IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**CP-41-CR- 1061-2008**
	:	
MAURICE PATTERSON,	:	**PCRA**
Petitioner	:	

OPINION AND ORDER

Maurice Patterson (Petitioner) filed a *pro se* petition for Post Conviction Relief (PCRA) on July 20, 2015. The Court appointed Edward J. Rymsza, Esq. on August 14, 2015 to represent Petitioner and filed an Amended PCRA petition on May 1, 2017 along with a Motion to Recuse this court.

The basic facts presented at trial were that Sean Durrant (Durrant) and Javier Cruz-Echevarria (Cruz) had Petitioner as a mutual friend in common where Durrant met Petitioner in SCI-Huntingdon. After Durant and Cruz engaged in at least one drug transaction with Eric Sawyer, Petitioner suddenly believed that Eric Sawyer had become a "snitch" and they were to murder him. Durrant told police that he had received letters and phone calls from Petitioner while Petitioner was incarcerated at the Lycoming County Prison encouraging him to take care of the business with Sawyer. In the early morning hours of March 31, 2007, Durrant and Cruz met Sawyer in an alleyway in the City of Williamsport, Lycoming County, Pennsylvania and Durrant shot and killed Sawyer with a shotgun.

Petitioner was assigned death-qualified court-appointed counsel to represent him.[1] Petitioner was tried in May 2010 and found guilty of Murder in the First Degree, Conspiracy, and Criminal Solicitation. After the penalty phase hearing, the jury concluded that the one aggravating factor outweighed any mitigating factors presented and Petitioner was sentenced to death on May 28, 2010. Trial Counsel filed timely post sentence motions which were denied by this Court on January 18, 2012.

Petitioner filed an appeal to the Pa Supreme Court and on April 28, 2014 the judgment of sentence was affirmed at *Commonwealth v. Patterson,* 91 A.3d 55 (Pa. 2014).

The issues raised on direct appeal were that sufficient evidence had not been presented to support the Petitioner's conviction on the charge Murder of the First Degree, the Court erred in its admission of a videotape of the murder scene, the failure of the court to allow evidence of Durrant's prior bad acts, expert testimony with regard to eyewitness testimony, evidence of another party' motive to commit the crime, admission of hearsay testimony, failure to allow the testimony of an inmate who was incarcerated with Durrant regarding Durrant's motive to do anything to obtain favor with the Commonwealth, cross-examination of the Petitioner on the song lyrics, the denial of the motion to suppress statements Petitioner made in prison when interviewed by the police as a violation of *Miranda*[2], refusal of the court to refresh a witness's memory by playing a videorecording, failure to give the 'life means life' instruction, and the unconstitutionality of the death penalty, along with the statutory review of the death penalty verdict.

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[1] *See* Pa. R. Crim. P. 801.
[2] *Miranda v. Arizona,* 384 U.S. 436 (1966).

Petitioner then filed a Writ of certiorari[3] with the United States Supreme Court which was denied on February 23, 2015. *Patterson v. Pennsylvania,* 574 U.S. 1160 (2015). Therefore, Petitioner's sentence became final February 23, 2015. Since Petitioner filed his *pro se* PCRA petition on July 20, 2015, his petition has been filed timely.

Petitioner filed a *pro se* petition for Post Conviction relief on July 20, 2015. Since this was his first Petition, the Court appointed Edward J. Rymsza, Esq[4]. on August 14, 2015 to represent him. PCRA counsel filed both an Amended Post Conviction Relief Act petition on May 1, 2017 as well as a Motion to Recuse this court.

A conference on the petition and argument on the Motion to Recuse was held on September 8, 2017. This Court denied the Motion to Recuse on September 13, 2017. On October 4, 2017 the Commonwealth filed an Answer to the Amended Petition.

After the conference, Petitioner was granted leave to file a supplement to the First Amended petition. That supplemental petition was filed on December 27, 2017. A conference was held on March 2, 2018 which discussed the request for any letters sent to counsel or the Court by Sean Durrant or Douglas Shaheen and a future conference scheduled based upon whether any additional letters were found.

On October 4, 2018 the next conference was held and the Court required PCRA counsel to come into compliance with 42 Pa. C.S. §9545(d)(1) and required PCRA counsel to supply signed certifications for each witness which would be called to testify. As a result, the Court granted him an extra 60 days to file the certifications. PCRA counsel filed a motion to reconsider on October 15, 2018 which was denied on October 24, 2018.

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[3] Michael Wiseman, Esquire, represented Petitioner on the Writ.
[4] Mr. Rymsza is also an 801 certified attorney.

On June 5, 2019, the Court granted an evidentiary hearing on issues and witnesses in the Petitioner's Amended PCRA petition and First Amended PCRA petition. Hearing was held on the outstanding issues on June 22 through June 24, 2021.

Once all of the hearings had been completed, the parties requested the opportunity to file briefs. After repeated extensions of time by agreement of the parties, Petitioner first brief was ultimately filed on January 18, 2022 and Commonwealth's brief September 16, 2022.

After completion of the hearing but as a consequence of the now new district attorney finding materials relevant to the PCRA claim, the Court granted the opportunity for Petitioner to reopen the record and held an additional hearing on that request on November 7, 2022.

A further hearing was scheduled for January 30, 2023. Once the hearing was completed and the transcript prepared of the additional hearing, another briefing schedule was set. Petitioner filed his brief on May 30, 2023. Commonwealth's reply brief was filed July 11, 2023 and Petitioner's surrebuttal brief filed September 6, 2023.

DISCUSSION

In his First Amended PCRA petition and his Supplemental Petition, Petitioner asserted numerous claims, most of which related to ineffective assistance of trial counsel.

The law presumes counsel has rendered effective assistance, and to rebut that presumption, the petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. *Commonwealth v. Kohler*, 36 A.3d 121, 132 (Pa. 2012). "[T]he burden of demonstrating ineffectiveness rests on [the petitioner]." *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). To satisfy this burden, a petitioner must plead and prove by a preponderance of the evidence that: "(1) his underlying claim is of arguable merit; (2) the

particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and, (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different." *Commonwealth v. Fulton*, 830 A.2d 567, 572 (Pa. 2003). Failure to satisfy any prong of the test will result in rejection of the petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

"Generally, where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." *Commonwealth v. Miller*, 819 A.2d 504, 517 (Pa. 2000) (citation omitted). A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued. ***Id.*** In addition, we note that counsel cannot be deemed ineffective for failing to pursue a meritless claim. *Commonwealth v. Nolan*, 855 A.2d 834, 841 (2004) (superseded by statute on other grounds).

In his First Amended PCRA petition, Petitioner separated his claims into two categories – those related to the guilt phase and those related to the penalty phase.

I. Claims Related to Guilt/Innocence Phase

A. Was trial counsel ineffective for failing to raise and litigate a Sixth Amendment right to counsel claim where statements obtained by law enforcement were taken after Petitioner's right to counsel had attached?

Petitioner first asserts that trial counsel was ineffective for failing to raise and litigate a Sixth Amendment right to counsel claim where statements were obtained by law enforcement after Petitioner's right to counsel had attached. The court cannot agree.

The Sixth Amendment guarantees the right to have counsel present at all critical stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 2085 (2009).

Critical stages include but are not limited to arraignments, post indictment interrogations, post indictment lineups, and the entry of a guilty plea. *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399, 1405 (2012). Once the Sixth Amendment right to counsel has attached and been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204, 2207 (1991). The Sixth Amendment right to counsel does not depend upon a request by the defendant. *Commonwealth v. Cornelius*, 856 A.2d 62, 72-73 (Pa. Super. 2004). A valid waiver of the Sixth Amendment right to counsel "should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information." *Id*. at 75. "[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

The Sixth Amendment right to counsel, like other constitutional rights, can be waived by a defendant. "So long as the defendant is made aware of the dangers and disadvantages of post indictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is knowing and intelligent." *Patterson v. Illinois*, 487 U.S. 285, 300, 108 S.Ct. 2389, 2398-99 (1988)(internal quotation marks omitted). There is no per se rule invalidating such a waiver simply because an arrestee was not advised that charges had been filed. *Commonwealth v. Rawls*, 256 A.3d 1226, 1234 (Pa. 2021), *cert. denied*, 142 S. Ct. 868 (U.S. 2022).

The right to counsel guaranteed by Article 1, §9 of the Pennsylvania Constitution is coterminous with the Sixth Amendment right to counsel. *Commonwealth v. Arroyo*, 555 Pa.

125, 723 A.2d 162, 170 (1999); *Commonwealth v. Kunkle*, 79 A.3d 1173, 1181 (Pa. Super. 2013).

Agent Leonard A. Dincher (Dincher) testified at the Suppression Hearing that on May 21, 2008 he obtained a warrant for the Petitioner's arrest. On May 22, 2008, Dincher along with Captain Raymond Kontz (Kontz), Officer Edward Lucas, and Officer James Roy went to the State Correctional Institution at Smithfield to execute the warrant. Dincher related that all of the officers were in plain clothes and unarmed when they arrived at the institution at 9:00 a.m. When arriving, the officers were taken into an inmate meeting room within a large meeting room. Inside the meeting room was an interview room about eight feet by twelve feet or ten feet by twelve feet which had glass to the left so you could see out. The interview room contained a table and three chairs. Petitioner was taken into the interview room where Dincher and Kontz joined him. Officers Lucas and Roy stayed outside to the side of the room. A Correctional Officer at the institution also remained outside the interview room.

Dincher related Petitioner appeared alert that day and aware of the nature of the investigation. At 9:35 a.m., Petitioner was advised of his rights. Dincher explained that he read the *Miranda*[5] form to Petitioner. Petitioner signed that he understood his rights and would talk. Based on Agent Dincher's testimony, the court found that Petitioner knowingly, intelligently and voluntarily waived his *Miranda* rights. Since Petitioner validly waived his right to counsel by signing the form, Petitioner's claim that his trial counsel was ineffective for failing to assert a claim that his right to counsel was violated when statements were taken from Petitioner by law enforcement after his right to counsel attached lacks merit.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The court rejects Petitioner's argument based on footnote 9 of *Patterson* that Petitioner's "*Miranda* waiver does not apply to post-charge questioning and such a waiver would be invalid under the Sixth Amendment." In the body of the *Patterson* decision, the United States Supreme Court stated:

> As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in Miranda has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.[9] We feel that our conclusion in a recent Fifth Amendment case is equally apposite here: 'Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.'

Patterson v. Illinois, 487 U.S. 285, 296–97, 108 S.Ct. 2389, 2397, 101 L.Ed.2d 261 (1988)(citations omitted). In footnote 9, the Supreme Court indicates that there may be exceptions to this general rule such as when an accused has not been told that his lawyer was trying to reach him during questioning or where there is a surreptitious conversation with an undercover officer once an accused has been indicted. It does not state that a *Miranda* waiver is invalid under the Sixth Amendment any time that an accused has already been indicted. In fact, the footnote goes on to note that the Sixth Amendment protects the attorney-client relationship.

Law enforcement filed a criminal complaint against Petitioner and obtained an arrest warrant. They proceeded to the state correctional institution where Petitioner was incarcerated to arrest him and questioned him at that time. Petitioner did not have counsel in this case at that time. Petitioner was advised of his right to counsel, but chose to waive his rights and speak with Agent Dincher. As Petitioner was not

represented by counsel at the time and he knowingly, voluntarily and intelligently waived his right to have counsel present while speaking with Agent Dincher, Petitioner's Sixth Amendment right to counsel was not violated. Counsel is not ineffective for failing to file a motion that lacks merit. *Commonwealth v. Johnson*, 139 A.3d 1257, 1272 (Pa. 2016)("counsel cannot be ineffective for failing to raise a meritless claim.") Furthermore, if counsel had filed such a motion, the court would have denied it based on Agent Dincher's testimony. Therefore, Petitioner has not suffered prejudice as a result of counsel's failure to file a motion to suppress Petitioner's statements on the basis that his Sixth Amendment right to counsel was violated.

B. Was trial counsel ineffective for failing to raise and litigate a motion to suppress the statements made to Deputy Sheriff Rockwell or otherwise object to the introduction of those statements?

Deputy Sheriff Brian Rockwell was one of the deputies that transported Petitioner from the Lycoming County Prison to the courthouse for hearings and trial in this case. At trial, Deputy Sheriff Rockwell provided brief testimony about two statements that Petitioner made to him when Petitioner was being transported on April 29, 2009. He testified that Petitioner told him (1) "Durrant lied and sucked up to [District Attorney Eric] Linhardt to get a deal" and (2) "I'm going to beat these charges because there is no name mentioned on the tape." Trial Transcript, May 20, 2010, at 56-57. He explained that he was the only Deputy in the vehicle with Petitioner because the statements were made when they had stopped for gas and Deputy Sheriff Michael Singer was pumping gas at the time the statements were made. Id. at 57-58.

There is nothing in the record to suggest that these statements were anything other than spontaneous statements made by Petitioner to Deputy Sheriff Rockwell during transportation. There is nothing in the record to show that Deputy Sheriff Rockwell questioned Defendant or said anything to him that would be likely to induce an incriminating response. Absent such information, there would be no basis to suppress the statements. In fact, during cross-examination of Deputy Sheriff Rockwell at trial, Attorney Rudinski asked, "And was there a conversation about this case?" and Deputy Sheriff Rockwell replied, "Nope." Id. at 58. Furthermore, Petitioner admitted in his direct testimony that he made the statement, but he was not talking to Deputy Sheriff Rockwell; he was thinking out loud. Trial Transcript, 05/21/10, at 167.

Similarly, there is nothing in the record to show that the statements were objectionable. The motion does not assert any basis for trial counsel to have objected and the court is not aware of any basis to object. The statements were relevant and admissible. The statements were not hearsay, because they were Petitioner's own statements so, when introduced by the Commonwealth, they qualified as statements of a party opponent under Pa. R. E. 803(25). Furthermore, the first statement was consistent with Petitioner's defense at trial that Durrant, who was the actual shooter, lied and blamed Petitioner to get a plea deal so that he would not receive a sentence of death or life without parole. Additionally, Petitioner testified at trial and attempted to explain the statements. He admitted that he said he could beat the case because there was no name on the tape, but he never told Durrant to kill Sawyer. Trial Transcript, 05/21/10, at 167, 169.

The court finds that Petitioner has failed to satisfy any of the three prongs necessary to establish an ineffective assistance of counsel claim. Therefore, this claim will be denied.

C. Was trial counsel ineffective for failing to litigate at trial and request a jury instruction regarding the voluntariness of Petitioner's statements made to law enforcement?

Petitioner contends that trial counsel was ineffective for failing to litigate at trial and request a jury instruction regarding the voluntariness of Petitioner's statements made to law enforcement. The court cannot agree.

The burden is on Petitioner to establish all three prongs of an IAC claim, i.e., the claim is of arguable merit, counsel had no reason for his allegedly ineffective act or omission, and prejudice. Although a defendant may challenge the voluntariness of his statements at trial even when the court has denied a motion to suppress and found that the statements were voluntarily made, he or she is not required to do so. In the court's opinion, the evidence presented at the suppression hearing that Petitioner's statements were involuntary was weak. At the suppression hearing, Agent Dincher testified that he, Officer Kontz, Officer Lucas and Officer Roy traveled to SCI-Smithfield to interview Petitioner. Officer Lucas and Officer Roy stayed outside of the interview room while he and Kontz interviewed Petitioner. He and Kontz were in plain clothes and were unarmed. The interview room was approximately 8 feet by 12 feet or 10 feet by 12 feet. There was a table and three chairs inside the room. They immediately identified themselves as police officers and read Petitioner his *Miranda* rights, which Petitioner waived. They showed Petitioner several CDs for three and one-half to four hours with a brief break for lunch. Agent Dincher was relaxed and did not raise his voice during the interview, as he wanted Petitioner to talk to him and did not want him to "shutdown." Petitioner's demeanor was cordial and laid back.

Petitioner testified at the suppression hearing that he was preparing to go to the yard when his cellmate told him he had a visit. Petitioner had no idea who would be there to visit him

because it was a Tuesday, which was not a visiting day for him. He went to the visiting room and put on visiting attire. There were six people in the room, most of whom were officers. Dincher asked him to go into the interview room, which Petitioner indicated was only about five to seven cinder blocks across and had a large window and a table that was too big for the room. Petitioner stated that before they gave him *Miranda* warnings, they played a tape of Kendra (his significant other) and told him that he would be looking at the death penalty and Kendra would be charged with murder if he did not cooperate. He knew he had been implicated in the Williamsport paper for this crime but even though he was not charged he still thought Dincher was a Public Defender. After about "fifteen minutes in", Petitioner claimed that he asked Dincher if he was a public defender and that is when they identified themselves as police officers and *Mirandized* him. He claimed he had "no choice" but to cooperate with them because he did not want charges for himself and/or for Kendra.

In rebuttal, Dincher testified that the Petitioner never asked if Dincher was a Public Defender and that he identified himself upon meeting the Petitioner. Kontz testified that when the Petitioner was brought into the interview room, they immediately identified themselves to the him. Kontz explained that the Petitioner was then *Mirandized* before any CD's were played and the interview began.

The court credited the testimony of the officers. Petitioner's testimony was not credible. His statements made no sense, particularly his claim that he thought that Dincher was from the Public Defender's Office. The voluntariness of a defendant's statement is determined based on the totality of the circumstances. The totality of the circumstances did not support a finding of involuntariness in this case.

No evidence was presented at trial to show that Petitioner's statements were involuntary. Therefore, Petitioner was not entitled to jury instructions about the voluntariness of his statements. *See Commonwealth v. Soto*, 202 A.3d 80, 99 (Pa. Super. 2018)("a defendant may not claim entitlement to an instruction that has no basis in the evidence presented during trial), *appeal denied*, 207 A.3d 291 (Pa. 2019).

Trial counsel testified that he did not have a reason for failing to litigate the voluntariness of Petitioner's statements at trial or request a jury instruction on voluntariness. The court questions this testimony. The evidence presented at the suppression hearing to show that the statements were not voluntary was weak. If Petitioner's weak suppression hearing testimony was presented at trial, it likely would have negatively affected his credibility in the eyes of the jury. It appears to the court that the defense strategy at trial was to show that Durrant, who was admittedly the actual shooter, was lying about Petitioner's involvement in the murder to help Durrant get a deal or a better deal for his own charges. It would make much more sense to pit Petitioner's credibility against Durrant's at trial than two law enforcement officers.

The court also does not believe that Petitioner has established prejudice. If the evidence that was presented at the suppression hearing was presented to the jury, the court does not believe that there is a reasonable likelihood that the jury would have found that Petitioner's statements were involuntary. Petitioner's testimony at the suppression hearing was not credible. Petitioner has not identified any additional evidence or testimony that would show that his statements were not voluntary and did not present any such evidence during the PCRA hearings. The court understands that the Commonwealth bears the burden to prove by a preponderance of the evidence that the statements were voluntary, but the testimony of Dincher and Kontz does that.

D. Was trial counsel ineffective for failing to request an appropriate cautionary instruction that Petitioner's drug dealing and his incarcerated status cannot be used as evidence of guilt?

Petitioner contends that his trial attorneys were ineffective for failing to request an appropriate cautionary instruction that Petitioner's drug dealing and his incarcerated status could not be used as evidence of guilt. The court cannot agree.

Evidence of Petitioner's drug dealing and his incarcerated status were admissible and could be used to establish his guilt by showing his motive to commit the crime and why he did not and/or could not kill the victim himself. This evidence also was part of the history or natural development of the case. Petitioner, the victim, Durrant and Javier Cruz-Echevarria were involved in a drug enterprise. Petitioner was incarcerated on drug offenses, and he believed that the victim was a "snitch." Through phone conversations and the "hit" letter, Petitioner directed Durrant to kill the victim. It was inevitable that evidence regarding Petitioner's drug dealing and incarceration was coming into evidence in this case. More importantly, Petitioner's defense was that the communications with Durrant were about their drug business and that he never directed Durrant to kill anyone.

To the extent that Petitioner is asserting that evidence of Petitioner's drug dealing and his incarcerated status could not be used to establish his propensity to commit crimes, the court concedes that this claim is of arguable merit. Petitioner's trial attorneys could have requested the court to give standard jury instruction 3.08 which states:

> 3.08 EVIDENCE OF OTHER OFFENSES AS SUBSTANTIVE PROOF OF GUILT
>
> 1. You have heard evidence tending to prove that the defendant was involved in [[[[[an offense] [improper conduct] for which [he] [she] is not on trial. I am speaking of the testimony to the effect that [explain testimony].

> 2. This evidence is before you for a limited purpose, that is, for the purpose of tending to [show [give specifics]] [contradict [give specifics]] [rebut [[[[[give specifics]] [give specifics]. This evidence must not be considered by you in any way other than for the purpose I just stated. You must not regard this evidence as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer guilt.

Pa. SSJI (Crim), §3.08. This instruction could have been tailored to explain to the jury the limited purposes for which this evidence could be used.

Although this claim may have arguable merit, Petitioner has failed to satisfy the two remaining prongs of an IAC claim. He has not established that trial counsel lacked a reasonable basis for failing to request such an instruction. Attorney Rudinski testified that he did not request such a cautionary instruction because he did not want to emphasize or highlight this evidence. PCRA Hearing, 06/23/21, at 17, 64-65.

The court also does not believe that Petitioner was prejudiced by the lack of a cautionary instruction. The defense theory of the case was that Durrant lied about Petitioner's involvement in order to secure a plea deal for himself, which would avoid the death penalty as well as a sentence of life imprisonment without the possibility of parole (LWOP). The defense did not want to focus on Petitioner's circumstances, but rather Durrant's bias in favor of the Commonwealth and interest in extricating himself from a sentence of death or LWOP. In its final instructions, the court instructed the jury about accepting the testimony of an accomplice like Durrant with caution. Trial Transcript, 05/26/2010, at 15-17. It also instructed the jury regarding the credibility of witnesses including any bias or interest the witness may have in the outcome of the case, and that it could not base its verdict sympathy for or prejudice against anyone. Id. at 23-26 (credibility), 29-30 (passion or prejudice). The defense could use these charges to try to convince the jury not to believe Durrant's testimony and to focus on Durrant's bad acts of drug

dealing and shooting the victim; rather than Petitioner's drug dealing and incarceration. Furthermore, no one improperly used the evidence at trial. The Commonwealth argued motive, but it did not argue propensity or dangerousness during the guilt phase of the trial.

Petitioner relied on the cases of *Commonwealth v. Billa*, 555 A.3d 835 (Pa. 1989) and *Commonwealth v. Moore*, 715 A.2d 448 (Pa. Super. 1998). The court finds that these cases are distinguishable.

In *Billa*, the evidence that was admitted at trial was much more inflammatory. Billa was on trial for rape and murder. The Commonwealth introduced evidence of a prior rape and attempted murder as part of a common plan or scheme. The details of the prior crime were admitted into evidence and they were graphic or inflammatory. The crimes were the same as the ones for which Billa was on trial. Here, no details of Petitioner's prior crimes were admitted into evidence. Petitioner was on trial for murder but the evidence regarding his prior crimes and incarceration related to him making phone calls from the jail to Durrant while incarcerated on pending drug charges and how the motive for the murder arose out the drug operation in which Petitioner, Durrant, Cruz-Echevarria, and the victim were all involved. The evidence was neither inflammatory nor graphic. The jury was aware that Durrant was the individual who actually shot the victim and he also was involved in drug dealing. The jury was not aware until the penalty phase that Petitioner had a prior conviction for murder.

In *Moore,* trial counsel introduced the defendant's criminal history rather than wait for the Commonwealth to do so to try to soften the impact of this type of evidence on the jury. The defendant had three prior convictions, two of which were *crimen falsi* offenses and one – aggravated assault- which was not. The Court found that trial counsel was ineffective for

introducing the inadmissible aggravated assault conviction. Here, no inadmissible evidence regarding Petitioner's prior convictions was admitted into evidence by trial counsel.

As previously stated, the defense in this case was to focus on Durrant and his bias. Asking for a jury instruction that would highlight Petitioner's criminal activities would not keep the focus on Durrant and instead would highlight the Commonwealth's theory of the case that Petitioner was the mastermind calling the shots from prison.

E. Was trial counsel ineffective for failing to request a Kloiber instruction regarding Marion Diemer's purported identification of Mr. Patterson?

Petitioner contends that trial counsel was ineffective for failing to request a *Kloiber* instruction with respect to Marion Diemer's identification of Petitioner. He claims trial counsel should have asked the court to give Pennsylvania Suggested Standard Jury Instruction 4.07(B) and he cites *Commonwealth v. Simmons*[6] for the proposition that counsel's failure to request this instruction entitled Petitioner to a new trial. The Commonwealth disagreed and argued that a *Kloiber* instruction was not required because Marion Diemer did not identify Petitioner as the killer of the victim but only as the individual who obtained the shotgun used in the murder and Petitioner admitted in his interview with Agent Dincher that he touched the shotgun.[7]

Marion Diemer was living with David Lehman. She took guns from Lehman to sell or to exchange for drugs. She provided the shotgun to Gregory Ricks for them to obtain drugs. She testified that she was in the driver's seat of the vehicle when Petitioner entered the vehicle to make the transaction with Ricks. She saw Petitioner for a few seconds through her rearview mirror. She admitted that she initially lied to the police and told the police that Ricks dropped

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[6] 647 A.2d 568 (Pa. Super. 1994), *appeal denied*, 540 Pa. 658 (1995).
[7] *See* Trial Transcript, 05/20/10, at 130-131.

her off at the Quik Fill and later returned. She didn't want to be involved and was afraid she would be charged. Three days later, she later admitted that the transaction occurred in the Jeep at the Quik Fill and that she was present during the transaction. The police showed Diemer a photo array and she pointed to Petitioner's photograph and said that it looked the guy without glasses. The police showed her a photograph of Petitioner with glasses and she positively identified him as the person who was in the back seat of the vehicle during the exchange with Ricks. She did not see Petitioner leave with the shotgun, but after he left the vehicle the shotgun was no longer in the back seat. She indicated that it was not dark, but it was getting dark. She admitted on cross-examination that she was high on the night the gun was exchanged, she never saw or met Petitioner before, she only saw Petitioner for a few seconds from the neck up because she looking through her rearview mirror and she was afraid to look but curious at the same time. She was also cross-examined about other inconsistencies in her prior statements and testimony and her testimony at trial. She could not remember the conversation between Ricks and Petitioner, and she wrote to Durrant for a few months out of fear, retaliation and guilt because she felt had if it not been for her using drugs that Durrant would not have had access to that gun. Trial Transcript, 05/18, 2010, at 38-90 (testimony of Marion Diemer).

The *Kloiber* instruction is found in Pa. SSJI (Crim) 4.07[8] which, at or near the time of Petitioner's trial, stated:

> 1. In [his] [her] testimony, [*name of witness*] has identified the defendant as the person who committed the crime. There is a question of whether this identification is accurate.
>
> 2. A victim or other witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it

[8] The instruction used to be part of 4.07(B), but it is now contained in 4.07(A).

with caution. Identification testimony must be received with caution [if the witness because of bad position, poor lighting or other reasons did not have a good opportunity to observe the criminal][if the witness in [his][her] testimony is not positive as to identity] [if the witness's positive testimony as to identity is weakened [by qualifications, hedging, or inconsistencies in the rest of [his] [her] testimony] [by [his] [her] not identifying the defendant, or identifying someone else, as the criminal [at a lineup] [when shown photographs] [*give specifics*] before the trial]] [if, before the trial, the defendant's request for a [lineup] [*specify request*] to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification] [if, [*give specifics*].

[*First Alternative: Court rules as a matter of law that caution is required:*]

3. In this case [there was evidence that [*name of witness*] could not see the criminal clearly] [*give specifics*]. Therefore, you must consider with caution [his] [her] testimony identifying the defendant as the person who committed the crime.

[*Second Alternative: Where there is a jury issue as to whether caution is required:]*

3. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution [*name of witness]*'s testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony.

4. You should consider all evidence relevant to the question of who committed the crime, including the testimony of [*name of victim or witness*], [any evidence of facts and circumstances from which identity, or non-identity, of the criminal may be inferred] [*give other circumstances*]. You cannot find the defendant guilty unless you are satisfied beyond reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.

Diemer did not identify Petitioner as the person who committed the crime, as she did not testify that Petitioner was involved in the murder of Sawyer. She identified Petitioner as the individual who obtained Lehman's shotgun from Ricks. Durrant used the shotgun to kill Sawyer.

A *Kloiber* charge is required "where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past. *Commonwealth v. Ali*, 608 Pa. 71, 106, 10 A.3d 282, 303 (2010). Such a charge was not required in this case because Diemer had the opportunity to clearly view Petitioner in the back seat of the Jeep; she did not equivocate on her identification of Petitioner and she did not identify anyone else or fail to identify Petitioner when given the opportunity to do so. She may have initially lied to the police about her being present for the gun transaction, but this affects her general credibility. It does not require an instruction that her identification testimony be received with caution.

Petitioner also was not prejudiced by trial counsel's failure to request a *Kloiber* instruction. If trial counsel had requested such an instruction, the Commonwealth would have opposed it as it did during these PCRA proceedings. The court would have denied trial counsel's request for such an instruction. Furthermore, the court properly instructed the jury regarding determining the credibility of witnesses, which included the considerations regarding Diemer's ability to see, hear or know about the things, her interest or bias, and her prior inconsistent statements. Specifically, the court told the jury:

> As judges of the facts you are the sole judges of credibility of the witnesses and their testimony. This means you must judge the truthfulness and accuracy of each witness's testimony and decide whether to believe all or part or none of the testimony. The following are some of the factors that you may and should consider when judging credibility in deciding whether or not to believe testimony. Was the witness able to see, hear, or know the things about which they testified? Was the ability of the witness to see, hear, know, remember or describe those things affected by youth or age or by any physical, mental or intellectual deficiency? Did the witness testify in a convincing manner? How did they look, act and speak while testifying? Was their testimony uncertain, confused, self-contradictory or evasive? Did the witness have any interest in the outcome of the case? Any bias, prejudice or other motive that might affect their testimony? How well does

> the testimony of the witness square with the other evidence in the case including the testimony of other witnesses? Was it contradicted or supported by the other testimony in evidence? Does it make sense?

Trial Transcript, 05/26/10, at 23-24. The court also instructed the jury regarding inconsistent statements as follows:

> You've also heard evidence that witnesses made statements on earlier occasions that were inconsistent with testimony in court. You may, if you choose, regard this evidence as proof of the truth of anything the witness said in the earlier statement. You may also consider this evidence to help you judge the credibility and weight of the testimony given by the witness at this trial.

Trial Transcript, 05/26/10, at 26. The court also gave the jury the standard instructions regarding false in one/false in all and conflicting testimony. Id. at 25, 28. In light of the instructions given to the jury, Petitioner was not prejudiced and/or any alleged error was harmless.

F. Were trial counsel and appellate counsel ineffective for failing to adequately litigate and preserve the issue of the denial of expert identification testimony of Dr. Jennifer Dysart?

Petitioner contends that trial counsel and appellate counsel were ineffective for failing to adequately litigate and preserve the issue of the denial of expert identification testimony of Dr. Jennifer Dysart. More specifically, Petitioner contends that trial and appellate counsel failed to do the following: (1) produce the expert report in a timely manner; (2) have the transcript of the argument on this issue prepared for appeal; (3) raise a state or federal due process claim that preclusion of the expert identification testimony violated Petitioner's right to present a defense; and (4) provide the court with a full proffer. The court cannot agree.

This claim lacks arguable merit. Although this particular IAC claim was not previously litigated, the underlying issue of admissibility of expert identification testimony in this case was

litigated at trial and on direct appeal. *See Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564, 573 (2005)(an ineffective assistance of counsel claim is distinct and therefore, not previously litigated; however, the claim may fail on the arguable merit or prejudice prong for the reasons stated on direct appeal).

At the time of Petitioner's trial in May of 2010, expert identification testimony was *per se* inadmissible. It was not until May 28, 2014 when the Pennsylvania Supreme Court decided *Commonwealth v. Walker,* 92 A.3d 766 (Pa. 2014), that any type of expert testimony regarding identification testimony became admissible. It is well-settled that counsel cannot be deemed ineffective for failing to predict a change in the law. *Commonwealth v. Cousar*, 638 Pa. 171, 154 A.3d 287, 303 (2017). Here, counsel anticipated a potential change in the law and asserted the issue at trial and on appeal. In rejecting Petitioner's claim that the court erred in precluding Petitioner from present expert identification testimony, the Court stated:

> We conclude Appellant's claim that the trial court erred in precluding him from presenting expert testimony to discredit Diemer's testimony is meritless, and that Appellant's reliance on *Biggers* is wholly misplaced. In *Biggers*, the challenged identification was made by the victim of the rape with which the defendant was charged, and the high Court ultimately determined there was no substantial likelihood of misidentification. Herein, the identification on which Appellant claims expert testimony was necessary was made by a witness who was voluntarily engaged in the sale of a gun, not by a witness who was the victim of a crime.
>
> Furthermore, we note that, as was the case in *Simmons*, during cross-examination, Appellant was free to, and did, challenge the witness's credibility and identification of Appellant based on, inter alia, the fact that the witness had not previously been involved in the sale of a firearm and was under the influence of drugs. Accordingly, we hold the trial court did not err in refusing Appellant's request to present expert testimony as to the effect of "gun sale stress" on eyewitness identification in the instant case.

Commonwealth v. Patterson, 625 Pa. 104, 129-130, 91 A.3d 55, 70-71 (2014).

Furthermore, *Walker* neither per se excludes nor per se admits expert identification testimony. Rather, the admissibility of such evidence is within the discretion of trial court and the use of such evidence is generally limited to situations where the Commonwealth's case relies solely or primarily upon eyewitness testimony. *Walker*, 92 A.3d at 787. Technically, Diemer was not an "eyewitness" as she did not observe the shooting of the victim. *See Commonwealth v. Buehl*, 508 A.3d 1167, 1180 (Pa. 1986)("a person who is not actually present at the scene of the crime is not an eyewitness"); *Commonwealth v. Lamb*, 455 A.2d 678, 684 (Pa. Super. 1983)(Corporal Hofe was not, strictly speaking, an eyewitness to the robbery since he did not witness the incident actually take place; rather, he saw individuals fleeing from the area where the crime took place); *Commonwealth v. Wolfe*, 447 A.2d 305, 312 (Pa. Super. 1982)(although witness saw an incident connecting the defendant to the crime, she did not see the crime with which he was charged; therefore, she was not an "eyewitness"). Moreover, the case against Petitioner did not rely solely or primarily upon eyewitness testimony. The case relied on testimony of Durrant, the "hit" letter, Petitioner's phone calls and statements. Diemer's testimony was only a small portion of the evidence against Petitioner. She may have put a gun in Petitioner's hands prior to murder but there were no allegations from anyone that Petitioner was the actual shooter. Therefore, the court finds that this issue lacks arguable merit.

Petitioner also has not established prejudice for several reasons. First, the court did not preclude the expert testimony due to the untimeliness of the expert report. If timeliness were the only issue, a continuance could have been granted to allow the Commonwealth to respond to the late report. Second, the Pennsylvania Supreme Court already held that such testimony was not admissible in this case. Third, even if *Walker* existed at the time of Petitioner's trial, the court would not have admitted expert identification testimony in this case as the case did not rely

solely or predominately on eyewitness testimony. Finally, even in the absence of Diemer's testimony, the Commonwealth had evidence in the form of Petitioner's own statements that he had access to the shotgun at some point in time as Petitioner admitted, in his police interview, to touching the weapon. Trial Transcript, 05/20/10 at 130-131 (testimony of Agent Dincher). Therefore, even if expert testimony had been admitted resulting in the rejection of Diemer's trial testimony, Petitioner's own statements connected him to the murder weapon.

G. Was trial counsel ineffective for failing to investigate and adequately object to the introduction of highly prejudicial rap lyrics as evidence pursuant to Pa. R. E. 404(b) and for failure to investigate, consult with and/or call an expert witness on the subject?

Contrary to Petitioner's arguments, the rap lyrics were not subject to preclusion by Pa. R. E. 404(b) nor were they unduly prejudicial. The rap lyrics were not other crimes, wrongs or bad acts. They were the words used by Petitioner to direct Durrant to kill Sawyer in this case. In the letter that Petitioner sent to Cruz and Durrant from prison, Petitioner stated "When I gave (sic) the word tear that ass out of that frame." Durrant testified that the phrase "tear the ass out of that frame" meant killing or getting rid of the victim. Trial Transcript, 05/19/10, at 66. Petitioner testified that the phrase came from a Tupac Shakur song and claimed that it related to drug dealing in the sense that nobody was going to make more money or provide better product than they were. Trial Transcript, 05/21/10, at 141-142. On cross-examination, the Commonwealth showed that in the lyrics of the Tupac Shakur song "Homeboyz", the phrase was used in the context of killing people. Trial Transcript, 05/24/10, at 138-39. On appeal, Petitioner asserted that the court erred in allowing him to be cross-examined with the song lyrics because the lyrics were not relevant and were highly prejudicial. The Pennsylvania Supreme Court found no merit to this argument. Therefore, to the extent that the first portion of this issue asserted that the rap

lyrics were highly prejudicial and inadmissible, the issue lacks merit. *Patterson*, 91 A.3d at 136-138.

PCRA counsel obtained an affidavit from an expert regarding the use of rap lyrics in general in trials and the use the phrase "tear the ass out the frame" by other artists. *See* Petitioner's First Amended PCRA Petition, Exhibit G. To the extent the expert claimed that the use of the lyrics at trial was highly prejudicial, the Pennsylvania Supreme Court has ruled otherwise. Furthermore, no one was suggesting that Tupac Shakur had killed anyone. The issue was to what was Petitioner referring when he wrote to Durrant and what did Durrant understand that phrase to mean. Petitioner was the one who brought rap lyrics into the trial by suggesting that the phrase was a lyric from a Tupac Shakur song. The Commonwealth then confronted Petitioner with lyrics from a song by that artist that suggested the reference was to killing people, not drug dealing as Petitioner contended. To the extent the expert notes other artists' use of the phrase in other contexts, it is irrelevant. Petitioner testified that the phrase was from a Tupac Shakur song, not any of the other artists mentioned in the affidavit.

The expert also asserted that there was another Tupac song where the phrase was used; however, the song- Bitch Please III- was a remix of songs by various artists that was compiled after Tupac's death. It utilized a portion of "Homeboyz" but after the phrase "Tear that ass out the frame" removed the following language: "completely get that ass kicked, Woke up on the street, but you'll be sleepin' in the casket". The remix, however, still talks about shooting people. After the deleted language, it continues:

> How long will it last? Nigga, don't ask, *just be first to blast*
> Outlaw on the mash, tryin' to be the first to see some cash
> My shit's classic, like my nigga Nate
> Go get the tape, we keep the nation anticipatin' until we break
> Money made me evil, court cases got me stressed

Niggas aimin' at my head, *but I still wear my vest* (emphasis added).

The remix also removed the last lines of that verse which in the original said:

> I don't give a f***, motherf***ers, I'm loc
> They all duckin' when my gun smoke
> You ain't shi* without your homeboys

Therefore, even the remix talks about shooting or killing people, it just does so in a more muted manner compared to the original. Accordingly, the court finds that this issue lacks merit and that Petitioner was not prejudiced by the failure to call this expert witness at trial.

H. Was trial counsel ineffective for failing to investigate, consult with and/or call a linguistics expert regarding the alleged "hit" letter?

Petitioner next contends that trial counsel was ineffective for failing to investigate, consult with and/or call a linguistics expert regarding the alleged "hit" letter. Petitioner asserts trial counsel should have called an expert witness to testify that while Cormier may have physical written the "hit" letter, the letter was not a transcription of Petitioner's words. There is nothing in the record to show that any witness was available and willing to testify as a linguistic expert in this case. According to the Amended PCRA petition, as part of the PCRA proceedings Petitioner anticipated calling Dr. Robert Leonard, an expert in forensic linguistics and anticipated that he would testify that the letter has linguistic features that closely resemble Cormier's other writings and features of a purely written communication, not a transcription of a spoken communication. According to the affidavit of Kalif Abney[9] another inmate who wrote letters for Petitioner, Petitioner would give Abney a general idea of what he wanted him to write in the letter, Abney would write the letter and then read it to Petitioner to make sure he was "alright with it."

[9] *See* Exhibit J of the Amended PCRA Petition.

The court did not grant an evidentiary hearing on this issue. Notably, Petitioner never provided an affidavit or witness certification from Dr. Robert Leonard. The court also finds that this issue lacks merit in light of Petitioner's trial testimony. During **direct** examination, Petitioner testified that he did not write the letter. His cellmate, Shaun Cormier, wrote the letter for him because Petitioner had an injured hand. Then the following exchange took place:

> Q. So he's writing this for you?
> A. Exactly.
> Q. ***Did you advise him what to write and he wrote it?***
> ***A. More or less, yes, I did***.
> Q. Okay, well you say more or less, obviously Mr. Linhardt's going to question you on that, what do you mean more or less?
> A. Okay, what I told him to write was what you all see there, but the way it was interpreted was --
> Q. All right, we'll get into that in a second, ***but the words you said were the words he wrote, correct?***
> ***A. Yes.***
> Q. Did you ask him to underline any words?
> A. Nothing was underlined.

Trial Transcript, 05/21/10 at 135-136 (emphasis added). As Petitioner admitted in his trial testimony that the words were his, any claim that the words were not his lacks merit. Additionally, the affidavit of Kalif Abney also supports that the ideas expressed in the letter would have been Petitioner's. Furthermore, Petitioner was not prejudiced. It is unlikely that the jury would accept the expert's testimony in light of Petitioner's admissions and it would negatively impact the defense as it would make the jury think that the expert is just a hired gun who would say anything.

I. Was trial counsel ineffective for failing to object to the enhanced security measures at trial?

Petitioner contends that there were enhanced security measures for Petitioner's trial that were not typically found in Lycoming County and that these security measures sent a message to

the jury that Petitioner was a dangerous individual and violated his due process rights. The court finds that this issue lacks merit. The court disagrees with Petitioner's contention that the security measures were not typical or that they sent a message to the jury that Petitioner was dangerous.

Although there is a metal detector in the lobby of the courthouse through which all members of the public are screened, whenever the court conducts a murder trial, there is second metal detector just outside the courtroom. There was a newspaper article with the headline that courthouse security was tight for this trial, but it did not indicate that that this was unusual for a capital case in Lycoming County. *See* First Amended PCRA Petition, Exhibit K. Rather, it stated: "A second metal detector was placed outside the courtroom. Court officials say the device has been used before in capital murder cases." *Id*. The article also noted that Petitioner "has been shuffled in and out of the courthouse by sheriff's deputies in the high[-]profile case." However, all individuals who are have been committed to jail because they have not posted bail are brought in and out of the courthouse by sheriff's deputies, and sheriff's deputies remain at various locations in the courtroom during criminal trials in Lycoming County, even when the individual is not in custody. Typically, there is one deputy by the entrance to the courtroom and one deputy toward or at the front of the courtroom near the bench.

The court adds the second metal detector outside the courtroom for murder trials for a couple of reasons. First, although infrequent, there have been instances where members of the public have made it through the initial screening despite carrying prohibited objects, such as knives, cell phones or recording devices, on their persons or in their belongings. Second, homicide trials, particularly ones in which the death penalty is sought, are very emotionally charged. It is a situation where individuals from both sides may have the most stress and, for lack of a better term, "motivation", for something untoward to happen. There are risks associated

with escape attempts by the defendant potentially with the aid of his supporters, as well as vigilantism from the victim's supporters to ensure that their concept of "justice" is carried out. There are also risks of outbursts or fighting amongst the competing supporters for both sides, which could require intervention by sheriff's deputies. Third, to quote an idiom attributed to Benjamin Franklin, "an ounce of prevention is worth a pound of cure." It is better to have those measures or resources in place and prevent a situation from occurring than to not have them and have a situation develop or escalate.

The court also finds that Petitioner was not prejudiced. Even if counsel had objected to the measures, the court would have overruled the objection and utilized the challenged security measures.

J. Was trial counsel ineffective for failing to object to Mr. Durrant's interpretation of the letter and the prison calls?

Petitioner contends trial counsel was ineffective for failing to object to Durrant's interpretation of the "hit" letter and six phone calls that Petitioner made from prison. He cites Rules 602 and 701 of the Pennsylvania Rules of Evidence to support his contention that Durrant should not have been able to testify about the meaning of letters and calls of which he had no personal knowledge. The court cannot agree.

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa.R.E. 701.

Rule 602. Need for Personal Knowledge

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Pa.R.E. 602.

1. ***The Letter***

Petitioner, Durrant and Cruz conspired to kill Sawyer. During trial, Durrant was questioned about the "hit" letter and six prison recordings from five calls and one visit. The letter was written by Petitioner so it was admissible as a statement of an opposing party. The "hit" letter was sent or directed to Durrant. He was the intended recipient of the letter. With respect to the letter, Petitioner's contentions clearly lack merit.

PCRA counsel questioned trial counsel about whether he had a strategic reason not to object to Durrant's interpretation of the letter. Trial counsel responded: "I don't know the—you know, at the time, what the context was, but it was a letter to—to him and he was telling what it meant, so I didn't feel that I needed to object to what he believed at that point." PCRA Hearing Transcript, 06/23/21, at 20. From trial counsel's response, the court concludes that he did not object because the letter was to Durrant. The court has already concluded that since the letter was written to Durrant, Rules 602 and 701 were not violated. This was also counsel's reason for not objecting. PCRA counsel did not ask trial counsel about the calls/recordings. Therefore, Petitioner has not established that trial counsel lacked a basis for failing to object.

Petitioner also was not prejudiced. Even if counsel had objected, the court would have overruled any objection based on Rules 602 or 701, because the letter, written by Petitioner, was directed to Durrant.

2. ***The recordings***

Durrant was questioned about five phone calls and one recorded visit. The first call was on March 24, 2007 at 9:23 p.m. Four people were part of that call – Petitioner; his girlfriend, Kendra Burrage; Javier Cruz; and Shaun Durrant. Durrant confirmed that those were the individuals on the call. Durrant testified that three-way calling was the usual way that Petitioner called them. Petitioner would call either Kendra or Cruz and the others would be present to also participate in the call. During this call, Petitioner told Cruz and Durrant to be present at Kendra's house the next day at 2:00 p.m. Trial counsel objected to this phone call, but the court overruled counsel's objection, because Durrant was present for this call. Trial Transcript, 05/19/10 at 68-72.

The second call was from March 25, 2007 at 1:58 p.m. Durrant testified that the call was between Petitioner, Cruz and Durrant. During this call, Durrant says "about Bop, let me take care of that. Durrant explained that "Bop" was Sawyer and that he was asking Petitioner to let him take care of Sawyer for being a snitch. By "take care of," Durrant meant kill Sawyer. Petitioner told Durrant to wait on that and Durrant replied "you give me the go ahead, and I'll do it then." Durrant explained that Petitioner wanted Durrant to wait until Petitioner had reviewed some paperwork about Sawyer being a snitch or witness against someone in the prison. Again, trial counsel objected, but then withdrew the objection when the DA explained that he was having Durrant explain what he meant by "paperwork." Petitioner then told Durrant he will have the word by the next visit, which would be a visit between Petitioner and Cruz on Tuesday, March 27, 2007. Cruz would then relay the message to Durrant. The message would be the "go ahead to kill Sawyer." During the call, Petitioner tells Cruz and Durrant that once he finishes going through the paperwork, he would give them the word and they would already know what to do.

Later in the conversation Petitioner and Cruz are laughing and saying that Raydar (Durrant) want that bull (Sawyer) bad but Petitioner can't sanction it yet. Durrant explained that conversation was about Petitioner giving him the word or the go ahead to kill Sawyer. Trial Transcript, 05/19/10, at 73-78.

The next recording was of a prison visit between Petition and Cruz on Tuesday, March 27, 2007 at 5:58 p.m. Durrant was not present at this visit. Trial counsel did not object to this recording. The DA had Durrant explain what Petitioner was saying to Cruz during this visit. Durrant testified that Petitioner was saying Sawyer had to be killed by Saturday. Durrant testified that following Cruz's visit with Petitioner, Cruz told Durrant that Petitioner had sanctioned or given the "go ahead" for Durrant to kill Sawyer. Trial Transcript, 05/19/10, at 79-81.

The next recording was of a phone call between Petitioner, Cruz and Durrant on March 27, 2007 at 7:58 p.m. Durrant had received the 'hit' letter from Petitioner in the mail earlier that day. Cruz had already told him that Petitioner gave the word. The 'other boy' was Sawyer and they were going to deceive him that the torch was being passed to him. Durrant says I got your kite today. Durrant explained that "kite" was slang for letter. Petitioner asks what's up with that 'other thing' (the killing). Durrant says that's going to be taken care of. He tells Petitioner he is going to go to Lowe's to get saw joint to break him down a little more, which meant that he is going to buy a saw at Lowe's to saw off the barrel of the shotgun. Durrant tells Petitioner, "I'm going to handle that" meaning I'm going to kill Sawyer. Petitioner says "when it's taken care of, he is going to breathe easier because he did business with that chump (Sawyer). Durrant explains that Petitioner is saying that they wouldn't have to worry about Sawyer snitching on them about their drug business. Petitioner than says we're three kings and you one of them baby.

We're all in this together. Three kings for life. Durrant explains that the three kings are Petitioner, Cruz and Durrant. Durrant then tells Petitioner "I'm going to make sure nothing come back on us while I'm living" and explains that meant he was going to make sure Sawyer does not set them up and snitch on them while he's living. Trial Transcript, 05/19/10, at 81-87.

The next recording played for the jury was a call from March 30, 2007 at 8:53 p.m. between Petitioner and Cruz. Cruz tells Petitioner that thing the about the other king was going to happen that night. Petitioner asks what thing and what king; there are only three kings. Durrant explained that the fake king was Sawyer and that he would killed that night. Petitioner responded to Cruz about be seen but don't be seen. Durrant explained that meant do it but don't be loud about it so you don't get caught. Trial Transcript, 05/19/10, at 88-90.

The District Attorney then played the next call between Petitioner and Cruz from March 30, 2007 at 9:27 p.m. Petitioner tells Cruz "if it ain't clickin tonight don't force it" and "on that 'other thing' if it ain't clickin' don't force it because we don't need no unnecessary mistakes because that boy be knockin' on your door not mine. Durrant explains that Petitioner is talking about selling all of the drugs and the 'other thing' is the killing of Sawyer. With respect to both, Petitioner is saying if it can't be done smooth, don't do it. Petitioner is also warning them that if they mess up the police will be knockin on the door of Durrant and Cruz. Trial Transcript, 05/19/10, at 90-92.

The final call played to the jury during Durrant's trial testimony was a call between – Petitioner and his girlfriend, Kendra, on March 31, 2007 at 9:23 a.m. Durrant did not explain this call; he merely identified the voices on the recording. Trial Transcript, 05/19/10, at 92-93.

After the prison recordings were played, Durrant testified that prior to March 31 he obtained a shotgun from Cruz; about 5 days before he shot Sawyer. He sawed off the barrel of

the shotgun and cut-off more of the butt or stock, which made the gun easier to conceal. He used a file to smooth the barrel after he cut it. He had a conversation on March 30 with Cruz about how get Sawyer to come and meet them so Durrant could kill Sawyer. Cruz would have to get Sawyer to come out because Durrant hardly knew/never dealt with Sawyer and Sawyer wouldn't trust Durrant. Durrant was present around 10:30 p.m. when Cruz called Sawyer and asked if he had drugs because Cruz had players who wanted to buy some drugs. Sawyer said he had to check and Cruz would have to call back later. Cruz calls later and Sawyer tells him it's a go. Cruz told Sawyer to meet him near Textron, but Sawyer did not know where Textron was. Instead, Cruz and Sawyer met up at Shamrock and Sawyer follow Cruz to the alley. Durrant got set up at alley. Durrant needed a cell phone so Cruz could call and tell him when Sawyer on his way. Durrant got a phone from Justine Gordner. Sawyer followed Cruz to alley. When Sawyer got out of his vehicle, Durrant snuck up behind him and shot him in the back of the head. He shot Sawyer a second time in the head while Sawyer was lying on the ground. Durrant then got in Cruz's vehicle and they left the area. The police started following them. Cruz slow down/stop and Durrant jump out of vehicle and flee. Durrant slipped, dropped gun, gloves and phone, which were recovered by the police after they apprehended Durrant. Trial Transcript, 05/19/10, at 93-109, 112-117.

With respect to the calls from March 24, March 25, and March 27 (at 7:58 p.m.), the court finds that Petitioner's claims lack merit. Trial counsel objected to the March 24 call and the court overruled that objection. Moreover, Durrant was a party to these calls and had personal knowledge of them. Therefore, Rules 601 and 702 were not violated.

With respect to the visit on March 27 (at 5:58 p.m.), the two calls on March 30, and the call on March 31, the court would find that this claim has arguable merit because Durrant was

not a party to these recordings. However, this does not mean that the recordings were inadmissible or that counsel was ineffective.

All of the recordings were conversations with Petitioner. Petitioner's statements were admissible as statements of an opposing party. Pa. R. E. 803(25)(A). The statements of Cruz were also admissible as statements of an opposing party, because they were statements of a co-conspirator during and in furtherance of the conspiracy. Pa. R. E. 803(25)(E). The statements of Cruz were also necessary to put Petitioner's statements in context. Durrant was familiar with the voices of Petitioner, Cruz, and Kendra. At a minimum, the recordings could be played for the jury and Durrant could testify regarding who was speaking during the recordings. *See* Pa. R. E. 901(b)(5).[10] Furthermore, although Durrant was not a party to half of the recordings, he was a party to the conspiracy to kill Sawyer and to deliver drugs, as were Cruz and Petitioner. All of the conversations in the recordings (except the recording of the call between Petitioner and Kendra[11]) were made in furtherance of the conspiracy. As such, Durrant would have knowledge about the slang terms being utilized and their meaning.

Petitioner also has not established the other two prongs for an effective assistance of counsel claim. Trial counsel was not questioned about his reasons or lack thereof with respect to the recordings. He was only questioned about the letter. Therefore, Petitioner has failed to establish the second prong for an IAC claim.

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[10] Rule 901(b)(5) states: The following are examples only—not a complete list—of evidence that satisfies the [authentication or identification] requirement: … (5) *Opinion About a Voice*. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

[11] With regard to the call between Petitioner and Kendra, Durrant only identified the voices on the recording. He did not offer any explanations about their conversation.

The court also finds that Petitioner was not prejudiced by trial counsel's failure to object. Had trial counsel objected to the recorded conversations to which Durrant was a party, the court would have overruled the objection. With respect to the other conversations, the court also likely would have overruled the objection on the basis that the conversations were in furtherance of the conspiracy to which Durrant was a party. Therefore, he had knowledge of conspiracy and the slang used by Petitioner and Cruz to discuss it.

In the alternative, even if trial counsel had made such an objection and the court had sustained it or erroneously overruled it, Petitioner was not prejudiced. The conversations in the recordings were admissible as statements of an opposing party. It is only Durrant's explanation of the conversations to which he was not a party that were arguably objectionable. Durrant did not offer any explanation of Petitioner's conversation with Kendra; he was familiar with their voices and merely identified them on the recording. Given the other evidence in the case, including Durrant's explanation of the letter that was written to him and the conversations to which he was a party, the jury would be able to understand the remaining conversations, even without Durrant's explanation of the calls and visit to which he was not a party. Therefore, there is not a substantial likelihood that the outcome of the proceedings would have been different.

K. Was trial counsel ineffective for failing to competently advise Petitioner about his decision to testify and to adequately prepare him to testify?

Petitioner next contends that trial counsel was ineffective for failing to competently advise him about his decision to testify and to adequately prepare him to testify. Petitioner has not satisfied his burden of proving all of the prongs of an IAC claim.

During the PCRA proceedings, Petitioner did not testify about trial preparation or what advice, if any, his attorneys gave him about testifying. During trial, Attorney Rude handled the

questioning of Petitioner. In the PCRA proceedings, Petitioner's counsel questioned Attorney Rude about trial preparation of Petitioner. Attorney Rude testified that since trials are fluid, the decision whether Petitioner would testify was probably made during trial. When asked if he prepared Petitioner to testify as a witness, Attorney Rude explained that he did not provide Petitioner with a script or ask him specific questions. Instead, there were conversations that he had with him discussing his story, what he meant by the letter, and discussing his connection and conversation to people on the outside. He did not conduct a formal mock direct or cross examination with Petitioner. Instead, he had conversation with Petitioner about what the Commonwealth's theory would be, and advised him to answer the questions asked of him, to not assume what they're asking and things of that nature. Attorney Rude also testified that he always has concerns about a defendant testifying. With regard to Petitioner, he could be volatile, he could come across the wrong way, and it would be difficult for defense counsel to control the situation during cross-examination. He also indicated that Petitioner may not have realized it, but every time Attorney Rude met with him was a discussion that Rude was using and seeing if he could testify. He also was sure that he reviewed with Petitioner how he should behave on the witness stand. PCRA Hearing Transcript, 06/22/21 at 45-47.

The prosecutor briefly questioned Attorney Rude about his preparation of Petitioner and concerns he may have had. Attorney Rude testified that he spoke frequently with Petitioner about the case, not only to prepare him for trial but to gain his trust and see how he would communicate and present himself. He also testified that he never provides his clients with a script for their testimony because he does not want their testimony to sound scripted. Attorney Rude agreed that he went into detail during Petitioner's testimony about three areas, including the "hit" letter. Petitioner explained where the phrase "tear that ass out the frame" came from

and that the letter meant get Sawyer out of the business, because he was a drain on the business; it did not mean to kill him. Attorney Rude explained that the defense attorneys believed that if Petitioner testified he would have to explain the letters the calls, and the whole communication about what really occurred. Attorney Rude admitted that he had some concerns about Petitioner's volatility and whether he would be aggressive, disagreeable, or raise his voice when he was challenged. Attorney Rude questioned or challenged him about his version and anything to see his personality and how he would testify. Attorney Rude believed that Petitioner would be able to testify not only intellectually, but also that he would be able to handle his emotions appropriately. He indicated that they presented a defense during the guilt phase that the jury could have found Petitioner not guilty. PCRA Hearing Transcript, 06/22//21, at 69-73.

The court finds that Petitioner has failed to satisfy his burden of proof on this claim.

The court finds that this claim lacks arguable merit. Attorney Rude did prepare Petitioner to testify; he just did not do so in the form of scripted questions or a mock examination. There was no evidence to refute Attorney Rude's testimony.

The court finds that there was a strategic reason for Attorney Rude not to utilize scripted questions or a mock examination; he did not want Petitioner's testimony to sound scripted or rehearsed. If the jury thought the testimony was scripted or rehearsed, they could be less likely to believe Petitioner's trial testimony and think it was a story that was simply made up for trial and repeatedly practiced.

The court also finds that Petitioner was not prejudiced. Petitioner's defense was that the Commonwealth and Durrant misinterpreted the letter and the "sanction" call, and Durrant was lying to get a plea deal. Petitioner's direct testimony provided helpful evidence to support that defense. Petitioner contended that he was telling Durrant and Cruz to cut the victim out of their

drug business and to be careful because the victim was a snitch who was working for the police and would set them up, then they also would be in jail like he was. To present the defense that Petitioner's words were being twisted and misconstrued, Petitioner had to testify. Only Petitioner could say what he meant.

L. Was trial counsel ineffective during voir dire for failing to inquire about the effect of Petitioner's prior murder that constituted the only aggravating circumstance?

Petitioner asserts that his attorneys were ineffective during *voir dire* for failing to question potential jurors about Petitioner's prior murder that constituted the only aggravating circumstance. The court finds that Petitioner has not satisfied his burden of proof.

During the PCRA hearings, PCRA counsel questioned Attorney Rudinski about the decision not to question jurors about Petitioner's prior third-degree murder conviction. Attorney Rudinski did not recall whether he questioned the jurors on that topic. PCRA counsel asked if the record reflects there were no such questions would you have a strategic reason for not asking that? Attorney Rudinski replied:

> A Well, there's a couple theories on jury selection and the death penalty, and I know one of them is to lay out all of those facts to make sure a jury could overlook it if appropriate. I don't, I guess. I don't.
> Q Okay. Did you think it would be important for the jury's -- to know about the jury's attitude about a prior homicide?
> A I didn't at first. Mr. Rude and I had a little conflict over the prior homicide. I thought we should get into a little bit of detail to let the jury know what the circumstances were and he was very reluctant to do that. It was probably one of the only things we had a real issue on.
> Q And -- and at the end, that sort of view may have prevailed, Mr. Rude's?
> A Yes, and as I've indicated, he was doing the death penalty phase primarily and that's –

PCRA Transcript, 06/23/2021, at 22-23. Attorney Rudinski did not complete his answer before PCRA counsel moved on to questioning him about Petitioner's race and the Commonwealth striking the only African American in the jury pool.

During cross-examination, the following discussion about the aggravating circumstance occurred:

> The aggravating circumstances, we -- you touched on that a little bit. What was your participation with respect to the aggravating circumstance being the prior homicide?
> A Well, if Mr. Rude had gotten any report from our experts, he would give me a copy so I would look at it. We would discuss it, but I may have talked to the expert once or twice on the phone, but nothing in depth. Mr. Rude was pretty much the one handling that end of it.
> Q Did you have anything to do with potentially exploring the circumstances surrounding the prior homicide?
> A I told you, that was -- as far as the case went, that was one area Mr. Rude and I had a dispute about. I, at that point, believed we should get in to detail and explain how it happened to show it wasn't quite like this homicide. And Mr. Rude didn't believe that and he was doing all of the other expert testimony, so I left it up to him at that point.
> Q What was his reasoning, if you recall for -- for not pursuing that in accordance with what you thought was appropriate at the time?
> A I -- I don't exactly know. Like I said, he was discussing with the -- our expert. I don't know if he thought that would highlight it or what his theory was on that.

PCRA Hearing Transcript, 06/23/2021, at 61-62.

PCRA counsel questioned Attorney Rude about why he did not investigate the prior murder and present evidence regarding the facts surrounding it during the penalty phase, but he never questioned Attorney Rude about why the jurors were not questioned about the prior

murder during *voir dire*. The court understands that Attorney Rude was questioned the day before Attorney Rudinski, but the court did not prohibit Petitioner or his counsel from recalling Attorney Rude to question him on this issue. Since it was Attorney Rude who did not want the jury to hear about Petitioner's prior murder and he was not questioned about *voir dire*, Petitioner has not met his burden of proof on this issue.

In this case, there may have been a benefit to not mentioning Petitioner's prior third-degree murder during *voir dire*. If the jury knew during *voir dire* that Petitioner had a prior third-degree murder conviction, it could make it less likely that the jury would accept the defense position during the guilt phase. In this case, Petitioner was not the shooter; Durrant was. The defense argued that Petitioner never intended for Durrant to kill Sawyer. Durrant misunderstood the letter that was written by Shawn Cormier on Petitioner's behalf. If the jury did not find Petitioner guilty of first-degree murder, there would be no penalty phase and no need for the jury to know about Petitioner's prior conviction.

M. Was trial counsel ineffective for failing to object to jury selection of the reference to multiple aggravating circumstances which was prejudicially misleading?

Petitioner next asserts that trial counsel was ineffective for failing to object during jury selection to a reference of multiple aggravating circumstances, which Petition contends was prejudicially misleading. The court finds that Petitioner has failed to satisfy his burden of proof on all prongs of an ineffective assistance of counsel claim.

Petitioner cites six locations in the record during jury selection that the court, the prosecutor or defense counsel used the term aggravating circumstances. Petitioner's objection is to the use of the plural rather than singular when the Commonwealth only gave notice of one aggravating circumstance.

During the questioning of Juror 118, the prosecutor said:

> Okay. Now, my next question for you is this. If you and your fellow jurors unanimously agree that these aggravating factors outweigh the mitigating factors the sentence must be death. Do you understand that?

Jury Selection Transcript, May 11, 2010, at 207. Juror 118 was selected for trial and became Juror 11.

During the questioning of Juror 122, Attorney Rude asked: "If we presented you evidence that outweighed the Commonwealth's aggravating factors you would then find even if it was a gruesome killing life in prison?" *Id*. at 263. Later, the prosecutor said to Juror 122:

> You will be required to weigh those factors and only if you and your fellow jurors unanimously agree that these aggravating factors outweigh the mitigating factors will the sentence be death. If you conclude that the mitigating factors, whatever they may be, outweigh any aggravating factors then the sentence must be life. Do you understand that?

The defense exercised one of its peremptory challenges to Juror 122. As capital cases require individual *voir dire,* no one other than Juror 122 would have heard these references. Since Juror 122 was not seated on the jury and no other jurors were present, Petitioner could not have been prejudiced by the references by both the Commonwealth and the defense to aggravating factors during the questioning of Juror 122.

On May 12, Attorney Rude asked Juror 135:

> Okay. For that second phase, and to help you come to that decision, the District Attorney's Office will present aggravating circumstances, facts and evidence they believe -- this can be different from what they've already presented in the trial, facts and evidence they believe should lead you to a decision of the death penalty; you understand that?
> A. Yes.

Jury Selection, 05/12/10, at 66. Counsel cannot object to his own conduct.

During questioning of Juror 136, he indicated that if he knew guilt absolutely no doubt, he would lean towards the death penalty. *Id*. at 110. Attorney Rude moved to strike Juror 136 for cause. The District Attorney viewed what the Juror stated as lingering doubt would be a mitigating factor, which is appropriate. The court then asked more questions of the juror to see if he understood that even if he found Petitioner guilty of first-degree murder beyond a reasonable doubt at the guilt phase, the death penalty and life imprisonment were equally viable options for the penalty phase and would depend on the evidence presented during the penalty phase. During that questioning, the court stated:

> And that testimony, that evidence may be aggravating factors, which the Commonwealth will argue outweigh anything else that could be presented by the defense, so that your verdict -- or your sentence should be death. The defense will present mitigating factors, and under the law there's eight different categories of mitigating factors, and that you are to consider those, because in some instances when a jury finds guilt on the charge of murder in the first degree, they find that mitigating -- that no aggravating factors exist and/or mitigating factors outweigh aggravating factors, so that they find a sentence of life imprisonment. The question that we need to know, regardless of who asks the question, but the answer we need to -- the question we need to know the answer to is whether or not, if you were selected as a jurors and you had now to go to the penalty phase, would you equally consider the information provided to the attorney -- provided by the attorneys so that when you hear my instructions on the law you do think of both as an option. I'm not saying at the very end both are going to be viable options, because clearly they're not. You're going to be asked to consider one or the other, are you going to consider my instructions, are you going to follow my instructions, which is that you have to find them both equally?
>
> THE JUROR: Yes.

Id. at 112. Based on the juror's answers to the court's questions, the court denied the defense motion to strike the juror, but allowed the attorneys to further question the juror. At the end of questioning, the defense exercised a peremptory challenge to strike Juror 136. *Id*. at 117. The

phrasing of the court's question was not inappropriate or objectionable. Therefore, defense counsel was not ineffective for failing to object. Furthermore, Petitioner was not prejudiced because Juror 136 was not selected to be a part of the jury that decided his case.

During the questioning of Juror 138, who knew Attorney Rude as a person who coached his grandsons in baseball and who knew Agent Dincher most of his life from living in the neighborhood, Attorney Rude asked the following questions:

> Q. Now, the Commonwealth, through the District Attorney's Office, will present what they consider aggravating factors. Factors they think you should listen to to determine a death penalty sentence; do you understand that?
> A. Yes.
> Q. Okay, and from the defense perspective I'll be presenting mitigating circumstances, facts and evidence that I believe should convince you that life in prison is the appropriate penalty. Do you understand that?
> A. Yes.
> Q. And you are to weigh them individually on your own, and decide if the aggravating factors outweigh the mitigating, or the mitigating factors outweigh the aggravating factors; do you understand that?
> A. Yes.

Id. at 134. This claim lacks merit. Defense counsel cannot object to his own questions. Furthermore, the questions were appropriate. During jury selection, everyone talked generically about weighing aggravating circumstances and mitigating circumstances to determine the potential jurors' views on the death penalty and the process for deciding what penalty should be imposed in this case.

Although PCRA counsel elicited from both trial counsel that the sole aggravating circumstance was Petitioner's prior third-degree murder conviction, neither Attorney Rudinski nor Attorney Rude were questioned about what, if any, reasons they had for not objecting to the plural references of aggravating circumstances related to this issue. This issue also was not briefed. There is nothing in the record from which the court can conclude that Petitioner has

satisfied his burden of proof with respect to the second prong of an ineffective assistance of counsel claim.

The court also finds that Petitioner was not prejudiced. Jury selection occurred during the eight business days between May 3-12, 2010. There were only six references during two of the days of jury selection. Only 2 jurors were selected for the jury and heard such a reference. The death penalty statute and the standard jury instructions speak of determining whether the aggravating outweigh the mitigating circumstances to determine whether a death sentence will be imposed. *See* 42 Pa. C.S.A. §9711; Pa. SSJI (Crim) §§15.2502E through 15.2502H. During the penalty phase, the court appropriately instructed the jury. Trial Transcript, 05/27/10, at 148-157. The jury is presumed to follow the court's instructions. *Commonwealth v. Johnson*, 289 A.3d 959, 1003 (Pa. 2023). Accordingly, the court finds that Petitioner has not established prejudice for this IAC claim.

N. Did the Commonwealth's discriminatory use of peremptory strikes violate Petitioner's state and federal constitutional rights and was counsel ineffective for failing to make a proper Batson challenge?

Petitioner contends that the Commonwealth used its peremptory strikes in a discriminatory manner which violated Petitioner's state and federal constitutional rights, and that trial counsel was ineffective for failing to make a proper *Batson* challenge. The court cannot agree.

Petitioner is a Black male. The Commonwealth utilized one of its peremptory challenges to strike the only Black juror, Juror 60, from the jury panel. During *voir dire*, Juror 60 stated that she had worked for the FBI for 1½ years in the fingerprint division. She did not have any animosity toward police or defendants in general and she would not believe police or give more

weight to their testimony simply because the witness was a police officer. She had strong feelings about the use of drugs, but not so strong that she couldn't be a fair juror. She did not like guns, but she could be fair even though there would be testimony about guns. She testified that she had been a victim of a hate crime in that her car had been spray-painted, perhaps by a neighbor and that she had a niece that had been murdered eight years earlier in Houston, Texas. The hate crime was not prosecuted due to insufficient proof that the neighbor was the person who committed the crime. She initially stated that, due to her niece's murder, she would probably have sympathy for the victim's family, but ultimately, she did not think that these experiences would affect her ability to be a fair and impartial juror. She would not automatically vote for or against the death penalty; it would depend on the circumstances. The perpetrator of her niece's murder did not receive the death penalty and Juror 60 was fine with that; she thought that life in prison was an appropriate sentence. The perpetrator had been convicted of rape as a result of an incident when he was 19 and the rape victim was 13. She acknowledged that it was wrong but did not see necessarily see it as a crime of violence. She noted that the perpetrator had only been out of jail for short period of time and perhaps had not acclimated to life outside of prison. She thought a woman from Clinton County who killed an elderly man deserved the death penalty because she knew the difference between right and wrong and due to the brutality of the murder.[12] She was willing to follow the law that a defendant is presumed innocent and the Commonwealth must prove his guilt and she would not have difficulty finding a defendant guilty if she was satisfied that the Commonwealth had proved him guilty. She had been a juror

[12] If the Court recalls the Clinton County woman's case correctly, she killed an elderly male World War II Veteran, who was her neighbor, by striking him over 60 times with an axe or a hatchet to steal money and a vehicle from him and as part of a gang initiation.

previously in a burglary case in which the jury found the defendant not guilty. She indicated that the people on both sides were not believable.

The District Attorney exercised a peremptory challenge to strike Juror 60. The District Attorney noted that she was previously on a jury where she found the defendant not guilty and he had excluded another juror on that basis. He also stated that Juror 60 was weak on the death penalty. The murderer of her own niece did not deserve the death penalty. He noted that that Juror #60 would consider being out a jail a short period of time to be mitigating where the Commonwealth would consider it an aggravating factor. He also noted that Petitioner also was only out of jail for a short time. Transcript, 05/06/2010, at 139-141.

The court found that the District Attorney provided race neutral reasons which were not pretextual and discharged Juror 60. *See* Transcript, 05/06/2010, at 143.

Petitioner contends that the Commonwealth committed a *Batson* violation and violated his constitutional rights by using its peremptory strikes to exclude the sole African-American juror on the panel. The court cannot agree.

> *Batson* set forth a three-part test for examining a criminal defendant's claim that a prosecutor exercised peremptory challenges in a racially discriminatory manner: first, the defendant must make a prima facie showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race; second, if the prima facie showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue; and third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination.

Commonwealth v. Harris, 572 Pa. 489, 817 A.3d 1033, 1042 (2002)(citations omitted).

> In the context of peremptory challenges, Pennsylvania law further requires the defendant, in his or her prima facie case, to make a record specifically identifying:
> 1. the race or gender of all venirepersons in the jury pools;

> 2. the race or gender of all venirepersons remaining after challenges for cause;
> 3. the race or gender of those removed by the prosecutor; and,
> 4. the race or gender of the jurors who served and the [race or] gender of jurors acceptable to the Commonwealth who were stricken by the defense.
> After such a record is established, the trial court must consider the totality of the circumstances to determine whether the defendant has made a *prima facie* case of purposeful discrimination.

Commonwealth v. Hill, 727 A.2d 578, 582 (Pa. Super. 1999)(citations omitted)

The court acknowledges that trial counsel did not establish the record required by *Hill*, but Petitioner was not prejudiced by this failure. The court readily acknowledges that Juror 60 was likely the only Black person in the jury panel and that the vast majority, if not all, of the remaining jurors were likely Caucasians. Even if Petitioner's trial counsel had created the necessary record, the outcome of the proceedings likely would not have been different, because the court found that the Commonwealth had race neutral reasons for the exercise of its peremptory challenge with respect to Juror 60 and that the Commonwealth did not engage in purposeful discrimination. The Commonwealth's race neutral reasons were not merely a pretext to remove minority jurors from the panel.

O. Was trial counsel ineffective for failing to object to and/or request appropriate cautionary instructions following the overwhelmingly prejudicial closing argument of the District Attorney?

Petitioner next contends that trial counsel was ineffective for failing to object to and/or request appropriate cautionary instructions following the closing argument of the District Attorney. With regard to a prosecutor's closing arguments,

> it is well settled that any challenged prosecutorial comment must not be viewed in isolation, but rather must be considered in the context in which it was offered. Our review of a prosecutor's comment and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial. Thus, it is well settled that statements

> made by the prosecutor to the jury during closing argument will not form the basis for granting a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict. The appellate courts have recognized that not every unwise remark by an attorney amounts to misconduct or warrants the grant of a new trial. Additionally, like the defense, the prosecution is accorded reasonable latitude, may employ oratorical flair in arguing its version of the case to the jury, and may advance arguments supported by the evidence or use inferences that can reasonably be derived therefrom. Moreover, the prosecutor is permitted to fairly respond to points made in the defense's closing, and therefore, a proper examination of a prosecutor's comments in closing requires review of the arguments advanced by the defense in summation.

Commonwealth v. Jones, 191 A.3d 830, 835–36 (Pa. Super. 2018)(quoting *Commonwealth v. Jaynes*, 135 A.3d 606, 615 (Pa.Super. 2016) (quotation marks, quotation, and citations omitted)).

Petitioner points to four areas in the District Attorney's closing argument that he contends were objectionable and prejudicial.

1. Appeal to Sympathy

First, Petitioner asserts that the District Attorney prejudicially appealed to sympathy when he made the following statement during his closing argument:

> It's not about Mr. Rudinski, and it's not about Mr. Rude. It's not about the Judge. It's not about you. It's not even about Mr. Patterson and his family. It's about Eric Sawyer. It's about giving Eric Sawyer and his mother justice…. It's you as the jury that have to give it to them, and you give them that justice with your verdict.

Trial Transcript, 05/25/10, at 109. Trial counsel did not object to these statements because he did not think that they were prejudicial. PCRA Hearing Transcript, 06/23/2021, at 28.

The court finds that this portion of the claim lacks merit. Trial counsel was not obliged to object to this statement. The District Attorney did not appeal to sympathy. He noted everyone's role in the proceedings and how it was the jury's role to decide the facts and ultimately decide

the guilt or innocence of the defendant. He neither introduced nor argued victim impact evidence. He merely asked the jury to render a just verdict by finding Petitioner guilty.

In *Commonwealth v. Coleman*, 913 A.2d 220 (Pa. 2006), the appellant made a similar argument. The prosecutor stated:

> I am not going to take up any more of your time. You have seen these people here and you saw the victim's mother take the stand. I hope you can send her home with a sense of justice and that justice has been done. She has to go back to that neighborhood, too. I am urging you to use your common sense because when you think about everything, of why he did what he did. Do not let him out of this one.

913 A.2d at 238. The Court rejected Coleman's claim and stated:

> This allegedly impermissible statement contains no mention of how the victim's mother's life has been altered by her son's death, but rather merely asks the jury to give the victim's mother a just verdict by declaring appellant guilty. The prosecutor's statement did not amount to impermissible victim impact argument. Nor is there anything in the argument that could be said to so destroy the objectivity of the jury that counsel were obliged to object. Because this individual claim of prosecutor misconduct has no more merit than the first, appellant cannot establish his primary layered ineffectiveness claim.

Id. Based on *Coleman*, Petitioner's claim lacks merit.

2. Vouching for the Credibility of Durrant

Next, Petitioner argues that the District Attorney improperly vouched for the credibility of the Commonwealth's chief witness, Sean Durrant, when discussing the terms of Durrant's plea agreement. Petitioner noted that during his closing argument, the District Attorney (DA) argued that "complete and truthful cooperation is a material condition of this agreement. What's the deal? The deal is, he tells the truth." Trial Transcript, 05/25/10, at 95. The DA then set forth the plea agreement in detail. He stated:

> The next part of the agreement. In the events (sic) that

> the District Attorney believes that the defendant has failed to fulfill any obligations under this agreement, then the District Attorney shall, in its discretion, have the option of petitioning the Court to be relieved of his obligations. What does that mean? It means if at any point we believe that Sean Durrant is lying, we're not bound by anything in this plea agreement. That's what that means.
> What's the next part of the agreement? In the event that the Court concludes that the defendant has breached the agreement, in other words that the Court has concluded that Sean Durrant is no longer cooperating and lying, what happens? The defendant will not -- the defendant will not be permitted to withdraw his plea. The District Attorney will be free to make any recommendations regarding sentence. The Commonwealth will be free to bring any other charges it has against the defendant, including charges originally brought against the defendant. What does that mean? It means if he lies, we're out. It means that even if we're out of this deal he can't take back his plea of third[-]degree murder, and we can refile charges of first degree murder and felons not to possess firearms, which we had withdrawn as part of this agreement. If he doesn't tell us the truth, he's stuck with his deal, he gets what he gets, and then he deals with first degree on top of it. That's the agreement with Mr. Durrant, and it is a [--] an agreement he well understands. Nothing in this agreement shall protect the defendant in any way from prosecution for perjury, false swearing, or obstruction of justice. He lies, he gets prosecuted. Period.

Id. at 95-96. Petitioner argues that this constitutes vouching, requiring a new trial. Petitioner relies on *Commonwealth v. Tann*,[13] *Commonwealth v. Sweeper*,[14] and several nonbinding federal circuit court cases.[15]

The Commonwealth argues that vouching occurs when the prosecutor states his or her personal opinion that the witness is telling the truth or when the prosecutor relies on or suggests that information outside of the record supports the witness's testimony. It argued that did not occur in this case as no statements were made by the

[13] 459 A.2d 322 (Pa. 1983).
[14] 450 A.2d 1368 (Pa. Super. 1982).
[15] *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994); *United States v. Smith*, 962 F.2d 923 (9th Cir. 1992); and *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980)

prosecutor or a witness that Durrant was telling the truth. There was evidence and testimony in the record about the plea agreement. A prosecutor is permitted to argue evidence in the record and is permitted to respond to the arguments made in the defense closing. The Commonwealth noted that the defense extensively argued about the plea and how it was the deal of a lifetime[16] and improperly gave his personal opinion when trial counsel stated he gets the deal if he tells the truth but he's still not telling the truth.[17] It argues that the DA's argument was based on evidence of record and fair comment or fair rebuttal to the defense closing argument. The Commonwealth relied on *Commonwealth v. Williams*,[18] *Commonwealth v. Lam*,[19] and *Commonwealth v. Sattazahn*.[20]

The *Williams* Court stated the test for improper "vouching" or bolstering as follows:

> For improper bolstering to occur, (1) the prosecutor must assure the jury the testimony of the government witness is credible, ***and*** (2) this assurance must be based on either the prosecutor's personal knowledge or other information not contained in the record.

896 A.2d at 541 (emphasis added). More recently, the Superior Court described vouching similarly:

> Vouching is a form of prosecutorial misconduct occurring when a prosecutor places the government's prestige behind a witness through personal assurances as to the witness's truthfulness, and when it suggests that information not before the jury supports the witness's testimony. Improper bolstering or vouching for a government witness occurs where the prosecutor assures the jury that the witness is credible, and such assurance is based on either the prosecutor's personal knowledge or other information not

[16] *See* Trial Transcript, 05/25/10, at 23-26.
[17] *See* Trial Transcript, 05/25/10, at 62 ("So he gets 25 years if he tells the truth, and he's still not telling the truth.").
[18] 896 A.2d 523 (Pa. 2006).
[19] 684 A.2d 153 (Pa. Super. 1996).
[20] 631 A.2d 597 (Pa. Super. 1993), *reversed on other grounds*, 952 A.2d 640 (Pa. 2008).

> contained in the record. Furthermore, vouching can occur when the prosecutor elicits improper comments from a Commonwealth witness.

Commonwealth v. Ramos, 231 A.3d 955, 959 (Pa. Super. 2020)(citations and internal quotation marks omitted). Even if "vouching" occurs, that does not end the inquiry.

> It is well settled that statements made by the prosecutor to the jury during closing argument will not form the basis for granting a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict. Like the defense, the prosecution is accorded reasonable latitude and may employ oratorical flair in arguing its version of the case to the jury. Prosecutorial misconduct will not be found where the comments were based on the evidence or derived from proper inferences.

Williams, 896 A.2d at 542. Furthermore, "[a] prosecutor may make fair comment on the admitted evidence and may provide fair rebuttal to defense arguments. Even an otherwise improper comment may be appropriate if it is in fair response to defense counsel's remarks. Any challenge to a prosecutor's comment must be evaluated in the context in which the comment was made." *Commonwealth. v. Burno*, 94 A.3d 956, 974 (Pa. 2014).

The court finds that this issue lacks merit. The DA did not expressly say that Durrant was credible and he did not argue evidence outside of the record. The main theme of the defense closing was that Durrant was lying about Petitioner's involvement to get the deal of a lifetime, and he lied with impunity. In addition to the specific references cited by the Commonwealth, trial counsel weaved arguments related to Durrant's stories and lies throughout his closing argument. The DA's argument was a fair comment or response to the defense closing. The DA's point was not that Durrant was telling the truth, but Durrant's risk or exposure of losing the deal entirely if he did not cooperate and testify truthfully. The DA's argument was not lengthy. The quotations in Petitioner's filing set forth above were the sum and substance of the DA's

argument on this topic. When the court heard the DA's argument, it did not strike the court as improper vouching. It also did not come across that way to defense counsel. *See* PCRA Hearing Transcript, 06/23/21 at 30.

Petitioner argues that "trial counsel acknowledged at the PCRA hearing that he "certainly" believed that the prosecutor's comments were vouching for the credibility of Mr. Durrant, but did not believe an objection was proper." Petitioner's Brief in Support, at 35-36. The court disagrees with Petitioner's characterization of trial counsel's testimony at the PCRA hearing.

During the PCRA hearing, PCRA counsel read the above-quoted portions of the DA's closing to trial counsel and asked him if he thought that there was anything objectionable about it. Trial counsel responded as follows:

> A The agreement was brought up during the trial. I -- I don't remember if it was the Commonwealth or we did, but it was -- I mean, our part of it was to show bias on the part of Mr. Durrant, and I think once we get into that, they can argue what the deal was.
> Q So you didn't -- did you believe that at least his comments in closing were some kind of veiled attempt at vouching for Mr. Durrant's credibility?
> A Certainly it was, yeah.
> Q Did you think there was anything objectionable about that in the context of a closing argument?
> A I guess I don't, because of the reason -- I don't think he really vouched for him, but he was on the edge of that. But the agreement was already in evidence.
> Q Okay. So if there was no objection, you just didn't believe that one was proper at that time?
> A That's correct.

PCRA Hearing Transcript, 06/23/21 at 30. Contrary to Petitioner's argument, the court interprets trial counsel's response as an acknowledgement that the DA was responding to trial counsel's

argument, he was arguing evidence in the record and that the DA, while arguing credibility, did not crossover into improper vouching.

After reviewing the cases cited by both parties, the court finds that this case is more similar to the cases cited by the Commonwealth than Petitioner. The court agrees that this case is controlled by *Williams.*

In *Williams*, the prosecutor noted that the witnesses' federal plea agreements required them to them to tell the truth and referenced the following statement that the federal judge made during the sentencing hearing for one of the witnesses: "And what does the Judge say? I commend you [Logan] for that. You [Logan] still came in here and told the truth even after you [Logan] were beaten. That's the Judge in the Federal trial." 896 A.2d at 542.

The Court found that the reference to the federal plea agreements did not constitute personal bolstering or improper vouching. *Id*. at 541. The Court found that the judge's statements "could more plausibly be viewed as improper vouching" but based on the appellant's evidence and arguments the appellant was not prejudiced and no relief was warranted. *Id*. at 542-543.

The court also finds that the cases Petitioner relies on are inapplicable or distinguishable.

In *Sweeper*, the prosecutor made an argument to the jury that if they believed the defense witnesses, they should "castigate [him] in essence for bringing a case found upon evidence fabricated by the police" and they should consider him a "big fool" to present that kind of perjured testimony. The defense objected and at sidebar requested a mistrial. The trial court did not think the prosecutor overstepped

any bounds and denied the mistrial request. On direct appeal, the Superior Court construed the prosecutor's remarks as saying "that the defense is a liar" and placing his own integrity on the line. The improper or personal vouching came from the prosecutor placing his own integrity at issue.

In *Tann*, the issue was not so much the terms of the witnesses' plea agreements, but the prosecutor's calling the witnesses' attorneys to testify about their clients voluntarily waiving their Fifth Amendment rights to self-incrimination so that the client could testify truthfully. This testimony amounted to personal vouching by the attorneys, but the relief in that case was inextricably intertwined with the improper inferences that arose out of that testimony when considered against the backdrop of a defendant who exercised his Fifth Amendment rights and chose not to take a plea deal or testify in his own defense. Here, Petitioner testified and there was no mention of any witness waiving their Fifth Amendment right against self-incrimination. The DA also did not call any witness to testify that Durrant was testifying truthfully as the attorneys did in *Tann*.

The court also finds the Federal cases cited by Petitioner to be inapplicable because they are nonbinding, they involved a different standard for vouching or a different procedural posture (direct appeal versus a post-conviction challenge) where the burden shifts[21] or the argument made or evidence presented was much more egregious. For example, in *United States v. Carroll*, the prosecutor made

[21] In a direct appeal context, the prosecution bears the burden of showing that any error is harmless (it did not or could not have affected the proceeding). In a post- conviction context, the petitioner bears the burden of showing that an error or omission occurred, there was no strategic basis for the error or omission designed to effectuate the petitioner's interests and that there is a likelihood that the error or omission affected the outcome of the proceeding.

statements such as "I submit to you that Robin and Richie Patrick are credible witnesses. I submit to you that no person would jeopardize themselves with this agreement to do anything but tell the truth" and "The truth. That's what this [plea agreement] represents for both Richie and Robin." 26 F.3d 1380, 1382 n.2 & n.3 (6th Cir. 1994).

In *United States v. Roberts*, the prosecutor argued evidence outside the record to bolster the witness's credibility. He indicated that a state police officer, Detective Sellers had been in the courtroom monitoring the testimony of John Harvey Adamson. During the prosecutor's closing argument, he argued that the plea agreement, coupled with Sellers' supervision, made Adamson a credible witness. He noted that Detective Sellers had been in the courtroom, he was not on vacation, and he had a mission to sit and listen to the testimony of Adamson. Defense counsel objected that there was no evidence of that and he had no idea if Sellers was on vacation or not. The judge admonished the prosecutor to stick to the record. The prosecutor persisted by saying "I submit to you, ladies and gentlemen that he was here to listen to that testimony and to make sure that –." He was interrupted again by the same defense objection. Before the judge could rule on the objection, the prosecutor said, "If Adamson lied, ladies and gentleman, the plea agreement is called off." 618 F.2d 530, 533 (9th Cir. 1980).

In *United States v. Smith*, in addition to the prosecutor arguing that the witness could not just "get up here and say whatever he wanted to say" because he would prosecute him for perjury if he did so, he stated that "the government's job is to . . . ferret through all the smoke screens and lead you to the truth" and "if I did anything wrong in this trial, I wouldn't be here. The court wouldn't allow that to happen." 962 F.2d 923, 934 (9th Cir. 1992).

The court also finds that Petitioner was not prejudiced. The jury was instructed that the arguments of counsel are not evidence, and that it was the judge or determiner of the facts and the credibility of the witnesses. Trial Transcript, 05/26/10 at 24-28, 32. Furthermore, having sat through the trial, the court believes that the jury accepted Durrant's testimony based not on the DA's argument about the plea agreement, but rather the corroboration of Durrant's testimony by Petitioner's own words in the hit letter and the prison calls, particularly the sanction call.

3. Improper/Inaccurate Definition of Reasonable Doubt

Petitioner also argues that trial counsel was ineffective for failing to request a cautionary instruction when the District Attorney explained the concept of reasonable doubt in such a way as to shift the burden onto the defense. The District Attorney stated:

> We'll hear instruction from the Court about reasonable doubt. Reasonable doubt is that doubt that would cause an ordinary person to hesitate in a matter of importance in their own affairs. It is not evidence beyond all doubt. It is not evidence to a mathematical certainty. **Only if you find that innocence is a reasonable possibility do you have a reasonable doubt.** And in this case the evidence is clear, and it is overwhelming.

Trial Transcript, 05/25/10, at 108 (emphasis added to highlight the language Petitioner finds objectionable). Petitioner acknowledges that trial counsel objected to this language after the District Attorney finished his closing argument (*see id.* at 112-114), but faults him for not requesting a cautionary instruction. Trial counsel not only objected, but he requested a mistrial. The court denied that request.

At the PCRA hearing, trial counsel testified that he did not request a cautionary instruction because he did not want to highlight it and the judge was going to give an instruction on what a reasonable doubt was. PCRA Hearing, 06/23/21, at 31-32.

Petitioner has not established the three prongs of an IAC claim.

First, the allegedly objectionable statement did not state that the defendant had any burden of proof. The District Attorney's statement "only if you find that innocence is a reasonable possibility do you have a reasonable doubt" was his shorthand way of stating concepts similar to those expressed by the court when it instructed the jury that "a reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt; it may not be an imagined one, nor may it be a doubt manufactured to avoid carrying out an unpleasant duty." Trial Transcript, 05/26/10, at 11.

Second, trial counsel had a strategic reason for not requesting such a cautionary instruction. He did not want to highlight the District Attorney's description of reasonable doubt.

Third, Petitioner was not prejudiced by trial counsel's failure to request a cautionary instruction. After the District Attorney gave his description of reasonable doubt in his closing, and even before trial counsel made his objection, the court instructed the jury as follows:

> So please, again, remember all my cautionary instructions to you about what you should and should not do, because ***you have not heard -- you've heard everything but my instructions to you on the law, so even though the attorneys may have educated you about that, I'm the final determiner of the instructions.*** So please don't discuss this case with, anyone and I guess the best thing would be to, if possible, *just put it out of your mind,* don't even think about anything, because if you're to deliberate **you're only supposed to be deliberating with all of you together in the deliberation room** ***after you've heard my instructions on the law.***

Trial Transcript, 05/25/10, at 111 (emphasis added). Based on the court's instruction, there was no need for trial counsel to request a cautionary instruction; the court basically had already given one in a manner that did not highlight the District Attorney's statement during closing. Since the court had already given an instruction, there was no need for trial counsel to request one and Petitioner was not prejudiced by trial counsel's failure to request such an instruction. Moreover,

the court told the jury in its preliminary instructions and in its closing instructions that the Commonwealth has the burden of proof; the defendant does not have a burden of proof and need not present any evidence, the arguments of the attorneys were not evidence; the jury determined the facts and the court determined the law; a reasonable doubt is one that would cause a reasonable person to hesitate in a matter of importance in his or her life; the court would instruct them on the law, and it was the court's instructions that would control, not counsel's arguments. Trial Transcript, 05/25/10 at 8-12, 17; Trial Transcript, 05/26/10, at 8-11, 22-32. The law presumes that the jury will follow the court's instructions. *See Commonwealth v. Johnson*, 289 A.3d 959, 1009 (Pa. 2023), citing *Commonwealth v. Chmiel*, 30 A.3d 1111, 1184 (Pa. 2011).

Accordingly, the court finds that of Petitioner's IAC claim related to this aspect of the District Attorney's closing argument does not entitled Petitioner to a new trial.

4. Comment on Defendant's Right to Remain Silent

During his closing argument, the District Attorney talked about the comments Petitioner made to Deputy Sheriff Rockwell. Petitioner contends that the District Attorney's statements were an improper comment on Petitioner's post-arrest silence. The court cannot agree. In the court's view, Petitioner misinterprets the District Attorneys argument.

Petitioner focuses on a small portion of the District Attorney's comments and takes them out of context. The court will provide the statement in context with the portion highlighted by Petitioner in bold.

> The telephone call that happens on March 25th of 2007 at two o'clock. This is the phone call on March 25, 2007 at two o'clock, a telephone call from the Lycoming County Prison from Maurice Patterson to Sean Durrant and Javier Cruz. The sanction call. Now there's a number of things that are significant about this call. The first thing that should jump out at you as you look at this is what Maurice Patterson said to Deputy Brian Rockwell. I want to show you what has been

previously marked as Commonwealth's Exhibit 69.

What did Maurice Patterson say to Deputy Brian Rockwell while being transported on April 29, 2009? He says, I'm going to beat these charges because there's no name mentioned on the tape. That's what he said, it's not what I say. Thank you.

Why is that important? It's important because he didn't say he was innocent, he said he's going to beat the charges. And he didn't utter a single word about these conversations being about drugs, which is what his whole defense has been since we've gotten here. He said he's going to beat the charges because no name is mentioned on the tapes. The conversation he forgot about was the conversation of March 25, 2007 when Mr. Durrant says, and about with "Bop," Eric Sawyer, let me take care of that. He forgot about this conversation.

He goes on to say in response to what Mr. Durrant says to him, about with "Bop", let me take care of that, he says, hold fast on that. Mr. Durrant says, you give me the go ahead -- you give me the go ahead, I'll do it then. He says, okay, let me finish looking through some paperwork, I'll give you the word, and when I give you the word you already know what it is, and he says, all right. What's chilling about this phone conversation is what they say next, I will play for you the second part of Commonwealth's Exhibit 28B.
(WHEREUPON recording played.)

He want the bull bad, but I can't sanction that just yet, and they're laughing. They're laughing. Mr. Patterson and Javier Cruz are laughing that they got Mr. Durrant so jacked up over this lie that Eric Sawyer is a rat and a snitch that he's ready to kill him now, and they're laughing about it. But what does Maurice Patterson say? I can't sanction that yet. His words, not mine.

Most important about this call, this sanction call, this sanction call is what makes him guilty. It's his sanction. His word, not mine. I can't sanction that yet. It's the sanction that makes him guilty of conspiracy. It's his sanction that makes him guilty of solicitation. It's his sanction of this murder that makes him an accomplice to murder.

Trial Transcript, 05/25/10 at 66-68. The District Attorney was not arguing or making a comment about Petitioner's silence. Petitioner did not remain silent. He had conversations with his co-

defendants/co-conspirators during recorded prison phone calls and visits, and he made statements to Deputy Sheriff Rockwell when he was being transported to a court hearing. The District Attorney was arguing how Petitioner's statements showed his guilt and how his statements were inconsistent with his trial testimony.

P. Were Petitioner's due process rights under the state and federal constitutions violated when the court precluded counsel from introducing the testimony of Douglas Shaheen that another individual ordered Durrant and Cruz to kill the victim?

Petitioner next asserts that his due process rights under the state and federal constitutions were violated when the court precluded counsel from introducing the testimony of Douglas Shaheen that another individual ordered Durrant and Cruz to kill the victim.

The way this issue is phrased is misleading. The court did not preclude counsel from calling Douglas Shaheen to testify as a witness at trial. The court precluded counsel from calling Shaheen, who could no longer remember speaking with Trooper Clark or Agent Dincher, to play in front of the jury a recording of Shaheen's interview with Trooper Clark to purportedly refresh his recollection. Although currently labeled as a "due process" claim, Petitioner's claim relies on the same evidence and the same hearsay exception, Rule 803.1(3), that was litigated on direct appeal.

To be eligible for relief under the PCRA, the petitioner must show that the issue or claim was not previously litigated or waived and that the failure to raise this issue prior to or during trial or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel. 42 Pa. C.S. §9543(a)(3), (4). An issue is previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa. C.S. §9544(a)(2). An issue is waived if it could have been raised before trial, at trial, or on appeal. 42 Pa. C.S. §9544(b).

> In this context, "issue" is "the discrete legal ground" that was forwarded to the highest appellate court and which would have entitled the defendant to relief. *Commonwealth v. Collins*, 585 Pa. 45, 888 A.2d 564, 570 (2005). Although there can be many theories and allegations in support of a single issue, Section 9544 refers to the discrete legal ground already raised and decided. *Id*. An issue is not previously litigated when it does not rely solely upon previously litigated evidence. *Commonwealth v. Miller*, 560 Pa. 500, 746 A.2d 592, 602 n.9 & 10 (2000).

Commonwealth v. Chmiel, 173 A.3d 617, 627 (Pa. 2017).

Although not asserted as a due process claim, the court's refusal to permit defense counsel to refresh Shaheen's recollection by playing in front of the jury Shaheen's recorded statements with Clark was litigated on direct appeal and rejected. The Pennsylvania Supreme Court stated:

> At trial, Appellant sought to call Douglass Shaheen as a witness. According to Appellant, Shaheen previously worked as a confidential informant, and, at one point, provided information to a state trooper ("Trooper Clark") about an individual, "AB", who allegedly was involved in the victim's murder. Appellant sought to introduce this testimony to show that the police had information that another individual was involved in the murder, but failed to follow up on such information. Prior to testifying, however, Shaheen indicated that he did not recall speaking with Agent Dincher, and did not recall "what he said to Trooper Clark." N.T. Trial, 5/21/10, at 55. Appellant thus sought permission to refresh Shaheen's recollection as to what he told Trooper Clark by playing for the jury a videotape of Shaheen's statement to Trooper Clark, notwithstanding Appellant's acknowledgement that "much of the information on the taped interview was about other individuals which would not be relevant and the information about 'AB' would be hearsay if played." Appellant's Brief at 51. Notably, the transcript does not indicate whether the videotape had been played for Shaheen outside of the presence of the jury, and reveals no request by counsel to have the videotape played outside the presence of the jury.
>
> The trial court refused to allow the defense to play the videotape in front of the jury on the basis that "if Shaheen had no memory of his conversations, the Court could not allow the Defense to play the video tapes, and therefore Shaheen was not needed as a witness." Trial Court Opinion, 1/18/12, at 40. Appellant argues that he should have been permitted to refresh Shaheen's recollection of his conversation with Trooper Clark by playing the recorded interview pursuant to Pennsylvania Rule of Evidence 803.1(3). Appellant further suggests, "[i]f the Court truly believed that some of the

> information was not admissible it either could have been redacted or Mr. Shaheen could have been given the tape to refresh his recollection outside of the presents [sic] of the jury but in the present case Appellant believes it was appropriate even in front of the jury." Appellant's Brief at 53.
>
> Rule 803.1(3) provides:
>
> (3) Recorded Recollection of Declarant–Witness. A memorandum or record made or adopted by a declarant-witness that:
>
> (A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;
>
> (B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and
>
> (C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made.
>
> If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.
>
> Pa. R.E. 803.1.
>
> As the Commonwealth highlights, ***the trial court did not preclude the defense from attempting to refresh the witness's recollection with the videotape; rather, it prohibited the playing of the tape in front of the jury, which is consistent with Rule 803.1. Thus, we find no error in the trial court's refusal to allow Appellant to refresh Shaheen's recollection by playing a videotape in front of the jury.***

Commonwealth v. Patterson, 625 Pa. 104, 141–42, 91 A.3d 55, 77–78 (2014)(emphasis added), *abrogated on other grounds by Commonwealth v. Yale*, 665 Pa. 635, 249 A.3d 1001 (2021). The issue of whether the court erred in precluding the defense from playing for the jury the tape of Shaheen's interview was litigated on direct appeal. PCRA counsel is merely asserting a new theory in support of this issue. He relies on the same evidence and circumstances as appellate counsel did during direct appeal. Therefore, this issue was previously litigated.

Even if this due process claim is considered a distinct legal issue, it was waived by failing to assert it during trial or on direct appeal. Trial and appellate counsel could have asserted that precluding the defense from playing the tape violated Petitioner's due process rights, but they did not. Therefore, this claim is waived.

Petitioner did not assert that trial/appellate counsel was ineffective for failing to object to the preclusion of the Shaheen tape as a violation of his due process rights and/or failing to assert this due process claim on direct appeal. Even if PCRA counsel had asserted this issue as an ineffective assistance of counsel claim, the court would reject it. To the court's knowledge, neither party submitted the tape of Shaheen's interview into evidence as part of the PCRA proceedings. Petitioner has the burden of proof, which he cannot satisfy without the introduction of the tape. Furthermore, the court does not know what Shaheen said about "AB"/ Posie's alleged involvement in the murder or Shaheen's source of information. Since trial/appellate counsel conceded in the appellate brief that the information about AB would be hearsay if played, it is likely that the information came from someone other than AB or AB did not say that he killed the victim or directed Durrant to do so. For all the court knows, Shaheen's information about AB/Posie came from Petitioner starting a rumor at the prison or another inmate overhearing Petitioner's conversation with Durrant and/or Cruz about the victim being a "snitch" against AB. See Trial Transcript, 05/09/10, at pp. 73-78 (Durrant testimony about March 25, 2007 phone call that Petitioner would give him the word after he finished reviewing paperwork about the victim being a "snitch") and at pp. 121-122, 144-146, 170-171, 199, 201-202, 216 (regarding being lied to about the victim being a "snitch" against AB). [22]

Although a defendant may have a due process right to present evidence of another perpetrator or to present a complete defense, that does not mean that he can do so with whatever evidence in whatever manner he wishes. "Third person guilt evidence is admissible if it is

[22] Durrant testified that Petitioner told him that the victim was working with the police and setting up drug buys and the victim wanted to set up Petitioner for a heroin buy. Trial Transcript, 05/19/10 at 59. Ronald Posie was incarcerated in the Lycoming County Prison in 2007, but he was not charged with drug offenses; he was charged with robbery and related offenses. See *Commonwealth v. Posie*, CP-41-CR-0000017-2007.

relevant, not otherwise excludable, and surmounts the disqualifying considerations of Pa. R. E. 403." *Commonwealth v. Yale*, 249 A.3d 1001, 1023 (Pa. 2021). The due process clause does not require the admission of inadmissible hearsay. Petitioner failed to present evidence from AB (Ronald Posie) or show the basis of Shaheen's statements. In other words, Petitioner failed to show that the proposed evidence was not inadmissible hearsay. The Pennsylvania Supreme Court already found that the recording of Shaheen's statements to Trooper Clark were not admissible under Pa. R. E. 803.1(3), which is the same rule upon which Petitioner bases his current arguments. Based on the Court's opinion on direct appeal, the court finds that this issue lacks merit.

Petitioner relies on *Holmes v. South Carolina*,[23] *Commonwealth v. Boyle*,[24] and *Commonwealth v. Ward.*[25] This reliance is misplaced.

In *Holmes*, the Court stated:

> State and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

547 U.S. at 325. Arbitrary rules are rules that exclude important defense evidence but do not serve any legitimate interests. *See id*. The Court found that South Carolina's rule that precluded defense evidence where the State's evidence was strong and the defense proffer did not raise a

[23] 547 U.S. 319 (2006).
[24] 368 A.2d 661, 669 (Pa. 1977).
[25] 605 A.2d 796 (Pa. 1992).

reasonable inference to his own innocence was arbitrary as it only evaluated the strength of one party's evidence and assumed that the strength of that party's evidence necessarily made the other party's evidence weak when, in fact, no such logical conclusion could be made. *See id.* at 330-31.

Here, the trial court analyzed the admissibility of the tape based on recognized hearsay principles designed to ensure the reliability of evidence admitted at trial and to permit the opposing party to cross-examine the witness. These are legitimate interests. The admission of hearsay that is not subject to any exception under the rules of evidence would permit the introduction of unreliable evidence that could be no more than rumor, innuendo or speculation.

In *Ward,* the Pennsylvania Supreme Court stated: "An accused has a fundamental right to present evidence so long as the evidence is relevant and not excluded by an established evidentiary rule." 605 A.2d at 797. In the *Ward* case, the appellant was the person with information about other individuals' motive to set a fire. The lower court permitted the appellant to testify but precluded testimony from the officer for whom the appellant was working as an informant and a Red Cross worker who would testify that all of the appellant's belongings were destroyed in the fire. The appellant testified about his status as an informant, the recent arrests of the individuals he was an informant against, and his fears of retaliation. This exposed the appellant to cross-examination by the prosecutor with his *crimen falsi* convictions. The Court found that it was not error to preclude the officer's testimony that the appellant had called him and made statements that he heard rumors that the drug dealers who had been arrested were out to get him or that he feared retaliation as this evidence was inadmissible hearsay. *Id.* at 797. The trial court erred, however, in precluding the officer from testifying about facts relating to the appellants status and reliability as an informant and precluding the Red Cross worker from

testifying about the appellant's request for assistance due to the loss of all his property in the fire. *Id*. at 798. This evidence was relevant and admissible to show the drug dealers' motive to set fire to the appellant's residence as well as to undermine the Commonwealth's evidence that appellant set the fire due to a disagreement with his brother by arguing the unlikelihood that appellant would destroy all of his worldly possessions merely because of a disagreement with his brother. *Id.* at 797-98.

Here, Shaheen was either unwilling or unable to testify as the defense had anticipated. Had Shaheen been willing able to testify about AB's involvement in the murder of the victim, the court likely would have permitted him to do so, provided Shaheen's testimony was based on statements that AB made directly to him (and not on rumor, innuendo or hearsay). That, however, is not what the defense wanted to do. Instead, the defense wanted to play Shaheen's taped statements to Trooper Clark in front of the jury to show that AB ordered Durrant to kill the victim. The court did not permit the defense to do that because those statements were hearsay and the bell could not be unrung if the recording did not refresh Shaheen's recollection. The recording consisted of out-of-court statements being offered for the truth of the matter asserted, which is the definition of hearsay. *See* Pa. R. E. 801(c)("'Hearsay' means a statement that (1) the declarant did not make at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

Trial counsel also had a reason for not calling Shaheen as a witness. Shaheen could no longer remember what he said to the law enforcement officers; he was no longer willing or able to testify in the manner that trial counsel thought that he would. See PCRA Hearing Transcript, 06/23/21, at 37-38.

For the foregoing reasons, the court finds that this claim fails.

Q. Was trial counsel ineffective for failing to conduct a competent investigation and preparation to further the defense theory that he was not involved in the murder?

Petitioner next asserts that trial counsel was ineffective for failing to conduct a competent investigation and preparation to further the defense theory that he was not involved with the murder. Petitioner contends that trial counsel was ineffective for failing to fully and adequately interview Shaheen prior to trial; failing to adequately prepare Shaheen for his trial testimony; and failing to interview and/or call at trial the following witnesses: Cruz, Shawn Cormier, Timothy Golder, Kalif Abney, and Darnell Mitchell. According to the PCRA petition, Cormier could have testified that Patterson never made him do anything and that Durrant was trying to set up Patterson. Golder could have testified that he observed Patterson when he used the telephone on March 31, 2007 and remembers how Patterson was visibly upset and began to cry when he learned information about what his "little brother" had done. Kalif Abney could have testified that Patterson was a small-time dealer who was not a leader of any organization; he helped Patterson write letters and Patterson would not specifically tell him what to write but would give him general topics/ideas and Abney would provide the specifics and read it back to Patterson; and the victim had a lot of enemies because he robbed people and messed with a lot of dudes' girls and then bragged about it. Darnell Mitchell could testify that Petitioner was not a big-time drug dealer, but he tried to make himself look bigger than he was and Mitchell "heard" another individual, A.B., was involved in the killing.

In the PCRA hearings, Attorney Rudinski was questioned about his trial preparation. He testified that he conducted an investigation to advance the theory that Petitioner was not involved in the murder. They interviewed various witnesses, but he could not recall their names. PCRA Transcript, 06/23/21 at 34. He was then questioned about Shaheen. He testified that he had

spoken to Shaheen prior to trial and intended to call him as a witness. *Id*. at 36. He had served Shaheen with a subpoena. Prior to trial, Rudinski had talked to Shaheen at the prison and Shaheen indicated how A.B. or Mr. Posie was the person behind this. Shaheen was the one that told Rudinski about the taped interview Shaheen had with Clark, but at the time of trial, Shaheen had a change of heart in what he told Rudinski. *Id*. Rudinski testified that Shaheen's failed recollection came as a surprise. Rudinski admitted that he did not play for Shaheen the recording that he was trying to convince the court to admit as evidence, but there was no follow-up questioning him about why he did not do so. The parties stipulated that Shaheen passed away on May 12, 2018. *Id*. at 89.

Rudinski was also questioned about Cruz. He stated that Cruz' trial predated Petitioner's trial. He did not believe that he tried to interview Cruz, but he may have spoken with Cruz' counsel, Ronald Travis. Rudinski believed that Cruz was going to appeal and therefore, he did not believe that he could talk to Cruz at the time of Petitioner's trial. He spoke with Cruz' counsel but he could not recall if he specifically asked if he could talk to his client or not. *Id*. at 45-46. On cross-examination, Rudinski testified that Cruz would have a Fifth Amendment right or privilege not to testify. *Id*. at 71. Prior to Rudinski's testimony, the Commonwealth was prepared to enter a stipulation. In light of Rudinski's testimony, the Commonwealth objected to Cruz' testimony as not relevant since he was not available as a witness at the time of Petitioner's trial. In the discussions following the Commonwealth's objection, PCRA counsel indicated that he would limit the stipulation to Cruz would simply say that Mr. Patterson didn't instruct him to kill anybody. *Id*. at 85. Furthermore, knowing Cruz' counsel, he certainly would have anticipated that he would not have been called as a witness given the dependency of his appeal. *Id.* PCRA counsel also indicated that if he called Cruz as a witness he would not ask him if he

was willing to testify at the time of Petitioner's trial but instead present his testimony more like an after-discovered evidence claim. The court noted that it had presided over Cruz' trial and he did not even testify in his own trial. *Id.* at 86-87. The court ultimately sustained the Commonwealth's objection. *Id.* at 89.

Rudinski was not questioned about Shawn Cormier, Timothy Golder, Kalif Abney or Darnell Mitchell and none of these potential witnesses testified during the PCRA proceedings.

A petitioner must plead **and prove** by a preponderance of evidence an IAC claim. *See* 42 Pa. C.S.A. §9543(a)(2)(ii). While Petitioner has pleaded this claim with specificity, he has failed to prove this claim. In general, to prove an IAC claim, the petitioner must prove that the claim has arguable merit, counsel had no reason for his actions or failure to act; and prejudice. To prove ineffectiveness for failure to call a witness, a PCRA petitioner must also prove that (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of, the witness; (4) the witness was willing to testify; and (5) the absence of testimony was so prejudicial as to deny the petitioner a fair trial. *Commonwealth v. Thomas*, 323 A.3d 611, 625 (Pa. 2024).

The court finds that Petitioner has failed to satisfy his burden of proof. The evidence presented at the PCRA hearing clearly showed that Shaheen was not called as a witness because he was no longer willing or able to testify in the manner in which Rudinski anticipated. The Pennsylvania Supreme Court held on direct appeal that the recording of Shaheen's interview was not admissible under Pa. R. E. 803.1(c). The tape was not introduced as an exhibit in the PCRA proceedings, however, based on the decision on direct appeal, it appears that Shaheen's proposed testimony was inadmissible hearsay.

Cruz was not called as a witness due to his Fifth Amendment right against self-incrimination. Rudinski did not speak directly with Cruz because he was represented by counsel, Ronald Travis. Travis passed away on December 24, 2017. PCRA Transcript, 06/23/21, at 85. Even PCRA counsel acknowledged that he would have anticipated that Cruz would not have been called as a witness at trial given the pendency of his appeal. *Id*.

None of the other witnesses were called to testify at the PCRA proceedings. Furthermore, there is nothing in the affidavits for those witnesses attached to the PCRA petition to show that counsel knew or should have know of their existence. Rudinski testified that he spoke to various witnesses but could not remember their names, but he was never specifically asked about Cormier, Golder, Abney and Darnell Mitchell.

The court also does not find that Petitioner was prejudiced. It appears that the information regarding A.B.'s involvement was inadmissible hearsay. Furthermore, without hearing any testimony from the witnesses, the court cannot say that their testimony would have affected the outcome of the proceedings.

R. Did the prosecutor's failure to disclose Giglio evidence of Marion Diemer deny Petitioner a fair trial; alternatively, was counsel ineffective for failing to object to the nondisclosure?

Petitioner next asserts that the prosecutor's failure to disclose *Giglio* evidence of Marion Diemer denied Petitioner a fair trial or in the alternative, counsel was ineffective for failing to object to the nondisclosure. The court cannot agree.

Petitioner assumes that there was an agreement not to prosecute, but he did not present any evidence that any express promises were made. He did not call Diemer or any member of the District Attorney's office to establish that there was such an agreement. Furthermore, to the

extent that there may have been an implicit agreement, Rudinski's cross examination of Diemer made the jury fully aware that she was not being prosecuted for any of her crimes. The jury was aware that she committed acts that could have subjected her to prosecution and she was never prosecuted for those crimes. Specifically, during cross-examination of Diemer the following exchange occurred:

> Q Okay. Now, have you been charged with the theft of the guns?
> A No.
> Q Have you been charged with lying to the police about these matters?
> A No.
> Q And that would be on both these occasions that you talked to Agent Dincher. Have you been charged at all with lying about that?
> A No.
> Q Have you been charged with any federal crimes of transferring guns for drugs?
> A No.
> Q Have you been charged at all with – in regards to the homicide?
> A No.

Trial Transcript, 05/18/2010, at 79. Diemer was further asked if she had been told that she would not be referred for federal prosecution and she responded she was told that they were not interested in that. *Id*. at 81-82. Trial counsel also stressed these points in his closing argument. Specifically, he argued:

> You heard Mr. Ricks got seven and a half to 15 years for the .22 rifle. This woman sold pistols for crack to the mysterious "J". She traded a shotgun for crack, and she isn't even charged with anything. Nothing. She's got all the reason in the world to keep going with this thing. I've got no charges against her. Nothing. Mr. Linhardt even assured her they won't even go after federal charges with her. They're not going to do that. This woman was dealing guns for crack cocaine, an extremely serious charge, and she's walking. Got all the reason in the world to lie.

Trial Transcript, 05/25/10, at 33-34. He also noted that the defense witnesses did not get any benefit for their testimony like Marion Diemer did; in fact, one witness probably lost his parole. Id. at 37.

Although Rudinski testified at the PCRA hearing that he did not recall if he requested discovery about any promises Marion Diemer received from the Commonwealth in exchange for her testimony and he did not specifically question her about any such promises during cross-examination,[26] Petitioner was not prejudiced because the jury was well aware that Diemer was a Commonwealth witness who was not being prosecuted for the crimes she committed.

S. Is Petitioner entitled to relief from his conviction and sentence because of the prejudicial effect of the cumulative errors in this case?

Petitioner contends that he is entitled to relief from his conviction and sentence because of the prejudicial effect of the cumulative errors in this case. In this portion of the opinion, the court will only address the cumulative effect of alleged errors regarding Petitioner's conviction. It will address any alleged cumulative effect regarding Petitioner's sentence when it addresses his penalty phase claims.

The court rejects Petitioner's claims that he is entitled to a new trial due to the cumulative effects of errors in the guilt phase. No number of failed claims may collectively attain merit if they could not do so individually. *Commonwealth v. Lopez*, 854 A.2d 465, 471 (Pa. 2004), quoting *Commonwealth v. Williams*, 615 A.3d 716, 722 (Pa. 1992).

T. Were Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights violated as a result of the appearance of bias of members of the Pennsylvania Supreme Court who judged the direct appeal?

[26] *See* PCRA Transcript, 06/23/21 at 46-48.

Petitioner contends that he is entitled to a new direct appeal due to the appearance of bias of members of the Pennsylvania Supreme Court, specifically Justices McCaffery and Eakin who were involved in an email scandal. Petitioner argues that the emails contained content that was demeaning to African-Americans, Latinos, women, homosexuals, and members of certain socioeconomic and religious groups. The emails included exchanges with "Commonwealth prosecutors" regularly and over a long period of time. According to Petitioner, the mere fact that the Justices possessed a racial and religious bias and that Petitioner is a member of a racial and religious minority, he is entitled to a new direct appeal before an unbiased tribunal. The court cannot agree.

The court finds that Petitioner has failed to satisfy his burden of proof. The petition alleges that Petitioner is black or African-American and Muslim. While those allegations might be true, the court does not believe that those facts were ever established in the record. Those facts certainly were not apparent during Petitioner's direct appeal. For example, a *Batson* challenge was not asserted on direct appeal for any of the members of the Supreme Court to know that Petitioner was black or African-American. Furthermore, Petitioner has not tied any specific email or category of emails to a specific issue asserted on direct appeal that Justices McCaffery or Eakin would have arguably been biased against. There also is nothing in the record to show that any of the prosecutors involved in Petitioner's case were involved in the email scandal. To the contrary, the "Commonwealth prosecutors" involved in the email scandal were members of the Office of Attorney General (OAG). There is nothing to even suggest that any of the members of the Lycoming County District Attorney's Office were part of any of the

email exchanges. Hence, there is no suggestion of a certain level of intimacy with the Justices and the Commonwealth prosecutors in this case as argued by Petitioner in his brief.[27]

Petitioner relies on *Williams v. Pennsylvania*[28]and *Hill v. Wetzel*[29]. The court finds that these cases are not applicable. In *Williams*, Chief Justice Castille was personally involved in the prosecution of Williams; more specifically, he signed paperwork which approved seeking the death penalty against Williams. Many years later, Williams achieved a stay of execution from the trial court, but the Commonwealth filed an emergency petition with the Pennsylvania Supreme Court seeking to vacate the stay. Williams sought Chief Justice Castille's recusal from considering the Commonwealth's petition. The Commonwealth opposed Williams recusal motion and Chief Justice Castille denied the recusal request without explanation. On appeal, the United States Supreme Court held that "Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." 136 S.Ct. at 1910. Therefore, Williams was entitled to new review before an unbiased tribunal. In comparison, there is no allegation here that any of the Justices who heard Petitioner's direct appeal had any personal involvement in Petitioner's case at the trial court level or any earlier proceedings.

Petitioner contends that *Hill* was granted habeas relief based on Justice McCaffery and Eakin's involvement in the email scandal. The court cannot agree with Petitioner's description of *Hill.* Hill was not granted habeas relief; he was granted an evidentiary hearing on two issues –

[27] *See* Petitioner's brief in support of Amended PCRA Petition, 01/18/2022, at 78.
[28] 579 U.S. 1, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016).
[29]279 F. Supp. 3d 550, 561 n.6 (E.D. Pa. Nov. 10, 2016).

Claim 5 and Claim 9. Furthermore, *Hill* is not binding precedent. Here, the court granted Petitioner an evidentiary hearing but he failed to establish his claim.

The Commonwealth relied on *Commonwealth v. Fears*.[30]

In *Commonwealth v. Fears*, an evenly divided Pennsylvania Supreme Court affirmed the trial court's rejection of a similar claim without holding an evidentiary hearing. In the Opinion In Support of Affirmance (OISA)[31], Justice Mundy stated:

> The Fourteenth Amendment guarantees that no state "shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const. XIV, Sec. 1. Due process concerns extend to the actions of the judiciary; accordingly, litigants are guaranteed an absence of actual bias on the part of any judge adjudicating their case. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The concept of bias encompasses matters in which an adjudicator has "a direct, personal, substantial, [or] pecuniary interest" in the outcome of the matter. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). While a fair trial is indeed "a basic requirement of due process," *Murchison*, supra, 349 U.S. at 136, 75 S.Ct. 623, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). In order to determine whether a judge harbors an unconstitutional level of bias, the inquiry is an objective one wherein the requisite question is whether "the average judge ... is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, —— U.S. ——, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) (citing *Caperton v. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (internal citations excluded)). The Supreme Court has determined that there is an impermissible risk of actual bias when a judge has had "significant, personal involvement ... in a critical decision regarding [the litigant's] case." *Williams*, 136 S.Ct. at 1905.

250 A.3d at 1193–94 (2021). As previously noted, Petitioner has not presented any evidence of significant personal involvement by any of the Pennsylvania Supreme Court Justices in any critical decision in Petitioner's case.

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[30] 250 A.3d 1180 (Pa. 2021).

[31] Chief Justice Baer, Justice Saylor and Justice Todd did not participate in the consideration of *Fears*. Justice Mundy authored the OISA, which was joined by Justice Dougherty. Justice Wecht authored the Opinion In Support of Reversal (OISR), which was joined by Justice Donahue.

The Opinion In Support of Reversal (OISR) would have remanded the matter to the trial court for an evidentiary hearing to give Fears the opportunity to prove his claims. Here, Petitioner had the opportunity to prove his claims, but he failed to present evidence to substantiate them. Additionally, he did not specify any link between Justices McCaffery and Eakin's biases and the issues presented on direct appeal.

For the foregoing reasons, the court finds that Petitioner has failed to establish his right to relief on this claim.

II. CLAIMS RELATED TO PENALTY PHASE

U. Was trial counsel ineffective for failing to object to the pretrial disclosure of the mitigation report of Lori James-Townes?

Petitioner contends that trial counsel was ineffective for failing to object to the pretrial disclosure of the mitigation report of Lori James-Townes.

PCRA counsel did not brief this issue. In the Amended PCRA petition, he asserts, without citation to any authority, that the "mitigation report does not qualify as an expert report even under any creative reading of [Rule 573(C)]." The court cannot agree.

Lori James-Townes was the defense mitigation specialist. She was qualified and testified as an expert in the field of clinical social work. *See* Trial Transcript, 05/27/10, at 50-56. She was permitted to testify about information provided by others without it being considered hearsay because it was information upon which this type of expert routinely relies. *See* Pa. R. E. 703; *Commonwealth v. Aumick*, 297 A.3d 770, 782 (Pa. Super. 2023)(en banc); *Commonwealth v. Flacks*, -- A.3d --, 2025 WL 52200 (Pa. Super. 2025). She testified that she was a clinical and forensic social worker and utilized her training and experience to explain how Petitioner's background and history were mitigating circumstances. Only expert witnesses are permitted to

testify in this manner. *See* Pa. R. E. 702. Lay witnesses are precluded from doing so. *See* Pa. R. E. 701(c).

Rule 573(C) states:

> (1) In all court cases, if the Commonwealth files a motion for pretrial discovery, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items:
> (a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, 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, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph (B)(1)(e); and
> (b) the names and addresses of eyewitnesses whom the defendant intends to call in its case-in-chief, provided that the defendant has previously requested and received discovery under paragraph (B)(2)(a)(i).
> (2) If an expert whom the defendant intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and the defendant disclose a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.

Pa .R..P. 573(C). The court finds that the mitigation report was discoverable under Rule 573.

Petitioner relies on *Commonwealth v. Sartin*,[32] to argue that the mitigation report need not be disclosed until used at the penalty hearing. Again, the court disagrees. *Sartin* dealt with an independent mental health examination of the defendant, not a mitigation report. The Court held that due to the defendant's right against self-incrimination, when the expert was only going to be utilized at the penalty phase, the expert's report must be sealed until the penalty phase. Unlike the report produced from an independent mental health evaluation of a defendant, the

[32] 751 A.2d 1140, 1141 n.1, 1143-1144 (Pa. 2000).

mitigation report is based predominantly on information obtained from others and not the defendant. Hence, there is little or no self-incrimination concern and no need to seal the report to protect that right.[33]

The only case that the court could find regarding the discovery of a mitigation report is *Commonwealth v. Holt.*[34]In *Holt*, the trial court found that the mitigation report was discoverable under Rule 573. Like Petitioner, Holt argued that Rule 573 did not encompass the mitigation report and that it was error for the court to require him to provide a copy of the report prior to the commencement of the penalty phase of the trial. The mitigation report, however, was never used at trial, rendering the issue moot.

The court also notes that it did not order the defense to disclose or provide the Commonwealth with a copy of the mitigation report prior to trial. Petitioner's attorneys chose to provide the report in an effort to convince the DA to change his mind about seeking the death penalty in this case.

Based on the foregoing, the court finds that this issue lacks merit.

Regardless whether the mitigation report qualifies as an "expert" report subject to disclosure under Rule 573, Petitioner has failed to establish the second and third prongs of an IAC claim. Petitioner cannot satisfy the second prong of an IAC claim as his attorneys had a strategic reason for disclosing the mitigation report to the Commonwealth. Attorney Rude testified that the reason they disclosed the mitigation report pretrial was to try to convince the

[33] To the extent that the mitigation expert interviews the defendant, it is generally about his background and characteristics, and not the crime for which he is on trial. Therefore, it is unlikely that the mitigation report will cause self-incrimination issues like a mental health evaluation Nevertheless, if the mitigation report contains information or statements from the defendant that would implicate a defendant's self-incrimination rights, the portions of the report that contain such information could be sealed until the penalty phase.
[34] 273 A.3d 514 (Pa. 2022).

Commonwealth to take the death penalty off the table. PCRA Hearing Transcript, 06/22/21, at 39. Therefore, counsel had a strategic reason for providing the report prior to the penalty phase that was designed to further Petitioner's interest. *See Commonwealth v. Pander*, 100 A.3d 626, 631 (Pa. Super. 2014). Merely because Petitioner's attorneys were not successful in getting the death penalty off the table does not mean that they were ineffective. *See id* (we do not employ a hindsight analysis in comparing trial counsel's actions with other efforts he may have taken); *see also Commonwealth v. Colon*, 230 A.3d 368, 324 (Pa. Super. 2020)(the reasonableness of the decisions made by counsel cannot be based upon the distorting effects of hindsight).

Petitioner also has not established that he was prejudiced by the "early" disclosure. The jury found the mitigating circumstances that the defense was seeking. Specifically, the jury found the following mitigating circumstances: "saw killing as a way of life, took car of fiancé's family and home through his drug organization, and his background and abuse as a child."

V. Was trial counsel ineffective for failing to properly investigate and present any evidence at the penalty phase regarding the circumstances of the prior murder that formed the basis for the sole aggravating circumstance?

Petitioner next contends that trial counsel was ineffective for failing to properly investigate and present evidence at the penalty phase regarding the circumstances of the prior murder that formed the basis for the sole aggravating circumstance. Petitioner bases his claim on an affidavit obtained from Leslie "Bones" Mitchell, dated February 22, 2016. *See* Petitioner's PCRA Exhibit 1.

The sole aggravating circumstance in this case was Petitioner's third-degree murder conviction related to the shooting death of Winston "Biggy" Evans. In his affidavit, Mitchell indicates that Evans and Petitioner worked for him selling crack out of a house. He had them

working together because they got along well – they used to hang out with each other, go to each other's houses, and treat each other to meals. Mitchell stated he kept a .22 caliber gun at the house for protection but the gun looked old, he bought it off the street, he never shot the gun before, and he didn't think it worked. On the night in question (March 18, 1996) before the shooting occurred, Evans paged Mitchell. Mitchell went to Evans' house. Evans told Mitchell that he and Petitioner had gotten into a fight at the crack house over a bottle of cologne. Petitioner was getting his [butt] kicked by Evans so he pulled the gun on him. Evans grabbed the gun away from Petitioner, removed the clip and gave the gun back to Petitioner. Evans showed the clip to Mitchell. Mitchell told Evans to watch the crack house and he would go find Petitioner. As Mitchell and Evans both left the crack house, they saw Petitioner come around the corner walking toward them. Petitioner had the gun and Evans made a joke about it because Evans still had the clip. Mitchell went up to Petitioner and physically tussled with him. As they were tussling the gun went off. Mitchell was surprised the gun went off; he thought the gun was empty because Evans had the clip. He also was surprised that Evans got hit because it was dark and Evans was about six car lengths away. Mitchell did not think that Petitioner knew how to use the gun. He "wonders" if tussling with Petitioner caused the gun to go off and he didn't think that Petitioner meant for the gun to go off. Evans died two or three days later. After Evans died, Mitchell was worried that he was going to be charged. The police acted like they wanted to put the homicide charge on him. The police kept telling him that his story didn't make sense and they pushed him to say things that really weren't true.

The court finds that, at best, Petitioner's reliance on the 2016 affidavit is misplaced and, at worst, it is (for lack of a better term) a "sleight of hand" or a "white-wash" in that the affidavit could never have been found in the file materials from the 1996 murder as it was authored

approximately 20 years after the conviction. Furthermore, as will be discussed in more detail later in this opinion, the affidavit differs in several significant respects from Mitchell's sworn trial testimony.

Petitioner argues that trial counsel was required to conduct a full and thorough investigation into the applicable aggravating circumstances and that he failed to do so. Petitioner relies on *Rompilla v. Beard*[35] and *Wiggins v. Smith.*[36] *Wiggins* deals with a failure of counsel to investigate mitigating circumstances. *Rompilla* does, however, stand for the proposition that capital counsel is required to investigate the aggravating circumstances that may be introduced by the prosecutor. In fact, in *Rompilla*, trial counsel was found ineffective for failing to examine Rompilla's prior conviction file when counsel knew that the prosecutor intended to rely on that file, not merely by introducing a notice of conviction into the evidence but by quoting damaging testimony of the rape victim in that case. 545 U.S. at 589-90. The Court, however, noted it was not creating a *per se* rigid rule and that in "other situations where a defense lawyer is not charged with knowledge that the prosecutor intends to use the prior conviction in this way, might well warrant a different assessment." *Id.* This finding also did not end the inquiry. The Court noted that Rompilla was prejudiced by counsel's lack of review of the file as it was "uncontested that they would have found a range of mitigation leads that no other source had opened up." Contained within the file were records of Rompilla's prior imprisonment, which disclosed information regarding Rompilla's childhood and mental health.

The court finds that the issue is of arguable merit. Counsel had an obligation to investigate the aggravating circumstance, i.e., Petitioner's prior third-degree murder conviction.

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[35] 545 U.S. 374, 387 (2005).
[36] 539 U.S. 510, 524 (2003).

By definition, third-degree murder is a murder that is committed with malice but is neither first-degree murder (intentional) nor second-degree murder (felony murder). Malice has multiple definitions. Under the first alternative in the Pennsylvania Suggested Standard Criminal Jury Instructions:

> a killing is with malice if the perpetrator's actions show his or her wanton and willful disregard of an unjustified and extremely high risk that his or her conduct would result in death or serious bodily injury to another. In this form of malice, the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that the perpetrator took action while consciously, that is, knowingly, disregarding the most serious risk he or she was creating, and that, by his or her disregard of that risk, the perpetrator demonstrated his or her extreme indifference to the value of human life.

Pa.SSJI (Crim) §15.2502C. Under the second alternative:

> a killing is with malice if the perpetrator acts with a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life [or] a conscious disregard of an unjustified and extremely high risk that his or her actions might cause death or serious bodily harm.

Id. Clearly, malice depends on the facts and circumstances of the incident. A reasonable defense attorney in a death penalty case would want to know what the facts and circumstances were to see if there were any circumstances to lessen the impact or weight of Petitioner's prior conviction.

The court also finds that counsel had no reason not to examine the file or the facts and circumstances surrounding Petitioner's prior conviction. Attorney Rude, who handled the penalty phase, testified that he did not obtain any public records from Petitioner's 1996 Philadelphia murder case and he did not conduct any independent investigation into those prior proceedings. He only talked to Petitioner and he only information he had about the prior murder

was what Petitioner had told him about the case. He did not interview Leslie Mitchell. He also admitted that he did not present any evidence regarding the prior murder and he was not prepared to counter the prior murder as an aggravating circumstance by demonstrating the facts or circumstances thereof. He admitted that he had no strategic reason for these failures. PCRA Hearing Transcript, 06/22/21, at 22-24, 62, 78.

The court finds that Petitioner has failed to establish the prejudice prong. To show prejudice, a petitioner must show a reasonable probability that the outcome of the proceedings would have been different. In *Thornell v. Jones*, 601 U.S. 154, 163, 144 S.Ct. 1302, 1310 (2024), the United States Supreme Court recently stated: "A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result."

Unlike *Rompilla*, here, the Commonwealth only introduced a certified record of the Petitioner's conviction for third-degree murder. It did not introduce testimony from the third-degree murder trial. Furthermore, a review of the file would not have revealed Leslie Mitchell's affidavit as it did not even exist until approximately 20 years later. Instead, it would have revealed Mitchell's statements in police reports and his testimony at the preliminary hearing and at trial **as a witness for the Commonwealth**. That evidence would not have been helpful to the defense.

At trial, Mitchell was unable to testify about the fight over the bottle of cologne because it was hearsay. He testified that it took him about six minutes to walk to Evans' house and he talked to Evans for about ten minutes before they went outside. They walked two doors down when they saw Petitioner at the corner coming from the opposite way with a gun in his hand. Mitchell walked towards Petitioner to calm him down. According to Mitchell's trial testimony,

Petitioner was "hype" because he and Evans were fighting and Evans made him shoot himself in the finger. Petitioner told him that. ***Petitioner said he was going to kill Evans***. Mitchell put his hands on Petitioner's shoulders to try to keep him from going toward Evans, who was standing about six car lengths away near a light pole. Mitchell demonstrated how his arms were extended with his right hand on Petitioner's left shoulder and his left hand was on Petitioner's right shoulder. Petitioner, who Mitchell knew was left-handed, raised the gun in his left hand under Mitchell's right armpit, reached around him and Mitchell heard a noise. Mitchell tussled with Petitioner and got the gun from him. Evans said, "I'm shot, call the cops." Petitioner ran off. Mitchell's cousin or nephew came around the corner. Petitioner told him to check on Evans, call 911 and call Mitchell when he got home. Mitchell had the gun so he took off. He gave the gun to a guy named Troy and Troy got rid of it.

Some of the other evidence at the third-degree murder trial and statements in the affidavit of probable cause were consistent with Mitchell's statements, such as Evans provided a clip or magazine with nine live rounds to Officer Eric Linder who responded to the dispatch and Evans died two or three days after the shooting from a gunshot wound to the stomach or upper abdomen.

Other statements and evidence were not consistent with Mitchell's affidavit and were more harmful to Petitioner. For example, Evans told Officer Linder that he had been shot in the stomach by a man named Reese (Petitioner). Evans said there was a knock at the door and it was Reese who wanted to speak to him. When Evans came out of the house, Reese pulled a .22 caliber gun and shot him. After being shot, Evans struggled with Reese over the gun. As Evans told Officer Linder this, he handed the officer the magazine or clip with nine live rounds of ammunition. Petitioner's Exhibit 14. The affidavit also indicated that Evans told a relative,

Bernard, that after the initial argument, Petitioner left saying he was going to return with another gun. Petitioner's Exhibit 14. Petitioner's then-girlfriend testified at trial that: Petitioner had brought the gun to his girlfriend's house two or three weeks before and told her it was a .22 long; Petitioner told his girlfriend the gun had jammed or something and it grazed Petitioner's finger; Petitioner told his girlfriend that the argument was over Evans telling Petitioner that his girl was sleeping around so he shot him; Petitioner was very angry; Petitioner said he and Bones (Mitchell) went to the house, Bones knocked on the door to get the guy to come out, and it happened on the porch. Commonwealth's Exhibit C (Third-Degree Murder Trial Transcript, Testimony of Shamika Watkins), at 44-57.

This evidence would have shown that Petitioner had been a drug dealer for decades and that when he got into disputes with other drug dealers in the same organization, he was a vindictive hothead and prone to resort to violence, specifically shooting the individual with whom he had the disagreement. If this sounds familiar to the facts and circumstances of this case, that is because it is (except he could not personally shoot the victim in this case because he was incarcerated.)

Perhaps Petitioner's argument is that the contents of the file would have disclosed Leslie Mitchell's name and counsel could have spoken to Mitchell and had Mitchell testify at trial consistent with his 2016 affidavit. This argument fails for several reasons. First, Mitchell was never called as a witness in the PCRA hearings. Second, neither Rudinski nor Rude were ever shown the affidavit from Mitchell and questioned about it nor were they or Mitchell subject to cross-examination by the Commonwealth with his statements and testimony from the investigation, preliminary hearing and trial of the third-degree murder from 1996. Third, the court would not have permitted trial counsel to attempt to relitigate the prior conviction with

evidence or testimony that the shooting was "accidental". The defense at trial was not even that the shooting was accidental but rather that it was done in the "heat of passion". Fourth, portions of Mitchell's affidavit are hearsay and/or irrelevant, such as Mitchell's information concerning what Evans "told" him and Mitchell's beliefs regarding whether the firearm was operable or loaded. It was not Mitchell's beliefs that were relevant but Petitioner's. Furthermore, Mitchell's affidavit is based on assumption that the gun was not loaded or was inoperable. Petitioner left and returned to shoot Evans. He could have returned after obtaining additional ammunition for the firearm or a different firearm altogether. Mitchell's assumption was obviously wrong as the gun in fact fired, Evans was struck in the stomach or abdomen and he died as a result. The police did not recover the firearm, because Mitchell disposed of it through Troy. Finally, Mitchell's statement that he did not think that Petitioner intended to shoot Evans was completely contrary to his trial testimony that Petitioner said he was going to kill Evans and that's when Mitchell attempted to grab Petitioner's shoulders. Commonwealth's Exhibit C (Third-Degree murder trial, Testimony of Leslie Mitchell), at 65.

Regardless of the reason for the dispute (a bottle of cologne, Evans causing Petitioner to shoot himself in the finger, or Evans statements about Petitioner's girlfriend sleeping around), this evidence would arguably help the Commonwealth as it would show that Petitioner was willing to kill over a petty dispute. If in the penalty phase the jury heard from Petitioner's girlfriend or received her trial testimony under Rule 804(b)(1) if she were unavailable as a witness, it would strengthen the Commonwealth's evidence from Durrant that the killing was not about drugs or the victim being a snitch but that Petitioner kills people over about disputes or disparaging remarks over a woman.

Based on what would have been found in a review of the file, which would not have included Mitchell's 2016 affidavit but would have included but not been limited to Petitioner's statements after the argument that he was going to get another gun, Evans statement to the police that he had been shot after answering the door, Petitioner's statements to his then-girlfriend, and Mitchell's trial testimony that Petitioner said he was going to kill Evans before he fired the gun, the court does not believe that a review of the third-degree murder file or the affidavit of Leslie Mitchell alone would have changed the outcome of the penalty phase.

W. Was trial counsel ineffective for failing to investigate, develop, and present a myriad of mitigation evidence?

Petitioner next contends that trial counsel was ineffective for failing to investigate, develop and present a myriad of mitigation evidence. After much consideration and review of all the affidavits and evidence, the court agrees.

Trial counsel had an obligation to conduct a reasonable investigation into Petitioner's background and circumstances. The Pennsylvania Supreme Court described counsel's duty to investigate as follows:

> In general, counsel has an obligation to conduct reasonable investigations or reach reasonable decisions that make a particular investigation unnecessary. In the context of the penalty phase of a capital case, counsel has a duty to thoroughly investigate a defendant's background, including the obligation to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. 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. At the same time, counsel's obligations do not require an investigation into every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.

Commonwealth v. Hughes, 865 A.2d 761, 813–14 (Pa. 2004)(citations and internal quotation marks omitted).

This claim has arguable merit.[37] The mitigation specialist, Lori James-Townes, basically testified that counsel and the team were not adequately prepared for the penalty phase – more interviews needed to be conducted and more document and records were needed. She expressed her concerns to counsel and sought counsel's help to obtain Department of Human Services records, criminal records, mental health records, educations records and the like. She described the cyclical nature of investigating mitigation evidence – how records would lead to witnesses, witnesses would reveal other avenues such as additional records or witnesses. She absolutely would have wanted to review Petitioner's school records, interview his teachers, review any mental health examinations or evaluations and consult with mental health professionals. She was concerned that she did not know all of Petitioner's background that would be necessary for a proper mitigation presentation. She was aware of a preliminary report from John Kelsey, a licensed psychologist hired by the defense to evaluate Petitioner, which showed a full-scale IQ of 78. Petitioner's IQ was a red flag that needed to be investigated further for other intellectual sectors of disability, adaptive functioning tests and records, such as school records and records from any prior mental health evaluations needed to be sought to corroborate. There were deficiencies gathering documents. She requested counsel's assistance in obtaining documents and sent letters and emails regarding the documents she was seeking. She did not receive many of the records she requested. PCRA Hearing Transcript, 06/24/21, at 13-14, 18-19,

She testified that there were a lack of meetings and sessions to prepare as a team for the penalty phase and most were held in the midst of trial. There was a lot of chaos and very little coordination. It needed to be a team effort, but it wasn't. Her only communication was with one

[37] The Commonwealth does not dispute that this claim has arguable merit. Commonwealth's Brief, at 34.

attorney. The lack of communication as a team was a red flag of team dysfunction. She did not really know how the trial was progressing prior to her testimony, because counsel did not really communicate that information to her. There was discussion at some point about having her testimony videotaped for presentation to the jury. She remembered one email in particular where she asked counsel "am I showing up or not."

She would have liked to know what the aggravating circumstances were, but she and counsel never discussed the prior homicide. There wasn't even a clear conversation around what mitigators they were going to present to the court.

She admitted that she was able to present the information that she had about Petitioner, but it was definitely lacking detail. She felt that the investigation was inadequate, they were not prepared for the penalty phase, and she did not have the information she needed. She faulted penalty counsel "for not giving proper time to prepare the penalty phase in a way that would have been justice for Petitioner."

Dr. Kelsey also requested additional records from counsel but never received them. Dr. Kelsey met with Petitioner on January 9, 2009. He interviewed Petitioner and conducted testing to determine his IQ, intellectual and adaptive functioning and any limitations he had. He determined that Petitioner's full-scale IQ was 78. He wrote two letters to counsel, dated January 13, 2009 and January 21, 2009, seeking critical records (including school records, report cards, achievement testing, behavioral observations and records regarding any prior psychological or psychiatric treatment that Petitioner may have received when he was 10 years old) that were necessary to complete his report. He never received the requested records from counsel and, as a result, he was never able to provide a diagnosis or a final expert report. His final report would have addressed the presence of any section 9711(e)(2), (e)(3) and (e)(8) mitigating

circumstances. He was never called as a witness and counsel never told him that he would not be needed as a witness. He read about the case in the newspaper. *See* Petitioner's Exhibit 13, affidavit of John Kelsey; PCRA Hearing Transcript, 06/22/21, at 8-9 (stipulation by Commonwealth to Petitioner's Exhibits 1 through 14 that the witnesses would testify as stated in their respective affidavits).

Counsel lacked any reasonable or strategic basis for his failure to obtain the requested records.[38] Attorney Rude was primarily responsible for the penalty phase presentation. Although he indicated that he thought Ms. James-Townes and her staff were also attempting collect records, he admitted that he was responsible for collecting the records and providing them to Ms. James-Townes and Dr. Kelsey. He admitted that he was deficient in his representation of Petitioner. He did not personally request records; he had an assistant prepare subpoenas for some records but never followed up to determine if any records were received. He testified that he did not have any reason for not calling Dr. Kelsey as a witness during the penalty phase and he did not have any idea why they did not call him. He did not have any reason for not conducting a further investigation. He admitted that other than Ms. James-Townes, the witnesses presented at the penalty phase for the defense consisted solely of Petitioner's family members and his fiancé. He acknowledged that records may have identified nonfamily mitigation witnesses. He did not remember if he contacted any nonfamily mitigation witnesses and he did not call any such witnesses at trial. He admitted that they could have presented more during the penalty phase and they were not as prepared as they should have been. PCRA Hearing Transcript, 06/22/21 at 20-40.

[38] The Commonwealth also concedes that there was no reasonable basis for counsel's actions or omissions. *See* Commonwealth Brief, at 34.

The court also finds that Petitioner was prejudiced. PCRA counsel obtained school records from Petitioner's elementary schools and discovered third party witnesses who could have been called as witnesses during the penalty phase. During the PCRA hearing on June 22, 2021, Petitioner introduced 14 exhibits,[39] which consisted of the type of records that Ms. James-Townes and Dr. Kelsey were seeking and affidavits of witnesses who were discovered from reviewing the records and speaking to the teachers and professionals mentioned therein. The Commonwealth stipulated that the witnesses would testify as stated in their respective affidavits. PCRA Hearing Transcript, 06/22/21, at 8-9. The court will not detail each exhibit in this Opinion, but it will highlight the exhibits from teachers and other professionals that discuss Petitioner's intellectual capabilities and challenges.

Petitioner's PCRA Exhibit 2 was an affidavit from Caren Gutman, a school psychologist. She noted that due to her caseload, she was not able to follow-up with the students she evaluated. She indicated she evaluated Petitioner in 1980 and recommended that he be placed in a class for children with learning disabilities. She evaluated Petitioner again in March of 1984. At that time, he was 10 ½ years old. She notices that he had poor attention skills and poor visual motor integration skills, possibly due to organic neurological causes or emotional concerns. She noted that Petitioner had serious emotional concerns. She referred him for a psychiatric evaluation due to his learning disabilities, his severe emotional concerns and his lack of progress in special education classes. The psychiatric evaluation did not occur until January of 1985. She noted his remarkable absenteeism. He missed 60 days of school in kindergarten and first grade and he missed 85 days of school in second grade. Petitioner had an Individualized Education Program

[39]These Exhibits were utilized and introduced during the PCRA hearings; they were not attached to the PCRA petitions.

(IEP). The IEPs were supposed to re-evaluated or updated every two years, but there was only 1 IEP from December 1987 in Petitioner's file. By the 88-89 school year, Petitioner was sent to a disciplinary school, which is not a good learning environment as the classes are filled with students with behavioral issues.

Petitioner's Exhibit 3 is an affidavit from Sheryl Kalick, Petitioner's first grade teacher at Whittier Elementary School during the 1979-1980 school year. Ms. Kalick stated that the first-grade students were grouped according to their abilities from the very, very bright group down to the very, very slow group. Ms. Kalick was teaching the very, very slow group that year and Petitioner was one of her students. She was not a special education teacher and it was not a special education class because they were not testing the students for learning disabilities yet. The school was overcrowded and the District dragged its feet to keep students in regular classes because that was less expensive. The District also promoted students to the next grade level even if they were not ready for it, rather than holding students back to repeat a grade. Regular classes would have 25 to 30 students, whereas special education classes were limited to a maximum of 10 students. She had at least 25 students in Petitioner's class, all of whom were very slow learners, and she had very little support – only one aide in reading for 40 minutes per day- to assist her with teaching these children. She indicated that Petitioner must have been severely struggling because he was screened for learning disabilities during the summer between kindergarten and first grade. She also indicated that Petitioner made very little progress in first grade. She struggled to find something positive to say in the comments about his progress so she made general comments like Petitioner was "eager to please." She requested that Petitioner be placed in special education classes and she requested psychological testing. She recommended that he be held back, but the District promoted him anyway. She also noted that Petitioner had

an excellent kindergarten teacher but, despite that, Petitioner probably should have repeated kindergarten as well, but he was promoted to first grade. Despite her recommendations, Petitioner began second grade in a regular class, and he struggled with reading, math, spelling and handwriting. During the school year, Petitioner was transferred to a learning-disabled class in a different school, Walton Elementary. She did not know if the mid-year transfer was due to Whittier being re-zoned because of overcrowding or if there were no openings in Whittier's learning-disabled class. She reviewed Petitioner's report card and noted that he struggled even in special class and was alarmed with his lack of progress and low math and reading levels. She noted health issues and parental neglect seemed to be the cause of Petitioner's high absenteeism. He was absent 64 days in kindergarten, 54 days in first grade, 85 days in second grade and 85 days in the 1982-1983 school year. Given the amount of absences, the school should have taken Petitioner's mother to court.

Petitioner's Exhibit 8 appears to consist of two separate sets of documents. The first set of documents contain Caren Gutman's psychological report about Petitioner from 1984 when he was at Walton Elementary in a learning-disabled class. It indicates that Petitioner was tested on March 19 1984 when he was 10 ½ years old. His full-scale IQ was 89, with a verbal score of 94 and a performance score of 87. He was reading at a grade level of 1.8 (below the first percentile), spelling at a grade level of 2.4 (first percentile) his arithmetic was at grade level 3.3 (seventh percentile). He was in a full-time learning-disabled class in January 1981. Despite his chronological age, he was working at a first-grade level (which would be that of a 6- or 7-year old) and functioning at the low average age of intelligence. His visual motor integration skills were at the level of an individual between 6 years 6 months and 6 years 11 months range, compared to his chronological age of 10 years 6 months and his mental age of 9 years 4 months.

He had impulsive behavior and "serious emotional concerns". In the four years since he both was last tested and transferred to a learning-disabled class, he only exhibited one year of growth or progress. His attention and concentration skills and visual motor integration skill were deficient, possibly due to organic causes or emotional concerns. The report recommended a psychiatric evaluation to determine if a serious emotional disability (S.E.D.) placement would be more appropriate.

The second set of documents relate to 8th grade or the years 1987-1988 and consists of District paperwork from 1988 when Petitioner was in 8th grade at Gillespie Jr. High to transfer him from a learning-disabled class to remedial disciplinary school; an interim report to parent dated March 3, 1987, and an 8th grade report card showing that Petitioner failed every subject except physical education and woodshop and he missed 58 days of school.

Petitioner's PCRA Exhibit 9 is a report date January 7, 1985 authored by Patricia Crowther, a child psychiatrist with the School District of Philadelphia. In the interview with Petitioner's mother, she reported that Petitioner was hyperactive and acts like he off (crazy). He cannot put anything on paper or be understood and he cannot cross the street by himself (even though he is 11 ½ years old at the time of the evaluation). He is always sick and has asthma. Mother also reported that her pregnancy with Petitioner was complicated by constant bleeding and she delivered him into the toilet. When he was one, he almost died in the hospital and needed extensive resuscitation. Among her conclusions and recommendations, Dr. Crowther stated:

> In light of pregnancy, birth and neonatal contingencies, subsequent asthmatic condition, [Petitioner] may well be learning disabled. Psychological testing indicated approximately 4 years deficit in V.M. integration. In addition, he shows clinical evidence of moderately severe, deviant, social and emotional

> disturbance which has its origins in distorted intrafamily relationships and unrelated caretaking practices.

Petitioner's PCRA Exhibit 9.

Petitioner's PCRA Exhibit 10 is a disability determination dated April 21, 1985 and authored by Dr. Melissa George, Psy.D. Relevant information contained within this document included a full-scale IQ score of 96, a verbal IQ of 87 (low average range), and a performance IQ of 106 (top of average range); a comment that the 19-point difference between the verbal and performance scores indicates a specific weakness in verbal functioning; his errors in the Bender Gestalt showed the performance of a 5 ½ year old (at a chronological age of 11 ½ years old), despite his high performance IQ score and gave the doctor the "impression that he does show some signs of organic impairment" which may be the root of his emotional and academic difficulties; notations about functioning at a second grade level academically, problems with memory and weakness in abstract thinking; and a statement that "certainly his medical history and current behavior are suggestive of possible brain damage."

These exhibits show the wealth of mitigation information and the potential witnesses that could have been discovered if Petitioner's counsel had conducted a proper investigation and obtained available records. This was precisely the type of information that Ms. James-Townes and Dr. Kelsey were seeking from counsel and which counsel failed to provide to them.

The Commonwealth asserts that Petitioner was not prejudiced because this information was cumulative of the information presented at the penalty phase hearing that Petitioner was "slow", and cites to pages 30-36 and 57-81 of the May 27, 2010 transcript. The court cannot agree.

Within the cited pages, there is very little information about Petitioner's education and intellectual functioning. There were general statements from his sister that he struggled in school, his grades weren't good, he needed a lot of help and he dropped out. *See* Trial Transcript, 05/27/10, at 35-36. The information relied on by Ms. James-Townes came from reports by his family members and a single school record from Maryland to the effect that Petitioner had a 9th grade education when he dropped out of school. *See* Trial Transcript, 05/27/10, at 69, 72-73 (testimony of Ms. James-Townes that she learned information from speaking to Petitioner and his family; they were unable to obtain Petitioner's Philadelphia school records and the sole Maryland school record considered that Petitioner dropped out in the 9th grade). The evidence at the penalty phase only suggested that Petitioner was a poor student, who was not interested in school and dropped out. It did not suggest to or inform the jury that his difficulties rose to the level of being "slow", having a learning disability, or being in special education classes. It also did not suggest that there were "organic neurological causes", that his skills deficits were "possibly due to organic causes or emotional concerns", that there were "signs of organic impairment" or that his medical history and behavior were "suggestive of possible brain damage" as indicated in the affidavits and documents contained in Petitioner's Exhibits 1 through 14.

Petitioner need not conclusively show that the outcome of the proceedings would be different. The court finds that the information contained within the school records was of a different nature and quality than that presented during the penalty phase. It is one thing for one's friends and family to say he struggled in school, but the testimony of friends and family tends to be discounted and given less weight due to their inherent bias in favor of their loved one as does general testimony about a rough childhood and difficulties in school. It is quite different to have

school records and other documents authored by independent teachers, psychologists and psychiatrists to establish that Petitioner has a learning disability, he was in special education classes and still struggling, and that the causes of these difficulties are not simply his lack of interest or effort in school endeavors but possibly caused by organic neurological causes, organic impairment, or brain damage.

Furthermore, the Commonwealth's theory of the case was that Petitioner was the criminal "mastermind" who controlled the drug organization. This evidence could suggest that Petitioner may have been more bluster and bravado to cover or compensate for his deficits than a "mastermind."

This new and additional information regarding Petitioner's deficits need only be enough to persuade a single juror that Petitioner, who undisputedly was not the shooter, should not receive the death penalty.

The Commonwealth argues that Petitioner did not present any testimony to establish prejudice in this case. Again, the court cannot agree. Petitioner presented Exhibits 1 through 14 and the Commonwealth stipulated that the witnesses would testify as stated in their respective affidavits. *See* PCRA Hearing Transcript, 06/22/21, at 8-9. By so stipulating, the Commonwealth relieved Petitioner of the need to present live testimony from these witnesses in the PCRA proceedings.[40]

The Commonwealth argues based on the strength of its aggravating factor- the prior third-degree murder- and other information in the records that would further show Petitioner's future dangerous that the new information would not change the outcome of the proceedings.

[40] In hindsight, the better course may have been for the court to reject the parties' stipulation so that the witnesses' testimony would be preserved and available for any future proceedings.

The court disagrees. In *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008), the Court upheld the grant of a new penalty hearing, despite the Commonwealth's strong evidence of aggravating circumstances consisting of the commission of the killing in the perpetration of a robbery, and a history of violent felonies, including two murders – one of which was a third-degree murder conviction where Sattazahn shot the victim in the face. The defense only presented two witnesses – a former employer who had not seen Sattazahn in 12 years and Sattazahn's mother. There was a wealth of mitigation evidence that counsel could have discovered had counsel not conducted a deficient pretrial investigation including, but not limited to reviewing the file of a prior third-degree murder conviction which included a DOC report containing red flags concerning potential mental health and/or cognitive impairment, and the failure to pass several grades in early childhood and placement in a special class, which strongly suggested potential mental, cognitive, emotional, and/or social difficulties which would bear investigation in defending against the imposition of the death penalty. The Court stated: "The absence, due to an inadequate investigation, of substantial, relevant, mitigating evidence diminishes confidence in the outcome of the sentencing proceeding, particularly given the appropriate single-juror frame of reference." *Id*. at 657.

Counsel's investigation and preparation were inadequate in this case. If counsel had conducted a proper investigation and obtained the records requested by Ms. James-Townes and Dr. Kelsey, he would have discovered significant mitigation evidence that could have been presented at trial but was not. This evidence documented that Petitioner had a learning disability and skills deficits sufficient for him to be placed in special education and contained references to his deficits being caused by or related to organic neurological impairment and the possibility of brain damage. As will be discussed in more detail below, even though the evidence presented at

the PCRA hearing was not sufficient to find that Petitioner was ineligible for the death penalty, this does not mean that this evidence has no value or effect, particularly given the fact that Petitioner was not the actual shooter but rather his involvement was that of a co-conspirator. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000)(overturning Virginia's finding that Williams was not prejudiced by counsel's ineffectiveness and noting the reality that Williams was "borderline mentally retarded" might well have influenced that the jury's appraisal of his moral culpability even though it would not preclude his eligibility for the death penalty).

X. Was trial counsel ineffective for failing to develop and litigate evidence to attack Petitioner's eligibility for the death penalty because of an intellectual disability?

Petitioner contends counsel was ineffective for failing to develop and litigate evidence to attack Petitioners' eligibility for the death penalty because of an intellectual disability. The court cannot agree.

To establish that an individual suffers from an intellectual disability in the PCRA context, a petitioner must prove by a preponderance of the evidence: (1) significant limitations in general intellectual functioning; (2) significant limitations in adaptive functioning; and (3) onset before the age of maturity. *See Commonwealth v. Cox*, 240 A.3d 509, 526–27 (Pa. 2020); *Commonwealth v. Miller*, 88 A.2d 624, 630 (Pa. 2005). Such a determination is primarily based upon the testimony of experts. *See Cox,* 240 A.3d at 529.

Petitioner has failed to establish that he is currently intellectually disabled or that he became intellectually disabled prior to reaching the age of 18. Petitioner did not present any testimony or evidence from any expert witness to state that Petitioner is or was intellectually disabled. Although the Commonwealth entered a stipulation with respect to Petitioner's PCRA Exhibits 1 through 14 that the witnesses would testify as stated in their respective affidavits,

none of the affidavits stated that Petitioner has significant limitations in general intellectual functioning, significant limitations in adaptive functioning or onset prior to the age of 18 or offered an expert opinion that Petitioner is or was intellectually disabled.

Petitioner cannot simply rely on the IQ scores in his school records or in Dr. Kelsey's letter dated January 21, 2009. *See id*. at 514 (the IQ score is but one factor, it should not be taken strictly at face value and must be adjusted for the standard error of measure or SEM), citing *Miller*, 88 A.2d at 630-31.

Even if Petitioner could simply rely on the IQ scores, they would not establish that he is intellectually disabled. The United States Supreme Court left to the States the task of developing appropriate ways to enforce the ban on executing intellectually disabled but the States discretion is not unfettered; it must be informed but not dictated by the medical community's diagnostic framework. *Moore v. Texas*, 581 U.S. 1, 13 (2017). When the Pennsylvania General Assembly failed to enact any such standards, the Pennsylvania Supreme Court did so in *Miller* when it concluded: "Thus, for purposes of the first factor, a person may be considered impaired by limited intellectual functioning if he or she has an IQ score anywhere between 65 and 75 on the Wechsler scales." *Cox*, 240 A.3d at 514, citing *Miller*, 88 A.2d at 630. Petitioner's childhood IQ scores were well-above this range. The documents reflect three full-scale IQ scores from when Petitioner was a minor: an IQ score of 89 when he was tested in 1980;[41] an IQ score of 89 when he was tested in 1984 (Petitioner's PCRA Exhibit 8); and an IQ score of 96 when he was tested in 1985 (Petitioner's PCRA Exhibit 10). Adjusting these ranges two SEMs would result in

[41] There is a box on Petitioner's PCRA Exhibit 8, which indicates the dates and scores of previous psychological examinations as "5-80 WISC-R 89 (101, 78)." 5-80 represents the date of May 1980. WISC-R 89 reflects a full-scale IQ score of 89 on the Wechsler Intelligent Scale for Children-Revised and the numbers 101 and 78 reflect Petitioner's Verbal and Performance IQ scores.

ranges of 84 to 94 for the 1980 and 1984 scores and 91 to 101 for the 1985 score.[42] None of these scores are between 65 and 75. Therefore, Petitioner has not shown that he has an intellectual disability that began while he was still a minor.

Y. Was trial counsel ineffective for failing to object to the introduction of inadmissible evidence at the penalty phase and failed to object to the prosecution's prejudicial closing argument there?

Petitioner asserts that counsel was ineffective for failing to object to the introduction of inadmissible evidence at the penalty phase and failed to object to the prosecution's prejudicial closing argument. More specifically, he asserts that trial counsel should have objected to the Commonwealth's evidence and/or argument regarding future dangerousness, lack of acceptance of responsibility, lack of sympathy or mercy for the victim, and the privileges that Petitioner would have if he were sentenced to life in prison.

The court finds that in light of the grant of a new penalty hearing, this claim is moot. Even if it is not moot, the court would not grant relief on this issue.

1. Future Dangerousness

Petitioner argues that future dangerous is not an aggravating factor; therefore, it was improper for the Commonwealth to argue it. The court cannot agree. The court finds that the Pennsylvania cases[43] cited by Petitioner, particularly *Commonwealth v. Fisher,*[44] have been superseded by statute. *See Commonwealth v. Tedford*, 960 A.2d 1, 40 n.28 (Pa. 2008). In the mid to late 1990s, the statute governing the sentencing for first-degree murder, 42 Pa. C.S. §9711,

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[42] United States Supreme Court decisions only require courts to account for the SEM when the IQ is close to, but above 70. *Moore*, 581 U.S. at 13. None of Petitioner's childhood IQ scores are "close to" 70.
[43] The remaining case Petitioner relies on is *Baer v. Neal*, 879 F.3d 769 (7th Cir. 2018). *Baer* is not binding precedent and it is clear distinguishable in that Indiana law precludes victim impact evidence whereas Pennsylvania's statute specifically authorizes the admissibility of victim impact evidence.
[44] 681 A.2d 130, 146 (Pa. 1996).

was amended several times. At the time of Fisher's trial, there was no statutory provision for the introduction of evidence other than the aggravating and mitigating factors; therefore, the Court held that the introduction of victim-impact evidence was reversible error. Currently, however, the statue expressly permits victim impact evidence, as well as other evidence relevant to sentencing. The current statute[45] states:

> In the sentencing hearing, evidence concerning the victim and the impact that the death of the victim has had on the family of the victim is admissible. Additionally, evidence may be presented as to any other matter that the court deems relevant and admissible on the question of the sentence to be imposed. Evidence shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e), and information concerning the victim and the impact that the death of the victim has had on the family of the victim. Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

42 Pa.C.S.A. § 9711(a)(2).

In *Simmons v. South Carolina*, the Court stated: "This Court has approved a jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." 512 U.S. 154, 162 (1994). It is just one factor, along with defendant's character, prior criminal history, mental capacity and background, that a jury may consider in determining an appropriate punishment. *Id.* at 163. Therefore, evidence of future dangerousness is relevant and admissible pursuant to section 9711(a)(2). A due process violation does not arise merely from the introduction of evidence and argument regarding future dangerousness.[46] Such a violation can arise, however, if a party requests an instruction that a sentence of life

[45] The statue was last amended in 1999 so this language also would have been in effect at the time of Petitioner's trial in 2010.

[46] The Commonwealth argues that much, if not all, of the evidence that Petitioner points to is not actually evidence of future dangerousness. While some of the instances relied on by Petitioner might not be future dangerous, the DA's argument "as long as he's alive he will continue to be a threat to the community" clearly is.

imprisonment for first-degree murder means life without parole and the court refuses to give it. *See id*. That did not occur in this case, though. During the final instructions for the penalty phase, the court gave such an instruction. The court stated:

> I'll explain something about a sentence of life imprisonment. Under Pennsylvania Law a prisoner who has been convicted of first degree murder and who is serving a sentence of life imprisonment is not eligible for parole. The parole board has no power to release the prisoner from prison. The only way such a prisoner can obtain release is by a commutation granted by the Governor. Pennsylvania has a board of pardons as well as a parole board. If a life prisoner can convince the board of pardons that his sentence should be commuted, that is made shorter, and the board of pardons unanimously recommends this to the Governor, the Governor has the power to shorten the sentence. If the Governor follows the pardon board's recommendation and commutes the sentence, the prisoner maybe released early or become eligible for parole in the future.
> I will tell you that the Governor and board of pardons rarely commute a sentence of life imprisonment. You can assume that whenever they do so they will act responsibly and will not commute the sentence of a prisoner who they believe is dangerous.

Trial Transcript, 05/27/10 at 155. This is the language of Pennsylvania Suggested Standard Jury Instruction 15.2502F, para. 9, which the appellate courts have found is sufficient. *See Commonwealth v. Fletcher*, 861 A.2d 898, 914 (Pa. 2004).

2. Lack of acceptance of responsibility, Sympathy for the victim and Prison Privileges

Petitioner also contends that the DA improperly argued that the jury should impose the death penalty out of sympathy for the victim, a lack of responsibility and the prison privileges he would have if the sentence were life in prison.

During his closing, the DA stated:

Mr. Patterson asks for mercy, but he showed Eric

> Sawyer none. Eric Sawyer didn't have the benefit of 12 jurors. Eric Sawyer didn't have the benefit of a nice and orderly courtroom, or a recorder taking down everything that was being said. Eric Sawyer didn't have the benefit of a fair minded Judge and the representation of two competent defense attorneys. Eric Sawyer didn't have the benefit of the Pennsylvania or United States Constitutions before he was executed. Mr. Patterson asks for mercy, but he showed Eric Sawyer none. If Mr. Patterson does serve a penalty of life in prison he's going to be in prison, and he's going to be in general population, and he will get his cable TV, and he will have access to his weights, and he will have yard privileges, and he will have three showers -- three showers -- he will have showers and three meals a day, and he will have the benefit of mail privileges and talking on the phone and visiting with his family. He will have all of those privileges. And what can Eric Sawyer do? What did Eric Sawyer's family do except visit him at his grave?
>
> Mr. Rude suggested in his opening statement that you should consider relative culpability. The sentences that others have received, that Mr. Durrant has received a sentence of 25 to 60 years and we are seeking a penalty of death for his client. You know what the difference between Sean Durrant and Maurice Patterson is? Sean Durrant's accepted responsibility for his role. He's shown genuine remorse for his role. He's apologized to this man's mother. What has Maurice Patterson done? He's shown no remorse. He's accepted responsibility for nothing. Not only if you believe the testimony of Lori James does Mr. Patterson not accept responsibility for what he's done, he doesn't even accept responsibility for who he is. You've heard about the suffering of Eric Sawyer's family because you have a right to know who Eric Sawyer was to them. You have a right to know how his loss has impacted the family that he has left behind. Maurice Patterson never knew that Eric Sawyer. Maurice Patterson doesn't care.
>
> Eric Sawyer's family suffers greatly, Mr. Patterson's family suffers, Javier Cruz's family suffers, Sean Durrant's family suffers. It's grief and suffering that Mr. Patterson has caused, and he accepts responsibility for none of it.

Trial Transcript, 05/27/10, at 134-135.

These comments do not entitle Petitioner to a new trial. "The Commonwealth may also argue at the penalty phase that a defendant showed no sympathy or remorse, so long as it is not

an extensive tirade." *Commonwealth v. Rivera*, 773 A.2d 131, 141 (Pa. 2001). This was not an extensive tirade. The court also instructed the jury not to be influenced by sympathy, passion, prejudice. Trial Transcript, 05/27/10, at 155-156 ("Now you must decide. Be fair and do not let yourself be influenced by passion or prejudice. It was entirely up to the defendant whether or not to testify, and you heard him present testimony. The sentence you impose must be in accordance with the law as I have instructed you, and not be based upon sympathy, prejudice, emotion, or public opinion, and not based solely on victim impact testimony."). The Commonwealth is also permitted to respond to the defense evidence and arguments. As the court noted previously in this opinion,

> it is well settled that any challenged prosecutorial comment must not be viewed in isolation, but rather must be considered in the context in which it was offered. Our review of a prosecutor's comment and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial. Thus, it is well settled that statements made by the prosecutor to the jury during closing argument will not form the basis for granting a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so they could not weigh the evidence objectively and render a true verdict. The appellate courts have recognized that not every unwise remark by an attorney amounts to misconduct or warrants the grant of a new trial. Additionally, like the defense, the prosecution is accorded reasonable latitude, may employ oratorical flair in arguing its version of the case to the jury, and may advance arguments supported by the evidence or use inferences that can reasonably be derived therefrom. Moreover, the prosecutor is permitted to fairly respond to points made in the defense's closing, and therefore, a proper examination of a prosecutor's comments in closing requires review of the arguments advanced by the defense in summation.

Commonwealth v. Jones, 191 A.3d 830, 835–36 (Pa. Super. 2018)(quoting *Commonwealth v. Jaynes*, 135 A.3d 606, 615 (Pa. Super. 2016) (quotation marks, quotation, and citations omitted)).

The court agrees that the DA argued facts not in evidence when he discussed privileges that Petitioner would have in prison. However, most of what he said was common sense. Petitioner could not be deprived of food, shelter or the ability to shower because that would constitute cruel and unusual punishment.

Supplemental Claims for Relief

In his Supplemental Claims for PCRA relief filed September 11, 2018, Petitioner raises several issues involving the letters from codefendant Sean Durrant and witness Douglas Shaheen. Petitioner generally alleges that both the Court and the Commonwealth violated Petitioner's due process rights and the Commonwealth violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In total, six letters are at issue. One letter from January 2010 from codefendant Durrant and five letters either from Doug Shaheen or on his behalf during the time frame of January to March 2010. The letter from Durant was addressed to this Court. The other letters were addressed to the then District Attorney of Lycoming County. The Court will review each issue separately.

A. Did the Commonwealth's failure to disclose the Durrant letter violate the Commonwealth's Brady obligations, the Rules of Professional Conduct, and deprive Petitioner of his right to a fair trial under the due process clauses of the Pennsylvania and United States Constitutions?

In his Supplemental Claims for PCRA relief Petitioner alleges that the Commonwealth prejudiced Petitioner in failing to disclose letters sent to them to trial counsel. Petitioner claims that the letter either contained exculpatory or impeachment material and that it also contained language that could be considered a threat to recant testimony. The Commonwealth in response asserts that the letter was forwarded to trial counsel, and in the alternative that if it was not

provided to trial counsel it was not *Brady* material but rather enhances his credibility as a witness.

The letter in question is marked as Exhibit B attached to the Petitioner's Supplemental filing dated September 11, 2018. In the letter, Durrant talks about not accepting the plea agreement of 25 to 60 years offered by the Commonwealth but that he would still testify in the trial because he "made a promise to the mother of the victim and his family" but that since " lawyers and the D.A. did something that can cause a dismissal of the whole case" he would still be willing to cooperate if he could receive a "five to ten" or "6 1/2 to 12 with time served, and if not he would go to trial" to "expose these things." But he wants to make sure that "those two don't get away with what they did."

Under *Brady,* the prosecution's failure to divulge exculpatory evidence is a violation of a defendant's Fourteenth Amendment due process rights. "[T]o establish a *Brady* violation, a defendant is required to demonstrate that exculpatory or impeaching evidence, favorable to the defense, was suppressed by the prosecution, to the prejudice of the defendant." *Commonwealth v. Gibson,* 597 Pa. 402, 951 A.2d 1110, 1126 (2008). *Commonwealth v. Cam Ly,* 602 Pa. 268, 293, 980 A.2d 61, 75 (2009).

In reviewing the letter, the plain meaning of the letter appears to be Durrant reaching out to the Court for assistance in negotiating his plea agreement. Nothing in the letter shows Durrant claiming that he was providing different information that would contradict what he had previously told the police which could have impeached him or offer anything exculpatory or material to exonerate Petitioner. In fact, Durrant reaffirms his willingness to cooperate against Petitioner and their co-defendant, Javier Cruz.

The best evidence of the purpose of Durrant's letter would be for Petitioner to call him as a witness during the PCRA hearing and to ask him about the letter. Petitioner has failed to show how he was prejudiced by the failure of the Commonwealth to provide the letter. Petitioner had the chance to call Durrant to question him about the letter to develop that prejudice. Since he was not called by Petitioner, the only evidence the Court has is the language of the letter which on its face does not appear to meet the requirements of *Brady*. Therefore, this issue has no merit.

B. Was Petitioner denied due process under the Pennsylvania and United States Constitutions and his right to a fair trial when the court failed to disclose to Petitioner's trial counsel the Durrant letter and/or any other correspondence it received from Durrant and Shaheen?

In this issue, Petitioner alleges that the failure of the Court to provide letters from Durrant and those sent by Shaheen denied him his due process rights. Petitioner alleges that those letters were material and exculpatory. Petitioner cites to *Commonwealth v. Santiago,* 591 A.2d 1095 (Pa. Super. 1991) and *Commonwealth v. Ritchie*, 480 U.S. 39 (1987) in support of its claim. The Commonwealth asserts that it did provide the substance of the letters received at the time of trial and could have questioned the witness about the letters that were sent.

In *Santiago*, the Superior Court found that the trial court failed to disclose evidence it had obtained from an *in camera* interview with a witness to the defense that was not in the possession of the Commonwealth when it learned at trial that the evidence was materially exculpatory. *Santiago*, 591 A2d at 1097. The Superior Court went further to cite a New Jersey case to say that '[the court] sits neither to prove guilt nor establish innocence; but merely to maintain a fair trial. It is almost inconceivable that a court, possessing exculpatory information, must remain silent when the prosecution possessing identical information would be compelled to speak." *United States v. Cuthbertson,* 511 F.Supp. 375, 382 (D.N.J.), *reversed on other grounds,*

651 F.2d 189 (3d. Cir.), *cert. denied sub nom, Cuthbertson v. C.B.S., Inc.,* 454 U.S. 1056, 102 S.Ct. 604, 70 L.Ed.2d 594 (1981). In *Ritchie*, the U.S. Supreme Court held that the Court in its *in camera* review of Children and Youth records had a responsibility to consider the materiality of a defense request and the "court would be obligated to release information material to the fairness of the trial." *Ritchie*, 480 U.S. at 60.

The Court provided information to the parties that defendants, including Shaheen regularly corresponded with the Court. N.T. 5/21/2010 at 56. Since the Court had a policy of not communicating with defendants represented by counsel, the letters would have been forwarded to the Commonwealth and counsel of record. Trial counsel, in an unrelated case such as Petitioner's, would not have received a copy of the letters because there would be no connection or reason to provide them with that information. Although the Court knew that Durrant was charged along with Petitioner and his other codefendant, Javier Cruz, there would be no reason for the Court to know that Shaheen was a witness in the case, as it discovered when he was discussed to be called as a witness in the original trial. N.T., 5/21/2010 at 56. In fact, the substance of the letters from Shaheen which had been found by the Commonwealth were either related to his request to be admitted to the Drug Court or to ask the Commonwealth for a more favorable plea offer. These letters were attached as exhibits to the Commonwealth's reply brief filed July 21, 2023. No mention of the outstanding charges against Petitioner or his codefendants was mentioned as to trigger the connection between the two. From a plain reading of the letter, it is difficult to see any materially exculpatory information contained in the letters from Shaheen.

In addition, at the time that this information was revealed to the parties during the original trial, trial counsel had the opportunity to call Shaheen as a witness and ask him about the

letters that he was writing to the Court. Trial counsel stated that they had interviewed him but chose not to call him as a witness. *Id.* at 57. Accordingly, this issue has no merit.

Similarly, as addressed above, the letter from Durrant also concerned his own case and the possibility of him negotiating a better deal from the Commonwealth. It possessed no materially exculpatory evidence. Therefore, this issue has no merit.

C. Was trial counsel ineffective for failing to request any remedial measures and/or investigation when the court disclosed that it had received letters from Durrant and Shaheen?

In this issue, Petitioner alleges that trial counsel had no reasonable basis for failing to request to see the letters that the Court received from both Shaheen and Durrant, ask the Court about the content of the letters, what it did with the letters or investigate. Petitioner also alleges that his failure to ask the Court for letters from Durrant "impeded" him from effectively cross-examining Durrant. The Commonwealth asserts that trial counsel's failure to request remedial measures did not prevent effective cross-examination.

"We do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." *Commonwealth v. Washington,* 592 Pa. 698, 927 A.2d 586, 594 (2007). Any reviewing court will conclude that counsel's chosen strategy lacked a reasonable basis only if the petitioner proves that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Commonwealth v. Williams,* 587 Pa. 304, 899 A.2d 1060, 1064 (2006) (citation omitted). Therefore, to establish the prejudice prong in an ineffective assistance claim, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness. *Commonwealth v.*

Dennis, 597 Pa. 159, 950 A.2d 945, 954 (2008), *Commonwealth v. Hanible*, 612 Pa. 183, 205–06, 30 A.3d 426, 439 (2011).

As discussed above, the letters from both Durrant and Shaheen were asking for consideration for benefits to themselves with no reference to withholding information or testimony about Petitioner's case. Petitioner fails to point out exactly how having that letter to cross-examine Durrant would have changed the outcome of the trial.

Trial counsel also had the opportunity to call Shaheen during the trial, knowing the existence of correspondence and chose not to do so. Trial counsel would not have been precluded from impeaching Shaheen after calling him as a witness. *See* Pa. Rule of Evidence 607[47]. Not having physical possession of the letters would not have stopped trial counsel from inquiring why he was writing the Court. Again, Petitioner cannot demonstrate how not having the letters with which to cross examine Shaheen would have changed the outcome of the trial. In the absence of information in Shaheen's letters talking about Petitioner, his case or any police contacts he may have had about it, it is more likely than not that trial counsel saw that there was no reasonable basis for calling him to testify as he provided no benefit to his client. Therefore, this issue has no merit.

D. Was the missing correspondence from Shaheen and Durrant to the court lost and/or destroyed in bad faith and in violation of Petitioner's rights to due process and a fair trial under the Pennsylvania and United States Constitutions?

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[47] Pa. Rule of Evidence 607. Who May Impeach a Witness, Evidence to Impeach a Witness
(a) Who May Impeach a Witness. Any party, including the party that called the witness, may attack the witness's credibility.
(b) Evidence to Impeach a Witness. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules.

With this issue, Petitioner alleges that the fact that letters were not provided during the trial and that the Commonwealth destroyed or lost the other letters which were sent. Petitioner alleges that those "lost or destroyed" letters potentially contained exculpatory and/or impeachment evidence or additional information. He also believes that a presumption should exist that those materials were a benefit to the defense. The Commonwealth argues that no reason existed that the Commonwealth would save one letter and destroy the others. Commonwealth asserts that both the Shaheen and Durrant letters had no exculpatory information contained in them. Trial counsel was notified by the Commonwealth that Shaheen did speak with investigators about a potential suspect and had the chance to investigate that claim, refuting the allegation that the Commonwealth was hiding potentially exculpatory information.

"Where evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so." *Clark v. Phila. Coll. of Osteopathic Med.*, 693 A.2d 202, 204 (Pa.Super. 1997) (quoting *Haas v. Kasnot*, 92 A.2d 171, 173 (Pa. 1952)) "the jury may draw an inference that it would be unfavorable to him." *Kasnot,* 92 A2d. at 173. Petitioner argues that since the Commonwealth had possession of letters from both Durrant and Shaheen and failed to provide them to trial counsel bad faith should be presumed.

Rule of Criminal Procedure 573 provides in pertinent part

> (B) Disclosure by the Commonwealth
> (1) *Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

> (a) Any evidence favorable to the accused which is material either to guilt or to punishment, and which is within the possession or control of the attorney for the Commonwealth.

The first determination which needs to be made if the Commonwealth violated Rule 573(B) in failing to provide the letters prior to Petitioner's trial. In reviewing the actual letters, it is clear that none of them contained evidence material to the guilt or punishment of the Petitioner. Even a conservative reading of the letters establishes what they are: attempts by both men to obtain more favorable dispositions of their cases. Because each of the men had pending criminal charges, without any direct reference to Petitioner, the Commonwealth would have no reason to provide the letters to Petitioner. Therefore, it is logical that the letters from Shaheen would have been only found in his file.

Since the Durrant letter said nothing about refusing to or no longer cooperating with the Commonwealth against his codefendants (including Petitioner) there would be no reason for the Court to provide the letter to anyone other than the parties to which it would pertain: his attorney and the Commonwealth. Accordingly, this issue also has no merit.

Finally, Petitioner cannot establish and the Court finds that neither of the men obtained any benefit from the Commonwealth or the Court[48] as a result of the letters written to them which then could have been used to impeach at trial. Therefore, the Court finds no discovery violation or of *Brady.*

E. Does Pennsylvania's capital punishment system violate Article 1, §13 of the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution?

[48] This Court was at the time and continues to be the only judge presiding over the Drug Court program.

In Petitioner's Supplement to First Amended PCRA motion, Patterson alleges that Pennsylvania's Capital Punishment system violates both Article I Section 13 of the Pennsylvania Constitution and the Eighth Amendment of the U.S. Constitution and he is entitled therefore to relief under the PCRA. For the following reasons, Petitioner's argument has no merit and he is not entitled to relief on this issue under the PCRA.

In order to be considered for PCRA relief, Petitioner must allege that he is eligible for relief pursuant to 42 Pa. C.S.A. §9543. One of the elements the Petitioner must plead and prove by a preponderance of the evidence is to show that the allegation of error has not been previously litigated or waived. 42 Pa. C.S.A. § 9543(a)(3). Petitioner has not complied with this requirement to make him eligible for relief. The PCRA statute defines previous litigation where 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; or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence. 42 Pa. C.S.A. § 9544 (a)(2), (3). The statute also defines the waiver of an issue 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.

Under Pennsylvania law in order to litigate constitutional issues on appeal, they must be raised before the trial court and included in the statement of matters complained of on appeal. *See generally* Pa. R. A.P. 302(a)("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal."); Pa.R.A.P.1925(b)(4)(ii) ("The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge."); *See also Commonwealth v. Laird,* 180, 988 A.2d 618, 644 n 27 (Pa. 2010).

When Patterson filed his post sentence motions, of the 28 issues that were raised, not one discussed the unconstitutionality of the death penalty. Opinion and Order, 01/17/2012. When Patterson took his initial direct appeal to the Supreme Court, none of those issues listed on his 1925(b) statement challenged the constitutionality of the death penalty. Opinion and Order, 08/12/2012. At no time prior to the direct appeal did trial raise any constitutional claim involving the death penalty. The Supreme Court found that the issue when raised for the first time in the brief on direct appeal was waived. *Commonwealth v. Patterson,* 91 A.3d 55, 77-78 (Pa. 2014). In addition, the Supreme Court found that trial counsel failed to support the issue raised with either a substantive argument or supporting case law to bolster its position. *Id.* at 78. Therefore, this issue would not be eligible for relief under Section 9543(a)(3).

In his Supplement to Amended PCRA, filed September 11, 2018, Petitioner alleges the capital punishment system in Pennsylvania is broken and that, among other conclusory statements, in the interests of justice his sentence of death needs to be vacated. This issue was at no time briefed by Petitioner's counsel.

In order to establish jurisdiction under the PCRA statute, Petitioner must also establish that his conviction or sentence resulted from one or more of the circumstances enumerated in subsection 9543(a)(2). 42 Pa.C.S. § 9543(a)(2). Petitioner has failed to plead or prove by a preponderance of the evidence one or more of the applicable subsections which would make him eligible for PCRA relief. Therefore, this issue would also not be eligible for relief under Section 9543(a)(2). Petitioner never specifically asserted that he was entitled to relief under section 9543(a)(2)(i). Any constitutional claim was waived by failing properly assert it at trial or on direct appeal. Therefore, even if he had alleged 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", though, he still would not be entitled to relief because he did not assert this claim as an ineffective assistance of counsel claim. *See Commonwealth v. Flor*, 259 A.3d 891, 908-909 (Pa. 2021).

Finally, what Petitioner does do is plead in his Supplement to Amended PCRA and rely upon the Joint State Government Commission (JSGC) report dated June 25, 2018[49].This report purports to support his claim that the provisions in the Eighth Amendment to the U.S. Constitution as well as Article 1 Section 13 of the Pennsylvania Constitution, "compel capital punishment to be declared unconstitutional." Supplement to Amended PCRA, 09/11/2018 at 19.

The JSGC report makes seven (7) key findings. First, the cost of death penalty is significantly more expensive than life imprisonment due to extensive litigation and higher correctional costs. The report noted a bias and unfairness highlighting the variability in how the death penalty is applied across counties, with racial and geographical disparities noted along with recommending a systematic data collection for proportionality review to be established. Next, the report examines that despite judicial protections such as those provided for by *Atkins v. Virginia*, 536 U.S. 304 (2002), inmates with intellectual disabilities and severe mental illnesses may still be sentenced to death. The report also found that any procedural safeguards were deemed inadequate to ensure compliance.

[49] As identified in Petitioner's Supplement, Senate Resolution No. 6 of 2011 directed the JSGC to establish a bipartisan task force and advisory committee to conduct a study of capital punishment in Pennsylvania and to report their findings and recommendation. The members of this Committee consisted of prosecutors, members of the judiciary, police officers, defense attorneys, social workers, and academics. See Joint State Government Commission, Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee, June 2018.

An additional area examined by the JSGC report was the jury selection process. The Committee found that the process of "death qualifying" jurors created biases, potentially affecting fair trial outcomes. Women, people of color, and certain faith groups also were found to face exclusion from participation. The Committee also found that procedural doctrines like waiver or forfeiture often prevent the review of serious constitutional claims. Pennsylvania's high rate of postconviction reversals were highlighted as an indication of inefficiencies. The report also discussed concerns over the constitutionality and humanity of Pennsylvania's execution methods and prolonged death row confinement. Finally, the Committee found that services for murder victims' families were inconsistent across counties, and that current funding does not sufficiently address the needs of victim's families.

While the 270-page report made a number of recommendations, abolishing the death penalty in Pennsylvania was not one of them. The report highlighted systemic issues with Pennsylvania's administration of the death penalty and called for comprehensive reforms to address fairness, efficiency, and human rights concerns. Among those recommendations were to improve data collection, enhance legal representation, adjust procedures for mental illness by creating pretrial determinations for intellectual disability and expanding mental illness exemptions, reform jury practices, address systemic inefficiencies by reinstating relaxed waiver rules for direct appeals in capital cases to prevent delays, offer more support for families by standardizing and increasing funding for victim advocacy services, and reevaluating the method and protocols for executions to bring them more in line with constitutional standards. The report's findings, though critical of Pennsylvania's capital punishment system, stop short of asserting constitutional violations; rather they suggest legislative reforms. The Pennsylvania

General Assembly has not acted to repeal the death penalty in response to the report, reflecting legislative deference to the current statutory framework.

On the issue of capital punishment Petitioner takes both an on its face and as-applied approach to challenge the constitutionality of the death penalty statute. However, Petitioner cannot cite to caselaw in support of his position on either approach.

Petitioner concedes that in *Gregg v. Georgia,* 428 U.S. 153 (1976) the U.S. Supreme Court upheld the death penalty on U.S. Constitutional grounds.

With respect to the Pennsylvania constitutional challenge, this court notes that *Commonwealth v. Hairston*, 249 A.3d 1046 (Pa. 2021) is the most recent Pennsylvania case to discuss capital punishment and its constitutionality. In *Hairston*, the Supreme Court determined that *Gregg, supra,* held that the death penalty did not violate evolving standards of decency. *Hairston*, 249 A.3d at 1055. The Pa. Supreme Court also determined that in *Gregg*, the Supreme Court made two fundamental determinations. First, that while prohibiting cruel and unusual punishments, the framers of the Constitution nevertheless expressly recognized the availability of capital punishment when due process is afforded. The Fifth Amendment to the United States Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor be deprived of life, liberty, or property, without due process of law...." *Gregg*, 428 U.S. at 177. And the second determination that the "evolving" nature of our standards of decency is generally a decision left for state legislatures. *Gregg,* 428 U.S. at 174; *Hairston,* 249 A.3d at 1055. Both Supreme Courts were reluctant to usurp the authority of the legislature, a democratically chosen body, "to respond to the will and consequently the moral values of the people." *Gregg,* 428 U.S. at 175-176; *Hairston,* 249 A.3d at 1056.

In reconciling the constitutionality of the death penalty with Article 1 Section 13 of the Pennsylvania Constitution, the *Hairston* court stated that

> this Court has repeatedly affirmed the constitutionality of the death penalty against challenges that it constitutes a "cruel punishment" under Article I, Section 13. *See, e.g.*, *Commonwealth v. Walter*, 632 Pa. 174, 119 A.3d 255, 293-94 (2015); *Commonwealth v. Perez*, 625 Pa. 601, 93 A.3d 829, 844 (2014). Article I, Section 13 of the Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." In *Zettlemoyer*, the defendant argued that imposition of the death penalty was "inevitably" cruel punishment under Article I, Section 13. *Zettlemoyer*, 454 A.2d at 967. This Court responded that the same claim, when raised under the Eighth Amendment's proscription against "cruel and unusual" punishments, had been rejected by the U.S. Supreme Court in *Gregg*. *Id.* Adopting the Supreme Court's reasoning in *Gregg*, this Court concluded that "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments."[7] *Id.* In particular, we emphasized first that the framers of our Constitution, like their counterparts drafting the United States Constitution, did not believe that capital punishment was a "per se violation of the prohibition against 'cruel punishments.' " *Id.* ("Article I, § 9 enacted simultaneously with Art. I, § 13, provides 'nor can [the accused in a criminal prosecution] be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.' Similarly, Art. I, § 10 provides '[n]o person shall, for the same offense, be twice put in jeopardy of life or limb....' ").

Hairston, 249 A.3d at 1058. For these reasons, Petitioner's facial challenge to the constitutionality of the death penalty must fail.

With respect to the as-applied challenge, Petitioner must assert that a law, while generally constitutional, is unconstitutional as applied to the specific circumstances of a particular case. In past cases addressing as-applied challenges to the constitutionality of the death penalty, the Pa. Supreme Court has acknowledged that an appellant must demonstrate that he is impacted by the alleged defect in order to be entitled to relief from his death sentence. *Hairston,* 249 A.3d at 1060.

Here, Petitioner cites back to the JSGC report arguing that each of the findings of the report as a whole make the determination of the capital punishment system arbitrary and capricious. Supplement to Amended PCRA, 09/11/2018 at 20. While citing each finding, Petitioner does not allege that he individually has been impacted or affected by the defects in Pennsylvania's capital punishment system identified in the JSGC report. Petitioner does not allege in any way how geographical, racial or jury bias impacted the prosecution of his case. While Petitioner suggests that unlike himself, the majority of District Attorneys are white, he can point to no evidence of prosecutorial bias in his prosecution. While there may be no process in place to undertake a proportionality review, Petitioner does not assert how that impacted the prosecution of his case. Finally, although Petitioner discussed the large number of appellate reversals in capital cases, he suggests nothing that would show that in some way impacted his prosecution, conviction and sentencing. Therefore, his as-applied challenge would also fail.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**CP-41-CR- 1061-2008**
	:	
MAURICE PATTERSON,	:	**PCRA**
Petitioner	:	

ORDER

AND NOW, this 21st day of January, 2025, for the reasons set forth in the foregoing Opinion, the court DENIES Defendant's PCRA petition with respect to his guilt phase claims and GRANTS Defendant's PCRA petition with respect to his penalty phase claims. The court VACATES the sentence of death and awards a new penalty hearing.

Defendant is notified that he has the right to appeal from this order to the Pennsylvania Supreme Court. *See* 42 Pa. C.S.A. §9546(d); *Commonwealth v. Williams*, 196 A.3d 1021, 1024 n.1 (Pa. 2018)("The PCRA provides that this Court shall have exclusive jurisdiction over appeals from a final order granting or denying relief in cases where the death penalty has been imposed"). The Commonwealth also has a right to appeal.

An appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the opposing party. The form and contents of the Notice of Appeal shall conform to the requirement set forth in Rule 904 of the Rules of Appellant Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa. R. App. P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, the party may lose forever their right to raise these issues.

The Clerk of Courts shall mail a copy of this order to the defendant by certified mail, return receipt requested.

By the Court,

Nancy L. Butts, President Judge

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