Received 11/09/2026 03:28 PM Supreme Court Eastern District

Filed 11/09/2026 03:28 PM Supreme Court Eastern District
34 EAP 2026

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 34 EAP 2026

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JEROME COFFEY,

Appellant.

BRIEF FOR APPELLANT

Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1452 EDA 2024, dated December 24, 2025, Affirming the Order of the Court of Common Pleas of Philadelphia County at CP-51-CR-0441911-1993 dated April 25, 2024

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STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 42 Pa. C.S.A. § 724(a) (relating to allowance of appeals from Commonwealth and Superior Court).

ORDER IN QUESTION

Mr. Coffey appeals the order of the Superior Court affirming the Court of Common Pleas' dismissal of his Post-Conviction Relief Act (PCRA) petition, which states in relevant part:

> In short, we determine that Appellant has not met his burden with respect to his multiple claims on ineffective assistance of counsel or the Commonwealth's violations of Brady. Accordingly, we have no cause to disturb the PCRA court's order dismissing Appellant petition.
>
> Order affirmed.

Appendix A, 53.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's standard of review for challenges to the legality of a sentence is *de novo,* and its scope of review is plenary. *Commonwealth v. Davidson,* 938 A.2d 198, 203 (Pa. 2007); *Commonwealth v. Batts,* 66 A.3d 286, 295 (Pa. 2013).

STATEMENT OF QUESTIONS PRESENTED

This Court granted Mr. Coffey's Petition for Allowance of Appeal with respect to the following question:

> Does this Court's decision in *Commonwealth v. Lee* finding mandatory life-without-parole unconstitutional for second-degree murder convictions apply retroactively?

Not raised or answered by the court below.

STATEMENT OF THE CASE

For thirty-three years, Jerome Coffey has been serving a mandatory sentence of life without the possibility of parole for felony murder. He was sentenced to die in prison, not because a judge or jury determined that life without parole was an appropriate sentence after considering his individual role in the crime, but because Pennsylvania law mandated it. The Pennsylvania Supreme Court has since recognized in *Commonwealth v. Lee*, 357 A.3d 356 (Pa. 2026) that this mandatory sentencing scheme is cruel and unconstitutional. Yet Mr. Coffey, along with approximately 1,100 other people serving the same sentence, remains imprisoned without the benefit of that constitutional protection.[1]

Mr. Coffey's case, riddled with constitutional deficiencies, exemplifies the need for retroactive relief. While Mr. Coffey has maintained his innocence for over three decades, the only witness who claimed to have observed the shooting testified that it was not Mr. Coffey. The Commonwealth's theory at his capital trial was that Mr. Coffey moved the victim from one vehicle to another before an unidentified co-

[1] According to records provided by the Department of Corrections ("DOC") which were compiled in January of 2026 and provided to counsel for Mr. Coffey, 1,148 people in DOC custody are serving sentences for second-degree murder convictions. This figure includes some individuals with term-of-years sentences that allow for parole eligibility, and it does not include individuals convicted of felony murder when that offense was classified as first-degree murder prior to a statutory change in 1974 which created the Commonwealth's current designation of degrees of murder.

conspirator shot and killed him. The Commonwealth presented no physical evidence connecting him to the killing. The only other co-defendant charged in relation to the homicide, Lee Smith, was acquitted of all charges. Mr. Coffey, however, was convicted of second-degree felony murder and sentenced to mandatory life without parole.

The evidence against Mr. Coffey consisted of two eyewitnesses whose initial descriptions of the assailant did not match him; a jailhouse informant whose testimony was contradicted by jail staff; a witness who recanted prior to trial and whose testimony is now known to have resulted from police coercion; and a juvenile witness whose testimony against Mr. Coffey consisted solely of unconstitutional hearsay. Notably, the recanting witness was the only witness whose testimony did not also implicate the acquitted co-defendant.

Mr. Coffey's efforts to challenge his conviction were further undermined by years of ineffective representation and abandonment by court-appointed appellate counsel. The Superior Court conceded that in Mr. Coffey's case there were "procedural missteps at nearly every level, for an unacceptable amount of time," and that "the court system is not free from fault." Appendix A, 46. His direct appeal, which raised only a single ancillary legal claim, was not completed until 2013, nearly two decades after his conviction. His timely first petition under the Post Conviction Relief Act (PCRA) led to the discovery of suppressed evidence and sworn testimony

that could have been used to impeach the only witness who testified only against Mr. Coffey and not his acquitted co-defendant. Relief under the PCRA was denied and affirmed by the Superior Court on the bases of prejudice and materiality. Subsequent to the Superior Court's ruling and prior to Mr. Coffey filing his Petition for Allowance of Appeal, this Court decided *Commonwealth v. Lee* and held that mandatory life without parole sentences for felony murder convictions are unconstitutional. Thus, Mr. Coffey's appeal to this Court presented the first opportunity for him to raise a challenge to the legality of his sentence under *Lee.*

This Court granted an allowance of appeal limited to the issue of determining whether the Pennsylvania's Supreme Court's decision in *Commonwealth v. Lee* finding mandatory life without parole unconstitutional for felony murder convictions applies retroactively. Mr. Coffey has now spent thirty-three years incarcerated under a sentence that Pennsylvania's highest court has recognized as unconstitutional. Over a thousand others remain in the same position.

I. Factual Background

On the evening of December 12, 1992, Johnny Moss was shot and killed. Two cars boxed him in on the side of the road in front of a family member's home in Philadelphia while speaking with his brother, Walker Moss. N.T. 6/7/94, p. 192. Three individuals exited their cars, while the driver of one remained inside. *Id.* One individual, who prosecutors argued was Mr. Coffey, shouted "Task Force" and

pulled Johnny Moss from his own car into one of the arriving cars. *Id.* Prosecutors argued that another individual, Lee Smith, shot at Johnny's brother, Walker Moss, striking him in the arm. *Id.* at 193. A third individual then fatally shot Johnny Moss. N.T. 6/8/94 at 136. Though Mr. Coffey was not charged with the crime of kidnapping in this case, the prosecution argued that the act of taking Johnny Moss from his own car into another car constituted kidnapping, a predicate felony for a second-degree felony murder conviction.[2] N.T. 6/15/94 at 130 (prosecutor's closing argument); 6/15/94 at 34-37 (charge to jury).

Mr. Coffey and Lee Smith were tried jointly in June of 1994 in a case that rested solely on witness testimony. Walker Moss testified at trial that he was shot by Lee Smith, and that he saw Mr. Coffey come out of the driver's side of the car door, yell "Task Force", and pull Johnny Moss out of his Jeep. N.T. 6/7/94, p. 201-04. He testified that he did not see the shooting of Johnny Moss, and did not identify the shooter. *Id.* at 204-07. Clarence Moss testified at trial that he saw both Mr. Coffey and his co-defendant Smith on the night of the murder, that he saw Smith shoot Walker, and that he saw Mr. Coffey near Johnny by the other car. N.T. 6/8/94, 126-

[2] Under Pennsylvania law, a defendant can be convicted of felony murder if the jury finds that he committed one of the underlying felonies enumerated in the second-degree murder statute even if that underlying felony is not brought as a standalone charge. *Commonwealth v. Madison*, 462 A.2d 228, 232 (Pa. 1983).

27, 144-45; 6/9/94, pp. 87-88. He testified that he saw a third, unnamed man shoot Johnny Moss. *Id.* N.T. 6/8/94 at 136.

Nemo Kennedy testified that Mr. Coffey came to his house with several other men on the night of the murder and stated that he "just did something," and he testified that Mr. Coffey implicitly confessed to him over the phone two days later. N.T. 6/7/94, pp. 95-98. Kennedy also testified that he consumed PCP, or angel dust, in addition to codeine and marijuana coated in embalming fluid, both on the night of December 12, 1992, and the date of his initial statement to police in March of 1993. *Id.* at 156, 159-160. He was not impeached with any prior sworn testimony, despite having testified under oath at his material witness bond hearing days before his appearance at trial that police had threatened himself and his aunt, and that he did not recall seeing Mr. Coffey at his home on December 12, 1992. N.T. 5/24/94, p. 81-93. Mr. Coffey's trial counsel had inexplicably absented himself from that bond hearing. *Id.* at 30.

Jailhouse informant Frank Singleton testified at trial to an alleged conversation with Mr. Coffey in jail a year before trial claiming Mr. Coffey threatened to "do" his sister, Latoya Singleton, if she testified. N.T. 6/9/94 at 152-53. He also testified that Lee Smith confessed to him that Smith had "pulled the trigger" on Johnny Moss. N.T. 6/9/94 at 155. His testimony was impeached by a jail

official, who demonstrated that Singleton and Coffey were never in the same dormitory at the same time. N.T. 6/14/94, p. 66-70.

Latoya Singleton testified at trial on the morning of June 10, 1994. Transcripts of Singleton's testimony were lost after trial and have never been located or reproduced.

Mr. Coffey's trial counsel, Attorney Michael G. Floyd, presented an alibi defense on Mr. Coffey's behalf at trial. In support of this defense, he called Mr. Coffey's sister, Jean Coffey, and his mother, Daisy Coffey. Both testified that Mr. Coffey was at home during the shooting putting together a crib for his sister, who had come home from the hospital that same day with her newborn. N.T. 6/14/94, pp. 9-11, 13:18-24 (Daisy Coffey); *Id.* at 84:11-24, 87 (Jean Coffey).

Mr. Coffey was convicted on June 17, 1994 of second-degree murder, criminal conspiracy, possession of an instrument of a crime, and aggravated assault. Certified Exhibits (hereinafter "C.E."), Verdict Report.[3] He was found not guilty of first-degree intentional murder. *Id.* Lee Smith was acquitted on all counts. Mr. Coffey has been serving a mandatory sentence of life without parole for the second-degree murder conviction since that time.

II. Procedural History

[3] Mr. Coffey was sentenced to 5-10 years on the criminal conspiracy charge, 2.5-5 years for possession of instrument of a crime, and 5-10 years on aggravated assault. All of these sentences were imposed concurrent to each other and to his life without parole sentence.

Throughout direct appeal and his PCRA, Mr. Coffey has endured a tortured procedural history of missed deadlines, repeated withdrawals by court appointed counsel, delays, and missing transcripts that were never located. This current appeal, thirty-three years into his sentence, stems from a PCRA Petition that was timely filed within one year of the conclusion of his direct appeal.

After Mr. Coffey was convicted, trial counsel failed to file an appellate brief, resulting in the dismissal of his direct appeal. C.E., Superior Court Order of Dismissal 01/03/1996. Mr. Coffey's appellate rights were subsequently reinstated. Delays ensued, in part due to missing transcripts of testimony from several days of jury selection, the morning of June 10, 1994, and jury deliberation on June 17, 1994. Those transcripts were never located or reproduced. Over the next fifteen years, several new appellate attorneys were appointed and removed. One of these attorneys, Bernard Siegel, failed to file an appellate brief for Mr. Coffey before being publicly censured by this Court for repeated failure to file appellate briefs.[4] Mr. Coffey's right to direct appeal was again reinstated in 2011 while represented by Attorney Joseph O'Keefe. *See* C.R., Notice of Appeal 6/29/2011. Attorney O'Keefe withdrew after being appointed to the bench in July of 2012. Attorney J. Michael Farrell, who finally litigated Mr. Coffey's direct appeal beginning in 2012, was later incarcerated and

[4] *Compare* C.E., Order Appointing Substitution Counsel 08/03/2006 (appointment of Bernard Siegel); C.R., Superior Court Order Dismissing Appeal 09/24/2007; *Office of Disciplinary Counsel v. Siegel*, No. 72 DB 2009 (Pa. Oct. 7, 2009).

disbarred for several crimes committed while serving as consigliere for the Nicka crime syndicate from 2009-2013.[5]

Then-Attorney Farrell filed a direct appeal brief in December of 2012. He sought relief on a single issue, abandoning forty other properly preserved claims. On May 29, 2013, the Superior Court affirmed the judgment of sentence. C.R., Memorandum Affirming Judgment of Sentence 05/29/2013. On November 20, 2013, the Supreme Court denied an allowance for appeal. C.R., Order Denying Petition for Allowance of Appeal 11/20/2013.

On November 21, 2014, Mr. Coffey filed a timely *pro se* first PCRA Petition. Current counsel obtained discovery from the District Attorney's Office in 2021, including three documents that were never previously disclosed: a Statement from Renaldo Robichaw implicating Nemo Kennedy in the murder of Johnny Moss; a handwritten police note reflecting Walker Moss's statement on December 12, 1992 that he did not know but could identify the assailants, which contradicted his trial testimony that he knew Mr. Coffey prior to the night of the shooting; and a hospital record showing Jean Coffey's discharge on December 12, 1992, reinforcing a disputed point of Mr. Coffey's alibi. An Amended PCRA was filed by present

[5] *See Philadelphia Attorney Sentenced to 42 Months in Prison For Laundering Drug Proceeds and Witness Tampering: Defense Attorney was Consiglieri for Drug Organization*, United States Department of Justice (July 18, 2017), https://www.justice.gov/usao-md/pr/philadelphia-attorney-sentenced-42-months-prison-laundering-drug-proceeds-and-witness

counsel in February 2022 and supplemented in September 2022. C.R., Amended Petition 02/21/2022; Supplement to Amended Petition 09/02/2022. Based on those two PCRA filings, the court granted an evidentiary hearing, which was conducted in September 2023. Certified Transcripts of Testimony, 09/10-13/2023. Renaldo Robichaw, Nemo Kennedy, attorney Michael G. Floyd, Detective Steven Vivarina, former Assistant District Attorney Hugh Colihan, and fact witness Andre Edmonds testified.

Following post hearing briefing, Judge Glenn Bronson dismissed Mr. Coffey's PCRA petition on April 25, 2024. Appendix B. After briefing and oral argument, the Superior Court affirmed Judge Bronson's dismissal on the basis of prejudice, that there was no reasonable likelihood of a different outcome at trial, in an opinion and order dated December 24, 2025. Appendix A. Mr. Coffey sought reargument on January 7, 2026. The Superior Court issued an order denying his application for reargument on March 5, 2026.

On March 26, 2026, this Court issued its ruling in *Commonwealth v. Derek Lee,* holding that mandatory life without parole sentences for felony murder are unconstitutional under Article I, Section 13 of Pennsylvania's Constitution. Mr. Coffey sought an Allowance of Appeal from the Pennsylvania Supreme Court on April 3, 2026. He sought review of each issue decided by the Superior Court and raised the question of whether the holding in *Lee* would be applied retroactively to

cases on collateral review. Claims regarding the illegality of a sentence are not waivable and can be raised at any time. *Commonwealth v. Andrews*, 768 A.2d 309, 312 n.4 (Pa. 2001); *Commonwealth v. McIntyre,* 232 A.3d 609, 617-19 (Pa. 2020); *Commonwealth v. Thorne*, 276 A.3d 1192, 1196-98 (Pa. 2022).

On September 29, this Court granted Allowance of Appeal on one issue: whether this Court's decision in *Commonwealth v. Lee* finding mandatory life without parole unconstitutional for second-degree murder convictions applies retroactively.

SUMMARY OF THE ARGUMENT

On March 26, 2026, this Court held for the first time that Article I, Section 13 of the Pennsylvania Constitution bestows greater protections on the citizens of the Commonwealth than the Eighth Amendment to the federal Constitution. It held that the Commonwealth's organic charter is violated by the mandatory imposition of a life without parole sentence on all individuals convicted of felony murder. Pennsylvania's strict liability felony murder law holds defendants who participate in one of the specifically enumerated felonies identified in the statute guilty of felony murder if an individual dies from a criminal homicide committed during the commission of that felony. As a matter of law, nobody convicted of felony murder in Pennsylvania has been found to have a specific intent to take a life, as the only *mens rea* in the felony murder statute is that pertaining to the underlying felony. This

statute sweeps up a wide range of culpability, including teenagers acting as lookouts or getaway drivers in robberies gone wrong and individuals who accidentally discharge a firearm resulting in death. Our Constitution does not tolerate the blanket application of the harshest imprisonment sanction under law to such a broad swath of conduct while expressly foreclosing the ability of a sentencing court to consider the facts of the offense and the characteristics of the defendant.

This Court held that cruelty has constitutional meaning in Pennsylvania. It held that this mandatory sentence is facially cruel. In Mr. Coffey's appeal, it will decide whether approximately 1,100 individuals whose convictions and sentences were imposed under this cruel and unconstitutional scheme must, nevertheless, die in prison. The question before this Court is whether the risk of cruelly disproportionate punishment, a risk held in *Lee* too great to tolerate, may nevertheless be continually imposed until death.

Justice and precedent require that this Court's ruling be applied retroactively. *Commonwealth v. Lee* announced a substantive rule, and its retroactive application flows from the longstanding judicial recognition that substantive rules require retroactive application, as exemplified in *Montgomery v. Louisiana*. But this Court can go further. Cruel punishments are constitutionally intolerable. This inviolable pillar of the constitutional order in Pennsylvania must apply prospectively and retroactively so that its moral force is given the full effect that it requires. The logic

underlying *Montgomery* – that unconstitutional sentences are void *ab initio*, and cannot legitimately be kept in place– has been recognized repeatedly by this Court. Clarifying that the void *ab initio* doctrine holds force in this Court's retroactivity analysis and establishing a bright line rule requiring retroactive application of new rules pursuant to Pennsylvania's cruel punishments clause will promote the efficient and fair administration of justice. Any ruling invalidating a sentencing scheme under Article I, Section 13 should be necessarily and automatically retroactive.

ARGUMENT

This case presents the first opportunity for this Court to determine whether a new rule of constitutional law established pursuant to the cruel punishments clause in Article I, Section 13 of the state constitution should be given retroactive application. The first step in this analysis requires the Court to determine what standard should apply in answering this question. As this Court has derived its retroactivity jurisprudence from the United States Supreme Court, the federal standards for determining retroactivity of new rules proscribing punishments provides a logical and compelling baseline to adopt for analyzing the retroactivity of new rules pursuant to the state cruel punishments clause. Such a baseline, as discussed *infra*, mandates the retroactive application of substantive rules. As *Lee* was a substantive rule that precluded the imposition of a particular punishment on a

category of offenders based on the offense they were convicted of, it must be given retroactive application to ensure fundamental fairness and constitutional justice.

I. *Lee* established a substantive rule prohibiting mandatory life without parole that requires retroactive application.

a. Pennsylvania Courts' independent retroactivity analysis derives standards from the Supreme Court of the United States, which requires the retroactive application of substantive rules.

The retroactive effect of Pennsylvania Supreme Court holdings is a matter of state law, subject to this Court's independent analysis. "The question of whether a state court decision announcing a new rule is to be applied retroactively or prospectively is squarely within the province of the state courts." *Dana Holding Corp. v. Workers' Comp. Appeal Bd*., 232 A.3d 629, 640 (Pa. 2020); *Blackwell v. Com., State Ethics Comm'n*, 589 A.2d 1094, 1098 (Pa. 1991); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). At the same time, this Court consistently turns to federal standards for retroactivity where they provide persuasive rules. The Pennsylvania Supreme Court's "retroactivity jurisprudence derives from that of the Supreme Court of the United States." *Dana Holding*, 232 A.3d at 637.

United States Supreme Court precedent on the retroactivity of judicial decisions provides a clear and administrable rule: substantive holdings – those which decriminalize categories of primary conduct or forbid punishments on classes of defendants because of their status or offense – must be given retroactive effect. This

rule is consistent with basic norms of constitutional adjudication and is binding as a "floor" of retroactivity on state courts with respect to federal constitutional rulings. It is independently consonant with core principles of longstanding Pennsylvania jurisprudence, and should be adopted as applicable to state constitutional decisions of this Court.

Pennsylvania courts have generally applied a test in criminal cases derived from *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Stovall v. Denno*, 338 U.S. 293 (1967) to determine when a court "could deny retroactive effect to a newly announced rule of criminal law." *Dana Holding*, 232 A.2d. at 638. This test requires balancing of "(1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect on the administration of justice by the application of the new rule." *Blackwell*, 589 A.2d at 1099. *Linkletter* balancing has coexisted with a general rule in criminal cases that requires retroactive application of new judicial decisions to cases pending on direct appeal. *Commonwealth v. Cabeza,* 469 A.2d 146, 148 (Pa. 1983); *see also Dana Holding*, 232 A.3d at 648-49.

Linkletter was later distinguished by the United States Supreme Court as applicable only to procedural rules. In *Robinson v. Neil*, the Court noted that it had repeatedly applied its holding in *Furman v. Georgia*, which struck down Georgia's death penalty, retroactively to death penalty cases on collateral review, without analysis of whether *Furman* met the *Linkletter* criteria. *Robinson v. Neil*, 409 U.S.

505 (1973). The Court held that "[i]n terms of some nonprocedural guarantees, this [*Linkletter*] test is simply not appropriate." *Id.* at 508. Striking down the death penalty, unlike a ruling on constitutional criminal procedure, was "tailored so as to deny the State only the authority to impose a punishment that we held unconstitutional," without the need to determine "the factual question of whether an offense had been committed." *Id.* at 509. The *Robinson* court found that its holding incorporating the double jeopardy prohibition against the States operated in the same fundamental way: it was "directed to the prevention of the second trial's taking place at all," no matter how scrupulously accurate the trial's factfinding procedures. *Id.* Without using the term "substantive," the United States Supreme Court held that this species of ruling – depriving the State of the power to try a defendant, or to impose a certain punishment – was entitled to retroactive effect.

Aligning with *Robinson*, the Pennsylvania Supreme Court consistently applied *Furman* to vacate death sentences on collateral review under the Post-Conviction Hearing Act without conducting a *Linkletter* balancing analysis. *See Commonwealth v. Raymond*, 304 A.2d 146 (Pa. 1973); *Commonwealth v. Ross*, 296 A.2d 629 (Pa. 1972); *see also Commonwealth v. Melton*, 351 A.2d 221, 223 n.1 (Pa. 1976). These cases illuminate the long historical record of giving retroactive effect to rules of constitutional law that limit the power of the government to impose specific punishments.

After its incorporation into Pennsylvania's retroactivity analysis, "the Supreme Court came to characterize *Linkletter* balancing" as "'unprincipled and inequitable.'" *Dana Holding*, 232 A.3d at 639 (*citing Teague v. Lane*, 489 U.S. 288, 304 (1989) (plurality op.)).[6] *Teague v. Lane* announced a clear standard for evaluation of cases on federal collateral review, plainly requiring retroactive application of new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe[.]" 489 U.S. at 308, 311.

Just four months after the plurality opinion in *Teague*, the U.S. Supreme Court described this retroactive class of new rules as those that are "substantive," equally applicable to the infliction of certain punishments as to primary conduct. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (*abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)). Prohibiting a specific punishment from being imposed on a category of individuals was "analogous to a new rule placing certain

[6] *See also Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (describing United States Supreme Court retroactivity caselaw between *Linkletter* and *Teague* as "somewhat confused and confusing.") Following the incorporation of this standard, Pennsylvania courts have applied retroactivity standards unevenly and inconsistently. *See* Hinshaw et al., 1 Standard Pennsylvania Practice 2d § 2:269 ("It is not clear that Pennsylvania follows any one particular rule for determining the retroactive effect of new decisions, but rather, several approaches have been used"). *Blackwell* itself has been aptly described as "not a model of clarity." *Dana Holding*, 232 A.3d at 650 (Dougherty, J., concurring). While not "overrule[d] in its entirety," the *Dana Holding* Court chose to "deconstruct" *Blackwell*. *Id.* at 649.

conduct beyond the State's power to punish at all;" "[i]n both cases, the Constitution itself deprives the State of the power to impose a certain penalty." *Id*.

In *Montgomery v. Louisiana*, the United States Supreme Court applied the mandate of *Teague* to its decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which struck down mandatory life without parole from being imposed on children. *Montgomery* held that vis-à-vis federal constitutional rulings, state "courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" 577 U.S. 190, 198 (2016) (*quoting Penry*, 492 U.S. at 330).

Montgomery held that the rule in *Miller v. Alabama* was substantive and, thus, necessarily retroactive. *Id.* at 212. In reaching this conclusion, the *Montgomery* court noted that *Teague*'s treatment of substantive rules was not novel; rather, it "continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Id.* at 202. An unconstitutional law "cannot be a legal cause of imprisonment." *Id.* at 202-03 (*citing Ex Parte Siebold*, 100 U.S. 371, 376-77 (1880); *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting) ("Since, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he

remain in jail"); Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970) ("the original sphere for collateral attack on a conviction" included cases in which "the sentence was one the court could not lawfully impose")). Following *Teague* and *Montgomery*, "a court generally has 'no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.'" *Commonwealth v. Cobbs*, 256 A.3d 1192, 1212 (Pa. 2021) (*citing Montgomery*, 577 U.S. at 203).

b. This Court should adopt *Teague*'s analysis that substantive rules must be given retroactive effect as a matter of Pennsylvania law.

This Court has not yet had occasion to apply the *Teague* framework to its independent analysis of new state constitutional rules. However, as this Court derives its retroactivity jurisprudence from the Supreme Court of the United States, *Teague* and its progeny's clear guidance on the retroactive applicability of substantive holdings should be adopted as an irreducible minimum rule. The *Teague* standard has been applied by this Court multiple times in cases analyzing federal constitutional rules, demonstrating its utility and administrability. The *Teague* analysis of substantive rules is the majority rule adopted by other States' high courts. Substantive rules should be given retroactive effect as a matter of Pennsylvania law.

This Court has clearly adopted *Teague* and its progeny as the framework applicable to the retroactive effect of new federal rules. *Commonwealth v. Bracey*,

986 A.2d 128, 143 (Pa. 2009) ("*Teague* is acknowledged as setting forth the legal framework for a principled approach to deciding when a pronouncement of law should be given effect to cases pending on collateral review"); *Commonwealth v. Washington*, 142 A.3d 810, 819 (Pa. 2016) (noting that *Teague* is Pennsylvania's default approach "to the retrospective application of new constitutional procedural rules pronounced by the Supreme Court of the United States"); *Commonwealth v. Miller*, 888 A.2d 624, 629 n.5 (Pa. 2005) (*sua sponte* evaluating retroactivity of *Atkins v. Virginia*, 536 U.S. 304 (2002) under standard for "substantive rule" articulated in *Penry* and finding *Atkins* retroactive); *Cobbs*, 256 A.2d at 1208-09; *Commonwealth v. Olson*, 218 A.3d 863 (Pa. 2019).

A majority of other States have adopted *Teague*'s treatment of substantive rules as a governing framework. *See Windom v. State*, 886 So. 2d 915, 943 (Fla. 2004) (Cantero, J., concurring, noting that twenty-eight states and the District of Columbia had adopted *Teague* "*at least* to cases stemming from a federal constitutional right, and the vast majority to all questions of retroactivity") (emphasis in original). Whether applying *Teague* or an alternative standard, however, other State high Courts have consistently found that decisions articulating substantive rights are retroactive. In particular, each of the states cited by this Court in *Lee*, 357 A.3d at 388-89, as striking down sentences under a "robust analysis" of their states'

analogous provisions to the cruel punishments clause has given retroactive effect to substantive or fundamental new rules.[7]

The principle that fundamental nonprocedural rules, including rules holding certain sentences unconstitutional, are given retroactive effect on collateral review long predates *Teague*. *Robinson*, 409 U.S. at 508; *see also Siebold*, 100 U.S. 371; *Raymond*, 304 A.2d 146; *Ross*, 296 A.2d 629. *Teague* and its progeny's clear delineation of "substantive" rulings has proven functional to administer; has been recognized by this court as "a principled approach," *Bracey*, 986 A.2d at 143; and is widely adopted among other States. This framework is persuasive, and should be independently adopted by this Court. Substantive holdings must be given retroactive effect.

[7] *Matter of Schoenhals*, 576 P.3d 554 (Wash. 2025); *Matter of Hinton*, 525 P.3d 156 (Wash. 2023) (Washington courts follow test from *Teague*); *State v. Rivens*, 261 S.E.2d 867, 870 (N.C. 1980) (North Carolina maintains a presumption in favor of the retroactivity of all State Supreme Court decisions announcing new rules of law); *People v. Poole*, No. 166813, 2025 WL 978646 (Mich. Apr. 1, 2025) (Michigan courts retroactively apply substantive rules); *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992) ("our decision today necessarily invalidates the sentences of all defendants currently incarcerated under the same penalty, and for committing the same offense, as the defendants at bar"); *People v. Anderson*, 493 P.2d 880, 899 n.45 (Cal. 1972) ("Inasmuch as today's decision is fully retroactive, any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus"); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *State v. Comer / State v. Zapate*, 266 A.3d 374 (N.J. 2022) (New Jersey mandating look-back petition after twenty years as remedy for retroactive state-constitutional decision); *State v. Santiago*, 122 A.3d 1 (Conn. 2015) (Connecticut abolishing death penalty retroactively in light of legislation that abolished it prospectively); *see also State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) (Iowa holding all mandatory minimum sentences unconstitutional for juveniles under 18 "will require all juvenile offenders who are in prison under a mandatory minimum sentence to be returned to court for resentencing").

c. *Lee* announced a substantive rule that struck down a punishment for a class of defendants.

Lee's abolition of mandatory life without parole for felony murder is a substantive rule. *Lee* struck down this mandatory sentence as substantively cruel and for a class of offenders due to their having diminished culpability based on the nature of their offense. That the rule of *Lee* is substantive is a straightforward proposition following from the *Lee* Court adjudicating a facial challenge to a mandatory life without parole sentence and striking it down through an analytical framework focused on the culpability of the defendant, severity of the penalty, and the penological justifications for the punishment. This framework is derived from antecedents in U.S. Supreme Court sentencing jurisprudence establishing substantive rules in the analogous Eighth Amendment context. Each of the foregoing aspects of the *Lee* decision underscore that the Court's primary concern was preventing the imposition of punishment that is constitutionally excessive for the crime of felony murder and therefore "beyond the State's power" to impose. *Penry*, 492 U.S. at 330.

In *Lee*, this Court determined that Mr. Lee raised "a facial challenge to a mandatory sentence of life without parole for second degree murder," noting that "a facial contest examines a law's constitutionality based on its text alone without considering the facts or circumstances of a particular case." *Lee*, 357 A.3d at 361. The *Lee* Court made clear that it was determining whether the Commonwealth had

the power to impose the sentence of "mandatory life without parole" in *any* case of felony murder in Pennsylvania. From the outset of its analysis, this Court signaled that it was adjudicating whether a specific criminal sentence was or was not within the power of the state to impose upon the category of individuals convicted of felony murder. This is precisely the concern of a substantive rule as understood under *Teague*, *Penry*, and *Montgomery*.

The Court then conducted an *Edmunds* analysis that resulted in the first decision in the history of the Commonwealth of Pennsylvania finding that Article I, Section 13 "provide[s] greater protections to our citizens than those recognized under the Eighth Amendment to the United States Constitution." *Lee*, 357 A.3d at 390; Pa. Const. Art. I, Section 13. This meant "that Section 13 embodies the principle that our citizens are protected from sanctions that are disproportionate to the circumstances of the offense for which they were convicted." *Id*. at 391. In determining whether mandatory life without parole for felony murder violated this precept of Section 13, the Court assessed "notions of culpability, severity, and penological justifications – akin to the factors identified by the United States Supreme Court in creating its framework in *Miller* and *Graham* to resolve Eighth Amendment jurisprudence regarding juveniles[.]" *Id*. Thus, the mode of inquiry itself was derived from a framework that has been utilized by the U.S. Supreme Court to ascertain substantive rules proscribing categories of punishment.

The *Lee* Court's culpability analysis began by recognizing that "federal cases considering the constitutionality of punishment of juveniles" that prohibited certain punishments did so "based on 'mismatches between the culpability of a class of offenders and the severity of a penalty.'" *Id*. (quoting *Miller*, 567 U.S. at 470). Noting that "the more purposeful is the criminal conduct, the more serious the offense, and, therefore, the more severely it ought to be punished," *Id*. (internal quotation omitted), the Court reasoned that "one who did not kill another or intend to kill another during the commission of a felony is less morally responsible and less deserving of one of the most severe punishments – mandatory life imprisonment without the possibility of parole – than the actual murderer." *Id*. at 391-92 (citing *Graham v. Florida*, 560 U.S. 48, 69 (2010); *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982)). The Court further anchored this analysis in sentencing cases that announced substantive rules striking down punishments on a categorical basis:

> [T]he United States Supreme Court has issued five decisions that imposed substantive constraints on the imposition of the sentences of death and life without parole. In each, the sentences were disproportionately severe because the offenders, as a category, by virtue of their status or offenses, were insufficiently culpable. *See Atkins* (forbidding the execution of those with "mental retardation"); *Roper* (forbidding the execution of juveniles); *Graham* (given their reduced culpability, barring life without parole for juveniles); *Miller* (banning mandatory sentence of life without parole for juveniles). While these federal decisions were limited to intellectually disabled individuals or juveniles deemed categorically less culpable than adults, and, thus, less deserving of the sentence of death or life without parole, the principles announced therein are equally applicable to an analysis under Section 13.

Id. at 392. Applying those principles to felony murder, the Court found that "unlike first degree murder, one may be convicted of second degree murder without malice (regarding the killing of the victim), without attempting to kill the victim, or without having any intent to kill the victim." *Id*. This led the Court to conclude that "the mandatory penalty scheme of life without parole for all offenders convicted of second degree murder fails to assess individual culpability regarding the intent to kill, and mandates the same punishment regardless of that culpability." *Id*. Again, the Court's concern with the power of the law to impose a specific punishment – mandatory life without parole – on a category of offenders convicted of felony murder is revealed through the precedent and principles of its analysis.

Next, regarding the severity of the punishment, *Lee* recognized the unique and extreme severity of a life without parole sentence. *Compare Lee*, 357 A.3d at 393 (The gravity of a sentence of life without parole cannot be overstated… Life without parole imposes the harshest imprisonment sanction permitted under the law — imprisonment until death without the opportunity for consideration of release") with *Miller*, 567 U.S. at 473 ("Life without parole forswears altogether the rehabilitative ideal," citing *Graham*, 560 U.S. at 74).

Finally, the Court considered whether mandatory life without parole for felony murder found support in "the traditional penological justifications for criminal punishment: rehabilitation, deterrence, retribution, and incapacitation."

Lee, 357 A.3d at 394. The Court held that none of these justifications supported the punishment. The sentence was "inconsistent with notions of rehabilitation"; deterrence is not served when the sentence punishes a defendant for the actions of a co-defendant and by imposing the same sentence imposed in the vast majority of cases of first degree murder; retributive ends of punishment are undercut in the absence of an individualized culpability analysis, as "mandatory life imprisonment without parole is inconsistent with the retributive principle that punishment should be proportionate to culpability"; and because "permanent incarceration of an individual is premised upon the notion that he cannot be rehabilitated or deterred from committing a future crime — that is, he will forever be a danger to society, he is incorrigible," incapacitation "cannot justify mandatory life imprisonment of all offenders who have been convicted of second degree murder, without an assessment of culpability." *Id*. at 394-95. As with its analysis of culpability and severity, this Court's assessment of the lack of penological justification for mandatory life without parole for felony murder reinforces its primary concern with protecting "citizens" of this Commonwealth "from sanctions that are disproportionate to the circumstances of the offense for which they were convicted." *Id*. at 391. These are concerns of the substantive power of the state to impose a punishment on a category of offenders.

While *Lee* does admit the possibility that life without parole may be constitutionally permissible for some individuals convicted of felony murder, a

crime that encompasses "a wide variety of criminal conduct and varying culpability for a killing," *id.* at 392, that does not make its ruling any less substantive in nature. Similarly, in *Miller*, the U.S. Supreme Court did not outlaw life without parole sentences for children *per se*. Both *Lee* and *Miller* announced a rule that a mandatory scheme facially posed too great a risk of disproportionate punishment on the class to whom it was applied. *Compare Miller*, 567 U.S. at 479 (2012) ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment") *with Lee*, 357 A.3d at 393, 395-96 ("[B]y its terms, the mandatory penalty scheme of life without parole for all offenders convicted of second degree murder fails to assess individual culpability," and citing *Miller* to conclude that "[d]ue to this scheme's mandatory nature and its unique severity, it poses a great risk of disproportionate punishment").

Montgomery rejected the state's argument that because *Miller* required a sentencing hearing, it was necessarily procedural. This argument "conflates a procedural requirement necessary to implement a substantive guarantee with a rule that regulates only the manner of determining the defendant's culpability … There are instances in which a substantive change in 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." 577 U.S. at 210 (cleaned up).

Lee is precisely the same: it mandates an individualized procedure in order to effectuate a substantive core. "While the justifications for punishment may support life-long incarceration for some convicted of this crime, such justification cannot support life without parole for all offenders, as individuals who have lessened culpability are less deserving of the most severe punishments, necessitating individualized assessment of culpability." *Lee*, 357 A.3d at 396.

Miller involved application of the "categorical approach" under the United States Supreme Court's Eighth Amendment jurisprudence, concluding that mandatory life without parole was unconstitutional for a "class of defendants because of their status." *Montgomery*, 577 U.S. at 208 (*quoting Penry*, 492 U.S. at 330). *Teague*'s progeny is equally clear that substantive rules forbid punishments on classes of defendants "because of their status *or offense*." *Id.* at 198 (citing *Penry*, 492 U.S. at 330) (emphasis added). *Lee* is directed at this second, equally substantive category: a class of defendants whose conduct falls constitutionally short of meriting the most severe imprisonment term available under law. This gets to the core of the substantive principle enshrined in Section 13: that "our citizens are protected from sanctions that are disproportionate to the circumstances of the offense for which they were convicted." *Lee*, 357 A.3d at 391.

"Like other substantive rules," *Lee*'s prohibition of mandatory life without parole for felony murder "is retroactive because it necessarily carries a significant

risk that a defendant … faces a punishment that the law cannot impose upon him." *Montgomery*, 577 U.S. at 208-09 (internal citations omitted). Here, the defendants in question are human beings sentenced to the harshest imprisonment sanction permitted under the law without any consideration of the facts of the case, their own culpability, or their individual characteristics. The necessity of some procedure to determine individualized culpability and individualized remedy does not alter the nature of this constitutional rule. *Lee* is a substantive holding. It is retroactive under the *Teague* standard.

As an imperative of law and a matter of justice, Mr. Coffey is entitled to an individualized resentencing pursuant to *Lee*. He is one of approximately 1,100 people convicted and sentenced to mandatory life without parole for felony murder, a sentence that has now been recognized by this Court as a transgression on the protections of Article I, Section 13. While this Court has the discretion to determine which new rules of law apply retroactively, that discretion has always been guided by considerations of justice and fundamental fairness. Permitting 1,100 people to continue serving illegal sentences that require them to die in prison would be offensive to the conceptions of human dignity, justice, and fundamental fairness that

animate Section 13.[8] *Lee* is a substantive ruling and justice requires its retroactive application.

II. Article I, Section 13 rulings striking down unconstitutional sentencing schemes should be automatically retroactive.

For the first time in our Commonwealth's history, this Court has given an independent meaning to the cruel punishments clause of Article I, Section 13, recognizing that it provides broader protections than the federal Eighth Amendment. The gravity of this ruling – and the importance of the rights this clause protects – warrant a comprehensive retroactivity doctrine that provides this protection equitably and universally to all Pennsylvanians.

Thus, Mr. Coffey further requests that when this Court determines that a sentence or sentencing scheme is "cruel" under Article I, Section 13 of the

[8] It is noteworthy that this point appears to have been recognized by major governmental stakeholders in response to *Lee*. While the Pennsylvania General Assembly was not able to agree on legislation in response to *Lee*, the Senate and the House of Representatives each passed bills that would have applied retroactively and eliminated life without parole for *all* individuals serving this illegal sentence currently by making them all parole-eligible. Senate Bill No. 1400 (Pa. 2026); House Bill No. 443 (Pa. 2025); House Bill No. 1042 (Pa. 2026). The Senate Bill was endorsed by the Attorney General of Pennsylvania and the Pennsylvania District Attorneys Association. *Senate Passes Baker, Langerholc Bill to Preserve Accountability in Second-Degree Murder Cases*, Pennsylvania Senate Republicans (June 25, 2026), available at https://www.pasenategop.com/news/senate-passes-baker-langerholc-bill-to-preserve-accountability-in-second-degree-murder-cases/ (noting Attorney General's endorsement of SB 1400); Justin Sweitzer, *A matter of life and death: Understanding the debate over second-degree murder sentencing in PA*, City and State PA (Aug. 4, 2026), available at https://www.cityandstatepa.com/policy/2026/08/matter-life-and-death-understanding-debate-over-second-degree-murder-sentencing-pa/415205/ (noting Pennsylvania District Attorneys Association's endorsement of SB 1400). This is in marked contrast to the situation after *Miller v. Alabama* was decided in 2012 and the General Assembly passed a non-retroactive law**.** P.L. 1655, Act No. 204 (Pa. 2012)**.**

Pennsylvania Constitution, any and all unconstitutional sentences stemming from that disposition should be automatically voided, and Pennsylvania courts should be expressly precluded from enforcing a sentence that they lack constitutional authority to impose. The issue before the Court in this matter – whether its ruling that mandatory life without parole sentences for felony murder are unconstitutional applies retroactively to cases on collateral appeal – illustrates the utility of such a rule. Where unconstitutional sentencing schemes are at issue, individuals serving those sentences are subjected to a violation that is, by its nature, continual and ongoing. Failing to require retroactive application of all Article I, Section 13 rulings which strike down unconstitutional sentencing schemes would tacitly endorse the possibility that cruel punishments may be inflicted upon some individuals.

As argued *supra, Lee* applies retroactively under the federal *Teague* test which this Court has applied in analogous scenarios. This Court could find this sufficient to settle the question presented in this matter. However, the particular state-specific nature of the interests involved in Article I, Section 13 claims, as well as the principles underlying *Teague* and federal retroactivity doctrine, provide compelling reason to provide broader protection for people serving unconstitutional sentences as a matter of state retroactivity doctrine. The interests involved are weighty, both for those serving sentences that constitute cruel punishments and as a matter of public concern.

At its core, our Constitution's cruel punishments clause "embodies the principle that our citizens are protected from sanctions that are disproportionate to the circumstances of the offense for which they were convicted." *Lee,* 357 A.3d at 391. This Court relied heavily on the unique, Pennsylvania-specific history of Article I, Section 13 in finding that it provided greater protection than the federal Eighth Amendment. This Court found persuasive historical analysis which rejected overly-harsh and severe punishments which were unnecessary for achieving the limited purposes of punishment, with a primary focus on deterrence and rehabilitation. *Id.* at 383-85. A bright-line rule will serve to advance the interests of justice, conserve judicial and party resources, and ensure the even-handed application of this Court's rulings across the Commonwealth, consistent with longstanding principles of Pennsylvania jurisprudence.

The Court should adopt Pennsylvania-specific retroactivity doctrine governing Article I, Section 13 claims to guide courts in this and future cases. A categorical rule whereby any sentence or sentencing scheme struck down as unconstitutional under Article I, Section 13, is automatically retroactive furthers the purpose of the enforcing constitutional right at issue by affirmatively precluding the ongoing imposition of a "cruel punishment."

a. Automatic retroactivity would effectuate traditional principles of Pennsylvania jurisprudence: the void *ab initio* doctrine and the core function of habeas corpus.

When criminal and sentencing statutes are held unconstitutional, they are rendered void as of the time of their enactment. The application of this doctrine to cases on collateral review is consistent with traditional principles of Pennsylvania habeas corpus jurisprudence. A holding that Article I, Section 13 rulings which void sentences as unconstitutionally cruel are automatically retroactive would cleanly effectuate existing void *ab initio* doctrine, consistent with both longstanding Pennsylvania habeas corpus principles and current Pennsylvania legislation on the scope of collateral relief.

The United States Supreme Court and this Court have recognized the particular importance of affording relief when criminal convictions and sentences were obtained through unconstitutional statutes via the void *ab initio* doctrine. The void *ab initio* doctrine declares that an unconstitutional law is "not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment… [a]n unconstitutional law is void, and is as no law." *Siebold*, 100 U.S. at 376-77. In *Montgomery,* the U.S. Supreme Court relied in part on this doctrine in finding that *Miller* applied retroactively. The Supreme Court in *Montgomery* emphasized that, pursuant to void *ab initio* principles, an "unconstitutional law is *no less void* because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce

punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." 577 U.S. at 204 (emphasis added). As support, the Court relied upon the underlying reasoning espoused in *United States v. United States Coin & Currency*, where Justice Harlan declared that "[n]o circumstances call more for the invocation of a rule of complete retroactivity than when the conduct being penalized is constitutionally immune from punishment." *Id.* (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)).

This Court has likewise recognized the void *ab initio* doctrine in the context of unconstitutional criminal and sentencing statutes. In the wake of *Montgomery*, this Court recognized the opinion's void *ab initio* logic and held that mandatory juvenile life without parole sentences were rendered "illegal and, therefore, void" by *Miller. Cobbs*, 668 Pa. at 36. More generally, this Court has repeatedly embraced the principle that any offense created by an unconstitutional statute is not a crime, and any conviction or penalty imposed under it is not merely erroneous, but entirely void, including on collateral review. *See Commonwealth v. McIntyre,* 232 A.3d 609, 619 (Pa. 2020) (holding that a conviction and sentence based upon a statute later determined to be unconstitutional "cannot stand" and "must be regarded as void from the time of its enactment"); *see also Commonwealth v. Wolfe*, 140 A.3d 651, 661 (Pa. 2016) ("a sentence based on an unconstitutional statute that is incapable of severance is void").

In *Lee,* this Court struck down as facially unconstitutional the sentencing scheme at 18 Pa.C.S. §1102(b) (mandating sentence of life imprisonment upon conviction for second-degree murder) and 61 Pa.C.S. § 6137(a) (prohibiting parole for offenders serving life imprisonment). *Lee*, 357 A.3d at 361; *see also Scott v. Pennsylvania Bd. of Prob. & Parole*, 284 A.3d 178, 195 (Pa. 2022) (discussing unified nature of sentencing provision and parole code as statutory sentencing scheme for second degree murder). Any sentence of mandatory life without parole for the crime of felony murder, whether imposed before or after the *Lee* ruling, whether on direct appeal or not, is void *ab initio* pursuant to clearly-established doctrine.

Those same void *ab initio* principles apply in equal force to not just *Lee*, but to any sentence or sentencing scheme deemed unconstitutional pursuant to Article I, Section 13. Any holding that a sentencing scheme is unconstitutionally cruel, like *Lee*, limits the Commonwealth's authority to punish. Any sentence held to be "cruel" should be similarly voided because courts cannot, and should not, be permitted to enforce a punishment that the law unequivocally does not permit. Accordingly, under void *ab initio* principles, sentences declared unconstitutional under Article I, Section 13 should be deemed retroactive automatically.

A clear holding that rulings voiding sentences as unconstitutionally cruel are necessarily retroactive is consistent with longstanding principles of Pennsylvania

jurisprudence as well. A core tenet of traditional Pennsylvania habeas corpus law was its availability to correct void, illegal, and excessive sentences on collateral review. "Habeas corpus lies to correct void or illegal sentences or an illegal detention … and where the record shows a trial or sentence or plea which was so fundamentally unfair as to amount to a denial of due process *or other constitutional rights* of the accused, habeas corpus will lie." *Commonwealth ex rel. Elliott v. Baldi*, 96 A.2d 122, 124 (Pa. 1953) (emphasis added). *See also Commonwealth v. Smith*, 187 A. 387, 387 (Pa. 1936) ("It is well established that sentence to imprisonment for a greater period than warranted by law is an illegal sentence, to correct which the prisoner is entitled to a writ of habeas corpus"); *Commonwealth v. Morgan*, 123 A. 337, 337 (Pa. 1924) ("Such writ [of habeas corpus] is a proper remedy where the relator is in confinement under a void or illegal sentence").

Habeas corpus review was incorporated by our legislature into the Post-Conviction Relief Act ("PCRA"). 42 Pa. C.S.A. § 9542. The PCRA, in turn, provides for correction of sentences greater than a lawful maximum, 42 Pa. C.S.A. § 9543(a)(2)(vii), and provides for jurisdiction over petitions asserting a constitutional right "that was recognized by … the Supreme Court of Pennsylvania … and has been held by that court to apply retroactively," 42 Pa. C.S.A. § 9545(b)(1)(iii). It is only logical that rulings voiding sentences as unconstitutionally cruel would be held retroactive and rendered cognizable under the PCRA, to effectuate the traditional

purposes of habeas corpus in Pennsylvania in full compliance with the PCRA's statutory text.

b. Bright-line rules on retroactivity promote the efficient administration of justice and serve fundamental fairness.

A bright-line rule would promote the orderly, even-handed, and swift administration of justice in the wake of rulings striking down sentencing schemes as unconstitutional under Article I, Section 13. It would provide binding guidance to litigants as well as lower courts responsible for initially adjudicating the application of constitutional rulings under Article I, Section 13. This effect is already apparent in the context of retroactive application to cases on direct appeal since this Court's ruling in *Lee*.

In *Commonwealth v. Cabeza,* this Court established a standard that a new rule of law applies to all cases pending on direct appeal when the issue is properly preserved, unless the court explicitly declares its ruling to apply only prospectively. *Cabeza,* 469 A.2d 146, 148 (Pa. 1983). Due to the clarity of this holding and jurisprudence establishing that challenges to the legality of the sentence cannot be waived and may be adjudicated by a court *sua sponte,* our Superior Court has been able to efficiently address and remand direct appeals in which appellants were mandatorily sentenced to life without parole for second-degree murder which were pending before *Lee* was decided, even if litigants were not able to raise or brief the issue to the court.

As of this filing, the Superior Court has remanded for resentencing under *Lee* in at least the following direct appeals: *Commonwealth v. Bartram,* No. 629 MDA 2025 (Pa. Super. Oct. 27, 2026) (non-precedential); *Commonwealth v. Hairston,* No. 1392 MDA 2025 (Pa. Super. Oct. 9, 2026) (*sua sponte*) (non-precedential); *Commonwealth v. Gates,* No. 861 WDA 2025 (Pa. Super. Sept. 16, 2026) (*sua sponte*) (non-precedential); *Commonwealth v. Burton,* No. 457 WDA 2025 (Pa. Super. Sept. 16, 2026) (*sua sponte*) (non-precedential); *Commonwealth v. Brown,* No. 794 MDA 2025 (Pa. Super. Sept. 10, 2026) (*sua sponte*) (non-precedential). This Court has summarily remanded for resentencing in similar circumstances. *See Commonwealth v. King,* No. 34 WAL 2024 (Pa. Sept. 17, 2026) (*per curiam*); *Commonwealth v. Galo-Ponce,* No. 262 MAL 2025 (Pa. Sept. 25, 2026) (*per curiam*); *Commonwealth v. Allen,* No. 123 MAL 2026 (Pa. Oct. 6, 2026) (*per curiam*); *Commonwealth v. Butler,* No. 128 MAL 2026 (Pa. Oct. 6, 2026) (*per curiam*); *Commonwealth v. Graham,* No. 62 EAL 2026 (Pa. Oct. 6, 2026) (*per curiam*). The *Cabeza* rule has provided both courts and litigants with certainty, enabled the conservation of judicial and litigant resources, and promoted efficient administration of justice to those entitled to protection of their newly-established rights under our Constitution's cruel punishments clause.

Furthermore, establishing a standard of automatic retroactivity for Article I, Section 13 rulings which hold sentencing schemes unconstitutional will promote

justice for PCRA petitioners seeking to vindicate their rights on collateral appeal without undermining finality concerns. *See e.g. Montgomery,* 577 U.S. at 205 (finding that the state's interest in finality carried no weight because "no resources marshaled by a State could preserve a conviction or sentence that the Constitution deprives the State of power to impose").

A bright-line retroactivity rule rooted in the void *ab initio* doctrine will enable litigants to raise cruel punishment claims and provide lower courts with an administrable method of adjudicating the claims swiftly, with minimal resources expended by the litigants or courts in determining whether the right applies retroactively. For individuals relying on the PCRA's newly-established constitutional right timeliness exception, they will be empowered to avail themselves of the anti-cruel punishment clause's protections without the uncertainty of whether and when a timely-filed PCRA petition will be reviewed by this Court in order to determine whether their meritorious claims under Article I, Section 13 apply retroactively. Judicial resources and those of the Commonwealth will be conserved by avoiding prolonged litigation regarding the retroactivity issue, and lower courts will benefit from the certainty afforded by a bright-line rule which enables them to efficiently adjudicate petitions.

As a matter of due process and fundamental fairness, the law must provide meaningful relief when a punishment has been determined to be unconstitutional.

"[D]ue process requires that the post conviction collateral relief process be fundamentally fair.'" *Commonwealth v. Peterson*, 192 A.3d 1123, 1130 (Pa. 2018). *See also Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007) ("petitioners must be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner").

Sentences that violate the lofty goals embodied by our Constitution's cruel punishments clause cannot be left in place simply because they were imposed before the constitutional defect was recognized. As this Court recognized in *Lee,* Article I, Section 13 "is founded to a large degree upon Enlightenment theories of deterrence and reformation, and on a rejection of punishments extending beyond the penological justifications for punishment as unnecessary[.]" *Lee,* 357 A.3d at 385. Our constitutional understanding of "necessity – and, thus, cruelty – was understood to evolve over time with the development of moral and scientific advancements." *Id.* To require more than one thousand Pennsylvanians presently serving a life without parole sentence for felony murder to serve out the remainder of a "cruel" sentence until their death would be not only unjust but unconscionable. Therefore, sentences deemed unconstitutional under Article I, Section 13 should receive automatic retroactive application.

CONCLUSION

Mr. Coffey is one of over one thousand Pennsylvanians currently serving an unconstitutional sentence. *Lee* was a substantive holding, and should be held retroactive under the now-standard analysis derived from *Teague*. Additionally, this Court should recognize that any new constitutional rule invalidating a sentence under Article I, Section 13 is necessarily retroactive.

Cruel punishments shall not be inflicted in Pennsylvania. Mr. Coffey and those similarly situated must be afforded the constitutional right this Court recognized in *Lee*. Appellant respectfully requests that this Court vacate his sentence and remand for an individualized resentencing proceeding in accordance with *Commonwealth v. Lee*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE: LENGTH OF BRIEF

I hereby certify that the foregoing Brief for Appellant consists of 9,775 words based on the word count function of the word processing program on which it was prepared, excluding the title page, table of contents, table of citations, and signature blocks, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

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CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Brief for Appellant complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

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APPENDIX A

Superior Court Opinion

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JEROME COFFEY	:	
Appellant	:	No. 1452 EDA 2024

Appeal from the PCRA Order Entered April 25, 2024
In the Court of Common Pleas of Philadelphia County Criminal Division at No(s): CP-51-CR-0441911-1993

BEFORE: LAZARUS, P.J., BOWES, J., and FORD ELLIOTT, P.J.E.*

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 24, 2025**

Jerome Coffey appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

This Court previously summarized the factual background of this matter thusly:

> [This case] follows the December 12, 1992 shooting death of Johnny Moss[,] who died from a gunshot wound to the head after his assailants pulled him from his vehicle under the pretense of acting as police officers. The evidence at trial established that Moss was seated in his father's vehicle, stopped at the corner of 24th and Thompson Streets [at approximately 11:00 p.m.] in the City of Philadelphia. As Moss talked to his brother, Walker Lee Moss (Walker), who was standing at the curb, two other vehicles pulled in around his, boxing him in and blocking egress. Witnesses testified that three males [out of four total] then exited from the car in front and that one of them, identified as [Appellant], yelled "task force," before another male pulled the victim from his own

---

* Retired Senior Judge assigned to the Superior Court.

> vehicle and pushed him into another. Although Walker struggled to help his brother, the assailants shot him, the bullet finding its place in his arm. When he ultimately reached his brother, he found him slumped in the car, bleeding from the head, with a bullet hole behind his ear. After the shootings, all four assailants fled.
>
> Following [Appellant]'s apprehension, [he was charged and] this matter proceeded to a jury trial before the Honorable James J. Fitzgerald in June 1994. [Appellant's cousin, Lee Smith, was also tried as a co-defendant.] Over a considerable number of days, [the jury] received the testimony of a member of the Philadelphia Police Mobil[e] Crime Unit who investigated the scene, as well as the supervising homicide detective and the medical examiner who conducted the victim's autopsy. In addition, the Commonwealth called Nemo Kennedy, Frank Singleton, and Latoya Singleton, each of whom reported encounters during which [Appellant] made incriminating statements about Moss's murder that either claimed responsibility or indicated his own complicity. [Clarence Moss, the victim's nephew, also testified that he recognized Appellant as being involved in the incident, having viewed the encounter from inside a nearby residence.] Finally, the Commonwealth called Walker . . ., who positively identified [Appellant] as one of the assailants[, particularly, the one who yelled "task force," and as someone that he had seen within the neighborhood before.]

Commonwealth v. Coffey, 81 A.3d 1006 (Table), 2013 Pa.Super. Unpub. LEXIS 889 at 1-3 (Pa.Super. 2013) (unpublished memorandum). Appellant did not testify, although he called his mother, Daisy Coffey ("Daisy"), and his sister, Jean Coffey ("Jean"), to speak to their recollection that Appellant was at home with them on the night of the shooting.

Following trial, Appellant was convicted of second-degree murder, aggravated assault, possession of instruments of a crime, and criminal conspiracy, whereas co-defendant Lee Smith was acquitted of all charges. The trial court imposed on Appellant a sentence of life in prison.

Appellant thereafter filed a direct appeal to this Court. As we later acknowledged, "the procedural history of the case assume[d] a tortured path, so sparsely documented that, seven years after the 1994 conviction, a panel of this Court remanded the case to the trial court with direction to supplement the record in view of the absence of several portions of the transcript." ***Id***. at 5. Despite our remand order being docketed in 2001, it took an additional twelve years before this Court ultimately rendered a decision as to the merits of Appellant's direct appeal. As aptly explained and summarized by the PCRA court:

> The record remained incomplete until March 2007, when counsel for [Appellant] filed a statement addressing the state of the record. However, on September 24, 2007, the Superior Court dismissed [Appellant]'s direct appeal due to appointed counsel's failure to file an appellate brief.
>
> On July 9, 2008, [Appellant] filed a petition under the PCRA seeking reinstatement of his right to appeal *nunc pro tunc*. [Appellant]'s direct appeal rights were reinstated . . . and on May 29, 2013, the Superior Court affirmed [Appellant]'s judgment of sentence. On November 20, 2013, the Pennsylvania Supreme Court denied *allocatur*. [Appellant] was represented on reinstated appeal by J. Michael Farrell, Esquire.
>
> On November 21, 2014, [Appellant] filed a *pro se* second petition under the PCRA . . ., which is at issue here. On February 29, 2016, David Rudenstein, Esquire[,] was appointed to represent [Appellant], and on May 26, 2017, [Appellant] filed a counseled, amended petition. On November 1, 2017, Martha Conley, Esquire[,] entered her appearance for [Appellant] pro bono, replacing [Attorney] Rudenstein, and on April 7, 2021, [Appellant] filed another amended petition.
>
> On October 6, 2021, Bret Grote, Esquire, entered his appearance on behalf of [Appellant] pro bono alongside Ms. Conley, and on February 21, 2022, Rupalee Rashatwar, Esquire,

> also entered her appearance. On February 21, 2022, [Appellant] filed a third amended petition, which incorporated all arguments from [Appellant]'s April 7, 2021 amended petition and superseded all previous filings. On September 2, 2022, [Appellant] filed a supplement to his amended petition.
>
> [In June] 2023, the Commonwealth filed a response to [Appellant]'s amended petition [as supplemented], in which it stated that it did not oppose an evidentiary hearing on all of [Appellant]'s claims except for (1) ineffective assistance of trial and appellate counsel for failure to raise a ***Batson***[1] claim; and (2) ineffective assistance of appellate counsel for failing to raise a claim that the presence of uniformed police officers in the courtroom prejudiced [Appellant. Counsel] filed a reply to the Commonwealth's response [that same month], in which he specifically claimed an evidentiary hearing was necessary to litigate the ***Batson*** claim. Following a status hearing . . ., the court directed [Appellant] to file a supplemental brief addressing his purported entitlement to relief that was premised upon the missing transcripts in his case. [Thereafter, Appellant] filed the requested supplemental briefing [and the Commonwealth responded].
>
> On September 7, 2023, the court dismissed [Appellant]'s ***Batson*** claim without an evidentiary hearing. The court then held a three-day evidentiary hearing from September 11th through September 13th on [Appellant]'s remaining claims[, wherein both Appellant and the Commonwealth called multiple witnesses]. Following the evidentiary hearing, [Appellant] filed a post-hearing brief[, as did the Commonwealth.] . . . On April 25, 2024, after having reviewed the briefs from both [Appellant] and the Commonwealth, the court rendered findings of fact and conclusions of law and dismissed [Appellant]'s [petition.]

PCRA Court Opinion, 8/13/24, at 2-4 (cleaned up).

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[1] ***See Batson v. Kentucky***, 476 U.S. 79, 89 (1986) (stating that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant").

This timely appeal followed. Both Appellant and the PCRA court complied with the dictates of Pa.R.A.P. 1925. Appellant presents the following eleven issues for our review, which we have reordered for ease of disposition:

> 1. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that trial counsel was constitutionally ineffective in failing to offer any individualized argument as to the suppression of prosecution witness [Walker]'s in-court identification of [Appellant] after [Walker]'s lineup identification was properly suppressed due to denial of [Appellant]'s right to counsel at the lineup?
>
> 2. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that his rights under ***Brady v. Maryland***, 373 U.S. 83 (1963), were violated when the prosecution suppressed a handwritten note from a police officer written the night of the murder reflecting that prosecution witness Walker . . . did not know the perpetrators of the offense, which contradicts [Walker]'s later testimony that he could identify [Appellant] as a perpetrator because he knew [Appellant] prior to the murder?
>
> 3. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that trial counsel was constitutionally ineffective by failing to investigate alibi witness [Jean]'s hospital records[,] which corroborated [Appellant]'s alibi defense, and where these hospital records would have prevented the trial prosecutor from effectively impeaching the memory of another alibi witness for [Appellant]?
>
> 4. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that his rights under [***Brady***] were violated when the prosecution suppressed hospital records from Jean . . . which were in its possession and which corroborated [Appellant]'s alibi defense and should have prevented the trial prosecutor from impeaching an alibi witness's memory regarding dates reflected in the suppressed hospital records?
>
> 5. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that trial counsel was constitutionally ineffective by absenting himself from prosecution

witness Nemo Kennedy's pre-trial material witness bond hearing, where trial counsel would have learned crucial impeachment information, including reference to an undisclosed third party statement implicating Kennedy in the murder, Kennedy's sworn testimony about police threats made against him and his family in order to compel his testimony against [Appellant], and Kennedy's sworn testimony that a statement he gave to police which implicated [Appellant] in the murder was false?

6. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that trial counsel was constitutionally ineffective by failing to impeach prosecution witness Nemo Kennedy with a statement implicating Kennedy in the murder for which [Appellant] was convicted?

7. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that his rights under [***Brady***] were violated when the prosecution suppressed a signed statement given to police by Renaldo Robichaw[,] which implicated prosecution witness Nemo Kennedy in the murder and would have been used by effective trial counsel to wholly discredit Kennedy's testimony against [Appellant], undermine the police and prosecution's entire investigation and prosecution of [Appellant], and introduce the possibility of an alternative suspect in the minds of jurors?

8. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that trial counsel was constitutionally ineffective by failing to investigate potential defense rebuttal witness Andre Edmonds, where Edmonds testified to facts which would have rendered prosecution witness Nemo Kennedy's implication of [Appellant] in the murder wholly incredible and where Edmonds testified that he attempted to reach [Appellant]'s trial counsel but was never contacted by trial counsel?

9. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that appellate counsel was constitutionally ineffective in abandoning a claim on appeal that [Appellant]'s Confrontation Clause rights were violated at trial where prosecution witness Latoya Singleton testified about a co-defendant's purported statement implicating [Appellant] in the offense and where the trial prosecutor "unmasked" [Appellant] as

> the subject of his co-defendant's statement during closing argument?
>
> 10. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that appellate counsel was constitutionally ineffective in failing to raise a claim on appeal under ***Commonwealth v. Shields***, 383 A.2d 844 (Pa. 1978), that [Appellant] had a colorable claim that his Confrontation Clause rights were violated, but could not be reviewed due to loss of significant and necessary portions of his trial transcripts and lack of any equivalent picture of the relevant portions of the proceedings?
>
> 11. Did the PCRA court err in dismissing [Appellant]'s PCRA petition where [Appellant] pled and proved that the cumulative effects of violations of his right to constitutionally effective counsel and under [***Brady***] entitle him to relief?

Appellant's brief at 2-6 (some capitalization and citations altered.

All of Appellant's claims on appeal fall within two broad categories: (1) a challenge to the efficacy of trial or appellate counsel, and (2) purported violations of Appellant's constitutional rights by the Commonwealth pursuant to ***Brady***. Before examining each issue *seriatim*, we generally recount the relevant legal principles.

This Court reviews the dismissal of a PCRA petition to determine "whether the findings of the PCRA court are supported by the record and are free from legal error." ***Commonwealth v. Howard***, 285 A.3d 652, 657 (Pa.Super. 2022) (cleaned up). Ultimately, "[i]t is an appellant's burden to persuade us that the PCRA court erred and that relief is due." ***Commonwealth v. Stansbury***, 219 A.3d 157, 161 (Pa.Super. 2019) (cleaned up).

With respect to Appellant's attacks on the adequacy of counsel's representation, we observe that "counsel is presumed to be effective, and a petitioner must overcome that presumption to prove" his entitlement to relief. ***See Commonwealth v. Simpson***, 112 A.3d 1194, 1197 (Pa. 2015). In that regard:

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

Commonwealth v. Sandusky, 203 A.3d 1033, 1043 (Pa.Super. 2019) (cleaned up). The petitioner's failure to sustain any prong of the test defeats the claim. ***See***, ***e.g.***, ***Commonwealth v. Rivera***, 199 A.3d 365, 374 (Pa. 2018). The Supreme Court of the United States has noted that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984); ***see also Commonwealth v. Wright***, 961 A.2d 119, 135 ("A defendant is entitled to a fair trial but not a perfect one." (citation omitted)).

Furthermore, our High Court has offered the following summary of the law governing Appellant's ***Brady*** claims:

> In ***Brady***, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Supreme Court subsequently held that the duty to disclose such evidence is applicable even if there has been no request by the accused, and that the duty may encompass impeachment evidence as well as directly exculpatory evidence. Furthermore, the prosecution's ***Brady*** obligation extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution.
>
> On the question of materiality, the Court has noted that such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Thus, there are three necessary components that demonstrate a violation of the ***Brady*** strictures: the evidence was favorable to the accused, either because it is exculpatory or because it impeaches; the evidence was suppressed by the prosecution, either willfully or inadvertently; and prejudice ensued.

Commonwealth v. Lambert, 884 A.2d 848, 853-54 (Pa. 2005) (cleaned up).

With this background in mind, we turn to Appellant's issues on appeal.

A. Walker's in-court identification

In his first claim, Appellant asserts ineffective assistance of trial counsel, Michael G. Floyd, Esquire, for failing to more vigorously challenge Walker's in-

court identification of Appellant as Johnny Moss's shooter. ***See*** Appellant's brief at 39-46.

By way of background, four months after the shooting, Walker participated in a lineup during which he identified Appellant as being involved in the incident, recognizing him by the name of "Hoagie." However, the trial court later granted a motion to suppress the lineup because it was performed without any defense counsel present. At trial, Appellant's counsel similarly sought to preclude Walker from identifying Appellant as the shooter in court, but in so doing merely relied upon arguments advanced by the counsel of co-defendant, Lee Smith. Smith, unlike Appellant, was not identified by Walker as a perpetrator at the lineup. The trial court rejected the co-defendants' requests and permitted Walker to identify both Appellant and Smith in court, finding that Walker had bases independent of the faulty lineup to support his testimony. These included, among other things, the strong lighting conditions and the fact that Walker had previously seen Appellant within the neighborhood and was familiar with his nickname.

Appellant asserts that counsel's representation in this regard was constitutionally inadequate, as there were stronger arguments his attorney could have raised to persuade the trial court to preclude identification. Citing precedent from the Supreme Court of the United States, he notes that:

> [w]hen a witness's identification of a defendant at a pretrial lineup is inadmissible because the defendant was deprived the right to counsel, a subsequent in-court identification by that witness is not admissible unless the trial court determines that the in-court

> identification is not tainted by the illegal lineup and is derived from an independent origin.

Id. at 40 (citing ***Gilbert v. California***, 388 U.S. 263 (1967)). He contends that because the out-of-court lineup identification was suppressed as illegal, the burden then shifted to the Commonwealth to demonstrate that Walker had an independent ground for identification. ***Id***. at 41. Appellant highlights that there were difficulties and inconsistencies with Walker's identification, namely that he initially told police that the person who yelled "task force" during the incident was "stocky" and approximately 5'5" or 5'6" in height, whereas Appellant is 6'2" and 180 pounds. ***Id***. at 41-42. Appellant emphasizes that this is not a "trivial discrepancy," but rather describes an entirely different person. ***See*** Appellant's reply brief at 12. He also notes that Walker did not identify Appellant by his street name of "Hoagie" until the unconstitutional lineup, months after the shooting, and that he was shown additional photographs beforehand that potentially introduced additional "taint." Appellant's brief at 42.

While Appellant acknowledges that trial counsel moved to preclude the identification in court, he contends that counsel did not convincingly argue these pertinent facts at that time. ***Id***. at 42-44. Instead, counsel relied solely upon the points raised by Smith's attorney, which were inapt because Walker did not identify Smith at the line-up. ***Id***. at 43. Appellant argues that "[w]hen in-court identifications are erroneously allowed despite illegal out-of-court identifications with insufficient proof of independent origin, prejudice can be shown even in the face of additional evidence." ***Id***. at 44. In addressing this

additional evidence, Appellant maintains that although eyewitness and nephew to the victim, Clarence Moss, also identified Appellant in court as a perpetrator, that testimony was suspect for a variety of reasons, including the witness's youth, history of juvenile adjudications giving him reason to lie to curry favor with law enforcement, and inconsistent accounts to police. ***Id***. Appellant additionally faults the PCRA court for placing the burden on him, rather than the Commonwealth, to prove any infirmity as to the out-of-court lineup. ***Id***. at 45. He concludes that "[a] reasonable trial attorney in [Attorney] Floyd's situation would have ensured that Walker . . . was never permitted to identify [Appellant] at trial." ***Id***.

The PCRA court found that Appellant did not meet his burden with respect to this claim, particularly because he did not prove sufficient prejudice. It recounted that the trial judge in 1994 "ruled that there was an independent source for Walker's in-court identification" of Appellant, namely that he was able to see the assailants' faces during the eleven-minute encounter and that lighting conditions were good, despite it occurring at night. ***See*** PCRA Court Opinion, 8/13/24, at 14-15. The PCRA court also noted a previous finding from the trial judge that "at no time during any identification procedure did the police indicate that the [various] defendants were involved, and that no identification procedure was impermissibly suggestive based on improper police conduct." ***Id***. at 15 (citing N.T., 5/24/94, at 19-20 (cleaned up)). The PCRA court thus concluded that since there was no evidence of a procedural infirmity with the pre-trial lineup beyond the absence of Appellant's counsel,

Appellant was not prejudiced by trial counsel's failure to make additional argument to preclude the subsequent in-court identification. ***Id***. It further determined that both the discrepancy in Walker's initial description of Appellant's physical characteristics to police and any exposure to a photo array would not have altered the trial court's findings, since "the totality of the circumstances established that Walker's identification of [Appellant] was reliable[.]" ***Id***. at 16.

Beyond reiterating some of the same matters highlighted by the PCRA court, in its brief, the Commonwealth maintains that Appellant's burden-shifting argument misses the point, since he misconstrues the burden relating to a defendant's motion to preclude in-court identification versus that imposed on a petitioner at a PCRA hearing. ***See*** Commonwealth's brief at 65-66 (citing ***Commonwealth v. Spotz***, 84 A.3d 294 (Pa. 2014), for the proposition that "when a PCRA petitioner asserts his trial counsel was ineffective for failing to litigate a pre-trial suppression claim, the burden of proof is on the defendant, not the Commonwealth.") The Commonwealth notes that the trial judge in this case reviewed extensive evidence and testimony concerning how the lineup was performed, and while it was illegal for lack of counsel, there was nothing to evince that it was otherwise unduly suggestive. ***Id***. at 66. Indeed, this finding is bolstered by the fact that, *inter alia*, Walker misidentified somebody else as co-defendant Smith at the lineup, which mitigates against the notion that it was an overly-biased procedure. ***Id***.

Upon review, we cannot conclude that the PCRA court's determinations are either in error or lacking support from the record. Based on the evidence presented, Appellant did not show a reasonable probability that the challenge to Walker's in-court identification would have succeeded had counsel raised the same arguments set forth now. To begin, while we recognize that Walker gave a different physical description of Appellant to police immediately following the shooting than that provided at trial, this would go to the weight of the evidence by which Walker could be impeached, not the admissibility of the identification itself. ***See***, ***e.g.***, ***Commonwealth v. Orr***, 38 A.3d 868, 874 (Pa.Super. 2011) (stating that "any indefiniteness and uncertainty in the identification testimony goes to its weight").

Further, we have not been persuaded that the PCRA court improperly placed an undue burden on Appellant in proving his claim. Although Appellant is correct that during the suppression hearing in 1994, the Commonwealth was required to demonstrate that Walker's in-court identification was not tainted by the prior suppressed lineup, he only cursorily presumes that the burden was not met at that time. As the PCRA court and Commonwealth note, the trial court reviewed substantial evidence before finding that Walker had an independent basis for the in-court identification as of trial. This included Walker's prior knowledge of whom Appellant was, perception of the events on the night in question, the adequate environmental lighting, and the dearth of evidence showing that the lineup unfairly pointed to the co-defendants. The trial court concluded that the Commonwealth met its burden at that juncture,

and now for purposes of the PCRA evidentiary hearing, it was Appellant who needed to demonstrate prejudice. ***See Stansbury***, 219 A.3d at 161. In all, we do not find that these newly-developed arguments would have convinced the trial court to disallow Walker from identifying in court the man he claimed was involved in killing his brother. Hence, no relief is due for this claim of ineffectiveness of counsel.

B. Police note concerning Walker's ability to identify the assailants

Closely related to the previous issue, Appellant contends that the Commonwealth violated ***Brady*** by failing to disclose before trial a handwritten note that appears to have been created by an officer on scene during the night of the murder. ***See*** Appellant's brief at 75-81. The note, which is not signed, recorded Walker's impression of the shooters immediately after the incident, and indicated in relevant part: "Don't know them, can ID." N.T. Hearing, 9/11/23, at Defense Exhibit 2. As discussed above, Walker later identified Appellant at a lineup and again at trial. During trial, he testified that he had never interacted with Appellant, but that he had seen him around the neighborhood before the shooting and that everyone knew him by the name of "Hoagie."

Appellant argues that this note constituted a "facial contradiction" to Walker's testimony and could have been used for effective impeachment purposes. ***See*** Appellant's brief at 75-76. He additionally posits that the note "thoroughly undermines the notion that Walker . . . had an independent basis"

for identifying Appellant in a lineup four months after the killing. ***Id***. at 76. Appellant avers that evidence of a witness previously failing to identify a defendant, like this note, is subject to disclosure by the Commonwealth pursuant to ***Brady***. ***Id***. at 77. He believes that had this information been utilized by counsel, the trial court would not have permitted Walker's in-court identification. ***Id***. at 79-80.

In rejecting this claim, the PCRA court found as follows:

> Contrary to [Appellant]'s argument, Walker's statement to the officer as memorialized in the officer's note did not contradict Walker's testimony in any significant way. At both the suppression hearing and at trial, Walker claimed only that he had seen [Appellant] before, and knew that people called him "Hoagie." That is substantially consistent with a statement to an officer that he did not "know" any of the perpetrators, but was able to identify them. Because the impeachment value of the note was minimal, there is not a reasonable probability that the result of the trial could have been different if the note had been disclosed. Therefore, the Commonwealth's failure to produce it did not violate ***Brady***, and no relief is due.

PCRA Court Opinion, 8/13/24, at 27-28.

The Commonwealth provides additional explanation as to why it believes the note had little impeachment benefit:

> Walker's trial testimony was generally that [Appellant] was a tenuous acquaintance from the neighborhood. In other words, Walker knew who [Appellant] was from seeing him once before in the neighborhood, but had never spoken to [Appellant] and did not "know" him personally. He testified at the suppression hearing, "I had seen [Appellant], you know, once before, before that night of the crime." N.T. 5/16/92 at 17; ***see also id***. at 26 ("I just knew one of them name. . . . That's Hoagie. I didn't know what his first name is . . . .) and ***id***. ("Q. Can you tell what is the basis you refer to them by names, how did you get to know their names? A. Well, Hoagie name is in the street; everyone know

> him, know him as Hoagie."). Then, at trial, when asked if he had "seen any of the [perpetrators] before in your life," Walker responded: "Well, yes, one I had seen. . . . I had saw him, you know. . . . That would be Mr. Hoagie." N.T., 6/7/9[4], at 194. And Walker's testimony about a different man . . . further suggested that he did not consider seeing someone once and having heard their name around the neighborhood to be the same thing as "knowing" them. N.T., 6/8/94, at 50–51 ("Do I know him, no. . . . I heard his name. . . . I saw him once . . . .").
>
> Moreover, Walker's alleged statement to officers was consistent with the formal police statement he gave later that night, which was read to jurors. In that statement, Walker was asked, "Would you be able to I.D. anyone from tonight?" He answered, "Probably the guy who did the shooting. The one that said task force." N.T., 6/8/94, at 38–39. As he admitted under cross-examination, he did not at that time tell officers that he recognized the man as "Hoagie." He simply said that he could probably identify him in the future. ***Id***. at 83–84.
>
> Accordingly, jurors already knew that on the night of the crime, Walker did not tell police that he knew (or knew of) the perpetrator. The hand-written note simply repeats what the jurors already knew about what Walker told the police that night—he didn't know the man who said "task force," but could probably make an identification in the future.

Commonwealth's brief at 68-69 (cleaned up). The Commonwealth further argues that it is unclear how the note would have been introduced at trial by Appellant had it been disclosed, and that in the same vein, it would not have influenced the trial court's pre-trial decision to permit Walker's in-court identification. ***Id***. at 70-71.

We find no fault with the PCRA court's decision to deny relief as to this claim. Assuming, *arguendo*, that the handwritten note constituted ***Brady*** material, the PCRA court's determination of no materiality is supported by the record. Appellant's argument relies heavily upon the semantics of the word

"know." Although he is adamant that introduction of this note would have fundamentally undercut Walker's testimony, the evidence bears out that this was not the case. The statement in the note would merely have impeached Walker in a duplicative manner on a point he was already questioned about, namely his formal statement to police the night of the shooting wherein he did not provide the name "Hoagie" and was somewhat equivocal about the ability to identify the perpetrators. Since introduction of this document at trial would not have raised "a reasonable probability that . . . the result of the proceeding would have been different," the note was not material as required by ***Brady*** and its progeny. ***See Lambert***, 884 A.2d at 854.

Our conclusion is not altered by the High Court's recent decision in ***Glossip v. Oklahoma***, 604 U.S. 226 (2025), which was decided while this appeal was pending and was raised in the Commonwealth's brief and Appellant's reply. There, the Court held that "[e]vidence can be material even if it goes only to the credibility of the witness[.]" ***Id***. at 248 (cleaned up). The ***Glossip*** Court vacated a murder conviction because the prosecution failed to correct false testimony given by one of its key witnesses, Justin Sneed. Sneed, who killed the victim, made an agreement to cooperate with the prosecution and testified that he was hired by Glossip to commit the murder.

The false testimony in question given during the trial was "that [Sneed] had been given lithium after asking for Sudafed [in jail] and had 'never seen no psychiatrist or anything.'" ***Id***. at 247. The Court held that this information was material because, had it been provided to the defense, it not only could

have been used to impeach Sneed based on a willingness to lie under oath, but also to support the theory that Sneed was solely responsible for the killing. ***Id***. at 249-50. It was known that Sneed was a drug user and later determined that he was specifically prescribed lithium to treat bipolar disorder by the prison psychiatrist. It was further undisputed that Sneed's combined diagnosis and drug usage had a high probability of driving him to bouts of violence.

We find ***Glossip*** distinguishable such that it does not control the outcome of this matter. Here, even if the handwritten police note arguably impeached Walker's account, its potential impact is significantly less than the withheld evidence at issue in ***Glossip***, which both indicated the witness's willingness to lie on the stand and provided a motive for the killing. As discussed, the note in the matter *sub judice* was largely consistent with the evidence heard by the jury, and neither undermined Walker's veracity nor implicated someone else as the guilty party. ***See***, ***e.g.***, N.T. Trial, 6/15/94, at 47-48 (defense counsel conceding during closing argument his belief that Walker is not "a malicious person" who would lie, but rather was mistaken in his identification of Appellant). Further, the note was not groundbreaking because the defense had the opportunity to question Walker based upon not naming "Hoagie" as a perpetrator until months after the shooting. This ***Brady*** claim thus warrants no relief.

C. Claims relating to Appellant's alibi defense

In his next two issues, Appellant contends that trial counsel was ineffective for failing to procure hospital records relating to the discharge of his sister, Jean, from the hospital the day of the shooting. ***See*** Appellant's brief at 46-49. In a similar fashion, he argues that the Commonwealth violated ***Brady*** by not disclosing these same records to Appellant before trial, when it is undisputed that the Commonwealth possessed them. ***Id***. at 86-89.

Pertinently, we recount that Appellant raised an alibi defense at trial.[2] More specifically,

> Jean testified that she gave birth to her son on December 10, 1992, and that she came home from the hospital two days later on December 12, 1992, which was the date of the murder. Jean stated that [Appellant] was at her house on the night of December 12, 1992, and that she saw [Appellant] sleeping in her bed at 11 p.m. Daisy[, Appellant's mother,] testified at [Appellant]'s trial that "she thought" Jean came home from the hospital on "December, January the 12th" and that Jean "came out on a Friday or Saturday." On cross-examination, Daisy admitted that she had not told [Appellant]'s counsel until after May 16, 1994, about this information regarding [Appellant]'s alibi. At [Appellant]'s evidentiary [PCRA] hearing, [Attorney] Floyd testified on this issue, stating that he had no recollection of trying to obtain hospital records for Jean.

PCRA Court Opinion, 8/13/24, at 16-17 (cleaned up).

In this context, Appellant argues that trial counsel undertook no investigation "to present corroborating evidence in the form of hospital records confirming the date of [Jean's] release," which allowed the testimony of Jean

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[2] In our prior decision, this Court erroneously indicated that Appellant proffered no evidence in his defense. ***See Coffey***, 81 A.3d 1006 (Table), 2013 Pa.Super. Unpub. LEXIS 889 at 3.

and Daisy to be prejudicially impeached. ***See*** Appellant's brief at 48. He avers that had his attorney pursued these documents, they could have been used to invariably bolster the credibility of the witnesses and resolve Daisy's hazy recollection of the date that Jean was discharged. ***Id***. at 48-49. With respect to the ***Brady*** violation, Appellant generally reiterates these same points, along with the fact that the Commonwealth did not disclose the documents in question, despite having them in hand prior to trial. ***Id***. at 86-89.

In dismissing the PCRA petition, the court determined that there was a lack of proven prejudice as to the ineffectiveness allegation. It found:

> [T]here is not a reasonable probability of a different outcome had [Attorney] Floyd investigated Jean's hospital records and presented them at trial. As stated by the court in its findings of fact and conclusions of law, although Daisy was equivocal in her recollection of the date Jean came home from the hospital, Jean, the mother of the baby who had just been born, was not uncertain of the date, and Jean's testimony that she came home from the hospital on December 12 was not effectively challenged by the Commonwealth. Moreover, the sole value of the hospital records would have been to corroborate the testimony of [Appellant]'s mother and sister that they were home on the date of the murder. The records did not prove that [Appellant] was at home with them at the time of the murder.

PCRA Court Opinion, 8/13/24, at 17 (cleaned up). The court likewise concluded that based on their limited probative value, the hospital records were not "material" as contemplated by ***Brady***, in the sense that they would not have led to a different result at trial if introduced. ***Id***. at 28.

The Commonwealth argues furthermore that had these records been entered into evidence, they would have undermined, not aided, Appellant's trial defense. ***See*** Commonwealth's brief at 81-82. It maintains that Jean testified at trial that she saw Appellant at her house early in the morning on the day of the shooting, whereas the records reflected that she was not discharged from the hospital until nearly noon that day.[3] The Commonwealth also aligns with the PCRA court in asserting that even if the records would have buttressed the credibility of Daisy, they were immaterial in the sense that they did not speak to where Appellant was located during the time of the murder. ***Id***. at 82.

We find that Appellant is not entitled to relief on either of these related ***Brady*** and ineffective assistance of counsel claims. Even though he is correct that the documents likely would have bolstered Daisy's credibility generally by refreshing her recollection as to specific dates in question, they ultimately had a tenuous bearing, at best, on the actual alibi. The shooting occurred in the late evening hours of December 12, 1992, approximately eleven hours after Jean was discharged from the hospital. As the PCRA court noted, the Commonwealth did not dispute Jean's testimony that she was discharged from the hospital earlier on the day of the shooting. If counsel had introduced these

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[3] Appellant responds that the Commonwealth, through this contention, "ignores the substance of" the alibi witnesses' testimony. He also reasserts that the hospital records were material for ***Brady*** purposes because they lent general credence to these witnesses, and that they need not have constituted direct proof of innocence. ***See*** Appellant's reply brief at 24-27.

documents at trial, we do not believe that there is "a reasonable probability that the outcome of the proceedings would have been different." ***Sandusky***, 203 A.3d at 1043.

Moreover, although the documents may have aided slightly in fortifying Daisy's credibility in a broad sense, we note that the Commonwealth attacked her testimony at trial not based upon her lack of recollection of the pertinent dates, but rather her decision to wait nearly one and one-half years before informing anyone that Appellant was with her the night of the murder. ***See***, ***e.g.***, N.T. Trial, 6/15/94, at 87 (arguing at closing that she "[d]idn't tell the lawyer, didn't tell the investigator, didn't tell [Jean], never went up to the prison and told [Hoagie]. Kept it here until she got to city hall on or after May 16, 1994. Why would she testify that way?"). Since introduction of the records would not have overcome this problematic aspect of the defense, it was unlikely to have any effect on the verdict and likewise was not material pursuant to ***Brady***.

D. Issues relating to Nemo Kennedy and Renaldo Robichaw

Appellant's next three claims all center around Nemo Kennedy and Renaldo Robichaw, both of whom were acquainted with Appellant at the time of the crime. Specifically, Appellant asserts that trial counsel was ineffective in choosing not to impeach Kennedy with a statement given to police by Robichaw (the "Robichaw Statement"), as well as opting not to stay at a bond hearing for Kennedy as a material witness. ***See*** Appellant's brief at 27-39.

Appellant further avers that the Commonwealth violated ***Brady*** when it did not provide the Robichaw Statement to the defense prior to trial. ***Id***. at 81-86.

The following background informs our consideration of these interrelated issues. In March 1993, prior to trial, Kennedy provided a statement to police indicating that within hours of the shooting, Appellant came to his residence at 2538 West Turner Street in Philadelphia and said that "we just killed somebody." N.T. Hearing, 9/11/23, at Defense Exhibit 10. Kennedy's statement also expressed that on the following morning, Appellant called him and relayed that "we did Johnny." ***Id***. Approximately a month before trial in 1994, however, Kennedy spoke with a defense investigator after receiving a call from Appellant in jail and recanted, proclaiming that he was under the influence of several drugs at the time he gave the statement to police and that it was not accurate.

Roughly eight days after Kennedy's recantation, Robichaw, a friend of Kennedy, furnished the Robichaw Statement to police. At the time, Robichaw was incarcerated for unrelated charges. In the statement, he asserted his understanding that Kennedy, not Appellant, was responsible for the murder. The Robichaw Statement also recounted that Kennedy requested that Robichaw help lay the blame on "Hoagie," i.e. Appellant, but Robichaw informed him that he did not want to be involved. ***See*** N.T. Hearing, 9/11/23, at Defense Exhibit 1. For reasons unknown, the Robichaw Statement was never provided to counsel for Appellant before or during trial.

On the day after the Robichaw Statement was taken, the court held a hearing to set bond for Kennedy as a material witness for Appellant's trial, as Kennedy had been evading police efforts to contact him in the weeks prior. Appellant himself did not appear for the hearing, though his trial counsel was present up to the time it was set to begin. Counsel then received leave of court to handle an unrelated matter in another courtroom, and informed the court that the attorney for Appellant's co-defendant, Lee Smith, would monitor Appellant's interests. During the bond hearing, the Commonwealth referenced the Robichaw Statement but did not call Robichaw as a witness. Kennedy attested somewhat in line with his recantation, but added allegations "that he did not see [Appellant] on the night after the murder, that police had threatened him and his family to get him to cooperate against [Appellant], and that he recanted his [initial police] statement to [Appellant]'s investigator in May 1994" because he was under the influence of drugs. ***See*** PCRA Court Opinion, 8/13/24, at 11-12 (citing N.T. PCRA Hearing, 9/13/23, at 42). To counter these allegations, the Commonwealth called Detective Robert Snell, who testified that when he had spoken to Kennedy on the day prior, Kennedy was very hostile and threatened the detective's family. ***See*** N.T., 5/24/94, at 68.

At trial approximately two weeks later, the Commonwealth called Kennedy as a witness but not Robichaw. Kennedy testified partially in line with his initial 1993 statement to police and not with his recantation or account from the material witness bond hearing. Specifically, he attested that

Appellant came to the residence after the shooting and said that he and some others "just did something." N.T. Trial, 6/7/94, at 94. Kennedy also stated that he confronted Appellant about shooting Johnny Moss two days later, and Appellant replied he did not "care what people said" and "that's how the game goes." ***Id***. at 95. After then explaining that he did not recall anything else, the Commonwealth entered into evidence Kennedy's original police statement as a prior inconsistent statement, which provided more detail and wherein Kennedy confirmed to detectives that he was not under the influence of drugs or alcohol. Appellant's trial attorney impeached Kennedy with his recantation, but did not do so with the Robichaw Statement or any information that was disclosed by Kennedy during the material witness bond hearing. Although Kennedy never testified that he recanted in fear of Appellant after Appellant called him from jail, he nonetheless said that he was "shocked" when he learned that Appellant viewed a copy of his 1993 statement to police.

At the evidentiary hearing for Appellant's PCRA petition, both Kennedy and Robichaw testified. Kennedy, contrary to the testimony he provided at trial, maintained that his initial account to police was false. He again iterated that he was intoxicated by drugs on the occasion, detectives threatened him and his family to make him point the finger at Appellant, and he was afraid of prosecution if he did not comply. The Commonwealth called rebuttal witness Detective Steve Vivarina, who relayed that he was involved in the taking of Kennedy's 1993 statement and would not have recorded it if he believed Kennedy was under the influence. Detective Vivarina also denied ever

threatening Kennedy or witnessing any other law enforcement officer doing the same.

Robichaw testified at the PCRA hearing that the Robichaw Statement was untrue, and that he only implicated Kennedy for being responsible for the murder because: (1) police told him that he would be able to go home after giving the statement; and (2) he was under the impression that Kennedy told investigators that Robichaw was involved. In essence, he contended that he gave the false statement solely in retaliation against Kennedy, whom he believed was blaming him for the shooting.

With this context, we return to Appellant's overlapping claims of ineffective assistance of counsel and Commonwealth violations of ***Brady***. He avers that trial counsel was ineffective by not attending Kennedy's material witness bond hearing. Had he done so, he would have learned that Kennedy alleged police misconduct in the investigation, which was more egregious than the limited information within his recantation statement to defense investigators. ***See*** Appellant's brief at 34-35. Appellant also asserts that this testimony would have had a different "character and import" than the recantation since it was given under oath in court. ***Id***. at 37. He laments that none of this information made it to the jurors. ***Id***. at 35.

Second, Appellant contends that had counsel remained at the bond hearing, he would have discovered the Robichaw Statement, which would have implicated Kennedy, not Appellant, as a perpetrator of the murder. ***Id***. at 34. He argues that this was important because "Kennedy was the primary

prosecution witness whose testimony implicated" Appellant, and that Kennedy's "credibility was paramount, and undermining his testimony would have been an essential tactic for any reasonable trial counsel." ***Id***. at 28. Appellant summarizes the importance of this information as follows:

> The jury did not hear that Nemo Kennedy considered himself a suspect in the murder and was afraid he would be prosecuted himself if he did not testify against [Appellant]. The jury did not hear that the Robichaw Statement named Kennedy as the perpetrator of the homicide and stated his intent to frame [Appellant]. Effective use of the Robichaw Statement would have provided the jury with an alternative view of the reason for Kennedy's testimony: that . . . Kennedy implicated [Appellant] in the offense to save himself from the threat of prosecution. The Robichaw Statement was explosive impeachment evidence with which Kennedy was never confronted.
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> The Robichaw Statement is a damning piece of evidence demonstrating the bias and unreliability of Kennedy as a witness due to his motivation to testify falsely to avoid prosecution, as well as the fact that police were willing to procure and use a statement they believed to be false in order to influence the testimony of a trial witness.

Id. at 29.

Appellant maintains that there is "more than a reasonable probability that [the statement's] use would have altered the outcome at trial," since it would have impeached Kennedy and cast doubt of the conduct of the officers who took the original statement in 1993. ***Id***. at 31. Finally, he argues that prejudice is presumed because co-defendant Lee Smith was acquitted, with the primary difference in evidence against him stemming from Kennedy's testimony. ***Id***. at 31-32. Appellant reiterates many of these same points in

his related position that the Commonwealth violated ***Brady*** by failing to provide to the defense the Robichaw Statement. ***Id***. at 81-86.

As with the previous claims discussed *supra*, the PCRA court determined that Appellant failed to meet his burden of proving prejudice or materiality at the evidentiary hearing. It determined that the Robichaw Statement was false and therefore had minimal impeachment value as to Kennedy. ***See*** PCRA Court Opinion, 8/13/24, at 10, 13. The court further held:

> Kennedy's vague and inconsistent trial testimony required the Commonwealth to substantially rely at trial on . . . Kennedy's March 1993 prior inconsistent statement to police. Since the Robichaw Statement was given in May 1994, more than a year after . . . Kennedy's . . . statement to police, the 1994 Robichaw Statement could not have served as a motive for . . . Kennedy to lie in 1993. Thus, the . . . Robichaw Statement would have been useless in impeaching the gravamen of . . . Kennedy's testimony, which was information elicited from this 1993 statement.

Id. at 10-11.

Next, the court found that Kennedy's testimony from the bond hearing was "duplicative" of the recantation he gave to Appellant's investigator, which accordingly put the defense on notice of that information. ***Id***. It also determined that Kennedy's statements at the evidentiary hearing about threats from law enforcement investigators were incredible, and thus Attorney Floyd's failure to present such information at trial would not have likely changed the outcome of trial. ***Id***. In the same vein, the court held that Appellant's ***Brady*** claim as to the Robichaw Statement failed for lack of materiality. ***Id***. at 26.

For its part, the Commonwealth likewise asserts that there was no prejudice proven with regard to counsel's failure to attend Kennedy's material witness bond hearing or to impeach him with the Robichaw Statement or other information unveiled during the hearing. It highlights that: (1) by Appellant's own concession, the Robichaw Statement was false; (2) Robichaw would have testified to this if called at trial; and (3) Robichaw admittedly had no firsthand knowledge as to who committed the crime. ***See*** Commonwealth's brief at 44. The Commonwealth notes moreover that while Kennedy's testimony was favorable to the prosecution, "it was also internally inconsistent and asserted that certain portions of his original statement to police, such as the exact words [Appellant] used to confess and where in the house he did so, were untrue." ***Id***. at 45. It argues therefore that, had counsel attempted to impeach Kennedy with the Robichaw Statement, the Commonwealth simply could have called Robichaw to demonstrate that the statement was false on its face. ***Id***. at 45-46.

The Commonwealth additionally asserts that use of the Robichaw Statement would not have bolstered Kennedy's recantation of his 1993 police statement, which was not so much a recantation, but rather an attempt to distance himself from his statements. In so doing, it opines that the defense investigator at trial confirmed that Appellant did not dispute the accuracy of Kennedy's statement to police. ***Id***. at 47-48. The Commonwealth adopts this same reasoning in asserting that the PCRA correctly dismissed Appellant's ***Brady*** claim involving the Robichaw Statement. ***Id***. at 49-50

Based on our review of the record, we cannot discern any error on the part of the PCRA court. We begin by noting that it is apparent that Attorney Floyd did not attend Nemo Kennedy's material witness bond hearing, proffered no reasonable reason for failing to do so, and did not suggest that he made any arrangement to follow up with counsel for Lee Smith after the hearing. It is also plain that the Commonwealth was in possession of the Robichaw Statement prior to trial and did not disclose it to Appellant before initiation of these PCRA proceedings.

However, the court acted within its discretion in finding that, had counsel utilized the Robichaw Statement or other information gleaned from the bond hearing at trial, it would not have raised a reasonable probability of changing the trial's outcome. The Robichaw Statement, which implicated Kennedy as the shooter, was demonstrably false. We agree with the Commonwealth that any attempt to impeach Kennedy with it would have been futile as the Commonwealth could have called Robichaw himself to dispel the statement conclusively, which he acknowledged at the PCRA hearing that he would have done.

Further, Kennedy's credibility at trial was already largely suspect, despite his being a witness of significance. Additional impeachment, even if achieved, would not undermine this Court's confidence in the proceedings. As recounted above, his testimony at trial was vague and far less damning than the information he provided to police in 1993. To support the Commonwealth's theory of the case, it largely utilized Kennedy as a vessel to

introduce his police statement which, much more than his trial testimony, provided evidence of Appellant's guilt. Appellant had the full and fair opportunity to impeach Kennedy about that statement with the information provided to the investigator during his recantation, which bore out more an attempt to disassociate himself than outright recant.

Furthermore, even if the Robichaw Statement would have buttressed Kennedy's recantation, this would not have provided a strong defense for Appellant based on the presumed untrustworthiness of recantation testimony. ***See***, ***e.g.***, ***Commonwealth v. D'Amato***, 856 A.2d 806, 825 (Pa. 2004) (recognizing that, "as a general matter, recantation evidence is notoriously unreliable, particularly where the witness claims to have committed perjury." (cleaned up)). This is especially true in light of the suggestion at trial that Kennedy recanted after being "shocked" from a phone call from Appellant at the jail, who read the 1993 police statement.[4]

Next, despite Appellant's suggestion, we do not presume prejudice merely because co-defendant Smith was acquitted of all charges, whereas Appellant was convicted of second-degree murder. There was additional evidence of Appellant's guilt, beyond Kennedy's testimony, that was unique to Appellant's role in the crime. This includes, but is not limited to, the identifications from Walker and Clarence Moss of Appellant as the actor who

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[4] We acknowledge that Appellant was never charged or convicted of any crime related to intimidating Kennedy as a witness, nor did Kennedy explicitly ever accuse Appellant of engaging in such behavior in these proceedings.

yelled "task force," and specific recollections of his street name of "Hoagie" and knowledge of him within the neighborhood. We note that Walker mistakenly indicated that someone other than Lee Smith was involved in the crime during a photo array, a fact that no doubt held great sway over the jury. And while both Walker and Clarence Moss had at least seen Appellant within the neighborhood in the weeks leading up to the shooting, there was no indication this was true as to Smith.

Finally, we accept that if Attorney Floyd had access to the Robichaw Statement and information from the material witness bond hearing, he could have provided more concrete cross-examination of Kennedy as to the allegations that police threatened him to testify against Appellant. Nonetheless, the PCRA court found that Kennedy's accusations were unbelievable. It also credited the testimony of Detective Vivarina dispelling Kennedy's claims. As the judge in the position to see the demeanor and presentation of the witnesses, we defer to the court's findings in this regard. ***See***, ***e.g.***, ***Commonwealth v. Johnson***, 966 A.2d 523, 539 (Pa.Super. 2009) (stating that a PCRA court's "credibility determinations should be provided great deference by reviewing courts" and that "one of the primary reasons PCRA hearings are held in the first place is so that credibility determinations can be made").[5] We also perceive that Kennedy's purported fear of law

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[5] The amicus brief from the Law Enforcement Action Partnership and the National Police Accountability Project offered significant discussion relating to
(Footnote Continued Next Page)

enforcement, if presented at trial, could have also been undercut at least in part by rebuttal testimony that Kennedy, not detectives, was asserting death threats during his interviews with law enforcement.

In short, while there was doubtless relevant information the trial counsel missed by failing to attend Kennedy's material witness bond hearing, as well as the Commonwealth's failure to disclose the Robichaw Statement, Appellant simply has not demonstrated the requisite prejudice or materiality as to these claims.

E. Counsel's failure to investigate Andre Edmonds

In his next issue, Appellant challenges the efficacy of trial counsel because he did not investigate potential rebuttal witness Andre Edmonds. ***See*** Appellant's brief at 49-56.

Edmonds testified at the PCRA evidentiary hearing that on the night of the shooting, he was at 2538 West Turner Street with Kennedy, Robichaw, and another individual named Neil Ransome, among many others who resided in the three-story house. He claimed that he was up until the early morning hours of the following day taking care of his newborn daughter on the second

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coercion methods of the Philadelphia Police Department in the late 1980s and early 1990s. It specifically contends that the intimidation complained of by Kennedy was similar in nature to that commonly utilized by the department during that era. ***See***, ***e.g.***, brief of amici curiae at 19-25. While we acknowledge the organization for its thoughtful and detailed insight into this important issue, we nevertheless reiterate that the PCRA court was able to assess the credibility of multiple individual witnesses, including Detective Vivarina, in ascertaining the veracity of the underlying accusations.

floor, and that Appellant never came to the residence, contrary to Kennedy's statement to police. Edmonds also attested that before trial, he attempted to contact Appellant's trial lawyer, but never heard back.[6] He further offered that if he had been called to trial, he would have testified in accordance with the above.

Edmonds also spoke to an affidavit that he prepared in 1996, approximately three and one-half years after the shooting and nearly two years after trial. ***See*** N.T. Hearing, 9/11/23, at Defense Exhibit 15. The content of the affidavit was generally consistent with his testimony at the PCRA evidentiary hearing, though it was different in some respects. In the affidavit, he stated that he was required to force Robichaw and another person out of the house for being too loud on the night of the shooting. He additionally claimed that most people in the house were high from ingesting drugs that they procured that same evening. Edmonds declared that Appellant did not come to the house after the shooting. Contrary to his testimony of the PCRA hearing, the affidavit stated that Edmonds directly communicated with Appellant's trial counsel about the information contained therein, but that counsel appeared to have no interest in speaking with him.

The PCRA court found that Appellant's claim of ineffective assistance of counsel for failing to investigate Edmonds could not succeed because Appellant failed to prove adequate prejudice. Particularly, the court deemed

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[6] Edmonds was incarcerated at the time and utilized his family to make those communication attempts. ***See*** N.T. Evidentiary Hearing, 9/12/23, at 11.

Edmonds incredible. ***See*** PCRA Court Opinion, 8/13/24, at 19. It stated: "The gravamen of his testimony, that he could recall the details of numerous people coming and going from a three-story house while he was taking care of his infant daughter, on an otherwise 'normal night' – was not believable." ***Id***. It also noted without significant discussion that Edmonds's testimony at the hearing had substantial inconsistencies with what was written in his 1996 affidavit. ***Id***.

To the contrary, Appellant argues that had Edmonds "testified at trial in 1994, [he] would have provided valuable testimony to impeach prosecution witness Nemo Kennedy's . . . testimony and original statement to police, which alleged that [Appellant] confessed to Johnny Moss's murder." Appellant's brief at 50. Appellant contends that the PCRA court's finding of incredibility is belied by the record, highlighting that Edmonds likely had strong recollection of the night in question because he testified that some of the residents were "acting out" and that was close in time to the murder of a neighbor. ***Id***. at 52-53. Appellant avers that the core of what Edmonds stated was consistent and that the PCRA court's reliance on minor inconsistencies was not justified. ***Id***. at 53. He maintains that the court's adverse credibility determination relies upon the passage of time between the night of the murder and the PCRA hearing, for which Appellant was not responsible. ***Id***. at 54-55. Appellant furthermore asserts that the failure to investigate Edmonds, beyond merely the failure to call him as a witness, constituted ineffectiveness because had trial counsel

simply spoken with Edmonds before trial, it would have led to additional investigatory avenues, such as to Renaldo Robichaw. ***Id***. at 55-56.

The Commonwealth counters with its view that the PCRA court's credibility determinations are supported by the record. It notes that during his testimony at the evidentiary hearing, Edmonds stated that many people came and went throughout the house every night, including Appellant several times a week. ***See*** Commonwealth's brief at 59. At no point did Edmonds say that the evening of the shooting was memorable so many years later because it was close in time to a murder that he later learned about. ***Id***. at 60. The Commonwealth disputes that the PCRA court was using the passage of time inequitably against Appellant, noting instead that Edmonds's testimony was implausible on its face and stressing that even the 1996 affidavit was created three and one-half years after the murder. ***Id***. at 60-61.

With respect to this issue, we find that the PCRA court's credibility findings are upheld by the certified record. In other words, there is adequate support for the court's determination that Edmonds's testimony at the hearing was incredible. Appellant presumes that Edmonds had a good reason to remember the night of December 12, 1992, since Appellant was later convicted of a murder occurring that evening, but this presumption was not established through any evidence. Despite being asked in several ways what helped Edmonds recall that particular night, his answers confirmed that it was

largely a usual period and indistinguishable from many others where large groups of people came and went.

Furthermore, Edmonds's assurance that Appellant never came to the residence that evening rested solely on his opinion that he would have heard or seen him, despite acknowledging that others were being rowdy and loud and that he spent the vast majority of the time on a different floor taking care of a newborn. We also agree that there is a significant discrepancy between Edmonds's 1996 affidavit and his testimony at the PCRA evidentiary hearing, namely the details and circumstances surrounding his purported attempts at communicating with Appellant's trial counsel prior to trial. In one instance, he contended that he actually communicated with the attorney, who showed little interest. On the other hand, at the hearing he claimed that neither he nor his family was able to get in touch with Attorney Floyd.

Under these circumstances, we do not have the grounds to disturb the PCRA court's credibility determination. As it found, Edmonds's testimony would have provided little evidentiary benefit for Appellant had it been introduced at trial, since it would not have effectively impeached Kennedy, whose value to the Commonwealth primarily stemmed from a 1993 police statement. Assuming for the sake of argument that Edmonds's testimony at the evidentiary hearing was generally consistent with his affidavit from 1996, we note that the affidavit was created years after the shooting and trial, which casts doubt on Edmonds's ability to call into question Kennedy's statement to police occurring significantly closer in time to the murder.

Moreover, even if counsel had investigated Edmonds before trial and come to learn the significance of Renaldo Robichaw and his statement, that would not have led to a different outcome in the proceedings for the reasons discussed in more detail *supra*. Hence, we uphold the PCRA court's rulings on these claims.

F. Claims relating to the performance of appellate counsel

In his next two issues, Appellant lodges objections to the performance of Attorney Farrell, his appellate counsel. First, he avers that Attorney Farrell should have pursued a claim on direct appeal that the Commonwealth violated ***Bruton v. United States***, 391 U.S. 123 (1968), through testimony introduced by witness Latoya Singleton and the Commonwealth's subsequent "unmasking" of Appellant as the shooter during closing remarks. ***See*** Appellant's brief at 57-65. Relatedly, Appellant faults counsel for failing to argue a violation of ***Shields*** in this Court, insofar as the trial testimony necessary to adjudicate the ***Bruton*** claim is no longer available. ***Id***. at 65-72.

The Supreme Court of the United States has outlined the following pertinent history relating to ***Bruton***:

> In ***Bruton*** . . ., this Court recognized a narrow exception to the presumption that juries follow their instructions, holding that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even with a proper instruction. In ***Richardson v. Marsh***[, 481 U.S.

> 200 (1987)], the Court declined to extend ***Bruton*** further to confessions that do not name the defendant. [The Court] later qualified ***Richardson*** by holding that certain obviously redacted confessions might be "directly accusatory," and thus fall within ***Bruton***'s rule, even if they did not specifically use a defendant's name.
>
> Thus, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly.

Samia v. U.S., 599 U.S. 635, 647-48 (2023) (cleaned up).

In ***Shields***, our High Court held that "[i]n order to assure that a defendant's right to appeal will not be an empty, illusory right, we require that he or she be furnished a full transcript or other equivalent picture of the trial proceedings." ***Shields***, 383 A.2d 844 at 846 (citation omitted). The Court added that "[m]eaningful appellate review is otherwise an impossibility, and fairness dictates that a new trial be granted." ***Id***. (citation omitted). Since the appellant in that case, through no fault of his own, could not obtain access to a transcript that spoke to his appellate claims, the Court determined that he was entitled to new trial.

As additional context for these claims, we note that at trial, Latoya Singleton, a person familiar with both Appellant and co-defendant Lee Smith, testified on behalf of the Commonwealth. There is no dispute that the transcript from the morning of her testimony is lost and unavailable. Based on references made later in the Commonwealth's closing and in the trial court's Pa.R.A.P. 1925(a) opinion, it is apparent that she attested to a written statement she gave to police in 1993. ***See*** N.T. Hearing, 9/11/23, at Defense Exhibit 16. In that statement, she indicated that approximately one or two

days after the shooting, Smith told her that Appellant admitted to shooting the victim. The statement specifically referenced Appellant by his pseudonym of "Hoagie." Furthermore, it appears that Singleton was posed a question by Smith's counsel about the statement that would have implicated Appellant directly, and Appellant's counsel lodged an objection. Although the exact details of this exchange are now unknown, the trial court recalled in its Rule 1925(a) opinion that it sustained the objection and instructed the jury to disregard the **question** of counsel, suggesting that Singleton did not respond to the question.

The subject of Singleton's testimony resurfaced during the Commonwealth's closing argument. Therein, the prosecutor stated:

> Latoya Singleton testified that early morning hours right after the murder that Lee Lee[7] came back in the house at 1724 North 25th Street and he said, Lee Lee said, hey, I was out there and **those other guys did it**. I was out there, he says, but **those other guys did it**. . . . Maybe it is something else that we're talking about in terms of the quality of the mind or the character of the soul of the man who is so quick to try to silence a young girl or lay off part of his responsibility on a friend, associate, **or even a cousin** . . . but I think that an individual who would do such things as try and get a girl to keep her mouth shut and try to lay a little bit of blame off on somebody else **maybe even his own cousin**, might be lacking a little bit.

N.T. Trial, 6/15/94, 100-02 (emphases added). There is no dispute that during the trial, the jurors were informed that Appellant and Lee Smith were cousins.

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[7] Testimony indicated that this was a nickname for Lee Smith.

Appellant asserts that counsel was ineffective for abandoning preserved ***Burton*** and ***Shields*** claims on appeal. In particular, he cites U.S. Supreme Court caselaw for the proposition that it is error for a prosecutor to "undo the effect of a limiting instruction" of a statement that was redacted to comply with ***Bruton***. ***See*** Appellant's brief at 59-60 (discussing ***Richardson***). He contends that the statements of the assistant district attorney in this matter "intentionally and unequivocally implicated [Appellant] as the person referenced in co-defendant Lee Smith's statement to Latoya Singleton," namely by the allusion to their relationship as cousins. ***Id***. at 60. In other words, he believes that whatever protections were made by the trial court with regard to ***Brutonizing*** Singelton's statement at trial were undone by the prosecution in closing. ***Id***. at 62.

Within his brief, Appellant notes that the PCRA court relied upon ***Commonwealth v. Brown***, 925 A.2d 147 (Pa. 2007) ("***Brown I***"), where our High Court concluded that particular comments by a prosecutor in closing did not violate ***Bruton*** if they "affected the redaction only indirectly and by inference and were not overly egregious." Appellant's brief at 62; ***Brown I***, 925 A.2d at 160. However, he asserts that the Court of Appeals for the Third Circuit subsequently determined that ***Brown I*** was wrongly decided based on relevant law coming directly from the United States Supreme Court. ***See*** Appellant's brief at 62-63 (citing ***Brown v. Superintendent Greene SCI***, 834 F.3d 506 (3d Cir. 2016). Appellant hence argues that the law stemming

from ***Bruton*** and its progeny, as articulated by the Supreme Court, "cannot be undone by decisions of the Pennsylvania Supreme Court[.]" ***Id***. at 63.

As to the ***Shields*** claim, Appellant highlights that the transcript of Singelton's testimony is not recoverable and this oversight was not addressed by counsel in any prior Pa.R.A.P. 1923 statement of absence of transcript. ***Id***. at 66. Without the testimony, Appellant protests, it cannot be known whether Singleton answered any question implicating Appellant as the shooter before the objection by counsel was lodged, and no jury instruction would have been sufficient to preserve Appellant's rights if that occurred. ***Id***. at 67-68, 70. He attacks the PCRA court's reliance on statements of the prosecutor in closing to reconstruct Singleton's testimony, as these "do not provide a remotely equivalent picture to the full transcript." ***Id***. at 68.

In addressing Appellant's ***Bruton*** assertion, the PCRA court referenced ***Commonwealth v. Roney***, 79 A.3d 595, 629 (Pa. 2013), which cited ***Brown I***, for the proposition that a violation only occurs when "the prosecutor discloses to the jury that the co-defendant's statement has been redacted and unequivocally identifies the defendant as the individual whose name was removed." PCRA Court Opinion, 8/13/24, at 23. The court found no evidence that the comments rose to such a level here. ***Id***. at 24. It also noted that the trial court had given multiple instructions to the jury that a statement from one defendant to a third party cannot be used against a co-defendant and that statements of counsel do not constitute evidence. ***Id***. at 24-25. In the court's

determination, this mitigated any prejudice arising from the assistant district attorney's comments.

The PCRA court similarly found that Appellant's ***Shields*** claim was meritless, since his issue concerning ***Bruton*** could be resolved by what existed in the record. ***Id***. at 22. It noted that during the Commonwealth's closing remarks, the prosecutor stated that "Laytoya [sic] Singleton testified that . . . Lee Lee said, hey, I was out there and those other guys did it . . ." ***Id***. at 22 (citing N.T. Trial, 6/15/94, at 100-02). The court opined that if the Commonwealth was permitted to utilize the statement that Singleton actually gave police, wherein she referenced Appellant directly by his street name of "Hoagie," it would have done so instead of generally referring to "those other guys." ***Id***. The court set forth the following additional analysis:

> Moreover, it is evident from [the trial court]'s opinion regarding an issue raised by [Appellant] in his post-verdict motion that . . . Singleton's testimony was ***Brutonized***. [The trial court]'s opinion indicates that [Lee] Smith's counsel directly asked . . . Singleton if . . . Smith had implicated [Appellant] in the shooting, [Attorney] Floyd objected, and Judge Fitzgerald sustained the objection. [The judge] instructed the jury to disregard the question, and further instructed the jury "several times" that questions of counsel were not evidence. Judge Fitzgerald would not have ruled in this manner if the jury had heard . . . Singleton say that Smith had said that "Hoagie . . . did it."

Id. at 22 (cleaned up).[8]

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[8] In its brief, the Commonwealth agrees with the PCRA court on a general level that there was no ***Bruton*** violation, but further maintains that Singleton's testimony at issue was not "testimonial," which is required for a
(Footnote Continued Next Page)

Again, we find no reversible error with the PCRA court's analysis as to these claims. Particularly, we agree that had counsel pursued the ***Bruton*** claim on direct appeal to this Court, it would not have garnered him relief. Pursuant to binding authority from our High Court in ***Brown I***, which was in effect at the time Appellant's brief was filed, we would have concluded that there was no ***Bruton*** violation because the prosecutor's statement referring to a "cousin" shortly after discussing Singleton's statement did not plainly identify Appellant. Neither did the comment demonstrate that Appellant's name was redacted from Latoya Singleton's police statement. ***See***, ***e.g.***, ***Commonwealth v. Cannon***, 22 A.3d 210, 219 (Pa. 2011) ("Thus, pursuant to ***Brown*** [***I***], a ***Bruton*** violation may arise when a prosecutor discloses to the jury that the co-defendant's statement has been redacted **and unequivocally identifies the defendant** as the individual whose name was removed." (emphasis added)).

Like the PCRA court, we do not find that the prosecution's two passing references to Smith's cousin were so egregious as to warrant extension of the ***Bruton*** rule to remarks that are not the testimony of a witness. ***See Brown I***, 925 A.2d at 398-99. This is so especially in light of the multiple cautionary

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Confrontation Clause violation. ***See*** Commonwealth's brief at 73-78 (citing ***Crawford v. Washington***, 541 U.S. 36 (2004)). Appellant counters, *inter alia*, that it would be inequitable to utilize precedent from 2004 against him when, by no wrongdoing, his appeal was not decided until 2013, nearly twenty years after conviction. ***See*** Appellant's reply brief at 21-24. Since we do not rely upon the Commonwealth's particular contention within this decision, we do not address it further.

instructions the trial court provided to the jury stressing that closing arguments are not evidence. When viewed in context, the assistant district attorney's comments constituted two fleeting moments in a lengthy closing that spanned forty-seven transcript pages. Thus, Attorney Farrell would not have succeeded in this claim if it had been included in Appellant's direct appeal.

Similarly, Appellant would not have fared better if counsel had pursued a ***Shields*** claim before this Court. We readily acknowledge that this case has lacked any semblance of orderly punctuality and has faced procedural missteps at nearly every level, for an unacceptable amount of time.[9] Had this Court access to Latoya Singleton's testimony at trial, we could more definitively gauge the quality of Appellant's ***Bruton*** claim insofar as his concern that her testimony at trial was not redacted and directly implicated Appellant as the shooter. Nevertheless, we align with the PCRA court in determining that various surviving portions of the record provide adequate insight to address the claim and would not have required a remand.

The trial court's Rule 1925(a) opinion speaks to sustaining an objection after Singleton was posed a question and specifically references a curative instruction for the jurors to disregard that specific **question**. This heavily

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[9] As discussed at length in the thoroughly researched and well-written amicus brief from Phillips Black, a nonprofit, public interest law practice, much of this delay is attributable to the various court-appointed attorneys for Appellant. Yet, the court system is not free from fault. That includes this Court, which could have done more to ensure a proper progression of Appellant's direct appeal throughout the 2000s.

supports the notion that Singleton did not answer the question before the objection was sustained, as the court otherwise would have provided and discussed an instruction about disregarding Singleton's **response**. Further, we find persuasive the court's observation that, during closing arguments, the Commonwealth appeared to carefully go out of its way to avoid using the name "Hoagie" when recapping Singleton's testimony. The remark would have been significantly stronger for the Commonwealth had it referenced verbatim, or close to it, Singleton's actual statement to police.

Although these sources are not the same as an existing transcript, we, unlike Appellant and amici, find what remains of the lengthy record to be an "equivalent picture of the trial proceedings" concerning this claim. ***See Shields***, 383 A.2d 844 at 846. By his argument, Appellant requests that we ignore the fact that the Commonwealth significantly watered down its closing to avoid directly referencing Appellant and that the trial court provided a thoughtful analysis of the issue confirming counsel's objection to the testimony of Singleton. We will not disregard reasonable inferences that undercut Appellant's position merely because they do not refute it to a mathematical certainty. Therefore, Appellant's claims lodged against the efficacy of appellate counsel fail.

G. Cumulative prejudice

In his remaining allegation on appeal, Appellant asserts that he is entitled to a new trial based upon the cumulative prejudice arising from the

various errors by counsel and the Commonwealth throughout these proceedings. ***See*** Appellant's brief at 89-94.

Our Supreme Court has recognized that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually." ***Johnson***, 966 A.2d at 532 (citation omitted). However, the Court clarified that this principle applies to claims that fail because of a lack of merit or arguable merit. ***See Commonwealth v. Sattazahn***, 952 A.2d 640, 671 (Pa. 2008). On the other hand, when the failures of multiple claims are each grounded in lack of prejudice, "[the] cumulative prejudice from individual claims may be properly assessed in the aggregate." ***Commonwealth v. Hutchinson***, 25 A.3d 277, 319 (Pa. 2011). Our High Court has also considered in this analysis allegations of constitutional errors, such as ***Brady***. ***See Commonwealth v. Lesko***, 15 A.3d 345, 417 (Pa. 2011).

Appellant highlights the following claims of ineffectiveness and ***Brady*** violations that the PCRA court determined lacked prejudice: trial counsel's failure to impeach Kennedy with the Robichaw Statement; counsel's decision not to remain at Kennedy's material witness bond hearing; the inadequate objections to Walker's in-court identification; counsel's choice not to obtain and utilize hospital records supporting Appellant's alibi defense; his attorney's opting not to investigate potential rebuttal witness Edmonds; and the Commonwealth's oversight in not providing the handwritten police note as to

Walker's observations the night of the shooting.[10] ***See*** Appellant's brief at 90. He accuses the PCRA court of performing a brief and inadequate analysis as to this claim. ***Id***. at 91. Appellant argues:

> [The prosecution] failed to disclose evidence that corroborated [Appellant]'s alibi, contradicted an already suspect witness identification, and cast doubt on the fundamental integrity of police investigation in the case. But for trial counsel's ineffectiveness in this case, [Appellant]'s jury would have encountered objective corroboration of his alibi defense. [It] would have learned that . . . Nemo Kennedy was coerced into testifying [by law enforcement], and heard from Andre Edmonds that [Appellant] did not come to Kennedy's house on the night in question. [It] would not have been exposed to a profoundly unreliable identification by Walker Moss. The Commonwealth's suppression of evidence and the failures of [Appellant]'s trial counsel weakened both the credibility of [Appellant]'s alibi witness and his ability to counter the Commonwealth's shoddy evidence against him. The prejudice of these omissions cannot be viewed in isolation. Viewed individually and cumulatively, as they must, the many errors at [Appellant]'s initial trial and on appeal merit relief.

Id. at 91-92. Furthermore, Appellant points to the fact that Lee Smith was acquitted of all charges, something he avers the PCRA court glossed over, and that Appellant's own conviction was for second-degree murder, which likely was a compromise verdict from the jurors based on a weak presentation from the Commonwealth. ***Id***. at 92-93. He concludes: "There can be no

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[10] To the extent that Appellant also includes his allegations of appellate counsel ineffectiveness, we do not consider them in weighing whether there was sufficient cumulative prejudice creating a reasonable possibility that the verdict of trial would have been different. By necessity, appellate counsel's failure to pursue claims on appeal could not have affected the jury's verdict directly. Moreover, we considered jointly the claims asserted against appellate counsel above, and concluded that even together, they would not have warranted appellate relief from this Court.

confidence in the outcome of a trial riddled with so many Constitutional errors. This Court has an opportunity to rectify over [thirty] years of wrongs suffered by [Appellant] — an opportunity which it was previously denied due to ineffective appellate counsel. Appellant's conviction must be overturned." ***Id***. at 94.[11]

In contrast to the PCRA court's terse assessment of this claim, the Commonwealth offers multiple points as to why it believes Appellant's argument fails. It works from the starting point of "imagin[ing] a trial where all allegedly suppressed evidence was disclosed to defense counsel, and where defense counsel behaved in all the ways that would have cured his alleged deficiencies, according to [Appellant]." Commonwealth's brief at 84. The Commonwealth avers that several pieces of information would not be included in the analysis due to the PCRA court's finding of a lack of arguable merit instead of prejudice, including counsel's failure to make unmeritorious arguments challenging Walker's in-court identification, seek out Jean's hospital records, or pursue a ***Bruton*** claim on appeal. ***Id***. at 84. With what remains, the Commonwealth

> assumes a trial where defense counsel had attempted to impeach Nemo Kennedy with Kennedy's testimony from his bond hearing, with [the Robichaw Statement], and with testimony by Andre

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[11] The amicus brief from Phillips Black discusses at length the frequent inadequacy of representation by court-appointed counsel in Pennsylvania, particularly in capital cases, where the prevalent fee structure disincentivizes thoroughness and creative argument. Since that specific issue is not before us, we do not weigh the wisdom of policies set by the various counties as enforced by the courts of common pleas.

> Edmonds. It also assumes that the Commonwealth turned over the handwritten note in the homicide file, concerning the early police interaction with Walker . . . on the night of the incident. Under these imagined alterations to the trial, confidence in the outcome is not undermined.

Id. at 84-85 (some capitalization altered).

In its brief, the Commonwealth concedes that Kennedy's credibility could have suffered if he was impeached with information gleaned from his material witness bond hearing, but that none of it would have cast doubt on his original statement to police in 1993, which ultimately ended up forming the crux of his evidence against Appellant. ***Id***. at 85. It additionally argues that even if the Robichaw Statement were to bolster Kennedy's later recantation, the weak and vague testimony of police coercion would not have held up because Appellant's defense investigator testified that Kennedy ultimately did not deny the accuracy of his statement to police.[12] ***Id***. at 85-86. The Commonwealth views less significantly than Appellant the fact that Smith was acquitted, discussing that there was substantially different evidence against the co-defendant, who was asserted to be less culpable than Appellant and who was not identified correctly by Walker or Clarence Moss prior to trial. ***Id***. at 87.

While perhaps Appellant's most robust argument on appeal, we nevertheless find that his claim does not warrant reversal of the PCRA court.

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[12] Appellant disputes this in his reply brief, arguing that the Commonwealth's interpretation of the testimony "borders on bad faith" and "rests on an implausible reading of a confused line of testimony." Appellant's reply brief at 9-10. Since we resolve this contention based on other bases, we do not adopt the Commonwealth's particular argument in this respect.

Unlike the Commonwealth, we conclude that **all** of Appellant's claims before the PCRA court failed based on a lack of prejudice. Accordingly, we consider this issue in the same light as proposed by Appellant in his brief.

Viewing the additional evidence in the aggregate, we are not persuaded that the errors by counsel, or related ***Brady*** violations by the Commonwealth, "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Sandusky***, 203 A.3d at 1043. Further argument as to Walker's in-court identification would not have compelled the trial court to preclude the same, especially since it allowed Walker and Clarence Moss to identify Lee Smith in court, despite them making prior mistakes in identification as to him. Next, had Walker been impeached with the police note about not "knowing" the perpetrators, this would have merely reiterated that he did not identify "Hoagie" by name the night of the murder, something argued by the defense at trial. ***See***, ***e.g.***, N.T. Trial, 6/15/94, at 53 (recounting that on the evening of the murder, Walker only indicated that he could "probably" identify the person who did the shooting). Additionally, if counsel had access to Jean's hospital records surrounding the birth of her child, this would not have offered any significant support to Appellant's purported alibi, when the crimes occurred half a day later and when the alibi took almost eighteen months to surface.

Furthermore, as analyzed in closer detail above, we recognize that information learned during Kennedy's material witness bond hearing, including the existence of the Robichaw Statement, certainly could have been

used to further impeach Kennedy during trial. Yet, Kennedy's value to the prosecution came through introduction of his statement to police in 1993, which was given well before the Robichaw Statement, recantation, or testimony at the material witness bond hearing. Based on the credibility determinations made by the PCRA court, which were supported by the record, Kennedy's allegations of undue police coercion were incredible and could have been rebutted with force by the Commonwealth at trial, particularly through Detective Vivarina.

Finally, had Andre Edmonds been called to further dismantle Kennedy's account, his questionable story, which the PCRA court found implausible, does not erode our confidence in the verdict. At best, it would have indicated that Edmonds did not see or hear Appellant at the residence on the night of the shooting, despite him staying on another floor, the house containing many rowdy and loud participants, and his preoccupation with watching his newborn daughter.

Had trial proceeded under these circumstances, we do not find the chance of a different jury verdict to be reasonably probable. Stated another way, this Court is confident that the outcome of the trial Appellant claims he should have had would have been the same as the one he, in fact, underwent. While Appellant's trial counsel seemingly failed to explore certain opportunities for further impeachment of Commonwealth witnesses, we reiterate that Appellant was entitled to constitutionally effect counsel and a fair trial, not perfection. ***See Strickland***, 466 U.S. at 689; ***Wright***, 961 A.2d at 135.

In short, we determine that Appellant has not met his burden with respect to his multiple claims on ineffective assistance of counsel or the Commonwealth's violations of ***Brady***. Accordingly, we have no cause to disturb the PCRA court's order dismissing Appellant petition.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 12/24/2025

APPENDIX B

Trial Court Opinion

1452 EDA 2024

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

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0441911-1993
	:	FILED
v.	:	AUG 13 2024
JEROME COFFEY	:	Appeals/Post Trial Office of Judicial Records

OPINION

BRONSON, J. August 13, 2024

Defendant Jerome Coffey has appealed from this Court's order of April 25, 2024, dismissing his second petition under the Post Conviction Relief Act ("PCRA"). For the reasons set forth below, the Court's order should be affirmed.

I. PROCEDURAL BACKGROUND

On June 17, 1994, following a jury trial before the Honorable James J. Fitzgerald, defendant was convicted of second degree murder (18 Pa.C.S. § 2502(b)), criminal conspiracy (18 Pa.C.S. § 903), possessing an instrument of crime ("PIC") (18 Pa.C.S. § 907), and aggravated assault (18 Pa.C.S. § 2702). Defendant was tried with his co-defendant, Lee Smith.[1] Judge Fitzgerald imposed the mandatory sentence of life in prison without the possibility of parole for the second degree murder conviction (18 Pa.C.S. § 1102(b)), as well as concurrent sentences of 5 to 10 years for criminal conspiracy, 2 ½ to 5 years for PIC, and 5 to 10 years for aggravated assault, for an aggregate sentence of life in prison. Defendant was represented at trial by Michael Floyd, Esquire.

[1] Mr. Smith was acquitted of all charges.

Following entry of defendant's judgment of sentence, the procedural history of defendant's direct appeal "assume[d] a tortured path, so sparsely documented that, seven years after the 1994 conviction, a panel of [the Superior] Court remanded the case to the trial court with direction to supplement the record in view of the absence of several portions of the transcript." Superior Court Opinion, dated May 29, 2013, at p. 4.[2] The record remained incomplete until March 2007, when counsel for defendant filed a statement addressing the state of the record. *Id.* However, on September 24, 2007, the Superior Court dismissed defendant's direct appeal due to appointed counsel's failure to file an appellate brief.

On July 9, 2008, defendant filed a petition under the PCRA seeking reinstatement of his right to appeal *nunc pro tunc*. Defendant's direct appeal rights were reinstated by agreement on June 17, 2011, and on May 29, 2013, the Superior Court affirmed defendant's judgment of sentence. On November 20, 2013, the Pennsylvania Supreme Court denied *allocatur*. Defendant was represented on reinstated direct appeal by J. Michael Farrell, Esquire.[3]

On November 21, 2014, defendant filed a *pro se* second petition under the PCRA ("Second Petition"), which is here at issue. On February 29, 2016, David Rudenstein, Esquire was appointed to represent defendant, and on May 26, 2017, defendant filed a counseled, amended petition.[4] On November 1, 2017, Martha Conley, Esquire entered her appearance for defendant *pro bono*, replacing Mr. Rudenstein, and on April 7, 2021, defendant filed another amended petition.

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[2] This citation is to the non-precedential opinion of the Superior Court affirming defendant's judgment of sentence on direct appeal.

[3] The Honorable Joseph Scott O'Keefe, who is currently a sitting judge in the Philadelphia Court of Common Pleas, was originally appointed to represent defendant on appeal. Judge O'Keefe was permitted to withdraw as counsel due to his appointment to the bench.

[4] Where, as here, defendant's direct appeal rights were reinstated *nunc pro tunc* in his first PCRA petition, his second petition is considered to be a first petition for the purpose of entitlement to appointed counsel. *See Commonwealth v. Figueroa*, 29 A.3d 1177, 1181 (Pa. Super. 2011).

On October 6, 2021, Bret Grote, Esquire, entered his appearance on behalf of defendant *pro bono* alongside Ms. Conley, and on February 10, 2022, Rupalee Rashatwar, Esquire, also entered her appearance.[5] On February 21, 2022, defendant filed a third amended petition ("Amended Petition"), which incorporated all arguments from defendant's April 7, 2021 amended petition and superseded all previous filings. On September 2, 2022, defendant filed a supplement to his Amended Petition ("September 2022 Supplemental Amended Petition").

On June 9, 2023, the Commonwealth filed a response to defendant's Amended Petition and September 2022 Supplemental Amended Petition, in which it stated that it did not oppose an evidentiary hearing on all of defendant's claims except for (1) ineffective assistance of trial and appellate counsel for failure to raise a *Batson* claim;[6] and (2) ineffective assistance of appellate counsel for failing to raise a claim that the presence of uniformed police officers in the courtroom prejudiced defendant. Defendant filed a reply to the Commonwealth's response on June 22, 2023, in which he specifically claimed an evidentiary hearing was necessary to litigate his *Batson* claim. Following a status hearing on June 23, 2023, the Court directed defendant to file a supplemental brief addressing his purported entitlement to relief that was premised upon the missing transcripts in his case.[7] On August 14, 2023, defendant filed the requested supplemental briefing ("August 2023 Supplemental Brief"), and on September 6, 2023, the Commonwealth filed a supplemental response.

On September 7, 2023, the Court dismissed defendant's *Batson* claim without an evidentiary hearing. The Court then held a three-day evidentiary hearing from September 11th

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[5] Quinn Cozzens, Esquire, a colleague of both Mr. Grote and Ms. Rashatwar, eventually entered his appearance for defendant on July 21, 2023.

[6] *See Batson v. Kentucky*, 476 U.S. 79 (1986) (a prosecutor's challenge to potential jurors solely on the basis of race violates the Equal Protection Clause of the United States Constitution).

[7] *See Commonwealth v. Shields*, 383 A.2d 844 (Pa. 1978) (when the loss of a crucial portion of a trial transcript renders meaningful appellate review impossible, fairness dictates that a new trial be granted).

through September 13th on defendant's remaining claims. Following the evidentiary hearing, defendant filed a post-hearing brief ("Defendant's Post-Hearing Brief") on November 13, 2023. On February 9, 2024, the Commonwealth filed its post-hearing brief. On March 8, 2024, defendant filed a reply to the Commonwealth's post-hearing brief ("Defendant's Reply Post-Hearing Brief"). On April 25, 2024, after having reviewed the briefs from both defendant and the Commonwealth, the Court rendered findings of fact and conclusions of law and dismissed defendant's Second Petition.

Defendant has now appealed the Court's dismissal of his Second Petition on the grounds that: 1) the PCRA court erred in dismissing defendant's claim that trial counsel was ineffective for failing to impeach Commonwealth witness Nemo Kennedy with the statement given by Renaldo Robichaw; 2) the PCRA court erred in dismissing defendant's claim that trial counsel was ineffective for failing to attend Mr. Kennedy's material witness bond hearing; 3) the PCRA court erred in dismissing defendant's claim that trial counsel was ineffective for failing to properly argue for the suppression of Commonwealth witness Walker Moss's in-court identification of defendant; 4) the PCRA court erred in dismissing defendant's claim that trial counsel was ineffective for failing to investigate alibi witness Jean Coffey's hospital records; 5) the PCRA court erred in dismissing defendant's claim that trial counsel was ineffective for failing to investigate potential rebuttal witness Andre Edmonds; 6) the PCRA court erred in dismissing defendant's claim that appellate counsel was ineffective for failing to raise a claim that the Commonwealth, during closing argument, "unmasked" defendant as the subject of his codefendant's statement in violation of the Confrontation Clause, 7) the PCRA court erred in dismissing defendant's claim that appellate counsel was ineffective for failing to raise a Confrontation Clause claim under *Shields*, 8) the PCRA court erred in dismissing defendant's

Brady claim regarding the statement given by Mr. Robichaw; 9) the PCRA court erred in dismissing defendant's *Brady* claim regarding a handwritten note authored by a police officer on the night of the murder; 10) the PCRA court erred in dismissing defendant's *Brady* claim regarding Jean Coffey's hospital records; and 11) the PCRA Court erred in dismissing defendant's cumulative prejudice claim. *See* Concise Statement of Errors Complained of on Appeal ("Statement of Errors") at ¶¶ 4(a)-4(k). For the reasons set forth below, defendant's claims are without merit, and the Court's order dismissing defendant's Second Petition should be affirmed.

II. FACTUAL BACKGROUND

The factual background of this case is set forth in the Superior Court's opinion filed in defendant's direct appeal as follows:

> The appeal follows the December 12, 1992 shooting death of Johnny Moss who died from a gunshot wound to the head after his assailants pulled him from his vehicle under the pretense of acting as police officers. The evidence at trial established that Moss was seated in his father's vehicle, stopped at the corner of 24th and Thompson Streets in the City of Philadelphia. As Moss talked to his brother, Walker Less Moss (Walker), who was standing at the curb, two other vehicles pulled in around his, boxing him in and blocking egress. Witnesses testified that three males then exited from the car in front and that one of them, identified as Coffey, yelled "task force," before another male pulled the victim from his own vehicle and pushed him into another. Although Walker struggled to help his brother, the assailants shot him, the bullet finding its place in his arm. When he ultimately reached his brother, he found him slumped in the car, bleeding from the head, with a bullet hole behind his ear. After the shootings, all four assailants fled.
>
> Following Coffey's apprehension, this matter proceeded to a jury trial before the Honorable James J. Fitzgerald[1] in June 1994. Over a considerable number of days, Judge Fitzgerald received the testimony of a member of the Philadelphia Police Mobil Crime Unit who investigated the scene, as well as the supervising homicide detective and the medical examiner who conducted the victim's autopsy. In addition, the Commonwealth called Nemo Kennedy, Frank Singleton, and Latoya Singleton, each of whom reported encounters during which Coffey

made incriminating statements about Moss's murder that either claimed responsibility or indicated his own complicity.[2] Finally, the Commonwealth called Walker Lee Moss, who positively identified Coffey as one of the assailants.

[1] Judge Fitzgerald is now a member of this Court.

[2] Kennedy attempted to recant his original statements to police, but admitted that he had done so because he had been threatened and feared for the lives of his family members.

Superior Court Opinion, filed May 29, 2013, at pp. 2-3. In addition, defendant called alibi witnesses Jean Coffey and Daisy Coffey, as well Sergeant Robert Brunson and private detective Robert Reese.[8]

III. DISCUSSION

An appellate court's review of a PCRA court's grant or denial of relief "is limited to determining whether the court's findings are supported by the record and the court's order is otherwise free of legal error." *Commonwealth v. Green*, 14 A.3d 114, 116 (Pa. Super. 2011) (internal quotations omitted). The reviewing court "will not disturb findings that are supported by the record." *Id.*

A. *Ineffective Assistance of Counsel Claims*

Defendant raises seven claims of ineffective assistance of counsel. *See* Statement of Errors at ¶¶ 4(a)-4(g). Under Pennsylvania law, counsel is presumed to be effective and the burden to prove otherwise lies with the petitioner. *Commonwealth v. Basemore*, 744 A.2d 717, 728 (Pa. 2000), n.10 (citing *Commonwealth v. Copenhefer*, 719 A.2d 242, 250 (Pa. 1998)). To obtain collateral relief based on the ineffective assistance of counsel, a petitioner must show that counsel's representation fell below accepted standards of advocacy and that as a result thereof,

[8] The Superior Court incorrectly stated in its opinion that the defense did not present any evidence. While defendant raised a claim based upon this error in his Second Petition, he has not pursued that claim on appeal.

the petitioner was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In Pennsylvania, the *Strickland* standard is interpreted as requiring proof that: (1) the claim underlying the ineffectiveness claim had arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. *Commonwealth v. Miller*, 987 A.2d 638, 648 (Pa. 2009); *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987). To satisfy the third prong of the test, the petitioner must prove that, but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different. *Commonwealth v. Sneed*, 899 A.2d 1067, 1084 (Pa. 2006) (citing *Strickland*, 466 U.S. at 694). If the PCRA court determines that any one of the three prongs cannot be met, then the court need not hold an evidentiary hearing as such a hearing would serve no purpose. *Commonwealth v. Jones*, 942 A.2d 903, 906 (Pa. Super. 2008).

1. Trial Counsel Ineffective Assistance Claims

a. Failure to impeach Nemo Kennedy with the Robichaw Statement

Defendant first claims that the Court erred in denying his claim that trial counsel, Michael Floyd, Esquire, was ineffective for failing to impeach Commonwealth witness Nemo Kennedy with Ronaldo Robichaw's statement to police. *See* Statement of Errors at ¶ 4(a); Defendant's Post-Hearing Brief at pp. 17-29. Prior to defendant's trial, Mr. Robichaw, a person Mr. Kennedy stated was with him the night of the murder, gave a statement to police in which he accused Mr. Kennedy of the murder of Johnny Moss ("Robichaw Statement"). *See* N.T. 9/11/2023 at 22; Evidentiary Hearing Defense Exhibit 1 (Robichaw Statement). Defendant argues that, because the Robichaw Statement implicated Mr. Kennedy, and not defendant, as one of Johnny Moss's assailants, the statement would have undercut Mr. Kennedy's trial testimony, provided the jury with an alternative suspect, and served as "critical impeachment material." *See*

Statement of Errors at ¶ 4(a); Defendant's Post-Hearing Brief at pp. 26. This claim is without merit.

On March 10, 1993, Mr. Kennedy gave a statement to detectives in which he stated that he had spoken to defendant on the night of the murder inside Kennedy's home at 2538 West Turner Street, and that a day after the murder, defendant had confessed to the murder during a phone call. *See* N.T. 6/7/1994 at 114-116, 121; N.T. 9/12/2023 at 39-40; Evidentiary Hearing Defense Exhibit 10 (March 1993 Kennedy Statement). Specifically, in his March 1993 statement, Mr. Kennedy averred that defendant had said to him on the night of the murder "we just killed somebody," and the next day, defendant spoke to him on the phone and said "we did Johnny." N.T. 6/7/1994 at at 114-116, 121; N.T. 9/12/2023 at 39-40; Evidentiary Hearing Defense Exhibit 10 (March 1993 Kennedy Statement).

However, about a month before defendant's trial on May 15, 1994, Mr. Kennedy recanted his statement to defendant's investigator. *See* N.T. 6/7/1994 at 100-108; N.T. 9/13/2023 at 42; Evidentiary Hearing Defense Exhibit 11 (May 1994 Kennedy Recantation). In his recantation, Mr. Kennedy averred that when he gave the March 1993 statement, he was under the influence of "PCP (angel dust) [and] V's [Valium] (cake + syrup)," and that he had not read his March 1993 statement until defendant sent him a copy of it in April 1994. *See* N.T. 9/13/2023 at 42; Evidentiary Hearing Defense Exhibit 11 (May 1994 Kennedy Recantation).

Shortly after Mr. Kennedy's recantation, on May 23, 1994, Mr. Robichaw gave a statement to police while he was incarcerated on an unrelated matter. *See* N.T. 9/11/2023 at 22; Evidentiary Hearing Defense Exhibit 1 (Robichaw Statement). In the Robichaw Statement, Mr. Robichaw stated that Mr. Kennedy had admitted to him that Kennedy and some other individuals, not including defendant, were the ones who killed Johnny Moss. *See* N.T.

9/11/2023 at 22; Evidentiary Hearing Defense Exhibit 1 (Robichaw Statement). Mr. Robichaw also averred in his statement that Mr. Kennedy had told him that "he wasn't sure of who [sic] gun killed Johnny . . . him and a couple other guys fired at the same time," and that Kennedy asked him to help "blame it on Hoagie."[9] *See* N.T. 9/11/2023 at 22; Evidentiary Hearing Defense Exhibit 1 (Robichaw Statement).

At defendant's trial, on June 7, 1994, the Commonwealth presented the testimony of Mr. Kennedy. *See* N.T. 6/7/1994 at 90-187. Mr. Kennedy testified that, on the night of Johnny Moss's murder, he saw defendant at his home on West Turner Street. *Id.* at 91-93. Mr. Kennedy also testified, contrary to his initial 1993 statement, that while in his home, defendant stated he "just did something," and then left the house. *Id.* at 94. Mr. Kennedy further testified that two days later, he spoke to defendant on the phone, and when Mr. Kennedy said to defendant "people are saying you killed Johnny Moss," defendant responded that he "don't care what people say" and "[t]hat's how the game go." *Id.* at 94-95. Mr. Kennedy then testified that he did not remember anything else, at which point the Commonwealth introduced his March 1993 statement as a prior inconsistent statement. *See id.* at 99, 114-116, 121. The Robichaw Statement was never used during the trial.[10]

At defendant's evidentiary hearing, Mr. Robichaw and Mr. Floyd testified regarding this issue. Mr. Robichaw testified that he was originally brought in for questioning regarding Johnny Moss's murder in March of 1993, but did not give a statement due to the advice of his attorney. N.T. 9/11/2023 at 17-20. He further testified that he did not give a statement to police until May 23, 1994, when he was brought down to the District Attorney's Office for an interview while he

[9] Hoagie is defendant's nickname. *See* N.T. 6/7/1994 at 4.
[10] As discussed in in Section III(B)(1), *infra*, defendant also claims that the Commonwealth failed to disclose the Robichaw Statement in violation of *Brady v. Maryland,* 373 U.S 83 (1963).

was incarcerated for a probation violation. *Id.* at 21-23. Mr. Robichaw testified that police officers told him he would be able to "go home" if he gave a statement. *Id.* at 23-25. He stated that while he was being interviewed, he was told that Mr. Kennedy and witness Neil Saleem Ransome had implicated him in Johnny Moss's murder. *Id.* at 24-26, 56-57. Mr. Robichaw testified that he gave a statement in which he blamed Mr. Kennedy for the murder only because he had been told that Mr. Kennedy had blamed him. *Id.* at 26-28. Moreover, he maintained that his statement was completely false. *Id.* at 26-28, 50-51. Mr. Floyd testified that he had no recollection of the Robichaw Statement. N.T. 9/13/2023 at 55-56.

The Court found the portion of Mr. Robichaw's testimony regarding the falsity of his statement to be credible, and found that the Robichaw Statement was, in fact, untrue. N.T. 4/25/2024 at 5. Accordingly, the Court found that defendant was not prejudiced by Mr. Floyd's failure to use the Robichaw Statement to cross-examine Mr. Kennedy regarding any matter dependent upon the truth of the Robichaw Statement, such as the assertions that Mr. Kennedy was the real culprit and was trying to frame defendant. *Id.* at 4-6; *see Miller*, 987 A.2d at 648.

Moreover, the Court found that defendant was also not prejudiced by Mr. Floyd's failure to use the Robichaw Statement to impeach Mr. Kennedy regarding matters not dependent on the truth of the statement, such as Mr. Kennedy's purported bias or motive to lie to avoid being accused of the murder. *Id.* at 6-8. As noted above, Mr. Kennedy's vague and inconsistent trial testimony required the Commonwealth to substantially rely at trial on Mr. Kennedy's March 1993 prior inconsistent statement to police. *See* N.T. 6/7/1994 at 99, 114-116, 121. Since the Robichaw Statement was given in May 1994, more than a year after Mr. Kennedy's March 1993 statement to police, the 1994 Robichaw Statement could not have served as a motive for Mr. Kennedy to lie in 1993. N.T. 4/25/2024 at 6-8. Thus, the May 1994 Robichaw Statement would

have been useless in impeaching the gravamen of Mr. Kennedy's testimony, which was the information elicited from his 1993 statement. *Id.*

Accordingly, there is not a reasonable probability that the outcome of the proceeding would have been different had Mr. Floyd used the Robichaw Statement to impeach Mr. Kennedy. *See Sneed*, 899 A.2d at 1084. No relief is due.

b. Failure to attend Nemo Kennedy's material witness bond hearing

Defendant claims that the Court erred in dismissing his claim that Mr. Floyd was ineffective for failing to attend Commonwealth witness Nemo Kennedy's pre-trial material witness bond hearing. *See* Statement of Errors at ¶ 4(b); Defendant's Post-Hearing Brief at pp. 17-29. Defendant argues that, had Mr. Floyd attended the hearing, he would have heard reference to the Robichaw Statement and learned "crucial impeachment information" from Mr. Kennedy's testimony at that hearing, including that detectives allegedly made threats against Mr. Kennedy and his family, and that Mr. Kennedy recanted his 1993 statement. *See* Statement of Errors at ¶ 4(b); Defendant's Post-Hearing Brief at pp. 17-29. This claim is without merit.

On May 24, 1994, the Commonwealth held a material witness bond hearing to secure Mr. Kennedy's presence at defendant's trial. At the hearing, prior to any testimony, Mr. Floyd asked to be excused and represented to the Court that co-defendant's counsel, Mark Gotlieb, Esquire, would handle his interest. *See* N.T. 5/24/1994 at 28. Following Mr. Floyd's departure, the Commonwealth referred to the Robichaw Statement, which named Mr. Kennedy as one of Johnny Moss's assailants, listing it as one of the reasons for requesting a high bail amount to secure Mr. Kennedy's availability for trial. *Id.* at 33. During the hearing, Mr. Kennedy testified that he did not see defendant on the night of the murder, that police had threatened him and his family to get him to cooperate against defendant, and that he recanted his March 1993 statement

to defendant's investigator in May 1994 because he made the 1993 statement while under the influence of PCP and Valium. *Id.* at 77, 84-89.

At defendant's evidentiary hearing, Mr. Kennedy, Philadelphia Homicide Detective Steve Vivarina, and Mr. Floyd testified regarding this issue. Mr. Kennedy testified that his March 1993 statement was false, that he gave the statement while under the influence of drugs, and that he was threatened by detectives to implicate defendant in Mr. Moss's murder. *See* N.T. 9/12/2023 at 42, 44-49. Mr. Kennedy specifically testified that detectives told him, if he did not make a statement implicating defendant, they were going to blame the murder on him, send his aunt back to jail while she was on parole, and at one point told him "[defendant is] going down for it anyway, we know he didn't do this but he's going down for it." *Id.* Detective Vivarina, one of the detectives who took Mr. Kennedy's March 1993 statement, testified that he did not remember Mr. Kennedy being under the influence of drugs on any of the occasions that they spoke, and that it in his normal practice he would not have taken the statement of any witness who appeared to be on drugs or intoxicated. N.T. 9/13/2023 at 16-17. Detective Vivarina further testified that he would have never prompted Mr. Kennedy to give a statement implicating defendant, and never threatened anyone in order to obtain a statement. *Id.* at 18-19. He further testified that had never seen his former partner, Detective Robert Snell, threaten anyone, but recalled that Mr. Kennedy had threatened Detective Snell's family. *Id.* at 18-20, 24. Mr. Floyd testified that he did not remember why he asked to be excused from Mr. Kennedy's material bond witness hearing, and that he did not remember if he followed up with Mr. Gottlieb after the hearing. *Id.* at 44-45.

The Court found that Mr. Floyd was not ineffective for absenting himself from Mr. Kennedy's hearing because defendant did not suffer prejudice as a result. *See Miller*, 987 A.2d at 648. This finding is fully supported by the record for several reasons.

First, there is not a reasonable likelihood that the outcome of defendant's trial would have been different had Mr. Floyd learned of the Robichaw Statement at Mr. Kennedy's hearing and used the statement at trial to impeach Mr. Kennedy. N.T. 4/25/2024 at 4-8. For the reasons set forth above in Section III(A)(1)(a), the Robichaw Statement was false and had minimal value for impeaching Mr. Kennedy.

Second, Mr. Kennedy's recantation of his March 1993 statement at the bond hearing was duplicative of Mr. Kennedy's May 15, 1994, recantation to defendant's investigator, and thus would not have had significant additional impeachment value. Evidentiary Hearing Defense Exhibit 11 (May 1994 Kennedy Recantation). Defense counsel was aware of the recantation prior to the material witness bond hearing and used the recantation at trial. N.T. 6/7/1994 at 151-157.

Finally, as to Mr. Kennedy's bond hearing testimony that detectives threatened him and his family to compel his testimony against Mr. Coffey, the Court found, as a fact, that Mr. Kennedy's testimony at the PCRA evidentiary hearing regarding the threats was incredible and was refuted by credible testimony from Detective Vivarina. N.T. 4/25/2024 at 8. As a result, Mr. Floyd's failure to hear Mr. Kennedy's testimony regarding these alleged threats would not have likely changed the outcome of defendant's trial. *Id.* at 8-9; *Sneed*, 899 A.2d 1084. Accordingly, no relief is due.

c. *Failure to properly argue for the suppression of Walker Moss's in-court identification*

Defendant claims that the Court erred in dismissing his claim that Mr. Floyd was ineffective for failing to properly argue for the suppression of Commonwealth witness Walker Moss's in-court identification. Statement of Errors at ¶ 4(c); Defendant's Post-Hearing Brief at pp. 29-33. Defendant argues that, had Mr. Floyd "elicited sufficient information" during the suppression hearing and offered individualized argument instead of relying on the arguments made by co-defendant's counsel, Mark Gotlieb, Esquire, there is a reasonable probability that Judge Fitzgerald would have suppressed Walker's in-court identification.[11] *See* N.T. 5/23/1994 at 43-48; Defendant's Post-Hearing Brief at pp. 29-33. This claim is without merit.

A witness whose pre-trial identification is suppressed "should not be permitted to make an in-court identification unless the prosecution establishes by clear and convincing evidence that the totality of the circumstances affecting the witness's identification did not involve a substantial likelihood of misidentification." *Commonwealth v. Fowler*, 352 A.2d 17, 19 (Pa. 1976). Prior to defendant's trial, Judge Fitzgerald ruled that Walker's out-of-court, lineup identification of defendant was inadmissible because defendant did not have counsel present. *See* N.T. 5/24/1994 at 20. However, Judge Fitzgerald also ruled that there was an independent source for Walker's in-court identification of defendant and held that his in-court identification would be admissible at trial. *See id.* at 10-11, 20. At defendant's suppression hearing, Walker testified that he was standing next to Johnny Moss's car near the corner of 24th and Thompson Street just prior to Johnny's murder. N.T. 5/16/1994 at 13-14. He stated that he saw three men jump out of a car, pull Johnny out of his own car, and put Johnny in their car before shooting

[11] Since Walker Moss and Johnny Moss share the same last name, the Court refers to both by their first names.

both him and Johnny. *Id.* at 14. Walker testified that, although it was nighttime, the lighting conditions were good because there was a streetlight in the area, he was able to see the assailants' faces, and the interaction lasted about 11 minutes. *Id.* at 16, 18. He also testified that defendant was the one driving the car that Johnny was pulled into, and that he knew it was defendant because he had seen him prior to the incident and knew his nickname on the street to be "Hoagie." *Id.* at 17, 26. Based on this testimony, Judge Fitzgerald found that there was adequate lighting for Walker to make an identification of defendant on the night of the murder, that Walker had a clear opportunity to observe defendant, and that Walker had seen defendant before the night of the murder. N.T. 5/24/1994 at 10-11. Judge Fitzgerald also determined, based on the testimony and exhibits presented at defendant's suppression hearing, that "[a]t no time during any identification procedure did the police indicate that the defendants . . . were involved," and that "[n]o identification procedure was impermissibly suggestive based on improper police conduct . . ." *Id.* at 19-20. At defendant's evidentiary hearing, Mr. Floyd testified on this issue, but did not recall any details about Walker or the suppression hearing. *See* N.T. 9/13/2023 at 48, 50-55.

Judge Fitzgerald's ruling was supported by the record and, thus, defendant was not prejudiced by any alleged deficiencies in Mr. Floyd's performance at the suppression hearing. *See Miller*, 987 A.2d at 648. In particular, there was no evidence present in the record of any infirmity in the out-of-court lineup procedure that would have tainted Walker's in-court identification. Despite defendant's arguments that 1) Walker's discrepancy in his height and weight descriptions of defendant impeached his identification; and 2) Walker may have been shown a photo array before the lineup; these factors, even if argued by Mr. Floyd, would not likely have changed Judge Fitzgerald's finding that Walker's in-court identification had an

independent source. Rather, the totality of the circumstances established that Walker's identification of defendant was reliable, and, therefore, even if Mr. Floyd had presented individualized argument in favor of suppression, it is unlikely Judge Fitzgerald's ruling would have changed. *See Fowler*, 352 A.2d at 19. Accordingly, no relief is due.

d. Failure to investigate Jean Coffey's hospital records

Defendant claims that the Court erred in denying his claim that Mr. Floyd was ineffective for failing to investigate alibi witness Jean Coffey's hospital records. Statement of Errors at ¶ 4(d); Defendant's Post-Hearing Brief at pp. 33-36. Defendant argues that Mr. Floyd should have tried to obtain the hospital records to corroborate that, on the night of the murder, defendant was at home with his sister, Jean, and his mother, Daisy Coffey, because Jean had just given birth.[12] Statement of Errors at ¶ 4(d); Defendant's Post-Hearing Brief at pp. 33-36. Defendant further argues that, had Mr. Floyd offered the hospital records at trial, it would have prevented the Commonwealth from impeaching Daisy's testimony regarding the date that defendant was home. Statement of Errors at ¶ 4(d); Defendant's Post-Hearing Brief at pp. 33-36. This claim is meritless.

At defendant's trial, Jean testified that she gave birth to her son on December 10, 1992, and that she came home from the hospital two days later on December 12, 1992, which was the date of the murder. N.T. 6/14/1994 at 84. Jean stated that defendant was at her house on the night of December 12, 1992, and that she saw defendant sleeping in her bed at 11 p.m. *Id.* at 85-89. Daisy testified at defendant's trial that "she [thought]" Jean came home from the hospital on "December, January the 12th" and that Jean "came out on a Friday or Saturday." *Id.* at 9-10. On cross examination, Daisy admitted that she had not told defendant's counsel until after May 16,

[12] Since Jean and Daisy Coffey share the same last name, the Court refers to both by their first names.

1994, about this information regarding defendant's alibi. *Id.* at 16-19. At defendant's evidentiary hearing, Mr. Floyd testified on this issue, stating that he had no recollection of trying to obtain hospital records for Jean. N.T. 9/13/2023 at 47-48, 60.

Defendant's claim is without merit because there is not a reasonable probability of a different outcome had Mr. Floyd investigated Jean's hospital records and presented them at trial. *See Sneed*, 899 A.2d at 1084. As stated by the Court in its findings of fact and conclusions of law, although Daisy was equivocal in her recollection of the date Jean came home from the hospital, Jean, the mother of the baby who had just been born, was not uncertain of the date, and Jean's testimony that she came home from the hospital on December 12 was not effectively challenged by the Commonwealth. N.T. 4/25/2024 at 12-13; *see* N.T. 6/14/1994 at 83-100. Moreover, the sole value of the hospital records would have been to corroborate the testimony of defendant's mother and sister that they were home on the date of the murder. The records did not prove that defendant was at home with them at the time of the murder.

Accordingly, Mr. Floyd was not ineffective for failing to investigate the hospital records. No relief is due.

e. Failure to investigate potential rebuttal witness Andre Edmonds

Defendant claims that the Court erred in dismissing his claim that Mr. Floyd was ineffective for failing to investigate potential defense rebuttal witness Andre Edmonds. Statement of Errors at ¶ 4(e); Defendant's Post-Hearing Brief at pp. 36-40. Defendant argues that, had Mr. Edmonds testified at defendant's trial, he would have contradicted Commonwealth witness Nemo Kennedy's testimony and rendered Mr. Kennedy's testimony "wholly incredible." *See* Statement of Errors at ¶ 4(e); Defendant's Post-Hearing Brief at pp. 36-40. This claim is without merit.

When raising counsel's failure to call a witness, "the PCRA petitioner satisfies the performance and prejudice requirements of the *Strickland* test by establishing that: '1) the witness existed; 2) the witness was available to testify for the defense; 3) counsel knew of, or should have known of, the existence of the witness; 4) the witness was willing to testify for the defense; and 5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.'" *Commonwealth v. Johnson*, 966 A.2d 523, 536 (Pa. 2009) (quoting *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007)). However, the failure to call a witness "is not *per se* ineffective assistance of counsel, for such decision implicates matters of trial strategy. It is the petitioner's burden to demonstrate that trial counsel had no reasonable basis for declining to call a particular person as a witness." *Commonwealth v. Hammond*, 953 A.2d 544, 558 (Pa. Super. 2008), *app. denied*, 964 A.2d 894 (Pa. 2009) (internal quotations omitted).

On May 14, 1996, following defendant's trial, Mr. Edmonds executed an affidavit in which he averred that he never saw or heard defendant come inside the house at 2538 West Turner Street on the night of December 12, 1992. *See* N.T. 9/12/2023 at 28-29, 35-36; Evidentiary Hearing Defense Exhibit 15 (Edmonds Affidavit). This was important, since Mr. Kennedy testified at trial that defendant went to 2538 West Turner Street that night and confessed to the murder. *See* N.T. 6/7/1994 at 91-94, 114-116, 121. At defendant's evidentiary hearing, Mr. Edmonds and Mr. Floyd testified regarding this issue. Mr. Edmonds testified that he resided at 2538 West Turner Street in December of 1992, and on the night of the murder, defendant was not present at that address. *See* N.T. 9/12/2023 at 7-10. Mr. Edmonds averred that on the night of the murder, he was in the middle room on the second floor of the house watching his three-month-old daughter, and could tell when anyone was coming and going from

the house because he could hear the door open and close. *See id.* at 8-10. Mr. Edmonds testified that he attempted to contact Mr. Floyd prior to defendant's trial after learning defendant had been charged with Johnny Moss's murder by calling and leaving messages, but that Mr. Floyd never got back to him. *Id.* at 11-12. Mr. Floyd testified that he did not recall being contacted by Mr. Edmonds, but stated that if he had received a call from a person who claimed to have helpful information about a client, he would have had an obligation to investigate. N.T. 9/13/2023 at 46-47.

The Court found that Mr. Edmonds was not a credible witness. The gravamen of his testimony – that he could recall the details of numerous people coming and going from a three-story house while he was taking care of his infant daughter, on an otherwise "normal night" – was not believable. N.T. 4/25/2024 at 13-14; N.T. 9/12/2023 at 23. Additionally, there were significant inconsistencies between Mr. Edmonds' testimony and his 1996 affidavit. N.T. 4/25/2024 at 13-14; N.T. 9/12/2023 at 24-25; Evidentiary Hearing Defense Exhibit 15 (Edmonds Affidavit).

Accordingly, because Mr. Edmonds' testimony regarding the night of the murder was incredible, defendant did not suffer prejudice by Mr. Floyd failing to investigate and call him as a witness at trial. *See Miller*, 987 A.2d at 648; *Johnson*, 966 A.2d at 536. No relief is due.

2. Appellate Counsel Ineffective Assistance Claims

Defendant raises two claims of ineffective assistance of appellate counsel, both related to purported violations of defendant's rights under the Confrontation Clause. Defendant claims that appellate counsel, J. Michael Farrell, Esquire was ineffective for 1) failing to raise a claim pursuant to *Commonwealth v. Shields*, 383 A.2d 844 (Pa. 1978), that defendant had a colorable Confrontation Clause claim that could not be reviewed due to the loss of trial transcripts; and 2)

abandoning a claim that the prosecutor violated the Confrontation Clause when he "unmasked" defendant as the subject of an out-of-court statement of co-defendant Lee Smith that inculpated defendant. *See* Statement of Errors at ¶¶ 4(f)-4(g); [13] Defendant's Post-Hearing Brief at pp. 42-51. For the reasons set forth below, these claims are without merit.

a. Failure to pursue Shields claim

Defendant claims that Mr. Farrell was ineffective for failing to raise a claim under *Commonwealth v. Shields*, 383 A.2d 844 (Pa. 1978). Under *Shields*, when the loss of a "crucial portion" of a trial transcript renders meaningful appellate review impossible, "fairness dictates that a new trial be granted." *Shields*, 383 A.2d at 845. However, "in order to 'establish entitlement to relief based on the incompleteness of the trial record, [defendant] must first make some potentially meritorious challenge which cannot be adequately reviewed due to the deficiency in the transcript.'" *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1150 (Pa. 2012). Meaningful review does not require a complete trial transcript. *See Commonwealth v. Lesko*, 15 A.3d 354, 410-411 (Pa. 2011). Here, defendant argues that he has a colorable claim that his Confrontation Clause rights were violated, but that his claim cannot be adequately reviewed due to the loss of "significant and necessary portions" of his trial transcripts, thereby rendering Mr. Farrell ineffective for failing to raise the issue on direct appeal. *See* Statement of Errors at ¶ 4(g); Defendant's Post-Hearing Brief at pp. 42-51.

The basis for defendant's claim is a statement that Latoya Singleton made to police in which she stated, "Lee Lee told me that Hoagie ... did it ..." *See* N.T. 5/19/1994 at 26-27. It was not disputed that "Lee Lee" was a nickname of co-defendant Lee Smith, who did not testify at trial, and "Hoagie" is defendant's nickname. If Ms. Singleton had testified at trial to Mr.

[13] Defendant's two claims regarding ineffective assistance of appellate counsel, set forth in his Statement of Errors at ¶ 4(f) and ¶ 4(g), are addressed here in reverse order for ease of analysis.

Smith's statement consistent with what she told the police, it arguably would have violated defendant's rights under the Confrontation Clause since Smith's statement inculpated defendant and Smith was not subject to cross-examination. *See Bruton v. United States,* 391 U.S. 123 (1968) (defendant's rights under the Confrontation Clause are violated where, at a joint trial, evidence is admitted of a statement of a non-testifying co-defendant that incriminates the defendant). However, if the version of Mr. Smith's statement that was presented to the jury had been "*Brutonized,*" that is, if the statement had been redacted in such a manner as to remove facially incriminating references to the defendant and the jury was given an instruction to only consider the statement as evidence against the defendant who made it, there would have been no Confrontation Clause violation. *Commonwealth v. Daniels,* 104 A.3d 267, 294 (Pa. 2014). Contextual implication will not violate a defendant's rights. So long as neutral pronouns such as "the other guy" or "him" are substituted for the name of the other defendant, and the jury is given an appropriate limiting instruction, *Bruton* is satisfied. *Id.*

It is undisputed that several days' worth of transcripts from defendant's trial are missing, including the transcripts of Ms. Singleton's testimony. *See* N.T. 9/13/2023 at 77-79. As a result, defendant argues that it is impossible to tell if Mr. Smith's statement to Ms. Singleton was properly *Brutonized* so as to avoid the Confrontation Clause violation. Therefore, defendant argues that he is entitled to a new trial under *Shields. See* Defendant's Post-Hearing Brief at 46-47. At defendant's evidentiary hearing, Mr. Farrell testified on this issue, stating that he had not been "adequately attentive to the absence of the transcript[s]" during defendant's case, that he did not take any steps to attempt to secure or identify missing transcripts, and that he did not have a strategic reason for neglecting to raise a *Shields* claim on direct appeal. N.T. 9/11/2023 at 82-95.

Because defendant's *Shields* claim is meritless, Mr. Farrell could not have been ineffective for failing to raise it on appeal. As the Court stated in its findings, defendant is not entitled to relief under *Shields* because his Confrontation Clause claim is reviewable from the available notes of testimony. N.T. 4/25/2024 at 14-15.

In particular, it is clear from ADA Hugh Colihan's closing argument during defendant's trial that Mr. Smith's statement to Ms. Singleton was adequately *Brutonized,* and thus, did not violate the Confrontation Clause. During closing argument, ADA Colihan highlighted Ms. Singleton's testimony, stating that "Laytoya Singleton testified that . . . Lee Lee said, hey, I was out there and *those other guys* did it . . ." N.T. 6/15/1994 at 100-102 (emphasis added). Had the jury been allowed to hear what Ms. Singleton had actually told police, that is, that Mr. Smith told her "Hoagie" did it, ADA Colihan certainly would not have used the phrase "those other guys" instead.

Moreover, it is evident from Judge Fitzgerald's opinion regarding an issue raised by defendant in his post-verdict motion that Ms. Singleton's testimony was *Brutonized.* Judge Fitzgerald's opinion indicates that Mr. Smith's counsel directly asked Ms. Singleton if Mr. Smith had implicated defendant in the shooting, Mr. Floyd objected, and Judge Fitzgerald sustained the objection. *See* Evidentiary Hearing Exhibit C-1 (Judge Fitzgerald January 19, 2001 Opinion) at p. 20. Judge Fitzgerald instructed the jury to disregard the question, and further instructed the jury "several times" that questions of counsel were not evidence. *Id.* Judge Fitzgerald would not have ruled in this manner if the jury had heard Ms. Singleton say that Smith had said that "Hoagie [that is, defendant] did it."

Accordingly, because the existing record fully supports the Court's finding that Mr. Smith's statement was *Brutonized,* no relief is due.

b. Failure to pursue claim that the Commonwealth "unmasked" defendant

Defendant also claims that, even if Mr. Smith's statement had been properly *Brutonized,* the prosecutor in closing arguments improperly "unmasked" defendant as "those other guys" in the statement by stating that Smith was quick to lay off his responsibility for the murder to "a friend, associate, or even a cousin," when the jury knew that defendant and Smith were cousins. *See* Statement of Errors at ¶ 4(f); Defendant's Post-Hearing Brief at pp. 42-51. Defendant argues that the prosecutor thereby undid the effect of any *Brutonization,* in violation of the Confrontation Clause. As a result, Mr. Farrell was ineffective for failing to raise this claim. *See id.* This claim is without merit.

The Pennsylvania Supreme Court has held that the *Bruton* rule ordinarily does not apply to comments by a prosecutor, which are non-evidentiary. *Commonwealth v. Roney,* 79 A.3d 595, 629 (Pa. 2013). A *Bruton* violation would only occur in this context in an egregious case in which the "prosecutor discloses to the jury that the co-defendant's statement has been redacted and unequivocally identifies the defendant as the individual whose name was removed." *Id.*[14]

In this case, evidence was presented at trial that defendant and his co-defendant, Mr. Smith, were cousins. N.T. 6/7/1994 at 85. During the Commonwealth's closing argument in defendant's case, ADA Hugh Colihan referred to the testimony of Commonwealth witness Ms. Singleton, and stated the following:

> "Latoya Singleton testified that early morning hours [sic] right after the murder that Lee Lee came back in the house at 1724 North 25th Street and he said, Lee Lee said, hey, I was out there and those other guys did it. I

[14] The rule set forth in *Roney* regarding prosecutorial comments originated in *Commonwealth v. Brown*, 925 A.2d 147 (Pa. 2007) ("Brown I"). The Third Circuit Court of Appeals held that the Pennsylvania Supreme Court's decision in *Brown I* was wrongly decided in *Brown v. Superintendent Green SCI*, 834 F.3d 506, 517 (3d. Cir. 2016) ("Brown II"). However, because Pennsylvania Courts are bound by the rulings of Pennsylvania Supreme Court, and not bound by decisions of the Third Circuit, the Court applies *Brown I.* In any event, *Brown II* was not decided until 2016, several years after defendant's direct appeal had concluded. Of course, appellate counsel could not have been ineffective for not raising a claim refuted by established precedent in the Supreme Court of Pennsylvania because of Third Circuit authority that did not exist at the time.

> was out there, he says, but those other guys did it . . . Maybe it is something else that we're talking about in terms of the quality of the mind or the character of the soul of the man who is so quick to try to silence a young girl or lay off part of his responsibility on a friend, associate or even a cousin . . . but I think that an individual who would do such things as try and get a girl to keep her mouth shut and try to lay a little bit of blame off on somebody else maybe even his own cousin, might be lacking a little bit."

N.T. 6/25/1994 at 100-102.

At defendant's evidentiary hearing, Mr. Farrell and ADA Colihan testified on this issue. Mr. Farrell testified that he did not have a strategic reason for failing to claim that the Commonwealth improperly argued to the jury that Mr. Smith had implicated defendant in the murder. N.T. 9/11/2023 at 90-91. Mr. Farrell also testified that, at the time of the hearing, he believed defendant had a colorable claim that the Commonwealth's closing argument violated *Bruton*. *Id.* Mr. Colihan testified that he did not recall his closing argument. *Id.* at 115.

Following the evidentiary hearing, the Court found that, although ADA Colihan may have improperly attempted to link defendant to the *Brutonized* statement of his co-defendant, the Commonwealth's comments during closing did not rise to the level of a *Bruton* violation under *Roney*. N.T. 4/25/2024 at 17-21; *Roney,* 79 A.3d at 629. This finding is fully supported by the record. At no time did the prosecutor "disclose[] to the jury that the co-defendant's statement ha[d] been redacted and unequivocally identif[y] the defendant as the individual whose name was removed." *Roney,* 79 A.3d at 629.

Moreover, after a sidebar in which trial counsel objected to the prosecutor's comments during closing and moved for a mistrial, Judge Fitzgerald reminded the jury of an instruction he had given earlier that a statement that one defendant makes to someone else cannot be used against another defendant. *See* N.T. 6/15/1994 at 155; N.T. 6/16/1994 at 20-22. Judge Fitzgerald also instructed the jury that statements of counsel are not evidence in both his

preliminary instructions and final charge. *See* N.T. 6/7/1994 at 30; 6/16/94 at 15. These instructions also mitigated any prejudice from the prosecutor's comments. *See Commonwealth v. Freeman*, 827 A.2d 385, 409 (Pa. 2003) (a jury is presumed to follow instructions provided by the Court).

Accordingly, because counsel cannot be ineffective for failing to raise a meritless claim, no relief is due.

B. Brady Claims

Defendant has raised three claims premised upon the Commonwealth's alleged failure to disclose exculpatory evidence in violation of *Brady*. Statement of Errors at ¶ 4(h)-4(j). Under *Brady v. Maryland,* 373 U.S 83 (1963), exculpatory evidence not disclosed to the defense will give rise to a due process violation and will require a new trial if the exculpatory evidence is "material" either to guilt or punishment. 373 U.S. at 87; *see also* Pa.R.Crim.P. 573(B)(1)(a) (specifying, as mandatory discovery, "[a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth"). If the police possess evidence that is favorable to the defense, then the Commonwealth is deemed to be responsible for its disclosure even if it is solely in the possession of the police. *See Commonwealth v. Lambert*, 884 A.2d 848, 854 (Pa. 2005).

Therefore, to establish a *Brady* violation, defendant must demonstrate that: "(1) the prosecution concealed evidence; (2) which was either exculpatory evidence or impeachment evidence favorable to him; and (3) he was prejudiced by the concealment." *Commonwealth v. Simpson,* 66 A.3d 253, 264 (Pa. 2013). In order to establish prejudice, defendant "must demonstrate a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability for these

purposes is one which undermines confidence in the outcome of the trial." *Id.* (internal quotations and citations omitted). Moreover, "*Brady* evidence may not be cumulative of other evidence, cannot have been equally available to the defense, and cannot have been discoverable through the exercise of reasonable diligence." *Id.* (internal citations omitted).

1. Robichaw Statement

Defendant asserts that the Court erred in denying his claim that the Commonwealth committed a *Brady* violation by withholding the Robichaw Statement. Statement of Errors at ¶ 4(h); Defendant's Post-Hearing Brief at 59-63. As stated above, in the Robichaw Statement, Renaldo Robichaw averred that Commonwealth witness Nemo Kennedy admitted to him that he killed Johnny Moss. *See* N.T. 9/11/2023 at 22; Evidentiary Hearing Defense Exhibit 1 (Robichaw Statement). Defendant argues that the Robichaw Statement was material because, had it been disclosed to effective trial counsel, the statement could have been used to "wholly discredit Kennedy's testimony against [defendant], undermine the police and prosecution's entire investigation and prosecution of [defendant], and introduce the possibility of an alternative suspect in the minds of jurors." *See* Statement of Errors at ¶ 4(h).

For the reasons stated above in Section III(A)(1)(a), *supra*, even if the Commonwealth had concealed the Robichaw Statement, defendant was not prejudiced. N.T. 4/25/2024 at 25; *see Simpson*, 66 A.3d at 264. Accordingly, this alleged concealment did not give rise to a *Brady* violation, and no relief is due.

2. Handwritten note

Defendant next claims that the Court erred in denying his claim that the Commonwealth committed a *Brady* violation by suppressing a handwritten note from a police officer that "[reflected] that prosecution witness Walker Moss did not know the perpetrators of the offense,

which contradicts Moss's later testimony that he could identify [defendant] as a perpetrator because he knew [defendant] prior the murder." Statement of Errors at ¶ 4(i); Defendant's Post-Hearing Brief at pp. 63-67. Defendant argues that, had the Commonwealth turned over the note, the note could have been used as evidence either to exclude Walker's in-court identification of defendant altogether or to impeach his testimony at trial. *See* Defendant's Post- Hearing Brief at pp. 63. This claim is without merit.

In the handwritten note in question, the officer recorded that Walker had told him, with regard to the perpetrators, "Don't know them, can ID." Evidentiary Hearing Defense Exhibit 2 (Handwritten Police Note). At the pretrial hearing to suppress Walker's identification of defendant, Walker testified as to the perpetrators that he had seen the defendant once before, and that he knew that defendant's nickname was "Hoagie." *See* N.T. 5/16/1994 at 16-17, 26. At trial, Walker testified that he recognized and had seen before one of the perpetrators, whom he identified as "Mr. Hoagie," the defendant. N.T. 6/7/1994 at 194. He further testified that "everyone knew [defendant] as Hoagie." N.T. 6/8/1994 at 84. At defendant's evidentiary hearing, former Philadelphia ADA Hugh Colihan testified on this issue. Mr. Colihan testified that, although he could not recall if this note was disclosed, the note was a document he would have "considered disclosing" at the time in light of Walker's testimony regarding the identification of defendant. N.T. 9/12/2023 at 146-147.

Contrary to defendant's argument, Walker's statement to the officer as memorialized in the officer's note did not contradict Walker's testimony in a significant way. At both the suppression hearing and at trial, Walker claimed only that he had seen defendant before, and knew that people called him "Hoagie." That is substantially consistent with a statement to an officer that he did not "know" any of the perpetrators, but was able to identify them. Because the

impeachment value of the note was minimal, there is not a reasonable probability that the result of the trial would have been different if the note had been disclosed. Therefore, the Commonwealth's failure to produce it did not violate *Brady*, and no relief is due. *See Simpson,* 66 A.3d at 264.

3. Hospital Records

Defendant claims that the PCRA Court erred in denying his claim that the Commonwealth committed a *Brady* violation by withholding Jean Coffey's hospital records. Statement of Errors at ¶ 4(j); Defendant's Post-Hearing Brief at pp. 67-69. As noted above, Jean testified at defendant's trial that she gave birth to her son on December 10, 1992, that she came home from the hospital during the day on December 12, 1992, and that defendant was with her on the night that Johnny Moss was shot, that is, the night of December 12, 1992. N.T. 6/14/1994 at 84.

For the reasons stated in Section III(A)(1)(d), *supra*, Jean's hospital records were of minimal probative value. Accordingly, even if the Commonwealth failed to disclose the medical records, the records are not "material" within the meaning of *Brady,* because they would not give rise to a reasonable probability that the result of the trial would be different had they been disclosed to defendant. *See Simpson*, 66 A.3d at 264. No relief is due.

C. Cumulative Prejudice

Defendant finally claims that the Court erred in dismissing his Second Petition because defendant "pled and proved that the cumulative effects of violations of his right to constitutionally effective counsel and under *Brady* v. *Maryland* entitle him to relief." Statement of Errors at ¶ 4(k); Defendant's Post-Hearing Brief at pp. 69-71, Defendant's Reply Post-Hearing Brief at pp. 40-41. This claim is without merit.

"It is well established that no number of failed ineffectiveness claims may collectively warrant relief if they do not do so individually." *Commonwealth v. Simpson*, 112 A.3d 1194, 1205 (Pa. 2015) (citing *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009)). "Yet, when the failure of individual claims is based upon a lack of prejudice, the cumulative prejudice arising from those individual claims may properly be considered." *Id.* at 1205-06 (citations omitted); *see Commonwealth v. Sepulveda*, 55 A.3d 1108, 1150 (Pa. 2012) ("if multiple instances of deficient performance are found, the assessment of prejudice properly may be premised upon cumulation."). "[W]here ineffectiveness claims are rejected for lack of arguable merit, there is no basis for an accumulation claim." *Commonwealth v. Smith*, 181 A.3d 1168, 1187 (Pa. Super.), *app. denied*, 193 A.3d 344 (Pa. 2018) (citing *Commonwealth v. Sattazahn*, 952 A.2d 640, 671 (Pa. 2008)).

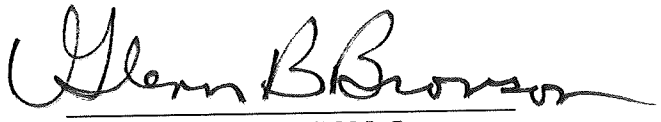
In addition, despite the failure of any individual *Brady* claims, courts "must consider the evidence in sum, for while one piece of information may be incomprehensible or insignificant on its own, its relevance may be substantial when combined with other evidence." *Commonwealth v. Cam Ly*, 980 A.2d 61, 84 (Pa. 2009). "Although generally the cumulative impact of meritless *Brady* claims cannot be grounds for relief, [courts] recognize the possibility that one piece of non-disclosed evidence may not be facially exculpatory on its own but its exculpatory merit may be revealed through the disclosure of other documents." *Id.*

Here, following defendant's evidentiary hearing, the Court determined that although several of defendant's ineffectiveness and *Brady* claims were dismissed based on lack of prejudice, the cumulative effect of any prejudice arising from defendant's claims would not have affected the outcome of the trial. N.T. 4/25/2023 at 26-27. Because this conclusion is fully supported by the record, no relief is due.

IV. CONCLUSION

For all the foregoing reasons, the Court's order dismissing defendant's Second Petition should be affirmed.

BY THE COURT:



GLENN B. BRONSON, J

Commonwealth v. Jerome Coffey **CP-51-CR-0441911-1993**
Type of Order: Opinion

PROOF OF SERVICE

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

Defendant:

Jerome Coffey
AS1558
SCI Pine Grove
189 Fyock Road
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Type of Service: ( ) Personal (**X**) First Class Mail () Other, please specify:

Assistant District Attorney:

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Philadelphia, PA 19107-3499

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Dated: August 13, 2024

Riley E. Cook, Esq.
Law Clerk to Hon. Glenn B. Bronson

Commonwealth v. Jerome Coffey **CP-51-CR-0441911-1993**
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Additional Party:
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Type of Service ( ) Personal (**X**) First Class Mail () Other, please specify:

Dated: August 13, 2024

Riley E. Cook, Esq.
Law Clerk to Hon. Glenn B. Bronson