OCTOBER TERM, 2025

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM HOUSMAN,
Petitioner,

v.

SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF APPENDICES

CLD-136

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-2628**

WILLIAM HOUSMAN, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(M.D. Pa. Civ. No. 3:20-cv-01198)

Present: KRAUSE, PHIPPS, and SCIRICA, Circuit Judges

Submitted are:

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

(2) Appellant's motion for an extension of the word limit for the application for certificate of appealability in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant William Housman's motion for an extension of the word limit on his application for a certificate of appealability ("COA") is granted. However, after careful review of the record, the parties' filings, and the decisions addressing Housman's habeas petition, his application for a COA is denied.

Housman raised three issues in his COA application, arguing: (1) that the trial court violated his due process rights by denying his motion to sever his trial from that of his co-defendant and admitting bad acts evidence against him, and that his trial counsel was ineffective for failing to properly challenge the admission of that evidence; (2) that the trial court violated his due process rights by giving erroneous jury instructions on

accomplice and conspiracy liability and that his trial counsel was ineffective for failing to object to them; and (3) cumulative error. Jurists of reason would not debate whether these claims were properly denied. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

For both of Housman's ineffective assistance of trial counsel claims, jurists of reason would not debate whether the Pennsylvania Supreme Court's legal or factual analysis was unreasonable in its conclusion that Housman was not prejudiced by his trial counsel's actions. See 28 U.S.C. § 2254(d)(1)-(2); Becker v. Sec'y Pa. Dep't of Corr., 28 F.4th 459, 462 (3d Cir. 2022). For his claim regarding the bad acts evidence admitted against him, trial counsel moved to sever the trial, entered a standing objection regarding the admission of this evidence against Housman, and objected to the trial court's jury instruction about the evidence as insufficient. Given the strong evidence presented against Housman — including his confession to police — jurists of reason would not debate whether there was a "reasonable probability that . . . the result of the proceeding would have been different" if Housman's trial counsel had challenged the bad acts evidence in a different way. See Strickland v. Washington, 466 U.S. 668, 694 (1984). For Housman's second ineffectiveness claim, he cannot show prejudice as jurists of reason would not debate whether the evidence against Housman was so strong that it was inconceivable for the jury to have found him guilty of first-degree murder merely as an accomplice.

As for Housman's due process claims, jurists of reason would not debate whether his claims regarding the severance motion and bad acts evidence are procedurally defaulted, as he did not raise them on direct appeal and cannot do so now. In his COA application, Housman has not raised claims of ineffective assistance of appellate counsel for failing to bring due process claims on direct appeal, such that counsel's actions could provide cause to excuse the default. See 28 U.S.C. § 2254(b)(1); Johnson v. Pinchak, 392 F.3d 551, 556, 563 (3d Cir. 2004) (explaining that constitutionally ineffective assistance of counsel can constitute cause to excuse the default of a claim). Even if he had, jurists of reason would not dispute whether the state court's factual or legal analysis was unreasonable in concluding that appellate counsel's actions did not prejudice him, as the Pennsylvania Supreme Court had already analyzed his related claim under state law regarding the severance motion and bad acts evidence and concluded that it did not prejudice him, given the properly admitted evidence against him.

For his remaining due process claim regarding the accomplice and conspiracy liability jury instructions, because jurists of reason would not debate the resolution of Housman's related ineffectiveness claim and trial counsel's ineffectiveness would serve as the basis to excuse the default of this claim, jurists of reason would not debate whether

this claim is also inexcusably procedurally defaulted. See Pinchak, 392 F.3d at 563. Finally, jurists of reason would not debate whether these issues cumulatively "had a substantial and injurious effect or influence in determining the jury's verdict." Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (citation omitted).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

A True Copy:

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

Dated: June 10, 2025
Gch/cc: All Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

William Housman,	:	**CIVIL ACTION NO. 3:20-cv-1198**
Petitioner,	:	
v.	:	**(JUDGE MANNION)**
John E. Wetzel, et al.,	:	
Respondents.	:	

ORDER

In accordance with the memorandum filed this same day Petitioner William Housman's objections (Doc. 51) will be **OVERRULED**, Judge Bloom's report and recommendation (Doc. 46) will be **ADOPTED IN ITS ENTIRETY** as the decision of the court, Housman's petition for habeas corpus (Doc. 1) will be **DENIED**, a certificate of appealability will not be issued, and the Clerk of Court is directed to close this case.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

DATE: August 1, 2024
20-1198-01 ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

William Housman,	:	**CIVIL ACTION NO. 3:20-cv-1198**
Petitioner,	:	
v.	:	**(JUDGE MANNION)**
John E. Wetzel, et al.,	:	
Respondents.	:	

MEMORANDUM

Presently before the court is the January 11, 2024, report and recommendation of Magistrate Judge Daryl F. Bloom. (Doc. 46.) Judge Bloom recommends that petitioner, William Housman's, petition for habeas corpus be denied as meritless and a certificate of appealability not be issued. Housman filed a timely objection (after a two-month extension for briefing by counsel) to the report arguing that Judge Bloom committed multiple errors in making his recommendation. However, based on the court's review of the report as described below, the court will overrule all of Housman's objections and adopt Judge Bloom's report and recommendation in its entirety.

I. BACKGROUND

Since the report correctly states the procedural and factual background of this case, (Doc. 46, pp. 2-13), it will not be repeated fully herein. In short

petitioner, William Housman, was convicted in 2001 of the kidnapping and first-degree murder of 18-year-old Leslie White in Cumberland County, Pennsylvania, in 2000. He and his co-defendant, Beth Markman, were sentenced to death. Prior to trial both Housman and Markman confessed to kidnapping and murdering White. However, each claimed they were coerced to do so by the other. Housman moved to sever his trial from Markman's due to her confession, but his motion was denied. At trial both Housman and Markman's confessions were admitted with references to each other's names removed. However, Housman's confession contained two instances of non-redaction, in which Markman's name was referenced. On appeal, the Pennsylvania Supreme Court vacated Markman's convictions finding that the two non-redactions violated her rights under the confrontation clause. Housman also appealed his conviction and death sentence, challenging *inter alia* the trial court's denial of his motion to sever, but both his conviction and death sentence were affirmed by the Pennsylvania Supreme Court.

On June 17, 2011, Housman filed a timely petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), and filed an amended, counseled petition on May 22, 2013. After three days of evidentiary hearings, Housman was granted PCRA relief in the form of new penalty trial on grounds Housman's counsel was ineffective for failing to present mitigating

evidence at the penalty phase. Still, the court found that Housman's claims regarding the guilt phase of his trial did not warrant relief. The Commonwealth appealed the grant of a new penalty trial and Housman appealed the denial of new guilt trial, but the Pennsylvania Supreme Court upheld the decision of the PCRA court. *Commonwealth v. Housman II*, 226 A.3d 1249 (Pa. 2020). Ultimately, the Commonwealth waived its right to proceed to a new penalty trial, and on January 22, 2021, the trial court resentenced Housman to a term of life imprisonment without the possibility of parole.

The present habeas corpus petition was initially filed during the pendency of Housman's state court proceedings on July 13, 2020. (Doc. 1.) As such the matter was stayed pending the outcome of his state court appeals. On January 21, 2022, Housman filed a renewed memorandum of law raising five grounds for relief: (1) the trial court's error in refusing to sever his and Markman's trials, as well as counsel's failure to effectively litigate the severance issue; (2) trial counsel's failure to object to the jury charge on accomplice liability and conspiracy; (3) trial counsel's failure to present evidence regarding White's cause of death; (4) a violation of Housman's Fifth Amendment right when his confession was admitted at trial; and (5) the effect of the cumulative errors resulting in prejudice.

II. LEGAL STANDARD

A. Reports and Recommendations of Magistrate Judges

When objections are timely filed to the report and recommendation of a magistrate judge, the district court must review *de novo* those portions of the report to which objections are made. 28 U.S.C. 636(b)(1); *Brown v. Astrue*, 649 F.3d 193, 195 (3d Cir. 2011). Although the standard of review is *de novo*, the district court "may also, in the exercise of sound judicial discretion, rely on the Magistrate Judge's proposed findings and recommendations." *Bynum v. Colvin*, 198 F. Supp 3d 434, 437 (E.D. Pa. 2016) (citing *United Stated v. Raddatz*, 447 U.S. 667, 676 (1980)).

B. State Prisoner Habeas Relief

A petition for writ of habeas corpus is the exclusive federal remedy for a state prisoner challenging the "very fact or duration" of his confinement and seeking "immediate release or a speedier release from that imprisonment." *Preiser v. Rodriguez,* 411 U.S. 475, 498-99 (1973); *Leamer v. Fauver,* 288 F.3d 532, 542-44 (3d Cir. 2002). A district court is authorized to "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a) (2006).

§2254 also mandates that federal court owe deference to the factual findings and legal rulings made by state courts in the course of state criminal proceedings. With respect to legal rulings by state courts, under §2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; *see* 28 U.S.C. §2254(d)(l); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. §2254(d)(2).

III. DISCUSSION

Judge Bloom found and this court agrees that all five of Housman's claims for relief were in some fashion raised before and considered by state courts, whose determinations were not contrary to clearly established law or based on an unreasonable determination of facts. Housman objects not only to Judge Bloom's finding on each of his claims for relief, but also the applicable legal standard.

A. Judge Bloom's Legal Standard

In addition to the legal standard summarized above Judge Bloom notes that "[t]ypically, habeas relief will only be granted to state prisoners in those

instances where the conduct of state proceedings led to a 'fundamental defect which inherently results in a complete miscarriage of justice' or was completely inconsistent with rudimentary demands of fair procedure." (Doc. 46, p. 14)(quoting *Reed v. Farley*, 512 U.S. 339, 354 (1994)). Housman objects to the application of *Reed* because the petitioner's claim in that case was for a violation of a federal statute, and he does not raise any claims regarding federal statutes here. As such the instant petition contends that to the extent Judge Bloom "relied upon this inapplicable legal standard in 'assessing Housman's petition' (Doc. 46, p. 21), the magistrate[1] erred." Regardless, based on the court's review, Judge Bloom's recommendations did not turn on *Reed* but rather the undisputed language from §2254 that only authorizes a federal court to grant a state petitioner habeas relief when the state court rulings in their case were contrary to clearly established law

[1] In this and all other instances where Housman's counsel refers to Judge Bloom as "the magistrate" the court wants to remind counsel that the title "magistrate" no longer exists in the U.S. Courts, having been changed from "magistrate" to "magistrate judge" in **1990**. Judicial Improvements Act of 1990, 104 Stat. 5089, Pub. L. No. 101-650, §321 (1990) ("After the enactment of this Act, each United States magistrate . . . shall be known as a United States magistrate judge."). Plaintiffs' counsel is reminded to use the correct title in the future, when referring to Judge Bloom or any other Magistrate Judge.

or based on an unreasonable determination of facts. Accordingly, the court will overrule Housman's objection to Judge Bloom's legal standard.

B. The Trial Court's Refusal to Sever and Counsel's Ineffectiveness in Litigating this Issue

Housman argues that the trial court erred when it refused to sever his trial from Markman's because it resulted in prejudicial evidence being admitted against him at trial and his trial and appellate counsel were ineffective for failing to properly litigate this issue. Housman initially raised this argument on direct appeal and it was rejected by the Pennsylvania Supreme Court in 2009. Specifically, the Pennsylvania Supreme Court, applying the appropriate abuse of discretion standard, found that the trial court did not abuse its discretion in denying severance where Housman and Markman's defenses were not so antagonistic as to warrant severance. *Housman I*, 986 A.2d at 835.

The court also found that any prejudice to Housman from the evidence introduced because of a joint trial was offset "by his own *admission that he violently strangled White to death* in his living room after luring her there under false pretenses, drove to Virginia with her lifeless body in her Jeep, and subsequently deposited her body in the trunk of an abandoned car." *Id*. (emphasis in original). The court reasoned that this evidence alone was

enough to apprise the jury of Housman's capacity for violence. Furthermore, the court found that the trial court gave a limiting instruction regarding the evidence submitted by Markman.

Housman again argued this claim under the PCRA, in the terms of ineffective assistance counsel, but the PCRA court found that Housman's claims rested on the same factual basis as his claim of trial court error, which the Pennsylvania Supreme Court found to be meritless. The Pennsylvania Supreme Court affirmed the PCRA court's findings and again reiterated that any prejudice Housman may have suffered "did not outweigh the overwhelming and properly-admitted evidence of his guilt." *Housman II*, 658 226 A.3d at 1263. Furthermore, the Pennsylvania Supreme Court found that counsel was not ineffective in not objecting to specific hearsay evidence Housman alleged was improperly admitted due to the trial court's refusal to sever because counsel had a reasonable basis for not objecting to the alleged hearsay statements.

Judge Bloom concluded that the state courts' prior determination on these arguments were not contrary to clearly established law or based on a reasonable determination of fact. Nonetheless Housman objects arguing that Judge Bloom erred because he 1. Wrongly accepted the state court's conclusion that Housman and Markman's defenses were not antagonistic, 2.

Did not apply the proper prejudice analysis, 3. Failed to acknowledge a later-in-time jury instruction that nullified the trial court's earlier limiting instruction, and 4. In also concluding that trial counsel had a reasonable basis for not objecting to alleged hearsay evidence.

1. Antagonistic Defenses

Housman argues that his and Markman's defenses were mutually exclusive and in turn antagonistic because in his version of events Markman forced him to kill White because Housman was cheating on her with White, while in Markman's version she simply did what she was told because she was in an abusive relationship with Housman. As such, both defendants argued that they lacked the specific intent to kill but instead participated in the homicide only because they were coerced to do so by the other. Regarding Markman's appeal, the Pennsylvania Supreme Court also found that "[her] and Housman's accounts of the central facts were irreconcilable." *Commonwealth v. Markman*, 916 A.2d 586, 603 (Pa. 2007). The court found that the "degree to which the jurors would believe" these contrasting accounts would determine whether the defendant "acted with a specific intent to kill" and was thus guilty of first-degree murder. *Id*. Housman claims it was patently unreasonable for the state court to reach the opposite conclusion on his appeal, and Judge Bloom erred in finding otherwise.

Moreover, Housman claims Judge Bloom erred in not considering whether the prior bad acts and bad character evidence submit by Markman in support of her defense that Housman abused her would have been admissible had he been tried alone.

The court disagrees with Housman's characterizations. As Judge Bloom noted in his report the Pennsylvania Supreme Court did not find that Housman was not prejudiced by the trial court's refusal to sever but rather that this prejudice was offset by his own confession of brutally murdering White and carelessly disposing of her body. Thus, its conclusions regarding Markman's appeal are not inconsistent with its conclusions regarding Housman's now multiple appeals. Likewise, Judge Bloom notes that the Housman's confession alone was enough to appraise the jury of his capacity for violence. Accordingly, even if the evidence of Housman's abuse of Markman was inadmissible it was not necessary for the jury to convict him, and the court will overrule his objection on this issue.[2]

[2] Housman cites *Zafiro v. United States*, for the proposition that severance is required "when evidence . . . that would not be admissible if a defendant were tried alone is admitted against a codefendant." 506 U.S. 534, 538–39 (1993). Notwithstanding that this case addressed severance under the Federal Rules of Criminal Procedure, not the analogous Pennsylvania rules, the Supreme Court in this case specifically declined "to adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses" because "mutually antagonistic defenses are not prejudicial *per*

2. Judge Bloom's Prejudice Analysis

Housman acknowledges that in finding no prejudice, Judge Bloom and prior state courts relied on his confession to conclude the Commonwealth presented overwhelming evidence of his guilt. However, he argues that the proper inquiry regarding prejudice is not whether there was sufficient evidence to support his conviction but rather "whether the error had a substantial influence on the verdict despite sufficient evidence to support the result apart from the error." *Yohn v. Love*, 76 F.3d 508, 523 (3d Cir. 1996)(citing *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)). As such Housman asserts Judge Bloom wrongly discounted the influence the trial court's refusal to sever had on the jury by allowing the admission of prejudicial evidence about his abuse of Markman that in turn impugned his credibility and undermined his defense that he killed White because of Markman's coercion. According to Housman without such evidence, the jury would have found his defense more credible.

Again, the court disagrees with Housman's characterizations. Judge Bloom did not deny that the trial court's refusal to sever influenced the jury

se." *Id*. Thus, any mutual antagonism of Housman and Markman's defenses alone did not require severance and the state courts prior determinations were not contrary to clearly established law.

because the commonwealth otherwise submitted sufficient evidence but rather that the evidence presented by the Commonwealth was so overwhelming the jury could have convicted Housman irrespective of any evidence submitted by Markman. Accordingly, even if Markman submitted no prejudicial evidence influencing the jury and jury found Housman more credible the other evidence was so overwhelming that the jury would have still convicted him, and the court will overrule his objection on this issue.

3. The Trial Court's Subsequent Jury Instruction

Housman also acknowledges the state court finding that the trial court's instruction limiting the jury's consideration of bad acts and bad character evidence submitted by Markman was "sufficient to eliminate any alleged prejudice stemming from Markman's assertions of [Mr. Housman]'s abuse." *Housman I*, 986 A.2d at 836. However, he argues that the state and in turn Judge Bloom ignored the trial court's subsequent instruction delivered during its final jury charge, which encouraged the jury to consider all the "facts" that Markman and the Commonwealth had presented. Housman, echoing Justice Baer's dissent from his direct appeal, takes the position that the jury would have assumed the subsequent instruction overrode the earlier instruction. *Housman I*, 986 A.2d at 851 (Baer, J., dissenting). Nonetheless, a dissent does not make a state's court finding unreasonable. Nor does

Housman submit any authority that a court must assume a subsequent jury instruction overrides or supersedes a prior jury instruction. Moreover, the Pennsylvania Supreme Court found the prior limiting instruction was sufficient but not necessary to eliminate any alleged prejudice. Accordingly, any subsequent confusion about the scope of that instruction would not be dispositive, especially given the otherwise overwhelming evidence of Housman's propensity for violence, and the court will overrule his objection on this issue.

4. Counsel's Failure to Object to Hearsay

Housman argues the Judge Bloom erred and state courts were unreasonable in concluding that trial counsel had a "reasonable basis" for not objecting to the hearsay evidence that was "cumulative" of his own confession. *Housman II*, 226 A.3d at 1264–65. Housman asserts that there is no "cumulativeness" exception to the general inadmissibility of hearsay evidence and had counsel properly litigated this issue there is a reasonable likelihood that there would have been a different result at trial or on direct appeal. Housman is correct that there is no "cumulativeness" exception to the hearsay rule, but the court disagrees that there is a reasonable likelihood absent such evidence the jury would not have convicted him.

The specific piece of hearsay at issue here is the testimony of Melissa Martin, a co-worker of White, recounting a conversation she had with Chad Wriglesworth, her, and White's supervisor at Wal-Mart the night Housman kidnapped and murdered her. Martin testified that White asked Wriglesworth if she could leave work early because Housman (falsely) told her his father had died and she wanted to be with him. Housman considers this testimony triple hearsay and argues his trial counsel should have objected to it. The Pennsylvania Supreme Court disagreed because it merely repeated Housman's own much more damning confession that he lied to White about his father's death to lure her to his home where he subsequently strangled her to death. Regardless of whether it was reasonable for counsel to object to this evidence it does not change the fact that it was redundant of evidence already going to the jury. Accordingly, it would be unreasonable to find absent such evidence the jury would not have convicted Housman and the court will overrule his objection on this issue.

C. Ineffective Assistance of Counsel – Failure to Object to the Jury Instructions for Accomplice and Conspirator Liability

Housman argues that his counsel was also ineffective for failing to object to the trial court's jury instructions on accomplice liability and conspiracy. He contends that the challenged instruction relieved the

Commonwealth of its burden to prove he had specific intent to kill for first-degree murder. The PCRA court denied this claim because the case Housman relied on was decided after Housman's trial, *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005), was decided after Housman's trial, and that his counsel could not be deemed ineffective for failing to predict a change in the law. The Pennsylvania Supreme Court affirmed noting that even if counsel had been deemed ineffective for failing to object to the disputed instruction, given the overwhelming evidence against Housman, it was "inconceivable that the jury would have convicted Housman merely as an accomplice to Markman, rather than as a principle to the crime." *Housman II*, 226 A.3d at 1268.

Judge Bloom found that these determinations were not contrary to established law or based on an unreasonable determination of fact. Nonetheless Housman objects arguing that Judge Blooms erred because he 1. Failed to address the inadequacy of the jury instructions that allowed the jury to find Housman guilty if it found that either he or his codefendant possessed the specific intent to kill, 2. Failed to acknowledge trial counsel was ineffective for failing to object to the incorrect jury charge, and 3. Erroneously concluded that Housman was not prejudiced by the allegedly unconstitutional jury instructions.

1. The Inadequacy of the Trial Court's Jury Instructions

Housman argues that Judge Bloom failed to analyze the trial court's jury instructions in light of *Laird*, which is binding precedent on this court, failed to address the trial court's instruction on conspiracy liability, which failed to advise the jury it had to make a finding of specific intent to kill, and failed to address the trial court's first-degree murder instruction, which also did not make clear that the jury must find each defendant possessed specific intent to kill. While Housman is correct that the *Laird* case presents a number of factual analogies to the present case and is binding on this court, Judge Bloom like the state courts who had previously heard this argument recognized the *Laird* case was decided after Housman was convicted and as such did not need to apply it to the disputed jury instruction insofar as it pertains to Housman's ineffective assistance of counsel claim.[3]

Likewise, Judge Bloom and the state courts did address whether the inclusion of the phrase "or to make it easier to commit all these crimes" in the trial court's conspiracy instruction relieved the Commonwealth of its burden in finding that the overwhelming evidence of Housman's specific intent to kill again made it "inconceivable that the jury would have convicted

[3] Like the PCRA court this court will not speculate as to whether the claim could have been properly raised pending direct appeal or in some other way.

Housman merely as an accomplice to Markman, rather than as a principal in the crime." *Housman II*, 226 A.3d at 1268.

As to the trial court's first-degree murder instruction, Judge Bloom and the state court noted, that at the penalty phase, Housman's principal role in the White's murder was highlighted by the fact the jury found Markman participation in the murder to be relatively minor. *Housman II*, 226 A.3d at 1268 n. 13. As such Housman's contention that the jury could have wrongly convicted him by believing only Markman had specific intent is of no moment. The jury found Housman not Markman was the driving force in White's murder. Accordingly, even if the jury thought only one defendant had specific intent to kill White that Defendant was Housman not Markman and the court will overrule his objection on this issue.

2. Trial Counsel's Failure to Object to Jury Instructions

Housman argues that contrary to Judge Bloom' assessment the state court findings that counsel was not deficient because *Laird* was decided two years after Housman's case and counsel cannot be deemed ineffective for failing to predict subsequent changes in the law was unreasonable because *Laird* followed a line of similar cases. *See, e.g., Smith v. Horn*, 120 F.3d 400, 410 (3d Cir. 1997); *Commonwealth v. Huffman*, 638 A.2d 961, 964 (Pa. 1994); *Commonwealth v. Bachert*, 453 A.2d 931, 935 (Pa. 1982). Housman

is correct that neither the state court nor Judge Bloom addresses these cases which predated his trial. But the Third Circuit has found a failure to properly instruct a jury on specific intent is subject to harmless error analysis. *Bronshtein v. Horn*, 404 F.3d 700, 712 (3d Cir. 2005) citing *Smith,* 120 F.3d at 416–17. Given the overwhelming evidence of Housman's specific intent such an error here could be considered harmless. Accordingly, even if Housman's counsel could be deemed ineffective it would not disturb his conviction and the court will overrule his objection on this issue.

3. The Jury Instructions' Prejudice to Housman

Housman argues that had counsel objected to the challenged jury instructions, there is a reasonable probability that at least one juror would have had a reasonable doubt as to his guilt. This court like Judge Bloom and the state courts disagree. As previously discussed, the alleged errors in the trial court's jury instruction were harmless. Housman further argues Judge Bloom failed to account for the impact of the evidence Markman had told her probation officer and friend she was going to kill White, consider that trial counsel's defense strategy was to argue Housman lacked specific intent to kill making it more likely the jury convicted him without finding he had specific intent, and address the Pennsylvania Supreme Court's decision on

Markman's appeal that "the evidence supported a finding of [Markman] guilt[y] as a principal or an accomplice." *Markman*, 916 A.2d 586.

However, Markman's comments that she was going to murder White does not change the fact that Housman confessed to actually murdering White. Likewise, regardless of trial counsel's strategy the overwhelming evidence yet again made it "inconceivable that the jury would have convicted Housman merely as an accomplice to Markman, rather than as a principal in the crime." *Housman II*, 226 A.3d at 1268. And finally, the alleged inconsistency in the Pennsylvania Supreme Court's decisions on Markman and Housman's appeals do not support a finding here that an error in the trial court's jury instructions was anything but harmless. The Pennsylvania Supreme Court found a jury *could* have convicted Markman as principal or accomplice but at the penalty phase the jury found that Markman only played a relatively minor role in the murder. Partially on that basis state courts and now Judge Bloom have repeatedly affirmed that Housman cannot show prejudice and or that there is a reasonable probability that the outcome of his trial would have been different. Accordingly, this court agrees the trial court's jury instructions did not prejudice Housman and will overrule his objection on this issue.

D. Ineffective Assistance of Counsel – Medical Examiner Evidence

Housman argues that his counsel was additionally ineffective for failing to introduce evidence from the medical examiner that White's death was caused by the gag in her mouth, rather than being choked with a wire and Housman's arm. He further asserts that the prosecution committed misconduct when it elicited misleading testimony with respect to White's cause of death at trial and failed to correct it. The PCRA court rejected this claim noting that at the evidentiary hearing, Housman's counsel testified that he had a strategic basis for not cross examining, the medical expert, Dr. Venuti. Further the PCRA court reasoned, and the Pennsylvania Supreme Court agreed that even if counsel was deemed ineffective for failing to introduce this evidence the outcome of the trial would not have been different.

Judge Bloom found that these determinations were not contrary to established law or based on an unreasonable determination of fact. He further noted that the evidence presented at trial, including Dr. Venuti's testimony, established that White died of asphyxiation, and both Markman and Housman played a part in cutting off White's airway—Markman by placing a gag in White's mouth, and Housman by pulling up on White's neck

with a wire forcing the gag further into White's mouth. Nonetheless Housman objects arguing that Judge Blooms erred 1. In concluding the evidence established that Housman's action contributed to the blocking of White's airway, 2. In affirming the state court's finding that counsel was reasonable for not questioning the medical examiner on the topic, and 3 In his prejudice analysis of both Housman's claims of counsel's ineffectiveness and prosecutorial misconduct.

1. The Evidence Housman's Actions Contributed to White's Asphyxiation

Housman argues that Judge Bloom's conclusions regarding the evidence of his contribution to White's asphyxiation relied on the medical examiner's reference to possible, but indeterminate, contributing factors and therefore was inaccurate based on the factual record. Specifically, Housman claims that Judge Bloom and the state courts unreasonably relied on the medical examiner's testimony that the wire Housman used "could have forced the gag further back into the victim's mouth, obstructing the airway," to rebut Housman's contention that the gag, which Markman had forced into White's mouth, was the only certain cause of death. *Housman II*, 226 A.3d at 1271.

However, a reading of the subsequent paragraphs of the Pennsylvania Supreme Court's opinion reveals that the court did not rely entirely on the medical examiner's testimony. The court found that "Housman's own admission that he strangled the victim with a speaker wire, was sufficient to permit the jury to conclude that he intentionally, deliberately, and with premeditation participated in the murder of Leslie White." *Id*. Thus, "even if the actual cause of the victim's death was asphyxia due to the cloth in her mouth and the gag around her face, and not the speaker wire around her neck, the evidence clearly was sufficient to convict Housman of first-degree murder. *Id.* citing *Commonwealth v. May*, 887 A.3d 750, 757 (2005) (Appellant's active participation in the killing of two victims, including cutting the throat of and shooting one of the victims, was sufficient to prove that he harbored a specific intent to kill, such that, even if he did not inflict the specific injuries that caused each of the victim's deaths, he properly was convicted of first-degree murder because the evidence proved he clearly shared that intent with his accomplice); *Commonwealth v. Daniels*, 963 A.2d 409, 428 (2009)(Rejecting claim that counsel was ineffective for failing to secure testimony of a pathologist as to specific cause of death, and emphasizing that "PCRA defense experts' opinions on the specific cause of death say little about appellees' intention−which was a very different question.... [A]ppellees

controlled the circumstances surrounding [the victim's] death every step of the way and ... those circumstances fully supported a finding of an intent to kill beyond a reasonable doubt.") Accordingly, this court agrees with Judge Bloom and will overrule Housman's objection on this issue.

2. Counsel's Questioning of the Medical Examiner

Housman argues that Judge Bloom and the state courts' conclusion that counsel had a strategic reason for not questioning the medical examiner more thoroughly about White's cause of death were unreasonable. Specifically, he asserts that the strategy counsel testified about at the PCRA hearing to stay out of this issue given that the evidence indicated both Housman and Markman played a role in White's death is inconsistent with the record in that counsel did question Dr. Venuti about the absence of ligature marks on White's neck or other signs of strangulation. As such Housman characterizes counsel's strategy as an "after-the-fact rationalization" of his ineffectiveness.

While Housman is correct that Judge Bloom did not address this inconsistency, it has no bearing on his ultimate conclusion on this issue because Housman was not prejudiced by counsel's alleged ineffectiveness. Housman confessed to strangling White. On that basis alone the jury could have convicted him of first-degree murder. Accordingly, Dr. Venuti's

testimony and counsel's cross-examination of her were not dispositive and the court will overrule Housman's objection on this issue.

3. Judge Bloom's Prejudice Analysis

Housman argues Judge Bloom and the state court again applied the wrong standard in assessing the prejudice from his counsel's alleged ineffectiveness. According to Plaintiff Judge Bloom and the state courts' sufficiency of the evidence analysis is contrary to clearly established federal law because the proper standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). However, ever under this standard Housman was not prejudiced. There is no reasonable probability that aside from counsel's failure to further cross-examine Dr. Venuti about the cause of White's death the jury would not have convicted Housman of first-degree murder because Housman also confessed to strangling White. Accordingly, Housman was not prejudiced by counsel's alleged ineffectiveness under his own standard and the court will overrule his objection on this issue.

E. Miranda Violations

Housman argues that his confession is inadmissible because he did not waive his *Miranda* rights, and that even if he did waive his rights, any

waiver was not knowing and voluntary. He asserts that prior to giving police his inculpatory statement, he invoked the right to counsel and to remain silent, and after he started taking to the police, he did not understand what constituted a waiver. On direct appeal, Housman claimed that he was denied his right to counsel when he was questioned about White's murder, in connection with his arrest for stealing her Jeep. The Pennsylvania Supreme Court denied this claim finding that Housman "received *Miranda* warnings and waived them before making incriminating statements. Thus, there was no *Miranda* violation warranting suppression of his statements to police." *Housman I*, 986 A.2d at 839-40.

Judge Bloom found that this was a reasonable application of the law because Housman's recorded confession indicates that officers informed him several times that if he did not wish to speak to them, they would leave the room. The officers further advised him of his right to remain silent and counsel, and that he could re-invoke his rights at any time, and they would stop questioning him. Housman also signed a waiver of his Miranda rights before confessing to murdering White with Markman. Nonetheless Housman objects arguing that Judge Blooms erred 1. When he concluded that Housman received Miranda warnings and waived them and 2. By not

acknowledging Housman did not understand the meaning of the word "waiver" when officers took his confession.

1. Housman Receipt and Waiver of his Miranda Rights

Housman argues that Judge Bloom's interpretation of his recorded confession is incomplete and erroneous in that officer's continued to question Housman even after he informed them that he did not wish to speak or waive his Miranda rights. In support of this argument Housman cites out of context two lines from his confession transcript:

> OLIVER: Having these rights in mind, do you wish to waive them at this point and talk to us in here right now?
>
> HOUSMAN: Uh, naugh, you said, I could stop at any time.

(Doc. 4 at 5)

However, a complete reading of the transcript reveals that Housman was not refusing to speak with officers. In fact, it reveals that Housman agreed to waive his rights and, in the exchange, cited above was actually only asking for clarification as to his ability to re-invoke his rights. The complete exchange reads as follows:

> OLIVER: This is, this, listen, this is, I'm advising you of your Constitutional Rights. Before we ask you any questions, you must understand your rights. First, you have the right to remain silent,

Secondly, anything you say can be used in court. Third, if you, third, I'm really having a hard at 4:20 in the morning. I apologize. You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you without cost to you before any questioning if you wish. And if you choose to answer questions, you can stop answering at any time. So if you're agreeing to talk to us here at the beginning, later on you decide you don't want to, you can quit. Okay.

HOUSMAN: Okay.

OLIVER: You understand what I've just read to you?

HOUSMAN: Yes sir.

OLIVER: Having these rights in mind, do you wish to waive them at this point and talk to us in here now.

HOUSMAN: Uh, naugh, you said I could stop at any time.

OLIVER: You can stop at any time.

HOUSMAN: If I waiver them though…

OLIVER: No, if you waive them, you can still stop at any time.

(Id.)

Accordingly, it's Housman's interpretation of the recording not Judge Bloom's that is incomplete and erroneous and the court will overrule his objection on this issue.

2. Housman's Understanding of the Word "Waiver"

Housman argues that to the extent he waived his Miranda rights, the waiver was not voluntary, knowing, and intelligent because he did not understand the meaning of the word "waiver." Specifically, he points to the section of his confession transcript where he expressed confusion over the meaning of the word "waiver" saying, "I just say it was confusing because you waiver and I know waiver means whether or not." (Doc. 4, p. 6) However, contrary to Housman's assertions this confusion does not indicate he did not understand his rights. The full transcript indicates that Housman was read his rights, affirmed that he understood those rights, and was told multiple times that once he started talking he could stop at any time. Accordingly, regardless of whether Housman knew the meaning of the word waiver, he knew his rights and that once he started talking despite those rights he could stop talking at any time, and the court will overrule his objection on this issue.

F. Cumulative Errors

Housman argues that the cumulative errors of the trial court and his trial and appellate counsel described above warrant habeas relief. However,

Judge Bloom concluded that Housman's claims regarding his counsel's ineffectiveness and the trial court's errors to be without merit. *See Aponte v. Eckard*, 2016 WL 8201308, at *20 (E.D. Pa. June 3, 2016) ("The cumulative error doctrine requires the existence of 'errors' to aggregate. Absent such errors by counsel, the cumulative error doctrine does not apply.") Nonetheless, Housman claims that Judge Bloom assumed the trial court's first-degree murder instruction was in fact erroneous and disposed of that claim on prejudice alone, so it was wrong for him to later assert there were no errors to aggregate.

To the extent Judge Bloom or this court found that the trial court or Housman's counsel committed errors as discussed above this court finds that those errors were harmless because absent all of these alleged errors the jury still could have convicted Housman of first-degree murder based on his confession alone. Accordingly, even aggregating any errors in his underlying conviction Housman is not entitled to relief based on the cumulative error doctrine and the court will overrule his objection on this issue.

G. Certificate of Appealability

To receive a certificate of appealability a petitioner must demonstrate that reasonable jurists would find the district court's assessment of [his/her]

constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, (2000). Here Judge Bloom concluded that Housman has made no such showing, nor can he given the state court findings and clear evidence of his factual guilt. Nonetheless Housman argues that jurist of reason could debate Judge Bloom's recommended disposition. In support of this claim, he cites Justice Baer's dissent on his initial direct appeal. *Housman I*, 986 A.2d at 848 (Baer, J., dissenting).

While some of the arguments raised here were also raised on direct appeal, the inquiry here is not whether reasonable jurist would disagree on the disposition of Housman direct appeal or even on Judge Bloom's report and recommendation but on this court's disposition of the instant habeas petition. Furthermore, much has changed since the Pennsylvania Supreme Court originally affirmed Housman's conviction. First and foremast his death sentence has been vacated and his case was re-reviewed under the PCRA, including a three-day evidentiary hearing, that confirmed the Pennsylvania Supreme Court's majority decision as it pertains to the claims at issue here. As a result, the Pennsylvania Supreme Court **including Justice Baer** affirmed the PCRA court's findings and denial of a new guilt trial. Accordingly, no reasonable jurist could not disagree with this court's disposition of the instant petition and a certificate of appealability will not be issued.

IV. CONCLUSION

Based on the aforesaid Housman's objections (Doc. 51) will be overruled, Judge Bloom's report and recommendation (Doc. 46) will be adopted in its entirety as the decision of the court, Housman's petition for habeas corpus (Doc. 1) will be denied, a certificate of appealability will not be issued, and the Clerk of Court will be directed to close this case.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

DATE: August 1, 2024
20-1198-03

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

WILLIAM HOUSMAN,	:	Civil No. 3:20-CV-1198
Petitioner,	:	
	:	(Judge Mannion)
v.	:	
	:	(Magistrate Judge Bloom)
JOHN E. WETZEL, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

I. Introduction

William Housman, the petitioner, was convicted in 2001 of first-degree murder, kidnapping, and other related charges arising out of the murder of 18 year old Leslie White in Cumberland County, Pennsylvania, in 2000. He and his co-defendant, Beth Markman, were sentenced to death. In January of 2021, after a host of state court appeals, Housman's death sentence for the first-degree murder conviction was vacated, and he was ultimately resentenced to a term of life imprisonment without the possibility of parole.

Housman now files this instant petition for habeas corpus, challenging the state court's refusal to sever his trial from his co-

defendant and the admission of his confession at trial, as well as raising several claims that his trial and appellate counsel were ineffective. (Doc. 1). After consideration, we conclude that Housman's claims are meritless. Accordingly, we recommend that this petition be denied.

II. Statement of Facts and of the Case

The factual background of the instant case was thoroughly discussed by the Pennsylvania Supreme Court in its decision affirming Housman's conviction and sentence, *Commonwealth v. Housman*, 986 A.2d 822 (Pa. 2009), and is summarized as follows: Housman met the victim, Leslie White, when White began working at Wal-Mart in Mechanicsburg, Pennsylvania, after she graduated high school. *Id.* at 826. The two began a romantic relationship, although Housman was in a relationship and lived with his co-defendant, Beth Markman. *Id.* Markman discovered emails between Housman and White and directed Housman to end his relationship with White. *Id.* Markman told several friends that she wanted to "kick White's ass," and remarked to her probation officer that if she caught Housman cheating, she would kill the girl. *Id.* Housman did not end his relationship with White. *Id.*

After Markman became suspicious that Housman had not ended his relationship with White, she drove him to a Sheetz, where Housman called White from a payphone and falsely told her that his father had died so that White would come to his house to console him. *Housman*, 986 A.2d at 826. Housman told White that Markman was out of town, and White left work at Wal-Mart and drove to Housman and Markman's trailer. *Id.* Markman hid in a back room while Housman and White talked. *Id.* In her subsequent confession and trial testimony, Markman stated that she hid in the room until she heard White cry out after Housman hit her in the hand with a hammer. *Id.*

When Markman came out of the back room, Markman and Housman tied White up using speaker wire to tie her hands and feet, shoved a piece of red cloth in her mouth, and tied a gag around her mouth. *Housman*, 986 A.2d at 826-27. After stepping outside to smoke a cigarette, Housman and Markman reentered the trailer, and Markman held White down while Housman wrapped speaker wire around her neck and choked her, ultimately using both the wire and the crook of his arm, until she died. *Id.* at 827. White's cause of death was determined to be asphyxiation. *Id.* Housman and Markman wrapped White's body in a

tent, stuffed the body in the back of White's Jeep, and drove the Jeep to Virginia, where Housman's family owned property. *Id.* They placed her body in the trunk of an abandoned car on a piece of remote land. *Id.* They also discarded her personal belongings, except for a camera that they later pawned. *Id.*

After White's parents filed a missing persons report, authorities tracked White's Jeep to Virginia, where Housman and Markman had been staying with friends after the murder. *Housman*, 986 A.2d at 827. Police arrived at the residence and found White's Jeep in the driveway. *Id.* Deputy Brian Vaughn of the Franklin County Sheriff's Office spoke with Housman and Markman separately, who both claimed that they did not know where White was located. *Id.* Following this encounter with law enforcement, Housman and Markman drove White's Jeep to the remote land where they had dumped her body and abandoned the Jeep there. *Id.* at 828. Authorities later found the Jeep and White's body, along with other evidence including Markman's DNA under White's fingernails and Housman's fingerprints on the Jeep. *Id.*

Police then obtained a search warrant for Markman's trailer in Pennsylvania, where they found blood and urine in the place where

White was likely strangled. *Housman*, 986 A.2d at 828. They also found speaker wire, red fibers, a piece of red cloth, a hammer, and a stethoscope. *Id.* Housman and Markman were arrested one week after the murder. *Id.* Police obtained the camera from the pawn shop, which contained photographs taken just days after the murder showing Housman pretending to strangle Markman while Markman laughed. *Id.*

After their arrests, Housman and Markman were both given *Miranda* warnings, which they waived, and gave taped confessions to the police. *Housman*, 986 A.2d at 828. They both confessed to participating in White's murder but asserted that the other had threatened and forced their respective participation. *Id.* For his part, Housman admitted to strangling White with the speaker wire but alleged that Markman directed him to do it while threatening him with a hammer. *Id.* He asserted that Markman wanted to get rid of White to alleviate their relationship issues. *Id.* Markman, on the other hand, admitted to tying White up and gagging her while Housman threatened her with a knife, and stated that Housman strangled White with the wire and with his arm. *Id.* She further stated that Housman had terrorized her the night

prior to the murder by forcing her to remain in the trailer naked while threatening her with a knife. *Id.*

Prior to trial, Housman moved to sever his trial from Markman's trial due to Markman's confession, but his motion was denied. *Housman*, 986 A.2d at 828-29. Subsequently, after learning that Markman intended to assert a duress defense and introduce evidence of Housman's past abuse of her, Housman moved for reconsideration of the court's order denying severance, which was also denied. *Id.* at 829. At trial, both Housman's and Markman's confessions were admitted with references to each other's names removed,[1] and Markman also testified at trial while Housman did not. *Id.* Housman's confession indicated that Markman coerced Housman to tie White up and kill her. *Id.* Markman introduced evidence of abuse by Housman in the months leading up to the murder. *Id.* She further testified that she felt threatened by Housman, which is why she participated in the murder. *Id.* Ultimately, the trial court did not instruct the jury on the defense of duress. *Id.*

[1] Housman's confession contained two instances of non-redaction, in which Markman's name was referenced in his confession at trial. On appeal, the Pennsylvania Supreme Court ultimately found that this violated Markman's rights under the Confrontation Clause. *Commonwealth v. Markman*, 916 A.2d 586, 600-05 (Pa. 2007).

Both Housman and Markman were convicted of first-degree murder and all other charges. *Housman*, 986 A.2d at 829. During the penalty phase, the jury found that the defendants committed the murder while in the perpetration of a felony and sentenced them both to death. *Id.* On appeal, Markman's convictions for murder, kidnapping, and unlawful restraint were vacated, as the court found that the two non-redactions in Housman's confession violated *Bruton v. United States*, 391 U.S. 123 (1968). *Commonwealth v. Markman*, 916 A.2d 586, 600-05 (Pa. 2007).

Housman appealed his conviction and death sentence directly to the Pennsylvania Supreme Court. *Housman*, 986 A.2d 822 (Pa. 2009). On appeal, Housman challenged: the sufficiency of the evidence for his first-degree murder, kidnapping, and conspiracy convictions; the trial court's denial of his motion to sever; the admission of Markman's confession against him; the trial court's failure to give an appropriate cautionary instruction regarding Markman's evidence of abuse; the admission of the forensic pathologist's testimony; the admission of his confession; and the failure to suppress evidence from the searches of the trailer. *Id.* The Court affirmed Housman's convictions and sentence. *Id.* Justice Saylor wrote a concurring opinion in which he stated he would vacate

Housman's death sentence but affirm his conviction for first-degree murder, noting that while he viewed the trial court's failure to sever as substantially prejudicial, any error was harmless "[g]iven the remarkable strength of the Commonwealth's case for first-degree murder[.]" *Id.* at 844. Justice Baer dissented from the opinion of the Court, noting that he would vacate Housman's convictions due to the trial court's failure to sever the trials. *Id.* at 844-52. Housman's petition for writ of certiorari to the United States Supreme Court was denied. *Housman v. Pennsylvania*, 562 U.S. 881 (2010).

On June 17, 2011, Housman filed a timely petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), and filed an amended, counseled petition on May 22, 2013. Housman moved for the recusal of the Cumberland County Court of Common Pleas, which was granted, and after three days of evidentiary hearings, Judge Linda Ludgate of the Berks County Court of Common Pleas granted Housman PCRA relief in the form of a new penalty trial. (PCRA Court Opinion, February 2, 2018, Doc. 4-6, Exhibit 7). In her opinion, Judge Ludgate granted PCRA relief on the grounds that Housman's counsel was ineffective for failing to present mitigating evidence at the penalty phase

of trial. (*Id.* at 12-16). However, the court found that Housman's claims regarding the guilt phase of his trial did not warrant relief. (*Id.* at 17-22).

The Commonwealth appealed the court's decision granting penalty-phase relief, and Housman cross-appealed the denial of guilt-phase relief. The Pennsylvania Supreme Court upheld the decision of the PCRA court. *Commonwealth v. Housman*, 226 A.3d 1249 (Pa. 2020). Regarding Housman's claim that he was entitled to a new guilt-phase trial, he asserted that his trial counsel was ineffective in several respects, including the failure to object to evidence of prior bad acts, as well as hearsay evidence; the failure to properly litigate the issue of severing the trial; the failure to object to the court's jury charge on accomplice liability and conspiracy; and the failure to present evidence regarding White's cause of death from the medical examiner. *Id.*

The Court found that Housman's claims regarding the guilt phase were meritless. *Housman*, 226 A.3d at 1261-72. The Court concluded that Housman did not suffer prejudice from the admission of the bad acts and hearsay evidence, given the fact that the "overwhelming" and "properly admitted evidence that Housman lured the victim to his trailer by lying to her, strangled her with speaker wire, and discarded her body in an

abandoned car, was sufficient to demonstrate to the jury Housman's capacity for violence and to support his conviction for first-degree murder." *Id.* at 1262-63. The Court further found that Housman's severance claim, which he claimed warranted a new trial because the failure to sever resulted in the admission of the bad acts and hearsay evidence, failed as "this Court previously rejected this identical argument on direct appeal, concluding that any prejudice that resulted from the admission of such evidence was *de minimis*, and was eclipsed by his own admissions." *Id.* at 1266.

Housman also claimed that his counsel was ineffective for failing to object to the jury charges on accomplice liability and conspiracy. He argued that the jury charge eliminated the Commonwealth's burden to prove that he had the specific intent to kill for first-degree murder. The Court ultimately found that Housman could not show that he was prejudiced by counsel's failure to object to the jury charge. *Housman*, 226 A.3d at 1268. Recounting the evidence against Housman at trial, the Court reasoned:

> Housman confessed that he lured the victim to his trailer by lying to her, strangled her with speaker wire, and discarded her body in an abandoned car. Based on this evidence, it is inconceivable that the jury would have convicted Housman

> merely as an accomplice to Markman, rather than as a principal in the crime.

Id. The Court further noted that during the penalty phase, Housman's primary role in the murder was highlighted by the fact that the jury found Markman's participation in the murder to be relatively minor. *Id.* at n. 13. Accordingly, the Court found this ineffectiveness claim to be without merit. *Id.*

Finally, the Court considered Housman's claim that his counsel was ineffective for failing to present evidence regarding White's cause of death. *Housman*, 226 A.3d at 1268-69. Housman argued that White's actual cause of death was due to Markman stuffing the gag in her mouth, rather than Housman strangling her with the speaker wire and his arm. *Id.* The Court ultimately found that the evidence at trial was sufficient for the jury to convict Housman of first-degree murder, and thus, Housman could not show that he was prejudiced by his counsel's failure to introduce certain evidence regarding White's cause of death. *Id.* at 1271.

Thus, the Supreme Court ultimately found that Housman's claims regarding the guilt phase of his trial were without merit and affirmed the PCRA court's denial of relief in the form of a new trial. *Housman*, 226

A.3d at 1272. However, finding that Housman's counsel failed to present mitigating evidence at the penalty phase, the Court affirmed the PCRA court's decision granting Housman a new penalty phase. *Id.* Ultimately, the Commonwealth waived its right to proceed to a penalty phase, and on January 22, 2021, the trial court resentenced Housman to a term of life imprisonment without the possibility of parole. (Doc. 42-33 at 2).

The instant habeas corpus petition was initially filed during the pendency of Housman's state court proceedings on July 13, 2020. (Doc. 1). The matter was briefly stayed pending the outcome of Housman's state court appeals, and the petitioner filed a renewed memorandum of law in support of his petition on January 21, 2022, following his resentencing in state court. (Doc. 34). In his petition, Housman raises five grounds for relief: (1) the trial court's error in refusing to sever his and Markman's trials, as well as counsel's failure to effectively litigate the severance issue; (2) trial counsel's failure to object to the jury charge on accomplice liability and conspiracy; (3) trial counsel's failure to present evidence regarding White's cause of death; (4) a violation of Housman's Fifth Amendment right when his confession was admitted at trial; and (5) the effect of the cumulative errors resulted in prejudice.

After consideration, we conclude that Housman's claims are without merit and do not warrant habeas relief. Accordingly, we recommend that this petition be denied.

III. Discussion

A. State Prisoner Habeas Relief–The Legal Standard.

(1) Substantive Standards

In order to obtain federal habeas corpus relief, a state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
> .....
> (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.

28 U.S.C. § 2254(a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. Regarding these substantive standards, federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. *See e.g., Reed v. Farley*, 512 U.S. 339, 354 (1994). Claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so great as to be of a constitutional dimension. *See Priester v. Vaughan*, 382 F.3d 394, 401–02 (3d Cir. 2004).

(2) Deference Owed to State Courts

These same principles that limit habeas relief to errors of a constitutional dimension also require federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254.

First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was either: (1) "contrary to" or involved an unreasonable application of clearly established case law; *see* 28 U.S.C. § 2254(d)(l); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. *See Rice v. Collins*, 546 U.S. 333, 338–39 (2006); *see also Warren v. Kyler*, 422 F.3d 132, 139–40 (3d Cir. 2006); *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002).

In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made during criminal proceedings. *See e.g., Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam); *Demosthenes v. Baal*, 495 U.S. 731, 734–35 (1990). This principle applies to state court factual findings made both by the trial court and state appellate courts. *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir.2006). Thus, we may not re-assess credibility determinations made by the state courts, and we must give equal deference to both the explicit and implicit factual findings made by the state courts. *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir. 2000). Accordingly, in a case such as this, where a state court judgment rests upon factual findings, it is well-settled that:

> A state court decision based on a factual determination, ..., will not be overturned on factual grounds unless it was objectively unreasonable in light of the evidence presented in the state proceeding. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003). We must presume that the state court's determination of factual issues was correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. §

> 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 285 (3d Cir. 2000).

Rico v. Leftridge–Byrd, 340 F.3d 178, 181 (3d Cir. 2003). Applying this standard of review, federal courts may only grant habeas relief whenever "[o]ur reading of the PCRA court records convinces us that the Superior Court made an unreasonable finding of fact." *Rolan*, 445 F.3d at 681.

(3) Ineffective Assistance of Counsel Claims

These general principles apply with particular force to habeas petitions that assert claims of ineffective assistance of counsel. It is undisputed that the Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack of a sentence based upon a claim of ineffective assistance of counsel must meet a two-part test established by the Supreme Court in order to survive. Specifically, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) that, but for counsel's errors, the result of the underlying proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 691-92 (1984). A petitioner must satisfy both of the *Strickland* prongs in order to maintain

a claim of ineffective counsel. *George v. Sively*, 254 F.3d 438, 443 (3d Cir. 2001).

Strickland first requires a petitioner to "establish first that counsel's performance was deficient." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001). This threshold showing requires a petitioner to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. *Id.* Additionally, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* Generally, "[t]here is a 'strong presumption' that counsel's performance was reasonable." *Id.* (quoting *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996)). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 689).

Under the second *Strickland* prong, a petitioner also "must demonstrate that he was prejudiced by counsel's errors." *Id.* This

prejudice requirement compels the petitioner to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Moreover,

> [I]n considering whether a petitioner suffered prejudice, "[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: 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."

Rolan, 445 F.3d at 682 (quoting *Strickland*, 466 U.S. at 696) (internal quotations omitted).

Although sometimes couched in different language, the standard for evaluating claims of ineffectiveness under Pennsylvania law is substantively consistent with the standard set forth in *Strickland*. *See Commonwealth v. Pierce*, 527 A.2d 973, 976–77 (Pa. 1987); *see also Werts v. Vaugh*, 228 F.3d 178, 203 (3d Cir. 2000) ("[A] state court decision that applied the Pennsylvania [ineffective assistance of counsel] test did not apply a rule of law that contradicted *Strickland* and thus was not 'contrary to' established Supreme Court precedent"). Accordingly, a federal court reviewing a claim of ineffectiveness of counsel brought in a

petition under 28 U.S.C. § 2254 may grant federal habeas relief if the petitioner can show that the state court's adjudication of his claim was an "unreasonable application" of *Strickland*. *Billinger v. Cameron*, 2010 WL 2632286, at *4 (W.D. Pa. May 13, 2010). To prevail against this standard, a petitioner must show that the state court's decision "cannot reasonably be justified under existing Supreme Court precedent." *Hackett v. Price*, 381 F.3d 281, 287 (3d Cir. 2004); *see also Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (where the state court's application of federal law is challenged, "the state court's decision must be shown to be not only erroneous, but objectively unreasonable") (internal citations and quotations omitted).

The Supreme Court has observed a "doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (noting that the review of ineffectiveness claims is "doubly deferential when it is conducted through the lens of federal habeas"). This doubly deferential standard of review applies with particular force to strategic judgment like those thrust upon counsel in the instant case. In this regard, the Court has held that:

> "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688, 104 S. Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.,* at 689, 104 S. Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.,* at 690, 104 S. Ct. 2052.

Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009). The deference which is owed to these strategic choices by trial counsel is great.

> Therefore, in evaluating the first prong of the *Strickland* test, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* The presumption can be rebutted by showing "that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound." *Thomas v. Varner,* 428 F.3d 491, 499-500 (3d Cir. 2005) (footnote omitted).

Lewis v. Horn, 581 F.3d 92, 113 (3d Cir. 2009).

It is against these legal benchmarks that we assess Housman's petition.

B. This Petition Should Be Denied.

As we have noted, Housman asserts five claims for relief, all of which in some fashion were raised before and considered by the state courts. After consideration of these claims, we conclude that the state courts' determinations were not contrary to clearly established law or based on an unreasonable determination of the facts. Accordingly, these claims do not warrant habeas relief.

1. Ground One: Trial Court's Refusal to Sever and Counsel's Ineffectiveness in Litigating the Issue

Housman first contends that the trial court erred when it refused to sever his trial from Markman's because the refusal to sever resulted in prejudicial evidence being admitted at trial. Embedded in this claim is Housman's additional assertion that his trial and appellate counsel were ineffective for failing to properly litigate this issue. Housman argues that Markman's ability to introduce evidence that he abused her prejudiced him and denied him his right to a fair trial. He further argues that his counsel was ineffective for failing to object to the evidence and for failing to request an additional limiting instruction.

Housman's claim that the trial court committed reversible error by failing to sever Housman's and Markman's trials was initially raised on

direct appeal and rejected by the Pennsylvania Supreme Court. *Commonwealth v. Housman*, 986 A.2d 822, 833-85 (Pa. 2009). The court first noted that the trial court's decision not to sever the trials could only be overturned upon a finding of a "manifest abuse of discretion." *Id.* at 834. The court then found that the trial court had not abused its discretion and instead properly exercised its discretion to deny severance where Housman had not shown that the potential for prejudice outweighed the interests served by a joint trial. *Id.* at 835. In making this determination, the court first noted that the defendants' defenses were not so antagonistic as to require separate trials. *Id.* at 834. Additionally, the court found that any potential prejudice stemming from the evidence Housman was challenging, *i.e.*, the evidence that he abused Markman, was offset "by his own *admission that he violently strangled White to death* in his living room after luring her there under false pretenses, drove to Virginia with her lifeless body in her Jeep, and subsequently deposited her body in the trunk of an abandoned car." *Id.* at 835 (emphasis in original). In fact, the court reasoned that this evidence alone was enough to apprise the jury of Housman's capacity for violence. *Id.*

Further, in response to Housman's claim that the court failed to give, and his counsel failed to argue for, a limiting instruction regarding the evidence of abuse, the court found that the trial court did, in fact, give a limiting instruction, which instructed the jury to consider the evidence of abuse only as it related to the effect it had on Markman. *Housman*, 986 A.2d at 836. This instruction was given prior to Markman's testimony, as well as during the penalty phase. *Id.* Accordingly, the court found no error. *Id.*

Housman also raised this claim at the PCRA level, although couched in terms of ineffective assistance of counsel. (Doc. 42-27 at 16-17). In finding that this claim failed, the PCRA court noted that Housman's claim rested on the same factual basis as his claim of trial court error, which the Pennsylvania Supreme Court found to be meritless. (*Id.*). Accordingly, the PCRA court found that Housman's attempt to relitigate this claim as one of counsel's ineffectiveness failed because Housman had not shown underlying merit to the claim or that he was prejudiced by his counsel's alleged failure to properly litigate the severance claim. (*Id.* at 17).

The Supreme Court of Pennsylvania affirmed the PCRA court's denial of this claim. *Housman*, 226 A.3d at 1261-66. The court discussed counsel's alleged failure to properly litigate the severance issue, as well as the specific evidence that Housman alleged was improperly admitted due to the refusal to sever, including prior bad acts and hearsay evidence. *Id.* The court ultimately found that any prejudice Housman may have suffered from introduction of bad acts evidence "did not outweigh the overwhelming and properly-admitted evidence of his guilt," and accordingly found that because he had not shown a reasonable probability that the outcome would have been different had this evidence been excluded, Housman's ineffectiveness claim failed. *Id.* at 1262-63. With respect to his claims concerning hearsay evidence, the court found that Housman waived all his claims but one because he failed to develop his argument as to these claims. *Id.* at 1264. As to the one properly developed claim, the court found counsel had a reasonable basis for not objecting to the alleged hearsay statement, and thus, Housman's ineffectiveness claim failed. *Id.* at 1264-65. Finally, as we have noted, the court found that Housman failed to demonstrate that his ineffectiveness

claim had arguable merit because the substance of his severance claim was denied on direct appeal. *Id.* at 1266.

We cannot conclude that these state court determinations denying Housman's claims were contrary to established law or based on an unreasonable determination of the facts. The courts determined that Housman's severance claim lacked merit, finding that the trial court properly exercised its discretion to try the defendants together in a case in which the defendants both admitted to participating in the murder, and their defenses were not so inconsistent as to warrant separate trials. *See Commonwealth v. Lambert*, 603 A.2d 568, 573 (Pa. 1992) ("Mere fingerpointing alone—the effort to exculpate oneself by inculpating another—is insufficient to warrant a separate trial."). Additionally, the state courts properly concluded that any evidence introduced by Markman did not outweigh the Commonwealth's evidence establishing Housman's role in the murder. As the courts explained, the record indicates that the Commonwealth presented overwhelming evidence of Housman's guilt, including his own confession in which he admitted to luring the victim to his home under false pretenses, strangling the victim with speaker wire, wrapping her body in a tent, driving her car to

Virginia, and abandoning the body and the car in a remote area. Accordingly, we cannot conclude that the trial court's refusal to sever denied Housman his right to a fair trial, or that trial and appellate counsel were ineffective for failing to litigate the issue. This claim is without merit and does not warrant habeas relief.

2. **Ground Two: Ineffective Assistance of Counsel – Failure to Object to the Jury Instructions for Accomplice and Conspirator Liability**

Housman next argues that his counsel was ineffective for failing to object to the jury charges on accomplice liability and conspiracy. He contends that the instructions provided to the jury relieved the Commonwealth of its burden to prove that he had the specific intent to kill for first-degree murder.

The PCRA court denied this claim. (Doc. 42-27 at 18). The court noted that the case Housman relied on to support his claim that the accomplice charge was erroneous, *Laird v. Horn*, 404 F.3d 700 (3d Cir. 2005), was decided after Housman's trial, and that his counsel could not be deemed ineffective for failing to predict a change in the law. (*Id.*). The Pennsylvania Supreme Court affirmed, finding that Housman could not show that he was prejudiced by counsel's failure to object to the

instructions. *Housman*, 226 A.3d at 1268. The court noted that even if counsel could be deemed ineffective for failing to object to the instruction, given the overwhelming evidence against Housman, it was "inconceivable that the jury would have convicted Housman merely as an accomplice to Markman, rather than as a principal in the crime," given that "Housman confessed that he lured the victim to his trailer by lying to her, strangled her with speaker wire, and discarded her body in an abandoned car." *Id.*

Here, we cannot conclude that the state courts' decisions were contrary to established law or based on an unreasonable determination of the facts. As a matter of clearly established federal law, a challenged jury instruction " 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). A petitioner challenging the instruction "must show both that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden to prove every element of

the crime beyond a reasonable doubt." *Id.* at 190-91 (quoting *Estelle*, 502 U.S. at 72).

The trial court first charged the jury on accomplice liability, stating in relevant part:

> A defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He or she is an accomplice if, *with the intent of promoting or facilitating commission of the crime*, he or she solicits, commands, requests, encourages or agrees with the other person in planning or committing it.

(Doc. 42-14 at 2-3) (emphasis added). Immediately thereafter, the court instructed the jury on the charge of homicide, stating in relevant part:

> First degree murder is a murder in which the killer has the specific intent to kill. You may find a defendant guilty of first degree murder if you are satisfied the following three elements have been proven beyond a reasonable doubt:
>
> One, that Leslie White is dead. Two, that a defendant killed her. Three, that a defendant did so with specific intent to kill and with malice.
>
> Those are the elements out of the Crimes Code, ladies and gentlemen. I tell you that a person has a specific intent to kill if he or she has a fully formed intent to kill and is conscious of his or her own intention.
>
> As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is killing with malice. Stated differently, a killing is with specific intent to kill if it is willful, deliberate and premeditated.

(*Id.* at 4).

In the instant case, the Pennsylvania Supreme Court concluded that there was not a reasonable likelihood that the jury misapplied the instructions and convicted Housman as an accomplice without finding that he had the specific intent to kill for first-degree murder. *Housman*, 226 A.3d at 1268. Rather, the court concluded that given the trial court record and the evidence of Housman's specific intent to kill White, including Housman's confession, it was "inconceivable that the jury would have convicted Housman merely as an accomplice to Markman, rather than as a principal in the crime." *Id.* Accordingly, the court concluded that Housman had not shown prejudice from counsel's failure to object to the instruction. *Id.*

We cannot conclude that this determination was contrary to law or based on an unreasonable determination of the facts. Giving deference to the state court findings, as we must, the state court record was replete with evidence of Housman's specific intent to kill White, including Housman's confession that he lured White to his home under false pretenses, strangled her with a wire, wrapped her body in a tent and drove her body to Virginia, where he dumped the body in an abandoned

car on a remote plot of land. Further, as the court noted, at the penalty phase, Housman's principal role in the murder was highlighted by the fact that the jury found Markman's participation in the murder to be relatively minor. *See Housman*, 226 A.3d at 1268 n. 13.

Thus, even if counsel could be deemed ineffective for failing to object to the jury charge, we cannot conclude that there is a reasonable likelihood that the jury convicted Housman merely as an accomplice to the murder without finding that he had the specific intent to kill. Rather, we agree with the state court that Housman cannot show prejudice; that is, that there is a reasonable probability that the outcome of his trial would have been different. Accordingly, this claim affords Housman no relief.

3. Ground Three: Ineffective Assistance of Counsel – Medical Examiner Evidence

Housman next contends that his counsel was ineffective for failing to introduce evidence from the medical examiner that White's death was caused by the gag in her mouth, rather than being choked with the wire and Housman's arm. He further asserts that the prosecution committed misconduct when it elicited misleading testimony with respect to White's cause of death at trial and failed to correct it.

Housman raised this claim of counsel's alleged ineffectiveness at the PCRA level, and the PCRA court rejected this claim. (Doc. 42-27 at 17). The court noted that at the evidentiary hearing, Housman's counsel testified that he had a strategic basis when he did not cross examine Dr. Venuti on this issue. (*Id.*). Further, the court reasoned that even if counsel could be deemed ineffective for failing to present such evidence, Housman was not able to show that the outcome of trial likely would have been different. (*Id.*). The Pennsylvania Supreme Court agreed. *Housman*, 226 A.3d at 1271. The court first recognized trial counsel's explanation for failing to cross examine Dr. Venuti on the issue, noting counsel's testimony that the evidence showed both defendants were in the process of causing White's death, and he did not see an advantage to nitpicking the issue. *Id.* The court further highlighted Dr. Venuti's testimony at trial, which indicated that the wire used by Housman "around the victim's neck could have forced the gag further back into the victim's mouth, obstructing her airway[,]" *Id.* (quoting N.T. Trial, 10/29/01, at 540), contradicted Housman's contention that she testified it was the gag that obstructed White's airway. Finally, the court reasoned that even if counsel could be deemed ineffective, given the evidence of Housman's

specific intent to kill White, he could not show that he was prejudiced by counsel's actions. *Id.*

We cannot conclude that these determinations were contrary to law or based on an unreasonable determination of the facts. The evidence presented at trial, including Dr. Venuti's testimony, established that White died from asphyxiation. The evidence further established that both Markman and Housman played a part in cutting off White's airway—Markman by placing a gag in White's mouth, and Housman by pulling up on White's neck with the speaker wire, forcing the gag back further into White's mouth. Counsel testified that he did not see an advantage to nitpicking the issue, given that the evidence indicated both defendants played a role in causing White's death. Accordingly, we agree with the state courts that counsel had a reasonable basis for not cross-examining Dr. Venuti on the issue, and that in any event, Housman was not prejudiced because the evidence was sufficient to convict him of first-degree murder.

Housman further claims that his counsel should have used a memorandum by Agent Oliver of the Virginia State Police, which recounted a discussion with Dr. Venuti regarding the lack of ligature

marks on White's neck, to cross examine Dr. Venuti and to rebut the allegedly misleading testimony given by Agent Lester at trial that indicated White had ligature marks on her neck from the speaker wire. He contends that Agent Lester's testimony was misleading because the memorandum indicated that Dr. Venuti reported no ligature marks on White's neck, but that Agent Lester testified that White had a mark on her neck.

To the extent Housman is raising a claim of prosecutorial misconduct, this claim, even if properly exhausted, is without merit. In order to obtain federal habeas relief from a claim of prosecutorial misconduct, the petitioner must show that the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Here, as the Pennsylvania Supreme Court noted, even absent the testimony of Agent Lester regarding ligature marks on White's neck or cross examination of Dr. Venuti regarding the ligature marks, "there was sufficient evidence that Housman's unchallenged acts constituted first-degree murder." *Housman*, 226 A.3d at 1271. This evidence, as we have explained, included Housman's own confession that he wrapped speaker

wire around White's neck and strangled her. Accordingly, we cannot conclude that the exchange between the prosecutor and Agent Lester constituted prosecutorial misconduct that would warrant habeas relief.

4. Ground Four: *Miranda* Violation

Housman also challenges the admissibility of his confession to the Virginia State Police, contending that he did not waive his *Miranda* rights, and that if he did waive his rights, any waiver was not knowing and voluntary. Housman asserts that prior to giving the police his inculpatory statement, he invoked his right to counsel and to remain silent. He further argues that any waiver that occurred after he began speaking to the police was not knowing or voluntary because he did not understand what constituted a waiver.

Housman asserted this claim in his direct appeal to the Pennsylvania Supreme Court, albeit in a somewhat different fashion. *Housman* 986 A.2d at 839-40. On direct appeal, Housman claimed that he was denied his right to counsel because he was being questioned about White's murder, which was related to his larceny arrest. *Id.* at 840. In denying this claim, the Pennsylvania Supreme Court found that Housman "received *Miranda* warnings and waived them before making

incriminating statements. Thus, there was no *Miranda* violation warranting suppression of his statements to police." *Id.*

We cannot conclude that this decision was an unreasonable application of the law or based on an unreasonable determination of the facts. A review of Housman's recorded confession indicates that the officers informed Housman several times that if he did not wish to speak to the officers, they would leave the room. (Doc. 4 at 6, 8, 10). They advised him of his right to remain silent and his right to counsel, as well as informing him that if he waived his rights, he could re-invoke at any time, and they would stop questioning him. (*Id.* at 8). Housman signed a waiver of his *Miranda* rights and subsequently gave a statement to the officers in which he confessed to participating in White's murder with Markman. Accordingly, this claim does not warrant habeas relief.

5. Ground Five: Cumulative Errors

Finally, Housman asserts that the cumulative errors of the trial court and his trial and appellate counsel warrant habeas relief. However, we have concluded that Housman's claims regarding his counsel's ineffectiveness and the trial court's errors to be without merit. *See Aponte v. Eckard*, 2016 WL 8201308, at *20 (E.D. Pa. June 3, 2016) ("The

cumulative error doctrine requires the existence of 'errors' to aggregate. Absent such errors by counsel, the cumulative error doctrine does not apply"). Accordingly, this claim of cumulative errors does not entitle Housman to habeas relief.

Finally, we have carefully considered whether Housman is entitled to a certificate of appealability under 28 U.S.C. § 2253. As the Supreme Court observed "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, (2000). Here, we conclude that Housman has made no such showing, nor can he in light of the state court findings and clear evidence of his factual guilt. Accordingly, a certificate of appealability should not issue in this case.

IV. Recommendation

Accordingly, for the foregoing reasons, upon consideration of this petition for writ of habeas corpus, IT IS RECOMMENDED that the petition be DENIED, and that a certificate of appealability should not issue.

The petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

s/ Daryl F. Bloom
Daryl F. Bloom
United States Magistrate Judge

DATED: January 11, 2024

604 Pa. 596
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
William HOUSMAN, Appellant.

452 CAP
|
Argued Dec. 2, 2004.
|
Re–Submitted Feb. 25, 2008.
|
Decided Dec. 29, 2009.

Synopsis
Background: Defendant was convicted in the Court of Common Pleas of Cumberland County, Criminal Division, No. 01–246, George E. Hoffer, J., of first degree murder, kidnapping, theft by unlawful taking or disposition, unlawful restraint, abuse of corpse, and criminal conspiracy, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, No. 452 CAP, Eakin, J., held that:

there was sufficient evidence of defendant's specific intent to kill;

there was sufficient evidence to support defendant's convictions for kidnapping and conspiracy to commit kidnapping;

failure to grant severance was not manifest abuse of discretion;

insufficient redaction of co-defendant's confession before its introduction did not violate defendant's confrontation rights;

admission of photographs taken with victim's camera after her death was not clear abuse of discretion;

deputy's interrogation of defendant was not custodial;

defendant's confession was voluntary; and

probable cause supported issuance of search warrants.

Affirmed.

Saylor, J., concurred in part and dissented in part, and filed opinion.

Baer, J., dissented and filed opinion.

Attorneys and Law Firms

***602** ****826** David J. Foster, Costopoulos, Foster & Fields, Lemoyne, for William Housman.

Jaime M. Keating, District Attorney's Office of Cumberland County, Amy Zapp, Harrisburg, for Commonwealth of Pennsylvania.

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

OPINION

Justice EAKIN.

***603** This is a direct appeal from a death sentence imposed on appellant for the first degree murder [1] of Leslie White, and the related crimes of kidnapping, theft by unlawful taking or disposition, unlawful restraint, abuse of corpse, and criminal conspiracy. [2] We affirm.

Shortly after graduating from high school, Leslie White, the victim, met appellant when she began working at the Wal–Mart photo shop in Mechanicsburg, Cumberland County. They began a romantic relationship; however, appellant was already involved in a romantic relationship with co-defendant Beth Ann Markman, and had been living with her for nearly two years.

Markman discovered e-mails between White and appellant, revealing their affair. Markman told appellant to end his relationship with White, and told several friends and co-workers ***604** she intended to " 'kick [White's] ass.' " *Commonwealth v. Markman,* 591 Pa. 249, 916 A.2d 586, 593 (2007). Markman's co-workers noticed bruising around her eyes and neck, which she attributed to fights with appellant over the e-mails. On one occasion, Markman called Wal–Mart to speak with White, which left White scared and crying.

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Markman also visited the store once, looking for White, but left without incident. Markman told a friend "if she ever got her hands on [White], she was going to kill her." N.T. Trial, 10/25/01, Vol. I, at 82. She told her probation officer, [3] Nicole Gutshall, she caught appellant cheating on her, and if she caught him cheating again, she would kill the girl.

Appellant did not terminate his relationship with White. Appellant and Markman made plans to move to Virginia for a fresh start. However, Markman became suspicious that appellant had not ended his relationship with White. Markman drove appellant in her car to a local Sheetz store, where appellant used a pay phone to call White at Wal–Mart. He falsely told White his father died, and asked her to come to console him. He told her Markman was out of town. Various Wal–Mart employees testified White received this call from appellant, and she told her co-workers appellant's father died and she was leaving work early to console him.

When White arrived at the trailer where appellant and Markman lived, appellant talked with her in the living room, while Markman hid in the bedroom until, according to her subsequent confession and trial testimony, she heard a thump and White cried out because appellant hit her hand with a hammer. Then appellant and Markman subdued White and tied her ****827** hands and feet with speaker wire, shoved a large piece of red cloth in her mouth, and used another piece of cloth to tie a tight gag around her mouth. With White bound, Markman and appellant stepped outside to smoke cigarettes and discuss their next move. Upon reentering the trailer, Markman held White down while appellant strangled her with speaker wire and the crook of his arm, killing her. During the struggle, White scratched Markman's neck. White died of ***605** asphyxiation caused by strangulation and the rag stuffed into her mouth.

After White died, Markman wrapped White's body in a tent and placed it in the back of White's Jeep. The couple then fled to Virginia. Markman drove her car and appellant drove White's Jeep—carrying White's body. In Virginia, they drove to a remote piece of land owned by appellant's mother, then placed White's body in the trunk of an abandoned car. They discarded White's personal effects, except for her camera, which they intended to sell.

Appellant and Markman remained in Virginia for several days, staying with friends and appellant's father. Appellant continued to drive White's Jeep, which he held out as his own. While staying with Larry Overstreet and Kimberly Stultz, Markman corroborated appellant's story that they bought the Jeep from Markman's friend in Pennsylvania. At the Overstreet residence, Markman retrieved White's camera from the Jeep and they all took pictures of each other—Markman stated she bought the camera from the same woman who sold them the Jeep. Overstreet and Stultz recalled seeing scratches on Markman's neck, which Markman explained were from a dog. Stultz gave Markman the phone number of a pawn shop, and the shop owner testified he gave Markman $90 and a pawn ticket for the camera. Markman asked Stultz for cleaning supplies because "the Jeep smelled bad, like somebody had a dead animal in [it]." N.T. Trial, 10/29/01, Vol. III, at 501. Markman also told Stultz that appellant had been seeing another woman, and if she ever met this other woman, she would "whoop her ass." *Id.,* at 494. Another friend, Nina Jo Fields, testified that during the couple's visit to her home, Markman told her appellant had been cheating on her, but that she "[didn't] have to worry about the damn bitch anymore, [because she] took care of it." N.T. Trial, 10/26/01, Vol. II, at 322, 351.

After White's parents filed a missing persons report, the authorities tracked her Jeep to appellant's location in Virginia. Deputy Brian Vaughan of the Franklin County Sheriff's office in Virginia went to the house to question appellant and ***606** Markman about the Jeep and White's whereabouts. When he saw the Jeep in the driveway, he ran the license plate number, which traced back to the Toyota Leasing Corporation.

Markman and appellant came to the door to greet Deputy Vaughan. Deputy Vaughan questioned them separately in his patrol car about the Jeep. Appellant, who was questioned first, told Deputy Vaughan he called White to ask her to console him about his dog, which had just died. Appellant said White never arrived at the trailer, and he subsequently left with Markman for Virginia. He claimed a friend loaned him the Jeep.

Subsequently, Markman voluntarily entered the patrol car and explained to Deputy Vaughan she had only seen White once, but had had several phone conversations with her. She denied knowledge of White's whereabouts, but indicated White had a bad relationship with her parents, suggesting she had run away. Markman denied knowing how appellant acquired the Jeep, and admitted driving separate ****828** cars to Virginia. When Deputy Vaughan asked Markman if she was afraid of appellant, she said she was not; rather, she admitted she had a violent temper, and appellant often had to restrain her from attacking him. She said she provoked appellant in the past

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and had thrown things at him, but appellant never assaulted or threatened her.

Following the police visit, appellant and Markman drove back to the property where they left White's body; there they abandoned the Jeep. Despite the couple's efforts to conceal the evidence, the police soon discovered the Jeep, as well as White's partially-decomposed body in the trunk of the abandoned car—the body was still bound, gagged, and wrapped in the canvas tent. Appellant's fingerprints were found on the car's trunk lid and license plate, a compact disc recovered from the Jeep, the Jeep's hatch, and other evidence recovered from the scene. Markman's fingerprints were found on a potato chip bag retrieved from the Jeep, and the Jeep's passenger door and rear hatch. Subsequent analysis revealed Markman's DNA under White's fingernails.

***607** The Pennsylvania State Police obtained a search warrant for Markman's trailer and executed it; they found blood on a pillow and urine on the carpet in the place White was likely strangled. Police also discovered two lengths of speaker wire, red fibers on the floor, a piece of red cloth, a steak knife, red fibers on the knife, a tent storage bag, a hammer, and a stethoscope. Police arrested appellant and Markman on October 11, 2000, exactly one week after the murder. Police retrieved White's camera from the pawn shop and developed the film. The pictures taken at the Overstreet residence were admitted into evidence at trial; in one photograph—taken just days after appellant and Markman strangled White to death—Markman is laughing while appellant pretends to strangle her.

Following their arrest, and after receiving *Miranda*[4] warnings, Markman and appellant waived their rights and agreed to be interviewed, providing tape-recorded statements. Each independently confessed to participating in White's murder. Appellant admitted to killing White by strangling her, but claimed Markman instigated the murder to eliminate the source of one of their relationship problems and enable them to start their relationship anew. He maintained Markman directed him to tie White up and strangle her, and Markman forced compliance by hitting him with a hammer and then spinning the hammer in a threatening manner. After White died, Markman listened with a stethoscope to verify her death before wrapping the body in the tent.

In her police statement, Markman admitted she bound and gagged White and held her down while appellant strangled her. She insisted, however, appellant devised the plan to murder White in order to steal her Jeep, and he coerced her assistance by threatening to kill her with a hunting knife if she did not obey him. Markman also asserted appellant wore down her resistance by terrorizing her the night before the murder by holding a knife to her throat and forcing her to remain naked in the trailer. Markman said she only realized White was dead when White lost control of her bladder.

***608** Appellant moved to sever his trial from Markman's because introduction of Markman's confession to police, which was admissible against Markman, would violate his Sixth Amendment right to confront a witness against him. The trial court denied ****829** the motion. Appellant and Markman were tried on one count each of criminal homicide, kidnapping, unlawful restraint, and abuse of a corpse, and two counts of theft by unlawful taking or disposition (pertaining to the Jeep and the camera), as well as conspiracy as to all of these offenses.

Appellant and Markman each decided to advance a duress defense, trying to show they engaged in the conduct charged because they were coerced by the other through "the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist." 18 Pa.C.S. § 309(a). Upon learning Markman intended to show she acted under duress as the result of appellant's abuse, appellant filed a motion for reconsideration of the severance denial, arguing he would be prejudiced by evidence of his abuse of Markman. The trial court again denied the motion, and the joint trial began.

During the guilt phase, the Commonwealth played an audiotape of Markman's confession, altered so references to appellant were replaced with another voice saying "the other person." In her confession, Markman initially denied knowledge of White's murder, or even knowing White had been to her trailer the night she was killed. After being questioned, Markman changed her story and said appellant was helping White run away from her parents, and while Markman drove to Virginia in her car, appellant drove White to Virginia in White's Jeep. When police asked about the scratches on her neck, Markman changed her story again and said she had gotten into a fight with White the day she left for Virginia. After further interrogation, Markman confessed to her role in the murder, but blamed appellant for making her participate by threatening and terrorizing her. Markman said when White arrived at the trailer in response to appellant's phone call, she stayed out of the way until she heard White

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cry out ***609** when appellant hit her hand with a hammer. Appellant then made Markman tie White up, gag her, and blindfold her. Markman said after appellant strangled White, he made her wrap White's body in the tent and put it in the Jeep. When asked why appellant killed White, Markman responded she believed he wanted the Jeep.

Markman was permitted to adduce evidence of abuse by appellant in her defense. Markman testified appellant physically abused her during their relationship, particularly in the months before the murder. *Markman,* at 596–97. She also alleged appellant terrorized her for the two days preceding the murder, during which time he cut her clothes off with a knife, repeatedly raped her, and threatened her if she did not do as he instructed. *Id.,* at 596.

Markman's testimony also included details of the night of the murder. Markman claimed that when she drove appellant to the gas station, she did not know he was planning to call White, and she attempted to escape once they returned to the trailer; however, appellant violently prevented her from leaving. *Id.* Markman stated even when White was bound and gagged, she did not know appellant was going to kill her, and she was in the kitchen getting White a glass of water when appellant strangled her. *Id.* At that time, Markman testified appellant ordered her to return the gag to White's mouth because it had slipped, and she only obeyed him because she was afraid he would kill her, too. *Id.,* at 596–97. As for her statement to Officer Vaughan that appellant had never abused her, she said she was trying to protect him. When questioned about the photograph in which she was laughing while ****830** appellant pretended to strangle her, Markman stated appellant was tickling her. *Id.,* at 597.

Based on the evidence of abuse, Markman requested a jury instruction on the defense of duress. The trial court refused because Markman placed herself in a situation where it was probable she would be subjected to duress. We disagreed, finding the jury should have been informed of the duress elements. *Id.,* at 609.

***610** The Commonwealth also introduced a tape of appellant's confession, which was redacted so references to Markman were replaced with "the other person" in another voice. Due to an apparent oversight, there were two instances of non-redaction, where appellant's references to Markman by name remained on the tape. *Id.,* at 596 n. 5. The confession alleged Markman conceived of the plot to kill White, directed its execution, and forced appellant to cooperate. *Id.,* at 601. Appellant said Markman wanted White dead because she was jealous. He admitted he called White to the trailer because he wanted someone to talk to, and he knew he had to lie to get her to come to the trailer. After appellant talked with White for a few minutes, Markman came out of the bedroom, playing with a hammer. According to his confession, after playing with the hammer, Markman hit him with the hammer " [j]ust enough for me to feel the pain." Transcript of Redacted Taped Statement of Housman, 10/12/00, at 25. Markman directed appellant to tie White's hands, and once he was finished, she tied appellant's hands and White's feet. After blindfolding and gagging White, Markman untied appellant and they went outside to smoke a cigarette. While they were outside, according to appellant's confession, Markman said if appellant loved her, he would do as she told him. When they went back inside, Markman directed appellant to pull speaker wire around White's neck, which he did because he did not "want to die that night" in the event Markman "flipped out and wanted to hit me with a ... hammer." *Id.,* at 30. Appellant confessed to devising the plan to leave the state with White's body so they could hide it on his family's Virginia property. Markman's confession implicating appellant was similarly redacted at trial; incriminating references to appellant were removed and replaced with the same phrase, "the other person."

The trial court informed the jury the taped confessions had been altered at the trial court's direction to include the words "the other person" and they were only to consider the confession as evidence against the defendant that gave the confession. Appellant did not testify and presented no defense ***611** during the guilt phase. He argued he lacked the specific intent to kill White because of Markman's threats and conduct with the hammer, his confession supported a third degree murder conviction, and the crimes not did not involve kidnapping.

The jury convicted both appellant and Markman of first degree murder and all other charges. Finding one aggravating circumstance, a killing committed while in the perpetration of a felony, *see* 42 Pa.C.S. § 9711(d)(6), the jury sentenced both to death; post-sentence motions were filed and denied. Markman and appellant filed separate direct appeals. We reversed Markman's convictions and remanded for a new trial for the murder, kidnapping, and unlawful restraint charges because appellant's redacted confession violated Markman's confrontation rights pursuant to *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294

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(1998). *See Markman,* at 603, 605. We now address the issues raised in appellant's direct appeal.

****831** As indicated, the trial court admitted appellant's audiotaped confession implicating Markman in the murder; the audiotape removed appellant's references to Markman and replaced them with the phrase, "the other person," in a voice distinct from appellant's, with the exception of two instances of non-redaction. *See id.,* at 600–05. Based on that issue, we granted Markman a new trial for murder, kidnapping, and unlawful restraint, but affirmed her convictions for theft, abuse of a corpse, and criminal conspiracy. *Id.,* at 605, 613. This Court held that playing appellant's confession to the jury came within *Bruton,* as it comprised appellant's attempt to shift the bulk of the blame to Markman, while not affording her the opportunity to cross-examine him. *Id.,* at 603; *see Bruton,* at 132, 88 S.Ct. 1620 (finding admission of non-testifying co-defendant's confession, which facially incriminated defendant, violated defendant's confrontation rights because there was no opportunity for defendant to cross-examine co-defendant concerning assertions in statement).

***612** This Court conducts an independent review of the sufficiency of the evidence in support of first degree murder when a death sentence is imposed. 42 Pa.C.S. § 9711(h); *Markman,* at 597. There is sufficient evidence when the evidence admitted at trial, and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to enable the fact-finder to conclude the Commonwealth established all of the elements of the offense beyond a reasonable doubt. *Markman,* at 597.

To sustain a conviction for first degree murder, the evidence must establish the defendant is responsible for the unlawful killing of a human being, and the defendant acted with a specific intent to kill. *Id.;* 18 Pa.C.S. §§ 2501, 2502(a), (d). In evaluating whether the evidence is sufficient to support the conviction, the Commonwealth may sustain its burden "by means of wholly circumstantial evidence; the entire trial record is evaluated and all evidence received against the defendant considered; and the trier of fact is free to believe all, part, or none of the evidence...." *Markman,* at 598.

Here, the evidence showed appellant killed White by strangling her with speaker wire after he and Markman subdued her by tying her hands. Appellant and Markman wrapped White's body in a tent, and appellant put the body in White's Jeep. Appellant fled with Markman to Virginia, lied to Virginia police about the Jeep's ownership, disposed of White's body on his family's Virginia property, disposed of the Jeep on the same property when the police began investigating, and left his father's house when police began to suspect the Jeep was stolen. *See Commonwealth v. Johnson,* 576 Pa. 23, 838 A.2d 663, 681 (2003) (noting flight and concealment can constitute circumstantial evidence of consciousness of guilt); *see also Markman,* at 598 (finding evidence sufficient to sustain Markman's conviction for first degree murder for her involvement in killing White). Additionally, appellant placed the call that lured White to the trailer under false pretenses. These facts are sufficient to sustain a finding that appellant acted with the specific intent to kill White. *See id.*

***613** Appellant further challenges the sufficiency of the evidence to sustain his convictions for kidnapping and conspiracy to commit kidnapping. As we explained in *Markman,* where we were faced with the same argument appellant currently advances, kidnapping is defined as follows:

> (a) Offense defined.—A person is guilty of kidnapping if he unlawfully removes ****832** another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions:
>
> (1) To hold for ransom or reward, or as a shield or hostage.
>
> (2) To facilitate commission of any felony or flight thereafter.
>
> (3) To inflict bodily injury on or to terrorize the victim or another.
>
> (4) To interfere with the performance by public officials of any governmental or political function.

18 Pa.C.S. § 2901(a). Removal or confinement is unlawful if accomplished by force, threat, or deception. *Id.,* § 2901(b).

Appellant argues there was no evidence White was confined for a substantial period in a place of isolation. In Markman's direct appeal, we found "the determination of a substantial period subsumes not only the exact duration of confinement, but also whether the restraint, by its nature, was criminally significant in that it increased the risk of harm to the victim." *Markman,* at 600. We concluded it was undisputed White was

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not immediately killed after being tied up and was left alone in the trailer while appellant and Markman went outside to smoke cigarettes and discuss their plan. *Id.* If White had not been so confined, she might have escaped or cried for help. *Id.* The confinement period was also sufficient to cause an increased risk of harm due to the oxygen blockage from the rag in her throat. *Id.* Ultimately, we found in *Markman* that the jury was entitled to conclude "White was confined in a place of isolation for a substantial period." *Id.*

***614** Appellant asserts the Commonwealth failed to demonstrate White was unlawfully confined in a place of isolation because she was held in the living room of a trailer located in a busy trailer park in the early evening, and her location arguably preserved for her the usual protections of society. However, appellant bound White's hands, while Markman gagged her so she could not cry out, thus confining her in a place of isolation, "separated from the normal protections of society in a manner which made discovery or rescue unlikely." *Id.* (citing Model Penal Code § 212.1, cmt. 3 (place of isolation "is not a geographical location but rather effective isolation from the usual protections of society[;]" one's own apartment in city may be "place of isolation," if circumstances of detention made discovery or rescue unlikely)). Thus, the evidence was sufficient to support appellant's kidnapping conviction. Appellant also asserts there was insufficient evidence of conspiracy to commit kidnapping because he did not kidnap the victim. For the reasons above, we likewise find the evidence is sufficient to sustain appellant's conviction for conspiracy to commit kidnapping. *See* 18 Pa.C.S. § 903. [5]

****833** Further, appellant contends his death sentence must be vacated because the evidence failed to support the only aggravating circumstance the jury found—that appellant committed a killing while in the perpetration of the felony of kidnapping. *See* 42 Pa.C.S. § 9711(d)(6). As discussed above, the evidence was sufficient to support appellant's convictions for kidnapping ***615** and conspiracy to commit kidnapping. Therefore, this argument is meritless.

Next, appellant argues his trial should have been severed from Markman's because her duress defense permitted her to present substantial prejudicial evidence of uncharged conduct by appellant, which would not have been admissible if he was tried separately. Appellant argues this prejudice was augmented by the trial court's decision not to charge the jury on duress, thus exposing the jury to this evidence without the benefit of the context in which it was admitted—Markman's duress defense. [6]

The Commonwealth argues appellant and Markman were properly tried together because they did not dispute how the crime occurred. After White was killed, both explained how they concealed the body and left Pennsylvania. Because appellant and Markman consistently recounted each other's role, the Commonwealth contends their defenses, which merely claimed the co-defendants manipulated each other into participating in the crime, were not antagonistic and they were properly tried together. *See Commonwealth v. Marinelli,* 547 Pa. 294, 690 A.2d 203, 213 (1997) ("The fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance."); *Commonwealth v. Chester,* 526 Pa. 578, 587 A.2d 1367, 1373 (1991) ("[T]he fact that defendants have conflicting versions of what took place, or the extents to which they participated in [the crime], is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together.").

Regarding the admission of evidence of abuse, the Commonwealth argues it was admissible to support Markman's duress defense, despite the court's conclusion the defense was not available to her. The Commonwealth asserts appellant was not prejudiced because the jury was capable of distinguishing between the substantial evidence supporting a first degree ***616** murder conviction and the evidence Markman presented to minimize her role in the crimes. If the joint trial and subsequent admission of evidence was in error, the Commonwealth argues any error was harmless, as it could not have affected the verdict.

Rule 582 of the Rules of Criminal Procedure permits joinder of offenses or defendants:

> Rule 582. Joinder—Trial of Separate Indictments or Informations
>
> A) Standards
>
> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

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> (b) the offenses charged are based on the same act or transaction.
>
> ****834** (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582(A). There is no dispute Markman and appellant participated in the same act or transactions. Where a party can show he will be prejudiced by a joint trial, "[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief[.]" *Id.,* 583.

Whether to grant a motion for severance is within the trial court's sound discretion and "should not be disturbed absent a manifest abuse of discretion." *Chester,* at 1372. *Chester* noted joint trials are preferred where conspiracy is charged. Severance may be proper where a party can establish the co-defendants' defenses are so antagonistic that a joint trial would result in prejudice. *Id.,* at 1372–73. However, the party seeking severance must present more than a mere assertion of antagonism:

> ***617** [T]he fact that defendants have conflicting versions of what took place, or the extents to which they participated in [the crime], is a reason for rather than against a joint trial because the truth may be more easily determined if all are tried together. ... Defenses become antagonistic only when the jury, in order to believe the essence of testimony offered on behalf of one defendant, must necessarily disbelieve the testimony of his co-defendant.

Id., at 1373 (citations omitted).

Here, the circumstances are analogous to *Chester,* in that neither appellant nor Markman denied murdering White, but disputed their role in the crime. The evidence indicated White died from the combination of appellant's strangulation and the obstruction of her airway caused by the rag Markman stuffed in her mouth. For the jury to accept Markman's defense that she committed the killing out of fear for her own life does not require the jury to completely reject appellant's version of events. The jury could have accepted appellant's and Markman's accounts. The jury could have also rejected both accounts entirely and found appellant and Markman were willing participants who later pointed the finger of blame at one another. The jury's verdict convicting appellant and Markman of first degree murder reveals it did not find their defenses so antagonistic as to compel acquittal of one defendant if it found the other guilty.

Regardless of the reasoning behind the jury's verdict, the fact the co-defendants blamed one another is insufficient to warrant separate trials based on antagonistic defenses. "Mere fingerpointing alone—the effort to exculpate oneself by inculpating another—is insufficient to warrant a separate trial." *Commonwealth v. Lambert,* 529 Pa. 320, 603 A.2d 568, 573 (1992). Indeed, if truth is the goal, having all the fingerpointing before the same fact-finder is quite efficacious.

While we do not dispute the evidence of abuse would not have been admissible at a separate trial against appellant, any prejudice to him was offset by the evidence he presented establishing Markman's violent nature. Appellant presented ***618** evidence painting Markman as a violent and jealous individual, both older and larger than him, and alleged Markman wielded a hammer and forced his participation in the killing. He also presented evidence establishing Markman planned and instigated the killing to eliminate their relationship problems. Had he presented this evidence at a separate trial, he would make the very evidence of which he now complains relevant in rebuttal.

****835** In addition, while the evidence of abuse could have caused the jury to infer appellant was violent, any prejudice was eclipsed by his own *admission that he violently strangled White to death* in his living room after luring her there under false pretenses, drove to Virginia with her lifeless body in her Jeep, and subsequently deposited her body in the trunk of an abandoned car. The jury was aware, based on this evidence alone, of appellant's capacity for violence. Suggestions that he intimidated Markman pale in comparison. Focusing on the possibility of mice, appellant ignores the elephant in the room.

Any prejudice resulting from Markman's admission of evidence of abuse was *de minimis,* and did not overcome the factors weighing in favor of a joint trial, nor did the prejudice outweigh the Commonwealth's overwhelming evidence supporting appellant's first degree murder conviction.[7] Again, the law favors a joint trial when criminal conspiracy

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is charged, *Chester,* at 1372, and the learned trial court's decision regarding severance should not be disturbed absent a manifest abuse of discretion. *Id.* Regardless of whether we would in hindsight have granted severance, there is no basis for finding ***619** an abuse of discretion, much less one that is manifest. The court acted within its discretion in determining appellant—the party seeking severance—failed to meet his burden of establishing the potential for prejudice outweighed the interests served by a joint trial.

Appellant also asserts he was prejudiced by the admission of Markman's redacted confession in violation of his state and federal confrontation rights. Appellant contends an incriminating statement made by a co-defendant may not be admitted at a joint trial unless the confession has been property redacted to exclude references to the co-defendant, and the jury has been properly cautioned to only consider it against the co-defendant actually making the statement.

In *Bruton,* the United States Supreme Court examined whether Bruton's Sixth Amendment confrontation rights were violated when, at a joint trial, his non-testifying co-defendant's confession was introduced, and if such rights were violated, whether an instruction directing the jury to consider the confession only against the co-defendant, and not Bruton, would cure such violation. *See Bruton,* at 126, 88 S.Ct. 1620. *Bruton* held the introduction at trial of the non-testifying co-defendant's confession describing the defendant's participation in the crime deprived the defendant of his rights under the Confrontation Clause. *Id.; see also Gray,* at 197, 118 S.Ct. 1151 (prohibition on introduction of non-testifying co-defendant's confession at joint trial naming defendant as perpetrator extends to redacted confessions in which defendant's name replaced by blank space, word "deleted," or similar symbol).

The *Bruton* rule applies solely to non-testifying co-defendants. *See* ****836** *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand."); *Nelson v. O'Neil,* 402 U.S. 622, 627, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971) ("The Constitution as construed in *Bruton,* in other words, is violated only where the out-of-court hearsay statement is that of a declarant who is ***620** unavailable at the trial for 'full and effective' cross-examination."); *Commonwealth v. Overby,* 570 Pa. 328, 809 A.2d 295, 303 (2002) (where express implication exists in joint trial, jury instruction insufficient to cure prejudice to non-testifying co-defendant, and violates Confrontation Clause). Thus, it is evident that admission of a co-defendant's redacted confession does not violate a defendant's Sixth Amendment confrontation rights when the co-defendant takes the stand and subjects himself to full and fair cross-examination.

Here, the *Bruton* rule is clearly inapplicable. Appellant asserts the insufficient redaction of Markman's confession violated his confrontation rights; however, he fails to acknowledge this rule applies only to non-testifying co-defendants, and he also fails to acknowledge Markman took the stand at trial and subjected herself to extensive cross-examination pursuant to the Sixth Amendment and *Bruton.* Because the facts of this case and the admission of Markman's confession clearly fall outside the *Bruton* rule, appellant's assertions are meritless, and he is not entitled to a new trial on the murder, kidnapping, unlawful restraint, and conspiracy charges simply because his co-defendant received this relief.

Appellant next asserts the trial court failed to provide timely cautionary instructions regarding evidence of his abuse of Markman. The Commonwealth argues such instructions were appropriately given at the guilt and penalty phases, and appellant was not prejudiced in this regard.

A required limiting instruction may be given either at the time limited-purpose evidence is introduced, or during the general charge. *Johnson,* at 672; *see also* Pa.R.Crim.P. 647(D) (trial judge may give limiting instruction "anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case"). It is within the trial court's discretion to determine when the instructions would be appropriate. *Commonwealth v. Spotz,* 563 Pa. 269, 759 A.2d 1280, 1286 (2000). Prior to Markman's testimony, the trial court instructed the jury:

> ***621** Ladies and gentlemen, you have heard before from various witnesses, and I guess you are going to hear again, testimony regarding possible abuse done by [appellant] to Markman.
>
> You are allowed to hear this evidence for only one specific limited purpose, that being to assist you in determining the effect it may have had in regard to Markman's claim that she was coerced to commit criminal acts.
>
> I specifically tell you that under the law that you may not consider this evidence or this testimony as evidence that

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> [appellant] has bad character or a propensity to commit crimes.

N.T. Trial, 10/30/01, Vol. IV, at 889–90. The trial court also instructed the jury in the general charge during the penalty phase:

> In this case, in each verdict, under the sentencing code, only the following matters, if proven to your satisfaction beyond a reasonable doubt, can be considered aggravating circumstances. That circumstance would be the same in each case. That the defendant committed a ****837** killing while in the perpetration of a felony in this case, kidnapping.

Commonwealth's Brief, at 49 (quoting N.T. Trial, 11/1/01, Vol. VI, at 1442). "There is a presumption in the law that the jury followed the instructions given by the trial judge...." *Commonwealth v. Steele,* 522 Pa. 61, 559 A.2d 904, 913 (1989) (citing *Commonwealth v. Stoltzfus,* 462 Pa. 43, 337 A.2d 873, 879 (1975)). Accordingly, pursuant to this presumption, the jury is considered to have followed the trial court's limiting instruction regarding the evidence of appellant's abuse of Markman, and considered only whether Markman was coerced to commit criminal acts. These instructions were sufficient to eliminate any alleged prejudice stemming from Markman's assertions of appellant's abuse.

Appellant next claims Markman's closing arguments at the guilt and penalty phases prejudiced him, as Markman's counsel essentially acted as "additional prosecutors" during the arguments. Appellant's Brief, at 61. Other than referring to ***622** the general standard concerning closing arguments and a Kentucky case, *see id.,* at 60–61 (citing *Foster v. Commonwealth,* 827 S.W.2d 670, 683 (Ky.1991)), appellant does not rely on any other authority to support his position. The Commonwealth argues Markman's closing arguments were not prosecutorial arguments, but merely advocacy for Markman, and the jury was not prevented from making an impartial determination of appellant's guilt.

During his guilt phase closing argument, Markman's counsel noted appellant had been accused of abusing Markman. N.T. Trial, 11/1/01, at 54–55 ("When you heard about abuse, you heard it from that stand, from witnesses that spoke to each of you. [Appellant's counsel] stands up here before you and says [appellant] takes responsibility. Well, you know what, he has got a lot to be responsible for, legally and otherwise."). This statement was made in response to appellant's closing, in which his counsel argued, "They have been smearing [appellant] for the past week and a half. I'm not saying this guy is a cub scout. He is a criminal, he is a murderer. But they are smearing him in an effort to have [Markman] deny responsibility and to say she didn't do anything wrong." *Id.,* at 49–50. In his penalty phase closing, Markman's counsel noted appellant did not deny the evidence of abuse when he testified during the penalty phase in an effort to minimize Markman's role in the murder. N.T. Trial, 11/5/01, at 166–68. Appellant contends Markman's counsel's prejudicial remarks at the penalty phase included "[Markman] did bind, gagged, blindfolded ... White. But it was [appellant] that choked ... White to death and then, I suggest to you, set the rest of the agenda on the way down to Virginia." *Id.,* at 169.

The court instructed the jurors the only aggravating circumstance they were permitted to consider was whether the killing was done while in the perpetration of a felony. *See* N.T. Trial, 11/1/01, Vol. VI, at 1442. Appellant offers no reason to disturb the presumption that jurors follow the court's instructions, beyond mere conclusory statements. Appellant is merely trying to reframe his previously rejected claim he was prejudiced by the abuse evidence. As noted ***623** previously, the evidence presented at trial was sufficient to establish appellant committed first degree murder; it was also sufficient to establish the aggravating circumstance. There is no reason to believe the verdict or punishment was the product of prejudice arising from closing arguments.

Next, appellant argues a *Simmons* instruction should be given as a matter of course prior to death penalty deliberations. *See* ****838** *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (instructing jury life sentence means life without parole). Appellant also contends Markman placed his future dangerousness at issue, thus warranting a *Simmons* instruction. The Commonwealth argues Markman—not the Commonwealth—made references to appellant's future dangerousness, and this Court should not extend *Simmons* to this case.

A *Simmons* instruction is only required when the Commonwealth places a defendant's future dangerousness at issue in the sentencing phase. *Commonwealth v. Rainey,* 593 Pa. 67, 928 A.2d 215, 241–42 (2007) (citing *Simmons*). We have required a *Simmons* instruction in cases where

the prosecutor made explicit references to the defendant's future dangerousness. *See, e.g., Commonwealth v. Trivigno,* 561 Pa. 232, 750 A.2d 243, 253–54 (2000) (asking jury to use prior criminal convictions as "weather vane looking into the future" and determine if "they are significant in that they are a determinant of where the man is, where[ ] he's going...."). Appellant is unable to cite a single example of the prosecution arguing he is a future danger. Markman's references to past abuse were presented, not as an indication of future dangerousness, but as an argument for mitigation of Markman's participation. Furthermore, appellant does not provide any authority showing the United States Supreme Court extended *Simmons* to cases where a co-defendant allegedly places another defendant's future dangerousness at issue. Requiring a *Simmons* instruction under these circumstances would greatly expand this rule, and appellant provides no compelling reason or authority to do so.

***624** Next, appellant claims the trial court erred in permitting the forensic pathologist, Dr. Venuti, to testify regarding White's struggle as she was murdered because there was an insufficient evidentiary basis for the testimony. Appellant concedes the cause of death was relevant, but argues whether White was struggling to free herself and get some air to breathe is irrelevant. Other than this general assertion, appellant does not explain why Dr. Venuti could not testify regarding White's struggle. The Commonwealth argues appellant was not prejudiced, and Dr. Venuti presented proper opinion testimony based on the facts.

We will not reverse a trial court's determination regarding the admissibility of evidence absent a clear abuse of discretion. *Mitchell,* at 452. Moreover, an erroneous evidentiary ruling "does not require us to grant relief where the error is harmless." *Id.* Expert testimony is allowed to "assist the trier of fact to understand the evidence or to determine a fact in issue...." Pa.R.E. 702. The evidence regarding White's struggle was introduced to assist the jury in understanding the manner of White's death. Trial Court Opinion, 5/25/04, at 91. As a forensic pathologist who performed White's autopsy, Dr. Venuti was qualified to discuss the details of White's death, and aid the jury in understanding the evidence with which it was presented. The testimony also helped explain why Markman's DNA was found underneath White's fingernails. N.T. Trial, 10/29/01, Vol. III, at 541–42. Finally, since Markman and appellant each admitted to killing White, appellant has not shown how this information prejudiced him, or how it was so unduly prejudicial as to warrant a new trial. Accordingly, the trial court did not abuse its discretion in allowing the introduction of the expert's testimony.

Next, appellant argues the trial court erred by admitting photographs he had taken with White's camera, which he stole and then sold following the murder. He claims these photographs had no probative ****839** value and were prejudicial. The photographs depict appellant making an obscene gesture of "giving the finger," and appellant pretending to strangle ***625** Markman. The Commonwealth argues the photographs were relevant to show appellant and Markman's demeanor after the murder, and appellant was not unduly prejudiced by their admission.

We will not reverse a trial court's determination regarding the admissibility of evidence absent a clear abuse of discretion. *Mitchell,* at 452. Moreover, an erroneous evidentiary ruling does not require us to grant relief where the error is harmless. *Id.* These photographs—showing appellant and Markman on good terms following the murder—undermine appellant's argument Markman coerced him to commit the murder. Further, any prejudicial effect of the photographs is far outweighed by appellant's admission that he violently strangled White. Appellant also does not show how the admission of the photographs, in comparison to all the other evidence, warrants a new trial.

Next, appellant argues the trial court erred in refusing to suppress his statements to the Virginia State Police because he was not given *Miranda* warnings. Appellant argues he was subjected to a custodial interrogation in the police car. The Commonwealth argues appellant was not in custody and freely made statements to police; thus, no *Miranda* warnings were required. *Miranda* warnings are only required in a custodial interrogation. *Oregon v. Mathiason,* 429 U.S. 492, 494, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Commonwealth v. Gaul,* 590 Pa. 175, 912 A.2d 252, 255 (2006). To determine if an interview rises to the level of a custodial interrogation, we must view the totality of the circumstances to determine whether a reasonable person in the suspect's position would have believed he was under arrest. *Stansbury v. California,* 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam).

Here, Deputy Vaughan went to appellant's father's Virginia residence October 7, 2000. Trial Court Opinion, 5/25/04, at 35. Appellant and Markman emerged from the residence agreed to speak with Vaughan. *Id.,* at 36. Appellant voluntarily entered the front seat of the police car, which was

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unlocked, ***626** and did not contain a cage. *Id.* Appellant was not handcuffed, restrained, or searched, and the interview lasted approximately 15 to 20 minutes. *Id.* At the close of questioning, appellant got out of the car and returned to the residence. *Id.,* at 37. Vaughan then left while appellant and Markman remained at the residence; they were not in custody. *Id.,* at 60.

It is clear a reasonable person in appellant's position would not feel he was under arrest as he freely entered and exited the police car, and spoke with the deputy while unrestrained in the front seat. Further, the interview only lasted, at most, 20 minutes, and appellant was free to leave after the interview. The trial court properly determined appellant was not subjected to a custodial interrogation; thus, *Miranda* warnings were not required and appellant's October 7, 2000 statements to Deputy Vaughan were properly admitted.

Next, appellant argues he was denied his right to counsel on October 12, 2000, when he was questioned about the murder after he was arrested for larceny involving White's Jeep. Appellant contends the right to counsel applies to all offenses relating to the same incident. Appellant also argues his statement was made more than six hours after his arrest; thus, any evidence gathered after the six-hour mark was required to be suppressed pursuant to ****840** *Commonwealth v. Davenport,* 471 Pa. 278, 370 A.2d 301, 306 (1977) (where accused not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment not admissible). Appellant also contends his confession, which was tape-recorded by the Virginia State Police, should have been suppressed pursuant to the Pennsylvania Wiretapping and Electronic Surveillance Control Act (Pennsylvania Wiretap Act).[8]

The Commonwealth argues appellant waived his right to counsel and cannot now claim he was denied this right or that his statement was somehow coerced. Additionally, the Commonwealth asserts *Davenport*'s six-hour rule has since been abandoned in favor of the totality of the circumstances test set ***627** forth in *Commonwealth v. Perez,* 577 Pa. 360, 845 A.2d 779 (2004). Pursuant to *Perez,* the Commonwealth argues appellant's statements were voluntarily made, and although he was originally arrested on larceny charges regarding White's Jeep, within five hours of his arrest he was questioned and made inculpatory statements regarding White's murder; thus, under the totality of the circumstances, the statements were admissible. *See id.,* at 787. The Commonwealth also argues the admission of appellant's statements did not violate either Virginia's Interception of Wire, Electronic or Oral Communications Act (Virginia Wiretap Act)[9] or the Pennsylvania Wiretap Act.

Appellant does not argue he invoked his right to counsel after receiving *Miranda* warnings; instead, he claims his right to counsel existed because he was being questioned about the White murder, which was related to his larceny arrest. Appellant received *Miranda* warnings and waived them before making incriminating statements. Thus, there was no *Miranda* violation warranting suppression of his statements to police.

Additionally, as the Commonwealth noted, although appellant relies on *Davenport* for the suppression of his statements, it has since been overruled by *Perez,* which held "voluntary statements by an accused, given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible *per se.* Rather, ... regardless of the time of their making, courts must consider the totality of the circumstances surrounding the confession." *Perez,* at 787 (footnote omitted). In reviewing the totality of the circumstances, it must be considered whether, under the circumstances, the confession was freely and voluntarily made. *Id.,* at 785. Various other factors to consider include the interrogation's duration and means, the defendant's physical and mental state, the detention conditions, police attitude during the interrogation, and any other factors indicating whether coercion was used. *Id.*

***628** *Perez* was decided March 24, 2004, prior to the trial court's opinion in the instant case; however, the general rule in Pennsylvania is to apply the law in effect at the time of the appellate decision. *See Commonwealth v. Cabeza,* 503 Pa. 228, 469 A.2d 146, 148 (1983) (principle applies with equal force to both criminal and civil proceedings); *see also Commonwealth v. Parker,* 435 Pa.Super. 81, 644 A.2d 1245, 1249 (1994). Furthermore, in *Perez,* we stated "[t]his rule will apply to appellant's case and all pending cases where the issue has been properly raised." *Perez,* at 788. In this case, the issue has been preserved at all times up to and including direct appeal. Additionally, the rule of retroactivity ****841** is one of judicial discretion, which should be applied on a case-by-case basis. *Blackwell v. Commonwealth, State Ethics Commission,* 527 Pa. 172, 589 A.2d 1094, 1099 (1991). In determining whether to apply a rule retroactively, courts should consider the new rule's purpose, extent of reliance on the old rule, and effect on administration of justice by retroactive application of new rule. *Id.*

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The *Blackwell* factors weigh in favor of retroactively applying the totality of the circumstances test announced in *Perez.* The new rule and the old rule share the same purpose: "to guard against coercive interrogation and to ensure the accused is promptly afforded his constitutional rights [.]" *Perez,* at 786. At the time of the new rule's announcement, Pennsylvania courts had already abandoned the stringent bright-line rule because it was "so readily capable of avoidance as to function as no rule at all...." *Id.,* at 785–86 (quoting *Commonwealth v. Bridges,* 563 Pa. 1, 757 A.2d 859, 883 (2000) (Saylor, J., concurring)). As such, *Perez* did not, "strictly speaking, fashion[ ] a 'new' rule of criminal procedure[,]" *Id.,* at 790 (Castille, J., concurring). The totality of the circumstances rule was born entirely out of the six-hour rule and its litany of exceptions. *Perez*' s rearticulation of the six-hour rule merely clarified the rule's evolution. The effect of its retroactive application, unlike its predecessor, is to aid the administration of justice. Accordingly, in this case, it is appropriate to apply the rule announced in *Perez.*

***629** Appellant was arrested October 11, 2000, at 10:50 p.m., on grand larceny charges regarding White's Jeep, and was detained by the Franklin County Sheriff's Office. His interrogation began at 4:19 a.m., October 12, 2000. *See* Transcript of Redacted Taped Statement of Housman, 10/12/00, at 4. Appellant was properly advised of his *Miranda* rights, signed a waiver of his rights, and gave a voluntary statement, implicating himself and Markman in White's murder. *See id.,* at 4–8. The interrogation concluded shortly after 5:08 a.m., about six hours and 20 minutes after his arrest. *See id.,* at 49–52. A thorough review of the record indicates appellant's statements were voluntary, he was cooperative, and the entire encounter was completed in about an hour to an hour and a half. *See generally id.; see also* N.T. Omnibus Hearing, 5/21/01, at 96. Thus, based on the totality of the circumstances, pursuant to *Perez,* appellant's statements to police were properly admitted, despite the length of time between his initial arrest and his confession.

Appellant asserts the tape recording of his statements violated the Pennsylvania Wiretap Act, and although legal in Virginia, his statements should have been suppressed. The Pennsylvania approach to conflict of law issues varies depending upon whether the laws are procedural or substantive in nature. [10] Pursuant to *Commonwealth v. Sanchez,* 552 Pa. 570, 716 A.2d 1221 (1998), where a conflict of law arises regarding procedural matters, Pennsylvania will apply its procedural laws when it is the forum state. *Id.,* at 1223. However, where a conflict exists regarding substantive laws, such as here, "Pennsylvania courts take a flexible approach which permits analysis of the policies and interests underlying the particular issue before the court." *Id.* "This approach ****842** gives the state having the most interest in the question paramount control over the legal issues arising from a particular factual context, thereby allowing the forum to apply the ***630** policy of the jurisdiction most intimately concerned with the outcome." *Id.,* at 1223–24.

Sanchez determined the issue of whether the result of a legally conducted canine sniff in California supported a search warrant in Pennsylvania, where the sniff would not have been conducted legally under Pennsylvania law. Holding California had the most interest in the canine sniff's validity, this Court noted the sniff took place there, involving a package shipped by its residents. It further stated, "No Pennsylvania state interest would be advanced by analyzing the propriety of the canine sniff under Pennsylvania law because the canine sniff did not occur in Pennsylvania and no Pennsylvania state officer was involved in the canine sniff." *Id.,* at 1224.

The Virginia Wiretap Act allows "a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Va.Code Ann. § 19.2–62(B)(2). It defines oral communication as "any ... communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations but does not include any electronic communication [.]" *Id.,* § 19.2–61.

Appellant's statement was taken in Virginia, by the Virginia police. Both officers present during appellant's confession were parties to the recording, and one of them testified he was the consenting party under the statute. N.T. Omnibus Hearing, 5/21/01, at 84, 86. Thus, because one of the officers consented, which is all that is required by the statute, the information was obtained from appellant through valid and legal means in Virginia. Here, as in *Sanchez,* no Pennsylvania state interest would be advanced in analyzing the legality of the tape recording under Pennsylvania law because it did not occur in Pennsylvania, and none of our police officers participated in appellant's questioning. Although Pennsylvania has an interest in preventing its citizens from being tape-recorded without the proper consent, we cannot control our sister ***631** states' otherwise legal

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undertakings. Therefore, Virginia is the jurisdiction having the greater interest in the legality of the recording of appellant's statement, and the substantive laws governing the Virginia Wiretap Act apply.

Moreover, the Pennsylvania Superior Court has held taped conversations between a party in Pennsylvania and a party in a sister state are admissible in a Pennsylvania court despite violation of the Pennsylvania Wiretap Act if the conversation was legally recorded in the sister state. *See Larrison v. Larrison,* 750 A.2d 895, 898–99 (Pa.Super.2000) (holding telephone conversation legally recorded in New York admissible in Pennsylvania court when recording would have violated Pennsylvania Wiretap Act); *see also Commonwealth v. Bennett,* 245 Pa.Super. 457, 369 A.2d 493, 494–95 (1976) (holding evidence legally obtained in New Jersey could be used in support of Pennsylvania search warrant when wiretap would have violated Pennsylvania Wiretap Act). Therefore, because the Virginia Wiretap Act applies, and appellant's recorded confessions were legally obtained in Virginia, the confession was properly admitted.

Finally, appellant asserts the evidence obtained in the two searches of his trailer should be suppressed because the affidavit used to procure the original search warrant ****843** contained insufficient probable cause, and the subsequent search was based on his unconstitutionally elicited confession. Appellant contends the affidavit failed to establish criminal activity occurred in his trailer regarding White's murder. The Commonwealth argues the standard regarding probable cause to issue a search warrant is well-settled, and the affidavit clearly established a basis for probable cause supporting the search warrant issued for appellant's trailer. Additionally, the Commonwealth asserts appellant knowingly and voluntarily waived his *Miranda* rights, and subsequently gave a statement to police; thus, his inculpatory statements were voluntary, and using those statements to establish probable cause was lawful.

It is well-established that a magistrate may not consider any evidence outside of the affidavit to determine ***632** whether probable cause exists to support a search warrant. *See* Pa.R.Crim.P. 203(B). This Court has held "[b]efore an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search ..." and such information "must be viewed in a common sense, nontechnical, ungrudging and positive manner." *Commonwealth v. Baker,* 532 Pa. 121, 615 A.2d 23, 25 (1992). The United States Supreme Court has stated:

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... [concluding]" that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 238–39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (quoting *Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). Furthermore, probable cause is based on probability, not a *prima facie* case of criminal activity; deference should be afforded the magistrate's finding of probable cause.

Here, the affidavit of probable cause indicated White received a phone call while at work, and subsequently told her co-workers she had to leave to console appellant, whose father had just died. White's Jeep was last seen at appellant's home, as was Markman's car. White's Jeep was subsequently found at appellant's father's residence in Virginia, again with Markman's car, and White's body was discovered on land belonging to appellant's family. *See* Affidavit of Probable Cause, Trooper Sally A. Worst, 10/9/00. The facts presented in the affidavit create the probability that evidence of White's murder would be found in appellant's trailer, and because great deference is due the issuing magistrate, the search warrant issued was supported by sufficient probable cause.

***633** Having concluded that appellant's claims for relief are without merit, pursuant to 42 Pa.C.S. § 9711(h)(3), we must affirm the sentence of death unless we determine the sentence was the product of passion, prejudice, or any other arbitrary factor, or the evidence fails to support the finding of at least one aggravating factor. *Id.* Upon review of the record, we conclude the sentence of death was not the product of passion, prejudice, or any other arbitrary factor. Rather, it was based upon evidence properly admitted at trial. We also conclude the evidence was sufficient to support the finding of at least one aggravating factor, that appellant committed a killing while in

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the perpetration of a felony. **844 Accordingly, we affirm the determination of guilt as to all counts, and affirm the sentence of death.

Pursuant to 42 Pa.C.S. § 9711(i), we direct the Prothonotary of the Supreme Court of Pennsylvania to transmit, within 90 days, the complete record of this case to the Governor of Pennsylvania.

Judgment of sentence affirmed.

Chief Justice CASTILLE and Justices TODD, McCAFFERY and GREENSPAN join the opinion.

Justice SAYLOR files a concurring and dissenting opinion.

Justice BAER files a dissenting opinion.

Justice SAYLOR, concurring and dissenting.
I join the result reached by the majority insofar as it affirms Housman's convictions, but respectfully dissent from the denial of relief as to the death sentence.

While I agree with Mr. Justice Baer, writing in dissent, that the trial court's error in failing to sever Appellant's trial from that of co-defendant Beth Ann Markman was substantially prejudicial when viewed in isolation, in the present matter the Commonwealth's case against Appellant for first-degree murder was overpowering. Significantly, the prosecution was not premised on circumstantial evidence or identification testimony. Rather, it was undisputed at trial that Housman placed *634 the phone call luring the victim to the trailer and that he intentionally strangled her there. His defense was merely that he was frightened into doing this. His purported "fright," however, amounts to something short of coercion, because at trial he conceded that he was criminally liable for third-degree murder, which subsumes a malicious mental state. Thus, he did not pursue a conventional duress defense. Further, the only evidence that Housman was hit *and/or* threatened during the episode was exceptionally weak, since it derived solely from his own self-serving statement to police, brought onto the record during the prosecution's case-in-chief. Indeed, Housman did not testify at trial to create a credibility issue under *Commonwealth v. Young,* 561 Pa. 34, 87 & n. 16, 748 A.2d 166, 194 & n. 16 (1999) (reargument opinion), as did Markman.

Given the remarkable strength of the Commonwealth's case for first-degree murder, the absence of any viable defense or testimony creating a credibility issue, and with full appreciation that the prejudice resulting from the trial court's refusal to sever was substantial, I conclude that such error may be deemed harmless for purposes of preserving Housman's convictions under the third method of establishing harmless error referenced by both the majority and the dissent. *See* Majority Opinion, *op.* at 835 n. 7; Dissenting Opinion, *op.* at 851-52 (Baer, J.).[1] However, in light of the significant possibility of spillover prejudice which may have affected the penalty determination, I would vacate Housman's death verdict and remand for a new sentencing hearing.

Justice BAER, dissenting.
The Majority affirms the direct appeal from a sentence of death imposed by the Cumberland County Court of Common Pleas following Appellant William H. Housman's conviction for the first-degree murder of Leslie White and the related crimes of kidnapping, theft by unlawful taking or disposition, unlawful restraint, abuse of corpse, and criminal conspiracy. I believe *635 the trial court erred in denying Appellant's motion to sever his trial from **845 that of his co-defendant, Beth Ann Markman, because of the prejudice that resulted to Appellant from the introduction of Markman's evidence, and that the error was not harmless. Accordingly, I would reverse the conviction and remand for a new trial.

As the Majority notes, Appellant's counsel learned pre-trial that Markman intended to offer the defense of duress and evidence in support thereof at trial, arguing that she suffered long-term physical and emotional abuse at the hands of Appellant. Appellant's counsel filed a motion for reconsideration of the denial of severance, arguing that the evidence of abuse Markman intended to introduce at trial was not legally or factually relevant to Appellant's guilt in this capital case and would, in fact, be severely prejudicial. The evidence that counsel anticipated Markman presenting, and which counsel brought to the court's attention, included statements from a neighbor relating that Markman described how Appellant had wrapped a telephone cord around her neck, that she saw Markman with bruises and black eyes which were attributed to Appellant, and that she observed Appellant trying to sabotage Markman's car. Another neighbor was to testify to hearing constant fighting between Markman and Appellant, and a friend and neighbor was to relate that Markman had told her that Appellant had tortured Markman for an entire night, had taken a knife and

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cut her down the chin, neck, stomach, and legs, had gagged her with underwear and tied her up, and that the neighbor had seen the cuts and bruises that had resulted from these attacks.

A different friend was to testify that Markman had complained to her about the abuse, and she had suggested that Markman obtain a protection from abuse order. A colleague of Markman's was to testify that Markman complained of abuse by Appellant and often came to work black and blue. Another friend was to testify that one time when Appellant got angry with Markman, he threatened to cut her brake lines, and another time stated that he wanted to kill her. Counsel further argued that the prejudicial effect of this evidence of abuse, which would not be admissible against Appellant in a ***636** separate trial for the alleged murder, could not be cured by any cautionary instruction. The trial court denied the motion for reconsideration, and, as expected, Markman introduced at trial all of the foregoing evidence of Appellant's alleged abuse of her, along with additional evidence of such abuse. Importantly, the trial court declined to instruct the jury during its charge regarding Markman's defense of duress.

Appellant presently argues that his trial should have been severed from Markman's because her antagonistic defense of duress, though ultimately disallowed by the trial court, permitted Markman to present substantial prejudicial evidence of his uncharged conduct that would not have been admissible if he was tried separately. Appellant asserts that, consequently, the joint trial resulted in the same jury charged with deciding his fate being subjected to days of testimony and argument of his alleged physical, verbal, and other abuse of Markman, painting him as a sadistic monster with evidence irrelevant to the murder for which he was on trial. Appellant argues that the resulting prejudice was even more acute, if possible, because the trial court ultimately refused to charge the jury on Markman's defense of duress, therefore allowing it to hear the evidence without an instruction defining the context for which it was offered. The Majority rejects Appellant's argument.

****846** Reading Rules 582[1] and 583[2] of the Rules of Criminal Procedure together, it is apparent that joint trials of co-defendants ***637** are proper where (1) the defendants are alleged to have participated in the same act or transaction or series of acts or transactions, and (2) a defendant will not be prejudiced by being tried jointly with the other defendant. There is no dispute here regarding whether Markman and Appellant participated in the same act or transaction. The question here is one of prejudice, and it is on that question that I respectfully but strongly disagree with the Majority.

The question of prejudice involves a balancing test, where interest in judicial economy is balanced against the need to minimize prejudice against a defendant. *Commonwealth v. Patterson,* 519 Pa. 190, 546 A.2d 596 (1988). Generally, joint trials are encouraged when judicial economy will be promoted by avoiding the expensive and time-consuming duplication of evidence. *Commonwealth v. Jones,* 542 Pa. 464, 668 A.2d 491 (1995). In addition, where, as here, conspiracy is charged, joint rather than separate trials are preferred. *Commonwealth v. Chester,* 526 Pa. 578, 587 A.2d 1367, 1372 (1991); *Jones,* 668 A.2d at 501; *Patterson,* 546 A.2d 596.

Although judicial economy would be served by a joint trial, that is only one side of the equation. "This interest in judicial economy must be balanced against the need to minimize prejudice that may be caused to a defendant by consolidation." *Patterson,* 546 A.2d at 600. Where the defendant can show that he will be prejudiced by a joint trial, severance may be proper. *Jones,* 668 A.2d at 501. The "prejudice" of which Rule 583 speaks is not the ordinary prejudice that a defendant suffers from being charged with a crime; rather, the prejudice of Rule 583 is "that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence." *Commonwealth v. Lark,* 518 Pa. 290, 543 A.2d 491, 499 (1988). The potential for prejudice resulting from a joint trial exists where the evidence introduced against one defendant would be inadmissible against the other. ***638** *Commonwealth v. Lambert,* 529 Pa. 320, 603 A.2d 568, 573 (1992) (recognizing that separate trials for co-defendants should be granted where the evidence is such that, while it will be introduced against one defendant, it will not be admissible against others).

The Rules of Evidence prohibit introduction of prior bad acts to demonstrate conformity. *See* Pa.R.E. 404(b)(1) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity ****847** therewith"). Normally, in criminal trials, evidence of prior crimes or bad acts committed by a particular defendant is not admissible and any reference to it constitutes reversible error. *See Commonwealth v. Allen,* 448 Pa. 177, 292 A.2d 373, 375 (1972) (noting that the prosecution may not introduce evidence of the defendant's prior criminal conduct

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as substantive evidence of his guilt on the present charge). The purpose of this rule is to prevent the conviction of an accused for one crime by the use of evidence that he has committed other unrelated crimes, and to preclude the inference that because he has committed other crimes, he was more likely to commit that crime for which he is being tried. *Commonwealth v. Trowery,* 211 Pa.Super. 171, 235 A.2d 171, 172 (1967); *see also Commonwealth v. Malloy,* 579 Pa. 425, 856 A.2d 767 (2004) (observing that evidence of prior bad acts are not admissible for the sole purpose of demonstrating a criminal defendant's propensity to commit crimes); *Commonwealth v. Fisher,* 564 Pa. 505, 769 A.2d 1116, 1128 (2001), *cert. denied* 535 U.S. 906, 122 S.Ct. 1207, 152 L.Ed.2d 145 (2002) (same).

Evidence of Appellant's abuse of Markman, introduced by Markman in her defense, would not have been admissible in a separate trial because it consisted of evidence of prior uncharged conduct and bad acts and tended to demonstrate Appellant's criminal propensity, thereby prejudicing him. Markman attempted to paint Appellant as an abusive boyfriend who conceived of and directed the murder of his former girlfriend in the same manner Appellant had previously abused Markman. Markman's defense required her to demonstrate Appellant's abusive propensity and violent characteristics. Thus, where she was tried with the man whom she ***639** accused of such extensive abuse, the jury was clearly exposed to the facts averring that Appellant had previously committed violent abuse against one girlfriend, Markman, even going so far as to choke her with wire, the exact method by which he carried out the murder of his other girlfriend, the victim. I believe, therefore, that Appellant demonstrated that the evidence of abuse Markman intended to offer and did, in fact, present, was overwhelmingly and unduly prejudicial. [3]

This situation is distinguishable from that presented in *Chester,* 587 A.2d 1367, on which the Majority relies, and in *Commonwealth v. King,* 554 Pa. 331, 721 A.2d 763, 771 (1998), and *Commonwealth v. Marinelli,* 547 Pa. 294, 690 A.2d 203, 213 (1997), on which the Commonwealth relies. In those cases, the evidence admitted in ****848** the joint trial would have been admissible in a separate trial. Therefore, there was no need to analyze the prejudicial effect of such evidence. Similarly, I do not believe that here we have mere fingerpointing, as the Majority does. Rather, we have an entire trial tainted by the co-defendant's defense, received without context, demonstrating Appellant's systematic, unrelenting, abusive, criminal behavior to one girlfriend in a trial for the murder of a second ***640** girlfriend. Such evidence amounts to far more than mere suggestions of intimidation. *See* Majority Op. at 834-35.

In *Zafiro v. United States,* 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), the high Court opined that when defendants have properly been joined, a district court should only grant severance if there is a serious risk that a joint trial "would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539, 113 S.Ct. 933. The Court went on to say that where evidence is admitted at a joint trial that would not be admissible in a separate trial, a defendant might be prejudiced:

> Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh,* less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. [See 481 U.S.

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200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)].

Zafiro, 506 U.S. at 539, 113 S.Ct. 933 (internal citations omitted).

I believe that this case is representative of those situations in which the U.S. Supreme Court thought the risk of prejudice ***641** is high. In fact, it would be difficult to imagine a situation more prejudicial to a defendant than one in which the evidence that would be inadmissible in a separate trial is admitted not *against* the codefendant but, rather, *by* the codefendant, in an attempt to shift the blame for the murder of Appellant's former girlfriend from herself to Appellant by demonstrating that Appellant forced her participation in the murder. This evidence of wrongdoing on the part of Appellant, presented as part of the co-defendant's defense, could "lead the jury to conclude that a defendant is guilty" even more so, I believe, than evidence of other wrongdoing on the part of a co-defendant. *Zafiro,* 506 U.S. at 539, 113 S.Ct. 933. *See also Commonwealth v. Morris,* 493 Pa. 164, 425 A.2d 715 (1981) (applying Pa.R.Crim.P. 582(A)(1) to find that judicial economy cannot be elevated above the integrity of the factfinding process, and holding that to allow inadmissible evidence that is "irrelevant and prejudicial" to influence a verdict in the name of judicial economy is " abhorrent to our sense of justice."); *Foster v. Kentucky,* 827 S.W.2d 670 (Ky.1991) (holding that in a ****849** joint trial where a co-defendant sought to advance the defense of coercion based on abuse by the appellant, the trial court properly precluded evidence of uncharged criminal misconduct by the appellant, but that in the penalty phase, the trial court erred by permitting such evidence of abuse, finding that the evidence was highly prejudicial and required severance).

Generally, an instruction to the jury to consider evidence only with respect to the defendant against whom it is offered is sufficient to remove any potential prejudice. *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); *Commonwealth v. Travers,* 768 A.2d 845, 847 (Pa.2001). Therefore, "[w]hen charges against several defendants are consolidated for trial ... the trial judge must exercise extreme care that evidence admissible against one defendant is not improperly received against another." *Commonwealth v. Scarborough,* 313 Pa.Super. 521, 460 A.2d 310, 313 (1983). Although in some situations a cautionary instruction is not sufficient to cleanse prejudice, these situations are the exception, ***642** not the rule. *See Richardson,* 481 U.S. 200, 107 S.Ct. 1702; *Bruton v. United States,* 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) ("Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions ... there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

Having chosen to deny the motion for severance and permit admission of evidence of abuse, the trial court could have provided jury instructions in an attempt to overcome the extensive prejudicial effect of the testimony that was ultimately presented by Markman.[4] That evidence, as predicted in Appellant's motion to sever, included testimony from Deborah Baker, a friend of Markman, that she saw bruises on Markman beginning in 1999, which became progressively worse into the summer of 2000, and that Markman was "scared to death" of Appellant. Several of Markman's colleagues testified that Markman indicated that her boyfriend was abusive, and that Markman came to work upset and with bruises and black eyes. One colleague testified that she saw Markman on one occasion with bruises on her ears and arms, a black eye, and, on another occasion, with bruises all over her body, which Markman attributed to Appellant's abuse. When Markman tried to evict Appellant from the trailer, this witness was there to ensure Markman did not get hurt.

The manager of the trailer park where Markman and Appellant lived testified that when Markman wanted to remove Appellant's name from the lease because they were not getting along, Appellant hit Markman in the mouth and nose. The manager also testified to seeing bruises on Markman, and to witnessing a fight on October 2, 2000, to which police responded. An emergency room nurse testified that Markman ***643** came to the hospital on August 10, 2000, for treatment of two black eyes and complaining of dizziness and nausea. A neighbor in the trailer park testified that she saw Markman with black and blue marks and significant swelling on her face. Another neighbor testified to witnessing Appellant put Markman in a choke hold, bang her head on the wall, and throw her to the floor. Another neighbor, who also ****850** saw bruises all over Markman, testified that Markman's eyes were so black that Appellant called her a raccoon.

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Markman herself then testified regarding her relationship with Appellant. Shortly after Markman took the stand and began to testify about the abuse she suffered, Appellant's counsel objected to this testimony. The prosecutor then indicated the he did not think the evidence was relevant to the issue of Appellant's guilt, and requested a cautionary instruction. The trial court instructed the jury as follows:

> Ladies and gentlemen, you have heard before from various witnesses, and I guess you are going to hear again, testimony regarding possible abuse done by [Appellant] to Markman.
>
> You are allowed to hear this evidence for only one specific limited purpose, that being to assist you in determining the effect it may have had in regard to Markman's claim that she was coerced to commit criminal acts.
>
> I specifically tell you that under the law that you may not consider this evidence or this testimony as evidence that [Appellant] has bad character or a propensity to commit crimes.

N.T. 10/30/2001 at 889–90. Counsel for Appellant objected that he did not believe the cautionary instruction was adequate. *Id.* Beyond this isolated statement, the court gave no further instruction in this regard, notably not again mentioning the subject during its charge to the jury.

Markman proceeded to testify that Appellant's abuse began early in their relationship with pushing and shoving. She testified that in 1999, Appellant threw her to the floor in front of her daughter. The abuse escalated when Appellant began ***644** punching Markman in the side of her head, and began regularly to grab and squeeze her arms, and grab her by the throat and push her against the wall. Beginning in late 1999 and escalating into 2000, Appellant started hitting Markman more with his fists on her head and body, causing bruising and swelling. In the summer of 2000, the abuse got worse. When asked what he would do, Markman replied: "Pushing, grabbing me by the throat, put me up against the wall. Grab me around my throat. Like this (indicating) like a half Nelson type thing. Flip me over to the floor. While he had his hand around my neck, he would have his hand covering my nose and my mouth." He would threaten to snap her neck if she was not quiet. Markman testified that Appellant threatened her life several times, and once caused her to go to the emergency room because of bruises to the head, black and blue marks, and dizziness. She also testified that she attempted to obtain a protection from abuse order against Appellant but did not follow through for fear of Appellant's anger. Markman further testified that during a fight over Appellant's relationship with the victim, Leslie White, Appellant pinned her against the wall, grabbed her, put wire around her throat, and threatened her. He told her that it was her fault he was the way he was, and proceeded to carry her into the bedroom and rape her.

Markman continued her testimony, detailing the events that happened in the days leading to the murder. She explained that on October 2, 2000, just two days before the murder, when she decided to evict Appellant from the trailer, he pulled wires from her car. A day or two later, she returned to her trailer and found Appellant inside. He grabbed her by the throat, squeezed, and held a knife against her throat, until she began to black out. He used the knife to cut off her clothes, ran the knife down her body, and raped her. When he was finished, according to ****851** Markman's testimony, he tied her up, stuffed underwear in her mouth, and let her sleep. He threatened that if she told anyone about what he had done, he would "put a .45 in your [Markman's] head." Markman testified that Appellant told her he was leaving, but before he ***645** left he wanted Markman to drive him to a phone to make a phone call. During the trip to the convenience store from which the call to White was placed, Markman testified that Appellant held a knife to her and forced her to drive him. Markman proceeded to detail how Appellant forced her to participate in murdering White, which, as discussed above, she testified that she participated in out of fear of Appellant. At the conclusion of Markman's defense, the trial court inexplicably concluded that the evidence did not support the defense of duress, and declined to instruct the jury accordingly.

In light of the extensive evidence of abuse, I would find that the passing cautionary instruction, delivered mid-trial at the request of the prosecutor, was wholly insufficient to ameliorate the extreme prejudice that resulted from Markman's defense of duress, copiously delivered during the joint trial. In this case, where Appellant was on trial for murdering his former girlfriend by strangling her with his arm and speaker wire, and his current girlfriend was permitted to introduce unrebutted evidence of Appellant's abuse, including Appellant's choking her with his arm and wire, considering all of the circumstances under which the irrelevant evidence was given and its probable effect on the jury, *Commonwealth v. Richardson,* 496 Pa. 521, 437 A.2d 1162, 1165 (1981), including the nature of the crime, *Commonwealth v. Morris,* 513 Pa. 169, 519 A.2d 374, 377 (1986), the trial court's brief cautionary instruction during

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Markman's testimony was insufficient to cure the prejudice caused by such evidence. *See Bruton,* 391 U.S. 123, 88 S.Ct. 1620 (concluding that admission of co-defendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant); *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (holding that reversal follows if a confession admitted in evidence is found to be involuntary, regardless of possibility that jury correctly followed instructions and determined confession to be involuntary); *Commonwealth v. Chacko,* 480 Pa. 504, 391 A.2d 999 (1978) (where jury's reaction to photographic evidence ***646** was more likely to be emotional rather than rational, the trial judge's cautionary instructions to jury on admitting photographs could not cure prejudicial effect); *Commonwealth v. Archambault,* 448 Pa. 90, 290 A.2d 72, 75 (1972) (holding that where the judge told the jury that it would be a miscarriage of justice not to find the defendant guilty, cautionary instructions that the jury is the final arbiter of the verdict were insufficient).

Finally, I do not believe that the trial court's failure to sever Appellant's trial from Markman's was harmless error. *See Markman,* 916 A.2d at 603 (defining harmless error as (1) the error did not prejudice the defendant or the prejudice was *de minimus;* (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict). As explained, Appellant was prejudiced by the joint trial and the subsequent admission of evidence by ****852** Markman demonstrating Appellant's criminal propensity, and I do not believe the prejudice can be considered *de minimus,* as the Majority concludes. Rather, Markman's entire defense was premised upon portraying Appellant as violent and abusive.

Moreover, the erroneously admitted evidence of abuse was not merely cumulative of other properly presented evidence. Without the evidence of abuse presented by Markman the jury would not have been made aware of Appellant's alleged abusive propensity. Finally, the remaining uncontradicted evidence of guilt was not so overwhelming and the error's prejudicial effect was not so insignificant by comparison that the error could not have contributed to the verdict. Appellant's defense, as articulated to the jury through the reading of his confession, was that Appellant lacked the specific intent to kill and acted only because Markman coerced him. Thus, the issue was whether Appellant acted with the specific intention to bring about the kidnapping and murder of White. His ***647** credibility in this regard would determine whether the jury found him guilty of first degree murder. His position that he was coerced by Markman could not stand next to the extensive portrayal by Markman of Appellant as abusive and the mastermind of the murder. In this regard, in Markman's appeal, we held that Markman was prejudiced by the joint trial with Appellant due to the introduction of Appellant's redacted statement. *Markman,* 916 A.2d at 603. In reaching this conclusion, we specifically found that Markman's and Appellant's defenses were irreconcilable:

> [F]or purposes of ascertaining [Markman's] guilt, the central issue as to both the murder and the kidnapping was whether, and to what extent, [Markman] acted with an intention to bring about the kidnapping and killing of White. The degree to which the jurors would believe [Markman's] account of the underlying events, as recited both in her confession and in her trial testimony, would therefore determine whether they would find her guilty of these crimes, including whether they would conclude that she acted with a specific intent to kill. On this topic, Housman's confession represented the only proof directly refuting [Markman's] claim that Housman forced her against her will to harm White. Indeed, [Markman's] and Housman's accounts of the central facts were irreconcilable. In contrast to [Markman's] account, Housman's confession painted [Markman] as the individual who directed all of the crucial events to accomplish the binding and killing of White.

Markman, 916 A.2d at 603.

Accordingly, because I believe that the trial court erred in denying Appellant's motion to sever, and that the trial court's

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cautionary statement was insufficient to cure this harmful error, I would remanded for a new trial, and would not reach the remaining issues addressed by the Majority. [5]

All Citations

604 Pa. 596, 986 A.2d 822

Footnotes

1 18 Pa.C.S. § 2502(a).

2 *Id.,* § 2901(a), § 3921, § 2902(a), § 5510, and § 903(a), respectively.

3 Markman was on probation due to a prior arrest for bad checks.

4 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

5 Section 903 provides, in relevant part:

> (a) Definition of conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> * * *
>
> (e) Overt act.—No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

18 Pa.C.S. § 903(a),(e).

6 As noted previously, *Markman* held the trial court erred in this regard and the jury should have been informed of the elements of duress. *Markman,* at 611.

7 We are not required to grant relief when an erroneous evidentiary ruling is harmless. *Commonwealth v. Mitchell,* 588 Pa. 19, 902 A.2d 430, 452 (2006). An error is harmless when:

> (1) the error did not prejudice the defendant or the prejudice was de minimis; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hutchinson, 571 Pa. 45, 811 A.2d 556, 561 (2002) (quoting *Commonwealth v. Robinson,* 554 Pa. 293, 721 A.2d 344, 350 (1998)).

8 18 Pa.C.S. § 5701 *et seq.*

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9 Va.Code Ann. § 19.2–65.

10 "As a general rule, substantive law is that part of the law which creates, defines[,] and regulates rights, while procedural laws are those that address methods by which rights are enforced." *Payne v. Commonwealth Department of Corrections,* 582 Pa. 375, 871 A.2d 795, 801 (2005) (citations omitted).

1 I also agree with the majority that Housman's other guilt-phase claims are meritless.

1 Rule 582. Joinder—Trial of Separate Indictments or Informations

A) Standards

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582(A).

2 Pa.R.Crim.P. 583 provides "[t]he court may order separate trials of offenses or defendants or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together."

3 The Majority concludes that evidence of Appellant's abuse of Markman would have been admissible in a separate trial against Appellant to rebut his argument that he lacked the specific intent to kill the victim. I disagree. If, in separate trial, the Commonwealth sought to respond to counsel's argument that Appellant lacked the specific intent to kill because Markman coerced him with the threat of force, the Commonwealth could have fairly have done so with evidence that Appellant was not under duress when he killed the victim. It could have, for example, called Markman to refute Appellant's argument that she coerced his compliance. It could not have paraded in witness after witness over the course of several days to testify to Appellants' long term, abusive conduct towards Markman. As discussed above, the prejudicial impact of such evidence outweighs its probative value. *See* Pa.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *Commonwealth v. Wright,* 599 Pa. 270, 961 A.2d 119, 151 (2008) (citing the comment to Rule 403 that "Unfair prejudice" means a tendency to suggest decision on an improper basis or divert the jury's attention away from its duty of weighing the evidence impartially.).

4 Given the extreme prejudice to Appellant from this pervasive testimony, I am unwilling to conclude that a curative jury instruction would have cured the error. As such instruction was not even given, it is unnecessary to confront that question.

5 Appellant further argues that he was prejudiced in the penalty phase by the trial court's decision not to sever and to allow additional evidence by Markman regarding Appellant's abuse. Appellant specifically refers to Markman's expert testimony regarding the trauma Markman endured from Appellant. I do not believe the Majority sufficiently addresses this argument, and, as expressed *infra,* I am skeptical that the trial court's

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penalty phase instruction could have cured the prejudice to Appellant. As I would remand for a new guilt-phase trial, I would grant Appellant a new penalty phase proceeding.

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658 Pa. 49
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant
v.
William Howard HOUSMAN, Appellee
Commonwealth of Pennsylvania, Appellee
v.
William Howard Housman, Appellant

No. 765 CAP, No. 766 CAP
|
Submitted: June 13, 2019
|
Decided: March 26, 2020

Synopsis

Background: After conviction and death sentence entered in joint trial for capital murder and related offenses were affirmed on direct appeal, 604 Pa. 596, 986 A.2d 822, defendant filed petition for postconviction relief based on claims of ineffective assistance of trial and appellate counsel. The Court of Common Pleas, Cumberland County, Criminal Division, No. CP-21-CR-0000246-2001, granted defendant new penalty phase hearing, but denied penalty phase claims. Commonwealth appealed grant of new penalty phase, and defendant appealed denial of guilt phase claims.

Holdings: The Supreme Court, No. 765 CAP, Todd, J., held that:

defendant was not prejudiced by trial counsel's failure to object to witnesses' testimony regarding other bad acts of physical violence;

defendant was not prejudiced by trial counsel's failure to object to witnesses' testimony regarding nonviolent bad acts;

counsel was not ineffective for failure to object to alleged triple hearsay testimony of victim's coworker regarding conversation that she had with her assistant manager about defendant;

defendant was not entitled to postconviction relief on claim that appellate counsel was ineffective for failure to challenge on direct appeal denial of motion to sever guilt phase of capital murder trial from codefendant's;

defendant was not prejudiced by trial counsel's failure to object to jury instructions on conspiracy and accomplice liability;

defendant was not entitled to postconviction relief on claim that trial counsel was ineffective for failure to question medical examiner regarding absence of ligature marks around victim's neck;

counsel's investigation into and presentation of capital defendant's mitigation case was unreasonable; and

defendant was prejudiced by counsel's unreasonable investigation into and presentation of mitigation case, thus warranting new penalty phase trial.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

****1254** Appeal from the Order entered on February 2, 2018 in the Court of Common Pleas, Cumberland County, Criminal Division, at No. CP-21-CR-0000246-2001 granting a new penalty phase.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE TODD

***57** Before our Court in this capital case are the cross-appeals of the Commonwealth, which has been designated as the ***58** appellant in this matter, and William H. Housman, designated as the appellee, from the order of the Cumberland County Court of Common Pleas granting Housman's petition for relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541 *et seq.*, in the form of a new penalty trial, but denying him guilt phase relief. [1] After careful review, we affirm.

I. BACKGROUND

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This case arises from the October 2000 murder of Leslie White, the facts of which were summarized by this Court on Housman's direct appeal:

> Shortly after graduating from high school, Leslie White, the victim, met [Housman] when she began working at the Wal-Mart photo shop in Mechanicsburg, Cumberland County. They began a romantic relationship; however, [Housman] was already involved in a romantic relationship with co-defendant Beth Ann Markman, and had been living with her for nearly two years.
>
> Markman discovered e-mails between White and [Housman], revealing their affair. Markman told [Housman] to end his relationship with White, and told several friends and co-workers she intended to " 'kick [White's] ass.' " Markman's co-workers noticed bruising around her eyes and neck, which she attributed to fights with [Housman] over the e-mails. On one occasion, Markman called Wal-Mart to speak with White, which left White scared and crying. Markman also visited the store once, looking for White, but left without incident. Markman told a friend "if she ever got her hands on [White], she was going to kill her." She told her probation officer, ****1255** Nicole Gutshall, she caught [Housman] cheating on her, and if she caught him cheating again, she would kill the girl.
>
> [Housman] did not terminate his relationship with White. [Housman] and Markman made plans to move to Virginia ***59** for a fresh start. However, Markman became suspicious that [Housman] had not ended his relationship with White. Markman drove [Housman] in her car to a local Sheetz store, where [Housman] used a pay phone to call White at Wal-Mart. He falsely told White his father died, and asked her to come to console him. He told her Markman was out of town. Various Wal-Mart employees testified White received this call from [Housman], and she told her co-workers [Housman's] father died and she was leaving work early to console him.
>
> When White arrived at the trailer where [Housman] and Markman lived, [Housman] talked with her in the living room, while Markman hid in the bedroom until, according to [Markman's] subsequent confession and trial testimony, she heard a thump and White cried out because [Housman] hit her hand with a hammer. Then [Housman] and Markman subdued White and tied her hands and feet with speaker wire, shoved a large piece of red cloth in her mouth, and used another piece of cloth to tie a tight gag around her mouth. With White bound, Markman and [Housman] stepped outside to smoke cigarettes and discuss their next move. Upon reentering the trailer, Markman held White down while [Housman] strangled her with speaker wire and the crook of his arm, killing her. During the struggle, White scratched Markman's neck. White died of asphyxiation caused by strangulation and the rag stuffed into her mouth.
>
> After White died, Markman wrapped White's body in a tent and placed it in the back of White's Jeep. The couple then fled to Virginia. Markman drove her car and [Housman] drove White's Jeep − carrying White's body. In Virginia, they drove to a remote piece of land owned by [Housman's] mother, then placed White's body in the trunk of an abandoned car. They discarded White's personal effects, except for her camera, which they intended to sell.
>
> [Housman] and Markman remained in Virginia for several days, staying with friends and [Housman's] father. [Housman] continued to drive White's Jeep, which he held out as his own. While staying with Larry Overstreet and Kimberly ***60** Stultz, Markman corroborated [Housman's] story that they bought the Jeep from Markman's friend in Pennsylvania. At the Overstreet residence, Markman retrieved White's camera from the Jeep and they all took pictures of each other − Markman stated she bought the camera from the same woman who sold them the Jeep. Overstreet and Stultz recalled seeing scratches on Markman's neck, which Markman explained were from a dog. Stultz gave Markman the phone number of a pawn shop, and the shop owner testified he gave Markman $90 and a pawn ticket for the camera. Markman asked Stultz for cleaning supplies because "the Jeep smelled bad, like somebody had a dead animal in [it]." Markman also told Stultz that [Housman] had been seeing another woman, and if she ever met this other woman, she would "whoop her ass." Another friend, Nina Jo Fields, testified that during the couple's visit to her home, Markman told her [Housman] had been cheating on her, but that she "[didn't] have to worry about the damn bitch anymore, [because she] took care of it."
>
> ****1256** After White's parents filed a missing persons report, the authorities tracked her Jeep to Housman's location in Virginia. Deputy Brian Vaughan of the Franklin County Sheriff's office in Virginia went to the house to question [Housman] and Markman about the Jeep and White's whereabouts. When he saw the Jeep in the

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driveway, he ran the license plate number, which traced back to the Toyota Leasing Corporation.

Markman and [Housman] came to the door to greet Deputy Vaughan. Deputy Vaughan questioned them separately in his patrol car about the Jeep. [Housman], who was questioned first, told Deputy Vaughan he called White to ask her to console him about his dog, which had just died. [Housman] said White never arrived at the trailer, and he subsequently left with Markman for Virginia. He claimed a friend loaned him the Jeep.

Subsequently, Markman voluntarily entered the patrol car and explained to Deputy Vaughan she had only seen White once, but had had several phone conversations with her. She ***61** denied knowledge of White's whereabouts, but indicated White had a bad relationship with her parents, suggesting she had run away. Markman denied knowing how [Housman] acquired the Jeep, and admitted driving separate cars to Virginia. When Deputy Vaughan asked Markman if she was afraid of [Housman], she said she was not; rather, she admitted she had a violent temper, and [Housman] often had to restrain her from attacking him. She said she provoked [Housman] in the past and had thrown things at him, but [Housman] never assaulted or threatened her.

Following the police visit, [Housman] and Markman drove back to the property where they left White's body; there they abandoned the Jeep. Despite the couple's efforts to conceal the evidence, the police soon discovered the Jeep, as well as White's partially-decomposed body in the trunk of the abandoned car − the body was still bound, gagged, and wrapped in the canvas tent. [Housman]'s fingerprints were found on the car's trunk lid and license plate, a compact disc recovered from the Jeep, the Jeep's hatch, and other evidence recovered from the scene. Markman's fingerprints were found on a potato chip bag retrieved from the Jeep, and the Jeep's passenger door and rear hatch. Subsequent analysis revealed Markman's DNA under White's fingernails.

The Pennsylvania State Police obtained a search warrant for Markman's trailer and executed it; they found blood on a pillow and urine on the carpet in the place White was likely strangled. Police also discovered two lengths of speaker wire, red fibers on the floor, a piece of red cloth, a steak knife, red fibers on the knife, a tent storage bag, a hammer, and a stethoscope. Police arrested [Housman] and Markman on October 11, 2000, exactly one week after the murder. Police retrieved White's camera from the pawn shop and developed the film. The pictures taken at the Overstreet residence were admitted into evidence at trial; in one photograph − taken just days after [Housman] and Markman strangled White to death − Markman is laughing while [Housman] pretends to strangle her.

***62** Following their arrest, and after receiving *Miranda* warnings, Markman and [Housman] waived their rights and agreed to be interviewed, providing tape-recorded statements. Each independently confessed to participating in White's murder. [Housman] admitted to killing White by strangling her, but claimed Markman instigated the murder ****1257** to eliminate the source of one of their relationship problems and enable them to start their relationship anew. He maintained Markman directed him to tie White up and strangle her, and Markman forced compliance by hitting him with a hammer and then spinning the hammer in a threatening manner. After White died, Markman listened with a stethoscope to verify her death before wrapping the body in the tent.

In her police statement, Markman admitted she bound and gagged White and held her down while [Housman] strangled her. She insisted, however, [Housman] devised the plan to murder White in order to steal her Jeep, and he coerced her assistance by threatening to kill her with a hunting knife if she did not obey him. Markman also asserted [Housman] wore down her resistance by terrorizing her the night before the murder by holding a knife to her throat and forcing her to remain naked in the trailer. Markman said she only realized White was dead when White lost control of her bladder.

[Housman] moved to sever his trial from Markman's because introduction of Markman's confession to police, which was admissible against Markman, would violate his Sixth Amendment right to confront a witness against him. The trial court denied the motion. [Housman] and Markman were tried on one count each of criminal homicide, kidnapping, unlawful restraint, and abuse of a corpse, and two counts of theft by unlawful taking or disposition (pertaining to the Jeep and the camera), as well as conspiracy as to all of these offenses.

[Housman] and Markman each decided to advance a duress defense, trying to show they engaged in the conduct charged because they were coerced by the other through ***63** "the use of, or a threat to use, unlawful force against his person or the person of another, which a person

of reasonable firmness in his situation would have been unable to resist." 18 Pa.C.S. § 309(a). Upon learning Markman intended to show she acted under duress as the result of [Housman's] abuse, [Housman] filed a motion for reconsideration of the severance denial, arguing he would be prejudiced by evidence of his abuse of Markman. The trial court again denied the motion, and the joint trial began.

During the guilt phase, the Commonwealth played an audiotape of Markman's confession, altered so references to [Housman] were replaced with another voice saying "the other person." In her confession, Markman initially denied knowledge of White's murder, or even knowing White had been to her trailer the night she was killed. After being questioned, Markman changed her story and said [Housman] was helping White run away from her parents, and while Markman drove to Virginia in her car, [Housman] drove White to Virginia in White's Jeep. When police asked about the scratches on her neck, Markman changed her story again and said she had gotten into a fight with White the day she left for Virginia. After further interrogation, Markman confessed to her role in the murder, but blamed [Housman] for making her participate by threatening and terrorizing her. Markman said when White arrived at the trailer in response to [Housman]'s phone call, she stayed out of the way until she heard White cry out when [Housman] hit her hand with a hammer. [Housman] then made Markman tie White up, gag her, and blindfold her. Markman said after [Housman] strangled White, he made her wrap White's body in the tent and put it in the Jeep. When asked why [Housman] killed ****1258** White, Markman responded she believed he wanted the Jeep.

Markman was permitted to adduce evidence of abuse by [Housman] in her defense. Markman testified [Housman] physically abused her during their relationship, particularly in the months before the murder. She also alleged [Housman] terrorized her for the two days preceding the murder, ***64** during which time he cut her clothes off with a knife, repeatedly raped her, and threatened her if she did not do as he instructed.

Markman's testimony also included details of the night of the murder. Markman claimed that when she drove [Housman] to the gas station, she did not know he was planning to call White, and she attempted to escape once they returned to the trailer; however, [Housman] violently prevented her from leaving. Markman stated even when White was bound and gagged, she did not know [Housman] was going to kill her, and she was in the kitchen getting White a glass of water when [Housman] strangled her. At that time, Markman testified [Housman] ordered her to return the gag to White's mouth because it had slipped, and she only obeyed him because she was afraid he would kill her, too. As for her statement to Officer Vaughan that [Housman] had never abused her, she said she was trying to protect him. When questioned about the photograph in which she was laughing while [Housman] pretended to strangle her, Markman stated [Housman] was tickling her.

Based on the evidence of abuse, Markman requested a jury instruction on the defense of duress. The trial court refused because Markman placed herself in a situation where it was probable she would be subjected to duress....

The Commonwealth also introduced a tape of [Housman's] confession, which was redacted so references to Markman were replaced with "the other person" in another voice. Due to an apparent oversight, there were two instances of non-redaction, where [Housman]'s references to Markman by name remained on the tape. The confession alleged Markman conceived of the plot to kill White, directed its execution, and forced [Housman] to cooperate. [Housman] said Markman wanted White dead because she was jealous. He admitted he called White to the trailer because he wanted someone to talk to, and he knew he had to lie to get her to come to the trailer. After [Housman] talked with White for a few minutes, Markman came out of the bedroom, playing with a hammer. According to his confession, after playing ***65** with the hammer, Markman hit him with the hammer "[j]ust enough for me to feel the pain." Markman directed [Housman] to tie White's hands, and once he was finished, she tied [Housman's] hands and White's feet. After blindfolding and gagging White, Markman untied [Housman] and they went outside to smoke a cigarette. While they were outside, according to [Housman's] confession, Markman said if [Housman] loved her, he would do as she told him. When they went back inside, Markman directed [Housman] to pull speaker wire around White's neck, which he did because he did not "want to die that night" in the event Markman "flipped out and wanted to hit me with a ... hammer." [Housman] confessed to devising the plan to leave the state with White's body so they could hide it on his family's Virginia property ....

The trial court informed the jury the taped confessions had been altered at the trial court's direction to include the words "the other person" and they were ****1259**

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only to consider the confession as evidence against the defendant that gave the confession. [Housman] did not testify and presented no defense during the guilt phase. He argued he lacked the specific intent to kill White because of Markman's threats and conduct with the hammer, his confession supported a third degree murder conviction, and the crimes not did not involve kidnapping.

Commonwealth v. Housman, 604 Pa. 596, 986 A.2d 822, 826-30 (2009) (internal citations and footnotes omitted).

On November 1, 2001, the jury convicted both Housman and Markman of first-degree murder, [2] kidnapping, [3] theft by unlawful taking or disposition, [4] unlawful restraint, [5] abuse of a corpse, [6] and criminal conspiracy. [7] The Commonwealth sought ***66** the death penalty for both Housman and Markman. At his penalty phase, Housman presented the testimony of Robin Collins, a spiritual advisor with the Cumberland County Prison; Cheryl McElwee Gillespie, Housman's half-sister (Cheryl and Housman shared the same mother, Geneva Housman); and Dr. Stanley Schneider, a psychologist who evaluated Housman and who spoke with several of Housman's family members. The relevant testimony of these individuals is discussed in detail below. Housman also took the stand. On November 5, 2001, the jury found one aggravating circumstance − a killing committed while in the perpetration of a felony, *see* 42 Pa.C.S. § 9711(d)(6) − and two mitigating circumstances − a troubled childhood and acceptance of responsibility under the catchall mitigator, *see* 42 Pa.C.S. § 9711(e)(8) − and returned a sentence of death. [8]

On December 29, 2009, in an opinion authored by former-Justice Eakin, this Court affirmed Housman's judgment of sentence. *See Housman, supra*. Justice Baer authored a dissenting opinion, stating that he would have reversed Housman's conviction and remanded for a new trial due to the trial court's refusal to sever the trials of Housman and Markman. Then-Justice, now-Chief Justice, Saylor authored a concurring and dissenting opinion, indicating that he would affirm Housman's conviction, but would vacate his death sentence and remand for a new sentencing hearing. Thereafter, Housman sought *certiorari* before the United States Supreme Court, which was denied on October 4, 2010. *See Housman v. Pennsylvania*, 562 U.S. 881, 131 S.Ct. 199, 178 L.Ed.2d 120 (2010) (order).

On June 17, 2011, Housman filed a timely *pro se* petition for relief pursuant to the PCRA. A 187-page amended counseled ***67** petition was filed on May 22, 2013. Subsequently, Housman sought to further amend his petition to include constitutional challenges regarding an alleged bias of Justice Eakin, and he also sought recusal ****1260** of the entire Cumberland County Court of Common Pleas bench. Housman's motion to amend his PCRA petition was denied, [9] but his motion for recusal was granted, and, ultimately, following three days of evidentiary hearings and several extensions, the PCRA court, by the Honorable Linda K.M. Ludgate of the Berks County Court of Common Pleas, granted Housman a new penalty trial, concluding that he established that trial counsel was ineffective for failing to "investigate, develop and present compelling mitigation evidence." PCRA Court Opinion, 2/2/18, at 10. The PCRA court further held that "the improper arguments and victim impact testimony challenged [by Housman], when taken cumulatively with [the mitigating evidence claim], support the finding of ineffectiveness and the granting of a new penalty phase." *Id.* at 10-11. The PCRA court determined that Housman's remaining claims were either previously litigated or without merit; thus, it denied Housman's request for a new guilt trial. The Commonwealth appealed the PCRA court's grant of a new penalty-phase trial, and Housman cross-appealed the court's denial of guilt-phase relief.

II. ANALYSIS

In reviewing the grant or denial of PCRA relief, an appellate court considers whether the PCRA court's conclusions are supported by the record and free of legal error. *Commonwealth v. Crispell*, 648 Pa. 464, 193 A.3d 919, 927 (2018). Moreover, the factual findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given deference. *See Commonwealth v. Spotz*, 84 A.3d at 312, 319 (Pa. 2014).

In order to qualify for relief under the PCRA, a petitioner must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the ***68** enumerated errors in 42 Pa.C.S. § 9543(a)(2). These errors include, *inter alia*, a violation of the Pennsylvania or United States Constitutions, or instances of ineffectiveness of counsel that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Id.* § 9543(a)(2)(i) and (ii); *Crispell*, 193 A.3d at 927. A petitioner also must establish that his claims have not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). An issue is previously litigated if "the highest appellate court

in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." *Id.* § 9544(a)(2).

Additionally, to obtain relief under the PCRA based on a claim of ineffectiveness of counsel, a PCRA petitioner must satisfy the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Pennsylvania, we have applied the *Strickland* test by requiring a petitioner to establish that: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Commonwealth v. Pierce*, 567 Pa. 186, 786 A.2d 203, 213 (2001). Counsel is presumed to have rendered effective assistance, and, if a claim fails under any required element of the *Strickland* test, ****1261** the court may dismiss the claim on that basis. *Commonwealth v. Ali*, 608 Pa. 71, 10 A.3d 282, 291 (2010). We will first address Housman's guilt-phase claims.

A. Guilt Phase

1. Evidence of Prior Bad Acts

Housman asserts that trial counsel was ineffective for failing to object to the admission of evidence of his prior bad acts, bad character, and propensity for violence at the guilt phase of his trial, and, further, that appellate counsel was ineffective in failing to properly raise this issue on direct appeal. Evidence of prior bad acts is generally inadmissible to ***69** prove character or to show conduct in conformity with that character. Pa.R.E. 404(a)(1). Such evidence is permissible, however, when offered to prove other relevant facts, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or *res gestae* to give context to events surrounding a crime. Pa.R.E. 404(b)(2); *Crispell*, 193 A.3d at 936. Although evidence of prior bad acts may be relevant and admissible, due to the potential for misunderstanding, the defendant is entitled to a jury instruction cautioning that the evidence is admissible only for a limited purpose. *Crispell*, 193 A.3d at 937.

Specifically, Housman challenges the testimony of witnesses who testified on behalf of Markman that Housman was physically, sexually, and verbally abusive toward Markman. Housman concedes that the trial court instructed the jury that this evidence was admissible only for purposes of Markman's duress defense, but notes that the court subsequently disallowed Markman's defense and failed to strike the bad acts evidence from the record. Housman additionally references testimony that he "committed rape;" "possessed child pornography and had sexually explicit relationships with minors;" was "crazy" and "suicidal;" was "lazy and could not hold down a job;" had previously been incarcerated; threatened to kill animals; vandalized the property of others; was a gang member; had the look of "pure evil;" was banned from the trailer park where he lived; committed burglary and theft; and lacked remorse. Housman's Brief at 102. According to Housman, this testimony was irrelevant, inadmissible, and highly prejudicial.

In response to Housman's argument, the Commonwealth notes that the majority of the evidence to which Housman refers was introduced not by the Commonwealth, but by Markman, in an effort to support her duress defense.[10] The ***70** Commonwealth further ****1262** argues that, even if certain evidence was improperly admitted, the properly-admitted evidence was so overwhelming that Housman suffered no prejudice.

The PCRA court rejected Housman's claim, observing that the bad acts evidence

> only came in because of the court's refusal to sever the trials. The instances of admitted bad acts were used on [direct] appeal as facts in support of demonstrating the prejudice caused by the court's alleged failure to sever the trials. But, on the same facts as we have before us concerning this very Claim, the Supreme Court denied relief on [Housman's] due process/fair trial claim which encompassed severance, the admitted bad acts evidence and the hearsay ***71** presented at trial through co-defendant's Markman's defense.

PCRA Court Opinion, 2/2/18, at 18.

We agree that Housman's ineffectiveness claim fails because, even if the aforementioned evidence was improperly

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admitted, he has failed to demonstrate prejudice. As noted, on direct appeal, Housman argued that one of the reasons his trial should have been severed from Markman's was because her duress defense permitted her to present substantial prejudicial evidence of uncharged conduct by Housman. In rejecting Housman's claim that he was entitled to a new trial due to the trial court's refusal to sever the trials, this Court explained, *inter alia*:

> while the evidence of abuse could have caused the jury to infer appellant was violent, any prejudice was eclipsed by his own admission that he *violently strangled White to death* in his living room after luring her there under false pretenses, drove to Virginia with her lifeless body in her Jeep, and subsequently deposited her body in the trunk of an abandoned car. The jury was aware, based on this evidence alone, of appellant's capacity for violence. Suggestions that he intimidated Markman pale in comparison. Focusing on the possibility of mice, appellant ignores the elephant in the room.
>
> Any prejudice resulting from Markman's admission of evidence of abuse was *de minimis*, and did not overcome the factors weighing in favor of a joint trial, nor did the prejudice outweigh the Commonwealth's overwhelming evidence supporting appellant's first degree murder conviction.

Housman, 986 A.2d at 835 (emphasis original).

Although Housman now couches his claim in terms of ineffectiveness, this Court has already concluded that the properly-admitted evidence that Housman lured the victim to his trailer by lying to her, strangled her with speaker wire, and discarded her body in an abandoned car, was sufficient to demonstrate to the jury Housman's capacity for violence and to support his conviction for first-degree ****1263** murder. We likewise ***72** conclude that any prejudice from the admission of evidence of Housman's nonviolent bad acts, including his alleged possession of child pornography and sexual relationships with minors, did not outweigh the overwhelming and properly-admitted evidence of his guilt. Accordingly, there is no basis to conclude that, had the evidence of Housman's prior bad acts not been admitted, there is a reasonable probability that the result of the proceeding would have been different. For this reason, his ineffectiveness claim fails.

2. Hearsay

Housman next argues that his trial counsel was ineffective in failing to object to the admission of "numerous hearsay statements," which he maintains violated his right to confrontation and due process under the United States and Pennsylvania Constitutions. Housman's Brief at 117. Hearsay, defined as an out-of-court statement offered to prove the truth of the matter asserted therein, generally is inadmissible at trial, unless it falls within an exception to the hearsay prohibition. *Commonwealth v. Tam M. Le*, 652 Pa. 425, 208 A.3d 960, 970 (2019).

The PCRA court, in denying Housman relief on this claim, noted:

> [Housman] plainly failed to meet his burden due to his lack of specificity as to which instances of hearsay he means to address here. Neither the petition nor memorandum specify exactly how counsel erred or how [Housman] was prejudiced. Instead, [Housman] posits vague claims regarding the hearsay allegedly introduced at trial. He states that trial counsel failed to object to "some" of the hearsay and that appellate counsel only raised "some" of the instances where trial counsel failed to object to such hearsay. We cannot address a generalized presentation of such a fact-intensive claim.

PCRA Court Opinion, 2/2/18, at 17 (emphasis original).

In his brief to this Court, Housman identifies a single statement which he contends was improper hearsay and to which trial counsel should have objected. Specifically, he quotes the following exchange between the prosecutor and ***73** Melissa Martin, a Wal-Mart employee, who recounted her conversation with the assistant manager, Chad Wriglesworth, after White requested permission to leave work early after receiving a telephone call from Housman:

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Prosecutor: Now, after that inquiry, what happened there at work after that? Did you make an inquiry about Will Housman?

Martin: Yes. Chad and I discussed what was happening, what Leslie [White] had said to him.

Prosecutor: Okay. And what was that?

Martin: He -- Chad told me that Leslie said that Will had just called, his father had died, and that she wanted to go be with him.

Prosecutor: So it was Will had just called, his father had died, Leslie wanted to be with him?

Martin: Correct.

N.T. Trial, 10/25/01, at 103.

Housman asserts that the above statement constituted "highly prejudicial triple hearsay, which supported the Commonwealth's theory that Housman lured the victim to his home under false pretenses." Housman's Brief at 119. He further claims that "[t]he Commonwealth's witnesses and Markman's witnesses repeatedly testified about alleged altercations between Housman and Markman that these witnesses never actually observed," and, in a footnote, directs this Court's attention to ****1264** "Claim 7 of the PCRA petition," *id.* at 120, for a "lengthy discussion of each piece of inadmissible hearsay evidence that was introduced at Mr. Housman's trial." *Id.* at n.38.

Regarding Housman's citation to his PCRA petition, we have previously held that "incorporation by reference" is an "unacceptable manner of appellate advocacy for the proper presentation of a claim for relief to our Court." *Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291, 342 (2011); *see also Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078, 1092 n.3 (1993) (specifying that all claims a litigant desires this Court to consider must be set forth in the appellate brief and not just incorporated by reference). Rather,

> ***74** [o]ur rules of appellate procedure specifically require a party to set forth in his or her brief, in relation to the points of his argument or arguments, "discussion and citation of authorities as are deemed pertinent," as well as citations to statutes and opinions of appellate courts and "the principle for which they are cited." Pa.R.A.P. 2119(a), (b). Therefore our appellate rules do not allow incorporation by reference of arguments contained in briefs filed with other tribunals, or briefs attached as appendices, as a substitute for the proper presentation of arguments in the body of the appellate brief. Were we to countenance such incorporation by reference as an acceptable manner for a litigant to present an argument to an appellate court of this Commonwealth, this would enable wholesale circumvention of our appellate rules which set forth the fundamental requirements every appellate brief must meet. *See, e.g.*, Pa.R.A.P. 2135(a)(1) (establishing length of principal brief at no greater than 70 pages); *Commonwealth v. (James) Lambert*, 568 Pa. 346, 356 n.4, 797 A.2d 232, 237 n.4 (2001) (Opinion Announcing Judgment of the Court) (refusing to consider claims not argued in the brief but incorporated by reference from motions made at trial and observing that "[t]o permit appellant to incorporate by reference his previous motions would effectively allow him to more than double the original briefing limit."). The briefing requirements scrupulously delineated in our appellate rules are not mere trifling matters of stylistic preference; rather, they represent a studied determination by our Court and its rules committee of the most efficacious manner by which appellate review may be conducted so that a litigant's right to judicial review as guaranteed by Article V, Section 9 of our Commonwealth's Constitution may be properly exercised. Thus, we reiterate that compliance with these rules by appellate advocates who have any business before our Court is mandatory.

Briggs, 12 A.3d at 343 (footnotes omitted).

Housman has failed to develop or present a proper argument with respect to all but a single claim of hearsay, so ***75** we find his claims regarding those unidentified instances to be waived. [11] With respect to the one instance of alleged hearsay identified by Housman in his brief − Martin's testimony regarding the conversation she had with Wal-Mart Assistant Manager Wriglesworth about Housman's telephone call to White − we reject Housman's claim that trial counsel was ineffective for failing to object to this statement. The alleged hearsay statement was cumulative of Housman's own confession, wherein he admitted to calling White for the purpose of ****1265** luring her to his trailer. *See* Housman's Brief in Support of Postsentence Motions, 3/19/02 (PCRA Hearing Exhibit 24), at 6 ("Mr. Housman explained that he called Ms. White and lied to her about his father's death because he needed someone to talk to and 'I knew she wouldn't come over so I told her dad died.' ''). Thus, counsel

had a reasonable basis for not objecting to the statement, and, accordingly, Housman's claim that he is entitled to a new trial because trial counsel was ineffective for failing to object to the statements fails.

3. Trial court's refusal to sever trials

Housman next contends that his appellate counsel was ineffective in failing to properly raise and litigate a claim that Housman's right to due process and a fair trial were violated when the trial court refused to sever the guilt phase of his trial from that of his co-defendant Markman, thereby allowing highly prejudicial evidence, including prior bad acts, bad character, and hearsay, to be introduced into evidence. Housman acknowledges that trial counsel raised and preserved this issue as a claim under the United States and Pennsylvania Constitutions, and, further, that his appellate counsel raised the issue on direct appeal. He maintains, however, that appellate counsel was ineffective "for failing to raise it as a federal due process claim and failing to raise specific factual and legal grounds supporting this claim." Housman's Brief at 125.

***76** In response, the Commonwealth contends that Housman fails to demonstrate arguable merit or prejudice with respect to this claim. It first observes that, notwithstanding the fact that appellate counsel did not specifically cite federal due process principles on direct appeal, the foundation of Housman's federal due process claim was substantively rejected by this Court on direct appeal, wherein this Court, in rejecting his state claim, relied extensively on *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991), which, in turn, relied on federal precedent. Noting that "the test for prejudice in the ineffectiveness context is more exacting than the test for harmless error," the Commonwealth further argues that, in light of this Court's determination that any error by the trial court in failing to sever Housman's case from Markman's was harmless, Housman failed to meet his burden that he was prejudiced by appellate counsel's alleged ineffectiveness. Commonwealth's Reply Brief at 36-37 (citing *Commonwealth v. Spotz*, 624 Pa. 4, 84 A.3d 294, 315 (2014) (observing that, in order for an error to be deemed harmless, the Commonwealth must establish, beyond a reasonable doubt, that the error did not contribute the verdict, whereas, in order to establish actual prejudice in connection with an ineffectiveness claim, the defendant must demonstrate that the ineffectiveness had an actual adverse effect on the outcome of the proceedings)).

The PCRA court rejected Housman's claim, noting that, while now couched as an ineffectiveness claim, it rests on the same facts upon which this Court denied the claim on direct appeal. PCRA Court Opinion, 2/2/18, at 15. The court further reasoned that, even if appellate counsel was unreasonable in failing to present the additional arguments offered by Housman, Housman failed to demonstrate that there was a reasonable probability that the additional arguments would have resulted in a different outcome. *Id.* at 16.

We agree with the PCRA court that Housman's refashioned severance claim does not afford him relief. This Court addressed a similar claim by the defendant in *Commonwealth v. Elliott*, 622 Pa. 236, 80 A.3d 415 (2013). In that case, the defendant argued that, although appellate counsel unsuccessfully ***77** challenged the ****1266** admissibility of bad acts evidence on direct appeal, counsel was ineffective for failing to raise the distinct contention that the admission of bad acts evidence violated his federal constitutional right to due process. The PCRA court in *Elliott* determined that the issue had been previously litigated on direct appeal and, therefore, was not cognizable under the PCRA. This Court concluded that the PCRA's court's finding that the issue had been previously litigated was erroneous, as a Sixth Amendment claim of ineffectiveness raises a distinct legal ground for purposes of state PCRA review from the underlying claim of trial court error. *See Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564, 573 (2005).

Nevertheless, we concluded that Elliott's ineffectiveness claim lacked arguable merit, as the foundation of the underlying federal due process claim was that the evidence was irrelevant and unduly prejudicial, an argument this Court had rejected on direct appeal. *See Elliott*, 80 A.3d at 442. Housman's underlying federal due process claim is based on the argument that the trial court's refusal to sever his trial from Markman's unduly prejudiced him by permitting evidence of his prior bad acts and bad character to be used against him. However, this Court previously rejected this identical argument on direct appeal, concluding that any prejudice that resulted from the admission of such evidence was *de minimis*, and was eclipsed by his own admissions. *See Housman*, 986 A.2d at 835. Thus, consistent with *Elliott*, Housman has failed to demonstrate the arguable merit prong of his current ineffectiveness claim, and he is not entitled to relief.

4. Jury charge on accomplice liability and conspiracy

Housman next argues that trial counsel was ineffective for failing to object to the trial court's charge on accomplice liability and conspiracy because the charge did not advise the jury that it had to make a finding that Housman had a specific intent to kill in order to convict him as an accomplice to first-degree murder. Housman contends that the jury charge, as ***78** given, eliminated the Commonwealth's burden of proof as to a crucial element of the offense, violating his due process rights.

In support of his argument, Housman quotes the following portion of the jury charge on accomplice liability given by the trial court:

> I say, as a general rule, you may find a defendant guilty of a crime without finding that he or she personally engaged in the conduct required for the commission of the crime. A defendant is guilty of a crime if he or she is an accomplice of another person who commits that crime.
>
> A defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He or she is an accomplice if, with the intent of promoting or facilitating commission of the crime, he or she solicits, commands, requests, encourages or agrees with the other person in planning or committing it.
>
> You may find a defendant guilty of a crime on the theory that the defendant was an accomplice so long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it.

N.T. Trial, 11/1/01, at 1209-10.

Housman suggests that the above charge was substantially similar to the charge deemed to violate due process by the Third Circuit in *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005) ("Under Pennsylvania law, first-degree murder requires the specific intent to kill, and that *mens* ****1267** *rea* is also required of accomplices and co-conspirators."). Housman further notes that this Court already determined, in his co-defendant's appeal, that the accomplice liability charge given by the trial court was erroneous. *See Markman*, 916 A.2d at 597 n.8 ("Here, the trial judge gave the jury a general accomplice liability instruction, but did not explain that the defendant must personally have had a specific intent to kill to be convicted of first degree murder as an accomplice. While this omission constituted error under the *Bachert/Huffman* [12] rule ***79** ... the error is irrelevant for purposes of a sufficiency analysis and, moreover, the parties have not raised the issue.").

Housman additionally challenges the trial court's conspiracy charge to the jury, which provided:

> For purposes of this case, the defendants are charged with conspiracy on homicide, kidnapping, theft, unlawful restraint and abuse of corpse. I just gave you the elements of those charges.
>
> In order to find the defendants guilty of conspiracy to commit these charges, you must be satisfied initially that the following two elements of a conspiracy have been proven beyond a reasonable doubt:
>
> One, that the defendants agreed with one another that they or one or more of them would engage in conduct which constitutes a crime of homicide as I have described it or kidnapping or theft or unlawful restraint or abuse of [a] corpse, or agreed to aid another person or persons in the planning and/or commission of the crimes as I have outlined them to you. And, second, that the defendant or defendants did so with the intent of promoting or facilitating commission of these other crimes.
>
> In other words, the defendants shared the intention to bring about the crime *or to make it easier to commit all these crimes*.
>
> No person may be convicted of conspiracy unless an overt act is done in pursuance of the conspiracy -- unless an overt act is alleged and proven to have been done by the defendant or the co-defendant, co-conspirator.
>
> In this case, it is alleged that the following were overt acts: Luring Leslie White to 112 Big Spring Terrace in Newville, blindfolding, gagging, tying the hands and feet of Leslie White, strangling Leslie White, stealing White's vehicle ***80** and camera and using this property as their own, transporting White's body to Floyd County, Virginia, in the rear of her Jeep and placing White's body in the trunk of an abandoned car on the abandoned property that you heard, such as her whereabouts were unknown.
>
> Thus, you cannot find the defendants guilty unless, in addition to the elements of conspiracy, you are satisfied beyond a reasonable doubt that one of the defendants did

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at least one of the alleged overt acts in pursuance of the conspiracy.

N.T. Trial, 11/1/01, at 1221-22 (emphasis added). Housman maintains that the inclusion of the above-italicized phrase "or to make it easier to commit all these crimes" **1268 in the trial court's conspiracy charge relieved the Commonwealth of its burden of proving that he had the specific intent to kill.

The PCRA court rejected Housman's claims of ineffectiveness based on the trial court's jury instructions on accomplice liability and conspiracy, noting that *Laird*, the case on which Housman relies, was decided years after the jury instruction was given in the instant case, and holding that counsel cannot be deemed ineffective for failing to predict a change in the law. PCRA Court Opinion, 2/2/18, at 17.

The Commonwealth asserts that Housman ignores the more recent controlling case law of this Court, including *Commonwealth v. Daniels*, 600 Pa. 1, 963 A.2d 409 (2009), wherein we held that the PCRA petitioner was not prejudiced by counsel's failure to challenge the trial court's jury instructions regarding the specific intent to kill required for a conspiracy conviction, even though an isolated portion of the charge appeared to have violated the rule of *Huffman.* Indeed, the Commonwealth suggests that the instruction on accomplice liability given by the trial court in the instant case was nearly identical to the one at issue in *Daniels*, as well as the instruction at issue in *Commonwealth v. Bennett*, 618 Pa. 553, 57 A.3d 1185 (2012), and that, consequently, trial counsel was not ineffective for not challenging the instruction. Commonwealth's Brief at 46. The Commonwealth further points out that, in *Bennett*, this Court *81 stated that it is not bound by decisions of the Third Circuit construing Pennsylvania law. *See Bennett*, 57 A.3d at 1203.

We need not engage in a protracted examination of the trial court's instructions on accomplice liability and conspiracy in this case to determine whether counsel was ineffective for failing to object to the charge. As noted above, under the *Strickland* test, a petitioner must establish that his underlying claim has arguable merit; that no reasonable basis existed for counsel's action or failure to act; and that petitioner suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability that the result of the proceeding would have been different. *Pierce*, 786 A.2d at 213. A claim may be dismissed if it fails any one of these three prongs. *Ali*, 10 A.3d at 291.

In the instant case, we find that Housman's ineffectiveness claim fails because he cannot demonstrate that he was prejudiced by counsel's failure to object to the jury instructions. Housman confessed that he lured the victim to his trailer by lying to her, strangled her with speaker wire, and discarded her body in an abandoned car. Based on this evidence, it is inconceivable that the jury would have convicted Housman merely as an accomplice to Markman, rather than as a principal in the crime. [13] For this reason, his ineffectiveness claim fails.

5. Evidence as to specific cause of death

Housman next contends that his trial counsel was ineffective for failing to present evidence to establish that Markman's act of placing a gag in the victim's mouth, rather than Housman's act of wrapping speaker wire around the victim's neck, was **1269 the actual cause of the victim's death, and for failing to object to the trial court's related instruction. He further argues that *82 the prosecution elicited and failed to correct misleading testimony regarding the specific cause of death.

Preliminarily, at trial, the medical examiner, Dr. Susan Venuti, testified that, during the autopsy of the victim, she removed, *inter alia*, the speaker wire that was tied around the victim's wrists and ankles, the cloth gag that was tied around the victim's face, and the folded piece of cloth that had been stuffed into the victim's mouth. N.T. Trial, 10/29/01, at 533-36. Dr. Venuti also noted that she had observed "a small area of pink discoloration on the decedent's neck," which "could be due either to some pressure on the neck, it could be a pressure mark, or it could simply be some discoloration due to the decompositional changes." *Id.* at 538.

Dr. Venuti testified that it was her belief "that Leslie White died from deprivation of oxygen due to airway obstruction. And the term we use is asphyxia due to suffocation by smothering." *Id.* at 545. When asked what effect "getting the hands under the ligature or wire that may have been placed around her neck" would have had on the process of asphyxiating the victim, Dr. Venuti further stated:

> Okay, you also have to remember that the decedent had a large gag cloth within her mouth and also another gag securely tied around her mouth and her neck. This action about her neck

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> and her upper body may force this gag further back in her throat, push her tongue further backwards, and it will obstruct her airway.

Id. at 540. She further explained:

> The term asphyxiate means lack of oxygen. A person can be asphyxiated by having their external airways obstructed, for instance, their nose or their mouth.
>
> Another mechanism can be obstructing the decedent's airway around the neck. The trachea can be obstructed, or the blood vessels supplying the blood to and from the brain can be obstructed, physically lying on both sides of the front of the neck.

Id. at 543.

Commonwealth witness Agent Stephen Lester, who was present at the autopsy of the victim, also testified at trial, ***83** where the following exchange occurred during cross-examination:

> **Markman's counsel:** And do you recall Doctor Venuti telling you that she did not find any bruising in the neck area, but if there were, if they were there, they could have been destroyed by decomposition?
>
> **Agent Lester:** That is correct.

N.T. Trial, 10/26/01, at 414.

On redirect, the following exchange took place:

> **District Attorney:** There was a mark on the neck, was there not? Let me show you Commonwealth Exhibit Number 88. We haven't had an opportunity to view Dr. Venuti's testimony yet.
>
> **Agent Lester:** Yes. There was a mark on the neck, but --
>
> **District Attorney:** I think Mr. Braught [Markman's counsel] was trying to talk about ligature marks. You didn't find any of those, and she said it could have not been there because of decomposition?
>
> **Agent Lester:** That is correct.
>
> **District Attorney:** But there was this pink spot on the neck that still remained?
>
> ****1270 Agent Lester:** Right.

Id. at 414-15.

Housman contends that counsel was ineffective for failing to rebut the Commonwealth's theory that Housman intended to and/or caused the victim's death by strangling her with speaker wire with two pieces of evidence. First, he notes that Dr. Venuti's autopsy report listed the cause of death as "asphyxia due to suffocation by smothering." Report of Autopsy, 1/18/01 (PCRA Hearing Exhibit 19). He further refers to a memorandum by Virginia State Police Agent S.T. Oliver, in which the agent recounts that Dr. Venuti told him, during a November 3, 2000 interview in her office, that she saw no evidence of ligature strangulation on the victim's body, and that she did ***84** not believe decomposition would have obscured ligature injuries. [14] That memorandum provided:

> Dr. Venuti advised that during the autopsy of LESLIE WHITE, she saw no petechial hemorrhages and no evidence of any ligature strangulation. This is why she ruled that WHITE died from suffocation. Dr. Venuti did not rule out that something may have blocked the carotid artery but it would have been done with something that was soft that did not leave any marks. She advised that there was a lot of decomposition on the body and this may have obscured minor injuries but does not believe that it would have obscured any ligature injuries.
>
> Dr. Venuti offer [sic] the opinion that if the victim was gagged in Pennsylvania, she probably died before getting to Virginia. She advised that she had no way of knowing for sure when or where the victim died.

Memorandum of S.T. Oliver, 11/3/00 (PCRA Hearing Exhibit 20).

According to Housman, his counsel should have used the autopsy report and Agent Oliver's memorandum to cross-examine Dr. Venuti regarding the absence of ligature marks, and to rebut Agent Lester's testimony. Housman further suggests that the prosecutor's failure to correct Agent Lester's statement that Dr. Venuti opined that the absence of ligature marks on the victim could have been due to decomposition of the body, when the police memorandum of Agent Oliver contradicted the statement, amounts to prosecutorial misconduct. Housman's Brief at 152. Housman argues that, where there is "any reasonable likelihood" that

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"false testimony" offered by the prosecutor could have "affected the judgment of the jury," a new trial is required. *Id.*

The PCRA court rejected Housman's claim, concluding, *inter alia*, that trial counsel testified at the PCRA hearing ***85** that he did not cross-examine Dr. Venuti regarding her report that noted a lack of ligature marks because, "[s]trategically, I thought there was more than enough evidence based on my client's own admissions and all of the evidence he strangling [sic] the young girl and the woman puts a sock down her throat. They are both in the process of causing her death, and I didn't see the strategic advantage of getting involved in that particular issue." N.T. PCRA Hearing, 5/22/17, at 89-90. The PCRA court additionally reasoned that, even if there was no reasonable basis for trial counsel's actions, Housman failed to demonstrate prejudice.

****1271** We find no error in the PCRA court's rejection of Housman's claim. Initially, although Housman suggests that Dr. Venuti testified that it was the gag which impaired or obstructed the victim's airway, and that Dr. Venuti "repeatedly refused to conclude that the evidence showed that strangulation caused [the victim's] death," Housman's Brief at 147, Dr. Venuti nonetheless stated, as evidenced by the trial testimony quoted above, that a ligature or wire around the victim's neck could have forced the gag further back into the victim's mouth, obstructing her airway. N.T. Trial, 10/29/01, at 540.

Moreover, there was sufficient evidence that Housman's unchallenged acts constituted first-degree murder. A person is guilty of first-degree murder where the Commonwealth proves that a human being was unlawfully killed; the person accused is responsible for the killing; and the accused acted with specific intent to kill. 18 Pa.C.S. § 2502(d); *Commonwealth v. May*, 584 Pa. 640, 887 A.2d 750, 753 (2005). An intentional killing is a killing by means of poison, or by laying in wait, or by any other kind of willful, deliberate and premeditated killing. 18 Pa.C.S. § 2502(a). The Commonwealth may establish that a defendant intentionally killed another "solely by circumstantial evidence, and the fact finder may infer that the defendant intended to kill a victim based on the defendant's use of a deadly weapon on a vital part of the victim's body." *May*, 887 A.2d at 753.

***86** The evidence presented at trial, including Housman's own admission that he strangled the victim with speaker wire, was sufficient to permit the jury to conclude that he intentionally, deliberately, and with premeditation participated in the murder of Leslie White. His active participation in this regard was sufficient to allow the jury to conclude that he harbored a specific intent to kill. Accordingly, even if the actual cause of the victim's death was asphyxia due to the cloth in her mouth and the gag around her face, and not the speaker wire around her neck, the evidence clearly was sufficient to convict Housman of first-degree murder. *See May*, 887 A.3d at 757 (appellant's active participation in the killing of two victims, including cutting the throat of and shooting one of the victims, was sufficient to prove that he harbored a specific intent to kill, such that, even if he did not inflict the specific injuries that caused each of the victim's deaths, he properly was convicted of first-degree murder because the evidence proved he clearly shared that intent with his accomplice); *Daniels*, 963 A.2d at 428 (rejecting claim that counsel was ineffective for failing to secure testimony of a pathologist as to specific cause of death, and emphasizing that "PCRA defense experts' opinions on the specific cause of death say little about appellees' intention−which was a very different question.... [A]ppellees controlled the circumstances surrounding [the victim's] death every step of the way and ... those circumstances fully supported a finding of an intent to kill beyond a reasonable doubt.").

Accordingly, Housman fails to demonstrate that he was prejudiced by trial counsel's failure to present evidence establishing that it was Markman's specific acts of placing a gag in and around the victim's mouth, rather than Housman's act of wrapping speaker wire around the victim's neck, that caused the victim's death.

6. Cumulative effect of errors

Finally, Housman argues that, in the event this Court determines he is not entitled to relief from his "conviction and sentence" based on any of the individual claims discussed ***87** above, he nonetheless is entitled to relief due to the cumulative effect of the errors at trial. Housman's ****1272** Brief at 160. Housman suggests that, while this Court has "been averse to broadly-stated claims of cumulative error," we have acknowledged that multiple instances of deficient performance may warrant a prejudice assessment premised on cumulation. *Id.* Housman's discussion, however, appears to be limited to the errors he alleges occurred during the penalty phase of his trial. At any rate, in addressing Housman's guilt-phase claims above, we rejected three − that counsel was ineffective for failing to object to the admission of

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evidence of Housman's prior bad acts and bad character; that counsel was ineffective for failing to object to the trial court's charge on accomplice liability and conspiracy; and that counsel was ineffective for failing to cross-examine Dr. Venuti regarding the absence of ligature marks and rebut Agent Lester's testimony − on the basis that he failed to demonstrate prejudice. Upon review, we find that these three errors are insufficient to establish collective prejudice that would entitle Housman to relief. Accordingly, for all of the reasons set forth above, we affirm the PCRA court's denial of a new trial.

B. Penalty Phase

As noted above, the PCRA court awarded Housman a new penalty trial based on his claim that trial counsel was ineffective for failing to investigate and present certain mitigation evidence. The Commonwealth challenges that determination, while Housman maintains that the PCRA court's holding was proper. Housman further argues that the PCRA court erred in rejecting several additional bases for his claim that he is entitled to a new penalty trial. We address the issue of mitigation evidence first, as we find it to be dispositive.

With regard to the presentation of mitigation evidence,

> [i]t is well-established that capital counsel has an obligation under the Sixth Amendment to conduct a reasonably thorough investigation for mitigating evidence or to make reasonable decisions that make further investigation unnecessary. ***88** *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 380 (2011); *Commonwealth v. Sattazahn*, 597 Pa. 648, 952 A.2d 640, 655 (2008); *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's duty encompasses pursuit of all statutory mitigators of which he is aware or reasonably should be aware, unless there is some reasonable ground not to pursue the circumstance (such as when it might open the door to harmful evidence). *Commonwealth v. Malloy*, 579 Pa. 425, 856 A.2d 767, 787 (2004). In evaluating an ineffectiveness claim alleging counsel's failure to investigate and present mitigation evidence in a capital case, we consider a number of factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the additional or different mitigation evidence that could have been presented. *Lesko*, 15 A.3d at 380; *Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564, 580 (2005). None of the aforementioned factors is, by itself, dispositive, because even if counsel's investigation is deemed unreasonable, the defendant is not entitled to relief unless the defendant demonstrates that prejudice resulted from counsel's conduct. *Id.*

Commonwealth v. Brown, 196 A.3d 130, 151 (2018) (quoting *Commonwealth v. Tharp*, 627 Pa. 673, 101 A.3d 736, 772 (2014)).

In his amended PCRA petition, Housman claimed that trial counsel was ineffective for failing to retain or request the appointment of a mitigation specialist; failing ****1273** to conduct a life history mitigation investigation; failing to have a life history report prepared; failing to reasonably consult with mental health experts; and failing to present compelling available mitigation evidence to the jury. Amended PCRA Petition, 5/22/13, at 155. Specifically, Housman argued, *inter alia*, that trial counsel, despite being aware of their existence, failed to obtain his medical records from the Spartanburg Mental Health Clinic, where he received outpatient psychological and psychiatric treatment from 1989 to 1992 with psychologist Steven Hope. He further claimed that trial counsel was ineffective for, *inter alia*, failing to present during his penalty ***89** trial specific examples of the physical and emotional abuse he suffered during childhood; failing to interview and/or obtain testimony from mental experts who treated Housman as an adolescent; and failing to present evidence of his cognitive impairments.

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We begin by reviewing the mitigation evidence that actually was presented at the penalty phase of Housman's trial. First, counsel presented the testimony of Robin Collins, a spiritual advisor at the prison, who testified that he feels a "special affection" for Housman, who he had been counseling for five to six months. N.T. Trial, 11/2/01, at 1287. Collins testified that Housman is always prepared for Bible study, and that Housman "fits in well" in the prison's Bible study classes. *Id.* at 1287-88. Collins indicated that he would be willing to correspond in writing with Housman in prison. *Id.* at 1289.

Counsel also presented the testimony of Housman's half-sister, Cheryl, who testified that she lived with her mother, Geneva Housman; her siblings (including Housman); and Housman's father, Howard Housman (hereinafter, "Howard"), until she was in the sixth grade, when she told her mother that Howard had been sexually abusing her. *Id.* at 1296. At that point, she, her mother, and her siblings moved out of the house. *Id.* Housman remained with his father. Cheryl further testified that Howard was physically abusive to her older brother, Russell, and that she once observed Howard repeatedly kick Russell in his groin. *Id.* Cheryl stated that another of her older brothers, Larry, was "treated like a work horse." *Id.* She described Howard as "cruel and heartless. He is just a horrible person." *Id.* at 1298.

Finally, counsel for Housman presented the testimony of Dr. Stanley Schneider, who testified that he administered a psychological test to determine Housman's intelligence level, a personality inventory, and an interpersonal inventory to determine how he relates to others. *Id.* at 1304. Dr. Schneider stated that he also reviewed Housman's school records, as well as the psychiatric records from Housman's three-week inpatient stay at the Spartanburg Regional Medical Center in South Carolina in 1991, when he was 15 years old. ***90** *Id.* at 1305. [15] Dr. Schneider also indicated that he spoke with Housman's mother, Geneva; his father, Howard; his half-sister, Cheryl; and his half-brother, Russell. *Id.* at 1304.

Dr. Schneider testified that his "findings indicate and support basically what you heard Cheryl testify to a few minutes ago, there are a number of negative environmental factors, abandonment, loss issues. [Housman] was witness to family torture and violence." *Id.* at 1307. He further stated that, when he first met Housman, he "idolized his dad" and "didn't want anything negative said about his father"; however, Housman eventually shared that he was "abused and harshly treated by his father." *Id.* at 1309. Dr. Schneider also ****1274** noted that Housman's mother, Geneva, described Housman's father as "crazy." *Id.*

With respect to his behavior in school and his academic performance, Dr. Schneider stated that Housman:

> did not fare well there. C's, D's, E's. That is the bad news. The good news is that there is no evidence I got of any expulsions or suspensions or detentions. There is no report I have of his acting out in an aggressive way. He wasn't reported to be fighting with other kids.
>
> He had learning problems. There is no question about that. He has no significant work history. He can't make it in the world of work. He has had menial jobs. And in terms of his intelligence, he is average to below average. I can't find any reason in terms of his intellectual ability that he couldn't succeed in school except for this attention deficit disorder, and his inability to form positive relationships with others.

Id. at 1310.

When asked about the results of the psychological tests he gave Housman, Dr. Schneider explained that Housman presented as dependent, socially anxious, and self-demeaning; that he "tends to lack initiative"; that he is insecure and has dependency needs toward females; that he is fearful of being rejected by others; and that he needs reassurance, support, ***91** and direction. *Id.* at 1310-11. He also opined that Housman had attention deficit disorder, *id.* at 1310, and indicated that, if he had seen Housman when Housman was younger, he would have diagnosed him with an attachment disorder, which he defined as a "profound disturbance in social relatedness." *Id.* at 1313. Dr. Schneider reiterated that, in reviewing Housman's background, he did not find a history of acting out in a violent, hostile, aggressive, or abusive manner toward others. *Id.* at 1308, 1312. Somewhat inconsistently, however, Dr. Schneider later testified that Housman was diagnosed "as having a conduct disorder. That is because he acted out as an adolescent and resulted in his being hospitalized in Spartanburg, South Carolina." *Id.* at 1315.

In discussing Housman's hospitalization, Dr. Schneider simply stated: "He was hospitalized. He responded to that hospitalization. Unfortunately it was only about three weeks. But the records reviewed indicated that he did well for a short period of time after he was released. But there was no follow-up treatment. There was no treatment in the school." *Id.* at 1309.

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Finally, Housman took the stand, and asked the jury to "allow [him] to live in prison so [he] can correspond more with Mr. Collins." *Id.* at 1282. When asked by his counsel what his position was with respect to the jury's verdict, Housman responded: "My opinion is this, I think the verdict that the ladies and gentlemen here [gave] was fair and just due to the heinous act that was done." *Id.* at 1281. The entire presentation of mitigation evidence comprises 36 pages of the transcript.

Next, we consider the mitigation evidence presented at Housman's PCRA hearing. Housman presented, *inter alia*, the testimony of Kathleen Kaib, an investigator and mitigation specialist with the Federal Public Defender's Office. [16] Kaib stated that she met with Housman numerous times, reviewed all of his medical and school records, and conducted interviews ***92** with Housman's family. Kaib explained that, when he was born, Housman lived with his mother, Geneva; his father, Howard; ****1275** and his three half-siblings. Kaib noted that Housman's father, Howard, described Housman's mother Geneva as "a drunk," who was "always with different men." PCRA Hearing, 5/22/17, at 397. Kaib explained that Geneva was afraid of Howard because, in addition to physically abusing the children, he abused her as well. When Housman was nearly four years old, his half-sister Cheryl told their mother that Howard was sexually abusing her. Geneva took Housman's three half-siblings out of the house, but left Housman with his father. Approximately one year later, Geneva kidnapped Housman and sent him and Cheryl to Virginia to live with their aunt and uncle, Geneva's sister and brother-in-law. After their uncle began to sexually abuse Cheryl, Cheryl begged her mother to send her and Housman to their maternal grandfather's house, which Geneva did. *Id.* at 189-90. Cheryl and Housman lived with their grandfather for less than a year before he had a stroke and died. *Id.* at 190. Cheryl and Housman then moved back into a home with Geneva and her paramour, where Housman stayed until he was almost ten, at which time he moved in with Howard and Howard's wife, Doris. When Housman showed up at his father's home, he apparently was filthy, lacked basic hygiene skills and manners, and his clothes were ragged. *Id.* at 397. One day when Housman was 11 years old, he came home to find Doris in the bathtub after she had attempted to commit suicide. Doris attempted suicide a second time when Housman was 14 years old. Housman remained with his father and stepmother until he was approximately 16 years old, and then returned to live with his mother and her boyfriend for another year. At age 17, Housman again returned to the home of his father and stepmother. *Id.* at 395-96.

Kaib testified that Housman reported that he had been sexually abused by his stepmother Doris's cousin's son; Doris confirmed this. *Id.* at 392-93. Kaib noted that Housman also told her that he had been physically abused by both his father ***93** and Doris, and Doris described that abuse in an affidavit, which stated, in part:

> 9. Sometimes I had to beat Bill [Housman] because of his behavior. I remember one time I was so angry at Bill that I took out a metal yardstick and I beat him til the stick was bent double. I didn't like to do it, but you have to discipline children or they won't listen and learn. That's how I learned. My daddy would beat me with hickory sticks until my legs were raw when I did something wrong.
>
> * * *
>
> 15. When Bill got to Greenville Tech he started skipping school all the time. I would drop him off but he wouldn't even go to class. When his daddy found out about him not going to school he got crazy angry. Howard told me to leave for a bit and when I returned Bill had the imprint of a six pack cooler where his daddy had whopped him upside the head as punishment. Bill was dazed and sick from the beating, but he didn't go back to school.

Affidavit of Doris Housman, 4/23/13, at 2-3 (PCRA Hearing Exhibit 12). Doris also indicated that, when Housman was in his late teens, he moved to Virginia to stay with an older half-brother, Lee, who reportedly "regularly beat" him, and on one occasion "beat the living slip out of [him]." *Id.* at 3.

Cheryl, who had testified at Housman's penalty trial, also testified at the PCRA hearing, but in greater detail. She testified that Housman's father, Howard, who was referred to by the nickname "Crazy" because of the "crazy" and "mean, awful things" he did to her and her siblings, had fallen off a building and had a steel plate ****1276** in his head. N.T. PCRA Hearing, 5/22/17, at 178. She described that Howard made her put "half moon ice trays" in her vagina until she bled, laughed when she cried because of the pain, and poured buckets of water over her head. *Id.* at 179. She also stated that, in the winter, Howard would lock her outside while she was undressed and make her run around the outside of their trailer, and that he would hang her upside down with her head in the toilet. *Id.* She explained that, if she didn't eat her dinner, she would have to stand in the corner on

one foot until it was time ***94** to go to bed. *Id.* at 179-80. According to Cheryl, the children were not allowed to eat food from the refrigerator, and Howard counted the slices of lunch meat every day; if one was missing, the children were punished. *Id.* at 180-81. Cheryl recounted the same instance that she described at Housman's penalty hearing, wherein on one occasion, Howard repeatedly kicked her brother Russell in his groin as he lay on the floor.

Cheryl stated that, initially, she did not report the abuse to her mother because Howard threatened to kill Geneva. *Id.* at 182. Cheryl also described an incident where Howard shoved her mother so hard that her mother broke her ankle and had to go to the hospital. *Id.* at 182-83. Cheryl testified that, because her mother worked multiple jobs, Cheryl was responsible for taking care of Housman, including feeding, bathing, and dressing him, playing with him, and putting him to bed. *Id.* at 184. She also described that she attempted to run away, once when she was in first grade, and again when she was in fifth or sixth grade. *Id.* at 185-87.

Housman's mother, Geneva, also testified at the PCRA hearing, corroborating much of Cheryl's testimony. She stated that her pregnancy with Housman was unplanned, and that she returned to work approximately six weeks after giving birth to him, leaving him in the care of seven-year-old Cheryl and Howard. She also stated that Howard was so violent that she once pointed a gun at him, an occurrence that Housman witnessed. *Id.* at 208-11. Geneva stated in her affidavit that she thought Cheryl had told her when Housman's trial was being conducted, but that she never received any paperwork, never spoke with anyone, and was never visited by anyone working on his case. Affidavit of Geneva Housman, 4/3/13 (PCRA Hearing Exhibit 11), at 4.

In terms of expert testimony, Housman presented, *inter alia*, the testimony of Dr. Carol Armstrong, a neuropsychologist who evaluated Housman while he was in prison. Dr. Armstrong testified that the tests she administered to Housman revealed that he suffers from "executive dysfunction and memory impairment ... typical of someone with very severe ADHD [(Attention-Deficit/Hyperactivity Disorder)] effects." ***95** N.T. PCRA Hearing, 5/23/17, at 238. She also stated that she found mild impairment in several areas, including multitasking, social reasoning and judgment, and practical reasoning. *Id.* at 239. Dr. Armstrong noted that she reviewed school records, medical records, reports, affidavits, notes of testimony, and other evidence that was presented at both the penalty trial and at the PCRA hearing, and she observed several red flags and risk factors for brain dysfunction and abnormal brain development. In particular, she noted the following factors, all of which were contained in records from the Spartanburg Mental Health Clinic, where Housman received outpatient psychological and psychiatric treatment from 1989 to 1992: outpatient psychological treatment for a period of 2½ years; a referral for inpatient psychological treatment; a recommendation for family therapy, and the parents' refusal to comply with that recommendation; a recommendation for placement outside the home; a ****1277** notation that Housman's mother drank a lot; a notation that Housman had significant losses and disruptions in his early life, and poor attachment as a child and in his adult life; exposure to family violence as a child, including violence with a gun; physical punishment by his father with a horse harness; and two suicide attempts by his stepmother, with whom he lived at the time. *Id.* at 267-70. Dr. Armstrong also referenced a notation in the records from the Spartanburg Mental Health Clinic that Howard had reported that he came home from work one day when Housman was a year old and found a note from Geneva indicating that she "taken off" to drink and be with other men, and that Housman did not see Geneva again until he was in kindergarten and Geneva picked him up from school and sent him with Cheryl to live with their aunt and uncle. *Id.* at 267; PCRA Hearing Exhibit 14, at 31-32.

Housman also presented the testimony of Dr. John Warren, a forensic psychologist, who was retained to review the mitigation evidence presented at Housman's sentencing hearing, as well as the records from Housman's outpatient therapy. Dr. Warren met with Housman on two occasions. Dr. Warren opined that the chaos and neglect suffered by Housman as a ***96** child likely resulted in his anxiousness, depression, impulsivity, and other problems. *Id.* at 122. Dr. Warren further noted that, although the psychologist at the Spartanburg Mental Health Clinic recommended residential care for Housman so that he would have stability in his life, Housman's father and stepmother refused to act on that recommendation. Indeed, the physician's service notes for one of Housman's outpatient appointments read as follows:

> This boy was accompanied by his step-mother who is obviously very angry and immediately started telling about all the problems that he had caused. He has been expelled from school because of stealing a coat belonging to

> another child. The step-mother started telling about that and about how he has ruined their marriage. He cringed during much of this time and obviously was very uncomfortable. He spoke up a time or two saying that she is a perfectionist and he is never able to please her. She seemed to have no insight and no understanding. I told her I felt that probably they needed family therapy, but she said that all the changes were up to William, the son and that she and his father were not going to make any changes because they had already done all they were going to do. I really feel that some placement outside the home would probably be best for this child.

PCRA Hearing Exhibit 13 at 11. Dr. Warren also noted that the psychologist had recommended family therapy, but Housman's father and stepmother refused that. N.T. PCRA Hearing, 5/23/17, at 126.

Based on his review of the neuropsychological evaluation performed by Dr. Armstrong, Dr. Warren opined that Housman suffered from neurocognitive impairment; severe ADHD; Generalized Anxiety Disorder with elements of Post-Traumatic Stress Disorder; Dysthymic Disorder (chronic depression); and Developmental Reading Disorder. *Id.* at 130-35.

Finally, Dr. Lenora Petty, a child psychiatrist and the Medical Director in the Adolescent Unit at Spartanburg Regional Medical Center, where Housman received inpatient treatment in 1991, testified that, upon Housman's discharge, she recommended that he go into a residential treatment ***97** facility for long-term treatment, but that her advice was not followed by Housman's family. *Id.* at 255-56. She recounted that, upon Housman's release from inpatient ****1278** treatment, she "felt that his prognosis was poor for the future." *Id.* at 256.

As noted, the PCRA court found Housman was entitled to relief on his ineffectiveness claim. In support thereof, the court opined:

> Here, the evidence at the evidentiary hearing demonstrated that Counsel's penalty phase investigation was unreasonable. Specifically, Counsel had information on readily available mental health records from the Spartanburg Mental Health Clinic. He failed to contact the Mental Health Clinic, obtain those records and investigate into them further. Counsel erroneously assumed that the records from the Mental Health Clinic would be the same as those he would obtain from the Spartanburg Regional Medical Center; he believed the two entities were [one and] the same. Despite the vast differences between the names, he chose to only look into one of the two. He only obtained medical records from the Regional Medical Center, a hospital. He never obtained the mental health records from the Mental Health Clinic. However, had he done even a cursory search of the records he did obtain from the Regional Medical Center, a search of the differently named Mental Health Clinic, he would have had observations from Doctors Hope and Petty who treated [Housman] for psychiatric disorders as an adolescent, and who had knowledge of [Housman's] records at the Mental Health Clinic. He also would have had evidence of severe mental health diagnoses. Moreover, he would have had the treating doctors' sense of [Housman's] family background/home-life at that time. At the PCRA evidentiary hearing, Trial Counsel conceded that he had no reasonable basis for not investigating into both the Regional Medical Center and the Mental Health Clinic, and that he did not have any reasonable basis for failing to obtain the complete records therefrom.
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> ***98** If Counsel would have presented the missing records at trial, the jury would have seen that [Housman's] parents abandoned him to whatever mental instability that he had when he was young and vulnerable. We believe that the argument would reasonably be that he was doomed from the start. The Spartanburg doctors' diagnosis, prescription for treatment and prognosis for the adolescent [Housman] all fell on deaf ears. [Housman's] parents felt that he was the problem and that he needed to change, but they did not offer any support to help the child change or handle his problems. They washed their hands of him. [Housman] was a child, he could not provide for his own well-being. His parents had a duty to care for his needs, his medical and mental health, to provide for his well-being, but they refused to help him. They refused to get him necessary treatment. [Housman] fell off the map treatment-wise until

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> the actions that led [to] this case. As an adolescent, he had a poor prognosis for the future; and that prognosis proved prophetic, all because his parents gave up on him. We believe that this insight into [Housman's] background could possibly have swayed a juror who was deciding whether death is the warranted punishment against the presumption of life. This was exacerbated by the fact that also within the Spartanburg Mental Health Clinic records were more severe diagnoses than what Doctor Schneider had reviewed and the jury had heard.

PCRA Court Opinion, 2/2/18, at 12-14 (footnote omitted). Indeed, the PCRA court characterized trial counsel's investigation into Appellant's mitigation defense as "devastatingly poor." *Id.* at 15.

****1279** Before us, the Commonwealth challenges the PCRA court's grant of a new penalty-phase trial. First, the Commonwealth contends that the PCRA court erred in failing to engage in a comparison of the evidence presented at trial and the evidence presented at the PCRA hearing, as required by *Commonwealth v. Gibson*, 597 Pa. 402, 951 A.2d 1110, 1121-22 (2008) (noting that resolution of cases involving claims of ineffective assistance of counsel for failing to investigate, develop, and ***99** present mitigating evidence in capital cases requires, especially in close cases, "a developed post-conviction record accompanied by specific factual findings and legal conclusions").

The Commonwealth further asserts that the PCRA court erred in concluding that Housman's ineffectiveness claim had merit, that counsel was ineffective, and that Housman demonstrated prejudice. Specifically, the Commonwealth argues that, while Dr. Schneider did not possess Housman's patient records from the Spartanburg Mental Health Clinic, the information contained in those records was not "distinguishable" from the information contained in the records, interviews, and other documents that Dr. Schneider did have, and which was presented at the penalty phase of trial. Commonwealth's Brief at 68. Observing that the PCRA court, in its opinion, cited to Dr. Warren's testimony at the PCRA hearing, the Commonwealth states that the "gist" of Dr. Warren's "bland testimony" was that:

> Mr. Hope and Dr. Petty were recommending residential care for [Housman]; that the family considered it but then declined to pursue it; the family therapy referenced in the notes did not appear to be true family therapy; the defendant had anxiety and apprehension; he was bullied, acted as a class clown, cried a lot, sought attention, and that the mother had alcohol issues. It is *outrageous* to say Dr. Schneider did not have this information from the Hospital records, interviews, and other documents he had; the guts of all of this supposedly "new" information was provided in his expert testimony at sentencing and through other witnesses who spoke.

Id. at 68 (emphasis original).

The Commonwealth also avers that Dr. Petty's testimony, to which the PCRA court also referred, tracked the reports by Dr. Petty that were contained in the records from the Spartanburg Regional Medical Center that Dr. Schneider reviewed and relied upon. *Id.* at 69, 888 A.2d 564, 580. The Commonwealth contends that, on cross-examination, "Dr. Petty unwittingly affirmed every conclusion Dr. Schneider gave at trial," and suggests that Housman's "cumulative and objectively ***100** unimpressive PCRA presentation demonstrates an error below." *Id.* Based on its argument that the records from the Spartanburg Mental Health Clinic were cumulative of evidence presented at Housman's penalty trial, the Commonwealth contends Housman's underlying ineffectiveness claim lacks merit. *Id.* at 79, 888 A.2d 564, 580.

The Commonwealth further maintains that the PCRA court erred in finding that trial counsel had no reasonable basis for failing to obtain Housman's medical records from the Spartanburg Mental Health Clinic, in that counsel properly relied on Dr. Schneider, who knew the records existed but "apparently deemed [them] unnecessary or cumulative." *Id.* at 78, 888 A.2d 564, 580. Finally, the Commonwealth argues that Housman failed to demonstrate prejudice because "[t]he sentencing case put on here was even more involved than that in [****1280** *Commonwealth v. Daniels*, 628 Pa. 193, 104 A.3d 267 (2014)],[17] and the 'additional' mitigation did nothing to alter the concise yet thorough presentation made at trial." Commonwealth's Brief at 83.

After careful review, we find the PCRA court's determination that trial counsel's investigation into and presentation of

mitigation evidence at Housman's penalty trial constituted ineffectiveness to be supported by the record. Initially, and as detailed above, the mitigation evidence presented during the penalty phase of Housman's trial pales in comparison to the mitigation evidence that was presented at his PCRA hearing. In light of the disparity between the mitigation evidence which was presented, and which could have been presented, we have little difficulty in concluding that Housman's underlying ineffectiveness claim has merit.

***101** We next review the PCRA court's finding that there was no reasonable basis for trial counsel's failure to obtain Housman's mental health records from the Spartanburg Mental Health Clinic, and to present at trial the mitigation evidence presented at the PCRA hearing. At Housman's PCRA hearing, trial counsel Hubert Gilroy testified that he was court-appointed counsel for Housman, and that he had previously served as counsel in two capital appeals. N.T. PCRA Hearing, 5/22/17, at 5. When asked if anyone assisted him in preparing the mitigation case, Attorney Gilroy stated that he had two law clerks from Dickinson School of Law working with him, and he had hired a private investigator to aid in contacting potential witnesses. Additionally, he hired Dr. Schneider from Schneider Guidance Associates "to aid in providing mitigation and testifying with respect to mitigating factors." *Id.* at 41. Attorney Gilroy stated that he hired Dr. Schneider because he "believe[d] he worked with me in other prior criminal cases. I know he worked with me in other prior civil cases." *Id.* at 43. Attorney Gilroy testified that Dr. Schneider had experience in doing evaluations in child custody cases, but that he "doubted" that he had any training in forensic psychology. *Id.* When asked if that lack of training was a concern, Attorney Gilroy replied, "It wasn't at the time. I thought he -- based upon the work he did and the interaction and the limited stuff we had to deal with, I thought he did a good, fair job." *Id.*

Attorney Gilroy explained that he was in charge of collecting records for the mitigation case, and that he spoke with some of the witnesses himself. *Id.* at 44. He stated that, after Dr. Schneider met with Housman, Dr. Schneider provided Attorney Gilroy with a list of the records he wanted to review, and Attorney Gilroy requested them. Upon receiving them, Attorney Gilroy gave them to Dr. Schneider. *Id.* Although Attorney Gilroy conceded that he had received a letter from Dr. Schneider indicating that Housman had been in outpatient therapy with psychologist Steven Hope at the Spartanburg Mental Health Clinic, counsel apparently did not attempt to obtain those records. *Id.* at 48-50, 888 A.2d 564, 580. When questioned about this, Attorney Gilroy responded that he ***102** requested the records that Dr. Schneider asked him to, but that he was unaware if ****1281** they had obtained all of the necessary records because he "didn't look at all of the records in the file." *Id.* at 50, 888 A.2d 564, 580. When asked if, upon receiving the records he obtained at the request of Dr. Schneider, he reviewed the records himself, Attorney Gilroy stated that he could not recall. *Id.* at 55, 888 A.2d 564, 580. Attorney Gilroy explained that, for purposes of looking for "potential mitigating evidence within the records," he retained and relied on Dr. Schneider for that purpose. *Id.* at 55-56, 888 A.2d 564, 580. When asked specifically if he had a strategic reason for failing to obtain the records from the Spartanburg Mental Health Clinic, Attorney Gilroy stated that he did not. *Id.* at 57, 888 A.2d 564, 580.

With regard to witnesses who could have offered information or testified regarding Housman's mitigation case, Attorney Gilroy explained that he relied on Housman and Dr. Schneider "to create a witness list." *Id.* at 62, 888 A.2d 564, 580. When asked if he had a strategic reason for failing to contact "potential nonfamily witnesses such as service providers whose names appeared or might have appeared in some of the records" that he received − for example Dr. Petty − to provide mitigation evidence, Attorney Gilroy replied: "Certainly not strategic. I was relying upon Dr. Schneider, him looking at the records. If he needed something else or if he needed to speak with somebody who actually treated Mr. Housman, I was relying upon him to make that determination." *Id.* at 70-71, 888 A.2d 564, 580. Attorney Gilroy likewise testified that he did not have a strategic reason for failing to speak with, or have Dr. Schneider speak with Steven Hope, the psychologist who treated Housman at the Spartanburg Mental Health Clinic. *Id.* at 72, 888 A.2d 564, 580.

When asked if he had considered employing a mitigation specialist, Attorney Gilroy indicated that, while he "didn't think Dr. Schneider was, quote, a mitigation specialist, closed quote," he "thought Dr. Schneider with his training could provide mitigating factors that would assist us." *Id.* at 81, 888 A.2d 564, 580. When asked why he chose to use Dr. Schneider ***103** in the presentation of Housman's mitigation case, Attorney Gilroy stated:

> I like to use local people because I have jurors from Cumberland County. And if they hear the local person who they trust and give credence to, they're

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> usually better off than -- than bringing in people from outside the area. That's assuming you get somebody locally that can do the job. I thought he could do a -- the work we needed to have done in this case.

Id. at 106.

We conclude that Attorney Gilroy had no reasonable basis for failing to obtain Housman's records from his outpatient psychotherapy at the Spartanburg Mental Health Clinic, or for failing to present the evidence that was contained in the records from the Spartanburg Regional Medical Center, which he did have. This Court recognizes that, in addressing claims that counsel was ineffective for failing to present mitigation evidence, a court may not "conflate the roles and professional obligations of experts and lawyers by demanding that counsel spot 'red flags' when the mental health expert they hired failed to do so." *Commonwealth v. Brown*, 649 Pa. at 333, 196 A.3d at 154. Here, however, Attorney Gilroy essentially relied on Dr. Schneider, whom he knew was not a forensic psychologist or psychiatrist, not only to act as a mental health expert, but essentially to act as co-counsel. Attorney Gilroy admitted that he relied on Dr. Schneider to determine which records to request, and which witnesses to interview. He further admitted that he was not sure whether he, ****1282** himself, reviewed the records that he did obtain. Even a superficial review of those records would have alerted Attorney Gilroy to the fact that there were additional records and witnesses that may have provided valuable mitigation evidence. An attorney cannot abdicate his own responsibility by hiring a mental health expert, or any other expert for that matter. While a mental health expert reasonably may be expected to spot red flags regarding certain aspects of a defendant's mental state, the expert is not an attorney, and should not be expected to make decisions as to whether to ***104** obtain records, such as school and hospital records, that are clearly relevant to a defendant's mitigation case, or to decide what witnesses to interview. Thus, we conclude that trial counsel's performance during the penalty phase of trial was not based upon a reasonable strategy, but resulted from inattention to the mitigation evidence that was readily available.

Finally, we must determine whether the record supports the PCRA court's finding that Housman was prejudiced by trial counsel's failures. We conclude that it does. The *Strickland* test for prejudice requires a showing of a reasonable probability that the outcome of the penalty proceeding − here, the unanimous verdict of death − would have been different. *Daniels*, 104 A.3d at 297. In assessing *Strickland* prejudice,

> the question is whether the defendant has shown a reasonable probability that, had the mitigation evidence adduced at the PCRA hearing ... been presented at the penalty phase, the outcome of the proceedings would have been different because at least one juror would have found that the mitigating circumstances collectively outweighed (or were as weighty as) the aggravating circumstances, or to convince a juror to find that the overall quality of the case in mitigation warranted a sentence of life in prison.

Id. at 303-04. Of course, "a penalty verdict only sufficiently supported by the record is more likely to have been affected by a deficiency in counsel than one with overwhelming record support." *Id.* at 297.

Although Dr. Schneider testified at the penalty hearing that Housman was subject to "a number of negative environmental factors, abandonment, loss issues," and witness to "family torture and violence," he did not describe any specific incidents in support of that vague statement. N.T. Trial, 11/2/01, at 1307. Dr. Schneider further testified that, while Housman's grades were poor, he did not receive any expulsions, suspensions, or detentions, and did not appear to act out aggressively. *Id.* at 1310. He described Housman as having average to ***105** below average intelligence; being dependent, insecure, socially anxious, and self-demeaning; and opined that he suffered from ADHD. Most significantly, with respect to Housman's inpatient treatment at Spartanburg Regional Medical Center, Dr. Schneider briefly stated: "He was hospitalized. He responded to that hospitalization. Unfortunately it was only about three weeks. But the records reviewed indicated that he did well for a short period of time after he was released. But there was no follow-up treatment. There was no treatment in the school." *Id.* at 1309.

However, had trial counsel presented at trial the available evidence that was described by Kaib at the PCRA hearing,

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including the testimony of Housman's stepmother Doris, the jury would have learned that Housman was not just treated "harshly" by his father, but that he was physically abused by a number of people in his life, including his father, stepmother, and older half-brother. The jury also would have had a more vivid picture of the violence ****1283** and abuse that occurred in the household from the time Housman was born.

Had trial counsel reviewed Dr. Petty's notes from Housman's inpatient treatment at the Spartanburg Regional Medical Center, the jury would have been privy to a more in-depth − and, indeed, more accurate − description of Housman's emotional and behavioral history than suggested by Dr. Schneider's brief testimony. For example, Dr. Petty's intake notes, dated May 27, 1991, provided: "[t]he precipitating events for this hospitalization are increasing irritability, increasing impulsivity, explosive behavior, increasing crying. [Housman] has had many of these behaviors for some time; however, has been having increasing problems particularly in the past week to two weeks, where he has been 'losing it' and has become explosive." PCRA Hearing Exhibit 14 at 8. Dr. Petty further noted that there was an altercation between Housman and his father, and that Housman had "been somewhat cruel to his dog." *Id.* This evidence directly contradicts Dr. Schneider's testimony that Housman was not aggressive. Moreover, the intake notes *specifically* direct referral to ***106** Housman's treatment records with Steven Hope at the Spartanburg Mental Health Clinic.

Physician notes from a psychological consultation performed by Dr. Luther Diehl on June 4, 1991, while Housman was receiving inpatient treatment, indicated, *inter alia*, that Housman appeared to be fairly anxious, socially withdrawn, and aloof, and felt alienated even from his family. *Id.* at 15. Dr. Diehl also opined that Housman had "significant learning problems"; "oppositional defiant disorder of adolescence, with anxiety features"; "developmental reading disorder"; and "mixed schizoid and paranoid personality features developing." *Id.* at 16-17. These diagnoses are more than simply "cumulative" of Dr. Schneider's testimony that Housman suffers from ADHD.

Finally, in her discharge notes, dated June 20, 1991, Dr. Petty observed that Housman: "had a history of increasing irritability, impulsivity, explosive behavior, aggression, and stealing. Many of these behaviors had been long-standing, and his stealing and explosive behavior had increased over the past few months prior to admission. He actually did hit his father prior to admission." *Id.* at 5. Dr. Petty further noted that Housman "showed tremendous amounts of anger in regards to various issues, mostly to do with his stepmother and/or biological mother. He became angry on several occasions, at one point to point where he felt he was 'going to explode'; and never really required restraining, but found it very difficult to control his anger." *Id.* Dr. Petty's notes further recounted:

> It is quite evident from his behavior in hospital that [Housman] has a great deal of difficulty maintaining his anger, that he can become highly explosive, that he does not empathize very well with others and sees nothing wrong with his behavior. He is also fairly possessive ... and has a very negative reaction to his biological mother. When in a fit of anger, he stated he wanted to kill her.... [Housman] seemed to improve somewhat in hospital, albeit in a highly structured setting. He never required restraints, although coming close on several occasions. His anger was quite evident, and was directed to various staff members as well ***107** as to others. He also was noted to have a tendency to be quite manipulative in his behaviors on the ward in regards to his interactions with peers and with staff, and as noted above, he appears to have very little concern or empathy for others other than someone that he feels he needs to ****1284** protect, and he protects them very fiercely.

Id. at 6.

Dr. Petty indicated that Housman had signs of attention deficit order, conduct disorder, and a "developing personality disorder, most likely antisocial in nature." *Id.* at 7. Dr. Petty further opined that Housman "*presents in such a way that his future, particularly with a combination of attention deficit disorder and conduct disorder, bode poorly in terms of prognosis.*" *Id.* (emphasis added). In addition to individual therapy, Dr. Petty recommended family or group therapy to assist in controlling his anger. *Id.* Dr. Petty's prognosis casts

doubt on Dr. Schneider's testimony that Housman "responded to" his hospitalization.

Additionally, had trial counsel obtained Housman's outpatient records from the Spartanburg Mental Health Clinic, the existence of which counsel testified that he was aware, *see* N.T. PCRA Hearing, 5/22/17, at 48-49, he could have presented the long-term observations and conclusions by Housman's treating psychologist, Steven Hope, that: Housman felt responsible for his stepmother's suicide attempt, PCRA Hearing Exhibit 13 at 14; Housman was greatly concerned about the relationship between his mother and his father and stepmother, fearing his mother would break up his father and his stepmother, *id.* at 15; Housman had multiple suspensions from school, *id.* at 19; Housman's stepmother was very demanding and easily frustrated with her stepson, to the extent she often refused to participate in his treatment; *id.* at 25; Housman had engaged in a pattern of stealing and fighting, *id.* at 31; Housman's father confessed to beating him with a horse harness because he suspected Housman stole it, *id.* at 39; Housman consistently felt unwanted and unloved, *id.* at 40; Housman felt guilty about his stepmother's health issues, ***108** *id.* at 46, 888 A.2d 564, 580; and Housman was anxious and disappointed. *Id.* at 53, 888 A.2d 564, 580.

Moreover, had counsel obtained Housman's medical records from the Spartanburg Mental Health Clinic, it is possible that he, or Dr. Schneider, would have observed the same red flags and risk factors for brain dysfunction and abnormal brain development that Dr. Armstrong saw in her review of the records. In light of all of the additional potential mitigation evidence described above, we reject the Commonwealth's characterization of Housman's PCRA evidence as "cumulative and objectively unimpressive." Commonwealth's Brief at 69.

In the instant case, the jury found a single aggravating circumstance − a killing committed while in the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6) − and two mitigating circumstances − a troubled childhood and acceptance of responsibility under the catch-all mitigator, 42 Pa.C.S. § 9711(e)(8). Notably, however, Attorney Gilroy testified at Housman's PCRA hearing that he had hoped to establish additional mitigating factors under Section 9711(e)(2) (defendant was under the influence of extreme emotional disturbance), and (e)(3) (capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired), but that, after reviewing Dr. Schneider's written report, he "didn't feel Dr. Schneider was going to be able to testify on some of those areas. Although I asked him to examine them and he examined them and he said that he doesn't believe he could give an opinion favorable to our -- my client on that." N.T. PCRA Hearing, 5/22/17, at 77.

In terms of deciding whether Housman has established that there is a reasonable probability that, had the mitigation evidence ****1285** produced at his PCRA hearing been presented at the penalty phase, the outcome of the proceedings would have been different because at least one juror would have found mitigating circumstances that collectively outweighed the single aggravating circumstance, we find this case to be similar to *Tharp, supra*. Therein, as in the instant case, the Commonwealth presented a single aggravating circumstance; in *Tharp*, ***109** that circumstance was a victim was under the age of twelve, see 42 Pa.C.S. § 9711(d)(16). While the jury in the instant case found two mitigating circumstances, both of which fall under the catch-all mitigator, the jury in *Tharp* found two *separate* mitigators − that the defendant had no significant history of prior criminal convictions, *id.* § 9711(e)(1), and the catchall mitigator, *id.* § 9711(e)(8). *Tharp*, 101 A.3d at 745.

In concluding that the new evidence of mitigation that was presented at Tharp's PCRA hearing, which concerned her mental health, supported two additional mitigating circumstances, including that the defendant was under the influence of extreme emotional disturbance, and that the capacity of the defendant to appreciate the criminality of her conduct or conform her conduct to the requirements of law was substantially impaired − the very same mitigators Attorney Gilroy testified he would have liked to submit to the jury in the instant case − we stated:

> [T]he new evidence of mitigation presented at the PCRA hearing that related to Appellant's mental health supported two additional mitigating circumstances for which the defense did not present any evidence at trial−that Appellant was under the influence of extreme mental and emotional disturbance pursuant to Section 9711(e)(2), and that her capacity to conform her conduct to the requirements of law was substantially impaired pursuant to Section 9711(e)(3). As noted, Appellant demonstrated that at the time of trial, counsel was in possession of a pretrial competency report drafted by Dr. Moran, which indicated that Appellant had only borderline intellectual functioning, and suffered from several mental impairments. As illustrated in detail, *supra*, Appellant presented at the PCRA evidentiary hearing testimony from additional mental health experts who had

reviewed Appellant's background and the extent of her criminal behavior and opined that at the time of the murder, Appellant was under the influence of extreme mental and emotional disturbance and her capacity to conform her conduct to the requirements of the law was substantially impaired.

***110** We cannot say that had such mental health mitigating evidence been presented, the jury would still have arrived at a death verdict. *See Commonwealth v. Keaton*, 615 Pa. 675, 45 A.3d 1050, 1093 (2012) (holding that trial counsel was ineffective for failing to investigate and present evidence of neurological impairment and psychological disorders because such evidence would have supported the (e)(2), (e)(3) and (e)(8) mitigators, and there is a reasonable probability that at least one juror may have struck a different balance had such evidence been presented); *Commonwealth v. Martin*, 607 Pa. 165, 5 A.3d 177, 203–04 (2010) (holding that trial counsel was ineffective for failing to present during the penalty phase available mental health mitigation evidence supporting two additional statutory mitigators not proffered by the defense); *Commonwealth v. Zook*, 585 Pa. 11, 887 A.2d 1218, 1235 (2005) (holding that the defendant was prejudiced by trial counsel's [failure] to present available evidence of defendant's head injury and ****1286** resulting brain damage that were available at the time of trial to establish two additional mitigating factors that were not presented during the penalty phase).

Tharp, 101 A.3d at 773-74.

We further explained in *Tharp* that the PCRA court's and the Commonwealth's reliance on our prior decisions in *Gibson* and *Lesko*, where we held that no prejudice resulted from trial counsel's failure to present mitigation evidence due to the significant amount of aggravating evidence presented, was misplaced:

In relying on *Gibson* and *Lesko*, both the PCRA court and the Commonwealth appear to conflate the evidence of Appellant's guilt, which is overwhelming, with the evidence of statutory aggravating circumstances presented during the penalty phase, which consists of a single, albeit weighty, aggravating factor of the age of the victim.

In *Gibson*, the Commonwealth presented evidence of and the jury found the statutory aggravating circumstances of multiple murders, 42 Pa.C.S. § 9711(d)(11), creating a grave risk to others, *id.* § 9711(d)(7), and commission of the ***111** murders during the perpetration of a felony, *id.* § 9711(d)(6). Likewise, in *Lesko*, the Commonwealth presented evidence of and the jury found the statutory aggravating circumstances of multiple murders, a significant history of violent felony convictions, *id.* § 9711(d)(9), and the killing of a police officer. *Id.* § 9711(d) (1). Here, as noted, the single aggravating factor presented to the jury by stipulation was that the victim was a child under the age of twelve. *Id.* § 9711(d)(16). While this single aggravating circumstance is undoubtedly grave, we cannot conclude that it equates with the overwhelming evidence of statutory aggravating factors found by the juries in *Gibson* and *Lesko*. *See Commonwealth v. Malloy*, 856 A.2d at 789 (holding that the defendant was prejudiced by trial counsel's failure to present mitigating evidence, and emphasizing that the Commonwealth pursued a single aggravating circumstance). In assessing prejudice, that single aggravating circumstance must be contrasted with the two mitigating circumstances actually presented as well as the mitigating circumstances that trial counsel should have pursued. Under the circumstances presented, we conclude that there is a reasonable probability that at least one juror at Appellant's trial may have struck a different balance had such mental health mitigation evidence been presented.

Tharp, 101 A.3d at 774.

Herein, we likewise cannot say that, had trial counsel adequately reviewed the records from Housman's inpatient treatment at the Spartanburg Regional Medical Center, and/or had counsel obtained and reviewed, or had Dr. Schneider review, the records from Housman's outpatient treatment at the Spartanburg Mental Health Clinic, and offered at Housman's penalty trial that evidence, and the evidence derived therefrom that was presented at the PCRA hearing, the jury would still have returned a death sentence. The novel evidence presented at the PCRA hearing, including the more detailed account of Housman's abusive upbringing and his history of emotional, social, and psychological problems, as well as the serious diagnoses and poor prognoses by his treating psychiatric ***112** providers, would have supported Attorney Gilroy's submission of, and potentially at least one juror's finding of, two additional mitigating circumstances. At the very least, this same evidence may have resulted in at least one juror finding that the mitigating circumstances under the ****1287** catch-all mitigator collectively outweighed, or were as weighty as, the single aggravating circumstance, such that the penalty verdict would have been different.

Accordingly, for the foregoing reasons, and mindful of the deference that must be afforded to the findings of the post-conviction court, which hears evidence and passes on the credibility of witnesses, we conclude that the record supports the PCRA court's determination that Housman's claim that trial counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase had arguable merit; that trial counsel's performance lacked a reasonable basis; and that Housman suffered prejudice as a result of counsel's ineffectiveness. Accordingly, with respect to the Commonwealth's appeal, we affirm the PCRA court's grant of a new penalty trial.

In light of our affirmance of the PCRA court's grant of a new penalty trial on the basis of trial counsel's ineffectiveness in failing to investigate and present mitigating evidence at Housman's penalty phase, we need not address Housman's remaining penalty-phase claims. [18]

Order affirmed.

Chief Justice Saylor and Justices Baer, Donohue, Dougherty, Wecht and Mundy join the opinion.

All Citations

658 Pa. 49, 226 A.3d 1249

Footnotes

1 In capital cases, this Court has exclusive appellate jurisdiction over orders finally disposing of petitions for relief pursuant to the PCRA. *See* 42 Pa.C.S. §§ 722(4); 9546(d); *Commonwealth v. Williams*, 594 Pa. 366, 936 A.2d 12, 17 n.13 (2007).

2 18 Pa.C.S. § 2502(a).

3 18 Pa.C.S. § 2901.

4 18 Pa.C.S. § 3921.

5 18 Pa.C.S. § 2902(a).

6 18 Pa.C.S. § 5510.

7 18 Pa.C.S. § 903(a).

8 Markman also was sentenced to death, but, on direct appeal, this Court reversed her convictions and remanded for a new trial on the murder, kidnapping, and unlawful restraint charges, finding (1) that introduction of Housman's erroneously redacted confession violated Markman's confrontation rights under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998); and (2) that the jury should have been informed of the elements of the defense of duress. *See* *Commonwealth v. Markman*, 591 Pa. 249, 916 A.2d 586 (2007).

9 Housman does not presently challenge the denial of his motion to amend his PCRA petition.

10 Indeed, a review of the transcript reveals that only four of the statements were not introduced during Markman's presentation of a duress defense, and, further, that Housman's characterization of the evidence is inaccurate. For example, David Wriglesworth, the assistant store manager at the Wal-Mart where White and Housman once worked, was asked whether Housman was terminated from employment, and responded, “[y]es, he was.” N.T. Trial, 10/25/01, at 145. No witness testified that Housman was “lazy and could not hold down a job,” as Housman claims. Another witness, Joshua Kerstetter, a part-time employee at the Wal-Mart,

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described the day when White left work after she had received a call from Housman telling her his father had died. Kerstetter stated that White "was concerned that [Housman] was actually going to do harm to himself because he was so distraught over his father being dead." *Id.* at 149. There was no reference to Housman being "crazy."

Regarding evidence of Housman's prior incarceration, page 434 of the notes of testimony from October 26, 2001 reflects a discussion between the court and the attorneys regarding scheduling issues and a tape recording, but no reference to Housman having been previously incarcerated, as Housman claims.

Finally, Housman asserts that the Commonwealth introduced evidence that he lacked remorse, citing to page 313 of the transcript of October 26, 2001. Housman's Brief at 107. However, the only statement on that page pertaining to Housman's demeanor was a statement by Deputy Brian Vaughan, who, in response to the Commonwealth's questioning, indicated that Markman, at the time of arrest, "appeared to be hyperventilating, having trouble catching her breath," while Housman "wasn't having any such trouble." Housman, however, argues that the prosecutor utilized this statement to argue during his closing argument that Housman's subsequent showing of remorse was contrived because he had not shown remorse earlier. Appellant's Brief at 107. A review of the portion of the closing argument cited by Housman, however, does not reveal any statement regarding Housman's demeanor at the time of arrest, or suggestion that his demeanor at that time demonstrated a lack of remorse. *See* N.T. Trial, 11/1/01, at 148-49.

11 We recognize that, in its brief, the Commonwealth addresses several alleged hearsay statements beyond the one specifically identified by Housman in his brief. This, however, does not alter this Court's prohibition against incorporation by reference.

12 In *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994), this Court found reversible error where the trial court's instruction suggested that the jury could find that the defendant possessed the specific intent to kill required for a first-degree murder conviction based solely on an act of his accomplice. We clarified that the Commonwealth must prove beyond a reasonable doubt that the defendant independently possessed the requisite specific intent to kill, and that the same could not be proven by evidence of the intent to kill possessed by the defendant's accomplice or co-conspirator.

13 Indeed, while not dispositive, we note that the jury – the same jury that heard the guilt and penalty phase presentations against both Housman and Markman – found as a penalty phase mitigating factor for Markman that her participation in the killing was relatively minor, *Markman*, 916 A.2d at 597 n.7 (citing 42 Pa.C.S. § 9711(e)(7)), thereby highlighting Housman's predominate role.

14 On at least one occasion, Housman refers to this memorandum as "Dr. Venuti's report to Agent Oliver." Housman's Brief at 149. The memorandum, however, was not authored by Dr. Venuti; rather, the memorandum merely set forth Agent Oliver's recollection of his interview with Dr. Venuti.

15 Housman was 24 years old at the time of the crime.

16 As several of the witnesses who testified at the PCRA hearing refer to or rely on the reports of other witnesses, for clarity, in some instances we discuss the testimony out of order.

17 The Commonwealth quotes the following excerpt from *Daniels*:

> Given the case in mitigation already presented to the jury emphasizing both Daniels's troubled childhood as well as positive attributes and his religious conversion, and the substantial evidence in aggravation, we do not believe that the marginal additional mitigation evidence produced at the PCRA hearing was sufficient to establish a reasonable probability that the result of the penalty phase would have been different.

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Daniels, 104 A.3d at 310.

18 Specifically, Housman also alleges that trial counsel was ineffective for: (1) failing to object to unconstitutional and unduly prejudicial victim impact testimony; (2) failing to properly raise and litigate his claim that his right to silence, due process, and confrontation were violated; (3) failing to seek a penalty-phase severance, thus depriving him of due process and the individualized sentencing determination to which he was entitled under the Eighth and Fourteenth Amendments to the United States Constitution; and (4) failing to object to the erroneous submission of the (d)(6) aggravating circumstance (killing committed during the perpetration of a felony) to the jury. Housman's Brief at 79-87, 87-97, 127-133, 153-160.

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	OF CUMBERLAND COUNTY,
	:	PENNSYLVANIA
v.	:	
	:	NO: CP-21-CR-0246-2001
	:	
WILLIAM HOUSMAN	:	**THIS IS A CAPTITAL CASE**

IN RE: PETITION FOR POST-CONVICTION COLLATERAL RELIEF

ORDER AND OPINION OF THE COURT

AND NOW, this 2nd day of February, 2018, upon careful consideration of Defendant's Petition for Post-Conviction Collateral Relief, and after an evidentiary hearing on the matter and having reviewed the respective briefs in support of the opposing positions, we are satisfied that Petitioner has met his burden of proving that he is entitled to relief under the Post-Conviction Relief Act. For the reasons set forth below, the Petition is granted in part and denied in part; the request for relief in the form of a new penalty phase is granted; relief in the form of new trial is denied.

PROCEDURAL HISTORY

I. Trial and Direct Appeal Proceedings

On November 1, 2001, following a jury trial, Petitioner was convicted of the following: Count 1, Murder in the First Degree, 18 Pa.C.S.A. §2502(a); Count 2, Kidnapping, 18 Pa.C.S.A. §2901(a)(2)(3); Count 3, Theft by Unlawful Taking, 18 Pa.C.S.A. §3921(a); Count 4, Unlawful Restraint, 18 Pa.C.S.A. §2902(a)(1); Count 5, Abuse of Corpse, 18 Pa.C.S.A. §5510; and five counts of Criminal Conspiracy, 18 Pa.C.S.A. §903(a)(1). On November 5, 2001, following the penalty phase of trial, the jury returned a verdict of death on Count 1, finding one aggravating circumstance (that the killing was committed during the course of a felony, 42 Pa.C.S.A.

§9711(d)(6)), and two mitigating circumstances (troubled childhood and acceptance of responsibility under the catch-all mitigator, 42 Pa.C.S.A. §9711(e)(8)). On February 1, 2002, the court formally imposed the death sentence and, on the remaining counts, sentenced Petitioner to the following:

> Count 2: not less than four years (4) nor more than twenty (20) years in a State Correctional Institution, to run consecutive to the sentence imposed at Count 1;
>
> Count 3: not less than fourteen (14) months nor more than seven (7) years) in a State Correctional Institution, to run concurrent with the sentence at Count 2, but consecutive to the sentence at Count 1;
>
> Count 4: no sentence imposed because the crime merges with Count 2, Kidnapping;
>
> Count 5: not less than one (1) year nor more than two (2) years in a State Correctional Institution, to run concurrent with the sentence at Count 2, but consecutive with the sentence at Count 1;
>
> Count 6 (Conspiracy to Commit Homicide): not less than twenty (20) years nor more than forty (40) years in a State Correctional Institution, to run consecutive to the sentence at Count 1;
>
> Count 6 (Conspiracy to Commit Kidnapping): not less than nine (9) months nor more than five (5) years in a State Correctional Institution, to run concurrent with the sentence at Count 2, but consecutive to the sentence at Count 1;
>
> Count 6 (Criminal Conspiracy to Commit Unlawful Taking): no sentence imposed because the crime merges with Count 3, Theft by Unlawful Taking;
>
> Count 6 (Criminal Conspiracy to Unlawful Restraint): no sentence imposed because the crime merges with Count 2, Kidnapping; and
>
> Count 6 (Criminal Conspiracy to Abuse of Corpse): no sentence imposed because the crime merges with Count 5, Abuse of Corpse.

On February 11, 2002, Petitioner's trial counsel filed a post-sentence motion arguing, *inter alia*, that Petitioner was prejudiced by the trial court's failure to sever both the guilt phase and the penalty phase of the trial. On March, 2002, Petitioner's trial counsel filed a supplemental post-sentence motion. On August 1, 2002, the court appointed new counsel for Petitioner to

replace trial counsel. On January 23, 2003, Petitioner's new counsel filed Petitioner's second supplemental post-sentence motions, arguing, *inter alia*, that the trial court erred by failing to adequately redact the taped confession of the co-defendant. On May 25, 2004, the trial court denied all post-sentence motions.

On June 9, 2004, Petitioner filed a timely notice of appeal with the Pennsylvania Supreme Court. On December 29, 2009, the Court affirmed Petitioner's conviction and death sentence. *Commonwealth v. Housman*, 986 A.2d 822 (Pa. 2009).[1] Justice J. Michael Eakin authored the opinion of the Court. Justice Max Baer issued a dissenting opinion, stating that he would have reversed the conviction and remanded for a new trial because of the trial court's failure to sever the trial. Chief Justice Thomas Saylor issued a concurring and dissenting opinion, stating that he would affirm the conviction but convert the death sentence because of the trial court's failure to sever the trial. On March 12, 2010, the Court denied reargument. On October, 4, 2010, the United States Supreme Court denied Petitioner's Petition for Writ of Certiorari. *Housman v. Pennsylvania*, 131 S.Ct. 199 (Mem) (2010).

II. Post Conviction Relief Act Proceedings

On June 17, 2011, Petitioner filed a timely *pro se* petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§9541-9546. On May 22, 2013, Petitioner's counsel filed a First Amended Petition for habeas corpus and PCRA relief, arguing, *inter alia*, that trial counsel was ineffective.

On June 24, 2011, the Commonwealth filed a motion for a "Rule to Show Cause for Federal Community Defenders' Authority to Enter into State Case," arguing that Petitioner's counsel

[1] In the interim, Appellant's co-defendant, Beth Ann Markman's conviction and death sentence were overturned by the Pennsylvania Supreme Court due to the trial court's failure to properly redact Appellant's recorded confession, which was played during the guilt phase of the trial. Appellant elected not to testify during the guilt phase. *Commonwealth v. Markman*, 916 A.2d 586 (Pa. 2006).

violated federal law and the ethical standards of Pennsylvania by filing appearances in the case. This sole issue was removed to the United States District Court for the Middle District of Pennsylvania on August 7, 2013. The Hon. A. Richard Caputo of the Middle District court granted the Commonwealth's motion and denied as moot the Federal Community Defender's motion to dismiss. On June 12, 2015, the Third Circuit Court of Appeals held that disqualification proceedings brought against the Federal Community Defender were preempted by federal law and must be dismissed, reversing the judgment of the Middle District and remanding the matter with instructions that the Federal Community Defender's motion to dismiss be granted. *See In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 477 (3d Cir. 2015). On January 25, 2016, the United States Supreme Court denied the Commonwealth's petition for writ of certiorari. *Pennsylvania v. Fed. Cmty. Defender Org.* 136 S. Ct. 994 (2016).

On April 5, 2016, Petitioner filed simultaneously a Motion for Leave to Amend his first amended PCRA petition, an amendment to his first amended PCRA petition, and a Motion to Recuse the Cumberland County Court of Common Pleas. Petitioner's amendment raised constitutional claims regarding alleged apparent and/or actual bias on the part of former Justice Eakin, who authored the Pennsylvania Supreme Court opinion on Petitioner's direct appeal. Petitioner argued in his Motion to Recuse that the members of the Cumberland County bench demonstrated clear bias in favor of Justice Eakin when they joined in writing a letter to the Court of Judicial Discipline in his support, and therefore, they could not be impartial regarding Petitioner's claims.[2] On April 11, 2016, Petitioner's Motion for a full bench recusal was granted.

[2] The Hon. Jessica Brewbaker, only recently elected to the bench, and the Hon. Wesley J. Oler, Jr., Senior Judge, did not join in writing the letter to the Court of Judicial Discipline.

On July 22, 2016, the Commonwealth filed its response to Petitioner's Motion for Leave to Amend his first amended PCRA petition. On August 22, 2016, we heard argument on Petitioner's Motion to Amend and Petitioner's related Motion for Discovery, filed July 20, 2016. We directed the Commonwealth to respond to Petitioner's Discovery Motion. The Commonwealth responded on September 2, 2016. On September 23, 2016, we denied Petitioner's Motion to Amend his first amended PCRA Petition and again directed the Commonwealth to file an adequate response by November 15, 2016, stating whether it is in possession of the items requested by Petitioner in the Discovery Motion. The Commonwealth simultaneously filed a Motion to Have Defendant Undergo a Psychiatric Forensic Evaluation and its own Discovery Motion on November 10, 2016. It made a written response to Petitioner's Discovery Motion via email on November 15, 2016. We granted the Commonwealth's Motions on November 29, 2016.

On October 20, 2016, we set an evidentiary hearing on the PCRA Petition for February 16, 17, 20, and 21, 2017. On February 16, 2017, we continued the hearing to May 22, 23, and 24, 2017, due to the Court's medical issue. These dates were again changed to add June 12, 2017. We held a three-day evidentiary hearing, during which, Petitioner, his counsel and the Commonwealth were present. Petitioner presented numerous witnesses to support his contention that trial counsel was ineffective at his trial and penalty phase. The Commonwealth also offered its own expert to refute Petitioner's claim. After the close of testimony, we directed Petitioner to file his brief in support of his PCRA Petition by August 14, 2017, and for the Commonwealth to file its brief by September 29, 2017. On August 12, 2017, Petitioner requested an Extension of Time in which to file his brief. Specifically, counsel had just given birth and was unable to fully complete her portion of the brief. Co-counsel requested an additional week so that he could

complete her portion and submit the complete brief. We granted the request and extended the deadlines. Petitioner timely submitted his brief on September 1, 2017. The Commonwealth then requested an extension of time to file its brief due to the unavailability of the Commonwealth's attorney. We granted that request and extended the Commonwealth's briefing deadline. The Commonwealth timely submitted its brief on October 26, 2017.

BACKGROUND OF THE POST CONVICTION PROCEEDINGS

Petitioner and co-defendant Beth Ann Markman were tried together and found guilty of the murder of eighteen year-old college student Leslie White. In order to support her defense of duress, Markman presented evidence that she was a victim of domestic abuse by Petitioner.[3] Each of her ten witnesses testified to Petitioner's alleged abuse of Markman. Markman testified that, just days before the murder, Petitioner held her at knife point, stripped her naked, raped her, and threatened to kill her if she disobeyed him. During the penalty phase, she presented the expert testimony of a forensic psychologist specializing in trauma victims. This evidence was presented to the same jury that was to decide Petitioner's penalty.

One of the primary issues on Petitioner's appeal was whether the trial court erred by failing to sever the guilt and penalty phases of the trial from those of his co-defendant. On December 29, 2010, Justin Eakin authored the decision of the Pennsylvania Supreme Court which upheld the trial court's denial of Petitioner's motion to sever. The decision was joined by Justice McCaffery, then-Chief Justice Ronald Castille, Justice Debra Todd, and Justice Jane Greenspan.

Petitioner filed his Petition for Post-Conviction Relief on June 17, 2011. While disposition on the Petition was pending, two Justices of the Supreme Court of Pennsylvania became

[3] The trial court ultimately disallowed Markman from arguing duress to the jury and presenting expert testimony in support of such a defense. On Markman's direct appeal, the Pennsylvania Supreme Court held that the trial court erred by disallowing the duress instruction. *Commonwealth v. Markman*, 916 A.2d 586, 611 (Pa. 2007). Her case was remanded on March 26, 2009. She entered a guilty to murder in the first degree and numerous lesser charges on October 12, 2010.

involved in disciplinary proceedings. On October 27, 2014, following an order of suspension and an inquiry by the Judicial Conduct Board, Justice McCaffery resigned from his position as Pennsylvania Supreme Court Justice.[4] Justice Eakin later faced the same fate and resigned on March 15, 2016, following similar accusations of misconduct, an order of suspension and a hearing before the Judicial Conduct Board. On December 18, 2015, during the investigation into his alleged misconduct, the entire Cumberland County Bench, excepting Judge Brewbaker, issued a letter to the Judicial Conduct Board in support of Justice Eakin. Presiding Judge, Jack A. Panella, admonished the Cumberland Bench for what he deemed to be an attempt to influence the Board.

On April 5, 2016, Petitioner filed for a leave to amend his PCRA to add facts and a challenge regarding Justice Eakin's participation in the state Supreme Court's decision denying his appeal on the severance issue. Particularly, Petitioner called into question Justice Eakin's impartiality concerning the death penalty based on his comments and emails that surfaced during the investigation. It further moved to recuse the entire Cumberland County Bench for its support of Justice Eakin during his misconduct hearing, alleging that the bench was just as tainted and impartial as Justice Eakin by giving him support in the face of such relevant misconduct. A full bench recusal was granted on April 4, 2016, by President Judge Guido. However, the PCRA Court, with the Honorable Linda K.M. Ludgate presiding, denied the second Motion to Amend on September 23, 2016, and limited the evidentiary hearing to those raised in the first Amended Petition.

The Court held an evidentiary hearing on the Post-Conviction Relief Petition on May 22, 2017 through May 23, 2017, and on June 12, 2017. At hearing, Petitioner presented seven witnesses. The Commonwealth presented one.

[4] Amendment to Amended Petition for Writ of Habeas Corpus, April 5, 2016, p. 11.

Petitioner's half-sister, Cheryl McElwee testified at the hearing. She testified to the neglect and abuse that she and Petitioner suffered at the hands of their parents when they were quite young. She reiterated most of what she testified to at trial but with the addition that Petitioner was in the home and possibly saw his father severely beat mother at some point when Petitioner was around three (3) years old.[5] A gun was said to be involved and their Mother was hospitalized with a foot injury. She also restated that her family members, including their mother, Geneva Housman, knew of the proceedings but refused to testify on Petitioner's behalf at his penalty phase.

Petitioner's mother, Geneva Housman also testified. She had not testified at trial but stated at the evidentiary hearing that she would have if she would have been asked. Her testimony mimicked much of what Cheryl McElwee testified to beforehand regarding to Housman's Father's brutal nature, but from an adult's perspective.[6]

Kathleen Kaib testified on behalf of Petitioner. She testified that she is employed with the Federal Defenders as a mitigation specialist. She created a detailed life history report on Petitioner and testified to the investigation and process which led to her report.[7] This report was entered as an exhibit at the evidentiary hearing. It was not presented at trial.

Doctor Lenora Petty, a medical doctor specializing in child psychiatry, testified for Petitioner.[8] She treated Petitioner at the Spartanburg Regional Medical Center when he was a child. As his doctor at the Medical Center, she was aware of and reviewed Petitioner's outpatient treatment records at the Mental Health Clinic. She noted that the instability found in his early childhood had a negative impact on his mental health and wellbeing which was already patently

[5] *See* Cheryl McElwee's complete testimony. Transcript of Proceedings, *In Re: Evidentiary Hearing*, May 22-23, 2017 and June 12, 2017, Volumes I-II, Volume I at 174:17-202:4.
[6] *See* Geneva Housman's complete testimony. Tr. at 202:20-222:2.
[7] *See* Kathleen Kaib's complete testimony. Tr. at 382:4-404:12.
[8] *See* Dr. Petty's complete testimony. Tr. at 246:2-260:1.

clear by the time Petitioner was fifteen (15) years old. She acknowledged the bleak prognosis and parental abandonment described in the Spartanburg Mental Health Clinic records. She was never contacted by Trial Counsel despite her being Petitioner's doctor of record at the Medical Center.

Doctor John Warren testified at the evidentiary hearing as a forensic psychologist. He evaluated Petitioner's medical and psychological records, as well as his social history. He testified that a life history report is crucial when making a psychological evaluation in preparation for a penalty phase and detailed the importance of what was held in the Spartanburg Mental Health Clinic records that were missed at Petitioner's capital trial.[9]

Petitioner called Doctor Carol Armstrong, a neuropsychologist. She testified that after having evaluated Petitioner and his history, she concluded that he suffered from psychological impairments which included executive dysfunction and memory impairment, as well as severe Attention-Deficit/Hyperactivity Disorder.[10] This differed from the psychological conclusions expressed by Doctor Schneider at trial but she opined that it was based on a more comprehensive history of Petitioner.

Petitioner also called Hubert Gilroy, Petitioner's Trial Counsel.[11] He described the obstacles that he faced at trial concerning the severance issue, bad acts evidence and other motions. He further discussed his difficulty in presenting a penalty phase defense. He stated that most of Petitioner's family refused to cooperate and did not want to testify on Petitioner's behalf. He testified that while he did attempt to find every piece of information that could be a mitigating circumstance, he did not have any strategic reason for failing to thoroughly follow through on his mitigation investigation; he did not have a strategic reason for not obtaining the records from the

[9] *See* Dr. Warren's complete testimony. Tr. at 110:4-172:10.
[10] *See* Dr. Armstrong's complete testimony. Tr. at 231:12-247:7, and 300:20-306:17.
[11] *See* Attorney Gilroy's complete testimony. Tr. at 8:23-108:18.

Spartanburg Mental Health Clinic. Nor did he have a strategic reason for failing to call witnesses, like Doctor Petty, at trial to speak to and present the records from the Mental Health Clinic.

Appellate Counsel, David Foster, also testified.[12] His testimony concerned what he did and did not raise on appeal. He conceded that he would not have had any strategic basis for failing to raise issues concerning improper argument, improper jury instructions, and excessive victim impact testimony. But he did not concede that such error were obvious in the trial record.

The Commonwealth presented only Doctor John O'Brien, a board certified forensic psychiatrist.[13] He commented that the testimony of the Petitioner's witnesses did not touch the behaviors associated with the offense in this particular case. He also pointed out what he felt were problems in the review done by Dr. Warren. He stated that the age of the records used by Dr. Warren were problematic, and opined that Dr. Warren's diagnosis is inaccurate. He did not believe that Petitioner suffered from extreme mental and emotional disturbance. Nor did he believe that Petitioner was so mentally or emotionally impaired so as to not appreciate the criminality of his conduct or prevent him from conforming his conduct to societal expectations.

DISCUSSION

We believe that the Petitioner raised and supported one claim that would stand to warrant a new penalty phase under Petitioner's Claim XIV. This Claim alleges that Trial Counsel was ineffective at Petitioner's Capital Sentencing where he failed to investigate, develop and present compelling mitigation evidence. We are satisfied that this claim is supported by the record. Moreover, the improper arguments and victim impact testimony challenged in Claims XIII and

[12] *See* Attorney Foster's complete testimony. Transcript of Proceedings, *In Re: Evidentiary Hearing*, June 12, 2017, Volume II, at 6:10-27:8.
[13] *See* Dr. O'Brien's complete testimony. Tr. at 309:9-380:17.

XII, when taken cumulatively with Claim XIV, support the finding of ineffectiveness and the granting of a new penalty phase. Therefore, we will address Claim XIV first, followed by Claims XIII and XII. All of the remaining claims contain issues that were previously litigated or are without support, and we are satisfied that they do not warrant relief separately or cumulatively.

Claim XIV

Trial counsel has an obligation to conduct a thorough investigation of a capital Petitioner's background in preparation for the penalty phase of trial. This obligation includes the duty to discover *all reasonably available* mitigating evidence. *Commonwealth v. Spotz*, 47 A.3d 63 (Pa. 2012); *Commonwealth v. Gribble*, 863 A.2d 455 (Pa. 2009) *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008); *Commonwealth v. Rainey*, 928 A.2d 215 (Pa. 2007); *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004).[14] This obligation encompasses the requirements of capital counsel to conduct a thorough pretrial investigation of mitigating evidence, to make reasonable decisions that make further investigation unnecessary, and to pursue all reasonable avenues for developing mitigating evidence. *Commonwealth v. Tharpe*, 101 A.3d 736 (Pa. 2014); *Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012); *Commonwealth v. Tedford*, 960 A.2d 1 (Pa. 2008); *Commonwealth v. Williams*, 936 A.2d 12 (Pa. 2007); *Commonwealth v. Malloy*, 856 A.2d 767 (Pa. 2004); *Commonwealth v. Smith*, 675 A.2d 1221 (Pa. 1996).

In evaluating an ineffectiveness claim alleging counsel's failure to investigate and present mitigation evidence in a capital case, we must consider a number of factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the additional or different mitigation evidence that could have been presented. Nonetheless, even if counsel's investigation is deemed unreasonable, the defendant must demonstrate that he

[14] We recognize that Pennsylvania case law on this issue aligns with the federal cases and therefore will dispense with the federal case citations.

suffered prejudice as a result of counsel's conduct. *Commonwealth v. Tharp*, 101 A.3d 736 (Pa. 2014).

Here, the evidence at the evidentiary hearing demonstrated that Counsel's penalty phase investigation was unreasonable. Specifically, Counsel had information on readily available mental health records from the Spartanburg Mental Health Clinic. He failed to contact the Mental Health Clinic, obtain those records and investigate into them further. Counsel erroneously assumed that the records from the Mental Health Clinic would be the same as those he would obtain from the Spartanburg Regional Medical Center; he believed the two entities were on in the same. Despite the vast differences between the names, he chose to only look into one of the two. He only obtained medical records from the Regional Medical Center, a hospital. He never obtained the mental health records from the Mental Health Clinic. However, had he done even a cursory search of the records he did obtain from the Regional Medical Center, a search of the differently named Mental Health Clinic, he would have had observations from Doctors Hope and Petty who treated Petitioner for psychiatric disorders as an adolescent, and who had knowledge of the Petitioner's records at the Mental Health Clinic. He also would have had evidence of severe mental health diagnoses. Moreover, he would have had the treating doctors' sense of Petitioner's family background/home-life at that time. At the PCRA evidentiary hearing, Trial Counsel conceded that he had no reasonable basis for not investigating into both the Regional Medical Center and the Mental Health Clinic, and that he did not have any reasonable basis for failing to obtain the complete records therefrom.

Since Counsel's failure to investigate and present mitigation evidence was unreasonable, we must evaluate the prejudice, if any, suffered by Petitioner due to such failure. To establish prejudice in an ineffective assistance of counsel claim involving failure to investigate and present

mitigating evidence at the penalty phase, the Court must consider not only the evidence and argument presented at the penalty phase but also the evidence and argument that would have been presented at the penalty hearing had trial counsel properly investigated such evidence. *Commonwealth v. Ligons*, 971 A.2d 1125, 1150 (Pa. 2009); *Commonwealth v. Malloy*, 856 A.2d 767, 789 (Pa. 2004). In assessing the probability of a different outcome, the court must reweigh the evidence in aggravation against the totality of available mitigating evidence; this includes the evidence adduced on collateral review, and which would have been presented had counsel conducted a proper investigation. *Commonwealth v. Koehler*, 36 A.3d 121 (Pa. 2012); *Ligons*, 971 A.2d 1125; *Malloy*, 856 A.2d 767.

A reasonable probability that the defendant would have been able to prove at least one additional mitigating circumstance and at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones had additional mitigation evidence been presented at the penalty phase, is a probability sufficient to undermine confidence in the death verdict that the jury returned. *Commonwealth v. Gibson*, 19 A.3d 512 (Pa. 2011). Of course, the a court can never make with absolute certainty the determination of how the jury would have evaluated testimony it never heard, but it can evaluate the relative strength of the aggravation and mitigation circumstances and the arguments to be made thereon in light of a full and complete record. *Commonwealth v. Koehler*, 36 A.3d 121 (Pa. 2012). It is also important to note that since the determination is fact-intensive, the individual decisions of these types of cases are rarely precedential. *See Commonwealth v. Gibson.*

If Counsel would have presented the missing records at trial, the jury would have seen that Petitioner's parents abandoned him to whatever mental instability that he had when he was young and vulnerable. We believe that the argument would reasonably be that he was doomed

from the start. The Spartanburg doctors' diagnosis, prescription for treatment and prognosis for the adolescent Petitioner all fell on deaf ears. Petitioner's parents felt that he was the problem and that he needed to change, but they did not offer any support to help the child change or handle his problems. They washed their hands of him. Petitioner was a child, he could not provide for his own well-being. His parents had a duty to care for his needs, his medical and mental health, to provide for his well-being, but they refused to help him. They refused to get him necessary treatment. Petitioner fell off of the map treatment-wise until the actions that led in this case. As an adolescent, he had a poor prognosis for the future; [15] and that prognosis proved prophetic, all because his parents gave up on him. We believe that this insight into Petitioner's background could possibly have swayed a juror who was deciding whether death is the warranted punishment against the presumption of life. This was exacerbated by the fact that also within the Spartanburg Mental Health Clinic records were more severe diagnoses than what Doctor Schneider had reviewed and the jury had heard.

There is no certainty in assessing the relative heinousness of murders as against evidence in mitigation. We do not have a crystal ball to tell us what would or would not have happened. Nonetheless, given the profound circumstances and utter unfairness surrounding this case, there is a reasonable probability that, but for Counsel's deficiencies, at least one juror would view both the mitigation case and overall penalty judgment differently, and would have decided against the imposition of the death penalty. Accordingly, we were satisfied that Petitioner met his burden under Claim XIV of the Petition.[16]

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[15] Transcript of Proceedings, *In Re: Evidentiary Hearing*, May 22-23, 2017 and June 12, 2017, Volume I-III, at 125:-128:14 and 253:4-257:11.

[16] We note that despite PCRA Counsels' failure to adequately articulate their legal application and argument under this claim in their brief, we nonetheless were obligated to thoroughly analyze the facts and apply the law under the discernable claim of counsel ineffectiveness for the failure to conduct a thorough investigation of a capital defendant's mitigation case.

Claim XIII

We were satisfied that even the slight weight given to the influence of the improper arguments concerning Petitioner's silence bolsters the prejudice already suffered by Petitioner from Trial Counsel's failure to fully investigate readily known and available mitigation evidence and present such at the penalty phase. On its own, the claim would likely fail, but cumulatively, it supports the granting of new penalty phase. The taint of the improper arguments coupled with the devastatingly poor investigation into Petitioner's mitigation defense call into question the jury's verdict of death.

Claim XII

Claim XII, like XIII, does not fail outright when reviewed cumulatively with the strength of Claim XIV. We are satisfied that the victim impact testimony was somewhat unduly influential and therefore Trial Counsel's failure to object to has bearing in light of the strength if Claim XIV. As with Claim XII, on its own, Claim XII would fail to warrant relief, but given the totality of the claims and the strength of Claim XIV on its own, the aggregate prejudice suffered from Trial Counsel's ineffectiveness under the three claims taken cumulatively is enough to warrant a new penalty phase.

Remaining Claims

Claim I fails. Petitioner raises the same due process issue that was raised on direct appeal but couches it in ineffectiveness of appellate counsel. The claim rests on Appellate Counsel's failure to "properly" raise and litigate the issue. However, the claim fails because it also rests on the very same facts upon which the Supreme Court denied the claim and upheld the verdict and sentence of death. The complete record was before our appellate courts. The state's highest court did not find that Petitioner was so prejudiced so as to have been deprived of his right to due

process. Petitioner did not supply any additional facts that appellate counsel missed in order for there to be a basis of error that would create a probability of a different result. He merely threw arguments at the wall that Appellate Counsel could have used based on the same record before the Supreme Court. Yet, even assuming, *arguendo*, that counsel's failure to present such arguments was unreasonable, Petitioner failed to show how any of the "missed" arguments would have made a difference in the appellate case to warrant relief. Since the strongest issues/arguments (concerning severance) were raised and denied based on these facts, it is unlikely that any other arguments based on these very same facts would have persuaded the appellate courts otherwise. Petitioner failed to meet his burden of demonstrating a reasonable probability that the outcome would have been different had appellate counsel made the minute additions to his arguments.

Claim V does not warrant relief. It relies on the medical examiner to solve the "whodunit" as to the ultimate cause of death where two individuals are simultaneously in the act/process of killing someone. Moreover, as trial counsel noted for his strategic reason, such nitpicking would not likely have helped his case. The jury would likely have found it empty. After all, the jury convicted and sentenced both Markman and Petitioner to death, knowing that it would be virtually impossible for both to have committed the exact action that killed White. It did not matter to the jurors which defendant actually caused the death; both were nonetheless equally responsible for the death in the eyes of the jury. Each took a substantial part in the totality of the crime with the intent to bring about the outcome. Once again, even assuming that Trial Counsel's omission of evidence constituted an unreasonable error, Petitioner failed to meet his burden of demonstrating prejudice- that there is a reasonable probability that the outcome would have been different but for appellate counsel's error. Therefore Claim V fails.

Claim VI fails. Counsel cannot be deemed ineffective for failing to predict what would be declared a faulty jury instruction.[17] The case used by Petitioner to demonstrate that the very instruction given in Petitioner's case was erroneous was decided years after Petitioner's conviction. *See Laird v. Horn*, 404 F.3d 700 (3d Cir. 2005). It just happened to challenge that same instruction which the courts had been using for years in murder cases prior to the decision that deemed such instruction inadequate and unconstitutional. But, Counsel cannot be deemed ineffective for failing to predict subsequent changes in the law. Instead, Petitioner must demonstrate that counsel was incompetent under the law in existence at the time of trial. *See Commonwealth v. Ogrod,* 839 A.2d 294 (Pa. 2003); *Commonwealth v. Carpenter,* 725 A.2d 154 (Pa. 1999). To the extent that Petitioner's argument relies on *Laird,* it necessarily fails. Petitioner cannot demonstrate that prior counsel was ineffective for failing to object to the instruction on the basis of jurisprudence first articulated in later cases. *See Commonwealth v. Gribble*, 863 A.2d 455, 464 (Pa. 2004).

Claim VII should be denied. Aside from the same reasons for denial discussed in Claims I and VII, the Petitioner plainly failed to meet his burden due to his lack of specificity as to which instances of hearsay he means to address here. Neither the petition nor memorandum specify exactly how counsel erred or how Petitioner was prejudiced. Instead, Petitioner posits vague claims regarding the hearsay allegedly introduced at trial. He states that trial counsel failed to object to "some" of the hearsay and that appellate counsel only raised "some" of the instances where trial counsel failed to object to such hearsay. We cannot address a generalized presentation of such a fact-intensive claim. Being that objections were raised at trial to "some"

[17] We do note that Petitioner's case was pending on direct appeal when the jury instruction was held to be unconstitutional. However, Petitioner raises the issue in the form of trial counsel ineffectiveness which cannot stand for the reasons stated. Therefore, we will not speculate as to whether the claim could have been properly raised pending direct appeal or upon this collateral appeal in some other way.

hearsay evidence, and that "some" of the objected to and not objected to hearsay was raised and addressed on appeal, it was important for Petitioner to point to the specific instances of hearsay (*i.e.*, those instances not addressed and insufficiently addressed on direct appeal) he wished to address here. He first would have to demonstrate that these instances were not of those previously litigated. Then he would have to demonstrate that these instances were surely error and not the product of some strategic choice on the part of counsel, and then that but for counsels' errors, there is a reasonable probability that the raising of such at trial or on appeal would have made a difference in the outcome of the trial. It is further claimed that Appellate Counsel failed to include discovery and federal challenges when challenging the hearsay that he did raise on direct appeal. But, once again, without specific application to what Appellate Counsel did and did not raise and how the issues could have been raised, it is impossible to ascertain the error and prejudice therefrom. As such, Petitioner simply did not meet his burden on Claim VII.

Claim VIII does not succeed. This claim is tied in with Claim I, which raises the severance issue under the due process claim. For the same reason as Claim I (and for one of the reasons of Claim VII), the claim fails. The bad acts and the alleged "corroborating hearsay" only came in because of the court's refusal to sever the trials. The instances of admitted bad acts were used on appeal as facts in support of demonstrating the prejudice caused by the court's alleged failure to sever the trials. But, on the same facts as we have before us concerning this very Claim, the Supreme Court denied relief on Petitioner's due process/fair trial claim which encompassed severance, the admitted bad acts evidence and the hearsay presented at trial through co-defendant Markman's defense.

Claim IX fails for the same lack of specificity found in Claim VII. Petitioner claims ineffectiveness for prior counsels' failure to object to instances of prosecutorial misconduct but fails himself to specify the exact instances of misconduct that warrant relief. With the specifics surrounding the alleged improper arguments, etcetera, the Court cannot make a determination as to whether the choice to not object was strategic, or whether, if the failure was unreasonable, it caused sufficient prejudice to the Petitioner so as to warrant relief. And he does not demonstrate how the Court failed to instruct the jury as to the arguments of counsel not being evidence. Therefore, this Claim fails.

Claim X fails. Once again, the severance claim was previously litigated. Here, Petitioner just couches it in ineffectiveness of prior counsel. However, prior counsel did raise the severance issue at trial and on appeal. The fact that prior counsel did not succeed on the challenges does not mean that they were ineffective. Petitioner did not present anything at hearing that would create a probability that the trial and appellate courts would have decided differently in light of an ineffectiveness claim. The facts remain the same. The Supreme Court did not find any reversible error in Petitioner's guilt or penalty phases of his capital case based on these facts which clearly included the joinder of his trial with co-defendant Markman and all that it entailed for Petitioner's own case. Raising the ineffectiveness claim does not create a probability that the court will now find prejudice in the very same facts where it had not before, without any supplement to the initial set of facts pertaining to the severance issue. This Claim must fail.

Claim XI fails. We find it disingenuous for Petitioner to continually play the "accomplice" card as an uncontested fact. At trial, both co-defendants pointed the finger at the other. The jury was free to believe, based on the facts presented at trial and strength of the

Commonwealth's case, that either was a principal and not a mere accomplice. The Claim does not succeed.

For the above reasons above, we find that the confidence in the verdict of death has been undermined by Trial Counsel's deficiencies. Consequently, Petitioner's Petition for Post-Conviction Collateral Relief in the form of a new penalty phase is **GRANTED**, the sentence of death is **VACATED** and Petitioner is **GRANTED A NEW PENALTY PHASE**. The Petition in all other respects is **DENIED.**

By the Court,

Linda K.M. Ludgate, S.J.

Distribution:

Office of the District Attorney of Cumberland County

Shawn Nolan, Esquire
Federal Community Defender, Capital Habeas Office
601 Walnut Street, Suite 545
Philadelphia, PA 19106

Court Administrator

COMMONWEALTH	:	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA
	:	
v.	:	
	:	CP-21-CR-0246-2001
	:	
WILLIAM HOUSMAN	:	**CAPITAL**

IN RE: OPINION PURSUANT TO Pa. R.A.P. 1925

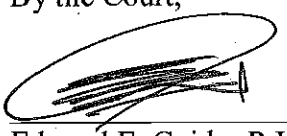
Ludgate, S.J., April 11, 2018

On February 2, 2018, we entered an order upon Petitioner's Petition for Post-Conviction Collateral Relief which granted relief in part, in the form of a new penalty phase, and denied relief in all other respects. Both the Commonwealth and Petitioner filed timely appeals from that Order. We will adopt the rationale set forth in our Opinion of February 2, 2018 in support of our Order. That Opinion encompasses each of the allegations of error raised by the parties save for Petitioner's allegation of error XIX. We will address allegation of error XIX in this opinion below.

In Petitioner's allegation of error XIX, he alleges that we erred in denying his Motion for Leave to Amend the Petition to include a claim of judicial bias regarding his adjudication on direct appeal. We believed that the timeframe of the Justice's controversial emails did not coincide with Petitioner's adjudication on direct appeal. Moreover, even if the timeframe in which the emails arose would have been relevant, we did not believe that such would have made a difference in Petitioner's case. We believe that the Opinion of the Supreme Court addressing the issue of trial joinder, not the constitutionality of capital punishment itself, rendered moot any supposed bias relating to the penalty as it concerned Petitioner. Therefore, we denied the Petitioner's Motion for Leave to Amend the Petition.

With our opinion above and our Opinion filed on February 2, 2018, we have addressed all of the errors raised on appeal. Accordingly, the record does not require further supplementation and the Clerk of Courts is directed to transmit the same to the Supreme Court of Pennsylvania for disposition of the appeal.

By the Court,



Edward E. Guido, P.J.
On Behalf of L.K.M. Ludgate, S.J.

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Clerk of Courts