NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DONALD M. GUY	:	
Appellant	:	No. 1042 EDA 2025

Appeal from the PCRA Order Entered April 10, 2025
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0002434-2009

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DONALD M. GUY	:	
Appellant	:	No. 1043 EDA 2025

Appeal from the PCRA Order Entered April 10, 2025
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0002439-2009

BEFORE: McLAUGHLIN, J., KING, J., and BECK, J.

MEMORANDUM BY KING, J.: **FILED NOVEMBER 19, 2026**

Appellant, Donald M. Guy, appeals from the order entered in the Philadelphia County Court of Common Pleas, which dismissed his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We vacate the dismissal order and remand for further proceedings. We also grant the

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[1] 42 Pa.C.S.A. §§ 9541-9546.

petition to withdraw filed by appointed counsel, George S. Yacoubian.

On September 14, 2012, a jury convicted Appellant of two counts of first-degree murder and related offenses at two different docket numbers. That same day, the court sentenced Appellant to consecutive terms of life imprisonment without the possibility of parole. This Court affirmed the judgment of sentence on October 7, 2014, and our Supreme Court denied Appellant's petition for allowance of appeal on April 22, 2015. ***See Commonwealth v. Guy***, 108 A.3d 104 (Pa.Super. 2014) (unpublished memorandum), *appeal denied*, 631 Pa. 746, 114 A.3d 1039 (2015).

Appellant timely filed a *pro se* PCRA petition on April 15, 2016. The court appointed counsel ("first PCRA counsel"), who filed a motion to withdraw and brief pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). On June 30, 2017, the court provided Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition without a hearing. Appellant filed a *pro se* response to the Rule 907 notice on July 17, 2017. On August 4, 2017, the court removed first PCRA counsel and appointed second PCRA counsel to assist Appellant. Second PCRA counsel filed an amended petition on January 25, 2018.

On February 8, 2019, the court entered an order granting an evidentiary hearing for two of Appellant's issues concerning after-discovered evidence. The court conducted the evidentiary hearing on July 9, 2019. Nevertheless,

Appellant's co-defendant, Thomas Foggy, "was not brought down" from state prison. (N.T. Hearing, 7/9/19, at 4). This witness was critical because one of Appellant's claims centered on Mr. Foggy's recantation of his trial testimony implicating Appellant. The court conducted a second evidentiary hearing, with Mr. Foggy, on September 22, 2022.[2]

On November 8, 2022, second PCRA counsel filed a motion to withdraw. In it, second PCRA counsel claimed that Appellant had retained a new attorney ("third PCRA counsel") "to take over the pending PCRA proceedings…." (Motion to Withdraw, filed 11/8/22, at 1). Third PCRA counsel entered his appearance that same day. The court permitted second PCRA counsel to withdraw on January 19, 2023. On March 24, 2023, the court conducted a third evidentiary hearing and received testimony from the prosecutor who participated in Appellant's trial. Following the hearing, the court ordered the parties to submit additional briefs. The court subsequently continued the matter.[3] Ultimately, the Commonwealth filed its post-hearing brief on September 23, 2024.

At some point after the Commonwealth submitted its brief, third PCRA

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[2] Between the two hearings, second PCRA counsel filed a supplemental PCRA petition on July 26, 2021.

[3] Although third PCRA counsel informed the court that he would not be filing a brief, the Commonwealth needed additional time due to the unavailability of certain transcripts, as well as its intent to file "its brief in conjunction with the post-hearing brief of co-defendant Foggy." (Order, filed 3/8/24, at 1 n.2).

counsel expressed his desire to withdraw.[4] The court permitted third PCRA counsel to withdraw on November 22, 2024. On January 10, 2025, the court appointed fourth PCRA counsel, Attorney Yacoubian. The court also granted a continuance and scheduled a March 2025 Zoom hearing to determine "whether the petition is ripe for review by the court." (Order, filed 1/10/25). Before Attorney Yacoubian took any action, however, new private counsel ("fifth PCRA counsel") entered his appearance on February 6, 2025.

On February 8, 2025, fifth PCRA counsel filed a motion for an extension. In it, counsel explained that: 1) Appellant had retained counsel's firm two days earlier; 2) counsel was in the process of obtaining Appellant's files from Attorney Yacoubian; 3) counsel needed to conduct a full review of the files; and 4) counsel requested a continuance of the next Zoom hearing. On February 11, 2025, the court denied fifth PCRA counsel's motion. On February 19, 2025, fifth PCRA counsel filed another motion for an extension of time to file an amended PCRA petition. In the alternative, counsel requested the court's permission to withdraw. On February 25, 2025, the court denied fifth PCRA counsel's request for an extension, granted the request to withdraw, and reappointed Attorney Yacoubian.

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[4] A formal motion to withdraw does not appear in the record. Instead, the record includes an order scheduling a November 2024 hearing to address third PCRA counsel's request. (***See*** Order, filed 10/8/24).

On March 19, 2025, the court reissued Rule 907 notice.[5] Despite being represented by Attorney Yacoubian, Appellant filed a *pro se* response to the Rule 907 notice on March 31, 2025. On April 10, 2025, the court entered its order dismissing Appellant's PCRA petition.

On April 16, 2025, Attorney Yacoubian timely filed a notice of appeal on Appellant's behalf. Following some delays, the court permitted Attorney Yacoubian to file a Pa.R.A.P. 1925(b) concise statement of matters complained of on appeal on September 28, 2025. On January 14, 2026, Attorney Yacoubian filed a ***Turner***/***Finley*** brief in this Court. The next day, Attorney Yacoubian filed an application to withdraw as counsel. On May 19, 2026, new private counsel, Attorney Goldstein, entered his appearance in this Court. That same day, Attorney Goldstein filed an application to file a replacement brief. Specifically, Attorney Goldstein sought to withdraw and replace the filings that Attorney Yacoubian had submitted on Appellant's behalf. On June 23, 2026, this Court denied Attorney Goldstein's application. Further, we permitted Attorney Goldstein to file a response to Attorney Yacoubian's ***Turner***/***Finley*** brief. Attorney Goldstein filed a response to Attorney

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[5] The Rule 907 notice also crystallized the final form of the collateral issues Appellant had litigated. Specifically, Appellant presented: 1) a claim of after-discovered evidence alleging that Mr. Foggy had recanted his trial testimony; 2) a claim of after-discovered evidence alleging a pattern and practice of coercion by Philadelphia homicide detectives; 3) ineffective assistance of trial counsel for providing deficient advice about Appellant's right to testify at trial; 4) ineffective assistance of trial counsel for failing to call certain witnesses; and 5) cumulative prejudice due to trial counsel's ineffectiveness.

Yacoubian's ***Turner***/***Finley*** brief on August 17, 2026. As we will discuss ***infra***, Attorney Goldstein wishes to raise new ineffectiveness claims pursuant to ***Commonwealth v. Bradley***, 669 Pa. 107, 261 A.3d 381 (2021).

As a prefatory matter, we address Attorney Yacoubian's application to withdraw. Before counsel can be permitted to withdraw from representing a petitioner under the PCRA, Pennsylvania law requires counsel to file a "no-merit" brief or letter pursuant to ***Turner*** and ***Finley***. ***Commonwealth v. Karanicolas***, 836 A.2d 940 (Pa.Super. 2003).

> [C]ounsel must then submit a "no-merit" letter to the [PCRA] court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007). Counsel must also send to the petitioner a copy of the "no-merit" letter or brief and motion to withdraw and advise the petitioner of his right to proceed *pro se* or with privately retained counsel. ***Id.*** "Substantial compliance with these requirements will satisfy the criteria." ***Karanicolas, supra*** at 947.

Here, Attorney Yacoubian filed an application to withdraw and a ***Turner***/***Finley*** brief detailing the nature of his review and explaining why Appellant's issues lack merit. Counsel notified Appellant of the request to withdraw and advised Appellant regarding his rights. Thus, counsel substantially complied with the ***Turner***/***Finley*** requirements. ***See Wrecks, supra***; ***Karanicolas, supra***. Accordingly, we proceed to an independent

evaluation. ***See Turner, supra*** at 494-95, 544 A.2d at 928-29 (stating that reviewing court must conduct independent analysis and agree with counsel).

Attorney Yacoubian presents the following issues for this Court's review:

> Recantation of co-defendant Thomas Foggy[.]
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> * * *
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> Coercive tactics of Philadelphia detectives[.]
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> * * *
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> Ineffectiveness of trial counsel regarding [Appellant's] testimony[.]
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> * * *
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> Ineffectiveness of trial counsel regarding Wilson Rodriguez[.]
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> * * *
>
> Cumulative effect[.]

(***Turner***/***Finley*** Brief at 14, 16, 17, 19).

"Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error." ***Commonwealth v. Beatty***, 207 A.3d 957, 960-61 (Pa.Super. 2019), *appeal denied*, 655 Pa. 482, 218 A.3d 850 (2019). "[W]e review the court's legal conclusions *de novo*." ***Commonwealth v. Prater***, 256 A.3d 1274, 1282 (Pa.Super. 2021), *appeal denied*, 672 Pa. 30, 268 A.3d 386 (2021). "A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be

provided great deference by reviewing courts." ***Commonwealth v. Johnson***, 600 Pa. 329, 356, 966 A.2d 523, 539 (2009).

To obtain relief based upon after-discovered evidence under the PCRA, a petitioner must establish:

> (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict.

Commonwealth v. Washington, 592 Pa. 698, 715, 927 A.2d 586, 595-96 (2007). If the after-discovered evidence is incredible, it would not compel a different outcome, and the PCRA court must deny the request for a new trial. ***See Commonwealth v. Small***, 647 Pa. 423, 451, 189 A.3d 961, 977 (2018) (explaining PCRA court needed to, in first instance, assess credibility of after-discovered recantation in light of evidence as whole; unless PCRA court is satisfied that after-discovered evidence is credible, it should deny new trial).

Further, counsel is presumed to have rendered effective assistance. ***Commonwealth v. Hopkins***, 231 A.3d 855 (Pa.Super. 2020), *appeal denied*, 663 Pa. 418, 242 A.3d 908 (2020).

> [T]o establish a claim of ineffective assistance of counsel, a defendant must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. The burden is on the defendant to prove all three of the following prongs: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is

> a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Sandusky, 203 A.3d 1033, 1043 (Pa.Super. 2019), *appeal denied*, 654 Pa. 568, 216 A.3d 1029 (2019) (internal citations and quotation marks omitted). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111 (2011).

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has forgone and which forms the basis for the assertion of ineffectiveness is of arguable merit." ***Commonwealth v. Smith***, 167 A.3d 782, 788 (Pa.Super. 2017), *appeal denied*, 645 Pa. 175, 179 A.3d 6 (2018) (quoting ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994)). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004) (quoting ***Commonwealth v. Geathers***, 847 A.2d 730, 733 (Pa.Super. 2004)).

"Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests." ***Commonwealth v. Kelley***, 136 A.3d 1007, 1012 (Pa.Super. 2016) (quoting ***Pierce, supra*** at 524, 645 A.2d at 194-95).

> The test for deciding whether counsel had a reasonable basis for his action or inaction is whether no competent counsel would have chosen that action or inaction, or, the alternative, not chosen, offered a significantly greater potential chance of success. Counsel's decisions will be

> considered reasonable if they effectuated his client's interests. We do not employ a hindsight analysis in comparing trial counsel's actions with other efforts he may have taken.

Commonwealth v. King, 259 A.3d 511, 520 (Pa.Super. 2021) (quoting ***Sandusky, supra*** at 1043-44).

"To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding." ***Commonwealth v. Spotz***, 624 Pa. 4, 33-34, 84 A.3d 294, 312 (2014) (internal citations and quotation marks omitted). "A criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Hopkins, supra*** at 876 (quoting ***Commonwealth v. Chambers***, 570 Pa. 3, 33, 807 A.2d 872, 883 (2002)).

For claims of ineffectiveness based upon counsel's failure to call a witness:

> A defense attorney's failure to call certain witnesses does not constitute *per se* ineffectiveness. In establishing whether defense counsel was ineffective for failing to call witnesses, a defendant must prove the witnesses existed, the witnesses were ready and willing to testify, and the absence of the witnesses' testimony prejudiced petitioner and denied him a fair trial.

Commonwealth v. Cox, 603 Pa. 223, 267-68, 983 A.2d 666, 693 (2009) (internal citation omitted). A petitioner "must show how the uncalled

witnesses' testimony would have been beneficial under the circumstances of the case." ***Commonwealth v. Gibson***, 597 Pa. 402, 441, 951 A.2d 1110, 1134 (2008).

Additionally, the decision on whether to testify on one's own behalf is to be made by the defendant after full consultation with counsel. ***Commonwealth v. Michaud***, 70 A.3d 862, 869 (Pa.Super. 2013).

> In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.

Id. (quoting ***Commonwealth v. Nieves***, 560 Pa. 529, 533, 746 A.2d 1102, 1104 (2000)).

After a thorough review of the certified record, the parties' briefs, and the relevant law, we conclude the record supports the PCRA court's denial of relief. ***See Prater, supra***; ***Beatty, supra***. The opinion of the Honorable Linda A. Carpenter, filed on April 10, 2025, adequately disposed of the issues that Appellant has been litigating since 2016.

Regarding Appellant's after-discovered evidence claims, the PCRA court found Mr. Foggy's recantation to be incredible. (***See*** PCRA Court Opinion, filed 4/10/25, at 12) (unnumbered). We cannot say that the court erred by denying Appellant's requested relief that was based upon incredible evidence. ***See Small, supra***. To the extent that Appellant also raised an after-discovered evidence claim related to the purported coercion of one of the

preliminary hearing witnesses, Vanessa Delvalle, the court found that the police witness credibly testified that Ms. Delvalle's statements were not coerced. (***See*** PCRA Court Opinion at 16). The record supports the court's determination. Specifically, Detective Greg Singleton participated in Ms. Delvalle's interview, and he did not recall that he or his partner told Ms. Delvalle "that if she didn't cooperate … she could go down with" Appellant. (N.T. Hearing, 7/9/19, at 20). Absent more, we grant great deference to the PCRA court's credibility determinations. ***See Johnson, supra***.

Regarding Appellant's ineffectiveness claims, the PCRA court noted that Appellant failed to make a proffer regarding the purportedly deficient advice that trial counsel provided about Appellant's decision not to testify. (***See*** PCRA Court Opinion at 20). Our review confirms that Appellant failed to establish how trial counsel interfered with his right to testify, or that trial counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by Appellant. (***See*** Amended PCRA Petition, filed 1/25/18, at 17-22; N.T. Hearing, 9/22/22, at 106-114).[6] Further, the court correctly determined that Appellant's on-the-record colloquy at trial demonstrated his knowing waiver of the right to testify. (***See*** N.T. Trial, 9/13/12, at 78-79).

Appellant also claimed that trial counsel was ineffective for failing to call two witnesses: Rasheed Clover and Wilson Rodriguez. Appellant's amended

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[6] Appellant did not address this issue at the PCRA hearing. Instead, his testimony dealt with his discovery of Mr. Foggy's recantation.

PCRA petition did not include an affidavit from Mr. Clover. Although the amended petition included an affidavit from Mr. Rodriguez, it was unsigned. (***See*** Amended PCRA Petition at Exhibit P5). Subsequently, these witnesses did not testify at the evidentiary hearings. In disposing of this claim, the court again cited Appellant's on-the-record colloquy at trial, where Appellant indicated that there were no additional witnesses that he wanted to present. (***See*** N.T. Trial, 9/13/12, at 77-78). Appellant is bound by these statements, and he cannot assert that trial counsel was ineffective on these bases. ***See Commonwealth v. Paddy***, 569 Pa. 47, 82, 800 A.2d 294, 316 (2002) (explaining that defendant who makes knowing, voluntary, and intelligent decision concerning trial strategy cannot later complain that trial counsel was ineffective on basis of that decision).[7]

Based upon the foregoing, we conclude there is no merit to the claims that Appellant has been litigating in the PCRA court. Our review of the record also leads us to agree with Attorney Yacoubian that Appellant is not entitled to relief on these claims. Consequently, we grant Attorney Yacoubian's

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[7] "[N]o number of failed ineffectiveness claims may collectively warrant relief if they fail to do so individually. When the failure of individual claims is based upon a lack of prejudice, however, then the cumulative prejudice from those individual claims may properly be assessed." ***Commonwealth v. Elliott***, 622 Pa. 236, 294, 80 A.3d 415, 450 (2013), *cert. denied*, 574 U.S. 828, 135 S.Ct. 50, 190 L.Ed.2d 54 (2014) (internal citations omitted). Here, we have rejected Appellant's ineffectiveness claims based upon the arguable merit prong of the test for ineffectiveness. Thus, there can be no aggregation of prejudice from multiple ineffectiveness claims, and Appellant's claim of cumulative error also fails. ***See id.***

petition to withdraw.

Nevertheless, we are mindful of the new ineffectiveness claims advanced by Attorney Goldstein. While our Supreme Court's holding in ***Bradley*** allows PCRA petitioners to raise claims of PCRA counsel's ineffectiveness at the first opportunity to do so, "[i]t is not an appellate court's function to engage in fact-finding." ***Commonwealth v. Shaw***, 665 Pa. 126, 141, 247 A.3d 1008, 1017 (2021) (quoting ***BouSamra v. Excela Health***, 653 Pa. 365, 386-87, 210 A.3d 967, 979-80 (2019)). The PCRA court is "the appropriate—and, indeed, the only—forum for the evidentiary and factual development" of PCRA claims. ***Id.*** (quoting ***Commonwealth Koehler***, 658 Pa. 658, 695, 229 A.3d 915, 937 (2020)). In ***Bradley***, our Supreme Court also acknowledged that remand is proper in certain cases where ineffectiveness claims are raised on appeal in the first instance:

> In some instances, the record before the appellate court will be sufficient to allow for disposition of any newly-raised ineffectiveness claims. However, in other cases, the appellate court may need to remand to the PCRA court for further development of the record and for the PCRA court to consider such claims as an initial matter. Consistent with our prior case law, to advance a request for remand, a petition would be required to provide more than mere boilerplate assertions of PCRA counsel's ineffectiveness …; however, where there are material facts at issue concerning [claims challenging counsel's stewardship] and relief is not plainly unavailable as a matter of law, the remand should be afforded[.]

Bradley, supra at 142-43, 261 A.3d at 402 (internal citations, footnote, and quotation marks omitted).

Instantly, Attorney Goldstein challenges all prior counsels' effectiveness.[8] These claims, however, have not been developed outside of the arguments included in Attorney Goldstein's filing. Although Attorney Goldstein's filing addresses all three parts of the test for ineffectiveness, Appellant has not had the opportunity to proffer input from prior counsel regarding the "strategic basis" for their actions. ***See Commonwealth v. Roney***, 622 Pa. 1, 21, 79 A.3d 595, 606-07 (2013), *cert. denied*, 574 U.S. 829, 135 S.Ct. 56, 190 L.Ed.2d 56 (2014) (explaining petitioner offered no affidavit or other evidence as to what trial counsel did or did not investigate; petitioner provided no explanation for absence of affidavit from trial counsel and proffered no evidence as to what actions trial counsel took or failed to take; thus, any assertion that trial counsel had no reasonable basis for inaction was speculative). Likewise, the PCRA court did not have the opportunity to assess prejudice in the first instance. ***See Shaw, supra*** at 140-41, 247 A.3d

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[8] Attorney Goldstein is Appellant's sixth PCRA counsel. Therefore, Appellant must now present "layered" claims of ineffective assistance, referring to trial counsel and all prior PCRA counsels' ineffectiveness. "In determining a layered claim of ineffectiveness, the critical inquiry is whether the first attorney that the defendant asserts was ineffective did, in fact, render ineffective assistance of counsel. If that attorney was effective, then subsequent counsel cannot be deemed ineffective for failing to raise the underlying issue." ***Commonwealth v. Burkett***, 5 A.3d 1260, 1270 (Pa.Super. 2010). Here, Attorney Goldstein raises layered claims of all prior PCRA counsels' ineffectiveness for failing to argue that trial counsel was ineffective for: 1) failing to object to the trial court's instruction on character evidence; 2) failing to object to the prosecutor's closing argument; 3) failing to present any theory of defense; and 4) agreeing to a jury instruction regarding an absent witness's prior testimony. (***See*** Response to ***Turner***/***Finley*** Brief, filed 8/17/26, at i).

at 1017 (holding petitioner did not waive challenge to stewardship of PCRA counsel and observing that Superior Court should have provided PCRA court with opportunity to assess prejudice in first instance).

Under these circumstances, we conclude that the record before us is insufficient to allow for disposition of the newly raised ineffectiveness claims. ***See Bradley, supra***. The most prudent course of action is to vacate the order denying PCRA relief and remand this case to the PCRA court for Appellant to create an evidentiary record in conjunction with his new ineffectiveness claims. ***See id. See also Koehler, supra*** at 696, 229 A.3d at 937 (explaining appellate review requires "development of a record as warranted and, where a hearing is appropriate, an assessment of the facts by the trial court hearing the evidence"). Upon remand, Attorney Goldstein should file an amended PCRA petition on Appellant's behalf, wherein he can fully develop the claims advanced on appeal. Thereafter, the court must decide whether to conduct an evidentiary hearing on the new claims.

Order vacated; case remanded with instructions. Attorney Yacoubian's petition to withdraw is granted. Jurisdiction is relinquished.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/19/2026

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PCRA Unit
CP Criminal Listings

THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVNIA	:	**CP-51-CR-0002434-2009**
	:	**CP-51-CR-0002439-2009**
V.	:	
	:	
DONALD GUY	:	

OPINION

This Opinion is written in support of this Court's April 10, 2025 dismissal of Donald Guy's PCRA petition.

PROCEDURAL HISTORY

On September 4, 2012, Donald Guy ("Guy") presented this Court with a request for new counsel, which this Court denied, and the Commonwealth presented a motion *in limine* to admit Vanessa Delvalle's testimony from the preliminary hearing, which this Court held under advisement. On September 5, 2012, this Court granted the Commonwealth's motion *in limine* and denied Guy's subsequent requests for new counsel.

On September 10, 2012, Guy elected to exercise his right to a jury trial and pled not guilty to the charges of Murder of the First Degree (H1), Robbery (F1), Conspiracy to Commit Robbery ("Conspiracy") (F1), Carrying Firearms in Public in Philadelphia (VUFA) (M1), and Possession of Instrument of Crime (PIC) (M1) on bill of information CP-51-CR-0002434-2009 as well as Murder of the First Degree (H1), Robbery (F1),

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Conspiracy (F1) on bill of information CP-51-CR-0002439-2009 arising from the shooting deaths of a husband and wife, Amissi Ndikumasabo and Bintou Soumare, on July 15, 2008 inside their clothing store, Urban Wear, in the Northeast section of the City of Philadelphia.

On September 14, 2012, the jury found Guy guilty of the above listed charges. At the conclusion of the trial, this Court sentenced Guy to two consecutive terms of Life imprisonment without parole on the homicide charges.[2] On September 20, 2012, Guy filed a Post-Sentence Motion, which was denied by operation of law on January 22, 2013.

On January 30, 2013, this Court received a Notice of Appeal and on March 13, 2013, upon completion of the notes of testimony, Guy was served an Order directing him to file a concise statement of the matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On March 19, 2013, this Court received Guy's 1925(b) response; however, on May 9, 2013, appellate counsel petitioned this Court to withdraw from representation. On May 10, 2013, this Court granted the request to withdraw and subsequently appointed new appellate counsel. Guy was served a second Order directing him to file a concise statement of matters complained of on appeal pursuant to

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[2] On bill of information CP-51-CR-0002434-2009, this Court sentenced Guy as follows:

- Murder of the First Degree (H1): Mandatory Life imprisonment without parole
- Robbery (F1): 10–20 years of incarceration (*concurrent* to the Murder charge)
- Conspiracy (F1): 10–20 years of incarceration (*concurrent* to the Murder charge, *consecutive* to the Robbery charge)
- VUFA (M1): 2.5–5 years of incarceration (*concurrent* to the Murder charge, *consecutive* to the Conspiracy charge)
- PIC (M1): 2.5–5 years of incarceration (*concurrent* to the Murder charge, *consecutive* to the VUFA charge)

On bill of information CP-51-CR-0002439-2009, this Court sentenced Guy as follows:

- Murder of the First Degree (H1): Mandatory Life imprisonment without parole (***consecutive*** to the Murder charge in bill 2434)
- Robbery (F1): 10–20 years of incarceration (*concurrent* to the Murder charge in bill 2439, *consecutive* to the PIC charge in bill 2434)
- Conspiracy (F1): No further penalty

Pa.R.A.P. 1925(b). Newly appointed appellate counsel requested an extension of time to file a 1925(b) response, which this Court granted. On June 19, 2013, this Court received Guy's 1925(b) response and this Court filed its Opinion on August 21, 2013.

On October 7, 2014, the Superior Court affirmed Guy's convictions and judgment of sentence. Guy filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which was denied on April 22, 2015.

On April 15, 2016, Guy filed the instant, timely PCRA petition.[3] PCRA counsel was appointed and, on April 15, 2017, counsel filed a *Finley*[4] Letter. The matter was first listed before this Court for decision on May 5, 2017. On May 5, 2017, this Court continued the matter to June 30, 2017. On June 30, 2017, following a review of the record, this Court sent Guy a 907 Notice, pursuant to Pa.R.Crim.P. 907(1).

On July 23, 2017, new PCRA counsel entered appearance and filed a Motion for Leave to file an Amended Petition, which this Court granted on August 4, 2017. On January 25, 2018, Guy filed an Amended Petition raising various claims of ineffective assistance of counsel and two claims of after-discovered evidence. On March 24, 2018, Guy filed a Motion for Leave to Supplement the Amended Petition, which this Court granted on May 21, 2018. On June 17, 2018, Guy filed a Supplement to the Amended Petition. On August 17, 2018, the Commonwealth filed a Motion to Dismiss. On August 23, 2018, Guy filed a Reply. On October 1, 2018, the Commonwealth filed a Supplement to the Motion to Dismiss.

Shortly thereafter, on October 11, 2018, Guy's co-defendant Thomas Foggy filed his own PCRA Petition – six years after entering a negotiated plea – asserting parallel

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[3] In addition to his initial petition, Guy also filed pro se Amended Petitions on June 7, 2016 and January 4, 2017 as well as a pro se Petition for Leave to Amend on January 12, 2017.
[4] *Com. v. Finley*, 550 A.2d 213, 215 (Pa. Super. 1988).

claims of after-discovered evidence, including averments that a pattern of police misconduct resulted in the coercion of his statement to police paired with a recantation of his trial testimony that inculpated himself and Mr. Guy.

On December 14, 2018, this Court continued the instant matter to February 8, 2019 for further review of the record and the extensive submissions of the parties. On February 8, 2019, this Court issued an Order granting an evidentiary hearing on Guy's two claims of after-discovered evidence and continued the matter to April 5, 2019 for status of evidentiary hearing date. In the interim, on February 25, 2019, this Court granted Guy's February 16, 2019 Motion to Supplement the Record and incorporated the attached submissions into the record.

On April 5, 2019, in coordination with counsel calendars, this Court scheduled the evidentiary hearing for July 9, 2019 and further directed the exchange of witness lists among the parties. In the interim, on May 17, 2019, upon review of the Petition and initial Letter Brief of the Commonwealth in co-defendant Foggy's PCRA proceeding, this Court determined that the proceedings would need to be coordinated with the instant PCRA proceedings already scheduled for an evidentiary hearing on July 9, 2019. Additionally, the matter was scheduled for a status on June 5, 2019, prior to the hearing, to address the proposed witness lists.

On July 9, 2019, co-defendant Foggy was not brought in from custody and, as such, this Court heard testimony from Detective Singleton only in regard to the instant Petition.[5] The evidentiary hearing was then bifurcated to September 16, 2019.

On September 16, 2019, co-defendant Foggy's counsel was ill and unable to appear and the evidentiary hearing was continued to January 24, 2020. On January 24,

[5] This Court has allowed Mr. Foggy to incorporate this testimony.

2020, Guy was not brought in from custody and, as such, this Court heard testimony from Detective Dove, Detective Bass, and co-defendant Foggy only in regard Foggy's Petition.[6] The hearing was then bifurcated to January 31, 2020 for the scheduling of the next hearing date. On January 31, 2020, the evidentiary hearing was scheduled for June 3, 2020.

On June 3, 2020, amid the ongoing COVID-19 pandemic and the court closure, the evidentiary hearing could not go forward and the matter was continually statused to procure a new evidentiary hearing date in consideration of the court, prison, and transportation protocols necessitated by the ongoing pandemic.[7]

On June 27, 2022, counsel agreed to work together to select date for the continued in-person evidentiary hearing and the matter was continued to August 26, 2022 for status of such date. On July 7, 2022, in coordination with counsel, this Court scheduled the evidentiary hearing for September 22, 2022 with the August 26, 2022 status to remain to confirm that all necessary paperwork was in place for the September 22, 2022 hearing.

On September 22, 2022, this Court heard further testimony from co-defendant Foggy and Detective Bass, as respectively called by Guy and the Commonwealth in the instant Petition.[8] This Court also heard testimony from Guy, who was the final witness presented in the instant Petition. The hearing was then further bifurcated to January 19,

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[6] This Court has allowed Mr. Guy to incorporate this testimony.
[7] The matter was subsequently statused on July 23, 2020, September 24, 2020, November 13, 2020, January 14, 2021, March 12, 2021, May 7, 2021, July 23, 2021, September 17, 2021, November 10, 2021, January 12, 2022, March 23, 2022, May 19, 2022, and June 27, 2022.
[8] This Court allowed Mr. Foggy to incorporate this testimony and reopen the record for examination of the witnesses in his Petition.

2023 for presentation of the Commonwealth's rebuttal witnesses in co-defendant Foggy's Petition only.

On November 8, 2022, Guy's (2nd) PCRA counsel filed a Motion to Withdraw and, on January 19, 2023, upon entry of new (3rd) PCRA counsel on the docket, this Court granted the Motion.

On January 19, 2023, Foggy was not brought in from custody, due to an issue with the writs, and the hearing was continued to March 24, 2023.

On March 24, 2023, this Court heard testimony from the Commonwealth's rebuttal witnesses – Brian McMonagle, Esq. and former Assistant District Attorney William Davis – who were, respectively, Foggy's defense counsel for the negotiated plea and sentencing and the assigned prosecutor for Foggy's plea and co-defendant Guy's trial. At the conclusion of the testimony, the matter was continued to May 31, 2023 for a status of post-hearing briefs to be submitted by the parties.

On May 31, 2023, this Court granted co-defendant Foggy's request for further extension and continued the matter to June 22, 2023 for a status of post-hearing briefs to be submitted by the parties.

On June 22, 2023, Guy confirmed that no further supplement/brief would be filed[9] and the matter was continued to July 25, 2023 for the Commonwealth's brief.[10]

On July 25, 2023, this Court was made aware that co-defendant Foggy's PCRA counsel had passed away and, as such, scheduled several listings to confirm that Foggy was aware of counsel's passing, that he wished to have new counsel, and that

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[9] *See* this Court's June 22, 2023, July 26, 2023, September 12, 2023, October 19, 2023, December 1, 2023, and January 5, 2024 Orders at FN1.

[10] Co-defendant Foggy filed his post-hearing brief on June 21, 2023.

new counsel had entered.[11] On December 1, 2023, Foggy confirmed that no supplemental filing would be made and both matters were continued to January 5, 2024 for the Commonwealth's brief to be filed.[12]

January 5, 2024, this Court granted the Commonwealth's request for further extension and continued the matter to March 8, 2024.

On March 8, 2024, the Commonwealth advised that it was still awaiting the transcripts from the September 22, 2022 and March 24, 2023 proceedings and the matter was continued to May 17, 2024 for a status of such transcripts. On May 17, 2024, June 28, 2024, and again on July 23, 2024, the Commonwealth advised that it was still awaiting the transcript from the March 24, 2023 proceeding and the matter was continued to September 19, 2024 for a status of such transcript and the Commonwealth's brief.

On September 19, 2024, the Commonwealth confirmed receipt of the outstanding transcript and the filing of its brief in co-defendant Foggy's matter. The instant matter was continued to November 22, 2024 for the filing of the Commonwealth's brief in opposition to Guy's Petition.

On September 23, 2024, the Commonwealth file its brief.

On September 29, 2024, (3rd) PCRA counsel filed a Motion to Withdraw and this Court scheduled a hearing for November 22, 2024.

On November 22, 2024, this Court granted the Motion to Withdraw and continued the matter to January 10, 2025 for status of new PCRA counsel.

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[11] Co-defendant Foggy's matter was listed August 15, 2023, September 12, 2023, and October 19, 2023.
[12] The Commonwealth was coordinating the filing of its briefs in these two related PCRA matters.

On January 10, 2025, this Court confirmed that new (4th) PCRA counsel had just entered appearance and continued the matter to March 7, 2025 for confirmation that the matter was now ripe for review by the Court.

On February 6, 2025, yet another new PCRA counsel – *now the 5th PCRA counsel of this Petition* – entered appearance[13] and, on February 8, 2025, filed a Motion requesting a 90-day continuance. On February 11, 2025, this Court denied the Motion and ordered that the March 7, 2025 status date was to remain to confirm that the Petition was ripe for review.

On February 19, 2025, PCRA counsel filed a Motion for Adequate Time to Present an Amended PCRA Petition or, alternatively, to be permitted to withdraw. On February 25, 2025, this Court granted in part and denied in part the Motion as follows:

1. THE REQUEST FOR ADEQUATE TIME TO PRESENT AN AMENDED PCRA PETITION IS **DENIED**. THIS COURT HAS ALREADY PERMITTED THE FILING OF AN AMENDED PETITION (AFTER THE FILING OF A *FINLEY* LETTER BY PRIOR PCRA COUNSEL) AND SUBSEQUENT SUPPLEMENTS TO THE AMENDED PETITION. THE EVIDENTIARY RECORD HAS BEEN CLOSED SINCE THE CONCLUSION OF THE SEPTEMBER 22, 2022 HEARING. PETITIONER HAS CONFIRMED SINCE JUNE 22, 2023 THAT NO FURTHER SUPPLEMENT/BRIEF WOULD BE FILED, AND THE MATTER HAS BEEN TRACKING FOR COURT DECISION IN COORDINATION WITH CO-DEFENDANT FOGGY'S PETITION, AS THIS COURT'S FACTUAL FINDINGS AND LEGAL CONCLUSIONS IN THE CO-DEFENDANTS' PETITIONS MUST BE CONSISTENT.

2. THE REQUEST TO WITHDRAW IS **GRANTED.** RECENTLY ENTERED PCRA COUNSEL REPRESENTS THAT, IN HIS CURSORY REVIEW, HE HAS "FOUND NUMEROUS REFERENCES TO FILINGS THAT CANNOT BE FOUND ON THE DOCKET." THIS REPRESENTATION IS INACCURATE. PETITIONER HAS **TWO** BILLS OF INFORMATION, AS REFLECTED ON THIS COURT'S FEBRUARY 11, 2025 ORDER, BUT COUNSEL HAS CONTINUED TO ONLY HAVE HIS APPEARANCE FORMALLY ENTERED ON DOCKET CP-51-CR-0002439-2009. ACCORDINGLY, KARL SCHWARTZ, ESQ. SHALL WITHDRAW APPEARANCE ON DOCKET CP-51-CR-0002439-2009 AND GEORGE YACOUBIAN, ESQ. SHALL BE RE-

[13] Counsel only entered appearance on docket CP-51-CR-0002439, as discussed below.

APPOINTED ON DOCKET CP-51-CR-0002439-2009 IN ORDER TO HAVE THE SAME PCRA COUNSEL ON BOTH DOCKETS ENCOMPASSED IN THE ONE PCRA PETITION.

This Court further adjourned the March 7, 2025 listing in order to allow PCRA counsel adequate time to withdraw/enter appearance and indicated that it would issue its decision by written Opinion, in coordination with the Opinion on co-defendant Foggy's Petition, on or before March 28, 2025.

On March 19, 2025, this Court sent Guy a 907 Notice, pursuant to Pa.R.Crim.P. 907(1). On March 20, 2025, Guy filed a response to the 907 Notice, which this Court has reviewed and has not found to be persuasive. While Guy asserts a litany of complaints against his third PCRA counsel, who has since withdrawn, the averments have no bearing on this Court's findings and conclusions and many of the averments are procedurally incorrect. The findings made by this Court were predominantly factual findings based upon credibility and, having been the Court that presided over *both the trial and the evidentiary hearing* in this matter, and having had the fully transcribed record before it at the time of the instant decision, the record controls. Accordingly, on April 10, 2025, this Court dismissed the PCRA petition.

DISCUSSION

Pursuant to 42 Pa.C.S. 9545(b), a PCRA petition, including second and subsequent petitions, must be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that his claim(s) fall under any of the three enumerated exceptions to the one year requirement. These exceptions are

interference by government officials[14], facts unknown and not discoverable by due diligence[15], and newly recognized constitutional rights that apply retroactively[16]. A petition claiming one of these exceptions must be filed within sixty (60) days of the time the claim could have been presented.[17] Further, the Pennsylvania Supreme Court set forth in *Commonwealth v. Fahy*[18] that "a claim of ineffective assistance of counsel does not save an otherwise untimely petition for review on the merits."[19]

In the instant matter, Guy's PCRA petition was timely filed and, through his Amended Petition and supplemental submissions, Guy has asserted two claims of after-discovered evidence, two claims of ineffective assistance of counsel, and a claim of cumulative impact. Upon review of the Petition, Amended Petition, Motions to Dismiss, and the supplemental submissions of the parties, this Court has determined that Guy's claims do not warrant relief.

i. After-discovered evidence

To be eligible for relief on the basis of after-discovered evidence, pursuant to 42 Pa.C.S. § 9543(a)(2)(vi), the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence resulted from the unavailability, at the time of trial, of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.[20] Specifically, the petitioner must demonstrate the following four factors by a preponderance of the evidence: first,

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[14] 42 Pa.C.S. 9545(b)(1)(i).
[15] 42 Pa.C.S. 9545(b)(1)(ii).
[16] 42 Pa.C.S. 9545(b)(1)(iii).
[17] 42 Pa.C.S. 9545(b)(2).
[18] 714 A.2d 214 (Pa. 1999).
[19] *Id.* at 223.
[20] 42 Pa.C.S. § 9543(a)(2)(vi).

the evidence was discovered after the trial and could not have been obtained at or prior to the conclusion of the trial by the exercise of reasonable diligence; second, the evidence is not merely corroborative or cumulative; third, the evidence would not be used solely for impeaching credibility of a witness; and finally, the evidence is of such nature and character that a different verdict would likely result if a new trial were granted.[21] Failure to satisfy any one of the four factors precludes the grant of a new trial.[22] Moreover, our Supreme Court has long held that "the proposed new evidence must be 'producible and admissible.'"[23]

Letters and affidavit from co-defendant Foggy

Guy first asserts a claim of after-discovered evidence based upon letters and an affidavit from co-defendant Foggy alleged to recant his trial testimony. With regard to the letters submitted as P2 and P3, this Court notes that they are *neither dated nor signed*, and the return mailing address on the envelope attached as P1(A) indicates a "Derrick Jackson" in "Willingboro, NJ", not Thomas Foggy. Even if this Court were to accept, against the argument of the Commonwealth, that Derrick Jackson is a third party used for correspondence between co-defendants Foggy and Guy – who have a separation order in place with regard to their housing which further precludes direct correspondence – the letters fail to identify their author, as they are not signed by anyone, they are not dated, and they make no mention of the events giving rise to the instant charges, the trial itself, nor that any testimony had been recanted. Accordingly,

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[21] *Com. v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010).
[22] *Com. v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010).
[23] *Com. v. Castro*, 93 A.3d 818, 825 (Pa. 2014). *See also Com. v. Chamberlain*, 30 A.3d 381, 414 (Pa. 2011); *Com. v. Smith*, 540 A.2d 246, 263 (Pa. 1988); *Com. v. Scott*, 503 Pa. 624, 470 A.2d 91, 93 (Pa. 1983).

the letters fail to have any substantive value in this Court's assessment of the after-discovered evidence proffered in the Petition.

With regard to the affidavit, the document is similarly *not dated* and vaguely states that Foggy himself had been involved in a homicide, that he "put Donald Guy in it by saying he killed two people which was a lie", and that he "put everything on Donald [because] the Detective made [him]." The affidavit wants for any details about the Detective or the double homicide at the Urban Wear store that would correct the existing testimony that Guy had shot the two Urban Wear store owners in the course of a robbery. Although Foggy made a wholesale recantation of all prior statements and testimony at the January 24, 2020 and September 22, 2022 evidentiary hearings, this Court – *as the Court who also presided over the trial in this matter and the plea and sentencing proceedings for co-defendant Foggy* – simply did not find the recantation testimony to be credible, as discussed below.

In his wholesale recantation at the evidentiary hearings, Foggy attempted to provide a different narrative of what he and Guy were doing on the day of murders and insisted on Detective Dove's involvement in taking the statement he gave to police, that he now claims is false and was coerced into signing. With regard to the new narrative about what he and Guy were doing in the vicinity of the Urban Wear store at the time of the murders, Foggy provided nonsensical testimony involving trips in and out of a barber shop waiting for a haircut, the attempt to get change for a $50 bill to buy some marijuana from Guy, and ultimately taking off chasing after Guy because Guy still had his money.[24] This narrative was not credible to this Court and is further belied by the corroborating evidence. The video surveillance footage presented at the trial and the

[24] N.T. 1/24/20 at 50-68.

instant evidentiary hearing – which shows both Guy and Foggy going in and out of the Urban Wear store around the time of the 911 call to police – establishes a timeframe that disproves Foggy's new narrative.[25] Moreover, the video footage of Foggy and Guy going in and out of the store corroborates Foggy's original testimony that he and Guy ran from the store after Guy shot Amissi Ndikumasabo and Bintou Soumare and then tried to return moments later, but were halted by Bintou crawling out of the store. The hat, shirts, and pistol recovered from a nearby dumpster – for which Guy's DNA matched the DNA found on a hat and t-shirt and his fingerprints matched those on the dumpster – corroborates Foggy's statement to police that after running out of the store, Guy ditched his hat, t-shirts, and pistol in the dumpster.

With regard to the taking of the statement, Foggy testified that it was Detective Dove along with Detective Bass who interviewed him and filled in the contents of the statement that he was coerced to sign. Foggy's testimony remains unsupported by the paperwork and the testimony of Detective Bass, which this Court found to be credible. The paperwork itself indicates that the statement was taken by Detectives Bass and White and the testimony of Detective Bass confirmed the same. Specifically, the detective's testimony established that Foggy was brought in by Detective White and Sergeant Wilkins and subsequently interviewed by himself and Detective White.[26] Detective Bass explained that he and Detective Butler were the assigned detectives on these shootings and he described his responsibilities for overseeing the investigation,

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[25] N.T. 1/24/20 at 60-68.
[26] N.T. 1/24/20 at 130-132. N.T. 9/22/2022 at 65-67, 70-76. The testimony of Detective Bass further indicated that detectives were investigating Guy even before Foggy gave his statement to police. N.T. 1/24/20 at 145-151.

which included interviewing Foggy.[27] Detective Bass clarified that Detective Butler was out on vacation at the time of the interview, so he chose Detective White to witness the interview, given Detective's White's involvement in locating Foggy.[28] While Foggy seemingly attempts to interject Detective Dove into the taking of his statement to impugn the integrity of the statement, based upon Detective Dove's subsequent termination and conviction for unrelated misconduct, there is no support in the record for any such finding.

In addition to these shortcomings, the substance of the affidavit patently fails to establish a claim of after-discovered evidence, as failure to satisfy any one element precludes the court from granting relief. Here, Guy cannot show that the information contained in the affidavit is of such nature and character that a different verdict would likely result if a new trial were granted. Even if this Court were to accept co-defendant Foggy's wholesale recantation, the supporting evidence of the events following the shooting so overwhelmingly demonstrated Guy's guilt that a different verdict would not likely result. As stated by this Court in its 1925(a) Opinion, and adopted by the Superior Court, the evidence of the events following the shooting established the following:

> Guy called Vanessa Delvalle for help, specifically asking her "can you bring me a pair of sneakers because I just killed two people." Police arrived at Urban Wear in response to a 911 call reporting gunshots and encountered a hysterical, bloodied Bintou and unresponsive Amissi. Amissi died at the scene; Bintou died later in the hospital from complications from the shooting. Police recovered the following items from the scene: a revolver wedged under the door, a camouflage hat inside the store, and a semi-automatic pistol along with a hat and t-shirts in a nearby dumpster. Guy's fingerprints were identified on the dumpster where the semi-automatic pistol, hat, and shirts were recovered and Guy's DNA matched the DNA found on a recovered hat and t-shirt. Video surveillance from a neighboring store depicted two males walking towards

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[27] N.T. 9/22/2022 at 70-76.
[28] N.T. 9/22/2022 at 74: 18-22.

> Urban Wear preceding the 911 call and later running away from Urban Wear around the time that the 911 call was made. In the video, one of the males wore a camouflage hat while walking towards the store and did not wear the hat while running away. Vanessa Delvalle gave a statement to police and also identified Guy from a still shot photograph from a surveillance video. After a lengthy search, police found Guy at a relative's home, hiding under a bed, and arrested him.[29]

Accordingly, Guy has failed to satisfy the four requisite prongs for a claim of after-discovered evidence based upon the letters and affidavit from co-defendant Foggy and, thus, his claim must be dismissed.

Pattern and practice of the Philadelphia Homicide Detectives

Guy next asserts a claim of after-discovered evidence based upon the pattern and practice of coercion by the Philadelphia Homicide Detectives following the investigation, indictment, and subsequent conviction of Philadelphia Police Detective Ronald Dove.[30] Specifically, Guy's averments of police coercion are twofold: first, that, based upon the above-discussed affidavit of co-defendant Foggy, the detectives who interviewed Foggy created an entirely false statement and coerced him to sign it; and second, that Detectives Dove and Singleton threatened witness Vanessa Delvalle and coerced her into making false statements against Guy during the course of her interview with the detectives and subsequently testifying consistently with such statement at the preliminary hearing. Upon review of the record, this Court concludes that no relief is due.

Initially, this Court notes that the investigation, indictment, and subsequent conviction of Detective Dove were confined to conduct stemming from a personal

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[29] August 21, 2013 Opinion at Page 5-6.

[30] Detective Dove's termination in November 2013 and subsequent conviction arose from his conduct in assisting his girlfriend in covering up a murder.

matter. The mere fact that Detective Dove was one member of the team of police personnel involved in investigating the instant July 15, 2008 shooting of Amissi Ndikumasabo and Bintou Soumare does not impute the assumption that the investigation was improperly conducted.

In addressing Guy's claim of police coercion related to Foggy's statement to detectives, this Court relies on its discussion and credibility findings above in pages 12-14 to conclude that no relief is warranted.

With regard to Guy's claim of police coercion concerning the statement and preliminary hearing testimony of witness Vanessa Delvalle, this Court similarly finds that no relief is due. This Court heard testimony from Detectives Singleton[31] and Dove[32] concerning the statement given by Ms. Delvalle, which described her conversations with Guy following the murders and included her identifications of both Guy and Foggy. The testimony established that Ms. Delvalle was brought to the Roundhouse at 8th and Race where she was questioned by the detectives shortly after arrival and then brought home. This testimony is confirmed by Ms. Delvalle's own testimony from the preliminary hearing where she estimated that she was at the Roundhouse for 45-60 minutes and she repeatedly confirms that the information in the statement about the phone calls from Guy about the murders is true.[33] This Court found the detectives' testimony to be credible and concludes that there is no basis in the record to support a finding that Ms. Delvalle's statement was coerced.

This finding, however, is only relevant to the limited extent that Ms. Delvalle's preliminary hearing testimony was consistent with such statement, as Ms. Delvalle's

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[31] N.T. 7/9/19 at 7-33.
[32] N.T. 1/24/20 at 17-27.
[33] N.T. 9/12/12 at 157, 162, 167-69

statement *was not presented at trial*. As stated by the Superior Court in its Opinion affirming Guy's convictions "[a] review of the record reveals that Delvalle's statement itself was not admitted at trial; rather, it was her preliminary hearing testimony."[34]

As such, in order to prevail on his claim of after-discovered evidence, Guy must establish that Detectives Dove and Singleton threatened and/or coerced Vanessa Delvalle into testifying consistently with her statement – that he alleges to be false – at the preliminary hearing. During the evidentiary hearings in this matter, *neither of the detectives were asked anything about the preliminary hearing*. Thus, this Court only has the preliminary hearing itself to consider, which is void of any testimony by Ms. Delvalle that she was coerced in any way into giving false testimony. As discussed above, the testimony from the preliminary hearing instead confirms that the information in her statement about the phone calls from Guy concerning the murders is true. Upon consideration of all of available evidence, this Court finds no basis to conclude that Ms. Delvalle was coerced into testifying falsely at the preliminary hearing and Guy's claim for relief must be dismissed.

ii. Ineffective assistance of trial counsel

Under the Post-Conviction Relief Act, claims of ineffective assistance of counsel are evaluated pursuant to the three-prong test set forth by the Pennsylvania Supreme Court in *Commonwealth v. Pierce*[35], using the same standard as when such claims are raised on direct appeal.[36] *Pierce* established that ineffectiveness claims are measured

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[34] Superior Court Opinion filed October 7, 2014 at docket 566 EDA 2013, page 10.
[35] 527 A.2d 973 (Pa. 1987).
[36] *Com. v. Kimball*, 724 A.2d 326 (Pa. 1999).

by both counsel's performance and the prejudice suffered by the petitioner.[37] The law presumes counsel to have been effective; thus, the petitioner bears the burden of establishing the following three prongs: first, that the ineffectiveness claim has arguable merit; second, that counsel's act or omission did not have a reasonable basis; and third, that the petitioner suffered prejudice on account of counsel's act or omission.[38] If it is apparent that the prejudice prong has not been met, the first two prongs of the test need not be determined.[39]

In assessing the *Pierce* prongs related to counsel's performance, counsel's error or omission "must have so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place."[40] Counsel inherently has broad discretion to determine the strategy employed, thus a review of counsel's act or omission must determine whether counsel's decisions were reasonably designed to benefit the client.[41] A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.[42]

In assessing the prejudice prong of *Pierce*, the petitioner must prove that he suffered prejudice on account of counsel's decisions. "Prejudice" can be described as whether, but for the arguably ineffective act or omission, there is a reasonable probability that the outcome would have been different.[43] In other words, the petitioner

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[37] *Com. v. Pierce*, 527 A.2d 973, 975 (Pa. 1987).
[38] *Id. See also Com. v. Breakiron*, 729 A.2d 1088, 1101 (Pa. 1999).
[39] *Com. v. Jones*, 683 A.2d 1181, 1188 (Pa. 1996).
[40] *Com. v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006) (citing *Com. v. Allen*, 732 A.2d 582, 587 n.15 (Pa. 1999).
[41] *Com. v. Fowler*, 670 A.2d 153, 155 (Pa. Super 1996); *Com. v. Polston*, 616 A.2d 669, 677 (Pa. Super 1992).
[42] *Com. v. Howard*, 719 A.2d 233, 237 (Pa. 1998).
[43] *Com. v. Kimball*, 724 A.2d 326, 330 (Pa. 1999).

must establish that counsel's actions prejudiced him to such an extent that a *reliable* determination of guilt was not made at trial.[44]

Advice caused an unknowing and unintelligent waiver of Guy's right to testify

Guy first avers that trial counsel was ineffective for providing deficient advice to him regarding his right to testify. With regard to this type of ineffectiveness claim, the appropriate assessment of prejudice must focus on whether the result of the *waiver proceeding* would have been different absent counsel's ineffectiveness, not whether the outcome of the trial itself would have been more favorable had the defendant taken the stand.[45] This Court, however, need not reach the assessment of prejudice in the disposition of the instant clam because Guy has failed to set forth sufficient facts to

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[44] *Com. v. Lassen*, 659 A.2d 999, 1011 (Pa. Super 1995).

[45] *Com. v. Walker*, 110 A.3d 1000, 1005 (Pa. Super. 2015). *But see Com. v. Towles*, 208 A.3d 988, 1003–04 (Pa. 2019) (questioning appropriateness of *Walker* standard). In *Towles*, the Court opined:

> We recognize, as Appellant highlights, that the Superior Court's *Walker* decision applies a different prejudice standard derived from prior decisions of this Court. *See Walker*, 110 A.3d at 1005 (holding that prejudice, relative to a claim of deficient stewardship in advising a defendant not to testify at trial, is assessed according only to whether or not the defendant would have testified had fuller advice been rendered). We decline, however, to consider here whether that standard is the correct one to apply generally to claims of deficient stewardship associated with legal advice discouraging a defendant from testifying at trial. We do so, in part, because the Commonwealth has not presented any advocacy for or against the particularized *Walker* standard.
>
> Instead, we simply conclude that the *Walker* standard cannot apply in this particular case, given the pervasive weaknesses in Appellant's argument throughout. It would simply be unreasonable to afford Appellant a new trial to present a heat-of-passion theory to a jury which is inherently weakened by his own testimony that he never intended to shoot anyone; that is stripped of a main element of Appellant's present argumentation concerning his voluntary intoxication; and which encompasses an objective criterion that Appellant wishes to address through a discussion of subjective factors. Application of the *Walker* standard here would also preclude us from giving any effect to the substantial evidence of Appellant's consciousness of guilt (including fleeing the scene and being untruthful with police), and the PCRA court's abundantly reasonable conclusion that jurors would have been (and would be) skeptical of Appellant's self-serving testimony. He simply faces too many hurdles otherwise to relieve him of the obligation to establish that, but for the asserted lack of completeness in his counsel's advice, there is a reasonable probability the outcome of the proceedings would have been different.

Commonwealth v. Towles, 208 A.3d 988, 1003–04 (Pa. 2019).

support an ineffectiveness claim. The longstanding precedent of this Commonwealth provides that:

> The decision of whether or not to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.[46]

Guy has not set forth any averments of the advice given to him by his trial counsel regarding his decision of whether or not to testify. The averments in the Petition merely set forth what Guy proffers that he would have said if he had taken the stand at trial; however, such averments lack any purpose absent a proffer of the alleged deficient advice that trial counsel provided as to why Guy should not testify on his own behalf. This Court is without any basis to conclude that the advice of counsel was so unreasonable as to render Guy's waiver of his right to testify as unknowing and unintelligent. Moreover, this Court's thorough colloquy of Guy on his constitutional rights and his decision to testify or not testify belies any assertions of an unknowing or unintelligent decision. For ease on review, this Court has included the full text of the colloquy below:

> **THE COURT**: All right. Now, have you had a chance to have a discussion with Mr. Gottlieb about what your constitutional rights to testify and what your constitutional rights to not testify are?
> **THE DEFENDANT**: Yes.
> **THE COURT**: And have you had a chance to make a decision about that?
> **THE DEFENDANT**: Yes.
> **THE COURT**: And what has your decision been?
> **THE DEFENDANT**: I'm not going to testify.
> **THE COURT**: You're not going to. Okay. And I know throughout the course of the trial that there had been some question that at some points

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[46] *Com. v. Smith*, 181 A.3d 1168, 1179 (Pa. Super. 2018) (citing *Com. v. Nieves*, 746 A.2d 1102, 1104 (Pa. 2000)).

you were not always in agreement with Mr. Gottlieb in what you thought the defense could be or should be, and you have discussed with him. I think at some point you may have even expressed that you wished that you had wanted to testify, that I thought that that's something that you may have when you were telling me about at the beginning of the case in some ways that you were unhappy with Mr. Gottlieb, that I thought that you had indicated that you might want to testify. Have you had a chance to talk to him about what it would mean if you did testify?
THE DEFENDANT: Yes.
THE COURT: Okay. Now, I'm going to tell you that, you know, your lawyer is your person and Mr. Gottlieb has been around a long time and he's handled lots and lots and lots of homicide cases and he is the person that we have appointed to represent you. But do you understand that in the end, that the decision whether to testify is yours? Do you understand that?
THE DEFENDANT: Yes.
THE COURT: And that you can't, if you make this decision now, you can't blame it. You can't say, oh, well, my lawyer told me to do it, because that's not. It's got to be your decision based on what he's told you of the risks and benefits of exercising whichever constitutional rights you plan to exercise. Do you understand what I'm saying?
THE DEFENDANT: Yes.
THE COURT: All right. Is it your decision not to testify in this case?
THE DEFENDANT: Yes.
THE COURT: Okay. And now, you've already heard when the jury first met with me my going through constitutional rights, you know, that you're presumed to be innocent, the Commonwealth has to prove the charges with evidence that's beyond a reasonable doubt, and that they can't hold it against somebody because they exercise their constitutional right to remain silent. There's actually a jury charge that I have here and it's read in every case in which the defendant exercises that right to remain silent, and this is what the jury instruction is. It says it is entirely up to a defendant in every criminal trial whether or not to testify. He has an absolute right founded on the constitution to remain silent. You must not draw any inferences of guilt or any other inference adverse to a defendant from the fact that he did not testify. Do you understand that that will be the instruction that I'll be giving the jury if you decide to exercise this right to remain silent?
THE DEFENDANT: Yes.
THE COURT: And there is, if you change your mind, because it's not set in stone until Mr. Gottlieb says that he rests, that if you do take the stand, there's another instruction that applies and essentially there is an instruction that, you know, it tells the jury to weigh testimony in the same way as other witnesses except there is this additional caveat: In weighing the testimony of defendant, you may consider the fact that he has a vital interest in the outcome of this trial. You may take the defendant's interest into account along with all other facts and circumstances bearing on

credibility in deciding what weight his testimony deserves. Do you understand that?
THE DEFENDANT: Explain it to me again.
THE COURT: Huh?
THE DEFENDANT: Can you explain it to me again?
THE COURT: Yeah. If you decide and change your mind, because I want you to understand that I'm doing this colloquy now just because we have a break and I know that you've gone both ways about what you're going to do, I want you to understand that if you change your mind about and that you do wish to testify, and we'll go through it again, the instruction that the jury will get if you testify is this: The defendant took the stand as a witness in this case. In considering the defendant's testimony, you are to follow the general instructions I gave you for judging the credibility of any witness. That means I tell them that they judge your testimony in the same way as everyone else's, your demeanor, what you say. But they also get this extra instruction: You should not disbelieve the defendant's testimony merely because he is the defendant. In weighing his testimony -- this is if you had taken the stand -- however, you may consider the fact that he, the defendant, has a vital interest in the outcome of this trial. You may take the defendant's interest in the trial into account along with all other facts and circumstances bearing on credibility, that's believability, in deciding what weight the defendant's testimony deserves. Do you understand?
THE DEFENDANT: Yes.
THE COURT: All right. And I wanted you to know that so that you could understand that there's an instruction based on which, you know, whether you do or you don't testify. Do you understand?
THE DEFENDANT: Yes.[47]

[. . .]

THE COURT: All right. Now, I want to know, is anyone forcing you or threatening you in any way either way about what your decisions are with regards to your rights to testify?
THE DEFENDANT: No.
THE COURT: All right. And do you have anything that you wish for me to explain to you about your rights to testify that you still need explanation for? Anything at all that you need for me to explain to you?
THE DEFENDANT: No.
THE COURT: Is there anything that you need to ask Mr. Gottlieb or even the District Attorney about what your rights are as far as constitutional rights in the case?
THE DEFENDANT: No. He explained it to me.
THE COURT: All right. I believe that at this juncture Mr. Guy is making a informed and voluntary decision and my understanding is, Mr. Guy, that you are making the decision that you do not wish to testify; is that right?
THE DEFENDANT: Yes.

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[47] N.T. 9/13/2012 at 72-77.

THE COURT: All right. And Mr. Gottlieb, you can certainly explain to him that that decision can change.
MR. GOTTLIEB: Surely. He understands that. We did talk about that, Your Honor.
THE COURT: And I will look to you and I'll look to Mr. Guy. If at any time something changes, is different than what I asked you, I'm going to look to Mr. Gottlieb. I'm going to look to you and you can always change it up until the time the case rests. Do you understand?
THE DEFENDANT: Yes.[48]

The submissions and the record simply fail to support the ineffective assistance of counsel, with regard to Guy's decision not to testify at trial and, as such, no relief is warranted.

Failure to call two witnesses

Guy next avers that trial counsel was ineffective for failing to interview, subpoena, and/or otherwise secure the trial testimony of Wilson Rodriguez.[49] In order to establish that trial counsel was ineffective for failing to call a witness, the petitioner must demonstrate that (1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial.[50] In showing the requisite prejudice, the petitioner "must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case."[51]

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[48] N.T. 9/13/2012 at 78-79.
[49] This Court notes that the Amended Petition also included an ineffectiveness claim for counsel's failure to interview, subpoena, and/or otherwise secure the trial testimony of Rasheed Glover; however, this claim was withdrawn via Guy's Reply to the Commonwealth's Motion to Dismiss on account of Mr. Clover's failure to make himself available to receive and sign an affidavit.
[50] *Com. v. Dennis*, 17 A.3d 297, 302 (Pa. 2011).
[51] *Com. v. Sneed*, 45 A.3d 1096, 1109 (Pa. 2012)

In the instant case, although Guy has attached an affidavit of Mr. Rodriguez providing his putative testimony and willingness to testify, the affidavit is not signed. As such, this Court cannot consider the putative facts set forth or the averment that Mr. Rodriguez was available and willing to testify and the claim must fail. Moreover, Guy completed a colloquy on the record at the time of trial regarding his decision not to testify and his decision not to present any witnesses. The transcript provides the following:

> **THE COURT**: All right. Now, I do also know that you had told me at the beginning of the case, you had given me some, either you were reading from some information or you told me about some areas where you felt that Mr. Gottlieb hadn't met with you, hadn't presented witnesses that you thought he had, hadn't done some things. Is there any area in which you believe there are witnesses that you wish for him to call and present on your behalf that he has not or in your conversations you believe that he's not calling?
> **THE DEFENDANT**: Everything is fine.
> **THE COURT**: All right. Now, I want to know, is anyone forcing you or threatening you in any way either way about what your decisions are with regards to your rights to testify?
> **THE DEFENDANT**: No.
> **THE COURT**: All right. And do you have anything that you wish for me to explain to you about your rights to testify that you still need explanation for? Anything at all that you need for me to explain to you?
> **THE DEFENDANT**: No.
> **THE COURT**: Is there anything that you need to ask Mr. Gottlieb or even the District Attorney about what your rights are as far as constitutional rights in the case?
> **THE DEFENDANT**: No. He explained it to me.[52]

As such, the record further refutes Guy's claim of ineffectiveness because Guy indicated that he understood the proceedings and that "everything is fine" with regard to the witnesses called on his behalf. Accordingly, this Court has determined that Guy's claim of ineffective assistance of trial counsel must be dismissed.

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[52] N.T. 9/13/2012 at 77-79.

iii. Cumulative prejudice

Finally, Guy avers that the numerous instances of deficient performance by trial counsel permit this Court to consider the cumulative impact of such performance in determining whether there is a reasonable probability that the outcome would have been different. In *Commonwealth v. Hannibal*[53], our Supreme Court opined that "[w]hile this Court has emphasized that 'no number of failed claims may collectively warrant relief i[f] they fail to do so individually,' [. . .] we have also recognized that 'if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation.'"[54] Although the precedent of this Commonwealth permits the cumulative analysis of prejudice in limited circumstances, this Court's analysis of the aforementioned ineffectiveness claims, even if taken cumulatively, would not support a finding that Guy's claims warranted relief.

CONCLUSION

Based upon this Court's independent review of the Petition, record, evidence presented, and Petitioner's response to the 907 Notice, this Court concludes that Guy's claims do not warrant relief.

BY THE COURT:

CARPENTER, J.

[53] 156 A.3d 197 (Pa. 2016).
[54] *Id.* at 234.

First Judicial District of Pennsylvania
Honorable Linda A. Carpenter
229 City Hall
Philadelphia, PA 19107

Commonwealth v. Donald Guy
CP-51-CR-0002434-2009
CP-51-CR-0002439-2009

Date: April 10, 2025

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R. Crim. P. 114:

Defense Counsel/Party: Donald Guy / KS-0866
SCI–Houtzdale
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Type of Service: ( ) Personal (X) First Class Mail ( ) Other: Electronic court notification

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Type of Service: ( ) Personal ( ) First Class Mail (X) Other: Electronic court notification

District Attorney: PCRA Unit
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Janet Brinkman