OCTOBER TERM, 2024

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ROLAND LAIRD,
Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT, S.C.I. SOMERSET, Respondents.

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

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

— CAPITAL CASE —

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INDEX OF APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-9000

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RICHARD ROLAND LAIRD,
Appellant
v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS;
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2:11-cv-01916)
District Judge: Honorable Jan E. DuBois

_____

Argued October 8, 2024
Before: RESTREPO, PHIPPS and FISHER, *Circuit Judges*.

(Filed: February 26, 2025)

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_____

OPINION OF THE COURT

_____

FISHER, *Circuit Judge*.

This is an appeal from a denial of a petition for writ of habeas corpus, under 28 U.S.C. § 2254, raising a *Strickland v. Washington* claim of ineffective assistance of counsel. Over thirty years ago, Defendant-Appellant Richard Laird committed a vicious murder with his friend and co-conspirator,

Frank Chester, ending the life of Anthony Milano, a 26 year-old homosexual man. Twice, Laird was tried for and convicted of first-degree murder and sentenced to death. Throughout the past years, Laird has sought multiple forms of post-conviction relief but presently has only a penalty-phase *Strickland* claim. The claim asserts that Laird's trial counsel was ineffective for failing to retain and present an additional penalty-phase expert witness to address the sexual abuse that Laird suffered as a child. Like the District Court before us, we conclude that Laird's petition fails to entitle him to relief. We, therefore, will affirm.

I.[1]

A. Factual History

1. Laird and Chester Murder Milano

In the early morning hours of December 15, 1987, Milano was brutally murdered in a wooded area in Bristol, Pennsylvania. He was beaten. His neck and throat were slashed numerous times—to the point where his head was nearly severed from his spinal cord. He sustained a hairline fracture to the base of his skull. And he eventually died from aspirating his own blood for between five and ten minutes.

The events leading up to the murder began around 11:30

[1] The state-court record in this case spans over 15,000 pages. As this appeal covers both state and federal litigation, we cite to the state-court record as it appears on this Court's federal appellate docket (Dkt.). We also reference the District Court docket (Dist. Dkt.). For purposes of Factual History, most facts are those underlying Laird's 2007 retrial and first-degree murder conviction, as summarized by the Pennsylvania Supreme Court on direct appeal. *See Commonwealth v. Laird*, 988 A.2d 618 (Pa. 2010).

p.m. on December 14, 1987, when Milano encountered Laird and Chester at the Edgely Inn. Milano had never before met the two men, so a few hours of interaction occurred between the three, during which (as the bartender testified) Laird and Chester taunted Milano about his masculinity—the taunts centered on their contention that he was gay. The men used homophobic slurs to refer to Milano and expressed generalized laments as to the "infiltration" of homosexuals in modern society. A151 ("[Laird] used derogatory terms such as 'fag' when speaking of Milano to others at the bar, and at one point expressed to the bartender that he . . . was 'sick and tired of these people trying to infiltrate us.'"); *see also* Dkt. 116-37, at 216, 243. Laird and Chester also, in apparent mockery, slow danced together while laughing. The bartender warned Milano that the men "were just out to cause some trouble" and that he should leave. Dkt. 116-37, at 214. After about three hours at the bar, Milano, Laird, and Chester left the Inn together, with Milano agreeing to Laird's request to drive him home. After driving around for an hour, Laird and Chester directed Milano to drive into a wooded area, where he stopped along the side of the road and got out of his car.

Once Milano exited the vehicle, physical violence against him began. Chester punched or kicked Milano in the head, knocking him to the ground. Then, Laird jumped on top of Milano, wrestling and pinning him. Using a box-cutter, Laird slashed Milano's shoulder, neck, and throat—severing at least two vertebrae in the process. Milano was found lying face up with his left eye partially open, bruises to his facial area (including a hairline fracture to the skull and flattening of the brain consistent with blunt trauma and brain hemorrhaging), and innumerable slashes on his neck and throat. The cuts were so deep that Milano was nearly decapitated. He aspirated on a tremendous amount of his own blood for five to ten minutes

before he bled to death. His severe and rapid loss of blood was caused and compounded by cerebral trauma. After Laird and Chester slayed Milano, they fled the scene on foot to a nearby friend's house.

2. Laird Attempts to Hide the Murder

The day after the murder, Laird's girlfriend saw him place his blood-covered keychain as well as his previous day's clothing into a plastic bag, which he then discarded in a dumpster in a nearby town. Testimony at trial revealed: Laird kept his box-cutter with him at all times; Laird disposed of his box-cutter in a creek after the murder; Laird asked his girlfriend if she would "be an alibi"; Laird repeatedly advised Chester not to discuss the incident with anyone and he stated, "[N]o evidence, no crime." A10, A152. During the investigation, Chester cooperated with police by giving them permission to intercept his calls with Laird. Laird was recorded suggesting Chester leave town, indicating his intention to "hide until this blows over," recommending ways to pass a polygraph test, commenting on the district attorney's inability to prove a case without evidence, and expressing his belief that criminal homicide is subject to a seven-year statute of limitations. *Id.*

B. Procedural History

On December 22, 1987, two days after the recorded phone call, Laird and Chester were arrested in connection with the killing.

1. The First Trial and Direct Appeals (1988)

In May 1988, Laird was tried for multiple offenses in a joint capital trial with Chester, in the Court of Common Pleas of Bucks County. Both men testified and admitted to being present at Milano's murder, but they each blamed the fatal wounds on the other. The jury found both men guilty of first-

degree murder, second-degree murder, third-degree murder, kidnapping, and other offenses. Laird presented only one witness at the penalty phase, Barbara Parr, his then-girlfriend and the mother of his infant child. Both Laird and Chester were sentenced to death.

On appeal, in March 1991, the Pennsylvania Supreme Court affirmed the convictions and sentences. *Commonwealth v. Chester*, 587 A.2d 1367, 1371–72 (Pa. 1991). The United States Supreme Court denied certiorari. *Laird v. Pennsylvania*, 502 U.S. 849 (1991).

2. Post-Conviction Relief Attempts after the First Trial (1988–99)

Laird filed a collateral attack, seeking post-conviction relief under 42 Pa. C.S. § 9546(d), Pennsylvania's Post Conviction Relief Act (PCRA). From 1993 to 1997, the PCRA Court held multiple evidentiary hearings on Laird's claims, including a contention that Laird's trial counsel had been ineffective in the investigation and presentation of penalty-phase mitigating evidence. Among those who testified were: Laird's younger brother by four years, Mark Laird; neuropsychologist Dr. Henry Dee; and psychiatrist Dr. Robert Fox.

Mark's testimony centered around his and Laird's upbringing. He shared details about the brothers' relationship with their father, Richard Laird Senior, an alcoholic who verbally and physically abused his children and wife. Mark recounted these instances of abuse—abuse he and his brother both endured and witnessed. He described instances where he would walk into a room to discover his father and his brother naked, after which Laird Senior would throw Mark out of the room. Also, Mark testified about the multiple head injuries that Laird suffered as a child.

The doctors' testimonies collectively span hundreds of transcript pages, centering on Laird's mental health—both Dr. Dee and Dr. Fox had previously evaluated Laird, reviewed his records, and interviewed witnesses. Dr. Dee testified about the verbal, physical, and sexual abuse that Laird had suffered and the effects of that abuse on him. He shared that although Laird had not told him which male relative sexually abused him—just that a male relative had—Mark had told him during his interview that the abuser was their father. Dr. Dee explained that Mark did not understand that sexual abuse was occurring when he was a child, but "later understood from [Laird] that [Laird] was forced to perform fellatio on his father many, many times throughout childhood. Up until the age of nine." Dkt. 116-51, at 89. Dr. Dee also testified about Laird's long history of alcohol and substance abuse, which had begun by the time Laird was about nine years old.

Dr. Fox's testimony addressed the same topics as Dr. Dee's testimony. Dr. Fox detailed Laird's mental illness, including his post-traumatic stress disorder (PTSD) and attention-deficit/hyperactivity disorder (ADHD). Like Dr. Dee, Dr. Fox had learned from Mark that Laird Senior sexually abused Laird. Dr. Fox testified that when he had asked Laird, "in the gentlest and least confront[ational] manner possible," whether he had been sexually abused, Laird became "extremely distressed." Dkt. 116-54, at 132–33. In light of Laird's reaction, "this part of [the] interview was relatively brief and curtailed by [Dr. Fox] because [he] didn't want to cause [Laird] distress." *Id.* at 133. Dr. Fox analogized his questioning of Laird about the sexual abuse he endured to "torturing an animal in a cage." *Id.*

Ultimately, Laird's attempts at state post-conviction relief were unsuccessful. In September 1997, the PCRA Court denied relief, and in March 1999, the Pennsylvania Supreme

Court affirmed. *Commonwealth v. Laird*, 726 A.2d 346, 349–51, 357–58 (Pa. 1999) (concluding that the PCRA Court erred in reasoning that none of Laird's penalty-phase claims were cognizable but nevertheless holding that his mitigation-related ineffective-assistance claim lacked merit).

3. Federal Habeas Attempts after the First Trial (1999–2006)

In September 1999, after exhausting his avenues of state-court collateral attack, Laird sought federal habeas relief under 28 U.S.C. § 2254 in the U.S. District Court for the Eastern District of Pennsylvania. Two years later, the District Court granted relief in part. *Laird v. Horn*, 159 F. Supp. 2d 58, 67 (E.D. Pa. 2001). The claims on which relief was granted included a guilt-phase claim and multiple penalty-phase claims. To remedy what the Court determined to be violations of Laird's due process rights, the Court vacated without prejudice Laird's first-degree murder conviction and death sentence but left his other convictions undisturbed. In July 2005, we affirmed, addressing only Laird's guilt-phase claim. *Laird v. Horn*, 414 F.3d 419, 421 n.1, 430 (3d Cir. 2005). We directed that the case be returned to the state court for the Commonwealth to either retry Laird for first-degree murder, followed by a new sentencing hearing, or to sentence Laird on the second-degree murder conviction and remaining charges. *Id.* at 430 n.9. In January 2006, the U.S. Supreme Court denied review. *Beard v. Laird*, 546 U.S. 1146 (2006).

4. The Second Trial (2007–10)

In January and February 2007, the Commonwealth retried Laird for first-degree murder in the Court of Common Pleas of Bucks County. Attorneys John J. Kerrigan, Jr. and Keith J. Williams were appointed to jointly represent Laird, with Kerrigan as lead counsel during the guilt phase and

Williams as lead counsel during the penalty phase. At the time of appointment, both Kerrigan and Williams had been practicing for decades and had previous experience defending capital murder cases. Though the two attorneys split responsibility between the phases of the trial, they "did help out each other in each other's areas." Dkt. 116-35, at 139.

The defense strategy differed from Laird's first trial because Laird elected not to testify during his retrial.[2] Instead, he "admitted to having murdered Milano and sought only to show he could not have formed a specific intent to kill" necessary to convict him of first-degree murder. *Commonwealth v. Laird*, 988 A.2d 618, 631 (Pa. 2010). To prove Laird lacked the requisite mental state, his trial counsel asserted a defense of diminished capacity, which they alleged resulted from combined effects of Laird's extreme intoxication on the night of the offense and his preexisting brain damage.

During the guilt phase, Laird called four expert witnesses to support his defense—Dr. Dee, Dr. Fox, psychiatrist Dr. John O'Brien, and toxicologist Dr. Gary Lage. The testimony mainly concerned Laird's history of alcohol and substance abuse, supporting defense counsel's theory that Laird experienced diminished capacity at the time of the murder. *See* Dkt. 119-1, at 9 (Dr. Lage estimated that Laird's blood-alcohol level at the time of the murder was about 0.45).

[2] Laird's and Chester's testimony from the original trial was read to the jury as part of the Commonwealth's case-in-chief. Partway through the reading of Chester's testimony, the trial judge ordered the testimony be read but not re-transcribed, to which the parties did not object. Therefore, the remainder of Chester's testimony was not transcribed, nor was any of Laird's testimony. Accordingly, we cite to the first trial's transcript when referring to their testimony.

The Commonwealth presented testimony that Laird was not staggering or swaying when he left the bar, nor was he stumbling or slurring his words at his friend's house following the murder. The jury was not persuaded by Laird's defense—it returned a unanimous guilty verdict after less than two hours of deliberation.

In mid-February 2007, the penalty phase began. The Commonwealth relied on the evidence presented during the guilt phase to present two aggravating factors: (1) murder in the course of committing a felony (kidnapping) under 42 Pa. C.S. § 9711(d)(6), and (2) commission of the offense by means of torture under 42 Pa. C.S. § 9711(d)(8). The parties stipulated to the felony aggravating factor because Laird's original conviction on kidnapping was left undisturbed by the federal court's grant of habeas relief.

During the two-day hearing, Laird called six witnesses to support his mitigation case. Three of those witnesses' testimonies are directly relevant to this appeal.

Mark testified about the brothers' shared childhood—recalling in detail the abuse their father inflicted on their mother and them, as well as the events that led to Laird's serious head injuries. He discussed Laird's struggles with alcohol and substance abuse—recounting times when he would go out looking for Laird and find him "shit-faced, either passed out or just sitting there." Dkt. 116-46, at 234–37. Mark also testified about the circumstances surrounding what he later (in adulthood) understood to be their father's sexual abuse of Laird. When asked whether there was sexual abuse going on in the household, Mark responded:

> Yeah. I remember crying because I would be knocking on the door wanting to play with my brother and my father and I wasn't allowed in.

> Of course, they were naked at the time and I didn't really understand it at the time what was going on but I do remember that. I don't know the specifics of what happened. I just remember wanting to go into the room and not understanding why I wasn't allowed in.

Id. at 220–21. When asked whether Mark's relationship with his father or brother changed after this experience, Mark responded: "This was the norm for me, so I didn't notice any difference . . . . Eventually, the beatings and shit got so bad that my mother got the balls to leave him." *Id.* at 231–32.

Dr. Dee and Dr. Fox again testified about Laird's life history and mental impairments and diagnoses. They explained their preparation for Laird's interviews—which included reviewing his school records, military records, and court records—and details of their interviews with Laird's brother, his mother, and Laird himself.

Dr. Fox testified that collecting Laird's history revealed that he "was raised in a very chaotic and abusive family." He explained that he interviewed Laird a decade earlier in 1996, in preparation for Laird's first trial, as well as more recently, the week before the retrial's penalty phase. Dr. Fox noted that what Laird revealed to him during the more recent interview "was, essentially, the same as what he had said to [him] ten years ago." Dkt. 116-36, at 8. For example, the interviews revealed that Laird Senior was "physically, psychologically and sexually abusive to [Laird] and physically abusive and psychologically abusive to [Laird's mother and brother]." *Id.* at 6–7. On direct examination, Dr. Fox testified that the culminating circumstances of Laird's difficult childhood—the abuse, alcohol and drug issues, and head injuries—led him to diagnose Laird with ADHD, PTSD, polysubstance

dependence, mood disorder due to head trauma, alcohol dependence, and extreme mental disturbance. Dr. Fox explained each of these diagnoses in detail, including his opinion of how they affected Laird.

Dr. Fox also testified about the sexual abuse that Laird endured and its effects on him. Dr. Fox answered in the affirmative—both on direct and cross-examination—to the question of whether it was his opinion that Laird was a victim of sexual abuse. On cross, Dr. Fox conceded that Laird was not willing to describe his sexual abuse during his 1996 interview, which lasted "for a long, long period of time [two and a half hours]." *Id.* at 27. At that time, Laird became agitated and responded with "emotionality," *id.*, declining to answer questions about details. This response differed from Laird's more recent interview, during which Laird admitted "that he was sexually abused by his father when he was a boy[,] [describing] that his father [had] forced him to perform oral sexual acts on him." *Id.* at 17. Dr. Fox also answered questions about the psychological effect of abuse on "children who have been systematically abused," like Laird. *Id.* at 29.

Dr. Dee testified about his interviews with Laird, too. Like Dr. Fox, he had interviewed Laird in preparation for the first trial and again, shortly before the retrial's penalty phase began. Dr. Dee's testimony covered the same general topics as Dr. Fox's—noting, "[Laird's] childhood was marked by quite severe abuse of all kinds—physical abuse, emotional abuse and sexual abuse." *Id.* at 59. Regarding the issue of sexual abuse, Dr. Dee testified that Laird told him that a male family member had sexually abused him, but Laird did not disclose the identity of the male family member, Laird Senior. So, Dr. Dee did not learn that Laird's abuser was his father until he later interviewed Mark. Dr. Dee recounted Laird's description of the abuse. Laird Senior would force Laird to perform fellatio, after

which he "would humiliate him and further emotionally abuse [Laird] by telling him he was a filthy, he was a nasty boy, to go wash out his mouth and [he] shouldn't be doing things of that sort, which, of course, is terribly confusing to anybody." *Id.* at 61. While Laird Senior physically and emotionally abused the other members of the family, his sexual abuse was apparently restricted to Laird.

Dr. Dee also testified about the sources he relied on in forming his professional opinion. On cross, he was asked about a part of his interview report where he "noted that . . . Laird had a long[-]smoldering antagonism toward persons identified as homosexuals, and that might have been why [he] fastened upon Anthony Milano." *Id.* at 97–98. Further, the Commonwealth refreshed Dr. Dee's recollection of Dr. David Silverman's report, which Dr. Dee had reviewed when diagnosing Laird. In the report, Dr. Silverman stated that Laird "hated homosexuals." *Id.* at 98. On redirect, Dr. Dee stated about his work as an expert: "[A] significant part of my practice is child welfare cases where children are abused." *Id.* at 107. The defense rested shortly after.

Laird's penalty-phase defense was, like his guilt-phase defense, unpersuasive to the jury, which returned a verdict of death. The jury unanimously found that the Commonwealth had proven the kidnapping aggravating factor but not the torture aggravating factor. At least one juror found the following mitigating factors: physical abuse, sexual abuse, emotional abuse, witness to the abuse of others, psychological consequences of abuse, substance abuse, alcohol abuse, and conduct in prison. The only proposed mitigator that no juror found was that Laird stipulated to having participated in the murder. Still, the jury unanimously concluded that the aggravating factor outweighed the mitigating factors.

In February 2010, the Pennsylvania Supreme Court affirmed Laird's retrial conviction and sentence. *Commonwealth v. Laird*, 988 A.2d 618 (Pa. 2010). In November 2010, the U.S. Supreme Court denied certiorari. *Laird v. Pennsylvania*, 562 U.S. 1069 (2010).

5. Post-Conviction Relief Attempts after the Retrial (2011–Present)

In November 2011, Laird began federal habeas corpus proceedings, which were stayed in March 2012 for Laird to expeditiously exhaust his state court remedies. He initiated proceedings under the PCRA and moved for a stay of execution, which was granted.

a. The Second PCRA Case—Hearing Testimony & PCRA Court Decision

Among Laird's claims was an argument that "trial counsel unreasonably failed to investigate and present compelling mitigating evidence," Dkt. 116-23, at 425, including "testimony from an expert in male sexual abuse," *id.* at 427. According to Laird, such an expert would have "been able to educate jurors on the devastating implications of abuse by a family member[]" and "been equipped to explain how and why men process such abuse and if and when victim[]s are able to reveal the abuse and the identity of the abuser." *Id.* at 427–28. Laird's amended petition notes that he had recently been interviewed by Dr. David Lisak, "a clinical psychologist with almost 25 years of experience in the field of [effects of] childhood physical and sexual abuse on later development, especially in men." *Id.* at 428. Laird said he provided new details of his experience during this interview, including his age during the abuse (five to eleven years old) and that his father would ejaculate into his mouth and routinely anally rape him. The amended petition claims, "To this day, [Laird]

experiences 'body memories' from the abuse, including gag impulses, sharp rectal pain and other tactile memories." *Id.* at 429. Laird argued that, had the jury been provided with these "powerful details" of his life story, there was a reasonable probability that at least one juror would have weighed the aggravating and mitigating factors differently. *Id.* at 425.

From April through September 2012, the Court held multiple evidentiary hearings on Laird's PCRA claims. Several witnesses testified, including Mark, Dr. Lisak, and Williams, among others. Mark's testimony included details of the abuse from his and Laird's childhood. Mark provided one new piece of information about the sexual abuse: He recalled "[p]retty regular" instances "where it would be just [Laird Senior] and [Laird] after a shower, laying there in a towel with an ashtray, a pack of Winstons." Dkt.116-46, at 46. On cross, Mark again conceded that he never actually saw Laird Senior sexually abuse Laird.

Dr. Lisak's testimony reviewed his opinion of Laird's childhood trauma—based on his two meetings with Laird, his interview of Mark, and his analysis of relevant records (including Laird Senior's military records). Mark told Dr. Lisak about the "very routine occurrence" of Laird Senior emerging from his morning shower in a towel and pulling Laird out of the boys' bedroom or telling Mark to get out of the bedroom and closing the door. Dkt. 119-3, at 77. Years later, Mark understood these instances as the routine which preceded Laird's sexual abuse.

Describing his interviews with Laird, Dr. Lisak testified that, when he would begin to ask Laird questions about his sexual history, Laird would turn pale and start sweating; his breathing rate would increase as his body went rigid; and he would avert his gaze. When Dr. Lisak asked about Laird

Senior, Laird responded, "[T]he sick fuck would rub his dick between my cheeks." *Id.* at 93. Laird recounted two routine ways his father would sexually abuse him—one of which was consistent with Mark's description—telling Dr. Lisak that Laird Senior orally and anally raped him for years.

Dr. Lisak explained the methodology he employed while questioning Laird about sexual abuse, which involves "difficult and sensitive information." *Id.* at 81. He testified that, when Laird was interviewed by other experts five years prior in 2007, there was a common understanding among practitioners—Dr. Lisak called it the "dominant culture"—that direct questions would probably not elicit information from a victim of alleged sexual assault. *Id.* at 88–89. Rather than asking point-blank if an individual had been sexually abused, Dr. Lisak's approach was to ask about the person's "sexual history" and "sexual experience." *Id.* at 81. When pressed, Dr. Lisak explained that:

> Most people who were sexually abused don't think of it that way [as assault]. They very often, people who have been severely abused, whether it's sexually or physically, simply don't walk around with that kind of a scheme about what happened to them. So if you ask the question that way, they're quite likely to say no, even though they've had experiences that absolutely were sexual abuse or physical abuse.

Id. at 88–89. Dr. Lisak's opinion was that Laird would have provided more details in response to an indirect form of questioning, had Dr. Lisak been the one to interview him in 2007. *Id.* at 185.

Dr. Lisak also opined about the effects of the abuse on Laird's development. Laird described to Dr. Lisak extreme

feelings of inferiority, as if "something [was] profoundly wrong with him . . . a symptom referred to as internalization." *Id.* at 115. Dr. Lisak testified that these feelings led Laird to develop "a kind of a persona of hyper-masculinity to counter what he really felt about himself." *Id.* Additionally, Dr. Lisak noted that "Laird described a life-long reaction, negative reaction to any touch from a male," to the point where Laird could not even tolerate having a man cut his hair. *Id.* at 201–02.

Attorney Williams's testimony covered his and Kerrigan's qualifications as well as details of Laird's refusal to discuss his allegations of sexual abuse during preparation for the 2007 retrial. Williams explained he had "represented many defendants on capital cases, but [he had] handled the guilt phase[s] in all the other [cases]." Dkt. 116-35, at 139–40. His first experience as penalty-phase counsel was for Laird. Williams testified that, before the retrial, there was "some feeling that there had been sexual abuse, but that . . . Laird was reluctant to talk about it." *Id.* at 156. Then, "the sexual abuse was only an allegation" that Laird "wouldn't even talk to [Williams] about." *Id.* at 158. Still, Williams testified that he looked for further corroborative evidence of the sexual abuse, including by searching for more information about Laird Senior. When asked if he could have hired experts specifically trained in eliciting sexual abuse history, Williams responded:

> I guess, sure. I mean I had experts, I was using the experts I had, I didn't – never crossed my mind to go out and find some new special expert who could more – was more capable of getting under Mr. Laird's skin and finding it out. No, we had experts. I relied on those experts, I relied on what Mr. Laird told me, I relied on what his brother told me, I relied on the other witnesses

> we talked to during the whole investigation.

Id. at 158. Williams noted that "Kerrigan took the lead on the experts because he was using them first in the guilt phase." *Id.* at 168.

Williams also discussed the strategy behind the defense's witness presentation. He explained that Mark's testimony during the 1997 PCRA proceedings was longer than his 2007 penalty-phase testimony because "between the time of the PCRA and the time of trial, Mark Laird was no longer a cooperative witness for us. He really didn't want to be there and was not going to be as forthcoming as he was at the prior hearing." *Id.* at 170. When asked about this same difference in the testimony of Dr. Dee and Dr. Fox, Williams explained that the goal of the guilt phase was to show "some kind of diminished capacity," which required evidence of Laird's history of substance abuse, but the goal of the penalty phase was to show "the abuse and the long-term effects of the abuse." *Id.* at 173–74. Williams also testified that he "didn't want [Dr. Dee and Dr. Fox] on the stand too long" during the penalty phase because the jury had not "believed" them during the guilt phase. *Id.* at 193–94.

In orders entered in May 2012 and August 2013, the PCRA Court denied relief. It determined that Laird failed to show that his trial counsel was unreasonable for failing to retain an additional expert to testify regarding his sexual abuse. The PCRA Court held that Dr. Lisak "uncovered . . . details of physical, emotional, and sexual abuse from [Laird's] father" that were "similar" to what was presented at the penalty phase but altogether not significantly new or different. Dkt. 116-23, at 320. The PCRA Court opined:

> [Laird] also argues that counsel were ineffective in failing to retain an expert to testify regarding

> sexual abuse. [Laird's] current counsel met with a Dr. David Lisak, a clinical psychologist. However, [Laird] assert[ed] no significantly new information or diagnoses that were not presented at the penalty phase. Certainly, doctor after doctor could evaluate [Laird] and likely uncover additional details from [his] past with different theories about how those events in his life impacted him. Nonetheless, trial counsel presented testimony directly from a family member and through two different experts who conducted multiple interviews. The experts presented opinions that [Laird] suffered from physical, sexual, emotional, and psychological abuse, had diagnoses of brain damage, memory impairment, drug and alcohol dependence, ADHD, and PTSD. Trial counsel were not ineffective for failing to present additional details that would have been insignificant considering the evidence as a whole.

Id. (internal citations omitted).

b. The Second PCRA Case—Laird's Appeal & Pennsylvania Supreme Court Decision

In 2015, on appeal, the Pennsylvania Supreme Court affirmed the PCRA Court's denials of relief, and the U.S. Supreme Court denied certiorari. *Commonwealth v. Laird*, 119 A.3d 972, 1012 (Pa. 2015), *cert. denied*, 562 U.S. 1069 (2010).

The Pennsylvania Supreme Court opinion addressed Laird's contention that "an expert such as Dr. Lisak could have described how [Laird Senior's] actions in sexually abusing him over a period of years led to an emotional state that included confusion, self-loathing, guilt, shame, and humiliation." *Id.* at

997. But it did not find persuasive Laird's argument that "there is a meaningful distinction between the 'almost bald assertions of abuse and impairment that jurors heard and a detailed and corroborative narrative that would have been offered by effective counsel.'" *Id.* (quoting Laird's Brief at 20). Instead, the Court held "that the experts who testified at the penalty hearing provided significant, detailed information concerning [Laird's life history]." *Id.* The Court recognized that:

> Dr. Lisak was . . . able to provide some additional perspective concerning the level of vulnerability felt by children who are abused . . . and the tendency of abused boys to deal with such feelings of vulnerability by adopting what the expert termed a hyper-masculine persona as they progress into adolescence. Still, the factual information Dr. Lisak could have supplied about [Laird's] childhood would have been largely cumulative of that provided by Drs. Dee and Fox, as well as Mark Laird, all of whom informed the jury about the nature and severity (and several examples) of the physical and sexual abuse [Laird] suffered at the hands of his father.

Id. at 998 (internal citations omitted).[3]

Though the Court did not agree with the PCRA Court that "Dr. Lisak's testimony would have been 'insignificant,'" it nevertheless did not believe that the testimony would have been reasonably likely to convince a juror to alter the balancing of the mitigating and aggravating factors. *Id.* (rejecting Laird's contention that the aggravating factor of kidnapping is "weak," as kidnapping is a serious crime, which the record amply showed). Thus, the lack of an additional expert did not prejudice Laird. *Id.* at 997–99.

c. The Second Habeas Case—District Court Decision and This Appeal

After the state-court proceedings concluded, Laird's federal habeas case was reactivated. In February 2016, Laird filed an amended habeas petition asserting ten claims for relief. Among them was the same mitigation-related ineffective-assistance claim he had raised in his second PCRA petition. In August 2016, the District Court denied the petition in its entirety and denied Laird's request for a certificate of appealability. *Laird v. Wetzel*, 11-cv-1916 (E.D. Pa. Aug. 19,

[3] Earlier in its opinion, where analyzing another of Laird's claims, the Pennsylvania Supreme Court reviewed Mark's testimony and determined "the essential points regarding the severity of . . . the sexual abuse . . . all formed part of [his] testimony at the penalty hearing." *Id.* at 992. The Court concluded that anything Mark omitted was covered in the testimony of Dr. Fox and Dr. Dee. *Id.* at 993. The jury found seven mitigating factors relating to this information, including "physical abuse; sexual abuse; emotional abuse; witnessed the abuse of others; psychological consequences of abuse; substance abuse; and alcohol abuse." *Id.*

2016) (Dist. Dkt. 52, 53).

In September 2016, Laird filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), which the District Court denied. The District Court concluded that the Pennsylvania Supreme Court had "reasonably" ruled that Laird was not prejudiced by the evidence presented during the penalty phase that described his experience of childhood sexual abuse and its effects. The Court also ruled that trial counsel performed effectively despite not consulting a specialist expert on sexual abuse. In June 2017, Laird filed a notice of appeal.

In March 2020, we partially granted Laird's motion for a certificate of appealability. The sole issue before us is:

> [W]hether counsel was ineffective at the 2007 penalty hearing, in violation of the Sixth Amendment, in failing to present an additional mitigation expert to investigate and diagnose the psychological effects of childhood sexual abuse on male victims and the impact of the sexual abuse inflicted on [Laird] by his own father as it may have related to the murder he committed.

Dkt. 89 at 1–2. We consider only that which appears in the record as relevant to this question.

II.

Our review of this petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), which substantially limits a federal court's power to grant relief on claims adjudicated on the merits by a state court. *See* 28 U.S.C. § 2254(d). A federal court may only consider habeas petitions where a defendant is being held in state custody "in violation of the Constitution or laws or treaties of the United

States." *Id.* § 2254(a). Where a state court has adjudicated the merits of a claim, a federal court cannot grant habeas relief unless the state court's decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(1)–(2); *see also Brown v. Superintendent Green SCI*, 834 F.3d 506, 512 (3d Cir. 2016).

Under § 2254(d)(1), a state court decision is "contrary to" clearly established federal law if the state court "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405, 413 (2000). The petitioner has the burden to "show far more than that the state court's decision was 'merely wrong' or 'even clear error.' The prisoner must show that the state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)) (internal citations omitted).

Under § 2254(d)(2), "a state court decision is based on an 'unreasonable determination of the facts' [where] the state court's factual findings are 'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 281 (3d Cir. 2016) (en banc) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). This review requires us to analyze "whether there was sufficient evidence to support the state court's factual findings." *Id.* Those findings, implicit and explicit, are subject to AEDPA deference. *See* 28 U.S.C. § 2254(e)(1). They are "presumed to be correct" unless the habeas petitioner rebuts

the presumption "by clear and convincing evidence." *Id.*; *see also Lewis v. Horn*, 581 F.3d 92, 111 (3d Cir. 2009).

AEDPA's deferential standard of review applies only to claims adjudicated on the merits in state court. *Cone v. Bell*, 556 U.S. 449, 472 (2009). If a state court decides only part of a federal claim (*e.g.*, only the prejudice component of an ineffective-assistance claim), then only the part ruled on receives AEDPA deference. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam) (applying AEDPA deference to just one element of a court's *Strickland* analysis).

AEDPA's standard is "difficult to meet." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Richter*, 562 U.S. at 102). The high bar "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). A petitioner can overcome AEDPA's high burden only by showing there was no reasonable basis for the state court's decision. *Id.* at 98. In other words, "a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 419–20 (2014) (quoting *Richter*, 562 U.S. at 103).

A federal court may not grant habeas relief simply because it "concludes in its independent judgment that the state-court decision applied a Supreme Court case incorrectly." *Blystone v. Horn*, 664 F.3d 397, 417 (3d Cir. 2011). Nor may the court determine the state court's factual determinations are unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt*

v. Titlow, 571 U.S. 12, 18 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Rather, it "determine[s] what arguments or theories supported or . . . could have supported . . . the state court's decision; and then . . . ask[s] whether it is possible fairminded jurists could disagree" that they are inconsistent with Supreme Court precedent. *Richter*, 562 U.S. at 102. This is "the only question that matters under § 2254(d)(1)." *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)).

AEDPA's deferential standard applies "with full force even when reviewing a conviction and sentence imposing the death penalty." *White v. Wheeler*, 577 U.S. 73, 81 (2015).

III.

Laird's ineffective-assistance claim is governed by clearly established federal law that "consists of the rules for determining when a criminal defendant has received inadequate representation as defined in *Strickland*." *Premo v. Moore*, 562 U.S. 115, 121 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). Under *Strickland*, a habeas petitioner must show (1) that trial counsel's performance fell below an objective standard of reasonableness and (2) that the performance resulted in prejudice. *Glenn v. Wynder*, 743 F.3d 402, 409 (3d Cir. 2014).

The Supreme Court has instructed that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Titlow*, 571 U.S. at 22 (quoting *Strickland*, 466 U.S. at 690). There is "[n]o particular set of detailed rules for counsel's conduct [that] can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions." *Pinholster*, 563 U.S. at 195 (quoting *Strickland*, 688 U.S. at 688–89). So, "[s]urmounting *Strickland*'s high bar is never an easy task."

Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

The Pennsylvania ineffective assistance standard is materially identical to *Strickland*. *Commonwealth v. Pierce*, 527 A.2d 973, 976 (Pa. 1987) (holding that *Strickland* and the Commonwealth's leading case address "identical textual and policy considerations," and in fact "constitute the same rule").

Because the standards created by *Strickland* and AEDPA are both highly deferential, review of an ineffective-assistance claim under AEDPA is "doubly" so. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In the first instance, "the state court was obligated on post-conviction review to view [counsel's] performance deferentially," and then, guided by AEDPA, "we must give wide deference to the state court's conclusions, disturbing them only if the state court unreasonably applied either of the prongs of *Strickland*." *Collins v. Sec'y, Pa. Dep't of Corr.*, 742 F.3d 528, 546–47 (3d Cir. 2014).

A. Jurisdiction

The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. § 1291. When a district court has not held an evidentiary hearing, as it did not here, we exercise de novo review of its habeas decisions, including its application of AEDPA. *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009). We review state-court determinations under the same standard that the district court applied. *Blystone*, 664 F.3d at 416–17.

B. Laird's Claim

Laird argues that his trial counsel were ineffective for unreasonably failing to investigate and present at his 2007 penalty phase compelling mitigating evidence of the sexual abuse that he suffered during childhood as well as the impact

of that trauma on his development and on the offense. He argues that defense counsel's presentation of the evidence failed to convey the magnitude of his abuse, thus failing to connect it to the crime. Laird calls the District Court's ruling "manifestly wrong" and an unreasonable application of *Strickland*. Appellant's Br. 17–18. Although the District Court did not adopt the state court's ruling that testimony of Dr. Lisak's report would have been "cumulative" of the trial mitigation evidence, it nevertheless accepted the Pennsylvania Supreme Court's holding that Laird was not prejudiced because at least one juror found a mitigating factor present. Laird argues that Dr. Lisak's testimony would have dramatically upgraded the mitigation evidence in quality and quantity, potentially causing more jurors to have weighed mitigation more favorably. Therefore, he claims, he was prejudiced by the exclusion of the testimony. He requests that we reverse the District Court's judgment and remand with instructions to grant his petition and vacate his death sentence.

In opposition, the Commonwealth argues that defense counsel's performance did not fall below the standard guaranteed to Laird under the Sixth Amendment. It argues that counsel reasonably investigated by consulting multiple mental health experts who, through their testimony, adequately "present[ed] the evidence of Laird's childhood abuse, including sexual abuse, its effect on his life, and the connection between that abuse and Anthony Milano's murder." Appellee's Br. 22. Further, the Commonwealth contends that the state court's analysis is entitled to our deference, as it reasonably interpreted *Strickland* where it determined that Laird was not prejudiced by counsel's performance. Concluding, the Commonwealth recognizes that although further details of Laird's sexual abuse came to light after his retrial, those details were not sufficiently different from the details already

presented to the jury so as to cause the jury to weigh the mitigating and aggravating factors differently. It requests we affirm.

We will begin our review by addressing which state-court decision requires deference under AEDPA. We will then examine the state-court analyses, which we will determine were reasonable. Finally, we will ask whether fair-minded jurists could disagree as to the Courts' ultimate holdings and will answer in the negative.

1. Last Reasoned Decision

When applying AEDPA deference to a *Strickland* claim, a federal court reviews the "last reasoned" state-court decision that addressed that claim. *Abdul-Salaam v. Sec'y, Pa. Dep't of Corr.*, 895 F.3d 254, 265 (3d Cir. 2018) (quoting *Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008)). This decision is often the state's highest court's opinion, where the petitioner exhausted their claim. However, in Laird's case, the "last reasoned" decision for each *Strickland* prong, respectively, was made by different courts. *See, e.g.*, *Porter*, 558 U.S. at 39–40 (applying AEDPA deference to the lone *Strickland* prong addressed by the state court); *Abdul-Salaam*, 895 F.3d at 266 (same).

The Pennsylvania Supreme Court denied Laird's additional-expert claim on *Strickland*'s prejudice prong, but it did not address *Strickland*'s performance prong. Therefore, its opinion is the "last reasoned" decision for but half of the *Strickland* analysis. *See Laird*, 119 A.3d at 1012; *see also* Dkt. 116-23, at 207 (notice of appeal). In light of the Court's failure to reach the performance prong, Laird asserted—and the District Court erroneously concluded—that this prong ought to be reviewed de novo. Rather, we must move backward in the case timeline to the PCRA Court's decision, which is the "last

reasoned" analysis of the performance prong. The PCRA Court denied Laird's claim on both *Strickland*'s prejudice and performance prongs. Since the performance-prong analysis was not displaced on appeal to the Pennsylvania Supreme Court, it remains intact.

We have previously reviewed different state courts' analyses of *Strickland*'s prongs as the "last reasoned" decisions. In two instances, we were presented with the reverse of this case: we reviewed the PCRA courts' prejudice-prong analyses as the last reasoned decisions because the Pennsylvania Supreme Court only addressed the performance prong. *See Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 597 (3d Cir. 2015); *Bond*, 539 F.3d at 289. There is no compelling reason to distinguish Laird's case from those two.

Our responsibility to adhere to AEDPA remains, regardless of the parties' interpretations. The Commonwealth asserts that AEDPA deference applies, but it does not argue that this deference applies to the PCRA Court's performance-prong analysis, nor does it take issue with the District Court's and Laird's application of de novo review to this prong. However, "[e]very court of appeals to consider the question . . . has held a State's lawyers cannot waive or forfeit § 2254(d)'s standard." *Langley v. Prince*, 926 F.3d 145, 162 (5th Cir. 2019) (en banc); *see also id.* at 162 n.8 (collecting cases). Accordingly, we will review the PCRA Court's performance-prong analysis. While we will not reach the prejudice prong, we recognize the Pennsylvania Supreme Court's analysis to be the last reasoned decision on that prong. AEDPA deference applies to both decisions.

2. Deficient Performance

To establish the first prong of *Strickland*, deficient performance, a challenger must show that "counsel's

representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There is no specific guideline. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105 (internal quotation marks and citations omitted); *accord Strickland*, 466 U.S. at 689 (A court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

In capital cases specifically, counsel must undertake a "thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. "[C]ounsel's general duty to investigate takes on supreme importance . . . in the context of developing mitigating evidence to present to a . . . jury considering the sentence of death . . . ." *Marshall v. Hendricks*, 307 F.3d 36, 99 (3d Cir. 2002) (quoting *Strickland*, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part)). Even so, "strategic choices made after less than complete investigation are reasonable . . . to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (quoting *Strickland*, 466 U.S. at 690–91). As a threshold, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id.* True, "defense counsel should try to discover all reasonably available mitigating evidence, regardless of whether all of that evidence will ultimately be introduced at trial." *Abdul-Salaam*, 895 F.3d at 269 (internal quotation marks omitted). But "[i]n assessing the reasonableness of [counsel's] investigation . . . a court must consider not only the quantum of evidence already

known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

Though any number of hypothetical experts may have been available for the defense, "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. Thus, the question of how much investigation and how many experts were reasonable is, like any other *Strickland* performance inquiry, case- and fact-specific. *Strickland*, 466 U.S. at 688, 690. The selection of an expert witness is an example of counsel's strategic choice that, when made "after thorough investigation of law and facts," is "virtually unchallengeable." *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (quoting *Strickland*, 466 U.S. at 690).

Here, the performance of defense counsel is at issue where they did not retain and present a specialist on childhood sexual abuse—namely, one like Dr. Lisak—in the 2007 retrial penalty phase. Essentially, the PCRA Court determined that Dr. Lisak would have provided no significantly new information or diagnoses that were not presented at the penalty phase. "Certainly," the PCRA Court observed, "doctor after doctor could evaluate [Laird] and likely uncover additional details from [his] past with different theories about how those events in his life impacted him." Dkt. 116-23, at 320. But the PCRA Court faithfully applied *Strickland* in concluding that it was sufficient that "two different experts[,] who conducted multiple interviews [of Laird,] presented opinions that [Laird] suffered from physical, sexual, emotional, and psychological abuse, had diagnoses of brain damage, memory impairment, drug and alcohol dependence, ADHD, and PTSD." *Id.* The testimony of Laird's brother also helped to paint the picture.

Id. In sum, the PCRA Court held that, "Trial counsel were not ineffective for failing to present additional details that would have been insignificant considering the evidence as a whole." *Id.*

This was a merits determination of the claim of ineffectiveness related to experts, and thus § 2254(d) governs our review. As we will now explain, this determination was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Strickland* and its progeny. 28 U.S.C. § 2254(d)(1). Furthermore, in the case before us, it is not possible for fairminded jurists to disagree with the PCRA Court's reasoning. *See Richter*, 562 U.S. at 102. As the U.S. Supreme Court has noted, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 105. Here, we answer in the affirmative.

Laird contends that the omission of Dr. Lisak's testimony meant that a "critical component" of his mitigation case was not presented. He argues that Dr. Lisak would have testified about two "unrebutted fact[s:] that Laird was repeatedly orally and anally raped by his father over a period of years, and . . . that Laird's murder of a man he perceived as gay was linked to his own experience of brutal and horrific sexual abuse." Appellant's Br. 36–37. But those facts would not have been new. Testimony by Mark, Dr. Dee, and Dr. Fox can only be fairly read as indicating to the jury that sexual abuse was a regular occurrence, just as physical abuse was, and that Laird's life history could have been related to the murder. *See, e.g.*, Dkt. 116-24, at 220–21.

The PCRA Court disagreed with Laird, and its analysis

was reasonable. The Court analyzed counsel's preparation for the retrial; noted that the witnesses who testified during the guilt phase provided information and diagnoses no different from what Dr. Lisak would have said; and concluded that Dr. Lisak's additional testimony "would have been insignificant considering the evidence as a whole." Dkt. 116-23, at 320. The record supports this reasoning because, by the time the trial advanced to the penalty phase, the jury had already heard testimony during the guilt phase that Laird "suffered from physical, sexual, emotional, and psychological abuse, had diagnoses of brain damage, memory impairment, drug and alcohol dependence, ADHD, and PTSD." *Id.*

Laird points to no evidence that suggests either Dr. Dee or Dr. Fox believed they were hampered in their ability to interview and evaluate Laird, which would have potentially required defense counsel to seek an additional expert. Even assuming a younger Laird would have trusted a specialist like Dr. Lisak with further details of his abuse, these details still would not have presented anything new or different—they would have been, as the Pennsylvania Supreme Court concluded, "largely cumulative." *Laird*, 119 A.3d at 997–98.

The PCRA Court recognized defense counsels' presentation of several types of mitigating evidence as a strategic choice they made to counteract and downplay the weight of the two serious aggravating circumstances that were on the table: kidnapping and torture. But Laird argues that Williams's decision to not retain a specialist was not strategic—Williams admitted it did not cross his mind to find a specialist more capable of eliciting further details of the sexual abuse.

Such an argument ignores that Laird was the only source that could provide additional information about his own

sexual abuse, and Laird likewise was the only limitation on defense counsel's ability to uncover information. For example, there are no records from any school, medical facility, mental health facility, court proceeding, or police investigation to corroborate or detail Laird's sexual abuse that counsel failed to uncover. Mark was the only witness who corroborated that Laird was sexually abused, and he could only testify as to indicia of abuse, the significance of which he did not understand until he was an adult. Laird himself never testified at the PCRA hearings that followed the retrial, so there was no first-hand support for the notion that he would have revealed more information in 2007, had counsel retained a different type of expert who would have employed different techniques. Laird's claim that he would have been more willing to share details of his abuse with a special expert is merely one-sided speculation. As our sister circuits have recognized, complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of what a witness would have testified to are largely speculative. *See, e.g.*, *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007); *Wallace v. Lockhart*, 701 F.2d 719, 727–28 (8th Cir. 1983). Crediting this kind of second-guessing would allow hindsight to improperly undermine trial strategy decisions.

Laird's case is distinguishable from the ones cited in his briefing. In those cases, there were gaping holes in the mitigation investigations. For example, *Rompilla v. Beard* requires capital counsel "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." 545 U.S. 374, 377 (2005). Laird's counsel did just this—they presented a thorough mitigation case, as evidenced by the jury's finding of seven mitigating factors. They not only presented evidence of Laird's good character in

prison but also relied on all relevant records; the testimony of the only living family member who could attempt to corroborate the sexual abuse; and two expert witnesses who testified about Laird's abusive childhood and its impact. Furthermore, counsel argued in closing that the very fact that Laird and his brother only reluctantly discussed their painful history proved the abuse occurred. This was a reasonable trial strategy to counter the suggestion that the sexual abuse had been belatedly fabricated.

Other cases where we have concluded counsel was ineffective concern behavior far below the level exhibited by Laird's trial counsel. Counsel were ineffective in the presentation of mitigation evidence where they performed only a cursory investigation, failing to acquire available records regarding the defendant's background. *Outten v. Kearney*, 464 F.3d 401, 415–18 (3d Cir. 2006). Counsel were ineffective for failing to obtain school and juvenile court records, failing to interview family members with documented mental health issues, and failing to obtain any expert testimony at all regarding the defendant's mental health. *Abdul-Salaam*, 895 F.3d at 268; *Rompilla*, 545 U.S. at 382. We have even found counsel ineffective for failing to timely prepare for the penalty phase. *Jermyn v. Horn*, 266 F.3d 257, 306–08 (3d Cir. 2001) (counsel was ineffective where they had only two years of legal experience, did nothing to investigate and corroborate allegations of abuse through readily-available witnesses and documentary evidence, and did not begin preparation for the penalty phase until the night before). Williams's and Kerrigan's performance is simply not comparable to those cases.

If we were to adopt Laird's argument, we would pervert the *Strickland* standard by impermissibly raising the bar for counsel effectiveness. Holding Williams's performance to be

ineffective would essentially ensure that no trial counsel can ever be effective enough, as there may always be other experts who could prompt survivors to reveal more information about their sexual abuse. In fact, our sister circuits have cautioned against the dangers of this very type of hindsight. *See Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) (stating that the "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial").

We will not second-guess the state court's legitimate reasoning. "[W]hen the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that 'could have supported' the state court's decision." *Dennis*, 834 F.3d at 283. Likewise, "[w]e will not gap-fill when the state court has articulated its own clear reasoning." *Id.* at 284. Here, the PCRA Court articulated its reasoning clearly. We defer to the PCRA Court's review of the performance prong because it faithfully applied *Strickland* to the merits of Laird's claim and reasonably concluded that Williams's decision to not hire an additional expert for the penalty phase was strategic. Considering the totality of the circumstances, viewed "[u]nder the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard," *Knowles*, 556 U.S. at 123, we agree. The PCRA Court's application of *Strickland*'s performance prong was not contrary to, nor an unreasonable application of, federal law articulated by the U.S. Supreme Court.

3. Prejudice

Even where counsel's performance was objectively unreasonable, we do not set aside a state-court criminal judgment unless the error had an effect on the trial's outcome.

Both prongs of *Strickland* must be met for a petitioner to receive relief for an ineffective-assistance claim. *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 938 (3d Cir. 2019). Logically, prejudice is absent where counsel's performance did not objectively fall short of professional standards. In Laird's case, because the PCRA Court's *Strickland* performance prong analysis was reasonable and is subject to our deference, we need not address the Pennsylvania Supreme Court's ruling on the prejudice prong.

IV.

We are not callous about the anguish caused by a traumatic upbringing like Laird's. Nor do we forget the anguish of Anthony Milano, who unfairly bore the brunt of what can only graciously be considered a gruesome and altogether avoidable manifestation of that trauma. Grave circumstances aside, "the only question that matter[ed]" here, *Lockyer*, 538 U.S. at 71—the only one the law authorizes us to consider—is whether the Pennsylvania courts left a Sixth Amendment violation unaddressed by wrongly applying federal law. They did not, and jurists of reason would not disagree. *See Miller-El*, 537 U.S. at 327; *Strickland*, 466 U.S. at 687.

For these reasons, we will affirm the District Court's denial of the habeas petition.

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

RICHARD ROLAND LAIRD, **Petitioner,** **v.** **JOHN E. WETZEL, Acting Secretary, Pennsylvania Department of Corrections, LOUIS FOLINO, Superintendent of the State Correctional Institution at Greene, MARIROSA LAMAS, Superintendent of the State Correctional Institution at Rockview, THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,** **Respondents.**	**CIVIL ACTION** **NO. 11-1916**

M E M O R A N D U M

DuBois, J. **August 18, 2016**

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I. INTRODUCTION

This is a habeas corpus case brought by a state prisoner, Richard Laird, under 28 U.S.C. § 2254. After obtaining habeas relief in this Court, which was upheld on appeal by the United States Court of Appeals for the Third Circuit, Laird was re-tried for first-degree murder in the Court of Common Pleas of Bucks County, Pennsylvania. The jury found Laird guilty of first-

degree murder and returned a verdict of death. The matter is before the Court at this time on Laird's second Petition under 28 U.S.C. § 2254.

Presently before the Court is Laird's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he claims that his second trial and sentencing violated his constitutional rights. For the reasons that follow, his petition is denied and dismissed.

II. BACKGROUND

A. History of Laird's Prior Conviction[1]

On May 19, 1988, petitioner and his co-defendant Frank Chester were convicted of, *inter alia*, first degree murder and kidnapping in relation to the death of Anthony Milano on December 15, 1987. The jury returned a verdict of death against both defendants on May 21, 1988. On July 19, 1989, the trial court sentenced petitioner to death on the first degree murder charge and to a "consecutive sentence of not less than 10 nor more than 20 years" on the kidnapping charge. Petitioner was not sentenced in connection with any of the other crimes for which he was convicted: second and third degree murder, aggravated assault, unlawful restraint, false imprisonment, conspiracy, and possession of an instrument of crime.[2]

Petitioner's direct appeals and petitions for collateral review of his conviction and sentence were denied, first by the Court of Common Pleas of Bucks County and then by the Pennsylvania Supreme Court.

In 1999, petitioner filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 in this Court. By Memorandum and Order dated September 5, 2001, this Court granted that

[1] The Court's Memorandum and Order dated September 5, 2001 granting Laird's first petition for habeas relief under 28 U.S.C. § 2254 contains a more extensive explanation of this history. *See Laird v. Horn*, 159 F. Supp. 2d 58, 68-69 (E.D. Pa. 2001).

[2] *See Laird v. Horn*, 414 F.3d 419, 430 n.9 (3d Cir. 2005) (explaining that, if a conviction was obtained after retrial, Laird could be sentenced "on the remaining charges that he was convicted of" in his first trial).

petition in part on the grounds that (1) there was a reasonable likelihood that the jury applied the trial court's accomplice liability instructions in a way that relieved the prosecution of establishing beyond a reasonable doubt that petitioner harbored a specific intent to kill; (2) petitioner's right to a fair trial and sentencing was violated when he was forced to wear shackles and handcuffs visible to the jury; (3) there was a reasonable likelihood that the jury applied the trial court's mitigating circumstance instruction in a way that precluded them from considering constitutionally relevant evidence; and (4) defense counsel's failure to conduct any investigation into petitioner's background and many possible sources of mitigating evidence at sentencing was objectively unreasonable and resulted in prejudice. *Laird v. Horn*, 159 F. Supp. 2d 58 (2001). This Court vacated Laird's first degree murder conviction and death sentence without prejudice to the right of the Commonwealth of Pennsylvania to re-try Laird for first degree murder and, if he was found guilty, to seek the death penalty again at sentencing. *Id.* By Opinion and Order dated July 19, 2005, the United States Court of Appeals for the Third Circuit affirmed the judgment of this Court. *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005).

B. <u>Factual Background</u>

Petitioner was re-tried in January and February of 2007 in the Court of Common Pleas of Bucks County. The facts underlying petitioner's current first-degree murder conviction, as summarized by the Pennsylvania Supreme Court on direct appeal, *Com. v. Laird*, 988 A.2d 618, 625-627 (Pa. 2010), are as follows:

At 11:30 p.m. on December 14, 1987, the victim, Anthony Milano, drove to the Edgely Inn in Bristol Township, a bar where Laird and Chester were drinking and playing pool. Milano had never met Laird or Chester prior to that evening. During the next three hours, Milano, Chester, and Laird drank alcohol and conversed together. The bartender testified that, at some

point, Laird and Chester began taunting Milano concerning his masculinity because they believed he might be homosexual. In this respect, Laird used derogatory terms such as "fag" when speaking of Milano to others at the bar, and at one point told the bartender that he (Laird) was "sick and tired of these people trying to infiltrate us." Nevertheless, Milano agreed to give Laird and Chester a ride home. Multiple witnesses testified that, during this time, and throughout the ensuing events, Laird seemed coherent, was able to stand without swaying, and was not slurring his speech. Laird, Chester, and Milano ultimately left the Edgely Inn just before 2:30 a.m. on December 15, with Milano driving his car and Chester and Laird supplying directions.

Approximately one hour later, the three individuals, still in Milano's car, proceeded to a wooded area of the township, stopped along the side of the road, and exited the vehicle. Chester then punched or kicked Milano in the head several times, causing him to fall to the ground. Laird jumped on top of Milano, pinned him to the ground, and killed him by slashing his throat repeatedly with a box-cutter. Laird and Chester ran toward the home of a friend, Rich Griscavage. En route, Laird took off his shirt, wiped blood from his jacket with it and discarded it. Upon arriving at Griscavage's house, Chester and Laird were visibly agitated. Chester told Griscavage that they had gotten into a fight with someone and "the dude is dead," whereupon Laird interrupted and instructed Chester not to discuss the matter. Soon thereafter, Griscavage gave Laird a ride home on the back of his motorcycle. He testified that Laird did not have any trouble keeping his balance or leaning into turns, so that the ten-minute motorcycle ride was uneventful.

Later that day, Laird's girlfriend observed Laird place his keychain, which was covered with blood, as well as all of the clothing he was wearing when he arrived home, into a plastic

bag, which he then discarded in a dumpster in a nearby town. She testified that he always carried his box-cutter with him, but that he disposed of it after the murder by throwing it into a creek. Additionally, Laird asked her if she could "be an alibi," repeated his instruction to Chester not talk to anyone about the incident, and stated, "no evidence, no crime." Finally, the Commonwealth introduced a tape recording and transcript of a consensually intercepted telephone call between Chester and Laird on December 20, 1987. During the call, Laird suggested that Chester leave town, stated his intention to "hide until this blows over," recommended ways of passing a polygraph test, commented on the district attorney's inability to prove a case without evidence, and expressed his belief that criminal homicide is subject to a seven-year statute of limitations. Two days later, Laird was arrested at a motel in Falls, Pennsylvania.

Laird presented at trial substantial expert testimony of a diminished capacity defense based on his alleged inability to form a specific intent or to remember the murder. This evidence included opinion testimony that petitioner's blood-alcohol content on the night of the murder would have been approximately 0.45 percent (more than eight times the legal limit), that he had organic brain damage and was addicted to drugs and alcohol, which impaired his ability to plan and execute a course of action and to behave rationally, and that he had no present memory of the crime.

The jury in Laird's second trial rejected the diminished capacity defense and found him guilty of first-degree murder on February 9, 2007. After hearing evidence presented during the penalty phase, which lasted two days, the jury returned a verdict of death.

C. Procedural History of the Current Petition

Laird's conviction and sentence were upheld by the Pennsylvania Supreme Court on April 9, 2010. The United States Supreme Court denied Laird's petitioner for writ of *certiorari* on November 29, 2010.

On March 17, 2011, petitioner filed a Motion For Appointment of Federal Habeas Corpus Counsel and Leave to Proceed In Forma Pauperis in this Court. By Order dated March 24, 2011, the Court granted petitioner's Motion and appointed the Federal Community Defender Office for the Eastern District of Pennsylvania to represent Laird and allowed counsel 180 days to file a petition for writ of habeas corpus. On that same date, petitioner filed an Emergency Motion for Stay of Execution, which the Court granted by Order dated April 19, 2011.

On November 3, 2011, petitioner filed a Petition for Writ of Habeas Corpus in this Court. On February 21, 2012, petitioner filed a Motion to Stay Federal Habeas Corpus Proceedings and for Federally Appointed Counsel to Pursue and Complete Exhaustion in State Courts. By Order dated March 8, 2012, the Court granted the Motion to Stay and ordered the Federal Community Defender Office to expeditiously exhaust all state court remedies and move to have the matter returned to the court's active docket within thirty days after exhaustion of all such remedies.

On March 23, 2011, petitioner initiated post-conviction proceedings under the Pennsylvania Post-Conviction Relief Act ("PCRA") in the Court of Common Pleas of Bucks County and moved for a stay of execution, which was granted. On September 19, 2011, petitioner filed his PCRA petition. The Court of Common Pleas held an evidentiary hearing on May 23, 24, June 19, and September 14, 2012. That court denied the petition for PCRA relief by Order dated August 7, 2013 and issued an opinion explaining the grounds for the denial on April 4, 2014.

On September 3, 2013, petitioner timely appealed the denial of his PCRA petition to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed the denial of post-conviction relief on all claims by Opinion and Order dated July 20, 2015.

On October 7, 2015, petitioner filed a Motion to Reactivate Case in this Court pursuant to the Order dated March 8, 2012. The Court granted the Motion in part by Order dated October 16, 2015. Petitioner filed a Consolidated Petition for Writ of Habeas Corpus and Supporting Memorandum of Law on February 19, 2016. Respondents filed a Response on April 19, 2016, and Petitioner filed a Reply on June 24, 2016.

III. LEGAL STANDARDS

A. Exhaustion and Procedural Default

1. The Exhaustion Requirement

A federal writ of habeas corpus may not be granted to a person incarcerated pursuant to a state court judgment unless he or she has first exhausted the remedies available in state court. As amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 provides that "[a]n 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. . . ." 28 U.S.C. § 2254(b)(1).

To satisfy this exhaustion requirement, the petitioner must "afford each level of the state courts a fair opportunity to address the claim," *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996), *abrogated on other grounds by Beard v. Kindler*, 558 U.S. 53 (2009), by fairly presenting "the 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,'" *Harmon v. Lamar*, No. 13-3762, 2016 WL 521084, at *3 (3d Cir. Feb. 10, 2016) (*quoting McCandless v. Vaughn*, 172 F.3d 255, 261 (3d

Cir. 1999)). "It is not enough that all the facts necessary to support the federal claim were before the state courts," *Anderson v. Harless*, 459 U.S. 4, 6 (1982), and "'mere similarity of claims is insufficient to exhaust,'" *Bronshtein v. Horn*, 404 F.3d 700, 725-26 (3d Cir. 2005) (*quoting Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam)). Rather, the petitioner must demonstrate that "the claim brought in federal court [is] the substantial equivalent of that presented to the state courts. Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts." *Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989) (citations omitted), *cert. denied*, 493 U.S. 1036 (1990).

The Third Circuit has observed that a petitioner can present a federal claim in state court through, for example, "(a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Nara v. Fran*k, 488 F.3d 187, 198 (3d Cir. 2007), *as amended* (June 12, 2007) (citing *McCandless*, 172 F.3d at 260).

2. Procedural Default

Even if a petitioner did not present a claim to the state courts, that claim may nevertheless be exhausted if "(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." 28 U.S.C. § 2254(b)(1)(B). *See also Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006) ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (explaining that the second exception applies when "corrective process is so clearly deficient as to render futile any effort to obtain relief"). "A habeas petitioner who has defaulted his federal claims in

state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

However, "[w]hen a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court" because it is procedurally defaulted. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred. . . .").

The same is true when a claim is unexhausted but some independent state procedural rule bars the petitioner from returning to state court to exhaust the claim. In this case, the state procedural rule that would prevent petitioner from returning to state courts to litigate any unexhausted claims in his federal petition is the statute of limitations on post-conviction relief under the PCRA, which requires any post-conviction petition to be filed within one year of when a defendant's conviction becomes final. 42 Pa.C.S. § 9545(b)(1); *Keller v. Larkins*, 251 F.3d 408, 415–16 (3d Cir. 2001) (explaining that federal claims unexhausted in Pennsylvania state courts are procedurally defaulted because of the one-year PCRA statute of limitations).

Although procedurally defaulted claims are barred as a general rule, a federal court may reach such claims upon a showing of cause and prejudice or a fundamental miscarriage of justice. *Id.* As explained by the Third Circuit, "claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner establishes cause and prejudice or a fundamental miscarriage of justice to excuse the default." *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001) (internal quotation marks omitted) (citing *Coleman*, 501 U.S. at 731).

To establish "cause" for procedural default, "the petitioner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Werts v. Vaughn,* 228 F.3d 178, 193 (3d Cir. 2000) (quoting *Murray v. Carrier,* 477 U.S. 478, 488 (1986)), *cert. denied*, 532 U.S. 980 (2001). A petitioner can show cause by demonstrating, for example, "a factual or legal basis for a claim was not reasonably available to counsel or. . . interference by government officials sufficient to make compliance [with the state procedural rule] impracticable." *Id.* at 193 (citing *Murray,* 477 U.S. at 488).

To show "prejudice," the petitioner must prove "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170 (emphasis in original). "This standard essentially requires the petitioner to show he was denied 'fundamental fairness' at trial." *Werts,* 228 F.3d at 193.

Finally, "[t]o show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime, by presenting new evidence of innocence." *Keller,* 251 F.3d at 415-16 (3d Cir. 2001) (internal citation omitted) (citing *Schlup v. Delo,* 513 U.S. 298, 316 (1995), *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)).

B. <u>Independent and Adequate State Grounds</u>

Default can also occur independently of exhaustion. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner 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." *Coleman v. Thompson,* 501 U.S. 722, 750 (1991).

"A state rule provides an independent and adequate basis for precluding federal review of a claim if the rule speaks in unmistakable terms, all state appellate courts refused to review the petitioner's claims on the merits, and the state courts' refusal was consistent with other decisions, that is, the procedural rule was consistently and regularly applied." *Albrecht v. Horn*, 485 F.3d 103, 115 (3d Cir. 2007) (internal alterations and quotation marks omitted) (quoting *Doctor v. Walters*, 96 F.3d 675, 683–84 (3d Cir. 1996)). *See generally* James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 26.1 (7th ed. 2016) (discussing the criteria used to determine whether a state procedural rule constitutes an independent and adequate state ground). Such a rule is independent "when resolution of the state procedural law question [does not] depend[ ] on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

However, a state procedural rule will not bar federal review of a habeas claim unless that rule was firmly established and regularly followed at the time the default occurred. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991) (holding that "an adequate and independent state procedural bar to the entertainment of constitutional claims must have been firmly established and regularly followed by the time as of which it is to be applied" in order to preclude federal habeas review (internal quotation marks omitted)); *Doctor*, 96 F.3d at 684 ("A state rule is adequate only if it is 'consistently and regularly applied.'" (quoting *Johnson v. Mississippi*, 486 U.S. 578, 587)). "As such, in determining whether a particular state rule is independent and adequate, the Court must identify the state procedural rule, ascertain the time at which the alleged default occurred and then decide whether the rule was firmly established and regularly and consistently applied at the time the alleged default occurred." *Laird v. Horn*, 159 F. Supp. 2d 58, 74 (E.D. Pa. 2001).

C. Application of 28 U.S.C. § 2254

Once a federal habeas court determines that a petitioner has exhausted state remedies and that a claim is not procedurally defaulted, the court must determine whether the claim was adjudicated on the merits in state court. "[T]he distinction between claims that have been so adjudicated and claims that have not been means the difference between highly deferential review and de novo review." *Collins v. Sec'y of Pennsylvania Dep't of Corr.*, 742 F.3d 528, 544 (3d Cir.), *cert. denied sub nom. Collins v. Wetzel*, 135 S. Ct. 454 (2014).

"For the purposes of Section 2254(d), a claim has been 'adjudicated on the merits in State court proceedings' when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance, rather than on a procedural, or other, ground." *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009), *as corrected* (July 15, 2009) (clarifying that the adjudication "can occur at any level of state court"). Moreover, "the Supreme Court [has] held that qualification for AEDPA deference 'does not require citation of our [federal] cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state court decision contradicts them.'" *Priester v. Vaughn*, 382 F.3d 394, 398 (3d Cir. 2004) (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)).

In the event that a claim was not adjudicated on the merits by the state courts, the District Court exercises "pre-AEDPA independent judgment." *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000); *see also* 28 U.S.C. § 2254(d) (limiting the grant of the writ "with respect to any claim that was adjudicated on the merits in State court proceedings"). This requires the federal court to "conduct a de novo review over pure legal questions and mixed questions of law and fact. . . However, § 2254(e)(1) still mandates that the state court's factual determinations are

presumed correct unless rebutted by clear and convincing evidence." *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010) (citation omitted) (internal quotation marks omitted).

If the state court resolved the issue on the merits, the federal court reviews that decision with deference. Section 2254(d) forecloses relief unless the state court's "adjudication of the claim [on the merits]—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court, interpreting § 2254 as amended by AEDPA, explained that the "contrary to" clause implicates two different types of cases. Specifically, "a federal habeas court may grant the writ if the state court [1] arrives at a conclusion opposite to that reached by this Court on a question of law or [2] if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413.

Under the "unreasonable application" clause, a federal court may grant habeas relief when the state court identifies the correct legal principle from the decisions of the Supreme Court, but unreasonably applies that principle to the facts of a particular case. *Id.* "A state determination may [also] be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000).

The Supreme Court distinguished between incorrect application and unreasonable application of federal law in *Williams*, concluding that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. When inquiring into whether the application of law was unreasonable in a particular case, the federal habeas court should "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. In determining whether the state court applied Supreme Court precedent reasonably, habeas courts may consider the decisions of the lower federal courts. *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999) ("[T]he primary significance of the phrase 'as determined by the Supreme Court of the United States' is that federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed."), *cert. denied sub nom. Matteo v. Brennan*, 528 U.S. 824 (1999). "In essence, § 2254(d)(1) 'demands that state-court decisions be given the benefit of the doubt,' and the Supreme Court has cautioned lower courts against any 'readiness to attribute error' by failing to 'presume that state courts know and follow the law.'" *Sawyer v. Superintendent Muncy Sci*, 619 F. App'x 163, 169 (3d Cir. 2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)), *cert. denied sub nom. Sawyer v. Smith*, 136 S. Ct. 1173 (2016).

D. Ineffective Assistance of Counsel Claims under *Strickland v. Washington*

Ineffective assistance of counsel claims are analyzed in two parts. "First, the defendant must show that counsel's performance was deficient," meaning that it "fell below an objective standard of reasonableness" under all the circumstances, including "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A court considering a claim

of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). "Second, the defendant must show that [counsel's] deficient performance prejudiced the defense," which requires the defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687, 694.

Strickland itself poses a high bar, but "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington*, 562 U.S. at 105. "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Against this doctrinal backdrop, the Court now turns to the merits of petitioner's claims.

IV. DISCUSSION

A. Guilt Phase Claims

1. Jury Selection and Change of Venue (Claim VIII)

Petitioner contends that his Sixth Amendment right to a fair trial by a panel of impartial jurors was violated when the trial court seated jurors who "were exposed to relentless pretrial publicity" that disclosed that petitioner had previously been convicted and sentenced to death for killing Anthony Milano, and characterized "the case as a hate crime due to the victim being a homosexual." Consolidated Petition for Writ of Habeas Corpus and Supporting Memorandum of Law ("Pet.'s br."), at 128-29. Three months before trial began, petitioner's trial counsel moved to change venue, arguing that was necessary in order to avoid a jury pool unfairly prejudiced by

media coverage of the crime. The trial court denied this motion on the ground that there was insufficient evidence of overwhelming pretrial publicity at that point in time, but said that it would allow defense counsel to renew the motion closer to the trial date.

Trial counsel never renewed the motion for change of venue despite the fact that several articles were published after the initial denial of the motion, one prospective juror told the trial court "that she had heard other members of the jury panel discussing newspaper articles about the case" during jury selection, and a seated juror (Juror #12) told the trial court that he heard from a co-worker, who had attended high school with petitioner, that the case was "gruesome." Pet.'s br. at 130. During *voir dire*, however, trial counsel did submit as evidence of potentially prejudicial publicity two news articles published around the time that jury selection began. Pet.'s br. at 133-34.

Petitioner claims that his trial counsel's failure to renew the motion for change of venue was unreasonable and prejudicial under *Strickland*. Pet.'s br. at 136-37. During the post-conviction hearing, petitioner's attorneys testified that they did not renew the motion during jury selection because, under the circumstances, they did not believe that it would be granted and therefore continuing to litigate the motion would have been a "waste of time." N.T. May 23, 2012 at 106-07, 144. Petitioner argues that this point of view was unreasonable and that he was prejudiced by the fact that the jury was selected from Bucks County residents who were exposed to negative publicity about his case. Pet.'s br. at 137. For the following reasons, the Court rejects petitioner's arguments.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to "a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see also Skilling v. United States*, 561 U.S. 358, 378 (2010); *Patton v.*

Yount, 467 U.S. 1025 (1984); *Rideau v. Louisiana*, 373 U.S. 723 (1963). A criminal defendant can demonstrate that his jury was biased, and therefore that his trial was fundamentally unfair, in two ways: (1) by proving that "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," in which case prejudice to the defendant is presumed; or (2) by demonstrating "actual prejudice—that is, a juror unable to render a fair and impartial verdict based solely on the evidence. . . ." *Rock v. Zimmerman*, 959 F.2d 1237, 1252-53 (3d Cir. 1992), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 619 (1993); *see also Skilling*, 561 U.S. at 385 (considering actual prejudice after concluding that the facts did not warrant a presumption of prejudice); *Patton*, 467 U.S. at 1035-36. Petitioner argues that the facts of this case are sufficient to prove both presumed prejudice and actual prejudice, and therefore his counsel was ineffective for failing to renew the motion for a change of venue. Pet.'s br. at 134.

With respect to the first method of demonstrating that a jury was biased, "[a] presumption of prejudice . . . attends only the extreme case." *Skilling*, 561 U.S. at 381. To succeed in securing such a presumption, a criminal defendant must demonstrate that "[t]he community and media reaction. . . [was] 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 (explaining that the presumption applies in cases with "an 'utterly corrupt' trial atmosphere). The Supreme Court has identified four factors to be considered in determining whether pretrial publicity warrants a presumption of prejudice in a particular case: (1) the size and characteristics of the community from which the jury pool was drawn, (2) the nature of the publicity, (3) the time between the media attention and the trial, and (4) whether the jury's ultimate decision indicates bias. *Skilling*, 561 U.S. at 379, 382-84.

Under the second method of establishing jury bias, a criminal defendant must show that at least one juror was actually biased and unable to render an impartial verdict based solely on the evidence. *Rock*, 959 F.2d at 1253. Due process does "not require[ ]. . . that the jurors be totally ignorant of the facts and issues involved;" rather, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). Ultimately, jury selection "is particularly within the province of the trial judge," and thus "[r]eviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling*, 561 U.S. at 386.

The Pennsylvania Supreme Court rejected petitioner's claim based on jury selection and the need for a change of venue on the ground that petitioner failed to demonstrate that he was prejudiced by the pretrial publicity—either presumably or actually—and thus could not show that his counsel was ineffective for failing to renew the change of venue motion. *Com. v. Laird*, 119 A.3d 972, 981-82. The Pennsylvania Supreme Court explained that the two articles in the record (which were submitted by trial counsel during *voir dire*) were not "materially sensational, inflammatory, or slanted toward conviction" and thus petitioner had failed to show that prejudice should be presumed. *Id.* at 981. That court further held that petitioner did not prove actual prejudice because there was no evidence demonstrating that any seated juror was unable "to 'set aside [his] impressions or preliminary opinions and render a verdict solely based on the evidence presented to [him] at trial.'" *Id.* (quoting *Com. v. Briggs*, 12 A.3d 291, 314 (Pa. 2011)). Specifically, the court rejected petitioner's argument that he was actually prejudiced by Juror

#12, the only juror on which petitioner's argument of actual prejudice is based, because that juror "testified during *voir dire* that he did not form any preconceived ideas about Appellant's guilt or innocence. . . ." *Id.* at 982.

The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs this Court's review of petitioner's jury selection claim.

(a.) Presumption of Prejudice

Petitioner first argues that relief is warranted on his jury selection/change of venue claim under § 2254(d)(2) because the decision of the Pennsylvania Supreme Court that prejudice should not be presumed in this case was based on an unreasonable determination of the facts in light of the record. Pet.'s br. at 138. Petitioner specifically contends that the Pennsylvania Supreme Court unreasonably "limited its review of the pretrial publicity to the two articles submitted during jury selection, ignoring the publicity that led up to trial." Pet.'s br. at 138; *see also Laird*, 119 A.3d at 981 ("Only two articles of record were disseminated in the media shortly before Appellant's retrial…."). Those two articles were published the day before jury selection began ("Convicted killer back in court," January 28, 2007)[3] and on the second day of jury selection ("Jury selection begins in Laird retrial," January 30, 2007). The Pennsylvania Supreme Court found that these articles were not "materially sensational, inflammatory, or slanted toward conviction," and that the only aspect of the articles that would warrant a presumption of prejudice under Pennsylvania state law was their revelation that petitioner "had been convicted and sentenced to death previously, and that the then-impending proceeding would be a retrial necessitated by the federal courts' decision to vacate his first-degree murder conviction and death sentence." *Laird*, 119 A.3d at 981 (citing *Com. v. Karenbauer*, 715 A.2d 1086, 1092 (Pa. 1998)). The Pennsylvania Supreme Court noted that the January 30, 2007 article "contains a

[3] This article is not included in petitioner's Appendix.

sensationalized sentence. . . quot[ing] an unnamed prosecutor as stating that whoever perpetrated the crime 'slic[ed] Milano up like a cheap piece of tenderloin,'" but found that "the remainder of the story [wa]s factual in nature." *Id.*

This Court concludes that the decision of the Pennsylvania Supreme Court was not unreasonable in light of the record. First, as for petitioner's contention that the state court improperly limited its presumption-of-prejudice-analysis of pretrial publicity to only two articles, petitioner has failed to demonstrate (1) that he produced additional articles or evidence of publicity for the state court to examine and (2) that there was any additional publicity that his counsel should have submitted to the trial court in support of a renewed motion for change of venue. Concerning the second point, petitioner has produced for this Court seven additional articles concerning his re-trial. *See* Appendix to Consolidated Pet. for Writ of Habeas Corpus and Supporting Mem. of Law, ECF No. 39-1 (hereinafter "Appendix"). Of these seven additional articles, three were published after the jury selection was completed,[4] so it was impossible for trial counsel to have relied on them during jury selection. One of the articles was published in 1988,[5] after petitioner's first trial, and could have little or no effect on jury selection in 2007. The Court determines that the other three articles, published from June 30 to October 31, 2006, do not undermine the decision of the Pennsylvania Supreme Court because they predominantly contain factual, not inflammatory, reporting. *See* Appendix at 167-71. The Court concludes that petitioner has produced no evidence in support of his argument that pretrial publicity was so overwhelming and inflammatory that prejudice in this case should be presumed

[4] *See* Appendix, at 1-6 (three articles published on February 8, 10, and 15, 2007, after the trial began on February 5 and ended on February 13).

[5] *See* Appendix, at 132-166 (one article published in two parts in December 1988 and January 1989, largely based on a reconstruction of the evidence from the first trial). Petitioner does not claim, nor could he, that an article published in 1988-1989 prejudiced the Bucks County jury pool in 2007. *See Patton*, 467 U.S. at 1035 (holding that the passage of time between a first trial and second trial can cure prejudice that existed at the time of the initial trial).

and that his trial counsel could have successfully litigated a renewed motion for a change of venue on that ground.

Petitioner relies on *United States v. Casellas-Toro*, 807 F.3d 380 (1st Cir. 2015), in support of his argument that the pretrial publicity in this case warrants a presumption of prejudice. In that case, the defendant was convicted of murdering his wife eight days before he was indicted by a federal grand jury for falsely telling federal officers that he had been the victim of a carjacking three days after his wife was killed. *Id.* at 383. During his murder trial, the state argued that he staged the carjacking so that the murder weapon would appear "stolen "and not be found. *Id.* His murder trial was sensationalized in the press: "television, radio, internet, and print media outlets in Puerto Rico ha[d] continuously, intensely and uninterruptedly covered [his] case virtually on a daily basis" once his wife's body was discovered, "the media covered every minute of every day" of his murder trial, and his sentencing on the criminal charges was broadcast live on television, internet, and radio. *Id.* at 383-84 (internal quotation marks omitted). The government did not oppose the motion for a change of venue, and conceded that defendant had proved that prejudice should be presumed. Nevertheless, the federal trial court denied the defendant's motion for change of venue outside Puerto Rico on the ground that "there [wa]s a sufficient possibility we can get a[n impartial] jury." *Id.* at 384.

The United States Court of Appeals for the First Circuit held that the trial court abused its discretion in denying the motion on the ground that prejudice should have been presumed from the "blatantly prejudicial" media coverage. *Id.* at 386-87. The First Circuit relied on the district court's finding that "'Puerto Rico is a compact, insular community' that is highly susceptible to the impact of local media," the government's agreement that "the media coverage was massive and sensational," the fact that the "media reported rumors about Casellas's character" and

extensively covered the murder trial, in which the state "claimed Casellas lied about the carjacking—the crime in this case," and that the jury's conviction of Casellas on all federal counts (two of which were nullified by the trial court). *Id.* at 386-88.

The publicity in this case is miniscule in comparison to the overwhelming media coverage at issue in *Casellas-Toro*. Over the course of this litigation, petitioner and his counsel have referred to a total of nine articles and one radio broadcast. *See* Pet.'s br. at 130-34; Appendix, at 1-6, 132-173. Not only does the record presented by petitioner and his counsel reveal that there was little media coverage, it demonstrates that the overall quality of the coverage was not inflammatory or sensational. In its best light, petitioner's argument that ten instances of media coverage—very little of which was inflammatory—over the course of three months, in a fairly large community of approximately 625,000 people, is insufficient to warrant a presumption that the jury pool was so overwhelmed with prejudicial information that no impartial jury could be assembled. *See Skilling*, 561 U.S. at 379, 382-84 (articulating four factors); *cf. Rock*, 959 F.2d at 1253 (upholding trial court's determination that publication of thirteen articles and eleven radio stories during three month period was insufficient to support a presumption of prejudice).

Petitioner also incorrectly contends that *Casellas-Toro* stands for the proposition that media coverage revealing "the opinion of another jury" in a previous trial of the same case may prejudice an entire jury pool. *See* Pet.'s br., at 138 (citing 807 F.3d at 387). First, as explained above, *Casellas-Toro* did not concern a second trial for the same offense (like this case), but a later trial for a factually related offense. Second, and more importantly, the statement of the *Casellas-Toro* court that a pool of potential jurors "may have difficulty disbelieving or forgetting the opinion of another *jury*," as revealed to them by the press, was subsumed in its discussion of

the second *Skilling* factor: the nature of the publicity. It is precisely the nature of the publicity in this case that is distinguishable from the nature of the publicity in *Casellas-Toro*. The fact that an earlier jury verdict was disclosed did not, in and of itself, warrant a presumption of prejudice in *Casellas-Toro*; rather, it was the pervasive and inflammatory nature of the media coverage overall, in combination with the other three *Skilling* factors, that warranted such a presumption in that case, and that does not support such a presumption in this case.[6] *See Casellas-Toro*, 807 F.3d at 388 ("The *Skilling* factors reveal this to be an extreme case.").

For these reasons, the Court concludes that the Pennsylvania Supreme Court's rejection of petitioner's presumption of prejudice argument was reasonable.

(b.) Actual Prejudice

Petitioner next contends that the decision of the Pennsylvania Supreme Court rejecting the jury selection/change of venue claim on actual prejudice grounds was based on an unreasonable determination of the facts in light of the record. *See* 28 U.S.C. § 2254(d)(2). The Court rejects this argument and concludes that the decision of the Pennsylvania Supreme Court was reasonable.

Petitioner argues that his counsel should have moved for a change of venue on the ground that the pretrial publicity about his case had actually prejudiced the jury pool. In support of this argument, petitioner relies on the fact that, on the second day of jury selection, a "prospective juror. . . told the court that she had heard members of the jury panel discussing newspaper articles about the case." Pet.'s br. at 132-33 (citing N.T. Jan. 30, 2007, at 201). Petitioner also

[6] Petitioner does not argue that the decision of the Pennsylvania Supreme Court was contrary to federal law under *Skilling*, and thus the Court does not address such an argument.

notes that a total of 22 prospective jurors out of a total pool of 150 venire persons, or 14.66 percent, testified that they generally knew about the case.[7] Pet.'s br. at 132; Resp't br., at 121.

The Court rejects this argument. The fact that potential jurors had prior knowledge about the defendant or the crime does not automatically demonstrate that a potential juror is actually prejudiced. *Irvin*, 366 U.S. at 722-23. The more important question is the number of venire persons who had already formed an opinion about petitioner's guilt that they could not set aside. From the record, it appears that only one out of the 150 potential jurors stated that such knowledge would make it difficult for him to be fair and impartial. N.T. Jan. 29, 2007, at 382. Contrary to petitioner's argument, the record does not disclose that the entire jury pool was unduly prejudiced against him. *Cf. Patton*, 467 U.S. at 1029-30 (rejecting actual prejudice challenge when 77% of prospective jurors admitted that they would carry an opinion about petitioner's guilt into the jury box); *Murphy v. Florida*, 421 U.S. 794 (1975) (same when 20 of 78 venire persons were excused for cause "because they indicated an opinion as to petitioner's guilt").

Petitioner's actual prejudice argument also focuses on Juror #12, who admitted during *voir dire* that one of his co-workers had known petitioner in high school. *See* Pet.'s br. at 139. The co-worker reportedly described the crime as "gruesome" and in a "less than flattering" way based on an article he had read. *Id.* In rejecting this argument, the Pennsylvania Supreme Court

[7] Respondents argue that petitioner's *Strickland* claim on this issue was not fairly presented to the Pennsylvania Supreme Court and therefore is not exhausted. Resp't br., at 126. The Court disagrees. Petitioner challenged the appropriateness of jury selection in his case on the grounds that his counsel was ineffective and that it violated his right to due process under the United States Constitution. Petitioner also fairly informed the Pennsylvania Supreme Court about the fact that prospective jurors may have discussed newspaper articles about his case, *Com. v. Laird*, No. 683 Capital Appeal Docket, Initial Brief of Appellant, at 74-75 (Aug. 22, 2014) (hereinafter "Pet.'s PASC br."). Thus, petitioner presented "the federal claim's 'factual and legal substance to the state court[ ],'" and his claim was exhausted. *Harmon v. Lamar*, No. 13-3762, 2016 WL 521084, at *3 (3d Cir. Feb. 10, 2016) (quoting *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999)); *see Lesko v. Owens*, 881 F.2d 44, 50 (3d Cir. 1989) ("Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts.").

did not consider petitioner's allegation that the co-worker, after describing the crime, encouraged Juror #12 to try to be selected for the jury. *See Laird*, 119 A.3d at 982; Pet.'s br. at 139-40. The omission of this fact from its analysis, however, does not undermine that court's determination. In fact, the Pennsylvania Supreme Court properly relied on the fact that "Juror 12 testified during *voir dire* that he did not form any preconceived ideas about Appellant's guilt or innocence, and that he would refrain from speaking any further to his co-worker about the case." *Laird*, 119 A.3d at 982.

Actual prejudice cannot be proven when "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 722-23; *see also Patton*, 467 U.S. at 1029-30, 1039 (Court of Appeals determined that defendant was actually prejudiced when 8 of 14 seated jurors had an opinion as to defendant's guilt at one point in time, but Supreme Court reversed on the ground that actual prejudice could not be demonstrated when all of those jurors testified that they could set those opinions aside). In this case, Juror #12 stated that he could be impartial. On that record, petitioner has not demonstrated actual prejudice by the seating of Juror #12. N.T. Jan. 30, 2007, at 68, 71.

For these reasons, this Court concludes that the Pennsylvania Supreme Court reasonably rejected petitioner's actual prejudice arguments.

(c.) Conclusion

The Pennsylvania Supreme Court reasonably rejected petitioner's ineffective assistance of counsel claim based on jury selection and the failure to renew the motion for a change of venue. First, because a presumption of prejudice was not warranted and there was no actual prejudice, petitioner has not demonstrated that his counsel acted unreasonably in failing to renew the motion for a change of venue. *See Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000) ("[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim."). Second,

petitioner has not demonstrated prejudice under *Strickland* because he failed to present any evidence or argument that would have warranted the granting of a renewed motion to change venue, and therefore there is no reasonable likelihood that the outcome of the proceeding would have been different. The Court thus rejects petitioner's claim for relief under § 2254(d) on the ground that his counsel failed to provide effective assistance in connection with jury selection.

2. Trial Counsel's Investigation and Presentation of Diminished Capacity Evidence (Claim V)

Petitioner claims that he was prejudiced by his counsel's deficient presentation of evidence in support of his diminished capacity defense during the guilt phase of the trial. Specifically, petitioner argues that his counsel was ineffective in presenting the diminished capacity defense on the grounds that he mishandled fact witness testimony, expert testimony, and documentary evidence (such as petitioner's medical records). Pet.'s br. at 88. It is petitioner's position that the Pennsylvania Supreme Court's rejection of these three arguments was unreasonable in light of the record. *Id.* at 112. Petitioner also claims that the Pennsylvania Supreme Court's separate analysis of each of the three issues—fact witnesses, expert witnesses, and medical records—was an unreasonable application of *Strickland* because it failed to account for the prejudicial effect of counsel's performance in the guilt phase as a whole. Pet.'s br. at 111. The Court will address these issues in turn.

(a.) Fact Witnesses

Petitioner first claims that his trial counsel was ineffective because he failed to fully examine the Commonwealth's fact witnesses based on their testimony at the 1988 trial in presenting evidence of petitioner's impairment from alcohol consumption on the night of the offense. According to petitioner, at the 2007 trial many Commonwealth witnesses

> "claimed they could not recall with any specificity the type or amount of alcohol Petitioner had consumed that evening [of the murder]. However,

> during the proceedings in 1988. . . and in their statements to investigators at the time of the crime, all of these witnesses described Petitioner as significantly impaired from drinking alcohol. Given that witnesses in this case would be testifying about events that transpired in 1987, reasonable trial counsel would, at a minimum, have anticipated that witnesses might have some difficulty recalling the events of that evening and would have been prepared to refresh their recollection with their prior testimony and/or statements."

Pet.'s br. at 89. Moreover, petitioner contends that counsel failed to effectively impeach the same witnesses when they "change[d] their testimony, testif[ied] falsely, or minimize[d] the extent of Petitioner's impairment that evening." Pet.'s br. at 90.

Specifically, petitioner relies on the following differences between testimony elicited at the 2007 trial and the witnesses' prior testimony and statements to show that his counsel was ineffective:

- At petitioner's 2007 trial, Alan Hilton testified that he could not remember whether petitioner and Chester were drinking at Chester's apartment. At the 1988 trial, Hilton testified that petitioner and Chester drank at both the apartment and the bar, and that petitioner drank beer and shots at the Edgely Inn. Pet's brief at 91-92. Hilton also told an investigator (Joe Stark) in 1988 that petitioner and Chester were "shit-faced." Pet's brief at 92.

- In 2007, Gale Gardner testified that she remembered "people drinking," but could not remember what type of alcohol or how much alcohol petitioner consumed. Pet's brief at 93. In 1988, Gardner testified that petitioner and Chester were drinking beer and that she thought petitioner was drunk at the Edgely Inn because he was slurring his speech and talking loudly. Pet's brief at 93-94. Gardner was also at the apartment when Chester and petitioner returned around 4:00 a.m. In 2007, after she testified that petitioner was "coherent" at 4:00 a.m., trial counsel impeached her with her 1988 trial testimony that petitioner was "drunk" when he returned to the apartment. However, petitioner faults counsel for failing to impeach Gardner with her more specific prior inconsistent statement to the police in 1987 that petitioner was "mumbl[ing]" and "stagger[ing]" when he returned to the apartment at 4:00 a.m. Pet's brief at 94. Petitioner also faults counsel for failing to impeach Gardner with the fact that, in 1987, she had initially lied to the police and said that Chester was not at petitioner's apartment on the night of the murder and the fact that she was on probation in Florida for a traffic offense, which gave her a "motive to testify favorably for the Commonwealth." Pet.'s br. at 95.

- Jolanda Thompson was at the Edgely Inn on the night of the crime. In 2007, Thompson testified that everyone was drinking but that she "wasn't paying that much

attention to what they were drinking." Pet.'s br. at 96. Petitioner faults counsel for failing to impeach Thompson with her 1987 statement to investigators that petitioner "was drinking shots. . . They both were downing shots" and that the owner of the bar had asked her "not to say that Frank was drunk because he was underage." Pet.'s br. at 96. Petitioner argues that, by "questioning Ms. Thompson about that statement, counsel could have also developed his theory that the bartender that evening, James Phillips, Jr., was minimizing the level of petitioner and Chester's impairment in order to protect the bar owner [his father] from civil liability." Pet.'s br. at 97.

- James Phillips, Jr., was the bartender at the Edgely Inn on the night of the crime and his parents owned the bar. In 2007, Phillips testified that he served petitioner one shot and served his table two pitchers of beer. In 1988, Phillips testified that he served petitioner two or three shots of vodka and served petitioner and Chester at least four pitchers of beer. Pet.'s br. at 97. Petitioner also argues that his counsel "failed to effectively cross-examine James Phillips about his motive to minimize the amount of alcohol he served petitioner because of liability for his family business" based on Thompson's statement. Pet.'s br. at 97-98.

After reviewing the evidence that petitioner claims should have been admitted, the Pennsylvania Supreme Court ruled that petitioner had not demonstrated prejudice under *Strickland*. Specifically, that court concluded: "If counsel had done everything Appellant now alleges he should have done, it is possible the jury would have been left with the impression that he had consumed even more alcohol, but the additional amount would not likely have been significant; as such, it would not have materially aided Appellant's defense in view of the record as a whole." *Com. v. Laird*, 119 A.3d 972, 985 (Pa. 2015).

Petitioner claims that the Pennsylvania Supreme Court's rejection of this argument was unreasonable in light of the state court record. According to petitioner, that court held "that counsel was not ineffective" and petitioner was not prejudiced "for failing to use the Commonwealth witnesses to bring out evidence of Petitioner's *impairment* on the night of the offense, because counsel presented evidence of alcohol *consumption*." Pet.'s br. at 112 . Petitioner contends that the Pennsylvania Supreme Court's focus on evidence of "the number of drinks" he consumed was unreasonable in light of the record when the issue at trial was his "impairment at the time of the murder," thus entitling him to relief under § 2254(d)(2). Pet.'s br.

at 113-14 ("Because evidence of impaired functioning is different from and more critical to a diminished capacity defense than evidence of [the] amount of alcohol consumed, it was unreasonable for the state court to fail to analyze the effect of counsel's failure to present evidence of impaired functioning.").

Respondents argue that the ruling of the Pennsylvania Supreme Court was not unreasonable. First, they state that "[p]etitioner's attempt to parse out his claim by distinguishing alcohol consumption versus impairment fails on this record. It is clear counsel attempted to establish both consumption and impairment." Resp't br. at 93. Respondents also contend that counsel reasonably presented the diminished capacity defense by cross-examining all of the Commonwealth's fact witnesses and presenting the testimony of four expert witnesses, who opined that petitioner's blood-alcohol content was 0.45 at the time of the murder and that the combination of that amount of alcohol with his underlying brain damage resulted in his inability to form specific intent. Resp't br. at 93. Respondents finally argue that petitioner cannot demonstrate that he was prejudiced because "the questions Petitioner contends counsel failed to ask would not have meaningfully contributed to the overall evidence counsel presented regarding consumption and impairment." Resp't br. at 94.

The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs the Court's review of this claim. This Court determines that the conclusion of the Pennsylvania Supreme Court with respect to prejudice was reasonable and thus rejects petitioner's argument. Petitioner contends that the Pennsylvania Supreme Court was unreasonable in focusing on the fact that the 2007 jury heard considerable evidence regarding how much he drank on the night of the murder, but insufficient evidence of impairment due to alcohol consumption. Inconsistent with that argument, most of the evidence that petitioner now

claims should have been admitted concerns the amount of alcohol that he ingested and not the degree to which he was impaired. *See* Pet.'s br. at 91-97 (citing Hilton's 1988 testimony that petitioner and Chester drank at both the apartment and the bar, and that petitioner was drinking beer and shots at the Edgely Inn, Gardner's 1988 testimony that petitioner and Chester were drinking beer, Thompson's 1987 statement to investigators that petitioner "was drinking shots. . . They both were downing shots," and Phillips's 1988 testimony that he served petitioner two or three shots of vodka and served petitioner and Chester at least four pitchers of beer).

While petitioner is correct that evidence of impairment is more important than evidence of alcohol consumption in proving a diminished capacity/voluntary intoxication defense (or obtaining an instruction on such a defense)[8], the record belies his argument that trial counsel failed to adequately present such a defense. First, petitioner's trial counsel introduced sufficient evidence of impairment to warrant jury instructions by the trial court on diminished capacity and voluntary intoxication. *See* N.T. Feb. 9, 2007, at 79-80. Second, if petitioner is correct that the amount of alcohol ingested is relatively unimportant in proving diminished capacity, the additional evidence about his alcohol consumption on the night of the murder that petitioner contends his trial counsel should have adduced at trial is equally unimportant. Finally, even if the additional testimony about his *consumption* of alcohol was introduced at trial, there is no reasonable probability that the outcome would have been different because the jury was properly

[8] *See, e.g., Jordan v. Beard*, No. 02 Civ. 8389, 2003 WL 22845418, at *5 (E.D. Pa. Nov. 26, 2003) ("An overview of Pennsylvania case law in this area shows that petitioner does not satisfy his burden for a voluntary intoxication instruction by merely proving he was drinking prior to committing the offense with which he has been charged. As previously stated, the record must show that the petitioner was so overwhelmed or overpowered by the alcohol he consumed that he suffered a complete loss of his faculties or sensibilities."); *Com. v. Sanchez*, 82 A.3d 943, 977 (2013) ("Where a defendant admits to committing a killing, in order to be entitled to a voluntary intoxication instruction… [m]ere evidence of the consumption of alcohol or drugs and an appearance of intoxication is not sufficient to support a conclusion that a defendant was overwhelmed or overpowered to the point of being incapable of forming the requisite specific intent to kill.").

instructed that petitioner's level of *impairment* was most important in considering his diminished capacity defense. *See* N.T. Feb. 9, 2007, at 79 (instructing the jury that "the defendant is permitted to claim as a defense that he was so overpowered by intoxicants that the defendant had lost control of his faculties and was incapable of forming specific intent to kill required for first degree murder.").

Petitioner relies on only three pieces of evidence concerning the degree of his impairment that were not admitted at the 2007 trial to demonstrate that he was prejudiced by his trial counsel's alleged errors: (1) Hilton's statement from 1988 that petitioner and Chester were "shit-faced"; (2) Gardner's 1988 testimony that she thought petitioner was drunk at the Edgely Inn because he was slurring his speech and talking loudly; and (3) Gardner's statement to the police in 1987 that petitioner was "mumbling" and "stagger[ing]" when he returned to the apartment at 4:00 a.m. Pet's brief at 92-94. The Court determines that the Pennsylvania Supreme Court's rejection of petitioner's arguments regarding this evidence was reasonable.

Hilton's statement about petitioner being "shit-faced" was made to an investigator, Joe Stark, in 1988. At the post-conviction hearing, trial counsel explained that during his preparation for the 2007 trial, he could not locate Stark to secure him as a witness,[9] which led him to believe that he would be unable to confront Hilton with an authenticated version of his prior inconsistent statement during trial. N.T. May 23, 2012, at 45 (explaining that if Hilton "had denied [making his statement to Stark]. . . I don't know what I would have done" because Stark was unavailable). While trial counsel stated that there was no "strategy or tactic" for his failure to present Hilton's statement, N.T. May 23, 2012, at 47, the Court concludes that counsel did not act unreasonably in choosing not to confront Hilton with a statement that he could not authenticate.

[9] Trial counsel's belief was substantiated by Stark's testimony at the PCRA hearing that, during the time leading up to the 2007 trial, he was having personal difficulties that may have prevented him from returning phone calls and responding to inquiries. *See* N.T. May 23, 2012, at 212-13.

Trial counsel also testified at the post-conviction hearing that he would have been worried about introducing Gardner's statement that petitioner was "stagger[ing]" and "mumbl[ing]" after the crime because in the same testimony Gardner had said that petitioner was "soaked in blood." N.T. May 23, 2012, at 54-55. Even though counsel stipulated that petitioner participated in the murder, he believed it could harm the defense if the jury believed that petitioner was "soaked in blood" and thus petitioner, and not Chester, was the more violent and culpable person. N.T. May 23, 2012, at 55-56. Although counsel did not recall having this exact thought at the time of trial, N.T. May 23, 2012, at 56, the conclusion of the Pennsylvania Supreme Court that petitioner failed to demonstrate that his counsel was ineffective in failing to elicit potentially damaging testimony was not unreasonable. *Laird*, 119 A.3d at 984-86.

Moreover, Hilton and Gardner's statements that petitioner was slurring his speech and talking loudly while he was at the bar are indicative of his level of impairment, but insignificant in comparison to the other evidence of petitioner's impairment on the night of the crime that was presented at the 2007 trial. For example, trial counsel presented the following evidence indicating that petitioner was impaired:

- Officer Patrick Connell's 1988 testimony that he saw petitioner at the Edgely Inn after midnight on December 15, 1987, petitioner was "adamant and boisterous" and used expletives when he refused to provide proof of identification, and the fact that petitioner argued with police officers and the odor of alcohol on petitioner's breath convinced him that petitioner was intoxicated. N.T. Feb. 5, 2008, at 128-30, 135;

- Thompson testified that petitioner "gave [her] the creeps" and "was very loud, boisterous," that at one point petitioner was "hollering," and that petitioner and Chester were "partying." N.T. Feb. 5, 2008, at 169, 171, 175;

- Phillips testified that petitioner was being "mean-spirited" and a "bully," that petitioner told Officer Connell and other officers that "it was none of their F-ing business" how long he had been at the bar, that petitioner and Frank Chester started to slow dance together, that petitioner threw or smashed a shot glass. N.T. Feb. 5, 2007, at 195, 204, 212-13, 243, 255;

- Hilton testified that petitioner and Chester were calling people names and being "pretty nasty," and that petitioner made a sexual overture to Gale Gardner. N.T. Feb. 6, 2007, at 28-29;

- Barbara Parr testified that petitioner and Chester were kick boxing with each other when she arrived at the Edgely Inn, and that when petitioner returned to their apartment around 4:00 a.m. he was drunk and "passed out." N.T. Feb. 6, 2007, at 106-07, 115-16;

- Richard Griscavage testified that he could smell alcohol on petitioner and Chester when they appeared at his apartment around 4:00 a.m. after the murder. N.T. Feb. 6, 2007, at 162.

- Gale Gardner testified that petitioner made a sexual remark to her. N.T. Feb. 7, 2007, at 28;

- Dr. John O'Brien testified that he estimated petitioner to have had a blood-alcohol content of 0.45% on the night of the crime; N.T. Feb. 8, 2008, at 28;

- Chester's declaration stated that "[w]hen [Laird] left the Edgely Inn, Rick was drunk out of his mind. By the end of that evening, Rick could barely walk. He was stumbling and falling down in the street. I damn near carried Rick to Rich Griscavage's house." N.T. Feb. 8, 2008, at 14;

See also N.T. Feb. 9, 2007, at 14-15, 20, 28-31 (counsel's closing argument recounting diminished capacity evidence to the jury).

In comparison to of all of this evidence of the level of petitioner's impairment as a result of alcohol consumption on the night of the offense, the additional testimony from Hilton and Gardner cited by petitioner is cumulative. Such evidence would have been trivial additions to the other evidence of his impairment. Accordingly, petitioner has not demonstrated that he was prejudiced by the fact that his counsel did not utilize Hilton's and Gardner's statements at trial.

Finally, the Pennsylvania Supreme Court reasonably concluded that counsel did not render ineffective assistance when he chose not to impeach witnesses who testified favorably for the defense on the topic of diminished capacity. *Laird*, 119 A.3d at 985. The record demonstrates that Gardner, Thompson, and Phillips all testified that petitioner was intoxicated and had consumed a substantial amount of alcohol on the night in question. N.T. Feb. 5, 2007, at

169, 171, 175 (Thompson's testimony that petitioner "was very loud, boisterous," that at one point petitioner was "hollering," and that petitioner and Chester were "partying"); N.T. Feb. 5, 2007, at 195, 204, 212-13, 243, 255 (Phillips's testimony that petitioner was being "mean-spirited" and a "bully," that petitioner used expletives and was rude to police officers at the bar, and that petitioner threw or smashed a shot glass); N.T. Feb. 7, 2007, at 28 (Gardner's testimony that petitioner said he "wanted to run his tongue across [her] teeth"). This Court concludes that the record supports the ruling of the Pennsylvania Supreme Court that petitioner was not prejudiced by the fact that his counsel did not attempt to impeach witnesses, who gave testimony in 2007 that substantiated his diminished capacity defense, with their prior statements and testimony from the 1988 trial.

For these reasons, the Court concludes that the ruling of the Pennsylvania Supreme Court rejecting petitioner's claim under *Strickland* based on his counsel's examination of fact witnesses was reasonable in light of the record, and denies Laird's Petition for relief under § 2254 on this ground.

(b.) Expert Witnesses

Petitioner claims that his counsel was ineffective in preparing Dr. Henry Dee, Ph.D. and Dr. Robert Fox, Jr., M.D., for trial. Petitioner was evaluated by Dr. Dee—a psychologist and neuropsychologist—and Dr. Fox—a psychiatrist—in 1997 in connection with petitioner's first PCRA hearing, which was primarily aimed at developing mitigation evidence that was not presented at petitioner's first trial in 1988. Petitioner first argues that his counsel should be responsible for "the fact that Drs. Dee and Fox had not thoroughly explored the issue of diminished capacity" because "counsel failed to make arrangements for these doctors to reevaluate Petitioner [in 2007] and focus on the issue of his mental state at the time of the crime." Pet.'s br. at 100.

Petitioner next argues that his counsel's failure to adequately prepare Dr. Dee and Dr. Fox in 2007 resulted in damaging cross-examination from the prosecution because of petitioner's 1988 testimony. Specifically, in 1988 petitioner testified at trial that he recalled the events of the night of the crime and that Frank Chester had killed Anthony Milano. In 2007, the experts testified that petitioner's brain damage negatively affected his memory and that petitioner did not remember the night of the crime. The prosecutor then confronted the experts on cross-examination with petitioner's inconsistent testimony from 1988 that he remembered the crime. Pet.'s br. at 100. Petitioner contends that counsel's failure to anticipate this line of cross-examination and to explore the issue with his experts in advance of trial "constitutes gross incompetence," which prejudiced petitioner because the experts' "credibility [was] irreparably damaged before the jury." Pet.'s br. at 102.

The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs the Court's review of this claim. The Pennsylvania Supreme Court first concluded that "Appellant has not explained how additional evaluations undertaken closer to the time of the 2007 retrial would have allowed Dr. Dee to testify more persuasively concerning Appellant's diminished capacity in 1987," or prepared "Dr. Fox to testify more forcefully or convincingly that Appellant suffered from diminished capacity." *Com. v. Laird*, 119 A.3d at 988-89. That court also was not "persuaded that the experts' opinions were weakened by a supposed failure to read the 1988 transcript." *Id.* at 989. Finally, the court rejected petitioner's claim on the ground that he did not suffer undue prejudice from the prosecutor's cross-examination, particularly with regard to Dr. Fox who testified "that a person whose memory of the events in question was impaired by operating in an alcohol-induced blackout could later give an account, apparently from memory, of the events that transpired during the relevant interval. . .

through a process known as 'confabulation.'" *Id*. (citing N.T. Feb. 8, 2007, at 141-42). Petitioner claims that this decision was unreasonable in light of the record. Pet.'s br. at 111, 114.

The Court first evaluates petitioner's contention that Dr. Fox and Dr. Dee did not "thoroughly explore[ ] the issue of diminished capacity" in their testimony at the 2007 trial. Pet.'s br. at 100. In 2007, Dr. Dee testified that his evaluation of petitioner in 1997 consisted of multiple performance tests, an interview with petitioner, and interviews with his mother and brother. N.T. Feb. 8, 2007, at 77-79. Based on this evaluation, Dr. Dee discovered that petitioner's cognitive function was impaired as a result of brain damage, including a significant impairment in memory functioning, which was likely caused by head injuries. N.T. Feb. 8, 2007, at 81-83. Dr. Dee concluded to a reasonable degree of scientific certainty that petitioner suffered from diminished capacity solely from his brain damage because his "ability to plan and carry out any kind of sequential behavior was impaired by" his head injury in 1981, "including the events of the night of the murder." N.T. Feb. 8, 2007, at 85-86. Dr. Dee testified that, in petitioner's case, the combination of brain damage plus excessive alcohol ingestion impaired his ability to form the specific intent to kill. N.T. Feb. 8, 2007, at 87-90.

Similarly, Dr. Fox testified that he interviewed petitioner, investigated his personal history, and relied on the psychological tests performed by Dr. Dee in 1997. N.T. Feb. 8, 2007, at 123-24, 126-27. Dr. Fox diagnosed petitioner with post-traumatic stress disorder, attention-deficit/hyperactivity disorder ("ADHD"), brain damage from repetitive head injuries, and drug and alcohol abuse. N.T. Feb. 8, 2007, 127-28. He explained that the type of brain damage from which petitioner suffers impairs executive functioning, i.e. decision-making, organization, and rational thinking. N.T. Feb. 8, 2007, at 132-134. Dr. Fox also testified that petitioner was "severely impaired" on the night of the crime when his blood-alcohol content was estimated to

be 0.45%, and that individuals with such a high blood alcohol content can be in an "alcohol delirium," which causes them to suffer from blackouts and memory loss. N.T. Feb. 8, 2007, at 139-40. Consistent with Dr. Dee's testimony, Dr. Fox testified that excessive alcohol consumption "increases the impairment" of an individual who already suffers from underlying brain damage. N.T. Feb. 8, 2007, at 143. Finally, Dr. Fox opined that on the night of the offense petitioner suffered from a diminished capacity to form specific intent because of the degree of his cognitive impairment due to brain damage, which was heightened by the effect of the large quantity of alcohol he consumed. N.T. Feb. 8, 2007, at 144-45.

The Court determines that the decision of the Pennsylvania Supreme Court rejecting this aspect of petitioner's claim was reasonable in light of the record. First, petitioner's argument that it was necessary for Dr. Dee and Dr. Fox to evaluate him again in advance of the 2007 trial is meritless. Petitioner fails to identify any additional evidence that might have been discovered from another evaluation nineteen years after the crime occurred. For this reason, and because of the experts' detailed testimony in support of petitioner's diminished capacity defense at the 2007 trial, the Pennsylvania Supreme Court properly rejected this argument.

The Court next addresses petitioner's argument that his trial counsel did not adequately prepare Dr. Dee and Dr. Fox for cross-examination on the subject of petitioner's 1988 testimony. Dr. Dee and Dr. Fox examined petitioner in 1996, and both experts met petitioner on only one other occasion: in 2007, Dr. Fox met petitioner on the evening before his testimony, and Dr. Dee met with petitioner on the morning of his testimony. On cross-examination at the 2007 trial, the prosecutor asked Dr. Dee why he had not discussed the murder during his conversation with petitioner earlier that morning. N.T. Feb. 8, 2007, at 101. Dr. Dee responded that, first, it was not relevant to his goal of determining whether petitioner suffered from cognitive impairment,

and second, that petitioner said he did not remember the night of the crime. N.T. Feb. 8, 2007, at 101-02. The latter point was consistent with the experts' opinions that petitioner's brain damage negatively affected his memory. The prosecutor then asked Dr. Dee whether he was aware that petitioner testified in detail about the crime during the 1988 trial; Dr. Dee responded that he was aware that petitioner had testified, but he could not remember the details of that testimony. N.T. Feb. 8, 2007, at 106-07. Dr. Dee then agreed with the prosecutor that petitioner's apparent memory of the events in 1988 was more indicative of his memory capabilities on the night of the crime in 1987 than his lack of memory in 2007, thus implying that petitioner may not have been suffering from the effects of brain damage on the night of the crime. N.T. Feb. 8, 2007, at 111.

Dr. Fox testified on cross-examination at the 2007 trial that, the previous evening, petitioner told him that he had no memory of what happened on the night of the crime after he was shooting pool at the Edgely Inn. N.T. Feb. 8, 2007, at 150-51. Dr. Fox next stated that he had read the 1988 transcript of petitioner's testimony, and that he remembered petitioner testifying in detail about the night of the crime and the killing of Anthony Milano. N.T. Feb. 8, 2007, at 154-56. He then had the following exchange with the prosecutor:

> "Q: You would agree with me that somebody who would testify to these specific details would have a pretty good memory of what happened, correct?
> A: Not necessarily.
> Q: Unless they were lying, right?
> A: Or confabulating.
> Q: Well, confabulating, not telling the truth?
> A: It's different from lying."

N.T. Feb. 8, 2007, at 157. Only a few minutes earlier, Dr. Fox had testified on direct examination that confabulation occurs when individuals "make up [facts] to fill in the blanks. . . for the period of time that they don't remember." N.T. Feb. 8, 2007, at 141-42; *see also id.* at

167-68 (explaining that petitioner's apparent memory of the crime in 1988 was "probably confabulating").

The Court determines that the decision of the Pennsylvania Supreme Court rejecting petitioner's ineffective assistance of counsel claim on the ground that the experts were properly prepared for cross-examination was reasonable. That court reasonably concluded that Dr. Fox had a logical explanation for the inconsistency between petitioner's 1988 testimony and the experts' conclusions when he testified that petitioner "probably confabulate[ed]" the details of his 1988 testimony after the fact, which petitioner would have been unable to distinguish from actual memory. *Com. v. Laird*, 119 A.3d at 989; N.T. Feb. 8, 2007, at 167-68. Contrary to petitioner's argument that additional evaluations by Dr. Dee and Dr. Fox were necessary to rebut the prosecutor's line of questioning, *see* Pet.'s br. at 111, Dr. Fox's explanation sufficiently responded to the cross-examination of both experts on the point of petitioner's memory. Moreover, petitioner has not provided the Court with any evidence or argument as to what more favorable cross-examination testimony would have resulted from counsel's additional preparation of Dr. Dee and Dr. Fox.[10] The Court declines to impose on trial counsel the impossible burden of immunizing expert witnesses from any damage on cross-examination.

[10] The only arguably relevant case on which petitioner relies in support of this argument is *Affinito v. Hendricks*, 366 F.3d 252, 260 (3d Cir. 2004), in which the Third Circuit held that counsel's failure to provide his mental health expert with the defendant's statements to the police constituted deficient performance. In that case, counsel's failure to acquaint his own expert with the basic underlying facts of the case resulted in the expert reversing his diminished capacity opinion while testifying on cross-examination, and testifying that the defendant would have formulated specific intent to kill. *Id*. The Third Circuit held that defense counsel was objectively unreasonable in failing to ensure that his own expert had "as complete and accurate a description of the facts and circumstances surrounding the crime as possible." *Id.*

Finally, the Court rejects petitioner's argument that the Pennsylvania Supreme Court "unreasonably ignored the fact that the prosecutor successfully undermined the defense expert[s'] opinions *because* they did not evaluate Petitioner after his admission of" participation in the murder. Pet.'s br. at 115. As explained above, petitioner has not shown what favorable evidence could have been developed from an additional evaluation. Furthermore, petitioner has failed to connect the benefits of the hypothetical additional evaluation to any damage caused to the experts' credibility by cross-examination. Specifically, petitioner has not explained how such an evaluation could have cured the inherent inconsistency between petitioner's 1988 defense that he was not involved in the killing of Anthony Milano and his 2007 defense in which he admitted that he was involved, but lacked the capacity to form a specific intent to kill. Rather, the Court agrees with respondents' point that the contradiction between petitioner's 1988 testimony and the experts' opinions "was not created. . . by counsel's failure to prepare the experts, but rather by the inconsistency between Petitioner's defenses [of actual innocence at the first trial and diminished capacity]. . . and second trial[ ]." Resp't br. at 104. This contradiction prevents petitioner from being able to demonstrate that the result of the proceeding would have been different if his experts had been prepared in a different way or if they had conducted an additional evaluation of petitioner. The Court concludes that petitioner has failed to prove that he was prejudiced by his counsel's actions.

Affinito is distinguishable. There is no contention in this case that Dr. Dee or Dr. Fox was unacquainted with the underlying facts, and neither of those experts reversed their diminished capacity opinions in their testimony. Instead of agreeing with the prosecutor that the defendant had specific intent, as the expert in *Affinito* did, Dr. Dee only agreed with the prosecutor's statement that petitioner's testimony in 1988 was a better reflection of his memory capabilities in 1987 than his current inability to remember the events surrounding the crime. N.T. Feb. 8, 2007, at 111. In *Affinito*, the expert's damaging testimony could clearly have been prevented if counsel had properly informed him of the facts at issue. In this case, however, there is no evidence or argument as to how additional preparation by counsel could have prevented Dr. Dee from agreeing with a fairly obvious conclusion.

The Court concludes that the decision of the Pennsylvania Supreme Court to reject petitioner's ineffective assistance claim in connection with his trial counsel's preparation of expert witnesses and presentation of their testimony during the guilt phase was reasonable. Accordingly, the Court denies Laird's Petition under § 2254 based on this argument.

(c.) Medical Records

Petitioner claims that his trial counsel was ineffective because he failed to introduce medical records substantiating that petitioner had suffered multiple head injuries and had a history of drug and alcohol addiction. Pet.'s br. at 103-105. Specifically, petitioner argues that these records should have been used to corroborate Dr. Dee's testimony that petitioner's brain damage was caused by multiple head injuries and that petitioner was addicted to drugs and alcohol. Petitioner also contends that the records should have been used on re-direct examination to rehabilitate Dr. Dee after he had the following exchange with the prosecutor on cross-examination:

> "Q: You would agree with me that the only injury that you have medical substantiation is the head injuries from 1981, correct?
> A: That's the only one I have records on, yes.
> Q: So all the injuries you're talking about, you got that information from the defendant's mother and the defendant's brother, is that correct?
> A: And from him.
> Q: And from him?
> A: Right.
> Q: So it's only accurate as what they tell you correct?"

Pet.'s br. at 104 (quoting N.T. Feb. 8, 2007, at 97-98). Petitioner contends that the medical records were necessary to rebut the prosecutor's "insinuat[ion]. . . that Petitioner and his family contrived childhood head injuries after his arrest and conviction in this case to bolster an argument of diminished capacity." Pet.'s br. at 104-05.

The Pennsylvania Supreme Court rejected this argument in part on the ground that petitioner suffered no prejudice from his counsel's failure to present the medical records at trial.

That court noted that "the Commonwealth did not dispute that Appellant suffered at least one serious head injury that included a skull fracture in the early 1980s when he fell from a moving vehicle," and emphasized that "[t]he contested issue in the guilt phase was whether the resulting brain damage, combined with other factors such as alcohol consumption, impaired Appellant's cognitive functioning so that his capacity to form a specific intent to kill was diminished." *Laird*, 119 A.3d at 990-91 (footnote omitted).

The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs the Court's review of this claim. This Court concludes that the ruling of the Pennsylvania Supreme Court that petitioner suffered no prejudice from his counsel's failure to present the medical records at trial was reasonable. In particular, the Court agrees that the question whether petitioner's brain damage was caused by one or several head injuries is ancillary to whether he had the capacity to form specific intent on the night of the crime. *See id.* at 991. Based on the record, petitioner cannot demonstrate that the jury was substantially more likely to accept a diminished capacity defense supported by documentation of multiple head injuries instead of only one injury. Accordingly, the conclusion of the Pennsylvania Supreme Court that petitioner failed to show prejudice under *Strickland* was reasonable.

The Pennsylvania Supreme Court did not address petitioner's claim that his counsel should have introduced the medical records to substantiate the experts' diagnoses that petitioner was addicted to drugs and alcohol, even though it was exhausted and ripe for review. *See Com. v. Laird*, No. 683 Capital Appeal Docket, Initial Brief of Appellant, at 57-58 (Aug. 22, 2014) (hereinafter "Pet.'s PASC br."). The Court thus reviews this claim *de novo*. *See Collins v. Sec'y of Pennsylvania Dep't of Corr.*, 742 F.3d 528, 544 (3d Cir.), *cert. denied sub nom. Collins v. Wetzel*, 135 S. Ct. 454 (2014). This Court determines that petitioner has failed to demonstrate

that his counsel's failure to introduce records of his drug and alcohol abuse resulted in prejudice under the second prong of *Strickland*. The primary issue at trial was whether petitioner was substantially impaired on the night of the offense. While documentary evidence that petitioner habitually abused alcohol could support his diminished capacity defense that relied, in part, on his intoxication from alcohol consumption, the Court concludes that it is not reasonably probable that "the result of the proceeding would have been different" if this evidence had been introduced. *Strickland*, 466 U.S. at 687.

Accordingly, the Court denies Laird's Petition under § 2254 on the ground that he suffered prejudice from his trial counsel's failure to introduce the medical records.

(d.) The Pennsylvania Supreme Court Did Not Unreasonably Apply *Strickland*

The Court rejects petitioner's claim that the Pennsylvania Supreme Court unreasonably applied *Strickland* when it separately evaluated the three distinct types of evidence that petitioner claimed his counsel was ineffective in presenting. "A state court decision involves an 'unreasonable application of federal law' under 28 U.S.C. § 2254(d)(1) where it 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Jacobs v. Horn*, 395 F.3d 92, 120 (3d Cir. 2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000)). "For a federal court to find a state court's application of law unreasonable, 'the state court's decision must have been more than incorrect or erroneous.' Rather, "[t]he state court's application must have been 'objectively unreasonable.'" *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003)).

Strickland does not impose any rigid or mechanical framework on the court in addressing an ineffective assistance claim. *See Strickland*, 466 U.S. 668, 697 (explaining that the two prongs may be addressed in any order and a court may dispose of an ineffective assistance claim after analyzing only one component). Rather, *Strickland* is a "flexible," *McDonald v. Hardy*,

359 F. App'x 650, 653-54 (7th Cir. 2010), and "general" standard, *Harrington v. Richter*, 562 U.S. 86, 105 (2011). This is one of the reasons that so-called "double deference" characterizes the application of § 2254(d) to *Strickland* claims. *Id.* ("The *Strickland* standard is a general one, so the range of reasonable applications is substantial.")

In this case, it was not "objectively unreasonable" for the Pennsylvania Supreme Court to divide its analysis of petitioner's claim that his counsel was ineffective during the guilt phase into three parts. Each part focused on the logically separate types of evidence that petitioner claimed were mishandled by his trial counsel.[11] Thus, the Court concludes that the Pennsylvania Supreme Court's application of *Strickland* to petitioner's claims was not "objectively unreasonable," *Wiggins*, 539 U.S. at 520-521, and rejects petitioner's argument that he is entitled to relief under § 2254(d)(1) on this ground.

3. Frank Chester's Testimony and Presence in the Courtroom (Claim IX)

Petitioner claims that his right to due process under the Fourteenth Amendment was violated when a witness identified Frank Chester in open court as petitioner's co-conspirator and when the prosecution introduced in evidence Chester's testimony from the 1988 trial. Specifically, petitioner claims that he was prejudiced in two ways: (1) after Chester invoked the Fifth Amendment privilege against self-incrimination outside the presence of the jury and the

[11] Moreover, the decision of the Pennsylvania Supreme Court makes clear that petitioner presented these issues separately before the PCRA court, but combined them on appeal. *Laird*, 119 A. 3d at 982, n. 9 ("Appellant has organized his brief to consolidate the present claim [failure to impeach Commonwealth witnesses] with the next three [failure to move to exclude evidence or request a mistrial, failure to prepare expert witnesses, and failure to introduce medical records]."). Nevertheless, the Pennsylvania Supreme Court addressed the issues separately for valid reasons: "the issues are conceptually distinct, they were raised separately in Appellant's notice of appeal, and the PCRA court treated them seriatim." *Id.* Moreover, that court explicitly addressed petitioner's fear that the cumulative prejudice of all of the guilt phase errors regarding the diminished capacity defense would be ignored: "To the extent Appellant's present decision to raise them as multiple parts of a single claim is undertaken in an effort to aggregate prejudice, our present disposition does not undermine that objective in light of Appellant's final contention pertaining to cumulative prejudice." *Id.* (internal citations omitted). Petitioner's claim that the Pennsylvania Supreme Court failed to consider the cumulative prejudice of these errors is unsupported by the record.

trial court declared him unavailable as a witness, Chester was brought into the courtroom and identified by Detective Robert Potts as petitioner's accomplice in the murder of Anthony Milano; and (2) the prosecution introduced Chester's testimony from 1988 even though it believed the testimony was false, as evidenced by the Commonwealth's prosecution of Chester for the same crime. Pet.'s br. at 141-43.

For the following reasons, the Court concludes that both aspects of this claim are procedurally defaulted and that petitioner has failed to excuse the default by showing cause and prejudice or a miscarriage of justice.

(a.) Identification of Chester Before the Jury

The factual background of this claim, according to petitioner, is as follows:

> [During the guilt phase of the trial, the] Commonwealth brought Chester from death row to court in prison garb. With the jury removed from the courtroom, Chester asserted his Fifth Amendment privilege, and Judge Boylan found him "unavailable." NT 2/7/07, 13-16. The prosecutor asked that Chester "remain with the sheriffs in the courtroom," and Judge Boylan had him "seated in the first row of seats in the courtroom," where he remained while the jury was brought in. *Id.* at 16. The Commonwealth presented Detective Robert Potts who, at the prosecutor's request, identified Chester for the jury and testified that "no one else has ever been arrested for this murder other than Frank Chester and Richard Laird." *Id.* at 18-19. The sheriffs thereafter removed Chester from the courtroom, as the jury looked on. *Id*. at 22.

Pet.'s br. at 143-44. Later that day, the prosecutor read into the record Chester's testimony from the 1988 trial, in which Chester claimed that petitioner alone killed Milano. *Id.* at 144.

Petitioner argues that this sequence of events violated his right to due process under the Fourteenth Amendment because "[i]t is well established under federal. . . law that a jury may not consider that a witness has chosen to exercise his Fifth Amendment privilege because this invites the jury to make an impermissible inference" about the witness's guilt and, for this reason, a prosecutor commits constitutional error by "calling that witness to the stand before the jury" to

assert the Fifth Amendment privilege. Pet.'s br. at 148-49 (citing *United States v. King*, 461 F.2d 53, 56-57 (8th Cir. 1972), *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970)).

Petitioner acknowledges that the trial court properly required Chester to assert his Fifth Amendment privilege outside the presence of the jury. However, petitioner argues that:

> After Chester claimed the privilege. . . the prosecutor did (and Judge Boylan allowed) what the law forbids – the prosecutor had Chester remain on display in the courtroom while the jury returned; the prosecutor had a prosecution witness identify Chester for the jury; the prosecutor had the witness tell the jury that Chester and Petitioner were the only participants in the offense; and the prosecutor then had Chester removed from the courtroom as the jury watched. By displaying Chester to the jury and then introducing his prior testimony, the prosecutor achieved the same effect as if she had put Chester on the stand to assert the Fifth Amendment privilege.

Pet.'s br. at 149-50.

Respondents contend that this part of petitioner's claim—allowing Chester to remain in the courtroom and having a prosecution witness identify him as petitioner's accomplice in the offense—was disposed of by the Pennsylvania Supreme Court on an adequate and independent ground of state law, and therefore is outside the scope of this Court's habeas review. Specifically, respondents argue that, because the Pennsylvania Supreme Court rejected petitioner's argument on direct appeal on the ground that petitioner's trial counsel failed to object to the identification of Chester before the jury, this argument cannot be reviewed by this Court. Specifically, respondents rely on the following footnote in the decision of the Pennsylvania Supreme Court:

> As part of this claim, Appellant also includes a separate contention that the trial court should not have allowed Chester to be seated in the courtroom for identification by the arresting officer. . . . Whatever merit this contention may or may not have, Appellant failed to preserve it for review by lodging a timely objection. *See* N.T. Feb. 7, 2007, at 16-22.

988 A.2d 618, 633 n.13 (Pa. 2010).

This Court agrees with respondents that petitioner's claim cannot be reviewed because the Pennsylvania Supreme Court disposed of the claim on an independent and adequate ground of state procedure. "A state rule provides an independent and adequate basis for precluding federal review of a claim if [1] the rule speaks in unmistakable terms, [2] all state appellate courts refused to review the petitioner's claims on the merits, and [3] the state courts' refusal was consistent with other decisions, that is, the procedural rule was consistently and regularly applied." *Albrecht v. Horn*, 485 F.3d 103, 115 (3d Cir. 2007) (internal quotation marks omitted).

Pennsylvania's requirement that trial counsel contemporaneously object to errors during the trial in order to preserve them for direct appeal is codified in Pennsylvania Rule of Appellate Procedure 302(a), which provides that "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." This was the basis for the Pennsylvania Supreme Court's refusal to review this argument on the merits. *See Albrecht*, 485 F.3d at 115. As other courts in this district have held, this rule speaks in unmistakable terms and was consistently and regularly applied at the time of petitioner's trial in 2007. *See, e.g.*, *McKant v. Cameron*, No. 14 Civ. 2528, 2015 WL 1540790, at *5 n.4 (E.D. Pa. Apr. 6, 2015) (holding that state court's ruling that petitioner waived claim by failing to object during 2008 trial constituted an adequate and independent state ground and precluded federal habeas review); *Granese v. Wenerowicz*, No. 12 Civ. 5875, 2015 WL 996320, at *9 (E.D. Pa. Mar. 4, 2015) (holding, in context of 2006 trial, that "the rule of waiver for failing to raise a contemporaneous objection to the prosecutor's closing argument is both independent and adequate, [and] petitioner has procedurally defaulted this claim. This claim is unreviewable." (internal citation omitted)).

Because all three elements of the independent and adequate state rule inquiry are satisfied, *see Albrecht*, 485 F.3d at 115, petitioner has procedurally defaulted his due process

claim regarding Chester's identification in front of the jury. Whether petitioner can excuse the default will be evaluated in § IV.A.3(c), *infra*.

(b.) Commonwealth's Use of Chester's Prior Testimony Despite its Belief that the Testimony was False

Petitioner also claims that his right to due process under the Fourteenth Amendment was violated when the prosecution introduced Chester's 1988 trial testimony, which the prosecution "believed was false and inconsistent with the physical evidence." Pet.'s br. at 151 (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959), *Com. v. Bazemore*, 614 A.2d 684, 688 (Pa. 1992)). Respondents state in response that, in his briefs to the Pennsylvania state courts, petitioner asserted this claim under the Confrontation Clause of the Sixth Amendment only, and not the Due Process Clause of the Fourteenth Amendment. Further, petitioner did not raise any Sixth Amendment claim in his § 2254 petition in this Court. Thus, according to respondents, there is no exhausted version of the "false testimony" claim under the Fourteenth Amendment for this Court to review. Resp't br., at 133-34.

Petitioner responds that this claim was properly exhausted in the state courts because he relied on the decision of the Pennsylvania Supreme Court in *Bazemore*, which used the phrase "miscarriage of justice" in this context, and thus alerted the state courts that he was raising a due process claim. Pet.'s Reply br., at 36-37 (quoting *Bazemore*, 614 A.2d at 688); *see Nara v. Frank*, 488 F.3d 187, 198 (3d Cir. 2007) (explaining that a state prisoner can exhaust federal claims by, *inter alia*, "rel[ying] on state cases employing constitutional analysis in like fact situations"). Petitioner also argues that he alleged "a pattern of facts that is well within the mainstream of constitutional litigation" when he argued that his 2007 conviction rested on testimony given in 1988 that the prosecution believed to be false. Pet.'s Reply br. at 37 (quoting *Evans v. Court of Common Pleas, Del. County, Pa.*, 959 F.2d 1227, 1232 (3d Cir. 1992)).

This Court determines that this claim was not properly exhausted before the state courts for three reasons. First, petitioner's reliance on *Bazemore* was insufficient to alert the state courts that he was raising a due process claim. The decision of the Pennsylvania Supreme Court in *Bazemore* focused on a defendant's Sixth Amendment right to confront and cross-examine witnesses who testified against him. *See Bazemore*, 614 A.2d at 686 (examining "what suffices to establish 'full opportunity' to cross-examine. . . an unavailable witness. . . [in the context of] the Sixth Amendment right of confrontation"). *Bazemore* used the phrase "miscarriage of justice" in the Sixth Amendment context of depriving the defendant of "the opportunity to test the credibility of th[e] witness" that the prosecution knew to be presenting false testimony. *Id.* at 686-88 (citing 29 Am. Jur. 2d. Evidence, § 738 ("The real basis for the admission of testimony given by a witness at a former trial is to prevent the *miscarriage of justice* where the circumstances of the case have made it unreasonable and unfair to exclude the testimony.") (emphasis added)). *Bazemore*, a decision interpreting the Sixth Amendment, contains no reference to the Fourteenth Amendment. Moreover, the Pennsylvania Supreme Court stated that it did not understand petitioner's reliance on this language to raise a federal due process claim. *See Laird*, 988 A.2d at 630-33. Accordingly, petitioner's reliance on *Bazemore* did not alert the Pennsylvania courts that he was raising a due process claim.

Second, petitioner's use of the phrase "miscarriage of justice" is insufficient, standing alone, to exhaust his due process claim under the Fourteenth Amendment. In *Duncan*, 513 U.S. 364, 365-66 (1995) (per curiam), the Supreme Court of the United States held that a state prisoner's argument to a state court that an evidentiary ruling amounted to a "miscarriage of justice" did not fairly present a due process claim. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the

Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Id.* at 366; *see also id.* at 366-67 (Souter, J., concurring) ("[R]espondent's 'miscarriage of justice' claim in state court was reasonably understood to raise a state-law issue of prejudice, not a federal issue of due process."). Thus, petitioner's passing reference to a potential and unspecified "miscarriage of justice" in his brief to the Pennsylvania Supreme Court does not support his argument that he exhausted his federal due process claim.

Finally, the Court rejects petitioner's argument that he raised "a pattern of facts that is well within the mainstream of constitutional litigation" in the state courts. Pet.'s Reply br. at 37 (quoting *Evans*, 959 F.2d at 1232). Specifically, petitioner argued before the Pennsylvania Supreme Court that the Commonwealth's prosecution of Chester for the same crime demonstrates that the Commonwealth "disbelieved its own witness'[s]" testimony that petitioner was solely responsible for killing Milano. *Com. v. Laird*, No. 527 Capital Appeal Docket, Initial Brief of Appellant (June 23, 2008), at 32 (hereinafter "Pet.'s PASC Dir. App. br."). This is not the same familiar "pattern of facts" at issue in *Napue v. Illinois*, 360 U.S. 264, 271 (1959), and other cases on which petitioner now relies.

In *Napue*, the prosecutors failed to disclose to defense counsel that a witness had been offered a potential reduction of his sentence in return for testifying against the defendant, and the witness perjured himself when he testified that he had received no promise of consideration in return for his testimony. 360 U.S. at 265-66. The United States Supreme Court held that the defendant's conviction violated due process because it was based on false evidence that went uncorrected by the state. *Id.* at 268; *see also* Pet.'s br., at 151-52 (citing *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995) ("[A] conviction obtained by the *knowing use of perjured testimony* is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false

testimony could have affected the judgment of the jury." (emphasis added)); *Giglio v. United States*, 450 U.S. 150 (1972) (finding a due process violation when one prosecutor's affidavit provided evidence that a witness testified falsely under the direction of another prosecutor at trial)).

In contrast to these cases, petitioner has not produced any evidence that Chester's 1988 testimony was, in fact, false, or that the prosecutor in 1988 knew it to be false and presented it anyway. Thus, petitioner's claim—that the prosecutor "disbelieved" Chester's testimony—does not present the familiar "pattern of facts" that give rise to due process violations, and therefore it is not exhausted.

For these reasons, the Court concludes that petitioner's due process claim based on the Commonwealth's alleged "belief" that Chester's 1988 testimony was false was not exhausted before the state courts. Because petitioner is barred by the one-year statute of limitations from returning to state court to exhaust this claim, this claim is also procedurally defaulted. *See Keller v. Larkins*, 251 F.3d 408, 415–16 (3d Cir. 2001) (citing 42 Pa.C.S. § 9545(b)(1)) (explaining that federal claims unexhausted in Pennsylvania state courts are procedurally defaulted because of the one-year PCRA statute of limitations).

The Court now addresses the question whether petitioner can excuse the default of his claim that his due process rights were violated by Chester's identification before the jury and the Commonwealth's alleged disbelief of his testimony.

(c.) Excuse of Procedural Default: Cause and Prejudice or Miscarriage of Justice

Because petitioner's due process claim concerning Chester's appearance in court and the prosecution's use of his prior testimony at the 2007 trial is procedurally defaulted, "federal habeas review of th[is] claim[ ] is barred unless the prisoner 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." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner presents no argument on these grounds for excusing the procedural default of his due process claim.

The Court determines that there was no cause or prejudice to excuse counsel's failure to properly exhaust this due process claim before the state courts. The experienced counsel who represented petitioner on direct appeal should have (1) discovered that no objection was raised when Chester was identified and, therefore, should have challenged that identification by an ineffective assistance of counsel claim, and (2) cited to a federal case or explicitly mentioned the Due Process Clause in arguing that Chester's prior testimony was false, or presented evidence demonstrating that the prosecutor knew that Chester perjured himself in 1988. Moreover, petitioner does not contend that "a factual or legal basis for [his due process] claim was not reasonably available to counsel or [there was] interference by government officials sufficient to make compliance [with the state's contemporaneous objection rule] impracticable." *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000).

Finally, petitioner has presented no evidence that he is actually innocent, thus precluding a finding that failure to review his due process claim would result in a "miscarriage of justice." *See Keller*, 251 F.3d at 415-16.

For the foregoing reasons, the Court concludes that petitioner's claim is procedurally defaulted and dismisses Laird's § 2254 Petition with respect to his claim under the Due Process Clause of the Fourteenth Amendment.

4. Trial Court's Refusal to Instruct the Jury on Lesser Offenses (Claim VII)

In 1988, petitioner appealed the convictions and sentences imposed at his initial trial. Except for the first degree murder charge, all of his convictions—including those for second and third degree murder—were affirmed on appeal and post-conviction review in state court.

This Court vacated petitioner's initial conviction for first degree murder and his death sentence, and that ruling was affirmed by the United States Court of Appeals for the Third Circuit, resulting in a remand to the Court of Common Pleas of Bucks County for retrial on the first degree murder charge alone. *See Laird v. Horn*, 414 F.3d 419, 430 n.9 (3d Cir. 2005) (affirming this Court's decision vacating Laird's first degree murder conviction, remanding the case to this Court "so that the matter may be returned to state court for further proceedings," and clarifying that "[o]ur holding in no way undermines the jury's guilty verdict on the remaining charges. . . the Commonwealth will have the option of retrying Laird for first-degree murder" on remand).

Petitioner claims that his constitutional rights were violated by the trial court's refusal to instruct the jury on lesser included offenses of second and third degree murder at his retrial. Specifically, petitioner argues that the trial court's decision violated the Eighth Amendment as interpreted by the United States Supreme Court in *Beck v. Alabama*, 447 U.S. 625, 636-38 (1980). Pet.'s br., at 124-25.

In the time leading up to the 2007 retrial, petitioner's counsel filed a Motion to Quash Verdicts and/or Convictions seeking to set aside all of petitioner's remaining convictions. The basis for the Motion was the United States Supreme Court's decision in *Beck*, 447 U.S. at 636-38, which held that defendants being tried for a capital offense are entitled to have the jury instructed on all lesser included offenses that are supported by the evidence. N.T. Oct. 30, 2006,

at 68-72. The trial court denied this Motion, and directed counsel to consider how to instruct the jury on the fact that petitioner had already been convicted of lesser degrees of murder in connection with killing Anthony Milano. N.T. Oct. 30, 2006, at 83.

On the first day of the retrial, the court made the following statements to the jury:

> The defendant before you, Richard Laird, is charged with first degree murder. . . The only issue that you'll have to decide during this trial is whether he is guilty of first degree murder. If you decide that he is not guilty of first degree murder, the defendant will not be released from custody. He will receive a life sentence from this Court for another degree of murder in connection with the death of Anthony Milano. . . In this case everyone agrees or it is conceded that Anthony Milano is dead and that the defendant killed him. The sole issue for your determination is whether the defendant did so with the specific intent to kill and with malice.

N.T. Feb. 5, 2007, at 24. All counsel agreed to this instruction. At the end of the guilt phase, the court instructed the jury only on the basis of first degree murder. N.T. Feb. 9, 2007, at 64, 75-85.

Petitioner contends that the trial court's refusal to instruct the jury on second and third degree murder violated the rule articulated by the United States Supreme Court in *Beck*, 447 U.S. at 636-38, that defendants being tried for a capital offense are entitled to have the jury instructed on all lesser included offenses that are supported by the evidence. [12] In *Beck*, the Supreme Court

[12] Petitioner also claims that these same facts constitute a violation of his due process rights. Specifically, petitioner argues that state law requiring instructions on lesser included offenses created "a protected liberty interest by placing substantive limitations on official discretion," the violation of which supports a federal due process claim. Pet.'s br., at 123-24. Respondents contend that petitioner's due process argument based on state law was not exhausted before the Pennsylvania courts and, because of the one-year PCRA statute of limitations, is procedurally defaulted. Resp't br., at 120 n.37. The Court agrees with respondents. Petitioner's brief before the Pennsylvania Supreme Court argued only that state law was violated, and did not explain that this violation of state law was also intended to support a federal due process claim. *See* Pet.'s PASC Dir. App. br., at 22-23. The only federal law cited by petitioner before the Pennsylvania Supreme Court on this issue concerned his Eighth Amendment claim, which is addressed on the merits above. *Id.*, at 23-24. "[A] habeas petitioner wish[ing] to claim that. . . a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment. . . must say so, not only in federal court, but in state court." *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). Because petitioner said nothing before the state courts about due process in connection with the trial court's decision not to instruct the jury on lesser included offenses, he failed to exhaust this due process claim. In addition, because the one-year statute of limitations under PCRA bars petitioner from returning to state court to exhaust this claim, the claim is also procedurally defaulted, and therefore outside the

was confronted with an unusual Alabama statute that prohibited a trial court from instructing a capital jury on lesser included offenses, which had the effect of leaving the jury with "the choice of either convicting the defendant of the capital crime, in which case it [wa]s required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime." *Id.* at 628-29. The Supreme Court ruled that the Alabama statute was unconstitutional under the Eighth Amendment because the unavailability of lesser offenses "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 642. Specifically, the *Beck* court was concerned with cases in which "the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—[because] the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637.

Subsequent cases have emphasized that the rule articulated in *Beck* applies only to similar situations in which "the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), *overruled on other grounds Hurst v. Florida*, 136 S.Ct. 616 (2016); *see also Terry v. Petsock*, 974 F.2d 372, 378 (3d Cir. 1992) (explaining that the "central concern of *Beck* is simply not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence").

scope of this Court's habeas review. *Keller v. Larkins*, 251 F.3d 408, 415–16 (3d Cir. 2001) (citing 42 Pa.C.S. § 9545(b)(1)). Petitioner has made no argument to support a showing of cause and prejudice or a miscarriage of justice relating to this due process claim. Consequently, petitioner's Motion under § 2254 on this ground is dismissed.

Spaziano provides an important limitation on *Beck* that is relevant to this case. In *Spaziano*, all offenses with which the defendant could have been charged were time-barred except for first degree murder, which was governed by no statute of limitations. 468 U.S. at 450. The trial court gave the defendant the choice between waiving the statute of limitations on the lesser offenses, in which case the jury would be instructed on them under *Beck*, or asserting the statute of limitations, in which case the jury would hear nothing of the lesser offenses. *Id*. The defendant chose to assert the statute of limitations and was tried on the first degree murder charge only, was convicted of first-degree murder, and argued on appeal that *Beck* required reversal of his conviction. *Id.* at 450-54. The United States Supreme Court rejected his argument on the ground that it would require the Court to

> divorce the *Beck* rule from the reasoning on which it was based. The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations. Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process.

Id. at 455 (emphasis added). In other words, "*Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." *Id.* at 456.

In this case, the Pennsylvania Supreme Court rejected petitioner's *Beck* claim on direct review of petitioner's conviction and sentence. *Com. v. Laird*, 988 A.2d 618, 628-29 (Pa. 2010). That court ruled that petitioner's case was "readily distinguishable from *Beck*" for two reasons. "First, the Commonwealth lacked authority to retry Appellant for second- or third-degree murder, as his convictions for those offenses were left undisturbed." *Id.* at 629 (citing *Spaziano*, 468 U.S. at 455). In addition, the Pennsylvania Supreme Court relied on the fact that "the trial court in [Appellant's] case informed the jury that an acquittal would not result in

Appellant being placed at liberty. . . Thus, unlike in *Beck*, the jury was aware that an acquittal of first-degree murder would result in Appellant's continued incarceration for a lower degree of murder." *Id.* at 629.

The Pennsylvania Supreme Court adjudicated this claim on the merits, and thus § 2254(d) governs the Court's review of this claim. Petitioner contends that the ruling of the Pennsylvania Supreme Court was contrary to federal law as articulated in *Beck* and *Spaziano* under § 2254(d)(1). Specifically, petitioner argues that *Spaziano* is distinguishable from this case, on the ground that *Spaziano* concerned lesser offenses that "were unavailable because the defendant strategically forfeited them." Pet.'s br., at 126. Petitioner argues that this case is different because "the lesser offenses were not 'available' only because the prosecution refused to make them so" when it opposed defense counsel's Motion to Quash his convictions for second and third degree murder. Pet.'s br., at 127. Thus, according to petitioner, the Pennsylvania Supreme Court's reliance on *Spaziano* was unreasonable and the *Beck* rule should apply to this case.

This Court rejects petitioner's narrow characterization of *Spaziano*. In that case, the United States Supreme Court explained that "*Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." *Spaziano*, 468 U.S. at 456. The Court did not limit this holding to situations where the lesser offenses do not "exist" because the defendant strategically chooses to assert the statute of limitations. In short, the reason why lesser offenses are unavailable or nonexistent is irrelevant; if the jury "in reality [has] no choice" to convict the defendant of any lesser charges, then *Beck* does not require the jury to be instructed on those charges.

The Pennsylvania Supreme Court's application of *Beck* and *Spaziano* was correct. *Beck* is inapposite because petitioner's retrial did not constitute an all-or-nothing situation in which the

jury had to choose between sentencing the defendant to death or setting him free. Rather, the jury was instructed that the result of acquitting petitioner on the first degree murder charge was a life sentence previously imposed for killing Anthony Milano. N.T. Feb. 5, 2007, at 24 ("If you decide that [Laird] is not guilty of first degree murder, the defendant will not be released from custody. He will receive a life sentence from this Court for another degree of murder in connection with the death of Anthony Milano."); *see also Terry*, 974 F.2d at 377-78 (concluding that *Beck* did not apply in a case when the jury knew that the defendant was already serving a life sentence for another offense).

At petitioner's retrial, lesser offenses for second and third degree murder did not "exist" because a final judgment of conviction had already been entered against petitioner on those charges. Accordingly, *Spaziano* governs this case. To instruct the jury on lesser included offenses would have itself resulted in a violation of the Double Jeopardy Clause of the United States Constitution. *See, e.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) ("[O]nce a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.").

The Court thus rejects petitioner's claim that his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on unavailable lesser offenses, and concludes that the decision of the Pennsylvania Supreme Court was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). Laird's Petition for relief under § 2254 on this ground is denied.

5. Double Jeopardy (Claim VI)

Petitioner's final guilt phase claim is that his conviction and sentence for first degree murder at his retrial, at which time his conviction for the lesser included offense of third degree murder still stood, violated the Double Jeopardy Clause of the Fifth Amendment. Specifically,

petitioner argues that: (1) third degree murder is a lesser included offense of first degree murder, and therefore they are the "same offense" for purposes of double jeopardy; therefore (2) his multiple convictions and punishments for the "same offense" violate the prohibition against double jeopardy. Pet.'s br., at 116-17.

The Double Jeopardy Clause "consist[s] of three separate constitutional protections. [1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *rev'd on other grounds Alabama v. Smith*, 490 U.S. 794 (1989). Petitioner's brief is not entirely clear regarding which of these three protections he claims was violated. Because the record discloses that petitioner was not acquitted of any offenses, the Court will construe this claim as arising under the latter two protections, i.e. second prosecution for the same offense after conviction and multiple punishments for the same offense.

Petitioner asserted this claim before the Pennsylvania courts on direct review of his conviction and sentence. *See* Pet.'s PASC Dir. App. br., at 18-22. The Pennsylvania Supreme Court rejected petitioner's claim that, because he had a standing conviction for third-degree murder, he could not be retried for first-degree murder under the Pennsylvania Crimes Code §§ 109-110. *Com. v. Laird*, 988 A.2d 618, 627-28 (Pa. 2010) (citing 18 Pa.C.S. § 109-110). Specifically, that court ruled that (1) Section 109, which prohibits a second prosecution based on the same facts "for a violation of the same provision of the statutes," did not bar petitioner's retrial for first degree murder because it is a "distinct offense[ ]" from third degree murder; and (2) Section 110, which prohibits a later prosecution for a different offense if the defendant could have been convicted of that offense when he was first prosecuted, did not apply to this situation

because it "embodie[d] a rule of compulsory joinder. . . and hence, can only logically apply in a situation where the challenged conviction is for an offense that the Commonwealth did not pursue in the initial proceedings." *Id* at 628 (internal citations omitted).

Petitioner contends that, because the Pennsylvania Supreme Court did not rule on his double jeopardy claims under federal law, this Court should address his claims *de novo*. Pet.'s br., at 120. Respondent disagrees, and argues that petitioner presented his double jeopardy claims to the Pennsylvania Supreme Court on the basis of state law only and, therefore, his federal claims are unexhausted and procedurally defaulted. Resp't br. at 111. Assuming *arguendo* that *de novo* review applies because (a) petitioner did exhaust his federal double jeopardy claims before the Pennsylvania Supreme Court and (b) that court did not adjudicate the claims on the merits, this Court determines that petitioner's double jeopardy claims are not meritorious and must be rejected. *See* 28 U.S.C. § 2254(b)(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."); *see also Young v. Folino*, No. 08 Civ. 2164, 2009 WL 5178302, at *3 (E.D. Pa. Dec. 23, 2009) ("The Court retains discretion to deny a habeas petition on the merits even if it. . . contains both exhausted and unexhausted claims.").

(a.) Re-trial for the "Same Offense"

The Court concludes that petitioner was not "twice put in jeopardy" when he was retried for first degree murder. *See* U.S. Const. amend. V. "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn," but "'the conclusion that jeopardy has attached begins, rather than ends, the inquiry' as to whether the Double Jeopardy Clause" has been violated. *Serfass v. United States*, 420 U.S. 377, 388, 390 (1975) (quoting *Illinois v. Somerville*, 420 U.S. 458, 467 (1973)). What the Double Jeopardy Clause specifically prohibits is the following pattern of events: "once a defendant is placed in jeopardy for an offense, *and jeopardy*

terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (emphasis added). Common jeopardy-terminating events include "acquittal or a final judgment of conviction." *United States v. Jose*, 425 F.3d 1237, 1240 (9th Cir. 2005).

However, there are "limited circumstances [under which] a second trial on the same offense is constitutionally permissible," *United States v. Pharis*, 298 F.3d 228, 241 (3d Cir. 2002) (citation and internal quotation marks omitted), such as when a defendant successfully appeals his conviction on the ground that a legal error was committed at trial. *Burks v. United States*, 437 U.S. 1, 15 (1978) (distinguishing reversal of a criminal conviction on appeal "for trial error" from a reversal for "evidentiary insufficiency" (citing *Ball v. United States*, 163 U.S. 662, 672 (1896)). The rationale for this rule, as articulated by the United States Supreme Court, is that "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo*, 377 U.S. 463, 466 (1964); *see also Burks*, 437 U.S. at 15 (explaining that, after reversal for trial error, "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.").

Petitioner does not claim—nor could he—that his retrial for first degree murder violated the prohibition against double jeopardy because he had previously been convicted of first degree murder. This is precisely the scenario permitted by *Ball* and *Burks*: petitioner challenged his initial conviction of first degree murder by petition for writ of habeas corpus and this Court vacated the conviction due to a number of trial errors but not for any insufficiency of the evidence. *See Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001).

Rather, petitioner argues that his retrial for first degree murder violated the prohibition against double jeopardy because his conviction of third degree murder in the initial trial constitutes the "same offense." Petitioner relies on the rule of statutory construction in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), pursuant to which separate crimes are "separate" for double jeopardy purposes if each one "requires proof of a fact which the other does not." Pet.'s br., at 117-18. Accordingly, lesser included offenses are considered the "same" as greater included offenses because they do not require the proof of any additional elements. *See, e.g.*, *Brown v. Ohio*, 432 U.S. 161, 168 (1977). Under Pennsylvania law, as petitioner correctly notes, third degree murder is a lesser included offense of first degree murder: third degree murder requires proof that the defendant killed another person with malice aforethought, while first degree murder requires that the defendant killed with specific intent *and* malice aforethought. Pet.'s br., at 118 (citing 18 Pa.C.S. § 2502). Therefore, petitioner is correct that third degree murder is the "same offense" as first degree murder for double jeopardy purposes under *Blockburger*.

Such a determination, however, does not inevitably lead to the conclusion that the Double Jeopardy Clause was violated when petitioner was retried for first degree murder after being convicted for the "same offense" of third degree murder. Rather, there was no constitutional violation in this case for two reasons: (1) the Double Jeopardy Clause "does not prohibit the State from prosecuting [a defendant] for [greater and lesser included] multiple offenses in a single prosecution," *Ohio v. Johnson*, 467 U.S. 493, 500 (1984), as the Commonwealth did in petitioner's initial trial, and (2) as explained above, the Double Jeopardy Clause also does not prohibit retrial of charges that were reversed or vacated for trial error as opposed to evidentiary insufficiency, *Ball*, 163 U.S. at 671-72. The fact that these two events—neither of which

amounts to a constitutional violation—occurred in succession in petitioner's case does not create a new type of double jeopardy violation.

The United States Court of Appeals for the Ninth Circuit addressed a nearly identical case and reached the same conclusion. In *United States v. Jose*, the defendants were convicted at an initial trial of felony murder and predicate/lesser included offenses of armed robbery and armed burglary, and the defendants successfully appealed and obtained reversal of their felony murder convictions on the ground of trial error. 425 F.3d at 1240. The government then sought to retry the defendants on the felony murder charge. *Id*. The "case present[ed] the unique situation in which a defendant is tried on greater and lesser included offenses under the same indictment, jeopardy terminates as to the lesser offenses by virtue of final convictions, and the government seeks to retry the defendant on the greater offense after reversal." *Id.* at 1243.

The Ninth Circuit in *Jose* rejected the defendants' double jeopardy claim on multiple grounds. First, the court noted that "[t]he Double Jeopardy Clause embodies two concepts, whose aims serve as its twin rationale—'principles of finality and[. . .] prosecutorial overreaching.'" *Id.* at 1242-43 (quoting *Johnson*, 467 U.S. at 501-02). Consequently, the court ruled that neither principle had been offended: "[t]he prosecution did not overreach when it charged and tried the defendants on both felony murder and its lesser included predicates in the same trial. Similarly, the defendants had no legitimate expectation of finality in a judgment that they placed in issue by appealing." *Id.* at 1243 (internal citation omitted).[13]

[13] The Double Jeopardy Clause bars retrial for a greater offense only after jeopardy terminated for a lesser included offense (the "same offense") *when the offenses are charged in different indictments*. *Jose*, 425 F.3d at 1242 (citing *Brown*, 432 U.S. at 166-68). Even though petitioner's current conviction for first degree murder occurred after jeopardy terminated in connection with the third degree murder charge, petitioner was charged with both third and first degree murder in the same indictment and tried on those charges simultaneously. Because "there is a difference between separate, successive trials of greater and lesser offenses, and the different situation in which both are tried together," there was no violation of the Double Jeopardy Clause when petitioner was retried on a greater included charge (first degree murder)

The *Jose* court also rejected the defendants' double jeopardy argument because, under *Ball*, "jeopardy continues on remand" of charges reversed on appeal for trial error, "and there is accordingly no double jeopardy violation [when] the retrial is precipitated by. . . a defendant's successful reversal of conviction." *Id.* at 1244 (citing *Ball*, 163 U.S. at 671-72); *see also Burks*, 437 U.S. at 15 n.9 (explaining that one rationale supporting "the policy of allowing retrial [of the same offense] to correct trial error" is "that the appeal somehow continues the jeopardy which attached at the first trial"). This is true even when jeopardy has terminated on other lesser or greater included charges, which are technically the "same offense." *Jose*, 425 F.3d at 1244.; *see also United States v. Jackson*, 658 F.3d 145, 151 (2d Cir. 2011) (rejecting defendant's double jeopardy argument after defendant had been convicted of a lesser offense, but retried on a greater offense because the first jury deadlocked, on the ground that the later trials "are properly seen as continuations of the initial trial and did not expose [defendant] to double jeopardy").

This case is identical to *Jose* and, for the same reasons articulated by the Ninth Circuit, there was no violation of the Double Jeopardy Clause when petitioner was retried for first degree murder even though he was previously convicted of the lesser included offense of third degree murder. The two constitutional protections of the prohibition against double jeopardy argued by petitioner were not violated by retrying petitioner for first degree murder: the prosecution appropriately charged petitioner with both third and first degree murder in the same indictment and tried him for those charges simultaneously in 1988, and petitioner had no legitimate expectation of finality in the final judgment of conviction on the first degree murder charge, which he successfully appealed. *See Jose*, 425 F.3d at 1242-43. In addition, jeopardy terminated with respect to third degree murder when the final judgment of that conviction was entered in

that was originally brought in the same indictment as the lesser included offense (third degree murder) as to which jeopardy had already terminated. *Id.* (quoting *United States v. DeVincent*, 632 F.2d 155, 158 (1st Cir. 1980)).

1988; but jeopardy "continued" with respect to first degree murder when petitioner successfully appealed his initial conviction for that offense and there was a retrial on that offense. *See Burks*, 437 U.S. at 15 n.9; *Jackson*, 658 F.3d at 151; *Jose*, 425 F.3d at 1244. Because the retrial did not put petitioner in jeopardy a second time, there was no constitutional violation.

Accordingly, petitioner's argument that his retrial for first degree murder violated the Double Jeopardy Clause of the Fifth Amendment on this ground is rejected.

(b.) Multiple Punishments for the "Same Offense"

The Court also concludes that petitioner's claim that his "separate convictions and sentences [for first and third degree murder] violate the protection against double jeopardy because the sentencing court 'prescrib[ed] greater punishment than the legislature intended'" must be rejected. Pet.'s br., at 121 (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). Petitioner is correct that the Double Jeopardy Clause "protects against multiple punishments for the same offense," *Pearce*, 395 U.S. at 717, and that, "where two statutory provisions proscribe the 'same offense' [under *Blockburger*], they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent," *Whalen v. United States*, 445 U.S. 684, 691-92 (1980). In this context, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S.at 366.

This rule has no application to petitioner's case, however, because he did not receive multiple punishments. Petitioner has only been sentenced for his conviction for first degree murder: once in 1988, which sentence was vacated by this Court on habeas review, *see Laird* 159 F. Supp. 2d 58, 131 (E.D. Pa. 2001), and again in 2007 after he was retried and convicted, N.T. Feb. 13, 2007, at 200. Petitioner admits that the Court of Common Pleas never imposed sentence on his conviction for third degree murder. Pet.'s Reply br., at 33; *see also Laird*, 159 F. Supp. 2d

at 68 ("On July 19, 1989, the trial court sentenced petitioner to death on the first degree murder charge and to a consecutive sentence... on the kidnapping charge. It does not appear that petitioner was sentenced on any other crimes of which he was found guilty."). Thus, petitioner did not receive more than one punishment for the "same offense."

Nevertheless, petitioner argues that it is a "legal fiction that [he] was not formally 'sentenced' for second or third degree murder [because a] sentence of life imprisonment for another degree of murder exists by virtue of the trial court's instruction" to the jury. Pet.'s Reply br., at 33. What petitioner refers to is the trial court's explanation at the beginning of the trial: "If you [the jury] decide that he [Laird] is not guilty of first degree murder, the defendant will not be released from custody. He will receive a life sentence from this Court for another degree of murder in connection with the death of Anthony Milano." N.T. Feb. 5, 2007, at 23.

This instruction by the trial court does not amount to cumulative sentencing. First, petitioner cites no authority that a trial court's comments to a jury can be treated as a sentence or constitute punishment under the Double Jeopardy Clause. Second, the trial court correctly instructed the jury on this issue: depending on whether it convicted petitioner of first degree murder, petitioner would receive one sentence (the death penalty) or another (life imprisonment), but never both.

This Court also rejects petitioner's argument that, because "[t]here is no 'clear' legislative intent [under Pennsylvania law] authorizing separate convictions and punishments for a primary offense and a lesser included one," the Double Jeopardy Clause was violated in his case. Pet.'s br., at 118-19. Petitioner explains that:

> Under 42 Pa.C.S. § 9765. . . multiple offenses for a single criminal act "merge" for sentencing purposes when "all of the statutory elements of one offense are included in the statutory elements of the other offense." Under those circumstances, the court may sentence the defendant only on the

> higher graded offense. . . Far from reflecting a "clear legislative intent" to authorize multiple convictions[14] and punishments, state law expressly forbids them.

Pet.'s br., at 119 (internal citations omitted).

Petitioner is correct in pointing out that state law forbids multiple punishments for the same offense, but that law is inapposite to this case: petitioner's sentence complies with state law because he was never punished multiple times. As explained above, petitioner admits that he was not punished multiple times. *See* Pet.'s Reply br., at 33. Petitioner's sentence complied with 42 Pa.C.S. § 9765: his conviction for third degree murder "merged" for sentencing purposes with the greater offense of first degree murder, and petitioner was sentenced "only on the higher graded offense." Therefore, in petitioner's case, "the sentencing court [did not] prescrib[e] greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366. Accordingly, petitioner's claim that his sentence violates the Double Jeopardy Clause is rejected.

For the foregoing reasons, Laird's Petition under § 2254 on the ground that the Double Jeopardy Clause was violated in his case is denied.

B. <u>Penalty Phase Claims</u>

1. Penalty Counsel's Investigation and Presentation of Mitigation Evidence (Claim I)

As the Pennsylvania Supreme Court explained, there are two aspects to petitioner's first sentencing phase claim. Specifically, petitioner contends that (1) he was deprived of effective assistance of counsel during the sentencing phase because the testimony that counsel elicited from Mark Laird, Dr. Henry Dee, Ph.D., and Dr. Robert Fox, Jr., M.D., was merely an abbreviated, and therefore less effective, version of those witnesses' testimony during the 1997 PCRA hearing; and (2) his counsel failed to investigate and present an additional expert in the

[14] The Court has already ruled that there is no constitutional bar to petitioner's separate convictions of lesser and greater included offenses, *supra* § IV.A.5(a.).

area of male sexual abuse, who could have explained to the jury a potential reason that petitioner committed the crime charged. Pet.'s br., 27. For the following reasons, the Court rejects both of these arguments.

(a.) Insufficiency of 2007 Mitigation Presentation in Comparison to 1997 PCRA Presentation (Mark Laird, Dr. Henry Dee, Dr. Robert Fox)

Petitioner contends that counsel's presentation of mitigation evidence regarding his mental health impairments and history as an abuse victim was inadequate compared to the way that this evidence was presented at the 1997 PCRA hearing. First, petitioner argues that counsel's examination of his brother, Mark Laird, about the physical, psychological, and emotional abuse that their father inflicted on them and their mother, and Mark Laird's recollection of one instance in which he believed their father sexually abused petitioner, was ineffective in comparison to Mark's 1997 testimony. Pet.'s br., at 43-44. Petitioner also claims that the testimony of Dr. Dee and Dr. Fox at sentencing was inadequate when compared to the depth and detail of the same experts' testimony at the 1997 PCRA hearing. *Id.* at 41, 44.

The Pennsylvania Supreme Court determined that the record contradicted petitioner's argument because trial counsel's presentation of mitigation evidence was substantially similar to the evidence presented at the 1997 PCRA hearing. *Com. v. Laird*, 119 A.3d 972, 992-95. This record distinguished petitioner's case from cases such as *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Commonwealth v. Smith*, 606 Pa. 127 (2010), in which habeas relief was granted on the ground that counsel failed to present any mitigation evidence stemming from the defendant's difficult past. *Id.* at 996-97.

Petitioner argues that he is entitled to relief under § 2254(d)(2) on the ground that the Pennsylvania Supreme Court's conclusion that the differences between Mark Laird's, Dr. Dee's, and Dr. Fox's testimony at the 1997 PCRA hearing and at petitioner's 2007 sentencing were "not

extensive" was an unreasonable determination of the facts in light of the state court record. Pet.'s br., at 49. The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs the Court's review of this claim.

As the Court explained above, to prevail on an ineffective assistance of counsel claim petitioner must prove both (1) that his counsel acted in an objectively unreasonable manner that (2) caused him to suffer prejudice. *Strickland*, 466 U.S. at 687-88. "Because this claim arises out of the sentencing phase of his trial, [petitioner] must establish actual prejudice by showing that 'there is a reasonable probability that, absent the errors, the sentencer… would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Richmond v. Polk*, 375 F.3d 309, 327 (4th Cir. 2004) (quoting *Strickland*, 466 U.S. at 695). The Court addresses the testimony of Mark Laird, Dr. Dee, and Dr. Fox in turn.

Mark Laird: The Pennsylvania Supreme Court stated as follows with respect to Mark Laird's testimony at the 2007 trial:

> Mark Laird testified in the penalty phase and recounted how he and Appellant were regularly beaten by his father without provocation and for seemingly arbitrary reasons, *see, e.g.*, N.T., Feb. 12, 2007, at 70… Mark noted that Appellant was beaten more violently than himself because Appellant was the older of the two brothers… Separately, Mark testified that he and Appellant witnessed their father violently beat their mother, leaving rooms in shambles due to household items being broken during the altercation. Mark stated that the beatings became so severe that, when Appellant was approximately eleven years old, their mother left their father and moved to Pennsylvania to 'rebuild her life with her two sons.' *Id.* at 83. He observed that he had only isolated memories of the time period because he had 'blocked it out[.]' *Id.*
>
> As for sexual abuse, Mark testified to memories of his father and Appellant being in the bedroom with the door closed, and that when Mark opened the door for a moment he saw the two naked. *See id.* at 71–72, 82. Mark added that this was "the norm" during that period of time, albeit he clarified that at his young age he did not understand what was taking place in the bedroom. *Id.* at 83.

> Mark also testified at some length concerning Appellant's progressive, years-long descent into a pattern of alcohol and drug abuse during Appellant's adolescence. *See id.* at 85–88. Finally, Mark observed that, unrelated to the beatings by his father, there were "many" incidents in which Appellant was "hit in the head." *Id.* at 84. These included the mishap involving Appellant falling off of a moving vehicle, *see id*. at 85, as well as a separate occasion where someone struck Appellant in the back of the head with a two-by-four, causing Appellant to fall to the ground and temporarily lose his vision. *See id.* at 84–85.

Com. v. Laird, 119 A.3d 972, 991-92 (Pa. 2015).

The Pennsylvania Supreme Court then reviewed the transcript of Mark Laird's testimony from the 1997 PCRA hearing, which revealed that

> "Mark did provide several additional details on these and related topics [in 1997]. In particular, he testified that: their father was an alcoholic and drank frequently; their father verbally berated Mark and Appellant by calling them names and telling them they were worthless; when being physically abused, the brothers were prohibited from crying on pain of further beatings; the boys' mother would sometimes instruct them to hide from their father; the military belt was made of leather and had a large buckle; when Appellant was young he stayed with his father in Japan for a short time and returned home with a scar on his forehead due to an altercation with his father; and there was one occasion later in life when Mark learned from Appellant that the incidents in which Mark would see his father and Appellant naked in the bedroom involved sexual abuse. *See* N.T., Jan. 21, 1997, at 202–213."

Id. at 992.

The Pennsylvania Supreme Court determined that the additional details from Mark Laird's 1997 testimony would have "supplemented the information the jury heard," but that "the essential points regarding the severity of the physical beatings to which Appellant was subjected, the sexual abuse, and the experience of seeing his family members brutalized by his father, all formed part of Mark's testimony at the penalty hearing" in 2007. *Id.* That court also cited to parts of Dr. Dee's and Dr. Fox's testimony during the 2007 penalty phase in which they provided further details of physical and sexual abuse of petitioner, and relied on the fact that at least one juror found all of the mitigating factors related to this information—physical abuse; sexual

abuse, emotional abuse, witnessing the abuse of others, psychological consequences of abuse, substance abuse, and alcohol abuse. *Id.* at 993. In conclusion, the Pennsylvania Supreme Court stated this record did "not reflect that counsel's performance fell below the standard of reasonable professional assistance required by *Strickland*." *Id.*

The Court rejects petitioner's argument that the ruling of the Pennsylvania Supreme Court was based on an unreasonable determination of the facts in light of the record. A review of Mark Laird's testimony in 1997 and 2007 reveals that nearly identical subjects were covered, and the 2007 sentencing jury was not deprived of any significant facts concerning petitioner's background. The Pennsylvania Supreme Court reasonably relied on the fact that at least one juror found all of the mitigating factors presented. *See Richmond*, 375 F.3d at 328 (relying on the fact that jury found as fact the relevant mitigating factors but nevertheless decided to impose the death penalty to reject *Strickland* claim).

This Court agrees that Mark Laird's 1997 testimony was more detailed than his 2007 testimony, but it cannot be said that counsel's examination of Mark Laird in 2007 was so unreasonable that he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

The Pennsylvania Supreme Court did not reach the second prong of *Strickland* with regard to petitioner's argument based on his counsel's examination of Mark Laird. Therefore, petitioner's argument under the second prong of *Strickland* is reviewed *de novo* by this Court. *See Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010). This Court concludes that petitioner suffered no prejudice as a result of the alleged errors in his counsel's presentation of Mark Laird's testimony. As explained above, the differences between Mark Laird's testimony at the 1997 PCRA hearing and the 2007 penalty phase were minor and insignificant. The addition of

such insignificant testimony would have been unlikely to have changed the outcome of the penalty phase in 2007. *See Strickland*, 466 U.S. at 694 (requiring prejudice to be supported by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

Dr. Henry Dee and Dr. Robert Fox: The Court now turns to petitioner's contention that his trial counsel did not elicit sufficiently detailed testimony from the experts who testified during the penalty phase, Dr. Dee and Dr. Fox. The Pennsylvania Supreme Court compared the 1997 testimony of Dr. Dee and Dr. Fox with their 2007 testimony in both the guilt and sentencing phases:

> In the [2007] guilt phase Dr. Dee, as noted above, discussed his evaluation of Appellant—which, again, was based on interviews with Appellant and his family members, medical and other records, and the administration of two batteries of tests—and stated that Appellant suffered from cognitive impairments resulting from brain damage, causing mental-health deficits including those which affected his memory functioning and executive functioning. In the penalty phase, he discussed at considerable length the graphic nature of the abuse visited upon Appellant, his brother, and his mother when Appellant was a young child, ultimately culminating in Mrs. Laird's decision to move away with her two sons.

Com. v. Laird, 119 A.3d 972, 994 (Pa. 2015). Dr. Dee also testified about petitioner's alcohol use, which had begun at a young age, and petitioner's ADHD diagnosis as a young child, which went untreated and which led petitioner to use amphetamines as an adolescent to alleviate its symptoms, and he diagnosed petitioner with significant brain damage from head injuries. *Id.* at 995. Dr. Dee "concluded to a reasonable degree of psychological certainty that, at the time of the crime, Appellant was under the influence of an extreme mental or emotional disturbance." *Id.* (citing 42 Pa.C.S. § 9711(e)(2)).

The Pennsylvania Supreme Court explained that Dr. Fox's testimony during the 2007 penalty phase covered similar topics as Dr. Dee's testimony, including petitioner's alcoholic

father who subjected petitioner and his mother and brother to physical and psychological abuse and sexually abused petitioner, that petitioner began drinking alcohol from a young age involuntarily when his father gave it to him, that petitioner had suffered multiple head injuries that caused a mood disorder, and that petitioner suffered from ADHD, post-traumatic stress disorder ("PTSD"), alcohol dependency, and a history of polysubstance abuse. *Id.* Dr. Fox also concluded that petitioner was suffering from an extreme mental or emotional disturbance on the night of the crime. *Id.*

The Pennsylvania Supreme Court concluded that the testimony of Dr. Dee and Dr. Fox at the 2007 trial was not significantly different from their testimony in 1997. An examination of the record shows that this conclusion was reasonable.

Dr. Dee testified at the 1997 PCRA hearing that he diagnosed petitioner with ADHD, and brain damage from multiple head injuries, and noted petitioner's history of alcohol and substance abuse. N.T. Jan. 21, 1997, at 53, 56. He also testified about his discussions with petitioner's mother, who told him about the abuse from petitioner's father, and with Mark Laird, who further explained the physical abuse and said that he saw petitioner and his father naked in a room together, which Mark Laird later realized was indicative of sexual abuse. N.T. Jan. 21, 1997, at 79-89. The doctor explained that, based on petitioner's brain damage alone, petitioner's ability to conform his conduct to the requirements of the law would have been impaired and, when the effects of petitioner's brain damage were combined with the effects of petitioner's dysfunctional childhood, ADHD, and ingestion of a large amount of alcohol, petitioner was even more substantially impaired. N.T. Jan. 21, 1997, at 123-27. As the Pennsylvania Supreme Court recounted, this history and diagnoses are nearly identical to the history and diagnoses about which Dr. Dee testified in 2007 at both the guilt and penalty phases.

At the 1997 PCRA hearing, Dr. Fox testified that petitioner had severe and untreated forms of PTSD and ADHD, the symptoms of which he self-medicated with alcohol and amphetamines, and that petitioner suffered from head injuries and associated brain damage. He went on to explain that petitioner developed PTSD after being abused by his father and witnessing his father's abuse of his mother and brother. N.T. Jan. 22, 1997, at 43-44, 48-50, 112-116. Dr. Fox's testimony from the 1997 PCRA hearing was more detailed because he testified for nearly two days, often proceeding in an almost narrative form with little direction from counsel. Petitioner's trial counsel cannot be faulted for choosing not to replicate all such testimony before a jury and during the guilt and penalty phases of the 2007 trial that, combined, lasted seven days.

Moreover, the Pennsylvania Supreme Court's disposition of this claim was not an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). That court distinguished Laird's case from the precedent he relied upon to argue that his counsel's presentation of expert testimony during the penalty phase was unreasonable. *Laird*, 119 A.3d at 996 (citing *Wiggins v. Smith*, 539 U.S. 510 (2003), *Com. v. Smith*, 995 A.2d 1143 (2010)). In both *Wiggins* and *Smith*, counsel was aware that their clients had suffered from abusive childhoods and other difficulties but made no attempt to investigate their clients' backgrounds and ultimately presented no evidence on that subject during the penalty phases of their respective trials. *Wiggins*, 539 U.S. 516-17; *Smith*, 995 A.2d at 1172. The Supreme Court of the United States granted habeas relief in *Wiggins*, and the Pennsylvania Supreme Court did the same in *Smith*, on the ground that counsel unreasonably failed to investigate their clients' backgrounds for potentially significant mitigation evidence. As explained by the Pennsylvania Supreme Court, these cases are distinguishable on the ground that petitioner's counsel investigated his background and mental

impairments and presented significant substantive testimony on that subject. *Laird*, 119 A.3d at 996-97 ("[C]ounsel employed four expert witnesses and ensured that two of them provided extensive and detailed testimony in the penalty phase concerning Appellant's abusive childhood, his subsequent head injuries, his mental-health impairments, and the effects all of these factors had on his cognitive functioning. Further, the jury was instructed that these experts' guilt-phase testimony was part of the penalty phase through incorporation, so that their cumulative penalty phase testimony was even more detailed.").

A review of relevant federal case law reveals that the decision of the Pennsylvania Supreme Court was not contrary to federal law. *See* 28 U.S.C. § 2254(d)(1). The cases in which federal courts have granted habeas relief on the ground that counsel's use of experts during the mitigation phase of a capital case arose out of far more extreme circumstances than the alleged errors in petitioner's case. *Compare Johnson v. Bagley*, 544 F.3d 592, 600-606 (6th Cir. 2008) (reversing state court's denial of habeas relief and holding that defense attorneys failed to adequately prepare their mental health expert, who gave testimony damaging to the defendant during the mitigation phase, because they failed to properly investigate defendant's background of abuse and mental impairment), *and Stevens v. McBride*, 489 F.3d 883, 896-98 (7th Cir. 2007) (reversing state court's denial of habeas relief on the ground that trial counsel was unreasonable in presenting mental health expert, who had testified during guilt phase that the defendant suffered from no mental impairments, again at penalty phase when counsel thought the expert was a "quack" and had no idea how the expert would testify), *with Pietri v. Fla. Dep't of Corr.*, 641 F.3d 1276, 1284-88 (11th Cir. 2011) (upholding state court's conclusion that counsel could not be held deficient when "the evidence ultimately presented at trial encompassed the material for which [petitioner] now asserts fault with counsel."), *and Sims v. Brown*, 425 F.3d 560, 586

n.17 (9th Cir. 2005) (holding counsel acted reasonably in relying on qualified experts to properly diagnose defendant and give favorable testimony and collecting cases in which courts found deficient performance regarding the use of experts).

As a final point on this issue, the Court notes that petitioner received a significantly more effective presentation of mitigation evidence at his 2007 retrial than he did at his original 1988 trial. In 1988, petitioner's counsel conducted no inquiry into his background and medical history in connection with the penalty phase and presented no mental health experts during sentencing, allegedly "because his defense and that of his client was not guilty." *Laird v. Horn*, 159 F. Supp. 2d 58, 115 (E.D. Pa. 2001). The only evidence presented in mitigation at the 1988 trial was petitioner's young age at the time of the offense, his lack of a history of violent crimes, his state of intoxication, his role as a devoted father, and the fact that he was the son of a career officer in the Marine Corps. *Id.* at 116. This Court determined that the Pennsylvania Supreme Court's ruling that petitioner's counsel made a reasonable strategic decision not to develop additional mitigation evidence at the 1988 trial was clearly erroneous and that petitioner's counsel failed to properly investigate his background and marshal appropriate expert testimony in defense of his life. *Id.* Indeed, the circumstances of petitioner's 1988 trial are significantly similar to the deficient investigations that warranted habeas relief in *Wiggins* and other cases discussed above.

The Court concludes that the Pennsylvania Supreme Court's rejection of this argument was not contrary to federal law or an unreasonable determination of the facts in light of the record, and thus rejects petitioner's argument that his counsel was ineffective in presenting mitigation evidence during the penalty phase of his 2007 trial.

(b.) Failure to Call Additional Expert in Male Sexual Abuse

Petitioner further argues that his counsel was ineffective for failing to present an additional mitigation expert to investigate and diagnose the psychological effects of sexual abuse

on male victims. It is petitioner's position that, even though his attorneys knew that he had been sexually abused by his father, "counsel made no attempt to develop or present that information, either from Petitioner himself, from the experts who testified…, or from a[n additional] specialist in childhood sexual abuse." Pet.'s br., at 40. Petitioner points to the testimony of clinical psychologist Dr. David Lisak, Ph.D., a defense witness at his 2012 PCRA hearing, as the type of expert testimony that his penalty phase counsel should have developed. *Id.* at 44-47. In sum, he claims that he was prejudiced by his counsel's failure to "connect the dots" between his history as a victim of sexual abuse and the "hate crime" for which the Commonwealth sought the death penalty because an effective presentation of mitigation evidence could have convinced at least one juror to vote for a life sentence. *Id.* at 50.

The Pennsylvania Supreme Court summarized Dr. Lisak's testimony as follows:

> "A review of the post-conviction record reveals that Dr. Lisak related several examples of violence that were not mentioned at trial, such as an incident in which Appellant and his brother witnessed an apparent attempt by their father to strangle their mother with his hands. *See* N.T., May 24, 2012, at 113. Dr. Lisak was also able to provide some additional perspective concerning the level of vulnerability felt by children who are [sexually] abused—particularly by a parent to whom they would ordinarily look for protection—and the tendency of [sexually] abused boys to deal with such feelings of vulnerability by adopting what the expert termed a hyper-masculine persona as they progress into adolescence. *See* N.T., May 24, 2012, at 115."

Com. v. Laird, 119 A.3d 972, 997-98 (Pa. 2015). That court then characterized this testimony as "largely cumulative of that provided by Drs. Dee and Fox, as well as Mark Laird, all of whom informed the jury about the nature and severity (and several examples) of the physical and sexual abuse Appellant suffered at the hands of his father." *Id.* The Pennsylvania Supreme Court concluded that petitioner failed to demonstrate he was prejudiced by his counsel's failure to present the "cumulative" testimony because at least one juror found all of the mitigating factors proffered by the defense, which included, *inter alia* physical abuse, sexual abuse, emotional

abuse, witnessed the abuse of others, and psychological consequences of abuse, and therefore the outcome of a sentencing proceeding with Dr. Lisak's testimony would not have been different. *Id.* at 998-99.

Petitioner challenges the conclusion of the Pennsylvania Supreme Court that he suffered no prejudice from counsel's failure to present an expert in sexual abuse on the ground that the Pennsylvania Supreme Court unreasonably discounted the significance that the jury would have attached to the testimony from an expert in sexual abuse.

The Pennsylvania Supreme Court addressed this argument on the merits, and thus § 2254(d) governs the Court's review of this claim. The Court concludes that this summary by the Pennsylvania Supreme Court was a fair characterization of Dr. Lisak's testimony in light of the record. It is true that much of Dr. Lisak's testimony was similar to that provided by Dr. Dee and Dr. Fox. *Compare, e.g.* N.T., May 24, 2015, at 50, 118 (Lisak concluded that petitioner was a victim of sexual abuse by his father and that petitioner self-medicated his trauma symptoms with alcohol and amphetamines from a young age), *with* N.T. Feb. 13, 2007, at 17, 47 (Fox testified that petitioner told him one week prior to trial that he had been sexually abused and explained that testing results supported the fact that Laird was telling the truth about being abused), *and id.* at 59, 77-78 (Dee testified that Laird was sexually abused and that he self-medicated the symptoms of his ADHD with amphetamines). However, some of Dr. Lisak's testimony at the 2012 PCRA hearing was not cumulative of the testimony presented at the 2007 trial. For example, in contrast to the evidence of a single incident of potential sexual abuse that was presented to the jury in 2007, Dr. Lisak testified that petitioner revealed to him that he was sexually abused by his father on a regular basis from the age of about five until his mother moved with him to Pennsylvania, around the age of eleven. N.T., May 24, 2012, at 112-113.

Moreover, Dr. Lisak testified that the psychological harm to petitioner was likely magnified by the fact that his father was the perpetrator of the abuse, and that petitioner's experiences as a victim were corroborated by his life-long aversion to being physically touched by other men. N.T., May 24, 2012, at 121, 201, 208. No evidence of this nature was presented at petitioner's 2007 trial.

The Court determines that the Pennsylvania Supreme Court reasonably concluded that petitioner suffered no prejudice from the fact that a sexual abuse expert was not called as a witness on the ground that this testimony was not "reasonably likely to have convinced a juror to alter his or her balancing of the mitigating circumstances against the kidnapping aggravator." *Laird*, 119 A.3d at 998. In addition to the comparison of Dr. Lisak's testimony with that of Dr. Dee and Dr. Fox, set forth above, to demonstrate that the 2007 jury heard about the psychological consequences of petitioner's history as a victim of sexual abuse, the Pennsylvania Supreme Court properly relied on the fact that at least one juror found sexual abuse to be proven by a preponderance of the evidence in concluding that the testimony presented during sentencing sufficiently established that petitioner was, in fact, sexually abused. *Id.*, at 997; *see also Richmond*, 375 F.3d at 328 (relying on the fact that jury found as fact the relevant mitigating factors but nevertheless decided to impose the death penalty to conclude that the repetitive testimony of an additional expert was unlikely to "result[ ] in the jury balancing differently the mitigating and aggravating factors and concluding that a death sentence was not warranted"). The fact that at least one juror found as fact that petitioner was a victim of sexual abuse decreases the likelihood that the outcome of the penalty proceeding would have been different if the jury had heard Dr. Lisak's testimony confirming that petitioner was a victim of sexual abuse and that he was abused on multiple occasions.

The determination of the Pennsylvania Supreme Court is further supported by counsel's closing argument during the penalty phase, which covered many of the subjects that petitioner claims were missing from the 2007 trial. Specifically, counsel argued that he had proven by a preponderance of the evidence—the required standard—that petitioner was, in fact, sexually abused by his father, and rhetorically asked the jury "[w]hat kind of person does [sexual abuse by their own father] create? A person who, obviously, can no longer function on the streets of this world. . . We are all a product of our childhood. We can't get away from it. Some of us rise above it, some of us don't. And just because we don't doesn't mean we deserve the death penalty when we commit a crime." N.T., Feb. 13, 2007, at 149-50. While an attorney's closing argument does not constitute evidence, penalty counsel's words to the jury covered issues similar to those testified to by Dr. Lisak at the 2012 PCRA hearing.[15]

For the reasons stated above, the Court concludes that the decision of the Pennsylvania Supreme Court was reasonable and rejects petitioner's claim that his penalty phase counsel was ineffective in investigating and presenting mitigation evidence, and denies Laird's Petition under § 2254 on this ground.

[15] The Pennsylvania Supreme Court did not reach the first prong of *Strickland* with regard to petitioner's claim that an expert like Dr. Lisak should have been utilized during the penalty phase. This Court reviews petitioner's claim under the first prong of *Strickland de novo*. *See Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010). The Court determines that petitioner's trial counsel did not act unreasonably in not securing an additional expert in the area of male sexual abuse. At the hearing on post-conviction relief, Mr. Keith Williams, petitioner's trial attorney who was primarily responsible for the penalty phase in 2007, testified that an additional expert like Dr. Lisak could have provided more evidence corroborating petitioner's claim that he was sexually abused, but that "it never crossed [his] mind to" engage an additional expert who "was more capable of getting under Mr. Laird's skin." Instead, Mr. Williams relied on Dr. Dee and Dr. Fox and on what petitioner and his brother had told counsel about the sexual abuse during counsel's investigation. N.T., May 23, 2012, at 165. "[A]ttorneys are entitled to rely on the opinions of mental health experts" as sufficiently complete explorations of all potential areas of mitigation that those experts are qualified to diagnose. *Sims v. Brown*, 425 F.3d 560, 585-86 (9th Cir. 2005); *see also Harrington v. Richter*, 562 U.S. 86, 107 ("Even if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it."). Accordingly, the Court concludes that petitioner's counsel did not act unreasonably in relying on Dr. Dee and Dr. Fox to testify about the effects of sexual abuse on petitioner's psychological health.

2. Victim Impact Evidence (Claim III)

In capital cases arising out of events that occurred before 1995, Pennsylvania law prohibits the introduction of victim impact evidence during the penalty phase. *See* 42 Pa. C.S. § 9711; *Com. v. Young*, 748 A.2d 166, 185 (Pa. 2000); *accord Com. v. Fisher*, 681 A.2d 130, 145 (Pa. 1996). This rule is inapplicable to the guilt phase of such trials.

At petitioner's 2007 trial, both parties and the court agreed that this rule governed petitioner's case, and the trial court granted petitioner's motion *in limine* to preclude the admission of such evidence during the penalty phase. N.T. Oct. 30. 2006, at 138-39, 147. During the guilt phase, the prosecutor elicited some testimony that, according to petitioner, was victim impact evidence, which was permissible under the law applicable at that time. After the guilt phase ended, petitioner's trial counsel and the prosecutor agreed to incorporate the entire record from the guilt phase into the record for the penalty phase, and the prosecution introduced no new evidence during the penalty phase. Thus, the alleged victim impact evidence that was introduced during the guilt phase was incorporated into the sentencing phase record.

Petitioner claims that his counsel was ineffective because he permitted victim impact evidence admitted during the guilt phase to be incorporated into the sentencing record. Pet.'s br., at 61. Petitioner argues that he was prejudiced when the prosecutor emphasized this evidence in her closing argument to the jury at the end of the penalty phase, which led the jury to improperly consider evidence that was inadmissible for the purpose of sentencing him. Pet.'s br., at 62, 70.

According to petitioner, the following testimony from the guilt phase constituted victim impact evidence and was inappropriately incorporated into the sentencing record:

- The victim's father, Vito Milano's, testimony that "before Anthony Milano's death he lived with his wife and Anthony, but then Anthony was killed and his wife 'died thirteen years ago' and 'now I'm living by myself.' NT 2/5/07, 48-49. He testified that 'Anthony was 26 years old. He was going to Art Institute in Philadelphia. He finish the school and

graduated with honor roll.' *Id*. at 49. He related his sad last encounter with his son: 'He said good night, daddy. I said no stay out too late. . . . I never see my son alive from that night. I never see him alive.' *Id*. at 51." Pet.'s br. at 62-63;

- Testimony from Orpha Newswanger, who was with Milano earlier that night, that "1) Anthony Milano was a friend from the Mennonite church in Levittown; 2) he attended 'Bible studies' sessions she organized; 3) he participated in 'reading scriptures' on the night of his death; 4) the topics of that night's session were 'learning to become a servant' and 'peace-making'; and 5) he was hungry and she gave him some chocolate cake and she did not 'ever see [her] friend again.' NT 2/5/07, 67-70." Pet.'s br. at 63;

- Melanie Ozdemir's testimony that "Anthony Milano was a 'real good friend' and had been for 'a long time' before he was killed. NT 2/6/07, 126." Pet.'s br. at 63.

Petitioner also claims that the prosecutor improperly emphasized the victim impact evidence during her statements opening and closing both the guilt and penalty phases, as follows:

- The prosecutor's opening statement for the guilt phase stated: "[In] December, 1987, Anthony Milano was a 26-year-old young man with his whole life ahead of him. Anthony was a recent graduate from Philadelphia Art School with honors. He had a future ahead of him filled with promise. Anthony was a beloved son of Vito Milano and Rose Milano, his parents. Anthony was a friend and a brother to his sister Anne Marie. Anthony was and he is no more," and "[W]hen Anthony didn't come home that night, his parents were concerned." Pet.'s br. at 62 (quoting N.T. Feb. 5, 2007, at 27, 35) (alteration in original);

- The prosecutor's closing argument during the guilt phase ended "with a plea for 'justice [in] this world where Anthony Milano is a beloved son, a memory of a beloved son to his father" and "Anthony Milano in his sister's heart is still a friend and brother.' NT 2/9/07, 58." Pet's brief at 63 (alteration in original);

- The prosecutor's closing argument during the sentencing phase "told the jury Petitioner 'took a life filled with promise and future away from' Anthony Milano, and prevented him from 'go[ing] home that night to his family.' NT 2/13/07, 129, 134. She told the jury that Petitioner's stipulation to his involvement in the murder spared the family no pain because 'the Milanos [i.e., Anthony Milano's father and sister] had to sit here again and listen to what happened to their son in

> that dark, cold woods.' *Id*. at 125." Pet.'s br. at 63-64 (alteration in original).

The Pennsylvania Supreme Court concluded that this testimony did not constitute victim impact evidence and that the prosecutor's comments did not exceed the bounds of permissible argument. *Com. v. Laird*, 119 A.3d 972, 1010-12 (Pa. 2015). Instead, that court determined that most of the evidence was admissible life-in-being or background testimony from witnesses who testified about Milano's whereabouts before he went to the Edgely Inn or who identified Milano's personal belongings found by the police in petitioner's possession after the crime. *Id.* at 1010. Newswanger's testimony "that Anthony Milano had listened to a tape and read Bible passages relating to peacemaking. . . c[a]me[ ] closest to straying beyond what was permissible for evidentiary purposes," but the Pennsylvania Supreme Court ultimately concluded that this evidence was not prejudicial to petitioner because "it was, within the proceeding as a whole, *de minimus* [sic] and insufficient to undermine our confidence in the outcome of the sentencing hearing." *Id*. The Pennsylvania Supreme Court also determined that, while some of the prosecutor's comments were unnecessary, they were not "evidence" that is inadmissible under state law and were "within the latitude afforded to a district attorney in making her arguments." *Id.* at 1012.

Much of petitioner's argument regarding this claim is devoted to challenging the ruling of the Pennsylvania Supreme Court that this evidence was not inadmissible victim impact evidence under Pennsylvania law. Pet.'s br., at 69-70. Petitioner claims that this conclusion was unreasonable in light of the record. *Id.* This argument is not cognizable, however, because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a

conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

The United States Court of Appeals for the Third Circuit has held that "evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Att'y Gen. of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980). "To constitute the requisite denial of fundamental fairness sufficient to issue a writ of habeas corpus, the erroneously admitted evidence must be material in the sense of a crucial, critical, highly significant factor, and the probative value of the evidence must be so conspicuously outweighed by its inflammatory content that a defendant's constitutional right to a fair trial has been violated." *Peterkin v. Horn*, 176 F. Supp. 2d 342, 364 (E.D. Pa. 2001) (internal quotation marks omitted).

Petitioner has failed to demonstrate that the challenged victim impact evidence was "crucial, critical, [or] highly significant" in light of the totality of the evidence admitted at his trial or that its probative value was "conspicuously outweighed by its inflammatory content." *Id.* This minimal testimony was presented early during the five-day guilt phase and, in the context of the totality of the evidence that the jury heard about the crime and about petitioner as an individual, was unlikely to have influenced the jury over one week later at the end of the penalty phase. Petitioner has also failed to demonstrate that the prosecutor's argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). "Viewed in the context of the entire penalty proceeding, . . . the challenged comments [by the prosecutor] were brief, isolated

remarks" that did not "exceed[ ] constitutional bounds." *Wharton v. Vaughn*, No. 01 Civ. 6049, 2012 WL 3535866, at *66 (E.D. Pa. Aug. 16, 2012).

Petitioner has failed to show that the admission of the challenged evidence deprived him of fundamental fairness. The determination of the Pennsylvania Supreme Court that the challenged evidence was not, in fact, inadmissible victim impact testimony is not cognizable on federal habeas review under the circumstances presented in this case. Because "counsel cannot be deemed ineffective for failing to raise a meritless claim," *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000), this Court concludes that petitioner was not deprived of the effective assistance of counsel under *Strickland* when his trial lawyer failed to object to the admission of such testimony on state law grounds.

Petitioner further claims that his counsel's failure to prevent the admission of this evidence prejudiced his rights to a fair sentencing under the Eighth Amendment and to due process under the Fourteenth Amendment. Respondents contend that these arguments were not fairly presented to the state courts and therefore are not exhausted and are procedurally defaulted. Specifically, respondents argue that petitioner only claimed that his attorney's actions were deficient and that he suffered prejudice under *state law*, without reference to any federal constitutional rights. Thus, according to respondents, any Eighth Amendment or due process claim based on the admission of victim impact evidence is not exhausted and is procedurally defaulted, and therefore cannot be reviewed by this Court. Resp't br., at 67.

In his Reply, petitioner argues that his constitutional claim was fairly presented to the state courts because (1) his initial PCRA petition in the Court of Common Pleas stated that "the jury's sentencing decision was tainted by improper 'victim impact' information," which entitled him to relief on "the underlying constitutional claim that *due process* required Petitioner to be

adjudged by a jury untainted by improper evidence," and (2) he "cited several state court opinions in both his PCRA petition and Pennsylvania Supreme Court brief that addressed whether the introduction of victim impact evidence prior to the 1995 amendment interjected an impermissible and unconstitutional factor into the jury's sentencing decision." Pet.'s Reply br., at 24-25 (emphasis in original).

The Court agrees with respondents: petitioner failed to exhaust his claim that the admission of victim impact evidence and the prosecutor's related argument violated his rights under the Eighth and Fourteenth Amendments, and thus this claim is procedurally defaulted. First, the fact that petitioner alluded to his federal constitutional rights in his initial PCRA petition is insufficient, standing alone, to exhaust this claim; rather, petitioner must "afford *each level of the state courts* a fair opportunity to address the claim." *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996) (emphasis added). Unlike petitioner's PCRA petition in the Court of Common Pleas, his appeal brief to the Pennsylvania Supreme Court contains no reference to due process or the Eighth Amendment in the context of this claim. Moreover, the "passing reference" to jury tainting and due process in the initial PCRA petition is insufficient to notify a state court that a federal claim is being raised. *Keller v. Larkins*, 251 F.3d 408, 415 (3d Cir. 2001) (citing *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam)) (holding that "passing reference to the concept of a 'fair trial'" is insufficient to exhaust a federal due process claim).

Second, the Court rejects petitioner's argument that he exhausted this claim by "rel[ying] on state cases employing constitutional analysis in like fact situations." *Nara v. Frank*, 488 F.3d 187, 198 (3d Cir. 2007), *as amended* (June 12, 2007) (citing *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999)); *see* Pet.'s br. at 24-25. In his brief to the Pennsylvania Supreme Court, petitioner relied on the following cases to argue that his counsel was ineffective: *Commonwealth*

v. Fisher, 681 A.2d 130 (Pa. 1996), *Commonwealth v. McNeil*, 679 A.2d 1253 (Pa. 1996), and *Commonwealth v. Young*, 748 A.2d 166 (Pa. 2000). Pet.'s PASC br., at 41-44. Contrary to petitioner's argument, these cases do not employ federal constitutional analysis in a manner that would have alerted the Pennsylvania Supreme Court to the fact that petitioner was asserting a federal claim. Rather, these cases explicitly address the question whether *Pennsylvania law* prohibits the admission of victim impact evidence, in view of the decision of the Supreme Court of the United States in *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991), that the federal constitution permits the admission of such evidence during capital sentencing.

For example, in *Fisher*, the Pennsylvania Supreme Court considered whether, "[i]n light of the decision in *Payne*, . . . *our capital sentencing scheme* would permit the admission of relevant 'victim impact' testimony," and applied state principles of statutory construction to the Pennsylvania Sentencing Code. *Fisher*, 681 A.2d at 146 (emphasis added) (citing 42 Pa.C.S. § 9711(a)(2)); *see also McNeil*, 679 A.2d at 1259 (granting relief on ineffective assistance of counsel claim on the ground that, "at the time of the penalty hearing, Frinzi's testimony concerning the victim's generosity and kindness was inadmissible" under Pennsylvania state law); *Young*, 748 A.2d at 185 (same, on the ground that *Fisher* and *McNeil* held that victim impact evidence was inadmissible under pre-1995 version of 42 Pa.C.S. § 9711(a)(2)).

None of these cases address the question whether victim impact testimony admitted during capital sentencing violated the defendant's federal constitutional rights. Rather, petitioner's reliance on these cases supports the state law argument he made before the state courts: that the challenged evidence "is precisely the type of information that was not permitted under the pre-1995 [Pennsylvania] statute," with no mention of how the admission of such evidence affected his federal rights to due process or a fair trial. Pet.'s PASC br., at 46.

Consequently, petitioner's reliance on these decisions in his brief before the Pennsylvania Supreme Court is insufficient to have "fairly presented" his federal constitutional claims to the state courts.

This Court concludes that petitioner's claim that his trial counsel was ineffective for failing to object to the introduction of this evidence on the ground that the evidence violated his Eighth Amendment right to a fair trial and his Fourteenth Amendment right to due process is not exhausted. Moreover, this claim is procedurally defaulted because petitioner is barred from returning to the state court to litigate the federal grounds of this claim by the one-year PCRA statute of limitations. *Keller*, 251 F.3d at 415-16 (citing 42 Pa.C.S. § 9545(b)(1)).

Petitioner can only excuse the procedural default of this claim by demonstrating cause and prejudice or a fundamental miscarriage of justice. *Supra*, at 10-11 (citing *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000)). Petitioner has failed to do so: he does not allege that any "objective factor external to the defense impeded counsel's efforts to comply with the State's" one-year statute of limitations, *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000), and there is no reason to believe that the "factual or legal basis for [this] claim was not reasonably available to counsel." *Id.* This Court has already explained, *supra*, that petitioner has not demonstrated prejudice caused by the admission of the testimony challenged as victim impact evidence or from the prosecutor's argument. Finally, petitioner has presented no new evidence of actual innocence to demonstrate that failure to review this claim would result in a fundamental miscarriage of justice. *See Keller*, 251 F.3d at 415-16. Consequently, the Court will not consider petitioner's claim that his federal constitutional rights were prejudiced by his counsel's failure to object to the admission of the alleged victim impact evidence at sentencing.

For these reasons, Laird's Petition for relief under § 2254 on the ground that his trial counsel was ineffective in permitting alleged victim impact testimony to be incorporated into the sentencing record is dismissed.

3. "Prior Bad Acts" Evidence (Claim IV)

Petitioner next claims that his trial counsel was ineffective because he allowed "inadmissible and highly prejudicial evidence of Petitioner's prior bad acts" on the night of the crime to be admitted during the guilt phase of his trial, which was then incorporated into the sentencing record. Pet.'s br., at 74. Specifically, the prosecution elicited testimony from a number of witness that, while at the Edgely Inn on the night of the offense, petitioner provided alcohol to a young child and made sexual advances to Gale Gardner, who was seventeen years old at the time. Petitioner argues that his counsel should have filed a pre-trial motion *in limine* to exclude this testimony, objected to the evidence at trial, requested a cautionary instruction, or moved for a mistrial on the ground that evidence of a criminal defendant's prior bad acts is inadmissible. *See* Pa. R. E. 404(b) ("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."). Because the entire trial record was incorporated into the record at sentencing, and because (according to petitioner) the prosecutor "capitalized on this evidence" during her closing argument, petitioner claims that his counsel's failure caused him to suffer prejudice at sentencing.[16] Pet.'s br., at 81-84.

[16] Petitioner argued to the Pennsylvania Supreme Court that the prior bad acts evidence prejudiced him at both phases of the trial, and the Pennsylvania Supreme Court adjudicated both of these claims on the merits. *See Laird*, 119 A.3d at 986-87, 1004-05. Petitioner's brief before this Court titles this claim "Trial Counsel Was Ineffective *At Sentencing* When He Failed to Object to the Admission of Prejudicial and Inflammatory Evidence," Pet.'s br., at 73 (emphasis added), but argues that the admission of the prior bad acts testimony entitles petitioner to relief from both his conviction and sentence, *id.*, at 87. The substance of the argument in petitioner's brief focuses on the prejudice that petitioner suffered at sentencing and challenges the determination of the Pennsylvania Supreme Court as it relates to the

Specifically, petitioner claims that the incorporation of the following testimony from the guilt phase into the sentencing record caused him to suffer prejudice. The Court notes that the guilt phase record was not read into the record at sentencing, but was incorporated in its entirety by stipulation of the parties. Petitioner first points to evidence that, while at the Edgely Inn, he gave his then-fiancée's, Barbara Parr's, nine-year old son alcohol that caused him to vomit. Parr testified on direct examination as follows:

> Q: What did you do when you were at the bar?
> A: My son was there and he had been drinking
> Q: What do you mean by that?
> A: He was sick. He was drunk. They had given him alcohol.
>
> **Mr. Kerrigan**: Objection.
>
> **The Court**: Sustained. The jury shall disregard the part that they had given him alcohol. She can testify as to the observation that he was drunk and he was getting sick.
>
> Q: Well, did Rick Laird say anything to you about giving him alcohol?
> A: Yeah.
> Q: What did he say?
> A: That they had given it to him, him and Frank.
> Q: And what kind of alcohol was it?
> A: I don't remember.
> Q: When you say your son was sick, what do you mean?
> A: He was vomiting.
> Q: Were you upset about that?
> A: Yes.

N.T. Feb. 6, 2007, at 69-70.

Gale Gardner also testified on this topic. On direct examination, she testified:

> Q: And when you got back to the Ambassador Arms apartment, do you recall what you did?
> A: Yeah. I sat and listened while the child became ill and well, she [Parr] tried to care for the child.
> Q: And did you know why the child was sick?
> A: I do.
> Q: Why was that?
> A: He was drinking at the bar.

penalty phase. Therefore, the Court limits its review of this claim to the prejudice that petitioner claims he suffered at sentencing.

N.T. Feb. 7, 2007, at 29 (alteration added). Petitioner further faults his counsel for eliciting the following testimony from Gardner on cross-examination:

> Q: Did you see him [Laird] drinking shots?
> A: I don't remember. I remember the child was drinking.
> Q: You remember the child was drinking?
> A: I remember from the vomiting later in the evening.
> Q: You remember the child was drinking. Who was the child with at the bar?
> A: Barbara and Rick and Frank and I.
> Q: And the child was drinking at the bar while you all were there?
> A: I know he was vomiting later and everybody was talking about he was drunk from Wild Turkey or something.
> Q: Wild Turkey?
> A: Mm-hmm.
> Q: Do you know what Wild Turkey is?
> **Ms. Henry**: Objection.
> A: Something that makes a child vomit.
> **The Court**: I'm sorry
> **Ms. Henry**: I'll withdraw it.
> A: Something that makes a child vomit.
> Q: Is Wild Turkey alcohol?
> A: I imagine it is.
> Q: Did you see the child drinking?
> A: No, I just remember listening to them talk about it later.
> Q: But did you see the child drinking at any time while you were with him?
> **Ms. Henry**: Objection, asked and answered.
> **The Court**: This is cross-examination.
> A: No, I don't remember. No, I don't think so.

N.T. Feb. 7, 2007, at 48-49 (alteration added).

Petitioner also claims that he was prejudiced by the admission of evidence that he "was heard to make sexually explicit comments to Gale Gardner, who was seventeen years old" at the time, while petitioner was "in the company of his eight-month pregnant fiancée." Pet.'s br., at 78. On this subject, Gardner testified:

> Q: Did you have a conversation or did Rick Laird say something to you at that bar?
> A: He did.
> Q: Do you recall what he said?
> A: I do.
> Q: Tell us what he said.

A: He said that he wanted to run his tongue across my teeth.
Q: And had you ever met Rick Laird before?
A: I hadn't.

N.T. Feb. 7, 2007, at 28. Alan Hilton, who was also at the bar, testified that petitioner had said to Gardner "[s]omething about going home and having sex or having sex with him something around that." N.T. Feb. 6, 2007, at 28.

Finally, petitioner argues that his sentencing was unfair because the prosecutor "capitalized on this evidence when she told the jury: 'And then the final, the catchall [mitigation factor], is any other evidence of mitigation concerning the character and the record of the defendant and the circumstances of his offense. Well you already know a lot about Richard Laird's character, I submit to you.'" Pet.'s br., at 79 (quoting N.T. Feb. 13, 2007, at 124) (alteration added).

The Pennsylvania Supreme Court rejected this claim on the ground that petitioner did not prove that he was prejudiced by the inclusion of this evidence from the trial phase into the sentencing record. The court "observed that the evidence about which Appellant presently complains was isolated and minor within the context of a five-day murder trial, particularly when compared to the other conduct to which Appellant stipulated—most notably, that he had participated in a brutal murder and that he had been convicted of kidnapping the victim." *Com. v. Laird*, 119 A.3d 972, 1005 (2015). That court rejected petitioner's argument that the prosecutor's summation was improper because, based on its interpretation of the record, the prosecutor was not inviting the jury to consider non-statutory aggravation when she referred to petitioner's "character;" rather, she "concentrated her remarks on the circumstances surrounding the killing itself, namely, the kidnapping and alleged torture of Milano" and emphasized that the jurors' "sentencing decision should not be based on their 'feelings,' but on 'objective standards under the law' as applied to the underlying facts." *Id.* (quoting N.T. Feb. 12, 2007, at 117, 126-

34). Finally, the Pennsylvania Supreme Court ruled that its confidence in the sentencing verdict was not undermined by the incorporation of this evidence because "through the verdict slip and accompanying instructions from the bench, the trial court channeled the jury's consideration of aggravating circumstances into the two discrete aggravators alleged by the Commonwealth. . . there is nothing in the record suggesting the jury was told it could consider aggravating evidence untethered to" the kidnapping and torture factors. *Id.*

Petitioner challenges the Pennsylvania Supreme Court's ruling on two grounds. First, petitioner contends that the court's conclusion "rested on a fundamental mischaracterization of the record that amounted to an unreasonable determination of the facts," thus entitling petitioner to relief under § 2254(d)(2). Second, petitioner argues that the court's ruling was contrary to federal law under § 2254(d)(1) on the ground that it departed from *Strickland*'s prejudice analysis, which requires a court to account for the fact that "'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support.'" Pet.'s br., at 84-87 (quoting *Strickland*, 466 U.S. 668, 696 (1984)).

The Pennsylvania Supreme Court addressed the prior bad acts claim on the merits, and thus § 2254(d) governs the Court's review of this claim.[17] The Court rejects both of petitioner's arguments and agrees with the Pennsylvania Supreme Court that petitioner did not show that he was prejudiced at sentencing by the introduction of this evidence during the guilt phase. First, the totality of the prior bad acts evidence consists of four small pieces of testimony during the guilt phase of the trial, which lasted five days. Second, there is no plausible likelihood that the

[17] Petitioner's brief argues that the Pennsylvania Supreme Court's alleged misapplication of *Strickland* means that that court's "prejudice analysis. . . deserves no deference." Pet.'s br., at 87. This argument is incorrect. The Pennsylvania Supreme Court clearly analyzed this as an ineffective assistance of counsel claim under *Strickland* and reached a decision on the merits. *See Laird*, 119 A.3d at 1005 (citing *Com. v. Hutchinson*, 811 A.2d 556, 562 (2002) (employing *Strickland* framework to ineffective assistance of counsel claim)). Thus, contrary to petitioner's argument, § 2254(d) precludes this Court from reviewing this claim *de novo*.

result of the penalty phase would have been different if this evidence, which was presented to the jury one week earlier during the guilt phase, had not been incorporated into the record in the penalty phase.

Petitioner attempts to argue that the jury's attention was drawn to the stale prior bad acts evidence when the prosecutor referred to that evidence in her closing argument at sentencing. According to petitioner, this comment caused the jury to improperly consider his character as a potential aggravating factor in violation of the Eighth Amendment. Pet.'s br., at 62, 70. As noted above, the prosecutor said: "And then the final, the catchall [mitigation factor], is any other evidence of mitigation concerning the character and the record of the defendant and the circumstances of his offense. Well you already know a lot about Richard Laird's character, I submit to you." N.T. Feb. 13, 2007, at 124.

When viewed in its entirety, the record demonstrates that petitioner's interpretation of the prosecutor's statement is incorrect: the prosecutor's comment did not constitute an argument that the jury should view petitioner's character—as evidenced by his prior bad acts—as a potential aggravating factor. In general, during her closing argument to the jury at sentencing, the prosecutor identified specific evidence that she believed supported the aggravating factors presented by the Commonwealth or did not support the mitigating factors presented by the defense. *See generally* N.T. Feb. 13, 2007, at 126-34 (prosecutor's closing argument on aggravating circumstances of kidnapping and torture and facts relevant to those two elements).[18] The excerpted statement relied on by petitioner comes from the prosecutor's discussion of the

[18] *See, e.g.*, N.T. Feb. 13, 2007, at 120 (arguing that the catchall mitigating factor was not substantiated by Mark Laird's testimony because "a lot of people in this world go through difficult things as young children. They go through difficult things and those people don't do the type of thing that Mr. Laird did to Anthony Milano"), at 122-23 (arguing that the mitigating factor that the defendant was unable to appreciate the criminality of his conduct was not warranted because of the evidence of how petitioner acted after the killing: "The cover up that started right away of getting rid of the shirt, getting rid of the murder weapon, running from the scene, the getting a ride home; washing blood off his hands").

catchall *mitigation* factor, during which she did not recall any evidence that she believed was particularly relevant to the mitigating factor of petitioner's character. N.T. Feb. 13, 2007, at 124. Therefore, petitioner's interpretation of what the prosecutor said on this issue is incorrect for two reasons: (1) the prosecutor did not refer to the prior bad acts evidence at all, and (2) the prosecutor only spoke of petitioner's character in the context of a *mitigation* factor, and did not argue that the jury could rely on his character as an aggravating circumstance. Accordingly, the determination of the Pennsylvania Supreme Court that, in view of the totality of the evidence, the testimony of petitioner's prior bad acts or character was only "minor" and therefore unlikely to prejudice him at sentencing, was reasonable. *See* 28 U.S.C. § 2254(d)(2).

The Court also rejects petitioner's argument that the Pennsylvania Supreme Court misapplied *Strickland* in evaluating prejudice. *See* 28 U.S.C. § 2254(d)(1). Petitioner is correct that *Strickland* requires the prejudice analysis to "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. *Strickland* also explained, in the context of potential prejudice at capital sentencing, that "the question is whether there is a reasonable probability that, absent the errors, the sentencer. . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* The analysis of the Pennsylvania Supreme Court comports with these requirements. That court examined the prior bad acts evidence in the context of all the other evidence heard by the jury during both the guilt and penalty phases, reviewed the prosecutor's closing argument, and determined that the jury would not have weighed the aggravating and mitigating factors any differently, primarily because the evidence challenged by petitioner was irrelevant to those factors. *See Laird*, 119 A.3d at 987, 1005. Therefore, the Pennsylvania Supreme Court did not misapply federal law under *Strickland*, and relief under § 2254(d)(1) is not warranted.

Petitioner relies on the general rule that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. This aspect of *Strickland*, however, is inapposite under the circumstances presented in this case. To demonstrate that he was prejudiced by his counsel's actions at sentencing, petitioner "must establish actual prejudice by showing that 'there is a reasonable probability that, absent the errors, the sentencer… would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Richmond v. Polk*, 375 F.3d 309, 327 (4th Cir. 2004) (quoting *Strickland*, 466 U.S. at 695). There was no mention of the prior bad acts during the attorneys' arguments or the trial court's instructions at sentencing, and therefore there is no link between the minor evidence of prior bad acts admitted during the guilt phase and petitioner's sentence. Thus, the Pennsylvania Supreme Court reasonably concluded that petitioner suffered no prejudice.

Because the Pennsylvania Supreme Court reasonably rejected petitioner's *Strickland* claim based on the admission of prior bad acts evidence, this Court denies Laird's Petition under § 2254 on this ground.

4. Trial Court's Instructions and Prosecutor's Argument Regarding Mitigation (Claim II)

Petitioner's final sentencing phase argument is that the trial court's instruction on the definition of mitigating evidence, and the prosecutor's closing argument to the jury which repeated language from the trial court's instruction, violated his Eighth Amendment right to a fair sentencing. Petitioner contends that his trial counsel was ineffective under *Strickland* for failing to object to the trial court's instruction and the prosecutor's argument. For the following reasons, the Court rejects petitioner's claim.

At the end of the penalty phase, the trial court instructed the jury, in part, as follows:

> Members of the jury, you must now decide whether to sentence the defendant to death or life imprisonment. Your sentence will depend upon what you find about aggravating and mitigating circumstances. *The sentencing code defines aggravating and mitigating circumstances. They're things that make a first degree murder case either more terrible or else less terrible.*

N.T. Feb. 13, 2007, at 164 (emphasis added). After instructing the jury that aggravating factors must be found unanimously and beyond a reasonable doubt, but that mitigating factors could be found by individual jurors based on only a preponderance of evidence, the trial court explained that "[t]his different treatment of aggravating and mitigating circumstances is one of the law[']s safeguards against unjust death sentences. It gives the defendant a full benefit of any mitigating circumstances." N.T. Feb. 13, 2007, at 167-68. The trial court also told the jury that three mitigating factors presented by the defense—extreme mental or emotional disturbance, capacity of the defendant to appreciate the criminality of his conduct, and defendant's age at the time of the offense—as well as the catchall factor—the character of the defendant and circumstances of the offense—were "identified by the legislature for your consideration" and that the law "provides that you are to consider" these factors. N.T. Feb. 13, 2007, at 172-73. The trial court finally instructed the jury that "you should, when you go back to deliberate, consider all of the factors on the verdict slip if you reach the issue of mitigating factors." N.T. Feb. 13, 2007 at 175.

During her closing argument to the jury, the prosecutor anticipated the trial court's definition of mitigating circumstances as things that make the case "less terrible." At various points in her summation, the prosecutor made the following statements:

- "So let's talk a little bit about the first, if you you've heard any evidence that makes this case less terrible over the past day or so. . . . Did the testimony from the deacon and the two prison guards that you heard, does that qualify as a mitigating circumstance? In other words, did it make this case, this killing, less terrible? I submit to you that it doesn't." N.T. Feb. 13, 2007, at 117-19;

- In reference to the testimony from Mark Laird, Dr. Dee, and Dr. Fox about petitioner's mental health and history of abuse: "You have to decide, number 1, whether

it's believable and, number 2, does it really make this case, this killing, less terrible? Because that's what you're ultimately going to have to decide." N.T. Feb. 13, 2007, at 121;

- In reference to the catchall mitigation factor concerning defendant's character and the circumstances of the offense: "Now, under this they have physical abuse, sexual abuse, emotional abuse, witnessed the abuse of others, the psychological consequences of this abuse. Well, the first thing that has to happen is, you have to believe that, number 1, that the abuse occurred. And the second question is, does it rise to the level of what they're talking about that makes this case, this killing, any less terrible? They're talking about, again, the alcohol abuse, the substance abuse and the conduct in the prison. Again, ladies and gentlemen, I submit to you that all of those things don't have an impact and don't make this case any less terrible." N.T. Feb. 13, 2007, at 124-25;

- "So those are the things that the defense argues to you that they've proven. . . They established that those mitigating circumstances somehow make this crime less terrible." N.T. Feb. 13, 2007, at 126.

Petitioner claims that the trial court's instruction and prosecutor's statements that "mitigating circumstances. . . [are] things that make a first degree murder case. . . less terrible" conflicts with the Eighth Amendment's requirements that capital sentencing be "based on a 'reasoned moral response' to the background and character of the defendant as a 'uniquely individual human being,' and. . . that the jury give full consideration and full effect to any mitigating evidence the defendant presents." Pet.'s br., at 53-54 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)) (internal citations omitted). According to petitioner, "the Eighth Amendment does not focus on '*the case*' or '*the killing*,' but on *the individual defendant*." Pet.'s br., at 54. Petitioner claims that his counsel was ineffective for failing to object to the trial court's instruction and prosecutor's argument on the ground that they "diverted the focus of the jury's life or death deliberation from a reasoned determination as to Petitioner's personal culpability to an amorphous and unguided consideration of how 'terrible' 'the case' was." Pet.'s br., at 54, 56-58.

Petitioner raised this *Strickland* claim in the Pennsylvania Supreme Court on post-conviction review. That court relied on its own precedent interpreting similar instructions in

rejecting petitioner's claim on the ground that the challenged instructions did not, "'as a whole, interfere[ ] with the jury's evaluation of the specific mitigation evidence presented by Appellant or their assessment of his personal moral culpability. These instructions merely expressed to the jury, in laymen's terms, the purpose for the distinction between aggravating and mitigating circumstances in a capital penalty phase.'" *Com. v. Laird*, 119 A.3d 972, 1006 (Pa. 2015) (quoting *Com. v. Washington*, 927 A.2d 586, 613-614 (Pa. 2007)). That court then ruled that petitioner's related argument concerning the prosecutor's argument was meritless. Specifically, the Pennsylvania Supreme Court stated that, "[i]nasmuch as these repeated instructions were proper, . . . it is speculative to argue that the prosecutor's earlier description of mitigation, couched in terms of whether a 'case' or a 'killing' was rendered less terrible, interfered with the jury's ability to carry out its Eighth Amendment duties, notwithstanding that the prosecutor may have reiterated this description several times." *Id.* at 1007.

The Pennsylvania Supreme Court adjudicated this claim on the merits, and thus § 2254(d) governs the Court's review of this claim. Petitioner contends that the decision of the Pennsylvania Supreme Court was contrary to federal law and unreasonable in light of the record, and thus argues that relief is warranted under §§ 2254(d)(1) and (d)(2). Pet.'s br., at 60. This Court rejects both of petitioner's challenges.

In evaluating a jury instruction, the Court's "analysis must focus initially on the specific language challenged, but must consider that language as part of a whole." *United States v. Gordon*, 290 F.3d 539, 544 (3d Cir. 2002) (citing *Francis v. Franklin*, 471 U.S. 307, 315 (1985)). The central inquiry is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

The Court first notes that petitioner raised a nearly identical claim in his petition for habeas relief from his first conviction. Previously, petitioner claimed that he was prejudiced at his first sentencing hearing in 1988 when his counsel failed to object to the trial judge's comments at the beginning of the penalty phase that, "[i]n general terms, aggravating and mitigating circumstances are circumstances concerning the killing and the killer which *make a first degree murder case either more serious or less serious*." *Laird v. Horn*, 159 F. Supp. 2d 58, 108 (E.D. Pa. 2001) (emphasis added). Specifically, petitioner argued "that by using the words 'in this case,' the trial court improperly focused the jury's attention on the murder, and away from petitioner's background. . . thus failing to convey to the jury that it could take petitioner's background and character into account in its analysis of mitigating circumstances." *Id.* This Court rejected that claim on the ground that these introductory comments were not reasonably likely to have diverted the jury from considering constitutionally relevant evidence because the trial court's charge "accurately informed the jury that it could take petitioner's background and character into account." *Id.* at 109 (citing *Boyde*, 494 U.S. at 380).

In the habeas Petition presently before the Court, petitioner claims that similar language used in the trial court's instructions at his 2007 trial caused him to suffer prejudice for the same reasons. This Court concludes that the Pennsylvania Supreme Court's rejection of this claim was not unreasonable. The specific language to which petitioner objects is nearly identical to Pennsylvania Standard Criminal Jury Instruction 15.2502E(1), which both state and federal courts have upheld in the face of identical Eighth Amendment challenges.[19] *See, e.g.*, *Lesko v. Wetzel*, No. 11 Civ. 1049, 2015 WL 249502, at *46-47 (W.D. Pa., Jan 20, 2015) (concluding that

[19] The Court notes that the current version of this instruction no longer contains the "less terrible" language and contains no definition of aggravating or mitigating circumstances in general. 15.2502E (Crim) Death Penalty, Instruction Before Hearing, Pa. SSJI (Crim) (2016), note.

"more terrible/less terrible instructions" are not erroneous); *Marinelli v. Beard*, No. 07 Civ. 173, 2012 WL 5928367, at *96-97 (M.D. Pa., Nov. 26, 2012) (same); *Stevens v. Beard*, 701 F. Supp. 2d 671, 735 (W.D. Pa. 2010) (same); *Laird*, 119 A.3d at 1006-07 (collecting Pennsylvania cases). In particular, every federal court to have considered this instruction has found "no error in the language" challenged by petitioner and characterized it as a permissible way for the trial court to "explain[ ] generally the role of mitigating and aggravating factors in a capital case as it introduced those concepts to the jury." *Lesko*, 2015 WL 249502, at *47; *accord Stevens*, 701 F. Supp. 2d at 735. This Court agrees with those decisions, and concludes that the specific language challenged by petitioner was not reasonably likely to have diverted the jury from its duty under the Eighth Amendment to consider all mitigation evidence presented by the defense.

Moreover, in the context of the charge as a whole, this single sentence in the trial court's instructions was unlikely to have caused the jury to disregard the mitigating evidence related to petitioner's character and background in violation of the Eighth Amendment. After the trial court generally defined mitigating circumstances as things that make the "case. . . less terrible," the court continued to explain to the jury that state law requires them to consider all mitigating factors presented by the defense and to "give[ ] the defendant a full benefit of any mitigating circumstances." N.T. Feb. 13, 2007, at 164, 167-68. The trial court ended its instruction on that issue by telling the jurors that "you should. . . consider all of the [mitigating] factors on the verdict slip." N.T. Feb. 13, 2007, at 175. Based on this record, petitioner has failed to show that it was reasonably likely that the jury applied these instructions in an unconstitutional manner. Therefore, the conclusion of the Pennsylvania Supreme Court that petitioner failed to demonstrate that the charge "as a whole" was unconstitutional was reasonable. *Estelle*, 502 U.S. at 72.

Finally, petitioner's focus on the prosecutor's emphasis of the "less terrible" language in an attempt to demonstrate increased prejudice from the challenged instruction is misplaced. If the trial court's definition of mitigating circumstances as "less terrible" was proper, the prosecutor cannot be faulted for quoting the same definition in her closing argument. Initially, the Court notes that "arguments of counsel generally carry less weight with a jury than do instructions from the court" and, "like the instructions of the court, must be judged in the context in which they [we]re made." *Boyde*, 494 U.S. at 384-85.

Moreover, the prosecutor's comments in this case did not increase the likelihood that the jury misapplied the trial court's instructions for two reasons. First, as explained above, the trial court told the jury that they must consider the mitigating evidence submitted by the defense. Second, defense counsel's closing argument noted the potentially misleading nature of the prosecutor's comments and explained what was missing. Specifically, defense counsel argued to the jury:

> Now, we presented numerous mitigating factors, and pretty much the Commonwealth dismisses them out of hand. They're all useless, they don't make it less terrible. Well, that's not the complete definition of what mitigating factors are. Mitigating factors, and the Court will tell you, are things you're supposed to consider. Again, I didn't make these mitigators up. They come from our statutes and our Courts. You will see the wording of them as they are read off to you. I didn't make these up. This physical abuse is not something I made up. It exists. It's in our statutes and our Courts. Sexual abuse, I didn't make it up. It's in our statutes and it's in our Courts' decisions. These are things that they've laid out that must be presented on someone's behalf if they're facing the death penalty ... must be. So don't think that we're trying to make excuses. . . These are Court designated mitigating factors, and they aren't just to the crime itself. . . You try the crime, you sentence the person. These factors are about the person.

N.T. Feb. 13, 2007, at 145-46. For these reasons, the conclusion of the Pennsylvania Supreme Court that the prosecutor's argument did not "interfere[ ] with the jury's ability to carry out its Eighth Amendment duties" was not unreasonable in light of the record. *Laird*, 119 A.3d at 1007.

The Court concludes that the Pennsylvania Supreme Court's rejection of petitioner's claim regarding the trial court's instruction on mitigating circumstances and the prosecutor's argument on the definition of mitigating circumstances were not contrary to federal law or an unreasonable interpretation of the record. This Court thus rejects Laird's Petition under § 2254 for habeas relief on this ground.

C. Cumulative Prejudice Claim (Claim X)

Petitioner finally claims that the cumulative prejudice resulting from all of the constitutional errors at his trial warrants habeas relief. Pet.'s br., at 155. Petitioner relies on the cumulative error standard articulated by the Supreme Court of the United States in *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), which requires the court to consider "all errors, whether [based on] constitutional or state law, and ask whether the cumulative effect of these errors, in light of the evidence offered at trial as a whole, created a 'reasonable probability' that 'the result of the proceeding would have been different'" under *Strickland*, and "require[s] the petitioner to show that the cumulative effect of trial errors 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Collins v. Beard*, 2012 WL 3135625, at *20 (E.D. Pa. Feb. 29, 2012) (quoting *Kyles*, 514 U.S. at 435, *Strickland*, 466 U.S. at 694), *report and recommendation adopted by Collins v. Beard*, 2012 WL 3136768.[20]

As explained above, petitioner has failed to demonstrate that his retrial and resentencing were infected by any errors. *See id.* (rejecting cumulative prejudice claim and noting that "[t]rial *errors* are different from *imperfections* in the trial." (emphasis in original)). Consequently, there are no errors to aggregate and petitioner cannot prove cumulative prejudice.

[20] The Court of Appeals for the Third Circuit requires "a claim of cumulative error [to] be presented to the state courts before it may provide a basis for habeas relief." *Collins v. Sec'y of Pennsylvania Dep't of Corr.*, 742 F.3d 528, 543 (3d Cir.), *cert. denied sub nom. Collins v. Wetzel*, 135 S. Ct. 454 (2014). Petitioner exhausted his cumulative prejudice claim before the Pennsylvania Supreme Court, and that court rejected that claim on the merits. *Laird*, 119 A.3d at 1012.

See, e.g., *Robinson v. Sup't, SCI Somerset*, No. 13 Civ. 6918, 2014 WL 7232239, at *15 (E.D. Pa. Dec. 17, 2014) ("The cumulative error doctrine requires the existence of 'errors' to aggregate. Absent such errors by counsel, the cumulative error doctrine does not apply."). Thus, Laird's Petition under § 2254 on this ground is denied.

V. CONCLUSION

For the foregoing reasons, petitioner's Consolidated Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 is denied and dismissed. A certificate of appealability will not issue because reasonable jurists would not debate whether the petition states a valid claim of the denial of a constitutional right or this Court's procedural rulings with respect to petitioner's claims. *See* 28 U.S.C. § 2253(c)(2) (providing that a certificate of appealability in a § 2254 case "only if the applicant has made a substantial showing of the denial of a constitutional right"); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An appropriate order follows.

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

RICHARD ROLAND LAIRD, **Petitioner,** **v.** **JOHN E. WETZEL, Acting Secretary, Pennsylvania Department of Corrections, ROBERT D. GILMORE,[1] Superintendent of the State Correctional Institution at Greene, MARK GARMAN,[2] Superintendent of the State Correctional Institution at Rockview, THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,** **Respondents.**	**CIVIL ACTION** **NO. 11-1916**

O R D E R

AND NOW, this 1st day of June, 2017, upon consideration of Petitioner's Motion to Alter and Amend Judgment and Consolidated Brief (Document No. 54, filed Sept. 16, 2016), Respondents' Answer in Opposition to Petitioner's Motion to Alter and Amend Judgment and Consolidated Brief (Document No. 56, filed Sept. 30, 2016), and Reply in Support of Petitioner's Motion to Alter and Amend Judgment (Document No. 60, filed Oct. 14, 2016), and the letters from Richard Laird to the Court dated January 28 and February 26, 2017,[3] for the reasons set forth in the accompanying Memorandum dated June 1, 2017, **IT IS ORDERED** as follows:

[1] Robert D. Gilmore became the Superintendent of the State Correctional Institute at Greene on March 29, 2014. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Robert D. Gilmore is substituted for Louis Folino as a respondent in this suit.
[2] Mark Garman became the Superintendent of the State Correctional Institute at Rockview on July 27, 2015. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Mark Garman is substituted for Marirosa Lamas as a respondent in this suit.
[3] Copies of the letters from Richard Laird dated January 28 and February 26, 2017 shall be docketed by the Deputy Clerk.

1. Petitioner's Motion to Alter and Amend Judgment (Document No. 54) is **GRANTED IN PART AND DENIED IN PART,** as follows:
    a. That part of petitioner's Motion which seeks reconsideration of the Court's denial of the Consolidated Petition for Writ of Habeas Corpus (Document No. 39) on the ground that petitioner did not establish cause to overcome the procedurally defaulted Due Process claims in Claim IX (Frank Chester's Identification and Testimony) is **GRANTED**;
    b. Petitioner's Motion is **DENIED** in all other respects;
2. Those parts of the August 18, 2016 Memorandum (Document No. 52) and Order (Document No. 53) in which petitioner's Consolidated Petition for Writ of Habeas Corpus was dismissed on the ground that petitioner did not establish cause to overcome the procedurally defaulted Due Process claim in Claim IX challenging Frank Chester's identification and testimony are **VACATED**;
3. Petitioner's Consolidated Petition for Writ of Habeas Corpus is **DENIED** with respect to petitioner's Due Process claim in Claim IX challenging Frank Chester's identification and testimony; and
4. A certificate of appealability will not issue because reasonable jurists would not debate whether that portion of the Consolidated Petition for Writ of Habeas Corpus which challenges the identification and testimony of Frank Chester under the Due Process Clause of the Fourteenth Amendment states a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484.

The Court having noted that two parts of the Memorandum dated August 18, 2016,

require clarifications which do not alter the ruling of the Court, **IT IS FURTHER ORDERED** that the Memorandum dated August 18, 2016, is clarified and amended as follows:

1. The part of the third-to-last paragraph in Part IV(A)(2)(c) which states that "petitioner cannot demonstrate that the jury was substantially more likely to accept a diminished capacity defense supported by documentation of multiple head injuries instead of only one injury" is **AMENDED** to state the following:

> petitioner did not demonstrate a reasonable probability that the jury's determination of guilt would have been different, i.e., that the jury would have accepted a diminished capacity defense supported by documentation of multiple head injuries instead of only one injury.

2. The final sentence in Part IV(A)(2)(c) which states that "Accordingly, the Court denies Laird's Petition under § 2254 on the ground that he suffered prejudice from his trial counsel's failure to introduce the medical records" is **AMENDED** to state the following:

> Accordingly, the Court denies Laird's Petition under § 2254 with respect to the claim that he suffered prejudice from his trial counsel's failure to introduce the medical records.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

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

RICHARD ROLAND LAIRD, **Petitioner,** **v.** **JOHN E. WETZEL, Acting Secretary, Pennsylvania Department of Corrections, ROBERT D. GILMORE,[1] Superintendent of the State Correctional Institution at Greene, MARK GARMAN,[2] Superintendent of the State Correctional Institution at Rockview, THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,** **Respondents.**	**CIVIL ACTION** **NO. 11-1916**

DuBois, J. **June 1, 2017**

M E M O R A N D U M

I. INTRODUCTION

By Memorandum and Order dated August 18, 2016, the Court denied state prisoner Richard Laird's Consolidated Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("habeas petition") on a variety of substantive and procedural grounds, and denied a certificate of appealability. Presently before the Court is Petitioner's Motion to Alter and Amend Judgment and Consolidated Brief pursuant to Federal Rule of Civil Procedure 59(e) ("Motion to Alter and Amend Judgment"), seeking reconsideration of the Court's denial of his habeas petition and certificate of appealability on four grounds. For the reasons that follow, petitioner's Motion to

[1] Robert D. Gilmore became the Superintendent of the State Correctional Institute at Greene on March 29, 2014. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Robert D. Gilmore is substituted for Louis Folino as a respondent in this suit.
[2] Mark Garman became the Superintendent of the State Correctional Institute at Rockview on July 27, 2015. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Mark Garman is substituted for Marirosa Lamas as a respondent in this suit.

Alter and Amend Judgment is granted with respect to the Court's determination that the failure of counsel on direct appeal to challenge Frank Chester's identification by an ineffective assistance of counsel claim and his testimony by specific reference to the Due Process Clause of the Fourteenth Amendment did not constitute cause for excusing the procedural default of those claims. Upon reconsideration, with respect to that issue—petitioner's due process claim challenging the identification and testimony of Frank Chester—the habeas petition is denied. The Motion to Alter and Amend Judgment is denied in all other respects. Excepting only as noted above, the Memorandum and Order dated August 18, 2016, remains in effect.

II. BACKGROUND

The background of this case is set forth in detail in the August 18, 2016, Memorandum and Order. *Laird v. Wetzel, et al.*, Civ. No. 11-1916, 2016 WL 4417258 (E.D. Pa. Aug. 19, 2016) ("*Laird*"). The facts are recited in this Memorandum only as necessary to address the issues presented by petitioner's pending Motion.

A. Petitioner's First Conviction

On May 19, 1988, in the Court of Common Pleas of Bucks County, Pennsylvania, petitioner and his co-defendant Frank Chester were convicted of, *inter alia*, first degree murder and kidnapping in relation to the death of Anthony Milano on December 15, 1987. The jury returned a verdict of death against both defendants, and the trial court sentenced petitioner to death on the first degree murder charge and to a "consecutive sentence of not less than 10 nor more than 20 years" on the kidnapping charge. Petitioner was not sentenced in connection with any of the other crimes for which he was convicted, including second and third degree murder.

Petitioner's direct appeal and petition for collateral review of his conviction and sentence were denied. In 1999, petitioner filed a Petition for Writ of Habeas Corpus Under 28 U.S.C.

§ 2254 in this Court. By Memorandum and Order dated September 5, 2001, this Court granted that petition in part, and vacated petitioner's first degree murder conviction and death sentence without prejudice to the right of the Commonwealth of Pennsylvania to re-try petitioner for first degree murder and, if he was found guilty, to seek the death penalty at sentencing. *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001). The United States Court of Appeals for the Third Circuit affirmed the judgment of this Court by Opinion and Order dated July 19, 2005. *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005).

B. Petitioner's Second Conviction

In January and February of 2007, petitioner was re-tried on the charge of first degree murder in the Court of Common Pleas of Bucks County. On retrial, petitioner stipulated that he participated in the murder but presented a diminished capacity defense, arguing that he was unable to form the requisite specific intent for first degree murder or remember the murder. *Com.v. Laird*, 988 A.2d 618, 624 (Pa. 2010). As summarized by the Pennsylvania Supreme Court on direct appeal, petitioner presented substantial expert testimony with respect to this defense, including opinion testimony that petitioner had organic brain damage. *Id.* The jury in petitioner's second trial rejected the diminished capacity defense and found petitioner guilty of first degree murder on February 9, 2007. *Id.* After hearing evidence presented during the penalty phase, the jury returned a verdict of death. *Id.*

Petitioner's direct appeal of his second conviction and sentence were denied. His petition for collateral review under the Pennsylvania Post-Conviction Relief Act ("PCRA") was denied by the Court of Common Pleas of Bucks County. The Pennsylvania Supreme Court affirmed the denial of post-conviction relief on all claims by Opinion and Order dated July 20, 2015.

Petitioner filed a Consolidated Petition for Writ of Habeas Corpus and Supporting Memorandum of Law in this Court on February 19, 2016, in which he asserted ten claims for relief. In the Memorandum and Order dated August 18, 2016, this Court denied and dismissed the habeas petition in its entirety and denied a certificate of appealability. Petitioner filed the pending Motion to Alter and Amend Judgment on September 16, 2016. In that Motion, petitioner asks the Court to reconsider its rulings on four claims: Claim V (ineffective assistance of counsel in presenting diminished capacity defense), Claim VI (retrial for first degree murder violated the double jeopardy clause of the Fifth Amendment), Claim VIII (ineffective assistance of counsel for failure to renew motion for change of venue) and Claim IX (identification of Frank Chester and introduction of Chester's testimony violated the Due Process Clause of the Fourteenth Amendment). Respondents filed an Answer in Opposition to Petitioner's Motion to Alter and Amend Judgment and Consolidated Brief. This Motion is thus ripe for review.

III. APPLICABLE LAW

Only three situations justify altering or amending a judgment under Federal Rule of Civil Procedure 59(e): "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). The moving party has the burden of establishing one of these grounds. *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011).

The scope of a motion for reconsideration under Federal Rule of Civil Procedure 59(e) is "extremely limited" and should not be used to relitigate the case. *Id.* A motion for reconsideration "addresses only factual and legal matters that the Court might have overlooked." *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (citation

omitted). "It is improper on a motion for reconsideration to ask the Court to rethink what it already thought through—rightly or wrongly." *Id.* (citation omitted).

IV. DISCUSSION

In his Motion, petitioner does not assert that the law has changed or that new evidence has become available since issuance of the August 18, 2016, Memorandum and Order. Petitioner argues that the Court misapplied the law and/or misconstrued the record with respect to each of petitioner's four claims for relief. The Court will address each of the challenged rulings in turn.

A. Claim V: Ineffective Assistance of Counsel in Presenting Diminished Capacity Defense

Petitioner seeks reconsideration of the Court's denial of his petition and of a certificate of appealability with respect to the Court's conclusion that the Pennsylvania Supreme Court reasonably determined that petitioner was not prejudiced by his trial counsel's failure to introduce medical records of petitioner's multiple head injuries at trial.

1. Petition for Writ of Habeas Corpus

In his habeas petition, petitioner argued that his trial counsel was ineffective for failing to introduce medical records demonstrating the number of head injuries that petitioner had sustained to support his diminished capacity defense. Consolidated Pet. for Writ of Habeas Corpus & Supp. Mem. ("Pet'r's Br.") 103-06. Petitioner claimed that these records would have corroborated the reports of head injuries by petitioner and his family that petitioner's expert witness considered in diagnosing petitioner with brain damage and that the prosecution implied were fabricated to support petitioner's diminished capacity argument. Pet'r's Br. 104-05.

Because the Pennsylvania Supreme Court resolved this claim on the merits, this Court reviewed the claim under the deferential review of 28 U.S.C. § 2254(d). 28 U.S.C. § 2254(d)

forecloses relief on issues adjudicated on the merits by the state court unless the adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Based on that provision, the Court concluded in the Memorandum dated August 18, 2016, that the Pennsylvania Supreme Court reasonably determined that petitioner suffered no prejudice from his trial counsel's failure to introduce the medical records. In doing so, this Court noted the statement of the Pennsylvania Supreme Court that petitioner's serious head injury in the early 1980s was undisputed and the conclusion of that Court that the contested issue was not whether petitioner had brain damage but whether that brain damage, in concert with other factors, diminished petitioner's capacity to form specific intent. *Laird*, 2016 WL 4417258, at *20. This Court agreed with the conclusion of the Pennsylvania Supreme Court that whether petitioner's brain damage was the result of one or several injuries was ancillary to the question of whether he had the capacity to form specific intent at the time of the murder, and thus, petitioner could not show prejudice from his trial counsel's failure to introduce evidence of multiple, rather than one, head injuries. *Id.*

2. Motion to Alter and Amend Judgment

In his Motion to Alter and Amend Judgment, petitioner argues that this Court erred in concluding that the Pennsylvania Supreme Court's determination of no prejudice was reasonable because that conclusion, based on the premise that the number of head injuries petitioner suffered was "ancillary" to the determination of diminished capacity, was contradicted by the trial record. Petitioner states that the genuineness of petitioner's brain damage was in fact a "central aspect to the defense." Pet'r's Mot. to Alter & Amend J. ("Pet'r's Mot.") 7. In support

of this position, petitioner reiterates his argument, made in the habeas petition, that medical records of his head injuries would have rebutted the prosecution's suggestion that the reports of head injuries from petitioner and his family were fabricated. *Id.* at 7-9. In his Reply in support of the Motion, petitioner also argues that by failing to introduce the medical records, trial counsel "diminished the experts' proof" on the question of diminished capacity and failed to ensure that the expert witnesses had the relevant background information for their opinions. Pet'r's Reply in Supp. Mot. ("Pet'r's Reply") 3-4.

The Court concludes petitioner has failed to show that it erred in determining that the decision of the Pennsylvania Supreme Court on this issue was reasonable. First, petitioner's arguments in his Motion reiterate the arguments presented in the habeas petition which the Court has already considered and rejected. *See Glendon Energy Co.*, 836 F. Supp. at 1122 ("It is improper on a motion for reconsideration to ask the Court to rethink what it already thought through . . . ." (citation omitted)). Second, even though the Court rejected petitioner's argument that the Pennsylvania Supreme Court unreasonably concluded that he suffered no prejudice, this Court appreciated the centrality of brain damage to petitioner's diminished capacity defense. Petitioner misconstrues the Court's reasoning—the Court did not state that the genuineness of petitioner's *brain damage* was ancillary to the question of whether he formed specific intent on the night of the murder. Rather, the Court concluded that, based on the record, the Pennsylvania Supreme Court reasonably determined that the *number* of head injuries petitioner had suffered was ancillary to his ability to form specific intent, and thus petitioner could not show prejudice from his trial counsel's failure to introduce evidence of multiple head injuries. *Laird*, 2016 WL 4417258, at *20. Thus, petitioner has not met his burden of showing a clear error of law or fact requiring reconsideration of the Court's judgment.

For the same reasons, the Court concludes that reconsideration of its denial of a certificate of appealability on this issue is not warranted because petitioner has not shown a clear error of law or fact in the Court's previous determination that petitioner had not satisfied the standard for a certificate of appealability. Petitioner did not make a substantial showing in his habeas petition, and has not made a substantial showing in the pending Motion, that reasonable jurists would debate whether the habeas petition states a valid claim of the denial of constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (describing the "substantial showing" requirement for a certificate of appealability under 28 U.S.C. § 2253(c)).

B. Claim VI: Retrial for First Degree Murder Violated the Double Jeopardy Clause of the Fifth Amendment

Petitioner seeks reconsideration of the Court's denial of a certificate of appealability with respect to the Court's conclusion that retrial for first degree murder following petitioner's conviction for third degree murder, not attacked in any post-trial proceeding, did not violate the Double Jeopardy Clause of the Fifth Amendment.

1. Petition for Writ of Habeas Corpus

In his habeas petition, petitioner argued that his retrial, conviction, and sentence for first degree murder violated the Double Jeopardy Clause of the Fifth Amendment because his conviction for the lesser included offense of third degree murder had not been vacated. Pet'r's Br. 116-18.

In the August 18, 2016, Memorandum and Order, this Court concluded that the petitioner's double jeopardy claims were not meritorious. *Laird*, 2016 WL 4417258, at *30. The Court agreed with petitioner that the offense of first degree murder and the lesser included offense of third degree murder were the "same offense" for double jeopardy purposes under *Blockburger v. United States*, 284 U.S. 299 (1932). *Laird*, 2016 WL 4417258, at *31. However,

the Court decided that petitioner's retrial for first degree murder was constitutional because the Double Jeopardy Clause (1) "'does not prohibit the state from prosecuting [a defendant] for [greater and lesser included] multiple offenses in a single prosecution,'" *id.* (quoting *Ohio v. Johnson*, 467 U.S. 493, 500 (1984)), and (2) "does not prohibit retrial of charges that were reversed or vacated for trial error as opposed to evidentiary insufficiency," *id.* (citing *Ball v. United States*, 163 U.S. 662, 672 (1896)). The Court stated that "[t]he fact that these two events—neither of which amounts to a constitutional violation—occurred in succession in petitioner's case does not create a new type of double jeopardy violation." *Id.* In addition, the Court relied on the reasoning of the United States Court of Appeals for the Ninth Circuit in *United States v. Jose*, 425 F.3d 1237 (9th Cir. 2005), the facts of which presented a virtually identical situation to petitioner's case, in concluding that the constitutional protections of the Double Jeopardy Clause were not violated by petitioner's retrial, conviction, and sentence for first degree murder. *Laird*, 2016 WL 4417258, at *32.

2. Motion to Alter and Amend Judgment

In his Motion to Alter and Amend Judgment, petitioner argues that the Court erred in denying a certificate of appealability on this issue because (1) the Court's determination that the retrial of petitioner for first degree murder did not constitute double jeopardy contradicts the Court's conclusion elsewhere in the August 18, 2016, Memorandum that an instruction on third degree murder on retrial would have resulted in double jeopardy and (2) reasonable jurists would debate the Court's assessment of petitioner's constitutional claims. Pet'r's Mot. 12-17.

The Court concludes that petitioner has not demonstrated that the Court erred in denying a certificate of appealability. First, the Court's conclusion that a jury instruction on third degree murder would constitute double jeopardy is not inconsistent with its conclusion that petitioner's

retrial for first degree murder did not constitute double jeopardy. The Court's determination that an instruction on third degree murder would constitute double jeopardy was based on the fact that petitioner had been convicted of third degree murder and that conviction had not been reversed. While the Court agreed that petitioner was correct in stating that third degree murder was the "same offense" as first degree murder under *Blockburger*, it held that the Double Jeopardy Clause had not been violated by petitioner's retrial because petitioner had been charged with both offenses in his first prosecution and had no legitimate expectation of finality in the final judgment of conviction on the first degree murder charge because of his appeal. *Laird*, 2016 WL 4417258, at *31-32. The Court reasoned that even though jeopardy had terminated with respect to third degree murder at the entry of the final judgment on that conviction at petitioner's first trial, jeopardy had continued with respect to first degree murder because of petitioner's successful appeal. *Id.* The Court's conclusion that a jury instruction on third degree murder, an undisturbed conviction, would constitute double jeopardy does not undermine this analysis.

Second, the Ninth Circuit's disapproval of the situation faced by petitioner—entry of judgment of conviction by the trial court on both greater and lesser included offenses—in the *Jose* case does not establish that reasonable jurists would debate whether double jeopardy bars retrial in that situation. While the Ninth Circuit directs its district courts to avoid this situation by entering a judgment of conviction only on the greater offense when a jury convicts on both greater and lesser included offenses, the *Jose* court still concluded that the standing conviction for the lesser included offense did not bar retrial on the successfully appealed greater offense.

Third, the Court rejects petitioner's contention that *Jose* conflicts with other Ninth Circuit authority with respect to the specific situation faced by petitioner. The case cited by petitioner as

conflicting with *Jose*, *Wilson v. Czerniak*, 355 F.3d 1151 (9th Cir. 2004), is factually distinguishable from both *Jose* and this case. In *Wilson*, the petitioner was acquitted on the lesser included offense and the jury hung on the greater offense. 355 F.3d at 1154. The Ninth Circuit concluded that the petitioner's *acquittal* on a lesser included offense barred retrial on the greater offense. *Id.* In contrast, both the petitioner in *Jose* and petitioner in this case were *convicted* of both the lesser included offense and the greater offense at their first trials, successfully appealed the conviction with respect to the greater offense only, and were retried for the greater offense alone. *Jose* thus addresses a situation that *Wilson* does not—the situation at issue in this case.

Fourth, the Court rejects petitioner's argument that the Ninth Circuit's reasoning in *Jose*, and the Court's reasoning in this case, conflicts with Supreme Court precedent. In the case cited by petitioner, *Brown v. Ohio*, the Supreme Court held that conviction and punishment on lesser included offense barred a *subsequent* prosecution for the greater offense. 432 U.S. 161, 169 (1977). *Brown* is factually distinguishable from both *Jose* and this case, as the petitioner in *Jose* and petitioner in this case were charged with, convicted of, and sentenced on the greater offense in their first prosecutions, and neither was sentenced on the lesser included charges. Thus, the situation at issue in this case and in *Jose* does not implicate the concerns addressed by *Brown*—"attempts to relitigate the facts underlying the acquittal" and "attempts to secure additional punishment after a prior conviction and sentence." *Id.* at 166 (citations omitted). In this case, the conviction sought on retrial was the conviction that petitioner successfully appealed, not an additional conviction. *Jose* itself distinguishes *Brown* in a similar manner, stating that the Supreme Court noted in *Brown* that it "was 'not concerned . . . with the double jeopardy questions that may arise when a defendant is retried on the same charge after . . . a conviction is

reversed on appeal.'" *Jose*, 425 F.3d at 1242 (citing *Brown*, 432 U.S. at 165 n.5).

Finally, the Court rejects petitioner's argument that double jeopardy is implicated because "a retrial on the greater offense *necessarily* involves a retrial on all elements of the lesser included offense." Pet'r's Mot. 16 (emphasis in original). In petitioner's case, retrial on the greater offense did not necessitate retrial on any elements of the lesser included offense of third degree murder—"the only remaining question for the jury was whether he acted with a specific intent to kill, thus making him guilty of first-degree murder." *Com.v. Laird*, 988 A.2d at 624.

For all of the foregoing reasons, the Court concludes that petitioner has not shown that the Court erred in not issuing a certificate of appealability with respect to his double jeopardy claim.

C. Claim VIII: Ineffective Assistance of Counsel for Failure to Renew Motion for Change of Venue

Petitioner seeks reconsideration of the Court's denial of his habeas petition and of a certificate of appealability with respect to its conclusion that the Pennsylvania Supreme Court reasonably determined that petitioner had not shown that he suffered prejudice on retrial from pretrial publicity and thus could not show that trial counsel was ineffective for failing to renew a motion for change of venue based on pretrial publicity.

1. Petition for Writ of Habeas Corpus

In his habeas petition, petitioner argued that the Pennsylvania Supreme Court's decision with respect to his ineffective assistance of counsel claim for failure to renew a motion for change of venue was unreasonable in light of the state record. Petitioner argued that the Pennsylvania Supreme Court unreasonably limited its review of pretrial publicity to the two newspaper articles submitted by trial counsel during jury selection and mischaracterized the newspaper articles as not presumptively prejudicial despite the fact that the articles discussed

petitioner's prior conviction and sentence. Pet'r's Br. 138. In support of his argument that the media coverage was presumptively prejudicial because it referred to his previous conviction and death sentence, petitioner relied on *United States v. Casellas-Toro*, 807 F.3d 380, 386-87 (1st Cir. 2015) (considering the four factors articulated in *Skilling v. United States*, 561 U.S. 358 (2010), to find that pretrial publicity was presumptively prejudicial). Pet'r's Br. 134-38. Petitioner also argued that the conclusion of the Pennsylvania Supreme Court that he suffered no actual prejudice was unreasonable because jury panel members had been discussing newspaper articles about the case during jury selection and a seated juror had knowledge of the case. Pet'r's Br. 138-40.

Because the Pennsylvania Supreme Court resolved this claim on the merits, the Court reviewed this claim under the deferential review of 28 U.S.C. § 2254(d) and concluded that the Pennsylvania Supreme Court reasonably rejected petitioner's claim that he had suffered prejudice, either presumed or actual, by his trial attorney's failure to renew a motion for change of venue. *Laird*, 2016 WL 4417258, at *10-12. With respect to his claim of presumed prejudice and argument that the Pennsylvania Supreme Court unreasonably limited its analysis of presumption of prejudice to the two newspaper articles submitted by trial counsel, this Court determined that petitioner "had failed to demonstrate (1) that he produced additional articles or evidence of publicity for the state court to examine and (2) that there was any additional publicity that his counsel should have submitted to the trial court in support of a renewed motion for change of venue." *Id.* at *10. In so concluding, this Court analyzed the seven additional articles produced by petitioner in support of his habeas petition and determined that four of the articles could have had little or no effect on jury selection in 2007—one was published in 1988 and three were published after jury selection. *Id.* With respect to the remaining three articles,

this Court stated they did not undermine the decision of the Pennsylvania Supreme Court because they were predominantly factual and not inflammatory. *Id.*

This Court distinguished *Casellas-Toro* from this case based on the level of coverage, the quality of the coverage, and the size of the community, and determined that petitioner had not shown that the media coverage was so overwhelming and prejudicial that no impartial jury could be assembled. *Id.* The Court also concluded that that petitioner mischaracterized *Casellas-Toro* as standing for the proposition that the mere disclosure of a previous jury's opinion in the same case may prejudice the jury pool. *Id.* at *11. Rather, the statement in *Casellas-Toro* that jury panel members "may have difficulty disbelieving or forgetting the opinion of another jury" was only part of the broader inquiry into the nature of the media coverage. *Id.* The Court concluded that the correct inquiry was not whether a previous verdict was revealed but whether the nature of that publicity was so "pervasive and inflammatory" that, in combination with the other *Skilling* factors, the publicity resulted in presumed prejudice. *Id.*

This Court also determined that the Pennsylvania Supreme Court reasonably decided that petitioner had not shown actual prejudice. This Court rejected petitioner's argument that the mere fact that potential jurors had knowledge about petitioner or the crime demonstrated actual prejudice. *Id.* Instead, this Court stated that the correct inquiry was into the number of venire persons who had formed an opinion about petitioner's guilt that could not be set aside. *Id.* The record demonstrated that only a small percentage of potential jury members knew about the case, and only one of 150 potential jurors stated that his knowledge of the case would affect his impartiality. *Id.* The only seated juror with knowledge of the case testified that he had no preconceptions about petitioner's guilt, and this Court determined that the Pennsylvania Supreme Court reasonably concluded that petitioner had not shown actual prejudice based on that

testimony. *Id.* at *12.

2. Motion to Alter and Amend Judgment

In his Motion to Alter and Amend Judgment, petitioner argues that the Court erred in determining that the Pennsylvania Supreme Court reasonably concluded that petitioner had not demonstrated either presumed or actual prejudice stemming from the pretrial media coverage. Specifically, petitioner contends that the Court "unduly minimized" the prejudice that resulted from "the juror's knowledge of an earlier death sentence" in its analysis of presumed prejudice, incorrectly distinguished *Casellas-Toro,* and ignored "the distinct and inherent prejudice that results when a capital jury learns that a previous jury has sentenced the defendant to death for the same crime." Pet'r's Mot. 3-4. In support of his argument that knowledge of a defendant's prior sentence is inherently prejudicial, petitioner cites to multiple state cases and a case from the United States Court of Appeals for the Fourth Circuit. *Id.*

This Court concludes that petitioner has not demonstrated that it erred in determining that the Pennsylvania Supreme Court reasonably determined that petitioner did not suffer prejudice. First, to the extent that petitioner's argument is that he disagrees that the publicity in *Casellas-Toro* is factually distinguishable from the publicity in this case, mere disagreement with the Court's conclusion is insufficient to meet the burden for granting a motion for reconsideration. *See Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 606 (M.D. Pa. 2002) (stating that a motion for reconsideration should not be used "as an attempt to relitigate a point of disagreement between the Court and the litigant" (quotation marks and citation omitted)). The Court also notes that, while it distinguished *Casellas-Toro* on the ground that that case did not concern a trial for the same offense, but rather for a factually related offense, the primary basis for distinguishing *Casellas-Toro* from this case was the factual differences between the two cases,

including the level and quality of pretrial media coverage.

Second, the Court rejects petitioner's argument that it ignored the existence of any inherent prejudice that occurs when a jury learns that a previous jury has sentenced defendant to death for the same crime. The cases cited by petitioner do not demonstrate that the Court erred in determining that the pretrial publicity was not inherently prejudicial or that petitioner did not suffer actual prejudice. In *People v. Wooley*, the Illinois Supreme Court concluded that there was reversible error where ten of the seated jurors were informed by the judge during venire that the defendant had been previously sentenced to death. 793 N.E.2d 519, 524-25 (Ill. 2002). In this case, by contrast, petitioner did not demonstrate that any of the seated jurors had knowledge of his previous sentence or that a significant number of the members of jury pool had knowledge of his prior sentence.

Likewise, the other cases cited by petitioner do not demonstrate a clear error of law or fact in the previous ruling of this Court. Petitioner's case differs from the cases he cites—he has not demonstrated that any of the seated jurors were informed during the trial of petitioner's previous sentence. *See State v. Rimmer*, 250 S.W.3d 12, 32-33 (Tenn. 2008) (finding no reversible error where seated jury was informed at sentencing that the defendant had previously been on death row because the information had been revealed by a defense witness in response to defense counsel's question); *Hammond v. State*, 776 So.2d 884, 889 (Ala. Crim. App. 1998) (reversible error when the prosecutor commented on the defendant's previous sentence during sentencing phase of the defendant's second trial); *Fullwood v. Lee*, 290 F.3d 663, 682 (4th Cir. 2002) (concluding that defendant was entitled to an evidentiary hearing when a seated juror alleged that the jury was informed by outside sources that the defendant had been sentenced to death by another jury). Thus, the Court concludes that petitioner has not shown that it erred in

concluding that the Pennsylvania Supreme Court reasonably determined that petitioner had not suffered prejudice.

For the foregoing reasons, the Court also concludes that reconsideration of its denial of a certificate of appealability on this issue is not warranted because petitioner has not shown that the Court erred in its previous determination that petitioner had not satisfied the standard for a certificate of appealability. Petitioner has not made a substantial showing that reasonable jurists would debate whether petitioner's ineffective assistance of counsel claim for failure to renew a motion for change of venue states a valid claim of the denial of constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484.

D. Claim IX: Identification of Frank Chester and Introduction of Chester's Testimony Violated the Due Process Clause of the Fourteenth Amendment

Petitioner seeks reconsideration of the Court's denial of a certificate of appealability with respect to the Court's conclusion that petitioner failed to show cause to overcome the procedural default of his due process claim challenging the constitutionality of the identification of Frank Chester in court after Chester had asserted his Fifth Amendment privilege and the later introduction of Chester's testimony from the 1988 trial. Petitioner does not challenge the determination of the Court in the August 18, 2016, Memorandum that both aspects of this claim are procedurally defaulted.

1. Petition for Writ of Habeas Corpus

In his habeas petition, petitioner claimed that his right to due process under the Fourteenth Amendment was violated when Frank Chester, petitioner's co-defendant in the 1988 trial, was identified in court at petitioner's retrial as petitioner's co-conspirator after Chester had invoked his Fifth Amendment privilege against self-incrimination. Pet'r's Br. 141, 148-49. Petitioner also claimed that his right to due process was violated when the prosecution

introduced Chester's testimony from the 1988 trial, which the prosecution "believed was false and inconsistent with the physical evidence." Pet'r's Br. 151.[3]

In its August 18, 2016, Memorandum, this Court concluded that both aspects of petitioner's due process claim were procedurally defaulted and unable to be reviewed. This Court determined that the part of petitioner's due process claim challenging Chester's identification was procedurally defaulted because the Pennsylvania Supreme Court had disposed of the claim on an adequate and independent state ground, namely, that petitioner's trial counsel had failed to contemporaneously object to Chester's identification before the jury. *Laird*, 2016 WL 4417258, at *23. This Court determined that the part of petitioner's due process claim challenging the use of Chester's prior testimony was procedurally defaulted because the claim was not properly exhausted before the state courts. *Id.* at *24-25. Continuing in the Memorandum dated August 18, 2016, the Court concluded that there were no grounds for excusing the procedural default of either part of the due process claim because petitioner had not demonstrated cause or prejudice. *Id.* at *25. In so concluding, the Court stated that "[t]he experienced counsel who represented petitioner on direct appeal should have (1) discovered that no objection was raised when Chester was identified and, therefore, should have challenged that identification by an ineffective assistance of counsel claim and (2) cited to a federal case or explicitly mentioned the Due Process Clause in arguing that Chester's prior testimony was false, or presented evidence demonstrating that the prosecutor knew that Chester perjured himself in 1988."[4] *Id.*

[3] In his briefs before the Pennsylvania state courts, petitioner asserted this claim under the Confrontation Clause of the Sixth Amendment. Petitioner did not assert a Sixth Amendment claim in his habeas petition before this Court. *Laird*, 2016 WL 4417258, at *22-23.

[4] In determining that the petitioner's due process challenge to Chester's testimony was not properly exhausted, the Court also stated in the August 18, 2016, Memorandum that "petitioner

2. Motion to Alter and Amend Judgment

In his Motion to Alter and Amend Judgment, petitioner argues that reasonable jurists would debate the Court's conclusion that, because his counsel on direct appeal "should have" appropriately challenged Chester's identification by an ineffective assistance of counsel claim, petitioner did not establish cause to overcome procedural default. Pet'r's Mot. 11. Petitioner claims that, because he had a right to effective assistance of counsel on direct appeal, the ineffective assistance of his appellate counsel may establish cause for the procedural default of his ineffective assistance of counsel claim for his trial counsel's failure to object to Chester's identification. Pet'r's Mot. 11 (citing *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985)). Petitioner moves only for reconsideration of the Court's denial of a certificate of appealability with respect to this claim; he does not argue that the Court should reconsider the underlying ruling.

On this issue, the Court concludes that it erred by stating, without further explanation, that petitioner did not show cause for the procedural default of this aspect of his due process claim based on the fact that counsel on direct appeal failed to challenge the identification of Chester as ineffective assistance of counsel. Under Pennsylvania law, "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Thus, any ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity." *Com. v. Grant*, 813 A.2d 726, 738 (Pa. 2002). In short, appellate counsel was not required to raise an ineffective assistance of trial counsel claim on direct appeal.

While not argued by petitioner in the Motion to Alter and Amend Judgment, the Court

has not produced any evidence that Chester's 1988 testimony was, in fact, false, or that the prosecutor in 1988 knew it to be false and presented it anyway." *Laird*, 2016 WL 4417258, at *25. The relevant prosecutor's knowledge is the prosecutor in 2007.

concludes that it mistakenly stated in the Memorandum dated August 18, 2016, that petitioner did not establish cause with respect to the part of his due process claim that challenged the introduction of Chester's testimony for the stated reason that his counsel on direct appeal failed to specifically refer to the Due Process Clause or present evidence that the prosecutor in 1988 knowingly presented perjured testimony. Because petitioner had a right to effective assistance of counsel on direct appeal, *Evitts*, 469 U.S. at 396-97, an error of counsel on direct appeal could establish cause to overcome procedural default, *see Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Thus, without more of an explanation, it was insufficient to state that petitioner did not establish cause because his counsel on direct appeal erred.

Petitioner has satisfied his burden of establishing a ground for reconsideration—the need to correct a clear error of law in the August 18, 2016, Memorandum and Order—with respect to the Court's conclusion that petitioner did not demonstrate cause because counsel on direct appeal failed to properly raise either aspect of his due process claim.

3. Reconsideration of the August 18, 2016, Memorandum and Order with respect to Claim IX (Frank Chester's Identification and Testimony)

On reconsideration, the Court need not determine whether petitioner has shown cause and prejudice to excuse the procedural default of either part of his due process claim—the identification of Chester before the jury or the use of Chester's testimony from the 1988 trial. Rather, the Court concludes that petitioner's arguments with respect to the identification and testimony of Chester under the Due Process Clause of the Fourteenth Amendment are without merit and denies his habeas petition with respect to this claim on that ground. Under 28 U.S.C. § 2254(b)(2), "[a]n 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." *See also Taylor v. Horn*, 504 F.3d 416, 427 (3d Cir. 2007) ("[B]ecause we will deny all

of Taylor's claims on the merits we need not address exhaustion." (citing 28 U.S.C. § 2254(b)(2)). The Court addresses each due process argument in turn.

a. Factual Background

At petitioner's retrial in 2007, the Commonwealth sought Chester's testimony in the guilt phase as part of its case-in-chief. During a morning session, in the absence of the jury, Chester was brought to the courtroom in his prison clothing and, as the parties had anticipated, he asserted his Fifth Amendment privilege against self-incrimination. Retrial Tr. 13-16, Feb. 7, 2007. Judge Boylan then found Chester unavailable as a witness. *Id.* at 13-16. Chester was removed from the witness stand but remained in the courtroom at the prosecutor's request. *Id.* at 16. Chester was seated in the first row of the courtroom. *Id.* After the jury returned to the courtroom, the Commonwealth called Detective Robert Potts to testify. *Id.* at 17. Detective Potts identified Chester and testified that "no one else has ever been arrested for this murder other than Frank Chester and Richard Laird." *Id.* at 18-19. Petitioner's trial counsel did not object to Chester's identification before the jury. *Id.* at 18-22. Chester was then removed from the courtroom in the jury's presence. *Id*. at 22.

That afternoon, the Commonwealth sought to introduce Chester's testimony from petitioner's and Chester's first trial in 1988. *Id.* at 130. At that trial, Chester and petitioner each testified and asserted that the other man was fully responsible for Anthony Milano's murder. Trial Tr. 478-80, 548, 654-66, May 18, 1988. Prior to the introduction of Chester's testimony at petitioner's retrial, Judge Boylan instructed the jury, in relevant part, as follows:

> This testimony was given at a prior proceeding where Frank Chester's criminal responsibility was at issue. Frank Chester was convicted at a prior proceeding of murder and related offenses . . . .
>
> . . . I want to give you an instruction as well with respect to Mr. Chester's testimony because he was an accomplice. Put simply, an accomplice is a person

> who knowingly and voluntarily cooperated with or aids another person in committing an offense.
>
> There are special rules that apply to accomplice testimony. First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source. Second, you should examine the testimony of an accomplice closely and accept it only with care and caution. Third, you should consider whether the testimony of an accomplice is supported in whole or in part by other evidence.

Retrial Tr. 131, Feb. 7, 2007. Chester's testimony from 1988 was then read into the record in its entirety. *Id.* at 132-40; Retrial Tr. 92, Feb. 9, 2007.

During deliberations, the jury sent Judge Boylan the following written question: "Should any significance be attached to the fact that Frank Chester was brought into the courtroom without testifying?" Retrial Tr. 90, Feb. 9, 2007. In response, Judge Boylan told the jury: "The simple answer is no. No significance should be attached to that. I will tell you that Frank Chester was unavailable to either side as a witness in this case." *Id.* at 90-91.

b. Identification of Chester Before the Jury

In his habeas petition, petitioner argues that his right to due process under the Fourteenth Amendment was violated by Chester's identification before the jury and the prosecution's introduction of Chester's testimony because this amounted to Chester asserting his Fifth Amendment privilege in front of the jury. Pet'r's Br. 148-49. Petitioner argues that this constitutes reversible, constitutional error because "a jury may not consider that a witness has chosen to exercise his Fifth Amendment privilege because this invites the jury to make an impermissible inference" with respect to the witness's guilt. *Id.* (citing *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970)).

In addition to arguing that petitioner had procedurally defaulted this claim, respondents

state that the record does not permit anything "more than pure speculation that the jury concluded Chester had invoked his right against self-incrimination," and that, "even if . . . there was some reasonable basis to believe" that the jury had concluded that Chester had invoked his Fifth Amendment privilege, there were no impermissible inferences to be drawn because it was undisputed that petitioner had murdered Milano and that Chester had participated in the murder. Answer to Pet'r's Br. 136-37 (Document No. 42, filed Apr. 19, 2016).

i. Legal Standard

"It is well settled that the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defense." *Bowles*, 439 F.2d at 542. However, reversible error is not automatically committed where "a witness claims his privilege not to answer" in the presence of the jury. *Todaro v. Fulcomer*, 944 F.2d 1079, 1083 (3d Cir. 1991). In *Namet v. United States*, 373 U.S. 179 (1963), the Supreme Court of the United States, in concluding on direct appeal that there was no reversible error where the witness invoked the Fifth Amendment in the presence of the jury, "observed that the case before it was not one in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant." *Todaro*, 944 F.2d at 1083 (citing *Namet*, 373 U.S. at 189); *see also United States v. Victor*, 973 F.2d 975, 979 (1st Cir. 1992) (stating that reversible error from "a witness' assertion of his or her Fifth Amendment rights in the presence of the jury" may result "from prosecutorial misconduct when the government [attempts] to build its case out of inferences arising from the witness' assertion of the Fifth Amendment-privilege" or, "in the circumstances of a given case, . . . where inferences from a witness' refusal to answer add critical weight to the prosecution's case." (quotation marks and citations omitted)).

ii. Discussion

The Court concludes that petitioner's argument that the identification of Chester before the jury after asserting his Fifth Amendment privilege against self-incrimination amounts to a due process violation under the Fourteenth Amendment is without merit.

First, the identification of Chester in the courtroom and the later introduction of Chester's testimony from the 1988 trial were not equivalent to Chester asserting his Fifth Amendment privilege before the jury. Chester did not assert his Fifth Amendment privilege in the presence of the jury, and there was no mention of the Fifth Amendment before the jury. Retrial Tr. 13-16, Feb. 7, 2007. When the jury asked Judge Boylan whether any significance should be given to the lack of in-person testimony by Chester, Judge Boylan instructed the jury that "no significance should be attached to that" and stated that Chester was unavailable for both sides. Retrial Tr. 90-91, Feb. 9, 2007. At no point was the jury informed that Chester had asserted his Fifth Amendment privilege against self-incrimination.

Second, even if Chester's identification in the courtroom and later introduction of his testimony were the equivalent of asserting the Fifth Amendment privilege in the presence the jury, Chester's refusal to testify was not the "only source, or even the chief source, of the inference" that Chester engaged in criminal activity with petitioner. *Todaro*, 944 F.2d at 1083. The fact that Chester and petitioner had engaged in criminal activity together was not in dispute. For example, in closing argument, petitioner's counsel stated, "The defendant is guilty of murder. He along with Frank Chester killed Anthony Milano. There's no question about it. There's no issue about it." Retrial Tr. 6, Feb. 9, 2007. The jury was instructed that Chester had been convicted of murder before hearing his testimony from 1988. Retrial Tr. 131, Feb. 7, 2007. Thus, any inference from Chester's assertion of his Fifth Amendment privilege would not have

been relevant to the only question at issue in this case—whether petitioner had the requisite mental state when he killed Milano such that he was guilty of first degree murder.

Therefore, the Court concludes that petitioner's due process claim with respect to the identification of Chester before the jury is without merit.

c. Frank Chester's Testimony

In his habeas petition, petitioner argues that he was denied due process when the prosecutor in 2007 knowingly introduced false statements made by Chester during his testimony in 1988. Petitioner argues that his due process rights were violated because "the Commonwealth presented evidence that it believed was false and inconsistent with the physical evidence," namely, that Chester testified that he was not involved in the killing and that petitioner was solely to blame for Anthony Milano's death. Continuing, petitioner argues that "[i]f the Commonwealth believed Chester's first trial testimony, no such charges would have been filed against him," and offers as additional evidence that Chester's testimony was false the fact that the prosecution in 1988 attacked Chester's credibility and that Chester was convicted on all counts. Pet'r's Br. 151; Reply in Supp. Pet'r's Br. 39-40. Petitioner contends that it was "reasonably likely that the jury relied on [Chester's] testimony when they rejected Petitioner's diminished capacity defense," Pet'r's Br. 151, and that Chester's testimony "materially misled the jury about the relative culpability of the two perpetrators," Reply in Supp. Pet'r's Br. 40. Furthermore, petitioner contends that respondents admitted the significant effect of Chester's testimony on the jury's verdict because they stated that "it was 'important to hear the only available evidence' describing the 'critical hours'" between Milano, Chester, and petitioner's departure from the bar and Chester and petitioner's arrival at Griscavage's apartment. Reply in Supp. Pet'r's Br. 39 (quoting Answer to Pet'r's Br. 141).

i. Legal Standard

A criminal defendant's right to due process is violated by "the state's knowing use of perjured testimony to obtain a conviction." *Lambert v. Blackwell*, 387 F.3d 210, 242 (3d Cir. 2004). This includes situations "'when the government, although not soliciting false evidence, allows it go uncorrected when it appears at trial.'" *Id.* (quoting *United States v. Biberfeld*, 257 F.2d 98, 102 (3d Cir. 1992) (citation omitted)). To establish this violation, a criminal defendant must show that: (1) the testimony was perjured; (2) "the government knew or should have known of [the] perjury; (3) the testimony went uncorrected; and (4) there is a reasonable likelihood that the false testimony could have affected the verdict." *Id.* "A witness commits perjury if he or she 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008) (citation omitted).

ii. Discussion

In sum, petitioner argues that the prosecutor in 2007 knowingly presented Chester's perjured testimony from 1988 because the prosecution believed Chester was an unreliable witness and Chester was convicted of murder despite testifying that petitioner was solely responsible for Milano's death. The Court disagrees.

First, excepting the portion of Chester's testimony in which he denied involvement in Milano's murder, petitioner has not presented evidence that Chester's testimony was false or that the prosecutor in 2007 knew it was false. Even if the Court assumes that Chester testified that he did not participate in the murder "with the willful intent to provide false testimony," *Hoffecker*, 530 F.3d at 183, the fact that Chester was then convicted of murder does not mean that the entirety of his testimony was perjured. There is certainly evidence in the record that both parties

believed Chester was an unreliable source. The prosecutor argued in closing that the jury needed evidence "that corroborates Frank Chester[.] Because you need that, you really do. You just can't rely on Frank Chester and Richard Laird's words." Retrial Tr. 40, Feb. 9, 2007. Similarly, the defense argued in closing that "One of the things about Frank Chester, you know he's not telling the truth, the whole truth, and nothing but the truth. You know that. The question you're going to have to decide is when is he telling the truth and when is he not telling the truth and why and how could we tell that?" Retrial Tr. 18, Feb. 9, 2007. Furthermore, Judge Boylan instructed the jury prior to the introduction of Chester's testimony from 1988 that the testimony was "from a corrupt and polluted source" and thus required additional scrutiny. Retrial Tr. 131, Feb. 7, 2007. However, petitioner presents no evidence which demonstrates that Chester's testimony, excepting his assertions that he did not participate in the murder, was in fact false, or that the prosecutor in 2007 knew that such testimony was false.

Second, petitioner does not satisfy the requirement that the perjury remained uncorrected. Assuming that Chester perjured himself in 1988 when he stated that he did not participate in the murder, this testimony did not remain uncorrected before the jury—it was undisputed at petitioner's retrial that Chester had participated in the murder and the jury was informed that Chester had been convicted of murder. *See Ford v. Superintendent, SCI-Frankville*, No. 12-CV-01278, 2013 WL 5457801, at *5 (E.D. Pa. Sept. 19, 2013) (overruling the petitioner's objection to Report and Recommendation on the ground that the prosecution did not violate the Fourteenth Amendment because "the prosecution in the present case did not allow false testimony to go uncorrected").

Therefore, the Court concludes that petitioner's argument that he was denied due process because the prosecution knowingly introduced Chester's false testimony is without merit. The

Consolidated Petition for Writ of Habeas Corpus is thus denied with respect to petitioner's claim that the identification and testimony of Frank Chester violated the Due Process Clause of the Fourteenth Amendment.

A certificate of appealability will not issue because reasonable jurists would not debate whether petitioner's challenge to the identification and testimony of Frank Chester under the Due Process Clause of the Fourteenth Amendment states a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484.

E. Petitioner's Challenge to His PCRA Counsel's Representation with Respect to the Testimony Challenged as Victim Impact Evidence (Claim III)

In letters to the Court dated January 28, 2017, and February 26, 2017, petitioner challenged the effectiveness of his current counsel's representation during his PCRA proceedings on the ground that his federal constitutional arguments with respect to the testimony he challenged as victim impact evidence were not exhausted before the state courts. Letter from Richard Laird (Feb. 26, 2017), at 2. In concluding that petitioner had not exhausted this claim before the state courts, this Court determined in the August 18, 2016, Memorandum that he had not sufficiently raised the federal constitutional challenges to this testimony in his PCRA petition or in his collateral appeal to the Pennsylvania Supreme Court. *Laird*, 2016 WL 4417258, at *44.

The Court need not address the question of whether petitioner's PCRA counsel was ineffective or whether such ineffective assistance of counsel could serve as cause to overcome the procedural default of petitioner's federal constitutional claims. In the Memorandum dated August 18, 2016, this Court concluded that petitioner "has not demonstrated prejudice caused by the admission of the testimony challenged as victim impact evidence or from the prosecutor's argument." *Id.* at *45. The Court referred to its earlier discussion of the effect of this evidence, which was as follows:

> The minimal testimony was presented early during the five-day guilt phase, and, in the context of the totality of the evidence that the jury heard about the crime and about petitioner as an individual, was unlikely to have influenced the jury over one week later at the end of the penalty phase. Petitioner has also failed to demonstrate that the prosecutor's argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Viewed in the context of the entire penalty proceeding, the challenged comments by the prosecutor were brief, isolated remarks that did not exceed constitutional bounds.

Id. at *43 (quotation marks and citations omitted). Because petitioner has not shown prejudice, the procedural default of this claim cannot be excused.

V. CONCLUSION

For the foregoing reasons, petitioner's Motion to Alter and Amend Judgment is granted with respect to the Court's determination that the failure of counsel on direct appeal to challenge (1) Frank Chester's identification by an ineffective assistance of counsel claim and (2) Frank Chester's testimony by specific reference to the Due Process Clause of the Fourteenth Amendment did not constitute cause for excusing the procedural default of that claim. Upon reconsideration, with respect to that issue—petitioner's due process claim challenging the identification and testimony of Frank Chester—the Consolidated Petition for Writ of Habeas Corpus is denied. The Motion to Alter and Amend Judgment is denied in all other respects. Excepting only as stated above, the Memorandum and Order dated August 18, 2016, remains in effect. An appropriate order follows.

COMMONWEALTH of Pennsylvania, Appellee

v.

Richard Roland LAIRD, Appellant.

Supreme Court of Pennsylvania.

Submitted Nov. 7, 2014.

Decided July 20, 2015.

Background: Defendant, who had been convicted of first-degree murder, kidnapping, aggravated assault, and related offenses and was sentenced of death, filed a petition for post-conviction relief, after grant of federal habeas corpus relief, 159 F.Supp.2d 58 and affirmance of convictions, 605 Pa. 137, 988 A.2d 618. The Court of Common Pleas, Bucks County, Criminal Division, No. CP–09–CR–0000746–1988, Rea Behney Boylan, J., denied relief. Defendant appealed.

Holdings: The Supreme Court, No. 683 CAP, Saylor, C.J., held that:

(1) counsel's failure to renew an earlier motion for a change of venue immediately before, or during, jury selection did not prejudice defendant;

(2) counsel's alleged failure to adequately prepare his expert witnesses for the guilt phase of murder trial did not prejudice defendant;

(3) counsel's alleged failure to obtain testimony from experts during the penalty phase of retrial as detailed as testimony counsel had elicited during initial murder trial did not constitute deficient performance; and

(4) counsel's failure to object to the Commonwealth's definition of mitigating circumstances did not prejudice defendant.

Affirmed.

1. Criminal Law ⚿1430, 1433(1), 1450, 1615

To be eligible for relief, a Post-Conviction Relief Act (PCRA) petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one of the statutory circumstances enumerated for relief in the PCRA, and that the allegation of error has not been previously litigated or waived. 42 Pa.C.S.A. § 9543(a)(2).

2. Criminal Law ⚿1881

Pennsylvania's test for ineffective assistance of counsel is the same as the two-part performance-and-prejudice standard set forth by the United States Supreme Court in *Strickland v. Washington*, albeit the Supreme Court has divided the performance element into two sub-parts dealing with arguable merit and reasonable strategy. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⚿1881

To succeed on an ineffectiveness claim under state law, a petitioner must demonstrate that: the underlying claim is of arguable merit; counsel had no reasonable basis for the act or omission in question; and he suffered prejudice as a result.

4. Criminal Law ⚿1902

Trial counsel's failure to renew an earlier motion for a change of venue immediately before, or during, jury selection did not prejudice capital murder defendant; there were only two newspaper stories that appeared shortly before or during jury selection, the articles were not sensational, inflammatory, or slanted toward conviction, any potential juror who expressed knowledge that defendant was being retried was excluded from the jury, and the only seated juror who learned anything from the media had heard a generalized description from a co-worker, and nothing material about defendant. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⚿126(1)

A change of venue is necessary when the court determines that a fair and impartial jury cannot be selected in the county where the crime took place.

6. Criminal Law ⚿126(1)

The trial court is in the best position to assess the atmosphere of the community and to judge the necessity of any requested change of venue.

7. Criminal Law ⚿134(1)

For the purpose of a motion for a change in venue, the existence of pretrial publicity does not alone justify a presumption of prejudice, but prejudice will be assumed where the defendant shows that the publicity: was sensational, inflammatory, and slanted toward conviction, rather than factual or objective; revealed the defendant's prior criminal record, if any, or referred to confessions, admissions, or reenactments of the crime by the defendant; or was derived from official police and prosecutorial reports.

8. Criminal Law ⚿1925

Trial counsel's cross examination of several witnesses concerning capital murder defendant's alcohol consumption in the hours before the murder was not ineffective, even though defendant proffered ways counsel could have more skillfully handled the witnesses so as to portray an even higher level of intoxication and make defendant's diminished-capacity defense more likely to prevail; counsel adduced significant eyewitness testimony suggesting that defendant had consumed a very large amount of alcohol on the night of the murder, that he was drinking before arriving at the bar, that at the bar he shared several 64 ounce pitchers of beer and ingested at least one shot of liquor, and that he was loud and boisterous, and counsel called an expert toxicologist who estimated that defendant's blood alcohol content (BAC) just prior to the murder was approximately 0.45 percent. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⚿633.10

The Constitution guarantees the accused a fair trial, not a perfect one.

10. Criminal Law ⚿1890

Although hindsight might reveal the comparative worth of alternatives not pursued, an ineffective counsel claim cannot succeed on that basis. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⚿1927

Trial counsel's failure to file a motion in limine to exclude bad acts evidence, that capital murder defendant had furnished alcohol to a minor and he made a sexual remark to female, did not prejudice defendant; defendant stipulated to having participated in the murder, the only question for the jury was whether he acted with specific intent, and the bad acts evidence was fairly isolated and minor in relation to the five days of testimony during the guilt phase. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⚿1931

Trial counsel's alleged failure to adequately prepare his expert witnesses for the guilt phase of capital murder trial did not prejudice defendant; three psychological or psychiatric experts testified regarding defendant's inability to form specific intent on the night of the murder, and defendant failed to explain how an additional evaluation before the retrial would have allowed experts to testify more forcefully or convincingly that defendant suffered from diminished capacity. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⚿1933

Trial counsel was not ineffective for failure to introduce medical documentation supporting defendant's allegation that he

suffered from brain damage at the time of the murder due to having sustained multiple head injuries; the issue in the guilt phase the trial was whether the alleged brain damage, combined with other factors such as alcohol consumption, impaired defendant's cognitive functioning so that his capacity to form a specific intent to kill was diminished, and whether that brain damage stemmed from one or multiple head injuries was not relevant to the determination. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⚿1961

Trial counsel was not ineffective for failure to present as much mitigating evidence on retrial as he did during defendant's initial capital murder trial; the difference between the information elicited by defendant's brother during the original trial and later on retrial was not extensive. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⚿1961

Trial counsel was not ineffective for alleged failure to obtain testimony from experts during the penalty phase of retrial as detailed as testimony counsel had elicited during initial capital murder trial; both experts testified during the guilt phase of trial and their testimony was incorporated into the penalty phase, experts testified as to the abuse defendant suffered at the hands of his father, his use of drugs and alcohol, and his brain damage, and there was little change between the substance of the experts opinions from the initial trial when compared to the retrial. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⚿1961

Capital murder defendant's counsel was not ineffective for failure to present expert mitigating evidence as to the long-term effect of childhood sexual abuse on males; the experts who testified at the penalty hearing provided significant, detailed information concerning defendant's abusive childhood, his mental-health impairments, his long-term substance abuse and alcohol dependency, and his brain damage stemming from serious head injuries, and the jury was informed that those factors, combined with defendant's heavy alcohol ingestion during the hours leading up to the crime, significantly affected his cognitive functioning. U.S.C.A. Const. Amend. 6.

17. Criminal Law ⚿1961

Capital murder defendant was not prejudiced by counsel's failure to object to prosecutor's cross-examination of clinical neuropsychologist on Eighth Amendment grounds, after expert was asked whether her opinion as to another defendant's mental state in an unrelated case had been rejected as "very speculative"; the remark was brief and isolated, and counsel immediately objected and a curative instruction was provided. U.S.C.A. Const.Amends. 6, 8.

18. Sentencing and Punishment ⚿1615, 1616

The Eighth Amendment requires nonarbitrary, individualized assessment of the appropriateness of the death penalty as to each capital defendant. U.S.C.A. Const. Amend. 8.

19. Sentencing and Punishment ⚿1665, 1702

A full consideration of the character and record of the defendant and the circumstances of the offense forms an indispensable part of the process of inflicting the penalty of death.

20. Constitutional Law ⚿4744(2)
Sentencing and Punishment ⚿1769

Capital murder defendant's due process rights were not violated at penalty phase when the prosecutor cross-examined clinical neuropsychologist as to whether

her opinion that another defendant suffered from an extreme mental or emotional disturbance at the time of the offense, like expert had opined in defendant's case, had been rejected as speculative; the question at most constituted witness impeachment rather than substantive evidence in support of the death penalty, and the information was not kept secret from defendant or his attorney. U.S.C.A. Const.Amend. 14.

21. Criminal Law ⚿1961

Capital murder defendant was not prejudiced by counsel's failure to object to the incorporation of guilt-phase evidence of defendant making a sexual remark to female and providing alcohol to a minor during the penalty phase of trial; in the penalty phase, the prosecutor did not discuss the testimony concerning the remark to female or the alcohol given to minor, and she never mentioned these items in her argument to the jury. U.S.C.A. Const. Amend. 6.

22. Criminal Law ⚿1962

Capital murder defendant was not prejudiced by counsel's failure to object to the Commonwealth's definition of mitigating circumstances, which was described as evidence that made the case more or less terrible; the Standard Criminal Jury Instruction described aggravating and mitigating circumstances as "things that make a first-degree murder case either more terrible or else less terrible," and the jury charge as a whole did not interfere with the jury's evaluation of mitigation evidence. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⚿1922

Capital murder defendant's counsel was not ineffective for failure to object to the admission of victim impact testimony during the guilt phase of trial; the brief comments suggested that the victim's family was concerned when they had not heard from the victim and did not know his whereabouts, and most of the complained-of evidence did not purport to describe victim's personal qualities or the impact of his death upon his family. U.S.C.A. Const. Amend. 6; 42 Pa.C.S.A. § 9711(a)(2).

24. Criminal Law ⚿338(7)

A criminal defendant does not have the right to have all evidence presented against him at trial sanitized of anything that could cause jurors to sympathize with the victim or his family.

25. Criminal Law ⚿2077

Prosecuting attorneys have leeway to present their closing arguments with logical force and vigor, and they are permitted a degree of oratorical flair in advocating the Commonwealth's case.

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Jill Marie Graziano, Esq., Michelle Ann Henry, Esq., Doylestown, Amy Zapp, Esq., PA Office of Attorney General, for Commonwealth of Pennsylvania.

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

OPINION

Chief Justice SAYLOR.

This capital post-conviction appeal relates to Appellant's killing of Anthony Milano in 1987. The underlying facts are described in *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991), and *Commonwealth v. Laird*, 605 Pa. 137, 988 A.2d 618 (2010).

Briefly, on the night of December 14, 1987, Milano drove to the Edgely Inn in Bristol Township, a bar where Appellant

and his friend Frank Chester were drinking. Milano, Chester, and Appellant conversed and drank alcohol until the early morning hours of December 15. Witnesses testified that, during this time, Appellant seemed coherent, was able to walk without swaying or stumbling, and was not slurring his speech. At some point, Appellant and Chester began taunting Milano because they thought he might be homosexual. In spite of the taunting, Milano agreed to give Appellant and Chester a ride home. Traveling in Milano's car, they eventually proceeded to a wooded area, stopped along the side of the road, and exited the vehicle. Chester struck Milano, causing him to fall to the ground. Appellant pinned Milano down and killed him by slashing his throat repeatedly with a box-cutter. Appellant and Chester ran to the home of a friend, Rich Griscavage. On arriving at Griscavage's residence, Chester said they had gotten into a fight and "the dude is dead." Appellant told Chester to "shut up." Griscavage gave Appellant a ride home on his motorcycle. He testified that Appellant had no trouble keeping his balance or leaning into turns.

Later that day (December 15, 1987), Appellant's girlfriend observed Appellant place his blood-covered keychain and clothing into a plastic bag, which he discarded in a dumpster in a nearby town. She testified that Appellant disposed of the box cutter by throwing it into a creek, and, additionally, asked her if she could "be an alibi." That evening, Milano's car was found engulfed in flames, and the fire marshal testified that, in his opinion, the fire was deliberately set. Milano's body was found near the car.

The Commonwealth introduced a recording and transcript of a phone call between Chester and Appellant that occurred five days after the killing, the interception of which was approved by Chester. During the call, Appellant: suggested that Chester leave town; indicated his intention to "hide until this blows over;" recommended ways of passing a polygraph test; commented on the district attorney's inability to prove a case without evidence; and expressed a belief that criminal homicide is subject to a seven-year statute of limitations. *See Laird*, 605 Pa. at 150–52, 988 A.2d at 625–26; *Chester*, 526 Pa. at 586–89, 587 A.2d at 1371–72.

Appellant and Chester were tried together in May 1988. Each testified and admitted he was present at the crime scene, but blamed the other for the killing. Both defendants were convicted of first-degree murder, kidnapping, aggravated assault, and related offenses. Both were sentenced to death. This Court affirmed the judgments of sentence. *See Chester*, 526 Pa. at 615, 587 A.2d at 1385.

Appellant filed a timely petition under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541–9546 ("PCRA"), which was denied. *See Commonwealth v. Laird*, 555 Pa. 629, 726 A.2d 346 (1999). The federal district court granted in part Appellant's subsequent petition for habeas relief, vacating his first-degree murder conviction and death sentence. *See Laird v. Horn*, 159 F.Supp.2d 58 (E.D.Pa.2001), *aff'd*, 414 F.3d 419 (3d Cir.2005). With Appellant's conviction for, *inter alia*, kidnapping still in place, the Commonwealth retried him on the first-degree murder charge in February 2007.

At his retrial, Appellant was represented by attorneys John Kerrigan and Keith Williams, with the former having a leading role in the guilt phase and the latter primarily responsible for the penalty phase. For his guilt-phase strategy, Appellant stipulated that he participated in murdering Milano, but not that he acted with specific intent. Thus, the only question for

the jury was whether Appellant acted with a specific intent to kill so as to make him guilty of first-degree murder. As to this issue, Appellant advanced a diminished-capacity defense, which negates specific intent so as to mitigate first-degree murder to third-degree murder. *See Commonwealth v. Hutchinson*, 611 Pa. 280, 341, 25 A.3d 277, 312 (2011). To support the defense, Appellant presented the testimony of multiple experts who indicated that Appellant had a high blood-alcohol content ("BAC") at the time of the killing and that this, together with brain damage resulting from head injuries sustained during Appellant's life, impeded Appellant from forming the requisite intent to kill. The experts also developed that, given the amount of alcohol Appellant ingested prior to the killing, he may have been acting in an "alcoholic blackout," where he could function normally but later have no recall of the time period in question. Two of the experts related that Appellant told them shortly before the retrial that he had no memory of the killing. *See Laird*, 605 Pa. at 148, 988 A.2d at 624.

The defense was unsuccessful, however, as the jury convicted Appellant of first-degree murder. In the penalty phase, Appellant again received the death penalty when the jury determined that the only aggravating factor it found—the circumstance pertaining to a killing committed while in the perpetration of a felony (here, kidnapping), *see* 42 Pa.C.S. § 9711(d)(6)—outweighed the mitigating circumstances found by one or more jurors pursuant to the "catchall" mitigator, *see id.* § 9711(e)(8) (relating to "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense").[1] This Court affirmed the judgment of sentence on direct appeal. *See Laird*, 605 Pa. at 186, 988 A.2d at 648.

Appellant filed a counseled, amended PCRA petition, raising thirteen claims. The PCRA court, per Judge Boylan (who also presided over Appellant's retrial), dismissed two claims without a hearing.[2] The court thereafter conducted an evidentiary hearing on the remaining claims on May 23, May 24, and June 19, 2012, at which a number of witnesses testified, including Attorneys Kerrigan and Williams. The PCRA court denied relief by two orders dated August 7, 2013.[3] After Appellant filed a notice of appeal, the court issued an opinion pursuant to Rule 1925(a), Pa. R.A.P., addressing each of the allegations of error reflected in the notice of appeal and concluding that it had properly denied the petition. *See Commonwealth v. Laird*, No 1988–746, *slip op.* 2014 WL 8734830 (C.P. Bucks April 10, 2014) ("PCRA Ct. Op. II").

[1] To be eligible for relief, a PCRA petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one of the circumstances enumerated in Section 9543(a)(2) of the PCRA, 42 Pa.C.S. § 9543(a)(2), and

1. The specific (e)(8) mitigating factors found by the juror(s) are discussed below. *See infra* note 16 and associated text.

2. The claims pertained to allegations that counsel failed to life-qualify the jury and that the jurors were exposed to extraneous influences. Appellant does not challenge these dismissals on appeal.

3. The first order was accompanied by an opinion and only related to Claim V(B) of the petition, which asserted that trial counsel erred by failing to introduce medical records and police reports to support the diminished capacity defense. *See Commonwealth v. Laird,* No. 1988–746, *slip op. & order,* 2013 WL 10545879 (C.P. Bucks Aug. 7, 2013) (''PCRA Ct. Op. I''). The second order summarily denied relief on the petition as a whole.

that the allegation of error has not been previously litigated or waived. *See Commonwealth v. Baumhammers*, 625 Pa. 354, 364–65, 92 A.3d 708, 714 (2014) (citing *Commonwealth v. Sneed*, 616 Pa. 1, 16–17 & n. 13, 45 A.3d 1096, 1105 & n. 13 (2012)). Because all the claims Appellant presently raises relate to an alleged deprivation of the Sixth Amendment right to competent counsel, *see McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970), he may only prevail if he pleads and proves that his conviction or sentence resulted from ineffective assistance of counsel that, under the circumstances, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have occurred. *See* 42 Pa.C.S. § 9543(a)(2)(ii); *Commonwealth v. King*, 618 Pa. 405, 415, 57 A.3d 607, 613 (2012).

[2, 3] Pennsylvania's test for ineffectiveness is the same as the two-part performance-and-prejudice standard set forth by the United States Supreme Court, *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), albeit this Court has divided the performance element into two sub-parts dealing with arguable merit and reasonable strategy. *See Commonwealth v. Washington*, 592 Pa. 698, 713 n. 8, 927 A.2d 586, 594 n. 8 (2007). Therefore, to succeed on an ineffectiveness claim, a petitioner must demonstrate that: the underlying claim is of arguable merit; counsel had no reasonable basis for the act or omission in question; and he suffered prejudice as a result, *i.e.*, there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *See Commonwealth v. Harris*, 578 Pa. 377, 387, 852 A.2d 1168, 1173 (2004) (citing *Commonwealth v. Pierce*, 567 Pa. 186, 203, 786 A.2d 203, 213 (2001)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *See King*, 618 Pa. at 416, 57 A.3d at 613 (citing *Commonwealth v. Ali*, 608 Pa. 71, 86–87, 10 A.3d 282, 291 (2010)). *See generally Commonwealth v. Kimball*, 555 Pa. 299, 311–13, 724 A.2d 326, 332–33 (1999) (developing that the PCRA test for prejudice is identical to that of *Strickland*).

Appellant forwards multiple ineffectiveness claims as well as a contention that he should be afforded relief based on the cumulative effect of counsel's alleged errors. For convenience, Appellant's claims have been reordered below according to the chronology of events surrounding his retrial. Details of the retrial and post-conviction proceedings will be set forth as necessary to resolve each claim.[4]

Failure to renew change-of-venue motion

[4] Appellant's first claim is based on an allegation that there was excessive publicity about the crime during the timeframe leading up to his retrial, and that this publicity prejudiced the jury against him. Appellant faults counsel for failing to renew an earlier motion for a change of venue immediately before, or during, jury selection.

A hearing on pretrial motions was held on October 30, 2006, three months before jury selection. In support of a venue-change motion, counsel explained that certain news articles concerning the upcoming trial described Appellant as having been "previously convicted" of murder as opposed to simply "accused," as would be the norm for a first trial. Counsel argued that

4. In reviewing an order denying a PCRA petition, we consider whether the evidence of record supports the PCRA court's ruling and whether that ruling is free from legal error. *See Commonwealth v. Halley*, 582 Pa. 164, 169 n. 2, 870 A.2d 795, 799 n. 2 (2005).

the publicity was especially damaging because certain advocacy groups were promoting the view that Appellant was motivated to kill Milano by his perception of Milano's sexual orientation. The Commonwealth responded that the publicity was not excessive and the mere existence of some pretrial publicity did not justify a change of venue. The common pleas court denied the motion but stated that counsel would be permitted to renew it and place any supporting evidence into the record at *voir dire*. To minimize any further exposure counsel and the Commonwealth entered into an agreement—which the court approved by order issued from the bench—that neither side would speak publicly about the case before trial. When jury selection began in late January 2007, counsel did not renew the motion.

Appellant argues that, between the October 2006 denial of the motion and the conclusion of *voir dire* on January 31, 2007, several articles appeared in the local Bucks County *Courier Times*. He observes that counsel placed two of these articles into the record during jury selection in the context of a motion to strike a prospective juror for cause. The first article, dated January 28, 2007 (one day before jury selection began) appeared on the front page of the newspaper and carried the headline, "Convicted killer back in court." *See* Petitioner's PCRA Exhibits, Vol. I, at 303; *see also* N.T., Jan. 29, 2007, at 290–322 (containing the *voir dire* examination and strike for cause of a prospective juror who had read the January 28 article). Appellant argues that this article was damaging because it discussed his prior conviction and death sentence, as well as related information about the case from which prospective jurors should be shielded. The second newspaper story, entitled, "Jury selection begins in Laird retrial," was published on January 30, 2007, the second day of jury selection. *See* Petitioner's PCRA Exhibits, Vol. I, at 305; *see also* N.T., Jan. 31, 2007, at 190–214 (reflecting the *voir dire* examination and peremptory strike of a prospective juror who had read the January 30 article). Appellant suggests that he was prejudiced by this article because the word "retrial" appeared in the headline.

Overall, Appellant maintains that 22 panelists admitted having some knowledge about the case and that, of those, thirteen knew that Appellant was previously convicted of murder and had received the death penalty. Appellant points to several instances in which a prospective juror, on individual questioning, expressed knowledge of the facts of the case or an opinion as to Appellant's guilt. Appellant also notes that one of the selected jurors, Juror 12, was the co-worker of a person who attended high school with Appellant and who had recently read an article about the case. In this regard, Appellant observes that Juror 12 stated he had spoken with his co-worker the previous day and that the co-worker described the case as "gruesome." [5] Appellant contends, based on the foregoing, that trial counsel erred in not renewing the motion for a change of venue. He maintains that he was presumptively prejudiced by having his case tried to a Bucks County jury under the circumstances. In the alternative, Appellant con-

5. Appellant also claims that the co-worker spoke about Appellant in a " 'less-than-flattering' manner." Brief for Appellant at 74 (quoting N.T., Jan. 31, 2007, at 67). However, the transcript reflects that the juror only stated that his co-worker "was less than flattering" about the crime in view of its "gruesome" quality, rather than about Appellant. N.T., Jan. 31, 2007, at 66–67. Notably, Juror 12 specifically denied that his co-worker said anything negative about Appellant. *See id.* at 67. Additionally, Juror 12 testified that he had not himself seen any information about the case. *See id.* at 66.

tends he suffered actual prejudice because the jury that was seated was not fair and impartial.[6]

The Commonwealth responds that the question is not whether jurors exposed to media reports had some knowledge of the crime, but whether they were able to set aside any impressions or preliminary opinions they may have formed and render a verdict based only on the evidence presented at trial. It highlights that the two newspaper articles mentioned above are the only media stories of record. *See* Brief for the Commonwealth at 93 & n.11. The Commonwealth notes, moreover, that in the three days of jury selection, only a fraction of the 160 panelists stated they had any familiarity with the case, and virtually all of them were stricken, either for cause or via peremptory challenges. The Commonwealth adds that only a single individual—Juror 12—was seated who had indicated any familiarity with the case, and that such familiarity was limited to a suggestion by his co-worker that the underlying facts were "gruesome." Further, the Commonwealth observes that Juror 12 testified he would put aside what his co-worker said and rely solely on the trial evidence and the court's instructions. As such, the Commonwealth argues that Appellant's claim lacks arguable merit, counsel acted reasonably in not renewing the motion to change venue, and Appellant has not established a basis to presume prejudice or find actual prejudice.

In rejecting this claim, the PCRA court recounted that it had dismissed all prospective jurors who knew the case was a retrial. *See* PCRA Ct. Op. II, *slip op.* at 10. The court also recited that Attorney Kerrigan had testified at the PCRA hearing that he would have renewed the motion for a change of venue if it appeared at jury selection that the publicity had been overwhelming, *see id.* at 11 (quoting N.T., May 23, 2012, at 106–07), and that Attorney Williams testified that, at the conclusion of jury selection, he and Mr. Kerrigan were "ready to go forward" and believed a venue-change motion at that juncture would have been a "waste of time." *See id.* (quoting N.T., May 23, 2012, at 144). Ultimately, the PCRA court concluded that: the venire panelists' knowledge of the case was "limited;" the community was not "saturated" with publicity; and it would have denied a renewed change-of-venue motion in any event because the court "would have had no basis to grant such a motion." *Id.* at 13.

[5–7] A change of venue is necessary when the court determines that a fair and impartial jury cannot be selected in the county where the crime took place. *See Commonwealth v. Karenbauer*, 552 Pa. 420, 433, 715 A.2d 1086, 1092 (1998). "[T]he trial court is in the best position to assess the atmosphere of the community and to judge the necessity of any requested change." *Commonwealth v. Briggs*, 608 Pa. 430, 466, 12 A.3d 291, 313 (2011) (internal quotation marks omitted). The existence of pretrial publicity does not alone justify a presumption of prejudice, but prejudice will be assumed where the defendant shows that the publicity: was sensational, inflammatory, and slanted toward conviction, rather than factual or ob-

6. In the present context, the allegations relating to prejudice are an essential part of the arguable-merit prong of the ineffectiveness test. This is because the viability of any claim that counsel's stewardship was deficient rests on the premise that Appellant was prejudiced—or that counsel should have known he would be prejudiced—by counsel's failure to renew the change-of-venue motion. *Cf. Baumhammers*, 625 Pa. at 382–83, 92 A.3d at 725 (explaining that the arguable-merit and prejudice prongs overlap in the context of an argument that counsel was ineffective for failing to call a witness).

jective; revealed the defendant's prior criminal record (if any) or referred to confessions, admissions, or reenactments of the crime by the defendant; or was derived from official police and prosecutorial reports. *See Karenbauer,* 552 Pa. at 434, 715 A.2d at 1092; *Commonwealth v. Tharp,* 574 Pa. 202, 219 830 A.2d 519, 529 (Pa.2003). Even if the accused proves one of these factors, a change of venue is not required unless he also shows, *inter alia,* that the pretrial publicity was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it. *See Karenbauer,* 552 Pa. at 434, 715 A.2d at 1092.

Here, in arguing for a finding of presumed or actual prejudice, Appellant primarily refers to the two newspaper stories of record which appeared shortly before or during jury selection. We do not find these articles to be materially sensational, inflammatory, or slanted toward conviction.[7] Indeed, the only *Karenbauer* factor that these stories implicate is that they reveal Appellant's prior criminal record in that they state he had been convicted and sentenced to death previously, and that the then-impending proceeding would be a retrial necessitated by the federal courts' decision to vacate his first-degree murder conviction and death sentence. Although Appellant correctly notes that trial counsel were concerned about such publicity, any such concerns were allayed when it emerged during jury selection that only a small portion of the venire had been exposed to these media stories, and anyone who knew that Appellant was being retried would be excluded from the jury. The only seated juror who had learned anything stemming from the media had only heard a second-hand generalized description of the nature of the crime itself and nothing material about Appellant.

The United States Supreme Court has explained that jurors need not "be totally ignorant of the facts and issues involved" in an upcoming trial, *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), *quoted in Commonwealth v. Robinson,* 581 Pa. 154, 197 n. 36, 864 A.2d 460, 485 n. 36 (2004), and that a presumption of prejudice "attends only the extreme case." *Skilling v. United States,* 561 U.S. 358, 381, 130 S.Ct. 2896, 2915, 177 L.Ed.2d 619 (2010). The record before us does not suggest that pretrial publicity in this case was extreme or that the community must be deemed to have been saturated with it. Only two articles of record were disseminated in the media shortly before Appellant's retrial, and only a comparatively small portion of the venirepersons indicated an awareness of them. Thus, Appellant's assertion that prejudice should be presumed cannot be supported. *Cf. Karenbauer,* 552 Pa. at 434, 715 A.2d at 1093 (rejecting a presumed-prejudice argument where the appellant made a "bald assertion that the pretrial publicity in th[e] case was extensive").

Any contention that actual prejudice occurred—or, more accurately in view of the ineffectiveness overlay, that counsel should have been aware that actual prejudice was likely to ensue—depends on the predicate that the individuals selected to serve as jurors would have been unable, in view of the pretrial publicity, to "set aside their impressions or preliminary opinions and render a verdict solely based on the evidence presented to them at trial." *Briggs,* 608 Pa. at 467, 12 A.3d at 314 (citing

7. One of the articles contains a sensationalized sentence in that it quotes an unnamed prosecutor as stating that whoever perpetrated the crime "slic[ed] Milano up like a cheap piece of tenderloin." Petitioner's PCRA Exhibits, Vol. I, at 304. However, the remainder of the story is factual in nature.

Commonwealth v. Tressler, 526 Pa. 139, 145 n. 6, 584 A.2d 930, 933 n. 6 (1990); *Commonwealth v. Hoss*, 469 Pa. 195, 200–01, 364 A.2d 1335, 1338 (1976)). Besides Juror 12, however, the ability to set aside preliminary opinions derived from the media was not an issue since there is no record basis to believe that the other seated jurors were exposed to the newspaper articles in question. As for Juror 12, his exposure was limited to having heard that the case involved "gruesome" facts, *see* N.T., Jan. 31, 2007, at 71, a description that was not substantially at issue. *See, e.g., id.* at 72 (reflecting that, in ascertaining whether Juror 12 would be capable of listening to the Commonwealth's evidence without compromising his ability to be fair and impartial, Attorney Kerrigan explained that "this case involves a very horrible, brutal killing"). Additionally, Juror 12 testified during *voir dire* that he did not form any preconceived ideas about Appellant's guilt or innocence, and that he would refrain from speaking any further to his co-worker about the case. *See* N.T., Jan. 31, 2007, at 68, 71.

The PCRA court credited such testimony as it concluded that Appellant "can demonstrate no partiality of any juror." PCRA Ct. Op. II, *slip op.* at 10. We find this conclusion to be supported by the record, including the extensive *voir dire* transcripts and related exhibits, and consistent with precedent. *See, e.g., Briggs*, 608 Pa. at 471–74, 12 A.3d at 316–18 (affirming the denial of a motion for a change of venue where eight seated jurors had read about the case in the media, six of those eight had forgotten about it by the time they were summoned for jury duty, and none of the eight indicated that their exposure would interfere with their ability to render a verdict based solely on the trial evidence).

Accordingly, since Appellant has not demonstrated a basis to presume prejudice or find actual prejudice, the underlying claim lacks arguable merit.[8] That being the case, relief is unavailable on the present ineffectiveness contention. *See generally Commonwealth v. Keaton*, 615 Pa. 675, 693, 45 A.3d 1050, 1061 (2012) ("Failure to establish any prong of the [ineffectiveness] test will defeat an ineffectiveness claim.").

Failure to impeach Commonwealth witnesses [9]

[8] Next, Appellant maintains that his guilt-phase counsel, Attorney Kerrigan, rendered ineffective assistance in cross-examining several witnesses concerning Appellant's alcohol consumption. Although counsel did, through cross-examination, bring to light that Appellant had consumed alcoholic beverages during the relevant timeframe, Appellant proffers that there were ways counsel could have more skillfully handled these witnesses so as to portray an even higher level of intoxication and thereby make his diminished-capacity defense more likely to prevail.

Appellant focuses on four such individuals. First, he notes that Chester's friend Alan Hilton testified at the 2007 retrial that at the bar, although Appellant was drinking beer, *see* N.T., Feb. 6, 2007, at 43,

8. *See supra* note 6.

9. Appellant has organized his brief to consolidate the present claim with the next three. However, the issues are conceptually distinct, they were raised separately in Appellant's notice of appeal, and the PCRA court treated them seriatim. To the extent Appellant's present decision to raise them as multiple parts of a single claim is undertaken in an effort to aggregate prejudice, *see* Brief for Appellant at 67–70, our present disposition does not undermine that objective in light of Appellant's final contention pertaining to cumulative prejudice. *See id.* at 77–79.

he was not falling down, slurring his speech, or swaying and that he did not appear to be drunk, *see id.* at 28; whereas, at the first trial in May 1988, Hilton testified more particularly that Appellant had ingested beer and two shots of liquor. Additionally, in January 1988 Hilton told Joe Stark, an investigator for the public defender's office, that Appellant and Chester were getting "shit faced" at the bar, as memorialized in a report prepared by Stark.

Second, Appellant refers to the testimony of Gale Gardener, another friend of Chester's. On the evening in question, Gardener was present at Chester's apartment, then Appellant's apartment, and then the bar, after which she and Appellant's fiancée Barbara Parr returned to Appellant's apartment to sleep. Gardener testified at the retrial that Appellant: drank alcohol at Chester's residence, *see* N.T., Feb. 7, 2007, at 42, 46; drank alcohol at the bar later on, *see id.* at 48; and was "coherent" upon arriving at his apartment after the killing, *id.* at 63. In view of the passage of over 19 years, however, she was unable to give further details regarding the number and types of alcoholic beverages that Appellant had consumed, and she conceded that her memory was fresher in 1988 when she testified at Appellant's first trial. *See id.* at 51. Appellant acknowledges that, in cross-examining Gardener, counsel showed her a transcript of her 1988 trial testimony in an attempt to refresh her recollection, and Gardener testified at the retrial that she had testified truthfully in 1988 when she described Appellant as "drunk" upon his arrival at his apartment after the killing, *see id.* at 57–58. Appellant complains, however, that counsel failed to: (a) confront Gardener with a statement she gave to police in which she stated that, when Appellant returned to his apartment, he "mumbled" that Chester was alright and then "staggered" into the bedroom; or (b) impeach her with her alleged motive to testify favorably for the Commonwealth by minimizing the amount of alcohol Appellant had consumed. Appellant asserts that such motive stemmed from Gardener's friendship with Chester as well as her status as a Florida probationer based on driving without a license as a habitual offender.

Third, Appellant finds deficient counsel's questioning of Jolanda Thompson, a former co-worker of Chester's who was present at the bar on the night in question. Thompson testified at the retrial that a group of individuals, including Appellant, were all drinking at the bar and that Appellant was loud and boisterous, but she could not recall the specific amount Appellant drank. *See* N.T., Feb. 5, 2007, at 173–75. Appellant avers that counsel failed to "impeach" Thompson with her statement to Joe Stark (as reflected in a report prepared by Stark in January 1988) that Appellant had, in fact, been drinking shots of liquor. Brief for Appellant at 51.

Finally, Appellant highlights the testimony of James Phillips, Jr., the bartender at the Edgely Inn on the night in question. Phillips testified at the retrial that, when he arrived at the bar that evening, Appellant and Chester were sharing a 64–ounce pitcher of beer and that he (Phillips) refilled the pitcher twice. *See* N.T., Feb. 5, 2007, at 210. Phillips also stated that, in addition to the beer, he served one shot of liquor to Appellant, and Appellant threw an empty shot glass across the bar in anger. Appellant faults counsel for failing to elicit that, at the preliminary hearing in January 1988, Phillips testified that he had brought a total of four pitchers of beer to Appellant and Chester, and had served Appellant two or three shots of liquor. Appellant takes particular exception in this regard because, at the time of the events,

Phillips was the bar owner's son and he had become the owner by the time of the retrial. Thus, Appellant posits that counsel should have presented evidence that Phillips had a motive to downplay the amount of alcohol he served Appellant because he was concerned about his business incurring civil liability. Although counsel did attempt (unsuccessfully) to introduce into evidence a civil complaint filed by Milano's parents against the Edgely Inn, Appellant offers that there was other evidence of motive that could have been proffered. In particular, he identifies a statement that Jolanda Thompson gave Joe Stark in which Thompson related that James Phillips, Sr., the owner of the bar in December 1987, had asked her not to say that Chester was drunk that night because Chester was underage. According to Appellant, if counsel had reviewed that statement it would have prompted him to cross-examine James Phillips, Jr. as to whether his father had told him also to minimize the amount of alcohol he served Appellant.

The PCRA court rejected the position that counsel provided deficient stewardship based on the questioning of these four witnesses. The court reasoned in particular that, even to the extent the material in Stark's reports may have been somewhat helpful, Stark credibly testified at the PCRA hearing that he was not reachable when counsel was preparing for the retrial because he was experiencing personal problems and was not maintaining an office, returning phone calls, or responding to contacts. *See* PCRA Ct. Op. II, *slip op.* at 23; *see* also N.T., May 23, 2012, at 43–44, 46–47 (reflecting Attorney Kerrigan's PCRA testimony that he had tried unsuccessfully to contact Stark). The PCRA court also rejected the premise that Gardener could have been confronted with evidence of motive or bias, particularly since Appellant failed to establish a connection between Gardener's status as a Florida probationer and a supposed motive to falsify her testimony. More generally, the court recounted that counsel testified his strategy was to demonstrate extreme intoxication by adducing testimony concerning Appellant's alcohol ingestion from as many witnesses possible. The court reasoned, in this regard, that counsel elicited substantial testimony along these lines and "argue[d] in closing that Appellant was extremely intoxicated at five times the legal limit with a BAC of 0.45 percent." PCRA Ct. Op. II, *slip op.* at 22. Thus, the PCRA court concluded that Appellant failed to show counsel acted unreasonably or that he suffered prejudice. *See id.* at 26–27.

A review of the record confirms that guilt-phase counsel adduced significant eyewitness testimony suggesting that Appellant had consumed a very large amount of alcohol on the night of the murder. The jury learned that he was drinking before arriving at the bar, that at the bar he shared several 64–ounce pitchers of beer with Chester and ingested at least one shot of liquor, and that he was loud and boisterous. The jury also heard that Appellant was described by Gardener as being "drunk" at a time when her memory of the events was still fresh. Other individuals besides these four witnesses provided supporting testimony. *See, e.g.*, N.T., Feb. 5, 2007, at 135–36 (testimony of Officer Patrick Connell to the effect that when he encountered Appellant at the bar, Appellant showed signs of intoxication, including smelling like alcohol and becoming belligerent with three armed officers); N.T., Feb. 6, 2007, at 100, 115–16 (testimony of Barbara Sylvia (formerly Barbara Parr) that Appellant "drank a lot when he drank," and that when he arrived at his apartment after the killing he was "drunk" and he "passed out" on the bed); *see* also N.T., Feb. 8, 2007, at 179 (testimony of Dr.

O'Brien, an expert witness, that Appellant was reported to be "overwhelmingly intoxicated" during the early hours of December 15, 1987, and that "when he returned home he was likewise reported to be stumbling and passed out"). For his part, counsel emphasized Appellant's "severe degree of intoxication" in his summation. N.T., Feb. 9, 2007, at 9.

If counsel had done everything Appellant now alleges he should have done, it is possible the jury would have been left with the impression that he had consumed even more alcohol, but the additional amount would not likely have been significant; as such, it would not have materially aided Appellant's defense in view of the record as a whole. It bears noting, in this latter respect, that counsel called an expert toxicologist, Gary Lage, PhD, to testify concerning Appellant's BAC on the night of the murder. Dr. Lage observed that Appellant drank for more than seven hours that evening, from 7:00 pm until after 2:00 am. *See* N.T., Feb. 8, 2007, at 26. In view of Appellant's physical characteristics and the number and types of beverages he ingested—and when during the evening he ingested them—the expert estimated that Appellant's BAC during the early morning hours of December 15, 1987, was approximately 0.45 percent. *See id.* at 28, 57–58. Dr. Lage explained that this was significant because the effects on the brain become severe, and a coma can develop, when a person's BAC reaches the range of .40 to .50 percent. *See id.* at 30.[10] Thus, we find Appellant's present argument unpersuasive to the degree he suggests that counsel's alleged omissions left the jury with a material misimpression concerning the amount of alcohol he consumed.

Separately, Appellant does not articulate any connection between Gardener's status as a Florida probationer—or as a friend of Chester's—and a motive to minimize the amount of alcohol Appellant drank. Nor would the Stark reports have added meaningfully to the picture of Appellant being heavily intoxicated, as the information contained in them is largely cumulative of that which was brought out at trial. If counsel had been able to impeach Gardener, moreover, it is unclear how this would have aided his case, since Gardener's testimony confirmed that Appellant had ingested a significant amount of alcohol and that he was "drunk." Finally, even if the Stark report on Jolanda Thompson had been available, the relevant portion only pertains to what Phillips' father said to her (Thompson), and not to Phillips himself. As such, the assumption that it would have led to the jury hearing that Phillips' father instructed Phillips to minimize the amount of alcohol he served to Appellant is speculative.[11]

10. Counsel was also permitted to read to the jury a paragraph from an affidavit signed by Chester at a time when he was contesting his own responsibility for the murder. The paragraph stated as follows:

> On the night of the Milano homicide, Rick drank an extraordinary amount of liquor. By the time he and I arrived at the Edgely Inn, we had consumed not less than two cases of twelve-ounce bottles of beer. At the Edgely Inn Rick and I drank eleven pitchers of beer, Rick drank half a liter of Jack Daniels, and then Rick did two or three shots of Jack Daniels. When we left the Edgely Inn, Rick was drunk out of his mind. By the end of that evening Rick could barely walk. He was stumbling and falling down in the street. I damn near carried Rick to Rich Griscavage's house.

N.T., Feb. 8, 2007, at 14.

11. Counsel did cross-examine Phillips about: his interest in the Edgely Inn's well-being, since he was the bar owner's son at the time of the events; his concern with serving a patron too much alcohol; and his practice of "flagging" a patron that seemed unruly—that is, refusing to serve him any more alcohol and/or asking him to leave the bar—which Phillips conceded he did not do with regard

[9, 10] The Constitution guarantees the accused a fair trial, not a perfect one. *See, e.g., Commonwealth v. Rasheed*, 536 Pa. 567, 570–71, 640 A.2d 896, 898 (1994). Moreover, "[a]lthough hindsight might reveal the comparative worth of alternatives not pursued, an ineffectiveness claim cannot succeed on that basis." *Chester*, 526 Pa. at 612, 587 A.2d at 1384. Here, the differences between the manner in which counsel cross-examined the four witnesses at issue, and the way Appellant now believes he should have cross-examined them, are relatively minor or are based on speculation and conjecture. Appellant's presentation has not brought to our attention any substantial way in which counsel's cross-examination failed to bring to light the contention, and supporting evidence, that he was highly intoxicated on the night in question. Under these circumstances, we agree with the PCRA court's essential determination that Appellant has failed to demonstrate that his attorney's performance was deficient.

Failure to move to exclude evidence or request a mistrial

[11] In his next claim, Appellant maintains that counsel erred by failing to object or move *in limine* to exclude certain "bad acts" evidence or request a mistrial once the evidence was adduced. In particular, Appellant takes issue with testimony that, when he was at the Edgely Inn, he furnished alcohol to a minor and made a sexual remark to Gail Gardener.

During the evening of December 14, 1987, Appellant, his fiancée Barbara Parr, Chester, and Gardener were at the apartment Parr shared with Appellant. At some point, Appellant and Chester left to go to the Edgely Inn, and they took Parr's son with them, who was nine or ten years old. Later that night, Parr and Gardener joined Appellant and Chester at the bar for a brief period, during which two things occurred: Appellant stated to Gardener that he wanted to "run his tongue across [her] teeth," N.T., Feb. 7, 2007, at 28, and Parr became angry with Appellant because someone told her that Appellant and Chester had given her son alcohol. Specifically, Parr testified as follows on direct examination by the Commonwealth:

> Q. What did you do when you were at the bar?
>
> A. My son was there and he had been drinking.
>
> Q. What do you mean by that?
>
> A. He was sick. He was drunk. They had given him alcohol.
>
> [Defense counsel]: Objection.
>
> THE COURT: Sustained. The jury shall disregard the part that they had given him alcohol. She can testify as to the observation that he was drunk and he was getting sick.
>
> BY [the Commonwealth]:
>
> Q. Well, did Rick Laird say anything to you about giving him alcohol?
>
> A. Yeah.
>
> Q. What did he say?
>
> A. That they had given it to him, him and Frank.

N.T., Feb. 6, 2007, at 69–70.

Appellant faults counsel for failing to: move *in limine* to exclude this evidence; renew his objection to the above testimony; and request a mistrial after that testimony was elicited. He theorizes that such information cast a negative light upon his character, making it less likely that the

to Appellant. *See* N.T., Feb. 5, 2007, at 235–36, 250. Furthermore, during his guilt-phase summation, counsel emphasized Phillips' motive to understate the amount of alcohol he served to Appellant. *See* N.T., Feb. 9, 2007, at 29–32.

jury would accept his diminished-capacity defense. *See* Brief for Appellant at 63–66.

We may assume that testimony to the effect that Appellant made a sexual remark to Gardener and that he and Chester gave alcohol to a minor child was likely to cause the jury to view Appellant's character unfavorably. Still, Appellant stipulated to having participated in Milano's murder, and the only question for the jury was whether he acted with specific intent. The above proofs were largely collateral and/or irrelevant to that question. In the context of a guilt phase that included five days of testimony, moreover, this information was fairly isolated and minor, and the Commonwealth did not use it in its closing argument. *See* N.T., Feb. 9, 2007, at 35–58. Hence, admission of the testimony does not undermine our confidence in the verdict. As such, even if we assume, *arguendo,* that the underlying claim has arguable merit and counsel lacked a reasonable strategy, Appellant has not proven prejudice. *Cf. Commonwealth v. Busanet,* 572 Pa. 535, 549, 817 A.2d 1060, 1068 (2002) (holding that prejudice was not proved where counsel unnecessarily made the jury aware of the defendant's prior assault conviction, because the Commonwealth presented substantial independent inculpatory evidence at trial and the reference to the assault conviction was "isolated and not exploited" by the Commonwealth).

Failure to prepare expert witnesses

[12] Next, Appellant argues that his counsel were ineffective for failing adequately to prepare his expert witnesses for the guilt phase of trial. During that portion of the proceedings, Appellant called three psychological or psychiatric experts to testify regarding his inability to form specific intent on the night in question. These included Henry Dee, PhD, a clinical neuropsychologist,[12] Robert Fox, MD, a forensic psychiatrist, and John O'Brien, MD, JD, another forensic psychiatrist. Drs. Dee and Fox had evaluated Appellant for his first PCRA appeal in 1997 and had developed mitigating evidence based on Appellant's life history and other factors. Appellant suggests that their effectiveness in 2007 was limited because counsel did not meet with them until shortly before trial or request that they re-evaluate Appellant for purposes of the diminished-capacity defense. Appellant also asserts that counsel was ineffective for failing to require that these experts read the transcript of his first trial so they would be prepared to answer cross-examination questions about how Appellant could have been operating in an alcoholic blackout when he acted to conceal evidence shortly after the incident and was able to testify about the events at his first trial.

The PCRA court rejected this claim primarily on the basis that Appellant did not explain how the experts' testimony might have been more helpful if trial counsel had taken the suggested actions. The court observed that Appellant benefitted from the testimony of four experts: Dr. Lage, who, as noted, estimated Appellant's BAC at 0.45 percent; Dr. Dee, who testified that Appellant had sustained brain damage from several head traumas, including an early–1980s skull fracture, and that intoxication would exacerbate the effects of the brain injury to the point where Appellant was unable to plan and carry out a homicide; Dr. Fox, who testified that Appellant could not have formed a specific intent to kill; and Dr. O'Brien, who stated that Appellant's level of intoxication would seriously impair any person's functioning and cognition, but when brain damage is added

12. Dr. Dee explained that a clinical neuropsychology is the study of the relationship between brain damage and behavior. *See* N.T., Feb. 8, 2007, at 73.

to the picture the effects would become worse. The court suggested that little would have been gained by further clinical examination of Appellant, as it was difficult to see how the experts' opinions could have been more favorable to Appellant. *See* PCRA Ct. Op. I, *slip op.* at 4–7; PCRA Ct. Op. II, *slip op.* at 45–47.

The record supports this determination. During the first PCRA proceedings in 1997, Dr. Dee testified concerning Appellant's mental-health ailments, including brain damage, attention-deficit hyperactivity disorder (ADHD), and a highly dysfunctional family history. He opined that these factors, when combined with the fact that Appellant had consumed a "toxic" quantity of alcohol, would have substantially impaired Appellant's cognitive functioning. N.T., Jan. 21, 1997, at 120–26. Although much of Dr. Dee's 1997 testimony related to penalty-phase mitigation, *see, e.g., id.* at 124 (expressing that Appellant suffered from an "extreme mental or emotional disturbance"), he also opined that Appellant's level of cognitive impairment on the night in question undermined his ability to form a specific intent to kill. *See id.* at 127.

In his testimony at the retrial, moreover, Dr. Dee recounted that, for the 1997 proceedings, he had spent a full day with Appellant in July 1996, interviewing him and administering two batteries of psychological and neuropsychological tests. Dr. Dee noted that he had also interviewed Appellant's mother and brother and had reviewed numerous records, including psychiatric reports, toxicology reports, hospital and other medical records, police records, and testimony from prior proceedings. *See* N.T., Feb. 8, 2007, at 78–80. Dr. Dee ultimately expressed his expert opinion, based on all of the available data, that the cognitive impairments to which Appellant was subject amounted to diminished capacity for purposes of Pennsylvania law. *See id.* at 86, 89–90. Appellant has not explained how additional evaluations undertaken closer to the time of the 2007 retrial would have allowed Dr. Dee to testify more persuasively concerning Appellant's diminished capacity in 1987.[13]

Likewise, Dr. Fox testified at the 1997 hearing that Appellant was operating in an "alcohol intoxication delirium" which, when combined with his brain damage, would have prevented Appellant "from being able to form intent." N.T., Jan. 22, 1997, at 169; *see also id.* at 171 (reflecting Dr. Fox's opinion that Appellant had diminished capacity).

At the 2007 retrial, Dr. Fox also listed the items on which he was relying for his expert opinion, including: his in-person interviews with, and professional evaluation of, Appellant; his interviews with Appellant's brother and mother; various records of the same type as those referenced by Dr. Dee; and Dr. Dee's neuropsychological evaluation and report. *See* N.T., Feb. 8, 2007, at 123–26. Based on these sources, Dr. Fox stated that, at the relevant time, Appellant was suffering from a number of psychiatric impairments, including post-traumatic stress disorder (PTSD) as a result of his abusive childhood (in which his father gave him alcohol as a young boy, beat him arbitrarily, and sexually abused him), ADHD, and organic brain disorder resulting from repetitive head injuries as well as fourteen years of drug abuse and alcohol dependency. Dr. Fox explained at length the way these factors adversely affected Appellant's memory and undermined his executive

13. Drs. Dee and Fox did meet with Appellant before the retrial, but these meetings, which lasted an hour or less, evidently did not subsume new psychological evaluations.

functioning—*i.e.*, decision making and impulse control—including the ability to plan actions and carry them out. *See id.* at 132–35; *see also id.* at 142–43 (testimony of Dr. Fox that "[a] person who has decreased cognitive ability and impaired executive functioning ... and brain damage and then you add a huge amount of alcohol which also impairs executive function, while they may be capable of behaviors—walking, talking, driving, cutting somebody's throat—they are not capable of making conscious decisions, conscious intent in the way that we normally think about that process"). Like Dr. Dee, Dr. Fox opined that Appellant had diminished capacity as that term is defined by Pennsylvania law, and was unable to form a specific intent to kill. *See id.* at 144–45, 170.

Again, Appellant has not explained how an additional evaluation shortly before the retrial would have allowed Dr. Fox to testify more forcefully or convincingly that Appellant suffered from diminished capacity. Nor are we persuaded that the experts' opinions were weakened by a supposed failure to read the 1988 trial transcript. Although Dr. Dee indicated that he had not done so, Dr. Fox stated that he did. *See id.* at 123, 154. As well, Dr. Fox explained to the jury that a person whose memory of the events in question was impaired by operating in an alcohol-induced blackout could later give an account, apparently from memory, of the events that transpired during the relevant interval. In particular, Dr. Fox expressed that, through a process known as "confabulation," individuals who are extremely intoxicated unconsciously invent details

> to fill in the blanks, if you will, for the period of time that they don't remember.... Some of it may be based on vague ... parts of the story that they remember. It will be what they piece together from the state of their clothing or what people say to them the next day in an attempt to try to put things together.

Id. at 141–42; *see also id.* at 70 (reflecting similar testimony by Dr. Lage). On cross-examination, the Commonwealth confronted Dr. Fox with the transcript of Appellant's testimony from the 1988 trial. He admitted it was fairly detailed but maintained that it could nonetheless have been the result of confabulation, *see id.* at 157, 168, an assertion that was supported by Dr. O'Brien's independent testimony that "confabulation can be very detailed." *Id.* at 194.

In light of the foregoing, we conclude that the record adequately supports the PCRA court's finding that "trial counsel already had favorable testimony from the experts to support a diminished capacity defense[.]" PCRA Ct. Op. II, *slip op.* at 46; *accord id.* at 47 ("Little would have been gained from further evaluations, as the experts already were able to provide favorable opinions on the ultimate issue of diminished capacity."). As for counsel's failure to have Drs. Dee and Fox re-evaluate Appellant in 2006 or 2007, Appellant has not explained how such reevaluations could have been helpful. The prior evaluations were undertaken closer in time to the offense, and these are the assessments that the experts relied upon. By the time of the retrial, moreover, the offense had occurred more than 19 years earlier. *Accord* Brief for the Commonwealth at 83 ("[T]here was little to be gained from additional meetings with Appellant in 2007, twenty years after the murder and ten years after [Drs. Dee and Fox] had already rendered an expert opinion regarding Appellant's diagnoses."). Thus, Appellant's underlying claim lacks arguable merit.

Failure to introduce medical records

[13] In a related claim, Appellant contends that trial counsel were ineffective for failing to introduce medical documentation supporting his allegation that he suffered from brain damage at the time of the murder. According to Appellant, these records would have strengthened his diminished capacity defense.

Dr. Dee's guilt-phase testimony included references to having reviewed records of a skull fracture that Appellant sustained several years before the murder when he fell off the hood of a moving car. Dr. Dee also discussed the family's reports that Appellant suffered other head injuries as a child and during adolescence. Appellant faults counsel for not introducing into evidence records of all of these injuries. He suggests that the lack of documentation harmed Dr. Dee's credibility on cross-examination because Dr. Dee could not support his testimony that there were multiple head injuries as opposed to only a single injury. Appellant argues that the records, therefore, "would have negated any contention that Appellant fabricated [his] injuries to help support his diagnosis of brain damage[.]" Brief for Appellant at 57.

In the PCRA court, this averment was part of a broader claim involving numerous medical and police documents from the 1970s and 1980s. Although PCRA counsel were ultimately able to obtain many of these records and supply them to the court, the court found them largely illegible and added that they could not be authenticated because PCRA counsel were unable to produce a records custodian or the surviving radiologist to authenticate them. *See* PCRA Ct. Op. II, *slip op.* at 29. The court also determined that, even if the records could have been admitted at the retrial, there was no reasonable likelihood they would have altered the outcome. In this respect, the court recited that the defense presented testimony from three medical experts during the guilt phase, all of whom were questioned extensively as to Appellant's brain damage and the effects of intoxication on his ability to form a specific intent to kill. According to the PCRA court, these experts "referenced and discussed the medical records at issue here, despite the fact that they were not admitted as an exhibit." PCRA Ct. Op. II, *slip op.* at 30–31.

Presently, Appellant does not contest the PCRA court's determination that the records would have been inadmissible at his retrial due to a lack of authentication. *See* Pa.R.E. 901; *Commonwealth v. Zook*, 532 Pa. 79, 97, 615 A.2d 1, 10 (1992) ("Generally, for a document to be admissible it must be relevant and authenticated."). Thus, Appellant makes no effort to establish that the records would have been admissible, and by extension, that trial counsel can be faulted for not introducing them. *See Commonwealth v. Smith*, 490 Pa. 380, 387, 416 A.2d 986, 989 (1980) (explaining that counsel cannot be deemed ineffective for failing to pursue a meritless course of action).

As well, the Commonwealth did not dispute that Appellant suffered at least one serious head injury that included a skull fracture in the early 1980s when he fell from a moving vehicle.[14] The contested issue in the guilt phase was whether the resulting brain damage, combined with

14. Although Appellant implies that the Commonwealth "attacked" Dr. Dee's opinion based on a lack of medical documentation, Brief for Appellant at 57, Appellant only references one instance during the cross-examination of any defense expert in which the prosecutor questioned the reliability of the family's reports of head injuries earlier than the one involving the fall from the moving vehicle. *See* N.T., Feb. 8, 2007, at 81.

other factors such as alcohol consumption, impaired Appellant's cognitive functioning so that his capacity to form a specific intent to kill was diminished. Whether that brain damage stemmed from one or multiple head injuries was largely beside the point, particularly as multiple experts referred to psychiatric testing and evaluations as the primary basis for their conclusions regarding the nature and severity of Appellant's impaired mental functioning. *See* N.T., Feb. 8, 2007, at 82 (testimony of Dr. Dee); *id.* at 128–31 (testimony of Dr. Fox); *cf. id.* at 94 (reflecting Dr. Dee's explanation that neuropsychological testing is more accurate than MRI imaging in detecting brain damage). Consequently, we agree with the PCRA court's conclusion that, even if the medical records had been introduced at trial, there is no reasonable likelihood that the outcome of the proceedings would have been different.

Failure to present a more detailed mitigation case

[14] Appellant's first penalty-phase claim is based on an allegation that his counsel failed to investigate and present available and compelling mitigation that would have reduced Appellant's moral culpability in the eyes of the jury.[15] Appellant argues that counsel presented only minimal proofs regarding the serious abuses and impairments he suffered during childhood and adolescence, and which caused lifelong emotional scars that led him to self-medicate with drugs and alcohol. Appellant proposes that, even though his sentencing jury heard some evidence about these matters, they did not learn the full extent of the adversities he faced as a child. In particular, Appellant highlights the difference between the testimony given at his 1997 PCRA hearing by his brother Mark Laird and defense experts Drs. Dee and Fox, and the more abbreviated testimony provided by these individuals at his 2007 penalty hearing. Separately, inasmuch as Appellant was sexually victimized by his father, he faults counsel for not hiring an expert in male sexual abuse and its psychological effects.

This claim has two parts. The first relates to the alleged brevity of the testimony given by Mark Laird and Drs. Dee and Fox at the penalty hearing when compared to their earlier testimony. The second pertains to counsel's failure to supplement the penalty-phase expert evidence with additional testimony from someone who could have more particularly addressed the manner in which the childhood sexual abuse affected Appellant. We will address these contentions separately, starting with a review of the testimony given by Mark Laird, Dr. Dee, and Dr. Fox at the penalty hearing.

Mark Laird testified in the penalty phase and recounted how he and Appellant were regularly beaten by his father without provocation and for seemingly arbitrary reasons, *see, e.g.*, N.T., Feb. 12, 2007, at 70 (relating that Appellant's father "snapped his fingers ... and if you didn't know what he meant by snapping his fingers ... you got your ass beat"), and that his father used a military belt and a large ring to administer the beatings. Mark noted that Appellant was beaten more violently than himself because Appellant was the older of the two brothers. As for the

15. *See generally Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989) (''*Penry I*'') (referring to ''the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'' (internal quotation marks omitted)), *abrogated on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

ring, Mark recalled that it had a large letter 'R' embossed on its surface and that his father would "thunk" both brothers on the head so hard that it left an 'R' mark in their skin and made them dizzy. *Id.* at 71. Separately, Mark testified that he and Appellant witnessed their father violently beat their mother, leaving rooms in shambles due to household items being broken during the altercation. Mark stated that the beatings became so severe that, when Appellant was approximately eleven years old, their mother left their father and moved to Pennsylvania to "rebuild her life with her two sons." *Id.* at 83. He observed that he had only isolated memories of the time period because he had "blocked it out[.]" *Id.*

As for sexual abuse, Mark testified to memories of his father and Appellant being in the bedroom with the door closed, and that when Mark opened the door for a moment he saw the two naked. *See id.* at 71–72, 82. Mark added that this was "the norm" during that period of time, albeit he clarified that at his young age he did not understand what was taking place in the bedroom. *Id.* at 83.

Mark also testified at some length concerning Appellant's progressive, years-long descent into a pattern of alcohol and drug abuse during Appellant's adolescence. *See id.* at 85–88. Finally, Mark observed that, unrelated to the beatings by his father, there were "many" incidents in which Appellant was "hit in the head." *Id.* at 84. These included the mishap involving Appellant falling off of a moving vehicle, *see id.* at 85, as well as a separate occasion where someone struck Appellant in the back of the head with a two-by-four, causing Appellant to fall to the ground and temporarily lose his vision. *See id.* at 84–85.

Appellant describes the above as a "bare bones" presentation that omitted many details. Brief for Appellant at 14. He contrasts it with the 1997 hearing in which PCRA counsel elicited more information from Mark about the beatings and sexual abuse. A review of that proceeding reveals that Mark did provide several additional details on these and related topics. In particular, he testified that: their father was an alcoholic and drank frequently; their father verbally berated Mark and Appellant by calling them names and telling them they were worthless; when being physically abused, the brothers were prohibited from crying on pain of further beatings; the boys' mother would sometimes instruct them to hide from their father; the military belt was made of leather and had a large buckle; when Appellant was young he stayed with his father in Japan for a short time and returned home with a scar on his forehead due to an altercation with his father; and there was one occasion later in life when Mark learned from Appellant that the incidents in which Mark would see his father and Appellant naked in the bedroom involved sexual abuse. *See* N.T., Jan. 21, 1997, at 202–213.

We agree with Appellant that, had these additional details been elicited from Mark at the penalty hearing, it would have supplemented the information the jury heard. Still, the essential points regarding the severity of the physical beatings to which Appellant was subjected, the sexual abuse, and the experience of seeing his family members brutalized by his father, all formed part of Mark's testimony at the penalty hearing. Although Mark omitted any mention of the boys' being instructed to hide from their father and the father's name-calling, and although he only indirectly testified concerning the presence of sexual abuse, the sentencing jury heard from other witnesses about most of these facets of Appellant's childhood. *See, e.g.*,

N.T., Feb. 13, 2007, at 15 (testimony of Dr. Fox, based on the life history he obtained from Appellant and his interviews with family members, that Appellant was the victim of emotional and sexual abuse as a child); *id.* at 17 (reflecting Dr. Fox's testimony that Appellant revealed to him that his father "forced him to perform oral sexual acts on him"); *id.* at 59 (testimony of Dr. Dee that Appellant "told me he had been sexually abused as a child [by] a male family member," and he learned from Mark Laird "that that family member was his father"). Thus, when viewed in the context of the penalty phase as a whole, the difference between the information provided by Mark Laird in 1997 and in 2007 was not extensive.

Notably, as well, jurors found seven mitigating factors relating to this information: physical abuse; sexual abuse; emotional abuse; witnessed the abuse of others; psychological consequences of abuse; substance abuse; and alcohol abuse. *See* First Degree Murder Sentencing Verdict Slip at 3, *reproduced in* Commonwealth Exh. 4 (Feb. 13, 2007).[16] In view of the foregoing, the record does not reflect that counsel's performance fell below the standard of reasonable professional assistance required by *Strickland*. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Therefore, the underlying claim as it relates to Mark Laird's testimony lacks arguable merit.

It is also worth observing that, in his testimony during the 2012 PCRA hearings, Attorney Wiliams explained that, although Mark had been forthcoming in 1997, at the retrial ten years later he was noticeably less cooperative. As such, counsel added, he believed that any attempt to dwell on the life-history issues at length or push for further details could have risked a perception among jurors that Mark was less than eager to assist his brother in avoiding the death penalty. *See* N.T., May 23, 2012, at 170, 192. For his part, Mark corroborated counsel's observation, noting that he had testified against several criminal defendants in Bucks County in the pre–2007 timeframe and had thereby made enemies in the area. *See* N.T., June 19, 2012, at 14. Accordingly, and in view of the media coverage, Mark stated that having to appear at the courthouse for the retrial made him fear for his safety so that he was not entirely focused on the proceeding—but rather, was "watching who's coming through the door." *Id.* at 24; *see also id.* at 21 (recounting that, during his time at the courthouse, he was "looking around for people that shouldn't be there" and "avoiding the press").

Although the PCRA court did not expressly rely on this facet of the PCRA evidence in rejecting the present claim, the relevant testimony was uncontradicted and tended to demonstrate that counsel had a reasonable strategy for his approach to examining Mark Laird at the penalty phase, in which the most significant aspects of Appellant's traumatic childhood were brought to light, but some of the more peripheral details were left out. *See generally Commonwealth v. Williams*, 587 Pa. 304, 311, 899 A.2d 1060, 1064 (2006) ("If counsel's chosen course had some reasonable basis, the inquiry ends[.]"). For this additional reason, we conclude that counsel's performance was not constitutionally deficient.

[15] As part of this claim, Appellant also faults counsel for failing to obtain more detailed testimony from Drs. Fox

16. One or more jurors also concluded that Appellant's good conduct in prison comprised an additional mitigating factor. The only proposed mitigator that the jurors did not find was that Appellant stipulated to having participated in the murder.

and Dee during the 2007 penalty phase—again, comparing their 2007 testimony to the information they supplied at the earlier PCRA hearing. In this part of his argument, Appellant recounts that, in 1997, these experts were on the witness stand for a much longer period of time than at the penalty hearing, meaning that their testimony at the latter hearing "offered far fewer details and explanations about Appellant's cognitive impairments." Brief for Appellant at 16. As to the substance of the allegedly incomplete testimony, Appellant focuses primarily on Dr. Fox, who he says elaborated in 1997 concerning his "severe but untreated form of ADHD," his need to "self-medicate the symptoms," the fact that his ADHD led to additional abuse by his father, and the fact that the Department of Corrections was then treating him for the disorder. *Id.* at 15; *see also id.* at 11 (suggesting that: the evidence of childhood abuse was elicited at the penalty hearing in a "check-list fashion, as the experts simply responded 'yes' " when asked whether Appellant suffered from abuse or brain damage; the jurors learned little or nothing about the life-long consequences of Appellant's ADHD, brain damage, and PTSD; and they therefore gave the mitigating factors that they did find little or no weight).

This argument is contrary to the record. Both experts testified during the guilt phase of trial, and their testimony was incorporated into the penalty phase.[17] These experts gave additional testimony in the penalty phase. In the guilt phase Dr. Dee, as noted above, discussed his evaluation of Appellant—which, again, was based on interviews with Appellant and his family members, medical and other records, and the administration of two batteries of tests—and stated that Appellant suffered from cognitive impairments resulting from brain damage, causing mental-health deficits including those which affected his memory functioning and executive functioning. In the penalty phase, he discussed at considerable length the graphic nature of the abuse visited upon Appellant, his brother, and his mother when Appellant was a young child, ultimately culminating in Mrs. Laird's decision to move away with her two sons. The nature of Dr. Dee's testimony is illustrated by the following excerpt:

> [Appellant's] childhood was marked by quite severe abuse of all kinds—physical abuse, emotional abuse and sexual abuse.... The physical abuse visited on these boys was pretty severe. There were beatings that were not contingent upon any behavior of theirs that they could tell. In other words, they didn't know why they were being beaten. Their father reportedly beat them with anything at hand. Even had some sort of creative punishment like kneeling on dried beans which are like small pebbles. And the sexual abuse began, apparently, fairly early in life. [Appellant] was forced by his father to perform fellatio.... [S]ubsequent to that his father would humiliate him and further emotionally abuse him by telling him he was a filthy [sic], he was a nasty boy, to go wash out his mouth and shouldn't be doing things of that sort, which, of course, is terribly confusing to anybody.... [T]he physical and emotional abuse were visited to all members of the family, particularly during periods of alcoholic binges on his father's part. His father was described by all of them as an alcoholic. And the cycle violence [sic] toward them[,] that is, the mother and

17. *See* N.T., Feb. 12, 2007, at 26. Such incorporation also expressly included the testimony of Appellant's other two experts, Drs. Lage and O'Brien. *See id.* at 68.

the two children, continued until Mrs. Laird told me she found it unbearable.

N.T., Feb. 13, 2007, at 59–62.

Dr. Dee proceeded to describe how Appellant's alcohol use began at an early age through no fault of his own, as his father would place liquor in Appellant's soft drinks and deceive Appellant into drinking vodka. *See, e.g., id.* at 63 (describing that, when Appellant was eight years old, he came into the house after performing yard work on a hot day, and his father, as an "amusing prank," gave him a glass of vodka, telling him it was water). Dr. Dee explained that this ultimately led to Appellant repeating his father's pattern of binge drinking up to and including the time of the homicide.

The expert additionally highlighted Appellant's ADHD diagnosis early in life and described how this affected his emotional development—particularly since it went untreated (notwithstanding that his parents were notified about it), eventually leading to rejection by teachers and peers and, ultimately, a failure to complete high school. *See id.* at 63–66. He noted, as well, that Appellant used amphetamines during adolescence, which was consistent with untreated ADHD because such drugs are effective in alleviating the symptoms of ADHD. Dr. Dee further developed that Appellant suffered significant brain damage and that this, together with Appellant's abusive childhood, substantially affected his functioning as an adult. He diagnosed Appellant with chronic brain syndrome with mixed features and concluded to a reasonable degree of psychological certainty that, at the time of the crime, Appellant was under the influence of an extreme mental or emotional disturbance. *See id.* at 77–78; 42 Pa.C.S. § 9711(e)(2).

Dr. Fox testified in the penalty phase to similar effect. *See, e.g.*, N.T., Feb. 13, 2007, at 6 (describing Appellant's father as a chronic alcoholic who was physically and psychologically abusive toward Appellant, his mother, and his brother, and sexually abusive toward Appellant). Like Dr. Dee, Dr. Fox recounted that Appellant's father gave him alcohol at an early age, and then Appellant began drinking alcohol voluntarily in his teens. He also observed that Appellant's father often struck Appellant on the head with his ring and noted that Appellant's "accumulative head injuries over the years"—including the skull fracture and concussion Appellant sustained upon falling off a moving vehicle—were verified by X-rays. *Id.* at 9. Dr. Fox stated that these records corroborated the results of Dr. Dee's neuropsychological testing. *See id.* at 9–10.

As well, Dr. Fox expressed his view that Appellant suffered from both ADHD and PTSD, the latter being an Axis–I diagnosis, *i.e.*, a "major psychiatric illness in the nomenclature of the American Psychiatric Association and all international medical bodies." *Id.* at 10–11. Dr. Fox explained the manner in which PTSD arises and how it affects behavior:

> It's a condition that results from a person being exposed to a trauma that is potentially life threatening, and in the case of individuals who were sexually abused and physically abused and psychologically abused in childhood is considered to be the result of accumulative trauma, not just a single event.... So children who are systematically abused over years, as [Appellant] was, very often suffer from post traumatic stress disorder. That's characterized by difficulties with the management of emotions, by paranoia, by difficulty in interpersonal relationships; by flashbacks and other types of anxiety symptoms.

N.T., Feb. 13, 2007, at 11.

Additionally, Dr. Fox diagnosed Appellant with alcohol dependency, a history of

polysubstance abuse, and mood disorder resulting from head trauma, which, he explained, tends to bring about personality changes due to damage to the areas of the brain that control personality. *See id.* at 11–13. Dr. Fox, like Dr. Dee, eventually concluded to a reasonable degree of scientific certainty that, at the time of the incident, Appellant suffered from an extreme mental or emotional disturbance. *See id.* at 14.[18]

Notwithstanding the above, Appellant posits that a full presentation of mitigation evidence would have included even more detailed testimony about the clinical aspects of his cognitive impairments. Appellant references *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Commonwealth v. Smith*, 606 Pa. 127, 995 A.2d 1143 (2010), as presenting analogous scenarios. He suggests that, as in those cases, if additional information had been included, there is a reasonable likelihood the outcome would have been different. *See Wiggins*, 539 U.S. at 538, 123 S.Ct. at 2544; *Smith*, 606 Pa. at 178, 995 A.2d at 1173.

We note, however, that the present case is materially different from *Wiggins*. In that matter, although counsel were aware from Wiggins' presentence report that he had endured a difficult childhood, *see Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 15 (1999); *see generally Wiggins*, 539 U.S. at 516–17, 123 S.Ct. at 2533 (detailing the physical, psychological, and sexual abuse Wiggins suffered as a child), they elected not to investigate further and ultimately presented no information on the subject to the jury. Clearly, that is not true of trial counsel in the present matter, as counsel employed four expert witnesses and ensured that two of them provided extensive and detailed testimony in the penalty phase concerning Appellant's abusive childhood, his subsequent head injuries, his mental-health impairments, and the effects all of these factors had on his cognitive functioning. Further, the jury was instructed that these experts' guilt-phase testimony was part of the penalty phase through incorporation, so that their cumulative penalty phase testimony was even more detailed.

Nor is this case similar to *Smith*. As in *Wiggins*, Smith's counsel was aware of Smith's abusive childhood and the correlation between such a family history and mental impairments, but he made no attempt to present mitigating evidence along these lines. Additionally, it was suggested to counsel that a psychiatrist who testified in the guilt phase (relating to the defense of cocaine-induced psychosis) should evaluate Smith for the penalty phase, but counsel nonetheless "ignored the possibility that mental health mitigating evidence existed which would be helpful in the penalty phase." *Smith*, 606 Pa. at 176, 995 A.2d at 1172. Smith's counsel also overlooked juvenile and hospital records that a post-conviction expert described as "red flags" which signaled the need to develop mental-health mitigation. Finally, despite knowing that Smith had been treated for substance abuse, counsel did not seek Smith's treatment records or juvenile file. Under these circumstances, and in light of a post-conviction evidentiary record containing voluminous potential mitigation that was foregone, this Court expressed that counsel "myopically focused only on the guilt phase defense of cocaine-induced psychosis" and improperly "offer[ed] only gener-

18. Dr. Fox also testified that Appellant "suffered from a form of diminished capacity," *id.*, although he did not expressly state that Appellant's capacity was impaired in terms of his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. *See* 42 Pa.C.S. § 9711(e)(3).

alized character evidence at the penalty phase." *Id.* Here, by contrast, although the 1997 post-conviction testimony of Drs. Dee and Fox may have been lengthier than the testimony they offered a decade later during the penalty phase, there was little difference in terms of substance. *Accord* PCRA Ct. Op. II, *slip op.* at 52 ("Appellant's argument about the insufficient length of testimony by Dr. Fox and Dr. Dee lacks any merit [because] [t]he focus is on the substance of the testimony.").[19]

[16] In the second part of this claim, Appellant argues that a full presentation of mitigating evidence would have included testimony from an expert on the long-term effect of childhood sexual abuse on males in particular. Appellant states that David Lisak, PhD, a clinical psychologist, testified about this topic at the 2012 PCRA proceedings. Appellant maintains that an expert such as Dr. Lisak could have described how his father's actions in sexually abusing him over a period of years led to an emotional state that included confusion, self-loathing, guilt, shame, and humiliation. Such an expert, according to Appellant, could also have: explained that Appellant's use of methamphetamines beginning at age twelve was a "classic example of self-medication" as this drug is known to alleviate the symptoms of PTSD; obtained an accurate and thorough social history by using specialized techniques to overcome Appellant's "understandable reluctance to access memories of himself as a child;" and conveyed to jurors that when a male child is sexually victimized, it "leav[es] him profoundly scarred and caus[es] constant doubt about his capacity to protect the integrity of his most basic boundaries." Brief for Appellant at 19–20. Appellant concludes that there is a meaningful distinction between the "almost bald assertions of abuse and impairment that jurors heard and a detailed and corroborative narrative that would have been offered by effective counsel." *Id.* at 20.[20]

It is evident from the discussion above that the experts who testified at the penalty hearing provided significant, detailed information concerning Appellant's unfortunate childhood, his mental-health impairments such as PTSD and ADHD, his long-term substance abuse and alcohol dependency, and his brain damage stemming from serious head injuries. The jury was also informed that these factors, combined with Appellant's heavy alcohol ingestion during the hours leading up to the crime, significantly affected Appellant's cognitive functioning. Having been so informed, the jury found seven distinct mitigating factors relating to Appellant's life history and mental-health impairments. *See* text accompanying *supra* note 16.

A review of the post-conviction record reveals that Dr. Lisak related several examples of violence that were not mentioned at trial, such as an incident in which

19. Appellant references other cases which are similarly distinguishable. *See, e.g.,* Brief for Appellant at 12 (citing *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*) (finding ineffective assistance where penalty-phase counsel presented no life-history or mental-health mitigation notwithstanding that the defendant had an abusive childhood, was traumatized by multiple wartime combat experiences, and suffered from brain damage which could manifest in impulsive, violent behavior)).

20. Appellant also expresses that an expert such as Dr. Lisak could have testified regarding physical abuse by Appellant's stepfather. However, Dr. Lisak clarified that any allegation by Appellant regarding altercations with his stepfather was largely collateral to the main issue in that it would only have been relevant to the timing of when Appellant left home. Thus, Dr. Lisak never attempted to interview Appellant's stepfather or otherwise ascertain whether the allegation was true. *See* N.T., May 24, 2012, at 165.

Appellant and his brother witnessed an apparent attempt by their father to strangle their mother with his hands. *See* N.T., May 24, 2012, at 113. Dr. Lisak was also able to provide some additional perspective concerning the level of vulnerability felt by children who are abused—particularly by a parent to whom they would ordinarily look for protection—and the tendency of abused boys to deal with such feelings of vulnerability by adopting what the expert termed a hyper-masculine persona as they progress into adolescence. *See* N.T., May 24, 2012, at 115. Still, the factual information Dr. Lisak could have supplied about Appellant's childhood would have been largely cumulative of that provided by Drs. Dee and Fox, as well as Mark Laird, all of whom informed the jury about the nature and severity (and several examples) of the physical and sexual abuse Appellant suffered at the hands of his father. Under these circumstances, Appellant has not demonstrated that further testimony from Dr. Lisak was necessary to avoid prejudice. *See Commonwealth v. Wayne*, 553 Pa. 614, 642, 720 A.2d 456, 470 (1998) (reciting that, when a PCRA petitioner claims counsel was ineffective for failing to call a witness, the petitioner must demonstrate, *inter alia*, that the witness's testimony was necessary to avoid prejudice). In this regard, the PCRA court expressed that

> doctor after doctor could evaluate Appellant and likely uncover additional details from Appellant's past with different theories about how those events in his life impacted him. Nonetheless, trial counsel presented testimony directly from a family member and through two different experts who conducted multiple interviews. The experts presented opinions that Appellant suffered from physical, sexual, emotional, and psychological abuse, had diagnoses of brain damage, memory impairment, drug and alcohol dependence, ADHD, and PTSD.

PCRA Ct. Op. II, *slip op.* at 53. The court ultimately concluded that counsel "were not ineffective for failing to present additional details that would have been insignificant considering the evidence as a whole." *Id.*

While we do not necessarily endorse the concept that Dr. Lisak's testimony would have been "insignificant," neither do we believe, in view of the record as a whole, that it was reasonably likely to have convinced a juror to alter his or her balancing of the mitigating circumstances against the kidnapping aggravator. In this latter respect, although Appellant describes the aggravator as "weak," Brief for Appellant at 24, we note that kidnapping is a serious crime that is likely to terrorize virtually anyone who becomes the victim of it. Here, Anthony Milano was outnumbered two-to-one by individuals who had consumed alcohol and had taunted him about his sexual orientation. At least one of these individuals (*i.e.*, Appellant) was much larger than Milano and had been acting in an obstreperous and somewhat bullying manner throughout the evening—even to the point of swearing at three armed officers. The jury heard that Milano had agreed to give Appellant and Chester a ride, but at some point during the ride he was apparently forced to do their bidding in terms of driving to other places with no assurance as to when he would be free of their dominating presence.[21] Milano was

21. Information concerning what took place during the ride was introduced through the reading of Chester's and Appellant's testimony from the 1988 trial. This included Chester's description that Appellant began "smacking" Milano while Milano was driving, N.T., May 18, 1988, at 524, albeit Appellant denied that assertion, *see id.* at 548, 580. *See generally* N.T., Feb. 9, 2007, at 92 (reflecting that pages 460–541 and 547–590 of the May

ultimately forced to exit his own vehicle and walk into a wooded area in darkness. Under such circumstances, any contention that the jury was likely to consider as "weak" the aggravating factor that Milano was killed while being kidnapped lacks any foundation in the record.

Failure to properly object to the questioning of Dr. Dee

[17] Appellant's next claim is similar to one that was raised and rejected on direct appeal. It involves a question that the prosecutor asked while cross-examining Dr. Dee during the penalty phase, and defense counsel's objection to that question.

In the penalty-phase, Dr. Dee, as noted, opined that Appellant suffered from an extreme mental or emotional disturbance at the time of the offense. *See* 42 Pa.C.S. § 4711(e)(2). On cross examination, the Commonwealth questioned Dr. Dee about whether he had given a similar opinion in other capital cases. During the questioning, the Commonwealth began describing the facts of those cases, whereupon the court held a sidebar discussion at which it admonished the Commonwealth that it could not question Dr. Dee about the details of other cases, but it could elicit that Dr. Dee had "given the same opinions" regarding other capital defendants. N.T., Feb. 13, 2007, at 82. The court additionally instructed the jury that "your task here is to follow the law as I give it to you with respect to this defendant and these circumstances." *Id.* at 83. When the Commonwealth resumed its cross-examination, it referred to a Florida case in which Dr. Dee had testified, and queried as follows:

> Q. Again, your testimony or your opinion was that [the defendant in that matter] suffered from a mental condition that substantially impaired his ability to comply with the law. Does that refresh your recollection?
>
> A. Well, that's [the] statutory language in Florida, yeah.
>
> Q. In fact, in that case the court found that your testimony to be [sic] very speculative—
>
> [Defense counsel]: Objection, Your Honor.
>
> THE COURT: Sustained. Members of the jury, again, you will need to follow the standards in this case as to the law.

Id. at 86. Another sidebar conference was held in which counsel moved for a mistrial on the premise that the Commonwealth had "told the jury that another [c]ourt has found this witness not to be credible," and "it's impossible to unring this bell." *Id.* at 87–88. The court denied the motion but provided an immediate curative instruction, telling the jury:

> Dr. Dee has been received as an expert in this case. I gave you instructions earlier in the trial regarding expert testimony but I will later give you instructions regarding the manner in which you are to evaluate his testimony. The sole issue before you today is what the penalty should be for this defendant, and you are only to consider the evidence presented in this case and the law as I give it to you.

Id. at 90.

On direct appeal, Appellant maintained that the trial court had erred in denying his mistrial motion because the Commonwealth's suggestion that another court found Dr. Dee's testimony to be "very speculative" constituted prosecutorial misconduct. He also proffered that his rights under the Eighth Amendment and the Due Process Clause were harmed because the Commonwealth placed before the jury in-

18, 1988, trial transcript were read for the jury during the retrial).

formation that he had no opportunity to deny or explain, and the jury was prevented from giving full consideration and effect to all mitigation. This Court denied the claim on its merits insofar as it was based on an allegation of prosecutorial misconduct, and found the claim waived to the extent it was grounded on the Eighth Amendment and the Due Process Clause. In terms of waiver, the Court observed that these constitutional arguments were not raised in Appellant's statement of matters complained of on appeal. *See Laird*, 605 Pa. at 179–81 & n. 27, 988 A.2d at 643–44 & n. 27.

Appellant now suggests that trial counsel was ineffective for failing to base his mistrial motion on the Eighth Amendment and the Due Process Clause (presumably that of the Fourteenth Amendment).[22] He contends that, if counsel had specified these constitutional bases and included them in his statement of matters complained of, they would have been preserved on appeal and this Court would have granted relief instead of finding the claim waived in part.

[18, 19] The Eighth Amendment requires non-arbitrary, individualized assessment of the appropriateness of the death penalty as to each capital defendant. Therefore, a full consideration of the character and record of the defendant and the circumstances of the offense forms an "indispensable part of the process of inflicting the penalty of death." *Monge v. California*, 524 U.S. 721, 734, 118 S.Ct. 2246, 2253, 141 L.Ed.2d 615 (1998). *See generally Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 761, 139 L.Ed.2d 702 (1998) (observing that, in the selection phase of a capital punishment determination, "we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination").

Much of the Supreme Court's jurisprudence in this arena has pertained to whether a trial court's jury instruction had the effect of limiting the jury's ability to consider and give full effect to the defendant's mitigation. *See, e.g., Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) ("*Penry II*"); *Smith v. Texas*, 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (*per curiam*). However, the Court has also indicated that the Eighth Amendment prohibits prosecuting attorneys from engaging in conduct which would have a similar effect. For example, the Amendment precludes prosecutors from suggesting to the jury that it does not bear the final responsibility for determining the appropriateness of the accused's death. *See Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (invalidating a death sentence imposed after the prosecutor told the jury that "your decision is not the final decision" because it "is automatically reviewable by the [state] Supreme Court").

Appellant's argument implicates this latter facet of Eighth Amendment precedent. He does not suggest that the trial court's instructions were faulty in the sense that, by themselves, they precluded the jury from affording complete consideration to his mitigating evidence. Rather, he asserts that the prosecutor's unfinished question, as recited above, prevented the jury from giving full effect to the mitigating evidence offered by that expert. *See* Brief for Appellant at 27 (arguing that the Commonwealth "discouraged the jury from finding the mitigating factors identified by Dr. Dee"). He additionally proffers that the court's curative instruction—as well as

22. The Eighth Amendment applies to the States through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

its subsequent more general jury charge regarding expert testimony—did little to remedy the problem. In this regard, Appellant references *DePew v. Anderson*, 311 F.3d 742 (6th Cir.2002), for the principle that the Eighth Amendment is violated when a prosecuting attorney "unfairly undercut[s]" the defendant's mitigation evidence. Brief for Appellant at 26–27.

In *DePew*, the reviewing court found that the prosecutor's conduct did, indeed, limit the jurors' ability to fully consider the defendant's mitigation. The conduct in that matter was described by the court as follows:

> [T]he prosecutor openly declared at a pretrial hearing that he did not care whether [DePew] received fair treatment. Later the prosecutor informed the jury of an alleged knife fight, which was not in evidence, and implied thereby that [DePew] was guilty of wrongdoing, of which there was absolutely no evidence. Further, the prosecutor commented to the jury on a subsequent conviction of [DePew's], unsupported by any evidence in the record, and then after being admonished by the trial judge, who had previously warned against mention of such[,] told the jury that no such conviction existed. The prosecutor then exhibited and commented on a totally irrelevant photograph depicting [DePew] next to a marijuana plant. Further, the prosecutor, in his closing remarks at the penalty stage, told the jury that "[i]t's not necessarily true that if you get three counts of twenty to life that it will add up to sixty—that's not necessarily true." While this does not involve a total misstatement of the law, it certainly could be construed as misleading.

DePew, 311 F.3d at 744–45 (citation and some internal brackets omitted) (quoting *State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542, 556 (1988)).

The situation in *DePew*, as described above, is not comparable to the Commonwealth's penalty-phase conduct presently in dispute. The conduct here consisted of a single, partial question suggesting that, in an unrelated case, a court in another jurisdiction found Dr. Dee's testimony "very speculative." The remark was brief and isolated, and subject to a contemporaneous objection, which was sustained. Moreover, no context was given, and thus, although the Commonwealth's question/remark may have been improper, its effect on the jury was necessarily limited. In this respect, we observed on direct appeal that,

> on both direct and cross examination, Dr. Dee described in significant detail the information and reasoning that formed the basis for his conclusions regarding Appellant. Considering all of these circumstances, as we must, we do not believe that the prosecutor's single reference to the Florida case, which was subject to an immediate curative instruction, had the "unavoidable effect" of prejudicing the jurors against him and preventing them from rendering a fair and impartial verdict.

Laird, 605 Pa. at 181, 988 A.2d at 644 (citing N.T., Feb. 13, 2007, at 56–78 (direct examination), 90–105 (cross-examination)).

Furthermore, we disagree with the premise that the court's curative charge was ineffectual. In the charge, the Court told the jury that "[t]he sole issue before you today is what the penalty should be for this defendant, and you are *only to consider the evidence presented in this case* and the law as I give it to you." N.T., Feb. 13, 2007, at 90 (emphasis added). By straightforward implication, the jury was instructed to disregard information about other cases. *Accord* Brief for the Com-

monwealth at 55. *See generally Commonwealth v. Stokes,* 576 Pa. 299, 306, 839 A.2d 226, 230 (2003) ("A jury is presumed to follow the court's instructions.").

In contrast to *DePew,* the present matter is substantially akin to *State v. LaMar,* 95 Ohio St.3d 181, 767 N.E.2d 166 (2002). In that matter, the prosecutor's penalty-phase argument included a misstatement of the nature of mitigating circumstances. When defense counsel objected and moved for a mistrial, the trial court sustained the objection, denied the motion, and gave a curative instruction telling the jury to disregard that portion of the prosecutor's argument. Before the jury retired to deliberate, the trial court supplied an accurate definition of mitigating evidence. On federal habeas review, the district court quoted *DePew*'s admonition that, "[w]hen a prosecutor's actions are so egregious that they effectively foreclose the jury's consideration of . . . mitigating evidence, the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." *LaMar v. Ishee,* 2010 WL 5574467, *61 (S.D.Ohio July 30, 2010) (quoting *DePew,* 311 F.3d at 748 (internal quotation marks and citation omitted)), *report and recommendation adopted,* 2011 WL 2555354 (S.D.Ohio June 27, 2011). However, the court expressed that the prosecuting attorney's conduct at LaMar's trial "can hardly be compared to the egregious and inflammatory statements and conduct of the prosecutor in *DePew.*" *Id.* at *62. As noted, we reach a similar conclusion here.

In light of the foregoing, we see no realistic possibility that the trial court would have provided "the extreme remedy of a mistrial," *Commonwealth v. Powell,* 598 Pa. 224, 249, 956 A.2d 406, 421 (2008), or that this Court would have granted such relief on direct appeal, if only penalty-phase counsel had articulated an Eighth–Amendment basis for his objection. *Accord* PCRA Ct. Op. II, *slip op.* at 50 ("Even if trial counsel had . . . cited a different basis for mistrial, it would not have resulted in a different outcome."). *See generally Commonwealth v. Bryant,* 620 Pa. 218, 238, 67 A.3d 716, 728 (2013) ("When the trial court gives adequate cautionary instructions, declaration of a mistrial is not necessary."). That being the case, Appellant's ineffectiveness claim lacks arguable merit to the degree it is founded on the Eighth Amendment.

[20] As pertains to the due-process basis for this claim, Appellant's specific argument is that the Commonwealth improperly "injected information into the penalty phase . . . that Appellant had no opportunity to deny or explain." Brief for Appellant at 29–30.[23] As precedent, Appellant

23. It may seem at first that a due process argument was litigated on direct appeal, since a claim of prosecutorial misconduct is often a particularized due process claim based on the right to a fair trial. *See, e.g., Commonwealth v. Watkins,* — Pa. ——, ——, 108 A.3d 692, 720 (2014). However, prosecutorial misconduct may also be grounded on other asserted violations. *See Commonwealth v. Reid,* — Pa. ——, ——, 99 A.3d 427, 456 (2014). Here, the prosecutorial-misconduct allegation considered on direct appeal related to the principle that it is improper for prosecutors to express their personal beliefs on questions that are exclusively for the jury, including witness credibility. *See Laird,* 605 Pa. at 179–80, 988 A.2d at 643. Such precept has often been explained by reference to codes of professional responsibility as they relate to the prosecutorial function, rather than by reference to due process as such. *See, e.g., Commonwealth v. Grant,* 479 Pa. 74, 81, 387 A.2d 841, 844 (1978). Hence, we will address the present due process argument on its merits rather than invoking the rule that a new theory cannot be raised during post-conviction proceedings in support of the same ineffectiveness claim that was litigated on direct appeal. *See, e.g., Commonwealth v. Collins,* 585 Pa. 45, 56, 888 A.2d 564, 570 (2005).

references the Opinion Announcing the Judgment of the Court in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In *Gardner*, a jury recommended a sentence of life imprisonment, but the sentencing judge overrode that recommendation based on a state-issued presentence report that the judge received after the jury was dismissed. Portions of the report were confidential and were never disclosed to the defendant or his attorney. A three-Justice plurality of the Supreme Court concluded that this procedure violated due process because the defendant had no opportunity to deny or explain the information on which the court relied. *See Gardner*, 430 U.S. at 362, 97 S.Ct. at 1207.[24]

Gardner has been summarized as requiring that "a defendant ... have a meaningful opportunity to deny or explain the State's evidence used to procure a death sentence." *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir.1998). Thus, for example, the California Supreme Court has held that a new penalty hearing was warranted where the trial court prevented the defendant from introducing evidence concerning certain strict security measures in place in California state prisons. The defendant sought to introduce these proofs to rebut the prosecution's evidence that the defendant had previously engaged in assaultive behavior and escape attempts while living in a jail setting with more lenient security protocols. After the trial court ruled that the defendant's evidence was inadmissible, the prosecutor suggested in his closing argument that the defendant's antisocial behavior was likely to escalate over time. Additionally, in responding to a jury question, the trial court informed the jurors they could consider as an aggravating factor the possibility of future escapes and/or violent crimes. The reviewing court stated that, although evidence of prison conditions is generally inadmissible during the penalty phase, the defendant's due process rights as articulated in *Gardner* were harmed because the prosecutor introduced evidence which the defendant was prevented from denying or explaining. *See People v. Smith*, 61 Cal.4th 18, 186 Cal.Rptr.3d 550, 584, 347 P.3d 530 (2015).

On the other hand, the Supreme Court has deemed *Gardner* inapplicable where the defendant had an opportunity to rebut or explain evidence, notwithstanding that its introduction surprised the defense. In *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), for example, the Court rejected a *Gardner* claim where two surprise witnesses testified at the penalty phase and the defendant had an opportunity to cross-examine them. The Court distinguished *Gardner*, characterizing it as "forbid[ding] the use of secret testimony in the penalty proceeding of a capital case which the defendant has had no opportunity to consider or rebut." *Id.* at 164–65, 116 S.Ct. at 2082. In rejecting the claim, the Court reasoned that, in

24. The *Gardner* majority was highly fractured, and the Supreme Court later described *Gardner*'s actual holding as a narrow one based on the Eighth Amendment. *See O'Dell v. Netherland*, 521 U.S. 151, 162, 117 S.Ct. 1969, 1976, 138 L.Ed.2d 351 (1997). On the other hand, a four-Justice plurality has reaffirmed *Gardner*'s due process component, *see Simmons v. South Carolina*, 512 U.S. 154, 161, 114 S.Ct. 2187, 2192, 129 L.Ed.2d 133 (1994), and, in a different context, a majority of the Supreme Court has referred to "'the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (quoting *Gardner*, 430 U.S. at 362, 97 S.Ct. at 1207). Particularly in view of *Skipper*, we conclude that the due process principle articulated by the *Gardner* plurality represents binding precedent.

Gardner, the defendant "literally had no opportunity to even see the confidential information, let alone contest it." *Id.* at 168, 116 S.Ct. at 2084. The defendant in *Gray,* on the other hand, "had the opportunity to hear the testimony of [the two surprise witnesses] in open court, and to cross-examine them." *Id.; cf. People v. Sakarias,* 22 Cal.4th 596, 94 Cal.Rptr.2d 17, 995 P.2d 152, 185–86 (2000) (denying relief on a Gardner claim where the sentencing court possessed secret information but did not expressly use it in its sentencing decision).

Even assuming that the prosecutor's partial question constituted "information" for *Gardner* purposes, the present case is materially distinguishable from *Gardner.* First, the question at most constituted witness impeachment rather than substantive evidence in support of the death penalty. As well, the information was not kept secret from the defendant or his attorney. Rather, it was stated in open court and pertained to a prior judicial decision which was a matter of public record. *See Porter v. State,* 788 So.2d 917, 923 (Fla.2001) (quoting *State v. Porter,* No. 85–5546 CFA, order at 4–7 (Fla. 18th Cir.Ct. May 10, 1996)). As such, Appellant could have sought to contest or explain the information, for example, by questioning Dr. Dee on redirect examination. *Cf. State v. Conaway,* 339 N.C. 487, 453 S.E.2d 824, 846 (1995) (rejecting a *Gardner* due process contention based on impeachment evidence because, *inter alia,* the defendant testified at his sentencing hearing and could have addressed the evidence while on the witness stand). Instead, Appellant raised an immediate objection, and he benefitted from a contemporaneous curative instruction designed to eliminate any prejudice to his penalty-phase case stemming from the mention of the Florida decision. As discussed, moreover, the jury is assumed to have followed the instruction, and thus, to have considered only "the evidence presented in this case." Consequently, this is not a case in which it can be said that Appellant either "had no opportunity to even see the confidential information, let alone contest it," *Gray,* 518 U.S. at 168, 116 S.Ct. at 2084, or otherwise lacked "a meaningful opportunity to deny or explain the State's evidence used to procure a death sentence." *Duvall,* 139 F.3d at 797. That being the case, Appellant's underlying due process argument lacks merit.

Failure to object to other-bad-acts evidence

[21] Appellant's next argument is based on the fact that all of the guilt-phase evidence was incorporated into the penalty phase. Counsel wanted the incorporation to occur so that the extensive, favorable expert testimony adduced to support his diminished-capacity defense could be considered by the sentencing jury. *See* N.T., May 23, 2012, at 180–81. Appellant maintains, however, that counsel was ineffective for failing to object to the incorporation of some of the guilt-phase evidence: specifically, the testimony that, at the Edgely Inn, Appellant made a sexual remark to Gail Gardener and gave alcohol to Barbara Parr's son. Appellant views these proofs as irrelevant to a capital penalty hearing because they do not implicate a statutory aggravator. He indicates, in this regard, that the effect of counsel's omission was to allow the jury to consider non-statutory aggravation, particularly inasmuch as the trial court did not issue a cautionary instruction in the penalty phase admonishing the jury against considering other-bad-acts evidence in its sentencing decision. Appellant suggests that, to make matters worse, the prosecutor affirmatively encouraged the jury to rely on such evidence in her closing argument, when she told the jury that

> the final, the catchall [mitigating circumstance], is any other evidence of mitigation concerning the character and the record of the defendant and the circumstances of his offense. Well, you already know a lot about [Appellant's] character, I submit to you. You already know a lot about the circumstances of the offense.

N.T., Feb. 13, 2007, at 124. Appellant suggests that the statement, "you already know a lot about [Appellant's] character," was a veiled reference to the other-bad-acts testimony.

On review, we disagree with the suggestion. In the penalty phase, the prosecutor did not discuss the testimony concerning the remark to Gardener or the alcohol given to Parr's son, and she never mentioned these items in her argument to the jury. Rather, the prosecutor concentrated her remarks on the circumstances surrounding the killing itself, namely, the kidnapping and alleged torture of Milano. *See* N.T., Feb. 12, 2007, at 15–16 (opening statement); N.T., Feb. 13, 2007, at 126–34 (summation). She also expressed to the jurors that their sentencing decision should not be based on their "feelings," but on "objective standards under the law" as applied to the underlying facts. N.T., Feb. 13, 2007, at 117. Moreover, any contention that the prosecutor, in the above-quoted portion of her summation, sought to invite the jury to consider non-statutory aggravation is based on speculation.

Additionally, we have already observed that the evidence about which Appellant presently complains was isolated and minor within the context of a five-day murder trial, particularly when compared to the other conduct to which Appellant stipulated—most notably, that he had participated in a brutal murder and that he had been convicted of kidnapping the victim. Based on this information, moreover, the jury could also infer that Appellant perjured himself at his first trial in which he testified that he had not participated in the murder and sought to shift exclusive blame onto Chester. *See* N.T., May 18, 1988, at 548, 564, 579.[25]

Finally, it bears noting that, through the verdict slip and accompanying instructions from the bench, the trial court channeled the jury's consideration of aggravating circumstances into the two discrete aggravators alleged by the Commonwealth. *See, e.g.*, N.T., Feb. 13, 2007, at 171. Indeed, there is nothing in the record suggesting the jury was told it could consider aggravating evidence untethered to one of these two factors.

In view of the foregoing, the implicit inclusion of the limited other-bad-acts testimony within the overall incorporation of guilt phase evidence into the penalty hearing does not undermine our confidence in the sentencing verdict. *Cf. Commonwealth v. Hutchinson*, 571 Pa. 45, 55, 811 A.2d 556, 562 (2002) (in the context of an ineffectiveness claim raised on direct review, finding no prejudice where counsel failed to object to isolated and passing testimony about other bad acts).

Failure to object to argument and instructions regarding mitigation

[22] Next, Appellant contends that counsel were ineffective for failing to object to the Commonwealth's argument, and the trial court's instructions, concerning the definition of mitigating circumstances. Appellant references several places in the prosecutor's summation where she indicated that mitigating evidence is that which makes the "case" or the "killing" less terrible. He also observes that, in the intro-

25. This denial and blame-shifting testimony was read to the jury.

ductory portion of its jury charge, the trial court stated that aggravating and mitigating circumstances are "things that make a first degree murder case either more terrible or less terrible." N.T., Feb. 13, 2007, at 164. Appellant argues that such descriptions focus on the crime and not the person who committed it.[26] In this way, Appellant maintains, these types of explanations fail to implement the Supreme Court's Eighth–Amendment directive that a capital sentencer "treat[ ] the defendant as a uniquely individual human being" and that the sentence itself "reflect[ ] a reasoned moral response to the defendant's background, character, and crime." *Penry I*, 492 U.S. at 319, 109 S.Ct. at 2947 (internal quotation marks, citations, and brackets omitted); *see* Brief for Appellant at 37. Appellant acknowledges that this Court has previously rejected similar challenges to this type of instruction, but he maintains that relief is presently warranted because the prosecutor repeatedly used the term "case" or "killing" during her summation. Appellant contends, therefore, that the present dispute is distinguishable from others in which the same definition of mitigating circumstances was upheld. *See* Brief for Appellant at 38.

On direct review, this Court observed that we have consistently rejected similar challenges to the same instruction. *See Laird*, 605 Pa. at 183, 988 A.2d at 645 (citing *Commonwealth v. King*, 554 Pa. 331, 364, 721 A.2d 763, 779–80 (1998); *Commonwealth v. Saranchak*, 544 Pa. 158, 175–76, 675 A.2d 268, 276–77 (1996)). In *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586 (2007), for example, the instruction was used and the same essential argument was made on appeal. This Court reasoned that:

> The trial court is allowed considerable discretion in phrasing instructions as long as they adequately convey the law. In fact, Pennsylvania Standard Criminal Jury Instruction 15.2502F(1) describes aggravating and mitigating circumstances as "things that make a first-degree murder case either more terrible or else less terrible." Additionally, we have rejected the claim Appellant now advances, declining to find that the trial court instructions
>
> > as a whole, interfered with the jury's evaluation of the specific mitigation evidence presented by Appellant or their assessment of his personal moral culpability. These instructions merely expressed to the jury, in laymen's terms, the purpose for the distinction between aggravating and mitigating circumstances in a capital penalty phase.

Id. at 745, 927 A.2d at 613–14 (quoting *Commonwealth v. Johnson*, 572 Pa. 283, 325, 815 A.2d 563, 588 (2002), in turn quoting *Commonwealth v. Stevens*, 559 Pa. 171, 207 739 A.2d 507, 526–27 (1999)).[27]

When we consider the trial court's charge "as a whole," as we must, *see Com-*

26. Appellant quotes selected excerpts from a law dictionary for the position that "case" means event, happening, situation, or circumstances. He argues that, as such, "case" is an inappropriate term for defining mitigation. *See* Brief for Appellant at 38.

27. Contrary to Appellant's suggestion, *see supra* note 26, the phraseology pertaining to making a first-degree murder "case" less terrible, as understood in lay terms, is proper inasmuch as it subsumes the broad category of circumstances included within the statutory definition of mitigation (including the "catchall" circumstance). Indeed, by Appellant's own account the term includes the attending "circumstances" and "situation," both of which, we believe, jurors will understand to encompass more than the crime itself—particularly where, as here, the general definition is followed by instructions as to particular mitigators.

monwealth v. Hawkins, 567 Pa. 310, 338, 787 A.2d 292, 308 (2001), we reach the same conclusion here. As in *Washington*, the jury charge tracked the standard instruction pertaining to the definition of aggravating and mitigating circumstances. Significantly, as well, the specific mitigating circumstances relating to Appellant's life history and personal character (such as good conduct in prison) were enumerated on the verdict slip. After charging the jurors with regard to certain mitigating factors, the court issued a separate instruction concerning the "catchall" factors, stating:

> The [Pennsylvania] legislature ... provides that you are to consider any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the defendant's offense. And I have listed there [on the verdict slip], for your consideration, all of the mitigating factors that have been presented for your consideration under this subsection. They include physical abuse, sexual abuse, emotional abuse, witness the abuse of others, psychological consequences of abuse. Substance abuse, alcohol abuse, conduct in prison. And during this trial the defendant stipulated to the fact that he participated in the murder.

N.T., Feb. 13, 2007, at 173. After a brief sidebar discussion, the court reiterated its admonition that the jury should consider all of the listed mitigating circumstances, clarifying that each was to be evaluated separately. *See id.* at 175.

Inasmuch as these repeated instructions were proper, and considering that all of the proposed life-history and character-based mitigation was listed on the verdict slip which the jurors took with them during deliberations, it is speculative to argue that the prosecutor's earlier description of mitigation, couched in terms of whether a "case" or a "killing" was rendered less terrible, interfered with the jury's ability to carry out its Eighth Amendment duties, notwithstanding that the prosecutor may have reiterated this description several times.[28] Moreover, the record contradicts Appellant's argument since one or more jurors expressly found all of the proffered character and life-history mitigation. *See supra* note 16 and accompanying text. Accordingly, Appellant's underlying claim lacks arguable merit and, as such, he cannot obtain relief on his ineffectiveness contention.

Failure to object to victim impact evidence

[23] In his last penalty-phase claim, Appellant asserts that the jury's sentencing decision was tainted by improper victim impact testimony that was introduced in the guilt phase and, as such, was included within the incorporation of evidence into the sentencing phase.[29] Appellant recognizes, in this regard, that the 1995 legislative change which allowed victim impact evidence to be presented in a capital penalty hearing, *see* 42 Pa.C.S. § 9711(a)(2), does not apply to sentences imposed for offenses, such as the present one, which occurred before its effective date, *see Commonwealth v. Duffey*, 585 Pa. 493, 516, 889 A.2d 56, 70 (2005), and that the pre–1995 version of Section 9711(a)(2) has been interpreted to preclude the intro-

28. Although Appellant is correct that counsel did not object during the prosecutor's summation, counsel did observe in his responsive argument to the jury that the prosecutor's description was incomplete, that mitigating factors are legislatively defined, and that the court would provide definitive instructions on the matter before the jury retired to deliberate. *See* N.T., Feb. 13, 2007, at 145.

29. Appellant does not allege that any such evidence was adduced in the penalty phase.

duction of such testimony, *see Commonwealth v. Fisher*, 545 Pa. 233, 266, 681 A.2d 130, 146 (1996).[30] He notes that a similar claim was deemed waived on direct appeal due to trial counsel's failure to object to the evidence in question. *See Laird*, 605 Pa. at 181–83, 988 A.2d at 644–45. Thus, Appellant now adds an ineffectiveness overlay based on such omission, citing in particular the failure to object to the incorporation of any guilt-phase victim impact evidence into the penalty phase. *See* Brief for Appellant at 45. He observes that, in view of the governing legal framework as mentioned above, counsel obtained a pretrial ruling that victim impact evidence would be excluded from the penalty hearing. Hence, he argues, such an objection would have been sustained.

The evidence Appellant claims was improper consists of testimony from three guilt-phase witnesses. First, Vito Milano, Anthony's father, testified that: he lived with his wife and Anthony in 1987, but now his wife was deceased and so he lives alone; at the time of his death Anthony was 26 years old and had recently graduated from art school with honors; on the night of the murder, Anthony said goodnight to his parents, stating he had to go out for a while; and he (Vito) never saw his son again. Second, Orpha Newswanger, who knew Anthony Milano from church, stated that: Anthony sometimes attended Bible studies in her home, and they were completing lessons on learning to become a servant; Anthony visited her during the evening in question and the two listened to a tape pertaining to peacemaking and read several associated scriptures; and she never saw him again. Finally, Melanie Ozdemir—who identified the victim's car, as well as an ornament that hung from the rearview mirror, which was later in Appellant's possession—testified that Anthony Milano was a good friend of hers and she had known him since 1979 when the two were in high school together.

In addition to the above, Appellant urges that the prosecutor "continued the victim impact theme in her closing argument at both phases." Brief for Appellant at 43. In particular, Appellant states that in the guilt phase, the prosecutor concluded her summation by contrasting what she termed as Appellant's "world" in which Anthony Milano was less than human, with "our world" in which he was a beloved son and brother. N.T., Feb. 9, 2007, at 57–58. In her penalty-phase summation, more-

30. Victim impact evidence is designed to show the victim's "uniqueness as an individual human being." *Payne v. Tennessee*, 501 U.S. 808, 823, 111 S.Ct. 2597, 2607, 115 L.Ed.2d 720 (1991) (internal quotation marks omitted). Such evidence includes information about the victim and the impact of the victim's death on his or her family which is not otherwise relevant to the proceeding. *See Commonwealth v. Rios*, 591 Pa. 583, 612–13, 920 A.2d 790, 807 (2007), *overruled on other grounds, Commonwealth v. Tharp*, —— Pa. ——, 101 A.3d 736 (2014).

In June 1987, the United States Supreme Court ruled that the Eighth Amendment bars admission of victim impact evidence during the penalty phase because such evidence is unrelated to the defendant's blameworthiness. *See Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). *Booth* was overruled four years later in *Payne*, where the Court determined, *inter alia*, that the amount of harm caused by the defendant is relevant to his blameworthiness and, as such, to an assessment of the appropriate sentence. *See Payne*, 501 U.S. at 819, 111 S.Ct. at 2605; *cf. id.* at 825, 111 S.Ct. at 2608 (reasoning that, just as the defendant is entitled to remind the sentencer he is a unique individual, so too the prosecution should be permitted (if a state statute allows it) to remind the jury that "the victim is an individual whose death represents a unique loss to society and in particular to his family" (internal quotation marks and citation omitted)). In light of *Duffey* and *Fisher*, however, *Payne*'s holding has no application to this case.

over, the prosecutor expressed that the victim's family "had to sit here again and listen to what happened to their son in that [sic] dark, cold woods." N.T. Feb. 13, 2007, at 125. Later, she indicated that, for purposes of the torture aggravator, what mattered was how the killing was accomplished rather than the fact of the killing itself, in which Milano's "life filled with promise and future" was taken from him. *Id.* at 129. Finally, the prosecutor remarked on "[t]he inability [of the victim] to go home that night to his family." *Id.* at 134.

The Commonwealth responds that the challenged guilt-phase information was either permissible life-in-being testimony (*i.e.,* evidence that the victim was alive prior to the time of the alleged murder) or relevant to the narrative of events leading up to the offense. The Commonwealth adds that, although some of the information, such as that provided by Vito Milano, may have seemed unfortunate, this alone does not convert it into victim impact testimony.

In *Commonwealth v. McNeil*, 545 Pa. 42, 679 A.2d 1253 (1996), as in the present case, victim impact evidence was precluded. This Court sustained an ineffectiveness claim where counsel failed to object to penalty-phase testimony by the victim's aunt stating that the victim was gracious, kind, and generous, and had particular concern for the underdog and the elderly. Such testimony clearly pertained only to the victim's personal qualities and had no other relevance to the sentencing proceeding. Since it was impossible to determine how the jury might have considered the testimony while weighing the aggravating and mitigating factors, the Court remanded for a new sentencing hearing. *See id.* at 55–56, 679 A.2d at 1259.

[24] On the other hand, "a criminal defendant does not have the right to have all evidence presented against him at trial sanitized of anything that could cause jurors to sympathize with the victim or his family." *Commonwealth v. Rios*, 591 Pa. 583, 612–13, 920 A.2d 790, 807 (2007), *overruled on other grounds, Commonwealth v. Tharp,* —— Pa. ——, 101 A.3d 736 (2014). Thus, in *Commonwealth v. Bardo,* —— Pa. ——, 105 A.3d 678 (2014) (*per curiam*), the mother of the infant murder victim testified that, after searching for her child throughout the night, she was at a store when another woman came through the door yelling that the missing baby had just been found in a creek wrapped in a garbage bag. This Court concluded that the testimony was not victim impact evidence since it did not concern the victim or the impact of the victim's death on her family. Rather, it was deemed to be "part of the chronology of the crime charged in this case." *See id.* at ——, 105 A.3d at 715 (internal quotation marks omitted).

Additionally, as the Commonwealth observes, life-in-being testimony is not victim impact testimony, and hence, is not subject to the pre–1995 restriction. *See, e.g., Commonwealth v. Carson*, 590 Pa. 501, 531–32, 913 A.2d 220, 237 (2006) (holding that the victim's mother did not provide victim impact evidence by testifying that: before the crime occurred her son was alive and well; the next time she saw him he was dead; and she identified his body at the medical examiner's office). Finally, the category of victim impact evidence has been held to exclude generalized background information concerning the victim (including the fact that the victim graduated from a particular school) as well as brief comments suggesting that the victim's family was concerned when they had not heard from the victim and did not know his whereabouts. *See Commonwealth v. Miller*, 560 Pa. 500, 519, 746 A.2d

592, 602 (2000) (describing such information as "matter of fact").

Here, most of the complained-of evidence either falls into this latter category or did not purport to describe Anthony Milano's personal qualities or the impact of his death upon his family. The fact that Anthony Milano was 26 and had graduated from art school constituted general background information, as did the evidence that Ms. Newswanger knew him from church. Vito Milano's testimony that he lives alone was also background information that cannot be viewed as victim impact evidence except via conjecture, since there is no record basis to believe Anthony, had he still been alive, would have been living with him in 2007. Moreover, the fact that Anthony was seen at his parents' house and at Ms. Newswanger's residence on night in question constitutes permissible chronology-of-events evidence. Further, Melanie Ozdemir's statement that she was a good friend of the victim's and had known him since high school helped lay the foundation for her ability to identify his car and the glass ornament that was in Appellant's possession in the post-killing timeframe.

The evidence that Anthony Milano had listened to a tape and read Bible passages relating to peacemaking when he was at Orpha Newswanger's house on December 14, 1987, comes closest to straying beyond what was permissible for ordinary evidentiary purposes. In all events, the PCRA court credited penalty-phase counsel's "strategic decision to limit the jury's exposure to unfavorable evidence" by omitting any particularized objection to such evidence at the time of the general incorporation of guilt-phase evidence into the penalty phase. PCRA Ct. Op. II, *slip op.* at 58. As well, the testimony along these lines was quite brief—consisting of two short questions and answers—and it was adduced on the opening day of a trial in which the jury began deliberating on the sentence eight days later. Accordingly, even if we assume that Orpha Newswanger's testimony in this respect was improperly admitted, it was, within the proceeding as a whole, *de minimus* and insufficient to undermine our confidence in the outcome of the sentencing hearing.

As for the prosecutor's guilt-phase summation, we note initially that it was not evidence. *See Commonwealth v. Philistin*, 617 Pa. 358, 381, 53 A.3d 1, 14 (2012) ("[T]he Commonwealth's closing argument was not victim impact evidence, as 'the arguments of counsel are not evidence.' " (quoting *Commonwealth v. Ligons*, 565 Pa. 417, 773 A.2d 1231, 1238 (2001))).[31] Thus, it was not incorporated into the penalty phase. Accordingly, to the degree Appellant's complaint rests on the premise he was harmed by spillover prejudice from the district attorney's guilt-phase summation, such contention is inapplicable to the issue of whether counsel should have objected to the incorporation of portions of the guilt-phase evidence.

[25] Insofar as the issue may be viewed broadly to subsume counsel's failure to voice a contemporaneous objection to the prosecutor's summation, we note that, under this Court's case precedent, prosecuting attorneys have leeway to "present [their] arguments with logical force and vigor," *Commonwealth v. Cox*, 556 Pa. 368, 385, 728 A.2d 923, 931 (1999) (internal quotation marks omitted), and they are permitted a degree of oratorical flair in advocating the Commonwealth's case, *see Commonwealth v. Keaton*, 556 Pa. 442, 463, 729 A.2d 529, 540 (1999). Here, the prosecutor's brief references to

31. The trial court instructed the jury to this effect. *See* N.T., Feb. 9, 2007, at 62.

the victim being a "beloved son" to his father and "still a friend and a brother" to his sister, N.T., Feb. 9, 2007, at 58, did not, as in *McNeil,* amount to specific information about Anthony Milano's character, personal qualities, or "uniqueness as a human being," *Payne,* 501 U.S. at 823, 111 S.Ct. at 2607; *see Commonwealth v. Bomar,* 573 Pa. 426, 458, 826 A.2d 831, 850 (2003), nor did they describe the impact of his death upon his family. Rather, they articulated that the victim was loved by his father and sister. In this regard, our Court has explained that, "[w]hile reference to irrelevant matters should be avoided, ... murder victims are not simply props or irrelevancies in a murder prosecution, and innocuous references to victims and their families are not necessarily prejudicial." *Commonwealth v. Freeman,* 573 Pa. 532, 582, 827 A.2d 385, 415 (2003). We conclude that, consistent with the precepts contained in decisions such as *Cox* and *Bomar,* the prosecutor's brief references to Anthony Milano's father and sister fell within the boundaries of permissible advocacy and did not constitute improper victim impact argumentation or other misconduct so as to obligate counsel to object.

As for the Commonwealth's penalty-phase summation, we observe initially, and in addition to the principles already mentioned, that a prosecutor's comments must be evaluated in the context in which they were made, *see Commonwealth v. Hall,* 549 Pa. 269, 285, 701 A.2d 190, 198 (1997), and a prosecutor may urge the jury to view the defense's mitigation evidence with disfavor. *See Stokes,* 576 Pa. at 311, 839 A.2d at 233; *accord Commonwealth v. Watkins,* —— Pa. ——, ——, 108 A.3d 692, 720 (2014) (*per curiam*). These precepts are relevant to the first aspect of the Commonwealth's penalty-phase summation that Appellant challenges, which occurred when the prosecutor indicated that Anthony Milano's father and sister had to sit through another trial and hear what happened to him. The prosecutor stated:

> The final [proposed mitigating circumstance] is that during this trial the defendant stipulated to the fact that he participated in the murder. Well, ladies and gentlemen, I submit to you that is not a valid mitigating circumstance. We all went through last week [*i.e.,* the guilt phase] together. We all sat here and we had to bring witnesses in. Witnesses that did not want to be here. Witnesses that had put this behind them. Witnesses that had to come in here and they changed their lives, many of them, and recounted that day back in December, 1987. And the Milanos had to sit here again and listen to what happened to their son in that [sic] dark, cold woods. And the defense attorneys came up here and what they said to you is find Richard Laird not guilty. It's not an admission. That's not mitigation.

N.T., Feb. 13, 2007, at 125. The single sentence which Appellant now highlights, when viewed in context, was part of the Commonwealth's argument for why the stipulation should not be considered mitigating. Appellant does not cite any authority, moreover, suggesting that observing or participating in the trial of the accused constitutes victim impact, and our research does not reveal any. Thus, we conclude that the prosecutor's comment was not improper.

Another portion of the summation to which Appellant objects pertains to the prosecutor's argument that the jury should find the torture aggravator:

> Aggravating factor number 2 is not the fact that they killed Anthony Milano, not the fact that he killed him and took his life away, took a life filled with promise and future away from him; that's not it. It's the way that it was done. It's the

> horrifying circumstances under which Anthony Milano died. That is the second aggravating factor because this killing was done by means of torture.

N.T., Feb. 13, 2007, at 129. We acknowledge that the prosecutor could have advocated in favor of the torture aggravator without adding that the victim's life was "filled with promise and future." However, an expression along these lines is generalized and, again, under this Court's cases, it fits within the latitude afforded to a district attorney in making her arguments.

Finally, Appellant takes issue with the concluding paragraph of the prosecutor's summation, in which she indicated:

> Ladies and gentlemen, for what the law requires, for what the evidence says, for the taking of another life in the most heinous of ways, and for what Anthony Milano endured. The inability to go home that night to his family, the safety, the terror, the pain, the struggle, the cruelty, for all those things, ladies and gentlemen, I ask you to uphold your oath, follow the law and return the only just verdict in this case . . . death.

N.T., Feb. 13, 2007, at 134 (ellipsis in original). Appellant criticizes the reference to the victim's inability to go home to his family. Again, however, this is generalized and it is obvious that all murder victims cannot to go home to their family. Thus, any contention that this constituted improper victim impact argumentation is meritless.

Cumulative effect of alleged errors

Finally, Appellant argues that he is entitled to relief predicated on the cumulative effect of counsel's alleged deficiencies. However, virtually all of Appellant's ineffectiveness contentions fail due to a lack of arguable merit to the underlying claim. To the extent any have been disposed of based on the absence of sufficient prejudice to undermine confidence in the outcome, we are satisfied that prejudice is lacking on a collective basis as well.

The order of the PCRA court is affirmed.

Justices EAKIN, BAER, TODD, and STEVENS join the opinion.

Michael J. YOCABET, Appellee,

v.

UPMC PRESBYTERIAN and University of Pittsburgh Physicians,

Appeal of UPMC Presbyterian Shadyside.

Christina L. Mecannic, Appellee,

v.

UPMC Presbyterian and University of Pittsburgh Physicians,

Appeal of UPMC Presbyterian Shadyside, Appellant.

Superior Court of Pennsylvania.

Argued Jan. 27, 2015.

Filed June 5, 2015.

Background: Transplant donor and recipient filed actions against hospital and physicians, alleging medical malpractice and other claims. The Court of Common Pleas, Allegheny County, Civil Division, Nos. G.D. 11–19112, 11–19113, Wettick, J., 2014 WL 8107486, entered orders requiring hospital to produce materials it asserted were confidential under Peer Review Protection

2014 WL 8734830 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Criminal Division
Bucks County

COMMONWEALTH of Pennsylvania,
v.
Richard Roland LAIRD.

No. CR007461988.
April 10, 2014.

Opinion

Rea B. Boylan, Judge.

***1** Richard Laird ("Appellant") appeals from the Court's denial on August 7, 2013, of his Post Conviction Relief Act claims. The Court files this opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a).

I. PROCEDURAL HISTORY

In 1988, Appellant and Frank Chester were tried together and convicted of first, second, and third degree murder (18 Pa.C.S.A. § 2502) of Anthony Milano and sentenced to death. Appellant was also convicted of kidnapping (18 Pa.C,S.A. § 2901), aggravated assault (18 Pa.C.S.A. § 2702), unlawful restraint (18 Pa.C.S.A. § 2902), false imprisonment (18 Pa.C.S.A. § 2903), and possessing instruments of a crime (18 Pa.C.S.A, § 907). The Pennsylvania Supreme Court affirmed Appellant's conviction and sentence. *Com. v. Laird*, 587 A.2d 1367 (Pa. 1991). PCRA relief was denied. *Com. v. Laird*, 726 A.2d 346 (Pa. 1999). Appellant sought federal habeas relief in the U.S. District Court for the Eastern District of Pennsylvania. On September 9, 2001, the District Court vacated only the conviction of first degree murder and the death sentence. *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001), *affirmed, Laird v. Horn*, 414 F.3d 419 (3d. Cir. 2005), *cert, denied, Beard v. Laird*, 546 U.S. 1146 (2006).

Appellant was retried for first degree murder, and he was convicted by a jury on February 9,2007. The penalty phase began on February 12, 2007, and the jury returned a verdict of death on February 13, 2007. Appellant's direct appeal was denied by the Pennsylvania Supreme Court. *Com. v. Laird*, 988 A.2d 618 (Pa. 2009), *cert, denied, Laird v. Pennsylvania*, 131 S. Ct. 659 (2010).

On September 19, 2011, Appellant filed a PCRA claim. The Court held hearings on April 19,2012, May 23-24, 2012, June 19, 2012, and September 14,2012, The Court denied Appellant's claims on August 7,2013.

II. FACTS

The Pennsylvania Supreme Court summarized the relevant facts on direct appeal as follows:

At 11:30 p.m. on December 14, 1987, the victim, Anthony Milano, drove to the Edgely Inn in Bristol Township, a bar where Appellant and Chester were drinking and playing pool. Milano had never met Appellant or Chester prior to that evening. During the next three hours, Milano, Chester, and Appellant drank alcohol and conversed together. [...] Milano agreed to give Appellant and Chester a ride home. Multiple witnesses testified that, during this time, and throughout the ensuing events, Appellant seemed

coherent, was able to stand without swaying, and was not slurring his speech. Appellant, Chester, and Milano ultimately left the Edgely Inn just before 2:30 a.m. on December 15, with Milano driving his car and Chester and Appellant supplying directions.

Approximately one hour later, the three individuals, still in Milano's car, proceeded to a wooded area of the township, stopped along the side of the road, and exited the vehicle. Chester then punched or kicked Milano in the head several times, causing him to fall to the ground. Appellant jumped on top of Milano, pinned him to the ground, and killed him by slashing his throat repeatedly with a box-cutter. The assailants ran toward the home of a Mend, Rich Griscavage. En route, Appellant took off his shirt, wiped blood from his jacket with it and discarded it. Upon arriving at Griscavage's house, Chester and Appellant were visibly agitated. Chester indicated to Griscavage that they had gotten into a fight with someone and "the dude is dead," whereupon Appellant interrupted and instructed Chester not to discuss the matter. Soon thereafter, Griscavage gave Appellant a ride home on the back of his motorcycle. He testified that Appellant did not have any trouble keeping his balance or leaning into turns, so that the ten-minute motorcycle ride was unproblematic.

***2** Later that day, Appellant's girlfriend observed Appellant place his keychain, which was covered with blood, as well as all of the clothing he was wearing when he arrived home, into a plastic bag, which be then discarded in a dumpster in a nearby town. She testified that he always carried his box-cutter with him, but that he disposed of it after the murder by throwing it into a creek. Additionally, Appellant asked her if she could "be an alibi," repeated his instruction to Chester not talk to anyone about the incident, and stated, "no evidence, no crime." Finally, the Commonwealth introduced a tape recording and transcript of a consensually intercepted telephone call between Chester and Appellant on December 20, 1987. During the call, Appellant suggested that Chester leave town, indicated his intention to "hide until this blows over," recommended ways of passing a polygraph test, commented on the district attorney's inability to prove a case without evidence, and expressed his belief that criminal homicide is subject to a seven-year statute of limitations. Two days later, Appellant was arrested at a motel in Falls, Pennsylvania.

Corn. v. Laird, 988 A.2d 618, 625-26 (Pa. 2010).

II. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

On September 3, 2013, the Appellant submitted a notice of appeal, raising the following questions for review:

A. Were trial counsel ineffective when they failed to properly present evidence of the conditions and effects of Petitioner/Appellant's confinement in the Bucks County Correctional Facility during pretrial and trial proceedings?

B. Were trial counsel ineffective for failing to renew and litigate a motion for change of venue or venire despite the fact that the community and jury pool had been saturated with highly prejudicial publicity in violation of Petitioner/Appellant's right to an impartial jury and due process under the Sixth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Pennsylvania Constitution?

C. Were trial counsel ineffective for failing to adequately voir dire or life qualify the jury in violation of Petitioner/Appellant's Sixth and Fourteenth Amendment rights to a fair and impartial jury under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

D. Were trial counsel ineffective for failing to renew and litigate a motion to exclude evidence of Petitioner/Appellant's prior convictions in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

E. Were counsel ineffective for failing to impeach Commonwealth witnesses with prior inconsistent statements and/or evidence of their bias, interest or motive in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

F. Were counsel ineffective for failing to introduce medical records and police reports which supported Petitioner/Appellant's diminished capacity defense in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

G. Were Petitioner/Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution as well as the Pennsylvania Constitution violated when counsel ineffectively failed to move *in limine*, and/or object to the introduction of inadmissible and highly prejudicial testimony? Were counsel also ineffective for failing to move for a mistrial when the jury heard this inflammatory testimony?

H. Were counsel ineffective for failing to adequately prepare expert witnesses to testify on the issue of diminished capacity in violation of Petitioner/Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and corresponding portions of the Pennsylvania Constitution?

I. Did counsels' failure to raise and preserve arguments and objections to the Commonwealth's improper questioning of defense expert, Dr. Dee, violate Petitioner/Appellant's due process rights?

***3** J. Were counsel ineffective during the penalty phase by failing to adequately investigate, develop, and present the case for life and for failing to rebut the Commonwealth's evidence in violation of Petitioner/Appellant's rights under the United States Constitution and the Pennsylvania Constitution?

K. Were trial counsel ineffective when they unreasonable [sic] failed to object to the impermissible victim impact testimony and evidence?

L. Were trial counsel ineffective at the penalty phase of trial when they failed to object to the admission of prejudicial prior bad act evidence in violation of Petitioner/Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the Pennsylvania Constitution?

M. Were counsel ineffective at the penalty phase for stipulating to the sole aggravating circumstance, that the killing was committed while in the perpetration of a kidnapping (42 Pa C.S. § 9711(d)(6)), in violation of Petitioner/Appellant's Sixth, Eighth and Fourteenth Amendment rights and the corresponding portions of the Pennsylvania Constitution?

N. Were counsel ineffective when they failed to object to the Commonwealth's improper argument and the court's improper instruction to the jury regarding the definition, weight and value of mitigating evidence in violation of Petitioner/Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the Pennsylvania Constitution?

O. Did the jurors' consideration of extraneous argument and evidence during their sentencing phase deliberation violate Petitioner/Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights and the corresponding portions of the Pennsylvania Constitution?

P. Is Petitioner/Appellant entitled to a new trial because the cumulative effect of the errors in this case undermines confidence in the outcome at both the guilt and penalty phases of trial?

Q. Did the PCRA court err in its; pre-hearing rulings, rulings during the: scope of the proceedings and hearing, and post-hearing rulings, including evidentiary rulings and rulings concerning the scope of the hearing?

R. Did the PCRA court err in its determinations of the issues and sub-issues in this matter, including previous litigation, waiver, burdens of pleading and proof, and other procedural issues in this litigation, and including the merits of Petitioner/Appellant's claims for relief?

IV. DISCUSSION

A. Were trial counsel ineffective when they failed to properly present evidence of the conditions and effects of Petitioner/Appellant's confinement in the Bucks County Correctional Facility during pretrial and trial proceedings?

Leading up to trial, Appellant was transferred from SCI Green to the Bucks County Correctional Facility. On October 17, 2006, Appellant submitted a letter to the Court, complaining of sleep deprivation from lights and noise, isolation, cold temperatures, minimum meal rations, dirty beds, linen, and clothing, lack of outdoor exercise, and no mirror, towel, or wash cloth. Exhibit 1 to Appellant's Petition for Habeas Corpus and PCRA Relief. Trial counsel complained that Appellant was always in the Restrictive Housing Unit (RHU), and was more difficult to access, NT. 10/30/06, pp. 143-44. However, counsel did meet with Appellant and has not made a claim that they were unable to confer or that his ability to defend his case was impacted in some way. Twice, Appellant requested that he be returned to SCI-Greene, and both times, the Court entered an order for his return. N.T. 10/30/06, p. 144, 148-49.N.T. 12/13/06, p. 32.

***4** Appellant was advised to address these concerns with the President Judge or the prison. N.T. 10/30/06, p. 145;N.T. 1/31/07, p. 273. Trial counsel in fact did send a letter to the President Judge on February 1,2007, complaining of the conditions, especially Appellant's inability to sleep due to noise. Exhibit 2 to Appellant's Petition for Habeas Corpus and PCRA Relief. Then President Judge Heckler responded on February 5,2007, indicating that he had checked with the prison and was satisfied that, while the RHU may be a less than ideal lodging, it is not a place where sleep is impossible as a result of continuous din." Exhibit 2 to Appellant's Petition for Habeas Corpus and PCRA Relief.

At the PCRA hearing on May 23, 2012, trial counsel stated that he took several actions in response to Appellant's complaints. N.T. 5/23/12, p. 71. First, he called the Department of Corrections in Harrisburg to request that Appellant be removed from death row. *Id.* When that was unsuccessful, he called the ACLU to see if that organization could provide additional assistance. *Id.* at 72. Next, trial counsel brought up the issues Appellant was having to Clifton Mitchell, a local corrections official. *Id.* at 73. Ultimately, trial counsel believed the issue was being addressed by Mr. Mitchell, and he stated that he "did not think it was as big a deal ... as maybe [Appellant] thought it was." *Id.* at 76.

A petitioner has the burden of proof for a PCRA claim and must plead and prove ineffective assistance of counsel by a preponderance of the evidence. 42 Pa.C.S.A. § 9543(a)(2)(ii). *Com. v. Pierce* lays out a three-part test for PCRA ineffective assistance of counsel claims: (1) the claim must have arguable merit; (2) counsel must have lacked any reasonable basis for his/her action or omission; and (3) the defendant must have been prejudiced by counsel's conduct 527 A.2d 973,976-77 (Pa. 1987). The test does not employ a hindsight evaluation of the record and docs not consider whether other alternative courses of action were more reasonable. *Com. v. McNeil*, 487 A.2d 802, 805 (Pa. 1985), *citing Com. ex rel. Washington v. Maromy*, 235 A.2d 349,352-53 (Pa. 1967). Where trial counsel's decisions had a reasonable basis, the balance tips in favor of finding effective assistance. *Id.* at 805-06.

Appellant argues that his counsel was ineffective because he did not request an evidentiary hearing on the matter. Further, trial counsel did not further detail how the adverse conditions at the RHU precluded adequate representation. Finally, trial counsel was ineffective for not filing a petition for a writ of *habeas corpus*, alleging Eighth and Fourteenth Amendment violations.

Appellant's argument fails to establish ineffective assistance of counsel. Firsts trial counsel had a reasonable basis for the actions taken. He brought Appellant's complaints to the attention of Mr. Mitchell and the President Judge, The complaints generally dealt with issues of personal comfort, such as ability to sleep, the quality and amount of food, cleanliness of the surroundings, and access to exercise. Although trial counsel mentioned on one occasion, he had "some difficulty" meeting with Appellant, he was not prevented from doing so. N.T. 10/30/06 at 143-44. Appellant presented no evidence that conditions interfered with preparations for trial. Thus, trial counsel had no reasonable basis to pursue the matter further.

Trial counsel's failure to request a hearing or file a *habeas* petition did not prejudice Appellant. Appellant has failed to demonstrate that a change in Appellant's living conditions would have made a difference In the outcome of either the guilt or penalty phases of the trial. Because Appellant has not shown that the failure to take further action with regard to Appellant's complaints about living conditions prejudiced the outcome, his claim fails.

B. Were trial counsel ineffective for failing to renew and litigate a motion for change of venue or venire despite the fact that the community and jury pool had been saturated with highly prejudicial publicity in violation of Petitioner/Appellant's right to an impartial jury and due process under the Sixth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Pennsylvania Constitution?

***5** Appellant provides no evidence that even a single juror was influenced by pretrial publicity and fails to show that such publicity had any prejudicial effect Therefore, Appellant's counsel were not ineffective in failing to renew a motion for change of venue, and the claim is without merit.

In the early stages of *voir dire*, the Commonwealth briefly described the facts of the case, and the Court asked members of the jury panel if any had heard anything about the case. N.T. 1/29/07, p. 29. Only eight of sixty responded affirmatively. *Id.* During individual *voir dire*, prospective jurors were again asked about prior knowledge of the case because it had received some recent media attention. They were also asked if they read newspapers, how they got their news, what types of television shows they watched, and what types of books they read. N.T. 1 /29/07, pp. 56-60. Prospective jurors were dismissed if they knew that the case was a retrial. *See*, e.g., N.T. 1/29/07, pp. 264-95; N.T. l/30/07,pp. 151-62.

The only juror with any prior knowledge of the case was juror number 12. On the day before jury selection, a co-worker brought up the case in vague terms. N.T. 1/31/07, pp. 65-83. The co-worker mentioned that he went to high school with and used to bum cigarettes from Appellant and that it was a gruesome crime. *Id.* at 65-68. However, juror number 12 was unaware of how old the case was or anything that had happened previously, and he did not have any preconceived ideas about whether or not Appellant should be found guilty of first degree murder. *Id.* at 66,68. Juror number 12 agreed not to have any conversations with the co-worker during the trial and not to discuss the case with anyone. *Id* at 82.

At the PCRA hearing on May 23, 2012, trial counsel made the following statements regarding a renewed motion for change of venue;

***Cross Examination of Mr. Kerrigan*:**

Q. Now, Mr. Kerrigan, you discussed briefly on direct examination the motion that you and Mr. Williams raised for a change of venue —

A. Yes.

Q. — in this matter. And during your voir dire of the prospective jurors, is it—do you recall questioning, you or Mr. Williams, questioning jurors about if they knew any facts about the case?

A. Yes.

Q. And is it fair to say, Mr. Kerrigan, that if you had fell that jurors were giving answers which indicated they couldn't be fair and impartial or they knew too much about the case and couldn't set that aside, you would have raised that issue to the Court?

A. I would ask them to be stricken for cause.

Q. And is it fair to say that if you felt that it was overwhelming, that you were just getting juror upon juror who was answering in such a fashion, you would have renewed a motion to change venue because you were of the belief that you could not seat a jury?

A. Yes.

N.T. 5/23/12, pp. 106-07.

***Direct Examination of Mr. Williams*:**

Q. You did not renew a change of venue motion prior to trial. Is that correct?

A. That is correct.

Q. And did you have any strategic or tactical reason for not doing so?

A. My recollection, I'm not a hundred percent clear on it, is at that point we were ready to go forward, we didn't think it would he granted, and we thought it was a waste of time.

N.T. 5/23/07, p. 144,

A change in venue is compelled whenever a trial court concludes a fair and impartial jury cannot be selected from the residents of the county where the crime occurred *Com. v. Briggs*, 12A.3d291,313-14(Pa.20n). Pre-trial publicity will be presumed to have been prejudicial if the defendant is able to prove that the publicity was sensational, inflammatory, and slanted toward conviction, rather than factual or objective; that such publicity revealed the defendant's prior criminal record, if any, or referred to confessions, admissions, or reenactments of the crime by the defendant; or that *it* was derived from official police and prosecutorial reports. *Com. v. Karenbauer*, 715 A.2d 1086,1092 (Pa, 1998). Even if the defendant proves the existence of one or more of these circumstances, a change of venue or venire is not warranted unless he or she 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 insufficient time has passed between the publicity and the trial for any prejudice to have dissipated. *Id.*

***6** Further, a defendant generally must show that the publicity "caused actual prejudice by preventing the empanelling of an impartial jury." *Briggs* at 313.

The mere existence of pretrial publicity alone, however, does not constitute actual prejudice. Simply because prospective jurors may have heard about a case through media reports does not render them incapable of jury service, since, in today's "information age," where news of community events are disseminated virtually instantaneously by an ever multiplying array of delivery methods, it would be difficult to find 12 jurors who do not at least have some knowledge of the facts of an important and tragic incident like this one,

Id. at 313-14, *citing Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). Therefore, the question is not whether prospective jurors have knowledge of the crime being tried, or have even formed an initial opinion based on the news coverage they had been exposed to, but, rather, whether it is possible for those jurors to set aside their impressions or preliminary opinions and render a verdict solely based on the evidence presented to them at trial, *Briggs at 314* (internal citations omitted). If the Court is satisfied that an objective, open-minded jury can be selected from the members of the community exposed to the publicity it need not grant a change of venue. *Com. v. Smith*, 433 A.2d 489, 493 (Pa. Super. 1981).

Counsel were not ineffective in failing to renew the motion for change of venue. The defense made a reasonable, tactical decision that they would be able to identify jurors that had been exposed to pretrial publicity and request that they be stricken for cause. Indeed, appropriate jurors were selected. Trial counsel also testified that, had knowledge of the case been pervasive

in the venire, they would have renewed the motion for change of venue. They acted reasonably in relying on individual voir dire to identify potential jurors with prior knowledge of the case. Appellant has not met his burden of showing trial counsels' actions were unreasonable.

Further, Appellant can demonstrate no partiality of any juror, and he was not prejudiced by any pretrial publicity. Only eight of sixty in the venire had even heard of the case. Only one selected juror had prior knowledge; however, he did not learn anything other than the fact that it was a gruesome case. Knowledge of the case was limited within the venire. It was not so extensive, sustained, and pervasive that the community was saturated by it. In fact, counsel from both sides minimized the exposure further by entering a stipulation on October 30,2006, that neither side would speak to the media. N.T. 10/30/06, p. 6-8. Appellant did not meet his burden of showing how pretrial publicity or prior knowledge of any selected juror prejudiced the outcome. Renewing the motion for change of venue would have been fruitless, and this Court would have had no basis to grant such a motion. Therefore, counsel were not ineffective,

C. Were trial counsel ineffective for failing to adequately voir dire or life qualify the jury in violation of Petitioner/Appellant's Sixth and Fourteenth Amendment rights to a fair and impartial jury under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

***7** Each juror was life qualified and none of the selected jurors gave answers that would suggest they could not be fair and impartial. The Court asked each potential juror the following:

Is there anything in your beliefs that would make it impossible for you to impose the penalty of life imprisonment if it was warranted under the law and the evidence?

Is there anything in your beliefs that would make it impossible tor you to impose the death penalty if it was warranted under the law and the evidence?

NT. 1/29/07; NT, 1/30/07; NT. 1/31/07. Further, trial counsel specifically asked each potential juror individually if he or she had any preconceived notion regarding the death penalty and life imprisonment. Trial counsel then discussed with each the requirement of weighing mitigating and aggravating evidence in order to decide upon a proper sentence. The following is a typical exchange between trial counsel and a potential juror:

MR. WILLIAMS (trial counsel): Sir, you understand that you have to, first, make the decision as to whether or not Mr. Laird's guilty of first degree murder. It's only if you come to that conclusion as a juror that you reach the penalty phase. You understand that?

PROSPECTIVE JUROR NO. 4: Yes

MR. WILLIAMS: You may hear evidence of mitigation. That is evidence including Mr. Laird's character, background and other circumstances of the offense, which could provide you with the basis to spare his life. Do you understand that?

PROSPECTIVE JUROR NO. 4: Yes, I do

MR. WILLIAMS: You may also hear evidence of aggravation. That is circumstances that the legislature has decided that are factors that you can use to determine whether or not he should receive the death penalty. Do you understand that?

PROSPECTIVE JUROR NO. 4: Yes, I do

MR. WILLIAMS: If you reach that point in time you have to weigh those aggravators and the mitigators to decide what the penalty would be. You understand that?

PROSPECTIVE JUROR NO. 4: Yes, I do

MR. WILLIAMS: Is there any reason to believe you could not do that?

PROSPECTIVE JUROR NO. 4:I don't think so

MR. WILLIAMS: Do you understand just because you have found Mr. Laird guilty of first degree murder doesn't necessarily mean that the death penalty has to be imposed?

PROSPECTIVE JUROR NO. 4: Yes, I do

MR. WILLIAMS: Can you tell me what your attitude towards the death penalty is?

PROSPECTIVE JUROR NO. 4: (No response.)

THE COURT: Do yon have any beliefs about the death penalty that would bear on your ability to decide this case?

PROSPECTIVE JUROR NO. 4: No, I don't

MR. WILLIAMS: I'm sorry, you said, no, you don't?

PROSPECTIVE JUROR NO. 4:I do not

MR. WILLIAMS: Do you have any specific attitudes concerning life imprisonment that would make it impossible for you to be fair?

PROSPECTIVE JUROR NO. 4: I do not have

N.T. 1/29/07, pp. 73-75.

The defendant bears the burden of showing that the jury was not impartial. *Com. v. D' Amato*, 856 A.2d 806, 814 (Pa. 2004), *citing Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). A defendant must be permitted, on request, to ask life-qualifying questions during *voir dire*. *Morgan v. Illinois*, 504 U.S. 719, 736 (1992); *Com*, v. *Speight*, 854 A.2d 450, 459 (Pa. 2004). However, counsel is not required to ask these questions. *Com. v. Bond*, 819 A.2d 33, 50 (Pa. 2002). Failure of counsel to ask life-qualifying questions does not constitute ineffectiveness absent a showing that counsel's overall performance led to the seating of a jury which was not fair and impartial. *D'Amato*, at 814, *citing Com. v. Morris*, 684 A.2d 1037, 1043 (Pa. 1996). Further, "the mere fact that counsel may not have posed the specific question as to whether a prospective juror would vote for a sentence of life imprisonment in an appropriate case does not justify the conclusion that counsel failed to assure that a fair and impartial jury was selected." *Com. v. Jermyn*, 533 A.2d 74, 87 (Pa. 1987),

***8** Trial counsel was not ineffective in failing to life qualify potential jurors. In fact, all jurors were life qualified. First, the Court specifically asked each prospective juror: "Is there anything in your beliefs that would make it impossible for you to impose the penalty of life imprisonment if it was warranted under the law and the evidence?" Second, trial counsel engaged in exhaustive exchanges with potential jurors, emphasizing the need for them to consider mitigating and aggravating factors in determining whether the death penalty or life imprisonment was appropriate and determining whether each had any preconceived beliefs about the death penalty,

Further, even assuming that trial counsel failed to ask proper life-qualifying questions, Appellant has failed to show that the jury impaneled was not impartial. Appellant did not question trial counsel or present any evidence at the PCRA hearings on this issue. Appellant raises no factual basis to support an assertion that any juror was not able to impartially carry out his/her duties. The record is devoid of evidence showing any juror had a bias or prejudice that would have prevented him/her from following *the* law when imposing a sentence. Therefore, even if trial counsel erred, no prejudice occurred, and Appellant fails to demonstrate ineffective assistance of counsel on this basis.

D. Were trial counsel ineffective for failing to renew and litigate a motion to exclude evidence of Petitioner/ Appellant's prior convictions in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

Appellant's prior convictions would properly have been admissible (had he testified), and trial counsel were not ineffective for failing to renew a motion to exclude. Appellant argues that 1) had trial counsel renewed the motion, the evidence would have been excluded, and 2) that Appellant then would have testified in his own defense.

Appellant had convictions for Theft in 1984, Theft and Receiving Stolen Property in 1986, and Receiving Stolen Property in 1987. Prior to trial, the Commonwealth filed a motion to admit Appellant's *crimen falsi* convictions, and Appellant, in turn, filed a motion to exclude. The Court held that the convictions would probably be admissible if Appellant testified; however, the Court deferred a definitive ruling until after the Commonwealth's case in chief, encouraging Appellant to renew his morion at that time. N.T. 12/13/06, Appellant chose not to do so and did not testify.

Pa.R,E. 609 [1] slates:

Impeachment by evidence of conviction of crime

a) For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, shall be admitted if it involved dishonesty or false statement

b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect

In *Com. v. McEnany, 732* A.2d 1263, 1270 (Pa. Super. 1999), the Superior Court ruled that the trial court properly permitted the Commonwealth to introduce the defendant's prior conviction for impeachment purposes, when the second trial was held more than ten years after the prior conviction. In *McEnany*, the defendant had been convicted of receiving stolen property on April 25, 1986, but was never incarcerated for the offense. He was convicted of second degree murder and related offenses in 1993 and was incarcerated for those convictions on October 19, 1993. On November 9,1995, his sentence was reversed and the Court remanded the case for a new trial. His second trial was in September 1997. Therefore, 11 years and 4 months had passed since his 1986 conviction. The Court held that the time the defendant spent in prison following his 1993 conviction should not count toward the passage of the ten-year period during which the appellant's 1986 conviction was per se admissible to impeach Ids credibility. *McEnany* at 1271.

***9** The relevancy of the dishonest act is expiated only by the passage of ten uninterrupted years of freedom; the time spent in confinement for the offense does not count in the passage of the ten-year impeachment period. The necessary implication is that time spent in confinement, without normal opportunity to commit additional criminal offenses, does not demonstrate rehabilitation.

Id at 1270, *citing Com. v. Jackson*, 585 A2d 1001,1003 (Fa. 1991). The Court further stated that the defendant "should not reap the benefit of precluding, at his retrial, evidence that was unquestionably admissible in his first trial, simply because he took an appeal." *Id.*

First, Appellant's first trial in 1988 occurred well before the ten-year period had expired from his last *crimen falsi* convictions (1984, 1986, and 1987). Therefore, because they were admissible at his first trial, he should not benefit simply because of the appeal. Second, Appellant was incarcerated continuously since 1988. As stated by *McEnany* and *Jackson, supra*, the rationale behind the rule is that the passage of time demonstrates rehabilitation of one's credibility. Appellant has been continuously confined. Thus, he did not demonstrate rehabilitation with the passage of time because he did not have a normal opportunity to commit additional *crimen falsi* offenses. He had not had ten uninterrupted years of freedom, and the prior convictions were properly admissible under Pa.R,E. 609.

Alternatively, the probative value of the convictions outweighed the prejudicial effect. The Court must weigh 1) the degree to which the prior offense reflects upon Appellant's veracity; 2) the degree to which the prior offenses tended to smear Appellant or suggest a propensity to commit murder; 3) the age and circumstances of Appellant; 4) the strength of the Commonwealth's case and the ability of the defense to present its case through other witnesses; and, 5) the availability of other means of impeachment. *Com. v. Roots*, 393 A.2d 364 (1978); *Com. v. Randall*, 528 A.2d 1326 (1987).

At a pretrial hearing on December 13.2006, the Court found that Appellant's prior offenses were crimes involving dishonesty and reflected on the veracity of Appellant as a witness. N.T. 12/13/06, pp. 2-3. Further, the offenses did not have an overwhelming tendency to smear Appellant's character or suggest a propensity to commit the crime. They were for Theft and Receiving Stolen Property and were totally unrelated to the first degree murder charge. Appellant was an adult when he was convicted of these crimes. Id. at 4. The Court stated that the convictions, with the exception of the 1985 summary theft of July 31,1985, probably met the criteria and were admissible. *Id* at 6. The Court reserved ruling on prongs 4) and 5) of the *Roots* test and stated the defense was free to renew an objection at the conclusion of the Commonwealth's case. *Id.*

Ultimately, the defense chose not to renew the objection. At the PCRA hearing, trial counsel explained the trial strategy:

Q. Okay, So did you have any strategy or tactic for not making sure that those convictions wouldn't come in in the event that he decided to testify?

A. I think the whole trial was set up with the understanding that he wasn't going to testify, and I think he was, you know, fully onboard with that, and the thought of making — renewing a motion that had already been denied, which was — which was moot because he wasn't going to testify, you know, didn't get us anywhere.

***10** N.T. 5/23/12, p. 84.

A claim of ineffective assistance of counsel exists where the underlying argument/tactic/issue is of arguable merit, there is no basis for counsel's actions, and such action prejudiced Appellant. First, the convictions were admissible had Appellant testified; thus, renewing the motion would not have succeeded. Second, a reasonable basis existed for trial counsel's decision not to renew the motion. It was quite reasonable to forgo renewing the motion, because as trial counsel explained, "the whole trial was set up with the understanding that [Appellant] wasn't going to testify." *Id*

At Appellant's first trial in 1988, he testified in great detail regarding the offense, which was inconsistent with the strategy in 2007 of having a diminished capacity and no memory of the events. N.T. 5/18/88, pp. 547-91. During that testimony, Appellant testified in great detail about the murder, claiming that Frank Chester killed Anthony Milano. He said he recalled seeing Mr. Mikno's blood spurting on him, hearing a gurgling noise, and running some distance with Mr. Chester to a friend's apartment *Id.*

Appellant's strategy at the prior trial was to deny the killing, asserting that it had been Mr. Chester alone. That strategy and testimony was inconsistent with a diminished capacity defense. Thus, it was a reasonable strategy to advise Appellant not to testify at his second trial in. 2007 so that he would not be subject to cross examination regarding his prior testimony. In comparison, being confronted with prior *crimen falsi* convictions would have been insignificant. The risk of being confronted with Appellant's prior testimony was greater than any risk posed by the prior convictions. Furthermore, Appellant presented no evidence that he ever told trial counsel he wanted to testify. Nor did he so testify at the PCRA healing. Therefore, Appellant fails to show that trial counsel's failure to renew the motion was unreasonable.

Finally, even if counsel erred, it did not prejudice Appellant because he has not shown he would have testified at trial if the Court had ruled in his favor. Furthermore, the convictions were admissible under the law. The Appellant failed to meet the burden of showing trial counsel were ineffective.

E. Were counsel ineffective for failing to impeach Commonwealth witnesses with prior inconsistent statements and/or evidence of their bias, interest or motive in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

Appellant argues that trial counsel were ineffective in failing to impeach four Commonwealth fact witnesses. The crux of the claim is that these witnesses either did not remember, or downplayed, the level of intoxication of Appellant on the night of the murder. Appellant argues that trial counsel should have confronted these witnesses with statements at prior hearings, where testimony was perhaps more favorable to Appellant. However, Appellant fails to meet his burden of proving by a preponderance of the evidence that trial counsels' actions were unreasonable and that but for trial counsels' supposed failures, there is a reasonable probability that the outcome would have been different.

***11** At the PCRA hearing, Mr. Kerrigan (trial counsel during the guilt phase) testified that part of Ms strategy was demonstrating extreme intoxication by eliciting such testimony from as many witnesses that night as he could. NX 5/23/12, pp. 16-18; 38-70. Trial counsel did in fact elicit substantial testimony about the amount of alcohol consumed, and did argue in closing that Appellant was highly intoxicated at five times the legal limit with a BAC of 0.45 percent. N.T. 2/9/07, pp, 19. He also argued that the Commonwealth had not disproven that Appellant had suffered a blackout during the killing. N.T, 2/9/07, pp. 9. Trial counsels' actions were reasonable and Appellant fails to demonstrate a reasonable probability mat the outcome would have been different had trial counsel impeached the witnesses as suggested.

1. Testimony of Alan Hilton

Commonwealth witness Alan Hilton provided testimony regarding his observations of Appellant on the night of the murder. Mr. Hilton was a friend of co-defendant Frank Chester. A small group of individuals, including Mr. Hilton, began the night at Frank Chester's apartment, then traveled to Appellant's apartment before proceeding to a local bar, the Edgely Inn. N.T. 2/6/07, pp. 22-23. Mr. Hilton testified that Appellant was drinking beer and maybe shots between 10:30 and 11:30 PM. *Id.* at 43. At the 1988 trial, Mr. Hilton testified that Appellant was drinking “beer and a couple of shots.” N.T. 5/17/88, p. 277. However, in response to the question, “did they seem drunk, [Appellant] and Chester,” Mr. Hilton replied, “no.” N.T. 5/17/88, p. 263.

Appellant argues that trial counsel should have confronted Mr. Hilton with testimony from the first trial in 1988 about the amount of Appellant's alcohol consumption, In addition, Appellant argues that trial counsel also should have used a statement Mr. Hilton made to Bucks County Public Defender's Office investigator Joseph Stark in an interview on January 5,1988. When discussing Frank Chester's and Appellant's drinking on the night of the murder, Mr. Hilton used the phrase, “they were getting shit faced.” Appellant's PCRA Petition, 9/19/11, Exhibit 5.

Appellant does not meet his burden of establishing that trial counsels' actions were unreasonable. On cross examination, Mr, Hilton testified that Appellant was drinking beer and maybe shots. Trial counsel stated that he did attempt, albeit unsuccessfully, to contact Mr, Stark by calling a former law office where Mr. Stark worked, N.T. 5/23/12, pp. 46-47, Mr. Stark testified that in late 2006 and early 2007, although he was a licensed attorney, he had some personal struggles and did not maintain anoffice. *Id.* at 212-13. He farther stated that due to those struggles, he may not have returned phone calls or responded to contacts. *Id.*

Trial counsel admitted that the "shit faced" comment could have been useful. N.T. 5/23/12, p. 47. However, trial counsel also further commented on his presentation of Appellant's intoxication:

When you got a bartender that says I served him 200 ounces of beer, and that was only the time when I was there, I don't know when he was drinking before I got there, and he got a six pack or two six packs to go and he was drinking shots, et cetera, et cetera, I think the jury got the idea that he was, you know, pretty well intoxicated. And the fact that I may have not gotten Hilton to say he was drinking, and I don't even recall - I'm sure I asked Hilton if he was drinking, I'm sure I asked everybody that was around if he was drinking, but I'm sure the jury got the picture that he had a tremendous amount to drink that night.

Id at 49, Trial counsels' actions were not unreasonable based on the totality of the evidence presented regarding Appellant's intoxication - that he drank approximately one ease of beer, at least one to two pitchers of beer, probably shots, and that his estimated BAC was 0.45 percent.

***12** Even if trial counsel had no reasonable basis for failing to confront Mr. Hilton with the prior statements, Appellant failed to meet his burden of showing that there was a reasonable probability that the outcome would have been different.

2. Testimony of Gale Gardner

Commonwealth witness Gale Gardner testified that she was a friend of Frank Chester. On the night of the murder, she was wilh Mr. Chester and Appellant briefly at the bar, and she slept on Appellant's couch. RT. 2/7/07, p. 30. The testimony focused on her observations of and conversations with Frank Chester and Appellant that night and the next day.

Appellant argues that trial counsel failed to confront Ms. Gardner with testimony from Appellant's first trial about how much she saw Appellant drink. However, this argument is meritless. Trial counsel did cross examine Ms. Gardner about her prior testimony, and ultimately, she admitted that Mr. Chester and Appellant had two cases of beer. *Id.* at 53-56. In addition, the police statement that Appellant asserts should have been used for impeachment also contained a statement about Appellant's clothing being soaked in blood as he came into his apartment N.T, 5/23/12, pp. 54-56. Although Counsel did not recall what his specific strategy was at the time, he stated would have been concerned about the "soaked in blood" statement. *Id* at 55-56.

Second, Appellant argues that trial counsel failed to develop and confront Ms. Gardner with the fact that she was on probation in Florida. Appellant alleges that Ms. Gardner's supervision status somehow provided a motive for her to testify favorably for the Commonwealth. It is clear that a witness may be questioned about pending charges. However, here Appellant fails to develop a connection between Ms. Gardner's legal status and any motive to falsify or color her testimony. Therefore, the argument is meritless, as Ms. Gardner's testimony in this case was completely unrelated to her probation in Florida,

The defense elicited evidence about intoxication, and Appellant has failed to show that counsel was ineffective in any way or that the outcome would have been different.

3. Testimony of Jolanda Thompson

Appellant's claim regarding Ms. Thompson's testimony also focuses on her observations of Appellant's alcohol consumption. Ms, Thompson stopped by the bar after work for a sandwich and remained there from approximately 11:30 P.M. to 1; 00 A.M,

N.T. *2/5/07*, pp. 166-68; 172-73. Ms. Thompson's testimony at trial was that "everybody was drinking on the other side [at the bar]." N.T. 2/5/07, pp. 173-74. In addition, she stated that "[t]hey were partying on the other side of the bar." *Id.* at 175. Appellant argues that trial counsel should have confronted Ms. Thompson with a prior account of the evening given to the Bucks County Public Defender's investigator, Joseph Stark. Ms. Thompson told Mr. Stark that Appellant and Mr. Chester were drinking shots and beer and that Mr, Phillips, the bar owner, told her not to say that Mr, Chester was drunk because he was underage. Appellant's PCRA Petition, 9/19/11, Exhibit 11. As discussed, *supra*, trial counsel attempted unsuccessfully to contact Mr. Stark, who was going through some personal struggles at the time.

Appellant fails to show that trial counsel acted unreasonably. This independent witness' observations regarding this narrow window of time were consistent with the defense of intoxication. Furthermore, Appellant has failed to show counsel had no basis for the strategy used or that the verdict would have been different.

4. Testimony of James Phillips, Jr.

***13** Appellant argues that trial counsel were ineffective for failing to confront Mr. Phillips with prior testimony regarding the amount of alcohol consumed by Appellant on the night of the murder. Further, Appellant argues that trial counsel should have confronted Mr, Phillips with a perceived motive to lie because of the bar's potential civil liability. Mr. Phillips testified that Appellant and Mr, Chester had approximately three pitchers while he was tending bar between 10:30 PM and 2:00 AM. N.T. 2/5/07, p. 210. In addition, he testified that Appellant ordered himself a shot of vodka, Mr. Chester a shot of Jack Daniels, and Mr. Milano a shot of Sambuka *Id.* at 203. At a pretrial hearing in 1988, Mr. Phillips estimated thai Appellant had approximately two to three shots. N.T. 1/26/88, p. 33. In addition, Mr. Phillips previously estimated he had served them three pitchers after he arrived and he had seen an additional empty pitcher, 1/26/88, p. 30. Trial counsel did not confront Mr. Phillips with his testimony from 1988.

Considering the record as a whole, trial counsels' strategy with Mr. Phillips was reasonable. In closing, trial counsel sought to discredit Mr. Phillips' testimony by arguing the bias of a bar owner against admitting that a patron was intoxicated:

I'm part of the ownership. My parents own this bar. I now own it. And nobody in my bar is intoxicated because it's against the law for somebody to be intoxicated, for me to serve an intoxicated person. So therefore they can't be intoxicated. That's what he said, something to that effect, He didn't say I can't serve if they're intoxicated, he said they weren't intoxicated.

N.T. 2/9/07, p. 30. Trial counsel also challenged Mr. Phillips' credibility based on his other actions that evening:

He served [pitchers] to two people he should have been flagging out of there. Get them out of there. They were yelling and screaming and hollering. They're doing a kick boxing exhibition in part of the corner of the bar according to one of the witnesses. lle allowed Laird to throw a shot glass, bang a shot glass off of the bar. This is the kind of behavior that they should have been out of there. He was hollering, boisterous. He was a bully according to Phillips and Phillips only seen him once before and referred to him as a bully. He was screaming at people shooting pool. The bartender was allowing underaged drinking, not only underaged drinking in the form of Frank Chester who was twenty years old at the time but there was an eight-or nine-or ten-year-old kid in that bar drinking. He had a shot glass. What bartender or owner or whatever doesn't say what is this kid doing in the bar, first of all? And what is he doing with a shot glass? I mean, this is what we're dealing with [sic] with Mr. Jim Phillips.

Id at 30-31. Trial counsels' strategy was to discredit Mr. Phillips while emphasizing the high alcohol consumption based on other testimony. In fect, Appellant's toxicologist, Dr. Gary Lage, testified that based on the estimated amount of alcohol consumed by Appellant (one case of beer, one and a half 64-ounce pitchers of beer, and one shot of Jack Daniels), his blood alcohol content would have been 0.45 percent. N.T. 2/8/07, p. 28. Further, Dr. Lage stated that a BAC of 0.45 would result in severe effects, with the possibility of black outs and coma. *Id.* at 30-34.

The defense presented multiple sources of evidence to establish Appellants' level of intoxication. Trial counsel did in fact confront Mr. Phillips regarding his actions and potential motive to lie and argued that his actions were questionable.

Even if trial counsels' strategy was unreasonable, the failure to confront Mr. Phillips did not prejudice Appellant. Confronting turn with the amount of alcohol served to Appellant that evening only stood to gain a trivial increase - from three to four pitchers and from one to two or three shots. Compared to the other testimony admitted (one case of beer, one and a half 64-ounce pitchers of beer, and one shot of vodka), such an increase would have been insignificant. Further, cross examination established the potential bias of Mr. Phillips. He admitted his parents owned the bar in 1988 and mat he owned the bar in 2007. Additional cross examination on this issue would not have further assisted Appellant, as trial counsel did, in fact, argue such bias in closing. Appellant failed to meet his burden of showing that further cross examination about the amount of alcohol served by Mr. Phillips and his potential bias had a reasonable probability of changing the outcome.

F. Were counsel ineffective for failing to introduce medical records and police reports which supported Petitioner/Appellant's diminished capacity defense in violation of Petitioner/Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution and the corresponding portions of the Pennsylvania Constitution?

***14** Appellant claims his Fifth, Sixth, and Fourteen Amendment rights were violated, because "counsel was ineffective at trial for failing to introduce documentation supporting a diminished capacity defense, including medical records and police reports."[2] Appellant's PCRA Petition, 9/19/11. Specifically, Appellant argues that trial counsel "unreasonably failed to present these records at trial and/or through the defense experts who testified to [Appellant's] capacity at the time of the offense. Counsel's failure prejudiced [Appellant], where the sole issue at the guilt phase of his trial was whether [Appellant's] intoxication and brain damage diminished his capacity to form specific intent." Appellant's PCRA Petition, 9/19/11.

PCRA hearings were held on May 23-24, June 19, and September 14,2012. During the evidentiary hearings, PCRA counsel attempted to introduce various medical records dated November of 1979 through November of 1985 from Lower Bucks Hospital and Delaware Valley Medical Center.[3] The copies of the records provided are in part illegible and unreadable. PCRA counsel did not produce a records custodian or the surviving radiologist mentioned in some records from Lower Bucks Hospital, Phillip S. Brackin, M.D., to authenticate the documents. Instead, PCRA counsel sent the Commonwealth a letter in which a representative of Aria Health states "This is to inform you that the medica] records for patients treated at Delaware Valley Medical Center have been destroyed in accordance with PA Statute 28 Section 115.24."[4] Although PCRA counsel was unable to authenticate the medical records and the Commonwealth objected to their admission, this Court admitted the records for the purpose of the PCRA hearing due to the extraordinary nature of the death penalty. PCRA Petitioner Vol. I, pp. 74-175.

At the conclusion of the hearing on September 14, 2012, this Court stated that it would enter an Opinion and Order regarding the admissibility of the medical records after counsel filed briefs. On October 26,2012, Appellant filed a "Memorandum Regarding Relevance and Admissibility of Medical and Military Records." On November 9, 2012, the Commonwealth filed a "Memorandum of Law in Opposition the Medical and Military Records Proffered as Evidence by Petitioner." On December 6, 2012, this Court ordered the defense to identify the specific references to "the medical history of prior head injuries" within the medical records. On December 13, 2012, the defense filed a letter with this Court and identified the following records and attached copies of said records:

The records indicate that on November 6, 1979, [Appellant] presented to Delaware Valley Medical Center Emergency Room with complaints of head pain and nausea after being hit in the head during a fight. On September 19,1983, [Appellant] was admitted to Delaware Valley Medical Center for treatment of a fractured right arm and right leg, and skull fracture. At that time, the medical personnel noted in the patient history, "pt. also admits to past hx of head trauma."

***15** Appellant's claim for ineffective assistance of counsel fails. First, Appellant never demonstrated how the medical records would be admissible at trial. Second, even assuming that the medical records were admitted at trial, it would not have affected the outcome. At trial, the jury heard the testimony and argument about Appellant's head injuries and diminished capacity. Throughout the trial, counsel zealously argued and presented multiple expert witnesses who opined that Appellant had a diminished capacity. During opening and closing statements, trial counsel argued that Appellant was impaired due to a prior skull fracture and intoxication at the time of the crime.

During the guilt phase of the trial, the defense presented three experts to prove that Appellant had a diminished capacity at the time of the murder due to intoxication and brain damage. Specifically, the defense presented Henry L. Dee, Ph.D., an expert in neuropsychology, and Robert A. Fox, Jr., M.D. and John S. O'Brien II, M.D., J.D., experts in forensic psychiatry. NT. 2/8/07, pp. 77,122, 178, These experts referenced and discussed the medical records at issue here, despite the fact that they were not admitted as an exhibit.

The first expert, Dr, Dee, told the jury that he interviewed Appellant and his brother, and he reviewed the discovery, testimony from prior proceedings, prior expert studies and reports about Appellant, and Appellant's medical records. N.T. 2/8/07, pp. 78-79. Dr. Dee also conducted his own neuropsychological evaluation of Appellant, which included multiple tests. NX 2/8/07, pp. 79-80. Dr. Dee concluded that Appellant suffered from chronic brain syndrome with mixed features, and that be found evidence of impaired cognitive function as a result of brain damage. N.T. 2/8/07, pp. 79, 81-83.

Dr. Dee stated that Ids review of Appellant's medical records provided evidence of the possible reasons for the brain damage. In 1981, while fooling around, Appellant fell from the hood of a moving car, which resulted in a skull fracture with the occipital bone and two hospitalizations. N.T. 2/8/07, pp. 83-84. Dr. Dee opined that on the night of the murder Appellant had a diminished capacity because he was suffering from the brain damage that he sustained back in 1981, which impaired his ability to control impulses, as well as his ability to plan and carry out sequential behaviors. N.T. 2/8/07, pp. 84-86. According to Dr. Dee, Appellant's capacity to plan and carry out a specific intent to kill was substantially impaired due to his brain damage and intoxication. N.T. 2/8/07, pp. 88-90, 93-94.

During cross-examination, Dr. Dee said that his “charge was to determine whether or not he had cognitive impairment as consequence of brain damage that might impair anything he did” and concluded that Appellant's ability to plan anything was substantially impaired. N.T. 2/8/07, pp. 93, 101. Dr. Dee explained that “neuropsychological testing is actually more sensitive than an MR1 for the evidence of brain damage” and that anyone who sustains a skull fracture will have permanent brain damage. N.T. 2/8/07, pp. 94-97. He noted that Appellant had suffered a number of head injuries in his childhood and adolescent years, prior to the injury in 1981. N.T. 2/8/07, p. 97

The Commonwealth never disputed the fact that Appellant sustained a head injury in 1981. However, cross-examination explored the possibility for malingering, or “faking bad.” N.T. 2/8/07, pp. 98-99. The prosecutor also questioned Dr. Dee about Appellant's ability to recall the specific details of the crime during the original trial proceedings in 1988. N.T. 2/8/07, pp. 101-12.

The second expert, Dr. Fox, interviewed and evaluated Appellant, interviewed his family members, and reviewed the following materials prior to his examination of Appellant: prior trial testimony, prior proceedings and appeals, medical records, hospital records, and other expert evaluations. N.T. 2/8/07, pp. 123-24, 126. Dr. Fox explained to the jury that Appellant suffered from a number of different psychiatric illnesses: post traumatic stress disorder as a result of childhood abuse, ADHD, organie brain disorder *due* to repetitive head injuries, and chronic use of drugs and alcohol over approximately fourteen years. N.T. 2/8/07, pp. 127-28. Dr. Fox opined that during his evaluation and interview of Appellant he found notable indications of brain damage: disorganized thinking, significant memory impairments, difficulty with executive functioning (decision making and impulse control), permanent problems with memory function, and diminished performance in ability reasoning testing. N.T. 2/8/07, pp. 128-35. Dr. Fox also described Appellant as a drug addict and explained his history of drug and alcohol use dating back to age seven - including, alcohol, amphetamines, marijuana, LSD, and other substances. N.T, 2/8/07, pp. 136-37. Dr. Fox explained

that with Appellant's underlying brain damage and cognitive impairment, the addition of alcohol would have increased the impairment, and Appellant was unable to form a specific intent to kill. N.T. 2/8/07, pp. 143-45.

***16** On cross-examination, Dr. Fox was also questioned about Appellant's previous testimony about the specific details of the crime. N.T. 2/8/07, pp. 150-57. However, Dr. Fox found that Appellant still did not have the specific intent to kill. N.T. 2/8/07, p. 170.

The third expert, Dr. O'Brien testified that based upon Appellant's degree of intoxication, he would have had significant difficulty formulating intent. N.T. 2/807, pp. 179-80. Dr. O'Brien recalled evidence of significant head trauma and brain damage and opined about the impact of alcohol combined with brain damage as follows:

Well, it certainly can change the threshold at which people experience the deleterious effects of an intoxicant such as alcohol. So if you have an individual with the degree of intoxication Mr. Laird had, without brain damage you're still going to expect to see impairment in functioning and cognition. But add the brain damage into the mix and the chances are that the threshold in terms of the sensitivity to those sorts of symptoms or responses to alcohol would change and make the individual more sensitive.

N.T. 2/8/07, pp. 182.

On cross-examination, the prosecutor additionally questioned Dr, O'Brien about Appellant's present memory impairment issues, pointing to his vivid recall of the details of the crime during the 1988 proceedings and the steps he took to conceal his involvement in the crime. N.T. 2/8/07, pp. 189-208. Specifically, at the prior trial, Appellant testified to recalling the following details: calling the victim a “faggot,” dancing in the barroom with his co-defendant, tlirowing a shot glass and then speaking to the bartender, leaving the bar with his co-defendant and the victim, driving down specific roads with the victim as the driver; going to the 7-Eleven store and driving around looking for “reefer,” seeing and hearing the victim being murdered, and running away after the murder and discarding his bloody clothing. N.T. 5/18/88, pp. 547-94.

During the penalty phase, the trial record was incorporated and counsel argued that evidence of Appellant's brain injury could be used as mitigation. N.T. 2/12/07, pp. 21,24,26. The victim's brother testified about two instances in which Appellant sustained a head injury and about Appellant's abuse of drugs and alcohol. N.T. 2/12/07, pp. 84-88.

Indeed, the medical and police records at issue provided no additional information supporting or bolstering Appellant's diminished capacity defense. The jury heard evidence of Appellant's prior head injuries, Trial counsels' strategy was not unreasonable and the outcome would not have been different.

Moreover, if admitted at trial, the medical records also contained information that would not be favorable to Appellant. For example, Appellant gave multiple versions of the fell in 1983. He initially reported to Lower *Bucks* Hospital that he fell off the hood of a moving car and he later reported to Delaware Valley Medical Center that he fell down a hill. Appellant also denied having drug and alcohol abuse issues, was injured previously during a fist fight, refused to cooperate with neurological testing, and left the hospital against medical advice.

The medical records could not be authenticated, and therefore, they were not admissible. However, even if they were admitted, they provide no additional favorable information. For the reasons stated above, Appellant has not met bis burden of showing that an attempt by counsel to introduce the records would have resulted in a different outcome.

G. Were Petitioner/Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution as well as the Pennsylvania Constitution violated when counsel ineffectively failed to move *in limine*, and/or object to the introduction of inadmissible and highly prejudicial testimony? Were counsel also ineffective for failing to move for a mistrial when the jury heard this inflammatory testimony?

***17** Appellant argues that trial counsel were ineffective in failing to move *in limine* and/or properly object to: 1) testimony that Appellant furnished alcohol to a minor; 2) testimony that Appellant made sexually explicit remarks to a seventeen year-old; 3) Frank Chester's former testimony; 4) questioning of the defense expert, Dr. O'Brien, that "contained facts not within the court record"; (5) testimony of other bad acts committed by Appellant and Mark Laird; and (6) Frank Chester's presence in the courtroom for identification by the arresting officer.

1. Testimony that Appellant furnished alcohol to a minor.

At trial, Barbara Sylvia testified that her nine-or ten-year-old son got sick because he was drinking at the Edgely Inn. N.T. 2/6/07, p. 70. Specifically, Ms. Sylvia provided the following testimony on direct examination by the Commonwealth:

Q. What did you do when you were at the bar?

A. My son was there and he had been drinking.

Q. What do you mean by that?

A. He was sick. He was drunk. They had given him alcohol.

[Trial Counsel]; Objection.

THE COURT: Sustained. The jury shall disregard the part that they had given him alcohol. She can testify as to the observation that he was drunk and he was getting sick.

BY: [the Commonwealth]:

Q. Well, did Rick Laird say anything to you about giving him alcohol?

A. Yeah.

Q. What did he say?

A. That they had given it to him, him and Frank.

Q. And what kind of alcohol was it?

A. I don't remember.

Q. When you say your son was sick, what do you mean?

A. He was vomiting.

Q. Were you upset about that?

A. Yes.

Id. at 70-71.

Appellant argues that counsel was ineffective for failing to object to this testimony. At the PCRA hearing, trial counsel stated that he was not "interested in advancing" the fact that Appellant may have provided alcohol to a minor. *Id.* at 123. However, during closing argument, trial counsel used this detail in attacking the bartender, Mr. Phillips', credibility. N.T. 2/9/07, pp. 31-32.

Appellant fails to show that trial counsels' actions were unreasonable. Trial counsel did object initially, although, he did not specifically object on the basis that it was improper bad act, or propensity evidence. Although trial counsel later stated at the PCRA hearing he did not want to advance this evidence, it did give him ammunition to discredit the bartender's testimony. Further, the fact that Appellant may have provided alcohol to a boy advanced the theory that he was extremely intoxicated. The evidence, at least in part, helped advance Appellant's theory. Therefore, Appellant has not met his burden of showing the defense was unreasonable.

Even if trial counsels' actions were unreasonable, Appellant does not demonstrate that the failure to object prejudiced the outcome. With a diminished capacity defense, the only issue at trial was Appellant's intent during the commission of the murder. The fact that he may have provided alcohol to a minor had little bearing in demonstrating Appellant's state of mind at the time of the offense, which occurred much later that night. If anything, it advanced the defense of diminished capacity by demonstrating his level of intoxication. In light of all the evidence, Ms. Sylvia's passing reference to her son drinking carried little, if any, weight. Appellant failed to meet his burden of demonstrating that the outcome would have been different had trial counsel objected.

2. Testimony that Appellant made sexually explicit remarks.

Trial counsel made a reasonable, strategic decision not to object to testimony about Appellant making a sexually explicit remark. Ms. Gardner, who was age 17 at the time, testified that at the Edgely Inn, Appellant stated that he wanted to run his tongue across her teeth. NT. 2/7/07, p. 28. When questioned about the statement at the PCRA hearing, trial counsel answered:

***18** A. I think the only thing I was thinking of it would just show his craziness. I mean here he is, his wife, bis girlfriend is there, and I dunk he said something like -I think he licked her teeth or something like that, did something.

Q. All right.

A. And J think he said you tell my wife this I'll kill you.

Q. Right.

A. How does that hurt me?

Q. Well, so I assume from your answer that you felt that this supported your position of— that he was intoxicated?

A. Yes.

N.T. 5/23/12, pp. 87-88. With a diminished capacity defense resting, in part, on intoxication, this detail fit the overall theme of extreme intoxication. It fit together with other behavior of Appellant at the bar that night: swearing at the police, yelling at patrons, throwing the shot glass, etc. Therefore, Appellant has failed to show that this strategy was unreasonable.

3. Prior testimony of Frank Chester

Next, Appellant claims that trial counsel failed to object on relevancy grounds to Frank Chester's former testimony. He argues that he had conceded his presence, his participation in the crime, and his collusion with Mr. Chester. Therefore, it was

unreasonable for trial counsel not to object to its relevancy. However, the claim is meritless. First, Mr. Chester was subject to extensive cross examination by the District Attorney and Appellant's counsel. Second, with a diminished capacity defense, Appellant's actions and stale of mind during the commission of the offense were highly relevant. The details of Appellant's actions, especially surrounding the murder itself, were highly probative of his mental state. No one, except Mr. Chester, was present during portions of the evening, and he was the only possible source for that information. The fact that Appellant and Mr. Chester ran from the scene, that Appellant took the globe from Mr. Milano's car, that Appellant removed his shirt, that he pinned down Mr. Milano's arms, and much more, tended to indicate that Appellant did not act with diminished capacity. The evidence was relevant and an objection on that basis would have been fruitless.

4. Questioning of the defense expert, Dr. O'Brien, that "contained facts not within the court record."

Appellant argues that trial counsel were ineffective in failing to properly object to particular questions by the Commonwealth of defense expert Dr. O'Brien on the basis that the questions contained facts not within the court record. Specifically, during the cross examination of defense expert Dr. O'Brien, the Commonwealth asked the following:

Q. And you are aware of the fact that Frank Chester and Richard Laird sought to get together in the law library while they were both incarcerated?

A. I thought at least for significant periods of time they were in different facilities.

Q. Well, at some point were you aware that they were not in different facilities and they were attempting to get together in the law library?

N.T. 2/8/07, pp. 204-05. Trial counsel did object, although Dr. O'Brien continued his answer and the Commonwealth followed up without further objection. For the following reasons, Appellant has failed to meet his burden of showing that trial counsel were ineffective.

First, trial counsel did object. Where a petitioner could have raised an issue but failed to do so before trial, at trial, on appeal, or in a prior state post-conviction proceeding, the issue is waived in a PCRA. 42 Pa.C.S. § 9544(b); *Com v. Kagan*, 743 A,2d 390,394-95 (Pa. 1999), *citing Com, v. Lark*, 698 A.2d 43,46 (Pa. 1997). The issue of prosecutorial misconduct or improper questioning could have been raised on direct appeal and is now waived.

***19** Second, Appellant has failed to articulate how the question prejudiced the outcome. "[E]very improper and inflammatory leading question by a district attorney does not necessarily require a new trial." *Com. v. Hoskins*, 485 Pa. 542,403 A.2d 521, 528 (Pa. 1979) (internal citations omitted). The test is whether the effect of the question gave the jurors a fixed, mental bias or hostility against the defendant, so as to corrupt their truth-determining function. *Com. v. Ragan*, 743 A.2d 390, 404 (Pa. 1999). The effect of such questions "depends upon the atmosphere of the trial." *Id, citing Com. v. Stoltzfus*, 337 A.2d 873 (Pa. 1975).

The questions at issue were insignificant in the context of the Commonwealth's entire cross examination of Dr. O'Brien. On direct examination, Dr. O'Brien testified that in his opinion, Appellant, based on his level of intoxication (estimated by another defense expert to have been at 0.45 percent BAC), could not have had the required specific intent for first degree murder. N.T. 2/8/07, pp. 179-80. In preparing his opinion, Dr. O'Brien reviewed an affidavit prepared by Mr. Chester leading up to the first trial in 1988, stating that Mr. Chester observed Appellant stumbling and falling down in the street and that Mr. Chester had to carry Appellant to a friend's house. *Id.* at 203-04. However, Dr. O'Brien admitted that he had not taken into account inconsistent statements made by Mr. Chester at trial. *Id.* at 206.

Further, for his report, he did not consider certain witness testimony and witness statements, the recorded conversation between Appellant and Mr. Chester, and various other pieces of evidence. *Id* at 185-87. The Commonwealth also confronted Dr. O'Brien with Appellant's testimony from his first trial, in which he recalled very specific details about the killing. *Id* at 194-95. Dr.

O'Brien admitted that Appellant had a strategy at a prior proceeding "that he was going to present himself as an individual who had not been as severely intoxicated, could remember things and did not engage in the killing," but claimed it was not reality. *Id* at 194. At trial, the Commonwealth presented a recorded phone conversation between Mr. Chester and Appellant. N.T. 2/6/07, pp. 228-30; Trial Exhibit C-44. Therefore, the jury already knew that Appellant and Mr. Chester had discussed the crime and what steps they should take, even before being arrested.

The questions by the Commonwealth, asserting that the two may have conversed while in pre-trial confinement were not highly prejudicial and likely had little or no impact on the jury. The jury was already aware that Appellant and Mr. Chester discussed plans to avoid liability. Further, the Commonwealth conducted a lengthy cross examination challenging Dr. O'Brien's credibility. Appellant has failed to demonstrate that trial counsel's failure to continue to object to the questions led to any prejudice, and his claim fails,

5. Testimony of other bad acts committed by Appellant and Mark Laird.

Appellant argues that trial counsels' failure to object to testimony regarding improper tags on Appellant's vehicle constitutes ineffective assistance of counsel. At trial, Detective Timothy Carroll testified that he pulled over Appellant's vehicle for having bad tags and that he learned the tag's owner lived at an apartment complex where Mark Laird worked. N.T. 2/6/07, pp. 136-38. Trial counsel during the guilt phase had no questions for Detective Carroll and slated he had no strategy tor failing to object, other than a desire to get a description of Appellant's condition that morning. N.T. 5/23/12, p. 93. However, Detective Carroll offered little or no physical description of Appellant at trial. N.T. 2/6/07, pp. 133-38.

***20** Appellant fails to argue how this evidence prejudiced the outcome of the trial and fails to meet his burden of proof. In light of all the evidence presented, the fact that Appellant had an improper tag on his vehicle is insignificant. Further, Appellant's strategy was a diminished capacity defense. Appellant conceded that he committed the killing. That Appellant had an improper tag had no impact on his strategy of raising diminished capacity. Appellant failed to demonstrate that trial counsel were ineffective for not objecting to the admission of this testimony.

6. Frank Chester's presence in the courtroom for identification by the arresting officer.

Appellant argues that trial counsel were ineffective for failing to object to Mr. Chester's brief presence in the courtroom for the purpose of identification by the Commonwealth's witness. Detective Robert Potts. The Commonwealth called Mr. Chester at trial, and outside the presence of the jury, he asserted his Fifth Amendment right against self incrimination. N.T. 2/7/07, pp. 14-15. He then remained in the courtroom, escorted by sheriff's deputies, for a portion of Detective Potts' testimony so that Detective Potts could identify him as one of the two individuals arrested for the killing of Mr. Milano. *Id.* at 16. During deliberations, the Court addressed the following question by the jury:

Question: "Should any significance be attached to the fact that Frank Chester was brought into the courtroom without testifying?" [...] The simple answer to that is no. No significance should be attached to that I will tell you that Frank Chester was unavailable to either side as a witness in this case.

N.T, 2/9/07, pp, 90-91, Trial counsel agreed with the instruction. *Id.* At the PCRA hearing, trial counsel stated he had no reason or strategy for not objecting to Mr. Chester's presence in the courtroom. N.T. 5/23/12, p. 95.

Appellant argues that displaying Mr. Chester in front of the jury in shackles and escorted by sheriffs deputies prejudiced Appellant. We do recall that Mr. Chester was in prison garb but do not recall whether he was shackled. The Appellant has failed to develop a record in this regard. ThejuryknewMr. Chester was convicted of killing Mr. MUano with Appellant, and thus, Appellant states it was error for the jury to see him this way. He further argues that the error prejudiced him because the Pennsylvania Supreme Court would not consider the issue on direct appeal, deeming it waived in the absence of an objection.

He speculates that the Supreme Court would have reversed the conviction on appeal on this basis. However, Appellant fails to develop the law or cite any cases to support his position,

Nonetheless, security measures in a courtroom are within the sound discretion of the trial court judge. *Com. v. Jasper*, 610 A.2d 949,955 (Pa. 1992). A judge may properly determine that witnesses may remain shackled. *Com. v. Young*, 748 A.2d 166 (Pa. 1999) (rejecting a challenge based on the fact that a defense witness was shackled). There is a presumption against presenting a criminal defendant in front of a jury in shackles. *Jasper* at 955, *citing Illinois v. Allen*, 397 U.S. 337 (1970). The sight of a criminal defendant in shackles and prison garb is inherently prejudicial, and "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large." *Holbrook v. Flynn*, 475 U.S. 560,569 (1986).

However, there is a difference between the constitutional rights attached to the appearance of a defendant and the appearance of a witness. Viewing a defendant in shackles during the entire course of a trial tends to suggest his/her guilt. It is a stretch to suggest that a witness, even a co-conspirator or co-defendant, carries such an equal weight or stigma. In this case, the appearance of a co-defendant in shackles who Appellant bad argued was more culpable than Appellant could have actually assisted Appellant En placing blame upon him. The Commonwealth presented testimony from Appellant at the first trial stating that Mr, Chester was the one who killed Mr. Milano, not Appellant. Also, implicit in the diminished capacity defense is that Appellant did not know or appreciate what he was doing and that the other actor, Mr. Chester, was more culpable for what happened.

***21** In this case, if Mr. Chester appeared in shackles it did not unfairly prejudice Appellant. The jury already knew that Mr, Chester was guilty of murder, regardless of his physical appearance. N.T. 2/7/07, p. 131. Further, Appellant conceded that he was involved in the killing with Mr. Chester. The only issue to be determined by the jury was his mental state. Thus, Appellant has failed to meet his burden of showing that trial counsel's failure to object prejudiced the outcome of the case.

H. Were counsel ineffective for failing to adequately prepare expert witnesses to testify on the issue of diminished capacity in violation of petitioner/Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and corresponding portions of the Pennsylvania Constitution?

Appellant argues that trial counsel were ineffective in failing to property prepare defense experts Dr. Gary Lags, Dr. Henry Dee, and Dr. Robert Fox. Specifically, Appellant states that trial counsel did not actually meet these experts before the day of trial. Also, he argues that the failure of trial counsel to have the experts re-evaluate Appellant did not allow them to supplement their original opinions from 1997. Appellant asserts that the experts were not able to consider recent witness statements which may have given the experts more credibility.

The argument is meritless. Appellant has not met his burden of showing whether or how the experts' testimony would have differed had trial counsel taken the suggested actions. Appellant neither discussed the substantive expert opinions in detail nor explained how additional information would have impacted their testimonies. Appellant benefited from testimony of four experts. Despite Appellant's assertions, a review of the record reveals that they began preparing well in advance of trial. Dr. Gary Lage, a toxicologist/pharmacologist, began reviewing documents and witness statements back in the fall of 2006 and wrote a report dated December 28,2006, estimating Appellant's blood alcohol content (BAC) to be 0.45 percent. NT. 2/8/07, pp. 21-22,38. Thus, he required no new information to opine as to Appellant's BAC. Dr. Lage took into account the witness statements, the weight of Appellant, and the time period during which Appellant was drinking in making his estimate. No further preparation or interviews would have strengthened his opinion or the underpinnings for it.

Dr. Henry Dee, a clinical psychologist, testified on behalf of the defense and stated although he had never met trial counsel in person, they had spoken by phone in advance. *Id* at 72. Dr. Dee examined Appellant in 1997 and testified that Appellant had brain damage resulting from an accident in 1981, that his cognitive function was likely impaired in 1987, that alcohol or intoxication would make the brain damage worse, and that, in his opinion, Appellant's mental stale met the definition for diminished capacity in Pennsylvania. *Id.* at 72-91. The scope of Dr. Dee's opinion was focused on Appellant's brain damage and events in his life leading up to the murder in 1987. Therefore, his conclusion about Appellant's mental health history before 1987

would not have changed had he repeated the analysis conducted in 1997. Appellant has tailed to show how further preparation would have changed what would have been presented at trial.

Dr. Robert Fox, a psychiatrist, provided testimony for the defense. Although he had never met trial counsel, they had spoken by phone a few times leading up to trial. N.T. 2/8/07, p. 117. Dr. Fox interviewed Appellant back in 1996, interviewed family members, and reviewed medical records and the report of Dr. Dee, *Id* at 123-24. Ultimately, Dr. Fox provided an opinion that based on Appellant's brain damage and level of intoxication on the night of the killing, Appellant could not have formed a specific intent to kill. *Id*, at 144-45. Dr. Fox's opinion was primarily based on his evaluation of Appellant and a review of Appellant's medical history before 1987. Appellant has not identified any new information after 1996 which should have been analyzed by the expert or presented at trial.

***22** Appellant fails to demonstrate that trial counsels' course of action was unreasonable. At the PCRA hearing, trial counsel stated it would have been helpful to have the experts meet with Appellant in advance, hut because of distance and convenience, they did not do so. N.T. 5/23/12, pp. 28-29. However, trial counsel already had favorable testimony from the experts to support a diminished capacity defense: a 0.45 BAC, testimony regarding brain damage, blackouts, and three independent opinions that Appellant could not form specific intent. Had trial counsel opened the door to farther evaluations of Appellant by experts, it is possible that they could have formed opinions that were less favorable. Little would have been gained from further evaluations, as the experts already were able to provide favorable opinions on the ultimate issue of diminished capacity. Allowing the experts to re-evaluate Appellant would have had uncertain results at best, and Appellant fails to meet bis burden as to the second prong of the *Pierce* test. For the same reasons, Appellant fails to demonstrate a reasonable probability that the outcome would have been different had trial counsel further prepared the experts.

I. Did counsels' failure to raise and preserve arguments and objections to the Commonwealth's improper questioning of defense expert, Dr. Dee, violate Petitioner/Appellant's due process rights?

During the sentencing phase at trial, Dr. Dee testified that Appellant suffered from brain damage, attention deficit disorder, and the effects of adverse childhood circumstances. NT. 2/13/07, pp. 53-103. His opinion was based on interviews, psychological testing, and a review of Appellant's records. Dr. Dee ultimately opined that, on the night in question, Appellant acted under the influence of extreme mental or emotional disturbance. RT. 2/13/07, pp. 73, 79. During cross Exarainaticn, the Commonwealth elicited that Dr. Dee had testified as a defense expert in numerous other capital cases. Defense counsel objected, and the Court clarified that it would not permit questioning about the details or merits of those other cases, but that the Commonwealth could ask whether Dr. Dee had given the same opinion regarding other capital defendants. *Id.* at 82. The Court then instructed the jury that "your task here is to follow the law as I give it to you with respect to this defendant and these circumstances." *Id.* at 83. Thereafter, the Commonwealth referred to a Florida case in which Dr. Dee had testified as a defense expert:

Q. Again, your testimony or your opinion was that [the defendant in that matter] suffered from a mental condition that substantially impaired his ability to comply with the law. Does that refresh your recollection?

A. Well, that's [the] statutory language in Florida, yeah.

Q. In fact, in that case the court found that your testimony to be very speculative.

[Defense counsel]: Objection, Your Honor.

THE COURT: Sustained. Members of the jury, again, you will need to follow the standards in this case as to the law.

N.T. 2/13/07, p. 86. At the ensuing sidebar conference, counsel moved for a mistrial, which was denied. The Court instructed the jury that Dr. Dee:

[H]as been received as an expert in this case. I gave you instructions earlier in the trial regarding expert testimony but I will later give you instructions regarding the manner in which you are to evaluate his testimony, The sole issue before you today is what the penalty should be for this defendant, and you are only to consider the evidence presented in this case and the law as I give it to you.

Id. at 89-90. After closing arguments on the sentence, the Court further instructed:

Remember, youjurors are the sole judges of the credibility and weight of all testimony. The fact that the lawyers and I may have referred to certain witnesses as experts and that the witness may have special knowledge or skill, does not mean that their opinions are necessarily right.

When you are determining the credibility and weight of an expert's testimony and opinions consider all the factors which I have described earlier that [sic] you are relevant when evaluating the testimony of a witness. You should also consider all other things bearing on credibility and weight, including the training, education, the experience and ability of each expert. The factual information on which he or she based an opinion. The source and reliability of that information and the reasonableness of any explanation he gave to support the opinion.

***23** *Id.* at 161-62.

Appellant argues that counsel were ineffective in failing to preserve arguments in support of the motion for mistrial. Specifically, counsel did not assert violations of Appellant's due process and Eighth Amendment rights, issues which the Pennsylvania Supreme Court later deemed waived because they were not included in the statement of matters complained of on appeal. *Com. v. Laird*, 988 A.2d 618, 644, n. 27 (Pa. 2010).

At the PCRA hearing, Appellant provided the following testimony of Mr. Williams (trial counsel during the penalty phase);

Q. On February 13th, during Dr. Dee's testimony, the Commonwealth made a comment about Dr. Dee's testimony being speculative, and on that day you moved for a mistrial. Do you recall that?

A. I recall moving for a mistrial.

Q. Okay, And based on the record, your mistrial motion was based on the tact that the Commonwealth had improperly commented on the credibility of your expert witness. Do you recall that?

A. That's my recollection.

Q. Did you also object or move for a mistrial on the basis that the Commonwealth's comment also violated Mr. Laird's due process and Eighth Amendment rights because it allowed them to present the jury with information that you had no opportunity to deny or explain?

A. I don't recall making that objection.

Q. Okay, And if you didn't make that objection, did you have any strategic reason for failing to allege those additional grounds for your mistrial motion?

A. No, I believe I had addressed reasonable grounds for my objection and motion for a mistrial. That specific objection did not cross my mind.

N.T. 5/23/12, pp. 174-75.

This Court properly denied the mistrial, and in doing so, did not infringe upon Appellant's due process or Eighth Amendment rights. The Eighth Amendment requires that a sentencing jury be able "to consider and give effect to mitigating evidence" about the defendant's "character or record or the circumstances of the offense." *Oregon v. Guzek*, 546 U.S. 517, 525-526, (2006), *citing**Penry v. Lynaugh*, 492 U.S. 302 (1989). However, reasonable limits may be placed upon the evidence a defendant can submit and the manner in which it is submitted. *Id.*

Appellant is not arguing that the Court limited his ability to present mitigating evidence. The argument is that the Commonwealth's cross examination of Dr. Dee somehow prevented the jury from properly considering mitigating evidence. The argument is meritless. First, the Commonwealth did not even finish the question, and Dr. Dee did not answer. Second, the Court immediately offered a curative, limiting instruction. Third, the Court properly left it in the jury's hands to determine the credibility of Dr. Dee and to assign its own weight to that mitigating evidence.

Even if trial counsel had objected and cited a different basis for mistrial, it would not have resulted in a different outcome. "A mistrial is not necessary where cautionary instructions are adequate to overcome any possible prejudice." *Com. v. Larkins*$_y$ 829 A.2d 1203,1207 (Pa. Super. 2003) *citing* *Com. v. GMen*, 798 A.2d 225, 231 (Pa. Super. 2002). It is presumed that a jury follows the Court's instructions, *Com. v. Baker*, 614 A.2d 663, 672 (Pa. 1992). For the reasons stated above, the Court's timely curative instruction adequately overcame any possible prejudice. Accordingly, the claim of due process and Eighth Amendment violations is meritless, and trial counsel cannot be deemed ineffective for failing to preserve an objection under those grounds.

J. Were counsel ineffective during the penalty phase by failing to adequately investigate, develop, and present the case for life and for failing to rebut the Commonwealth's evidence in violation of petitioner/Appellant's rights under the United States Constitution and the Pennsylvania Constitution?

***24** Appellant argues that counsel were ineffective by presenting insufficient evidence regarding Appellant's history of victimization, mental impairment, and other mitigating factors. Although trial counsel presented many factors, Appellant argues that the testimony from witnesses and experts was not as extensive as it could have been. Appellant also faults counsel for not hiring an expert to explore the sexual abuse Appellant suffered as a child. Appellant states that with such information, there is a reasonable probability that at least one juror would have struck a different balance.

Appellant's argument that counsel failed to present sufficient evidence of childhood abuse is meritless. Appellant argues that bis brother, Mark Laird, had previously testified in more detail regarding the abuse. Mark Laird testified during the penaity phase that their father beat Appellant and him with a belt and ring, and that the memories he had until aged seven or eight were "of a violent nature." N.T. 2/12/07, pp. 68-70. He also testified that their father severely beat their mother, and that the boys witnessed it. *Id.* Mark Laird described instances of sexual abuse, where Appellant and his father would be naked hehind a closed door. *Id* at 70. In addition, Dr. Fox also recounted conversations with Mark Laird about physical abuse endured by the brothel's during childhood. N.T. 2/13/07, pp. 6-7. Dr. Dee also testified extensively about the physical, sexual and psychological abuse, including providing specific details received from Appellant and family members. *Id.* at 56-66, Therefore, trial counsel presented detailed accounts of the abuse by presenting the testimony of Mark Laird, Dr. Fox, and Dr. Dee.

Further, Appellant's argument about the insufficient length of testimony by Dr. Fox and Dr. Dee lacks any merit. The amount 6f time each expert testified has little or no bearing on the issue. The focus is on the substance of the testimony. Dr. Fox testified extensively during the penalty phase of the trial. He recounted Appellant's family history, his victimization, history of drug and alcohol abuse, head injuries, and diagnoses of ADHD, PTSD, mood disorder due to a head trauma, polysubstance dependence, and alcohol dependence. N.T. 2/13/07, pp. 5-13. Dr. Fox also testified that Appellant was a victim of sexual, emotional, and psychological abuse and witnessed the abuse of family members. *Id.* at 14-15.

Dr. Dee discussed the history of Appellant, his childhood, and family in great detail. *Id.* at 55-65. He testified about the treatment of Appellant by his father - that he inflicted severe physical abuse, that he gave Appellant alcohol at a young age, and that

he sexually abused Appellant. *Id.* Dr. Dee opined about Appellant's ADHD diagnosis and its impact on Appellant, as well as testing that demonstrated significant brain damage, *Id.* at 64-68. He also discussed Appellant's history of abusing drugs and alcohol and self medicating with amphetamines. *Id.* at 76-77.

Trial counsel presented testimony about Appellant's family history, physical and emotional abuse, sexual abuse, and expert opinions on various conditions and impairments. Further, the jury found the following specific mitigating factors during the penalty phase: physical abuse, sexual abuse, emotional abuse, witnessing the abuse of others, psychological consequences of the abuse, substance abuse, alcohol abuse, and conduct in prison. N.T. 2/13/07, p. 194; Trial Exhibit CP-4. Thusjurors accepted that these factors existed, and counsel were not ineffective.

Appellant also argues that counsel were ineffective in failing to retain an expert to testify regarding sexual abuse. Appellant's current counsel met with a Dr. David Lisak, a clinical psychologist. Appellant's PCRA Petition, Para 191. Dr. Lisak interviewed Appellant and uncovered similar details of physical, emotional, and sexual abuse from Appellant's father. Dr. JLisak opined that Appellant suffered from lasting trauma due to this abuse. However, Appellant asserts no significantly new information or diagnoses that were not presented at the penalty phase. Certainly, doctor after doctor could evaluate Appellant and likely uncover additional details from Appellant's past with different theories about how those events in his life impacted him. Nonetheless, trial counsel presented testimony directly from a family member and through two different experts who conducted multiple interviews. The experts presented opinions that Appellant suffered from physical, sexual, emotional, and psychological abuse, had diagnoses of brain damage, memory impairment, drug and alcohol dependence, ADHD, and PTSD. Trial counsel were not ineffective for failing to present additional details that would have been insignificant considering the evidence as a whole.

***25** Even if Appellant's claim had merit, he fails to meet his burden of demonstrating that trial counsel did not have a reasonable basis for their presentation of evidence. Trial counsel presented several types of mitigating evidence. The standard for ineffective assistance of counsel does not employ a hindsight evaluation of potential alternatives, *McNeil, supra.* Trial counsel had a reasonable strategy of downplaying the weight of the kidnapping aggravator and presenting multiple mitigators. At the PCRA hearing, Mr. Williams (trial counsel during the penalty phase), summed up the strategy as follows;

Q. Can you tell me about your mitigation or your sentencing phase theory or theme?

A. My theory, No. I, was that there were 110 aggravators, even though the Court was giving us one of kidnapping, we thought before trial and even after the guilt phase was done that realty they hadn't proven that. So we would argue that that had no weight, and they should disregard it completely.

If we were successful there, the only other one was torture, which I don't think they ended up finding any way, but we thought always was very weak as far as an aggravator was concerned.

The second thing is we thought we had multiple mitigators. I forget the whole list at this point in time, but I think they found five, six or seven, it was a fair amount that they did find, and I presented about a dozen, if I recall correctly, from writing it on the chalkboard at the time of my closing.

So it was basically two-fold in that area, very weak aggravators and we thought very strong mitigators.

N.T. 5/23/12, pp. 144-45. Appellant has failed to articulate why trial counsel's strategy and actions were unreasonable, and thus, has failed to meet his burden.

Further, Appellant did not demonstrate prejudice. The jury found eight mitigating factors based on the evidence presented, including physical abuse, sexual abuse, emotional abuse, witnessing the abuse of others, psychological consequences of abuse, substance abuse, alcohol abuse, and his conduct in prison. Trial Exhibit CP-4. Therefore, the defense was successful in convincing the jury these factors existed. However, ultimately the jury determined that the aggravating factor outweighed the

mitigating factors. Appellant does not meet his burden of demonstrating that any additional details on the same factors would have tipped the balance, and his claim fails.

K. Were trial counsel ineffective when they unreasonable [sic] failed to object to the impermissible victim impact testimony and evidence?

Appellant argues that the jury's sentencing decision was tainted by improper "victim impact information." Specifically, Appellant argues that statements by the prosecutor during the guilt phase referring to Anthony Milano's life, his hopes for the future, and Information from his family were improper. In addition, Appellant states that the prosecutor's reference to the guilt-phase testimony of Vito Milano (victim's father) and the statements that his family would never see him again were impermissible. Appellant argues that the presence of the victim's family in the courtroom during the proceedings was improper "victim impact information," especially since Vito Milano exited the courtroom during testimony about his son's injuries. Appellant's argument is without merit, because the prosecutor's comments were proper argument. Further, the law does not require exclusion of a murder victim'd family from the courtroom in order for a criminal defendant to receive a fair trial.

During the guilt phase of the trial, Vito Milano testified for the Commonwealth. Vito Milano testified that Anthony Milano was 26 years old, graduated from the University of the Arts in Philadelphia, was on the honor roll, and that he had a sister, Anne Marie. N.T. 2/5/07, p. 49. He also described what happened the night of the murder and related his last encounter with his son. Id. at 51. The prosecutor made statements in her opening at the guilt phase about Anthony Milano, bis life, and his family. N.T. 2/5/07, p. 27.

***26** December, 1987, Anthony Milano was a 26-year-old young man with his whole life ahead of him. Anthony was a recent graduate from Philadelphia Art School with honors. He had a future ahead of him filled with promise. Anthony was a beloved son of Vito Milano and Rose Milano, his parents. Anthony was a friend and a brother to Ids sister Anne Marie.

Anthony was and he is no more. Because on December 14 th, 1987 Anthony Milano encountered this defendant Richard Laird and his buddy Frank Chester and they intentionally, deliberately, willfully, maliciously killed him.

...

He said he was going out for a while and he said good night And that is the last time he saw his family.

Id. She went on to outline the details of what occurred on (he night of the murder. Later, during sentencing argument, while attempting to reduce the weight given to Appellant's stipulated involvement in the murder, the prosecutor stated, "And the Milanos had to sit here again and listen to what happened to their son in that dark, cold woods." N.T. 2/13/07, p. 122.

A prosecutor is free to present argument with logical force and vigor so long as there is a reasonable basis in the record for the prosecutor's remarks. *Cam. v. Busanet*, 54 A.3d 35, 64 (Pa. 2012), *citing Com.v. Hutchinson*, 25 A.3d at 306 (Pa. 2011). "Reversible error arises from a prosecutor's comments only where their unavoidable effect is to prejudice the jurors, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict." *Id, citing Com. v. Tedford*, 960 A.2d 1,33 (Fa. 2008). For an ineffective assistance of counsel claim based on prosecutorial misconduct, the defendant must demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right, such as the Fifth Amendment privilege against compulsory self-incrimination or the Sixth Amendment right to a fair trial, or a constitutional interest such as due process. *Com. v. Horrible*, 30 A.3d 426,464-65 (Pa, 2011). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* at 465, *quoting Greer v. Miller*, 483 U.S. 756 (1987).

Appellant fails to meet his burden of showing the prosecutor's remarks were improper. The opening statement simply provided biographical information about Mr. Milano's life. The details were not inflammatory and were not of such a nature that would

cause an impermissible level of sympathy by the jury. The matter-of-fact information was not of the sort that would generate a fixed bias and hostility toward Appellant. In addition, the comments at closing must be taken in context. The Court instructed the jury that one potential mitigator was that Appellant stipulated to his participation in the killing. Attempting to reduce the weight of this evidence in mitigation, the prosecutor was pointing out that witnesses still had to testify and go through the process of the trial, including the victim's family. This was a fair rebuttal to a mitigating factor requested by the defense. As such, the argument was proper, and Appellant's argument is meritless.

Further, The testimony of Vita Mikino was not victim impart testimony. Victim impact testimony has been defined as "information concerning the victim and the Impact the victim's death has had on the family of the victim." 42 Pa.C.S. § 9711 (a)(2); *Com v. Carson*, 913 A.2d 220,237 (Pa. 2006). Vito Milano's statements were matter of fact and confined to biographical information about his son. He did not provide, and the Commonwealth did not elicit, testimony regarding the impact of his son's death on the family. Therefore, this evidence was not victim impact evidence, and Appellant's claim is meritless.

***27** Even if Appellant's claims have merit, he fails to meet his burden of showing that trial counsels' actions were unreasonable. Mr. Williams (trial counsel for the penalty phase) stated that he did not object to the incorporation of all the evidence at the beginning of the penalty phase because he wanted to avoid repeating any testimony related to life-in-being during sentencing. N.T. 5/23/12, pp. 180-81.

Q. And the record reflects that all of the evidence from the guilt phase was incorporated into the sentencing phase. Is that consistent with your recollection?

A. Yes, it is.

Q. Did you have a strategic reason for not objecting to the incorporation of testimony with regard to the victim's life and [sic] being or victim impact testimony?

A. Did I have a specific reason why I did or didn't?

Q. Why you did not object at the time it was incorporated into the sentencing phase.

A. Yes, because I wanted it to happen. I wanted our experts' testimony incorporated. I didn't want them to put it on again in the penalty phase. 1 wanted to avoid that. I wanted it incorporated.

Q. Based on the record the Court had precluded victim impact testimony from coming in during the course of the entire trial. Is that right?

A. That's my recollection.

Q. Okay. So would mere have been any reason to believe that additional victim impact testimony would have come in the sentencing phase?

A. Well, there was reason to believe that they were out — able to get that life and [sic] being testimony in during the guilt phase, so I had certainly no reason to have confidence how that was going to turn out in the penalty phase, and if I could limit it by incorporating the testimony from the penalty phase, I thought that was a smart thing to do.

Id. This was a reasonable strategic decision to limit the jury's exposure to unfavorable evidence for Appellant. In addition, had trial counsel objected only to the life-in-being evidence, it could have led to an instruction from the Court that highlighted the testimony. Trial counsel's decision was reasonable and Appellant failed to carry his burden on that basis.

Further, the Commonwealth's comments during sentencing argument were not improper. The prosecutor made a brief remark that Appellant "took a life filled with promise and future away from" Anthony Milano, and prevented him from "[going] home that night to his family." N.T. 2/13/07, pp. 126,131. A prosecutor may properly comment upon the evidence and may argue in closing arguments any reasonable inferences arising from the evidence. *Com. v. Lawsan*, 546 A.2d 589 (Pa. 1988). The standard for prejudice is whether the unavoidable effect of the comments resulted, in the minds of the jurors, in fixed bias and hostility toward the defendant, such that they could not weigh the evidence objectively and render a true verdict. *Busanet, sitpra; Com. v. Young*, 572 A.2d 1217 (1990). Statements that amount to mere oratorical flair are permissible. *Com. v. Ford*, 650 A.2d 433,442 (Pa. 1994); *Com.v. Kemp*, 753 A.2d 1278 (Pa. 2000).

Here, the prosecutor's argument was based on a fair inference that could he drawn in almost any murder case - that a victim would not be going home to his or her family. The comment was not based on any prior testimony or victim impact evidence. Neither was it a character attack on Appellant. Her statements did not exceed the bounds of propriety and were not so severe as to create a fixed bias or hostility by the jury toward Appellant Appellant fails to meet his burden of demonstrating that any objection would have merit.

***28** Appellant also argues that trial counsel should have objected to the Milano family's presence in the courtroom, especially when Mr. Milano exited during the coroner's testimony. In order to give meaning to Pennsylvania statutes on victims' rights, victims must have the right to attend trial and other significant aspects of a case. For example, Pennsylvania law requires that victims receive notice of significant actions and proceedings in a case. 18 P.S. § 11.201. In addition, the Court may not exclude any victim from a proceeding on the basis that the person may provide testimony or an impact statement. 42 Pa.C.S.A. § 9738. The inference implicit in these statutes is that a victim has a right to attend trial and other significant events of the case. In a homicide case, "victim" includes family members of the homicide victim. 18P.S. § 11.103. Therefore, Vito Milano and the family had a right to be present in the courtroom dining trial.

The test on appeal for a trial court refusing to bar spectators is abuse of discretion. *Com. v. Sanchez*, 36 A.3d 24,47 (Pa. 2011). Appellant must show that the spectator's actions caused actual prejudice or were inherently prejudicial. *Id, citing Com*, v. *Philistin*, 774 A.2d 741,743 (Pa. 2001). Further, a prosecutor's brief reference to a victim's family in the courtroom does not constitute misconduct or require reversal. *Com*, v. *Elliott*, 80 A.3d 415 (Pa. 2013) (upholding a conviction where the prosecutor welcomed the victim's family to the courtroom during opening). *Com. v. Sanchez*, 36 A.3d 24, (Pa. 2011) (upholding a conviction and death sentence where members of the victim's family sobbed during portions of the trial).

Appellant's claim is meritless, as members of Mr. Milano's family fall under the definition of "victims" of 18 P.S. § 11.103, and as such, they had a right to be present in the courtroom. An objection by trial counsel would have been fruitless, as the Court had no basis to exclude the family. *Elliott* and *Sanchez* make clear that a victim's family may be present and may exhibit at least some emotion in the courtroom. With the only alleged incident being Vito Milano leaving the courtroom on one occasion, the facts were never sufficient to warrant the Court barring the family from the courtroom.

Appellant fails to demonstrate a reasonable probability that the outcome would have been different without the prosecutor's comments or without the victim's family present. In light of all the evidence, the prosecutor's passing reference to the victim's family having to sit through the trial carried little weight. The prosecutor's comments were not highly inflammatory and did not create a fixed bias or hostility such that the jury could not properly weigh the evidence or follow the Court's instructions. While every measure must be taken to ensure that a defendant receives a fair trial, no trial should or can be sanitized to such an extent that the jury is unaware that a life has been taken. Appellant fails to meet his burden of demonstrating trial counsel were ineffective.

L. Were trial counsel ineffective at the penalty phase of trial when they failed to object to the admission of prejudicial prior bad act evidence in violation of Petitioner/Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the Pennsylvania Constitution?

Appellant argues that trial counsels' failure to object to testimony regarding Appellant's improper tags on his vehicle and funushing alcohol to a minor child constitutes ineffective assistance of counsel. However, Appellant fails to demonstrate that no reasonable lawyer would have failed to object and that this failure caused prejudice.

Appellant presented the following testimony from Mr. "Williams (trial counsel during the penalty phase) on direct examination at the PCRA hearing on May 23, 2012:

Q. Okay. The next thing I want to address is the other bad acts testimony used in aggravation by the Commonwealth. And as we've discussed, the entire guilt phase evidence was incorporated into the sentencing phase by the Commonwealth, and do you recall whether this — do you recall the guilt phase testimony with regard to the fact that Mr. Laird supposedly furnished alcohol to a minor and used stolen tags on his car?

***29** A. I recall that testimony, and I recall that the jury did not find that as an aggravator is my recollection.

Q. And do you — you did not object to this testimony. Is that correct?

A. I don't recall objecting to it.

Q. Did you ask for a cautionary instruction with regard to this testimony?

A. I can't specifically recall.

Q. And do you have a strategic reason for not objecting or seeking an instruction with regard to this testimony?

A. At the time I believed that it was relevant testimony that the judge had ruled that prior bad acts were allowed in. That's my recollection.

N.T. 5/23/12, pp. 181-82. As discussed, supra, Section G, trial counsel did Initially object to the testimony regarding Appellant's providing alcohol to a minor. However, the witness continued her testimony after the prosecutor phrased the question differently, and trial counsel did not renew an objection Trial counsel did not object to the improper tags evidence.

For the reasons discussed, *supra*, Section G., trial counsel were not ineffective for failing to object to this evidence during the guilt phase. Likewise, Appellant does not meet his burden of showing that a failure to object at the beginning of the penalty phase was unreasonable. Although trial counsel was mistaken that this Court had ruled on this evidence, failing to object at the beginning of the penalty phase was not unreasonable. Objection to the incorporation of this evidence at the penalty phase, at most, could have gained a limiting instruction. Inevitably, such a limiting instruction would have had to mention the evidence at issue, instructing the jury that it could not consider that Appellant may have had improper tags or that he may have served alcohol to a minor. Calling attention to this evidence likely would have caused more harm than good, even if such objections were successful. Appellant fails to meet his burden of showing that trial counsel's actions were unreasonable.

Second, incorporation of this evidence during the penalty phase caused no prejudice to Appellant. These acts were insignificant when one considers them in the context of all the evidence presented. The Commonwealth presented no evidence about these issues during the penalty phase and never mentioned them during the sentencing argument. The offense of first degree murder and the aggravating factor of a commission of a killing during the course of a felony overwhelmed any inferences from the improper tags or the alcohol to a minor.

Further, the Court specifically instructed the jury about what it could consider in deciding upon a sentence:

Members of the jury, you must now decide whether to sentence the defendant to death or life imprisonment. Your sentence will depend upon what you find about aggravating and mitigating circumstances. The sentencing code defines aggravating and mitigating circumstances. They're things that make a first degree murder case either more terrible or else less terrible. Your verdict must be a sentence of death if you unanimously find, that is, all of you find, at least one aggravating and no mitigating circumstance, or if you unanimously find one or more aggravating circumstance that outweighs any mitigating circumstances. If you do not agree on one or the other of these findings then the only verdict you may return is a sentence of life imprisonment.

***30** N.T. 2/13/07, p. 164. The jury was only to consider aggravating and mitigating circumstances as defined by the court The trial court continued by explaining, in depth, the process of weighing the aggravating factors against the mitigating factors, depending upon which the jury found. *Id* at 169-73. It is a well-known principle that a jury is presumed to follow the Court's instructions. *Com. v. Baker*, 614 A.2d 663,672 (Pa. 1992). Here, the instructions did not leave room for the jury to consider evidence that did not fall into the categories of aggravating and mitigating circumstances.

In addition, the closings for both sides reinforced that the jury must only consider the aggravating and mitigating factors as stated by the Court, The Commonwealth arguments about aggravation were limited to the murder taking place during the perpetration of a felony, and having been committed by means of torture, N.T. 2/13/07, pp. 126-34. The defense also discussed the fact that there were two possible aggravating factors. *Id.* at 138-42. Consequently, the trial court, prosecutor, and trial counsel each properly discussed the law regarding the only two permissible aggravating factors it could consider. Therefore, any objection from trial counsel or further instructions would have had no impact on how the jury weighed these factors. Appellant has not demonstrated a reasonable probability that the outcome would be different had trial counsel objected, and his claim fails.

M. Were counsel ineffective at the penalty phase for stipulating to the sole aggravating circumstance, that the killing was committed while in the perpetration of a kidnapping (42 Pa. C.S, § 9711 (d)(6)), in violation of Petitioner/Appellant's Sixth, Eighth and Fourteenth Amendment rights and the corresponding portions of the Pennsylvania Constitution?

Appellant argues that trial counsel erred in stipulating that the defendant was convicted of kidnapping in conjunction with the murder. However, the argument is meritless, because Appellant had already been convicted of kidnapping. The conviction would have been admitted into evidence regardless, and the Commonwealth presented evidence sufficient to support a finding that the killing occurred during the perpetration of die kidnapping. Further, Appellant fails to show he was prejudiced by trial counsel's stipulation.

Appellant was convicted of kidnapping at his first trial in 1988, and the conviction was upheld on appeal. *Com v. laird*, 587 A.2d 1367 (Pa. 1991); *Lairdv. Horn*, 159 RSupp. 58, 94 (E.D. Pa. 2001); *Laird v. Horn*, 414 f.3d 419,430 (3d Cir. 2005). A record of conviction is admissible by the Commonwealth to support an aggravating factor. *Com. v. Ly*, 599 A.2d613,620(Pa. 1991). Therefore, even absent a stipulation, the Commonwealth would have conclusively established Appellant's conviction of kidnapping.

In a capital case, the Commonwealth must prove an aggravating circumstance beyond a reasonable doubt during the penalty phase. 42 Pa. C.S. § 9711; *Com. v. Pagan*, 950 A2d 270, 288 (Pa. 2008); *Com. v. Baker*, 614 A.2d 663, 677 (Pa. 1992). Appellant argues that the trial court's instructions and the Commonwealth's argument impermissibly directed the jury's rinding with respect to the aggravating factor. However, although the parties stipulated that the kidnapping occurred, the jury still had a duty to 8nd that the killing occurred during the perpetration of a kidnapping. The trial court instructed the jury as follows:

As I told you earlier you must agree unanimously on one of two general findings before — you must agree unanimously on one of the aggravating findings before you can sentence the defendant to death.

***31** That means there must be a finding that there is, at least, one aggravating circumstance and no mitigating circumstances or there's a finding that there are one or more aggravating circumstances which outweigh any mitigating circumstances....

When voting on aggravating circumstances you can only find aggravating circumstances to be present if you all agree that it is present. On the other hand, each of you is free to regard a particular mitigating circumstance as present despite what the other jurors may believe.

Remember the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt, while the defendant only has to prove any mitigating circumstance by a preponderance of the evidence.

N.T. 2/13/07, p. 167-68.

The following aggravating circumstances are submitted to the jury and must be proven by the Commonwealth beyond a reasonable doubt. The first aggravating circumstance submitted to you is that the defendant committed a killing while in the perpetration of a felony. You will recall that there was a stipulation or agreement that the defendant has been convicted of kidnapping in the course of these events, and that is a felony.

Id. At 171.

By acknowledging the stipulation, the trial court did not direct a finding of the aggravating circumstance. The trial court exhaustively made it clear that the jury must make a specific finding that the defendant committed the killing during the perpetration of the kidnapping, and that the standard was beyond a reasonable doubt. The (rial court gave further specific instructions on how to fill out the verdict form. *Id.* at 169-70. Nowhere did the trial court instruct that the aggravating factor must be checked, or that the aggravating factor was already proven. As noted above in *Baker*, a jury is presumed to follow the trial court's instructions, and Appellant presented nothing in this case to indicate otherwise.

In addition, the Commonwealth presented sufficient evidence to support a jury finding beyond a reasonable doubt that the killing occurred during the perpetration of the kidnapping. Testimony established that Appellant, Mr. Chester, and Mr. Milano were at the Edgely Inn and left together in Mr. Milano's vehicle. “The Commonwealth presented evidence that although Appellant initially sought a ride home, they did not go to his residence but drove to other locations. N.T. 2/5/07, pp. 211 -222; NT. 2/7/07, p. 133,144. Appellant admitted he was involved in the killing that occurred in a wooded area, and the Commonwealth presented statements from Appellant and Mr. Chester regarding the details of how die killing occurred. *Id.* The jury found during the guilt phase that Appellant had killed Mr, Milano. Without a stipulation, the Commonwealth would have been entitled to admit Appellaofs conviction for kidnapping. The evidence was sufficient to establish the aggravating factor beyond a reasonable doubt.

Appellant fails to meet his burden of demonstrating that no reasonable counsel would have stipulated to the kidnapping. A strategy of conceding that a killing occurred during the commission of a felony and arguing that the mitigating factors outweigh the aggravating factor has been upheld by the Pennsylvania Supreme Court. *Com. v. Williatfis*, 640 A.2d 1251 (Pa. 1994) (determining trial counsel's strategy of conceding robbery as an aggravator was reasonable, where trial counsel argued that the several mitigating factors outweighed the aggravator); *Com. v. Rivera*, 773 A.2d 131 (Pa. 2001) (upholding a conviction where trial counsel conceded robbery, criminal conspiracy, and possessing an instrument of a crime, while instead focusing on discrediting two other aggravating factors and arguing that the jury should find two mitigating factors).

***32** Appellant's conviction was clearly admissible and absent a stipulation the Commonwealth could have presented further evidence in this regard. At the PCRA hearing, trial counsel testified as follows:

Q. So it's your understanding that you did stipulate to the aggravating circumstance?

A. I stipulated that I wasn't allowed to challenge that as an aggravator, that it would get to the jury, not that it's an actual aggravator. In fact, I argued strenuously that it should be given no weight because they hadu't really proved it, So, again, I'm having trouble with the wording.

Q. You tell me, I'm asking about whether — you know, whether there's a distinction between the conviction versus the aggravating factor.

A. I think there is because — just because it's there it still has to be given weight by a jury to mean anything. You can have an aggravator just like you can have a mitigator, and if the jury chooses to find it but give it no weight it means nothing, they can't use it.

I'm saying that I stipulated, I guess that's the word that was used, that the appellate court said I can't say it doesn't exist because they said it does and that he's already convicted of it. But what I could do is Fight its weight and whether or not it should be given any credibility at the penalty phase.

N.T. 5/23/12, pp, 183-84.

Trial counsel's strategy in stipulating was reasonable in light of the procedural history and the mitigating evidence which was to be presented-Trial counsel reasonably believed he could not legally contest that there was a conviction for kidnapping. Further, he made the calculated decision to rest his credibility and argument on the mitigating factors. Contesting that the kidnapping conviction existed likely would have only achieved a loss of credibility that may have distracted from or damaged his argument about the mitigating factors.

Appellant also fails to demonstrate a reasonable likelihood that the outcome would have been different had trial counsel not stipulated to the kidnapping. As noted above, the Commonwealth had ample evidence to establish the kidnapping. The Commonwealth also presenting overwhelming evidence to demonstrate that the killing occurred during the perpetration of the kidnapping. Ultimately, the evidence in front of the jury would not have changed. The Court repeatedly reminded the jury that it must find any aggravating factors beyond a reasonable doubt. Appellant fails to meet his burden, and the claim for ineffective assistance of counsel on this basis fails.

N. Were counsel ineffective when they failed to object to the Commonwealth's improper argument and the court's improper instruction to the jury regarding the definition, weight and value of mitigating evidence in violation of Petitioner/Appellant's rights under the Sixth, Eighth and Fourteenth Amendments and the corresponding provisions of the Pennsylvania Constitution?

Appellant argues that the Court's instructions and the Commonwealth's argument prevented the jury from giving full consideration to mitigating circumstances, and were, therefore, unconstitutional. Appellant claims that trial counsel's failure to object to either or both was unreasonable, and had the objection been preserved, there is a reasonable probability that Petitioner's sentence would have been reversed on appeal. Appellant's claim is meritless on its face because it rests on the assumption that the Pennsylvania Supreme Court will overrule prior caselaw on mitigating evidence instructions.

***33** The Court issued the Standard Jury Instruction on mitigating evidence. “The sentencing code defines aggravating and mitigating circumstances. They're things that make a first degree murder case either more terrible or else less terrible.” N.T. 2/13/07, p. 163. Appellant claims the words “more terrible” and “less terrible” “diverted the focus of the jury's life or death deliberation from a reasoned determination as to Appellant's persona! culpability to an amorphous and unguided consideration of how ‘terrible’ ‘the case’ was.” Petitioner's PCRA Petition, Para. 243.

The Pennsylvania Supreme Court has repeatedly upheld the “less terrible” language. *Com. v. Gwynn*, 943 A,2d 940,951 (Pa. 2008); *Com v. King, 111* A.2d 763, 779-80 (Pa. 1998); *Com*, v. *Samnchak*, 675 A.2d 268 (Pa. 1996). Therefore, Appellant's argument is meritless and fails to meet the first prong of the *Pierce* ineffectiveness of counsel test. Trial counsels' decision to rely on Pennsylvania Supreme Court rulings in crafting objections and argument is entirely reasonable. Appellant fails to meet his burden of demonstrating counsel was ineffective on this ground.

O. Did the jurors' consideration of extraneous argument and evidence during their sentencing phase deliberation violate Petitioner/Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights and the corresponding portions of the Pennsylvania Constitution?

In this claim, Appellant asserts that his constitutional rights were violated because the jury "did not base their verdict solely on the evidence presented during the trial," Appellant's PCRA Petition, Paras. 255, 259. However, Appellant fails to establish the existence of external influences and fails to demonstrate that the jury did not properly follow the instructions and consider mitigating factors.

Specifically, Appellant asserts:

[According to at least one juror, several jurors informed the others that they had no choice but to sentence [Appellant] to death in light of the existence (and stipulation to) the kidnapping aggravator.

Additionally, jurors were also told by their foreperson that she would be unable to face the victim's fattier with any sentence less than death. Accordingly, while jurors found the existence of mitigating factors, they refused to weigh them in arriving at their sentence.

Appellant's PCRA Petition, Para. 245.

The individual statements attributed to jurors by the defense do not establish that the jury was subject to any external influence. At most, they evidence internal debate and deliberations. Further, they fail to demonstrate that the jury did not follow the Court's instructions or consider all of the evidence in this case in a fair and impartial way. Indeed, the jury specifically found mitigating factors.

The jury is presumed to follow the Court's instructions. *Com. v. Baker*, 614 A.2d 663, 672 (Pa. 1992). *See also Com. v. Chattel*, 30 A3d 1111, 1184 (Pa. 2011) and *Commonwealth v. Stoltzfus*, 337 A.2d 873, 879 (Pa. 1975). Further, the non-impeachment rule prohibits a court from later delving into the mechanics of jury deliberations, with a narrow exception for external influences.

A juror is not competent to testify as to what transpired in the jury room. [The Supreme Court has] stated:

> We cannot accept the statement of jurors as to what transpired in the jury room as to the propriety or impropriety of a juror's conduct. To do so, would destroy the security of all verdicts and go far toward weakening the efficacy of trial by jury, so well grounded in our system of jurisprudence. Jurors cannot impeach their own verdict. Their deliberations are secret and their inviolability must be closely guarded.

***34** *Com. v. Pierce*, 309 A.2d 371, 372 (Pa. 1973) (internal quotation marks and citations omitted). *See also Carter v. U.S. Steel Corp.*, 604 A.2d 1010,1013 (Pa. 1992) (plurality) ("a juror is incompetent to testify as to what occurred during deliberations"). *See also Pittsburgh Nat 7 Bank v. Mut. Life Ins. Co.*, 425 A.2d 3 S3 (Pa. 1981). "[T]he need to ensure fair trials, free from improper influences must be balanced with the need for finality and for protecting the sanctity of the jury room. *Carter*, 604 A.2d at 1013.

Pennsylvania Rule of Evidence 606 permits a narrow exception to the no impeachment rule: "a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Pa.R,E. 606(h). This exception allows "post trial testimony of extraneous influences which might have affected (prejudiced) the jury during their deliberations." *Com. v. Neff*, 860 A.2d 1063, 1069 (Pa. Super. 2004), *citing Pittsburgh Nat* 7 *Bank*, 425 A,2d at 386. "Extraneous information has been defined as information that was not provided in open court or vocalized by the trial court via instructions." *Neff*, 860

A.2d at 1069, *citing* *Boring v. LaMarca*, 646 A.2d 1199,1202 (Pa. Super. 1994). "Under the exception to the 'no impeachment rule,' a juror 'may testify only as to the existence of the outside influence, but not as to the effect this outside influence may have had on deliberations," ' *Neff*, 860 A.2d at 1069 (internal citations omitted). "Under no circumstances may jurors testify about their subjective reasoning processes." *Id*

Appellant failed to allege any "external" influence. The statements above attributed to jurors reference internal sources - other jurors. Any discussion about the kidnapping aggravator and whether the foreperson would be able to face the victim's family are not matters of improper external influence. These do not cover "prejudicial facts not of record," and thus, they fall within the no impeachment rule. Appellant demonstrated no improper influence and no evidence that the jury did not follow the Court's instructions.

P. Is Petitioner/Appellant entitled to a new trial because the cumulative effect of the errors in this case undermines confidence in the outcome at both the guilt and penalty phases of trial?

A claim that die cumulative effect of allegations of error requires a new trial is without merit. No number of failed claims attain merit if they could not do so individually. *Com. % Laird*, 605 Pa, 137,186, 988 A,2d 618,647 (Pa. 2010) (internal citations omitted). Appellant's individual claims fail, and therefore, he has no cumulative effect claim.

Q. Did the PCRA court err in its pre-hearing rulings, rulings during the scope of the proceedings and hearing, and post-hearing rulings, including evidentiary rulings and rulings concerning the scope of the hearing?

Appellant fails to articulate any further alleged errors, if any, committed by the Court in its rulings. Therefore, there is no basis on which to evaluate this claim. The Court carefully considered all claims made by Appellant in his PCRA petition, held hearings in 2012 and 2013, and exhaustively reviewed the records created since 1988. The Court's rulings were proper.

R. Did the PCRA court err in its determinations of the issues and sub-issues in this matter, including previous litigation, waiver, burdens of pleading and proof, and other procedural issues in this litigation, and including the merits of Petitioner/Appellant's claims for relief?

***35** Again, Appellant fails to articulate any further alleged errors, if any, comroitted by the Court in its rulings. Therefore, there is no basis on which to evaluate this claim, The Court carefully considered all claims made by Appellant in his PCRA petition, held hearings in 2012 and 2013, and exhaustively reviewed the records created since 1988. The Court's rulings were proper.

For the foregoing reasons, the denial of Appellant's PCRA petition was proper.

DATE: April 10, 2014.

BY THE COURT,

<<signature>>

REA B. BOYLAN, J.

Footnotes

1 The version of Pa. R.E. 609 cited here is that version in force at the time of trial in 2007. That version was rescinded and replaced Jan. 17,2013, effective March 18, 2013, although the substance of the provisions at issue remain the same,

2 Police reports that were part of the discovery in this matter, and were contained in Exhibit PCRA-Petitioner Volume I, beginning on page 206 were admitted without objection during the PCRA hearing as they were part of the record in discovery, but no testimony regarding this issue or Officer Connclt was presented throughout the hearings. N.T. 5/24/12. p. 218.

3 Presently known as Aria Health.

4 28 Pa. Code § 115.24 provides for Microfilming medical records. "Medical records may be microfilmed immediately after completion. Microfilming may be done on or off the premises. If done off the premises, the hospital sftall take precautions to assure the confidentiality and safekeeping of the records. The original of microfilmed medical records shall not be destroyed until the medical records department has had an opportunity to review the processed film for content."

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 17-9000

_____

RICHARD ROLAND LAIRD,
Appellant

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

_____

(E.D. Pa. No. 2:11-cv-01916)

_____

Present: RESTREPO, PHIPPS, and FISHER, *Circuit Judges*.

_____

SUR PETITION FOR PANEL REHEARING

_____

The petition for rehearing filed by Appellant, Richard Roland Laird in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: April 8, 2025
cc: Cristi A. Charpentier, Esq.
Joseph W. Luby, Esq.
John T. Fegley, Esq.

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

IN THE COURT OF COMMON PLEAS
BUCKS COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	Honorable Rea B. Boylan
Respondent,	:	
	:	No. 746/88
v.	:	
	:	CAPITAL PCRA
RICHARD ROLAND LAIRD,	:	
Petitioner.	:	

NOTICE OF FILING

Kindly take notice of the filing of the following Expert Report in the above-captioned matter:

1. David Lisak, Ph.D.

Billy Nolas /gs

Billy H. Nolas
PA Bar 83177
Defender Association
Capital Habeas Corpus Unit
610 Walnut Street, Suite 545W
Philadelphia, PA 19106
(215) 928-0520

Dated: March 9, 2012

David Lisak, Ph.D.

Forensic Consultation & Training
Associate Professor of Psychology
University of Massachusetts Boston

455 Winch Street, Framingham, MA 01701
617-947-4119
dlisakfc@gmail.com

Report on Traumatic Childhood Events Affecting Richard Laird

Qualifications

1. I am a clinical psychologist and Associate Professor of Psychology at the University of Massachusetts Boston, where I teach, and conduct and supervise research in the doctoral program in clinical psychology. For the past 25 years, I have been researching the causes and consequences of interpersonal violence, and I have studied the impact of childhood physical and sexual abuse on later development, especially in men. My research has been published in numerous scholarly journals, and I have presented scores of papers, symposia, and workshops at conferences throughout the United States and Canada.

2. I am an active member and a Fellow of the American Psychological Association (APA), and an active member of the International Society for Traumatic Stress Studies. I was the founding editor of the journal, *Psychology of Men and Masculinity*, a scholarly journal published by APA. In addition, I was a founding member of the National Organization on Male Sexual Victimization, now re-named *Male Survivor*, I am a founding board member of *1in6*, a Los Angeles-based non-profit organization focused on outreach and treatment for male victims of sexual abuse, and I serve on the national

advisory board of *Peace Over Violence*, another LA-based non-profit organization that provides services to victims of violence.

3. In addition to my research and teaching, I am a licensed health care provider in the State of Massachusetts. For many years, I maintained a part-time private practice specializing in the treatment of adult men who had been sexually and/or physically abused as children. Currently, I serve as a consultant and expert in a variety of forensic contexts across the United States and Canada. I have been qualified by courts as an expert on psychological trauma and childhood abuse and violence, and I have testified in state, federal and military courts. I have conducted detailed evaluations of scores of men either charged with or convicted of homicide and/or sex offenses at prisons and jails across the United States. I have served as faculty at judicial, prosecutor, and law enforcement training conferences on sexual aggression and psychological trauma in all 50 states, and have consulted to the U.S. Department of Justice, the Federal Bureau of Investigation, the U.S. Air Force, the U.S. Army, the U.S. Navy, the U.S. Marine Corps, the U.S. Coast Guard, the U.S. Department of Defense, local police departments, and to individual judges and prosecutors on matters pertaining to perpetrators of non-stranger sexual aggression, to the psychological and neurobiological consequences of trauma, and to the prevention of sexual violence.

4. Over the past 25 years, in clinical, research or forensic contexts, I have treated or evaluated hundred's of men who suffered childhood trauma.

5. My CV is attached.

Referral Question

6. I was asked by the attorneys representing Richard Laird to evaluate whether Mr. Laird experienced childhood trauma, in particular, sexual abuse, physical abuse, and domestic violence, and to describe the impact of that abuse on his development.

Interviews and Documents Reviewed

7. In interviewed Richard Laird for a total of approximately six hours on September 12, 2011 and February 29, 2012. In addition, I interviewed his brother, Mark Laird, on November 14, 2011.

8. The following is a list of documents I reviewed in preparing this report:

a. Portions of the trial transcript, Commonwealth of Pennsylvania vs. Richard Roland Laird and Frank Chester, 1988.

b. Portions of the trial transcript, Commonwealth of Pennslyvania vs. Richard P. Laird and Frank Chester, 1997.

c. Portions of the trial transcript, Commonwealth of Pennslyvania vs. Richard Laird, 2007.

d. Pennsylvania State Police Criminal History Record of Laird, Richard Roland.

e. Letter from attorney John J. Kerrigan, Jr. to Dr. Gary L. Lage, dated November 2, 2006.

f. Declaration of Frank Chester, undated, with cover letter dated December 12, 2006.

g. Photocopies of crime scene photographs.

h. Neuropsychological evaluation of Dr. Henry L. Dee, dated August 2, 1996.

i. U.S. District Court opinion, dated September 5, 2001, Richard Laird v. Martin Horn, et al.

j. Delaware County medical records (1983) for Richard Laird.

k. File containing annotated literature on Attention Deficit Disorder.

l. Report of autopsy performed on Anthony Milano, dated January 27, 1987.

m. Birth records for Richard Laird.

n. Pennsylvania Department of Corrections records on Richard Laird.

o. Toxicology report by National Medical Services, dated May 2, 1995.

p. Police reports related to 1987 homicide investigation.

q. Transcript of wiretapped phone call between Frank Chester and Richard Laird, December 20, 1987.

r. Psychiatric report by Dr. Robert A. Fox, dated January 21, 1997.

s. ADHD treatment chart, 1997-98.

t. Report by Dr. John S. O'Brien, dated January 16, 2007.

u. Notes re report by Dr. Joseph S. Silverman, dated January 8, 2007.

v. Report by Dr. Joseph S. Silverman, dated November 10, 1994.

w. Middle and high school records for Richard Laird.

x. Military service records for Richard Laird Sr.

y. Declaration of Thomas J. McIntyre, dated January 27, 2012.

z. Declaration of Brian O'Leary, dated February 6, 2012.

aa. Declaration of John F. Guilmartin, Jr. Ph.D., dated February 17, 2012

Findings

9. Richard Laird was raised in a family in which alcoholism, violence, and abuse – psychological, physical and sexual – were rampant. Violence and alcoholism, and the chaos that they spawned, shaped his childhood and ultimately derailed his life.

10. Mr. Laird's father, a career Marine and Vietnam veteran, was an alcoholic who terrorized his family. He savagely beat his wife, Mr. Laird's mother, often in the presence of his children. He degraded and tormented both his wife and his children. But his greatest brutality, and his sadism, were directed at Mr. Laird. From the age of approximately five, and continuing until the family disintegrated when he was 10 or 11 years old, Richard Laird was repeatedly orally and anally raped by his father.

11. Mr. Laird's disclosure of the sexual abuse that he suffered at the hands of his father has been piecemeal, which is a very typical pattern among male victims of sexual abuse, and particularly so when the sexual abuse is perpetrated by a close family member. Mr. Laird's first disclosure of the abuse was to his brother, Mark, when the two were adolescents. Mark recalled that this disclosure came in the context of a conversation that he initiated, in which he asked Richard why he, Richard, had always seemed to be favored by their father. Mark recalled to Richard repeated scenes from their childhood, when their father would take Richard into the bedroom and tell Mark to stay out. There was a set pattern to these routines. They occurred in the morning. Their father would shower and shave, and then have Richard strip down either naked or to his underwear, and take him into the bedroom. Mark recalled that Richard told him that their father "wasn't right," that he was "sick," and even though Mark could not recall Richard's

exact words, he understood from that moment that their father had sexually abused Richard.

12. Mark Laird disclosed this information when he was interviewed by Dr. Henry Dee prior to the 1997 trial. Richard Laird also disclosed that he had been sexually abused, both to Dr. Dee, and to Dr. Joseph Silverman in 1994, but in both cases he apparently refused to identify the perpetrator, saying that it was a male family member.

13. Mr. Laird's partial disclosure – refusing to identify that it was his father, and minimizing the extent and severity of the abuse – is common, even typical for male victims of childhood sexual abuse. To be sexually abused – made the helpless, powerless object of another male's sexual gratification – is so utterly humiliating for most men that they often harbor it as a secret for much, if not all of their lives. The helplessness, powerlessness and terror that are the essence of the trauma violate the core norms of masculinity. To acknowledge that it happened, for most males, is to acknowledge that they are somehow tainted, weak, and inadequate as men. Some male victims respond to this overwhelming conflict by taking on a persona of hyper-masculinity. They portray themselves – in their dress, their language, their mannerisms, and their preoccupations – as stereotypes of masculinity, all in the effort to maintain their denial that they were helpless victims as children.

14. Richard Laird adopted such a hyper-masculine persona, an exterior façade of extreme toughness to mask the experiences of abject vulnerability that marked his entire childhood. It is thus not surprising that his disclosures about the sexual abuse, to Mark when they were both adolescents, and to the doctors who evaluated him after the

Milano homicide, were hesitant and partial. Since that is the norm for such disclosures, evaluators must be both persistent and comprehensive in their assessments in order to uncover the true dimensions of the sexual trauma. Mr. Laird's disclosures to me during the course of the interviews was also piecemeal. Only with persistent questioning did a more complete picture of the extent, nature and consequences of the sexual abuse emerge.

15. When, during my evaluation, Richard Laird described the details of the sexual abuse that he suffered, his demeanor was consistent with that of other men who have made similar disclosures to me over the course of my professional career. Physiologically, he showed many signs of marked autonomic arousal. His face became noticeably pale, his upper body became extremely rigid, his respiration rate increased and he began sweating. He also showed clear signs of feeling intense shame. He lowered his eyes and head, his voice became markedly fainter; his appearance could best be described as "caved in."

16. It was also notable that Mr. Laird's recounting of the sexual abuse hinged on very specific sensory memories, rather than around some type of story or narrative. For example, the very first statement he made about the sexual abuse was this: "The sick fuck would rub his dick between my cheeks." This was followed by a long silence during which he was trying to contain his emotional reaction. He was close to tears, and his body was virtually vibrating, his leg bouncing up and down rapidly. His next statement was: "No good dirty bastard. Go wash out your mouth." It took me a minute to realize that he was mimicking his father's voice, and after a couple of questions, I confirmed

that those were his father's words, telling the five year old Richard to wash out his mouth after his father had orally raped him and ejaculated into his mouth.

17. The interview, and Mr. Laird's disclosure, proceeded in this way, from one sensory fragment to another. This type of disclosure is entirely consistent with what is known about the neurobiology of traumatic memory and how that biology often affects a victim's memories. Traumatic events are typically recalled as a collection of intense sensory fragments. This characteristic of traumatic memory is caused by the intense activation of the amygdala, and a corresponding suppression of the hippocampus, both components of the brain's limbic system, and both integrally involved in traumatic memory and its retrieval.

18. Richard Laird was raped by his father routinely and repeatedly, from about the age of five, until about the age of eleven. Laird Sr. would very often come home at night, staggering drunk. "Every time he came home drunk I knew I would either have to suck his dick or get beaten," Richard said. His father would come into the bedroom that Richard shared with Mark, and he would get into Richard's bed, and either orally or anally rape him. Mark recounted these routine events as well, and now clearly feels very guilty that he did not understand what was happening to his brother. When Laird Sr. would come home drunk, sometimes he would tell Mark to "go lay with your mother," and sometimes he would take Richard out of the bedroom. He was four years younger than Richard, and thus much too young to comprehend what was happening, just as he was too young to understand what was happening when his naked father would take Richard into the bedroom some mornings and shut the door.

19. Even as Richard disclosed the oral and anal rapes, he did not readily disclose the most intimate, and therefore also most traumatic and humiliating aspects of the rapes. This pattern of disclosure is almost universal among victims of sexual trauma. Thus, only after some questioning, did Richard reveal that he still, to this day, experiences involuntary gag reflexes, something he has experienced all of his life. These gag reflexes are involuntary reactions to the sensory memory of the taste and consistency of his father's ejaculate in his throat. Similarly, and even more reluctantly, Richard disclosed that after his father would anally rape him he would feel rectal pain and discomfort for days.

20. To the present day, Richard Laird experiences flashbacks – involuntary and sudden sensory memories of the feel of his father's naked body, or a sudden pang of rectal pain. He also periodically still experiences nightmares, but nowhere near as frequently as he did during his childhood and adolescence, when his nightmares were constant. The most common nightmare that plagued his nights involved a ghost-like man who would come to attack him in his bed. In one version, Richard would fight the ghost-man, and he would wake up thrashing and sweating. In the second version, the man would be on top of him, hurting him, Richard would be utterly paralyzed with terror, and the man would tell Richard, "don't worry, it will soon be over." Richard would wake up trying to scream for help but nothing would come out. He would be both paralyzed and unable to scream.

21. This latter description is a classic description of tonic immobility, which is a physiological response to extreme terror and helplessness that is common to all

mammals. Research has documented that a large proportion of children who suffer sexual abuse experience tonic immobility, and clinical work with survivors of childhood sexual abuse reveals that nightmares among survivors of sexual abuse often involve a re-living of the terrifying state of tonic immobility.

22. That Richard Laird's father was capable of sadistic brutality is corroborated by witnesses to his violent, abusive behavior and his alcoholism. Thomas McIntyre, now a retired Marine Corps officer, was Laird Sr.'s immediate supervisor during the mid-1970's, which is approximately when Richard Laird's parents separated. In his affidavit, Mr. McIntyre recounted that he was very concerned about Laird Sr.'s abuse of alcohol, his attitude and behavior toward enlisted men, and his abusive behavior toward his partner. McIntyre's affidavit is notable in his willingness to criticize a deceased fellow Marine, and suggests that he must have been quite seriously concerned about Laird Sr.'s behavior.

23. What Mr. McIntyre could not have seen is the true scope of Laird Sr.'s brutality. Mark Laird described numerous scenes that graphically depict the level of violence that his father was capable of. He recalled "vicious" fights between his parents in which furniture was thrown and overturned, glass shattered, and always, his mother's terrifying screams. In one incident, he and Richard were in the back seat of a Volkswagen, his mother in the driver's seat, when their father came to the driver's window, reached in, and began strangling their mother. Mark recalled: "She was turning blue, and he's saying, 'I'm not hurting her, I'm not hurting her,' and he's killing her."

24. During another fight, Laird Sr. hit their mother with a teak wood lamp. "He'd go into a cold rage," Mark remembered. "Not yelling. Cold as a fucking stone. That's when he was really scary. I don't think he knew who he was."

25. Mark and Richard lived in constant terror of their father's rage and brutality. When he beat them, and being the oldest, Richard was dealt the worst of it, he beat them with his fists and with his military belt, using the buckle end to ensure maximum pain. "His face would be distorted," Mark recalled, "evil and sick looking. When he was in that state, he would kill someone."

26. Mark has been left deeply scarred by the terror and violence that he was exposed to. For many years he suffered constant nightmares, and he used drugs to help him stay awake to avoid those night terrors. Like Richard, for years he abused drugs.

27. The Laird family disintegrated in 1974 when they were living in Houston. Richard's mother took her two sons – Richard was 10 and Mark was seven – and moved into an apartment. They were destitute, and Richard recalled frequently being hungry. However, at some point their financial situation improved noticeably. Richard discovered later that his mother was embezzling money from the company she worked for. When it was discovered, the family fled to Philadelphia where his mother's sister could help them.

28. When Richard was 13 years old, his mother married Jim Kesler, a Pennsylvania state trooper. According to Richard, there was friction from the outset, and it quickly worsened. Richard was rebellious and already deeply into alcohol and substance

abuse. Jim Kesler tried to impose his authority in the household, and according to both Richard and other witnesses, he did so with physical violence. Kelly Lyons and her mother, Anna Walters, testified in 1997 that they had witnessed Kesler's violence directed both at Richard and his mother. One particularly violent episode took place at Walters' home: Kesler dragged Richard along the ground and beat him severely.

29. Richard described another episode when Kesler was drunk and enraged. He handed a rifle to Richard, stood on the coffee table in the living room, and screamed at Richard: "Shoot me! Shoot me!" Kesler regularly beat Richard with his fists, hitting him repeatedly in the face and the ribs.

30. The violence and conflict escalated to the point that Richard, at the age of 15 and with his mother's assent, moved out of the house. He was a young teenager who had by then endured a decade of unrelenting sexual and physical abuse, and who was already far along the path of alcohol and drug addiction. Drugs and alcohol were the only escape available to Richard, and that he discovered them was nearly inevitable. He was surrounded by adults who were alcoholics, and he was systematically deprived, from early childhood, of the experiences, support and nurturance that would have given him better alternatives for dealing with the multitude of severe symptoms and legacies of abuse from which he suffered.

Impact on Richard Laird's Development

31. Like most boys who are sexually abused, Richard never told anyone what was happening to him. Disclosures by boys is a rarity, in part because they are so intensely

shamed that they believe it is their fault, and that they will be further humiliated if anyone knows about it. In Richard's case, it was his own father who was torturing him, in his own home, with his mother down the hall, his younger brother just outside the door. Under such circumstances, a five year old boy will invariably believe that the abuse is his fault, that there is no one who will stop it or help him.

32. So Richard did what most boys do. He tried to repress the experiences out of existence. "I put it in a dark corner and shut the door," he said during the evaluation. Almost all boys attempt this adaptation, because they have few, if any other choices. A young boy cannot cope with the overwhelming emotional states triggered by such terrifying experiences – the terror, the rage, the abject helplessness and powerlessness. Nor can a young boy comprehend what is happening. He cannot understand that the adult who is sexually abusing him is wrong, is bad, is committing a serious, violent crime. Instead, he assumes that something terrible is happening to him because he is fundamentally terrible. Given these overwhelming emotional and cognitive assaults, repression of the experience is often the young boy's only option.

33. Unfortunately, it doesn't work. Repression may allow a boy to struggle through some of his childhood years and into his adolescence, but the many legacies of sexual abuse will emerge.

34. Richard Laird spent his childhood feeling utterly ashamed and worthless. He felt inferior, less than his peers. "As a little kid, you try to fit in, but you know that you aren't normal, that it wasn't right, that you weren't right," he explained during the evaluation. His statement is a perfect example of how sexual abuse is internalized by the child: "it"

wasn't right, so "you" aren't right. The badness, the shame intrinsic to the sexual abuse, becomes a part of the child, and the child experiences himself as bad and shameful.

35. There were some particular manifestations of this that Richard recalled, and they are frequently reported by male survivors of sexual abuse. Throughout his childhood, he felt inferior and intimidated by other males, and because of this he would try to avoid urinating in public bathrooms where he would have to stand next to other males, especially if there were no partitions between the urinals.

36. He also had intense, negative reactions to any physical contact from another male. "I can't stand it if a man touches me in any way." He explained that when he went for a haircut he would insist on a female haircutter because having a male's fingers touch his head was intolerable. As a child, when he felt so acutely vulnerable, he would even refuse to go out somewhere with a grown man. If a friend of the family offered to take him fishing he would refuse to go because he feared being alone with a grown man.

37. To help him cope with his intense feelings of inferiority, Richard did what many male victims of sexual abuse do; he adopted a hyper-masculine façade; a persona of extreme toughness. Such a persona has two purposes. First, it reassures the boy/man that he is not inferior to other men, but rather he is much more masculine than they are. Second, it signals to other males that they had better stay away, and never challenge his masculinity. "As I got older," Richard said during the evaluation, "I started to feel I could be the baddest motherfucker."

38. Richard's first year of junior high school offered him a respite from these torments, and a new and potentially positive way to cope with his chronic feelings of inferiority and worthlessness, as well as his intense rage. He tried out for his school's football team and became a star defensive linebacker.

39. Football was a revelation to Richard. On the field, his physical skills could overcome his deep-seated feeling of worthlessness, and he basked in the approval of his coach, a male role model who treated him with decency. He soaked up this new experience and responded with fervor. He spent hours in the weight room and gym strengthening his body, and hours on the practice field honing his football skills. And in games, he found a perfect outlet for his long-repressed rage at the father who tortured him – he hit opposing players with a ferocity that was only tolerated because it was happening on a football field. "I hit people so hard, and my coach loved it!" Richard recalled during the evaluation. In describing this "football year" he became extremely animated, and the enormously positive meaning of it clearly still resonated in him.

40. It lasted one year. The next year, his school banned the football league because it was deemed too dangerous, and converted the league to "flag football" in which there is no hitting or tackling. The loss may have been even more consequential for Richard than simply the loss of a positive outlet for his anger, and a source of positive feeling about himself. During his 'football year,' Richard reported that he did not do or even think of drugs. His focus was intensely centered on building his physical strength, and gaining the approval of his coach. When he lost football, he turned to alcohol and drugs.

41. Richard had been introduced early to alcohol. Around the age of 10 or 11 his father gave him a glass of water that was really pure vodka. A chronic alcoholic, his father would take him to bars and pour bourbon into Richard's soda. Richard believes that this was happening routinely long before he reached ten years of age.

42. Exposed to his father's alcoholism, and directly guided into drinking by his father long before he was even a teenager, Richard's own descent into alcoholism was classically "over-determined." That is, multiple factors converged that dramatically increased the likelihood of him becoming an alcoholic. His father modeled the behavior itself, as well as the behavior as a solution to problems and stress. Richard was given the powerful message that when you feel lousy, you drink. His father also gave Richard access to alcohol, so that not only did Richard witness the behavior, he was physically coached into mimicking it. And finally, once Richard tasted alcohol and experienced its effects, it was immediately and powerfully reinforcing because it alleviated at least some of his suffering.

43. "Alcohol was an escape. It was an escape from who I was. It gave me confidence," Richard explained during the evaluation. Alcohol medicated the chronic feelings of worthlessness, inferiority and shame that plagued him. For a child who has learned no other way to handle these intensely negative emotional states, alcohol is a powerful reward that reinforces the drinking behavior. When Richard drank, he drank to get drunk. To obliterate those negative emotional states.

44. Alcohol is a liquid drug. Soon Richard discovered other drugs and methamphetamine became his favorite. "It made you feel normal," Richard said. "I was

sharp as a tack if I was on the right dose." Meth also alleviated his chronic feelings of depression.

45. Among the many deleterious effects of chronic substance abuse, two are particularly consequential, and both dramatically affected Richard's life. Chronic substance abuse slows down and can even arrest normal development, and it almost invariably introduces the abuser into the violent and chaotic culture of drugs and drug dealing.

46. When a young boy begins to abuse alcohol and drugs at a young age – Richard was drinking by the age of 10 and using meth by age 12 – he quickly learns that the answer to any stressful situation, or to any distressing emotion, is to use drugs. In doing so, he deprives himself of the opportunity to try out any more positive, more adaptive strategy for coping with these challenges. He never tries them out, he never uses them, he never practices them. Instead of spending his teenage years slowly developing increasingly adult-like coping strategies, he spends his teenage years drunk or high on meth. The consequence is that he emerges into young adulthood without the inner resources that a young adult must have to cope with the far more serious world that young adults inhabit. Very often, part of that far more serious world is the drug culture itself, a culture that is imbued with violence, and that both produces and feeds on chaos.

Conclusions

47. Richard Laird was severely sexually and physically abused throughout his childhood, abuse that left him profoundly scarred. His biological father was a brutal child

rapist and an alcoholic, and he both sexually tortured Richard and initiated him into a life of alcoholism and drug abuse. That alcohol and drug abuse in turn derailed Richard's life, directing him into the chaotic and violent life of the drug culture.

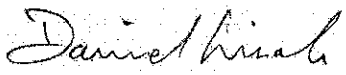
48. In his 1994 report, Dr. Joseph Silverman concluded with the following statement:

> "It appears to me that at the time of the killing of Anthony Milano Mr. Laird was intellectually impaired to such a degree that his judgment and self-control were undermined. It is probable that long smoldering antagonism toward persons identified as homosexual might have fastened upon Anthony Milano, a drinking companion on the night in question, resulting in Mr. Milano's death."

49. While it is not my intent to attempt to discern Richard Laird's mental state at the time of the crime, my evaluation of Mr. Laird does corroborate the existence and the saliency of the ingredients identified by Dr. Silverman in 1994. Richard Laird was an alcoholic and chronic meth user, and by most accounts he was severely intoxicated during the night that the crime occurred. He also harbored intense negative feelings about male-to-male touch. He described a somewhat more nuanced attitude toward homosexuals than that referred to in Dr. Silverman's report, in which Richard reportedly said that he "hated" homosexuals. During my evaluation of Richard, he was very clear that certain types of approaches, or unwanted advances, or touching, could trigger a sharp, even violent reaction from him. However, he stated that if he was sober, or "relatively sober," he could and would be in control of those reactions.

50. He gave as an example of that an incident that occurred when he was approximately 15 years old. He was working as a mechanic's helper for a company that rented large trailers that were used by horse racing outfits. On one occasion, he traveled with the company's owner to the Pocono race track to help maintain the equipment. He and the owner slept that night side by side in a bunk in the trailer. The owner reached out and put his hand on Richard's genitals, and Richard reacted by throwing his arm off. This happened at least twice during the night. Richard recalled it as intensely disturbing, but he said he could control his reaction because he was sober.

51. Richard stated to me that he has no memory of the events of the night that Mr. Milano was murdered, beyond a few scattered memories of drinking at the bar and playing pool. It is possible that in an extremely intoxicated state, Richard may have acted on the long, pent-up rage he was capable of feeling towards any male whom he perceived as wanting to touch him against his will.



David Lisak, Ph.D.

Framingham, Massachusetts

March 1, 2012

CERTIFICATE OF SERVICE

I, Billy H. Nolas herebye certify that on this 9th day of March 2012, I served a true and correct copy of the foregoing *Petitioner's Notice of Filing* on the following persons in the manner and location indicated below, which service satisfies the requirements of the Pennsylvania Rules of Criminal Procedure:

Michelle A. Henry
First Assistant District Attorney
Office of the Bucks County District Attorney
55 East Court Street
Doylestown PA 18901

Billy Nolas Jr
Billy H. Nolas

Dated March 9, 2012