[J-70-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 303 CAP
	:	
Appellee	:	Appeal from the Order entered April 13,
	:	2000 in the Court of Common Pleas of
	:	Philadelphia County, Criminal Division, at
v.	:	No 3888-3895 July Term 1990
	:	
	:	
JOHN WESLEY BROWN,	:	
	:	
Appellant	:	SUBMITTED: February 11, 2002

OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: April 29, 2005**

Appellant, John Wesley Brown, appeals from the Order of the Court of Common Pleas of Philadelphia County, denying his petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. For the reasons that follow, we affirm the order of the PCRA court.

The underlying facts of the case, as set forth by this Court on direct appeal, are as follows:

> On June 10, 1990, appellant and his father, Wesley Brown, who was then seventy-seven years old, were together in their home in Philadelphia. A quarrel between the two occurred over appellant's use of his father's car for "hacking," that is, an unlicensed taxi service. Appellant shot his father four times with a .38 caliber pistol and left him to bleed to death in their home. A neighbor who heard the shots called the victim's granddaughter; she in turn called her grandfather. Appellant answered the phone and told his niece that her grandfather was outdoors. Appellant placed a .38 caliber revolver next to his father's body and took $400 from his father's wallet, then drove off in his father's car. He disposed of the murder weapon by throwing it out the car window in Maryland en route to Georgia.

> Two days later appellant was stopped at a road check in Georgia; a computer check of appellant's driver's license disclosed that the license was expired, that the car was stolen, and that appellant was wanted in Pennsylvania for murder. Appellant admitted shooting his father, but claimed it was done in self-defense after his father pointed a .357 magnum pistol at him.
>
> Following appellant's trial, the jury found him guilty of murder of the first degree, robbery, and possessing an instrument of crime. Following the penalty phase of the trial, the jury found that an aggravating circumstance existed, to-wit, that appellant had been convicted of a prior voluntary manslaughter; the jury also found three mitigating circumstances, namely, that appellant had no significant history of prior criminal convictions, that he acted under extreme mental or emotional disturbance, and that he had some other evidence of mitigation. In balancing the statutory factors, the jury concluded that the aggravating circumstance outweighed the mitigating circumstances, and unanimously reached a verdict of death.

Commonwealth v. Brown, 648 A.2d 1177, 1180 (Pa. 1994) (footnotes omitted).

Following his conviction, Appellant obtained new counsel and filed a direct appeal to this Court, raising numerous issues of trial court error as well as claims of counsel ineffectiveness. Our Court affirmed the judgment of sentence on October 6, 1994. Id. On January 15, 1997, Appellant filed a *pro se* PCRA petition. Current counsel was appointed to represent Appellant, and an amended petition was filed on April 2, 1998. Thereafter, Appellant filed supplemental pleadings, which he captioned as either replies to the Commonwealth's motions to dismiss or supplemental amended petitions. These pleadings were filed on August 26, 1998, October 9, 1998, April 1, 1998, and June 16, 1999. The Commonwealth responded to each pleading by filing motions to dismiss. On February 2, 1999, May 17, 1999 and December 22, 1999, the trial court conducted hearings for the sole purpose of determining whether an evidentiary hearing was warranted. After Appellant and the Commonwealth argued their legal positions, the trial court took the matter under advisement. On April 12, 2000,

the trial court orally granted the Commonwealth's motion to dismiss the PCRA petition, and on April 13, 2000, the court filed its order and opinion in support thereof.

In this appeal from the PCRA court's dismissal of his petition, Appellant raises twenty-three issues, and numerous sub-issues, for our review. Initially, we note that this Court has jurisdiction over Appellant's petition because we directly review the denial of post conviction relief in death penalty cases pursuant to 42 Pa.C.S. § 9546(d). In cases where the judgment of sentence was final prior to the 1995 enactment of the timeliness requirement, a first PCRA petition is considered timely if filed within one year of the effective date of the enactment or January 16, 1997. Section 3(1) Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. Because the instant petition is Appellant's first PCRA petition and it was filed on January 15, 1997, it is considered timely filed.

Prior to addressing the merits of Appellant's issues, we must first entertain the Commonwealth's contention that Appellant's claims are not cognizable under the PCRA. The Commonwealth argues that Appellant erroneously raises allegations of error as if he were presenting the claims on direct appeal and ignores his burden of proof under the PCRA. It further argues that Appellant's boilerplate assertions of all prior counsel's ineffectiveness, without providing the required legal analysis for demonstrating each layer of counsel's supposed ineffectiveness, is insufficient to avoid waiver of the underlying claims. Upon careful consideration of the manner in which Appellant's claims have been presented, and in light of the strict requirements of the PCRA and this Court's case law interpreting such requirements, we agree with the Commonwealth that several of Appellant's claims are not reviewable. Each issue, however, must be examined independently to determine whether review of the merits is required.

In order to be eligible for relief, a PCRA petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one or

more of the enumerated defects found in 42 Pa.C.S. § 9543(a)(2), and that the allegation of error has not been previously litigated or waived. 42 Pa.C.S. § 9543(a)(3). A claim is previously litigated under the PCRA if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. 42 Pa.C.S. § 9544(a)(2). An allegation is deemed waived "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b). We further note that, pursuant to Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), the relaxed waiver rule is no longer applicable to PCRA appeals and therefore any claims that have been waived by Appellant are beyond the power of this Court to review under the terms of the PCRA.

With these principles in mind, we turn to Appellant's allegations of error. For purposes of our review, we do not examine these issues in the order raised by Appellant in his brief. Rather, we begin with those issues that we find to be "previously litigated" under the PCRA because they were reviewed by this Court on direct appeal. We agree with the PCRA court that Appellant's challenge to the evidence supporting the aggravating circumstance of a prior conviction of voluntary manslaughter, set forth at 42 Pa.C.S. § 9711(d)(12) (Argument I), was raised on direct appeal and was rejected by this Court. To be precise, Appellant challenged the aggravator on direct appeal by arguing that the prosecutor elicited testimony from a detective establishing that Appellant had been "charged" in a prior homicide. Appellant argued that evidence of a charge was not evidence of a "conviction." Our Court rejected this claim as frivolous, finding that the detective testified that Appellant had been charged with voluntary manslaughter *and* that he pled guilty to such charge. Commonwealth v. Brown, 638

A.2d at 1185. Appellant also argued on direct appeal that the prosecutor erred in the manner in which she presented the evidence of the aggravating circumstance, *i.e.*, by eliciting from the detective a long recitation of the facts of the prior manslaughter case. Our Court likewise rejected this claim on the merits. Id. at 1186. Such claim, raised again in the instant appeal as one challenging the detective's testimony as hearsay, is not reviewable. Appellant cannot obtain post conviction review of claims previously litigated on appeal by presenting new theories of relief to support the previously litigated claims. Commonwealth v. Stokes, 839 A.2d 226, 229 (Pa. 2003).

In his current appeal, Appellant additionally argues that the sole aggravating circumstance found is legally inapplicable to his case. To satisfy section 9711(d)(12), the Commonwealth must demonstrate that "[t]he defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), or a substantially equivalent crime in any other jurisdiction, committed either before or at the time of the offense at issue." 42 Pa.C.S. 9711(d)(12). Appellant maintains that because he was convicted of voluntary manslaughter prior to 1967, when 18 Pa.C.S. § 2503 was codified, the aggravator does not apply. As this is yet another challenge to the sole aggravator, which was upheld on direct appeal, this claim arguably has been previously litigated. To the extent that this specific issue was not previously litigated on direct appeal, the issue is waived due to Appellant's failure to raise it on direct appeal. 42 Pa.C.S. § 9544(b).

The next claim that was previously litigated on direct appeal alleges that Appellant is entitled to relief because he was forced to wear shackles during his trial and because there was a large police presence in the courtroom (Argument VII). On direct

appeal, we held that the trial court did not abuse its discretion in permitting Appellant to be shackled in the courtroom because Appellant offered no evidence that any juror saw the shackles or was influenced by the observation. 648 A.2d at 1189. The latter part of Appellant's claim, that he is entitled to relief as a result of the large police presence in the courtroom, was not raised on direct appeal, and is therefore waived. 42 Pa.C.S. § 9544(b).

We also find waived several other issues that Appellant failed to raise on direct appeal. Appellant's claims that the trial court gave an improper self-defense charge to the jury (Argument XII) and that his conviction and death sentence were the result of racial discrimination (Argument XVI) were never raised on direct appeal to this Court and are therefore not reviewable. Also waived are the following claims relating to jury selection: that prospective jurors were improperly dismissed for cause and were not life-qualified (Argument XIII), that the trial court improperly restricted Appellant's right to *voir dire* prospective jurors (Argument XIV), and that the prosecution exercised racially discriminatory peremptory challenges (Argument XV). Additionally, we find waived the claims that the trial court erred in its reasonable doubt instructions (Argument XVII), and that the trial court failed to provide a "life without parole" instruction (Argument XVIII). These issues were available to Appellant on direct appeal when he was represented by new counsel. As he failed to raise them on appeal from the judgment of sentence, they are waived. 42 Pa.C.S. § 9544(b). [1]

[1] In Argument XX, Appellant attempts to overcome waiver of the aforementioned claims by baldly asserting the ineffectiveness of all prior counsel without setting forth the three prong standard for ineffectiveness established in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), as it relates to the performance of counsel at *any* level of (continued…)

Additionally, we find waived Appellant's claim that Justice Castille's participation in Appellant's direct appeal deprived him of his right to an impartial appellate tribunal because Justice Castille was the District Attorney at the time Appellant was criminally charged (Argument XIX). This claim was not presented in Appellant's PCRA petition and therefore is not reviewable.[2]

We turn next to Appellant's claims of ineffective assistance of counsel. In Commonwealth v. McGill, 832 A.2d 1014, 1020-26 (Pa. 2003), this Court recently clarified the procedure to be followed in preserving and proving a PCRA claim challenging the effectiveness of counsel other than immediate appellate counsel. In the context of this case, McGill, explains that "in order for a petitioner to properly raise and prevail on a layered ineffectiveness claim, sufficient to warrant relief if meritorious, he must **plead, present,** and **prove**" the ineffectiveness of direct appellate counsel, which necessarily relates back to the actions of trial counsel. Id. at 1022 (emphasis in original). Therefore, to preserve a claim that direct appellate counsel was ineffective, the petitioner must: (1) plead, in his PCRA petition, that direct appellate counsel was ineffective for failing to allege that trial counsel was ineffective; and (2) present

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(…continued)
representation. Such an undeveloped claim, based upon a boilerplate assertion of all prior counsel's ineffectiveness, cannot convert a claim of trial court error into one of counsel's ineffectiveness. *See* Commonwealth v. Bracey, 795 A.2d 935, 940 n.4 (Pa. 2001) (The mere tacking on of a sentence stating that all prior counsel were ineffective for failing to raise underlying claims of error does not satisfy Appellant's burden of establishing that he is entitled to post conviction relief on ineffective assistance of counsel claim.).

[2] We further note that Appellant did not seek Justice Castille's recusal on direct appeal and has not sought recusal in the instant matter.

argument and develop all three prongs of the Pierce test regarding the ineffectiveness of direct appellate counsel. Id.

As we explained in McGill and expounded upon in Commonwealth v. Rush, 838 A.2d 651 (Pa. 2003), review of the issue of ineffectiveness of trial counsel is merely a component of the claim at issue -- that challenging the effectiveness of appellate counsel. Therefore, to demonstrate that a "layered" claim of appellate counsel's ineffectiveness has arguable merit, the petitioner must develop all three prongs of the Pierce test as to the ineffectiveness of trial counsel. McGill, 832 A.2d at 1022; Rush, 838 A.2d at 656.[3] Stated differently, if the petitioner fails to develop any of the three Pierce prongs regarding the underlying issue of trial counsel ineffectiveness, he or she will have failed to establish the arguable merit prong of the claim of appellate counsel's ineffectiveness. McGill, 832 A.2d at 1023; Rush, 838 A.2d at 656. Only when the petitioner has adequately pled and presented the ineffectiveness of trial counsel pursuant to the Pierce test will this Court proceed to review the layered claim to determine whether he or she has proven appellate counsel's ineffectiveness. McGill, 838 A.2d at 1023.

Pursuant to the mandate of McGill, where the petitioner has pled, presented, and proved the underlying issue of trial counsel ineffectiveness, a remand may be necessary to allow the petitioner an opportunity to correct any errors with regard to the pleading and presentation of his or her claim of appellate counsel ineffectiveness.

[3] It is well-established that the Pierce test requires the PCRA petitioner to demonstrate that: (1) the underlying claim has substantive merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and, (3) the petitioner suffered prejudice as a result of that counsel's deficient performance. Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).

McGill, 838 A.2d at 1024. Where the petitioner fails to plead and prove all three prongs of the Pierce test regarding the underlying issue of trial counsel's ineffectiveness, however, a remand is unnecessary because the petitioner cannot establish the arguable merit prong of the Pierce test regarding the ineffectiveness of appellate counsel. Id.; Rush, 838 A.2d at 656.

Therefore, as a threshold matter, we must determine whether Appellant has properly preserved his remaining claims of appellate counsel ineffectiveness as required by McGill and Rush. We find that Appellant properly pled these layered ineffectiveness claims in a manner sufficient to warrant merits review. In his Brief to this Court, Appellant also adequately addressed the Pierce standard regarding the ineffectiveness of trial counsel. However, as detailed below, Appellant has failed to prove all three prongs of the Pierce test as it relates to each underlying issue of trial counsel's ineffectiveness. Having failed to establish trial counsel's ineffectiveness for each issue raised on appeal, Appellant cannot satisfy the arguable merit prong of the Pierce test regarding the ineffectiveness of appellate counsel. In light of this determination, a remand is not warranted here.[4] [5]

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[4] We recognize that the PCRA court neither identified Appellant's failure to develop his layered claims of appellate counsel ineffectiveness as a ground for dismissal, nor did it offer him an opportunity to amend his petition to develop those claims. Instead, the court examined the merits of Appellant's underlying allegations of trial counsel's ineffectiveness and found them to be without merit. Because we agree with this assessment, a remand is not required.

[5] We further note that in his reply brief, Appellant attempts to remedy some of the deficiencies in his initial brief and to comply with the various capital PCRA cases that were decided *after* his initial brief had been filed. Appellant attaches to his reply brief a declaration of appellate counsel, wherein counsel states, *inter alia*, that he had no (continued…)

Pursuant to McGill and Rush, the first claim of appellate counsel ineffectiveness involves the issue of whether trial counsel was ineffective for failing to procure the decedent's (Appellant's father's) criminal history (Argument II). Appellant also argues that appellate counsel was ineffective for not challenging trial counsel's failure to raise a Brady[6] violation when the Commonwealth failed to disclose the decedent's criminal history to defense counsel.

In examining these claims of appellate counsel ineffectiveness, we must determine whether Appellant satisfied the three prongs of Pierce as to trial counsel's

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(…continued)
tactical reason for omitting the claims raised in the PCRA petition and that it was not within his normal practice to present non-record based claims on direct appeal.

The Commonwealth has filed an application for leave to file a post-submission motion to strike Appellant's reply brief or permit response. Therein, it contends that Appellant's reply brief should be stricken for noncompliance with Pa.R.A.P. 2113(a) because it does not address any new matters raised in the Commonwealth's brief. Appellant has filed an answer to the Commonwealth's application, wherein he opposes the relief requested by the Commonwealth.

We agree with the Commonwealth that an appellant is prohibited from raising new issues or remedying an original brief's deficient discussion in a reply brief. *See* Pa.R.A.P. 2113(a); Commonwealth v. Fahy, 737 A.2d 214, 219 n.8 (Pa. 1999). However, under circumstances similar to that present here, this Court has considered such arguments made in an appellant's reply brief in a capital PCRA case. *See* Commonwealth v. Bracey, 795 A.2d at 941 n.5 (Because the appeal necessitated a discussion of the applicability of the relaxed waiver doctrine to PCRA capital appeals and because the Commonwealth filed a motion to respond to the appellant's reply brief and provided such a response, we considered the "new" arguments raised in the reply brief.). Accordingly, we shall consider the arguments set forth in the reply brief and deny the Commonwealth's request to strike the same. As noted *infra*, however, because we find no merit to Appellant's claims of trial counsel ineffectiveness, his assertions regarding appellate counsel's performance do not entitle him to relief.

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

performance. We find that he did not. It is undisputed that the Commonwealth provided the defense with the decedent's criminal record dating back to 1973, which included a 1973 conviction for violating the Uniform Firearms Act, and two convictions in 1973 and 1974 for driving under the influence of alcohol.

Appellant argues, however, that the Commonwealth failed to disclose the decedent's 1930 Ohio conviction for robbery, his 1946 conviction for carrying a concealed deadly weapon, his 1953 conviction for a violation of the Uniform Firearms Act, and several drunk driving convictions from the 1950's and 1960's. Appellant contends that these convictions would have supported his claim of self-defense. In support of this allegation, Appellant relies upon a declaration of trial counsel, wherein counsel states that, had he been provided a complete criminal history of the victim, he would have investigated the background of the prior offenses and would have presented this material to the jury in support of his theory of self-defense and also as mitigation evidence in the penalty phase. Declaration of Daniel Greene, Appendix of Exhibits to Initial Brief of Appellant, Exhibit 5.[7]

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[7] Similar to his other exhibits, Appellant refers to Exhibit 5 as the "Declaration/Affidavit of Daniel Greene." Appellant's exhibits, however, are not properly characterized as "affidavits" because they have not been sworn to by the declarant before an officer authorized to administer oaths. See 1 Pa.C.S. § 1991 ("Affidavit" is defined as "[a] statement in writing of a fact or facts signed by the party making it, sworn to or affirmed before an officer authorized by the laws of this Commonwealth to take acknowledgments of deeds, or authorized to administer oaths, or before the particular officer or individual designated by law as the one before whom it is to or may be taken, and officially certified to in the case of an officer under his seal of office.") However, as noted *infra*, even assuming the truth of the declarations, Appellant's claim of ineffective assistance of counsel fails.

The Commonwealth persuasively argues that it has no obligation to provide a defendant with his victim's criminal history, particularly where, as here, that record is equally accessible to the defense and the victim is the defendant's father. *See* Commonwealth v. Spotz, 756 A.2d 1139, 1154 (Pa. 2000) (stating that there is no Brady violation where the prosecutor failed to turn over evidence readily obtainable by, and known to, defendant). Moreover, because the convictions are alleged to be relevant only to the self-defense claim, Appellant himself would have had to have knowledge of them. If he did not, then the previous convictions would have no bearing on his self-defense claim. As there was no Brady violation, there was no basis for trial counsel to raise such issue. Accordingly, Appellant has failed to satisfy the arguable merit prong of the Pierce test as to trial counsel's ineffectiveness and, therefore, the claim of appellate counsel ineffectiveness fails.

The related claim of appellate counsel ineffectiveness for not challenging trial counsel's failure to discover the decedent's criminal history on his own likewise fails. The remoteness in time of the convictions and the fact that the jury was made aware of the victim's 1973 violation of the Uniform Firearms Act, dispel any claim of prejudice. Having failed to satisfy the Pierce test as to trial counsel's performance, his claim of appellate counsel ineffectiveness is unsupportable.

The next claim of appellate counsel ineffectiveness encompasses the issue of whether trial counsel was ineffective for failing to investigate, develop, and present evidence that would have supported Appellant's theory of self-defense (Argument III). Specifically, Appellant argues that trial counsel should have presented psychiatric evidence establishing that he suffered from mental and cognitive impairments, including

bipolar disorder and organic brain damage, as well as evidence that he was threatened and abused by his father. He argues that such evidence should have been presented to support a theory of voluntary manslaughter, either by demonstrating an imperfect self-defense claim or a provocation and passion theory. He relies on trial counsel's declaration, wherein counsel states that had he known of Appellant's alleged mental and cognitive impairments, he would have presented them to the jury. Declaration of Daniel Greene at 11, Appendix of Exhibits to Initial Brief of Appellant, Exhibit 6.

We find that there is no arguable merit to the issue of trial counsel's ineffectiveness because the record at the time of trial did not reveal evidence of mental illness or abuse that would have prompted trial counsel to conduct a further investigation in that regard. In fact, the record established the contrary. In his sworn statement to the police, Appellant was specifically asked whether he had ever been treated for mental health problems. (N.T. 7/18/91, 748). Appellant responded "no." Id. Moreover, a pre-sentence investigation report prepared by a psychologist who evaluated Appellant on December 10, 1991, indicated that Appellant reported no history of neurological, suicidal, or psychiatric problems. Exhibit B to the Commonwealth's Motion of December 14, 1999, filed in Philadelphia County Common Pleas Court. The report further indicated that Appellant did not suffer from any major mental illness, but rather was diagnosed with "personality disorder N.O.S. [not otherwise specified], with some dissocial and anti-social features." Id. The primary alleged basis for counsel to have suspected that Appellant was mentally ill at the time of trial is Appellant's "obsession with space travel." The record demonstrates, however, that trial counsel did not view such interest as irrational, but rather offered such evidence in mitigation by

presenting the fact that he shared his interest in NASA and the space program with his niece and other children in the neighborhood, taking them to conventions, and educating them on the subject. (N.T. 7/17/91, 585; 7/24/91, 1035, 1044).

Additionally, the record indicated that Appellant had not been abused by his father. In his testimony at trial when he was describing the events leading to the shooting, Appellant explained that his father had thrown a garbage can at his car moments prior to the homicide. (N.T. 7/19/91, 842). When asked whether his father had ever done that before, Appellant stated, "me and my dad never had any violence of any kind." Id. He went on to state, "My dad had never hit me, not once." Id.

Even assuming such abuse and mental illness did exist, Appellant never informed trial counsel of the same, and there was no objective evidence of record that would have prompted counsel to look further into the issues.[8] *See* Commonwealth v. Bracey, 795 A.2d at 944 (trial counsel not ineffective for failing to present evidence of alleged abuse where neither the defendant nor his family informed counsel of the abuse). In fact, in the same statement to police referenced above, Appellant made a flippant comment that he was sorry for what occurred and that he was "pleading insanity and self-defense." (N.T. 7/18/91, 747). Presumably recognizing the lack of record evidence establishing such defense, trial counsel filed a pre-trial motion *in limine* seeking to *preclude from evidence* any reference Appellant made regarding insanity. *See* Trial court opinion at 8 and exhibit. Accordingly, trial counsel cannot be deemed

[8] The 1999 declarations upon which Appellant now relies on to establish his mental illness at the time of trial involve examinations that were conducted years *after* Appellant's trial, and therefore did not exist at the time the penalty phase of the trial was conducted.

ineffective for failing to present mental health evidence to support Appellant's theory of self-defense when there was no such evidence of record. As there is no arguable merit to the issue of trial counsel ineffectiveness, the claim of appellate counsel ineffectiveness fails.

We must next determine whether appellate counsel was ineffective as a result of trial counsel's failure to investigate and prepare for the penalty phase (Argument IV). As in the prior issue, Appellant alleges that trial counsel failed to present significant mitigating evidence of Appellant's major mental illness, traumatic childhood, and organic brain damage. Although Appellant has produced a declaration of trial counsel wherein he admits that he did not conduct an investigation into Appellant's mental illness, traumatic childhood, and organic brain damage, counsel states that he was unaware of Appellant's deficiencies in this regard. As noted, the information available to trial counsel at the time of trial did not alert counsel to further investigate such issues. *See* Commonwealth v. Bracey, *supra*; Commonwealth v. Uderra, 706 A.2d 334, 339-340 (Pa. 1998) (holding that trial counsel was not ineffective for declining to present mitigation evidence regarding appellant's psychological problems and drug use when appellant failed to disclose any information about those problems prior to trial). In addition, the nature of the crime -- Appellant shooting his father following a heated argument -- did not on its face suggest that the perpetrator was mentally ill. As discussed in detail *supra* at 13-14, the record at the time of trial indicated that Appellant did *not* suffer from any mental infirmity and had *not* been abused by his father.

Rather than portray Appellant as mentally disabled, trial counsel portrayed Appellant as a caring friend and neighbor, a proposition consistent with the self-defense theory presented during the guilt phase. The PCRA court succinctly recognized,

> All of the witnesses who testified for [Appellant] at the penalty phase portrayed Appellant as a hero (pulled witness from wreckage of auto accident); a counselor of wayward youth; a father-figure; a community leader; and a lover and protector or young children in the neighborhood.

Trial court opinion at 9.

Even assuming that Appellant's claim is of arguable merit and that counsel failed to have a reasonable basis for failing to further investigate mental health and abuse issues in the penalty phase of trial, Appellant has failed to demonstrate that he was prejudiced by counsel's substandard performance. Such a showing has always been a prerequisite to a claim alleging the ineffective assistance of counsel. *See* Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987); Strickland v. Washington, 104 S. Ct. 2052 (1984). In order to demonstrate prejudice in this context, Appellant must show that there is a reasonable probability that, absent counsel's failure to present the mitigation evidence he currently proffers, he would have been able to prove at least one mitigating circumstance by a preponderance of the evidence and that at least one jury member would have concluded that the mitigating circumstance(s) outweighed the aggravating circumstance(s). *See* 42 Pa.C.S. § 9711(c). Here, the jury found the mitigating circumstances that Appellant acted under extreme mental or emotional disturbance and the catchall mitigating circumstance of other evidence of mitigation. These mitigating circumstances relate to the evidence Appellant currently proffers. Moreover, we cannot conclude that there is a reasonable probability that the jury would have afforded any more weight to the mitigating circumstances when Appellant has

failed to establish that such evidence of mental illness existed at the time of trial. Thus, Appellant has failed to demonstrate that he was prejudiced by trial counsel's performance during the penalty phase. Accordingly, the issue of trial counsel ineffectiveness fails and renders the claim of appellate counsel's ineffectiveness untenable.[9]

Appellant's next claim of appellate counsel ineffectiveness involves trial counsel's failure to impeach the misleading testimony of the medical examiner (Argument VI). At trial, Bennett Preston, M.D., the Assistant Medical Examiner for the City of Philadelphia, testified that the victim had been hit by three bullets: two of those bullets entered the victim's left chest and the third entered his upper left outer arm, passed through the arm,

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[9] Relying on trial counsel's declaration and our recent decision in Commonwealth v. Malloy, 856 A.2d 767 (Pa. 2004), Justice Saylor noted in his dissenting opinion that he would remand to the PCRA court for an evidentiary hearing, particularly for disposition of this issue. The instant case, however, is clearly distinguishable from Malloy. First, this case is not one in which the PCRA court denied Appellant the opportunity to prove his claims. To the contrary, the PCRA court conducted several hearings solely to determine whether an evidentiary hearing was required. *See* (N.T. 2/2/1999, 5/17/1999, and 12/22/1999). The PCRA court ultimately adopted the Commonwealth's argument that, because it is clear from the record that trial counsel's performance at the penalty stage was objectively reasonable, there is no reason to present testimony of trial counsel's assertion of "self-ineffectiveness." (N.T. 12/22/1999 at 65-66). In its brief to this Court, the Commonwealth characterizes trial counsel's willingness to allege a lack of preparation as a "blatant misrepresentation to this Court" because it is simply not consistent with what actually occurred at trial. Commonwealth's Brief at 24 n.23.

Second, unlike Malloy, substantial evidence of mitigation was presented. In Malloy, trial counsel failed to conduct even a cursory review of the appellant's background and offered no affirmative evidence at all for the jury to consider, only a brief argument and a stipulation. Malloy, 856 A.2d at 789. Not surprisingly, the jury in Malloy found no mitigating circumstances. In contrast, Appellant's trial counsel presented no less than **eight witnesses** during the penalty phase and, as noted, the jury found three mitigating circumstances. Accordingly, unlike trial counsel in Malloy, Appellant's counsel did not abrogate his duty to present penalty phase evidence of mitigation.

reentered the victim's body under his left arm and traveled under the skin, partially exiting through the back. Dr. Preston testified that the path of the bullet that entered the victim's arm was consistent with the victim having his left hand raised in a defensive posture at the time he was shot, thus discounting Appellant's theory that he had acted in self-defense. (N.T. 7/18/91, 758-766).

Appellant argues that Dr. Preston's testimony is scientifically unsound and that trial counsel was ineffective for failing to obtain an expert to rebut it.[10] He relies on two declarations of Dimitri Contostavlos, M.D., who opined that it was impossible to tell from a single gunshot wound whether the victim's left arm was raised in a defensive position. Dr. Contostavlos found that one could not determine whether the victim's palm was facing away from the body or whether the victim's left hand was holding a firearm. Declaration of Dr. Dimitri Contostavlos, Appendix of Exhibits to Initial Brief of Appellant, Exhibit 16.

The Commonwealth argues that, contrary to Appellant's contentions, Dr. Preston's opinion was not based upon a "single gunshot wound," but instead on a total of four wounds inflicted by a single bullet. Moreover, it persuasively notes that Dr. Contostavlos' proposition, that the victim's left arm was wounded while it was holding a weapon at Appellant, is belied by Appellant's own testimony. At trial, Appellant testified that his father pointed a gun at him with his *right* hand. (N.T. 7/19/91, 902). Thus, whether the victim's left hand was raised or by his side is irrelevant to the question of

[10] Appellant further contends that the Commonwealth's knowing presentation of Dr. Preston's materially false testimony violates his constitutional rights to due process. This claim is frivolous as a difference in medical opinion clearly does not amount to "false testimony."

whether he was aiming a firearm at Appellant. The Commonwealth further notes that Dr. Contostavlos and Dr. Preston agreed that the bullets passed through the victim's body in a downward direction, which refutes Appellant's trial theory that he dove to the ground and fired up at his father in self-defense. Under these circumstances, we agree with the Commonwealth that trial counsel's failure to secure Dr. Contostavlos to testify at trial did not prejudice Appellant and therefore trial counsel cannot be deemed ineffective. This being the case, Appellant cannot sustain his burden of satisfying the Pierce standard as to appellate counsel's ineffectiveness.

Appellant's next claim of appellate counsel ineffectiveness alleges that trial counsel failed to present material guilt phase evidence in support of his theory of self-defense (Argument X). Identical to his claims in Argument III, Appellant argues that trial counsel ignored evidence of the decedent's history of firearm offenses and the abuse that Appellant suffered by the hands of his father. As noted in disposing of Appellant's previous claims of ineffectiveness at 12, *supra,* Appellant did not demonstrate that he made counsel aware of his father's abusive behavior. See Commonwealth v. Bracey, 795 A.2d at 944 (trial counsel not ineffective for failing to present evidence of alleged abuse where neither the defendant nor his family informed counsel of the abuse). Thus, there is no merit to the issue of trial counsel ineffectiveness and the claim of appellate counsel ineffectiveness has not been established.

Within this same claim of ineffectiveness, Appellant further contends that appellate counsel was ineffective due to trial counsel's failure to hire a firearms expert to examine the evidence linking Appellant to the murder weapon. He asserts that he has currently retained such an expert who opined that the police were grossly negligent in

failing to have the gun fingerprinted before the fingerprints were destroyed by the blood examination. He also contends that appellate counsel was ineffective as a result of trial counsel's failure to object to testimony that twenty or more shotgun shells were found in Appellant's room when there was no evidence establishing that a shotgun was used in the commission of the instant murder.

To determine the merit of this claim under McGill and Rush, we again look to whether there is arguable merit to the issue of trial counsel's ineffectiveness for failing to have the firearm fingerprinted. Detective Bittenbender testified at trial that the handgun was supposed to be submitted for fingerprints, but was not because of a mistake made by the police department. (N.T. 7/18/91, 652-53). Because trial counsel had nothing to do with the reason why the gun was not promptly fingerprinted, there is no arguable merit to the issue of trial counsel's ineffectiveness in this regard. Thus, the claim of appellate counsel ineffectiveness cannot prevail.

As to the issue relating to trial counsel's failure to object to testimony that shotgun shells were found in Appellant's bedroom, we find that Appellant has failed to demonstrate the prejudice prong of the Pierce standard as it relates to trial counsel's performance. Appellant could not have been prejudiced by such testimony because Appellant himself testified that he owned several guns, including a blank shotgun, as well as gun-related items. (N.T. 7/19/91, 831-32). Thus, trial counsel cannot be deemed ineffective and the claim of appellate counsel ineffectiveness necessarily fails.

Appellant also argues that appellate counsel was ineffective for failing to raise the issue that trial counsel improperly denigrated his client (Argument XI). Appellant

argues that in the closing argument of the penalty phase, his counsel stated the following:

> [T]hen my client, John Brown, has to be one of the most evil people that ever graced the threshold of this planet. He has to be rotten and malicious. He has to be the most evil person there ever was.

Appellant's Brief at 62. Appellant contends that trial counsel's denigration of his client emphasized to the ultimate sentencer that he was a bad person.

This claim is belied by the record. Rather than arguing to the jury that Appellant was evil, trial counsel asserted that, if the prosecution's version of the events were true, Appellant would have to be "the most evil person there ever was, but I suggest to you that he is not. He is not that." (N.T. 9/22/92, 925). Trial counsel then explained why the prosecutor's version of the events was not true. The issue of trial counsel ineffectiveness therefore lacks arguable merit and the claim of appellate counsel ineffectiveness fails.

Finally, we examine those claims that were not previously litigated or waived and do not allege the ineffective assistance of counsel. The first claim in this category alleges that Appellant was incompetent to stand trial and therefore his conviction and death sentence are unconstitutional (Argument V). We recognize that Appellant did not challenge his competency at trial or on direct appeal and first asserted the claim in his PCRA petition under the guise of ineffective assistance of trial counsel. In the current appeal, Appellant presents the issue of whether he was "unconstitutionally tried while incompetent." Appellant's Brief at 2, Issue V. As this issue was not raised on direct appeal, we would generally find it waived. This Court has consistently held, however, that the issue of whether a defendant was competent to stand trial is an exception to the

waiver rule in cases on direct appeal. Commonwealth v. Tyson, 402 A.2d 995 (Pa. 1979); Commonwealth v. Silo, 364 A.2d 893 (Pa. 1976); Commonwealth v. Marshall, 318 A.2d 724 (Pa. 1974); *See also* Pate v. Robinson, 383 U.S. 375, 385 (1966) (finding that it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial).

The issue of whether this case law applies with equal force in the PCRA context has recently divided this Court. *See* Commonwealth v. Santiago, 855 A.2d 682 (Pa. 2004). In Santiago, a plurality of this Court held that the failure to raise on direct appeal a claim that the appellant was incompetent at the time of trial does not constitute a waiver of that claim for purposes of the PCRA. We reaffirm the plurality's position in Santiago in the instant appeal.

We begin our analysis with a review of the pertinent statutory language. As noted, Section 9544(b) provides that an issue is waived for purposes of the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. § 9544(b). We recognize that Appellant "could have" raised the competency claim on direct review, but we conclude that the General Assembly intended for Section 9544(b) to apply to those claims that are *required to be preserved*. If the nature of the claim involves a right so fundamental to a fair trial that renders it non-waivable, then the claim is not required to be preserved and is not subject to the waiver provision of the PCRA. To hold to the contrary would render the language of the statute absurd and violate a fundamental rule of statutory construction. *See* 1 Pa.C.S. § 1922 (1); (stating that it is presumed that the General Assembly does not intend a result that is absurd.); *See also* Id. at § 1922 (3) (setting

forth that it is presumed that the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth).

Our Court has similarly ruled in three previous cases. In Commonwealth v. Fernandez, 410 A.2d 296, 298 n.8 (Pa. 1980), this Court held that the same reasoning for finding an issue of competency non-waivable on direct appeal would preclude a waiver of competency issues under the Post Conviction Hearing Act (PCHA), Act of January 25, 1966, P.L. (1965) 1580, § 1 1180-1 et seq. (Supp. 1979 -1980), the predecessor to the PCRA, when the defendant is shown to have been incompetent. Recognizing that the appellant's challenge to his guilty plea on grounds of incompetency was not raised on direct appeal, our Court nevertheless proceeded to examine the merits of the issue. We concluded that the PCHA court properly determined that the appellant possessed the mental capacity to enter a valid plea of guilt. Having failed to overcome the presumption that the appellant's failure to appeal was knowing and understanding, our Court affirmed the order of the PCHA court.[11]

We elaborated on that proposition in Commonwealth v. Nelson, 414 A.2d 998 (Pa. 1980). There, the Court addressed an appeal from the denial of relief under the PCHA. The appellant raised the issue of whether trial counsel was ineffective in failing to request a hearing on appellant's competency to stand trial. This issue was abandoned by counsel at the PCHA hearing. We stated:

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[11] To be precise, the Fernandez Court concluded that the appellant did not overcome the presumption that his failure to appeal was knowing and understanding, and *therefore* the claim was "waived." Id. at 298. Considering that the Court in the preceding paragraph explicitly stated that waiver of competency claims was precluded under the PCHA, the Court presumably employed the term "waived" to indicate that the appellant had not satisfied his burden of demonstrating incompetence.

> We have long held that "the mental competence of an accused must be regarded as an absolute and basic condition of a fair trial." Commonwealth v. Bruno, 435 Pa. 200, 205 n.1, 255 A.2d 519, 522 n.1 (1969). Accordingly, we have been loath to find waiver of such a claim. Commonwealth v. Marshall, 456 Pa. 313, 318 A.2d 724 (1974). Indeed, we have recently held that "when the issue presented is whether a person was competent to stand trial, the waiver rule is not applicable." Commonwealth v. Tyson, 485 Pa. 344, 402 A.2d 995, 997 (1979).
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> It is, of course, true that Tyson, id., and Marshall, *supra*, were direct appeals, and while Bruno, *supra*, was a collateral attack, it was not a PCHA petition. Nevertheless, our waiver doctrine, although judge-made and not statutory, is one we stringently apply. We have expressly discarded the "fundamental error" rule. Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974). Thus, while not recognizing fundamental error, we nevertheless will not permit the waiver of a claim of incompetency, so basic is it to our concepts of justice that a trial of an incompetent is no trial at all. Although we recognize the PCHA includes a waiver provision of its own, 19 P.S. § 1180-3(d), having held the competency of an accused to be an absolute and basic condition of a fair trial, we further hold the no-waiver rule in Tyson to be applicable here as well.

414 A.2d at 1000-1001. As no competency hearing had been conducted, the Court remanded for an evidentiary hearing.[12]

[12] Six Justices participated in the Nelson decision. Justice O'Brien drafted the lead opinion, which was joined by Chief Justice Eagen and Justice Nix. Although Justice Roberts filed a dissenting opinion, it is beyond cavil that he agreed with the rule of law cited *supra*. The first sentence of Justice Roberts' dissent states, "I agree with the majority that this Court must remand the record for further proceedings on appellant's competency claim." Id. at 1001. A remand would be unnecessary if the competency claim was found to have been waived. Justice Roberts went on to disagree with the *mandate* of the majority as he would have allowed *additional* claims of ineffective assistance of counsel to be fully litigated on remand, as opposed to solely the competency issue. Justice Flaherty also filed a dissenting opinion, which was joined by Justice Larsen, which disagreed with the resolution of the competency issue. As four of the six participating Justices agreed with the rule of law at issue here, Nelson is precedential authority on that proposition.

Our Court reaffirmed the Nelson rule in Commonwealth v. Giknis, 420 A.2d 419 (Pa. 1980). On appeal to our Court from the denial of PCHA relief, the appellant in Giknis raised the issue of whether the trial court had an independent basis upon which to determine his competence to enter a plea of guilt because the report issued by the Sanity Commission was inadequate. The appellant also contended that his due process rights had been violated when the trial court proceeded with his case in view of his questionable competency to stand trial. We initially noted that under normal circumstances, the two claims would be waived because the PCHA provided that an issue is waived if it "could have been raised before the trial, at trial, on appeal. . . ." Id. at 420, citing Act of January 25, 1966, P.L. 1580, § 4, 19 P.S. § 1180-4 (Supp. 1979-80). We recognized that appellant could have raised those issues prior to trial, at trial and on direct appeal, but did not do so. We declined to find the issues waived, however, based on our pronouncement in Nelson. Our Court proceeded to examine the substance of the competency claims based on the evidence of record and concluded that the appellant was competent at the time of trial. Id. at 421.

Having established that this Court has precluded the waiver of competency claims under the PCHA in Fernandez, Nelson, and Giknis, we must determine whether we reach the same result under the provisions of the PCRA.[13] The relevant provisions defining waiver in both statutes, however, are nearly identical in that they both provide

[13] The Concurring Opinion disagrees with the analysis employed by this Court in Fernandez, Nelson, and Gilkins and characterizes such decisions as "problematic," "uneven," and "frankly useless." Concurring opinion at 11, 16. With all due respect, such disparaging characterizations do not render the cases any less authoritative for the narrow proposition for which they were cited, namely, that this Court has precluded waiver of issues challenging the mental competency of the accused under the PCHA.

that an issue is waived if it could have been raised on direct appeal. Accordingly, we hold that the failure to raise on direct appeal a claim that the appellant was incompetent at the time of trial does not constitute a waiver of that claim for purposes of the PCRA.

We clarify that our decision does not conflict with the seminal case of Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), where this Court eliminated the capital case relaxed waiver rule on PCRA review. In order for the waiver rule to be "relaxed," the waiver doctrine must first be applicable to the issue at hand. As demonstrated *supra*, it is well-settled that the issue of whether a defendant was competent to stand trial is not subject to the waiver rule. Thus, our abolition of the capital case relaxed waiver rule has no bearing on this issue. This being the case, we now proceed to address the merits of Appellant's claim. [14]

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[14]The Concurring Opinion repeatedly asserts that, contrary to a myriad of cases, our Court inappropriately "converts" the claim of ineffective of assistance of counsel into the underlying claim of whether Appellant was competent to stand trial. No such conversion has taken place. Consistent with the approach previously taken by this Court, we are simply examining the issue raised by Appellant. As noted, the issue presented in Appellant's Brief is whether he was "unconstitutionally tried while incompetent." Appellant's Brief at 2, Issue V. To the contrary, the issue raised in the appellant's brief in each case cited by the Concurrence was *whether counsel was ineffective* for failing to challenge the competency of the accused or request a competency hearing. Commonwealth v. Marrero, 748 A.2d 202, 203 (Pa. 2000); Commonwealth v. Judge, 797 A.2d 250, 256 (Pa. 2002); Commonwealth v. Bracey, 795 A.2d 935, 945 (Pa. 2001); Commonwealth v. Basemore, 744 A.2d 717, 725 (Pa. 2000); Commonwealth v. Breakiron, 729 A.2d 1088, 1093, 1098 (Pa. 1999); Commonwealth v. Cross, 634 A.2d 173, 175 (Pa. 1993); Commonwealth v. Nelson, 414 A.2d at 999. As we find that the issue presented by Appellant is not subject to the waiver rule, we see no need to address it under the guise of ineffective assistance of counsel. To the extent, however, that Appellant additionally argues that appellate counsel was ineffective for failing to challenge his competency, such claim fails as we conclude that there is no arguable merit to the underlying issue.

Appellant argues that he was incompetent to stand trial and therefore his conviction and death sentence are unconstitutional In support of this claim, he attached to his PCRA petition the declaration of Dr. Richard Dudley, Jr., wherein Dr. Dudley states that based upon his examination of Appellant in 1999, he has "significant questions as to [Appellant's] capacity to assist trial counsel." Declaration of Dr. Richard Dudley, Appendix of Exhibits to Initial Brief of Appellant, Exhibit 14.

A defendant is presumed to be competent to stand trial. Commonwealth v. duPont, 681 A.2d 1328, 1330-31 (Pa. 1996). Thus, the burden is on Appellant to prove, by a preponderance of the evidence, that he was incompetent to stand trial. In order to prove that he was incompetent, Appellant must establish that he was either unable to understand the nature of the proceedings against him or to participate in his own defense. Commonwealth v. Hughes, 555 A.2d 1264, 1270 (Pa. 1989); *see also* 50 P.S. § 7402(a). Appellant has failed to satisfy this standard.

The report of Dr. Dudley discloses that his examination of Appellant took place eight years after Appellant's trial. While Dr. Dudley states that he has "significant questions" regarding Appellant's capacity to assist trial counsel, he has not stated that Appellant was incompetent in 1991 when the trial occurred. Moreover, when evaluated by the court psychologist on December 10, 1991, Appellant was found "capable of understanding a sentencing procedure." The doctor also found that Appellant "does not suffer from a major illness." Trial counsel, who worked with the defendant from the time of his arrest until after his trial, saw no reason to raise the issue of defendant's competency and, instead, argued that he acted in self-defense. The PCRA court,

therefore, properly concluded that the defendant was able to consult with counsel rationally and possessed a rational and factual understanding of the proceedings.

Appellant next argues that the proportionality review performed by this Court on direct appeal denied him due process (Argument IX).[15] This Court has consistently recognized that issues regarding the proportionality of capital sentences were decided by our Court on direct appeal and are therefore previously litigated and beyond the purview of the PCRA. See Commonwealth v. Edmiston, 851 A.2d 883, 900 (Pa. 2004); Commonwealth v. Albrecht, 720 A.2d at 708; Commonwealth v. Wharton, 811 A.2d 978, 991 (Pa. 2002). Appellant, however, is not challenging the proportionality of his sentence, but rather the method of review our Court employed on direct appeal. As the PCRA petition was the first opportunity for Appellant to raise such a claim, we shall entertain the merits of the issue. *See* Commonwealth v. Edmiston, 851 A.2d at 900.

At the time of Appellant's trial, this Court was required to determine whether his death sentence was "excessive or disproportionate to the penalty imposed in similar cases." 42 Pa.C.S. § 9711(h)(3)(iii).[16] Appellant contends that our Court's proportionality review utilized an inaccurate database without providing Appellant's counsel notice and an opportunity to participate. This identical claim was raised and rejected in Commonwealth v. Edmiston, 851 A.2d at 901, where we recognized that our

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[15] Although the PCRA court did not specifically address this issue, it was listed as Issue V in Appellant's Supplemental PCRA petition dated June 16, 1999.

[16] In 1997, the General Assembly repealed the requirement of proportionality review. This Court continues to undertake proportionality review on direct appeal of death sentences in cases where the sentence of death was imposed prior to June 25, 1997, the effective date of the repeal. See, Commonwealth v. Edmiston, 851 A.2d 883, n.11 (Pa. 2004) (Slip op. at n.11); Commonwealth v. Gribble, 703 A.2d 426 (Pa. 1997).

Court has consistently upheld the validity of our proportionality review against similar challenges. *See also* Commonwealth v. Marshall, 812 A.2d 539, 551-52 (Pa. 2002); Commonwealth v. Wharton, 811 A.2d at 991; Commonwealth v. Gribble, 703 A.2d 426, 440 (Pa. 1998).

Appellant next argues that the PCRA court erred in failing to grant him an evidentiary hearing on his PCRA claims (Argument XXII). Appellant, however, does not identify which of his various issues warrant an evidentiary hearing. Rather, he asserts that, "based on the myriad material issues of fact requiring evidentiary resolution, it was error for the court below to dismiss Appellant's petition without granting a hearing first." Appellant's Brief at 94. Such a broad declaration of error is insufficient to warrant relief.

Appellant also argues that the PCRA court erred in denying his requests for discovery (Argument XXIII). He asserts that he sought "discovery of, *inter alia,* whether any witness received payments in return for their [sic] testimony as part of the District Attorney's witness protection program and the discovery provided to trial counsel as well as any other Brady material that exists in this case, and any notes or training policies on jury selection and the use of peremptory jury strikes in this and other cases." Appellant's Brief at 95. Appellant fails to specify what Brady materials he sought. Moreover, his entire argument in support of this claim is his assertion that the Philadelphia District Attorney's Office acknowledged making undisclosed payments and housing arrangements for witnesses in other cases. Such allegation falls woefully short of establishing entitlement to relief. In addressing a similar claim in Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), we stated:

> The petition fails to tie the broad allegations regarding the District Attorney's policy of paying witnesses to the witnesses in Appellant's own

> case. Allusions to discovery violations in other cases are insufficient to demonstrate that any such violations existed in this case. Appellant has not presented one iota of evidence, such as an affidavit from one of the witnesses in his case, to suggest that any of those witnesses received any economic benefits. We will not sanction a fishing expedition when Appellant fails to provide even a minimal basis for his claim. As Appellant fails to make a showing of exceptional circumstances pursuant to Pa.R.Crim.P. 1502(e)(1), the court below did not abuse its discretion in failing to grant the motion.

746 A.2d at 591.[17] Accordingly, Appellant has failed to demonstrate that the PCRA court abused its discretion in denying his requests for discovery.

Finally, Appellant contends that the cumulative effect of the errors he has alleged in his brief entitle him to relief (Argument XXI). Because we find no merit to any of Appellant's claims, their alleged cumulative effect does not warrant relief. *See* Commonwealth v. Blystone, 725 A.2d 1197, 1208-09 (Pa. 1999) ("No amount of failed claims may collectively attain merit if they could not do so individually.").

Accordingly, we affirm the order of the PCRA court.[18]

Mr. Justice Castille files a concurring opinion in which Mr. Justice Eakin joins.

Mr. Justice Nigro files a concurring and dissenting opinion.

Mr. Justice Saylor files a dissenting opinion.

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[17] Rule 1502, which was renumbered as Rule 902, effective April 1, 2001, provides that "no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause." Pa.R.Cr.P. 902. As this rule was enacted on August 11, 1997, after Appellant's petition was filed, it is inapplicable. Our discussion in Lark regarding the inadequacy of the appellant's claim, however, is relevant to our disposition of the instant claim.

[18] The Prothonotary of the Supreme Court is directed to transmit a complete record of this case to the Governor within ninety days of our decision in accordance with 42 Pa.C.S. § 9711(i).