart, J., concurring)).

C. The Trial Court's Omission Offended the Evolving Standards of Decency that Underlie the Eighth Amendment.

Petitioner's statutorily-mandated death sentence offended "the evolving standards of decency that mark the progress of a maturing society," because, when imposing the sentence, the ill-informed jury was given conflicting information about whether, in Pennsylvania, "life imprisonment" means "life without possibility of parole." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). As such, the sentence violated the Eighth Amendment.

The evolving standards of decency that give content to the Eighth Amendment are measured by objective indicia of community values, including legislative judgments, sentences imposed by juries, public opinion, and international practices and opinion. See e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988); Ford v. Wainwright, 477 U.S. 399 (1986); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977). The imposition of a statutorily-mandated death sentence, returned by a jury that has been presented a materially false and harsher sentencing choice, offends every one of these indicia of community values.

This Court has placed great weight upon legislative judgments as a primary indicator of community values. The judgments of these legislative bodies overwhelmingly reject Pennsylvania's approach.[7] In fact, at the time of Petitioners' conviction and sentencing, only

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[7]Indeed, the Pennsylvania legislature did not require the withholding of information

Pennsylvania, South Carolina and Virginia provided capital sentencing juries the life without parole sentencing option but refused to inform those juries that a life sentence meant life without parole.[8]

Virtually no other death-penalty state follows Pennsylvania's practice. Twenty-one (21) of the other twenty-four (24) comparable states that provide the jury an option between life without possibility of parole and death inform the sentencing jury of the defendant's parole ineligibility, either by instructing the jury to choose between the sentencing alternatives of death and life without parole,[9] or by giving the jury the power to specify whether the defendant should or should not be eligible for parole. This "nearly universal acceptance" that juries should be advised when "life" means "life without parole," "establishes the value to the defendant of this

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concerning parole ineligibility -- that is a court-made rule, initially designed to protect defendants against harsher punishment caused by jury speculation about possible early release from prison.

[8]See VA. CODE § 18.2-10, -31; VA. CODE ANN. § 53.1- 151(B); Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), cert. denied, 112 S. Ct. 88 (1991); O'Dell v. Commonwealth, 364 S.E.2d 491, 507, cert. denied, 488 U.S. 871 (1988). State v. Simmons, 310 S.C. 439, 444, 427 S.E.2d 175, 179 (1993), rev'd, Simmons v. South Carolina, 512 U.S.154 (1994).

[9]ALA. CODE § 13A-5-46(e) (1982); ARK. CODE ANN. § 5-4-603(b) (Supp. 1993); CAL. PEN. CODE §190.3 (West 1988); CONN. GEN. STAT. §53a-46a(f) (West 1985); DEL. CODE. ANN. tit. 11, 4209(a) (1987); 1993 Fla. Sess. Law Serv. 93-406, S.B. 26-B, § 16; FLA. STAT. 775.0823(1) (effective 1/1/94), FLA. STAT. 921.142 (West 1992) & Standard Jury Instructions-Criminal Cases, 603 So.2d 1175, 1205 (Fla. 1992); LA. CODE CRIM. PROC. ANN. art. 905.6 (West Supp. 1993); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1993); N.H. REV. STAT. ANN. § 630:5 (IV) (Supp. 1992); WASH. REV. CODE ANN. § 10.95.030(1), 95.050 (West 1990). Case law in three other states requires that capital sentencing juries be informed whenever a life sentence means the defendant will be ineligible for parole. See COLO. REV. STAT. § 16-11-103(1)(b) (Supp. 1993); ILL. REV. STAT. ch. 38, ¶ 1005-8-1 (Smith-Hurd Supp. 1992); MISS. CODE ANN. § 47-7-3(1)(a) (Supp. 1992). Two of the remaining life-without-parole jurisdictions -- South Dakota and Wyoming -- have not considered the question of whether jurors should be instructed concerning the unavailability of parole. See S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); WYO. STAT. §§ 6-2- 101(b), 7-13-402(a) (Supp. 1992).

procedural safeguard." Beck v. Alabama, 447 U.S. 625, 636-37 (1980). Neither Congress nor *any* state legislature has approved the imposition of a statutorily-mandated death sentence (such as was imposed here) by a jury that had been presented a materially false and harsher choice as to its sentencing options, nor has any state or federal legislature other than Pennsylvania acquiesced in such a practice adopted by the courts in that jurisdiction.

Thus, legislative judgments provide powerful evidence that Pennsylvania's practice of withholding material information concerning the "life without possibility of parole" sentencing option, and its even more narrow practice of mandating in certain instances that death sentences be imposed by a jury that is presented a materially false choice as to its sentencing options, offends the evolving standards of decency that prevail in this Nation, and therefore violates the Eighth Amendment. E.g., Ford v. Wainwright, 477 U.S. at 408 (execution of insane violates Eighth Amendment, in part because no state legislature permits execution of insane); Coker v. Georgia, 433 U.S. at 594 (death penalty for non-homicidal rape of adult woman violates Eighth Amendment, in part because no other state legislature authorizes death penalty in those circumstances).

The sentencing practices employed in Pennsylvania also draw no support from any other of the indicia of community values employed by the courts to assess the constitutionality of a penal sanction under the Eighth Amendment, whether the indicator is the judgments of juries,[10]

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[10] Polling data from the Simmons case reveals that only 7.1% of eligible jurors believed that a person who was sentenced to life would actually spend his entire life in prison -- and therefore that 92.9% of respondents were unaware of the jury's actual sentencing options. Petitioner's Brief, Simmons v. South Carolina, 1993 WL 657673 at *154a, Table 2. Yet, if they were faced with a decision between sentencing a defendant to life or death, 86.8% of the jurors said it would be important to them to know "how much time the person would have to spend in

public opinion,[11] or international law and practices.[12] This Court should grant certiorari to clearly indicate that American constitutional justice has evolved beyond such a practice.

III. THE TRIAL COURT'S FAILURE TO PROVIDE A LIFE WITHOUT POSSIBILITY OF PAROLE INSTRUCTION RESULTED IN A CAPITAL SENTENCING HEARING BEFORE A JURY UNCOMMONLY WILLING TO CONDEMN PETITIONER TO DIE, VIOLATING HIS SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

The Sixth Amendment right to an impartial jury guarantees that a capital defendant not be sentenced before a jury "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, 391 U.S. 510, 521 (1968). The trial court's failure to provide a life without possibility of parole instruction resulted in a sentencing hearing before a jury that: (1) erroneously believed that Petitioner could be released on parole, leading them to incorrectly assume that he would pose a danger to society in the future, and making a death sentence more likely; (2) was prevented by the absence of a "life without parole" instruction from giving full weight to evidence present in the record that might have justified a sentence of life without possibility of parole (but which might not justify a life sentence if parole were a possibility), again making a death sentence more likely; and (3) was provided a materially false sentencing instruction that "would result in harsher penalty

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prison before they would have a chance to be released, if you sentenced them to life imprisonment." Id. at *155a (Table 3).

[11] Pennsylvania practice is squarely at odds with the long-standing position of the American Law Institute that capital sentencing juries should be informed "of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against the sentence of death." See ALI MODEL PENAL CODE § 210.6 (Prop. Off. Draft 1962).

[12] Pennsylvania's death-penalty practices do not draw any support from international law and practices and not one international or regional human rights treaty envisions that death sentences would be imposed by a jury that has based its judgment on a materially inaccurate and harsher view of its sentencing options.

options," Fontenot v. State, 881 P.2d 69, 74 n.2 (Okla. 1994), making a sentence of death more likely.

These factors, individually and cumulatively, resulted in the imposition of a death sentence by a jury that was "oriented impermissibly toward the death penalty even before it began its deliberations," State v. Henderson, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990) (reversing death sentence when information concerning length of defendant's parole ineligibility withheld from jury), overruled on another holding by, Clark v. Taney, 118 N.M. 486, 882 P.2d 527 (1994), and uncommonly willing to condemn him to die. Andre Thompson's death sentence was imposed in violation of the Sixth Amendment, and this Court should grant certiorari to rectify this error.

IV. THE PENNSYLVANIA SUPREME COURT HAS MISAPPLIED SIMMONS V. SOUTH CAROLINA IN NUMEROUS DECISIONS.

Since Simmons was decided, the Pennsylvania Supreme Court has adopted a rigid interpretation of its applicability, holding that "instructions detailing the character of a life sentence are not required where future dangerousness is not expressly implicated." Commonwealth v. King, 554 Pa. 331, 363, 721 A.2d 763, 779 (1998) (emphasis supplied). It then has extremely narrowly interpreted what constitutes an argument for future dangerousness, and has held that a defendant's future dangerousness is not implicated even when the Commonwealth has sought death, *inter alia*, on the grounds that the defendant has a significant history of violent felony convictions. E.g., Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (1995) (no future dangerousness where state sought significant history aggravator and prosecutor argued that a defendant who had been convicted of a murder committed while on parole was a predator on the elderly, and stated, "Make it very clear to Mr. Simmons that you are going to protect society. Death is for sure, but just how long is for life? Be sure, ladies and gentlemen. The penalty should be death."), cert. denied, 516 U.S. (1996); see also Commonwealth v. May, 551 Pa. 286, 710 A.2d 44 (1998) ("aggravating circumstance of appellant's prior record for violent felonies addressed only appellant's past conduct, not his future dangerousness"); Commonwealth v. Rompilla, 554 Pa. 378, 394, 721 A.2d 786, 795 (1998) (same), reversed on other grounds, Rompilla v. Beard, 125 S.Ct. 2456, 73 USLW 4522, decided June 20, 2005.

In this case, the Pennsylvania Supreme Court's holding flies in the face of its own past recognition that "the threat of danger the defendant poses to the community" is "[a]n integral part of the jury's determination whether a defendant should be sentenced to death," Commonwealth v. Chester, 526 Pa. 578, 602, 587 A.2d 1367, 1379 (1991), and that "[t]he essence of parole is release from prison, before the completion of sentence." Commonwealth v. Butler, 458 Pa. 289, 297 n.11, 328 A.2d 851, 856 n.11 (1974) (quoting Morrissey v. Brewer, 408 U.S. 471, 478 (1972)). The decision in this case also flies in the face of this Court's holding that "*Consideration of a defendant's past conduct as indicative of his probable future behavior is . . . inevitable.*" Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (emphasis added).

This Court should grant certiorari to correct the Pennsylvania Supreme Court's misinterpretation of this Court's binding precedent.

V. THE PENNSYLVANIA SUPREME COURT'S REJECTION OF THE SIMMONS INSTRUCTION CREATES A CONFLICT WITH OTHER STATES AND THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT.

This Court should grant certiorari to resolve the conflict between Pennsylvania and States such as Mississippi and New Mexico concerning the inherently mitigating value of informing the jury when a life sentence is without parole, and the effect such information has on the consideration of other relevant mitigating evidence.

In contrast to Pennsylvania, other States (properly) inform a jury when an alternative to death is a life sentence without a possibility of parole. In Mississippi, the Supreme Court has held that "[t]he knowledge that the alternative to death is a life sentence, without possibility of probation or parole is the type of relevant and accurate sentencing information to which our cases speak and which every jury faced with the determination of life or death is entitled to consider." Russell v. State, 607 So.2d 1107, 1118 (Miss. 1992). In New Mexico, the Supreme Court reversed a death sentence when information concerning the length of the defendant's parole ineligibility was withheld from the jury. The court held the jury was "oriented impermissibly toward the death penalty even before it began its deliberations." State v. Henderson, 109 N.M. 655, 659, 789 P.2d 603, 606-07 (1990), overruled on another holding by, Clark v. Taney, 118 N.M. 486, 882 P.2d 527 (1994) (order in which sentences are imposed).

CONCLUSION

This Court should grant certiorari to redress the compelling constitutional violations in this case and to resolve the conflicts among the state and federal appellate courts.

Respectfully submitted,

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Dated: August 1, 2005

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	No. 55, 56, 58/1994
	)	
vs.	)	**VOLUME XIV OF XIV**
	)	
HARVEY MIGUEL ROBINSON	)	

NOTES OF TESTIMONY
SENTENCING HEARING

FILED IN SUPREME COURT
OCT 05 2012
EASTERN DISTRICT

Commencing November 10, 1994
Courtroom No. 5A
Lehigh County Courthouse
Allentown, Pennsylvania 18105

HEARD BEFORE THE HONORABLE ROBERT K. YOUNG, J.

APPEARANCES:

ROBERT L. STEINBERG, ESQUIRE
DISTRICT ATTORNEY
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CARMEN MARINELLI, ESQUIRE
JAMES BURKE, ESQUIRE
-- On behalf of the Defendant

CLERK CRIMINAL-JUVENILE LEHIGH COUNTY, PA
AUG 16 3
FILED IN SUPREME COURT
MAR 18 2002
EASTERN DISTRICT

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Dolores Young, RPR/CM
Official Court Reporter

Lodged 6/30/95 3:45PM CJD

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6/95
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but let's try and get back in an hour, all right?

MR. HAEDRICH: If you don't mind, we would like to stay and listen to the charges and just take us down after.

THE COURT: Fine. We'll do it.

***

(11:46 A.M.).

***

JURY CHARGE

THE COURT: I will do mostly reading this time rather than talking to you too much.

Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment.

The sentence will depend upon your findings concerning aggravating and mitigating circumstances.

The Crimes Code, again, the statute out of Harrisburg, provides that the verdict must be a sentence of death, it must be a sentence of death, if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or if the jury unanimously finds one or more aggravating circumstances which outweigh any of

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the mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. The defendant has the burden of proving mitigating circumstances, but only by a preponderance of the evidence.

Now, I talked to you, I think, last time about what preponderance means, more probably true than not. So, again, to avoid a death sentence, when it's not really necessary and we give a break, in a sense, in the system to the defendant, but the Commonwealth has to prove aggravating beyond a reasonable doubt, but mitigating circumstances only need be proven by the defense by a preponderance of the evidence.

This is a lesser burden of proof than beyond a reasonable doubt. A preponderance of the evidence exists when one side is more believable than the other side.

All the evidence from both sides, including the evidence you heard earlier during the trial in chief -- so all the evidence, not only what you heard the last two days, but the trial evidence as well -- as to aggravating or mitigating

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circumstances is important and is proper for you to consider. So you consider all the evidence in both cases.

As I previously told you, you should not decide out of any feelings of vengeance or prejudice toward the defendant.

We go on as we did in the first trial. Try not to be emotional but we're ferreting out, we're questing for justice, and you're to give logical -- be logical, impartial and fair.

As I previously told you, it is entirely up to the defendant whether to testify and you must not draw any adverse inference from his silence.

The verdict is for you, the members of the jury. Remember and consider all the evidence, giving it the weight, the substance, the value, to which you think it is entitled.

Remember that you are not merely recommending the imprisonment. The verdict you return will actually fix the punishment at death or life imprisonment.

Remember, again, that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the

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verdict of each and every one of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

You will be given a verdict slip upon which to record your verdict and findings.

You will note that paragraph two of the verdict slip requires you to make special findings regarding aggravating and mitigating circumstances if your verdict is death.

If after conscientious and thorough deliberations you are unable to agree on your findings and verdict, you should report that to me.

If, in my opinion, further deliberations will not result in the unanimous agreement on the sentence, it will be my duty to sentence the defendant to life in prison. So if you can't agree, I'll sentence him to life.

I'm going to hand you a sample verdict slip. I'm allowed to do that in this case.

Mr. Ring, would you hand these

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out? See if there are enough.

MR. RING: To the jury?

THE COURT: Yes, each juror gets one of these and counsel, as well, gets one.

MR. BURKE: Thank you.

THE COURT: I'm going to hand you a sample because you'll be actually filling out the sentence here and we'll go over that together.

I've picked Joan Burghardt's, simply because she was the first victim.

MR. RING: I'll give one to counsel.

THE COURT: Yes. The actual verdict slips are in a different format. I felt those were hard to read. So you'll find the same material on these sheets. I have done section -- what's called the first part, section A, first. And section B, second. But you'll find the same material on these.

Let's go over this together. When you are in the jury room, read the verdict slip before you begin to discuss the case.

Do not write anything on the slip unless and until you have finished deliberating and agreed on your sentence.

Use the verdict slip for only

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one thing, to record your sentencing verdict and findings.

As I told you earlier, you must agree unanimously on one of two general findings before you can sentence the defendant to death.

They are a finding that there is at least one aggravating circumstance and no mitigating circumstances or a finding that there are at least one aggravating circumstance and no mitigating circumstances which outweigh the mitigating -- I'm sorry -- or a finding that there are one or more aggravating circumstances which outweigh any mitigating circumstances.

In deciding whether aggravating outweigh mitigating circumstances, do not simply count their number.

Compare the seriousness and importance of the aggravating with the mitigating circumstances.

If you agree -- if you all agree on either one of the two general findings then you can and must sentence the defendant to death.

When voting on the general findings, you are to regard a particular aggravating circumstance as present only if you all agree it is

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present. So on aggravating you must all agree on that.

On the other hand, each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe.

This different treatment of aggravating and mitigating circumstances is one of the law's safeguards against unjust death sentences. It gives a defendant the full benefit of any mitigating circumstances. It is closely related to the burden of proof requirements. Remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt while the defendant only has to prove any mitigating circumstances by a preponderance of the evidence.

If you do not agree unanimously on a death sentence, if you do not agree unanimously on a death sentence, and on one of the two general findings that would support it, then you have two immediate options. You may either continue to discuss the case and deliberate the possibility of the death sentence, or, if you all agree to do so, you may stop deliberating and sentence the defendant to life imprisonment.

If you should come to a point

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where you have deliberated conscientiously and thoroughly and still cannot all agree either to sentence the defendant to death or to stop and sentence him to life imprisonment, report that to me.

If it seems to me that you are hopelessly deadlocked, it will be my duty to sentence the defendant to life imprisonment.

I want to go over the form with you. You've seen it. You'll find there are two sections, again. These will be on eight and-a-half by 11 inch pages but let's go over this. I have filled in the first section.

In the case you have now, I filled in the term number of the case, it's Commonwealth of Pennsylvania v. Harvey Robinson.

In this particular case, 56 was the number given by the Clerk of Courts downstairs in Joan M. Burghardt. And the instructions say to read the entire verdict slip before beginning deliberations.

I have gone over the evidence with counsel and these are the aggravating and mitigating circumstances which I charge you are applicable in this case.

The list is long under the law,

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but these are the ones that I have found are relevant and material in your particular case. Sometimes there are few, sometimes there are more.

But you will see here, the following aggravating circumstances are submitted to the jury and must be proven by the Commonwealth beyond a reasonable doubt. And there are four. Killing while perpetrating a felony. I would comment on that, but because you have found him, the defendant, guilty in each case of the murder and a felony, be it rape or kidnapping or burglary, I believe I can say that the Commonwealth has proven that particular element beyond a reasonable doubt.

Multiple killings. The actual language in the statute is complicated. But we've agreed that multiple killings is more simple, just to say that, than the actual language. That is an aggravating factor. If one killing occurred with others, that's to be considered an aggravating factor. And since you've found three murders happened by this defendant, I would think that that would also have been proven beyond a reasonable doubt.

Number three and four, you have your own decision to make on that. Offense committed by means of torture. You can accept or reject that

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but if you accept it you must be convinced beyond a reasonable doubt.

And I'll read you the definition our Pennsylvania Supreme Court has handed down regarding what constitutes torture.

The Commonwealth must prove that a defendant had a specific intent to inflict unnecessary pain or suffering or both pain and suffering in addition to the specific intent to kill to establish that the offense was committed by means of torture.

So you have already decided by deciding murder of the first degree that there was a specific intent to kill. That was part of the law I gave you about murder of the first degree.

But to find him guilty of torture you must find not only that specific intent to kill but a specific intent to inflict unnecessary pain or suffering or both pain and suffering.

Another aggravating circumstance which you may consider, and make your own determination of, is the significant history of convictions involving violence to persons. If a defendant is found to have a significant history, that is not his first offense, in fact, the law says, a

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mitigating factor would be if it's the first offense, not in this case, but the flip side of that is, if there is a long criminal history, significant history, that becomes aggravating.

Significant will be up to you to decide. It's a word, like reasonable, and so forth. You jurors will tell us. You know his record. You've heard his juvenile record of those felonies which involve violence.

And these convictions don't count if it's a motor vehicle violation and those kinds of things. It's where you have violence involving persons and, so, you'll tell us whether or not that aggravating factor is present and, again, you must be convinced, all of you, beyond a reasonable doubt.

The following mitigating circumstances are submitted to the jury and must be proved by the defendant by a preponderance of the evidence; more probably true than not.

There are three that I'm going to have you consider, but there's a fourth also.

Let's take the first three. The youth of the defendant is such a factor under the Crimes Code. You may -- you must discuss whether that

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is mitigating or not.

Family background and environment may be considered by you to be mitigating or not, again.

And use of alcohol and drugs at the early age and at the older age.

Those are three that the Court has found may or may not be appropriate depending upon your decision.

But it's important that you notice number four, which is any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

And there the law, I think, acknowledges that your job is so difficult, and that we can't categorize everything, they have given you certain categories, but if there's something that you jurors believe is mitigating, that we have not covered, the lawyers and the Judge, you're allowed to put that in -- you must tell us what it is -- and that comes a little later.

But if you have something else, I don't know, I suppose, if you think the disorder that he has is, what's it called -- don't tell me -- antisocial personality disorder, I mean, there are

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things that -- you've heard about his change of religion, I suppose; the no misconducts in prison; those are all things, we can't categorize them all, but if you all agree that something else, that we haven't mentioned, is a mitigating factor that lessens the impact of this, so be it.

You may find such factor, but it must be based upon the evidence that you heard in these two trials. And you're not -- the instructions go on to tell you, you're not to complete the sentencing verdict slip until your deliberations are concluded. The sentencing verdict slip is only to be used to record your sentencing verdict and the findings upon which it is based.

If after sufficient deliberation you cannot unanimously reach a sentencing verdict, do not complete or sign this slip, but return it to the Judge. The Judge will determine if further deliberations are required.

If they are not, the Judge will sentence the defendant to life imprisonment. Now, before you can sentence the defendant to death, let's look at the second part of the slip.

Now, the second half over here is what you fill out. Before you can sentence the

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defendant to death, you must all agree, remember, this is unanimous, you know that.

If one of you decides that you cannot make these findings in this top section, under A and B, then it would be life imprisonment. It takes a unanimous verdict to make it death.

And to make the sentence death, you must all agree on the general finding in either B(1) or B(2). If you all agree on one or more aggravating circumstances, and all agree that there are no mitigating circumstances, then check B(1). And you can see B(1) says, at least one aggravating circumstance and no mitigating circumstance.

And then you tell us the aggravating circumstances unanimously found are, looking at the ones I've listed, there are four there, any one of those -- or two, or three, or four of those -- that you find beyond a reasonable doubt existed, place that on those lines.

At that point, count the aggravating circumstances listed in part B on which you all agree.

If you all agree on one or more aggravating circumstances, and, although one or more of you find mitigating circumstances you all agree

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that the aggravating outweigh the mitigating circumstances, then check B(2).

Now, what that is saying is, you may find one, two, three, four, or none, aggravating factors. And you may find one two, three, or whatever, mitigating factors.

Then the issue becomes, do those aggravating circumstances, balancing those, weighing those, studying those, do they outweigh the mitigating? Or are the mitigating factors more important, more weighty?

So, then, if the aggravating one or two outweigh the mitigating one or two, or three or four, if you don't count them, the value of them, then you may still find the death sentence.

Again, if you do B(2), fill in the blanks, tell us which mitigating, aggravating factors. But if you sign B(2), what you are saying is, although you find mitigating and aggravating, the aggravating outweigh the mitigating. That's how you can do it.

Now, C is the findings on which the sentence of life in prison is based. You can find there are no aggravating circumstances or you could find that the mitigating circumstances are not

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outweighed by the aggravating circumstances; and, then, the mitigating circumstances found by one or more of us are, and list those; and the aggravating circumstances, if any, unanimously found, and you list those. I think that will be helpful.

All right. I have the verdict slips and there will be three separate deliberations. We have three first degree murders.

So, you may not -- you may find certain aggravating circumstances regarding one victim that aren't existing in the other victim.

I threw out torture as -- not to tell you that, but that's the kind of thing or -- sometimes you may find different aggravating circumstances with different victims. So, that's why there are three separate slips.

I think with that, you're ready to deliberate.

MR. STEINBERG: Your Honor, may we approach?

THE COURT: Yes, certainly.

(Whereupon, the following discussion was held on the record at sidebar:)

MR. STEINBERG: There are two things, Judge, that I think --

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THE COURT: Did I miss something?

MR. STEINBERG: Number one is, I don't think you can tell the jury that two of the aggravating circumstances are proven.

THE COURT: I know.

MR. STEINBERG: I think what you can say to them is that there has been testimony concerning all --

THE COURT: I can't direct them that --

MR. STEINBERG: You cannot.

MR. BURKE: No, you can't.

MR. STEINBERG: I think you have to tell them that, "This is up to you."

THE COURT: When I said it, I was bothered about it, too, but it was so clear.

MR. BURKE: Right. They have to consider it again.

MR. STEINBERG: It's not contested and I think by you saying to them that it's been proven, that they're bound, they're going to be obligated to follow it; and you have to tell them that it's for them to determine whether or not those -- any of these have been proven. So I think that's

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important, that that be corrected.

THE COURT: Can I tell them they're idiots if they don't?

MR. STEINBERG: No, you can't say that, Judge.

THE COURT: I'm being facetious.

MR. STEINBERG: I know. With respect to the individual ones themselves, I know we have them listed on the verdict slip but I think there's an obligation on the Court to read to them the statute, for example, on the aggravating, killing committed -- defendant committed killing while in the perpetration of a felony. And I think you have to read that to them.

THE COURT: All right.

MR. STEINBERG: And I think you have to say to them, I will instruct you as a matter of law that rape and kidnapping are felonies, but it is up to you to determine whether it constitutes a felony or not.

THE COURT: All right.

MR. STEINBERG: But I think you have to also explain -- you have explained the committed by means of torture, but what I would indicate to you, with respect to the torture, I don't

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know if defense counsel wants the explanation, it's more than pain and suffering and it's more than the intent to kill. It's pain and suffering which is unnecessarily heinous and cruel.

THE COURT: Right.

MR. STEINBERG: And I would think that defense counsel would actually want that part of the Daniels' definition.

MR. BURKE: No, I don't want that in.

MR. STEINBERG: Showing exceptional depravity?

MR. BURKE: I would go straight with the instructions.

MR. STEINBERG: You're satisfied with the torture instruction as it exists?

MR. BURKE: (No response.)

MR. STEINBERG: What I'm getting at is, the way that Daniels reads is that it is not only intent to kill but it is also the intent to cause pain which is unnecessarily cruel, heinous and atrocious evidencing exceptional depravity.

That adds more to the definition, which I think would probably add more of a burden to prove the torture, but it's your decision.

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I'm just trying to be careful about that.

MR. BURKE: Well, the only problem I have with that case is that it has grounds for confusion with regards to it.

MR. STEINBERG: I am not saying that you do it. All I am pointing out is --

THE COURT: All right.

MR. STEINBERG: -- if I was in your position, I would request it. But if your position -- you are defense counsel. If you say, "No, I don't want it all," I want you to say that on the record.

MR. BURKE: Yes. I find it to be necessarily confusing.

MR. STEINBERG: For the record, Mr. Burke, is it correct that you do not want the Court to explain torture any further?

MR. BURKE: I am satisfied with the <u>Nelson</u> instruction.

MR. STEINBERG: Judge, with respect to the torture, I would tell them that the torture testimony has been limited to Joan Burghardt and Charlotte Schmoyer. I don't believe I presented any torture testimony with respect to Jessica Jean Fortney.

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MR. BURKE: No.

MR. STEINBERG: The other instruction, the defendant has a significant history of felony convictions, it is both -- it's the use or threat of violence to the person, is the way the statute reads.

Now, while you have it on here as significant history of convictions involving violence to the person, it truly is the use or threat of violence to the person and I would just suggest that the Court instruct the jury that way. Tell them that it's a shorthand version.

THE COURT: Yeah. They're all shorthand.

MR. STEINBERG: Right. And, finally, with respect to the multiple killings, it's a shorthand version, but I think the Court has to read subsection 11 which is, the jury has to be satisfied the defendant has been convicted of another murder committed either before or at the time of the offense at issue.

And I think, either that, or number ten has to be read to the jury, which reads, defendant has been convicted of another federal or state offense committed either before or at the time

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of the offense at issue for which a sentence of life imprisonment or death was imposable for, or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. Either 10 or 11 has to be read to them.

I think it's more appropriate to read 11, but the Court may want to read 10 as well. And I think the Court is obligated to actually read the statute to them, even though it is uncontested that there are multiple killings here.

THE COURT: Yeah.

MR. STEINBERG: I don't think you can get around it.

MR. BURKE: There's always a choice, Mr. District Attorney, between ten or 11. It's a semantical difference.

MR. STEINBERG: Right.

MR. BURKE: I don't know if they're going to get caught up in nuances.

MR. STEINBERG: I think 11 is easier to understand; 6, 8, 9 and 11, I think 11 is the one that applies. I would point the Court to 42 Pa. 9714.

MR. BURKE: Yes.

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THE COURT: Okay.

MR. STEINBERG: I would ask the Court to do that. Those are the only things I am concerned about, Judge, but I think the big one I am concerned about is the fact that --

THE COURT: I directed them to find.

MR. STEINBERG: That's right. You can't do that.

MR. BURKE: No.

MR. STEINBERG: -- with all due respect.

THE COURT: No. I was worried about it when I said it but it seemed so obvious.

MR. STEINBERG: Okay.

(Whereupon, the discussion at sidebar concluded.)

THE COURT: Counsel have asked me to read -- what we have in the verdict slip is a shorthand version. I think I had told you this isn't the actual language of the Act.

To be safe, they want me to read the actual language of the aggravating circumstances.

We talked about the -- it says, killing while perpetrating a felony. That's the first

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one. The actual language of the statute says: "The defendant committed a killing while in the perpetration of a felony." So, I'm reading you the long language. I shortened that up to, killing while perpetrating a felony.

In multiple -- I just put down multiple killings. In that one, the defendant has been convicted of another murder committed either before or at the time of the offense at issue. Those are precise words of the law. And they want this on the record, and they're entitled to it.

Offenses committed by means of torture. Here is the actual language of that. Let me read that to you, the actual language of the statute. The offense was committed by means of torture.

Significant history of convictions involving violence to persons. I'll read that to you. The defendant, and these are the statutory language for these aggravating factors, the defendant has a significant history of felony convictions involving the use or threat of violence to the person; such felonies would be the rape or the kidnapping.

Now, I also indicated that you should find, because of the evidence you heard,

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numbers one and two. I really can't direct you to do that. That's your finding to make.

You're on your own as to whether or not multiple killings are a factor and while perpetrating a felony are a factor. Take into consideration what you've already found but I can't direct you to find that. That's up to you, all right?

The torture is limited. I think that Charlotte Schmoyer -- and which was the other one on evidence of torture?

MR. STEINBERG: Joan Mary Burghardt.

THE COURT: Joan Burghardt. I don't think evidence of Jessica Jean Fortney was in on that.

MR. STEINBERG: That's correct, Your Honor.

THE COURT: So we should strike torture from Jessica Jean Fortney's list of aggravating circumstances, okay?

Have I covered what counsel wanted me to cover?

MR. STEINBERG: Just one last thing, Your Honor, and I apologize. Can we just

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approach for the record?

THE COURT: Oh, sure. It's important we do this right.

(Whereupon, the following discussion was held on the record at sidebar:)

THE COURT: What did I miss?

MR. STEINBERG: It's not what you missed, it's what you said.

The significant history of felony convictions would not include the kidnapping or, when we're dealing with the past convictions, we're dealing with the attempted homicide, the rape, the aggravated assault.

So, I think that it becomes important that the jury understands the significant history of the felony convictions involving the use or threat of force deals with his prior --

MR. BURKE: Right, prior record, before the --

MR. STEINBERG: Not to the offenses that they're considering.

THE COURT: Okay.

MR. STEINBERG: I just wanted to be clear with respect to that.

MR. BURKE: Yeah. That's

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correct.

MR. STEINBERG: The only other thing, with respect to, again, with respect to the felony, and I think the Court -- the Court should instruct that rape and kidnapping, for purposes of whether it's in the perpetration of a felony, that rape and kidnapping are felonies.

THE COURT: I thought I said that.

MR. BURKE: I thought you had. You did mention that.

MR. STEINBERG: I didn't hear that, Judge. With respect to the multiple killings, and I know the obvious, Judge, but, what they have to consider is the fact that, if you look at the language in the statute, if I could borrow it for a second, Judge, what they have to understand is that he was convicted -- when they're looking at, the defendant's been convicted of another murder committed either before or at the time of the offense at issue, when they're looking at Charlotte's murder, when they're looking at Charlotte's case, they have to decide whether he's been convicted in Joan Mary Burghardt's and Jessica Jean Fortney's before they consider that that aggravating circumstance applies to Charlotte.

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When they're dealing with Joan Mary Burghardt --

MR. MARINELLI: Um-hum.

MR. STEINBERG: -- they have to consider whether he's been convicted of Charlotte's --

MR. BURKE: Um-hum.

MR. STEINBERG: -- and Jessica Jean's at or about the time. When they're considering Jessica Jean Fortney, they have to consider whether he's been convicted --

MR. MARINELLI: (Nodded affirmatively.)

MR. STEINBERG: -- of Joan Mary's and Charlotte's at or about the time. And I think you've got to explain that to them, Judge.

MR. BURKE: They all interplay.

MR. STEINBERG: They all interplay. In other words, in Charlotte's --

THE COURT: You look at Joan's.

MR. STEINBERG: The multiple killings in Charlotte's case --

MR. BURKE: Yes.

MR. STEINBERG: -- would be Jessica Jean and Joan Mary. With Joan Mary Burghardt's case, the multiple killing aspect would be

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Charlotte's and Jessica Jean's; so on and so forth.

MR. BURKE: Multiple killings, and they don't really have to go back into that. I don't know whether that's semantic. There's not a difference, really.

MR. STEINBERG: If you're willing to waive it, that's fine. I just want to make sure that the record is clear. If you don't want too much emphasis placed upon the fact that --

THE COURT: I think it was clear, but I'll do it again.

MR. BURKE: I thought it was clear and I think if we -- I'm glad that Mr. Steinberg has approached on this, but I don't know about this particular one, with regards to that. I don't know if it's just going to open it up. It doesn't rebound to you in any negative way.

MR. STEINBERG: It may place more emphasis on that than you want.

MR. BURKE: Right.

MR. STEINBERG: And if you're satisfied with the instructions --

MR. BURKE: Yes.

MR. STEINBERG: That's fine. I just, and what I'm doing is, I'm pointing out issues,

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and I think this is important enough --

MR. BURKE: Sure.

MR. STEINBERG: -- that I should be pointing issues out to the Court on this.

THE COURT: Just let the jury go. Are you ready?

MR. STEINBERG: Yeah.

(Whereupon, the discussion at sidebar concluded.)

THE COURT: I think the last point they want me to bring up, I mentioned kidnapping as one of those offenses of the history.

The history of the violence to persons would only include the prior cases so it wouldn't be in that element there.

Okay. I think, with that, we can let the jury go deliberate.

MR. HAEDRICH: Your Honor, we have one question.

THE COURT: Sure.

MR. HAEDRICH: On the life in prison, is that without parole, just so we're sure? Would there be a chance of parole if it was life in prison?

THE COURT: I don't see how I

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can guarantee -- that's the present law. But what if the legislature changes the law? I can't guarantee that. That's the way the law is now.

MR. HAEDRICH: Just so we know, Your Honor.

THE COURT: Who knows two years from now if they'll change the law. I can't tell you.

MR. STEINBERG: Judge, may we approach?

THE COURT: Okay. I must have misspoken somewhere.

(Whereupon, the following discussion was held on the record at sidebar:)

MR. STEINBERG: I think the only instruction the Court can give is, "Life is life."

MR. MARINELLI: Life is life.

MR. BURKE: Yes, Your Honor, that's been the -- you are not allowed to comment on presently.

MR. STEINBERG: All you can say is, "Life means life."

THE COURT: They might change the law.

MR. BURKE: No.

MR. STEINBERG: Not on that

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issue, Judge.

MR. BURKE: I don't think you're going to have any evidence of that.

(Whereupon, the discussion at sidebar concluded.)

THE COURT: I'm to tell you, and it's accurate, "Life is life." There won't be any parole. Life is life.

Okay. Now they're going to go and deliberate and get some lunch.

Mr. Ring, would you collect the verdict slips?

(Whereupon, the verdict slips were retrieved from the jurors.)

THE COURT: Let me have this back. I must take torture off the one.

MR. HAEDRICH: Okay.

(Whereupon, the tipstaves were sworn.)

MR. RING: All rise, please, while the jury leaves the courtroom.

(Whereupon, the jurors were taken from the courtroom at 12:21 to have lunch and begin their deliberations.)

THE COURT: I'll talk to the

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