[J-17-2019] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 752 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	November 16, 2007 in the Court of
	:	Common Pleas, Philadelphia County,
v.	:	Criminal Division at No. CP-51-CR-
	:	1024821-1988 (Nunc Pro Tunc appeal
	:	rights reinstated on 06/22/2017)
ANTHONY REID,	:	
	:	SUBMITTED: February 4, 2019
Appellant	:	

DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: August 18, 2020**

Anthony Reid ("Reid") secured reinstatement of his collateral appeal rights nunc pro tunc through the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 ("PCRA")[1], as a result of the United States Supreme Court's decision in *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899 (2016). *Williams* expressed, in no uncertain terms, the structural collapse caused by the participation of former Chief Justice Ronald Castille ("Castille") on the panel adjudicating Terrance Williams' collateral appeal. *Williams* announced that this Court committed a Due Process Clause[2] violation that "affected the

[1] On June 22, 2017, the Honorable Leon W. Tucker, Court of Common Pleas of Philadelphia County, granted relief on Reid's second PCRA petition. This ensuing nunc pro tunc appeal is from the 2011 decision of the Honorable William J. Mazzola, who decided Reid's (first, serially amended) PCRA petition. The 2011 PCRA court decision was appealed to this Court, with former Chief Justice Castille participating. The PCRA court's dismissal of the PCRA petition was affirmed. *Commonwealth v. Reid*, 99 A.3d 427 (Pa. 2014) ("2014 PCRA Appeal").

[2] U.S. Const. amend. XIV, § 1.

. . . whole adjudicatory framework below." *Id*. at 1910. The matter was remanded so that Williams could "present his claims to a court unburdened by any 'possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused.'" *Id*. at 1910 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Reid is in an identical posture to Williams: Castille, as the District Attorney of Philadelphia County, authorized pursuit of the death penalty in his case and Castille later participated in the panel adjudicating his collateral appeal. As such, Reid is constitutionally entitled to the same relief as Williams: an appeal to an unburdened court. The Majority decides otherwise based upon a flawed sua sponte analysis of the jurisdiction of this Court. I respectfully dissent as I believe we are required to provide Reid with the appeal of the PCRA order that was effectively denied by Castille's participation in this Court's failed adjudication. After analysis based on current United States Supreme Court jurisprudence, I conclude that *Williams* recognized a substantive rule that requires retroactive application to Reid and the extremely limited number of individuals to whom its holding would apply.[3] I find that Reid has satisfied the exception to the time bar of the PCRA codified at 42 Pa.C.S. § 9545(b)(1)(iii). A review of the merits of the pending appeal results in affirmance of the guilt phase determinations of the 2011 PCRA court. Reid is entitled to limited penalty phase relief by way of a remand for a hearing on the mitigation evidence proffered by Reid's lay witnesses.

[3] To allay fears that our analysis "create[s] needless uncertainty for our trial and appellate courts," Majority Op. at 50, we note that, as discussed at length later in this opinion, the substantive rule that we recognize applies only to those capital case defendants where Castille, as District Attorney, authorized pursuit of the death penalty and later participated in an appeal from imposition of a death sentence.

I. History of the Case

The Majority fails to take into serious account the fact that this matter implicates the integrity of this institution. *Williams* undermined the legitimacy of our Court as the court of final resort in death penalty appeals. "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." *Matter of Glancey*, 527 A.2d 997, 999 (Pa. 1987) (emphasis omitted) (quoting Commentary to Canons of Judicial Ethics). The outcome advanced by the Majority further erodes it by not affirming that *Williams* applies to the extremely small number of cases that fall within its direct holding.[4]

This case arises out of the shooting death of Mark Lisby ("Mark Lisby" or "victim") on July 11, 1988. Reid and Lawrence Boston ("Boston") were both members of the Junior Black Mafia ("JBM"), a Philadelphia gang that sold drugs in the late 1980s. Boston was a JBM drug distributor who engaged the victim's nephew, Terrance Lisby, to sell drugs. On July 9, 1998, the victim stole approximately five hundred dollars' worth of cocaine capsules from his nephew. In the early morning hours of July 11, 1988, Boston and Reid appeared at 2444 North Stanley Street, where the victim was staying, to inquire about the missing drugs. The victim was staying there with Lisa Dargan ("Dargan"), the mother of his child, who observed portions of the encounter. She saw the victim, Boston and Reid having a brief conversation in the doorway, following which Boston and Reid asked the victim to go for a walk with them. The three walked down the street and around a corner, outside of Dargan's view. Morris Dozier ("Dozier"), a neighbor, observed the incident from

[4] Reid and Williams are in identical postures: both were sentenced to die only upon Castille's initial authorization to seek the death penalty, and both had their appeal decided by a court tainted by Castille. As explained infra, the new substantive rule announced in *Williams* requires reinstatement of appellate rights to Reid and the limited number of death row inmates similarly situated.

nearby and saw Reid shoot the victim three times. Dargan heard three shots but did not see the shooting. Reid and Boston fled.

In December of 1988, Reid was tried for various charges in connection with the death of Mark Lisby. At trial, the Commonwealth presented evidence of the above facts. The main witnesses were Dargan, Dozier, and Boston. The jury found Reid guilty of criminal conspiracy, 18 Pa.C.S. § 903, but hung on the remaining charges. A mistrial was declared and a second trial commenced on December 27, 1990.

Dargan, Dozier, and Boston were again the main witnesses. However, at the second trial, Boston invoked his Fifth Amendment right against self-incrimination and refused to testify. The trial court deemed him unavailable, and allowed his testimony from Reid's first trial to be read into the record.

The Commonwealth also presented various other witnesses who incriminated Reid. The victim's brother, Randall Lisby, testified that Reid admitted to shooting the victim. Kevin Brown ("Brown") testified that he saw Reid running away from the scene with Boston. Brown also testified that Reid was a member of the JBM and witnessed Reid on multiple occasions waving his gun and threatening people. Terrance Lisby also testified regarding Reid's affiliation with the JBM. As discussed in detail below, many of these witnesses were initially reluctant to identify Reid and to testify against him. Some, such as Dozier, testified that they received threats as a result of their testimony at previous proceedings.

Reid's trial counsel conceded that Reid was present at the time Mark Lisby was shot, but argued that Boston was the shooter and that Reid was not involved in any way. Counsel argued that Boston, unlike Reid, had a clear motive to kill the victim. Counsel

impeached the three key witnesses with prior inconsistent statements and failures to identify Reid on prior occasions.

Reid was convicted of murder of the first degree, carrying a firearm without a license, and possessing an instrument of crime.[5] Following a penalty hearing at which the jury found one applicable aggravating circumstance[6] and no mitigating circumstances, Reid was sentenced to death.[7] On the remaining counts, Reid was sentenced to ten to twenty years of imprisonment.

Reid appealed. In a unanimous opinion, this Court affirmed his judgment of sentence. *Commonwealth v. Reid*, 642 A.2d 453 (Pa. 1994). Former District Attorney Castille, who had only recently been elected to the Pennsylvania Supreme Court, did not participate in this case on direct appeal. Thereafter, on December 12, 1996, Reid filed his first pro se PCRA petition. The case was assigned to the Honorable James Lineberger with Daniel Silverman, Esquire appointed to represent Reid. On January 27, 1999, Reid filed his first counseled PCRA petition, First Amended PCRA Petition, 1/27/1999, followed by multiple amended petitions. Supplemental Amended PCRA Petition, 4/15/1999; Second Supplemental Amended PCRA Petition, 7/11/2000; Third Supplemental PCRA Petition, 2/13/2001. On November 21, 2001, the Commonwealth filed a motion to dismiss pursuant to Pa.R.Crim.P. 907, arguing that Reid's PCRA petition lacked merit. Commonwealth Motion to Dismiss, 11/21/2001. Reid filed a response. Reid's

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[5] 18 Pa.C.S. §§ 2502(a), 6106, 907.

[6] 42 Pa.C.S. § 9711(d)(9) (significant history of felony convictions involving the use or threat of violence to the person).

[7] 42 Pa.C.S. § 9711(g).

Consolidated Response, 7/12/2002. The case was reassigned to the Honorable William J. Mazzola in 2005.

No further action occurred until August 8, 2007, when the Commonwealth filed another motion to dismiss. Reid filed a brief in opposition, and Judge Mazzola issued a notice of intent to dismiss on October 18, 2007. The petition was formally dismissed on November 19, 2007. *See* Majority Op. at 2 n.2.

Reid appealed, and timely filed a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), followed by two supplemental statements. Pa.R.A.P. 1925(b) Statements, 8/28/2009; 09/10/2009; 10/1/2009. On March 8, 2011, the PCRA court filed a lengthy Rule 1925(a) opinion, addressing Reid's claims.[8] PCRA Court Opinion, 2/14/2011. This Court, with Castille participating, issued an opinion affirming the PCRA court with now Chief Justice Saylor dissenting. *See Commonwealth v. Reid*, 99 A.3d 427 (Pa. 2014). Sixty days after *Williams* was issued, Reid successfully sought relief through the PCRA. He now seeks to have his PCRA appeal heard by an unbiased panel.

II. Jurisdictional Review

The Honorable Leon Tucker determined that Reid's PCRA petition satisfied a time bar exception and, on June 22, 2017, entered an order reinstating Reid's appellate rights nunc pro tunc. The Commonwealth filed a notice of appeal from that order and Reid filed a timely notice of appeal nunc pro tunc pursuant to the PCRA court's order.

[8] The PCRA Court Opinion, though filed March 8, 2011, is dated February 14, 2011, and therefore will be cited as "PCRA Court Opinion, 2/14/2011." The opinion addressed the claims in this case as well as Reid's PCRA claims in another case arising out of the murder of Michael Waters.

The Commonwealth's appeal was docketed at 751 CAP, which was administratively discontinued when the Commonwealth filed a praecipe of discontinuance. Reid, meanwhile, separately filed a notice of appeal, docketed at the above-captioned 752 CAP number. Reid's appeal at the present docket challenges the Honorable William J. Mazzola's order of November 19, 2007, which dismissed Reid's (first, serially amended) PCRA petition. The PCRA court's dismissal of that PCRA petition was affirmed, with former Chief Justice Castille participating. *Commonwealth v. Reid*, 99 A.3d 427 (Pa. 2014) ("2014 PCRA Appeal").

Raising, sua sponte, the jurisdictional issue abandoned by the Commonwealth, the Majority concludes that this Court lacks jurisdiction to decide this appeal under the PCRA without engaging in a proper analysis of retroactivity principles.[9] An examination of *Williams* establishes that it qualifies as a substantive rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality), and thus this Court is required to give it retroactive effect. While the Majority contends that the *Williams* decision does not apply retroactively because the United States Supreme Court did not expressly declare it to be retroactive, its analysis overlooks the Court's holding in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), which announced that state collateral courts are constitutionally

[9] The Majority finds that quashal is warranted due to Reid's failure to establish jurisdiction under the PCRA. If the Majority is correct in its analysis, the proper course would be to reverse the order granting reinstatement of appellate rights. *See Commonwealth v. Robinson*, 837 A.2d 1157 (Pa. 2003) (vacating the Superior Court's judgment that a PCRA petition was timely and directing that the underlying PCRA petition be dismissed as time-barred). However, as the critical issue is whether Reid satisfied an exception to the time bar, further elaboration on this point is unnecessary.

obligated to give retroactive effect to new rules that fall within the *Teague* definition of substantive rules. Because *Williams* qualifies, we must give it retroactive effect.

Reid's PCRA petition asserts that his filing satisfied each of the three statutory exceptions to the time bar, 42 Pa.C.S. § 9545(b)(1)(i-iii).[10] The PCRA court's opinion focused on the first two exceptions, regarding newly-discovered facts, (b)(1)(i), and governmental interference, (b)(1)(ii). The (b)(1)(iii) exception was addressed in the PCRA court's opinion after the Commonwealth raised the issue in its concise statement. "Questions regarding the scope of the statutory exceptions to the PCRA's jurisdictional time-bar raise questions of law; accordingly, our standard of review is de novo." *Commonwealth v. Fahy*, 959 A.2d 312, 316 (Pa. 2008) (citation omitted).

Reid's PCRA petition fits squarely within the exception contained in section 9545(b)(1)(iii), as it governs cases such as his where a new constitutional rule applies

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[10] These exceptions are:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws 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. § 9545(b)(1)(i)-(iii).

retroactively.[11] The Majority "question[s] the propriety of" our decision to address whether *Teague* applies. Majority Op. at 47. The Majority argues that the statutory requirement of pleading and proving that a PCRA exception applies suggests that in PCRA matters an appellate court is limited to examining only the arguments raised below and may go no further. That argument is, however, in direct tension with the well-settled ability of an appellate court to affirm on any basis. *Commonwealth v. Diaz*, 226 A.3d 995, 1011 (Pa. 2020) ("[W]e may affirm on any ground 'where the correct basis for the ruling . . . is clear upon the record' and the pertinent facts have been resolved by the court of original jurisdiction.") (quoting *In re A.J.R.-H.*, 188 A.3d 1157, 1176 (Pa. 2018)); *Commonwealth v. Tighe*, 224 A.3d 1268, 1279–80 (Pa. 2020) ("Nevertheless, this Court can affirm if the lower tribunal's decision was correct for any other reason supported by the record.") (citation omitted). We have explained that "[t]his jurisprudential doctrine stems from the focus of review as on the judgment or order before the appellate court, rather than any particular reasoning or rationale employed by the lower tribunal." *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1200 (Pa. 2009) (citation omitted).

Whether viewed as affirming the PCRA court's jurisdictional ruling on an alternative basis or more broadly as an application of the "right for any reason" doctrine, at the end of the day we may affirm on any supported basis. To be clear, Reid pled the (b)(1)(iii) exception to establish PCRA jurisdiction, PCRA Petition, 8/8/2016, at 5, and argued that *Williams* must apply retroactively, Reply to Motion to Dismiss, 4/3/2017, at 9-10. Moreover, the PCRA court held that Reid met the (b)(1)(iii) timeliness exception because,

[11] As a result of this conclusion, it is unnecessary to address the other exceptions to the PCRA time bar.

in its view, *Williams* qualified as a watershed procedural rule under *Teague*. Trial Court Opinion, 11/6/2017, at 18. The fact that we find that the (b)(1)(iii) exception was met for a different jurisprudential reason affirms that judgment.[12] This is a straight-forward application of the "right for any reason" doctrine, and the Majority's suggestion that in affirming, this Court is limited to applying the exact legal arguments as the lower court, is a corruption of the long-standing doctrine.[13]

The Majority opines that the doctrine does not apply based on its reading of Section 9545(b)(1), which mandates that any PCRA petition shall be filed within one year of the date that the judgment becomes final "unless the petition alleges and the petitioner proves" one of the enumerated exceptions. To support the notion that Reid must prove the legal argument supporting his claim that *Williams* recognized a constitutional right that applies retroactively, the Majority cites four cases involving the two fact-driven exceptions

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[12] The Majority continuously conflates the pleading and proof requirement to trigger the exception to the PCRA time bar with the application of the "right for any reason" doctrine. We do not suggest, as the Majority states, that a PCRA petition need only "check off the box" for the newly recognized constitutional rights exception and "hope that an appellate court will do the legal leg work by 'proving' jurisdiction for him on appeal." Majority Op. at 49. Reid pled the exception, invoked *Williams*, and the facts supporting its application are undisputed: Castille authorized pursuit of the death penalty and then participated in his appeal challenging the imposition of the sentence. There is no pleading or proof gap. The PCRA court agreed that Reid met the exception. It is that judgment that is under review and it may be affirmed based on a legal rationale different from the PCRA court's rationale. Reid requested the opportunity to brief the issue and if granted he would have had an avenue for arguing alternative bases for affirmance of the PCRA court's finding of jurisdiction.

[13] The governmental interference and newly-discovered fact exceptions involve proving actual facts, as opposed to theories of law as presented in this appeal. The "right for any reason" doctrine treats the two differently. *In re A.J.R.-H.*, 188 A.3d at 1176 ("The doctrine . . . may not be used to affirm a decision when the appellate court must weigh evidence and engage in fact finding or make credibility determinations to reach a legal conclusion.")

to the timeliness bar, the governmental interference and newly-discovered fact exceptions, contained in subsections (b)(1)(i) and (b)(1)(ii),[14] and a fifth case in which the petitioner failed to plead any exception to the time bar.[15] Nothing in these cases supports the proposition that Reid, who pled the (b)(1)(iii) exception to the time bar based on *Williams*' retroactive effect and alleged the key (undisputed) facts regarding Castille's participation that makes *Williams* apply to him, had an obligation to "prove" the precise legal argument supporting application of the exception.[16] Forcing the notion of "proving"

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[14] *Commonwealth v. Edmiston*, 65 A.3d 339, 345 (Pa. 2013) ("Appellant relies on the exceptions for governmental interference and previously unknown facts."); *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008) ("Appellant invoked timeliness exceptions (b)(1)(i) and (b)(1)(ii), neither of which the PCRA court found applicable."); *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1266 (Pa. 2008) ("Appellant argued his third PCRA petition fell within 42 Pa.C.S. § 9545(b)(1)(ii)'s timeliness exception . . . . Appellant also argued his petition fell within § 9545(b)(1)(i)'s exception[.]"); *Commonwealth v. Fahy*, 737 A.2d 214, 218 (Pa. 1999) ("Appellant attempts to invoke only the exception found in 42 Pa.C.S.A. § 9545(b)(1)(i) by offering that his failure to raise his claims previously was the result of interference by government officials.").

[15] *Commonwealth v. Robinson*, 139 A.3d 178, 182 (Pa. 2016) ("Petitioner failed to assert any exception to the timeliness requirement, and, thus, the trial court lacked jurisdiction to address the merits of the petition.").

[16] "A 'fact,' as distinguished from the 'law,' is that which is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law." *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011) (citation, ellipsis, and bracketing omitted). Moreover, the idea that a legal argument must be "proven" is belied by PCRA jurisdictional precedent that requires a petitioner to meet his burden of proof by a preponderance of the evidence depending on the nature of the time bar claim. *See Commonwealth v. Ali*, 86 A.3d 173, 178 (Pa. 2014) ("[T]o qualify for the newly-discovered evidence exception, therefore, Appellant bears the burden of proving by a preponderance of the evidence that he was mentally incompetent during the period in which to raise and preserve claims in his first PCRA petition."). How does one prove the law within an evidentiary weight standard?

the law into the context of the (b)(1)(iii) timeliness exception is as impossible as forcing a square peg into a round hole.[17]

In actuality, the Majority is advancing the proposition that Reid waived the argument that *Williams* applies retroactively based on the recognition that it announced a substantive rule of law that applies retroactively on collateral review. Thus, according to the Majority, on direct review, this Court cannot apply the "right for any reason" doctrine to the PCRA's judgment that jurisdiction was established under the newly recognized

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[17] The Majority suggests that application of the "right for any reason" doctrine in the review of a finding of jurisdiction by a PCRA court threatens the separation of powers between the judicial and legislative branches. According to the Majority, the application of the "right for any reason" doctrine "might undermine section 9545(b)(1)[.]" Majority Op. at 49. If the Majority is of the view that the General Assembly has re-written this Court's function of reviewing judgments of the lower courts and not the rationale supporting those judgments which is a foundational principle of appellate review, then the Majority creates a true separation of powers problem. The Majority's citation to *Commonwealth v. Albrecht*, 720 A.2d 693, 700 (Pa. 1998), to support the proposition that we would countenance such an infringement on our fundamental function misses the mark. In *Albrecht*, we recognized that our equitable rule of relaxing the application of waiver of issues on direct appeal in PCRA capital cases could not co-exist with the PCRA's proscription that waived claims are not cognizable under the PCRA. 42 Pa.C.S. § 9543(a)(3). The relaxed waiver rule was a judicial gift to capital defendants. The right for any reason doctrine is imbedded in our appellate role as reviewers of judgments, not rationales.

In *Albrecht*, we recognized: "Relaxed waiver, as an operating principle, was created to prevent this court from being instrumental in an unconstitutional execution." *Id*. at 700 (citation omitted). *Albrecht* eliminated that doctrine in the PCRA context as incompatible with its statutory language, "which excludes waived issues from the class of cognizable PCRA claims." *Id*. Of course, this did not mean that those claims were forever foreclosed from review, as the defaulted issues could be raised in collateral proceedings "upon a demonstration of ineffectiveness of counsel in waiving the issue." *Id*. Similarly, when we abolished "relaxed waiver" prospectively for capital direct appeals in *Commonwealth v. Freeman*, 827 A.2d 385, 403 (Pa. 2003), we noted that "the PCRA exists for them, as for other criminal defendants, as a vehicle for a full and fair, counseled proceeding through which they may challenge the stewardship of trial counsel and pursue other appropriate collateral claims." *Id*. Reid, however, cannot pursue his claim in our courts unless the time bar exception applies.

constitutional right exception because neither Reid nor the PCRA court relied on this rationale. The Majority's proposition is in direct contravention of our prerogative to affirm on any basis supported by the record:

> … This general tenet flows from a recognition that it is the judgment or order itself that is the subject of appellate review, rather than any particular reason or argument advanced by the court or prevailing party. The precept may be applied even though the reason for sustaining the judgment was not raised in the trial court, relied on by that court in reaching its decision, or brought to the attention of the appellate court[s].

Thomas G. Saylor, *Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and An Anecdotal Experience with Former Chief Justice Cappy*, 47 Duq. L. Rev. 489, 490 (2009) (footnotes omitted).[18]

Where, as here, the matter is before us on direct appeal, and Reid prevailed on the jurisdictional issue before the PCRA court, Reid had no obligation to preserve the issue that *Williams* created a new substantive rule. *See id*. at 492.[19] We therefore turn to whether *Williams* qualifies under the Section 9543(b)(1)(iii) exception.

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[18] The "unsettled" nature of the doctrine in the title refers to "application of the doctrine by a discretionary review court … namely whether the doctrine permits the affirmance of a trial court's decision for any reason or, conversely, that of the intermediate appellate court." *Commonwealth v. Fant*, 146 A.3d 1254, 1265 (Pa. 2016) (citing Thomas G. Saylor, *Right for Any Reason*). There is nothing unsettled in the application of the doctrine in this capital PCRA appeal before us on direct review.

[19] The Majority suggests that we somehow violate the duty to act as neutral arbiters and upend our adversarial system, Majority Op. at 48, because we rely on the right for any reason doctrine. While the Majority significantly embellishes and expands the arguments previously advanced by the Commonwealth before the PCRA court, we would never countenance a suggestion that the Majority is advocating for the position abandoned by the current Philadelphia District Attorney. Like our learned colleagues in the Majority, it is our duty to apply the law within the bounds of precedent and we have done so.

To be clear, our analysis of the (b)(1)(iii) exception based on recent United States Supreme Court jurisprudence and its impact on the appropriate categorization of *Williams*

The Supreme Court in *Williams* acknowledged that its "due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor." *Williams*, 136 S. Ct. at 1905. The Supreme Court then announced that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*.

The Supreme Court had little difficulty concluding that the decision to seek the death penalty was a critical one and that Castille's participation was significant and personal. The Court then rejected the argument that because Castille did not cast the deciding vote, any error caused by his participation was harmless. Since appellate panel deliberations are confidential as a general rule, "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process." *Id*. at 1909. The error was structural, as it tainted the entire result by "affect[ing] the . . . whole adjudicatory framework below." *Id*. at 1909-10.

For the reasons discussed infra, *Williams* announced a substantive rule that must apply retroactively in this case as a matter of constitutional law. The Majority fails to recognize that constitutional dimension by erroneously relying upon the plain language of subsection 9545(b)(1)(iii), as interpreted in *Commonwealth v. Abdul-Salaam*, 812 A.2d 497 (Pa. 2002). In *Abdul-Salaam* this Court indicated that "[b]y employing the past tense in writing this provision, the legislature clearly intended that the right was already

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is an effort to reconcile the PCRA statutory framework with the teachings of the High Court. This is the role of judges.

recognized at the time the petition was filed." *Id*. at 501. The Majority reasons that *Williams* does not satisfy the statutory exception because the case has not to date been held to apply retroactively.

That conclusion ignores critical, recently developed constitutional considerations. *Abdul-Salaam* qualified its statutory analysis as follows:

> The inquiry does not necessarily end with the plain language of a single section of the PCRA statute, since certain post-conviction claims are to be channeled through the statutory post-conviction procedure although they might not otherwise plainly fall within the parameters of the PCRA. *See, e.g., Commonwealth v. Lantzy,* 558 Pa. 214, 223, 736 A.2d 564, 570 (1999) (stating that "the PCRA provides the exclusive remedy for post-conviction claims seeking restoration of appellate rights due to counsel's failure to perfect a direct appeal, since such claims also were cognizable on traditional habeas corpus review"). Rather, the question arises whether the salient restriction on serial, state post-conviction review is a reasonable one, since this Court has acknowledged that the General Assembly is authorized, consistent with the Pennsylvania Constitution, to impose reasonable restrictions on the various forms of post-conviction review. *See Commonwealth v. Peterkin,* 554 Pa. 547, 556–57, 722 A.2d 638, 642 (1998).
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> Here, we view the relevant limitation on serial state collateral review as a reasonable one, particularly as applied to the circumstances of the present case, in which the claims asserted depend upon an evolving line of United States Supreme Court precedent involving an interpretation of the United States Constitution, and review within the federal judicial system over which that Court presides has not been shown to be foreclosed. Therefore, accepting the plain language of the statute, as exemplifying a reasonable restriction on serial state collateral review, we hold that the language "has been held" means that the ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review.

Id.

Abdul-Salaam's analysis of the constitutional reasonableness of its statutory interpretation was fully in accord with the prevailing view of retroactivity before *Montgomery*. *Montgomery* held that *Miller v. Alabama*, 567 U.S. 460 (2012) (Eighth Amendment forbids mandatory sentence of life without parole for juvenile homicide offenders), must be given retroactive effect in state collateral proceedings. The holding in *Montgomery* drastically altered the legal landscape for determining the retroactive application of new constitutional rules. "This conscription into federal service of state post-conviction courts is nothing short of astonishing." *Id*. at 737 (Scalia, J., dissenting). Indeed, this conscription undercuts the reliance on *Abdul-Salaam* by the Majority.

Retroactivity is constitutionally required

Montgomery held that states must give retroactive effect to *Miller.* It did so by constitutionalizing *Teague*, 489 U.S. 288, which established the modern retroactivity framework. Before *Montgomery*, retroactive application of new cases via *Teague* was typically applied in the context of federal habeas courts reviewing the validity of state judgments. *Teague* itself was such a case, arriving at the High Court following denial of Teague's petition for a writ of habeas corpus from his state court conviction. Teague urged that "the Sixth Amendment's fair cross section requirement should now be extended to the petit jury." *Id*. at 292. The Court declined to address whether that rule should be adopted because it would not apply to Teague in any event. The Supreme Court in *Teague* reached that conclusion by holding that non-retroactivity is the default

rule when a federal habeas court examines a state court judgment.[20] Thus, Teague would not receive the benefit of the new rule even if the Court were inclined to create it.

Teague held that two kinds of rules would qualify as exceptions to this general principle.[21] The first exception, concerning new substantive rules, was "not relevant here," and *Teague* did not elaborate further on its scope. The Supreme Court has since summarized that category as rules that "place[] a class of private conduct beyond the power of the State to proscribe, or address[] a 'substantive categorical guarantee accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (citation omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989)). The second exception was for "watershed rules of criminal procedure," defined as "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

Until *Montgomery*, nothing required states to give retroactive effect to any new constitutional rulings if convictions were already final when the new rule was issued, even if the new rule fell within a *Teague* exception. "Since *Teague* is based on statutory

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[20] The United States Supreme Court has not explicitly decided whether federal habeas relief is available when the new rule is announced after the last state court adjudication on the merits, *Greene v. Fisher*, 565 U.S. 34, 39 (2011), nor has it decided whether *Teague* applies when a federal habeas court reviews a federal conviction. *See Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1264 (2016) ("The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption.").

[21] "The non-retroactivity principle **prevents** a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). The *Teague* exceptions are therefore more accurately characterized as rules not subject to the retroactivity bar.

authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Danforth v. Minnesota*, 552 U.S. 264, 278–79 (2008). States were only required to apply new rules to cases pending on direct review when the new rule was announced. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (holding that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication").

Montgomery altered that framework by holding that state collateral courts must give retroactive effect to new substantive rules when the collateral proceedings are open to a claim that would be governed by the new rule.

> If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.

Montgomery, 136 S. Ct. at 731–32 (quotation marks and citation omitted). Since Pennsylvania's collateral review courts are open to retroactive application of new rights through the section 9545(b)(1)(iii) exception and a prisoner is permitted to allege due process violations once jurisdiction is established, it follows from *Montgomery* that Pennsylvania is constitutionally obligated to give retroactive effect to *Williams* if it qualifies as a substantive rule.[22]

A narrow focus on the language of subsection 9545(b)(1)(iii) results in a mistaken retroactivity analysis based on pre-*Montgomery* law. This Court's *Abdul-Salaam* decision

[22] *Montgomery* did not decide whether states are obligated to give retroactive effect to watershed rules of criminal procedure.

does not support the "no jurisdiction" disposition since that case decided the statutory question with the understanding that states could flatly refuse to apply new rules retroactively in collateral proceedings.[23] Forcing a prisoner to wait until another case decided the retroactivity issue was reasonable because a prisoner had no constitutional basis to insist on retroactivity in the first place. As a result of *Montgomery*, that principle is no longer true. A litigant may not be denied the opportunity to argue that a given rule qualifies as a substantive rule under *Teague*.[24] *Cf. Commonwealth v. Delgros*, 183 A.3d

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[23] That view was aptly summarized by Justice Scalia in dissent in *Montgomery*:

> Neither *Teague* nor its exceptions are constitutionally compelled. Unlike today's majority, the *Teague*-era Court understood that cases on collateral review are fundamentally different from those pending on direct review because of "considerations of finality in the judicial process." *Shea v. Louisiana,* 470 U.S. 51, 59–60, 105 S. Ct. 1065, 84 L.Ed.2d 38 (1985). That line of finality demarcating the constitutionally required rule in *Griffith* from the habeas rule in *Teague* supplies the answer to the not-so-difficult question whether a state post-conviction court must remedy the violation of a new substantive rule: No. A state court need only apply the law as it existed at the time a defendant's conviction and sentence became final. *See Griffith, supra,* at 322, 107 S. Ct. 708. And once final, "a new rule cannot reopen a door already closed." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 541, 111 S. Ct. 2439, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.). Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription.

Montgomery, 136 S. Ct. at 739 (Scalia, J., dissenting).

[24] The Majority vehemently disagrees with any suggestion of a narrowing of the holding of *Abdul-Salaam* even in light of *Montgomery* by asserting that the latter case cannot alter *Abdul-Salaam*'s statutory analysis. Majority Op. at 53-54. Their opinion correctly notes that *Abdul-Salaam* did not discuss *Teague*. However, *Abdul-Salaam* did not discuss *Teague* because *Teague* simply did not matter at that time. Prior to *Montgomery* when *Abdul-Salaam* was penned, a prisoner had no right whatsoever to insist on any retroactive application of new law on collateral review.

352, 363 (Pa. 2018) (Saylor, C.J., concurring) (opining that where defendant is statutorily ineligible for PCRA review as a result of a sentence that imposed only a fine, due process requires that an exception be made to the general rule barring review of collateral claims on direct review).

Williams qualifies as a substantive rule under Teague

Having established that we are required to give retroactive effect to *Williams* if it qualifies as a substantive rule within the meaning of *Teague*, the question is whether the right announced in *Williams* meets that standard. As a preliminary matter, this requires a precise identification of the substantive right announced by *Williams*. "It is axiomatic, and self-evident, that the asserted newly-created right actually must enure to the benefit of the petitioner." *Commonwealth v. Spotz*, 171 A.3d 675, 681 (Pa. 2017). It is similarly self-evident that determining whether the new right is applicable to Reid requires precisely defining what the newly created right is.

Williams broadly held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal

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Moreover, the Majority claims that the petitioner's claim in *Abdul-Salaam* "depend[ed] upon an evolving line of United States Supreme Court precedent involving an interpretation of the United States Constitution, and review within the federal judicial system over which that Court presides has not been shown to be foreclosed," 812 A.2d at 501, and states that the same is true here. Majority Op. at 53. The petitioner in *Abdul-Salaam* argued that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002), apply retroactively. *Id*. at 500. In this context the *Abdul-Salaam* Court referenced the possibility that the United States Supreme Court itself would decide whether those cases would apply retroactively, thereby obviating the need to determine the question. Indeed, approximately eighteen months later, the High Court definitively addressed whether *Ring* applied retroactively. *See Schriro v. Summerlin*, 542 U.S. 348, 364 (2004). Again, requiring a prisoner to await developments as a condition of seeking collateral relief was in all cases acceptable pre-*Montgomery*. That is no longer true.

involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 136 S. Ct. at 1905. Yet that formulation[25] is imprecise for purposes of our *Teague* analysis because it does not give weight to the extraordinary circumstances created by Castille's participation that caused the structural collapse of the 2014 PCRA appeal.

That said, the critical formulation we must address here is the **only** Due Process Clause rule that clearly emerged from *Williams*: the Due Process Clause is violated where a sentence of death is imposed on a defendant, and the prosecutor who authorized the pursuit of that defendant's sentence subsequently sits on a court of last resort to hear his death penalty appeal. The new substantive rule that we are called upon to apply is thus narrow in scope. That narrowness is a function of the fact that the Due Process Clause "demarks only the outer boundaries of judicial disqualifications." *Williams*, 136 S. Ct. at 1908 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

The remaining question is whether the precise due process rule established in *Williams* qualifies as a substantive rule within the meaning of *Teague*.[26] The clearest

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[25] This precept is codified in the Pennsylvania Code of Judicial Conduct. *See* Pa. Code Judicial Conduct 2.11(A)(6)(b) (requiring disqualification if the jurist "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding").

[26] As an alternative to reliance on a *Teague* analysis, Reid argued in his PCRA petition that *Williams* should apply under a broader retroactively model. "Assuming, *arguendo*, that *Williams* does not apply retroactively as a matter of federal law, the Pennsylvania courts should nonetheless apply it retroactively pursuant to their 'authority to grant relief for violations of new rules of constitutional law when reviewing [their] own State's convictions.'" PCRA Petition, 8/8/2016, at 6 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 280-81 (2008)). Speaking to that point, this Court has observed:

> Thus, litigants who may advocate broader retrospective extension of a new federal constitutional rule would do best to

example of a substantive rule is one holding that certain conduct cannot be criminalized. *See, e.g.*, *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (recognizing that the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), barring criminalization of sodomy would apply retroactively under *Teague*). There is no doubt that Reid was convicted for conduct that the States may validly punish.

> try to persuade this Court both that the new rule is resonate with Pennsylvanian norms *and* that there are good grounds to consider the adoption of [a] broader retroactivity doctrine which would permit the rule's application at the collateral review stage. In the latter regard, the Court would benefit from recognition and treatment of the strong interest in finality inherent in an orderly criminal justice system, as well as the social policy and concomitant limitations on the courts' jurisdiction and authority reflected in the Post Conviction Relief Act. Because the appellant in this matter has not set an appropriate stage for either pillar of such review, the *Teague* line of analysis remains the appropriate default litmus governing the present appeal.

Commonwealth v. Cunningham, 81 A.3d 1, 9 (Pa. 2013) (footnote omitted), *abrogated by Montgomery*, *supra*.

Reid's request to provide briefing on the PCRA jurisdictional issue having been denied by this Court after raising the jurisdictional issue sua sponte, this argument was not developed for our consideration. Nevertheless, *Williams* is doubtlessly the type of case justifying a broader retroactivity application since this Court's integrity is at stake. Furthermore, any interest in finality is minimal given that (1) the death penalty is at issue; and (2) the Commonwealth has discontinued its appeal.

Notably, the primary justification for refusing to give retroactive effect to new cases is the cost associated with reopening cases that became final long ago. The Commonwealth's discontinuance implicitly waives any reliance on those traditional resource-based concerns by voluntarily assuming the risk of having to expend resources resulting from any remedies granted by this Court, up to and including a whole new trial. Additionally, the extremely small number of cases impacted by *Williams* is likewise relevant in assessing an impact on resources. *See Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) (Breyer, J., dissenting) ("Retroactivity here, for example, would not require inordinate expenditure of state resources. [It] would affect approximately 110 individuals on death row. . . . Consequently, the impact on resources is likely to be much less than if a rule affecting the ordinary criminal process were made retroactive.").

However, the application of substantive rules is not limited to the pure question of whether the person may be punished at all. It extends to new rules that touch on whether the prisoner may **remain** in jail in light of case law issued after the judgment of sentence became final, even though the underlying conduct was doubtlessly criminal. This is demonstrated by the rationale employed by the High Court in *Montgomery* in holding that the rule announced in *Miller* qualified as a substantive rule.

Miller explicitly recognized that there is no blanket prohibition against confining a juvenile convicted of homicide for life with no hope of release. "Our decision does not categorically bar a penalty for a class of offenders or type of crime. . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Miller*, 567 U.S. at 483. Nevertheless, it was not dispositive of the *Teague* question that a proper sentencing hearing could have justified that penalty, a classic example of a procedural rule that would not apply retroactively because it would only "enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability." *Montgomery*, 136 S. Ct. at 730 (quotation marks, citation, and emphasis omitted). The *Montgomery* Court stated that

> [t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish. For example, when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. *See*, *e.g., Atkins v. Virginia,* 536 U.S. 304, 317, 122

> S.Ct. 2242, 153 L.Ed.2d 335 (2002) (requiring a procedure to determine whether a particular individual with an intellectual disability "fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus" that execution is impermissible).

Montgomery, 136 S. Ct. at 735.

The comparable substantive aspect of *Williams* is that its new specific due process holding deprived this Court of the power to render judgment in any case that falls within the *Williams* ruling,[27] as "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Williams*, 136 S. Ct. at 1909. *Williams* removed the power of this Court to render judgment in the capital cases tainted by Castille's dual participation. As a result, Reid is entitled to a procedure, i.e. reinstatement of his appellate rights nunc pro tunc, to give him an opportunity to present his arguments to an unbiased panel.

This conclusion follows from the connection between our invalidated appeal and the validity of Reid's punishment. Unlike the United States Constitution, which provides no right of an appeal, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *McKane v. Durston,* 153 U.S. 684 (1894)), the Pennsylvania Constitution guarantees that right in its Article V, Section 9. As stated in *Commonwealth v. Morris*, 771 A.2d 721, 732 n.10 (Pa. 2001), that right extends to PCRA cases even though there is no underlying constitutional right to collateral review:

> Although [Morris] does not have a constitutional right to collateral review, he does have a constitutional right to appeal from a court of record to an appellate court. Pa. Const. Article V, § 9. Similarly, the legislature has provided a right to appeal in cases on collateral review. 42 Pa.C.S. § 9546(d). Thus,

[27] The Majority agrees that if *Williams* qualifies as a retroactive right under 42 Pa.C.S. § 9545(b)(1)(iii), Reid's petition may meet the jurisdictional requirement. Majority Op. at 41.

> where these rights have been conferred, it would be insincere for us to conclude that the right to appeal can be limited on the basis that there is no constitutional right to collateral review in the first instance.

Id. at 732.

Appellate review can be "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The enshrinement of a right to appeal in the Pennsylvania Constitution demonstrates that our appellate courts are an integral part of the system for a final adjudication of guilt or innocence. As a result, a valid appeal is an indispensable part of determining whether Reid's continued confinement on death row is actually valid.

While the prior appeal at issue here was from a collateral order and the PCRA is civil in nature, the purpose of PCRA review is to give the prisoner an opportunity to establish that he is being held in violation of the law. "The purpose of [the PCRA] is not to provide convicted criminals with the means to escape well-deserved sanctions, but to provide a reasonable opportunity for those who have been wrongly convicted to demonstrate the injustice of their conviction." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998). The Commonwealth cannot insist that Reid remain on death row without a valid appeal as of right from the PCRA court's denial of his petition claiming error in his conviction. In this respect, it is critical to note that the sole avenue of appeal in death penalty cases is to this Court.[28] Reid's attempted appeal to this Court, immutably tainted

[28] *See* 42 Pa.C.S. § 9546(d) ("A final court order under [the PCRA] in a case in which the death penalty has been imposed shall be directly appealable only to the Supreme Court pursuant to its rules."); 42 Pa.C.S. § 722(4) (vesting exclusive jurisdiction of appeals from, inter alia, subsection 9546(d)).

by Castille, was a nullity. His remedy is a de novo appeal to a Court unburdened by the taint.[29]

As further support, the High Court recently held in *Welch v. United States*, ___ U.S.___, 136 S. Ct. 1257 (2016), that its decision in *Johnson v. United States,* ___ U.S.___, 135 S. Ct. 2551 (2015), which struck down the residual clause of a sentencing law as void for vagueness, was substantive under *Teague*. The *Welch* Court explained that its decision striking down the residual clause was substantive because

> [b]efore *Johnson,* the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *Johnson,* the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson,* so it can no longer mandate or authorize any sentence. *Johnson* establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. *United States v. United States Coin & Currency,* 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). It follows that *Johnson* is a substantive decision.

Id. at 1265.

Comparably, no matter how impeccable the legal reasoning set forth in our 2014 appeal disposing of Reid's PCRA appeal may have been, the bottom line is our decision cannot be used to give legitimate effect to Reid's continued confinement on death row in the post-*Williams* world. The refusal by the Majority to allow a de novo appeal under

[29] The substantive rule we recognize is narrow. We decide only that the *Williams* substantive rule applies to the cases where Castille authorized the death penalty and later participated in an appeal from a death sentence. To date, four years after *Williams*, we have five such cases (two of which involve Reid) on our docket where the defendants claim that the *Williams* rule pattern applies. For this reason, the Majority's reliance on cases involving different fact patterns is inapposite.

these circumstances is based on a fundamental misunderstanding of *Williams* and results in the denial of Reid's right to an appeal of the 2011 denial of his PCRA petition. Therefore, just as in *Miller*, a new procedure, i.e. a de novo appeal of the 2011 PCRA decision, is necessary to address the lawfulness of his punishment and continued confinement.[30]

This claim is not subject to waiver

The PCRA's eligibility for relief provisions state that the petitioner must prove "[t]hat the allegation of error has not been previously litigated or waived." 42 Pa.C.S. § 9543(a)(3). The Majority finds that any PCRA claim would be waived even if *Williams* announced a new rule because Reid failed to file a recusal motion when the matter was before Castille.

That conclusion is not supported by our jurisprudence. At best, it can be said that the issue of waiver when new constitutional rights are at issue is an unsettled matter in

[30] As to the analysis of whether *Williams* qualifies as a substantive rule based on *Miller*'s analysis of *Teague*, the Majority claims that *Miller* "did not expand the definition of substantive rules." Majority Op. at 56. It is telling that the Court resorts to a dissenting opinion to support that characterization, acknowledging that "*Miller* seems at odds with *Montgomery*'s ultimate holding . . a point which did not escape the *Montgomery* dissenters' notice." *Id*. at n.23. Justice Scalia's dissent accused the *Montgomery* majority of "not applying *Miller*, but rewriting it." *Id*. (quoting Scalia, J., dissenting). But even if Justice Scalia is correct that *Montgomery* rewrote *Miller*, we are bound to apply the "new" interpretation. We cannot ignore *Montgomery*'s analysis simply because Justice Scalia believed that it was mistaken.

Moreover, the Majority notes that the High Court granted certiorari in *Jones v. Mississippi*, 285 So.3d 626 (Miss. Ct. App. 2017), *cert. granted*, 140 S. Ct. 1293 (2020), and discerns that the Court "seems poised to remove all doubt regarding its holdings in *Miller* and *Montgomery*." *Id*. That is difficult to square with its assertion that "the rationale employed by the *Montgomery* Court is squarely in line with that Court's longstanding articulation of retroactivity principles[.]" Majority Op. at 56. What is clear is that the Majority's view, which is based on the dissenting opinion in *Montgomery*, is not a reflection of the current state of the law.

this Commonwealth. This is presumably due to the fact that very few decisions have been held to apply retroactively under subsection 9545(b)(1)(iii). To our knowledge, only *Miller* and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the intellectually disabled cannot be executed), have qualified. As to *Miller*, it has never been suggested that its retroactive application through the PCRA is available only if the juvenile preserved an Eighth Amendment challenge to his sentence at the relevant time. Once the subsection 9545(b)(1)(iii) exception creates jurisdiction under the PCRA, any issue respecting the legality of the life without parole sentence becomes non-waivable due to *Miller*'s substantive character.

Likewise, issues concerning whether a particular defendant is intellectually disabled under *Atkins* are not subject to waiver; i.e. we do not ask whether the defendant raised an issue regarding his mental capacity at the time of the actual trial. Instead, this Court established standards to be met after a defendant has raised an *Atkins* claim. *See Commonwealth v. (Joseph) Miller*, 888 A.2d 624, 629 n.5. (Pa. 2005) (finding *Atkins* qualified as a right that applies retroactively without reference to waiver). Additionally, in *Commonwealth v. Brown*, 872 A.2d 1139, 1154 (Pa. 2005), we held that competency is not subject to the PCRA's waiver provision, concluding that the waiver provision applies "to those claims that are required to be preserved." *Id.* (emphasis omitted). We further remarked, "If the nature of the claim involves a right so fundamental to a fair trial that renders it non-waivable, then the claim is not required to be preserved and is not subject to the waiver provision of the PCRA." *Id*. As explained at length supra, Castille's participation resulted in a structural error that was fundamental to a fair appellate

decision.[31] Reid was thus not required to preserve this challenge to Castille's participation and the challenge was not subject to waiver.[32]

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[31] This is not a case where there is a distinct issue to be raised, as that term refers to a "discrete legal ground." *Commonwealth v. Collins*, 888 A.2d 564, 570 (Pa. 2005). In all cases where Castille participated in death penalty case appeals despite authorizing the death penalty, the discrete legal ground is the same: due process required that he remove himself from consideration of the appeal. *Cf*. *Commonwealth v. Chmiel*, 173 A.3d 617, 627 (Pa. 2017) (concluding that prior claim of counsel ineffectiveness for failure to challenge admissibility of microscopic hair analysis testimony was distinct from claim that FBI considered that kind of analysis to be scientifically unreliable).

[32] The Majority insists that Reid was required to file a recusal motion to preserve the challenge to Castille's participation. It inexplicably cites Castille's recusal opinion in *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006) (Recusal Opinion of Castile, J.), which adopted the Commonwealth's description of his role in death penalty cases, as placing Reid on notice of a possible basis to request recusal. "And perhaps most importantly, one of those [recusal] requests resulted in a published opinion by then-Justice Castille in which he acknowledged his actual role in all capital cases." Majority Op. at 36.

If the *Rainey* opinion demonstrates the availability of a motion to recuse, it more so establishes the outcome of such a motion and the futility in filing it. Castille's published refusal to recuse in cases where he served as the District Attorney in Philadelphia County and authorized the death penalty made the need to file a recusal motion an act of futility. This Court has not foreclosed the adoption of a futility doctrine as a reason to overlook waiver when new constitutional rules are at issue. *See Commonwealth v. Hays*, __ A.3d __, 2019 WL 5617792, at *6 (Pa. Oct. 31, 2019) ("In an appropriate case, I would be receptive to considering a moderate adjustment to our approach to futility, in cases involving the retroactive application of a new constitutional rule[.]") (Saylor, C.J., concurring). Furthermore, while "the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process," *Commonwealth v. McKenna*, 383 A.2d 174, 180 (Pa. 1978), we have recognized "occasional rare situations where an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure. One such situation is surely the imposition of capital punishment." *Id*. (footnote omitted). Contrary to the Majority's charge that I have "ignore[d] that this Court has long since applied strict waiver principles even to capital cases, especially in the post-conviction context," Majority Op. at 58 n.24, as discussed supra at 11 n.17 this Court eliminated "relaxed waiver" in part because alternative channels existed to pursue defaulted claims. Our decision in *Freeman* decided "to return the relaxed waiver doctrine to its roots in *McKenna*," 827 A.2d at 402, "a case where this Court stepped in to prevent what would have been an unconstitutional execution." *Id*. at 397. I find that even if the Majority is correct in believing that this issue is technically waived, the limited *McKenna*

Finally, the constitutionalization of *Teague* severely undermines the viability of a procedural bar, like waiver, as a justification for refusing to give retroactive effect to a new substantive rule. Traditionally, the finality of a judgment of sentence when the new rule was announced was the primary justification for denying retroactive effect. Whether a defendant's judgment of sentence became final one day before the new rule of law was announced or decades before was of no moment. Since finality no longer serves as a

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formulation recognized in *Freeman* applies. The intersection of futility, capital punishment, and the fact that the United States Supreme Court has called into question the integrity of this institution warrants overlooking any actual waiver, lest we be a part of an unconstitutional execution.

Moreover, the reliance by the Majority on the statutory text of subsection 9543(a)(3) ("To be eligible for relief . . . the allegation of error has not been previously litigated or waived"), ignores the previously litigated aspect. Thus, even if Reid had filed a recusal motion, the PCRA claim would fail because it would have been previously litigated.

Therefore, under the Majority's view of how the subsection 9545(b)(1)(iii) constitutional right exception interacts with the subsection 9543(a)(3) waiver provision, **no one** can ever secure relief. If that is the case, (b)(1)(iii) would appear to be effective only with respect to new rules implicating legality of sentencing, such as *Miller*.

In response, the Majority argues that this recusal claim would not be subject to the previous litigation bar because a jurist's personal decision whether to grant a motion to recuse does not qualify as a ruling on the merits to which a litigant could have had review as a matter of right. *See* 42 Pa.C.S. § 9544(a)(2). Apparently, the Majority finds that the bar would not apply because recusal is a matter for the individual jurist and therefore does not represent the judgment of the court as an institution. *See Commonwealth v. Jones*, 663 A.2d 142, 143 (Pa. 1995) (Opinion of Castille, J. in support of denying recusal) ("Under the existing practice of this Court, recusal has been a matter of individual discretion or conscience and only the jurist being asked to recuse himself or herself may properly respond to such a request.") (citation omitted). The only mechanism available to enforce recusal—putting aside the fact that Castille should have recused on his own accord in this case—is to request it. Denying that motion is therefore a decision on the merits.

The Majority also ignores that the previous litigation bar applies to issues that have been "raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S. § 9544(a)(3). Thus, if Reid had indeed filed a motion to recuse in the PCRA appeal at issue, Castille's inevitable denial would have precluded application of *Williams* even if the case were held to satisfy the (b)(1)(iii) exception.

valid justification under *Montgomery* when a substantive rule is at issue, the question becomes whether the failure to file a futile recusal motion, in the hopes that one day the law would change, is a valid justification for denying retroactive effect. *Montgomery* said this about finality as an interest:

> As a final point, it must be noted that the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences. *Teague* warned against the intrusiveness of "**continually** forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U.S., at 310, 109 S. Ct. 1060. This concern has no application in the realm of substantive rules, for no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose.

Montgomery, 136 S. Ct. at 732.

For these reasons, Reid's failure to file a motion for the recusal of Castille does not justify denying relief when a substantive rule is at issue. Moreover, in light of Castille's intractable refusal to recuse in *Rainey*, nothing in our precedents mandates that this claim would be waived.

Having concluded that the PCRA court correctly decided that it had jurisdiction under the PCRA, a review of the merits of the nunc pro tunc appeal follows.

III. Merits Review

In order to succeed on a claim for collateral relief under the PCRA, Reid must demonstrate that his conviction or sentence resulted from one of the circumstances listed in the eligibility provision, 42 Pa.C.S. § 9543(a)(2). Here, Reid claims that his conviction and sentence resulted from "[i]neffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that

no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). He must also demonstrate that the issues raised have not been previously litigated or waived. 42 Pa.C.S. § 9544. This Court will deem an issue previously litigated if "the highest court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or … [the issue] has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S. § 9544(a)(2) and (3). An issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial . . . on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must plead and prove, by a preponderance of the evidence, that (1) the underlying claim is of arguable merit; (2) counsel had no basis for his or her action or inaction; and (3) petitioner suffered prejudice as a result of counsel's action or inaction. *Strickland v. Washington*, 466 U.S. 668 (1984); *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). We presume that counsel rendered effective assistance. *Commonwealth v. Tharp*, 101 A.3d 736, 747 (Pa. 2014). To demonstrate prejudice, the petitioner must establish that, but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1127-28 (Pa. 2011). Because a petitioner is required to satisfy each of the three elements of ineffectiveness, failure to satisfy any one element is dispositive. A court analyzing an ineffectiveness claim need not address the elements in any particular order and may elect to address whichever element a petitioner fails to meet first.

In reviewing the PCRA court's denial of relief, we examine whether the PCRA court's determination is "supported by the record and free of legal error." *Tharp*, 101 A.3d at 746 (citing *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1117 (Pa. 2012) (internal citations omitted)); *see Commonwealth v. Colavita*, 993 A.2d 874, 887 (Pa. 2010) ("To the extent review of the PCRA court's determinations is implicated, an appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its conclusions of law to determine whether they are free from legal error."). This Court thus applies a de novo standard of review in determining whether counsel's performance fell below constitutional mandates, and we will not will not disturb a lower court's factual and credibility findings on appeal so long as they are supported by the record. *Commonwealth v. Simpson*, 112 A.3d 1194, 1198 (Pa. 2015).

Under the prevailing law at the time, Reid was required to raise claims of ineffectiveness "at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant." *Commonwealth v. Hubbard*, 372 A.2d 687, 695 n.6 (Pa. 1977), *abrogated by Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). Reid was represented by Samuel Stretton, Esquire, at trial and on direct appeal. After filing a pro se PCRA petition, Reid was appointed private counsel, Daniel Silverman, Esquire, and thereafter, the Federal Public Defenders took over the appeal. Accordingly, Reid was not required to raise counsel's ineffectiveness until collateral review, when he was first represented by new counsel, and his claims of ineffectiveness were not waived on direct appeal. *See Sepulveda*, 55 A.3d at 1117 n.7 ("[E]ven under the pre-*Grant* rule, appellant was not required to raise ineffectiveness claims until he obtained new counsel[.] … Because the same counsel represented

appellant at trial and on direct appeal, collateral review is appellant's first opportunity to raise claims sounding in trial counsel's ineffectiveness."). As a result, Reid was not required to "layer" his ineffectiveness claims. *See Commonwealth v. McGill*, 832 A.2d 1014, 1022 (Pa. 2003) (defining mechanics involved in presenting layered ineffectiveness claim).

Guilt Phase

I. Batson Claim

Reid argues that the prosecutor improperly exercised peremptory strikes based on race and gender in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), and that trial counsel was ineffective for failing to raise this claim during voir dire and for failing to make these arguments to the trial court and on appeal.[33] He also argues that he was entitled to discovery related to his claim, although in his brief he does not identify the discovery sought or the basis for his request.[34]

In *Batson*, the United States Supreme Court held that the Equal Protection Clause forbids prosecutors from challenging a potential juror solely based upon the juror's race. *Batson*, 476 U.S. at 89. When a *Batson* issue arises during jury selection, it is the defendant's burden to prove purposeful discrimination on the part of the state. *Id*. at 93.

[33] Reid first raised this claim in his first amended PCRA petition. First Amended PCRA Petition, 1/27/1999, at 9-26 (¶¶ 17-52).

[34] Reid focuses his arguments almost entirely upon his claim regarding **racial** rather than gender discrimination. In asserting a gender discrimination claim, he fails to provide any evidence of a pattern of discrimination and merely states that the prosecutor exercised eight strikes against black women. Reid's Brief at 21. He fails to offer any facts which if believed would establish a meritorious claim of gender discrimination. *Commonwealth v. Roney*, 79 A.3d 595, 623 n. 27 (Pa. 2013) (failure to present reasoned and developed argument supporting allegation of gender discrimination results in waiver of claim).

The defendant "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id*. The defendant is "entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Id*. at 96. The Supreme Court also stated that a defendant could make a prima facie showing by showing that a prosecutor exercised a "pattern of strikes against black jurors." *Id*. Once a defendant makes out a prima facie case, the burden shifts to the state to demonstrate a neutral explanation for challenging the juror at issue. *Id*. at 97. Then, the trial court has the duty to determine whether the defendant has established actual purposeful discrimination. *Id*. at 98.

When a post-conviction petitioner raises a *Batson* claim for the first time on collateral review, he is not entitled to rely on *Batson*'s burden-shifting formulation. Instead, according to *Commonwealth v. Uderra*, 862 A.2d 74, 86-87 (Pa. 2004), the petitioner "bears the burden in the first instance, and throughout of establishing actual, purposeful discrimination by a preponderance of the evidence." This principle has been cited and applied in various cases, most recently in *Commonwealth v. Rivera*, 199 A.3d 365 (Pa. 2018); *see also Commonwealth v. William Johnson*, 139 A.3d 1257, 1282-83 (Pa. 2016); *Commonwealth v. Blakeney*, 108 A.3d 739, 768 (Pa. 2014).

Reid urges this Court to break from *Uderra*'s requirement that PCRA petitioners prove "actual, purposeful discrimination by a preponderance of the evidence" in order to prevail on a *Batson* claim raised post voir dire. Reid's Brief at 27. He argues that the *Uderra* standard is higher than that required by *Batson* and is "fundamentally inadequate to vindicate the substantive rights provided" by equal protections. *Id*. at 27-28. In

response, the Commonwealth argues that *Uderra* is consistent with federal jurisprudence, *McCrory v. Henderson*, 82 F.3d 1243, 1251 (2d Cir. 1996), and that the burden imposed by *Uderra* is justified because of the complexity involved in ineffective assistance of counsel cases, as well as the difficulties associated with a belated *Batson* claim. Commonwealth's Brief at 17.

As stated above, *Uderra* is well-settled law in Pennsylvania, and Reid offers no compelling reason to break with it. As the *Uderra* Court explained, and the Commonwealth reminds us, the standard is logical in collateral appeals. Although the *Batson* burden-shifting formula generally applies when a defendant raises a *Batson* objection during trial, greater difficulties arise in cases where no objection is raised to trigger a contemporaneous inquiry. *Id*. at 86. In such circumstances, the Court observed, "it is exponentially more difficult to perform a reasoned assessment concerning the presence or absence of purposeful discrimination." *Id*.

Reid argues in the alternative that he could have satisfied the *Uderra* requirement at an evidentiary hearing. The standard for reviewing a *Batson* claim for which no evidentiary hearing was held is whether the petitioner's proffer, if believed, raises actual, purposeful discrimination. *See similarly Uderra*, 862 A.2d at 87. The case law does not set a threshold of how many strikes against minority jurors could establish actual purposeful discrimination, although there are examples of courts finding a prima facie case of discrimination based upon the number of strikes used against minority jurors. *See Commonwealth v. Dinwiddie*, 542 A.2d 102, 105 (Pa. Super. 1988) (where the prosecutor used 83% of strikes against black venire persons, the defendant established a prima facie case of racial discrimination); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (defendant

established a prima facie case of racial discrimination by showing that the prosecutor used 75% of peremptory strikes against black venire persons when they only made up 20% of the jury pool).

Reid's proffer falls short of establishing actual, purposeful discrimination. He claims that the prosecutor's exercise of strikes of black jurors was "grossly disproportionate" to his exercise of strikes of white jurors, because the prosecutor exercised nine of twelve strikes against black venire persons. Reid's Brief at 12-15. Reid admits that there were eight jurors whose race he cannot identify because his counsel did not keep records of venire persons' races at trial, six of whom were struck. Reid's Brief at 12-15.

As the Commonwealth points out, even under Reid's count, it is possible that the prosecutor struck a proportionate number of white and black jurors. Commonwealth's Brief at 16-17. Due to the number of venire persons of unidentified race in this case, the record of strikes does not establish a prima facie case, let alone a case of actual purposeful discrimination.

Reid also argues that this Court should consider the "culture of discrimination" in the Philadelphia District Attorney's Office at the time of his trial, combined with the incomplete statistics he has compiled. He cites to a jury selection training videotape featuring a former prosecutor ("the McMahon tape"), which he characterizes as "urg[ing] prosecutors to engage in racially discriminatory and other improper jury selection practices." Reid's Brief at 16. He also relies upon a lecture given by a member of the Philadelphia District Attorney's office ("the Sagel lecture"), as reflected in the notes of an attendee ("the Lentz notes"), which he claims also evidences a practice of prosecutors

discriminating against African Americans and utilizing pretextual assertions to avoid *Batson*. *Id*. at 16-17.

Reid's reliance on the "culture of discrimination" based upon those materials is unavailing. This Court has repeatedly "condemn[ed] in the strongest terms the practices described in the transcript [of the McMahon tapes], which flout constitutional principles in a highly flagrant manner." *Commonwealth v. Basemore*, 744 A.2d 717, 731 n.12 (Pa. 2000). Likewise the Lentz notes are suggestive of a disregard for constitutional principles. Nonetheless, the existence of the McMahon tape and Lentz notes do not prove racial discrimination in this case where there is no evidence connecting this prosecutor to the McMahon tapes or Lentz notes, nor any other evidence suggesting that the prosecutor exercised strikes in a manner consistent with the discriminatory methods described therein. *Accord Commonwealth v. Roney*, 79 A.3d 595, 622 (Pa. 2013) ("[T]he mere existence of the McMahon videotape does not establish a general policy of racial discrimination in jury selection in the District Attorney's Office, and does not prove racial discrimination in a particular case[.]"); *Commonwealth v. Hanible*, 30 A.3d 426, 479 (Pa. 2011) (rejecting reliance on notes absent any link connecting the lecture and the case at hand); *Commonwealth v. Hutchinson*, 25 A.3d 277, 288-89 (Pa. 2011) (stating that the McMahon tapes and Sagel lecture notes "establish[] neither a general policy in the District Attorney's Office of racial discrimination in jury selection, nor the presence of racial discrimination in jury selection in an individual case when a prosecutor other than McMahon or Sagel represents the Commonwealth").

Finally, as to Reid's assertion that he is entitled to further discovery regarding this claim, the PCRA court did not err in denying his motion for discovery. Under the

Pennsylvania Rules of Criminal Procedure, "no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause." Pa.R.Crim.P. 902(E)(2). This Court reviews the PCRA court's denial of a discovery motion for abuse of discretion. *Commonwealth v. Natividad*, 200 A.3d 11, 40-41 (Pa. 2019). As explained above, this Court has determined that information related to the Lentz notes was insufficient to establish purposeful discrimination. Reid does not explain how the additional discovery he seeks would be relevant to establishing his claim and therefore does not show good cause.

II. Failure to investigate and present exculpatory witnesses

Reid argues that trial counsel was ineffective for failing to locate and present the following witnesses: Kevin Bowman, Darryl Gray, and Willie Brown.[35] Reid's Brief at 32-38. According to Reid, these witnesses could have (1) proven that Reid was not the shooter and (2) could have called into question Dozier's eyewitness account by showing that Dozier did not actually witness the shooting. *Id*. at 38. He submits that his proffers

[35] Reid first raised this claim in his first counseled PCRA petition, where he alleged that he had located multiple independent witnesses who provided exculpatory information, including Kevin Bowman and Darryl Gray. First Amended PCRA Petition, 1/27/1999, at 58-60 (¶¶ 115-122).

Before the PCRA court, Reid set forth claims relating to various other witnesses as well. In briefing this issue to this Court, however, Reid only develops his arguments with regard to Kevin Bowman, Darryl Gray, and Willie Brown. He states, in a footnote, that "[i]n addition to Gray, Willie Brown and Bowman, other available witnesses likewise would have contradicted key elements of the Commonwealth's case[,]" and he cites to affidavits of Robert Durand and Damien Williams. Reid's Brief at 35-36 n.12. However, he does not develop any argument relating to the testimony of those witnesses. Therefore, those claims are waived. *See Commonwealth v. Kareem Johnson*, 985 A.2d 915, 924 (Pa. 2009) ("where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived.").

raise genuine issues of material fact and therefore, the PCRA court erred in denying him an evidentiary hearing on this claim. *Id*. at 31. The PCRA court properly denied Reid's request for an evidentiary hearing with respect to Reid's claim that trial counsel's failure to locate and present each of these witnesses at trial.

A PCRA court may dismiss a PCRA petition without an evidentiary hearing only when it is satisfied that "there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by any further proceedings." Pa.R.Crim.P. 909(B)(2). This Court has restated the rule as providing that a petitioner, in order "to entitle himself to an evidentiary hearing … must raise an issue of fact, which, if resolved in his favor, would justify relief." *Commonwealth v. Simpson*, 66 A.3d 253, 260 (Pa. 2013). Thus, the principal question before this Court is whether Reid has presented a genuine issue of material fact with regard to his claim for collateral relief, and whether further proceedings would serve a legitimate purpose. We review the PCRA court's denial of an evidentiary hearing for an abuse of discretion. *Id*. at 261.

Moreover, when considering claims that trial counsel was ineffective for failing to investigate and call certain witnesses at trial, this Court considers five factors. According to *Commonwealth v. Pursell*, 724 A.2d 293, 306 (Pa. 1999), the petitioner must show (1) that the witness existed; (2) that the witness was available; (3) that counsel knew or should have known of the witness; (4) that the witness was prepared to cooperate and would have testified on petitioner's behalf; and (5) that the absence of the testimony prejudiced the petitioner. *See also William Johnson*, 139 A.3d at 1284. Addressing this issue requires a closer look at the proposed testimony of each of the witnesses.

Kevin Bowman

With his first Amended PCRA petition, Reid filed a declaration of Kevin Bowman, R. 124 (Affidavit/Certification of Kevin Bowman pursuant to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904, (hereinafter "Bowman certification") 1/4/1999). Bowman stated that Boston came to him and said he had a problem with the victim. *Id*. ¶ 2. According to Bowman's certification, Bowman asked Reid to accompany Boston to talk to the victim on the night of the murder. *Id*. Then, later that night, after the murder, Bowman spoke with Boston and Reid. During that conversation, Boston and Reid told Bowman the following: when they went to speak with the victim, unbeknownst to Reid, Boston had brought a gun, and Boston (not Reid) shot the victim, though he did so in self-defense. *Id*. ¶¶ 3-6. Bowman also stated that Dozier, the key eyewitness to the shooting, told Bowman that he did not actually witness the shooting. *Id*. ¶ 9.

With regard to Kevin Bowman's proposed testimony, the PCRA court stated that, "on top of being total hearsay, there's no indication that this information could have been available at trial or that defense counsel could have discovered it[;] it would have only been used for impeachment, and would only have been corroborative or cumulative of Boston's prior inconsistent statements." PCRA Court Opinion, 2/14/211, at 185. The Commonwealth takes a different approach and argues that trial counsel's determination not to present Bowman, "a convicted murderer, JBM member, and drug dealer would have been reasonable." Commonwealth's Brief at 25.

The PCRA court correctly determined that Bowman's statements as to what Reid, Boston and Dozier told him are hearsay. Bowman's statements as to what Reid, Boston and Dozier told him all constitute hearsay because they were made by Reid, Boston or

Dozier (the declarants) outside of court, and the party (Reid) seeks to introduce them to prove the truth of the matter asserted. Moreover, none of the exceptions to the rule against hearsay would apply to allow admission of the key portions of Bowman's statement. The most significant portion of Bowman's statement is undoubtedly his assertion that Boston confessed that he (rather than Reid) shot the victim, yet Reid has not demonstrated how that testimony would have been admissible at trial.[36] *See Commonwealth v. Puksar*, 951 A.2d 267, 278 (Pa. 2008) (in asserting ineffectiveness related to failure to present witness testimony, petitioner failed to demonstrate how proposed testimony of witness which was hearsay would be admissible, and therefore, petitioner's claim lacked arguable merit). As such, the PCRA court did not err in concluding that Bowman's statements regarding Boston's confession were inadmissible hearsay and in determining that Reid's claim therefore lacked arguable merit. *Id*. at 278.

As to Bowman's proposed testimony regarding Dozier and disputing his eyewitness account of the shooting, this testimony was cumulative of the other impeachment of Dozier at trial. Hence, no prejudice arose by virtue of its absence. At trial, Dozier's eyewitness account was thoroughly cross-examined. He testified at trial that Reid shot the victim. However, as trial counsel brought out, Dozier had not

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[36] The only plausible basis to admit this hearsay evidence would be the hearsay exception for statements against penal interest, Pa.R.E. 803(4), but it is inapplicable here, because that Rule applies only where there are "corroborating circumstances" which indicate the statement's trustworthiness. *Id*. at 804(b)(3)(B). Boston's alleged admission to Bowman is not supported by corroborating circumstances indicative of trustworthiness. Although the statement was against his penal interest insofar as he admitted to shooting the victim, he clearly sought to shift blame by claiming that he only brought a gun because he was afraid of the victim, and that he shot the victim in self-defense. His statement was not detailed nor did it include critical details of the shooting. His statement was not made to a person of authority such as a police officer, or a person who claimed to be a close friend and confidant of the declarant.

immediately identified Reid to the police, and Dozier had told the defense investigator that Reid did not shoot the victim. Trial counsel questioned Dozier about drinking and using drugs on the night of the shooting. Additionally, Dozier admitted he had previously stated that he only identified Reid because the police threatened to lock him up. Although the proposed testimony of Bowman could have offered another avenue of cross-examination of Dozier, it was merely cumulative of other impeachment. In these circumstances, the PCRA court reasonably concluded that failure to introduce more impeachment could not rise to the level of prejudice. *See William Johnson*, 139 A.3d at 1284 (where most of testimony of proposed witnesses would have been cumulative of testimony already on the record, failure to present these witnesses was not prejudicial).

Darryl Gray

Reid also included the declaration of Darryl Gray who claimed that he was an eyewitness to the murder of Mark Lisby. Affidavit/Certification of Darryl Gray pursuant to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904, (hereinafter "Gray certification"), 1/6/1999) ¶ 2. According to his certification, Gray, who went by "Bub" or "Bubby" in the neighborhood, was walking home on the night of the shooting when he saw Reid, Lisby, and "a smaller guy [he] didn't know who was dressed in all black or very dark clothing." *Id*. ¶¶ 1-2. According to Gray, he saw the small guy arguing with Lisby, then saw him "all of a sudden pull a pistol out of his waist and sho[o]t [Lisby]." *Id*. ¶ 3. Gray began running away from the area, then saw Dozier come out of his nearby residence. Gray stated that there was "no way" that Dozier could have seen the shooting from his vantage point. *Id*. ¶ 5. Gray's certification also indicates that "[n]o police officers, lawyers or investigators ever asked [him] about [the victim]'s death until December of 1998." *Id*. ¶ 7. Gray, like the other

proffered witnesses, makes no representation that he was available and willing to testify at the time of trial.

As to Gray's proposed testimony, the PCRA court rejected the claim on multiple bases including that, "[h]is statement … fails to indicate that he was available and willing to offer such testimony during trial[.]" PCRA Court Opinion, 2/14/2011, at 185-86. The Commonwealth makes similar arguments, stating that there is no evidence that Reid ever told trial counsel about Gray and that "Gray himself does not explain why he waited more than ten years to come forward and did not state that he would have been willing to cooperate and testify on [Reid]'s behalf." Commonwealth's Brief at 23-24.

Reid fails to show that Gray was available and willing to testify at trial pursuant to the third *Pursell* factor. Neither Reid's PCRA Petition nor Gray's certification makes a representation as to Gray's availability to testify. Reid never established the witness's availability to testify, only addressing it after the Commonwealth filed a motion to dismiss asserting that Reid failed to prove that Gray and the other witnesses were available to testify at trial. In response to the Commonwealth's motion to dismiss, Reid averred, in a footnote, "that these witnesses would, in fact, have been available to testify had counsel properly investigated." Reid's Consolidated Response to the Commonwealth's Motion to Dismiss, 7/12/2002, at 33 n.19. Making this general averment in an unsworn responsive pleading is clearly insufficient for Reid to meet his burden of showing that Gray was willing and available to testify.

The Commonwealth relies on *Commonwealth v. Bryant*, 855 A.2d 726, 748 (Pa. 2008), where this Court, in rejecting an ineffectiveness claim premised on failure to call witness, drew attention to the fact that Bryant "made no proffer as to whether these

witnesses were willing and able to testify[.]" Commonwealth's Brief at 22 (citing *Bryant*, 855 A.2d at 748).[37] Although that was not the only factor supporting this Court's denial of PCRA relief in that case, the Court acknowledged the importance of demonstrating that a witness was willing and available to testify in order to succeed on such a claim. As illustrated by Bryant, the *Pursell* factors require the petitioner to show that the witness would have been willing and able to testify. *Pursell*, 724 A.2d at 306. Likewise, in evaluating a failure to call a witness claim in *William Johnson*, 139 A.3d at 1286, this factor was met when the witness certifications themselves made clear that the witnesses were available and willing to testify had they been called as trial witnesses by defense counsel. Reid's bare assertion made in a responsive pleading that "these witnesses" were available and willing to testify falls short of what was shown in *William Johnson* and was insufficient to meet the fourth *Pursell* factor.

Willie Brown

Lastly, Willie Brown's certification states that he grew up in the same neighborhood as Reid and Boston and that he was "standing in an alley near the scene where Mark Lisby was shot and saw the shooting take place." He claims to have seen the gun and the shooter and that "Reid was definitely not the shooter." "Affidavit/Certification of Willie Brown pursuant to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904", 1/4/2000, ¶ 3. Brown's certification states that Dozier was "not there or anywhere in sight when Mark Lisby was shot." *Id*. ¶ 4. The Commonwealth disputes Reid's ability to meet any of the *Pursell* factors with regard to Brown, in that Reid failed to provide any identifying information,

[37] To be clear, in *Bryant*, this Court did not find that factor dispositive; instead, it placed emphasis on the facts that Bryant made no proffer that the witnesses would maintain consistent stories and that Bryant failed to prove prejudice. *Id*.

failed to explain why Brown failed to come forward sooner, failed to proffer that Brown would have been willing and able to testify and failed to explain how counsel knew or should have known of the witness. Commonwealth's Brief at 25.

Reid's certification and arguments regarding Willie Brown were inadequate to require an evidentiary hearing. As the Commonwealth points out, Reid fails to offer any identifying information to show that Brown actually existed, was available and would have testified on Reid's behalf. Unlike Bowman and Gray whose identities were known to the Commonwealth, Brown's identity and whereabouts were a mystery. Reid's failure to make more specific allegations regarding Brown, i.e., his failure to identify Brown's date of birth, precise location, and how counsel actually knew or should have known of Brown's existence, is fatal to his claim.

In addition to failing to meet the *Pursell* factors, this claim fails because of waiver. According to the rules of appellate procedure, it must be clear from the record or petitioner's brief where he raised and preserved a claim. *See* Pa.R.A.P. 2117(c) (where an issue is not reviewable unless it is raised or preserved below, appellant brief must indicate, inter alia, where in the first instance, the questions sought to be reviewed were raised, and the method in which they were raised). As explained above, supra footnote 19, Reid first raised this claim in his first counseled PCRA petition, where he alleged that he had located multiple independent witnesses who provided exculpatory information, including Kevin Bowman and Darryl Gray. First Amended PCRA Petition, 1/27/1999, at 58-60 (¶¶ 115-122). Despite Reid's representation in his brief to this Court that he raised and preserved this claim in his first amended petition, Reid's Brief at 31, Reid's first amended PCRA petition of January 27, 1999, did not mention Willie Brown (whose

certification is dated January 4, 2000). Notably, the record does not contain a PCRA petition presenting his claim with regard to Willie Brown or attaching Willie Brown's January 4, 2000 certification. Instead, the first time Willie Brown's certification appears in the record is as an attachment to a letter from PCRA counsel to the PCRA court, in 2010, in response to a request from the PCRA court asking counsel to provide an additional copy of Willie Brown's certification. It is unclear how the PCRA court knew about this witness as the record is silent as to when Reid first raised and briefed his claim with regard to Willie Brown. Before this Court, Reid does not identify where he raised and briefed the claim. Therefore, he has waived his claim with regard to Willie Brown.

III. Kloiber instruction

In his third issue, Reid argues that trial counsel was ineffective for failing to request that the jury be instructed regarding the reliability of eyewitness identification testimony in accordance with *Commonwealth v. Kloiber*, 106 A.2d 820 (Pa. 1954). Reid's Brief at 39-47; First Amended PCRA Petition, 1/27/1999, at 35-37 (¶¶ 68-73). He also asserts that direct appeal counsel had no reasonable basis for failing to raise trial counsel's ineffectiveness in this regard. Reid's Brief at 42-45.

According to *Kloiber*,

> where the [eye]witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the [c]ourt should warn the jury that the testimony as to identity must be received with caution.

Kloiber, 106 A.2d at 826-27. A *Kloiber* instruction advises the jury that witnesses sometimes make mistakes in identification, and that, if certain factors are present, the accuracy of identification testimony is so doubtful that a jury must receive it with caution. *Id*. A defendant is entitled to a *Kloiber* instruction where the eyewitness "(1) was not in a

position to clearly observe the defendant, or is not positive as to identity; (2) equivocated on the identification; or (3) failed to identify the defendant on prior occasions." *William Johnson*, 139 A.3d at 1281; *See also Commonwealth v. Brown*, 196 A.3d 130, 163-64 (Pa. 2018); *Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010). In *Commonwealth v. Paolello*, 665 A.2d 439, 454-55 (Pa. 1995), we emphasized that a *Kloiber* instruction addresses "the actual physical ability of the witnesses to observe from their respective positions in relation to the events" and that it is **not** about the credibility of the eyewitnesses.

Reid argues that he was entitled to a *Kloiber* instruction with regard to the testimony of Dozier and Boston because they previously indicated that Reid was not the shooter, as well as their testimony regarding the circumstances of the shooting. Reid emphasized that Dozier had given a statement to police indicating that the shooter was wearing dark clothing, whereas Reid was wearing a white shirt that night, Dozier's testimony that he drank and was high at the time of the incident, and that Dozier made these observations from twenty-seven feet away at two in the morning. Reid's Brief at 39-47. In response, the Commonwealth disputes Reid's claim that Dozier was unable to view the shooting. It draws attention to testimony that the shooting occurred in a well-lit area, Dozier had ample time to view the shooter, and that Dozier and Boston were personally familiar with Reid. The crux of the Commonwealth's argument is that the witnesses' failure to identify Reid on prior occasions arose out of fear and cannot be equated with the type of failure to make a prior identification that warrants a *Kloiber* instruction. Commonwealth's Brief at 26-29 (citing, inter alia, *Commonwealth v. Lee*, 585 A.2d 1084, 1087 (Pa. Super. 1991)).

The PCRA court determined that a *Kloiber* instruction was not applicable because Dozier and Boston's identifications "could not be characterized as coming from one who lacked 'a position to observe' or not being positive, or 'weakened by qualifications[.]'" PCRA Court Opinion, 2/14/2011, at 35-36. It explained that both Dozier and Boston's prior failures to identify Reid were "clearly motivated by fear of reprisal[,]" not an inability to observe the shooting, and as such, were not subject to a *Kloiber* instruction. *Id*. at 36.

The Commonwealth correctly points out that the facts do not support a *Kloiber* instruction in this case. Both Dozier and Boston were in a position to observe the shooter. *Kloiber*, 106 A.2d at 826-27. Dozier was within twenty-seven feet of the shooter, observed him for approximately five minutes, and the area was well lit. Boston was standing next to the shooter and could view him. Both men personally knew Reid and had the opportunity to view and identify him as the shooter.

The PCRA court and the Commonwealth are also correct that *Kloiber* instructions focus on the circumstances of the incident and the witness's actual ability to see and identify the assailant. *See Paolello*, 665 A.2d at 454-55 (focusing on "the actual physical ability of the witnesses to observe from their respective positions in relation to the events"). *Kloiber* does not generally apply in circumstances where a prior failure to identify an assailant is wholly attributable to fear or intimidation, and where there are no factual circumstances undercutting the witness's actual ability to make the identification. *See Lee*, 585 A.2d at 1087 (where witness's initial failure to identify shooter was due to fear of reprisal, *Kloiber* charge was not warranted). Therefore, the PCRA court properly concluded that Reid's claim was without merit.

IV. Dozier plea deals

Reid complains that trial counsel was ineffective for failing to impeach Dozier, the key eyewitness against him, with evidence that Dozier had six criminal cases that had been pending, but that the Commonwealth dismissed after Dozier began cooperating against Reid prior to this trial. Reid's Brief at 48-53; First Amended PCRA Petition, 1/27/1999, at 43-45 (¶¶ 83-84). With regard to prejudice, Reid argues for this Court to consider trial counsel's ineffective cross-examination of Dozier along with the prejudice arising from the admission of Boston's testimony (issue nine).[38] The Commonwealth argues that Reid failed to demonstrate a claim of arguable merit, because the six criminal cases Reid refers to "were all dismissed, and counsel could not have been ineffective for not presenting this evidence of alleged bias." Commonwealth's Brief at 29-30 (citing *Commonwealth v. Hill*, 566 A.2d 252, 253 (Pa. 1989) (jury must be advised of possible bias only when there are outstanding criminal charges or a non-final disposition against the witness)). The Commonwealth also asserts that Reid was not prejudiced by the lack of cross-examination regarding these dismissed cases since trial counsel impeached Dozier with his criminal record including crimen falsi, and with his drug addiction and drinking on the night of the shooting. *Id*. at 30; *see similarly* PCRA Court Opinion, 2/13/2011, at 162-164. Thus, the Commonwealth argues that the evidence would be "cumulative and corroborative" and that Reid cannot establish prejudice.

Reid correctly points out that by virtue of the dismissed cases, Dozier's possible favorable treatment could have been raised to support his theory that Dozier was

[38] As will be discussed in detail below, Reid fails to establish a meritorious challenge to Boston's testimony. Therefore, there is no cumulative prejudice to be considered.

beholden to the Commonwealth and therefore, was relevant impeachment testimony. *See United States v. Abel*, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony[.]"); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (stating that the partiality of a witness is always relevant to discredit the witness). Moreover, the Sixth Amendment Confrontation Clause entitles a defendant to cross-examine a prosecution witness whose unrelated criminal charges were dismissed prior to trial. *See Commonwealth v. Evans*, 512 A.2d 626, 632 n.4 (Pa. 1986) (recognizing rule from *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (prohibition into inquiry regarding possibility that state's witness would be biased as a result of the state's dismissal of a pending unrelated charge in exchange for his willingness to talk to police violated Sixth Amendment Confrontation Clause)).

Even though Reid correctly points out that Dozier's possible favorable treatment could have been raised to support his theory that Dozier was beholden to the Commonwealth, he fails to demonstrate how impeaching Dozier as to these specific charges could have made a difference in a juror's evaluation of Dozier. Dozier had been examined and cross-examined as to, inter alia, various aspects of his criminal record, *See* N.T., 1/2/1991, at 2.19-20 (acknowledging convictions for burglary, unauthorized use of an automobile, and house arrest); *id*. at 2.99 (acknowledging that he was on house arrest), and as to the fact that police told him they would lock him up and hold him if he did not identify the shooter, *id*. at 2.51-52, 2.103. Trial counsel thoroughly demonstrated that Dozier was "beholden to the Commonwealth" for various reasons. Reid's Brief at 50.

As such, Reid does not prove that "there is a reasonable probability that," had trial counsel cross-examined Dozier regarding these already dismissed criminal charges, "the outcome of the proceeding would have been different." *Pierce*, 786 A.2d at 213.

V. Terrance Lisby plea deal

In his next issue, Reid complains that the trial court erred in precluding trial counsel from cross-examining Terrance Lisby regarding the extent of the benefits of a plea deal he received for testifying in this and another case. First Amended PCRA Petition, 1/27/1999, at 45-47 (¶¶ 85-90). During trial, trial counsel cross-examined Terrance Lisby regarding his plea deal that led to his testimony. Terrance Lisby testified that he was charged with first-degree murder for the homicide of Bernard Skinner, who he had shot and killed with a gun. N.T., 1/2/1991, at 2.201. He received a plea deal for that homicide, pursuant to which he pled to murder of the third degree, admitted that he committed the shooting, and agreed to testify against Reid. N.T., 1/2/1991, 2.191-201. During cross-examination, when trial counsel questioned Terrance Lisby regarding his understanding that the plea removed the possibility of "first degree life imprisonment[,]" Terrance Lisby stated, "That's how you put it, sir." *Id*. at 2.202. Trial counsel continued that line of questioning, leading to the following exchange:

> Q. And you knew if you went to trial, if you were convicted of murder in the first degree, you would get life without parole; correct?
>
> A. Maybe.
>
> MR. KING: Objection. That is a misstatement. There is no such thing in this Commonwealth.

> THE COURT: Let's just say life imprisonment.
>
> BY MR. STRETTON:
>
> Q. You knew there was no parole for life imprisonment, the Governor could only pardon; am I right?
>
> MR. KING: Objection, with the strength of our last government I wouldn't make any bets.
>
> THE COURT: Commutation, let's not get into that.

Id. at 2.202. The record thus makes clear that trial counsel sought to question the witness regarding the fact that he faced the possibility of a sentence to life without parole, but that the trial court instructed counsel to "just say life imprisonment." *Id*.

Reid specifically complains that the trial court erred in precluding cross-examination specifically regarding the fact that Terrance Lisby avoided a sentence of life without the possibility of parole. Reid's Brief at 55 (citing *Simmons v. South Carolina*, 512 U.S. 154, 169 & n.9 (2004) (explaining, based upon "commonsense understanding[,]" "public opinion and juror surveys[,]" "that there is a reasonable likelihood of juror confusion about the meaning of the 'life imprisonment'")). He asserts that trial counsel properly objected when the trial court limited his cross-examination of Terrance Lisby, but that trial counsel should have also preserved the issue through post-verdict motions and that appellate counsel should have raised this issue on appeal. *Id*. at 56-57. In asserting prejudice, Reid states that discrediting Terrance Lisby's testimony was critical to his defense, and that Terrance Lisby was the only witness who connected Reid to the JBM

and thus, that his testimony was of singular importance in establishing motive, i.e., that Reid shot the victim in order to protect the JBM. *Id*. at 53.[39]

The Commonwealth argues that trial counsel fully informed the jury of the benefits of Terrance Lisby's "sweetheart" plea deal. Commonwealth's Brief at 31-33 (citing N.T., 1/2/1991, 2.222). The Commonwealth also argues that Reid failed to demonstrate that trial counsel lacked a reasonable basis for pursuing this issue further, as counsel "thoroughly and effectively" addressed Terrance Lisby's favorable plea deal and motive to testify against Reid. *Id*. at 32-33. Finally, the Commonwealth asserts that Reid failed to demonstrate prejudice because "[m]ention of the unlikelihood of parole for a life prisoner would not have made a difference[,]" and because Terrance Lisby's testimony was cumulative of other incriminating evidence. *Id*. at 33-34.[40]

Reid has not demonstrated that the trial court abused its discretion in constraining counsel to refer to the foregone sentence as "life imprisonment[,]" as that limitation was consistent with the law at the time.[41] At the time of trial, juries were not entitled to learn

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[39] Contrary to Reid's assertion, Terrence Lisby was not the only witness who testified regarding Reid's motive for killing the victim. Brown's testimony also brought to light Reid's affiliation with the JBM and served as a basis for the Commonwealth's arguments that Reid was motivated to kill the victim to protect the JBM. N.T., 1/8/1991, at 6.53-54 (Brown testifying that Reid used expression "get down or lay down" as a warning to cooperate with the JBM or die).

[40] The PCRA court focused on substantially similar reasons for rejecting this issue. Like the Commonwealth, it did not view the trial court's instruction as preventing the jury from hearing the benefits of Terrance Lisby's plea deal. PCRA Court Opinion, 2/14/2011, at 165 (citing N.T., 1/2/1991, 2.201-23).

[41] Viewed from the perspective of the law as it currently stands, the Commonwealth was incorrect in stating that "there is no such thing [as life without parole] in this Commonwealth," and in fact, in certain circumstances, a jury is even entitled to an instruction that "life" means life without parole. *See Commonwealth v. Brown*, 196 A.3d 130, 185 (Pa. 2018) (where Commonwealth puts future dangerousness at issue and

that there was no chance of parole for a life sentence in Pennsylvania. *See Commonwealth v. Szuchon*, 693 A.2d 959, 962 (Pa. 1997) (acknowledging that, prior to new rule established in *Simmons* in 1994, juries were not entitled to learn that life means life without parole).

Moreover, Reid cannot demonstrate that trial counsel's inability to question Terrance Lisby regarding the fact that he avoided a sentence of life without the chance of parole resulted in prejudice. In determining whether counsel's omission resulted in prejudice, we consider whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Commonwealth v. Kimball,* 724 A.2d 326, 332-33 (Pa. 1999). As this Court recently explained, "a speculative or attenuated possibility of a different outcome is insufficient to undermine confidence in the outcome." *Commonwealth v. Jones*, 210 A.3d 1014, 1019 (Pa. 2019).

Trial counsel thoroughly cross-examined Terrance Lisby regarding his motive to testify against Reid. Trial counsel specifically emphasized the significant benefits of the plea deal. *Accord* N.T., 1/2/1991, 2.201-03; 2.217-22 (trial counsel cross-examining Terrance Lisby that, "all this stuff that you said [for the first time] on direct about JBM is only after your recollection suddenly got refreshed by this sweetheart of a deal you got from the D.A.'s office?"); 2.233-36 (impeaching Terrance Lisby as to prior testimony and asking, "Because that's what you want the Jury to believe now so Mr. King can say nice things about you when you go back for sentencing?"); 2.246 ("I understand the pressure

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defense counsel requests instruction, defendant entitled to instruction that life means life without parole); *Commonwealth v. Dougherty*, 860 A.2d 31, 37 (Pa. 2004) (same).

that you face when you know that he is going to be talking to the Judge about your sentence."). In closing argument, trial counsel further emphasized the benefits of the plea deal and argued that this sweetheart deal motivated Terrance Lisby to testify against Reid untruthfully. N.T., 1/8/1991, 6.119. In sum, trial counsel brought to light Terrance Lisby's motivation to testify against Reid and how he sought to reap the benefits of a very beneficial plea deal. Reid's suggestion that Terrance Lisby's motivation to testify untruthfully hinged on the fact that Lisby would avoid life without parole (rather than on the fact that his sentence was five years instead of life, regardless of the possibility of parole) is dubious.

In that vein, understanding this distinction could not have reasonably led the jury to reach a different assessment with regard to Terrance Lisby's credibility and bias. Reid does not demonstrate that this distinction alone could have swayed a juror to discredit Terrance Lisby's testimony. Reid failed to prove that the cross-examination of Terrance Lisby was inadequate, let alone that there is a reasonable probability that, with more extensive cross-examination, the outcome of the proceeding would have been different. *See Kimball*, 724 A.2d at 332; *Jones*, 210 A.3d at 1019.

Finally, Reid also asserts that trial counsel was ineffective for failing to cross-examine Terrance Lisby regarding the factual circumstances underlying his plea deal, which Reid claims would have demonstrated to the jury that the facts would have supported a first-degree murder conviction. Reid fails to develop this argument and cites to no authority providing that trial counsel should have cross-examined Terrance Lisby regarding the factual circumstances underlying the guilty plea to demonstrate that, absent a plea, they would have supported a conviction for first-degree murder. Reid's Brief at

56. Because he fails to develop that argument and does not cite to any support for his position, Reid cannot prevail on his claim. *See Kareem Johnson*, 985 A.2d at 924 ("[W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived.").

VI. Bolstering Terrance Lisby's testimony

Again with regard to Terrance Lisby's plea deal, Reid argues that trial counsel was ineffective for failing to object to references to the deal's requirement of "truthful" testimony, because such testimony improperly bolstered the testimony of Terrance Lisby. Reid's Brief at 59; First Amended PCRA Petition, 1/27/1999, at 47-49 (¶¶ 91-95). In *United States v. Young*, 470 U.S. 1, 18-19 (1985), the United States Supreme Court held that it was improper for a prosecutor to vouch for the credibility of witnesses because such vouching gives the impression that the prosecutor knows of additional evidence not of the record that supports the charges and "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." This Court has likewise observed that "[i]t is improper for the prosecutor to offer his or her personal opinion as to … the credibility of any testimony." *Commonwealth v. Hutchinson*, 25 A.3d 277, 302 (Pa. 2011).

Reid explains that the Commonwealth called a witness, Assistant District Attorney Joseph LaBar, to testify regarding the terms of Terrance Lisby's plea deal. Reid complains that LaBar testified that Terrance Lisby's plea deal required him to "testify truthfully[,]" or else the deal would be revoked. *Id.* at 59 (citing N.T., 1/2/1991, 2.191 (on direct examination, Terrance Lisby was asked, "Did you as a result of that plea agree to

testify truthfully in any and all matters that you were involved?" and he responded affirmatively); *see* N.T., 1/3/1991, 3.14-23 (LaBar testifying specifically regarding the terms of the plea deal and stating, "The only agreement [as to sentence] was that if he testified fully and truthfully, we would make that fact known to" the sentencing judge)). Reid claims that this testimony unfairly bolstered Terrance Lisby's credibility by suggesting that the Commonwealth viewed Terrance Lisby's testimony as truthful and that there could be no reasonable basis not to object to this testimony. *Id*. He asserts that this error should be considered cumulatively along with trial counsel's other errors.

The Commonwealth asserts that the prosecutor here "offered no personal assurances as to [Terrance] Lisby's veracity, nor did he insinuate that Lisby was truthful for reasons outside the record." Commonwealth's Brief at 34-35. Instead, he merely presented the terms of the plea deal. *Id*. The Commonwealth cites to *Commonwealth v. Miller*, 819 A.2d 504, 515-16 (Pa. 2002), where, in almost identical circumstances, this Court reasoned that the "use of the word 'truthful' … [wa]s merely an articulation of the parameters of the plea agreement, that Blakeney would provide 'truthful' testimony and a guilty plea, in exchange for life imprisonment (as opposed to death)." Likewise, in *Commonwealth v. James T. Williams*, 896 A.2d 523, 541-42 (Pa. 2006), this Court made a similar observation when it stated that, "[t]he mere reiteration that the federal plea bargains required truthful testimony did not improperly put the imprimatur of the government on each witness's testimony." Because the prosecutor's reiteration of the terms of Terrance Lisby's plea deal was proper, this claim is not of arguable merit, and counsel had no reason to object. *Id*. at 35.

VII. Limiting instruction regarding prior bad act evidence

Reid argues that trial counsel ineffectively failed to request a limiting instruction after the trial court permitted "prior bad act" evidence admitted at trial and the penalty phase. Reid's Brief at 63-70; First Amended PCRA Petition, 1/27/1999, at 31-34 (¶¶ 59-67). Where evidence of a prior bad act is introduced, the party is entitled to a limiting instruction. *Commonwealth v. Billa*, 555 A.2d 835, 842 (Pa. 1989); *Commonwealth v. Claypool*, 495 A.2d 176, 179 (Pa. 1985).

Consideration of this issue requires an understanding of the introduction of the complained of evidence. During trial, the prosecutor introduced evidence that Reid was a member of the JBM gang, that the JBM sold drugs and engaged in violence and intimidation, that Reid was central to the elimination of rival drug dealers on behalf of the JBM, and that both Dozier and Terrance Lisby believed their lives were in danger as a result of their testimony against Reid and the JBM. Reid's Brief at 65.

The Commonwealth initially draws attention to the reasoning underlying this Court's opinion, on Reid's direct appeal, in which we stated that the evidence was properly admitted over counsel's objections. Commonwealth's Brief at 36-38 (citing *Reid*, 642 A.2d at 461). The Commonwealth asserts that because the evidence "was relevant for more than the limited purposes asserted by [Reid]," *id*. at 37, i.e., to show that this was not a spontaneous murder but that Reid "was a JBM enforcer who killed the victim because he had stolen illegal JBM drugs[,]" *id*. at 37-38 (citing *Reid*, 642 A.2d at 461), and that Reid was "a JBM enforcer with a 'job to do'" — then a limiting instruction was not warranted. *Id*. at 38. Alternatively, even if the trial court gave a limiting instruction —

telling the jury to consider the evidence only as proof of motive and conspiracy — the outcome of the proceedings would not have been different. *Id*.

In denying this claim, the PCRA court observed that Reid failed to "propose what form or content such a charge should contain." PCRA Court Opinion, 2/14/2011, at 51. As to Reid's claim that such an instruction was warranted during the penalty phase, the PCRA court stated that there is no legal requirement for doing so. *See id*. at 52-54 ("None of the cases say … that a court must specifically instruct a jury to disregard any evidence presented in the guilt phase when considering the sentence; the only instruction the court is required to give is to only set forth what matters are proper to consider, and that is what the court did here."). The PCRA court further explained that, "[m]erely incorporating facts into a record does not mean that the jury was told to consider those facts in sentencing[.]" *Id*. at 53. The PCRA court recounted that the trial court instructed the jury to only consider one aggravator, that Reid "has a significant history of felony convictions involving the use or threat of violence to the person[,]" N.T., 1/10/1991, at 8.88, and thus the jury was not permitted to consider the JBM evidence which did not relate to any convictions. *Id*.

Preliminarily, we quote the relevant observations from our direct appeal decision regarding the introduction of this evidence.

> At trial, [Reid] sought to impeach the testimony of the Commonwealth's eyewitness, Morris Dozier, who testified that he had seen [Reid] shoot Mark Lisby. [Reid] inquired about a prior inconsistent statement, which indicated that Dozier, who had known [Reid] for years, could not identify the shooter. In so doing, defense counsel "opened the door" for the Commonwealth to show that the prior statement was the result of threats that Dozier had received from the JBM. Thus, the Assistant District Attorney was simply pursuing a line of questioning that [Reid] had begun, and Dozier's apprehension, fueled by fear of the JBM, was effective rebuttal of [Reid]'s attempt to impeach him. Furthermore,

> evidence of [Reid]'s connection with the JBM was admissible to prove motive and conspiracy. *Commonwealth v. Gwaltney*, 442 A.2d 236 (Pa. 1982). The inference from such evidence was that [Reid] was a JBM enforcer who killed the victim because he had stolen illegal JBM drugs. Thus such evidence was entirely relevant and admissible.
>
> Although [Reid] complains at length that such evidence was admitted, he offers no legally valid reason for concluding that its admission was error. The probative value of establishing [Reid]'s association with the JBM outweighed any implication of prior criminal activity, and counsel cannot be ineffective for failing to object to the admission of this evidence.

Reid, 642 A.2d at 461.

Our analysis therefore discussed two different types of evidence. The first concerned evidence that members of the JBM threatened Dozier and other witnesses, which was properly admitted in response to trial counsel's questioning. That evidence was relevant to the jury's assessment of Dozier's credibility. The second involved unspecified direct evidence of Reid's connection with the JBM, offered to prove motive and conspiracy.

Reid's argument treats all of this evidence together as "prior bad act evidence." We disagree. Evidence that Reid was a member of JBM is not evidence of a particular crime, wrong or act. That a particular fact carries negative associations does not mean it constitutes a bad act. *See Commonwealth v. Johnson*, 160 A.3d 127, 145–46 (Pa. 2017) (statement that defendant said he was willing to "shoot someone" to make money did not fall under Rule 404(b); the statements related to "his desire to make money (or, more generally, to attain success) and his willingness to do anything (even to kill) to accomplish this end"). Additionally, evidence regarding threats issued to Dozier were not used to

prove anything regarding Reid or his character. It was used to explain the effect such acts had on Dozier.

Reid argues that trial counsel should have sought a jury instruction indicating that the jury should only consider this evidence for the limited purpose for which it was introduced and that the jury must not rely on such evidence to infer guilt on the basis of Reid's propensity to commit a crime. Reid's Brief at 64-66. He asserts that the fairness of the proceedings was undermined because the jury was free to use the evidence beyond its permissible purpose, and he further asserts that this unfairness infected the penalty phase of trial. *Id*. at 66-67. He argues, based upon *Billa*, that the prior bad act testimony was extensive, inflammatory, and failure to request a limiting instruction was ineffective assistance of counsel. *Id*. at 68. With regard to the penalty phase, Reid further argues that trial counsel should have sought a cautionary limiting instruction with regard to this evidence since the Commonwealth incorporated all of its evidence at the penalty phase, "even though none of these crimes met the criteria for any statutory aggravating circumstance." *Id*. at 66.

Reid relies in large part on our disposition in *Billa*, which awarded a new trial for trial counsel's failure to request a limiting instruction after the Commonwealth introduced evidence of Billa's prior sexual assault. The Commonwealth called the victim, who "vivid[ly] recount[ed]" the incident at Billa's murder trial. 555 A.2d at 839. This Court agreed that the evidence was relevant under the particular circumstances of the case "to establish motive/intent and to negate appellant's claim of accident[.]" *Id*. While relevant, the evidence was highly inflammatory, and

> created the substantial danger that the jury could be swayed in its deliberations on the degree of guilt by this evidence

> showing appellant's criminal character and his propensity to sexually assault young Hispanic females. Such evidence was relevant and admissible as the trial court ruled, but the court erred in failing to give an immediate and complete cautionary or limiting instruction to the jury explicitly instructing the jury as to the limited purposes for which the evidence was deemed admissible. Such an instruction neither preceded nor followed the introduction of said evidence, nor was a limiting instruction given in its final charge to the jury. Without such instruction, the jury was left without guidance as to the use it could legitimately make of the inflammatory evidence and may have been more inclined, therefore, to convict the appellant of first degree murder because he had assaulted and intended to kill his prior victim.

Id. at 841–42 (footnote omitted).

We noted that trial counsel objected to the admission of the testimony but did not request an instruction. Applying ineffectiveness principles, we found that the claim was clearly of arguable merit since Billa "was **entitled** to a limiting instruction on the use that the jury could make of the challenged evidence which was admissible only for a limited purpose. The court's failure to give such an instruction, upon request, would have been reversible error." *Id*. at 842 (emphasis in original). Regarding prejudice, we similarly observed, "Given the highly inflammatory and extensive nature of the evidence of the prior sexual assault, we cannot say with any reasonable certainty that the jury would have returned the same verdict of murder of the first degree had it been properly instructed." *Id*. at 843.

Reid relies on *Billa*'s ineffectiveness analysis as justifying a new trial here without identifying the 404(b) evidence which was purportedly subject to a limiting instruction, or the language of the limiting instruction, or how he was prejudiced as a result of his counsel's failure to request a specific instruction.

Reid's claim suffers from the same failings as applied to introduction of such evidence at the penalty phase. Moreover, the prosecutor incorporated the evidence by reference, but never relied upon it to establish an aggravating circumstance. Finally, the PCRA court is correct in pointing out that the trial court's instructions specifically limited the jury's consideration to evidence of Reid's history of felony convictions, and this evidence does not fall in that category. Therefore, Reid has not demonstrated that he was prejudiced by any failure to request a limiting instruction, and he is not entitled to relief on this claim.

VIII. Instruction on witness bias

Reid complains that trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction that restricted the jury's consideration of the effect of plea agreements on certain witnesses' motives for testifying. Reid's Brief at 70; First Amended PCRA Petition, 1/27/1999, 39-43 (¶¶ 81-82).[42] Reid complains specifically of the trial court's instructions with regard to Kevin Brown, Terrance Lisby, Morris Dozier, and Lawrence Boston because each of these witnesses had pending charges for which Reid believes they sought to curry favor with the prosecution through their testimony. With regard to Brown, the trial court instructed the jury that he had an outstanding robbery charge, and that "I had allowed this evidence in for the sole purpose of informing you if any agreement exists between him and the Commonwealth for his testimony in this case. It is my recollection that Kevin Brown has denied any deal of any kind." *Id*. at 72 (citing N.T., 1/8/1991, 6.156). Reid argues that this charge was inaccurate: the evidence was

[42] Reid's trial counsel did in fact request an instruction regarding "a witness who has self-interest or … benefit received" (N.T., 1/8/1991, 6.180-81), and therefore, Reid does not complain that trial counsel was ineffective for failing to request an instruction.

admissible not just to show that an agreement existed, but more importantly, to establish "Brown's potential bias arising from his expectation of leniency." *Id*. With regard to Terrance Lisby, the trial court likewise instructed the jury that the "sole purpose" of introducing evidence of a plea deal was to inform the jury "if any agreement exists between him and the Commonwealth." *Id*. (citing N.T., 1/8/1991, at 6.155). Again, Reid contends that the evidence was admissible not just to show that an agreement existed, but also to establish that Terrance Lisby testified in hopes of receiving leniency and favorable treatment before the sentencing judge.

Reid thus argues that these instructions improperly restricted the jury to consider only the existence of an agreement, rather than to consider that the witness benefitting from such an agreement had a motive to fabricate testimony. Reid emphasizes that trial counsel's main approach was to attack the credibility of these witnesses. Thus, it was essential for the jury to understand the significance of these pending charges as a possible motive to give biased testimony. *Id*. at 74. Given the proper instructions, he submits, the jury "likely would have entertained doubts about the testimony of one or more of these witnesses, and consequently would have harbored reasonable doubt as to [Reid]'s guilt." *Id*.

The Commonwealth and PCRA court correctly explain that the instructions given in this case, when viewed as a whole, were proper. Commonwealth's Brief at 38; PCRA Court Opinion, 2/14/2011, at 159 ("[T]he court's instructions cannot be judged solely in isolated parts; it must be considered as a whole. Viewing the charges in that light, the court fully covered all aspects of the requirements for the admission and consideration of witnesses' other crimes."). In this case, the trial court instructed the jury that "it is part of

the function of the jury to decide the credibility of witnesses." N.T., 1/8/1991, at 6.147. It instructed the jury to consider, inter alia, "all of the surrounding circumstances" in determining credibility. *Id*. at 6.148. It also instructed the jury to keep in mind that some witnesses "have an interest or motive which may have colored their recollection and testimony" and that "all such personal equations must enter into [its] determination" regarding credibility. *Id.* at 6.149. Finally, it instructed the jury that, in deciding which testimony to believe, it is up to the jury to determine whether conflicts in testimony are "brought about by an innocent mistake or by an intentional falsehood[.]" *Id*.

In *Commonwealth v. Harris*, 852 A.2d 1168, 1176-77 (Pa. 2004), we considered circumstances similar to those here, where a defendant claimed he was entitled to a jury instruction to explain that a Commonwealth witness' testimony might have been motivated by his interest in receiving favorable treatment with regard to pending charges. We acknowledged that in *Commonwealth v. Thompson*, 739 A.2d 1023, 1030-31 (Pa. 1999), this Court found arguable merit in a claim that trial counsel should have sought an instruction informing the jury that it could find that a witness with pending charges against him "had a potential bias in aiding the Commonwealth in establishing their case against [Thompson.]" However, in both *Harris* and *Thompson*, this Court also determined that the absence of a specific instruction regarding the testimony of the witness being potentially motivated by an attempt to curry favor with the Commonwealth was not prejudicial. No prejudice ensued in *Harris* because the jury was made aware of the possibility that the witness had agreed to testify in order to receive favorable treatment through cross-examination and the jury was instructed to consider the possibility of bias in evaluating the credibility of each witness. *Harris*, 852 A.2d at 1177-78.

Likewise, here, through cross-examination, trial counsel brought to light the possibility that each of these witnesses agreed to testify in order to receive favorable treatment. Moreover, the trial court's instructions to the jury adequately informed the jury that it could consider whether a witness had an agreement for testifying, whether "some have an interest or motive which may have colored the recollection and testimony," as well as "all of the surrounding circumstances [to] determine which witnesses you will believe and what weight you will give their testimony." N.T., 1/8/1991, 6.148-49. Even if counsel should have sought an instruction informing the jury that it could consider these witnesses' pending criminal charges as evidence of bias, Reid cannot demonstrate prejudice. Because Reid fails to show how he was prejudiced by the lack of a specific instruction exploring the significance of the witness' plea deals, he is not entitled to relief on this claim.

IX. Boston's testimony

In his next claim, Reid complains that he was deprived of his rights to due process, a fair trial, and the effective assistance of counsel by the admission of Boston's testimony at trial. Reid's Brief at 85-88.[43] The facts underlying this claim are as follows. At the first trial, Boston testified against Reid, stating that Reid shot the victim, but then at the second, Boston invoked his Fifth Amendment right against self-incrimination. The invocation was made outside of the presence of the jury and over the objection of trial counsel. The trial court declared Boston unavailable and thus, allowed Boston's testimony to be read into the record. N.T., 1/4/1991, 4.5-13, 4.40-43.

[43] Reid raised this claim in his pro se PCRA petition. Pro Se PCRA Petition 12/12/1996, at 3a (¶ 6).

It is well established that prior testimony from an unavailable witness is admissible at trial, provided that the defendant had a full and fair opportunity to cross-examine the witness at the prior proceeding. *Commonwealth v. Rodgers*, 372 A.2d 771, 779 (Pa. 1977). A witness who invokes the privilege against self-incrimination is "unavailable" for purposes of that rule. *Id*. Moreover, "the general rule is that waiver of the privilege against self-incrimination in one proceeding does not affect the right to invoke it in another." *Commonwealth v. Hall*, 565 A.2d 144, 155 (Pa. 1989).

Boston's assertion of his privilege against self-incrimination was proper because he risked self-incrimination by testifying. The Commonwealth and PCRA court presented a compelling demonstration of the type of incrimination Boston faced: his testimony would incriminate him with regard to sales of controlled substances and with regard to his complicity in the murder of the victim. Commonwealth's Brief at 43-44; PCRA Court Opinion, 2/14/2011, at 132. Boston had reason to believe he faced a danger of prosecution, and so his exercise of his Fifth Amendment privilege was appropriate. *Commonwealth v. Long*, 625 A.2d 630, 636-37 (Pa. 1993)). Accordingly, the trial court properly accepted Boston's invocation of his right against self-incrimination, determined Boston was unavailable and permitted his testimony from the first trial to be read into the record.

Reid's main contention is that, "once a witness makes a knowing and intelligent waiver of the privilege against self-incrimination in one proceeding, it is waived for further proceedings in the same case as long as his compelled testimony would not require disclosure of new information." Reid's Brief at 85. He thus argues for an exception to that well-established rule providing that waiver of the privilege against self-incrimination

in one proceeding does not affect the right to invoke it in another. According to Reid's logic, Boston waived the privilege at the first trial and should not have been permitted to invoke his privilege against self-incrimination. However, Reid does not cite to any Pennsylvania cases adopting that exception nor does he present a developed argument in support of its adoption. His only citation is to a footnote in *Hall*, where this Court acknowledged that there is "some authority" to support such a position, but where it refused to adopt or apply such a rule in this Commonwealth. *Hall*, 565 A.2d at 155 n.19. However, as noted above, Pennsylvania law recognizes that waiver of the privilege against self-incrimination in one proceeding does not affect a person's right to invoke it in another. *Id*. at 155. Because Boston's prior testimony was properly admitted, Reid's claim is without merit.

X. Prosecutorial Misconduct in Closing

Reid argues that the prosecutor's closing argument was improper because it "repeatedly invoked community values and the problems facing the City of Philadelphia to implore the jury to convict [Reid]." Reid's Brief at 77. Essentially, he complains that the prosecutor appealed to the jury's fear of crime generally and encouraged the jury to convict merely to ameliorate profound societal ills in a broken community, rather than focusing on the specific guilt of the defendant. He argues that counsel was ineffective for failing to object to the closing remarks, and that he is therefore entitled to a new trial. *Id*.

The PCRA court rejected this claim on the basis that this Court on direct appeal specifically addressed and rejected Reid's claims related to the prosecutor's closing arguments. PCRA Court Opinion, 2/14/2011 at 67. The Commonwealth likewise responds that, when Reid raised a similar issue before this Court on direct review, the

Court reviewed the prosecutor's closing argument and determined there was no prosecutorial misconduct. Commonwealth's Brief at 40-41 (citing *Reid*, 642 A.2d at 460). Therefore, the Commonwealth argues that Reid's claim has been finally litigated and is therefore unreviewable. *Id*. at 42 n.14 (citing 42 Pa.C.S. §9543(a)(3) (listing amongst eligibility factors for PCRA relief "[t]hat allegation of error has not been previously litigated or waived")). Further, the Commonwealth argues that this issue is without merit because the prosecutor's arguments were not improper. *Id*. at 41-42.

The Commonwealth correctly states that this claim was litigated and decided on direct review. During the direct appeal, this Court considered Reid's argument that the prosecutor engaged in misconduct during his arguments to the jury. Therein, Reid complained that the prosecutor "committed misconduct during his penalty phase argument by referring to his own modest upbringing" and "ma[de] further allegations of misconduct based upon numerous references to statements by the [prosecutor] during his arguments to the jury[.]" *Reid*, 642 A.2d at 460. The Court stated that it had "reviewed the entire argument" by the Prosecutor in both trials and "conclude[d] that he did not deliberately seek to destroy the objectivity of the fact finder, and that his argument did not have the 'unavoidable effect' of prejudicing the jury, forming in their mind a fixed bias and hostility towards [Reid] so that they could not weigh the evidence objectively and render a true verdict." *Id*. at 460-61. The Court thus held that the prosecutor did not engage in misconduct in his arguments to the jury. "[G]iven our finding that the prosecutor did not exceed the bounds of reasonable advocacy during either trial, trial counsel cannot be deemed ineffective for failing to further object on the basis for prosecutorial misconduct." *Id*. at 461. As this Court on direct appeal addressed the entire closing argument of the

prosecutor and determined that there was no misconduct, and also determined that trial counsel was not ineffective for failing to object to the closing arguments, this claim has been finally litigated. *See* 42 Pa.C.S. §9543(a)(3) (listing amongst eligibility factors for PCRA relief "[t]hat allegation of error has not been previously litigated or waived.")

Penalty Phase

I. Mitigation evidence

Reid asserts that trial counsel abdicated his responsibility to advocate for Reid at capital sentencing in that he "presented only minimal mitigating evidence[,]" and that "the evidence failed to inform the jury of either [Reid]'s life history or his mental health and cognitive impairments." Reid's Brief at 88-89. To prevail in asserting a claim of ineffective assistance of counsel in conducting an inadequate investigation regarding mitigation evidence, Reid must demonstrate (1) that the claim is of arguable merit, (2) that counsel's actions lacked an objective reasonable basis, and (3) that he was prejudiced by counsel's actions or inactions. *Commonwealth v. Crispell*, 193 A.3d 919, 941 (Pa. 2018). "It is well-established that capital counsel has an obligation under the Sixth Amendment to conduct a reasonably thorough investigation for mitigating evidence or to make reasonable decisions that make further investigation unnecessary." *Commonwealth v. Tharp*, 101 A.3d 736, 764 (Pa. 2014). This duty encompasses the pursuit of all relevant statutory mitigators, absent some reasonable ground not to pursue one. *Id*. In evaluating the claim, we consider "the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the additional or different mitigation that could have been presented." *Commonwealth v. Lesko*, 15 A.3d 345, 380 (Pa. 2011). "Trial counsel is obliged to obtain as much information as possible to prepare an accurate

history of the client." *Crispell*, 193 A.3d at 941 (citing *Commonwealth v. Martin*, 5 A.3d 177, 206 (Pa. 2010)). Similarly, according to the United States Supreme Court, counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

In *Porter v. McCollum*, 558 U.S. 30, 40 (2009), the United States Supreme Court found that counsel's failure to uncover and present any evidence of Porter's mental health, his family background or his military service "did not reflect a reasonable professional judgment[,]" even if the defendant was uncooperative in assisting counsel in gathering the mitigation evidence. *Id*. The ineffectiveness in failing to conduct reasonable mitigation resulted in prejudice in *Porter* in that "[t]he judge and jury" at "sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id*. at 41. Had Porter's trial counsel been effective, "the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability'" such as his military service, his struggle to return to normalcy after the war, "his childhood history of physical abuse, and [] his brain abnormality, difficulty reading and writing, and limited schooling." *Id*. (internal citations omitted). The Court thus determined that there "exist[ed] too much mitigating evidence that was not presented to now be ignored." *Id*. at 44 (internal citations omitted). *See similarly Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding that Wiggins suffered prejudice as a result of counsel's failure to uncover mitigating evidence that Wiggins suffered abuse, homelessness, and diminished mental capacities, and thus "has the kind of troubled history we have declared relevant to assessing defendant's moral culpability.").

Here, Reid argues that he "pled a claim of ineffective assistance of counsel that required an evidentiary hearing." Reid's Brief at 101, 104. The Commonwealth does not oppose remand for an evidentiary hearing on this claim, observing that "neither the Commonwealth nor this Court must accept all of the information contained in PCRA counsel's amended petition at face value[,]" but instead must consider, inter alia, whether the PCRA court should have conducted an evidentiary hearing before denying relief. Commonwealth's Brief at 44, 47. The Commonwealth agrees that Reid has established the existence of a genuine issue of material fact and that, accordingly, the PCRA court erred in rejecting his claims without an evidentiary hearing. *Id*. at 48.

Reid presents two types of ineffectiveness claims with regard to the lack of mitigation evidence. First, he contends that trial counsel failed to present an expert witness to testify regarding his mental health and cognitive impairments. Second, he argues that trial counsel presented little information regarding his life history and did not conduct a reasonable investigation so that a full picture could have been provided to the jury.

Mental health mitigation

Reid argues that counsel should have, through a mental health professional, presented his mental health difficulties to the jury, and that such presentation would have impacted the result of the proceeding. Reid's Brief at 100 (citing *Strickland*, 466 U.S. at 694). He draws attention to the fact that in 1989, he underwent a court-ordered mental health evaluation in another case, resulting in a report that showed "'much concreteness of thinking' (an indicator of possible organic brain damage) 'ego impairment'; and a diagnosis of Mixed Character Disorder with Schizoid elements." Reid's Brief at 93. He

argues that that evaluation should have led counsel to present mental health mitigation evidence to influence the jury's deliberations. In further support, he cites to a report and declaration submitted by psychiatrist Dr. Julie Kessel. After interviewing Reid and reviewing his records, she submitted a declaration indicating that children in foster care for an extended period and in multiple placements, such as Reid, often develop serious mental and emotional disorders, that they "fear abandonment and have difficulty developing trust or forming stable relationships." *Id*. at 98 (citing Kessel Decl., ¶ 11). She also indicated that Reid "had a substantially impaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law, primarily as a result of cognitive dysfunction." *Id*. (citing Kessel Decl., ¶ 20). Reid also submits that a reasonable investigation by trial counsel would have revealed that Reid suffered from a history of head injuries, and that, as a result, a neuropsychological evaluation could have lead an expert to determine that Reid suffered from various cognitive disorders (e.g., organic brain damage), personality disorders (e.g., fear of abandonment, inability to regulate feelings and make choices in his best interests), and polysubstance abuse. *Id*. at 98-99 (Kessel Decl., ¶¶ 16-18).

Reid's arguments overlook the procedural history of this case, and in particular, the fact that trial counsel's request for funding to obtain a private psychologist was denied by the trial court. *See* N.T., 1/10/1991, at 8.4-11. At the time of trial and prior to the penalty phase hearing, trial counsel requested that funding be provided to employ a psychologist, Dr. Gerald Cook, to interview Reid. *Id*. at 8.4. The trial court denied the request, stating that Reid "ha[d] been examined by psychiatrists on numerous occasions" for the purpose of determining competency and that those examinations sufficed. *Id*. at

8.5, 8.11. In denying the request, however, the trial court offered counsel an alternative approach, advising that Reid could be examined for the purpose of providing expert mental health testimony by a psychiatrist employed by the City of Philadelphia on contract from Temple University Hospital and paid for by the court. *Id*. at 8.8. Reid's counsel refused the offer. On direct appeal, this Court found no error in the trial court's decision, stating that we "perceive no constitutional violation, error of law, or abuse of discretion" because the trial court did not preclude Reid from being examined by a psychologist for the purpose of mitigation. *Reid*, 642 A.2d at 457. Instead, we indicated that the trial court's decision "merely precluded the excessive use of public funds for [Reid] to hire his own particular psychologist." *Id*.

In his supplemental amended PCRA petition, Reid argues that while trial counsel properly requested the funds for a mental health expert, he was ineffective "in laying out the reasons why a mental health expert was necessary." Supplemental Amended PCRA Petition, 4/15/1999, 2, 20. This claim lacks merit. As noted, this Court has already ruled that the trial court's decision to deny funds for an independent expert was not error. Moreover, trial counsel could not have been ineffective in failing to convince the trial court that a mental health expert was necessary, as the trial court never ruled that an expert witness was unnecessary. Instead, the trial court ruled that Reid was not entitled to the funds necessary to retain an independent expert and would have to utilize the services of a mental health expert on contract from Temple University Hospital. N.T., 1/10/1991, at 8.8.

Given our ruling on direct appeal, Reid's only available ineffectiveness claim at this stage of the proceedings would be that trial counsel failed to utilize the services of one of

the Temple University Hospital mental health experts who would have testified to the cognitive and/or developmental deficiencies upon which he now relies. It may well be that the experts available to trial counsel were unwilling to opine in a manner beneficial to Reid, in which case, counsel would not be ineffective. Reid's claim is devoid of this essential element and thus, no relief is available.

Life History mitigation

At the penalty phase of Reid's trial, his trial counsel called four witnesses, each of whom offered only very brief testimony. As Reid points out, trial counsel's entire penalty phase presentation, including argument as to whether one of the witnesses could testify, lasted little more than ten minutes and was set forth in approximately fifteen transcript pages. Reid's Brief at 89. The first witness called was Kim Caldwell, who testified that Reid had recently embraced a "moral philosophy."[44] Three of Reid's foster sisters then provided testimony, all indicating that their foster family life was difficult and impoverished, that they loved Reid, but also, that they had been more successful than Reid. *Id*. at 90 (citing N.T., 1/10/1991, 8.44-61). Each of Reid's foster sisters – Lydia Banks, Lillian Elaine White, and Linda Curry – testified that they grew up together under the care of their foster mother, Georgia Hawkins, in a poor neighborhood in North Philadelphia. N.T., 1/10/1991, at 8.47-49 (Banks); 8.55 (White); 8.59 (Curry). According to their scant testimony, they grew up in poverty amongst seven or eight other foster children in a very

[44] Caldwell stated that Reid had embraced a "philosophy that deals with morality" that requires "change and reform" and also, that he was an active participant in that philosophy. N.T., 1/10/1991, at 8.46-47. As is discussed further in the subsequent claim, counsel was prohibited from bringing to light that Reid had become a participant in a "major religion;" that the religion was Islam; and that he had adopted a moral philosophy that believes in a God. N.T., 1/10/1991, at 8.44-47.

small house. *Id*. at 8.49. Banks testified that Reid was taken from his biological parents when he was six or seven months old, and she did not know if Reid ever knew or saw his biological parents, as he spent his entire childhood in foster care. *Id*. at 8.47-49. She stated that he is a "smart and kind person" and that she had never seen "any wrong" in Reid. *Id*. at 8.50. White said that he is "a loyal and kind brother who loves his family dearly" and "there is nothing he wouldn't do for his family." *Id*. at 8.55-56. Curry described Reid as a "sweet and intelligent and nice person." *Id*. at 8.59-60. Essentially, Banks, White and Curry opined only that Reid was a "good person."

On cross-examination, the prosecutor drew attention to the discrepancy between Reid's criminality and his foster sisters' success. They had graduated from high school and held steady employment, while Reid dropped out of high school in ninth grade. N.T., 1/10/1991, at 8.57. White graduated high school and had been working for General Electric for one year and a half. *Id*. at 8.57. Curry worked as a food service supervisor, *id*. at 8.60-61, and Banks worked full-time as a special education teacher. *Id*. at 8.52. The prosecutor also used their testimony to illustrate that they had all been taught right from wrong. *Id.* at 8.50, 8.59-60. On redirect examination, trial counsel asked Banks why she "made it and Mr. Reid didn't," to which she replied that their foster parents (the Hawkins) were old by the time Reid was a child and that they "might not have been able to give [Reid] what he needed[.]" *Id*. at 8.53. Taken as a whole, the testimony of Reid's foster sisters resulted in more harm than good for him, as the prosecutor was able to discount the notion that Reid's difficult childhood explained his violent nature — as others living in the same conditions succeeded in lives without any similar violence.

Contrary to the scant evidence actually presented, Reid claims that there was a wealth of available mitigation evidence that could have, and should have, been submitted to the jury. According to Reid, trial counsel conducted no meaningful pre-trial mitigation investigation and failed to develop anything more than a skeletal life history for the jury's consideration. Reid's Brief at 88. As the affidavits of Reid's foster sisters attest, trial counsel did not interview them prior to their testimony, having just met them briefly outside of the courtroom immediately before their testimony began. *Id.* at 90. Trial counsel likewise did not meet with or interview other available witnesses, including Reid's other foster sister, his foster mother, and his birth mother. *Id.* No records relating to his childhood were ever obtained, including from the public schools, the Women's Christian Alliance (which supervised his foster care), the Pennhurst State School and Hospital (relating to his mother's intellectual disability), and the Salvation Army. Finally, Reid argues that trial counsel presented the jury with no evidence to explain how he was drawn into the "family-like" structure of a gang so that the jury might understand his gang membership "as a symptom of and result of his troubled life, rather than as a sign that he was inherently violent and should die." Supplemental Amended PCRA Petition, 4/15/1999, at 3.[45]

[45] Reid first raised the lack of mitigation evidence claim in his supplemental amended PCRA petition of April 15, 1999. Our procedural rules permit a judge to "grant leave to amend … a petition for post-conviction collateral relief at any time" and indicate that "[a]mendment shall be freely allowed to achieve substantial justice." Pa.R.Crim.P. 905(A). Reid requested to file an amended petition, gave a reason for needing additional time to file it, and indicated the claims he intended to raise. *See Commonwealth v. Porter*, 35 A.3d 4, 12 (Pa. 2012) (finding issue raised in supplemental pleading waived because, "there [wa]s no indication that [Porter] ever requested, or that the PCRA court ever granted, leave to amend the [first] petition at all, much less to amend it to include a new and unrelated claim"). Moreover, the Commonwealth did not then and does not now

Reid points out that, in their affidavits filed in connection with his supplemental amended PCRA petition, Banks, White and Curry all provided detailed accounts of their experiences and observations regarding Reid's difficult childhood. For example, White testified in her affidavit that the two of them were removed from the Hawkins foster home when he was seven and she was eight and placed in a different foster home (owned by foster parents named Yelverton). Lillian Elaine White Decl., ¶ 6. She described life in the Yelverton's home as "horrible." The two of them were locked in the house while the Yelvertons took their own children out. *Id.* Mrs. Yelverton frequently beat Reid with an extension cord. *Id.* ¶ 8. Although White was returned to the Hawkins foster home within a year, Reid remained at the Yelverton home for several more years. *Id.* ¶ 8. White recalled that Reid suffered at least two serious head injuries, one after being hit by a baseball bat and another after running into a bannister. *Id.* She indicated that Reid suffered depression as a result of his abandonment by his mother, who often said she was going to visit him but sometimes did not show up as promised. *Id.* ¶ 10-11. As he grew older, White said that he began to hang out on the street with boys who frequently got in trouble, and soon thereafter he dropped out of school. *Id.* ¶ 12. The Hawkins were too old and sick to intervene effectively to get him on the right track. *Id.* White ended her affidavit by indicating that she testified on Reid's behalf "only to ask for mercy. No one asking me about [Reid] and what his life was like. If anyone had asked I would have given them the same information as I have given in this statement and would have told it in Court, under oath." *Id.* ¶ 13.

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object to his filing. The PCRA court did not rule on his request, but instead, years later, stated that it would address the issues in the supplemental amended petition (and did so).

As to the second prong of the ineffectiveness test, Reid argues that counsel could have no reasonable basis for failing to conduct the above-described investigation. Absent such investigation, "counsel could not make reasonable, informed decisions about what to present to the jury." Reid's Brief at 97.

As to the third prong, Reid asserts that trial counsel's deficient performance resulted in prejudice, in that it is reasonably likely that at least one juror would have voted for a life sentence based upon the alternative mitigation case that he submits on PCRA. *Id*. at 97 (citing *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (prejudice is a question of whether "one juror would have struck a different balance"). He argues that trial counsel could have presented persuasive mitigation evidence, "including evidence about [] Reid's childhood, which was marred by severe poverty, abuse, neglect and abandonment[.]" *Id*. at 100. Specifically, trial counsel could have painted the following picture:

> Anthony Reid is the child of Jessie Davis and Georgia Reid. He has never had any contact with his natural father. When Mr. Reid was conceived, his mother was AWOL from the notorious Pennhurst State School, where she had been committed for mental retardation [i.e., intellectual disability] as a teenager after she was found wandering in the streets. Georgia Reid Decl., A300-01; Pennhurst State School Records, A403-08.
>
> Shortly after his birth, Mr. Reid was placed in foster care, first in a temporary Department of Public Welfare foster home, and then in more permanent foster homes. Georgia could not decide whether to put him up for adoption. She visited him occasionally after he was placed in the foster homes. Once he was older, she frequently wrote to him, promising that she would come to get him, but she never did, leaving him devastated. Georgia Reid Decl., A300-01; [Lydia] Banks Decl., A184-47; Stanell Yelverton Decl., A195-97.
>
> Mr. Reid was developmentally slow during the first year of his life. This was attributed to the foster parents' failure to provide sufficient stimulation for him. Foster Care Records, A102-37.

> Mr. Reid's physical needs were taken care of by his foster parents, James and Georgia Hawkins, but he also experienced significant neglect and abuse in the Hawkins home. [Linda] Curry Decl., A188-90; Sandra Leonard Decl., A191-92; [Lydia] Banks Decl., A.184-87. At age nine, however, he was removed along with a younger foster sister from the Hawkins home and placed in another foster home, that of the Yelvertons. Both of them were abused and neglected by the Yelvertons. [Lillian Elaine] White Decl., A181-83; [Lydia] Banks Decl., 184-87. A year later, Elaine was allowed to return to the Hawkins home, but, to his distress, [Reid] had to stay with the Yelvertons. Stanell Yelverton Decl., A195-97; Marcia Yelverton [Decl.], A198-99.

Reid's Brief at 96-97. Records regarding Reid's early life could have shown the jury that Reid was "not yet ready to read" at seven years old, was held back a year, needed "constant direction;" was wetting his bed in sixth grade; was sucking his thumb at sixteen years old; and was not considered for adoption because he was "functioning in the dull normal range." *Id*. at 91-92.

Reid also stresses that trial counsel should have presented evidence in the penalty phase to contradict the Commonwealth's focus on Reid's gang membership in the JBM. Supplemental Amended PCRA Petition, 4/15/1999, at 29-32. Reid contends that if trial counsel had obtained his school records, he could easily have identified Reverend John Teagle, who would have offered testimony regarding his observations of Reid beginning when he was around sixteen or seventeen years old. *Id.* at 30. Reverend Teagle would have testified that Reid was not as "streetwise" as other boys in the neighborhood, who were able to talk Reid into helping them with their schemes, including the selling of drugs, by promising him a portion of the money received (and would then often cheat him out of it). *Id.* Reverend Teagle indicated that Reid considered the JBM to be his surrogate family, as he had never felt he was a part of the Hawkins' family. *Id.* Reverend Teagle

also concluded his affidavit by indicating that he was never contacted by any lawyer who represented Reid, but if he had been he would have freely shared what he know about Reid's background. *Id.*

The Commonwealth takes the position that Reid establishes genuine issues of material fact and therefore is entitled to remand for an evidentiary hearing. Commonwealth's Brief at 48. It agrees that counsel was obligated to secure the necessary records related to Reid's foster care placement. *Id*. at 46. It also agrees that trial counsel was ineffective for failing to investigate and present available mitigation regarding his foster care situation, his school records, his mother's medical history, his abusive and deprived childhood, and the expert medical opinions regarding organic brain damage. *Id*. The Commonwealth submits that this Court should also consider "the impact of the prosecutor's closing remarks[,]" which "took advantage of the brevity and superficiality of the mitigation presentation[,]" contained references to God and quotations to the Bible, "which might today require reversal." *Id*. at 48. The Commonwealth states that it "cannot be confident that the jury's verdict was not the constitutionally unacceptable product of passion." *Id*. at 48 (citing 42 Pa.C.S. §9711(h)(3) (providing that this Court "shall affirm the sentence of death unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor")).

By drawing a sufficiently strong contrast between the evidence actually presented at the penalty phase of trial and what could have been presented if trial counsel had conducted a more thorough investigation of available mitigation evidence, Reid has demonstrated that the PCRA court erred in denying him an evidentiary hearing on this claim. *See Commonwealth v. Ligons*, 971 A.2d at 1125, 1149 (Pa. 2009) ("Generally, the

question of whether the PCRA court erred in its determination that trial counsel was ineffective for failing to investigate and present sufficient mitigating evidence depends upon a myriad of factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented."). "The reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation." *Commonwealth v. Rainey*, 928 A.2d 215, 239 (Pa. 2007) (citing *Commonwealth v. Hughes*, 865 A.2d 813-14 (Pa. 2004)). The Commonwealth does not contest either that trial counsel did not know, inter alia, of Reid's history of foster care, or that further investigation (including meeting with any of his actual witnesses or available family members) would have revealed useful mitigating evidence.

To reverse a PCRA court's decision to dismiss a petition without a hearing, an appellant must show that he raised "a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing." *Commonwealth v. Hanible*, 30 A.3d 426, 452 (Pa. 2011). For the reasons stated hereinabove, I would conclude that Reid has met this standard and that the case should be remanded to the PCRA court for an evidentiary hearing on this issue.

II. Evidence of conversion to Islam

During the penalty phase, Reid called Kim Caldwell as a witness to testify regarding Reid's conversion to Islam, how he was an "active and devout Muslim who renounced violence, had adopted and followed a strict set of religiously-based guidelines for conducting one's affair, and now adhered to the righteous path of the God-loving." Reid's Brief at 107. He submits that witnesses were prepared to testify to those facts, as

well as the sincerity of his conversion, *id*.; however, when counsel asked Caldwell "what faith" Reid converted to, the trial court interrupted and called counsel to sidebar. N.T., 1/10/1991, 8.45. The trial court instructed counsel not to "bring religion into this Courtroom" since "[i]t is against the law[.]" *Id*. Trial counsel objected, but conformed his questioning to the trial court's instructions by inquiring as to whether Reid had "embraced any philosophy that deals with morality[]" and refraining from comment on religion. *Id*. at 8.46. Reid complains of the trial court's restriction on presenting evidence that he had converted to Islam while in prison. He alleges that appellate counsel was ineffective for failing to properly preserve and brief this issue. Reid's Brief at 107.

Reid argues that appellate counsel should have argued to this Court on direct appeal that the trial court's prohibition against admission of this evidence violated both United States Supreme Court precedent and the PCRA. Reid's Brief at 108. He complains that appellate counsel should have cited authority to support this position. *Id.* (citing 42 Pa.C.S. § 9711(e)(8) (providing that "[m]itigating circumstances shall include" inter alia, "any aspect of a defendant's character and record") and *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the Eighth and Fourteenth Amendment require that the jury in a death penalty case, not be precluded from considering "any aspect of a defendant's character or record")). He argues that his conversion to Islam during the thirty months while awaiting re-trial was relevant and admissible mitigation. *Id*. In particular, "[h]is acceptance of strict religious moral teachings, the sincerity with which he made this conversion, and his religiously based renunciation of violence are all factors the jury could use to assess his 'probable future behavior' and constitute 'evidence that the defendant

would not pose a danger if spared.'" *Id*. at 108-109 (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)).

The Commonwealth agrees that the trial court erred in precluding Reid from presenting evidence regarding his conversion to Islam. Commonwealth's Brief at 50-51. It argues that the characterization of Reid's reformation as adherence to "a philosophy that deals with morality" (N.T., 1/10/1991, 8.46) was an inadequate substitute because embracing a philosophy is not equivalent with a sincere religious conversion. *Id*. With regard to prejudice, the Commonwealth stated that it "is unwilling to conclude … that no juror would have voted for life based upon the precluded mitigation evidence." *Id*. at 51.

Reid and the Commonwealth are correct that any relevant mitigation evidence is admissible and that the trial court had no lawful basis for confining counsel to general references to morality rather than Islam. The PCRA court and trial court offered no legal basis to exclude such references from the defendant's mitigation case. Precluding counsel from exploring this area of questioning in terms of Islam meant that counsel was unable to present testimony as to the sincerity of Reid's conversion. As *Lockett* provides, the Eighth and Fourteenth Amendment require that the penalty phase jury "not be precluded from considering, **as a mitigating factor**, any aspect of defendant's character[.]" *Lockett*, 438 U.S. at 604-05 (emphasis in original).

This issue, like the previous issue, implicates the fullness with which counsel explored mitigation and humanized Reid. As such, and because I would remand for an evidentiary hearing regarding mitigation, I would remand with instructions for the PCRA court to consider whether it should cumulate this error with the failure to investigate and

prepare the mitigation case when determining whether Reid suffered prejudice.[46] As this Court has recognized, "if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation." *Raymond Johnson*, 966 A.2d at 532 (providing that multiple assertions of trial counsel's ineffectiveness, when intertwined, "may fairly be considered together"); *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994) (considering multiple instances of ineffectiveness "in combination" to establish prejudice).

III. Simmons instruction

In his third penalty phase issue, Reid argues that the trial court erred in failing to inform the jury, upon counsel's request, that life means life without parole. Reid's Brief at 112 (citing *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994)). He explains that trial counsel requested such an instruction at trial, N.T., 1/10/1991, at 8.21 and that the jury in fact requested the court to "define life imprisonment," *id*. at 8.100, but the trial court refused to do so. *Id*. at 8.101-02. Reid's counsel requested the trial court define life, but did not object when the instruction was not given. *Id*. at 8.102. Appellate counsel did not pursue the issue on appeal. Reid therefore complains that appellate counsel was ineffective for failing to advance this issue on appeal.

The Commonwealth asserts that trial counsel cannot be ineffective for failing to request a *Simmons* instruction because "*Simmons* was decided after defendant's trial, and does not apply retroactively on collateral review." Commonwealth's Brief at 49. The

[46] One could argue, that the prohibition on naming Reid's religion and stating that he now believed in God did not result in prejudice sufficient to require a new penalty phase. I tend to agree that this error standing alone may not have resulted in prejudice. It is for that reason that I recommend further consideration and cumulation of prejudice by the PCRA court on remand.

Commonwealth draws attention to *O'Dell v. Netherland*, 521 U.S. 151 (1997), where the United States Supreme Court held that *Simmons* announced a new procedural rule that was not watershed and therefore, does not apply retroactively under *Teague*. *Id*.

According to the well-established law, a capital defendant is entitled to such an instruction when the prosecutor puts future dangerousness at issue. *Simmons*, 512 U.S. at 156. Here, Reid and the Commonwealth agree that the prosecutor put Reid's future dangerousness at issue by arguing to the jury that Reid is "[a] menace to all living things" and by asking the jury "How many more? Only you can answer that question… I implore you, stop Anthony Reid." N.T., 1/10/1991, at 8.68-72. Through these arguments, the prosecutor explicitly asked the juror to conclude that Reid would be a significant future danger, and it implicitly asked the jury to prevent this future danger by sentencing Reid to death.

However, the Commonwealth and Reid disagree about whether *Simmons* applies to this PCRA appeal. Initially, there is no question that *Simmons* was announced while Reid was on direct appeal, and that, if it had been properly raised, he would have been entitled to its benefit. This Court issued its opinion on direct appeal on May 24, 1994, and *Simmons* was decided on June 17, 1994, within Reid's window for filing a petition for a writ of certiorari to the United States Supreme Court. *See Shea v. Louisiana*, 470 U.S. 51, 55 n.3 (1985) (observing that, had this case been pending on certiorari when the new rule was announced, "it surely would have been remanded, as were other such cases, for reconsideration in light of the new rule announced"); U.S. Sup.Ct. Rule 13 (providing that a petition for a writ of certiorari is timely when it is filed within ninety days of the entry of judgment). Because he fell within that window, Reid's judgment was not yet final, and

he would have been entitled to the benefit of *Simmons*, subject to rules of procedural default. *See id*. at 59 n.4 (citing with approval to Justice Harlan's view that "cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final").

Nonetheless, as this Court recognized in *Commonwealth v. Tilley*, 780 A.2d 649, 652-53 (Pa. 2001), and *Commonwealth v. Sneed*, 899 A.2d 1067, 1076-77 (Pa. 2006), trial counsel and appellate counsel will not be deemed ineffective for failing to perfect an appeal with regard to an issue that is not supported in the law at the time it could have been raised. *See Sneed*, 899 A.2d at 1076 ("Counsel clearly cannot be faulted for failing to raise a *Batson* objection at trial because *Batson* did not yet exist.") At the time they could have raised and preserved this *Simmons* issue, trial and appellate counsel had no duty to do so, since *Simmons* had not been announced. *See Commonwealth v. Christopher Williams*, 936 A.2d 12, 28 (Pa. 2007) (stating that "[t]rial counsel, of course, cannot be deemed ineffective for failing to predict a change or development in the law"); *Commonwealth v. Gribble*, 863 A.2d 455, 464 (Pa. 2004) (providing that "appellant must demonstrate that counsel was incompetent under the law in existence at the time of trial. Counsel cannot be deemed ineffective for failing to predict developments or changes in the law."). As such, neither trial counsel nor appellate counsel was ineffective for failing to preserve the issue of trial court's failure to instruct the jury regarding the meaning of life imprisonment.[47]

[47] Notably, Reid does not set forth an argument or develop a claim that appellate counsel could have raised the *Simmons* issue once *Simmons* was decided, i.e., through a petition for certiorari to the United States Supreme Court, and that he would have therefore been entitled to relief on that basis.

Conclusion

I dissent from the Majority's determination that this Court does not have jurisdiction to consider the merits of this appeal. Furthermore, having concluded that Reid is entitled to an evidentiary hearing regarding his penalty phase claim of trial counsel's ineffectiveness for failing to conduct an adequate mitigation investigation and presentation, I would remand to the PCRA court with instructions to conduct an evidentiary hearing. In considering the prejudice occasioned by trial counsel's ineffectiveness in the penalty phase, I would also instruct the PCRA court to consider the impact of the trial court's restriction of Reid's evidence regarding his conversion to Islam. In all other respects, I would affirm the PCRA denial of relief.

Justice Wecht joins this dissenting opinion.

Judge McCaffery joins Section Three of Justice Donohue's Dissenting Opinion affirming the PCRA court's denial of relief in most respects but remanding for an evidentiary hearing regarding certain penalty phase claims.