

OCTOBER TERM, 2026

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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MARCEL EMANUEL JOHNSON,  
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,  
Respondent.

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On Petition for Writ of Certiorari to the  
Supreme Court of Pennsylvania

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APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI

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— CAPITAL CASE —

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Dated: August 20, 2026

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353 A.3d 609

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee

v.

Marcel Emanuel JOHNSON, Appellant

No. 813 CAP

|

Submitted: February 26, 2025

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Decided: March 26, 2026

**Synopsis**

**Background:** After petitioner's convictions of two counts of first-degree murder, one count of third-degree murder, arson endangering persons, and possessing instruments of crime and his capital sentence were affirmed on direct appeal by the Supreme Court, No. 711 CAP, 639 Pa. 196, 160 A.3d 127, petitioner filed petition under Post Conviction Relief Act (PCRA). The Court of Common Pleas, Bucks County, Criminal Division, No. CP-09-CR-0001413-2014, Diane E. Gibbons, J., denied petition in its entirety. Petitioner appealed.

**Holdings:** The Supreme Court, No. 813 CAP, Wecht, J., held that:

[1] any failure to disclose *Brady* evidence regarding jailhouse informant was insufficiently material and prejudicial to warrant relief;

[2] any failure to disclose *Brady* evidence regarding petitioner's brother was insufficiently material and prejudicial to warrant relief;

[3] any deficiencies in informant's testimony were insufficiently material for due process to oblige Commonwealth to correct them;

[4] defense counsel's facially deficient investigation into alternate killers was not prejudicial;

[5] any failure by defense counsel to adequately challenge expert testimony as to presence of victim's DNA under petitioner's fingernails was not prejudicial;

[6] defense counsel's failure to present character witnesses at guilt phase of trial was not prejudicial;

[7] petitioner was not prejudiced by any deficiency in defense counsel's objections to limitation of mitigation experts' testimony;

[8] petitioner was not prejudiced by any deficiencies in defense counsel's investigation into relatives as potential witnesses for mitigation;

[9] defense counsel's failure to object to testimony supporting witness-killing aggravator was not prejudicial; and

[10] fact that prosecutor was running unopposed for seat on Court of Common Pleas at time of PCRA hearing before same court did not require PCRA judge's recusal.

Affirmed.

McCaffery, J., filed opinion concurring in part and dissenting in part.

Donohue, J., filed dissenting opinion in which McCaffery, J., joined.

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

West Headnotes (59)

[1] **Criminal Law** 🔑 **Specification of errors**

On direct appeal of a capital conviction, the Supreme Court considers the sufficiency of the evidence regardless of whether the defendant raises a sufficiency challenge.

[2] **Criminal Law** 🔑 **Interlocutory, Collateral, and Supplementary Proceedings and Questions**  
**Criminal Law** 🔑 **Post-conviction relief**

On appeal from the denial of Post Conviction Relief Act (PCRA) relief, the Supreme Court's standard of review calls for it to determine whether the ruling of the PCRA court is supported by the record and free of legal error. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

2 Cases that cite this headnote

[3] **Criminal Law** 🔑 Review De Novo

On appeal from the denial of relief under the Post Conviction Relief Act (PCRA), the Supreme Court reviews questions of law de novo. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

1 Case that cites this headnote

[4] **Criminal Law** 🔑 Matters or Evidence Considered

**Criminal Law** 🔑 Judgment, sentence, and punishment

The Supreme Court's scope of review of the denial of relief under the Post Conviction Relief Act (PCRA) is limited to the PCRA court's findings and the evidence of record, viewed in the light most favorable to the Commonwealth as the prevailing party. 42 Pa. Cons. Stat. Ann. § 9541 et seq.

2 Cases that cite this headnote

[5] **Criminal Law** 🔑 Multiple particular grounds

A new trial may be awarded to a defendant due to cumulative prejudice accrued through multiple instances of trial counsel's ineffective representation. U.S. Const. Amend. 6.

[6] **Criminal Law** 🔑 Materiality and probable effect of information in general

Relief for a *Brady* violation is due when a court determines that the favorable evidence withheld was material, meaning that prejudice must have ensued.

[7] **Constitutional Law** 🔑 Failure to correct false testimony

The Commonwealth's knowing and willful failure to correct false testimony implicates due process protections. U.S. Const. Amend. 14.

[8] **Criminal Law** 🔑 Effect of perjured testimony; remedy

The Commonwealth's knowing and willful failure to correct false testimony in violation of due process requires relief if there is any reasonable likelihood that the uncorrected testimony could have affected the judgment of the jury. U.S. Const. Amend. 14.

[9] **Criminal Law** 🔑 Effectiveness of Counsel  
**Criminal Law** 🔑 Issues, proof and variance

To support a claim for ineffective assistance of counsel, a Post Conviction Relief Act (PCRA) petitioner must plead and prove three things, and failure to prove any one prong of this test will defeat the claim: first, that the claim has arguable merit; second, that counsel could have had no reasonable basis for the challenged action or omission (subject to the presumption that counsel is acting effectively); and third, that the ineffectiveness caused him prejudice. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i), (ii).

[10] **Criminal Law** 🔑 Prejudicial effect

Prejudice, as an element of a claim for ineffective assistance of counsel in a petition under the Post Conviction Relief Act (PCRA), occurs where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i), (ii).

[11] **Criminal Law** 🔑 Materiality and probable effect of information in general

Prejudice due to a *Brady* violation occurs when a defendant shows a reasonable probability that, had the evidence at issue been disclosed to the defense, the result of the proceeding would have been different.



**[12] Criminal Law** ➡ Materiality and probable effect of information in general

A reasonable probability that the result of the proceeding would have been different but for a *Brady* violation, as the standard for showing prejudice from such a violation, does not mean that the defendant would more likely than not have received a different verdict had the evidence at issue been disclosed; it means only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.

**[13] Criminal Law** ➡ Impeaching evidence

The *Brady* disclosure obligation extends to information that may be used to impeach prosecution witnesses.

**[14] Criminal Law** ➡ Impeaching evidence

Any implication, promise, or understanding that the government would extend leniency in exchange for a witness' testimony is relevant to the witness' credibility, supporting disclosure of that information under *Brady*.

**[15] Criminal Law** ➡ Diligence on part of accused; availability of information

*Brady* is not violated when the defendant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources.

**[16] Criminal Law** ➡ Sanctions for failure to disclose

In order to be entitled to a new trial for failure to disclose *Brady* evidence affecting a witness's credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence.

1 Case that cites this headnote

**[17] Criminal Law** ➡ Impeaching evidence

The prospect of prosecutorial leniency for a witness in return for the witness's testimony implicates the obligation of disclosure under *Brady*.

1 Case that cites this headnote

**[18] Criminal Law** ➡ Conduct and argument of prosecutor

Any failure by prosecution to disclose *Brady* evidence regarding jailhouse informant's alleged history of trading cooperation with investigators in various cases, including allegedly false jailhouse confessions, for favorable treatment in his own case was insufficiently material and prejudicial to warrant relief from defendant's convictions for first- and third-degree murder under Post Conviction Relief Act (PCRA), even though informant's testimony that defendant confessed to murder in jail was only direct evidence of his guilt; no promise of leniency, express or implied, was made to informant, evidence at issue was cumulative of other evidence about informant's history that was introduced at trial or possessed by defense, and unrelated evidence of defendant's guilt was overwhelming. 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i).

**[19] Criminal Law** ➡ Conduct and argument of prosecutor

Any failure by prosecution to disclose *Brady* evidence that police had threatened defendant's brother with being prosecuted for his role in events giving rise to defendant's murder charges in order to obtain brother's testimony was insufficiently material and prejudicial to warrant relief from defendant's convictions for first- and third-degree murder under Post Conviction Relief Act (PCRA), even though such evidence might have reflected poorly on brother's credibility as witness for Commonwealth; brother's testimony that defendant told him before murders that defendant wanted money was cumulative of

other, unchallenged testimony, evidence of motive was not necessary for convictions, brother's other testimony was materially corroborated, and unrelated evidence of guilt was overwhelming. 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i).

**[20] Criminal Law** 🔑 Effect of perjured testimony; remedy

If the defendant establishes that the prosecutor knowingly allowed false testimony to stand uncorrected, the burden rests with the Commonwealth to establish lack of prejudice.

2 Cases that cite this headnote

**[21] Criminal Law** 🔑 Conduct and argument of prosecutor

Any deficiencies in jailhouse informant's testimony, at defendant's capital murder trial in which informant's testimony about defendant's confession was sole direct evidence of guilt, that informant had offered Commonwealth information and testimony in defendant's case in exchange for personal benefits in informant's own pending criminal matters, were not material, and thus, any failure by Commonwealth to correct informant's testimony, as required by due process, did not warrant relief under Post Conviction Relief Act (PCRA); informant testified truthfully that he hoped for but had not been promised assistance in exchange for testimony, omitting only his expectation of future assistance with one pending matter out-of-state, and circumstantial evidence of defendant's guilt was overwhelming. U.S. Const. Amend. 14; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i).

**[22] Criminal Law** 🔑 Conduct and argument of prosecutor

On a petition under the Post Conviction Relief Act (PCRA), a due process violation for failure to correct false testimony is subject to the materiality analysis that applies to other *Brady* violations. U.S. Const. Amend. 14; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(i).

**[23] Criminal Law** 🔑 Strategy and tactics in general

Defense counsel's strategy at trial is only as reasonable as the investigation that supported such strategy, for purposes of a claim of ineffective assistance of counsel. U.S. Const. Amend. 6.

**[24] Criminal Law** 🔑 Determination

In evaluating a claim of ineffective assistance of counsel, the Supreme Court must grant a heavy measure of deference to counsel's judgments. U.S. Const. Amend. 6.

**[25] Criminal Law** 🔑 Prosecution's right to disclosure

The Rules of Criminal Procedure do not impose a discovery obligation on the defendant to produce the results of investigations that he does not intend to introduce in his case-in-chief. Pa. R. Crim. P. 573(C).

**[26] Criminal Law** 🔑 Preparation for trial

Defense counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary.

**[27] Criminal Law** 🔑 Preparation for trial

Defense counsel's failure to conduct an investigation must be informed by a reasonable strategy.

**[28] Criminal Law** 🔑 Effectiveness of Counsel

In reviewing a claim of ineffective assistance of counsel, as a basis for Post Conviction Relief Act (PCRA) relief, a court cannot allow 20/20 hindsight to cloud its consideration of the context in which trial counsel made tactical and strategic



decisions. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii).

[29] **Criminal Law** 🔑 Preparation for trial

**Criminal Law** 🔑 Raising of Particular Defense or Contention

**Criminal Law** 🔑 Investigating, locating, and interviewing witnesses or others

There was no reasonable probability that, but for defense counsel's failure to conduct thorough investigation into alternate possible killers, including by identifying witnesses from victim's phone records which police also had failed to investigate, result of defendant's trial for first- and third-degree murder and related offenses would have been different, and thus, counsel's facially deficient investigation was insufficiently prejudicial to constitute ineffective assistance of counsel, even if investigation would have revealed other persons had opportunity to kill victims; circumstantial evidence of defendant's guilt would still have been overwhelming even if defense counsel had introduced evidence of other possible killers or used it to impeach quality of police investigation. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii).

[30] **Criminal Law** 🔑 Preparation for trial

The law counsels against applying a per se rule finding prejudice, as an element of a claim for ineffective assistance of counsel, any time trial counsel's investigation is wanting. U.S. Const. Amend. 6.

[31] **Criminal Law** 🔑 Impeachment or contradiction of witnesses

Any failure by defense counsel, prior to trial for first- and third-degree murder, to investigate and obtain prison records and records concerning jailhouse informant's own pending criminal matters out of state did not prejudice defendant, and thus, did not constitute ineffective assistance of counsel, even if counsel could have used records to conduct more rigorous examination and impeachment of informant, whose testimony

about defendant's jailhouse confession was sole direct evidence of guilt; Commonwealth only offered limited assistance to informant and never offered anything relative to out-of-state cases in return for testimony, informant testified about his pending matters and hope to gain benefits by testifying, and unrelated, circumstantial evidence of guilt was overwhelming. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii).

[32] **Criminal Law** 🔑 Impeachment or contradiction of witnesses

Any failure by trial counsel to impeach defendant's brother, who testified for Commonwealth at trial for first- and third-degree murder, using Commonwealth's alleged threats to prosecute brother if he did not cooperate did not prejudice defendant, and thus, did not constitute ineffective assistance of counsel; brother's evidence was generally cumulative of evidence presented and was not essential to the overwhelming circumstantial evidence of defendant's guilt, as fortified by other evidence including defendant's jailhouse confession, and brother's sole distinctive contribution merely indicated defendant's motive was to gain money, which was not element of murder or particularly important given strength of circumstantial case. U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii).

[33] **Criminal Law** 🔑 Identification

Defense counsel can be deemed ineffective for failing to educate himself with respect to the import and credibility of DNA evidence introduced by the Commonwealth in a criminal trial; such evidence is especially potent when it points an accusatory finger at the defendant, which makes it especially important that counsel prepare to meet such evidence armed with whatever means of rebuttal are available. U.S. Const. Amend. 6.

[34] **Criminal Law** 🔑 Evidence and witnesses

Any failure by trial counsel to adequately challenge admissibility or weight of Commonwealth expert's testimony regarding presence of victim's DNA under defendant's fingernails, which expert opined required "intimate contact," did not prejudice defendant, and thus, did not support post-conviction relief on basis of ineffective assistance of counsel, even though identity was central to defense, expert's opinion as to "intimate contact" was unsupported by sole scientific source he cited, and victim's DNA was only physical evidence that might tie defendant to crime, where non-DNA evidence of defendant's guilt, including jailhouse confession and circumstantial evidence, was overwhelming, and DNA evidence, including on weapon handle, was generally inconclusive and unhelpful to prosecution. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii)*.

[35] **Criminal Law** 🔑 Presentation of witnesses

**Criminal Law** 🔑 Character of accused

Defense counsel may be deemed ineffective for failing to present character witnesses. *U.S. Const. Amend. 6*.

[36] **Criminal Law** 🔑 Character of accused

Defense counsel did not perform deficiently by failing to present witnesses at guilt phase of trial for first- and third-degree murder to testify as to defendant's good character and non-violent reputation; if counsel had presented character witnesses, Commonwealth could have presented rebuttal evidence such as witness who had told defense investigator that defendant had committed armed robberies in past, and positive character testimony was unlikely to be strongly beneficial to defense. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii)*.

[37] **Criminal Law** 🔑 Evidence and witnesses

Defense counsel's failure to present witnesses at guilt phase of trial for first- and third-degree murder to testify as to defendant's good character and non-violent reputation did not

prejudice defendant, as necessary to warrant post-conviction relief on basis of ineffective assistance of counsel; having good reputation in community would not have diminished overwhelming strength of Commonwealth's case, including defendant's reckless flight from scene around time of murders, changing stories he told investigators, presence of victim's DNA under his fingernails, his putative confession to jailhouse informant, and evidence exhibiting his consciousness of guilt. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii)*.

[38] **Criminal Law** 🔑 Grounds in general

In reviewing petition for post-conviction relief from convictions for first- and third-degree murder and other offenses, when considering whether counsel's various alleged errors at guilt phase of trial cumulatively prejudiced defendant despite lacking prejudicial effect considered separately from each other, Supreme Court would not consider trial counsel's alleged ineffectiveness for failure to present character evidence, where Supreme Court had not only rejected character-evidence claim due to lack of prejudice, but had also found trial counsel had reasonable basis not to present character witnesses. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii)*.

[39] **Criminal Law** 🔑 Multiple particular grounds

Where numerous claims of ineffective assistance of counsel fail for want of prejudice, a court must consider their cumulative prejudicial effect before it rejects the claims in toto. *U.S. Const. Amend. 6*.

1 Case that cites this headnote

[40] **Criminal Law** 🔑 Multiple particular grounds

In considering whether multiple claimed errors by trial counsel cumulatively prejudiced a defendant, satisfying the prejudice prong of a claim of ineffective assistance of counsel, a court's inquiry is probabilistic. *U.S. Const. Amend. 6*.



[41] **Criminal Law** 🔑 Standard of Effective Assistance in General

For purposes of a claim of ineffective assistance of counsel, a defendant is entitled to a fair trial, not a perfect one. *U.S. Const. Amend. 6*.

[42] **Criminal Law** 🔑 Multiple particular grounds

Trial counsel's alleged deficiencies in failing to investigate and impeach jailhouse informant who testified that defendant had confessed to murder, investigate and impeach defendant's brother who testified as to motive, challenge admissibility and weight of expert opinion that presence of victim's DNA under defendant's fingernails required "intimate contact," and adequately investigate leads as to other potential killers did not cumulatively prejudice defendant at trial for first- and third-degree murder, and thus, did not warrant post-conviction relief for ineffective assistance of counsel, where circumstantial evidence of guilt was overwhelming and was undisturbed by counsel's alleged errors. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9543(a)(2)(ii)*.

[43] **Criminal Law** 🔑 Interlocutory, Collateral, and Supplementary Proceedings and Questions

On appeal from denial of Post Conviction Relief Act (PCRA) petition, Supreme Court could not consider, on stand-alone basis as opposed to basis for claim of ineffective assistance of counsel, petitioner's arguments that court at penalty phase of his capital murder trial erred in excluding mitigation experts' testimony regarding how his behavior was impacted by deficits in executive functioning and regarding generational trauma that he himself did not experience, where petitioner either did litigate or could have litigated such issues on direct appeal. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. §§ 9543(a)(3), 9544*.

[44] **Criminal Law** 🔑 Presentation of evidence in sentencing phase

Post Conviction Relief Act (PCRA) petitioner failed to establish that he was prejudiced by any deficiency in defense counsel's objections or failure to object, at penalty phase of capital murder trial, to limitation of mitigation experts' testimony regarding generational trauma that petitioner himself did not experience and regarding behavioral impact of petitioner's deficits in executive functioning, and thus, any such deficiencies did not constitute ineffective assistance of counsel, where jury was given ample evidence of circumstances of petitioner's upbringing and was unpersuaded that he had established mitigating circumstance that he was under influence of extreme mental or emotional disturbance. *U.S. Const. Amend. 6; 42 Pa. Cons. Stat. Ann. § 9711(e)(2)*.

[45] **Criminal Law** 🔑 Presentation of evidence in sentencing phase

Post Conviction Relief Act (PCRA) petitioner failed to establish that defense counsel lacked reasonable basis for failing to secure attendance of petitioner's aunt at penalty phase of capital murder trial to provide mitigating testimony that petitioner grew up in squalor and was subject to regular physical and mental abuse at his parents' hands, as necessary for counsel's failure to present aunt's testimony to constitute ineffective assistance of counsel, even though defense counsel indicated he would have used aunt's testimony if he had had the opportunity, where defense counsel testified at PCRA hearing that he had pursued mitigation evidence at some length but felt he had exhausted his avenues, and it was not clear that aunt was available and would have testified at trial. *U.S. Const. Amend. 6*.

[46] **Criminal Law** 🔑 Presentation of evidence in sentencing phase

Any modest deficiencies in defense counsel's investigation into relatives who might have provided evidence, at penalty phase of defendant's trial for capital murder and other

crimes, that defendant was raised in squalor and was subject to severe child abuse at his parents' hands, as relevant to mitigating circumstance of "extreme mental or emotional disturbance," were unlikely to have affected imposition of capital sentence, and thus, any such deficiencies were insufficiently prejudicial to constitute ineffective assistance of counsel; jury found numerous aggravators after considering facts of offenses and conventional "battle of the experts" primarily regarding defendant's mental health, as anticipated and enriched by expert's detailed account of his history of abuse and family trauma. *U.S. Const. Amend. 6*; *42 Pa. Cons. Stat. Ann. § 9711(e)(2)*.

**[47] Sentencing and Punishment** 🗝️ **Declarations and confessions**

Fact that four-year-old victim was not established witness in any pending prosecution at time she, her mother, and mother's unborn child were murdered did not preclude Commonwealth from introducing, at penalty phase of defendant's trial for capital murder and other offenses, jailhouse informant's testimony that defendant confessed he had killed four-year-old victim to silence her as witness who could have identified defendant as mother's killer, for purpose of establishing aggravating circumstance that "victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing [her] testimony against the defendant," where informant's testimony, which was not inherently incredible, was direct evidence of intent to silence witness. *42 Pa. Cons. Stat. Ann. § 9711(d)(5)*.

**[48] Criminal Law** 🗝️ **Presentation of evidence in sentencing phase**

At penalty phase of trial for two counts of first-degree murder and one of third-degree murder, defense counsel's failure to object, on reliability grounds, to jailhouse informant's testimony that defendant had confessed to killing four-year-old victim because she could have identified

defendant as person who had killed her mother immediately prior, as evidence of witness-killing aggravator, did not prejudice defendant, and thus, did not constitute ineffective assistance of counsel supporting post-conviction relief from capital sentence imposed for four-year-old victim's murder; even if jailhouse informant's testimony had been excluded, jury would still have found two other aggravators as to that victim, namely multiple murders and killing of victim under age 12. *U.S. Const. Amend. 6*; *42 Pa. Cons. Stat. Ann. § 9711(d)(5)*, (16).

**[49] Criminal Law** 🗝️ **Post-conviction proceeding not a substitute for appeal**

Petitioner waived his argument, as stand-alone claim for relief under Post Conviction Relief Act (PCRA), that trial court was required, at penalty phase of his trial for two counts of first-degree and one count of third-degree murder, to give jury instruction that sentence of life in prison without possibility of parole meant he would never be released on parole, where petitioner could have pursued such argument on direct appeal but failed to do so. *42 Pa. Cons. Stat. Ann. §§ 9543(a)(3)*, 9544.

**[50] Sentencing and Punishment** 🗝️ **Instructions**

At penalty phase of his trial for two counts of first-degree murder, one count of third-degree murder, and other offenses, defendant was not entitled to jury instruction under *Simmons v. South Carolina*, 114 S.Ct. 2187, that sentence of life in prison without possibility of parole would mean he would never be released on parole, where Commonwealth never put defendant's future dangerousness at issue.

**[51] Judges** 🗝️ **Determination of objections**

In evaluating whether recusal was required, the Supreme Court assumes that a jurist will possess interests and relationships that might conceivably influence their judgment but, in the normal course of events, the mere presence of an interest or relationship that could theoretically

affect a judicial decision does not create a presumption of partiality. Pa. Code of Jud. Conduct, Canon 2.4(A).

**[52] Judges** 🔑 **Bias and Prejudice**

Recusal is required wherever there is substantial doubt as to the jurist's ability to preside impartially.

**[53] Judges** 🔑 **Bias and Prejudice**

A jurist's impartiality is called into question, warranting recusal, whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter.

**[54] Judges** 🔑 **Bias and Prejudice**

The appearance of impropriety sufficient to disqualify a judge exists when a significant minority of the lay community could reasonably question the court's impartiality.

**[55] Criminal Law** 🔑 **Preliminary proceedings**

The Supreme Court reviews the denial of a motion to recuse a judge for an abuse of discretion.

**[56] Criminal Law** 🔑 **Discretion of Lower Court**

An "abuse of discretion" is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence of record.

**[57] Criminal Law** 🔑 **In general; complaint, warrant, and preliminary examination**

In reviewing the denial of a motion to recuse, the Supreme Court presumes judges are fair and competent.

**[58] Judges** 🔑 **Bias and Prejudice**

Fact that prosecutor at Post Conviction Relief Act (PCRA) petitioner's capital murder trial was running unopposed for seat on Court of Common Pleas at time of PCRA hearing before same court in same county did not call into question impartiality of, and require recusal of, all judges of that county's Court of Common Pleas, where petitioner presented no concrete evidence of PCRA judge's bias or special solicitude toward prosecutor, PCRA judge assured impartiality, PCRA judge was assigned to case in wake of trial judge's recusal and planned to rule on petition before any swearing-in, and considerable time and effort had already gone into PCRA proceedings, some of which would have to be duplicated before any newly assigned judge. [42 Pa. Cons. Stat. Ann. § 9541 et seq.](#)

**[59] Criminal Law** 🔑 **Death penalty cases**

**Criminal Law** 🔑 **Adequacy of investigation of mitigating circumstances**

Attorneys who defend capital cases undertake a solemn obligation, at the heart of which lies the imperative to conduct thorough investigations at each phase of a capital prosecution to ensure that all avenues for testing the Commonwealth's case for guilt and meeting its claimed aggravating factors with available mitigating evidence are thoroughly explored.

Appeal from the Order entered on December 29, 2023, in the Court of Common Pleas of Bucks County, Criminal Division, at No. CP-09-CR-0001413-2014. [Diane E. Gibbons](#), Judge

**Attorneys and Law Firms**

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TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

## OPINION

JUSTICE WECHT

\*618 Marcel Emanuel Johnson was convicted by a jury of killing Ebony Talley (first-degree murder<sup>1</sup>), her unborn child (third-degree murder<sup>2</sup>), and her four-year-old daughter, R.R. (first-degree murder), as well as other associated offenses.<sup>3</sup> He was sentenced to death for R.R.'s murder. On direct appeal, this Court affirmed his judgment of sentence.<sup>4</sup> Now before this Court is Johnson's appeal of the Court of Common Pleas' denial in its entirety of Johnson's timely first petition under the Post Conviction Relief Act ("PCRA").<sup>5</sup> We affirm.

### I. Background

For reasons that will become clear, we segregate the circumstantial evidence supporting Johnson's convictions in this case from certain evidence that comes under challenge in Johnson's PCRA claims. This is necessary because our analysis of the issues in this case requires us to consider whether, with problematic evidence excluded, there is a reasonable probability that \*619 the outcome of the trial would have been different. Accordingly, we begin with the trial court's account, as sustained by the trial record, with the contested evidence excised. Afterward, we review the challenged evidence. Our analysis of the issues follows.

#### A. The Circumstantial Case for Guilt

The trial court's detailed account, limited to the circumstantial evidence and modestly abridged, is as follows:

On Monday, November 25, 2013, at approximately 3:30 p.m., Bristol Township Police were dispatched to a reported fire in Building 600 of the Avalon Court Apartments located in Bristol Township, Bucks County. Officer Joseph Dragon was the first emergency responder to arrive at the scene. Upon his arrival, he was advised by employees of the apartment complex that a child might be trapped in one of the basement level apartments. Officer Dragon

then entered the building and proceeded down to the basement level. He was prevented from entering the common hallway on that floor due to the presence of thick, heavy smoke. Two firefighters, who arrived in advance of the emergency equipment, identified Apartment 604, located on the basement level of the building, as the location of the fire and also attempted entry. They too were forced to retreat due to the dense smoke and heat.

Entry into Apartment 604 was made shortly after the first fire engine arrived. After entering the apartment, firefighters proceeded to a bedroom located in the rear of the apartment. There, they observed the bed and piles of clothes burning. Once that fire was extinguished, firefighters found the body of a deceased female lying face-down on the bedroom floor. Her head and neck were encased in a blue plastic bag. This victim was identified as twenty-two-year-old Ebony Talley. Talley was five months pregnant at the time of her death. Firefighters found Talley's four-year-old daughter, R.R., on the floor in the living room lying beneath an overturned couch. R.R. was rushed to St. Mary Medical Center where she was pronounced dead.

\* \* \* \*

The [autopsy] of Talley's body revealed thirty-five knife wounds .... One of the stab wounds penetrated her uterus and punctured the amniotic sac. Defensive wounds were found on her arms and on her left hand. Talley also suffered a blunt impact injury to her mouth, causing her to lose two teeth. One tooth was found in her mouth at the autopsy. The other was found at the crime scene on the floor in between the kitchen/dining area and the living room of the apartment. [Pathologist Ian Hood] testified that the injury was consistent with Talley having been struck in the face with the frying pan found near her body at the scene.... The cause of death was determined to be multiple stab wounds. Dr. Hood testified that he could not exclude terminal asphyxiation, caused by the plastic bag being placed over her head, as the final mechanism of death. Fingernail scraping[s] taken from Talley at the autopsy were submitted for DNA analysis. The scrapings contained male DNA.

The twenty-week male fetus Talley was carrying, otherwise healthy and uninjured, died as a result of the death of his mother.

The Commonwealth's arson expert ... testified that two fires were set inside the apartment; one in the back bedroom next to the body of Talley, the other in the living room next

to where R.R. lay \*620 dying. He testified that the fires were intentionally set by application of an open flame to two separate fuel sources, clothing and a cushioned chair in the bedroom and a potholder in the living room. Cooking oil was poured throughout the scene. It was found at both points of origin and on the victims' clothing.

Talley lived with her daughter in Apartment 604 of Avalon Court Apartments.<sup>[ 6 ]</sup> Johnson used her apartment to shower and change clothes. He also stored his personal property there. At the time of her death, Talley was selling heroin out of that apartment. Johnson, an accomplice in Talley's drug dealing activities, knew that she sold heroin.... Johnson had ... told his girlfriend, Natashia Martinez, that he had to do something to make money. The night before she was murdered, Talley asked her boyfriend, Eric Nawuoh, to tell Johnson that he had to "leave." Nawuoh did as she requested.

On the morning of the murders, Talley, R.R., Talley's mother, her two sisters, Nawuoh and Johnson were at the victims' apartment. Nawuoh left the apartment before noon. Talley's mother and sisters left at approximately 2:30 in the afternoon, leaving Talley and R.R. alone with Johnson. When he was last seen by the victims' family, Johnson was wearing dark clothing, a black or blue hoodie, dark pants and dark shoes.

At approximately 2:30 that afternoon, maintenance man Joseph Casey saw R.R. playing outside with a dog. Seeing that she was alone, he told her to go back inside. At that time, he noted that Talley's burgundy Cadillac was parked in front of Building 600. At approximately 3:00 p.m., Casey observed smoke in Building 600. After calling the fire department, he and his co-workers attempted to enter the hallway to the ground floor apartments where the victims resided but were prevented from doing so as black smoke began filling the hallway. When he went back outside, Casey noticed that the Cadillac was gone and immediately notified police of its absence.

Just minutes before police and fire crews arrived, area resident, Nigeria Gary, was sitting in her vehicle in the parking lot of the Avalon Court Apartments when she observed the burgundy Cadillac quickly reverse out of its parking space, strike a parked car and speed out of the apartment complex. At approximately 3:27 p.m., a local video surveillance camera captured the vehicle as it traveled away from Avalon Court Apartments, in the direction of Levittown Trace Apartments.

At approximately 5:30 p.m., a resident of Levittown Trace Apartments, Jill Connolly, observed the burgundy Cadillac drive into the parking lot of Levittown Trace Apartments. After the car entered the lot, the headlights were switched off, the car reversed and proceeded to the rear of H Building. Approximately three minutes later, Connolly observed Johnson walk from that location towards the entrance of F Building.

Johnson thereafter unexpectedly arrived at the apartment of Jina Padilla, located in F Building of Levittown Trace Apartments. He was wearing a blue sweater, jeans and a red and black hat. He appeared to be "very worried" and "very panicky" and immediately asked to use Padilla's cell phone. After Padilla agreed \*621 to let him use her phone, Johnson took the phone into her bedroom to make his call(s) in private. After using the phone, Johnson asked Padilla if he could leave a bag at her apartment. She refused his request. Johnson, who was at Padilla's apartment for approximately thirty minutes, used the bathroom before leaving. He was in the bathroom for five to ten minutes.

While police and fire crews were still on scene, Brittany Coles, Talley's cousin, received multiple cell phone calls from Johnson at five to ten minute intervals. During those calls, Coles told Johnson that the apartment was on fire, that R.R. might be in the apartment, that Talley could not be located and, ultimately, that R.R. had been rushed to the hospital. Coles asked Johnson to return to the apartment to find out what was happening. Although Johnson admitted that he was at Levittown Trace Apartments, less than a mile from the scene, and that he had Talley's car and her Xbox, he refused Coles' request for help. Talley's sister, Paulina Burke, also received calls from Johnson while he was at Levittown Trace Apartments. Burke told Johnson that there was a fire at the apartment and that the family was being told that Talley and R.R. were killed. She told him that she and the family were at the police station and that he needed to come to the station as well. Johnson, who was less than half a mile from the police station, refused to cooperate.

Based on this information, investigators proceeded to Levittown Trace Apartments. In several common areas of the complex, they found belongings of Johnson that had been stored in Talley's apartment prior to the murders. At 6:20 p.m., police located Talley's burgundy Cadillac behind H Building, a secluded area of the complex. Police kept the car under surveillance until 7:08 p.m., at which time Johnson got into the car and began to drive away. Police



immediately stopped the car. Johnson, the sole occupant of the vehicle, was no longer wearing the clothing he had worn earlier in the day. He had fresh injuries to his right hand. A bottle of Clorox bleach was found on the right rear passenger floor of the car.

At 7:37 p.m., Johnson agreed to speak with investigating detectives. During that interview, Johnson admitted that he knew Talley was pregnant. He admitted that he had been at Talley's apartment earlier in the day. He stated that he left the apartment because Talley asked him to leave. He initially claimed that after leaving the apartment, he walked to a local Burger King and that, while there, he contacted a friend he identified as "Eric Stahl" who, Johnson said, arrived at the Burger King driving the victim's Cadillac. Johnson stated that he and Stahl then drove to Levittown Trace Apartments. He claimed that Stahl gave him the keys to the car and left on foot. Johnson claimed that he then tried to enter H Building and that when he could not do so, he returned to the car, began to drive and was then immediately stopped by police. After being advised that there were numerous surveillance systems in the area of the Burger King where Johnson claimed to have met Stahl, Johnson admitted that he had taken the victim's car from the Avalon Court Apartments, and that, while doing so, he hit a parked car and left at a high rate of speed. Johnson admitted that Talley's sister had urged him to come to the police station and that he refused to do so. His excuse for refusing to assist the victims' family and investigators was that he had outstanding non-traffic summary citation warrants for sleeping in a \*622 vehicle. He later stated that he did not want to get involved and that, "It was every man for himself." During the course of the interview, Johnson was shivering, shaking and sweating.

While Johnson was at the police station, the investigating detectives executed a search warrant issued for Johnson's person. Buccal swabs and fingernail scraping[s] were taken from Johnson at that time. DNA analysis of the scrapings from Johnson's right hand revealed the presence of Talley's DNA. Johnson's DNA was compared with DNA obtained from various pieces of evidence.... [ 7 ]

In the area between the kitchen and living room of the crime scene, police found large blood stains, Talley's tooth, one earring which matched the earring found on Talley's body and a wireless Xbox controller to Talley's Xbox which Johnson had in his possession immediately after the murders. In that same area, police found a personalized dog tag inscribed "Tashia loves you forever." Johnson's

girlfriend, Natasha Martinez, testified that the dog tag belonged to Johnson and that Johnson always wore that dog tag. Johnson's cell phone was also found at the crime scene. [ 8 ] Images of Johnson wearing that dog tag were downloaded from that phone. 9

Even this account, while thorough, leaves out a handful of items of circumstantial evidence that further incriminated Johnson. For instance, Detective Jack Slattery testified that, during the police station interview of Johnson, without any prompting, Johnson raised the prospect of cooking grease as a fire hazard present in the apartment:

Q. Do you know—did you either question [Johnson] or did he say anything about the burners on the stove and pots of grease?

A. Once the fire was disclosed by him, the knowledge that there had been a fire in apartment 604 was disclosed by him, not by us, he almost seemed to be making excuses as to why this fire would have happened accidentally.

\* \* \* \*

He began to explain that [Talley] would leave a burner on the stove on in the apartment as a source of heat, and that she would leave pots or pans of grease or oil right next to the open flame. And he began to tell us that this is something that he tried to address with her, that he had told her about this, that it was dangerous.

Q. So he mentioned pots of grease to you?

A. He did.

Q. Was that before you had even—did you ever say anything to him about the grease?

A. No. To be clear, at the time I was unaware that grease was an issue. I had never set foot inside the scene. 10

\*623 Undisputedly, the fire did not start in the kitchen.

Furthermore, the instances of Johnson's shifting story reviewed by the trial court alone were not the only ones. For example, Johnson's explanation as to what prompted him to contact Talley's cousin, Brittany Coles, shortly after leaving Avalon Court was inconsistent:

Q.... Did he say that he knew whether Brittany Coles was related to [Talley]?



A. He did. He told us that he was aware that Brittany Coles was [Talley's] cousin.

Q. Did you ask him about that phone call?

A. Yes. An obvious question that Detective Fuhrmann and I had would have been why he thought it was necessary to contact Brittany Coles, [Talley's] cousin; if it was just out of the blue or if there was a purpose behind it. What he explained to us initially was that he had saw police and fire personnel responding to Avalon Court. He quickly changed that and said that he didn't see them actually responding, but he saw them going in the direction of Avalon Court.

And then this next part was confusing to me. He saw that the police department responded to a subject that he knew in the Levittown Trace Apartments, and that caused him some concern for something in Avalon Court.<sup>11</sup>

On direct appeal, this Court noted additional evidence regarding details of the burgundy Cadillac and its contents:

[Investigators] noticed that the [Cadillac's] license plate had been changed, but the VIN number, which is visible through the windshield, verified that it was Talley's vehicle.... A subsequent search of Talley's vehicle revealed, among other items, a bundle of eight empty wax packets stamped in red with "# 1 way to go," in the ash tray. These packets were identical to the packets found around Talley's body and in her bedroom.<sup>12</sup>

Finally, this Court summarized the procedural history:

The police arrested Johnson that evening on charges of possession of drug paraphernalia based on items found in his possession when the police stopped him in Talley's vehicle....

In January 2014, Johnson was charged with the murders of Talley, R.R., Talley's unborn child and related crimes.

\* \* \* \*

A jury trial commenced in May 2015, at the conclusion of which Johnson was convicted of the first-degree murders of both Talley and R.R., third-degree murder of Talley's unborn child, arson (endangering people), and possessing instruments of crime.<sup>13</sup>

### B. The Other Evidence of Guilt

The trial court also summarized additional evidence that is the subject of the legal issues raised by Johnson in his PCRA petition and before this Court on appeal:

Within days of the murders, Johnson made a number of statements at the Bucks County Correctional Facility ["BCCF"] to a fellow inmate [George Lewis]. Johnson told Lewis, "She made me kill her." Lewis asked, "Who?" Johnson responded, "Ebony." Johnson further stated that he had "killed the baby." Johnson explained that he "had \*624 to stab her" because she was "very smart and she can identify me." Johnson told Lewis that he stabbed "the baby" in the upper chest and that he "put the baby on fire" and then fled the scene.

Johnson also spoke to his brother, Marquis Johnson, by telephone from the prison. During one recorded conversation, Johnson directed Marquis to retrieve "evidence" that Johnson said he had hidden in a box on the wall of a laundry room in F Building of Levittown Trace Apartments. [Marquis] went to that location and retrieved a blue latex glove containing small yellow bags and a money order. Johnson's brother cashed the money order and hid the glove containing the packets in a crawl space in his home.

Police later retrieved the glove and determined that it contained 167 small yellow packets of heroin. The 167 yellow heroin packets were stamped with a red "#1" with "way to go" printed inside the number. Empty yellow packets containing the same stamp were found at the crime scene scattered on the floor near the body of Talley, in a shoe box found in the bedroom where her body was found, in the living room of the apartment and in the Cadillac. The glove also contained a clear plastic bag. Eleven identical clear plastic bags were found on Johnson's person when he was stopped by police the day of the murders. Johnson's DNA was found on that glove.<sup>14</sup>

The money order that Marquis retrieved from the box found at Levittown was for "[a]bout \$80,"<sup>15</sup> which corresponded

to the amount of the money order that Talley obtained the morning before she was killed.<sup>16</sup>

The confession to Lewis was the only direct evidence of Johnson's guilt introduced at trial. And the lead prosecuting attorney, ADA Matthew Weintraub, characterized Johnson's confession as the "linchpin" of his case (and other words to similar effect).<sup>17</sup>

Also admissible but at issue herein was the Commonwealth's DNA evidence. That evidence as presented arguably was broadly favorable to Johnson because there was very little DNA evidence implicating him in the murders. But it wasn't all favorable. The Commonwealth's DNA expert, Dr. Alex Glessner, testified that genetic material found under Johnson's fingernails matched Talley's DNA, and that her DNA would only be found under Johnson's nails as a consequence of intimate contact.<sup>18</sup> Trial counsel did nothing to undermine this conclusion either in cross-examination or with the assistance of a DNA expert for the defense, despite the fact that counsel consulted an expert who discerned numerous flaws in the Commonwealth's expert's methods and conclusions. The article that \*625 the Commonwealth's expert cited in support of his conclusion contradicted the proposition that *only* intimate contact could have resulted in the DNA match. Rather, the article indicated that genetic material could have found its way under Johnson's nails through co-occupancy of an apartment with Talley. Dr. Glessner admitted as much at a later PCRA hearing.<sup>19</sup> The evidence indicated that Johnson spent significant time in Talley's apartment and perhaps sometimes stayed the night.

### C. The Penalty Phase

This Court summarized the penalty-phase evidence on direct appeal:

During the penalty phase, the Commonwealth presented evidence of four aggravating factors as to Talley: torture; conviction of another murder at the same time of Talley's murder; involvement in the sale of narcotics at the time of the murder; and knowledge of Talley's pregnancy.<sup>8</sup> N.T.T., 6/8/2015, at 192-95. The Commonwealth pursued three aggravating factors with regard to R.R.: that R.R. was a witness to a murder and was killed to prevent her from testifying; conviction of another murder at the same time as R.R.'s murder; and that R.R. was less than twelve years old.<sup>9</sup> *Id.* at 197-200.

<sup>8</sup> 42 Pa.C.S. §§ 9711(d)(8), (11), (13), (17).

<sup>9</sup> *Id.* §§ 9711(d)(5), (11), (16).

Johnson presented evidence in support of four mitigating factors: his lack of a significant history of prior criminal convictions; extreme mental or emotional disturbance at the time of the murders; and the fact that he was twenty-one at the time of the murders.<sup>10</sup> *Id.* at 200. Johnson also presented an assemblage of evidence under the catchall mitigating factor, 42 Pa.C.S. § 9711(e)(8), including evidence that Johnson's life up until the time of the murders was characterized by chronic and pervasive abuse, neglect and abandonment; that he suffered brain damage and had been diagnosed with various mental illnesses; cycles of placement in and out of treatment programs; and a complete lack of any semblance of stability or permanence. The jury ultimately sentenced Johnson to death for R.R.'s murder and life in prison for Talley's murder.

<sup>10</sup> *Id.* §§ 9711(e)(1), (2), (4).<sup>20</sup>

### D. Direct Appeal

[1] On direct appeal this Court considered (among other things omitted from this account) the sufficiency of the evidence as a matter of course.<sup>21</sup> Next, the Court considered and rejected various challenges to the trial court's refusal to suppress evidence at trial. Additionally, Johnson challenged the trial court's admission of Marquis' testimony that, shortly before the murders, Johnson asserted in conversation with Marquis that Johnson was "willing to do anything to make a come up,"<sup>22</sup> which Marquis indicated was a \*626 way of signaling Johnson's ambitions to improve his situation economically.

The Court then turned to issues raised by Johnson relative to the penalty phase of his trial. First, this Court considered and rejected Johnson's assertion that the trial court wrongfully excluded his mitigation expert's testimony regarding a multi-generational history of abuse, poverty, drug abuse, and mental illness. That court had deemed such evidence relevant only to the extent that it "was somehow made part of the family structure or ... was made known to [Johnson], and therefore could be said to have had an impact upon him."<sup>23</sup> Correlatively, the trial court had excluded the subset of such evidence for which Johnson was not present, or of which he was never made aware.

Finally, fulfilling another obligation of this Court that is peculiar to capital direct appeals, this Court tested the imposition of the death penalty for bias engendered by passion, prejudice, or another arbitrary factor, as well as for the sufficiency of the evidence of the aggravating factors found by the jury.<sup>24</sup> The evidentiary basis for the aggravators was ample, and this Court found that the sentence was not the result of any arbitrary factor.

For all these reasons and others, this Court affirmed the conviction and judgment of sentence.

## II. Legal Standards

This case comes before us now on collateral review under the PCRA, which “provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.”<sup>25</sup> Relevant to this case, Johnson can establish a right to PCRA relief if he pleads and proves by a preponderance of the evidence that he has been convicted of a crime in Pennsylvania and is awaiting execution of a sentence of death for that crime, and that his conviction resulted from one or more of the following:

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

\* \* \* \*

- (vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.<sup>26</sup>

Additionally, Johnson must prove that his issues have not been previously litigated or waived because he failed to raise them at the earliest time he could.

An issue has been previously litigated if the highest appellate court in which the petitioner was entitled to

review as a matter of right has ruled on the merits of the issue.... A PCRA claim is waived “if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post[ ]conviction proceeding.”<sup>27</sup>

\*627 [2] [3] [4] “On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error.”<sup>28</sup> We review questions of law *de novo*, and “our scope of review is limited to the PCRA court’s findings and the evidence of record, viewed in the light most favorable to the Commonwealth as the prevailing party.”<sup>29</sup>

## III. PCRA Proceedings

These proceedings commenced when Johnson filed a timely *pro se* PCRA petition on January 9, 2018. Present counsel filed an amended PCRA petition on Johnson’s behalf on July 15, 2019. The Commonwealth responded with an “Answer and Memorandum of Law in Opposition to Johnson’s Petition.” Various other motions followed, including a Motion for an Evidentiary Hearing, which the PCRA court granted.

The PCRA court held evidentiary hearings from June 28 through June 30, 2023, and again on August 9 and August 10, 2023. In November 2023, Johnson moved to amend his PCRA petition, and the PCRA court granted the motion. An amended petition and additional filings followed. The PCRA court denied Johnson’s final amended petition on December 29, 2023, and Johnson filed the instant, timely appeal in this Court. The PCRA court issued its [Pa.R.A.P. 1925\(a\)](#) opinion on April 5, 2024.

## IV. Guilt Phase Issues and Analysis

### A. The Issues and the Necessity of Prejudice

[5] As noted, *supra*, Johnson cannot establish a basis for relief under the PCRA unless he establishes that the trial deficiencies asserted “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.”<sup>30</sup> As well, under the guises of both “materiality” and “prejudice,” this question—the likely effect of the error on the outcome of the trial—pertains individually to all of the specific assertions of error raised by Johnson in this case. Importantly, with



respect to claims of constitutional ineffectiveness of counsel, this Court has held that, “[w]hen the failure of individual [constitutional ineffectiveness of counsel] claims is grounded in lack of prejudice, then the cumulative prejudice from those individual claims may properly be assessed.”<sup>31</sup> Thus, “a new trial may be awarded due to cumulative prejudice accrued through multiple instances of trial counsel’s ineffective representation.”<sup>32</sup>

In the order presented, Johnson presents the following challenges to the conduct and outcome of his guilt-phase trial:

(1) that the prosecution violated its obligation to disclose exculpatory or witness impeachment evidence under *Brady v. Maryland*;<sup>33</sup>

**\*628** (2) that the prosecution failed to correct the false trial testimony of its primary witness, George Lewis, a jailhouse informant who claimed that Johnson confessed to him the killings at issue in this case;

[6] [7] [8] These two issues implicate both materiality and prejudice. “It is well-settled that *Brady* and subsequent precedent flowing therefrom impose[ ] upon a prosecutor the obligation to disclose all favorable evidence that is material to the guilt or punishment of an accused ....”<sup>34</sup> Relief for a *Brady* violation is due when a court determines that “the evidence was material, meaning that prejudice must have ensued.”<sup>35</sup> Relatedly, the knowing and willful failure to correct false testimony implicates due process protections. Such a violation requires relief if there is “any reasonable likelihood” that the uncorrected testimony could have “affected the judgment of the jury.”<sup>36</sup>

The next four issues that Johnson raises involve allegations of constitutionally ineffective assistance of trial counsel, Craig Penglase and John Fioravanti.<sup>37</sup> They are as follows:

(3) that trial counsel was constitutionally ineffective for failing to sufficiently investigate Lewis’ putative history of trading cooperation with investigators, including allegedly false jailhouse confessions, for favorable treatment, and to use this information to impeach Lewis’ trial testimony;

(4) that trial counsel “was ineffective for failing to understand, investigate and impeach the Commonwealth’s DNA evidence”;<sup>38</sup>

(5) that trial counsel failed to undermine the Commonwealth’s case by highlighting alleged deficiencies in the Commonwealth’s investigation; and

(6) that trial counsel failed to present character evidence favorable to the defense.

[9] [10] To support a claim for ineffective assistance of counsel, a PCRA petitioner must plead and prove three things: first, that the claim has arguable merit; second, that counsel could have had no reasonable basis for the challenged action or omission (subject to the presumption that counsel is acting effectively); and third that the ineffectiveness caused him prejudice.<sup>39</sup> Prejudice occurs where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>40</sup> Failure to prove any one prong of the test will defeat the claim.<sup>41</sup>

**\*629** The applicable materiality and/or prejudice requirements loom large among these issues. In the absence of the prescribed showing of materiality and/or prejudice, no relief is due under the PCRA. With respect to prison informant Lewis’ damning testimony regarding Johnson’s alleged confession and the somewhat less damning, but still problematic, testimony of Marquis hinting at Johnson’s possible motive for killing Talley, as well as with respect to the way in which counsel met the Commonwealth’s DNA evidence, there are two questions bearing upon materiality and prejudice. First, whether a trial conducted wholly without either or both witness’ testimony and without the DNA evidence would likely have led to the same result. Second, whether there is a reasonable probability that a trial conducted *including* the testimony of Lewis and Marquis, and including the DNA evidence, but in which counsel engaged in more vigorous and effective impeachment with the advantage of the allegedly withheld and/or wrongfully unfound and/or unused impeachment evidence would likely have led to a different verdict.

### B. The Circumstantial Case Against Johnson

It is axiomatic that guilt may be proved beyond a reasonable doubt by circumstantial evidence alone.<sup>42</sup> And here, there is a circumstantial case to consider that in no way hinges upon the evidence that Johnson maintains should have been disclosed by the Commonwealth and/or should have been leveraged in impeachment against certain witnesses. Thus, we

highlight what in the foregoing account of the circumstantial case against Johnson is unchallenged and points to Johnson's guilt of murdering the victims in this case.

- Johnson was engaged in the drug trade with Talley.
- Johnson had expressed dissatisfaction with his circumstances and sought to improve his fortunes.<sup>43</sup>
- Johnson was alone with Talley about a half-hour or even less before the fire in Talley's apartment was discovered. At that time, Johnson was wearing a dark hoodie, dark pants, and dark shoes.
- Moments before a fire was detected in Talley's apartment, Johnson was seen hastily leaving the apartment complex parking lot in Talley's car, striking another parked car as he went. Attached to the car was a license plate that was not associated with the vehicle registration.
- Shortly after leaving the apartment, Talley's vehicle was observed heading in the direction of the sprawling Levittown Trace Apartments complex. There, Johnson parked the car in a very remote part of the parking lot.
- Johnson then visited the Levittown Trace apartment of an acquaintance, appeared to be worried and nervous, and asked to use her phone. She gave him her phone, and he made calls in the bedroom with the door closed, out of the acquaintance's hearing. Afterward, he spent five to ten minutes in the bathroom. Johnson \*630 asked to leave a bag of his belongings with the acquaintance, who refused.
- Johnson made repeated calls to Talley's cousin and sister in the hours after the killings, inquiring as to the situation at Avalon Court. But he refused to return to check on the situation or to turn over Talley's vehicle to police, citing in response to both requests a dubious concern regarding outstanding bench warrants for non-traffic-related summary offenses.
- In the car with Johnson were numerous bags that bore the same stamp as identical bags containing heroin found at Avalon Court around Talley's dead body. Also in the car was a bottle of bleach.
- At the time of Johnson's apprehension he was no longer wearing a dark hoodie. Instead, he was wearing a wrinkled blue sweater and different shoes.

- Johnson was observed by investigators to have two apparently recent lacerations to his hands.
- During Johnson's police interview, he behaved nervously; he was shivering and sweaty.
- Johnson lied repeatedly to investigators, his story shifting in ways material to the investigation. For example, only when confronted with the threat of contradictory video evidence did Johnson withdraw his claim that Talley's car was brought to him by a friend<sup>44</sup> and acknowledge that he had driven it from the Avalon Court lot, striking another car as he did so.
- During his interview, Johnson specifically raised the prospect that the fire was caused by Talley's propensity for leaving a stove burner on in close proximity to pots and pans of cooking grease. At that time, even investigators had yet to learn that cooking oil was present in and around the two fires, neither of which began in the kitchen.
- Johnson's phone was found in Talley's apartment, and his belongings later were found in various locations around the Levittown Trace apartment complex.<sup>45</sup>

Viewed in its entirety and in isolation, this evidence creates a strong circumstantial case for guilt. Johnson's observed behavior not only is compatible with guilt but is incompatible with any other reasonably imaginable sequence of events. Then there is Johnson's general evasiveness with Talley's family members. And, during his interview, Johnson made the improbable allusion to cooking oil as a potential fire hazard, which is almost too on-the-nose to believe.

There is no evidence to support an alternate account, one that explains how someone else committed the crimes in the half-hour or less that separated Johnson's hasty departure from Talley's apartment and the discovery of the fire. The combination of the two—the effort to conceive an alternate explanation for Johnson's behavior and the difficulty conceiving of another perpetrator—make it surpassingly difficult to conclude that a jury would acquit Johnson even without Lewis' testimony regarding Johnson's alleged confession, Marquis' testimony as to motive and certain items retrieved at Johnson's request, and the \*631 limited incriminating DNA evidence introduced at trial.



In short, the circumstantial case against Johnson was sufficiently compelling that it is difficult to perceive a reasonable probability that the trial outcome would have differed had the jury simply been denied Lewis' and Marquis' testimony and the relatively modest, equivocal DNA evidence entirely.

### C. The Claims

The above discussion, which presupposes that the jury never heard from Lewis or Marquis, or were given the DNA evidence, does not end our inquiry. Johnson's intertwined arguments about deficient *Brady* disclosures and trial counsel ineffectiveness are based upon the proposition that trial attorneys Penglase and Fioravanti failed to receive from the Commonwealth—and failed to obtain—and/or failed to utilize certain putatively damning impeachment evidence against Lewis, Marquis, and the Commonwealth's DNA expert. Thus, we must consider the likelihood that more effective impeachment of these witnesses at trial—rather than their absence—not only would have discredited their testimony, but would so adversely have affected the prosecution's credibility before the jury that the jury was reasonably likely to have reached a different verdict. In order to make this assessment, we must review the evidence upon which Johnson's claims are based.

#### 1. Disclosure Violations Under *Brady v. Maryland*

It is well-settled that *Brady* and subsequent precedent flowing therefrom impose[ ] upon a prosecutor the obligation to disclose all favorable evidence that is material to the guilt or punishment of an accused, even in the absence of a specific request by the accused. *Commonwealth v. Strong*, 563 Pa. 455, 761 A.2d 1167, 1171 & n.5 (2000). This Court has held that, to establish a *Brady* violation, a defendant has the burden to prove that: (1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it impeaches; (2) the prosecution has suppressed the evidence, either willfully or

inadvertently; and (3) the evidence was material, meaning that prejudice must have ensued. *Commonwealth v. Chambers*, 570 Pa. 3, 807 A.2d 872, 887 (2002); *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136, 1141 (2001).<sup>46</sup>

[11] [12] “Under *Brady*, prejudice occurs when a defendant shows a ‘reasonable probability that[,] had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ”<sup>47</sup> “A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence; it means only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.”<sup>48</sup> This Court has held that, “as a matter of law, a court reviewing multiple pieces of exculpatory evidence that the prosecution failed to disclose is required to view the effect of the non-disclosures cumulatively.”<sup>49</sup>

[13] [14] [15] [16] The *Brady* obligation extends to information that may be used to impeach \*632 prosecution witnesses.<sup>50</sup> “Any implication, promise or understanding that the government would extend leniency in exchange for a witness’ testimony is relevant to the witness’ credibility.”<sup>51</sup> However, “*Brady* is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources.”<sup>52</sup> “[I]n order to be entitled to a new trial for failure to disclose evidence affecting a witness’ credibility, the defendant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence.”<sup>53</sup>

The alleged *Brady* material at issue with respect to Lewis’ attempt to serve his own interests by testifying against Johnson broadly involves information and documents, allegedly in the Commonwealth's possession in advance of Johnson's trial, which established that Lewis was a serial informant with a history of providing information, including potentially false information, to law enforcement in order to curry favor. Johnson's own summary of the evidence that he contends was withheld in violation of *Brady* provides a useful structure for discussion:



The prosecution had, or could have readily obtained,<sup>[ 54 ]</sup> a plethora of evidence showing that Lewis, a jailhouse informant, had motives to curry favor with the prosecution in order to limit his liability and potential jail time for various charges against him. This evidence included: 1) Lewis's repeated offers to work as an informant for the police and District Attorney Office; 2) a letter Lewis sent to the DAO [*i.e.*, District Attorney's Office] seeking benefits in exchange for his cooperation; 3) efforts made by the prosecutor to advocate on Lewis's behalf with New Jersey authorities who were prosecuting Lewis for criminal offenses; 4) that Lewis would receive consideration on his open cases in exchange for his cooperation; and 5) Lewis lied to prison authorities about the supposed funeral of his granddaughter in an attempt to obtain a furlough.<sup>55</sup>

In sum, Johnson argues, Lewis' offer to provide information about this case to law enforcement was but one among serial "attempts to cooperate with Bucks County law enforcement since arriving" at BCCF in return for favorable treatment in Pennsylvania and relative to certain then-pending \*633 charges in New Jersey.<sup>56</sup>

In the leading example cited by Johnson, the Commonwealth allegedly failed to disclose evidence in its possession of ADA Weintraub's email and telephone communications with Attorney Ward, the New Jersey prosecutor overseeing the aforesaid New Jersey charges, which included felony burglary, theft, and domestic violence, which could incur substantial prison terms. Attorney Ward had "agreed to give Mr. Lewis sentencing consideration on his open charges in New Jersey due to his cooperation and testimony in the Bucks County homicide case."<sup>57</sup> Attorney Ward attested that he confirmed this by May 27, 2015 email to ADA Weintraub.<sup>58</sup> Attorney Ward also noted that ADA Weintraub asked him to

look into \$635 seized from Lewis in connection with his New Jersey arrest. Ultimately, evidently after Johnson's trial had run its course, Attorney Ward dismissed some of Lewis' open charges and offered time served and a return of the seized money.

To be clear, ADA Weintraub testified that he had no recollection of asking Attorney Ward for any such consideration.<sup>59</sup> But in Johnson's characterization, ADA Weintraub acknowledged his awareness, in advance of Lewis' testimony, that Attorney Ward intended to grant Lewis favorable consideration in New Jersey for his testimony against Johnson.<sup>60</sup> ADA Weintraub further admitted discussing the status of Lewis' New Jersey cases with Lewis when he prepared Lewis for trial, and that Lewis asked for assistance. Again, though, ADA Weintraub indicated that he did not recall whether he told Lewis that he would try to assist him with his New Jersey cases, but he asserted that he would not have promised Lewis any particular benefit. Rather, it was his custom to promise cooperating witnesses only that he would be "an ally" relative to pending prosecutions.<sup>61</sup> Johnson also claims that Lewis was aware of a potentially favorable plea deal before he testified in Johnson's case, although it is not clear from the averment and citation that Lewis had any reason to understand that prospect as arising from, or contingent upon, his testimony in this case or any effort on his behalf by ADA Weintraub.<sup>62</sup>

ADA Weintraub testified that it was generally his practice to turn information pertaining to such discussions over to the defense.<sup>63</sup> But Attorneys Penglase and Fioravanti both testified that they were unaware of ADA Weintraub's interactions with Attorney Ward regarding the New Jersey cases or of Attorney Ward's pre-trial \*634 indication that he would consider Johnson's cooperation in this case.<sup>64</sup>

Johnson separately asserts that Lewis made very similar accusations to BCCF investigators regarding another inmate with whom he served, Shaquel Rock. There, Lewis alleged that Rock had confessed to Lewis that he killed an off-duty corrections officer in Trenton, NJ.<sup>65</sup> This killing and the fact that Rock was a person of interest in the case were reported in mainstream media available to BCCF inmates. New Jersey investigators found Lewis' claim incredible, and eventually cleared Rock.<sup>66</sup> The Commonwealth did not dispute that this report existed or was disclosable *Brady* impeachment evidence, had it been in the Commonwealth's possession. But

the Commonwealth claimed that it was not in its possession at the relevant time. Rather, it was in BCCF's possession—and, as such, was available to Johnson's trial counsel for the asking in any event.<sup>67</sup>

Nonetheless, asserting that BCCF was acting on behalf of the Commonwealth when it received Lewis' report of Rock's alleged confession, Johnson asserts that the failure to obtain and disclose this information violated the United States Supreme Court's holding in *Kyles* that the prosecution has “a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case[,] including the police.”<sup>68</sup> ADA Weintraub's co-counsel and *de facto* discovery manager, ADA Thomas Gannon, testified that the DAO sometimes directed prison investigators to work on pending cases and those investigators reported to the DAO.<sup>69</sup> Thus, on Johnson's account, the prosecution had a duty to obtain and disclose this information.<sup>70</sup> Notably, there is no evidence that BCCF officials were acting at the behest of the DAO in this case. Nor was there any evidence that government control of the records in question was exclusive.

To these detailed allegations of critical omissions relative to Lewis' testimony, \*635 Johnson briefly asserts additional omissions. He cites Lewis' alleged lie to the court regarding either the fact or the timing of his granddaughter's funeral in order to gain a furlough.<sup>71</sup> The court granted the furlough, but when authorities “looked into Lewis's request, they discovered that Lewis was lying.”<sup>72</sup>

Separately, Johnson asserts that the prosecution violated *Brady* relative to the circumstances of the testimony of Johnson's brother, Marquis Johnson. As set forth above, Marquis testified at trial that, shortly before the killings, Johnson had indicated that he was willing to act precipitously to “make a come up,” the salient implication being that Johnson was willing to kill to advance his interests. According to Johnson, in order to extract Marquis' testimony, prosecutors threatened Marquis with prosecution connected to the Talley killing should he refuse to testify.<sup>73</sup> ADA Weintraub was present during that interview, and he acknowledged that Marquis openly worried about his criminal exposure.<sup>74</sup> The prosecution also failed to disclose a pending alleged violation of Marquis' probation for domestic violence against his girlfriend that happened shortly before trial.<sup>75</sup>

The PCRA court rejected these claims in turn. With regard to Lewis, the court underscored that ADA Weintraub did not offer to assist him relative to his New Jersey cases. Although ADA Weintraub inquired as to the seized \$635, he did not ask for its return and he never followed up on his initial inquiry.<sup>76</sup> With regard to the May 27, 2015 email from Attorney Ward, the court noted the absence of evidence that Lewis was aware of the email or its substance before he testified. Furthermore, the email suggested no agreement between ADA Weintraub and Attorney Ward. The mere hope of leniency is not *Brady* material.<sup>77</sup> The court further noted that the Commonwealth turned New Jersey-related material over to Attorney Penglase in discovery even before the preliminary hearing in this case, and that Attorney Penglase cross-examined Lewis on the information at that hearing. As to additional information, including a letter Lewis sent to prison authorities offering information about other charges, the Commonwealth admitted that it would have been disclosable if it hadn't inadvertently overlooked it, but the court deemed it immaterial because it was cumulative of other evidence, noting, *inter alia*, that the Commonwealth adduced several instances of Lewis' effort to trade information for special consideration at the outset of its direct examination of Lewis.

Supporting this claim is the information ADA Weintraub elicited from Lewis on direct testimony regarding Lewis' self-interested basis for testifying:

[ADA WEINTRAUB]. Do you have a—two convictions in 1996 for burglary and theft?

[LEWIS]. Yes.

Q. Is that in New Jersey?

A. Yes.

Q. You have a conviction in 2010 for hindering apprehension?

A. Yes.

\*636 Q. Do you have a pending shoplifting case in New Jersey?

A. Yes.

Q. Are you expecting to resolve that case when you get returned from here back to New Jersey?



A. Yes.

Q. You also have a charge over in New Jersey that's pending for burglary?

A. Yes.

Q. In addition, you have some charges that are even older than the ones that we have talked about for crimes of dishonesty in New Jersey?

A. Yes.

Q. Are you currently also facing a parole violation for a fleeing and eluding case here in Bucks County?

A. Yes.

Q. Did you receive an original sentence on this fleeing and eluding from the police case here of 11 and a half to 23 months in [BCCF]?

A. Yes.

Q. At some point, Mr. Lewis, did you receive some additional time on that case the last time you were here because of misconducts?

A. Yes.

Q. And are you currently awaiting to see what will happen for your parole violations?

A. Yes.

Q. When you are done testifying in this case, what is your understanding of what we will do for you?

A. Try and help me out with my parole violation.

\* \* \* \*

Q. Have we made any promises to you as to what your sentence is going to be?

A. No.

Q. Will that ultimately be up to a judge?

A. Yes.

Q. Have you testified in a prior proceeding relating to this case?

A. Yes.

Q. And prior to—either before or after that did we give you any assistance?

A. Yes.

Q. What did we do?

A. Helped me out with my—my detainer I had.

Q. Okay. Did you—when you first reported—did you report information that you knew to the jail?

A. Yes.

Q. When you first reported that information that you knew about this case to the jail, did you have those misconducts that we just talked about?

A. Yes.

Q. Was it your hope that you were going to get help with those misconducts?

A. Yes.

Q. Did you, in fact, get any help with those misconducts?

A. No.<sup>78</sup>

[17] As set forth above, there is no question that the prospect of leniency in return for testimony implicates *Brady*. In *Napue*, the United States Supreme Court made comments especially salient to the instant case, because there, as here, some information had been given to the jury to indicate that the informant might have been motivated by self-interest to testify against the defendant.

\*637 In *Napue*, the state's "principal witness" testified that he had received no promise of consideration for his testimony at the trial in question.<sup>79</sup> In point of fact, the state's attorney had promised to recommend a reduction in the witness' sentence for the murder that was the subject of the case at issue. But the prosecutor did not correct the false testimony. The jury was told, however, that an unnamed public defender had promised to "do what he could" for the witness.<sup>80</sup> The question was not specifically a *Brady* question—a decision that was still a few years away when *Napue* was decided—but framed instead as a matter of due process arising from the uncontested failure to flag and/or correct the witness' false



testimony. The Illinois court found no basis for relief; in its view the testimony regarding the public defender's intention to seek a benefit for the witness was sufficient to apprise the jury of the witness' potential motive to falsify testimony.

The Supreme Court found otherwise. The Court noted that the prosecutor's choice to ask the informant at trial whether any official source promised the informant consideration, itself, indicated the prosecution's recognition that the presence or absence of such consideration might sway a jury's credibility determination. "Had the jury been apprised of the true facts," the Court concluded, "it might well have concluded that [the informant] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [the informant] was testifying, for [the informant] might have believed that such a representative was in a position to implement ... any promise of consideration."<sup>81</sup> This Court in (*Andre*) *Johnson* effectively imported this principle into the *Brady* context, when it quoted *Napue* vis-à-vis prejudice: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."<sup>82</sup>

Regarding the materiality component of the *Brady* test, Johnson underscored Lewis' central role in the prosecution, a role that ADA Weintraub characterized as such at the PCRA hearing.<sup>83</sup> Nor is this characterization a *post hoc* assessment. As Johnson highlights, ADA Weintraub in his opening statement referred to Lewis as "one of the most important people in this case" due to Johnson's confession.<sup>84</sup> On ADA Weintraub's own post-trial account, Lewis was an "excellent witness," and the only witness "who gave direct testimony relating to [Johnson's] commission of the murders."<sup>85</sup>

**\*638** Attorney Penglase admitted that a dominant theme of the defense required discrediting Lewis; "[if] we didn't make him a liar, then Mr. Johnson confessed."<sup>86</sup> Attorney Penglase indicated that he would have used the report regarding Rock had he been aware of it, because the information Lewis was "trying to sell was wrong," and it was "another example of him trying to sell information for benefit."<sup>87</sup>

The Commonwealth does not categorically dispute that disclosable documents regarding Lewis' history of

cooperation were not disclosed. Instead, it argues that the omission was immaterial because it was "cumulative of what trial counsel already knew"<sup>88</sup> and had communicated to the jury.<sup>89</sup> On the Commonwealth's account, trial counsel was aware of numerous instances of Lewis' cooperation with law enforcement and conveyed that fact to the jury through cross-examination and in its closing argument.

It is true that Attorney Penglase spoke only briefly about Lewis' history of cooperation in closing: "The only evidence that we have in this case that directly suggests that Marcel was involved in these murders is George Lewis. George Lewis is a liar. George Lewis has a lifetime of dishonesty. He is a career liar."<sup>90</sup> Thus, while Attorney Penglase argued that Lewis lied in his testimony about aspects of his interactions with Johnson, the above quotation is all Attorney Penglase had to say about Lewis' lengthy, now-undisputed history of informing on fellow inmates and others for personal advantage—evidence that ADA Weintraub admitted he would consider disclosable, and that Attorney Penglase indicated he would have liked to have had in his possession and might have used in impeachment, given the opportunity.

The PCRA court was unconvinced. First, it underscored a categorical lack of evidence that the Commonwealth *offered* Lewis assistance with his then-pending New Jersey charges. While ADA Weintraub passed on Lewis' inquiry regarding his seized cash, in no way did he seek its return. And he never followed up on his request. Similarly, while Attorney Ward in an email to ADA Weintraub indicated that he would grant consideration of Johnson's testimony in connection with those outstanding New Jersey charges, there was no evidence that Lewis was aware of this email or the sentiment Attorney Ward conveyed in it. ADA Weintraub acknowledged uncertainty in the details but was confident that he promised nothing as to the charges pending in New Jersey or otherwise.<sup>91</sup> The PCRA court emphasized that an informant's "hope is certainly not *Brady* material."<sup>92</sup>

**\*639** Among things that were admittedly not disclosed, the court acknowledged the Commonwealth's admission that it inadvertently withheld a letter that Lewis sent to Bucks County authorities offering to cooperate in a prior case in that county in exchange for leniency in a then-pending case against him. The ADAs in this case testified that they were not aware of the letter in question. Noting that ignorance is not a defense against a *Brady* violation, the court then turned to materiality. The court found that the letter would



have been no more than cumulative, because the jury was conscious of numerous attempts Lewis had made to cooperate in exchange for personal advantage. To impeach using the letter merely would have contributed to the sense that Lewis had an incentive to lie, but the jury was made well aware of this prospect in any event by the prosecution at trial. As well, trial counsel testified that Lewis was effective on the stand, and counsel had no interest in extending his testimony, lest counsel's own credibility be undermined.<sup>93</sup> Instead, counsel relied upon the testimony of a prison investigator to confirm that Lewis offered to come forward in tandem with a request for assistance with his prison misconducts.<sup>94</sup>

Finally and generally, the court found that, to the extent that Johnson's claims involved information contained in prison records, including the aforesaid letter regarding Shaquel Rock, the Commonwealth neither had possession of those records nor had any obligation to obtain them and turn them over. Rather, those records were equally available to the defense, and when that is the case, no *Brady* violation occurs.<sup>95</sup>

Next, the PCRA court considered Johnson's claims regarding impeachment evidence as to Marquis, evidence which suggested that the police had threatened Marquis, explicitly or implicitly, with the specter of prosecution in association with his role in events underlying this case. Johnson's allegation in the PCRA court was that a promise of leniency on various pending charges to extract from Marquis testimony about Johnson wanting "to make a come up" contributed to a jury finding that Johnson had a motive for the crimes. The most compelling support for this claim was ADA Weintraub's own testimony regarding an interrogation at which he was present. There, he agreed with PCRA counsel that information was communicated to Marquis that he "could be potentially charged or criminally responsible for destroying evidence or lying to or obstructing justice."<sup>96</sup> On Johnson's account, evidence that the prosecution had threatened Marquis shortly before he offered his account of Johnson's alleged statement about making "a come up" \*640 might have been worthy impeachment evidence that trial counsel could have used had it been in his possession.<sup>97</sup>

The PCRA court found that Johnson had waived this claim by failing to call Marquis Johnson to testify at the PCRA hearing. On the PCRA court's account, rendered problematic by the record, the only outstanding issues for Marquis were pending probation and parole violations, as to which he was

not contacted until after trial. Because leniency could only have been promised with the cooperation of the probation and parole officials, and they had yet to contact Marquis, no such offer could have been extended. Accordingly, no relief was due.<sup>98</sup>

[18] [19] We find no error in the result reached by the PCRA court.

[W]e have observed that "due process requires the jury to be informed of any promise or understanding that the government would extend leniency in exchange for a witness's testimony." *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1131 (2011). Indeed, "[a]ny implication, promise or understanding that the government would extend leniency in exchange for a witness' testimony is relevant to the witness' credibility." *Strong*, 761 A.2d at 1171. Notably, we have further explained that the promise or "understanding between the prosecution and its testifying witness need not be in the form of a signed contract or a completed, ironclad agreement in order to qualify as *Brady* material," *Chmiel*, 30 A.3d at 1131, as impeachment evidence relating to "the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness." *Strong*, 761 A.2d at 1175.<sup>99</sup>

Here, the testimony does not establish that any promise of leniency, express or implied, was made in this case, at least not to Lewis.<sup>100</sup> Furthermore, we agree with the PCRA court that the evidence in question by and large would have been cumulative of evidence admitted at trial—or possessed by the defense, which elected not to introduce it—that made clear that Lewis had a history of seeking assistance in exchange for information concerning other criminality.

In seeking to establish materiality, Johnson underscores Lewis' apparently false claim to prison officials that Shaquel Rock confessed to a nightclub shooting in New Jersey, highlighting Attorney Penglase's PCRA testimony that it would have served as useful impeachment evidence because "it appears that the information that Lewis was trying to sell was wrong. And, two, it's another example of him trying to sell information for benefit."<sup>101</sup> And regarding Marquis, Johnson argues that "[e]vidence that Marquis Johnson was \*641 threatened with being charged in the murder of Ebony Talley immediately before he provided an incriminating statement against Mr. Johnson could have been used by

competent counsel to show that Marquis had fabricated this story about the ‘come up’ to ... avoid being charged in the homicide.”<sup>102</sup>

Undoubtedly, the evidence Johnson highlights would have been of at least some superficial benefit to Attorney Penglase in fortifying Johnson’s defense, inasmuch as it would have reflected poorly on both Lewis and Marquis. This, in turn, might have dented the principal evidence of motive (Marquis) and the only direct evidence of guilt (Lewis).

But we must conclude that Johnson has failed to establish materiality. We already established that a trial totally devoid of this challenged evidence would have led to the same result on the strength of the circumstantial case for guilt. Assessing the probable outcome of a trial at which Attorney Penglase’s cross-examinations of Lewis and Marquis proceeded with the benefit of potentially omitted *Brady* information, we arrive at the same conclusion. As to Lewis, in general terms, his effort to cooperate with law enforcement in service of his own self-interest was established by the Commonwealth on direct examination. Marquis’ testimony in a sense was cumulative of Martinez’s testimony to similar effect, albeit lacking the evocative “make a come up” language. As well, informing Marquis of the mere prospect of criminal exposure neither is a promise of leniency nor can it be assumed to have extracted his materially corroborated testimony. And even if Marquis had been discredited in the eyes of the jury, Martinez’s unchallenged testimony was to similar effect. Finally, evidence of motive is not necessary to a homicide prosecution.<sup>103</sup>

Here as well, the strength of the circumstantial case and the other evidence (assuming for this analysis that ineffectiveness claims against that evidence are unsuccessful) overwhelms the prospect of prejudice. And in this regard, we merely advert to the trial court’s original account of the voluminous circumstantial case against Johnson as supplemented and distilled above. Regardless of the vigor and rigor of the cross-examinations of Lewis and Marquis with the benefit of the allegedly undisclosed *Brady* evidence, our confidence in the jury verdict is not sufficiently undermined. Consequently, even assuming Johnson’s account of the *Brady* violations bears out, he cannot obtain relief on that claim for want of a showing of materiality and of prejudice.<sup>104</sup>

## 2. Failure to Correct False Testimony

In a closely related, narrower issue, Johnson argues that the Commonwealth violated his due process rights when it knowingly failed to correct false testimony—specifically Lewis’ allegedly too-narrow account of what he hoped to gain from testifying against Johnson in this case.

[20] Recently, the Supreme Court addressed the subject of uncorrected false testimony in *Glossip v. Oklahoma*.<sup>105</sup>

\*642 There, the Court explained the governing standard as follows:

In *Napue*, this Court held that a conviction knowingly “obtained through use of false evidence” violates the Fourteenth Amendment’s Due Process Clause. 360 U.S. at 269, 79 S.Ct. 1173. To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it “to go uncorrected when it appear[ed].” *Ibid*. If the defendant makes that showing, a new trial is warranted so long as the false testimony “may have had an effect on the outcome of the trial,” *id.* at 272, 79 S.Ct. 1173—that is, if it “‘in any reasonable likelihood [could] have affected the judgment of the jury,’ ” *Giglio*, 405 U.S. at 154, 92 S.Ct. 763 (quoting *Napue*, 360 U.S. at 271, 79 S.Ct. 1173). In effect, this materiality standard requires “ ‘the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *United States v. Bagley*, 473 U.S. 667, 680, n. 9, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).<sup>106</sup>

In so many words, if the defendant establishes that the prosecutor knowingly allowed false testimony to stand uncorrected, the burden rests with the Commonwealth to establish lack of prejudice.

We have addressed the evidence Johnson relies upon for this issue previously. It includes evidence that he maintains was discoverable under *Brady* (as discussed above) and information that Attorney Penglase might have discovered given due investigation (as discussed below). In short, Johnson contends that Lewis testified falsely about “the benefits he expected to receive for his cooperation.”<sup>107</sup> When asked whether he hoped to gain anything by his testimony, Lewis specifically alluded to help with his



parole violation, an associated detainer, and institutional misconducts he had had at BCCF—all as related in the lengthy excerpt of his testimony set forth above in connection with his *Brady* argument.

This testimony about what Lewis hoped to gain, on Johnson's account, was not false in itself. But Johnson maintains that it was effectively false inasmuch as it omitted aspirations to leniency of which the prosecutor was aware. In particular, Johnson alleges, ADA Weintraub knew that Lewis stood to gain favorable consideration for his cooperation in connection with open charges pending in New Jersey. At the PCRA hearing, ADA Weintraub acknowledged that he knew, before Lewis testified at Johnson's trial, that Attorney Ward intended to consider Lewis's Pennsylvania cooperation in fashioning a plea agreement disposing of Johnson's New Jersey charges. Nor was ADA Weintraub's willingness to raise his cooperation with New Jersey prosecutors unknown to Lewis: to the contrary, Lewis asked ADA Weintraub to inquire of New Jersey prosecutors regarding \$635 seized from him at the time of his New Jersey arrest, and ADA Weintraub undisputedly did so.

The PCRA court, relegating its discussion of this claim to a footnote, adverted directly to its review of the *Brady* allegations. “In short,” it explained, “while \*643 [Johnson] believes Mr. Lewis did not accurately mention the assistance with his pending New Jersey matter he expected to receive in return for his testimony, this Court finds that no such promise by the Commonwealth was made to Mr. Lewis.”<sup>108</sup> With no such promise comes no false testimony.

Having set forth in full ADA Weintraub's direct examination with regard to Lewis' outstanding charges at the time of his testimony and what he hoped to gain by his cooperation, we reiterate only the general points. First, ADA Weintraub adduced testimony regarding the charges against Lewis outstanding in New Jersey. Then ADA Weintraub inquired regarding an outstanding parole violation in Bucks County awaiting disposition as well as prison misconducts. “When you are done testifying in this case,” ADA Weintraub then asked, “what is your understanding of what we will do for you?” Lewis replied, “Try and help me out with my parole violation.”<sup>109</sup> Lewis further indicated that he had not been promised any particular sentence. Lewis also acknowledged prior prosecutorial assistance with an outstanding detainer. Finally, Lewis admitted that, in bringing information to prison authorities, he hoped to gain assistance with outstanding

prison misconducts, but indicated that he received no such help.<sup>110</sup>

[21] What we take from this testimony is that the jury was adequately informed that Lewis had offered information and testimony for personal benefits in this case. The jury also knew that Lewis could anticipate that cooperation sometimes invites prosecutorial assistance in pending matters. The jury was aware that Lewis had serious criminal charges outstanding in New Jersey. What we do not perceive in Lewis' testimony is any lie of commission or omission. ADA Weintraub asked specific questions to which he received focused, evidently true answers. As to the open-ended question concerning Lewis' expectation of any further assistance after his testimony, the only arguable omission raised by Johnson pertains to the New Jersey prosecution. Setting aside that the jury had been informed generally about Lewis' outstanding New Jersey charges, the PCRA court found that no promise of assistance, express or implied, had been extended with respect to these charges. This finding of fact is supported by the record; we may not disturb it.

[22] We note as well that a due process violation for failure to correct false testimony is subject to the materiality analysis that applies to other *Brady* violations.<sup>111</sup> And here, given the overlap—the harm asserted ultimately being the want of more vigorous direct and/or cross-examination regarding the prospect of assistance with the New Jersey charges—our materiality analysis is the same. There is no reason to question the jury's verdict due to the strength of the circumstantial case against Johnson.

### 3. Ineffective Assistance of Counsel, General Failure to Investigate and Impeach

As set forth above, to support a claim for ineffective assistance of counsel, a PCRA petitioner must plead and prove three things: first, that the claim has arguable \*644 merit; second, that counsel could have had no reasonable basis for the challenged action or omission (subject to the presumption that counsel is acting effectively); and third that the ineffectiveness caused him prejudice.<sup>112</sup> Prejudice occurs where “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”<sup>113</sup> Failure to prove any one prong of the test will defeat the claim.<sup>114</sup>

[23] [24] Principally at issue are deficiencies in trial counsel's investigation and impeachment of Lewis, Johnson, and the DNA evidence. This Court has explained:

Counsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary. *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717, 735 (2000) (citing *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). Counsel's unreasonable failure to prepare for trial is "an abdication of the minimum performance required of defense counsel." *Commonwealth v. Brooks*, 576 Pa. 332, 839 A.2d 245, 248 (2003) (quoting *Perry*, 644 A.2d at 709). The duty to investigate, of course, may include a duty to interview certain potential witnesses; and a prejudicial failure to fulfill this duty, unless pursuant to a reasonable strategic decision, may lead to a finding of ineffective assistance. Recently summarizing cases in *Commonwealth v. Dennis*, 597 Pa. 159, 950 A.2d 945 (2008), this Court stated that:

These cases ... arguably stand for the proposition that, at least where there is a limited amount of evidence of guilt, it is *per se* unreasonable not to attempt to investigate and interview known eyewitnesses in connection with defenses that hinge on the credibility of other witnesses. They do not stand, however, for the proposition that such an omission is *per se* prejudicial.

*Id.* at 960 (citing *Perry*, *supra*; *Commonwealth v. Weiss*, 530 Pa. 1, 606 A.2d 439, 442-43 (1992); *Commonwealth v. (Harold) Jones*, 496 Pa. 448, 437 A.2d 958 (1981); *Commonwealth v. Mabie*, 467 Pa. 464, 359 A.2d 369 (1976)) (emphasis omitted).<sup>115</sup>

In short, as Johnson frames it, "counsel's strategy at trial is only as reasonable as his investigation that supported such strategy."<sup>116</sup> Nonetheless, we must grant a "heavy measure of deference to counsel's judgments."<sup>117</sup>

We address the alleged deficiencies in Attorney Penglase's investigation and impeachment in turn, concluding by considering the cumulative prejudicial effect of what we find to be several troubling deficiencies in Attorney Penglase's approach to preparing Johnson's defense.

Although Johnson leads with a discussion of Attorney Penglase's alleged prejudicial failure to investigate Lewis specifically, we first take up Johnson's contention that Attorney Penglase's pre-trial investigation was *categorically* deficient. This issue focuses upon alleged \*645 deficiencies

in the police investigation that counsel failed to exploit in service of his "empty chair" defense, by which Attorney Penglase indicated that he sought to create an open question as to who killed the victims by suggesting or implying an unspecified cohort of shadowy, deliberately unnamed potential killers.

Johnson underscores Talley's drug dealing business and the risks to which that exposed her. According to Johnson, she was known to sell fake drugs and had a reputation as a snitch, both perilous behaviors in the drug business. Police did not investigate those aspects of her life or fully explore the people she interacted with the day she was killed. For one thing, police did not timely request Talley's phone records, despite the facts that the killer took her phone and that she was known to have used it frequently up to very shortly before her death. Because police waited six months to request the phone records, they could not obtain the substance of her text messages immediately before her death, which might have been available had they acted more promptly. What they did obtain was a general log of the calls and texts to and from her phone in the days before and the day of her murder. But they never sought to identify or interview the individuals to whom the numbers corresponded—*i.e.*, the people with whom she communicated, especially on the day of her killing.

Johnson had told investigators that, when he left the apartment before the killings, Talley had a drug customer on the way. Johnson offered the same information to Attorney Penglase and allegedly asked him to review Talley's phone traffic from the day of the killing, but Attorney Penglase failed to do so. At first, he did not even request the records from the Commonwealth, but when eventually he obtained them, he did nothing more. Neither he nor Attorney Fioravanti directed investigator Sean Hawke to follow up on the numbers.

Police also had information regarding several people who frequented Talley's apartment and allegedly were involved in Talley's drug business. They were associated with a white Crown Victoria like one the police seized outside the apartment, which was registered to Kevin Kerkula, with whom police had reason to believe Talley was romantically involved. No one ever claimed the car, but police made no effort to perform a forensic analysis of the car or to interview Kerkula.

Evidence suggested Talley had several recurring sexual partners, and she was found dead in the apartment with her



pants down and her underwear ripped. But counsel made no effort to investigate these relationships.

When asked to explain why he did not follow up on—or at least highlight at trial—these deficiencies in the police investigators’ efforts, Attorney Penglase expressed that, in pursuing an “empty chair” defense, he did not want to identify specific candidates for fear that the prosecution could obtain rebuttal evidence that effectively proved that each specific alternative killer could not be guilty.<sup>118</sup> Johnson disagrees; in his view this is incoherent, because counsel did not need to identify any one suspect to highlight the investigative deficiencies. It would have sufficed simply to elicit at trial all the leads police investigators did *not* pursue. The prosecution would have been more or less incapable of rebutting that evidence.

As critically, counsel effectively confessed to conducting *no* material investigation \*646 in this case. He “didn’t interview any witnesses.”<sup>119</sup> He did not tell his investigator to interview a single witness.<sup>120</sup> He declined to follow up on any of the leads Johnson provided him because much of Johnson’s voluminous narrative “wasn’t even internally consistent.”<sup>121</sup>

[25] The only reason Attorney Penglase offered for his failure to investigate was his claim that doing so would have disserved his empty chair defense, though it is not entirely clear how. It seems he was concerned about reciprocal discovery obligations<sup>122</sup>—ostensibly that he would have to disclose any leads he pursued that turned out to be dead ends or to be compatible with Johnson’s guilt—but it is not clear what authority would require disclosure of defense counsel’s investigative dead ends.<sup>123</sup> This misunderstanding of the law and the failure to disabuse himself of it, Johnson argues, “is a quintessential example of unreasonable performance under *Strickland*.”<sup>124</sup>

[26] Johnson correctly asserts that counsel “has a general duty to undertake reasonable investigations or make reasonable decision[s] that render particular investigations unnecessary.”<sup>125</sup> Here, he maintains, Attorney Penglase had no reasonable basis to forego an entire array of available investigative leads that might have led to at least hints of other parties with motive and opportunity to have killed the victims.

Among people the police failed to identify from phone records and that both counsel and police failed to investigate were John Clinton, who stipulated for purposes of the PCRA hearing that Johnson was not in competition with Talley for drug business \*647 and that both obtained drugs from the same supplier. Clinton also would have testified that Kerkula contacted him the day of the murder; Kerkula was the next to last person Talley communicated with that day. At a minimum, counsel could have challenged investigators’ failure to investigate Kerkula. Another person who appeared on Talley’s phone log from the day of the killing was Mark Wilson. Wilson had a criminal record for setting fire to his parent’s house while his mother was home—and taking her cell phone. This information is suggestive, at the very least.

In sum, cell phone records at least implied that a drug customer may have been on the way to visit Talley at the same time that Johnson allegedly killed her, that Talley had informed numerous people the morning of her killing that she had a large volume of heroin to sell, and that Johnson had no apparent motive to kill a business associate.

The PCRA court accepted Attorney Penglase’s explanation that his strategy actually comported with Johnson’s desired defense—that he highlighted Talley’s “dangerous lifestyle” and that Johnson’s own litany to counsel of potential leads was internally inconsistent and therefore was insufficient to warrant further exploration. The court also rejected suggestions that the defense investigator’s efforts were wanting: on the PCRA court’s account, “Hawke interviewed key witnesses uncovered by police, canvassed the Avalon Court apartment complex in search of additional witnesses, and effectively neutralized Commonwealth witnesses.... [He] was not required to investigate every drug dealer, every drug user, or every criminal with whom Ms. Talley associated....”<sup>126</sup> The court further indicated that Johnson’s “own, new investigation has not produced anything of value other than inadmissible conjecture, rumor, and speculation.”<sup>127</sup>

The PCRA court also rejected the claim that counsel should have done more to reveal the alleged deficiencies in the police investigation. “[I]f he would have done so,” the court concluded, “he would have opened the door to the testimony regarding the number of witnesses interviewed and the number of other individuals investigated and eliminated as suspects by the Commonwealth,” undermining the empty chair strategy.<sup>128</sup> Thus, trial counsel’s strategy was reasonable.

[27] We find the PCRA court's dismissive response to these issues nearly as unsatisfying as counsel's minimal investigation and effort to call into question what may have been an insufficient police investigation. As noted, counsel's avowed failure to investigate must have been informed by a reasonable strategy,<sup>129</sup> and it is not at all clear that such a strategy is present here.

[28] Having said that, we cannot reject out of hand the PCRA court's suggestion that the putative evidence counsel could have uncovered—even assuming the individuals in question were available to testify—would not have been useful to the defense. Similarly, while it may be the case that the police investigation was thin enough that the prosecution would have had no way of rebutting criticism of its investigative efforts, the question whether \*648 counsel had a reasonable basis for fearing this to be the case does not depend on what hindsight suggests could have happened had counsel pursued this line of inquiry. We cannot allow 20/20 hindsight to cloud our consideration of the context in which counsel made tactical and strategic decisions.<sup>130</sup>

Finally, there is the question of prejudice. The unpursued prospect of obtaining the evidence identified above—at least as characterized by Johnson—which might call into question the identity of the killer to some degree undermines confidence in the verdict. Detective Jack Slattery testified at the PCRA hearing that there was no reason not to have obtained the phone records sooner, because the absence of Talley's phone from the scene suggested that it had been taken by the killer to hide incriminating evidence that might be found on it.<sup>131</sup> Had the records been sought sooner after the murder, there was some chance that they would have contained the content of text messages sent the day of the murder.<sup>132</sup> This was especially problematic inasmuch as Talley had used her phone the day of her murder as late as 2:49 p.m., minutes before her death.<sup>133</sup>

[29] Having said as much, we must also acknowledge that a handful of drug-dealing or drug-consuming witnesses who might muddy the waters of the case for Johnson's guilt by hinting at alternative killers does not affect, in our view, the strength of the circumstantial case for Johnson's guilt. Even if someone else might have had opportunity, that does not explain Johnson's frantic behavior at the relevant time, his persistent inquiries regarding the fire, his serial refusals to cooperate with family and police who enlisted his assistance,

his shifting stories under police questioning, Talley's DNA under Johnson's fingernails,<sup>134</sup> and so on.

[30] On balance we cannot find sufficient prejudice arising from these allegations to sustain an ineffective assistance claim arising from the facially deficient quality of counsel's investigation. The law counsels against applying a *per se* rule finding prejudice any time counsel's investigation is wanting,<sup>135</sup> and here it would take such a rule to overcome the circumstantial case against Johnson.

#### 4. Ineffective Assistance, Failure to Impeach George Lewis

[31] With respect to Lewis, counsel's alleged omissions largely pertain to obtaining and/or utilizing prison records—those obtained, those overlooked, the distinction between which is blurry at times—and potentially available records concerning the New Jersey prosecutions. We have already reviewed the direct and cross-examinations at trial of Lewis regarding the pending New Jersey matters; ADA Weintraub's \*649 PCRA testimony regarding the limited extent to which he offered assistance with those charges; the PCRA court's sustainable finding of fact that ADA Weintraub never promised anything relative to New Jersey in return for Lewis' testimony; and the allegations regarding prejudice arising from any failure to disclose records in the Commonwealth's possession that pertained to the outstanding New Jersey matter. We found no prejudice, and the same applies here, even to the extent that counsel could have conducted a more rigorous examination and could have utilized the records thus obtained to enhance his efforts to impeach Lewis.

There also appears to be some confusion in the PCRA record concerning what prison records Attorney Penglase had in his possession, though there is little dispute that he neglected to use the New Jersey-related material they contain at trial. These records could not be the subject of the above *Brady* analysis, because we find that ADA Weintraub had no obligation to produce them.

This does not change the analysis. Inasmuch as all of the evidence in question would have gone to Lewis' veracity, the frequency of his efforts to curry favor, and the degree to which he sought or expected consideration for his testimony in this case, we cannot conclude that under such impeachment it is reasonably probable not only that the jury would have rejected the substance of Lewis' testimony but that, in so doing, it



would have found the prosecution in its entirety so flawed as to reach a different verdict.

For want of prejudice, this claim fails.

##### *5. Ineffective Assistance, Failure to Impeach Marquis Johnson*

[32] Here, too, our analysis is materially the same as it was in connection with Johnson's parallel *Brady* claim. Even if we assume that Attorney Penglase was aware of—and had vigorously cross-examined Marquis concerning—the alleged threats of prosecution that investigators leveled in an effort to extract testimony against Johnson, Marquis' evidence was substantially similar to Martinez's and was less than essential to the circumstantial case, as fortified by other evidence, including DNA, Johnson's jailhouse confession, and so on.

In short, on our reading, Marquis' testimony was of only secondary benefit to the prosecution, adding cumulative evidence of Johnson's effectively undisputed involvement with Talley in the drug trade. His lone distinctive contribution was relative to asserting a putative motive, which is neither necessary nor, in this case, terribly beneficial, given the strength of the circumstantial case. Here as well, the ineffectiveness claim fails due to Johnson's failure to establish the reasonable probability of a different outcome had trial counsel impeached Marquis relative to his own criminal exposure.

##### *6. Ineffective Assistance, Failure to Challenge DNA Evidence*

At issue here is Johnson's contention that trial counsel failed “to investigate, consult with an expert, or otherwise properly prepare to confront the Commonwealth's DNA testimony.”<sup>136</sup> At the outset, it is important to note that the only substantial DNA evidence linking Johnson to Talley was the presence of Talley's DNA under Johnson's fingernails, which allegedly signaled “intimate contact.” No serology analysis had been performed to determine the source of that DNA, *i.e.*, skin, blood, etc. Arthur Young, an expert whom both defense attorneys consulted, indicated in \*650 his declaration that “it was likely that the victim's DNA was due to transfer, as [Johnson] was an occupant in [Talley's] residence and only needed to come in contact with objects in that residence to pick up detectable levels

of her DNA on or under his fingernails.”<sup>137</sup> In the same declaration he highlighted other potential weaknesses in the Commonwealth's DNA expert's analysis and indicated that he was, at the time of trial, available and willing to prepare a report and testify as to these flaws.<sup>138</sup>

Attorney Penglase undisputedly had maintained some contact with Young. And he undisputedly sought and was granted permission to have Young in the courtroom during the Commonwealth's expert's testimony, ostensibly to ensure adequate preparation for cross-examining that witness.<sup>139</sup> However, very shortly before trial, Attorney Penglase cut off contact with Young, evidently because he learned that Young had been discredited in New York for lying under oath.<sup>140</sup>

Regarding his decision to proceed to trial without a DNA expert in the courtroom, Attorney Penglase testified as follows:

Q. Well, without an expert in the room, what was your plan to attack the DNA information that was testified to.

A. My plan was to use the information that I had been gathering from Mr. Young and Ms. [Katherine] Cross [Young's then-business partner<sup>141</sup>] throughout the pendency of the matters, to use my own knowledge as an attorney working with DNA evidence and, quite frankly, the Cross-Examination of the Commonwealth's expert. That expert gave me almost every piece of evidence and concession that I needed.

\* \* \* \*

Q. Did you have any strategic reason for not challenging the admissibility of some of the DNA opinions under the Pennsylvania *Frye* standard?

A. My opinion was that the DNA evidence was very good for the defense, and my recollection of it is that I wanted it all in. The Commonwealth's expert did her best to color that evidence in the light favorable to the Commonwealth but, frankly, as I said, I think that at the end of the day the DNA evidence was the defense's best exhibits.<sup>142</sup>

Johnson notes that the Commonwealth's expert testified that the only way Talley's DNA would have come to be under Johnson's fingernails was through “more than just casual contact”—rather “some kind of intimate contact.”<sup>143</sup> But that testimony was “wrong,” in Johnson's formulation, or

perhaps just incomplete. In support of that testimony, the Commonwealth's expert cited an article that complicated the unequivocal trial testimony by indicating that such a DNA deposit might also arise where two individuals share accommodations. At the PCRA hearing, the same investigator conceded the point.<sup>144</sup> Penglase evidently did **\*651** not read this article, and did not cross-examine the expert on this point—this, despite the fact that he indicated that his goal at trial was “to minimize [the Commonwealth expert's] opinion of intimate versus casual contact.”<sup>145</sup>

Johnson argues that the insufficiency of Attorney Penglase's investigation, and his failure to have a DNA expert in the room during the Commonwealth's DNA testimony, lack any reasonable basis. And this is evidenced by the materially undisputed fact that the expert's own cited article undermined the superficial certainty of his testimony, a fact even that expert concedes now. Given that, on his present account, Attorney Penglase's entire strategy for defending against the DNA evidence was to impeach the expert's testimony, his utter failure to prepare to do so effectively was unreasonable.

The result, Johnson argues, was prejudicial. In effect, the Commonwealth's expert's testimony that the only way Talley's DNA could have ended up under Johnson's fingernails was through intimate contact went un rebutted by the compelling evidence that was available to the defense, and, as the principal physical evidence inculpatory Johnson, it was critically important to the jury's verdict. The evidence that Johnson had handled the skillet found near Talley's body—the one that investigators speculated had been used to knock out two of Talley's teeth—for want of rebuttal could only have further damaged Johnson's defense. Thus, according to Johnson, there is a reasonable probability that without even that modest amount of physical evidence, the jury would have reached the contrary verdict.

The PCRA court, crediting Attorney Penglase's stated strategy of highlighting the relative *lack* of physical evidence, noted the various potential sources of DNA that did *not* disclose any identifiable trace of Johnson's genetic material. Citing the defense's opening argument, the court observed that Attorney Penglase presented the Commonwealth's own theory of the case—that Talley had struggled with her attacker, clutching and fighting him, and during that struggle the attacker ripped off her wig and do-rag—and noted that the various items associated with that struggle bore none of Johnson's DNA, even though it bore male chromosomal material. “[Talley] probably didn't know she was [d]oing it,

but she tried her best to give you evidence of her attacker. She left it in lots of places. None of it belongs to [Johnson].”<sup>146</sup>

The PCRA court noted that there is no obligation to counter expert testimony with countervailing expert testimony if counsel “is able effectively to cross-examine prosecution witnesses and elicit helpful testimony.”<sup>147</sup> And the court cited one important instance where Attorney Penglase elicited from a Commonwealth expert that a given result from the scene excluded Johnson, albeit divorced from the context of which item was in question.<sup>148</sup> In another instance, Attorney Penglase elicited an admission that the supposed match with the skillet handle in fact failed definitively to **\*652** link Johnson to that item.<sup>149</sup> These and other instances, on the PCRA court's account, demonstrated that Attorney Penglase sufficiently cross-examined the Commonwealth's DNA experts without the benefit of a defense expert.

Regarding prejudice, the PCRA court opined that a defense expert “would have only muddled the waters and confused the jury” to no clear benefit.<sup>150</sup> Moreover, it is not clear that the defense would have been able to locate an expert witness to testify in effective impeachment of the Commonwealth's evidence.

[33] There is no question that counsel can be deemed ineffective for failing to educate himself with respect to the import and credibility of DNA evidence introduced by the Commonwealth in a criminal trial. Such evidence is especially potent when it points an accusatory finger at the defendant, which makes it especially important that counsel prepare to meet such evidence armed with whatever means of rebuttal are available.

In *Commonwealth v. Pruitt*, this Court acknowledged the “potency of DNA evidence.”<sup>151</sup> In that case, as here, counsel had failed to rely upon a countervailing expert witness to challenge the Commonwealth's DNA evidence, had materially failed to educate himself on the subject, and, in the words of the appellant in that case, effectively conducted cross-examination “on the fly.”<sup>152</sup> This Court found no prejudice sufficient to sustain an ineffectiveness claim on this basis. However, in making that determination, we observed that the defendant's “identity as the robber and killer has never seriously been put into contest,” and “the fact of [the] crime was apparent from the physical evidence, and [the defendant] ha[d] never provided any plausible explanation that would



persuasively suggest any other person's involvement in the relevant events.”<sup>153</sup>

[34] Here, by contrast, identity is central to Johnson's defense, and the DNA evidence in question is the only physical evidence that may tie him to the crime. The very theory that Johnson was a regular in Talley's house suggests that more DNA evidence would have been found than actually was. That said, in this case, for purposes of the present analysis, there also is a jailhouse confession and a damning circumstantial case.

To find prejudice, we must find that, had Attorney Penglase taken the steps Johnson would have had him take, there is a reasonable probability that the verdict would have differed. Given the sum and substance of the non-DNA evidence, we cannot so find. In effect, against a volume of inconclusive and therefore unhelpful evidence to the prosecution—which, as such, arguably was beneficial to the defense—stood one especially problematic finding of Talley's DNA under Johnson's fingernails. We cannot conclude that, without that genetic evidence, the jury was reasonably likely not to convict Johnson.

#### *7. Ineffective Assistance, Failure to Introduce Character Evidence*

Johnson contends that, in this case, his “reputation for being a peaceful citizen was relevant to the murder charges against him and would have constituted substantive evidence of his innocence of \*653 these charges.”<sup>154</sup> Characterizing this case as “a close one,”<sup>155</sup> Johnson points to the prosecution's heavy reliance upon Lewis' testimony, infirmities in the evidence of motive, and the absence of incriminating DNA evidence.<sup>156</sup> He underscores that the parties stipulated that several witnesses were available and willing to testify as to Johnson's good character and non-violent reputation, including a bishop at Johnson's church and a number of Johnson's close friends.

Evidently taking arguable merit for granted—and we will do the same<sup>157</sup>—Johnson proceeds directly to the question of the reasonableness of counsel's decision not to call character witnesses. Counsel testified that he elected not to do so first because he feared opening the door to incriminating evidence. As well, he avowedly preferred to reserve those witnesses (if necessary) for the penalty phase, and worried

that, if he presented them during the guilt phase and the jury found Johnson guilty, the witnesses' credibility would be compromised for the penalty phase.

[35] There is no question that counsel *may* be deemed ineffective for failing to present character witnesses. In *Weiss*, for example, this Court found ineffectiveness for the failure to call such witnesses when the trial evidence was in the nature of he-said / she-said, and the PCRA court determined that there were numerous witnesses who had years of familiarity with the defendant, all of whom would testify to the defendant's good reputation in the community. These circumstances created an “overwhelming need for character evidence,” and counsel's “limited investigation into the quantity and/or quality of potential character witnesses on behalf of appellant, and counsel's prejudice toward familial witnesses,” as well as his ultimate decision not to call any character witnesses, lacked a reasonable basis under the circumstances of that case and prejudiced the defendant at trial.<sup>158</sup>

In rejecting this claim in this case, the PCRA court focused upon what it took to be counsel's reasonable basis for declining to call character witnesses. It underscored that, where character evidence is introduced, it may be rebutted with countervailing evidence regarding the defendant's reputation in the community *or* specific instances of the defendant's conduct that are at odds with his purported reputation.<sup>159</sup> Thus, when counsel has grounds to fear such rebuttal evidence, he “ha[s] an objectively reasonable basis for determining that the evidence would have done more harm than good, [and the] claim fails.”<sup>160</sup>

[36] During his PCRA testimony, Attorney Penglase cited this concern.<sup>161</sup> Less convincingly, he also cited his concern that \*654 he would risk discrediting character witnesses who might be useful for mitigation purposes during the penalty phase, if Johnson was found guilty of the alleged murders.<sup>162</sup> But his concern for rebuttal evidence appears valid on the record. For example, Hawke testified during the PCRA hearing that he had interviewed Coles before trial, who indicated that Johnson had committed armed robberies around the Avalon Court Area.<sup>163</sup> As noted above, Coles, Talley's cousin and Johnson's friend, appeared at trial as a witness for the prosecution, whom Johnson called several times the afternoon of the killings.<sup>164</sup>

While counsel may be deemed ineffective for failing to present character evidence, we find few instances in which this Court has granted relief on that basis; Johnson cites only *Weiss*. The attorney in *Weiss* was far more neglectful of the prospective benefit of investigating and calling available character witnesses in that case. As well, the potential benefit of character testimony appears to have been greater there than in this case. Where an impeccable reputation in the community may well be a dispositive factor in a he-said/she-sexual assault case like *Weiss*, here it is less clear how even the most positive of community reputations might have played against Lewis' testimony and/or with the circumstantial evidence of Johnson's guilt. And there is evidence that his reputation was not impeccable or irrebuttable in any event.

[37] Ultimately, albeit with ongoing reservations about the rigor of Attorney Penglase's investigatory efforts, we cannot conclude that he lacked a reasonable basis for declining to present character witnesses. Moreover, even if we found fault in his decision, we would be hard pressed to find prejudice in it. Having a good reputation in the community would not change the fact of Johnson's conduct during the afternoon and evening of the day in question, from his reckless flight to the instability of the stories he told investigators. And it is unlikely that it would fatally undermine the combination of Johnson's putative confession, the presence of Talley's DNA under his nails, and the evidence exhibiting his consciousness of guilt.

#### 8. Ineffective Assistance, Cumulative Prejudice

[38] [39] We have found that each of the foregoing ineffective assistance claims by itself does not undermines confidence in the verdict or create a reasonable probability that a jury would have reached a different result. However, where numerous ineffective assistance claims fail for want of prejudice, we must consider their cumulative prejudicial effect before we reject the claims *in toto*.<sup>165</sup>

Our misgivings regarding Attorney Penglase's investigative diligence give us pause. In his PCRA testimony, Attorney Penglase conceded an alarming number of the deficiencies that Johnson identified, and not infrequently conceded that he lacked a reasonable basis for his decisions. It appears to us that, even granting Attorney Penglase the assumption that his decisions were considered at the time they were made, time after time his review led \*655 him to the conclusion that little or no investigation was called for.

We cannot gainsay the difficulties this presents. Counterposed against a compelling circumstantial case for Johnson's guilt, we nonetheless must acknowledge that the only direct evidence of Johnson's guilt came in the form of an inherently suspect, and only modestly tested, report of a jailhouse confession. We also have what appears to be a pervasive pattern of deficiencies in trial counsel's investigation and preparation for Johnson's guilt-phase trial—not just as to Lewis, but as to the quality and rigor of the Commonwealth's investigation and counsel's failure to fully test the DNA evidence that, to a limited but not negligible extent, tied Johnson to some physical encounter with the victim. We have on occasion granted relief for deficiencies in trial preparation like these.

[40] [41] [42] But while we must consider the prejudice occasioned by these shortcomings cumulatively, our inquiry is probabilistic, and “[a] defendant is entitled to a fair trial, not a perfect one.”<sup>166</sup> We have little difficulty anticipating a guilty verdict despite Attorney Penglase's alleged deficiencies with respect to his investigation and impeachment of either of George Lewis or Marquis Johnson standing alone, or with regard (standing alone) to the apparent weakness of his treatment of the Commonwealth's DNA evidence. It is with great misgivings that we can implicitly bless legal representation that seemed often to select the least burdensome option, venturing only a handful of *post hoc* rationalizations for the investigated avenues untraveled.

Nonetheless, we must not allow our discomfiture to overwhelm our reticence to second-guess counsel's decisions, let alone to overturn a jury's verdicts of guilt of three homicides. Nor can it eclipse what we have underscored is a strong circumstantial case against Johnson.

On balance, the strength of the circumstantial case must prevail over the several weaknesses in Attorney Penglase's efforts on Johnson's behalf. In several instances where counsel lacked a reasonable basis for his chosen course, the resultant prejudice is not enough to overcome the undisturbed evidence of guilt. Accordingly, we find no grounds for relief from the guilt-phase verdict rendered by the jury, and we proceed to consider the penalty-phase issues that Johnson raises.

#### V. Penalty Phase



### A. Aggravators and Mitigators and the Standard of Review

Capital sentencing is governed by statute. 42 Pa.C.S. § 9711 provides for what amounts to a second trial in which the jury determines whether the circumstances of a first-degree murder warrant imposition of the death penalty. In the course of that trial, the prosecution introduces some number of enumerated aggravating circumstances and the defense counters with evidence of mitigating circumstances. A lengthy and exclusive list of eighteen aggravating circumstances is provided in Section 9711(d). A less lengthy list of mitigating circumstances is provided for in Section 9711(e).

The jury is instructed on all aggravating and mitigating circumstances as to which there is some competent evidence. Aggravating circumstances must be proved beyond a reasonable doubt, while mitigating circumstances need be proved only by a preponderance of the evidence. The jury may impose the death penalty only upon unanimous accord. But it is instructed that it *must* impose the death penalty if (a) it \*656 finds at least one statutory aggravator and no statutory mitigators *or* (b) it finds at least one of each and concludes that the aggravating circumstances outweigh the mitigating circumstances.<sup>167</sup> In this case, the jury unanimously found that the aggravating factors in Sections 9711(d)(5), (11), and (16) outweighed the mitigating factors found in Sections 9711(e)(1), (4), and (8).<sup>168</sup> The jury did *not* find that Johnson “was under the influence of extreme mental or emotional disturbance” at the time of the killings, a mitigator that Johnson sought to establish through evidence of his “traumatic upbringing and serious mental health impairments.”<sup>169</sup>

To reiterate before we take up our discussion, on review of an order denying relief under the PCRA, this Court reviews the PCRA court’s decision for an error of law or an abuse of discretion. This Court further is bound by any findings of fact that are supported by the PCRA record, viewed in the light most favorable to the prevailing party.<sup>170</sup>

### B. Ineffective Assistance, Failure to Resist Exclusion of Mitigating Evidence

[43] Johnson argues that the trial court erred in excluding what he describes as “mitigating evidence of [Johnson’s] multigenerational history of trauma and mental illness and the effects of [Johnson’s] brain damage on his emotional and

mental development.”<sup>171</sup> As an example of the former, he notes that the trial court restrained mitigation expert Carol Krych from testifying as to any evidence of generational trauma that Johnson, himself, did not experience. In Johnson’s opinion, this precluded Krych from testifying regarding precisely the information she and other mitigation experts rely upon in formulating their opinions. Genetics and environment are important factors in mental and emotional development and the diagnosis of mental illness. Similarly, the court precluded neuropsychologist Dr. Carol Armstrong from “testifying about how [Johnson’s] deficits in executive functioning impacted his behavior.”<sup>172</sup> As evidence of the trial court’s “reprimanding” tone in rejecting Dr. Armstrong’s testimony, he cites two incidents in which the court pointedly instructed Dr. Armstrong to answer the question posed.<sup>173</sup> Johnson also argues that the trial judge’s allegedly intemperate trial demeanor during sentencing reflected a lack of impartiality. On Johnson’s account, the court “openly criticized [Krych’s and Dr. Armstrong’s] testimony and implied that their credibility was suspect.”<sup>174</sup> As stand-alone issues, these either were or could have been litigated on direct appeal. Accordingly, we may not consider them on their own terms \*657 on collateral review.<sup>175</sup>

But Johnson also seeks to frame this as an ineffectiveness claim. Specifically, he argues that Attorney Fioravanti was ineffective for failing to object to the limitations the court imposed upon Dr. Armstrong’s testimony. Similarly, counsel was ineffective for not objecting to the suggestions of partiality that met Krych’s and Dr. Armstrong’s testimony. Counsel raised the issue on direct appeal, Johnson concedes, but on his account appellate counsel Attorney Fioravanti’s appellate argument was enfeebled by a lack of examination of binding precedent in favor of a broader understanding of the scope of mitigating evidence that is relevant in capital sentencing proceedings.

[44] Johnson’s argument as to this issue is perplexing. Asserting first that “[c]ounsel posed no objection at trial to the limitation on Dr. Armstrong’s testimony,”<sup>176</sup> he goes on to acknowledge that counsel did object to limitations on Krych’s testimony, but contends that Attorney Fioravanti was ineffective for *how* he objected, failing to cite any applicable law at the time of the objection. He then acknowledges that Attorney Fioravanti raised the underlying evidentiary issue on direct appeal to this Court, and that this court considered and rejected it, but faults the way in which Attorney Fioravanti argued the issue. Ultimately, we find Johnson’s arguments

as to Attorney Fioravanti's alleged deficiencies at trial and on appeal too vague to credit or treat as a basis for relief, and Johnson's perfunctory claims of prejudice wholly unconvincing. The jury was given ample evidence of the regrettable circumstances of Johnson's upbringing and was unpersuaded that he had established the [Section 9711\(e\)\(2\)](#) mitigator.

Accordingly, Johnson's allegations of Attorney Fioravanti's ineffectiveness at trial and on appeal with respect to these evidentiary questions fail.

### C. Ineffective Assistance, Failure to Develop Mitigating Evidence

Johnson also argues that Attorney Fioravanti constitutionally was ineffective for failing adequately to develop mitigation evidence in advance of sentencing, particularly as to the [Section 9711\(e\)\(2\)](#) mitigator (defendant “under the influence of extreme mental or emotional disturbance”). He notes that the defense relied exclusively upon the testimony of Dr. Armstrong, a neuropsychologist, and Dr. Steven Berkowitz, a psychiatrist. On Johnson's account, Attorney Fioravanti knew that the prosecution would rely in rebuttal upon the report of John O'Brien, M.D., but failed either to obtain or perhaps seek to preclude Dr. O'Brien's report because the defense experts were given insufficient time to prepare to meet the report. Regarding Dr. O'Brien's report, it allegedly was provided on June 5, 2015, the day after penalty proceedings commenced and after Dr. Armstrong already had testified. Johnson also contends that Attorney Fioravanti categorically failed to investigate and present family witnesses to a legacy of \*658 family trauma, who have declared in connection with these proceedings that they were available and would have testified if asked.

Dr. Armstrong testified that Johnson had various impairments that interfered with his availability to learn from social cues.<sup>177</sup> She testified that childhood trauma had caused him brain damage, and a person with his impairments could not live a normal life.<sup>178</sup> Dr. Berkowitz testified that Johnson met nine of ten factors provided for by the Adverse Childhood Experiences (“ACE”) study.<sup>179</sup> High ACE scores are associated with a heightened risk of poor physical and mental health and increased criminal behavior.<sup>180</sup> Dr. Berkowitz also testified that Johnson suffered from [bipolar disorder](#), and this, combined with his childhood trauma, affected brain development and made him more impulsive.<sup>181</sup>

Dr. O'Brien attacked the bipolar diagnosis and the conclusion that Johnson suffered from any brain damage. Indeed, he challenged the proposition that childhood trauma can cause brain damage at all.<sup>182</sup> According to Johnson, on cross-examination, Attorney Fioravanti failed entirely to address Dr. O'Brien's rejection of the [bipolar disorder](#) and simply elicited that Dr. O'Brien was not a neuropsychologist.<sup>183</sup>

As noted, Attorney Fioravanti retained Krych, a seasoned mitigation specialist, to assist in gathering records and preparing a life history. He was sufficiently aware of the sheer volume of potential evidence that the defense sought a continuance of the trial to conduct a thorough investigation. Most of Johnson's extended family lived in Georgia, but counsel delayed until only weeks before the delayed trial commenced to seek funding for travel to investigate those potential witnesses. On Johnson's account, Krych deemed it important to establish a multigenerational history of family dysfunction and of mental disorders that may be hereditary.

In particular, Krych believed that Johnson's aunt, Regina Baskett, would be a strong mitigation witness. But Attorney Fioravanti made only minimal effort to secure her attendance at trial and never advised the trial court that he was encountering difficulty in that endeavor. As well, of Johnson's six siblings, two of whom were juveniles, counsel spoke with Marquis and Mitchell, but Marquis was a witness for the prosecution and counsel was aware that Mitchell would be unavailable for trial. A third brother, Montel, was on parole, but counsel made no effort to track him down.

For purposes of this appeal, we are limited to consider what Johnson highlights. To that end, we will consider only the failure to secure Baskett's and Montel's testimonies. In Baskett's PCRA declaration, she indicated that Johnson grew up in squalor and was subject to regular physical and mental abuse at the hands of his parents.<sup>184</sup> Montel, too, attested that he was witness (and party) to the severe \*659 childhood abuse inflicted upon Johnson at home.<sup>185</sup> This evidence cannot be mistaken for the remote proposed mitigating evidence the exclusion of which this Court affirmed on direct appeal.<sup>186</sup> Which is to say, even on the trial court's own terms, this presumably would (or at least should) have been treated as relevant evidence.

This makes it problematic that counsel failed fully to explore these avenues and seek to present these witnesses at trial.



Montel attested that he lived in Philadelphia at the time of Johnson's trial and would have made himself available if asked.

The PCRA court was unpersuaded. It cited the United States Supreme Court for the proposition that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”<sup>187</sup> The court must “apply[ ] a heavy measure of deference to counsel's judgments.”<sup>188</sup> This Court has elaborated to similar effect specifically in the context of investigations in furtherance of mitigation in capital cases.<sup>189</sup> “Where, as here, the jury finds both aggravating and mitigating factors,” the PCRA court continued, “ ‘the prejudice inquiry considers whether there is a reasonable probability that, had the PCRA evidence been adduced at the penalty phase at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones.’ ”<sup>190</sup>

Contrary to Johnson's present characterization, the PCRA court cited Attorney Fioravanti's testimony that he had pursued mitigation evidence at some length and had run into a wall. He testified that he felt as though he had “exhausted” his avenues. Neither of Johnson's (allegedly abusive) mother or stepfather would cooperate, and on counsel's account, the brothers had come to a dead end. He also came to the conclusion that traveling to Georgia wouldn't change “what we already had.”<sup>191</sup>

On the PCRA court's account, this established that counsel's “investigation was not only reasonable, but was thorough and complete.”<sup>192</sup> In lieu of more direct witnesses to Johnson's allegedly abusive, traumatizing childhood, the court allowed Krych to read directly from her detailed mitigation report, and that was the only available way Attorney Fioravanti could present to the jury the aforesaid history. Regarding the allegedly compromised opportunity to rebut Dr. O'Brien's testimony, the court opined that Attorney Fioravanti “effectively cross-examined the Commonwealth's expert witness on his lack of expertise in specific areas important to Trial Counsel's arguments.”<sup>193</sup>

For these reasons, the court declined to find the degree of Attorney Fioravanti's investigation constitutionally defective, and it hinted at the conclusion that any such \*660 deficiency had caused insufficient prejudice to warrant relief.

[45] [46] The PCRA court's finding of reasonableness is, itself, reasonable and supported by the record. Notwithstanding counsel's indication that he would have used Baskett's testimony if he had the opportunity, it is not clear on the PCRA court's assessment that the opportunity was there, given the limited evidence that she was available and would have testified at the time. As for prejudice, as we have noted herein, Johnson is entitled to a fair trial, not a perfect trial. Here, mitigating and aggravating factors were determined based upon a combination of the facts of the underlying crimes as found by the jury and a conventional battle of experts primarily regarding Johnson's mental health, as anticipated and enriched by Krych's detailed account of his history of abuse and family trauma. Prejudice must be assessed in light of the numerous aggravators that the jury found, and we simply do not find that any modest deficiency in counsel's investigation creates a reasonable probability of a divergent outcome in sentencing. Accordingly, this issue fails.

#### D. Ineffective Assistance, Failure to Challenge Witness-Killing Aggravator

[47] Johnson would have had trial and appellate counsel argue that Lewis' testimony alone, as the sole evidence that Johnson killed R.R. to silence her as a witness who could identify him as Talley's killer, “did not meet the reliability requirement necessary to establish the [corresponding] aggravating circumstance” found at 42 Pa.C.S. § 9711(d)(5) “where, as here there was no pending prosecution at the time of the killing.”<sup>194</sup> By way of arguable merit, Johnson notes that the aggravator on its face suggests that it applies only where the victim was established as a prosecution witness, and he cites this Court's decision to that effect in *Commonwealth v. Crawley*.<sup>195</sup> But Johnson also acknowledges that we effectively nullified that narrow holding in *Commonwealth v. Appel*, decided the following year, holding that the Section 9711(d)(5) aggravator *could* apply to the killing of a *potential* witness.<sup>196</sup> In *Appel*, Johnson acknowledges, we held that with direct evidence of the intention to silence a witness to a crime, it is unnecessary that the witness be part of a pending prosecution, as such.

Here, however, he argues that the direct evidence is insufficiently credible, because the direct evidence was Lewis' testimony regarding Johnson's alleged prison confession. Citing former Chief Justice Saylor's stated skepticism of jailhouse informants, Johnson argues that Lewis' testimony simply wasn't enough—evidently because,

whether the evidence he offered was “direct” or not, it was inherently incredible.<sup>197</sup>

Aside from the subjective comments of one Justice, albeit as fortified by a modicum of common sense, the simple fact is that *Appel* opened the door to the sort of evidence of the intent to silence a witness that was proffered in this case. The jury \*661 was entitled to credit that testimony. For those reasons alone, we find no arguable merit to Johnson's claim.

[48] Moreover, if we found arguable merit, and found no reasonable basis for counsel not to raise the objection to the reliability of a jailhouse informant's testimony that Johnson believes was warranted at trial and on appeal, we nonetheless would find no prejudice. In order to find prejudice in this context, we must discern “a reasonable probability that, had the PCRA evidence been adduced at the penalty phase”—or, here, used to impeach Lewis’ trial testimony—“at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones.”<sup>198</sup> We find no such probability even if, as Justice Donohue hypothesizes, Lewis's testimony was categorically discredited by at least one juror.<sup>199</sup> It is true that, had the impeachment had the desired effect, it would have reduced the aggravators found unanimously from three to two, for want of direct evidence of the Section 9711(d)(5) witness-killing aggravator (which, as noted above, must be proved beyond a reasonable doubt by direct evidence). And we acknowledge that there is some appeal to treating the fact that (in that scenario) the statutory mitigators would outnumber the statutory aggravators as dispositive in Johnson's favor. But no case law suggests that the analysis is a counting exercise. Section 9711(d)(5) was but one of three aggravators in a multiple-murder case, and one of the remaining aggravators was for the killing of a victim under twelve years old, the putative witness in question. We cannot deem it reasonably probable, in light of the two other aggravators found by the jury, that one or more members of the jury would have retreated from imposing a death sentence under these circumstances. Accordingly, this claim fails.<sup>200</sup>

**\*662 E. Failure to Provide the Jury with a “*Simmons* Instruction”**

In *Simmons v. South Carolina*, during closing argument in a capital case, the prosecution “raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, [the petitioner] never would be released on parole and thus, in his view, would not pose a future danger to

society.”<sup>201</sup> The United States Supreme Court held that, when a prosecutor raises future dangerousness, the defendant may seek a jury instruction to the effect that a sentence of life in prison without the possibility of parole means exactly that. As this Court explained in *Spotz*, evidence of future dangerousness sufficient to trigger *Simmons* protections “is evidence with a tendency to prove dangerousness in the future.”<sup>202</sup>

[49] Johnson's arguments on this issue fail for a number of reasons. First, to the extent that it is framed outside the context of ineffective assistance of counsel, it could have been pursued on direct appeal. Thus, as a stand-alone issue, it is waived under the PCRA.

[50] Recognizing this fact, Johnson primarily argues this as an ineffective assistance of appellate counsel claim. The difficulty, here, is that this Court has hewed to the United States Supreme Court's line that such an instruction is required only where future dangerousness is put at issue by the prosecution. Johnson cites no instance in which the Commonwealth put future dangerousness at issue. And he cites nothing to suggest that appellate counsel acted unreasonably in deciding not to appeal the trial court's rejection of trial counsel's effort to elicit a *Simmons* instruction, nor any indication of prejudice in the form of authority compelling relief on appeal. The law entitles him to no such argument or instruction.

Even if we credit this issue as having arguable merit, we must confront the conclusory nature of Johnson's argument, which comprises barely over one page.<sup>203</sup> Merely asserting the lack of a reasonable basis for declining to pursue this issue on appeal and baldly insisting that the decision was prejudicial is insufficient in any case to secure relief. None is due here. Direct appellate counsel was not ineffective in declining to pursue the *Simmons* issue.

## VI. Failure to Recuse

On March 23, 2023, the PCRA court signaled to the parties that ADA Weintraub was running to be a judge on the Court of Common Pleas of Bucks County, evidently unopposed. The court suggested then that ADA Weintraub's presumptive successful election to the court would likely cause a conflict of interest, and indicated that it would therefore seek to conduct an evidentiary hearing and decide Johnson's PCRA petition



before ADA Weintraub could be sworn in. On April 4, 2023, noting that he intended to call into question ADA Weintraub's "credibility and integrity," Johnson filed a motion to recuse the entire \*663 Bucks County Court of Common Pleas. The PCRA court found no conflict because it intended to rule on the PCRA petition before any swearing-in could occur—and it followed through on that promise, denying relief in a December 29, 2023 order.<sup>204</sup>

[51] [52] [53] [54] As our Superior Court aptly has explained:

As our Judicial Code dictates, "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Pa. Code of Judicial Conduct, Canon 2.4(A). Thus, we assume that a jurist will possess interests and relationships that might conceivably influence their judgment but, in the normal course of events, the mere presence of an interest or relationship that could theoretically affect a judicial decision does not create a presumption of partiality.

Rather, "[r]ecusal is required wherever there is substantial doubt as to the jurist's ability to preside impartially." *In the Interest of McFall*, 533 Pa. 24, 617 A.2d 707, 713 (1992). "A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter." *Id.* Thus, "[i]n order for the integrity of the judiciary to be compromised, we have held that a judge's behavior is not required to rise to a level of actual prejudice, but the appearance of impropriety is sufficient." *Id.* at 712. In this regard, the appearance of impropriety sufficient to disqualify a judge exists when "a significant minority of the lay community could reasonably question the court's impartiality." *Commonwealth v. Bryant*, 328 Pa.Super. 1, 476 A.2d 422, 426 (1984) (quoting *Commonwealth v. Darush*, 501 Pa. 15, 459 A.2d 727, 732 (1983)).<sup>205</sup>

[55] [56] [57] We review the denial of a motion to recuse for an abuse of discretion.<sup>206</sup> "An abuse of discretion is not merely an error of judgment, but occurs only where the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence of record."<sup>207</sup> In so doing, we "presume[ ] judges are fair and competent."<sup>208</sup>

[58] Noting what he asserts to be a lack of distinction between a prosecutor in the process of running unopposed for a seat on the Court of Common Pleas and one who has been sworn in to such a position, Johnson insists that the PCRA court in this case could not pass upon the aspersions Johnson cast upon ADA Weintraub's integrity when ADA Weintraub was, or was about to become, "a colleague on the bench."<sup>209</sup> Notably absent from Johnson's presentation is any concrete evidence of the court's bias or special solicitude toward ADA Weintraub. Also missing is any case law suggesting that a given court cannot pass on cases under the management of attorneys who are also candidates to become a judge in that or any \*664 other court. Most judicial candidates practice while they run, and most run in jurisdictions where they practice. The difficulty in requiring recusal in all or most such situations is obvious. And nothing in the law cited by Johnson suggests that, under these circumstances, the court's assurances of impartiality<sup>210</sup> cannot be trusted. It is simply not clear that "a significant minority of the lay community could reasonably question the court's impartiality"<sup>211</sup> under the circumstances presented.

Bearing in mind our deference to a judge's assurances of his or her ability to rule impartially, as well as our prescribed presumption of fairness and competence, we find no abuse of discretion in the PCRA judge's refusal to recuse from this case. Thus, we affirm the PCRA court's decision not to recuse.

## VII. Cumulative Prejudice

As discussed and considered in connection with the guilt-phase assessment of various claims of ineffective assistance of counsel, where multiple claims of ineffective assistance fail for want of sufficient prejudice, this Court may assess the prejudice of those errors cumulatively in order to determine whether the petitioner has been denied due process. In a parting section, though, Johnson seeks to expand this to consideration of prejudice arising from *Brady* violations and others—and to the putative accumulation of errors asserted in both the guilt-phase and penalty-phase as one body.

But even granting this heuristic—which we historically have allowed only in the context of ineffectiveness claims, as set forth above—Johnson cannot succeed. A great deal of his challenge to this case hinges in various ways upon his discomfiture with the degree of Lewis' contribution to the verdict and, putatively, to the imposition of a death sentence.

But as we have related, it is less than reasonably probable that, even if certain *Brady* disclosures had been made, and even if guilt-phase counsel had been more effective in digging up impeachment evidence and using it against Lewis at trial, the jury would have reached a different result. Whether because the circumstantial case was sufficient in itself or because the jury could have credited Lewis in any event, the result of both phases of trial likely would have been the same. Consequently, even viewing the assertions of error in sum, and even allowing that we find troubling that Johnson's trial attorneys elected not to travel various potential avenues of inquiry, we discern no reasonable probability that the jury would have reached different verdicts in either phase in this case.

### VIII. Conclusion

[59] Attorneys who defend capital cases undertake a solemn obligation. And as set forth above, at the heart of the obligation lies the imperative to conduct thorough investigations at each phase of a capital prosecution to ensure that all avenues for testing the Commonwealth's case for guilt and meeting its claimed aggravating factors with available mitigating evidence are thoroughly explored. In this case, Johnson has raised valid questions concerning the thoroughness of both of his attorneys' preparations in this case. That \*665 being said, in some instances there have been at least plausibly reasonable bases for counsel's omissions, and in all instances the evidence that defense counsel could have done very little to assail painted a damning picture of Johnson's guilt, one that preserves our confidence in the ultimate verdict.

Primarily because we find that the various arguable deficiencies raised on appeal did not prejudice the verdict, and for all the other reasons stated herein, we affirm the PCRA court's order denying Johnson's petition for collateral relief.

Chief Justice *Todd* and Justices *Dougherty*, *Mundy* and *Brobson* join the opinion.

Justice *McCaffery* files a concurring and dissenting opinion.

Justice *Donohue* files a dissenting opinion in which Justice *McCaffery* joins.

JUSTICE *McCAFFERY*, concurring and dissenting

I concur with the Majority's conclusion that Appellant, Marcel Emanuel Johnson, is not entitled to collateral relief on his guilt-phase claims. However, I believe trial counsel's unreasonable failure to investigate and impeach a jailhouse informant, whose testimony provided the only direct evidence supporting the witness-killing aggravator in 42 Pa.C.S. § 9711(d)(5),<sup>1</sup> caused Johnson prejudice. I therefore join the Dissent's analysis and conclusion that Johnson's death sentence should be vacated and that his case should be remanded for a new penalty phase. I write separately to further explain why Johnson was prejudiced.

### I. Ineffective Assistance of Counsel: Prejudice and Capital Sentencing

To prevail on an ineffectiveness claim, a petitioner must demonstrate that his claim has arguable merit, that defense counsel had no reasonable strategic basis for the challenged action or inaction, and that counsel's deficient performance resulted in prejudice. See *Commonwealth v. Daniels*, 628 Pa. 193, 104 A.3d 267, 281 (2014). Failure to meet any one prong — arguable merit, deficient performance, or prejudice — is fatal to the claim. See *Commonwealth v. Fears*, 624 Pa. 446, 86 A.3d 795, 804 (2014). With respect to Johnson's claim challenging his trial counsel's failure to investigate and impeach the jailhouse informant (George Lewis), the Court's focus should be on the prejudice prong.<sup>2</sup>

Prejudice exists if there is a “reasonable probability that the outcome of the proceeding would have been different but for counsel's constitutionally deficient performance.” \*666 *Daniels*, 104 A.3d at 281 (citations omitted). A reasonable probability is less than “more likely than not[.]” *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 693, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). It is “a probability that is sufficient to undermine confidence in the outcome of the proceeding.” *Daniels*, 104 A.3d at 281 (citing *Commonwealth v. Spatz*, 624 Pa. 4, 84 A.3d 294, 312 (2014)).

When assessing prejudice in the penalty phase of a capital trial, “the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. See also *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471



(2003) (“In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.”).

The court “must consider the totality of the evidence before the judge or jury[.]” while “[t]aking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings[.]” *Strickland*, 466 U.S. at 695–696, 104 S.Ct. 2052. Prejudice may exist even if another aggravator remains. See *Porter v. McCollum*, 558 U.S. 30, 40–44, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (*per curiam*);<sup>3</sup> *Wiggins*, 539 U.S. at 534–538, 123 S.Ct. 2527; *Williams v. Taylor*, 529 U.S. 362, 396–399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Prejudice must always be assessed “in the context of the entire case,” regardless of whether the reviewing court ultimately affirms the death sentence. *Commonwealth v. Bomar*, 629 Pa. 136, 104 A.3d 1179, 1204 (2014) (citation omitted). See also *Thornell v. Jones*, 602 U.S. 154, 165–172, 144 S.Ct. 1302, 218 L.Ed.2d 626 (2024) (holding, after extensively examining the aggravators and mitigators, that the defendant failed to show prejudice under *Strickland*).<sup>4</sup>

Because capital sentencing requires a **moral judgment** of whether an eligible defendant deserves death, the prejudice analysis demands a close assessment of the remaining aggravators and the mitigating evidence. See *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527 (explaining that, in capital sentencing cases, the prejudice inquiry asks whether counsel’s deficient performance “influenced the jury’s appraisal of [the defendant’s] moral culpability”) (citation and internal quotation marks omitted); cf. *Richmond v. Lewis*, 506 U.S. 40, 48, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992) (“[W]hen the sentencing body is told to weigh an invalid factor in its decision, a \*667 reviewing court may not assume it would have made no difference if the thumb had been removed from death’s side of the scale,’ nor can a court ‘cure’ the error without deciding, itself, that the valid aggravating factors are weightier than the mitigating factors.”) (citing *Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), holding modified by *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006)).<sup>5</sup> *Strickland* and its progeny demand a “probing and fact-specific analysis.” *Sears v. Upton*, 561 U.S. 945, 955, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (*per curiam*) (citation omitted).

The prejudice analysis requires that the court evaluate the qualitative weight of the remaining aggravators and balance it against overall strength and character of the mitigating evidence:

[F]or purposes of assessing *Strickland* prejudice, the question is whether the defendant has shown a reasonable probability that ... 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 ... that the overall quality of the case in mitigation warranted a sentence of life in prison.

*Daniels*, 104 A.3d at 303–304 (citation omitted). In evaluating the remaining aggravators, the court must assess the role that the subtracted aggravator played in the government’s theory of prosecution, including whether that aggravator overlapped factually with one of the other remaining aggravators, and whether it added special moral force or merely cumulative weight. Cf. *Sanders*, 546 U.S. at 221, 126 S.Ct. 884 (holding that, if at least one juror determines that the prosecution did not prove an enumerated aggravator beyond a reasonable doubt, the jury cannot weigh the evidence proffered to support that aggravator “unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances”) (emphasis in original); *Stringer*, 503 U.S. at 230, 112 S.Ct. 1130 (“In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor.”).<sup>6</sup> On the mitigation side of the scale, \*668 the court must consider not only the number of mitigators found but also the depth and moral force of all the mitigating evidence. See *Porter*, 558 U.S. at 40–44, 130 S.Ct. 447; *Rompilla v. Beard*, 545 U.S. 374, 378, 390–393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins*, 539 U.S. at 534–538, 123 S.Ct. 2527; *Williams*, 529 U.S. at 395–396, 120 S.Ct. 1495. Even “where the aggravating factors greatly outweigh the mitigating evidence [such that] there may be no ‘reasonable probability’ of a different result[.]” the reviewing court must still show its work. *Jones*, 602 U.S. at 165, 144 S.Ct. 1302. Most importantly, prejudice must be assessed through the lens of Pennsylvania’s death penalty statute. See *Daniels*, 104 A.3d at 303. Under Pennsylvania law,



[t]he capital sentencing process implicates two discrete determinations; the first is eligibility, in which the statutory scheme narrows the class of persons who may be subject to the death penalty; the second is selection, at which point the sentencer decides whether a person who is eligible for the death penalty should receive such punishment. Aggravating circumstances provide the means of narrowing the class for purposes of eligibility and, under the Pennsylvania statute, along with mitigating circumstances and victim impact evidence, serve as the bases for the selection decision.

*Commonwealth v. Hughes*, 581 Pa. 274, 865 A.2d 761, 798 n.41 (2004) (citations omitted).

Death is permitted only if the jury unanimously finds that (1) the Commonwealth proved, for eligibility purposes, at least one statutorily enumerated aggravating circumstance beyond a reasonable doubt; and (2) for selection purposes, either (a) there are “no mitigating circumstances,” or (b) “one or more aggravating circumstances ... outweigh any mitigating circumstances.” 42 Pa.C.S. § 9711(c)(1)(iv). Death is prohibited if one or more jurors determine the aggravators and mitigators are in equipoise. *See id.* Crucially, the death penalty statute “does not provide for consideration of factors outside those denominated as aggravating or mitigating circumstances or victim impact evidence.” *Hughes*, 865 A.2d at 799 n.44. *See also* 42 Pa.C.S. § 9711(d) (“Aggravating circumstances shall be limited to the [enumerated statutory factors.]”).

For the selection determination, “a mere mathematical finding of more aggravating or mitigating circumstances is not dispositive; a jury may weigh one factor more heavily than multiple other factors.” *Commonwealth v. Speight*, 578 Pa. 520, 854 A.2d 450, 461 n.10 (2004) (citing 42 Pa.C.S. § 9711(c)). The death penalty statute does not “provide an express standard to be applied in weighing mitigating factors against aggravating factors[.]” *Commonwealth v. Beasley*, 504 Pa. 485, 475 A.2d 730, 737 (1984). The

determination involves an inherently moral question of whether the defendant deserves the death penalty. *See Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (noting the weighing of aggravators and mitigators \*669 boils down to “whether the defendant, in the eyes of the community, is morally deserving of the death sentence”); *cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) (reaffirming “that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant’s moral culpability”).

So, when assessing prejudice on collateral review, “the weighing process involves an assessment of the relative strength and weakness of the aggravating and mitigating evidence, which is necessarily a qualitative and not a quantitative approach, especially when the catchall mitigator is at issue.” *Daniels*, 104 A.3d at 304 (citations omitted). The reviewing court “must also keep in mind how tailored death penalty proceedings are toward life sentences, ... not only in the channeling of aggravators and the differing burdens of proof governing aggravators and mitigators, but also in the fact that a single juror can effectively negate the prospect of a death sentence.” *Id.* at 303 (citations omitted). If one juror would have found that the Commonwealth failed to prove a statutory aggravator beyond a reasonable doubt, the evidence proffered in support of that aggravator may not be included in the jury’s moral calculus during the selection process unless another aggravator found by the jury allowed it “to give aggravating weight to the same facts and circumstances.” *Sanders*, 546 U.S. at 220, 126 S.Ct. 884.

## II. Johnson Suffered Prejudice at Sentencing

In Johnson’s case, the jury found three aggravators and three mitigators in relation to R.R.’s murder. The aggravating circumstances were that the victim was a prosecution witness to another murder (Ebony Talley’s), that Johnson was convicted of another murder (Talley’s) committed at the same time, and that the victim was a child under 12 years old. *See* 42 Pa.C.S. § 9711(d)(5), (11), (16). The mitigating circumstances included Johnson’s lack of significant prior criminal history, his young age, and the catchall mitigator. *See* 42 Pa.C.S. § 9711(e)(1), (4), (8).

The catchall mitigator is especially important in the prejudice analysis. *See Daniels*, 104 A.3d at 283 (citations omitted). It covers “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” 42 Pa.C.S. § 9711(e)(8). “Evidence concerning



the catchall mitigator tends to be subjective, and the value of that evidence no doubt varies depending upon the context.” *Commonwealth v. Ballard*, 622 Pa. 177, 80 A.3d 380, 411 (2013). As pertinent here, Johnson presented evidence that his “life up until the time of the murders was characterized by chronic and pervasive abuse, neglect and abandonment; that he suffered brain damage and had been diagnosed with various mental illnesses; cycles of placement in and out of treatment programs; and a complete lack of any semblance of stability or permanence.” *Commonwealth v. Johnson*, 639 Pa. 196, 160 A.3d 127, 136 (2017).

In my view, for the reasons set forth in the Dissent, “there is a reasonable possibility that one or more of the jurors would have found that Lewis’s testimony was not credible and therefore, that the Commonwealth did not establish the aggravating circumstance [in Section 9711(d)(5)] beyond a reasonable doubt[.]” Dissent at 679-80. I also agree “there is a reasonable possibility that one or more of the jurors would have found that ... the two remaining aggravating circumstances did not outweigh the three mitigating circumstances.” *Id.* Based on the unique circumstances of Johnson’s case, I am not confident that, without the witness-killing aggravator in \*670 their moral calculus, all twelve jurors would have struck the same moral balance and unanimously sentenced him to death for R.R.’s murder.

As the Majority observes, “had the impeachment had the desired effect, it would have reduced the aggravators found unanimously from three to two, for want of direct evidence of the Section 9711(d)(5) witness-killing aggravator[.]” Majority Opinion at 661. While the numerical decrease in the aggravators is not dispositive, even the Majority recognizes that “there is some appeal to treating the fact that (in that scenario) the statutory mitigators would outnumber the statutory aggravators as dispositive in [Johnson’s] favor.” *Id.* Yet rather than conduct a probing, fact-intensive inquiry, the Majority hastily concludes there is no “reasonabl[e] probab[ility], in light of the two other aggravators found by the jury, that one or more members of the jury would have retreated from imposing a death sentence under these circumstances.” *Id.* at 661. The Majority reasons only that “Section 9711(d)(5) was but one of three aggravators in a multiple-murder case, and one of the remaining aggravators was for the killing of a victim under twelve years old, the putative witness in question.” *Id.* at 661. As such, I dissent from the Majority’s analysis and conclusion.

I agree with the Majority that, when assessing prejudice on collateral review, the “task of reweighing” involves “a degree of difficult speculation.” Majority Opinion at 661 n.200 (citation omitted). Our Court inevitably must decide “how a jury would review the evidence remaining in light of changes imposed on appeal[.]” *Id.* (citation omitted). See also *Strickland*, 466 U.S. at 695–696, 104 S.Ct. 2052. However, little speculation is needed where, as here, the jury found multiple mitigating circumstances and its final moral judgment included an improper aggravator. See *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833, 849 n.16 (1985) (plurality opinion) (recognizing, on direct appeal, that if the jury imposes the death penalty based on “several aggravating circumstances, one of which was improper under state law,” then our Court “would be required to vacate the death sentence, at least where, as here, mitigating circumstances were present”) (citations omitted); cf. *Commonwealth v. Karabin*, 521 Pa. 543, 559 A.2d 19, 24 (1989) (“[T]he jury’s finding of two aggravating circumstances, one of which is unsupported by the evidence, and unspecified mitigating circumstances requires that the death sentence imposed on the [defendant] be vacated.”) (citations omitted); *Commonwealth v. Caldwell*, 516 Pa. 441, 532 A.2d 813, 817–818 (1987) (“The jury’s finding of four aggravating circumstances, two of which are unsupported by the evidence, and unspecified mitigating circumstances requires that the death sentences imposed on the [defendant] be vacated.”) (citations omitted). In my view, “if there is an improper aggravating circumstance presented to the jury[,] it is impossible to tell from the record how the jury would have decided absent the improperly presented circumstance.” *Holcomb*, 498 A.2d at 850.

Johnson’s death sentence was not a foregone conclusion. “This is not a case where a jury expressly found that no mitigating circumstances were present, such that, upon declaring invalid one of multiple aggravating circumstances found by the jury, this Court could nevertheless affirm the death sentence on grounds that the death penalty is required so long as there remains at least one valid aggravating circumstance.” *Commonwealth v. Aulisio*, 514 Pa. 84, 522 A.2d 1075, 1080 (1987) (citation omitted). On the contrary, the jury clearly judged that Johnson’s character \*671 weighed in favor of life. The jury sentenced him to life imprisonment for Talley’s murder, despite finding the multiple-murders aggravator.<sup>7</sup> The jury’s verdict with respect to her murder is significant because the multiple-murder aggravator “is widely considered to be the ‘most powerful imaginable aggravating evidence.’ ” *Bomar*, 104 A.3d at

1204 (citing *Commonwealth v. Simpson*, 620 Pa. 60, 66 A.3d 253, 278 (2013)). So, in their moral calculus, the jurors clearly gave **substantial** weight to Johnson's mitigation. See *Johnson*, 160 A.3d at 151 n.27, 153 n.29 (discussing the jury's sentencing verdicts). At the very least, the jury's imposition of different punishments for each murder establishes that one or more jurors concluded that the multiple-murders aggravator was in equipoise with Johnson's mitigation. Otherwise, the jury would have sentenced Johnson to death twice instead of only once. So, the witness-killing aggravator and the child-killing aggravator were the only ones that could have tipped the scale towards death.

It is impossible for us to know for certain which one tipped the scales. However, the killing of a child eyewitness to a murder to prevent her from testifying against the murderer is, without question, morally reprehensible. It also seems clear that, since the killing a child and the killing a witness are two independent aggravators, the killing of a child eyewitness is more morally bankrupt than the killing of an adult eyewitness. But if we subtract the witness-killing aggravator, that leaves the child-killing aggravator as the only one with the potential to tip the balance in favor of death. Although merely subtracting the witness-killing aggravator is not enough when assessing prejudice in a vacuum, it is significant in Johnson's case given the jury's decision to sentence him to life imprisonment for Talley's murder based on his mitigating circumstances. It is a factor supporting a reasonable probability that, had the impeachment evidence been presented and used by competent defense counsel, at least one juror would have found **not only** that the Commonwealth failed to prove the witness-killing aggravator **but also** that the remaining aggravators did not outweigh Johnson's mitigating circumstances.

The witness-killing aggravator played a vital role in the Commonwealth's theory of prosecution. The lead prosecutor consistently stressed that Lewis' jailhouse informant testimony was "very important" and "critical to the case." Majority Opinion at 624 n.17 (citation omitted). It was the "linchpin" of the case.<sup>8</sup> *Id.* (citation omitted). In fact, in his closing argument during the penalty phase, the lead prosecutor explicitly told the jurors that the witness-killing aggravator was "probably one of the heaviest" they had to consider. N.T., 6/8/2015, at 124. The prosecutor argued Johnson "chose to murder [R.R.], too, because in the words of George Lewis — and that is direct evidence ... not circumstantial evidence ... the baby was smart, the baby knew me, and could identify me. That's what makes

this an aggravating circumstance." *Id.* at 125–126. Thus, it is impossible to ignore that Lewis' testimony \*672 was critical to the jury's assessment of Johnson's moral culpability; it fundamentally "alter[ed] the entire evidentiary picture." *Strickland*, 466 U.S. at 695–696, 104 S.Ct. 2052.

Upon reading the cold trial transcript, I cannot shake the gut-wrenching moral reaction to Lewis' testimony that Johnson stabbed and killed a four-year-old girl to prevent her from identifying him as the culprit. That he killed R.R. is an aggravating circumstance due to her age, but evidence that he killed her to prevent her from identifying him invokes such a powerful moral and emotional response that I cannot fathom what went through the jurors' minds (or what chills went down their spines) as they heard Lewis' testimony. But, had at least one juror deemed Lewis unbelievable based on a competent counsel's effective use of the impeachment evidence, that testimony would not have been weighable in aggravation.<sup>9</sup> The Majority seems to overlook this nuance.<sup>10</sup> I take the Commonwealth's stated position on the importance of Lewis' chilling testimony at face value.

For the foregoing reasons, I conclude that, upon a meaningful reweighing of the multiple-murders and child-killing aggravators and the three mitigators found by the jury, there is a reasonable probability that at least one juror would have concluded that the aggravators did not outweigh the mitigating circumstances.

To be clear, I agree with the Majority that "the jury is a black box" and that "we can only (but must) speculate as to its contents." Majority Opinion at 661–62 n.200. However, the Majority's claim that my opinion "writes the multiple-murder aggravator out of the verdict" is spurious. *Id.* To repeat what I just wrote above: "[U]pon a meaningful reweighing of the **multiple-murders** and child-killing aggravators and the three mitigators found by the jury, there is a reasonable probability that at least one juror would have concluded that the aggravators did not outweigh \*673 the mitigating circumstances." See *supra* p. 13 (emphasis added).

The Majority and I disagree on whether that reweighing must be done by a jury. I conclude it must, because (1) there is a reasonable possibility that, but for counsel's deficient performance, at least one juror would have found Lewis's testimony not credible, and thus that the Commonwealth failed to prove the witness-killing aggravator beyond a reasonable doubt; (2) that aggravator played a vital role in the Commonwealth's case; (3) the jury did not find the



multiple-murders aggravator alone was sufficient to justify the death penalty; (4) the jury found three mitigators; (5) no jury ever weighed those three mitigators, the multiple-murders aggravator, and the child-killing aggravator without the witness-killing aggravator in the moral equation; and (6) there is a reasonable probability that, without the witness-killing aggravator, one or more jurors would have voted not to impose the death penalty. *Cf. Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177, 1186 (1994) (“The jury’s weighing of aggravating and mitigating circumstances is a **subjective** process.”) (emphasis added); *Commonwealth v. Fahy*, 512 Pa. 298, 516 A.2d 689, 698 (1986) (“[I]t is exclusively a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances in the case.”).

Although the jury could have imposed the death penalty based on the child-killing aggravator and multiple-murders aggravator, the test for prejudice is not whether the jury could “still have decided on the death penalty.” *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456. Nor is it whether the jury “more likely than not” would still have imposed death. *Porter*, 558 U.S. at 44, 130 S.Ct. 447 (citing *Strickland*, 466 U.S. at 693–694, 104 S.Ct. 2052). The test is whether “the likelihood of a different result ... is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” *Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

Since “execution is the most irremediable and unfathomable of penalties[,]” remand is the proper course to ensure that Johnson’s death sentence is legally and morally sound. *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). See also Dissent at 680 n.8 (criticizing the Majority for “acting as a super jury without engaging in the individualized weighing of the remaining aggravating circumstances and the mitigating circumstances — a weighing process that is constitutionally and statutorily mandated in capital sentencing”) (citations omitted); *Daniels*, 104 A.3d at 321 (Saylor, J., concurring and dissenting) (expressing concern about “the speculativeness inherent in no-prejudice determinations” in capital cases, and stating that this Court “should err on the side of providing defendants with one trial at which the defense is guided by a competent, prepared lawyer”) (citing *Commonwealth v. Koehler*, 614 Pa. 159, 36 A.3d 121, 162 (2012) (Saylor, J., concurring)).

In short, because trial counsel’s deficient performance undermines my confidence that all twelve jurors would have

reached the same moral judgment absent the witness-killing aggravator, I would hold that Johnson suffered prejudice and would remand for a new penalty phase.

JUSTICE **DONOHUE**, dissenting

Marcel Emanuel Johnson’s sentence of death was based on, inter alia, the jury’s finding that “[t]he victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony \*674 against the defendant in any grand jury or criminal proceeding involving such offenses.”<sup>1</sup> 42 Pa.C.S. § 9711(d)(5) (“**Section 9711(d)(5)**”). The Majority’s scrupulous review of the evidence introduced during the guilt phase of Johnson’s trial brings to light the only evidence on which the aggravating circumstance was based: the testimony of a jailhouse informant from Bucks County Correctional Facility (“BCCF”), George Lewis. Its review also shows that impeachment of Lewis’s testimony—whether by fault of the Commonwealth or trial counsel’s ineffectiveness—was plainly deficient. The Majority establishes that the problems with Lewis’s testimony did not infect the deliberation of guilt because there was adequate circumstantial evidence **other than Lewis’s testimony** to support Johnson’s convictions, and I fully agree. I depart from the Majority, however, because I believe that the deficiency in the impeachment of Lewis infected the jury’s deliberation of **Section 9711(d)(5)** and contributed to Johnson’s death sentence. I also write to express my concern with the application of a due diligence requirement to claims raising violations of the constitutional rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). I would vacate Johnson’s sentence and remand for a new penalty phase.

#### Lewis’s Guilt Phase Testimony

During the guilt phase of Johnson’s trial, George Lewis testified. On direct examination, Assistant District Attorney (ADA) Weintraub reviewed Lewis’s prior history including convictions for burglary, theft, hindering apprehension and crimes of dishonesty; pending charges for shoplifting, burglary; and pending parole violation for fleeing and eluding. N.T., 6/1/2015, at 221–22. Lewis testified that he believed the prosecution would, after he testified, “help [him] with [his] parole violation,” although he had not been made any promises about his sentence. *Id.* at 222. He stated that ADA Weintraub had helped him out with a detainer, but not other outstanding prison “misconducts.” *Id.*

Speaking to the facts of this case, Lewis testified that while he was in BCCF, he was hired to be a “babysitter,” a job that entailed watching over an inmate that may hurt himself or others or someone with institutional charges. *Id.* at 224-25. Lewis was assigned to babysit Johnson the week of Thanksgiving 2013. *Id.* at 227. According to Lewis's account, he was sitting by the door of Johnson's cell when he saw Johnson sitting on the end of his bed with his head down. Lewis asked him “What's wrong?” and Johnson responded that “She made me – she made me kill her.” *Id.* at 230. Lewis asked who, and Johnson answered “Ebony.” *Id.* Testifying to the jury regarding this interaction, Lewis said, “I don't know this woman. I don't know her, I don't know him. I don't know anyone. Like I said, I'm from New Jersey.” *Id.* According to his account, Johnson continued talking and confessed, “And also, I killed the baby.” *Id.* Lewis asked, “You killed a baby?” and Johnson responded, “Yeah. I \*675 had to stab her because she very – she 4 years old. She very smart and she can identify me.” *Id.*<sup>2</sup> Lewis testified that he extended two kindnesses to Johnson during their interactions by giving him a jolly rancher and helping him to try to place a phone call.

During his testimony, Lewis admitted that he had “heard about [the case], but ... never knew that was the defendant that I was watching.” *Id.* He said he knew about it from watching the news and people talking about it in jail. He also said that his understanding was that Johnson was incarcerated for drug paraphernalia, not murder. *Id.* at 231. Lewis testified that he was “very surprised” by Johnson's revelations, particularly because Lewis himself could never hurt anybody, especially because he had a four-year-old granddaughter. *Id.* at 232. Asked why he came forward, Lewis stated it was because people were hurt in this situation including a baby, unborn child and young mother. *Id.* He admitted that he was hoping to help himself, too. *Id.*

On cross-examination, Lewis explained that his prison “misconducts” were for fight charges and for not being on the medical unit at one point. *Id.* at 241-42. He explained that he spent time in restrictive housing, the location where he had been babysitting Johnson, as a result of the “misconducts.” *Id.* Trial counsel cross-examined Lewis about a few topics. He challenged whether Lewis had conditioned his assistance on receiving help with the “misconducts,” which Lewis denied. *Id.*<sup>3</sup> Next, counsel questioned Lewis persistently about the exact date he received the information from Johnson and Lewis's inconsistencies in his representation about whether the conversation with Johnson took place on a Monday,

Tuesday or Wednesday. *Id.* at 243-49. Counsel generally inquired about Lewis's knowledge of the case from the news and from talking with other people in prison. *Id.* at 249-51. Regarding the jolly rancher candy, counsel questioned Lewis about whether he had the candy in his pocket because of his diabetes. *Id.* at 251. Counsel questioned Lewis about whether allowing Johnson to place a phone call was not typically allowed for individuals on watch. *Id.* at 251-53. Finally, counsel questioned Lewis about what Johnson was wearing during their interactions—an orange jumper. *Id.* at 253-54.

### Penalty phase

Lewis's testimony was incorporated into the penalty phase for the jury's consideration at sentencing. His testimony in relation to R.R.'s killing that Johnson told him that he killed the baby because she was “very smart and she can identify me” was critical to proving the aggravator, [Section 9711\(d\)\(5\)](#). N.T., 6/1/2015, at 230-31.

Pursuant to [Section 9711\(d\)\(5\)](#), the prosecution must prove that “[t]he victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.” [42 Pa.C.S. § 9711\(d\)\(5\)](#). \*676 The prosecution must meet its burden of proving [Section 9711\(d\)\(5\)](#) either by establishing that a victim “was in fact a witness in a pending grand jury or criminal prosecution” or “where the killing results from the intention to eliminate a potential witness, if such facts can be established by direct evidence.” [Commonwealth v. Appel](#), 517 Pa. 529, 539 A.2d 780, 784 n.2 (1988) (emphasis in original). Since *Appel*, this Court has consistently reaffirmed the latter requirement. Where the Commonwealth intends to prove that the killing intended to eliminate a potential witness, it must do so through direct evidence. See, e.g., [Commonwealth v. Daniels](#), 628 Pa. 193, 104 A.3d 267, 313 (2014); [Commonwealth v. Eichinger](#), 591 Pa. 1, 915 A.2d 1122, 1144-45 (2007); [Commonwealth v. Fletcher](#), 580 Pa. 403, 861 A.2d 898, 910-11 (2004).

Consistent with that requirement, the trial court instructed the jury that under this aggravating circumstance, “the killer's intention to eliminate the victim as a potential witness” must be “established through direct evidence” and proved beyond a reasonable doubt. N.T., 6/8/2015, at 198-99. The trial court highlighted that Lewis's testimony was the **only** direct evidence to prove this aggravating circumstance regarding Johnson's confession:



Now, here there is only one piece of direct evidence that was presented in this trial, and that is the testimony of George Lewis. That evidence regarding the defendant's statement, allegedly made at the Bucks County Correctional Facility as to why he killed [R.R.].

If you believe the testimony of George Lewis, and if you believe that the defendant made the statement that he killed the child because she saw him, could recognize him and was smart and that is why he killed her - - it is for you to recall the exact statement that was made. If you find - - if you believe that testimony and you believe that it is proven beyond a reasonable doubt, then that would be direct evidence of - - of - - direct evidence sufficient for you to find that the child was, in fact, killed in order to prevent her from testifying in a criminal proceeding.

*Id.* Thus, the aggravating circumstance was entirely dependent on the jury's evaluation of Lewis's testimony and credibility.

### The impeachment evidence not presented

During the PCRA proceedings, Johnson identified significant information that trial counsel should have uncovered or should have realized was in his possession to impeach Lewis at trial. Trial counsel's impeachment of Lewis should have included evidence that Lewis repeatedly offered to work as an informant for the District Attorney's Office ("DAO"), including by sending a letter to the DAO seeking benefits in exchange for cooperation. Johnson's Exhibit 240 (Letter, May 9, 2013, from Lewis to ADA David Heckler). He had been arrested for fleeing and alluding, receiving stolen property, recklessly endangering another person, unauthorized use of a motor vehicle and resisting arrest in 2013 because he engaged in a highspeed chase with police officers while driving a stolen vehicle.<sup>4</sup> Johnson's Exhibit 239 (Preliminary \*677 Hearing Memorandum from Courtnee Neumann, 2/12/2013). According to the preliminary hearing memorandum prepared by the Commonwealth, Lewis advised the affiant "that he wanted to cooperate ... re being a CI." *Id.* In Lewis's subsequent handwritten plea to the DAO, he stated that he had worked as an informant for five years, "I can help you if you can help me," and "I have lot[ ]s of things that I know about [and] we can help each[ ] other." Johnson's Exhibit 240 (Letter, May 9, 2013, from Lewis to ADA David Heckler).

Lewis's corrections records would have assisted in impeachment as well.<sup>5</sup> For instance, while in prison at BCCF, in 2013, Lewis alleged that Shaquel Rock, another inmate with whom he served, had confessed to Lewis that he killed an off-duty corrections officer. *See* Johnson's Exhibit 243 (BCCF Incident Report of Chief Investigator Frank Bochenek, 10/13/2013). Initially, the killing and the fact that Rock was a person of interest was reported in the news. However, as the New Jersey investigation developed, two other persons were charged, not Rock. *Id.* Moreover, the BCCF Incident Report states that Lewis told the investigator "that all he wants is to have the two detainers from New Jersey dropped as they are for non-payment[.]" and that the investigator told him "that no deal can be made by this investigator and that [he] would contact the proper jurisdiction and relate the information to them." *Id.*

A review of Lewis's corrections records would also show that he misrepresented his granddaughter's funeral to try to get a furlough. Johnson's Exhibit 262 (Case Note from BCCF records, 5/31/2013 (indicating that multiple officers called the funeral home "only to be informed that no funerals were scheduled for June 1, 2013")). A closer inspection of evidence in trial counsel's possession (i.e., Lewis's jail calls) would have contradicted Lewis's testimony that he did not "know this woman" or "anyone" involved because, as he told his wife of the phone, he was in prison with his cousin who he believed was R.R.'s father. *Compare* N.T., 6/1/2015, at, 230 with Johnson's Exhibit 185 (Transcript – Lewis Call 1, 11/30/2013, at 4 (stating that "the four-year-old girl, that's my cousin's baby dead. He in here.")).<sup>6</sup>

With this evidence, trial counsel could have attempted to show that Lewis was \*678 willing to do anything—including lying about another inmate's confession or his granddaughter's funeral—to get out of jail. As trial counsel testified at the PCRA hearing, the evidence regarding Rock and the letter to the DAO's office would have shown exactly what counsel wished to demonstrate through cross-examination of Lewis, "that he's testimony for hire." N.T., 6/28/2023, at 194; *id.* at 195 (referring to the letter to the DAO's office as "an express example of something I was trying to prove"). The clear implication trial counsel could have drawn was that Lewis's claim was incredible as to Rock just as it was as to Johnson.

In addition to the significant impeachment regarding Lewis's "testimony for hire," Johnson advances substantial arguments that counsel also should have uncovered—and

Lewis should have been cross-examined about—Lewis's outstanding charges, the significant sentences to which he was exposed, and any benefits he hoped to obtain through his cooperation. Johnson's Brief at 56-57 (arguing that trial counsel should have cross-examined Lewis about the fact that he was facing years in prison and therefore had a motive to testify falsely). Myriad evidence establishes that Lewis had a lot to gain from testifying, significant criminal exposure, and a history of attempting to lie (or “cooperate”) his way out of jail. Virtually none of this evidence was before the jury at trial, and the jury was therefore unable to engage in an informed deliberation of Lewis's credibility.

### I. Ineffective assistance of counsel

To establish ineffective assistance of counsel, a PCRA petitioner must plead and prove that the claim has arguable merit, that counsel had no reasonable basis for the challenged act or omission, and that the ineffectiveness caused him prejudice. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 974-75 (1987). Prejudice occurs where there is a reasonable likelihood that, but for counsel's ineffectiveness, the result of the proceeding would have been different. *Id.* This Court has recognized claims of ineffectiveness based on counsel's failure to impeach a witness on certain issues, as has the Superior Court.<sup>7</sup> This is unsurprising given the vital importance of cross-examination to the adversarial and truth-seeking processes of criminal trials. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”).

Here, Johnson has established that trial counsel should have conducted an investigation into Lewis's background and utilized impeachment of Lewis to expose his significant bias and motive for testifying. Counsel admitted that he failed to request, *inter alia*, Lewis's correction records, and did little to no investigation. N.T., \*679 6/28/2023, at 207. Trial counsel also admitted that he could have used the evidence detailed above to expose Lewis's testimony as “testimony for hire.” *Id.* at 194. Thus, this claim is of arguable merit.

Trial Counsel had no reasonable basis for failing to uncover and exploit these weaknesses in Lewis's testimony. Counsel's strategy was to show that Lewis was lying. Again, using counsel's own words, there was express evidence supporting the defense theory and counsel believed that this “information would have been important” to aid in impeaching Lewis. *Id.* at 176. The PCRA court's explanation for trial counsel's

approach is unconvincing. Speaking only to evidence that trial counsel possessed but decided not to use to impeach Lewis, the PCRA court credited counsel's decision to forego questioning Lewis because he was “answering questions so well,” and counsel wished to preserve his own credibility. PCRA Court Opinion, 5/14/2024, at 23. Given the strength of the impeachment evidence uncovered, trial counsel's initial evaluation of Lewis's testimony might not have held up. Even if trial counsel decided to forgo questioning Lewis, he could have questioned the prison investigator or another Commonwealth witness about Lewis's history of providing testimony (even false testimony) to benefit himself. To the extent trial counsel failed to engage in an investigation of Lewis and uncover this impeachment, this failure was not supported by any reasonable strategy.

As to prejudice, I would separately analyze the guilt phase and penalty phase. As to the guilt phase, I note that the Majority correctly finds that the non-disclosure of the *Brady* evidence was not material because a trial totally devoid of the evidence (i.e., had Lewis not testified) would have led to the same result with regard to the guilt verdict and that cross-examination on the point would have also led to the same result. On this conclusion I am aligned with the Majority. As the Majority explains, the jury was “informed that Lewis had offered information and testimony for personal benefit in this case.” Majority Op. at 643; N.T., 6/1/2013, at 221-32. The testimony at trial established Lewis's willingness to cooperate against Johnson, that he had already benefited from coming forward with the information against Johnson, and that Lewis faced charges. Trial counsel even called an investigator from the BCCF who indicated that Lewis brought forward the information regarding Johnson and in exchange, asked for his institutional misconducts to be reduced. N.T., 6/2/2015, at 18-23. However, there was no reference to any other instance in which Lewis cooperated with law enforcement in his own self-interest. I agree with the Majority's conclusion that this evidence, though problematic, was not material to the determination of Johnson's guilt. Majority Op. at 641-42, 648-49.

Nonetheless, Johnson presents compelling arguments that he suffered prejudice as to penalty phase. Johnson's Brief at 32-34. As explained above, the Commonwealth relied on Lewis's testimony alone as the direct evidence to support the aggravator in [Section 9711\(d\)\(5\)](#). Indeed, because the Commonwealth intended to prove that the killing intended to eliminate a potential witness, it was required to do so through direct evidence, and Lewis was its only source



of Johnson's confession. See, e.g., *Daniels*, 104 A.3d at 313; *Eichinger*, 915 A.2d at 1144-45; *Fletcher*, 861 A.2d at 910-11; N.T., 6/8/2015, at 198-99 (instructing jury that the only direct evidence to establish this aggravator was the testimony of Lewis). Had the jury been presented with this powerful impeachment evidence suggesting that Lewis was an informant for hire and a liar, there is a reasonable possibility that one or more of the jurors would \*680 have found that Lewis's testimony was not credible and therefore, that the Commonwealth did not establish the aggravating circumstance beyond a reasonable doubt, and further that the two remaining aggravating circumstances did not outweigh the three mitigating circumstances.<sup>8</sup> Because I believe Johnson has established that counsel provided ineffective assistance in failing to adequately investigate and impeach Lewis, I would vacate Johnson's sentence and remand for a new penalty phase trial.

## II. *Brady* and due diligence

In *Brady*, the United States Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. There are “three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). According to the High Court, the *Brady* obligation applies to

any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

*Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

\*681 Thus, the basic duty of the prosecutor established in *Kyles* is that the prosecutor must learn of and disclose any favorable evidence known to others acting on the government's behalf in a case. See, e.g., *Commonwealth v. Bagnall*, 661 Pa. 123, 235 A.3d 1075 (2020) (“[K]nowledge of favorable evidence known to others acting on the government's behalf in a case will be imputed on the governmental body conducting the prosecution.”) In *Bagnall*, for instance, this Court held that the duty extended to the cooperation agreement between the Mercer County District Attorney's Office and a witness, although the Office of the Attorney General later assumed the prosecution and was never made aware of the existence of the agreement.

As Johnson cites, the Ninth Circuit Court of Appeals has interpreted the *Brady* obligation to require that “[w]hen the state decides to rely on the testimony of such a witness [as a jailhouse informant], it is the state's obligation to turn over all information bearing on that witness's credibility[,]” including “the witness's criminal record, including prison records, and any information therein which bears on credibility.” *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997). The *Carriger* court found that the state had an obligation, before putting the jailhouse informant on the stand, to obtain and review the jailhouse informant's corrections file, “and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.” *Id.* I believe that the Ninth Circuit in *Carriger* correctly determined that the state's disclosure obligations under *Brady* extend to the corrections file of its key witness. Thus, in my view, the prosecution's *Brady* obligation applied to Lewis's corrections documents.

Although my disagreement with the Majority is specifically about corrections records, I believe it stems from a more foundational disagreement about our *Brady* jurisprudence. Namely, the Majority recounts the *Brady* standard and tacks on that “*Brady* is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources.” Majority Op. at 632 (quoting *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 608 (2013) (emphasis added)). In describing the PCRA court's opinion, the Majority includes the same notion that *Brady* includes this fourth requirement, i.e., that the evidence must not have been available to the defense with reasonable diligence, or else the *Brady* claim will be defeated. Majority Op. at 639



(stating that where the asserted *Brady* violation arises out of records equally available to the defense, “no *Brady* violation occurs”). I am concerned with the suggestion that there exists a rule requiring a defendant to act with reasonable diligence to establish a *Brady* claim.

Many Pennsylvania cases repeat the proposition that *Brady* is not violated if the appellant could have uncovered the same evidence with due diligence. See, e.g., *Commonwealth v. Carson*, 590 Pa. 501, 913 A.2d 220, 245 (2006); *Commonwealth v. Bagnall*, 661 Pa. 123, 235 A.3d 1075, 1091 (2020). The Court originally pulled from federal case law in *Commonwealth v. Paddy*, 569 Pa. 47, 800 A.2d 294, 305-06 (2002), when we stated that

no *Brady* violation occurs ... if the defendant knew, or with reasonable diligence could have known, of such evidence, see *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) [overruled by *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016)]; \*682 *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir.1979).<sup>4</sup> ...

<sup>4</sup> But cf. *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995) (reasoning that, given the workload of the public defender's office, defense counsel could reasonably have forgotten that he had previously represented another person who had initially been charged with the defendant's crime, and the state was obligated to disclose information concerning that person to the defense).

*Id.* (emphasis added). There continues to be a Circuit split about whether requiring a showing of due diligence on the part of the defense is inconsistent with *Brady*.<sup>9</sup> And since *Paddy*, the Third Circuit has withdrawn from its reasoning in *Starusko* that “the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.” *Starusko*, 729 F.2d at 262 (quoting *Campagnuolo*, 592 F.2d at 861), overruled by *Dennis*, 834 F.3d 263.

The Third Circuit expressly overruled its line of cases applying a diligence requirement, reasoning that the United States Supreme Court never recognized a due diligence duty of defense counsel as part of *Brady*. *Dennis*, 834 F.3d at 290. It highlighted that *Brady* and the cases applying it are entirely focused on disclosure by the prosecution, not diligence by the defense. *Id.* Assessing whether defense counsel could have uncovered the evidence was, according to the Third Circuit,

“beside the point,” and requiring such an assessment would be like “add[ing] a fourth prong” to the *Brady* analysis. *Id.* at 291, 293. We are not bound by *Dennis*,<sup>10</sup> but it should give us pause given that we drew this fourth prong from the federal courts of appeals in the first place.

Contrary to *Dennis*, this Court has continued to repeat the legal premise that there is no *Brady* violation where the defendant could have known of such evidence with due diligence. In *Commonwealth v. Hannibal*, 638 Pa. 336, 156 A.3d 197, 210-11 (2016), this Court stated that evidence that corrections’ records were available by subpoena would defeat a *Brady* violation. Candidly, I question our reasoning, though I believe it was inconsequential in that matter because we had resolved the *Brady* claim first by finding that it was waived.

Regardless of *Hannibal*, I believe our recent decisions have correctly revealed that the foundations of this “fourth prong” are cracking. In 2020, we acknowledged but declined to apply the fourth prong to defeat a *Brady* claim. *Commonwealth v. Bagnall*, 661 Pa. 123, 235 A.3d 1075, 1091 (2020) (“Under the circumstances of this case, we decline to hold that these pronouncements and the availability of transcripts from Gregory’s criminal matter operate to defeat Appellant’s claim.”). And in 2023, we acknowledged that our case law is not consistent with that of the Third Circuit after *Dennis*, but avoided the issue and left it for another day. *Commonwealth v. Conforti*, — Pa. —, 303 A.3d 715, 726 n.8 (2023).

I would not recite (let alone apply) our language from *Paddy*, drawn from *Starusko*, and overruled in *Dennis*, until we address the tension between imposing such a requirement on a defendant to establish a violation of a prosecutor’s duty that is \*683 otherwise absolute. See, e.g., *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (“[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.”). As the High Court has stated, “A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Banks v. Dretke*, 540 U.S. 668, 696, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).

Thus, I do not join the Majority’s recitation of the *Brady* standard insofar as it imposes a fourth prong, a reasonable diligence requirement, to establish a *Brady* violation, nor its finding that the Commonwealth had no duty to disclose the corrections file related to its key witness in this case.



## All Citations

Justice [McCaffery](#) joins this dissenting opinion.

353 A.3d 609

## Footnotes

- 1     18 Pa.C.S. § 2502(a) (“A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.”).
- 2     *Id.* § 2502(c) (“All other kinds of murder shall be murder of the third degree.”).
- 3     Johnson also was convicted of arson endangering persons, *id.* § 3301(a), and possessing instruments of crime, *id.* § 907.
- 4     *Commonwealth v. Johnson*, 639 Pa. 196, 160 A.3d 127 (2017).
- 5     See 42 Pa.C.S. §§ 9541-9546. The PCRA “provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.” *Id.* § 9542.
- 6     Talley's was subleasing the apartment from an acquaintance, Gisele Ucci, who was on a lengthy trip in Argentina. Talley also had use of Ucci's Cadillac, which plays a role in this case. For purposes of this narrative we refer to both as Talley's.
- 7     Omitted here is reference to a partial match with DNA obtained from a frying pan handle found near Talley's body, with the pan, itself, found nearby. Talley was missing two teeth; one was found in her mouth, the other on the floor near her body. As discussed below, the quality and relevance of the supposed partial match is very much in question, hence its omission from this portion of our factual recital.
- 8     The testimony established that Johnson made the aforesaid phone calls from phone numbers unfamiliar to the recipients, who knew Johnson's personal number.
- 9     Tr. Ct. Op., 3/23/2016, at 1-9 (names modified; citations to notes of testimony and exhibits omitted).
- 10    Notes of Testimony at Trial (“N.T.T.”), 5/29/2015, at 287-88.
- 11    *Id.* at 289.
- 12    *Johnson*, 160 A.3d at 135.
- 13    *Id.* (footnote omitted)
- 14    Tr. Ct. Op., 3/23/2016, at 9-10 (names modified; citations to notes of testimony and exhibits omitted).
- 15    N.T.T., 6/1/2015, at 70.
- 16    See N.T.T., 5/27/2015, at 111 (Talley's mother, Pearline Burke, testified that the morning before the killing she rode with Talley to get a money order for \$80).

- 17 See, e.g., Notes of Testimony at PCRA Hearing (“N.T.P.”), 6/28/2023, at 112-13 (ADA Weintraub describing counsel’s use of “linchpin” as “literally true” and adding that Lewis was “very important” and “critical to the case”).
- 18 See N.T.T., 5/29/2015, at 179 (“DNA that does not belong to the person whose fingernails they are under, it needs to be more than just casual contact. So you need to have some kind of intimate contact with another person to deposit enough DNA under your fingernails to render a test result at the end showing more than one person.”).
- 19 See N.T.P., 8/10/2023, at 132-33.
- 20 *Johnson*, 160 A.3d at 135-36 (some footnotes omitted; some citations modified).
- 21 On direct appeal of a capital conviction, this Court considers the sufficiency of the evidence regardless of whether the defendant raises a sufficiency challenge. See *Johnson*, 160 A.3d at 136 (citing *Commonwealth v. May*, 584 Pa. 640, 887 A.2d 750, 753 (2005)).
- 22 *Id.* at 145 (quoting N.T.T., 6/1/2015, at 63-64). In testimony excerpted by this Court in the same connection, Marquis elaborated that Johnson “said that if you have to shoot someone to make a come up or be involved in anything to make that come up, he will do so.” N.T.T., 6/1/2015, at 64.
- 23 *Johnson*, 160 A.3d at 147.
- 24 See *id.* at 153.
- 25 42 Pa.C.S. § 9542.
- 26 42 Pa.C.S. § 9543(a)(2).
- 27 *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 593-94 (2007) (quoting 42 Pa.C.S. § 9544(b)) (cleaned up).
- 28 *Id.* at 593.
- 29 *Commonwealth v. Chmiel*, 643 Pa. 216, 173 A.3d 617, 625 (2017).
- 30 42 Pa.C.S. §§ 9543(a)(2)(i), (ii); cf. *id.* § 9543(a)(2)(vi) (providing for collateral relief based upon “[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available *and would have changed the outcome of the trial if it had been introduced*” (emphasis added)).
- 31 *Commonwealth v. Spatz*, 610 Pa. 17, 18 A.3d 244, 321 (2011).
- 32 *Id.* at 321 (describing our holding in *Commonwealth v. Perry*, 537 Pa. 385, 644 A.2d 705, 709 (1994)).
- 33 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
- 34 *Commonwealth v. Bagnall*, 661 Pa. 123, 235 A.3d 1075, 1085-86 (2020) (citing *Commonwealth v. Strong*, 563 Pa. 455, 761 A.2d 1167, 1171 & n.5 (2000)).
- 35 *Id.* at 1086.
- 36 *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)).



- 37 Attorney Fioravanti was appointed first to the case, did most of the writing, and was primarily responsible for retaining and supervising court-appointed investigator Sean Hawke. As trial approached, Attorney Penglase assumed the role of lead attorney for the guilt phase, while Attorney Fioravanti primarily handled preparation for, and eventual trial of, the penalty phase.
- 38 Johnson's Br. at iii.
- 39 See *Commonwealth v. Buehl*, 540 Pa. 493, 658 A.2d 771, 777 (1995); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (1987).
- 40 *Commonwealth v. (Raymond) Johnson*, 600 Pa. 329, 966 A.2d 523, 533 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).
- 41 *Commonwealth v. Fears*, 624 Pa. 446, 86 A.3d 795, 804 (2014).
- 42 *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820, 827 (1954) (“[I]t is clearly settled that a man may be convicted on circumstantial evidence alone, provided his guilt is proved beyond a reasonable doubt.”).
- 43 As detailed above, his most forceful alleged statement on this point was made to Marquis, which we exclude for present purposes. But he also made similar comments to his girlfriend, who testified that he told her that “he had to do something about making money.” N.T.T., 6/1/2015, at 45.
- 44 Police efforts to confirm the existence of the friend Johnson named were unsuccessful.
- 45 For present purposes, we exclude the items Marquis retrieved from Levittown Trace at Johnson's request. Other bags of belongings were found by investigators.
- 46 *Bagnall*, 235 A.3d at 1086 (citations modified).
- 47 *Commonwealth v. Conforti*, — Pa. —, 303 A.3d 715, 730 (2023) (quoting *Commonwealth v. Bomar*, 629 Pa. 136, 104 A.3d 1179, 1189 (2014)).
- 48 *Commonwealth v. (Andre) Johnson*, 644 Pa. 150, 174 A.3d 1050, 1056 (2017) (cleaned up).
- 49 *Commonwealth v. Natividad*, 650 Pa. 328, 200 A.3d 11, 39 (2019) (cleaned up).
- 50 *(Andre) Johnson*, 174 A.3d at 1056.
- 51 *Bagnall*, 235 A.3d at 1085-86 (cleaned up); see *(Andre) Johnson*, 174 A.3d at 1056-57 (finding impeachment evidence subject to *Brady* where withheld police reports “suggest[ed] that the [the witness] sought to curry favor with the police in the face of ongoing criminal investigations and mounting evidence of his own criminal conduct”).
- 52 *Commonwealth v. Roney*, 622 Pa. 1, 79 A.3d 595, 608 (2013).
- 53 *Commonwealth v. Marinelli*, 570 Pa. 622, 810 A.2d 1257, 1273-74 (2002) (quoting *Commonwealth v. (Roderick) Johnson*, 556 Pa. 216, 727 A.2d 1089, 1094 (1999)).
- 54 Johnson cites no case law, and we are not aware of any, to suggest that the Commonwealth is responsible for obtaining *Brady* evidence not already in its possession, except when the source in question obtained the information subject to disclosure as an agent for the Commonwealth. See *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see *infra* n.70 & accompanying text. There is no evidence that BCCF officials were investigating any matters here at issue at the behest of the Commonwealth, as such.

Accordingly, we focus only upon what Johnson can establish was in the Commonwealth's possession before and during Johnson's trial.

55 Johnson's Br. at 17-18.

56 *Id.* at 20.

57 *Id.* at 22.

58 See Email, Attorney Ward to ADA Weintraub, 5/27/2015, Amended Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.*, Appendix at A-03664 (“Did Mr. Lewis testify as expected? He is scheduled to be back with us on Monday and I will factor his cooperation level with you into his plea agreement here.”) (hereinafter “PCRA Appendix”).

59 See, e.g., N.T.P., 6/28/2023, at 96-98.

60 Johnson's Br. at 23 (citing N.T.P., 6/28/2023, at 97).

61 See N.T.P., 6/28/2023, at 91 (indicating that he will generally tell cooperating witnesses “that they will gain an ally in me”).

62 See Johnson's Br. at 24-25. The hearing excerpts cited by Johnson subtly differ from his characterization, indicating only that Lewis' attorney believed they were in position to make a deal in New Jersey that would result in a sentence of time-served. Nothing in the excerpts suggests any causative factor without which such a sentence would not be offered.

63 See, e.g., N.T.P., 6/28/2023, at 98.

64 See *id.* at 173-74 (Attorney Penglase); See *id.*, 6/29/2023, at 70-71 (Attorney Fioravanti).

65 See Johnson's Br. at 26-28; PCRA App. at 06358-59 (BCCF Incident Report of Chief Investigator Frank Bochenek, 10/30/2013).

66 See PCRA App. at 06359 (BCCF Incident Report).

67 In *Commonwealth v. Hannibal*, 638 Pa. 336, 156 A.3d 197, 210-211 (2016), this Court found no *Brady* violation where prison record evidence in the Commonwealth's possession was available to the defense by subpoena.

68 Johnson's Br. at 27 (quoting *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555).

69 See generally N.T.P., 6/30/2023, at 87-88. In context, ADA Gannon indicated that in cases where he was cooperating with a prison investigator—e.g., prosecutions associated with crimes committed in prison—he might direct the investigator to follow up on one lead or another.

70 Johnson cites as additional support for this obligation the Ninth Circuit decision *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), in which the court held that the lack of actual possession of prison records establishing witness cooperation was no excuse for the prosecution's failure to disclose impeachment evidence of a bargain for information, because the prosecution has a duty to learn of exculpatory evidence and “is in a unique position to obtain information known to other agents of the government.” *Id.* at 480. Thus, “[t]he state had an obligation, before putting [the informant] on the stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.” *Id.* Notably, *Giglio* speaks only to the circumstance where one prosecutor falsely represented to a jury that no promise of leniency had been



made in exchange for a critical witness' testimony when, in fact, another prosecutor in the same office had made such a promise.

71 See Johnson's Br. at 11.

72 *Id.* at 57.

73 See *id.* at 28-29.

74 N.T.P., 6/28/2023, at 122-23.

75 See Johnson's Br. at 29.

76 PCRA Ct. Op., 4/5/2024, at 30-31.

77 *Id.* at 31 (citing, *inter alia*, [Bomar](#), 104 A.3d at 1193-94; [Commonwealth v. Spatz](#), 587 Pa. 1, 896 A.2d 1191, 1214-16 (2006)).

78 N.T.T., 6/1/2015, at 220-23. BCCF investigator Frank Davis also testified that Lewis sought favorable treatment on his pending misconducts in exchange for information. See *id.*, 6/2/2015, at 23-24.

79 [Napue](#), 360 U.S. at 265-66, 79 S.Ct. 1173.

80 *Id.* at 268, 79 S.Ct. 1173.

81 *Id.* at 270, 79 S.Ct. 1173.

82 ([Andre](#)) [Johnson](#), 174 A.3d at 1057 n.6 (quoting [Napue](#), 360 U.S. at 269, 79 S.Ct. 1173).

83 See, e.g., N.T.P., 6/28/2023, at 112-13.

84 Johnson Br. at 30 (quoting N.T.T., 5/27/2015, at 42-43).

85 *Id.* Tellingly, at the end of ADA Weintraub's concluding narrative, with which he opened his closing argument, ADA Weintraub repeatedly invoked Lewis' putative validation of the ADA's account. See generally N.T.T., 6/2/2015, at 78 ("George Lewis knew that fact."), 79 ("What did George Lewis also tell you?"), 89 ("Another interesting point I'd like to make regarding George Lewis ..."), 90 ("And that is ... one of the reasons why [Lewis] is credible and why you should believe him.").

86 Johnson's Br. at 30 (quoting N.T.P., 6/28/23, at 247); see N.T.P., 6/29/2023, at 5 ("I needed to prove that George Lewis was lying. If I didn't, Marcel Johnson confessed to him.").

87 Johnson's Br. at 31 (quoting N.T.P., 6/28/2023, at 204).

88 Cmwlth.'s Br. at 27 (capitalization normalized).

89 *Id.* at 28.

90 N.T.T., 6/2/2015, at 71.

91 In a candid moment, ADA Gannon indicated that the DAO's "practice was not to make promises to anyone, because if you make a promise, obviously, you have to disclose that. And I believe there was no specific promise made to Mr. Lewis ...." N.T.P., 6/30/2023, at 51.

- 92 PCRA Ct. Op. at 31 (citing to similar effect *Bomar*, 104 A.3d at 1193; *Commonwealth v. Santiago*, 439 Pa.Super. 447, 654 A.2d 1062, 1081-82 (1994)). The court was similarly dismissive of Johnson's claim that the prosecution knew but did not disclose a prior connection between Lewis and Talley. But the evidence of this was found in prison phone calls the records of which (a) were not in the Commonwealth's possession but (b) were in the defense's possession. *Id.* at 32. The court further added that Attorney Penglase had a reasonable basis for not cross-examining Lewis on the possible connection. In this regard, the court indicated that "[e]vidence at trial established that George Lewis did not know of Ms. Talley or her family prior to meeting [Johnson] in [BCCF]. Therefore, George Lewis' lack of connection to Ms. Talley was already known to the jury and any additional questioning would have been futile." *Id.* On this basis as well, the court found, Johnson was not prejudiced.
- 93 *Id.* at 34.
- 94 *Id.*
- 95 See *Roney*, 79 A.3d at 608 ("*Brady* is not violated when the appellant knew or, with reasonable diligence, could have uncovered the evidence in question, or when the evidence was available to the defense from other sources.").
- 96 N.T.P., 6/28/2023, at 122-23.
- 97 Johnson's Br. at 31.
- 98 As noted above, the fact that the specter of criminal liability was dangled before Marquis during police question is established in the PCRA record by the testimony of ADA Weintraub, who was present at the interview in question. As well, the record contains a 2019 declaration by Marquis, which largely concerns what Marquis could have testified to relative to mitigation, but also contains an allegation that police threatened to implicate him in the murders of Talley and R.R. if he did not cooperate. See PCRA App. at A-00421-22.
- 99 *Bagnall*, 235 A.3d at 1086 (citations modified).
- 100 Marquis presents a more complicated case, in this regard.
- 101 Johnson's Br. at 31 (quoting N.T.P., 6/28/2023, at 204).
- 102 *Id.*
- 103 Cf. *Commonwealth v. De Petro*, 350 Pa. 567, 39 A.2d 838, 840 (1944) ("Proof of motive is never necessary ... [,] but it is always relevant.").
- 104 See *Commonwealth v. Abdul-Salaam*, 615 Pa. 297, 42 A.3d 983, 987 (2012) (even assuming a cumulative analysis of multiple items of *Brady* non-disclosure, concluding that materiality was not established due to a failure to show a reasonable probability of a different outcome with the benefit of the *Brady* evidence in question).
- 105 604 U.S. 226, 145 S. Ct. 612, 221 L.Ed.2d 90 (2025). This decision is the subject of a Motion to Allow Post-Submission Communication that Johnson filed pursuant to Pa.R.A.P. 2501. The Commonwealth does not oppose this Motion, though it contests the utility of *Glossip* to Johnson's appeal. We hereby grant Johnson's Motion to Allow Post-Submission Communication.
- 106 *Glossip*, 145 S.Ct. at 626-27 (citations modified).
- 107 Johnson's Br. at 38.



- 108 PCRA Ct. Op. at 29 n.7.
- 109 N.T.T., 6/1/2015, at 222.
- 110 *Id.* at 223.
- 111 See *Commonwealth v. Wallace*, 500 Pa. 270, 455 A.2d 1187, 1190-91 (1983). It bears mention that, as in *Wallace*, this Court has treated a failure to correct false testimony as one among several categories of *Brady* violation.
- 112 See *Buehl*, 658 A.2d at 777; *Pierce*, 527 A.2d at 975.
- 113 (*Raymond*) *Johnson*, 966 A.2d at 533 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).
- 114 *Fears*, 86 A.3d at 804.
- 115 (*Raymond*) *Johnson*, 966 A.2d at 535-36 (citations modified).
- 116 Johnson's Reply Br. at 19-20 (citing *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).
- 117 *Wiggins*, 539 U.S. at 521-22, 123 S.Ct. 2527.
- 118 N.T.P., 6/28/2023, at 159.
- 119 *Id.* at 158.
- 120 *Id.* To be clear, investigator Hawke did canvass Avalon Court, speak with various residents, and report back to Attorney Fioravanti. See *id.*, 6/29/2023, at 9-10, 16. So it cannot fairly be said that he did nothing.
- 121 *Id.*, 6/28/2023, at 161.
- 122 See *id.* at 153 (explaining failure to request prison files that he did not receive in discovery because he “did not want to obtain a document that [he] would have to turn over in reciprocal discovery”).
- 123 In criminal cases, the defendant's discovery obligations are limited to what the prosecution shows to be “material[ ] to the preparation of the Commonwealth's case ..., subject to the defendant's rights against compulsory self-incrimination,” among the following items: (1) “results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, ... that the defendant intends to introduce as evidence in chief, or were prepared by a witness whom the defendant intends to call at the trial”; and (2) “the names and addresses of eyewitnesses whom the defendant intends to call in its case-in-chief.” Pa.R.Crim.P. 573(C)(1). Notably, there is no rule-based discovery obligation to produce the results of investigations that the defense does not intend to introduce in its case-in-chief. And this Court, at least, has never suggested otherwise. See generally *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 946-49 (2005) (reviewing generally the requirements and limitations of Pa.R.Crim.P. 573(C) and its interaction with the work-product doctrine). Which is to say that Attorney Penglase was free to investigate any leads he chose without fear that the mere fact or results of his investigations would be discoverable to the prosecution if he chose not to present them at trial. Thus, at least arguably, no harm could have come from more rigorous investigation.
- 124 Johnson's Br. at 88 (quoting *Hinton v. Alabama*, 571 U.S. 263, 274, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (“An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”)).

- 125 *Id.* (citing [Commonwealth v. Cox](#), 603 Pa. 223, 983 A.2d 666, 692 (2009)).
- 126 PCRA Ct. Op. at 14.
- 127 *Id.* at 15.
- 128 *Id.* (echoing, *inter alia*, Attorney Penglase's testimony that he "was much happier to present the jury with an empty chair of potential killers rather than present them with the name of someone the Commonwealth could contradict," N.T.P., 6/28/2023, at 159).
- 129 See ([Raymond](#)) *Johnson*, 966 A.2d at 535-36.
- 130 See [Commonwealth v. Williams](#), 636 Pa. 105, 141 A.3d 440, 463 (2016) (determining "whether counsel's decision had any basis reasonably designed to effectuate his client's interest" "cannot be a hindsight evaluation of counsel's performance, but requires an examination of whether counsel made an informed choice, which[,] at the time the decision was made[,] reasonably could have been considered to advance and protect the defendant's interests" (cleaned up)).
- 131 N.T.P., 8/9/2023, at 12-14, 23.
- 132 *Id.* at 12.
- 133 Johnson's Br. at 90.
- 134 As set forth below, this evidence may have been subject to more effective impeachment than Attorney Penglase managed. But it still had an evidentiary foundation, and the jury may well have found the Commonwealth's expert convincing even in the face of a more effective attack.
- 135 See [Dennis](#), 950 A.2d at 960.
- 136 Johnson's Br. at 65.
- 137 Decl. of Arthur Young, 7/11/2019, at 4 ¶16, PCRA Appendix at A-05988.
- 138 *Id.* at 7-8 ¶26, PCRA Appendix at A-05991-92.
- 139 See Johnson's Br. at 66-67.
- 140 N.T.P., 6/29/2023, at 79-80.
- 141 Cross testified that she provided no substantive information regarding Johnson's case to Attorney Penglase, and at most offered only general information about DNA testing and analysis. *Id.*, 8/9/2023, at 136.
- 142 *Id.*, 6/29/2023, at 79-82.
- 143 Johnson's Br. at 68 (quoting N.T.T., 5/29/2015, at 179-80).
- 144 *Id.* at 68-69 (citing N.T.P., 8/10/2023, at 132-33, 144).
- 145 *Id.* at 72 (quoting N.T.P., 6/29/2023, at 130).
- 146 PCRA Ct. Op. at 26 (quoting N.T.T., 5/27/2015, at 48)
- 147 *Id.* at 27 (quoting [Commonwealth v. Treiber](#), 632 Pa. 449, 121 A.3d 435, 454 (2015)).



- 148 *Id.* The evidence under discussion in this instance was a hair recovered from the back of the victim's hand that was determined not to be Talley's own. See N.T.T., 5/28/2015, at 105-06.
- 149 N.T.T., 5/29/2015, at 191-92.
- 150 PCRA Ct. Op. at 28.
- 151 640 Pa. 237, 162 A.3d 394, 401 (2017).
- 152 *Id.* at 400.
- 153 *Id.* at 401.
- 154 Johnson's Br. at 95.
- 155 *Id.*
- 156 *Id.* at 96.
- 157 See *Commonwealth v. Weiss*, 530 Pa. 1, 606 A.2d 439, 442 (1992) (holding that, where direct evidence is in short supply, character evidence "is substantive, not mere makeweight evidence," and a claim regarding the failure to present same has arguable merit); see generally *Commonwealth v. Neely*, 522 Pa. 236, 561 A.2d 1, 3 (1989) (holding that character evidence "may, in and of itself, (by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty").
- 158 *Weiss*, 606 A.2d at 443.
- 159 PCRA Ct. Op. at 48.
- 160 *Id.* (quoting *Commonwealth v. Busanet*, 572 Pa. 535, 817 A.2d 1060, 1070 (2002)).
- 161 *Id.* at 48-49 (citing N.T.P., 6/29/2023, at 134-35).
- 162 *Id.* at 49.
- 163 N.T.P., 6/29/2023, at 20.
- 164 See generally N.T.T., 5/28/2015, at 245-68.
- 165 See *Spotz*, 18 A.3d at 321. Because this applies only to claims that fail for want of prejudice, we will not consider the alleged ineffectiveness for failing to present character evidence, which we have determined failed because counsel had a reasonable basis for declining to present such evidence.
- 166 See *Commonwealth v. Wright*, 599 Pa. 270, 961 A.2d 119, 135 (2008).
- 167 See generally 42 Pa.C.S. § 9711(c).
- 168 Respectively, the enumerated aggravating circumstances were that the victim (R.R.) was a prosecution witness to the murder of Talley; the victim was convicted of another murder (Talley); and the victim was a child under twelve years of age. Respectively, the mitigating factors were that the defendant had no significant prior criminal history; the defendant's young age; and the "catch-all mitigator," which applies to "[a]ny other [unenumerated] evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(8).

- 169 Johnson's Br. at 100 (quoting 42 Pa.C.S. § 9711(e)(2)).
- 170 See *Spotz*, 84 A.3d at 311.
- 171 Johnson's Br. at 123.
- 172 *Id.* at 125.
- 173 See *id.*
- 174 *Id.* at 126.
- 175 See 42 Pa.C.S. § 9543(a)(3) (providing that eligibility for PCRA relief is unavailable when the issue has been "previously litigated or waived"); *id.* § 9544 (providing that an issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue," and that it is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding"); see generally *Commonwealth v. Vandivner*, 634 Pa. 482, 130 A.3d 676, 683 (2015) (PCRA claim properly denied where it had been litigated on direct appeal).
- 176 Johnson's Br. at 127.
- 177 N.T.T., 6/4/2015, at 132.
- 178 *Id.* at 140-41.
- 179 *Id.*, 6/5/2015, at 206.
- 180 *Id.* at 205.
- 181 *Id.* at 207, 212, 223.
- 182 *Id.*, 6/8/2015, at 87-89.
- 183 This is, to say the least, a parsimonious account of Attorney Fioravanti's cross-examination of Dr. O'Brien, which elicited significantly more information designed to undercut Dr. O'Brien's bases for disagreeing with Drs. Armstrong and Berkowitz. See N.T.T., 6/8/2015, at 101-13.
- 184 See Decl. of Regina Baskett, 5/15/2019, at ¶¶ 28-31, PCRA App. at 00462-63.
- 185 See, e.g., N.T.P., 8/9/2023, at 188-201.
- 186 As noted, that subject is waived as previously litigated, and ineffectiveness will not lie for failing to investigate or present evidence that the court deemed inadmissible.
- 187 PCRA Ct. Op. at 51 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).
- 188 *Id.* (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052).
- 189 See *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130, 151 (2018).
- 190 PCRA Ct. Op. at 51-52 (quoting *Commonwealth v. Daniels*, 628 Pa. 193, 104 A.3d 267, 297 (2014)).
- 191 N.T.P., 8/10/2023, at 44-45.



- 192 PCRA Ct. Op. at 52.
- 193 *Id.* at 53-54.
- 194 Johnson's Br. at 132.
- 195 514 Pa. 539, 526 A.2d 334 (1987).
- 196 517 Pa. 529, 539 A.2d 780 (1988).
- 197 See Johnson's Br. at 134; *Commonwealth v. Crispell*, 648 Pa. 464, 193 A.3d 919, 956 n.2 (2018) (Saylor, J., concurring) ("I take this opportunity to note my agreement with those jurisdiction which have found [jailhouse informant] testimony to be 'inherently suspect.' " (citation omitted)); cf. *Commonwealth v. Dowling*, 316 A.3d 32, 49 (2024) (conceding "that there is a reasonable debate to be had concerning the reliability of jailhouse informant testimony").
- 198 *Daniels*, 104 A.3d at 297.
- 199 See Diss. Op. at — (Donohue, J.) (finding "a reasonable possibility that one or more of the jurors would have found that Lewis's testimony was not credible").
- 200 Justice Donohue criticizes us for acting as a "super jury" that has failed to engage in the weighing process prescribed by *Daniels*. Diss. Op. at — — n.8 (Donohue, J.). That is an odd criticism, as it fails to explain how we can at the same time have transgressed by acting "super"-deliberatively and by failing to deliberate. In any event, *Daniels* requires a degree of difficult speculation on this Court's part regarding how a jury would review the evidence remaining in light of changes imposed on appeal, a "task of reweighing" that "is not an exact science." See *Daniels*, 104 A.3d at 304. Were it not so, the law would provide that, in any circumstance in which an aggravator is removed from the calculus, the case must be remanded for a new sentencing proceeding. For his part, Justice McCaffery asserts that "little speculation is needed where, as here, the jury found multiple mitigating circumstances and its final moral judgment included an improper aggravator." Conc. & Diss. Op. at 670 (McCaffery, J.). But he also engages in his own critical speculation. For example, based upon what seem to be mechanistic assumptions about the jury, Justice McCaffery writes the multiple-murder aggravator out of the verdict. In his view, the fact that the jury declined to impose the death penalty for Talley's murder—implicitly finding that aggravator alone insufficient as to Talley—necessarily means that the jury could not have relied upon that aggravator at all in imposing the death penalty for R.R.'s murder. See Conc. & Diss. Op. at 670-71 (McCaffery, J.). This bald inference excludes any number of alternate explanations for the jury's divergent sentencing choices between the two victims. That the multiple-murder aggravator was not enough to impose death for Talley's murder hardly excludes the prospect that it was deemed sufficient for R.R. when combined with the victim-under-twelve aggravator. Indeed, the distinction between the sentence imposed for Talley's murder and that imposed for R.R.'s murder suggests that the jury made far *more* of the victim-under-twelve aggravator than Justice McCaffery thinks it did. Ultimately, the jury is a black box; we can only (but must) speculate as to its contents. We have reviewed the evidence in aggravation and mitigation, taking careful account of what we can glean from the jury's consideration of that evidence, as reflected in the aggravators and mitigators the jury properly found and in its verdict. Under the circumstances presented, we are not prepared to second-guess the jury's conclusion.
- 201 512 U.S. 154, 165, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (footnote omitted).
- 202 896 A.2d at 1245 (quoting *Kelly v. South Carolina*, 534 U.S. 246, 254, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002)).
- 203 Johnson's Br. at 130-31.

- 204 Ultimately, though, ADA Weintraub was sworn in and became Judge Weintraub several months before the PCRA court issued its [Pa.R.A.P. 1925\(a\)](#) opinion in support of its ruling in April of 2024.
- 205 *Commonwealth v. Dip*, 221 A.3d 201, 206-07 (Pa. Super. 2019) (citations modified; emphasis omitted).
- 206 *Lomas v. Kravitz*, 642 Pa. 181, 170 A.3d 380, 389 (2017).
- 207 *Id.*
- 208 *In re Lokuta*, 608 Pa. 223, 11 A.3d 427, 435 (2011).
- 209 Johnson's Br. at 138.
- 210 The PCRA court thoroughly and convincingly explained its reasoning for denying recusal in open court. See PCRA Ct. Op. at 79-80 (quoting N.T.P., 6/28/2023, at 9-12). In doing so, the judge noted that he had already been assigned this case in the wake of the trial judge's recusal, and cited the considerable time and effort that had gone into the PCRA proceedings to that point, at least some of which would have to be duplicated before a newly assigned judge.
- 211 *Dip*, 221 A.3d at 206-07.
- 1 "The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing [her] testimony against the defendant in any grand jury or criminal proceeding involving such offenses." [42 Pa.C.S. § 9711\(d\)\(5\)](#).
  - 2 I agree with the Dissent that Johnson's claim has arguable merit and that his trial counsel's performance was constitutionally deficient. See Dissent at 678-79. The Majority ostensibly agrees this particular claim hinges on prejudice. See Majority Opinion at 647 ("[C]ounsel's avowed failure to investigate must have been informed by a reasonable strategy, and it is not at all clear that such a strategy is present here.") (footnote omitted); *id.* at 649 (affirming dismissal of guilt-phase claim challenging counsel's ineffectiveness in failing to impeach Lewis on prejudice grounds because "we cannot conclude that under such impeachment it is reasonably probable not only that the jury would have rejected the substance of Lewis' testimony but that, in so doing, it would have found the prosecution in its entirety so flawed as to reach a different verdict."); *id.* at 660-62 & n.200 (reweighing the aggravators and mitigators and declining to find prejudice).
  - 3 A *per curiam* opinion's precedential value depends on the degree of its reasoning. Generally, a summary affirmance or reversal lacks precedential value, but a reasoned opinion is given the same weight as a signed opinion. See Bryan A. Garner et al., *The Law of Judicial Precedent* 214–217 (2016). The Court often issues such opinions in the federal habeas context. See, e.g., *Klein v. Martin*, — U.S. —, 146 S. Ct. 589, 593, 223 L.Ed.2d 484 (2026) (citing examples).
  - 4 I note that "the resolution of capital-sentencing ineffectiveness claims is frequently fact-intensive, so that, other than in terms of the pronouncement of overarching standards, the precedential effect of individual decisions may be limited." *Commonwealth v. Gibson*, 610 Pa. 332, 19 A.3d 512, 526 (2011) (citation and internal quotation marks omitted); cf. *Shinn v. Kayer*, 592 U.S. 111, 123, 141 S.Ct. 517, 208 L.Ed.2d 353 (2020) ("[B]ecause the facts in each capital sentencing case are unique, the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case.").
  - 5 *Sanders* eliminated the distinction drawn in *Stringer* between "weighing States" and "non-weighing States" for purposes of assessing "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty." See *Sanders*, 546 U.S. at 221, 126 S.Ct. 884 (emphasis and citation omitted). In a "weighing" State, "after a jury has found a defendant



guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence.” *Stringer*, 503 U.S. at 229, 112 S.Ct. 1130. By contrast, “[i]n a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty.” *Id.* at 231, 112 S.Ct. 1130. Pennsylvania is a weighing State. See 42 Pa.C.S. § 9711(c)(1).

- 6 I have found no binding precedent, by either our Court or the United States Supreme Court, addressing how to reweigh the mitigators and aggravators where there is a reasonable probability that, but for counsel's error, at least one juror would have found them in equipoise based on the prosecution's failure to prove one of them beyond a reasonable doubt. In my view, the closest comparators are cases, like *Sanders* and *Stringer*, addressing how to reweigh aggravators and mitigators upon subtracting an aggravator later deemed invalid. With the caveat that harmless-error review under the Eighth Amendment and the *Strickland* prejudice standard under the Sixth Amendment are not coextensive, I would follow the general legal principles articulated in *Sanders* and its predecessors. Cf. *Andrew v. White*, 604 U.S. 86, 95, 145 S.Ct. 75, 220 L.Ed.2d 340 (2025) (*per curiam*) (reaffirming that “certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt”) (citations omitted); *id.* at 94–95, 145 S.Ct. 75 (recognizing the overlap between general legal principle underlying state prisoner's Fourteenth Amendment due process claim and “the Eighth Amendment principle that a sentence may not be grossly disproportionate to the offense”) (citation omitted).
- 7 In relation to Talley's murder, the Commonwealth attempted to prove four statutory aggravators, including torture, see 42 Pa.C.S. § 9711(d)(8); conviction of another murder at the same time as her murder, see 42 Pa.C.S. § 9711(d)(11); Johnson's commission of a felony drug offense in connection with her murder, see 42 Pa.C.S. § 9711(d)(13); and Johnson's knowledge of her pregnancy, see 42 Pa.C.S. § 9711(d)(17).
- 8 The Commonwealth maintains that same position on appeal. See Commonwealth Brief at 70 (acknowledging that the prosecutors “hitch[ed] their wagon to Lewis' confession”).
- 9 Since Lewis' testimony was not probative of the remaining aggravators for committing multiple murders and killing a child, the jury could not have given aggravating weight to that evidence unless it found the witness-killing aggravator beyond a reasonable doubt. See *infra* note 10. Crucially, had at least one juror found the evidence insufficient to prove the witness-killing aggravator beyond a reasonable doubt, the entire jury would have been precluded from weighing Lewis' testimony in aggravation. That is because his testimony would not have been admissible through one of the two remaining aggravators. See 42 Pa.C.S. § 9711(d); *Hughes*, 865 A.2d at 799 n.44; cf. *Sanders*, 546 U.S. at 220–221, 126 S.Ct. 884.
- 10 The Majority says it “reviewed the evidence in aggravation and mitigation, taking careful account of what we can glean from the jury's consideration of that evidence, as reflected in the aggravators and mitigators the jury properly found and in its verdict.” Majority Opinion at 662 n.200. But, due to the Majority's clandestine reweighing, it is unclear if that “evidence” includes Lewis' testimony on the aggravation side of the scale. Although Lewis' testimony would have been admissible in the Commonwealth's presentation of the aggravating circumstances for purposes of determining Johnson's death-eligibility, our Court must assume that, had one or more jurors found insufficient proof of the witness-killing aggravator, the jurors would have followed the court's instructions and omitted that evidence from the selection process. See *Commonwealth v. Reid*, 627 Pa. 151, 99 A.3d 470, 514 (2014) (“[A] jury is presumed to follow a trial court's instructions.”) (citation omitted). So, even if eleven of twelve jurors heard Lewis' testimony and found the witness-killing aggravator beyond a reasonable doubt, none of them would have been permitted to weigh that testimony in aggravation during the selection process. See *supra* note 9. Thus, insofar as the Majority incorporated Lewis' testimony into the prejudice analysis, the Majority's reliance thereon is misplaced.

- 1 A death sentence requires a jury's unanimous determination that the Commonwealth proved beyond a reasonable doubt the existence of certain aggravating circumstances that outweighed any mitigating factors proven by the defense by a preponderance of the evidence. 42 Pa.C.S. § 9711(c). Here, the jury found three aggravating circumstances and three mitigating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances to reach its sentence. 42 Pa.C.S. §§ 9711(d)(5), (11) (conviction of another murder at the same time), and (16) (that the victim was less than twelve-years-old); 42 Pa.C.S. §§ 9711(e)(1) (that defendant has no significant criminal history), (e)(4) (the age of the defendant at the time of the crime), and (e)(8) (catchall). *Commonwealth v. Johnson*, 639 Pa. 196, 160 A.3d 127, 135-36 (2017).
- 2 ADA Weintraub asked Lewis to recount this multiple times. Lewis testified: "He said he stabbed the baby in the upper chest, I think he told me." N.T., 6/1/2015, at 233; *id.* at 239 (stating that Johnson told him he stabbed her once in the upper chest). Then, asked what else Johnson told him about the four-year-old, Lewis stated that "She was very smart and that she could identify him." *Id.* at 234.
- 3 After the Commonwealth rested, trial counsel called an investigator from BCCF who testified that Lewis brought him this information regarding Johnson and when he did so, he sought for his misconducts to be reduced. N.T., 6/2/2015, at 18-23.
- 4 The PCRA court, Commonwealth and Majority acknowledge that this evidence was not disclosed to trial counsel. PCRA Court Opinion, 4/5/2024, at 33 (recounting that the Commonwealth admits that it inadvertently did not disclose this letter). However, the PCRA court found that the letter would have been cumulative because the jury was aware of numerous attempts Lewis had made to cooperate in exchange for consideration on his outstanding cases. I have identified no support for the PCRA court's finding because in Lewis's testimony and in the testimony of the BCCF investigator, there is no reference to efforts to cooperate other than against Johnson. In fact, trial counsel admitted that he did not impeach Lewis with prior cooperation and that he ceased his questioning quickly because he believed Lewis was withstanding cross-examination too well. See N.T., 6/29/2023 (a.m.), at 113 (trial counsel testifying that at trial he did not impeach Lewis with his prior cooperation in New Jersey); 114 ("When the questioning isn't going the way you want it to go, sometimes the best thing to do is shut up and sit down.").
- 5 In addressing this claim, one could fault the Commonwealth for failing to turn over Lewis's corrections records and/or one could fault trial counsel for failing to request to review Lewis's corrections records. Whether based on counsel's ineffectiveness or the prosecutor's failure to turn over the evidence, Johnson's penalty phase was unfair. With regard to the alleged *Brady* violation, I question the Majority's premise that the Commonwealth did not have a duty to uncover Lewis's corrections records as well as the imposition of a requirement of due diligence on trial counsel to establish a *Brady* violation, as I address in the following section. Nonetheless, I emphasize that the application of due diligence is of no consequence to my resolution of this issue because either way, Johnson is entitled to a new penalty phase.
- 6 Johnson has shown that Lewis's cousin Kevin Fant was incarcerated with Lewis, and that Fant dated Talley from 2008 to 2011 and attended R.R.'s birth and for a time believed he was R.R.'s father. See Johnson's Brief at 52-55.
- 7 *Commonwealth v. Cousar*, 638 Pa. 171, 154 A.3d 287, 295-302, 307 (2017) (remanding for an evidentiary hearing to address whether defense counsel was ineffective for failing to cross-examine a police officer about discrepancies in his report and to address the adequacy of counsel's impeachment of an eyewitness); *Commonwealth v. Bolden*, 512 Pa. 468, 517 A.2d 935, 940-42 (1986) (Opinion Announcing the Judgment of the Court) (remanding for an evidentiary hearing to address whether counsel had a reasonable basis for failing to impeach a police officer about an inconsistency between his testimony and police report); *Commonwealth v. Strutt*, 425 Pa.Super. 95, 624 A.2d 162, 163-66 (1993) (finding counsel was ineffective for failing to prepare for cross-examination and cross-examine a Commonwealth witness about the victim's conduct following the



sexual assault at issue, which testimony demonstrated the victim was acting normally and thus supported the defense that there was no assault).

- 8 Engaging in this prejudice analysis requires us to “evaluate the relative strength of the evidence in aggravation and mitigation, as well as the parties’ arguments in light of the full hybrid record produced at trial and upon collateral attack.” *Commonwealth v. Daniels*, 628 Pa. 193, 104 A.3d 267, 304 (2014). In my view, once we acknowledge the reasonable likelihood that jurors would have rejected this aggravator in this case, the balance has changed so significantly that a remand for a new penalty phase is warranted. *Id.* at 284 (Saylor, J., concurring) (stating that the standard pertaining to prejudice places appellate courts in a difficult position of speculating “whether each one (and every one) of twelve individuals, having twelve unique mindsets which we cannot know, would have supported a death sentence, had an appropriate defense presentation been made. ... I believe we should err on the side of providing defendants with one trial at which the defense is guided by a competent, prepared lawyer”) (quoting *Commonwealth v. Koehler*, 614 Pa. 159, 36 A.3d 121, 162 (2012) (Saylor, J., concurring)).

Instead of engaging in the deliberative weighing process described by the *Daniels* Court, the Majority cursorily decides that, in light of the two other aggravators found by the jury—that the victim was under twelve years old and that the defendant was convicted of another murder at the same time—it cannot deem it reasonably probable that one or more jurors would have retreated from a sentence of death. Majority Op. at 660-61. This analysis does not follow the “very specific guidelines about how [it] should weigh the various mitigating and aggravating circumstances.” N.T., 6/8/2015, at 205 (instructing jury). The Majority does not acknowledge the mitigating circumstances let alone address the relative strength of the evidence in mitigation, nor does it address the fact that the same jury returned a life sentence with respect to the mother’s killing. In sum, the Majority is acting as a super jury without engaging in the individualized weighing of the remaining aggravating circumstances and the mitigating circumstances—a weighing process that is constitutionally and statutorily mandated in capital sentencing. *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); 42 Pa.C.S. § 9711.

- 9 See Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 U.C.L.A. L.REV. 138 (2012).
- 10 “Although we treat decisions of the Third Circuit as persuasive authority on questions of federal constitutional law, we are not bound by them.” *Commonwealth v. Hicks*, 652 Pa. 353, 208 A.3d 916, 936 n.13 (2019).

**IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA :

No. CP-09-CR-0001413-2014

v. :

MARCEL JOHNSON :

**OPINION**

Marcel Johnson (hereinafter “Appellant”) appeals to the Supreme Court of Pennsylvania from this Court’s denial of his Amended Post-Conviction Relief Act (hereinafter “PCRA”) Petition on December 29, 2023. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), this Court files this Opinion in support of the Court’s ruling.

**I. FACTUAL BACKGROUND**

On June 3, 2015, following a trial by jury, Appellant was convicted of: (1) First Degree Murder<sup>1</sup> for the death of twenty-two-year-old Ebony Talley; (2) First Degree Murder<sup>2</sup> for the death of her four-year-old daughter, R.R.; (3) Third Degree Murder<sup>3</sup> of an Unborn Child for the death of the five-month-old male fetus Ebony Talley was carrying at the time she was murdered; (4) Arson Endangering Persons<sup>4</sup>; and (5) Possessing Instruments of a Crime.<sup>5</sup>

On June 9, 2015, following the penalty phase of the trial, the jury returned a verdict of death for the First Degree Murder of R.R. and a verdict of life imprisonment for the First Degree

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<sup>1</sup> 18 Pa.C.S. § 2501(a)

<sup>2</sup> 18 Pa.C.S. § 2502(a)

<sup>3</sup> 18 Pa.C.S. § 2603(a)

<sup>4</sup> 18 Pa.C.S. § 3301(a)(1)(i), (ii)

<sup>5</sup> 18 Pa.C.S. § 907(a)



Murder of Ebony Talley. On that same date, the Honorable Diane E. Gibbons (hereinafter "Trial Court") imposed consecutive sentences of no less than twenty years to no more than forty years in a state correctional institution for the crime of Third Degree Murder of an Unborn Child and no less than ten years to no more than twenty years in a state correctional institution for the crime of Arson Endangering Persons. The Trial Court also imposed a concurrent sentence of no less than two-and-one-half years to no more than five years in a state correctional institution for the crime of Possessing Instruments of a Crime.

The facts of this case were discussed at length in the March 23, 2016 Opinion issued by the Trial Court and are set forth as follows:

On Monday, November 25, 2013, at approximately 3:30 p.m., Bristol Township Police were dispatched to a reported fire in Building 600 of the Avalon Court Apartments located in Bristol Township, Bucks County. Officer Joseph Dragon was the first emergency responder to arrive at the scene. Upon his arrival, he was advised by employees of the apartment complex that a child might be trapped in one of the basement level apartments. Officer Dragon then entered the building and proceeded down to the basement level. He was prevented from entering the common hallway on that floor due to the presence of thick, heavy smoke. Two firefighters, who arrived in advance of the emergency equipment, identified Apartment 604, located on the basement level of the building, as the location of the fire and also attempted entry. They too were forced to retreat due to the dense smoke and heat.

Entry into Apartment 604 was made shortly after the first fire engine arrived. After entering the apartment, firefighters proceeded to a bedroom located in the rear of the apartment. There, they observed the bed and piles of clothes burning. Once that fire was extinguished, firefighters found the body of a deceased female lying face-down on the bedroom floor. Her head and neck were encased in a blue plastic bag. This victim was identified as twenty-two- year-old Ebony Talley. Ms. Talley was five months pregnant at the time of her death. Firefighters found Ms. Talley's four-year-old daughter, R.R., on the floor in the living room lying beneath an overturned couch. R.R. was rushed to St. Mary Medical Center where she was pronounced dead.

Autopsies were performed by forensic pathologist Dr. Ian Hood. The autopsy of R.R. revealed that R.R. died as a result of a single knife wound to her chest. The knife entered her body below her collar bone and cut her carotid artery and jugular

vein, causing her to bleed to death. R.R.'s abdomen was extensively burned in the fire. She was alive at the time.

The examination of Ebony Talley's body revealed thirty-five knife wounds to her scalp, her face, the back and sides of her neck, her upper chest, her left armpit, her abdomen, her upper back, the back of her left thigh and the inside of her left knee. One of the stab wounds penetrated her uterus and punctured the amniotic sac. Defensive wounds were found on her arms and on her left hand. Ms. Talley also suffered a blunt impact injury to her mouth, causing her to lose two teeth. One tooth was found in her mouth at the autopsy. The other was found at the crime scene on the floor in between the kitchen/dining area and the living room of the apartment. Dr. Hood testified that the injury was consistent with Ms. Talley having been struck in the face with the frying pan found near her body at the scene. Large areas of Ms. Talley's body were burned in the fire. She was burned as she was dying or within one or two minutes of her death. The cause of death was determined to be multiple stab wounds. Dr. Hood testified that he could not exclude terminal asphyxiation, caused by the plastic bag being placed over her head, as the final mechanism of death. Fingernail scrapings taken from Ebony Talley at the autopsy were submitted for DNA analysis. The scrapings contained male DNA.

The twenty-week male fetus Ms. Talley was carrying, otherwise healthy and uninjured, died as a result of the death of his mother.

The Commonwealth's arson expert, Fire Marshall Kevin Dippolito, testified that two fires were set inside the apartment; one in the back bedroom next to the body of Ebony Talley, the other in the living room next to where R.R. lay dying. He testified that the fires were intentionally set by application of an open flame to two separate fuel sources, clothing and a cushioned chair in the bedroom and a potholder in the living room. Cooking oil was poured throughout the scene. It was found at both points of origin and on the victims' clothing.

Ebony Talley lived with her daughter in Apartment 604 of Avalon Court Apartments. [Appellant] used her apartment to shower and change clothes. He also stored his personal property there. At the time of her death, Ms. Talley was selling heroin out of that apartment. [Appellant], an accomplice in Ebony Talley's drug dealing activities, knew that she sold heroin. Less than five days before the murders, [Appellant] had a conversation with his brother, Marquis Johnson, outside of the apartment. At that time, [Appellant] told his brother that he wanted money and was "willing to do anything" to get it. He told him that he would "shoot someone" or be "involved in anything" if that was what was required to "make a come up." [Appellant] had also told his girlfriend, Natashia Martinez, that he had to do something to make money. The night before she was murdered, Ebony Talley asked her boyfriend, Eric Nawuoh, to tell [Appellant] that he had to "leave." Mr. Nawuoh did as she requested.



On the morning of the murders, Ebony Talley, R.R., Ebony Talley's mother, her two sisters, Eric Nawuoh and [Appellant] were at the victims' apartment. Mr. Nawuoh left the apartment before noon. Ms. Talley's mother and sisters left at approximately 2:30 in the afternoon, leaving Ms. Talley and R.R. alone with [Appellant]. When he was last seen by the victims' family, [Appellant] was wearing dark clothing, a black or blue hoodie, dark pants and dark shoes.

At approximately 2:30 that afternoon, maintenance man Joseph Carey saw R.R. playing outside with a dog. Seeing that she was alone, he told her to go back inside. At that time, he noted that Ebony Talley's burgundy Cadillac was parked in front of building 600. At approximately 3:00 p.m., Mr. Casey observed smoke in Building 600. After calling the fire department, he and his co-workers attempted to enter the hallway to the ground floor apartments where the victims resided but were prevented from doing so as black smoke began filling the hallway. When he went back outside, Mr. Casey noticed that the Cadillac was gone and immediately notified police of its absence.

Just minutes before police and fire crews arrived, area resident, Nigeria Gary, was sitting in her vehicle in the parking lot of the Avalon Court Apartments when she observed the burgundy Cadillac quickly reverse out of its parking space, strike a parked car and speed out of the apartment complex. At approximately 3:27 p.m., a local video surveillance camera captured the vehicle as it traveled away from Avalon Court Apartments, in the direction of Levittown Trace Apartments.

At approximately 5:30 p.m., a resident of Levittown Trace Apartments, Jill Connolly, observed the burgundy Cadillac drive into the parking lot of Levittown Trace Apartments. After the car entered the lot, the headlights were switched off, the car reversed and proceeded to the rear of H Building. Approximately three minutes later, Ms. Connolly observed [Appellant] walk from that location towards the entrance of F Building.

[Appellant] thereafter unexpectedly arrived at the apartment of Jina Padilla, located in F Building of Levittown Trace Apartments. He was wearing a blue sweater, jeans and a red and black hat. He appeared to be "very worried" and "very panicky" and immediately asked to use Ms. Padilla's cell phone. After Ms. Padilla agreed to let him use her phone, [Appellant] took the phone into her bedroom to make his call(s) in private. After using the phone, [Appellant] asked Ms. Padilla if he could leave a bag at her apartment. She refused his request. [Appellant], who was at Ms. Padilla's apartment for approximately thirty minutes, used the bathroom before leaving. He was in the bathroom for five to ten minutes.

While police and fire crews were still on scene, Brittany Coles, Ebony Talley's cousin, received multiple cell phone calls from [Appellant] at five to ten minute intervals. During those calls, Ms. Coles told [Appellant] that the apartment was on fire, that R.R. might be in the apartment, that Ebony Talley could not be located and, ultimately, that R.R. had been rushed to the hospital. Ms. Coles asked

[Appellant] to return to the apartment to find out what was happening. Although [Appellant] admitted that he was at Levittown Trace Apartments, less than a mile from the scene, and that he had Ebony Talley's car and her Xbox, he refused Ms. Coles' request for help. Ebony Talley's sister, Paulina Burke, also received calls from [Appellant] while he was at Levittown Trace Apartments. Ms. Burke told [Appellant] that there was a fire at the apartment and that the family was being told that Ebony Talley and R.R. were killed. She told him that she and the family were at the police station and that he needed to come to the station as well. [Appellant], who was less than half a mile from the police station, refused to cooperate.

Based on this information, investigators proceeded to Levittown Trace Apartments. In several common areas of the complex, they found belongings of [Appellant] that had been stored in Ebony Talley's apartment prior to the murders. At 6:20 p.m., police located Ebony Talley's burgundy Cadillac behind H Building, a secluded area of the complex. Police kept the car under surveillance until 7:08 p.m., at which time [Appellant] got into the car and began to drive away. Police immediately stopped the car. [Appellant], the sole occupant of the vehicle, was no longer wearing the clothing he had worn earlier in the day. He had fresh injuries to his right hand. A bottle of Clorox bleach was found on the right rear passenger floor of the car.

At 7:37 p.m., [Appellant] agreed to speak with investigating detectives. During that interview, [Appellant] admitted that he knew Ebony Talley was pregnant. He admitted that he had been at Ebony Talley's apartment earlier in the day. He stated that he left the apartment because Ebony Talley asked him to leave. He initially claimed that after leaving the apartment, he walked to a local Burger King and that, while there, he contacted a friend he identified as "Eric Stahl" who, [Appellant] said, arrived at the Burger King driving the victim's Cadillac. [Appellant] stated that he and Stahl then drove to Levittown Trace Apartments. He claimed that Stahl gave him the keys to the car and left on foot. [Appellant] claimed that he then tried to enter H Building and that when he could not do so, he returned to the car, began to drive and was then immediately stopped by police. After being advised that there were numerous surveillance systems in the area of the Burger King where [Appellant] claimed to have met Eric Stahl, [Appellant] admitted that he had taken the victim's car from the Avalon Court Apartments, and that, while doing so, he hit a parked car and left at a high rate of speed. [Appellant] admitted that Ebony Talley's sister had urged him to come to the police station and that he refused to do so. His excuse for refusing to assist the victims' family and investigators was that he had outstanding non-traffic summary citation warrants for sleeping in a vehicle. He later stated that he did not want to get involved and that, "It was every man for himself." During the course of the interview, [Appellant] was shivering, shaking and sweating.

While [Appellant] was at the police station, the investigating detectives executed a search warrant issued for [Appellant's] person. Buccal swabs and fingernail scrapings were taken from [Appellant] at that time. DNA analysis of the scrapings



from [Appellant's] right hand revealed the presence of Ebony Talley's DNA. [Appellant's] DNA was compared with DNA obtained from various pieces of evidence. A partial match with [Appellant's] DNA was found on the handle of a broken frying pan seized from the scene. That handle was found in the hallway leading to the bedroom where Ebony Talley was found. The cooking surface of the pan was found in the bedroom next to her body.

In the area between the kitchen and living room of the crime scene, police found large blood stains, Ebony Talley's tooth, one earring which matched the earring found on Ebony Talley's body and a wireless Xbox controller to Ebony Talley's Xbox which [Appellant] had in his possession immediately after the murders. In that same area, police found a personalized dog tag inscribed "Tashia loves you forever." [Appellant's] girlfriend, Natashia Martinez, testified that the dog tag belonged to [Appellant] and that [Appellant] always wore that dog tag. [Appellant's] cell phone was also found at the crime scene. Images of [Appellant] wearing that dog tag were downloaded from that phone.

Within days of the murders, [Appellant] made a number of statements at the Bucks County Correctional Facility to a fellow inmate. [Appellant] told the inmate, "She made me kill her." The inmate asked, "Who?" [Appellant] responded, "Ebony." [Appellant] further stated that he had "killed the baby." [Appellant] explained that he "had to stab her" because she was "very smart and she can identify me." [Appellant] told the inmate that he stabbed "the baby" in the upper chest and that he "put the baby on fire" and then fled the scene.

[Appellant] spoke to his brother, Marquis Johnson, by telephone from the prison. During one recorded conversation, [Appellant] directed his brother to retrieve "evidence" that [Appellant] said he had hidden in a box on the wall of a laundry room in F Building of Levittown Trace Apartments. [Appellant's] brother went to that location and retrieved a blue latex glove containing small yellow bags and a money order. [Appellant's] brother cashed the money order and hid the glove containing the packets in a crawl space in his home.

Police later retrieved the glove and determined that it contained 167 small yellow packets of heroin. The 167 yellow heroin packets were stamped with a red "#1" with "way to go" printed inside the number. Empty yellow packets containing the same stamp were found at the crime scene scattered on the floor near the body of Ebony Talley, in a shoe box found in the bedroom where her body was found, in the living room of the apartment and in the Cadillac. The glove also contained a clear plastic bag. Eleven identical clear plastic bags were found on [Appellant's] person when he was stopped by police the day of the murders. [Appellant's] DNA was found on that glove.

Commonwealth v. Johnson, No. CP-09-CR-0001413-2014, pp. 1-10 (Bucks Cty. March 23, 2016).

## II. PROCEDURAL HISTORY

On December 22, 2017, the Supreme Court of Pennsylvania affirmed Appellant's convictions and judgement of sentence. On January 9, 2018, Appellant filed a *pro se* PCRA Petition. The Trial Court appointed Stuart Wilder, Esquire to represent Appellant and ultimately granted a Motion for Appointment of Co-Counsel and a Motion for Pro Hac Vice Admission for the Federal Public Defenders' Office to enter its appearance. After several requests for time-extensions, Appellant ultimately filed his counseled, amended PCRA Petition on July 15, 2019. On June 26, 2020, this matter was reassigned from the Trial Court to this Court. On June 30, 2020, after several time extension requests, the Commonwealth filed its Answer and Memorandum of Law in Opposition to Amended PCRA. Thereafter, from July 15, 2020 to December 12, 2022, Appellant and the Commonwealth filed several motions for leave to reply, several discovery motions, several motions for extension of time, and a Motion in Support of an Evidentiary Hearing as well as several answers and replies. Additionally, during that time, Appellant appealed one discovery Order issued by this Court that was later upheld by the Supreme Court of Pennsylvania.

On March 23, 2023, this Court held a hearing on Appellant's Motion in Support of an Evidentiary Hearing. This Court granted Appellant's Motion and held a hearing on his amended PCRA Petition on June 28, 2023 through June 30, 2023 as well as August 9, 2023 through August 10, 2023. Additionally, this Court held a hearing on Appellant's Motion to Recuse Bucks County Court of Common Pleas on June 28, 2023. On November 17, 2023, Appellant filed a Motion to Amend PCRA Petition, which this Court granted on November 27, 2023, as well as a Post Hearing Memorandum in Support of PCRA Petition and the Commonwealth filed a Memorandum of law in Opposition of PCRA. On that same date, this Court held a hearing for



oral argument on Appellant's Amended PCRA Petition. On November 28, 2023, Appellant filed a Motion to Submit Additional Facts in Support of Amended Petition for Writ of Habeas Corpus, which this Court granted on December 29, 2023.

On December 29, 2023, this Court issued its Order denying Appellant's Amended PCRA Petition.

### **III. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL**

On January 16, 2024, Appellant filed Notice of Appeal to the Supreme Court of Pennsylvania. On January 17, 2024, this Court issued an Order directing Appellant to file a concise statement of alleged errors to be addressed on appeal. On January 31, 2024, Appellant complied with said Order and raised the following issues, *verbatim*:

1. Were trial counsel ineffective for failing to investigate and present evidence of Petitioner's innocence which would have undermined the Commonwealth's case and created a reasonable doubt of Petitioner's guilt of first-degree murder in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution?
2. Were trial counsel ineffective by failing to investigate and present available impeachment evidence for two critical Commonwealth witnesses: George Lewis and Marquis Johnson?; were trial counsel also ineffective for failing to present effective argument and request applicable jury instructions regarding the credibility of these witnesses? Is there a reasonable probability of a different result at the guilt-innocence and penalty phases of Petitioner/Appellant's trial had trial counsel not rendered deficient performance?
3. Were trial counsel ineffective for failing to challenge the accuracy, reliability and admissibility of DNA evidence? Was Petitioner convicted and sentenced to death on the basis of false and unreliable DNA evidence? As a result of counsel's ineffectiveness and the presentation of unreliable DNA evidence were Petitioner's federal and state constitutional rights violated?
4. Were trial counsel ineffective for failing to investigate and present character evidence on behalf of Petitioner in violation of Petitioner's federal and state constitutional rights to the effective assistance of counsel?

5. Did the Commonwealth violate Petitioner/Appellant's federal and state rights to due process, and the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny by failing to disclose material and exculpatory impeachment evidence relating to Commonwealth witnesses, George Lewis and Marquis Johnson?; were trial counsel ineffective for failing to discover and/or present this evidence at Petitioner/Appellant's trial? Did the Commonwealth's failure to disclose or trial counsel's deficient performance establish materiality/prejudice at the guilt-innocence and penalty phases of Petitioner/Appellant's trial?
6. Did the Commonwealth violate Petitioner/Appellant's federal and state rights to due process and a fair trial by presenting and/or allowing to go uncorrected testimony that the Commonwealth either knew or should have known was false pursuant to *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny; was trial counsel ineffective for failing to raise this issue at Petitioner/Appellant's trial or on Petitioner/Appellant's direct appeal?
7. Was Petitioner deprived of his constitutional rights by counsel's failure to adequately litigate the motion to suppress Petitioner's statement to the police?
8. Was Petitioner deprived of his right to a fair trial due to erroneous jury instructions and were counsel ineffective for failing to object to these instructions in violation of Petitioner's federal and state constitutional rights?
9. Is Petitioner/ Appellant entitled to a new trial and sentencing due to the prosecutor's numerous improper arguments at both the guilt and penalty stages in violation of his federal and state constitutional rights to a fair trial and fair and impartial sentencing?; Were trial counsel ineffective for failing to object to these improper arguments?
10. Was Petitioner/Appellant denied his right to the effective assistance of counsel at his capital sentencing because counsel failed to investigate, develop and present mitigating evidence?
11. Was Petitioner/Appellant denied his right to due process and a fair and reliable sentencing under the Eighth and Fourteenth amendments because the trial court excluded relevant mitigating evidence depriving the jury of critical sentencing information and made these rulings and related comments in a manner manifesting an appearance of or actual bias?; were counsel ineffective in litigating these issues?
12. Did the trial court err in refusing to permit trial counsel to give the jury accurate information regarding a life sentence and was trial counsel ineffective for failing to make sure the jury was properly instructed in violation of Petitioner's state and federal constitutional rights?



13. Was Petitioner/ Appellant sentenced to death on the basis of an invalid aggravating circumstance (42 Pa. C.S. § 9711(d)(5))?.; were prior counsel ineffective at both trial and appeal for failing to effectively litigate this issue?
14. Was Petitioner/Appellant denied his right to a fair and reliable sentencing in violation of his Sixth, Eighth and Fourteenth amendment rights because the jury instructions were constitutionally infirm?.; were trial counsel ineffective for failing to object and effectively litigate this claim?
15. Did the trial court repeatedly and erroneously grant the Commonwealth's motions for cause, depriving Petitioner/Appellant an impartial jury in violation of his federal and state constitutional rights?.; were trial counsel ineffective for failing to ensure that Petitioner was tried by an impartial jury?
16. Does Pennsylvania's capital punishment system violate Article I, Section 13, of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution?
17. Is the death penalty incompatible with the "evolving standards of decency that mark the progress of a maturing society" in violation of the Eighth Amendment to the United States Constitution and the Article I, Section 13 of the Pennsylvania Constitution?
18. Is Petitioner/Appellant entitled to a new guilt-innocence and penalty phase because the cumulative effect of the errors in this case undermine confidence in the outcome at both phases of trial and violated Petitioner/Appellant's rights to due process, protection from cruel and unusual punishment, effective assistance of counsel, and a fair trial and sentencing?
19. Were direct appeal counsel ineffective for failing to raise any and all of the claims identified in this Statement?
20. Did the Court err in denying Petitioner's Motion to Recuse the Bucks County Bench from participating in the consideration and adjudication of his amended PCRA Petition, violating Petitioner/Appellant's rights under the State and Federal Constitutions and under the Pennsylvania Judicial Code?

## IV. DISCUSSION

### 1. *Standard of Review*

The standard of review regarding the dismissal of a petition for post-conviction relief is “whether the determination of the PCRA court is supported by evidence of record and is free of legal error.” Commonwealth v. Brandon, 51 A.3d 231, 233 (Pa. Super. 2012) (citing Commonwealth v. Burkett, 5 A.3d 1260, 1267 (Pa. Super. 2010)) (citations omitted). “In evaluating a PCRA court’s decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.” Id. In addition, appellate courts will not “disturb a PCRA court’s ruling if it is supported by the evidence of record and is free of legal error.” Burkett, 5 A.3d at 1267.

Many of Appellant’s allegations concern whether Wm. Craig Penglase, Esquire (counsel during the guilt phase of Appellant’s trial) and John Fioravanti, Esquire (counsel during the penalty phase of Appellant’s trial) (hereinafter individually and collectively referred to as “Trial Counsel”) were ineffective in their representation of Appellant. To be eligible for PCRA relief, Appellant must establish by a preponderance of the evidence that his conviction resulted from “[i]neffective assistance of counsel, which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” 42 Pa.C.S.A § 9543(a)(2)(ii).

When reviewing ineffective assistance of counsel claims, a court presumes that counsel was effective. Commonwealth v. Fletcher, 986 A.2d 759, 772 (Pa. 2009). In order to overcome this presumption, Appellant must establish that (1) his trial counsel’s performance was so deficient that it fell below an objective standard of reasonableness and (2) counsel’s deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). To assess an ineffective assistance of counsel claim, Pennsylvania courts apply a three-part inquiry wherein an appellant has the



burden of showing that (1) the underlying claim is of arguable merit; (2) counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) he was prejudiced by counsel's ineffectiveness. Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987); see Commonwealth v. Walls, 993 A.2d 289, 296 (Pa. Super. 2010) (quoting Commonwealth v. Wallace, 724 A.2d 916, 921 (Pa. 1999)). Appellant must individually discuss and prove each prong of the Pierce test to be entitled to relief. Commonwealth v. Williams, 980 A.2d 510, 520 (Pa. 2009). Failing to meet any prong of the Pierce test defeats an ineffectiveness claim. Id.

Further, "[c]ounsel cannot be deemed ineffective for failing to raise a meritless claim." Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014). Moreover, counsel's representation does not lack a reasonable basis if the chosen course of strategy or tactics "had some reasonable basis designed to effectuate his client's interests. Courts should not deem counsel's strategy or tactics unreasonable unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." Commonwealth v. Koehler, 36 A.3d 121, 132 (Pa. 2012).

A Court will not find prejudice unless an appellant proves that there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Walls, 993 A.2d at 296 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The appellant must show that "counsel's errors were 'so serious as to deprive the [appellant] of a fair trial, a trial whose result is reliable.'" Commonwealth v. Simpson, 66 A.3d 253, 277 (Pa. 2013) (quoting Harrington v. Richter, 562 U.S. 86 (2011) (citations omitted)). Pennsylvania courts have repeatedly held or implied that an attorney's basis for making one strategic or tactical decision over another is not subject to judicial speculation. Commonwealth v.

DuPont, 860 A.2d 525, 533 (Pa. Super. 2004). The Pennsylvania Supreme Court has cautioned that:

The task is not to identify various hindsight “gotcha” scenarios: i.e., counsel could have done this, or he should not have done that. Indeed, the U.S. Supreme Court has emphasized that the Sixth Amendment right to counsel does not exist in a vacuum, but exists to ensure a fair trial, a trial whose result is reliable.

[...]

The fact that the defendant on collateral attack looks at a fixed record and produces a theory by which trial counsel can be assailed for failing to parry a point made by the Commonwealth does not mean that the Commonwealth would have been left without recourse, under the available evidence.

Commonwealth v. Daniels, 104 A.3d 267, 285-86 (Pa. 2014) (citing Lockhart v. Fretwell, 506 U.S. 364 (1993)). Importantly, a claim of ineffectiveness must be denied where an appellant’s evidence fails to meet any of these prongs. Commonwealth v. Rainey, 928 A.2d 215, 224 (Pa. 2007).

## ***2. Trial Counsel’s Investigation of Appellant’s Innocence***

Appellant’s first alleged error states that Trial Counsel was ineffective for failing to investigate and present evidence of Appellant’s innocence which would have undermined the Commonwealth’s case and created reasonable doubt of Appellant’s guilt of first-degree murder. This Court does not agree.

During the PCRA evidentiary hearing in June of 2023, Trial Counsel explained that his overall strategy was to argue Appellant’s innocence and to show that the Commonwealth rushed to judgement and pinned the case on Appellant as he was an easy target. Specifically, Trial Counsel argued that: (1) Ms. Talley lived a dangerous lifestyle that included a whole host of unsavory characters and (2) the lack of forensic evidence that existed exonerated Appellant. N.T. 6/28/2023,



pp. 158, 105. Trial Counsel further explained the challenges to presenting such a claim to a jury in a capital trial:

In many ways an innocence claim is the worst kind of claim you can present during a capital trial because if...he's convicted then my co-counsel has to stand up and essentially [disavow] me and everything that I said during the first half of the trial and still ask them to save his life. So it's a big ask for the jury....It's just a hard sell.

Id. at 107. Therefore, Trial Counsel explained, he would much rather “present the jury with an empty chair of potential killers rather than present them with the name of someone the Commonwealth could contradict.” Id. at 159. This Court’s review of the record supports Trial Counsel’s explanation. However, Appellant still attempts to argue speculative and futile theories to discredit Trial Counsel’s strategy. This Court is not persuaded.

First, Appellant alleges Trial Counsel failed to properly use his private investigator, Sean Hawke. While this Court is aware that “[c]ounsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary,” it is unsure how Appellant can genuinely believe that Mr. Hawke’s investigation was insufficient. Commonwealth v. Johnson, 966 A.2d 523, 535 (Pa. 2009). The PCRA evidentiary hearing revealed that Mr. Hawke interviewed key witnesses uncovered by police, canvassed the Avalon Court apartment complex in search of additional witnesses, and effectively neutralized Commonwealth witnesses such as Denise Schorle, whose testimony would have placed Appellant at Ms. Talley’s apartment at the time of her murder. Mr. Hawke was not required to investigate every drug dealer, every drug user, or every criminal with whom Ms. Talley associated, or follow up on every unsubstantiated rumor that circulated among those interviewed. In fact, that investigation is precisely the opposite of what Trial Counsel intended to present at trial:

As I already indicated, I did not want to spin out a theory that was wrong that was based on words that were said by Marcel Johnson. I would much rather have an

empty chair to point at an unknown, unnamed killer than to provide someone the Commonwealth could run down and prove me wrong.

N.T. 6/28/2023, p. 163. Therefore, Trial Counsel instructed Mr. Hawke to investigate credible leads and witnesses. In fact, Appellant's own, new investigation has not produced anything of value other than inadmissible conjecture, rumor, and speculation. While he names, what he believes are, several potential suspects that Trial Counsel should have investigated, the record reflects that there is not an ounce of merit to any of the theories that one of these individuals could have been responsible for the murders.

Similarly, Appellant also argues that Trial Counsel should have more effectively cross-examined witnesses on the lack of police investigation. However, if he would have done so, he would have opened the door to the testimony regarding the number of witnesses interviewed and the number of other individuals investigated and eliminated as suspects by the Commonwealth—thoroughly undermining his entire trial strategy. Trial Counsel testified that he did not want to “give [investigators] the opportunity to explain away all of the things that they didn’t do.” N.T. 6/29/2023, p. 55. It is clear that Trial Counsel's strategy was reasonable, Appellant's claim as no merit, and Appellant did not suffer any undue prejudice.

Next, Appellant argues that Trial Counsel should have further investigated and debunked the Commonwealth's theory that Appellant murdered Ms. Talley, her unborn child, and R.R. to gain credibility in the drug trade. More specifically, Appellant believes that a fellow drug-dealer, John Clinton, should have been interviewed and called to testify to the fact that Appellant had no conflict with Ms. Talley. This argument is illogical for several reasons.

First, there is no evidence that Appellant provided Trial Counsel with Mr. Clinton's name or that he was willing to testify on Appellant's behalf. As Appellant had often provided Trial Counsel with “lots and lots of information that was not true. And sifting through what was and



what was not true took an inordinate amount of time, a tremendous amount of time,” it is unlikely Trial Counsel even knew of his existence. N.T. 6/28/2023, p. 160. In fact, even the Commonwealth did not interview Mr. Clinton.

Second, even if Mr. Clinton were available and willing to testify, there is no indication that his testimony would have undercut the Commonwealth’s theory of the case. The Commonwealth never presented any evidence of any argument or disagreement between Ms. Talley and Appellant and Mr. Clinton’s testimony would have merely corroborated a fact that the Commonwealth did not dispute. Additionally, if not on direct examination, the Commonwealth would have been able to elicit testimony on cross-examination that Ms. Talley was a Queen Pin who moved a lot of drugs, providing credibility to the theory that she had the things Appellant lacked and needed for success in the drug trade. As Trial Counsel argued several times throughout the trial that there was no evidence of Appellant and Ms. Talley having an argument, he cannot be deemed ineffective for failing to pursue a meritless investigation that at best would have been cumulative, but at worst would have helped the Commonwealth’s case.

Further, Appellant believes Trial Counsel was ineffective for failing to consult with expert witnesses to adequately challenge Commonwealth expert Dr. Ian Hood. However, Appellant fails to explain how consulting such an expert would have helped the defense theory of the case. Trial Counsel vigorously cross-examined Dr. Hood and elicited a plethora of information that helped his theory of the case. He is not ineffective for choosing this line of trial strategy.

In addition, Appellant asserts that Trial Counsel was ineffective for failing to properly address a few collateral points made by the Commonwealth. For example, the Commonwealth noted that a money order for Ms. Talley was found amongst Appellant’s things in his apartment. However, Trial Counsel noted that his “theory was that [the Commonwealth’s] theory that this was

money motivated was just the dumbest thing [he] had ever heard. So the fact that [they had found this money order for] less than \$100... when this was their industry, was of no moment to the murder.” N.T. 6/28/2023, p. 248. Therefore, highlighting this evidence would have drawn the jury’s attention to a fact that Trial Counsel only wanted to minimize. Another example is that Appellant believes Trial Counsel did not effectively cross-examine a witness on whether Appellant cleaned himself off at her apartment after the murders. However, her statements are trial were consistent with her statements to police during their investigation. All Trial Counsel could do was elicit testimony from her admitting that she saw no blood on Appellant when he entered her apartment and found no items belonging to him after he had left.

A third example is that Appellant believes Trial Counsel was ineffective for failing to effectively cross-examine witnesses regarding fake licenses plates found in Ms. Talley’s vehicle, implying that she had switched the tags on her car. However, the Commonwealth’s argument was that Appellant had access to the fake license plates, not that he actually switched them himself. Trial Counsel cross-examining on this issue would have been irrelevant and illogical. Lastly, Appellant believes Trial Counsel was ineffective for failing to call his prior public defender, Christina King, as a witness to testify that she told Appellant not to speak to anyone about the case in an effort to discredit his confession to fellow Bucks County Correctional Facility inmate George Lewis. However, it is no secret that clients often disregard advice from their attorneys and this could have easily been elicited by the Commonwealth on cross-examination. As such, Appellant’s claim has no merit.



### ***3. Trial Counsel's Investigation of George Lewis and Marquis Johnson***

Appellant believes Trial Counsel was ineffective for failing to investigate and present impeachment evidence for two Commonwealth witnesses: George Lewis and Marquis Johnson. For the reasons outlined below, this claim does not warrant PCRA relief.

#### **A. George Lewis**

As explained above, “[c]ounsel has a general duty to undertake reasonable investigations or make reasonable decisions that render particular investigations unnecessary.” Commonwealth v. Johnson, 966 A.2d 523, 535 (Pa. 2009). “The reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation.” Commonwealth v. Hughes, 865 A.2d 761, 813-14 (Pa. 2004). While Trial Counsel’s decisions and investigations were arguably reasonable, the entirety of Appellant’s claims do not warrant PCRA relief because Appellant fails to identify any resulting prejudice.

First, Appellant argues that Trial Counsel was ineffective for failing to investigate several unrelated or nonexistent matters. For example, Appellant believes Trial Counsel was ineffective for failing to investigate Mr. Lewis’ cooperation with an investigation into a defendant named Sim Bradley on an unrelated matter. There is no merit to this claim because the Bucks County District Attorney’s Office is unaware of any cooperation from Mr. Lewis—or anyone else—in a case involving Sim Bradley and there is no resulting prejudice because Appellant’s own investigation over the past 10 years has not uncovered any evidence that George Lewis was involved in the Sim Bradley case. Similarly, Appellant believes Trial Counsel is ineffective for failing to obtain Mr. Lewis’ furlough request records. However, as this is an anecdotal story with no probative value to the case at bar, Appellant was not prejudiced by the decision. What’s more, Appellant argues that

Trial Counsel was ineffective for failing to uncover potential witnesses, fellow Bucks County Correctional Facility inmates, named “Boo Boo” and “Man Man,” to impeach Mr. Lewis’ credibility by testifying to what news articles he read about the murder. However, testimony from the PCRA hearing revealed that Bucks County Correctional Facility receives one copy of the newspaper per day and the articles are regularly taken from the newspaper and kept by the inmates. Therefore, if an inmate was not the first person to get the newspaper, many of the articles are missing or unreadable. N.T. 6/29/2023, pp. 93-94. As Mr. Lewis already admitted to watching the news regarding the murder while in prison, these witnesses would not have offered any value and Appellant has not demonstrated the prejudice he faced by their absence.<sup>6</sup>

Second, Appellant asserts that Trial Counsel was ineffective for failing to conduct investigations into matters that would not have been admissible in court. For instance, Appellant argues that Trial Counsel was ineffective for failing to uncover prison records that indicate Mr. Lewis previously offered false information on fellow inmate Shaquel Rock. Again, Appellant cannot prove that he was prejudiced by this course of action. Essentially, Mr. Lewis told authorities that Shaquel Rock admitted to shooting an off-duty officer at a night club in New Jersey, but this was later refuted by evidence and Shaquel Rock was never convicted of the crime. However, even if Trial Counsel had uncovered this information, Trial Counsel would only have been able to confront Mr. Lewis with the report and asked whether he knew what was done with the information after he had reported it. He would not have been able to parade additional witnesses to attempt to establish if Shaquel Rock was actually involved in the shooting or not because it is a long-

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<sup>6</sup> Additionally, while Appellant believes that George Lewis’ discovery in BCCF that he was distantly related to Boo Boo, who dated Ms. Talley’s sister, and Man Man, who dated Ms. Talley, proves Mr. Lewis knew Ms. Talley, this Court is not convinced. N.T. 6/29/2023, pp. 92-93. This is a loose connection at best, but it is in no way powerful impeachment evidence.



established rule in the Commonwealth that “a witness may not be contradicted on a collateral matter.” Commonwealth v. Holder, 815 A.2d 1115, 1119 (Pa. Super. 2003) (quoting Commonwealth v. Johnson, 628 A.2d 940, 942 (Pa. 1994)). “A collateral matter is one which has no relationship to the matter on trial.” Johnson, at 943. Accordingly, beyond pointing out this single instance of Mr. Lewis’ attempt to cooperate with law enforcement – for which Trial Counsel already had ample evidence of – the remaining witnesses would not have been relevant, and their testimony would not have been admissible because what statements Shaquel Rock actually made and what his involvement in the shooting actually was were all collateral matters. See Johnson (finding that testimony regarding whether the victim had previously reported that another individual had assaulted her previously in a similar manner was “immaterial to whether or not, ... three or four years later – appellant dragged [the victim] behind the bushes in the park and raped her.”).

Additionally, Pa.R.E. 608(b) specifically states that “the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witnesses conduct.” The comment further explains that this Rule is consistent with Commonwealth v. Cragle, 422 A.2d 547 (Pa. Super. 1980), which itself outlines:

an important curb is the accepted rule that proof is limited to what can be brought out on cross-examination. Thus, if the witness stands his ground and denies the alleged misconduct, the examiner must “take his answer,” not that he may not further cross examine to extract an admission, but in the sense that he may not call other witnesses to prove the discrediting acts.

Cragle, at 551 (quoting McCormick on Evidence § 42 (Cleary ed. 1972), p. 84). As such, Appellant cannot establish that he was prejudiced by Trial Counsel’s failure to uncover this incident.

Additionally, if Trial Counsel had uncovered this single additional piece of anecdotal evidence that implies George Lewis was a person who had a history of seeking to cooperate with the police to help himself out of situations, it would have merely been cumulative of what trial counsel already knew. Having failed to establish that this evidence was anything more than cumulative of what Trial Counsel already knew and failed to establish that this evidence was admissible at trial, Appellant is entitled to no relief on this ground.

Third, Appellant argues that Trial Counsel was ineffective for not conducting investigations that he actually *had* conducted. For instance, Appellant believes that Trial Counsel was ineffective for failing to investigate the media coverage relevant to George Lewis' statements. However, this Court is confused—not only did Trial Counsel obtain these news reports, he cross-examined George Lewis on their contents. While Appellate found a few additional reports that Trial Counsel did not use, these reports contain no additional, new information. Therefore, not only is there no merit to this issue, Appellant also has not demonstrated any prejudice. Further, Appellant asserts that Trial Counsel was ineffective for failing to obtain his file from the Bucks County Public Defender's Office, who represented Appellant prior to Trial Counsel. However, at the PCRA hearing, it was revealed that Trial Counsel not only obtained the file, but also met with several attorneys from the Office to discuss the case. Trial Counsel's billing records reflect that he called Anne Faust of the Public Defender's Office on January 27, 2014, to arrange obtaining the file. He had a conference with her on January 29, 2014, in which he received the file and discussed it with her. He also spoke with Attorney Christina King of the Public Defender's Office on January 30, 2014, regarding potentially using her as a witness in the suppression hearing. Trial Counsel also had a phone call with Brandon Ingraham on January 30, 2014, in which he left a voicemail looking for his file and had a conference with him on February 4, 2014. PCRA Ex.1, p.P1-2.



Accordingly, Appellant's claim in this regard must fail there is nothing further for Trial Counsel to investigate. Commonwealth v. Cox, 983 A.2d 666, 692 (Pa. 2009) ("Trial counsel testified at the PCRA hearing that she did not have the ballistic evidence tested because she saw nothing in the report prepared by the Commonwealth's ballistics expert that was of import or that required further investigation."); Commonwealth v. Steele, 961 A.2d 786, 826-27 (Pa. 2008) ("Appellant has not demonstrated that trial counsel should have conducted further investigation because the information available to trial counsel did not alert them to investigate further.").

Moreover, Trial Counsel was not ineffective for failing to investigate George Lewis' cooperation as an informant in New Jersey. Trial Counsel knew of this cooperation through discovery and had no need to investigate it further (the record makes plain that counsel was well aware of Mr. Lewis' prior work as an informant in New Jersey. Mr. Lewis discussed it when he spoke to the detectives on December 2, 2013. PCRA Ex.233, p.P5743-44. It was in a police report provided to Trial Counsel in pretrial discovery. PCRA Ex.74, P2753-54. Trial Counsel cross-examined Mr. Lewis about it at the preliminary hearing. PCRA Ex.235, p.P5788-91 (N.T. 3/4/14, pp. 34-38)). Appellant has not shown that any further investigation would have uncovered more than was already known. As such, this claim fails.

Lastly, Appellant believes that Trial Counsel was ineffective for failing to impeach the credibility of George Lewis at trial. This argument lacks merit because it is nothing more than speculative hindsight.

At trial, Trial Counsel attempted to paint George Lewis as a liar several times. Beginning with his opening statement, Trial Counsel portrayed George Lewis as a liar that was trying to sell faulty information to police for his own benefit. N.T. 5/27/2016, pp. 43-44. During George Lewis' direct testimony, he admitted that he had pending and prior cases involving crimes of dishonesty

as well as the fact that he sought assistance with his misconducts occurred in BCCF so they would not add additional time to his sentence. On cross-examination, Trial Counsel elicited testimony that he violated BCCF rules and that showed his confusion over the dates he had been with Appellant in the Restricted housing Unit of BCCF. In his closing argument, Trial Counsel argued to the jury that George Lewis was a career liar who watched the news and used the information for his own benefit.

At the PCRA hearing, Trial Counsel testified that he chose to forego certain lines of questioning because George Lewis “did very well” as a witness and, despite Trial Counsel’s efforts on cross-examination, “at some point in time, it became clear that [Trial Counsel] was going to get from him that he was a lifetime snitch and not much more” so Trial Counsel just “wanted him off the stand.” N.T. 6/29/2023, p. 209. Trial Counsel further explained that because George Lewis was answering questions so well, he decided to cease cross-examination so that he could preserve his own credibility to the jury. *Id.* at p. 114.

The fact that this strategy was ultimately unsuccessful is immaterial, as Trial Counsel’s strategy may be viewed as objectively reasonable. Credibility of a witness is a determination left to the jury, and despite Trial Counsel’s efforts, the jury believed Mr. Lewis. Thus, this claim must fail. Commonwealth v. Williams, 899 A.2d 1060, 1064 (Pa. 2006)(“If counsel’s chosen course had some reasonable basis, the inquiry ends and counsel’s assistance is deemed effective.”).

B. Marquis Johnson

Appellant also believes that Trial Counsel was ineffective for failing to impeach the testimony of his brother, Marquis Johnson. This claim fails for several reasons.

First, Trial Counsel explained his reasonable strategy at the PCRA hearing. Essentially, Trial Counsel believed Marquis Johnson’s testimony was inconsequential and wanted the jury to think “so what?” when reviewing it. He explained that if he were to thoroughly cross-examine



him, it would have amplified his testimony to the jury instead of keeping it inconsequential and make it appear that he was more worried about the testimony than he actually was in reality. N.T. 6/28/2023, p. 247-50.

Juries are everyday people who are told to not leave their common sense at the door. If they saw Trial Counsel taking a great amount of time to attack the testimony of a witness, it looks like the testimony is damning enough to the defense's case to put that effort into attacking it. This would have undermined Trial Counsel's efforts to convince the jury that this evidence was immaterial as it was not a strong enough motive for the nature of the murder. At the PCRA hearing, Trial Counsel testified to this strategy when he reasoned:

His testimony wasn't important enough. His testimony in this case didn't make Marcel Johnson a murderer, it didn't even come close. His testimony in this case, I was trying to make it unimportant. I did not want to cross-examine him or impeach him to give him credibility.

N.T., 6/28/2023, p. 261.

Further, at the time of trial, Trial Counsel considered using Marquis Johnson as a witness at the penalty phase. While this eventually did not come to fruition as he had declined to testify on Appellant's behalf, Trial Counsel did not want to hurt his credibility and undermine any potential beneficial testimony. N.T., 6/29/2023, p. 120. While this was not the primary reason for not impeaching Marquis Johnson, it was another concern in Trial Counsel's mind. N.T., 6/28/2023, p. 256-57. Pennsylvania Courts have long held that counsel is not to be held "to be ineffective if the particular course chose by counsel had some reasonable basis designed to effectuate his client's interest." Williams, 899 A.2d at 1064. As Trial Counsel's PCRA testimony clearly established such a strategy, this claim is necessarily without merit. Id ("If counsel's chosen course had some reasonable basis, the inquiry ends and counsel's assistance is deemed effective.").

Moreover, Appellant cannot establish that the claim is of arguable merit or that he was prejudiced by Trial Counsel's actions. After Appellant murdered Ms. Talley and R.R., Marquis Johnson attempted to retrieve evidence and dispose of it on Appellant's behalf. Clearly, there is no merit to any suggestion by Appellant that Marquis Johnson lied in his testimony to hurt Appellant; a man who committed crimes for his brother would not then decide to lie on the witness stand to land his brother on death row. Marquis Johnson spent most of the investigation avoiding police and trying to provide them with as little information as possible. He only provided information in response to a grand jury subpoena when he was placed under oath and asked questions, and that information was consistent with his testimony at trial. Therefore, the record reflects that Marquis Johnson merely went from trying to hide information to protect his brother to being honest and forthcoming about what he knew when he had no other choice. Appellant fails to demonstrate how any of Marquis Johnson's testimony was false. Appellant's claim fails.

#### ***4. DNA Evidence Presented at Trial***

Next, Appellant argues that Trial Counsel was ineffective for failing to challenge the accuracy, reliability, and admissibility of certain DNA evidence. This argument is without merit.

First, as outlined above, Trial Counsel testified that his strategy was to argue Appellant's innocence, an argument that was possible, in-part, due to the lack of forensic evidence recorded in the case. As such, Trial Counsel had a reasonable, strategic basis for not calling his own DNA expert to discredit Dr. Fesolovich and Dr. Glessner, the two Commonwealth DNA expert witnesses: they actually *helped* Appellant.

More specifically, the evidence in question that Dr. Fesolovich testified to excluded Appellant from the DNA profiles recovered from the hairs in Ms. Talley's hand and "do-rag." This evidence was favorable to the defense and Trial Counsel testified that while "[t]he



Commonwealth's expert did her best to color that evidence in the light favorable to the Commonwealth... at the end of the day the DNA evidence was the defense's best exhibits." N.T. 6/29/2023, p. 81-82. Therefore, there would be no logical reason for Trial Counsel to discredit the Commonwealth's expert's opinions. Undermining her credibility could also cause the jury to call into question her opinion that concluded the DNA sampled did not belong to Appellant—a key argument in Appellant's innocence defense. In fact, during opening arguments, Trial Counsel stated:

[Ms. Talley] fought for the life of her child in the next room and the child in her womb. And that struggle tells you what you need to know about this case. Her attacker ripped the wig and skull cap, the do-rag, off her head and threw it on the floor.

During the struggle, she clutched her attacker. She fought her attacker. We know this because we find it in her hairs. They're actually her own hairs coated with someone else's DNA. Guess whose DNA it isn't? It isn't Marcel's. The do-rag that's ripped off her head and put on the floor, it has her blood on it. It has her DNA on it. It has male chromosome DNA on it that doesn't belong to Mr. Johnson.

[Ms. Talley] probably didn't know she was going it, but she tried her best to give you evidence of her attacker. She left it in lots of places. None of it belongs to the Defendant.

N.T. 5/27/2015, pp. 47-48. Further, the DNA report that contained these conclusions was only generated four weeks before trial. This, in conjunction with the report's conclusions, supported Trial Counsel's theory of the case: forensic evidence did not point to Appellant *and* the Commonwealth was still processing evidence well after Appellant was arrested and just weeks before trial, indicating that the Commonwealth rushed to judgement when arresting Appellant and never looked back.

Additionally, Appellant misrepresents Trial Counsel's preparation with respect to the DNA evidence. Trial Counsel did consult with a second DNA expert, Arthur Young, who provided

useful information about the science behind the DNA reports. After these discussions, Trial Counsel concluded that he did not need to present his own DNA expert and could effectively bring out the information he needed through cross-examination of the Commonwealth's witness.

Trial counsel need not introduce expert testimony on his client's behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. Additionally, trial counsel will not be deemed ineffective for failing to call an expert merely to critically evaluate expert testimony that was presented by the prosecution.

Commonwealth v. Treibler, 121 A.3d 435, 454 (Pa. 2015). During the Commonwealth Expert's testimony, the following exchange occurred:

Q. Miss, if there are two alleles that are consistent with Mr. Johnson, why does your lab report say that Mr. Johnson is excluded as a contributor?

A. So looking at the extra alleles that are not in the major contributor is not all that we do for our interpretation. Again, I'm guided by my interpretation guidelines, and we're looking at a minor contributor and potential reference samples that could be consistent with that minor contributor. I look at the profile that I am looking at as well with the rest of the profile before I make my interpretation, calculations that I do, not just whether or not the allele is present or not. So based on my interpretation guidelines, Marcel Johnson would still be excluded from that sample.

N.T. 5/28/2015, pp. 106-07. Therefore, cross-examination was an effective strategy as Trial Counsel did not need to discredit the Commonwealth's witness, he needed only to clarify her findings so that the jury understood Appellant was excluded from all DNA samples she tested. As it is clear Trial Counsel had a reasonable basis for not calling his own DNA expert, "the inquiry ends and counsel's assistance is deemed effective." Commonwealth v. Williams, 899 A.2d at 1064.

Second, Trial Counsel was not ineffective for deciding not to call a DNA expert to rebut testimony from the second Commonwealth DNA expert, Dr. Glessner. Dr. Glessner testified that there was DNA under Appellant's fingernails that could have resulted from either bodily fluids or scratched tissue. He did not opine which had occurred in the case at bar and on cross-examination he explicitly admitted that he did not know how the DNA got under Appellant's fingernails. N.T.



5/29/2015, p. 205. He also testified that there was one single finding of Ms. Talley's DNA under Appellant's fingernails, but admitted that there were numerous other samples where Appellant's DNA was not found.

Dr. Glessner also testified as to the DNA evidence that was found on the handle of the pot that was used to strike Ms. Talley and stated that the major contributor was Ms. Talley's DNA and that he was only able to develop a partial male profile in the remaining DNA. While Appellant's DNA partially matched that sample, through cross-examination, Trial Counsel elicited testimony from Dr. Glessner that confirmed the partial male profile was "not interpretable" and that Appellant could not be definitively "linked to that item whatsoever." N.T. 5/29/2015, p. 191-92. Again, it is clear cross-examination was a reasonable method employed by Trial Counsel to combat Dr. Glessner's testimony, which often actually helped Appellant. Additionally, it is clear that calling an expert to discredit testimony that was actually beneficial is foolish. Appellant fails to meet the second prong of the ineffective assistance of counsel inquiry outlined in Pierce.

Further, Appellant cannot establish that the underlying claim is of arguable merit nor that he was prejudiced by Trial Counsel's ineffectiveness. The Commonwealth's witnesses' testimony was sound and meritorious. A defense DNA expert would have only muddied the waters and confused the jury. It is not clear that Appellant would have benefitted from discrediting the Commonwealth's witnesses nor is it likely that Appellant would have been able to find a credible expert to discredit the Commonwealth witnesses' testimony in the first place. Therefore, Appellant fails the first and third prongs of the ineffective assistance of counsel inquiry outlined in Pierce as well. Appellant's assertion that Trial Counsel was ineffective for failing to challenge the accuracy, reliability, and admissibility of DNA evidence does not warrant PCRA relief.

### 5. *The Commonwealth's Alleged Brady Violation*<sup>7</sup>

Appellant believes that the Commonwealth withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose evidence relating to Commonwealth witnesses George Lewis and Marquis Johnson and that Trial Counsel was ineffective for failing to litigate this issue. This claim is without merit.

To obtain relief under Brady v. Maryland, Appellant must establish: (1) the evidence is favorable to him, either because it is exculpatory or because it impeaches; (2) the evidence was either willfully or inadvertently suppressed by the Commonwealth; and (3) Appellant was prejudiced by the suppression. Commonwealth v. Weiss, 81 A.3d 767, 783 (Pa. 2013). Importantly, “[i]t is well established that ‘no Brady violation occurs when the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence.’” Commonwealth v. Spatz, 896 A.2d 1191, 1248 (Pa. 2006).

In assessing whether a defendant was prejudiced by the suppression of evidence, “favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Kyles v. Whitley, 514 U.S. 419, 433 (1995). A “reasonable probability” is one “sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985). Put another way, in assessing prejudice, the court must

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<sup>7</sup> In conjunction with his claim that the Commonwealth committed a Brady violation, Appellant also alleges that the Commonwealth knowingly presented and/or failed to correct false testimony of George Lewis in violation of Napue v. Illinois, 360 U.S. 264 (1959) (holding that a defendant’s due process rights are violated when the prosecution fails to correct testimony it knows to be false). For the reasons set forth in this section, this Court finds this argument to be without merit. In short, while Appellant believes Mr. Lewis did not accurately mention the assistance with his pending New Jersey matter he expected to receive in return for his testimony, this Court finds that no such promise by the Commonwealth was made to Mr. Lewis. Second, although Appellant believes Mr. Lewis did not accurately mention that he knew Ms. Talley because he had dated a relative, there is no evidence suggesting Mr. Lewis actually knew Ms. Talley and that he testified untruthfully except for unfounded speculation promulgated by Appellant. Therefore, Appellant’s claim is without merit and does not warrant PCRA relief.

determine not whether the verdict would have been different with the evidence, but “whether in its absence [Appellant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Weiss, 81 A.3d at 784 (citations omitted). “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.” Commonwealth v. Chambers, 807 A.2d 872, 887 (Pa. 2002).

Moreover, in determining the materiality of evidence withheld by the prosecution, the court must view the significance of such evidence in relation to the record as a whole. Commonwealth v. Santiago, 654 A.2d 1062, 1070 (Pa. 1994). “Brady evidence may not be cumulative of other evidence.” Commonwealth v. Simpson, 66 A.3d 253, 264 (Pa. 2013) (citing Commonwealth v. Lambert, 884 A.2d 848, 856 (Pa. 2005)).

A. George Lewis

Appellant asserts that the Commonwealth failed to disclose: (1) a promise for consideration in George Lewis’ pending New Jersey case; (2) that George Lewis had relatives that knew Ms. Talley; (3) that George Lewis had worked as an informant with New Jersey authorities previously; (4) that George Lewis offered to provide information to the Commonwealth when he was incarcerated on a previous case; (5) that the Commonwealth was aware that George Lewis had previously misinformed the Commonwealth about another inmate confessing to a crime; and (6) that George Lewis lied about attending a funeral to obtain a furlough. However, Appellant has failed to substantiate any of these claims.

a. *The Commonwealth did not offer to assist George Lewis in his open New Jersey matter.*

The first instance of assistance Appellant refers to is an email sent by the Commonwealth to the New Jersey prosecutor’s office asking them to look into the status of \$635 taken from Mr.



Lewis when he was arrested in New Jersey. There was no request that it be returned to Mr. Lewis nor any suggestion as to what should be done with the money. In fact, the prosecutor from the Commonwealth testified at the PCRA hearing that he had not even followed-up on his initial request. N.T. 6/28/2023, p. 113. This is clearly not exculpatory.

Next, Appellant refers to an email sent from the New Jersey prosecutor, Timothy Ward, informing the Commonwealth that the Court in New Jersey would consider Mr. Lewis' testimony in Bucks County when imposing sentence. However, it is not clear that George Lewis even knew of this before his testimony and there is no evidence that an agreement between Timothy Ward and the Commonwealth was even made (Timothy Ward indicated that he does not recall whether or not he offered this consideration himself nor does he recall any discussions of any specific considerations. Additionally, the prosecutor from the Commonwealth testified that he did not orchestrate the offer and did not ask Timothy Ward to extend any credit to George Lewis in exchange for his testimony; he did not even recall if the offer was ever mentioned to George Lewis, but he knew for sure that he did not promise anything specifically as he has no ability to affect the proceedings in another state). N.T. 6/28/2023, pp. 97-98, 11-15.

While George Lewis may have hoped to receive leniency for his testimony, his hope is certainly not Brady material. Commonwealth v. Bomar, 104 A.3d 1179, 1193 (Pa. 2014); see also Spotz, at 1214-16 (finding that despite the District Attorney's discussion with counsel for the testifying co-defendant about a plea deal for testimony, no agreement existed and Brady was not violated despite the District Attorney ultimately testifying on the co-defendant's behalf at her sentencing hearing.); Commonwealth v. Santiago, 654 A.2d 1062, 1081-1082 (Pa. Super. 1994), appeal denied, 664 A.2d 540 (Pa. 1995) (no Brady violation where "no evidence that any promise had been made to Howard Long regarding his outstanding robbery case, except that his cooperation

in the Santiago trial would be made known to the court at the time Long was to be sentenced.”).

As such, Appellant’s claim has no merit and must fail.

*b. There is no credible evidence that George Lewis knew of Ms. Talley or her family prior to meeting Appellant.*

Appellant asserts that George Lewis knew Ms. Talley and the Commonwealth failed to disclose this conflict to Trial Counsel. However, this assertion is without merit.

The only evidence that George Lewis knew Ms. Talley comes from a prison call between George Lewis and his wife in which he discussed knowing Ms. Talley. At the PCRA hearing, prosecutors from the Commonwealth testified that they were not in possession of this call and never obtained any of George Lewis’ prison call recordings. N.T. 6/28/2023, pp. 50-52; N.T. 6/30/2023, p. 116. However, Trial Counsel *was* in receipt of the phone calls and reviewed them. N.T. 6/29/2023, pp. 59-60. As mentioned above, “[i]t is well established that ‘no Brady violation occurs when the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence.’” Spotz, 896 A.2d at 1248.

Moreover, not only does this claim lack merit, Trial Counsel had a reasonable basis to avoid cross-examining George Lewis on the possibility of his connection with Ms. Talley. Evidence at trial established that George Lewis did not know of Ms. Talley or her family prior to meeting Appellant in the Bucks County Correctional Facility. Therefore, George Lewis’ lack of connection to Ms. Talley was already known to the jury and any additional questioning would have been futile. As such, Appellant was not prejudiced by Trial Counsel’s actions and this claim is without merit.

- c. *The Commonwealth disclosed that George Lewis worked as a paid informant in New Jersey.*

Appellant believes the Commonwealth committed a Brady violation by not disclosing that George Lewis worked as a paid informant for police in New Jersey. This claim is wholly without merit. The Commonwealth not only turned this information over to Trial Counsel in discovery, it also provided the information even before Appellant's preliminary hearing. In fact, Trial Counsel cross-examined George Lewis on this fact at his preliminary hearing. Therefore, Appellant's claim is without merit and no further prejudice ensued, affording Appellant no PCRA relief.

- d. *The letter from George Lewis looking to cooperate with Bucks County authorities was immaterial and not a violation pursuant to Brady.*

Appellant claims that the Commonwealth committed a Brady violation because it did not disclose of a letter from George Lewis to the Commonwealth during a prior Bucks County case in which he offered to cooperate with the Commonwealth in other investigations in exchange for his then-open case. While the Commonwealth admits that it inadvertently did not disclose the letter, this Court believes Appellant's emphasis on the nondisclosure is a red-herring as the letter is immaterial and no prejudice ensued.

While the Commonwealth admits that the letter was not disclosed, both Bucks County prosecutors testified that they did not know of the letter and, therefore, the lack of disclosure was not deliberate. However, as inadvertent nondisclosures can still be violations under Brady, this Court looked to whether the letter was material to Appellant's case and determined that it was not.

On the question of materiality, the Supreme Court of Pennsylvania has noted that such evidence is material if:

there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient



to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Lambert, 884 A.2d at 854. Upon consideration of the record as a whole, this Court believes that disclosure of the letter would have been nothing more than cumulative evidence. Trial Counsel had already argued numerous incidents to the jury of George Lewis offering to cooperate in exchange for leniency to try to convince them that he was lying (these incidents include that George Lewis previously worked as an informant, that he asked for help for prison misconducts in exchange for information, and that he was facing a parole and probation violation for which he was expecting leniency). In fact, these facts were brought out on direct examination, in addition to the evidence of *crimen falsi*, proving that the jury knew of George Lewis' repeated attempts at cooperation but still found his testimony to be truthful.

Additionally, as discussed previously, it is unlikely that Trial Counsel would have even used the letter as impeachment evidence against George Lewis. Trial Counsel testified at the PCRA hearing that George Lewis was a credible witness and it was clear the jury believed his testimony. Trial Counsel made a strategic decision to cease cross-examination to maintain his own credibility in hopes that he would not lose the jury entirely. Therefore, Trial Counsel made the strategic decision to call a prison investigator to confirm that George Lewis only came forward with evidence on the condition that he would receive help. This prison investigator could not have properly authenticated and testified to the letter. Therefore, Appellant's claim that the Commonwealth committed a Brady violation is meritless.

*e. George Lewis did not serve as an informant in the Sim Bradley drug case.*

While Appellant claims that the Commonwealth failed to disclose evidence that George Lewis acted as an informant in a drug case for a defendant named Sim Bradely, Appellant fails to

acknowledge that such evidence does not exist. At the PCRA hearing, not only did the Commonwealth state it had no knowledge of any cooperation, Appellant also failed to demonstrate that George Lewis cooperated and that evidence of the same even exists. Therefore, this allegation has no merit.

*f. The Commonwealth had no duty to disclose prison inmate records.*

Appellant claims the Commonwealth failed to disclose records revealing George Lewis offered information on a fellow inmate, Shaquel Rock, and lied about a furlough for a funeral he wished to attend. However, the Commonwealth was not in possession of these records and had no such duty to disclose them. The records were from the Bucks County Correctional Facility and were not in control of the Commonwealth at any point. Further, Trial Counsel had equal access to the records. As such, this claim must fail.

**B. Marquis Johnson**

Appellant asserts that the Commonwealth withheld promises of leniency to obtain the cooperation and testimony of Appellant's brother, Marquis Johnson. However, this claim does not warrant PCRA relief for several reasons.

First, there is no evidence regarding this allegation on the record. Appellant failed to call Marquis Johnson to testify at the PCRA hearing to address these allegations. Therefore, this Court believes Appellant has abandoned this claim. However, the record indicates that, even if Appellant had addressed this claim at the PCRA hearing, it is without merit. At the time of his testimony, Marquis Johnson was only facing probation and parole violations. There could not have been an agreement for leniency in these violations as the probation office was only able to make contact with him on June 8, 2015—one week after his testimony. Therefore, Appellant is not entitled to PCRA relief.

#### ***6. Motion to Suppress Appellant's Statements to Police***

Appellant also challenges Trial Counsel's litigation of Appellant's Motion to Suppress his statements he made to police. This Court does not find this challenge to have any merit.

Initially, this Court notes that Trial Counsel did file and litigate a Motion to Suppress Appellant's statements to police on the grounds that insufficient probable cause existed to arrest Appellant and that he had not voluntarily waived his Miranda rights. The Trial Court denied Appellant's Motion and *the Pennsylvania Supreme Court affirmed the Trial Court's rulings*. Therefore, this is nothing more than a blatant attempt by Appellant to relitigate previously raised claims under the guise of an ineffective assistance of counsel claim. As "[i]t is well settled that one cannot avoid the restrictions on raising a previously litigated issue by claiming that counsel was ineffective in his or her method of advocating the issue," this Court rejects Appellant's claim on procedural grounds before even reaching the merits of his issue. Commonwealth v. McCall, 786 A.2d 191, 194 (Pa. 2001). However, in an effort to be thorough, this Court will also dismiss Appellant's claim on its merits.

First, the claim that Appellant's statements to police should be suppressed has no arguable merit. Appellant argues that he was not properly informed of the subject matter of the investigation and, as such, could not knowingly waive his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 44 (1966). While it is true that officers did not inform Appellant that he was a suspect in a homicide investigation, the Trial Court, this Court, and the Supreme Court of Pennsylvania believe this is inconsequential. When an individual has not been advised of the crime under investigation, the Commonwealth must prove by a preponderance of the evidence that Appellant knew of the occasion for the investigation. Commonwealth v. Dixon, 379 A.2d 553 (Pa. 1977). Trial Counsel



explicitly cited this case in his argument for suppression to the Trial Court, but the Trial Court rejected this argument when it reasoned:

I don't find it at all persuasive and makes it completely illogical to me that a defendant would think that the number of officers would swoop down on him, taking him into custody in a car that was owned by a homicide victim or potential homicide victim, and that the police would be there not because of the homicide or was not taking him into custody because of the homicide, but taking him into custody for some old summary citations, basically what amounts to a dispute between himself and District Court. So I find that there absolutely no reasonable inference that the defendant thought he was being questioned about some old summary citations and whether or not he paid the cost or appeared in court for those old summary citations.

N.T. 11/26/2014, p. 19. Further, at the time of the interview, the evidence shows that Appellant knew that Ms. Talley and R.R., whom he had seen that afternoon, had just died and their apartment was set on fire. He knew that he had the car that fled the scene shortly before the homicides and arson. He knew family members and friends of Ms. Talley and R.R. had begged him to speak to police to provide information. Put simply, he knew he was the subject of a homicide investigation and voluntarily decided to give statements to police.

Moreover, the evidence is clear that officers possessed probable cause to arrest Appellant. "Probable cause to arrest exists when the facts and circumstances within the police officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." Commonwealth v. Dommel, 885 A.2d 998, 1002 (Pa. Super. 2005). Further, "probable cause does not involve certainties, but rather 'the factual and practical considerations of everyday life on which reasonable and prudent [persons] act.'" Id. At the time Appellant was arrested, police knew that the car Ms. Talley was driving was missing from her apartment complex where it had been parked prior to her murder; that the car was seen leaving the parking lot at a high rate of speed and hitting another car; that Appellant was the last known

person to see Ms. Talley and R.R. alive; and that Appellant was actively avoiding speaking to police officers. If this does not amount to probable cause, this Court would be hard pressed to find a set of facts that do amount to probable cause. Therefore, Appellant fails to satisfy the first prong of the ineffective assistance of counsel test outlined in Pierce.

Second, Trial Counsel had a reasonable basis for his litigation strategy when arguing the Motion to Suppress. As mentioned above, Trial Counsel employed the exact strategy Appellant outlines in his Amended PCRA Petition. Appellant's only contention is that Trial Counsel did not use a specific methodology, i.e., that Trial Counsel did not use a specific script in his arguments to the Trial Court. This is not a proper basis to attack Trial Counsel's effectiveness; Appellant also fails to satisfy the second prong of the ineffective assistance of counsel test outlined in Pierce.

Third, as the statements were voluntarily given after officers possessed probable cause, Appellant was not prejudiced by any alleged "ineffectiveness." As stated, the Supreme Court of Pennsylvania explicitly upheld the Trial Court's findings of fact and conclusions of law regarding Appellant's Motion to Suppress. Therefore, Appellant also fails to satisfy the third prong of the ineffective assistance of counsel test outlined in Pierce. Appellant is not entitled to relief on this claim.

### ***7. The Commonwealth's Arguments***

Appellant asserts that Trial Counsel was ineffective for failing to object to statements made by the prosecutor in his closing arguments at both the guilt and penalty phases of Appellant's trial. This argument is without merit for the following reasons.

The Pennsylvania Supreme Court has held "[W]e will not assume that a verdict rendered by a jurist was influenced by [...] extraneous prejudicial remarks and comments [by a prosecutor], rather it must be demonstrated by the record that the verdict was indeed the product of that corrupt

source.” Commonwealth v. Harvey, 526 A.2d 330, 333 (Pa. 1987). As such, to successfully claim that trial counsel was ineffective for failing to object to a prosecutor’s conduct, an appellant must demonstrate that the prosecutor’s actions “violated a constitutionally or statutorily protected right, such as the Sixth Amendment right to a fair trial, or a constitutional interest such as due process.” Commonwealth v. Cox, 983 A.2d 666, 685 (Pa. 2009). A due process violation occurs if the prosecutorial misconduct rises to such a significant level so as to result in the denial of the defendant’s right to a fair trial. Id. “The touchstone is fairness of the trial, not the culpability of the prosecutor.” Id.

An appellant carries a “heavy burden” to establish that counsel was ineffective in failing to object to an improper closing argument, as he must demonstrate that: (1) the argument was “genuinely prejudicial” to the appellant; (2) the prejudice was not cured by the court’s limiting instructions; (3) counsel did not have a reason for failing to object to the remarks; and (4) counsel’s failure to object denied the appellant a fair trial. Commonwealth v. Thompson, 660 A.2d 68, 75 (Pa. Super. 1995). While it is improper for a prosecutor to offer his or her personal opinion as to the guilt of the defendant or the credibility of any testimony, it is “well within the bounds of proper advocacy for the prosecutor to summarize the facts of the case and then ask the jury to find the defendant guilty based on those facts.” Commonwealth v. Chmiel, 30 A.3d 1111, 1146–47 (Pa. 2011) (citations omitted). “A prosecutor is permitted fairly wide latitude in advocating for the Commonwealth, including the right to argue all fair deductions from the evidence, to respond to defense arguments, and to engage in a certain degree of oratorical flair.” Commonwealth v. Van Horn, 797 A.2d 983, 989 (Pa. Super. 2002).

Reversible error only occurs when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant



such that the jurors could not weigh the evidence and render a true verdict. Chmiel at 1146-47. Additionally, the Pennsylvania Superior Court has held that comments made during a closing argument "...must be considered in the context of the entire situation." Commonwealth v. Johnson, 719 A.2d 778, 790 (Pa. Super. 1998). The scope of this contextual review extends to include the contents of the entire case. Commonwealth v. Raffensberger, 435 A.2d 864, 870-71 (Pa. Super. 1981) ("...[A]llegedly prejudicial remarks must be read in the context of the case as a whole, with a particular view to the evidence presented and reasonable inferences drawn therefrom, in order to determine whether they are indeed prejudicial").

Here, Appellant has cherry-picked specific statements from, and therefore has changed the context of, the prosecutor's closing arguments to bolster his assertion that Trial Counsel was ineffective for failing to object. During the guilt phase closing argument, Appellant alleges that the prosecutor made four impermissible statements: (1) saying that Appellant was "evil" and not human; (2) improperly bolstering the affiants; (3) improperly commenting on Appellant's right to a fair trial; and (4) arguing facts he knew to be false. During the penalty phase closing argument, Appellant alleges that the prosecutor made three impermissible statements: (1) remarks requiring nexus to between mitigation evidence and crime; (2) remarks characterizing Appellant as "evil"; and (3) remarks encouraging the jury to base its verdict on an emotional response to the victim impact statement. However, it is clear that each of these comments was permissible for the reasons this Court discusses below.

A. Referring to Appellant as "evil" and not human

Appellant specifically takes issue with the following statement made by the Commonwealth:

You are the appointed guardians of the truth in this case. It's up to you to decide what happened. What did the defendant do? What did he say? And many of those

things are in evidence and obviously very, very clear. He murdered little [R.R.] and Ebony in cold blood with a hardness of heart, with evil in his heart, because he wanted what they had.

N.T. 6/2/2015, pp. 75-76. The prosecutor was permitted to make this statement as, when read in the context of the entire closing argument, it is clear that the prosecutor was arguing that Appellant acted with malice, a necessary element the prosecution must prove in order for a jury to find a person guilty of first degree murder. In fact, moments later, the prosecutor stated, “Hardness of heart, depraved indifference to the value of human life. That is malice, ladies and gentlemen. That is evil.” Id. at pp. 88-89. If anything, these comments were merely permissible oratorical flair as they described Appellant’s actions, not Appellant himself.

Appellant also argues that the Commonwealth impermissibly argued that Appellant was not human. Specifically, Appellant argues that the prosecutor improperly stated:

[Trial Counsel] said that these were human reactions. The defendant is human, after all. I beg to differ, ladies and gentlemen, on one of his reactions. He tried to cry, but no tears came out.

N.T. 6/2/2015, pp. 103-103. First, this Court does not believe that the record reflects the prosecutor referring to Appellant as not being human, but rather the prosecutor is *admitting Appellant is human*, a fact that makes it so unbelievable that Appellant could genuinely respond to police questioning in the way he did if he were innocent. Further, again, when this comment is viewed in the context of the prosecutor’s argument as a whole, it is clear that the argument was in direct response to Trial Counsel’s closing argument. Trial Counsel argued that Appellant’s lies and false emotion during his interview with police officers was a normal, understandable reaction. Therefore, the prosecutor merely responded by arguing that such behavior was actually evidence of guilt. These statements were not based on opinion, but rather evidence in the record and Trial

Counsel's own statements in his closing argument. They are in no way inflammatory and Trial Counsel was not ineffective for failing to object to such statements.

A. Improperly bolstering the affiants

Appellant argues the following statement improperly bolstered Detective Slattery and Detective Fuhrmann, the detectives who initially interviewed Appellant:

Is it uncomfortable to be questioned by police? Of course it is. I am not saying that it's not. But Detective Slattery and Detective Fuhrmann are two of the most professional, personable, low-key detectives you will ever meet. They know how to do their job. And they were not intimidating him.

N.T. 6/2/2015, p. 102. However, when making this argument, Appellant fails to mention what this comment was in response to: Trial Counsel's own arguments attempting paint Appellant's behavior in the interview as reasonable ("Can you imagine being in that circumstance in the interview room that you have all pictured with the one-way mirror and two detectives who know what they are doing asking you questions for three hours?" Id. at 71.). As such, this was clearly a permissible argument in response to a defense argument and Trial Counsel was not unreasonable for declining to object.

B. Improperly commenting on Appellant's right to a fair trial

Appellant believes the Commonwealth erroneously stated:

The evidence cries out for justice for [the victims]. And justice can only be served here if you find this defendant guilty. On November 25 of 2013 the defendant acted as [R.R.] and Ebony's judge. The defendant acted as [R.R.] and Ebony's jury. And the defendant acted as their executioner. We are giving him the justice he deserves, giving him much more respect and protection than he ever thought to give Ebony and her little baby and little [R.R].

N.T. 6/2/2015, p. 127. This Court does not find this comment to be impermissible. A prosecutor is not precluded from arguing, within the bounds of propriety, for law and order, and in making such an argument may remind the jury of the dangers inflicted upon the community by certain



criminality. Commonwealth v. Feiling, 252 A.2d 200 (Pa. 1969); Commonwealth v. McHugh, 145 A.2d 896 (Pa. 1958). Nor are members of the jury foreclosed from recognizing their role as citizens. Commonwealth v. Lee, 395 A.2d 935 (Pa. Super. 1978). It is only when the jurors are asked to place themselves in the unfortunate circumstances of the victim or are otherwise encouraged to divert their attention from the evidence before them in favor of their own sympathies or fears, that the argument exceeds the bounds of propriety. Commonwealth v. Youngkin, 427 A.2d 1356, 1365 (Pa. Super. 1981). Therefore, the Commonwealth's arguments were permissible. In fact, Trial Counsel *did* object to this argument but was overruled by the Trial Court. While Trial Counsel did not raise this issue on direct appeal, it is clear that it is without merit and Appellant would not have been successful had the issue been raised. As such, Trial Counsel was not ineffective.

C. Arguing facts the prosecutor knew to be false

Appellant takes issue with three separate remarks made by the prosecutor and believes that they are not based on evidence from trial. A review of the record clearly demonstrates this belief is without merit.

The prosecutor first argued that Appellant used a friend's, Ms. Padilla's, apartment bathroom to scrub his hands after setting fire to and leaving Ms. Talley's apartment. While, Ms. Padilla testified that she did not know what Appellant did in the bathroom, which was consistent with her earlier statement to police officers, no evidence in the record contradicts the claim made by the prosecutor and he was permitted to include it in his argument. N.T. 5/29/2015, p. 40. The prosecutor next argued that Appellant used a frying pan to smash Ms. Talley's face. Evidence from the trial showed that a Y-STR DNA strand that was consistent with Appellant was found on the handle. Therefore, it is a reasonable inference to assert that Appellant used the frying pan to strike

Ms. Talley. Lastly, the prosecutor argued that a bloody handprint that appeared on an interior wall of the apartment belonged to Ms. Talley. The evidence from trial showed that the only blood found at the scene was Ms. Talley's and that she was first attacked in the kitchen but tried to flee to the bedroom, which was the path along which the handprint was found. It is another reasonable inference that, as Ms. Talley bled heavily and retreated to find safety, she grabbed onto the wall and left a bloody handprint behind.

As such, these arguments were all permissible and Trial Counsel was reasonable to decline to object.

D. Remark requiring nexus between mitigation evidence and crime

Appellant takes issue with the following statement:

Marquis Johnson did not have an easy life. He had the exact same life as the defendant. Marquis Johnson came in here, he testified, he told the truth. He has a wife, he has two kids. He has a job. Where did things go wrong? All things in life are possible if you try hard enough regardless of your terrible upbringing and terrible circumstances. You cannot, ladies and gentlemen, use that to excuse the defendant's behavior. And Marquis Johnson is living proof of that.

N.T. 7/8/2015, pp. 130-31. Appellant believes that this statement amounts to the prosecutor arguing that the mitigation evidence presented by Appellant is irrelevant. However, this is just not true. A review of the full record reveals that the prosecutor was merely making a weight of the evidence argument for the jury to consider when determining whether the mitigation warranted a sentence less than death. The Pennsylvania Supreme Court has ruled:

[Prior U.S. Supreme Court cases] hold evidence relevant to a defendant's character must be admitted in a capital sentencing if a defendant offers it. In no way do those cases say the jury is required to give it weight, or that the Commonwealth is not permitted to argue against it or produce contrary evidence. It is well settled '[a] prosecutor may rebut mitigation evidence in his arguments and may urge the jury to view such evidence with disfavor.' Chmiel, at 1185.

Commonwealth v. Eichinger, 108 A.3d 821, 838-39 (Pa. 2014). This is exactly what happened in the case at bar. Further, the Pennsylvania Supreme Court has explicitly held that prosecutors' arguments that other people who had similar upbringing to an appellant's and did not commit murder is a fair response to the catch-all mitigator. Commonwealth v. Carson, 913 A.2d 220, 270-71 (Pa. 2006). As such, Trial Counsel had no credible reason to object to this line of argument.

E. Remarks characterizing Appellant as "evil"

Appellant cites three instances where he believes the Commonwealth referred to him as evil. A review of the record reveals that all three of these references are mischaracterized by Appellant.

First, in the guilt phase of Appellant's trial, the prosecutor equated the term "evil" with malice to describe Appellant's actions. For the reasons set forth in the analysis above, this claim is without merit. Second, when attacking the credibility of Appellant's expert witness, Dr. Berkowitz, the prosecutor referred to Appellant's "evil, heinous murders." Again, this description was in relation to Appellant's actions and was in response to Dr. Berkowitz claiming that society was in part to blame for Appellant's actions. This is merely oratorical flair and is plainly permissible in a closing argument. Third, in the Commonwealth's closing argument during the penalty phase, it argued that a sentence of death was not about revenge, but about retribution, or "the reward for the evil that the defendant" had wrought. N.T. 6/2/2105, p. 145. Again, the prosecutor merely characterized Appellant's actions as evil—not Appellant himself.

There is no categorical prohibition on a prosecutor's use of the term "evil" so long as it is not used in a context that would suggest that the prosecutor was making *ad hominem* attacks, invoking reference to a religious authority, or otherwise employing the term in an inflammatory manner. Here, the prosecutor did none of those things. His scant and brief use of this term to



describe the murders and the element of malice was in no way objectionable or prejudicial and Trial Counsel is not constitutionally ineffective for not objecting to these remarks.

F. Remarks encouraging the jury to base its verdict on an emotional response to the victim impact statement

Appellant believes it was improper for the Commonwealth to summarize the victim impact testimony and ask the jury, when weighing the aggravating factors versus mitigating factors, to put the victim impact evidence on the side of the scale with the aggravators. N.T. 6/8/2015, pp. 139-42. This Court is unsure why Appellant finds this impermissible.

Appellant does not contest that the victim impact testimony that was admitted at the penalty phase was admissible under the law. See 42 Pa. C.S. §9711(a)(2) (permitting at a capital murder trial: (1) evidence about the victim; and (2) evidence regarding the impact that the death of the victim has had on the victim's family). Indeed, the Pennsylvania Supreme Court has held the admissibility of victim impact evidence to be constitutional, observing that “victim impact testimony is just one of the relevant factors the jury may consider when weighing the aggravating and mitigating circumstances it has found during deliberations on sentence.” Commonwealth v. Means, 773 A.2d 143, 154 (Pa. 2011). As this is precisely what the prosecutor was doing in his closing argument, it is clearly permissible and Appellant’s argument to the contrary is without merit.

Further, the Trial Court provided instructions to the jury regarding victim impact evidence and stated that they may only consider if they found at least one aggravating circumstance and at least one mitigating circumstance. Only then, the Trial Court instructed, could the jurors give the evidence whatever weight they believed it deserved, but cautioned that their consideration of such evidence “must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence presented.” N.T. 6/8/2015, pp. 206-07. The Trial Court further

cautioned that the jury's verdict must be in accordance with the law and could not be based on "sympathy, prejudice, emotion, public opinion, and may not be based solely on victim impact statement." Id. at 207; see also, id. at 213 ("The sentence you impose must be in accordance with the law as I have instructed you and not based on sympathy, prejudice, emotion or any public opinion or anything else. It may not be based solely on victim impact testimony. It must be based on a rational decision what the facts and circumstances are. It must be based on the law as I give it to you."). Of course, a jury is presumed to follow the trial court's instructions. Commonwealth v. Brown, 786 A.2d 961, 971 (Pa. 2001). Appellant's assertion that Trial Counsel was ineffective is without merit.

#### G. Conclusion

Overall, Appellant's claims that the prosecution erred in its closing arguments are devoid of merit. However, even if one of the comments was made in error, Appellant cannot meet his heavy burden to demonstrate that he was prejudiced by Trial Counsel's failure to object. Appellant does not demonstrate how any of the aforementioned comments prejudiced him to the point of denying him a fair trial. Further, any allegedly prejudicial effects were cured by the Trial Court's instructions to the jury. The jury is presumed to have followed the Trial Court's instructions in rendering its verdict and, accordingly, Appellant has failed to establish even one of the required prongs of the Peirce test for ineffective assistance of counsel.

#### 8. *Character Evidence*

Appellant alleges that Trial Counsel was ineffective for failing to present character evidence on Appellant's behalf during the guilt phase of Appellant's trial. For the reasons outlined below, this claim does not warrant relief.

First, it is clear that Trial Counsel possessed a reasonable basis to avoid presenting character evidence at the guilt phase of Appellant's trial. "The failure to call character witnesses does not constitute *per se* ineffectiveness." Commonwealth v. Treiber, 121 A.3d 435, 453 (Pa. 2015). In fact, trial counsel must consider that when a character witness is called by a defendant regarding a pertinent character trait, not only may the Commonwealth cross-examine the witness with specific instances of the defendant's conduct which are probative of his character, the Commonwealth may also rebut the testimony with character witnesses to the contrary. Pa.R.E. 405(a)(1); Pa.R.E. 404(a). As such, where trial counsel declines to call character witnesses based on a founded "concern that the foregone character testimony would have opened the door to substantial, damaging evidence" counsel "ha[s] an objectively reasonable basis for determining that the evidence would have done more harm than good, [and the] claim fails." Commonwealth v. Busanet, 817 A.2d 1060, 1070 (Pa. 2002).

In the case at bar, this is exactly why Trial Counsel declined to call character witnesses to testify on behalf of Appellant. Trial Counsel was not only afraid of opening the door to testimony that would not have been favorable the defense, but Trial Counsel was also afraid to discredit defense witnesses that could be used during the penalty phase of Appellant's trial:

[GUILT PHASE] TRIAL COUNSEL: Because you, essentially, have an entire character evidence trial immediately following if I lose. I would have been calling—I would typically be calling the same witnesses as Mr. Fioravanti would... and—you have one chance to make an impact on those witnesses. That chance is in the penalty phase. I wasn't going to use them for some—I wasn't going to use them in the guilt phase.

THE COMMONWEALTH: Would you agree with me that if you had called character witnesses in the guilt phase they would have been to present representation of non-violence for Mr. Johnson; is that correct?

[GUILT PHASE] TRIAL COUNSEL: Yes.

THE COMMONWEALTH: You would agree with me that if you had called those witnesses and the jury had found him guilty, nonetheless, that would have,



essentially, discredited those witnesses when they later testified at the penalty phase; is that correct?

[GUILT PHASE] TRIAL COUNSEL: Yes.

THE COMMONWEALTH: Was that one of your concerns?

[GUILT PHASE] TRIAL COUNSEL: Yes.

THE COMMONWEALTH: And I believe you [alluded] to this on Direct Examination, but you do agree with me had you presented evidence of Mr. Johnson's non-violence, the Commonwealth would have had ample evidence of violent behavior that they could have rebutted?

[GUILT PHASE] TRIAL COUNSEL: Yes. That's what I meant by opening the door.

N.T. 6/29/2023, pp. 134-35. Additionally, penalty phase Trial Counsel further testified that:

I felt that the stronger part of the case for me and what I would have probably insisted with Mr. Penglase would be to let me use these character witnesses at the penalty phase in part because Marcel didn't testify, but in another part because I wanted—you know, we know a nun and we had a lady who worked with him at the school who I felt were very emotional witnesses. And their emotional presence was more compelling at the end of the penalty phase when they basically asked the jury to spare his life.

N.T., 6/29/2023 (p.m.), pp.82-82. Therefore, the record is clear that Trial Counsel had a reasonable basis to decline to call character witnesses during the guilt phase of Appellant's trial. As a matter of law, this Court cannot conclude that the alternative not chosen, i.e. presenting the witnesses at the guilt phase of trial, had a substantially greater potential for success and Appellant fails to meet the second prong of the Peirce ineffective assistance of counsel test.

Second, it is clear that Appellant was not prejudiced by any alleged ineffectiveness on behalf of Trial Counsel. While Appellant asserts that the Commonwealth did not have sufficient rebuttal evidence, he asserts this argument for the sole reason that in his juvenile adjudication for simple assault, the Victim regretted pressing on in the prosecution years later. However, he fails to account for the additional rebuttal evidence available to the Commonwealth. Appellant received

numerous misconducts while at the Bucks County Correctional Facility including throwing an “unknown yellow substance” at another inmate, harassing a female staff member, and being physically aggressive. The Commonwealth also had videos of Appellant singing about acts of violence towards women as well as witnesses who knew Appellant to have a tendency to be violent and were not surprised he was a suspect in a homicide investigation. In fact, even Appellant’s own mother and stepfather knew Appellant to be a violent individual and admitted this to Trial Counsel when faced with the prospect of testifying.

Therefore, even if Trial Counsel presented character evidence at the guilt phase of Appellant’s trial, the Commonwealth would have had an overwhelming amount of evidence to present in rebuttal of the character witnesses’ claims to the point where a juror would question the character witnesses’ credibility. Appellant fails to meet the third prong of the Peirce ineffective assistance of counsel test and his claim that Trial Counsel was ineffective is wholly without merit.

#### ***9. Mitigation Evidence***

Appellant believes that Trial Counsel was ineffective at sentencing for failing to investigate, develop, and present mitigation evidence. Appellant also believes that the Trial Court improperly excluded relevant mitigating evidence and Trial Counsel was ineffective in litigating the same. For the reasons set forth below, this claim is without merit.

##### **A. Trial Counsel was not ineffective as he properly investigated, developed, and presented compelling mitigation evidence.**

Despite Appellant’s assertions to the contrary, Trial Counsel was not ineffective in his investigation and presentation of mitigation evidence during the penalty phase of Appellant’s trial. When evaluating a claim of ineffectiveness with respect to an alleged failure to present mitigation evidence, the U.S. Supreme Court has explained:

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. The Pennsylvania Supreme Court has similarly opined on how a reviewing court should assess an ineffectiveness claim in this context:

It 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. 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 (Pa. 2018) (quoting Commonwealth v. Tharp, 101 A.3d 736, 772 (2014)).

When assessing prejudice, "a reviewing court must ask whether 'the result of the particular proceeding [was] unreliable because of a breakdown in the adversarial process that our system counts on to produce just results'." Daniels, 104 A.3d at 297 (quoting Lesko, 15 A.3d at 383). Where, as here, the jury finds both aggravating and mitigating factors, "the prejudice inquiry considers whether there is a reasonable probability that, had the PCRA evidence been adduced at



the penalty phase at least one juror would have concluded that the mitigating circumstances collectively outweighed the aggravating ones.” *Id.* (citing Commonwealth v. Gibson, 19 A.3d 512, 526 (2011) (“Gibson II”)). See also Commonwealth v. Bardo, 105 A.3d 678, 684-85 (Pa. 2014) (same).

In the case at bar, the PCRA hearing revealed that Trial Counsel and his investigators conducted an investigation into Appellant’s life and childhood and presented several witnesses to humanize Appellant and corroborate his dysfunctional family history. Trial Counsel also retained experts to explain the impact of Appellant’s childhood on his brain development and behavior. However, despite repeated attempts, Trial Counsel explained that most lay witnesses would not agree to testify on Appellant’s behalf, which was the true impediment to presenting mitigation evidence. N.T. 8/10/2023, p. 90. Appellant now asserts that Trial Counsel should have requested a continuance of trial to continue to search for witnesses willing to testify, but Trial Counsel explained:

My strategy was that I felt that we had exhausted, you know, everything that we needed. I didn’t think that another continuance with the scheduling would have yielded anything additional that, you know, I would have been able to use. [Appellant’s] brothers, to me, had come to a dead-end. The mother had come to a dead-end. I had tried numerous times in addition to the litigation team to speak with her. I had tried numerous times to speak with the stepdad. I didn’t feel that, you know, that was going to work out any differently for me. I didn’t believe, frankly, that [taking a trip to Georgia to interview more witnesses] would change, you know, what we already had. And I just didn’t see that there was going to be anything additional based on me having the records, based on what I knew that would change in order for me to ask for another postponement.

N.T. 8/10/2023, pp. 44-45. Therefore, Trial Counsel’s investigation was not only reasonable, but was thorough and complete. In fact, due to the lack of witnesses willing to testify on behalf of Appellant, Trial Counsel secured an agreement from the Commonwealth that the defense expert, Carol Krych, would be able to read directly from her extensive mitigation report on Appellant.

N.T. 6/5/2015, p. 42. This agreement was the only way Trial Counsel could present to the jury the “extensive abuse, the turmoil of his childhood, and terrible parenting, [and] the institutional failure[s]” Appellant faced in order to cause a juror to have mercy on Appellant. N.T. 8/10/2023, p. 91.

Appellant uses testimony from Carol Krych in an attempt to discredit Trial Counsel’s investigation. He argues that Ms. Krych, the expert, believed that Trial Counsel should have requested a trial continuance to search for more witnesses. However, her testimony on cross-examination revealed that she was incredibly unrealistic about the scope of her role and the time and resources available to conduct an investigation and wanted nothing more than for Trial Counsel to cede all control to her and her opinions. The PCRA hearing revealed Ms. Krych to be nothing more than an expert who over-stepped in her role without having the requisite experience, training, and education to do so. In fact, Trial Counsel’s own testimony corroborated this observation by this Court. He stated that he was frustrated at the time of trial because Ms. Krych often thought she was the boss and was extremely overbearing in pushing her own mitigation strategy. N.T. 8/10/2023, pp. 83, 89.

Further, Trial Counsel was not ineffective for his decision not to call witnesses in rebuttal to the Commonwealth’s expert. The standard for evaluating whether counsel was ineffective for failing to present expert witnesses in rebuttal is well-settled:

Trial counsel need not introduce expert testimony on his client’s behalf if he is able effectively to cross-examine prosecution witnesses and elicit helpful testimony. Additionally, trial counsel will not be deemed ineffective for failing to call a medical, forensic, or scientific expert merely to critically evaluate expert testimony [that] was presented by the prosecution. Thus, the question becomes whether or not [counsel] effectively cross-examined [the Commonwealth’s expert witness].

Chmiel, at 1143 (Pa. 2011) (citations omitted). At the penalty-phase of Appellant’s trial, Trial Counsel effectively cross-examined the Commonwealth’s expert witness on his lack of expertise

in specific areas important to Trial Counsel's arguments. While Appellant argues that Trial Counsel's experts seemed less prepared than the Commonwealth's expert, this is not the fault of Trial Counsel as he had provided both of his experts with the same materials as the Commonwealth's expert. Further, it is illogical for Appellant to complain that Trial Counsel was ineffective in not calling his experts for rebuttal and to also complain that he was unhappy with the performance of his experts overall.

As such, it is clear that Trial Counsel conducted a sufficient investigation but ran into a predicament often seen in horrendous cases such as the one at bar: no one is able to defend the character of a person who is known to be violent and can cold-heartedly kill a pregnant woman and a four-year-old child. Appellant's argument is without merit.

B. The Trial Court properly excluded certain mitigation evidence and Trial Counsel was not ineffective in his litigation of the issue.

First, Appellant believes that he should have been permitted to offer evidence of the childhood abuse, trauma, and mental health diagnoses of his parents and grandparents. When Trial Counsel attempted to elicit such information, the Commonwealth objected, and the Trial Court heard argument on the objection outside the presence of the jury. Trial Counsel argued that the jury needed to hear the testimony to understand the overall picture of Appellant's life. When the Commonwealth argued that what Appellant's parents and grandparents experienced is irrelevant, Trial Counsel still continued to argue that it was necessary to give the jury the "whole picture" of Appellant and to show that the abuse did not just come out of nowhere. He explained that the expert would testify to the correlation between risk factors for trauma and multi-generational dysfunction. However, the Trial Court disagreed and found that his parents' and grandparents' histories were irrelevant and would be excluded from Appellant's mitigation.



On direct appeal, the Pennsylvania Supreme Court agreed with the Trial Court and affirmed its ruling. While Appellant believes that both courts ruled erroneously because Trial Counsel was ineffective in litigating the issue by failing to argue proper case law, Appellant has provided no such case law that supports his position and, therefore, this Court found his argument to be without merit.

Second, Appellant claims that the Trial Court twice improperly precluded testimony from Appellant's expert, Dr. Armstrong, that was relevant and Trial Counsel failed to object to said erroneous rulings. This Court does not agree. One pivotal role of the trial court is to serve as gatekeeper and to rule on the admissibility of evidence. Commonwealth v. Safka, 141 A.3d 1239, 1249 (Pa. 2016). Indeed, "[t]he admissibility of evidence is a matter for the discretion of the trial court and a ruling thereon will be reversed on appeal only upon a showing that the trial court committed an abuse of discretion." Commonwealth v. Poplawski, 130 A.3d 697, 716 (Pa. 2015) (citation omitted). With respect to the admission of expert testimony in particular, such decisions are generally left to the discretion of the trial court, and its rulings thereon will not be reversed absent an abuse of discretion. Commonwealth v. Watson, 945 A.2d 174, 176 (Pa. Super. 2008). "An expert's testimony is admissible when it is based on facts of record and will not cause confusion or prejudice." Id.

Here, the Trial Court was properly serving its role as gatekeeper by ensuring that Dr. Armstrong was answering the questions posed to her by counsel and not merely offering a narrative that could confuse or mislead the jury. A review of the record reveals that Dr. Armstrong's testimony was lengthy and often unnecessarily long-winded and nonresponsive to the questions posed. Once on direct examination, when Trial Counsel asked how brain damage could affect emotional responses, Dr. Armstrong began to go into specific examples of Appellant's childhood

that could cause brain damage so the Trial Court interrupted and directed her to answer the question asked. Instead of following the Trial Court's direction, Dr. Armstrong defended her response by saying that she does these "kinds of explanations all of time." N.T. 6/4/2015, p. 143. Dr. Armstrong then reluctantly agreed to "connect it to diagnoses" and the Trial Court responded "Well, don't do us a favor. Do what I am telling you to do." Id.

The only other time the Trial Court admonished Dr. Armstrong was when she was being cross-examined and was, again, providing lengthy and nonresponsive answers. The Commonwealth asked a question to which Dr. Armstrong provided a nonresponsive answer. Instead of allowing her to ramble on, the prosecutor interrupted and stated that he wished to ask something else. Dr. Armstrong responded flippantly by stating "I'd like to finish my sentence" and the Trial Court told her that was nonresponsive and directed the Commonwealth to ask its next question. N.T. 6/4/2015, p 157. The Trial Court then asked Dr. Armstrong for the last time to answer the question being asked, to which Dr. Armstrong replied "I will try to do my best" and the Trial Court again stated, "Don't make comments. Answer the question that you are being asked. I think that you should be able to figure out how to do that."

After Dr. Armstrong's testimony and outside the presence of the jury, the Trial Court explained that it was necessary to admonish the witness because she was not answering questions and was making inappropriate comments. The Trial Court offered, and ultimately gave, the following curative instruction to the jurors:

Members of the jury, before Mr. Weintraub calls his next witness, I wanted to give you additional instructions. First of all, as I told you before, my job is not to determine the facts. My job is to control the law and to make sure the evidence comes in the way it's supposed to come in under the rules of evidence. During the testimony of the last witness, I felt it necessary and I still believe it was necessary to admonish the witness for – to answer the questions. That having been said, you should not consider anything that I said in terms of controlling the courtroom, in terms of questions and answers and the rules of evidence as having any impact

whatsoever on your decision about what weight of credibility you are going to give that testimony.

This is not a comment. My admonishment was not a comment on the weight or credibility of her testimony. My admonishment was about making sure that the testimony comes in as it should pursuant to the rules of evidence, and that's all.

Id. at 174-75. Therefore, there is no indication from the record that Dr. Armstrong was improperly cut off by the Trial Court or that any of the Trial Court's rulings were erroneous. Appellant's argument to the contrary is without merit.

Additionally, to the extent that Appellant argues that the Trial Court demonstrated "a marked lack of impartiality" in favor of the Commonwealth, this Court also believes Appellant's argument is unsupported by the record. The Trial Court merely directed Dr. Armstrong to answer questions. To the extent that Appellant is referring to the Trial Court's questions during another defense expert's, Ms. Krych's, testimony, this Court notes that the Trial Court merely asked three clarifying questions to orient the Trial Court and jury.

"While a trial judge should normally leave questioning of witnesses to counsel, justice may require that a trial judge ask questions when absurd, ambiguous, or frivolous testimony is given or testimony is in need of further elucidation." Commonwealth v. Carson, 913 A.2d 220, 249 (Pa. 2006). See also Pa. R.E. 614(b) ("Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness."). Moreover, when evaluating the questioning conducted by the trial court to determine if it demonstrated impartiality, the reviewing court must consider the context in which such questioning occurred. Carson, supra. When viewed in this context, it is clear that the Trial Court was well within its bounds to ask clarifying questions to Ms. Krych. Additionally, although not necessary and in an abundance of caution, the Trial Court again offered to give, and formally gave, a curative instruction to the jury during the final jury instructions that stated:



To the extent I admonished any witnesses during the course of the trial, this is not a comment and you should not take that as a comment about my opinion as to their credibility or the accuracy of their testimony or the weight of their testimony. When witnesses were admonished, it is because they are not following the rules of court. And I need them to follow the rules of court to make sure that you hear the information you are supposed to hear and are able to hear the information you are supposed to hear. So please keep that in mind. Witnesses are admonished all the time in courtrooms. It has nothing to do with your fact-finding function.

N.T. 6/8/2015, p. 177. In short, the Trial Court made it abundantly clear to the jurors that they were not to consider anything the court said to a witness as an indication of the court's opinion of that witness, and were not to consider any such interactions between the Trial Court and the witnesses in assessing the witness' credibility. Jurors, of course, are presumed to follow the court's instructions. Commonwealth v. Baez, 720 A.2d 711, 721 (Pa. 1998) (citation omitted). Therefore, Trial Counsel was not unreasonable for declining to object to the Trial Court's statements and for declining to raise the issue on appeal. As there is no merit to the allegations, Appellant also cannot demonstrate that he was prejudiced by Trial Counsel's actions. This claim cannot afford Appellant PCRA relief.

#### ***10. The Trial Court's Rulings on the Commonwealth's Motions for Cause***

Appellant believes Trial Counsel was ineffective for failing to ensure his jury was impartial as the Trial Court repeatedly and erroneously granted the Commonwealth's motions for cause, in violation of his federal and state constitutional rights. This Court does not agree.

Initially, this Court notes that Appellant did not question any member of Trial Counsel during his PCRA hearing on their decisions regarding jury selection. The Pennsylvania Supreme Court has cautioned that, "[a]s a general rule, a lawyer should not be held ineffective without first having an opportunity to address the accusation in some fashion." Commonwealth v. Koehler, 36 A.3d 121, 132 (Pa. 2012). "The ultimate focus of an ineffectiveness inquiry is always upon counsel, and not upon an alleged deficiency in the abstract." Id. Therefore, this Court believes that

the record is devoid of any evidence to overcome the presumption that Trial Counsel was effective and any analysis regarding the reasonableness of Trial Counsel's strategy would be nothing more than pure speculation. Consequently, Appellant does not meet the second prong of the ineffective assistance of counsel test outlined in Peirce and his claim must fail on procedural grounds. However, in an effort to be diligent, this Court will also address and reject Appellant's claim on its merits.

First, Appellant's claim that the Trial Court's decisions rendered his jury impartial are without merit. Appellant attacks the exclusion of five specific jurors, out of a total of 260 jurors, over the course of five days. Appellant believes that there was insufficient *voir dire* and that Trial Counsel did not properly rehabilitate these five jurors who expressed general opposition to capital punishment. However, Appellant's argument completely disregards current Pennsylvania case law.

The Pennsylvania Supreme Court allows a trial court to exclude any potential juror in a capital case when they express reservations about the death penalty:

When a juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath, he is properly excluded from the jury. Commonwealth v. Chmiel, 612 Pa. 333, 30 A.3d 1111, 1172 (2011). Jurors are also properly excluded when they express uncertainty about their ability to impose the death penalty. Commonwealth v. Watkins, 630 Pa. 652, 108 A.3d 692, 706-07 (2014), quoting Commonwealth v. Carson, 590 Pa. 501, 913 A.2d 220, 262 (2006). Furthermore, it is within the trial court's discretion to strike a juror for cause and such a decision will not be disturbed absent an abuse of discretion. Id. at 707.

Commonwealth v. Rivera, 199 A.3d 365, 384 (Pa. 2018). More specifically, the Pennsylvania Supreme Court has stated:

Any person may be excluded from a jury who holds views on capital punishment that prevents or substantially impairs [sic] that person from adhering to the trial court's instructions on the law.... Commonwealth v. Lark, 548 Pa. 441, 698 A.2d 43, 48 (1997). 'A juror's bias need not be proven with unmistakable clarity.'

Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516, 525 (1997). For instance, in Morales, we held that a juror expressed sufficient doubt about his ability to impose the death penalty when he said, ‘I’m not certain that I could judge someone fair enough to give them the death penalty.’ Id. We also found no error in excluding a juror who did not ‘feel comfortable having to make a decision about someone else’s life’ and who ‘always’ doubts whether imposing the death penalty is correct. Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130, 137 (1996).

Id. at 706-07 (quoting Commonwealth v. Carson, 913 A.2d 220, 262 (Pa. 2006)). In permitting the trial court great deference in making the determination as to whether the juror has conveyed such a substantial impairment, “... the [United States Supreme] Court has also recognized the impracticability of a rigorous proof requirement..., and accordingly, directed the affordance of a substantial deference in favor of the determination of the trial judge, who has seen and heard the venireperson.” Commonwealth v. Uderra, 862 A.2d 74, 81 (Pa. 2004).

On May 20, 2015, when jury selection began, the Trial Court gave the following instruction to the jury panel:

Because this is a first degree murder case and because there are aggravating circumstances that the Commonwealth has alleged would justify imposition of the death penalty, if the jury convicts this defendant of first degree murder, we will then reconvene to have a second phase of the trial called the penalty phase of this trial.

At that point the Commonwealth will introduce evidence in order to establish what by statute is defined as aggravating circumstances in support of the death penalty. The defense will introduce evidence or rely on evidence listed through cross examination of mitigating circumstances which would mitigate in favor of a life sentence.

You would listen to that evidence, I would then instruct you on the law about what aggravating circumstances are, about what mitigating circumstances are, how those are weighed and what the law requires in terms of imposition of death penalty or imposition of life. As a jury you would have to make that decision. And that decision would be yours.

...

Because this is a death penalty case we are doing individual *voir dire*. What that means is rather than talking to jurors as a group and selecting the jurors as a group,



we are going to do it one at a time, meaning once we are done here, you are going to be taken into the back and you will wait there and we will take you one at a time and ask—the attorneys will then ask you questions to determine whether or not you could be a fair and impartial jury.

...

Members of the jury, based on what you have heard so far—and you haven't heard a lot—you know that this is a first degree murder case, you know that the three people who died in October of 2013, this defendant is charged with murder, you know it is a death penalty case.

And as I said, the Commonwealth will be introducing evidence to support aggravating circumstances which would favor imposition of the death penalty. Defense will be introducing evidence that would support imposition of a life sentence. That is what this case involves. Is there anything based on anything you have heard so far that has—convinces you that you cannot sit as a juror in this case?

N.T., 5/20/2015, pp. 3-4, 18-19. In response to this question, Prospective Juror No. 15 stated, "sentencing someone to death, I don't know if I could do that or not." The Commonwealth followed up by asking "...if it were warranted, would you be able to sentence somebody to death?" and Prospective Juror No. 15 again stated, "I don't think so," so the Commonwealth moved to strike the juror for cause. Trial Counsel then questioned the juror and asked, "Do you believe if we told you a little bit more about the law it would help, or is your opinion pretty set?" and the juror replied "That's my opinion." Therefore, the Trial Court granted the Commonwealth's Motion. N.T. 5/20/2015, pp. 175-78.

In response to this question, Potential Juror No. 17 stated, "I don't believe in the death penalty *per se*." N.T. 5/20/2015, p. 18. Later on during individual *voir dire*, Potential Juror No. 17 again stated "but if you ask me directly would I convict the death penalty, I could not say yes to that....But I could not face a direct question about the death penalty." The Commonwealth inquired further about Potential Juror No. 17's views and while the juror stated several times they could follow the law and be accurate and honest, they again reiterated their disbelief in the death penalty

three separate times and stated that they would have trouble directly imposing a sentence of death. Id. at 195-202. Therefore, both the Commonwealth and Trial Counsel agreed that Potential Juror No. 17 should not be selected and was excused by the Trial Court. Id. at 202.

In response to this question, Prospective Juror No. 24 also waived on whether his personal beliefs about the death penalty would impair his service as a juror and merely stated he would “try his best” and that it “is possible” that his personal opinions about the death penalty would substantially impair his ability to render a death sentence. N.T. 5/21/2015, pp. 273-74. Therefore, Prospective Juror No. 24 was excused by the Trial Court.

In response to this question, a second Prospective Juror No. 15 also waived on his ability to impose the death penalty. While Appellant is correct that second Prospective Juror No. 15 did provide some answers to indicate that he could serve as a juror and put aside his personal beliefs, he often admitted that he could not say for sure if his personal beliefs would impair his ability to act as a juror. N.T. 5/22/2015, p. 194. Shortly thereafter, the following exchange took place:

PROSPECTIVE JUROR 15: ...Would I do the best I could? Absolutely. But I just want to be up front. I have problems with the death penalty. Would that affect me in a penalty phase? Until I get there—I will let you know afterwards. I don't know....I am just afraid that my feelings ahead of time might—might sway my decision a little bit.

DEFENSE COUNSEL: You mean your feelings about the death penalty?

PROSPECTIVE JUROR 15: Yes, sir.

DEFENSE COUNSEL: So that is what you are concerned about, feelings about the death penalty might sway your duty as a juror? Is that what you are saying?

PROSPECTIVE JUROR 15: Yes....

N.T. 5/22/2015, pp. 212-15. Based on this testimony, the Commonwealth made a motion to strike the juror for cause and Trial Counsel stated he could not oppose. The Trial Court granted the Commonwealth's Motion.

Lastly, in response to the Trial Court's question, Potential Juror No. 3 stated that he was "opposed to the death penalty" and that he didn't "believe [he] could render a death verdict." N.T. 5/26/2015, pp. 35-36. Therefore, the Commonwealth made a motion to strike the juror for cause and Trial Counsel did not oppose the motion, which was granted by the Trial Court.

A review of the record reveals that each of these five jurors was dismissed after a clear demonstration that their personal opinions would interfere with the ability to act as a juror. While Trial Counsel did not attempt to rehabilitate some of these jurors, the law is clear that rehabilitation is not Trial Counsel's duty. Further, the Trial Court had the ability to assess the potential jurors in such a way that subsequent attorneys and judges cannot—the Trial Court could view the jurors mannerisms, hear the inflections in their speech, and, overall, gain a better sense of whether each juror could properly sit on Appellant's jury. As there is no evidence that the Trial Court abused its discretion when granting the Commonwealth's motions, Appellant's claim has no merit and fails to satisfy the first prong of the ineffective assistance of counsel test outlined in Pierce. Moreover, as each juror was properly stricken for cause, Appellant was not prejudiced by Trial Counsel's alleged-but-nonexistent ineffectiveness. Appellant fails to meet the third prong of the ineffective assistance of counsel test outlined in Pierce and his claim cannot be afforded PCRA relief.

### ***11. Jury Instructions***

Appellant challenges the jury instructions given by the Trial Court at both the guilt and penalty phases of trial by asserting they were erroneous and improper and argues that Trial Counsel was ineffective for failing to litigate the same. However, a review of the record elicits no support for Appellant's claims.

Pennsylvania Appellate Courts have articulated that the well-settled standard of review in assessing a trial court's jury instructions is as follows:



[W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. . . . Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Patterson, 180 A.3d 1217, (Pa. Super. 2018) (citations omitted). The Pennsylvania Rules of Criminal Procedure provide trial courts with the authority to give instructions to the jury “before the taking of evidence or at any time during the trial as the judge deems necessary and appropriate for the jury’s guidance in hearing the case.” Pa. R.Crim.P. 647(E).

A. Guilt Phase Jury Instructions

First, Appellant argues that the Trial Court improperly instructed the jury on malice and specific intent regarding first degree murder. Specifically, the Trial Court stated, “I instruct you right now that a person with a specific intent to kill – if a person has a specific intent to kill, that is, in fact, malice. So malice and specific intent to kill are one in the same.” N.T. 6/2/2015, p. 162. However, when read in the context of the jury instructions as whole, it becomes clear that Appellant is merely attempting to cherry-pick and distort the Trial Court’s statements. In its entirety, the Trial Court stated:

Let’s start with first degree murder. First degree murder is the highest degree of murder. It has three elements. In order for the Commonwealth to prove the defendant guilty of first degree murder, the Commonwealth must prove that the victim is dead – obviously we have three victims here – second, that the defendant killed that person; and, third, that the defendant did so with the specific intent to kill and with malice.

I instruct you right now that person with a specific intent to kill – if a person has a specific intent to kill, that is, in fact, malice. So malice and specific intent to kill are one in the same.

So in order to find the defendant guilty of first degree murder, you must find one – let’s start with Ebony Talley. One, [...] that Ebony Talley is dead. Two, that the defendant killed Ebony Talley, that he was the direct cause of her death. And, three, that the defendant had the specific intent to kill Ebony Talley. If you find specific intent, then you have malice.

For the crime of first degree murder of [R.R.], the Commonwealth has to prove that [R.R.] is dead; second, that the defendant killed [R.R.] and he was the direct cause of her death; and third, that he did so with the specific intent to kill her. Same thing for the unborn child. [...]

Specific intent to kill has a specific legal meaning. Stated differently, the specific intent to kill is a willful, deliberate premeditated killing. A person has a specific intent to kill if he has a fully formed intent to kill. So specific intent to kill is exactly what you think it is. It is a fully formed intent to kill.

The specific intent to kill meaning for first degree murder does not require planning or previous thought or any – for any particular length of time. It can occur very quickly. All that is necessary is that there is enough time so the defendant can and does form a fully formed intent to kill.

N.T. 6/2/2015, pp. 161-64. Later, when instructing on third degree murder, the Trial Court stated as follows with respect to the element of malice:

Third degree murder is committed if the Commonwealth proves three things: First, that the named victim ... is dead; second, that the defendant killed that person; and, third, that the defendant did so with malice.

Malice here has a specific definition. The killing with malice for purposes of third degree murder does not simply mean hatred, spite or ill will. For murder of the third degree, a killing is with malice if the defendant acted with a wickedness of disposition, a hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm, and an extreme indifference to the value of human life.

In other words, a defendant acts with malice if he consciously disregards an unjustified and extremely high risk that his actions might cause death or serious bodily injury.

Id. at 174-75. Finally, the Trial Court summarized the degrees of murder, starting with first degree murder:

Before I leave the three charges of murder, I just want to summarize. In order for a defendant to be guilty of murder, a defendant – or someone has to have died. Second, that the defendant has to be the cause of death, which means the defendant has to be the direct cause of death. And, third, there has to be malice. If you find a fully formed specific intent to kill, malice is satisfied and, therefore, that is first degree murder.

Id. at 175. Therefore, it is evident that the Trial Court made it clear that specific intent and malice were two separate elements. Appellant's claim has no merit and he was not prejudiced by Trial Counsel's decision not to object or raise the issue on appeal.

Further, Appellant was not prejudiced by the instruction as he claims. He argues that the jury could have agreed on a recklessness *mens rea* but nevertheless improperly convicted him of first degree murder. However, in light of the evidence presented at trial (i.e. the fact that Ms. Talley was struck so hard her tooth fell out; the fact that Ms. Talley was repeatedly stabbed over and over again; the fact that Appellant tied a plastic bag around Ms. Talley's head; the fact that R.R., a four-year-old witness, was stabbed and killed to avoid identifying Appellant; and the fact that the apartment was set on fire to destroy evidence), it is clear that the jury had an abundance of factors to consider when determining Appellant possessed specific intent to kill. Accordingly, Appellant's claim fails all three prongs of the ineffective assistance of counsel test outlined in Peirce.

Second, Appellant believes that the Trial Court erroneously defined the term "reasonable doubt" while instructing the jury. Specifically, the Trial Court stated:

In every criminal trial the defendant is presumed to be innocent. The mere fact that he was arrested and is accused of a crime is not any evidence against him. The defendant is presumed innocent throughout the trial unless and until you conclude based on your evaluation of the evidence that the Commonwealth has proven him guilty beyond a reasonable doubt.

[...]

Although the Commonwealth has the burden of proving the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt. Commonwealth is not required to prove its case to a mathematical certainty. The Commonwealth is not required to demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to be restrained in acting in a matter of importance in his or her own affairs. A reasonable doubt must arise out of the evidence that was presented or the lack of evidence presented with respect to some element of a crime.



A reasonable doubt has to be a real doubt. It cannot be an imagined doubt. It can't be a doubt that's manufactured to avoid carrying out what is to a lot of people a very unpleasant duty.

N.T. 6/2/2015, pp. 135-37. Importantly, this Court notes that this jury instruction is almost identical to the one outlined the Pennsylvania Suggested Standard Jury Instructions (Pa. SSJI (Crim) §7.01). The only difference is that the Trial Court used the term “restrained in acting” instead of “hesitate before acting.” However, appellate courts have explicitly found this discrepancy to be harmless. See Thomas v. Horn, 570 F.3d 105, 119 (3d Cir. 2009) (rejecting claim that use of the term “restrain from acting” suggested a higher degree of doubt than “reasonable doubt” that rendered the court’s jury instructions unconstitutional); Commonwealth v. Carson, 913 A.2d 220, 255 (Pa. 2006) (rejecting as frivolous the claim that counsel was ineffective for failing to object to instruction on reasonable doubt that employed the term “restrain” rather than “hesitate,” finding the distinction *de minimis*.)

Further, the authority cited by Appellant even holds that “so long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.” Victor v. Nebraska, 511 U.S. 1, 5 (1994) (internal citation omitted). The Victor Court in fact observed that it had only *once* held that a court’s definition of reasonable doubt was unconstitutional and that was where the trial court instructed that reasonable doubt would give rise to a “grave uncertainty” and constituted “an actual substantial doubt.” Id. at 5-6 (citing Cage v. Louisiana, 498 U.S. 39, 40 (1990)). Therefore, there is no question that the Trial Court’s instruction was proper and that Appellant’s claim is without merit. Any objection by Trial Counsel would have been meritless and, as such, Trial Counsel is not ineffective for failing to raise a meritless claim. Appellant’s argument to the contrary must fail.

Third, Appellant believes that Trial Counsel was ineffective for failing to request a special jury instruction regarding George Lewis' testimony and the fact that he had a criminal history and was previously an informant. However, Trial Counsel did request, and the Trial Court ultimately gave, such an instruction:

There are a number of people who are under supervision as a result of criminal conduct. Marquis Johnson, Joshua Debliek and George Lewis all testified that they were currently under supervision, whether probation or parole. It is for you to recall what they testified to. But you may consider that criminal record and the fact that they are currently under supervision. Again, not to say that they are bad people *per se*. The fact that they are currently under supervision is – or under probation or parole was admitted so that you could consider that evidence as affecting their potential credibility.

In other words, you may consider the fact that they are on probation and parole and decide yourself that they have a motive to seek the approval or to seem some other concession from the Commonwealth and, therefore, would testify in favor of the Commonwealth.

[...]

You also heard that some witnesses were convicted of prior crimes of what we call *crimen falsi*. Those are crimes that involve dishonesty. Theft is a crime of dishonesty. Burglary is a crime of dishonesty. If a person – the Court allowed evidence that those persons were convicted of crimes of dishonesty, again not to prove that they are bad people; it is admissible for a specific purpose.

You may consider the fact that a person engaged in a crime of dishonesty in determining whether or not you choose to believe their testimony in this case. And that is the only purpose you may consider that evidence for. In other words, you can consider their prior conviction for a crime of dishonesty in deciding whether or not to believe all, part or none of that person's testimony.

N.T. 6/2/2015, pp. 152-54. Accordingly, Trial Counsel was not ineffective and Appellant's claim is without merit.

#### B. Penalty Phase Jury Instructions

First, Appellant argues that Trial Counsel was ineffective for failing to ensure that the jury was instructed that a life sentence in Pennsylvania means that Appellant would spend the rest of

his life in prison. While Trial Counsel did request such an instruction, the Trial Court properly denied the request and found that such an instruction is only given when the Commonwealth argues a defendant's future dangerousness, which did not occur in the case at bar. See Simmons v. South Carolina, 512 U.S. 154, 168- 69 (1994). See also Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (reiterating that when "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.") (internal quotations and citation omitted); Commonwealth v. Trivigno, 750 A.2d 243, 254 (Pa. 2000) (affirming that where a prosecutor argues a defendant's future dangerousness, trial court must instruct on the meaning of life sentence).

Further, the Trial Court found that such an instruction is not an accurate statement. The Pennsylvania Supreme Court has held that the possibility of commutation should be considered by a jury when instructed on the meaning of a life sentence. The Trivigno Court resolved the issue of how jurors should be instructed on a life sentence when such an instruction is required and concluded as follows:

We now hold that when a Simmons instruction is required because the prosecution has argued the defendant's future dangerousness, the trial court ... should inform the jury that a life sentence means that a defendant is not eligible for parole, but that the Governor has the power to grant a commutation of a sentence of life or death if based on the recommendation of the Board of Pardons following a public hearing. Further, the trial court should relay any available statistical information relating to the percentage of life sentences that have been commuted within the last several years.

Trivigno, 750 A.2d at 355-56. Undoubtedly, Trial Counsel cannot be deemed ineffective for having unsuccessfully requested such an instruction. Further, Trial Counsel had a reasonable basis to fail to raise this argument on appeal: it had no merit, whereas he believed other, less frivolous



arguments did. See Commonwealth v. Blakney, 108 A.3d 739, 750 (Pa. 2014) (“With regard to ‘reasonable basis’ in the appellate context, it is well settled that appellate counsel is entitled, as a matter of strategy, to forego even meritorious issues in favor of issues he believes pose a greater likelihood of success.”). Therefore, Appellant’s claim must fail.

Next, Appellant asserts that the Trial Court improperly instructed the jury as to the aggravating circumstances. Appellant argues that the Pennsylvania sentencing statute is unconstitutional as it “does not require that the jury find each fact necessary to impose a death sentence unanimously and beyond a reasonable doubt” and “the statute provides no standard of proof for the jury to apply in determination of whether the aggravating circumstances outweigh any mitigating” and cites Hurst v. Florida, 136 S.Ct. 616 (2016). Notably, this precise argument was recently dismissed in Commonwealth v. Le:

The Hurst Court determined that Florida’s capital sentencing scheme violated the Sixth Amendment because it required a judge, as opposed to a jury, to make the critical findings needed for the imposition of a death sentence. Hurst did not, contrary to Appellant’s argument, require that, in order to conclude that a sentence of death is appropriate, a jury determine that the aggravating circumstances *outweigh* the mitigating circumstances beyond a reasonable doubt.

Commonwealth v. Le, 208 A.3d 960, 981 (Pa. 2019) (emphasis in original). Additionally, Appellant concedes his position was dismissed by the Pennsylvania Supreme Court but raises such a claim for preservation of the issue for subsequent proceedings. Appellant’s claim is without merit.

Lastly, Appellant asserts that the Trial Court erred in instructing the jury that a sentence of life imprisonment requires a unanimous verdict and that his attorney provided ineffective counsel for failing to object to the same. This Court does not agree. More specifically, the Trial Court stated:

First, however, you must understand that your verdict must be a sentence of death if and only if you unanimously find that – as all of you agree, that there is at least one aggravating circumstance and no mitigating circumstances. That is one way that your sentence must be death, that there is at least one aggravating circumstance and no mitigating circumstances.

The second way where your sentence must be death is where if you find – unanimously find one or more aggravating circumstances and that those aggravating circumstances outweigh all of the other mitigating circumstances. If you do not all agree on one or the other of these two findings, then the only verdict that you may return is a sentence of life imprisonment.

N.T. 6/8/2015, pp. 188-89. In continuing its instructions to the jury as to the manner in which they were to formulate their verdict, the Trial Court further directed that:

Your final sentence, life imprisonment or death must be unanimous. All of you must agree that the sentence should be life imprisonment or that the sentence should be death or that the sentence should be death because there is at least one aggravating circumstance and no mitigating circumstance or because the aggravating factors or circumstances outweigh the mitigating factors or circumstances.

N.T. 6/8/2015, pp. 210-11. These instructions are in direct accordance with the law outlined by the Pennsylvania Supreme Court:

The jury's verdict in the penalty phase of a first degree murder case, whether it be a sentence of life or death, must, just as is true of any verdict in a criminal case, be unanimous. Where the jury is unable to reach a unanimous agreement as to the sentence, the court must impose a sentence of life. 42 Pa.C.S. § 9711(c)(1)(v). However, for the jury to return a verdict, it must necessarily be a unanimous verdict. Appellant's argument to the contrary, that the jury could impose a life sentence in the absence of a unanimous agreement, is nonsensical. The charge as given does nothing more than inform the jury that it is free to reach a verdict of a life sentence or one of death.

Commonwealth v. Jones, 683 A.2d 1181, 1199 (Pa. 1996). There is no credible argument that the Trial Court erred. Appellant's claim that Trial Counsel was ineffective for failing to object to these obstructions is wholly without merit.

***12. Aggravating Circumstance Set Forth in 41 Pa.C.S. § 9711(d)(5)***

Appellant argues that he was sentenced to death on the basis of an invalid aggravating circumstance and that Trial Counsel was ineffective for failing to effectively litigate the issue. This Court does not agree. 42 Pa.C.S. §9711(d)(5) provides that when “[t]he victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses[,]” it may be considered an aggravating factor during the penalty phase of a capital murder trial. While Trial Counsel unsuccessfully challenged this aggravating circumstance before the Trial Court and the Pennsylvania Supreme Court on the grounds that it was unconstitutionally vague, Appellant believes that Trial Counsel should have instead argued that the Pennsylvania Supreme Court’s interpretation defies the plain meaning of the statute; that the Pennsylvania Supreme Court has failed to consistently apply its own interpretation; and that the evidence in the case at bar did not meet the Pennsylvania Supreme Court’s own standard for when it may be applied. However, for the reasons set forth below, not one of these arguments have merit and Trial Counsel was not ineffective for declining to raise them.

Initially, the aggravating circumstance outlined above required a criminal proceeding to be *pending* at the time of the murder to be applicable. However, in Commonwealth v. Appel, 539 A.2d 780 (Pa. 1988), the Pennsylvania Supreme Court expanded application of this aggravator to cases in which a victim was killed to prevent him or her becoming a witness against the defendant even before the prosecution was pending. The Pennsylvania Supreme Court reasoned that the purpose of the previous “pending” requirement was to endure that the defendant had the “fully informed intent” to kill a potential witness, and this intent could be demonstrated by direct evidence even before prosecution began. Id. n. 2. The Court specifically stated:



We maintain the position that the existence of this aggravating circumstance cannot be established circumstantially unless the victim was in fact a witness in a pending grand jury or criminal prosecution. However, the killing of a potential Commonwealth witness before either of these bodies results in the same frontal assault upon the criminal justice system. To ignore this erosion in the process where it can be established by direct, rather than the less reliable circumstantial evidence, would unduly restrict the obvious legislative intent. Therefore, we will permit a finding of the existence of this particular aggravating circumstance where the killing results from the intention to eliminate a potential witness, if such facts can be established by direct evidence. Such is the case here.

Id. at 784 n. 2. Appellant argues this rule is not consistently applied due to a subsequent holding in Commonwealth v. Marshall, 568 A.2d 590 (Pa. 1989), which was decided a year after Appel. The Court in Marshall found that, while evidence of the victim pleading for her life in exchange for her silence could evoke the aggravating circumstance, evidence of a two-year-old victim crying for her mother was insufficient to evoke the aggravating circumstance. Marshall at 599-600. While this Court does not believe this holding is inconsistent the holding in Appel, even if it were, every case decided after Marshall regarding the issue, some as recently as 2007, have repeatedly held that the aggravating circumstance may be applied in cases where, despite the fact that no prosecution is pending, direct evidence shows that the defendant had a fully informed intent to kill someone who could be a potential witness. See Commonwealth v. Strong, 563 A.2d 479, 485 (Pa. 1989) (finding sufficient direct evidence to support aggravating circumstance where appellant killed the victim to prevent him from reporting a robbery and stated to his co-defendant that he was “tired of leaving witnesses behind”); Commonwealth v. Pelzer, 612 A.2d 407, 416 (Pa. 1992) (finding the Commonwealth presented sufficient direct evidence through co-defendant testimony that appellant killed the victim because the victim could identify appellant’s house where the particular criminal episode began); Commonwealth v. Henry, 569 A.2d 929, 937 (Pa. 1990), abrogated on other grounds by Commonwealth v. Wilson, 861 A.2d 919 (2004) (holding sufficient direct evidence existed to support aggravating circumstance when appellant’s cellmate testified

that he confessed to murdering a female victim “to keep the girl from identifying him”); Commonwealth v. Fisher, 741 A.2d 1234, 1239-40 (Pa. 1999) (reaffirming that this aggravator “encompasses the killing of a potential witness, even when there is no criminal proceeding pending at the time of the murder, if the killer’s intention to eliminate the victim as a potential witness is established through direct evidence”); Commonwealth v. Eichinger, 915 A.2d 1122, 1144-45 (Pa. 2007) (affirming sufficiency of evidence of 9711(d)(5) aggravator where appellant told police he killed the three year old because she knew him and could speak his name).

In the case at bar, George Lewis testified that Appellant told him that he killed R.R. because she was smart and could identify him as her mother’s murderer. N.T. 6/1/2015, p. 230. This is direct evidence that Appellant killed R.R. “for the purpose of preventing [her] testimony against [Appellant] in any grand jury or criminal proceeding involving such offenses.” While Appellant attempts to paint Mr. Lewis’ testimony as untruthful and dishonest, this Court thoroughly addressed the meritless nature of that assertion and dismissed it above. The jury weighed Mr. Lewis’ credibility and believed his testimony. On direct appeal, the Supreme Court of Pennsylvania explicitly found that there was “ample evidence to support the jury’s finding of these aggravating factors....” Johnson, 160 A.3d at 153.

Clearly, Appellant’s claims, even if litigated by Trial Counsel, would not have been meritorious and, as counsel cannot be found to be ineffective for failing to raise a meritless claim, he had a reasonable basis to decline to raise such arguments. Appellant was not prejudiced by Trial Counsel’s decision and this claim may not be afforded PCRA relief.

### ***13. Constitutionality of the Death Penalty***

Next, Appellant asserts that the death penalty violates Article I, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution as it

violates the “evolving standards of decency that mark the progress of a maturing society.” First, this Court notes that Appellant cannot seek to establish new principles of constitutional law through a PCRA Petition:

[T]he PCRA’s eligibility provisions provide no easy harbor for the recognition, or creation, of new constitutional rights. The PCRA provides a mechanism for vindicating existing constitutional rights, and it also provides a mechanism for implementing new constitutional rules of retroactive application, no matter when the new rule is established. See 42 Pa.C.S. § 9545. But, the new rule has to exist already.

Commonwealth v. Robinson, 82 A.3d 998, 1021 (Pa. 2013). “Simply stated, by its terms, the PCRA does not deem cognizable claims” seeking to innovate new constitutional rules. Id.; see also Commonwealth v. Towles, 208 A.3d 988, 1009 (Pa. 2019) (“The post-conviction arena does not generally offer a forum to innovate new principles of constitutional law.”); Commonwealth v. Fears, 86 A.3d 795, 817 (Pa. 2014) (citations omitted) (“[T]he PCRA provides a means to obtain relief based on existing or newly-recognized constitutional rights, however, the right must first exist for a petitioner to claim it as a basis for relief. Here, appellant seeks to have a new substantive constitutional rule declared . . . . Therefore, his claim is not cognizable under the PCRA.”). Thus, it is abundantly clear that the PCRA is an improper avenue for innovating new constitutional principles. However, in the interests of justice, this Court will address the merits of Appellant’s claims.

The Pennsylvania Supreme Court has made it clear that “duly enacted legislation carries with it a strong presumption of constitutionality. The presumption of constitutionality will not be overcome unless the legislation clearly, palpably, and plainly violates the constitution.” Commonwealth v. Turner, 80 A.3d 754, 759 (Pa. 2013). Further, “the heavy burden resting upon the person asserting unconstitutionality of legislation is one of the most firmly established principles of our law.” Rufo v. Board of License and Inspection Review and City of Philadelphia,



192 A.3d 1113, 1120 (Pa. 2018). Pennsylvania appellate courts have repeatedly declined to find the death penalty statute unconstitutional:

In considering such an emotionally charged, controversial and polarizing issue such as the death penalty, the legislature is peculiarly well-adapted to respond to the consensus of the people of this Commonwealth. Regardless of the personal beliefs of any member of this Court, it is manifestly not our function or prerogative to perform as a super-legislature and disturb the determination of the General Assembly absent a demonstration that the legislative enactment *clearly, palpably* and *plainly* violates some specific mandate or prohibition of the constitution.

Commonwealth v. Zettlemoyer, 454 A.2d 937, 959 (Pa. 1982) (emphasis in original) (citations and internal quotations omitted).

Since the analysis outlined in Zettlemoyer, the Pennsylvania Supreme Court still consistently finds the death penalty statute to be constitutional:

A presumption exists “[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth” when promulgating legislation. 1 Pa.C.S. § 1922(3). Duly enacted legislation is presumed valid, and unless it clearly, palpably and plainly violates the Constitution, it will not be declared unconstitutional. Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198, 207 (2007). Accordingly, the party challenging the constitutionality of a statute bears a heavy burden of persuasion. Id. Moreover, this Court has articulated the principle that “the Pennsylvania prohibition against ‘cruel punishments’, like its federal counterpart against ‘cruel and unusual punishments’, is not a ‘static concept.’” Zettlemoyer, supra at 967–968 (quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The concept “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Id. at 968 (quoting Gregg, 428 U.S. at 173, 96 S.Ct. 2909). “[T]he most accurate indicators of those ‘evolving standards of decency’ are the enactments of the elected representatives of the people in the legislature.” Id.

Commonwealth v. Baker, 78 A.3d 1044, 1050 (Pa. 2013).

While the Supreme Court has increasingly limited the application of the death penalty to only the most serious offenders and most serious offenses, it has not provided any indication that it intends to rethink its jurisprudence in Gregg upholding the death penalty as a permissible punishment. No majority opinion has reconsidered its prior admonition that the Constitution

expressly recognizes capital punishment or found that it is inherently inhuman and barbarous. In 2019, the Supreme Court reaffirmed the constitutionality of the death penalty, rejecting a claim that Missouri's lethal injection protocol was unconstitutional:

This Court likewise focused on the Supreme Court's admonition that our state's "evolving standards of decency" should generally be left to our General Assembly to decide. In this regard, we observed that in 1794, the General Assembly approved an act, the first of its kind among the states, creating degrees of murder with the death penalty confined to murder of the first degree. From that time forward, this Commonwealth has always operated under some legislative enactment setting the penalty for at least some first-degree murders at death, except for brief periods caused by decisions of this Court, and in those instances the legislature always acted promptly to fill the gaps caused by those decisions. *Id.* As such, the General Assembly of this Commonwealth has, since its inception, consistently and continually expressed its conviction that the death penalty is, for at least some intentional killings, an appropriate and necessary form of punishment.

In sum, Hairston fails to present any compelling justification for altering our present course. We acknowledge that many states have found defects in the implementation of the death penalty, but Hairston fails to demonstrate that those examples present convincing new evidence that the death penalty is cruel and unusual punishment violative of the Eighth Amendment or of Article I, Section 13. In addressing a similar challenge to the constitutionality of the death penalty just five years ago, we observed that "Appellant's argument, relying on a minority of states which have abolished the death penalty and a few select international legal documents condemning or calling for restrictions on the death penalty, [was not] sufficient to warrant our reassessment, at this juncture, of the constitutionality of the death penalty *per se*." [*Commonwealth v. Walter*, 119 A.3d 255, 294 (Pa. 2015)]. Likewise, today, Hairston's arguments are not sufficient to warrant reconsideration of the jurisprudence announced by the Supreme Court in *Gregg* and this Court in *Zettlemoyer*.

*Commonwealth v. Hairston*, 249 A.3d 1046, 1057-59 (Pa. 2021). As such, absent any indication to the contrary, this Court must follow the case law outlined by the Pennsylvania Supreme Court and will not declare a duly enacted body of legislation to be unconstitutional. Appellant's claim that this is in error is meritless.

#### ***14. Cumulative Error***

Appellant argues that the cumulative effect of all of the alleged errors warrants PCRA relief. Yet, as outlined above, Appellant has failed to establish the merits of even *one* claim and he cannot gain relief by alleging the cumulative effect of these meritless claims entitles him to relief. The Pennsylvania Supreme Court has repeatedly held that “no number of failed claims may collectively warrant relief i[f] they fail to do so individually.” Commonwealth v. Rainey, 928 A.2d 215, 245 (Pa. 2007). The evidence outlined in the case at bar overwhelmingly establishes Appellant’s guilt. The jury correctly determined that Appellant murdered Ms. Talley, her unborn son, and her four-year-old daughter, R.R.. Appellant’s dissatisfaction with the verdict is not a ground for relief. Appellant’s claim that he is entitled to trial due to the cumulative effect of the “errors” is without merit.

#### ***15. Motion for Recusal***

Appellant’s last statement alleges that this Court abused its discretion in denying his Motion for Recusal. It is well-settled that the standard of review of a trial court’s decision to deny a party’s Motion for Recusal is “exceptionally deferential. [Pennsylvania appellate courts recognize that] trial judges are ‘honorable, fair and competent,’ and although [it] employ[s] an abuse of discretion standard, [it] do[es] so recognizing that the judge himself is best qualified to gauge his ability to preside impartially.” Commonwealth v. Bonds, 890 A.2d at 418 (Pa. Super. 2005) (citing Commonwealth v. Abu-Jamal, 720 A.2d 79, 89 (Pa. 1998)). The party who asserts that a trial judge should recuse bears the burden of setting forth specific evidence of bias, prejudice, or unfairness. See Commonwealth v. Perry, 364 A.2d 312, 318 (Pa. 1976). “Furthermore, a decision by the trial court against whom the plea of prejudice is made will not be disturbed absent an abuse of discretion.” Commonwealth v. Buehl, 658 A.2d 771, 782 (Pa. 1995). See also



Commonwealth v. Tedford, 960 A.2d 1, 55-56 (Pa. 2008) (“[I]t is the burden of the party requesting recusal ‘to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.’”).

Here, after a hearing on June 28, 2023 on Appellant’s Motion for Recusal, this Court denied Appellant’s Motion that requested this Court to recuse itself due to the fact that District Attorney Weintraub, whom Appellant raised prosecutorial misconduct claims against, had announced his intention to campaign, unopposed, for a vacant judicial position in the Bucks County Court of Common Pleas. This Court stated:

Here are my thoughts on it: I was not the trial judge and I think, again, I will make things clear on the record. I have never, not even casually, discussed this case with anyone from the District Attorney’s Office, in particular, with the District Attorney. The only information I know about this case has come from the lawyers.

When Judge Gibbons came and asked that it be reassigned, she said she didn’t think she could continue with it and I didn’t even ask her why. I’ve known Judge Gibbons since the two of us worked in the DA’s office back in the ‘80s so I’m dating both of us. So if she said she didn’t feel she can handle it, I accepted that without question.

So I knew nothing about the case. I knew nothing about the allegations. [I] haven’t talked to anybody about it except my law clerk, who is present, but I’ve never talked to—I think it’s clear I never talked to you or, in particular, any of the witnesses and, specifically, Mr. Weintraub about the case.

I don’t know that it would make a lot of sense, frankly, to ask someone else to do this when we’ve invested so much time and effort in it. We have had multiple hearings. In fact, it started out with Ms. Graziano...well over a year ago.

And so we’ve had this hearing, we’ve had three days set aside this week for this hearing. And it would—frankly, it would be easy for me to say, ‘okay, your motion’s granted.’ You get out of the work, but I’m charged with the responsibility of making decisions that I believe are correct and that, I think, require me to do justice.

I understand how your client may not think that it’s fair or may have a perception but I want to assure him, I don’t have any trouble hearing this case. It didn’t even occur to me that it would be an issue because I think the lawyers that know me

know I won't hesitate to rule one way or the other based solely upon the facts and the law.

In fact, my recollection is Mr. Weintraub tried a murder case in front of me and he would probably consider it a loss when I found—I think it was a manslaughter. So I'm not afraid to do my job, so to speak. I appreciate your concerns, but I just don't think, under the circumstances, there's any reason for me to recuse myself.

And I think, if anything, it would be a dereliction of my duties by asking someone else to start all over again in this case. And you probably understand, and I'm sure you know what's been put into this case and having to start over again, isn't only unfair to your client but unfair to the Commonwealth but everybody that has an interest in this case.

So for those reasons, I believe after reviewing the applicable rules of professional responsibility and the case law, I don't believe that recusal is in order. I believe that I can hear this case and I can hear it fairly and impartially and I'm confident, notwithstanding that we probably agree is an artificial date, that I will have it done before he's sworn in, so for those reasons the motion is denied.

N.T. 6/28/2023, pp. 9-12. Therefore, as this Court believed that it could be unbiased, unprejudiced, and fair, it denied Appellant's Motion. Additionally, as stated at the hearing, all evidence was presented, all briefs were filed, and this Court issued its decision on Appellant's PCRA claims prior to then-District-Attorney Matthew Weintraub taking the bench in January of 2024. As the Commonwealth Court of Pennsylvania has previously outlined, a judge is not even required to recuse himself when he presides over a matter in which another judge of the same county is implicated, let alone when that person has not even officially won the election and taken a seat on the bench yet. See Korner v. Warman, 659 A.2d 83 (Pa. Cmwlth. Ct. 1995) ("On review, we find nothing that directs recusal, or even suggests recusal just because a fellow county judge is allegedly implicated in a case, where the trial judge foresees no problem with impartiality."). As such, Appellant's assertion that this denial is an abuse of this Court's discretion is baseless and without merit.

### ***16. Overwhelming Evidence***

Lastly, while this Court has thoroughly reviewed and dismissed each of Appellant's PCRA claims, it also finds it important to note that one should not be fooled by the voluminous amount of alleged issues and the immaterial and irrelevant cases Appellant cites to support them. The evidence in this case overwhelmingly proves Appellant's guilt beyond a reasonable doubt. There is absolutely no reason to believe that, had anything at trial gone differently, the outcome would have been any different. Appellant not only provided a full confession to a fellow Bucks County Correctional Facility inmate, the circumstantial evidence of Appellant's guilt was plentiful. Several days before the murders, Appellant told his brother he was desperate to make a "come up." Appellant was the last known person to see the victims alive, and the only one seen fleeing the scene moments before the fire was discovered. Appellant refused to return to the scene or turn in the car Ms. Talley drove despite pleas from the victims' family members to do so. Appellant attempted to evade police and, when arrested, he lied to police. Appellant also had drugs and a money order that belonged to Ebony Talley, which Appellant hid and told his brother to make sure "never [saw] the light of day." In addition, while, as discussed above, the DNA evidence was not overwhelming in this case, no doubt due to the fire and water that covered the scene, Appellant did have Ms. Talley's DNA evidence under his nails. In short, Appellant undoubtedly murdered Ms. Talley, her unborn child, and four-year-old daughter and a jury properly weighed mitigating and aggravating factors and, after much deliberation, found a death sentence to be appropriate. Appellant is understandably unhappy with the outcome. However, Appellant's displeasure does not create a valid ground for PCRA relief and this Court properly concluded the same.



**V. CONCLUSION**

For the aforementioned reasons, this Court believes that the issues which Appellant has complained of in his Concise Statement are without merit. Accordingly, this Court respectfully submits that the December 29, 2023 Order denying and dismissing Appellant's Amended PCRA Petition should be affirmed and that Appellant's appeal be denied.

BY THE COURT:

April 5, 2024  
Date

  
\_\_\_\_\_  
WALLACE H. BATEMAN, JR.

***Copies sent to:***

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