NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GARY LEE GERBER JR.	:	
Appellant	:	No. 3276 EDA 2025

Appeal from the PCRA Order Entered November 21, 2025
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0000112-2007

BEFORE: LAZARUS, P.J., PANELLA, P.J.E., and STEVENS, P.J.E.*

MEMORANDUM BY PANELLA, P.J.E.: **FILED NOVEMBER 20, 2026**

Gary Lee Gerber, Jr., appeals from the order of the Court of Common Pleas of Monroe County denying his third petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Gerber argues that the PCRA court erred in concluding that two of his ***Brady***[1] claims were untimely for failing to satisfy the government interference exception and that his one timely raised ***Brady*** claim was meritless. After careful review, we affirm.

This Court previously summarized the facts underlying Gerber's 2010 conviction.

> On December 16, 2006, police charged Gerber with criminal homicide and related charges following an incident that resulted

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* Former Justice specially assigned to the Superior Court.

[1] ***Brady v. Maryland***, 373 U.S. 83 (1963).

in the death of Robert Hagan ("the victim"). When addressing Gerber's direct appeal, we cited the trial court's detailed summary of the pertinent facts and trial proceedings as follows:

> The majority of the facts are not in dispute: in the early morning hours of August 13, 1993, Gerber was alone with the victim in the victim's vehicle while parked along Rimrock Road in Monroe County. At some point while inside the vehicle, Gerber "lashed out" on the victim stabbing him four times in the back[,] Gerber admitted stabbing the victim. Gerber also cut the victim's throat in a manner that showed no sign of hesitation; the victim's neck wound was characterized as a superficial wound because no major arteries were cut, but the area had many blood vessels which have resulted in fairly profuse bleeding. These stab wounds were potentially lethal because of the amount of hemorrhaging and blood loss the victim suffered, as well as his collapsed lung.
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> At trial, Gerber testified he was inebriated and parked his pickup truck in a parking lot. Two men approached, told him he could not park there and they would give him a ride, and helped him into what he believed was the victim's car. The next thing Gerber remembered was waking up in the victim's car, his pants and his underwear were pulled down, somebody was on top of him and trying to force something into him, and he felt excruciating pain. On appeal, Gerber claims the victim was trying to homosexually rape him.
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> After being stabbed, the victim exited the car and fled. The victim's body was eventually found on a bridge on Rimrock Road approximately 290 feet away from where Gerber stabbed him. Blood drops were found in various locations along the road leading toward the bridge on Rimrock Road. It was determined the victim had suffered massive injuries to his head, *i.e.*, a crushed skull and brain, and massive injuries to his torso, *i.e.,* a crushing injury to his entire side of his chest. These injuries were consistent with him being run over by a car.

Gerber stated that, after he stabbed the victim, he got into the driver's seat of the victim's vehicle and drove up Rimrock Road toward Route 611, which is the same direction where the victim's body was found. Thereafter, Gerber drove the vehicle to his father's junkyard and wiped down the interior of the car to clean off the blood. Gerber stated that he only cleaned off the steering wheel and the shifter of the vehicle, but also noted that the "car was like forensically clean like somebody knew what they were doing did it." Although Gerber only admits having wiped down the interior of the vehicle, Gerber's father testified that he also observed Gerber wiping down the car from the outside. Additionally, wipe marks were found on the passenger door window of the victim's vehicle and blood was present on the front license plate of the vehicle in a manner that was consistent with someone wiping the license plate. Finally, Gerber admitted "getting rid of the car" by dumping it along Schaffer's School House Road.

Gerber testified that he never felt an impact of hitting a body that night, but he did admit that he could have driven through a "brick wall because he was so expletive scared that night."

In his closing argument, Gerber's trial counsel made clear that the majority of these facts were not in dispute. However, the Defense argued that Gerber stabbed the victim in self-defense, believing that he was being sexually assaulted by the victim. Gerber claims that he began driving the victim's car, but never knew that he hit the victim because of his emotional state after being sexually assaulted and because of the foggy weather conditions that morning. Finally, Gerber claims that he dumped the vehicle on Schaffer's School House Road because his father told him to and that he never came forward to the police with his self-defense claim because he was ashamed of being sexually assaulted.

Commonwealth v. Gerber, No. 2067 EDA 2020, 2021 WL 5232441, at **1-2 (Pa. Super. filed Nov. 10, 2021) (unpublished memorandum), *appeal denied*, 277 A.3d 1106 (Pa. 2022) (brackets, ellipsis, and citation omitted).

On July 14, 2010, Gerber was found guilty of first-degree murder and he was sentenced to life in prison. Gerber filed a post-sentence motion, which was denied, and he appealed.[2] On January 7, 2015, this Court affirmed Gerber's judgment of sentence. ***See Commonwealth v. Gerber***, No. 1415 EDA 2013, 2015 WL 7573047 (Pa. Super. filed Jan. 7, 2015) (unpublished memorandum). He did not seek further review.

On July 27, 2015, Gerber filed a counseled PCRA petition raising multiple claims of trial counsel's ineffectiveness. After holding evidentiary hearings, the trial court denied Gerber's petition. On November 27, 2017, this Court affirmed the court's denial and on May 29, 2018, our Supreme Court denied his petition for allowance of appeal. ***See Commonwealth v. Gerber***, No. 3201 EDA 2016, 2017 WL 5943221 (Pa. Super. filed Nov. 21, 2017) (unpublished memorandum), *appeal denied*, 186 A.3d 938 (Pa. 2018).

On July 30, 2018, Gerber filed his second PCRA petition. After a hearing, the PCRA court entered an order finding that Gerber's second PCRA petition was untimely filed and he failed to establish a timeliness exception. ***See***

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[2] Initially, we vacated his judgment of sentence and remanded for the trial court to conduct an evidentiary hearing and consider newly discovered DNA evidence. After the hearing, the trial court denied Gerber's motion and resentenced him to life in prison.

Gerber, 2021 WL 5232441, at *3. This Court affirmed on November 10, 2021, and our Supreme Court denied Gerber's petition for allowance of appeal.

On July 8, 2024, Gerber filed his third PCRA petition and later amended that petition on December 19, 2024. Therein, he raised ***Brady*** claims based on three pieces of evidence he had obtained since the conclusion of his prior appeal: (1) bench notes of Pennsylvania State Police scientist George Surma; (2) bench notes of PSP Lieutenant Dennis Loose that included twelve photographs of tire casts; and (3) a map and report of the crime scene prepared by Trooper Tolan one week before trial. He argued that his claims were timely under the government interference exception, that the due diligence requirement is unconstitutional, and alternatively, that he exercised due diligence. Evidentiary hearings were held on April 22 and 23, 2025, and argument was held on October 24, 2025.

On November 21, 2025, the PCRA court issued an opinion and order that dismissed the Surma and Loose ***Brady*** claims as untimely for lack of due diligence (and alternatively finding that the underlying ***Brady*** claims were meritless), and finding the Tolan ***Brady*** claim timely but meritless.[3] Gerber

[3] We commend the Honorable Arthur L. Zulick for aiding our appellate review with his detailed and well-reasoned opinion.

timely appealed. Both Gerber and the PCRA court complied with Pennsylvania Rule of Appellate Procedure Rule 1925. ***See*** Pa.R.A.P. 1925(a)-(b).[4]

Gerber raises the following issues for our review.

> Did the lower court err, abuse its discretion and deprive Appellant of due process of law secured by the Fourteenth Amendment to the United States Constitution and Article I, §9 of the Pennsylvania Constitution, when it:
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> > 1. imposed a diligence requirement regarding the governmental interference exception to the time bar?
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> > 2. found that [Gerber] was not adequately diligent to meet the time bar exception?
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> > 3. found that none of the withheld exculpatory or impeachment evidence was material?
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> > 4. failed to assess the cumulative impact of all the suppressed evidence, but instead considered materiality item by item?
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> > 5. found the conclusions in Surma's lab report and his trial testimony to be equivalent to his suppressed bench notes, therefore rendering the bench notes immaterial?
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> > 6. required [Gerber] to produce an expert in tire tread analysis, in order for the court to take notice of the obvious difference between tire tread designs recorded in the suppressed Loose photos (depicting tire impression casts); and trial photo exhibit (C-20)

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[4] At the end of 2025, then-President Judge Zulick retired and the matter was reassigned to the Honorable Jonathan Mark. President Judge Mark wrote a brief 1925(a) statement referring to the reasons stated in the November 21, 2025, opinion which it summarized as Gerber "reasonably could and should have raised his claims relating to the Surma bench notes [and] the Loose notes and photographs . . . in prior proceedings—at the latest, during the proceedings on his second PCRA petition. He did not." 1925(a) Statement, 1/12/26, at 2-3.

> depicting a tire track next to alleged blood, from where lay witness Trooper DeAndrea purportedly collected the casts?
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> 7. found that a lay witness can testify that a substance appeared to be blood, even when the sample in question was analyzed by a scientist who determined blood was not present?

Appellant's Brief, at 1-2.

Gerber's issues are interrelated and contest the PCRA court's ruling that his Surma and Loose ***Brady*** claims were untimely and meritless, and that his Tolan ***Brady*** claim was meritless.

> In PCRA appeals, our scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party. Because most PCRA appeals involve questions of fact and law, we employ a mixed standard of review. We defer to the PCRA court's factual findings and credibility determinations supported by the record. In contrast, we review the PCRA court's legal conclusions *de novo.*

Commonwealth v. Isaac, 205 A.3d 358, 362 (Pa. Super. 2019) (citation omitted).

"The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267-68 (Pa. 2008) (citations omitted). A PCRA petition, including a second or subsequent petition, shall be filed within one year of the date the underlying judgment becomes final. 42 Pa.C.S.A. § 9545(b)(1). A judgment becomes final "at the conclusion of direct review, including

discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of the time for seeking review." 42 Pa.C.S.A. § 9545(b)(3).

As this Court previously established, Gerber had until February 8, 2016, to file a timely PCRA petition. ***See Gerber***, 2021 WL 5232441, at *3. Here, he did not file his third PCRA petition until July 8, 2024. Therefore, his third PCRA petition is facially untimely, and he must satisfy a timeliness exception.

Three statutory exceptions exist to the PCRA's time bar. To invoke an exception, a petition must allege and a petitioner must prove:

> (i) the failure to raise a claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or the law of this Commonwealth or the Constitution or law of the United States;
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> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
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> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545(b)(1)(i)-(iii).

"It is the petitioner's burden to allege and prove that one of the timeliness exceptions applies." ***Abu-Jamal***, 941 A.2d at 1268 (citation omitted). Additionally, "[a]ny petition invoking an exception . . . shall be filed within one year of the date the claim could have been presented." 42 Pa.C.S.A.

§ 9545(b)(2).[5] "In order to establish the governmental interference exception, a petitioner must plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials, and (2) the petitioner could not have obtained the information earlier with the exercise of due diligence." ***Commonwealth v. Kennedy***, A.3d 1128, 1135 (Pa. Super. 2021) (citing ***Abu-Jamal***, 941 A.2d at 1268).

At the outset, Gerber argues that the due diligence requirement for the government interference exception to the PCRA time bar conflicts with the statutory language of the PCRA and is unconstitutional. ***See*** Appellant's Brief, at 35-38. However, Gerber does recognize that existing Supreme Court precedent establishes that, to satisfy the government interference exception, a petitioner must demonstrate he exercised due diligence, ***see id.*** at 36 (citing ***Abu-Jamal***, 941 A.2d at 1268), and that this Court rejected this claim in his prior appeal. ***See id.*** at 3 (citing ***Gerber***, 2021 WL 5232441, at *6).

It is a core tenant of our judicial system that, as an intermediate appellate court, we are "bound by existing precedent under the doctrine of *stare decisis* and continue[] to follow controlling precedent as long as the decision has not been overturned by our Supreme Court." ***Commonwealth v. Reed***, 107 A.3d 137, 143 (Pa. Super. 2014) (citation omitted). Accordingly,

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[5] Previously, Section 9545(b)(2) only set forth a sixty-day period. For claims arising on or after December 24, 2017, the period for presenting the claim is one year.

we are bound by our Supreme Court's precedent that a PCRA petitioner raising a claim under the government interference exception must establish that the claim could not have been raised earlier with the exercise of due diligence.

Alternatively, Gerber invites us to stay resolution of his appeal pending our Supreme Court's decision in ***Commonwealth v. Wyant***, wherein the Court granted review to decide "[w]hether, as a matter of statutory interpretation, the governmental interference exception to the PCRA's one-year jurisdictional time-bar, 42 Pa.C.S.[A.] §9545(b)(1)(i), requires a petitioner to demonstrate that he exercised due diligence in ascertaining the information underlying his claim?" ***Commonwealth v. Wyant***, 356 A.3d 746 (Pa. 2026).[6] Again, "because our Supreme Court has not yet decided this issue, we remain bound by existing precedent." ***Commonwealth v. Hind***, 304 A.3d 413, 417 n.4 (Pa. Super. 2023) (citation omitted). Therefore, we decline to stay the matter.

Next, Gerber argues that he exercised due diligence in seeking the Surma bench notes and Loose notes and photographs. He argues that he first became aware of "bench notes" and questions surrounding Surma's training in late 2017, after ***Commonwealth v. Chmiel***, 173 A.3d 617 (Pa. 2017), was decided. ***See*** Appellant's Brief, at 39-40. He asserts that from that point, until he received the material in January 2024, he attempted to obtain the material

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[6] According to the publicly available docket sheets, it appears that briefing has been completed but the case has not yet been scheduled for oral argument.

through filing letters to the Commonwealth, right to know law requests with the state police, a federal *habeas corpus* action, and a civil action.[7] ***See id.***

Regarding the Surma and Loose notes, the PCRA court reasoned that although Gerber was "persistent" with his efforts, he ultimately failed to establish why he could not have obtained them sooner before he first requested them on May 10, 2018.

> His civil suit was filed on September 17, 2021, at a time when he was represented by counsel in his second PCRA proceedings. **He could have used the civil rules to obtain the production of the Surma and Loose bench notes and photographs, which he eventually did, but he waited [over two years later] until December of 2023 and March of 2024 to obtain them**. He obtained the December 2023 subpoena before a hearing scheduled for February 5, 2024. The March 26, 2024 subpoena requested the materials be produced for a May 13, 2024 hearing before the court. He had the right to seek production of documents in his civil case promptly after he filed the complaint, which he did not do. ***See*** Pa.R.C.P. 4009.21. Instead, he waited more than two years to seek that discovery, which ultimately led to his ability to obtain the documents. If this was a priority, his attorney could have assisted him in complying with the civil discovery rules. He ably used the subpoenas when he focused on them two years later. This was not reasonable diligence to obtain evidence during the one-year period after he became aware of the bench notes. The PCRA petition will be denied due to lack of jurisdiction as it relates to the Surma [and Loose] notes.

PCRA Court Opinion, 11/21/25, at 28-29 (emphasis added).

We agree with the PCRA court. Further, as the Commonwealth points out, Gerber failed to present any evidence that the government interfered with

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[7] For a detailed timeline of Gerber's actions, see the PCRA Court Opinion at 21-24.

him requesting and obtaining the Surma notes before May 7, 2018. ***See*** Appellee's Brief, at 29. Therefore, because Gerber has failed to plead and prove a timeliness exception, the PCRA court did not err in finding that Gerber's ***Brady*** claims related to the Surma and Loose notes were untimely.

Similarly, Gerber failed to establish due diligence in obtaining the Loose photos. The PCRA court reasoned that because Loose testified at trial about the existence of the photos, Gerber was aware of their existence, and therefore, failed to exercise due diligence by not seeking them until over ten years later. ***See*** PCRA Court Opinion, 11/21/25, at 30-32 (citing N.T., 7/12/10, 35). Gerber argues that he should not be found to be on notice about the existence of the Loose photos because he was provided hundreds of photographs in discovery and was operating on the reasonable belief that all the photographs were disclosed to his attorney. ***See*** Appellant's Brief, at 43-44. Further, he argues that appellate counsel for the Commonwealth was unaware whether the Loose photos were turned over in discovery and "diligence does not require a petitioner to know things that the prosecutor either did not know." ***Id.*** at 43. We are unpersuaded.

Gerber was aware of the photos based on Loose's trial testimony and failed to explain how he was prevented access from obtaining them. As we have previously explained, "knowledge of the files, absent action to obtain them, precluded a finding of due diligence." ***Commonwealth v. Smallwood***, 155 A.3d 1054, 1065 (Pa. Super. 2017) (emphasis and citation omitted); ***see***

also Commonwealth v. Williams, 168 A.3d 97, 123 (Pa. 2017) ("information that was clearly available to [the petitioner] at the time of trial cannot be cloaked as a claim of governmental interference to circumvent the PCRA timeliness requirements.") (citation omitted). Because Gerber was aware of the existence of the photos at the time of trial, he did not exercise due diligence by first attempting to obtain them over eight years later. Therefore, the PCRA court did not err in finding that Gerber's ***Brady*** claim related to the Loose photos was untimely.[8]

Next, Gerber asserts that he was prejudiced by the Commonwealth's failure to provide the Tolan report of the crime scene created a week before trial and seventeen years after the murder. ***See*** Appellant's Brief, at 68-69. Gerber argues that had it been disclosed, he could have called Tolan to testify at trial that a report was not made because the crime scene measurements were lost, which would have undermined the integrity of the investigation. ***See id.***

The PCRA court thoroughly and aptly explained why, although Gerber's Tolan ***Brady*** claim was timely, it still did not entitle him to relief because it was meritless.

> [] Gerber also challenges the Commonwealth's failure to provide him with a copy of the Tolan Report before trial as a ***Brady*** violation. The Commonwealth concedes that Trooper Todd Tolan

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[8] Because we agree with the PCRA court that Gerber's ***Brady*** claims based on the Surma notes and the Loose notes and photos were untimely, we need not assess the underlying merits of his claims.

mapped the scene of the crime on June 29, 2010, using a Leica Total Station and standard measuring tapes "to document the roadway geometry and the parking lot geometry for the area of Rimrock Drive south of State Route 611" in Hamilton Township, Monroe County, Pennsylvania. Defendant's Exhibit 11. Trooper Tolan signed the report (which included the map) on June 30, 2010. The report was filed with the PSP and his supervisor signed the report on July 27, 2010[, almost two weeks after the verdict was rendered]. ***Id.*** At the time Trooper Tolan prepared the map, the crime scene had changed in significant respects. At the time of the murder in 1993, the area was an open lot. At the time of the mapping in 2010, a building had been constructed on the lot. N.T., 4/23/25, at 9. Attachment 4 of the report was information about a base model 1992 Chevy Cavalier two-door coupe, which was the model of the Hagen vehicle. ***Id.*** at 94. Trooper Tolan did not do an accident reconstruction of the murder scene. ***Id.*** at 98.

The evidence established that the Tolan report was never turned over to the prosecution. The prosecutors were unaware of it. ***Id.*** at 118. The State Police did not bring it to [the prosecution's] attention. The report and mapping were not turned over to the defense. The court does have jurisdiction over this claim because the report was in the possession of the State Police when the trial began on July 10, 2010. [] Gerber could not have known about the Tolan Report because neither he nor the Attorney General's prosecutors knew about it until the PSP turned it over to Gerber in the civil action in 2024. He amended his PCRA petition to include it within one year of its discovery.

However, even though the court has jurisdiction over this claim, . . . Gerber is not entitled to post-conviction relief. Due process requires the prosecution to disclose evidence that is favorable to the defense and is material. ***Kyles v. Whitley***, 514 U.S. 419, 437 (1995). There are two components to a ***Brady*** claim: (1) the government suppressed favorable evidence either intentionally or inadvertently; and 2) the suppressed evidence was material to the outcome of the trial. Favorable evidence includes impeachment evidence and exculpatory evidence. ***United States v. Bagley***, 473 U.S. 667, 676 (1985). A prosecutor's failure to disclose ***Brady*** material requires relief when the exculpatory evidence would have been material to the trial. ***Brady***, 373 U.S. at 87.

The Tolan mapping was done almost 17 years after the murder. In 1993, the lot was bare dirt being used by construction vehicles.

> In 2010, the lot had been paved over, and a building had been constructed on it. Obviously no particular crime scene measurements could be done in 2010 with these changes, and Trooper DeAndrea testified at the trial in 2010 that the State Police had lost his specific crime scene measurements. **The Tolan mapping would not have proven anything relevant at the time of the trial other than to establish the geographical location of the crime scene**.
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> [] Gerber argues that if he had known about the report, he could have called Trooper Tolan as a witness and shown that an accident reconstruction could have been done if DeAndrea had not lost his measurements. He could have also established that State Police protocol required an accident reconstruction if a vehicle crash resulted in a fatality. His trial counsel could have used this fact to "undermine the integrity of the investigation" citing the ***Kyle[s]*** case. **However, nothing prevented [] Gerber's trial counsel from pointing out that the Commonwealth had not done an accident reconstruction at the time of the trial, because the Commonwealth didn't prove that it did one**. [] Gerber has not established that the Tolan report and map was material evidence favorable to the defense. This claim will be denied.

PCRA Court Opinion, 11/21/25, at 36-38 (emphasis added) (record citation format altered).

Gerber argues that the PCRA court's analysis misses the mark because his claim is not that the investigation could have been undermined by an accident reconstruction not being done before trial, but "[r]ather, the claim relies on Tolan's post-conviction admission that such a reconstruction could have been done, but for the fact that [Trooper DeAndrea] lost his measurements – as Tolan testified, those measurements were needed to do the reconstruction." Appellant's Brief, at 69-70 (emphasis omitted). As the PCRA court recognized, Trooper DeAndrea testified at trial that the crime scene measurements were lost. Accordingly, at the time of trial, the defense

was aware that the crime scene measurements were lost and that an accident reconstruction was not performed and had the opportunity to bring it to the jury's attention. Therefore, the PCRA court did not err in finding that Gerber's Tolan ***Brady*** claim was meritless.

Lastly, in conclusory fashion, Gerber asserts that the PCRA court failed to conduct a cumulative materiality analysis for the ***Brady*** claims. ***See*** Appellant's Brief, at 70. This claim does not merit relief. It is well-settled that "no number of failed claims may collectively warrant relief if they fail to do so individually." ***Commonwealth v. Spotz***, 8 A.3d 294, 321 n.22 (Pa. 2014) (brackets and citation omitted). As explained above, none of Gerber's ***Brady*** claims merit relief. Two ***Brady*** claims were untimely, with no exception pleaded and proven. The third claim, although timely, lacks substantive merit. Therefore, Gerber's argument is without merit.

For the foregoing reasons, we affirm.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/20/2026